APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

1937 *January*, 8

AMINUDDIN AND ANOTHER (JUDGMENT-DEBTORS) *v.* PANCHAITI AKHARA BARA UDASI (DECREE-HOLDER)*

Civil Procedure Code, section 51(*d*); *order XL, rule* 1(2)—*Receiver—Execution of decree—Occupancy and exproprietary tenancy holdings—Appointment of receiver to collect rents from sub-tenants is tantamount to dispossession of the tenant —Civil Procedure Code, section* 60—*Agra Tenancy Act (Local Act III of* 1926), *section* 23(1).

In execution of a personal decree against a mortgagor under order XXXIV, rule 6 of the Civil Procedure Code the court appointed the mortgagee decree-holder as a receiver to collect the income, i.e. rents from sub-tenants, of the mortgagor's occupancy and exproprietary tenancy holdings:

Held that a receiver can not be appointed for realising the income from occupancy and exproprietary tenancies of a judgment-debtor. Section 51(*d*) of the Civil Procedure Code, which enumerates the appointment of a receiver as one of the modes of execution, is limited and controlled by the provisions of order XL, rule 1, and a receiver can not be appointed if it would be a contravention of order XL, rule 1(2). The appointment of a receiver to collect the rents from sub-tenants would be tantamount to dispossession of the tenant from his occupancy and exproprietary holdings; and as under section 23(1) of the Agra Tenancy Act such tenancies are not transferable in execution of a decree, they are not properties which can be attached and sold under section 60(1) of the Civil Procedure Code, and therefore the tenant can not be dispossessed at all from the holding at the instance of the decree-holder. The appointment of a receiver is therefore barred by order XL, rule 1(2).

Messrs. *Hyder Mehdi* and *Zafar Mehdi*, for the appellants.

Mr. *Haribans Sahai*, for the respondent.

BENNET, J.:—This is an execution first appeal by the judgment-debtors against an order of the execution court appointing a receiver. The circumstances are

*First Appeal No. 185 of 1935, from a decree of Brij Behari Lal, Civil Judge of Allahabad, dated the 23rd of February, 1935.

that the appellants originally owned a zamindari share and certain occupancy holdings and their zamindari share was mortgaged. The respondent, the mortgagee, brought a suit for sale on the simple mortgage and obtained a decree and put the property up for sale and bought the property himself and is now owner of the zamindari property and is one co-sharer out of several co-sharers. In connection with that transaction of sale an exproprietary tenancy arose which is held by the appellants in addition to their occupancy holdings. As the decree was not fully satisfied, a personal decree was prepared under order XXXIV, rule 6, and in execution of that decree an application was made for the appointment of a receiver to take possession of the occupancy tenancies and the exproprietary tenancies. The court below has granted the application. It is set out that the occupancy tenancy is about one hundred bighas and the order appoints the decree-holder as receiver and states that one quarter of the occupancy tenancy will remain for the maintenance of the judgment-debtors which should include those plots in the actual possession of the judgment-debtors and that in regard to the remaining three quarters the receiver will have a right of collecting rent, ejecting sub-tenants and admitting fresh tenants on better terms and higher rent. The ground of appeal is whether such an order appointing a receiver is legal. Learned counsel for the respondent contended that a receiver was appointed in execution under section 51(*d*) and that there was no condition or limitation in the Code on the appointment of a receiver. Section 51 states: "Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree . . . (*d*) by appointing a receiver." Now the word "prescribed" is defined in section 2(16) as meaning "prescribed by rules". Order XL is headed "Appointment of receivers". It was argued that this would only apply to receivers who are not appointed in execution,

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but rule 1(1)(*a*) states that "The court may appoint a receiver of any property, whether before or after decree." Clearly therefore order XL governs the appointment of receivers appointed by an execution court. Order XL, rule 1(2) states: "Nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove." The question before us is whether this sub-rule bars the appointment of a receiver of occupancy tenancy and of exproprietary tenancy. In this connection reference must be made to another provision of the Code, that is section 60. Section 60(1) states in regard to land: "The following property is liable to attachment and sale in execution of a decree, namely land . . . and, ... all other saleable property, movable or immovable, belonging to the judgment-debtor, etc." Now in regard to lands it appears to us that two conditions must be satisfied. The lands must be held saleable and they must belong to the judgment-debtor. In the present case it is argued for the appellants that the interest of the judgment-debtors in the lands is not saleable and that the lands do not in fact belong to the judgment-debtors but that the judgment-debtors only have a non-transferable interest in the lands. In the Agra Tenancy Act (Act III of 1926) section 23 provides in sub-section (1): "The interest of an exproprietary tenant, of an occupancy tenant . . . is not transferable either in execution of a decree of a civil or revenue court or otherwise." The argument for the appellants therefore is that the interest of the appellants in these exproprietary and occupancy holdings is not transferable in execution of a decree and therefore that their interest is one to which section 60(1) would not apply and therefore their interest is one which is not subject to attachment and therefore under order XL, rule 1(2) a receiver cannot be appointed to take possession or custody of their interest. Learned counsel for the respondent endeavoured to draw a distinction

between taking possession of the tenancy and collecting the rents from sub-tenants. There is no doubt that the provisions of the order of the lower court indicate taking possession, as the order provides that the receiver will collect the rent, eject sub-tenants and admit fresh tenants. This is clearly the possession of the tenancies. But learned counsel argued that some order might be framed which would avoid these difficulties and he suggested that an order might be framed by which the receiver would merely collect the rent and would not be in any kind of possession of the tenancies. We consider that it would not be possible to frame such an order. If a receiver is to collect rent from sub-tenants, he would have to have power to do so through the revenue court and he would have to be empowered to bring suits for arrears of rent in the capacity of the landholder of the sub-tenants within the meaning of section 3(6) of the Agra Tenancy Act. To put the receiver in such a position undoubtedly implies dispossession of the appellants from their position as tenants. There is therefore the necessity in framing any such order for a receiver that there should be a removal of the appellants from the possession of the tenancy. Learned counsel for the respondent has not shown any ruling of any High Court in which it has ever been held that a receiver can be appointed to hold occupancy tenancy. The cases on which he relied are as follows:

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Kirtarth Gir v. *Mathura Prasad Ram* (1). This was a case of the year 1924 and the judgment-debtor was a permanent lessee or thekadar paying a certain rent to the zamindar. In execution the Civil Judge had appointed a receiver to collect rents recoverable by the thekadar from occupancy and non-occupancy tenants and the thekadar appealed and argued that he was in the position of a non-occupancy tenant and that his interest in the holding could not be transferred except by way of lease for one year. He relied on the provisions of

(1) (1924) I.L.R., 46 All., 924.

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the Agra Tenancy Act II of 1901, section 20(3). Now in that Act a distinction was drawn in section 20 between exproprietary tenants and occupancy tenants and non-occupancy tenants other than thekadars who come under section 20(2) and in regard to these classes it was provided that their interest was not transferable in execution of a decree of a civil or revenue court, or otherwise than by a voluntary transfer between persons in favour of whom as co-sharers in the tenancy such right originally arose. The provision in regard to the interest of thekadars was merely that it was subject to the terms of his lease heritable, but not transferable. There was no provision that the interest of a thekadar was not transferable in execution of a decree of a civil or revenue court. This distinction in Act II of 1901, in our opinion, renders this particular case no authority for the proposition that a receiver can be appointed for an occupancy tenancy or an exproprietary tenancy. The court held that the appointment of a receiver made by the court below was valid. The court proceeded to state that order XL does not specifically refer to execution proceedings and that when in execution proceedings a receiver is appointed, it was assumed that he was put into the position of a judgment-debtor and there was no transfer of property from the judgment-debtor to him and that all that the court had done was to appoint a person who should, whenever rents accrued, recover them and utilise them on behalf of the judgment-debtor in payment of the decree. The words actually used in order XL are not "transfer" but "remove from the possession or custody of the property" which are words considerably wider than transfer. As indicated above, this sub-rule does, in our opinion, apply in the present case and the prohibition against taking possession and custody applies because the property is not property which can be attached under section 60 of the Civil Procedure Code and it is property for which there is a special provision against transfer

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in execution of a civil court decree. As regards the particular case of a thekadar, it is to be observed that the present Tenancy Act (Act III of 1926) in section 203(1) states: "Except as may be otherwise provided by the terms of the theka, the interest of a thekadar shall not be transferable, or be saleable in execution of a decree." The language is slightly different from the language used in section 23, which is in regard to the interest of exproprietary or occupancy tenants, that their interest is not transferable in execution of a decree. Moreover as regards the thekadar, both in the present Act and in the former Act there is a provision that an exception may arise from special provisions in the terms of the theka. We are not told what were the terms of the permanent lease in the ruling under consideration.

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The next ruling on which reliance was placed is *Manohar Singh* v. *Riazuddin* (1). That, however, was a case where a decree-holder had obtained a simple money decree against the judgment-debtors who were agriculturists in Bundelkhand. The civil court had appointed a receiver for the tenancy or the zamindari share held by the judgment-debtors. It was provided in section 16(1) of the Bundelkhand Land Alienation Act (Act II of 1903) that "No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue court, made after the commencement of this Act." The prohibition therefore was merely against a sale and not against the transfer of the proprietary interest in the land. The receiver was appointed to receive the rents and profits of this zamindari share. Now the Act itself contains provisions in section 17 for a civil court decree passed on a mortgage made before the commencement of this Act, or in section 17A for a revenue court passing a decree under certain sections of the Tenancy Act as a result of which the Collector offers the decree-holder a mortgage to hold possession of the land for a period not

(1) [1934] A.L.J., 770.

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exceeding 20 years. This is by way of an appointment of a receiver. In the particular case before this Court it was not a decree under the Tenancy Act or a decree in a mortgage suit but a simple money decree. There is nothing whatever in the Bundelkhand Land Alienation Act which would militate against the appointment of a receiver by the civil court in a manner which was analogous to the provisions of the Act in sections 17 and 17A. The mere provision that the land could not be sold was not in any way violated by such an appointment. We consider therefore that the rule laid down in this ruling that a receiver could be appointed under those conditions for the property of a judgment-debtor which was subject to the Bundelkhand Land Alienation Act is no authority for the contention advanced by learned counsel for the respondent in the present case, as the case of exproprietary and occupancy holdings stands on an entirely different footing.

Learned counsel for the respondent then referred to a ruling, *Rajindra Narain Singh* v. *Sundara Bibi* (1), of their Lordships of the Privy Council. That, however, was an entirely different case where the respondent had obtained a money decree against the appellant and applied to attach and sell 16 villages in execution. The appellant held the villages under the terms of a compromise deed which provided that he was to hold and possess the villages, yielding a profit of Rs.8,000 a year, in lieu of his maintenance, without power of transfer, during the lifetime of his brother, to whom he was to pay Rs.7,872 a year in respect of the Government revenue, cesses and malikana. The prohibition against transfer of course could not be used as a shield against the decree held by his brother as the prohibition was that it was not to be transferred to other persons. Their Lordships held that a receiver could be appointed. The property, however, in that case was zamindari property and their Lordships held that section 60(1)(*n*)

(1) (1925) I.L.R., 47 All., 385.

precluded an application for sale of property which was for a right of maintenance. We do not consider that that case is an authority for the present proposition.

Reference was then made to the case of *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank* (1). That was a case in which it was held that the courts were competent to appoint a receiver of certain income which arose to the appellant on his relinquishing his title of Nawab Nizam of Murshidabad on an agreement between the appellant and the Secretary of State for India. On page 6 it is stated: "Before their Lordships the additional point was taken on behalf of the appellant that the rents in question formed part of a political pension and were thus exempt from attachment under head (g) of the enumerated exceptions in section 60(1) of the Code of Civil Procedure. This belated attempt to assimilate the rents to a political pension plainly fails." Their Lordships therefore held that this property was not property against which there was a prohibition against attachment and sale under the provisions of section 60 of the Civil Procedure Code and therefore the ruling is no authority for the present case in which there is a statutory provision.

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For these reasons, we consider that the present case is one in which the provisions of order XL, rule 1(2) do not authorise the court to remove the appellants from the possession of their occupancy and exproprietary tenancies and therefore the court has no right to appoint a receiver. The appeal is accordingly allowed with costs.

SULAIMAN, C.J.:—I concur in the order proposed by my learned brother. The question in this case is whether a receiver can be appointed for realising the income from the occupancy and exproprietary tenancies of the judgment-debtor. It is conceded by learned counsel for the respondent that the tenant does not possess any lands which can be attached under section 60 of the Code of Civil Procedure. It is further conceded

(1) (1931) I.L.R., 59 Cal., 1.

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that any interest which he possesses is not transferable nor attachable or saleable under the Tenancy Act. It is, however, contended that section 51 of the Code of Civil Procedure confers a general power on an execution court to appoint a receiver in every case where it is just and equitable and that the appointment of such a receiver neither amounts to a transfer of the interest of the judgment-debtor to the receiver nor even his dispossession. So far as the point of view that there has been no transfer of any interest is concerned, it may be accepted. This was the main point argued before the Division Bench in *Kirtarth Gir* v. *Mathura Prasad Ram* (1), where it was laid down that the appointment of a receiver did not bring about any transfer of an interest of the thekadar or perpetual lessee who was the judgment-debtor in that case. It is not quite clear whether the further point was also argued before the Bench or not that the appointment of a receiver amounts to dispossession of the judgment-debtor, for there is no specific reference to such a plea. If the learned Judges meant to hold that the appointment of a receiver does not amount even to a dispossession of the judgment-debtor, then that view must now be deemed to have been overruled by the pronouncement of the Full Bench in *Ram Swarup* v. *Anandi Lal* (2). In this Full Bench case it was pointed out on pages 963 to 964 that section 51 does not confer any such powers and that having regard to the definition of the word "prescribed", it is subject to the rules in schedule I and that section 51 and order XL, rule 1 go together and that in the same way section 94(*d*) does not confer any such wide powers and is in itself subject to the rules prescribed in the schedule. It was also made clear at pages 962 to 963 that the appointment of a receiver amounts to a dispossession of the judgment-debtor within the meaning of order XL, rule 1(2). The case of *Kirtarth Gir* v. *Mathura Prasad Ram* (1) was a case of a thekadar whose position, as pointed out by my

(1) (1924) I.L.R., 46 All., 924. (2) (1936) I.L.R., 58 All., 949.

learned brother, was not identical with that of an occupancy or exproprietary tenant.

The other case relied upon on behalf of the respondent is *Manohar Singh* v. *Riazuddin* (1). But there the property of which the receiver had been appointed consisted of agricultural lands in Bundelkhand which were inalienable, and the only prohibition in the Bundelkhand Act was against a sale in execution of a decree or order.

The case of *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank* (2) related to a pension and the case of *Rajindra Narain Singh* v. *Sundara Bibi* (3) related to maintenance allowance, in neither of which there was any question of a dispossession from any property at all. Section 51 empowers a court to order execution by appointing a receiver, which is one of the modes of execution. It does not authorise the court to appoint a receiver of all properties. On the other hand, order XL makes it clear that the court may by order appoint a receiver of any property, subject to the condition that the court is not authorised to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The appointment of a receiver of occupancy or exproprietary tenancies is certainly tantamount to the removal of these tenancies from the possession and custody of the tenant. The appointment will have the effect of preventing the tenant from cultivating his lands or manuring it. In case of default of payment of rent there is a risk of the tenancy being forfeited and the tenant losing the tenancy. Again there may be difficulty if the receiver goes to the revenue court to institute suits for recovery of rents from sub-tenants. Generally the profits of tenancies accrue after money and labour have been spent. It is not a case where there is any fixed income like pension or maintenance allowance, which

(1) [1934] A.L.J., 770. (2) (1931) I.L.R., 59 Cal., 1.
(3) (1925) I.L.R., 47 All., 385.

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accrues regularly. It seems to me that it will be contrary to the spirit of the Tenancy Act to hold that although the tenancy lands cannot be attached or sold nor can even a lease be granted for a longer period than is prescribed, the dispossession of the tenant can be brought about in an indirect way by appointing a receiver of such tenancies and thereby dispossessing the tenants for an indefinite period until all the debts due from him have been paid up. This may be tantamount to an ejectment of the tenant, which is not allowed except in accordance with the Act, and is certainly introducing a stranger into the village which the landholder may not like. When a simple loan is advanced on personal credit, it is not in the contemplation of the parties that the debt would be recovered out of tenancy lands in the possession of the tenant. There is no equity in favour of the creditor which would compel a court to order the dispossession of the tenant from his agricultural lands, which have been expressly made inalienable by statute. Learned counsel for the respondent has almost to concede that so far as the tenancy lands which are actually in the cultivation of the tenant are concerned, it would be very difficult to appoint a receiver because he would have to dispossess the tenant. It is, however, suggested that the receiver may be appointed in respect of the tenancy lands which are sublet to sub-tenants so long as the sub-tenants continue to remain in possession. But the sub-tenancies may be for a temporary period and the tenant must be deemed to be in possession of the land in the same way as when there were no sub-tenants. I do not think that there is any valid distinction to be drawn between these cases.