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v.
U KHA.

PAGE, C.J.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1935

Aug. 19.

K. B. ROYCHOWDHURY
v.
BURMA LOAN BANK, LTD.*

Judgment—Letters Patent, cl. 13—Order for the examination of a person under Companies Act (VII of 1913), s. 196—Order not a judgment.

Where the Court orders the public examination of a person under s. 196 of the Companies Act, the order is not a judgment within clause 13 of the Letters Patent and is therefore not appealable.

In re Dayabhai v. *A.M.M. Murugappa Chettyar*, I.L.R. 13 Ran. 457—*followed.*

K. C. Sanyal (with him *Talukdar*) for the appellant.

Chowdhury for the respondents.

PAGE, C.J.—In this case my learned brother Braund J., taking winding-up matters, has made an order that the appellant should be examined under section 196 of the Indian Companies Act. A preliminary objection is taken that no appeal lies from that order upon the ground that the order is not a judgment within clause 13 of the Letters Patent. In our opinion it clearly is not a judgment within the meaning of that term as defined in *In re Dayabhai Jiwandass and seven others* v. *A.M.M. Murugappa Chettyar* (1). In my opinion the preliminary objection succeeds, and the appeal is dismissed, with costs three gold mohurs.

MYA BU, J.—I agree.

* Civil Misc. Appeal No. 66 of 1935 from the order of this Court on the Original Side in Civil Misc. No. 127 of 1934.

(1) (1935) I.L.R. 13 Ran. 457.

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Baguley.

1935

Aug 23.

S.K.R.M. CHETTYAR

v.

V.E.A. CHETTYAR.*

Receiver, appointment in mortgage suit—Interest in arrear—Criterion for appointing a receiver—Insufficiency of security.

The mere fact that interest is in arrear does not necessarily entitle the plaintiff to have a receiver appointed in his mortgage suit. The criterion is whether the security is sufficient or not. If the security, originally sufficient is likely to become insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself, the Court in its discretion would appoint a receiver.

Ahmed Cassim Bharoocha v. *M.L.M.R.A. Chettyar Firm*, 5 L.B.R. 135 ; *Khoo Joo Tin* v. *Ma Sein*, I.L.R. 6 Ran. 261 ; *Ma Joo Tean* v. *The Collector of Rangoon*, I.L.R. 12 Ran. 437—*referred to.*

P. B. Sen for the appellants.

Clark for the respondents.

BAGULEY, J.—This is an appeal against an order appointing a receiver in a certain mortgage suit pending in the District Court of Insein. The learned Judge in appointing the receiver appears to have been mainly influenced by the fact that payment of interest was seriously in arrear. He also came to the finding that the value of the property mortgaged was insufficient to cover the amount which would be payable to the plaintiff in the event of a mortgage decree being passed as prayed.

The appointment of the receiver is attacked on many grounds. The first ground is that in a suit of this nature, *i.e.*, a suit for sale on an equitable mortgage, the Court has no power to appoint a receiver. In support of this contention Mr. P. B. Sen wished to

* Civil Misc. Appeal No. 22 of 1935 from the order of the District Court of Insein in Civil Misc. No. 29 of 1934.

quote rulings of the Allahabad and Patna High Courts. We found, however, that his rulings were in unauthorized reports, and as there is clear authority from a Bench decision of this Court,—from which we see no reason to differ—, we did not allow the cases to be quoted as authorities. The Bench decision to which reference is made is *Ma Joo Tain* v. *The Collector of Rangoon* (1), in the report of which, at page 441, appears the passage :

" At one time the Court felt some diffidence in appointing a receiver at all in a mortgage suit, but both in England and in India the propriety of appointing a receiver in a suitable case cannot now be challenged."

This ruling was not cited by the learned Judge in the judgment under appeal. The cases to which he referred are *Khoo Joo Tin* v. *Ma Sein* (2) and *Ahmed Cassim Bharoocha* v. *M.L.M.R.A. Chettyar Firm* (3). The headnote of *Khoo Joo Tin*'s case runs :

" Held, that a mortgagee who has filed a suit in respect of his mortgage is as a matter of course entitled to have a receiver appointed of the mortgaged property, if the interest is in arrear . . . "

If the actual judgment, however, is examined it is doubtful whether the judgment goes as far as this. It is a short judgment, and the finding of the trial Court was overruled because it was directly contrary to the law that had been laid down by the Chief Court of Lower Burma in *Ahmed Cassim Bharoocha*'s case (3), and it was pointed out that when there was a ruling of the highest Court of the Province published, a subordinate Court was bound to follow it. The judgment afterwards goes on to say : " It is clear that

(1) (1934) I.L.R. 12 Ran. 437. (2) (1928) I.L.R. 6 Ran. 261.
(3) 5 L.B.R. 135.

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interest was heavily in arrear and the Court ought certainly to have appointed a receiver "; so that this ruling really states that in that particular case it must be regarded as just and convenient to appoint a receiver because the interest was heavily in arrear ; and the learned Judges who constituted the Bench approved of the Chief Court ruling, *Ahmed Cassim Bharoocha* v. *M.L.R.M.A. Chetty* (1).

Turning now to *Ahmed Cassim Bharoocha*'s case, we find that this was a case of a receiver having been appointed in a mortgage suit filed upon an equitable mortgage. It was pointed out that in the present Code (which was quite new when this ruling was made) the language used was that used in the English Judicature Act and a Court might appoint a receiver where it appears just and convenient to do so. Therefore, the learned Judges considered that they were bound to follow the previously existing interpretations of the English Judicature Act, and they laid down two principles : firstly, receivers are generally appointed as a matter of course if the interest on mortgages, legal or equitable, is in arrear ; and secondly, that in the case of equitable mortgages receivers are appointed if there is reason to apprehend that the property is in peril or is insufficient to pay the charges or incumbrances thereon. This ruling, as has been pointed out, was approved of in *Khoo Joo Tin*'s case (2) ; and it will be noticed that according to it the mere fact that interest is in arrear does not entitle the plaintiff to have a receiver appointed. It is merely stated that receivers are usually appointed as a matter of course, and it follows that the bare fact of interest being in arrear, by itself, is not always a sufficient warrant

(1) 5 L.B.R. 135. (2) (1928) I.L.R. 6 Ran. 261.

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for the appointment of a receiver. In all cases the Court must hold that it is just and convenient that a receiver should be appointed.

It was argued before us that the receiver should not have been appointed unless the property was in jeopardy or that there was a likelihood of a waste or destruction to the property, and reference was made to the Privy Council case of *Benoy Krishna Mukherjee* v. *Satish Chandra Giri* (1) ; but in this case there was no question of the appointment of a receiver to take possession of mortgaged properties, the question which was then before their Lordships was one as to whether a receiver should be appointed to take charge of property, the possession of which was in dispute, and naturally to a case of that kind different considerations apply.

Another point raised was that the plaintiffs had not made out a *prima facie* case that there was an equitable mortgage, and therefore, no receiver should have been appointed. It is true that the existence of the mortgage is denied by the defendants in their written statement, but at this stage we are not concerned with the question of whether the plaintiffs are entitled to a mortgage decree or not. To get a decree, they have, of course, to prove the mortgage. The question now before us is whether they have *prima facie* made out enough to justify the Court in appointing a receiver. In the present case it is admitted that the defendant's title-deeds are in the possession of the plaintiffs. It is also admitted that the defendants are indebted to the plaintiffs for some unspecified sum. Unless there is very clear and cogent evidence to account for the title-deeds of the defendant's being in the possession of the plaintiffs, I would incline to the

(1) (1927) I.L.R. 55 Cal. 720.

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view that there is a *prima facie* case made out that the defendant's property covered by the title-deeds is mortgaged to the plaintiffs. It seems, therefore, that *prima facie* the plaintiffs have made out that there exists a mortgage.

" The possession of deeds under circumstances consistent with a deposit by way of security raises a *prima facie* case for the appointment of a receiver on an interlocutory application "

[*Ahmed Cassim Bharoocha* v. *M.L.R.M.A* (1) at page 137].

The next point urged is that there is not a large sum due for arrears of interest. This argument is based on the fact that, as is usual among Chettyars, accounts are kept showing interest compounded every year. One page of the accounts for the year 1933-34 has been translated. This shows apparently, though it is not too easy to understand, that at the beginning of the year, *i.e.*, 13-4-33, the sum of Rs. 69,377-11 was due. To this sum interest is added at varying rates and credit is given for certain payments. It is noticeable that all these credits are deducted from the principal amount due, and, although I have not checked it, I presume that as a result of this principal being diminished by all moneys received, the accumulation of interest has *pro tanto* been diminished. At the end of the year the remainder of the principal is added up together with various items of interest, which are set down as they become due, and one or two odds and ends, with the result that at the end of the year the total debit was put down as Rs. 68,941-10-9. It was argued that because the total amount at the end of the year was less than the total amount due at the beginning of the year, therefore, interest could not have been in

(1) 5 L.B.R. 135.

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arrear. Now, this argument, to my mind, is completely begging the question. It is well known that Courts of law usually think in terms of simple interest, whereas a Chettyar always thinks in terms of compound interest. From the legal point of view the original amount borrowed is the principal, and everything else in excess of that, which is payable by the debtor, is interest, and in my opinion, unless it is shown that the original amount borrowed was less than Rs. 68,941-10-9, interest is outstanding. According to the affidavit filed by the plaintiffs, the principal amount due is Rs. 60,512-8-9, and if that is correct, then interest is outstanding. It is worthy of note that the reply affidavit filed on behalf of the defendants merely refers to the accounts for the year 1933-34, and it nowhere states what the original amount of money borrowed was. In the affidavit filed by the plaintiffs it was also pointed out that the amount put down as due for principal on 13-4-33 included past interest, and the defendants do not seem to have put in any reply affidavit to this statement.

In my opinion, however, the most important criterion with regard to whether a receiver should or should not be appointed is the question whether the security is sufficient. If a man borrowed half a lakh of rupees on property honestly worth one lakh of rupees and likely to fetch that amount if put up to auction, the creditor would be amply secured even if interest amounting to Rs. 10,000 was in arrear, and under such circumstances I do not think it would be just to appoint a receiver for the property. The main criterion, in my opinion, is whether the mortgagee, having originally been well secured, finds that the security is likely to be insufficient, either by reason of considerable

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accumulation of interest or by reason of depreciation of the value of the property itself. In the present case the learned Judge came to the conclusion that the plaintiffs did not appear to be well secured by the property mortgaged. Whether they are or they are not secured is undoubtedly a matter of opinion. The learned Judge seems to have applied his mind correctly to the question before him. It is well known that the value of land at the present moment is always problematical. Debtors usually think that land has a certain intrinsic value of its own quite regardless of what it is likely to fetch if put up to auction. Often and often one finds statements to the following effect: "My land is worth Rs. 100 per acre, but there are no buyers at the present time." There are traces of this idea in the evidence recorded by the learned Judge. The Bailiff himself says :

> "In this case I am a receiver of about 700 acres. I cannot say what this property would fetch if I sold it. I think the most it will fetch will be Rs. 40 or Rs. 50 per acre. I do not think that many people will bid for such a large area . . ."

In other words, he realizes, as everybody must realize, that when a large area of land is put on the market it immediately forces down the price likely to be obtained. I am not satisfied that the learned Judge has come to a wrong conclusion in thinking that the property if put up to auction will fetch a sum sufficient to cover the decree which, if the plaintiffs are successful, will be passed in their favour, and for these reasons I would dismiss the appeal with costs, advocate's fee five gold mohurs.

I would note that this order does not deal with, because the point was not raised, the question of whether a receiver can ever be appointed when the

mortgage does not cover the annual rents and profits either directly or constructively, and in addition the remedy of a personal decree is barred by limitation.

The point will have to be settled sometime, but *Ma Joo Tean* v. *The Collector of Rangoon* (1) deals with a case where the mortgage constructively covered the annual rents and profits.

MYA BU, J.—I agree. The judgment in *Khoo Joo Tin* v. *Ma Sein* (2) does not go as far as what is stated in its headnote, and, considering that the case of *Ahmed Cassim Bharoocha* v. *M.L.M.R.A. Chettyar Firm* (3) is approved of in that judgment, it is incorrect to read it as laying down that the mere fact of interest being in arrear by itself entitles a mortgagee, who has filed a suit in respect of his mortgage, to have a receiver appointed of the mortgaged property. In all cases the discretion of the Court to appoint a Receiver can be properly exercised only when it is just and convenient that a receiver should be appointed, and in an application for appointment of a receiver of the mortgaged property, pending a mortgage suit, the question whether it is just and convenient to appoint a receiver turns generally on whether the security is reasonably sufficient to satisfy the amount of the decree which the plaintiff-applicant is likely to obtain in the suit. Such amount need not necessarily consist of both the principal and interest.

(1) (1934) I.L.R. 12 Ran. 437. (2) (1928) I.L.R. 6 Ran 25
(3) 5 L.B.R. 135.