APPELLATE CIVIL.

Before Mr. Justice Bagnley, and Mr. Justice Mosely.

1938

Feb. 10.

ABDUL KADER AND OTHERS

v.

R.M.P. CHETTYAR FIRM.*

Receiver—Order refusing to remove receiver—Appeal against order—Court's power to remove receiver—Burma General Clauses Act, s. 16—Civil Procedure Code, O. 40, r. 1.

An appeal lies against an order refusing to remove a receiver appointed under O. 40, r. 1 of the Civil Procedure Code.

In view of s. 16 of the Burma General Clauses Act, O. 40, r. 1 of the Civil Procedure Code must be regarded as giving authority to the Court to remove the receiver, and if an application is made to remove the receiver then the dismissal of the application must be regarded as an order passed under O. 40, r. 1 of the Code.

Sripati Datta v. *Bibhuti Datta*, I.L.R. 53 Cal. 319, referred to.

Eastern Mortgage & Agency Co., Ltd. v. *Saha*, 20 C.W.N. 789, dissented from.

Hay (with him *K. C. Sanyal*) for the appellants.

Surridge for the respondents.

BAGULEY, J.—This is an appeal against an order passed by the District Judge of Thatôn refusing to discharge a receiver and restore certain lands to the appellants. The proceedings arose out of a mortgage. The R.M.P. Chettyar Firm filed a suit on a mortgage against thirty-two defendants who might be referred to as group A and group B. At the same time they applied for the appointment of a receiver to take charge of certain land covered by the mortgage. A receiver was appointed. After this group B defendants were ordered to be struck off the record by the District Court and the order striking the group B defendants

* Civil Misc. Appeal No. 42 of 1937 from the order of the District Court of Thatôn in Civil Misc. No. 27 of 1935.

off the record was confirmed by this Court in Civil Revision No. 254 of 1936. The defendants group B thereafter ceased to be parties to the mortgage suit. It was after they had ceased to be parties to the suit that they filed an application asking that the appointment of the receiver be cancelled, that the receiver be discharged from his possession and that the land and property be released to them. Affidavits were filed and then without further investigation the order, which is the subject-matter of the present appeal, was passed dismissing the application. The defendants, whom I have referred to as group B, now come to this Court in appeal.

The first point that was raised was whether an appeal lies. It is urged that this is an order and that it is not an order which is made appealable under the Code as it is not an order which is referred to in Order 43, rule 1. Under this rule, sub-clause (*s*), an order under rule 1 or rule 4 of Order 40 is appealable, but it is claimed that the present order is not one passed under Order 40, rule 1, or rule 4 ; and no other orders under Order 40 are appealable. It is quite clear that this order cannot come under rule 4. Rule 1 empowers the Court to appoint a receiver, to remove any person from possession or custody of the property, to commit the same to the possession, custody or management of the receiver, and to confer certain powers upon the receiver. It is argued that what was asked for here was an order to remove the receiver and the application was dismissed ; so the order cannot be said to have been passed under Order 40, rule 1.

This reasoning, in my opinion, is fallacious. Section 16 of the Burma General Clauses Act says :

"Where, by any Act, a power to make any appointment is conferred, then, unless a different intention appears, the authority

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having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power."

In my opinion Order 40, rule 1, must, therefore, be regarded as giving authority to the Court to remove the receiver, and if an application is made to remove the receiver then the dismissal of that application must be regarded as an order passed under Order 40, rule 1, as the right of appeal is given generally to all orders passed under Order 40, rule 1. If Order 43, rule 1, is examined carefully it will be seen that in some cases the right of appeal is given generally to all orders under a certain rule, but in others the right of appeal is only given to certain orders passed under that rule. For instance, Order 43, rule 1 (*r*) makes appealable an order refusing the grant of a certificate under rule 6 of Order 45, but apparently does not make appealable an order under that rule granting the same kind of certificate. Order 43, rule 1 (*t*) makes appealable an order of refusal to re-admit or to re-hear an appeal, but does not make appealable an order allowing re-admission or re-hearing.

We were referred to the *Eastern Mortgage & Agency Company, Limited* v. *Premananda Saha* (1). In the judgment occurs the following passage :

"This is not a case of an application for appointment of a Receiver or of a refusal to appoint a Receiver. In substance it is one for the removal of a Receiver who has already been appointed. Therefore, I think that no appeal lies."

No reasons whatsoever are given for this opinion. A different view, however, was taken by the Calcutta High Court in *Sripati Datta* v. *Bibhuti Bhusan Datta* (2) in which it is laid down that an appeal lies against

(1) 20 C.W.N. 789. (2) (1925) I.L.R. 53 Cal. 319.

an order removing a receiver, and this case has been accepted and officially reported, whereas the other case is not; in addition to this, the judgment in this case gives full reasons for coming to the conclusion to which it came, and the General Clauses Act has been referred to as giving the right. I think it unnecessary to give further authority—I hold that an appeal lies.

To turn now to the merits of the case, the present appellants whom I have referred to above as group B, are no longer defendants in the mortgage case. They are no longer parties to the case. If they were in possession of the land at the time when the receiver took charge of the land they were wrongly ousted by the receiver unless they were liable to be ousted either by the plaintiff or by the other defendants in the case. This I think is manifest from Order 40, rule 1 (2) which says;

"Nothing in this rule shall authorize 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 learned Judge in his order refers to *M. S. Naikwara* v. *Ma E Byu* (1). In that case a receiver was appointed to properties belonging to A and also to properties belonging to B, and B was subsequently held to be wrongly joined and dismissed from the suit. The Court ordered the properties to be returned to B and held that the receiver's possession was wrongful *ab initio*. The learned Judge referring to this case says:

"It is not known whether or not the property mentioned as B's in the case under reference was under a mortgage, or whether the regular suit was of the same nature as the present one."

He goes on to say:

"In the present suit, the property over which the receiver was appointed is under very heavy mortgage to the petitioners who are

(1) (1923) I.L.R. 1 Ran. 770.

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contesting the title set up by the present respondents adverse to them as well as to the mortgagors."

The learned Judge appears to have overlooked the fact that the property in itself was not under mortgage. What was claimed to be mortgaged was the right, title and interest of the defendants who are still defendants in the case. The defendants who have been dismissed from the case are now in the position of complete outsiders. This being so, *if* the property was in the actual possession of the group B defendants and *if* neither the plaintiff nor the group A defendants had any present rights to remove the group B defendants from possession of the property, the Court, by appointing a receiver, had no right to oust them.

The learned Judge seems to have gathered from the judgment of this Court in Civil Miscellaneous Appeal 27 of 1935, that the defence in the regular suit had not disclosed any *prima facie* title in the group B defendants. But that was not conclusive nor a considered final judgment. If the present appellants were in possession and if none of the other parties to the suit had the right to remove them from their possession, then the receiver could not remove them from their possession and should now be ordered to give the land back to them. No full enquiry has as yet been held with regard to the fact or the nature of the possession at the time that the receiver was appointed and this will have to be held before orders can finally be passed on the present application.

For these reasons I would allow the appeal, set aside the order dismissing the application for the removal of the receiver and would direct that the District Court do hold an enquiry—

(1) as to whether the present appellants were in possession of the land at the time the

receiver was appointed and (2) if they were in possession, whether, at that time, the plaintiff or the other defendants had the right to remove them.

After holding this enquiry the Judge will pass orders, keeping in mind the provisions of Order 40, rule 1 (2). Costs of this appeal, advocate's fee five gold mohurs, will be decided by the ultimate result of the application for removal of the receiver. If appellants are successful, they will get their costs from the respondents; if the appellants are unsuccessful, then they will bear respondents' costs of this appeal.

MOSELY, J.—I agree.

CIVIL REVISION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

KHAN SAHIB v. UCHIL LEBBAY.*

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Feb. 17.

Limitation—Payment by debtor—Payment towards principal or interest—Question unnecessary for purpose of limitation—Limitation Act, s. 20.

For the purpose of saving limitation it is immaterial whether a payment made by a debtor after 1st January 1928 is towards interest or towards principal. In either case, provided the payment is made within the period of limitation and the requirement as to writing is carried out, a fresh period of limitation begins under s. 20 of the Limitation Act.

U Ba Gyi v. *U Than Kyaik*, I.L.R. 7 Ran. 522, distinguished.

Joseph for the applicant.

Jeejeebhoy for the respondent.

ROBERTS, C.J.—This is a case which has reached this Court from the Small Cause Court by reason of an order

* Civil Revision No. 278 of 1937 from the judgment of the Small Cause Court of Rangoon in Civil Regular Suit No. 1608 of 1937.