APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

1938
August 2

DAMODAR MORESHWAR PHADKE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* BAI RADHABAI BHRATAR DAMODAR RAOJI RANADE (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), s. 58—Simple mortgage—Preliminary decree for sale—Appointment of Receiver—Court has jurisdiction to appoint Receiver.

In a suit on a simple mortgage the Court has jurisdiction to appoint a Receiver even after the making of a preliminary decree for sale.

Jaikissondas Gangadas v. *Zenabai, and Kazi Mahomed Miya Dada Miya,*(1) *Paramasivan Pillai* v. *Ramasami Chettiar,*(2) *S. C. Venkanna* v. *Mangammal*(3) and *Gobind Singh* v. *Punjab National Bank, Ltd.*(4) followed.

Ram Swarup v. *Anandi Lal,*(5) dissented from.

APPEAL against the order passed by V. V. Gadkari, First Class Subordinate Judge at Nasik.

Application made by the mortgagee decree-holder for the appointment of a Receiver.

The facts are stated in the judgment of His Lordship the Chief Justice.

L. P. Pendse, for the appellants.

G. M. Joshi, for the respondent.

BEAUMONT C. J. This is an appeal from an order made by the First Class Subordinate Judge of Nasik appointing a receiver of the mortgaged property. The mortgage was a simple mortgage within the meaning of s. 58 of the Transfer of Property Act, so that it contained an obligation on the

*Appeal No. 9 of 1938 from Order.

(1) (1890) 14 Bom. 431.
(2) (1933) 56 Mad. 915, F. B.
(3) (1936) 14 Ran. 308, S. B.
(4) [1935] A. I. R. Lah. 17.
(5) (1936) 58 All. 949, F. B.

part of the mortgagor to pay the mortgage money and a provision that if the money was not paid, the mortgagee should be at liberty to bring the property to sale. In February 1936, the mortgagee filed a suit to enforce his mortgage, and on December 18, 1936, a preliminary decree was made. The decree provided that in default of payment of the amount found due within a stated period the plaintiff might apply for sale of the mortgaged property. On April 17, 1937, the plaintiff applied for the appointment of a receiver of the mortgaged property, the ground for the appointment being that interest was in arrear and had not been paid for some time and that rates and taxes were also in arrear. In December 1937, when the order appointing a receiver was made, the mortgagee had obtained a final decree for the sale of the property.

Now it has been argued in the first place that in the case of a simple mortgage the Court has no jurisdiction to appoint a receiver after the making of a preliminary decree. I think that, so far as the general principle is concerned, it makes no difference whether the application for the appointment of a receiver is made before or after the making of a preliminary decree. It is somewhat astonishing to find this contention raised because this Court since the year 1890, when the decision in *Jaikissondas Gangadas* v. *Zenabai*[1] was given, has, I believe, always considered that the Court has jurisdiction to appoint a receiver in the case of a simple mortgage, and the same view has been taken by the High Courts at Calcutta, Rangoon and Madras. I may refer to *Paramasivan Pillai* v. *Ramasami Chettiar*,[2] *S. C. Venkanna* v. *Mangamma*[3] and *Gobind Singh* v. *Punjab National Bank, Ltd.*[4] However Mr. Pendse for the appellants has referred us to a recent ruling of a full bench of the Allahabad High

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Court—*Ram Swarup* v. *Anandi Lal*[1]—in which the Court held that in the case of a simple mortgage where the mortgagor was in possession the Court had no power to appoint a receiver. The then learned Chief Justice, Sir Shah Muhammad Sulaiman, based his judgment partly on the view that the appointment of a receiver in the case of a simple mortgage would alter the contractual relations between the parties. In a simple mortgage the mortgagor is entitled to possession and to receive the profits, and the learned Chief Justice considered that the appointment of a receiver would have the effect of varying the rights of the mortgagor. I am unable to see how the appointment of a receiver can affect anybody's rights. The Court, when it appoints a receiver, merely takes charge of the property which is the subject-matter of the suit in order to protect it until it is decided who is entitled thereto. Amongst other things which the Court will have to decide in a mortgage suit is the title to any moneys or other properties in the hands of a receiver, and the Court will direct the receiver to deal with the moneys or properties accordingly. But the mere appointment of a receiver cannot, in my opinion, affect the ultimate rights of the parties in any property which the receiver may collect.

The principal ground, however, on which the Allahabad High Court based their decision rested on O. XL, r. 1, sub-r. (2), of the Civil Procedure Code. Order XL, r. 1, sub-r. (1), is to the effect that where it appears to the Court to be just and convenient, the Court may appoint a receiver whether before or after a preliminary decree, and remove any person from possession or custody of the property. The words "just and convenient" are taken from the Judicature Act of 1873, which in its turn was based on the practice of the old Court

[1] (1936) 58 All. 949, F. B.

of Chancery, so that the jurisdiction of Courts to appoint a receiver where "just and convenient" is an ancient one. Sub-r. (2) of r. 1 of O. XL is in these terms :—

"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."

It seems to me that the meaning and effect of this sub-rule is perfectly plain. It is an enactment for the benefit of third parties and means that the wide words of sub-r. (*1*) are not to be construed to justify the Court in removing from possession or custody of property a third party who has got a good title to such possession or custody as against the parties to the suit. The words "whom any party to the suit has not a present right so to remove" merely mean whom no party to the suit has a right so to remove. The provision seems to be *ex abundanti cautela* because it could hardly be suggested that it would be just to remove from possession of property a person who had a good right to such possession as against the parties before the Court. But the difficulty which the Allahabad High Court felt, a difficulty which as far as I know has not been shared by any other High Court, is that in a simple mortgage the mortgagor is in possession and he cannot be removed by the mortgagee, and therefore there is no party to the suit who can remove the person in possession. Mr. Justice Thom, as he then was, puts the position very shortly when he says (p. 969) :—

"If the words are given their natural meaning it is not open to the courts to appoint a receiver to mortgaged property if there be no party to the suit who has a right to have the mortgagor removed from possession."

With great respect to the learned Judges who decided that case, they ignore the fact that the mortgagor is a party to the suit and can remove himself. If the Allahabad view is right, where the mortgagor is in possession by a licensee, the

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Court can appoint a receiver, since the mortgagor can remove his licensee, but if the mortgagor is in possession himself, the Court cannot appoint a receiver. This seems a strange result. The construction of sub-r. (2) suggested might have far-reaching effects in curtailing the powers of the Court to appoint a receiver in suits relating to co-ownership, e.g., partition or partnership suits, in which one party to the suit may be in possession and no other party may have power to remove him. I am not prepared to follow the Allahabad view, and in my opinion, there is not the slightest doubt that the Court has jurisdiction to appoint a receiver in the case of a simple mortgage whether before or after a preliminary decree.

Upon the question whether in this particular case it was just and equitable to appoint a receiver, I think there can be very little doubt. At the time the application was made, not only was interest in arrear—and I reserve my opinion as to whether interest being in arrear by itself would have been sufficient—, but rates and taxes were in arrear and the property was, therefore, in jeopardy. Moreover, at the time the appointment of the receiver was made, the Court had actually made an order for the sale of the property, and there can be no doubt that the Court having ordered the property to be sold was entitled to take possession of it and protect it pending sale. I think, therefore, that the learned Judge had jurisdiction to appoint a receiver, and that he exercised his jurisdiction rightly in making the appointment.

The appeal will, therefore, be dismissed with costs.

SEN J. I agree.

Appeal dismissed.

J. G. R.