APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, Kt. K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Geidt.

RABEHOLME

v.

SMITH AND OTHERS.*

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Jan. 3.

Receiver—Practice—Dismissal of suit—Application by Receiver for liberty to sell—Power of Court—Costs.

When a suit, in which a Receiver has been appointed, has been dismissed, the Court has no jurisdiction to give the Receiver any fresh power, as for instance, liberty to sell.

APPEAL by the plaintiff, W. C. Rabeholme, from an order of Bodilly J.

On the 22nd December 1904 a suit, being suit No. 935 of 1904, was instituted by certain members of a Society, known as the Parental Academic Institution and Doveton College, against certain other members and against the Society, praying, *inter alia*, for the appointment of a new Committee or trustees of the Society, for the appointment of a Receiver, and, if necessary, that a scheme should be framed for the management of the Society.

By an order made in the said suit and dated the 27th February 1905, the Official Receiver was appointed Receiver in that suit. Subsequently the parties presumably came to terms and what purported to be a consent decree in terms of the compromise was entered on the 21st June 1905, though the decree was not finally settled until the 31st August 1905.

On the 2nd February 1906 the appellant and others, members of the Society, instituted the present suit against the respondent and others praying for a declaration that the decree and subsequent orders passed in suit No. 935 of 1904 were invalid and inoperative and should be set aside, on the ground that the terms of the decree did not in fact receive their consent, and were contrary to the rules and constitution of the Society.

Appeal from Original Order No. 54 of 1906 in suit No. 110 of 1906.

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On the 27th April 1906, the Official Receiver was appointed Receiver in this suit, at the instance of some of the defendants, and on the 7th July 1906, he presented a petition to the Court praying that he might be at liberty to sell certain properties belonging to the Society for Rs. 2,50,000, or that in the alternative, the Court would give such directions as may seem fit.

This petition was filed on the 11th July 1906 and the application heard on the 19th July, before Bodilly J., when it was directed to stand over, with leave to the petitioner to renew the application.

The action was subsequently heard, and on the 29th August 1906 Bodilly J. delivered judgment, dismissing the suit with costs.

Immediately thereupon the petition of the 7th July was renewed by the Official Receiver, and Bodilly J. passed the following order:—

BODILLY J. This is an adjourned application. The Receiver applies for liberty to sell certain property, the subject matter of an application, which came on before Mr. Justice Woodroffe in September last, in suit No. 935 of 1904. I adjourned the application, inasmuch as the action was coming on for hearing the evidence which would enable me to make up my mind, whether I should make the order asked for. The action came on before me and I reserved judgment, and today Mr. Graham renewed his application. On my telling him that I had the judgment ready, he said he thought it would simplify matters if I gave judgment first and then allowed him to make the application. I delivered judgment in favour of the defendants in the suit. Objection was taken by Mr. Zorab on behalf of the plaintiffs at the conclusion of the judgment that I could not hear the application, inasmuch as my decision in the case discharged the Receiver, and he could not then be heard on this application. I do not think that his contention is correct. In the first place, the application is not a substantive application, but was one made in the suit and adjourned for the convenience of the Court and the parties, in order that the facts might be fully placed before the Court. The Receiver in this suit, although he is discharged in respect of many matters, still remains the custodian of the property, of which he is appointed Receiver, for the purpose of the better protection and administration of the property. The Receiver has been appointed by the Court not only to hold the moveable and immoveable property belonging to the Society, but is appointed also to carry out the management of the Society; which is providing for the education and maintenance of the children of the members of the Society. The Receiver is not discharged in respect of this, until he submits his accounts and receives his final discharge.

I think I am still entitled to make the order that he, the Receiver, be entitled to sell the property situated at 53, Park Street for a sum of not less than

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Rs. 2,50,000. He is to reconsider as to whether the offer of that sum, which has been made through Mr. Leslie, an attorney of this Court on behalf of his client, is the best price that can be obtained for the property, having regard to the whole of the circumstances surrounding the offer. He is to be at liberty, if he thinks fit, to advertise the property to be sold, and if at the end of 14 days he receives no better offer than Rs. 2,50,000, which Mr. Leslie's client is prepared to give, he is to be entitled to sell it for that sum.

From this judgment and order the plaintiff, W. C. Rabeholme, appealed.

The decision in the suit was also appealed against, but was affirmed by the Court of Appeal.

Mr. Zorab and *Mr. L. P. E. Pugh*, for the appellant. The Court of first instance, having dismissed the suit, was *functus officio* and had no power or jurisdiction to make the order for sale: see *Yamin-ud-Dowlah* v. *Amed Ali Khan*(1). Further, the Receiver had no *locus standi* or right to make the application.

Mr. Garth and *Mr. Graham*, for the respondent.

MACLEAN C.J. In the appeal, which we have just disposed of, we have stated all the facts connected with this litigation and it is unnecessary, I think, to recapitulate them in relation to the present appeal. The present appeal really deals with a very short point. The decree, which was made by the learned Judge in the Court of First Instance dismissing the suit on the 29th of August 1906, went on to order that the Receiver appointed in the suit be continued, until the further order of the Court. Now, what happened in the suit, as regards the Receiver, was this. The suit was instituted on the 2nd of February 1906, and on the 27th of April 1906, the Official Receiver was appointed Receiver in the suit: and, on the 7th of July in the same year he presented a petition to the Court in this suit asking that he might be at liberty to sell certain properties of the defendant society for a sum of Rs. 2,50,000 in terms of a certain specified agreement, or in the alternative that the Court would give directions as to what should be done in relation to the sale of the properties. It appears

(1 (1894) I. L. R. 21 Calc. 561.

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that, although the application was made, as I have said, on the 7th of July, the learned Judge did not deal with the application, until he had disposed of the suit, which was subsequently dismissed with costs. The learned Judge says "I adjourned "the application inasmuch as the action was coming on for "hearing, the evidence in which would enable me to make "up my mind whether I should make the order asked for." The Judge also made this observation. "The application was "one made in the suit and adjourned for the convenience of the "Court and the parties, in order that the facts might be fully "placed before the Court." Then he made the present order. The objection then and now taken is that, inasmuch as the Court had dismissed the suit, it had no jurisdiction to make, as it did, an order substantially in the terms of the prayer of the application of Receiver, and the plaintiffs have accordingly appealed from that order. They contend that the Court had no such power. A preliminary objection was taken that the appellants have no right of appeal. I am unable to take that view. An order has been made adverse to them and I think they have a right to come to this Court and to submit that in the circumstances the Judge in the Court of First Instance had no power to make that order. The simple question then is whether the suit having been dismissed the Court had the power to make the order giving liberty to the Receiver to sell. I am bound to say that I do not think that the Court had that power, and for this short reason. By the dismissal of the suit, the suit came to an end, and, although, where a Receiver has been appointed, the Court usually directs, at the instance of the parties or of some of them that the Receiver should pass his final accounts and then be discharged, I do not think that it had any power, after the suit has been dismissed, to give the Receiver any fresh power such as in the present case. If this view is sound, as I think it is, that disposes of the appeal. I thought at one time that it might be possible to give the respondents on this appeal an opportunity of amending their application by making it an application in the first suit in which a Receiver had been appointed and who apparently has not been discharged. But on consideration, it seems to me that there are insuperable difficulties in doing this.

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The result, therefore, is that the appeal must succeed and the appellants must have their costs. As between the appellants and the Receiver, the latter must pay the costs, but as we are not administering the estate we can make no order as to his having those costs out of the estate. He must apply for them to the Court below and as he has acted *bonafide* in the matter, the Court may, perhaps allow them.

Speaking, however at any rate for myself, I am strongly of opinion that applications of this class should be made, not by and in the name of the Receiver, but by and in the name of the parties, who urge him to make them. By putting the Receiver forward to fight their case they escape the liability of being ordered to pay the costs.

HARINGTON J. I agree. I only add that I think an order of this nature ought not to be made pending the drawing up of the new scheme. The evidence of the value of the property is very shadowy and it is not clear that the society would get the full value of the property at the price at which it is proposed that it be sold. The account no doubt shows an excess of expenditure over income, but when the new scheme is formulated it may be possible to bring the expenditure within the income and so to render the sale unnecessary. At any rate in my opinion the question whether the interests of the school would be better served by a sale, or by a reduction of expenditure, ought to be open for consideration when the provisions of the new scheme are under discussion. For these reasons I agree in the judgment passed by the learned Chief Justice that the appeal must be decreed.

GEIDT J. I agree in the judgment delivered by the learned Chief Justice.

Appeal allowed.

Attorneys for the Appellants: *Morgan & Co.*

Attorneys for the Respondents: *Ward, Leslie & Hinds, Martelli, Ghose and Kar.*

J.C.