APPELLATE CIVIL.

Before Sharfuddin and Richardson JJ.

1913

April 22.

BIDYAPRASAD NARAIN SINGH

v.

ASHRAFI SINGH.*

Receiver, appointment of—Civil Procedure Code (Act V of 1908), O. XL, r. 1—Powers of Civil Court when Receiver in possession under s. 146 (2), Criminal Procedure Code (Act V of 1898)—Conditional appointment—Former Receiver, reappointment of.

The appointment of a receiver by a Civil Court under O. XL, r. 1, of the Code of Civil Procedure does not operate as a discharge of the receiver of the same properties already appointed by a Magistrate under section 146 (2) of the Code of Criminal Procedure.

As a general rule when there is a receiver in possession appointed by the Magistrate, and application is made to the Civil Court to exercise its powers under O. XL, r. I of the Code of Civil Procedure, the Civil Court should make a conditional order of appointment and inform the Magistrate so that the latter may have an opportunity of withdrawing his attachment.

Unless there is good reason to the contrary, the Civil Court should, as a matter of judicial discretion, appoint as its receiver the person already appointed by the Magistrate.

Barkat-un-nissa v. *Abdul Aziz* (1) distinguished.

APPEAL by Bidyaprasad Narain Singh and Sriprasad Narain Singh, two of the defendants.

This appeal arose out of a suit for the possession of certain immoveable properties. In the course of certain criminal proceedings between the parties the Subdivisional Magistrate, in exercise of his powers

* Appeal from Original Order, No. 424 of 1912, against the order of Kishori Lal Sen, Subordinate Judge of Mozafferpore, dated June 5, 1912.

(1) (1900) I. L. R. 22 All. 214.

under section 146 of the Code of Criminal Procedure, attached the greater part of the properties in dispute, and appointed one Mr. Stevens as receiver thereof. Subsequently in this suit, on the application of the plaintiffs and with the consent of one of the defendants, the Subordinate Judge appointed one Babu Jatadhari Prasad receiver of the properties in suit under O. XL, r. 1, of the Code of Civil Procedure.

This appointment was made on April 26, 1912.

Thereupon the remaining defendants and Mr. Stevens presented petitions to the Court, stating that the order of April 26, 1912, had been obtained without their knowledge, praying that Mr. Stevens should be retained as receiver, and submitting that the Subordinate Judge had no jurisdiction to remove him.

On June 5, 1912, the Subordinate Judge dismissed these petitions, and confirmed his previous order appointing Babu Jatadhari Prasad receiver.

The defendants, Bidyaprasad Narain Singh and Sriprasad Narain Singh, thereupon appealed to the High Court.

Babu Shorashi Charan Mitra, for the appellants. The Subordinate Judge had no power to make an interlocutory order interfering with the possession of the receiver validly appointed by the Magistrate. The receiver's possession can only be terminated by an order of the Court that appointed him, or by the final determination of the rights of the parties in the Civil Court. Order XL, rule 1 (*2*), of the Code of Civil Procedure prevents the removal of the Magistrate's nominee. As a general principle a Court will not appoint a receiver when there is already a receiver appointed in other proceedings: see Lord Halsbury's "Laws of England," volume 24, Title—

1913

BIDYAPRASAD NARAIN SINGH v. ASHRAFI SINGH.

"Receivers", page 370. If an appointment is made, the person already in possession as receiver under the order of the other Court should be appointed: *In the Estate of F. J. Cleaver* (1).

Babu Lachmi Narain Singh and *Babu Baldeo Narain Singh*, for the respondents. The order of the Subordinate Judge was right. The Magistrate's order is only operative until a competent Civil Court takes seisin of the matter: *Barkat-un-nissa* v. *Abdul Aziz* (2). The Legislature could not have intended that the order of the Magistrate should be a bar to the exercise of the ordinary powers of the Civil Court. The language of the Court in *Lokenath Shah Chowdhry* v. *Nedu Biswas* (3) shows that the possession of the Magistrate is regarded as merely temporary.

Cur. adv. vult.

SHARFUDDIN AND RICHARDSON JJ. The question for our consideration is whether the Subordinate Judge has correctly decided that a Civil Court acting under Order XL of the Civil Procedure Code has power to appoint a receiver in supersession of the receiver appointed by the Magistrate under clause (*2*) of section 146 of the Criminal Procedure Code.

When there is a dispute as to immoveable property likely to cause a breach of the peace, and the Magistrate, having made an order in the terms of section 145 of the latter Code, is unable to decide which of the parties was in actual possession at the date of such order, he is empowered by clause (*1*) of section 146 to attach the subject of dispute "until a competent Court has determined the rights of the parties thereto or the person entitled to possession,

(1) [1905] P. 319. (2) (1900) I. L. R. 22 All. 214.
(3) (1902) I. L. R. 29 Calc. 382.

thereof". Clause (2) of the section provides that "when the Magistrate attaches the subject of dispute he may, if he thinks fit, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure".

The possession of a receiver so appointed is the possession of the Magistrate who appoints him, and the Magistrate has possession or custody under a statutory power or title good against the parties to the dispute until a judicial determination is arrived at by the proper Court in regard to "the rights of the parties" or "the person entitled to possession". An interlocutory order of a Civil Court appointing a receiver does not amount to such a determination, and cannot therefore have the effect of discharging the Magistrate's attachment, or enable the Court to remove the receiver appointed by the Magistrate. The order made by the learned Subordinate Judge in this case assumed, contrary to the fact, that one of the parties to the suit had at the time the right to terminate the Magistrate's attachment or which is the same thing to remove the Magistrate's receiver. The learned Subordinate Judge says that in virtue of the suit instituted before him he has seisin of the land. So he has *quoad* the parties to the suit. But he has overlooked clause (2) of rule 1 of Order XL which says that nothing in the 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". None of the parties to the suit has a present right to interfere with the Magistrate's possession. The whole object of the attachment is to vest the possession or management of the property in the Magistrate safe from any interference of the parties. The mere institution of the suit clothes the

1913

BIDYAPRASAD NARAIN SINGH v. ASHRAFI SINGH.

Civil Court with no right or power not then possessed by one or other of the parties before it. It does not give the Court a right to possession *contra mundum*.

There is no question of the relative superiority or inferiority of one Court in relation to another. It is sufficient to say that the two Courts—the Court of the Magistrate which first dealt with the dispute between the parties under the Criminal Procedure Code, and the Court of the Subordinate Judge before whom the dispute is subsequently brought—are independent Courts, and, apart from some special provision or power, a prior legal possession or custody obtained by the one must be respected by the other. The two cases referred to by the Subordinate Judge do not support his view. The case of *Barkat-un-nissa* v. *Abdul Aziz* (1) turns not upon the language of section 146 of the Criminal Procedure Code, but upon the different language used in section 145, where a power is given to the Magistrate, in the event of his finding possession to be with one of the parties, to declare that party entitled to retain possession until he is "evicted in due course of law". In *Lokenath Shah Chowdhry* v. *Nedu Biswas* (2), the High Court refused to interfere with the management by the Magistrate of property attached under section 146, on the ground that the intervention of the Magistrate was only temporary, and a remedy could be obtained in the Civil Court. The point before us was not before the Court, and we do not lay too much stress on observations in the judgment not directed to that point. It is clear, however, that the remedy which the Judges contemplated was a remedy by way of final decision of the respective rights of the parties. "It is beyond doubt", they say, "that recourse must be had to the Civil Court for a final settlement of the matter in

(1) (1900) I. L. R. 22 All. 214. (2) (1902) I. L. R. 29 Calc. 382.

dispute, pending which the Magistrate by an attachment holds the land".

Though the Magistrate, however, has an abstract right to retain possession, it is also within his discretion to withdraw his attachment. We do not suppose that any Magistrate would desire to retain possession of property attached under section 146, or to be responsible for the management of such property longer than is necessary in the interest of peace and order which is his sole interest in the matter. It appears to us that when the dispute comes before the Civil Court and that Court acting of its own motion, or at the instance of one or other of the parties before it, thinks that a receiver should be appointed, it should make a conditional order. The receiver may be appointed conditionally on the Magistrate withdrawing his attachment. On the Magistrate being approached after this order is made, we are of opinion, speaking generally and without intending to lay down a rule applicable to all circumstances, that it would be a wise and proper exercise of discretion on the Magistrate's part to withdraw his attachment. The effect of the withdrawal of the attachment would be to remove the receiver, if any, appointed by the Magistrate, and so leave the field open for the receiver appointed by the Civil Court. Unless, however, the concurrence of the Magistrate is obtained in this or some other way, the receiver appointed by the Magistrate cannot be removed before the time fixed by section 146.

As to the selection of a receiver, in the event of a Civil Court deciding to take such a course as that which we have suggested, here also the exercise of a discretion is involved. The Civil Court has a discretion to continue the receiver appointed by the Magistrate or to appoint some one else as receiver.

1913

BIDYAPRASAD NARAIN SINGH v. ASHRAFI SINGH.

and, in the absence of good reason to the contrary, it appears to us wiser and more prudent that the receiver appointed by the Magistrate should be continued. A change of management is in itself undesirable, and if a Magistrate's receiver is liable to be removed when a suit is instituted, it may be difficult for the Magistrate to find a proper person for the post. In the case before us it appears that the land attached by the Magistrate forms a great part though not the whole of the land which is the subject matter of the suit before the Subordinate Judge. It is not suggested that Mr. Stevens, the receiver appointed by the Magistrate, had been guilty of mismanagement or was in any way unfit for the post. On the contrary when the plaintiffs applied to the Subordinate Judge to appoint a receiver, they suggested that the appointment should be given to Mr. Stevens. So far as the materials for forming a conclusion are before us, it appears to us that the Subordinate Judge, assuming that he was in a position to appoint a receiver, would have made a wiser choice if he had selected Mr. Stevens. If he had done so there would probably have been no difficulty.

The Subordinate Judge made two orders in this connection, an order dated April 26, 1912, and an order dated June 5, 1912. The former order purported to remove Mr. Stevens and to appoint Babu Jatadhari Prasad to be receiver. It was made on the application of the plaintiffs to which we have referred and in the presence of the plaintiffs and the defendant No. 1 apparently by consent. Subsequently the other defendants as well as Mr. Stevens came in and preferred objections. After hearing arguments, the Subordinate Judge passed the second order confirming the first. The appeal before us, preferred by the objecting defendants, is expressed to be from the

second order. It was suggested for the respondents that no appeal lies from that order inasmuch as it was merely confirmatory. There is no substance in this contention. The Civil Procedure Code, Order XLIII, rule 1 (*s*), allows an appeal from an order made under rule 1 of Order XL. The first order which was made behind the back of the appellants must be regarded as merged in the second. In substance and effect the appeal is from an order appointing a receiver which purports to be made under rule 1 of Order XL. Such an order is appealable under Order XLIII.

The result is that the appeal is allowed to this extent, that both the orders of the Subordinate Judge are set aside and the matter is remitted to him to be dealt with in the light of the observations which we have made. The appellants are entitled to their costs already incurred in this connection in this Court and the Court below. Further costs will be in the discretion of the Subordinate Judge.

The above order sufficiently disposes of the Rule issued at the instance of Mr. Stevens. Mr. Stevens is entitled to his costs in this Court and the Court below out of the attached property. As in the appeal, we make no order as to any further costs he may incur.

H. R. P. *Appeal allowed.*