**(1945) 02 PAT CK 0009**

**In the Patna High Court**

Haragopal Nandy Chowdhry and Another — APPELLANT

Vs

Deoniti Prasad Singh and Others — RESPONDENT

**Date of Decision :** 23-02-1945

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 51

**Citation :** AIR 1945 Patna 404

## Judgement

1. This is an appeal from the order of the learned Subordinate Judge of Gaya, directing that a receiver be appointed in respect of the properties, popularly known as the Jamtara Raj, in possession of the appellants as usufructuary mortgagees. The facts leading up to this appeal are a little complicated; but, in so far as they are necessary for the determination of this appeal, they may shortly be stated as follows: The owner of the properties in question (to be hereinafter described as the mortgagor) executed two mortgage bonds in favour of Babu Eajniti Singh and others (who will be des-cribed in this judgment as the decree-holders), one on 2nd February 1913, for two lacs of rupees, and the other on 6th May 1917, for Rs. 2,86,500, mortgaging several talukas, practically the whole of the raj, extending over an area of about 200 square miles, situated mostly in the district of the Santal Parganas and partly in the district of Gaya. The mortgagor also executed three other simple mortgage bonds in favour of different persons. It is not necessary to go into the details of those transactions, except to state that one of the transactions led to a suit for sale. A decree was obtained by the mortgagee, and the properties sold. At the judicial sale, one Udit Narayan Singh became a purchaser of the properties on 17th May 1940.

2. The appellants came to acquire their interests in the mortgagor''s properties in the following manner: On 19th December 1926, the mortgagor executed a usufructuary mortgage-bond in favour of the appellants'' father, securing an advance of Rs. 40,000 and agree, ing to make over possession and management of the properties for 11 years to the mortgagee. The only interest which the mortgagor reserved for himself was the right to receive a monthly allowance of Rs. 1000 but, however, the mortgagee was not given possession of the

properties, with the result that a criminal litigation followed in the shape of a cheating case against the mortgagor. It ultimately ended by the parties entering into an ekrar-nama on 13th September 1927, .whereby the mortgagee agreed to advance the further sums of (1) Rs. 15,000 for the payment of the dues of one Kedar Marwari, and (2) Rs. 83,000 to liquidate the debts due to the firm of Thanmal Chunnilal from the mortgagor. It is said that, ever, on the further payments being made by the mortgagee, the mortgagor per-sisted in refusing to deliver possession of the properties to the mortgagee in pursuance of the ekrarnama. This led to another cheating case, resulting in the conviction of the mort-gagor. Ultimately, a ''title suit, being Title Suit No. 6 of 1928, was instituted by the mortgagee in order to enforce the terms of the mortgage bond and the ekrarnama aforesaid. This suit was eventually compromised on 6th January 1931, the terms of settlement being that the mortgage bond of 1926 and the ekrarnama of 1927, already referred to, were confirmed by the mortgagor, and the mortgagee agreed to make further advance in order to defray the costs of survey and settlement proceeding, which was then in progress. It was as a result of these several transactions between the mortgagor and the mortgagee that the" latter came in possession of the properties It is also said that the mortgagee, the pre-decessor-in-interest of the appellants, advanced about one lac of rupees to meet the costs of the settlement proceeding. It is thus alleged that the appellants'' predecessor-in-interest advanced in all, in round figures, about two lacs of rupees, besides paying the monthly allowance of Rs. 1000 to the mortgagor until the year 1941, aggregating to about a lac and fifty thousand rupees.

3. It now remains to state the events which happened in respect of the mortgages aforesaid of the years 1913 and 1917 in favour of the decree-holders. On 24th March 1931, the mortgagees under those two bonds instituted a suit in the Court of the Settlement Officer under the provisions of Regn. 3 of 1872 to enforce those mortgages, and, by an ex parte order, got the suit transferred to the Court of the District Judge of Gaya, who, in his turn transferred it to the Court of the Subordinate Judge at Gaya for disposal. On 25th July 1931, the plaintiffs in the mortgage suit made an application for the appointment of a receiver of the mortgaged properties, chiefly on the grounds that the mortgage security was insufficient to pay off all the dues on the two mortgage bonds in suit, that the interest on the two mortgage bonds was in arrears, and that defendant 19, the predecessor in-interest of the appellants, had been committing waste by cutting trees, etc. On 17th September 1931, defendant 19, that is to say, the usufructuary mortgagee; who had obtained possession of the properties as aforesaid by virtue of the compromise dated 6th January 1931, opposed the appointment of a receiver, and challenged the jurisdiction of the Court to entertain the suit. On 5th October 1931, the Court made an order, appointing a receiver of the properties. Against that order of the Court below, defendant 19 came up in-appeal to this Court. The appeal was allowed by this Court. The decision of this Court is reported in Nrisingha Charan Nandy Chowdhry Vs. Rajniti

 

Prasad Singh and Others, . This decision of a Division Bench of this Court (of which one of us was a member) has been very strongly relied upon by the appellants in the present appeal, and we shall have to say something about it in the course of this judgment.

4. On 18th November 1932, the Subordinate Judge of Gaya decided the question of jurisdiction in favour of the plaintiffs. Against that decision defendant 19 aforesaid moved this Court in revision, and obtained a rule and an order of stay of the suit itself, pending the hearing of the application in this Court. The revisional application was decided against the petitioners in this Court by its judgment dated 9th February 1934, which is reported in Nrisingha Charan Nandy Vs. Rajniti Parsad Singh and Others, . The appellants then made an application for leave to appeal to His Majesty in Council from the decision of this Court, holding that the Court of the Subordinate Judge at Gaya had jurisdiction to entertain the suit. That application being dismissed, the appellants obtained special leave from their Lordships of the Judicial Committee, and the appeal was heard by their Lordships and decided on 4th May 1936. Their Lordships affirmed the decision of this Court, and dismissed the appeal with costs.

5. It will thus appear that it took about five years to have the question of jurisdiction conclusively determined. In the Court below as also in this Court it has been said on behalf of the decree holders that the appellants succeeded in delaying the decision of the suit itself by raising the question of jurisdiction and by reiterating their objections on this question from Court to Court. It was not until 30th June 1937, that the suit was ultimately heard and decided. The trial Court passed a decree for nine lacs odd. The appellants brought an appeal to this Court from the decision of the learned Subordinate Judge at Gaya, decreeing the suit as aforesaid. It was First Appeal No. 45 of 1938. Meanwhile, the Bihar Money-lenders Act having come into force, the mortgaged properties had to be valued, and the valuation was fixed by the executing Court at nine lacs of rupees by its order dated 5th September 1939. Against this order of the Court, fixing the value of the properties, Misc. Appeal No. 260 of 1939 was preferred in this Court. During the pendency of the two appeals aforesaid in this Court, the properties were put up to sale and purchased on 8th January 1940, by the decree holders themselves for the amount fixed by the Court as their value. The appellants as also the mortgagor made an application under Order 21, Rule 90, Civil P. C, for setting aside the sale on the usual grounds, one of which was that the properties had been sold for a grossly inadequate price. During that proceeding, the properties were valued by the Court at eleven lacs and odd thousand rupees, and the sale was ultimately set aside on 30th January 1941. During the pendency of the appeal in the High Court, the mortgager as well as the decree-holders made an application for the appointment of a receiver of the mortgaged properties. These applications were strongly opposed by the appellants, and after hearing the parties, this Court dismissed both the applications on 16th August 1940.

 

6. The first appeal (45 of 1938) against the preliminary decree for sale was partly allowed by reducing the amount of the claim and a decree for about eight lacs and fifty thousand rupees was passed, with future interest at six per cent, per annum. The preliminary decree for sale passed by the High Court on 12th November 1941, was made final by the order of the Subordinate Judge at Gaya, dated 24th July'' 1943. The amount as shown in the final decree due to the decree-holders on the mortgages aforesaid comes to about Rupees 9,44,000. From the preliminary decree passed by this Court on appeal, the appellants have made an application for leave to appeal to His Majesty in Council. This application was made in 1942, but has not yet been heard. It may also be stated that the mortgagor has instituted a suit in forma pauperis for accounts and for possession of the mortgaged properties on the allegation that the mortgagees (the appellants before us) have paid themselves out by appropriating the usufruct of the properties, and that the mortgagor, on account being taken between the parties, would be entitled to a substantial sum of money from the mortgagees in possession. Meanwhile the decree-holders made their application for execution of the decree in these terms:

It ia prayed that notice under Order 21, Rule 22, Civil P. C., may be issued against the judgment-debtors as well as on defendants 30 and 31 and the valuation of the mortgaged properties may be fixed and sale proclamation may be issued and the decretal amount with interest and costs may be realized by sale of the said properties (which are described below) according to the terms of the decree and meanwhile as the completion of the sale will take a long time and the mortgage suit is pending from 1931 and the decree-holders have already lost a veryularge amount of money as stated below and as it is highly just and convenient and expedient in the interest of justice of the case that at least the interest on the decretal amount whioh itself amounts to more than Rs. 52,000 per annum be realised from the income of the properties which aocording to the principal judgment-debtors is not more than Rs. 54,000 per annum, the decree-holders pray that pending the completion of the sale of the properties as prayed for above a receiver may be appointed for the said mortgaged properties till the 3ale is confirmed on the following amongst other additional grounds as well as on other grounds stated in petition which is being filed separately.

7. The grounds set out for the appointment of a receiver may be summarised as follows : The mortgage suit filed in 1931 was delayed for 3even years on account of the several infructu-ous proceedings aforesaid taken by the appelant?, with the result that the decree-holders have sustained a loss of several lacs of rupees on account of the rule of damdupat being applicable to the case. The final disposal of the suit may yet take considerable time, as the application for leave to appeal to His Majesty in Council has not yet been disponed of. Defendant 19 now represented by the appellants, having no "abiding interest in the mortgaged properties," would take all steps within their power to delay the finality of litigation in execution proceedings, and, by that time, the decree-holders'' dues would amount to more than fifteen lacs of rupees, and, in the meantime,

 

defendant 19 and the appellants have been committing various acts of waste and mismanagement in respect of the mortgaged properties, thus seriously affecting the value thereof. In support of these allegations, it is further stated that homestead lands are being settled in the town of Jamtara as also in the suburbs with tenants at low rents and high premiums, without mentioning the amount of premiums realised from the tenants in the deeds of settlement. The appellants are also said to have settled proprietors'' private lands, which are especially valuable, on nominal rents after receiving substantial premiums. They are said further to have cut down and sold thousands of valuable trees for their timber from the extensive jungles in the estate. They are also said to have allowed the public demands in respect of the mortgaged properties to remain in arrears. It was also alleged in the application for the appointment of a receiver that defendant 19 and the appellants had realised more than eight lacs of rupees from the properties in their possession, thus entirely satisfying their dues under their mortgage bond. It was also said that, as a matter of fact, the appellants had been overpaid, and that it was in their interest to delay the sale of the properties as long as they could do it by raising all kinds of objections in the execution proceedings. It was thus suggested that the appellants, though originally usufructuary mortgagees, are no longer entitled to continue in possession of the mortgaged properties. On these allegations the decree-holders invited the executing Court to appoint a receiver to take charge of the properties and the rents and profits thereof until they are sold, and the sale finally confirmed by the Court. After hearing the parties, the Court below ordered the appointment of a receiver in the following terms:

The Receiver appointed in this case should take charge of the properties and would pay only a reasonable amount to be fixed hereafter for maintenance of the mortgagors and will keep in deposit rest of the income after defraying charges of the management of the estate. If in the redemption suit that is pending before the Jamtara Court anything is found due to judgment-debtor 19 which appears to be very unlikely the same will be paid up out of the income of the estate that will be in deposit with the receiver of the period before the sale and the rest of the amount that will remain with the reoeiver to be disbursed after the sale according to law.

8. Hence this appeal by the successors to the estate of defendant 19.

9. Mr. S. N. Bose, who has argued this appeal on behalf of the appellants with great force and ability, has raised the following contentions against the appointment of a receiver : (1) There being no legal impediment to the sale of the mortgaged properties, there is no right in the decree-holders to have a receiver of those properties appointed by way of equitable execution; (2) no receiver can'' be appointed so as to oust the appellants from possession of the properties given to them by way of a usufructuary mortgage; (3) the decree-holders, having only a right to get the properties sold in execution of their simple mortgages, are not entitled to possession of the properties and to the usufruct

 

thereof until after the sale of the properties. Hence, no receiver can be appointed at their instance, especially as the appointment of the receiver will not be of any benefit to them; and (4) that the allegations as regards waste by settlement of homestead and kamat lands as also by sale of timber in the jungles have not been substantiated, and that the delay in the final disposal of the suit was not due to any wilful acts of the appellants.

10. The first three contentions really resolve into this: whether a receiver can be appointed in a suit on a simple mortgage or in execution proceedings taken to enforce the decree for sale. In this connexion great reliance was placed by counsel for the appellants on the cases in The Bank and Behar Ltd. Vs. Hari Kishun Prasad Jhun-Jhunwala and Others, , Hemendra Nath Roy Chowdhury and Another Vs. Prokash Chandra Ghosh and Others, , Kshitish Chandra Acharjya Choudhry and Others Vs. Raja Janakinath Roy and Others, , Renula Bose in Sir Kameshwar Singh of Darbhanga Vs. Anath Nath Bose and Others, , Anandi Lal and Others Vs. Ram Sarup and Others, and Ma Hnin Yeik v. K. A. R. K. Chettyar Firm AIR 1939 Rang. 321. On the other hand, Mr. P. R. Das appearing on behalf of the decree-holders-respondents has contended that it is not an inflexible rule of law that, unless there is a legal impediment to the sale of the mortgaged properties, no receiver could be appointed at the instance of the mortgagee-decree-holder; that in India there is nothing like equitable execution, and the amended CPC of 1908 has incorporated what may have been equitable execution in England in the Code itself in Section 51 read with Order 40, Civil P. C, and, therefore, it is permissible in an appropriate case to appoint a receiver even in ''a suit on a simple mortgage or in the execution proceedings after a decree for sale has been passed on a simple mortgage. Mr. Das also contended that, though ordinarily a receiver may not be appointed in an action on a simple mortgage, or in an execution proceeding taken to enforce a mortgage decree for sale, if a special case is made out, a receiver may be appointed. He has further contended that in the special circumstances of this case, where the mortgagee decree-holder has been kept out of his money for more than 30 years (in the case of the first bond) and when, at the instance of the appellants, his mortgage suit was held up for about 7 years, thus causing him a loss of interest amounting to about four lacs of rupees, it is "just and convenient" that a receiver should be appointed. He also strongly relied on the circumstance that prima facie the appellants have been more than paid out in respect of their dues against the estate of the mortgagor on the basis of their usufructuary mortgage bond and the further advances made by them by virtue of the agreement between the appellants and the mortgagor. Mr. Das strongly relied upon the cases in Rameshwar Singh v. Chuni Lal Shaha A. I. R. 1920 Cal. 545 , (Raja) Promothanath Malia Vs. H.V. Low and Co., , Paramsivan Pillai v. Rama-sami Chettiar A. I. R. 1933 Mad. 570, Damodar Moreshwar v. Radhabai Damodar A. I. R. 1939 Bom. 54, Gobind Singh v. Punjab National Bank Ltd. A. I. R. 1935 Lah. 17, In re Pope (1886) 17 Q. B. D. 743 and Manindra Chandra v. Suniti Bala Debi AIR 1926 Cal 1006. Reference was also made to Coote on Mortgages, 9th Edn.,

 

vol. 2, p. 823.

11. The strongest case in support of Mr. Bose''s contention is the decision of a Bench of this Court, to which one of us was a party reported in 13 P. L. T. 525 As already indicated, this is a decision between the same parties, though it does not have the effect of res judicata, having been given in this ,verj suit at an early stage of the proceedings. Sir Courtney-Terrell C. J., held in that case that the mortgagee of a simple mortgage merely has the right to sue upon the personal covenant, or to bring the property to sale but he cannot satisfy his claim out of the rents and profits of the mortgaged property. He is in a position different from that of an English legal mortgagee who has a contractual right to the possession of the mortgaged property, as well as from an equitable mortgagee who is entitled by contract to be put into the position of a legal mortgagee with the privileges appertaining to that position. The Courts may appoint a receiver on the application of a legal or equitable mortgagee by reason of his right to possession. But no receiver can be appointed on the application of a simple mortgagee as he has no right to immediate possession of the property. These observations were not expressly assented to by one of us who agreed simply with the conclusion that the circumstances of the case, as disclosed till then, did not justify the appointment of a receiver. The following observations made in that case would show how their Lordships-were viewing the situation then:

The suit was instituted in March 1931 and being now over a year old must be ripe for hearing. It seems likely therefore that the suit will be decided'' before long and in these circumstances there does not appear to me any particular necessity for altering the status quo.

12. As regards the judgment of the late Chief Justice, the following observations have been made by Ramesam J., in the Full Bench case in Paramsivan Pillai v. Ramasami Chettiar A. I. R. 1933 Mad. 570:

In the first place the passages in Coote on Mortgages, where the position of an equitable mortgagee is discussed, show that, unless there is an express covenant for getting possession under certain circumstances, the equitable mortgagee is not entitled to possession, and it would not be correct to say that the English decisions allowing a receiver to be appointed in the case of an equitable mortgagee depended on his right to possession. On the other hand the observations in In re Pope (1886) 17 Q. B. D. 743 show that the appointment of a receiver in the case of an equitable mortgagee was based on just the opposite ground. It is because an equitable mortgagee is not entitled to possession it was said that a receiver should be appointed, and it was refused in the case of a legal mortgage. Whatever may be the position of an equitable mortgagee under English law, an equitable mortgagee under Indian law is merely a creature of the Transfer of Property Act. Under the Transfer of Property Act an equitable mortgagee has no right to possession. His only right is to obtain a decree for sale. I am not aware of any decision where it has been held that an equitable mortgagee is entitled to ask and demand possession of the mortgaged property.

 

I am therefore unable to concur with the statement of Terrell C. J., ''The same difference therefore between a simple mortgagee under Indian law and a legal mortgagee under English law exists between a simple mortgagee and an equitable mortgagee.

Far from there being such a difference, at least in the matter of obtaining possession, a simple mortgagee and an equitable mortgagee seem to stand on the same footing. In both, the mortgagee is not entitled to possession and it is on the consideration that a mortgagor who continues to enjoy the property without paying down the interest from out of the profits of the property may be said to be from an equitable point of view committing a breach of his undertaking, and where there are other circumstances such as the property being insufficient, that Courts have to proceed to appoint receivers in the case of equitable mortgages. The Madras and Calcutta cases appointing receivers in the case of equitable mortgages cannot. be distinguished on the ground suggested by Terrell C. J. The other learned Judge, Fazl Ali J., agrees with the conclusion and has based his reasons on the ground that the case before him was not a fit one for the appointment of a receiver.

13. In the Full Bench case decided by the Madras High Court, their Lordships have clearly laid it down that the Court has'' jurisdiction to order the appointment of a receiver in the suit of a simple mortgagee. The other Division Bench ruling of this Court relied upon by the learned Counsel for the appellants is the case in 23 P. L. T. 191 That case is not an authority for the proposition that in no circumstances can a receiver be appointed in the suit of a simple mortgagee. Their Lordships have pointed out in that case that relief by having a receiver appointed is not a matter of course, and can'' only be given where it''appears to be just and convenient to do so; by way of illustration their Lordships further point out that a proper case must be made out for the exercise of the Court''s discretion to appoint a receiver by way of execution, for example, by showing the existence of an impediment which prevents the decree-holder from obtaining satisfaction by an ordinary execution sale. But their Lordships do not lay it down that the existence of a "legal impediment" is a condition precedent to the appointment of a receiver in a mortgage action. The next case relied upon on behalf of the appellants is that in Kshitish Chandra Acharjya Choudhry and Others Vs. Raja Janakinath Roy and Others, In that case a Division Bench of the Calcutta High Court observed as follows:

Whether the appointment is regarded as made in the suit or in execution what the Court has to see is whether the appointment appears to the Court to be just and convenient within the meaning of Order 40, Rule 1 of the Code. It is obvious that when the question arises, after a mortgage decree for sale whether a receiver should be appointed in respect of the property to, be sold, inPorder ,to see whether it would be just and convenient to make the appointment, one must consider what impediment there is or may be for the sale to be held.

14. Though their Lordships have made a reference to any "impediment" to the

 

sale ordered by a decree on a simple mortgage, they also make these significant remarks:

It is also true that in actions for foreclosure or for sale if there is reason to suspect that the security is or would become insufficient or if the interest is in arrear the Court may appoint a receiver to safeguard the interest of the mortgagee. It is also correct to say that the right that the mortgagee has in this respeot is not affected by the mere fact that a decree for sale has been passed.

15. Hence, this case is not an authority for the proposition that a receiver may not be appointed in a suit on a simple mortgage bond. The case in Renula Bose in Sir Kameshwar Singh of Darbhanga Vs. Anath Nath Bose and Others, is a. decision of a Single Judge of the Calcutta High Court, sitting on the Original Side. In this case Panckridge J. made the following observations;

The general position appears to be that the Court will not appoint a receiver in execution unless the oircumstances are such as to make the sale of the properties a matter of serious difficulty. Once a receiver in execution is appointed, the mortgagee will as a rule have little inducement to bring the properties to sale and will tend to let matters drag on indefinitely. If the properties are producing a good income, it is probable that the mortgagee will have a more profitable investment than he will be able to obtain from the sale proceeds if the properties are brought to sale. This does not, however, mean that if there are substantial difficulties in the way of the sale the Court will not help the mortgagee by appointing a receiver. The Court, in considering this question, should also, in my opinion, take into consideration the diligence of the mortgagee.

16. In this case reference is made to the decision of a Division Bench of the same High Court given by Rankin C. J. The position is thus summarised by Panckridge J.:

The leading case is that of (Raja) Promothanath Malia Vs. H.V. Low and Co., . That suit was a money suit in which the plaintiffs had obtained a decree. In execution Lort-Williams'' J. appointed a receiver of mofussil immovable properties with power to sell. Although the appeal against his order was dismissed, the observations of Rankin C. J. make it clear that although the Court has jurisdiction to make an -order of the nature of the one which was the subject-matter of the appeal, the ordinary mode of execution is by attachment and sale. The considerations which weighed with the. Court in that case appear to me to have even greater force in a mortgage suit where the Court has specifically in terms decreed that the property should be brought to sale in the event of failure to redeem.

17. The case in (Raja) Promothanath Malia Vs. H.V. Low and Co., referred to above, decided by Rankin C. J. and Ghose J., was strongly relied upon on behalf of the decree-holders, respondents. Their Lordships have noticed in that decision that in India the distinction between legal and equitable interests is not observed in the full sense in which it is part of the law in England, and that since 1908, at

 

all events, provision has been made by the Code for the appointment of a receiver as a form of execution (Section 51). In the course of his judgment the learned Chief Justice made the following observations:

In England, the appointment of a receiver is often regarded as a form of equitable execution; but in In re: Shephard Atkins v. Shephard (1889) 43 Ch. D. 131, the Court of appeal pointed out that the expression tends to error. What a creditor gets by the appointment of a receiver is not execution, but a substitute for execution; a form of equitable relief which is granted on the ground that there is no effective remedy by exeoution at law. Accordingly, there is authority for the proposition that a person seeking "equitable execution" must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. In India the distinction between legal and equitable interests is not observed in the full sense in which it is part of the law in England. Since 1908, at all events, provision has been made by the Code for the appointment of a receiver as a form of execution (Section 51). It is not contended for the respondents in this appeal that the appointment of a receiver is a matter of right or that a proper case is not required to justify the exercise of the Court''s discretion to appoint a receiver by way of execution.

18. The later decision of the Calcutta High Court in 59 Cal. 2054 was relied upon on behalf of the appellants. In that case the history of the legislation relating to the appointment of a Receiver in India has been reviewed. Their Lordships have observed in that case that Section 51(d), Civil P. C. recognizes the appointment of a Eeceiver as a mode of execution of a decree, and says that such an order may be made on the application of a decree-holder. They also observed that the clause only gives legislative sanction to certain decisions under the old Code, in which it was held that the execution may be had by appointing a Receiver where that course is more likely to benefit both the judgment-debtor and the decree-holder than a sale of the attached property. It has also been said in that case that the terms of Order 40, Rule 1, Civil P. C., 1908, are wider than the corresponding Section 502 of the Code of 1882 and do not provide that the appointment of a Receiver should be confined to a suit. But they go on to add that Section 51 of the Code of 1908 is to be read with Rule 11 of Order 21 and Rule 1 of Order 40 and the order is to be regarded as made under the last mentioned rule and justified, if only that rule would justify it. In this connexion reference is made to the case in Srinivas Prosad Singh v. Kesho Prosad Singh (11)12 I. C. 745.

19. The only other case relied upon by the appellants is the Full Bench decision of the Allahabad High Court in Anandi Lal and Others Vs. Ram Sarup and Others, . This case was particularly relied upon as an authority for the proposition that in the case of a simple mortgage the corpus of the mortgaged property forms the security for the debt but the income is the property of the mortgagor and he is absolutely entitled to appropriate it until the property passes out of the ownership by sale, and, therefore, there is no point in

 

appointing a Receiver with a view to. collecting such income. In the course of his judgment, Sulaiman C. J. has observed that, the, entire law relating to the appointment of a Receiver is contained in Rule 1 of Order 40, Civil P. C. and that the said rule does empower a Court, where it appears to be just and convenient, to appoint a Receiver to any property, whether before or after a decree, and to remove any person from the possession or custody of the property, etc., etc. The learned Chief Justice further observed that, if Sub-rule (1) stood by itself, the power would have been unrestricted; but Sub-rule (2), which runs as follows "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" has curtailed the general power conferred upon the Court by Sub-rule (1). Reading the two sub-rules together, the result arrived at is stated by the learned Chief Justice to be as follows:

necessarily follows that there is no authority in a Court whatsoever 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 is not easy to see how in some cases theappointment of a receiver was ordered although no party to the suit has a present right so to remove the person in possession or custody of the property. The language of Sub-rule (2) is plain, and there is no escape from it. In order to interpret the rule we must give the proper and ordinary meaning to the words used therein, and not interpolate into the rule some new words and then interpret the rule in the light of the new words so introduced. The plain ,words in Sub-rule (2) are ''any person.'' Is there any justification for adding the words ''other than the parties to the suit'' immediately after these words ? The Legislature has not only used the expression ''a person'' but has emphasised it still further by using the words ''any person''. When the word ''any'' is there, can we seriously say that it means only persons other than the parties to the suit ? To take such words to be implied there, would be to nullify the force of the word ''any'' almost completely. The words in my opinion are general, and have been used in a''wide sense, and are fully comprehensive to include both persons who are parties and persons who are non-parties. It is difficult to understand how the meaning of these general words can be restricted to non-parties only.

20. The observations quoted above have been adversely criticised in the judgment of the Division Bench of the Bombay High Court in Damodar Moreshwar Phadke Vs. Radhabai Damodar Ranade, . Their Lordships have observed as follows with reference to the de cision referred to above:

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 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-rule (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.

21. This view of the Bombay High Court has not found favour with the Rangoon High Court where a Full Bench of that Court had to decide the same question in Ma Hnin Yeik v. K. A. R. K. Chettyar Firm AIR 1939 Bang. 321. The decision of the Full Bench in that case may best be stated in the following words of Roberts C. J.:

With great respect, the fallacy in the later decision seems to lie in the assumption that a receiver, if appointed when a licensee of the mortgagors is in possession, can exercise rights adverse to the mortgagor. The suggestion here that Sub-rule (2) of Order 40, ft. 1 refers to third parties only and has been merely inserted ex abundanti cautela seems to me to be fraught with difficulty in its application. But I prefer to take the opening words of the rule and to say that the Court undoubtedly has jurisdiction to appoint a receiver in a simple mortgage suit but that whether it will do so must depend upon, what is just and convenient in each particular case having regard to the reason for which he is appointed, to the precise nature of the security in the particular contract whereby a simple mortgage has been created and bearing in mind the limitations imposed by Sub-rule (2) of the rule itself. Since it may be thought necessary to be more explicit in answering the seoond question in the reference I would reply that the faot that interest on the mortgage debt is in arrear, or subsequently in arrear, can only be a faotor in deciding whether a receiver should be appointed; the faot that the security is likely for any reason to become insufficient may be another faotor; but the governing words of the rule are whether it is just and convenient and in deciding this matter due weight must be given to all relevant considerations inoluding those mentioned in Sub-rule (2) of Order 40, Rule 1.

22. But the Full Bench of the Rangoon High Court does not go to the length to which the Full Bench of the Allahabad High Court has gone. The Rangoon High Court has acceded to the proposition that the Court has jurisdiction to appoint a receiver in an action on a simple mortgage, but has indicated further that an exceptional case has to be made out in order to secure such an appointment. The Full Bench has further laid down that each case has got to be decided on its own facts.

23. A Division Bench of the Lahore High Court also has affirmed the proposition that in a suit oh a simple mortgage for sale of the mortgaged property the Court has jurisdiction to take mortgaged property in custodia legis by the appointment of a receiver to take possession of the mortgaged property and to collect the rents and profits pending the disposal of the suit. The Division Bench in that case has taken note of the decisions of the different High Courts bearing on the

 

question. Their Lordships further have observed that ordinarily the Court will not deprive the mortgagor of possession of the mortgaged property; but where there has been serious default in the payment of interest and the mortgagee''s security has diminished, or where the Court is otherwise satisfied that it is just and converient that a receiver should be appointed the Court would not hesitate to remove the mortgagor from possession. Hence, each case has to be determined on the individual circumstances of that particular case.

24. These are the important decisions bearing on the question and cited before us, and, in our opinion, it may safely be said that the balance of judicial opinion in India is in favour of the view that in a suit on a simple mortgage for sale the Court has jurisdiction to appoint a receiver to take possession of the mortgaged property and to realize the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course. Ordinarily a Court of justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by a sale held in execution of the final decree in the action. A receiver in such a suit, or in execution proceedings re-suiting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court. It is not practicable to lay down any hard and fast rule governing the circumstances in which a receiver in such a suit ean be appointed; but by way of illustration it may be said that where the Court is satisfied that the value of the security has diminished by act of the mortgagor or otherwise, or where the mortgage security is apparently insufficient to liquidate the entire dues of the mortgagee on the foot of the bond in suit, the Court would be inclined to appoint a receiver so as to place the rents, issues and profits of the properties in the hands of the Court to be dealt with in accordance with the justice and equity of that particular case.

25. In the present case the execution stage has been reached. So far as the execution stage is concerned, the position is clearer still by virtue of the enactment of Section 51(d), Civil P. C., which provides that the appointment of a re-ceiver is one of the modes of execution available to a decree-holder in a proper case. The provisions of Order 40, Rule 1 of the Code also were suitably amended by adding the words "whether before or after decree" in Clause (a) to bring it in conformity with the new provisions contained in Section 51. It is hardly necessary to point out that the provisions of Section 51(d) have got to be read along with those of Order 40, Rule 1 of the Code, in order to grant relief to a decree-holder by the appointment of a receiver. The interpretation of the above provisions in the Code by the Allahabad High Court in the Full Bench decision, referred to above, is rather too narrow. We would prefer to follow the Division Bench ruling of the Bombay High Court, noticed above, in which Beaumont C. J. has pointed out the inconvenient, results which may follow from a narrow interpretation of the provisions of Order 40, Rule 1.

 

26. It now remains to consider whether the facts and circumstances disclosed in the present case justify the appointment of a receiver as ordered by the Court below. It is an uncontroverted fact that interest'' on the two bonds in suit has remained unpaid since the year 1913 in the one case and since 1917 in the other. It has also to be noted that at the instance of the appellants, who are in the position of subsequent encumbrancers, the mortgage suit remained pending for about seven years, and the application for leave to appeal to His Majesty in Council still remains undisposed of. The interest on the decretal sum of over ten lacs at the court rate amounts to about Rs. 60,000 per year. It is not clear that the net profits of the properties under the mortgages exceed the aforesaid annual interest on the decretal sum. It is also a fact that the mortgagor himself is not in possession of the properties since January 1931, and it has been stated before us that even his monthly allowance of Rs. 1000, promised to be paid by defendant 19 aforesaid, has not been paid since 1941. On the other hand, the appellants have been in possession of the properties since 1931 and appropriating the rents and profits of the same towards their dues aforesaid. The appellants contended before us that the Court below had prejudged the issue in the account suit, pending between the mortgagor and the appellants, by coming to the conclusion that the appellants had overpaid themselves. The Court below was certainly entitled to come to its own conclusions for the purposes of the determination of the -question before it, namely, whether or not a receiver should be appointed in respect of the mortgaged properties. In that connexion it had been alleged on behalf of the decree-holders as also by the mortgagor that the appellants had realized from the properties in their possession more than their dues from the mortgagor. If that is so, no injustice can be done to the appellants by putting the properties in charge of an officer of. the Court so as to collect the rents and profits to secure them for the benefit of the party legally entitled to them. This matter arises only incidentally in the present case, and the conclusion of this Court, or of the Court below, on this question cannot be said to amount to a decision of the points in con. troversy between the parties in that suit. The question has to be determined in a summary way on prima facie evidence, without going into all the details of the accounts between the parties. We find no reason in this appeal to differ from the view taken by the Court below which seems to be supported by good prima facie reasons.

27. In discussing the question whether a receiver should or should not be appointed, the first and foremost Consideration before the Court is whether it is "just and convenient" that the properties should be taken charge of by an officer of the Court. If by appointing a receiver the Court will be doing some injustice to any of the parties to the litigation the Court will not appoint a receiver. In the present case there are three parties who are vitally interested in this question, namely, (1) the decree-holders, who have obtained an order from the Court below for the appointment of a receiver, (2) the judgment-debtor, who also has joined the decree-holders in their prayer for the appointment of a receiver, and who is entitled in his own account suit aforesaid to have a receiver appointed for

 

his own benefit and (3) the appellants, who are . at present in possession of the properties. If we are satisfied that by making an order for the appointment of a receiver the Court will be doing an injustice to the appellants, the order of the Court below appointing a receiver should not be allowed to stand. It has been, vehemently contended on behalf of the appellants that the appellants have done no wrong so as to be penalised by the order for the appointment of a receiver. But this argument, in oar opinion, proceeds on the assumption that the order of appointment is meant to penalise any party to, the litigation. That is not the underlying idea of such an appointment. The real intention of the Court in making such an appointment is to preserve the properties and the usufruct thereof for the benefit of such of the parties to the litigation as may ultimately be held entitled to the same. The Court below has directed by its order under appeal that, if as a result of the account suit, referred to above, it is found that the appellants'' dues have not been liquidated during the period of their possession, they will be entitled to so much of the profits in deposit in Court as would satisfy their claim, and only thereafter any other question could rise in respect of the disposal of the surplus profits in the hands of the Court.

28. This order, in our opinion, sufficiently safeguards the appellants'' interests which can legitimately be claimed from the mortgagor through the Court. The decree-holders as also the judgment-debtor both join in their allegations that the appellants have been committing waste by settling homestead and kamat lands at very low rents and by charging considerable premiums which are not shown in such accounts as are kept by the mortgagees in possession. The latter, on the other hand, stoutly deny any such waste. They also deny that thousands of trees in the jungle appertaining to the estate in their possession have been cut down, and the timber misappropriated by them. In view of the litigation pending between the mortgagor and the mortgagees in possession, it is not either necessary or desirable that this Court should finally express any opinion on those controversies. It is enough to say that these are substantial questions raised by the parties, and that there are temptations in the way of the appellants to make as much money out of the properties in their possession as they possibly can, because they are fully cognizant of the fact that the properties are not going to remain in their hands for long. Mr. S. N. Bose referred us to the provisions of Regns. 3 of 1872 and 2 of 1886 at pp. 24 and 66, respectively, of the Santal Parganas Manual to show that they could not legally charge any premium in respect of homestead lands settled by them. There is a wide gulf between a person''s legal rights and his inclinations to make illegal gains; but as already indicated, it is not absolutely necessary to decide whether it has been established in this case that the mortgagees in possession have been guilty of waste. Even apart from this consideration, in our opinion it is convenient, with a view to'' safeguarding the interests of all the parties" concerned, without doing any injustice to any one of them, that a receiver should be appointed to take charge of the properties.

29. It was, also contended on behalf of, the appellants that Udit Narayan Singh,

 

who had purchased the equity of redemption in a certain money" sale, was also interested in the properties, but had not been made a party to this case relating to the appointment of a receiver. Mr. G. P. Das has filed a vakalat-nama on behalf of the said Udit Narayan Singh, and has informed us that his client has no objection to the appointment of a receiver. Thus, it is apparent that all the parties concerned with the properties except the appellants are not only agreeable to the appointment of a receiver, but are anxious about it. The decree-holders are so keen on the appointment of a receiver that they readily agreed to the suggestion of the Court to reduce the rate of interest for two years during which period the receiver, when appointed would remain in charge of the properties, and by" which time it is expected that the execution proceedings would, be terminated by the sale of the properties, and Mr. P. E. Das on behalf of the decree-holders has agreed that for two years the interest decreed by the Court, namely six per cent, per annum, might be reduced to four per cent, per annum, as a proof of the decree-holders'' earnestness to bring the properties to sale as early as possible. This was done with a view to benefit the judgment-debtor as also the decree-holders, including the minors amongst them who are vitally interested in having the properties brought to sale as expeditiously as possible consistently with the requirements of the law. Mr. P. R. Das also agreed that neither the execution proceedings nor the sale itself should be stayed pending the proceedings necessary for the appointment of a receiver. Mr. S. N. Bose also on behalf of the appellants under, took not to pray for any stay. But on behalf of the judgment-debtors Mr. G. P. Das contended that the properties should not be sold, and that the usufruct thereof be utilised in paying off the decree. Such a course does not appear to be feasible in view of the fact that the interest accruing due every year on the total sum decreed in favour of the decree-holders may be paid out of the usufruct, as it appears on the materials now before us, and much may not be left towards the liquidation of the capital sum. Hence it is not practicable to appoint a receiver for the purpose of collecting the rents and profits of the properties with a view to the ultimate liquidation of the decretal debt. The receiver to be appointed in this case would only take charge of the properties pending the conclusion of the execution proceedings ending with the confirmation of the sale. The decree-holders have also agreed that the revenue and other public demands from the properties must be paid regularly by the receiver even though it may be found that the usufruct in the hands of the receiver is not sufficient to meet those demands. The decree-holders undertook that, if. and when necessary, they will be prepared to advance the necessary amounts to pay the Government revenue and other public demands. We know that this Court set aside the orders of the executing Court fixing the value of the properties in accordance with the provisions of the Money-lenders Act. With a view to the expeditious disposal of the execution case, it is essential that the proceedings in relation to the valuation should be concluded without any avoidable delay.

30. Having come to the conclusion that it is a fit case in which a receiver should

 

be appointed, we have to determine the terms on which a receiver should be appointed, and the date from which his appointment should take effect. It is manifestly just that the appellants, who are at present in possession of the properties, should continue to be in possession until the end of the agricultural year, that is, until Chait of the Bengali year, which will be some time in the middle of April next. By that time the appellants may be able to realise their current dues as also arrears from tenants. They also may by that time realise such of their rent decrees as can be executed before the termination of the year. But such of their rent decrees and rent suits as remain outstanding or pending shall be taken charge of by the receiver to be appointed who will collect the amounts due and prosecute the suits, for the benefit of such of the parties to this litigation as may ultimately be found entitled to the same. The receiver shall be entitled to get himself substituted in place of the original decree-holders as also in the rent suits and other suits pending in Court in respect of the properties in question. It follows from what has been said above that the appellants shall be liable to pay all the Government demands in respect of the properties up to the time that they are allowed to remain in possession, that is to say, up to the end of this Bengali year. Mr. Bose, on behalf of the appellants, has undertaken to do so, and has also informed us that his clients undertake not to commit any waste while they are in possession.

31. As regards giving any maintenance to the mortgagor, it was contended on behalf of the appellants, that he is not entitled to any maintenance, inasmuch as all his interests in the mortgaged properties have passed out of his hands. We are not in possession of all the materials bearing on this question, and, therefore, it will be left to the lower Court to determine what amount, if any, the mortgagor is entitled to receive from the receiver by way of maintenance. Mr. S. N. Bose at the end of his arguments suggested that, if the Court decided to affirm the order of the Court below directing the appointment of a receiver, one of his clients should be appointed a receiver. On the other hand Mr. P. R. Das on behalf of the decree-holders expressed their wish to be appointed a receiver. Naturally, the parties are not agreed about the person to be appointed as receiver. Considering all the circumstances of the present case, in our opinion, it would be just and convenient that a receiver should be appointed, and that he should be a person; preferably a retired official, who should get a decent salary for the dis charge of his onerous duties. Who should actually be appointed as receiver is a matter which will be decided hereafter. In the result, we'' agree with the Court below that this is a fit case in which a receiver should be appoint ed. The appeal is accordingly dismissed with costs.

 