

(1924) 08 MAD CK 0064
In the Madras High Court

K. Rajagopala Chariar

APPELLANT

Vs

Musammat Jamal Ayisha Bibi and Others

RESPONDENT

Date of Decision : 29-08-1924

Acts Referred:

Contract Act, 1872 — Section 70

Citation : 90 Ind. Cas. 337

Hon'ble Judges : Charles Gordon Spencer, O.C.J.;Srinivasa Iyengar, J

Bench : Division Bench

Judgement

Charles Gordon Spencer, Officiating, C.J.—The appellant holds a first mortgage over the machinery, types and other stock-in-trade of the Modern Printing Press which is installed in premises belonging to the 1st respondent. The 1st respondent has a decree for arrears of rent and for ejectment of the tenant against the 2nd respondent. Third respondent is a Receiver appointed, in the course of the execution of the 1st respondent's decree and was directed by the Court in presence of all the parties to sell the press for the best price obtainable and mean while to keep it running as a going concern and to pay the rent due to the landlord. Owing to various reasons the attempt to dispose of the press as a going concern was unsuccessful, and the materials were eventually sold for Rs. 10,000 which is less than the sum due to the appellant on his mortgage decree of July 10, 1924. In this appeal we are asked to declare that the appellant's claim to the proceeds of the mortgaged property should be given precedence over the 1st respondent's claim for rent and over the disbursements made by the Official Receiver to workmen for keeping the press running as a going concern. It is argued for the appellant that his position as a secured creditor cannot be rendered worse by an order passed on a petition to which he was not a party, that the landlady can only pursue her remedy for rent against the printer and the Receiver, that his consent to the sale of the press free of encumbrances was given on condition that he should have the same right over the proceeds as he had over the property mortgaged to him, that the Receiver is not entitled to pay the rent out of the proceeds of the corpus and that the order of Devadoss, J.,

was only to pay the rent out of the net collections.

2. The last plea is not well founded. In the affidavit of the 1st respondent's agent, it was suggested that the Court should direct the Receiver to pay the rent out of the gross collections. But the order of the Court, dated the 26th February 1923 does not state from what source the Receiver should pay the rent. In this affidavit of July 1924, the appellant states, that he understood Mr. Justice Devadoss' order that the rent should be a first charge as meaning that it should only be paid after the secured creditors had been satisfied. But the reply affidavit of the 1st respondent's assistant contains a sworn statement that Mr. Justice Devadoss refused to make any order for sale of the property unless the parties agreed that rent should be paid to the plaintiff as a first charge. Apart from any consideration as to what the parties understood the learned Judge's order to mean, it is very clear from the affidavits and orders to which our attention has been drawn that the appellant, though not a party to the 1st respondent's suit, became aware of the appointment of a Receiver and that he applied to the Court that the Receiver appointed in the 1st respondent's suit should be appointed Receiver in his own mortgage suit (Original Side No. 582 of 1923) and that he opposed the removal of, the press from its present premises and asked that the defendant should be restrained by an injunction from removing it. He, therefore, acquiesced in the housing of the property in the 1st respondent's premises and in the employment of a Receiver to preserve the property for the benefit of such parties as might be eventually held to have a prior right to it. It is clear that notice was given to his Vakil before passing the order of 24th July 1923 to sell the plant and machinery to public auction with the reserve price of Rs. 31,500 after rejecting an offer for Rs. 30,500. Kumaraswami Sastri, J., decided that the appellant was estopped by his conduct from claiming that the landlady and the Receiver should go without satisfaction of their claims and I am clearly of opinion that the learned Judge was right. Appellant evidently acquiesced in the property being kept where it was and he took the benefit of its being preserved. He cannot now claim to have the properties without paying any rent for the period prior to the sale at which he purchased. If he had not moved for keeping the properties in the 1st respondent's premises, she might have got vacant possession and have let the premises to others. He not only enjoyed the benefit of the Receiver's management, but also he has had the benefit of the shelter of the 1st respondent's roof which together resulted in the property being preserved for him and he adopted those benefits when he asked for the press to be left where it was and for an order that the 3rd respondent should continue to manage it instead of getting it sold as soon as possible under his mortgage. The case, therefore, in my opinion, clearly falls within Section 70 of the Contract Act which, as I explained in *Rajah of Pittapur v. Secretary of State* 25 Ind. Cas. 783 : 16 M.L.T. 375 covers cases of the nature of salvage. The English case of *Bertrand v. Davies* (1862) 54 E.R. 1204 : 3 Beav. 429 : 32 I.J. Ch. 41 : 9 Jur. (N.S.) 34 : 7 L.T. (N.S.) 372 : 11 W.R. 48 : 135 R.R. 504 was quoted on behalf of the Receiver. In that case it was held that a Manager appointed by a Court to manage a West

India estate was entitled to a lien on the estate for expenditure incurred in the course of management when the persons interested by tacit acquiescence had encouraged him to incur such expenditure. In Fisher on Mortgages, page 281 this case is quoted as an instance of an equitable salvage lien arising in connection with certain undertakings which would fail for want of immediate pecuniary and other supplies. In this respect the cultivation of West India estates has been put on the same footing as the working of mines, alum works and other works of a perishable nature. The facts of Bertnand v. Davies (1862) 54 E.R. 1204 : 3 Beav. 429 : 32 I.J. Ch. 41 : 9 Jur. (N. s.) 34 : 7 L.T. (N.S.) 372 : 11 W.R. 48 : 135 R.R. 504 are not exactly similar to the present case but the principle of salvage is the same. In Giridhari Lal Ray v. Dharendra Kristo Mukerjee 34 C.P 427 : 11 C.W.N. 1 : 4 C.L.J. 495 there was an order of Court directing the Receiver to raise a loan to preserve the property for the benefit of all parties and the learned Judges held that, if the Court was satisfied that a certain order was made for the benefit of all the parties to the litigation, it was not necessary to inquire further into the circumstances which justified such an order and that a Court appointing a Receiver to be in possession of an estate can deal with the property which is under its control and can authorise the Receiver to create a lien on the property which will take priority over any other mortgage of an earlier date. In the present case the Court did not order the Receiver to raise a loan for the purpose of paying the rent of the premises where the press was and for paying the wages of the workmen who were employed to work it as a going concern. The Judge might have done so and, if in pursuance of the Court's order the Receiver had mortgaged the press for raising a fund to defray the cost of his management, that mortgage would have taken precedence over the appellant's security. Under these circumstances, I have no doubt that the learned Judge's order to pay the rent due to the plaintiff from 1st December 1922 up to the delivery of possession and the wages of the workmen and the Receiver's remuneration in priority to the appellant's mortgage out of the proceeds of the sale of the press was justified both, in fact and in law, and the appeal is dismissed with costs of 1st and 3rd respondents (two sets).

Srinivasa Iyengar, J.

3. The question raised in this appeal is a difficult and important one and I have given it my earnest consideration. At the hearing of the appeal I was much impressed with the argument on behalf of the appellant that if one person should file a suit against another and get an order for the appointment of a Receiver in that suit in respect of property which is mortgaged to various persons who are not made parties to the action, the orders passed in that suit with regard to the management of the property by the Receiver would have the effect of depleting, if not, of entirely destroying the securities held by the mortgagees. Generally speaking no doubt such a result would be liable to be characterised as monstrous. But the law is perfectly clear that when the property is placed in custodia legis by the appointment of a Receiver all the orders passed by the Court for the management of such property will be binding on all persons who, if

not actual parties to the suit, have so conducted themselves either with regard to the litigation or with regard to the management of the property under the directions of the Court, as to make themselves virtually or constructively parties to the suit or have otherwise submitted themselves to such management by the Court. It is unnecessary for me to say whether or not the appellant in this case was well advised or ill advised in his Conduct with regard to the litigation, in question and also with regard to the management of the press by the Court. It seems to me that the observation made by the learned Counsel for the 1st respondent that the appellant was always hovering about the Court and appearing in the case in various proceeding and then disappearing, was a very true and just observation. It is also perfectly clear that the appellant far from disputing or questioning the management of the press by the Court through its Receiver, complained at one stage of the apprehended danger of the Receiver being discharged insisting upon the necessity for continuance of the Receiver and suggesting that the Receiver should be in charge on such terms as to payment of rent, etc., as the Court may deem fit. In the face of such an application, it is impossible to resist the conclusion that the appellant submitted himself to the management by the Court. If so, it follows that either as party, virtual or constructive or as a mortgagee who had submitted himself to the management by the Court, he became bound by all the necessary orders made by the Court in respect of the management. It is true that the application of the appellant for making him really a party to the suit was not ordered by the Court. But, if thereafter the appellant had not intervened in the suit and made himself virtual or constructive party as aforesaid, he might possibly have been in a different position. It is true that the mortgage in favour of the appellant was not of the business as a going concern. But at the same time the covenants in the deed of mortgage make it clear that for the maintenance of the value of the securities it was deemed necessary that the business should be maintained and carried on as a going concern. There can also be no doubt that the appellant himself regarded that not only the carrying on of the press as a going concern, but its being housed in the same premises belonging to the 1st respondent were both necessary for the maintenance of the value of his securities. In these circumstances the amounts directed to be expended by the Court by way of salvage was an expenditure necessary for and binding on all the parties including the appellant. It is no doubt to be regretted that things turned out quite differently to what was expected. I am not also sure whether the equitable doctrines of salvage lien might not require considerable extensions in their application to complicated and growing commercial conditions in future. However, that may be, for the reasons already given I agree with my Lord the Officiating Chief Justice in the order made by him.