

(1937) 09 MAD CK 0017
In the Madras High Court

S.A. Subramanyam Chettiar and Another	APPELLANT
Vs	
K.G. Ethirajulu Chettiar and Another	RESPONDENT

Date of Decision : 16-09-1937

Acts Referred:

Citation : AIR 1938 Mad 325 : (1938) 1 MLJ 249

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The appellants mortgaged the property in question to the respondents. The respondents obtained a decree; but because of the various applications that the appellants made in this Court and other tactics that they adopted, the sale has not taken place even now. The respondents thereupon put in an application for the appointment of a Receiver and a Receiver was appointed. Certain allowances were given to the appellants for their expenses; and they were allowed to remain in possession of that part of one of the houses in which they lived. Subsequently, the present order was passed ordering them to vacate that part of the house also, because the Receiver was unable to realise any rent for the benefit of the mortgagees. Hence this appeal.

2. The learned Counsel for the appellants places reliance on Anandi Lal and Others Vs. Ram Sarup and Others, , a Full Bench case of that Court.

Their Lordships in that case came to the conclusion that although the first part of Order 40, Rule 1 was wide enough to enable a Receiver to be

appointed in all cases; yet Clause 2 of that rule meant in practice that a Receiver could not be appointed on behalf of a simple mortgagee the

reason being that the mortgagee was not entitled to immediate possession and

that the Receiver could not be appointed as there was no use in appointing a Receiver if he could not enter into possession. This decision meant that a Receiver should not be appointed on the application of a simple mortgagee. It is conceded that the finding that a Receiver should never be appointed on behalf of a simple mortgagee is not the law current in this presidency; but it is contended that this Court, although holding in the Full Bench case *M. Paramasivan Pillai Vs. A.V.R.M.S.P.S. Ramasami Chettiar*, following older cases that a Receiver could be appointed in such suits, this Court has nowhere given a finding that the second, clause of Order 40, Rule 1 did not apply to the possession and dispossession of the mortgagor. It is seen however from a reading of the Allahabad case that the principal reason why the Allahabad High Court came to the conclusion that a Receiver ought not to be appointed in suits on a simple mortgage, is that Clause (2) of Order 40, Rule 1 did not permit of a Receiver's dispossessing the mortgagor. Their Lordships of the Allahabad High Court expressed dissent from the judgment of the Full Bench of this High Court in *M. Paramasivan Pillai Vs. A.V.R.M.S.P.S. Ramasami Chettiar*, where the opinion was held that the appointment of a Receiver was not dispossession at all as the Receiver held possession on behalf of the mortgagor, and merely preserved the profits from the property for the benefit of the mortgagee in case the mortgaged property was not found sufficient. I cannot therefore, in the face of *M. Paramasivan Pillai Vs. A.V.R.M.S.P.S. Ramasami Chettiar*, accept the reasoning in the Allahabad case which formed the basis of a decision completely at variance with that in *M. Paramasivan Pillai Vs. A.V.R.M.S.P.S. Ramasami Chettiar*. If, as is the law in this presidency, a receiver can be appointed it is a necessary concomitant of his office that he should be able to lease the property and that if he is obstructed by the mortgagor he can seek the aid of the Court to remove him. If the arguments of the learned Counsel for the appellants were correct a Receiver in a mortgage suit would be able to do nothing at all if the mortgagor chose to resist him; for the mortgagor could remain on his property and because he was in possession he could not be dispossessed. Even if he did not occupy the whole of the property himself but leased it to some other person, that other person's possession would be possession of the mortgagor, and the Receiver and the Court would be equally

powerless to collect rent from that other person if he desired to pay the rent to the mortgagor himself. Clause (d) of Order 40, Rule 1 confers upon

the Receiver power to manage the property and to collect the rents and profits thereof and he cannot do this against the obstruction of the

mortgagor unless he is allowed to enter into possession himself.

3. The next contention raised on behalf of the appellants is that as in a previous application by the mortgagee the Court did not see fit to eject the

mortgagor from possession, the mortgagee was estopped by the principle of constructive res judicata from again applying to the Court and asking

it to eject the mortgagor. I cannot accept this contention. The Court may not have seen fit at a particular stage of the suit to pass an order evicting

the mortgagor; but it was perfectly open to the Court if it saw fit at some later stage, to do so. In making its first order, the Court considered what

was the most convenient course to adopt at that time; and in doing so it certainly did not decide any question against the mortgagee either expressly

or by implication which would amount to a decision on some point which would prevent that point being: raised in a subsequent stage of the suit.

4. The last contention is that the Court has not found that the mortgagor by his conduct has merited such an order. It is clear however from a

perusal of the order appealed against and from the various proceedings that have taken place at the instance of the mortgagor, that the mortgagor

has succeeded for a long period of years in preventing the mortgagee from realising the fruit of his decree. I am certainly of opinion that the lower

Court was quite justified in passing the order it did.

5. In the result the appeal is dismissed with costs of the contesting respondent.