ALLAHABAD HIGH COURT

Anandi Lal

Vs.

Ram Sarup

(Sulaiman, C.J., Thom and Rachhpal Singh, JJ.)

04.03.1936

ORDER

Sulaiman, C.J.

1. This is an application of Lala Ram Swarup and others in which the applicant prays the Court to appoint a receiver of certain mortgaged properties.

2. On 30th October 1922 a mortgage-deed was executed by one Ganga Ram who was the manager of a joint Hindu family and one Piare Lal in favorof the applicant's father. The sum advanced to the mortgagor was ₹ 1,05,000/- . This sum was advanced at the rate of 9 annas per mensem compoundable every six months. The prescribed term of the mortgage was three years, that is the money was repayable to the mortgagee on 30th October 1925. The money was not repaid in 1925 and the payment of interest appears to have been very irregular. In 1933 the plaintiffs filed a suit in which they claimed ₹ 1,49,264/- plus interest. On 8th September 1934 a preliminary decree was passed in favor of the plaintiffs for a sum of ₹ 1,72,527/- . Against this decree the defendants to the suit have preferred a first appeal in this Court. The applicants have since obtained a final decree in their favor for the amount above mentioned. The applicants pray that in the special circumstances of this case a receiver be appointed to take charge of the mortgaged property pending the result of the appeal against the decree on the basis of the mortgage-deed.

3. It appears that included in the mortgaged property were certain stone quarries and it is alleged by the applicants that since the institution of the suit upon the basis of the mortgage the defendants have been mining these quarries at an abnormal rate and that as a result the value of the mortgaged property is depreciating. The defendants have opposed this application and they themselves filed an application which is before us in which they pray the Court that pending the result of their appeal the execution of the plaintiffs' decree should be stayed.

4. The defendants contend that this Court has no power to appoint a receiver in mortgage suit even after a decree has been passed in favor of the plaintiffs. This raises a somewhat difficult point of law which has been considered on several occasions by different Benches of this Court and of the other High Courts in India. Briefly the argument for the applicants is that under Section 51, Civil Procedure Code, the decree-holder in a mortgage suit is entitled to an order from the Court directing that his decree be executed by the appointment of a receiver.

5. The defendant's reply is that under the provisions of Order 40, Rule 1, Sub-rule (2), Civil Procedure Code, the Court is not empowered to appoint a receiver in circumstances where the mortgagor cannot be removed by the mortgagee from the mortgaged property. It was contended that the only right which the mortgagee has under his decree is the right to sell the mortgaged property in accordance with the provisions of the Civil Procedure Code. Until the mortgaged property has been sold in execution of the decree it was urged, the mortgagors could not be removed from the mortgaged property. In other words in the suit in which this application is made there is no right in the mortgagee to remove the mortgagor. In these circumstances it was contended that the application for the appointment of a receiver should be dismissed. Learned Counsel for the applicants has referred in support of his application to the decision in *Mohammad Ishaq v. Om Parkash*[1] In that case it was held that it was open to the Court to say that although the property mortgaged was not to be sold and execution by that method would not be permitted, execution would be permitted by the appointment of a receiver. This decision carries the applicants the whole way and if this decision stood alone the applicants would have been in a position to contend that the law as laid down by almost every High Court in India was to the effect that Section 51 conferred upon the Court a right to appoint a receiver in execution of a mortgage decree. Learned Counsel for the applicants referred also to the cases reported in *Paramasivan Pillai v. Ramasami Chettiar*[2] *Rameshar Singh v. Chunni Lal Shaha*[3] and *Gobind Singh v. Punjab National Bank, Ltd*[4]. These decisions support the view that the Court has power under the provisions of the Civil Procedure Code to appoint a receiver to take charge of property in a mortgage suit.

6. As against these authorities however the opposite parties have referred to the cases reported in *Gobind Ram v. Jwala Pershad*[5] and *Makhan Lal v. Mushtaq Ali*[6] These two latter decisions are directly opposed to the other authorities to which we have referred above. Learned Counsel for the opposite parties referred also to another decision of this Court in *Ram Prasad v. Bishambhar Nath*[7] In that case it was decided that in view of the provisions of Order 40, Rule 1(2) it was not open to the Court to appoint a receiver in a mortgage suit and in execution of the mortgage decree. One of the learned Judges who decided this case was also a party to the decision upon which the applicants relied in the case reported in *Mohammad Ishaq v. Om Parkash*[8] It appears that in this Court there is a divergence of opinion as to the true meaning of the provisions of the Code referred to above. The other High Courts in India have taken the view that it is open to the Court to appoint a receiver in execution of a mortgage decree. In this state of the authorities in our view it would be desirable if so far as this Court is concerned the matter is finally considered

and decided by a Full Bench. Let the record be laid before the learned Chief Justice for the constitution of a Full Bench to decide the question: 'Under the provisions of the Civil Procedure Code is it competent to appoint a receiver of the property mortgaged pending the decision of an appeal against a mortgage decree?"

Sulaiman, C.J.

[1]1933 All 227 [3]1920 47 Cal 418 [5]1918 43 IC 533
[2]1933 56 Mad 915 [4]1935 Lah 17 [6]1927 All 419
[7]1934 ALJ 561
[8]1933 All 227

7. The question referred to this Full Bench is: "Under the provisions of the Civil Procedure Code, is it competent to appoint a receiver of the property mortgaged pending the decision of an appeal against a mortgage decree?" In this case there had been a simple mortgage-deed executed on 30th October 1922; the suit for sale was fixed on 19th May 1933 and the preliminary decree was passed on 8th September 1934. An appeal from this preliminary decree is pending in this Court. In the meantime the Court below has passed a final decree for sale on 17th August 1935.

8. The mortgagees have filed an application for the appointment of a receiver direct in the High Court where the appeal from the preliminary decree is pending, but no appeal from the final decree has been preferred. It is understood that the question for consideration is not merely whether a bare order appointing a receiver of any property under Order 40, Rule 1(a) can be passed in this case, but the substantial question is whether the Court is authorized to remove the mortgagor from the possession or custody of the mortgaged property. There is no doubt that there has been a considerable conflict of opinion on the main question in the various High Courts. Speaking broadly the High Courts of Calcutta, Bombay, Madras, Lahore and Rangoon have taken the view that a receiver can be appointed even in a suit for sale on the basis of a simple mortgage, though even in these Courts there are earlier cases taking the contrary view. For instance, in *Kumaraswamy Pillai v. S. Pasupathia Pillal*[9] Spencer, J., at p. 608, remarked that:

> The words 'any person' are sufficiently wide, and in my opinion should not be confined to persons who are not parties to the suit as was held in an earlier case.

9. In *Girdhari Lal v. Paras Ram*[10] at p. 459, Broadway, J., preferred to accept the same view as expressed in Allahabad. The High Court of Allahabad, the Patna High Court and the Oudh Chief Court have taken the view that the mortgagor cannot be deprived of the possession of the mortgaged property by such a receiver until the sale has actually taken place. I do not however propose to review the cases of the other High Courts, except only a few of them. But I must discuss the leading cases of this Court. In *Gobind Ram v. Jwala Pershad*[11] Sir Henry Richards, C.J., and Sir P.C. Banerji, considered the language of Order 40, Rule 1, and particularly Clause (2) of that rule, and held that:

> It seems to us abundantly clear that neither the plaintiff nor the prior incumbrancer has

> any present right to remove the mortgagor from possession of the mortgaged property.

10. They based their decision on the prohibition contained in Clause (2) against the Court removing from the possession or custody of the property any person whom any party to the suit has not a present right so to remove. Quite a different idea has been attributed to the Bench in a Full Bench of the Madras High Court. In *Makhan Lal v. Mushtaq Ali*[12] Walsh and Banerji, JJ., again held that the appointment of a receiver under Order 40, Rule 1, was inappropriate to a suit under a simple mortgage, and would in fact be contrary to the provisions of Order 34, Civil Procedure Code In their opinion, Order 40 had nothing to do with the execution of mortgage decrees. It is hardly necessary to mention that this view must have been followed in numerous unreported cases. The case

[9](1921) 61 IC 605
[10]1933 14 Lah 457
[11]1918 43 IC 533
[12]1927 All 419

of *Mohammad Ishaq v. Om Parkash*[13] was a somewhat peculiar case the facts of which should be carefully examined. A mortgage decree for sale had already been obtained against the plaintiff and others. He then brought a suit to obtain a declaration that the decree was not binding on him. He followed it up with an application to the Court for an injunction restraining the defendants decree-holders from executing their decree. The defendants as a counter-measure filed an application for the appointment of a receiver of the mortgaged property. The Court below had heard both the applications together and by the same order stayed the execution of the decree, and also appointed a receiver of the property ordered to be sold. The plaintiff, who had secured the stay of the execution, came up in appeal challenging that part of the order by which the receiver had been appointed. The learned Judges pointedly remarked, that if the decree-holder is not going to have his decree executed, it is not fair to the decree-holder that the plaintiff should enjoy the property without making any payment.

11. The learned Acting Chief Justice then referred to Order 40, Rule 1(2), and expressed the opinion that it would be a very narrow construction on which to accept the argument that as the decree-holder is not entitled to remove the plaintiff whom he has not the present right so to remove, the Court was not authorized to appoint a receiver, and remarked:

> If this construction were good, there would be no case whatsoever in which a receiver could be appointed. All that Sub-rule (2) means is that where any of the parties who are subject to the jurisdiction of the Court has no right to remove a third party from possession, that third party shall be allowed to remain in possession. The parties to the suit being subject to the jurisdiction of the Court can raise no objection whatsoever to its order for the appointment of a receiver.

12. With the utmost respect, I would say that there was obviously an overstatement when it was said that if the narrow construction were good, there would be no case whatsoever in which a receiver could be appointed. Obviously there can be numerous cases of this kind; for example, where the suit is for recovery of possession of the property, or where the property is in the

custody of the Court or a third party like the Collector, or where the receiver is appointed in order to enable him to transfer certain properties, to recover debts, or to bring suits etc. The statement of the law that Sub-rule (2) applies to third parties only will be dealt with separately. But on the facts of that case the decision can be supported on the ground that the plaintiff had applied for an injunction against the decree-holder restraining him from executing the decree the grant of which was a discretionary matter under Order 39, Rule 1 and the Court could therefore put the plaintiff to terms. Apparently the Court below bad granted an injunction subject to the condition of the appointment of a receiver, and both directions had formed parts of the same order. The appellate Court could therefore very well say that the injunction having been granted on the condition of the appointment of a receiver, it would not while maintaining the injunction remove the condition. Unfortunately, the two earlier cases of this Court were not cited by the counsel before the Bench. It may well be that the case was decided on its special facts. But with great respect, I am unable to agree with the view that, Sub-rule (2) applies to a third party only.

[13]1933 ALJ 51

13. The learned Acting Chief Justice, who had decided *Mohammad Ishaq v. Om Parkash*[14] had to consider the same point in *Ram Prasad v. Bishambhar Nath*[15] when sitting with Bennet, J. That case was a peculiar one. In that although no express order for the appointment of a receiver had been made by the Court below, which had passed the preliminary decree, it had actually issued an order that the tenancy should make deposits in Court, that these deposits be made over to the judgment-debtor on his giving security, and the money should remain in the Court's deposit, to be made over to the rightful man when the appeal is decided. It was for all practical purposes a case where the Court had brought, the property in its own custody and under its own control by issue of an injunction and attachment. That is why the learned Judges felt called upon to consider the effect of Order 38, Order 39 and Order 40' in a case where a preliminary decree-under Order 34, Rule 4, had been passed. Bennet, J., expressly dissented from the view expressed by the Full Bench of the Madras High Court, and the Calcutta and Rangoon High Courts, and held that where a plaintiff in a mortgage suit has no right to a personal decree, he cannot apply for the enforcement of personal remedies. Mukerji, J., also expressed dissent from the Madras Full Bench case reported in *Paramasivan Pillai v. Ramasami Chettiar*[16] The case in *Rameshar Singh v. Chunni Lal Shaha 1920 47 Cal 418* was distinguished because in that case a receiver had been previously appointed. The learned Judge pointed out that as the application for the appointment of the receiver related to the mortgaged property itself and not to any other property, and there was no allegation in the application which would bring the case either under Order 38, or Order 39 and the application was not meant to be one for preservation of property under Order 39, Rule 7, "but its object simply was to have the benefit of the income of the mortgaged premises before the mortgaged premises are sold up," hence the application should not be allowed. The learned Judge pointed out that the Madras case was based on the views of English law, and ignored the definition of a simple mortgage as given in the Transfer of Property Act. Although it can be said that the question did not so directly arise in *Ram Prasad v. Bishambhar Nath*[17], there can be no doubt that Mukerji, J., on a reconsideration of the rulings of the other High Courts, came to a definite conclusion that the Calcutta and Madras views were not

correct.

14. This case has been followed in another unreported case by Allsop and Bajpai, JJ., in an application in *Daya Ram v. Girwar Lal*[18] Decided on 19th August 1935. On the other hand, Iqbal Ahmad and Kisch, JJ., in Civil Rev No. 581 of 1932, decided on *Kr. Mohammad Zafar Husain Khan v. Khiali Ram*[19], *C*Decided on 8th March 1933, upheld an order for the appointment of a receiver. It is not clear whether their attention was drawn to the previous rulings of this Court. In any case the question had not arisen in a mortgage suit, but in the course of an execution of a money decree in which attachment of the property had been ordered. The case is therefore distinguishable. The Patna High Court in *Nrisingha Charan Nandy v. Rajniti Prasad Singh*[20] has accepted the Allahabad view. Courtney-Terrell, C.J., has pointed out the difference between an English mortgage and a simple mortgage in India. As regards certain English mortgages where there is a right of possession, and mortgages where there is a power of sale without reference to the Court, the mortgagee is under Section 69, Transfer of Property Act, now himself entitled to appoint a receiver of the income of the mortgaged property, just as much as he can sell without the intervention of

[14]1933 ALJ 51 [16]1933 56 Mad 951 [18] F.A. No. 41 of 1931
[15]1934 ALJ 561 [17]1934 ALJ 561 [19] iv. Rev. No. 581 of 1932
[20]1932 Pat 360

the Court. Now the main thing is to consider the reasons on which the two conflicting views have been based rather than the number of cases holding either view. The grounds for holding that such a jurisdiction exists may be classified as follows:

> (I) The first line of reasoning in a large number of cases, particularly of the Calcutta High Court, is that the power to appoint a receiver in a mortgage suit for sale existed in England, Ireland and America, and that it may therefore be held to exist in India also. By way of illustration, the case in *Weatherall v Eastern Mortgage Agency Co*[21]. may be quoted where such cases are cited. There are several difficulties in this line of reasoning which seem to have been overlooked, (1) the remedy which an English mortgagee can claim is not identical with the relief claimed by a simple mortgagee in India. As was pointed out by their Lordships of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai*[22] the holder of an English mortgage has the option of suing for foreclosure or for sale. It is also settled law in England that when the date for the payment has expired and the money has not been paid, the simple mortgagee has a right to obtain possession of the property. The Indian law is entirely different. A simple mortgagee has no right of foreclosure and no right to obtain possession at all. His exclusive remedy is to realise his money by the sale of the property. And of course it can never be certain that he himself will be the ultimate purchaser of it. (2) Another difficulty in this line of reasoning is that in England the appointment of a receiver is an equitable remedy and certain equitable considerations govern it. In India equity and law have been combined, and the complete law has been codified, and Courts are accordingly governed by it. The question no longer is whether the English Courts have jurisdiction to make any such order. The sole question

is whether the Indian statutory law allows it or prohibits it. (3) What has been consistently ignored in all the cases which have placed reliance on the English practice is that there is absolutely no rule in the English Annual Practice corresponding to Sub-rule (2), Order 40, Rule 1, which we have to interpret in India. Analogy from another system cannot be sought when there is a statutory enactment here which in terms is not to be found elsewhere. I am therefore unable to attach any great weight to this line of reasoning.

(II) The second line of reasoning is a sort of a special pleading for the simple mortgagee, showing how hard it may be on him if a receiver is not appointed, how it may be possible for the mortgagor to waste and damage the property if no receiver is appointed, how he may appropriate the income while the interest remains unpaid and the mortgage debt is not satisfied, and so on. In such cases only a one-sided view has been presented, and the mortgagor's point of view not taken into account at all. Now, when the question is one of interpretation of a statutory enactment, considerations of hardship which depend on a particular point of view favored are not of much avail. The danger to the mortgaged property being damaged or wasted is imaginary. There is ample provision in Order 39, Rule 1, to prevent waste and damage. As a mortgage creates a charge on the property there can of course be no real danger of alienation so as to deprive the mortgagee of his rights. Even as regards the properties of the mortgagor other than those mortgaged, there is provision for attachment before judgment. The appointment of

[21](1911) 13 CLJ 495

[22](1907) 30 Mad 426

a receiver is therefore not the only possible remedy which a mortgagee can be said to have. The view that the mortgagor should not continue to appropriate the income of the mortgaged property when the mortgage debt is not satisfied and interest is not being paid utterly ignores the terms of the contract between the parties. In the case of a simple mortgage, the property is a mere security for payment of the money, and the mortgagor is entitled to appropriate the income until the property passes out of his ownership by sale. The mortgagee has no right whatsoever to the income of the mortgaged property, to the rents and profits, or to obtain possession of it before the mortgagor has lost his interest in it. This being the contractual relation . between the parties, there is absolutely no point in contending that it is unfair that the mortgagor should appropriate the income while the interest is not being paid. In case of default the mortgagee's remedy is to bring a suit for sale forthwith.

As against this, the mortgagor's point of view may also be noted. He has a right to redeem the property up to the last moment. He is entitled to retain the rents and profits and appropriate the income as long as his equity of redemption has not been extinguished. Even when a suit for sale is brought and a preliminary decree is obtained, the Court is bound to give the mortgagor another chance to redeem the property, and is under a statutory duty to allow him time to redeem the mortgage and pay the mortgage money within the time fixed. To appoint a receiver of his property so that he may not have the

rents and profits with which to pay the mortgage money would be ostensibly to give him an opportunity to redeem the mortgage, and yet really deny it by making it almost impossible for him to do so. The mortgagor has merely undertaken the liability that if he is not able to pay the money with interest, his property would be liable to be sold. He had never agreed that the mortgagee would either himself or through the Court dispossess him of the property before the procedure laid down for the realization of the mortgage money by sale has been gone through. For a Court to intervene and dispossess the mortgagor from the mortgaged property out of regard for the mortgagee would be tantamount to inventing a new procedure to evade the provisions of Order 34, and forcing upon the mortgagor a new contract, never contemplated by him, which would have been more appropriate in the case of a possessory mortgage.

As under the terms of a simple mortgage the mortgagee is not entitled to the income or the usufruct of the property, which should go to the mortgagor, there is no point in appointing a receiver for the collection of such income. It cannot be paid to the mortgagee before the property has been purchased by him. If the object in appointing a receiver be to preserve the income so that it may be available later to the mortgagee if he can obtain a simple money decree under Order 34, Rule 6, a more appropriate remedy would be the attachment of the income. Some of the learned Judges of Madras and Calcutta have even gone to the length of holding that the mortgagee is entitled to be paid the rents and profits realized by the receiver as the usufruct is a part of his security. In this view I am altogether unable to concur. The Court should not constitute itself a gratuitous protector of the simple mortgagee and allow him to receive income of the mortgaged property in direct violation of the terms of the contract. If examined purely from the standpoint of the convenience of the mortgagee, it may be considered proper to appoint a receiver so that a simple mortgagee may have the benefit of receiving income which his contract had not permitted to him. But the appointment of a receiver invariably implies an extra expenditure which Courts as a rule direct to be met out of the income. Thus the additional burden of a gratuitous appointment of a receiver falls on the mortgagor and his estate, though the benefit of it goes exclusively to the mortgagee.

(III) The third line of reasoning is that there being older cases under the Code of 1882 permitting the appointment of a receiver in a suit for sale, it must now be taken to be the law settled by authorities; See *Manindra Chandra Ray v. Suniti Bala Debi*[23] which was, however, a case of an English mortgage. The fact that there is a slight variation between the last paragraph of the old Section 503 and Sub-rule (2) of Order 40, Rule 1 has been overlooked. The prohibition contained in the previous paragraph was confined to "property under attachment," whereas the prohibition in Sub-rule (2) applies to all kinds of properties. The difference which this change has brought about is obvious. Previously there was no prohibition against the appointment of a receiver under Section 503 of a mortgaged property which could not be under attachment. Now there is a prohibition in Sub-rule (2) which applies to mortgaged property just as much as to property attached. The Courts when deciding cases under the old Code were not so hampered, and could

exercise their power under the substantial part of section 503 without any hindrance. But Courts acting under the present Code have a greater restriction imposed on them. Reliance on the authority of the older cases is, therefore, not well-placed.

(IV) The fourth line of reasoning is that the appointment of a receiver is an equitable relief, and all that is necessary to see is whether it is "just and convenient" to appoint a receiver irrespective of the nature of the suit. Of course, even as regards the question of justice and convenience, points of view would differ according as the position is viewed from the standpoint of the mortgagee or from that of the mortgagor. But when the law has been codified in India, the question of jurisdiction depends not so much on equitable considerations as on the language of the statutory enactment itself.

(V) The fifth line of reasoning is to suggest that the appointment of a receiver of the mortgaged property and his taking over possession does not amount to the dispossession of the mortgagor at all inasmuch as the income or the rents and profits are mere accession to the mortgaged property. A typical case advocating such a view is *Paramasivan Pillai v. Ramasami Chettiar*[24] With the utmost respect, I would say that such a conception is untenable. The corpus of the mortgaged property is one thing, while its usufruct is quite another. The very essence of a simple mortgage is to keep a clear distinction between the corpus which is the security for the debt, and the income which belongs to the mortgagor. If the income were an accession to the mortgaged property, then the entire income from the commencement of the simple mortgage must be such an accession and must belong to the mortgagee and not to the mortgagor. If the income also is to belong to the mortgagee, then all distinction between a simple mortgage and a possessory mortgage may just as well be abolished, and the written contract between the parties torn to pieces.

[23]1926 Cal 1006

[24]1933 56 Mad 915, (926-7)

15. It is impossible to say that merely because the receiver is an officer of the Court, his taking over possession is not a dispossession of the person previously in possession. If his taking over possession of any property were not to amount to the removal of any person from the possession or custody of such property, then there was no occasion for Sub-rule (2) at all. It need not have been there. The very fact that it has been enacted shows that the legislature intends that if a receiver takes possession of some property, then the person from whose custody or possession it is taken has been removed from such possession or custody. As soon as a receiver is appointed, and property is taken possession of by him, the property passes out of the possession and custody of the other person. Even where the person in possession is himself appointed the receiver, the character of his possession changes and his liability is of a different nature, as he becomes an officer of the Court and holds possession of the property on its behalf. But his dispossession would be only constructive and not actual.

16. With regard to a few other cases cited at the Bar, I may point out that in *The Eastern Mortgage and Agency Co. v. Rakea Khatun*[25] Sub-rule (2) of Order 40, was not even discussed. In *Amarnath v. Mt. Tehal Kuar*[26] the learned Judges relied on the Calcutta case in *Staya Narain Singh v. Keshabati Kumari*[27] and the Madras case in *Ajapa Natesa Pandara Sannadhi v.*

Ramalingam Pillai[28] The contrary authorities were not cited by counsel as referring to the contention that a receiver of the property should not be appointed as possession of it cannot be awarded in a declaratory suit; the Bench observed:

> Our attention has not been invited to any authority which would limit the jurisdiction of the Court in the manner indicated above.

17. This case was, of course, followed by a learned single Judge in *Paras Ram v. Puran Mal-Ditta Mal*[29] The case in *Ma Joo Tean v. The Collector of Rangoon*[30] was the case of an English mortgage, under the terms of which the rents and profits formed part of the property subject to the mortgage. In *Sher Singh v. Devi Dayal*[31] it was merely stated that Sub-rule (2) was intended to protect third parties and not parties to the suit, but no reasons were given. It is our plain duty to examine the language of the relevant sections of the Code itself. So far as Section 51 is concerned, it does not apply to the present case, because we are not dealing with the matter in any execution proceeding. Nevertheless it may be pointed out that all that the section does is to enumerate in general terms the various modes in which the Court may in its discretion order the execution of the decree according as the nature of the relief granted may require. The legislature has taken care to preface the section with the words "subject to such conditions and limitations as may be prescribed." It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule. Thus even Section 51 would be governed by Order 40, Rule 1. No one could suggest that where a decree orders the sale of a particular property, the executing Court could direct its delivery specifically, or direct the arrest or detention of the defendant in person. Obviously all the various modes mentioned in Section 51 are not open to an executing Court in every case; it is to be guided by the procedure laid down in the schedule, and

[25]16 CWN 997 [27]1915 25 IC 406 [29]1925 Lah 590
[26]1922 Lah 444 [28](1913) 20 IC 767 [30]1934 12 Bang 437
[31](1913) 20 IC 761

must resort to the method appropriate to each case.

18. It is Section 94(d) which is more relevant. Under it a Court has power to appoint a receiver of any property, and enforce the performance of his duties by attaching and selling his properties. But here again, no wide powers have been conferred on Courts. Section 94 in itself really confers no such power at all because it expressly contains the words "if it is so prescribed," i.e., prescribed by the rules in the schedule. Obviously the legislature intended that the Courts should not assume any power on the ground that it is inherent in them and exercise them when there is no express provision in the rules themselves. There is often too great a temptation to treat powers of interference as inherent in Courts. The legislature has thought it fit to create a safeguard against it. The authority to appoint a receiver is prescribed in Order 40, Rule 1. A civil Court cannot, therefore, act outside that rule. Rule 1 empowers (a) a Court, where it appears to it to be just and convenient, to appoint a receiver of any property whether before or after a decree; (b) to

remove any person from the possession or custody of the property; (c) to commit the same to the possession, custody or management of the receiver; and (d) to confer upon the receiver certain powers. If Sub-rule (1) had stood by itself, the power would have been unrestricted. But Sub-rule (2) runs as follows:

> Nothing in this 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.

19. The general power under Sub-rule (1) has, therefore, been curtailed by Sub-rule (2). Both the sub-rules must be read together as forming part and parcel of one rule. It is impossible to separate them so as to apply the one and ignore the other. It necessarily follows that there is no authority in the Court what soever 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 the appointment of a receiver was ordered although no party to the suit had a present right so to remove the person in possession or custody of the property. The language of the 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 to interpolate into the rule some new words, and then to 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 emphasized 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. That such a restriction would be improper is conclusively shown in my mind by the circumstances that sub rule (2) is really related to Sub-rule (1) (b) where the same words "any person" are also used. Curiously enough this fact has not been noted in any of the judgments holding the contrary view. Can it be seriously suggested that the words "any person" have a different meaning in rule (1) (b) from what they have in Sub-rule (2)? It is a well settled rule of interpretation that the same expression used in the same section is to be given the same meaning. Now it is utterly impossible to hold that the words "any person" in Sub-rule (1) (b) mean "any person other than a party to the suit." Such an interpretation would completely nullify the effect of Sub-rule (1). There is in my opinion no option but to hold that the words "any person" therein are general, and include parties to the suit. Once that has to be conceded there is no option whatsoever but to hold that the same words in Sub-rule (2) are equally general and include parties to the suit. It would be stultifying oneself to say that the words ' any person" in (1) (b) mean any person whether a party or not a party, whereas the same words in Sub-rule (2) mean

only a person who is not a party to the suit. In my opinion such a contradictory interpretation is an impossible one.

21. Another difficulty in holding the contrary view is that it can be only in rare cases, if in any at all, that a third party would be dispossessed by the order of a Court. The injustice of it is obvious even if inconvenience be not clear. If a third party has put forward a claim of his own then it is grossly unjust to him that before his claim has been adjudicated by a competent Court of law, he should be dispossessed by another Court, hearing a case to which he is not a party, and the property in his possession handed over to a receiver appointed in that suit. I am aware that the Calcutta High Court has even gone to the length of holding that such an order can be made: see , at p. 720. But faced with the apparent injustice of the order it has felt compelled to lay down that there should be some sort of preliminary inquiry. I should have thought that even if it be convenient to the mortgagee it would be grossly unjust to the third party to order his property to be seized even though he be putting forward a bona fide claim of title which has not yet been thoroughly adjudicated upon in a proper Court of law. It is difficult to see how it would be "just" to dispossess him after a summary inquiry. And if it is not just, then the appointment would be contrary to the opening words of the rule. If the third party were a mere licensee or a tenant whose term had expired, the position might be different.

22. It seems to me that to confine the prohibition contained in Sub-rule (2) to nonparties only would be to put a forced interpretation on the sub-rule by assuming without any adequate grounds that certain words which do not occur there are necessarily implied. I am unable to agree that this is a proper method of interpretation. There is no need for a High Court to put on a strained interpretation. If it feels that the rule does not work fairly, the High Court can get the rule itself amended easily. So long as it stands, its language must be given its full effect. The provisions of Sub-rule (2) have not been made a part of Sub-rule (1) (b) only but added separately. It follows that Sub-rule (2) must be read as part of Rule 1 and controls the whole of Sub-rule (1). Accordingly the powers conferred by Sub-rule (1) cannot be exercised where they come in conflict with the provisions of Sub-rule (2). My conclusions can be summarized by paraphrasing Order 40, Rule 1 as follows:

23. Where it appears to the Court to be just and convenient, the Court may by order, (a) appoint a receiver of any property whether before or after decree, in any suit, (b) remove any person, whether a party to the suit or not a party, from the possession or custody of the property, provided his dispossession is in the circumstances not unjust to him, and provided further that any party to the suit has a present right so to remove him, (c) commit the same property to the possession, custody or management of the receiver, provided any party to the suit has a present right to remove the person in possession or custody thereof, (d) confer upon the receiver all or some of the powers (i) as to bringing and defending suits, realization of property, (for example, recovery of debts), and the execution of documents as the owner himself has, (ii) for the management, protection, preservation and improvement of the property, and (iii) the collection of rents and

profits thereof, the application and disposal of such rents and profits, provided no person is removed from the possession or custody of the property whom any party to the suit has not a present right so to remove.

24. My answer to the question referred to us therefore is that although there is no objection to the mere appointment of a receiver of any property, the Court can not remove from the possession or custody of the property any person whether a party to the suit or not, whom any party to the suit has not a present right so to remove.

Thom, J.

25. I concur. The answer to the question referred turns on a sound interpretation of Order 40, Rule 1(2). The. terms of this provision are perfectly plain, and simple. The expression "any person" obviously includes all persons whether parties to the suit or not. If the words are given their natural meaning it is not open to the Courts to appoint a, receiver to mortgaged property if there be no party to the suit who has a right to have the mortgagor removed from possession. Where the Courts have appointed a receiver in cases where no party to the suit had a present right to remove the mortgagor, they have not acted in strict compliance with the provisions of the statute. They have legislated. They have introduced into the provision after the words "any person" the further words "not a party to the suit." What is the practice in other countries or what may appear to the Courts to be reasonable, expedient, or equitable are irrelevant considerations when the words of the statute are plain. The Courts, it is true, may introduce words which are not in the statute or ignore words which are there if strictly to interpret a particular provision, giving every word its full and natural meaning, would lead to an obvious absurdity or to a result repugnant to the general policy of the Act or clear intention of the legislature. Obviously it cannot be contended that the interpretation of Order 40, Rule 1(2) according to the plain meaning of its wording would entail either of such consequences. In the result I agree in answering the question referred as the learned Chief Justice suggests.

Rachhpal Singh, J.

26. The question which has been referred to a Full Bench for an expression of opinion is:

> Under the provisions of Civil Procedure Code, is it competent to appoint a receiver of a mortgaged property, pending the decision of an appeal against a mortgage decree.

27. The applicant instituted a suit against the opposite party on the basis of a mortgage-deed and obtained a preliminary decree for sale on 8th September 1934. Against that decree, the defendants have preferred an appeal to this Court, which is still pending. The money due on the mortgage decree was not paid and the mortgagee has obtained a final decree for sale. Before the final decree was obtained by the mortgagee, he put in an application in this Court praying for the

appointment of a Receiver of the mortgaged property on the allegation that since the institution of the suit upon the basis of the mortgage-deed, the defendants have been mining certain stone quarries at an abnormal rate with the result that the value of the mortgaged property was depreciating. The defendants opposed the application and contended that this Court had no power to appoint a Receiver in a mortgage suit. The learned Judges, before whom the application made by the mortgagee in this Court for the appointment of a receiver was pending, have referred the above mentioned question for the opinion of a Full Bench. At the very outset it may be pointed out that the present application made by the mortgagee is not an application in execution department but is an application made to a Court in a pending suit between the parties. The determination of the question raised before us depends on the construction to be placed on the provisions of Order 40, Rule 1. Order 40, Rule 1, enacts:

> (1) Where it appears to the Court to be just and convenient, the Court may by order (a) appoint a receiver of any property, whether before or after decree; (b) remove any person from the possession or custody of the property; (c) commit the same to the possession, custody or management of the receiver; and (d) ... (2) Nothing in this 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.

28. Two conflicting interpretations are sought to be placed on the provisions of Rule 1, Order 40, Civil Procedure Code, before us. The decision as to which of the interpretations is correct, would mainly depend on the construction which we place on Rule 1, Order 40, Sub-clause (b) and Sub-rule (2). Learned Counsel for the applicant has urged before us very strongly that Clause (b) relates to third persons not parties to the suit and, therefore, Sub-clause (2) of the rule, can have no application to parties to the suit. In support of his contention, learned Counsel for the applicant has referred us to several cases decided by some of the High Courts. I proceed to consider these cases. In *Hudson v. Morgan*[32] which was decided when Civil Procedure Code of 1882 was in force, a Bench of two learned Judges of the Calcutta High Court, while dealing with this question, made the following observations:

> In determining whether the Court should remove from possession or custody of property under attachment, any person who is not a party to the litigation, the test to be applied is, whether the parties to the suit or some or one of them have or has a present right so to remove him. If the intention of the legislature had been that a person who was not a party to the suit should not, under any circumstances, be deprived of possession of the disputed properties, the Code would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the receiver and a stranger to the suit.

29. Another case in which a similar view was taken is reported in *Staya Narain Singh v. Keshabati Kumari*[33] the Court expressed the following opinion:

[32](1909) 36 Cal 713
[33]1915 25 IC 406, at p. 407

> Order 40, Rule 1(2), for instance clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit.

30. A similar view was expressed in *Paras Ram v. Puran Mal-Ditta Mal*[34] and it was held that Sub-rule (2), Rule 1, Order 40, refers to the case of a person other than a party to the suit and does not debar the Court from removing one of the parties to the suit from the possession of the property and that there is nothing in Rule 1, which excludes mortgage suits from its operation and a Receiver can therefore be appointed in a mortgage suit. I may also refer in this connexion to the case in *Ajapa Natesa Pandara Sannadhi v. Ramalingam Pillai*[35] where two learned Judges of the Madras High Court had expressed an opinion that Sub-section (2), Rule 1, Order 40, was intended to protect third persons not parties to the suit. *Mohammad Ishaq v. Om Parkash*[36] is a case which was decided by a Bench of this Court consisting of Mukerji, Ag.C.J. and myself. This was a case in execution department. The following observations were made by us in our judgment:

> It has, however, been contended that the order passed by the learned Judge militates against Sub-rule (2), Rule 1, Order 40, Civil Procedure Code The argument is that as the decree-holder is not entitled to remove the plaintiff from possession of the property, the Court was not authorized to appoint a receiver of the property. This, in our opinion, is a very narrow construction of Sub-rule (2). If this construction were good there would be no case whatsoever in which a receiver could be appointed. All that Sub-rule (2) means is that where any of the parties who are subject to the jurisdiction of the Court has no right to remove a third party from possession that third party shall be allowed to remain in possession. The parties to the suit being subject to the jurisdiction of the Court can raise no objection whatsoever to its order for the appointment of a receiver.

31. The view taken in this Allahabad case is in conflict with the view taken in some of the previous cases decided by this Court to which a reference would be made shortly. I wish to point out that in arguments addressed to us at the hearing of the above mentioned case, these previous cases were not brought to our notice, otherwise we would have made a mention of them in our judgment. Now I may mention the cases in which an opposite view was taken. In *Gobind Ram v. Jwala Pershad*[37] a Bench of two learned Judges of this Court, made the following observations:

> A mortgagor, where the mortgage is a simple mortgage, is entitled to remain in possession of the mortgaged property until such time as that property has been brought to sale in due course of law. Order 40, Rule 1, provides for the appointment of a receiver by the Court. It has been enacted that where it appears to the Court to be just and convenient a receiver may be appointed. Clause 2 provides 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. It seems to us abundantly clear that neither the

plaintiff nor the prior incumbrancer has any present right to remove the mortgagor from the possession of the mortgaged property.

[34]1925 Lah 590 [36]1933 ALJ 51

[35](1913) 20 IC 767 [37]1918 43 IC 533

32. Another case on the point is *Makhan Lal v. Mushtaq Ali*[38] in which Walsh and Banerji, JJ. gave expression to a similar view. The latest case of this Court on the point is in *Ram Prasad v. Bishambhar Nath*[39] In that case it was held that where a plaintiff in a mortgage suit has no right to a personal decree he cannot apply for enforcement of personal remedies and that his remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale ha has no right to take possession of the property or any income of the property. In such a case there is no jurisdiction for a Court to appoint a receiver. In *Nrisingha Charan Nandy v. Rajniti Prasad Singh*[40] a Bench of that Court held that Order 40 did not apply to mortgage suits and therefore a receiver could not be appointed by a Court. The High Courts at Bombay, Calcutta, Madras and Lahore have all definitely held that a receiver can be appointed in a mortgage suit. Most of the cases in which this view was taken are noticed in *Paramasivan Pillai v. Ramasami Chettiar*[41] After hearing learned arguments addressed to us by Sir Tej for the applicant and Dr. Katju for the opposite party, I have arrived at the conclusion that the observations made by Mukerji, A. C.J., and myself in *Mohammad Ishaq v. Om Parkash* [42] are not correct. On a reconsideration of the question, I have arrived at the conclusion that according to the provisions of Order 40, Rule 1, a Court has no power to remove from possession a person whom the person making the application has no present right to dispossess. In other words, I have come to the conclusion that Clause (b) relates to all persons including parties to the suit.

33. I am of opinion that the view taken in *Gobind Ram v. Jwala Pershad*[43] which has prevailed in this Court for a number of years, should be followed. Rule 1, Order 40, first enacts that a Court has full power to appoint a receiver of any property whether before or after decree. Clause (b) provides that in exercise of that power, the Court can pass an order removing any person from the possession or custody of the property and under Clause (c) it has power to put it in possession of the receiver. The words used in Clause (b) are "any person," and in my opinion, they refer not only to third party as contended on behalf of the applicant, but also include parties to the suit. Sub-rule (2) places a limitation on the powers of the Court in the matter of removing "any person" from the possession or custody of the property. It enacts that nothing in this 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. The expression "any person," used in Sub-rule (2), includes parties to the suit and not only third parties. Under Rule 1 the Court has power to remove from possession not only parties to the suit but also third parties, and therefore when a party to the suit applies that the opposite party should be re. moved from the possession by the appointment of a receiver, then the person sought to be dispossessed is entitled to resist the prayer for his dispossession on the ground that the party praying for his dispossession has not a present right to remove him from possession.

34. For the reasons given above, I am of opinion that where a party to a suit, who is sought to be dispossessed, is a simple mortgagor in possession, then the Court has no power to appoint a receiver and to order his dispossession under the provisions of Order 40, Rule 1, Civil Procedure Code A simple mortgagor has a right to remain in possession and to appropriate the profits of the mortgaged property till the sale has actually taken

[38]1927 All 419 [40]1932 Pat 360 [42]1933 ALJ 51
[39]1934 4 AWR 594 [41]1933 56 Mad 915 [43]1918 43 IC 533

place and that (right cannot be defeated by the appointment of a receiver. If a mortgagee who has obtained a decree finds that his mortgagor is causing injury which would diminish the value of the mortgaged property, then I apprehend that his only remedy is to proceed under the provisions of Order 39, Civil Procedure Code On the other hand, in a suit for foreclosure, the Court will have power to appoint a receiver and to remove the mortgagor from possession. The reason is that under the terms of the mortgage, the mortgagee has a present right to dispossess the mortgagor. The mortgagor, under the terms of the mortgage, agrees to put the mortgagee in possession and if he does not do so, the mortgagee is entitled to institute a suit for possession and in that suit it is open to him to make an application for the appointment of a receiver. In a suit for foreclosure, the provisions of Sub-rule (2), Order 40, will not help the mortgagor. With utmost respect, I do not agree with the general proposition laid down in *Makhan Lal v. Mushtaq Ali*[44] that the provisions of Order 39 allow no loophole for the application of the procedure provided by Order 40, to the mortgage decrees. For the reasons given above, I would answer the question referred to the Full Bench as follows:

> Under the provisions of Civil Procedure Code, it is therefore competent to appoint a receiver of a mortgaged property pending the decision of an appeal against a mortgage decree provided the party applying for the appointment of a receiver can establish that he has a present right to remove the opposite party from possession and custody of the mortgaged-property.

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[44]1927 All 419