1939

Present : **Keuneman and Wijeyewardene JJ.**

RABBIA UMMA *v.* NOORDEEN *et al.*

32—D. C. Colombo, 9,327.

Receiver—Application made to protect interest of plaintiff—Object of appointing receiver—Protection of property—Defendant in possession—Civil Procedure Code, s. 671.

Where, in an action for the recovery of a half share of the rents and profits of certain premises, the plaintiff applied for the appointment of a receiver under section 671 of the Civil Procedure Code,—

Held, that the plaintiff was not entitled to have a receiver appointed to protect his pecuniary interests.

A receiver is appointed for the protection of the property itself.

Where a right is asserted to property in the possession of a defendant claiming to hold under a legal title, a Court will not interfere with the possession by appointing a receiver unless a very strong case is made out.

THIS was an action instituted by the plaintiffs to recover a sum of Rs. 2,600 and Rs. 200 per month, being half share of the rents and profits of certain premises in the Second Cross street, Pettah. On the same day as the plaint the plaintiffs filed petition and affidavit

praying for the appointment of a receiver for the custody, management and preservation of the rents, the subject-matter of the action. The learned District Judge allowed the application.

H. V. Perera, K.C. (with him *F. A. Tisseverasinghe, L. A. Rajapakse,* and *P. Thiagarajah*), *for defendant, appellant.*—A receiver is not appointed in an action of this kind. The learned District Judge misdirected himself on the facts. No interlocutory order has been entered in the partition action which is pending.

The District Judge was asked to use his discretion. He exercised that discretion wrongly where he based his finding on wrong facts.

The plaintiffs should definitely prove that under section 671 of the Civil Procedure Code they had established a *primâ facie* right to or interest in the premises. They have failed to do so.

The defendants are in possession of the property and their possession should not be disturbed.

A receiver can only be appointed for the restoration, preservation, better custody, or management of any property. This necessity has not arisen. (*Corbet v. The Ceylon Co., Ltd.*[1]

Appointment of a receiver would be to prejudge the case and prejudice the defendants (*Seyadoris v. Hendrick*[2]).

N. E. Weerasooria, K.C. (with him *C. E. S. Perera* and *Dodwell Goonewardene*), for plaintiff, respondent.—Receivers are appointed for the better management of property—Section 671 of the Civil Procedure Code. It is true the District Judge has misstated a fact, namely, the entering of an interlocutory order. There is sufficient evidence on record apart from this to appoint a receiver.

Once the District Judge has used his discretion that should not be interfered with lightly.

The defendants are collecting rents due to us. The decision in the Partition case depends on the construction of a will. There is a *fidei commissum.*

In *Sideswari Dabi v. Abheyeswari Dabi*[3] a receiver was appointed when an appropriate case was made out.

Cur. adv. vult.

April 4, 1939. KEUNEMAN J.—

The plaintiffs in this action alleged that one Meera Neina was the original owner of premises No. 32, now Nos. 94, 96, and 98 in Second Cross street, Pettah, Colombo; that Meera Neina by last will, dated January 7, 1891, gifted the said premises to his daughter Pitchamal, subject to certain conditions, and that the said Pitchamal became entitled to the property on the death of Meera Naina subject to the said conditions, and that on the death of the said Pitchamal, Abdul Cader and Abdul Raoof succeeded to the title in virtue of the conditions in the last will, and that Abdul Cader had conveyed his half share of the premises to the three plaintiffs.

They further alleged that the defendant's husband had induced the said Pitchamal to execute a deed of gift in his favour of the premises in question and had in turn gifted the premises to the defendant, but

[1] 4 S. C. C. 143. [2] 2 C. L. R. 167. [3] I. L. R. 15 Cal. 818.

stated that these deeds conveyed no title to the defendant. They stated that the defendant had appropriated the entire rents and profits of the premises, and prayed for judgment in the sum of Rs. 2,600 to date of action, and Rs. 200 a month thereafter.

It is to be noted that the plaintiffs, though they set out their title did not ask for a decree declaring that they are entitled to a half share of the premises. They merely sued for a half share of the mesne profits.

It has, however, transpired in the course of these proceedings that the present plaintiffs, and the defendant and certain other parties are parties to a partition action, D. C. Colombo, No. 1,073, relating to the same premises. This action is now pending.

On the same day as the plaint, the plaintiffs filed petition and affidavit praying for the appointment of a receiver for the custody, management and preservation of the rents, the subject-matter of the action. The defendants filed a statement of objections. At the inquiry the learned District Judge allowed the application of the plaintiffs and directed that a receiver be appointed to receive and collect one-half of the rents and profits from the premises. From this order the defendant now appeals.

The learned District Judge addressed himself to section 671 of the Civil Procedure Code. The first matter for consideration was whether the plaintiffs had "established a *primâ facie* right to or interest in" the premises. In dealing with this point, the District Judge held that the interlocutory decree in the partition action had decided that the plaintiffs had title, and that until the Court after hearing the defendant's intervention decided otherwise, the right must be deemed to exist. It has been admitted before us that, in point of fact, no interlocutory decree has been entered in the partition action. The defendant intervened before interlocutory decree, and the trial in the partition action has not yet taken place. Accordingly, the basis of the District Judge's finding disappears. It has, however, been argued by the respondent's Counsel that the affidavit filed by the plaintiffs has not been rebutted by a counter affidavit, and that the plaintiffs have established a *primâ facie* interest in the property. The terms of the plaintiffs' affidavit are consistent with the terms of the plaint. As regards the facts set out therein, there is no dispute between the parties, and the point of contention is whether in virtue of the terms of the last will of Meera Neina, the gift made by Pitchamal to the defendant's husband conveyed no title. This is a question of law which will have to be determined on the interpretation of the terms of the last will. I cannot regard the statement in the plaintiffs' affidavit that they are now entitled to a half share of the premises as a statement of fact; it is merely an expression of opinion, and in view of the fact that this important question still remains for determination, I do not think that the plaintiffs have established a *primâ facie* right to or interest in the property.

Acting upon the assumption that there was an interlocutory decree declaring the plaintiffs entitled to one-half of the property, the District Judge held that the right extended to the rents and profits. He commented on the fact that there might be a considerable delay in concluding this action and the partition action. He was of opinion that

under the authorities cited to him, he had a discretion in a proper case to appoint a receiver, and having considered the circumstances, and having regard to the long time that must elapse before the dispute could be settled, he made order that the receiver be appointed.

Counsel for the appellant argued that there was no proof in this case that such appointment was " necessary for the restoration, preservation, or better custody or management of any property, the subject of the action ". What is the subject-matter of the action which it is sought to preserve? It is contended for the respondents that what has to be preserved is the future rents and profits, but I do not myself think that section 671 contemplates the preservation of property which is to come into existence in the future, even if we can regard the claim for future mesne profits as property. Clearly the claim for Rs. 2,600 cannot be regarded as property, in respect of which the appointment of a receiver will be allowed, and the immovable property is not the subject-matter of the action.

Further, the plaintiffs' right cannot be larger than that which they would have had if they actually claimed declaration of title to the immovable property. In this connection the language of Clarence J. in *Corbet v. The Ceylon Coy., Ltd.*[1] is relevant. " It is not shown in support of the application . . . . that the estates are being impaired or mismanaged *ad interim* . . . . Plaintiff in asking for a receiver . . . . does so upon the merits of his case and nothing else; and to ask the Court to grant a receiver upon such grounds is in effect to ask the Court to prejudge the whole case ". This judgment was quoted with approval in *Seyadoris v. Hendrick*[2] by Lawrie J., who added " As I read section 671 the Court is not authorized to appoint a receiver to protect the pecuniary interests of one of two joint owners, but only to protect the property itself ".

Further, the Indian Courts have held as follows in *Sideswari Dabi v. Abheyeswari Dabi*[3] (decided under section 503 of the Civil Procedure Code of 1882) :—" If a right was asserted to property in the possession of the defendants claiming to hold under a legal title, the Courts did not interfere by appointing a receiver unless a very strong case was made out ". This was stated to be in accordance with the principles of the English law as well.

I do not think the plaintiffs have made out either a strong or a sufficient case in this instance. I also think that the plaintiffs have asked for the appointment of a receiver merely for the preservation of their pecuniary interests.

I am of opinion that the learned District Judge was wrong in ordering the appointment of the receiver. I allow the appeal and set aside the order. The defendant is entitled to the costs of the appeal and of the proceedings in this matter in the Court below.

The application for revision does not arise now, and it is accordingly dismissed without costs.

WIJEYEWARDENE J.—I agree.

Appeal allowed.

[1] *4 S. C. C. 143* [3] *I. L. R. 15 Cal. 818.* [2] *2 C. L. R. 167.*