

(1959) 09 RAJ CK 0003

In the Rajasthan High Court

Case No : Civil Miscellaneous First Appeal No. 45 of 1958

Balbir Anand and Others

APPELLANT

Vs

Ram Jawaya Kapoor and Others

RESPONDENT

Date of Decision : 29-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7, Order 40 Rule 1, Order 43 Rule 1, 115, 94

Citation : AIR 1960 Raj 192 : (1960) RLW 334

Hon'ble Judges : I.N. Modi, J; D.M. Bhandari, J

Bench : Division Bench

Advocate : R.K. Rastogi and D.P. Gupta, for the Appellant; R.A. Gupta, for the Respondent

Final Decision : Partly Allowed

Judgement

Pbhandari, J.—This is a miscellaneous first appeal against the order of the District Judge, Alwar, dated 24-3-1958, by which he ordered that the factory "The Alwar Mineral Syndicate", which was the subject matter of litigation between the parties, be given on lease to Shri Ram Jawaya Kapoor (Respondent No. 1) for a term of five years from 1-6-1958 at Rs. 1,000/-/- per month. In pursuance of that order, the Receiver who had been appointed in compliance with the order of the High Court for United State of Matsya, Alwar dated 31-3-1949 executed a lease on 16-4-1958 in favour of Respondent No. 1 and delivered the possession of the factory premises on that date to Respondent No. 1.

2. The plaintiffs, Ram Swaroop and Ravindra, who are Respondents Nos. 2 and 3 in this appeal, instituted a suit in the court of the District Judge, Alwar, on 11-1-1949 claiming that they had two-third share in the suit property and that the same should be partitioned and the defendants be also ordered to furnish accounts. An application for appointment of Receiver pending the decision of the suit was made which was refused by the trial court but ultimately the Matsya High Court on appeal directed that a "Receiver" be "appointed" of the disputed

properties pending the disposal of the present suit. In pursuance of that order, the trial court appointed a Receiver under the terms and conditions set out in the order of the District Judge dated 23-2-1950.

One of the terms and conditions was that the Receiver shall not grant leases without the leave of the court. Thereafter, a preliminary decree was passed by the District Judge on 14-2-1955, by which the plaintiffs' share was determined as two-third in the suit property and the defendants' share as one-third in it. It was also provided in the decree that the Receiver shall remain in possession of the property on behalf of the parties. The Receiver was also directed to divide the properties between the parties in accordance with the decree. An appeal was filed by the defendants to this Court against that decree and cross-objection was tiled by the plaintiffs.

This Court by its order dated 13-4-1955 stayed the proceedings for the final decree. The learned District Judge felt the necessity of inspecting the site of the factory on 24-11-1957, in connection with certain orders which he had to pass relating to the refund of certain money which had been lying in deposit as security. He inspected the site on 16-12-1957 and found that the factory was lying in ruins and was not properly looked after by the Receiver, He was also informed by the Receiver and the Advocate of the plaintiffs that someone was anxious to get the machinery as well as the premises on lease for doing business of making powder of barytes stones.

On 17-12-1957, the plaintiff made two applications, one for giving the property on lease and the other for the removal of the Receiver. On the same date, another application was made by Respondent No. 1 that he was prepared to take the factory on lease for a period of five years on a monthly rent of Rs. 1,000/-/- provided that it was given in working order. Notice of these applications was given to the parties and the case was fixed for hearing on 4-1-1958. The Receiver had submitted his resignation meanwhile and on 4-1-1958 the court ordered that a Public Works Deptt. contractor be appointed to assess the value of the property and the case was adjourned to the 15th of January, 1958.

The case was again adjourned to 25-1-1958. On that date parties informed the Court that before the property is leased out, an opportunity may be given to them to arrive at a settlement and for that the case may be adjourned for one month. The case then came up for hearing on 25-2-1958 but no compromise had taken place. The case was adjourned for orders to 8-3-1958. On that day parties and their counsels were absent and the District Judge noted that he thought it necessary to pass proper order suo motu.

On 24-3-1958, the order under appeal was passed. It appears that the resignation of the Receiver was not accepted and the Receiver was directed by the order of the 1st of April 1958 to execute the lease in accordance with the order of 24-3-1958 in favour of Respondent No. 1. The lease deed was executed on 16-4-1958 and the possession of the property was delivered to Respondent

No. 1.

3. It may also be mentioned that a letter offering Rs. 1,100/-/- p. m. as rent was sent to the District Judge by a Company "Strake and Co." of New Delhi on 6-1-1958 which was duly received by the District Judge. A telegram was further sent by the same company on 14-1-1958, saying that it was prepared to pay the highest lease money and praying that hearing may be granted. Another letter was also sent by the Company on 14-1-1958 confirming the telegram. As it appears from the order under appeal, the learned District Judge did not take notice of these documents.

A telegram was also sent on the 10th of April, 1958, by one of the defendants that parties were negotiating compromise and the court was requested not to complicate matters by giving the factory on lease to third party. The learned District Judge did not take notice of this document as well. It appears that on 27-4-1958, a compromise was arrived At between the parties by which they admitted their respective shares as declared by the Court in the property in dispute and further agreed to withdraw their appeal and cross objection in the High Court.

It was also agreed that the defendants should purchase the share of the plaintiffs of Rs. 60,000/-/-and on the payment of that amount they would become the owners of the entire assets of the factory. An application for recording the compromise was made on 27-4-1958. It was also mentioned in the application that the parties had agreed to make joint efforts to get the order of lease vacated. On that very day, another application was made for cancelling the lease. In this application it was also stated that the plaintiffs had been offered Rs. 1,250/-/- per month as rent,

4. It appears that the parties carried out the terms of the compromise and on 28-11-1958, an application was made on behalf of the parties requesting the court to record the compromise and pass a final decree declaring the defendants to be exclusive owners of the entire property and dismissing the plaintiffs' suit. It was also prayed that possession of the entire suit property be handed over to the defendants and the lease granted to Respondent No. 1 be terminated. This compromise was recorded under Order 23 Rule 3 C. P. C. and a final decree was passed in terms of compromise on 28-11-1958. It may also be mentioned that the appeal against the preliminary decree and the cross-objection filed in this Court were withdrawn on 7-5-1958. The plaintiffs filed the present appeal on 14-5-1958 praying that the order of the learned District Judge dated 24-3-1950 be set aside and the lease be terminated.

5. The sole point for determination in this appeal is whether the order passed by the learned District Judge dated 24-3-1958 was a proper order and if not whether it can be interfered" with by setting it aside or otherwise modifying it in exercise of the appellate or revisional jurisdiction of this Court.

6. We first proceed to examine the propriety of the order. Section 94 C. P. C. lays

down the general powers of the court in regard to interlocutory proceedings. So far as it is relevant for the purposes of this case, it runs, as follows:

"In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient". It is clear from the very reading of the section that whatever action is to be taken by a court of law in the matter of the appointment of a receiver or conferring powers on him, or making other interlocutory order in this connection, it must be with the dominant object to prevent the ends of justice from being defeated. The provisions relating to Order 40 are subject to this controlling Section 94 and in taking any action under Order 40 or passing any interlocutory order, it is the duty of the court of law to keep in view that the rights of the parties are not jeopardised and the ends of justice not defeated. Order 40, Rule 1 permits the Court to pass the order referred to in Clause (a), (b), (c) and (d) if it appears to the Court on passing such an order just and convenient.

This very phrase is employed in Clause (e) of Section 94. The propriety of the order of a court passed under Order 40 is to be judged by the test that the order was passed for the purpose of preventing the ends of justice from being defeated, and further that in the circumstances of the case, that order was just and convenient. If in a suit pertaining to a property, it appears to the Court that the property should be preserved pending the litigation in order that it may be available to the parties after the dispute is settled, the Court may take action either under Order 39, Rule 7, Order 39, Rule 7 empowers the Court to make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise thereunder.

In some cases it is not only essential that the property should be preserved but it is also necessary that it must be managed during the pendency of the litigation. In such cases, the Court may take resort to Order 40, Rule 1 and appoint a receiver of the property. The next step is to take, the possession of the property from any person in possession subject of course to Clause (2) of Order 40, Rule 1 and commit the same to the possession, custody or management of the receiver and then confer upon the receiver all such powers as the Court may think proper on the receiver for the realisation, management, protection, preservation and improvement of the property.

The powers granted under Order 40 flow from Clauses (d) and (e) of Section 94 and Section 94 lays down that it is only the powers that have been prescribed that a Court of law can exercise. Thus, if in the "opinion of the Court it is necessary and expedient that any person should be removed from the possession or custody of the property, it is to be done by appointment of a receiver and

committing the same to the custody of management of the receiver. It is the receiver who as an officer or agent of the court is to manage the property.

The scheme laid down in Order 40, Rule 1 is that in the matter of management of the property in dispute, the court must act through its agent and should not take upon itself the cumbersome burden of managing the property. The management of the disputed property may often be a laborious process involving the realization of rents and profits, looking after the repairs and even managing business and entering into contracts. A court of law is not expected to do all these things, except through the agent by conferring on him such powers as it may deem proper and as provided under Sub-clause (d) of Order 40, Rule 1. A Court of law must resist the temptation of doing all these things by itself without the assistance of a receiver appointed in normal course, otherwise it may commit grave errors in the management of the property on account of imperfect knowledge of the whole situation, or for other similar causes.

It is also in the fitness of things that a court of law, should keep itself aloof from day to day affairs relating to the cases pending before it. Otherwise there may arise occasions for misunderstanding regarding the purpose of an order passed bona fide. The dignity and decorum of a Court of law is likely to be affected if it involves itself too much in the management of the property. It is for this reason that a receiver is to be appointed when the circumstances of the case demand that there must be something more than the preservation of the property.

7. Now let us examine what has happened in this case in the light of the above observations. Let us first see whether the, learned District Judge was doing anything in order to prevent the ends of justice from being defeated. From the narration of the facts given above, it is clear that the receiver had been appointed pending the disposal of the present suit. The suit had progressed to the stage of a preliminary decree so far back as 14-2-1954. Thereafter what remained to be done was that the receiver, who may be taken to have been appointed also as a commissioner, was to divide the property between the parties in accordance with the decree.

The decree further provided for the sale of the property if it could not be so divided. Thus, the property was either to be divided Or sold, and it was to be preserved till then. If on 16-12-1957 the learned District Judge was not satisfied with the receiver in connection with the preservation of the property, he should have taken necessary steps for appointing another receiver or given specific directions to the receiver for the preservation of the property. There was no necessity for granting the lease of the factory, and in any case, a lease for five years. It is true that one of the plaintiffs had made an application for giving the property on lease, but he did not appear to have taken any further interest in the application.

On the other hand, it appears that the parties made themselves busy in coming to a compromise. When the case had reached the stage at which there was every

possibility of its early end, it must have occurred to the learned District Judge that granting the ground lease for a period of five years would only operate unjustly on the parties and would in no way advance the cause of justice. The proceedings show that the parties had absented themselves on 8-3-1958 when the matter of giving the lease was to be decided. This only shows that the parties were not at all agreeable that the property should be leased.

Still the learned District Judge took it in his head to go out of his way and to pass orders suo motu and this he did on 24-3-1958, by passing an order that the property may be leased to Respondent No. 1 for a period of five years. The learned District Judge should have acted with circumspection, and had he done so, he would have at once come to the result that granting a lease for such a long term would not only be inconvenient to the parties but highly unjust to them inasmuch as the parties will be kept out of possession of the property for a long time the right relating to which had been determined by a preliminary decree. We can only say that the order of the District Judge was indiscreet and highly unjustified.

8. Even if the learned District Judge had made up his mind to lease out the properties for the sake of preserving them as also for putting them to some profitable use, it was no business of the learned District Judge to have settled the terms of the lease by himself. He should have left the entire matter to the receiver after conferring on him the powers to lease. As we have already pointed out, this was the proper course which he should have adopted. This course adopted would have been the right and normal thing to do with its manifest advantages inasmuch as the receiver would, have thought it right to advertise for the lease and invite offers for it.

It appears from the proceedings that Strake and Co. sent two letters and one telegram to the learned District Judge, but he ignored them. As a Court of law he might have been entitled to ignore them as they were not in the form of applications before him. Had the receiver been entrusted with the job, he could have taken notice of these documents and entered into correspondence with that Company. It also appears that the parties had made up their mind to come to a compromise rather than to see that the property should be leased out.

In fact, one of the defendants sent a telegram to the Court requesting it not to lease out the property as it would complicate matters. The parties would have been definitely in a better position to approach the receiver and to place before him all the relevant material regarding the leasing of the property including the undesirability of leasing the property at that stage. As it turned out when the matter of drafting and executing the lease was entrusted to the receiver, he got a clause inserted in the lease deed. It is Clause 7 which provides for the determination of lease by giving six months' written notice after a period of two years. This may not be perfectly in accordance with the order of the learned District Judge, yet it mitigated the rigour of the lease of five years. What we wish to point out is that the learned District Judge should have left the matter in the

hands of a receiver instead of taking it up in his own hands and this would have been in accordance with law. We have already pointed out the manner in which Court of law should act in the matter of management of the property under the custody of the receiver.

It must always be left to a receiver to enter into a contract after due care and attention. The receiver may seek guidance and may ask for sanction of the Court. This the receiver does in order To absolve himself from the charge that he might be acting imprudently or in an unauthorized manner. The receiver when seeking sanction is bound to place all relevant material before the Court of law and it is comparatively easy for a Court of law to make up its mind whether to grant sanction or not under those circumstances. At the time of the granting of the sanction, the Court may also permit the parties to make their own submissions but instead of adopting this course, if a Court takes the whole thing upon itself, it is only putting itself in the wrong. We are not at all satisfied with the manner in which the learned District Judge acted in granting the lease to Respondent No. 1 and we express our strong disapproval of it.

9. Now comes the question whether we should set aside or annul the lease, in exercise of our appellate or revisional jurisdiction. So far as the appellate jurisdiction is concerned, it has been held by a Bench decision of this Court in *Ajit Singh and Another Vs. Yamuna Devi and Another*, that where the court merely passes an order or gives a direction which the receiver is bound to comply with, it cannot be said that any power is being conferred within the meaning of Clause (d) of this rule and such order is not appealable under Order 43, Rule 1 (s).

In this case also, it was the court itself which had passed the order under appeal and the contention of the learned counsel for the defendants that this order may be considered as a mere direction to the receiver has got no force. This being the position, we cannot set aside the order in exercise of our appellate jurisdiction,

10. Now coming to our revisional jurisdiction, we have first to examine whether it is permissible for us to annul the lease. On this point, we may refer to the judgment in *Krista Chandra Ghose v. Krista Sakha Ghose* ILR 36 Cal 52. In that case, the receiver had been authorised to lease the disputed property from time to time for a term not exceeding six years on such terms as the receiver may deem reasonable. The receiver granted a lease of part of the zemindari to one of the parties to the suit.

The other party had made an offer to the receiver to take the lease for a higher sum but that offer was rejected. Thereupon, an application was made that the lease granted by the receiver be held invalid and that the lease of the property be granted after advertisement so as to secure a larger rental in the interests of the estate. It was contended before the learned Judge that no summary order should be passed for cancelling the lease and his Lordship accepted the contention with the following observations:

"I am not asked in this matter to control the option of the Receiver, because the

Receiver has already done that which is complained of and has conveyed the property into the hands of the lessee, a third party, to whom the Receiver, under the order giving him authority to do so, granted a lease, which has been completed and under which possession has been given. Admittedly, in this case, the lessee is also a party to the suit; but though he is subject to the jurisdiction of the Court as a party he is not subject to its jurisdiction as lessee. This is not a case in which the matter rests on agreement which has not been carried out, and in which the Court may interfere to prevent its Receiver giving effect to the proposed agreement. This is a case, in which the matter has passed out of the stage of agreement, and has resulted in a conveyance of the property to the lessee. As long as that lease stands, the property must be taken to be in the lessee, and I do not think that I can, on this application, set aside that lease".

This authority by an eminent Judge is entitled to great weight. This case was referred to by the Madras High Court in *P.S.S. Meyappa Chettiar Vs. Nagammai Achi*, which was a case of a lease for an indefinite period obtained by practising fraud on the Court. It was held that where it is found that there has been fraud upon the Court in granting and obtaining the lease, the Court is entitled to set it aside in a summary manner. Reliance for this view was placed on *Sirish Chandra Banerjee and Another Vs. Debendra Nath Banerjee and Others*, In the present case, there has been no fraud on the Court and we cannot take assistance from the cases of fraud played on the Court as these cases stand on a different footing altogether.

No authority of any High Court in India has been brought to our notice for the proposition that the lease granted by a Court of law can be cancelled in exercise of its summary jurisdiction. If we turn our attention to Section 144 of C. P. C. there is a long series of authorities that the relief under that section is not available against a third party. However, we have come across a passage in the *Treatise on the Law of Receivers*, by James L. High, 4th Edition, at Page 772. It runs, as follows:

"In New York, it is held that the court may authorize its receiver to lease the premises for the customary term for which such premises are ordinarily leased, even though the term should extend beyond the termination of the litigation, and that such authority may be granted to the receiver upon an ex parte application. The Court may, however, modify or vacate such order and annul the lease, in which event lessees who have taken the lease in good faith, relying upon the order of the court, are entitled to indemnity out of the funds arising from a sale of the premises in a partition suit in which the receiver was appointed",

The above passage also shows that the lessee in case of premature annulment or determination of the lease was entitled to indemnity. Even if we act on the proposition laid down in the above passage, we shall have to determine the amount of compensation which may be payable to the lessees in case their lease is determined otherwise than in accordance with the lease deed.

11. Counsel for Respondent No. 1 has urged that he has built a business out of nothing and invested a large sum of money in the business of the factory and would suffer heavily if his lease is terminated at this stage after he had run the business for more than a year. In the circumstances of the case, we would have to grant him some breathing time. We, however, find that it is not necessary to go outside the lease deed for the purposes of granting any relief to the defendants.

In the lease deed itself, there is a provision for the termination of the lease deed after a period of two years by six months' notice. In our opinion, the trial court can enforce this clause of the lease deed summarily after directing the receiver to give notice as provided for in that clause. It has been held in *Surendra Keshub Roy v. Doorgasoondery Dosee* ILR 15 Cal 253 that:

"A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be".

This can even be done after the case has been dismissed. We may point out that there is a great deal of difference between a case in which a court of law is enforcing summarily the terms of a contract entered by it in course of management of the property and a case in which it is taking any action summarily in breach of such contract. In our opinion, in the present case, if any action is taken under Clause 7 of the contract, it would only be in conformity with it and not after annulling it.

12. We have carefully considered the question whether in the peculiar circumstances of this case we should order the cancellation of the lease immediately after reasonable notice and send the case back for an enquiry as to whether any equities arise in favour of the lessees and, if so, what compensation should be awarded to them for such cancellation of the lease; but we have come to the conclusion that this would very likely mean protraction of this litigation and the remedy may prove not a little burdensome to both Parties.

We are, therefore, inclined to think, having regard to all the circumstances of the case, that in pursuance of the specific condition for an earlier termination of the lease contained in the deed of lease to which we have referred above, the District Judge should terminate the lease by giving six months' notice to the lessees at the end of two years from the date of the lease and then the lease in question would stand concluded once and for all. The lessees cannot legitimately complain against such an action because they stand already committed to this condition and in such an event no further enquiry as to the arising of any equities in their favour need arise at all. We order accordingly. It is hardly necessary for us to add that in the meantime the lessees shall punctiliously observe all the conditions of the lease until the subject matter of the lease is duly handed over to the appellant.

13. The result is that we partly allow this appeal treating it as a revision and dispose of it as directed above. The parties shall bear their own costs in this

Court.