09.02.2021
Court No. 19
Item No.03
CP

C.O. 541 of 2020
with
CAN 1 of 2020

M/s. Bagmari Industrial Corporation & ors.
vs.
Taqi Hasan Niazi & anr.

(video conference)

Mr. Aniruddha Chatterjee
Mr. Debabrata Roy

....for the petitioners.

Mr. Sk. Md. Galib
Mr. Khwaja A. Rahaman

.....for opposite party no.1.

Mr. Abu Siddque Malik

...for the Board of Wakf.

This revisional application is directed against an order dated January 2, 2020, passed by the learned Waqf Tribunal, West Bengal in Suit No. 74 of 2016, appointing a receiver. The relevant portion of the order impugned is quoted as follows:

> "that the application dated 08.02.2018 filed under Order 40 Rule 1 read with 151 CPC is allowed on contest but without cost.
>
> The application dated 28.08.2019 filed under Section 151 CPC in support of application under Order 40 Rule 1 CPC is accordingly disposed of.
>
> Sk. Mehbub Hossain (9433190693), Advocate, 38B, Dr. Suresh Sarkar Road (Near Rahmania Masjid/KMC, Water Supply/Birsul Hat) Kolkata – 700014 is appointed as Receiver in this case.
>
> Ld. Receiver is directed to take constructive possession of the entire property of Waqf

> Estate for the purpose of realizing arrears of rent, occupational charges and mesne profits.
>
> Ld. Advocae/Receiver is directed to open a Bank account.
>
> Receiver is to realize of the moneys/mense profit from the occupants of the property which are being collected by the plaintiffs namely Gabmari Industrial Corporation from occupants/encroachers of different parts of the premises.
>
> Receiver is to deposit the money so collected by him in the Bank account after deducting the legal expenses and charges duly incurred by him.
>
> Receiver is to mange, protect and preserve the property and to save the property from further encroachments.
>
> Receiver is to pay all Kolkata Municipal Corporation Taxes.
>
> Remuneration of the Receiver will be at 10% of the net income to be generated from Waqf Estate.
>
> Receiver is directed to submit accounts in every six months before this Tribunal during the pendency of main suit."

Mr. Chatterjee, learned advocate appearing for the petitioners submits that in a suit filed by the lessees for a declaration that the plaintiffs as lessees were entitled to extension and/or renewal of the lease for a further period of ten years in respect of premises no. 299 and 300, Bagmari Road, Manicktala, Kolkata and for permanent injunction, a receiver could not be appointed at the instance of the lessors for realization of arrear rent, occupation charges and mesne profits from the occupants of the property who were admittedly sub-lessees under the lessees. Moreover appointing a receiver to manage preserve and protect the property would result in interference by the court with regard to enjoyment of the property leased in favour of the lessees. According to Mr. Chatterjee, in the application for appointment of receiver, there was no mention of imminent danger to the demised premises. Mr. Chatterjee submits that the lease was for a period of 51 years from 1965 with a further clause of renewal for a period of further 10 years at the instance of the lessee. Mr. Chatterjee submits that if it is accepted that the lease was terminated by invoking the sooner termination clause in 1997, as submitted by the mutwalli, in that case, the lessees would become statutory tenants and the West Bengal Premises Tenancy Act, 1956 would be governing such tenancy. Mr. Chatterjee further submits that termination of tenancy under such circumstances would not make them encroachers as per Section 2(ee) of the Waqf Act, 1995. According to him, Clause 3A and 3F of the lease deed were relevant for the purpose. Clause 3A of the lease deed allowed the lessee to demolish and construct permanent brick built buildings, factory sheds and other structures with good materials on the demised premises or on any part thereof and in connection therewith and to cut down trees, demolish and remove the existing buildings, sheds and structures of the demised premises according to the requirements of the lessee for personal and commercial purpose. Clause 3F stipulated that if after expiry of the term of 51 years the lessees were desirous of obtaining a renewal of the said lease, the lessees should, by a notice in writing not less than three calendar months before the expiry of the term request for such renewal for a further period of ten years and the lessor shall at the cost of the lessees, grant to the lessees renewal of the lease for a further term of ten years at a rent of Rs.2,600/- per month and on the same terms and conditions as contained in the said lease deed except for a further renewal. After the expiry of 51 years the lessors refused to renew the lease. The suit was filed. The lessees are in possession.

Mr. Galib, learned Advocate for the mutwalli submits that the Waqfnama allowed grant of lease for one year. The erstwhile mutwalli did not have the authority to grant the lease in question for 51 years along with a renewal clause. That the petitioners were encroachers as the lease has been terminated. That the petitioners were earning from the property but the Waqf estate was suffering as the petitioners did not pay the rent. There was every chance of the Waqf property being wasted and damaged. That the receiver has been rightly appointed in order to protect the Waqf estate from damage and future alienation, creation disturbances and other encumbrances.

Mr. Malik, learned Advocate for the Waqf Board adopts the submissions of Mr. Galib.

From the plaint it appears that the mutwalli instituted a suit for eviction being Title Suit No. 142 of 1999 in the court of the learned Civil Judge (Senior Division), Sealdah. The said suit was filed for eviction on the ground of default. Subsequently, a sum of Rs.3,41,344.00 was sent to the mutwalli by demand draft on June 30, 2016 which was refused. Subsequently the said suit was dismissed for non-prosecution. Thereafter, encroachment proceedings were filed under Section 54 of the Waqf Act, 1955. That the plaintiffs had a right to stay in the demised premises on the basis of the renewal clause.

The defendant as the mutwalli filed the written statement in this suit and contended that the lease having been terminated, the plaintiffs were rank encroachers and did not have any right to remain on the property. That the property was being wasted and dissipated. That the whole purpose of granting the lease was for generation of income for the waqf estate but due to default and also other illegal activities of the lessees, the waqf estate was not generating any income and, on the contrary was at the verge of being alienated by the petitioners. That the waqf estate was used for generation of income of the lessees but the original lessor was not earning any income from such property.

An application for appointment of receiver was also filed with similar allegations as appearing in paragraphs 3(b) to 4(a), of the said application which are quoted below:

> "3(b) The Plaintiff No. 1 was one Partnership Firm, which once had its office at Premises No. 53/55, Baranashi Ghosh Street, P.S. Girish Park, Kolkata – 700 007.
>
> 3(c) That on 11th August 1965, Asghar Hossain (since deceased being the then sole Mutawalli, had executed a registered Lease Deed for 51 years from the 1st day of August, 1965, in favour of the Plaintiff No. 1, interestingly enough the term period for granting a Lease as stipulated in the Deed of Wakf/Wakfnama is merely for one year only, thus the illegally existed in the said Lease from the very beginning.
>
> 3(d) That the Plaintiff No. 1 is grossly guilty of various act of breaches of the covenants and conditions of the said Deed of Lease, dated 11.8.1965 and are also guilty of continuing and uninterrupted breach of the same, till date which includes massive illegal constructions (beyond the permitted period) and attempted change of nature and character of the said suit property, in most illegal means.
>
> 3(e) That the Defendant's predecessor-in-office namely Sirajul Hasan Niazi, as the Mutawalli of the said Wakf Estate, had on the Plaintiff No. 1 issued by the Notice dated 16th October, 1997, under the statutory provisions or Sections 106/111G/114A of the Transfer of Property Act, 1982, the said Notice was sent through Registered Post and was duly served on the Plaintiff No. 1 and other the-then partners of the Plaintiff No. 1, thus terminating the said Lease.
>
> 3(f) It is pertinent to mention here, that as stipulated in paragraph 3(B) of the said Lease Deed dated 11th day of August, 1965, it has specifically and categorically laid down that if the rent thereby reserved or any part thereof shall remain unpaid for a period of three months after becoming due and payable whether formally demanded or not or if default shall be made in

observing on performing any of the covenants and condition whether affirmative or negative herein contained and on the part of the Lessee to be observed and performed or in case the Lessee being adjudicate and insolvent them and in any of the suit cases it shall be lawful for the Lesor at anytime hereafter re-enter upon the demised premises of any portion thereof in the name of the whole and to take possession of the several premises hereby demised and thereupon this demise shall absolutely cease and determine and if necessary the Lessor will be entitled to claim appointment of a Receiver according to his own choice. If the Lessee shall before the termination of the said term without the previous consent in contrary of the Lessor violates the demised premises it shall below full for the Lessor to take possession of the same for the protection thereof without any manner prejudicing the demise or the rights of the lessor hereunder and without suffering himself to any action for or otherwise howsoever and to relate the demised premises at the first rent that can be reasonably obtained for the same.

3(g) Thus it is conspicuously clear that due to breach of covenants, conditions and stipulations, as laid down in most specific and vivid terms, in the said Lease Deed, by the Plaintiffs the said Lease had for long stand determined and terminated, for all intents and purposes, in the eye of law.

3(h) In order to deliberately cause loss, damage and detriment to the Wakf property/suit property, the Plaintiff No. 1 and their men, agents and associates raised numerous illegal and unauthorised structures and encroached upon the vacant/open space of the said Waif property/suit property. The Defendant's predecessor-in-office made repeated complaints to the Municipal authorities, against the Plaintiff No. 1, but to no effect, thus by their inaction/non-action the Municipal authorities had helped the Plaintiff No. 1 and his men and associates, in illegal and unauthorised constructions and in illegal encroachment of the said Wakf property/suit property.

3(i) That on 27th April, 2005, when a high level spot enquiry was conducted by the Wakf Board, West Bengal at the Suit property/ Wakf property at Premises No. 299 and 300, Bagmari Road, P.S. Manicktala, Kolkata – 700054, by the Chief Executive Officer and Deputy Chief Executive Officer, and two sitting Waqf Board

> members who found numerous illegal construction at the suit property and also found an illegal construction under progress at that particular point of time.
>
> 3(j) That by letter dated 01.9. 2006, the Assistant Assessor-Collector (North), Assessment Department, Kolkata Municipal Corporation had reportedly inspected of the suit property/wakf property, where a good number of newly constructed shop, godowns were seen in the compound of the said Waqf Estate/suit property.
>
> 4(a) That the Plaintiff No. 1 has illegally let-out parts of the said Wakf premises to many occupants being the Encroachers to whom they claim to be tenants under West Bengal Premises Tenancy Act, illegally and without any lawful authorities whereas the provisions of the said West Bengal Premises Tenancy Act did not apply to the said Lease. Thus as Encroachers they are liable to be evicted by due process of law."

The petitioners filed a written objection to the said application for appointment of receiver and denied the allegations of encroachment, alienation and immense danger to the property.

The learned tribunal relied on the covenants of the lease deed which allowed the lessor to enter into the premises and take over possession in case of illegal activities and passed the order impugned. The learned tribunal took note of the allegations of non-payment of arrear rent and also apprehension of wastage, danger and dissipation and directed the appointment of the receiver for the reasons which are quoted hereunder:

> "It is admitted fact on record that lease has expired and same has not been extended/renewed by Mutawalli with concurrence of Board of Auqaf. It is also admitted fact on record that there are arrears of rent on the

> shoulder of Plaintiffs and other occupants. Suit No. 6/2018 is ending before this Tribunal. Waqf property has more than 7 Bighas of land is under the occupation of Plaintiffs and others. It will be seen during the trial as to whether Plaintiffs and others are encroachers or not but at present it is evident that the Waqf Estate is not able to generate income from the Waqf property at market rate due to occupation of Plaintiffs and others. There is allegation that Plaintiffs and his associates may transfer the remaining part of Waqf property by way of sub-lease to other persons by realizing premium/salami. Admittedly, some construction has been raised over the Waqf property. Even after expiry of lease deed Plaintiffs and others are in occupation and are generating huge income at the cost of Waqf Estate. The Waqf property is in danger being frittered away. Board has not taken the Waqf Estate under its Direct Management. Mutawalli of the Waqf Estate seems to be helpless due to highhandedness of Plaintiffs and their continuance in the Waqf property under the garb of expired lease. Waqf property may be further misappropriated, further sub-let, further encroached by third person and may be caused immense loss if the Receiver is not appointed till disposal of present suit. Rejections of Eviction Case No. 2 of 2015 and pendency of Suit No. 6 of 2018 are not impediments in appointing Receiver in the present case. Defendant/Mutawalli has excellent chance of success in this case. Waqf property can best be preserved and protected under Receiver till disposal of main case."

Admittedly, the receiver was appointed to realize monies, occupation charges and mesne profits from the occupants. The question of collection of mesne profits would arise when the suit is finally decided and it is held that the lessees were in unauthorized occupation of the premises. Secondly, from the averments in the application for appointment of receiver bald remarks have been made about wastage, alienation, encroachment but there are no specific instances to substantiate such allegations. Neither the mutwalli nor the board of waqf took any steps towards removal of these persons until 2015 when proceeding under Section 54 of the Waqf Act was initiated. Even in this suit the opposite parties could have prayed for an injunction restraining the lessees from doing any act of wastage, damage or causing irreparable loss and injury to the property in question. Such was not done. On the contrary, a receiver was appointed to collect the rent from the sub-lessees of the lessees without there being any claim to such rents. Moreover the receiver has been asked to supervise and manage the estate when the lessees are still in possession. In the written statement there is no counter-claim.

A prima facie reading of the clauses in the lease deed clarify that the lease was granted for usage, occupation of the building, factory sheds, commercial property etc. to the lessee. The lessee was given the right to demolish and rebuild on the said property. Whether the new structures which the learned tribunal observed were constructed subsequent to the termination are matters which have to be decided at the trial on evidence.

The enquiry report which was relied upon by the learned tribunal was not an enquiry made by the commissioner during the pendency of the proceedings, nor did the lessees have any opportunity to deal with the same. Moreover, in a suit for renewal of the lease by a lessee, appointment of a receiver at the mere asking is not permitted unless there are specific instances of damage, dissipation and alienation of the property in question. The defendants were always at liberty to pray for temporary injunction as per the Code of Civil Procedure and also for payment of the contracted rent or the agreed rent. The contracted rent or the agreed rent should be paid by the person in occupation at least as usage charges for staying in the property even after termination of the lease. They cannot stay for free.

The tribunal has rightly held that whether plaintiffs were encroachers or not or whether the plaintiffs were entitled to stay in the property by claiming further renewal were matters to be decided in the suit. Having held as above, the court could not direct the receiver to take over supervision and management of the property through the receiver in the lessee's suit for a declaration and renewal of the lease without satisfying itself as to the nature and character of damage, dissipation that were likely to happen on the property in case a receiver was not appointed. Whether the lessors have a right to the rents payable by the sub-lessees of the petitioners are maters to be decided later. The lease did not specifically prevent induction of sub-lessees in the property, on the contrary, the lessees were given a free hand to deal with the property and enjoy the same in any manner whatsoever but, of course, without creating any unlawful activities and upon payment of regular rent.

As a general rule, a Court would not entertain the claim for appointment of a receiver as the only prayer. A substantive relief in addition to a receiver must be claimed, save in a few exceptional cases. The jurisdiction to appoint a receiver was only exercisable for the purpose of protection or enforcing a legal or equitable right. In this case, the suit was at the instance of the lessees who wanted to exercise their right under the lease deed for renewal of the lease. In such a case, without there being very exceptional circumstances and without there being an express provision under the statute for appointment of a receiver, the order impugned could not have been passed. A receiver could be appointed in a claim, for the purpose of getting in and holding or securing funds or other property, which the Court at the trial or in the course of the claim would have the power and the means to distribute amongst or make over to the persons or person entitled thereto, in the property in dispute. Here, the dispute was between the lessor and the lessees. The lessees have sought for a declaration of their entitlement to renewal of the lease under the deed of lease. Even if the lessees have sub-let the property to others, the lessor would not have any claim over the rent payable by such sub-lessees at this stage. The lessor has a claim against the lessees for payment of rent. Without deciding the rights of the lessor, interference by the Court by such interim measure may cause irreparable loss to the lessees. In the order impugned there was nothing to show that the learned Tribunal was satisfied that the premises involved in the proceeding was in danger, if left until the trial in the possession or under the control of the lessees.

Appointment of a receiver cannot be a matter of course. It is the lessees' suit for declaration of his right to renewal of the lease. Without there being specific instances of the property being wasted or disrupted, the order impugned could not have been passed. Stray and vague allegations cannot be entertained by the Court and in any even the direction upon the receiver to collect rent mesne profits from sub-lessee and to supervise and manage the property is not sustainable in law. It is on record that there is no counter-claim for recovery of possession or for damages by the defendants/lessors in the suit. What cannot be done directly cannot be done indirectly. The status of the petitioners and their sub-lessees in respect of the suit property has not yet been decided to be wrongful by the learned Tribunal.

The order impugned is set aside and quashed. However, the lessees cannot withdraw from their obligation to pay the agreed rent along with all arrears at the rate of Rs.2,400 per month on and from the month following the month for which it was last paid and also pay current rent month by month every month to the waqf estate also at the rate of Rs.2,400 per month. Arrears of rent will carry interest @ 6% p.a. to be paid proportionately with each instalment. Fraction if any be added to the last instalment. The arrear rent shall be paid in five equal monthly instalments. Current rent shall be paid from the month of February 2021 within the 7th of March 2021 and month by month every month within the 7th of the succeeding month. The payment shall be made by Account Payee Cheque drawn in favour of the mutwalli. Receipt shall be granted by the mutwalli. All payments and acceptance will be without prejudice to the rights and contentions of the parties in all proceedings arising out of the said premises.

In case of default, the defendants will be at liberty to pray for appropriate orders in the learned court below including attachment of rent paid by the sub-lessees. With regard to the apprehension of the defendants regarding alienation, dissipation, further encroachment and wastage, the defendants are always at liberty to pray for an injunction before the learned court below and if such application is made, the same will be disposed of as expeditiously as possible and on its own merits and in accordance with law.

This court has not gone into the merits of the suit. The learned court below shall not be influenced by the observations made hereinabove and will proceed independently. The above observations are tentative in nature.

The revisional application is disposed of. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible subject to compliance of all usual formalities.

(Shampa Sarkar, J.)