

Hiralal Patni

Vs

Loonkaram Sethiya & Others

Civil Appeal No. 110 of 1961

(K. Subha Rao, Raghuvar Dayal, J. R. Mudholkar JJ)

11.04.1961

JUDGMENT

SUBBA RAO, J. –

This appeal by special leave is directed against the judgment dated October 14, 1960, of the High Court of Judicature at Allahabad confirming the order passed by the Civil Judge, Agra, directing the Official Receiver to take possession of the property of the appellant.

This case illustrates how the enforcement of an interlocutory order appointing a Receiver made in the interest of all the parties concerned could be obstructed and the object of the order itself be defeated by dilatory tactics adopted by one party or other.

At Agra, there were there spinning mills and one flour mill, all of which together were described as the Johns Mills; and, originally, the John family or their predecessors were the owners of all these mills. At the time the present proceedings were initiated, other persons had acquired interest therein. The following persons were the joint owners of the mills : (1) Hiralal Patni, the appellant, and Munni Lal Mehra..... 19/40th share; (2) Gambhirmal Pandiya Private Ltd.... 8/40th share; (3) Messrs. John & Co... 11/40th share; and (4) I. E. John 2/40th share. Seth Loonkaran Sethiya, respondent No. 1, advanced large amounts to Messrs. John & Co. on the security of its business assets and stocks. On April 18, 1949, the said Sethiya filed O.S. No. 76 of 1949 in the Court of the Civil Judge, Agra, against John & Co. for the recovery of the amount due to him by sale of the assets of the said company. To that suit the partners of Messrs. John & Co., for convenience described as "defendants 1st set", and the partners of Messrs. Johns Jain & Co., who were for convenience described as "defendants 2nd set", were made parties. Pending the suit, the said Sethiya filed an application under O. XL, r. 1, Code of Civil Procedure, for the appointment of a Receiver. By an order dated May 21, 1949, the learned Civil Judge appointed two joint Receivers and directed them to run the three spinning mills. Hiralal Patni filed an appeal against that order to the High Court at Allahabad, and the said Court by its order dated August 22, 1949, modified the order of the Civil Judge confining the order of appointment of Receivers only to the share of Messrs. John & Co. in John Jain Mehra & Co. Loonkaran Sethiya made another application in the Court of the Civil Judge for the appointment of a Receiver for the property of Hiralal Patni and the learned Civil Judge by his order dated December 1, 1951, directed the Receivers to take possession of the appellant's share in the mills also. Against this order an appeal was preferred to the High Court and the operation of the said order was stayed pending the disposal of the appeal. On April 5, 1954, the Civil Judge passed a preliminary decree against the defendants therein directing them to deposit the decree amount in court within the prescribed time, and in default the plaintiff was given a right to apply for a final decree for sale of the business assets of the defendants. The decree also gave a right

to apply for a personal decree in case the sale proceeds were not sufficient to discharge the decree. The preliminary decree directed that the Receivers should continue on the property until discharged. Hiralal Patni preferred an appeal to the High Court against the said preliminary decree and applied for interim stay of its operation. On August 23, 1955, the High Court discharged the Receivers appointed by the learned Civil Judge, and appointed another Receiver in their place. On March 25, 1955, the learned Civil Judge prepared a scheme for running the mills, and the parties preferred appeals against that scheme to the High Court. The said appeals were compromised and under the terms of the compromise the parties agreed to take different mills on lease for a period of three years from the Receiver. On January 14, 1956, the Receiver executed a lease in respect of the flour mill in favour of Hiralal Patni for a period of three years. Under the lease deed it was agreed that he should deliver the demised premises to the Receiver upon the expiry of the term. In due course, on March 14, 1956, a final decree was made in the suit for the sale of the properties, but the final decree was silent in regard to the Receiver appointed earlier. On September 29, 1958, Hiralal Patni applied to the High Court for extension of the lease by three years. On January 16, 1959, the High Court rejected the application on the ground that the lease was only a stopgap arrangement and that it was for the Receiver to make a fresh arrangement of the future under the supervision and directions of the Civil Judge, Agra. On January 17, 1959, the Receiver applied to the Civil Judge for instructions whether he should proceed at once to dispossess the appellant. On notice, Hiralal Patni raised various objections and claimed that he was entitled to remain in possession of the property as its owner. The learned Civil Judge disallowed his objections and held that the Receiver derived his authority from the preliminary decree, and directed the Receiver to lease out the said flour mill by auction for a period of two years. Pursuant to that order, an auction was held, and the appellant was the highest bidder, and he paid the lease amount and executed a formal lease deed. Not satisfied with the order of the Civil Judge, Hiralal Patni preferred an appeal to the High Court. The High Court in an elaborate judgment considered the contentions raised on behalf of Hiralal Patni and dismissed the appeal. Hence the present appeal.

Learned counsel for the appellant raised before us the following three contentions, which the appellant unsuccessfully raised before the High Court as well as before the Civil Judge : (1) On a true construction of the relevant orders the Receiver has no power to dispossess the appellant in such a way as to prevent him from working his flour mill. (2) After the passing of the final decree, though the Receiver may continue for the purpose of accounting and discharge of debts, he cannot exercise any powers in respect of the rights of the parties. And (3) in any view, as the appellant acquired right under a lease deed and continued in possession after its expiry, he could be dispossessed only by a suit and not by a summary procedure.

The first question turns upon the construction of the relevant orders. The Civil Judge appointed two joint Receivers by an order dated May 21, 1949. It is not necessary to consider the said order as the final order that governed the rights of the Receiver and the parties was that made by the High Court on appeal on August 22, 1949. After considering the contentions of the parties, the High Court came to the conclusion that a Receiver should be appointed to be in charge of the entire property, immovable and moveable, of the defendants 1st set for its protection and preservation. The order of the High Court described the John family as defendants 1st set to the suit, and defendant 5, Hiralal Patni, defendant 6, Munnilal Mehra, and Messrs. John Jain Mehra & Co. as defendants 2nd set. This order was confined only to the properties of defendants 1st set. The High Court further proceeded to state :

"In the finance agreement in plaintiff's favour, the plaintiff was not given any right to enter into possession on non-payment or to run the mills..... There being no right

given to the plaintiff to enter into possession and manage the mills or to have a receiver appointed, a receiver can be appointed only under Order 40, rule 1 of the Code of Civil Procedure."

Adverting to the contention raised by the defendants that a Receiver could not be appointed to run the mills, the High Court observed :

"In view of the order that we propose to pass today we do not want to go into that question. In case the mills are not run under the order of the Collector under the United Provinces Industrial Disputes Act, or by the partners we propose to give the parties permission to move this court. In case we decide to appoint a receiver to run the mills we shall then consider whether a receiver can or cannot be appointed for the purpose of running the mills."

Then the High Court stated :

"We have already set out the circumstances which in our opinion make it necessary that a receiver should be appointed to take charge of the property of defendants first set whether under the finance agreement of July 1948 there was a charge created on the property, moveable and immovable, or not. The Receiver will not interfere with the running of the mills except under express orders of the Court and to the extent when it becomes necessary by reason of the value of the security being jeopardized by any action of the defendants."

Then the High Court pointed out that the Collector had the power under s. 3 of the Industrial Disputes Act to make arrangements for the running of the mills. Finally the High Court observed:

"It may be necessary from time to time to give directions to the receiver. The parties may also want portions of this order to be clarified or other directions obtained. The lower court may give such directions to the receiver or to the parties as it may consider just and proper. In case further directions are necessary or the receiver or the parties are not satisfied with the directions given they may move this court for further directions."

Shortly stated, the High Court confirmed the order of the Civil Judge appointing the Receivers and directed them to take charge of the properties of defendants 1st set. The High Court expressly prohibited the Receivers from interfering with the running of the mills except under express orders of the court, for at that time it did not think it necessary to direct the Receivers to do so. It may be recalled that the Receivers were not appointed for the flour mill of the appellant, Hiralal Patni, as he was one of the defendants belonging to the 2nd set. Learned counsel for the appellant contends that this order did not put the mills in the possession of the Receivers and that the Receivers were given only a supervisory control over the share of the defendants 1st set in the mills. Whatever terminology may have been used, the fact remains that the Receivers were put in charge of the entire property of defendants 1st set, which includes their share in the mills, though it was equally made clear that the Receivers could not directly run the mills without further directions in that regard.

The Civil Judge by his order dated December 1, 1951, directed the Receivers to take possession of the share of defendants 2nd set also. The operative portion of that order reads :

"For all these reasons I have come to the conclusion that it is just and convenient that

a receiver should be appointed over the share of the defendant II set, and I order that the present receivers who are in possession of the defendant 1st set share should also be appointed receivers over the share of the defendant II set. As for the prayer allowing the receivers to run the mills the question of running of the mills is already before the High Court as is shown by the compromise dated 8th September 1950. It is not known what has happened after this compromise. The receivers are directed to seek the direction of the Hon'ble High Court on the question of the running of mills so that there may be no chance of conflicting or orders passed by this court and the Hon'ble High Court, on this matter. The receivers will not interfere with the running of the mills except under express orders of this court and to the extent when it becomes necessary by reason of the value of the security being jeopardized by any action of the persons running the Mills. The receivers are appointed over the share of the defendants II set only, for the purpose of preservation and protection and realization of the rent."

This order runs on the same lines indicated by the High Court in its earlier order in respect of the share of defendants 1st set. What is to be noted is that under this order the Receivers were prohibited from running the mills except under the specific orders of the said court or of the High Court. On April 5, 1954, a preliminary decree was made in the suit, and under that decree the defendants were directed to deposit a sum of Rs. 18,00,152 in court within the prescribed date and in default the plaintiff was given a right to apply for a final decree for the sale of the assets of the spinning mills. There was a further direction that in case the nett sale proceeds of the said property were found insufficient to satisfy the plaintiff's claim, the plaintiff would get a personal decree against defendants 1st set and defendants 2nd set for the balance of his claim. The Receivers were directed to continue on the property until discharged. Under the preliminary decree, the plaintiff became entitled not only to the sale of the assets of the spinning mills but also to a personal decree against all the defendants for recovering any balance that might still be due to him after the sale of the said properties. What is more, the Receivers were expressly directed to continue till they were discharged, and as the decree did not specify the powers of the Receivers, it must be held that they continued to exercise such powers as they had under the previous orders of the courts dated August 22, 1949 and December 1, 1951.

On March 25, 1955, the learned Civil Judge, Agra, prepared a scheme for the running of the three spinning mills, and the parties preferred two appeals to the High Court against the scheme. On July 22, 1955, a compromise was effected between the parties in the said two appeals and the appeals were disposed of in terms of the compromise by order of the High Court dated August 23, 1955. As the terms of this order are rather important in the context of the contentions raised before us, we would read the relevant portions thereof :

Clause 1. That the aforesaid parties have without prejudice to their rights and litigation between them have after deliberate consideration and as a special effort to make arrangements for running the Johns Mill have decided that the three spinning Mills and Flour Mill situate in Agra should be run by the parties in accordance with the terms and conditions set forth below.

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(vi) That the lease shall be granted by the receiver on terms and conditions approved by the Court.

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(ix) If any lessee shall fail to run the Mill after delivery of possession or pay the lease money or fail to carry out the arrangements arrived at between the parties for a period of three months, the receiver shall take possession of the Mills and with the permission of the court shall lease out that particular mill to any of the parties excepting the party in default who may offer the highest bid in accordance with the orders passed by the Civil Judge in this matter.

#Clause 4.##

The arrangement embodied in this document is only for the purpose of working the mills by the petitioners. Nothing contained in this document will affect the rights and obligation of the parties which are or may be the subject matter of suit No. 76 of 1949 or in any litigation between the parties and notwithstanding anything contained herein but subject however to the express provision in the preceding paragraph of this clause it will be open to the petitioners to seek their remedies in any manner provided by law, and without prejudice to the rights of the parties to obtain a stay order from the Hon'ble High Court or any other Court."

What is the effect of this order ? Learned counsel for the appellant contends that this order embodies an internal arrangement between the defendants for running the mills and that it does not in any way enlarge the scope of the orders dated August 22, 1949, and December 1, 1951, under which the Receivers were appointed. We do not think that the scope of the orders is so limited. The combined effect of the said earlier orders was that the Receivers should take possession of the entire properties of the two sets of defendants. But the Receivers were not given the power to run the mills without specific directions to that effect by the court. The Civil Judge by his order dated March 25, 1955, evolved a scheme for running the mills, and by that order he laid down the conditions and directed the Receivers to advertise calling for applications from persons, including the Government, who were willing to run the mills. This order was only confined to the three spinning mills. The compromise order in the appeals covered also the flour mill. Though different mills were to be run by different defendants by obtaining lease deeds, that was only a mode evolved for running the mills under the supervision of the court. Under the compromise, the leases were to be executed in favour of the Receiver. It also provided that in case the lessees did not carry out the terms of the lease, the Receiver should take possession of the mill in respect of which default was committed and, with the permission of the court, should lease out the mill to any of the defendants other than the defaulting party. The clauses saving the rights of the parties obviously refer to their rights which were the subject-matter of the suit and they could not have any reference to the terms agreed upon under the compromise order. Under the compromise order, the courts, though by consent, gave directions for running the mills which they left out for future consideration in their earlier orders. The result was that under the earlier orders, all the properties of the defendants were put in possession of the Receivers, and under the compromise order, the Receiver was directed to run the mills under the agreed scheme.

Pursuant to the terms of the compromise order, on January 14, 1956, the Receiver executed a lease in favour of the appellant in respect of the flour mill for a period of three years, and under that lease deed the appellant got possession from the Receiver and agreed "To yield up all the demised premises with all fixture, improvement and replacements thereto in good and tenantable repair and condition in accordance with the lease covenants in that behalf herein contained upon the expiry of

the term hereby created or the sooner determination of these presents as herein provided." Whatever ambiguity there may have been, this lease deed dispels it, for under the lease deed the appellant admits the legal possession of the Receiver, takes a lease under him, and agrees to put him back in possession after the expiry of the lease. On September 29, 1958, the appellant again applied to the court for extension of the lease for three more years, thereby accepting his possession under the Receiver, though the court on January 16, 1959, dismissed that application on the ground that the lease was only a stopgap arrangement and that it was for the Receiver to make a fresh arrangement for the future under the supervision and directions of the Civil Judge under whose preliminary decree he derived authority. It is manifest from the aforesaid orders that the Receiver was put in possession of the entire property of the defendants, that he was not empowered to run the mills personally, that by subsequent orders he was directed to lease out the mills to the parties in the manner prescribed and that under the final order he was to take over possession and make other arrangements for running the mills. In the premises, we find it very difficult to accept the argument of learned counsel that the Receiver was not put in possession of the mills, but the mills continued to be in the possession of the defendants. We hold on a construction of the relevant orders that the flour mill of the appellant was also put in the possession of the Receiver and that the appellant was running the said mill under the compromise formula.

The second contention of learned counsel for the appellant is that the Receiver appointed in the suit ceased to be a Receiver qua the rights of the parties when the final decree was made by the Court. This contention leads us to the consideration of the question whether a Receiver appointed in a suit ceases to be such automatically on the termination of the suit. Neither s. 51(d) nor Order XL of the Code of Civil Procedure prescribes for the termination of the office of receivership. We must, therefore, look for the solution elsewhere. Some of the authoritative text-books on receivers may usefully be consulted in this connection.

In Halsbury's Laws of England, 3rd edn., Vol. 32 (Lord Simonds), at p. 386 under the heading "Duration of appointment by court", the following statement occurs :

"When a receiver is appointed for a limited time, as in the case of interim orders, his office determines on the expiration of that time without any further order of the court, and if the appointment is 'until judgment or further order' it is brought to an end by the judgment in the action. The judgment may provide for the continuance of the receiver, but this is regarded as a new appointment. If a further order of the court, though silent as to the receivership, is inconsistent with a continuance of the receiver, it may operate as a discharge.

When a receiver has been appointed on an inter-locutory application without any limit of time, it is not necessary to provide for the continuance of his appointment in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers. So, also the appointment of a receiver generally by the judgment in an administration action need not be continued by the order on further consideration."

In Kerr on Receivers, 12th edn., in Chapter XII under the heading "Discharge of a Receiver", the legal position is explained thus :

"The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further

order."

In High on the Law of Receivers, 4th edn., the following observations appear at p. 985 :

"The functions of a receiver usually terminate with the termination of the litigation in which he was appointed. And when the bill upon which the appointment was made is afterwards dismissed upon demurrer, the duties of the receiver cease as between the parties to the action. And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership. But an order of discharge does not necessarily follow, in all cases, because of the determination of the suit, and the court may, upon sufficient cause shown, either discharge or continue the receiver, according to the exigencies of the case."

The learned author makes a further distinction at p. 986 between the following two classes of cases :

"Since the final decree in the cause is generally decisive of the subject-matter in controversy, and determines the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver, since there is then nothing further for him to act upon, although it would seem to be still necessary that a formal application be made for his discharge. But when the court by its decree does not attempt to decide the main question in controversy, and leaves the receiver's possession undisturbed, it cannot be held to have the effect of operating as a discharge, or of superseding his functions."

Woodroffe in "The Law relating to Receivers in British India", 4th edn., states at p. 22 thus :

"O. XL, r. 1(a) now expressly provides that a receiver may be appointed whether before or after decree. As long as the order appointing a receiver remains unreversed, and as long as the suit remains a *lis pendens*, the functions of the receiver continue, until he is discharged by order of the Court."

The law may briefly be stated thus : (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the action. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are usually terminated, he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree if the exigencies of the case so require.

Let us now apply the said principles to the facts of the instant case. The order appointing the Receivers did not expressly state that the Receivers' term would expire on the termination of the suit. Under the preliminary decree the plaintiff became entitled to apply for the passing of the final decree for the sale of the property charged and also to get a personal decree against the defendants 1st set and 2nd set for the balance of his claim remaining due after the sale. The preliminary decree expressly directed the Receivers to continue until discharged. Pursuant to the preliminary decree, a final decree for sale of the said properties was made, but the said decree did not in any way modify the direction given in the preliminary decree in respect of the Receivers. The combined effect of the

two decrees is that the final decree did not terminate the suit, for the plaintiff would still be entitled to get a personal decree in case the sale proceeds were sufficient to pay off his dues. It cannot, therefore, be said that the suit has been finally disposed of. That apart, the preliminary decree in express terms directed the Receivers to continue till they were discharged. In the circumstances, we are definitely of the opinion that the Receivers continued by the preliminary decree are entitled to function in that capacity till they are discharged.

The third contention of learned counsel for the appellant raises the question whether in the circumstances of this case the Receiver could recover possession from the appellant only by instituting a regular suit against him for eviction. The facts germane to this contention may be briefly recapitulated. On January 14, 1956, the appellant executed a lease deed in respect of the flour mill in favour of the Receiver and there was an express recital therein that the lessee would deliver possession to the Receiver of all the demised premises upon the expiry of the term of lease. The said lease was executed as a part of a compromise scheme for running the mills. The term of the lease had expired. Thereafter the court directed the Receiver to take possession of the property and auction the same to the highest bidder. The question is whether under the circumstances a court can dispossess the appellant under a summary process or whether it could only do so by directing the Receiver to file a suit for eviction. The material provisions of Order XL of the Code of Civil Procedure read :

Rule 1. (1) Where it appears to the Court to be just and convenient, the Court may by order -

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(b) remove any person from the possession or custody of the property;

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(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof,.....

(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.

Under this Order, a receiver is an officer or representative of the court and he functions under its directions. The court may, for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Sub-r. (2) of rule 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit, the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. In the present case, the appellant was a party to the suit and the court, through the Receiver took possession of the mill and thereafter the Receiver, during the course of the administration of the property, under a compromise arrangement for running the mills, leased out the flour mill to the appellant with an express condition that the appellant should redeliver the property to the Receiver on the expiry of the lease. Admittedly the term of the lease had expired, and the court directed the Receiver to take possession of the mill. The court, in our view, was

legally competent to confer a power on the Receiver under Order XL, r. 1(1)(d), of the Code of Civil Procedure to recover the property from the appellant.

The decisions cited at the Bar are not of much relevance to the present case. *Krista Chandra Ghose v. Krista Sakha Ghose* [(1908) I.L.R. 36 Cal. 52.] is a case where a lease was granted by a Receiver acting under an order of court and the possession of the property had been given to the lessee, and subsequently certain parties applied to the court for a declaration that the lease was invalid on the ground that it was obtained by collusion. There the court held that no summary order could be passed to set aside the lease and the proper remedy would be by a suit against the Receiver and also against the lessee. In that case the lessee, though he was a party to the suit, acquired a leasehold right under the lease deed and third parties, who offered a higher rent, sought to question the lease on the ground of collusion. Woodroffe, J., held that the dispute could only be decided in a properly instituted suit. The Rajasthan High Court in *Nanakchand v. Pannalal* [A.I.R. 1951 Raj. 152.] held that a Receiver could not recover the rent from a lessee in a summary order of the court, but should file a suit just like any other landlord. The Allahabad High Court in *Loonkaran v. I. N. John* [A.I.R. 1961 All. 59.], though it conceded that where a lease had been executed by the Receiver, the lessee may ordinarily be evicted from the demised property only by a regular suit, held that where after the expiry of the term of the lease granted by a Receiver, the sub-lessee in possession gave an undertaking to the court that he would vacate the premises in favour of the prospective lessee if no fresh lease was granted in his favour, the court has power to eject the sub-lessee in its summary jurisdiction. The learned Judge observed at p. 59 thus :

"By giving an undertaking to the court that he would vacate the Mill in favour of the prospective lessee and by bidding in the court-auction the appellant, in our view, submitted himself to the jurisdiction of the court. The appellant could therefore be ejected by summary process, instead of by a suit."

So too, the High Court of Travancore-Cochin in *Sivarajan v. Official Receiver, Quilon District* [I.L.R. 1953 T.C. 30.] held that where the period of the lease granted to the receiver had already expired and as per the express stipulation in the lease deed the lessee was bound to surrender possession of the property without raising any objection at all, the Court could summarily evict him. The learned Judge made the following observations at p. 39 :

"Even though the lease deed stands in favour of the receiver the express undertaking given by the lessee for an unconditional surrender of the property is in favour of the court.The summary enforcement of the undertaking thus taken by the court is only a step towards the discharge of the duties of the court in the management of the estate and it cannot be said that the court has lost its jurisdiction in that direction merely because the property has been in the possession of a lessee."

Further citation would be redundant. These and such decisions seem to hold that a court cannot evict a lessee from a receiver, whether he is a party to the suit or not, in exercise of its summary jurisdiction unless the lease expressly conferred a right of re-entry under the lease deed on the receiver. It is not necessary to demarcate the boundaries of the summary jurisdiction of a court in managing an estate through a receiver, for in this case we are clearly of the opinion that the appellant was in possession of the mill under an agreed and integrated scheme for running the mills by the different partners, though he was put in possession under a document described as a lease deed. In effect the Receiver, during the course of the management, entrusted each mill to one of the partners so that the mills might be properly worked under experienced hands. The appellant

expressly agreed to put the Receiver in possession of the mill after the expiry of three years. No question of deciding the conflicting claims of a lessee and a third party arises in this case; nor is the court called upon to pronounce on the vested rights of a lessee in conflict with those of the Receiver. But this is a simple case of a court in the course of its administration of the estate through the agency of a receiver making a suitable provision for the running of the mills. As the agreed term had expired, the court, in our view, could certainly direct the appellant to put the mill in the possession of the Receiver.

Lastly it has been brought to our notice that an application for the discharge of the Receiver is pending in the lower court. Any observations that we have made in this judgment are not intended to affect the merits one way or other in the disposal of that application. That application will be disposed of in accordance with law.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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