
(2013) 09 CAL CK 0110
In the Calcutta High Court

Case No : F.A. No. 26 of 2010 and C.A.N. No. 7552 of 2011

Bharat Petroleum Corporation Limited	APPELLANT
Vs	
Aarvee Finvest Private Limited	RESPONDENT

Date of Decision : 13-09-2013

Acts Referred:

Citation : (2013) 4 CALLT 386 : (2014) 1 RCR(Rent) 217 : (2014) 1 WBLR 1023

Hon'ble Judges : Subhro Kamal Mukherjee, J; Harish Tandon, J

Bench : Division Bench

Advocate : Sudhir Chandra Agarwal, Mr. Surojit Nath Mitra, Mrs. Suparna Mukherjee and Ms. Maya Bhadra, for the Appellant; Saktinath Mukherjee, Aniruddha Chatterjee and Mr. Srijib Chakraborty, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.—This is an appeal against judgment and decree dated June 29, 2009 passed by the learned Civil Judge (Senior Division), First Court at Alipore, District: South 24 Parganas, in Title Suit No. 92 of 2008. By the impugned judgment and decree, the learned trial judge decreed the suit on contest without any order as to costs. The trial court granted a decree for recovery of khas possession of the suit premises along with buildings and structures standing thereon by evicting the defendant and its men and agents. The Trial Court, also, granted a preliminary decree for mesne profit from the date of institution of the suit till recovery of possession at such rate as to be determined in a separate proceeding under Order XX, rule 12 of the Code of Civil Procedure. The defendant was directed to vacate the suit premises within three months. In default, liberty was granted to the plaintiff to put the decree into execution.

2. The premises in question is 56A, Syed Amir Ali Avenue, Kolkata-700017 along with buildings and structures standing thereon measuring, more or less, 18 cottahs 13 chittaks and 9 square feet.

3. The plaintiff contended in the plaint that the property-in-suit originally belonged to one Sankar Chatterjee. After the demise of the said Sankar

Chatterjee, the property, according to natural law of succession, devolved upon his widow Shrimati Mira Chatterjee.

4. By executing the registered kobala dated June 16, 2003, the said Shrimati Mira Chatterjee transferred her right, title and interest in the suit property in favour of the plaintiff.

5. The original owner, by a registered deed of lease, inducted Burma shell Oil Storage and Distributing Company of India as the lessee for a period of 20(twenty) years at a rent of Rs. 3,520/- (Rupees three hundred (sic thousand) five hundred and twenty) only per month payable according to English Calendar. The lease was granted on April 29, 1963. Subsequently, the lease as extended for further period of 20(twenty) years, which expired on April 30, 2003.

6. In view of the nationalisation of Burma shell Oil Storage and Distributing Company of India under the Burma shell (Acquisition of Undertaking of India) Act, 1978, the leasehold interest of the said Company stood transferred, along with its assets and liabilities, to Bharat Petroleum Corporation, with effect from August 1, 1977.

7. The Bharat Petroleum Corporation was the defendant in the suit.

8. It was contended that the plaintiff had duly communicated its acquisition of title in the property-in-suit from the said Shrimati Mira Chatterjee. The plaintiff demanded vacant possession on the expiry of the lease. As the defendant refused to deliver possession in favour of the plaintiff, the said suit was instituted by the plaintiff, inter alia, for recovery of possession.

9. The principal defence taken in the written statement was that the predecessor-in-interest of the defendant took lease of vacant land and, in terms of the said deed of lease, constructed and erected structures on the said premises. Therefore, it was contended that the tenancy of the defendant was a thika tenancy. With the promulgation of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 (the said Act of 2001 in short), the property stood vested in the State and the defendant became direct thika tenant under the State. Thus, the civil court had no jurisdiction to entertain the suit and to pass a decree for recovery of possession. The title of the plaintiff was challenged by contending that the original owner, on the date of the transfer, had no subsisting interest in the property in view of the said Act of 2001.

10. The point for consideration in this appeal is whether the registered deed of lease dated April 26, 1963 for a term of 20(twenty) years created a thika tenancy when pucca constructions were raised by the lessee in terms of the said deed of lease.

11. The Calcutta Thika Tenancy Act, 1949 (the said Act of 1949 in short), was introduced to protect the interests of the thika tenants. The thika tenant was defined under sub-section (5) of section 2 of the said Act, 1949, which runs as under:

2(5) "thika tenant" means any person who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such person, but does not include a person-

(a) Who holds such land under that another person in perpetuity; or

(b) Who holds such land under that another person under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; or

(c) Who holds such land under that another person and uses or occupies such land as a khatal.

12. Therefore, under the said Act of 1949, the predecessors-in-interest of the defendant could not be treated as a thika tenant as they were holding the land under a registered lease executed in 1963 for a term of 20 twenty) years.

13. Admittedly, the predecessors-in-interest of the defendant had made pucca constructions according to the terms of the lease. In the written statement, it was categorically admitted that the lessee in terms of the lease has constructed and erected pucca structures.

14. u/s 10A(i) of the said Act of 1949, a thika tenant could erect pucca structures, with prior permission of the thika controller, only for residential purpose.

15. Admittedly, the property was leased out for setting up a retail outlet for petroleum products and not for residential purpose. The scheme of the acquisition Act and its subsequent amendments were to permit a tenant with kutcha structure, whether it was acquired or erected, to make pucca construction with the prior permission of the thika controller. Although a thika tenancy could be for residential, business or manufacturing purpose, the said Act of 1949 conferred the right to make pucca structures only for residential purpose and the said Act of 1981 for residential and business purposes, but none of the said Acts conferred such right on thika tenant for manufacturing purpose.

16. In *Lakshmi Moni Dasi v. State of West Bengal* reported in (1987) 2 CHN 148, a special division bench of this Court held:

(a) The impugned Act is not protected under Article 31C of the Constitution of India as it is found on scrutiny of different provisions of the Impugned Act that the Impugned Act has not been enacted to give effect to provisions of Articles 39(b) and (c) of the Constitution and the impugned Act is open to challenge on the score of violations of part III of the Constitution.

(b) Within the scope and ambit of Section 5 of the impugned Act only lands comprised in thika tenancies within the meaning of the Calcutta Thika Tenancy

Act, 1949 comprising a kutchha structure and/or a pucca structure constructed for residential purpose with the permission of the controller under the Calcutta Thika Tenancy Act, 1949 and khatal lands held under a lease shall vest and save, as aforesaid, no other land and structure vests under the impugned Act.

17. However, the decision of the special division bench was challenged before the Supreme Court of India. We are, now, informed that with the enactment of Calcutta Thika Tenancy (Acquisition and Regulation) Act, 2001, the appeal has been withdrawn.

18. During the pendency of the matter before the Apex Court, the next Act, namely, the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 (the said Act of 2001 in short), was enacted. The Act of 2001 repealed said Act of 1981. The said Act of 2001 was given effect from January 18, 1982, that is, from the same date on which the said Act of 1981 was brought into force.

19. The said Act of 2001 had wider application. Apart from the Kolkata and the Howrah Municipal Corporation, the lands within other municipalities in West Bengal were brought under the applicability of the said Act.

20. Section 2(14) of the said Act of 2001 originally defined the thika tenant as follows:

thika tenant means any person who occupies, whether under a written lease or otherwise, land under another person, and is, or but for a special contract, would be, liable to pay rent at a monthly or any other periodical rate for that land to that another person, and has erected or acquired by purchase or gift any structure including pucca structure, if any, on such land for residential, manufacturing or business purpose, and includes the successors-in-interest of such person...

21. The above quoted original definition of thika tenant was amended by the West Bengal Thika Tenancy (Acquisition and Regulation Amendment) Act, 2010. By the said amendment Act, the following words "by purchase or gift any structure on such land" occurring in the original definition were substituted by the words "by purchase or gift any structure including pucca structure if any on such land."

22. The 2010 Amendment Act was a piece of conditional legislation. The Amending Legislation became an Act with the publication of the assent on October 5, 2010.

23. Section 1(2) made the Amending Act conditional in the sense that it provided that it would come into force on such date as the State Government by notification in the Official Gazette appoint. The Amending Act did not at all provide for any retrospective operation for the amended provisions. It is admitted that the Amending Act was enforced with effect from November 1, 2010.

24. The result is that the substitution in the definition of thika tenant became operative only with effect from November 2010 and not earlier.

25. The amended definition of 2010 did not redefine the thika tenancy as defined in the said Act of 1949, in the said Act of 1981 or as originally in the said Act of 2001. The amendment Act of 2010 amended the definition of thika tenant u/s 2(14) of the said Act of 2001 only and that too with effect from November 1, 2010.

26. The thika tenancy dealt with by the said Act of 1981 or by the said Act of 2001 was a thika tenancy as it existed on January 18, 1982 when both the Acts were brought into force.

27. The said Act of 2001 like the said Act of 1981 provided for continuance of thika tenants after vesting of the lands along with the landlord's interest. Several incidences of tenancies in respect of lands vested in the State were indicated in both Acts.

28. The amended definition of thika tenancy under the said Act of 2001 has nothing to do with the thika tenancies, which were liable to be vested with the coming into force of the said Act of 1981 on January 18, 1982. The amended definition deals with a post-vesting thika tenant continuing to hold under the State with the extended right to make pucca structures.

29. It is pertinent to note that the pucca structure has been separately defined u/s 3(7) of the said Act of 1981 without altering the definition of the thika tenant. Section 6 of the said Act, which relates to the Incidence" of the tenancy in respect of the lands vested in the State wherein sub-section (4) thereof entitles the thika tenants to construct the pucca structure in accordance with the sanctioned building plan of the Kolkata Municipal Corporation or the Howrah Municipal Corporation, as the case may be, for the residential and the business purposes. Similar provision is retained u/s 5(5) of the said Act of 2001 with the proviso added thereto which requires a "no objection certificate" from the thika Controller before making pucca construction.

30. The reasons for non-inclusion of the pucca structure within the definition of the thika controller either in the said Act of 1949 or the said Act of 1981 or in the said Act of 2001, before the amendment is brought in the year 2010 can be gathered from the Division Bench Judgment of this Court in case of Sri Sri Satyanarayan & Ors. v. S.C. Chunder reported in (2001) 3 CHN 641 in these words:

The root of the Thika Controller's jurisdiction is the State Act passed in West Bengal which is called the Calcutta Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981. Its precursor was the Thika Tenancy Act of 1949. The purpose of those Acts was to grant some protection to poor persons who happened to be living within city limits, but who had means to afford only kutcha structures above their head.

* * *

The question which automatically comes to one's mind is that if construction of any structure make one a thika tenant then there would be a duplication of the rent laws. A tenant would be protected, if he constructs or obtains a permanent structure on land, both by the Thika Tenancy Laws and by the Rent Controller Legislation. However, this unwholesome anomaly has been avoided from the very beginning by means of judicial decisions whereby the words "any structure" in the Thika Tenancy Act have been consistently held to mean kutchra or temporary structure.

31. Further, inspiration can be drawn from the single bench decision in *India City Properties Limited v. Bharat Petroleum Corporation Limited* reported in (2010) 1 CHN 163. It has been held that the pronouncement of the special division bench in *Lakshmi Moni Dasi* (supra) has remain unaffected by the amended Section 5 of the said Act of 1981:

Thus, what is to vest in the State under the 1981 Act since amended in 1993? It is the land comprised in and appurtenant to the tenancies of thika tenants that would vest in the State and on such vesting a thika tenant would be a tenant under the State. A thika tenant is one who erects a structure not a pucca or of permanent duration on the land of the landlord. If it was the intention of the legislature to include pucca construction within the ambit of thika tenancy, then no separate definition of pucca structure would have been necessary either in the 1949 Act or the 1981 Act, as amended in 1993. Section 3(4) of the 1949 Act clearly entails that a thika tenant raising pucca structure on the thika land would be evicted. Again the definition of pucca structure in 1981 Act, section 2(7), is not without significance. This definition has to be read with section 6(4) of the 1981 Act with amendment in 1993. This section 6(4) of the 1981 Act, since Amended in 1993, clearly provides that after a thika tenancy vests in the State a thika tenant then only can erect a pucca structure in accordance with building plan of the Calcutta Municipal Corporation. At the cost of repetition it has to be mentioned that there is practically no distinguishing feature between the section 5 as it was there in 1981 Act and section 5 as it has been in that Act after its Amendment in 1993 with retrospective effect from 18.01.1982 so far as the lease in question is concerned. In other words, the Full Bench decision in *Laxmi Moni* is not materially affected by 1993 Amendment with particular reference to amended section 5. Clauses (a)(b)(d) in the amended section 5 do not at all apply to the lease in question. In clause (c) there is reference to "other lands" which are not covered by clauses (a) and (b) held under a written lease or otherwise including open area, roads, passages, tanks, pools and drains. Now there has been a definition of "other lands" in section 3(5A) in the amendment Act, but there was no definition of "other lands" in the original 1981 Act, although there (sic there) was reference to such "other lands" in the original section 5 in 1981 Act. I have reproduced both the original unamended section 5 and the amended section 5 at paragraphs 20 and 21 of this judgment. Now in

terms of the definition of "other lands" in the amended section 3(5A) "other lands" includes any vacant land or tank. Evidently demised lands is not covered by "other lands" as is used in clause (c) of the amended section 5 because the demised land with a boundary wall and two privies inside was for storage and sale of petroleum products, motor accessories by construction of building, pumping plant and accessories which the respondent did on such land long before the amended section 5 came into effect. The other distinguishing feature between the original section 5 and the amended section 5 is that in the former registered lease for a period of less than 12 years remained outside the scope and ambit of thika tenancy, while in the amended section 5 duration of lease has been done away with. So far as the duration of lease is concerned it has to be mentioned that such distinguishing feature is of no consequence. Therefore, so far as the lease of the case in appeal is concerned Laxmi Moni's (supra) case has remained unaffected by the amended section 5 of the 1981 Act.

32. On behalf of the defendant/appellant reliance has been placed upon the amended definition of thika tenants u/s 2(14) of the said Act of 2001. Such reliance does not appear to be well placed as the amended definition came into force only on November 1, 2010 whereas according to the case of the defendant/appellant, the vesting had taken place on January 18, 1982.

33. On behalf of the defendant/appellant it has been submitted that the decision of the special division bench was not acceptable and deserving to be reconsidered. But, that judgment, until upset, is a binding precedent to be followed by us.

34. On behalf of the appellant the question of maintainability of the suit has been raised in the context of section 5(3) as it was originally there in the said Act of 2001. Section 5(3) of the said Act of 2001 Act originally provided that if any question arises as to whether a person was a thika tenant or not, the matter would be decided by the Controller. The Amendment Act of 2010 coming into force from November 1, 2010 substituted section 5(3) with the following sub-section:

5(3) If any question arises as to whether a person is a thika tenant or not or whether the land in question is thika land or not, the controller, either on his own motion or upon receiving any information, may, after giving the persons interested an opportunity of being heard and after examining all such documents, and particulars, as may be considered necessary, enquire upon and decide such question.

35. When this substitution is brought about with effect from November 1, 2010, it may not have any application to a question arising prior to January 18, 1982.

36. Section 5 of the said Act of 2001 professes to deal with "incidents" of tenancies in respect of lands vested in the State. Section 5(3) of the said Act of 2001 was not intended to apply to any question arising prior to its enforcement or on the date of vesting on January 18, 1982.

37. In any view of the matter a Civil Court has the inherent power to determine the existence of non-existence of its jurisdiction.

38. In the instant case, the basic points raised on behalf of the appellants is not even permitted to be raised by the said Act of 1949 itself as the tenure of the lease was for 20(twenty) years and the structure, was admittedly pucca and permanent.

39. The expression "any structure" occurring in the definition of thika tenant in the said Act of 1949, in the said Act of 1981 and, also, in the said Act of 2001, prior to the amendment with effect from November 1, 2010, had the connotation indicated by the special division bench.

40. It is indeed significant that even after the judgment of the special division bench delivered on July 8, 1987, the legislature, while enacting the said Act of 2001, did not at all indicate its disapproval of the interpretation given to the expression "any structure" by the said special division bench.

41. On the contrary, the expression "any structure" in the definitional clause of thika tenant in the said Act of 2001 coming into force on November 22, 2002 retained the same expression as interpreted by the said special division bench without any qualification or modification.

42. The legal effect of such retention was to accord legislative approval to the judicial pronouncement by the said special division bench.

43. All the more significant is the withdrawal of the special leave petition, in view of the enactment of the 2001 Act, it goes without saying that such withdrawal could not affect the legality and operation of a judgment under appeal.

44. The effect of retention of the same expression in a subsequent enactment in the context of a prior judicial pronouncement has been dealt with by the Full Bench of this Court in Renuka Pachal Vs. Sm. Chapa Guha Neogi and Others, The Full Bench observed that:

When the State Legislature enacted the West Bengal Act XXVI of 1969 raising the District Judges jurisdiction from ten thousand rupees to fifteen thousand rupees, it must be presumed to have known how Section 4 of the West Bengal Act XVI of 1957 was interpreted by the division bench of this Court in the cases of Loke Nath Mueherjee Vs. Sueasona Sadhurhan, and Mukunda Das Nandy and Others Vs. Bidhan Chandra Roy and Others, In spite of the said decisions, the same savings clause was introduced by section 5 of the 1969 Act. In section 5, it was stated: "Nothing in this Act shall apply to or affect any appeal from any decree or order passed before the commencement of this Act." "This was, therefore, a conscious adoption or approval by the legislature of this Court's decisions in Mukunda Das Nandy and Others Vs. Bidhan Chandra Roy and Others, . It is interesting that the Bengal, Agra and Assam Civil Courts Act has once again been amended by the West Bengal Act XIII of 1977 which came into force on June 27, 1977. Certain amendments were made to section 25 of the original Act and the

same savings section is there which is section 4.

Our point is that by adopting the same savings provisions over and over again the State Legislature made both the 1969 Act and 1977 Act retrospective in operation to a limited extent. In Craies on Statute Law, 6th edition at 167 it is stated: "There is a well known principle of construction that where the legislature used in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted unless a contrary intention appears.

The Supreme Court adopted this principle of construction in P. Vajravelu Mudaliar Vs. Special Deputy Collector, Madras and Another, and i Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta, . Our Court, also, took the same view in Nishikanta Roy Vs. Monmohon Sen Gupta,

45. In the result, the points raised by the appellant in support of the appeal do not survive to call for any interference with the judgment under appeal.

46. Therefore, the appeal is dismissed.

47. The judgment and decree passed by the learned Trial Judge are affirmed. In view of dismissal of the appeal, the application filed under C.A.N. 7552 of 2011 becomes infructuous and is, also, dismissed.

We direct the parties to bear their respective costs in this appeal.

Harish Tandon, J.

I agree.