

(2011) 04 CAL CK 0004

In the Calcutta High Court

Case No : GA No. 1079 of 2006, GA No. 1706 of 2006 and CS No. 281 of 2005
and GA No. 2110 of 2006 and CS No. 114 of 2006

Bharat Petroleum Corporation Ltd.

APPELLANT

Vs

The Howrah Motor Company Ltd.
 Atindra Private Ltd.
Vs Bharat Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Calcutta Thika and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981
— Section 5
Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 — Section 2(14)
Constitution of India, 1950 — Article 226

Citation : (2011) 2 CHN 891

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Rajyashree Choudhury Mukherjee and Siddhartha Mitra, for Bharat Petroleum Corporation Limited, for the Appellant; Hiralak Mitra Utpal Bose, Dwaipayan Sengupta, Aryak Dutta, Anindya Lahiri, Arnab Chakroborty and Bithika Mandal for Atindra Private Limited, for the Respondent

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—The Plaintiff in the earlier suit has, by operation of law, come to be entitled to the rights of Burmah Shell Oil Storage and Distribution Company of India Ltd. CS No. 281 of 2005 was filed against the first Defendant company and the person who was seemingly in control thereof for a declaration that the Plaintiff as lessee of premises No. 14A, R.N. Mukherjee Road, Calcutta 700001, was entitled to run and administer its retail outlet thereat and a perpetual injunction restraining the Defendants from encroaching on the land or interfering with the Plaintiff and its agents carrying on business thereat. On an application by it, the third Defendant was added as a party to the suit since it claimed to be the lesser in respect of the suit premises. Such added Defendant in the earlier suit is the Plaintiff in the subsequent suit where the Plaintiff in the earlier suit is the only Defendant.

2. Burmah Shell obtained a lease of the premises for a period of 10 years in the year 1957. Under a fresh agreement of April 30, 1968 Burmah Shell was granted a lease of the land measuring about four cottah with effect from October 1, 1967 for a period of 21 years. The document records, inter alia, that the lessee would use the premises "as a depot for storage and sale of Petroleum products, Motor Accessories etc and for all such purposes the lessee shall be of liberty to make excavations therein for tanks for the purpose of storage of Petroleum and...have right to lawfully erect thereon any building, pumping plant and accessories as may be requisite...." Clause 9 of the deed records that upon the "breach of any of the covenants or conditions by the Lessee...it shall be lawful for the Lesser to treat this demise as if an end and to determine the demise and to re-enter the demised premises...."

3. It appears to be the fairly admitted position that Burmah Shell constructed a sales room at the premises and appointed the first Defendant in the earlier suit as a dealer thereat. The assets of Burmah Shell in India were taken over by the government of India pursuant to an Act of 1976 and the rights subsequently vested in Bharat Petroleum Corporation Ltd (BPCL). Sometime in the 1980s, the Plaintiff in the later suit, Atindra Private Limited (Atindra), came to acquire the premises from the erstwhile owners and BPCL appears to have accepted Atindra as its landlord.

4. After the Calcutta Thika and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981 came into effect, petrol pumps in the city were thought to be covered by the statute. On an appeal arising out of an order passed on a petition under Article 226 of Constitution filed by BPCL, an order was made on December 13, 1988 that provided that the rents payable in respect of the premises till January, 1988 would be paid to advocates representing Atindra in such proceedings and the rents payable from February, 1988 would be paid to the Registrar, Original Side. It is not in dispute that BPCL has made payments in terms of such order and it continues to deposit the monthly rents with the Registrar.

5. In or about the year 2000 BPCL terminated the dealership of Howrah Motors whereupon the decision was challenged in the writ jurisdiction of this Court. Such attempt, understandably, failed and the suit filed before the City Civil Court for the same purpose also came to naught. During the time that the notice of termination was sub judice, BPCL could not operate its retail outlet at the premises though it claims that it continued in juridical possession thereof. After Howrah Motors' endeavor to continue the dealership arrangement failed to garner judicial support, BPCL dithered awhile before instituting CS No. 281 of 2005. On the maiden interlocutory application in its suit, BPCL obtained an order on March 28, 2006 which restrained the original Defendants, their servants, agents and assigns from interfering with or obstructing the Plaintiff from carrying on its business of sale of petroleum products from the premises and further injected the Defendants from committing trespass or encroaching into the retail

outlet in any manner whatsoever. A prayer for the appointment of a receiver was declined. Atindra had an application ready for being added as a Defendant to the earlier suit but took no steps for moving such application before the order dated March 28, 2006 was made. Atindra filed a subsequent application in April, 2006 for modification and stay of operation of the order dated March 28, 2006. On such application a special officer was appointed on April 6, 2006 to inspect the premises and report to Court. The special officer's report of April 17, 2006 recorded that as to who was in "possession of the pump is a matter of records." The parting line of the report observed that it was "not a petrol pump in operation." On April 12, 2006 Atindra was added as a party to the earlier suit but it was specified that it would have no right to make any counter-claim. On appeal, the added Defendant was left free to lodge a counterclaim.

6. Atindra's suit was filed in or about May, 2006 claiming a declaration that BPCL had no right in respect of the premises and that Atindra had exercised its right of re-entry thereat with an alternative prayer for eviction of BPCL. The three applications that have come up - not at the instance of the parties but upon the court noticing such matters not having being disposed of - are Atindra's application for modification of the order dated March 28, 2006 in the earlier suit; BPCL's subsequent application for the appointment of a receiver over the suit property; and, Atindra's application in its suit for an injunction restraining BPCL from disturbing Atindra's possession of the premises.

7. BPCL claims that Atindra and Howrah Motors are so closely connected that the two ought to be seen as one. It contends that in view of the resistance put up by Howrah Motors following the determination of the dealership agreement, BPCL could not be in physical possession of the property but BPCL was legally entitled thereto and continues to be in juridical possession thereof till dispossession therefrom in accordance with law. BPCL relies on the averments in its petition and the photographs appended thereto to assert that it was only upon the order for a special officer being appointed that Howrah Motors and Atindra went about taking the law into their own hands and attempting to disturb BPCL's legal possession of the property. Indeed, the photographs relied upon by BPCL and claimed to have been taken on April 12, 2006 reveal that machines have been uprooted and thrown on the roadside to make way for cars to be parked at the premises. Some of the photographs show the cars coming in to be parked and the special officer's report corroborates that by the time he visited the premises cars were parked bumper to bumper thereat. Though the photographs relied upon by BPCL have not been questioned by Atindra, a rival set of photographs appended to Atindra's application shows machines being brought into the premises on April 12, 2006 and painting and other works being undertaken thereat on the same day. Atindra suggests that it was BPCL that had attempted to alter the possession obtaining at the site for quite some time, on the strength of the order dated March 28, 2006 though such order was restricted to Howrah Motors and had nothing to do with the rights of BPCL under the deed of lease of 1968.

8. BPCL has relied on several judgments in support of its rights in respect of the property and its entitlement to a receiver being appointed thereat. A judgment reported at Satyanarayan Banerji and Another Vs. Kalyani Prosad Singh Deo Bahadur and Others, has been placed in support of the contention that the appointment of a receiver will not affect the title to the property over which the receiver is appointed but it might only temporarily affect the right of possession thereto. BPCL says that Atindra has attempted to change the position as to possession during the pendency of the actions or, at the very least, after the institution of BPCL's suit and the Court should not countenance such conduct. A judgment reported at T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, has been placed for the five requirements recognized therein in the appointment of a receiver. In addition, BPCL has relied on a Full Bench judgment reported at Lakshmimoni Das and Others Vs. State of West Bengal and Others, and a Division Bench judgment reported at 1986 (1) CHN 21 (Jatadhari Daw v. Smt Radha Debi) to suggest that the land and structures were governed by the 1981 Act and stood vested in the state. BPCL has also referred to the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 and particularly to the definition of a "thika tenant" in Section 2(14) thereof.

9. Atindra says that even though at one point of time Howrah Motors and Atindra could have been seen as the same entity, long prior to the institution of the earlier suit, the controlling interest of Atindra had passed from the Days to another. Atindra submits that BPCL's claims against Howrah Motors and BPCL's rights in respect of the property have to be distinguished. According to the Plaintiff in the later suit, BPCL had no right as on March 28, 2006 to retain or repossess the property and its application for the appointment of a receiver should be seen in such light. According to Atindra, the property lay abandoned and had attracted anti-socials whereupon Atindra had entered into possession. Atindra claims to have used the property as a parking lot for cars belonging to those in control of Atindra and their friends.

10. The legal issues have to be sifted from the chaff of prejudice that hangs in the air. It matters little, in legal terms, as to whether Howrah Motors and Atindra are de facto the same entity in the sense that the same minds control the two corporate bodies. What is of significance at the moment is that there is no claim by BPCL against Atindra and BPCL's prayer for the appointment of a receiver over the premises is on its insinuation that Atindra has stepped in and taken over from Howrah Motors. It cannot be lost sight of that there is no independent suit by BPCL qua its right - juridical or actual - to continue in possession of the property whether under the 1968 deed of lease or otherwise. In the context of the suit in which BPCL's application for the appointment of a receiver has been made, the prayer has to be seen in furtherance of the relief's claimed in that suit and not directed independently against Atindra for Atindra having allegedly dispossessed or attempted to dispossess BPCL from the property. In the absence of BPCL having amended its plaint to enlarge the gamut of the suit notwithstanding Atindra's unwise move to join the fray, BPCL's plea for

appointing a receiver has per force to be viewed on the basis of the underlying suggestion that Atindra is an alter ego of Howrah Motors.

11. It is by the same test that Atindra's application in BPCL's suit for modification of the order dated March 28, 2006 is found to be misconceived. Since such matter was not within the scope of BPCL's suit, the order dated March 28, 2006 cannot be understood to extend beyond the relationship between BPCL and its erstwhile dealer, Howrah Motors, and spill into the rights under the deed of lease of 1968. That Atindra filed an independent claim bears testimony to Atindra's subsequent realization that the right it canvassed by way of its modification application in BPCL's suit was beyond the purview of that action. The order dated March 28, 2006 cannot be read to imply that it conferred any benefit on BPCL in respect of BPCL's right to remain in occupation of the premises.

12. The assessment can be taken to a different level and beyond the contours of BPCL's claims in its suit. If BPCL's application for the appointment of a receiver is seen to be in furtherance of its rights against Atindra - which it should not be, given the limited ambit of the action - BPCL still may not have a case to remain in possession or for the appointment of a receiver pending adjudication of its claim. There are two aspects to this consideration which will overlap with the matters relevant in BPCL's defence to Atindra's suit and the interlocutory application made therein. As at the date of BPCL's suit being launched, it had no right to continue in possession of the property whether under the deed of lease or under the Act of 1981. The point of prejudice as to how Atindra dispossessed BPCL from the property asides, BPCL had no legal right either on the date of institution of the suit or when its application for appointment of a receiver was filed to remain in possession of the property. BPCL has not been able to show any right to continue in possession after 1988 and even under Court orders it paid rent to advocates then representing Atindra till January, 1988 and thereafter to the Registrar, Original Side. BPCL cannot demonstrate that Atindra accepted rent from it after September, 1988 for BPCL to assert that it had become a monthly tenant under Atindra after the expiry of the lease by efflux of time. BPCL seeks to assert its juridical possession of the premises since it cannot show actual possession thereof. It is possible that interim orders obtained by Howrah Motors prevented BPCL from repossessing its retail outlet from its erstwhile dealer and operating the same. On the basis of affidavit evidence, BPCL's case of having been dispossessed of its juridical possession of the petrol pump on April 12, 2006 cannot be accepted against the assertion by Atindra that BPCL had attempted to use the order dated March 28, 2006 to reclaim the property. There is no clear case of forcible dispossession made out by BPCL since its refrain is that it was only in juridical possession of the premises. In any event there is no action by BPCL for restoration of its possession.

13. The Act of 2001 came into force only in the year 2010. It does not appear, prima facie, that BPCL was in occupation of the property in the sense that

Section 2(14) of 2001 Act demands. Further, the Full Bench in Lakshmimoni Das approved the Division Bench dictum in Jathadhari Daw and held that Section 5 of the 1981 Act covered "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 vest under the impugned Act."

14. Jatadhari Daw dealt with a petrol pump, incidentally originally let out to Burmah Shell. BPCL seeks to distinguish Jatadhari Daw on the ground that there was an existing structure on the land in that case. But it would be evident from Jatadhari Daw that the decision turned on the interpretation of Section 5 of the 1981 Act rather than on the consideration that there were existing structures thereat at the time the lease was granted. Further, paragraph 56(b) of Lakshmimoni Das is the Full Bench's interpretation of the entire ambit of Section 5 of the 1981 Act and such decision has attained finality upon the challenge thereto before the Supreme Court being withdrawn by the State. If BPCL was not in occupation of the premises prior to the 2001 Act coming into effect in 2010, such Act cannot be cited by it to reclaim possession.

15. GA No. 1079 of 2006 and GA No. 1706 of 2006 stand dismissed. GA No. 2110 of 2006 in the later suit is allowed by restraining BPCL from disturbing Atindra's possession in respect of the property.

16. There will be no order as to costs.

17. Under certified photocopies of this judgment if applied for, be supplied to the parties subject to compliance with all requisite formalities.