

(1964) 12 CAL CK 0004
In the Calcutta High Court
Case No : A.F.O.D. No. 217 of 1957

Bhusan Chandra Paul and Others

APPELLANT

Vs

Bengal Coal Co. Ltd.

RESPONDENT

Date of Decision : 07-12-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Transfer of Property Act, 1882 — Section 111, 114

Citation : AIR 1966 Cal 63 : (1966) 1 CALLT 288

Hon'ble Judges : Tarapada Mukherji, J;A.C. Sen, J

Bench : Division Bench

Advocate : Chittatosh Mookerjee and Uma Prosad Mookerjee, for the Appellant;
Joy Gopal Ghose, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Mukherji, J.—The defendants in a suit for ejectment on the ground of forfeiture have come up on appeal against the judgment and decree passed by a Subordinate Judge at Asansol. The suit was by a lessor against the lessees for khas possession on ejectment of the latter from the leasehold property on the ground of forfeiture by the breach of an express condition in the lease providing that on breach thereof the lessor would be entitled to re-enter.

2. Messrs. Bengal Coal Company who we the respondents in this appeal gave a sub-lease in respect of a coal mining area in the year 1948 to appellants 1 to 4 who carried on business in the name of a partnership firm named "Gazadhar Coal Company", which is appellant No. 5 in this appeal. The indenture of lease provided that,

"if any rent, royalty, or any other sum of money reserved and made payable or any part thereof shall be in arrear or unpaid for the space of six calendar months next after the day whereon the same ought to be paid it shall be lawful for the lessors at any time thereafter to re-enter into and upon the said premises or any part thereof."

It was alleged that the defendants-appellants defaulted in the payment of rents and royalties, etc., as stipulated in the indenture and thereby their lease became liable to forfeiture. The said lease was determined by service of notice in November 1952 and thereafter the present suit was instituted. The plaint also included a prayer for recovery of rents and royalties, etc. with interest thereon.

3. The defendants filed a joint written statement denying that any amount was due from them on account of arrears of rent or royalty, the same having been paid to the plaintiff in due course. The defendants also denied receipt of any notice determining the tenancy as alleged.

4. The learned Subordinate Judge found that there was nothing to prove that the defendant paid any amount beyond what was admitted by the plaintiff Company and was credited to the account of the defendants in schedule B of the plaint. He found that the defendants had made default in payment of rents, royalties, etc. in terms of their lease and that because of a breach of an express condition in the covenant which provided for a right of re-entry on breach thereof, the plaintiff Company was entitled to forfeit the lease and to re-enter the leasehold premises. On the question of service of notice u/s 111(g) T. P. Act he found that the same was duly served on the defendants.

5. During the trial the defendants raised a plea that the plaintiff was not entitled to khas possession in view of the vesting of intermediary interests in mining rights in the State Government under the provisions of the West Bengal Estates Acquisition Act of 1953. The learned Subordinate Judge considered this contention and found that considering the position of the parties at or about the time when the cause of action for the suit arose and without allowing extraneous matters to crop up it would appear that the defendants were already trespassers on the leasehold property before the Act of 1953 came into operation and that such unlawful possession of trespassers which kept the plaintiff out of khas possession of the property would not disentitle them to the relief claimed in the suit. In other words he found that in the circumstances of the case there was no vesting of the plaintiffs interest in the disputed coal mining property in the State Government in terms of the W. B. Estates Acquisition Act.

6. After the conclusion of arguments in the suit the defendants filed a petition offering to pay to the plaintiff Company the rents in arrears with interest and cost of the suit within 15 days and praying for relief against the forfeiture. The learned Subordinate Judge considered the prayer in his judgment, but refused to give the relief prayed for.

7. As a result of its findings the trial court granted a decree for khas possession after ejecting the defendants from the leasehold property and a further decree for recovery of the amount as detailed in schedule B of the plaint together with further Interest at the rate of six per cent per annum from the date of the decree till realisation.

8. Against this decree the defendants have come up on appeal. Mr. Chittatosh

Mookerjee appearing on behalf of the appellants urged that the trial court erred in finding that there was a forfeiture of the lease as claimed and that the defendants were not entitled to any relief in view of Section 114 of the Transfer of Property Act. He contended that on the materials on record the trial court should have found that there was no service of notice u/s 111(g) T. P. Act on defendants 3 and 4 and further that it should have been held that the plaintiff Company was not entitled to recover possession in view of the vesting of their intermediary interest in the State Government under the provisions of the W. B. Estates Acquisition Act.

9. On the question of forfeiture, the plaintiff adduced oral evidence to prove non-payment of rents and royalty. None of the defendants were examined in the suit, and no evidence was adduced in support of the plea of payment that was raised in the written statement. According to D. W. 1 Krishnaprosad the defendants have their books of accounts and receipts showing payments, but these were not produced in the suit. As a matter of fact no evidence was adduced to prove the payments alleged and on the evidence on record there is no escape from the conclusion that the amounts claimed in the suit as arrears of rent, royalty, etc. are due and payable and have remained unpaid since the end of 1949. The relevant term in the indenture of lease regarding payment of rent and royalty, etc. and the provision regarding the landlord's right of re-entry on failure to pay the same is embodied in Clause VI (6) of Exhibit 1, the purport whereof has been noted earlier in the judgment. There is no question that breach of the covenant in this regard did entail forfeiture of the lease in terms of Section 111(g) T. P. Act.

10. The question is whether the defendants are entitled to relief against the forfeiture for non-payment of the rent in arrears in terms of Section 114 T. P. Act. The granting of the relief under the section is a matter within the discretion of the court. The petition filed by the defendants in this regard is printed at page 13 of the Paper Book. The offer that was made was not an unconditional one. The defendants still denied that the plaintiff Company was entitled to re-enter and stated that in case the court was inclined to pass a decree for ejectment they would be agreeable to pay the rents in arrears with interest and the full costs of the suit within fifteen days. What Section 114 T. P. Act contemplates is payment or tender to the lessor or the giving of such security as the, court thinks sufficient for making such payment within 15 days. In the present case the offer that was made after conclusion of the arguments was neither a payment nor a tender to the lessor nor was any security furnished to the court with an undertaking to make the payment within 15 days. The offer, thus, was not strictly in terms of Section 114 T. P. Act, and that is virtually what the court has found while rejecting the defendant's prayer in this connection. In order to get the benefit of relief against forfeiture under the Section the lessee is required at the hearing of the suit either to pay or to tender to the lessor the rent in arrear together with the interest thereon and the full cost of the suit or to give sufficient security with the undertaking to make the necessary payment within 15 days. A simple offer to pay the requisite amount within 15 days would not be in

compliance with the requirements of the Section and on the strength of such offer relief against forfeiture cannot be claimed. We find that the defendant's prayer for relief has been rightly rejected.

11. So far as the question of service of notice u/s 111(g) on the defendants is concerned, it is not in dispute that the same was duly served on defendants 1, 2 and 5. Ex. 2 is the notice which was served. Clause IX (iii) to the indenture Exhibit 1 provides as follows:

"Every notice requiring to be served hereunder shall be sufficiently and properly served if sent by registered Post to the address of the Lessees as given before....."

The address given before is the address in paragraph 1 of Exhibit 1 and is village Domohoni, Thana Baraboni Sub-Division Asansol in the District of Burdwan.

12. Exhibits 3 to 3(d) are the postal registration receipts which show that the notices on the defendants were sent to the address above which is within Charanpur Post Office. Exhibits 4 to 4(d) are the postal acknowledgments. Exhibits 4(c) and 4(d) are the acknowledgments in respect of the notice addressed to defendants 3 and 4. In the former the address as originally given is as per the terms of Clause IX (iii) of the indenture (Exhibit 1). But the same appeal's to have been penned through and another address was substituted thereof. So far as Exhibit 4 (d) acknowledgment is concerned the address thereon is as required in the clause above. The postal seal on these two acknowledgments show, however, that they were actually delivered by the Karmatar Post Office in Santnal Parganas. The two notices whereof Exhibits 4(c) and 4(d) are the acknowledgments must have been redirected after they had been registered and posted by or on behalf of the plaintiff Company. Where or by whom this was done has not come out in evidence; but the notices must have been redirected by the postal authorities on some instruction given by or on behalf of the addressees. Exhibit 4(d) was delivered by the Karmatar Post Office although the address of the addressee on it is Domohoni within P. S. Charanpur in the District of Burdwan. Apparently, the redirected address was noted on the envelope containing the notice and the address on the acknowledgment was not corrected accordingly. Whatever that be, the position stands that the notices were directed to the address as given in the indenture Exhibit 1 in terms of Clause IX (in) thereof and in accordance with those terms the giving of the notice by registered post to that address, is to be treated as sufficient and proper service thereof. It was for the defendants to prove that the notices were not duly served, but neither defendant No. 3 nor defendant No. 4 came forward to deny the service.

13. In the case Harihar Benerjee v. Ramshashi Roy ILR 46 Cal 458: (AIR 1918 PC 102) was involved a question similar to the one raised in this suit. It was held

"the personal tender or delivery may take place anywhere: the vicarious tender or delivery must take place at the residence of the person intended to be bound

by the notice. In the case of joint tenants, each is intended to be bound and it has long ago been decided that service of a notice to quit upon a joint tenant is prima facie evidence that it has reached the other joint tenants".

In dealing with service by registered post it was stated.

"..... but it is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself or that he cannot do so by the hand of another person or that if another person does sign it on the addressee's behalf, the presumption is that it never was delivered to the addressee himself mediately or immediately."

The statements above lay down a rule governing the mode of proof relating to service and says in effect that service by registered post of a notice directed to the correct address is prima facie proof if the acknowledgment receipt comes back with the signature of somebody thereon and further that service of such a notice upon one joint tenant is prima facie evidence of service on the others when similar notices on all the joint tenants are sent by post to the correct address.

14. We were further referred to the case Bejoy Chand Mahatab Vs. Kali Prasanna Seal and Others, which says that service on all joint tenants in terms of Section 106 T. P. Act is necessary in order to determine a tenancy, but that is a proposition with which nobody will quarrel.

15. On behalf of the respondent Company we were further referred to the case Kanji Manji Vs. The Trustees of The Port of Bombay, which lays down that notice served on one of the joint tenants is sufficient to terminate a lease. The question involved does not appear to have been discussed in detail as it was not necessary in view of the fact that the learned Advocate concerned conceded the position, but even apart from the broad proposition of law laid down in the case, there is ample justification in the materials on record in the present case in support of the trial court's finding in favour of the service of notice on defendants 3 and 4. The notices on these two defendants were sent by registered post to the address mentioned in the indenture of lease Exhibit I as per Clause IX(iii) thereof. So far as the lessor is concerned he did what he was required to do in terms of the contract and proper service of the notice is to be deemed to have been effected. Further, in view of the fact that the notices were sent by registered post, as evidenced by postal receipts Exhibits 3(b) and 3(d), there would be a presumption of effective service, and the further fact that the acknowledgements of the notices directed to the address given in the indenture Exhibit 1 came back with the signature of somebody would provide prima facie evidence of service. All these taken together would throw the onus on the defendants to prove that they did not in fact receive the notices and that onus remains undischarged. Evidence was adduced to show that Bhatu Mahato whose signature appears on the acknowledgments of Exhibits 4(c) and 4(d) never worked for the defendants concerned. But the best evidence in support of the

denial is wanting because of the non-examination of Bhatu Mahato and of the defendants concerned and because of the non-production of the books and registers of the Company which according to the two witnesses for the defendants examined in the case would show the names of all the persons working for the defendants concerned. The evidence on behalf of the plaintiff was that Bhatu Mahto works under these defendants. On a consideration of the evidence and of the legal position involved we find that the notices u/s 111(g) T. P. Act were duly served on defendants 3 and 4 as well.

Coming now to the question of vesting of the mining interest of intermediaries in terms of Section 28 of the W. B. Estates Acquisition Act, the question came up for consideration in the case *Katras Jharia Coal Co. Ltd. Vs. State of West Bengal and Others*, wherein it has been held that there has been no such vesting for non-service of notice u/s 4 of the Act after amendment of the definition of the term "intermediary" by including within the same the interests of intermediaries in mining interest. We find, however, that the question of vesting is not relevant for the purpose of determining the right of the plaintiff Company to khas possession as claimed. If the interest of the plaintiff Company had vested in the State Government, it would be entitled to receive compensation in respect thereof and a decree for khas possession though it may not be executable would be evidence of plaintiff's right to receive compensation in respect thereof and would entitle it thereto in terms of the Act. The principle that the Court should not pass a decree which would be unexecutable would not be attracted to the case as in any case the decree confers on the decree-holder some legal right of which he would otherwise be deprived. In this view of the matter we are of the view that the provisions of the W. B. Estates Acquisition Act would not in the facts of the case stand in the way of the plaintiff getting a decree in the suit. On the facts proved the plaintiff Company was entitled to a decree if the W. B. Estates Acquisition Act had not been passed. The Court would certainly take into account changes in the law pending the suit that might affect the rights of the parties which are being canvassed therein. But when the right to get khas possession is substituted as a result of the subsequent change in the law by a right to get compensation which would be assessed by the Revenue Officers a refusal by the Court to grant a decree for khas possession would deprive the plaintiff of the right to get full compensation and this is an aspect of the matter which the Court must consider while considering the change in the law pending the suit. In this view of the matter we find that the trial court was amply justified in rejecting the objection taken in this regard by the defendants.

16. In view of the above discussion the suit must be held to have been correctly decreed. The appeal, accordingly, fails and is dismissed with costs. The judgment and decree appealed against are affirmed.

A.C. Sen, J.

17. I agree.

