
(2007) 03 GAU CK 0027
In the Gauhati High Court

Himani Malngiang and Others

APPELLANT

Vs

Lummawshun Minerals (P.) Ltd. and Others

RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 16, 20, 21

Citation : (2007) 3 GLR 890 : (2008) GLT 10 Supp

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—This appeal is directed against the order dated 3.11.2005 passed by the learned Assistant District Judge, Shillong in TS No. 11(H) of 2005 holding that the Court at Shillong has no jurisdiction to try the suit tiled by the appellants for recovery of compensation for wrong done to his/her landed properties situate at Khadduria and Dilong under the Sheila Wahadadarship of the East Khasi Hills District.

2. The controversy arose on the following facts and circumstances. The respondent No. 1 is a company constituted under the Companies Act, 1956 with its registered office at Hotel Polo Towers, Polo Ground, Oakland Road, Shillong and has acquired landed properties at Nongtraï for mining of limestone and shale mines and for construction of a Cement Plant to be built by its present company, namely, Lafarge Surma Ltd. in Bangladesh. To that end, the respondent No. 1 constructed and installed Ropeway Conveyor belt for linking its minestones quarry site at Nongtraï village, Sheila with the Cement Factory site at Chatak, Bangladesh. According to the appellants, the respondent No. 1, while drawing the Conveyor belt, passed through their lands situate at Khadduria and Dilong and had to enter and occupy and use the same without their permission. At this stage, it may be clarified that the appellants are the duly constituted power of attorney holders on behalf of the other owners of the said lands. The appellants are stated to have taken up the matter, firstly, with one Shri SG Lyngdoh, one of

the Directors of the respondent No. 1 by a series of three letters for settlement of compensation, which did bear any result. This led them to issue pleader's notice dated 2.6.2004, which also turned out to be not fruitful. The subsequent letters numbering two sent to the respondent No. 1 in this behalf also came a cropper. This apparently drove the appellants to file the suit claiming the reliefs of recovery of compensation for wrongful possession of their lands by the respondent No. 1 and a prayer for issuing temporary injunction to restrain it from carrying on further construction works on the said lands till the suit was finally decided.

3. The trial court by its order dated 6.7.2005 issued an ad-interim injunction restraining the respondent No. 1 from carrying on all kinds of works on the suit land, the order whereof was served upon the said respondent at its registered office at the Hotel Polo Towers Complex. The respondent No. 1 promptly challenged this order before this Court on the ground of maintainability, jurisdiction, etc. It appears that this Court by the order dated 29.7.2005 in FAO No. 2(T) of 2005 directed the respondent to approach the trial court to raise those points and at the sometime suspending the ad-interim injunction granted by the trial court till the question of jurisdiction was decided. When the trial court accordingly proceeded with the suit the respondent No. 1 filed an application u/s 21 read with Section 151 of the CPC objecting the jurisdiction of the trial court at Shillong to try the suit when the aforesaid lands were situated outside the territorial jurisdiction thereof claiming, inter alia, that though it had its registered office at Hotel Polo Towers at Shillong, it carried on its business at Nongtra Village, Sheila in the District of East Khasi Hills. After hearing the parties, the trial court passed the impugned order allowing the objection of the respondent-company. The trial court is of the view that the respondent-company carried on its business at Nongtra Village of Sheila confederacy. East Khasi Hills District and that all its Directors were residing outside the jurisdiction of the court and further that this findings were in consonance with the correspondences taken up by the appellant with the Directors of the company, who were residing out the jurisdiction of the court. Upon these findings, the trial court took the view that it had no jurisdiction to proceed further with the suit and, consequently, directed the appellant to file the plaint before the competent court of jurisdiction for trial.

4. Assailing the impugned order, Mr. R. Choudhury, the learned Counsel for the appellants contends that the trial court has completely misread the provisions of Section 16 of the Code, in general, and the proviso to Section 16 of the Code, in particular, which in terms provides that a suit to obtain compensation for wrong to immovable property such as the one in the instant case can be filed, among others, in the court within the local limits of whose jurisdiction idea that the relief can be obtained through his personal obedience. According to the learned Counsel, the instant case is one where the respondent usually and voluntarily resides at Hotel Polo Towers, Complex, Polo Bazar, Shillong, or, at any rate, carried on their business thereat, which is its registered office and the reliefs claimed in the suit can be obtained by its personal obedience. Strong reliance is

placed by the learned Counsel upon the following directions:- (i) V. Raghavan v. Rambilas Nandlal (1965) 1 MLJ 313: Union of India v. Logic Systems (P.) Ltd. AIR 1992 Del. 153 to buttress his contentions. On the other hand, Mr. V.G.K. Kynta, the learned Counsel for the respondents, submits that the terms "resides or personally works for gain" must be taken to refer to natural persons and not to legal entities, such as limited companies or Government; such descriptions can properly apply to an individual or individuals, and not to a corporate body. So construed, so submits the learned Counsel for the respondents, the respondent-company cannot be held to be covered by the proviso to Section 16 of the Code and the impugned order holding that the court at Shillong does not have the territorial jurisdiction to try the suit in question is perfectly in order and cannot be assailed in any manner. In support of his submissions, the learned Counsel for the respondents takes me to the following decisions:- (i) Azizuddin and Co. Vs. Union of India (UOI), (ii) Badrinarayan v. Excise Commissioner, Hyderabad AIR 1962 A.P. 382 : (iii) Bakhtawar Singh Bal Kishan Vs. Union of India (UOI) and Ors, and (iv) Harshad Chiman Lal Modi Vs. DLF Universal and Another,

5. To appreciate the rival submissions advanced on behalf of the parties, I may at the outset quote the provisions of Section 16 of the Code, which are in the following terms:

Suits to be instituted where subject-matter situate subject to the pecuniary or other limitations prescribed by any law, suits, -

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property,

actually under distraint or attachment shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

6. In the instant case, the suit is, in substance, a suit for compensation for wrong done to the alleged landed properties of the appellants and is, undoubtedly,

within the purview of Section 16(e) of the Code. There can also be no two opinions that the landed properties in question are situated at Nongtra Village within the District of East Khasi Hills and not at Shillong, although the ownership thereof is yet to be decided. There is also no dispute that the landed properties are held by the respondent-company. Therefore, ordinarily, by the operation of Section 16(e) of the Code, the suit is to be instituted in the court within the local limits of whose jurisdiction the landed properties situate, namely, the court at East Khasi Hills District and not at Shillong. The only question which falls for consideration then is whether the exception carved out in the proviso to Section 16 of the Code will be applicable to this suit. A perusal of the said proviso provides that a suit for compensation for wrong done to immovable property may be instituted at the plaintiff's option either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business or personally works for gain, provided:

- (1) the property is held by or on behalf of the defendant;
- (2) the relief sought can be entirely obtained through the personal obedience of the defendant; and
- (3) the property is situate in, and not beyond, India.

7. The proviso is obviously an exception to the main clauses and should not be construed as widening their scope. It will, thus, apply only if the suit falls within one of the categories mentioned in the section and complete relief could be granted by compelling obedience of the defendant to the decree. The personal obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the court or carries on business within those limits. For in the one case, the person of the defendant being within the jurisdiction and in the other his personal property, the court may, if he does not comply with the judgment, direct the arrest of the defendant and commit him to jail or order that his properties be attached until he complies with the order of the court. But if neither the defendant nor his personal property is within the jurisdiction, the court will not entertain such a suit for a relief respecting immovable property situate beyond its jurisdiction inasmuch as the court cannot in that event execute its decree on the principle that a court does not entertain a suit if it cannot enforce its decree in the suit. This necessarily leads me to embark on the enquiry as to whether the respondent-company "actually and voluntarily resides, or carries on business or personally works for gain" within the Municipality of Shillong. No doubt, if the respondent-company actually and voluntarily resides or carries on business or works for gain in Shillong, the court at Shillong will have the jurisdiction to entertain the suit. For, in that event, the personal obedience of the defendant can be secured by directing the arrest of the defendant and commit him to jail or order that his properties be attached until he complies with the order of the court.

8. The expressions "actually and voluntarily resides, or carries on business, or personally works for gain" appearing in the proviso to Section 16 have the same connotation as the same expression appearing in Section 20(a) of the Code. According to Andhra Pradesh High Court in Badrinarayan case (supra), the said expression in Section 20 clearly refers to a natural person and not to a legal entity like the Government. Similarly, Madras High Court in Azzizuddin & Co. case (supra) held that the word "resides" must be taken to refer to natural persons and not to legal entities, such as limited company or Governments and that the Union of India cannot be said to personally work for gain; such description can properly apply to an individual or individuals, and not to corporate body, still less to the Government of State. Whatever controversy remained thereafter has been set at rest by the Apex Court in M/s. Bakhtawar Singh Bal Kishan (supra) by approving the observations of Delhi High Court in Binani Bros. (P.) Ltd. v. Union of India ILR (1975) 2 Del. 196 that the expressions "voluntarily resides", or "personally works for gain" necessarily refer to natural persons and not to legal entities. Incidentally, the Delhi High Court therein followed Badrinarayan case (supra). This brings me to the question whether the respondent-company "carries on business" at Shillong. It is contended by Mr. R Choudhury, the learned Counsel for the petitioner, that the respondent-company has its registered office at the Hotel Polo Towers Complex, Oakland Road, Polo Ground, Shillong where the policy decision of the company is always taken and, is, therefore, carrying on its business at Shillong as well as at Nongtra village, Sheila where locates its construction site. According to the learned Counsel, the cause of action, thus, having arose at Shillong, the court at Shillong has the jurisdiction to entertain the suit, or at any rate, since the cause of action also partly arose at the registered office of the respondent-company at Shillong, the trial court grossly erred in holding that the court at Shillong does not have such jurisdiction.

9. It seems to me that the expression "carries on business" cannot be construed in a manner suggested by the learned Counsel for the petitioner. True, the expression does not necessarily involve actual [presence or personal effort and a man may carry on a business in. a place through an agent or through a manager or by his servants without his ever having gone there. However, to my mind, in the context of the proviso to Section 16, it means having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control if not over the actual method of working, at any rate, upon the existence of the business. In other words, to constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Merely because the respondent-company has its registered office at Shillong, it does not mean that the essential part of its business is carried on at Shillong. In the instant case, what is the business carried on by the respondent-company, and where ? Paragraph No. 3 of the revision petition of the petitioner reveals the nature of the business of the petitioner, namely, mining of limestone and shale mines for the purpose of manufacturing cement at a cement plant to be built by Lafarge Surma Ltd. in Bangladesh. Mining of limestone and shale mine appear to

be the essential part of the business of the respondent-company and such business is carried on by it at Nongtra Village, Sheikha in East Khasi Hills District. Thus, in my judgment, the location of the registered office of the respondent-company at Shillong where no essential part of the business is demonstrated to be carried on cannot confer upon the court at Shillong the jurisdiction to try the suit in question. Thus, on the facts found, when the respondent-company is obviously not a natural person nor is carrying on business at Shillong, the question of securing personal obedience for enforcing the decree cannot and does not arise inasmuch as neither the arrest of the respondent-company nor attachment of its personal property can be physically effected.

10. That apart, even assuming that the respondent-company is actually and voluntarily residing at Shillong, the proviso to Section 16 cannot be invoked by the appellants for another more important reason. As noted already, the proviso will apply only if the suit falls within one of the categories mentioned in the section and complete relief could be granted by compelling personal obedience of the defendant to the decree. This proviso appears to be an application, though in a highly modified form of the maxim "Equity acts in personem". Mulla in his Commentary on CPC, 15th edn. at page 235 pointed out that when it is said that "Equity acts in personam", what is meant is that the court of Equity in England (now the Chancery Division of the High Court of Justice) has jurisdiction to entertain certain suits (suits in Clauses (a), (b) and (c) of the present section being entirely excluded) respecting immovable property, though the property may situate abroad, if the relief can be obtained through the personal obedience of the defendant. The learned author also further observes therein that if neither the person of the defendant nor his personal property is within the jurisdiction, the court will not entertain a suit for a relief respecting immovable property situate beyond its jurisdiction, for the court cannot in that event execute its decree either in rem or in personam and a court does not entertain a suit if it cannot enforce its decree in the suit. The legal position is further clarified by the Apex Court in the recent case of Harshad Chiman Lal Modi (supra), cited by Mr. V.G.K. Kynta, the learned Counsel for the respondent, in the following:

Section 16, thus, recognizes as well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam, recognized by the Chancery Courts in England, Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting

immovable property situate abroad by enforcing their judgments by process in personam, i.e., by arrest of defendant or by attachment of his property.

The top court further held:

The proviso is, thus, an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant.

Finally, what is a suit in personam is best explained in the inimitable words of Mulla in the same book, which are as follows:

Suits in personam - Suits in respect of which Courts of Equity in England exercise jurisdiction in personam are called suits in personam. The essential feature of suits in personam is that the land in respect of which the suit is brought is situate abroad, but the person of the defendant or his personal property is within the jurisdiction of the court in which the suit is brought. The land being situate abroad, the decree cannot be executed in rem, that is to say, it cannot be executed against the land. But the person or the personal property of the defendant being within the jurisdiction, the decree can be executed in personam that is to say, against the person or personal property of the defendant. It must, however, be noted that the only class of cases in which Courts of Equity in England entertain suits relating to land situated abroad are cases of contracts, fraud, and trust. Thus, suits for specific performance of contracts for sale of land (u) and suits for foreclosure, (v) sale, (w) or redemption, (x) in the case of a mortgage of land are cases of contract and the court of Equity in England will entertain such suits if the contract is made in England, and the defendant resides or carries on such suits if the contract is made in England and the defendant resides or carries on business in England, though the land may be situated abroad. Similarly where lands abroad have been acquired by the fraud of a party residing in England, a suit to set aside the transaction will be entertained by the court of Equity in England (y). The Court of Equity will also entertain a suit to enforce express trusts affecting land situate in a foreign country if the trustee resides in England, (z) but has no jurisdiction to interfere with the administration of a trust which has to be conducted in a foreign territory (a). It has also no jurisdiction to entertain suits for recovery (b) or for partition (c) of land, or for damages for trespass to land (a). See Clauses (a), (b) and (e) of this section.

11. In the case before us, the suit is basically one for recovery of compensation wrong done to an immovable property and, therefore, a suit for damages for trespass to the land of the appellants. As noted already, the proviso to Section 16 is an exception to the main part of the section. It is, thus, obviously not a suit in personam or a suit in respect of contracts ; fraud and trust. If the interpretation on this proviso as suggested by the learned Counsel for the appellants is accepted, then it will have the effect of widening the scope of the

main provision. For example, to circumvent the principal section, all that the plaintiff has to do is to show that the defendant has its registered office in Shillong and then proceed to institute the suit thereat, even though the defendant carries on his business outside Shillong. The proviso of the main section cannot be permitted to destroy the main section. If there be any doubt on this view of mind, such doubt is dispelled by the decision of the Apex Court in Harshad Chiman Lal Modi case (supra). In that case, the suit for specific performance of contract agreement relating to immovable property situate in Gurgaon (Haryana) was instituted at Delhi where situates the Head Office of the defendants. The agreement in question was also entered into by the parties at Delhi; payment was also to be made at Delhi and some installments were also paid at Delhi. On the facts so found, the Apex Court held that the court at Haryana, and not at Delhi has the jurisdiction to try the suit. Though a suit for specific performance of contract for sale of land is certainly a case of contract, such a suit was not allowed to be entertained by a court at Delhi since the scope of the proviso to Section 16 of the Code is considered to be more limited than in the rule of English equity.

12. The net result of the foregoing discussion is that there is no merit in this appeal, which is hereby dismissed. However, on the facts and circumstances of the case, I pass no order as to costs. Liberty is given to the appellants to approach the competent court of jurisdiction, if so advised.