
(2012) 07 CAL CK 0155
In the Calcutta High Court
Case No : S.A. No. 79 of 2011

M/S. Eastern Coalfields Ltd.

APPELLANT

Vs

Sri Falguni Dasgupta and Others

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(4)
Coal Mines (Nationalisation) Act, 1973 — Section 2, 7
Easements Act, 1882 — Section 60
Transfer of Property Act, 1882 — Section 54

Citation : (2012) 4 CALLT 451 : (2012) 4 CHN 528

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Alok Banerjee, Mr. Susanta Pal, Mr. Partha Basu and Mr. Nikhil Kumar Roy, for the Appellant; Tarakeshwar Pal and Mr. Partha Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Gupta, J.—This appeal is directed against the judgment and the decree passed by Learned Additional District Judge, 2nd Court, Asansol in Title Appeal No. 8 of 2004/71 of 2003 by setting aside the judgment and the decree passed by learned Civil Judge (Junior Division), 2nd Court, Asansol in Title Suit No. 233 of 2000. The respondents / plaintiffs filed said suit for declaration and mandatory injunction alleging that their father Debkumar Dasgupta purchased "A" schedule property from Bengal Coal Company Ltd. on 8th October, 1971 on payment of a valuable consideration (Rs. 600/-) and came into possession of the same on the 22nd of October, 1971. It is further case that the defendant No. 1 company proposed to hand over the "B" schedule property to their father in exchange of the "A" schedule property in terms of a deed of exchange. Though the plaintiffs' father delivered possession of the "A" schedule property and came into possession of the "B" schedule property, but deed of exchange was not executed in spite of repeated requests. The plaintiffs' father died on 21.09.1979 and the plaintiffs as his heirs and legal representatives continued to possess "B"

schedule property as of right. Only when the plaintiffs tried to sell out the "B" schedule property they came to learn about said non-execution of deed of exchange by the defendant No. 1 Company. As in spite of repeated requests and sending of lawyer's notice dated 12th of May, 2000 the defendant company did not execute the deed of exchange, the plaintiffs were compelled to file this suit for declaration and mandatory injunction.

2. The defendants filed a written statement denying material allegations of the plaint and contending inter alia that the suit was not maintainable as plaintiffs already filed another suit being Title Suit No. 33 of 1999 against these defendants on similar and identical grounds. It is a specific case that the alleged sale by M/s. Bengal Coal Company Ltd. to the plaintiffs' father on 08.10.1971 was illegal, inoperative and collusive and that both "A" schedule and "B" schedule properties were properties of Bengal Coal Company Ltd. and that after nationalization of Coal Mines said lands vested to the defendant No. 1 Company as per provisions of Coal Mines (Notification) Act, 1973 free from all encumbrances. It is further case that the suit lands were all along under the occupation of Bengal Coal Company Ltd. and thereafter under the defendant Company and the plaintiffs or their predecessor in interest were never in possession of the same and the suit was liable to be dismissed with cost.

3. Learned Trial Court framed several issues and after contested hearing dismissed the suit by observing that plaintiffs failed to adduce any cogent evidence to establish either their title to "A" schedule or to "B" schedule property or their possession thereon.

4. The plaintiffs preferred an appeal being Title Appeal No. 8 of 2004/71 of 2003 which after contested hearing was allowed by allowing decree to the plaintiffs as prayed in the plaint. Learned Lower Appellate Court in the process observed that though there was no registered document regarding purchase of the "A" schedule property by the plaintiffs' father from M/s. Bengal Coal Company Ltd. and though admittedly there was no registered deed of exchange executed by the defendant company allowing the exchange of "A" schedule property with "B" schedule property, but the plaintiffs and before plaintiffs their father were in possession of "A" schedule property and thereafter "B" schedule property and that in this way plaintiffs acquired a title to the "B" schedule property by way of adverse possession.

5. At the time of admission of this second appeal filed at the instance of the defendant Company the following substantial questions of law were framed :

(a) Whether the learned Court of appeal below was justified in holding that the suit out of which the present appeal arises was not hit by order 23 Rule 1(4) of the CPC notwithstanding the fact that the previous suit which was withdrawn without taking leave under Order 23 Rule 1 of the Code was in respect of the selfsame subject matter.;

(b) Whether the learned Court of appeal below committed substantial error of

law in reversing the findings of the learned trial Judge that the suit was barred by limitation;

(c) Whether the learned Court of appeal below erred in laws in holding that the plaintiff has acquired the property by adverse possession without noticing the ingredients of adverse possession which were required to be taken note of by recording such findings.

6. Mr. Alok Banerjee, learned counsel for the appellant/defendant Company, submits that before filing of the Title Suit being Title Suit No. 233 of 2000 present plaintiffs filed another suit being Title Suit No. 33 /1999 against this defendant over the self-same suit property and that said earlier suit was withdrawn without any leave of the Court to institute a fresh suit in respect of the same subject matter. His further case is that respondent/plaintiffs" subsequent suit being Title Suit No. 233 of 2000 was barred under Order 23 Rule 1 (4) of the Code of Civil Procedure. According to him, learned Courts below wrongly decided said point of law against this defendant. According to him, said subsequent suit of 2000 was not maintainable being hit by the principles of Order 23 Rule 1(4) of the Code of Civil Procedure.

7. Mr. Tarakeshwar Pal, learned counsel for the respondent plaintiffs, on the other hand, submits that the defendant company took the same plea in the written statement but failed to give any evidence to show that the earlier suit was withdrawn without any leave or that the present suit was filed after withdrawal of the earlier suit.

8. Order 23 Rule 1(4) of the CPC runs as follows:-

Where the plaintiff -

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject- matter or such part of the claim.

9. Admittedly, the plaintiffs filed an earlier suit being Title Suit No. 33 of 1999 against the present defendant over the self-same property praying for declaration and permanent injunction with other consequential reliefs. It is also an admitted fact that later on plaintiffs filed the present suit being Title Suit No. 233 of 2000 against the same defendants relating to the same property for declaration and mandatory injunction. But no document was filed by the defendant to show that the subsequent suit was filed after withdrawal of the present suit. No suggestion to that effect was also given to the plaintiff (P.W.1) during his cross-examination. The provisions under Order 23 Rule 1(4) of the CPC can only be pressed into service if it can be shown that the subsequent suit was filed after withdrawal of the earlier suit on the self-same matter against the same party when the earlier suit was withdrawn without any leave to file fresh

suit on the same cause of action. I have already stated that there is no evidence, either oral or documentary, to show that this later suit was filed after withdrawal of the former suit.

10. As such the provisions of Order 23 Rule 1 (4) of the CPC cannot be applied in this case in absence of evidence that the later suit was filed only after withdrawal of the former suit. Learned Trial Court elaborately discussed on this issue and observed that Order 23 Rule 1 (4) of the CPC was not a bar in filing of the present suit of 2000. I find no infirmity in the aforesaid findings of the learned Trial Court which was duly confirmed by the learned Lower Appellate Court.

11. Mr. Alok Banerjee, learned counsel for the appellant/defendant, next submits that plaintiffs failed to produce any registered document to show that the "A" schedule property was purchased by their father from Bengal Coal Company Ltd. or got possession of the same, or the father of the plaintiff got the "B" schedule property in exchange of the "A" schedule property from Eastern Coal Fields Ltd. (defendant company) on the strength of any registered deed of exchange or got possession of the "B" schedule property from said company. According to Mr. Banerjee, after promulgation of the Coal Mines (Notification) Act, 1973 all the properties of Bengal Coal Company Ltd. and other private companies dealing with coal mines vested to the Central Government free from encumbrance and that the defendant company being Government concern managing coal fields of Eastern India came into possession of all the properties of the Bengal Coal Company Ltd. including both "A" schedule and "B" schedule property free from encumbrance since 1st day of May, 1973. According to him, as there was no registered sale deed in favour of plaintiff's father in respect of "A" schedule property worth above Rs. 100, no title passed to the plaintiffs' father or then to plaintiffs in respect of "A" schedule property. According to Mr. Banerjee even if there was a talk of giving "B" schedule property to the plaintiffs' father in exchange of "A" schedule property by the defendant company in 1976 but it did not materialize and that there was no registered deed of exchange to confer title of "B" schedule property upon the father of the plaintiffs or on his death upon the plaintiffs and that there was no document of handing over possession of the "B" schedule property to the plaintiffs' father by the defendant company. In this connection, he refers to case laws reported in AIR 1985 Supreme Court page 192 (Union of India and others vs. United Collieries Ltd and others) and AIR 1997 Supreme Court page 1599 (Bharat Coking Coal Ltd. vs. Madanlal Agrawal) to impress upon this Court that the landed properties of the erstwhile private coal mine vested to the Central Government in terms of Section 2 (h) of said Act of 1973 free from encumbrance. Mr. Banerjee next submits that the learned Trial Court rightly held that as plaintiffs failed to produce any registered document in respect of sale of "A" schedule property by erstwhile the Bengal Coal Company Ltd. in favour of their father and also failed to produce any registered document of exchange of "A" schedule property with "B" schedule property executed by the defendant company, the plaintiffs had no right, title and interest in the suit property and as such plaintiffs were not entitled to get any decree of declaration

of title and of mandatory injunction in the suit. According to him, learned Lower Appellate Court without any pleading or evidence made out a third case of acquiring title of "B" schedule property by the plaintiffs by way of adverse possession and passed a decree in their favour which was not backed either by evidence or by law. In this connection he has referred case laws reported in AIR 1964 Supreme Court page 1254 (S. M. Karim vs. Mst. Bibi Sakina) wherein it was held that a person pleading adverse possession has no equities in his favour. It was further held that since he is trying to defeat the rights of the true owner, he has to clearly plead and establish all the facts necessary to establish his adverse possession.

12. Mr. Tarakeshwar Pal, learned counsel for the respondent/plaintiffs, on the other hand, submits that there were overwhelming documents to show that the Bengal Coal Company Ltd., received consideration money of Rs. 600/- from plaintiffs' father for sale of "A" schedule property and took necessary steps for handing over possession of the same after necessary measurements and that present appellant defendant company also sent a letter dated 22.11.1976 (Ext.2) to the father of the plaintiffs proposing exchange of his "A" schedule property with "B" schedule property and that appellant defendant company being a Government organization should not deny the title of the plaintiffs' father either in "A" schedule property or in "B" schedule property. Mr. Pal further submits that even if there was no registered document of sale in respect of "A" schedule property or any registered document of exchange in respect of "B" schedule property, but in view of the continuous possession of the plaintiffs in "B" schedule property from time of their father, learned Lower Appellate Court rightly observed that the plaintiffs acquired title in "B" schedule property by way of adverse possession, in view of the prayer of the plaint for granting of any other or further relief / reliefs which the plaintiffs are entitled to. In this connection he has referred a case law reported in AIR 1984 (NOC) page 303 (Cal) (Mrs. R. G. Vakil and another vs. Ramendra Nath Banerjee).

13. I have carefully considered the submissions made by learned counsels of the parties in the backdrop of the evidence, both oral and documentary. There is no denial that in spite of alleged receipt of consideration money of Rs. 600/- by the authority of the Bengal Coal Company Ltd., from the father of the plaintiffs for sale of "A" schedule property no registered sale deed was ultimately executed. As such no legal title passed to the father of the plaintiffs in respect of "A" schedule property in view of the bar u/s 54 of the Transfer of Property Act. It is not disputed that after promulgation of the Coal Mines (Notification) Act, 1973 the properties of the Bengal Coal Company Ltd. vested to the Central Government free from encumbrance with effect from 1st day of May, 1973. As such, "A" schedule and "B" schedule properties being the properties of said Bengal Coal Company Ltd. vested to the defendant company being an agent of the Central Government in terms of said Act of 1973. From the evidence on record, both oral and documentary, I have no option but to hold that no legal title passed to the father of the plaintiffs either in "A" schedule property or in "B"

schedule property for non-execution of any registered document of sale in respect of "A" schedule property and also for non-execution of any registered document for exchange of "A" schedule property with "B" schedule property. Though the plaintiffs filed certain documents to show that steps were taken from the side of the Bengal Coal Company Ltd. in 1971 as well as in 1972 for execution of the sale deed and also for handing over possession of the "A" schedule property to the father of the plaintiffs but no document could be filed regarding handing over of the possession of "A" schedule property to the father of the plaintiffs. However, there was some oral evidence about possession of said "A" schedule property by the father of the plaintiff and also possession of "B" schedule property by him after 1976 in terms of the proposal of exchange of "A" schedule property with "B" schedule property vide letter dated 22.11.1976 issued by the authority of the defendant company vide Exhibit-2. Learned Lower Appellate Court was of the opinion that as said oral evidence of the witnesses of the plaintiff regarding possession of "B" schedule property since 1976 was convincing the plaintiffs acquired a good title to the "B" schedule property for said long uninterrupted possession by way of adverse possession. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. In the case in hand, admittedly there was no pleading whatsoever claiming title to the suit property by way of adverse possession not to speak of giving any particular about the commencement of said possession or even any assertion regarding continuous possession of the same openly and adversely. There was also no evidence to that effect during evidence of P.W.s.

14. In the case of M/s. R. G. Vakil (*supra*) it was held as follows:-

If the plea has not been specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

15. The said case has no application as in this case there was no evidence of claiming any title to the "B" schedule property by way of adverse possession, from the side of the plaintiffs. As such, aforesaid case law as referred by learned counsel for the respondent /plaintiffs has no application in the facts and circumstances of this case.

16. In this connection Mr. Pal, learned counsel for the respondent plaintiffs has referred to Section 60 of the Easement Act to impress upon this Court that a license under a void agreement made for valuable consideration is in equity exactly similar to a valid grant, and cannot, therefore, be revoked if the licensee acting on the grant has incurred expenses and paid the stipulated consideration.

17. Unfortunately, I am not impressed with the aforesaid argument of Mr. Pal. In

the case in hand the "A" schedule property as well as "B" schedule property being properties of the Bengal Coal Company Ltd. vested to the defendant State Company with effect from 1st day of May, 1973 free from encumbrance in terms of relevant provisions of the Coal Mines (Notification) Act, 1973. Again, as per Section 7 of the said Act the Central Government or the Government Company is not to be liable for prior liabilities of the private companies. As such, Section 60 of said Easement Act had no application in the facts and circumstances of the case. However, in terms of Section 7 of said Act of 1973 plaintiffs had a right to recover said consideration money from the owner / agent / manager or managing director as the case may be, of the earlier company namely the Bengal Coal Company Limited.

18. Accordingly, I find and hold that the findings of the learned Lower Appellate Court that plaintiffs acquired a title to the "B" schedule property by way of adverse possession were without any basis and were perverse.

19. Learned Lower Appellate Court did not reverse the findings of learned Trial Court on the point of limitation as learned Trial Court also observed that the suit was not barred by limitation which was concurred by the learned Lower Appellate Court. In view of the discussion made above I refrain from making any observation on this issue as that issue was wrongly framed.

20. Accordingly, the appeal is allowed by setting aside the impugned judgment and decree of learned Lower Appellate Court and by restoring the judgment and decree of learned Trial Court.

21. However, I pass no order as to costs.

22. Send down Lower Court record along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.