

(2012) 04 CAL CK 0103
In the Calcutta High Court
Case No : S.A. No. 206 of 2005

Sri Mohan Chandra Karak

APPELLANT

Vs

Bani Roy and Another

RESPONDENT

Date of Decision : 19-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 5 Rule 20, Order 9 Rule 13
Companies Act, 1956 — Section 51
West Bengal Land Reforms Act, 1955 — Section 8, 9(6)

Citation : (2012) 04 CAL CK 0103

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Phalguni Sarkar, for the Appellant; Budhadab Ghoshal, D. Dandapath, For the respondent No. 1, Mr. Ajay Debnath, For the respondent No. 2, Mr. Partha Sarathi Bose, Jiban Ratan Chatterjee and Mr. Raj Kumar Gupta, For the respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This Second Appeal is directed against the judgment and decree dated February 11, 2005 passed by the learned Additional District Judge, 3rd Court, Bankura in Title Appeal No. 63 of 2004 thereby affirming the judgment and decree dated September 30, 2004 passed by the learned Civil Judge (Junior Division), 2nd Court, Bankura in Title Suit No. 121 of 1997. The respondent No. 1 instituted a suit being Title Suit No. 121 of 1997 for declaration of her right, title and interest in the suit property and that the defendant No. 1 has no right, title and interest in the suit property, permanent injunction restraining the defendant No. 1 from disturbing the plaintiff's possession in the suit property and other reliefs. That suit was decreed on contest against the defendant No. 1 and ex parte against the rest defendants.

2. Being aggrieved, the defendant No. 1 preferred an appeal being Title Appeal 63 of 2004. That appeal was dismissed on contest affirming the judgment and decree passed by the learned Trial Judge. Being aggrieved, the defendant No. 1

has preferred this second appeal.

3. The following two substantial questions of law have been framed for decision in this second appeal:-

(a) Whether the learned courts below committed substantial error of law in declaring a pre-emption order u/s 8 of the West Bengal Land Reforms Act to be void for non-service of summons of the said proceedings by totally overlooking the fact that separate suit for such declaration is not maintainable.

(b) In view of the fact that the respondents in the present case did not file any application before the court granting pre-emption application for setting aside ex parte order of pre-emption. Whether the learned courts below committed substantial error of law in setting aside that pre-emption order on the ground of non-service of summons.

4. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the appellant got an ex parte order of pre-emption against the respondent No. 2 in respect of the suit property as described in the schedule of the plaint and in Misc. Case No. 15 of 1992. The respondent No. 1 thereafter filed the suit being Title Suit No. 121 of 1997 for declaration of title and permanent injunction as stated earlier.

5. The plaintiff contended that though he became the owner of the suit property by purchase, he was not made a party in the said misc. case for pre-emption. No notice was served upon the opposite parties of the pre-emption case. As such, the ex parte order of pre-emption case is void and the same is not binding upon the opposite parties of the misc. case including the plaintiff.

6. On the other hand, the appellant as defendant No. 1 of the said suit has contended that he, being a Bargadar of the suit property, filed an application u/s 8 of the W.B.L.R. Act against the transfer dated April 7, 1992 and that during the pendency of the pre-emption case, the defendant No. 2 had transferred the suit property in favour of the plaintiff / respondent herein and as such, the order of the pre-emption case is also binding upon the plaintiff.

7. The above facts are not in dispute. So, the fact remains that the appellant as Bargader got an order of pre-emption in a misc. case being Misc. Case No. 15 of 1992 u/s 8 of the W.B.L.R. Act, 1955. Challenging the order of that misc. case, the title suit has filed by the respondent No. 1. Now, when an order u/s 8 of the W.B.L.R. Act, 1955 has been passed, if any person is aggrieved by that order, the appropriate remedy is to file an appeal u/s 9(6) of the said Act of 1955. So, the remedy of aggrieved person against the order of the learned Civil Judge lies by preferring an appeal to the District Judge within 30 days from the date of order of pre-emption under the above provisions of Section 9(6) of the 1955 Act and not to file a civil suit as has been done in the instant case. There is, of course, a general provision under Order 9 Rule 13 of the C.P.C. for setting aside an ex parte order of pre-emption. If the opposite party of the misc. case is of the

opinion, the ex parte order was passed against him and he was not aware of the same, he may file an application for setting aside the ex parte order of pre-emption under Order 9 Rule 13 of the C.P.C. and such a provision is very much applicable in respect of a misc. case u/s 8 of the W.B.L.R. Act, 1955. So, the agreed person has remedy to take appropriate steps by either of the modes referred to above, but, there is no provision for filing a suit for declaration and injunction for setting aside that ex parte order as has been done in the instant case. Filing of a separate suit to cancel an order of pre-emption is not permissible either under the provisions of the W.B.L.R. Act, 1955 or under the C.P.C. Therefore, the steps taken by the respondent No. 1 for declaration and injunction by filing a suit are not permissible. So, the suit for the reliefs filed by the respondent No. 1 is not maintainable at all. Since, the respondent No. 1 did not file any application or appeal for setting aside the ex parte order passed u/s 8 of the W.B.L.R. Act, 1955 and since the Courts below entertained the suit and the first appeal, I am of the opinion that the Courts below have committed a substantial error of law in setting aside the order of pre-emption.

8. Much arguments have been made by both the parties relating to mode of service of summons in the misc. case. While it is argued on behalf of the petitioner of the misc. Case that summons was duly served under Order 5 Rule 20 of the C.P.C., when the summons could not be served upon the respondent No. 2 in the misc. case directly by other modes.

9. It is also argued on behalf of the respondents that the respondent No. 1 was not at all a party in the said suit. The property had been transferred to the subsequent transferee, that is, the added respondents in the instant appeal.

10. On the other hand, it is also argued on behalf of the respondent No. 2 that in order to serve summons upon a company, that is, the respondent No. 2, the provision of Section 51 of the Companies Act must be complied with and this has the overriding effect of Order 29 Rule 1 of the C.P.C. and so, summons should have been served in complying with Section 51 of the Companies Act. If I discuss all such facts within the scope of the second appeal and if I come to the conclusion in this regard and ultimately, if any application or appeal for setting aside the ex parte order of pre-emption is filed, my findings may create an impression upon the Court which is to deal with such matters subsequently. Since, I have decided that both the Courts below have committed substantial errors of law in entertaining a suit and an appeal thereon which are not maintainable at all, I restrain myself from making any observations as to service of summons upon the respondents herein in the misc. case under reference. For the same reason the decisions of *Parimal Kumar Guha v. Smt. Sovana Sinha* reported in 1983(1) CLJ 237, *Teharoonchand Vs. Surajmull Nagarmull*, and *Harendra Nath Ghosal v. Superfoam Pvt. Ltd.* reported in 1991(1) CHN 356 referred to by the respondent No. 2 on service of notice under Order 5 Rule 20 of the C.P.C. and notice upon the company u/s 51 of the Companies Act referred to are not discussed in details. If the question of service arises subsequently, these

decisions may be referred to in the appropriate proceedings. Both the Courts below have committed substantial errors of law in setting aside the order of pre-emption on the ground of non-service of summons and entertaining the suit which is not maintainable at all. Both the substantial questions of law are, thus, answered. Accordingly, the judgment and decree under appeal cannot be sustained.

11. Accordingly, the second appeal is allowed.

12. The judgment and decree dated February 11, 2005 passed by the learned Additional District Judge, 3rd Court, Bankura in Title Appeal No. 63 of 2004 is hereby set aside. The said Title Appeal stands allowed on contest.

13. The judgment and decree passed by the learned Trial Judge in Title Suit No. 121 of 1997 is hereby set aside. The title suit be and the same stands dismissed on contest.

14. Considering the circumstances, there will be no order to as costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.