

Indian Iron and Steel Co. Ltd.

Vs

Chhaganlal Marwari

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Vs

State of West Bengal

Civil Appeal Nos. 1690 and 1691 of 1981

(K. Ramaswamy, N. Venkatachala JJ)

22.09.1993

ORDER

1. This appeal arises from the judgment dated November 16, 1978 of a Division Bench of the Calcutta High Court in appeal A. A. D. No. 1271 of 1966. The facts, in brief, are that the appellant is the owner of the demised site granted to Mohammadin & Bros., the tenant for use and occupation. The lease was of March 13, 1939. The tenant raised structures on the site and was in enjoyment of them. The appellant filed Title Suit No. 76 of 1953 against the tenant for ejection from the demised site and for mesne profits. A preliminary decree was made on November 12, 1953 directing recovery of Khas possession subject to the appellant's paying compensation for the structures which had to be determined either by mutual agreement or by an order of the court. Since there was no mutual agreement, a final decree was made on August 22, 1957 directing the appellant to pay a sum of Rs. 1390 as compensation towards the value of the structures. That final decree was not appealed against by the tenant. Later on, the appellant filed Title Suit No. 87 of 1963 against not only the said tenant but also against the respondent and two others for declaration of title, possession, mesne profits and mandatory injunction against the respondent to pull down the structures on the site. The defence set up by the respondent in the suit was that he was inducted by Mohammadin Bros. on the site and structures thereon prior to partition of India and before their migration to East Pakistan. More over Mohammadin & Bros. had transferred their rights in favour of the respondent by oral sale. Hence the respondent had been in possession and enjoyment of the shops on the site in his own right and as owner thereof. At any rate the respondent had perfected his title to the site and structures by adverse possession. He had also let out certain portions of the structures to others. Further, in survey and settlement records, his name had come to be entered, as owner.

2. The trial court did not accept the claim of the appellant that Mohammadin Bros. had surrendered possession of the site and structures by abandonment. It also found the claim of the respondent that he and two others had been in possession as tenants and sub-tenants to be of no merit. The pleas of oral sale and adverse possession of the respondent were also negatived. It held that the decree in T. S. No. 76 of 1953 had become inexecutable, having been barred by limitation and the appellant was not entitled to the decree as prayed for. On appeal, the appellate court disbelieved the respondent's pleas of oral sale as well as adverse possession. But on the basis of findings on other issues, it reversed the decree of the trial court and decreed the suit. As stated earlier the High Court reversed

the decree and non-suited the appellant. Thus, this appeal by special leave.

3. The facts as disclosed from the judgments of the courts below are that the appellant is the owner of the property which Mohammadin & Bros. took on lease with permission to erect structures thereon for use and enjoyment. The respondent came into possession of the site and structures as a tenant of Mohammadin & Bros., but no attornment of tenancy was made to the appellant as a sub-tenant. The plea of the respondent is one of acquisition of title to the site and structures either by purchase from Mohammadin & Bros. or by adverse possession. The decree in Title Suit No. 76 of 1953 was barred by limitation and remained unexecuted. On these facts the question is, whether the decree in O. S. No. 76 of 1953 stands in the way of the appellant to get the declaration of title to the disputed site and other reliefs sought in the suit. Order 21, Rule 35(1), CPC provides :

" (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

Sub-rules (2) and (3) are not material, hence omitted. Order 21, Rule 36 provides :

"Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous places on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property."

4. Delivery of immovable property from the judgment-debtor should be obtained in execution of the decree under Order 21, Rules 35 and 36 within the period of limitation allowed under Article 136 of the Schedule to the Limitation Act, 1963 (Article 182 of Schedule 1 of old Act) without the need to file an independent suit for the purpose. It becomes, thereby, clear that after the expiry of the prescribed period, no independent suit for recovery of possession of the property which is the subject-matter of the decree, would lie. All questions arising between the parties or their representatives relating to the execution or satisfaction of that decree should also be determined by the executing court and not by a separate suit. However, the condition precedent for applicability of the said provision is that a person in possession should have derivative title of tenancy rights of the demised property, i. e. the subject-matter in execution through the judgment-debtor in that suit.

5. Admittedly, the respondent had not become the tenant of the appellant by attornment. Nor was he a sub-tenant. Though it was claimed that the 1st respondent came into possession of the site as a tenant from Mohammadin & Bros., the latter having migrated to East Pakistan, the tenancy rights which they had with the appellant had come to an end by the decree in the suit. Admittedly, there existed no relationship of landlord and tenant or sub-tenant between the appellant and the respondent. On the other hand, the respondent set up his own title either by oral purchase from Mohammadin Bros. or by adverse possession. Both the pleas were negatived by the courts below and the High Court did not go into that question, nor disturbed those findings. Therefore, the only question which requires examination is as to what is the nature of right of the respondent in the property (site and structures). By reason of his own plea of ownership by purchase or adverse possession, it was not open to him to claim any right as a tenant under Mohammadin Bros. or a sub-tenant of the appellant. His tenancy rights with Mohammadin Bros. having been merged into his

ownership right, he denied himself of the right under Section 47 read with Order 21 Rule 36, CPC. In these circumstances Order 21 Rule 36 is inapplicable to the case of respondent, nor is he entitled to take aid of the inexecutability of the decree made in Title Suit No. 76 of 1953. The High Court was, therefore, in error, in assuming that the respondent has been continuing as a tenant and, therefore, Order 21 Rule 36, CPC and Section 47 CPC stood in the way of the appellant to have the declaration of title and possession sought for. We are of the considered opinion that on the factual matrix of the case, the approach adopted by the High Court is wholly unsustainable. The further finding of the High Court that Section 70 of the West Bengal Non-Agricultural Tenancy Act impedes execution of the decree is obviously erroneous. The condition precedent to apply Section 70 is that the respondent should be a tenant and that there should be a decree of eviction by the civil court pursuant to which the tenant should be ejected. Since the respondent did not claim the right of tenancy under the appellant, Section 70 was clearly inapplicable. Accordingly we hold that the decree in T. S. No. 76 of 1953 is not of any consequence. The appellant as an owner of the disputed site, is, therefore, entitled to the declaration of title as prayed for and the consequential reliefs. The suit as decreed by the appellate court is, therefore, legal and is accordingly confirmed.

6. However, in view of the fact that there are certain structures existing on the disputed site to which the appellant cannot lay any claim, a reasonable compensation for removal of the structures should be determined. It is stated that in terms of the final decree a sum of Rs. 1390 was already deposited. If that amount is available, it is open to the respondent to withdraw the same from the trial court. Even otherwise, the appellant, shall pay a sum of Rs. 5000 to the respondent towards the value of structures, if the respondent files the usual undertaking before this Court that he and his tenants or anybody else would vacate the suit premises within the period of four months from today. The undertaking should be signed by him as well as by all the tenants whom he has inducted into the suit premises within a period of six weeks from today. Failure on the part of respondent to give an undertaking and affidavits, shall disentitle him to get Rs. 5000 or Rs. 1390 and this conditional order shall stand vacated and a preliminary decree for mesne profits from three years prior to the date of the suit would be passed. The appeal is accordingly allowed, but in the circumstances, parties are directed to bear their own costs.

C. A. No. 1691 of 1981

7. In view of the judgment just pronounced in C. A. No. 1690 of 1981, it is not necessary to go into the correctness of the order passed by the High Court. In this matter, the appellant as a tenant claimed the right to supply of electricity. The High Court dismissed the writ petition. Though leave was granted, in view of the fact that there is a decree for ejectment passed against the appellant in the appeal just disposed of, it is not necessary to go into the question. The appeal is accordingly dismissed, but without costs.

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