

(2008) 01 CAL CK 0077
In the Calcutta High Court
Case No : C.O. No. 1387 of 2007

Sk. Rafiuddin Ahmed

APPELLANT

Vs

Hazi Abdur Rahim and Others

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 — Section 5
Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 14 Rule 1, Order 14 Rule 2(2), Order 7 Rule 11

Citation : (2008) 2 CALLT 99 : (2008) 2 CHN 40 : 113 CWN 176

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Jiban Ratan Chatterjee, Malay Kr. Das and Dibyajyoti Raha, for the Appellant; Saptangshu Basu, Aniruddha Chatterjee, Kalyan Bhowmick and Ananya Das, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—The plaintiffs/opposite parties filed a suit for eviction against the defendant/petitioner herein on various grounds including the ground of default in payment of rent, reasonable requirement etc. under the provision of the West Bengal Premises Tenancy Act.

In such a suit, the defendant filed an application under Order 7 Rule 11 of the CPC for rejection of the plaint by alleging therein that the defendant is not a premises tenant under the plaintiffs in respect of the suit premises.

2. It was further claimed by the defendant in his said application that the defendant is a thika tenant in respect of the suit premises and since the interest of the landlord in the thika tenanted property vested with the State under the provisions of Section 5 of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, the defendant became a direct tenant under the State. As such, the suit is not maintainable in its present form.

3. Such application of the defendant was rejected by the learned Trial Judge on 25th March 2004 vide order No. 28 by holding, inter alia, that the Court is unable

to rely upon the documents produced by the defendant, in respect of his claim for thika tenancy right at the time of consideration of the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure.

4. On examination of the pleadings made out by the plaintiffs in the plaint, the learned Trial Judge found that the plaintiffs sought for eviction of the defendant under the provision of the West Bengal Premises Tenancy Act by treating the defendant as a premises tenant under him.

5. Under such circumstances, the learned Trial Judge rejected the defendant's application for rejection of the plaint.

6. Being aggrieved by the said order, the defendant/petitioner moved of a revisional application being CO. No. 1906 of 2004 which was ultimately disposed of by the learned single Judge of this Court on 9th July, 2004. While disposing of the said revisional application, His Lordship directed that the suit be tried with a preliminary issue as to its maintainability on the ground raised by the petitioner in his application under Order 7 Rule 11 of the Code of Civil Procedure. It was further directed therein that the suit should be tried with the aforesaid preliminary issue as expeditiously as possible within a period of three months from the date of communication of the order.

7. Even thereafter the learned Trial Judge did not consider the defendant's application under Order 7 Rule 11 of the CPC in the light of the order passed by the learned single Judge of this Court in the earlier revisional application and as such, another revisional application was moved by the petitioner before this Court challenging the propriety of the said order of the learned Trial Judge.

8. The said revisional application which was registered as C.O. No. 1195 of 2006 was disposed of by another learned single Judge of this Court on 17th August, 2006: While disposing of the said revisional application, His Lordship set aside the order which was impugned in the said revisional application by holding, inter alia, that the said order of the learned Trial Judge cannot be maintained as the said order was not passed by following the direction passed in the earlier revisional application.

9. Accordingly, the defendant's application under Order 7 Rule 11 of the CPC was again sent back to the learned Trial Judge for his consideration in the light of the order passed in the first revisional application as referred to above.

10. In this context, the defendant's application under Order 7 Rule 11 of the CPC was taken up for consideration by the learned Trial Judge once again and ultimately the defendant's said application was again rejected by the learned Trial Judge by the order which is impugned in this revisional application.

11. While disposing of the said application, the learned Trial Judge held that the defendant/petitioner cannot be held to be a thika tenant by placing reliance upon the receipt of Thika Tenancy Controller showing deposit of rent by the defendant with the Thika Controller.

12. The learned Trial Judge did not find any substance in the contention of the petitioner as no ground rent receipt, issued by the admitted Zamindar, was produced by the defendant/petitioner at the time of consideration of the said application. The learned Trial Judge found that the schedule property in respect of which eviction decree has been sought for in the suit, is one tin-shed garage and the defendant has also claimed his tenancy right in respect of the said tin-shed covered garage.

13. On examination of the plaint, the learned Trial Judge also found that the land is not the subject-matter of the suit property.

Considering as such, the learned Trial Judge held that without trial on evidence, the learned Trial Judge cannot come to the conclusion that the suit property is a thika tenancy property and as such, the contention of the defendant to the effect that such property vested with the State in view of the provisions of Section 5 of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, was not accepted by the learned Trial Judge.

14. Accordingly, the defendant's application under Order 7 Rule 11 I of the CPC was rejected by the learned Trial Judge.

15. The defendant/petitioner is still not happy with the order passed " by the learned Trial Judge and as such, he has filed this revisional application challenging the propriety of the said order.

16. Heard Mr. Chatterjee, learned senior Advocate, appearing for the defendant/petitioner and Mr. Basu, learned Advocate, appearing for the plaintiffs/Opposite parties.

17. Though I am aware about my limitation following settled principles of law that even an erroneous finding of the Court between the inter parties is binding not only upon the parties but also upon the Court but still then, this Court feels that it will be unjust if the impugned order is disturbed for the following reasons:

Admittedly, the defendant has not yet filed any written statement in the suit. As such, Court cannot anticipate as to what sort of defence the defendant will disclose in his written statement. Unless the written statement is filed in the suit, issues cannot be framed under Order 14 of the Code of Civil Procedure, inasmuch as issues are framed at the first hearing of the suit, after reading the plaint and the written statement, if any and after examination under Rule 2 of Order 10 and after hearing the parties or their pleaders upon ascertainment as what material propositions of fact or of law the parties are at variance.

18. For convenience of understanding as to how issues are framed, the provisions contained in Order 14 Rule 1 of the Civil Procedure Code, is set out hereunder.

Order 14 Rule 1.- Framing of Issues.- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact.

(b) Issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

19. Order 14 Rule 1 of the CPC thus makes the aforesaid position absolutely clear that no issue can be framed, unless the written statement is delivered by the defendant or the oral evidence of the party or companion of the parties is taken by the Court at the first hearing of the suit for ascertaining the matters in controversy in the suit.

20. Here neither written statement has been filed by the defendant nor a date was fixed for hearing of the suit nor the parties or their companion was examined by the Court under Order 10 Rule 2 of the Code of Civil Procedure.

21. While disposing of the earlier revisional applications, this basic principle of law was lost sight of.

22. In the first revisional application, the learned single Judge of this Court directed the learned Trial Judge to hear the preliminary issue on the basis of the pleadings as disclosed in the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure.

23. In my view, this is another misconception of law inasmuch as it is settled law of the land that at the time of consideration of the defendant's application for rejection of a plaint under Order 7 Rule 11 of the Code of Civil Procedure, the Court is required to examine the pleadings of the plaintiffs alone and nothing else for ascertaining as to whether any of the conditions as mentioned therein requiring rejection of plaint, is satisfied in the particular case or not.

24. The Court can neither consider the defence regarding maintainability of the suit as disclosed in the petitioner's application under Order 7 Rule 11 of the CPC nor can the Court consider the documents on which the defendant wants to rely

upon to support his claim of thika tenancy for coming to the conclusion regarding maintainability of the suit.

25. The basic ingredients of the provisions contained in Order 7 Rule 11 of the CPC were also not taken into consideration while disposing of those earlier revisional applications, as aforesaid.

26. That apart, the provision contained in Order 14 Rule 2 Sub-rule (2) was also not taken into consideration while disposing of the earlier revisional applications.

27. Order 14 Rule 2(2) of the CPC provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to:

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it things fit, postponement the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue.

28. The said provision makes it clear the circumstances under which the Court can consider any particular issue as a preliminary issue by postponing the hearing of the other issues.

29. In the present case, the jurisdiction of the Court is not questioned. The only question which was sought to be raised by the defendant in his application under Order 7 Rule 11 of the CPC is the maintainability of the suit on the ground of a bar created under the law for the time being in force.

30. Thus an impression was sought to be given to the Court that the provision contained in Order 14 Rule 2(2) Clause (b) is attracted here. Even then, Court cannot opt for such consideration of the said dispute as preliminary issue as the provision under Order 14 Rule 2(2) of the CPC makes it clear as to when such an issue can be disposed of as a preliminary issue.

31. In my view, such issue can be disposed of as preliminary issue only when the entire suit or any part thereof can be disposed on a pure question of law relating to any of the bar as mentioned in Clause (a) or (b) of Order 14 Rule 2(2) of the Code of Civil procedure.

32. Thus, it is absolutely clear that if the consideration of any dispute relating to maintainability of the suit due to bar of statute depends upon consideration of a mixed question of law and fact, the Court cannot consider such an issue as a preliminary issue.

33. Status of the defendant as that of a thika tenant or of a premises tenant, is a matter of evidence which is required to be resolved on trial on evidence.

34. Since the plaintiffs never claimed the defendant as their thika tenants in the plaint, the defendant's contention that the suit is barred under the provision of Thika Tenancy Act, because of vesting of the landlords' interest with the State, cannot be considered as a preliminary issue under Order 14 Rule 2(2) of the CPC even though such issue is raised at the trial of suit after delivery of defence by the defendant in the suit.

35. Under such circumstances, the directions which were passed by the learned single Judge of this Hon'ble Court while disposing of the earlier revisional applications, are absolutely illegal and contrary to the established provision of law contained in Civil Procedure Code. The said orders should be regarded as non est as those orders were passed by total non-application of mind and as such, this Court holds that if the said orders are required to be carried out, then the entire trial of the suit will be frustrated in view of the fact that steps which are required to be taken either by the parties or by the Court will be absolutely against the aforesaid provisions of the CPC which are prescribed for trial of the suit.

36. On examination of the plaint, this Court finds that this is essentially a suit filed by the landlord/plaintiff against the defendant describing him as a premises tenant under the provision of the West Bengal Premises Tenancy Act and a decree for eviction was sought for on different grounds recognised under the said Act.

37. That apart, the schedule of the suit property also indicates that the plaintiffs claim eviction of the defendant from one room and not from the bare land.

38. On examination of the plaint, this Court cannot come to a conclusion at this stage that the suit is barred under any of the provision of the Calcutta Thika Tenancy Acquisition & Regulation) Act, 1981.

39. In such view of the matter, this Court holds that the learned Trial Judge was absolutely justified by rejecting the petitioner's application under Order 7 Rule 11 of the Code of Civil procedure.

40. Before parting with, this Court repeats once again that since it is well settled that at the time of consideration of the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure, the Court cannot look into any other documents and/or contention of the defendant regarding maintainability of the suit, save and except, the pleadings disclosed in the plaint itself. Even the Court cannot dispose of any dispute relating to the maintainability of the suit due to bar of statute as preliminary issues after taking evidence in the suit.

41. This Court, thus, holds that the contention of the defendant regarding his thika tenancy right in the suit property should have been kept apart when the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure, was taken into consideration.

42. Under such circumstances, this Court does not find any justification to

interfere with the order impugned as this Court cannot come to a conclusion which is different from the conclusion which was arrived at by the learned Trial Judge on the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure.

43. It is, however, made clear that if after filing of the written statement, the Court finds that such a dispute is raised by the defendant in his written statement, the learned Trial Judge will frame such an issue and will consider the same in accordance with law along with the other issues at the time of hearing of the suit.

44. Since the aforesaid orders as mentioned hereinabove, were passed by the learned single Judges of this Hon'ble Court in the earlier two revisional applications without taking note of the aforesaid provisions of law, the said orders cannot create any judicial precedence.

45. Though the Court cannot ordinarily post-mortem the propriety of the earlier decision of the Court between the parties inter se, but still then, this Court has done this for doing justice to the litigants for whose benefit the Court exists. Parties cannot suffer for the mistake of the Court and when such mistake is discovered by the Court itself, the Court cannot avoid doing justice to the parties by not rectifying its own mistake and no technical consideration, in my view, can fetter the jurisdiction of the Court to rectify the Court's own mistake.

46. Considering the age of the suit, this Court directs the defendant/petitioner to file his written statement positively within a period of two weeks from date. In default, the learned Trial Judge will proceed with the suit ex parte. The learned Trial Judge will take all steps to expedite the hearing of the suit as far as possible.

The revisional application is, thus, disposed of.

47. Learned Advocates for the contesting parties are permitted to take down the gist of this order for communication to the learned Trial Judge and the learned Trial Judge is directed to act upon such communication without insisting upon production of the certified copy of this order.

Urgent Xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.