

08.03.2021.
Item No. 6

F.M.A.T. 1319 of 2016
With
C.A.N. 3 of 2020 (Old No. C.A.N. 2165 of 2020)

Smt. Kalpana Dubey, since deceased,
Represented by Sri Pradip Dubey and others.
Vs.
Sri Radhyashyam Gurey.

Mr. Debasish Roy,
Mr. Goutam Das.

... for the appellants.

Mr. Indranath Mukherjee.

... for the respondents.

The instant appeal has been filed assailing the order of the first appellate court, by which the matter was remanded to the trial court for fresh hearing.

A suit for recovery of possession on the ground of default, reasonable requirement, nuisance and annoyance is filed against the defendants/appellants. It is stated in the plaint that one Sarat Chandra Gurey was the absolute owner of premises no. 100, Raja Rajendra Lal Mitra Road, P.S. Beliaghata, Kolkata - 700 085 by dint of 'Kobala' executed and registered in the year 1928. Subsequently, the said owner executed a deed of trust setting the property in trust for himself as well as his wife with clear stipulation that after the death of those trustees it will devolve upon the persons named therein and if the trustees died and the trust come to an end by virtue thereof, the plaintiff/respondent is the absolute owner of the said premises.

After the written statement is filed by the original defendant/appellant, the trial court framed the issues and one of the issues, which can be seen,

pertains to the jurisdiction of the court in entertaining the suit claiming such relief. A plea was taken by the original defendant/appellant that the subject property is comprised in thika tenancy and, therefore, the proceeding for eviction lies before the Thika Controller and by virtue of Section 21 of the Thika Tenancy (Acquisition and Regulation) Act, 2001 (hereinafter referred to as 'said Act'), the jurisdiction of the Civil Court is barred.

Since the aforesaid issue touches upon the jurisdiction of the court, the trial court decided to proceed with the said issue of jurisdiction as a preliminary issue and ultimately held that the property being the subject matter of the suit is a thika tenanted property and in view of the provisions contained in Section 8(3) of the said Act, the relief in the form of eviction can only be adjudicated by the Thika Controller. The trial court, thus, dismissed the suit and the decree of dismissal was carried to the first appellate court.

The appellate court reversed the judgement and decree of the trial court, firstly, on the ground that the findings recorded by the trial court is cryptic and the concept of thika tenancy has not been considered upon proper appreciation of the documentary evidence as well as the oral evidence adduced by the respective parties; secondly, there is no reflection in the plaint that the property vested with the State and in absence of any document of vesting, it was not proper on the part of the trial court to hold that the suit property is a thika tenanted property.

While remanding the matter to the trial court, the first appellate court granted liberty to the parties to implead the Thika Controller as party to the suit or to take a proper report from the said authority as to

whether the scheduled property is a thika tenanted property or not.

Mr. Debasish Roy, learned Advocate appearing for the defendants/appellants, founded his challenge on the findings of the first appellate court on the deed of trust, the reflection whereof can be seen in the plaint, in support of the contention that the settler himself admitted the property to have comprised in thika tenancy and, therefore, there was no necessity to remand the matter for further adjudication. He further submits that if the document relied upon by the plaintiff/respondent manifestly show that the suit property was a thika tenanted property, no further evidence is required to be led, but in view of the embargo having created under Section 5(3) of the said Act, such question can only be decided by the Thika Controller. He also submits that even the relief in the form of an eviction of a tenant by a thika tenant cannot be adjudicated by the Civil Court in view of the exclusion provisions contained under Section 21 of the said Act, which has been vested upon the Thika Controller under Section 5(3) of the said Act.

On the other hand, the respondent submits that there is no question of the thika tenancy having involved in the said proceeding, as the admitted owner purchased the property along with the structure way back in the year 1928. The list of documents appended to the plaint contained the said deed and, therefore, merely on a reflection of something, the support whereof is lacking, the Court should not jump to the conclusion that the property is a thika tenanted property. There are other documents relied upon by the plaintiff/respondent included in the list appended to the plaint and the assimilation of the contents thereof is one of the

onerous duty of the Civil Judge in adjudicating the title or the cause based upon the title.

Under Order XIV Rule 2 of the Code of Civil Procedure, though the Court is required to answer all issues, but if answering one of the issues, the Court finds that the suit is not maintainable, there is no fetter on the part of the Court to embark such journey and decide the same. The issue must be an issue of law distinct from the issue of fact and law. The defendants/appellants have not adduced evidence as yet. We are told that the plaintiff's evidence is complete and the suit is fixed for recording evidence of the defendants.

The preliminary issue of such nature can only be decided after the evidence of both the parties and while answering all the issues, if one of the issues clinches the jurisdiction of the Court, the Court may venture to decide such issue and need not answer other issues. The issue, which strikes at the root of the jurisdiction of the Court, is always decided as the preliminary issue provided it is an issue of law and the parties have disclosed their stands by adducing evidence.

A distinction is to be drawn between the rejection of the plaint under Order VII Rule 11 (d) of the Code and the dismissal of the suit under Order XIV Rule 2 of the Code while answering the preliminary issue. In the former case, the Court is required to confine its scrutiny within the four corners of the plaint and the documents annexed thereto. However, in the later case, the Court has to consider the other documents produced by the respective parties and its evidentiary value on the issue of law pertaining to the jurisdiction.

The appellate court has remanded the matter framing an issue whether the property is a thika

property or not and further directed the Thika Controller to be impleaded as party in the said proceeding for the convenient disposal of the said issue.

We are not concurring with the findings of the appellate court in this regard in view of the express embargo created under Section 21 of the said Act in conjunction with the provisions contained under Section 5(3) of the said Act. The moment an issue as to the thika tenancy is raised and if the court prima facie finds that such issue is intricately involved with the relief, the same is to be decided by the forum provided in the said statute.

It appears that the appellate court has assumed the jurisdiction by framing such an issue, the adjudication whereof has been fettered by Section 21 of the said Act and to that extent we feel that the impugned judgement is required to be modified. We have seen the issues framed in the suit from the trial court's judgement and the first issue relates to the maintainability of the suit in its present form and law, which necessarily imbibe within itself the jurisdictional issue, if raised, to be decided.

We, therefore, modify the judgement and decree of the first appellate court to the extent that the matter is remanded to the trial court for fresh hearing and the trial court shall decide all the issues framed in this regard at the time of final disposal thereof.

Since the defendants' evidence is still awaiting, the trial court shall make endeavour to complete the deposition of the defendants at an earliest preferably within four months from the date of communication of this order.

With these observations, the appeal is disposed of.

In view of disposal of the appeal itself, the connected application being CAN 3 of 2020 (Old No. CAN 2165 of 2020) has become infructuous and the same is also disposed of.

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(Harish Tandon, J.)

(Kausik Chanda, J.)