

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 9 of 2014

**Zubeda Khatoon, since deceased, represented by Shahzad Ahmed
Vs
Md. Shamim & Ors.**

For the Appellant : Mr. Sarban Bhattacharya

For the Respondents : Mr. K.D. Poddar
Mr. A.K. Dutta

Heard on : 16.01.2024

Judgment on : 07.02.2024

Ajoy Kumar Mukherjee, J.

1. The present Second Appeal has been directed by the appellant being aggrieved and dissatisfied with the judgment and decree dated 8th February, 2006 passed by the learned 6th Bench, City Civil Court, Calcutta in T.A. no. 82 of 2005 affirming the judgment dated 6th July, 2005 passed by the learned 3rd Bench, Small Causes Court, Calcutta in Ejectment Suit No. 557 of 2001.

2. Brief background of the present appeal is that the respondents/plaintiffs filed aforesaid suit for eviction of the defendant/appellant from the suit premises, occupied by the defendant as a tenant under the plaintiffs at a rental of Rs. 30 per month, payable

according to English Calendar month. The plaintiffs in the plaint alleged that the defendant is a defaulter in payment of rent in respect of the suit premises since the month of August, 1981 and as such the plaintiff terminated the tenancy of the defendant in respect of the suit premises by serving notice under section 13(6) of the West Bengal Premises Tenancy Act, 1956 (Act of 1956) asking him to vacate the suit premises with the expiry of the month of June 1986. As the defendant failed to vacate the suit premises inspite of the termination of tenancy, the plaintiff filed the aforesaid suit for eviction and for recovery of khas possession.

3. The defendant contested the suit by filing written statement contending *interalia* that there was no relation of landlord and tenant between the plaintiffs and the defendants and as such the question of payment of rent to the plaintiff does not arise. The defendant also challenged the legality, validity and sufficiency of the ejectment notice allegedly served upon her and accordingly the defendant prayed for dismissal of the suit. The Defendant also filed application under section 17(2) of the West Bengal Premises Tenancy Act, denying landlord tenant relationship. The Trial Court by order no. 145 dated 21.04.1995, came to a finding that there exists landlord tenant relationship between the parties and the defendant is a defaulter in payment of rent and the total amount of rent due is Rs. 7317/- and the defendant was directed to pay the said arrear amount of rent by seven monthly instalments. It is alleged that the defendant thereafter did not comply the direction made in aforesaid order no. 145 and as such the Trial Court by a subsequent order dated 17.03.2005, on the basis of plaintiff's application filed under section 17(3) of the Act of 1956, was

pleased to struck off the defence of the defendant against delivery of possession. Defendant did not challenge the said order passed under section 17(3) by the court below.

4. Thereafter the Court held that from the exhibited documents it appears that the defendants received the ejectment notice by putting his signature on 16.05.1986. Since the defence of the defendant has been struck off, under section 17(3) of the Act and since relationship between the parties as landlord and tenant has been established and since the defendant is a defaulter since August 1981 and the eviction notice was duly served upon the defendant, the court below on the ground of default in payment of rent, decreed the suit in favour of plaintiff, directing the defendant to quit and vacate the suit premises within three months from the date of order vide judgment dated 06.07.2005.

5. Being aggrieved and dissatisfied with the said judgment and order defendant/appellant preferred first appeal before the Appellate Court being aforesaid T.A. 82 of 2005, wherein appellant contended that the court below passed the judgment on the basis of surmise and conjecture and ignored the fact that predecessor of plaintiff purchased the property in the year 1981 from Gopal Lal Mallick, who was Zamindar of the property and Zamindar's interest in the suit property vested in the state in view of the promulgation of Calcutta Thika Tenancy (Acquisition and Requisition) Act, 1981 and predecessor of the plaintiffs by purchase did not acquire any right, title, interest in the suit property. The defendant is a Bharatia under Muhammad Yunsuf being the Thika Tenant of the suit property whom he paid rent till his death. Thereafter he is paying rent to Abdul Hamid and others who are

the legal heirs of said Md. Yunsuf. Accordingly while passing the judgment the court below erred in law and fact that the defendant is a tenant under the plaintiff and that notice of eviction has been served upon him.

6. Learned Appellate Court after hearing the parties concurred with the finding of Trial court that it is a matter of record that the defence of the appellant/ defendant has been struck off under section 17 (3) of the Act of 1956 for non-compliance of the order passed under the provisions of section 17(1) and 17(2) of the said Act and accordingly the defendant is a defaulter in payment of rent since the month of August, 1981 in respect of the suit premises and turned down the defendants contention that there was no landlord tenant relationship between the parties. The court below further held that the defendant having failed to challenge the order passed under section 17(2) of the Act, by the Trial Court vide order no. 145 dated 21.04.1995, before any superior court, she is debarred from raising the issue that she had no relationship with the plaintiffs as tenant and landlord in respect of the suit premises. The defence of the defendant/appellant has been struck off for non-payment of arrear rent and current rent as per order of court, under section 17(3) of the Act of 1956 and accordingly the court below affirmed the judgment and decree dated 06.07.2005 passed by the Trial Court.

7. Being aggrieved by and dissatisfied with the said judgment passed by the first appellate Court, defendant/appellant preferred this second appeal and while the Division Bench of this court admitted the second appeal, has been pleased to held vide it's order dated 4th December, 2006 that this appeal will be heard on the following substantial questions of law:-

- (a) Whether the lower appellate Court was justified in holding that the appellant was debarred from challenging the Order No. 145 dated April 21, 1995 passed by the learned Trial Judge as the appellant did not challenge the same before a superior court; and*
- (b) As to whether on the materials on record the order striking out defence of the tenant/defendant under sub-section (3) of Section 17 of the West Bengal premises Tenancy Act, 1956 was legal.*

8. Mr. Sarban Bhattacharya learned Counsel appearing on behalf of the appellant argued that the appellant/defendant raised the defence that there is no landlord tenant relationship and certain other person are his landlord who had not been made parties in the present suit and in the application filed by the defendant, under section 17(2) of the Act of 1956, defendant canvassed such defence, but the trial court on the basis of registered instrument in favour of plaintiff, decreed the suit observing that on the face of the registered instrument in favour of plaintiff it does not fit in the mouth of defendant that there is no relationship of land and tenant between the parties. Unfortunately the first appellate court also relying the aforesaid order no. 145 dated 21.04.1995 held since the defendant had not challenged the order passed in connection with the application under section 7(2) of the Act, he is debarred from raising the issue that he had no relationship with the plaintiff as tenant and landlord in respect of the suit premises.

9. Mr. Bhattacharya in this connection submits that the order no. 145 by which learned first appellate court refused to entertain the defence of the appellant is an interlocutory order and it is settled law that interlocutory order is not binding at the final stage of the hearing of the suit. In this context he relied upon para 7, 8, 9, 10, 13 of the judgment of Apex Court passed in **Satyadhan Ghosh Vs. Deorjan Debi and another** reported in

AIR 1960 SC 941 and contended that it is not imperative upon the suitor to prefer appeal from every interlocutory order by which he may conceive himself aggrieved, or that, if he does not do so, the benefit of the consideration of the appellate court would be forfeited for ever. He further contended that even assuming that such order was binding on the learned Trial Court at the final hearing, the said order was definitely not binding on the learned first appellate court. In this context he further contended that appellate court is not bound by the observation made by the learned trial court in an interlocutory order and as such the court below clearly erred in law by observing that since order no. 145 had not been challenged before the higher forum, the appellant is debarred from raising such issue.

10. Mr. Bhattacharya further argued that even if the plaintiffs are the owners of the suit property, the same would not necessarily mean that there is a land lord-tenant relationship between the plaintiffs and defendant. In fact the Trial Court has based its decision regarding the landlord-tenant relationship only on the basis of sale deed in favour of the plaintiffs and he ought to have considered whether any agreement of tenancy or rent receipt or such material in connection with the suit property has been produced or not. Accordingly plaintiffs did not discharge their burden of proof and on the contrary defendant can hardly prove any negative issue.

11. Mr. Bhattacharya further argued that it is settled law that even if the defence of defendant is struck off, the same would not mean that the plaintiff's case is proved. The plaintiffs have to prove their case by leading cogent evidence, but unfortunately the Trial Court passed the decree on the

basis of exhibit 1, which is copy of ejectment notice, A/D card and postal receipt and the consolidated rate bill which is marked as exhibit 2. He further contended that the order no. 145 is an interlocutory order and was passed for a limited purpose and Trial Court and the court below were not justified in passing the decree solely based on order no., 145, in the absence of evidence laid by the plaintiffs regarding landlord-tenant relationship.

12. Mr. Poddar learned counsel appearing on behalf of the respondent submits that this is a judgment of affirmation and High Court generally does not interfere with the concurrent findings, unless there is perversity in the judgment. He further contended while disposing application under section 17(2) of the Act of 1956 the court below decided that there exists landlord and tenant relationship between the parties and the plaintiff was found to be the owner of the property by purchase being order no 145. He further contended that said order was neither complied with nor challenged by the tenant/appellant and for which plaintiff filed petition under section 7(3) of the Act for striking off defence due to non-compliance of the order passed under section 7(2) of the Act, which was allowed by the court.

13. Mr. Podder further submits that during trial, the tenant could not disprove the plaint case. The Appellate Court rightly affirmed the judgement passed by the Trial Court. Mr. Poddar further submits that the story of Thika Tenancy or that some third party is a Thika tenant and present appellant is Bharatia under them in connection with the suit property, are all irrelevant in view of judgment passed in Title Suit no. 1711 of 1985 filed against plaintiff's predecessor at the instance of the third parties i.e. the

alleged thika tenants. Accordingly respondents have prayed for dismissal of the second appeal

14. Needless to mention, when the plaintiff alleged that there exists landlord and tenant relationship between the parties and defendant asserts that the property is a thika tenancy property and there are thika tenants in the property under whom he is a Bharatia, the initial onus is upon the plaintiff to prove the relationship. The question of onus however loses its importance, once the plaintiffs tender evidence in support of landlord-tenant relationship and onus shifts upon the defendant/appellant to show that the property is a thika tenancy property and that he is a Bharatia under thika tenants. The burden of proof in that view of the matter shifts upon defendant/appellant who asserts that since he is a Bharatia under some other persons, he is not obliged to pay rent to plaintiff which is against the plaintiff's case of relationship of land and tenant. Here from the case and counter case, it appears that whether defendant has any obligation to pay rent to plaintiff forms an essential part of the party's case and accordingly the proof of such case of thika tenancy rests on him.

15. When plaintiff discharged his burden by adducing oral as well as documentary evidence in the proceeding under section 17 which had not been shakened during cross examination, the onus of proof shifted upon the defendant, who has asserted positive case i.e. his right to stay in the suit property by establishing his case that the subject matter of the suit is governed under Thika Tenancy act and the Act of 1956 has got no application and that the petitioner is a Bharatia under the Thika Tenant at a monthly rent of Rs. 30/- per month and that her landlord is Abdul Hamid

and others and that the purchase of Julekha Bibi from Gopal Lal Mallick is a fraudulent and illegal deed in view of promulgation of the Thika tenancy Act. So onus of proof of aforesaid positive assertions made by defendant is heavily lies upon the defendant/appellant.

16. In the present context it is not in dispute that said Abdul Hamid and other had instituted Title Suit no 1711 of 1985 against original defendant Zulekha Bibi, the Predecessor of Respondents and others and the said suit was dismissed by a judgment dated 30th June 2005. In the said suit the following issues were framed.

- (i) Whether the defendant (Md. Samim and others) has got any right title and interest in the suit premises by purchase?
- (ii) Whether the landlord's right title interest in the suit premises vested to the state of West Bengal under the Calcutta Thika Tenancy (Aquisition and Regulation) act 1981?
- (iii) Whether the defendant has any right to demand rent from the tenant as mention in the schedule "B" to the plaint
- (iv) Are the plaintiffs (Abdul Hamid and others) entitled to get decree for declaration and injunction against the defendant as prayed for?
- (v) What other relief or reliefs the plaintiff's are entitled to?

17. While dismissing the said suit the court was of clear view that the documents filed by the defendant in that suit are sufficient to come to a conclusion that Julekha Begum was the law full owner of the suit premises. It was further observed that the registered deed stands in the name of Julekha Begum is valid in the eye of law, unless set aside by a competent

court of law. In the said suit the written agreement of Thika Tenancy in favour of Julekha Begum is marked as Exhibit-A. It was further observed that the plaintiffs (Abdul Hamid and others) failed to substantiate or establish or prove that they are Thika Tenant in respect of the suit premises. They also failed to establish that they are landlords of the parson described to the schedule B to the plaint and accordingly said court declined to pass decree in favour of aforesaid plaintiffs and accepted the case of Julekha Begum (predecessor of plaintiffs herein) that she had purchased the suit premises from Gopal Lal Mallick and the said deed shows that the land with structure was transferred to Julekha Begum by the superior landlord. Therefore the earlier status of Julekha Begum as Thika Tenant subsequently by execution of the said registered deed of sale converted into the status of absolute owner of the suit premises, since Calcutta Thika Tenancy (Acquisition and Regulation) act 1981 came into force on 18-01-1982, long after when the suit premises including the structure was absolutely transferred by the superior landlord to Julekha Begum by way of sale. Therefore the question of vesting of the suit premises to the state of West Bengal under the said Act does not arise at all.

18. Said observation of a competent court of law has not been set aside by any other competent court of law and in view of aforesaid observation as quoted above, I find nothing wrong in the ultimate finding of the Trial court that there exists landlord tenant relationship, which does not call for any interference. Since the defendant/appellant did not comply the order passed in 17(2) of the Act and intentionally violated the said order, claiming himself as tenant under Abdul Hamid and others illegally, the trial court has also

committed no wrong in striking off the defence of the defendant and as such the said order passed by Trial court under section 17(3) of the act of 1956 is legal, valid and tenable in the eye of law

19. Defendant/appellant has not challenged the service of eviction notice in the second appeal and it is evident from the documents marked as exhibit that the notice of eviction sent under 13(6) of the said act had been duly served upon the defendant/tenant.

20. Last but not the least, both the courts below on the basis of evidence and materials available in the record came to a finding that there exists landlord tenant relationship between the parties and the defendant is a defaulter in payment of rent and for which, plaintiff is entitled to get decree of eviction against defendant on the ground of default. It is well settled in view of judgment of the apex court reported in **Ramathal Vs. Maruthathal and others** reported in **AIR 2018 SC 340** that it is not appropriate for the High court to embark upon the task of re-appreciation of evidence in the second appeal and disturb the concurrent findings of fact of the courts below which are the fact finding courts. Of course when appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, High Court is empowered to interfere on a question on a fact as well. Since in the present context as discussed above there is absolutely no perversity in the judgments passed by the courts below, High court is not supposed to interfere on the question of fact. There is nothing to show that the court below acted contrary to mandatory provision of law or that their findings are based on inadmissible evidence or no evidence nor there is any case that the

courts below have ignored any material evidence or have drawn any wrong inference. It is well settled that the High Court cannot substitute opinion for the opinion of the appellate court, unless it is found that the conclusion drawn by the courts below were erroneous being contrary to be mandatory provisions law or is based upon inadmissible evidence or arrived at without evidence. In this context, I am also of the view that the documents sought to have been produced as additional evidence in the present appeal has got no relevancy with the substantial question of law involved in this appeal.

21. In such view of the matter and on the basis of discussion stated above the present second appeal being **S.A. 9** of **2014** stands dismissed. The connected Application is also disposed of accordingly. However in the fact and circumstance of the case there shall be no order as to cost.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)