

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

S.A. 202 of 2018

**Sandhya Shaw
-Vs.
Durgaprasad Kanu**

For the Appellants : Mr. Subhasis Panchal

For the Respondent : Mr. Buddhadev Ghoshal
Mr. Avijit Chakraborty
Mr. Pankaj Kumar Gupta

Heard On : 16.04.2024

Judgement Delivered On : 15.07.2024

Supratim Bhattacharya, J.:

1. This instant appeal has been preferred by the appellant being aggrieved by and dissatisfied with the judgment dated 18th of January 2017 passed by the Ld. Civil Judge (Sr. Divn.), 3rd Court Howrah in Title Appeal No. 18 of 2016.

Through the said judgment the Ld. First Appellate Court has set aside the judgment dated 31.07.2012 passed in the Title Suit No. 14 of 2005 by the Ld. Civil Judge (Jr. Divn.), 5th Court Howrah.

The Ld. Trial Court through the judgment had reached to the conclusion that the lease deed in question bearing the number 2835 of 2002 executed on 03.05.2002 is binding upon the parties,

thereby had passed the order that the suit be dismissed on contest.

2. The appellant herein is the lessee who was the defendant before the Trial Court and respondent before the First Appellate Court while the respondent herein was the plaintiff before the Trial Court and appellant before the First Appellate Court.

3. Facts before the Trial Court:

The instant *lis* has been initiated by the lessor in the year 2005 by instituting a suit being Title Suit No. 14 of 2005. In the said suit the plaintiff/lessor by filing a plaint among other things had prayed for a declaration that the deed of *lease dated 03.05.2002* in favour of the defendant/lessee allegedly executed by the plaintiff is fraudulent, invalid and inoperative and the defendant/lessee has neither any *locus standi* nor he is entitled to extend the extent of the 'B' *schedule property (which is the suit property in question)* that is all the peace and parcel of property consisting of five (5) rooms with brick build was and tile shed being a portion of and included within the Howrah Municipal corporation holding No. 44, Bhot Bagan Lane, Ghusuri, PS Malipanchghara, District-Howrah and permanent injunction restraining the defendant and her men and agents from making any further encroachment of any portion of the 'A' *schedule property (which is the suit holding)* which is all that peace and parcel of property consisting of thika land measuring about 3 cottas together

with structure made with split bamboo wall and tile shed having about 15 rooms, holding No. 44, Bhot Bagan Lane, Ghusuri, PS Malipanchghara, District-Howrah and committing any illegal or unlawful act.

The defendant/lessee entered appearance in the said title suit and contested the same filing a written statement through which he prayed for dismissal of the said suit.

On consideration of the pleadings of the parties the Ld. Trial Judge was pleased to frame the following issues:

- “1) Is the suit maintainable in its present form?*
- 2. Is the suit bad for joinder and/or mis-joinder of parties?*
- 3. Is the description of Schedule A and B of the plaint vague and insufficient?*
- 4. Is the defendant a premises tenant in respect of the suit property?*
- 5. Has the plaintiff any cause of action to sue?*
- 6. Is the plaintiff entitled to get any decree as prayed for?*
- 7. To what other relief/reliefs to which the plaintiff is entitled to in law and equity?*
- 8. Is the deed of lease dated 3.5.2002 void, illegal as per the provision of Thika Tenancy Act ?”*

After elaborate discussion the Ld. Trial Judge had come to the conclusion that the impugned lease deed bearing the no. 2835 of 2002 executed on 03.05.2002 is binding upon the parties in its terms and conditions and had passed the order

“that the instant suit be and the same is hereby dismissed on contest. There shall be no order as to costs. The suit is thus disposed of.”

4. Facts before the First Appellate Court

Being aggrieved by and dissatisfied with the judgment passed by the Ld. Trial Court the lessor preferred the first appeal. The Ld. First Appellate Court framed the following points for decision:

- “1. Whether the Ld. Court below committed any error by rejecting the plaintiff/appellant case of T.S. 14/05?*
- 2. Whether the appellant /plaintiff has been able to prove his case?”*

The Ld. First Appellate Court during elaborate discussion has observed that the deed of lease being dated 03.05.2002 and the suit being instituted on 27.01.2005 which is within 3 years from the date of execution of the lease deed as such the suit has been filed within the period of limitation.

Apart from the above, the Ld. First Appellate Court has conjointly taken into consideration Section 6(3) and Section 7(1) of the Calcutta Thika and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981 (for short the 1981 Act) and has also taken into consideration Section 105 of the Transfer of Property Act, 1882 (for short the 1882 Act) and has come to the finding that the suit property

is a thika property as such the suit property cannot be the subject matter of a lease so the deed of lease dated 03.05.2002 is not a valid document.

The First Appellate Court has also taken into consideration Section 21 of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 (for short the 2001 Act) which creates restriction to decide and deal with any matter which is required to be decided or dealt with by the controller or the appellate authority and has stated that the controller of the appellate authority has no right or jurisdiction to resolve the dispute regarding the title of the land in question and civil Court has every right to decide the title of the parties to the suit in thika property.

Apart from the above the Ld. First Appellate Court has taken into consideration both oral and documentary evidence and has found that the deed of lease dated 03.05.2002 is not valid and is not binding upon the appellant/plaintiff. After discussion the Ld. First Appellate Court has held that the Ld. Trial Court committed error by dismissing the suit and has allowed the first appeal, thereby passing an order that the instant appeal be and same is decreed *ex parte*, thus setting aside the order of the Ld. Trial Judge passed in the title suit declaring that the deed of lease dated 03.05.2002 is void and not binding upon the parties and as such the lessee is an unauthorized occupant in respect of the Schedule 'B' of the plaint and has restrained the lessee

from changing the nature and character and alienating of the 'B' schedule property.

5. Being aggrieved by the Judgment passed by the Ld. First Appellate Court, the lessee has preferred the instant second appeal.
6. The instant second appeal has been admitted and the following questions of law have been framed:

"1. Whether the Court of appeal below was justified in shifting the onus on the defendants/appellants to prove the validity of the deed of lease when such dispute was raised by the plaintiff/respondent?"

2. Whether the Court of appeal below was justified in reversing the judgment and decree of the Trial Court as the defendants/appellants failed to prove that contents of lease deed was read over and explained to the plaintiff when the execution thereof could not have been specifically denied?"

7. Heard Mr. Subhasis Panchal on behalf of the appellant/lessee and Mr. Buddhadeb Ghoshal being assisted by Mr. Pankaj Kumar Gupta and Mr. Avijit Chakraborty for the respondent/lessor.
8. The Ld. Counsel representing the appellant/lessee during his exhaustive submission has stated:

- i) That the case of the lessor has arisen following a registered lease of deed dated 03.05.2002 which has been executed by the lessor in favour of the lessee in respect of the suit property.
- ii) The Ld. Counsel has further submitted that from the deed in question it transpires that one Pankaj Kumar Gupta son of Durga Prasad Saw was one of the attesting witness and the said witness has also deposed as PW2 and being the son of the plaintiff the said witness had admitted his signature as attesting witness to the said deed of lease.
- iii) The Ld. Counsel has further submitted that the Trial Court was pleased to dismiss the suit holding inter alia that in the light of the evidence adduced by the parties it is amply clear that the impugned deed of lease cannot be held to be inoperative and is binding upon the parties.
- iv) The Ld. Counsel has also submitted that the First Appellate Court reversed the judgment of the Trial Court on two grounds firstly holding that the property being a thika property is governed in accordance with the terms of the 1981 Act as such it prohibits transfer of thika property as per Section 6(3) of the said Act, as such the deed of lease dated 03.05.2002 is not a valid document and as such the said deed is not binding upon the parties.

- v) The Ld. Counsel has further submitted that the other ground for reversal of the judgment of the Ld. Trial Court is that the executants of the said deed in spite of being present in the registry office did not present the deed for registration and it appears that the lessee presented the deed for registration and it appears that some places in the said deed in question are remaining blank and in one place 99 has been handwritten as such the said deed of lease is not binding upon the parties.
- vi) He has further submitted that the point canvassed regarding the transfer of thika property that is Section 7(1) of the 1981 Act does not stipulate any prohibition against letting out whole or any part of the structure standing in the thika tenancy land and Section 6(3) of the 1981 Act also does not prohibit the interest of the thika tenants and tenants of other lands holding directly under the State and there is no prohibition as regards to transfer of the said property.
- vii) He has further submitted that the subject matter of the lease deed consists of 4 to 5 rooms comprising 555 sq. ft. of thika land and only by way of a lease of 99 years cannot be said to be in contravention with the provisions of Section 6(3) of the 1981 Act.
- viii) The Ld. Counsel has further submitted that the as regards to the execution of the document the lessor has not been able to

substantiate that misrepresentation was made during the course of the proceeding and has further submitted that the instrument was executed in presence of the registering officer and was prepared upon prior deliberation by the parties and upon prior fixing of the rate of rent and being satisfied with each and every terms and conditions of the deed the plaintiff duly executed the said deed by signing on it and that too in presence of his son who is an attesting witness and a master degree holder.

- ix) The Ld. Counsel has further submitted that the said deed of lease has not been fraudulently prepared under the disguise of preparing a tenancy agreement.
- x) The Ld. Counsel has further submitted that there was exchange of money on account of premium for the aforesaid period of lease and the entire amount was paid through 4 account payee cheques and in furtherance the lessor had encashed the said cheques immediately.
- xi) The Ld. Counsel has further submitted that legal proceeding has been initiated after along period of about 3 years having mala fide motive.
- xii) The Ld. Counsel has further submitted that Section 32 of the Registration Act, 1908 which has been referred to by the First Appellate Court which lays down as regards to the person to

present the document for registration. In the said section it has been stated that a document can be presented for registration by either of the parties and as such there is no wrong on the part of the appellant to present the deed for registration.

- xiii) He has further submitted that as neither of the parties has denied the execution of the deed of lease and keeping in mind that the lessor in lieu of such execution duly acknowledge amount of money from the lessee it cannot be said at a late stage that there was something done wrongly behind the back of the lessee.
- xiv) He has further submitted that the Ld. Trial Court has rightly dismissed the suit and the Ld. First Appellate Court has totally erred in law by reversing the said judgment and decree of the Trial Court and hence has prayed for allowing the instant appeal setting aside the judgment and decree passed by the Ld. First Appellate Court.

In support of his contentions the Ld. Counsel has referred to a judgment passed by the Hon'ble Single Bench of this Court and published in 1999 2 CLJ 186, in the case between Radheshayam Kundu and ors. Vs. State of West Bengal and ors., wherein it has been held that giving in lease the structure lying in a thika property is not barred and transfer by lease is permissible.

He has further relied upon another judgment delivered by the Hon'ble Apex Court in the case between Rajendra Pratap 'singh Vs. Ramesar Prasad published in (1998) 7 SCC 602 wherein it has been held that a registered deed of kabuliayat executed only by the lessee in favour of the lessor and the lessee in his written statement did not dispute the said fact so the lease was validly made and it cannot be denied and said to be void at a later stage.

9. The Ld. Counsel representing the respondent/defendant has submitted the following:

- i) That the suit is for declaration that the deed of lease dated 03.05.2002 in favour of the appellant/defendant is fraudulent invalid, inoperative and is void being in contravention of Section 6(3) and Section 7(1) of the 1981 Act.
- ii) He has further submitted that the plaintiff/respondent has sought for permanent and mandatory injunction along with declaration that the appellant/defendant is an unauthorized occupant in respect of the suit property.
- iii) He has further submitted that the deed in question that is the lease deed dated 03.05.2002 is void ab initio as because transfer is prohibited by the 1981 Act.
- iv) He has further submitted that with the introduction of the 1981 Act the rights of a thika tenant in heritable but not

transferrable and Section 7(2) states that any transaction, contract or agreement oral or written in contravention of the provision of the act shall be void.

- v) He has further submitted that letting out of vacant land in respect of a thika property is prohibited under Section 6 of the 2001 Act.
- vi) Ld. Counsel has further submitted that as per Section 105 of the 1882 Act lease has been defined as a transfer of right and interest.
- vii) He has further submitted that if the object of any agreement or contract is not lawful the same is not legally enforceable and forbidden by law under Section 23 and 24 of the the Indian Contract Act, 1872.
- viii) Ld. Counsel has further submitted that an illegal thing cannot be legalized even on consent and compromise.
- ix) The Ld. Counsel has further submitted that the ownership of the land and the ownership of the structure standing thereon cannot be segregated. So any instrument executed and registered in contravention of the mandatory provisions of the Thika Tenancy Act is void.
- x) The Ld. Counsel has further submitted that there is no memorandum of consideration annexed to the impugned lease deed.

- xi) The Ld. Counsel has further submitted that the respondent/ plaintiff in his amended plaint has stated that the said lease deed was not read over and explained to him.
- xii) The Ld. Counsel has further submitted that the First Appellate Court has rightly come to the conclusion that the deed is void and thereby setting aside the judgment of the Trial Court.
- xiii) On behalf of the respondents the following authorities have been cited those are
 - 1. (2007) 12 SCC 175
 - 2. AIR 1953 Mad 611
 - 3. AIR 1968 SC 956
 - 4. 1981 85 CWN 606
 - 5. 1988 Supreme (Ori) 126
 - 6. 70 Ind Cas 525.

Banking upon the aforesaid facts the Ld. Counsel has prayed for dismissal of the instant appeal.

- 10.** The moot point to be considered in this instant appeal is as to whether the Ld. First Appellate Court has reached to the conclusion correctly or not, thereby affirming the judgment of the Ld. Trial Court.
- 11.** Both the substantial questions of law are interlinked so those are dealt together

- 12.** From the submission of the Ld. Counsels representing the appellant and the respondent it transpires that the instant *lis* revolves around a deed of lease dated 03.05.2002 executed by the respondent /plaintiff in favour of the appellant/ defendant.
- 13.** As the lease in question is dated 03.05.2002 so this *lis* will be governed by the 1981 Act and not by the 2001 Act. As the 2001 Act has come into effect on and from 01.03.2003.
- 14.** It will be not irrelevant to refer to Section 27 of the 2001 Act. Section 27 of the 2001 Act states as follows:

“27. (1) With effect from the date of commencement of this Act, the Kolkata Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981, shall stand repealed.

(2) Notwithstanding the repeal of the said Act, such repeal shall not—

(a) affect the previous operation of the said Act or anything duly done or suffered thereunder; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the said Act; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the said Act; or

(d) affect any investigation, legal proceeding or remedy, in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.”

15. From the aforementioned section it is apparent that legal proceeding or remedy will be guided by the 1981 Act, as it has been mentioned in Section 27 (2)(d) of the 2001 Act that notwithstanding the repeal of the said Act such repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation liability, penalty, forfeiture or punishment as aforesaid. It has also been laid down in the said section that any such legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the 2001 Act has not been passed.

16. The suit property which has been mentioned in the schedule of the plaint is all that part and parcel of the property consisting of 5 rooms situated at 44, Bhot Bagan Lane, Ghusuri, PS-Malipachghora, District-Howrah standing on thika land. So the *lis* in question involves 99 years of lease in respect of 5 rooms standing on thika land.

17. Section 6(3) of the 1981 Act states as follows:

“(3) The interests of thika tenants and tenants of other lands holding directly under the State under sub-section (1) shall be heritable and shall not be transferable except inter se amongst the heirs and existing co-sharers-interest or to

the prospective heirs, subject to the provisions of sub-section (1) of section 7.”

The aforementioned section is subject to the provisions of Section 7(1) of the 1981 Act.

Section 7(1) of the said Act states as follows:

“7. Thika Tenant not to let out land

1) The thika tenants and tenants of other lands holding directly under the State shall be entitled to let out in whole or in part structures existing on or constructed after the date of commencement of this Act on such lands but not any vacant land or any part thereof.”

18. From the aforementioned two sections it is clear that the thika tenants shall be entitled to let out in whole or in part only structures existing on the thika land. From Section 6(3) of the 1981 Act it is apparent that the interests of thika tenants shall not be transferable except *inter se* amongst the heirs and existing co-shares-interest or to the prospective heirs.

19. In this instant *lis* the appellant/defendant has contested and has filed his written statement. From the pleadings of the parties it is apparent that the appellant/defendant is not a relative of the respondent/plaintiff and the appellant/defendant was never a co-sharer in respect of the said thika property, as such as laid down under Section 6(3) and Section 7(1) of the 1981 Act, the respondent/plaintiff had no right to transfer the suit property that is

the structure standing upon the thika land to the appellant/defendant by way of the said lease in question. As such the lease in question is not at all tenable according to the provisions of law.

- 20.** From the aforementioned discussion it is apparent that though a structure standing upon a thika land can be transferred but that has to be transferred to a co-sharer of the said property or to any heir but not to an outsider.
- 21.** As regards to institution of the suit that is the said title suit, before a Civil Judge is also not tenable as because Section 10 along with Section 12 of the 1981 Act states that the State Government may by notification appoint one or more officers as Controller to perform all the functions of a Controller under the 1981 Act and a Controller had been entrusted with all the powers of the civil court while trying a suit under the Code of Civil Procedure.
- 22.** As such a Civil Judge does not have the power to entertain and decide a suit involving Calcutta Thika & Other Tenancies and Lands etc. Act, 1981.
- 23.** From the plaint it transpires that the plaintiff has prayed for a declaration that the deed of lease dated 03.05.2002 in favour of the defendant allegedly executed by the plaintiff is fraudulent, invalid and inoperative so it transpires that the plaintiff has prayed for declaring the deed in question that is the lease deed to be void.

Declaration of a registered deed in respect of a thika property to be void can be decided only by the Controller. Section 23 of the 1981 Act lays down the bar as regards to the jurisdiction of a civil court. Section 23 states as follows:

“23. No civil court shall have jurisdiction to decide or deal with any question or to determine any matter which is by or under this Act required to be or has been decided or dealt with or to be determined or has been determined by the Controller or the appellate or other authority specified in the provisions of this Act and no order or judgment passed or proceedings including' execution proceedings commenced under the provisions of this Act shall be called in question in any civil court.”

24. In this regard this Court refers to the judgment of a Division Bench of this Hon'ble High Court passed in the case between Sri Samarendranath Das @ Samar Das vs. M/s. Bengal Central Building Society Ltd and ors. published in 2015 SccOnline Cal 838 wherein the said Division Bench in Paragraph no. 9 has laid down the following:

“9.) The decisions referred by the learned Counsel for the appellant are clearly distinguishable on facts from our present case. In the case of State of Tamil Nadu v. Ramalinga Samigal Madam reported in (1985) 4 SCC 10 it was held that the Settlement Officer's decision regarding grant or refusal to grant ryotwari patta in respect of land would not bar or exclude the Civil Court's jurisdiction to determine the nature

of the land. This judgement differs on facts from our present case. In Dhulabhai's case reported in AIR 1969 Supreme Court 78 the principles regarding exclusion of jurisdiction of the Civil Court have been laid down. It has been held in the aforesaid decision that where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. In our instant case the plaintiff/appellant's specific case in the plaint is that the subject of the deed of conveyance dated 27th July, 2011 is schedule 'B' property which is comprised in thika tenancy and as such the transfer of such property offends the provision of W.B.T.T Act 2001 and consequently renders the deed of conveyance void. In Paragraph 8 of plaint it has been mentioned that schedule 'B' property is a part of schedule 'A' property whereas schedule 'C' property is a part of schedule 'B' property. In view of Sub-Section (2) of Section 6 of the W.B.T.T Act 2001, it is within the exclusive jurisdiction of the Controller to declare the impugned transfer of such property as invalid which the plaintiff virtually seeks from the Civil Court in terms of prayers (b), (c) and (d) of the plaint. Granting the aforesaid reliefs to the plaintiff would be tantamount to declaring as invalid the alleged transfer of the property in question by virtue of the impugned deed of conveyance. The above mentioned provision of the W.B.T.T Act clearly excludes the Civil Court's jurisdiction to deal with the matter. The judgements reported in (2008) 15 SCC 517 (N. Padmamma v. S. Ramakrishna Reddy) and AIR 2010 Supreme Court 2897 (Ramesh Gobindram (deceased by LRs.) v. Sugra Humayun Mirza Wakf.) are also of no avail to the appellant for the simple reason that from the statements in

the plaint itself, the suit appears to be barred by Section 21 of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001.”

- 25.** The aforementioned judgment has also been dealt with by a coordinate bench of this Hon'ble court in the case between Pravash Eich and Anr. Vs. Sri Shivsankar Eich and Ors. and reported in 2017 SccOnline Cal 19153.
- 26.** Thus the issue of declaration of a registered deed to be void or not, can be dealt with by the Controller only and the civil court does not have the jurisdiction.
- 27.** So from the above discussion it is evident that the deed of lease which is in question is not in accordance with the 1981 Act. It is also revealing that the Civil Court that is the Ld. Trial Court did not have the jurisdiction to decide the said suit.
- 28.** The Ld. First Appellate Court has come to the finding that the Ld. Trial Court had the jurisdiction to deal with the issue which is not correct as such the judgment of the Ld. First Appellate Court requires interference. This Court is at one with the view of the Ld. First Appellate Court as to the fact that the registered deed in question is not enforceable as it is not in accordance with law but this Court differs with the view of the Ld. First Appellate Court in regard to the issue that the Ld. Trial Court in this case the Ld. Civil Judge, (Jr. Divn.) had the jurisdiction to decide the suit

- 29.** This Court does not feel it necessary to deal with the other aspects in respect of the lease in question, as it has been found that the registered deed that is the deed of lease is against the provisions of law. So this Court restricts itself from discussing the other issues as regards to the deed in question.
- 30.** As it has been stated earlier that the Judgment and Decree passed by the Ld. First Appellate Court requires interference so this instant appeal being No. **S.A. 202 of 2018** stands **allowed**.
- 31.** Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
- 32.** Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)