

17.05.2024
Item No.15
gd/ssd

CO/3388/2023
SUKAMAL KHAN & ORS.
VS
SUBRATA DAS & ORS.

Mr. Ram Chandra Guchhait,
Mr. Sourav Guchhait
..for the petitioners.

Mr. Bhaskar Ghosh, Sr. Advocate,
Mr. Sanjay Mukherjee
..for the opposite parties.

The judgment and order dated August 22, 2023 passed by the learned Additional District Judge, Fast Track Court-II Howrah in Misc. Appeal No.103 of 2022 is under challenge in this application under Article 227 of the Constitution of India at the instance of the plaintiffs.

The petitioners have filed a suit for declaration that they are the lawful owners and co-sharers in respect of 'B' Schedule property and for a decree of permanent injunction restraining the opposite parties and their men and agents from making any construction over the 'B' Schedule property.

The learned Trial Judge by an order dated 1st June, 2022 allowed the application for temporary injunction thereby restraining the opposite parties herein from making any construction over the 'B' Schedule property till the disposal of the suit.

The opposite parties herein challenged the said order in Misc. Appeal No.103 of 2022 and the learned Judge of the Court of Appeal below by the order impugned allowed the Misc. Appeal thereby setting aside the order of injunction passed by the learned Trial Judge.

The learned Advocate appearing for the petitioners submits that the opposite parties herein filed an application under Order VII Rule 11(d) of the Code of Civil Procedure praying for rejection of plaint on the ground that the suit is barred by law as the suit property is a Thika property and the learned Trial Judge, by an order dated 19th February, 2022, rejected the said application under Order VII Rule 11(d) of the Code of Civil Procedure.

Therefore, according to the learned Advocate for the petitioners, the issue of maintainability of the suit being decided by the learned Trial Judge in favour of the petitioner herein at an earlier stage of the proceedings, such a plea cannot be raised in the subsequent stage of the same proceedings.

He submits that the principles of *res judicata* applies in the subsequent stages of the same proceedings also. He further submits that the Court of appeal below being swayed by the judgment passed in Title Suit No.310 of 1983 affirmed in Title Appeal No.260 of 1986 allowed the misc. appeal

without appreciating the fact that the plea as to the bar of the jurisdiction of the Court to decide the instant suit cannot be raised in the Miscellaneous Appeal after the same has been decided in an earlier stage by the Trial court.

Mr. Ghosh, learned senior Advocate representing the opposite parties submits that it is well settled that while deciding an application under Order VII Rule 11(d) of Code the Court has to consider only the averments made in the plaint. He submits that the order dated 19th February, 2022 was passed by the learned Trial Judge only considering the plaint averments. He, therefore, submits that the said order cannot act as a bar in raising the plea as to the maintainability of the suit in the miscellaneous appeal.

Heard the learned Advocates for the parties and perused the materials placed.

It is well settled that before passing an order of injunction the Court has to be prima facie, satisfied as to the maintainability of the suit.

The learned Judge of the Court of Appeal below after taking into consideration the documents placed on record observed as follows:

“Moreover, from the documents filed by the appellants, it appears that the plaintiffs’ predecessor filed a suit against the defendants’ predecessor for eviction of tenant before the then Ld. 3d Munsif, Howrah which

was registered as T.S No-310 of 1983. The suit was dismissed on contest and the then Ld. 3rd Munsif, Howrah declared the suit property as 'Thika Property'.

The plaintiffs' predecessor preferred an appeal against the said order of dismissal of the suit (T.S NO-310 of 1983) which was registered as Title Appeal No-260 of 1986. The appeal was also dismissed on contest. As such, the judgment and decree passed by the then Ld. 3rd Munsif, Howrah declaring the suit property as 'Thika' was affirmed by the Ld. Appellate Court. The judgment passed in the appeal was not challenged in any higher forum. As such, the nature of suit property involved in this suit between the same parties has been conclusively determined by a competent Court of Law and its binding upon the parties.

After the commencement of Calcutta Thika Tenancy Act the right of the landlord vested to the State and as such, the predecessor of defendant nos-1 to 4 became 'Thika Tenant' directly under the State which has been further affirmed by the Ld. 1st A.D.J, Howrah in Title Appeal No-260 of 1986.

Although the Ld. Advocate for the respondents argued that the appellants are trying to make construction over the suit property in violation of law and as such, the Civil Court has jurisdiction to pass an order of injunction but the plaintiffs in their suit have prayed for declaration that the plaintiffs are lawful owners and co-sharers in respect of the 'B'-schedule property, which in view of the judgments passed in T.S No-310 of 1983 and Title Appeal No-260 of 1986 are bad in law Under Section 11 of C.P.Code.

Hence, it is apparent that the plaintiffs/respondents could not make out any prima facie case in their favour so as to get an order of injunction".

Thus it appears that the learned Judge of the Court of Appeal below arrived at prima facie finding that the Civil Court has no jurisdiction to try and entertain the instant suit for declaration and injunction as the suit property is a Thika property. It

was further observed that the predecessor of the defendant nos.1 to 4 became Thika Tenant directly under the State.

It further appears that the learned Judge of the Court of Appeal below recorded that the petitioners herein who were the respondents in misc. appeal suppressed material facts and did not come up with clean hands.

There is, however, no quarrel of the proposition of law laid down by the Hon'ble Supreme Court in *Vijayabai & Ors. Vs. Shriram Tukaram & Ors.* reported at AIR 1999 (SC) 431 that the principles of *res judicata* shall apply even if *res judicata* in its strict sense may not apply.

However, in view of the observations made hereinbefore, this Court is of the view that the said decision cannot come to the aid of the petitioners in the case on hand.

This Court, therefore, does not find any infirmity in the order passed by the learned Judge of the Court of Appeal below in Miscellaneous Appeal No.103 of 2022.

At this stage, learned Advocate for the petitioners submits that the suit is ready for hearing and a date for evidence has already been fixed sometimes in the month of June, 2024.

In the light of the aforesaid submission made by the learned Advocate for the petitioners, this Court requests the learned Civil Judge, 7th Court, Howrah to dispose of the Title Suit No.100 of 2022 as expeditiously as possible without granting any unnecessary adjournments to either of the parties.

Accordingly, CO 3388 of 2023 stands dismissed.

There will be no order as to costs.

Urgent certified copy of this order, if applied for, be given to the learned advocates for the parties on usual formalities.

(HIRANMAY BHATTACHARYYA, J.)