

April 15, 2024
Sl. No.36
Court No.19
s.biswas

CO 3431 of 2022

Ananda Kundu and another
vs.
Smt. Supriya Barman and others

Mr. Sumit Roy
Mr. Sailen Naskar

... for the petitioners

Mr. Abhijit Ray
Mr. Santu Nandy
Md. Ayaan

... for the opposite party no.1

1. The revisional application arises out of an order dated August 11, 2022 passed by the learned Judge, 12th Bench, City Civil Court at Calcutta in Title Suit No.870 of 2019.
2. The learned court rejected an application under Order 7 Rule 11 of the Code of Civil Procedure. According to the learned court, the question of rejecting the plaint, at the nascent stage, would not arise. A meaningful reading of the plaint did not reflect that the suit was barred under the provisions of The West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001, (hereinafter referred to as the said Act). According to the learned court, the plaint read as a whole also did not indicate that the reliefs claimed, were barred by law.
3. The suit was filed for declaration and injunction. A declaration that the plaintiff was the absolute owner of the A-schedule property and was

entitled to enjoy the property, without any obstruction and hindrance from the side of the defendants and their men and agents, was the first prayer. Further declaration that the defendants and their men and agents could not construct on the property without proper sanction and permission and without maintaining adequate space between the two properties was prayed for. Permanent injunction restraining the defendants and their men and agents from constructing on the B schedule property, in violation of the rules, thereby depriving the plaintiff of her right to air and light was also prayed for.

4. Mr. Sumit Roy, learned advocate appearing on behalf of the petitioners/defendant nos.1 and 2, submits that the suit was not maintainable as the property on which the alleged construction was going on, was a thika property.
5. The plaintiff had categorically stated in paragraph 11 of the plaint that the sanction to build on the said plot was not obtained by the defendants either from the Kolkata Municipal Corporation or from the Thika Controller.
6. The learned advocate for the opposite parties submits that the plaint indicates that the suit was barred by the provisions of the said Act.

Further, the reliefs claimed did not also pertain to anything arising out of the rights and obligations of the thika tenant vis-a-vis the plaintiff. The issue involved in the suit was beyond the scope and jurisdiction of the Thika Controller.

7. Having heard the learned advocates for the respective parties, this court finds that in paragraph nos.1, 2 and 3 of the plaint it has been averred that the plaintiff is owner of the property situated at 81/C, Tarak Pramanick Road, Kolkata 700006, being A schedule property. The plaintiff had constructed a G+1 building on the said property. In paragraph nos.4 to 7, the plaintiff stated that the defendant nos.1 and 2 were the owners of the neighbouring property, i.e., premises no.49/H/6, Madhu Roy Lane, Kolkata 700006. The defendants property has been described in schedule-B.
8. The contention of the plaintiff is that the defendant was demolishing the old structure on B-schedule property and constructing a new building thereon, without taking any permission from the Kolkata Municipal Corporation and the Thika Controller. The allegation is that the act of demolition, excavation, drilling, digging of trenches, etc. were so close to the boundary wall

of the plaintiff's property that such activities was resulting in damage to the floors, walls, etc. of the plaintiff's property. Accordingly, the suit was filed with the prayers which have been mentioned hereinabove. The plaintiff is also enjoying an injunction. Thus, the bone of contention of the plaintiff is that the defendants were constructing without proper sanction from the permission granting authorities and without observing the building rules. The defendants were not maintaining adequate side space between the two properties. As a result of such construction, digging, drilling, etc., the property of the plaintiff suffered damage and there was obstruction of free play of light and air. The suit was filed with prayers for declaration that the plaintiff was entitled to enjoy a schedule property, free from any hindrance, damage and disturbance from the defendants and with a further prayer restraining the defendants from causing any kind of damage or disturbance to the plaintiff's property.

9. Under such circumstances, upon a meaningful reading of the plaint, this court cannot arrive at the conclusion that the suit was per se barred by law. Whether the Thika Controller had the power to adjudicate the allegations made by the

plaintiff can be decided as a separate issue. Whether the suit was barred under the provisions of the Thika Tenancy Act would also be decided as an issue as of now. Reliance has been placed on the decision of **Samarendra Nath Das @ Samar Das vs. Bengal Central Building Society Limited** reported in 2015(5) CHN (Cal) 23 by the petitioner. This court cannot travel beyond the averments in the plaint to arrive at the decision that the suit was barred by the provision of the Thika Tenancy Act, only because the alleged illegal construction was continuing on the neighbouring property, which was alleged to be thika property by the defendants. The contents of the plaint should be deemed to be correct and correctness of the defendants' submissions cannot be decided at this stage. Moreover, whether the reliefs claimed in the suit were within the jurisdiction of the Thika controller and the controller could grant such reliefs cannot be decided at this stage.

10. The judgment cited by Mr. Sumit Roy, learned advocate for the petitioners, is not applicable at this stage, as the facts are distinguishable. In the decision of **Samarendra Nath Das @ Samar Das** (supra), the Hon'ble Division Bench came to the finding that a prayer for declaration was for

setting aside a deed of conveyance of a thika property.

11. Reference is made to decision of **G. Nagaraj and Anr. vs, B.P. Mruthunjayanna and Ors.** decided in **Civil Appeal No.- 2737 of 2023.**

The Hon'ble Apex Court held as follows:-

"6. The law is well settled. For dealing with an application under Rule 11 of Order VII of CPC, only the averments made in the plaint and the documents produced along with the plaint are required to be seen. The defence of the defendants cannot be even looked into. When the ground pleaded for rejection of the plaint is the absence of cause of action, the Court has to examine the plaint and see whether any cause of action has been disclosed in the plaint.

7. A perusal of the judgments of the Trial Court and the High Court will show that the Courts have gone into the question of correctness of the averments made in the plaint by pointing out inconsistent statements made in the plaint. The Courts have referred to the earlier suits filed by the appellants and have come to the conclusion that the plaint does not disclose cause of action.

8. The learned counsel appearing for the second and third respondents vehemently submitted that on a plain reading of the plaint, it is crystal clear that cause of action is not disclosed. Therefore, we have perused the plaint. After having perused the plaint and in particular paragraphs 16 and 17, we find that the cause of action for filing the suit has been pleaded in some detail. It is pleaded how the first appellant acquired title to the property. The facts constituting alleged cause of action have been also incorporated in paragraph 17.

9. We are of the view that merely because there were some inconsistent averments in the plaint, that was not sufficient to come to a conclusion that the cause of action was not disclosed in the plaint. The question was whether the plaint

discloses cause of action. As observed earlier, the plaint does disclose cause of action. Whether the appellants will ultimately succeed or not is another matter.”

12. In the decision of ***Kamala and ors. vs. K.T.***

Eshwara Sa and ors., reported in **(2008) 12**

SCC 661, the Hon’ble Apex Court held as follows:-

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”

13. The revisional application stands disposed of without any interference.

14. All the parties are directed to act on the basis of the server copy of the order.

15. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)