

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

Present:

The Hon'ble Justice Dinesh Kumar Sharma

**C.O. 1605 of 2022
with
CAN 1 of 2023**

**Sri Manik Das
Vs.
Promila Das & Ors.**

For the petitioner: **Mrs. Sabita Mukherjee Roy Choudhury, Adv.,
Ms. Sneha Sinha, Adv.**

For the Opposite parties: **Mr. Krishna Das Poddar, Adv.,
Ms. Mandira Barman, Adv.,
Mr. Surajit Maity, Adv.**

Heard on: **26.08.2025**

Judgment on: **25.09.2025**

DINESH KUMAR SHARMA, J.:

1. Present petition has been filed challenging the order dated March 15, 2022 passed by Learned Second Judge City Civil Court at Calcutta in Misc. Case No. 597 of 2020 (arising out of Title Execution Case No. 53 of 2011), whereby the Learned Trial Court while deciding an application of the opposite party under Order 21 Rule 101 and 104 read with Section 47 and Section 151 of the CPC set aside the ex parte judgment and decree passed by the Court in Title Suit

No. 1897 of 2003 as having been passed without jurisdiction and further directed to restore back possession to the petitioners of the suit property.

2. Briefly stated the facts as emerged are that initially a Title Suit No. 1897 of 2003 was filed by the petitioner herein against amongst others, the deceased father of the opposite party no. 2 and 3, namely, Rup Chandra Rajak Alias Das, inter alia, praying for a decree of declaration and recovery of Khas possession of the suit property in the premises no.B12/1/H/5 Ram Chand Ghosh Lane, Police Station- Burtolla, Kolkata- 700006. The said suit was decreed ex parte by judgment and decree dated June 9, 2011. An application was filed under Order 9 Rule 13 of the CPC along with Section 5 of the Limitation Act bearing Misc. Case No. 819 of 2011 for setting aside the ex parte decree, which was dismissed in default on September 5, 2014. This led to filing of another Misc. Case No. 1892 of 2015 under Order 9, Rule 13 CPC, the same was also dismissed after contest vide order dated February 13, 2020. It is pertinent to mention here that setting aside of ex parte judgement/decreed was prayed for primarily on the ground that their earlier advocate did not pursue the case diligently. In the meanwhile a title suit was also filed by the opposite party for partition bearing Title Suit No. 383 of 2015.
3. The petitioner challenged the impugned order passed in Misc. Case No. 597 of 2020 on the ground that the learned Court exceeded its jurisdiction and committed material irregularity by entertaining and deciding the present application. Learned counsel submitted that an application under Order 21, Rule 101 of the CPC can be entertained only where a third party to the suit

seeks to establish its independent title to the decretal property. Such an application cannot be moved by the judgment debtor, who had suffered the decree. The petitioner also submitted that Section 47 of the CrPC has not been followed by the Learned Trial Court as Section 47 is limited to the execution, discharge and satisfaction of the decree.

4. The petitioner further submitted that the Learned Trial Court has committed grave illegality by holding that the Civil Court did not have jurisdiction. Learned counsel submitted that the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001, hereinafter referred as Thika Tenancy Act, is applicable for a eviction of a tenant and for eviction of Bhartia by the tenant. The petitioner submitted that other nature of the suits in between the persons holding right attached thereto can always be adjudicated by the Civil Court.
5. Learned Counsel for the petitioner submitted that in fact Late. Rup Chandra Rajak traespassed in the ground floor of the petitioner, for which the petitioner filed suit no. 1897 of 2003 for recovery of the possession. Learned Counsel submitted that the defendants in the suit were duly served. However, they did not contest the suit which resulted into ex parte decree dated June 9, 2011. The petitioners filed a Title Execution Case No. 35 of 2011. In the said Misc. case on the resistance being offered by Late. Rup Chandra Rajak the petitioners were granted police help in Misc. Case 795 of 2012 vide order dated July 25, 2014. Pursuant to this the petitioner got possession of two rooms on February 27, 2015 and Execution Case was disposed of with satisfaction, vide order dated March 27, 2015. Learned Counsel submitted that Late. Rup

Chandra Rajak filed an application under Order 9, Rule 13 Vide Misc. Case No. 819 of 2011 and the same was dismissed for non prosecution vide order dated September 5, 2014. Learned counsel further submitted that second Misc. Case No. 1892 of 2015 for setting aside ex parte decree was also dismissed on contest vide order dated February 13, 2020. Learned counsel submitted that the order in Misc. case no. 1892 of 2015 has not been challenged by the opposite party/JD and has thus attained finality.

6. Learned counsel for the petitioners submitted that thereafter the legal heirs of Late. Rup Chandra Rajak filed Misc. Case No. 597 of 2020 under order 21, Rule 101 and 104 read with Section 47 of the CPC challenging the ex parte decree dated June 9, 2011 passed in Title Suit No. 1897 of 2003 claiming therein that the subject matter of the suit is a thika tenancy property and the JD in title suit no. 1897 of 2003 were monthly thika tenants and, therefore, the Civil Court had no jurisdiction to try the suit.
7. Learned counsel submitted that the learned Executing Court without taking evidence, wrongfully and illegally set aside the ex parte decree passed in the year 2011 vide order dated March 15, 2022. Learned counsel further submitted that the petitioners had been taking contradictory stand as on one hand it was claimed that the Civil Court has no jurisdiction to entertain as the subject matter of the property was a thika tenancy, whereas they themselves filed the partition suits (Title suit no. 383 of 2015) regarding the same subject matter.
8. Learned counsel for the petitioner submitted that the present suit does not fall within the ambit of Section 8 of the Thika Tenancy Act, and thus, is not barred

under Section 21 of the Thika Tenancy Act. Learned counsel submitted that suit for eviction of a trespasser, even if the property is a thika tenancy property, is maintainable before the Civil Court.

9. Learned Counsel further submitted that once the execution petition had been duly satisfied the learned executive Court had become functus officio and had no jurisdiction. Learned counsel for the petitioner placed reliance upon Md. Jamil Akhter vs. Abdul Majir, 2011 (1) Cal LJ 308 and Asit Chatterjee vs. Kanai Lal Das, 2023 (1) ICC 1556.
10. Per contra, learned counsel for the opposite party submitted that the initial title suit was filed regarding inter se disputes of Thika tenants. Learned counsel submitted that the petitioner being the plaintiff filed the suit for eviction of suit of trespasser, wherein it was an admitted fact that the parties to the suit were joint thika tenants and their predecessor in interest is common. Learned counsel submitted that thus, admittedly eviction of thika tenants was sought in the Title suit, which was not maintainable before the Civil Court in view of Thika Tenancy Act.
11. Learned Counsel further submitted that in the written statement itself the defendant/opposite party had challenged the Jurisdiction. However, subsequently the suit was decreed ex parte on account of negligence of the then lawyer. Learned counsel further submitted that the application under Order 9, Rule 13 CPC was also dismissed on account of the fault of the lawyer.
12. Learned counsel submitted that Section 5(3) of the Thika Tenancy Act, specifically provides that any question regarding whether a person a thika

tenant or not or whether the land in question is thika land or not, the jurisdiction vests with the controller. Learned counsel submitted that the parties are admittedly joint thika tenant and the petitioner falsely manufactured the story regarding trespassing in 1992, which on the fact of it was false. Learned counsel submitted that even otherwise the suit was barred as it was filed in 2003 i.e. after 11 years of alleged trespass.

13. Learned counsel submitted that the petitioner had misled the learned Trial Court. Learned counsel submitted that nullity of an order can be challenged at any stage or in any proceedings and even at the execution stage. Learned counsel further submitted that the petitioner in the year 1992 had filed a case under Sections 448, 427 and 504 of the Indian Penal Code against Kesto Das i.e. husband of the opposite party no.1 bearing GR Case No. 1852 of 1992/TR no. 183 of 1993. Learned Counsel submitted that the said case after full contest resulted into the acquittal, vide order dated September 28, 2006. Learned counsel submitted that summons of Title Suit No. 1897 of 2003 were served only after the criminal case has resulted into the acquittal. Learned Counsel submitted that the order dated September 28, 2006 has attained finality as the same has not been challenged.
14. Learned counsel further submitted that the judgment cited by the learned counsel for the petitioner are distinguishable as in those cases the suit were filed against the trespassers.
15. The Court has considered the submissions and perused the record carefully. The above narration makes it clear that the case has a chequered history. The

suit was filed long back in the year 2003. The predecessor in interest of the opposite party though filed the written statement, but did not contest the suit which resulted in the ex parte decree in the year 2011. The two applications filed for setting aside of ex parte decree were also dismissed in default and on contest respectively. The dismissal of application of setting aside ex parte decree on merit has not been challenged by the opposite party and has thus, attained finality. In the impugned order the learned Executing Court, inter alia, held that the learned Civil Court had usurped the jurisdiction in contravention of the provisions of Thika Tenancy Act, and thus, the decree is a nullity. Learned Court in the impugned order further inter-alia held that if the decree is without jurisdiction it is a nullity and its invalidity could be setup, whenever and wherever, even at the stage of execution and even in collateral proceedings. Perusal of the order dated June 9, 2011 vide which the Title Suit No. 1897 of 2003 was decreed ex parte indicates that the Learned Trial Court noted the pleadings, that on July 12, 1992 the Predecessor-in-interest of the opposite party trespassed into the rooms of the plaintiff/petitioner and took forcible possession of the rooms prescribed in Schedule-B of the plaint and also took forcible possession of another room of the petitioner/plaintiff on January 6, 1999. Learned Trial Court after taking into account the ex parte evidence of the plaintiff/petitioner decreed the suit ex parte.

16. Before proceeding further it is advantageous to refer to the relevant provisions of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 Section 5, Sub-Section 3 provides as under:

“[(3) If any question arises as to whether a person is a thika tenant or not or whether the land in question is thika land or not, the Controller, either on his own motion or upon receiving any information, may, after giving the persons interested an opportunity of being heard and after examining all such documents and particulars as may be considered necessary, enquire upon and decide such question.]”.

17. Section 8, Sub-Section 2 and 3 provides as under:

“2) Every thika tenant holding directly under the State under sub-section (1) shall be liable to pay to the State Government in the prescribed manner such revenue as may be determined.

[(3) If any question arises as to whether a person is a thika tenant or not or whether the land in question is thika land or not, the Controller, either on his own motion or upon receiving any information, may, after giving the persons interested an opportunity of being heard and after examining all such documents and particulars as may be considered necessary, enquire upon and decide such question.]”.

18. Section 21 of the Thika Tenancy Act, places a bar upon jurisdiction of the Civil Court Section 21 reads as under:-

“21. Bar to jurisdiction. -No civil court shall have jurisdiction to decide, or to deal with, any question, or to determine any matter, which, by or under this Act, is required to be, or has been, decided or dealt with, or which is to be, 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”.

19. The Coordinate Bench of this Court in Md. Jamil Akhter (Supra), inter alia, held that the suit for eviction of a licensee by the licensor does not fall either under Section 8(3) or under Section 21 of the said Act as both the aforesaid provisions created a bar in maintaining a suit between the Thika Tenant and

the Bhartia before the Civil Court without reference to the suit for eviction of a licensee without a licensor.

20. Similarly, the Division Bench of this Court in Asit Chatterjee (supra), inter alia, held that suit for eviction of a trespasser cannot be said to be barred under Section 8(3) or Section 21 of the West Bengal Thika Tenancy Act. It was further, inter alia, held that in order to ascertain whether the Civil Court has jurisdiction to try and determine the suit initially the pleadings and at the trial evidence are to be looked into by Trial Court.
21. It is pertinent to mention that though, the defendant/opposite party had taken a plea regarding the non maintainability of a suit, but failed to substantiate the same at an appropriate stage in the title suit 1897 of 2003. The defendant/opposite party after filling the written statement proceeded ex parte and did not contest the case. The successive applications for setting aside ex parte order were also dismissed in default and on contest. The opposite party/defendant have tried to put the entire blame on the earlier advocate, without any substantive proof. Merely making allegation against the erstwhile advocate for unfavourable orders will not absolve the opposite party/defendant for their casual approach and non-seriousness towards the matter. It is a settled proposition that a party who has not pursued matter diligently, cannot be given concessions afterwards merely, on the ground that there was a fault of a lawyer. If there was an actual fault of the lawyer nothing prevented the Defendant/opposite party from proceedings against that particular lawyer. However, no material regarding this has been placed on record nor the same

has been pleaded by the learned counsel for the opposite party. It is also matter of record that the Misc. Case No. 1892 of 2015 for setting aside the ex parte decree was dismissed on contest vide order dated February 13, 2020 and the same has not been challenged and has thus attained finality.

22. Thus, the defendant opposite parties have always been absolutely negligent and careless towards pursuing their rights. It is pertinent to mention that only after dismissal of the second application for setting aside ex parte order, the present application was moved under Order 21, Rule 101 and 104 read with Section 47 and 151 of the CPC.
23. It cannot be disputed the Thika Tenancy Act confers exclusive jurisdiction upon the controller, regarding the dispute between Thika Tenant and Bhartia tenant. However, though the suit for eviction may not be maintainable against the Thika Tenant, but a suit against the trespasser would not be barred under Thika Tenancy Act. In order to ascertain the maintainability of the suit the Court is required to go into the pleadings of the parties. Merely by raising an issue that the suit is not maintainable will not take away the jurisdiction of the Court. The party who raises a plea is legally bound to prove the same in accordance with law. The perusal of the initial plaint filed by the petitioner/plaintiff herein though admits that parties were Thika Tenant in respect of the subject matter as having inherited. However, subsequently, an amicable settlement took place between the co-sharers on February 23, 1985 and they were allotted the respective portions in the suit property. The plaintiff/petitioner had pleaded that he was allotted one big room and one

attached small room on the first floor and two rooms on the ground floor in the property. It was further pleaded that the predecessor-in-interest of the defendant/opposite party had been threatening to take over possession illegally for which the petitioner/plaintiff had filed complaint before the Police and the Authorities. However, on July 12, 1992 the defendants with the help of anti social element took forcible possession and trespassed into the plaintiff's room situated on the ground floor for which a GD Entry was made on which the proceedings were initiated.

24. The plaintiff further pleaded that the opposite party took forcible possession of plaintiff's another room and trespassed therein for which another GD entry was made on January 6, 1999. Thus, the plaintiff/petitioner had filed the title suit no. 1897 of 2003 against the opposite party specifically alleging that they were the trespasser in the property. The defendant/opposite party for the reasons best known to them, did not choose to contest the said suit and remained ex parte.
25. It was incumbent upon the opposite party/defendant to prove that they were in the possession as a Thika Tenant and had not trespassed into the property in question. It is also pertinent to mention here that nothing prevented the defendant/ opposite party from raising an issue before the Thika Controller to decide the status under Thika Tenancy Act.
26. In view of the discussions made hereinabove I consider that the learned Executing Court swayed away by the plea taken by the opposite party/defendant that the learned Civil Court had no jurisdiction without any

substantive material on record. Thus, the impugned order cannot be sustained in the eyes of law and is set aside. The petition is allowed. No order as to cost.

(Dinesh Kumar Sharma, J.)