

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.M.A. No. 800 of 2024

**Syed Khawaja Moin and Another
Vs.
Md. Safi Alam**

For the appellants	:	Mr. Sounak Bhattacharya, Ms. Sreeparna Ghosh, Mr. Anirban Saba Roy
For the respondent	:	Mr. Anirban Roy, Mr. Ashim Kumar Roy, Mr. Abid Jamal
Heard on	:	07.08.2025, 12.08.2025 & 18.08.2025
Reserved on	:	18.08.2025
Judgment on	:	26.08.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal arises out of an order of remand. The plaintiffs/appellants filed a suit for eviction of the defendant/respondent under Section 6 of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as "the 1997 Act") on the grounds of default in payment of rent, reasonable requirement and nuisance and annoyance. During pendency of the suit, the defendant/respondent did not file any application under Section 7(1) or Section 7(2) of the 1997 Act. The learned Trial Judge framed several

issues and decided all of those in her final judgment, granting a decree of eviction on the grounds of reasonable requirement as well as default. The learned Trial Judge, notably, also decided the issue of landlord-tenant relationship in favour of the plaintiffs/appellants. While doing so, it was held that the defendant/respondent have failed to prove their plea that the property was a *Thika* Tenancy.

2. The defendant/respondent preferred an appeal against the same, which was ultimately decided by the learned First Appellate Court by holding that non-filing of an application under Section 7(2) of the 1997 Act, when the landlord-tenant relationship was not admitted by the defendant, was not fatal and remanding the matter to the Trial Court for a fresh adjudication by framing all issues, including the issue of maintainability as well as other issues.
3. Challenging the same, the plaintiffs/appellants have preferred the present appeal.
4. Learned counsel for the plaintiffs/appellants argues that in view of the learned Trial Judge having held in her judgment that the defence of the defendant/respondent was liable to struck out in view of non-compliance of Sections 7(1) and 7(2), the written statement of the defendant could not be looked into. Since the question as to whether the suit property is a *Thika* Tenancy was raised in the written statement, upon striking out the defence of the defendant, such pleading could not be considered at all. As a consequence, it is argued, no dispute could be deemed to have been raised in the eye of law as to

the property being a *Thika* Tenancy and, as such, the learned First Appellate Court erred in law in remanding the matter, *inter alia* to decide the issue of maintainability and other issues, instead of dismissing the title appeal of the defendant/respondent.

5. Learned counsel for the appellant cites an unreported judgment of the Supreme Court in the matter of *Seventh Day Adventist Senior Secondary School – versus – Ismat Ahmed and Others*, in support of the proposition that the deposit of rent and filing of an application, under Section 7(1) and/or Section 7(2) of the 1997 Act, within the statutory time limit, is mandatory. In default, the benefit of the proviso to sub-section (2) of Section 7 cannot be availed of.
6. Learned counsel next cites an unreported judgement rendered by a learned Single Judge of this Court in *Deep Chand Hirawat – versus – Smt. Kamala Devi Chowdhary & Ors. [C.O. 3681 of 2022]*, where the learned Single Judge observed that deposit of admitted arrear rents along with ten per cent statutory interest is a mandatory pre-condition to filing an application under Section 7(2) of the 1997 Act. Upon such deposit, the tenant was enjoined by law to continue to pay to the landlord or deposit with the Civil Judge a sum equivalent to the rent at that rate, month by month within the 15th day of each succeeding month. Without depositing the admitted arrears as per the time stipulated in the said provisions, the tenant cannot seek protection from eviction under any of the grounds mentioned in Section 6 of the 1997 Act.

7. Learned counsel appearing for the appellants next cites the judgments of *Smt. Bina Devi Binani – versus – Ramesh Kumar Gupta (since deceased By Smt. Kiran Gupta)*, reported at (2016) 5 CHN 376, and *Arun Prakash Saha – versus – Asit Baran De & Anr.*, reported at (2017) 1 Cal LJ 615, passed by a learned Single Judge of this Court, where it was held that the consequence under sub-section (3) of Section 7 of the 1997 Act of striking out defence against delivery of possession is by operation of law and for that there is no necessity of any application by the plaintiff/landlord. The word “shall”, appearing in the said sub-section, was held to be mandatory. The learned Single Judge further held that in the absence of compliance of Section 7(1), a right accrues in favour of the plaintiff/landlord under Section 7(3) for striking out of the defence of the defendant/tenant and the court had no discretion but to pass order directing striking out of the defence against delivery of possession.
8. Learned counsel next argues that although counter-suggestions were put by the defendant/respondent to the plaintiffs’ witnesses in evidence as regards the suit property being a *Thika* Tenancy, such portion of the cross-examination could not be looked into by the Court, since it was beyond the rights of the defendant, whose defence had been struck out, to make out an independent case beyond the plaint, in the garb of such cross-examination.
9. Learned counsel cites, in support of such proposition, *Modula India - versus – Kamakshya Singh Deo*, reported at (1988) 4 SCC 619, where

the Supreme Court held that the rights of a defendant, upon the defence being struck off, is restricted to cross-examination of the plaintiff's witnesses and to address the argument on the basis of the plaintiff's case. The cross-examination could not be permitted to travel beyond the limited objective of pointing out the falsity or weaknesses of the plaintiff's case and could not be converted virtually into a presentation of the defendant's case, either directly or in the form of suggestions put to the plaintiff's witnesses.

10. Lastly, learned counsel cites another judgment of a learned Single Judge of this Court in the matter of *Sri Ranjit Sarkar v. Malati Ghosh*, reported at (2009) 2 Cal LJ 596, where the learned Single Judge held, *inter alia*, that if the default committed by the defendant occurred during the subsistence of the Calcutta *Thika* Tenancy (Acquisition and Regulation) Act, 1981 (for short, "the 1981 Act"), which was the predecessor statute of West Bengal *Thika* Tenancy (Acquisition and Regulation) Act, 2001 (in brief, "the 2001 Act"), the right of the plaintiff to evict the defendant accrued during the subsistence of the 1981 Act and, as such, the relationship between the parties would be governed by the 1981 Act and not by the 2001 Act. Section 27 of the 2001 Act was interpreted in such manner in the said judgment. It is contended that in the present case, the right to obtain eviction accrued prior to the coming into force of the 2001 Act and, as such, the bar under Section 5 and/or Section 8 of the 2001 Act does not apply to the present case.

Thus, the learned Trial Judge had the jurisdiction to decide the question of *Thika* Tenancy as well and pass a decree of eviction.

11. Learned counsel appearing on behalf of the defendant/respondent argues that no civil suit can be decided by a Civil Court under Section 9 of the Code of Civil Procedure if there is an express bar in any statute to do so. Section 5(3) of the 2001 Act, it is contended, operates as such a bar, thereby precluding the Civil Court from deciding the issue of *Thika* Tenancy. Thus, the learned Trial Judge acted beyond her jurisdiction in deciding the said issue and passing a decree of eviction. As such, the First Appellate Court ought to have set aside the judgment and decree outright instead of remanding the matter. In any event, the learned First Appellate Judge was justified in remanding the suit for a re-hearing on all issues, including maintainability, after the proceeding pending before the *Thika* Controller was over.
12. Learned counsel for the respondent hands over for the perusal of this court the certified copy of an order passed by the *Thika* Controller in Miscellaneous Case No. 14 of 2013, where the *Thika* Controller, during the pendency of the present *lis*, adjudicated in favour of the defendant/respondent, holding him to be *Thika* Tenant in respect to the suit property. Apart from placing the said certified copy for the perusal of the court, learned counsel for the respondent also files photocopies of such certified copy, which are kept on record.
13. It is argued that under Order XLI Rule 27(1)(b) of the Code of Civil Procedure, the appellate court can, if it deems necessary for the proper

adjudication of the appeal, direct any document to be produced or evidence to be adduced, either by way of document or witness action. In support of such contention, learned counsel for the respondent cites *N. Natarajan v. Executive Officer, Chitlapakkam Town Panchayat, Chennai*, reported at *AIR 2015 (NOC) 1305 (Mad)*, and an unreported Division Bench judgment of this Court in the matter of *Charu Diesels LLP and others Vs. M/s. E.L. Properties Private Limited and others (FMA 360 of 2025)*.

14. Learned counsel for the respondent next cites *Asma Lateef and another v. Shabbir Ahmad and others*, reported at *(2024) 4 SCC 696*, in support of the proposition that the question of jurisdiction of the court, if raised, has to be determined at the commencement and not at the conclusion of the enquiry. Thus, it is argued that it was incumbent on the learned Trial Judge to decide the question of maintainability of the suit first, before deciding the suit on merits.
15. Learned counsel for the respondent contends that irrespective of the defence of the defendant being struck out, since it was pointed out to the trial court that a proceeding was already pending before the *Thika* Controller for adjudication of whether the property is a *Thika* Tenancy or not, the learned Trial Judge ought to have held that the Civil Court does not have jurisdiction to decide the issue or to take up the eviction suit for adjudication. Learned counsel relies on the bar incorporated under Sections 5 and 8 of the 2001 Act and cites Section 27 of the said

Act to contend that the bar of jurisdiction of the Civil Court hits at the root of the suit and applies irrespective of the defence being struck out.

16. Learned counsel cites a Division Bench judgment of this Court in the matter of *Synthetic Plywood Industries (P) Ltd. – versus – Smt. Manjulika Bhaduri & Others*, reported at (1998) 1 CHN 387, where it was observed that if a dispute is raised as to the landlord-tenant relationship even without filing an application under Section 17(2) of the West Bengal Premises Tenancy Act, 1956 (for short, “the 1956 Act”), which was the predecessor statute of the 1997 Act, the court must decide such issue before striking out the defence on the ground of non-compliance of Section 17(1) of the 1956 Act.
17. Learned counsel for the defendant/respondent next cites *M/s. Calcutta Bonemiles & Fertilisers (P) Ltd. – versus – M/s. Organochem (P) Ltd.*, reported at 2013 SCC OnLine Cal 4147, and argues on the strength of the said judgment that even if no application is filed under Section 17(2) of the 1956 Act, the dispute as to landlord-tenant relationship between the parties can be raised even at the stage of striking out of the defence under Section 17(3) of the said Act.
18. Learned counsel for the respondent also relies on *Rajiv Ghosh – versus – Satya Naryan Jaiswal*, reported at 2025 SCC OnLine SC 751, where it was held by the Supreme Court that if an objection was not taken in the High Court or Trial Court, the same cannot be taken up for the first time in appeal.

- 19.** In the present case, it is submitted that the plaintiffs did not address the question of the Trial Court not being empowered to decide the issue of maintainability due to the striking out of the defence and, thus, cannot be permitted to take the same for the first time in appeal. The learned Trial Judge, it is submitted, observed in the impugned judgment, only at the stage of passing such final decision, that the defendant/respondent's defence ought to be struck out. However, prior thereto, issues had been framed on all questions and those were decided by the learned Trial Judge on merits.
- 20.** Learned counsel relies on *Fona Rubber Pvt. Ltd. – versus – Eastern Chemical Industries*, reported at (2015) 5 CHN 175, where a learned Single Judge of this Court observed that even in a second appeal, the appellant is entitled to bring on record the proceedings and the final order of the *Thika* Controller, if in the meantime such a proceeding has been initiated and an order has been passed therein. Thus, it is argued that this Court has ample jurisdiction to take into consideration the final disposal of the proceeding before the *Thika* Controller in favour of the defendant/respondent, to the effect that he was a *Thika* Tenant in respect of the suit property.
- 21.** Heard learned counsel for the parties. Upon adverting to the materials on record and considering the rival contentions of the parties, the court comes to the following conclusions:

(i) Jurisdiction

- 22.** This issue has two aspects – first, whether the defendant/respondent could raise the issue of bar under Section 5(3) of the 1997 Act read with Section 8(2) of the 2001 Act despite his defence being struck out, and secondly, whether the Trial Court had jurisdiction to decide the question of *Thika* Tenancy and to pass an eviction decree.
- 23.** Section 5(3) of the 2001 Act stipulates that 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.
- 24.** On the other hand, Section 8(2) of the 2001 Act provides that if any question arises as to whether a person is a *Bharatia* under a particular *Thika* tenant, the Controller, either on his own motion or upon receiving any information, may, after giving the person 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.
- 25.** Sub-section (3) of Section 8 provides that any dispute regarding payment of rent by the *Thika* tenant to the State Government or by a *Bharatia* to a *Thika* tenant, or any case of eviction of *Bharatia*, shall be disposed of by the Controller in such manner as may be prescribed.

- 26.** Thus, there cannot be any manner of doubt that the jurisdiction of deciding whether a property is a *Thika* Tenancy and deciding an eviction suit between a *Thika* Tenant and a *Bharatia* lies exclusively with the *Thika* Controller.
- 27.** Both Sections 5(3) and 8(2) of the 2001 Act use the expression “if any question arises”, thus indicating that a question has to be raised, as to whether a property is a *Thika* Tenancy or whether a person is a *Bharatia*, for the Controller to adjudicate the same. In the present context, the appellants argue that since the defence of the defendant/respondent was struck out under Section 7(3) of the 1997 Act, such question, which was pleaded in the defence taken in the written statement, never arose at all in the eye of law. From a plain reading of the plaint, no whisper can be seen as to the property being a *Thika* Tenancy. By placing reliance on *Modula India (supra)*¹, the appellants have argued that the limited rights of a defendant in a suit where his defence has been struck out are confined to cross-examining the plaintiff’s witness and to address arguments on the basis of the plaintiff’s case. The defendant cannot lead evidence of his own, nor can his cross-examination travel beyond the limited objective of pointing out falsity or weakness of the plaintiff’s case. In terms of *Modula India (supra)*, cross-examination cannot travel beyond its legitimate scope and convert itself virtually into a presentation of the defendant’s case,

1. *Modula India – versus – Kamakshya Singh Deo, reported at (1988) 4 SCC 619*

either directly or in the form of suggestions put to the plaintiffs' witnesses.

- 28.** However, there are certain peculiar circumstances of this case which are to be adverted to.
- 29.** First, the learned Trial Judge had not struck out the defence of the respondent till the final hearing of the suit and/or before passing the final judgment. Rather, the learned Trial Judge took into consideration the rival pleadings of the parties in the plaint as well as the written statement and framed issues thereon. Not stopping there, the learned Trial Judge then proceeded to hear arguments and decide on merit each of the issues, including the issue as to whether the suit property was a *Thika* tenancy. It is reflected in the judgment of the learned Trial Judge herself that the trial court took into consideration the bar under Section 5 of the 2001 Act, but still proceeded to decide the issue of *Thika* tenancy in the teeth of it.
- 30.** Thus, in the present case, it is to be kept in mind that the defence of the respondent had not yet been struck out when the final judgment, deciding the issue as to *Thika* Tenancy and other issues pertaining to eviction, were decided on merits by the learned Trial Judge.
- 31.** Therefore, even on the day of passing of the impugned judgment, the defence of the defendant/respondent had not been struck out; rather, an issue as to maintainability of the suit, on the question of bar under Section 5 of the 2001 Act, was framed and decided on merits.

- 32.** The appellants contend that striking out of defence is a matter of course and there is no option left before the trial court, in the event no application under Section 7(1) or Section 7(2) has been filed, but to strike out the defence. The appellants also rely on certain judgments in support of such proposition, which are required to be examined here.
- 33.** In the case of *Seventh Day Adventist Senior Secondary School (supra)*², the Supreme Court merely held that the compliance of Section 7(1) and Section 7(2) of the 1997 Act is mandatory and that the time limit for such compliance cannot be extended beyond the time stipulated in the proviso to sub-section (2) of Section 7.
- 34.** In. *Bina Devi Binani (supra)*³ and *Arun Prakash Saha (supra)*⁴, the learned Single Judge came to the conclusions that the consequence of Section 7(3) of the 1997 Act is by operation of law and there is no necessity of any application to be filed by the landlord under the said provision for the defence to be struck out. The learned Single Judge further held that with default, a right accrues in favour of the plaintiff/landlord under Section 7(3) for striking out the defence and the court had no discretion but to pass an order of striking out the defence.

2. *Seventh Day Adventist Senior Secondary School – versus – Ismat Ahmed and Others*

3. *Smt. Bina Devi Binani – versus – Ramesh Kumar Gupta (since deceased By Smt. Kiran Gupta, reported at (2016) 5 CHN 376*

4. *Arun Prakash Saha – versus – Asit Baran De & Anr., reported at (2017) 1 Cal LJ 615*

- 35.** Again, the learned Single Judge in *Deep Chand Hirawat (supra)*⁵ observed that an application under Section 7(2), without any deposit of arrear rent along with statutory interest within the time prescribed by the statute itself, was not maintainable and the compliance of Section 7(2), read with Section 7(1) was mandatory.
- 36.** However, with the deepest of respect, neither of the said judgments passed by learned Single Judges of this Court took into consideration the ratio laid down in the Division Bench judgment of *Synthetic Plywood Industries (P) Ltd. (supra)*⁶. The Division Bench of this Court categorically laid down the law in the said judgment that the defence of a defendant cannot be struck out under the provisions of the Section 17(3) of the 1956 Act, if he raises a dispute as to relationship of landlord and tenant between the parties, unless the issue as to relationship of landlord and tenant is decided against the defendant. The Division Bench further observed that the consistent view of this Court for about 40 years since has been that if any dispute is raised by a defendant to the aforesaid effect even without filing an application under Section 17(2) of the Act, before striking out his defence on the ground of non-compliance of Section 17(2) of the 1956 Act, the court must decide that issue.

5. Deep Chand Hirawat – versus – Smt. Kamala Devi Chowdhary & Ors. [C.O. 3681 of 2022]

6. Synthetic Plywood Industries (P) Ltd. – versus – Smt. Manjulika Bhaduri & Others, reported at (1998)

- 37.** Again, in *M/s. Calcutta Bonemiles & Fertilisers (P) Ltd. (supra)*⁷, a learned Single Judge of this Court reiterated the proposition that even if a defendant/tenant has not filed an application under Section 17(2) of the Act, he can certainly raise such dispute as to existence of relationship of landlord and tenant under Section 17(3) of the 1956 Act and the court is obliged to determine the same before passing an order striking out the defence of the tenant.
- 38.** Learned counsel for the appellants argues that the said judgments are distinguishable inasmuch as those dealt with the 1956 Act whereas there is no provision akin to Section 17, sub-sections (2A) and (2B) of the said Act in the 1997 Act. The 1997 Act makes it mandatory for the compliance of Sections 7(1) and 7(2), particularly in view of the proviso thereto. Sub-sections (2A) and (2B) of Section 17 of the 1956 Act, on the other hand, gave ample leeway to the tenant for extension of the time to deposit. Thus, in view of the change of law, the appellants argue that there cannot be any doubt that the period for deposit to be made under sub-sections (1) and (2) of Section 7 of the 1997 Act became mandatory.
- 39.** However, even proceeding on such premise, the cardinal basis of the judgment rendered by the Division Bench in *Synthetic Plywood*

7. *M/s. Calcutta Bonemiles & Fertilisers (P) Ltd. – versus – M/s. Organochem (P) Ltd., reported at 2013 SCC OnLine Cal 4147*

*Industries (P) Ltd. (supra)*⁸ did not change by the amendment of statute. Just as in Section 17 of the 1956 Act, in Section 7 of the 1997 Act as well, the language used is “tenant” and not “defendant”. On such premise, the Division Bench held in *Synthetic Plywood Industries (P) Ltd. (supra)* that if a ‘defendant’ takes a stand disputing the landlord-tenant relationship itself, he is not obliged to make the deposit or file an application under Section 17(1) or Section 17(2), since under the said Section, it is only a ‘tenant’, and not a ‘defendant’, who is to make such deposit. The position would have been otherwise if the language used in the Section was “defendant”, in which case, there would be no option for the defendant not to make the applications or make the deposits.

- 40.** On such score, which was the very basis of the Division Bench judgment, the language of Sections 17 of the earlier statute and that of Section 7 of the current statute do not differ, since both use the expression “tenant” and not “defendant”. If a defendant takes a stand, under either the 1956 Act or the 1997 Act, that he is not a “tenant” at all under the plaintiff, it is open to him to take the risk of not filing even an application under Section 7(2) of the 1997 Act or Section 17(2) of the 1956 Act, but simply raise the dispute as to landlord-tenant relationship. In such case, both as per *Synthetic Plywood Industries (P)*

8. *Synthetic Plywood Industries (P) Ltd. – versus – Smt. Manjulika Bhaduri & Others, reported at (1998)*

*Ltd. (supra)*⁹ and *M/s. Calcutta Bonemiles & Fertilisers (P) Ltd. (supra)*¹⁰, it would be the incumbent obligation of the court, before striking out the defence, to decide the landlord-tenant relationship prior to such striking out of defence. It has to be kept in mind that although the 1997 Act would govern the *inter se* relationship between the *Thika tenant* and the *Bharatia*, there is a qualitative difference between a “landlord” and “tenant” under the 1997 Act and a “*Thika tenant*” and a “*Bharatia*” under the 2001 Act, since in the two cases, the forum deciding the eviction suit would be different.

- 41.** Section 7(3) of the 1997 Act also uses the language “tenant”, on whose failure to comply with sub-sections (1) or (2) of Section 7, the rigour of Section 7(3) would follow and the defence against delivery of possession would be struck out. However, if the defendant takes a stand that he is not a “tenant” under the 1997 Act at all and such objection is upheld by the court, the penalty of striking out of the defence would not follow as well. This makes it mandatory for the court, even at the stage of passing an order under Section 7(3), to decide the issue of landlord-tenant relationship prior to striking out the defence of the defendant. Such aspect neither fell for consideration nor was decided by the

9. *Synthetic Plywood Industries (P) Ltd. – versus – Smt. Manjulika Bhaduri & Others, reported at (1998) 1 CHN 387*

10. *M/s. Calcutta Bonemiles & Fertilisers (P) Ltd. – versus – M/s. Organochem (P) Ltd., reported at 2013 SCC OnLine Cal 4147*

Supreme Court in the judgment of *Seventh Day Adventist Senior Secondary School (supra)*¹¹.

- 42.** Furthermore, even going by the proposition laid down in *Smt. Bina Devi Binani (supra)*¹², although sub-section (3) of Section 7 of the 1997 Act does not require an ‘application’ by the plaintiff for the defence to be struck out, it is mandatory for the Civil Judge to pass an ‘order’ striking out the defence. Sub-section (3) of Section 7 provides that if the tenant fails to deposit or pay any amount referred to in sub-section (1) or sub-section (2) within the time specified therein or within such extended time as may be granted, the Civil Judge “shall order” the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit. Thus, the mandatory pre-requisite of the Act is that an order has to be passed by the court striking out the defence, despite no prior application being necessary, and such order has to be passed “prior to proceeding with the hearing of the suit”. The scheme of the statute for requiring the court to pass an order under Section 7 (3) prior to hearing the suit is clear, that the parties would proceed to go to the hearing of the suit knowing fully the scope of the evidence to be adverted to and arguments to be made. In the present case, however, such order was never passed before proceeding with the hearing of the suit; on the contrary, the trial court framed issues on all

11. *Seventh Day Adventist Senior Secondary School – versus – Ismat Ahmed and Others*

12. *Smt. Bina Devi Binani – versus – Ramesh Kumar Gupta (since deceased By Smt. Kiran Gupta, reported at (2016) 5 CHN 376*

questions raised and every defence taken in the written statement, including the issue of maintainability. Not only that, evidence was actually permitted to be led by both sides and arguments were also heard on all issues. Thereafter the court of first instance also decided all issues.

- 43.** Even in the judgment, the defence of the defendant/respondent was not specifically struck out in so many words, but it was merely observed that in view of the defendant's non-compliance of Section 7(2), he was not entitled to the protection under Section 7(4) of the 1997 Act. Hence, no opportunity was given to the defendant to argue before the Court, even at the time of passing the order under Section 7(3) which never came, that there was no landlord-tenant relationship between the parties, although the trial court was obliged to decide the issue of landlord-tenant relationship, which implicitly includes the question of maintainability of the suit, even at the time of striking out the defence.
- 44.** As held in *Asma Lateef (supra)*¹³, if a question of jurisdiction arises, it has to be determined by the court at the commencement and not at the conclusion of the enquiry in that regard. Thus, irrespective of whether the defence was struck out or not, it was the incumbent duty of the Trial Court in the present case to decide the issue of jurisdiction first.
- 45.** The learned Trial Judge, in fact, framed an issue on maintainability, discussed Section 5 of the 2001 Act, but still proceeded to adjudicate

13. *Asma Lateef and another v. Shabbir Ahmad and others*, reported at (2024) 4 SCC 696

the question of *Thika* Tenancy itself and to pass a decree of eviction on merits, instead of relegating the adjudication to the appropriate statutory authority, that is, the *Thika* Controller, which exercise was palpably *de hors* the law.

- 46.** Another aspect of the matter is that a “question” as to whether a property is a *Thika* Tenancy property, within the contemplation of Section 5(3) and Section 8(2) of the 2001 Act, may be raised in any form, and not necessarily as a pleading in the written statement or as an issue in the suit. The defendant/respondent specifically argued before the learned trial Judge that there was a pending proceeding under the 2001 Act before the Controller, which was the appropriate authority to decide such issue. Hence, the rigours of Section 5(3), read with Section 8(2), of the 2001 Act were squarely attracted even if we proceed on the premise that the written statement was not to be looked into.
- 47.** In any event, in view our above discussions, at the time of adjudication of the dispute of *Thika* Tenancy on merits, the defence had not yet been struck out by the learned Trial Judge.
- 48.** Since an order is mandatorily to be passed for the defence to be struck out, even under Section 7(3) in its new Avatar, in the absence of such order, it was the bounden duty for the learned Trial Judge to decide the issue of maintainability and relegate the matter to the *Thika* Controller.
- 49.** That apart, Sections 5 and 8 of the 2001 Act have to be read in the context of Section 21 thereof, since the bar of jurisdiction to civil courts

under the 2001 Act is not confined to Sections 5 and 8 of the said Act. Such bar stems from Section 21 of the Act, which provides that no civil court shall have jurisdiction to decide, or to deal with, any question, or to determine any matter, which, by or under the said 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 the Act, shall be called in question in any civil court.

- 50.** Thus, the expansive language of Section 21 completely bars the jurisdiction of the civil court, thereby coming within the ambit of “express bar” as contemplated in Section 9 of the Code of Civil Procedure.
- 51.** Hence, since Sections 5 and 8, read with Section 21, of the 2001 Act categorically debar the civil court from deciding disputes as to *Thika* Tenancy and from deciding eviction suits between the *Thika* Tenant and the *Bharatia*, the trial court could not have decided either of the said matters at all.
- 52.** Irrespective of the defence of the respondents being struck out, even without looking at the written statement, the learned Trial Judge was fully aware of the pendency of a proceeding before the *Thika* Controller on the relevant date, where a question had been raised as to whether the suit property is a *Thika* Tenancy. Such question, under Section 5(3) or Section 8(2) of the 2001 Act, need not necessarily be raised in

the suit itself. As the dispute was pending before the *Thika* Controller when the suit was being decided, the Civil Court ought to have dismissed the suit due to lack of inherent jurisdiction.

53. The bar under Section 21 creates a bar as to subject-matter jurisdiction of the civil court, which hits at the root of the authority of the civil court, thus, vitiating the entire adjudication which has been called in question in the present case. Such inherent and subject-matter bar, unlike technical bars on the ground of territorial or pecuniary jurisdiction, has to be decided at the outset.
54. Hence, we are of the clear opinion that the learned trial Judge erred in law in entertaining and adjudicating the suit on merits, thereby usurping the jurisdiction of the *Thika* Controller in the teeth of the bar under Section 21, read with Sections 5 and 8, of the 2001 Act, by deciding the question as to whether the suit property is a *Thika* Tenancy property and passing a decree of eviction against the defendant/respondent who claimed to be *Bharatia*.
55. The next component of the argument of the parties is how far the defendant/respondent was justified in putting counter-suggestions to the plaintiffs' witnesses regarding the *Thika* Tenancy. Although we have observed above that the defence was not struck out when the judgment was rendered and the learned Trial Judge proceeded to adjudicate the suit on all issues by formally formulating such issues, including the issue of maintainability and *Thika* Tenancy/landlord-tenant relationship, even if it is to be assumed for argument's sake that

the defendant had no defence in view of Section 7(3) of the 1997 Act, he had the right, in terms of *Modula India (supra)*¹⁴, not only to cross-examine the plaintiffs' witnesses but to address arguments on the basis of the plaintiffs' case. The Supreme Court held in the said report that the cross-examination cannot travel beyond the limited objective of pointing out the falsity or weakness of the plaintiffs' case. Even going by such yardsticks, the implicit consideration, even if not pointed out by the defendants, before a civil court prior to adjudicating the civil suit is whether the suit is maintainable in the very first place. It has to be read into the pleadings of the plaint, by necessary implication, that the suit is maintainable, in order to get a valid decree in the eye of law. Thus, the defendant/respondent was very much entitled to argue on the weakness of the plaintiffs' case to the effect that the suit was not maintainable before the civil court at all. Pertinent questions in that regard, if put in cross-examination to the plaintiffs' witnesses, were also valid since those would then pertain to the issue of maintainability on the basis of the plaint case itself.

- 56.** Thus, on such count as well, the learned trial Judge erred in law in not considering the explicit admission of the plaintiffs' witness regarding pendency of a proceeding before the *Thika* Controller. On the contrary, the trial court chose to ignore the bar and in the teeth of the same, proceeded to adjudicate the issue of *Thika* Tenancy as well as passed a

14. *Modula India – versus – Kamakshya Singh Deo, reported at (1988) 4 SCC 619*

decree of eviction, thereby throwing out the window Sections 5 and 8, read with Section 21 of the 2001 Act.

(ii) **Whether the jural relationship between the parties is governed by the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 or the the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001**

57. Section 27 of the 2001 Act, which is the relevant provision pertaining to repeal and savings, is reproduced hereinbelow:

“27. Repeal and savings.—(1) *With effect from the date of commencement of this Act, the Kolkata Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981 (West Ben. Act XXXVII of 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.”

58. The appellants, by placing reliance on *Sri Ranjit Sarkar (supra)*¹⁵, argue that since the default occurred prior to coming into force of the 2001 Act, the said Act would not apply but the predecessor statute of 1981 would be applicable. Such argument, however, is not tenable in the eye

15. *Sri Ranjit Sarkar v. Malati Ghosh*, reported at (2009) 2 Cal LJ 596

of law. With utmost respect to the learned Single Judge, the proposition laid down in *Sri Ranjit Sarkar (supra)* to the effect that since the default occurred prior to the coming into force of the 2001 Act, the Act of 1981 would apply, is against the grain of Section 27 of the 2001 Act.

- 59.** Section 27(2), which has been reproduced above, saves any right, privilege, obligation or liability acquired, accrued or incurred under the 1981 Act. It also saves anything duly done or suffered thereunder. However, the premise of the learned Single Judge in *Sri Ranjit Sarkar (supra)*¹⁶ was that the right to evict emanates from the 1981 Act. However, there is nothing within the four corners of the 1981 Act which confers upon the landlord the right to evict the tenant. Such right stems either from the Rent Control law, that is, the 1956 Act or the 1997 Act, or common law and/or the general statute that is the Transfer of Property Act, 1882. In the present case, the suit has been filed under the 1997 Act and the right to evict, if any, emanates from such statute, and not the 1981 Act, whereas Section 27 of the 2001 Act perpetuates the operation of the 1981 Act in respect of rights, privileges, obligations or liabilities accrued or incurred under the 1981 Act or anything duly done or suffered under the 1981 Act. The 1981 Act does not confer any right of eviction, just as its successor statute of 2001 Act does not. Accordingly, there is a cardinal error in holding

16. *Sri Ranjit Sarkar v. Malati Ghosh*, reported at (2009) 2 Cal LJ 596

that the right to evict the tenant was conferred under the 1981 Act which would be saved by virtue of Section 27 of the 2001 Act. It is the 2001 Act which is to be considered, which was fully in force when the eviction suit was filed in the year 2013.

- 60.** Moreover, the learned Single Judge observed in *Sri Ranjit Sarkar (supra)*¹⁷ that such view was a “*prima facie* view”, which cannot operate as a binding precedent in any event.
- 61.** Hence, the bar under the 2001 Act is squarely applicable in the present case and the argument of the appellant that the 1981 Act would apply is fallacious.

(iii) Whether the order of the Thika Controller can be looked into

- 62.** During pendency of the appeal, the *Thika* Controller has disposed of Miscellaneous Case No. 14 of 2013, upon giving adequate hearing to all concerned, coming to the conclusion that the defendant/respondent is a *Thika* Tenant in respect of the property-in-suit.
- 63.** As per the principle laid down in *Charu Diesels LLP (supra)*¹⁸ as well as *N. Natarajan (supra)*¹⁹ if a party seeks to produce additional evidence, the court has ample power under Order XLI Rule 27(1)(b) of the Code of Civil Procedure, if the court feels it necessary for such evidence to come on record for a complete adjudication of the *lis*, to permit adduction of

17. *Sri Ranjit Sarkar v. Malati Ghosh*, reported at (2009) 2 Cal LJ 596

18. *Charu Diesels LLP and others Vs. M/s. E.L. Properties Private Limited and others*

19. *N. Natarajan v. Executive Officer, Chitlapakkam Town Panchayat, Chennai*, reported at AIR 2015 (NOC) 1305 (Mad)

such evidence. In the present case, the certified copy of the order of the *Thika* Controller dated April 18, 2024, passed during pendency of the instant appeal, has been placed before this Court by the defendant/respondent. Thus, the court cannot turn a blind eye to the same.

- 64.** Clause (b) of the Order XLI Rule 27(1) provides that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced. As the cardinal dispute involved in the appeal centres around the dispute as to *Thika* Tenancy, the order of the *Thika* Controller, which has come in the meantime, would be all-important.
- 65.** Thus, not only is the certified copy of the said order germane, but the same has to be necessarily looked into for a complete and proper adjudication of the appeal.
- 66.** The said order clearly shows that the respondent has already been adjudicated as a *Thika* Tenant by the competent authority in law.
- 67.** Coming back to the rigour of Section 21 of the 2001 Act, which has been couched in extremely wide language, the civil court loses jurisdiction to decide or deal with any question or to determine any matter which, under the 2001 Act, is not only required to be, but has been, decided or dealt with by the Controller. Under the said Section, no order or judgment passed, or proceedings including execution

proceedings commenced under the provisions of the 2001 Act shall be called in question in any Civil Court. Thus, if we take into consideration the judgment of the *Thika* Controller, which is a conclusive adjudication by the competent forum that the defendant/respondent is a *Thika* Tenant, it precludes the civil court from deciding an eviction suit between a *Bharatia* and a *Thika* Tenant. Section 21 of the 2001 Act clearly provides that no order passed under the provisions of the said Act shall be called in question in any civil court, thus having an overriding effect on a decree of the civil court.

- 68.** In the present case, the judgment of the trial court was not merely illegal, but it was a nullity, being vitiated by inherent lack of jurisdiction. The civil court did not have jurisdiction at all to decide the suit, including the issue of *Thika* tenancy, and to pass a decree of eviction between a *Thika* tenant and a *Bharatia*. Thus, we are of the considered opinion that the learned first appellate court also erred in law in relegating the suit to the trial court afresh in remand, instead of setting aside the judgment and decree of the trial court outright on the ground of maintainability alone.
- 69.** In fact, as of today, the remand order loses relevance and is rendered academic, since the trial court was directed to wait for the *Thika* Controller's order, which has already come. Thus, a further remand to the trial court would be entirely unnecessary, and a mere exercise in futility, on such aspect as well.

- 70.** As such, we are of the impugned judgment and decree of both the courts below suffer from palpable legal error and ought to be set aside.
- 71.** Accordingly, F.M.A. No. 800 of 2024 is allowed on contest, thereby setting aside the judgment and remand order dated June 3, 2024 passed by the learned Judge, Eighth Bench, City Civil Court at Calcutta in Title Appeal No. 98 of 2023 as well as the judgment and decree dated August 29, 2023 passed by the learned Judge, Third Bench, Presidency Small Causes Court in Ejectment Suit No. 216 of 2013.
- 72.** Consequentially, Ejectment Suit No. 216 of 2013, filed before the learned Judge, Third Bench, Presidency Small Causes Court at Calcutta is dismissed.
- 73.** There will be no orders as costs.
- 74.** Urgent certified copies, if applied for, be supplied to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)