

## Hooghly Building and Investment Co. Ltd. Vs Janab Syed Asghar Hussain Ismail

**Court:** Calcutta High Court

**Date of Decision:** Nov. 20, 2014

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 7 Rule 11, Order 8 Rule 10, 80 Waqf Act, 1995 â€” Section 6, 83, 83(1), 85

**Citation:** (2015) 1 CALLT 231 : (2015) 3 CHN 62 : (2015) 1 WBLR 455

**Hon'ble Judges:** Sahidullah Munshi, J

**Bench:** Single Bench

**Advocate:** Sardar Amjad Ali, Dipankar Chakraborty and K.A. Bhaduri, Advocate for the Appellant; Tapas Kumar Mondal, Anupam Bhattacharyya and Salahuddin, Advocate for the Respondent

### Judgement

Sahidullah Munshi, J.

This revisional application is directed against Order No. 41 dated 7th April, 2011 by which the learned Trial Judge

rejected an application dated 20th March, 2007 under Order VII Rule 11 of the Code of Civil Procedure. The application which was filed by the

defendant/petitioner under Order VII Rule 11 has been annexed as Annexure P-5 to this revisional application. When the revisional application

was admitted by this Court an order was passed on 15th June, 2011 and it has been observed in the said order as follows :

This interim order is passed considering the fact that recent amendments in the West Bengal Thika Tenancy (Acquisition and Regulation) Act,

2001 were not adverted to and hence the order, prima facie, borders on perversity.

2. The petitioner has filed a supplementary affidavit today with which a copy of the said order has been annexed. The supplementary affidavit has

been filed to bring in certain facts which are sequel to the observation contained in the said order passed by this Hon"ble Court.

3. In the application under Order VII Rule 11 the defendant/petitioner has made out a case that the plaint has been filed without any proper cause

of action and the same is barred by law. It has been further added that plaintiff has made Postal Department, Government of India, and others as

parties being defendant Nos. 3 to 5 but no statutory notice as required under Section 80 of the Code of Civil Procedure was issued before filing of

the suit and, therefore, the suit is also barred by law. The defendant/petitioner has also made out a case in their application that under Order VII

Rule 11 of the Code the plaint is liable to be rejected at the threshold because of the provisions of Waqf Act, 1995 particularly when Section 85 of

the Waqf Act, 1995 bars the jurisdiction of Civil Court in respect of a suit or a legal proceeding regarding any dispute relating to Waqf. They

claimed that the suit is barred by the provisions of Thika Tenancy Act and that the suit is also barred by the provisions of Specific Relief Act and

further that the plaint is liable to be rejected since the reliefs have been claimed by the plaintiff against the persons with whom the plaintiff has or

had no privity of contract. On these grounds the defendant/petitioner agitated before the learned Court below that the plaint is liable to be rejected

under the provisions of Order VII Rule 11 of the Code of Civil Procedure. On perusal of the plaint averment and the application under Order VII

Rule 11 of the Code of Civil Procedure the learned Court below passed the impugned order and made certain observations in support of its

decision to reject the application filed by the defendant/petitioner under Order VII Rule 11 of the Code of Civil Procedure. Mr. Ali, learned senior

advocate appearing for the petitioner submits that the order impugned is not sustainable in law and the same is liable to be set aside for the reasons

that the learned Court has not taken into consideration the grounds which were made out in support of rejection of plaint. He submits that the

learned Court, while coming into conclusion to reject the application filed by the plaintiff on 20th March, 2007, made certain observation which is

diametrically opposite to the conclusion he made. He submits that although, the learned Judge took note of the Waqf Act and the bar provided

thereunder, the learned Court has erred in law in not holding that in view of the provisions of the Waqf Act the suit may not be filed before the Civil

Court. Such observation of the Court has not been reflected in his ultimate decision. The learned advocate has also drawn the attention of the

Court that some other observation has also been made which has got no reflection in his decision. Mr. Ali further submits that the property in

question is a Thika land which is apparent from the averment made in the plaint to the effect that an open land was leased out with a right to the

lessee to make construction thereon and further that the said lease was assigned to his client subsequently. He submits that in view of Section 21 of

the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 2001, Civil Court's jurisdiction has been totally barred which has to be decided by

the Thika Tenancy Controller.

4. Mr. Tapas Kumar Mondal, appearing for the opposite parties, has supported the impugned order and submits that application under Order VII

Rule 11 was not maintainable and the learned Court below has rightly rejected the same. The learned advocate submits that even no pleading has

been made by the defendant/petitioner before the Court and they only urged before the Court to reject the plaint without disclosing any materials

by filing a written statement, although, according to the provisions of the Civil Procedure Code, written statement is required to be filed within a

specified period of time. According to the learned advocate, the revisional application should be rejected and the order impugned should be

upheld. The said learned advocate for the opposite party also submits that the suit is maintainable and cannot be barred under Section 21 of the

Thika Tenancy Act. If at all necessary the petitioner should have first gone before the Thika Tenancy Controller for a decision whether the

property is thika tenancy property or not but in the present suit this question cannot be decided.

5. Learned advocate Md. Salahuddin, appearing for the opposite party No. 6 submits that in view of the provisions of Waqf Act, 1995 and

particularly in view of Section 6 and Section 85 of the said Act no suit can be held to be maintainable before any Civil Court which is required to

be decided by the Tribunal established under the provisions of Section 83 of the said Act and according to him the suit ought not to have been filed

before the Civil Court and instead the same should have been filed before the Waqf Tribunal. He further submits that having regard to the amended

provisions of Section 83 of the Waqf Act as amended by virtue of Act 27 of 2013 the Trial Court ought not to have held that the suit was

maintainable in the Civil Court and to substantiate his argument he refers to sub-Section 1 of Section 83 which says -

83(1)... The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of

any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the

lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.

6. He submits that in view of the said amended provisions of Section 83(1) the present suit should have been instituted before the Waqf Tribunal.

He, however, denies the contention of the petitioner that the suit should be decided by the Thika Controller.

7. In reply, Mr. Ali submits that in a case where a party files an application under Order VII Rule 11 of the Code for rejection of plaint, filing of

written statement is not a sine qua non by the contesting defendant. To this effect he has relied upon a judgment of the Hon"ble Apex Court

reported in Saleem Bhai and Others Vs. State of Maharashtra and Others, The fact of the case is that the 8th defendant therein filed an appeal

before the Apex Court and the plaintiffs were the respondents. The appellant filed an application under Order VII Rule 11 of the Code of Civil

Procedure in the suit praying the Court to dismiss the suits on the grounds stated therein that was under Sub-rule (a) and (d) of Rule 11 of Order

VII, CPC. When such prayer was made the respondents also filed an application under Order VIII Rule 10, CPC to pronounce judgments in the

suits as the appellant did not file his written statement. The learned Judge directed the appellant to file his written statement and aggrieved thereby

the appellant filed revision petition before the High Court of Madhya Pradesh. While confirming the order of the learned Trial Judge the High Court

reiterated the direction given by the Trial Court that the appellant should file his written statement and observed that the Trial Court would frame

issues of law and facts arising out of pleadings and that the Trial Court should record its finding on the preliminary issue. On such facts the Hon"ble

Apex Court held that relevant facts which need to be looked into for deciding an application under Order VII Rule 11 are the averments in the

plaint. The Trial Court can exercise the power under Order VII Rule 11, CPC at any stage of the suit before registering the plaint or after issuing

summons to the defendant at any time before the conclusion of the trial. It has been held that for the purposes of deciding an application under

Order VII Rule 11 the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly

irrelevant. A direction to file written statement without deciding the application under Order VII Rule 11, CPC cannot but be procedural

irregularity touching the exercise of jurisdiction by the Trial Court. It has been held that it, therefore, suffers from non-exercising of jurisdiction

vested in the Court. In the said case the Hon"ble Apex Court set aside the impugned order and remitted the matter back to the Trial Court for

deciding the application under Order VII Rule 11 of the said Code on the basis of the averments in the plaint after affording an opportunity of

hearing to the parties in accordance with law. Mr. Ali has also relied upon another judgment reported in T. Arivandandam Vs. T.V. Satyapal and

Another, to show the ratio decided thereunder that on a meaningful - not formal - reading of the plaint if it is manifestly vexatious and meritless in

the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11 taking care to see that the ground

mentioned therein is fulfilled. Meaning thereby a bogus litigation can be shot down at the earliest stage.

8. I have heard the parties at length. On perusal of the impugned order it appears to this Court that the decision of the learned Court below is not

in consonance with the observation which has been made in rejecting the application under Order VII Rule 11 of the Code of Civil Procedure. In

the impugned order the learned Judge has mentioned that -

Now, let me consider whether the suit is barred under the provisions of the Wakf Act, 1995. I have carefully perused the provisions of Wakf Act,

1955. This is a suit for recovery of khas possession and injunction. The plaint case is that the suit property is a wakf property and the plaintiff is a

mutawalli of the same. That the defendants are lessee under the plaintiff and that the lease has been determined by efflux of time. In the instant suit

there is no dispute regarding wakfs. In my considered opinion, there is no provision in the Wakf Act, 1995, empowering the Tribunal or the Board

of Wakfs to entertain a suit for eviction of a lessee filed by mutawalli.

Therefore, in my considered opinion, the suit is not barred under the provisions of the Wakf Act, 1995.

9. From the above as quoted it appears that the learned Judge has considered the provisions of Waqf Act, 1995 but has not elaborately dealt with

the provisions relevant for the purpose. If Sections 83 and 85 of the Act are taken into consideration as it was before amendment in 2013, it will

appear that a suit in respect of a waqf property is barred under Section 85 of the Waqf Act, 1995. Even if one is to confine within the averments

of the plaint then also it is apparent on the face of the plaint record that the suit property has been claimed to be a waqf property and if it is so then

the Court is under obligation to decide the question of maintainability of a suit before a Civil Court taking into consideration of the provisions of

Section 85 of the Waqf Act, 1995. Provisions of Section 83 of the said Act is also to be taken note of which says that Tribunals have been

constituted for the purpose of determination of any disputed question or other matter relating to not only waqf but also waqf property. The learned

Judge has observed that in the instant suit there is no dispute regarding waqf. Even that is assumed to be correct, it is not correct that the suit

property is not a waqf property. Therefore, the finding of the learned Judge that the suit is not barred under the provisions of Waqf Act, 1995

requires to be scrutinized further. The said Waqf Act has been amended in 2013. The provisions of Section 83 of the said Act have undergone

amendment. I have already quoted the amended provisions of Section 83. Whether amended provision of Section 83 is applicable in this case is

yet to be scrutinized. The amended provision, however, clearly states that Waqf Tribunal constituted within the meaning of Section 83 will also

decide question relating to eviction of tenant, determination of rights and obligations of the lessor and the lessee of a waqf property. In the instant

suit, these are the questions and cause of action for the suit is based on those questions. If at all the provision of amended Act is applicable the

learned Judge is also required to take note of the amended provision of Section 83 of the Waqf Act.

10. So far the provisions of Sections 5 and 21 of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 it is, however, made

clear that within the limits of the plaint it is not apparent that the defendant/petitioner has been shown as a thika tenant, nor any prayer has been

made in the plaint for a decision from the Court with regard to status of thika tenancy in relation to the parties in the suit. But the learned Judge has

made a finding to the effect that -

Now let me consider whether the suit is barred under the provisions of the Thika Tenancy Act. I have carefully perused the various provisions of

the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001, hereinafter, referred to as the Act of 2001, in short. In the instant case

the defendants have failed to produce any document to show that the learned Thika Controller has decided the suit property to be a thika land or

the defendants to be thika tenants. In my considered opinion, having regard to the provisions of Sections 5 and 21 of the Act of 2001, this Court

has no jurisdiction to determine the question whether the suit property is a thika land or the defendants are thika tenants or not.

Therefore, in my considered opinion, the suit is not barred under the provisions of the Thika Tenancy Act.

11. From the above quoted observation it appears that on the one hand, the learned Court has said that Court has no jurisdiction to determine the

question whether the suit property is a thika land or the defendant is thika tenant or not but, at the same time, the Court has finally concluded that

the suit is not barred under the provisions of Thika Tenancy Act. Be that as it may, the conclusion of the Court and the finding made before such

conclusion are contradictory rather conclusion is not based on the finding and, therefore, I have no option but to hold that the impugned order

cannot be sustained and the same is hereby set aside and is remanded back to the learned Trial Court for a fresh decision, on the application filed

by the defendant/petitioner under Order VII Rule 11 of the Code of Civil Procedure. I remit the case back to the Trial Court for deciding the

application under Order VII Rule 11, CPC on the basis of the averments in the plaint after affording an opportunity of being heard to the parties in

accordance with law.

12. This revisional application is allowed.

13. All interim orders vacated.

14. In view of the orders passed, CAN 7822 of 2011 need not be considered separately and the same stands disposed of.

15. Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual

formalities.