***THE HON'BLE SRI JUSTICE M.LAXMAN**

+ SECOND APPEAL No.214 OF 2015

% 18—07—2022

Smt.Azmath Jahan

…Appellant

vs.

$ M.Venkateshwarlu

… Respondent

!Counsel for the Appellant: Sri Muddu Vijai

^Counsel for Respondent: Sri B.Chinnapa Reddy

<Gist :

>Head Note :

? Cases referred

1. AIR 2022 SC 2242
2. C.SA.No.236 of 2018, dated 19.09.2018
3. (1859) 7 M.I.A 283
4. MANU/MH/0116/1912
5. (1914) 16 BOMLR 954
6. (2014) 1 SCC 648
7. (1997) 1 SCC 502
8. MANU/SC/1338/2019

IN THE HIGH COURT FOR THE STATE OF TELANGANA
HYDERABAD

*** * * ***

SECOND APPEAL No.214 OF 2015

Between:

Smt.Azmath Jahan

…Appellant

And

M.Venkateshwarlu

… Respondent

JUDGMENT PRONOUNCED ON: 18.07.2022

THE HON'BLE SRI JUSTICE M.LAXMAN

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? :

2. Whether the copies of judgment may be Marked to Law Reporters/Journals? :

3. Whether His Lordship wishes to see the fair copy of the Judgment? :

M.LAXMAN, J

THE HONOURABLE SRI JUSTICE M.LAXMAN

SECOND APPEAL No.214 OF 2015

JUDGMENT:

1. The present appeal assails the judgment and decree dated 15.10.2014 in A.S.No.4 of 2014 on the file of the Court of the XIV Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad (for short, 'first appellate Court'), wherein and whereby the suit filed by the respondent herein for eviction of the appellant herein from the suit property and also damages was allowed by reversing the judgment and decree dated 31.12.2010 in O.S.No.2353 of 2008 on the file of the Court of the XXI Junior Civil Judge, City Civil Court, Hyderabad (for short, 'trial Court'). In the said suit, the plaint was ordered to return holding that civil Court has no jurisdiction to entertain suit.

2. The appellant herein is the defendant and the respondent herein is the plaintiff in the said suit. For the sake of convenience, the appellant herein is referred to as 'landlord' and the respondent herein is referred to as 'tenant'.

3. The short case of the landlord is that she is the owner and possessor of house property bearing No.8-2-609/8/M, Gowrishankar Colony, Road No.11, Banjara Hills, Hyderabad. She let out Mulgi No.2, admeasuring 135 square feet (10 feet X 13.5 feet) which is forming part of house No.8-2-609/8/M (hereinafter called "suit schedule property"), to the tenant on a

monthly rent of Rs.1,300/- i.e., Rs.900/- towards rent of suit property and Rs.400/- towards rent of furniture. An amount of Rs.25,000/- was deposited by the tenant with the landlord towards security deposit. The period of tenancy was from 01.10.2005 to 31.08.2006 and the defendant had to vacate the suit property by 01.09.2006. While so, the tenant failed to pay the rent from 01.01.2008. In those circumstances, the landlord issued a notice to the tenant to vacate the suit property by 30.06.2008. Despite receipt of the said notice, the tenant neither issued any reply nor vacated the suit property. Hence, the landlord filed the present suit.

4. The case of the tenant is that he admits the tenancy, monthly rent, deposit of security amount and commencement of tenancy. His case is that the building is of two decades old and the landlord having purchased the building converted the suit property into a shop and it was assessed to the Municipality by 1988-90 itself. Therefore, the suit property comes under the purview of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 (for short, the Rent Control Act); hence, the suit before the civil Court is not maintainable. The tenant denied receipt of notice of eviction issued by the landlord and prayed to dismiss the suit.

5. The trial Court, on the basis of the above pleadings, has framed the following issues:

> "1. Whether this Court has jurisdiction to entertain the suit, because the suit schedule property is less than 15 years?

2. Whether the plaintiff is entitled for eviction of suit schedule property as prayed for?

3. Whether the defendant is a defaulter in payment of monthly rents?

4. Whether the plaintiff has issued quit notice to the defendant for termination of their tenancy?

5. Whether the plaintiff is entitled for mesne profits as prayed for?

6. To what relief?"

6. The plaintiff, to support his case, himself was examined as P.W.1 and relied upon Exs.A-1 to A-4. The defendant, to support her case, examined D.W.1, but did not adduce any documentary evidence.

7. The trial Court took up all the issues for trial including the issue of jurisdiction and facts and rendered its judgment only on issue No.1 relating to jurisdiction of the civil Court and did not answer other issues. Accordingly, the trial Court held that the age of the building is more than 15 years and thus, the suit property is governed by the provisions of the Rent Control Act. Having held so, the trial Court ordered the return of the plaint for presenting the same before the appropriate forum. Aggrieved by the same, initially, the landlord preferred Civil Miscellaneous Appeal under Order XLIII of CPC before the Chief Judge, City Civil Court, Hyderabad and on objection, the same was converted to a regular appeal i.e., A.S.No.4 of 2014 under Section 96 of CPC.

8. The first appellate Court, after appreciating the evidence on record, found that the suit property is not below 15 year old construction and not governed by the Rent Control Act; that the tenant was not a statutory tenant and the tenancy was regulated by the Transfer of Property Act. Accordingly, the first appellate Court ordered for eviction of the tenant from the suit property by decreeing the suit. Aggrieved by the same, the tenant has filed the present appeal.

9. This Court, by order dated 09.06.2015, admitted the appeal by referring to ground Nos.4, 6 and 8 mentioned in the Memorandum of grounds of appeal. The above procedure is not in tune with the requirement of Section 100 of CPC and also against various judgments of the Apex Court. Thus, this Court has reframed the following substantial questions of law.

> "(i) Whether the findings of the first appellate Court in reversing the findings of the trial Court by holding that the defendant herein was not a statutory tenant but ordinary tenant under the Transfer of Property Act, suffer from any perversity?
>
> (ii) Whether the judgment of the trial Court in returning the plaint to present it before the proper Court having held that the defendant is a statutory tenant is an appellable decree (section 96 cpc) or appellable order under **Order XLIII of CPC?**
>
> (iii) Whether the trial Court, having taken up all the issues for trial without opting to adjudicate jurisdiction as a preliminary issue by postponing other issues as required under Order XIV Rules 1 & 2 of CPC, was right in answering only issue on territorial jurisdiction ignoring other issues of facts as mandated under Order XIV and XX of CPC?"

10. Heard both sides.

Findings on substantial question of law No.(i):

11. The trial Court appreciated the evidence of both parties and found that there is no pleading in the plaint with regard to re-construction of the building subsequent to plaintiff's purchase and relied upon Ex.A-4 (the sale deed), more particularly the annexure 1-A to the sale deed, which shows that the structure covered under the sale deed is dated 28.01.1994 and it is of 20 years old to hold that building is of 15 year old. On the basis of such evidence, the court held that the suit property comes under the purview of the Rent Control Act.

12. The first appellate Court found that the sale deed (Ex.A-4) refers the original structure as a tin shed. The appellant Court also noticed clear admission of D.W.1 to the effect that the building now in his occupation is with RCC roof and consists of four floors with RCC roof. On scrutiny of such evidence, it is held that the building is not more than fifteen years old and does not come under the purview of the Rent Control Act. The first appellate Court also held that the notice issued by the landlord is a valid one and ordered for eviction of the tenant from the suit property.

13. The contention of the learned counsel for the appellant/tenant is that the building was assessed to tax prior to purchase made by the landlord under Ex.A-4. Thus, the building is more than twenty years old, as such, it comes under the purview of the Rent Control Act. The first appellate Court, without considering the evidence on record in true

perspective, has reversed the finding of the trial Court holding that the suit property is not more than fifteen years old.

14. The learned counsel for the respondent/landlord has contended that admittedly, the building was re-constructed after demolition of the old tin shed and the premises which the tenant occupies is with RCC roof and not a tin shed. The suit was filed in the year 2008. Even the date of purchase is taken as completion of construction of reconstructed building, the suit is within fifteen years. Therefore, the requirement of 15 years from the date of construction has not been over. Therefore, the trial Court is wrong in holding that the tenanted portion exists prior to the sale. According to him, the building is below 15 years.

15. It is also his contention that in the plaint while referring to jurisdiction, a specific averment was made that the building is of 12 years old, but the same was not unnoticed by the trial Court while holding that there are no pleadings to show the age of the building.

16. To decide the said issue, it is apt to refer to Section 32 of the Rent Control Act and it reads as under:

> "**32. Act not apply to certain buildings:-** The provisions of this Act shall not apply,-
>
> (a) to any building belonging to the State Government or the Central Government, or Cantonment Board or any local authority;
>
> (b) to any building constructed or substantially renovated, either before or after the commencement of this Act for a period of fifteen

> years from the date of completion of such construction or substantial renovation.
>
> Explanation-I:- A building may be said to be substantially renovated if not less than seventy five per cent of the premises is built new in accordance with the criteria prescribed for determining the extent of renovation.
>
> Explanation-II:- Date of completion of construction shall be the date of completion as intimated to the concerned authority or of assessment of property tax, whichever is earlier, and where the premises have been constructed in stages the date on which the initial building was completed and an intimation thereof was sent to the concerned authority or was assessed to property tax, whichever is earlier.
>
> (c) to any building the rent of which as on the date of commencement of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 2005, exceeds rupees three thousand and five hundred per month in the areas covered by the Municipal Corporations in the State and rupees two thousand per month in other areas."

17. A reading of the above provision would clearly indicate that any building constructed or substantially renovated either before or after commencement of the Rent Control Act, and if the period of fifteen years is not completed from the date of completion of construction or substantial renovation, the building is excluded from the purview of the Rent Control Act. Explanation I to Section 32 shows that a building is said to be substantially renovated, if renovation is more than 75% of the premises built new in accordance with the criteria prescribed. Explanation II shows that the date of completion of construction shall be the date of completion as intimated to the concerned authority or of assessment of property tax, whichever is earlier. Further, the rent of the buildings if exceed Rs.3,500/- per month in Municipal corporation area

and Rs.2,000/- per month in other areas, are also excluded from the purview of the Rent Control Act.

18. In the present case, the plea set up by the landlord is that the building is of twelve years old. The contention of the defendant is that the building is of twenty years old.

19. The trial Court has placed great reliance on annexure-1A to the sale deed under Ex.A-4. As seen from the map of Ex.A-4, the structure at the time of purchase i.e., on 28.01.1994 was only a small tin shed room which is of 10 X 10 sft., ACC sheet room. The landed area purchased was 245 square yards. It is not in dispute that the structure which was existing as on the date of purchase was not the same structure which was let out to the tenant. The premises let out to the tenant is the mulgi of RCC roof admeasuring 135 sft., (10 X 13.5 sft) in the ground floor. The building is of four floors with RCC roof. If the structure which existed on the date of purchase is taken into consideration, it would not withstand to the strength for raising a four floor building in RCC structure over the entire extent of 245 square yards. This means, the plaintiff's claim of reconstruction of the building after demolition of tin shed gets corroboration from the own admission of the tenant that his portion is with RCC roof and lying on the ground floor and building is of 4 floors with RCC roof.

20. The trial Court while assessing the age of the building has placed more reliance on the age of the old building given under annexure 1-A of Ex.A-4. No doubt, it shows the age of the building as on the date of purchase was 20 years. In fact, as seen from the definition of Section 32 of the Rent Control Act, when the substantial renovation or fresh construction is made, the commencement of 15 years shall be from the date of completion of the building or substantial renovation and the substantial renovation is said if it is not less than **75%** new structure. If the four floor RCC building is compared with 135 sft., tin shed room, it amounts to either total new construction or at least substantial renovation by way of more than 75% new structure.

21. Further, the case of the landlord is that ground floor construction was completed in the year 2001 and the construction of other floors was completed in the year 2006. In the present case, there is no intimation of completion of construction of building or no proof to the effect that the building was made to assessment so as to commence the period of fifteen years, which is exempted from the purview of the Rent Control Act. In the absence of such evidence, the only evidence which is to be looked into is the sale deed (Ex.A-4) and the map annexed to it. The building which is now let out is not the same structure which was existed on the date of plaintiff's purchase i.e., 28.01.1994. Even if the sale date is taken as construction completion date, the creation of tenancy and the institution of

the present suit are within fifteen years. Therefore, the first appellate Court has rightly appreciated the evidence in arriving to the conclusion that the building is not governed by the Rent Control Act. Hence, I do not find any perversity in the findings of the first appellate Court in this regard. The substantial question of law is decided accordingly.

Findings on substantial question of law Nos.(ii) & (iii):

22. It is to be noted that the jurisdiction issue in the present case depends upon the findings of fact, and therefore, all the issues have to be framed and tried. In the case on hand, the trial Court has not taken the jurisdiction issue as preliminary issue, but framed all issues and tried; however, it has given finding only on the jurisdiction issue and no findings have been given on other issues which relate to findings of facts. In this regard, law mandates that findings have to be given on all issues, even though the suit is not maintainable on the aspect of jurisdiction. This has not been followed by the trial Court. In this regard, it is apt to refer to Rules 1 and 2 of Order XIV and Rule 5 of Order XX of CPC and they read as under:

ORDER XIV
SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues:- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions arc those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of distinct issue.

(4) Issues are of two kinds:
(a) issues of fact,
(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements if any, and 1 [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing is this rule requires the Court to frame and record issued where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues:- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

ORDER XX

JUDGMENT AND DECREE

1 to 4 xxx (omitted as not necessary)

5. Court to state its decision on each issue:- In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit."

23. It is also apt to refer to the decision of the Apex Court in **Sathyanath v. Sarojamani**[1]**,** wherein it has been held as follows:

> "16. This Court in Ramesh B. Desai held that the principles enunciated in Major S. S. Khanna still hold good and the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue depends upon the question of fact, it cannot be tried as a preliminary issue. The said finding arises from the provision of Order XIV Rule 2 clause (a) and (b). After the amendment, discretion has been given to the Court by the expression 'may' used in sub-rule (2) to try the issue relating to the jurisdiction of the Court i.e. territorial and pecuniary jurisdiction, or a bar to the suit created by any law for the time being in force i.e., the bar to file a suit before the Civil Court such as under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and numerous other laws particularly relating to land reforms. Hence, if Order XIV Rule 2 is read along with Order XII Rule 5, the Court is expected to decide all the issues together unless the bar of jurisdiction of the Court or bar to the suit in terms of sub-rule (2) clause (a) and (b) arises. The intention to substitute Rule 2 is the speedy disposal of the lis on a question which oust either the jurisdiction of the Court or bars the plaintiff to sue before the Civil Court.
>
> 20. The provisions of Order XIV Rule 2 are part of the procedural law, but the fact remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside of findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the unamended Order XIV Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision. Thus, if the Court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext."

[1] AIR 2022 SC 2242

24. It is also apt to refer to the decision of High Court of Gujarath in **Babubhai Ushmanbhai Mandli v. Mehbubbhai Rasulbhai Mandali**[2], wherein it has been held as follows:

> "19. Rule 2 of Order 14 of the Civil Procedure Code, as it presently stands, reads as under :-
>
> > 2. Court to pronounce judgment on all issues.-(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
> > (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to -
> > (a) the jurisdiction of the Court, or
> > (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue".
>
> 20. The present structure of Rule 2 was brought about by the Civil Procedure Code (Amendment) Act, 1976. Before its amendment by the aforesaid amending Act of 1976, Rule 2 read as under :-
>
> > **Order XIV, Rule 2 - Issues of law and of fact.-**
> > Where the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."
>
> 21. When one draws a comparison between the earlier Rule 2 and the amended Rule 2, the comparison immediately leads to a conclusion that where under the old Rule 2 it was mandatory for a court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after the findings had been arrived at with respect to the issues of law, under the new, amended Rule 2, as has been spelt out and clearly stipulated in sub-rule (1) thereof, the Legislature has mandated that a court shall pronounce judgment on all issues, both of law as well as facts, notwithstanding that a case may be disposed of only on a preliminary issue. Under the new Rule 2, the only exception is contained in sub-rule (2) thereof which, in a manner of speaking, relaxes the aforesaid legislative mandate to a limited extent by conferring a discretion upon the court that if it is of the opinion that the case or any part thereof may be disposed of on a issue of law only,

[2] C.SA.No.236 of 2018, dated 19.09.2018

> it may try that issue first, in the process postponing the settlement of other issues until the issue of law has been determined. This discretion even though conferred by the aforesaid legislative amendment has, however, been circumscribed and limited, specifically and explicitly, only to two situations and these are that the issue or issues of law, only upon which the case or any part of the case may be disposed of, **must relate to either the jurisdiction of the court or a bar to the suit created by any law for the time being in force**. By a combined reading of sub-rule (1) and sub-rule (2) of Rule 2 what, therefore, emerges is that, except in situations covered by sub-rule (2), **a court must dispose of a suit as a whole, try all issues of law and fact together and accordingly pronounce judgment on all such issues even though the case may be disposed of on a preliminary issue**. More importantly, and for the purposes of our case, in the light of the specific reference on the formulated question of law, Rule 2 as it presently stands caters to and creates two sets of situations in a suit. One situation is where, at the stage of framing of issues the court exercises its discretion conferred upon it under sub-rule (2) and frames, in the first instance, issues of law only and passes an order specifically and explicitly proposing to try issues of law only, in the process postponing the settlement of other issues until after it has decided the issue of law only. In this situation, at the stage of determining or deciding the issues of law only the court may either dispose of the suit based on such determination of the issues of law only, of course these issues of law relating to the jurisdiction of the court or a bar to the maintenance of the suit created by law for the time being in force, or upon determination of issues of law only the court may hold that the suit is maintainable and/or that it has jurisdiction also to try the suit and thus, consequently to proceed to settle other issues for trial and determination. Such a situation is contemplated by sub-rule (2) and there is no manner of doubt that in taking recourse to such a situation the court has the mandate as well as the sanction from the legislature."

25. A reading of the above statutory provisions as well as the decisions of the Apex Court and High Court of Gujarath, they throw clear light on how issues of law and fact have to be dealt and how law underwent material change by virtue of amendment to Rule 2 of Order XLIV of CPC by way of Amendment Act, 1976 and held that when an issue of law and fact is involved, issue of law cannot be taken as a preliminary issue. Under un-amended Rule 2, it was mandatory for the Court to try issues of

law in the first instance and postpone the settlement of issues of fact until after the findings have been arrived in respect of issues of law. However, after amendment to Rule 2 the provision mandates that the Court shall pronounce the judgment on all issues both of law and facts notwithstanding the fact that the case may be disposed of only on preliminary issue. Discretion is conferred on the Court if it is in the opinion judge the case may be disposed of on issue of law only, it may try that issue first; in the process, the judge shall postpone the settlement of other issues, till issue of law is determined. However, issue of law is strictly restricted to the cases of jurisdiction or bar to the suit created under any law.

26. In the present case, the trial Court has not taken the jurisdiction issue as a preliminary issue. The reason was that the jurisdiction issue of law was mixed question of fact and law. The findings are required whether the tenant is a statutory tenant under the Rent Control Act or not. The trial court did not postpone the settlement of other issues but framed all issues and also tried all issues on merits along with the jurisdictional issue framed by the trial Court.

27. As per the provisions of Orders XIV and XX of CPC and also the ratio laid down by the Apex Court in **Sathyanath**'s case (supra), when the jurisdiction issue is not dealt with as a preliminary issue, the provisions mandate the trial Court to give findings on all issues but in the case on

hand the trial Court has not done the same. The material difference between the un-amended and amended sub-Rule (2) of Rule (2) of Order XIV of CPC was not taken cognizance by the trial Court. In this regard, the trial Court has committed procedural violation by answering the jurisdictional issue alone and has returned the plaint without answering other issues of facts.

28. Originally, the landlord had preferred Civil Miscellaneous Appeal before the first appellate Court treating the order of return as an appellable order Under Order XLIII Rule 1 of CPC. The Chief Judge, City Civil Court, Hyderabad, while numbering the appeal, did not agree that the said order is an appellable order under Order XLIII Rule 1 of CPC, but a regular appeal under Section 96 of CPC lies. Therefore, the landlord had converted the Civil Miscellaneous Appeal into first appeal. The first appellate Court was conscious of the mandatory requirement of the provisions of CPC and rightly answered all the issues.

29. The learned counsel for the tenant has raised an issue of maintainability of the regular appeal before the first appellate Court. According to him, Civil Miscellaneous Appeal under Order 43 Rule 1 is alone maintainable since order of return under Order XVII Rule 10 of CPC is an appelable order.

30. It is to be noted that though such a ground was raised before the first appellate Court, the court did not answer the same. Therefore, such a contention was again re-agitated before this Court.

31. Now the question is in the light of amended Rule 2 of Order XIV of CPC, and in view of the provision contained under Rule 5 of Order XX of CPC, the order of the trial Court amounts to decree or order, when the court did not decides jurisdiction issue as preliminary issue by postponing the settlement of other issues and but settled all issues and tried on merits but findings are rendered only on jurisdiction instead of all issues?

32. In this regard, it is apt to refer to the definitions of decree and order, Section 96 and Order 43 of CPC and they read as under:

> "**2. Definitions**:- In this Act, unless there is anything repugnant in the subject or context,
>
> (1)"Code" includes rules;
>
> (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
> (b) any order of dismissal for default.
>
> **Explanation**.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final
>
> (3) to (13) xxx (omitted as not necessary)

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree.

PART VII
APPEALS
APPEALS FROM ORIGINAL DECREES

96. Appeal from original decree.— (1)Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees."

ORDER XLIII
APPEALS FROM ORDERS

1. Appeal from orders:- An appeal shall lie from the following orders under the provisions of section 104, namely:

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in rule 10A of Order VII has been followed

33. A reading of the above definition of the decree, it is clear that if adjudication conclusively determines the substantial rights of parties with regard to all or any of the matter in controversy, whether it may be preliminary or final, it amounts to a decree. Any order of rejection of plaint and also any determination of any question under Section 144 is also treated as a decree. However, any adjudication from which an appeal lies as an appeal from the order and any order of dismissal for default is

not a decree. The definition of "order" shows that it is a formal expression of any decision of the Court which is not a decree.

34. The issue regarding whether an order passed on the jurisdictional aspect is an order or decree had much controversy even before the independence. This is clear from the judgments of the Bombay High Court in **Rachappa v. Shidappa**[3]**,** wherein it has been held that a decision upon jurisdiction had only the effect of regulating procedure and decides none of the rights of the parties so as to amount to a decree but it is an order appealable. However, the same Court in **Sidhanath Dhonddev Garud v. Ganesh Govind Garud**[4] held that the decision of the issues of mis-joinder, limitation and jurisdiction conclusively determines the right of the parties regarding some matters in controversy, the decision on each of those issues constitutes a decree.

35. This controversy was resolved by the Bombay High Court consists of five-judges Bench in **Chanmalswami Rudraswami v. Gangadharappa Baslingappa**[5] and upheld the view in **Rachappa**'s case (supra). This means, any decision on the jurisdiction has an effect of regulating procedure and decides none of the rights of the parties so as to constitute a decree and it only amounts to an order. If there are no other

[3] (1859) 7 M.I.A 283
[4] MANU/MH/0116/1912
[5] (1914) 16 BOMLR 954

issues are determined, the only course open to aggrieved part is to file a Civil Miscellaneous Appeal.

36. Prior to the amendment to Rule 2 of Order XIV, the decision on jurisdiction was mandated to decide in the first instance postponing the decision on other issues. In such scenario, if the plaint is order to return, the only remedy was to file a Civil Miscellaneous Appeal under Section 104 of CPC. But, as per the amended provision, if the jurisdictional issue is depending upon the decision of fact also, and such a decision cannot be taken as a preliminary issue, such issue has to be decided along with other issues. If all the issues are taken up for trial including the jurisdictional issue, the Court has to mandatorily decide all the issues. If such a Court decides all the issues, such a decision consists not only of findings on jurisdictional issue, but also findings on factual issues on merits. This means, when such a kind of judgment is passed on all issues including the jurisdictional issue, such a judgment comprehends the requirement of decree as well as order. However, if the finding is only on the jurisdictional issue, such finding touches the procedural aspect and decides nobody rights on merits. Therefore, it fulfills the requirement of order only. The findings on other factual issues which conclusively determine the substantial rights of the parties involved in the litigation and such a decision amounts to a decree.

37. Now the question is whether if such a judgment consists of both the requirement of order as well as decree, the party has a choice to prefer Civil Miscellaneous Appeal or a regular appeal.

38. The very object of the amendment of 1976 to Order XIV of CPC was to facilitate the appellate Court to appreciate the findings rendered by the Court on all issues including the findings on jurisdictional issue. That would facilitate the appellate Court to arrest the delay in concluding the litigation. The regular appeal under Section 96 of CPC is a comprehensive and effective remedy when compared to a Civil Miscellaneous Appeal under Section 104 of CPC.

39. A reading of Section 96 of CPC would show that an appeal shall lie from every decree passed by any Court exercising original jurisdiction, except which are expressly provided. Exceptions are that no appeal lies against a consent decree and also against a decree of a small causes Court when the amount does not exceed Rs.10,000/- except on the question of law. These are the only exceptions to Section 96 of CPC. A regular appeal shall lie against all other decrees.

40. When the regular first appeal is the remedy, the parties will have opportunities to prefer second appeal. This remedy of regular appeal is more effective than a remedy provided for appeal against orders. Therefore, when the order/judgment orders return of plain apart from

findings on all the issues including the jurisdictional issue, the effective remedy is to file a regular appeal under Section 96 of CPC treating the judgment as a decree. The remedy of Civil Miscellaneous Appeal is not an effective remedy when compared to the regular appeal.

41. The remedy can be viewed from another angle also. There are inconsistent decisions of the Apex Court with regard to the procedure to be adopted after return of the plaint. The Apex Court in **Oil and Natural Gas Corporation Ltd. v. Modern Construction & Company**[6] has taken a view, which reads as under:

> "13. Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order VII Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same."

42. In **Joginder Tuli v. S.L. Bhatia**[7]**,** the Apex Court has taken another view which reads as under:

> "5…Normally, when the plaint is directed to be returned for presentation to the proper Court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that state at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."

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[6] (2014) 1 SCC 648
[7] (1997) 1 SCC 502

43. A reading of the above two judgments would show that when a plaint is returned and submitted before jurisdictional court, one view, in **Modern Ceonstruction & Company**'s case (supra) is that to treat the plaint as a fresh plaint and any other formalities have to be done treating the case as a fresh including *de novo* trial. The other view in **Joginder Tuli**'s case (supra) is that when the plaint is returned and resubmitted, the Court where it is presented has to proceed with the stage which was existing at the time of return of the plaint.

44. This controversy was noticed by the Apex Court in **EXL Careers v. Frankfinn Aviation Services Pvt. Ltd.**[8] and opted the view taken in **Joginder Tuli**'s case (supra). However, in view of the conflicting decisions, the matter was referred to a larger Bench and the decision of the larger Bench appears to be awaited.

45. If the above two decisions are taken, if the plaint is returned after answering all the issues, there is difficulty for the Court where it is presented either to proceed *de novo* or what to be done on the findings on merits. Therefore, regular appeal under Section 96 of CPC is only the best solution, but not the Civil Miscellaneous Appeal in the background of the above situation.

46. The contention of the learned counsel for the tenant that the appeal suit filed by the landlord is not maintainable on the ground that no

[8] MANU/SC/1338/2019

findings were given by the trial Court on other issues is not tenable for the reason that the trial Court has committed procedural irregularity by not answering all the issues which were mandated to answer along with the jurisdictional issue in view of amendment made to Rule 2 of Order XIV of CPC. In the said backdrop, the appeal suit filed by the landlord before the first appellate Court is maintainable.

47. A contention was advanced by the learned counsel for the tenant that the first appellate Court ought to have remanded the case to the trial Court in the light of absence of findings on other issues, even though it reversed the findings of the trial Court on the jurisdictional issue. This contention has no merits. It is to be noted that the remand is required where additional evidence is required to answer the issues taken up by the appellate Court. If the evidence is sufficient enough to answer the issues which were not answered by the trial Court, the appellate Court can answer the same since it has a co-extensive power with that of a trial Court under Section 107 of CPC.

48. The evidence on record clearly shows that the tenant had received the notice of eviction issued under Section 106 of the Transfer of Property Act and it is not a defective notice. Once such findings are there, there is no other defence available to the tenant under the Transfer of Property Act unlike the proceedings under the Rent Control Act. This finding was rightly made by the first appellate Court, and such findings do not suffer

from any perversity so as to give rise any substantial question of law. Seeing from any angle, the findings of the first appellate Court do not suffer from any perversity. Accordingly, these substantial questions of law are decided.

49. In the result, the Second Appeal is dismissed, confirming the judgment and decree dated 15.10.2014 in A.S.No.4 of 2014 on the file of the Court of the XIV Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad. The tenant is granted 30 days time to vacate the suit premises from this date, if he files an undertaking, within one week from the date of this judgment before the trial Court undertaking to vacate the premises within 30 days from the date of decision of this Court. There shall be no order as to costs. Miscellaneous petitions, if any, pending, shall stand closed.

M.LAXMAN, J

Date: 18.07.2022
Note: L.R. Copy to be marked.
B/o. TJMR