JUDGMENT & ORDER

Heard Mr. Somik Deb, learned senior counsel appearing for the petitioners. Also heard Mr. Ratan Datta, learned counsel appearing for the respondents.

[2] These petitions are consolidated for disposal by a common order inasmuch as the controversy is structured on facts which resemble. By means of filing these petitions under Sectin-115 of the CPC read with Article-227 of the Constitution of India, the petitioners have urged for correcting the jurisdictional error committed by the learned Civil Judge, Sr. Division, Gomati Tripura, Udaipur, while deciding the case No. Civil Misc No.18 of 2021 and setting aside the impugned order dated 16.03.2022 passed by the learned Civil Judge, Sr. Division, Gomati Tripura, Udaipur in Case No.Civil Misc.18 of 2021. Also for examining the legality, propriety & correctness of the impugned order dated 16.03.2022 passed in Civil Misc. No.18 of 2021 also to quash the impugned order dated 16.03.2021 passed by the learned Civil Judge, Sr. Division, Gomati Tripura, Udaipur in Case No.18 of 2021.

[3] In case No. CRP. No.24 of 2022 the petitioner has prayed for the following reliefs:

> ***(i) Issue rule, calling upon the respondents and each one of them, to show cause as to why the impugned order dated 16.03.2022 (Annexure-6 supra), passed by the learned Civil Judge (Senior Division), Gomati Tripura, Udaipur, in case No. Civil Misc.18 of 2021, shall not be quashed/set aside for rendering substantive and conscionable justice to the petitioners;***
> ***(ii) Call for the records appertaining to this petition;***
> ***(iii) After hearing the parties, be pleased to make the rule absolute in terms of i & ii above;***
> ***(iv) Costs of and incidental to this proceeding;"***

[4] In case No. CRP. No.25 of 2022 the petitioners have prayed for the following reliefs:

> ***"(i) Issue notice, calling upon the respondents and each one of them, to show cause as to why the impugned order dated 16.03.2022 (Annexure-7 supra), passed by the learned Civil Judge (Senior Division), Gomati Tripura, Udaipur in case No.Civil Misc. 18 of 2021, shall not be quashed/set aside for rendering substantive and conscionable justice to the petitioners;***
> ***(ii) Issue notice, calling upon the respondents and each one of them, to show cause as to why the operation of the impugned order dated 16.03.2022 (Annexure-7 supra), passed by the learned Civil Judge (Senior Division), Gomati Tripura, Udaipur in case No.Civil Misc. 18 of 2021, as well as the further adjudication/trial of TS(P) No.04 of 2017 shall not be stayed, till the final disposal of this civil revision petition.***
> ***(iii) In the Ad-interim, and thereafter, on hearing the parties, in the Interim, an order, in terms of relief (ii) supra;***
> ***(iv) Call for the records appertaining to this petition;***
> ***(v) After hearing the parties, be pleased to make the Rule absolute in terms of i to iii above."***

[5] In gist, the case of the petitioner as it appears from the copy of the judgment of learned trial Court is that, the respondent Nos.1 and 2 instituted a partition suit, in the Court of learned Civil Judge, Sr. Division, Udaipur, Gomati Judicial District, Tripura against the petitioners and pro-forma respondent. After filing of the suit, summons were duly served upon the petitioners and the pro-forma respondents and subsequently, after receiving the said summons, the petitioner appeared before the Court of the learned Civil Judge, Sr. Division, Udaipur, Gomati Judicial District, Tripura and filed his written statement. Thereafter, the respondent Nos.1 & 2 had filed a petition, under Order-VI Rule-17 read with Section-151 of the CPC seeking amendment of the plaint.

[6] Thereafter, vide the order dated 15.11.2017, the said prayer for amendment was allowed. The pro-forma respondent preferred one civil revision petition vide CRP.No.25 of 2018 before this Court, praying for setting aside the order dated 15.11.2017. After hearing both the parties, this Court was pleased to pass an order dated 29.06.2019, thereby quashing/setting aside the said order dated 15.11.2017. Consequent upon making of order dated 29.06.2019, the position that was obtaining at that

time of institution of the plaint, stood restored and the alteration of the plaint, as sought for, by way of amendment, stood ineffective. Thereafter, the petitioner filed a case, in the Court of learned Civil Judge, Sr. Division Udaipur, Gomati Judicial District, Tripura, sought for dismissing the partition suit [TS (P) No. 04 of 2017, filed by the respondent Nos.1 & 2. In the said case, the pro-forma respondents have taken the plea of adverse possession over the suit land, denying the title of their predecessors as well as the respondents. Further, the petitioners have denied to recognize the respondents as their landlords, as they have never paid any rent to them. Thereafter, vide order dated 16.03.2022, the court below dismissed the petition, filed by the petitioners and the pro-forma respondents. Hence, these petitions have been preferred by the present petitioners.

[7] Mr. S. Deb, learned senior counsel assisted by Mr. Abir Baran, learned counsel appearing for the petitioners has submitted that initially, the plaintiffs-opposite parties-respondents No.1 and 2 instituted a partition suit being T.S.(P) 04 of 2017, in the Court of learned Civil Judge, Sr. Division, Udaipur, Gomati Judicial District, Tripura against the defendant-petitioner and the Pro-forma defendants-petitioners-opposite parties-respondents and they are the full-blooded brothers and sisters.

[8] He has submitted that the respondents No.1 and 2 and the petitioner became the owners, possessors and title holders of land measuring0.238 acres [0.018+0.060+0.060] acres +0.100 (0.099+0.001) acres = 0.238 acres], situated within the State of Tripura pertaining to Khatian No.2431, 2432 & 2433, vide Hal Plot No.480/7241, 480/7240 and 480 respectively and Khatian No.3761, vide Hal Plot No.214 and 214/6006, classified as Bastu (Nal) class of land and further, a land measuring 4.980 (3.940+1.040) acres situated within the State of Tripura pertaining to Khatian No.710, vide Hal Plot No.2758/2901 and 2758/2903,

classified as Itkala (Nal) class of land, in total the land measuring 5.218 acres. The respondents No.1 and 2 filed the partition suit for partition of the immovable ancestral properties against the petitioner and the pro-forma respondents.

[9] Mr. Deb, learned senior counsel has further contended that after filing of the suit, summons were duly served upon the petitioner and the pro forma respondents No.3 to 12 and subsequently, after receiving the said summons, the petitioner appeared before the learned Civil Judge, Sr. Division and filed written statement. It has been further averred that the pro-forma respondents No.4, 8 and 12 filed their joint written statement and the pro-forma respondents No.5, 6, 7, 9 and 11 filed their separate joint written statement, but the pro-forma respondents No.3 & 10 even though, they appeared but, did not file their written statement.

[10] Thereafter, the respondent Nos.1 and 2 had filed a petition, bearing case No. Civil Misc.158 of 2017 under Order-VI Rule-17 read with Section-151 of the CPC seeking amendment of the plaint, praying to insert the fact that the pro-forma respondents No.4 to 11 except the pro-forma respondents No.3 and 10 are the tenants over the said suit land and as they are not paying the monthly rents as tenants, they are liable tobe evicted from the suit property. Hence, it is patently clear that even the respondent Nos.1 and 2 are aware of the fact of occupation of the land and building by the pro-forma respondents. Subsequently, vide order dated 15.11.2017, the said prayer for amendment was allowed.

[11] He has submitted that the petitioner filed a case being numbered as Civil Misc.17 of 2021, before the Court below praying for dismissing the parttion suit (TS(P) No.04 of 2017) filed by the respondents No.1 and 2. In the said case, the petitioner has submitted that the

possession in a partition suit has to be understood only in the context who, is in actual physical possession. The pro-forma respondent Nos.3 to 12 (except pro-forma respondents No. 3 and 10) took the plea of adverse possession against the petitioner and the respondent Nos.1 and 2. Admittedly, they are in possession of the suit property and as such without ejecting them from the suit properties, the partition of the said land is not possible.

[12] The original partition suit is a building comprising of the pro-forma respondents in occupation, claiming their title on the basis of the adverse possession, though they have been mentioned as tenants in the plaint, so at this juncture, for amicable partition of the suit land it is required to first eject the pro-forma respondents from the suit properties. The original suit is only for amicable partition of the suit land and cannot be understood to mean a suit for eviction of the pro-forma respondents, which would change the essential character of the suit as one for partition and make it one for ejectment.

[13] He has further averred that the said case was dismissed vide order dated 16.03.2022, the court below dismissed the petition, filed by the petitioner. Being aggrieved by and dissatisfied with the impugned order dated 16.03.2022, passed by the learned Civil Judge, Sr. Division, Udaipur, Gomati Judicial District, Tripura in Civil Misc.17 of 2021, the petitioners have preferred this petition before this Court for substantial ends of justice.

[14] Mr. Deb, learned senior counsel without dwelling outside of the case has firmly contended that while passing the impugned order dated 16.03.2022 the learned Court below has failed to appreciate that the pro-forma respondents have been occupying the land and building, adversely

for more than the statutory period, denying the title of the petitioner, the respondents No.1 and 2 and their predecessors and by enjoying such peaceful adverse possession for more than 12 years, they perfected their right, title & interest over the said land and building and hence, acquired title over the said land and building to the extent under occupation of them.

[15] The learned court below has failed to appreciate that the suit properties are under the occupation of the pro-forma respondents No.3 to 12, having their claim of adverse possession, except the pro-forma respondents No.3 & 10, over the suit land and as such, no partition is possible without evicting the pro-forma respondents No.3 to 12. The learned Court below at the time passing of the order dated 16.03.2022 has failed to appreciate that the respondents No.1 & 2 had filed a petition seeking amendment of the plaint to insert the fact that the pro-forma respondents No.3 to 12 except the pro-forma respondents No.3 & 10, are the tenants over the said suit land and as they are not paying the monthly rents as tenants, they are liable to be evicted from the suit property and hence, it is patently clear that even the respondents No.1 and 2 are aware of the fact of occupation of the land and building by the petitioners. Thereafter, the said amendment petition was allowed vide order dated 15.11.2017.

[16] He has further argued that the Court below has failed to appreciate that the pro-forma respondent No.5 preferred one civil revision petition vide CRP No.28 of 2018 before this Court for setting aside the impugned order dated 15.11.2017 and the said order dated 15.11.2017 was set aside with specific observation that the respondents have taken mutually inconsistent, contradictory and destructive pleas. After setting aside of the order dated 15.11.2017 by the order dated 29.06.2019 passed

by this Court, no order of eviction of the pro-forma respondents can be passed as they remain in occupation of the suit property.

[17] The possession in a partition suit has to be understood only in the context, who is in actual possession. The pro-forma respondents took the plea of adverse possession against the petitioner and the respondents No.1 and 2. Admittedly, the pro-forma respondents are in possession of the suit property. As such, without ejecting them from the suit properties, the partition of the said land is not possible.

[18] The suit in question is a partition suit and as per the case projected by the respondents No.1 and 2, the suit land is also occupied by some tenants. Section-2 of the Partition Suit Act, assumes great significance, which mandates that in a suit for partition, in which, if instituted prior to the commencement of the said Act, a decree for partition might have been made, it appears to the Court that by reasons of the nature of the property to which the suit relates, or of the number of the shareholders therein, or any other special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of property and distribution of the proceeds thereof would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any such shareholders requested individually or collectively to the extent of one moiety or upwards, direct a sale of the property, and a distribution of the process thereof. But the Court below has failed to appreciate the mandate, contained in Section-2 of the Partition Act, is, by itself, vesting of an equitable jurisdiction on to the Court, trying a suit for partition of immovable property.

[19] Mr. Deb, learned senior counsel has submitted that Section-106 read with Section-111 of the Transfer of Property Act, which

mandates that in the absence of a contract of local law or usage to the contrary, a lease of immovable property (other than those for agricultural or manufacturing purposes) shall be deemed to be a lease from month to month, terminable, on the part of the lessor or the lessee, by causing a 15 days' notice. Admittedly, prior to institution of the suit, the respondents No.1 and 2 did not serve any notice, on to the pro-forma respondents, who according to them are the tenants. Therefore, the suit was not maintainable for non-observance of the mandatory prescription, contained in the aforesaid statutory provision.

[20] He has further argued that where a bar to suit, is created by any law for the time being in force, and for that purpose, it appears to be court that any suit can be decided on the preliminary issue of law along, that Court would decide such preliminary issue at the first instance and defer the adjudication of the suit, till the determination of such issues. Order-XIV Rule-2(2) of the CPC mandates that in a petition, under the said provision, the Court would take the statements made in the plaint, on the face value and thereupon, would proceed to decide the maintainability of the suit. Even if all the statements/averments made in the plaint, are taken on the face value, because of the grounds taken herein before, the suit is not maintainable, under the prescriptions, contained in the Partition Act and the Transfer of Property Act. The learned Court below has failed to appreciate the issues raised by the petitioners in the petition presented under Order-XIV Rule-2(2) of the CPC.

[21] On the other hand, plaintiff-OPs contested the case by filing written objection averring that the pro-forma defendant petitioners No. 1 to 6 are tenants over A- schedule land and Pro-forma Defendant Petitioners No.7 and 8 are tenants over B-schedule by possessing and occupying respective rooms of existing building and other portions and running their

regular business activities as well and contended that defendant OP Nirmalendu Datta is solely enjoying monthly rents deriving from Pro-forma-Defendant- Petitioners through the back door without divulging this thing and hence, thereby depriving two sisters i.e. the plaintiff OPs who are also equally entitled to its shares. Owing to this reason, they impleaded the petitioners as pro-forma defendant in the main suit so that by the judicial intervention the mesne profit of the property that is rents getting from them can be preserved and get their shares on success over the suit.

[22] They happened to refute all pleas taken by PDPs and categorically added that Pro-forma-Defendant-Petitioners claimed the ownership over the building and the land under their occupation. According to Plaintiff OPs, conduct of Defendant OP is found to be suspicious inasmuch he is neither raising any objection to the plea of adverse possession nor is he disclosing fact of receiving the rents from the pro-forma defendants petitioners rather implicitly allowing and strengthening the case of Pro-forma-Defendant-Petitioners.

[23] It is also their case that in the event Pro-forma-Defendant-Petitioners succeed to prove the plea of adverse possession, the portion of building and land their brother DOP is possessing can also be partitioned and on account of aforesaid false and baseless claim of petitioners, the original suit will not be frustrated on the ground of non-maintainability. In fact, pro-forma defendants petitioners in connivance with Defendant OP made the application at the stage of leading evidence only with an ill motive to drag the proceeding of original suit.

[24] Mr. Ratan Datta appearing for Plaintiff OPs strongly contended that unfortunately being brother of Plaintiff OPs, Defendant OP is taking plea of adverse possession through the Pro-forma Defendant

Petitioners only with *mala-fide* intention to deprive his both the sisters Plaintiff Ops of their respective shares over the suit land as well as rent benefits coming from tenancy.

[25] So far Rule-2(2) of Order XIV, CPC is concerned the main controversies in the suit cannot be adjudicated on the preliminary issues, it requires a full fledged trial and leading of evidence to decide all the matters involved in the original suit which are mixed questions of fact and law. However, if so requires, additional issues may be framed for deciding all disputes raised by the Pro-forma-Defendant-Petitioners on merit. But such pleas that the suit being barred by law and challenging on the matter of non-maintainability deserves no consideration and prayer for deciding their pleas on framing of preliminary issues should not be looked into whatsoever.

[26] In view of above discussions advanced by the learned counsel appearing for the parties and on perusal of the records, it is very much essential to discuss Order XIV Rule2(2), CPC which reads as under:

Rule 2(2), ORDER XIV, CPC

> ***"....(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."***

[27] From the bare reading of above provisions, it is crystal clear that court has given scope with discretion to decide the suit or cases on the matter of jurisdiction of the court to try the suit or a bar to the suit created by any law for time being in-force provided that the issues to be

determined preliminary would exclusively and purely be on law point in isolation to facts but not mixed question of law and fact.

[28] The Hon'ble Supreme Court in **S. S. Khanna, Major v. Brig. F. J. Dillon, reported in AIR 1964 SC 497** held, *"Under O. 14 R 2 Code of Civil Procedure, 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 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. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court : not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."*

[29] The Hon'ble Supreme Court in **Haridas Das -Vs- Usha Rani Banik & Ors.,** reported in **AIR 2006 SC 1634 : 2006 (4) SCC 78** held, *"A Constitution Bench of this Court in the case of Pandurang Dhondi Chougule v. Maruti Hari Jadhav (AIR 1966 SC 153) has held that the issue concerning Res-judicata is an issue of law and, therefore, there is no impediment in treating and deciding such an issue as a preliminary issue. Relying on the aforementioned judgment of the Constitution Bench, this court has taken the view in case of Meharban v. Punjab Wakf Board (supra) and Harinder Kumar (supra) that such like issues can be treated and decided as issues of law under Order XIV, Rule 2 (2) of the Code. Similarly the other issues concerning limitation, maintainability and Court fee could always be treated as a preliminary issues as no detail evidence is*

required to be led. Evidence of a formal nature even with regard to preliminary issue has to be led because these issues would either create a bar in accordance with law in force and they are jurisdictional issues."

[30] Section 2 in The Partition Act, 1893 says that "Power to court to order sale instead of division in partition suits ***:Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds."***

[31] Section 106 in The Transfer of Property Act, 1882: Duration of certain leases in absence of written contract or local usage:

> ***(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.***
>
> ***(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.***
>
> ***(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.***

> ***(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]"***

[32] Section 111 of The Transfer of Property Act, 1882**:** Determination of lease: A lease of immovable property determines:

> ***(a) By efflux of the time limited thereby;***
>
> ***(b) Where such time is limited conditionally on the happening of some event by the happening of such event;***
>
> ***(c) Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;***
>
> ***(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;***
>
> ***(e) By express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them.***
>
> ***(f) By implied surrender;***
>
> ***(g) By forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter 1[* * *]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; 2[or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event]; and in 3[any of these cases] the lessor or his transferee 4[gives notice in writing to the lessee of] his intention to determine the lease;***
>
> ***(h) On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.***
>
> ***Illustration to clause (f) A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon."***

[33] It is one of the points raised above by the Mr. Deb, learned senior counsel appearing for Petitioners that as per Section-2 of the Partition Act, the partition suit instituted by Plaintiffs Ops is not tenable

inasmuch, the land in dispute cannot be divided amongst them owing to the fact that petitioners are in possession of it and hence barred under this law. But having regard to the provisions of Section-2 what appears to this Court is that in a suit for partition, if instituted prior to the commencement of the Act, for the reasons stated in the section division of the property, cannot reasonably and conveniently be made and that a sale of property would be more beneficial it can direct sale and this can be done, however, on the request of the shareholders interested individually or collectively to the extent of one moiety or upwards. Furthermore, learned senior counsel relied upon Section-111 of the Transfer of Property Act where it only provides certain circumstances for the determination of lease as given and demonstrated herein above. On careful reading this Court finds nothing relevant in above provisions to draw inference that the partition suit filed by Plaintiff OPs is barred thereby and it needs to be decided on preliminary issue. These provisions are not applicable to the facts of instant case. The legal requirement under Section-2 of the Partition Act gives discretion upon the Court for deciding the property either by sale or partition. But it is not a mandatory to sell to suit property. Therefore, this point of contentions projected by counsel cannot be sustained.

[34] To be very specific on preliminary issues, this Court holds the view that Issue which is of legal nature and affects the jurisdiction of Court falling under O-XIV, R-2(2) can be termed as preliminary issue. A factual issue which needs the trial and leading evidence for decision cannot said to be preliminary issue. If decision on the issue of law is depending upon the decision of factual aspects, in that event the Code does not empower the Court to decide that issue of law on framing of preliminary issue.

[35] This Court after meticulous appreciation of the evidence on record and also on the basis of the submissions advanced by the learned

counsel appearing for the parties is of the view that the findings as arrived at by the Court below need no interference. What has been submitted by the learned counsel appearing for the petitioner placing reliance upon the Section-111 has no applicability in the facts and circumstances of the case in hand.

[36] Mr. Ratan Datta, learned counsel appearing for the respondents/plaintiffs submitted to pass an order directing the petitioners/tenants to deposit the rents/measne profits in Court below. Since this CRP is filed by defendants in their case, the plaintiffs cannot seek any relief. Since the prayer is made in suit seeking to deposit rents in Court, it is open for the plaintiffs to press for appropriate reliefs.

[37] Hence, this Court finds no infirmity in the findings arrived at by the Court below. Since the petitioners herein has failed to make out the case before the Court below, this Court has no hesitation to say that in the revision, appreciation of the factual issues are not permissible. Accordingly, the instant revision petition stands dismissed. Consequently, the order as passed by the Court below stands affirmed. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUDGE

A.Ghosh