

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

IA No: GA 3 of 2023

In CS 44 of 2013

Basu House Private Limited

Versus

Indian Overseas Bank

Mr. Shyamal Chakraborty, Adv.

Mr. Gourav Kumar, Adv.

... for the plaintiff/respondent.

Mr. Debdut Mukherjee, Adv.

Mr. Sudeep Pal Choudhuri, Adv.

Ms. Diya Nandi, Adv.

... for the defendant

Heard on : 02.02.2023

Judgment on : 07.02.2023

Krishna Rao, J.:

The petitioner/defendant has filed the instant application praying for following reliefs :

- “a) Recall the order dated January 9, 2013 by which the instant suit was directed to be placed in the list of ‘undefended suits’;*
- b) Leave be granted to your petitioner to enter appearance in the instant suit within such period as may be directed by this Hon’ble Court;*
- c) The plaintiff be directed to produce the original and/or a duly certified copy of the deed of lease dated July 1, 1972;*
- d) The plaintiff be directed to produce the records of the arbitration proceeding held between the parties before Sri Dhurjati Chakrabarti Thakur, Sole Arbitrator;*
- e) The instant suit be dismissed and/or permanently stayed and the parties herein be referred to arbitration;*
- f) In the alternative, the plaint of the instant suit be rejected and/or the plaint be taken off the file;*
- g) In the alternative, the suit be dismissed;*
- h) In the alternative, the time to file written statement be extended by a week from the date of passing of the order;*
- i) Stay of the order dated January 9, 2023 and all further proceedings in the suit, being C.S. No. 44 of 2013, till disposal of the instant application;*
- j) Ad-interim order in terms of prayer (i) above;*
- k) Costs of and/or incidental to the instant application be borne by the plaintiffs;*
- l) Such further and/or other order or orders be passed and/or direction or directions be given as Your Lordships deem fit and proper.”*

The respondent/ plaintiff has filed the suit being C.S. No. 44 of 2013 against the defendant praying for following reliefs :

- “a) Decree for recovery of vacant and peaceful possession of entire basement floor comprising an area of 2000 square feet together with ground floor comprising an area of 1800 square feet aggregating to an area of 3,800 square feet of the building at premises No. 3, Chowringhee approach, Kolkata 700072, more fully described in Schedule hereof :*

- (b) *Decree for Rs. 2,65,99,137.00/- as claimed in paragraph 15 of this plaint;*
- (c) *Decree for further mesne profits @ Rs. 25,333.00 per day from the date of institution of the suit till recovery of vacant possession of the tenanted premises entire basement floor comprising an area of 2000 square feet together with ground floor comprising an area of 1800 square feet aggregating to an area of 3,800 square feet of the building at premises No. 3, Chowringhee approach, Kolkata-700 072, more fully described in Schedule hereof;*
- (d) *Interim interest and interest on judgment @ 18% per annum and/or at such rate as to this Hon'ble Court may determine;*
- (e) *Alternatively, inquiry into the quantum of mesne profits and/or damages suffered by the Plaintiff and a decree for such sum as may be found due and payable against the Defendant;*
- (f) *Mandatory injunction directing the defendant to pay proportionate share of Municipal rates and taxes, commercial surcharge, water taxes, sewerage and drainage service with effect from 1st April, 2010 in respect of the area under occupation of the defendant on the basis of the Bills raised by the Kolkata Municipal Corporation till the date of delivery of vacant and khas possession of the suit premises to the plaintiff;.”*

The writ of summon was served upon the defendant on 19th June, 2013 but even after receipt of writ of summon, the defendant has not entered appearance in the suit and accordingly this Court had passed an order on 9th January, 2023 by fixing the matter in the list of undefended suit.

Now that defendant has filed the instant application praying for multiple reliefs on the following grounds :

- i. *The plaintiff had already initiated an Arbitration Proceeding against the defendant and an arbitrator was appointed and both the parties have participated in the arbitration proceedings but since the year 2016, no hearing was conducted and the arbitration proceeding is still pending before the Learned Sole Arbitrator and thus the suit is not maintainable.*

- ii. *The defendant has also filed an application before the Learned Arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996 and the said application is still pending before the Learned Arbitrator.*
- iii. *During the pendency of the arbitration proceeding, the Learned Advocate representing the defendant before Learned Arbitrator passed away on 8th February, 2017 and the cause papers of the arbitration proceeding which was kept in the chamber of the erstwhile advocate was destroyed by accumulation of water.*
- iv. *The plaintiff has admitted the fact with regard to the appointment of Arbitrator in paragraphs 6 and 11 of the plaint.*
- v. *The plaintiff has shown over value of the suit only to file the suit before this Court though the suit filed by the plaintiff is not maintainable before this Court.*

The counsel for the plaintiff has submitted that the plaintiff will not file any affidavit in opposition to the application filed by the defendant and he will resist the application orally.

The plaintiff contended that writ of summons of the instant suit was duly served to the defendant on 19th June, 2013 but the defendant has neither appeared in the suit nor had filed written statement, though the defendant had contested the interlocutory applications.

Counsel for the plaintiff submits that notice under Section 6 (4) of the West Bengal Premises Tenancy Act, 1997 was served upon the defendant.

No reasons have been shown by the defendant as to why the defendant had not entered into the suit and file written statement.

As regard the arbitration proceeding, the Counsel for the plaintiff submits that the arbitration proceeding is not connected with the eviction of

the defendant and the said proceeding is connected with the interest portion of the rent which is recoverable from the defendant.

The counsel for the plaintiff submits that the plaintiff has claimed an amount of Rs. 2,66,35,137/- for which this Hon'ble Court has got jurisdiction to entertain the suit filed by the plaintiff.

Heard the learned counsel for the respective parties and considered the materials on record.

Paragraph 6 and 11 of the plaint wherein the plaintiff has disclosed about the arbitration clause and appointment of Arbitrator which reads as follows :

"6. If any disputes, dissensions and/or differences arise between the parties hereto relating to an/or arise out of this indenture of lease or implementation thereof or otherwise by whatever name called during the period of the lease or after the expiry and/or termination of this lease then the same shall be referred to a sole Arbitrator being appointed, by the Lessor in accordance with the Arbitration Act, 1941 or any modification thereof then in force.

11. Since the defendant has failed and neglected to comply with the said Notice dated February, 19, 2010 and pay the said sum of Rs. 11,09,49,139.00p in terms of Arbitration Agreement contained in clause C (6) of the said Lease dated 1st July, 1972 the plaintiff, being entitled, has by its notice dated 28th December 2012, appointed Sri Dhurjati Chakrabarti Thakur, (Presiding Officer, Retired, Kolkata Debt Recovery Tribunal-III and New Delhi DRT-III), residing at No. 20/1/C. Hazra Road, First Floor, Kolkata-700 026 as the Sole Arbitrator for adjudication of the disputes between the parties."

In paragraph 9 of the plaint, the plaintiff has categorically stated that by a notice dt. 19th February, 2010, the plaintiff determined the lease tenancy and called upon the defendant to quit and vacate the demised premises and payment of arrears of rent, mesne profit, Municipal Taxes and

other taxes and in failure to comply with the notice dt. 19th February, 2010 by the defendant, the plaintiff has appointed an Arbitrator in terms of Clause C (6) of the lease deed dt. 1st July, 1972 and appointed an Arbitrator on 28th December, 2012.

The submissions made by the Counsel for the plaintiff that the Arbitration proceeding is connected with the interest portion of the rent which is recoverable from the defendant is contradictory to the statements made in the plaint. As per the averments made in the plaint, it is established that the plaintiff has appointed an arbitrator for noncompliance of the notice dt. 19th February, 2010 by the defendant.

In the case of Sundaram Finance Ltd. & Anr. -vs- T. Thankam reported in (2015) 14 SCC 444, the Hon'ble Court held that :

“8. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, as held by this Court in P. Anand Gajapathi Raju v. P.V.G. Raju.”

In the case of P. Anand Gajapathi Raju & Ors. -vs- P.V.G. Raju (Dead) & Ors. reported in (2000) 4 SCC 539, the Hon'ble Supreme Court held that :

“5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:

(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the court against the other party;

(3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.”

The notice dt. 19th February, 2010 is in connection with the determination and termination of leased tenancy, eviction of the defendant from the demised premises and for payment of arrears of rent as per market rate, mesne profit as well as Municipal Taxes and other tax. In the instant suit also the plaintiff has prayed for the same relief and thus this Court is of the view that the plaintiff without taking appropriate steps to continue with the arbitration proceeding, had filed the instant suit.

In view of the above, this court is of the opinion that in the present case, the plaintiff has admitted that there is an arbitration clause and the plaintiff has appointed an arbitrator and the arbitrator has proceeded with the arbitration proceedings. The suit filed by the plaintiff is subject matter of the arbitration agreement and the defendant has not submitted his written statement in the present suit. Thus this court has come to the conclusion that civil court has no jurisdiction to entertain the suit during the pendency of the arbitration proceeding, accordingly, **C.S. No. 44 of 2013 is dismissed.**

The parties to the suit are directed to approach the learned sole arbitrator to decide the dispute expeditiously in accordance with law.

G.A. 3 of 2023 is thus **disposed of**.

(Krishna Rao, J.)