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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision:05.09.2023

+ CM(M) 1424/2023

MAHESH CHANDER KUMAR Petitioner

Through: Mr. Praveen Suri, Advocate

versus

BHAGWAN SINGH SAINI Respondent

Through: Mr. Shivek Rai Kapoor and Ms.
Pulak Gupta, Advocates

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 45403/2023(for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stand disposed of.

CM(M) 1424/2023 & CM APPL. 45402/20239 (stay)

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 17.08.2023 passed by the District Judge (Commercial Court)-01, District: South-west, Dwarka Courts, New Delhi ('Trial Court') in CS (COMM) No. 245/2021 titled as "**Bhagwan Singh Saini v. Mahesh Chander Kumar**" whereby, the Trial Court dismissed the application filed by the Petitioner under Order 7 Rule 11 Code of Civil Procedure, 1908 ('CPC').

1.1. The Petitioner herein is the defendant and the Respondent herein is



the plaintiff in the civil suit filed for recovery of Rs. 21 lakhs along with interest and mandatory injunction for possession.

2. The relationship between the parties is admittedly of a licensor and licensee. The application under Order 7 Rule 11 CPC has been filed on 04.03.2023; by the defendant on the ground that the mandatory provision of Section 12-A of the Commercial Courts Act, 2015 ('Act of 2015') has not been complied with by the plaintiff before institution of the suit.

2.1. The Trial Court has dismissed the said application after taking note of the fact that the Coordinate Bench of this Court vide judgment dated 03.07.2023 in CM(M) 701/2023 preferred by the Petitioner herein had duly considered the said objection of the defendant and rejected the same. The relevant portion of the judgment dated 03.07.2023 reads as under:

"12. The last submission of Mr. Suri is in respect of the judgment of the Supreme Court in Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd., (2022) 10 SCC 1. According to Mr. Suri, the suit wherefrom the present challenge has arisen would not be maintainable for violating the mandatory provisions of Section 12A of the Commercial Courts Act, 2015.

13. Per contra, Mr. Mittal, learned counsel appearing for the respondent submits that the judgment as cited by the learned counsel for the petitioner are not applicable to the facts of the present case. Mr. Mittal submits that the petitioner has not disputed the fact that he was in occupation of the subject suit premises till the petitioner handed over keys of the subject suit property to the respondent before this Court at the time when the first appeal was filed by the petitioner before this Court while challenging the order dated 12.01.2023 passed by the learned Trial Court in an application under Order XXXIX Rule 10 CPC.

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“29. **Yet another argument, which is irrelevant and unnecessary to the lis before this Court**, was with respect to non-compliance of Section 12-A of the CC Act, is concerned, the same is noted for being rejected.

30. This is for the reason that originally, suit was filed as an ordinary suit and was later converted as a commercial suit under the CC Act, and the rigors of the 12-A would not be attracted since, no urgent reliefs were sought for at the time when the suit was converted as commercial suit. Moreover, no such objection was ever raised by the Petitioner subsequent to the conversion of nature of suit from ordinary to commercial.”

(Emphasis supplied)

2.2. The Trial Court noted that this Court’s judgment dated 03.07.2023 was not placed before the said Court by the Petitioner and he pressed his application contrary to the findings in the order dated 03.07.2023. The Trial Court concluded that the Petitioner’s conduct in pursuing this application despite the order dated 03.07.2023 was a misuse of the process of law and the Petitioner was guilty of suppressing he said order.

3. The learned counsel for the Petitioner before this Court has relied upon the judgment of the Supreme Court in ***M/s Patil Automation Private Ltd. & Ors. Vs. Rakheja Engineers Pvt. Ltd.*** (2022) 10 SCC 1, for maintaining the application under Order 7 Rule 11 CPC.

3.1. He states that he has assailed the impugned order of the Trial Court rejecting the application by contending that no reference can be made to the judgment dated 03.07.2023 passed by the Coordinate Bench of this Court in CM(M)701/2023 as the said finding of the Court is a mere obiter dicta.

4. In reply, the learned counsel for the Respondent places reliance upon



the judgment of the Coordinate Bench of this Court in **CEPCO Industries Pvt. Ltd. vs. Tewari Restaurant Pvt. Ltd.** passed in CS (OS) 682/2021 dated 09.01.2023 wherein the learned Single Judge as well after taking note of the fact that the commercial suit therein had been filed before the pronouncement of the judgment of **M/s Patil Automation Private Ltd. & Ors. Vs. Rakheja Engineers Pvt. Ltd.** (supra) concluded that no ground has been made out for rejection of the complaint on account of non-compliance of Section 12-A of the Act of 2015. The relevant portion of the judgment in **CEPCO Industries Pvt. Ltd.** (supra) read as under:

*“12. This Court, in various orders, including order dated 21.07.2022 passed in CS (OS) 469/2021 titled **Riveria Commercial Developers Ltd. v. Brompton Lifestyle Brands Pvt. Ltd.**, placing reliance on the above referred judgments, also allowed the suit to be registered as a Commercial Suit. The same procedure was followed by this Court vide order dated 15.12.2022 passed in FAO-IPD 23/2021 titled **Dhani Aggarwal v. Mahesh Yadav & Ors.***

*13. As far as non compliance with the mandatory provision of Section 12A of the Act is concerned, the judgment of the Supreme Court in **Patil Automation Pvt. Ltd. and Ors.** (supra) has been expressly made prospective in nature. The same, therefore, shall have no application to the facts of the present case as the suit was filed prior to the date of the said judgment. The parties were also referred to mediation vide order dated 22.04.2022 passed by the learned Joint Registrar (Judicial), however, the parties could not arrive at a settlement of their disputes.”*

5. This Court has considered the submission of the counsel for the Petitioner and finds no merit in the said submission.

6. In the facts of this case the suit was initially instituted in November 2020 as an ordinary civil suit and it was converted into a commercial suit on 05.10.2021 upon an application being filed by the Petitioner herein. Thus, in the facts of this case the plaintiff could not have invoked the provisions of Section 12-A of the Act of 2015 in a matter where the plaint was filed as an ordinary suit and tried as an ordinary suit initially.



7. The Trial Court after duly taking note of the date of institution of the present suit (i.e., November 2020) and the pronouncement of the judgement of the Supreme Court *M/s Patil Automation Private Ltd. & Ors.* (supra) that law settled therein shall apply prospectively w.e.f., 20.08.2022 rightly held in facts of this case that the present suit cannot be rejected on the ground of non-compliance of Section 12A of the Act of 2015. The ratio of the judgment of this Court in *CEPCO Industries Pvt. Ltd.* (supra) also applies to the facts of this case.

8. In addition, a bare perusal of the findings of this Court in C.M. (M) 701/2023 shows that at paragraph 12 the same very specific objection of non-maintainability of the suit on account of non-compliance of Section 12A of the Act of 2015 was specifically raised and contested as a ground in support of challenge to the impugned order dated 01.04.2023 therein. The Coordinate Bench duly considered the same and rejected the said objection on merits. The Petitioner herein is bound by the said finding of the Court and his contention that the findings at paragraph 29 and 30 rejecting his argument on merits is an obiter dicta and hence not binding on him is fallacious and hereby, rejected. The said conclusion operates as res judicata.

9. The Petitioner had filed this application under Order 7 Rule 11 CPC on 04.03.2023 was therefore conscious of the fact that the objection raised by him already stands considered and rejected by this Court vide judgment dated 03.07.2023 and therefore, the Trial Court rightly concluded that the defendant was precluded from agitating the said issue on 05.07.2023 when the matter was argued before the Trial Court.

10. This Court therefore, finds that the order passed by the Trial Court is correct in law and fact and the defendant herein was precluded from



agitating the same issue in view of the pronouncement of the order dated 03.07.2023, which was pending on this Petitioner. Even, otherwise the a noted above grounds raised by the Respondent are not maintainable in law in view of the fact that this suit was originally filed as an ordinary civil suit in November, 2020.

11. This Court has also been apprised that the parties have made an effort for an out of Court settlement whereby, the Petitioner herein during the pendency of this suit has also surrendered the possession of the suit property on 27.02.2023 in deference to the orders emanating from these suit proceedings. However, no settlement could be arrived on the arrears which are subject matter of recovery.

12. This Court also take note of the mis-conduct of the defendant in not complying with the orders of the Trial Court imposing costs on him from time to time; as noted in the impugned order. The Petitioner herein is not at liberty to ignore the directions of the Courts. The Trial Court is requested to exercise its jurisdiction for wilful non-compliance of its orders dated 12.01.2023 and this impugned order with respect to non-compliance of the order of costs.

13. At this stage, the learned counsel for the Petitioner states that the costs imposed by the Trial Court vide order dated 12.01.2023 will be paid to the Respondent within a period of three (3) days. The Petitioner is directed to ensure that in addition the costs imposed by the impugned order are also paid to the Respondent on or before 19.09.2023.

14. Accordingly, the present petition is dismissed. This Court has refrained from imposing costs but the Petitioner is cautioned against misusing the process of law and not to oppress the opposite party by filing



frivolous petitions and applications; failing which in future all such applications and petitions will be subject to exemplary costs.

MANMEET PRITAM SINGH ARORA, J

SEPTEMBER 5, 2023/hp/asb