

**IN THE HIGH COURT AT CALCUTTA
(ORIGINAL SIDE)
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

GA No. 1 of 2024

With

GA No. 2 of 2024

In

R.V.W.O. No. 31 of 2024

In

CS (COM) No. 384 of 2024

(Old No. CS 130 of 2022)

Harshvardhan Khemka & Ors.

Versus

Sudershan Prasad Bagaria & Anr.

Mr. Jishnu Saha, Sr. Adv.

Mr. Amit Kr. Nag

Mr. Partha Banerjee

Ms. Ranjabati Roy

... For the petitioners/defendants.

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Jishnu Chowdhury
Mr. Satadeep Bhattacharyya
Mr. Biswajit Kumar
Mr. Indradeep Basu
Ms. Yukti Agarwal
Ms. Shruti Swaika

... For the respondents/plaintiffs.

Hearing Concluded On : 13.11.2024

Judgment on : 29.11.2024

Krishna Rao, J.:

1. The petitioners/defendants have filed the present Review Application being R.V.W.O. No. 31 of 2024 praying for review of the order passed by this Court dated 10th June, 2024 in C.S. (COM) No. 384 of 2024 (Old No. CS 130 of 2022) wherein this Court as per submissions made by the Learned Counsel for the respective parties, directed the matter be listed before the regular Non-Commercial Division on 19th June, 2024 under the same heading.
2. The petitioners have also filed an application being G.A No. 1 of 2024 and G.A. No. 2 of 2024 along with RVWO No. 31 of 2024 praying for condoning the delay of 12 days in preferring review application and for stay of the order dated 10th June, 2024 till the disposal of the review application respectively. Review application along with other applications were taken together for hearing.

- 3.** Mr. Jishnu Saha, Learned Senior Advocate representing the defendants/ petitioners submits that the suit could not have simpliciter transferred to the regular Non-Commercial Division. He submits that this Court ought to have returned the plaint to the plaintiffs to be filed before the appropriate division.
- 4.** Mr. Saha submits that the plaintiffs/respondents have filed the suit as commercial suit and in the suit, the plaintiffs/respondents have also filed an application under Chapter XIII A of the Original Side Rules of this Court. The respondents realized that the suit is not maintainable before the Commercial Division of this Court, on 10th June, 2024, submitted that the suit can be heard by the regular Non-Commercial Division. He submits that Learned Counsel appearing for the defendants did not object for the same, being conscious of the fact that the plaint would be returned to the plaintiffs to file afresh before the Non-Commercial Division.
- 5.** Mr. Saha submits that after going through the order passed by this Court dated 10th June, 2024, the petitioners came to know that this Court has simply directed the matter be listed before the Non-Commercial Division on 19th June, 2024, instead of returning the plaint to the plaintiffs with the liberty to file the same before the appropriate Non-Commercial Division.
- 6.** Mr. Saha submits that there is an error apparent on the face of record, thus the order passed by this Court on 10th June, 2024, is liable to be

reviewed and to return the plaint to the plaintiffs for taking appropriate steps to file before the appropriate forum.

7. Mr. Saha in support of his submissions relied upon the following judgments:

- i. ***Laxmi Polyfab Pvt. Ltd. Vs. Eden Realty Ventures Pvt. Ltd. & Anr.*** reported in **2021 SCC OnLine Cal 1457.**
- ii. ***Deepak Polymers Pvt. Ltd. Vs. Anchor Investments Pvt. Ltd.*** reported in **2021 SCC OnLine Cal 4323.**
- iii. ***Jaspal Singh Chandhok and Ors. Vs. Sandeep Poddar & Anr.*** reported in **2023 SCC OnLine Cal 361.**
- iv. ***Soumitra Sen & Ors. Vs. Indian Oil Corporation Limited*** reported in **2023 SCC OnLine Cal 2470.**

8. Mr. Abhrajit Mitra, Learned Senior Advocate representing the plaintiffs/ respondents submits that the plaintiffs have not opposed for transfer of the suit from Commercial Division to Non-Commercial Division and accordingly, this Court has passed an order for listing the matter before the Non-Commercial Division on 19th June, 2024.
9. Mr. Mitra submits that from the YouTube recording of hearing dated 10th June, 2024, it reveals that the Learned Counsel for the defendants has categorically submitted before this Court : *“Let it be transferred, it cannot be heard My Lord”*. The Counsel for the plaintiffs has submitted that: *“So My Lord, it be transferred to the Regular Division, Your*

Lordship can treat it as, it can come on another day, Your Lordship can treat it as Regular Division and can hear it”.

10. Mr. Mitra submits that the Counsel for the petitioners has not made any submission before this Court that the suit cannot be transferred to Non-Commercial Division or that the plaint is required to be returned under Order VII Rule 10 of the Code of Civil Procedure, 1908.
11. Mr. Mitra submits that the Review Application filed by the petitioners is liable to be dismissed as the grounds made out in the review application are completely false. He submits that after giving consent through Counsel, if a party comes with an application making out a contrary case, the Court should not only dismiss the application but also to penalize the petitioners with perjury and costs. In support of his submission, Mr. Mitra has relied upon the judgments in the case of **Saraf Agencies Pvt. Ltd. & Anr. -vs- UCO Bank** reported in **2012 SCC OnLine Cal 6980** and in the case of **Anand Agarwal & Ors. -vs- Vilas Chandrakand Gaokar & Ors.** reported in **2018 SCC OnLine Bom 566**.
12. Mr. Mitra by relying upon the judgment in the case of **Orbit Electricals Pvt. Ltd. -vs- Deepak Kishan Chhabria & Ors.** reported in **(2024) 6 SCC 234** and submitted that to ascertain what transpired in Court it is permissible to play in Court, the YouTube recording/ CCTV footage for the Court in order to avoid controversy. He submits that in the said case, the Hon’ble Supreme Court has only relying upon

the CCTV footage but also transcribed the recording of the CCTV footage before arriving at the conclusion as to what transpired before the concern Court.

13. Mr. Mitra submits that a review against the consent order is not maintainable and no review can be allowed with respect to the consent order. He relied upon the judgment in the case of ***Manaj Tollway Pvt. Ltd. -vs- State of Maharashtra through the Secretary, Public Works Department*** reported in **2021 SCC OnLine Bom 303** and in the case of ***Suresh Kumar Jain -vs- Madanlal Jain*** reported in **2019 SCC OnLine Cal 9292**.
14. Mr. Mitra relying upon the judgments in the case of ***Ladymoon Towers Pvt. Ltd. -vs- Mahendra Investment Advisors Pvt. Ltd.*** reported in **2021 SCC OnLine Cal 4240**, ***Jai Balaji Industries Ltd. -vs- Calderys India Refractories Ltd.*** in **CS No. 19 of 2019** dated **13th May, 2022**, ***Sherawali Developers LLP vs. Majesty Homes & Ors.*** reported in **MANU/DE/3640/2024**, ***Satyavama Commotrade Pvt. Ltd. & Ors. -vs- Global Motocorp LLP & Anr.*** in **FMA No. 1522 of 2019** dated **11th November, 2019** and ***Suraj Prakash -vs- Neeraj Kumar & Ors.*** reported in **2023 SCC OnLine Del 4563** and submitted that the Calcutta High Court as well as the other High Courts when it was found that a suit instituted in a Commercial Division was not covered under the Commercial Courts Act, 2015 or the cases not covered by Section 15 of the Commercial Courts Act, 2015, the Hon'ble Courts have transferred the cases to the respective Divisions.

- 15.** Heard the Learned Counsel for the respective parties, perused the materials on record and the judgments relied by the parties. This Court by an order dated 10th June, 2024, passed the following order:

“The dispute involved between the plaintiffs and the defendants is landlord and tenant.

It is submitted from the Bar that the suit is to be heard by the regular non-commercial division and accordingly, as per the submission made by the counsel for the respective parties, let the matter be listed before regular non-commercial division.

List the matter on 19th June, 2024 under the same heading.”

- 16.** Now the petitioners being the defendants of the suit has filed the present application for review of the order on the ground that this Court by an order dated 10th June, 2024 has simply directed the matter to be listed before the Non-Commercial Division which is contrary to establish judicial precedent as this Court cannot transfer the suit from Commercial Division to Non-Commercial Division which only provides for return of plaint.

- 17.** The question before this Court whether the order dated 10th June, 2024 is required to be reviewed or not. Order XLVII, Rule 1 of the Code of Civil Procedure, 1908, read as follows:

**“ORDER XLVII
REVIEW**

1 . Application for review of judgment—

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]”

- 18.** The respondents raised contention that the order dated 10th June, 2024 is consent one and the petitioners have never prayed before this Court on 10th June, 2024 for return of plaint in terms of Order VII, Rule 10 of the Code of Civil Procedure, 1908. The respondents have disclosed the transcript of the hearing on 10th June, 2024 which reads as follows:

“Mr. Abhrajit Mitra, Senior Advocate for the Plaintiffs – We are appearing for the Plaintiff My Lord. This is a case of summary decree, I am

asking for on the ground of expiry of Lease. Lease granted in the year 1922 for 99 years, expired in 2021, August. So, I am asking for summary decree. Now, My Lord, before I proceed further, I don't want any argument on technicality. In case he is taking the point of summary decree can't be granted in a Commercial Division, I am happy to have it transferred to the Regular Division, so in case he's taking that point, otherwise.....

Mr. Jishnu Saha, Senior Advocate for the Defendants – It cannot be granted My Lord.

Hon'ble Justice Krishna Rao – I have changed the ball in your.....

Mr. Jishnu Saha, Senior Advocate for the Defendants – My Lord, even otherwise on merits, I am prepared.

Mr. Jishnu Saha, Senior Advocate for the Defendants – Let it be transferred, it cannot be heard my lord.

Mr. Abhrajit Mitra, Senior Advocate for the Plaintiffs – so My Lord, let it be transferred to the Regular Division, Your Lordship can treat it as, it can come on another day Your Lordship can treat this as a Regular Division and then hear it.

Hon'ble Justice Krishna Rao – I can transfer it, because normally this is (is) listed in the Commercial Division so I will transfer it to the Non-Commercial Division.

Mr. Abhrajit Mitra, Senior Advocate for the Plaintiffs –But may it maintain the position my lord.

Hon'ble Justice Krishna Rao – It's okay, next week it will come.”

This Court considered the transcript and the order dated 10th June, 2024. As per order dated 10th June, 2024, both the parties have agreed to transfer the case from Commercial Division to Non-Commercial Division. Section 15 of the Commercial Courts Act, 2015

provides for transfer of pending cases from Non-Commercial Division to Commercial Division but there is no provision for transfer of cases from Commercial Division to Non-Commercial Division.

In the case of ***Laxmi Polyfab Pvt. Ltd. (Supra)***, the Coordinate Bench of this Court held that:

“78. The Act of 2015 has not provided for any transfer of a suit filed in the Commercial Division to any other Court in the event a suit is found to be incorrectly filed in the Commercial Division. Thus in my view such suit has to be dealt with under Order VII Rule 11 or Order VII of Rule 10 as the case may be. The fifth and the sixth issues that have been raised herein are answered accordingly.

85. The Act of 2015 has no provision for transfer of a suit from the Commercial Division of the High Court to its Ordinary Original Civil Jurisdiction. However, the Commercial Division of the High Court can invoke Order VII Rule 10 of the Code of Civil Procedure, 1908 to deal with such a prayer.

86. In such circumstances, IA No. GA 4 of 2021 in CS No. 116 of 2019 is disposed of by directing the Department to return the plaint to the learned Advocate on Record for the plaintiff for presentation before the appropriate court. On return of the plaint, the Department will record CS No. 116 of 2019 as disposed of in the Commercial Division. The plaintiffs are at liberty to renew their prayer under Section 14 of the Limitation Act, 1963 before the appropriate Court.”

Mr. Mitra has relied upon several judgments in the case of ***Jai Balaji Industries Ltd. –vs- Calderys India Refractories Ltd.*** in ***CS No. 19 of 2019*** dated ***13th May, 2022***, ***Sherawali Developers LLP vs. Majesty Homes & Ors.*** reported in ***MANU/DE/3640/2024***, ***Satyavama Commotrade Pvt. Ltd. & Ors. –vs- Global Motocorp LLP***

& Anr. in **FMA No. 1522 of 2019** dated **11th November, 2019** and **Suraj Prakash -vs- Neeraj Kumar & Ors.** reported in **2023 SCC OnLine Del 4563** wherein this Court as well as the different High Courts have passed an order for transfer the case to the Non-Commercial Division. This Court finds that none of the parties have raised an objection that the Commercial Court cannot transfer the case to the Non-Commercial Court and the Hon'ble Courts have no occasions to decide the issue whether the Commercial Court can transfer the suit to Non-Commercial Court.

In all the above judgments, the Courts including this Court have transferred the suit from Non-Commercial Division to Commercial Division. In the case of **Ladymoon Towers Private Limited (Supra)**, the Coordinate Bench of this Court by holding that the suit filed by the plaintiffs is not covered under Section 2(1)(c)(i) of the Commercial Courts Act, 2015 and directed to be de-listed from the Commercial Division and transferred to the appropriate list governing the hearing of ordinary suits. The order passed by the Coordinate bench has been accepted by both the parties and have not raised any objection that this Court cannot transfer the case to the Non-Commercial Division and thus the judgment of **Ladymoon Towers Private Limited (Supra)**, is distinguishable from the facts of the case.

19. As regard no review is maintainable against a consent order, Mr. Mitra relied upon the judgement in the case of **Manaj Tollway Private Limited (supra)** wherein the Bombay High Court held that :

“68. In any event admittedly the order under review is an order accepting the consent terms as entered between the parties. It is well settled that the consent decrees are entitled to create estoppel, which put an end to further litigation between the parties. In the present case as noted above there is nothing on record either of a fraud on the Court or fraud on the Governor much less of established fraud which would in any manner vitiate the consent terms. The Court also cannot be oblivious that the review petition is filed after a lapse of 10 months as pointed out on behalf of Manaj. The review petition thus clearly appears to be an after thought, this more so when the consent terms were fully acted upon.”

In the case of **Suresh Kumar Jain (supra)**, the Hon'ble Division Bench of this Court held that:

“10. One of us (Arijit Banerjee, J.) who was a member of the Division Bench which passed the order under review, has clear recollection that the said order was passed on consent of the parties. Learned counsel for the custodian prayed for discharge. Neither of the parties objected to such prayer. In effect the order was a consent order. Learned counsel for the respondents submitted, and we think rightly, that review at the instance of any of the parties to a consent order is impermissible. However, learned counsel for the petitioners submitted that even by consent the parties could not vary/modify an arbitral award. If we permit the petitioners to agitate this point, the same would amount to reopening the appeal and rehearing the same on the basis that the earlier Division Bench erred in law in passing the order under review. That is not the scope of a review petition. Let us note a few Supreme Court decisions on this point.”

The cases referred above by Mr. Mitra, in the said cases none of the parties raised any objection that the consent order passed by the Court is against the statutory provisions of law. In the present case

though both the parties have submitted that the matter be transferred to Non-Commercial Division and this Court on the submissions of the parties directed to list the matter before the regular Non-Commercial Division.

Section 15 of the Commercial Courts Act, 2015 relates to transfer of pending cases from Non-Commercial Division to Commercial Division and not from the Commercial Division to Non-Commercial Division. There is no provision for transfer of the case from Commercial Division to Non-Commercial Division. In the case of ***Veer Kunwar Singh University Ad hoc Teachers Association & Ors. Vs. The Bihar State University (C.C.) Service Commission & Others*** reported in ***(2009) 17 SCC 184***, the Hon'ble Supreme Court held that by consent the statutory provisions cannot be violated. By consent jurisdiction cannot also be conferred.

20. As regard the applicability of Order VII, Rule 10 of the Code of Civil Procedure, 1908, Mr. Mitra relied upon the Judgment in the case of ***Macneill and Magor Ltd. and Another Vs. Mouhsen Ali and Another*** reported in ***1985 SCC OnLine Cal 25***, the Hon'ble Division Bench of this Court held that Order 7, Rule 10 of the Code of Civil Procedure, 1908, does not apply to a Chartered High Court when it exercises Ordinary or Extra Ordinary Civil Jurisdiction which is provided in Order XLIX Rule 3 of the Code Civil Procedure, 1908. But the Hon'ble Court held that the Chartered High Courts were exempted from the operation of the provisions of Rule 10 of Order VII of the Code

possibly for the historical reason that at one time suits could be filed in the original jurisdiction of the Chartered High Courts without court fees and return of a plaint from a Chartered High Court to District Courts would have created complications. Although Order XLIV, Rule 3 of the Code of Civil Procedure, 1908 makes the provisions contained in Order VII, Rule 10 applicable to the Chartered High Court, by an amendment dated 14th May, 1974 to the High Court Rules applicable in the Original Side of this Court, published in the Calcutta Gazette Part (I) dated 1st August, 1974, the provisions of Order VII, Rule 10 of the Code of Civil Procedure, 1908 has been made applicable to suits filed in their Court. Therefore, since 1st August, 1974, the provisions contained in Order VII, Rule 10 of the Code of Civil Procedure, 1908 are applicable to suits filed in the Original Side of this Court.

- 21.** Admittedly, the respondents being the plaintiffs have filed the suit before the Commercial Division. The defendants/petitioners raised objection that the suit filed by the plaintiffs is not covered under any of the provisions of Section 2(1)(c)(i) of the Commercial Court Act, 2015. Both the parties submitted that the suit be transferred to Non-Commercial Division. On the basis of the submissions, this Court by an order dated 10th June, 2024, directed that the matter be listed before the regular Non-Commercial Division. As held that there is no provision for transfer of suit from the Commercial Division to Non-Commercial Division and thus this Court finds that there is an error apparent on the face of the order dated 10th June, 2024.

- 22.** Considering the same, this Court is of the view that the order dated 10th June, 2024 is liable to be reviewed and accordingly, it is reviewed.
- 23.** The department is directed to return the plaint to the plaintiffs with the liberty to the plaintiffs to take appropriate steps to file the suit before the appropriate Court in accordance with law.
- 24. R.V.W.O. No. 31 of 2024 is allowed.** Consequently, **G.A. No.1 of 2024** and **G.A. No. 2 of 2024** are also **disposed of. C.S. (COM) No. 384 of 2024 (Old C.S. No. 130 of 2022)** be treated as **disposed of.**

(Krishna Rao, J.)