

D/L
Item No. 3
23.05.2025
KOLE

AO-COM 12 of 2025
With
IA No. CAN 1 of 2025
With
IA No. CAN 2 of 2025

Berger Paints India Limited
-Vs.-
PMC Rubber Chemicals India Pvt. Ltd. & Anr.

Mr. Jayanta Kumar Mitra, Sr. Adv.
Mr. Ratanko Banerji, Sr. Adv.
Mr. D. N. Sharma, Sr. Adv.
Mr. A. Basu

...for the appellant.

Ms. Swati Dalmia,
Mr. Orijit Chatterjee,
Mr. Indranil Karfa,
Ms. Sarbari Mukherjee,

.... For the respondent no. 1.

This appeal is directed against an order dated April 29, 2025 passed by the learned Judge, Commercial Court at Rajarhat, North 24 Parganas on an application filed by the present appellant in its suit registered as TS (COM) 85 of 2024.

It appears that ICI India Limited owned two factories somewhere in Rishra, Hooghly. One was a paint factory and the other was a chemical factory.

ICI India Limited sold off the paint factory to the predecessor-in-interest of the present appellant. This was done by way of a conveyance dated March 20, 2002. Along with such conveyance, a registered user agreement was executed by and between ICI India Limited and the predecessor-in-interest of the present appellant (for the sake of convenience referred to as 'Berger'), wherein Berger was

granted right of access to its paint factory which it purchased through a gate described as Gate-1. It would *prima facie* appear from the conveyance and the said agreement that Berger had agreed to purchase the paint factory *inter alia* on condition that it was granted access through Gate-1.

In 2007, the present respondent no. 1 (in short 'PMC') purchased the chemical factory from ICI.

It appears that till 2024 there was no problem between Berger and PMC. However, Berger says after failure of negotiation between it and PMC for permitting Berger to utilize part of PMC's land lying vacant, PMC started creating problems regarding Berger's access to its factory through Gate No. 1. This prompted Berger to file the present suit before the learned Trial Court. Berger is enjoying an order of injunction restraining PMC from interfering with Berger's right of access to its paint factory through Gate No. 1.

Initially, the *interim* order of injunction was passed in favour of Berger on February 16, 2024. From time to time such order was extended and is in operation even today.

On April 29, 2025, when the injunction application again came up before the learned Trial Court, the Court appointed an Advocate-Commissioner. The operative portion of the order passed by the Court on that date reads as follows:-

"This Court had earlier granted an ex parte ad-interim injunction by order dated 16.02.2024, restraining Defendant no. 1 from interfering with the Plaintiff's access through Gate No. 1. At that initial State, the Court was satisfied that the requirements for such relief namely, a prima facie case, balance of convenience, and risk of irreparable injury were fulfilled. However, upon contested hearing, it also appears inequitable to permit

the Plaintiff to continue using Defendant No. 1's property indefinitely, and without limitation, without payment of any consideration. To allow such access as a gratuitous right would impose undue hardship upon, and infringe the propriety rights of the Defendant no. 1.

In light of these competing claims and equities, and the parties' failure to reach mutual terms, this Court is of the view that the appointment of an Advocate Commissioner is necessary for the effective adjudication of the injunction petition.

Let Mr. Aneendya A Chakraborty, Advocate, High Court, Calcutta (M-7044483333 / 033 22621122, E-Mail – maildra@yahoo.com), of Emerald House, Room No. 2(1), Ground Floor 1B, Old Post Office Street, Kolata – 700001 be appointed as Advocate Commissioner to hold the commission work in terms of the order.

The fees/remuneration of the learned Advocate Commissioner is Rs. 40,000/- (rupees forty thousand only) per day (maximum eight days) to be paid by both the parties equally. Initially, the parties shall pay a minimum fee/remuneration of Rs. 80,000/- (rupees eighty thousand only) to the learned Advocate-Commissioner to being the commission work. The balance fee shall be payable on a daily basis by the parties.

The parties shall provide transportation charge for the learned Advocate Commissioner at the time of commission work.

Upon receipt of the said fees, the learned Advocate Commissioner shall visit the schedule property as mentioned in the plaint and injunction petition being the subject-matter of the dispute, and shall conduct the commission work/evidence along with the inventory of documents and would submit his final report by two months from the date of deposit of the Commissioner's fee/remuneration. The Commission work would include the necessity and urgency of Gate No. 1 for ingress and egress by the Plaintiff's vehicles used in connection with its business operations, including loading and unloading of goods, the average number of such vehicles using the passage daily, and the number of hours per day during which the

passage is used, whether vehicles merely pass through the gate or are halted for extended periods, and if so, for how long, a tentative assessment of the inconvenience or obstruction, if any, caused to Defendant no. 1's operations due to such use, a fair and reasonable estimate of the monetary value, if any, payable by the Plaintiff to Defendant no. 1 for such usage, taking into account the needs and positions of both parties, their business reputation, and the prevailing market rates under similar circumstances, the exigencies at the spot to demand.

The Commission shall be executed after giving due notice to both parties and/or their learned Advocates, and preferably in their presence. If the parties reach an agreement regarding any monetary consideration or payment terms during the course of the Commission, the same shall be recorded. In the absence of such consensus, the learned Advocate Commissioner shall submit his own suggestion regarding fair compensation, based on objective assessment.

The learned Advocate Commissioner shall be granted access to the relevant books, records, and operational documents of both parties necessary to prepare a comprehensive and impartial report. The report shall be submitted within the time frame stipulated by this Court.

The plaintiff/petitioner is to deposit the fees of the learned Advocate Commissioner at the earliest and file the receipt copy on 07.05.2025.

Both sides are directed to co-operate with the learned Advocate Commissioner to act in terms of this order.

The parties are also directed to deliver copies of the relevant orders, all documents/annexures, and petitions related to this case to the learned Advocate Commissioner.

The parties are directed to do the needful in this regard. Let the copy of the instant order be served upon the learned Advocates for the plaintiff/petitioner and the defendant/respondent and also the learned Advocate Commissioner for convenience.

Hence, it is

ORDERED

That

The ex parte ad-interim order dated 16th February, 2024 is hereby continued till disposal of the instant application.

The Defendant No. 1 is restrained from obstructing or interfering with the Plaintiff's ingress and egress through Gate No. 1, as per the Access Agreement dated 20 March 2002, until disposal of the instant application under Order XXXIX Rule 1 & 2 read with Section 151 of the CPC dated 15.02.2024."

Being aggrieved, Berger, being the plaintiff in the suit, has come up by way of this appeal.

We have heard learned Senior Counsel for the appellant/plaintiff and learned Counsel for the respondent no. 1/defendant no. 1.

The appeal is really directed against the portion of the order appointing Advocate-Commissioner. Having considered the arguments advanced on behalf of the parties, we are of the *prima facie* view that the order directing appointment of Advocate-Commissioner ought not to have been passed by the learned Trial Court on the injunction application of the plaintiff. *Prima facie* such direction appears to be beyond the scope of the suit. However, we clarify that these observations are only for the purpose of disposing of the appeal.

We could have stayed the operation of the portion of the order directing appointment of Advocate-Commissioner and directed exchange of affidavits for final disposal of the stay application filed in this appeal. However, to our query, learned Advocate for the respondent no. 1 fairly suggests that

it may be better if the matter is remanded back to the learned Trial Court after the impugned portion of the said order being set aside.

We accordingly do so. The portion of the order dated April 29, 2025, directing appointment of Advocate-Commissioner is set aside. The matter is remanded back to the learned Trial Court for final disposal of the plaintiff's injunction application in accordance with law after hearing all parties.

Learned Advocate for the respondent no. 1 says that the respondent no. 1 has already paid Rs. 40,000/- to the Advocate-Commissioner in terms of the order of the learned Trial Court. In view of the order directing appointment of Advocate-Commissioner being set aside by us, appropriate direction be issued by the learned Trial Court regarding refund of such payment.

We also see that the defendant no. 1 in the suit is suffering an *interim* order for more than one year. We, therefore, request the learned Trial Court to expedite the disposal of the injunction application and bring the same to its logical conclusion as early as possible and preferably within a period of three months from the date of communication of this order.

The appeal and the connected applications are, accordingly, disposed of.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Om Narayan Rai, J.)

(Arijit Banerjee, J.)