

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

C.O. No.- 3945 of 2025

Ambe Plywoods Private Limited

vs.

M/s. Engineers Service Station & Anr.

For the Petitioner	: Mr. Krishnaraj Thaker, Sr. Adv., Mr. Suddhasatva Banerjee, Adv. Mr. Sagnik Majumdar, Adv. Ms. Shreya Ghosh Dastidar, Adv. Mr. Aurin Chakraborty, Adv. Mr. Devdas Saha, Adv.
For the Respondent	: Mr. Satki Nath Mukherjee, Sr. Adv. Mr. Tanmoy Mukherjee, Adv. Ms. Aditi Kumar, Adv. Mr. Abirlal Chakraborti, Adv. Mr. S. Chatterjee, Adv.

Judgment Reserved on : 10.12.2025

Judgment Delivered on : 24.12.2025

Judgment Uploaded on : 24.12.2025

Shampa Sarkar, J.

1. Despite service, none appeared for the Opposite Party No. 2.
2. In this revisional application, the petitioner/deGREE holder has assailed the order dated September 25, 2025, passed by the learned Civil Judge (Senior Division), 2nd Court at Alipore, South 24 Parganas, in Misc.

Case No. 211 of 2025. The Misc. case arose out of Title Execution Case No. 8 of 2025. The order had been challenged on the ground of perversity, arbitrariness and wrongful exercise of jurisdiction. By the order impugned, the learned executing Court had granted an ex parte ad interim order of injunction, restraining the decree holder from creating any disturbance in the possession of the opposite party no. 1 over the decretal property. The order was passed in an application under section 151 of the Code of Civil Procedure filed by the opposite party No. 1. The opposite party No. 1 had filed a Misc. Case in the execution proceeding under Order 21 Rules 97, 98, 101 and 103 read with Section 47 of the Code of Civil Procedure.

3. It was urged by Mr. Thaker, learned Senior Advocate for the petitioner that the application was not maintainable at the instance of the opposite party No. 1. The opposite party no. 1 was the dealer of the Indian Oil Corporation Limited (IOCL), the opposite party no. 2 herein, and was occupying the premises in question by virtue of a dealership agreement dated May 17, 1985. A leave and licence was granted to the opposite party no. 1, to run the petrol pump from the said suit premises. The dealership agreement categorically mentioned that the licensee could use the said premises and the outfit, for the sole and exclusive purpose of storing, selling and handling the products purchased by the dealer from IOCL during the duration of the agreement. The terms and conditions of the dealership agreement specifically mentioned that, the dealer would not have any right, title or interest either in the premises or in the outfit and shall not be entitled to claim the right of lessee, sub-lessee or tenant. That the dealer

shall not be deemed to be in exclusive possession of the premises and will not have an independent right over the property.

4. The case run by the petitioner was that, in spite of such specific terms in the dealership agreement, the learned court treated the dealer as a third party, claiming an independent right to remain in the property. The petitioner purchased the suit premises by a registered deed of conveyance dated December 17, 2014 and substituted itself as plaintiff in the suit for eviction instituted by the erstwhile owners against the opposite party No. 2. The Title Suit No. 39 of 2000 was decreed on November 20, 2024 against the Opposite Party No. 2, directing the said party to vacate and deliver peaceful possession of the suit premises to the petitioner, after removing the installations and erections made thereon and underneath the surface, by restoring the same to its original state and situation, within a period of 60 days from the date of passing of the decree. As the Opposite Party No. 2 failed to comply with the decree, the petitioner filed Title Execution No. 8 of 2025 for execution of the decree.

5. On and about January 16, 2025, the Opposite Party No. 2 preferred an appeal challenging the judgement and decree of the learned Trial Judge, being Title Appeal No. 7 of 2025. The appeal was pending before the learned District Judge, South 24 Pgs at Alipore. Although, an application for stay had been filed in connection with the said appeal, no order of stay had been granted. The petitioner put the decree into execution on February 4, 2025. The Opposite Party No. 2 had filed an application under section 151 of the Code of Civil Procedure before the executing court and obtained an order of stay of the execution proceeding by citing pendency of the appeal, although

no stay had been granted by the Appeal Court. Under such circumstances, the petitioner preferred a revisional application being C.O No. 2342 of 2025 for a direction upon the learned executing court for expeditious disposal of the Title Execution Case No. 8 of 2025. Such direction was passed by the High Court.

6. Mr. Thaker urged that, the learned executing court has repeatedly acted in a manner prejudicial to the interest of the decree holder and despite the order of the High Court directing expeditious disposal of the execution proceeding, had extended the order of stay of execution by a further period of two months, to enable the opposite party no. 2 to secure an order of stay from the Appeal Court. According to Mr. Thaker, when the stay granted by the executing court was to expire, the opposite party no. 1 filed Misc. Case No. 221 of 2025 under Order 21 Rules 97, 98, 101 and 103 read with sections 47 and 151 of the Code of Civil Procedure, inter alia, claiming that the decree was a nullity, as the civil court lacked the jurisdiction to entertain the suit. The suit property was a Thika property and the opposite party no. 1 was a thika tenant.

7. Further contention of the opposite party no. 1 was that, the said opposite party was running a service station and repair business from the said petrol pump as well, which was independent of the dealership agreement with the opposite party no. 2. The opposite party No. 1 was enjoying a hostile title against the owners. The structures were erected on the said property and the same were being enjoyed for more than 40 decades. The opposite party no. 1 paid rent to the original plaintiffs through IOCL. The evidence on record would reveal that thika rents had been

deposited with the office of the Thika Controller. On February 5, 2013, a letter was issued by the opposite party no. 2 to the Regional Thika Controller for empanellment of the Engineers Service Station at the suit premises under the Thika Tenancy Act.

8. Mr. Thaker urged that, the Memorandum of Dealership Agreement between the two opposite parties clearly indicated that, the opposite party no. 1 would not claim any right title and interest in the said premises, independent of IOCL. The said agreement was before the Court. While considering the, *prima facie*, case of the third party who was claiming a separate and independent title and interest in the property, such aspect ought to have been looked into. The opposite party no. 1 was in permissive occupation from the judgment debtor. The decree bound the opposite party no. 1. In the teeth of the decree, which was obtained after a 20 long years battle, the order of ad interim injunction was passed without serving a copy upon the decree holder. The balance of convenience and inconvenience was in favour of not granting any order of injunction. Moreover, the executing court could not go behind the decree and come to a finding that, the opposite party no. 1 had established a good case and had a chance of success. The finding that immediate protection of the interest and possession of the opposite party no. 1 was erroneous.

9. It was further submitted that, the civil court had disposed of the issue of thika tenancy, thereby, negating the plea of the opposite party no. 2 that the property was a thika property and the opposite party no. 2 was the thika tenant. He contends that, the opposite party no. 2 had set up the opposite party no. 1, to resist execution as the opposite party no. 2 had failed to get

an order of stay from the Appeal Court. The opposite party no. 1 could not maintain an application under section 47 of the Code of Civil Procedure. Only parties to a suit could maintain such application. If the opposite party no. 1 wanted to take the advantage of the provisions of Order 21 Rules 97-103 of the Code of Civil Procedure, it would have to establish that its claim was neither under, nor through a party to the suit. That, the opposite party no. 1 had an independent right and interest in the property and such right and interest in the property enabled the opposite party no. 1 to resist the execution of the decree. Title Suit No. 39 of 2000 was instituted prior to enactment of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001. The executing court came to an erroneous finding that the opposite party no. 1 had made out an arguable case of being a thika tenant, without considering the fact that the opposite party no. 2 had also claimed to be a thika tenant upon payment of thika rent. The lease deed was executed on February 21, 1970, in favour of IOCL when the Calcutta Thika Tenancy Act, 1949 was in force. In view of the provisions of Section 2(5) of the Act of 1949, the opposite party no. 2 could not claim to be a thika tenant, as the duration of the lease was in excess of 12 years i.e. for a period of 20 years and with a further renewal for 10 years. The opposite party no. 2 was not a thika tenant on the date of coming into effect of the Act of 1981. The question of the Opposite Party No. 1 being a thika tenant also did not arise. Neither party qualified to be a thika tenant under the Act of 1981, nor under the Act of 2001. Thus, it was prayed that the order impugned should be set aside.

10. Mr. Sakti Nath Mukherjee, learned Senior Advocate for the opposite party no. 1 duly assisted by Mr. Tanmoy Mukherjee, learned Advocate, submitted that, as the judgment and decree was under challenge before the learned District Judge, South 24 Parganas. at Alipore, it had lost its finality and until the appeal was disposed of, the possession of the opposite party no. 1 should not be disturbed, even if the opposite party no. 1 had a derivative title from the opposite party no. 2. In this regard, reliance was placed on the decision of ***Zodiac Investment Limited vs. Durga Investment & Trading Co. & Anr.*** reported in ***1988 SCC OnLine Cal 53***. It was held by the Division Bench that, a decree for eviction against a tenant, divested the tenant of such status. Such decree was final. Once an appeal was preferred and was pending against such decree, the decree lost its finality during the pendency of the appeal and the tenant would not cease to be a tenant. Further reference was made to the decision of ***Satyanarayan Prosad Gooptu vs. Diana Engineering Company*** reported in ***1951 SCC OnLine Cal 195***, on the principle that a decision, which was pending adjudication in an appeal, did not attain finality, and what was once *res judicata*, again became a *res subjudice* i.e. a matter under judicial enquiry. Thus, the decree of eviction against the opposite party no. 2 requiring the opposite party no. 2 to hand over peaceful vacant possession to the decree holder/petitioner, was subject to judicial scrutiny in the appeal. The issue was once again open for adjudication. The opposite party no. 1 was running a business from the said premises legally and upon execution of a dealership agreement with the opposite party no. 1, which could not be disturbed. Reliance was further placed on the matter of

Chengalayala Gurraju vs Madapathy Venkateswara reported in **AIR 1917 Madras 597**. Further reliance was placed on the decision of **Produman Kumar vs Virendra Goyal** reported in **AIR 1969 SC 1349** on the proposition that, hearing of the suit would include hearing of the appeal. An appeal entailed re-hearing of the suit. Reliance was also placed on **Garikapati vs N. Subbiah Chowdhary** reported in **AIR 1951 SC 540**, in which the Supreme Court held that, pursuit of a remedy by way of suit, appeal and second appeal were really only steps in a series of proceedings, all connected by a unit and to be recorded as one legal proceeding. Mr. Mukherjee submitted that, the moment the opposite party no. 2 had filed the appeal and the appeal was being heard, the decree appealed from lost its finality and became a pending matter. The opposite party no. 1, being in lawful occupation of the property, was within its right to urge before the Court that, the decree for eviction could not deprive him of his status of a licensee, pending the hearing of the appeal. The opposite party no. 1 filed the Misc Case challenging the veracity of the decree on various grounds. The learned executing court secured the possession of the opposite party no. 1 in terms of the precedents laid down by the various courts. **Anwarbi vs Pramod D.A. Joshi and Ors.** reported in **(2000) 10 SCC 405** was referred on the proposition that, it was for the decree holder to take appropriate steps under Order 21 Rule 97 for removal of the obstruction and to have the rights of the parties, including the obstructionist, adjudicated. The Hon'ble Apex Court had protected the possession of the third party, who was being continuously threatened with dispossession. The right of the third party/obstructionist, would be decided in the appropriate proceeding, in

accordance with law, and until and unless such proceeding terminated in favour of the decree holder, the decree holder could not take possession. The obstructionist/occupier, was entitled to retain possession. On such principles, the learned executing court restrained the decree holder from disturbing the possession of the opposite party no. 1. The appeal was pending before the learned District Judge. It was urged that, the civil court lacked jurisdiction to entertain the suit. The issue of thika tenancy was raised by the opposite party no. 2. The issue should have been referred to the Thika Controller. The decree was rendered a nullity and as such, the executing court rightly protected the possession of the opposite party no. 1 until the *lis* was decided. Reliance was also placed on the decision of the Hon'ble Apex Court in the matter of ***Purshottam Vishandas Raheja and Anr. vs Shrichand Vishandas Raheja (Dead) through Lrs. And Ors.*** reported in **(2011) 6 SCC 73**, on the scope of interference by a superior court in respect of a reasoned order, which was neither arbitrary nor capricious. Mr. Mukherjee submitted that, the order could not be said to be either perverse or capricious or passed in ignorance of the principles of law. The decision of the Apex Court was relied upon to substantiate that, when the executing court exercised discretion, the superior forum should be slow to interfere with the same, even if a contrary conclusion was possible. All that was required to be seen was whether the executing court had exercised its jurisdiction reasonably, in a judicial manner and had not ignored the relevant facts. Ordinarily, it was not open to the supervisory court, to substitute its own view and interfere with the discretion exercised by the learned executing court, unless the order was shocking to the conscience.

11. It was further submitted that, the order impugned was in the nature of injunction and the revisional application was not maintainable. Reference was made to ***Periyammal (Dead) Through Lrs & Ors. vs V. Rajamani and Anr. etc.*** reported in **2025 INSC 329**, in support of the contention that the proceeding before the executing court should be conducted in terms of Rule 98 of the Code of Civil Procedure.

12. Heard the Learned Advocate for the respective parties. Article 227 of the Constitution of India can be invoked, if the order impugned suffers from perversity, or from erroneous application of law, or arbitrariness and irregular exercise of jurisdiction by the court, or in case the order is passed in denial of the principles of natural justice.

13. After a long battle of 24 years 3 months and 22 days, the suit for eviction was decreed on November 20, 2024, against the opposite party no. 2. The opposite party no. 2 was directed to vacate and deliver vacant, peaceful and khas possession of the premises to the petitioner, after removing all installations and erections made thereon and underneath the surface. The petitioner was substituted in the pending suit after having purchased the property in 2014, from the original owners. Thus, the petitioner itself contested the suit for almost 10 years. The decree was put into execution. An appeal was preferred by the opposite party no. 2 belatedly, vide Title Appeal No. 07 of 2025, which is pending adjudication before the learned District Judge, South 24 Pgs. at Alipore. The opposite party no. 2 has not been able to obtain an order of stay of the execution case from the appeal court. The opposite party no. 2 preferred an application for stay of the decree, which was granted by the executing court for a limited

period, in order to enable the opposite party no. 2 to obtain an order of stay. However, the order of stay has not yet been passed by the learned appeal court. The executing court had extended the stay of the execution by a further period of two months, although, the High Court directed the executing court to expeditiously dispose of the execution case. It is well settled that, filing of an appeal does not amount to automatic stay of the order. On the other hand, the order impugned has practically created an anomalous situation and an automatic stay of execution. The Misc. Case was filed at the instance of a party who had entered into the premises as a licensee, upon a permission granted by the opposite party no. 1 (lessee). Mr. Mukherjee's submissions were also on such lines.

14. The said permissive occupation or enjoyment of the property was till the subsistence of the Dealership Agreement. The opposite party no. 1 relied upon this document in the Misc. Case, in order to substantiate its rightful occupation, possession and claim over the property. The same clearly contained such a restrictive clause. It, prima facie, appears that the opposite party no. 1 could not have claimed independent right, title and possession. The ambiguous and contrary averments in the application were ignored by the court. The dealership agreement/Memorandum of Agreement between the opposite parties provided that, the opposite party no. 1 could not claim to be a lessee and would not be deemed to be in exclusive possession of the premises.

15. The dealership agreement, the notices from the Thika Controller's Office, the rent receipts, etc. would, prima facie, demonstrate that, the opposite party no. 1 could not have an independent right in the property. In

the absence of any stay from the Appeal Court, the learned executing Court ought to have satisfied itself on the first principles for grant of an ad interim order in favour of the opposite party no. 1, in the teeth of the decree. The prima facie case, balance of convenience and inconvenience and irreparable loss and injury, are the three ingredients which the court had to assess, before passing an order of such nature. Prima facie, the opposite party no. 1 can neither have a hostile title to that of the judgment debtor/opposite party No. 2, nor can the said party be said to have an independent title. The nature of entry of the opposite party no. 1 in the premises, was ignored by the learned executing court. The dealership agreement contains the following :-

“2. The Corporation doth hereby grant to the Dealer leave and license and permission for the duration of this Agreement to enter on the said premises and to use the premises and outfit for the sole and exclusive purpose of storing, selling and handling the products purchased by the Dealer from the Corporation, Save as aforesaid, the Dealer shall have no right, title or interest in the said premises or outfit and shall not be entitled to claim the right of lessee, sub-lessee, tenant or any other interest in the premises or outfit, it being specifically agreed and declared in particular that the Dealer shall not be deemed to be in exclusive possession of the premises.”

16. The learned court held as follows :-

““this Court is of the considered view that Petitioner has come up with strong prima facie case and there is strong chance of succeeding in his claim apparently as the documents produced prima facie indicates that Petitioner has raised the question of legal force of the decree passed in TS 39 of 2000 being inoperative one as it involves matter of 'Thika Tenancy' which can be decided only by Thika Controller and the jurisdiction of a Civil Court is clearly barred.

Petitioner appears to have already complied with the notice received from Thika Tenancy Authority, Kolkata by making deposition of sum of Rs. 10,37, 787/- through TR Form No. 7 on 31-12-2022 & sum of Rs. 8,95,566/- through TR Form No.7 on

31-12-2022 in respect of premises No. 16, Gurusaday Road, Kol-19 to carry on business of a running petrol pump as well as Auto-Emission Centre as thika tenant.

Apparently Petitioner was not a party to the TS No. 39 of 2000. Apparently claiming still in possession of the subject matter of dispute to run business of Petrol Pump Petitioner M/S Engineers Service Station has filed under the instant Misc. case Order. 21 Rule 97, 99, 100 read with Section 47 of CPC in order to exercise possessory right over the properties described morefully in Schedule (A) & (B) under apprehension of being threatened to be dispossessed unlawfully, on producing copies of KMC Trade Licence, Licence issued by MSHSD, licence issued by Fire Dept. WI KMC Bill for sewage & drainage, KMC water supply bill, licence of auto-emissions testing centre, WB Professional Tax Registration, GST registration and CESC Bill.

However, on overall consideration of the entire facts and emergent circumstances, this Court is of the considerable opinion that there is involved an urgency for the issuance of an ad interim rule to protect the interest of Petitioner until adjudication of the Misc. case and if the Petitioner is dispossessed even before the disposal of the Misc. case filed under Or. 21 Rule 97 of CPC then he would suffer an irreparable loss.”

17. The Court recorded that, upon perusal of the affidavit and the documents placed, a prima facie, case had been made out by the opposite party no. 1 to be a thika tenant. The court questioned the legal basis of the decree passed in Title Suit No. 39 of 2000 and recorded that the decree was unenforceable in law as the matter of thika tenancy was involved. Such issue should be decided by the Thika Controller. The court recorded that, the authority had issued a notice claiming thika rent and the same was deposited. However, the notice was issued to the opposite party no. 2 and not to the opposite party no. 1. Such document was before the court. There was nothing on record for the court to presume that the opposite party No. 1 could set up a claim of thika tenancy, along with IOCL. Moreover, there was no apprehension that, the opposite party no. 1 would be dispossessed without following the due process of law i.e. without execution of the decree

in the manner provided by law. No, prima facie, case was discussed by the learned Court in support of the contention of the opposite party no. 1 that, the possession of the opposite party no. 1 was under threat. Before coming to a, prima facie, finding that the decree was a nullity and inoperative, the findings of suit court on the claim of the opposite party no. 2 of being a thika tenant should have been considered. Both the opposite parties could not be thika tenants at the same time. The lease was executed between the original owners of the premises and the opposite party no. 2 on February 21, 1970. The lease was executed for 20 years and thereafter renewed for a period of 10 years. The executing court did not take this aspect into consideration.

18. The decisions of this court relied upon by Mr. Mukherjee, namely, **Zodiac** (supra) and **Satyanarayan** (supra) cannot be applied to the facts of this case. The opposite party no. 2 was the lessee under the petitioner and the opposite party no. 1 was running a petrol pump upon obtaining a dealership agreement and was possessing the property upon obtaining a leave and licence from the opposite party no. 2. The opposite party no. 1 was not a sub-tenant under the opposite party no. 2. Secondly, the opposite party no. 2 could have obtained a stay from the appeal court, but failed to do so. Moreover, the order was passed on apprehension that, the opposite party No. 1 may be illegally dispossessed. Execution of a decree is the legal procedure to be followed, if the judgment debtor does not act in terms of the decree.

19. With regard to the issue of thika tenancy, this court, prima facie, finds that the notices were issued by the Government of West Bengal, Kolkata

Thika Tenancy, to the Chief Regional Sales Manager, IOCL, i.e. to the officer of the opposite party no. 2 and not to the opposite party No. 1. Under the law, both the parties cannot be thika tenants. The learned Court also failed to consider that the opposite party no. 2, upon obtaining a sanction from the Municipal Corporation and other authorities, constructed permanent structures for carrying on the business from the said premises. The opposite party no. 1 had mentioned such facts in the Misc. Case. It was admitted that, structures had been built 40 years ago. The jurisdiction of the civil court to decide the issue of thika tenancy was objected to by the opposite party no. 1, with a definite claim to be a thika tenant. Whereas, the civil court recorded that, the lease entered into for more than 20 years prior to 2000, would not be covered by the definition of thika tenancy, especially if pucca structures were constructed on the said land.

20. In the suit, the defendant also claimed to be a thika tenant. The court granting the decree was of the view that, anyone could take the defence of thika tenancy and unless there was any doubt or a suspicion that, the defendant could be a thika tenant, the question of relegating the issue for a decision by the Thika Controller, did not arise. The issue was decided by the civil court and is subjudice before the appeal court. Thus, without considering all these aspects as discussed above, the ex parte order of injunction was erroneous and contrary to law.

21. The learned Court also failed to take into consideration the settled principles governing thika tenancy, which have been laid down by various judicial authorities.

22. In the matter of ***Jatadhari Daw and Grandsons vs Smt. Radha Debi & Anr.*** reported in ***1985 SCC Online Cal 148***, it was held as follows

:-

“86. The question which remains to be considered is whether the said premises has vested in the State of West Bengal under the Calcutta *Thika* Tenancy (Acquisition and Regulation) Act, 1981 and whether the successor in interest of the company, the substituted defendant no. 1, has become a tenant under the State of West Bengal.

87. The Calcutta *Thika* Tenancy Act, 1981 came into force on the 18th January, 1982. The said Act of 1981 repealed the earlier Calcutta *Thika* Tenancy Act of 1949. When the suit was instituted and the appeals were filed the Act which was in force was the Calcutta *Thika* Tenancy Act, 1949. Under S. 2(5) of the Calcutta *Thika* Tenancy Act, 1969(sic) a *thika* tenant did not include a person who held land from another person under a registered lease when the duration of the lease was expressly stated to be a period of not less than 12 years.

88. The lease in the instant case was for a period of 20 years. Therefore, the company could not claim to be a *thika* tenant under the respondent under the Calcutta *Thika* Tenancy Act, 1949 at the date of the filing of the suit. Further, S. 2(5) of the Act, 1949 defined a *thika* tenant to be a person who had erected or acquired by purchase or gift any structure on the land under *thika* tenancy. The expression “structures” in the statute has been construed by this Court in *Monmatha Nath Mukherjee* (supra) and it was held the word ‘structures’ did not include a permanent structure. In the instant case it is not a dispute that permanent structures were existing and had been erected in the said premises and that at the commencement of the lease there were permanent structures existing in the said premises as would appear from the map or plan annexed to the lease.

89. On this ground also it cannot be said that the company was a *thika* tenant under the respondent within the meaning of the said Act of 1949.

95. It remains to be considered whether in view of the wide language of S. 5 of the Act noted earlier, it can be held that the land in dispute being a land held by the company under the respondent under a registered lease for a period of not less than 12 years has vested in the State free from all encumbrances.

96. On a plain reading it appears to us only two types of land come within the mischief of S. 5, namely, (a) land comprised in *thika* tenancy and (b) other lands. The expression “other land” is qualified in the section as follows:—

“Other lands held under any person in perpetuity or under registered lease for a period of not less than 12 years or held in monthly or periodical tenancy for being used or occupied as *Khataals*.”

97. It appears to us that the words “for being used or occupied as *Khataals*” qualify the expression “other lands” whatever be the period or nature of the tenancy. This is borne out by the frame of the later part of the section where the expressions “*thika* tenancies” and “*Khataals*” have been used in conjunction. The expression “other lands” do not appear in the later part of the section prior to the proviso.

23. In the matter of ***Lakshmimoni Das and Ors. vs State of West Bengal and Ors.*** reported in **1987 SCC Online Cal 140** three-Judge Bench held as follows :-

“56. For the reasons aforesaid we hold as follows:—

(a) The impugned Act is not protected under Art. 31C of the Constitution as it is found on scrutiny of different provisions of the impugned Act that the impugned Act has not been enacted to give effect to provisions of Arts. 39(b) and (c) of the Constitution and the impugned Act is open to challenge on the score of violations of Part III of the Constitution.

(b) Within the scope and ambit of S. 5 of the impugned Act only lands comprised in *thika* tenancies within the meaning of the Calcutta Thika Tenancy Act, 1949 comprising a kutcha structure and/or a pucca structure constructed for residential purpose with the permission of the Controller under the Calcutta Thika Tenancy Act, 1949 and khatal lands held under a lease shall vest and save as aforesaid no other land and structure vest under the impugned Act.

(c) Sub-sections (2) and (3) of S. 8 of the impugned Act and R. 5, Calcutta Thika Tenancy (Acquisition and Regulation) Rules, 1982 are ultra vires the Constitution.

(d) Rule 3(b) of the Calcutta Thika Tenancy (Acquisition and Regulation) Rules, 1982 excepting the following portion “every *thika* tenant or tenant shall pay to the Controller annual revenue being not less than what he was paying to the landlord before the coming into force of the Act” Rules 3(h), 3(i) and 3(j) of the said rules are ultra vires.

(e) Section 19 of the impugned Act in so far as it purports to abate any pending appeal preferred by a *thika* tenant against a decree for eviction of *thika* tenant under the Calcutta Thika Tenancy Act, 1949 and any execution proceeding for eviction of a *thika* tenant against whom a decree for eviction had been passed under the Calcutta

Thika Tenancy Act, 1949 before the enforcement of the impugned Act is illegal and ultra vires.

(f) Section 6(2) of the impugned Act excepting the proviso thereunder and Ss. 26 and 27 of the impugned Act are declared ultra vires.”

24. In the case of ***Nemai Chandra Kumar Through LRS and Ors. vs Mani Square Ltd. and Ors.*** reported in **2022 SCC Online SC 920**, the Apex Court was of the view that:-

“82. The suggestion that the expression “any structure”, in its plain meaning ought to be construed as inclusive of all structures whether kutchha or pucca, needs to be rejected for a variety of reasons.

83. In the 1949 Act as originally enacted, even though the expression “any structure” had been used but, it was consistently maintained by the Calcutta High Court with reference to the object and purpose of the 1949 Act and its frame that, the definition of “thika tenant” would not include pucca structure because the enactment was otherwise not dealing with the rights and liabilities of the tenant, for which the provisions of the Transfer of Property Act were required to be referred to; and such a proposition was also in accord with Section 2(6) of the 1949 Act; and per Section 108(p) of the Transfer of Property Act, a pucca structure was not permissible. In *Jatadhari Daw & Grandsons [Jatadhari Daw & Grandsons v. Radha Debi, 1985 SCC OnLine Cal 148 : (1986) 1 CHN 21]*, the Division Bench of the High Court, even while construing the 1981 Act, proceeded on the same lines and held that the expression “structure” in the statute did not include permanent structure.

84. The Full Bench of the High Court in *Lakshmimoni Das [Lakshmimoni Das v. State of W.B., 1987 SCC OnLine Cal 140 : AIR 1987 Cal 326]* meticulously examined variegated aspects of the matter and various provisions of enactments and also different pronouncements while holding that construction of kutchha structure on the leasehold land was a sine qua non for constituting thika tenancy. We find such interpretation to be in accord with the very object and purpose of these enactments, at least until the enforcement of the 2010 Amendment Act w.e.f. 1-11-2010; and the submission of the learned counsel for Respondent 1 based on the doctrine of stare decisis deserves to be accepted that the interpretation of this particular term “any structure”, which has been holding field for more than half a century ought not to be disturbed or unsettled. In *Shanker Raju [Shanker Raju v. Union of India, (2011) 2 SCC 132 : (2011) 1 SCC (L&S) 161]* this Court had held that : (SCC p. 139, para 10)

“10. It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of

stare decisis is expressed in the maxim *stare decisis et non quieta movere*, which means ‘to stand by decisions and not to disturb what is settled’. Lord Coke aptly described this in his classic English version as ‘*those things which have been so often adjudged ought to rest in peace*’. The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.”

(emphasis in original)

85. There are several indications which unfailingly lead to the conclusion that “any structure” which was employed in the 1949 Act and was further employed in the 1981 Act and also in the 2001 Act for the purpose of creation of thika tenancy referred only to kutchra structure until the year 2010. The first and foremost indication comes from the amendment of the 1949 Act by Act of XXIX of 1969 whereby clause (4a) was inserted to Section 2 and then Section 10-A was inserted to the enactment which, in effect, invested a right in the thika tenant to erect a pucca structure when using the land in question for a residential purpose but only with permission of the Controller. If pucca structure was a part of the definition of thika tenant in clause (5) of Section 2, Section 10-A was never required to be inserted to the 1949 Act. Then, in the 1981 Act, even when the legislature provided for acquisition of land comprised in thika tenancy and other lands, the principal part of the definition of thika tenant remained the same; only the other three exclusion conditions, as occurring in clause (5) of Section 2 of the 1949 Act were removed. However, the 1981 Act, as originally enacted, never provided for creation of thika tenancy by the event of tenant erecting or acquiring by purchase or gift, any pucca structure.

86. Of course, by amendment of Section 5 by the 1993 Amendment Act, it was introduced that even “other land” under lease could be acquired but, the purpose and object of the enactment did not provide for such a broad and all-pervading legislative fiat. This aspect of the matter does not require any further elaboration in the present case for the fundamental reason that claim of the appellants had only been of thika tenancy and when they do not answer to the description of thika tenant, there would arise no question of operation of Section 5 of the 1981 Act, whether in its unamended form or in its amended form.

87. Significant it is to notice that even in the 2001 Act, as originally enacted, the definition of thika tenancy in clause (14) of Section 2 thereof retained more or less the same expressions as were there in the 1981 Act; and the expression “any structure including pucca structure” came to be inserted to this clause only by the 2010 Amendment Act. Moreover, the 2010 Amendment Act was given only prospective effect from 1-11-2010 and not the retrospective effect, as was earlier given to the original Section 4 of the 2001 Act. Thus, acquisition of the land comprising thika tenancy with even erection or acquisition of pucca structure by the thika tenant came to be provided

for in specific terms by the legislature only from 1-11-2010 and not before. As noticed, before 1-11-2010, so far as the lease in question was concerned, the same had ceased to subsist and there was no existing lease which could have taken the appellants within the frame of thika tenancy on 1-11-2010.”

25. Thus, in my considered view, before entertaining the prayer for an ex parte ad interim order of injunction in the teeth of the decree, the learned executing court ought to have satisfied itself on the legal principles pertaining to thika tenancy.

26. Next, assuming that the application under section 151 is considered as an application for injunction, by ignoring the nomenclature/caption, this court can interfere with the order. It suffers from manifest error and is based on non-consideration of settled laws. The said application was filed almost eight months after filing of the execution case. The fact that although, the opposite party no. 2 was pursuing an appeal and had not been able to obtain a stay should have prevailed upon the learned executing court. By granting a blanket order of injunction, without following the principles laid down in ***Atma Ram (P) Ltd. Vs. Federal Motors (P) Ltd.*** reported in ***(2005) 1 SCC 705***, the court acted with material irregularity. A decree holder, who had obtained a decree for eviction and delivery of possession, must always be compensated when the fruits of the decree cannot be enjoyed. Courts have consistently held that, occupational charges at the market rate should be paid by the occupier, if the decree could not be immediately executed on account of stay. The relevant paragraphs in ***Atma Ram*** (supra) is quoted below :-

“8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

* * *

* * *

16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

* * *

* * *

18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by

payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.* [(1999) 2 SCC 325] this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

19. To sum up, our conclusions are:

(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.

(2) In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

(3) The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

20. In the case at hand, it has to be borne in mind that the tenant has been paying Rs 371.90p. rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq ft have been recently let out on rent at the rate of Rs 3,50,000 per month. The Rent Control Tribunal was right in putting the tenant on term of payment of Rs 15,000 per month as charges for use and occupation during the pendency of appeal. The Tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on an erroneous assumption that any direction for

payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the respondent tenant before us, nor was it in the High Court, that the amount of Rs 15,000 assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side.”

27. It is not the order alone, which is being considered by the court, but it is the way the learned Court had proceeded in the matter.

28. Article 227 of the Constitution of India provides that, every High Court can exercise superintendence over all courts and tribunals throughout the territories, upon which it exercises jurisdiction. The High Court has the duty to ensure that the tribunals and courts under it function within the framework of the laws and checks are to be imposed by the High Court in case of wrongful exercise of jurisdiction.

29. The order impugned is set aside. The learned executing Court shall decide the application under section 151 of the Code of Civil Procedure upon giving due opportunity to the petitioner to file its written objection. The learned executing court will proceed independently, without being influenced by this order.

30. The ad interim order stands vacated. The order impugned is set aside.

Urgent Photostat certified copies, if applied for, be supplied to the respective parties upon fulfilment of requisite formalities.

(Shampa Sarkar, J.)