

ORDER SHEET

APOT/100/2025
WITH
CS/276/2024
IA NO: GA-COM/1/2025

IN THE HIGH COURT AT CALCUTTA
Commercial Appellate Division
ORIGINAL SIDE

MD. ISLAM
VS
AMIT NEWAR AND ANR.

BEFORE:
The Hon'ble JUSTICE ARIJIT BANERJEE
AND
The Hon'ble JUSTICE OM NARAYAN RAI
Date : 20th May, 2025.

Appearance:
Mr. Arik Banerjee, Adv.
Mr. Arijit Roy, Adv.
Mr. P. P. Mukhopadhyay, Adv.
..for the appellant/petitioner

Mr. Kanishk Kejriwal, Adv.
Ms. Brinda Sengupta, Adv.
Mr. Ramendu Agarwal, Adv.
..for the respondents

Dictated by Arijit Banerjee, J.

The Court: This appeal is directed against a judgment and order dated January 24, 2025, whereby a Learned Judge of this Court disposed of GA/1/2021 in CS/276/2024 being an application filed by the respondents herein who are the plaintiffs in the suit.

The brief facts germane for the purpose of the present proceedings are that the appellant claims to be a monthly tenant under the respondents in respect of a shop-room (hereinafter referred to as "the suit premises") at

24A, Shakespeare Sarani, Kolkata. The respondents have filed a suit for recovery of possession of the suit premises from the appellant which is registered as CS-COM/276/2024. It is, *inter alia*, the contention of the respondents that the appellant herein last paid rent at the agreed rate in August, 2019. Thereafter the appellant has not paid a penny but has been enjoying the suit premises wherefrom he runs his business. Accordingly, in GA/1/2021, the plaintiffs prayed for the following orders:-

“a) Decree for eviction and recovery of vacant and peaceful possession of suit premises at the ground floor of premises no.24A, Shakespeare Sarani, Kolkata 700 017 more particularly described in Schedule-X hereunder against the defendant;

b) Decree for a sum of Rs.10,59,575/- towards the payment of defendant’s share of Municipal rates and taxes as pleaded in paragraph 11 hereinabove.”

On the day the matter was taken up for hearing by the Learned Single Judge, nobody appeared for the defendant (present appellant). The Learned Judge recorded in the order impugned herein that on November 18, 2024, learned counsel for the plaintiffs concluded his argument and the matter was fixed on December 9, 2024. On that date, learned counsel for the defendant prayed for time and the case was adjourned till January 9, 2025. On January 10, 2025, the matter was taken up for hearing but nobody appeared on behalf of the defendant. The Learned Judge adjourned the matter till January 21, 2025. In the order dated January 10, 2025, the Learned Judge made it clear that on the next date, if the defendant failed to appear, appropriate orders will be passed.

On January 24, 2025, the matter was finally taken up for hearing and disposal. Nobody appeared for the defendant on that date also. The Learned Judge disposed of the application by passing the impugned order, the operative portion whereof reads as follows:

“Admittedly, the defendant was the tenant in respect of the premises in question and the defendant in his affidavit in opposition at paragraph 5(bb) has admitted with regard to the enhanced rent. Paragraph 5(bb) reads as follows:

“5(bb). It is also pertinent to mention that the said monthly rent of the suit premises was enhanced to Rs.1,09,250/- (Rupees One lakh nine thousand two hundred fifty) only from the previously monthly rent of Rs.95,000/-(Rupees Ninety five thousand)only by the petitioners and which they received till November, 2019 and thereafter refused to accept online payment of rents from the respondent.”

Now, the only disputed question here is whether the defendant is required to pay the occupational charges i.e. Rs.1,09,250/- from the month of September, 2019 or from the month of November, 2019. The plaintiff is claiming the occupational charges from the month of September, 2019 but the defendant in his affidavit in opposition has stated that the plaintiff had received the rent till November, 2019.

Considering the above, this Court finds that as the defendant has admitted with regard to the enhanced monthly occupational charges at Rs.1,09,250/- in his affidavit in opposition, the defendant is directed to deposit the monthly occupational charges of Rs.1,09,250/- per month from the month of December, 2019 till the month of January, 2025 and also to continue to deposit the monthly occupational charges with the Registrar of this Court within two weeks from date of this order.

If the defendant deposits the said amount with the Registrar, Original Side of this Court, the Registrar, Original Side shall invest

the said amount in an interest bearing fixed deposit having the facilities of auto renewal and to file report before this Court.

In view of the above, GA/1/2021 is disposed of.

At the time of dictating the orders, learned counsel for the defendant appears and prays for time but considering the record it is found that time and again the defendant is taking time. The defendant has already admitted the enhanced occupational charges, thus, this Court did not find any reasons to adjourn the hearing of the application.”

As would appear from the aforesaid order, learned counsel for the defendant appeared before the Learned Judge at the time of the order being dictated. However, the Learned Judge declined to adjourn the matter noting that time and again the defendant had obtained adjournment. Being aggrieved, the defendant has come up by way of this appeal.

Appearing for the appellant, Mr. Arik Banerjee, learned advocate, has argued firstly that the Learned Judge ought not to have passed a direction for deposit of money. The order was in the nature of a mandatory injunction which, in view of the fact that the plaintiff has claimed damages/*mesne profits* in the suit, ought not to have been passed. Mr. Banerjee drew our attention to Section 41(h) of the Specific Relief Act. Mr. Banerjee also relied on a decision of the Hon’ble Supreme Court in the case of *Best Sellers Retail (India) Private Limited vs. Aditya Birla Nuvo Limited and Others*, reported (2012) 6 SCC 792 to argue that the grounds for passing an order of injunction, whether prohibitory or mandatory, do not exist in the present case. Learned counsel has also referred to a decision of a Co-ordinate Bench of this Court in the case of *Poonam Kejriwal vs. Bhagwandas Auto*

Finance Ltd. & Ors. 2009(2) CLJ (Cal) 301 in support of his contention that no mandatory injunction can be passed directing a defendant in an eviction suit to put in money on account of occupational charge during pendency of the suit.

Mr. Banerjee then argued that the suit does not involve commercial dispute. It is not maintainable in the Commercial Division of this Court. The appellant has filed an application under Order VII Rule 11, CPC, for rejection of the plaint. Without first deciding such application, the Learned Single Judge ought not to have passed any interim order in favour of the plaintiff. In this connection, learned counsel also referred to a decision of the Hon'ble Supreme Court in the case of *Asma Lateef and Another vs. Shabbir Ahmad and Others* reported at (2024) 4 SCC 696 in support of his contention that when the defendant/respondent to a proceeding raises a question of lack of jurisdiction of the Court to entertain the *lis*, without first deciding that issue, the Court should not pass any order pertaining to the merits of the case.

Mr. Banerjee further submitted that the appellant filed a suit in the City Civil Court in the year 2019 claiming declaration of tenancy and other consequential reliefs against the present plaintiffs. That suit is pending. An interim order of injunction is operating in that suit protecting the present appellant from unlawful dispossession. In view of that prior suit, the appellant herein has filed an application under Section 10, CPC before the Learned Single Judge in the present suit, for stay of trial of the suit. Hearing in that application has been concluded and judgment is reserved.

Without first disposing of that application, the Learned Judge ought not to have passed the impugned order.

We also heard Mr. Kejriwal, learned advocate for the respondents/plaintiffs. He says that the conduct of the appellant has been abysmal. Although the appellant admits in pleadings filed before the Learned Single Judge that occupational charge in respect of the suit premises has been increased to Rs.1,09,250/- with effect from July 1, 2016, since September, 2019, the appellant has not paid a penny to the respondents/landlords whether at the agreed old rate or at the agreed revised rate. Learned counsel further says that earlier the present plaintiff had filed a suit in this Court in the non-Commercial Division for eviction of the present appellant. The appellant took a point that the suit ought to have been filed in the Commercial Division since the suit premises is being used exclusively for commercial purpose. Faced with such objection, the plaintiffs withdrew that suit and then instituted the present suit in the Commercial Division. Now the appellant is taking a diametrically opposite stand and saying that the suit does not lie in the Commercial Division. This indicates the *mala fides* of the appellant.

We have considered the rival contentions of the parties.

Insofar as the question of the Learned Judge being obliged to decide the issue of jurisdiction is concerned, we note that presently, insofar as this Court is concerned, there are two views. One Learned Judge in the case of *Deepak Polymers Private Limited vs. Anchor Investments Private Limited* reported at 2021 SCC Cal 4323, has held that a dispute arising out

of refusal by the defendants to comply with notices issued by the landlord under Section 106 of the Transfer of Property Act, 1882, is based on a statutory right independent of any clause of the lease agreement and as such, the same would not come within the meaning of Commercial dispute as defined in Section 2(1)(c) of the Commercial Courts Act. However, another Learned Judge in the case of *T.E Thomson & Company Limited vs. Swarnalata Chopra Nee Kapur & Anr.* (CS-COM/4/2023) has differed from the aforesaid view and has referred the issue to a Larger Bench before which the issue is pending.

In view of the aforesaid, it was not unreasonable on the part of the Learned Single Judge who had, in fact, differed from the other Learned Judge, to not decide the issue of whether or not the present suit involves Commercial dispute, immediately. We also notice the wavering stand of the appellant herein. Earlier when the respondents herein had filed a suit in the non-Commercial Division of this Court, the appellant had argued that the subject matter of the suit involved commercial dispute. Now when the plaintiffs have presented the plaint in the Commercial Division, the appellant says it is a non-commercial dispute.

As regards the appellant's contention regarding pendency of his application u/s. 10 CPC, the Hon'ble Supreme Court has held in *Pukhraj D. Jain & Ors. vs G. Gopalakrishna* reported at (2004) 7 SCC 251, that mere filing of an application u/s.10 CPC does not put an embargo on the power of the Court to examine the merits of the matter. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a

nullity. We are therefore of the opinion that the learned Single Judge committed no error in passing the impugned order without first deciding the appellant's application u/s.10 CPC.

The judgment of the Supreme Court decision in *Asma Lateef and Others vs. Shabbir Ahmad and Others* (supra) cannot come to the appellant's rescue. If a genuine question of maintainability of a proceeding is raised, then of course that issue should be decided first before passing any order touching the merits of the case. However, we are of the opinion that the present objection of the appellant as to the maintainability of the suit in the Commercial Division is not bona fide and is an afterthought. The objection has been almost three and half years after institution of the suit.

In the case of *Best Sellers Retail (India) Private Limited*, supra, the plaintiff had obtained an order of temporary injunction from the learned Trial Court, restraining the defendants in the suit from leasing, sub-leasing, alienating or encumbering the suit schedule property pending disposal of the suit. The suit was for specific performance of an agreement. There was an alternative prayer in the plaint for damages assessed at Rs.20.12 crore. The challenge to the order of temporary prohibitory injunction having travelled to the Hon'ble Supreme Court, it was held that merely a prima facie case and balance of conveniences being made out by the plaintiff would not be ground enough for passing an order of injunction in the plaintiff's favour if it is found that the plaintiff can ultimately be compensated by way of damages in terms of his alternative prayer in the plaint.

In our respectful understanding, the aforesaid decision has no manner of application to the facts of the present case. The plaintiffs in this case have not claimed damages as an alternative relief. The only issue we are presently concerned with is whether or not the appellant/defendant can continue to enjoy the plaintiff's suit property, exploiting it commercially, without paying any occupational charge to the plaintiffs.

We cannot countenance a situation where a person shall enjoy the property belonging to another completely free of cost. While the respondents/plaintiffs say that the appellant herein paid rent/occupation charge last in the month of August, 2019, the appellant/defendant says that he paid rent till November, 2019. To avoid any controversy, the learned Judge directed the appellant to deposit occupational charge from December 2019. The learned Judge relied on an admission of the appellant in his affidavit-in-opposition filed in connection with GA No. 1 of 2021 which has been extracted above as part of the impugned order. There indeed is a clear admission that the agreed rent was enhanced to Rs.1,09,250/-. There is also an admission that the appellant paid rent to the respondents only till November, 2019. It is, however, the appellant's contention that after that, the respondents refused to accept online payment of rent from the appellant. This is disputed by the respondents/plaintiffs.

Be that as it may, it seems to be fairly clear and undisputed that since December, 2019, the appellant has not paid a farthing to the respondents but continues to occupy the suit premises. This cannot be permitted. There is an agreed rent between the parties. The Division Bench

judgment in the case of *Poonam Kejriwal*, supra, relied upon by the appellant is distinguishable. In that case there was no agreement between the defendant who was asked to put in occupational charge, and the landlord. It was held that a trespasser could not be directed to put in occupational charge during the pendency of the suit before assessment of damages.

In view of the aforesaid, we do not find any infirmity in the order of the learned Single Judge which is sought to be assailed before us. It is a perfectly fair and reasonable order.

Hence, this appeal fails and is dismissed with costs assessed at Rs.10,000/- to be paid to the State Legal Services Authority within a week from date. A copy of this order shall be sent by the Registry to the Member Secretary of the State Legal Services Authority. In that event the cost is not paid within the time period indicated herein, the Member Secretary shall draw the same to this Court's attention.

(ARIJIT BANERJEE, J.)

(OM NARAYAN RAI, J.)