

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(COMMERCIAL DIVISION)

APOT/128/2025
WITH
CS-COM/158/2024
IA NO: GA-COM/1/2025

MD SARFARAZ ALAM
VS
MD MOFAZZULAR RAHMAN AND ORS

BEFORE:

The Hon'ble JUSTICE ARIJIT BANERJEE

AND

The Hon'ble JUSTICE RAI CHATTOPADHYAY

Date : June 19, 2025.

Appearance:

*Mr. Pranit Bag, Adv.
Mr. Anuj Kr. Mishra, Adv.
Mr. R. R. Modi, Adv.
Mr. Anujit Mookherjee, Adv.
Mr. Prithish Chandra, Adv.
...for the appellant.*

*Mr. S. N. Mookherjee, Sr. Adv.
Mr. Rudraman Bhattacharyya, Sr. Adv.
Mr. Dhruv Chadha, Adv.
Ms. Pooja Chakraborty, Adv.
Ms. A. Bhattacharyya, Adv.
Ms. Debomita Sidhu, Adv.
...for respondent no. 3.*

*Mr. Utpal Bose, Sr. Adv.
Mr. D. N. Sharma, Sr. Adv.
Mr. Ankan Rai, Adv.
Mr. Yash Singhi, Adv.
Mr. Ratnesh Kumar Rai, Adv.
Ms. Devanshi Deora, Adv.
Mr. Aakash Mishra, Adv.
Ms. Nabanita Manna, Adv.
...for respondent nos. 5 & 6.*

Dictated by Arijit Banerjee, J.

The Court: This appeal is directed against a judgment and order dated April 9, 2025, whereby a learned Judge of this Court dismissed the appellant's application being GA-COM No. 9 of 2024.

The parties to the suit were partners of a firm. The appellant contends that the partnership stands dissolved pursuant to a notice of dissolution issued by the appellant since the partnership was a partnership at will. The respondents say that the appellant was expelled from the partnership. We are presently not concerned with such dispute.

GA-COM No. 9 of 2024 was filed by the appellant in CS-COM No. 158 of 2024 being a suit filed by some of the respondents herein, praying for the following reliefs:-

- a) “An order be passed directing the other respondents and the plaintiff being the partners of the firm to disburse a sum of Rs.2,69,61,000/- in favour of the petitioner as detailed in paragraph 20 hereinabove on account of renal transplant of the petitioner.
- b) An order be passed directing the other respondents and the plaintiff being the partners of the firm to disburse a sum of Rs.1,25,40,707/- on account of hospital admission cost of air ambulance, fooding and lodging in favour of the petitioner.
- c) An order be passed directing the Registrar, Original Side, to release the sum of Rs.50 lakhs along with accrued interest in favour of the petitioner which can be utilized towards medical treatment of the petitioner.
- d) Ad-interim orders in terms of prayers above;
- e) Such further order/orders be passed as this Hon’ble Court may deem fit and proper.”

At the *ad interim* stage, no order was passed by the learned Single Judge. The appellant preferred an appeal being APOT No. 423 of 2024. A Co-ordinate Bench by a judgment and order dated January 13, 2025, as corrected and clarified by an order dated January 20, 2025, disposed of the appeal. The operative portion of that order reads as follows;

“18. The basis of the application appears to be the prescription of two eminent doctors of Singapore, opinion by

another specialist Dr. Lalit Kr. Agarwal on 3rd December, 2024 and the estimated cost for undergoing such treatment. Before the Co-ordinate Bench, the respondent nos. 2 and 3 had agreed to provide Rs.50 lakhs for the purpose of providing the treatment and on the basis of such assurance, the said amount was released in favour of the appellant on terms and conditions as indicated in the order dated 21st December, 2020.

19. It is not in dispute that the said sum of Rs.50 lakhs is with the Registrar, Original Side and the said amount was invested. Neither of the parties has applied before the Court for withdrawal or utilisation of the said amount. This application has been filed now for utilisation of the said amount along with other reliefs. The requirement of the said amount for a medical treatment is *prima facie* established in view of several medical documents along with an estimate of the hospital where kidney transplantation is likely to take place.

20. Now that the said amount is lying with the learned Registrar, Original Side and the documents disclosed *prima facie* show that it involves substantial expenses to be incurred for the purpose of transplantation and the doctors have advised that immediate steps are required to be taken for kidney transplantation, we are of the view that the amount lying with the learned Registrar in terms of the order dated 21st April, 2021 passed in APO/29/2020 shall be released forthwith along with accrued interest in favour of the present appellant for the purpose of his medical treatment and the said amount for the time being shall be treated as an interest free loan till the accounts are finalised. The failure to pass such interim relief could be fatal and irreversible.

21. It is evident from the orders and the materials on record that the accounts have not yet been finalised.

22. The Registrar, Original Side shall file a report before the learned Single Judge on the returnable date placing on record the auditor's accounts in order to enable the parties to make appropriate submission on the said account.

23. We also direct the learned Registrar, Original Side to circulate the said report to the advocate-on-record of the parties in the meantime.

24. It would be open for the parties to take exception to the said report in the pending proceeding and pray for

appointment of an independent auditor and forensic audit if required. However, we emphasise that the settlement of accounts should be done at the earliest to obviate all future complications. Any further order with regard to disbursement of further amounts to meet expenses for the medical treatment shall be considered by the learned Single Judge in the pending proceeding.”

Thereafter, the appellant’s said application came up for final hearing before the learned Single Judge after exchange of affidavits. By the judgment and order impugned in this appeal the learned Judge disposed of the application without granting any relief to the appellant herein. The operative portion of the impugned order reads as follows;

“As stated above the Division Bench in the Order dated 06/09/2022 noted that without coming to a finding that the Respondents are under an legal liability or obligation to release funds in favour of the Petitioner for his medical treatment, albeit by way of interest free loan to be adjusted at the time of final settlement of accounts of the concerned partnership firm, the Court could not have directed the Respondents to pay any money to the Petitioner. Adjudication is pending for deciding the rights and liabilities of the parties and final settlement of accounts. It is yet to be decided whether the Defendants or the Plaintiffs are liable to pay any money to the Defendant no. 1/Petitioner. A Division Bench previously recorded an agreement between the parties without mandating them to pay anything to the Defendant no. 1/Petitioner. The Defendant no. 1/Petitioner has been paid a sum of Rs.10 lakhs per month till March 2025 out of agreement. It is submitted by Mr. Mookerjee that the amount is lying in a frozen account. The Defendant no. 1/Petitioner is at liberty to withdraw the money without prejudice to his rights and claims.

As discussed above, neither is there any decided right nor is there any declared equity in favour of the Defendant no. 1/Petitioner. The firm cannot be directed to lend any loan or provide for any financial accommodation without having any consent to do that. However, the parties are at liberty to

provide financial accommodation, financial help to the Defendant no. 1/Petitioner; they are at liberty to reimburse the medical costs or provide for costs of treatment of the Defendant no. 1/Petitioner if the other parties so desire. There should not be any judicial compulsion to lend money or to make any agreement between the Defendant no. 1/Petitioner and the other parties or among the parties herein, *inter se*. At this stage, without adjudication of rights and liabilities, this Court is of opinion that the order prayed for should not be passed. It is left to the volition of parties to bear medical expenses of the Defendant no. 1/Petitioner.”

Being aggrieved, the appellant is before us by way of this appeal.

At the outset, Mr. Mookherjee and Mr. Bose, learned senior Advocates representing the plaintiff no. 3 and the defendant nos. 2 and 3 respectively, raised a point of maintainability of this appeal. According to them, Section 13 of the Commercial Courts Act would not permit this appeal.

Section 13 of the Commercial Courts Act reads as follows:

“13. Appeals from decrees of Commercial Courts and Commercial Divisions.- [(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1-A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.”

Order XLIII Rule 1 of the Code of Civil Procedure enumerates the orders from which an intra-court appeal shall lie. Rule 1 is reproduced hereunder:

1. Appeals from orders. – An appeal shall lie from the following orders under the provisions of Section 104, namely:-

(a) an order under Rule 10 of the Order VII returning a plaint to be presented to the proper Court [except where the procedure specified in Rule 10-A of Order VII has been followed];

(b) [* * *]

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

(e) [* * *]

(f) an order under Rule 21 of Order XI;

(g) [* * *]

(h) [* * *]

(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;

[(ja) an order rejecting an application made under sub-rule (1) of Rule 106 or Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable;]

(k) an order Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under Rule 10 of Order XXII giving or refusing to give leave;

(m) [* * *]

- (n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- [(na) an order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent person;]
- (o) [* * *]
- (p) Orders in interpleader-suit under Rule 3, Rule 4 or Rule 6 of Order XXXV;
- (q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;
- (r) an order under Rule 1, Rule 2, [Rule 2-A], Rule 4 or Rule 10 of Order XXXIX;
- (s) an order under Rule 1 or Rule 4 of Order XL;
- (t) an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal;
- (u) an order under Rule 23 [Rule 23-A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;
- (v) [* * *]
- (w) an order under Rule 4 of Order XLVII granting an application for review.”

Learned senior counsel for the respondents submitted that the order sought to be impugned does not come within the purview of Order XLIII Rule 1 of the C.P.C. Therefore, this appeal is not maintainable.

Mr. Bag, learned counsel appearing for the appellant submitted that against the refusal of the *ad interim* order, when the appellant had come up before a Co-ordinate Bench, the Bench had assumed jurisdiction, entertained the appellant and passed an order on merits. Nobody objected to the jurisdiction of the Co-ordinate Bench on the ground that that appeal was not maintainable. Now the respondents cannot urge the point of maintainability.

Mr. Bag further submitted that the prayers in GA-COM No. 9 of 2024 which have been set out hereinabove could be considered to be prayers under Order XXXIX Rule 1 of the Code of Civil Procedure. In that event, rejection of

such prayer would be appealable under Order XLIII Rule 1 and therefore this appeal would be maintainable.

We are unable to agree with Mr. Bag on either of the aforesaid points. As regards the first point, the issue as regards the maintainability of the earlier appeal was not raised before the Co-ordinate Bench at all. The prayer in the application before the learned Single Judge was for a direction on the respondents to pay a certain sum of money to the appellant/petitioner. That prayer having been refused at the *ad interim* stage, the appeal was preferred. In our view, that appeal was also not maintainable but this issue was not urged before the Co-ordinate Bench. There cannot be an estoppel against a statute. An order refusing the appellant's prayer in GA-COM No. 9 of 2024 does not come within the ambit of Order XLIII Rule 1 of the Code of Civil Procedure. The prayers in the application also cannot be considered to be prayers under Order XXXIX Rule 1 of the Code of Civil Procedure.

In our considered view, this appeal is not maintainable. Hence we decline to entertain this appeal only on the ground of maintainability. We have not addressed the merits of the case at all.

Accordingly, the appeal and the connected application are dismissed.

(ARIJIT BANERJEE, J.)

(RAI CHATTOPADHYAY, J.)