

Tapesh Arora vs Mukesh Chand on 16 November, 2023

Author: Manmeet Pritam Singh Arora

Bench: Manmeet Pritam Singh Arora

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IN THE HIGH COURT OF DELHI AT NEW DELHI
CM(M) 1806/2023
TAPESH ARORA

MUKESH CHAND

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

% 16.11.2023 CM APPL. 57344/2023 (for exemption) Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

1. This is an application seeking stay of the decree of possession dated 05.10.2023, passed by the District Judge, Commercial Court-02, North-West District, Rohini Courts, Delhi ('Commercial Court') in CS (Comm.) No. 724/2022, titled as 'Mukesh Chand v. Tapesh Arora, Prop. ONS Engineering'.

2. The Petitioner herein is the defendant and the Respondent is the plaintiff. The civil suit has been filed on 03.06.2022, for recovery of possession of property bearing no. A-79, Group Industrial Area, Wazirpur, Delhi - 110052 ('subject property'), recovery of sum of Rs. 22,000/-, mesne profits and damages, permanent and mandatory injunction.

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3. The Commercial Court vide impugned judgment dated 05.10.2023, while deciding the application filed by the Respondent under Order XII Rule 6 of Code of Civil Procedure, 1908 ('CPC'), allowed the said application and passed a decree of possession (prayer 'a' in said plaint).

4. This petition has been filed under Article 227 of Constitution of India assailing the said decree of possession. At the outset, it is observed that the Petitioner herein has a statutory remedy of filing an appeal against the said decree of possession under Section 96 read with Order XLI of CPC as the

said judgment of the Commercial Court is a decree within the meaning of the Section 2(2) of CPC.

5. Learned counsel for the Petitioner herein, however, states that the Petitioner has not availed the remedy of appeal on the ground that the Petitioner herein has raised a challenge to the jurisdiction of the Commercial Court to try the suit itself.

5.1. He states that in view of the provisions of Section 12(3) of the Commercial Courts Act, 2015 ('Act of 2015'), the Petitioner herein has elected to maintain the present petition and not avail the statutory remedy of appeal.

5.2. He further states that as per the proviso to Section 13(1A) of the Act of 2015, an appeal can be filed only against the orders that are specifically enumerated under Order XLIII of the CPC and, infact, no appeal can be filed against the impugned decree of possession dated 05.10.2023 under the said provisions.

5.3. He states that there is no remedy of appeal against the said decree of possession under the provisions of Act of 2015 as Section 96 and Order XLI of CPC finds no mention in Section 13 of the Act of 2015.

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6. This Court is unable to accept the said submission of the Petitioner. In the considered opinion of this Court an appeal is maintainable against the impugned decree dated 05.10.2023 before the Commercial Appellate Division of this Court in view of Section 13(1A) of the Act of 2015.

7. In this regard, it would be instructive to refer to the decision of Supreme Court in Kandla Export Corporation and Anr. v. OCI Corporation and Anr., (2018) 14 SCC 715, and more specifically paragraph 13 therein.

8. The said judgement of the Supreme Court in Kandla Export (Supra) has been relied upon by the Division Bench of High Court of Gujarat in Kandla Container Terminal Pvt. Ltd. v. Doosan Heavy Industries and Construction Company Ltd., 2018 SCC OnLine Guj 4051, to explain the scope of Section 13 of the Act of 2015, which reads as under:

29. Applying the law laid down by the Hon'ble Supreme Court in the aforesaid decision to the facts of the case on hand and considering sub-section (1) of Section 13 of the Commercial Courts Act, 2015, we are of the opinion that against the final judgment and/or decision of the Commercial Court or the Commercial Division of the High Court only, appeal shall be maintainable before the Commercial Appellate Division of the High Court. However, an appeal shall also lie from such orders passed by the Commercial Division or a Commercial Court that are specifically enumerated

under Order XLIII of the Code as amended by the Commercial Courts Act, 2015 and Section 37 of the Arbitration and Conciliation Act, 1996. Therefore, the submission on behalf of Shri Kamal Trivedi, learned Senior Advocate on behalf of the respondent that an appeal under Section 13 of the Commercial Courts Act, 2015, shall lie only from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code, as amended by the Commercial Courts Act, 2015 and Section 37 of the Arbitration and Conciliation Act, 1996, is not acceptable. As observed and held by the Hon'ble Supreme Court, Section 13(1) of the Commercial Courts Act, 2015, is in two parts, one is with respect to providing appeal to the Commercial Appellate Division of the High Court against the final decision/judgment or order of the Commercial Court or the Commercial Division of the High This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/11/2023 at 00:12:57 Court and the second part is with respect to providing appeal from such orders passed by Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code as amended by the Commercial Courts Act, 2015 and Section 37 of the Arbitration and Conciliation Act, 1996. However, at the same time, Shri Trivedi, learned Senior Advocate appearing on behalf of the respondent is justified in raising the objection on the maintainability of the present appeal under Section 13 of the Commercial Courts Act, 2015 against the impugned order passed by the learned Commercial Court, Rajkot, overruling and/or setting aside the objection raised by the appellant herein on the jurisdiction of the Commercial Court, Rajkot, to entertain and adjudicate the execution petition.

('Emphasis Supplied')

9. Further, the Division Bench of this Court in HPL (India) limited & Ors. v. QRD Enterprises and Anr., 2017 SCC Online Del 6955, has clarified that the word 'judgment' appearing in Section 13(1) of the Act of 2015 actually relates to a 'decree'. The relevant portion of the said judgment reads as under:

"34. The above analysis reveals that : - (a) the word 'judgment' appearing in Section 13(1) of the said Act actually relates or has a reference to a 'decree';

(b) the word 'order' in that provision would have to be construed in the light of Section 2(14) of the CPC as meaning 'a formal expression of a decision of a Civil Court which is not a decree; (c) the appealable orders would be only those which are specifically enumerated under Order XLIII, as provided in the proviso to Section 13(1) of the said Act."

(Emphasis Supplied) The said law enunciated by the Division Bench of this Court would equally apply to Section 13(1A) of the Act of 2015, which as well refers to the right of appeal of party aggrieved by a judgment of a Commercial Court at the level of District Judge; and consequently, an

appeal would lie to the Commercial Appellate Division Bench of this Court. The relevant portion of Section 13 of Act of 2015 reads as under:

" 13. Appeals from decrees of Commercial Courts and Commercial Divisions

-- (1) 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.

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/11/2023 at 00:12:57 (1A) 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)."

10. This Court is therefore, of the opinion that in view of the fact the Petitioner is challenging the decree of possession passed by the impugned judgment dated 05.10.2023, the Petitioner has to file a substantive appeal under Section 96 read with Order XLI of CPC. The Petitioner cannot circumvent the statutory remedy of filing an appeal and seek a stay of the decree of possession from this Court in its supervisory jurisdiction. 10.1. The Supreme Court in *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Ors. v. Tuticorin Educational Society and Ors.*, (2019) 9 SCC 538, has held that wherever the proceedings are under the CPC and the forum is the civil Court, the availability of the remedy under the CPC will deter the High Court from exercising its jurisdiction. The relevant portion of the said judgment reads as under:

"13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."

(Emphasis Supplied)

11. The grounds urged by the Petitioner with respect to lack of jurisdiction of the Commercial Court has also been dealt with by this Court This is a digitally signed order.

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12. This Court, therefore, does not find any merit in this application and the same is accordingly, dismissed. This will however, not preclude the Petitioner herein from availing his statutory remedy of appeal against the decree of possession, in accordance with law.

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13. Learned counsel for the Petitioner states that the suit itself was not maintainable before the Commercial Court in view of the fact that the Respondent has not initiated pre-institution mediation as per the mandate of Section 12-A of the Act of 2015.

13.1. He fairly states that the present civil suit was instituted in June, 2022 and was duly accompanied with an application filed under Order XXXIX Rule 1 and 2 of CPC for interim relief. He however, contends that the relief sought in the said application was not urgent in nature. 13.2. He states that though the declaration of law in Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1, has been made effective from 20.08.2022, however, the law with respect to the mandatory nature of Section 12-A of the Act of 2015, within the territory of Delhi, has been settled by this Court prior to the said date. In this regard, he relies upon a reference dated 27.11.2018 (bearing Ref. No. 18/DSLISA/LAW/Pre-institution Mediation/ 2018/ 12818-12823) issued by Delhi State Legal Services Authority ('DSLISA') to contend that in view of the said reference, the pre-institution mediation as stipulated under Section 12-A of Act of 2015 became mandatory in Delhi.

14. In the facts of this case, the suit was filed in June, 2022 and though, the Supreme Court in Patil Automation Pvt. Ltd. (supra) has held that the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/11/2023 at 00:12:57 provisions of Section 12-A of the Act of 2015 are mandatory; however, the said Court has clarified that the said declaration will become effective only from 20.08.2022. Thus, this suit, which was filed in June, 2022, is not liable to be rejected on the said ground.

14.1. It is also a matter of record that the Petitioner had filed an application under Order XXXIX Rule 1 and 2 of CPC for seeking interim relief along with the plaint and therefore, in terms of Section 12A(1) of the Act of 2015, the Respondent/plaintiff was entitled to approach the civil Court directly, without seeking pre-institution mediation. In fact, even the reference letter dated 27.11.2018 issued by DSLISA on which reliance has been placed by the Petitioner herein, excludes the suits in which interim relief is contemplated. The relevant portion of the said reference letter dated 27.11.2018

reads as under:

"Thus, in all commercial disputes where no interim relief is contemplated, DSLSA through its respective DLSAs are mandated to facilitate conduct of mediation in all the matter."

(Emphasis Supplied) 14.2. With respect to the contention of the Petitioner that the application filed by the Respondent/plaintiff under Order XXXIX Rule 1 and 2 of CPC did not contemplate any urgent relief and therefore, the plaint is liable to be rejected, is also without merit. The Division Bench of this Court in Chandra Kishore Chaurasia v. R A Perfumery Works Pvt. Ltd., 2022 SCC OnLine Del 3529, has held that the question whether the suit involves any urgent interim relief is to be determined by the plaintiff alone and the Court cannot dismiss the suit on the ground that the remedy of mediation has not been exhausted. The relevant portion of the said judgment reads as under:

"31. First of all, there is no provision under Section 12A of the Commercial This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/11/2023 at 00:12:57 Courts Act, 2015 that requires the plaintiff to make any such application in a suit which involves urgent interim reliefs. As stated above, if the suit involves urgent interim relief, Section 12A of the Commercial Courts Act, 2015 is inapplicable and it is not necessary for the plaintiff to enter into a pre-institution mediation.

32. Second, a suit, which does not contemplate urgent interim relief, cannot be instituted without exhaustion of pre-institution mediation, as required under Section 12A(1) of the Commercial Courts Act, 2015. As noted above, the Supreme Court has held that the said provision is mandatory and it is compulsory for a plaintiff to exhaust the remedy of pre-institution mediation, in accordance with the rules before instituting a suit. The Court has no discretion to exempt a plaintiff from the applicability of Section 12A(1) of the Commercial Courts Act, 2015. It is not permissible for the court to pass an order contrary to law; therefore, an application seeking exemption from engaging in pre- institution mediation, in a suit that does not involve urgent interim reliefs, would not lie.

33. This Court also finds it difficult to accept that a commercial court is required to determine whether the urgent interim reliefs ought to have been claimed in a suit for determining whether the same is hit by the bar of Section 12A(1) of the Commercial Courts Act, 2015. The question whether a plaintiff desires any urgent relief is to be decided solely by the plaintiff while instituting a suit. The court may or may not accede to such a request for an urgent interim relief. But that it not relevant to determine whether the plaintiff was required to exhaust the remedy of pre-institution

mediation. The question whether a suit involves any urgent interim relief is not contingent on whether the court accedes to the plaintiff's request for interim relief.

34. The use of the words "contemplate any urgent interim relief" as used in Section 12(1) of the Commercial Courts Act, 2015 are used to qualify the category of a suit. This is determined solely on the frame of the plaint and the relief sought. The plaintiff is the sole determinant of the pleadings in the suit and the relief sought.

35. This Court is of the view that the question whether a suit involves any urgent interim relief is to be determined solely on the basis of the pleadings and the relief(s) sought by the plaintiff. If a plaintiff seeks any urgent interim relief, the suit cannot be dismissed on the ground that the plaintiff has not exhausted the pre-institution remedy of mediation as contemplated under Section 12A(1) of the Commercial Courts Act, 2015.

(Emphasis Supplied) 14.3. This Court is of the opinion that in view of the application filed along with the plaint, under Order XXXIX Rule 1 and 2 of CPC and the judgment This is a digitally signed order.

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15. Learned counsel for the Petitioner has further stated that the relief of possession in the present suit ought to have been valued as per the market value of the immoveable property. He states that however, in the plaint, the specified value of the suit has been calculated at the rate of rent to bring the case within the jurisdiction of Commercial Court.

16. This Court has considered the submissions of the Petitioner and perused the record. The paragraph no. 19.1 in the plaint sets out the amount at which each relief has been valued and the Court fees assessed thereon. However, in the written statement, the Petitioner/defendant while replying to paragraph 19.1 of the plaint, has failed to raise any specific plea disputing the valuation of the relief of decree of possession or other reliefs, as mandated under Order VIII Rule 3A (5) of CPC as amended by the Act of 2015. The denial in the written statement fails to give rise to the issue of 'specified value', as raised before this Court.

16.1. In the written statement, the Petitioner/defendant has raised a bald plea that the requisite Court fee has not been paid and no further. Before this Court it was argued that the relief for decree of possession has been incorrectly valued.

16.2. This Court has perused the plaint, wherein the Respondent/plaintiff has valued the relief for recovery of possession at Rs. 5,40,000/- (Rs. 45,000/- x 12) and paid a Court fee of Rs. 7,615/- on the same. The sum of Rs. 45,000/- per month is admittedly, the rent of the suit property, agreed between the parties.

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17. In view of the aforesaid observations, this Court is prima facie of the opinion that the grounds urged by the Petitioner do not show that the Commercial Court lacked jurisdiction to entertain the suit.

18. However, this Court would like to hear the Respondent before proceeding with the matter. Accordingly, the Petitioner is directed to re-serve a copy of this petition to the Respondent through speed post, courier and e-mail and in addition, to the counsel for the Respondent appearing before the Commercial Court.

19. The suit is pending before the Commercial Court for adjudication of the remaining reliefs i.e., prayers 'b' to 'f' in the plaint. It is made clear that the proceedings before the Commercial Court shall continue and no stay will be sought before the said Court on the ground of pendency of this petition.

20. List before the Joint Registrar (Judicial) on 05.01.2024.

21. List before the Court on 24.01.2024.

MANMEET PRITAM SINGH ARORA, J NOVEMBER 16, 2023/msh/ms/aa Click here to check corrigendum, if any This is a digitally signed order.

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