

Present: Smt. Suparna Ray (JO Code:WB00711)
Judge, Commercial Court at Alipore
Title Suit 04 of 2023
Renumbered as TS (Com) 48 of 2023
CNR No. WBSP18-000041-2023

Order No. 49

Date: 19.05.2025

In the matter of:

Suit for recovery of possession and mesne profit valued at Rs. 171,80,41,276/- and for injunction at Rs. 100/-.

AND

In the matter of:

Mani Square Limited.

Vs.

Shri Subhash Kumar and 04 Ors.

Appearance:

Mr. Jaydip Kar..Ld. Sr. Advocate
Mr. Pranita Bag..Ld. Advocate
Ms. Sayantani Das...Ld. Advocate
Ms. Rituparna Chatterjee...Ld. Advocate
Ms. Megha Yadav...Ld. Advocate
.....for the Plaintiff/Respondent.

Mr. Shuvasish Sengupta... Ld. Adv.
Mr. Pushan Kar..Ld. Adv.
Mr. Souvik Majumdar...Ld. Adv.
Ms. Annapurba Banerjee..Ld. Adv.
Ms. Ajeya Chowdhury...Ld. Adv.
.....for the Defendants/Petitioners.

Order

Today is fixed for passing the Order of I.A. No. 26 of 2024.

Plaintiff and defendant nos. 2 to 6 file their respective haziras.

Now, the instant record is taken up for passing the order in respect of aforesaid I.A.

I.A. No. 26 of 2024

1. In the apropos application as captioned above the defendant nos. 2 to 6 (hereinafter referred to as the “said defendants”) has resorted to provisions stipulated in Order VII Rule 10 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter

referred to as the “CPC”) as the said defendants seem that the instant suit as filed by the plaintiff herein has not at all attracted the provisions of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 (in short CCA), which is the rudimentary exponent to file any suit before a Commercial Court akin to it.

2. Plaintiff, however, has filed its written objection to the captioned application and further reply to that has also been filed by the said defendants.

3. The main objection of the plaintiff as regards the instant application is that the issue being the ‘commerciality’ became no longer *res integra* and barred by *res judicata* in view of reasons more-fully depicted in the following paragraphs of this Order.

4. On bare perusal of the parlance enumerated in the instant demurer application, it may be notional that mere contention of the said defendants herein is founded on the test of ‘commerciality’ of the instant suit, which needs to be adjudicated by this Court. And, for that, this Court needs to dip into the fathoms seam of the instant case by enumerating the appearance of the plaintiff as well as the said defendants in the picture of the instant case.

5. As such, *facto probanda* of the instant suit as enumerated by the plaintiff is stated herein. Jitendra Nath Ghosh, the original owner of the property in question, by virtue of a deed dated 15th December, 1973 leased out the suit property to Kumar Industries for a period of 20 years and by efflux of time said deed expired on 30th November, 1993. Mr. Jitendra Nath Ghosh died on 15th September, 1995 leaving behind his seven sons. In the meantime,

the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 was promulgated and came into effect on and from 1st March, 2003 whereby Thika Tenancies were deemed to have vested with the State with retrospective effect from 18th January, 1982. The provisions of the said Act of 2001 mandates that Thika Tenancy and rights there under could be decided by a Thika Controller and Section 4, 5 and 27 of the said Act of 2001 are relevant in the present proceeding. On April 9, 2023 i.e. immediately after the said Act of 2001 was brought into effect, the properties of Kumar Industries claimed to be Thika Tenants and deposited rent with respect to the property in favour of the State of West Bengal. Then, on 10th September, 2007 the plaintiff herein purchased the said suit property from the absolute owners of the said premises being seven sons of Jitendra Nath Ghosh. On 27th January, 2010 an order passed by the Learned Controller holding that the said Kumar Industries qualified as Thika Tenants under the said Act of 2001 and being aggrieved by this Order plaintiff preferred an application before the State Govt. under Section 13 of the Act of 2001 and the Joint Secretary to the Government of West Bengal in its Department of Land and Land Revenue requested the Kolkata Thika Controller to dispose of the application filed by hearing the parties and the said application was disposed of on August 1, 2012 against the plaintiff and in favour of the Kumar Industries. Then the plaintiff again filed an application before the West Bengal Land Reforms and Tenancy Tribunal and the Ld. Tribunal rejected the said appeal on 18th November, 2013. The plaintiff challenged the said order before

the Hon'ble High Court at Calcutta and the said Hon'ble High Court set aside the order of WBLRTT on March 10, 2014. Thereafter, the matter was reached before the Hon'ble Supreme Court and the Hon'ble Apex Court finally decided the matter on 27th July, 2022 declaring that the defendants were not Thika tenants within the meaning of the Act of 1981 giving reasons to that effect.

6. As regards the aforesaid *locus*, the plaintiff chose to file the instant suit before this Court praying for recovery of possession and the mesne profit along with other ancillary relief(s) thereto.

7. After institution of the instant suit before this Court, the said defendants filed another demurer application resorting to Order VII Rule 11 of the CPC, which was registered as I.A. No. 05 of 2023, praying for rejection of the plaint in context.

In the said application, said defendants molded their contention in two flexions, one is the plaint in context does not disclose any cause of action and second one is , the instant suit is barred by the laws of limitation. However, in addendum to the aforesaid contention, the said defendants filed a supplementary affidavit wherein the said defendants vividly took the point of 'commerciality' and stated that due to lack of 'commerciality' in the instant suit, the plaint in context ought to be rejected under Order VII Rule 11 of CPC. It is to be stated herein that besides the points of scarcity of cause of action and barred by the laws of limitation, the said defendants substantially raised their contention in respect of lack of 'commerciality' regarding the same as a surmountable tool for rejection of the plaint.

This Court, however, by penning the Order dated 06.03.2024 dismissed the said demurer application (I.A. No. 05 of 2023) holding that issues relating to the limitation and cause of action etc. are mixed question of fact and law, therefore, at a demurer stage the same cannot be adjudicated.

Being aggrieved by and dissatisfied with the Order dated 06.03.2024 said defendants preferred revisional application being registered as C.O. 956 of 2024 before the Hon'ble High Court at Calcutta and the Hon'ble Court by an Order dated 21.05.2024 was pleased to dismissed the said revisional application. Thereafter, the said defendants resorted to the Hon'ble Apex Court by filing a Special Leave Petition (S.L.P.), which was subsequently dismissed by the Hon'ble Apex Court by an Order dated 10.09.2024.

However, it is also pertinent to be mentioned herein that during making the argument in I.A. No. 05 of 2023 before this Court, Ld. Sr. Counsel appearing for the plaintiff submitted that the point raised in the supplementary affidavit filed by the said defendants cannot be raised in an application under Order VII Rule 11 of the CPC. He further submitted that the point could have been raised if the said defendants sought to treat the petition as an application under Order VII Rule 10 of the CPC. However, Ld. Sr. Counsel further contended that there are ample instances in the various clauses of the lease deed and also in the order of the Hon'ble Division Bench of the High Court at Calcutta passed on March 10, 2014 and the application under Right to Information Act which reveals that the property has always been used for

commercial purpose as admitted by the said defendants in various proceedings. Clause nos. 1,2,9,14,17 and 18 of the said lease deed would reveal that the property in issue was always initiated to be used for commercial purpose. Moreover, on perusal of the Order passed by the Division Bench of the High Court at Calcutta on March 10, 2014, it reveals that the property was to be used for running factory activities and as such, was intended to and put for commercial use and could not be otherwise contended by the defendants. Therefore, it is to be stated that there is a substantial counter-submission made by the Ld. Sr. Counsel for the plaintiff in respect of “commerciality” lying in the instant suit.

On the other hand, Ld. Counsel appearing for the said defendants had buttressed his submission in support of ‘non-commerciality’ and even chose the same as one of the substantial tools for rejection of the plaint.

Now, the question raised by the said defendants in the instant application is that the ‘commerciality’ issue was not decided by this Court while adjudicating the said application filed under Order VII Rule 11 of CPC by the said defendants, that’s why they filed the instant application under Order VII Rule 10 of CPC for testing the issue of ‘commerciality’ in the instant suit.

Although the Hon’ble High Court by an Order dated 21.05.2024 dismissed the revisional application of the said defendants yet certain observations were made by the Hon’ble Court, which needs to be regarded herein so as to find out a limpid

way out to adjudicate the present demurer application (I.A. No. 26 of 2024).

Before the Hon'ble High Court, as recorded in the Order dated 21.05.2024, the contention of the said defendants was that the suit was not maintainable before the Commercial Division as the dispute disclosed in the plaint was not a commercial one, regarding that reliance is placed on the paragraph nos. 5, 6 and 7 of the Order dated 21.05.2024 and as for convenience the same are set out hereunder:

“5. Order 7 Rule 7 of the Code of Civil Procedure was relied upon to urge that the plaint ought to have clearly stated the grounds on which the plaintiff proceeded against the petitioners and what were the reliefs claimed. It was next submitted that the suit was not maintainable before the Commercial Division as the dispute disclosed in the plaint was not a commercial one. The Commercial Court at Rajarhat did not have jurisdiction over the subject matter of the suit.

6. Mr. Chatterjee urged this Court to consider the specific objections taken in the application seeking rejection of the plaint. Learned Advocate stated that the suit for recovery of possession was filed under the Transfer of Property Act and did not come within the definition of a Commercial Dispute under Section 2(1)(c)(vii). The dispute did not arise out of any agreement in respect of immovable property, used exclusively for trade or commerce. The lease agreement which expired in 1993 could not be the basis for filing of the suit in the Commercial Division. Admittedly, there was no agreement between the plaintiff and the defendants in respect of the immovable property which had given rise to the present dispute. The schedule of the plaint would indicate that the property was a dwelling house. The plaint did not disclose that the petitioners were using the property for commercial activity. The petitioners had been in occupation of the premises even after the expiry of lease. They were exercising their right of possession over the premises, without any interference or interruption. Thus, the suit was also barred by limitation as the same was filed beyond twelve years from expiry of the lease.

7. The petitioners also raised a question with regard to the maintainability of the suit in the Commercial Court, on account of noncompliance of Section 12A of the Commercial Courts Act, 2015. It was submitted that mediation had not initiated by the plaintiff/opposite party”.

To the counter the contention of the said defendants, plaintiff's Ld. Sr. Counsel therein made submission in support of having 'commerciality' in the instant suit. In view of that, this Court relies on the paragraph nos. 9, 10, 11 and 15 of the Order dated 21.05.2024, which are as follows:

"9. Mr. S.N. Mookherjee, learned Senior Advocate on behalf of the opposite party, submitted that the grounds on which a plaint could be rejected, were not available to the petitioners. The plaint disclosed a cause of action. The suit property was leased for commercial use. Thus, the suit for recovery of such immovable property was a commercial dispute. The suit had rightly been filed before the Commercial Court. The dispute arose when the lease in respect of the immovable property expired in 1993. The lease agreement stood terminated by efflux of time. The plaintiff stepped into the shoes of the original owner of the property. The plaintiff was entitled to recover possession of the same from the petitioners. The petitioners were continuing to unlawfully occupy the premises, even after the termination of the lease. The suit was not filed earlier as the predecessor of the petitioners claimed to be thika tenants and a approached the Thika Controller for adjudication of their status vis-à-vis the suit property. Exemption from applicability of Section 12-A of the Commercial Courts Act, 2015 was prayed for and such leave was granted by the Court, by an order dated April 1, 2023.

10. Mr. Mookherjee, further submitted that at the stage of deciding an application under Order 7 Rule 11 of the Code of Civil Procedure, the averments in the plaint were to be taken as true and correct. Neither the documents relied upon by the petitioners nor the defence case in the written statement could be taken into consideration while adjudicating the said application.

11. It was next contended that paragraphs 2 and 3 of the plaint clearly indicated that the dispute arose upon determination of the lease dated December 15, 1973, on November 30, 1993. The original owner Jitendra Nath Ghosh, by a registered indenture dated December 15, 1973, had leased out the property to Badri Narayan Kumar and Nemai Chandra Kumar (since deceased). They claimed to be proprietors of one Kumar Industries. The said lease was for a term of 20 years, commencing from December 1, 1973. The premises were

leased for the purpose of running a ferrous and non-ferrous foundry and factory, etc. Even prior to the lease and at the time of grant of lease, the property was being used for commercial purpose. Paragraphs 6, 7, 8, 9 and 10 of the plaint were placed before this Court in order to narrate how the cause of action had arisen, leading to the filing of the suit. The original lessees illegally and wrongfully claimed to be thika tenants in respect of the suit property and submitted returns before the Controller, Kolkata Thika Tenancy. On such claims being made, the owners of the property could not take any action for eviction of the predecessor of the petitioners, because questions as to whether a person was a thika tenant or not, or whether the land was a thika property or not, were to be determined by the Thika Controller. The plaint further disclosed that by a conveyance dated September 10, 2007, the heirs of the original owner Jitendra Nath Ghosh had sold the property to the plaintiffs and six other companies for valuable consideration. By an order dated September 19, 2008, the High Court at Calcutta sanctioned a scheme of amalgamation whereby six other companies were amalgamated with the plaintiff/opposite party. Consequently, all the assets and properties of the six companies vested with the plaintiff. On January 27, 2010, an order was passed by the Controller, Kolkata Thika Tenancy. The opposite party filed an application dated August 26, 2010, before the Government under Section 13 of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001. Objection of the opposite party was disposed of by the thika controller on August 1, 2012 holding that Kumar brothers, that is, the predecessors of the petitioners, were thika tenants in respect of the property. The order of the thika controller was challenged before the West Bengal Land Reforms and Tenancy Tribunal. The tribunal rejected the appeal. The order was challenged before the High Court and by judgment and order dated March 10, 2014, the High Court set aside the order of the Tribunal, inter alia, holding that the predecessors of the petitioners were not thika tenants and the property was not a thika property. Aggrieved by the aforementioned order, the petitioners approached the Hon'ble Apex Court. The Hon'ble Apex Court by judgment and order dated July 27, 2022, upheld the order of the Division Bench of the High Court and dismissed the appeal.

15. Distinguishing the decision in *Deepak Polymers (supra)*, Mr. Mookherjee urged this Court to consider paragraph 27 of the said

decision. A coordinate Bench had opined that suits for termination of the lease on the ground of forfeiture or for violation of any of the clauses of the lease agreement or for specific performance of agreement, would definitely come within the purview of a commercial suit. In this case, the suit was filed for recovery of possession, after termination of the lease by effluxion of time. Eviction of those persons who were in wrongful and illegal possession of the property since 1993 was prayed for in the suit. Deepak Polymers (supra), would not apply in the instant case. According to Mr. Mookherjee, the said decision dealt with suits for recovery of immovable property under Section 106 of the Transfer of Property Act, 1882. Mr. Mookherjee submitted that as per the ratio of Ambalal (supra), the agreement between the parties should indicate that as on the date of the agreement, the property was exclusively used for trade or commerce. In the present case, the averments in paragraph 2 of the plaint clearly indicated that prior to the execution of the lease, the property was being used as a commercial property. The lease agreement also indicated that the property would be used for commercial purpose, that is, as a foundry and factory. The schedule of the plaint did not only mention a dwelling house, but also factory sheds, etc. Moreover, all such questions were matters of trial. The plaint read as a whole indicated why the suit had been filed before the Commercial Court and also how the cause of action arose. The trial court had been invited to decide an application under Order 7 Rule 11 of the Code of Civil Procedure. The learned Court, upon analyzing the submissions of the parties, held that all the issues raised in the said application were triable issues and involved mixed questions of law and fact. A roving enquiry to determine such questions, could not be embarked upon by the Court at a nascent stage of the suit.”

The Hon'ble Court in paragraph no. 16 of the said Order held that “*The defendants/petitioners prayed for rejection of the plaint on the grounds of non-disclosure of cause of action, lack of jurisdiction of the Commercial Court and non-maintainability of the suit on the ground of limitation” (emphasis added). In the said paragraph being the paragraph no. 16, the Hon'ble Court further held that “*There are**

sufficient pleadings to indicate why the dispute was covered by the definition of a commercial dispute under Section 2(1)(c)(vii) and explanation (a) thereof”(emphasis added).

The Hon’ble Court in paragraph no. 20 wrote as “*Thus, this Court has the occasion to peruse the documents produced with the plaint. The lease dated December 15, 1973, stipulated that the premises would be used to run a ferrous and non-ferrous foundry and machine shop factory etc.*” (emphasis added).

More so, in the paragraph no. 21, the Hon’ble Court further held that “*In this case, the averments in the plaint and the indenture of 1973 indicate that the lease of the land was granted for commercial use i.e. as a foundry and as a factory*”.

Lastly, the Hon’ble Court in paragraph no. 43 held that “*Under such circumstances, the revisional application is dismissed. The order impugned is upheld. All questions raised by the petitioners will be decided as issues in the suit, on the basis of evidence*”(emphasis added).

Therefore, it is to be stated herein that amongst the issues as raised by the said defendants in their Order VII Rule 11 application (I.A. No. 05 of 2024) before this Court and also before the Hon’ble Court preferring the revisional application, ‘commerciality’ was one of the core issues.

8. However, the plaintiff herein filed a petition before the Hon’ble High Court at Calcutta under Section 24 of the CPC read with Clause 13 of the Letters Patent being A.L.P. No. 02 of 2025, wherein by an Order dated 27th March, 2025, the Hon’ble High Court disposed of the said petition and directed this Court to try the instant suit. However, in the said Order dated 27.03.2025, the

Hon'ble High Court observed certain views which need to aver hereunder:

“8. The final outcome in the two suits will affect both the parties here in and thus making out a prima facie case for adjudication by the same court, not only to avoid possible conflicting decisions but also for the convenience of the parties on both sides, relating to common witnesses, same documents to be proved while deciding the same issues, similar in all respect to adjudicate the similar reliefs prayed for by the plaintiffs in both suits, which are inter connected.

9. Delay is also one of the grounds praying for transfer (Para 16(k)), which has been prima facie substantiated by the petitioners herein, that several extensions of interim order has been granted by the Commercial Court but the suit has not taken up for hearing, even though there is no stay of proceedings.

10. No prejudice shall be suffered by the Respondents herein, who instead of pursuing two suits before two forums would be able to pursue their relief before one court, making the balance of convenience and inconvenience tilt in favour of both parties herein, in case of such transfer.

11. For a title suit to be transferred to a Commercial Court there must exists a “commercial dispute” in the said suit.

12. That a Commercial Suit is to be heard only by a Commercial Court having jurisdiction has been laid down in the Commercial Court, Act (Section 15).

13. It has been decided finally in the petitioners“ suit before the commercial court that the issue there in, is a “commercial dispute”.

14. As such as it is seen that the “issue” in both the suits are same, between the same parties in respect of the same property, the issue in the Title Suit filed by the respondents herein, will also qualify as a “commercial dispute” and thus can be heard by the Commercial Court along with the petitioners Commercial Suit.”

9. In the instant Order VII Rule 10 application, the said defendants have contended that according to the Hon'ble High Court, the correct course for raising the issue of jurisdiction is by way of an application under Order VII Rule 10 of the CPC. The said

defendants were under the impression that the issue of jurisdiction can also be raised in an application under Order VII Rule 11 of the CPC, however, as it appears the said defendants were wrong. Hence, the said defendants made this application under Order VII Rule 10 of the CPC.

On the contrary, the plaintiff has contended that it shall be evident from a perusal of all the orders as mentioned hereinabove that the issue regarding jurisdiction was argued by the said defendants, responded to by the plaintiff and duly considered by the Court. The plaintiff has further contended that the said defendants have all along tried to derail and/or delay the instant suit by filing frivolous applications one after the other, in order to wrongfully and illegally being in possession of the suit premises.

10. Mr. Sengupta, Ld. Advocate appearing on behalf of the said defendants has contended that from the averments of the plaint it clears that the plaintiff filed the instant suit against the said defendants for wrongful occupation of the suit property. There is no subsisting contract between the plaintiff and the said respondents arise out of an agreement. The agreement executed in 1973 expired by the efflux of time in 1993 and by way of the instant suit, the plaintiff is exercising its purported statutory right to recover vacant possession of the suit property. As regards, Mr. Sengupta has relied on the submission of the Ld. Counsel of the plaintiff as recorded in the paragraph nos. 3, 9 and 10 of the Order dated 06.03.2024 passed by this Court in connection with the application filed under Order VII Rule 11 of the CPC (I.A. No. 05 of 2023). According to Mr.

Sengupta, the issue of 'commerciality' has not yet been decided by this Court in its Order dated 06.03.2024 and in the revisional application, the Hon'ble High Court held the contention of the Ld. Counsel of the said defendants that the Court was specifically required to return a finding as to the maintainability of the suit in the commercial court, was not correct and that the Hon'ble Court reserved all the issues to be decided at the trial. Therefore, as per the contention of Mr. Sengupta, the plaintiff's allegation that the said defendants are attempting to re-open the issue which was raised in the application under Order VII Rule 11 of the CPC and decided by all the Courts, is absolutely incorrect.

According to Mr. Sengupta, the dispute between the parties is not a commercial dispute inasmuch as the dispute does not arise out of an agreement relating to immovable property used exclusively in trade or commerce. As regards, he has relied on three cases being *Deepak Polymers (P) Ltd. Vs. Anchor Investments (P) Ltd*¹., *Soumitra Sen vs. Indian Oil Corporation Ltd*². and *Jaspal Singh Chandhok vs. Sandeep Poddar*³.

Mr. Sengupta has submitted that in the *Deepak Polymers* case (*supra*) the Hon'ble High Court at Calcutta held that a suit for recovery of possession of immovable properties under Section 106 of the T.P. Act, 1882 is based on the statutory right conferred by Section 106 of the 1882 Act and therefore the pre-condition of the applicability of Section 2(1)(c)(vii), i.e. the emanation of the dispute out of the lease agreement is not satisfied. In the *Jaspal Singh*

¹Reported in (2021) SCC Online Cal 4323.

²Reported in (2023) SCC Online Cal 2470.

³Reported in (2023) SCC Online Cal 361.

Chandhok's case (*supra*), the primary question was whether a suit for recovery of possession of immovable property due to efflux of time under Section 111(a) of the T.P. Act pertains to “commercial dispute” under the Commercial Courts Act, 2015. The Hon’ble High Court at Calcutta relied upon the *Deepak Polymers’* case (*supra*) and held that there was no lease deed relied by the plaintiff had expired due to efflux of time and the suit filed by the plaintiff was not covered under Section 2(1)(c)(vii) of the CCA.

Mr. Sengupta has added that in the instant application plaintiff’s contention is that there was no notice issued under Section 106 of the T.P. Act, 1882 to the said defendants. Such contention is countered by him submitting that it is an established principle of law that no notice to quit is necessary under Section 106 of the T.P. Act, 1882 and once a lease stands determined by efflux of time, there is no necessity for issuance of a notice of termination under Section 106.

According to Mr. Sengupta, while determining whether or not a dispute is commercial in nature, the primary question is whether the dispute arises out of an agreement and if the subject matter of the agreement is an immovable property, the second question is whether such immovable property is exclusively used for trade or commerce. In the instant case there is no such agreement, therefore, the second limb of test i.e. exclusively used for trade or commerce, would certainly fail. As regards, Mr. Sengupta has further relied on the *Deepak Polymers’* case (*supra*).

Mr. Sengupta has further stated that in the Order dated 27th March, 2025 passed by the Hon'ble High Court in A.L.P. No. 02 of 2025, the Hon'ble Court has observed that "*It has been decided finally in the petitioners' suit before the commercial court that the issue therein, is a 'commercial dispute'*", such observation is erroneous. As regards, Mr. Sengupta has relied on the case *Asrumati Debi vs. Rupendra Deb Raikot*⁴ wherein the Hon'ble Apex Court held that an order under Clause 13 of the Letters Patent is not a judgment since it does not affect the merits of controversy between the parties.

11. However, it is to be mentioned that the said defendants preferred a review petition before the Hon'ble High Court at Calcutta against the Order dated 27.03.2025 and the Hon'ble High Court by an Order dated 15.05.2025 dismissed the said review proceeding being registered as RVWO/12/2025 in ALP/2/2025 IA No. GA/1/2025, however, viewed as "*19. Regarding the submission made by Mr. Ghosh, that the petitioners apprehend that the order under review may influence, the Court while deciding the petition under Order 7 Rule 10 CPC filed in the commercial suit, it is made clear that the commercial court while deciding the application under order 7 Rule 10 CPC shall do so on its independent findings, as this Court while considering the prayer for transfer has not gone into the merit of any of the issues in the two suits*".

12. However, it is to be stated herein that at the time of penning the instant order, this Court is all along cautious and mindful

⁴Reported in (1954) SCC Online Cal 72.

regarding the scope and extent of the Order dated 27.03.2025 passed by the Hon'ble Court in an application made under Clause 13 of the Letters Patent being registered as A.L.P. No. 02 of 2025 and subsequently, the Order dated 15.05.2025 passed by the Hon'ble Court in the aforesaid review proceeding.

13. Mr. Kar, Ld. Sr. Counsel appearing for the plaintiff has steeply submitted that the issue pertinent to the instant demurer application i.e. 'commerciality' is no longer *res integra*, rather is barred by *res judicata* as the same has already been tested and decided in affirmative by the Hon'ble High Court and also the Hon'ble Apex of India. As such, the present application is devoid of merit. In view of his submission, Mr. Kar has relied upon the Order dated 21st May, 2024 passed by the Hon'ble High Court in C.O. No. 954 of 2024, which I have already discussed in the foregoing paragraphs of this Order. Besides the aforesaid submission, Mr. Kar has further submitted in the present case there was no notice which was issued under Section 106 of the Transfer of Property Act.

14. Mr. Bag, Ld. Counsel appearing for the plaintiff giving reliance and buttress on the submission advanced by Mr. Kar, has submitted that in S.L.P. (C) No. 15984/2024 the Hon'ble Apex Court by an Order dated 10th September, 2024 clarified that the other interlocutory matters stood concluded. Thus, there has been a final adjudication of the dispute between the parties as raised under Order VII Rule 10 being the instant application (I.A. No. 26 of 2024).

Mr. Bag has also relied on the Order dated 27th March, 2025 passed by the Hon'ble High Court in A.L.P. No. 02 of 2025 and submitted that in the said Order the Hon'ble Court held as "14. As such as it is seen that the *"issue" in both the suits are same, between the same parties in respect of the same property, the issue in the Title Suit filed by the respondents herein, will also qualify as a "commercial dispute" and thus can be heard by the Commercial Court along with the petitioners Commercial Suit*". Therefore, as per Mr. Bag, the present suit now should be adjudicated as a commercial suit under the express directions of the Hon'ble High Court at Calcutta.

Mr. Bag has further submitted that without prejudice to the aforesaid, the disputes between the parties are "commercial disputes" under Section 2(1)(c)(vii) of CCA. It is an undisputed fact that predecessor-in-interest of the said defendants came into possession of the suit premises by virtue of the Lease Deed dated 15.12.1973 which was being demised for the purpose of establishing a "ferrous and non-ferrous foundry and factory, etc." i.e. for a commercial purpose. He has further submitted that while being illegal occupation of the suit premises, the said defendants sub-leased it to West Bengal State Beverages Corporation Limited for running a depo, i.e. for a commercial purpose, as regards he has relied on the document annexed with the written objection as filed by the plaintiff to counter the instant application.

15. According to the contention of the plaintiff bolstered by its Ld. Counsels, it is evinced to me that the plaintiff's contention is revolving that the issue of 'commerciality' has been decided and if the same has not been done, for the sake argument, the instant

application would not also be subsisted inasmuch as in the property in context is solely used and even being used for a commercial purpose, which clearly entices the Section 2(1)(c)(vii) of CCA. To give a force to its contention, the plaintiff has relied upon three documents, as annexed with its written objection filed to the instant application, which are:

- i.** The Lease Deed dated 15th December, 1973.
- ii.** The Order dated 10th March, 2014 passed by the Hon'ble Division Bench of the High Court at Calcutta.
- iii.** The application made under the Right to Information Act and the reply to the same.

16. I have scrupulously perused the aforesaid documents and residue as emanated therefrom is as follows:

The Lease Deed dated 15th December, 1973 was executed by and between the original owner of the subject property, Sri Jitendra Nath Ghosh and the defendants herein, for the purpose of letting out the property described in the Schedule therein under the name and style "WILSON SUPPLY CORPORATION". In the said deed, it is conspicuously averred that "*The land shall be used for any lawful purpose which lessee desire and specifically for running a ferrous and non-ferrous Foundry and Machine shop Factory etc.*". It is further averred that "2. That, all the due pre-caution shall be exercised by the LESSEE in running the factory against fire or other accident and he shall comply with all regulations as imposed by Public Authorities in that behalf" and "11. The entirety of such factory plant and out fit as aforesaid shall remain the property of the Lessee...". For getting more conspicuous view, this Court has also relied on the Clause nos. 1,2,9,14,17 and 18 of the

said Lease Deed which would reveal that the property in issue was always intended to be used for commercial purpose. Moreover, the plaintiff in the paragraph no. 2 of its plaint also mentioned that the property had been used for commercial purpose.

Therefore, on a bare glance of the said Deed of Lease, it can safely be presumed that the Lessor is leasing a property to the Lessee with view to founding a factory and/or factory plant which of course falls in the parlance of “commerciality”. Therefore, it is to be stated herein that from the incipient stage or as on the date of execution of the said Lease Deed, the subject property was exclusively used for the commercial purpose, which is a grounded yardstick bounded by the Section 2(1)(c)(vii) of CCA by which subject matter of a dispute can be tried before a Commercial Court. More so, the connotation “used” as reflected by the Hon’ble Apex Court in *Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and Anr*⁵ is straightway satisfied in the instant case.

Besides the aforesaid, this Court further seems to refer some relevant parlance as made by the Hon’ble Division of the High Court at Calcutta in the Order dated 10.03.2014 passed in connection with W.P.L.R.T. 325 of 2013, which is as “*Admittedly, the lessees raised pucca structure having pucca foundation, pucca floor and pucca wall with partly tin and partly tile shed on the roof and used the said premises including the structure constructed therein for running its factory activities therein*”, therefrom it is clear that the Hon’ble High Court also was in an opinion that there was a factory. It is pertinent to mention that such proposition and/or averment made by the Hon’ble Division

⁵Reported in (2020) 15 SCC 585.

Bench has also been referred and/or relied upon by the Hon'ble Single Bench in its Order dated 21.05.2024 passed in connection with C.O. 954 of 2024, which I have already referred in the foregoing of this order.

In the *Ambalal Sarabhai's* case (*supra*), the Hon'ble Apex Court fixed two tests to consider the issue 'commerciality' in respect of an immovable property, which are, whether the subject immovable property was 'used' for trade or commerce or 'being used' for a commercial purpose. If one of such tests is affirmative, the Court considering the issue 'commerciality' has to admit that the suit is qualified to be tried only by a Commercial Court and not by any ordinary Civil Court. Relevant portion of the observation of the Hon'ble Apex Court made in *Ambalal Sarabhai's* (*supra*) case is as follows:

“A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of [Section 2\(1\)\(c\)](#) of the Act viz. “the agreements relating to immovable property used exclusively in trade or commerce”. The words “used exclusively in trade or commerce” are to be interpreted purposefully. The word “used” denotes “actually used” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “actually used”. Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above”.

From the foregoing averment of this order, it is no doubt to say that the subject matter of the present dispute has crossed the hurdle “used”. In spite of that, if the focus is made to the document

regarding the RTI application and reply to the same, it will be found that the said defendants sub-leased the subject property to West Bengal State Beverages Corporation Limited for running a depo, which is of course a sheer purpose of commercially used the said property. Therefore, beside the test “used”, the subject property is further crossed the threshold “being used”. Hence, there is no iota of doubt that the property in question was used and is being used exclusively for the purpose of commerce.

17. Beside the aforesaid, an argument is made by Mr. Sengupta, Ld. Counsel for the said defendants that while determining whether or not a dispute is commercial in nature, the primary question is whether the dispute arises out of an agreement and if the subject matter of the agreement is an immovable property, the second question is whether such immovable property is exclusively used for trade or commerce. In support of that, he has relied on the *Deepak Polymers’ case (supra)*.

So, according to Mr. Sengupta the dispute has to be arisen out of an agreement. In the instant case, it is admitted that there is no such agreement by and between the plaintiff and the said defendants, and reason of which is, the original owner had inducted the predecessors of the said defendants as lessees in respect of the suit premises for a period of 20 years, by way of the Lease Deed and such lease stood terminated by efflux of time sometimes in 1993. Then, the plaintiff stepped into the suit as the successors of the original owner as the said original owner sold out the suit property to the present plaintiff by way of registered conveyance deed. The

past and present owners of the suit property could not sue for recovery of possession from the persons allegedly in wrongful possession upon determination of the lease, as proceedings had been initiated before the Thika Controller and prolonged litigation continued upon the Hon'ble Supreme Court. Finally, it was held that the said defendants were not Thika tenants and the Hon'ble Apex Court granted liberty to the plaintiff to proceed in accordance with law for all other reliefs and claims. Hence, the plaintiff filed the instant suit for recovery of possession and mesne profit. It is to be stated that no notice under Section 106 of the Transfer of Property Act, 1882 was issued.

Being the successor in interest of the original lessor, the plaintiff came into the picture, therefore, the issue having an agreement between the plaintiff and the said defendants as raised by Mr. Sengupta, cannot and does not arise at all. If any such agreement is to be considered, that would be the original Lease Deed dated 15th December, 1973 which stood terminated and the same is clearly propelling that 'commerciality' is being emanated therefrom, which I discussed above.

18. In all the submissions made by the plaintiff, there is an issue that the point of 'commerciality' has been tested and as such this becomes *res judicata*, and counter to that, the said defendants tried to satisfied that the said point is *res integra*. On that aspect, it is to be clarified that at the point of penning this Order, this Court had to independently and freshly consider all the relevant pleadings placed and/or supplied by both sides and all such pleadings have

been perused and even relied on and/or referred to herein for coming to a robust adjudication of this application, shelving aside the point *re judicata* and/or *res integra* in respect of the issue “commerciality”. And, from such pleadings, this Court comes to a clear finding that the subject matter of the dispute is solely commercial in nature and as such the suit in context needs to be tried before this Court.

19. Therefore, from the above, I am of the considered view that the instant application being registered as I.A. No. 26 of 2024 is hereby dismissed on contest, without any order as to costs and accordingly, **disposed off**.

Fix the matter on **21.05.2025 from 03:00 p.m. to 03:30 p.m.** for hearing of I.A. No. 13 of 2023 and for filing written objection by the defendants, if any, in the meantime by serving the same upon the plaintiff.

Parties to act on the basis of the downloaded copy of the order sheet from the website/E-court App.

Dictated and corrected by me,

Sd/-
Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Sd/-
Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram