
(2026) 08 CAL CK 2983
In the Calcutta High Court, Appellate Side
Case No : F.M.A.T 271 of 2026

Arvind Kumar Jhunjhunwala & Ors.	APPELLANT
Vs	
Highview Apartments Private Limited & Ors.	RESPONDENT

Date of Decision : 04-08-2026

Acts Referred:

Code of Civil Procedure — Order XLI Rule 11, XXXIX Rule 10, Section 151, XLIII, Rule 10 of Order XXXIX

Citation : (2026) 08 CAL CK 2983

Hon'ble Judges : Sabyasachi Bhattacharyya, J; Supratim Bhattacharya, J

Bench : Division Bench

Advocate : Mr. Ishan Saha, Ms. Ishita Roy, Mr. Utpal Bose, Mr. Meghnad Dutta, Mr. S. Rudra

Final Decision : Dismissed

Judgement

1. Affidavit-of-service filed in court today be kept on record.
2. On the prayer of learned counsel for the appellants, leave is granted to the learned advocate-on-record for the appellants to rectify the valuation statement in the memorandum of appeal during the course of the day.
3. The appeal is taken up for hearing under Order XLI Rule 11 of the Code of Civil Procedure.
4. A threshold objection is raised at the outset by learned senior counsel appearing for the plaintiff/respondent no.1, as to the maintainability of the appeal.
5. Learned senior counsel points out that although Order XXXIX Rule 10 of the Code has been referred to in one of the precedents cited before the learned Trial Judge, which was taken note of, ultimately, the power invoked by the learned Trial Judge in passing the impugned order was Section 151 of the Code of Civil Procedure, under which the application from which the present order arises was also captioned.

6. As such, since an order under Section 151 of the Code is not appealable, the present appeal is not maintainable in the eye of law.

7. Learned counsel for the appellants, in reply to the maintainability objection, places reliance on the reference to the judgment of *Green Band Apartmentin* the impugned order, where a learned Single Judge of this court had invoked the power under Order XXXIX Rule 10 of the Code to pass directions as to payment of occupation charges, although distinguishing the ratio laid down therein on other grounds.

8. Learned counsel also takes the Court through the findings of the learned Trial Judge at page-7 of the impugned order, where it was recorded that in view of the thereinabove-referred decisions, "a well-settled legal proposition can be said to have been evolved and emerged as judicial precedents with the passage of time as to the effect that in exercise of power *under Order XXXIX Rule 10 of CPC read with Section 151 of CPC*, occupation charges can be fixed to be payable in terms of mutually agreed rate of last paid rent."

9. Hence, learned counsel for the appellants argues that the learned Trial Judge invoked the jurisdiction under Order XXXIX Rule 10 of the Code, albeit erroneously, which determines the remedy available against the impugned order.

10. It is contended that since an order passed under Order XXXIX Rule 10 of the Code is appealable under Order XLIII of the Code, the present appeal is maintainable.

11. On a careful perusal of the impugned order, we find that although the learned Trial Judge referred to Order XXXIX Rule 10, read with Section 151, of the Code apparently to invest the court with the powers to direct occupation charges even during pendency of an eviction suit, the power ultimately invoked by the court was specifically not mentioned to be Order XXXIX Rule 10.

12. Although the judgment of *Green Band (supra)* has been referred to in the ratio of the impugned order, where Order XXXIX Rule 10 was invoked by a learned Single Judge of this Court under similar circumstances, in subsequent portions of the impugned order, the learned Trial Judge also observed that finally the question remains as to what reliefs the plaintiff is entitled to get at that stage or as to whether the plaintiff is entitled to get all the reliefs as sought for in the application filed under Section 151 of the Code of Civil Procedure.

13. In the operative portion of the order as well, the learned Trial Judge categorically refers to the application being filed under Section 151 of the Code, thus belying the perception that the learned Trial Judge invoked powers under Order XXXIX Rule 10 of the Code.

14. Even otherwise, as submitted by both parties, Rule 10 of Order XXXIX of the Code does not apply to the present case, since under the said provision, only where the subject matter of a suit is money or some other thing capable of delivery and any party thereto *admits* that he holds such money or such thing as

a *trustee* for another party, or that it belongs or is due to another party, the court may order such amount to be deposited in court.

15. In the present case, during pendency of a suit for eviction and *mesne* profits, the plaintiff/respondent no.1 sought a direction on the defendants/appellants to pay occupation charges in respect of the suit property, which takes the prayer entirely out of the paradigm of Order XXXIX Rule 10 of the Code, particularly since there is no admission on such count on the part of the appellants.

16. Thus, it is under Section 151 of the Code, and not under Order XXXIX Rule 10 thereof, that the impugned order was passed by the learned Trial Judge.

17. Hence, an appeal being a creature of statute and no appeal being provided for statutorily against an order passed under Section 151 of the Code, the present appeal is not maintainable on such count.

18. Although both parties have advanced arguments on the merits of the case as well, in view of the threshold objection having been entertained, we abstain from commenting on the merits of the case, since it will tantamount to going beyond the jurisdiction of this court and pre-judging the issues.

19. Accordingly, FMAT 271 of 2026 is dismissed as not maintainable, with liberty to the appellants to take appropriate legal recourse against the impugned order.

20. Liberty is granted to the learned Advocate-on-record for the appellants to take back the certified copy of the impugned order, upon furnishing a photocopy thereof for the records.

21. Consequentially, CAN 1 of 2026 is also dismissed.

22. It is made clear that this court has not entered into the merits of the matter at all.

23. We also permit the appellants to withdraw the excess court fees of Rs.50,000/-, which has been erroneously deposited in connection with the appeal over and above the fixed court fees payable for a miscellaneous appeal.

24. As and when so approached by the appellants and/or the learned Advocate-on-record for the appellants, the said excess court fee shall be refunded to the appellants.

25. There will be no order as to costs.

26. Urgent certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.