

Neutral Citation No. - 2023:AHC-LKO:79267

Reserved

Case :- MATTERS UNDER ARTICLE 227 No. - 4811 of 2023

Petitioner :- Shashank Gupta

Respondent :- M/S Vatika Nirman Private Limited Lko. U.P. Thru.
Authorized Signatory And Another

Counsel for Petitioner :- Brijesh Kumar,Utkarsh Srivastava

Counsel for Respondent :- Suyash Gupta

Hon'ble Pankaj Bhatia,J.

1. Heard Sri Brijesh Kumar Saxena and Sri Utkarsh Srivastava, learned Counsel for petitioner and Sri Sudeep Seth, learned Senior Counsel assisted by Sri Suyash Gupta, learned Counsel appearing on behalf of the respondent no.1.
2. The present application has been filed by the petitioner challenging the order dated 03.08.2023, whereby the application filed by the petitioner for dismissal of the suit filed by the respondent Company under Order VII Rule 11 of the CPC has been rejected by the learned Commercial Court-II, Lucknow.
3. The facts in brief are that the respondent Company filed a suit for declaration and permanent injunction against the petitioner and one Pankaj Thakur before the Commercial Court, Lucknow. In the said suit, which is on record, the following prayers were made:

“(i) decree of declaration to the effect that all 15 (fifteen) builder buyer agreements executed with regard to unit numbers/flat numbers mentioned in paragraph 6 (six) of the plaint are illegal, null and void-ab-initio without having any legal sanctity, without consideration and had been procured by

force, coercion and is a result of cheating and fraud played by defendants in collusion with each other against the plaintiff company. The above illegal Builder Buyer Agreements do not create any legal right against the plaintiff company in any manner.

(ii) decree of permanent injunction whereby defendants be restrained permanently from creating any third party interest by way of sale, mortgage, lease or from creating any lien on the above flats/property detailed and described in paragraph no.6 (six) of the plaint on the basis of above illegal, null and void builder buyer agreements may kindly be passed in favour of plaintiff and against the defendants.

(iii) decree of permanent injunction whereby defendants be restrained permanently from interfering in the peaceful possession of above flats/units/property detailed and described in paragraph no.6 (six) of the plaint.

(iv) decree of declaration to the effect that the proceedings initiated by defendant before UP, RERA on the basis of illegal, null and void-ab-initio builder buyer agreements cannot be proceeded further and the above proceedings are farce as the same are emanating from the illegal documents procured by defendants by illegal means.

(v) suit be decreed in favour of plaintiff and against the defendants with costs.

(vi) any other relief which this Hon'ble Court may deem just and proper in the circumstances of the case may also be granted in favour of the plaintiff."

4. In the suit, it was stated that the plaintiff-Company is involved in a construction of a Group Housing and the petitioner, who was the defendant no.1 of the said suit, was said to be a sole authorized bank signatory working on behalf of the plaintiff-Company and the performa respondent was stated to be a Junior Accountant. Several allegations were levelled against the petitioner. In para 6 of the plaint, it was stated that the plaintiff-Company was engaged in construction of residential accommodation and the petitioner had *mala fidely* allotted 15 residential flats and had retained the money collected towards the said flats. The builder buyer agreement in respect of the constructions made by the plaintiff-Company contained in Clause-14(a) which stated that the allotments of the units shall be for residential purpose only. The said agreement is on record as Annexure-3 to the writ petition. It is also the case of the petitioner that he had filed 12 different complaint against the respondent-Company before the Uttar Pradesh Real Estate Regulatory Authority (in short 'the UPRERA'), which are pending consideration and were also mentioned in the plaint filed by the respondent-Company.
5. The petitioner, who was the defendant of the plaint, filed a written statement denying the allegations levelled in the plaint on 08.07.2023 and simultaneously also filed an application under Order VII Rule 11 of the CPC for dismissing of the plaint mainly on the ground that the dispute raised in the plaint and the reliefs as claimed could not be termed as a commercial dispute as defined under Section 2 of the Commercial Courts Act. The respondent-Company herein and the plaintiff of the said suit filed objection to the application filed under Order VII Rule 11 of the CPC and against the said objection, reply/

rejoinder was also filed by the petitioner, which are contained as Annexures 5, 6 & 7 to the writ petition.

6. After hearing the parties at length on the application filed under Order VII Rule 11, the Commercial Court dismissed the application filed by the petitioner by means of an order dated 03.08.2023, which has been challenged by the petitioner in the present application.
7. The neat submission of the Counsel for the petitioner Sri Brijesh Kumar Saxena is that the Commercial Court has erred in dismissing the application as even as per the plaint allegation, the disputes raised in the plaint could not be said to be a commercial dispute as defined under Section 2 of the Commercial Courts Act. It was also stated on behalf of the petitioner-defendant no.1 that the court fee paid in the suit was not proper and the arguments based upon the bar created by Section 79 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the 2016 Act') was also raised. In the order impugned, the Commercial Court although noted the submission of both the parties, dismissed the application holding that the law laid down by the Hon'ble Supreme Court in the case of *Ambalal Sarabhai Enterprises Limited vs K.S. Infraspace LLP and another; (2020) 15 SCC 585* shall not be applicable to the facts of the present case.
8. The contention of the petitioner with regard to the Section 10 of the CPC, the court fee being insufficient and the suit being bar by virtue of Section 79 of the 2016 Act, was also repelled.
9. Sri Brijesh Kumar Saxena, learned Counsel for the petitioner argues that the facts of the present case are squarely covered by the judgment of the Hon'ble Supreme Court in the case of

Ambalal Sarabhai Enterprises Limited (Supra) and confines his argument to the fact that the suit was not maintainable as it was not a commercial dispute as defined under Section 2 of the Commercial Courts Act. He draws my attention to the allegations levelled in the plaint, averments made in the application filed under Order VII Rule 11 as also the objections of the respondent-Company, who had opposed the said application to demonstrate that it was throughout the case of the respondent-Company that it was a commercial dispute as per Section 2 (1)(c)(vii) of the Commercial Courts Act and thus, this Court should intervene and set aside the order and also to quash the plaint.

10. Sri Sudeep Seth, learned Senior Advocate appearing on behalf of the respondent-Company, on the other hand, justifies the order by arguing that although in terms of the brochure and the builder buyer agreement, it was provided that the property can be used for residential purposes only, however, in practice, the property can be used for other purposes also, thus, the suit would fall within the definition of Section 2(1)(c)(vii) of the Commercial Courts Act. He also argues that although in the objections filed by the respondent-Company, it was specifically stated that the dispute raised in the plaint was covered by Section 2(1)(c)(vii) of the Commercial Courts Act, this Court should also consider that the dispute would also be covered by virtue of Section 2(1)(c)(vi) as well as Section 2 (1)(c)(xiv) of the Commercial Courts Act.
11. Considering the fact that the arguments raised by the parties are confined to the fact that the suit was barred by Section 2(1)(c) (vii) of the Commercial Courts Act, I propose to deal with the said issued at the first instance.

12. To appreciate the controversy raised in the present writ petition, it is essential to note the scheme of the Commercial Courts Act established by virtue of Act No.4 of 2016.
13. The preamble of the Act demonstrates that the Act was enacted to provide for commercial courts for adjudication of the commercial disputes of specified value and the matters connected therewith. The relevant provisions of Section 2(1)(c) which defines commercial dispute being Clause (vi) (vii) & (xiv) as are relevant for the present case are quoted below:

“Section 2. Definitions – (1) In this Act, unless the context otherwise requires, -

...

(c) “commercial dispute” means a dispute arising out of -

...

(vi) construction and infrastructure contracts, including tenders;

(vii) agreements relating to immovable property used exclusively in trade or commerce;

...

(xiv) mercantile agency and mercantile usage;

...”

14. In view of the scheme of the Act, as is clear from the preamble, clearly the legislature intended to take away the jurisdiction vested in the civil courts in respect of certain disputes and to that extent, the suit for which the commercial courts were established, could not institute before a civil court and thus, the jurisdiction of the civil courts provided under Section 9 of the CPC is taken away in respect of the commercial disputes as defined under Section 2.
15. On a plain reading of Clause (vii) of Section 2(1)(c) of the Commercial Courts Act, it is specifically provided that

commercial disputes would be the one which emanates from the agreements relating to immovable property used exclusively in trade or commerce. To omit the reading of the words exclusively in ‘trade or commerce’ will lead to an inference that the jurisdiction of the civil courts under Section 9 is being taken away impliedly, which is not permissible. Even otherwise, the said issue stands concluded in view of the pronouncement of the Hon’ble Supreme Court in the case of *Ambalal Sarabhai Enterprises Limited (supra)*, wherein the Hon’ble Supreme Court had the occasion to consider the scope of Section 2(i)(c) (vii) held as under:

“6. At the outset, it is noticed that the consideration required in the instant case is as to whether the transaction between the parties herein which is the subject-matter of the suit could be considered as a “commercial dispute” so as to enable the Commercial Court to entertain the suit. In that regard, it is necessary to take note of Section 2(1) (c)(vii) of the CC Act, 2015. The said provision to the extent relevant is extracted here below for reference.

*“2. **Definition.**—(1) In this Act, unless the context otherwise requires—*

*(a)-(b) * * **

*(c) “**commercial dispute**” means a dispute arising out of—*

*(i)-(vi) * * **

(vii) agreements relating to immovable property used exclusively in trade or commerce;

*(viii)-(xxii) * * **

From a perusal of the provision relied upon by the learned Senior Advocates it is noticed that the disputes arising out of agreements relating to immovable property used exclusively in trade or

commerce will qualify to be a commercial dispute to be tried by Commercial Courts. The question therefore would be that, in the instant case though the parties have entered into a sale transaction of the immovable property and presently in the suit the registration of a mortgage deed pertaining to the immovable property is sought, whether the immovable property involved could be considered as being used exclusively in trade or commerce.

14. In that view it is also necessary to carefully examine and entertain only disputes which actually answers the definition “commercial disputes” as provided under the Act. In the instant case, as already taken note neither the agreement between the parties refers to the nature of the immovable property being exclusively used for trade or commerce as on the date of the agreement nor is there any pleading to that effect in the plaint. Further the very relief sought in the suit is for execution of the mortgage deed which is in the nature of specific performance of the terms of Memorandum of Understanding without reference to nature of the use of the immovable property in trade or commerce as on the date of the suit. Therefore, if all these aspects are kept in view, we are of the opinion that in the present facts the High Court was justified in its conclusion arrived through the order dated 1-3-2019 [K.S. Infraspace LLP v. Ambalal Sarabhai Enterprises Ltd., 2019 SCC OnLine Guj 1926] impugned herein. The Commercial Court shall therefore return the plaint indicating a date for its presentation before the Court having jurisdiction.”

16. In view of the specific pronouncement of the Hon’ble Supreme Court interpreting Clause (vii) as extracted above and on plain reading of the provisions of the builder buyer agreements especially Clause 14(a) of the said Agreement, which is on record at page 60, the issue as raised in the suit filed by the

respondent-Company pertaining to the use of the flats, for which, the suit was filed stand clinched, thus I have no hesitation in holding that the suit as filed alleging that the execution of 15 builder buyer agreements to be illegal, null and void would not qualify to be a commercial dispute as defined under Section 2(1)(c)(vii) of the Commercial Courts Act.

17. Considering the second submission of the Counsel for the respondent-Company, in any case the dispute could fall within Clause (vi) and (xiv), *prima facie*, merits rejection as Clause (vi) of Section 2(1)(c) pertains to construction and infrastructure contract, including tenders whereas in the present case, there were no construction or infrastructure contract in between the plaintiff and the defendant, as admittedly, the plaintiff claimed that the petitioner-defendant no.1 was working for the Company. Similarly the same would not fall within the definition of Clause (xiv) as there was no 'mercantile agency' and 'mercantile usage' relationship in between the plaintiff and the defendant. The terms 'mercantile agency' and 'mercantile usage', although are not defined under the Commercial Courts Act owe its genesis to the Sale and Goods Act which under Section 2(9) defines mercantile agent as under:

“2 (9). “mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;”

No such relationship existed in between the plaintiff and the defendant. Even otherwise the said plea pertaining to the applicability of Clause (vi) and Clause (xiv) were neither raised in the objection filed by the respondent-Company nor are they

in the pleadings on record which has led to passing of the impugned order.

18. The reliefs as prayed could be agitated before the civil court in view of the provisions of Section 9 of the CPC, thus, for all the reasons recorded above, the writ petition filed by the petitioner deserves to be allowed. The order impugned dated 03.08.2023 (Annexure-1) is quashed.
19. The Commercial Court is directed to pass necessary orders returning the plaint filed by the plaintiff for it being presented before proper court.
20. In terms of the above observations, the writ petition stands *allowed*.

Order Dated:04.12.2023
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(Pankaj Bhatia,J.)