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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 01.09.2016

+ CM(M) 850/2016

MONIKA ARORA

..... Petitioner

Through Mr.Sudhir Nandrajog, Sr. Advocate
with Mr.Shailen Bhatia, Mr.Amit Jain and
Ms.Priyanka Anand, Advocates.

versus

NEERAJ KOHLI & ANR

..... Respondents

Through Mr.Rajesh Yadav and Ms.Ruchira,
Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

CM Nos. 31577-78/2016 (exemption)

Exemption is allowed subject to all just exceptions.

CM(M) 850/2016 and CM No. 31576/2016 (stay)

1. By the present petition, the petitioner seeks to impugn the order dated 02.08.2016 whereby an application under Section 151 CPC filed by the petitioner seeking re-transfer of the suit back to the High Court on the ground that the dispute involved in the suit is a commercial dispute covered under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (*hereinafter referred to as the Act.*) was dismissed. The trial court concluded that there is no commercial

dispute involved in the present case.

2. The suit was initially filed before this court and was transferred vide order dated 04.12.2015 pursuant to a notification issued by this court vide Circular dated 24.11.2015. Subsequently, on 28.04.2016 this court issued another circular as addendum to the circular dated 24.11.2015 stating that all suits covered by the first proviso to Section 7 of the Act filed or pending as on 26.10.2015 on the original side of this court shall be heard and disposed of by the Commercial Division of this court. It further provided that all suits relating to commercial disputes which have been transferred to the district courts pursuant to the notification dated 24.11.2015 shall be recalled back to the Delhi High Court and would be heard and disposed of by the Commercial Division of the Delhi High Court.

3. The present suit was filed by the respondents against the petitioner for specific performance of agreement to sell dated 12.01.2006. The parties along with one M/s.Jia Constructions had entered into an agreement to sell regarding the property being entire basement and ground floor of the property bearing No. L-II/92 Lajpat Nagar-II, New Delhi. It is the contention of the petitioner that the property in question as per the Master Plan for Delhi 2021 is notified as a commercial property. It is further urged that PW-1 Ms.Neeraj Kohli i.e. respondent No. 1 in her cross-examination dated 10.03.2014 has admitted that the property was purchased for using it as an office. Similarly, PW-2 Mr. Navin Kohli also in his cross-examination on 25.03.2015 stated that the purpose of purchasing the property was extension of their business and that it was to be used as an office-cum-godown. It is also urged that the agreement to sell was entered into between the petitioner and one M/s Jia Constructions (a co-owner of the property)

with the respondents. The said Jia Constructions has settled the matter with the respondents and has executed a sale deed in favour of the respondents for half undivided share in the basement and half undivided share in the ground floor of the property in question vide sale deed dated 04.06.2010. It is urged that in the sale deed, there is a column in the beginning which states “Use factor-Commercial”. Hence, it is urged that the respondents have admitted that the property in question is a commercial property. Reliance is placed on Section 2(1)(c)(vii) of the Act to contend that a commercial dispute means a dispute arising out of an agreement relating to an immovable property used exclusively in trade and commerce. Hence, it is urged that in terms of the notification of this court dated 28.04.2016, the matter should have been sent back for adjudication before this court and the trial court has erroneously passed the impugned order.

4. The trial court vide impugned order noted that as per Section 2(1)(c)(vii) of the Act, only agreements pertaining to immovable property used exclusively in trade and commerce fall within the ambit of a commercial dispute. It also noted that as per the agreement to sell, there is no stipulation contained that the property is being conveyed for commercial use. The sanctioned plan is for residential purpose. Hence, the property cannot be said to be used exclusively in trade and commerce. The admissions of the plaintiffs in the cross-examination were not accepted as clinching the factum of “exclusive” use in trade and commerce. and the present application was dismissed.

5. I have heard the learned counsel for the parties.

6. Learned senior counsel appearing for the petitioner has reiterated the contentions noted above, namely, the admissions of PW-1 and PW-2 in

cross-examination, the sale deed executed by M/s. Jia Constructions in favour of the respondents and the Master Plan 2021 to contend that by all counts, the property is a commercial property and the dispute between the parties would be a commercial dispute as per Section 2 of the Act.

7. Learned counsel appearing for the respondents has contended that in the present case when the agreement to sell was executed on 12.01.2006 between the parties, the property in question was not a commercial property. It was notified as a commercial property on 07.02.2007. He also relies upon the pleadings of the parties to contend that there is no averment that the property is a commercial property. He submits that even the plans have been sanctioned for a residential property. He relies upon the cross-examination of PW-4, Assistant Engineer South Delhi Municipal Corporation who has confirmed that the plans were sanctioned for residential purpose after demolition of the existing building. Merely because at some future stage the property may be used for commercial purpose, he submits, would not be a ground to hold it to be a commercial property. He relies upon the judgment of this court in the case of *Soni Dave vs. Trans Asian Industries Expositions Pvt. Ltd., 2016 SCC OnLine Del. 4282*.

8. I may first look at the statutory position. Section 2 (1) (c) (vii) reads as follows:-

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

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

xxx

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

xxx

Explanation.—A commercial dispute shall not cease to be a commercial dispute merely because— (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;”

9. In view of the above statutory provision, agreements relating to immovable property used exclusively in trade and commerce would be a commercial dispute. As per Section 7 of the Act, a Commercial Division shall have jurisdiction to try all suits relating to a commercial dispute of a specified value. Section 7 of the Act reads as follows:-

“7. Jurisdiction of Commercial Divisions of High Courts-All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court: ...”

10. The contention of the respondents that for the purpose of adjudicating upon the application of the petitioner seeking to have the suit transferred from the trial court to the Commercial Division of this court, only the pleadings are to be looked at is a misplaced contention. The Division Bench of this court in *State Trading Corporation of India Ltd. v. Government of Peoples Republic of Bangladesh*, 63(1996)DLT971/ (MANU/DE/0465/1996), summed up in its conclusion which are relevant here as follows:

“38 (IV) A court seized of a suit and a prayer for the grant of ad interim relief may be faced with a doubt or challenge as to the availability of jurisdiction to try the suit in a variety of

circumstances. The court has to act as under :- (a) In the case of inherent lack of jurisdiction apparent on the face of the record, court cannot exercise jurisdiction over the suit so as to pass any interlocutory order or grant interim relief; (b) If it appears from a bare reading of the plaint that the court does not have jurisdiction to try the suit, the plaint itself may be returned for presentation to a proper court under Order 7 Rule 10 CPC; (c) If the suit appears to be barred by any law, the plaint may be rejected under Order 7 Rule 11 Civil Procedure Code ; (d) It may be a disputed question of fact or law or both- whether court has jurisdiction over the suit or not. Such a question if it be a pure question of law it can be decided on hearing the parties on a preliminary issue. Such a challenge to the jurisdiction of the court to entertain the -suit being laid by the defendant as a pure question of law, it is incumbent upon the Judge to determine that question as a preliminary issue before making absolute the rule issued earlier; (e) If the determination of jurisdiction of the Court is a question of fact or mixed question of fact and law requiring evidence to be adduced before recording a finding, the determination of the question may in appropriate, cases be liable to be postponed till after the determination of all or several other issues if the evidence to be adduced by the parties may be common on the issue of jurisdiction and such other issues;”

In the present case, the parties have led their evidence and the matter is now at the stage of final argument. The controversy raised about whether the case covers a commercial dispute or not is a mixed question of law and facts. The evidence of the parties would have to be gone into. It would not be possible to decide this issue merely based on the pleadings of the parties. In view of the notification of this court dated 28.04.2016, this issue of jurisdiction would not be adjudicated upon at this stage itself.

11. The other contention of the respondents that Section 2 (1) (c) (vii) only relates to a property which is currently being used as a commercial

property is also a misplaced contention. As per Delhi Master Plan 2021, the property is now situated in a commercial area. The respondents propose to use it for their business. Merely because it is a fresh construction which has so far not been used for commercial purpose, would not take it out of the ambit of a commercial property.

12. The reliance of the learned counsel for the respondents on the judgment of this court in the case of *Soni Dave vs. Trans Asian Industries Expositions Pvt. Ltd.* is misplaced. That was a matter in which the property as per the Master Plan and the Municipal laws was a residential property. The court held that even if it is let out for use exclusively in trade and commerce or is used exclusively in trade and commerce it would still not qualify as a commercial property used exclusively in trade and commerce within the meaning of Section 2(1)(c) (vii) of the Act. It was stated that legislature could not have intended to bring disputes arising out of transactions relating to immovable property illegally used exclusively in trade and commerce within the ambit of a commercial dispute. In para 18, the court held as follows:-

“18. Following the said principles, Section 2(1)(c)(vii) has to be read and interpreted as ‘immovable property which is in accordance with law, used exclusively in trade or commerce’ and not as ‘immovable property which, in contravention of law, is used exclusively in trade or commerce’.”

13. The admitted position is that after sanction of the building plan and the execution of the agreement to sell, the area has been notified as a commercial area on 07.02.2007. The suit was filed subsequently in October 2007 i.e. when the area had already become a commercial area. The evidence and the testimony of PW-1 and PW-2 shows that the property is to

be used only for commercial purposes. To the same effect is also of the sale deed dated 04.06.2010 executed by Jia Constructions in favour of the respondents which states that the property is for “commercial use”.

14. In view of the above evidence on record, it is clear that the dispute which is to be adjudicated upon in the present suit is a commercial dispute which pertains to an agreement relating to immovable property to be used exclusively in trade and commerce.

15. The notification dated 28.04.2016 of this court states as follows:-

“Dated: 28.04.2016

CIRCULAR

Hon'ble the Chief Justice vide Notification dated 28th April, 2016 has been pleased to order issuance of the following addendum to Notification No. 27187/DHC/Orgl. dated 24.11.2015:

"All suits and applications covered by the first proviso to Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 filed or pending as on 26.10.2015 on the Original Side of the Delhi High Court, shall remain in the Delhi High Court and shall be heard and disposed of by the Commercial Division of Delhi High Court."

In terms of the said addendum, all suits and applications relating to commercial disputes stipulated by an Act to lie in a Court not inferior to a District Court, which have been transferred to the District Courts pursuant to the Notification No.27187/DHC/Orgl. dated 24.11.2015 shall be recalled back to the Delhi High Court for being heard and disposed of by the Commercial Division of Delhi High Court. Parties to such suits or applications may also approach the concerned District Courts

for sending such suits or applications to Delhi High Court for disposal by the Commercial Division of Delhi High Court. All such suits and applications that shall be recalled, on receipt from the District Courts, in the first instance shall be listed before the Joint Registrars for fixation of dates for listing before the Commercial Division of the Delhi High Court.”

16. In the light of the above notification and in view of section 2(1) (c) (vii) of the act, the present suit is liable to be transferred to this court for adjudication by the Commercial Division. The petition is accordingly allowed.

JAYANT NATH, J

SEPTEMBER 01, 2016

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