

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

+ **FAO (OS) No.166/2016**

% **Reserved on: 27th April, 2017**
Date of Decision: 22nd September, 2017

JAGMOHAN BEHLAppellant
Through Mr. D.K. Rustagi, Ms. Apoorv Rustagi
and Ms. Medha Arya, Advocates.

Versus

STATE BANK OF INDORE ...Respondents
Through Mr. S.N. Relan, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE A.K. CHAWLA

SANJIV KHANNA, J.

This intra-Court appeal raises an interesting issue on interpretation of Section 2 (1) (c) (vii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Act, for short).

2. Facts in brief relevant for the present controversy may be noted. The appellant, Jagmohan Behl, has instituted CS (OS) No. 2008/2010 against the tenant, State Bank of Indore, who is respondent before us. For the sake of convenience, the appellant has been described as the “plaintiff” and the respondent has been described as the “defendant” in the present order and judgment.

3. The aforesaid suit pertains to recovery of mesne profits of Rs.1.08 crores for the period between 1st September, 2007 till 30th August, 2010 along with interest from the defendant in respect of property No.M-46, Connaught Circus, New Delhi (hereinafter referred to as “the property”). The said property was given on lease to the defendant in the year 1986 for a period of five year on a monthly rent of Rs.40,000/- with renewal clause for two further terms with enhancement of rent by 15%. The defendant bank had also sanctioned a loan of Rs.24 lakhs with interest @ 17.5% per annum to the plaintiff which was agreed to be paid by way of adjustment against the rent.

4. The plaintiff had earlier filed a civil suit seeking possession (sic ejectment) on 27th October, 2001 being Suit No.340/2001 in which a decree under Order XII Rule 6 of the Code of Civil Procedure, 1908 (Code, for short) was passed on 1st May, 2002. However, in RFA No.361/2002 preferred by the defendant Bank the execution was stayed. For the sake of completeness, we would also record that the plaintiff has also sought decree of mandatory injunction and mesne profits with effect from 1st September, 2010 till the date of decree @ Rs.18,000/- per day. Interest on the amounts due was claimed.

5. In RFA No. 361/2002, the defendant on 25th August, 2011 had given an undertaking to vacate the premises within one year. The undertaking was accepted on the term that the defendant would pay Rs.1 lakh per month to the plaintiff towards rent/mesne profit for the period the defendant had remained in occupation along with interest and water charges. According to the said undertaking, the defendant was to vacate

the premises by 24th August, 2012. However, on 4th August, 2012, defendant had filed C.M. No.13656/2012 for extension of time. This application was allowed, granting six months' further time to vacate the property, subject to the defendant paying Rs.2,75,000/- towards rent/mesne profit for the period it continued to remain in occupation along with water and electricity charges.

6. It appears that possession of the property has been handed over to the plaintiff. However, the plaintiff has persisted with his suit CS (OS) No.2008/2010.

7. CS(OS) NO. 2008/2010 was filed in the Delhi High Court in view of the pecuniary jurisdiction. However, vide office order dated 24th November, 2015, issued by the Chief Justice in exercise of power conferred under Section 4 of the Delhi High Court (Amendment) Act, 2015, pecuniary jurisdiction for ordinary suits, which were not "commercial disputes", was raised to Rs.2 crores. Suits below Rs.2 crores were to be transferred to district courts. However, in cases of "commercial disputes" as defined under the Act, suits of specified value as determined vide Section 12 thereof, of not less than Rs.1 crore were to be tried by the High Court and were not to be transferred.

8. Learned single Judge by the impugned order dated 1st March, 2016, referring to Section 2 (1) (c) (vii) of the Act has held that the suit has to be transferred to the district court as it does not relate to a commercial dispute for no right under an agreement relating to immoveable property was sought to be enforced, inasmuch as the suit only seeks recovery of rent and

mesne profits. It would be a suit under Section 9 of the Act and not pursuant to an agreement.

9. In order to appreciate the controversy, we would first reproduce the relevant definition clause, i.e. 2 (1) (c) (vii), as also the explanation thereto:-

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

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

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

Explanation.-A commercial dispute shall not cease to be a commercial dispute merely because-

(a) It also involves action for recovery of immoveable property or for realisation of monies out of immoveable property given as security or involves any other relief pertaining to immoveable 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;”

10. The explanation in the present case has to be read as part and parcel of clause (vii), for the language of the explanation shows the purpose, and the construction consistent with the purpose which should be placed on the main provision. The main provision, therefore, has to be construed and read in the light of the explanation and accordingly the scope and ambit of sub-clause (vii) to clause(c), defining the expression “commercial dispute”, has to be interpreted. The explanation harmonises and clears up any

ambiguity or doubt when it comes to interpretation of the main provision. In *S. Sundaran Pillai and Ors. Vs. V.R. Pattabiraman & Ors.* (1985) 1 SCC 591, it was observed that explanation to a statutory provision can explain the meaning and intendment of the provision itself and also clear any obscurity and vagueness to clarify and make it consistent with the dominant object which the explanation seems to sub-serve. It fills up the gap. However, such explanation should not be construed so as to take away the statutory right with which any person under a statute has been clothed or to set at naught the working of the Act by becoming a hindrance in the interpretation of the same.

11. Clause (c) defines the “commercial dispute” in the Act to mean a dispute arising out of different sub-clauses. The expression “arising out of” in the context of clause (vii) refers to an agreement in relation to an immoveable property. The expressions “arising out of” and “in relation to immoveable property”¹ have to be given their natural and general contours. These are wide and expansive expressions and are not to be given a narrow and restricted meaning. The expressions would include all matters relating to all agreements in connection with immoveable properties. The immoveable property should form the dominant purpose of the agreement

¹The Supreme Court in *Doypack Systems (P) Ltd. vs Union of India* (1988) 2 SCC 299 went into the meaning of the phrases "pertaining to", "in relation to" and "arising out of". The court in the said case observed -

"48.The expressions "pertaining to", "in relation to" and "arising out of", used in the deeming provision, they are used in the expansive sense, as per decisions of the court, meanings found in standard dictionaries and principles of broad and liberal interpretation in consonance with Article 39 (b) and (c) of the Constitution.

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50. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context....."

out of which the dispute arises. There is another significant stipulation in clause (vii) relating to immoveable property, i.e., the property should be used exclusively in trade or commerce. The natural and grammatical meaning of clause (vii) is that all disputes arising out of agreements relating to immoveable property when the immoveable property is exclusively used for trade and commerce would qualify as a commercial dispute. The immoveable property must be used exclusively for trade or business and it is not material whether renting of immoveable property was the trade or business activity carried on by the landlord. Use of the property as for trade and business is determinative. Properties which are not exclusively used for trade or commerce would be excluded.

12. The explanation stipulates that a commercial dispute shall not cease to be a commercial dispute merely because it involves recovery of immoveable property, or is for realisation of money out of immoveable property given as security or involves any other relief pertaining to immoveable property, and would be a commercial dispute as defined in sub-clause (vii) to clause (c). The expression “shall not cease”, it could be asserted, has been used so as to not unnecessarily expand the ambit and scope of sub-clause (vii) to clause (c), albeit it is a clarificatory in nature. The expression seeks to clarify that the immoveable property should be exclusively used in trade or commerce, and when the said condition is satisfied, disputes arising out of agreements relating to immoveable property involving action for recovery of immoveable property, realization of money out of immoveable property given as security or any other relief pertaining to immoveable property would be a commercial

dispute. The expression “any other relief pertaining to immoveable property” is significant and wide. The contours are broad and should not be made otiose while reading the explanation and sub-clause (vii) to clause (c) which defines the expression “commercial dispute”. Any other interpretation would make the expression “any other relief pertaining to immoveable property” exclusively used in trade or commerce as nugatory and redundant.

13. Harmonious reading of the explanation with sub-clause (vii) to clause (c) would include all disputes arising out of agreements relating to immoveable property when used exclusively for trade and commerce, be it an action for recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property.

14. In the context of the present case, it is not disputed that the immoveable property was being used exclusively in trade and commerce. The said issue does not arise for consideration.

15. The next question, which arises for consideration, is whether a suit involving action for recovery of mesne profits is a dispute arising out of agreements relating to immoveable property. Answer to our mind would be in favour of the appellant when we read Order XX, Rule 12 of the Code and keep in mind the nature of the claim for mesne profits.

16. The expression “mesne profit” has been defined in sub-section(12) to Section 2 to the Code to mean those profits which a person in wrongful possession of such property actually received or might with the ordinary diligence have received together with interest on such profits but would

not include profits due to improvements made by the person in wrongful possession. Mesne profits can be also claimed in suits for partition and possession from other co-owners and joint-holders. However, in the present case, we are dealing with a property given on rent, for being exclusively used for trade and business.

17. The Supreme Court in *Corporation of Madras Vs. M.K. Buhari* (2000) 9 SCC 497 has held that mesne profit cannot be less than the rent payable in respect of the property given on rent. Mesne profits are in the form of damages which are payable by a person in wrongful possession. It protects the interest of the owner/landlord and is payable equivalent to the market rent by the person who has failed to deliver the possession and is holding over the property [See *Marshall Sons and Co. Ltd. Vs. Sahi Oritrans(P). Ltd.& Anr.* (1999) 2 SCC 325]. Claim for mesne profit can be joined with a suit for recovery of immovable property under Order II Rule 4 of the Code and for this no leave of the Court is required. Order XX Rule 12 stipulates that when a suit is filed for recovery of possession and for rent or mesne profits, the Court may pass a decree for possession of the property. It can also pass a decree for mesne profits or direct an enquiry as to the mesne profits. Such enquiry can be from the date of institution of suit till delivery of possession to decree holder, relinquishment of possession by the judgment debtor with notice to the decree holder through court or expiration of three years from the date of decree, whichever occurs first. A decree of mesne profits under clauses (b) and (c) would be a final decree, which would be passed after the enquiry.

18. Lease of immoveable property is dealt with under the Transfer of Property Act in Chapter V thereof. The said enactment vide section 105 defines what is lease, lessor, lessee and rent and vide section 107 stipulates how leases are made and can be terminated. Leases can be both oral or in writing. Noticeably, sub-clause (vii) to clause (c) in Section 2 of the Act does not qualify the word “agreements” as referring to only written agreements. It would include oral agreements as well. The provisions of the Transfer of Property Act deal with the effect of non-payment of rent, effect of holding over and most importantly the determination of the leases or their termination. It cannot be disputed that action for recovery of immoveable property would be covered under sub-clause (vii) to clause (c) when the immoveable property is exclusively used in trade or commerce. Read in this manner, we do not think that claim for recovery of rent or mesne profit, security deposit etc., relating to immoveable property which was used exclusively in trade or commerce should not be treated as a commercial dispute in view of the language, ambit and scope of sub-clause (vii) to clause (c) to Section 2 of the Act. These would qualify and have to be regarded as commercial disputes. The use of expression “any other relief pertaining to immoveable property” would mean disputes relating to breach of agreement and damages payable on account of breach of agreement would be covered under sub-clause (vii) to clause (c) to Section 2 of the Act when it is arising out of agreement relating to immoveable property exclusively used in trade and commerce.

19. In view of the aforesaid discussion, we find merit in the present appeal and the same is allowed. The impugned order dated 1st March,

2016, transferring the suit to the district court and holding that the dispute raised is not a commercial dispute under the Act is set aside. The suit, if it has been already transferred, will be returned/transferred to the High Court to be tried in accordance with law. No costs.

(SANJIV KHANNA)
JUDGE

(A.K. CHAWLA)
JUDGE

SEPTEMBER 22nd, 2017
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