

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

% **Date of decision: 28th March, 2017.**

+ **CS(COMM) 1353/2016**

SANJEEV KUMAR ARORA & ORS **Plaintiffs**

Through: Mr. Rajiv Bajaj, Adv.

Versus

SATISH MOHAN AGARWAL & ORS **Defendants**

Through: Mr. Pankaj Gupta and Ms. R. Gupta,
Adv. for D-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.15636/2016 (of D-1 u/O VII R-10 CPC)

1. The applicant/defendant No.1 seeks return of the plaint, in this suit for recovery of Rs.1,60,00,000/- filed in this Court on 23rd September, 2016 as a commercial dispute, contending that it is not a commercial dispute.

2. The claim of the plaintiffs for money in the present suit is on the basis of the three defendants having sold immoveable property to the plaintiffs with a promise to deliver the title documents and the plaintiffs subsequently realising that the title documents were lying deposited by way of equitable mortgage with the State Bank of Patiala and for release whereof the plaintiffs had to deposit monies before the Debt Recovery Tribunal and which monies are now sought to be recovered from the defendants.

3. The suit has been labelled as a 'commercial dispute' pleading that the property purchased has always been used by the plaintiffs for commercial purpose.

4. It is not in dispute that the minimum pecuniary jurisdiction of this Court to entertain original suits with effect from amendment of Section 5 of the Delhi High Court Act, 1966 vide Delhi High Court (Amendment) Act, 2015 which came into force on 26th October, 2015 was enhanced to above Rs.2 crores and unless this suit qualifies as a commercial dispute within the meaning of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ('Commercial Courts Act'), the suit, having been instituted thereafter, will be below the minimum pecuniary jurisdiction of this Court and the plaint will have to be returned to be filed in the Court of appropriate pecuniary jurisdiction.

5. The only question for adjudication thus is whether the claim in the suit is a commercial dispute within the meaning of Section 2(1)(c) of the Commercial Courts Act.

6. Section 2(1)(c) supra in Clauses (i) to (xxii) thereof lists the transactions dispute arising out of which qualify as a commercial dispute. With respect to such commercial disputes, vide Section 7 read with Section 2(1) of the Commercial Courts Act, if the valuation of the subject matter is not less than Rs.1 crore, this Court as the Commercial Division of the High Court would have jurisdiction.

7. The counsel for the plaintiffs relies only on Clause (vii) of Section 2(1)(c) of the Commercial Courts Act supra, as per which a dispute arising out of "agreements relating to immovable property used exclusively in trade or commerce" is a commercial dispute. The counsel for the plaintiffs argues that the dispute subject matter of the present suit arises out of agreement of sale by the defendant No.1 to the plaintiffs of a property used exclusively in

trade or commerce. He thus contends that Commercial Division of this Court i.e. this Bench has the jurisdiction to decide the suit and the plaint is not liable to be returned for filing in the Court of appropriate pecuniary jurisdiction.

8. The counsel for the plaintiffs, on being asked to show that the immovable property sold by the defendant No.1 to the plaintiffs is used exclusively in trade or commerce, has drawn attention to the site plan annexed to the Sale Deeds of the property to contend that the same does not contain any toilet or kitchen and is constructed like a shop.

9. I have drawn the attention of the counsel for the plaintiffs to my judgment in *Soni Dave Vs. Trans Asian Industries Expositions Pvt. Ltd.* AIR 2016 Del 186 where I have held that an immovable property if illegally used exclusively for trade or commerce cannot qualify under Section 2(1)(c)(vii) of the Commercial Courts Act supra and it has to be shown that the immovable property is legally permitted to be used exclusively for trade or commerce. The plaintiffs though in the plaint have pleaded that the property was purchased by the plaintiffs for commercial purposes and the plaintiffs are conducting their clothes business therefrom and the property has always been used for commercial purposes and the plaintiffs are continuing to use the same for commercial purposes but has not filed any document to show that the use permitted by law, of the property, is for trade or commerce or that the property is situated in a zone / locality, properties wherein are permitted to be used exclusively for trade or commerce.

10. The counsel for the plaintiffs has next drawn attention to the description of the property in one of the sale deeds as comprising of “one

shop and back side portion of said shop....”.

11. However therefrom also it cannot be said with certainty that the property is legally permitted to be used exclusively for trade or commerce. Else, the recitals in the said sale deeds describe the property as comprising of ground, first and second floors with roof rights “duly fitted with running electric, water and sewer connections” and which belies the contention of there being no toilet and kitchen etc. in the property.

12. Needless to state that the counsel for the defendant No.1 contends that the property is not permitted to be used exclusively for trade and commerce.

13. The version of the counsel for the defendant No.1 is also supported by the recitals in the sale deeds of other portions of the property which do not describe the portions sold thereunder as a shop.

14. The counsel for the plaintiffs then contends that it is a matter of trial whether the property is used exclusively for trade and commerce and since the plaintiffs are averring that the property is so used and the defendant No.1 is controverting, no case for return of the plaint of the plaintiffs is made out.

15. I am unable to agree with the aforesaid contention of the counsel for the plaintiffs.

16. Once a plaintiff seeks to bring a suit, which otherwise is below the minimum pecuniary jurisdiction of this Court for original civil disputes, to this Court claiming the same to be arising out of a commercial dispute, it is the bounden duty of the plaintiffs to establish that it is so. It is not as if the question, whether an immovable property is legally permitted to be used exclusively in trade or commerce, is a question, answer where to depends on

evidence to be led by parties. It is not open to the parties to, as per their sweet will, commence use of an immovable property for whichever purpose they may like, whether for trade or for commerce or for residence or for recreational or for institutional purpose. The Municipal and Development Laws enacted for a planned development of Delhi earmark Zones / Regions of Delhi and specify the user permitted therein. If it were to be held that the user depends upon the sweet will of the owner of the property, it would lead to an unplanned and uncivilised development of the city with residences interwoven with premises used for trade or commerce. It cannot be lost sight of that a human being is a social animal and the society in which we live is a civilised society. When human beings live in proximity to each other with the enjoyment of basic human rights being dependent upon the conduct of the neighbours, ownership of an immovable property does not carry with it any right to use the immovable property or to allow the use of immovable property for whatsoever purpose one may desire. With this motive / intent, the Master Plan and Zonal Development Plans prescribe the use to which a particular area / region / zone can be put to. The said plans also provide for Mixed Use Zones where, either the front portions of the ground floor are permitted to be used for trade or commerce with the rear portion of the ground floor and upper floor being used for residences or the entire ground floor being permitted to be used for trade or commerce with the upper floors being used for residences. Thus, it is not as if from the use of the word 'shop' in a portion of the property, it axiomatically follows that the entire property is being used for trade and commerce. If the plaintiffs in this suit for recovery of money, which is below the minimum pecuniary jurisdiction of this Court, desire the suit to be tried not by the

Court of the appropriate pecuniary jurisdiction i.e. by the Court of the District Judge (DJ) / Additional District Judge (ADJ) but by a Commercial Division of this Court, it was incumbent upon the plaintiffs to along with the plaint file documents to show the prescribed use of the property. The plaintiffs, not only have not done so but have inspite of the application of the defendant No.1 also have not bothered to show so.

17. The Commercial Courts Act, as per 'Statement of Objects and Reasons', was enacted to provide for speedy disposal of high value commercial disputes involving complex facts and question of law and to fulfil the need for early resolution of such disputes to create a positive image to the investor world about the independent and responsive Indian legal system. The said statement of objects and reasons for enactment of the law would be defeated, if doors of Commercial Courts / Commercial Division of the High Courts were to be open too wide by giving an extensive interpretation to Section 2(1)(c) of the Commercial Courts Act defining what is a commercial dispute. I say so because then the Commercial Courts and the Commercial Divisions of the High Courts would be inundated and which would put breaks on the objective of speedy resolution of such disputes. The whole purpose of classifying commercial disputes and specifying the value thereof shall then be lost.

18. It is also the case of the applicant/defendant No.1 that the applicant/defendant No.1 has instituted a suit for cancellation of the sale deeds and for recovery of possession and which suit though originally instituted in this Court has since, on enhancement of pecuniary jurisdiction of this Court, been transferred to the Subordinate Courts and the present suit

is by way of a counter-blast.

19. I have enquired from the counsel for the plaintiffs, whether the plaintiffs in their written statement to the suit filed by the defendant No.1 have taken a plea of the dispute being a commercial one. It has further been enquired whether the plaintiffs at the time of transfer of the suit filed by the defendant No.1 from this Court to the Sub-ordinate Courts took an objection that it was not liable to be transferred owing to being a commercial dispute. It has yet further been enquired, whether after the said suit has been so transferred, any objection has been taken that the same is not entertainable by the Sub-ordinate Courts, being a commercial dispute to be adjudicated by the Commercial Division of this Court. I say so because Explanation (a) to Section 2(1)(c) of the Commercial Courts Act provides that a commercial dispute shall not cease to be a commercial dispute merely because 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.

20. If the counsel for the plaintiffs is correct in his submission that the claim of the plaintiffs for realisation of monies, arising out of an agreement to sell by the defendant No.1 to the plaintiffs of immovable property is a commercial dispute, then so would be the claim of the defendant No.1 for cancellation of the said agreement i.e. the sale deeds.

21. The counsel for the plaintiffs fairly states that he has not taken any such objection.

22. The plaintiffs cannot blow hot and cold i.e. while defending a dispute raised by the other party to an agreement of sale of immovable property not

claim it to be a commercial dispute and while himself raising a dispute with respect to same agreement, claim it to be a commercial dispute.

23. That also gives an inkling of the reason for the insistence by the counsel for the plaintiffs on retaining this suit in this Court. Owing to the difference in the number of suits pending for disposal before the Courts of DJs / ADJs and before this Court and owing to the difference in the number of Judges on the Original Side of this Court and the DJs / ADJs, the disposal of a suit before the DJ / ADJ as of now is much quicker than before this Court. The plaintiffs, if were interested in early recovery of the money claimed by them to be due in this suit, for the said reason would not unreasonably insist upon continuing this suit in this Court. It appears that the plaintiffs, being in possession of the property, desire to prolong their possession by insisting upon this suit remaining before this Court, so as to, on the basis of the pendency of this suit in this Court, not allow the suit filed by the defendant No.1 and pending before the Sub-ordinate Courts also to proceed.

24. The counsel for the plaintiffs has handed over in the Court a copy of the order dated 16th September, 2016 of this Court in CS(OS) No.2493/2013 titled ***Bharam Dutt Gupta Vs. Sarju Kumar*** where observing that the counter-claim in the suit was for a sum of Rs.1.61 crores and was in relation to an agreement to sell of an immovable property which was for the purposes of running a factory, the suit under Section 2(1)(c)(vii) of the Commercial Courts Act was treated as a commercial suit.

25. I do not understand the purport of citing the aforesaid order. The said order is merely a procedural order and has no precedential value. With the

advantage of all orders available on the internet, a practice of citing thereof as precedent has evolved. Only those orders that adjudicate after noticing the rival contentions of the parties and giving reasons, qualify as precedent. The said order does not qualify as one. Reference with benefit can be made to *Deepesh Pakhru Vs. State of Maharashtra* AIR 2002 Bom 116 (DB).

26. The counsel for the defendant No.1 has handed over a judgment dated of the Division Bench in *Hindpal Singh Jabbal Vs. Jasbir Singh* 2016 SCC OnLine Del 4901. The suit therein was for seeking cancellation of General Power of Attorney, Sale Deeds and for recovery of possession of immovable property. It had come on record that the value of the property in question was Rs.1 crore. The reliefs claimed in the suit were however valued at approximately Rs.10.50 lakhs. It was held (i) that neither General Power of Attorney nor Sale Deeds can be regarded as “agreements relating to immovable property”; (ii) that a sale deed brings about a conveyance of property and cannot, by any stretch of imagination be construed as an “agreement relating to immovable property”; (iii) that the distinction between a sale and a contract for sale of immovable property has been brought out in Section 54 of the Transfer of Property Act, 1882 itself; (iv) that a General Power of Attorney does not amount to an ‘agreement relating to immovable property’ because the attorney holder only gets a power from the owner to transact business on his behalf.

27. The aforesaid judgment, in my view, applies on all fours to the controversy at hand.

28. The counsel for the plaintiffs however draws attention to para 15 of the aforesaid judgment where the Division Bench of this Court did not go

into the question whether the property subject matter of dispute before the Division Bench was exclusively used in trade or commerce, being of the view that the nature of the dispute raised in the suit did not concern any 'agreement relating to immovable property'. I am however unable to see as to how the same helps the plaintiffs. The present is also a case of sale deeds of property executed by the defendant No.1 in favour of the plaintiffs and cancellation whereof the defendant No.1 is seeking in his suit which has already been transferred to the Sub-ordinate Court and for compensation for misrepresentation allegedly practised by the defendant No.1 in execution thereof, the plaintiffs are suing by way of this suit. On the same parity of reasoning as given by the Division Bench of this Court, the plaint in this suit would also not qualify as a commercial dispute.

29. I therefore hold the dispute subject matter of the present suit to be not a commercial dispute within the meaning of Section 2(1)(c) of the Commercial Courts Act.

30. That being the position, the institution of this suit in this Court on 23rd September, 2016, after the amendment with effect from 26th October, 2015 of Section 5 of the Delhi High Court Act, 1966 enhancing the minimum pecuniary jurisdiction of this Court for Original Side suits to above Rs.2 crores and after the Office Order dated 24th November, 2015 of Hon'ble the Chief Justice of this Court in exercise of powers under Section 4 of the Delhi High Court (Amendment) Act, 2015 was not in the Court of appropriate pecuniary jurisdiction and the plaint is liable to be returned and is ordered to be returned to the plaintiffs for filing in the Court of appropriate pecuniary jurisdiction.

31. The application is disposed of.

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32. In accordance with the above, the plaint be returned to the plaintiffs for filing in the Court of appropriate pecuniary jurisdiction.

33. The date fixed of 15th May, 2017 before the Joint Registrar is cancelled.

MARCH 28, 2017

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(corrected & released on 22nd April, 2017)

RAJIV SAHAI ENDLAW, J.

