

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
COMMERCIAL APPEAL NO.1/2019
WITH
CIVIL APPLICATIONS NO.6 & 7/2019.

K.C. Construction & Co. & anr. Appellants.
Versus
Antonio Lino Wolfango Fernandes
and others. Respondents.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat
Ghanekar, Advocate for the Appellants.

Mr. Nigel da Costa Frias, Advocate for the Respondents No.1,2,8 and
9.

Mr. Preetam Talaulikar, Advocate for Respondents No.3 to 7.

Coram : R.D. Dhanuka &
Prithviraj K. Chavan, JJ.

Date : 11 March 2019.

P.C.:

1. The Appellants (original Plaintiffs), have impugned the order passed by the Commercial Court of District Judge, at Panaji, dated 30 October 2018, below the Application at Exhibit 29, filed by Defendants No.1, 2, 8 and 9 under Order VII, Rule 10 of the Code of Civil Procedure, 1908, directing that the plaint filed by the Plaintiffs be returned to the Plaintiffs.

2. Some of the relevant facts, for the purpose of deciding this Appeal, are as under :

It is the case of the Appellants that Respondents No.1 and 8 approached the Appellant No.2 to sell the suit properties, along with all the encumbrances and encroachments and offered the selling price of ₹ 10,000/- per sq. metre, and also agreed to sell additional property marked as 'B' with all the encumbrances on as is where is basis.

3. According to the Appellants, there were negotiations in respect of the suit properties, between the parties. The Plaintiffs agreed to pay the consideration of ₹ 9.20 crores. It is the case of the Appellants that since the Respondents failed to perform their part of the obligation, the Appellants filed a suit in the month of December 2017, praying for an order and direction that the Defendants be directed to execute the sale deed in respect of the suit properties and also praying for specific performance of the deed of sale and conveyance.

4. The contesting Defendants filed Written Statement in the said suit, denying the claim made by the Appellants. The Defendants No.1,2,8 and 9 also filed an application under Order VII, Rule 10 of the Code of Civil Procedure 1908, praying for return of the Plaint on the ground that there were no averments or even whisper in the plaint that the Appellants had intended to purchase the suit properties for commercial purpose, as stipulated in Section 2 of the

the Commercial Courts Act, 2015. It was also contended in the said Application that the dispute arising between the parties was not a commercial dispute, governed by the provisions of the Commercial Court Act, 2015 and, thus, the trial Court had no jurisdiction to entertain Special Civil Suit No.1/2018.

5. The said Application was resisted by the Appellants by filing reply on 25 June 2018. It was contended by the Appellants that the dispute was within the scope and ambit of the Commercial Courts Act, 2015 as could be ascertained by careful examination of the facts of the case and the documents relied upon. It was further stated in the said reply that the Appellants were willing to buy the properties at the agreed value and were ever ready and willing to fulfill their commitments to the Respondents as stated in the Plaint.

6. The learned trial Judge allowed the said Application (Exhibit 29) and directed return of the Plaint to the Plaintiffs. This order dated 30 October 2018 is impugned by the Appellants (original Plaintiffs) in this Appeal.

7. Mr. Usgaonkar, learned Senior Counsel for the Appellants invited our attention to some of the averments made in the Plaint filed by his client, the objections raised by the contesting Defendants in their Application under Order VII, Rule 10 of the Code of Civil Procedure 1908 and also reply of the Appellants to the said

Application. It is submitted by the learned Senior Counsel that there were sufficient averments in the Plaint filed by the Appellants that there was a transaction in respect of a huge property between the Appellants and the Respondents.

8. Learned Senior Counsel placed reliance on a copy of an email dated 2 May 2017 from some of the Respondents to one of his clients and would submit that by the said email, it was confirmed by those respondents that they had, in fact, agreed to buy the properties on outright basis at the rate of ₹ 10,000 per sq. metre on 'as is where is' basis. He also placed reliance on the certificate dated 5 May 2016 signed by one of the Respondents stating that the Respondent Harman Fernandes had authorised Jeremias D'Souza to clear, carry out survey and to secure the properties mentioned in the said certificate as bearing Survey Nos. 44/19, 44/27 and 44/28, situated at Bammon Waddo, within the Village Panchayat of Siolim. The learned Counsel also invited our attention to some of the *prima facie* findings rendered by the learned trial Judge and would submit that the Plaint is returned mainly on the ground that there was no written agreement between the parties.

9. It is submitted that even if no separate agreement was entered into between the parties, the agreement could be construed from the correspondence exchanged between the parties and as such, the impugned order passed by the learned trial Judge, allowing the

Application filed by some of the Respondents under Order VII, Rule 10 of the Code of Civil Procedure 1908, is totally erroneous. He submits that the learned trial Judge could have framed an issue of jurisdiction, along with other issues and could have tried the issues under Order XIV, Rule (2) of the Code of Civil Procedure, 1908 and could not have directed return of the Plaint.

10. Mr. Nigel da Costa Frias, for the Respondents No.1,2,8 and 9, on the other hand, placed reliance on Section 6 of the Commercial Courts Act, 2015, and on the definition of 'commercial dispute' under Section 2(1)(c)(vii). He submits that neither there is any averment in the Plaint that there was any agreement entered into between the parties relating to the immovable properties, nor was there any averment that the immovable property was used exclusively in trade or commerce. He submits that the suit properties were agricultural lands.

11. It is submitted that the learned trial Judge was justified in returning the Plaint exercising the powers conferred under Order VII, Rule 10 of the Code of Civil Procedure, 1908. The learned Counsel also placed reliance on Order VII, Rule (1)(f) of the Code of Civil Procedure, 1908 in support of his submission that the Appellants (original Plaintiffs) ought to have disclosed the facts in support of their contention that the suit filed by the Appellants was in respect of a commercial dispute and was within the jurisdiction of the

Commercial Court. He submits that the entire Plaint does not disclose any such averment, disclosing the facts showing that the Commercial Court had jurisdiction to entertain, try and dispose of the suit filed by the Appellants.

12. Mr. Preetam Talaulikar for Respondents No.3 to 7 adopts the submissions made by Mr. Nigel Costa Frias, appearing for Respondents No.1,2, 8 and 9.

13. A perusal of the Statement of Objects and Reasons of the Commercial Courts Act, 2015, clearly indicates that the said Act was enacted for speedy disposal of the commercial disputes, involving complex facts and questions of law. The 'commercial dispute' itself is defined under Section 2(1)(c). Section 2(1)(c)(vii) provides for one of the commercial disputes i.e. if the dispute is arising out of the agreement relating to immovable property used exclusively in trade or commerce. The definition of commercial dispute has to be read with Section 6 of the Commercial Courts Act, 2015 which confers jurisdiction of Commercial Court to try all suits and applications relating to a commercial dispute of a specified value arising out of the entire territory of the State over which it has been vested territorial jurisdiction. In this case, there is no dispute about the territorial jurisdiction.

14. The Court has to ascertain whether there is a commercial

dispute as defined under Section 2(1)(c) of the Commercial Courts Act, 2015 and, whether such a commercial dispute was within one of the 22 categories of disputes prescribed in definition of 'commercial dispute' under Section 2(1)(c) or not ? A perusal of the impugned order passed by the learned trial Judge indicates that the learned trial Judge, while allowing the application filed by the contesting defendants, has held that there was no agreement in writing between the parties.

15. A perusal of the averments made in the plaint which have to be considered for the purpose of considering the application under Order VII, Rule 10 of the Code of Civil Procedure, 1908, indicates that it was not the case of the Appellants that an agreement was already entered into between the parties and a sale deed or deed of conveyance was required to be executed between the parties in furtherance of the agreement for sale. A perusal of the Plaint further indicates that there is no averment in the Plaint that the immovable property, which was the subject matter of the suit, was exclusively used in trade or commerce. The learned Senior Counsel for the Appellants does not dispute that the property, in question, was an agricultural land. This Court in case of *Shri. Cheruparambil Mathew Vs. Shri. ERIC Eusebio Furtado & 11 Ors. (2017) SCC OnLine Bom 8322* has held that a Commercial Dispute within the meaning of Section 2(1)(c)(vii) of the Act, would be a dispute in respect of agreements relating to immovable property used exclusively

in trade or commerce.

16. In our view, the jurisdiction of the Commercial Court under Section 6, 7 read with Section 2(1)(c)(vii), would be depending upon the compliance of conditions i.e. (i) that there has to be an agreement relating to immovable property, (ii) that such immovable property is exclusive used in trade or commerce, (iii) All suits and applications relating to Commercial Disputes, shall be of a specified value prescribed under Section 13 of the Act, (iv) Such Commercial Court shall have territorial jurisdiction by virtue of a notification under Section 3(2) of the Act. The provisions of the Commercial Courts Act, 2015 being the provisions in a special statute, enacted for the purpose of speedy disposal of high value commercial disputes, all these conditions are mandatory and are required to be fulfilled.

17. Even if it is considered at this stage that there was an agreement entered into between the parties by exchange of correspondence, the Appellants failed to fulfill the second mandatory requirement in this case that the property in question was to be used exclusively in trade or commerce. It was not the case of the Appellants in the Plaint that the property which was agreed to be purchased by the Appellants from the Respondents was used exclusively in trade or commerce. This objection was specifically raised by the Respondents in the Application filed under Order VII,

Rule 10 of the Code of Civil Procedure 1908. The learned trial Judge has, while allowing the application filed by the contesting Defendants, has rendered specific findings that the requirement of definition of 'commercial dispute' has not been satisfied by the Appellants. In our view, the dispute raised by the Appellants would not fall within the ambit of Commercial dispute within the meaning of Section 2(1)(c)(vii).

18. In so far as reliance placed by the learned Senior Advocate for the Appellants on the email dated 2 May 2017 is concerned, a plain reading of the email dated 2 May 2017 which appears to be from one of the Respondents, does not, *prima facie*, indicate the execution of any concluded agreement between the parties.

19. Similarly, the certificate dated 5 May 2016 from one of the Respondents, authorising Jeremias D'Souza to clear, carry out survey and secure the properties mentioned in the said certificate, would also not advance the case of the Appellants. In our view, the provisions of the Commercial Courts Act, 2015 being a special statute and has been enacted for the special purpose, the conditions set out therein have to be complied with strictly. The Appellants, however, failed to comply with the mandatory requirement conferring jurisdiction under Section 6, read with Section 2(1)(c)(vii) of the Commercial Courts Act, 2015.

20. We do not find any infirmity in the impugned order passed by the learned trial Judge. There is no merit in this Appeal. The Appeal is, accordingly, dismissed. There shall be no order as to costs.

21. In view of the dismissal of the Appeal, the Civil Applications pending in this Appeal, do not survive and are accordingly dismissed.

(Prithviraj K. Chavan, J.)

(R.D. Dhanuka, J.)