ODC - 2

ORDER SHEET

IA No. GA 3 of 2019
in CS 217 of 2018

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

M/S. AMIT MOTORCYCLES PVT. LTD.
Versus
M/S. AXIS BANK LTD.

BEFORE:
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 15th December, 2020.

[Via Video Conference]

Appearance:
Mr. Arik Banerjee, Adv.
Mr. Avirup Mondal, Adv.
Mr. Rajib Mullick, Adv.
Ms. Monika Mondal, Adv.
... for the plaintiff/respondent

Mr. Swatarup Banerjee, Adv.
Mr. Joydeep Roy, Adv.
... for the defendant/petitioner

The Court : The issue which arises in this application filed by the defendant under Order VII Rule 11 of The Code of Civil Procedure, 1908 is whether leave under Section 12-A of The Commercial Courts Act, 2015 has to be obtained in a suit which was filed as a regular suit but was later ordered to be heard as a Commercial Suit.

The defendant has filed the instant application for dismissal of the suit on the ground that the suit is barred by law [Order VII Rule 11 (d) of the CPC].

Mr. Swatarup Banerjee, learned counsel appearing for the defendant/applicant argues that the suit is a Commercial Suit which necessitates the institution of the suit only upon leave being granted under Section 12-A of the 2015 Act. Counsel places an order of 16th January, 2020 of a learned Single Judge which noted that the instant suit has been filed after promulgation of the Commercial Courts Act, 2015 and that the disputes involved in the suit are commercial in nature under Section 2 (1) (c) of the Act. Counsel relies on an order dated 3rd September, 2020 passed in *CS No.78 of 2020 : Terai Overseas Private Limited vs. Kejriwal Sugar Agencies* in which a co-ordinate Bench considered the necessity of granting leave under Section 12-A of the 2015 Act together with Clause 12 of the Letters Patent, 1865 where the Court refused the prayer for leave under Section 12-A of the Act. It is submitted that the plaint in the instant suit was presented on 11th October, 2018 after Section 12-A of the Act came into force. A Notification of 20th March, 2020 issued by the Government of West Bengal delineating the pecuniary jurisdiction of the Courts under the Commercial Courts Act is shown for the point that even if the present suit is dismissed, the plaintiff would have to file the suit afresh as a Commercial Suit.

Mr. Arik Banerjee, learned counsel appearing for the plaintiff starts his arguments by submitting that the application for dismissal of the suit does not contain any pleading with regard to Section 12-A of The Commercial Courts Act and that the point has been taken for the first time by way of an oral argument. On the factual score, counsel places various orders passed in the suit including an order of 11th December, 2018 passed by a learned Single Judge by which the defendant bank was restrained from proceeding against the plaintiff under the SARFAESI Act. Counsel submits that the suit was filed in 2018 as a regular suit and it is only after the order dated 16th January, 2020 that the parties agreed to have the suit tried as a Commercial Suit. The next point taken by counsel is that Section 12-A of the 2015 Act relates to a "pre-institution" stage whereas the present suit has progressed to the defendant filing its written statement. Counsel also relies on Section 15 of the 2015 Act to submit that all pending suits and applications would automatically be transferred to a Commercial Division of a Court without the parties having to take any steps for the same. The other argument made is that the notification of 20th March, 2020 would not have retrospective affect and would not be applicable to the present suit. It is submitted that the parties were always ad idem on the point that the suit should be heard as a regular suit and which would appear from the order dated 11th December, 2018. Counsel reiterates that the point of Section 12-A has been taken for the first time before this Court.

On hearing learned counsel for the parties, this Court is of the view that there are ways of ascertaining whether a suit should have been filed as a Commercial Suit. One of the ways ascertaining the "Specified Value" of the suit as defined in Section 2(1)(i) of the Act. Under this definition, the expression "Specified Value" in relation to a commercial dispute has been defined as the value of the subject-matter in respect of a suit which shall not be less than Rs.3 lakhs. The prayers in the plaint, taken cumulatively, indicate that the value of the subject-matter on which the plaintiff claims relief in the suit exceeds Rs.1 Crore. Second, the pleadings in the plaint indicate that the dispute between the parties is a "commercial dispute" as defined under Section 2(1)(c). The order dated 16th January, 2020 indicates that the parties were agreeable to the suit being tried as a Commercial Suit.

The only question which remains is whether a suit filed in 2018 and being thereafter proceeded with by both the parties as a regular suit would require leave to be obtained under Section 12-A of The Commercial Courts Act.

Section 12-A, "Pre-institution Mediation and Settlement", is a provision which comes into play at the time of institution of a Commercial Suit where the plaintiff before instituting such suit must seek the leave of Court in respect of the mandatory requirement of exhausting the remedy provided for in Section 12-A (1). This Court is of the view that once a suit has been transferred to a Commercial Division of a High Court on the understanding of both the parties that it should be treated as a Commercial Suit for any of the reasons in Section 2 of the Act, the rigours of the Commercial Courts Act automatically comes into play. This Court would have taken a different view of the matter had the cumulative value of the prayers in the plaintiff as well as the nature of dispute indicated otherwise. However, on both counts it can be seen that as on the date of filing i.e. on 11th October, 2018, the suit could only have been treated as a Commercial Suit and not a regular suit.

Further, on the date when the plaint was presented, Section 12-A of Commercial Courts Act had already come into force (with effect from 3rd May, 2018).

A Commercial Suit cannot be exempted from the rigours under the 2015 Act merely on the erroneous understanding of a plaintiff and allowing the plaintiff to proceed on a wrong premise. Section 15 or Sub-section (4) thereof would not apply in this context since this provision deals with prescribing new timelines and consequent directions on a pending suit being transferred before a Commercial Division of a High Court.

The issue with regard to the application not taking the ground of Section 12-A cannot assist the plaintiff since an issue as fundamental as a plaint being barred by law can be taken by a party at any point of time even in the absence of a formal application being made in that regard.

In view of the above reasons, leave under Section 12-A of the Commercial Courts Act was a mandatory requirement which the plaintiff should have complied with. Since this was not done, the suit in its present form and having been accepted as a commercial suit, cannot proceed any further.

G.A. No. 3 of 2019 is accordingly allowed in terms of prayer (a). The plaint in C.S. No. 217 of 2018 directed to be taken off the file. The suit is dismissed. There shall be no order as to costs.

The plaintiff will however be at liberty to withdraw the court fees deposited by the plaintiff and using the same in the event the plaintiff intends to file a fresh suit for the same relief.

(MOUSHUMI BHATTACHARYA, J.)

RS/TO