

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 26.11.2019

JUDGMENT DELIVERED ON : 19.06.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

AND

THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

ORIGINAL SIDE APPEAL NO.92 OF 2019

AND

CIVIL MISCELLANEOUS PETITION NO.9003 OF 2019

M/s.Integrated Finance Company Limited
rep.by its Legal Officer and duly constituted Attorney
A.Hema Jothi
Registered Office at "Vairams"
No.112, Thyagaraya Road
T.Nagar, Chennai - 600 017
and Branch Office at
2nd Floor, Dol-Bin-Shri Premises
Co-operative Society Limited
69-71, Jamma Bhoomi Marg
Fort, Mumbai - 400 001

... Appellant

Versus

Garware Marine Industries Limited
Registered Office at Chander Mukhi
2nd Floor, Opp. Oberoi Hotel
Nariman Point, Mumbai - 400 021
Now 15 102, Buildarch Wisteria
1st Floor, Ram Murti Road
Dadar (W), Mumbai - 400 021

.. Respondent

Original Side Appeal filed under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 26.10.2018 passed in Application No. 4804 of 2018 in C.S. No. 591 of 2010 on the file of this Court.

For Appellant : Mr.V.P.Raman

For Respondent : Mr.Satish Parasaran, Senior Advocate
for Mr.R.Parthasarathy

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal is filed by the appellant against the judgment and decree dated 26.10.2018 passed in Application No. 4804 of 2018 in C.S. No. 591 of 2010. The said Application No. 4804 of 2018 has been filed by the respondent herein under Order VII Rule 11 of the Code of Civil Procedure (in short CPC) to reject the plaint in C.S. No. 591 of 2010. By the said order dated 26.10.2018, the learned single Judge held that the dispute involved in the suit is not an ordinary transaction engaged in by merchants, bankers, financiers or traders and as such it would not fall within the scope and ambit of Section 2 (1) (c) of The Commercial Courts Act, 2015 (in short Act). After holding so, the learned single Judge directed the application to be posted for further hearing on merits. In effect, it was held by the learned single Judge that the dispute between the parties is not a commercial dispute falling within the scope and ambit of the Act.

2. For the purpose of disposal of this appeal, certain facts are necessary and they are elucidated hereunder.

3. The appellant herein is carrying on business in Hire Purchase and Lease Financing. They are having their registered and administrative office at Chennai with several branches in various parts of the country. During the course of such business, the respondent herein approached the branch office of the appellant for lease facility. After deliberation, the appellant and the respondent entered into an equipment lease agreement on 30.06.1992 for leasing a textile machinery described in the schedule of the agreement for a total sum of Rs.1,17,15,960/- which is inclusive of finance charges repayable by the respondent in 60 monthly instalments at the rate of Rs.1,95,267/- each. Pursuant to the said agreement, the said equipment was placed within the premises of the respondent's sister concern by name Garware Nylon Limited in Pune for which the respondent is liable to pay lease rentals under the agreement to the appellant. It is stated that the respondent was irregular in payment of the lease rentals and the respondent had paid only 29 instalments as on 01.11.1994. As such, a fresh re-scheduled agreement with mutually agreed terms and conditions was entered into on 30.11.1995 in respect of the same asset for a total sum of Rs.1,23,34,486/-. Even as per the re-scheduled terms of the agreement, the respondent did not honour the payment schedule inspite of demands and reminders. There were also exchange of correspondence between the appellant and

respondent regarding sealing of the factory of M/s. Garware Nylon Limited where the asset was originally installed. The appellant thereafter sent a notice dated 29.06.2002 through their counsel and called upon the respondent to pay the sum of Rs.2,63,05,789.62 failing which it was stated that legal proceedings will be initiated for recovery of the amount. It was also stated that several cheques issued by the respondent were dishonoured on presentation and therefore, the appellant had initiated proceedings under Section 138 of The Negotiable Instruments Act and they are pending. Ultimately, the appellant has filed the suit in C.S. No. 591 of 2010 for recovery of amount of Rs.3,54,83,662/- with interest thereon at the rate of 36% per annum on Rs.95,82,486/- from the date of plaint till realisation.

4. In the suit in C.S. No. 591 of 2010 filed by the appellant herein for recovery of the amount, notice was ordered to the respondent herein, but the respondent herein did not appear. Therefore, by an order dated 15.06.2012 an ex parte decree was passed and this Court directed the respondent herein to pay the appellant a sum of Rs.6,49,38,386.92 with further interest at the rate of 36% per annum on the sum of Rs.95,82,486/- from 15.06.2012 till the date of realisation together with costs of the suit.

5. According to the appellant, as a counter-blast, the respondent herein has filed a suit in C.S. No. 689 of 2014 praying to direct the appellant herein to pay a sum of Rs.1,93,78,667/- as compensation together with further interest on Rs.1,93,78,667/- at the rate of 18% per annum at quarterly rests from the date of the suit viz., 30.04.2001 till payment and for costs.

6. As per the averments in the plaint in C.S. No. 689 of 2014, the respondent herein entered into an Equipment Lease Agreement dated 30.06.1992 with the appellant. As per the agreement dated 30.06.1992, the appellant gave on lease to the respondent one Himson Scragg SDS-8 Texturising Machine (Sr.No.23) for a period of five years. Further, the terms and conditions of the agreement indicate that the said machine was the sole and exclusive property of the appellant herein and the respondent has no right, title and interest therein, except lease. Further, the said machine was installed in the premises of M/s. Garware Nylons Limited, an associate company of the respondent at Pune. It is the case of the respondent that the respondent has been regularly paying the lease rentals under the Equipment Lease Agreement dated 30.06.1992 without any default.

While so, on or about 27.08.1996, the said M/s. Garware Nylons Limited, an associate company of the respondent at Pune suspended its operations and therefore, the respondent had requested the appellant herein to take steps to remove the said machine from the premises of the said company at Pune and to relocate and install the machinery at the factory premises of the respondent at Ahmed Nagar as the appellant is the owner of the machine. While so, one of the creditors of M/s. Garware Nylons Limited, has filed a Petition before this Court in Company Petition No. 521 of 1992 praying to wind up the said company. On 05.09.1997, the Official Liquidator attached to the High Court of Bombay was appointed as the provisional liquidator and he took charge and control of the assets of the said company, even though the said machinery did not belong to the said company. The request made by the respondent to the appellant herein to take necessary steps to get the machine released did not bear fruit. Therefore, the respondent filed Company Application No. 569 of 1997 praying to direct the Provisional Liquidator to hand over the said machinery to the appellant herein, who is the owner of the machinery. By a letter dated 09.03.1998, the respondent herein also requested the appellant to take steps to obtain necessary orders from the Court to take possession of the machinery which had been leased to the respondent/plaintiff, but was lying at the premises of M/s. Garware Nylons Limited, an associate company of the respondent at Pune. At this stage, the appellant, by letter dated 09.03.1998 demanded the respondent to pay Rs.43,70,345/- towards lease rentals. The respondent, by letter dated 17.03.1998, denied their liability to pay any amount inter alia stating that the appellant had handled the matter of removing the machineries from M/s. Garware Nylons Limited, an associate company of the respondent at Pune, in a negligent manner and hence profitable opportunities of putting the machineries to use were being lost. The respondent also stated that they would claim compensation from the appellant. Subsequently, there were exchange of notices between the respondent and the appellant herein and ultimately, the appellant had initiated criminal proceedings against the respondent herein. The respondent herein has also filed Suit No. 3513 of 2001 on 30.04.2001 before the High Court of Bombay. On notice, the appellant herein has raised the issue of jurisdiction by taking out an application in Chamber Summons No. 163 of 2009 and contended that the Courts at Chennai alone are having jurisdiction to deal with the issue and therefore, the suit filed by the respondent herein is not maintainable. By order dated 20.08.2013, the High Court of Judicature at Bombay passed an order returning the plaint to the respondent herein to file it before the Court having jurisdiction. Thereafter, the respondent herein has filed the suit in C.S. No. 689 of 2014 before this Court on 11.09.2014 praying to direct the appellant herein to pay a sum of

Rs.1,93,78,667/- as compensation together with further interest on Rs.1,93,78,667/- at 18% per annum at quarterly rests from the date of the said suit viz., 30.04.2001 till payment and/or realisation with costs.

7. When the said suit filed by the respondent herein in C.S. No. 689 of 2014 came up for hearing before the Commercial Division of this Court, the learned single Judge assumed jurisdiction of the Commercial Division to examine the issues involved in the suit. Accordingly, an order dated 27.06.2018 was passed in C.S. No. 689 of 2014 filed by the respondent herein and it reads as follows:-

"2. The plaintiff had taken on lease Himson Scragg SDS-B Texturising Machine for a period of five years. The machine was the sole and exclusive property of the defendant. The Plaintiff was only a lessee. The machine was used on a day to day basis for operations. The plaintiff had paid the lease rental until the Equipment Lease Agreement. The plaintiff requested the defendant to remove the machinery from GNL, which was an associate company of the plaintiff at Pune. However, the Official Liquidator, which was appointed by the Bombay High Court, took charge of the assets of GNL owing to liquidation proceedings. The machine was also taken possession by the Official Liquidator. It is under these circumstances, claiming damages, the suit had been instituted. Since the genesis of the claim is based on the commercial transaction, this Court has jurisdiction to examine the issues raised in the plaint."

8. While so, during the pendency of the suit in C.S. No. 689 of 2014, the respondent herein filed Application No. 1782 of 2017 in C.S. No. 591 of 2010 praying to condone the delay of 1690 days in filing an application to set aside the exparte Judgment and Decree dated 15.06.2012 passed in C.S. No. 591 of 2010, which is pending before the original side of this Court. A counter affidavit has been filed by the appellant contending that no proper explanation has been offered by the respondent for condonation of inordinate delay in filing the application to set aside the exparte judgment and decree dated 15.06.2012. By order dated 04.04.2017, this Court allowed the application subject to condition the respondent herein deposit a sum of Rs.30,00,000/- to the credit of C.S. No. 591 of 2010 and also a sum of Rs.5,000/- as costs to the appellant herein. The conditions imposed in the order dated 04.04.2017 has been complied with by the respondent and the suit in C.S. No. 591 of 2010 was restored.

9. After the suit in C.S.No.591 of 2010 was restored at the instance of the respondent herein, an application in A. No. 4804 of 2018 in C.S.No.591 of 2010 was filed by the respondent herein praying to reject the plaint in C.S. No. 591 of 2010 filed by the appellant on the ground that the right to sue accrue to the appellant herein only when the terms and conditions of the agreement/contract were allegedly breached by committing default in payment of rental amount viz., from the 11th rental instalment payable on 31st October 1996 as per the plaint and not till the termination of agreement by efflux of time viz., 30th November 2000. As per paragraph No.6 of the plaint in C.S.No.591 of 2010, the default occurred in October 1996 followed by a part payment in November 1997 and therefore, the present suit in C.S.No.591 of 2010 filed by the appellant on 28th November 2003 is barred by limitation. Therefore, the respondent herein would contend that the plaint in C.S. No. 591 of 2010 is liable to be rejected on the ground of limitation.

10. Resisting the Application No. 4804 of 2018 in C.S.No.591 of 2010, the appellant herein has filed a counter affidavit contending that the suit filed in C.S.No.591 of 2010 filed on 28th November 2003 is within the period of limitation. As per the agreement of lease dated 30.11.1995, the first payment is payable on 30.12.1995 and the last instalment payable on 30.11.2000 and therefore, the suit filed on 28.11.2003 is within the period of limitation. It was further stated that the application for rejecting the plaint has been filed belatedly especially when the suit in C.S.No.591 of 2010 was filed in the year 2010 in which an exparte judgment and decree was passed on 15.06.2012. According to the appellant, the instant application has been filed to wriggle out of the financial liabilities of the respondent and there is no bona fide in filing such an application. Therefore, the appellant prayed for dismissal of the application.

11. When the said application in Application No. 4804 of 2018 in C.S.No.591 of 2010 filed by the respondent herein for rejecting the plaint in C.S.No.591 of 2010 came up for hearing, the appellant herein sought for transferring the suit in C.S.No.591 of 2010 to the commercial division of this Court on the ground that the transaction involved inter se between the parties gives rise to a commercial dispute and further the issues involved in the suit in C.S.No.591 of 2010 are inter-connected with the issues involved in C.S.No.689 of 2014. However, the respondent herein, who is the plaintiff in C.S.No.689 of 2014 opposed the transfer of C.S.No.591 of 2010 to the commercial division. Since the issue relating to

jurisdiction was raised, the learned single Judge, before dealing with the merits of the Application No. 4804 of 2018 in C.S.No.591 of 2010, proceeded to hear the counsel for both sides to decide the issue as to whether the transaction involved in the suit in C.S.No.591 of 2010 is a commercial dispute. After hearing both sides, the learned single Judge passed a detailed order declining the request of the appellant herein to transfer the suit in C.S.No.591 of 2010 to commercial division of this Court. The relevant portion of the order dated 26.10.2018 reads as follows:-

"16. It is in this context, and in the light of the specific definition of 'banking and other financial services' that includes an equipment lease, that the Bench concludes that the activity of funding or financing by an NBFC in the business of lease or equipment leasing or hire purchase finance, falls in the category of financial services rendered by NBFCs to their customers.

17. In the light of the discussion as aforesaid, I am of the view that the dispute in question is not an ordinary transaction engaged in by merchants, bankers, financiers or traders that would come within the ambit of 'commercial dispute' in terms of Section 2 (1) (c) of the Act. This issue is answered accordingly. The application is posted for hearing on merits on 02.11.2018."

12. Assailing the order of the learned single Judge, the learned counsel for the appellant, at the outset, submitted that C.S. No. 689 of 2014 filed by the respondent herein is pending before the commercial division of this Court and the present suit in C.S. No. 591 of 2010 arises out of the same transaction. The issues to be framed by this Court in both the suits are likely to be common warranting a joint trial. The evidence to be let in by the parties pursuant to the issues framed is the same in both the suit. Therefore, if the suits are tried separately, the parties will be put to enormous trouble. In this regard, the learned counsel for the appellant placed reliance on the decision of the Honourable Supreme Court in the case of State Bank of India vs. Ranjan Chemicals Limited and another reported in (2007) 1 Supreme Court Cases 97 wherein it has been held that the Court can order joint trial when same question of law or facts arises in both the proceedings or that the right to relief claimed in them is in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial.

13. With regard to the merits of the case as to whether the issues involved in the suit in C.S. No. 591 of 2010 falls within

the ambit of the commercial division, the learned counsel for the appellant, at the outset, invited the attention of this Court to the objects with which the appellant company was established and submitted that one of the main objects to be pursued by the appellant company on its incorporation as listed in the Memorandum of Association of the appellant is to carry on and undertake business as financiers and capitalists to finance operations of all kinds such as managing, purchasing, trading, investments, hire, hire purchase and to finance lease operations of all kinds, purchasing, selling, hiring to let on hire all kinds of plant and machinery and equipment and to assist in financing of all and every kind and description of hire purchase or deferred payment or similar transactions. Thus, the appellant is carrying on the business of Non-Banking Financial Company (in short NBFC) which is governed by Regulations issued by the Reserve Bank of India vide notification No.DFC 114/DG (SPT)-98 dated 02.01.1998. As per the directions of the Reserve Bank of India, a company which carries on either hire purchase or equipment leasing will fall within the definition of Non-banking financial company. Therefore, according to the learned counsel, the emphasis is on the nature of the transaction and whether such transaction would qualify as an ordinary transaction of merchants, bankers, financiers and traders. The emphasis is not on whether the transaction is of a nature ordinarily carried on by the parties to the transaction, which give rise to the dispute. In other words, equipment leasing is also a type of transaction ordinarily resorted to by such company as part of it's business.

14. As a next fold of submission, the learned counsel for the appellant, by placing reliance on Section 2 (1) (c) of the Act submitted that Section 2 (1) (c) of the Act emphasis the commercial dispute, which means a dispute arising out of ordinary transactions of merchants, bankers, financiers and traders and such as those relating to mercantile documents, including enforcement and interpretation of such documents. Whether the appellant carried on equipment leasing as an ordinary transaction in the course of its business with the respondent is immaterial. On the other hand, the factor for consideration is whether equipment leasing is a transaction ordinarily carried on by NBFCs like the appellant. According to the learned counsel for the appellant, one of the main objects with which the appellant company was incorporated is to finance lease operations of all kinds, purchasing, selling, hiring to letting on hire all kinds of plant and machinery and equipment etc., However, the learned single Judge did not consider the definition given to the Act, particularly in Section 2 (1) (c) (i) of the Act. In Para No.7 of the order, the learned single Judge has taken into account the term 'relating to mercantile documents' as a test to determine whether the dispute will

qualify as a commercial dispute. However, the definition provided under the Act uses the word 'such as' and therefore it is only illustrative and the same will not determine whether a dispute will fall under the realm of the Act or not. The learned single Judge misconstrued the definition of commercial dispute and therefore the impugned order is liable to be set aside.

15. Per contra, the learned Senior counsel appearing for the respondent would contend that the learned single Judge sitting on the commercial bench, passed an order dated 27.06.2018 in C.S. No. 689 of 2014 filed by the respondent herein, where, it was observed that since the genesis of the claim is based on the commercial transaction, this Court has jurisdiction to examine the issues raised in the plaint. The fact remains that the said order dated 27.06.2018 was passed when the appellant and the respondent were not present and no contest was raised. Further, the order dated 27.06.2018 does not conclusively hold that the suit involves a commercial dispute under the Act. There was also no submission made as to the commercial division pointing out the dispute raised in the suit is not a commercial dispute as per Section 2 (1) of the Act. As such, the observation in C.S. No. 689 of 2014 will not have any binding precedent besides the said order is not a final order. Since the previous order passed in C.S. No. 689 of 2014 is not a final order it is subject to appeal along with the final decree. Therefore, it is not open to the appellant to contend that since C.S. No. 689 of 2014 is pending on the file of commercial division of this Court, C.S. No. 591 of 2010 has to be transferred to the Commercial Division to have a joint trial. Since the learned single Judge, in the present proceeding, having passed a reasoned order, the same is liable to be considered on merits. It is his contention that the transaction in question does not fall within the scope of Section 2 (1) (c) of the Act inasmuch as the present dispute arises out of equipment lease agreement. The leasing of equipment would not fall within the ambit of either sale of goods or provision of goods as mentioned in clause (xviii) of Section 2 (1) (c) of the Act. The lease in question is an operating lease and not a financial lease. The present transaction stands outside the ambit of an ordinary loan transaction as per the provisions of the Reserve Bank of India Act, 1934. In this context, the learned counsel drawn our attention to Section 45 I (a) of the Reserve Bank of India Act, which reads as follows:-

"(a) business of a non-banking financial institution means carrying on the business of a financial institution referred to in clause (c) and includes business of a non-banking company referred to in clause (f).

(b)

(c) financial institution means any non-banking institution which carries on its business or part of its business any of the following activities, namely:-

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own;

(ii) the acquisition of shares, stocks, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature;

(iii) letting or delivering of any goods to a hirer under a hire purchase agreement as defined in clause (c) of Section 2 of the Hire-Purchase Act, 1972

....

(f) non-banking financial company means:-

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company, and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the official gazette, specify;"

16. Therefore, the contention of the appellant that the dispute between the appellant and the respondent is a commercial dispute is incorrect since the clauses in the agreement would clearly shows that it is an operative lease and not a financial lease.. Admittedly, the appellant is a NBFC and for a dispute to be a commercial dispute, it must fall within the definition of Section 2 (1) (c) of the Act. In other words, the dispute ought to have arisen chiefly out of ordinary transaction/business of a financier and secondly, the appellant conducting its business of equipment lease should fall within the scope of ordinary transaction of the appellant i.e., NBFC. The nature of the transaction or dispute decides the fact whether the dispute is a commercial dispute or not and not the status of the party to the dispute. In this context, the learned Senior counsel for the respondent relied on the decision of the High Court of Gujarat in the case of Madhuram Properties vs. Tata Consultancy Services Limited reported in (2017) 4 GLR 3327 wherein it was held that while considering the question whether the dispute between the

parties can be said to be a commercial dispute, the status of the parties is not required to be considered. If the case falls within any of the provisions of Section 2 (c) of the Act, then and then only, it can be said to be a commercial dispute. The learned single Judge, rightly concluded that the status of the parties to the dispute is irrelevant for consideration while considering as to whether a transaction between the parties is a commercial dispute or not. The transaction in this case relates to an equipment lease agreement. It is not a finance lease but an operating lease. Thus, operating leases clearly falls outside the scope of banking service, and therefore it cannot be considered as the ordinary business of an NBFC.

17. The learned senior counsel for the respondent would further contend that if the clauses contained in the equipment lease agreement were taken note of, it could be easily concluded that the lease in question is a operating lease and there is no dispute over the same. The learned single Judge also, placed reliance on the decision of the Honourable Supreme Court in Asea Brown case mentioned supra to fortify such conclusion. In such view of the matter, the learned Senior counsel prayed for dismissal of the appeal.

18. We have heard the counsel for both sides and perused the materials placed on record. The learned single Judge, while considering an application filed by the respondent herein in Application No. 4804 of 2018 in C.S. No. 591 of 2010, under Order VII Rule 11 of CPC, to reject the plaint in C.S. No. 591 of 2010 has examined the applicability of the Commercial Courts Act, since the same was raised as an issue. According to the appellant, the appellant has filed the suit in C.S. No. 591 of 2010 and the respondent herein has also filed a suit in C.S. No. 689 of 2014 and the disputes in both the suits arise out of the same Equipment Lease Agreement dated 30.06.1992 and 30.11.1995 entered into between the appellant and respondent. While so, by the order dated 27.06.2018, the learned single Judge, sitting on the Commercial division of this Court held that the dispute between the parties in C.S. No. 689 of 2014 is a commercial dispute and therefore the suit is maintainable before the Commercial Division of this Court. However, contrary to such finding, the learned single Judge, sitting on the original side, held to the contra in C.S. No. 591 of 2010. Thus, there is divergence of opinion in the suit filed by the appellant as well as the respondent herein.

19. Before the learned single Judge, the application filed by the respondent to reject the plaint was taken up for hearing. During the course of such hearing, arguments were advanced to transfer the suit in C.S. No. 591 of 2010 to the Commercial Division Bench of this Court on the ground that the transaction

involved inter se between the parties give rise to a commercial dispute. The counsel for the appellant placed reliance on the earlier order dated 27.06.2018 passed by this Court in the suit filed by the respondent in C.S. No. 689 of 2014. Therefore, for more clarity, the order dated 27.06.2018 passed by this Court in C.S. No. 689 of 2014 filed by the respondent herein is once again reproduced hereunder:-

"2. The plaintiff had taken on lease Himson Scragg SDS-B Texturising Machine for a period of five years. The machine was the sole and exclusive property of the defendant. The Plaintiff was only a lessee. The machine was used on a day to day basis for operations. The plaintiff had paid the lease rental until the Equipment Lease Agreement. The plaintiff requested the defendant to remove the machinery from GNL, which was an associate company of the plaintiff at Pune. However, the Official Liquidator, which was appointed by the Bombay High Court, took charge of the assets of GNL owing to liquidation proceedings. The machine was also taken possession by the Official Liquidator. It is under these circumstances, claiming damages, the suit had been instituted. Since the genesis of the claim is based on the commercial transaction, this Court has jurisdiction to examine the issues raised in the plaint."

20. Therefore, according to the counsel for the appellant, when C.S. No. 689 of 2014 is pending before the commercial division, the present suit in C.S. No. 591 of 2010 is also to be transferred to the commercial division of this Court to have a joint trial besides the issues to be framed in both the suits are identical. But, we are not inclined to accept this submission. Merely because the suit in C.S.No. 689 of 2014 is pending before the commercial division of this Court, the other suit in C.S. No. 591 of 2010 cannot be transferred to the commercial division. The criteria for transfer is whether the issues raised in the plaint is a commercial dispute or not. Therefore, for this purpose, we have to deal with the nature of the dispute involved in C.S. No. 591 of 2010. The learned single Judge placed reliance on Section 2 (1) (c) of the Act to arrive at a conclusion that the issue involved in the plaint in C.S. No. 591 of 2010 is not a commercial dispute. For brevity and clarity, Section 2 (1) (c) of the Act reads as follows:-

"2. Definitions (1) In this Act, unless the context otherwise requires....

(c) 'Commercial dispute' means a dispute arising out of -

(i) Ordinary transactions of merchants, bankers, financiers and traders, such as those relating to mercantile documents, including enforcement and interpretation of such documents.

21. As per clause (xviii) of Section 2 (1) of the Act, commercial dispute means and includes agreements for sale of goods or provision of services.

22. In this case, the dispute between the parties emanates from and out an agreement dated 30.06.1992 and 30.11.1995. As per this agreement, a textile machinery was leased out by the appellant to the respondent herein for a total sum of Rs.1,17,15,960/-, which is inclusive of finance charges, repayable by the respondent in 60 monthly instalments at the rate of Rs.1,95,267/- each. Pursuant to the said agreement, the said equipment was installed in the premises of the respondent's sister concern by name Garware Nylon Limited in Pune for which the respondent is liable to pay the rentals. According to the appellant, since the respondent committed default in payment of the lease rentals, they were constrained to file the suit in C.S. No. 591 of 2010 for recovery of the amount.

23. Now, the question is whether leasing out of machinery on hire purchase is an ordinary transaction of a NBFC. To arrive at an answer for this question, it would be appropriate to look into the nature of business of NBFC. In this regard, Section 45 I (a) of the Reserve Bank of India Act gives a fitting answer. Section 45 (1) (a) of the said Act defines business of NBFC includes only the non-banking institution, which is a loan company or an investment company or a hire purchase finance company or an equipment leasing company or a mutual benefit financial company.

24. Further, Section 65 (12) of the Finance Act deals with the nature of services provided by non-banking financial company. As per Section 65 (12), financial leasing services including equipment leasing and hire-purchase. Section 65 (12) of the Finance Act is extracted hereunder:-

"Definitions:- In this chapter, unless the context otherwise requires--

(12) 'banking and other financial services' means-

a) the following services provided by a banking company or financial institution including a non-banking financial company or any other body

corporate or commercial concern namely;--

(i) financial leasing services including equipment leasing and hire-purchase.

25. Section 65 (12) do not cover operating lease. Thus, operating lease does not come within the scope of non-banking financial company and the said Act impliedly excluded it.

26. Keeping the above provisions in mind, we analyse the plaint averments. If we analyse the plaint averments, it is evident that the lease in question is only an operating lease and it is not a financial lease. In this context, we are fortified by the decision of the Honourable Supreme Court in the case of Asea Brown Boveri Limited vs. Industrial Finance Corporation reported in AIR 2005 SC 17, wherein it was held as follows:-

"In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property inasmuch as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the above mentioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancellable."

27. The learned single Judge has also relied on the Full Bench decision of the Honourable Supreme Court in the case of Association of Leasing and Financial Service Companies vs. Union of India and others reported in (2011) 2 Supreme Court Cases 352 wherein it was held that a finance lease transfers all the risks and rewards incidental to ownership even though the title may or may not be eventually transferred to the lessee. On the other hand, financial lease is the one whereby the lessee could use the asset for its entire economic life and thereby acquires risks and rewards incidental to the ownership of such assets. It

was also held therein that financial lease is a financial loan from the lessor to the lessee, but operating lease is a lease other than financial lease. Useful reference can be made to the decision of the Honourable Supreme Court in para Nos.20 and 21, which reads as follows:-

"20.In this connection, as and by way of illustration we need to give an illustration which brings out the distinction between a 'finance lease' and 'operating lease'. A finance lease transfers all the risks and rewards incidental to ownership, even though the title may or may not be eventually transferred to the lessee. In the case of 'finance lease' the lessee could use the asset for its entire economic life and thereby acquires risks and rewards incidental to the ownership of such assets. In substance, finance lease is a financial loan from the lessor to the lessee. On the other hand an operating lease is a lease other than the finance leased. Accounting of a 'finance lease' is under AS-19, which as stated above, is mandatory for NBFCs. It is a completely different regime. According to Chitty on contract, a hire-purchase agreement is a vehicle of instalment credit. It is an agreement under which an owner lets chattels out on hire and further agrees that the hirer may either return the goods and terminate the hiring or elect to purchase the goods when the payment for hire have reached a sum equal to the amount of the purchase price stated in the agreement or upon payment of a stated sum. The essence of the transaction is bailment of goods by the owner to the hirer and the agreement by which the hirer has the option to return the goods at some time or the other (See. Para 36.242, 36.243). Further in the bailment termed 'hire' the bailee receives both possession of the chattel and the right to use it in return for remuneration to be paid to the bailor (See 32.045). Further, under the head 'equipment leasing', it is explained that it is a form of long-term financing. In a finance lease, it is the lessee who selects the equipment to be supplied by the dealer or the manufacturer, but the lessor (finance company) provides the funds, acquires the title to the equipment and allows the lessee to use it for its expected life. During the period of lease the risk and rewards of ownership are transferred to the lessee who bears the risks of loss, destruction and depreciation of malfunctioning. The bailment which underlies finance leasing is only a device to provide the finance company with a security interest (its

reversionary right). If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the return of the capital (para 32.057). In the case of hire-purchase agreement the periodical payments made by the hirer is made up of;

- (a) consideration for hire
- (b) payment of account of purchase.

21. To sum up, NBFCs essentially are loan companies. They basically conduct their business as loan companies. They could be in addition thereto in the business of equipment leasing, hire purchase finance and investment. Because NBFCs are basically loan companies, they are required to show the assets leased as 'receivables' in their balance sheets. That, the activities of hire purchase finance/equipment leasing undertaken by NBFCs come under the category of 'para banking'. That, in substance a finance lease, unlike an operating lease, is a financial loan (assistance/facility) by the lessor to the lessee. That in the bailment termed 'hire' the bailee receives both possession of the chattel and the right to use it in return for remuneration. On the other hand, equipment leasing is long-term financing which helps the borrower to raise funds without outright payment in the first instance. Here, the 'interest' element cannot be compared to consideration for lease/hire. Thus, financing as an activity or business of NBFCs is different and distinct from operating lease/hire-purchase agreements in the classical sense. The elements of the financial lease or loan transaction are quite different from those in equipment leasing/hire purchase agreements between owner (lessor) and the hirer (lessee). There are two independent transactions and what the impugned tax seeks to do is to tax the financial facilities extended to its customers by the NBFCs under Section 66 of the 1994 Act (as amended) as they come under 'banking and other financial services' under Section 65 (12) of the said Act. 'The finance lease' and 'the hire-purchase finance' thus squarely come under the expression 'financial leasing services' in Section 65 (12) of the Finance Act, 1994 (as amended) "

28. By placing reliance on this decision, the learned single Judge concluded that the dispute in question is not an ordinary transaction resorted to by merchants, bankers, financiers or traders within the scope and ambit of Section 2 (1) (c) of the Act. We are in complete agreement with such a conclusion arrived at by the learned single Judge. When the lease in question is an operating lease and not a financial lease, it will not fall within the ambit of

29. Yet another submission made by the counsel for the appellant is that since the suit in C.S.No.689 of 2014 is pending before the commercial division of this Court, the present suit in C.S.No.591 of 2010 also is required to be transferred to the commercial bench for a joint hearing. In order to transfer a case to a commercial division of this Court, the issues involved in the suit has to fall within the scope and ambit of commercial dispute, as defined under Section 2(1)(c) of the Act. If it does not fall within the scope of Section 2 of the Act, such suit cannot be transferred to the commercial division of this Court. In the present case, the transaction and/or dispute involved in the suit in C.S.No.591 of 2010 does not fall within the scope and ambit of Section 2 of the Act and therefore, it cannot be transferred to the Commercial Bench of this Court. The mere pendency of C.S. No. 689 of 2014 before the Commercial division of this Court is not a criteria to transfer the instant suit in C.S.No.591 of 2010 to the commercial division and therefore, the said submission of the counsel for the appellant is hereby rejected.

30. We also find that the respondent herein has filed an application to reject the plaint in C.S. No. 591 of 2010 filed by the appellant on the ground that the suit filed by the appellant is barred by limitation. The learned single Judge did not go into the dispute between the parties inter se as regards jurisdiction or limitation. However, the learned single Judge had taken up the issue with regard to applicability of Section 2 (1) of the Act as a preliminary issue on the basis of the arguments advanced by the counsel for both sides. In effect, the learned single Judge did not render any finding or finally adjudicate the application filed by the respondent to reject the plaint in C.S. No. 591 of 2010. While so, we are of the view that no prejudice is caused to the appellant by reason of the order passed by the learned single Judge. The appeal filed by the appellant therefore lacks merits and it is liable only to be dismissed.

31. In the result, the Original Side Appeal fails and it is liable to be dismissed. Accordingly, it is dismissed and the judgment and decree dated 26.10.2018 passed in Application No.

4804 of 2018 in C.S.No.591 of 2010 is confirmed. No costs.
Consequently, C.M.P.No.9003 of 2019 stands closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

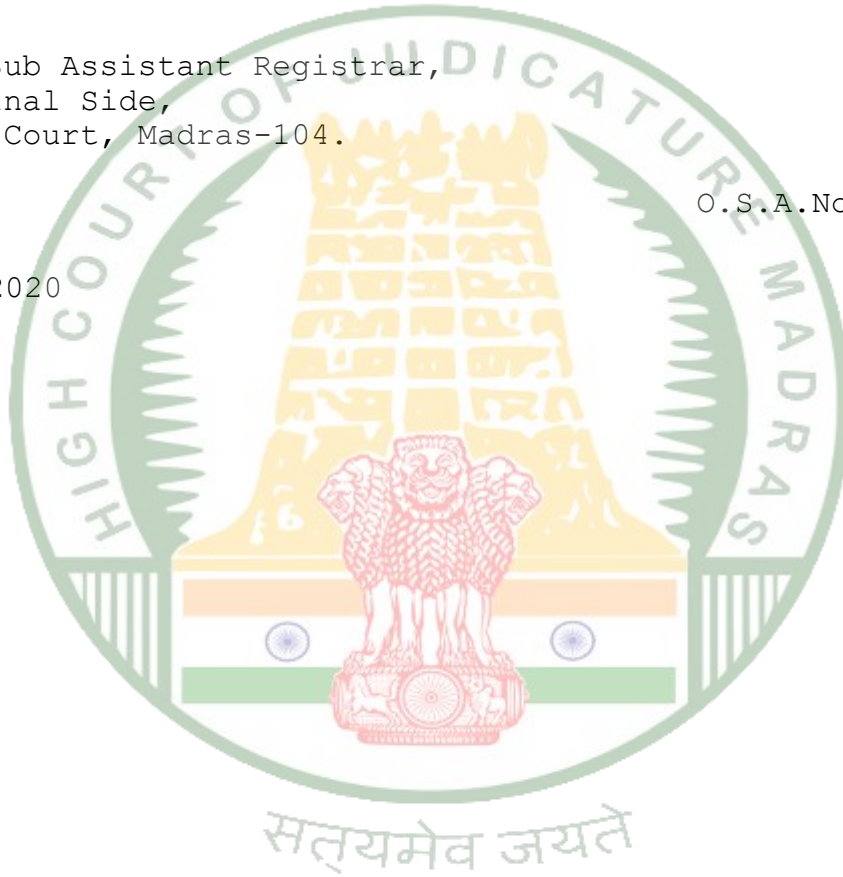
rsh

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras-104.

O.S.A.No.92 of 2019

MP (CO)
CS/17/07/2020



WEB COPY