IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

COMMERCIAL DIVISION

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE SHAMPA DUTT (PAUL)

FAT 267 OF 2021

WITH

IA No. CAN 2 OF 2022

W.B. State Warehousing Corporation

Vs.

Adventz Securities Enterprises Ltd.

WITH

FAT 268 OF 2021

WITH

IA No. CAN 2 OF 2022

W.B. State Warehousing Corporation

Vs

Adventz Securities Enterprises Ltd.

Appearance:

For the Appellant : **Mr. Sagar Bandyopadhyay, Adv.**

Mr. Mainak Krishna Ghosh, Adv.

Ms. Debdatta Saha, Adv.

Mr. Soumya Mukherjee, Adv.

For the Respondent : **Mr. Probal Mukherjee, Sr. Adv.**

Ms. Monika Kalra, Adv.

Mr. Farhan Ghaffar, Adv.

Mr. Ankit Shroff, Adv.

Ms. Ananya Chatterjee, Adv.

Judgment On : **25.11.2022**

Harish Tandon, J. :

The instant appeal arises from a judgment and decree dated 15th March, 2021 passed by the Commercial Court at Alipore in Title Suit no. 26 of 2019 whereby and whereunder the suit for recovery of possession and the arrear rent was decreed.

The said title suit was filed by the appellant in the Court of Civil Judge (Senior Division) at Alipore for recovery of possession, outstanding rent with interest and the *mesne* profits for the wrongful and illegal occupation of the appellant at the suit premises.

The facts emanate from the plaint of the said suit are adumbrated hereunder. One Poddar Projects Ltd. was a lessee in respect of a godown measuring 30 thousand square feet area at 1, Oil Installation Road, Calcutta – 88 under the Kolkata Port Trust. By virtue of the scheme of arrangements sanctioned by the Calcutta High Court in CA no. 226 of 1997, all the assets of the said Poddar Projects Ltd. stood transferred and vested in Hope

Cardamom Estate Ltd. Subsequently by the scheme of amalgamation sanctioned by the High Court in CA 462 of 1999 all the state of the said Hope Cardamom Estate Ltd stood transferred to and vested in Precision Paper Industries Ltd. Thereafter, the name of the said Precision Paper Industries Ltd. was changed to Poddar Heritage Corps Ltd. with effect from 19th September, 2002 which was again changed to Poddar Heritage Corp Ltd. with effect from 4th February, 2003. Subsequently, the name of the Poddar Heritage Corp Ltd. was again changed to Adventz Securities Industries Ltd. the respondent herein with effect from 5th August, 2010. The appellant was inducted as a sub-lessee in respect of the said demised premises by the original lessee i.e., Poddar Projects Ltd. at a rent of Rs. 3.50 per square feet per month on the basis of an agreement dated 24th November, 1995. It is stipulated in the said agreement that the tenure of the said lessee would be for a period of 3 years and in the event the possession is not delivered upon the expiration of the term, the rent would be increased by 15 per cent for the next 15 years and if such default still continues then it would further be increased for 15 years after an interval of every three years on the same terms and conditions. Admittedly, the possession was never delivered and by virtue of the agreement, the appellant continued in possession of the demised premises. In and around the month of January, 2002, a suit for recovery of possession was filed against the appellant, being Title Suit no. 3 of 2002 before the learned 8th Civil Judge (Senior Division) at Alipore. Since the said suit was filed under the provision of West Bengal Premises Tenancy Act which, according to the respondent is not applicable, the same was withdrawn upon obtaining leave of the Court to file a fresh suit. Such leave was granted on 22nd November, 2010. After obtaining such leave, a notice under Section 106 of the Transfer of Property Act was issued on 24th May, 2011 determining the said tenancy which was duly served upon the appellant. It is thus stated in the said plaint that after the expiration of the period provided in the said statutory notice, the appellant failed and neglected to comply the requisition made therein by delivering the possession of the demised premises and, therefore, are in wrongful occupation for which they are liable to pay the *mesne* profits and/or damages. It is further alleged that the appellant has also neglected to pay the arrear rent and, therefore, a decree for the recovery thereof is also sought.

The appellant appeared and contested the suit by filing the writing statements raising a plea that the respondent has no right, title and interest in respect of the suit premises. It is stated that one Kolkata Port Trust is the owner of the demised premises which was leased out to the Poddar Projects Ltd. for 30 years with effect from 15.09.1972 with the right to sublet the said premises. Since the said lease expired on 14.09.2002 and has not been extended or renewed, the plaintiff does not have a right to claim possession. Furthermore, the Kolkata Port Trust has issued a letter and contemplated to initiate a proceeding for recovery of possession of the demised premises and in view of the aforesaid fact, the respondent has no *locus standi* to file a suit. It is further stated that the rent is paid till June, 2009 on the Bill having raised on the appellant yet, the respondent did not have any right to claim such rent after the expiration of the period reserved in the original lease deed.

On the conspectus of the aforesaid facts averred in the pleadings, the issues were framed and ultimately by the impugned judgment the Trial Court decreed the same repelling the contention of the appellant on such score.

It would be relevant and pertinent to mention that after the promulgation of the Commercial Courts Act, 2015 the said suit stood transferred to the Commercial Court at Alipore after its establishment and an application was taken out raising the competence and jurisdiction of the Commercial Court to entertain such suit. The said application stood dismissed by Order no. 9 dated 6.1.2020 and the merit was thereafter proceeded with inviting the parties to adduce evidence in respect of their respective stands taken in the pleadings.

The Learned Advocate for the appellant squeezed his argument on the competence and jurisdiction of the Commercial Court in entertaining a suit for recovery of possession in respect of a immovable property as it does not satisfy the definition of a 'Commercial Dispute' defined in Section 2(c) of the Commercial Courts Act, 2015. It is contended that the immovable property being the demised premises cannot be regarded to have been used exclusively for trade and commerce and, therefore, cannot come within the ambit of the commercial dispute defined in the said Act. In respect of the aforesaid contention, the judgment of the Supreme Court in case of ***Ambalal Sarabhai Enterprises Ltd. vs. K.L. Infraspace LLP & Anr. Reported in (2019) SCC Online SC 1311*** is placed for the proposition that the dispute relating to immovable property per se may not be a commercial dispute unless it falls under Sub-clause (7) of Section 2(1)(c) of the Act. It is further submitted that the tenure of the agreement lapsed by passage of time and, therefore, the suit is not based on an agreement relating to the immovable property used exclusively in trade or commerce.

On the other hand, the learned Advocate for the respondent submits that the suit was initially filed before the regular Civil Court which stood transferred to the Commercial Court, after the promulgation of the Commercial Courts Act, 2015 and the plea of objection was taken in this regard which was rejected by the Commercial Court. It is further submitted that the appellant did not challenge the said order in the instant appeal nor have taken any plea in the memorandum of appeal and, therefore, is precluded from raising such point in the instant appeal. It is further submitted that admittedly the demised premises is used for the commercial purpose and, therefore, there is no fetter in the law to maintain the said suit before the Commercial Court. It is arduously submitted that the demised premises is not covered under the provision of the West Bengal Premises Tenancy Act, 2001 and, therefore, the recovery of possession based on the notice under Section 106 of the Transfer of Property Act is maintainable. Lastly, it is submitted that the appellant cannot deny the title of the respondent after the payment of rent in respect of the demised premises in view of the estoppels having created under Section 116 of the Evidence Act. Lastly, it is submitted that the appeal has no merit and, therefore, liable to be dismissed.

On the backdrop of the aforesaid facts emanates from the record and evidence adduced by the respective parties, it is undisputed that the appellant was inducted into the demised premises on the basis of an agreement initially for a period of 3 years and such possession continued until the notice under Section 106 of the Transfer of Property Act is served upon the appellant. Initially the suit was filed before the regular Civil Court which stood transferred to the Commercial Court after promulgation of the Commercial Courts Act, 2015. A plea of jurisdiction was raised before the Commercial Court and by an Order no. 9 dated 6.1.2020 the same was rejected. We are not unmindful of the proposition of law that such an order is not amenable to be challenged either by way of an appeal or a revision because of the embargo have been created in the Commercial Courts Act, 2015. However, we do not find any impediment on the part of the appellant to challenge the said order in the instant appeal filed against the judgment and decree in view of the provisions contained under Section 105 of the Code of Civil Procedure. None of the grounds incorporated in the memorandum of appeal would evince that the said order is also a subject matter of challenge therein and, therefore, it is not open the appellant to raise such issue at the Bar. However, We are not unoblivion of the fact that the issue which is a pure question of law can be raised for the first time before the higher forum provided the necessary averment required therefor are stated in the pleading.

In **Ambalal Sarabhai Enterprises Ltd. (Supra)** the Apex Court was considering a case relating to the return of the plaint in the suit for specific performance of a contract. In the said reported case an agreement for sale was executed in respect of a land in favour of the Respondent no. 2 therein who subsequently assigned and transferred his right created under the agreement in favour of the Respondent no. 1 therein. Subsequently, a sale-deed was executed on 03.11.2017 and certain other aspects were required to be completed pertinent to the nature of the use of the land for conclusion of the transaction. A memorandum of understanding was subsequently entered into between the parties therein which requires the execution of a mortgage deed by the Respondent no. 1 therein in favour of the appellant. Though the mortgage deed was executed but it was not registered and a suit was filed to enforce the registration of the said mortgage deed before the Commercial Court. A plea was taken whether a dispute relating to the transaction between the parties can be regarded as a commercial dispute so as to confer jurisdiction of the Commercial Court to entertain such suit. The question that fell for consideration was that although the parties have entered into the same transaction in respect of the immovable property and a suit for registration of the mortgage deed has been filed whether the immovable property involved can be regarded as being used exclusively in trade or commerce. It was found that the property involved therein was not being actually used for trade or commercial purposes and an argument was sought to be advanced that the language employed in Clause (vii) of Section 2(1)(c) of the said Act has to be interpreted in a manner that if it is capable of being used in future then it would satisfy the conditions laid down therein. The Apex Court did not accept the aforesaid contention in the following:

> ***"13. It is the case on behalf of the original plaintiff that as the original defendant No. 1 has failed to provide any infrastructural facilities and develop the plots and therefore, a Civil Suit for specific performance of the agreement has been***

filed. There are other alternative prayers also. Therefore, it cannot be said that the agreement is as such relating to immovable property used exclusively in trade or commerce. It is the case on behalf of the original plaintiff that as in Clause (vii) of Section 2(c), the phraseology used is not "actually used" or "being used" and therefore, even if at present the plot is not used and even if it is likely to be used even in future, in that case also, Section 2 (c)(vii) shall be applicable and therefore, the Commercial Court would have jurisdiction. The aforesaid has no substance. As per the cardinal principle of law while interpreting a particular statute or the provision, the literal and strict interpretation has to be applied. It may be noted that important words used in the relevant provisions are "immovable property used exclusively in trade or commerce". If the submission on behalf of the original plaintiff is accepted in that case it would be adding something in the statute which is not there in the statute, which is not permissible. On plain reading of the relevant clause it is clear that the expression "used" must mean "actually used" or "being used". If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, "likely to be used" or "to be used". The word "used" denotes "actually used" and it cannot be said to be either "ready for use" or "likely to be used"; or "to be used". Similar view has been taken by the Bombay High Court (Nagpur Bench). In the case of Dineshkumar Gulabchand Agrawal (Supra) and it is

> ***observed and held that the word "used" denotes "actually used" and not merely "ready for use". It is reported that SLP against the said decision has been dismissed by the Hon'ble Supreme Court."***

The Apex Court further held that the expression "used exclusively in trade or commerce" must be interpreted to be "actually used" and not "likely to be used" or "ready for use" in the following:

The ratio laid down in the above noted report does not appear to have any assistance to the appellant for the simple reason that a suit for specific performance of the contract was filed and it was found that the said immovable property was not actually used in trade or for commercial purposes. The Apex Court have held that the expression used in the aforesaid clause has to be given a literal meaning and something beyond the legislative intent should not be incorporated into the provisions.

In the instant case, the parties were conscious that the suit is being tried before the Commercial Court and the basic question that would arise is whether the reliefs sought for come within the commercial dispute. The first witness of the Defendant (DW1) in his cross-examination, categorically admitted that the said premises is taken on rent for commercial purpose and, therefore, in view of such admission the plea that the immovable property being the subject matter of the suit is not used exclusively in trade or commerce is not tenable. The admitted position as it stands is that the premises is being used for commercial purposes and, therefore, such plea taken at the Bar is not maintainable. Apart from the same, the plea of jurisdiction was raised before the Commercial Court and having decided against it is not open to the appellant to reagitate the said point without challenging the said order in the instant appeal by virtue of Section 105 of the Code of Civil Procedure. Admittedly, the appellant was inducted in the premises and the said tenancy was determined by issuing a statutory notice under Section 106 of the Transfer of Property Act. The first witness of the defendants has admitted the receipt of the said notice and even went on to say that they did not comply the requisitions made therein. Section 111 of the Transfer of Property Act determines the lease on the expiration of the period given in the statutory notice and, therefore, it is not open to the defendants to challenge the validity and/or sufficiency of the said notice after an admission is made in the evidence.

The plea of derivative title is also not available to the appellant for a simple reason that they admitted to have paid rent till the month of June, 2009 to the respondent and, therefore, they are estopped from challenging the derivative title of the respondent. Even otherwise, the respondent has been able to prove that by virtue of a scheme of amalgamation/arrangement sanctioned by the High Court all assets of the outgoing concern stood vested in the transferee company and mere change of the name does not alter the position. The position would have been different when the owner of the premises who have leased out the same to an outgoing concern does not accept the scheme of amalgamation and/or arrangement but it is not open to the sub lessee who attorned his tenancy upon payment of rent to challenge the derivative title of the transferee company. Since no other plea has been taken apart from the above, we do not find that there is any merit in the instant appeal. The appeal is thus dismissed.

There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

(Shampa Dutt (Paul), J.)

<u>Later:</u>

After delivery of the judgment in open Court, learned Advocate for the appellant prays for stay of the operation of the impugned order.

We do not find that there is any justification in passing the order of stay as prayed for.

The prayer for stay is hereby refused.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)