

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Uday Kumar

FMAT 67 of 2023
CAN 1 of 2023

GORA LALL SEAL

VS.

FINE INFRA PROJECTS PVT. LTD.

For the Appellant : Mr. Jishnu Chowdhury, Adv.
Mr. Rittick Chowdhury, Adv.

For the Respondent : Mr. Arindam Banerjee, Adv.
Mr. Debdoot Mukherjee, Adv.
Mr. Kritin Saraf, Adv.
Ms. Tshawana Parasram, Adv.
Mr. Debartha Chakraborty, Adv.

Hearing concluded on : 20th June, 2023.

Judgment on : 13th July, 2023.

Soumen Sen, J.:- The appellant is the plaintiff.

2. The appellant is aggrieved by an order dated 7th January, 2023 passed by the Judge, Commercial Court at Alipore in Money Suit 22 of 2021 in an application filed under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure.

3. The essential question arose before the determination of the learned Commercial Court was whether the dispute canvassed in the plaint

is a “commercial dispute” within the meaning of Section 2(1)(c)(vii) of the Commercial Courts Act.

4. The learned trial Judge on consideration of the averments made in the original plaint held that the suit is non-commercial in nature and, accordingly, returned the suit to be filed before the court having jurisdiction to try as a non-commercial suit.

5. The plaintiff/appellant is aggrieved by this order.

6. Mr. Jishnu Chowdhury, the learned Counsel representing the appellant submits that the learned trial Judge has proceeded erroneously in accepting the representation made on behalf of the respondent that the property in question relates to ten residential flats and twelve car parking spaces which are currently “not used for commercial purpose” or “will be used for commercial purpose in future” and that the subject properties are wholly for residential purpose and cannot be used for any commercial transaction. It is submitted that although the plaintiff filed an application for amendment of the plaint the learned trial Judge disregarding the well settled principles that an application for amendment was required to be heard first, decided the application for rejection of the plaint thereby preventing the plaintiff from curing the defects.

7. Mr. Chowdhury in this regard has relied upon the two decisions of our court namely, ***Nellimarla Jute Mills Company Ltd. v. Rampuria Industries & Investments Ltd.*** reported at (2009) 3 CHN 24 and ***Ahmed Hossain v. Chambelli*** reported at (1949) ILR 606 and has submitted that

an order passed for return of the plaint is required to be set aside due to such serious procedural lapse. It is submitted that the learned trial Court has failed to take into consideration that the agreement dated 30th March, 2015 and 2nd December, 2016 between the parties would clearly show that the agreements are in respect of immovable property being exclusively used for trade and commerce. It is further submitted that the learned trial Judge has failed to take into consideration the observation of the Hon'ble Supreme Court In ***Ambalal Sarabhai Enterprise Limited v. K.S Infra Space LLP & Anr.***, reported in **2020 (15) SCC 585** in which it has been specifically held that the agreement relating to immovable property used "exclusively in trade or commerce" would be a commercial dispute.

8. Mr. Chowdhury has also referred to the schedule of amendments proposed in the application for amendment in the plaint to show that it has been categorically stated in the proposed amendment that the erstwhile tenants of the plaintiff are still carrying on business in the suit property. The proposed schedule of the amendment is reproduced below:

"The plaintiff states that the agreements dated 30th March, 2015 and 2nd December, 2016 between the parties are in respect of the immovable suit property which is being used exclusively in trade or commerce and it is a commercial property The erstwhile tenants of the plaintiff are still carrying on business from the suit property. The certificates of enlistment issued by the Kolkata Municipal Corporation to the tenants who are carrying on business from the suit property are annexed hereto and marked with the letter "F". The plaintiff has also issued letters of attornment through which the tenancies in the suit property were transferred in favour of the defendant, copies whereof are annexed hereto and marked with the letter "G"."

9. Per contra, Mr. Arindam Banerjee learned Counsel representing for the respondents submitted that the parties have entered into two agreements dated 30th March, 2015 and 2nd December, 2016 respectively. These agreements were proceeded by an agreement dated October 10, 2014. In the first agreement it is clearly recorded that under the development agreement dated 10 October, 2014 the plaintiff and one Tiru Realtor Private Limited (hereinafter referred to as 'Tiru') the plaintiff granted an exclusive right to the said developer to develop to the suit premises for mutual benefit. Under the agreement it was, inter alia, agreed by and between the parties that the plaintiff would be entitled to 45,000 sq. ft. of residential constructed area in the new building to be constructed in the suit premises with the right to park 50 cars in the basement and the remaining areas would belong to the developer. Tiru paid a sum of Rs. 40 lacs as an interest free refundable security deposit. By the subsequent agreements entered into between the plaintiff and the respondent the plaintiff had agreed to sell and transfer his 1/3rd undivided share in the larger premises with various benefits to the respondent and in terms thereof it was agreed that the entire consideration would be paid partly in cash and partly allotting 10 number of residential flats.

10. Mr. Banerjee submitted that the schedule to both the agreements would show that the property is partly tenanted and there is no mention of any commercial activity being carried out from the suit premises. Mr. Banerjee has specifically referred to the first schedule of the agreement dated 30th March, 2015 which reads:

“All that the brick built messuages tenements hereditaments residential buildings sheds structures and dwelling houses (having total constructed area of 90000 sq. ft. more or less) together with the piece or parcel of land or ground thereunto belonging whereon or on parts whereof the same are erected and build containing by an area of 12 bighas 2 cottas 3 chittacks 21 sq. ft. more or less statute lying at and being Municipal Premises No. 35 Diamond Harbour Road, Police Station South Port, Kolkata 700 027, within the limits of Kolkata Municipal Corporation, ward no. 79 and butted and bounded in the manner the following that is to say:

On the North	: by 35/1 Diamond Harbour Road,
On the East	: by Diamond Harbour Road 25 feet wide
On the South	: by Port Commissioner’s land and
On the West	: by Port Commissioner’s land.

Or howsoever otherwise the same now are or is or heretofore were or was situated butted bounded called known numbered described or distinguished.”

11. It is submitted that similar schedule is mentioned in the second agreement dated 2nd December, 2016 which is in relation to the other premises. It is submitted that both the agreement would show that after the construction is completed the respondent shall deliver to the plaintiff possession of the owners allocation as defined in the development agreement. Mr. Banerjee has submitted that in **Ambalal Sarabhai** (supra) the Hon’ble Supreme Court has clearly stated that the words “used

exclusively in trade or commerce” are to be interpreted purposefully and meaningfully and the consideration for deciding whether it is a commercial dispute it has to be shown that the property is actually used “for commercial purpose and not “ready for use” or “likely to be used”.

12. Mr. Banerjee accordingly submitted that in view of the fact that on the date of institution of the suit the immovable property was not actually used for commercial purpose, the suit is required to be treated as a non-commercial suit and the learned trial Judge has rightly returned the plaint to be presented to the appropriate court. It is further submitted that by the order dated January, 2022 the learned trial Judge had decided to hear the application for rejection of the plaint first and thereafter to decide the application for amendment of the plaint. This order is not under challenge. The said issue cannot be raised in this appeal.

13. In reply Mr. Chowdhury has submitted that in an appeal from an order allowing the application for rejection of the plaint if it is demonstrated that a learned trial Judge has acted contrary to law and there is a lack of procedural fairness the appellate Court is not precluded to decide the legality of the order after taking into consideration the proposed amendment.

14. In deciding the jurisdiction to try the suit in the commercial division the trial court is required to take into consideration the averments in the plaint. In the event an application in the nature of demurer is filed like the present one where the question of jurisdiction is involved the court is required to take into consideration the proposed amendment first and

depending upon the outcome of the said application the demurrer application is to be decided. The trial court is required to ascertain the nature of the immovable property mentioned in the agreement if being exclusively used for trade or commerce as on the date of the agreement and any pleading to that effect. The use of the property for trade and business in presenti on the date of the agreement is determinative. The trial judge seems to have overlooked the aforesaid principle.

15. In **Amballal Sarabhai** (*supra*) “the words “used exclusively in trade or commerce” are to be interpreted purposefully. The word “used” denotes “actually used” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “actually used”. Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above.”

16. It thus makes it clear that a dispute relating to immovable property simplicitor will not amount to a commercial dispute unless it is also actually used exclusively in trade and commerce.

17. The application for rejection/ return of the plaint proceeds on the basis that it is not a commercial dispute. In **Ambalal Sarabhai** (*supra*) it is clearly stated that the nature of the dispute and the jurisdiction to try the same is to be reflected in the suit itself since in a civil suit the pleadings, namely, averments in the plaint would at the outset be relevant to confer jurisdiction. It was further held that the very purpose for enacting the said act is to expedite adjudicating process and to place such suits on a fast track. It is therefore necessary to strictly construe the provision of the Act.

It is necessary to carefully examine the plaint. The nature of the transaction between the parties, the nature of the land and the type of use to which it was being put as on the date of the agreement need to be seen. The entire plaint is required to be read as a whole. It is thus, necessary that the nature of the amendment is required to be considered before deciding the jurisdiction of the commercial court to try the suit. The court at this stage is not to consider the defence on merits and required to decide the application for amendment following the settled principles of law. The court however is entitled to consider the agreement in deciding its jurisdiction. The plaintiff filed the suit after obtaining dispensation under Section 12A of the Act.

18. The court needs to find out if after allowing the amendment the dispute can still be regarded as a commercial dispute. It is possible that even if it is registered as a commercial suit after a trial on appreciation of evidence, the contract and its nature are finally assessed, it may well turn out to be not a commercial dispute within the meaning of Section 2(1)(c) of the Act.

20. In fact, in the affidavit-in-opposition to the application for rejection of plaint it has been specifically stated that the property was used exclusively in trade and commerce and the proposed amendment was reiterated in paragraph 15 of the objection which was overlooked presumably on the ground that it was not stated in the original plaint. Under such circumstances, the impugned order is set aside. The learned Judge, commercial court, is directed to decide the application for amendment first on merits without being influenced by the observation

made in this order and then consider the application for rejection/return of the plaint.

21. The appeal and the application succeed.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)