Meena

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.85 OF 2020

1 MS. IDALINA PRECIOSA D'SOUZA ALIAS IDA D'SOUZA, aged 49 years, divorcee, daughter of late Alfred B. D'Souza, resident of 17, Grangeway, Parkside Houghton Regis, Dunstable LU55PR, Bedfordshire, London represented by her constitured attorney Mrs.Maria Liberata Mendonca e Khadapkar alias Liberata Khadapkar, aged 35 years, married, wife of Mr. Chandrashekar Khadapkar, resident of H.No.3, Near Ammonia Tank Behind C.M.E. Office, Jetty, Sada, Mormugao-Goa. ...Petitioner

V/s.

1 MR INACINHO CELESTINO DO PINTO E SA @ IGNATIUS DE SA aged 45 years, married, son of late Marcos Alvaro de Sa;

2 MRS CHARMAINE MARY SALDANHA E SA major, married, wife of Mr. Inacinho Celestino do Pinto e Sa @Ignatius de Sa, both r/s. House No.13/834/1, Casa Ditosa, Dayanand Bandodkar Road, Opposite Benferds Villa, Miramar, Panaji-Goa.

3 MR NANDAN FOWKAR major, age 64 years, retired CF-3,

Filomena Complex, Caculo Junction St.Inez, Moloca, Merces, P.O. Santa-Crux Ilhas-Goa.

4 KARNATAKA BANK LTD.
Ground floor, Karina Chambers, Near Caculo Island, M.G. Road, represented by its Senior Manager

5 MISS SHARDA BINGARDEVA,
major,
c/o. Mr. Arun Bingardeva, S. no.36, Mozeswadi, Vadgaonsheri, Pune-411014. … Respondents.

Mr P. Navti, Advocate for the petitioner.

Mr A.D. Bhobe with Ms S. Shaikh, Advocate for respondent Nos.1 and 2.

CORAM: BHARAT P. DESHPANDE,J.

DATED : 17th August, 2023

ORAL JUDGMENT:

1. Rule. Rule is made returnable forthwith.

2. Heard Mr P. Navti, learned Counsel for the petitioner and Mr A.D. Bhobe with Ms S. Shaikh, learned Counsel appearing for respondent Nos.1 and 2.

3. Impugned order dated 30/10/2019 below Exh.92 in Special Civil Suit No.92 of 2017, which is challenged by the petitioner/plaintiff.

4. By the impugned order, learned Trial Court directed that the dispute between the parties is a commercial dispute and therefore the suit has to be tried by the Commercial Court. While doing so, the application filed by the plaintiff to transfer the said suit to the Civil Court have been rejected.

5. The learned Counsel for the petitioner would submit that the dispute is purely a civil dispute and that except the valuation of the suit property, there is no commercial transaction between the parties. He submitted that prayer in the plaint is to declare the Deed of Sale dated 30/10/2007 as null and void and directing the defendants to pay mesne profit along with interest. He further submitted that though there are some transactions with regard to the bank on the basis of fixed deposits, such dispute cannot be termed as commercial dispute. He therefore submitted that the learned Trial Court had committed an error in considering that dispute being commercial in nature, to be tried only by Commercial Court. He placed reliance on the decision in the case of ***Ambalal Sarabhai Enterprises Limited v/s. K.S. Infraspace LLP and another [(2020) 15 SCC 585]***.

6. The learned Counsel Mr Bhobe appearing for the respondents would submit that though valuation of the property as mentioned in the plaint is more than the specific value as mentioned in the Commercial Courts Act and immovable property is involved, *prima facie* this dispute is with regard to the property which is in connection with the house.

However, he submits that even if it is considered as a commercial dispute as directed by the Trial Court no prejudice will be caused to them. Mr Bhobe further submits that the dispute is not *prima facie* a commercial dispute and needs to be tried by the Regular Civil Court.

7. The definition of "Commercial Dispute" as found in Section 2 (c) is very vast. However, reliance placed by the Trial Court is with respect to clause 2(c)(i) which specifies ordinary transactions of merchants, bankers, financiers and traders. However, the learned Trial Court failed to take into consideration that such ordinary transactions of merchants, bankers etc. are those relating to mercantile documents, including enforcement and interpretation of such documents. Admittedly in the present petition, there is no reference to any mercantile document qua the bankers. The documents referred in the plaint relates to fixed deposits in the name of the deceased who by Will bequeathed the property along with the amount mentioned in the fixed deposits.

8. On perusal of the plaint, there is absolutely no averment that transactions between plaintiff and defendants were of commercial nature. There is further no pleading to show that immovable property was used for commercial purpose. Only because the specified value of the property is more than the value as described under the Notification issued by the Government of Goa showing jurisdiction of the Commercial Court, the dispute cannot be termed as commercial dispute. All the conditions for deciding it as a commercial dispute needs to be fulfilled.

9. In the case of ***Ambalal*** (supra), Supreme Court in paragraphs 8 and 9 considered the aspects which required to be taken into consideration while deciding the dispute as a commercial dispute. For that purpose pleadings in the plaint requires specific averments. Said observations in paragraphs 8 and 9 read thus:

> *"8. Though such rival contentions are put forth by the learned senior advocate on either side, these aspects cannot be dealt with in abstract. Instead 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. Hence before adverting to the other aspects it would be necessary to carefully examine the plaint. The plaintiff has in detail referred to the nature of the transaction between the appellant and the respondents herein. In para 5 thereof the detail of the land bearing R.S. No.122 corresponding to City Survey No.1101 and 1100/1 having land area of 9207 square metres at Mouje Subhanpura Reg. District, Vadodara is referred. Further the schedule of the property is indicated in para 6 and reference is made to the Memorandum of Understanding where again the reference is made to the land. It is averred therein that it would be the total responsibility of the respondent No.1 herein (defendant No.2 in the suit) to change the land use as well as to pay the amount that may be required for the permission. The amount to be paid as premium is referred and the right of the plaintiff to secure the Mortgage Deed in view of the terms of the MoU is stated. In the entire plaint there is no reference to the nature of the land or the type of use to which it was being put as on the date of*

the Agreement to Sell/Sale Deed/Memorandum of Understanding or as on the date of the suit.

9. Further on referring to the cause of action in para 21, the plaintiff has thereafter referred in para 22 to the jurisdiction of the Court to hear and decide the matter. It would be appropriate to extract the same which reads as hereunder:

"22. Jurisdiction: The Plaintiff states that the Defendants having their office at Vadodara land which is the subject matter of the instant suit is situated within the territorial jurisdiction of this Hon'ble Court and hence this Hon'ble Court has the jurisdiction to hear and decide the matter." Even though in the paragraph describing jurisdiction the plaintiff has stated with regard to the territorial jurisdiction since the office and land being at Vadodara, there is no reference indicating the reason for which the plaintiff pleads that the Court which is the Commercial Court exclusively constituted to try the commercial disputes has jurisdiction to try the instant suit. In that background, a perusal of the prayer made in the plaint would essentially indicate that the suit is one seeking for specific performance of the terms of MOU whereunder it is agreed that the Mortgage Deed be executed. Even if the immovable property under the Mortgage Deed was the subject matter it was necessary to plead and indicate that the same was being used in trade or commerce due to which the jurisdiction of Commercial Court is invoked. Without such basic pleadings in the plaint, any explanations sought to be put forth subsequently would only lead to a situation that if an objection is raised, in every suit a consideration would be required based on extraneous material even to ascertain as to whether the intended transaction between the parties was of such nature that it is to be construed as a commercial dispute."

10. The Supreme Court in the case of ***Ambalal***(supra), further observed in paragraph 37 as under:

> *"37. A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2(1)(c) of the Act viz. "the agreements relating to immovable property used exclusively in trade or commerce". 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."*

11. Applying the above observations/principles, to the matter in hand, it is clear that the plaint is lacking particulars to consider it as a commercial dispute. Only because there are some bank transactions in connection with Fixed Deposits, the dispute cannot be termed as commercial dispute.

12. The immovable property is also not used for any commercial activity. No such averments are found in the plaint. Admittedly, there is a residential house. In such circumstances, the suit filed for cancellation of Sale Deed along with other grievances is a civil dispute and cannot be termed as commercial dispute so as to be tried and decided by the Commercial Court.

13. The impugned order therefore needs to be quashed and set aside. The application filed by the plaintiff for transferring the matter to Regular Civil Court having jurisdiction at Exh.92 stands allowed.

14. The Rule is made absolute in the above terms.

15. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

MEENA VISHAL BHOIR Digitally signed by MEENA VISHAL BHOIR Date: 2023.08.18 15:18:20 +05'30'