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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on : 01.05.2023

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Judgement pronounced on : 08 .05.2023

+ **FAO (COMM) 27/2023**

AMIT JAIN

..... Appellant

Through : Mr Pratap Singh Rawat, Advocate

versus

MAHAVIR INTERNATIONAL PVT LTD & ORS..... Respondents

Through : Mr Mukul Kumar Baid, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J.:

1. By way of this appeal, brought under the provisions of Order XLIII Rule 1 read with Section 151 of the Civil Procedure Code (hereinafter referred to as "the Code") and Section 13 of the Commercial Courts Act 2015 (hereinafter referred to as "the Act"), the appellant assailed order dated 11.11.2022 of learned District Judge (Commercial), South, Saket, Delhi, whereby application dated 05.11.2022 of the appellant plaintiff under Section 151 of the Code was treated as application under Order XXIII Rule 1(3) of the Code and disposed of, thereby permitting the appellant to withdraw the suit with liberty to file fresh suit, but declining the request of the appellant for return of the court fees. Upon service of notice of this appeal, the respondents entered appearance through counsel, who on

05.04.2023 submitted that the respondents have no objection to this appeal concerning the relief which has been denied to the appellant by the learned trial court. On 05.04.2023 itself, learned counsel for appellant was also called upon to address on maintainability of this appeal. Accordingly, we have heard learned counsel for both sides.

2. Briefly stated, circumstances leading to this appeal are as follows. The appellant filed a suit for recovery of Rs. 66,01,538/- with pendentelite and future interest at the rate of 18% per annum. Although, the cause of action pleaded by the appellant was a personal loan advanced by him to the respondents, but learned counsel for appellant in his wisdom filed the suit as commercial suit. On 07.10.2022, upon filing of written statement with an application under Order VII Rule 11 of the Code, learned trial court framed two questions for clarification, one of which was as to whether the dispute between the parties could be termed as commercial dispute and accordingly the suit was posted for the said clarifications. Thereafter, the appellant filed application dated 05.11.2022 under Section 151 of the Code seeking permission to withdraw the suit with liberty to file fresh suit before appropriate court and also sought return/refund of the original court fees of Rs. 67,000/-. The learned trial court treated the said application as application under Order XXIII Rule 1(3) of the Code and partly allowed the same, thereby permitting the appellant to withdraw the suit with liberty to file fresh suit before appropriate court but declining the prayer for return of court fees. Hence, the present appeal.

3. During arguments, learned counsel for appellant contended that the impugned order is a final order insofar as it leads to culmination of the suit and therefore, this appeal is maintainable. As regards refund of court fees, it

was contended that since the suit was not adjudicated on merits, the appellant is entitled to refund of court fees, especially because there is no objection from the opposite side. In support of his arguments, learned counsel for appellant placed reliance on Order dated 16.04.2021 of a learned Single Judge of this court in the case titled *Span Health Care Pvt. Ltd. vs Vishal Sharma*, CRP 31/2021; and Judgment dated 21.02.2020 of Nagpur Bench of Hon'ble Bombay High Court in the case titled *Nagpur District Central Co-operative Bank Ltd vs Union of India*, WP No. 4369/2009. As regards respondents, as mentioned above, they have no objection to this appeal.

4. Thence, two questions to be considered by this court are as to whether the present appeal is maintainable under Section 13 of the Act and as to whether the appellant is entitled to refund of court fees. We have examined these questions primarily keeping in mind as to whether on account of erroneous impression of the learned counsel for plaintiff in framing the suit as a commercial suit and filing the same before the commercial court, the litigant be penalized monetarily, especially where the learned counsel for plaintiff timely realized the mistake and sought withdrawal of the suit. Pertinently, the appellant, being aware that the action instituted by him was one over which the learned District Judge did not have subject matter jurisdiction, judgements dealing with the provisions of Order VII Rule 10 were cited. The learned District Judge though, as is evident upon perusal of the impugned judgement, disregarded the same, putting the onus squarely on the appellant.

5. The provision under Section 13 of the Act stipulates that any person aggrieved by the judgment or order of a Commercial Court at the level of

District Judge exercising original civil jurisdiction may appeal to the commercial appellate jurisdiction of the High Court within 60 days from the date of the judgment or order, provided that an appeal shall lie from such orders passed by a commercial court that are specifically enumerated under Order XLIII of the Code and Section 37 of the Arbitration and Conciliation Act 1996. Of course, Order XLIII of the Code does not explicitly cover an order passed under Order XXIII of the Code, but it would be significant to note that an order passed under Order VII Rule 10 of the Code qua return of plaint to be presented to the proper court certainly is covered under Order XLIII of the Code. In other words, there cannot be any dispute to the proposition that an order passed under Order VII Rule 10 of the Code can certainly be challenged by way of appeal.

6. In the present case, as mentioned above, the learned trial court expressed that the suit framed by the appellant would not fall under Section 2 of the Act and that led the appellant to file the application dated 05.11.2022 seeking permission to withdraw the suit with liberty to file fresh suit before appropriate court. The application was filed invoking Section 151 of the Code, but the intent and substance of the application was in the nature of process contemplated by Order VII Rule 10 of the Code. In our considered opinion, on account of financial ramifications for the plaintiff, the learned trial court ought to have treated the said application as one under Order VII Rule 10 of the Code instead of treating the same as one under Order XXIII Rule 1 of the Code. Alternatively, the learned trial court, being of prima facie view as regards jurisdictional competence, could have on its own also returned the plaint under Order VII Rule 10 of the Code.

7. In the case of *Kallu vs Phundan*, (1946) ILR 702, a Division Bench of the Allahabad High Court dealt with a situation where the suit was dismissed by the trial court on merits also, besides upholding the defendant's plea that the suit was not cognizable by the civil court. The learned Single Judge, followed by the Division Bench held that having arrived at a finding of lack of subject matter jurisdiction, the trial court ought have returned the plaint for being instituted in the court of competent jurisdiction instead of proceeding further. Similarly, in the case of *T. Krishnaveni Ammal vs The Corporation of Madras*, OS App. 117/1954, decided on 02.07.1956, a Division Bench of the Hon'ble Madras High Court also took a view that having accepted the plea based on Madras Estates Land Act that the suit was beyond jurisdiction, the trial court ought to have returned the plaint for presentation to the proper court instead of dismissing the same.

8. In the overall facts and circumstances of this case, throttling this appeal at its inception would be complete miscarriage of justice. We find no reason to hold that this appeal is not maintainable in the eyes of law.

9. Coming to the other aspect, the question as to whether a money recovery suit should be filed before a commercial court or a ordinary civil court is too intricate a question of law to be fathomed by a lay person. The litigant in regard to such decisions goes completely by the advice of her counsel. Where a counsel in her wisdom arrives at a particular view on any point of law and acts accordingly, but subsequently feels not confident to proceed further, the litigant ought not to be punished monetarily.

10. It is trite that while interpreting a fiscal legislation like Court Fees Act,

the court should adopt liberal attitude so as to lessen and not add to the burden of the litigant. Especially where the court dealing with the *lis* is of the view that it is not competent to decide the same, there is no logic in depriving the litigant refund of the court fees.

11. In the case of *Nagpur District Central Cooperative Bank* (supra) relied upon by learned counsel for appellant, in a similar situation, a Division Bench of the Bombay High Court, while referring to various judicial precedents including the decision of its Full Bench, took a view that where the court fees on the institution of a suit has been paid in a court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fees thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one.

12. Such refusal to refund court fees even in a *lis* which remained unadjudicated and expecting the litigant to pay up again would discourage the law-abiding litigant from approaching the justice dispensation system. Such a form of docket exclusion would be highly counterproductive for any civilized society.

13. In the present case, the fact remains that at the initial stage itself, on being pointed out the jurisdictional infirmity, the appellant fairly conceded and moved the application dated 05.11.2022 seeking permission to withdraw the suit with liberty to file fresh suit, the *lis* remains unsolved. There having been no formal adjudication of the dispute brought by the appellant before the trial court, we are of the opinion, that it would be too onerous on the appellant to make him pay court fees afresh.

14. In view of above discussion, we are unable to uphold the impugned order to the extent it rejects the prayer of the appellant for return/refund of the court fees and to that extent, the impugned order is set aside. Accordingly, the appeal is allowed.

15. A copy of this judgment be sent to the learned trial court and appeal file be consigned to records leaving the parties bear their own costs.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

MAY 8th, 2023
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