

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

% Judgment reserved on : 25.04.2023
Judgment pronounced on : 01.05.2023

+ CM(M) 330/2021 & CM APPL. 14392/2021

ASHUTOSH RAZDAN Petitioner

versus

NETCOM SOFTECH PRIVATE LIMITED & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Sanjeev Kumar Sharma and
Mr. Shivam Dahiya, Advocates.

For the Respondents : Mr. T.K.A. Padmanabhan, Mr.
Chander Shekhar Verma and Ms. Pooja
Iyer, Advocates.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

[The proceeding has been conducted through Hybrid mode]

1. Petitioner challenges the order dated 03.03.2021 whereby the learned Trial Court after considering the material on record of the suit, concluded that the dispute arising in the said suit is not a commercial dispute within the meaning of Section 2(1) (c) of the Commercial Courts Act, 2015 (hereinafter as “Act”) and simultaneously placed the matter before the learned Principal District and Sessions Judge (South-West), Dwarka Courts, for appropriate orders on the same.

2. Mr. Sanjeev Kumar Sharma, learned counsel appearing for the petitioner submits that the suit pending before the learned Trial Court was originally filed as a commercial suit as defined under Section 2 of

the Act. Learned counsel submits that while the suit was pending before the learned designated Commercial Court, upon a perusal of the record of the suit, the learned trial court came to the conclusion that the dispute arising in the said suit would not fall within the meaning of “*commercial dispute*” as defined under Section 2(1) (c) of the Act vide the order dated 11.03.2020.

3. The petitioner challenged the aforesaid order dated 11.03.2020 by way of CM(M) No. 445/2020 before this Court. This Court, by way of the order dated 09.10.2020 and after examining the records, remitted the matter back to the learned Trial Court to pass a reasoned order. Apparently, in pursuance of the aforesaid order, the learned Trial Court passed the order impugned herein.

4. The substratum of the case of petitioner was predicated on a document described as “*term sheet*” which was stated to have been executed on 05.05.2016 between the parties. So far as the said document is concerned, the validity or otherwise of the same is yet to be tested in trial.

5. Learned counsel appearing for the petitioner submits that the “*term sheet*”, particularly Para 1 clause (d) as also Para 2 clauses (b), (e) and (f) of the said “*term sheet*” was acted upon by the parties. In that, it is the statement of the petitioner that the petitioner had infused certain amounts which were to be used as capital for the purposes of the intended company styled as “*Netcom Technologies Private Ltd.*”. Learned counsel also submits that it was not only that the petitioner had acted upon the terms of the term sheet but the respondents also had commenced implementing certain clauses of the term sheet qua their

obligations towards the petitioner. On that basis, learned counsel submits that the parties were *ad idem* to the conditions of the term sheet and as such cannot today claim that the term sheet is of no consequence. Learned counsel also submits that the relevant parties to the agreement had appended their signatures to the said document. Learned counsel then referred to Para 4 of the said term sheet particularly to the table of profit sharing which was projected on certain profits being made by the intended company to submit that the nature of such transactions would fall within the definition of “*commercial dispute*”, as per the Act.

6. Learned counsel for the petitioner also submitted that the learned Trial Court had not considered the import of the said term sheet and had infact, to the contrary, concluded that in the absence of the intended company ever having been incorporated, such term sheet would have no validity or legality in the eyes of law. Learned counsel submits that it was only on that basis that the learned Trial Court concluded that the dispute in the suit would not fall within the ambit of Section 2 (1) (c) of the Act and thus, placed the matter before the learned Principal District and Sessions Judge for appropriate orders to transfer the same in a Court of ordinary civil court of competent jurisdiction. Learned counsel submits that the learned Trial Court has already decided the validity or otherwise of the term sheet which it could not have under the proceedings, ostensibly exercising the powers for transfer of suits as provided in Commercial Courts Act, 2015 and the Code of Civil Procedure, 1908. Learned counsel relies upon the judgment of this Court in ***Rachit Malhotra vs. One97 Communications Ltd.*** reported in **2018 SCC OnLine Del 12410**. He also relies upon the judgment of the

Hon'ble Supreme Court in *Vodafone International Holdings BV vs. Union of India and Another* reported (2012) 6 SCC 613 which essentially defined what a shareholder's agreement could be to submit that the term sheet relied upon by the petitioner would fall within the said definition. On that basis, learned counsel submits that the term sheet would fall within the definition of "*document*" as defined in Section 2 (1) (f) of the Act and therefore, would entitle the petitioner to maintain the suit in a Commercial Court.

7. Learned counsel relies upon the definition of "*commercial dispute*" as has been clarified in respect of shareholder agreement, joint venture agreement, management and consultancy agreements. On that basis, learned counsel submits that the term sheet could fall within any of the aforesaid three definitions and certainly, the dispute raised in the suit would fall within the meaning of Section 2(1) (c) of the Act. Thus, the learned Trial Court could not have placed the matter before the learned Principal District and Sessions Judge for appropriate transfer orders.

8. *Per Contra*, Mr. T.K.A. Padmanabhan, learned counsel for the respondent vehemently opposed the aforesaid submissions of the petitioner and supported the reasoning and rationale in the impugned order.

9. Learned counsel submitted that the intended company i.e., Netcom Technologies Private Limited, though, was genuinely sought to be brought into existence by the parties, however, infact was never incorporated due to certain reasons.

10. Learned counsel submits that the present petition is not

maintainable in view of the ratio laid down by this Court in ***Black Diamond Trackparts Pvt. Ltd. and Others vs. Black Diamond Motors Pvt. Ltd.*** reported in **2021 SCC OnLine Del 3946** and whereby the learned Division Bench of this Court had held that the bar under Section 8 of the Act is absolute and in only rarest of the rare and compelling cases should the High Court interfere under Article 227 of the Constitution of India. Learned counsel submits on that basis, that the present case is neither rare nor compelling for this Court to interfere. Learned counsel for the respondent relied upon ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society***, reported in **(2019) 9 SCC 538**, to submit that there is a specific bar on the powers of the High Courts to interfere with the orders under Article 227, which can be challenged by way of an alternate remedy duly provided in the Code of Civil Procedure, 1908 and thus, the present petition is not maintainable in view of such settled position of law.

11. Mr. Padmanabhan, learned counsel, while referring to the term sheet, submitted that it is only a document or an agreement to enter into a formal shareholder's agreement which never happened and therefore, no suit could be maintainable in respect of an agreement to enter into another agreement.

12. Learned counsel submits that in any case, even otherwise, the dispute, without admitting to the same, is between certain persons in regard to recovery of certain sum as also damages which could be entertainable, if at all, by an ordinary Civil Court rather than a Commercial Court. He further submits that the dispute *inter se* the parties to the said term sheet could not be termed as a commercial

dispute predicated on the fact that the said term sheet never formed the basis of either a formal shareholder agreement or a document on which the intended company was ever incorporated. Learned counsel submits that the reliance of the petitioner on the definition contained in Section 2 (1) (c) sub-clauses (i), (x), (xi), (xii), (xiii) and (xv) is absolutely misplaced for the reason that the said term sheet of a non-existent company could not have been given a colour of the meanings ascribed to the aforesaid sub-clauses of Section 2 (1) (c) of the Act.

13. Learned counsel also submits that the said term sheet was never signed by any Authorized Representative of respondent no.1/Netcom Softech Private Ltd. In other words, the respondent no.1 company, which the petitioner claims to have infused the funds with, was never a party to the said term sheet and therefore, does not bind the respondent no.1 company at all.

ANALYSIS AND CONCLUSION

14. This Court has considered the rival submissions, perused the impugned order as also the documents, including the term sheet placed on record.

15. At the outset, it would be apposite to extract Section 2 (1) (c) sub-Clauses (i), (x), (xi), (xii), (xiii) and (xv) as well as Section 2 (1) (f) of the Act, hereunder before proceeding to determine the issues:-

“Section 2(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;*
 -*
 - (x) management and consultancy agreements;*

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

.....
(xv) partnership agreements;

(f) “**document**” means any matter expressed or described upon any substance by means of letters, figures or marks, or electronic means, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter;”

A plain reading of the aforesaid provisions and sub-clauses of the Section 2 of the Act would bring to fore the fact that all those documents mentioned in sub-clauses (i), (x), (xi), (xii), (xiii) and (xv) would *ipso facto* form the substratum of any “*commercial dispute*” as defined under clause (c) of sub-section 1 of Section 2 of the Act. There is nothing in the Section 2 of the Act to conclude as to whether the said documents are or are not valid, legal or authentic documents. Any dispute arising out of any document, *per se*, in the nature of the aforesaid sub-clauses would qualify within the meaning of “*commercial dispute*” as defined in clause (c) of the Act. Having regard thereto, to interpret the aforesaid plain language to mean that only in cases where those documents pertain to an existing company or any other such institution, would be to do violence to the language as also to curtail the wide amplitude which the legislature appears to have intended to bestow upon the word “*commercial dispute*”. It is trite that Courts ought to lean towards the plain meaning appearing in a statute and not read into it restrictive or prohibitive definition, where none are arising out of such

plain reading. In any case, the validity or admissibility of any such document would be subject matter of trial.

16. Having regard to the aforesaid interpretation, this Court shall now proceed to consider the submissions of the parties in the aforesaid context.

17. The petitioner/plaintiff, in his plaint, has asserted that the said “*term sheet*” was executed between the parties in respect of an intended formation of company, namely, Netcom Technologies Private Limited and, therefore, was in the nature of shareholder’s agreement which is quite apparent from the reading of various clauses including the table of profit sharing.

18. That apart, the petitioner has also submitted that certain clauses of the said “*term sheet*” were, in fact, acted upon by both the parties and thus, sought to urge that the said document is a valid document and the suit can be predicated thereon in the commercial side.

19. This Court is not determining the aforesaid submission for the reason that the same would be a subject matter of the Trial Court which is yet to be adjudicated upon in accordance with law.

20. Having said that, this Court has considered the judgment rendered by the Hon’ble Supreme Court in ***Vodafone International Holdings (supra)*** whereby the Hon’ble Supreme Court in Para 261 held as under:-

“Shareholders' agreement

261. Shareholders' Agreement (for short “SHA”) is essentially a contract between some or all other shareholders in a company, the purpose of which is to confer rights and impose obligations over and above those provided by the company law. SHA is a private contract between the shareholders compared to the articles of association of the company, which is a public document. Being a private document it binds parties thereof and not the other remaining shareholders in the company.

Advantage of SHA is that it gives greater flexibility, unlike the articles of association. It also makes provisions for resolution of any dispute between the shareholders and also how the future capital contributions have to be made. Provisions of the SHA may also go contrary to the provisions of the articles of association, in that event, naturally provisions of the articles of association would govern and not the provisions made in SHA.”

Considering the aforesaid description of what a shareholder’s agreement would be, it appears *prima facie* that the “*term sheet*” could fall within the said parameters. If that be so, the “*term sheet*” would fall within the definition of a “*document*” whereon a commercial dispute had arisen.

21. The reference to the judgment of the Division Bench of this Court in ***Black Diamond (supra)*** to object to the maintainability is without any legs to stand, as the same supports the case of the petitioner and calls in favor of the maintainability of petition under Article 227 of Constitution of India against such orders of Commercial Court, in view of the fact that revisions against such orders are specifically barred as per Section 8 of the Commercial Courts Act. This is for the reason that the learned Trial Court while considering the issue determining whether it has jurisdiction, could possibly have considered the averments in the plaint as also the documents filed thereto, to determine such issues.

22. The said view was also fortified by the judgment of the Division Bench of this Court in ***M/s. RSPL Limited vs. Mukesh Sharma*** reported in **2016 SCC OnLine Del 4285**, wherein it was held as under:

“11. It must be stated that it is a settled proposition of law that the objection to territorial jurisdiction in an application under Order 7 Rule 10 CPC is by way of a demurrer. This means that the objection to territorial jurisdiction has to be construed after taking all the averments in the plaint to be correct. In Exphar SA

v. Eupharma Laboratories Limited : (2004) 3 SCC 688, the Supreme Court observed that when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts, as pleaded by the initiator of the impugned procedure, are true. The Supreme Court further observed that the objection as to jurisdiction in order to succeed must demonstrate that granted those facts, the Court does not have jurisdiction as a matter of law. It is also a settled proposition of law that while considering a plaint from the standpoint of Order 7 Rule 10 CPC, it is only the plaint and the documents filed along with it, that need to be seen. The written statement is not to be looked into at all.”

However, in the present case, the learned Trial Court has travelled far beyond and while considering the rival submissions of the respondent/defendant, examined the term sheet on its merits and concluded that the said “term sheet” is not a valid document in the eyes of law, as also concluded that in the absence of incorporation of Netcom Technologies Private Limited, the term sheet in any case, is not a valid document which could be proceeded with. The learned Trial Court has, by such unnecessary evaluation, not only transgressed its jurisdictional boundaries but has also committed material irregularity by such determination, which would prevent the petitioner/plaintiff from pursuing its reliefs even in the ordinary Civil Court.

23. That yet another concern which had caught the attention of this Court was the conclusion which the learned Trial Court had reached in respect of absence of privity of contract between the petitioner/plaintiff and respondent no.1/defendant no.1 (Netcom Softech Pvt. Ltd.). This Court is of the considered opinion that such conclusive finding of facts, at the preliminary stage of trial, would irreparably damage the claim of the petitioner without even having tested such issues in trial, thus, non-suiting the petitioner/plaintiff without trial. This is impermissible in

law, procedurally or otherwise.

24. This Court is consciously not entering into the merits of the dispute, lest the observations made herein may prejudice the stand taken by either of the parties before the learned Trial Court.

25. In view of the aforesaid observation and analysis, this Court is of the considered opinion that the learned Trial Court has acted with material irregularity in reaching conclusive findings without parties undergoing the trial and has also erroneously interpreted the term sheet as a legally invalid document without considering the plain language of Section (1) (c) (i), (x), (xi), (xii), (xiii) and (xv) of the Act.

26. In view of the above, the impugned order dated 03.03.2021 is set aside and the learned Principal District and Sessions Judge(South-West), Dwarka Courts is directed to remit the CS (Comm) 04/2019 titled as "*Ashutosh Razdan vs. Netcom Softech Pvt. Ltd. & Ors.*", back to the original commercial court. The learned commercial court is directed to proceed with the suit in accordance with law from the stage at which the suit stood, before the passing of the aforesaid impugned order.

27. However, it is made clear that the observations made herein are only to the extent of deciding the present *lis* before this Court and shall not tantamount to any expression on the merits of the case and therefore the rights and contentions of the parties are left open to be decided during trial.

28. The petition alongwith pending application stand disposed of with no order as to costs.

TUSHAR RAO GEDELA, J.

MAY 01, 2023/ॐ