

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Biswaroop Chowdhury

TRP (COMM) 5 of 2024

Pratap R. Daryanani

Vs.

Bimla Devi Pun & Ors.

For the Appellant	: Mr. Rishad Medora, Adv., Ms. Sonali Ghosh, Adv., Mr. Dipendra Nath Chander, Adv., Ms. Madhurima Basu, Adv.
For the Respondents	: Mr. Hashnuhana Chakraborty, Adv., Mr. Vinay Kumar Purohit, Adv.
Order dated	: 5 th December, 2024

Soumen Sen, J. (Oral):-

1. This is an application filed under Section 15(5) of the Commercial Courts Act, 2015 for transfer of a suit being Title Suit No. 953 of 2018 presently pending before the 6th Bench, City Civil Court, Kolkata.

2. The appellant filed an application under Section 15 of the Commercial Courts Act, 2015 before the learned Single Judge on 12th October, 2023 after there has been substantial progress in the trial. The basis of the application is that the dispute relates to an

immovable property which was exclusively used for trade or commerce and in view of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015, the suit filed by the plaintiff is in relation to a commercial dispute which is to be exclusively decided by the Commercial Court. It was further submitted that the valuation was erroneous.

3. However, on both counts the learned Trial Court has rejected the said application giving rise to the present proceeding.

4. We had initial hesitation as to the maintainability of the application under Section 15(5) of the Commercial Courts Act, 2015 as we are of the view that the remedy would lie in revision since the said order is not an appealable order under Order 43 of the Code of Civil Procedure. Moreover, the order was passed by a Civil Court and a party aggrieved can only challenge the order in accordance with the governing statute applicable to such proceeding (in this case Code of Civil procedure). However, it appears that two Coordinate Benches, in **FMAT 154 of 2023 with CAN 1 of 2023 (*Sarit Kumar Ghosh & Anr. Vs. Biswanath Banik & Ors.*)** on 20th April, 2023 and **FMAT 390 of 2023 with CAN 1 of 2023 (*Prasad Ecostructure LLP Vs. City Devcon Pvt. Ltd. & Ors.*)** on 19th January, 2024 respectively, have taken a view that the Civil Court, before which the suit is pending, if it decides not to transfer the case holding that it is not commercial then the Commercial Appellate Division of the High Court can be moved with an application under Section 15(5) to adjudge whether the matter is commercial or not and take a decision. The latter decision, however, has also observed in the same breath:

“As opposed to this when the civil court under Section 15 decides that the dispute is commercial and should be transferred to the commercial court and a party is aggrieved by this decision, a similar provision is not provided in Section 15.

To my mind when an ordinary civil court exercising the powers vested in it under Section 15 of the Commercial Courts Act, 2015 adjudicates on whether the suit is to be transferred to the commercial court or not, it continues to function as an ordinary civil court and cannot be described as a commercial court under the said Act. Hence any order passed by it is not appealable under Section 13 of the said Act. If the civil court rules that the suit is to be Transferred to the commercial court the remedy under Section 15 is also not available.

In that case should an aggrieved party be confined to an application for revision under Section 115 of the Civil Procedure Code or a writ application under Section 226 or 227 of the Constitution of India?

The appealability of such an order has to be tested under Order 43 read with Section 104 of the Civil Procedure Code. Order 43(1)(a) provides that an appeal shall lie from an order under Rule 10 of Order VII of the Code returning a plaint to be presented to the proper court.

Every part of a statute has to be given a proper meaning. Order VII Rule 10 provides that when a court comes to a conclusion that it does not have jurisdiction to decide a particular suit it simply returns the plaint to the plaintiff to enable him to present it in the proper court.” (emphasis supplied)

5. The earlier decision, **Sarit Kumar Ghosh & Anr.** (supra) in interpretation of Section 15(5) of the said Act has made the following observation :-

“The bare reading of the afore-mentioned provision leaves no ambiguity in our mind that in the event, the suit or application pending before the Civil Court is not transferred under Sub-Section (1), (2) and (3) of Section 15, the Commercial Appellate Division of the High Court may on an application taken out by any of the parties to the suit withdraw such suit or application from the Court where the aforesaid proceeding is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit. The logical inference which can be drawn from the aforesaid provision that the remedy by way of an appeal has not been provided but an application before the Commercial Appellate Division of the High Court may be filed seeking to achieve the same goal as intended to achieve by way of appeal which is admittedly not permissible.”

We have been informed by the appearing counsel that the Department may not receive the application to be filed directly before the Commercial Appellate Division of this Court but we do not find such apprehension to be correct. The moment the statute has provided an application to be filed before the Commercial Appellate Division of the High Court, the Department cannot deny such statutory right to be defeated or denied nor do we expect such course to be adopted.

*We noticed from the judgment of the Delhi High Court rendered in **Prem Arora v. Satyanarayan Khandelwal** reported in **2022 SCC Online (DelHi) 2142** that the*

aforesaid transfer application filed under Section 15(5) of the said Act are registered as T.R.P(C) so as to distinguish it from the other transfer applications filed under different provisions. So far as this High Court is concerned the alphabetical letter 'C' may come different category of the petition and, therefore, we suggest that the application under Section 15(5) of the said Act should be registered as T.R.P(Comm) so as to differentiate other category of petitions seeking transfer.” (emphasis supplied)

6. The aforesaid observation in Sarit Kumar Ghosh & Anr. (supra) has been relied upon for the purpose of maintainability of this application and the department's remarks with regard to certain deficiencies. The department proceeds to treat the said application as an appeal and accordingly, has given its observation. Although, we harbour a doubt with regard to the maintainability of the said application as we were of the view that the said Section 15(5) has been inserted essentially for transfer of suits and applications relating to a commercial dispute of a specified value pending in any civil court in any district and it does not contemplate any adjudication with regard to the commercial nature of the dispute as defined in Section 2(1)(c) of the said Act and in the event any adjudication as to the jurisdiction of a civil court to proceed with the suit as a commercial or non-commercial suit after the Commercial Courts Act, 2015 has come into force would require to be assailed in terms of provision of the Code of Civil Procedure or Commercial Courts Act, 2015, as the case may be,

in deference to the opinions expressed by the two aforesaid Coordinate Benches we proceed to decide the matter on merits.

7. Before that we must state that in our view the jurisdiction under Section 15(5) cannot be invoked when there is already an adjudication by the Civil Court as to the nature of the suit and as observed in **Sarit Kumar Ghosh & Anr.** (*supra*) “*an application before the Commercial Appellate Division of the High Court may be filed seeking to achieve the same goal as intended to achieve by way of appeal which is admittedly not permissible.*” The decision as regards the nature of the dispute is conclusive unless it is set aside by a competent court. The said Section 15(5) is not intended to be applied and set in motion once there has been already an adjudication on this issue. The said Section could be enforced when inspite of coming into force of the Commercial Courts Act, 2015 the commercial suits have not been transferred. Even if any concession is made as to its applicability it should be at the threshold and not after the issue is decided by a Civil Court. The manifest intention and object of the Commercial Courts Act, 2015 is to create an exclusive Commercial Court to decide a specific category of commercial disputes and not all disputes of commercial nature.

8. Although the application was filed under Section 15 of the Commercial Courts Act, 2015, it is in the nature of an application under Order 7 Rule 10 of the Code of Civil Procedure. For the purpose of deciding whether the Court has jurisdiction to try, receive and adjudicate the suit, it is trite law that the averments made in the plaint

has to be taken as true and correct. This is the only principle the Court is required to follow in deciding the said issue. Ordinarily, any such application is expected to be filed upon service of the summons and at least before the commencement of trial. Any belated application of this nature is not usually entertained as it is perceived to be an attempt to delay the trial lacking bonafide.

9. In the instant case, the evidence of the plaintiff was concluded and it is now for the defendant/appellant to adduce evidence. At this stage, the said application was filed. However prejudicial the facts may be, the Court cannot also allow a proceeding to continue if it is a commercial dispute in terms of Section 2(1)(c) of the 2015 Act. Section 15 in effect is a complete ouster of jurisdiction of a Civil Court for all or any of the disputes between the parties falling within the categories enumerated under Section 2(1)(c) of the Commercial Courts Act, 2015.

10. We have read the plaint carefully. The plaintiff has categorically stated in his assertion that the defendant is a trespasser. The uncle of the defendant was a monthly tenant and upon expiry of the original tenant on 27th March, 2018 the tenancy had come to an end. The suit is for eviction of a trespasser. There is no privity of contract between the plaintiff and the present defendant/appellant. Although the property was exclusively used in trade or commerce, the dispute is not between the plaintiff and the uncle of the present defendant.

11. Mr. Rishad Medora, learned Counsel appearing on behalf of the defendant/ appellant has argued that Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 only states agreements relating to immoveable property and it does not say that the agreement has to be between the parties in the suit if the plaintiff is required to refer the said agreement and it appears that the property at the time of institution of the suit was exclusively used in trade or commerce, the Civil Court loses its jurisdiction and it has to be tried as a commercial suit.

12. We are unable to accept the said submission. Merely because the plaintiff has referred to the certain documents showing the relationship of landlord and tenant between the plaintiff and the original defendant in order to show that the present defendant is a trespasser would not attract Section 2(1)(c)(vii) of the Commercial Courts Act, 2015. It is also argued that by reason of the expression that commercial dispute means “a dispute arising out of” all or any of the categories mentioned in the said definition clause, a dispute between the plaintiff and the present defendant would also come within the purview of the said Section is also not accepted for the above stated reason.

13. The decision in (1) and (2) are distinguishable as the issue in ***Tarapore and Company Ltd. V. Cochin Shipyard Ltd. Cochin & Anr.***, reported in **1984 (2) SCC 680** was whether the arbitration clause was wide enough to include a claim for compensation for excess payments made in imparting equipments due to price rise and ***Giriraj***

Gard v. Coal Indian Limited & Ors., reported in **2019(5) SCC 192**

deals with the issue whether arbitration clause from another document/contract has been incorporated in the subject document. It was held, arbitration agreement need not necessarily be in the form of a clause in substantive contract itself and it could be an independent agreement; or it could be incorporated by reference either from a parent agreement, or by reference to a standard form contract.

14. The provisions of the Commercial Courts Act, 2015 are required to be strictly construed. It has to be remembered that all disputes have not been categorised as a commercial dispute to be adjudicated under the Commercial Courts Act, 2015. It is only specific categories of disputes having specified value can only be adjudicated by the Commercial Court.

15. The objection as to valuation has been addressed in ***SAT 295 of 2014 with CAN 6443 of 2015 (Arobindo Saha & Ors. v Nowser Ali Khan)*** by a Division Bench presided over by Hon'ble Justice Jyotirmoy Bhattacharyya, former Chief Justice of this court in which it has been held:

“Let us now consider this part of the submission of Mr. Bhattacharya in the light of the provision contained in Section 7(vi) (a) of West Bengal Court Fees Act, 1970 which runs as follows :-

“7.(vi) for recovery of possession of immovable property :- In a suit for recovery of possession of immovable property from –

(a) a trespasser, where no declaration of title to property is either prayed for or necessary for disposal of the suit- according to the amount at which the relief sought is valued in the plaint subject to the provisions of section 11.”

Section 7(vi) (a) of West Bengal Court Fees Act, 1970 thus makes it clear that if possession from a trespasser is sought to be recovered on the basis of declaration of title of the plaintiff, then the plaintiff is required to value the suit on the basis of the actual market price of the suit property and he is also required to pay ad valorem court fees on the valuation of the suit property.

The said provision thus makes it clear that if the plaintiff files a suit for recovery of possession from a trespasser without seeking any declaration of his title in the property or in a case where grant of relief prayed for by the plaintiff is not dependent upon declaration of his title in the suit, then the plaintiff is not required to value the suit on the basis of the actual market price of the suit property. Under such circumstances, he can value the suit on the basis of the valuation of the relief claimed in the suit.”

16. The ratio of the said decision squarely applied in this case and has been rightly decided by the Learned Trial Court.

17. The dispute contemplates under Section 2(1)(c)(vii) in our view has to be a dispute between the parties to the agreements relating

to the immovable property which is being used exclusively for trade or commerce. The plaintiff has to state the agreement or the arrangement between the plaintiff and the uncle of the present defendant to establish its present right and it does not involve an adjudication of any right between the plaintiff and the original defendant. If a person has trespassed into the property in question merely because the said property is an immovable property used for trade or commerce he cannot claim that a suit for eviction of such a trespassers would be covered by the said clause. However, in the event during trial it transpires that the continuation of the defendant in respect of the such immovable property was pursuant to an agreement or arrangement and that property has been used exclusively for trade or commerce and privity of contract is established it would be open for the trial court to transfer the proceeding to the commercial division in exercising of its power under section 15 of the Commercial Courts Act, 2015. However, we make it clear that our observation should be read and understood in the context to the issues we have decided and cannot be read out of context as a decision binding on the trial court. The decision on the jurisdiction may not be conclusive if during trial it is established. The learned Trial court shall decide the suit uninfluenced by our observation.

18. The application is accordingly disposed of. However, there shall be no order as to costs.

19. Urgent Photo copy of this order, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)