

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

APOT/63/2025
WITH
RVWO/31/2024
CS-COM/384/2024
IA NO: GA-COM/1/2025

SUDERSHAN PRASAD BAGARIA AND ANR.
VERSUS
HARSHVARDHAN KHEMKA AND ORS.

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN
AND

The Hon'ble JUSTICE SMITA DAS DE
Date : 26th March, 2025.

Appearance:

Mr. Abhrajit Mitra, Sr. Adv.
Mr. Satadeep Bhattacharya, Adv.
Ms. Yukti Agarwalla, Adv.
Mr. Indradeep Basu, Adv.
...for the appellants

Mr. Jishnu Saha, Sr. Adv.
Mr. Amit Kr. Nag, Adv.
Mr. Partha Banerjee, Adv.
Ms. Ranjabati Ray, Adv.
...for the respondents

Soumen Sen, J. (Oral):

1. The appeal is arising out of an order by which the learned Single Judge has allowed a review application by modifying its earlier order of transferring the suit to the Commercial Division by substituting it with return of the plaint.
2. A fine distinction is raised by the learned counsel for the parties with regard to two words namely “transfer” and “return” of plaint in

the event the court deciding the suit finds that it does not have the jurisdiction.

3. The learned Single Judge in the instant matter, instead of transferring the suit has returned the plaint to be presented before the appropriate court, namely from the Commercial Division to ordinary original civil jurisdiction. Incidentally His Lordship had the determination to hear both the suits.
4. Mr. Abhrajit Mitra, learned senior counsel appearing on behalf of the appellant petitioner, has submitted that the learned Single Judge has failed to take into consideration that there is a Commercial Division of the High Court constituted under Section 4 of the Commercial Courts Act, 2015 and in the event the Hon'ble Judge in deciding the suit ultimately finds that it is not of a commercial nature, the suit can be transferred to the Non-Commercial Division and the question of returning the plaint does not arise in such case.
5. Mr. Mitra, has relied upon a Division Bench order and two Single Bench decisions, namely, *Satyavama Commotrade Private Ltd. and others vs. Global Motocorp LLP and Another* (Order dated 11.11.2019 in FMA 1522 of 2019), *Ladymoon Towers Private Limited vs. Mahendra Investment Advisors Private Limited* reported in 2021 SCC OnLine Cal 4240 and *Sherawali Developers LLP vs. Majesty Homes and Ors.* (MANU/DE/3640/2024) to argue that the proper course would be to transfer the suit from one Division to the other Division without any requirement for returning the plaint to

the plaintiff for presenting it to an appropriate Court. It is more so in view of the fact that the High Court itself is exercising the Commercial and Non-Commercial Division and it is a mere formality.

6. Mr. Jishnu Saha, learned senior counsel appearing on behalf of the respondent, has submitted that in view of Section 8, this application may not be maintainable. In any event and in any view of the matter, if the Commercial Court is of the opinion that the nature of the dispute is non-commercial, it can only return the plaint to the plaintiff to present it before the appropriate Court as the Commercial Courts Act, 2015 does not confer any power of transfer upon the said Court.
7. While hearing the matter, we have brought to the attention of the learned counsel for the parties a Three-Judge Bench decision of the Hon'ble Supreme Court in *EXL Careers And Another vs. Frankfinn Aviation Services Private Limited* reported in (2020) 12 SCC 667. The said decision was passed in connection with an application under Order VII Rule 10 of the Code of Civil Procedure. The consequences of return of plaint have been explained in the said judgment. The said judgment was found to be relevant with regard to the fate of any interim order that the plaintiff had been enjoying prior to the direction for return of the plaint.
8. The Commercial Courts Act, 2015 is a complete code in itself and has an overriding effect by virtue of Section 21 of the Act. Provisions that are inconsistent with any other law would have no

effect. The Code of Civil Procedure was amended in its application to a commercial dispute with a specified value in the manner as specified in the schedule. The transfer of suit or application is contemplated under Section 15 of the Commercial Courts Act, 2015.

9. The power of transfer of a suit, appeal or other proceeding is traceable under Section 24 of the Code of Civil Procedure. The said section confers a general power to transfer, withdraw and transfer suits, appeals or other proceedings at any stage on the application of the party and in this regard the power of the High Court and District Judge are concurrent. The High Court in addition to Section 24 CPC in exercise of power under Clause 13 of the Letters Patent can also transfer proceeding unto itself. The cardinal principle for exercising of power under Section 24 CPC is the convenience or inconvenience of the parties.
10. The said power shall not be confused with the power of transfer under Section 15 of the Commercial Courts Act which contemplates transfer of pending proceedings of suits which conform to the definition of “commercial disputes” under Section 2(1)(C) of the Commercial Courts Act, 2015 upon establishment of the Commercial Courts after being duly notified under Section 3 of the Act. The Constitution of Commercial Division of High Court is in terms of Section 4. It reads as follows:

“4. Constitution of Commercial Division of High Court.—(1)

In all High Courts, having¹ [ordinary original civil jurisdiction], the Chief Justice of the High Court may, by order, constitute Commercial Division having one or more Benches consisting of a single Judge for the purpose of exercising the jurisdiction and powers conferred on it under this Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Division”

11. The transfer of proceedings of pending cases is provided in Section 15. For convenience the said Section is reproduced below:

“15. Transfer of pending cases.—(1) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.*

(2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2).

(3) Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value shall stand transferred to

¹ Subs. by s. 8, *ibid.*, for “ordinary civil jurisdiction” (w.e.f. 3-5-2018).

the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.

(4) The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance² [with Order XV-A] of the Code of Civil Procedure, 1908 (5 of 1908): Provided that the proviso to sub-rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such transferred suit or application and the court may, in its discretion, prescribe a new time period within which the written statement shall be filed.

(5) In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub-section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it 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, and such order of transfer shall be final and binding.” (emphasis supplied)

12. In this regard, reference may be made to Rule 4 and 5 of the High Court at Calcutta Commercial Courts Practice Direction, 2021 duly notified on 13th October, 2023:

“4. Transfer of Pending Cases.-(1) Every suit, appeal or other proceeding pending before any Civil Court as per the Bengal, Agra and Assam Civil Courts Act, 1887 or in the High Court immediately before the date of issuance of the appropriate Notification of the pecuniary value in terms of section 3(1A) of the

Act, being a suit, appeal or other proceeding the cause of action whereof is based and the valuation of the relief of which is such that it would have been, if it had been filed after the commencement of the Act, within the jurisdiction of the Commercial Division or Commercial Appellate Division in the High Court or within the jurisdiction of the Commercial Courts or Commercial Appellate Courts at the District Level, shall be transferred by the Registry to the Commercial Division or the Commercial Appellate Division in the High Court and/or by the Competent Authority at District Level to the Commercial Courts or Commercial Appellate Courts at the District Level, as the case may be.

(2) The above provision for transfer shall not be applicable to suits, appeals or other proceedings instituted before any Civil Court as per the Bengal, Agra and Assam Civil Courts Act, 1887 or in the High Court in its Ordinary Original Civil Jurisdiction after the date of issuance of the appropriate Notification of the pecuniary value in terms of section 3(1A) of the Act. (emphasis supplied)

5. Transfer of Records. *(1) The Registry or the Competent Authority at District Level, as the case may be, will scrutinize the suits, appeals and other proceedings pending in the High Court or in the Courts subordinate to the High Court and shall identify the suits, appeals and other proceedings which relate to commercial disputes as defined in the Act and are of or above the specified value as notified by the State Government in exercise of powers conferred by sub-section (1A) of section 3 of the Act.*

(2) Upon such identification of the pending suits, appeals and other proceedings as defined in Clause 4(1) above, the Registry or the Competent Authority at District Level shall cause the transfer of all records of and relating to such identified suits, appeals and other proceedings to the Commercial Division or Commercial

² Subs. For “with Order XIV-A” by Act 28 of 2018, S.14 (w.r.e.f. 3-5-2018)

Appellate Division in the High Court or to the Commercial Courts or Commercial Appellate Courts at the District Level, as the case may be". (emphasis supplied)

13. In juxtaposition to the power conferred under Section 24 of the CPC and Section 15 of the Commercial Courts Act, 2015 the power of the court to return the plaint is to be considered. The power of the court to return the plaint is not similar to the power exercised under Section 24 of the CPC.

14. Section 24 CPC was amended by the CPC amendment Act, 104 of 1976 to include Sub-Section 5. The said Sub-Section 5 is reproduced below:

"(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it."

15. The amendment was made as there was conflict of decisions with regard to the question whether section 24 applied in relation to transfer of a suit from a court which had no jurisdiction following the view of the Andhra Pradesh High Court in **Thirumala v. Mulk Luri, AIR 1970 AP 174**. However, the transfer must be to a competent court. In **Macnill vs. Mouhsen AIR 1985 Cal 460** the Calcutta High Court for the ends of justice in exercise of the jurisdiction conferred by Section 24 directed the suit to be transferred to the district court having jurisdiction over the land as the plaint could not be returned under Order 7 Rule 10 for presentation before proper court because such provision would not apply to a chartered High Court.

16. In **S Chandra Sekhar Rao v. AIR 2005 NOC 88: 2004 AIHC 409 AP**, it was held that where defendant takes a plea that the court has no territorial jurisdiction to try the suit, the suit may be transferred to the court having jurisdiction and it is not necessary to return the plain to the plaintiff for production before proper court. The said provision would not however apply in the instant case. Section 24 does not confer a power on the learned Single Judge to make an order of transfer to a coordinate bench in exercise of power under Section 24 of the CPC. The court could have exercised jurisdiction only under section 15 of the commercial courts act 2015 in respect of pending cases.
17. Order 7 Rule 10 of the CPC provides for return of a plaint where a court is unable to entertain it for want of jurisdiction. It can be territorial, pecuniary or other causes. If the court is itself satisfied that it has no jurisdiction to try, receive and decide a cause, it is its duty to suo motu in exercise of power Order 7 Rule 10 CPC to return the plaint to be presented before the appropriate court. Where the court has no jurisdiction over the subject matter of the suit it has to return the plaint. (**See. Athmanathaswami Devasthanam v. K. Gopalaswami Aiyangar, AIR 1965 SC 338**). In such situation, dismissal of the suit would be unwarranted.
18. In the instant case both the parties have agreed that it is not a “commercial dispute” coming within the purview of Section 2(1)(c) of the Commercial Courts Act, 2015. The court has also independently come to a finding that it is not a commercial suit. In

such a situation, the plaint is required to be returned to the plaintiff to be presented it before the competent court. This power is exercised under Section 151 of CPC for the ends of justice as Order 7 Rule 10 is not applicable to Chartered High Court in view of Order XLIX Rule 3 of CPC. The plaint shall be deemed to have been filed before a court not having the jurisdiction over the subject matter and the only mode by which a party can continue with the cause is to pray for return of the plaint so as to enable the plaintiff to present it before the appropriate Court. If at any time it appears to the court on the averments in the plaint itself that it has no jurisdiction either pecuniary or territorial or over the subject matter the court can suo motu direct return of the plaint. In the instant case, continuation of the suit in the Commercial Division would be before a Court without having a jurisdiction to decide the suit as it is to be treated as an ordinary suit. Consequently a decree passed would be a nullity. The Commercial Division cannot decide any “commercial dispute” not coming within the purview of Section 2(1)(c) of the Commercial Dispute Act, 2015. Special procedures have been laid down for deciding a commercial dispute.

19. The return of the plaint cannot be equated with the power to transfer the suit or application as the case may be. It is not akin to a power of the Chief Justice or a District Judge to allocate work to the various judges including transfer of a case. The return of plaint is a judicial order. The suit could not have been transferred in

exercise of the statutory power under Section 15 of the Act. The suit was not pending on the date the Commercial Division of the High Court become operational. For a suit to be transferred after it is instituted after the Commercial Division is constituted and made functional it can only be in exercise of power under Order 7 Rule 10 of the CPC and for a Chartered High Court under Section 151 of CPC.

20. The learned Single Judge initially had ordered transfer on a misreading of Section 15 of the Commercial Courts Act. The Court can exercise jurisdiction only in terms of conferment of jurisdiction as bestowed by the statute and the roster as approved by the Hon'ble the Chief Justice and not otherwise. Any order passed disregarding such jurisdiction would be void *ab initio*. The learned Single Judge realising that it had no power to transfer under the provision of the Commercial Courts Act, 2015 has ordered return of the plaint to be presented under the appropriate Court and such power deemed to have been exercised under the inherent power.

21. On returning the plaint, it has to follow the procedure of the Original Side Rules of the court. The procedural formalities are different, more stringent in Commercial Division as compared to the procedure under the existing Code of Civil Procedure. None of the decisions relied upon by the parties have dealt with the said issue at all. The parties cannot by agreement confer jurisdiction on a Court. However, it cannot be overlooked that a Commercial Division has no independent existence and is closely connected

with ordinary original civil jurisdiction. Where the High Court is having ordinary original civil jurisdiction The Chief Justice of the High Court may by order constitute Commercial Division having one or more Benches to exercise jurisdiction under the Act of 2015. Thereby it is clear that Commercial Division is an extended arm or another wing of the ordinary original civil jurisdiction of the High Court. In such circumstances a plaint originally presented could be transferred in exercise of power to the Commercial Division which is in fact a wing of the very same ordinary original civil jurisdiction of the High Court and vice-versa. The power of the court to order a conversion in appropriate case to commercial division or vice versa could be exercised in absence of any prohibition. The issue is one of nomenclature.

22. This discussion is for the purpose of deciding the extension of the interim order till it is represented before the Commercial Division.
23. The principal grievance of the appellant appears to be the fate of the interim orders that the plaintiff was enjoying at the time of the transfer. In *EXL Careers* (Supra), it was held that on presentation after return, the suit has to proceed *de novo* before the competent Court even if evidence of parties already stood concluded and the matter fixed for final argument before the Court which returned the plaint.
24. In the instant case, we find that the plaintiff has been enjoying an interim order. On returning of the plaint, the pleadings filed in

the Commercial Division can be considered as deemed to have been filed in the ordinary original jurisdiction for the purpose of interim relief and other reliefs as the provisions of the Original Side Rules shall now apply in deciding the suit and the applications. It is really a matter of conversion. It is now required to be heard by the Hon'ble Judge in the Non-Commercial Division.

25. The defendant has already filed the written statement and there is no requirement to serve a fresh writ of summons upon the defendant. The learned Single Judge is requested to consider the pleadings already filed in relation to injunction and summary judgment and decide the issues on the basis of such pleadings. The parties shall not be prejudiced by such direction. The interim order the plaintiff was enjoying stands vacated by reason of the return of the plaint shall continue for a period of four weeks as we find the refusal to extend the same would cause serious prejudice.
26. On the plaint being represented the parties shall be at liberty to file additional pleadings if necessary. The pleadings filed in the Commercial Division can be considered afresh upon the suit being presented before the learned Single Judge.
27. The affidavit of service and the notice of motion filed are taken on record.
28. The plaint shall be presented within three weeks from date.
29. In view of the return of the plaint, the suit shall now be assigned a new number. Nomenclature of the plaint and all the

pending applications shall be changed in accordance with the Rules of the Original Side of the High Court.

30. The appeal and the application are disposed of.

(SOUMEN SEN, J.)

(SMITA DAS DE, J.)

bp/R.Bhar