

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 3572 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

M/S. KUSHAL LIMITED THROUGH AUTO. SIGN. AND MANAGING
 DIRECTOR MR. YOGESH GHANSHYAMBHAI PATEL

Versus

M/S. TIRUMALA TECHNOCAST PRIVATE LIMITED

Appearance:

HARSH V GAJJAR(7828) for the Petitioner(s) No. 1

ABHISST K THAKER(7010) for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE N.V.ANJARIA

and

HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date :10/06/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Whether the plaint of the Civil Suit instituted by the respondent- original plaintiff liable to be returned under Order

VII Rule 10 of the Code of Civil Procedure, 1908 to be presented before the proper court, is the question arising for consideration. Does the suit between the parties involve a 'commercial dispute' within the meaning of Section 2 (1)(c) of the Commercial Court's Act, 2015 is the crux of the controversy.

1.1 It is in context of this question that the petitioner - original defendant has challenged order dated 12.1.2022 passed by learned Judge, Commercial Court, City Civil Court, Ahmedabad, below application Exhibit 27 in Commercial Civil Suit No.3269 of 2021, whereby the application of the petitioner under Order VII Rule 10, CPC came to be rejected.

2. Heard learned senior advocate Mr.Mehul Shah with learned advocate Mr.Harsh Gajjar and learned senior advocate Mr.Mihir Thakor assisted by learned advocate Mr.Abhisht Thaker for the respondent, at length.

3. In order to appreciate the issue, looking at the subject matter of the suit instituted by the respondent herein against the petitioner, the prayer was made for possession, declaration and permanent injunction in respect of property described as non-agricultural land of Revenue Survey No.419, 420/K paiki, Final Plot No.43, Town Planning Scheme No.10, Rakhiyal, Ahmedabad together with the industrial shed thereon admeasuring 1876.93 sq.mtrs. The property was purchased by the plaintiff from the defendant by virtue of registered sale deed dated 4.10.2019.

3.1 In para 3 of the plaint, it was averred and mentioned by the plaintiff, *inter alia* thus,

"3. The present suit property was originally owned by the present Defendant, who were

using the said Suit Property as warehouse for its business. It is most respectfully submitted that, the absolute title, interest over the suit property for the present Plaintiff was established on 04.10.2019 by virtue of aforesaid Sale Deed and the Plaintiff herein had also paid dues sales consideration of Rs.1,95,00,000=00 to the present Defendant which is not in dispute.”

3.1.1 The case was explained further in para 4 stating,

“Since the present Defendant herein is using the suit property for its warehouse, the Defendant herein had urged the Plaintiff to take the suit property on leave and licence basis for 11 months 29 days for smooth transition / shifting of its business activities at new address. Hence, the Plaintiff herein had agreed to the request made by the present Defendant and had executed the aforesaid leave and licence agreement for 11 months 29 days in favour of the Defendant.”

3.1.2 It was thus the case of the plaintiff that before the property was purchased from the defendant, it was used originally by the defendant as warehouse for its business. In order to enable the defendant to find new address for its business, after the property was sold to the petitioner, the Leave & Licence Agreement dated 4.10.2019 came to be executed between the parties fixing the period and monthly licence fees. The plaintiff pleaded that defendant failed to pay the licence fees and that the amount due was recoverable from the defendant. It was stated that at the request of the defendant the Leave & Licence Agreement was extended also.

3.1.3 It was thereafter claimed that the defendant was liable to hand over the possession of the suit property upon expiry of the licence period. It was further averred that having

not complied with the repeated requests of the plaintiff in that regard and having continued with the possession and occupation of the suit property, the defendant had become a trespasser after lapse of period of Leave & Licence Agreement which was mutually extended.

3.1.4 Clause 16 (d) of the licence agreement was relied on by the plaintiff to further averred that the plaintiff is entitled to recover Rs.30,000/- per day from the determination of the Leave & Licence Agreement till the possession is restored towards compensation. It was stated that despite legal notice dated 10.1.2021 sent to the defendant, the suit property was not handed over, which was needed to the plaintiff for personal *bonafide* need. It was the case that the defendant has continued to stay in the premises by threatening and by coercive action.

3.2 The defendant - the petitioner herein filed application Exhibit 27 under Order VII Rule 10, CPC, seeking order from the court for return of the plaint on the ground *inter alia* that the suit could not have been instituted before the commercial court as it does not involve commercial dispute within the meaning of Section 2 (1) (vii) of the Commercial Courts Act, 2015. The defendant filed its written statement.

3.3 The plaintiff contested the Exhibit 7 application filing its reply. It was sought to be contended in application Exhibit 27 *inter alia* that the relationship between the parties was of licensor and licensee, that there was licence agreement and the prayer was for possession and permanent injunction, leaving the suit to be not involving any commercial dispute.

3.4 The commercial court below after considering the total facts, held that the suit involved 'commercial dispute' within the meaning of the Commercial Courts Act and the Commercial Court has jurisdiction to entertain and decide the suit.

4. Learned senior advocate for the petitioner Mr.Mehul Shah with learned advocate Mr.Harsh Gajjar for the petitioner vehemently assailed the impugned order. It was submitted that the suit contained the prayer for eviction and the suit in its controversy did not reveal any commercial dispute. Referring to paragraphs in the plaint it was submitted that the plaintiff wanted the possession of the suit property alleging that the status of the defendant was that of a trespasser and further that the plaintiff wanted the premises for personal use.

4.1 Learned senior advocate for the petitioner further submitted that the finding of the Court below that the suit is said to be arising out of 'the agreement' was erroneous in as much as the suit could not be said to be so arising out of the agreement. He further submitted that it is only the averments of the plaint which will have to be seen and assist in order to determine the nature of the suit. It was next submitted that merely because the prayer was for recovery of immovable property, in absence of any other characteristics of commercial dispute involved, the suit could not be treated as commercial suit.

4.2 The next submission of learned senior advocate for the petitioner was that under the definition of 'commercial dispute' under Section 2 (1) (c), the requirement inter-alia is that the premises should have been exclusively used for the purpose of trade, commerce or business. Referring to the Leave & Licence agreement in the instant case, it was submitted that it provided

that the premises 'to be used' for industrial purpose. When that is so it cannot be said, it was submitted that it was meant for exclusive use which implied that it was not actually used at the time of execution of agreement. Learned senior advocate for the petitioner relied on the decision of the Supreme Court in **Ambalal Sarabhai Enterprises Limited Vs. K. S. Infraspace LLP and Another [(2020) 15 SCC 585]** to buttress his submissions.

4.3 On the other hand learned senior advocate Mr.Mihir Thakor assisted by learned advocate Mr.Abhisht Thaker for the respondent supported the impugned order highlighting ingredients of definition of the term 'commercial dispute' in the Act. He emphasizes that the property was admittedly used for commercial purpose. He submitted that mere fact that the licence agreement was entered into, would not take the dispute out of the concept of commercial dispute when it falls within the definition. Learned senior advocate also took the court through the Legal & Licence Agreement and referred to the details of the property. On the basis of the contents, it was submitted that the property was used for commercial purpose.

5. In order to appreciate whether the dispute disclosed from the plaint could be said to be commercial dispute, the scope and import of Section 2 (1) (c) of the Commercial Courts Act, 2015, has to be considered first. Extracting the definition of 'Commercial Dispute' under the Act, to notice the ambit and applicability thereof,

"2(1)(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;

(ii) to (vi)

(vii) agreements relating to immovable property used exclusively in trade or commerce;

(viii) to (xxii)

Explanation.-A commercial dispute shall not cease to be a commercial dispute merely because

(a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

(d)

(e) सत्यमेव जयते

(f)

(g)

(h)

(i)

(2) The words and expressions used and not defined in this Act but defined in the Code of Civil Procedure, 1908 (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872), shall have the same meanings respectively assigned to them in that Code and the Act."

5.1 The explanation provides that a commercial dispute would otherwise not cease to be commercial dispute merely because action involves recovery of immovable property or realisation of money out of immovable property or involve any other relief pertaining to immovable property.

5.1.1 If any of ingredients in the sub-clauses in the Section are satisfied, the dispute would become commercial dispute. Sub-clause (vii) of this definition section says that the commercial dispute means a dispute arising out of 'agreements relating to immovable property views exclusively.'

5.2 Whether the test in Section 2 (1) (c) (vii) is satisfied or not may be appreciated from the averments in the plaint. From the para 3 quoted above, it would be seen that the plaintiff has in term stated that the defendant was using the suit property 'as warehouse for its business.' Therefore it is a clear case and admission on part of the plaintiff that the property was been used for business purpose and it was a warehouse. Similarly it was stated in para 4 that 'since the present defendant herein is using the suit property for its warehouse, the defendant herein had urged the plaintiff to take the suit property on Leave and Licence basis.'

5.2.1 In para 12 (a) of the plaint it was stated that the property was purchased by the plaintiff by registered sale deed from the defendant and that the defendant was using the property as warehouse for its business activities. There appears yet another averment in para 12 (b) that the Leave and Licence Agreement may be executed to enable the defendant to locate new property for its business activities. In other words, prior to and on the date of institution of the suit, the suit property was exclusively used in trade or commerce, for which there was no gainsaying.

5.3 The sale deed which was executed between the plaintiff and defendant whereby the plaintiff purchased the suit property

contained the following description to suggest that the land had superstructure thereon. The sale deed mentioned the property as non-agricultural land, '... more particularly described in the Schedule hereunder with superstructure... it was further mentioned that 'WHEREAS...vendor has decided to sell the said land with superstructure thereon to the purchaser.' The superstructure was an industrial superstructure. It is reflected and was described in the sale deed as '1830 sq.meters free hold non-agricultural industrial use bearing Revenue Survey No.419, 420/K paiki, Final Plot No.43 of Town Planning Scheme No.10, Rakhiyal, Ahmedabad together with the industrial shade thereon admeasuring at 1876.93 sq.mtrs.' The receipt regarding payment of sale consideration also mentioned that it included the industrial construction standing on the land.

6. In **Ambalal Sarabhai Enterprises Limited (supra)** the Supreme Court held that the dispute to be a commercial dispute under Section 2(1)(c)(vii), the agreement between the parties must refer to immovable property used or being used exclusively in trade and commerce. It was held that the word 'used' in the Section was indicative of the requirement that the property is 'actually used' and it cannot be either 'ready for use' or 'likely to be used' or 'to be used'.

6.1 The test that the property is actually used for trade or commerce and for business purpose as warehouse, is satisfied in the present case. As mentioned above, even on the date of institution of the suit and thereafter the property was used as warehouse.

6.2 In **Gujarat State Warehousing Corporation Vs. Divine Developers** being Special Civil Application No.9705 of 2019

decided on 24.12.2020 wherein the facts were that the suit was instituted by plaintiff for recovery of damages. The case was that the property comprising of four godowns were given to the defendant for the purpose of storing the groundnut and that the rentals were not paid. The suit was instituted in the commercial court, pursuant to which, application under Order VII Rule 11 was filed by the defendant to contend that the letting of the godown by the plaintiff to the defendant would not make the commercial dispute and the suit was not maintainable as commercial suit. This court negated the contention.

6.2.1 Decision of the Supreme Court in **Ambalal Sarabhai Enterprises Limited (supra)** was relied on by **Gujarat State Warehousing Corporation (supra)**. What was observed and held was as under,

“Dispute arising out of agreement whereby godown was leased on rent for the purpose of storage of goods could well be said to be falling within the clause of agreements relating to immovable property used exclusively in trade or commerce. The godown has no other use. It is a property used exclusively in trade and commerce. When the godown owned by the plaintiffs was rented by the defendant on a fixed rent, and the suit claim and relief sought for pertained to damages arising out of such subject transaction, the dispute arising therefrom becomes a ‘commercial dispute’ within the meaning of the Section 2(1)(c) of the Act.”

6.3 The acid test is that the property is used exclusively in trade or commerce. Dispute arising out of agreements relating to property used exclusively in trade and commerce would constitute a commercial dispute. The grounds raised in the plaint in support of the relief prayed could not be said to be

germane in concluding and deciding whether the dispute unfolded is commercial dispute. Nor the prayers made are decisive. The commercial court below is entirely right, as elaborated above, that the material ingredients of 'commercial dispute' in the Section are satisfied in the facts of the present case. The suit before the commercial court would be competent when there exists a commercial dispute.

7. For the forgoing reasons and discussion, the impugned order of the commercial court, City Civil Court, Ahmedabad dated 12.1.2022 below Exhibit 27 in Commercial Suit No.3269 of 2021 rejecting the application of the defendant under Order VII Rule 10, CPC could be said to be legal. The challenge in this petition is meritless and hence it is dismissed.

(N.V.ANJARIA, J)

(SAMIR J. DAVE,J)

FURTHER ORDER

At this stage learned senior advocate Mr. Mehul Shah requested the court to stay the aforesaid judgment and order to enable the petitioner to approach the higher forum. Learned advocate Mr. Abhisht Thaker for the respondent opposed the prayer stating that there was no stay throughout the pendency of the petition. In that view and further having regard that what is upheld is the order of the Commercial Court dismissing the application under Order VII Rule 10 of the Code of Civil Procedure, 1908, in the facts and circumstances of the case, we do not see any reason to accede to the request. Hence the request is rejected.

(N.V.ANJARIA, J)

(SAMIR J. DAVE,J)

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