

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Court No. 1

MATTERS UNDER ARTICLE 227 No. – 4127 of 2023

MAMTA KAPOOR AND ANOTHER

v.

VINOD KUMAR RAI

For the Petitioners : Mr. Ujjawal Satsangi, Advcoate

Last heard on May 20, 2024

Judgement on May 27, 2024

HON'BLE SHEKHAR B. SARAF, J.

1. The instant application under Article 227 of the Constitution of India has been preferred by Mamta Kapoor and Anurag Kumar Gupta (hereinafter referred to as 'the Petitioners') against the order dated January 17, 2023 passed by the Presiding Officer, Commercial Court, Varanasi in Misc. (Civil) Suit No. 375/2022.

FACTS

2. I have laid down the factual matrix of the instant *lis* below:

- a. Petitioners and Vinod Kumar Rai (hereinafter referred to as 'the Respondent') entered into a business agreement on July 7, 2022 for running, operating and managing Hotel Niveditta, situated at B-30/1-A-1-D, Assi, Varanasi (hereinafter referred to as 'the Hotel').
- b. In pursuance of the aforesaid agreement, a total amount of Rs.30,00,000/- was to be paid by the Petitioners to the

Respondent as security and the possession of the Hotel was to be taken over by the Petitioners. Thereafter, the Petitioners, approached the electricity department for verification of dues and to obtain appropriate electricity connection at the Hotel. The Petitioners were informed about the requirement of the installation of a separate transformer at the Hotel for electricity supply. The Petitioners informed the Respondent about the said requirement and asked them to apply or obtain the necessary certification from the electricity department.

- c. However, disputes and differences arose between the parties and the Petitioners approached the Commercial Court, Varanasi.
- d. The Commercial Court, Varanasi vide order dated January 17, 2023 refused to entertain the suit filed by the Petitioners on the ground that since the Hotel was not being used for trade or commerce, the dispute cannot be considered as falling within the ambit of Section 2(1)(c)(vii) of the Commercial Courts Act, 2015 (hereinafter referred to as 'the CC Act').
- e. Aggrieved by the aforesaid order dated January 17, 2023, the Petitioners have preferred the instant application under Article 227 of the Constitution of India before this Court.

Contentions By The Petitioners

3. Shri Ujjawal Satsangi, learned counsel appearing for the Petitioners has made the following submissions before this Court:

- a. A perusal of the agreement between the parties would show that although the nomenclature used for referring it is "Rent Agreement" but the clauses therein refer to a business operation and management agreement.
- b. Clause 4 of the agreement between the parties specifies that the Petitioners will be permitted to use the premises of the Hotel only for running a hotel and for no other purpose. Moreover,

Clause 18 further clarifies that the Petitioners were prohibited from keeping the Hotel closed for over a period of 15 days. It was further provided therein that if the Petitioners keep the Hotel closed for more than 15 days, then the Respondent would have the right to take over the Hotel and only if the Petitioners, upon notice, agree to run the Hotel, the agreement will continue otherwise it would be deemed that the Petitioners are not interest in running the Hotel and as such the agreement will be terminated. A combined reading of all these clauses goes on to show that though the nomenclature used in the agreement dated July 7, 2021 is “tenancy/rent”, the agreement is in the nature of operation and management of a hotel.

- c. It is apparent from the perusal of the facts and circumstances that the dispute in the instant case relates to a commercial dispute under Section 2(1)(c) of the CC Act and therefore, the Commercial Court was required to register the suit as a proper suit and thereafter afford an opportunity to the Petitioners to argue on merits.
- d. Rather than marking the suit as a Commercial Suit, as warranted under law, the Commercial Court, registered the suit as a Misc. Civil Case, which is an anomaly, and unrecognised under the eyes of law.
- e. Commercial Court incorrectly applied the law laid down by the Hon’ble Supreme Court in *Ambalal Sarabhai Enterprises -v- KS Infraspace LLP* reported in (2020) 15 SCC 585 to conclude that the Hotel was never used for trade and commerce and therefore the suit instituted by the Petitioners was unmaintainable.
- f. A perusal of the agreement would show that it was for the operation and management of a hotel, along with its equipment

and assets. Therefore, evidently, the Hotel was being used for trade and commerce.

- g. In light of the aforesaid facts, it is expedient in the interest of justice that the impugned order dated January 17, 2023 passed by the Presiding Officer, Commercial Court, Varanasi in Misc. (Civil) Suit No. 375/2022, be set aside. The Petitioners have no other equally efficacious and alternative remedy, other than approaching this Court under Article 227 of the Constitution of India.

Analysis and Conclusion

4. I have heard the learned counsel appearing on behalf of the Petitioner and perused the materials on record.

5. Before dealing with the instant case on merits, this Court would like to put on record that despite several opportunities afforded to the Respondent, none appeared to argue on his behalf. The fate of the Petitioners cannot be left at the mercy of the Respondent who does not seem to be interested in the instant matter. The failure on part of the Respondent suggests a disregard for this Court's process and time. Therefore, this Court, despite the fact that no arguments have been made by the Respondent, has proceeded to adjudicate the instant case on merits.

6. The main issue in the instant case is that whether the Hotel was being used by the Petitioners for trade and commerce, and therefore, the Commercial Court erred in dismissing the suit filed by the Petitioners.

7. Since the definition of a commercial dispute is contained in Section 2(c) of the CC Act, I have extracted it below:

“2. Definitions.—(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;*
- (ii) *export or import of merchandise or services;*
- (iii) *issues relating to admiralty and maritime law;*
- (iv) *transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;*
- (v) *carriage of goods;*
- (vi) *construction and infrastructure contracts, including tenders;*
- (vii) **agreements relating to immovable property used exclusively in trade or commerce;**
- (viii) *franchising agreements;*
- (ix) *distribution and licensing agreements;*
- (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;*
- (xiv) *mercantile agency and mercantile usage;*
- (xv) *partnership agreements;*
- (xvi) *technology development agreements;*
- (xvii) *intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*
- (xviii) *agreements for sale of goods or provision of services;*
- (xix) *exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;*
- (xx) *insurance and re-insurance;*
- (xxi) *contracts of agency relating to any of the above; and*

(xxii) such other commercial disputes as may be notified by the Central Government.

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;”*

(Emphasis Added)

8. Agreements relating to immovable property used exclusively in trade or commerce fall under the purview of “commercial disputes” as defined by Section 2(c)(vii) of the CC Act. This categorization highlights the specific nature of such agreements and their inherent connection to commercial activities. Immovable property in this context usually refers to land and buildings used solely for business purposes, such as offices, factories, warehouses, retail spaces, and other commercial establishments. These properties are distinct from residential or mixed-use properties, emphasizing their exclusive dedication to facilitating business operations.

9. Commercial disputes involving immovable property typically arise from agreements like lease contracts, sale agreements, joint development agreements, and mortgage arrangements. Lease agreements for commercial properties can lead to disputes over rent payments, lease renewals, property maintenance, and compliance with lease terms. For instance, conflicts may occur if a tenant defaults on rent or violates lease conditions, or if a landlord fails to provide agreed-upon services or attempts to unlawfully evict a tenant. Similarly, sale agreements for commercial properties can result in disputes concerning payment terms, transfer of property titles, and fulfilment of contractual obligations. Issues such as misrepresentation of property conditions, delays in possession, and breaches of contractual terms are common points of contention.

10. The expression “used” in Section 2(c)(vii) of the CC Act makes it clear that the immovable property must be actually used or being used for the purpose of “trade or commerce” and not “likely to be used” or “to be used”. In legal parlance, “used” generally implies active and current utilization rather than hypothetical or intended future use. This interpretation aligns with the principle that a legislation is designed to address present conditions and real-world applications rather than speculative scenarios. Reference in this regard can be made to the judgment of the Gujarat High Court in *Vasu Healthcare Private Limited -v- Gujarat Akruiti TCG Biotech Limited & 1(S)* reported in 2017 SCC OnLine Guj 724. Relevant paragraph is extracted herein:

*“33. Therefore, if the dispute falls within any of the clause 2(c) the dispute can be said to be “commercial dispute” for which the Commercial Court would have jurisdiction. It is required to be noted that before the learned Commercial Court the original plaintiff relied upon section 2(c)(i), 2(c)(ii) and 2(c)(xx) of the Commercial Courts Act only. Learned Counsel appearing on behalf of the original plaintiff has candidly admitted and/or conceded that the case shall not fall within clause 2(c)(i); 2(c)(ii) or 2(c)(xx) of the Commercial Courts Act. It is required to be noted that before the learned Commercial Court it was never the case on behalf of the original plaintiff that case would fall within section 2(c)(vii) of the learned Commercial Court. Despite the above we have considered on merits whether even considering section 2(c)(vii) of the Commercial Courts Act, the dispute between the parties can be said to be “commercial dispute” within the definition of section 2(c) of the Commercial Courts Act or not? Considering section 2(c)(vii), “commercial dispute” means a dispute arising out of the agreements relating to **immovable property used exclusively in trade or commerce**. As observed hereinabove, at the time of filing of the suit and even so pleaded in the plaint, the **immovable property/plots** the agreements between the parties cannot be said to be agreements relating to **immovable property used exclusively in trade or commerce**. As per the agreement between the party after getting the plots on lease from the GIDC, the same was required to be thereafter developed by the original defendant No. 1 and after providing all infrastructural facilities and sub-plotting it, the same is required to be given to other persons like the original plaintiff. It is the case*

*on behalf of the original plaintiff that as the original defendant No. 1 has failed to provide any infrastructural facilities and develop the plots and therefore, a civil suit for specific performance of the agreement has been filed. There are other alternative prayers also. Therefore, it cannot be said that the agreement is as such relating to immovable property used exclusively in trade or commerce. It is the case on behalf of the original plaintiff that as in clause (vii) of section 2(c), the phraseology used is not “actually used” or “being used” and therefore, even if at present the plot is not used and even if it is likely to be used even in future, in that case also, section 2(c)(vii) shall be applicable and therefore, the Commercial Court would have jurisdiction. The aforesaid has no substance. As per the cardinal principle of law while interpreting a particular statute or the provision, the literal and strict interpretation has to be applied. It may be noted that important words used in the relevant provisions are “**immovable property used exclusively in trade or commerce**”. If the submission on behalf of the original plaintiff is accepted in that case it would be adding something in the statute which is not there in the statute, which is not permissible. On plain reading of the relevant clause it is clear that the expression “used” must mean “actually used” or “being used”. If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, “likely to be used” or “to be used”. The word “used” denotes “actually used” and it cannot be said to be either “ready for use” or “likely to be used”; or “to be used”. Similar view has been taken by the Bombay High Court (Nagpur Bench) in the case of Dineshkumar Gulabchand Agrawal (Supra) and it is observed and held that the word “used” denotes “actually used” and not merely “ready for use”. It is reported that SLP against the said decision has been dismissed by the Hon’ble Supreme Court.”*

11. The Delhi High Court in ***Jagmohan Behl -v- State Bank of Indore*** reported in **2017 SCC OnLine Del 10706** held that a harmonious reading of Section 2(c)(vii) of the CC Act would include all disputes arising out of an agreement relating to an immoveable property being used exclusively for trade and commerce, be it a dispute for realisation of money given in the form of security or any other relief pertaining to such an immoveable property. Relevant paragraphs are extracted below:

“9. In order to appreciate the controversy, we would first reproduce the relevant definition clause, i.e. 2(1)(c)(vii), as also the explanation thereto:—

“Definitions.-(1) In this Act, unless the context otherwise requires

(c) “commercial dispute” means a dispute arising out of-

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

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

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

10. The explanation in the present case has to be read as part and parcel of clause (vii), for the language of the explanation shows the purpose, and the construction consistent with the purpose which should be placed on the main provision. The main provision, therefore, has to be construed and read in the light of the explanation and accordingly the scope and ambit of sub-clause (vii) to clause(c), defining the expression “commercial dispute”, has to be interpreted. The explanation harmonises and clears up any ambiguity or doubt when it comes to interpretation of the main provision. In *S. Sundaran Pillai v. V.R. Pattabiraman* (1985) 1 SCC 591, it was observed that explanation to a statutory provision can explain the meaning and intendment of the provision itself and also clear any obscurity and vagueness to clarify and make it consistent with the dominant object which the explanation seems to sub-serve. It fills up the gap. However, such explanation should not be construed so as to take away the statutory right with which any person under a statute has been clothed or to set at naught the working of the Act by becoming a hindrance in the interpretation of the same.

11. Clause (c) defines the “commercial dispute” in the Act to mean a dispute arising out of different sub-clauses. The expression

“arising out of” in the context of clause (vii) refers to an agreement in relation to an immoveable property. The expressions “arising out of” and “in relation to immoveable property”¹ have to be given their natural and general contours. These are wide and expansive expressions and are not to be given a narrow and restricted meaning. The expressions would include all matters relating to all agreements in connection with immoveable properties. The immoveable property should form the dominant purpose of the agreement out of which the dispute arises. There is another significant stipulation in clause (vii) relating to immoveable property, i.e., the property should be used exclusively in trade or commerce. The natural and grammatical meaning of clause (vii) is that all disputes arising out of agreements relating to immoveable property when the immoveable property is exclusively used for trade and commerce would qualify as a commercial dispute. The immoveable property must be used exclusively for trade or business and it is not material whether renting of immoveable property was the trade or business activity carried on by the landlord. Use of the property as for trade and business is determinative. Properties which are not exclusively used for trade or commerce would be excluded

12. *The explanation stipulates that a commercial dispute shall not cease to be a commercial dispute merely because it involves recovery of immoveable property, or is for realisation of money out of immoveable property given as security or involves any other relief pertaining to immoveable property, and would be a commercial dispute as defined in sub-clause (vii) to clause (c). The expression “shall not cease”, it could be asserted, has been used so as to not unnecessarily expand the ambit and scope of sub-clause (vii) to clause (c), albeit it is a clarificatory in nature. The expression seeks to clarify that the immoveable property should be exclusively used in trade or commerce, and when the said condition is satisfied, disputes arising out of agreements relating to immoveable property involving action for recovery of immoveable property, realization of money out of immoveable property given as security or any other relief pertaining to immoveable property would be a commercial dispute. The expression “any other relief pertaining to immoveable property” is significant and wide. The contours are broad and should not be made otiose while reading the explanation and sub-clause (vii) to clause (c) which defines the expression “commercial dispute”. Any other interpretation would make the expression “any other*

relief pertaining to immoveable property” exclusively used in trade or commerce as nugatory and redundant.

13. Harmonious reading of the explanation with sub-clause (vii) to clause (c) would include all disputes arising out of agreements relating to immoveable property when used exclusively for trade and commerce, be it an action for recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property.”

12. In ***Ambalal Sarabhai (supra)***, the Hon’ble Supreme Court propounded that a dispute relating to an immovable property if it falls under Section 2(1)(c)(vii) of the CC Act, would qualify as a commercial dispute. Relevant paragraph is extracted below:

“37. A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2(1)(c) of the Act viz. “the agreements relating to immovable property used exclusively in trade or commerce”. The words “used exclusively in trade or commerce” are to be interpreted purposefully. The word “used” denotes “actually used” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “actually used”. Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above.”

13. What emerges from a reading of the aforesaid judicial pronouncements is that, for a dispute arising out of an immovable property to be qualified as a commercial dispute, following conditions must be satisfied:-

a. For a dispute arising out of an immovable property to be qualified as a commercial dispute, an immovable property must be actually used or being used for the purpose of “trade or commerce” rather than being merely “likely to be used” or “to be used” This interpretation emphasizes the necessity for active and current utilization of the immovable property in commercial activities. The term “used” in Section 2(c)(vii) of the CC act excludes the notion of mere readiness or potential for future utilization.

b. The immovable property in question must be exclusively used for trade or commerce. Any other incidental or non-commercial

use may disqualify the dispute from being categorized as a commercial dispute.

c. The question that whether a dispute arising out of an agreement relating to an immovable property would qualify as a commercial dispute would necessitate a contextual analysis, and consideration of the specific language and purpose of the contractual provisions of the agreement in question.

d. Commercial disputes encompass all relevant disputes arising from agreements relating to immovable property exclusively used for trade and commerce. This includes disputes for recovery of property, realization of money, or any other relief pertaining to commercial activities.

14. Coming to the factual matrix of the instant case at hand, it is apparent that the agreement between the Petitioners and the Respondent was exclusively for the business operation and management of the Hotel, which would make any dispute arising out of the said agreement fall within the definition of a commercial dispute. Disputes arising out of business operation and management agreements of immovable properties, such as hotels, resorts, office buildings, shopping centres, and other commercial real estate, fall within the definition of a commercial dispute as outlined in Section 2(c)(vii) of the CC Act.

15. However, the Commercial Court, Varanasi held that the Hotel was never “actually used” for the purposes of trade or commercial and dismissed the suit filed by the Petitioners. Relevant portion from the impugned order dated January 17, 2023 passed by the Commercial Court, Varanasi is extracted herein:

“उपरोक्त विवेचना से स्पष्ट होता है कि वादिनी द्वारा प्रस्तुत वाद में उल्लेखित परिसर संख्या उपरोक्त होटल का संचालन वाणिज्यिक विद्युत की आपूर्ति न होने के कारण व्यापार व वाणिज्यिक रूप से वास्तविक प्रयोग कभी नहीं किया गया तथा माननीय उच्चतम न्यायालय द्वारा *Ambalal Sarabhai Enterprises Limited* के अन्तर्गत सुस्थापित विधि व्यवस्था के अनुसार वादिनी द्वारा प्रस्तुत वाद जो प्रकीर्ण सिविल वाद संख्या 375/2022 के रूप में दर्ज है की सुनवाई का क्षेत्राधिकार वाणिज्यिक न्यायालय वाराणसी को प्राप्त नहीं है तथा वादिनी का उपरोक्त प्रकीर्ण सिविल वाद तथा उसके साथ संलग्न वाद पत्र अस्वीकार किये जाने योग्य है।

आदेश

प्रकीर्ण सिविल वाद संख्या 375/2022 ममता कपूर व अन्य बनाम विनोद कुमार राय वाणिज्यिक न्यायालय को सुनवाई का क्षेत्राधिकार न होने के कारण अस्वीकार किया जाता है। कार्यालय को निर्देशित किया जाता है कि वह वादिनी की सम्पूर्ण पत्रावली नियमानुसार वादिनी अथवा उसके अधिकृत व्यक्ति को वापस प्राप्त कराये।”

16. A perusal of the factual matrix of the instant case would show that the Commercial Court, Varanasi was not justified in dismissing the suit filed by the Petitioners which would warrant the exercise of this Court’s powers under Article 227 of the Constitution of India. The Hotel was actually being used for trade and commerce, and the agreement between the parties was for the purpose of business management and operations exclusively. It is evident from the nature of the agreement that the primary purpose was to facilitate and manage commercial activities related to the Hotel. Therefore, the argument that the Hotel was not "actually used" for trade or commerce lacks merit, as the very purpose of the agreement was to engage in commercial activities related to the operation of the Hotel. The Commercial Court's narrow interpretation overlooks the broader commercial context of the agreement and fails to recognize the commercial nature of the dispute.

17. Accordingly, the impugned order dated January 17, 2023 is quashed and set aside with a direction upon the Commercial Court, Varanasi to hear the suit filed by the Petitioner on merits, expeditiously and preferably, within a period of 6 months from the date of receipt of a certified copy of this order.

18. With the above directions, the instant application is allowed. There shall be no order as to the costs.

Order Date :- 27.05.2024

Rakesh

(Shekhar B. Saraf, J.)