

Present: Sri Srikumar Goswami (JO Code WB00714)

Judge, Commercial Court at Alipore.

Money Suit 39/2019

(CNR no. WBSP18-000113-2019)

Order no. 25

19.04.2021

In the matter of :  
Suit for recovery of money  
valued at Rs.3 Crores.

And

In the matter of :  
Austin Distributors Pvt. Ltd.

Vs.

In the matter of :  
Sayan Sarker.

**ORDERED**

**I.A. no. 120/2020**

1. *Today is fixed for passing order of the demurrer application filed by the Defendant being I.A. no. 120/2020.*
2. *Defendant files hazira.*
3. *The instant application has been filed by the Defendant praying for return to the plaint to the regular Ld. Court as a regular suit.*
4. *I have already heard both sides.*
5. *Perused and considered the present application alongwith the objection and reply.*
6. *The instant application has been submitted on behalf of the Defendant on the ground that the instant suit did not fall*

  
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*within the meaning of the commercial dispute in terms of the Commercial Courts Act, 2015.*

7. *At the very outset, it can be said that a similar question has been arisen before this Court while considering an application for acceptance of written statement filed by the Defendant and by order dated 18.02.2020, such application was disposed off and it has been held by this Court in Paragraph no. 15 that the dispute is of commercial nature.*
8. *Against such order, a Revisional Application under Article 227 of the Constitution of India has been preferred by the Defendant on the point of acceptance of written statement before the Hon'ble High Court at Calcutta, being C.O. no. 1470 of 2020. While delivering the Judgement in such Revisional Application, the Hon'ble Court has been pleased to direct this Court to accept the written statement, but nowhere it has been disputed that the instant suit is not of commercial nature and in Paragraph no. 16 of the said Judgement, the Hon'ble Court has been pleased to observe:*

***“...It is also a fact, that the Commercial Court at South 24 Paraganas, to which the suit was transferred, became functional on and from July 5, 2019. Prior to the said date, suits involving commercial disputes were tried as regular suits before the court having territorial and pecuniary jurisdiction. The arguments of the opposite party that every suit filed after the enactment of the said Act should be treated as a Commercial suit and***

  
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*the provisions of the said Act would be applicable, cannot be accepted in the facts of this case. If such a proposition is accepted, then the plaint itself suffers from defects and cannot be entertained in the proceedings before the Commercial Court, inasmuch as, the said plaint has not been supported by an affidavit in the form and manner as prescribed under Order VI Rule 15-A of the Code of Civil Procedure...”*

9. *In the above Judgement, although the point as to whether the suit is of commercial nature or not has been raised, but the Hon'ble Court has been pleased not to pass any direction to transfer the instant suit from this Court to the regular Court, inspite of the fact that the Hon'ble Court has been pleased to pass necessary direction to accept the written statement filed by the Defendant. Accordingly, this issue has been dealt with by the Hon'ble High Court at Calcutta. Besides that, this Court has already dealt with the said issue vide order dated 18.02.2020.*

  
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10. *In addition to that, the case of the Plaintiff in short is as follows:*

a) *The Plaintiff deals with automobiles and is one of the largest automobile dealers in Eastern India and the Defendant is a civil engineer and also renders his services in the capacity of a project management consultant.*

b) *For the purposes of construction of a commercial building consisting of basement, ground floor and nine upper floors at IID/12, Rajarhat, New Town, Kolkata on 07.09.2014 and 08.09.2014, the Defendant offered his services as a project management consultant. In the said offer letter, the Defendant stated that he will provide complete project management consultation and also represented that he had the support of an extremely skilled manpower and technology which would be capable of handling such a big commercial project. The Defendant also offered to provide complete supervision over the project which included various services.*

c) *After several negotiations and upon being satisfied, the Plaintiff issued an appointment letter to the Defendant thereby accepting the offer dated 07.09.2014 and 08.09.2014.*

d) *In such appointment letter, it was clearly stated that the Defendant's responsibility was to provide complete project management consultation by its "extremely skilled manpower and technology." The scope of work was also mentioned in such letter and the said letter further provided some personnel including one project engineer, one site engineer, one supervisor and one quality engineer.*

e) *It has also been provided in the said appointment letter that as a consideration for such services, the Defendant*

  
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would be entitled to a monthly salary of Rs.1.3 lakh from which TDS would be deducted.

f) Subsequently, the Plaintiff was extremely dissatisfied with the quality of the services provided by the Defendant and an explanation was sought for from the Defendant in writing for such deficiency of services and ultimately, the Plaintiff filed the instant suit for the losses suffered due to the delay in completion of the project work and by filing such suit, Rs.3 Crores has been asked to be paid by the Defendant to the Plaintiff, for the losses and damages suffered by the Plaintiff.

11. By filing the instant application, it has been claimed by the Defendant that this is not a suit of commercial nature in terms of Section 2(c) of the Commercial Courts Act, 2015.

12. At this stage, only the averments of the plaintiff alongwith the annexures shall be taken into consideration and there is no scope of examination of the materials as disclosed by the Defendant in his written statement. At the same time, the averments of the Plaintiff must be taken as sacrosanct.

13. In the letter dated 08.09.2014 as annexed with the plaintiff, the Defendant has given the offer to the Plaintiff and there was a provision of service charge of Rs.1.5 lakhs and the scope of the work has also been mentioned. The letter dated 15.10.2014 issued by the Plaintiff as annexed with the plaintiff, was under the heading "Offer for Completion of

*Project B+G+IX Stories Commercial Building at IID/12  
Rajarhat, New Town, Kolkata”.*

14. *At the time of argument, it has been repeatedly mentioned on behalf of the Defendant that the term “salary” has been mentioned in the letter dated 15.10.2014. It is the case of the Defendant that it is not a contract for services and it is a clear case of employer-employee relationship as salary has to be paid. However, on scrutiny of the said document, it appears that the Defendant is only entitled to get Rs.1.3 lakhs per month and TDS shall be deducted from the bill of the Defendant as applicable. So there is no word “salary”.*

15. *It has been mentioned in Section 2(1)(c)(x) of the Commercial Courts Act, 2015 that commercial disputes include management and consultancy agreement. So, this suit involves a point for determination as to whether the Plaintiff is entitled to the lossess and damages of Rs.3 Crores as compensation for delay in executing the project work.*

  
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16. *At this stage, it appears that the relationship between the Plaintiff and the Defendant arises from a project management consultancy agreement. Moreover, at the time of hearing of the demurrer application, this Court has no power to make an enquiry and inestigation. Under Order VII Rule 11 CPC, only when it appears on the face of the plaint that the suit is barred, then only, there is a scope to*

*comply the said provisions, as there is not scope to declare that a suit is not maintainable in the subsequent occasions also, even by framing a separate issue.*

17. *So, whether this is a contract for employment or relationship between an employee and employer, is a mixed question of law and facts and the Defendant has the liberty to make an application at subsequent stage for framing a separate issue and in such circumstances, the Court has the ample power to make a further investigation.*

18. *On the face of the plaint, at this stage, it appears that the instant suit is of commercial nature and accordingly, the instant demurrer application is liable to be rejected.*

19. *Curiously enough, although the same point has been raised before the Hon'ble High Court at Calcutta and the Hon'ble Court has been pleased not to entertain such issue by giving necessary direction to transfer the suit to the regular Court, how the Defendant took such issue in subsequent stage over the similar issue once again.*

20. *The said question as previously raised before this Court has already been decided vide order dated 18.02.2020. So, in my opinion, it is an utter abuse of the process of law.*

21. Hence it is,

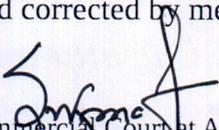
**Ordered**

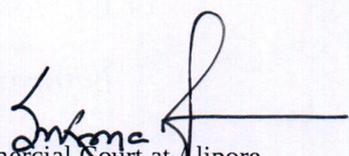
***that the instant demurrer application as filed by the Defendant is hereby considered and rejected with cost of Rs.25,000/- payable by the Defendant to the Plaintiff within 15 days of passing of this order, in default of which, the Plaintiff shall have the liberty to take the recourse of law for recovery of the said amount.***

***22. Accordingly, the instant I.A. no. 120/2020 is disposed off.***

***23. Fix 28.04.2021 for office report prior to fixing schedule of case management hearing.***

Dictated and corrected by me,

  
Judge, Commercial Court at Alipore,  
For South 24 Parganas, Purba Midnapore,  
Paschim Midnapore & Jhargram  
Judge  
Commercial Court at Alipore

  
Judge, Commercial Court at Alipore,  
For South 24 Parganas, Purba Midnapore,  
Paschim Midnapore & Jhargram  
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