

I.A. No. GA 6 of 2020
in
CS 390 of 2014
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
Swadha Builders Pvt. Ltd. & Ors.
Vs.
Nabarun Bhattacharjee & Ors.

For the Petitioners : Mr. Pramit Bag, Advocate
 Mr. Rahul Poddar, Advocate
 Ms. Alokanda Das, Advocate
 Ms. Rituparna Chatterjee, Advocate

For the Respondent Nos. 4 & 5 : Mr. Rupak Ghosh, Advocate

For the Respondent No. 7 : Mr. Ronojit Choudhury, Advocate

Hearing concluded on : January 08, 2021

Judgment on : January 13, 2021

DEBANGSU BASAK, J. :-

1. The plaintiffs have applied under Section 15 of the Commercial Courts Act, 2015 for transferring the instant suit to the Commercial Division of this Hon'ble Court.

2. Learned Advocate appearing for the plaintiffs has submitted that, the two criteria laid down under Section 15 of the Act of 2015 for the

transfer of the suit to the Commercial Division stands satisfied in the facts of the present case. He has submitted that, the disputes and issues involved in the present suit are commercial disputes within the meaning of Section 2(1)(c)(i) and (vii) of the Act of 2015. The plaintiffs have valued the suit in excess of the prescribed value for the Commercial Division. He has submitted that, the plaintiff has claimed a decree for declaration and perpetual injunction as also a decree for loss and damages suffered by the plaintiffs at the hands of the defendants. He has submitted that, the defendant Nos. 1 to 6 wrongfully and fraudulently induced the plaintiffs to enter into agreements by which, an immovable property of the plaintiff No. 1 was mortgaged by the defendant Nos. 1 and 2 for the purpose of obtaining credit facilities for the defendant No. 3 from the defendant No. 7. He has submitted that, the parties had entered into commercial transactions. The claim in the suit has arisen out of commercial transactions between the parties. The defendant Nos. 1 to 6 had acted fraudulently and induced the plaintiffs to part with an immovable property. Therefore, according to him, the issues that have arisen in the instant suit are commercial disputes within the meaning of the Act of 2015.

3. Learned Advocate appearing for the defendant Nos. 4 and 5 has submitted that, the disputes involved in the instant suit falls within the meaning of a commercial dispute under the provisions of the Act of 2015. He has submitted that, since the Court has not invited the parties to file any affidavit, the allegations made in the application as against his clients be deemed not to be admitted.

4. Learned Advocate appearing for the defendant No. 7 has submitted that, the disputes and issues involved in the instant suit are not commercial disputes within the meaning of the Act of 2017. He has relied upon **2019 SCC Online SC 1311 (Ambalal Sarabhai Enterprises Ltd. v. K.S. Infraspace LLP & Anr.)** and submitted that, merely because an immovable property is involved, the same does not partake the character of a commercial dispute. He has drawn the attention of the Court to the prayers made in the plaint. He has submitted that, essentially, the suit is for declaration, permanent injunction and damages. According to him, the plaintiff has based the suit on the basis of an agreement between the plaintiffs and the defendant Nos. 1 and 2. The loan that had been obtained from the bank was in the name of the defendant No. 6. The immovable property belonging to the plaintiff No. 1 had been mortgaged with the defendant No. 7. The immovable property concerned is an

agricultural land. The bank has proceeded under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 in respect of the secured assets including the immovable property concerned. Parties had filed writ petitions trying to prevent the bank from realizing its claim. He has submitted that, the suit was filed sometime in 2014. The defendant No. 7 has filed its written statement. According to him the suit should not be transferred to the Commercial Division.

5. The Law Commission of India, in its 253rd report, had recommended for the establishment of the Commercial Courts, the Commercial Division and the Commercial Appellate Divisions in the High Courts for disposal of commercial disputes of Specified Value. The Act of 2015 has come into effect on and from October 23, 2015 by virtue of the deeming clause as has been provided in Section 1 (3) of the Act of 2015. The Act of 2015 has been divided into seven chapters. Chapter V has one section namely Section 15 which is as follows: –

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 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 accordance 3 [with Order XV-A] of the Code of Civil Procedure,

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.

6. Section 15 of the Act of 2015 has provided a mechanism for transfer of pending suits as also proceedings governed by the Arbitration and Conciliation Act, 1996. Section 15 has provided for a mechanism by which, a suit or a proceedings governed by the Act of 1996 which involves a commercial dispute within the meaning of the Act of 2015 and is of a specified value as specified under the Act of 2015, has to be transferred to the Commercial Division or Commercial Court, as the case may be, for consideration. However, in matters which comes within the purview of Section 15 of the Act of 2015, and where, final judgement has

been reserved, then, such suit or proceedings are not to be transferred to the Commercial Division or the Commercial Court, as the case may be. Section 15 of the Act of 2015 has also empowered the Commercial Division of the High Court or the Commercial Court, as the case may be, to hold case management hearings in respect of the transferred suit or proceeding, in order to prescribe new timelines or issue further directions as may be necessary for a speedy and efficacious disposal of such suit or proceeding in accordance with Order XV-A of the Code of Civil Procedure, 1908.

7. The term commercial dispute is of wide import. It brings within its compass any dispute connected with the commercial world. However each and every commercial dispute involving in a suit pending before the High Court or a Civil Court prior to the coming into effect of the Act of 2015 will not be considered as a “commercial dispute” necessitating the invocation of Section 15 of the Act of 2015. Only such disputes which come within the purview of the definition of “commercial dispute” as has been provided in Section 2(1)(c) of the Act of 2015 will come into consideration.

8. What is a commercial dispute coming within the meaning of the Act of 2015 has been defined in Section 2 (1) (c) of the Act of 2015. Section 2 (1) (i) of the Act of 2015 has defined Specified Value.

9. **Ambalal Sarabhai (supra)** has considered Section 15 and the definition of a commercial dispute in the facts of that case and held as follows: –

“22. Section 3 of the Act deals with Constitution of Commercial Courts. As per Section 3 of the Act, the State Government shall, after consultation with the High Court, by notification, constitute Commercial Courts at District level if deemed necessary for the purpose of exercising jurisdiction under the Act. As per Section 3(1A) of the Act, Commercial Courts shall have jurisdiction to try the commercial disputes of a “Specified Value” which shall not be less than three lakh rupees or such higher value, for whole or part of the State, as it may consider necessary. After amendment in 2018, proviso to Section 3 provides that Commercial Courts may be constituted with respect to area over which the High Courts have ordinary original civil jurisdiction. Section 5(1) of the Act provides for the constitution of Commercial Appellate Division having one or more Division Benches for the purpose of exercising jurisdiction and powers conferred on it by the Act.”

10. In ***Ambalal Sarabhai (supra)*** the Supreme Court has considered an application under Order VII Rule 10 of the Code of Civil Procedure, 1908 filed by the defendant in a suit where the plaintiff claimed that, the disputes involved in the suit were commercial disputes within the meaning of the Act of 2015 and therefore, filed the suit in the Commercial Court. In that case, the plaintiff had executed an agreement to sell an immovable property in favour of one of the defendants in the suit. Such defendant had assigned and transferred its rights under the agreement to sell in favour of the other defendants in the suit. The plaintiff had thereafter entered into a deed of conveyance with the assignee. An issue of change of user of the land was involved by reason of which, the plaintiff and the two defendants had entered into a memorandum of understanding. In terms of such memorandum of understanding, the assignee had executed a mortgage deed in favour of the plaintiff which was not registered. The plaintiff had filed the suit before the Commercial Court seeking to enforce the execution of the mortgage deed. It is in such factual matrix that the Commercial Court had rejected the application under Order VII Rule 10 of the Code of Civil Procedure, 1908 filed by the defendants after taking note of the Memorandum of Association of the plaintiff and finding that, the

business of the plaintiff included the business of an estate agent. The Supreme Court had noticed the provisions of Section 2 (1)(c)(vii) of the Act of 2015 and observed that, the disputes arising out of agreements relating to immovable property used exclusively in trade or commerce will qualify to be a commercial dispute to be tried by Commercial Courts. The Supreme Court had answered the issue whether the immovable property involved could be considered as being used exclusively in trade or commerce by holding that, in the facts of that case that, the immovable property was not coming within the purview of the definition of commercial dispute given in section 2 (1) (c) (vii) of the Act of 2015.

11. As has been noted herein above, suits and applications under the Act of 1996 pending before the regular court are required to be transferred to the Commercial Division or the Commercial Court if it satisfies the criteria laid down under Section 15 of the Act of 2015. Section 15 has provided for two entry routes to the Commercial Division or the Commercial Court, as the case may be, in respect of a suit or an application under the Act of 1996. A suit or an application governed by the Act of 1996 can be transferred to the Commercial Court or the Commercial Division, as the case may be, either by the Court itself in seisin of such suit or the application under the Act of 1996, or on an

application by the parties to the suit or the application under the Act of 1996.

12. In either of the two routes, the Court has to find whether the final judgment in the suit or the application under the Act of 1996 has been reserved or not. In the event final judgment has not been reserved then the Court has to find three criteria to have been fulfilled for ordering a transfer to the Commercial Division or the Commercial Court as the case may be. The first is that the suit or the application under the Act of 1996 is pending on the date when the Commercial Division or the Commercial Court has been constituted. The second criteria is that the Court in seisin of the suit or the application under the Act of 1996 is required to find out is whether, the disputes involved come within the meaning of a commercial dispute as defined in section 2 (1) (c) of the Act of 2015 or not. In the event, the Court has formed an opinion that the disputes involved in the suit or the application under the Act of 1996 are a commercial dispute within the meaning of Section 2 (1) (c) of the Act of 2015, it has to find out whether, the value of such suit or the application under the Act of 1996 is of the specified value or not. When all these three criteria are fulfilled, then, the Court has to transfer the suit or the application under the Act of 1996 to the Commercial Division or to the

Commercial Court as the case may be. It is not necessary that the Court has to arrive at the findings in the sequence noted above. The sequence may be any but the fulfilment of all of the three criteria is imperative.

13. Applying the tests as has been noted above, in the facts of the present case, the Court has to find out whether, this suit was pending on the date when the Commercial Division of this Hon'ble Court was constituted or not. The court has to find out whether the disputes in the instant suit are a commercial dispute within the meaning of Section 2 (1) (c) of the Act of 2015 and whether the value of the suit is of the Specified Value or not. The facts and circumstances of each case have to be considered in order to find out whether the disputes involved in the case come within the purview of the meaning of a commercial dispute as defined in Section 2 (1) (c) of the Act of 2015 or not.

14. Five limited liability companies incorporated under the provisions of the Companies Act, 1956 have joined as plaintiffs in the instant suit. They have filed the instant suit against seven defendants. The plaintiffs have claimed that, the plaintiff No. 1 was the sole and absolute owner of an immovable property being premises No. 6, Jessore Road (North). The defendant Nos. 1 and 2 had initially approached the plaintiff No. 1 with

an offer to purchase such property by purchasing the entire shareholding of the plaintiff No. 1 and to pay on a deferred payment basis. The plaintiffs had rejected such offer. The defendant Nos. 1 and 2 had thereafter approached the plaintiffs through the defendant No. 4 who was known to the directors of the plaintiffs and whom the directors of the plaintiffs reposed trust and faith. According to the plaintiffs, the defendant No. 4 had guaranteed the performance of the terms and conditions by the defendant Nos. 1 and 2.

15. The plaintiffs have claimed that, following discussions and negotiations in which the defendant No. 4 participated, the plaintiffs and the defendant Nos. 1, 2 and 4 agreed and decided that the Jessore Road property excepting the portion already sold would be transferred to the defendant Nos. 1 and 2 by transferring all the shares held by the plaintiff Nos. 2 to 5 in the plaintiff No. 1 at and for a consideration of Rs.17,68,37,500/-. The defendants Nos. 1 and 2 had agreed to pay a sum of Rs. 51 lakhs to the plaintiff No. 1 to enable such plaintiff to pay off all outstanding loans given by the plaintiff Nos. 2 to 5 and/or the sister concerns of such plaintiff.

16. According to the plaintiffs, the plaintiffs and the defendant Nos. 1, 2 and 4 had agreed that, the defendant Nos. 1 and 2 will pay a sum of Rs. 51 lakhs upfront and will pay the balance of sum of Rs.17,17,37,500 within May 31, 2013 by post dated cheques. At the request of the defendants Nos. 1 and 2, the plaintiffs had allowed the defendant Nos. 1 and 2 to induct directors on the board of the plaintiff No. 1 to enable them to strategise and implement the marketing of the Jessore Road property and to file and pursue the appeal against the order passed by the Block Land and Land Reforms Officer, Barasat II rejecting the prayer for conversion of the agricultural land.

17. Acting on the basis of such agreement, the plaintiffs on receipt of the sum of Rs. 51 lakhs inducted the defendant Nos. 1 and 2 to the Board of Directors of the plaintiff No. 1. The existing directors of the plaintiff No. 1 resigned on October 1, 2012. The plaintiffs had entered into an agreement on October 3, 2012 with the defendant Nos. 1, 2 and 4 for transfer of the shares held by the plaintiffs Nos. 2 to 5 in the plaintiff No. 1 to the defendant Nos. 1 and 2 against payment of the agreed consideration. The agreement dated October 3, 2012 had provided that, the Jessore Road property may be mortgaged with any recognised bank. Simultaneously with the execution of such agreement, the defendant

Nos. 1 and 2 had issued four cheques dated October 3, 2012 aggregating to Rs. 51 lakhs and four post dated cheques dated May 30, 2013 for the sum of Rs.17,17,37,500. According to the plaintiffs, the defendant No. 4 had unconditionally guaranteed due payment of the balance consideration payable by the defendant Nos. 1 and 2 and the performance of their obligations under the agreement.

18. According to the plaintiffs, the defendant Nos. 1,2 and 4 were aware that the land was an agricultural land and that the application for conversion of the same had been rejected against which an appeal was required to be filed before the appropriate authority. At the request of the defendant Nos. 1 and 2 the plaintiffs had agreed to reappoint Mr. Binod Kumar Drolia as a director in order to assist the filing of the appeal against the order rejecting the conversion.

19. The plaintiffs have claimed that, the parties entered into a supplementary agreement on May 19, 2013 whereby the time for completion of the sale and transfer of the shares was extended till August 27, 2013 or within 15 days of the order of conversion being passed in respect of the land. Necessary extension for presentation of the post dated cheques had also been agreed upon. However, the defendants Nos.

1, 2 and 4 had failed to pay the consideration for sale within the extended period. The plaintiffs had contemplated cancelling the agreement dated October 3, 2012 and invoking the guarantee given by the defendant No. 4. The defendant No. 4 had approached the plaintiffs with an offer to secure the payment of the balance consideration for the shares by a corporate guarantee of the defendant No. 6 backed up by a mortgage of a tea garden owned by the defendant No. 6 at Agartala, in the state of Tripura. The plaintiffs had accepted such offer. The defendant No. 6 had executed a deed of guarantee and security in favour of the plaintiff Nos. 2 to 5 on September 26, 2013.

20. According to the plaintiffs, the defendant Nos. 1, 2 and 4 had failed to pay the plaintiffs within such extended time. The plaintiffs Nos. 2 to 5 being shareholders of the plaintiff No. 1 had issued a notice dated October 31, 2013 for convening the annual general meeting of the plaintiff No. 1. The defendant Nos. 1, 2 and 4 had once again approached the plaintiffs for a further extension of four months to pay the consideration. The defendant Nos. 1 and 2 had issued post dated cheques to the plaintiff under cover of a letter dated November 25, 2013. The defendant No. 4 had also signed the letter dated November 25, 2013 to confirm the continuance of his guarantee.

21. The plaintiffs have claimed that, they thereafter conducted searches in the office of the Registrar of Companies with regard to the affairs of the plaintiff No. 1. Upon such searches being conducted, the plaintiffs had come to learn that, a charge on the Jessore Road property had been created in favour of the defendant No. 7 to secure a loan of Rs. 40 crore sanctioned in favour of the defendant No. 3. According to the plaintiffs, the defendant Nos. 1, 2 and 4 had created such a mortgage without the due approval of the plaintiffs and in breach of the agreement entered into with the plaintiffs. Moreover, the plaintiffs have claimed that, the mortgage created by the plaintiff No. 1 was in violation of the Articles of Association of the plaintiff No. 1.

22. The plaintiffs had made further enquiries and came to learn that, the defendant No. 7 was not the regular bank of the defendant Nos. 1,2,3,5 and 6 and that the defendant Nos. 1 and 2 had for the first time entered into a banking relationship with the defendant No. 7 while obtaining the sanction of the financial limit of Rs. 40 crores for the defendant No. 3. According to the plaintiffs, the only collateral security offered was the mortgage of the Jessore Road property. According to the plaintiffs, the defendant Nos. 1 and 2 had entered into the agreement dated October 3, 2012 with the sole intent and object of using the

Jessore Road property as collateral for the purpose of obtaining finance for the defendant No. 3. The plaintiffs have alleged that the defendants had acted fraudulently with regard to the Jessore Road property and the plaintiffs. The plaintiffs have tabulated the particulars of fraud at paragraph 46 of the plaint.

23. The plaintiffs have claimed themselves to be owners of the Jessore Road property. The plaintiffs have claimed that they never intended to offer the Jessore Road property as security for any loan or advance obtained by the defendant No. 3 from any bank or financial institution or the defendant No. 7. According to the plaintiffs, there had been a clear understanding between the plaintiffs and the defendant Nos. 1 and 2 that such defendants will purchase the entire shares held by the defendant Nos. 2 to 5 in the plaintiff No. 1 on and for the consideration mentioned in the agreement dated October 3, 2012 within the time specified. According to the plaintiffs, despite extension of time being granted on diverse dates, the defendant Nos. 1 and 2 had paid a sum of Rs. 1.01 crores of the plaintiffs Nos. 2 to 5. The plaintiffs had terminated the agreement dated October 3, 2012 by moving the defendant Nos. 1 and 2 from the Board of Directors of the plaintiff No. 1 and reappointing the earlier directors. In response to notices sent by the plaintiff Nos. 1 to

5 to the defendant Nos. 1 and 2 in connection with the dishonour of the cheques issued by such defendants in favour of the plaintiffs, the defendant Nos. 1 and 2 terminated the agreement dated October 3, 2012.

24. The plaintiffs have claimed that they suffered loss and damages which they reasonably estimate at Rs. 9,50,67,840/-. The plaintiffs have claimed a decree for declaration that the mortgage of the Jessore Road property belonging to the plaintiff No. 1 in favour of the defendant No. 7 is wrongful, illegal, fraudulent and void. The plaintiffs have also claimed a decree for declaration that the guarantee given by the defendant Nos. 1 and 2 acting on behalf of the plaintiff No. 1 in favour of the defendant No. 7 is wrongful, illegal, fraudulent and void. The plaintiffs have sought decree for delivery up and cancellation of the Jessore Road property upon adjudging the same to be void. The plaintiffs have also sought perpetual injunctions relating to the Jessore Road property.

25. As the plaint stands, the Court has to decide the issue of the legality, validity and sufficiency of the equitable mortgage of the Jessore Road property belonging to the plaintiff No. 1 in favour of the defendant No. 7. The plaintiffs have relied upon the agreement dated October 3, 2012 and claimed that the defendant Nos. 1 to 6 acted in breach of the

terms and conditions of such agreement. The agreement dated October 3, 2012 has a clause which prevents alienation, transfer or encumbrance of the Jessore Road property. The parties have entered into a supplemental agreement dated May 2, 2013. The defendant No. 7 had accepted the Jessore Road property as collateral security for a loan granted by it to the defendant No. 3 by way of an equitable mortgage in respect thereof. The defendant No. 7 is a banker. The defendant No. 7 has proceeded against such Jessore Road property under the SARFAESI Act. The parties have not disputed the fact that the relationship between the defendant No. 3 and the defendant No. 7 is one of borrower and banker. As has been noted herein, the creation of mortgage in respect of the Jessore Road property in favour of the defendant No. 7 is an issue in the instant suit. The defendant No. 7 as a banker has not claimed that the creation of such mortgage was not done as an ordinary transaction of a banker. Again as has been noted herein, interpretation of a document relating to the immovable property concerned and in particular the validity sufficiency and legality of the equitable mortgage is an issue in the instant suit. Therefore, in my view, the disputes and issues that the parties have raised in the instant suit are commercial disputes within the meaning of Section 2(1)(c)(i) of the Act of 2015.

26. In view of the discussions above, IA No. GA 6 of 2020 in CS No. 390 of 2014 is allowed. There will be an order transferring Civil Suit No. 390 of 2014 to the Commercial Division of this Hon'ble Court. The department will incorporate the words "Commercial Division" in the cause title of the plaint by deleting the words "Original Side" therefrom. Such incorporation be incorporated within 4 weeks from date. The parties will thereafter adopt the amended cause title in the pleadings.

[DEBANGSU BASAK, J.]