
(2020) 09 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition (St) No. 92463 Of 2020

Vaijanath Dayanand Kale And Ors

APPELLANT

Vs

Nerkar Properties LLP And Ors

RESPONDENT

Date of Decision : 07-09-2020

Acts Referred:

Commercial Courts Act, 2015 — Section 2(1)(c)(iv), 8, 13
Code Of Civil Procedure, 1908 — Order 7 Rule 10

Citation : (2020) 09 BOM CK 0005

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Milind M. Sathaye, Surel Shah, Chetan Alai

Final Decision : Dismissed

Judgement

1. Heard learned Counsel for the parties.
2. This petition challenges an order passed by the District Court at Nashik, sitting as a commercial court. The impugned order has been passed on an application of the Petitioners herein, who are original defendants in the commercial suit, for return of the plaint for presentation to proper court under Order 7 Rule 10 of CPC.
3. The controversy in the matter is whether the suit filed by the Respondents herein (original plaintiffs) is a commercial suit. The dispute between the parties arises under an agreement by which the original defendants purportedly agreed to transfer their development rights, for construction of a building, to the plaintiffs in consideration of the latter sharing the development potential with them in the ratio of 43 : 57. This agreement, on the face of it, is prima facie a construction contract; it transfers development rights by way of construction of a building and sale of premises therein in a certain stated proportion as between the parties. The defendants' submission before the District Court was that the transaction did not come within the purview of a "commercial dispute" defined under Clause (c) of Section 2(1) of Commercial Courts Act, 2015 ("Act"). The

defendants submitted that the building proposed to be constructed was not used exclusively in trade or commerce as required by Sub-clause (vii) of Clause (c) of Section 2(1); so also, the transaction was not a construction or infrastructure contract covered by Sub-clause (vi) of clause (c) of Section 2(1). It was submitted that the suit not being thus a commercial dispute, the plaint should be returned for presentation to the proper court. The defendants relied on the decision of the Supreme Court in the case of *Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infraspace LLP*¹, which holds that only those contracts of immovable properties, where the properties are put to commercial or trade use, are covered by Sub-clause (vii) of Clause (c) of Section 2(1) of the Act and give rise to a commercial dispute. The learned District Judge primarily proceeded on the footing that there was no dispute about the proposition stated by the Supreme Court in *Ambalal Sarabhai Enterprises* case. According to the learned Judge, the contract concerned construction and infrastructure of a building and was accordingly covered by Sub-clause (vi) of Clause (c) of Section 2(1) of the Act, and there was no question of invoking Sub-clause (vii) of Clause (c) of Section 2(1).

4. The question to be considered by a court when an application is made to it under Order 7 Rule 10 of CPC is a question of initial jurisdiction. Such jurisdiction depends on the case pleaded before the court by the plaintiff, such case having to be assessed on the averments made in, as also documents produced with, the plaint. The case pleaded by the plaintiffs here indicates that disputes between the parties arise out of a construction and infrastructure contract. The plaintiffs aver their agreement with the defendants by which development rights available to the latter in respect of a certain immovable property were sought to be assigned to the plaintiffs in consideration of a share in the development potential in a certain stated proportion. The development envisaged by the parties is, admittedly, by way of construction of a building. In other words, the contract is for construction of a building. If that be so, there is no infirmity to be found in the impugned order so far as the court's assumption of initial jurisdiction is concerned. At that stage, the court is not really concerned with what is the defence to the action or what the defendants plead to be the nature of the dispute. It may well be that eventually, after a trial, after both parties are heard, evidence is led and the contract and its nature are finally assessed by the court, it may well turn out to be a case not involving a commercial dispute. In that case, however, it would be a matter for the defendants to allege in an appeal from the final order passed in the dispute; it does not offer any cause for return of the plaint under Order 7 Rule 10.

5. The scheme of the Commercial Courts Act, as indicated by Section 8, envisages that no civil revision application or petition shall be entertained against any interlocutory order of a commercial court, including an order on an issue of jurisdiction; any such challenge, subject to the provisions of Section 13 of the Act, shall be raised only in an appeal against the decree of the commercial court. Section 8 is a non-obstante provision and has an overriding effect over other

provisions of law. The bar exists evidently to ensure that no suit, filed as a commercial suit, is obstructed in its hearing before the commercial court by filing of challenges from interlocutory orders including, of course, an order on the issue of jurisdiction. This bar, obviously, would not apply to the jurisdiction of this court under Article 226 or 227, but the writ court, equally obviously, would restrict its interference with interlocutory orders of commercial courts only to those exceptional cases, where the courts have made patent jurisdictional errors. The present challenge involves an interlocutory or miscellaneous order passed by a commercial court concerning its jurisdiction on a fair assessment of the Plaintiff's case and there is no reason why the matter should be treated by this court as a special matter for making an exception for interfering in its writ jurisdiction. After all, if the defendants are right in their objection to the jurisdiction of the court, the same may well form part of their appeal from the final decree passed by the commercial court.

6. The impugned order is evidently based on Sub-Clause (vi) of Clause (c) of Section 2(1) of the Act. The judgment of the Supreme Court cited by the Petitioners, i.e. the case of Ambalal Sarabhai Enterprises, which essentially considers the content and scope of Sub-clause (vii) of Clause (c) of Section 2(1) of the Act, has no application to the facts of this case. This latter clause, as we have noted above, in any event, has not been applied in the present case by the learned District Judge.

7. Learned Counsel for the Petitioners submits that under his clients' original agreement, the development rights available to them are capable of being exploited for any type of construction, whether residential or commercial. This submission is neither here nor there so far as the impugned order is concerned. Any construction contract, whether it is for residential or commercial use, is nonetheless, in the first place, a construction contract and would be covered as such by Sub-clause (vi) of Clause (c) of Section 2(1) of the Act so as to give rise to a commercial dispute.

8. Accordingly, there is no merit in the writ petition. The writ petition is dismissed. The Petitioners shall pay costs of this petition quantified in the sum of Rs.50,000/- to the Respondents.

9. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.