

(2022) 09 CAL CK 0111

In the Calcutta High Court

Case No : FMAT No. 20 Of 2022, CAN 1 Of 2022

Venkatesh Vincom Private Limited

APPELLANT

Vs

M/S. Spice Of Joy, Multicuisine Restaurant Cum Bar & Ors.

RESPONDENT

Date of Decision : 26-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 7 Rule 10, Order 7 Rule 11
Negotiable Instrument Act, 1881 — Section 138
Commercial Courts Act, 2015 — Section 2(1)(c), 2(1)(c)(i), 2(1)(c)(vii), 2(1)(f)
Indian Partnership Act, 1932 — Section 18, 19, 22

Citation : (2022) 09 CAL CK 0111

Hon'ble Judges : Harish Tandon, J;Shampa Dutt (Paul), J

Bench : Division Bench

Advocate : Sarosij Dasgupta, Anurag Bagaria, Manju Bhuteria, Subhrendu Halder, Mohit Gupta, Tanni Luhariwala, Arundhuti Barman

Final Decision : Allowed

Judgement

Harish Tandon, J

The present appeal arises from a judgment and order dated 11.11.2021 passed by the learned Judge, Commercial Court at Alipore in Money Suit no. 12 of 2021 whereby and whereunder an application of Order 7 Rule 11 of the Code of Civil Procedure was disposed of directing the return of the plaint to be presented before the Competent Court.

Shorn of unnecessary details the suit was filed by the appellant for recovery of a sum of Rs. 97,65,333/- along with an interest at the rate of 4 per cent per annum till the realisation of the said amount before the Commercial Court at Alipore which was registered as Money Suit no. 12 of 2021. The plaint proceeds that the plaintiff-appellant is a non-banking financial company and engaged in lending money for business. The Respondent no 2 and 3 carrying on business of a multicuisine restaurant and bar in partnership, approached the appellant company for an accommodation loan of Rs. 15 lakhs for a period of 180 days at

an agreed rate of interest at the rate of 4 per cent per month. The said amount was given through an account payee cheque in favour of the Respondent no. 2 for and on behalf of the Respondent no. 1 which was duly encashed and receipt was issued by the Respondent no. 1 under his letterhead duly signed by the Respondent no. 2 as partner thereof. It is further stated that for few months the respondents paid the interest at such agreed rate by an account payee cheque to the appellant and further approach was made in the month of January, 2016 for further financial assistance of Rs. 25 lakhs at such agreed rate of interest. The said sum of Rs. 25 lakhs was further paid through an account payee cheque in favour of the Respondent no. 2 for and on behalf of the Respondent no. 1 which was duly encashed and the receipt issued by the Respondent no. 1 would corroborate the same. It is further stated that the sum of Rs. 1 lakh was paid by the respondents on 19.5.2018 towards the agreed amount of an interest which would be evident from the bank statements issued by the banker of the appellant for the relevant period. The plaint further proceeds that subsequently the cheques were issued by the defendants which were dishonoured for insufficient funds and proceeding under Section 138 of the Negotiable Instrument Act has been initiated and simultaneously the suit was filed before the Commercial Court for realisation of the money lent and advanced to the defendants together with an agreed rate of interest. It is pertinent to record that the TDS was deducted and deposited with the Income Tax Department and the certificate issued in this regard by the said authority would evince the transaction to have been affected and acknowledgement is made to the same.

An application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure was taken out by the respondent before the Commercial Court for rejection of the plaint primarily on the ground that the dispute does not satisfy the definition of a commercial disputes given under Section 2 (1)(c)(i) of the Commercial Courts Act, 2015. Though the other plea relating to pecuniary jurisdiction was also raised but the Commercial Court discarded the aforesaid contention in the impugned judgment which has not been challenged by the respondents either by filing a separate proceeding nor a cross-objection in the instant matter. Therefore, we are not venturing to go into the aforesaid aspect and restricted our determination to the core issue whether the dispute satisfies the definition of a commercial dispute assigned in Section 2 (1)(c)(i) of the said act.

The statement pertaining to the object and reasons for promulgation of the Commercial Courts Act, 2015 was conceptualised to create a global economic environment because of the seemingly increased competition and to attract the business at the international level to boost the economic growth of the country. The Law Commission of India in its 188th report recommended the Constitution of the Commercial Division of each High Court and a Bill in this regard was placed before the Lok Sabha but after discussion on the said Bill certain issues were raised and the matter was again relegated to the Law Commission for its examination. In 253rd Report, the Law Commission of India again recommended

for establishment of the Commercial Courts, the Commercial Division and Commercial Appellate Division in the High Court for disposal of commercial disputes of its specified value based on that such recommendation, the Bill was introduced in the Rajya Sabha on 24th April, 2015 which was sent for consideration of the Department relating to Parliamentary Standing Committee on Personnel, Public Grievance, Law and Justice and subsequently, the same was introduced and reduced in the form of an Act of Commercial Courts Act, 2015. The commercial dispute as defined in Section 2(1)(c)(i) of the said Act is expansive and imbibed within itself various categories of the disputes. We are not concerned with the other classes of the disputes imbued with the said definition clause as the determination is restricted to Clause (i) thereof. The said provision is reproduced as under:

"Sec. 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."

Taking lead from the language employed in the aforesaid Clause, the argument is advanced on behalf of the appellant that, lending of money for business purposes by the non-banking financial company comes within the ambit of the commercial dispute and, therefore, the Commercial Court has committed error in holding such transaction to be non commercial and returning the plaint to be presented before the Competent Court. It is submitted that the non-banking financial corporations are engaged in the business of financing the business organisations and such act has to be regarded as an ordinary transaction of the financier. It is further submitted that the receipts, the acknowledgement and the mode of transfer are to be regarded as the mercantile documents and, therefore, the Commercial Court has committed error in interpreting such document as non-mercantile document. It is submitted that mercantile document has not been defined in the said act and, therefore, the ordinary meaning is required to be assigned and the reference can be made to a definition of a mercantile from Black's Law Dictionary, 8th Edition means "an Act of a relating to a merchant or trading and are commercial in nature." However, it is further submitted that the court did not assign any reason nor returned any independent finding on the issue whether the dispute would come within the purview of the commercial dispute and, therefore, surreptitiously jumped to the conclusion that the plaint to be returned and presented before the appropriate forum. On the other hand, the learned Advocate for the respondent submits that the accommodated loan to an individual and not to a business establishment does not come within the commercial dispute. It is further submitted that the hand loan or the accommodated loan to an individual cannot be regarded as a commercial dispute and placed reliance upon a single Bench unreported judgment of this Court in case of Ladymoon Towers Private Limited vs. Mahendra Investment Advisors Private Limited (CS 99 of 2020) decided on 13th August, 2021. It is vociferously

argued that the Reserve Bank of India has issued a master circular pertaining to the fair practices code to be observed by all non-banking financial companies and the pleading in the plaint would corroborate that same has not been adhered to by the appellant. The arguments are further advanced taking a lead from the observations made by the Supreme Court in case *Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and Another* (Civil Appeal no. 7843 of 2019) for the proposition that by the introduction of the Commercial Courts Act the entertainability of the suit on the basis of the dispute which satisfies the definition of a commercial dispute under the said Act can only be entertained by the Commercial Court and, therefore, excludes the other class of litigations which are otherwise maintainable and entertainable in an ordinary Civil Courts. He further submits that the object of the establishment of the Commercial Court is to entertain the high value and secure the speedy disposal of the matter involving the commercial disputes and cannot be used to clog the system. The arguments were further advanced on the powers of the Court while dealing with an application under Order 7 Rule 11 of the Code to pass an order for return of the plaint to be presented before the Competent Court in exercise of powers under Order 7 Rule 10 thereof.

At the very outset, we must record that the primary question involved in the instant appeal is that the dispute raised in the said suit and the relief claimed thereunder whether satisfies the definition of a commercial dispute so as to make the suit entertainable and maintainable before the Commercial Court. The other issue whether the Court is competent to pass an order for return of the plaint in an application for rejection of the plaint becomes redundant in the event this Court finds that the suit is competent before the Commercial Court. However, it would assume significance in the event the dispute does not satisfy the conditions laid down in the definition of a commercial dispute under the said Act which in our opinion does not require any further elaboration as it is more or less settled that the Court enjoins power to return the plaint even if the application has been made for rejection of the plaint.

Reverting to the core issue the eventuality enshrined in Clause (i) of Section 2(1) (c) of the said Act postulates that a dispute arising out of the ordinary transaction of financier relating to mercantile documents including its enforceability and interpretation are the important factors to be borne in mind. The said Clause can be segregated into 3 parts. Firstly, the dispute must arise out of ordinary transaction of financier and secondly, such ordinary transaction must relate to a mercantile document and thirdly, the enforceability and the interpretation of such document is involved. Admittedly, the appellant is a non banking financial corporation which would be evident from the averments made in the plaint and the certificate of incorporation annexed thereto. The primary function of the non banking corporation is to extend financial supports and can be regarded as an ordinary transaction of the financier. We find no ambiguity in this regard that lending money by the appellant is fundamentally the transactions which it does and can be regarded as the ordinary transaction. The

parties are not ad idem on the expression "mercantile document" appearing in the said clause for the reason that there was no agreement in writing nor any document evincing the money given as loan to the respondents. The mercantile document is not defined in the said Act. However, the said Act defines 'document' in Section 2(1)(f) to mean any matter expressed or described upon any substance by means of letters, figures, or marks, or electronic means or, by more than one of those means, intended to be used, or which may be used, for the purpose of recording that manner. The definition of a document is expansive and is not restricted to any agreement to be executed by and between the parties recording the transactions at the beginning thereof. The definition is wide enough to include any expression or a description of any substance by means of letters, marks or figures or electronic means which would be sufficient enough to bring clarity of the matter. The word 'mercantile' in ordinary parlance means a document relating to a merchant or trading or a document which is commercial in nature. In Black's Law Dictionary, 8th Edition 'mercantile' is defined as in "BLD"

Since the word 'mercantile' includes the transaction which is of commercial nature the "commercial paper" is also defined in the Black's Law Dictionary as an instrument other than the cash for the payment of money and include negotiable instrument of a particular kind in the following:

"Commercial Paper: 1. An instrument, other than cash, for the payment of money. Commercial paper – typically existing in the form of a draft (such as a check) or a note (such as a certificate of deposit) – is governed by Article 3 of the UCC. But even though the UCC uses the term commercial paper when referring to negotiable instruments of a particular kind (drafts, checks, certificates of deposit, and notes as defined by Article 3), the term long predates the UCC as a business and legal term in common use. Before the UCC, it was generally viewed as synonymous with negotiable paper or bills and notes. It was sometimes applied even to nonnegotiable instruments. – Also termed mercantile paper; company's paper. See NEGOTIABLE INSTRUMENT."

" 'Commercial paper' is rather a popular than a technical expression, often used, however, both in statutes and in decisions of courts, to designate those simple forms of contract long recognized in the world's commerce and governed by the law merchant."

"Defined most broadly, commercial paper refers to any writing embodying rights that are customarily conveyed by transferring the writing. A large subset of commercial paper consists of such writings that are negotiable, which means that the law enables a transferee to acquire the embodied rights free of claims and defences against the transferor."

"Sec. 2 (c) "Commercial dispute" means a dispute arising out of –

(ii) Ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents.

The Stroud's Judicial Dictionary defines the commercial action to mean and include any cause arising out of ordinary transactions of merchants and traders and without prejudice to generosity of the following words: any cause relating to construction of a mercantile document, the export or import of mercantile, insurance, banking, mercantile agency and mercantile uses. It, thus, engulfed within itself any action or undertaking with an object to make a profit therefrom (see *Punjab University vs. Unit Trust of India & Ors.*, (2015) 2 SCC 669). In *Ladymoon Towers Pvt. Ltd.* (Supra) the Single Bench of this Court has relied upon various judgments of the Delhi High Court, Bombay High Court and Madras High Court as well as the Calcutta High Court to ascertain the meaning of a mercantile document. It has been held therein that all suits of recovery of money may not come within the purview of Section 2(1)(c)(i) of the Act if not based on any transaction relating to mercantile document. The view of the Bombay High Court has also been noticed to the effect that the suit cannot be treated as a commercial suit unless the transaction has occurred between the merchants, traders, bankers and financiers and, therefore, any transaction of two individuals in extending a friendly loan cannot be regarded as a commercial transaction or a transaction in an ordinary course of business. The view of the Madras High Court as relied on by the Single Bench in *Ladymoon Towers Pvt. Ltd.* (Supra) was that if the plaintiffs have not transacted in a capacity of a financier it cannot come within the purview of the aforesaid definition clause. So far as the Calcutta High Court view as noticed by the Single Bench in the above noted decision was based on the definition of a mercantile document appearing in the First schedule of City Civil Courts Act, 1953 to be a document between merchant and traders and the construction, interpretation and meaning of the words and clause of the mercantile document would assume a greater significance. Though the aforesaid judgments were noticed by the Single Bench in the above referred cases but ultimately it was held that the suit for recovery of money lend and advanced as friendly loan does not satisfy the definition of a commercial dispute. It is no doubt true that every nature of the monetary transaction cannot come within the ambit of a commercial dispute defined in the said Act. Such monetary transaction in an ordinary course of business transacted by the merchants, bankers, financiers and traders based upon a mercantile documents are regarded as a commercial transactions and a suit before the Commercial Court is maintainable. Taking a clue from the definition of a 'merchant', what was a conservative view at one point of time have seen a radical change with the varied varieties of transaction which can be manifestly seen from the expansive definition of a commercial dispute under Section 2(1)(c) of the said Act. By advancement of technology the mode and the nature of transactions have also been changed and what was earlier known as a negotiable instrument in a primitive stage has been gradually taken out of practice and the mode of the transaction has been well accepted in electronic form. The interpretative tool is an evolving process and changes with the behavioural pattern of the society more particularly in commercial transactions and, therefore, any rudimentary form of the interpretation may not be compatible with the changing pattern of the

commercial transactions.

In *Ambalal Sarabhai Enterprises Ltd. (Supra)*, the Apex Court was considering a case where an agreement for sale was executed in respect of a land in favour of the Respondent no. 2 therein would later on assigned and transferred his right by way of an assignment in favour of the Respondent no. 1. The Respondent no. 1 purchased the property on the basis of a deed of conveyance dated 3.1.2017 but the other aspect regarding the change relating to the nature of the use of the land for conclusion of the transaction was required to be performed by the seller. It was thought that the right of the appellant is required to be protected and to ensure the same a memorandum of understanding was entered into between the appellants and the respondents therein and a mortgage deed was required to be executed by the Respondent no. 1 in favour of the appellant. Though the mortgage deed was executed but the same was not registered and at that stage the appellant filed a commercial suit to enforce the execution of the mortgage deed before the Commercial Court. The question which was raised therein relates to the satisfaction of Clause 7 of Section 2(1)(c) of the said Act which requires that an agreement relating to immovable property used exclusively in trade or commerce to come within the purview of the commercial disputes. In the backdrop of the aforesaid facts, the Apex Court held:

"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.

38. On 3-11-2017, a Memorandum of Understanding was executed between the appellant-plaintiff, respondent-defendant and Ketan Bhailalbhai Shah, second respondent. As per the terms of MoU, parties executed a deed of conveyance of the land. A mortgage deed was executed simultaneously along with the MoU with respect to the part of the land admeasuring 15,000 sq ft in favour of the plaintiff. It was understood between the parties that Respondent 1 would apply for change of land use permission for the land in question on signing of the MoU. Mortgage deed was executed by Respondent 1 in favour of the appellant in order to ensure performance of obligations under the MoU. But the said mortgage deed was not presented for registration.

39. It appears that the trial court has proceeded under the footing that the parties to the suit more particularly, the appellant-plaintiff seems to be carrying on business as estate agent and the manage land, building, etc. and the very object as enumerated in Memorandum and Articles of Association of the appellant-plaintiff company established that the property in question is being used exclusively in trade or commerce rather in the business of the plaintiff. As

rightly pointed out by the High Court, there is nothing on record to show that at the time when agreement to sell came to be executed in 2012, the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2 (1) (c) of the Act. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court.

We do not find that the aforesaid judgment can be of any aid to the instant matter except for the proposition that unless the dispute satisfies the definition of a commercial dispute, any other disputes may not be brought before the Commercial Court. In the instant matter the Respondent no. 1 is admittedly running a multicuisine restaurant and bar and selling its products for profit. The appellant is a non-banking financial company and engaged in a business of financing or extending financial supports and making profit from the same. Any money given on loan is the ordinary transaction of the non banking financial company provided it augments income from such transactions. The Respondent no. 1 who is selling the product for profit is a merchant and, therefore, the transaction between the plaintiff who is engaged in a finance business extending loan for profit is a transaction between a financier and the merchant.

It leads to another question whether the loan extended to one of the partners for and on behalf of the firm can be regarded as a transaction with the firm. The answer can be traced from the provisions contained in Chapter IV of the Indian Partnership Act, 1932. Section 18 of the said Act postulates that the partner is an agent of a firm for the purpose of business of the firm. Section 19 contemplates the implied authority of the partner as an agent of the firm and Section 22 thereof binds the firm for any act of the instrument done or executed by the partner or other persons on behalf of the firm to be regarded as done or executed by the firm. Undisputedly, the cheque was issued by the appellant to the Respondent no. 2 and the receipt or a note evincing such transaction, was issued by the Respondent no. 1 firm. It is not a case where the Respondent no. 2 utilised the money for his individual purposes but in fact the money given by the appellant was used and utilised by the Respondent no. 1 firm and the TDS certificate also corroborate the same. Even the interest is paid by the Respondent no. 1 firm and, therefore, even if the cheque covering the loan amount was issued in the name of one of the partners but shall be regarded as a payment to the firm. As indicated above, there is no condition laid down in the said definition 'commercial dispute' that the mercantile document must be executed at the beginning or before the transaction having affected rather the document defined in Section 2(1)(f) of the Act includes any matter expressed or described upon any substance by means of letters, figures or marks or electronic means intended to be used or which may be used for the purpose of recording the matter. We, therefore, find no difficulty in considering that the mercantile document as an instrument by any other means coming within the ambit of the definition of a document executed by a merchant in an ordinary course of business and any restrictive interpretation would frustrate the legislative intent

and the object and purpose underlying the promulgation of the Commercial Courts Act, 2015. We, therefore, have no hesitation to hold that the dispute involved in the instant pattern satisfies the definition of a commercial dispute and the order of the Commercial Court cannot be sustained.

Accordingly, the order impugned is set aside. The appeal succeeds.

There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.