



(7) WP 93.2024

Sonam

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 93 OF 2024

1. Daniel Antonio Mascarenhas,
Son of Agnelo Antonio Mascarenhas,
About 39 years in age,
Indian National, businessman,
Resident of E-6/1, Khobra Vaddo,
Calangute, Bardez, Goa.
2. Tanaaz Alia De Souza,
Wife of Daniel Antonio Mascarenhas,
About 35 years in age, Indian National,
Resident of E-6/1, Khobra Vaddo,
Calangute, Bardez, Goa. ... PETITIONERS

Versus

1. Baga Downtown Hospitality LLP.,
A Limited Liability Partnership incorporated
under Rule 11(3) of the Limited Liability
Partnership Rules, 2009,
Having office at c/o. Calysta Hotels & Resorts LLP.,
Sy. No. 245/8, Titto's Lane 2,
Sauntawaddo, Baga, Calangute, Goa.
2. Aman Isani,
Son of Tahir Isani,
Resident of H. No. M/89/315,

Manek Mansion, Feira Alta,
Mapusa, Bardez, Goa.

3. Denis Shivani,
Son of Shivani Ramzam Ali,
Resident of 4-1974, Flat 3A,
Boggulkunta, Iriveni Complex,
Abids, Nampally, Hyderabad. ... RESPONDENTS

Mr. Parag Rao with Mr. Jatin Ramaiya, Mr. Omkar Thakur and Ms. Sowmya Drago, Advocates for Petitioners.

Mr. Gaurish Agni with Mr. Kishan Kavlekar, Advocates for Respondents.

CORAM:- BHARAT P. DESHPANDE, J.

DATED :- 22nd OCTOBER, 2024.

ORAL JUDGMENT

1. Rule.
2. Rule is made returnable forthwith.
3. Heard finally with consent.
4. The illegality or otherwise of the order passed by the Commercial Court on 18.12.2023 is questioned in the present petition.

5. Mr. Rao, learned Counsel appearing for Petitioners would submit that the Respondents had filed an application under Section 9 of Arbitration and Conciliation Act, 1996 for grant of interim relief, in connection with the Agreement of Lease dated 02.02.2021 instituted between the Petitioners and the Respondents.

6. Mr. Rao would submit that since the dispute between the Petitioners and the Respondents in connection with the Agreement of Lease is purely a Civil dispute and not coming within the definition of commercial dispute, an application filed under Section 9 of Arbitration and Conciliation Act, 1996 cannot be entertained by the Commercial Court which is designated in Goa as Senior Civil Judge Court.

7. Mr. Rao submits that such an application under Section 9 of Arbitration and Conciliation Act, 1996, wherein

there is no commercial dispute would lie before the Principal Court of original jurisdiction i.e. the District Court.

8. Mr. Rao would submit that the Petitioners raised objection before the Commercial Court, claiming that the application filed by Respondents under Section 9 of Arbitration and Conciliation Act, 1996 needs to be returned to the Respondents for the purpose of presenting it before the appropriate forum. However, without considering its own jurisdiction or deciding it, the application came to be rejected which is now under challenge in the present proceedings.

9. Mr. Rao would submit that the property belonging to the Petitioners was not put to the commercial use at the time of Agreement of Lease, however, in the Lease Agreement it was agreed that such property would be put to use for the commercial purpose in future. While placing reliance on

Section 2(c)(vii) of the Commercial Courts Act, 2015, Mr. Rao would submit that the language used in the said provision is restricted to an immovable property used exclusively in trade or commerce. According to him, only those immovable properties which are actually used exclusively in trade and commerce are coming under the definition of commercial dispute, and not the other properties. While placing reliance in the case of *Ambalal Sarabhai Enterprises Limited v/s K. S. Infra Space LLP and anr*¹, Mr. Rao would submit that it has been clarified by the Apex Court and thus, the suit property and more particularly at the time of Agreement of Lease was not put to commercial use.

10. Per contra, Mr. Agni would submit that the definition of Commercial Court includes other agreements regarding Franchisee Agreement, Joint Venture Agreement etc. which

¹(2020) 15 Supreme Court Cases 585

also could be related to a landed property. He submits that the Commercial Court has rightly considered the contentions raised by the parties and rejected the prayer of the Petitioners which needs no interference.

11. Mr. Agni while placing reliance on the case of ***Gaurang Manguesh Suctancar V/s Sonia Gaurang Suctancar*** in ***LD-VC-CW-88-2020*** dated 20th July, 2020, would submit that the Commercial Court is now entitled to deal with applications under Section 9 of Arbitration and Conciliation Act, 1996. Besides, he would submit that the agreement clearly falls within the scope of the commercial dispute.

12. Rival contentions fall for determination.

13. An application under Section 9 of Arbitration and Conciliation Act, 1996 is filed before the Commercial Court that is the Court of Civil Judge Senior Division, which is

now designated as the Commercial Court in the State of Goa, for interim relief against the present Petitioners. The Petitioners were notified and thereafter reply as well as preliminary objections were raised regarding jurisdiction of the said Commercial Court on the ground that the dispute which is raised in the said application, is in fact, not a commercial dispute. Similarly, an application is filed on behalf of the Petitioners with the prayer to return the application under Section 9 of Arbitration and Conciliation Act, 1996 to the Respondents or to dismiss it. After hearing the parties, the learner Trial Court/Commercial Court vide impugned order dated 18.12.2023, rejected such application.

14. Perusal of the impugned order would go to show that there is only one statement in paragraph No. 4, which is found recorded by the Commercial Court that on a bare reading of the said agreement it shows that the use of land was for commercial purpose. For arriving at the conclusion,

reliance is placed on the case of ***Gaurang Suctankar*** (supra).

15. Mr. Dessai has rightly pointed out that the observations of this Court in ***Gaurang Suctankar*** (supra) is not correctly interpreted by the Commercial Court. He submits that the issue involved in the case of ***Gaurang Suctankar*** (supra) was totally different, and specifically as to whether an application under Section 9 of Arbitration and Conciliation Act, 1996, in a commercial dispute could be filed before the Commercial Court or before the Court of principal Court of original jurisdiction (District Court).

16. In the case of ***Gaurang Suctankar*** (supra), one of the partners to the Partnership Deed invoked arbitration provision and applied for Arbitration and Conciliation Act, 1996 before the Senior Judge, Senior Division who was designated as Commercial Court under the Commercial

Courts Act. However, said Court refused to entertain the application and returned it to the applicant, to be presented before the District Court, on the ground that the application under Section 9 of Arbitration and Conciliation Act, 1996, lies before the Court having principal, Civil Court of original jurisdiction. In that context, the learned single Judge of this Court (Coram:-Dama Seshadri Naidu, J.) discussed entire provision of Commercial Courts Act and the Arbitration Act, together with a notification issued by Government of Goa designating the Commercial Courts and Commercial Appellate Courts. In that matter, there was absolutely no dispute as to whether the Deed of Partnership was a commercial transaction and the dispute between two partners was a commercial dispute. In that context, conclusions were drawn, which read thus:

(1) Contrary to the respondent's contentions, the Notification, dt.05.05.2020, issued by the Government of Goa, is in tune with the legislative mandate under Sections 3 and

3A of the Commercial Courts Act, 2015. dt.05.05.2020, issued by the Government of Goa, is in tune with the legislative mandate under Sections 3 and 3A of the Commercial Courts Act, 2015.

- (2) In the State of Goa, the designated District Courts are the Appellate Commercial Courts, and the Senior Civil Judges Courts are the Commercial Courts.*
- (3) Even adjudication of an application under Section 9 of the Arbitration Act must be before the Commercial Court, and that Commercial Court need not be the principal civil court of original jurisdiction.*
- (4) There is no conflict between the Arbitration and Conciliation Act 1996 and the Commercial Courts Act 2015. If at all we maintain the distinction, the former Act deals with the substantive rights of the parties to the arbitration, and the latter Act with the procedural essentials, the choice of the forum being a part of it.*
- (5) As Kandla Export Corporation has held, regarding any commercial arbitral dispute, the Arbitration and Conciliation Act 1996 determines, among other things, the appellate remedies and the Commercial Courts Act 2015 provides for the forum and adjudicatory procedure.*

17. In the case of *Ambalal Sarabhai Enterprises Ltd.* (*supra*), the Apex Court discussed the expression “commercial dispute” as defined under Section 2(1)(c)(vii) of the Commercial Disputes Act. The discussion is specifically on the word “used” occurring in the said provision and the meaning of it. Finally, the Apex Court observed that any dispute relating to immovable property per say may not be a commercial dispute. However, it becomes the commercial dispute if it falls under sub clause. (vii) of section (2)(1)(c) of the said act, i.e. agreement relating to immovable property used exclusively in trade and commerce. While interpreting the word “used”, the Apex Court observed that it denotes “actually used” and it cannot be either ready for use or likely to be used or to be used. It further observed that the meaning should be actually used, at the time of agreement. This word “used” has to be read along with the phrase “exclusively in trade or commerce”.

Thus, the Apex Court observed that the commercial dispute in connection with immovable property would fall under the said definition only if it is established and that too at the time of agreement between the parties that it was exclusively used in trade and commerce.

18. Returning back to the impugned order, one thing is clear that though the Petitioners raised specific objection that the landed property was not used for commercial purpose at the time of Agreement of Lease and thus, the so called dispute is not covered under the definition of commercial dispute, it is neither being discussed nor decided by the learned Court in the impugned order

19. In the case of *Gaurang Suctankar* (supra), the issue was quite separate and distinct. There is absolutely no discussion as to what constitutes the commercial dispute qua the immovable property. Thus, placing reliance on such

decision to reject an application has clearly shown non applicable of mind.

20. It is made clear that the case of *Gaurang Suctankar* (supra) is on different aspect though, it relates to application under Section 9 of Arbitration and Conciliation Act, 1996. Accordingly, every application under Section 9 of Arbitration and Conciliation Act, 1996, irrespective of the dispute being commercial or not, would not lie before the Commercial Court. Only an application under Section 9 of Arbitration and Conciliation Act, 1996 wherein it is admitted that the dispute which is covered under the definition of the commercial dispute, would lie before the Commercial Court as observed in the conclusions quoted above.

21. The course which is available to this Court is to quash and set aside the impugned order with a direction to rehear such application and decide whether the dispute raised by

the Respondents in connection with immovable property would fall within the definition of commercial dispute as found in Section 2(1)(c) of the Commercial Disputes Act and if found in affirmative, then only to proceed to decide such application.

22. Having said so, the impugned order is quashed set aside. The application filed by the Petitioners vide Exhibit 9 is restored with a direction to decide it afresh by considering as to whether dispute referred therein is actually commercial dispute and if answered in affirmative, consider such application under Section 9 of the Arbitration and Conciliation Act, 1996.

23. Rule is made absolute in the above terms.

BHARAT P. DESHPANDE, J.