

ODC-7

ORDER SHEET

IA NO.GA/4/2021

In

CS/99/2020

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

LADYMOON TOWERS PRIVATE LIMITED

Versus

MAHENDRA INVESTMENT ADVISORS PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date :13th August, 2021

[Via video conference]

Appearance:

Mr. Shailendra Jain, Adv.

Ms. Swati Agarwal, Adv.

... for the plaintiff

Mr. Jishnu Chowdhury, Adv.

Mr. Aritra Basu, Adv.

Mr. Abhijit Sarkar, Adv.

Mr. Souradeep Banerjee, Adv.

... for the defendant

The Court: The present application is for return of the plaint and for dismissal of the suit. The issue which arises for decision is whether the suit, filed before a Commercial Division of this Court, should be tried under the provisions of The Commercial Courts Act, 2015 or be heard as a regular suit.

The plaintiff complains about the conduct of the defendant in not filing the written statement and seeking to take advantage of such by having the suit transferred to a regime with more liberal timelines. The defendant insists that the want of jurisdiction of the Commercial Division can be urged at any point of time and should be decided by this Court before the suit proceeds any further. The claim in the suit is for recovery of money advanced by the plaintiff to the defendant as a short term financial accommodation with an accrued rate of interest. The plaintiff has claimed a decree for Rs.64,50,000/- along with accrued interest.

The defendant vigorously argues that the suit cannot be classified as a commercial suit as the dispute between the parties is not a commercial dispute, as defined in the Act. A “*commercial dispute*” has been defined under Section 2(1)(c) as a dispute arising out of a broad spectrum of transactions and agreements qualified by an explanation which provides an action for recovery of immovable property or for realisation of monies or where one of the contracting parties is the State or a Private body carrying on public functions the dispute shall not cease to be a commercial dispute within the meaning of Section 2(1)(c). The thrust of the present matter is whether the dispute in the suit falls within Section 2(1)(c)(i) which is set out below :-

“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;
.....”*

In order to ascertain whether the present dispute qualifies as a “*commercial dispute*” within the purview of the Act, it is necessary to break down the classes of persons and transactions contemplated in the above clause. Since clauses (ii) to (xxii) do not apply in this case, the construction of 2(1)(c)(i) falls for consideration in the present case.

“.....Ordinary transactions of merchants, bankers, financiers and traders.....”.

The statements in the plaint make it evident that the Directors of the plaintiff and the defendant were known to each other which served as a reason for the plaintiff to part with Rs.50 lakhs by way of a short-term loan. The Memorandum of Association of the plaintiff which is annexed to the plaint states that the plaintiff carries on business of acquisition by purchase, lease, etc., for development of land and buildings. The Objects of the Plaintiff Company provide that the plaintiff carries on real estate and construction business. It is hence evident that the plaintiff’s regular business is not of lending money and the plaint also does not contain any statement to that effect. The loan given by the plaintiff to the defendant was based on a familiarity between the Directors of the parties and can hence be assumed that the loan was in the nature of what is

occasionally referred to as a “hand-loan” and was not given in the regular course of business or as a commercial loan. This assumes importance in the difference recognised under Section 34 of The Code of Civil Procedure, 1908 between the rate of interest to be adjudged on a decree for payment of money and a liability arising out of a commercial transaction. The aforesaid would find support from *Manesh Rajkumar Kanhed vs. Ramesh Bhagwansa Walale*; AIR 2007 Bom 86, wherein it was held that taking of a “hand-loan” for starting a business of agency cannot come within the four-corners of the definition of a commercial transaction. *Dena Bank vs. Prakash Birbhan Katariya*; AIR 1994 Bom 343 also rejected the idea of a loan advanced for the construction of a hospital being termed as a commercial transaction.

“Merchants”

P. Ramanatha Aiyar’s The Law Lexicon, 2nd Edition, Reprint 2010 defines a “merchant” as one who buys and trades in anything and as merchandise includes all goods and wares exposed to sale in fairs or markets. The definition of merchant extends to all sorts of traders, buyers and sellers.

“Bankers”

In Halsbury’s Laws of England, Fourth Edition, Volume 3, a banker has been defined as one who is involved in the business of receipt of money on current or deposit account and the payment of cheques

drawn by and the collection of cheques paid in by a customer. Section 5(b) of The Banking Regulation Act, 1949 defines the work of a Banker on the same lines.

“Traders”

The commonly accepted definition of a “trader” is one who trades in goods, buys goods and sells them at a profit. Black’s Law Dictionary, Eighth Edition, also defines a trader as one who sells goods substantially in the form in which they are bought or as a member of a stock exchange, buys and sells securities on the exchange floor or one who buys and sells commodities and commodity futures for others or for his / her own account in anticipation of a speculative profit.

“Financiers”

The Oxford Universal Dictionary Illustrated defines a “Financier” as an administrator, collector or farmer of taxes or one who is skilled in levying and managing public money or as a capitalist concerned in financial operations. The definition proceeds to clarify that the objects of a financier are to secure an ample revenue.

The above definitions would make it clear that the dispute between the plaintiff and the defendant, which arises out of a loan given by the plaintiff to the defendant on the basis of a personal relation of familiarity, cannot be brought under the individual definitions of a transaction

between either merchants, bankers, financiers and traders, used disjunctively.

“Commercial Action”

Punjab University vs. Unit Trust of India; (2015) 2 SCC 669, set out the definition of the term ‘*commercial*’ as defined in Stroud’s Judicial Dictionary. Under this definition, commercial action was meant to include any cause arising out of the ordinary transactions of merchants and traders and without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage. The decision also explained that the words “*commercial purpose*” would cover an undertaking the object of which is to make a profit out of the undertaking.

“Mercantile documents”

The Delhi High Court in *Kailash Devi Khanna vs. DD Global Capital Ltd.; 2019 SCC Online Del 9954* held that all suits for recovery of monies cannot be brought under Section 2(1)(c)(i) of the Act where the suit is not based on any transaction relating to mercantile documents. The Bombay High Court in *Bharat Huddanna Shetty vs. Ahuja Properties & Developers; (Interim Application (L) No.14350 of 2021)* rejected the contention that the suit should be treated as a commercial summary suit on the mandate that the transaction had occurred between merchants, bankers, financiers and traders and further clarified that transactions

between individuals where the plaintiff gives a friendly loan to a needy friend will not be seen as a transaction in the course of ordinary business. The Madras High Court in *R. Kumar vs. T.A.S. Jawahar Ayya* (C.S. No.431 of 2019) was of the view that since the plaintiffs did not transact in the capacity of financiers, the dispute was not a “*commercial dispute*” and that an ordinary transaction of the four classes of persons mentioned in 2(1)(c)(i) arising out of mercantile documents alone would fall within the definition of a commercial dispute. The Calcutta High Court in *Associated Power Co. Ltd. vs. Ram Taran Roy*; AIR 1970 Cal 75 focused its gaze on a “mercantile document” within the meaning of the First Schedule of the City Civil Court Act, 1953 as a document between merchants and traders where the construction, interpretation and meanings of words and clauses of the mercantile documents would assume significance.

It should also be pointed out that the words used in sub-clause (i) of clause (c) are “*ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents.....*”. The placement of the underlined words between ordinary transactions of the named persons and the mercantile documents indicates that all transactions between the specified classes of persons will not result in a “*commercial dispute*” where the transaction does not relate to mercantile documents. Hence, only a dispute arising out of a transaction between the named classes of persons which has been formalised by way of a

mercantile document will be a “*commercial dispute*” under Section 2(1)(c)(i) of the 2015 Act.

The second part of sub-clause (i) of clause (c) “.....*including enforcement and interpretation of such documents*,” has often missed out any assessment of whether a dispute is a “*commercial dispute*” under this sub-clause. *Associated Power* considered this aspect of the matter, namely, whether the dispute involving the construction, interpretation and meaning of words and clauses of the mercantile documents, could be a “*commercial dispute*” on this basis.

The case-law on the subject would indicate that a mercantile document is a document used in a transaction or in relation to a transaction between merchants, bankers, financiers and traders. In the present case, the statements in the plaint make it clear that the plaintiff lent money to the defendant by way of an oral understanding without formalising or reducing such understanding in writing. The plaint does not plead the existence of any agreement, much less a written agreement involving a mercantile document.

South City Projects (Kolkata) Ltd. vs. Ideal Real Estates Pvt. Ltd.; (C.S.255 of 2019), a decision of a learned Single Judge of this court shown on behalf of the plaintiff can be referred to in respect of what would constitute a “*commercial dispute*” under the provisions of the 2015 Act can be distinguished from the present case since the defendant in *South City Projects* did not dispute that the claim in the suit was a “*commercial dispute*”. The plaintiff had even obtained registration under

the Bengal Money-Lenders Act, 1940 in the facts of that case. The Objects clause in the Memorandum of Association of the plaintiff in that case also permitted the plaintiff to lend an advance money which the court took into account and held that the transaction was, therefore, within the scope of the business of the plaintiff.

Clause 14 of the Objects clause of the plaintiff-company in the present case allows the plaintiff to invest money out of the surplus funds of the plaintiff-company in a manner as the plaintiff may deem fit. This clause cannot be construed to mean that the plaintiff is in the business of giving loans or lending money for the simple reason that a loan cannot be equated to an investment. It can even be said that a loan and an investment are antithetical and are mutually destructive in concept in the light of the expected end-result.

Although a point has been taken with regard to the decisions shown on behalf of the defendant as only being between individuals, it may be noted that Section 2(1)(c)(i) speaks in a language which is group-neutral, that is no distinction is made between transactions between individuals and companies or those between individuals and juristic entities.

The above discussion as to what would constitute a “*commercial dispute*” under the options contemplated in Section 2(1)(c) of the Act is important since courts generally tend to accept the listing of matters before the Commercial Division or the Commercial Appellate Division of a

High Court, as correct. The categorizations of matters before these Benches are usually done by the concerned Department or by the occasional assessment by the concerned court where a party takes objection to such classification. The two indices which form the basis of the decision as to the classification of a matter are (a) whether the dispute is a “*commercial dispute*”; and if held to be in the affirmative (b) the determination of the specified value of the subject matter of the commercial dispute in the action. Since the 2015 Act prescribes a different procedural regime for adjudication of commercial matters in line with the Statement of Objects and Reasons of the Act, it is only desirable that a court undertakes an enquiry in fit cases as to whether the matter should be listed before the Commercial Division before going into the merits of the case.

The definition section of the 2015 Act only contemplates a “*commercial dispute*” and not any other form of dispute where the basis of disagreement between the parties has a non-commercial cause. The gradation of disputes in Section 2(1)(c) taking into account all possible forms of agreements from which a “*commercial dispute*” may arise, makes it clear that the framers of the statute gave emphasis on the commercial flavour of the transaction as opposed to agreements entered into between parties without a commercial purpose. The qualification of the person being a Merchant, Banker, Trader or Financier imparts an unimpeachable commercial flavour to the transaction and the resulting dispute. The Insolvency and Bankruptcy Code, 2016, for example,

defines a dispute from a broader perspective as any suit or arbitration proceedings relating to an existing debt – Section 5(6)(a). The commercial purpose would generally mean a transaction by which a person's commercial or economic interests may be advanced and would result in an economic benefit to that person. It would not include an agreement where profit-making is an incidental outcome of the transaction or may happen by accident. Although, a “hand loan”, for example, is given by a person or entity to another with the expected outcome of the principal sum being returned with interest, the essential commercial flavour in such a loan may be lost by reason of the informal terms under which the money is lent and advanced and the consequent uncertainty which may result therefrom. The requirement of fixing the transaction within the ambit of Section 2(1)(c)(i), namely, between the named classes of persons can be construed being in aid of what the Act intends to cut down, namely, unnecessary wastage of time on ascertaining whether a dispute is a commercial dispute. The exhaustive categories of agreements in 2(1)(c)(i) – (xxii) leaves no doubt that the 2015 Act seeks to bring within its fold an inclusive range of disputes where the underlying purpose of the transaction is a commercial interest of the parties.

Since it has been found that none of the criteria mentioned in Section 2(1)(c)(i) of the Act has been met by the factual conspectus in the present case, C.S.99 of 2020 is directed to be de-listed from the Commercial Division and transferred to the appropriate list governing the hearing of ordinary suits. Although the defendant has failed to act in

accordance with the timelines prescribed under The Commercial Courts Act, 2015 and now seeks to take advantage of the comparatively liberal time frames of a regular suit, the defendant cannot be pinned down to the rigours of the 2015 Act if it is found that the suit does not arise out of a commercial dispute under the provisions of the 2015 Act.

G.A. 4 of 2021 is accordingly allowed.

The plaint filed in C.S.99 of 2020 is returned from the Commercial Division to the appropriate Bench.

The defendant shall comply with the directions passed by the learned Single Judge on 23rd December, 2020 and 3rd February, 2021, which facts were noted by this court in the order dated 14th July, 2021. The defendant shall comply within a week from date. The defendant cannot take advantage of the present application by not complying with the earlier orders, particularly when the application has been filed one year after the institution of the suit.

Parties shall be at liberty to apply for listing of this matter together with all connected applications before the appropriate Bench.

(MOUSHUMI BHATTACHARYA, J.)