

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 19th September, 2022
Pronounced on: 04th November, 2022

+ **CS(OS) 1466/2011**

IHHR HOSPITALITY (ANDHRA) PVT. LTD.

..... Plaintiff

Through: Mr. Abhimanyu Bhandari, Ms. Roohe
Hina Dua & Ms. Mansi Gupta,
Advocates.

versus

SEEMA SWAMI & ORS.

..... Defendants

Through: Mr. Anupam Srivastava & Mr.
Dhairya Gupta, Advocates for D-1 to
3, 6, 7, 9 to 15.
Mr. Amol Sharma, Advocate for D-
33/SCB.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

REVIEW PET. 233/2022

1. A Review Application under **Section 114 read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908** has been filed for review of the Order dated 01st August, 2022 with a prayer that the present Civil Suit may be converted into a Commercial Suit.

2. It is submitted in the application that I.A. 11946/2022 for conversion of present Civil Suit into a Commercial Suit for the purpose of trial, was disposed of *vide* Order dated 01st August, 2022, wherein it was observed that

considering the submission of the plaintiff's counsel that the main concern was that the disposal of suit may be expedited, it was directed that both the parties shall cooperate and an endeavour should be made by the Local Commissioner as well, to conclude the evidence expeditiously.

3. It is submitted in the application that vide Circular dated 28th April, 2016 and in catena of judgments, it has been clearly stated that suit covered under the first *proviso* of Section 7 of the Commercial Courts Act, 2015 should be transferred to Commercial Court Division of this Court. Since the present suit pertains to commercial transaction, the Order dated 01st August, 2022 be reviewed and the present suit be re-numbered as a Commercial Suit and be transferred to the Commercial Courts Division.

4. **Submissions heard.**

5. The Statement of Objections and Reasons to the Commercial Court Act, 2015 is to provide for speedy disposal of high value Commercial disputes so as to create a positive image in the minds of the investor world about the independent and responsive Indian Legal System.

6. The Commercial Courts Act, 2015 defines a commercial dispute and provides a special procedure for this class of litigation to be followed strictly to ensure expeditious disposal. The procedures are to be strictly interpreted and only such matters which qualify as commercial suits must be dealt with under the Commercial Courts Act. In Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infra Space LLP & Anr. (2020) 15 SCC 585 while referring to the Statement of Objects and Reasons, it was observed that “by interpreting the terms strictly” does not mean or imply that other suits of civil nature would be non-suited without any remedy. The excluded class of litigation will in any event be entertained in the ordinary civil courts wherein the remedy

already exists. Therefore, one needs to necessarily examine carefully whether the dispute can be entertained and falls within the definition of commercial dispute as provided under the Act. It was also observed that simply because the suit pertains to immovable property, would not *ipso facto* bring such matters within the definition of Section 2 of the Act. It has to necessarily satisfy the conditions as specified in the definition section to qualify as a commercial suit.

7. The term “*commercial dispute*” is of wide import. It brings within its compass any dispute connected with a commercial world. However, each and every commercial dispute pending before the High Court or Civil Court prior to coming into the effect of the Act in 2015 will not be considered as a commercial dispute necessitating invocation of Section 15 of the Act unless such disputes come within the purview of definition of commercial disputes as provided in Section 2 of the Commercial Courts Act. For ascertaining whether the suit needs to be transferred to the Commercial Division or the Commercial Court, the three factors to be considered are:

(i) the suit or the application under the Arbitration & Conciliation Act, 1996 was pending on the date when the Commercial Division or the Commercial Court was constituted;

(ii) that the court seisin of the suit or the application is required to find out whether the dispute involved comes within the definition of commercial dispute; and

(iii) whether the value of such suit is of the specified valuation.

8. If these three tests are satisfied, then a suit may be transferred from a regular civil court to Commercial Division.

9. In the present case, the first and third criteria is satisfied as the civil suit was pending at the time of constitution of the Commercial Division and the specified value of the suit is also more than Rs.2 Crore. The only aspect which needs determination is whether the dispute comes within the definition of “Commercial Suit” as defined under Section 2(1)(c) of the Act.

10. In the case of Lady Moon Towers Pvt. Ltd. vs. Mahindra Investment Advisors Pvt. Ltd. MANU/WB/0547/2021 it was observed by the High Court of Calcutta that the definition 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(i)(c) takes into account all possible forms of Agreements from which a commercial dispute may arise; it 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 the parties without a commercial purpose. The commercial purpose would generally mean a transaction by which a person’s commercial or economic interest 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. Home Loan for example is given by a person or entity to another with the expected outcome of principle sum being returned with interest. The essential commercial flavour in such a loan may be lost by way of informal terms under which the money is lent and advanced and the consequent uncertainty which may result therefrom. It was further observed that in terms of Section 2(i)(c) ordinary transactions of merchants, bankers,

financers and traders such as those relating to mercantile documents implies ordinary transactions between 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. Only those disputes arising out of a transaction between the named classes of persons which has been formalised by way of a mercantile document would be termed as a commercial dispute. In the said suit, a loan of Rs.50 lakhs had been given by the plaintiff Company to the defendant since the Directors of the Plaintiff Company were known to the defendant since long. It was held that simplicitor because a loan transaction was involved would not attract a commercial flavour to it and was held to be not a commercial dispute.

11. This Court in Kailash Devi Khanna vs. DD Global Capital Ltd. 2019 SCC OnLine Del 9954 held that all suits for recovery of monies cannot 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; decided on 13th July, 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 MANU/TN/4159/2020 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.

12. 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.

13. In the context of above discussion, it would be significant to consider the facts of the present case.

14. A suit for Recovery, Declaration and Permanent Injunction has been filed by the plaintiff against the 32 defendants. The basic averments are that Late Shri Manoj Kumar Swami was employed by the plaintiff Company vide letter dated 23rd May, 2003 as Unit Financial Controller in the plaintiff's holding Company's Accounts Department in Rishikesh. He came from a modest background and had no assets of his own. The Board of

Directors passed various Resolutions conferring specific and limited authority on Late Shri Manoj Swami and other Executives to operate its various bank accounts and on each occasion a Resolution was duly filed with the concerned defendant Bank. The defendant banks (30 & 31) were notified and authorized to act strictly and only in terms of such resolutions which could be amended only by further written instructions if given to the defendant banks, in terms of the subsequent Resolutions.

15. It is asserted that the plaintiff Company operated a bank account with the defendant No. 30 Axis Bank Ltd., Shakti Nagar Branch, New Delhi. By Board Resolution dated 31st September, 2006 Shri Manoj Kumar Swami was authorized to operate the said bank account singly upto a limit of ₹25,000/- and jointly with Mr. Gurmeet Singh or with Mr. Andrew Anthony or Mr. Eijaz Ali up to Rs. 5 lakhs. He also had authority to operate the bank account without any limit with Mr. Ashok Khanna or Mr. Gautam Khanna.

16. Likewise, the plaintiff Company had an account with defendant No. 31 State Bank of India, Nehru Place Branch, New Delhi, wherein similar limits were prescribed for operation of bank by Late Manoj Swami.

17. It is asserted that sometime in September/October, 2010, plaintiff discovered a fraud which had been played by Manoj Swami on the plaintiff Company. A complaint dated 20th October, 2010 was filed with Economic Offences Wing (EOW) of Delhi Police. Full facts relating to the fraud came to the knowledge of the plaintiff Company thereafter.

18. The plaintiff had started a Pune Hotel Project in January, 2007 which was nearing completion in August, 2010. In the course of reconciling and finalizing the accounts of this Project certain discrepancies came to light. The detailed scrutiny of the accounts of the Pune Project revealed that the

large amount of money had been illegally and unauthorizedly siphoned off from the bank account of the plaintiff Company with defendant No. 30 and 31. Falsification of various details and various records of the plaintiff Company came to light.

19. The plaintiff came to know about the embezzlement of huge amounts by Manoj Kumar Swami in conspiracy with defendant No. 1 to 8 and defendant No. 30. The defendant No. 30 Bank acted in violation of the written instructions given for operation of its Bank account. The employees of the bank conspired with Manoj Kumar Swami to defraud the plaintiff Company. It is explained that the money was syphoned of either through forged cheques of various amounts which were presented from time to time or through direct transfers, and the money was transferred to the accounts of defendant No. 1 to 8 who were to be the family members of Manoj Kumar Swami. The details of various transactions have been explained in the plaint.

20. It is further explained that the ill-gotten money was invested by Manoj Kumar Swami for purchase of flats and huge investments were made in the Mutual Funds as detailed in the plaint. Various bank accounts were maintained in Axis Bank, Shakti Nagar Branch which was operated by defendant No.1 and in which huge investments to the tune of approx. ₹4 Crores in Mutual Funds had been made. The details of the huge amounts embezzled by defendant No. 1 and various investments made, have been explained in detail in the plaint.

21. It is asserted that Manoj Kumar Swami and defendant No. 1 to 8 were assisted by defendant No. 9 to 31 to misuse funds illegally withdrawn from the plaintiff Company's bank account thereby causing a huge loss to the plaintiff Company and a gain to the defendants. A suit for recovery of

₹35,53,52,077.10/- has been filed by the plaintiff Company against the defendants.

22. The case of the plaintiff as disclosed in the plaint in nut shell is that while Late Manoj Kumar Swami was an employee of the plaintiff Company, had access to the various bank accounts of the plaintiff Company. He embezzled huge amounts through forged cheques and also by making fraudulent direct transfers from the bank accounts of the plaintiff Company in conspiracy with defendant No. 1 to 8. He with the assistance of other defendants siphoned of the money. The recovery of the amount has been sought on account of illegal withdrawals of the money from the account of the plaintiff Company.

23. The basic question which arises is whether the recovery sought on account of embezzlement of money from the bank accounts of the plaintiff can be held to be a suit of commercial nature.

24. This aspect was considered in in M.P. Venkatachalapathy Iyer and S.K. Sundaramanier and Co. v. The Commissioner of Income-tax, Madras AIR 1952 Mad 238. The said case was in the context of payment of Income Tax to consider whether an amount could be termed as the earnings of the Company. The facts were that certain amounts had been embezzled by the employee/ M.D of the Company. The question was whether the embezzled amount could be treated not as an income of the Company. A reference was made to Ramaswami v. Commissioner of Income-tax 53 Mad 904, wherein Curgenven J. held that to establish a loss, two conditions must be satisfied; **first**, is that it must be a loss of the part of the stock and trade in the business, and **secondly**, it must be a loss of such a kind as is incidental to the business. In the said case the Company was in the business of money

lending, but the money had been lost by way of theft. It was held that the theft of money cannot be termed as money lost in the course of business and as incidental to it. Therefore, any loss on account of theft cannot be considered to be in the ordinary course of business transaction.

25. In Curtis v. Oldfield Ltd. (1925) 9 Tax Case 319, the question came whether a loss on account of embezzlement can be considered as a loss during the trade. In the said case it was explained that when a defalcation or embezzlement happens, it can be treated as a trade loss, when such diversion of moneys is done unauthorizedly by an employee and he takes it out of the ambit of the trade income. It was observed that in any business one would necessarily have to employ subordinates to carry on the business. If owing to the negligence or dishonesty of any subordinate, some of the receipts of the business do not find their way or some of the bills are not collected or some such similar acts are performed which may be an expense connected with or arising out of the trade, it would be “a trade income” in its true sense. However, where the earnings of a Company are duly credited to the accounts of the Company and thereafter the assets/ money of the Company are taken out by the Managing Director dehors the trade all together by virtue of his position as a Managing Director, it cannot be said that any loss which so occurs can be termed as “a trade loss” or arising “in the course of business”.

26. It was explained that if taking an advantage of a situation the employee who is placed in a position of confidence, pockets a portion of money or funds or intercepts them without allowing the funds to reach the Till, it would be a loss in the course of the trade. However, if the funds have

reached the accounts, then any subsequent embezzlement cannot be termed to be in the course of business.

27. Applying the same analogy to the present case, the entire case of the plaintiff is that his employee Manoj Kumar Swami had embezzled huge amounts from the bank accounts of the plaintiff by committing forgery and by creating fraudulent documents. This he did in conspiracy with defendant No.1 to 8 and was assisted by the remaining defendants.

28. It was argued on behalf of the plaintiff that there is involvement of two defendant banks with whom the plaintiff had commercial dealings and any amounts permitted to be withdrawn by the Banks against the written instructions/ Resolutions of the plaintiff Company, would bring the transactions in the ambit of Commercial suit.

29. This argument holds no water in view of above discussion. The acts of defendant Banks in permitting withdrawals were not in the nature of commercial transaction, but in the nature of fraudulent withdrawal on the basis of forged cheques and falsification of accounts.

30. It is quite evident from the entire details given in the plaint that the suit is for the recovery of the amounts which were allegedly embezzled by an ex-employee Manoj Kumar Swamy and the embezzled money according to the plaintiff, had reached the accounts of defendants in the present suit. It is absolutely evident that the nature of transaction and the recovery is sought on the averments of embezzled amounts which cannot be termed as a “business transaction” or having arisen “in the course of business”. The suit does not qualify as a commercial suit as defined under Section 2(i)(c) of the Act.

31. The review petition is therefore without merit and is hereby dismissed. The Local Commissioner to make an endeavour to conclude the evidence as expeditiously as possible.

(NEENA BANSAL KRISHNA)
JUDGE

NOVEMBER 4, 2022
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