



GRAVITAS LEGAL

**Suit in relation to immovable property used for trade and commerce falls in the category of “Commercial suit”**

Authored by Rajeev Aggarwal and Prateek Badhwar

The issue whether a civil suit filed for recovery of possession, arrears of rent and mesne profit for a rented commercial premises would be a commercial suit within the provisions of Section 2 (1) (c) (vii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Act, for short) came up for consideration of the Hon'ble High Court of Delhi in the year 2017 in a Appeal FAO (OS) bearing No.166/2016 titled as *Jagmohan Behl vs State bank of Indore*.

**Relevant Provision**

Before proceeding to discuss the decision on the said issue it shall be appropriate to read the relevant provision:

*“Definitions.-(1) In this Act, unless the context otherwise requires-*  
*(c) “commercial dispute” means a dispute arising out of-*  
*(vii) agreements relating to immoveable property used exclusively in trade or commerce;*

*Explanation.-A commercial dispute shall not cease to be a commercial dispute merely because-*  
*(a) It also involves action for recovery of immoveable property or for realisation of monies out of immoveable property given as security or involves any other relief pertaining to immoveable property;*

*(b) One of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;”*

**Relevant Facts**

The Appellant Plaintiff has instituted Before Hon'ble High court of Delhi, one civil suit for recovery against the Respondent Defendant Bank i.e State Bank of Indore in the year 2010. The said Civil suit was for recovery mesne profits of Rs. 1.08 Crores for the period between 1st September, 2007 till 30th August, 2010 along with interest for a property No.M-46, Connaught Circus, New Delhi which was given on lease to the Respondent Bank.

However, vide office order dated 24th November, 2015, issued by the Chief Justice in exercise of power conferred under Section 4 of the Delhi High Court (Amendment) Act, 2015, pecuniary jurisdiction for ordinary suits, which were not “commercial disputes”, was raised to Rs. 2 Crores. Suits below Rs. 2 Crores were to be transferred to district courts. In cases of “commercial disputes” as defined under the Act, suits of specified value as determined vide Section 12 thereof, of not less than Rs. 1 Crore were to be tried by the High Court and were not to be transferred. Pursuant to the said directions, the Ld. Single Judge treated the said suit to be a non-commercial suit on the ground:

*“..for no right under an agreement relating to immoveable property was sought to be enforced, inasmuch as the suit only seeks recovery of rent and mesne profits. It would be a suit under Section 9 of the Act and not pursuant to an agreement.”*

### **Purpose of Explanation to Main Provision**

The Appellate Court rejected said finding of the Ld. Single Judge and found the same to be not sustainable in the light of aforesaid relevant provisions. The Hon’ble Court in the Appeal while interpreting the said Section 2 (1) (c) (vii) read with its Explanation elucidated and explained in the light of settled law, as to how the Explanation aforesaid has to be read in consonance with its aforesaid Main Provision. The relevant extract is as follows:

*(i) “.. The explanation in the present case has to be read as part and parcel of clause (vii), for the language of the explanation shows the purpose, and the construction consistent with the purpose which should be placed on the main provision...”*

*(ii) “..The explanation harmonizes and clears up any ambiguity or doubt when it comes to interpretation of the main provision.*

*(iii) The Hon’ble Court to explain the purpose of Explanation to a Main Provision reiterated the Judgement of the Hon,ble Apex Court in S. Sundaran Pillai and Ors. Vs. V.R. Pattabiraman & Ors. (1985) 1 SCC 591, as follows:*

- (a) Explanation to a statutory provision can explain the meaning and intendment of the provision itself.*
- (b) Clear any obscurity and vagueness to clarify and make it consistent with the dominant object which the explanation seems to sub-serve.*
- (c) It fills up the gap.*
- (d) However, such explanation should not be construed so as to take away the statutory right with which any person under a statute has been clothed or to set at naught the working of the Act by becoming a hindrance in the interpretation of the same.*

### **Meaning and Scope: Terms “arising out of” & “in relation to immoveable property”, “pertaining to”**

The Hon’ble Court while interpreting the relevant terms “arising out of” and “in relation to immoveable property” held as follows:

- (i) These expressions have to be given their natural and general contours.*
- (ii) These are wide and expansive expressions and are not to be given a narrow and restricted meaning.*
- (iii) The expressions would include all matters relating to all agreements in connection with immoveable properties.*
- (iv) The immoveable property should form the dominant purpose of the agreement.*

The Hon'ble Court while interpreting the aforesaid expressions relied upon the judgment of the Hon'ble Apex Court in *Doypack Systems (P) Ltd. vs Union of India* (1988) 2 SCC 299 which Judgment interpreted the scope and nature of words/phrases "pertaining to", "in relation to" and "arising out of" as follows:

- (i) “..they are used in the expansive sense, as per decisions of the court, meanings found in standard dictionaries and principles of broad and liberal interpretation in consonance with Article 39 (b) and (c) of the Constitution..”.
- (ii) “The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter...”.
- (iii) “..These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context.....”.

### **Determinative Factor: Exclusive use of Immovable Premises/Property for Trade & Business**

The Hon,ble Court to remove any ambiguity in relation to the reading of Clause (vii) aforesaid held the user of the immovable property to be determinative factor and further that the said property should be exclusively used for trade and business and in that behalf elucidated as follows:

- (i) The natural and grammatical meaning of clause (vii) is that all disputes arising out of agreements relating to immovable property when the immovable property is exclusively used for trade and commerce would qualify as a commercial dispute.
- (ii) The immovable property must be used exclusively for trade or business and it is not material whether renting of immovable property was the trade or business activity carried on by the landlord.
- (iii) Use of the property as for trade and business is determinative.
- (iv) Properties which are not exclusively used for trade or commerce would be excluded.

### **Meaning of term “shall not cease”: Clarificatory**

The Hon'ble Court further interpreted the expression “shall not cease”, and held the same to be clarificatory in nature holding in that behalf as follows:

- (i) *“The expression seeks to clarify that the immovable property should be exclusively used in trade or commerce, and when the said condition is satisfied, disputes arising out of agreements relating to immovable property involving action for recovery of immovable property, realization of money out of immovable property given as security or any other relief pertaining to immovable property would be a commercial Dispute...”.*

The Hon'ble Court also read the expression “any other relief pertaining to immovable property” as significant and wide. Therefore, the said judgment clarifies the legal position regarding suit relating to immovable property which is used in trade and commerce shall be a commercial suit under the provisions of commercial courts act. The relevant observations of the Delhi High Court in *Jagmohan Behl* Case are as follows:

*“13. Harmonious reading of the explanation with sub-clause (vii) to clause (c) would include all disputes arising out of agreements relating to immovable property when used exclusively for trade and commerce, be it an action for recovery of immovable property or realization of money given in the form of security or any other relief pertaining to immovable property.*

That apart, in order to have holistic view of the entire cavil, it is also pertinent to refer to decisions of both, the Supreme Court as well as other High Courts on the issue which were are considering in this instant article.

A Division Bench of the Gujarat High Court in the case of *Vasu Healthcare Private Limited vs. Gujarat Akruti TCG Biotech Limited and in Ujwala Raje Gaekwar vs Hemaben Achyut Shah, AIR 2017 Gujarat 153* also had the opportunity to interpret Section 2(1)(c) of CC Act, 2015. The Gujarat High Court also ruled that the expression “used” occurring in the said provision must mean “actually used” or “being used”. The High Court also explained that if the intention of the legislature was to expand the scope, in that case the phraseology “likely to be used” or “to be used” would have been employed. The relevant observations of the Gujarat High Court in *Vasu Healthcare* case are as follows:

*“Considering section 2(c)(vii), “commercial dispute” means a dispute arising out of the agreements relating to immovable property used exclusively in trade or commerce. As observed hereinabove, at the time of filing of the suit and even so pleaded in the plaint, the immovable property/plots the agreements between the parties cannot be said to be agreements relating to immovable property used exclusively in trade or commerce. As per the agreement between the party after getting the plots on lease from the GIDC, the same was required to be thereafter developed by the original defendant No. 1 and after providing all infrastructural facilities and sub-plotting it, the same is required to be given to other persons like the original plaintiff. It is the case on behalf of the original plaintiff that as the original defendant No. 1 has failed to provide any infrastructural facilities and develop the plots and therefore, a civil suit for specific performance of the agreement has been filed. There are other alternative prayers also. Therefore, it cannot be said that the agreement is as such relating to immovable property used exclusively in trade or commerce. It is the case on behalf of the original plaintiff that as in clause (vii) of section 2(c), the phraseology used is not “actually used” or “being used” and therefore, even if at present the plot is not used and even if it is likely to be used even in future, in that case also, section 2(c)(vii) shall be applicable and therefore, the Commercial Court would have jurisdiction. The aforesaid has no substance. As per the cardinal principle of law while interpreting a particular statute or the provision, the literal and strict interpretation has to be applied. It may be noted that important words used in the relevant provisions are “immovable property used exclusively in trade or commerce”. If the submission on behalf of the original plaintiff is accepted in that case it would be adding something in the statute which is not there in the statute, which is not permissible. On plain reading of the relevant clause it is clear that the expression “used” must mean “actually used” or “being used”. If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, “likely to be used” or “to be used”. The word “used” denotes “actually used” and it cannot be said to be either “ready for use” or “likely to be used”; or “to be used”. Similar view has been taken by the Bombay High Court (Nagpur Bench) in the case of Dineshkumar Gulabchand Agrawal (Supra) and it is observed and held that the word “used” denotes “actually used” and not merely “ready for use”. It is reported that SLP against the said decision has been dismissed by the Hon'ble Supreme Court.”*

As is manifest the decision of the Delhi High in *Jagmohan Behl* case is not in variance with the decision of the Gujarat High Court in *Vasu Healthcare* case. Both the High Courts have ruled that for a suit to be able to figure in the category of a commercial suit in terms of **section 2(c)(vii), of CC Act**, all that is required is that the dispute ought to arise out of **agreements relating to immovable property when used exclusively for trade and commerce**, notwithstanding the fact whether the suit is recovery of immovable property or realization of

money given in the form of security or any other relief pertaining to immoveable property. In other words, as long as the suit is *qua* a immoveable property, which is **used exclusively for trade and commerce**, it shall be a commercial suit under the CC Act, in terms of section 2(c)(vii), of CC Act

Some may argue, though, fallaciously that the Gujarat High Court in *Vasu Healthcare* case while relying upon the decision of the Bombay High Court (Nagpur Bench) in of Dineshkumar Gulabchand Agrawal has differed with the decision of the Delhi High Court *Jagmohan Behl* case. However, it is not the case at all, as all that the Gujarat High Court in the *Vasu Healthcare* case has stated that the immoveable property in question has to be in actual use for trade and commerce and it shall not suffice if the said immovable property **is likely to be used in future** for trade and commerce. Current use of the immovable property for trade and commerce is all that section 2(c)(vii), of CC Act requires. Further, it also needs to be pointed that the decision of the Gujarat High Court *Vasu Healthcare* case has been assailed before the Supreme Court in a SLP and the Supreme Court has granted leave and also directed the parties therein to maintain status quo.

Subsequently, the definition of a commercial dispute for the purposes of the CC Act 2015 again arose for consideration before the Nagpur Bench of the Bombay High Court in *Kanchanganga Realtors Pvt. Ltd. and Ors. vs. Monarch Infrastructure Developers Pvt. Ltd. and Ors.* MANU/MH/0192/2019, wherein the Bombay High Court sided with the decision of the Delhi High Court in *Jagmohan Behl case* and opined thus:

*“13. This is the approach that has been adopted by the Delhi High Court in the aforesaid two judgments in the case of Jagmohan Behi vs. State Bank of Indore (supra) and Monika Arora vs. Neeraj Kohli and another (supra). This Court respectfully agrees with the said judgments rendered by the Division Bench and learned Single of Delhi High Court. In the judgment of the Division Bench of the Delhi High Court in the case of Jagmohan Behi vs. State Bank of Indore (supra), specific reference has been also made to Explanation (a) to Section 2(1)(c)(vii) of the Act of 2015 and it has been held that the words "any other relief pertaining to immovable property" has to be given broad interpretation. This Court also finds that if the definition of the term "commercial dispute" under Section 2(1)(c)(vii) read with Explanation (a) thereto is interpreted in a narrow sense, as contended by respondent no. 1 herein, it would render the same nugatory and the Explanation would be rendered redundant.”*

Section 2(1)(c)(vii) of the CC Act of 2015 has also been the subject matter of interpretation before the Supreme Court in *Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infraspace LLP and Ors.*

### **Facts**

Denuded of unnecessary details the facts, which led to the decision of the Supreme Court Ambalal Sarabhai case, are that the appellant therein executed an agreement to sell dated 14.02.2012 in favour of the respondent No. 2 in respect of the land which was described in the agreement. The respondent No. 2 assigned and transferred all his rights under the said agreement to sell in favour of respondent No.1 by executing an assignment deed.

In other words, the respondent No. 1 therein was to purchase the land, which was the subject matter of the agreement from the appellant therein. Accordingly, the sale was made under a Deed of Conveyance.

Also, a Memorandum of Understanding was entered into between the appellant and the respondents herein. As per the same, a Mortgage Deed was required to be executed by respondent No. 1 herein in favour of the appellant, which was though executed but was not registered.

Thereafter, appellant therein filed the Commercial Civil Suit so as to enforce the execution of a Mortgage Deed. While the Commercial court rejected the application under Order VII Rule 10 of CPC filed on behalf of the application and ruled that the suit was indeed a commercial suit within meaning of Section 2(1)(c)(vii) of the CC Act of 2015, after referring to the Memorandum and Articles of Association of the appellant company, wherein it was delineated that the appellant company was entitled to undertake the business of that of an estate agent, the dispute was commercial dispute.

When the decision of the Commercial court was assailed before the High Court, it found fault with the manner in which the Commercial Court had rested its consideration on the Memorandum and Articles of Association and ruled that the **since immovable property was not being used for trade or commerce**, it was not a commercial suit and In that regard, the legal directed the return of the plaint to be presented in an appropriate Court.

### **Decision**

The Supreme Court in *Ambalal Sarabhai* case, speaking through Justice A.S. Bopanna, after considering the decisions of the both, the Delhi High Court in *Jagmohan Behl* Case as well as the decision of the Gujarat High Court in *Vasu Healthcare* case ruled thus:

“14. In that view it is also necessary to carefully examine and entertain only disputes which actually answers the definition "commercial disputes" as provided under the Act. **In the instant case, as already taken note neither the agreement between the parties refers to the nature of the immovable property being exclusively used for trade or commerce as on the date of the agreement nor is there any pleading to that effect in the plaint.** Further the very relief sought in the suit is for execution of the Mortgage Deed which is in the nature of specific performance of the terms of Memorandum of Understanding without reference to nature of the use of the immovable property in trade or commerce as on the date of the suit. Therefore, if all these aspects are kept in view, we are of the opinion that in the present facts the High Court was justified in its conclusion arrived through the order dated 01.03.2019 impugned herein. The Commercial Court shall therefore return the plaint indicating a date for its presentation before the Court having jurisdiction.”

Justice R. Bhanumati, after concurring with the decision of Justice Bopanna, gave current finding and observed thus:

*“16. I have gone through the judgment of my esteemed Brother Justice A.S. Bopanna. I am in full agreement with the conclusion that in order to fall within Section 2(1)(c)(vii) of the Commercial Courts Act, the immovable property must be "used exclusively" or "being used exclusively" in trade or commerce. However, in view of the importance of the question involved, I would like to give my reasonings for concurring with the conclusion of my esteemed Brother.”*

### Author's Analysis

The Supreme Court in *Ambalal Sarabhai* case has, in no manner whatsoever overturned or negated the decision of the Delhi High Court in *Jagmohan Behl* Case. Though, it can be stated that the Supreme Court has in a tacit manner endorsed view of the Gujarat High Court in *Vasu Healthcare* case, which in view of the author is not in variance with the view of the Delhi High Court in *Jagmohan Behl* Case.

Additionally, it needs to be reiterated that the decision of the Gujarat High Court *Vasu Healthcare* case has been assailed before the Supreme Court in a SLP and the Supreme Court has granted leave and also directed the parties therein to maintain status quo.

Supreme Court's endorsement in case *Ambalal Sarabhai* case of the Gujarat High Court's decision in *Vasu Healthcare*, cannot be taken to mean that the Supreme Court has upheld the impugned decision of the Gujarat High Court in *Vasu Healthcare* case, for the SLP is still being heard by the Supreme Court and the parties therein have been directed to maintain status quo.

Therefore, in view of the foregoing analysis it become clear as noon day that there subsists no difference of opinion between the rulings of the Delhi High Court in *Jagmohan Behl* Case and the Gujarat High Court in *Vasu Healthcare* case. Both the High Court in the said cases, as well as the Supreme Court in *Ambalal Sarabhai* case, in unequivocal terms have stated that for a suit to be a commercial suit under sub-clause (vii) to clause (c) of Section of the CC Act of 2015, the immoveable property, which is the subject of the agreements *qua* which a dispute has arisen must be **used exclusively" or "being used exclusively" in trade or commerce.**

The only aspect, which was additionally considered by the Delhi High Court in *Jagmohan Behl* Case was, whether a suit involving action for recovery of mesne profits is a dispute arising out of agreements relating to immoveable property, which of course, is **used exclusively for trade and commerce.** Ruling in the affirmative the Delhi High Court held thus:

*"16. The expression "mesne profit" has been defined in sub-section(12) to Section 2 to the Code to mean those profits which a person in wrongful possession of such property actually received or might with the ordinary diligence have received together with interest on such profits but would not include profits due to improvements made by the person in wrongful possession. Mesne profits can be also claimed in suits for partition and possession from other co-owners and joint-holders. However, in the present case, we are dealing with a property given on rent, for being exclusively used for trade and business.*

*18. ...It cannot be disputed that action for recovery of immoveable property would be covered under sub-clause (vii) to clause (c) when the immoveable property is exclusively used in trade or commerce. Read in this manner, we do not think that claim for recovery of rent or mesne profit, security deposit etc., relating to immoveable property which was used exclusively in trade or commerce should not be treated as a commercial dispute in view of the language, ambit and scope of sub-clause (vii) to clause (c) to Section 2 of the Act. These would qualify and have to be regarded as commercial disputes. The use of expression "any other relief pertaining to immoveable property" would mean disputes relating to breach of agreement and damages payable on account of breach of agreement would be covered under sub-clause (vii) to clause (c) to Section 2 of the Act when it is arising out of agreement relating to immoveable property exclusively used in trade and commerce.*

19. In view of the aforesaid discussion, we find merit in the present appeal and the same is allowed. The impugned order dated 1st March, 2016, transferring the suit to the district court and holding that the dispute raised is not a commercial dispute under the Act is set aside. ...”

Thus, there remains no trace of doubt that all disputes arising out of agreements relating to immoveable property, when the said immoveable property is used exclusively for trade and commerce, shall be commercial disputed within the scope and ambit of Section 2(1)(c)(vii) of the CC Act of 2015, notwithstanding the fact that whether the said dispute is with regard to recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property.

Further, there is no caviling about the fact that the High Courts of Delhi, Gujarat and Bombay in the different decisions cited above including the Supreme Court in *Ambalal Sarabhai* case, have arrived at one common conclusion that for a suit to be a commercial suit under Section 2(1)(c)(vii) of the CC Act of 2015, all that needs to be proved, is that the agreement which is the subject matter of the dispute is *qua* a immoveable property which is "**used exclusively**" or "**being used exclusively**" in trade or commerce.

It is just a matter of time that the ruling of Delhi High Court in *Jagmohan Behl* Case, to the effect that suits for recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property, which is "used exclusively" or "being used exclusively" in trade or commerce, are commercial suits, is affirmed by the Supreme Court.

\*\*\*\*\*



[www.gravitaslegal.co.in](http://www.gravitaslegal.co.in)



Gravitas Legal



[email@gravitaslegal.co.in](mailto:email@gravitaslegal.co.in)

#### **New Delhi**

C-91, 2nd Floor, Panchsheel Enclave, New Delhi – 110017 | Phone: (+91) (11) 45671111  
908, 9th Floor, P.P Towers, Netaji Subhash Place, Pitampura, New Delhi – 110034 | Phone: (+91) (11) 47065978

#### **Mumbai**

102, 1st Floor, Vikas Building, Bank Street Fort, Mumbai – 400001 | Phone: (+91) (22) 49725818

#### **Disclaimer:**

This communication is meant for information purposes only and does not constitute legal advice by the firm or its members. Should you have any queries on any aspect of this communication, please contact us.