

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 1691 of 2024****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2024****In R/FIRST APPEAL NO. 1691 of 2024**

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M/S KAMDAR CONSTRUCTION**Versus****LH OF ROSHAN ALI SADRUDDIN THOBHANI & ORS.**

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Appearance:**JENIL M SHAH(7840) for the Appellant(s) No. 1****MR MEHUL SHAH, SR. ADVOCATE WITH MR HENIL M SHAH(10677) for the Appellant(s) No. 1****MR BRIJ V SHETH(10594) for the Defendant(s) No. 1.1,1.3,1.4****MR JIGNESH L HAJARE(3994) for the Defendant(s) No. 1.2,1.5**

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CORAM: HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**and****HONOURABLE MR. JUSTICE NIRAL R. MEHTA****Date : 06/02/2025****ORAL ORDER****(PER : HONOURABLE MS. JUSTICE SANGEETA K. VISHEN)****Order in First Appeal**

Mr.Mehul Shah, learned senior counsel appearing with Mr.Henil Shah, learned advocate for the applicant, submitted that the suit was filed for setting aside of the sale deed and specific performance of the development agreement. Multiple issues have been considered including the issue of suit being barred by the provisions of the Commercial Courts Act, 2015 (hereinafter referred to as 'the Act of 2015') as well as the agreement containing arbitration clause. Upon applications Exh.12 and Exh.18 being filed by the respondents, that the plaint came to be rejected, only on the ground that the dispute involved, is commercial in nature. The court below, while considering the provisions of the Act

of 2015, concluded that the dispute would fall within the definition of commercial dispute as defined in the Act of 2015; however, the court, did not return the plaint only by observing that the pre-institution mediation and settlement, has not taken place and hence, no purpose would be served by returning the plaint. It is submitted that the court also found and concluded that there is an arbitration clause in the development agreement and the suit would not be maintainable. Having thus observed, the court below, ought to have returned the plaint and not dismissed the suit.

2. On the other hand, Mr.Brij Sheth, learned advocate appearing for respondent Nos.1.1, 1.3 and 1.4, submitted that there is suppression of material fact. Besides, as per the development agreement and stipulation contained therein, within the period of two-and-half-years, the land was to be developed. However, till date, the land has not been developed. It is also submitted that the claim putforth by the plaintiff that they have developed the land by investing huge amount, the said aspect ought to have been disclosed. However, there is not a whisper about the investment made by the plaintiff. The sole document placed on record, is the details of investment in the Rajkot Project which is of the period 2019 to March, 2020 whereas the land was to be developed immediately after the development agreement. It is also submitted that the plaintiff has not indicated any circumstances which stopped it to complete the work and about the cost incurred. It is also submitted that there lies fallacy in the submissions of the learned counsel for the appellant that the suit has been dismissed on the ground of availability of clause of arbitration and the dispute being commercial in nature. In fact, there were other submissions also raised in the application viz. absence of cause of action, limitation and jurisdiction. Therefore, if the court has accepted any one of the grounds and allowed the

application, then it cannot be said that any error has been committed by the court below.

3. Mr.Hajare, learned advocate appearing for respondent Nos.1.2 and 1.5, has joined the submissions made by Mr.Sheth, learned advocate, for the other respondents. It is submitted that it is not in dispute that there is an arbitration clause which objection is raised by the concerned respondents, which weighed with the court below and the court below has rightly rejected the plaint. If at all the plaintiff, was desirous, it was expected of the plaintiff to have filed an application for referring the matter to the arbitrator. In absence of any application being filed, it cannot be said that the learned Judge has committed an error. It is submitted that reference to the arbitrator, is as per the provision of Section 8 and the application has to be filed by the parties to the agreement and the respondents were not the parties to the agreement and hence, there arises no question of filing any application for referring the matter to the arbitrator.

4. Heard the learned advocates appearing for the respective parties.

5. Admit.

6. Mr.Brij Sheth, learned advocate and Mr.Jignesh Hajare, learned advocates, waive service of notice of admission on behalf of the respective respondents.

Order in Civil Application

Issue Rule, returnable forthwith. Mr.Sheth waives service of notice of Rule on behalf of respondent Nos.1.1, 1.3 and 1.5, whereas Mr.Hajare waives service of notice of Rule on behalf

of respondent Nos.1.2 and 1.5.

2. Pertinently, initially, there was a development agreement executed dated 25th May, 2012 between the parties containing arbitration clause, followed by another registered development agreement between the parties containing similar provision of arbitration as per clause 11. The dispute arose between the parties, which led to filing of the suit for setting aside the sale deed and seeking specific performance of the development agreement. During the pendency, that the respondents have filed applications, Exhs.12 and 18 raising multiple grounds. The learned Judge, while dealing with all the grounds, has dismissed the suit.

3. Perceptibly, the learned Judge was of the opinion that in view of the arbitration clause contained in the agreement, suit would not be maintainable. Further, while considering the provisions of Section 2(c) of the Act of 2015, was of the opinion that the development agreement would fall within clause 7 of Section 2(c) of the Act of 2015 and hence, Commercial Court shall have the jurisdiction to entertain the suit and applications relating to the commercial disputes. The learned Judge, was of the opinion that the issue would fall within the purview of the Commercial Court; however, the learned Judge proceeded to decide the issue and was of the opinion that Section 12A makes pre-institution mediation and settlement mandatory process before filing the suit under the Act of 2015. Instead of returning the plaint, the learned Judge, decided the issue by observing that referring the matter to the Court of competent jurisdiction, would not serve any purpose, as there was no pre-institution mediation and settlement.

4. In the *prima facie* opinion of this Court, when the Court below observed that it has no jurisdiction, could not have rejected

the plaint accepting the application Order VII Rule 11 of the Code of Civil Procedure, 1908 and could have returned the plaint or ordered steps as per the provisions of the Arbitration and Conciliation Act, 1996 and/or the Act of 2015.

5. In view of the above discussion, the parties are directed to maintain *status quo* till the final disposal of the First Appeal.

6. Civil Application is accordingly, allowed. Rule is made absolute to the aforesaid extent. No order as to costs.

(SANGEETA K. VISHEN,J)

(NIRAL R. MEHTA,J)

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