

OD-3

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

IA NO: GA/1/2023
In CS/98/2023

MERLIN PROJECTS LIMITED
VS
LORD GRIH NIRMAN PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE BISWAROOP CHOWDHURY

Date : 1st June, 2023.

[VACATION BENCH]

Appearance:

Mr. Surajit Nath Mitra, Sr. Adv.

Mr. Sankarsan Sarkar, Adv.

Mr. Uttam Sharma, Adv.

Mr. Shayak Sarkar, Adv.

Mr. Vrinda Kedia, Adv.

...for the plaintiff

Mr. Jishnu Saha, Sr. Adv.

Mr. A. Chatterjee, Adv.

Mr. K. Thaker, Adv.

Mr. D. Mukherjee, Adv.

Mr. A. Kanodia, Adv.

Mr. I. Saha, Adv.

...for the respondent in GA No. 1 of 2023

...for the petitioner/respondent in GA/2/2023

The Court:- Learned Advocate for the petitioner/plaintiff and learned Advocate for the defendant/respondent are present.

The petitioner/plaintiff has filed an application for injunction restraining the defendant/respondent from entering into contract pertaining to development or sale or alienation or encumbrance of the suit property and with a prayer for injunction restraining the

respondent/defendant their men and agent from alienating and/or encumbering or dealing with or disposing or creating any third party rights in respect of the suit property. As the application for injunction is to be taken up along with the application filed by the defendant/respondent challenging the maintainability of the suit and with a prayer for rejection of the plaint relating to CS/98/2023 (Marlin Projects Limited Vs. Lord Grih Nirman Private Limited), the application with regard to the maintainability is taken up for consideration first. It is the contention of the defendant/respondent that the instant suit being CS/98/2023 is not maintainable as the dispute is “Commercial Dispute” as defined in the Commercial Courts Act, 2015.

Mr. Saha, learned senior Advocate for the defendant/respondent draws attention to the provisions contained in Section 2(1)(c) Clauses vi, vii, and xi of the Commercial Courts Act, 2015. Learned Advocate submits that this particular disputes as provided under Clauses vi, vii, and xi falls under commercial dispute, to be decided by Commercial Court and this Court has no jurisdiction to adjudicate the said dispute. Learned Advocate draws attention to certain clauses of the term sheet relied upon by the plaintiff and submits that clause 8 of the term sheet will go to show that it is a commercial dispute where there is a provision for sharing of profit. Learned Advocate further submits as it is a joint venture agreement and also comes under the purview of commercial dispute.

Mr. Saha relied upon following judicial decision *Blue Nile Developers Private Limited vs. Mouva Chandra Sekhar and Other* reported (2021) SCC Online AP 3964, *Raj Kumar Gupta and Another vs. Jagan Nath Bajaj and Others* reported in (2022) SCC Online Del 2995, *P. Siva Mohan Reddey vs. K.R.K. Reddy* reported in *Manu/TL/0482/2023* and *T.K. Lathika vs. Seth Karsandas Jamndas* reported in (1999) 6 Supreme Court Cases 632.

The Hon'ble Andhra Pradesh High Court in the case of Blue Nile Developers Private Limited (supra) observed as follows:

“7. In view of the above said rival contentions and averments of both the parties in the above said IA, the court below framed a point for consideration to the effect that whether the dispute between the parties is a commercial dispute within the meaning of Section 2(1)(c)(vi) of the Act?

21. Since the above said two “words” also carry different meanings in contrast the above said expansion of the said clause is necessitated.

22. Hence from the above, it is clear that the “legislature” has included the various types of commercial transactions to bring under the fold of “commercial dispute” in case of any dispute arises from any of those transactions. On a careful reading of the above said provision of the Act, it is obvious that the legislature has taken due care while incorporating the above said clauses from (i) to (xxii) in Section 2(1)(c) of the Act by avoiding the repetition of words and sentences without effecting the full fledged meaning of the same even on expansion of the said each clause. Therefore, either giving any restrictive meaning or reading of a clause in isolation and expansion of one word only in the said clause would hamper and frustrate the meaningful definition of the said clause on its expansion by abrogating certain category of transactions from the purview of the benefit of the above said Act which is not otherwise the intendment of the legislature in bringing out the said enactment.”

In the case of P. Siva Mohan Reddy (supra) in Telengana High Court observed as follows:

14. ‘ Joint Venture’ literally means ‘a contractual agreement whereby two or more parties undertake an economic activity’; ‘a joint venture’ is ‘an association of two or more persons to carry out a single business enterprise for profit’ [Advanced Law Lexicon 3rd Edition by Ramnathan Iyer]. ‘A Joint Venture’ means ‘a business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) Shared profits and losses; and (4) Each member’s equal voice in controlling the project’. [Blacks Law Dictionary-ninth edition].

In the case of Raj Kumar Gupta and Another (supra), the Hon’ble Delhi High Court observed as follows:

“18. I am in respectful agreement with the view taken by the Andhra Pradesh High Court. A restrictive meaning cannot be given to the phrase ‘construction and infrastructure contracts’. The aforesaid phrase would include both ‘construction contracts’ as well as ‘infrastructure contracts’ and cannot be given a restrictive meaning to include only infrastructure contracts involving construction. This becomes clear from the use of the words ‘including tenders’, which would imply that all tenders relating to construction contracts as well as infrastructure contracts would be covered under the scope of commercial disputes.

19. In the present case the plaintiff seeks specific performance of the property Development Agreement, in terms of which the plaintiffs were to construct the property. The plaintiffs, being the builders are required to pay Rs.2,15,00,000/- crores to the defendants, being the owners of the property and carry out construction on the suit property at their own expense. In lieu thereof, the plaintiffs would be entitled to two floors of the building to be constructed and the remaining floors are to go to the defendants. Clearly, construction is the core of the aforesaid agreement and the dicta in *Blue Nile Developers* (supra) would be squarely applicable.”

Mr. Surojit Nath Mitra, learned senior Advocate for the plaintiff/petitioner submits that the suit is maintainable and the dispute does not come under the purview of commercial dispute. Mr. Mitra draws attention to clause 8 of the term sheet and submits that as per clause 8(a)

the developer and the land owner have agreed to enter into a joint development agreement for the construction and the development of residential/commercial/mixed use building with a minimum height of 80 meters at the property.

Mr. Mitra further draws attention to clause 6 where it is provided that the land owner shall have the tenancies vacated from the property at its own costs and expenses. If such tenants are to be allotted space/rehabilitated in the project, the same shall be adjusted from the land owner's share. On any such allotted space allotted to the tenants, no brokerage shall be payable however marketing cost at the rate of 1.5% shall be payable by the land owner or by the tenants.

Mr. Mitra further submits that the developer has the entire obligation to complete the projects and take necessary steps on its own costs and expenses. The developer has the obligation to complete the projects at its own costs and expenses after preparing building plans for the project to avail and utilise the maximum permitted FAR under law, have the same approved by the owner and make necessary application for obtaining the sanction of the Kolkata Municipal Corporation and other appropriate authorities within a maximum period of 12 (twelve) months from the execution of the development agreement.

Mr. Mitra also submits that from the obligation of the developer it will go to show that it is not a joint venture agreement but a simple

development agreement, where both parties do not take part in management as it is in the case of joint venture projects.

Mr. Mitra also relies upon the following judicial *decision Adhunik Steels Ltd. vs. Orissa Manganese And Minerals (P) Ltd.* reported in (2007) 7 Supreme Court Cases 125, *Rama Narang vs. Ramesh Narang And Others.* reported in (2021) 15 Supreme Court Cases 338, *Faqir Chand Gulati vs. Uppal Agencies Private Limited And Another* reported in (2008) 10 Supreme Court Cases 345, *Ambalal Sarabhai Enterprises Limited vs. K. S. Infraspace LLP And Another* reported in (2020) 15 Supreme Court Cases 585.

In the case of *Ambalal Sarabhai Enterprises Limited (Supra)*, the Hon'ble Supreme Court observed as follows :-

- “26. A matter will fall under the jurisdiction of the Commercial Court or the Commercial Division of the High Court on the following factors”
- (i) it shall be a commercial dispute within the meaning of Section 2(1)(c) of the Act; and
 - (ii) such commercial disputes are of a specified value as per Section 2(i) of the Act.”

In the case of *Ambalal Sarabhai Enterprises Limited (Supra)*, the Hon'ble Supreme Court observed as follows :-

“41. In *Vasu Healthcare (P) Ltd. v. Gujarat Akruiti TCG Biotech Ltd.*, referred to in extenso by my learned Brother, it was held that : (SCC OnLine Guj para 33)

:33.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”.

We entirely agree with the above purposive interpretation adopted by the Gujarat High Court.”

Mr. Mitra submits that considering the decision of the Hon’ble Supreme Court in the case of Faqir Chand Gulati vs. Uppal Agencies Private Limited and Another, it is clear that it is not a case of joint venture and does not come under Section 2 sub-section (1)(c)(xi).

Mr. Mitra further submits that as it is not a joint obligation of the parties to take part equally in management of development work and obligations of both parties are separate, it cannot be termed as a joint venture agreement and will not come under the Clause (xi).

With regard to the merits of the case, Mr. Saha submits that there is no concluded contract and the suit is not maintainable and the plaintiff is not entitled to an Order of injunction at this stage. Mr. Saha further submits that term sheets referred by the plaintiff is not an agreement but it is an agreement to enter into a subsequent agreement so this suit does not lie.

On the other hand, Mr. Mitra submits that term sheets contains all the terms and conditions which were required for entering into a lawful agreement.

Mr. Mitra further submits that the terms and conditions of the term sheets contained certain prohibitions, which the defendant cannot contravene.

Now, with regard to the maintainability of the suit, upon considering the provisions contained in Section 2(i)(c) sub-clause (vi), (vii) and (xi) and upon considering the judicial decisions relied upon by the learned Advocates and considering the facts of the case, this Court is of the view that the dispute between the parities does not come within the purview of commercial dispute under Section 2(i)(c) of the Commercial Court's Act, 2015. Thus the application for injunction is taken up for consideration. Upon considering the balance of convenience and exigency this Court is of the view that the plaintiff should be protected by ad-interim order of injunction.

Mr. Saha produces a registered agreement on conclusion of arguments and submits that development agreement has already been entered into, with a third party. Mr. Mitra objects to the same as because copies are not served. As copy is not served and document produced after conclusion of argument the document is not looked into at this stage.

Let there be an ad interim Order in terms of Prayers (a) and (b) of the Notice of Motion. The Defendant/Respondent is restrained by an order of

injunction from entering into any other contract pertaining to development or sale/conveyance or alienation or encumbrance of the suit property and/or dealing with or disposing of or creating third party rights in respect of the suit property for a period of five weeks after vacation.

Affidavit-in-Opposition is to be filed within two weeks after vacation. Affidavit-in-Reply, if any, be filed within one week thereafter.

Let the matter appear in the list four weeks after vacation under the heading "Adjourned Motion."

(BISWAROOP CHOWDHURY, J.)