

OD – 13, 14, 15 & 16

ORDER SHEET
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

IA NO. GA/2/2023
In CS/98/2023
MERLIN PROJECTS LIMITED
Vs
LORD GRIH NIRMAN PRIVATE LIMITED

IA NO. GA/4/2023
In CS/98/2023
MERLIN PROJECTS LIMITED
Vs
LORD GRIH NIRMAN PRIVATE LIMITED

IA NO. GA/5/2023
In CS/98/2023
MERLIN PROJECTS LIMITED
Vs
LORD GRIH NIRMAN PRIVATE LIMITED

BEFORE:
THE HON'BLE JUSTICE SUGATO MAJUMDAR
Date: 16th May, 2024

Appearance:

Mr. P. Chidambaram, Sr. Adv.
Mr. Surajit Nath Mitra, Sr. Adv.
Ms. Rajshree Kajaria, Adv.
Mr. Sankarsan Sarkar, Adv.
Mr. Dharav Saha, Adv.
Mr. P. Goyal, Adv.
Mr. Uttam Sharma, Adv.
Mr. Sayak Mitra, Adv.

...for the Plaintiff.

Mr. S. N. Mookherjee, Sr. Adv.
Mr. Jishnu Saha, Sr. Adv.
Mr. Joy Saha, Sr. Adv.
Mr. Reetobroto Kumar Mitra, Adv.
Mr. Aditya Kanodia, Adv.
Mr. Ishaan Saha, Adv.
Mr. Yash Singhi, Adv.
Ms. Shreya Trivedi, Adv.
Mr. Rajdeep Mantha, Adv.

...for the petitioner in GA No. 2/2023, GA No. 4/2023 & for respondent in GA 1/2023 & GA 5/2023.

The Court: Let the order dated 13th May, 2024 be corrected to the extent that the appearance would be read as in the instant cause title instead of the earlier appearance reflected in the order dated 13th May, 2024.

The Department is directed to incorporate the necessary corrections in the order dated 13th May, 2024 accordingly.

G.A. No. 2 of 2023 is an application filed by the Defendant of the suit praying for rejection of the plaint; dismissal of the suit; stay of all further proceeding of the suit till disposal of the application along with other prayers.

Since this is an application for rejection of plaint, it is necessary to consider the plaint case at the outset.

- a) The Plaintiff is a company engaged in development and construction of real estate for last 37 years.
- b) One M/s Basant Properties Limited was owner of a piece and parcel of land measuring about 2 bighas 11 cottahs comprising of

two storied brick built buildings having total built up area of 34, 949 sq. ft. at premises no.4, Lord Sinha Road, Kolkata – 700071. In the month of May-June, 2022 it was agreed between the Plaintiff and the said M/s Basant Properties Ltd. that the Plaintiff would purchase the said property which is more conveniently be described as “the suit property”, hereinafter. The Plaintiff was keen to purchase the property and to develop the same. The Plaintiff took steps and approached to various governmental authorities in furtherance of the object. The Plaintiff was desirous to commercially exploit the suit property.

- c) While negotiation between the Plaintiff and the said M/s Basant Properties were in progress, one Om Jalan approached the Plaintiff with proposal to make fund available for the development project; fund would be available through various companies under control of the said Om Jalan. Thus Mr. Jalan expressed his intention to join hands with the Plaintiff for the purpose of acquiring and developing the suit property. It was agreed between the representative of the Plaintiff company and the said Om Jalan that the Plaintiff would allow the said Mr. Jalan to purchase the suit property through a company owned and controlled by the said Mr. Jalan. Thereafter, development of the property would be done through the Plaintiff. Pursuant to the said agreement, the Defendant by an e-mail dated 10/11/2022 forwarded the final draft of deed of conveyance to the Plaintiff for purchasing the said property. Simultaneously, the Plaintiff and the Defendant were

also finalizing the terms contained in a “Term Sheet” to be executed between them for development of the property. It was agreed between them that the Term Sheet would be executed by and between the parties simultaneously with or immediately after execution of the deed of conveyance in respect of the suit property between the said M/S Basant Properties Ltd. and the Defendant. The deed of conveyance was executed accordingly on 11/11/2022. On the very same day the Plaintiff and the Defendant executed the Term Sheet recording the terms of the development agreement. Among others, there were terms that the developer and the land owner agreed to enter into a joint development agreement for construction and development of a residential/commercial/mixed use building with minimum height of 80 meters at the property (termed as “Project”); cost of construction and development of the project shall be completed by the developer, that is the Plaintiff, at its own cost and expense, in accordance with the Term Sheet; developers’ share would be 32% and the land owners share would be 68%; the developer should pay security deposit of Rs.7,00,00,000/- in a phase wise manner, as stated therein along with others. The Plaintiff paid an upfront amount of rupees two crores at the time of execution of the Term Sheet. There was a specific negative covenant running with the land, in the Term Sheet. Number of correspondences followed. It was also agreed upon that the parties herein, would acquire the adjacent plot for integrated development of both the premises. Pursuant to

subsequent negotiations, the Plaintiff further deposited a sum of rupees three crores in the Defendant's account.

- d) The sky changed soon. In terms of an e-mail dated 22/05/2023, the Defendant alleged that deposit of rupees three crores is unilateral act of the Plaintiff and that the Term Sheet was a void document and no terms or conditions were ever agreed upon or finalised between them. It was further stated in the said e-mail dated 22/05/2023 that the Defendant returned the said deposits of rupees two crores and three crores to the Plaintiff and the deal stood closed from the defendant's end. The Plaintiff learned that the Defendant is seeking to deal with, alienate, part with and create third party rights and/or dispose of the suit property in breach of the Terms Sheet.
- e) Accordingly, the Plaintiff instituted the instant suit praying for specific performance of the agreement concluded as per the Term Sheet, execution of joint development of agreement in terms of the Term Sheet along with other prayers.

In the context, the Defendant filed the instant application praying for rejection of the plaints. Grounds stated are that the parties were not *ad idem* on several essential terms for which negotiations were going on; no agreement was reached. Even assuming that the allegations made in the plaint are correct, the same involves commercial dispute, as defined in the Commercial Courts' Act, 2015. Instead of filling in the Commercial Division, the instant suit is filed in ordinary civil

jurisdiction. The plaint is clearly barred by law, therefore, and this Court has no jurisdiction to entertain the suit in Ordinary Original Jurisdiction.

Affidavit-in-Opposition is filed by the Plaintiff refuting all the contentions of the Defendant. It is denied that the suit involves any commercial dispute and that the suit is not entertainable by this Court exercising Original Ordinary Jurisdiction.

Mr. Mukherjee, the Learned Senior Counsel, appearing for the Defendant argued firstly that the suit involves a commercial dispute as is ex-facie evident from the allegations contained in the plaint. An agreement which transfers development rights for construction of a building and sale of premises therein, whether for commercial or residential use, is a construction contract under Section 2(1)(c)(vi) of the Commercial Courts' Act, 2015. "Construction and infrastructure contract" as the phrases used in Section 2(1)(c) of the Act, must be given a disjunctive interpretation. The averments made in the plaint as well as the documents annexed are also relevant to support the contention. Mr. Mukherjee refers to **Vaijanath Dayanand Kale vs Nerkar Properties LLP [2020 SCC OnLine Bom. 906]**, **Blue Nile Developers (P) Ltd. vs Movva Chandra Sekhar [2021 SCC OnLine AP 3964]**, **Raj Kumar Gupta vs Jagan Nath Bajaj [2022 SCC OnLine Del. 2995]**, **Swastik Project Pvt. Ltd. vs City Enclave Pvt. Ltd [2021 SCC OnLine Cal 452]** in support of his contention. According to him, the Term Sheet clearly shows that the Defendant offers the suit premises to the developer for construction and sale of constructed areas at the suit premises. Clear understanding that emanates from the Term Sheet is that a construction contract is contemplated within ambit of section 2(1)(c)(vi) of the Act.

It is next argued that a development agreement is in nature of collaboration agreement which would qualify as joint venture agreement within ambit of Section 2(1)(c)(xi) of the Act. A joint venture agreement is a business undertaking by two or more persons engaged in a single defined project. **Raj Kumar Gupta vs Jagan Nath Bajaj [2022 SCC OnLine Del. 2995]** and **P. Siva Mohan Reddy vs K.R.K Reddy [2023 SCC OnLine TS 1337]** was relied upon. According to the Learned Counsel, the agreement concerned and the dispute involved in the suit clearly comes within ambit of Section 2(1)(c)(vi) and 2(1)(c)(xi) of the Act. Being a commercial dispute, the suit is barred by the Act and is liable to be rejected.

Per contra Mr. Chidambaram, the Learned Senior Counsel for the Plaintiff argued firstly that while considering an application for rejection of plaint reading of the plaint and confinement of consideration within its periphery is sacrosanct. Referring to **Ambalal Sarabhai Enterprises Ltd. vs K.S. Infraspace LLP & Ors. [(2020) 15 SCC 585]** the Learned Senior Counsel submitted that definition of commercial dispute in Section 2(1)(c) must be strictly construed, else the very purpose of the Act would be frustrated.

It is further argued by Mr. Chidambaram that the plea of the Defendant is that the plaint should be rejected on the ground that the suit involves commercial dispute within meaning of Section 2(1)(c)(vi), Section 2(1)(c)(vii) and Section 2(1)(c)(xi) of the Act. Attention of this Court was invited to the fact that in the letter of repudiation dated 22/05/2023 as well as in the instant application, the plea of the Defendant is that the Term Sheet is a void document and that no agreement had been reached between the parties. In the circumstances, the Plaintiff is entitled to lead evidence of the circumstances under which the Term Sheet was agreed upon and executed by the parties herein. The Plaintiff is also entitled to lead evidence of

the circumstances under which the terms of the joint venture agreement were finalised. Hence, at this stage, by merely reading the plaint, the Term Sheet and the joint venture agreement, the only conclusion that can be reached is that the suit is maintainable and the plaint cannot be rejected. These are triable issues which can be decided only after full trial. Mr. Chidambaram referred to the decision of Division Bench of this Court in **Maharshi Commerce Ltd. vs Rajiv R. Balani [APOT No. 242/2022 dated 19/06/2023]** where the Division Bench held that whether there was reconstitution of a partnership business and it was accepted by the plaintiff are matters to be taken into consideration at the trial of the suit. Referring to **Sushil Kumar Agarwal vs Meenakshi Sadhu & Ors. [(2019) 2 SCC 241]** , **Rameshwar & Ors. Vs State of Haryana & Ors. [(2022) SCC OnLine SC 898]** it is submitted by the Learned Counsel that Section 2(1)(c)(vi) of the Act applies only to pure construction and infrastructure contracts. So far as Section 2(1)(c)(vii) is concerned, it is submitted, this applies only if the dispute arises out of agreements relating to immovable property used exclusively in trade and commerce. Referring to **Ambalal Sarabhai Enterprises Ltd. vs K.S. Infraspace LLP & Ors. [(2020) 15 SCC 585]** it is submitted that the word “used” denotes “actually used” and it cannot be “ready for used” or “likely to be used” or “to be used”. So far as Section 2(1)(c)(xi) of the Act is concerned, it is submitted by Mr. Chidambaram that this clause applies only to joint venture agreement and not to any development agreement. Referring to **New Horizons Ltd. & Anr. Vs Union of India & Ors. [(1995) 1 SCC 478]** and **Faqir Chand Gulati vs Uppal Agencies Private Ltd. [(2008) 10 SCC 345]** as well as various clauses of the Term Sheet, it is submitted a joint venture agreement contemplates joint ownership and control of property, sharing expenses, profits and losses, community of control over and active participation in management and

direction of business enterprise and others which are absent in the Term Sheet. Therefore, the parties did not contemplate to execute a joint venture agreement. In nutshell, it is argued that the instant application is liable to be dismissed.

I have heard rival submissions.

It is no longer *res integra* that a Court should trudge within four corners of the plaint while considering an application for rejection of plaint. There is no scope of digression from the peripheries of the plaint. A plain reading of the plaint provides certain basic facts. There was negotiation between the parties herein; the negotiation is related to construction/development of land; a Term Sheet was executed containing certain terms and conditions; it is in the plaint itself that the Defendant snubbed the Term Sheet as void. No development/joint venture agreement, in whatever way it may be termed, was executed between the parties. In these premises, what is admitted is negotiation between the parties. Execution of the Term Sheet is asserted by the Plaintiff denied by the Defendant. Unless the existence or execution of the Term Sheet is established in trial by adducing evidence, the same cannot be dissected to understand the nature and character of it. Development agreement, which was supposed to be executed, was not executed and is not in existence. Trying to understand the nature of a non-existence of documents or a future document which is only in the sphere of contemplation is but writing on air. Except negotiation there is no admission of existence of any agreement. It is nobody's case that there was an agreement.

What Section 2 (1)(c)(vi), Section 2 (1)(c)(vii) and Section 2 (1)(c)(xi) contemplates are agreements not negotiations; negotiations are not agreements. Existence of agreement is in dispute. Therefore, the aforesaid sub-clauses cannot be applied

unless existence of an agreement is proved. I do not think at this stage when the existence of an agreement or “Term Sheet” is in dispute, unless the same is established in trial by adducing evidence, nature and character of the same may be explored into. At this stage, it cannot be inferred or concluded that there is an agreement. In **Ambalal Sarabhai Enterprises Ltd. v. K.S. Infraspace LLP, [(2020) 15 SCC 585]** it was observed by the Supreme Court of India, as rightly relied upon by Mr. Chidambaram:

“37. A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2(1)(c) of the Act viz. “the agreements relating to immovable property used exclusively in trade or commerce”. The words “used exclusively in trade or commerce” are to be interpreted purposefully. The word “used” denotes “actually used” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “actually used”. Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above.”

Mr. Mukherjee, the Learned Counsel for the Defendant referred to number of decisions or different High Courts, as above mentioned namely, **Vaijanath Dayanand Kale vs Nerkar Properties LLP [2020 SCC OnLine Bom. 906]**, **Blue Nile Developers (P) Ltd. vs Movva Chandra Sekhar [2021 SCC OnLine AP 3964]**, **Raj Kumar Gupta vs Jagan Nath Bajaj [2022 SCC OnLine Del. 2995]**, **Swastik Project Pvt. Ltd. vs City Enclave Pvt. Ltd [2021 SCC OnLine Cal 452]**. All these cases were decided in the context that there existed agreements nature and characters of which could be dissected and scanned. In the present case, admittedly there is no agreement and existence of Term Sheet is disputed. Therefore, decisions of these cases are not helpful for Mr. Mukherjee.

I agree with the submission of Mr. Chidambaram that existence of an agreement is to be proved on trial since this involves a mixed question of law and fact; then only, if the existence of any agreement is proved, the true purport of the same may be considered. Till then all are future disputes and does not partake the character of commercial dispute, as ruled in **Ambalal Sarabhai Enterprises Ltd.** case (supra).

Since the dispute involved in the suit are not “commercial dispute” for reasons stated above. The suit cannot be said to be barred by law accordingly. In view of that plaint cannot be rejected. Therefore, the instant application is not maintainable.

In nutshell, for reasons stated above, the instant application stands dismissed, however, without any costs.

Fix on 21st June, 2024 for hearing other pending applications.

(SUGATO MAJUMDAR, J.)