

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6345 OF 2021

Mahir Builders and Developers	.. Petitioner
Versus	
Sultan Sirajuddin Mohammad	
Yasin and ors	.. Respondents

...

Mr.BG. Tangsali with Mr.Rushikesh Kale and Mr.Vilas Tendulkar
for the petitioner.

Mr.Rohit D. Joshi for respondent nos.3 to 6.

Mr.Rohit Sakhdeo for respondent nos.8 to 11.

CORAM: BHARATI DANGRE, J.

DATED : 22nd DECEMBER 2021

JUDGMENT:-

1 The petitioner, original defendant no.3(a) to 3(c) in a Suit filed for specific performance of contract of development agreement dated 1st October 2014, is aggrieved by the order passed below Exhibit 218 on 7th September 2021, by which the application filed by the petitioner seeking return of plaint under Order VII Rule 10 of Code of Civil Procedure read with Section 15(2) of the Commercial Courts Act, 2015 for its presentation before the Court of District Judge No.II, designated as a Commercial Court has been rejected.

The question that arises for determination in the Writ Petition is whether the dispute between the parties, as projected in the Civil Suit No.145 of 2021 filed by the plaintiffs (respondent nos.3 to 7 in the present Writ Petition) would fall within the ambit of a 'commercial dispute' as defined in Section 2(1)(c)(vii) of the Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Act of 2016.

2 In order to deal with the said issue, which arise for consideration, a brief reference to the facts involved is necessary.

3 The defendant nos.3 to 7 who are the original plaintiffs were allotted and delivered a piece and parcel of land admeasuring 650 sq.m under the 12.5% scheme of the City and Industrial Development Corporation (hereinafter referred to as 'CIDCO') vide lease agreement dated 11/11/2014. On 29/12/2014, CIDCO granted permission for transfer of the said plot in favour of a developer M/s.Dolphin Enterprises through its proprietor Shri Sultan Sirajuddin Mohd. Yasin since the plaintiffs expressed inability to develop the same on their own. Pursuant thereto, a tripartite agreement dtd. 17.3.2015 came to be registered between the original licensee (plaintiffs), CIDCO and the developer, the defendant no.1 in the Suit. The defendant no.1 in respect of the aforesaid plot, thus became the developer for the piece of land leased out to the plaintiff. The agreement to lease

dated 11/11/2014 executed between the CIDCO and the plaintiffs, as legal heirs of one Hirabai Tukaram Patil, who was owner of the property which was acquired for development by CIDCO. Thereafter, two further agreements came to be executed and the details of the same has surfaced on record through the affidavit of Estate Officer of CIDCO filed before this Court on 13/12/2021 which record the details of the three agreements as under:-

- "3 *Thereafter, 1st tripartite Agreement dated 17/03/2015 was executed between CIDCO and Nagesh Tukaram Patil, Goma Tukaram Patil. Smt.Anusaya Sitaram Bhoir, Smt.Suman Madan Mhatre and M/s. Dolphin Enterprises a proprietary firm through its proprietor Mr. Sultan Shirajuddin.*
- 4 *Thereafter, 2nd Tripartite Agreement dated 28/4/2015 was Executed between CIDCO AND M/S. Dolphin Enterprises a proprietary firm through its proprietor Mr. Sultan Shirajuddin. AND 1) M/S. Divine Homes a Proprietary Firm, through its Proprietor Mr. Arpit Sushil Agarwal (25%) 2) M/S. Dolphin Enterprises (75%) a proprietary firm through its proprietor Mr. Sultan Shirajuddin.*
- 5 *Thereafter, 3rd Tripartite Agreement dated 17/7/2018 was Executed between CIDCO AND 1) M/S. Divine Homes a Proprietary Firm, through its Proprietor Mr. Arpit Sushil Agarwal (25%) 2) M/S. Dolphin Enterprises (75%) a proprietary firm through its proprietor Mr. Sultan Shirajuddin AND 1) M/S. Mahir Buiders & Developers (50%) a partnership firm 2) M/S. Dolphin Enterprises (50%) a proprietary*

firm through its proprietor Mr. Sultan Shirajuddin Mohammad Yasin. All the agreement to lease, Allotment letters, Tripartite Agreements mentioned above were in respect of Plot no. 48, Sector-11, admeasuring to 950 sq.mtr at Taloja. The allotment was made as part of 12.5% scheme".

4 With the inter-se rights of development being transferred between the distinct parties, the original lessee instituted Special Civil Suit No.145 of 2021, revolving around the immovable property of 650 sq.m in plot no.48, Sector 11, Mauje Taloja, Panchanand Nagar, Taluka Panvel District Raigad. The Special Civil Suit impleaded the developer M/s.Dolphin Enterprises and subsequent developer M/s.Divine Homes along with the present petitioner M/s.Mahi Builders and developers along with a proforma defendant Tukaram Balu Patil and several other officer bearers of CIDCO as defendant nos.5 to 8. The plaintiffs rested his pleadings on the basis of allotment in their favour by CIDCO under 12.5% scheme floated by it. It was pleaded that they had entered into development agreement for the purpose of carrying out development of the plot and as per the said agreement, the respondent no.1 was to develop the plot to carry out its entire development after obtaining the requisite permissions from CIDCO. The necessary formalities like formation of Society, obtaining connections from the MSEDCL etc, and undertaking all necessary things for development of the plot and transferring the units to the intended purchasers was on

the developer. It was pleaded that the defendant no.1 was entitled to transfer the 50% of constructed area of building, whereas the plaintiffs were entitled to the remaining 50% of the constructed area. Based on the said agreement, it was pleaded that the plaintiffs transferred the suit plot admeasuring 950 sq.m, out of which the plaintiffs were entitled to an area of 650 sq.m, whereas the 300 sq.m area in the aforesaid plot was the entitlement of defendant no.4 Shri Tukaram Balu Patil. An agreement was entered into between defendant no.4 on one hand and the defendant no.3 M/s.Mahir Builders and Developers on 1/7/2013 for consideration of Rs.One crore and thirty three lakhs, and it was agreed that in the entire area of 300 sq.m belonging to defendant no.4, shall be transferred in favour of defendant no.3.

It was pleaded in the plaint that in the month of February 2020, the plaintiffs gained knowledge that the entire construction of the building was complete and most of the residential flats and commercial premises in form of shops were transferred. The plaintiffs were unaware of the said development and therefore, issued a notice to the defendant nos.1 to 3 and even lodged a complaint to the concerned police station to that effect. By instituting a civil suit, the plaintiff sought specific performance of the agreement and recovery of amount of Rs.89,49,960/- along with interest was also prayed for. Apart from this, the two subsequent tripartite agreements dated 28/4/2015 and 17/7/2018 executed without the knowledge of the

plaintiffs were also prayed to be cancelled and not binding on the plaintiffs.

5 The case of the plaintiff as presented in the plaint is that the plaintiffs had entered into a development agreement i.e. defendant no.1 M/s.Dolphin Enterprises, who had undertaken to develop the entire property and the tripartite agreement dated 17.3.2015 was executed between CIDCO, the plaintiff and M/s.Dolphin Enterprises, a proprietary firm. The present petitioner entered the scene when a third tripartite agreement was executed on 17/7/2018 between CIDCO and M/s.Divine Homes through its proprietor to the extent of 25% share and M/s.Dolphin Enterprises who had 75% stake and M/s.Mahir Builders and Developers, i.e. the petitioners who gained 50% share along with M/s.Dolphin Enterprises. The petitioner claimed that the plaintiffs have already entered into tripartite agreement with defendant no.1 and the property was already developed and used exclusively for commercial and trade purpose by way of transfer made in favour of various purchasers of the shop and flats. According to the petitioners, the defendant no.1 was authorized for development of entire plot and further authorized to transfer constructed building of his 50% share to intended purchaser, retaining the 50% share with the plaintiffs. According to the petitioners, the contingency i.e. if the defendant no.1 transferred more than his share, monetary compensation was to be recovered from defendant no.1 by the original plaintiffs.

Premised on this agreement between the parties, the petitioners claimed that the dispute was a commercial dispute as defined under Section 2(2)(i)(vii) of the Commercial Courts Act, 2015. They filed an application under Order 7 Rule 10 for returning the plaint to be presented to the Court in which the Suit should have been filed and/or to transfer the Suit to the Commercial Court u/s.15(2) of the Act as the valuation of the Suit is more than one crore.

6 This Application filed on 17/8/2021 by the present petitioners came to be rejected by Civil Judge, Sr. Division, Panvel by order dated 7/9/2021, the rejection being on grounds; there is no direct agreement between the defendant no.3(a) to 3(c) (petitioner herein) and the plaintiffs and secondly, the plaintiffs are not engaged in the business of sale of land on profit and therefore, the execution of development agreement in favour of defendant no.1 cannot be said to be a commercial transaction. Further recording that the Suit did not involve a commercial dispute, and executed development agreement and handing over the possession of the plot only with an intention to hand over 50% of the constructed premises for their own personal use and that of their family members and the sole act of execution of development agreement of the plot in favour of the defendant no.1 for having 50% of the constructed building, can't be termed as a commercial transaction though it may appear so, is the

finding returned by the Civil Judge, Panvel in the impugned order. The application filed by the petitioner is rejected, by recording that the intention to make profits on behalf of the plaintiffs is missing.

5 I have heard Advocate B.G. Tangsali along with Rushikesh Kale for the petitioners and Advocate Rohit Joshi for respondent nos.3 to 6 and Mr. Rohit Sakhdeo for respondent nos.8 to 11.

At the outset, it can be clearly discerned that the consideration in the present petition is whether the transaction between the parties, which is a subject matter of the suit could be considered as 'commercial dispute' so as to enable the commercial Court to entertain the Suit. The said submission revolve around Section 2(1)(c)(vii) of the Commercial Court Act 2015, which reads thus :

- 2(i) In this Act, unless the context otherwise require,
- (c) Commercial dispute means a dispute arising out of
- (i) to (vi)
- (vii) Agreements relating to immovable property use, exclusively in trade or commerce.

6 A perusal of the above quoted provision reveal that a commercial dispute would include a dispute arising out of the agreements relating to immovable property, used exclusively in

trade or commerce. The two terms which are involved in the aforesaid provision are 'relating to' and 'use' on one hand and 'trade' or 'commerce' on the other. If the dispute revolve around or relate to immovable property, that by itself does not qualify it to be classified as a commercial dispute, unless the immovable property which is the subject matter of the agreement is used exclusively in trade or commerce. The emphasis in the definition, being 'use of the immovable property, exclusively in trade or commerce'. The term 'trade' involves any exchange of money, whereas the term 'commerce' indicate the entire process of delivering products from manufacturers of consumers, which would comprise of factors like transportation, banking and insurance, warehousing etc. Thus, Commerce is a wider term of business which involve all activities performed by a business entity including buying and selling, advertising, marketing, etc. Thus, Trade has a narrower range compared to commerce which operate on a wider compass. Trade is limited to seller and buyer, whereas Commerce is a systematic economic activity capable of generating revenue. It requires support of several entities to complete the process.

The terminology used in Section 2(i)(c)(vii) is 'used' which denotes 'actually used'.

The Apex Court had an opportunity to deal with Section 2(1)(c)(vi) in determining whether the commercial Court would have jurisdiction to try a Suit revolving around an

agreement to sale/memorandum of Understanding. Authoritatively pronouncing that for invoking jurisdiction of Commercial Court, the property must be 'used exclusively', or 'being used exclusively' in trade or commerce, the intention of the legislature in using the said phraseology has been discerned in the following words :-

“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. 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”.

Further, in the very same law report, Justice R. Bhanumati, (as She was then), has further elaborated the scope of the said phrase in the following words :

"21 A perusal of the Statement of Objects and Reasons of the Commercial Courts Act, 2015 and he various amendments to Civil Procedure Code and

insertion of new rules to the Code applicable to suits of commercial disputes show that it has been enacted for the purpose of providing an early disposal of high value commercial disputes. A purposive interpretation of the Objects and Reasons and various amendments to Civil Procedure Code leaves no room for doubt that the provisions of the Act require to be strictly construed. If the provisions are given a liberal interpretation, the object behind constitution Commercial Division of Courts, viz. putting the matter on fast track and speedy resolution of commercial disputes, will be defeated. If we take a closer look at the Statement of Objects and Reasons, words such as 'early' and 'speedy' have been incorporated and reiterated. The object shall be fulfilled only if the provisions of the Act are interpreted in a narrow sense and not hampered by the usual procedural delays plaguing our traditional legal system.

22. *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”.*

7 In the backdrop of the aforesaid authoritative pronouncements when the facts involved in the present case are carefully perceived, it can be seen that the plot was allotted to the

original plaintiffs under the 12.5% scheme of CIDCO, where land was initially allotted to a villager in exchange of his farm land, the ratio of acquisition being 12.5%. (If villager owned 100 sq.m of land -- she was allotted 12.5 sq.m). The plaintiffs who are the project affected farmers and owner of 650 sq.m of land in Pendhar, Taluka Panvel, District Raigad, were extended the benefit of 12.5% floated by CIDCO, since their lands were acquired for Navi Mumbai project by CIDCO and the award involving their land was declared under the Land Acquisition Act, 1894. In the farmers whose lands were acquired for the Navi Mumbai Project, the State of Maharashtra implemented the 12.5% Scheme in the year 1994 and they were allotted land admeasuring 950 sqm in Mauje, Panch Nandannagar, Tal Panvel District Raigad in Survey No.48 on lease hold basis. The allotment in favour of the plaintiffs as reflected in the communication received by them on 14.11.1994 of CIDCO, which stipulated the terms and conditions, rights in their favour. Since the plaintiffs were unable to develop the lands themselves, they entered into a tripartite agreement on 17.3.2015 with the defendant no.1, which contemplated the entire portion of land by constructing residential and commercial galas and the plaintiffs were entitled for 50% of the constructed galas along with the parking space on ownership basis; remaining 50% residential areas and the commercial premises were allotted to the share of the developer.

The plaintiff sought specific performance of the said agreement being unaware of the subsequent agreements executed by the defendant no.1 in favour of the petitioners and one another developer. They also sought declaration to the effect that the two subsequent agreements dated 28/4/2015 and 17/7/2018 shall be cancelled and declared as not binding on the plaintiffs.

Looking to the nature of the relief sought in the plaint, it becomes apparently clear that the use of land was not exclusively for trade or commerce, since the perusal of the plaint will reveal that the plaintiffs were eligible to 50% share of the constructed residential premises and commercial galas, the premises being put to use by the plaintiffs themselves, both residential and commercial, which included 22 residential flats and six commercial premises in the name of Naga Tukaram Patil and Oma Tukaram Patil. The use of the land intended to be developed by the defendant no.1 was not exclusively for trade or commerce, but 50% of the constructed portion of the land handed over by the defendant no.1 was to be utilized by the plaintiffs for their own personal use.

In the aforesaid circumstances, requirement of 'used exclusively' in trade or commerce' in section 2(1)(c)(vii) cannot be invoked in the present case. The plaintiffs are the farmers whose land has been acquired by CIDCO and they are allotted the land under the Scheme of CIDCO and the plaintiffs by the agreement dated 17/3/2015 handed over the land leased out to

them by CIDCO for its development. The plaintiff had no intention to trade or carry out any commercial activity on the suit premises which were leased out to him by CIDCO but he intended development of the land leased out to him, but this did not involve exclusive use of the property in trade or commerce. The plaintiffs are seeking specific performance for the tripartite agreement dated 17th March 2015 where the defendant no.1 had agreed to utilize its own fund for development of the plot and was entitled for 50% of the constructed premises, by leaving remaining 50% for the plaintiffs. The defendant no.1 further executed an agreement with defendant no.2 and at a later point of time with the defendant no.3 and the plot allotted to defendant no.1 was developed and the premises were attempted to be sold off without handing over 50% agreed share to the plaintiffs. This constrained the plaintiffs to institute a Suit for specific performance of the agreement and cancellation of other agreements executed by defendant no.1 in favour of defendant nos.2 and 3.

The facts involved do not justify invocation of Section 2(1)(c)(vii) which contemplate the immovable property being exclusively used in trade or commerce. The exclusivity of the use of immovable property being the essence of Section 2(1)(c)(vii) and to bring the dispute within the folds of 'commercial dispute', cannot be traced in the given facts and circumstances and the subject matter of the suit, the learned Judge has rightly

rejected the Application filed by the petitioner seeking return of the plaint for its presentation to the Commercial Court.

.. Pertinent to note that in Ambala Sarabhai Enterprises Ltd Vs.K.S. Infraspace LLP and ors (2020) 15 SCC 585, the use of the Commercial Courts to entertain the ordinary dispute has been deprecated in the following words :

13. Having taken note of the submission, we feel that the very purpose for which the CC Act of 2015 has been enacted would be defeated if every other suit merely because it is filed before the Commercial Court is entertained. This is for the reason that the suits which are not actually relating to commercial dispute but being filed merely because of the high value and with the intention of seeking early disposal would only clog the system and block the way for the genuine commercial disputes which may have to be entertained by the Commercial Courts as intended by the law makers. In commercial disputes as defined a special procedure is provided for a class of litigation and a strict procedure will have to be followed to entertain only that class of litigation in that jurisdiction. If the same is strictly interpreted it is not as if those excluded will 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 has always existed.

36 A perusal of the Statement of Objects and Reasons of the Commercial Courts Act, 2015 and the various amendments to Code of Civil Procedure and insertion of new Rules to the Code applicable to suits of commercial disputes show that it has been enacted for the purpose of providing an early disposal of high value commercial disputes. A purposive interpretation of the Objects and Reasons and various

amendments to Code of Civil Procedure leaves no room for doubt that the provisions of the Act require to be strictly construed. If the provisions are given a liberal interpretation, the object behind constitution of Commercial Division of Courts, viz. putting the matter on fast track and speedy resolution of commercial disputes, will be defeated. If we take a closer look at the Statement of Objects and Reasons, words such as 'early' and 'speedy' have been incorporated and reiterated. The object shall be fulfilled only if the provisions of the Act are interpreted in a narrow sense and not hampered by the usual procedural delays plaguing our traditional legal system.

8 The learned counsel for the petitioner has relied upon the decision of this Court in Kanchanganga Realtors Pvt.Ltd, Nagpur Vs. M/s.Monarch Infrastructure Developers Pvt.Ltd, Nagpur and ors, AIR 2019 Bom, 102. On perusal of the facts involved and after referring to the provision, the learned Single Judge (Justice Manish Pitale) in the facts and circumstances have arrived at a conclusion that the MOU between the parties lead to a conclusion that the agreement relating to immovable property which is to be used exclusively in trade or commerce. The facts involved reveal that the parties entered into agreement to develop the property in question by undertaking construction activity or to further sell the same for commercial gains, in terms of the very object of the two parties i.e. petitioner no.1 and respondent no.1. Reliance was placed on the memorandum and Articles of Association of the petitioner no.1 as well as respondent no.1 wherein main object of both the parties was discerned, to carry

out development of the properties, to commercially exploit the same and to undertake the construction of various commercial complexes. In the given facts and circumstances, the MOU between the parties was rightly construed to be a subject matter falling within the purview of Section 2(1)(c)(vii) of the Comm Courts Act. However, the said case is distinguishable on the facts involved and do not in any way, come to the rescue of the petitioner in this case.

9 In view of the aforesaid, the Writ Petition is dismissed by upholding the impugned order.

No order as to costs.

SMT. BHARATI DANGRE, J