IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :27.04.2021

Pronounced on :25.05.2021

Coram:

THE HONOURABLE DR. JUSTICE Dr.G.JAYACHANDRAN

O.A.Nos.1681 and 1682 of 2021
and O.A.No.1 of 2021 in
C.S.No.2 of 2021

A.No.1681 of 2021:

Brigade Enterprises Limited
29th & 30th Floors
World Trade Centre, Brigade Gateway Campus,
26/1, Dr.Rajkumar Road,
Malleswaram-Rajajinagar,
Bangalore-560 055. .. Applicant/2nd defendant

/versus/

Kansai Nerolac Paints Limited
Represented by its authorised representative
Nerolac House, Ganapatrao Kadam Marg
Lower Parel, Mumbai,
Maharashtra. ..1st Respondent/plaintiff

Prayer: This application has been filed under Order XIV, Rule 8 of the O.S. Rules, r/w Order 1, Rule 10(2) read with Order VII, Rule 11(a) and Section 151 of the C.P.C., praying to strike off/delete the name of the applicant/second defendant herein from the array of parties in the aforementioned suit.

For Applicant :Mr.Satish Parasaran, Senior Counsel for Mr.P.V.Sajiv Kumar

For Respondent :Mr.Ravi Kumar Paul, Senior Counsel for Mr.G.Alwin Godwin

A.No.1682 of 2021:

Brigade Properties Private Limited,
29th & 30th Floors
World Trade Centre, Brigade Gateway Campus,
26/1, Dr.Rajkumar Road,
Malleswaram-Rajajinagar,
Bangalore-560 055. .. Applicant/3rd defendant

/versus/

Kansai Nerolac Paints Limited
Represented by its authorised representative
Nerolac House, Ganapatrao Kadam Marg
Lower Parel, Mumbai,
Maharashtra. ..1st Respondent/plaintiff

Prayer: This application has been filed under Order XIV, Rule 8 of the O.S. Rules, r/w Order 1, Rule 10(2) read with Order VII, Rule 11(a) and Section 151 of the C.P.C., praying to strike off/delete the name of the applicant/third defendant herein from the array of parties in the aforementioned suit.

For Applicant :Mr.Satish Parasaran, Senior Counsel for Mr.P.V.Sajiv Kumar

For Respondent :Mr.Ravi Kumar Paul, Senior Counsel for Mr.G.Alwin Godwin

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COMMON ORDER

(The case has been heard through Video Conferencing)

The suit filed for compensation and interest alleging that the 1st defendant, who purchased the property of the plaintiff had breached the undertaking to compensate the plaintiff, in the event, the CMDA accepts the plots area as 15.856 acres for computation of FSI.

2.The plaintiff herein as owner of the subject land, which according to title deed admeasuring 15.856 acres, entered into a Term Sheet with the third defendant on 29.06.2015 for a total consideration of Rs.550 crores. As per the Term Sheet, the purchaser Brigade Properties Private Limited (BPPL) (third defendant) includes any of its nominees or group companies or a separate Special Purpose Vehicle (SPV) formed by Brigade Enterprises Limited (2nd defendant) or its nominees and GIC, Singapore's Sovereign Wealth Fund through one of its affiliates.

Accordingly, the purchaser, Bridgate Properties Private Limited, the Third Defendant, through the 2nd defendant formed the First Defendant Company as the SPV and nominated it as the purchaser .

3.Subsequently, the plaintiff sold the subject property to the First Defendant as nominee of the Third Defendant. Since there was difference in the actual extent of land, between the title deed and the physical measurement, the purchaser agreed to pay compensation in the event CMDA approve the Building plan accepting the extent of land as found in the sale deed (15.856 acres) for computing FSI. The said contingent arose because, the plaintiff as per their title document i.e the sale deed of the year 1966 purchased 17 acres of land. Out of it, 0.81 acres land was acquired for Veeranam Drinking Water Project by the State Government and 0.32 cents acquired for widening of IT Expressway by the National Highways Department. So, the plaintiff sold to the first defendant land ad-measuring 15.856 acres. However, physical measurement of the property when made only 15.74 acres was available. So, it was agreed by the parties if CMDA accepts the measurement as found in title deed for FSI, compensation will be given to the plaintiff. Also, the purchaser agreed that the vendor (the plaintiff) will be permitted to peruse all the correspondence regarding the plan approval.

4.As per clause 2 and 3 of the undertaking dated 30/03/2016 given by the first defendant, which is the special purpose vehicle created by the 2nd and 3rd defendants, it is agreed to pay compensation to the plaintiff in the following manner:-

> "2.The Purchaser shall pay a compensation ("Compensation") to the Vendor towards the procurement of maximum permissible floor space index (FSI) for the development of the Plot Area in the manner set out below:
>
> (i)Compensation of Rs.12,13,74,500/- (Rupees Twelve Crores Thirteen lakhs Seventy Four Thousand Five Hundred Only) shall be paid by the Purchaser to the Vendor if the Purchaser is permitted, by the planning authorities, to utilize the entire Plot Area measuring 15.856 acres for the computation of FSI;
>
> (OR)
>
> (ii)Proportionate Compensation shall be paid by the Purchaser to the vendor if

purchaser is permitted by the planning authorities, to utilize only a portion of the Plot Area measuring over 15.51 acres but below 15.856 acres for the computation of FSI. The applicable formula to calculate the proportionate Compensation is as follows:-

Proportionate Compensation =(sanctioned land area -15.51 acres) x Rs.12,13,74,500/-
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0.345 acres

3.Notwithstanding anything contained herein, Parties expressly agree that if the Purchaser is permitted to utilize only a portion of the Plot Area measuring 15.51 acres or less for the computation of FSI then no Compensation or any other kind of cost, expense or reimbursement will be payable by the Purchaser to the Vendor. It is clarified that the payment of Compensation to the Vendor is contingent upon the Purchaser having obtained a planning permit from the Chennai Metropolitan Development Authority and a building plan approval from the Corporation of Chennai(both approvals together shall be referred to as "Plan Sanction") by being permitted to utilize either the entire Plot Area or a portion of the Plot Area measuring over and above 15.51 acres for the computation of FSI."

5. In the plaint it is averred that, though the first defendant agreed to permit the plaintiff to peruse all the correspondence regarding their plan approval, they have not disclosed to them about their application for

building plan sanction. Later, the plaintiff came to know that the defendant had shown 5.454 acres only for FSI and not 15.856 acres, thereby the defendants have deprived the plaintiff getting the compensation as agreed by the first defendant vide, agreement dated 30.03.2016.

6.The suit has been filed as a commercial dispute invoking Section 2(1)(c)(vii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 (Act 4 of 2016). Along with the suit, the plaintiff has also filed an application in O.A.No.1 of 2021 for interim injunction. On receipt of the suit summons, the 2nd and 3rd defendants have entered appearance and filed applications in O.A.Nos.1681 and 1682 of 2021, to strike off/delete the name of the applicants / the second defendant and the third defendant respectively, from the array of parties in the aforementioned suit.

7.According to defendants 2 and 3, the suit property was sold by the plaintiff to the first defendant company on 30.06.2016 which was incorporated during the month of September 2015. As far as defendants 2 and 3, who are the applicants herein are concerned, they are only shareholders of the first defendant company. The Brigade Enterprises Limited (applicant in A.No.1681 of 2021) is the holding company of the Brigade Properties Private Limited (Applicant in A.No.1682 of 2021). The property was purchased by the first defendant and developed by the first defendant as commercial and residential complex. The transaction is only between the plaintiff and the first defendant. The letter dated 30.03.2016 agreeing to pay compensation to the plaintiff was issued only by the first defendant. There is no privity of the contract between the plaintiff and defendants 2 and 3. Therefore, the plaint as against defendants 2 and 3 has to be strike off/delete.

8.The learned Senior Counsel appearing for the applicants also argued that the suit is not maintainable as a commercial dispute and it has to be tried only as an ordinary suit by the Regular Court and not by the Commercial Division of the High Court.

9.The defendants have also filed counter in the application in

O.A.No.1 of 2021 filed seeking interim injunction. The plaintiff herein has filed a common re-joinder to the counter filed in O.A.No.1 of 2021.

10. According to the learned Senior Counsel appearing for defendants 2 and 3, the suit is not maintainable before the Commercial Division of this Court, since Section 2 (1)(c)(vii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016) is not applicable to the facts of the present case. The learned Senior Counsel appearing for the defendants would submit that the suit has to be taken from the Board of Commercial Division and to be listed before the Regular Court. He heavily rely upon the judgment of the Hon'ble Supreme Court rendered in ***Ambalal Sarabhai Enterprises Limited v. K.S.Infraspace LLP and another reported in (2019 SCC Online SC 1311) and few other judgments.***

11.As far as the applications in O.A.Nos.1681 and 1682 of 2021 are concerned, he submitted that the applicants are not the proper and necessary parties to the suit. There is no privity of contract between defendants 2 and 3 and the plaintiff. Just being the holding company and the subsidiary company having shares in the first defendant company, it will not make defendants 2 and 3 a necessary party to the proceedings.

12.In response to the above submissions of the applicants, the learned Senior Counsel appearing for the plaintiff/respondent submit that as per the term sheet, the first defendant is a Special Purpose Vehicle (SPV) nominated by the third defendant company, which is the subsidiary of the second defendant company. Though defendants 2 and 3 are different legal entity in the eye of law, their composition and their holding in the first defendant company a SPV formed by the second defendant for the specific purpose namely to promote the suit property and as nominee of the third defendant purchaser, the first defendant in true sence have no independent existence. Therefore defendants 2 and 3 are proper party for the proceedings. Referring the term sheet, which was entered by the plaintiff with the third defendant where there is reference about the second defendant and the Special Purpose Vehicle (SPV) to be formed by the second defendant; the learned Senior Counsel for the plaintiff submitted that defendants 2 and 3 cannot disassociate themselves from the undertaking given by the first defendant.

Determination of jurisdiction:

13.Before adverting to the issue of deleting/strike off the plaint as against defendants 2 and 3, the jurisdiction of the commercial division has to be determined, since the preliminary objection regarding maintainability of the suit before the Commercial Division raised and substantial argument made.

14.Section 2(1)(c)(vii) of the Commercial Courts Act, reads as below:-

> "2(1)(c)(vii): Agreements relating to immovable 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 immovable property or for realisation of monies

out of immovable property given as security or involves any other relief pertaining to the immovable property.

15.When the interpretation of this Section came before the Hon'ble Supreme Court in *Ambalal Sarabhai Enterprises Limited case cited supra*, one of the Hon'ble Judges after considering the pleadings and the rival submissions held as below:-

> *"15........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.*
>
> *16.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."

16.While concurring the above view, the other Hon'ble Judge concluded her view in the following observations :-

"*41.A perusal of the Statement of Objects and Reasons of the Commercial Courts Act, 2015 and the various amendments to the 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 the 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 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.*

42.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."

17.The Hon'ble Supreme Court, on facts found that the plaintiff had not placed any record to show that on the date of agreement, the subject property was used in trade or commerce. Therefore observed that,

> *“44........ As rightly pointed out by the High Court, there is nothing on record to show that at the time when agreement to sell came to be executed in 2012, the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2(1)(c) of the Act. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court.”*

18.From reading of the above judgement, this Court finds that in that particular case, in the entire pleadings, there is no reference to the nature of the land and the type of the use it was put as on the date of agreement or on the date of the sale deed/memorandum of understanding or as on the date of the suit. The relief sought for in the said suit was in the nature of specific performance on the terms of the memorandum of understanding, without reference to the nature of the use of the immovable property in trade or commerce as on the date of the suit. Under these circumstances, the Hon'ble Supreme Court has held that when there is nothing on record to show that at the time, when the agreement to sale came to be executed in the year 2012, the property was being exclusively used in trade or commerce so as to bring the dispute within the ambit of Sub Clause (vii) of Section 2 (1)(c) of the Commercial Courts Act.

19.In the present suit, the immovable property, which is the subject matter, was used by the plaintiff for manufacturing and marketing the product by name earlier known as Goodlass Nerolac Paints, later taken over by Japan Company and renamed as M/s Kansai Nerolac Paints Limited. At para 9 of the plaint, it is specifically stated that the operation at the factory in the schedule property was not viable, so the plaintiff opted to close the operation and shift to Hosur and Gujarat. Subsequently, the plaintiff closed the factory and ceased all the manufacturing and commercial operations in the schedule property. Thereafter, they have finally sold the property to the first defendant for a specific consideration.

20.As far as the jurisdiction of this Court, admittedly, at the time of transaction, the plaintiff has ceased his operation as a manufacturer. But then, it does not mean that it has lost the character of the immovable property used exclusive in trade or commerce. If the clarification of the Hon'ble Supreme Court in paragraph No.42 of the judgment in *Ambalal Sarabhai Enterprises Limited case* along with the explanation (a) is read together, the test should be how the immovable property was used on the date of agreement or on the date of sale. In the instant case, prior to the agreement the property was used exclusively for trade and commerce viz manufacturing and marketing paints. The land owner ceased production, since it was not viable. Just because the production ceased, the character of the property for which it was used will not change. The Apex Court in *Ambalal* case, had amply clarified, that how the immovable property was used in the past is relevant and not how it is to be used in future. Records are available to show the subject land was exclusively used for trade and commerce and not for any other purpose. The relief in the suit is compensation pertaining to the immovable property which was used exclusively for trade and commerce.

21.For the above said reasons, this Court is of the view that the suit has be tried as a commercial suit. It satisfies all the parameters required to determine it as a commercial dispute. The jurisdiction of this Court is accordingly determined as commercial dispute under Section 2 (1) (c) (vii) read with the explanation (a).

22. <u>**O.A 1681/2021 and 1682 /2921**</u>

In the instant case, before executing the sale, the term sheet was entered between the third defendant and the plaintiff on 29.06.2015 wherein the third defendant as a purchaser had given inclusive meaning for the term 'purchaser' which includes the special purpose vehicle formed by the second defendant for the purpose of the transaction. The parties to the term sheet are referred as below:-

<u>Seller:</u> Kansai Nerolac Paints Limited having its registered office situated at Nerolac House, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013, Maharashtra, India (Seller).

Purchaser: Brigade Properties Private Limited (BPPL) having its registered office situated at 29th floor, WTC Bangalore, Brigade Gateway Campus, Malleshwaram-Rajajingar, Bangalore-55, Karnataka, India (Purchaser). Purchaser to include any of its nominees or Group Companies or a separate SPV formed by Brigade Enterprises Ltd., or its nominees and GIC, Singapore's Sovereign Wealth Fund, through one of its affiliates.

23.Though the sale deed was only between the first defendant and the plaintiff, the other two defendants, who are the holding company and the subsidiary of the holding company cannot claim that they are not necessary party to this proceedings, for the singular reason, the first defendant is the Special Purpose Vehicle (SPV) Company formed for the purpose of the project promotion. As creator and shareholder of the said SPV company, defendants 2 and 3 are proper parties to respond. The first defendant is the nominee of the third defendant with whom the plaintiff entered into the term sheet. The transfer of property is the outcome of the said term sheet. If there is any violation of the term sheet, terms of the sale deed or offer made by the first defendant to the plaintiff, The other defendants as creator of the SPV and nominator are proper parties to defend the action or failure of the SPV.

24.According to the learned Senior Counsel appearing for the applicants/defendants 2 and 3, the first defendant is an independent legal entity and the privity of the contract is only between the first defendant and the plaintiff. Therefore, the attempt of the plaintiff to lifting the corporate veil is impermissible.

25.This Court is not able to accept the said submission for the simple reason that the first defendant is a creature and out come of the term sheet dated 29.06.2015 entered between the plaintiff and the third defendant, who is the subsidiary company of the second defendant. The creation of the first defendant and the subsequent transaction between the plaintiff and the first defendant are not independent to the second and third defendants. Defendants 2 and 3 were always put in loop by the first defendant and the plaintiff regarding the progress of the transaction. The learned Senior Counsel appearing for the plaintiff has pointed out the e-mail correspondences between the parties, which show that the defendants 2 and 3 were monitoring and supervising the progress of the project carried through the first defendant. After the term sheet with the plaintiff, the subsequent nomination of the first defendant to carry on the project as Special Purpose Vehicle (SPV) make defendants 2 and 3 proper party for the adjudication of the suit.

26.In *Udit Narain Singh Malpahria -vs- Additional Member, Board of Revenue, Bihar, (AIR 1963 SC 786),* the distinction between " necessary party' and 'proper party' explained as under:-

> A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

27.Therefore, this Court holds that, since, the applicants are proper party whose presence is necessary for a complete and final decision on the question involved, the applications in O.A.Nos.1681 and 1682 of 2021 are dismissed.

Sd/-G.J.J
25.05.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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