

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION No. 7596 OF 2021

VAISHALI
ANIL
TIKAM

Pankaj Amrutlal Navlakha

...Petitioner

Vs.

**Rajkamal @ Rajesh Chandanmal Luniya
and Ors.**

...Respondents

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Mr. Mandar Limaye for Petitioner

Mr. S.C. Wakankar for Respondents

CORAM : SANDEEP K. SHINDE, J.

RESERVED ON : 29th AUGUST, 2022.

PRONOUNCED ON: 9th NOVEMBER, 2022

P.C.:-

1. Petitioner-Defendant No.1 in Special Civil Suit No. 6 of 2017, moved an application under Order 7 Rule 10 of the Code of Civil Procedure, seeking order to return the plaint for presenting before the appropriate Court having jurisdiction to try and entertain the suit, on the ground that dispute between the parties, was not 'commercial dispute' within the meaning of Section 2(c) of the Commercial Courts Act, 2015.

Facts in brief, are as under:

2. The Plaintiffs vide Development Agreement and Power of Attorney, both dated 30th June, 2021, entrusted the suit property to the Defendants and Amrutlal Navlakha for development upon certain terms

and conditions. One of the terms was that, after developing the property, Defendants were to hand over 40% of aggregate constructed area to the Plaintiffs. Plaintiffs' case is, nearly for 8 years, the Defendants did not bother to even obtain, building permission, although, development was to be completed within three years i.e. on or before 29th June, 2014. Thus, for inaction on the part of the Defendants, plaintiffs cancelled the development agreement and power of attorney on 15th July, 2014 and caused notice in newspaper on 5th July, 2014. Whereafter, suit was instituted in January, 2017, seeking cancellation of development agreement, injunction and for damages. Although, the Defendants were duly served, they did not file written statement/s. As a result, the suit was ordered, to proceed without, written statement.

3. Pending suit, the Defendant No.1 moved the application under Order 7 Rule 10 of CPC on 18th February, 2022, contending that dispute between the parties is not 'commercial dispute', within the meaning of Section 2(c) of the Commercial Courts Act, 2015 and, therefore, plaint be returned to the Plaintiffs for presenting before appropriate Court, having jurisdiction to try and entertain the suit.

4. The Learned Trial Court rejected the said application on 28th September, 2022.

5. Feeling aggrieved by it, the Defendant No.1 has preferred this

petition.

6. Heard learned counsel for the parties. Perused the plaint, development agreement and power of attorney.

7. The controversy in the matter is, whether suit filed by the Respondent is, a commercial suit. Herein, vide development agreement dated 30.6.2011 plaintiff inducted defendants in the suit property as a licensee from making construction therein. Vide clause 5 (a) of the Development Agreement, defendants were authorized to make construction as permissible and in accordance, with the building permission and thereupon sale shops, commercial units and the flats constructed therein. It was agreed that, defendants would hand over 40% of aggregate constructed area to the Plaintiffs in lieu of development rights given to them. As such, plaintiffs and defendants had agreed, to share development potential of the land in question, in ratio of 40:60. The clause No. 3 (a) of the Development Agreement fortifies this fact. It was then agreed under Clause No. 8 that defendants would complete the construction – development before 29th of June, 2014. Plaintiffs pleaded that the Defendants failed to make the development and even did not bother to secure the development permission. Under these circumstances, defendants instituted the suit. Therefore, dispute between the parties, as it appears arose out of development agreement relating to construction of

building. Thus, having regard to case pleaded by the Plaintiffs, the learned Trial Court held that the contract relates to construction and infrastructure of the building and was covered by clause (iv) of clause (c) of Section 2 (1) of the Commercial Courts Act, 2015 and there was no question of invoking sub-clause (vii) of Clause (c) of Section 2 (1) of the Act. As against this, it is defendants' case that at the time of executing development agreement suit property was open piece of land and not being used exclusively in trade or commerce. Therefore, the dispute was not a commercial dispute within the meaning of Act of 2015. . On this ground, the defendants sought return of the plaint.

8. I have perused the case pleaded by the plaintiffs and the development agreement. Having regard to pleadings in the plaint and recitals in the development agreement, the said agreement on the face of it, is a 'construction contract' within the meaning of clause (vi)). In the case of **Vaijanath Dayanand Kale (2021 (3) Mh.L.J.202)**, this Court has held that, jurisdiction depends on the case pleaded before the Court by the Plaintiffs and such a case is to be determined on the averments made in, as also documents produced with it. The case pleaded by the Plaintiffs here indicates that dispute between the parties arose out of construction and infrastructure contract and would cover by clause (vi) of section 2 (1) (c) of the Commercial Courts Act, 2015. Although reliance was sought

to be placed on the decision of the Apex Court in the case of **Ambalal Sarabhai Enterprises Ltd. [(2019) 13 SCALE 575]**, it may be stated that in that case the Hon'ble Supreme Court seized of the dispute with regard to execution of mortgage deed in respect of an immovable property that was not being used for trade or commerce. Therefore, the Hon'ble Supreme Court relying upon section 2(1) (c) (vii) of the Commercial Courts Act, came to a conclusion that suit would not qualify as a commercial suit. The supreme Court was not dealing with the case, involving construction over the suit property. Therefore, the decision in the Ambalal Sarabhai, does not help the petitioners.

9. That even otherwise, since the challenge involves interlocutory order passed by the Commercial Court, concerning the jurisdiction, yet, having regard to facts of the case, there is no reason to treat Petitioner's case as special case for making exception in interfering in the impugned order in the writ jurisdiction.

10. In the result, the petition is dismissed.

[SANDEEP K. SHINDE, J.]