

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

**INTERIM APPLICATION NO. 557 OF 2022
IN
COMMERCIAL SUIT NO. 181 OF 2018**

Rajesh Mahadev Mane & Ors. ... Applicants/Orig. Defendant
Nos.1, 3, 4, 6 to 9, 11 and 12)

In the matter between

Sanghvi Premises Pvt. Ltd. ... Plaintiff

Versus

Rajesh Mahadev Mane & Ors. ... Defendants

Mr. Girish Godbole a/w Ms. Namrata Pandit and H.G. Dharmadhikar for the Applicant/Defendant Nos.1, 3 to 12).

Mr. Naushad Engineer a/w Mr. Aditya Shiralkar, Ms. Riya Makwana and Ms. Apeksha Khetan i/b I.C. Legal for the Plaintiff.

Mr. Pramod Patil a/w Mr. Ajit Hon, Ms. Komal Mestry for Defendant No.13.

Ms. Lalita Phadke for the Applicant/Intervenor in CHSCD/178/2019.

CORAM : R.I. CHAGLA, J.

DATED : 26th FEBRUARY, 2022

ORAL JUDGMENT :

1 Heard Mr. Girish Godbole, learned Counsel appearing for the Applicant/Original Defendant Nos.1, 3, 4, 6 to 9, 11 and 12 and Mr. Naushad Engineer, learned Counsel appearing for the Plaintiff.

2 By this Interim Application, the Applicant has sought an order declaring that the dispute raised in the present Suit is not a commercial dispute under Section 2 (1)(c) of Commercial Courts Act, 2015.

3 Mr. Girish Godbole has submitted that the issue arising in the above Suit is for specific performance of permanent alternate accommodation agreements and/or agreement contained in consent which is contended by the Plaintiff to be valid, subsisting and binding upon the Plaintiff and Defendant Nos.1 to 12. He has submitted that the Suit has been incorrectly filed as a Commercial suit as the Suit concerns a surrender of tenancy of the Defendants under the permanent alternate accommodation agreements. He has submitted that in the plaint, the clause dealing with the jurisdiction of this Court has not justified the filing of the Suit under the Commercial Courts Act, 2015. In fact, from the averments in the plaint, it is clear that the Plaintiff-Developer is aggrieved by the Defendants failing to perform their obligations under the permanent alternate accommodation agreements by surrendering their tenancy. He has submitted that in the jurisdiction paragraph i.e. paragraph 49 of the Plaint it is only stated that Defendant Nos.1 to 12 resides in Mumbai, property is located in Mumbai, the suit premises are located in Mumbai, the permanent alternate accommodation agreements were entered into in Mumbai and is to be performed in Mumbai. The

entire cause of action had arisen in Mumbai. This Court has jurisdiction to entertain, try and dispose of the Suit.

4 Mr. Godbole has further submitted that the Plaintiff is not claiming any relief against Defendant No.13 who is the owner of subject property and had granted development rights to the Plaintiff in respect thereof under the registered development agreement dated 19.04.2007. He has submitted that the prayers in the Suit make it clear that the Plaintiff has only sought prayers against Defendant Nos.1 to 12 for vacating their respective suit premises under the permanent alternate accommodation agreements and the agreement contained in consent and/or handover quiet, vacant and peaceful possession thereof to the Plaintiff. He has submitted that prayer clause (c) cannot be read independently from prayer clauses (a) and (b) in the plaint. Prayer Clause (c) which seeks a permanent order and injunction restraining the defendant Nos.1 to 12 from in any manner interfering with and/or creating any impediment in redevelopment of the subject property in any manner whatsoever, has to be read in light of prayer clauses (a) and (b) which is for specific performance of the permanent alternate accommodation agreements in order for Defendant Nos.1 to 12 to surrender their tenancy by handing over possession of the suit premises to the Plaintiff.

5 Mr. Godbole has further referred to Section 2(c) where “commercial dispute” has been defined to be a dispute arising out of the disputes mentioned in sub-clauses (i) to (xxii). He has submitted that the Plaintiff had initially contended that the Suit concerned a dispute which according to them was a commercial dispute and falling within the definition of Section 2(c)(vii), namely agreements relating to immovable property used exclusively in trade or commerce. He has submitted that the permanent alternate accommodation agreements cannot be considered to be agreements relating to immovable property used exclusively in trade or commerce. He has relied upon the decision of the Supreme Court in *Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and another*¹. He has submitted that the Supreme Court in that decision had held that it is necessary for Courts to carefully examine and entertain only disputes which actually answers the definition “commercial disputes” as provided under the Act. In the case before the Supreme Court, the agreement between the parties was a mortgage deed and it was held that neither the agreement between the parties refers to the nature of the immovable property being used exclusively for trade or commerce as on the date of the agreement nor there was any pleading to that effect. The relief sought in the Suit was for execution of the

1 (2020) 15 SCC 585

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. The Supreme Court accordingly held that the High Court was justified in its conclusion arrived at that the Suit was not a commercial Suit and the commercial Court was required to return the plaint. He has submitted that the Supreme Court has considered the statement of object and reasons of the Commercial Courts Act, 2015 which shows that it was enacted for the purpose of providing an early disposal of high value commercial disputes. A purposive interpretation of the statement of objects and reasons and various amendments to the Civil Procedure Code leaves no room for doubt that the provisions of the commercial Courts 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. The object shall be fulfilled only if the provisions of the Commercial Courts Act are interpreted in a narrow sense.

6 Mr. Godbole has also relied upon a decision of the Gujarat High Court, in *Vasu Healthcare Private Limited vs. Gujarat Akruti TCG*

*Biotech Limited*². He has submitted that in that case the State Government had allotted the land in question and entered into an agreement with Respondent No.1 therein, who was the developer to develop the land for Biotech Park. The Original Plaintiff invested huge sum and entered into the contract with the Original Defendant No.1. It was the Original Plaintiff's case that for number of years nothing was done and the plots which were allotted to the Original Defendant No.1 were not developed and accordingly the Original Plaintiff had filed the Suit before the Commercial Court for the decree for specific performance/enforcement of the subject contract and claiming that the Defendants have committed breach and/or default in completing performance and fulfillment of their contractual obligations in respect of the subject property. It was contended by the Original Plaintiff that the Suit concerned agreements relating to immovable property used exclusively in trade or commerce and thus fell under Section 2(c)(vii) of the Commercial Courts Act. Since the land had been allotted and for which Defendant No.1 was developing the Biotech Park, it could be stated that the immovable property/ land/plots were being used exclusively in trade or commerce. The Gujarat High Court held that for a dispute to fall under clause 2(c) to be a "commercial dispute" for Commercial Court to have

2 AIR 2017 Gujrat 153

jurisdiction, it requires to fall within any of Clause 2(c) of the commercial Courts Act. It was not a case of the Original Plaintiff that the case fell within Section 2(c)(vii) of the Commercial Courts Act. From the dispute between the parties at the time of filing of the Suit, the immovable property/plots which is the subject matter of agreements between the parties cannot be stated to be agreements relating to immovable property used exclusively in trade or commerce. The agreement between the parties contemplated that after getting the plot on lease from G.I.D.C., the same was required to be thereafter developed by Original Defendant No.1 and after providing all infrastructure facility, the same was required to be given to the other persons like the Original Plaintiff. The case of the Original Plaintiff was that the Original Defendant No.1 had failed to develop the plots and accordingly the Suit for specific performance of the agreement had been filed. The Gujarat High Court adopted a literal and strict interpretation of Section 2(c)(vii), namely the words “immovable property used exclusively in trade or commerce” to mean must be “actually used” or “being used”. It was held that if the legislature were to expand the scope, in that case the phraseology used would have been different as per example “likely to be used” or “to be used”. Accordingly, the Gujarat High Court did not accept that the Suit was correctly filed under the Commercial Courts Act and that the agreement between the

Original Plaintiff and Original Defendant No.1 cannot be said to be an agreement relating to immovable property used exclusively in trade or commerce.

7 Mr. Godbole has submitted that in the present case the Suit concerns specific performance of the permanent alternate accommodation agreements and not concerning the development agreement between the Plaintiff and Defendant No.13. There is no agreement between the Plaintiff and Defendants involving the immovable property for exclusive used in trade or commerce neither is the said property used exclusively for trade or commerce. The suit premises is used solely for residential purpose and are not used exclusively in trade or commerce, as per the claim of the Plaintiff. Thus, the dispute arising in the present Suit is relating to the purported permanent alternate accommodation agreements and for surrender of the Applicant's tenancy in their residential units/suit premises.

8 There is an affidavit-in-reply filed on behalf of the Plaintiff which makes it clear that the Plaintiff has been advised that the present Suit is defined as a commercial dispute under Section 2(c)(vi) and 2(c)(xi) of the Commercial Courts Act. The Suit is one for ensuring the compliance and performance of the development agreement by carrying

out construction work.

9 Mr. Naushad Engineer, learned Counsel appearing on behalf of the Plaintiff has submitted that the cause of action in the present Suit is concerning an agreement of construction work. He has submitted that it has been averred by the Plaintiff that the Plaintiff has been ready and willing to perform all its obligations under the permanent alternate accommodation agreements as also the development agreement and the rectification agreement and take various steps in pursuance thereof. He has submitted that the prayers in the suit cannot be looked at as only concerning a surrender of tenancy by the Defendants under the permanent alternate accommodation agreements. It goes further as the permanent alternate accommodation agreements are necessary concomitant to the development agreement to enable the developer to redevelop the said property and is necessary an aid in such redevelopment. In fact this is clear from the prayers (a) to (c) which are to be read together and particularly in prayer clause (c) where a permanent order of injunction has been sought against defendant Nos.1 to 12 from interfering with and/or obstructing and/or creating any impediment in redevelopment of the said property.

10 Mr. Engineer has further submitted that in redevelopment of the suit property, the Plaintiff had obtained the consents from the occupants including the Applicants and entered into permanent alternate accommodation agreements. Under the agreement contained in consent and/or permanent alternate accommodation agreement, the occupants had agreed to co-operate in the redevelopment and agreed to surrender possession of their premises. Defendant Nos.1 to 12 by not performing their obligation under the agreement contained in consent and/or permanent alternate accommodation agreement have resulted in the Plaintiff being unable to demolish the subject property and proceed with the redevelopment. The development agreement concerns area sharing between the owners, the developers and occupants and thus, the Suit relates to the development agreement as well as the permanent alternate accommodation agreements and seeks execution of the same. The Suit is one for ensuring compliance and performance of the development agreement by carrying out construction work. The suit cannot be restricted to one relating to immovable property but is for ensuring the performance of the construction under the development agreement. He has referred to the necessary averments in the Plaint in this context. The Plaintiff has also averred in the plaint that the Plaintiff is ready and willing to demolish the remaining structures, including the suit premises

of Defendant Nos.1 to 12 and construct new buildings as a part of the redevelopment in discharge of its obligations. Further, that Defendant Nos.1 to 12 are bound and liable to comply with their obligations under the permanent alternate accommodation agreements and extend total co-operation in the redevelopment envisaged by the development agreement dated 19.04.2007.

11 He has placed reliance upon the decision of a single Judge (Gupte, J.) of this Court in *Vajinath Dayanand Kale vs. Nerkar Properties LLP*³. In the said decision the dispute between the parties arising under an agreement by which the Original Defendants agreed to transfer their development rights, for construction of a building to the Plaintiffs in consideration of the latter sharing the development potential had been considered. It was held in that case that agreement, on the face of it, was prima facie a construction contract; it transfers development rights by way of construction of a building and sale of premises therein in a certain stated proportion as between the parties. The Defendants therein had raised the contention that the transaction did not come within the purview of a “commercial dispute” defined under Clause (c) of Section 2(1) of Commercial Courts Act, 2015. The contention of the Defendants was that the building proposed to be constructed was not

3 2021 (3) Mh.L.J. 202

used exclusively in trade or commerce as required by sub-clause (vii) of Clause (c) of Section 2(1); so also, the transaction was not a construction or infrastructure contract covered by sub-clause (vi) of Clause (c) of Section 2(1) of the Commercial Courts Act. It was further held by the Single Judge of this Court that the development envisaged by the parties is, admittedly, by way of construction of a building. The contract was for construction of a building. The Single Judge of this Court considered the judgment of the Supreme Court in *Ambalal Sarabhai Enterprises Limited* (supra) which has also been relied upon by Mr. Godbole for the Defendants to be relating to the content and scope of sub-clause (vii) of Clause (c) of Section 2(1) of the Commercial Courts Act and thus had no application to the facts in the case before this Court. It was further held by the Single Judge that any construction contract, whether it is for residential or commercial use, is nonetheless, in the first place, a construction contract and was to be covered as such by sub-clause (vi) of Clause (c) of Section 2(1) of the Act so as to give rise to a commercial dispute. Placing reliance upon this decision, Mr. Engineer has submitted that in the present case it was not required to consider whether the contract was for residential or commercial use. However, what is necessary to consider is that the dispute concerned a construction contract as it is for redevelopment of the subject property and hence covered by

sub-clause (vi) of Clause (c) of Section 2(1) of the Commercial Courts Act. He has accordingly submitted that the present suit has been correctly filed as a commercial suit under the Commercial Courts Act.

12 Having considered the submission of the learned Counsel for the parties, in my view what is necessary to consider apart from specific performance of the permanent alternate accommodation agreements sought by the Plaintiff, is the purpose for filing of the Suit which is clearly for redevelopment of the subject property. In fact under the clauses of the permanent alternate accommodation agreements which are set out in paragraph 13 of the plaint, in particular Clauses 3, 4, 14 and 22 as well as the Clause concerning the undertakings and covenants of the occupants which include the Applicants/Defendants herein, it is provided that the occupants shall co-operate in all manners with the developer being the Plaintiff herein, in the scheme of redevelopment of the subject property. In fact, the Defendants have accorded their irrevocable and unconditional consent for demolition of the existing premises and the existing structure and for redevelopment of the subject property and construction of tenant building and buildings thereon. They have undertaken not to interfere and/or disturb with the demolition of the existing premises and existing structure and construction of tenant building and/or buildings of the subject property. They have also extended their co-operation for the

purpose of demolition of the existing structure as well as redevelopment of the new building. It thus can be seen from these clauses that the permanent alternate accommodation agreement cannot be confined to a mere surrender of tenancy. It goes much further and in fact is a concomitant and/or aid in the redevelopment/construction of the new building. Mr. Godbole has sought to contend that if the contention of Mr. Engineer on behalf of the Plaintiff that the present dispute is concerning a construction contract, such interpretation would open floodgates as it would apply to all flat purchase agreements. Such contention of Mr. Godbole cannot be accepted. Flat purchase agreements are a mere agreement entered into between the purchaser and the seller for sale of the flat and it does not concern redevelopment/construction of a new building which is the purpose for entering into permanent alternate accommodation agreements.

13 The decisions relied upon by Mr. Godbole namely *Ambalal Sarabhai Enterprises Limited* (supra) which is a decision of the Supreme Court and the decision of the Gujarat High Court in *Vasu Healthcare Private Limited* (supra) were concerned with the issue as to whether the disputes related to immovable property used exclusively in trade or commerce. In the present case it is made clear in the affidavit-in-reply to the Interim Application that the Plaintiff has filed the present Suit as a

Commercial dispute under Section 2(c)(vi) i.e. a dispute concerning a construction contract. One must consider that the Supreme Court and Gujarat High Court have both held that the provisions of the Commercial Courts Act cannot be given a liberal interpretation and that they must be strictly construed as the object behind constitution of Commercial Division of Courts is for putting the matter on fast track and speedy resolution of commercial disputes, will be defeated if the provisions of the Act are interpreted in a narrow sense. In my view, in the present case by adopting such an strict interpretation to Section 2(c)(vi) of the Act, the Suit does concern a dispute arising out of a construction contract. Further, the words used in Section 2(c)(vi) are “construction and infrastructure contracts, including tenders”. This has been construed by this Court in the decision relied upon by Mr. Engineer namely *Vaijnath Dayanand Kale* (supra) that any construction contract, whether it is for residential or commercial use, is nonetheless, in the first place, a construction contract and would be covered as such by sub-clause (vi) of clause (c) of Section 2(1) of the Commercial Courts Act so as to give rise to a commercial dispute. It was also held by the Single Judge in the said decision that the case decided by the Supreme Court in *Ambalal Sarabhai Enterprises Limited* (supra), essentially considered the content and scope of sub-clause (vii) of Clause (c) of Section 2(1) of the Commercial Courts

Act and thus, has no application to the facts of that case. This would be the similar position here as the Plaintiff has restricted its case to a dispute concerning a construction contract under sub-clause (vi) Clause (c) of Section 2(1) of the Commercial Courts Act. The facts of the present case concern the redevelopment of the building for the occupants to be housed and for which the permanent alternate accommodation agreements were entered into. Thus, the cause of action in the present suit clearly concerns a dispute arising out of a construction contract under Section 2(c)(vi) of the Commercial Courts Act. Thus, the Suit has been correctly filed as a Commercial Suit under the Commercial Courts Act.

14 Considering that this Court is a Court under the Commercial Division and thus a Commercial Court under the Commercial Courts Act, 2015, this Court will have jurisdiction to adjudicate the dispute between the Plaintiff and the Defendants.

15 Accordingly, the relief sought in the Interim Application taken out by the Applicant/Defendants for declaring that the Suit is not a commercial dispute in terms of Section 2(1)(c) of Commercial Courts Act, 2015, is rejected.

(R.I. CHAGLA, J.)

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