

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

GA No. 1 of 2023

With

GA (COM) No. 2 of 2024

In

CS (COM) No. 553 of 2024

(Old No. CS 213 of 2023)

Abdul Rashid

Versus

Bidhan De Sarkar and Anr.

Mr. Aritra Basu
Mr. Souradeep Banerjee
Ms. Sanjana Sinha
Mr. Abhisek Ghosh

... For the plaintiff.

Mr. Ratul Das
Mr. Sarbajit Mukherjee
Md. Sayeed Khan

... For the defendant no.1.

Ms. Srijani Mukherjee

... For the state.

Hearing Concluded On : 17.02.2025

Judgment on : 07.03.2025

Krishna Rao, J.:

1. The plaintiff has filed an application being G.A. No. 1 of 2023 praying for interim order. The defendants have filed an application being G.A. (COM) No. 2 of 2024 praying for dismissal of the suit.
2. The plaintiff is engaged in the business of real estate developer. The defendants are the owners of the Premises No. 42C and 42D, Serpentine Lane, Post Office – Entally, Police Station – Muchipara, Kolkata – 700 014. The said two premises are contiguous to each other. Premises No. 42A and 42B are also contiguous to the premises nos. 42C and 42D and are owned by the relatives of the defendants.
3. In order to develop the said premises after negotiations between the plaintiff and the defendants with respect to premises No. 42C and 42D, two development agreements both dated 25th October, 2017 were registered and signed between the parties. The defendants have also executed two Powers of Attorney in favour of the plaintiff with respect to the premises on 6th November, 2017 and 7th November, 2017.
4. Mr. Aritra Basu, Learned Advocate representing the plaintiff submits that the defendants were required to co-operate with the plaintiff, in

order to develop the premises but the defendants have acted in breach of the obligations recorded in the development agreements by not making payment of arrear corporation taxes and rates, Kolkata Municipal Corporation by an order dated 13th December, 2019 rejected the prayer of amalgamation of the premises with the adjacent premises as the defendants have not produced the partition deed and boundary declaration. In spite of receipt of Rs. 3,00,000/-, the defendants failed to negotiate with the existing tenants occupying various portions of the premises.

5. Mr. Basu submits that the plaintiff in terms of development agreements has made payment of the Municipal rates and taxes for the year 2017-2018, 2018-2019 and 2019-2020. He submits that the plaintiff has also made payment of Rs. 40,000/- as security deposit and also made payment of Rs. 3,00,000/- to the defendants to negotiate with the tenants.
6. Mr. Basu submits that by a notice dated 1st September, 2020, the defendants have terminated the development agreements on the allegation upon the plaintiff that the plaintiff has delayed the development work of the premises. He submits that there is no delay on the part of the plaintiff. He submits that the defendants have acted in breach of the obligations recorded in the development agreements by not negotiating with the tenants, and have also failed to produce the original boundary declaration and the partition deed due to which the Kolkata Municipal Corporation rejected the request of amalgamation.

- 7.** Mr. Basu submits that in one hand, the defendants have issued notice of termination and on the other hand, the defendants have allowed the plaintiff to perform the obligations of the development agreements. He submits that on 22nd September, 2021, the plaintiff made further payment of Rs. 2,50,000/- to the defendants for negotiation with the tenants.
- 8.** Mr. Basu submits that the development agreements were joint venture transactions in terms whereof the parties agreed for development of the premises. He submits that initially the plaintiff has filed the suit along with prayer for dispensation of formalities under Section 12A of the Commercial Courts Act, 2015 but the same was not granted and directed the plaintiff to complete the process of pre-institution mediation. He submits that the plaintiff has instituted a pre-institution mediation process, but the “non-starter” report was issued, and then the plaintiff has filed the present suit.
- 9.** Mr. Ratul Das, Learned Advocate representing the defendants submits that under Section 2(1)(c) of the Commercial Courts Act, 2015 does not define a Development Agreement as a “Commercial Dispute”. He submits that unless the plaintiff proves that the Development Agreement relied by the plaintiff dated 25th October, 2017 is a joint venture agreement, it would not fall within the definition of commercial dispute.

10. Mr. Das submits that for an agreement to be a joint venture, the necessary elements are: (i) an express or implied agreement, (ii) a common purpose that the group intends to carry out, (iii) share profits and losses and (iv) each member's equal voice in controlling the project. He submits that in the present case, the Development Agreement is an express agreement between the parties but that apart none of the necessary elements of a joint venture is met as regard there is no common purpose of the group as the plaintiff intended to construct a building for profits whereas the defendants would have used it for its residential use.
11. Mr. Das submits that in the Development Agreement, the parties are not having equal voice in controlling the project. Mr. Das relied upon the Judgment in the case of ***Faqir Chand Gulati vs. Uppal Agencies Private Limited and Another*** reported in ***(2008) 10 SCC 345***.
12. Mr. Das submits that the plaintiff is not in possession of the suit premises. He submits that all the correspondences and summons of this case are also received by the defendants at 42C which is the suit premises.
13. Mr. Das submits that the letter dated 24th September, 2021 relied by the plaintiff is an afterthought as the defendants have terminated the Agreement on 1st September, 2020. He further submits that the alleged money receipt for Rs. 2,50,000/- dated 22nd September, 2021 is also a manufactured document and the said receipt is an incomplete

document and the date appearing in the alleged receipt is not written by the defendant.

14. Mr. Das submits that the plaintiff has suppressed the letter dated 8th November, 2021, issued on behalf of defendants. He submits that the entire records and the pleadings on payment by the plaintiff are contrary to each other. He submits that the plaintiff has not made out any prima facie case for grant of interim order. In support of his submissions, Mr. Das relied upon the Judgment in the case of ***Kashi Math Samsthan and Another vs. Shrimad Sudhindra Thirtha Swamy and Another*** reported in ***(2010) 1 SCC 689***.

15. The first issue raised by the defendants in the present proceeding is that the Development Agreements both dated 25th October, 2017, are not the joint venture agreements as per the provisions of Section 2(1)(c)(xi) of the Commercial Courts Act, 2015. Clauses 2, 6, 18, 20, 21, 25 & 30(L) of the Development Agreement reads as follows:

***“2. The Owners hereby grants subject to what has been provided herein the exclusive right to the Developer to build construct, erect a new building after demolishing the existing structure at the said premises No. 42C, Serpentine Lane, P.S. Muchipara, Kolkata – 700014 in accordance with the plan to be sanctioned by the K.M.C. and other concerned authorities and complete the construction, erection and finishing work of the new building/s comprising of several flats/rooms/car parking space/s and to sell and transfer the flats/rooms/car parking space/s to the intending purchaser or purchasers in respect of the Developer’s allocation by entering into agreement for sale and/or transfer and realize sale proceeds in respect of the Developer’s allocation.*”**

6. *The Developer has agreed to allocate the Owners 50% (fifty percent) of the constructed area in the new building. It is clarified that the Owners are entitled to get their 50% (fifty percent) allocation in the newly constructed building, which include tenanted portion of the existing tenants within the said Owners' allocation, that is to be allocated in accordance with the terms and conditions under these presents together with proportionate share in all common areas, facilities and amenities. Besides the said Owners' allotment, the Developer shall make payment of the sum of Rs.20,000/- (Rupees twenty thousand only) as refundable deposit amount to the Owners. Save and except the above allocation of the Owners, the remaining 50% (fifty percent) of the constructed area in the newly constructed building upon the said First Schedule property together with proportionate share in all common areas, facilities and amenities whatsoever meant for common use including ultimate roof right in common shall belong to the Developer. The Developer has paid the said refundable deposit of Rs.20,000/- (Rupees twenty thousand only) to the Owners at the time of execution of this agreement.*

18. *The Developer shall be authorized in the name of the Owners to apply for, if necessary and obtain quotas, entitlement and other allotments for cement, steel, brick and other building materials for the construction of the building. The Developer shall be entitled to apply and obtain temporary and permanent connection of water, electricity power, drainage, sewerage connection to the said property and other inputs and facilities required for the construction and enjoyment of the building in the names of the Owners and for the said purpose the Owners shall execute Power of Attorney in favour of the Developer as shall be required by the Developer.*

20. *The developer shall complete the said construction of the proposed building within 24 months from the date of receiving vacant possession of the said property from the Owners and hand over the Owner's allocation to the Owners in finished condition therein and the Owners shall also co-operate with the Developer in all manner for constructing and completing the said*

building as aforesaid peacefully and uninterruptedly.

21. *The owner shall pay and clear-up all the arrears on account of Municipal taxes and other outgoing of the said premises till the handing over the vacant possession of the said property. It is further agreed by and between the parties that the owners shall not pay any taxes as Municipal taxes and other taxes in respect of the said property from the date of handing over the vacant possession of the said property till completion of the building or handing over the possession of the Owners' allocation. It is agreed that from the date of completion and allocation of the floor area between the owners and the Developer, all Municipal taxes and other taxes payable in respect of the said property shall be borne in proportionate of allocated area of Developer or its nominee/transferee/s and allocated area of owners of their nominee/transferee/s respectively.*

25. *As and from the date of service of notice of possession, the Owners or their nominees and the Developer or its nominees shall be responsible to pay and bear the proportionate share of the service charges and all other outgoing for common facilities and amenities in the building payable in respect of the Owners' and Developer's allocation.*

30(L). *That the Owners and the Developer jointly shall take the responsibility for successfully negotiating with the existing tenants of the said premises for obtaining "NO OBJECTION" and also to settle with the tenants and occupiers in the said property for shifting/vacating the said property either by allotting floor area and/or constructed space or in terms of money from the Owner's allocation."*

16. In the case of ***Faqir Chand Gulati (supra)***, the Hon'ble Supreme Court has considered the definition of "Joint Venture" which reads as follows"

"25. *An illustration of joint venture may be of some assistance. An agreement between the owner*

of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.

26. *We may now notice the various terms in the agreement between the appellant and the first respondent which militate against the same being a "joint venture". Firstly, there is a categorical statement in Clause 24, that the agreement shall not be deemed to constitute a partnership between the owner and the builder. The landowner is specifically excluded from management and is barred from interfering with the construction in any manner (vide Clause 15) and the builder has the exclusive right to appoint the architects, contractors and sub-contractors for the construction (vide Clause 16). The builder is entitled to sell its share of the building as it deemed fit, without reference to the landowner (vide Clauses 7 and 13). The builder undertakes to the landowner that it will construct the building within 12 months from the date of sanction of building plan and deliver the owner's share to the landowner (vide Clauses 9 and 14). The builder alone is responsible to pay penalties in respect of deviations (vide Clause 12) and for payment of compensation under the Workmen's Compensation Act in case of accident (vide Clause 10). Secondly, there is no community of interest or common/joint control in the management, nor sharing of profits and losses. The landowner has no control or participation in the management of the venture. The requirement of each joint ventures being the principal as well as agent of the other party is also significantly absent. We are, therefore, of the view that such an agreement is not a joint venture, as understood in law.*

28. *The basic underlying purpose of the agreement is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct*

two floors. Such agreement whether called as a "collaboration agreement" or a "joint venture agreement", is not, however, a "joint venture". There is a contract for construction of an apartment or house for the appellant, in accordance with the specifications and in terms of the contract. There is a consideration for such construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the landowner for a house construction (construction of the owner's share of the building) for a consideration. To that extent, the landowner is a consumer, the builder is a service provider and if there is deficiency in service in regard to construction, the dispute raised by the landowner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the landowner, but whether the agreement is in the nature of a joint venture or whether the agreement is basically for construction of certain area for the landowner.

29. It is, however, true that where the contract is a true joint venture the scope of which has been pointed out in paras 21 to 25 above, the position will be different. In a true joint venture agreement between the landowner and another (whether a recognised builder or fund provider), the landowner is a true partner or co-adventurer in the venture where the landowner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the landowner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The landowner himself is responsible for the construction as a co-adventurer in the venture. But

such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the landowners. Except assuring the landowner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the landowner.

30. *Learned counsel for the respondent contended that the agreement was titled as "collaboration agreement" which shows an intention to collaborate and, therefore, it is a joint venture. It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words "joint venture" or "collaboration" in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses."*

- 17.** Development Agreement entered between the parties are the admitted document. In paragraph 33 of the plaint, the plaintiff has specifically made out a case that the suit is related to commercial disputes and the plaintiff seeks specific performance of joint venture agreement for a commercial project. From the said averment, it is clear that the plaintiff

has filed the suit before the Commercial Court by treating the Development Agreement as joint venture.

- 18.** The plaintiff tried to impress upon this Court that initially the plaintiff has filed suit being C.S. No. 57 of 2023 along with leave for dispensation of Section 12A of the Commercial Courts Act, 2015 but this Court by an order dated 31st March, 2023 refused to grant dispensation of Section 12A of the Commercial Courts Act, 2015. Thereafter the plaintiff has initiated pre-institution mediation process and on receipt of “non-starter” report from the Mediation and Conciliation Committee, the plaintiff has filed the suit thus, the suit is coming under the purview of Commercial Dispute. When the plaintiff has filed the previous suit and prayed for leave for dispensation of Section 12A of the Commercial Courts Act, 2015 at that point of time, no notice was issued to the defendants. The issue of joint venture was not before this Court. At that point of time, this Court did not find any such situation which warrants leave under Section 12A of the Commercial Courts Act, 2015 and dispensation was not granted.
- 19.** It is also admitted that the premises in question are residential premises. As per the Development Agreement, the plaintiff being the developer has agreed to allocate the owners 50% of the constructed area in the new building and the owners are entitled to get their 50% share in the newly constructed building which include tenanted portion of the existing tenants within the said owner’s allocation.

20. The Development Agreement entered between the parties does not provide with regard to share of any profits. The agreement also does not disclose that both the parties have joint control over the construction/development and accountable to each other for their respective acts with regards to the construction of the new building. In the agreement, it is also clarified that the Developer shall be entitled to receive, take, realize and collect and retain all monies as development and construction costs of the new building with profit thereof from the persons or parties agreeing to acquire or purchase. It is also clarified that the Developer shall not claim for payment or reimbursement of any cost and expenses incurred towards construction of owner's allocation and common facilities and amenities from the owners.

21. Mr. Basu relied upon the case of **Rameshwar and Others vs. State of Haryana and Others** reported in **(2022) 17 SCC 1** wherein the Hon'ble Supreme Court relied upon the judgment in the case of **Faqir Chand Gulati (supra)** and held that:

“36. The above judgment in Uppal Agencies case, while clarifying the purpose of collaboration agreements, falls short of delving into the legal effects of the transfer of such development rights. Parting with rights which are fundamental to ownership, for valuable consideration (in cash or by handing over constructed units), leaving only the nominal “title” with the landowner, is a common feature of such collaboration agreements. Given the evolution in complexity of real estate contracts, and the absence of the definition of collaboration agreements in legislation, their interpretation by various High Courts assumes significance.”

22. The agreement between the parties is described as “Development Agreement”. The plaintiff in the suit at paragraph 33, described the same as “Joint Venture”. In the case of **Sushil Kumar Agarwal Vs. Meenakshi Sadhu and Others** reported in **(2019) 2 SCC 241**, the Hon’ble Supreme Court held that:

“17. The expression “development agreement” has not been defined statutorily. In a sense, it is a catch-all nomenclature which is used to be describe a wide range of agreements which an owner of a property may enter into for development of immovable property. As real estate transactions have grown in complexity, the nature of these agreements has become increasingly intricate. Broadly speaking, (without intending to be exhaustive), development agreements may be of various kinds:

***17.1.** An agreement may envisage that the owner of the immovable property engages someone to carry out the work of construction on the property for monetary consideration. This is a pure construction contract;*

***17.2.** An agreement by which the owner or a person holding other rights in an immovable property grants rights to a third party to carry on development for a monetary consideration payable by the developer to the other. In such a situation, the owner or right holder may in effect create an interest in the property in favour of the developer for a monetary consideration;*

***17.3.** An agreement where the owner or a person holding any other rights in an immovable property grants rights to another person to carry out development. In consideration, the developer has to hand over a part of the constructed area to the owner. The developer is entitled to deal with the balance of the constructed area. In some situations, a society or similar other association is formed and the land is conveyed or leased to the society or association;*

17.4. A development agreement may be entered into in a situation where the immovable property is occupied by tenants or other right holders. In some cases, the property may be encroached upon. The developer may take on the entire responsibility to settle with the occupants and to thereafter carry out construction; and

17.5. An owner may negotiate with a developer to develop a plot of land which is occupied by slum dwellers and which has been declared as a slum. Alternately, there may be old and dilapidated buildings which are occupied by a number of occupants or tenants. The developer may undertake to rehabilitate the occupants or, as the case may be, the slum dwellers and thereafter share the saleable constructed area with the owner.

18. When a pure construction contract is entered into, the contractor has no interest in either the land or the construction which is carried out. But in various other categories of development agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights.

19. In a construction contract, the contractor has no interest in either the land or the construction carried out on the land. But, in other species of development agreements, the developer may have acquired a valuable right either in the property or the constructed area. There are various incidents of ownership in respect of an immovable property. Primarily, ownership imports the right of exclusive possession and the enjoyment of the thing owned. The owner in possession of the thing has the right to exclude all others from its possession and enjoyment. The right to ownership of a property carries with it the right to its enjoyment, right to its access and to other beneficial enjoyments incidental to it. (*B. Gangadhar v. B.G. Rajalingam*). Ownership denotes the relationship between a person and an object forming the subject-matter of the ownership. It consists of a complex of rights, all of which are rights in rem, being good against the

world and not merely against specific persons. There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use and enjoy the thing owned; and a right to consume, destroy or alienate it. (Swadesh Ranjan Sinha v. Haradeb Banerjee). An essential incident of ownership of land is the right to exploit the development, potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer. This in essence is a parting of some of the incidents of ownership of the immovable property. There could be situations where pursuant to the grant of such rights, the developer has incurred a substantial investment, altered the state of the property and even created third-party rights in the property or the construction to be carried out. There could be situations where it is the developer who by his efforts has rendered a property developable by taking steps in law. In development agreements of this nature, where an interest is created in the land or in the development in favour of the developer, it may be difficult to hold that the agreement is not capable of being specifically performed. For example, the developer may have evicted or settled with occupants, got land which was agricultural converted into non-agricultural use, carried out a partial development of the property and pursuant to the rights conferred under the agreement, created third-party rights in favour of flat purchasers in the proposed building. In such a situation, if for no fault of the developer, the owner seeks to resile from the agreement and terminates the development agreement, it may be difficult to hold that the developer is not entitled to enforce his rights. This of course is dependent on the terms of the agreement in each case. There cannot be a uniform formula for determining whether an agreement granting development rights can be specifically enforced and it would depend on the nature of the agreement in each case and the rights created under it.”

- 23.** In the present suit as per the Development Agreement entered between the plaintiff and the defendants being the owners of the property

allowed the Developer to build, construct and erect a new building after demolishing the existing structure with the liberty to sell and transfer the flats/rooms/car parking space to the intending purchasers with respect to the developer's allocation only. There is no condition with respect to distribution of shares of profit. It is the simple agreement between the parties that the plaintiff being the developer will construct a new building and 50% of the new building is allocated to the developer with the right to sell and 50% will remain with the owners.

24. Considering the above, this Court finds that the Development Agreements entered between the developer and the owners cannot be a Joint Venture agreement and thus the case of the plaintiff is not coming under the purview of any of the clauses of Section 2(1)(c) of the Commercial Courts Act, 2015.
25. In view of the above, the department is directed to return the plaint along with all documents to the plaintiff by keeping the copies of the same for the purpose of record. The plaintiff is at liberty to file a fresh suit before the appropriate Court.
26. **G.A. (COM) No. 2 of 2024 is allowed. G.A. No. 1 of 2023 is dismissed.** Consequently, **C.S. (Com) No. 553 of 2024 (Old C.S. No. 213 of 2023) is dismissed.**

(Krishna Rao, J.)