

Full Day Seminar on Real Estate Transactions

Model Clauses in Joint Development agreement, ICAI, Nagpur Branch(WIRC)

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Introduction to Joint Development Agreement

Joint development agreement has two elements one is joint and other one is development

2(s) of RERA, 2016 “development” with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes redevelopment;

The definition had given the widest meaning to the word development.

Understanding word “Joint” In JDA

The word “Joint” is the most crucial word, here it is necessary to understand as to who are the persons who jointly wants to develop a land. The meaning of joint development has to be seen in the light of intentions of the parties.

Collaboration generally between land owner and developer - pooling resources, expertise, interest to achieve common goals.

The area of collaboration gives rise to various areas of debate and analysis.

It is like a area to choose your role and accordingly the rights, liabilities and taxability of parties can be decided.

Types of Collaborations or different types of JDA's

1. Small scale development, restructuring of old building in moder day building (floors, apartments) if less than 500 sq meters then rera would not apply unless there are special rules for the same.

2. Large scale development project(plots, floors, apartments)

The intention of the parties would decide as to what kind of collaboration is being done and which would further decided the right and liabilities of the parties with respect to the land and project.

Thereafter, collaboration between

1. Individuals,
2. individual and entity
3. Entity and entity

Role of parties/terms of the contract in JDA has direct impact upon rights and liabilities(including tax liabilities)

Analysis of various judgments of Hon'ble supreme court and Hon'ble High court and ITAT's, it can be safely said that the terms of the JDA has a very deep impact upon rights and liabilities of the parties. As there is lot of scope of discretion of authorities as to how the terms of the contract would be interpreted.

- **Chaturbhuj Dwarkadas Kapadia of Bombay** ([2003] 129 Taxman 497 (Bombay))
- **Jasbir singh Sarakria** [2007] 164 Taxman 108
- **Balbir Singh Maini** [2017] 86 taxmann.com 94 (SC)
- **M/S Seshasayee Steels P.Ltd** [2020] 115 taxmann.com 5 (SC)
- **Darshana Anand Damle** [2023] 155 taxmann.com 202 (Bombay)
- **Bharat Jayantilal Patel** [2023] 156 taxmann.com 308 (SC)

The areas where interpretation of terms of JDA was required by the authorities

clause 2(47)(v) of income tax,

clause 2(47)(vi) of income tax,

Section 53A of Transfer of property act,

RERA Act, status as promoter

meaning of de facto transfer of ownership rights,

analysis of rights akin to ownership rights

Difference of transfer under TPA and Income tax act

contract act

Transfer under income tax

2 [(47) “transfer”, in relation to a capital asset, includes,—

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(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

Analysis 53A Of Transfer of property act, 1882

Act 20 of 1929 [53A. Part performance.—Where any person **contracts to transfer for consideration** any immoveable property by writing signed by him or on his behalf from which the **terms necessary to constitute the transfer can be ascertained with reasonable certainty**, and the transferee has, **in part performance of the contract**, **taken possession** of the property or any part thereof, or the transferee, being already in possession, **continues in possession** in part performance of the contract **and has done some act in furtherance of the contract**, and the transferee has performed or is willing to perform his part of the contract,

then, **notwithstanding** where there is an instrument of transfer, that the transfer has not been **completed in the manner prescribed therefor by the law for the time being in force**, the transferor or any person claiming under him shall be **debarred from enforcing against the transferee** and persons claiming under him **any right in respect of the property** of which the transferee has taken or continued in possession, **other than a right expressly provided by the terms of the contract**: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

53A of TPA

Shrimant Shamrao Suryavanshi And ors. vs Pralhad Bhairoba Suryavanshi (D).. on 22 January, 2002, 2002 (3) SCC 676

The necessary conditions are:

- 1) there must be a contract to transfer for consideration any immovable property;
- 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- 5) the transferee must have done some act in furtherance of the contract; and
- 6) the transferee must have performed or be willing to perform his part of the contract.

Section 5 of TPA

5. “Transfer of property” defined.—In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and “to transfer property” is to perform such act.

The test is whether new interest is created or not. Therefore, for transfer two things are essential extinguishment of rights and creation of rights. The interest and rights must be of such a nature as defined under TPA such as sale, exchange, gift, mortgage etc.

,in present or in future would have impact on Vested interest ----- interest becomes enforceable then and there

Contingent interest---- interest becomes enforceable once, contingency is completed

Section 10, 11, 12 and such other sections provides that in case where the alienation of property is stopped then such condition is void, therefore there can be transfer in complete manner or no transfer as per TPA.

Section 17 registration act

17. Documents of which registration is compulsory-(1) the document must be compulsorily registered,

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property

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4 [(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 (48 of 2001) and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to-

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;

De facto Transfer and rights akin to ownership rights

- Balbir Singh Maini [2017] 86 taxmann.com 94 (SC)
- M/S Seshasayee Steels P.Ltd [2020] 115 taxmann.com 5 (SC)

These two judgments have now expanded the scope of the clause (vi)

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Who is an owner and what are his rights?

■ Jiban Roy Choudhury v. Taramoyee Debi, 1979 SCC OnLine Cal 83
In Salmond's Jurisprudence (12th edn.)

■ Ownership denotes the relation between a person and object. It consists in a complex of rights, which are **rights in rem**. The basic features of ownership are

- (i) **right to possess the thing;**
- (ii) (ii) **right to use and enjoy the thing owned, right to manage and use the income from it such right to possess being in fact liberties;**
- (iii) (iii) **right to consume or destroy as also to alienate or transfer the thing by will after death or by conveyance during lifetime;**
- (iv) (iv) **right of ownership being indeterminate in duration such interest being perpetual, determined neither by any set point** (as the interest of a lessee or bailee) **nor by owner's death**, as the property owned can descend to his heirs or while the new owner's interest is to continue, if the property is sold to him prior to death, unaffected by such death; and
- (v) (v) **ownership is residuary in character and when the lesser rights are given away, their extinction revives all rights in the owner.**

De facto Transfer and rights akin to ownership rights

When a person gives his ownership to other persons, then the same rights becomes vested in the new owner. This is an transfer as per transfer of property act.

Example section 54 of TPA “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale how made.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made **only by a registered instrument**. In case where there is a registered instrument, it means a de Jure transfer has taken place but in case where there is no registered instrument then all the other rights had been vested in the other person **but there is no required registered instrument. This would an de facto transfer.**

There may be some other ingredients missing but the essence of the transfer has to be seen.

Therefore, in a JDA to check whether a de facto transfer has taken place or not. it can be concluded only after analysis of the JDA and the intention of the parties.

RERA AND JDA

If the land owner has not completely transferred the rights of the land to the developer then there can be situations where land owner may be considered as promoter in the project.

Promoter has a key role to play in RERA act as well the project itself.

Land owner Ipso facto do not become promoter in a project

If the land owner has no role to play, then clearly he cannot be said as promoter.

When can it be said that the land owner has no role to play:

- ✓ When he has nothing to do with the management of construction, development, sale or marketing, the entire rights and powers had been transferred.
- ✓ There is no profit sharing with the developer,
- ✓ He has nothing to do with development or sale of the developed land.
- ✓ In other terms, de facto ownership of land had NOT been transferred to developer

The ultimate test is to see what is the intention viz-a-viz role of the land owner has to play in the project. **A single factor cannot be decided, the role/intention.** Merely sharing of profit or getting developed area as consideration cannot be considered solely.

For the terms of JDA the most essential element is Intention of the parties

Intention of the parties must be clear and well defined with respect to pooling/collaboration role, profit sharing, interest

- It is up to the land owner that **whether he want to be a promoter or not**. Whether as per law would be considered as promoter or co-promoter would depend on facts and circumstances. It is to be remembered that being promoter means that the land owner will be liable under law.
- Two types of promoters is mentioned under Rera Seller promoter and developer promoter2(zk) of RERA 2016 “promoter” means,— (i) **a person who constructs or causes to be constructed an independent building or a building consisting of apartments**, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
(ii) **a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or**

Balancing of rights has to be done for protections of all the parties to JDA

One side where the land owner do not want to be a promoter neither he want to pay income tax at the time of execution of JDA.

For tax, the clause v and vi conditions must not be fulfilled, in case it is fulfilled then individual can take benefit of 45 (5A) but in case of company or other entity some role must be kept intact.

On the same hand the developer wants to make sure that his work is not hindered or obstructed by the land owner. The developer can go for liquidated damages, indemnity.

For balancing, each and every terms of the JDA must be hand picked and tailored as per the requirement of the situation.

On basis of analysis of prevailing law what can be said as Model terms of a JDA

Preamble of the contract which would define the basic intention of the parties

Representation and warranties(owner gives warranties with respect his title and rights, no previous agreement, no encumbrances etc.)

Permissions and licences(needs to be settled in whose name the permission would be also, the same is required under RERA)

Delivery of possession

Profit sharing

Original documents

Power of attorney viz a viz the selling rights of parties after completion of project

Financials of Project

Indemnity

Force Majeure

Termination and remedies upon termination

Dispute resolution mechanism

Preamble of a JDA

The initial para which defines the objective and purpose of the agreement.

For instance,

- **WHEREAS, first** Party(owner of land) is the owner in possession of the land as mentioned under schedule
- **WHEREAS** the Developers herein have approached the Vendors with an intention to develop the said property from the Vendors and pursuant to the negotiations by and between the parties hereto

It is very necessary to laid down the basic idea behind any agreement and in the preamble, it is not necessary to provide an exhaustive idea basic idea would work

At the time of interpretation when term of agreement are vague and ambiguous, it is the preamble which is interpreted

Representation and warranties

Representation and warranties are very essential, it is a promise of a party that he has the rights, means, such other requirements which would be essential for performance of promise under the JDA

For instance, the land owner would represent and warrant that he has the appropriate rights and titles with respect to the land

The developer would represent and warrant that he has necessary means and skills for performance of promise under JDA

Making false representation and warranties can have far reaching consequences which includes criminal action as well civil action

Permissions and licences

For the purpose of JDA, it is necessary that the project has correct licences and approval.

The name of approval holder and licence must be settled because along with approval, liabilities follow. In RERA as well it is necessary to settle that who would act as promoter.

There may be cases where a person may not be explicitly named as promoter but due to his role, he can be deemed as a promoter or a person upon whom liability can be imposed.

Land owner must put contingencies/ condition precedents that a particular licence must be in name of developer then only possession would be handed over.

Restrictions and prior permissions

Before, presenting the documents belonging to land the written notice must be given to land owner.

Before, sub contracting permission must be taken from land owner,

In case where a settled time is extinguished then the said time shall be extended with permission of land owner.

By this manner the land owner is proving that the transfer has NOT taken place as the land owner continues to use his rights over the land.

Delivery of possession under JDA

Possession is the most essential element under any transaction which involves immovable property.

There can be different types of possessions i.e., **Actual Possession Constructive Possession, Joint Possession, Sole Possession, Adverse Possession, Legal Possession, Hostile Possession, Permissive Possession, License.** the possession is a subjective concept which has to be understood in light of other facts and circumstances.

Under JDA, if there is transfer of complete actual possession, the transfer as per IT act is attracted

But in cases where the land owner still has some major roles to play after execution of the JDA, then the nature of possession would be different.

Again in case of individual even if the transfer as per clause v and vi is made, then protection of 45(5A) can be taken.

Situations where it would be deemed to be actual physical possession

Giving land to developer for developing the same would be deemed as mere licence to enter and it cannot be said to be possession as required under section 53A of TPA and accordingly 2(47)(v) of income tax act.

The profit sharing clause would have a direct impact upon deciding the nature of possession.

Consideration and Profit sharing

There can be different ways for profit sharing

- A lump sum money
- A profit sharing in total sale consideration
- Allocation of units to further sale or for self use

The profit sharing clause has different impacts, in case of lump sum amount, if seen with other circumstance, it would result into transfer of capital asset and at the same individual and HUF would get benefit of 45(5A) of Income tax act. In case other entities it would fall under 45(1) and it would be taxable at the time of execution of JDA but at the same the status of possession has to be analysed.

In case of profit sharing, if seen with other circumstance it would not come under scope of transfer.

It had been observed that lump sum is not always the best option, profit sharing with the help of escrow account is a better option for both the parties.

Original documents of land

A innovative safeguard for developers is to get the original documents with them or keep them in escrow. By this manner no new rights could be created on the land which would be adverse to the developer.

Power of attorney or delegation of rights and powers

In case of individual a power of attorney for entire development and sale can be made and protections of from becoming a promoter and tax liabilities can be taken. But in case other than individual or HUF, the entity must keep some role not with respect to development and sale but with other conditions.

Power of attorney is a document which is generally executed by the land owner in favour of developer or such other person as the developer may direct.

As held under Suraj Lamp industries judgement such power of attorney do not create any title in the property, but if the said power of attorney is seen along with the fact of the profit sharing and possession then the said power of attorney would show the intention of the land owner that he wants no role in the JDA.

Power of attorney can be for sale, licences, approvals, marketing, development or such other rights as land owner may decide.

The said power of attorney also help the developer in his safeguard, the developer can ask for irrevocable power of attorney

Indemnification, the most essential safeguard of developer

Indemnification section 124 of Indian contract act, 1872 A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.

125 of Contract act Rights of indemnity-holder when sued. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Indemnity

Safeguard for land owner- that in case due to errors/faults on part of developer, the developer would have to indemnify the land owner.

Safeguard of developer- in case land owner fails to fulfil obligations and some litigation are filed against the developer, the land owner would have to indemnify the developer

Force Majeure

If the JDA is frustrated due to some new law or such situations which are beyond the control of parties then the parties cannot be compelled to perform their respective promises.

Section 64 and 65 of the Indian contract act would cover the situation of refund of money which had been given to land owner.

Termination of JDA and remedies

Termination can be based upon on some reasonable ground, it is necessary that the ground of termination has been explicitly provided under the agreement,

For instance, a land owner may represent that the land is duly partitioned and there is no any kind of third party rights over the land, in such a situation, the agreement can be terminated, it is advisable to send a notice of termination.

Or where the developer fails take due consents and permissions within given time, the agreement can be terminated.

Once the development had taken place and after that the decision of termination of the agreement can have sever consequences and losses.

Dispute resolution mechanism

Dispute between parties is something which the humans are well aware of, but with the evolution of human kind, the dispute resolution mechanisms have also evolved, now there are various ways to solve the issues, the first and most recommended is the amicable settlement and thereafter, arbitration can be good option for dispute resolution.

The damages, quantification of damages is a question of facts and the same has to be seen in the light of peculiar facts and circumstances.

Lastly, the intention of the parties must be clear and in current prevailing a good planning can be done so that both the parties feel safe to work together and can have maximum benefit from the said business arrangement.

THANK YOU
