

Arcon Systems Pvt Ltd vs Saluja Construction Company Ltd & Ors on 2 March, 2023

Author: Navin Chawla

Bench: Navin Chawla

\$~6

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 230/2021

ARCON SYSTEMS PVT LTD

..... Plaintiff

Through: Mr.Saurabh Seth, Adv.

versus

SALUJA CONSTRUCTION COMPANY LTD & ORS.

..... Defendant

Through: Mr.Anant Nigam, Mr.Chirag

Verma, Advs. for D-1.

Mr.Prithu Garg, Mr.Harsimran

Duggal and Mr.Aditya Awasthi,

Advs for D-2 to 5.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% 02.03.2023 I.A.15203/2022 and 15204/2022

1. These applications have been filed by the defendant nos.2 to 5 seeking their deletion from the array of the parties. It is stated that they are neither necessary nor the proper parties.

2. To appreciate this submission, few facts on the basis of which the present suit has been filed, need to be noticed:-

a) The defendant no.1 entered into a Property Development Agreement (hereinafter referred to as the 'PDA') dated 28.08.2018 with the defendant nos.2 to 4;

b) By virtue of the PDA, the defendant no.1 was to construct a building on the property bearing No.C-516, Defence Colony, New Delhi-110024 by demolishing the existing construction on the said land. The building was to consist of basement floor, stilt parking space, ground floor, first floor, second floor and third floor with terrace. The building was to be constructed at the cost of the defendant no.1;

c) Apart from the building, the defendant no.1 was to pay a sum of Rs.2.74 Crore to the defendant nos.2 to 4. The defendant no.1 was required to pay Rs.54,75,000/- at the time of execution of the PDA, and the balance sum of Rs.2,19,25,000/- at the stages that are mentioned in paragraph 8(a) of

the PDA.

d) Clause 18 of the PDA defines the share of the defendant no.1 and the defendant nos.2 to 4 in the building that would come up under the PDA, and is reproduced herein below:

"18. That in view of the above arrangement arrived at between the parties hereto and in lieu of the DEVELOPER

(a) re-developing the said property at its own cost using its infrastructure facilities, Man Power, Skill & expertise

(b) paying the aforesaid amount/ consideration to the OWNERS, the parties shall be shall be entitled to the following portions of the newly constructed building as under;

"OWNER No. 1 ALLOCATION (Prof. Neera Chandoke)

i) ENTIRE SECOND FLOOR

ii) SPACE FOR PARKING IN THE STILT AREA (AS PER PLAN)

iii) USE OF COMMON AREAS, STAIRCASE, LIFT, BACK COUTYARD, FREE INGRESS AND EGRESS FACILITIES AND SERVICES

iv) 22.5% UNDIVIDED, INDIVISIBLE AND IMPARTIBLE OWNERSHIP RIGHTS IN THE PLOT OF LAND MEASURING 325 SQ. YDS OWNER No. 2 ALLOCATION (Commodore Rajeev Sawhney)

i) ENTIRE THIRD FLOOR

ii) ENTIRE TERRACE RIGHTS OVER AND ABOVE THE ENTIRE THIRD FLOOR OF THE NEWLY CONSTRUCTED PROPERTY

iii) SPACE FOR PARKING IN THE STILT AREA (AS PER PLAN)

iv) USE OF COMMON AREAS, STAIRCASE, LIFT, BACK COUTYARD, FREE INGRESS AND EGRESS, FACILITIES AND SERVICES

v) 22.5% UNDIVIDED, INDIVISIBLE AND Signing Date:06.03.2023 IMPARTIBLE OWNERSHIP RIGHTS IN THE 14:41:26 PLOT OF LAND MEASURING 325 SQ. YDS.

OWNER No. 3 ALLOCATION (Lt. Col. Sanjeev Sawhney)

i) ENTIRE FIRST FLOOR

ii) SPACE FOR PARKING IN THE STILT AREA (AS PER PLAN)

iii) USE OF COMMON AREAS, STAIRCASE, LIFT, BACK COUTYARD, FREE INGRESS AND EGRESS, FACILITIES AND SERVICES

iv) 22.5% UNDIVIDED, INDIVISIBLE AND IMPARTIBLE OWNERSHIP RIGHTS IN THE PLOT OF LAND MEASURING 325 SQ. YDS DEVELOPER'S ALLOCATION

i) ENTIRE BASEMENT

ii) ENTIRE GROUND FLOOR

iii) SPACE FOR PARKING IN THE STILT AREA (AS PER PLAN)

iv) USE OF COMMON AREAS, STAIRCASE, LIFT, BACK COUTYARD, FREE INGRESS AND EGRESS, FACILITIES AND SERVICES

v) 32.5% UNDIVIDED, INDIVISIBLE AND IMPARTIBLE OWNERSHIP RIGHTS IN THE PLOT OF LAND MEASURING 325 SQ. YDS.

vi) THE DEVELOPER'S ALLOCATION SHALL NEITHER INCLUDE ANY RIGHTS IN ANY OTHER AREA OF THE BUILDING NOR SHALL IT INCLUDE ANY AREA OF THE TERRACE OF THE BUILDING ABOVE THE ENTIRE TERRACE FLOOR AND/ OR THEREABOVE [EXCEPT THE EASEMENTARY RIGHT TO INSPECT /MAINTAIN THE OVERHEAD TANK/ SERVICES AFTER OBTAINING PRIOR PERMISSION OF THE OWNERS].

e) Clause 23 of the PDA further entitled the defendant no.1 to book or negotiate for sale of its allocation or part thereof and to receive advance payment in its own name from a third party, however, "at its own risk and accountability". The said Clause further provided that till the new building is fully developed and constructed, the possession of the defendant no.1's allocation or any part thereof shall not be handed over to the said third person nor any Sale Deed be executed/registered. Clause 23 of the PDA is reproduced herein below:

"23. That the DEVELOPER shall be entitled only to book or negotiate for the sale of the DEVELOPER'S Allocation or any part thereof and shall be competent to receive advance payment, further part payment /balance payment in its own name through Cheque(s), Pay Order(s), Demand Draft(s), NEFT(s), RTGS(s) etc. in the name of the DEVELOPER from any third person/ entity /prospective purchaser at its own risk and accountability, and to issue receipts for the same. Provided that till the new building is fully developed and constructed on the said plot of land within the specified period as per the agreed specifications, the possession of the DEVELOPER'S Allocation or any part thereof shall not be handed over to the buyer / purchaser of the DEVELOPER'S allocation and also the DEVELOPER shall neither be entitled to hand over the possession of the DEVELOPER'S Allocation or any part thereof to any third

person/entity/prospective purchaser, nor shall the sale deed shall be executed / registered in favor of any third person/entity/prospective purchaser. The DEVELOPER has understood, noted, and accepted the restrictions imposed upon the DEVELOPER under these presents and the DEVELOPER reiterates that it shall not give the possession of and/ or execute or register any sale/conveyance deed in respect of and/or execute or register any Power of Attorney with a sale, transfer, conveyance clause in respect of the DEVELOPER'S Allocation or any part thereof to or in favor of any third person/entity/prospective purchaser till the DEVELOPER has first handed over the peaceful vacant possession of the OWNERS' Allocation to the OWNERS as per the agreed specifications in the enclosed Annexure-A."

f) Disputes having arisen between the defendant no.1 and the 14:41:26 this Court being CS(COMM) 510/2020, titled M/s Saluja Construction Company Limited v. Prof. Neera Chandhoke & Ors.

g) In the said suit, the plaintiff herein, claiming that it had entered into an Agreement to Sell dated 18.02.2019 with the defendant no.1 with respect to the basement and the ground floor of the suit property, filed an application seeking impleadment in the said suit, being I.A. 148/2021.

h) While the above application was pending adjudication in the said suit, the defendant no.1, who was the plaintiff in that suit, prayed for leave to withdraw the suit. This was opposed by the plaintiff, however, such opposition was rejected by the Court vide order dated 16.04.2021, observing as under:

"13. In his application, the applicant has admitted to have entered into an 'Agreement' with the plaintiff, with full knowledge of the PDA and its terms. It is specifically pleaded in its application by the applicant that it was shown the PDA by the plaintiff while entering into the 'Agreement'. In fact, the clauses of the PDA were mentioned in detail in the 'Agreement'.

14. A perusal of the PDA would show that the same is, in fact, a composite agreement for service of construction by the plaintiff and an agreement to sell for basement and ground floor by the defendants in favour of the plaintiff. As per the PDA, the plaintiff was required to redevelop/reconstruct the property after demolishing the same in lieu of what was allocated i.e., the entire basement and ground floor with space for parking in the stilt along with 32.5% undivided, indivisible and impartible ownership rights in the land underneath in the Suit Property. The agreement to sell part of the PDA was contingent upon the plaintiff performing its obligations of construction under the service part of the PDA. Admittedly, the construction part of the PDA has not been performed and PDA stood terminated before the new building could be constructed. In light of the same, the Digitally Signed By:SUNIL to the basement and ground floor could never come into being as the same was contingent upon the completion of construction.

15. The plaintiff's rights under the PDA were subject to construction and handing over the vacant physical possession of the defendants' allocation of the Suit Property.

16. At this stage, I also deem profitable to refer to the following portion of Clause 23 of the PDA:-

"23. That the DEVELOPER shall be entitled only to book or negotiate for the sale of the DEVELOPER'S Allocation or any part thereof and shall be competent to receive advance payment, further part payment / balance payment in its own name through Cheque(s), Pay Order(s), Demand Draft(s), NEFT(s), RTGS(s) etc. in the name of the DEVELOPER from any third person/entity/prospective purchaser at its own risk and accountability, and to issue receipts for the same...."

17. What is important to note is the applicant's candid admission in its application that it was shown the PDA before the signing the 'Agreement' with the plaintiff. With full knowledge of the restricted rights of the plaintiff under the PDA, and more specifically, the warning held out in Clause 23, that the plaintiff is free to entertain bookings and negotiate with third party buyers at its own risk, the applicant cannot be permitted to plead of having acquired independent rights to enforce the PDA against the defendants.

18. It was sought to be argued by the applicant that by virtue of the 'Agreement', it can legally maintain the suit in its capacity as the assignee of the plaintiff. I don't agree with the said proposition. Even assuming for the sake of arguments that by virtue of the 'Agreement', the applicant has been assigned the rights in the basement and ground floor by the plaintiff, the said assignment cannot survive on its own without the assignment of plaintiff's obligations under the PDA of construction. It is reiterated, as explained above, that the PDA is a composite agreement. Also, in law, only rights can be assigned and not obligations, without the express consent of the promisee to Digitally Signed By:SUNIL contract. In view thereof, the applicant's contention of being an assignee of the plaintiff is legally bereft of merit.

19. The applicant has further sought to contend that the defendants were aware of the 'Agreement' between the plaintiff and the applicant, therefore, they must be held accountable to give effect to the 'Agreement' even though the PDA has been terminated. In response, the defendants have referred to their reply dated 21.12.2020 to the legal notice issued by applicant addressed to the plaintiff and marked to the defendants. In the reply, it was stated that though the applicant had sent some messages indicating his desire to speak to the defendants however, no meeting/discussion took place between them. In the opinion of this Court, there is nothing found on record to show that a direct privity of contract was established between the applicant and the defendants.

20. The applicant's contention that its appointment as a nominee in the 'Agreement' amounts to assignment, is fallacious. It has already been explained above, that the applicant cannot claim to be an assignee. Be that as it may, in *Kapilaben and Others v. Ashok Kumar Jayantilal Sheth Through Poa Gopalbhai Madhusudan Patel and Others* reported as 2019 SCC OnLine SC 1512, it was held that there being no valid assignment by the original vendee in favour of the subsequent purchaser,

the latter could not enforce his contract against the original vendor. The decisions cited by the applicant are not applicable to the fact of the present case."

3. I am in full agreement with the observations made by the Court in the above referred order. Though the order further states that the same was not to prejudice the rights and the contentions of the parties in any fresh legal remedy that may be pursued, in my opinion, this does not come in the way of this Court in reiterating and following the observations and the findings of this Court in the order. Giving its own finding will only be a repetition of the said findings, with which I am in full concurrence.

I may also note that the said order remains Signing Date:06.03.2023 14:41:26 unchallenged by the plaintiff herein.

4. In view of the above, in my opinion, the remedy of the plaintiff, if any, is only against the defendant no.1. Admittedly, as the building was not constructed by the defendant no.1, the plaintiff has no cause of action against the defendant nos.2 to 5. The defendant nos.2 to 5 may at best be witnesses in the suit, however, are neither necessary nor the proper parties.

5. Accordingly, the present applications are allowed and the defendant nos.2 to 5 are deleted from the array of the parties.

6. The plaintiff shall file Amended Memo of Parties within a period of ten days from today.

CS(OS) 230/2021 & I.A. 6916/2021, 13678/2021

7. The learned counsel for the plaintiff and the only remaining defendant submit that though earlier attempts of arriving at an amicable settlement have failed, they are hopeful that the parties can arrive at an amicable settlement if they are referred to the Delhi High Court Mediation and Conciliation Centre, especially keeping in view of the order passed today.

8. Accordingly, the parties are referred to the Delhi High Court Mediation and Conciliation Centre, where they shall appear on 14.03.2023 at 4.00 p.m.

9. List before the Court on 11th July, 2023.

NAVIN CHAWLA, J MARCH 2, 2023/Arya