

(Under Order Xxxix Rules 1&2 Cpc By ... vs Prof. Neera Chandhoke & Ors on 16 April, 2021)

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(COMM) 510/2020, I.A. 10723/2020 (Under Order XXXIX Rules 1&2 CPC), I.A. 148/2021 (Under Order I Rule 10 CPC by Applicant), I.A.1835/2021 (Under Order VIII Rule 1 CPC by Defendants), I.A. 2934/2021 (Under Order VI Rule 17 CPC by Plaintiff), I.A. 4441/2021 (Under Order I Rule 10 CPC by Plaintiff), I.A. 4442/2021 (Under Order XXXIX Rules 1&2 CPC by Plaintiff) and CRL.M.A.210/2021 (Under Section 340 Cr.P.C.)
M/S SALUJA CONSTRUCTION COMPANY LIMITED

..... Plaintiff

Through: Mr. Harsh Sethi, Mr. Sarvapriya
Makkar and Mr. Anant Nigam,
Advocates.

versus

PROF. NEERA CHANDHOKE & ORS. Defendants

Through: Mr. Prithu Garg, Advocate
Mr. Darpan Wadhwa, Sr. Advocate
with Saurabh Seth, Advocate for
proposed defendants

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)

ORDER

% 16.04.2021

1. Although today the matter was listed for arguments however, learned counsel for the plaintiff, on instructions, has prayed for withdrawal of the present suit in terms of the Order XXIII Rule 1 CPC.

2. Learned counsel for the defendants has not opposed the said prayer.

3. Mr. Darpan Wadhwa, learned Senior Counsel while appearing for the applicant in I.A. 148/2021, filed under Order I Rule 10 read with Section 151 CPC on behalf of M/s Arcon Systems Pvt. Ltd, has opposed the withdrawal of the suit inter-alia on the plea of being a necessary party in the suit being a third party purchaser of part of the plaintiff's allocation of share in the property bearing No. C-516, Defence Colony, New Delhi (hereinafter referred to as "Suit Property"), which the plaintiff has

agreed to sell to the applicant vide Agreement to Sell dated 18.02.2019 (hereinafter referred to as 'Agreement').

4. Before adverting to the submissions made on behalf of the applicant, I deem it apposite to briefly refer to the facts of the present case.

5. The present suit has been filed by the plaintiff against the defendants for specific performance of Property Development Agreement dated 28.08.2018 (hereinafter referred to as "PDA"), entered into between the parties to the suit. The plaintiff also prayed for consequential decree of permanent injunction in the suit restraining the defendants from creating any third party rights in the basement and ground floor of the Suit Property along with other reliefs.

6. The plaintiff claims that being a company involved in the business of promotion, development and construction of real estate, it entered into the PDA with the defendants, who are the owners of their respective several floors in the Suit Property.

7. In terms of the PDA, the plaintiff undertook to reconstruct the Suit Property after demolishing the existing structure within a period of 18 months from the date of the receipt of the sanctioned plan from the authorities concerned or from the date of handing over the possession to the plaintiff, whichever was earlier. As per the PDA, the new structure to be built by the plaintiff was supposed to have upto third floor and in consideration of the construction carried out by the plaintiff at its own expense, the defendants agreed to allocate the basement and ground floor to the plaintiff, described in the PDA as Developer's Allocation. The remaining floors namely First Floor, Second Floor and Third Floor, were supposed to be allocated to Defendant No 3, 1 and 2 respectively, as exclusive owners. The plaintiff agreed to pay for Developer's Allocation partly in kind and partly in cash. The plaintiff agreed to bear the cost of construction, which included the services rendered by it, and in addition thereto, agreed to pay a sum of Rs. 2.74 crores to the defendants, collectively.

8. On account of certain disputes, the proposed building could not be constructed on the Suit Property and the defendants terminated the PDA, resulting into filing of the present suit. It has been informed that the Plaintiff and Defendants have reached an out of Court settlement.

9. Reverting to the contents made on behalf of the applicant, it is contended that the present suit has been filed collusively by the plaintiff and the defendants. It was submitted that the applicant had entered into an 'Agreement' with the plaintiff on 18.02.2019 with respect to the basement and ground floor of the Suit Property. It is submitted that by virtue of entering into the 'Agreement', interest was created in favour of the applicant. The applicant has placed reliance on the decision of the Supreme Court in Razia Begum v. Sahebzadi Anwar Begum and Others reported as AIR 1958 SC 886.

10. A brief written note has also been placed on record by the applicant where it has been stated that the applicant, by entering into an 'Agreement', already stepped into the shoes of the plaintiff as its successor-in-interest. It is submitted that being a successor in interest, the applicant has the right to continue the suit to seek specific performance of the PDA in so far as the applicant's rights are

concerned. Along with the brief note, the plaintiff has placed on record the decision of the Allahabad High Court in Vidhydhar Dube and Others v. Har Charan and Others reported as AIR 1971 All 41.

11. On the other hand, the submissions made on behalf of the applicant are controverted by learned counsels for the parties.

12. I have heard learned counsels for the parties and have also gone through the written submissions along with the relied upon decisions.

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 agreement to sell part of the PDA in relation 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 whom promises have been made in the 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.

21. In view of the above, the applicant's objection to the withdrawal of suit by the plaintiff and its substitution as the plaintiff is rejected. However, the applicant is at liberty to pursue its remedies under the 'Agreement' against the plaintiff, if any available in law. Even otherwise, this Court during the course of arguments has been informed by learned counsels for the parties that in the settlement arrived between them, the plaintiff has agreed and undertaken to settle the claims of the applicant on his own without any liability to the defendants.

22. Nothing commented in this order shall prejudice the rights and contentions of the parties in the fresh legal remedy that may be pursued in future.

23. Consequently, plaintiff is permitted to withdraw the suit and the same stands withdrawn, along with the pending applications. The ad-interim injunction granted on 22.12.2020 stands vacated. The I.A. 148/2021 stands dismissed.

MANOJ KUMAR OHRI, J APRIL 16, 2021 na [Click here to check corrigendum](#), if any