

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+IA No. 11716/2008 (of the plaintiff u/O 39 R 1 & 2 CPC) and
IA No. 12847/2008(of the defendant No. 3 u/O 39 R 4 CPC) in
CS(OS) No. 2017/2008

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Date of decision: 22.04.2009

MS. SARLA MEHRA

.....Plaintiff

Through: Mr. S.P. Aggarwal, Sr. Advocate with
Mr. Jagjit Singh Advocate

Versus

MR. PRALEEN CHOPRA & ORS.

....Defendants

Through: Mr. S. Santanam Swaminathan and
Mr. Kirtiman Singh, Advocates for D-1.
Mr. Dinesh Garg, Advocate for D-3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J. (ORAL)

1. The applications of the plaintiff for interim relief and of the defendant No. 3 for vacation of the ex parte ad interim injunction and a relief claimed in suit with respect whereto no evidence is required are for consideration.

2. The plaintiff has instituted this suit inter alia on the pleas that she is the owner of property No. B-43, Sarvodaya Enclave, New Delhi; that she had entered into an agreement dated 23rd June, 2006 with the defendant No. 1 and which agreement in common parlance is known as a Collaboration Agreement whereunder the defendant

No. 1 had at his own costs and risk agreed to demolish the existing structure on the said property of the plaintiff and to reconstruct a modern new building comprising of a basement, ground, first and second floor on the said property; that in consideration of the expenses and effort to be incurred by the defendant No. 1 in carrying out the said work, it was agreed that out of the newly constructed building, the basement, ground and first floor shall belong to the plaintiff and the second floor and the terrace above to the defendant No. 1; the defendant No. 1 was entitled to sell the said second floor and terrace and realize sale consideration thereof and/or to retain the same for himself; that a registered General Power of Attorney was also executed by the plaintiff with respect to the said second floor and terrace above in favour of the defendant No. 2 as nominee of the defendant No. 1.

3. The plaintiff approached this Court with a case that the defendant No. 1 had failed to complete the work of construction within the agreed time and also as per the agreement and had failed to even hand over the plaintiff's entitlement of the newly constructed building to the plaintiff, compelling the plaintiff to because of her circumstances, herself occupy her portion of the property; the defendants No. 1 and 2 were in contravention of the agreement allowing the defendant No. 3 to occupy the second floor of the property. The plaintiff has in this suit claimed the reliefs of mandatory injunction directing the defendant No. 1 to complete the remaining works, recovery of Rs. 35,50,000/- (rupees thirty five lacs fifty thousand only) towards damages till filing of this suit and cost of completion of the remaining work in the portions falling to the share of the plaintiff, of permanent injunction restraining the defendants No. 1 & 2 from handing over possession of the second floor and

terrace above to the defendant No. 3 and a decree for permanent injunction restraining the defendants No. 1 to 3 from getting any plans sanctioned from the MCD for raising construction of the third floor of the property. A decree for future mesne profits at Rs. 75,000/- per month has also been claimed.

4. Vide ex parte order dated 23rd September, 2008, finding a clause in the Collaboration Agreement whereunder the defendant No. 1 had agreed to deliver possession of the second floor and terrace to the purchaser only after putting the plaintiff into possession of her portion of the property and on the plea of the plaintiff that the defendants were attempting to illegally construct the third floor without plans therefor having been sanctioned by the MCD, the defendant No. 1 was restrained from handing over possession of the second floor and terrace to any person and the defendant No. 3 was restrained from occupying the second floor and terrace thereon. The defendants were also restrained from raising any construction above the second floor and from selling, alienating, encumbering or creating their party interest with respect to the second and third floors of the property.

5. After service of the defendants, the defendant No. 1 had expressed willingness to complete the works and to fill up the lacuna and deficiencies as pointed by the plaintiff. The matter was as such adjourned from time to time for enabling the defendant No. 1 to complete the works. Vide order dated 18th February, 2009, the ex parte order was also modified to enable the defendant No. 3 to carry out the works of interiors on the second floor also, inasmuch as it was found that a large number of defects and deficiencies pointed out by the plaintiff had by then be repaired/made up by the defendant No. 1.

6. The senior counsel for the plaintiff has now urged that there are still three deficiencies remaining. It is stated that there is seepage in the basement, the servant quarter on the terrace above the second floor has not been constructed and the elevator agreed to be provided in the building is not operational. On the contrary, it is informed by the counsel for the defendant No. 1 that the elevator has been installed and the three phase electrical connection therefor has also since been obtained and the license with respect thereto is expected in a day or two and whereupon, the elevator would be functional. It is not disputed by the senior counsel for the plaintiff also that the elevator has been installed.

7. As far as the seepage in the basement is concerned, though the defendant No. 1 assures that whatever can be done to repair the same and/or to prevent the same, even if the same remains, in my view, the plaintiff would have a monetary claim against the defendant No. 1 for the same and for the said reason, it cannot be said that the defendant No. 3 who has paid valuable consideration to the defendant No. 1 for purchase of the second floor and terrace above and sale deed in whose favour has been executed and registered prior to the institution of the suit can be deprived of using the property or from exercising rights with respect thereto.

8. The agreement between the plaintiff and defendant No.1 provides that if the defendant No.1 does not construct the building as agreed, the plaintiff will have the right to carry out the said works at the cost and expense of defendant No.1. Otherwise, the defendant No.1 was entitled under the agreement to sell/transfer/convey and assign his portion to any prospective buyer and to receive sale

proceeds “during or after the completion of the construction without any objection or hindrance” from the plaintiff. The only restriction was that the defendant No.1 shall first handover the actual possession of the plaintiff’s allocation to the plaintiff and thereafter handover the actual possession of the defendant No.1’s portion to the buyer. It is not in dispute that the plaintiff is now in actual possession of her portion. The plaintiff having permitted the defendant No.1 to sell his portion even during construction i.e. before the plaintiff could have satisfied herself of the defendant No.1 having carried out the works as per the agreement, and the defendants No.1 & 2 having so sold to defendant No.3, the inter se dispute of plaintiff & defendant No.1 as to quality of construction/nature of workmanship cannot affect the title of defendant No.3 and the plaintiff can only claim damages/costs for which also agreement provided as aforesaid, only, from the defendant No.1. The plaintiff cannot restrain the defendant No.3 from occupying the property or exercising ownership rights with respect thereto.

9. The plaintiff today seeks relief (i) with respect to direction for construction of servant quarter above the second floor and for continuance of the injunction already granted till then and (ii) of restraining the defendants from raising construction of the third floor of the property.

10. As far as the servant quarter is concerned, during arguments it transpires that the construction thereof has not taken place as yet owing to the parties being at variance as to the location thereof on the terrace above the second floor. While the defendant No. 3 who is now the owner of the second floor and terrace above has offered for the servant quarter to be provided at the rear end of the terrace with

access thereof from proposed spiral stair case from the rear open space in the ground floor, the plaintiff is not agreeable to the same. It has now been agreed in Court between the parties that the servant quarter shall be constructed adjacent to the existing stair hall and the access thereto shall be from the stair case providing access to the first floor, second floor and terrace above the property.

11. The main controversy between the parties is with respect to the construction of the third floor by the defendant No. 3.

12. Following Clause in the Collaboration Agreement dated 23rd June, 2006 pertains to the construction above the second floor:-

“That the Builder shall have the exclusive ownership and usage rights of the Entire Terrace over and above the Entire Second Floor of the said property, including rights of further construction only if permitted by MCD. However in that event the servant quarters and the overhead water tanks so provided to the owners/occupants of the building shall be shifted by them, on the newly build top terrace at the cost and expenses of the owner of the Second Floor.”

13. The General Power of Attorney dated 8th August, 2006 registered on 7th September, 2006 executed by the plaintiff in terms of Collaboration Agreement in favour of the defendant No. 2 also empowers the defendant No. 2 to sell or lease out the entire second floor, entire terrace over and above the entire second floor, etc. along with 30% undivided share in the property. The said Power of Attorney also empowers the defendant No. 2 to get the plan sanctioned from the MCD or other authorities and to get the requisite

permission therefor. It is significant that in this regard, no limit has been put on the power of the defendant No. 2. It is not as if the defendant No. 2 was empowered to obtain sanction for construction only up to the second floor.

14. A Sale Deed dated 7th March, 2008 and registered on 10th March, 2008 was executed by the defendant No. 2 as attorney of the plaintiff in favour of the defendant No. 3 with respect to the said second floor and the terrace, for a consideration of Rs.80 lacs. A perusal thereof shows the payments having commenced from 8th September, 2006. The defendant No.3 thereunder has a right of construction on the terrace subject to shifting the servant quarter to the top terrace.

15. The plaintiff has relied upon an affidavit attested on 14th August, 2006 of the defendant No. 1. However, the stamp paper thereof was purchased on 4th August, 2006. The paragraphs of the said affidavit relevant for the present purposes are as under:-

“That we hereby undertake and declare that we shall not construct the Third Floor of the said property, until and unless and the same is permitted by the MCD in future and other concerned authorities, during or after the completion of the building.

That we further undertake and declare that before starting the construction of the third floor, we shall take written consent from the said Mrs. Sarla Mehra, regarding the matter.

That no illegal construction shall be carried out on the Third Floor except for servant quarter.

That the terms of Affidavit shall remain binding upon all future prospective purchaser (s) of the Second Floor and above.”

16. The counsel for the defendant No. 1 has not denied the execution of the said affidavit. The counsel for the defendant No. 3 also states that for the present purposes he is not disputing the execution of the said affidavit. The senior counsel for the plaintiff states that in these circumstances, the effect of the aforesaid affidavit qua the right of defendant No.3 of construction of the third floor does not require any evidence and on the interpretation of aforesaid documents that aspect can be finally dealt with in this order. Thus this order/judgment deals with prayer (e) in the prayer paragraph of the plaint. It is contended by senior counsel for plaintiff that in view of the affidavit aforesaid whereunder the defendant No.1 has undertaken to before starting construction of 3rd floor, take written consent of plaintiff, the defendant No.3 claiming rights through defendant No.1 cannot construct 3rd floor, even if permitted by MCD, without written consent of plaintiff and is liable to be permanently enjoined therefrom.

17. After hearing arguments on 18th April, 2009, the matter was adjourned for today to enable the parties to mutually resolve the said controversy but the parties have been unable to do so.

18. The senior counsel for the plaintiff has contended that the plaintiff is not accepting the sale deed also in favour of the defendant No. 1. It is further contended that the sale deed does not refer to the collaboration agreement and thus, the defendant No.3 cannot have any benefit of the rights of the defendant No.1 under the collaboration agreement. However, the said pleas are now not tenable. It is not disputed that the defendant No.1 was authorized to sell. The defendant No.1 admits sale to defendant No.3. The certified copy of registered sale deed is on record. It is not the case that it is

not in accordance with terms/authorization in GPA, exercising powers whereunder it has been executed. Non mentioning of collaboration agreement therein is of no avail. The GPA was given in consideration of collaboration agreement and is in terms thereof. The GPA is for consideration. Of course if it is held that the defendant No.1 himself was disentitled from constructing 3rd floor without consent in writing of plaintiff, the defendant No. 3 cannot have a better right, notwithstanding non reference to affidavit (supra) in the sale deed.

19. Under the Collaboration Agreement, in lieu of the plaintiff contributing the land for the construction of the proposed building on the property, the defendant No. 1 paid to the plaintiff a non-refundable sum of Rs. 36 lacs. There is no dispute that this amount stands paid to the plaintiff. In consideration of the said payment and further consideration of the entire expense in demolition/construction of the new building being incurred by the defendant No. 1, the allocation of the plaintiff and the defendant No. 1 in the proposed new building is described in the collaboration agreement. The allocation of the defendant No. 1 is described as entire second floor, entire terrace over and above the entire second floor, one servant quarter with common W.C. on the top terrace, use of common areas, facilities and services, 30% undivided, indivisible and impartible ownership rights in the plot of land underneath.

20. I have enquired from the senior counsel for the plaintiff as to what was the consideration, if any, for the defendant No. 1 to, in the affidavit give up valuable right of construction of the third floor save with the permission of the plaintiff, if that is the interpretation thereof by the plaintiff. The senior counsel for the plaintiff has answered that the affidavit is in modification of the earlier agreement

and hence no consideration was required therefor.

21. This court in ***Ansal Properties & Industries Pvt. Ltd. Vs. Dr. Anand Nath*** MANU/DE/0824/1991 (and which judgment unfortunately does not appear to be reported in any of the journals having large circulation) has adjudicated nature of such collaboration agreements and even specific enforceability thereof. It was held that such collaboration agreements are agreements to transfer immovable property as distinct from agreements of construction of immovable property. It was further held that such agreement contemplates exchange between the owner of the land and the owner of the building constructed thereon, after the building has come into existence. The argument that a suit for specific performance of such agreement lies only after the building comes into existence was negatived. It was further held that on construction of building, one is the owner of land and other of the building and at that point of time, a deed of transfer or exchange is contemplated – At that time, the properties belonging to both are in existence, so clearly exchange of each other's property will then be simultaneous. It was further held that merely because of ownership of land, building constructed thereon by builder under contract with owner of land, will not belong to the owner on the principle of accretion; the building having come into existence in accordance with terms of the contract and with investment of the builder, belongs to the builder. A portion of the building belonging to the builder is then transferred/exchanged to/with the owner of land in consideration of owner transferring an undivided share in land underneath to the builder.

22. On such understanding of collaboration agreements, the courts have been issuing interim orders in disputes arising therefrom.

Reference must be made to one such order of Justice H.L. Anand of this court in **Kailash Nath & Associates Vs Shri Badri Prasad** in suit No.221/1981, disposing of interim applications on 14th September, 1981.

23. Seen in this light, the plaintiff herein in consideration of Rs 36 lacs and of being put into possession as owner of basement, ground, first floors of newly constructed building, agreed to transfer 30% undivided share in plot of land owned by her, to the defendant No.1 or his nominee and with right to construct second floor and above, as owner thereof. To effectuate the agreement to transfer, GPA was given to defendant No.2, again for consideration. The entire consideration due to the plaintiff has been paid/delivered and the transfer effected by execution of sale deed in favour of defendant No.3.

24. The immovable property comprising of the terrace rights above the second floor agreed to be transferred for consideration thus could not have been dealt with in the manner of the affidavit aforesaid. The same belonged to the defendant No. 1 and/or was agreed to be transferred to his nominee and had the agreement between the parties been that any rights therein (i.e. of refusal of permission to construct thereon) were being created in favour of the plaintiff, the parties would have entered into a proper agreement and would have provided consideration for creation of such rights in the terrace rights by the defendant No. 1 in favour of the plaintiff.

25. From the circumstances in which the affidavit and Power of Attorney were executed, it appears that the plaintiff after receiving Rs. 36 lacs was not willing to execute the Power of Attorney as

agreed without the said affidavit being executed. The language of the said affidavit also does not suggest that the defendant No. 1 had agreed to give up his right of raising construction on the terrace above the second floor to the plaintiff. There is no negative covenant in the affidavit that the defendant No.1 or his nominee shall not construct the 3rd floor as earlier agreed. The language suggests that the plaintiff expressed apprehensions of inconvenience to her as resident of lower floor in the event of 3rd floor being constructed, or of entire construction including of her portion being delayed if 3rd floor was to be also constructed at that time only. The said written consent of the plaintiff cannot be an absolute denial by the plaintiff for construction thereof or a demand for consideration by the plaintiff for giving the consent. The said written consent has to be confined to the plaintiff assuring herself that by construction of the said third floor no inconvenience shall be caused to the plaintiff and if any, adjustment with respect to timing of construction is required, the same is done. The affidavit cannot be read to mean a negation of the rights with respect to the terrace rights in favour of the defendant.

26. The principles of Section 11 of the Transfer of Property Act can also be invoked with advantage in this regard. Section 11 is as under:

“11. Restriction repugnant to interest created. – Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

[Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right

which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]“

The object and principle behind Section 11 is that the transferors should not be allowed to put a clog or restriction on the right of a vendee so as to be repugnant to the property sold. The main provision in a transfer is to be given effect and the repugnant one discarded. Here it is clear that the main object of the plaintiff as transferor was to, for consideration already received, make an absolute transfer of 30% undivided share in land with right to construct second floor and above; the inconsistent provisions as now pleaded of construction of third floor being not allowed inspite of being permissible in law, for the reason of plaintiff not consenting thereto in writing, cannot be given effect to. This is a principle of universal application, even *de hors* Section 11 (supra). The clause in the affidavit, if interpreted as contended by senior counsel for plaintiff, would be void and unenforceable. There can be no absolute restraint on construction of 3rd floor, at the sweet will and discretion of plaintiff. The plaintiff cannot be permitted to so cut down or defeat the estate created.

27. In the plaint also in para 30 which alone deals with the construction above the terrace floor, the plaintiff has not stated any reason as to why if the plans for construction are sanctioned of the third floor, the same should not be allowed to be constructed in terms of the Collaboration Agreement.

28. The plaintiff had claimed *ex parte* ad interim relief on the plea that the construction above the second floor was sought to be carried out without obtaining sanction. In fact, in the plaint as filed the

plaintiff has in para 5 admitted that the defendant No. 2 was authorized to sell the terrace rights to any third party and for sanction of plan etc. Had the parties intended to novate the Collaboration Agreement with respect to the terrace rights, the plaintiff in the General Power of Attorney which was as aforesaid registered after the affidavit, would have put a rider on the construction rights with respect to the said terrace. The plaintiff did not choose to do so. The defendant No.3 has dealt with defendants No. 1 and 2 on the basis of collaboration agreement and GPA and the plaintiff cannot now be permitted to arm twist the defendant No.3 to pay consideration to the plaintiff for consent in writing to construct the third floor.

29. I, therefore, find that the defendants if obtain the sanction for construction of the third floor are entitled to carry out the said construction and the plaintiff is not entitled to injunct the defendants from carrying out the same for the reason of having not given the consent in writing. The plaintiff is at best entitled to ensure that one servant quarter on the said terrace is provided by the defendants elsewhere, in terms of the Collaboration Agreement and the affidavit.

30. In the aforesaid circumstances, these applications and the suit qua relief (e) are disposed of with the following directions:-

- (i) The defendant No. 1 shall to the best of his ability remove the seepage and carry out the other work for the prevention of the same within thirty days hereof. If the plaintiff is not satisfied with the said works and/or if the seepage persists, the plaintiff shall be entitled, in accordance with the agreement to carry out the work and to make monetary claim with respect thereto against the

defendant No. 1.

- (ii) The defendant No. 1 shall ensure that the license for operation of the elevator in the building is obtained within ten days herefrom failing which the plaintiff shall have a monitory claim against the defendant No. 1 for the same also.
- (iii) The earlier order restraining the defendant No. 3 from occupying the second floor and the terrace and further restraining, the defendant No. 3 from selling, alienating or encumbering the same are vacated.
- (iv) The defendant No. 1 shall construct the servant quarter with common toilet as agreed aforesaid within four weeks herefrom failing which the plaintiff shall be entitled to construct the same at her own costs and to make a claim with respect thereto against the defendant No.1. The plaintiff shall not obstruct the defendant No. 1 in any manner from carrying out construction of servant quarter within 4 weeks as aforesaid.
- (v) The plaintiff is not found entitled to any injunction restraining the defendants from raising construction above the second floor in accordance with the Collaboration Agreement for the reason of the plaintiff having not consented to the same in writing. The suit claim in terms of paragraph (e) of the prayer paragraph in the plaint is dismissed.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW,J

April 22, 2009
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