

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: November 28, 2011

+ RFA(OS) 96/2011

GURU ENTERPRISES ...Appellant
Through: Mr.Dinesh Garg, Advocate.

versus
VIRENDER BHATNAGAR & ORS. ...Respondents
Through: Mr.Pramod Gupta, Advocate for R-1
and R-2.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

PRADEEP NANDRAJOG, J. (Oral)

1. Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni were the owners of property bearing No.2-E/13, East Patel Nagar, New Delhi. They entered into a collaboration agreement with M/s.Guru Enterprises i.e. the appellant on 13.11.1992 as per which the appellant had to construct a building after demolishing the existing construction. The share of the appellant in the new building to be constructed was agreed as 42.5% and that of Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni 57.5%.

2. DMRC acquired 125.85 sq.yd. of the land out of the total 800 sq.yd. and thus the building was constructed on 674.15 sq.yd. which was sold by Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni and the appellant for a consideration of ₹95 lakhs by and
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under a registered sale deed dated 5.7.2004. The sale deed was jointly executed in favour of the purchaser and in the sale deed Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni were described as vendors and the appellant was described as a confirming vendor.

3. Noting the fact that as per the collaboration agreement dated 13.11.1992 Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni were liable for all past dues qua the property and the future dues had to be shared proportionately, while executing the sale deed dated 5.7.2004, vide covenant No.4, the draftsman deviated from the agreement between Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni and the appellant by covenanting with the purchaser as under:-

“That any property tax, lease money and all other dies (sic: should read dues) and demands, regarding the said property up to the date of registration of this sale deed shall be paid by the vendors and confirming vendor and thereafter shall be paid by the vendee.”

4. Vide covenant No.10 it was recorded as under:-

“10. That the vendors/confirming vendor assure the vendee, that the vendors are absolute sole and rightful owners of the above said property and the same is absolutely free from all kinds of encumbrances whatsoever, such as sale, mortgage, gift, litigation, disputes, attachment in the decree of any courts, lien charges, court injunctions, legal laws, agreements, acquisition and requisition etc. and if it is proved otherwise or if the whole or any portion of the property hereby conveyed is taken away or goes out from the possession of the

vendee, on account of any defect in the ownership or title of the vendors, on account of any claim, to be made by any claimant, then the vendors and their property both moveable and immoveable shall be liable to make good the loss, thus sustained by the vendee and keep the vendee indemnified against all such losses, damages, costs and expenses, etc. accruing to the vendee in this connection.”

5. The purchasers realized that misuse charges in sum of ₹33,96,572/- were due and payable prior to the date of the sale and when demanded neither Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni nor the appellant paid the same and hence the purchasers filed a summary suit claiming decree in said sum.

6. The appellant sought leave to defend inter-alia pleading that except a sum of ₹10,594/-, which became due after the date of the collaboration agreement, the remainder were misuse charges prior thereto. Appellant offered to pay ₹10,594/-.

7. Declining leave to defend, learned Single Judge has passed a decree against the appellant in sum of ₹14,43,543/- being 42.5% of the demand in sum of ₹33,96,572/- holding that the appellant would be liable to proportionately recompense the purchaser. It must immediately be highlighted that the purchaser had to cough up said amount to the MCD.

8. The learned Single Judge, although has noted clause-10 of the sale deed dated 5.7.2004, but has overlooked the fact that it has two distinct parts. The first part is the representation to the purchaser, evidenced from the following

words: *That the vendors/confirming vendor assure the vendee, that the vendors are absolute sole and rightful owners of the above said property and the same is absolutely free from all kinds of encumbrances whatsoever, such as sale, mortgage, gift, litigation, disputes, attachment in the decree of any courts, lien charges, court injunctions, legal laws, agreements, acquisition and requisition etc.* The second part of the clause is the indemnification evidenced by the subsequent words of the clause as follows: *and if it is proved otherwise or if the whole or any portion of the property hereby conveyed is taken away or goes out from the possession of the vendee, on account of any defect in the ownership or title of the vendors, on account of any claim, to be made by any claimant, then the vendors and their property both moveable and immoveable shall be liable to make good the loss, thus sustained by the vendee and keep the vendee indemnified against all such losses, damages, costs and expenses, etc. accruing to the vendee in this connection.*

9. The learned Single Judge has overlooked that the indemnification liability qua the falsity of the representation that the property was free from any charges was not by the appellant, but was only by the vendors i.e. Mrs.Kamal Nayan Swanni, Ms.Jibani Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni.

10. Thus, a triable issue arises for consideration relatable to the interpretation of clause-10 of the sale deed and for which the terms of the collaboration agreement between the vendors i.e. Mrs.Kamal Nayan Swanni, Ms.Jibani

Swanni, Ms.Gurbani Swanni and Ms.Gurmeher Swanni and the confirming vendor i.e. the appellant may also be required to be looked into.

11. Taking on record the statement made by learned counsel for the appellant that the appellant would pay ₹10,594/- to the plaintiffs within eight weeks from today, we dispose of the appeal setting aside the impugned order dated 8.7.2011 dismissing IA No.6548/2007 i.e. the application filed by the appellant seeking leave to defend. The said application is allowed. The appellant is granted six weeks time from today to file a written statement. We clarify that such applications seeking leave to defend filed by other defendants which have been decided by the impugned order have not been commented upon by us for the reason said defendants have not filed any appeals.

12. Since one defendant has been granted leave to defend the suit, we note that suit proceedings are already in progress.

13. We leave the parties to bear their own costs.

CM No.15799/2011

Since appeal has been disposed of, instant application which seeks interim orders pending final hearing of the appeal is disposed of as infructuous.

PRADEEP NANDRAJOG, J.

NOVEMBER 28, 2011
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S.P.GARG, J.