

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

+ **CS(OS) No. 1380/1995**

% **9th January, 2018**

M/S VEERA BUILDERS (REGD.) Plaintiff

Through: Mr. Dinesh Garg & Ms.Rachna
Agrawal, Advocates.

versus

BISHEN DAYAL GOEL & ORS. Defendants

Through: Mr. Amit Bhagat and Ms.Sonali
Chopra, Advocate for D-2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

O.A. No. 240/2016

1. No one appears for the legal heirs of the deceased defendant no. 1 who have filed this OA seeking setting aside of the order dated 8.11.2016 whereby the legal heirs of the deceased defendant no. 1 were not impleaded in the suit on account of an application filed by the plaintiff being allowed.

2. The basic case of the plaintiff for not substituting legal heirs of the deceased defendant no. 1 was in terms of the spirit of the provision of Order XXII Rule 4 (4) of the Code of Civil Procedure,

1908 (CPC). Even today no one appears for the legal heirs of the deceased defendant no.1.

3. Considering that the defendant no. 1 did not appear in the suit after filing of the written statement and framing of issues, accordingly there is no need to add the legal heirs of the deceased defendant no. 1 as defendants in the present suit, more so because the suit is not argued for being decreed for specific performance but is only being decreed as prayed for recovery of the amount of Rs.27,00,000/- paid by the plaintiff to the defendant no. 1 under the receipts-cum-agreements to sell dated 28.3.1995 and 29.4.1995.

This O.A. is accordingly dismissed.

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4. This is a suit filed by the plaintiff partnership firm seeking specific performance of the receipts-cum-agreements to sell dated 28.3.1995 and 29.4.1995 entered into with respect to the suit property bearing no. C-254, Defence Colony, New Delhi. The defendant no. 1 in the suit was the proposed seller/owner of the suit property. Defendant nos. 2 and 3 in the suit are the brothers of defendant no. 1 and who claimed rights in the suit property under a

prior agreement dated 18.2.1994. On account of subsequent development which has taken place after filing of the suit that the defendant nos. 2 and 3 have succeeded in the suit for specific performance against defendant no. 1, and consequently defendant nos. 2 and 3 have become owners of the suit property pursuant to the prior agreement to sell in their favour dated 18.2.1994, therefore on behalf of the plaintiff, learned counsel for the plaintiff only seeks refund of the sum of Rs.27,00,000/- paid to the defendant no. 1 under the receipts-cum-agreements to sell dated 28.3.1995 and 29.4.1995. Therefore the suit is not pressed so far as relief for specific performance is concerned but is pressed only for relief of recovery of Rs.27,00,000/- paid by the plaintiff to the defendant no. 1.

5. That the defendant no. 1 has received this amount of Rs.27,00,000/- is an admitted fact and this is seen from the last few lines of para 1 of the preliminary objections of the written-statement filed by the defendant no. 1 as also reply in the written-statement to para 9 of the reply on merits to the plaint. This para clearly show that defendant no. 1 does not dispute receiving of the amount of Rs.27,00,000/- from the plaintiff.

6. It may be noted that defendant no. 1 originally appeared in the suit, filed his written-statement, but thereafter the defendant no. 1 did not appear and also did not lead any evidence. Defendant no. 1 only appeared till the framing of issues in this suit on 18.2.1998. Therefore, the present is a case where plaintiff has led evidence to prove its case but there is no evidence led on behalf of the defendant no. 1. Since no specific performance is claimed, defendant nos. 2 and 3 in the suit who have contested the suit would only remain proforma defendants so far as the relief only prayed for recovery of Rs.27,00,000/- by the plaintiff against the defendant no. 1.

7. Another important aspect to be noted is that in the litigation between the defendant nos. 2 and 3 as purchasers under the agreement to sell dated 18.2.1994 with the defendant no. 1 as seller of the suit property to the defendant nos. 2 and 3, a total sum of Rs.40,00,000/- was deposited by defendant nos. 2 and 3 in the suit no. 87/1995 of this Court, and which amount of Rs.40,00,000/- was deposited by defendant nos. 2 and 3 in compliance of their obligations to the defendant no. 1 under the agreement to sell dated 18.2.1994. The decree for specific performance in favour of defendant nos. 2 and

3 and as against the defendant no. 1 is dated 13.8.2004. This amount of Rs.40,00,000/- was deposited by defendant nos. 2 and 3 on 15.10.2004. As regards this amount of Rs.40,00,000/- deposited in the suit no. 87/1995 plaintiff in the present suit had filed an application for attachment before judgment and vide order dated 6.4.2016 a Learned Single Judge of this Court was pleased to attach this amount of Rs.40,00,000/- along with accrued interest thereon.

8. In view of the aforesaid facts which have emerged, and with the fact that defendant no. 1 is no longer the owner of the suit property and hence specific performance cannot be granted, because defendant nos. 2 and 3 are the owners of the suit property with whom plaintiff had no agreement to sell, and that the plaintiff only seeks recovery of a sum of Rs.27,00,000/- admittedly paid by the plaintiff to defendant no. 1, and receipt of which amount of Rs.27,00,000/- is admitted by the defendant no. 1 in his written-statement, therefore, the suit is decreed for a sum of Rs.27,00,000/- in favour of the plaintiff and against the defendant no. 1. It be noted that defendant no.1 has not pleaded or proved a case of loss being caused to him by the plaintiff and that consequently the defendant no.1 has adjusted this

amount towards any losses suffered by the defendant no.1. Defendant no.1 is therefore liable to repay the amount of Rs. 27,00,000/- received by him.

9. Learned counsel for the plaintiff agrees that interest at the rate of 10% per annum simple be held to be payable by the defendant no. 1 to the plaintiff, inasmuch as the transaction is a commercial transaction. Ordinarily, this Court would not have been inclined to grant such a high rate of interest in today's scenario, however, considering that the transaction was a commercial transaction, and defendant no.1 has enjoyed the benefit of Rs.27,00,000/- received from the plaintiff, accordingly plaintiff as agreed is granted interest at the rate of 10% per annum simple *pendente lite* and future till realization of the decretal amount from the defendant no. 1.

10. In view of Order XXXVIII Rule 11 CPC, an attachment order if passed in the suit will enure for the benefit in execution proceedings and no fresh order of attachment is required. Accordingly, attachment granted for the sum of Rs.40,00,000/- deposited in suit no. 87/1995 along with interest will continue to enure for the benefit of the plaintiff for the execution proceedings which will

be filed for recovery by the plaintiff of the amount decreed in the present suit as against the defendant no. 1.

11. Plaintiff will also be entitled to costs of the suit being the court fees paid in the suit as against the defendant no. 1.

12. In view of the above said discussion, suit of the plaintiff is disposed of as not pressed against the defendant nos. 2 and 3, but the suit is decreed of the plaintiff as against the defendant no. 1 for a sum of Rs.27,00,000/- plus interest at 10% per annum *pendente lite* i.e. from the date of filing of the suit on 30.5.1995 and future till realization of the decretal amount along with costs being court fees paid by plaintiff. Decree sheet be prepared accordingly.

JANUARY 09, 2018

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VALMIKI J. MEHTA, J