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

Reserved on : 22nd January, 2018

Date of decision : 5th March, 2018

+ **RFA 355/2017 & CMNo.13404/2017(stay)**

RAJINDER BALI

..... Appellant

Through: Mr. Dinesh Agnani, Senior Advocate
with Ms. Leena Tuteja, Ms. Diksha
Bhatia and Mr. Ishaan Chawla,
Advocates. (M:9910264203)

versus

SABH INFRASTRUCTURE LTD.

..... Respondent

Through: Mr. Ajay Mehrotra, Advocate with
AR of the Respondent in person.
(M:9811353874)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. A collaboration agreement was entered into on 30th April, 2012 between the Appellant/Mrs. Rajinder Bali (*hereinafter 'owner'*) and the Respondent/Plaintiff (*hereinafter 'builder'*). The collaboration agreement was in respect of property bearing no.D-49 situated at Greater Kailash, Enclave-II, New Delhi measuring 408.33 sq. yds (*hereinafter, 'suit property'*)..

2. The relevant clauses of the Collaboration agreement are set out herein below:

“1.....

2. *That the Builder shall demolish the existing structure on the said plot of land and develop, construct and build a building consisting of Basement, Stilt, Ground Floor, First*

Floor, Second Floor and Third Floor with terrace, at its own costs and expense, after getting the building plans and architectural drawings sanctioned from the authorities concerned.

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11. That the responsibility of the entire amount required or payable for carrying out construction, development, completion of the said building including the charges and fees of the architect for preparation of the plans and all the other statutory and other fees and/or demands shall be applied wholly to the account of Builder.

12.....20

21. The Owner shall bear and pay all outstanding charges and dues of whatsoever nature payable in respect of the said property including house tax, property tax, water and electricity charges, and other dues and demands till the date of handing over the vacant possession of the said property to the Builder and thereafter the same shall be paid by the Owner and the Builder in respect of their respective allocations after completion and handing over of the said building/ property. However, the water and electricity charges and any other charges from the date of handing over the vacant possession and during construction period and till the time the possession is handed over back to the Owner shall be paid and borne by the Builder.

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29. That the owner and the Builder shall themselves be responsible for all Income Tax and capital gain tax liability arising out of the sale of their respective allocations' in the proposed building.

.....”

3. As per the said agreement, the entire basement, Ground Floor, Second Floor, Third Floor, terrace over and above the Third Floor, along with stilt

area, servant quarter, common area, etc. was to fall in the share of the owner. The entire First Floor, a servant quarter along with use of common area was to fall in the share of builder. The owner would therefore have 77.5% of the undivided indivisible ownership rights in the plot and the remaining 22.5% was to vest with the builder. In addition to the ownership of the First Floor, the builder was to pay to the owner a sum of Rs. 2.25 crores as consideration against the rights in the property.

4. The owner handed over vacant possession of the property to the builder, on 13th October, 2012. Eighteen months' period was stipulated for completing the building. The admitted position on record is that the building was completed and the First Floor, which fell in the share of the builder, was sold to the builder vide sale deed dated 15th January, 2014. The owner cooperated in execution of the final sale documents. Possession of the remaining floors was also given to the owner and accounts were settled in January 2014.

5. In October 2014, an invoice is claimed to have been raised by the builder to the owner seeking reimbursement of VAT charges payable towards construction of the building. It is alleged that the owner did not make the payment. Accordingly, the builder got legal notice dated 2nd May, 2016 issued to the owner. Despite receipt of the notice, since no response was forthcoming, the suit was filed under Order XXXVII of the Code of Civil Procedure, 1908 (*hereinafter*, 'CPC') praying for a decree for a sum of Rs.8,57,222/- along with *pendente lite* and future interest. It is the case of the builder that he has deposited a total Value Added Tax (*hereinafter* 'VAT') amount of Rs.91,83,681/- (pages no.109, 111, 113 of the Trial Court record) and the share of the owner which had to be borne by her is

Rs.8,57,222/-. Admittedly, the builder has acquired ownership and already sold the First Floor of the property.

6. The builder sought summons for judgment under Order XXXVII CPC. The owner did not appear in the matter after service. The Trial Court decreed the suit on the basis that the suit was based on a written collaboration agreement. The said decree was passed on 5th November, 2015. Thereafter, the owner filed an application under Order XXXVII Rule 4 seeking setting aside of the decree which was heard and decided by the order dated 15th February, 2017.

7. Counsel for the Appellant/owner submits that this is a case where liability has been fastened on the owner incorrectly, inasmuch as, under the collaboration agreement, the owner was not liable to make any payment of VAT. The construction that was done by the builder was as per the collaboration agreement and as per the said agreement, the liability of statutory dues is of the builder. It is further submitted that there is no proof placed on record to show that the amount was actually deposited with the authority. The owner was not properly served in the suit under Order XXXVII of the CPC and hence she did not put in appearance. It is, thus, submitted that the decree was wrongly passed as there is no liability that can be fastened on the owner. It is further submitted that the suit under Order XXXVII of the CPC itself is not maintainable as the written contract i.e. the collaboration agreement clearly pinned the responsibility of paying statutory taxes and dues on the builder.

8. On the other hand, it is the submission of the builder that as per the agreement, the builder's responsibility was not to pay the VAT, especially in respect of the portions of the property which fell into the owner's share. Post

January, 2014, the owner and the builder had to bear the tax liability of their respective shares. The total cost of construction and the proportionate share of tax had to be borne by the owner.

9. The owner has relied upon the Delhi Value Added Tax Rules, 2005 (*hereinafter, DVAT Rules*) to submit that under Rule 3, in a works contract, the charges towards labour services and other charges are excluded from the taxable turnover. The present case is clearly covered by Rule 3 of the DVAT Rules and hence no liability can be fixed on the owner.

10. The builder relied upon *IDBI Trusteeship Services Ltd. v. Hubtown Ltd. AIR 2016 SC 5321*

Analysis & Findings

11. There is a fundamental flaw in the stand taken by the builder. As per the agreement, it was the builder's responsibility to demolish the entire existing structure and ***develop, construct and build*** the entire building. In lieu of carrying out the construction and upon payment of Rs.2.25 crores, the builder was to acquire ownership rights in the First Floor of the property. Thus, the builder's role in this case was not that of a 'service provider' but that of an owner. The builder was undertaking the construction activity, not on behalf of the owner but on his own behalf. As per clause 11, the cost of construction and other costs were to be borne purely by the builder. As per clauses 21 all taxes including house tax, property tax, water and electricity charges and other dues and demands from the date of handing over the vacant possession and during the construction period till possession is handed over back to the owner was to be paid and borne by the builder.

Even the permissions from municipal authorities for sanction and approval of the construction was to be obtained by the builder.

12. Clause 11 of the collaboration agreement is categorical that the “*entire amount required or payable for carrying out construction, development, completion*” was wholly on account of the builder. This Clause can have only one interpretation. The amount required or payable for carrying out the construction includes the VAT. The VAT amount would be covered clearly under the terminology “*statutory and other fees*” as contained in Clause 11. Thus, the demand for VAT charges from the owner cannot be on the basis of the collaboration agreement. The builder undertook the construction for his own benefit and not the owner’s benefit. The acquiring of ownership rights by undertaking construction shows that the collaboration agreement was not a contract for rendering services to the owner. There was no sale of goods or services between the owner and the builder. It was a contract under which the builder became part-owner of the property. The passing on of the burden of VAT charges to the owner was not contemplated in the collaboration agreement. A reading of the collaboration agreement clearly reveals that as per Clause 21, the owner had to bear her share of the taxes only for the period after the completion and handing over of the building to her. Admittedly, the VAT charges which have been claimed relate to the period of construction and not thereafter. The transaction for which the VAT is being demanded from the owner is, as per the invoice, for the period January, 2013 which is during the period of construction. This was clearly not the responsibility of the owner.

13. The conduct of the builder has also not been bona fide, inasmuch as, the sale deed for the First Floor was entered into on 15th January, 2014. In

the said sale deed, the entire cost of construction and the TDS etc., have been taken into account. Until then, there was no demand for the VAT charges and the invoice is claimed to have been raised for the first time only on 31st October, 2014. The invoice has clearly been raised as a complete afterthought after the entire transaction stood concluded between the parties. The legal notice and the suit filed thereafter have been a result of a deliberate misinterpretation of the collaboration agreement. The construction was the sole obligation of the builder and by raising an invoice towards VAT charges, the builder cannot pass on his responsibility and fasten the same on the owner. The owner has not bought any goods or services from the builder for her benefit, but the construction items and other goods have been purchased by the builder for completing the construction which was his own responsibility. This is not a case of a 'works contract' under Section 2(zc) of the Delhi Value Added Tax Act, 2004. Thus, on a clear reading of the collaboration agreement, the suit under Order XXXVII of the CPC is itself not maintainable. The impugned judgment and decree dated 5th November, 2015 and the impugned order dated 15th February, 2017 are set aside.

14. The usual course of action may have been to remand the matter back to the Trial Court after granting leave to defend to the Appellant/owner. However, in the present case such a course of action would not meet the ends of justice inasmuch as the owner is a widow who is almost 86 years of age. The collaboration agreement is the only basis of the suit and the conversion of the suit under Order XXXVII of the CPC to a simple suit, thereby requiring evidence to be led, would infact be of no avail. A reading of the collaboration agreement and the mutual obligations of the parties

therein makes it clear that the amount claimed towards VAT charges is not the liability of the owner. In commercial transactions of this nature, the court is vested with ample powers to pass a judgment in a summary manner especially when the foundation of the plaint itself is lacking. Under such circumstances, no useful purpose is served in granting leave to defend and remanding the matter. The suit is held to be not maintainable and the same is dismissed.

15. Appeal is allowed in the above terms. All pending CMs are disposed of. No order as to costs.

PRATHIBA M. SINGH, J.
Judge

MARCH 05, 2018/R

