

\$~6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) (COMM) 103/2018 & CM APPL. 19988/2018**

ARVIND YADAV

..... Appellant

Through: Mr.Raman Duggal with Mr.Akshay
Chaudhary, Mr.Arun K.Panwar &
Mr.Ojusya Joshi, Advocates.

versus

HARISH KUMAR BHALLA & ANR

..... Respondents

Through: Mr.Jitender Chaudhary, Advocate for
R1.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER

11.03.2019

%

Dr. S. Muralidhar, J.:

1. This is an appeal against an order dated 17th April 2018 passed by the learned Single Judge in OA 21 of 2018 in CS (COMM) 22 of 2015 upholding an order dated 30th January 2018 passed by the Joint Registrar ('JR') dismissing the Appellant's application IA 11489 of 2016 under Order 1 Rule 10 CPC for impleadment.

2. The facts in brief are that on 21st March 2013 a Collaboration Agreement (CA) was executed between Mr. Harish Kumar Bhalla (hereafter referred to as 'the owner') and Mr. Mannu Talwar (hereafter referred to as 'the builder') in terms of which the owner pooled in his plot of land and the builder agreed to contribute his resources to construct a superstructure on the plot. The builder fell short of funds. Both parties thereafter entered into a Supplementary Agreement (SA) dated 8th March 2014 in terms of which the

builder was allowed by the owner to accept a booking with respect to the second floor of the superstructure. It was specifically provided that till such time the building was not complete the owner would not execute the sale deed in favour of the nominee of the builder.

3. The case of the present Appellant is that thereafter on 16th October 2014, the builder and the Applicant entered into an Agreement to Sell (ATS) whereby the builder agreed to sell to the Appellant his right and interest in the second floor of the superstructure. The builder is stated to have sent the owner an e-mail on 22nd May 2015 nominating the Appellant as the builder's nominee for the execution of the sale deed in respect of the second floor. The Appellant claims that the builder received payment from the Appellant and sent an e-mail informing the owner about it.

4. On 12th October 2015 the architect provided the completion certificate in respect of the superstructure to the builder. On 14th October 2015 the owner gave the builder two days' time to rectify the minor discrepancies in the building. A complaint was given by the owner to the SHO Amar Colony stating that in the absence of the penalty amount being paid by the builder Unit No.3 could not be handed over. On 20th October 2015 the owner sent the builder a legal notice claiming that Rs.20 lacs would be required to complete the construction as per the CA.

5. In the above circumstances on 3rd November 2015 the builder filed Suit No.30 of 2015 in the District Court at Saket. However, the said suit came to be withdrawn. On 8th December 2015 the owner filed CS(COMM) 22 of

2015 in this Court against the builder for possession, declaration, permanent and mandatory injunction. The main prayers in the suit was for a decree of possession in favour of the owner (Plaintiff) of ground floor, first floor, second floor and third floor along with common services in common area of the property at 208, Sant Nagar, New Delhi. The other substantive prayers B, C, D and E read as under:

“B. pass the decree of declaration in favour of the Plaintiff declaring the collaboration agreement dated 21.10.2013 and supplementary agreement dated 08.03.2014 as cancelled, due to non- performance on the part of Defendant.

C. Pass the decree of Declaration declaring the Defendant to be not entitled to any benefit or refunds under the scheme of collaboration agreement dated 21.10.2013 and supplementary agreement dated 08.03.2015 and validating the forfeiture of the Plaintiff.

D. Pass the decree of Permanent Injunction restraining the Defendant, their agents, attorneys, representatives to sale, deal, possess, enter or create third party rights in any manner including sale or lease for the property bearing number 208, Sant Nagar, NewDelhi -110 065.

E. Pass the decree of Mandatory Injunction directing the Defendant to cancel the agreement or bookings if any received under the supplementary agreement regarding the dwelling unit no. 3/second floor of the property bearing no.208, SantNagar, New Delhi-110065.”

6. According to the Appellant despite knowing that he had a direct interest in the subject matter of the suit and particularly in view of clause ‘E’ of the prayer seeking cancellation of the agreement to sell dated 16th October 2015 entered into between the Appellant and the builder, the owner did not

implead the Appellant as a party to the suit. The Appellant contends that he is a necessary and proper party to the suit.

7. Accordingly the Appellant filed IA No.11489 of 2016 under Order 1 Rule 10 CPC in the aforementioned suit seeking impleadment. The JR who heard the application perused the CA dated 21st October 2013 and the SA dated 8th April 2014 and held that neither could create any privity of contract between the Appellant and the owner. After perusing the *bayana* agreement dated 16th October 2014 between the Appellant and the builder, the JR concluded that cause of action was limited by the Appellant himself to recovery of double the amount from the builder in the event of any dispute. Since according to the JR the Appellant had no right against the owner he was not a necessary party.

8. Aggrieved by the above order the Appellant filed OA No.21 of 2018 which came up for hearing before the learned Single Judge. Referring to the decision in ***Ramesh Hirachand Kundamal v. Municipal Corporation of Greater Bombay (1992) 2 SCC 524*** the learned Single Judge, in the impugned order dated 17th April 2018, observed that the Appellant being the subsequent buyer did not have any privity of contract with owner. No right of the Appellant flowed from either the CA or the SA between the owner and the builder. It was further held that even if prayer 'E' of the suit is allowed and the *bayana* agreement dated 16th October 2014 was cancelled, the Appellant's remedy against the builder would subsist and it would be upon to him to claim damages against the builder.

9. During the pendency of the present appeal a question arose whether the Appellant would have no grievance in the event if the owner gave up prayer 'E' in the suit. It must be noted here that both before the learned Single Judge and before this Court, the builder despite being served, did not appear.

10. On 8th February 2019 counsel for the owner/Plaintiff sought further time for instructions whether the Plaintiff would still press prayer 'E'. Thereafter, the owner filed an affidavit on 28th February 2019 stating that he was agreeable to delete prayer clause 'E' from the plaint. In other words he stated that he was not seeking any relief against the present Appellant. Accordingly, he prayed that the present appeal itself should be dismissed.

11. Mr. Raman Duggal, learned counsel appearing for the Appellant, on the other hand referred to the other prayers in the suit and submitted that any decision in respect of any of those prayers would continue to cause prejudice to the present Appellant who, according to him, was both a necessary and proper party to the suit.

12. The Court has considered the above submissions. From the narration of in the memorandum of appeal, it is seen that the Appellant's case is based on the interpretation of the CA as well as the SA between the owner and the builder as well as the *bayana* agreement dated 16th October 2014 between the Appellant and the builder. As far as the Plaintiff/owner is concerned even if he gives up prayer 'E' of the suit whereby he has challenged the *bayana* agreement between the Appellant and the builder, he is still in prayer (A) pressing for the relief of possession of all the portions of the built up

property i.e. the flats on each of the four floors, including the second floor. If the owner were to succeed in prayer 'A' in respect of the second floor, the resultant decree would prejudice the present Appellant who is also laying a claim to the second floor on the basis of the *bayana* agreement between him and the builder. Therefore, the mere fact that the owner is agreeable to give up prayer 'E' in the suit will not be a satisfactory resolution of the grievance of the present Appellant.

13. What also emerges from the above discussion is that even according to the owner, the present Appellant is a proper party to the suit. In other words any decision in favour of the owner in the suit in relation to any of the prayers therein *qua* the second floor of the building would adversely affect the rights and interests of the present Appellant. As explained in ***Ramesh Hirachand Kundamal v. Municipal Corporation of Greater Bombay*** (*supra*) a necessary and proper party would have to be "directly or legally interested in the action and has to be able to show that the result of the suit will curtail his legal rights." That condition is certainly satisfied in the present case. Any decision touching on the second floor flat in the premises might be adverse to the present Appellant who has entered into a bayana agreement with the builder for the very same second floor flat and claims to have parted with valuable consideration for that purpose.

14. Without entering into the merits of the case of the present Appellant in the main suit, and expressing no opinion on his contentions vis-a-vis his claims against the owner and builder, the Court is of the view that the Appellant is a necessary and proper party to the suit CS (COMM) 22 of

2015.

15. For the abovementioned reasons the impugned orders dated 30th January 2018 passed by the JR and 17th April 2018 passed by the learned Single Judge are hereby set aside. The Appellant is impleaded as Defendant No.2 in the suit CS(COMM) 22 of 2015.

16. It is clarified that in view of the above conclusion the owner/Plaintiff will not be bound by the affidavit dated 28th February, 2019 filed by him in the present appeal. All contentions of the owner/Plaintiff qua the rights and contentions of the present Appellant are left open to be urged before the learned Single Judge.

17. The Plaintiff/owner will now file an amended memo of parties in CS (COMM) 22 of 2015 within one week. The suit will be now listed before the learned Single Judge on the date already fixed and further steps would be taken consequential upon this order by the learned Single Judge.

18. The appeal is allowed in the above terms but in these circumstances with no orders as to costs. The pending application also stands disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 11, 2019/tr