

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

% Judgment delivered on: 08th May, 2020

+ C.R.P. No. 57/2019

M/S ASPEN BUILDTECH LTD

..... Petitioner

versus

M/S EPICURIA GALLEY PVT LTD

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Amarjit Singh Chandhiok, Senior Advocate with Mr. Ritesh Kumar, Mr. Vikram Sobti, Mr. Mehul Parti, Mr. Ashwani Malhotra, Ms. Swati Seth, Ms. Aditi Mohpatra and Mr. Taranjeet, Advocates.

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For the Respondent: Mr. Sandeep Sethi, Senior Advocate with Mr. Rajesh Yadav and Ms. Ruchira V. Arora, Advocates.

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CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

C.R.P. 57/2019 & CM APPL.9037/2019 (for interim relief), CM APPL.9038/2019 (for calling Trial Court record)

1. Petitioner impugns order dated 28.01.2019 whereby the Trial Court has allowed the application under Order 23 Rule 1(1) and 1(3) Code of Civil Procedure (CPC for short) filed by the Respondent and

permitted the Respondent to withdraw the Suit with liberty to file a fresh Suit for damages.

2. A License Agreement was entered into between the parties on 19.09.2015, whereby Petitioner had agreed to license part of its premises in commercial complex known as “Worldmark 1” located at Asset Area 11, situated at Hospitality District, Indira Gandhi International Airport, New Delhi. The license was entered into for a period of 15 years for the purposes of running of multi-tenanted Food & Beverage concepts under the brand and style of *Epicuria*.

3. Contending that Petitioner had committed breach of the license agreement; *inter-alia* changing the lay out of the access roads, ramps leading to changed orientation of the property requiring complete rework and re-planning, Respondent stopped paying the license fee. Petitioner/Defendant terminated the License Agreement.

4. Respondent filed a Suit for declaration, permanent and mandatory injunction seeking a declaration that the termination was illegal and sought a restraint against the Petitioner/Defendant from handing over possession of the tenanted portion to third party and further sought a restraint from interfering in the commencement of the operations by the Respondent/Plaintiff.

5. One of the objections taken by the Petitioner in the written statement was that the contract was terminable and as such the remedy

available to the Respondent Plaintiff was not enforcement of the agreement but damages; if termination was held to be illegal.

6. Respondent/Plaintiff had also filed an application under Order 39 Rules 1 & 2 CPC seeking an ad interim injunction. Said application was dismissed by order dated 12.01.2018 by the Trial Court declining the injunction and holding that the damages were an adequate remedy.

7. After dismissal of the application under Order 39 Rules 1 & 2 CPC, Respondent filed the subject application under Order 23 Rule 1 (1) and 1(3) seeking permission to withdraw the Suit with liberty to file a fresh Suit for damages on the same cause of action.

8. Grant of liberty to file a fresh Suit was opposed by the Petitioner contending that the Respondent had filed an application under Order 2 Rule 2 reserving the right to claim damages that may accrue in the future. It is contended on behalf of the Petitioner that since Respondent had specifically filed an application under Order 2 Rule 2 and reserved the right to claim damages that may accrue in the future, Respondent could not withdraw the Suit with liberty to file a fresh Suit for damages for breach of contract.

9. The Trial Court rejected the objection of the Petitioner holding that the fact that a separate application under Order 2 Rule 2 was filed by the Respondent along with the Suit mentioning about damages,

showed the intention of the Respondent/Plaintiff to claim damages and there was no reason for the Court to presume that Plaintiff would forego the right to claim damages, if any, which had arisen till the date of filing of the Suit and would only press for future damages. Further, Trial Court, while holding that the Suit was not maintainable allowed the application for withdrawal of the Suit with liberty to institute a fresh Suit for damages on the same cause of action.

10. It may be observed that Respondent had filed the subject Suit seeking declaration that the termination of the License was illegal and had sought permanent and mandatory injunction which were really in the nature of specific performance of the license agreement. One of the objections raised by the Petitioner/Defendant was that specific performance of a contract which is terminable could not be granted and the remedy, if any, would be of claiming damages.

11. Further, the application filed by the Respondent seeking ad interim injunction was dismissed by the Trial Court on 12.01.2018 holding that injunction could not be granted as damages were adequate remedy.

12. Faced with the objection taken in the written statement and the findings returned by the Trial Court in the order dated 12.01.2018 based on the application seeking ad interim injunction; that injunction could not be granted as damages were adequate remedy, Respondent filed the subject application under Order 23 Rule 1(1) and 1(3) CPC

seeking withdrawal of the Suit with liberty to file a fresh Suit for damages on the same cause of action.

13. Reference may be had to Section 21 of the Specific Relief Act, 1963 which reads as under:-

“21. Power to award compensation in certain cases.—(1) In a Suit for specific performance of a contract, the Plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such Suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the Defendant, and that the Plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such Suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the Plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the Plaintiff has claimed such compensation in his plaint:

Provided that where the Plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.”

14. In terms of Section 21(1) of the Specific Relief Act, in a Suit for specific performance of a contract, Plaintiff is entitled to claim compensation for its breach either in addition to or in substitution of such performance. Proviso to Section 21 stipulates that where Plaintiff has not claimed any compensation in the plaint, the Court shall at any stage of the proceeding allow him to amend the plaint on such terms as may be just for including a claim for such compensation.

15. Under order 23 rule 1 (3) CPC, where the court is satisfied that a Suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the Plaintiff to institute a fresh Suit for the subject-matter of a Suit or part of a claim, it may grant permission to withdraw with liberty to institute a fresh Suit.

16. Neither in the application, Respondent has contended that there is a formal defect because of which the Suit must fail or there are sufficient grounds for allowing the Plaintiff to institute a fresh Suit on

the same cause of action nor has the Trial Court adverted on the said aspect.

17. Powers under Order 23 Rule 1 (3) CPC for granting liberty to institute a fresh Suit can be exercised only in the given two circumstances. In the present case, as noticed above neither is it so contended by the Respondent/Plaintiff nor has the Trial Court considered the said aspect.

18. I am in agreement with the submissions of Mr. Chandhiok learned senior counsel for the Petitioner that the impugned order permitting withdrawal with liberty is not sustainable since it does not satisfy the requirement of Order 23 Rule 1 (3) CPC for grant of liberty to file a fresh Suit on the same cause of action.

19. The Trial Court by the impugned order did two things; (i) permitted withdrawal of the Suit and (ii) granted liberty to file a fresh Suit.

20. The sequitur to holding that the order is not sustainable, is not the order would be upheld in part and set aside in part. The effect is not that the application in so far as it seeks withdrawal would be allowed and the part which permits liberty to file a fresh Suit would be set aside. The order in its entirety has to be set aside i.e. the application under Order 23 Rule 1 sub Rule (1) and (3) CPC is liable to be dismissed in toto.

21. It is not permissible for the court to allow withdrawal of the Suit but refuse grant of permission. When an application is filed under Order 23 rule 1 (1) & (3) CPC, the court must either allow the withdrawal with liberty or dismiss the application.

22. Where the Plaintiff files an application under Order 23 Rule 1(1) & (3) CPC seeking liberty to withdraw the Suit with liberty to file a fresh Suit, the application has to be either allowed or dismissed in toto. It cannot permit withdrawal of the Suit and refuse to grant liberty to file a fresh Suit.¹

23. The consequence of the same would be that the Suit would continue to remain on the board of the Trial Court.

24. The further effect of the same is that Respondent would be entitled to move an application in terms of proviso to Section 21 and seek amendment of the plaint to incorporate the relief of damages in addition or in substitution to the claim for specific performance of the agreement.

25. In view of the above, petition is allowed in the above terms. Impugned order dated 28.01.2019 permitting the withdrawal of the Suit with liberty to file a fresh Suit for damages is set aside. The

¹ *Mon Bharan Hazam Versus Ratiram Gore* (2002) 3 Gau LR 370 (Gau); *Rajasundari w/o Sivaramakrishnan Versus Gowri alias Avaduai Ammal* AIR 2006 Mad 156; *Asha Agarwal Versus Arbind & Co.* (2013) 1 Gau LR 30 (Gau); *Bidhan Chandra Ghosh Versus Tapab Saha & Anr.* 2016 SCC OnLine Cal 3678

application under Order 23 Rule 1 sub Rule (1) and (3) CPC filed by the Respondent is dismissed in toto.

26. The Suit stands restored on the file of the Trial Court. The Trial Court would be at liberty to proceed further with the same in accordance with law.

27. Parties shall appear before the Trial Court for further directions on 14.07.2020.

28. Copy of the Judgment be uploaded on the High Court website and sent to learned counsel for the Parties through email.

SANJEEV SACHDEVA, J

MAY 08, 2020

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