

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

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**Reserved on: 31st May, 2021
Pronounced on: 4th June, 2021**

+ **CM (M) 8/2021**

BDR BUILDERS AND DEVELOPERS PRIVATE LIMITED

.....Petitioner

Through: Mr. Ravi Gupta, Senior Advocate
with Mr. Akhil Sachar, Ms.
Sunanda Tulsyan and Mr. Sachin
Jain, Advocates

Versus

SHRICHAND BIJLANI

.....Respondent

Through: Mr. Pradeep Norula and
Ms. Ayushi, Advocates

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

**CM (M) 8/2021, CM APPLN. 278/2021 (by the petitioner u/S 151
CPC for stay)**

1. This petition has been filed by the petitioner under Article 227 of the Constitution of India with the following prayers:

“ a) Allow the present Petition and set aside the order dated 05.09.2020 passed by the Court of Shri Sanjay Sharma-II, Additional District Judge-05 (South East), Saket Courts, New Delhi in Execution Petition No.

1352 of 2018 titled as Shrichand Bijlani versus BDR Builders and Developers Private Limited;

b) Pass any other such order as this Hon'ble Court may deem fit in the facts and circumstances of the present case.”

2. The brief facts as are relevant for the disposal of this petition are as follows. The petitioner had filed a suit for possession, recovery of mesne profit and damages against the respondent by claiming to be the sole and absolute owner of the built-up property No.C-11 Nizamuddin East, New Delhi, admeasuring 200 square yards. The respondent had opposed the suit on the ground that he in his own right was the owner of the suit property. At the stage of final arguments, the suit, which was filed in 2016, was settled and the parties entered into a compromise, the broad contours of which the court recorded on 10th November, 2017. On the basis of the said compromise broadly recorded on 10th November, 2017, both the parties moved an application before the learned Trial Court under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (“CPC”, for short) recording in detail the terms and conditions of the Compromise/Settlement Agreement (Annexure B). The learned Trial Court disposed of the suit in terms of the said Compromise/Settlement Agreement on 23rd December, 2017.

3. Subsequent to certain events, the respondent filed an Execution Petition bearing No.1352/2018. The respondent prayed that directions be issued to the petitioner to carry out the construction in strict adherence to the terms and conditions of the Compromise/Settlement Agreement on the basis of which the suit was decreed on 23rd December, 2017. The

impugned order dated 5th September, 2020 while disposing of objections filed under Section 47 CPC by the petitioner, has directed it to carry out the necessary repairs/modifications within three months from the date of the order. It also declined to vacate the interim order dated 19th December, 2018 whereby the petitioner has been restrained from creating third party rights or interests of any nature whatsoever in the first floor and basement of the suit property. The present petition has been filed assailing this order on various grounds.

4. It may be noticed here that in the course of hearing of this Execution Petition, the learned Executing Court appointed Shri Ajay Goshwami, Advocate as Local Commissioner on 31st October, 2018. The Local Commissioner inspected the premises on 5th November, 2018 and submitted his report dated 17th November, 2018. The petitioner filed objections under Section 47 CPC to the said report on 17th December, 2018. Despite the objections filed by the petitioner, the learned Executing Court took the report of the learned Local Commissioner, Shri Ajay Goshwami as filed on 30th November, 2018 in order to facilitate the settlement between the parties. On 19th December, 2018, the learned Executing Court directed the parties to maintain *status quo* qua the suit property till further orders.

5. According to the petitioner, it carried out several changes and rectifications on the basis of the Local Commissioner's report and filed a list on 17th January, 2019. However, these were disputed by the respondent. As a result, another Local Commissioner, Shri Sachin Aneja, Advocate was appointed to carry out further inspection of the suit

property. Shri Sachin Aneja, Local Commissioner inspected the suit property on 18th February, 2019 and submitted his report on 2nd March, 2019 to which the objections/clarifications were filed by the petitioner on 20th March, 2019. These objections were considered by the learned Executing Court vide the impugned order dated 5th September, 2020 directing the petitioner to remove the defects as noticed. The learned Executing Court fixed the matter for further proceedings on 29th January, 2021 vide order dated 17th December, 2020, according to the petitioner, without considering its submissions before it that the alleged defects have been duly rectified.

6. Sh. Ravi Gupta, learned Senior Advocate on behalf of the petitioner submitted that the defects were categorized as ‘minor’ and ‘major’ defects as described by the learned Local Commissioner and it is the case of the petitioner that all the defects described as ‘minor’ have been rectified. It is submitted that the modifications in the window size, stone cladding, etc., were carried out only on the instructions of the son of the respondent. With regard to the so-called ‘major’ deviation, learned Senior Counsel submitted that originally the parties had agreed to a building plan, which is placed on the record as a part of Compromise/Settlement Agreement, namely, as Annexures A-1, A-2 and A-3, the specific site plan for the stilt area/basement and the staircase being at page 71 of the electronic file (Annexure B). Learned Senior Counsel pointed out that as per this site plan, the staircase to the basement was continuous from the top floor. However, when the South Delhi Municipal Corporation (“SDMC”, for short) granted the Sanctioned Plan, in accordance with the existing Building Bye-Laws, the staircase to the

basement was to be constructed behind the lift (Annexure-T at page 221 of the E-file).

7. It is further submitted by learned Senior Counsel that by the time the construction was concluded in August, 2018, there was a move to change the Building Bye-Laws so as to permit the construction as per the agreed site plan (at page 71). Therefore, this staircase was constructed as per the agreed site plan though not in accordance with the Sanctioned Building Plan. It is stated that the SDMC has also compounded this deviation as it was in terms of the modified Building Bye-Laws (vide Circular dated 3rd December, 2018 (Annexure-N). The learned Senior Counsel, therefore, submitted that the construction at site was in terms of the terms and conditions of the Compromise/Settlement Agreement dated 23rd December, 2017 and there was no deviation that required rectification.

8. Learned Senior Counsel further argued that the intention of the respondent was *malafide* inasmuch as the Execution Petition was filed only after the petitioner had raised a demand vide Legal Notices dated 8th August, 2018 and 20th August, 2018 for a sum of Rs.9,00,000/- with interest @18% p.a. from 23rd December, 2017 towards payment of GST. It was further submitted that the construction was to be completed by February, 2019, but the petitioner had completed it by August, 2018, that is well before the deadline and had offered for possession the second, third and terrace floors, being the share of the respondent to him on 7th September, 2018 itself.

9. In accordance with the terms of the Compromise/Settlement Agreement, the respondent was required to pay a sum of Rs.75,00,000/-

towards balance consideration along with the GST payable and it was this amount that the petitioner had demanded vide the Legal Notice dated 7th September, 2018. The learned Senior Counsel for the petitioner submits that the respondent is trying to wriggle out of this liability of a sum of Rs.75,00,000/- plus Rs.18,00,000/- towards GST and to that end, has been refusing to take physical possession of the premises. According to the learned Senior Counsel, once the premises were offered for possession, the obligation on the petitioner had come to an end and the Clause xiii relating to penalty could not be enforced.

10. It is further submitted by the learned Senior Counsel that the continuation of the interim orders restraining the petitioner from disposing of its share of the property was inequitable as, when a sum of Rs.93,00,000/- was due and payable by the respondent, further restraint on the enjoyment of the property by the petitioner was unjustified. If at all any payments for the rectifications were to be suffered by the petitioner, the amount due and payable to it by the respondent could be adjusted to the sum of Rs.93,00,000/-, which was due to the petitioner. Learned Senior Counsel submitted that while the petitioner was not objecting to the rectification and was aggrieved only by the restraint order, nevertheless, to end all controversies, a prayer has been made that an independent third party be appointed to carry out the rectifications in the second, third and terrace floors as the basement was not the property of the respondent.

11. The learned counsel for the respondent, Shri Pradeep Norula submitted that from the reports of both the Local Commissioners, it was clear that there were deviations noticed in the construction and against the

terms of the Compromise/Settlement Agreement. The subsequent rectification was, therefore, of no consequence. The learned counsel did not dispute that in the course of all this time, the petitioner had in fact carried out some rectifications. However, according to him, the references made in the rejoinder filed by the petitioner to the list of the pending work appended to the reply of the respondent to this petition, did not reflect the correct position at site as the petitioner was referring to something totally different in his rejoinder. For instance, the reference to the skylight created in the common area was not the deviation pointed out but the location of the shaft.

12. Learned counsel for the respondent submitted that possession was to be offered after the completion of the construction strictly in terms of the Compromise/Settlement Agreement. Possession had to be handed over. By no measure could the sending of an email/letter to the effect that possession could be taken be considered handing over of possession. Learned counsel for the respondent pointed out that the very fact that even after obtaining the Completion Certificate 23rd August, 2018 work at site continued, establishes that the second, third and terrace floors were not ready for handing over or taking over of possession.

13. Learned counsel drew attention of the Court to the terms of the Clause xiii of the Compromise/Settlement Agreement to submit that when possession was not handed over by February, 2019, penalty was due and leviable at the agreed rate of Rs.1,00,000/- per month for the first three months, Rs.2,00,000/- per month for the next three months, Rs.3,00,000/- per month for the next three months and Rs.4,00,000/- per month thereafter, till the possession and willingness/readiness to execute

the sale-deed is offered to the defendant as per the Clause vii of the same Compromise/Settlement Agreement. The learned counsel also submitted that consent for any change from the approved site plan/or the Sanctioned Plan was to be with the written consent of the defendant or his nominees in terms of Clause vi of the same Compromise/Settlement Agreement. Admittedly, there is no written consent produced by the petitioner to support his claim that modifications were with the consent of the son of the respondent.

14. Learned counsel submitted that the interim orders restraining the petitioner from disposing of the first floor and the basement has to be seen in the context of this penalty, now amounting to Rs.90 lacs, which is due and payable to the respondent. Furthermore, if the interim orders were varied, the petitioner would vanish and the respondent would be left high and dry without a sale-deed in his favour. In these circumstances, learned counsel for the respondent submitted that no interference was warranted in the impugned orders.

15. Though both sides have taken this Court in great detail to the shortcomings in the construction, as claimed by the respondent, and the rectifications and clarifications, as claimed by the petitioner, it appears to this Court that these aspects would really be relevant while determining the question of enforcement of the penalty clause of the Compromise/Settlement Agreement. The respondent has claimed to be entitled to a sum of Rs.90 lacs as on date towards penalty, as the petitioner has not handed over possession or executed the sale-deed. On the other hand, according to the petitioner, the construction had been completed much before the deadline of February, 2019 as the Completion

Certificate was obtained on 23rd August, 2018 whereafter, the offer of possession was made to the respondent in terms of Clause vii. Learned counsel has urged that the shortcomings were not such that prevented the respondent from taking possession and still getting the rectifications done. These are questions of fact as are relevant for determination of the question as to whether or not the respondent is entitled to claim penalty and if so, of what amount. The impugned order does not touch upon the quantum of penalty.

16. Moreover, as rightly pointed out by the learned Senior Counsel for the petitioner, if the respondent were to claim penalty, then it would partake of the nature of damages for breach of contract and the provisions of the Contract Act would become relevant and the question whether without there was an attempt to mitigate the loss and to what amount the respondent would be entitled to would have to be determined. There is nothing on the basis of which the respondent presently claims the sum of Rs.90 lacs towards penalty, except that it is his own assessment. That has to be justified and would also depend on the answer to the question as to whether possession was offered.

17. It is not considered appropriate, therefore, to comment whether possession was offered by the petitioner or possession was refused by the respondent or whether there was in fact no offer of possession to the respondent. Since the basis of the claim of the respondent is that the property was not constructed in terms of the Compromise/Settlement Agreement and therefore, possession was not offered in terms of the Compromise/Settlement Agreement, any observations of this Court may prejudice either side. Therefore, this Court is not inclined to go that way.

18. However, a remark of the learned Executing Court in the impugned order (at page 45 of the E-file) that the compounding by the SDMC of the deviation in the Sanctioned Plan was immaterial, seems misplaced as it is the SDMC alone which is the Competent Authority to determine whether a deviation can be compounded and if so, on what terms. If at all, the proceedings are initiated for enforcement of the penalty clause, this observation of the learned Executing Court shall not come in the way of a decision in those proceedings.

19. Since the Local Commissioners had found some deviations and according to the rejoinder, several of the deviations have already been rectified, the direction of the learned Executing Court that the balance remaining defects be rectified within three months, cannot be faulted. However, the three months' period having expired, a further time of three months is granted to the petitioner to rectify all defects as have been found on the second, third and terrace floors, which do not entail removal of the load bearing pillars, beams and walls.

20. The learned Executing Court had on 19th December, 2018 and thereafter, through other subsequent orders, directed the parties to maintain *status quo* with regard to ownership and creation of third party rights in the premises in question that is the premises falling into the share of the petitioner viz. first floor and basement and to the share of the respondent viz. the second, third and the terrace floors. The ground floor has already been transferred to one Ms.Gauri Rasgotra vide Sale-Deed dated 27th September, 2018. The stilt floor is also divided equally between the petitioner and the respondent and one portion is for common use.

21. It is noticed that in the impugned order, the learned Executing Court refused to vacate this order dated 19th December, 2018, but directed that the interim order restraining the petitioner from creating any third party rights or interests of any nature whatsoever would remain in operation till the disposal of the Execution Petition. There is some merit in the submissions of the learned Senior Counsel for the petitioner that this operates inequitably on the petitioner.

22. Admittedly, as per the terms of Clause iv of the Compromise/Settlement Agreement, the respondent was required to pay a sum of Rs.75 lacs when the possession of the newly constructed second, third and terrace floors with stilt parking was given to the defendants or his nominees on or before 15th February, 2019. The respondent is seeking to set off this amount against what he claims he is entitled to under the as penalty clause. This dispute is yet to be resolved. Further, the staircase going to the basement is the second bone of contention and it is to be determined whether it calls for the re-construction in the light of the compounding allowed by the SDMC. In the circumstances, the complete restraint on the petitioner preventing him from disposing of both the first floors as well as the basement falling into the share appears to be unfair.

23. The present petition is accordingly disposed of directing the petitioner to complete the remaining rectifications in terms of the observations made hereinabove on the second, third and terrace floors within a period of three months from today. The learned Executing Court is directed to determine afresh the need for modifications of the stairs leading to the basement and the skylights, as provided in the common area for the benefit of the basement. The learned Executing Court shall

take into consideration the Circular dated 3rd December, 2018 of the SDMC modifying the Building Bye-Laws including the agreed site plan (at page 71 of the E-file) and the compounding of deviations by the SDMC. The interim orders are also modified and while the injunction is vacated in respect of the first floor of the suit property, the petitioner is restrained from creating any third party rights or interests of any nature whatsoever in respect of the basement, till the matter is finally decided by the learned Executing Court.

24. The petition is accordingly disposed of along with the pending application.

25. The judgment be uploaded on the website forthwith.

JUNE 04, 2021
pkb/ak/ck/s

(ASHA MENON)
JUDGE