

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

% **Pronounced on: 15th December, 2021**

+ **CS(OS) 576/2021, I.As.14345/2021 (of plaintiff u/O XXXIX R-1&2 CPC for interim relief) & 14346/2021 (of plaintiff u/S 149 r/w Section 151 CPC for extension of time of ten days for filing the balance court fees)**

SAMEER MADAN

..... Plaintiff

Through: Mr. Kishore M. Gajaria and
Mr. Aayush Paranjpe, Advocates

Versus

ASHOK KUMAR KAPOOR

..... Defendant

Through: None

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. The suit has been filed seeking specific performance of a Collaboration Agreement dated 18th July, 2021 along with prayers for grant of permanent and mandatory injunction against the defendant. In the alternative, damages to the tune of Rs.2,10,00,000/- have been claimed against the defendant for attempting to cancel the said Collaboration Agreement dated 18th July, 2021.

2. The suit is in respect of property bearing No.D-89, situated at Ashok Vihar, Phase-I, Delhi-110052. The defendant is stated to be having 75% share in the said property and in actual, physical possession of his share, while his brother had 25% share in the said property, which the

wife of the plaintiff claims to have purchased through an Agreement to Sell from him for a sum of Rs.3,23,00,000/-, Rs.30,00,000/- having been paid towards earnest money.

3. Mr. Kishore M. Gajaria, learned counsel for the plaintiff, submitted that a Collaboration Agreement was entered into between the plaintiff and the defendant for re-development of the property and the same had been duly signed by the defendant. However, subsequently, he issued a Notice dated 31st July, 2021 to the plaintiff stating that the Collaboration Agreement was an invalid document as it lacked in 'consideration' and had been forced upon the defendant, taking advantage of his age. The plaintiff responded to the said notice. There were WhatsApp communications and talks on the phone between the parties, but the defendant claimed he was being prevented from acting on the Collaboration Agreement by his son and daughter-in-law. Learned counsel submitted that it was in these circumstances that the suit has been filed and it was fully maintainable.

4. Learned counsel submitted that the cause of action to file the suit was clearly disclosed as the defendant in the telephonic conversations, as recorded and transcribed by the plaintiff and placed on the record as document No.6 of the E-file, clearly affirms having entered into the Collaboration Agreement. Therefore, there was an agreement in existence, which the defendant could be directed to perform. It was submitted that the adamantness of the defendant has made it impossible for the Collaboration Agreement to be executed. The plaintiff had suffered a loss due to the defendant's non-performance as he had raised huge loans

from the market and had purchased building materials worth Rs.10,00,000/- too. He had also lost an amount that he would have otherwise earned on the deal. These losses he was seeking to recover through the suit.

5. The learned counsel submitted that the Collaboration Agreement contained reciprocal promises. The plaintiff had undertaken to construct the property and the defendant did not have to spend any money. In return, the defendant had to transfer two floors and 25% of the stilt parking to the plaintiff. Thus, the consideration was the amount to be spent on construction. Each party's promise was the consideration for the reciprocal promise. Since this promise of constructing two floors and handing over the same to the defendant was "valuable", this satisfied the definition of 'consideration' under Section 2(d) of the Indian Contract Act, 1872. Relying on the decisions of the Supreme Court in *Union of India v. Chaman Lal Loona & Co.*, 1957 SCR 1039 and *Chidambara Iyer v. P.S. Renga Iyer & Ors.* (1966)1 SCR 168, it was urged that what was "valuable" is determinable also by the court and therefore, this Court may accept that consideration had passed, even if not in money.

6. I have heard learned counsel, perused the Collaboration Agreement and the cited case law.

7. The interpretation placed by the learned counsel for the plaintiff on the decision in *Chidambara Iyer (supra)* is somewhat misplaced. What the court held was that consideration must have some value and must be real and not illusory. It must also be adequate. It is not for the court to fix a value to what is offered as consideration and conclude that

consideration had passed. No doubt, the valuation placed by parties alone will not suffice. It must appear to the court too that valuable consideration had passed. Section 2(d) of the Indian Contract Act defines consideration as under: -

“2. Interpretation-clause –

(a) to (c) xxx xxx

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise”

8. Before referring to the Collaboration Agreement, the decision in ***Chaman Lal Loona (supra)*** may be adverted to. It was held as under: -

“9. It is necessary to appreciate clearly the distinction between the two classes of contracts where the consideration is either executed or executory. “An executed consideration consists of an act for a promise. It is the act which forms the consideration No contract is formed unless and until the act is performed, e.g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a nudum pactum In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration. In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the other The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by far the most common variety. In other words, a contract becomes binding on the exchange

of valid promises, one being the consideration for the other. It is clear, therefore, that there is nothing to prevent one of the parties from carrying out his promise at once i.e. performing his part of the contract; whereas the other party who provides the consideration for the act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party.....”

9. The question is whether the Collaboration Agreement contains promises that are valid and are binding.

10. It is to be noticed that this Collaboration Agreement records that the defendant had requested the plaintiff to construct a new building in place of the existing structure where the defendant was residing; the plaintiff was to convert the property from lease-hold to free-hold at his expense; thereafter, within 15 days, the plaintiff was required to hand over the vacant possession to enable the demolition of the old building and the reconstruction; the floors were to be shared i.e., the second and third floor with roof rights, along with 50% share in Stilt Parking would be with the defendant, the remaining portion, being the upper ground floor and entire first floor along with 50% share in Stilt Parking would be with the plaintiff for which the defendant would have to execute sale deeds; the defendant would have “no liability for any expense on construction”; the responsibility of abiding with the regulations and payment of penalty and accidents, have also been set out; there are assurances on the quality and certain guarantees have also been incorporated in respect of the construction.

11. However, there is no reference to the consideration being paid for

the transfer of the property by the defendant to the plaintiff; there is also no undertaking mentioned in the agreement as to the liability of the plaintiff to meet the construction cost; and finally, not even an estimate of the construction cost is mentioned, though there is some reference to the quality of construction being 'good'.

12. In fact, the legal notice, copy of which has been placed on record as document No.3, which was sent by the defendant to the plaintiff, highlights these lacunae in the Collaboration Agreement to notify the plaintiff that the Collaboration Agreement signed on 18th July, 2021 was only an invalid document. Interestingly, in the reply of the plaintiff to this Legal Notice, placed on the record as document No.4, this objection of the defendant finds no answer. What were the reciprocal promises made and constituted consideration is not revealed or explained.

13. Another fact that seems to be worthy of noticing is that the reply to the Legal Notice records that the conversion from lease-hold to free-hold has not taken place. In fact, the said reply also reveals that the Agreement to Sell with the brother of the defendant was also dependent on the said conversion and as per the WhatsApp communication placed on record, the plaintiff's wife seems to have called off that deal too. In any event, payment of Rs.30,00,000/- to the brother of the defendant can, by no means, be read as 'consideration' being paid to the defendant.

14. The WhatsApp communication addressed to the brother of the defendant (part of document No.5, at page 35 of the plaintiff's document in the E-file), which was sent by the plaintiff and his wife, affirms this position and as a consequence of the inability to convert the property, had

requested that the Agreement to Sell dated 31st July, 2021 between them be treated as cancelled. The refund of the entire amount paid to him was also called for.

15. The importance of 'consideration' cannot be belittled. It is the consideration which puts enforceability in the agreements to make promises legally binding. Even where the 'promisor' intends to bind himself by the promise, 'consideration' is essential to make the promise binding and enforceable.

16. In the present case, even if the submission of the learned counsel for the plaintiff is accepted that in the telephonic conversations, as recorded by the plaintiff, the defendant had acknowledged having agreed upon a collaboration with the plaintiff, unless and until 'consideration' was disclosed, this intent of the defendant would lead nowhere. As noticed herein before, the Agreement is completely silent on the value of the property, now belonging to the defendant, and the estimated cost of construction.

17. The Agreement seems to be more in the nature of a note of assurances and not a 'concluded' contract. Thus, at best, it could be said that the plaintiff assured the defendant that he would have no liability to meet the cost of construction, that the construction would be of good quality, that the construction would be carried out in accordance with the regulations and the construction would be completed within two years after the possession was handed over to the plaintiff, and that too only after the property was converted from lease-hold to free-hold. The clauses do not come forth as reciprocal promises, one being the consideration for

the other.

18. Clearly, the averments in the plaint and the documents filed by the plaintiff do not disclose any cause of action. The Supreme Court in *T. Arivandandam v. T.V. Satyapal*, (1977) 4 SCC 467 has held that while considering an application under Order VII Rule 11 CPC, what is required to be decided is whether the plaint discloses a “real cause of action” or something “purely illusory”. If, on a meaningful and not a mere formal reading of the plaint, it appears to be manifestly vexatious and meritless and fails to disclose a clear right to sue, but through clever drafting creates an illusion of a cause of action, the court being guided by the mandatory provisions of Order VII Rule 11 CPC should not hesitate to exercise powers vested in it to “nip it in the bud”. This view has been reiterated by the Supreme Court in *Madanuri Sri Rama Chandra Murthy v. Syed Jalal*, (2017) 13 SCC 174. This Court has also taken the same view in *Raunak Singh v. DDA*, 2021 SCC OnLine Del 5165.

19. In the light of the foregoing discussion, therefore, the plaint is rejected under Order VII Rule 11 (a) CPC. All pending applications stand disposed of.

20. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

DECEMBER 15, 2021

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