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

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Date of Decision: 07.03.2024

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FAO (COMM) 42/2024, CM No.13106/2024 & CM No.13107/2024

ASIF ALI KHAN

..... Appellant

Through: Mr. Rajesh Mahindru, Adv.

versus

MANOJ KUMAR

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (ORAL)**

1. The appellant (plaintiff in the suit) has filed the present appeal impugning an order dated 20.02.2024 (hereafter *the impugned order*) passed by the learned Commercial Court allowing the respondent's (defendant's) application under Order VII Rule 10 of the Code of Civil Procedure, 1908 (hereafter *the CPC*). The Court directed return of the plaint in view of its finding that the dispute between the parties is not a "commercial dispute" under the Commercial Courts Act, 2015 (hereafter '*CC Act*').

2. The appellant had instituted the said suit – CS (COMM) No.482/2022 captioned *Asif Ali Khan v. Manoj Kumar* – for recovery of sum of ₹55,00,000/-. The appellant claims that the respondent had entered into a Collaboration Agreement dated 22.06.2016 (hereafter *Collaboration Agreement*) with the owners of the property bearing no.260 & 260A, Khasra No.210 min., Village Hauz Rani, Tehsil Hauz Khas, Malviya Nagar, New Delhi -110017, admeasuring 573 sq. yds (hereafter *the subject property*). In terms of the Collaboration Agreement, the subject property was required to be



demolished and a new building was required to be raised by the respondent. Further, in terms of the Collaboration Agreement, the respondent was entitled to accept bookings for sale of separate portions of the subject property.

3. The appellant claims that on the basis of the representations made by the respondent, he agreed to purchase the first floor, corner side Flat No.8, Property No.260 & 260A, measuring 135 sq. yds., Khasra No.210 min., Village Hauz Rani, Tehsil Hauz Khas, Malviya Nagar, New Delhi-110017 out of the total area of 573 sq. yds (hereafter *the said flat*). The said flat comprised of three bed rooms, one drawing / dining room, three bathrooms, kitchen, staircase, lift with one car parking. The total sale consideration of the said flat was agreed at ₹1,27,00,000/-. The appellant claims that the parties had entered into an 'Advance Receipt-cum-Agreement to Sell and Purchase' dated 25.08.2016 (hereafter *Agreement to Sell*) recording the terms of their agreement.

4. The appellant claims that in terms of the Agreement to Sell, he made a total payment of ₹35,00,000/- to the respondent. The appellant seeks recovery of the said amount along with interest quantified at ₹20,00,000/- for the period 31.08.2016 to 31.07.2022 (the date of filing of the suit). The appellant had categorized the dispute between the parties as a commercial dispute. However, the learned Commercial Court found that the dispute involved in the suit was not a commercial dispute.

5. By the impugned order, the learned Commercial Court held that the disputes involved in the said suit could not be categorized as a commercial dispute within the meaning of Section 2(1)(c) of the CC Act. The learned Commercial Court also referred to Section 2(1)(c)(vii) of the CC Act, which provides that the disputes pertaining to agreements relating to immovable property used exclusively in trade or commerce would be categorized as



commercial disputes. But, in the present case, the transaction between the parties was a simple transaction of sale and purchase of a residential flat. Thus, the same was not a commercial transaction under Section 2(1)(c)(vii) of the CC Act.

6. The learned counsel appearing for the appellant submits that the learned Commercial Court's conclusion in this regard is erroneous. He submits that the said flat would be a commercial property and therefore, the disputes regarding the sale and purchase of the said flat are commercial disputes within the meaning of Section 2 (1)(c) of the CC Act. He relies on the terms and conditions of the Collaboration Agreement, which indicate that the respondent had agreed to develop a five storeyed building comprising of ground floor, first floor, second floor, third floor and fourth floor. The Collaboration Agreement also specifies that the ground floor and first floor shall be treated as a commercial property. He submits that thus the Agreement to Sell could not be interpreted on standalone basis and it was necessary to consider the same in conjunction with the Collaboration Agreement.

7. We have heard the learned counsel for the appellant.

8. The principal controversy is whether the said flat, which was agreed to be purchased by the appellant in terms of the Agreement to Sell, is (or would be) a commercial property. Admittedly, the Agreement to Sell does not describe the said flat or the subject property as a commercial property. More importantly, the description of the said flat in the Agreement to Sell clearly indicates that the first floor of the subject property, which was subject matter of transaction under the Agreement to Sell, is a residential property. The same is evident from the description of the property which, as noticed above, comprises of three bed rooms, one drawing / dining room, three bathrooms,



kitchen, staircase, lift with one car parking.

9. It is also relevant to note that there is no material on record to indicate that the land, on which the subject property was agreed to be built, is permitted to be used for a commercial purposes.

10. The learned counsel for the appellant contends that in a residential colony certain commercial use/activity is permissible. Illustratively, he refers the use of premises by a doctor. The fact that residential properties may be permitted to be used by professionals to carry on their profession does not change the nature of those properties. The same would remain a residential property and not become a commercial property. Thus, we find no merit in the aforesaid contention.

11. The learned counsel appearing for the appellant submits that the disputes involved in the present petition would also be covered as a commercial dispute under Clause (vi) of Section 2(1)(c) of the CC Act. The said clause reads as under:

“(vi) construction and infrastructure contracts, including tenders;”

12. The Agreement to Sell is in the nature of a contract for sale and purchase of immovable property; it is not a construction contract as contemplated under Clause 2(1)(vi) of the CC Act. Merely, because the payment of instalments of the purchase consideration is linked to the stage of construction, does not change the nature of the Agreement to Sell to a construction contract. A plain reading of the Agreement to Sell indicates that it is an agreement for purchase of a flat. In terms of the Agreement to Sell, the respondent had agreed to deliver the possession of the said flat on or before December, 2017 in a semi furnished stage – with fan, light, geyser, exhaust fan, Kent RO, chimney, modular kitchen, one wardrobe extra.



Notwithstanding the clear terms of the Agreement to Sell, the learned counsel submits that since the Collaboration Agreement was for redevelopment of the subject property, the Agreement to Sell is required to be considered in the same light. The said contention is insubstantial. It is the appellant's case that the respondent was entitled to sell a portion of the property, which was agreed to be redeveloped in terms of the Collaboration Agreement.

13. The learned counsel appearing for the appellant, at this stage, seeks to advance the contention, which is in variation with the pleadings in the plaint. He submits that since the first floor of the property fell into the share of the owners, the Agreement to Sell must be considered as a construction contract. He submits that as the Collaboration Agreement was for development of the subject property and the respondent was merely acting as an agent of the owners. This contention is also insubstantial apart from being in variation with the pleadings. Whether the said flat would fall to the share of the developer (the respondent) or the owner of the subject property makes little difference to the nature of the dispute involved. As noted above, the Agreement to Sell is a contract for sale and purchase of a residential flat; not a construction contract.

14. The appeal is unmerited. The same is, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MARCH 07, 2024

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