

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

% **Date of decision: 14th March, 2018**

+ **CS(OS) 14/2018**

SHRI ROMI GARG

.... Plaintiff

Through: Mr. Brij Bhushan Gupta, Sr. Advocate,
Ms. Nandni Sethi, Adv.

Versus

BDR BUILDERS & DEVELOPERS PVT. LTD. & ORS ...Defendants

Through: None

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No. 3532/2018 (of the plaintiff under Section 151 of the CPC for modification of the order dated 16th January, 2018).

1. The plaintiff has instituted CS(OS) No. 109/2017 against the defendant No.2 Lalit Modi for specific performance of an Agreement to Sell dated 9th July, 2012 as modified on 14th July, 2016 by the said defendant No. 2 Lalit Modi of property No. 32, Vasant Vihar, New Delhi to the plaintiff. Vide *ex parte* order dated 6th March, 2017 in the said suit, the defendant No. 2 Lalit Modi has been directed to maintain *status quo* with regard to title, status of construction and possession of the said property.

2. The plaintiff instituted this suit, pleading to have learnt (i) that the defendant No. 2 Lalit Modi had executed an Agreement to Sell and Receipt, both dated 24th June, 2014, in favour of defendant No. 1 BDR Builders and Developers Private Limited; (ii) that the defendant No. 2 Lalit Modi had also executed a registered GPA and Will both dated 10th February, 2016

registered on 12th February, 2017 in favour of defendant No.1; (iii) that in accordance with the arbitration clause in the said Agreement to Sell, the defendant No. 3 Naresh Gupta has rendered an Arbitral Award dated 12th January, 2017; (iv) that a petition being OMP (I) No. 3/2017 has been filed by the defendant No.1 BDR Builders and Developers Private Limited against the defendant No. 2 Lalit Modi under Section 9 of the Arbitration and Conciliation Act, 1996, in this Court. Pleading, that the Agreement to Sell, GPA and Will with respect to the property, executed by the defendant No. 2 Lalit Modi in favour of defendant No.1 BDR Builders & Developers Pvt. Ltd. are of a date subsequent to the Agreement to Sell dated 9th July, 2012 modified on 14th July, 2016 by the defendant No. 2 Lalit Modi with respect to the said property in favour of the plaintiff and are fabricated and bogus and intended to prejudice the rights of the plaintiff, reliefs of (a) declaration as null and void of the said Agreement to Sell, GPA and Will executed by defendant No. 2 Lalit Modi in favour of defendant No.1 BDR Builders and Developers Private Limited as well as the Arbitral Award dated 12th January, 2017; (b) declaration that the plaintiff continues to have rights in the said property by virtue of Agreement to Sell dated 9th July, 2012 as modified on 14th July, 2016 and the said rights of the plaintiff remain unaffected by the documents subsequently executed by defendant No. 2 Lalit Modi in favour of defendant No.1 BDR Builders and Developers Private Limited; (c) cancellation of the Agreement to Sell, GPA, Will and Arbitral Award; and, (d) permanent injunction restraining the defendants from acting in pursuance to their design and from further dealing with the property, were claimed in this suit.

3. The suit came up first before this Court on 16th January, 2018 when, finding (a) that the gravamen of the case of the plaintiff was that the defendant No. 2 Lalit Modi having entered into a prior Agreement to Sell with the plaintiff, subsequent documents in favour of defendant No.1 BDR Builders and Developers Private Limited are null and void; and, (b) that the plaintiff had already instituted CS (OS) No.109/2017 for specific performance of the Agreement to Sell in its favour, attention of the senior counsel for the plaintiff was drawn to ***Lala Durga Prasad Vs. Lala Deep Chand*** AIR 1954 SC 75 resolving the conflict of opinion existing between the High Courts prior thereto by holding that the remedy of person claiming prior agreement to sell is under Section 19(b) of the Specific Relief Act, 1963 and not by seeking declaration as null and void of the subsequent documents and it was enquired as to how this suit was maintainable.

4. The senior counsel for the plaintiff, on instructions, on 16th January, 2018 withdrew the suit and also sought refund of court fees and a certificate entitling the plaintiff to refund of 50% of the court fees paid on the plaint, was ordered to be issued.

5. The plaintiff has now filed IA No. 3532/2018 under Section 151 of the CPC for modification of the order dated 16th January, 2018 and restoration of this suit to its original number along with IA No. 3533/2018 for condonation of delay of 19 days in filing IA No. 3532/2018.

6. The senior counsel for the plaintiff, at the outset, clarifies that the Registry of this Court, in accordance with the direction for issuance of certificate for refund of court fees, has prepared such certificate and forwarded the same to the counsel for the plaintiff, but the same has not been encashed.

7. In the application, it is pleaded (i) that the plaintiff had withdrawn the suit on the understanding that the plaintiff will not be prejudiced thereby and can claim the relief as sought in this suit in CS(OS) No. 109/2017 already filed by the plaintiff for specific performance of the Agreement to Sell in favour of the plaintiff; (ii) however, the same remained to be mentioned in the order dated 16th January, 2018; (iii) that **Lala Durga Prasad** supra has no application to the facts of the present case and is distinguishable; (iv) that if this suit remains dismissed as withdrawn, it will cause extreme prejudice to the plaintiff.

8. As far as the aspect of clarifying that the order dated 16th January, 2018 of dismissal of the suit as withdrawn will not prevent the plaintiff from seeking remedies under Section 19(b) of the Specific Relief Act, 1963 is concerned, the same flows from a reading of the order dated 16th January, 2018 and there is no difficulty in clarifying so.

9. However, the senior counsel for the plaintiff has today not sought such clarification and on the contrary seeks restoration of the suit and issuance of summons thereof to the defendants. It is argued that **Lala Durga Prasad** supra is not applicable to the facts of the present case and **Bharat Karsondas Thakkar Vs. Kiran Construction Company** (2008)13 SCC 658 comes in the way of the plaintiff impleading the defendants No. 1 and 3 as parties in CS(OS) 109/2017 filed by the plaintiff for specific performance of the Agreement to Sell in favour of the plaintiff. It is further informed that the plaintiff applied for impleadment in OMP(I) No. 3/2017 and which application was also dismissed as the plaintiff is not a party to the arbitration agreement.

10. I have perused ***Bharat Karsondas Thakkar*** supra. Supreme Court therein was concerned with the question, whether in a suit for specific performance of an Agreement to Sell of immovable property instituted by the purchaser against the seller, a stranger or a third party to the agreement who had acquired an interest in the same property, is either a necessary or proper party to the suit. The question was framed, whether a person who had acquired an independent right in the property by way of a separate decree, but was not a party to the Agreement to Sell of which specific performance was sought, could be added as a party to the suit for specific performance and whether the decree passed in favour of such a person could be assailed in the suit for specific performance. It was held, that (i) a suit for specific performance of an agreement cannot be permitted to be converted into a suit for declaration of title and possession; (ii) that the scope of a suit for specific performance could not be enlarged and a third party or a stranger to the contract could not be added as a party thereto, changing the nature and character of the suit. Amendments sought to the said effect which had been allowed by the Division Bench of the High Court were thus not allowed and it was held that the proper course would be to claim the said reliefs not in the suit for specific performance but in a separate suit for declaration. Though ***Lala Durga Prasad*** supra was noticed, but it was held that it could not be brought to the aid of the case pleaded by the plaintiff in the suit.

11. The senior counsel for the plaintiff contends that as per ***Bharat Karsondas Thakkar*** supra, the present suit is maintainable notwithstanding ***Lala Durga Prasad*** supra.

12. I have minutely gone through ***Bharat Karsondas Thakkar*** supra, a dicta of two Hon'ble Judges of the Supreme Court vis-à-vis ***Lala Durga***

Prasad supra, a dicta of three Hon'ble Judges of the Supreme Court. **Bharat Karsondas Thakkar** supra does not hold **Lala Durga Prasad** supra to be not good law and merely holds the same to be not applicable to the case of the plaintiff therein. The question which thus arises is, whether to the facts of this case, **Lala Durga Prasad** supra applies or **Bharat Karsondas Thakkar** supra applies.

13. Section 19 of the Specific Relief Act is as under:-

“19. Relief against parties and persons claiming under them by subsequent title. –Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against–

- (a) either party thereto;*
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;*
- (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;*
- (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;*
- (e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:*

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

14. While under Clause (a), specific performance of a contract can be enforced against a party to the contract only, under Clause (b), specific performance of a contract can also be enforced against a stranger to the contract if such stranger is claiming under a party to the contract by a title arising subsequently to the contract. Clause (c) also permits specific performance of the contract to be enforced against a stranger claiming under a party to the contract, a title though prior to the contract and known to the plaintiff but which could have been displaced by the party to the contract.

15. Thus, specific performance of a contract is enforceable against strangers to the contract also falling in Clauses (b) and (c) of Section 19.

16. ***Lala Durga Prasad*** supra is a case of the title of the vendor in the property, of the contract of sale of which specific performance was sought, having, after the extension of contract of sale, vested in the custodian and who was impleaded in the suit. Supreme Court, after holding the plaintiff/ agreement purchaser to be entitled to a decree of specific performance, pondered the proper form of decree to be passed in such a situation. It was noticed that the practice of the courts in India had not been uniform; according to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone; a second considers that both the vendor and vendee should join while third would limit execution of the conveyance to the subsequent purchaser alone. It was held (i) that the title to the property had validly passed from the vendor to the subsequent transferee; the sale to him was not void but only voidable at the option of the other party to the contract; (ii) that since the title no longer vested with the vendor, it would be illogical to compel him to convey title to the plaintiff unless steps are taken to re-vest

the title in him either by cancellation of subsequent sale or by a reconveyance from the subsequent purchaser to him; (iii) that the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the plaintiff.

17. Per contra, in ***Bharat Karsondas Thakkar*** supra, the plaintiff in the suit for specific performance of a subsequent Agreement to Sell was not permitted to amend the plaint to challenge the decree in a suit pertaining to the earlier Agreement to Sell and to which decree the vendor had consented. Supreme Court, in para 23 of the judgment, noticed that ***Lala Durga Prasad*** supra was a case of a suit for specific performance by a prior purchaser against the vendor and a subsequent purchaser and in the said context held that in a suit filed by the prior purchaser, the decree of the form laid down had to be passed. It was further held in para 31 of the judgment that the decision in ***Lala Durga Prasad*** supra could not be brought to the aid of the case of the plaintiff in ***Bharat Karsondas Thakkar*** supra.

18. It would thus immediately be clear that the facts of the present case match with that of ***Lala Durga Prasad*** supra and not with the facts of ***Bharat Karsondas Thakkar*** supra. The plaintiff therein also claims the Agreement to Sell in its favour to be of a date prior to the date of the Agreement to Sell in favour of defendant No.1. Thus, the proper course for the plaintiff in the present case is under Section 19(b) of the Specific Relief Act only and not by way of the present suit.

19. The application for recall of the order dated 16th January, 2018, irrespective of maintainability thereof, is not maintainable because the plaintiff herself withdrew the suit, even if on a wrong premise.

20. Before parting with the matter, I may however notice that as per the plaintiff, the title in the property has till now not vested in the defendant No.1 BDR Builders and Developers Private Limited and which fact was not recorded/noticed on 16th January, 2018. A question may still arise, whether the plaintiff can invoke Section 19(b) of the Specific Relief Act.

21. I have also enquired from the senior counsel for the plaintiff/applicant the prejudice, if any, to the plaintiff by the Agreement to Sell by the defendant No. 2 in favour of the defendant No. 1 BDR Builders and Developers Private Limited inasmuch as a mere Agreement to Sell does not create any title in the property. If at all, at any time, the title in the property is vested in the defendant No.1 BDR Builders and Developers Private Limited, it is only then that the plaintiff can be said to be aggrieved.

22. The senior counsel for the plaintiff states that since, according to the plaintiff, the defendants No. 1 and 2 are in collusion with each other, the title to the property will ultimately be vested in favour of the defendant No.1 BDR Builders and Developers Private Limited.

23. I have further enquired from the senior counsel for the plaintiff, what is the cause of action to the plaintiff and or locus of the plaintiff to challenge the Agreement to Sell or the Arbitral Award between the defendants No.1 and 2 till the title in the property vests in the defendant No.1 BDR Builders and Developers Private Limited. It has been held in ***Sunil Kapoor vs. Himmat Singh*** ILR (2010) II Delhi 616 (SLP (C) No. 6010/2010 preferred whereagainst was dismissed on 12th March, 2010) that even a decree for specific performance of an Agreement to Sell does not vest any title in the plaintiff purchaser till conveyance deed of the property in terms of the decree of specific performance is executed in favour of the plaintiff purchaser.

24. Be that as it may, the said questions do not arise for consideration in this proceeding and thus it is clarified that the observations in these paragraphs are not to bind any of the parties in any other proceeding in which the said enquiry may be necessary.

25. Resultantly, IA No. 3532/2018 for recall of the order dated 16th January, 2018 is dismissed.

MARCH 14, 2018
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RAJIV SAHAI ENDLAW, J.



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