

(2018) 12 DEL CK 0035

In the Delhi High Court

Case No : Regular First Appeal No. 766 Of 2017

M/S. Vortex Facilities Management Pvt. Ltd. Formerly Known APPELLANT
As M/S Iskon Buildcon Pvt. Ltd

Vs

M/S Varindera Constructions Ltd RESPONDENT

Date of Decision : 06-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, Order 12 Rule 6, Order 7 Rule 11
Indian Contract Act, 1872 — Section 70
Haryana Apartment Ownership Act, 1983 — Section 2, 7, 11, 16, 23, 24

Citation : (2018) 12 DEL CK 0035

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Sandeep Sharma, Aman Dhyani, Pankaj Batra

Final Decision : Allowed

Judgement

Valmiki J. Mehta, J

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 18.10.2016 by which the trial court has, by exercising powers under Order VII Rule 11 CPC, rejected the plaint filed by the appellant/plaintiff for recovery of an amount of Rs. 22,87,312/- against the respondent/defendant, a company known as M/s Varindera Constructions Ltd. The suit amount claimed is towards maintenance charges of the multi-storeyed complex in which two flats are owned by the respondent/defendant. The multi-storeyed building in question is located at Silverton Project, Sector 50, Gurgaon. The respondent/defendant owns two units bearing nos. 404 and 405 and the same were purchased by the respondent/defendant from the developer M/s Sana Realtors Private Limited as per the 'Developer Buyer Agreement' dated 18.05.2011.

2. The facts of the case are that the appellant/plaintiff filed the subject suit for recovery of Rs. 22,87,312/- by pleading that the respondent/defendant being

owner of two units bearing nos. 404 and 405 in the subject multi-storeyed apartment complex, was liable to pay maintenance charges for the common area and facilities, which were being maintained by the appellant/plaintiff, and that the respondent/defendant had not paid maintenance charges right from the inception. After the appellant/plaintiff served Legal Notices dated 10.01.2015 and 16.02.2015 on the respondent/defendant, the subject suit was filed.

3. The respondent/defendant contested the suit by filing the written statement. After filing the written statement, the respondent/defendant filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that the suit is barred by the provisions of The Haryana Apartment Ownership Act, 1983 (hereinafter referred to as 'the Act') alongwith its relevant Rules and bye-laws as applicable to the apartment owners. The trial court has rejected the plaint under Order VII Rule 11 CPC by holding that the Act applies and as per the Act it is the association of apartment owners who have to provide maintenance facilities and take charges for the same but since there is no association of apartment owners, and only such association is entitled to claim maintenance charges, a maintenance agency such as the appellant/plaintiff cannot claim the maintenance charges which will be in violation of the provisions of the Act.

4. The Ld. counsels for both the parties have taken this Court through the relevant provisions of the Act which define apartment ownership, common facilities, maintenance of common facilities by common expenses. Other provisions referred to, pertain to the apartment owners being liable to pay for the maintenance charges, all parties to comply with the provisions of the Act and the bye-laws etc. The most important aspect which was vehemently and strongly urged on behalf of the respondent/defendant was by placing reliance upon the provisions of Sections 2, 7, 11, 16, 23 and 24 of the Act to argue that the entitlement to make a claim for maintenance charges is only by the association of apartment owners, and in this regard, the builder is deemed to have filed the necessary declaration at the time of taking completion certificate under Section 2 of the Act that the bye-laws which will govern the apartment association have been framed and shall apply.

5. At the outset, I may note that the impugned order though rejects the plaint under Order VII Rule 11 CPC, but really it is agreed by the counsels for both the parties that the trial court has exercised its powers under Order XII Rule 6 CPC to dismiss the suit. The impugned judgment therefore will be a judgment dismissing the suit on merits under Order XII Rule 6 CPC on the ground of existence of admitted facts that provisions of the Act bar the maintenance agency, which is not a maintenance agency of the association of apartment owners, to claim maintenance charges.

6. In my opinion, the trial court has clearly erred in dismissing the suit, and in fact the application filed by the respondent/defendant under Order VII Rule 11 CPC was a gross abuse of the process of law. I say so because the respondent/defendant is an outright dishonest company who from the year 2011, owns two

flats in the multi-storeyed complex and yet till date despite enjoying all maintenance facilities and common areas, has not paid a single rupee towards the maintenance charges of such common areas and common facilities. It does not lie in the mouth of the respondent/defendant, and who is the owner of two flats enjoying the benefit of various common areas and facilities including lifts, water supply etc. to claim that because of the provisions of the Act the respondent/defendant is not liable to pay any charges to the maintenance agency being the appellant/plaintiff although the respondent/defendant is very much enjoying the maintenance facilities. If the case of the respondent/defendant is that there is deficiency of service or some services are not provided or inadequate services are provided or a particular amount is not payable and only certain amounts are payable, all these are disputed questions of facts which cannot be decided in an Order XII Rule 6 CPC application or an Order VII Rule 11 CPC application.

7. Reliance placed by the respondent/defendant on the provisions of the Act at the first blush seemed to have merits, but admittedly, there is no association of apartment owners till date with respect to the subject multi-storeyed building. In such a situation, if the other apartment owners are paying the maintenance charges to the appellant/plaintiff, really it can be taken that the appellant/plaintiff will be the nominee of all the apartment owners to carry on the maintenance of the entire complex including incurring necessary expenses therewith, and such expenses are recovered by the appellant/plaintiff from the apartment owners. If the case of the respondent/defendant and as argued before this Court is that the maintenance agency is claiming illegal charges or the maintenance agency is earning illegal profits, again these are aspects which are disputed questions of facts and could not have been decided by the impugned judgment on an application of Order VII Rule 11 CPC or for that matter by applying the provisions of Order XII Rule 6 CPC.

8. In my opinion, *prima facie*, in case there is a maintenance agency who is providing the maintenance services of the common areas and facilities, then under Section 70 of the Indian Contract Act, 1872, all such persons who utilize such maintenance services including the respondent/defendant, and who are not receiving these services gratuitously, are therefore liable to pay for the same. The issue with respect to what is the amount which is payable, and not the amount as claimed by the appellant/plaintiff is a disputed question of fact which requires trial, and could not have been decided summarily in favour of the respondent/defendant by the impugned judgment while dismissing the suit for recovery of moneys towards maintenance charges. In my opinion, provisions of the Act are no doubt to be complied with, but in such a scenario when they are not being complied with, and there is a maintenance agency being the appellant/plaintiff, which is taking care of the maintenance, and no other apartment owner has any objection to the maintenance agency and doing its work, then only one apartment owner who owns two flats being the respondent/defendant cannot stand up as a complete owner of the all the flats together to contend that the

appellant/plaintiff should not be carrying on maintenance of the common areas and facilities and the respondent/defendant is not liable to pay towards maintenance and common areas and facilities. In my opinion, in fact prima facie, the entitlement of the respondent/defendant is to get an association created of the apartment owners of the said multi-storeyed building and when such an association is created, and the said association appoints an agency, then at that stage to claim that appellant/plaintiff will not be entitled to do the maintenance with respect to the subject multi-storeyed building. Till that time, the appellant/plaintiff who is performing the maintenance service of the common area and facilities cannot be denied the charges by a whimsical owner of two units in the said multi-storeyed building.

9. In view of the aforesaid discussion, this appeal is allowed. Since the respondent/defendant is a grossly dishonest company which has not paid any maintenance charges from the year 2011 till date i.e. for around as many as seven years, and the respondent/defendant is only resorting to technical aspects to harass the appellant/plaintiff, this appeal is allowed with costs of Rs. 2,00,000/- and this cost shall be paid by the respondent/defendant to the appellant/plaintiff within a period of six weeks from today. The payment of cost shall be a condition precedent to the respondent/defendant to pursue its defence in the trial court.

10. Parties to appear before the District & Sessions Judge, West, Tis Hazari Courts, Delhi on 20th December, 2018 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.