

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: May 17, 2012
Judgment Pronounced on : May 28, 2012

+ RFA (OS) 10/2008

D.D.A. Appellant
Represented by: Mr. Ajay Verma, Advocate.

versus

KAILASH NATH & ASSOCIATES Respondent
Represented by: Mr. Abhinav Vasisht, Senior
Advocate instructed by
Ms. Manmeet Arora,
Advocate and
Mr. Vipin Tyagi, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Pursuant to a public notice informing that on January 19, 1982, DDA would be conducting a public auction of commercial plots at Delhi; further informing the terms of the auction as per Ex.P-1, at the auction held on January 19, 1982, M/s. Kailash Nath & Associates made the highest bid pertaining to Plot No.2A, Bhikaji Cama Place, District Centre, New Delhi in sum of ₹3.12 crores, and the hammer fell. Required under Ex.P-1 to pay 25% of the bid amount towards earnest money, M/s. Kailash Nath & Associates deposited ₹78 lakhs at the fall of the hammer and awaited bid confirmation,

since Ex.P-1 had a term that the auction bid was subject to confirmation by the Vice Chairman DDA; and upon bid being confirmed, within 3 months thereafter, the balance bid amount had to be paid and thereafter DDA had to execute the necessary conveyance deed.

2. Vide Ex.P-3 dated February 18, 1982, M/s.Kailash Nath & Associates were intimated by DDA that the Vice Chairman had confirmed the bid, and this required M/s.Kailash Nath & Associates to pay the balance bid consideration in sum of ₹2.34 crores to DDA by May 18, 1982.

3. There were several other bidders of other plots whose bids were likewise confirmed and intimation sent. Including M/s.Kailash Nath & Associates bidders made a representation to DDA on May 5, 1982 praying that time be extended to deposit the remaining 75% of the bid amount, and it appears that the financial condition in the market in the realty sector was not too healthy.

4. DDA agreed to consider the request, and probably since a large number of auction purchasers were to be affected, it decided to constitute a committee to consider the matter. The Committee submitted its recommendations on July 21, 1982, recommending to the Vice Chairman DDA that time may be extended for remaining payment to be made, but upon the condition that the bidders would pay interest at different rates for different periods of delay on the amount outstanding. Accepting the recommendation of the committee, vide Ex.P-8 dated Augusts 11, 1982, DDA informed M/s.Kailash Nath & Associates as under:-

“DELHI DEVELOPMENT AUTHORITY
VIKAS MINAR
INDRAPRASTHA ESTATE
Regd. Ack.Due.

No. F.32(2)/82-Impl.
New Delhi.....11 AUG 1982

From
V.M.BANSAL.
DY.DIRECTOR(CE).

To
M/s Kailash Nath & Associates,
1006 Kanchanchanga, Bldg.
18 Bara Khamba Rd., N.Delhi 110001

Sub: Auction of plot No.2A Block No.-
meas.897.84 sq.mtrs. in Bhikaji Cama Place
Distt. Centre.

Dear Sir,

In continuation of this office letter dated 18-2-82 & with reference to your letter dated 18-5-82. It has been decided that extensions in payment of balance premium of ₹2,34,00,000/- (Rupees two crores & thirty four lacs only) has been given to you as under:-

- 1) Without charging any interest upto 18-5-82.
- 2) With interest @ 18% from 19-5-82 to 28-8-82 on the left out premium.
- 3) With interest @ 27% from 29-8-82 to 29-9-82 on the balance premium.
- 4) With interest @ 36% from 29-9-82 to 28-10-82 on the balance premium.

You are now requested to make the balance payment to the D.D.A. immediately alongwith interest as mentioned above.

Please note that no extension beyond period mentioned above is permissible

under any circumstances. In case you fail to make the payment of balance premium alongwith interest as mentioned above, the bid shall automatically stand cancelled and earnest money forfeited without any reference.

Yours faithfully,

(V.M.BANSAL)
DY.DIRECTOR(CE)"

5. The market appears not to have stabilized and the realty sector was still in trouble. M/s.Kailash Nath & Associates and other bidders made representations to DDA praying that time be further extended.

6. These requests were decided to be considered by DDA and yet another committee was constituted to examine these requests, and vide resolution No.24-A Ex.DW-2/P-3, on January 13, 1983, the recommended that the auction purchasers should deposit a sum equivalent to 50% of the bid amount within a period of 90 days from the date of intimation and the balance amount in instalments as per the decision taken by the committee.

7. DDA considered the recommendations of the committee at its meeting held on May 14, 1984 and vide resolution No.121, Ex.DW-2/P-4, resolved that each individual request would be considered on its own facts i.e. no collective decision would be taken.

8. Whereas DDA informed a few bidders that time had been extended qua them to make payments of the balance bid amount, no communication was addressed to M/s.Kailash Nath & Associates as also a few other bidders, and as regards M/s.Kailash Nath & Associates it sent letters

Ex.P-11 to Ex.P-18 between December 09, 1985 to October 10, 1987 to DDA, seeking information as to when it could pay the balance bid amount and with what rate of interest.

9. DDA did not respond to these letters till December 01, 1987, when it wrote the letter Ex.P-19 informing M/s.Kailash Nath & Associates that before its case was considered, it should give its consent for making payment of balance amount of 75% bid amount within the period to be fixed together with interest on the belated payment. The letter reads as under:-

“WITHOUT PREJUDICE”

F.No.(2)/S2/82-Impl.-I/4

DELHI DEVELOPMENT AUTHORITY

VIKAS SADAN

I.N.A.

NEW DELHI

From

DIRECTOR (C.L.)

DELHI DEVELOPMENT AUTHORITY

NEW DELHI.....198.....

To

M/s. Kailash nath & Associates,
1006, Kanchanjanga Bldg.,
18, Bara Khamba Road,
New Delhi-110001.

Sub: Regarding payment of balance premium in respect of Plot No.2-A situated in Bhikaji Cama Place Distt. Centre.

Sir,

With reference to the above subject, I am directed to inform you that your case for relaxing the provisions of Nazul Rules, 1981, to condone the delay for the payment of balance premium in

instalments was referred to the Govt. of India, Min. of Urban Development. Before the case is further examined by the Govt. of India, Min. of Urban Development, you are requested to give your consent for making payment of balance amount of 75% premium within the period as may be fixed alongwith 18% interest charges p.a. on the belated payment. Further the schedule of payment and conditions if any will be as per the directions issued by the Ministry of Urban Development, Govt. of India. It is, however, made clear that this letter does not carry any commitment.

Your consent should reach to this office within 3 days from the date of issue of this letter.

Yours faithfully,

Sd/-

DIRECTOR (C.L.)”

10. M/s.Kailash Nath & Associates communicated its consent vide its letter dated December 01, 1987, Ex.P-20, which reads as under:-

**“KAILASH NATH & ASSOCIATES Tel.3312648,
3314269
1006, KANCHENJUNGA
18, BARAKHAMBA ROAD
NEW DELHI-110 001**

Regd.Ack.Due.

December 1, 1987

The Director (C.L.),
Delhi Development Authority,
Vikas Sadan, I.N.A.,
New Delhi-110023.

Subject: Payment of balance premium in respect of plot No.2-A Bhikaji Cama Place Dist. Centre, New Delhi.

Dear Sir,

We are thankful to you for your letter No.F.30(2)/82-Impl.-I/4 dated nil received by us this afternoon, on the above subject.

We hereby give our consent that we shall make the payment of the balance amount of 75% premium within the period as may be fixed as per the schedule of payment and conditions, if any imposed, as per the directions issued by the Ministry of Urban Development, Govt. of India, alongwith 18% interest charges per annum on the belated payment.

We now request you to kindly convey us your formal approval to our making the said payment in instalments as requested for.

Thanking you,

Yours faithfully,
For KAILASH NATH & ASSOCIATES,
Sd/-
Partner.

Advance copy sent through Special Messenger."

11. With respect to the plot for which M/s.Kailash Nath & Associates had made a bid, the Central Government informed DDA on August 04, 1988 that the land was not Nazul land and thus it had no role to play in the commercial decision required to be taken and that it was for DDA to take the necessary decision.

12. Since M/s.Kailash Nath & Associates were not communicated any decision it sent a representation Ex.P-21 on September 06, 1988, and receiving no response sent

another representation Ex.P-23 on February 02, 1989 requesting DDA to send intimation as to by what date it could make payment and with what rate of interest.

13. It appears that M/s.Kailash Nath & Associates and a few other similar situate bidders got information that DDA was intending to cancel their bids and forfeit the earnest money deposited by them i.e. 25% of the bid amount and thus M/s.Kailash Nath & Associates and a few other bidders filed a writ petition, registered as WP(C) No.2395/1990 in this Court, alleging discrimination i.e. pleading that there was no justification to grant extension of time to a few bidders and deny the same to a few and for which instances were highlighted of those bidders who were granted extension of time to pay the balance bid amount. It was urged that having assured that time would be extended to make the payment, a statutory authority like DDA could not act unreasonably and not only not extend the time to make the balance payment but even forfeit the earnest money.

14. The writ petition was dismissed vide order dated September 02, 1993, Ex.P-24, holding that the dispute pertained to a matter of contract and thus the writ petition was not maintainable. Challenge before the Supreme Court failed.

15. After the writ petition was dismissed DDA sent a letter dated October 06, 1993, Ex.P-26 informing M/s.Kailash Nath & Associates that the bid had been cancelled and earnest money forfeited. The letter reads as under:-

“F.32(2)/82/CL/3816

New Delhi-23.....6/10/1993

From

DY. DIRECTOR (CL).

To
M/s. Kailash Nath & Associates,
1006, Kanchanjanga Building,
18, Bara Khamba Road,
New Delhi-110001.

Subject: Plot No.2-A in Bhikaji Cama Place
Distt. Centre.

Sir,

Consequent upon your failure to deposit the balance 75% premium of the aforesaid plot and dismissal of C.W.P. No.2395 of 1990 by the Hon'ble High Court, Delhi, I am directed to inform you that the bid/allotment of the said plot in your favour has been cancelled and earnest money amounting to ₹78,00,000/- deposited by you at the time of auction has been forfeited.

Yours faithfully,

(JAGDISH CHANDER)
DEPUTY DIRECTOR (CL)"

16. M/s.Kailash Nath & Associates thereafter filed a suit praying for a decree of specific performance requiring DDA to receive the balance bid amount and execute the sale deed, and alternatively for damages in sum of ₹3.12 crores. Narrating aforesaid, admitted facts, it was the case of M/s.Kailash Nath & Associates that having agreed as per Ex.P-19 to consider time being extended for making the balance payment, without notifying the extended time, DDA could not have cancelled the bid and forfeit the earnest money as per Ex.P-26.

17. Suffice would it be to state the plea in law taken by M/s.Kailash Nath & Associates was that notwithstanding time being of the essence of the contract, as per Ex.P-1,

requiring it to pay the balance bid amount within three months of the bid being confirmed i.e. by May 18, 1982, since DDA agreed to shift the time for making payment as per Ex.P-8 requiring the balance amount to be paid on various dates set out in Ex.P-8, the last date being October 28, 1982 and thereafter having agreed vide Ex.P-19 on December 01, 1987 to consider favourably to extend the time to make the payment, by its conduct and action DDA had waived even October 28, 1982 as the date by which balance consideration had to be paid and unless DDA notified another date, making it the date of the essence of the contract, DDA could not unilaterally terminate the contract.

18. In response, DDA filed a written statement, inter-alia, taking the plea that it had agreed to extend the time to make payment as per Ex.P-8 and that M/s.Kailash Nath & Associates did not pay within the time granted therein and was thus in breach. As regards its letter Ex.P-19, DDA pleaded that the same was sent without prejudice and thus merely because it agreed to consider whether or not to extend the time to make payment, it was not obliged to do so. DDA pleaded that the auction was governed by The Delhi Development Authority (Disposal of Developed Nazul Land) Rules 1981 and as per Rule 24 if the balance bid amount was not paid within 3 months of the bid being confirmed, the same was liable to be cancelled and the earnest money forfeited. DDA pleaded that the rules were statutory and being not challenged, the suit had to be dismissed. Thus, in law it was the case of DDA that merely because it wrote that it was willing to consider shifting the

date which was of the essence of the contract, said act by itself would not shift the date, which was of the essence of the contract, for the reason this shifting of date had to be a bilateral agreement between the parties and unless there was consensus ad-idem, there could be no unilateral shifting of the date, which was of the essence of the contract.

19. On the pleading of the parties the following issues were settled for adjudication:-

- “1. Whether the plaintiff is entitled to the relief of specific performance?
2. Whether the plaintiff is entitled to the relief of damages paid for alternative recovery of ₹3.12 Crores?
3. Whether the suit is in time?
4. Whether the plaintiff is entitled to the refund of ₹78 Lakhs with interest and if so at what rate and from what period? OPP
5. Whether the suit is barred by principles of res judicata/constructive judicata? OPP
6. Relief.”

20. Negating stand of DDA with reference to Rule 24 of The Delhi Development Authority (Disposal of Developed Nazul Land) Rules 1981, the learned Single Judge rightly took the view that DDA could not predicate a defence under Rule 24 which was brought into the statute book as amended on November 11, 1991 for the reason the auction in question took place in the year 1982. Secondly for the reason, which in our opinion is more fundamental, the land in question was not a Nazul land.

21. Spending a little time on the subject, we may note that 'The Delhi Development Authority (Disposal of Developed Nazul Land) Rules 1981', vide clause (i) of Rule 2 defines 'Nazul Land' to mean such land which is placed at the disposal of the authority under Section 22 of The Delhi Development Act 1957. As per Section 22 of The Delhi Development Act 1957 lands placed at the disposal of DDA by the Central Government have to be dealt with by DDA as per directions given by the Central Government and suffice would it be to state that 'The Delhi Development Authority (Disposal of Developed Nazul Lands) Rules 1981' are the directions of the Central Government with respect to the Nazul lands.

22. Through the communication dated August 04, 1988 of the Central Government to DDA we have proof that the land in question is not Nazul land.

23. We do not therefore debate with respect to DDA predicating a stand in appeal before us on the strength of the decision of a Division Bench of this Court reported as 73 (1998) DLT 843 Ashwini Kapur & Anr. v. UOI & Anr. which holds that pertaining to Nazul land, earnest money (being 25% of the bid amount) is liable to be forfeited not only on the general principles of law laid down by the Supreme Court in the decision reported as AIR 1970 SC 1986 Shree Hanuman Cotton Mills & Anr. v. Tata Air Craft Ltd. but even on the strength of 'The Delhi Development Authority (Disposal of Developed Nazul Land) Rules 1981' or the controversy that the learned Single Judge ignored Rule 29 of the said Rules, which rule since the very inception of the rules in the year 1981 also empowered DDA to likewise do.

The reason for our not entering into this debate is that the land in question is not Nazul land.

24. Holding that the plea of bar of res-judicata raised by DDA was premised on WP(C) No.2395/1990 filed and it being dismissed, the learned Single Judge correctly opined that the bar of res-judicata would not apply since the writ petition was dismissed as not maintainable and not on merits.

25. Noting that the plot had been re-auctioned by DDA in the year 1994 at a bid amount of ₹11.78 crores, declining specific performance and holding the suit to be filed within limitation, the learned Single Judge held that notwithstanding time being of the essence of the contract, since DDA vide its letter Ex.P-19 written on December 01, 1987 agreed to consider to extend the time for making payment, DDA could not without notifying a time for making payment cancel the bid and forfeit the earnest money, which action has been held to be unreasonable; and for which view the learned Single Judge has found sustenance in the decision reported as (1870) L.R. 10 Eq. 281 Webb v. Hughes. The decision of the learned Single Judge concludes by decreeing the suit in sum of ₹78 lakhs i.e. the earnest money paid by M/s.Kailash Nath & Associates to DDA together with interest @ 9% per annum (simple) commencing from February 17, 1994 i.e. when the suit was filed, till realization. Since DDA sold the land ultimately in sum of ₹11.78 crores the learned Single Judge has taken the view that even if there was a breach of the contract, DDA had suffered no loss and with reference to the decision of the Supreme Court reported as AIR 1970 SC 1955 Maula Bux v. UOI and noting

Section 74 and Section 75 of the Contract Act has held that even on said account DDA could not forfeit the security deposit.

26. Our job in the appeal is limited to decide, with reference to the legal contents of the plea advanced by DDA and M/s.Kailash Nath & Associates respectively, which rival pleas, with reference to their legal content have been noted by us in paras 17 and 18 herein above.

27. We re-note the legal contents of the rival submissions. Whereas M/s.Kailash Nath & Associates urge that no doubt time was of the essence of the contract as per Ex.P-1, but DDA extended the time for making balance bid sum vide its letter Ex.P-8, to October 28, 1982 and thereafter vide Ex.P-19, on December 01, 1987, agreed to consider extending the time. Thus, without notifying the extended time i.e. re-fixing the date of the essence of the contract DDA could not revoke the contract and forfeit the security deposit. Per-contra, DDA urges that within the extended time granted as per Ex.P-8 i.e. October 28, 1982, since M/s.Kailash Nath & Associates did not make the payment the contract was breached, entitling DDA to forfeit the earnest money and as regards its letter Ex.P-19 DDA urged that merely because DDA intimated, and that too making it expressly 'Without Prejudice' its willingness to consider further extending time to make the payment, did not oblige it to do so and would not mean that it had waived October 28, 1982 as the date by which the contract had to be finalized.

28. As noted by us, the learned Single Judge has decided in favour of M/s.Kailash Nath & Associates by

placing reliance upon the decision reported as (1870) L.R. 10 Eq. 281 Webb v. Hughes.

29. The decision reported as (1870) L.R. 10 Eq. 281 Webb v. Hughes concerned a contract for sale requiring the sale to be completed on February 26, 1869 i.e. February 26, 1869 was the date of the essence of the contract. Before the said date arrived the purchaser desired title documents to be shown or produced and the seller responded by delivering an abstract of title, which was found to be incomplete. The solicitors of the parties exchanged communications with respect to the title and the date February 26, 1869 expired. There was evidence that the parties continued to exchange correspondence with respect to the title till April 20, 1869 and not being able to resolve the issue, the suit was filed for specific performance. The suit was opposed on the plea that the date February 26, 1869 was fixed by the parties by consent and was of the essence of the contract and notwithstanding the defendant and the plaintiff, through their solicitors, continuing to negotiate on the subject of title thereafter, would not mean that the date for completion of the sale was extended. Decreeing the claim it was held that by continuing to negotiate as to title after the date fixed for completion had lapsed, the seller would be treated as having waived the date specified for contract to be completed and could not rescind without reasonable notice i.e. without notifying a date (extended) by which the sale had to be completed.

30. Important would it be to note that the decision reported as 3 Ch. 61 Tilley v. Thomas was distinguished in Webb's case (supra), which was cited by the defendant

therein, holding that in said decision it was noted that the seller had continued with the negotiations but expressly making the same 'Without Prejudice'.

31. In the decision reported as AIR 1946 Bom. 1 Anandram Mangtaram & Ors. v. Bholaram Tanuma, the parties entered into a contract according to which appellant had to deliver goods to the respondent by the end of February 1943. On February 27, 1943 appellant made partial delivery of goods. In further correspondence appellants maintained that they would make delivery of goods as soon as possible. On June 16, 1943 respondents finally offered appellants two days' time to deliver the remaining goods. On July 28, 1943 respondents accused appellants of breach of contract and specified the extent of damages owed. The learned Bench held that the correspondence between the parties does not tantamount to extension of time and the question of estoppel does not arise. There was no extension of time in the present case and damages to be paid by appellants would be computed from February 28, 1943.

32. The decision holds that the principle of law is that where, by agreement, time is made of the essence of the contract, it cannot be waived by a unilateral act of a party and unless there is consensus ad-idem between the parties and a new date is agreed to, merely because a party to a contract agrees to consider time being extended for the opposite party to complete the contract, but ultimately refuses to accord concurrence would not mean that the party has by conduct waived the date originally agreed as being of the essence of the contract.

33. In the decision reported as AIR 1986 Karnataka 14 M/s Venkateswara Minerals v. Jugalkishore Chiranjital, Firm, parties entered into agreement on February 1, 1968 for delivery of goods by appellants on March 16, 1968. On March 20, 1968 respondents contended that appellants had committed breach of contract and requested for refund of sale price within 8 days. On April 9, 1968, appellant contended that time was not of the essence and delivery was not made due to respondents fault. On August 2, 1968 respondent offered to extend the period of delivery by 7 days from date of receipt of this notice. But, no acceptance was communicated to respondent. On August 24, 1968 appellants wrote contending they have not committed breach. It was held that mere discussions on time being extended to complete the contract did not shift the original date by which the contract had to be performed and thus damages had to be awarded to the buyer.

34. In the decision reported as AIR 1958 SC 512 Keshavlal v. Lalbhai T. Mills Ltd., on July 4, 1942 and July 24, 1942 orders were placed by appellants with respondents for delivery of printed chits. Said order was to be delivered in September and October respectively. On August 15, 1942, respondent wrote to the appellants contending that in view of the strike at his factory all delivery dates were postponed for the duration of the strike. Once work resumed, appellants wrote to respondents on December 17, 1942 claiming that respondents were bound to deliver the goods as per their previous letter in August. Suit for damages was filed against respondents on January 9, 1946 but the appeal was dismissed due to vagueness and uncertainty between the

parties to extend the time, holding that the ratio of law was that once a date which was of the essence of the contract was agreed to by the parties, the same could be altered only by a mutual agreement.

35. In the instant case, the learned Single Judge has missed out that when DDA agreed to consider further time being extended as per its letter Ex.P-19 dated December 01, 1987, it expressly wrote at the top of the letter 'WITHOUT PREJUDICE' and this distinguishes the facts of the instant case from those in Webb v. Hughes case (supra) and brings the facts of this case similar to the facts in Tilley v. Thomas case (supra). It may additionally be noted that in the letter Ex.P-19, DDA has expressly written : *'It is, however, made clear that this letter does not carry any commitment.'*

36. The learned Single Judge has opined that once DDA agreed as per Ex.P-19 to consider extending time for M/s.Kailash Nath & Associates to make the balance sale consideration, it would be unreasonable for DDA to not grant reasonable time for payment to be made and straightway determine the contract.

37. Now, in India, reasonableness in State action is a facet of Article 14 of the Constitution of India and in the field of contract would have a considerable play at the pre-contract stage. Once parties have entered into a contractual obligation, they would be bound by the contract and the only reasonableness would be of the kind envisaged by the Supreme Court in the decision reported as AIR 1963 SC 1144 T.P.Daver v. Lodge Victoria No.363 SC Belgaum & Ors. On the subject of a member of a club being expelled, and the relationship being a contract as per the rules and regulations

of the club, adherence whereto was agreed to by he who became a member of the club and the management of the club, the Supreme Court observed that in such private affairs, it would be good faith in taking an action which is rooted in the minds of modern men and women i.e. in a modern democratic society and no more. The decision guides that where a private affair i.e. a contract is so perverted by a party that it offends the concept of a fair-play in a modern society, alone then can the action be questioned as not in good faith and suffice would it be to state that anything done not in good faith would be unreasonably done.

38. The learned Single Judge has held that the property was ultimately auctioned in the year 1994 at a price which fetched DDA a handsome return of ₹11.78 crores and there being no damages suffered by DDA, it could not forfeit the earnest money.

39. The said view runs in the teeth of the decision of the Supreme Court reported as AIR 1970 SC 1986 Shree Hanuman Cotton Mills & Anr. vs. Tata Aircraft Ltd. which holds that as against an amount tendered by way of security, amount tendered as earnest money could be forfeited as per terms of the contract.

40. We may additionally observe that original time to pay the balance bid consideration, as per Ex.P-1 was May 18, 1982 and as extended by Ex.P-8 was October 28, 1982. That DDA could auction the plot in the year 1994 in sum of ₹11.78 crores was immaterial and not relevant evidence for the reason damages with respect to the price of property have

to be computed with reference to the date of the breach of the contract.

41. The appeal succeeds. The impugned judgment and decree dated September 10, 2007 is set aside. Suit filed by M/s.Kailash Nath & Associates is dismissed, but we leave the parties to bear their own costs all throughout.

42. Amount deposited by DDA under orders of the Division Bench in the instant appeal be returned to DDA together with interest accrued thereon.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 28, 2012
dk