

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

Reserved on : 25.01.2016
Pronounced on : 09.02.2016

+ CS(OS) 679/2006

KISHAN LAL

..... Plaintiff

Through: Mr. Jinendra Jain with Mr. Shashwat Bhardwaj,
Mr. Abhishek Jain & Mr. Syed Aalim Akhtar, Advs.

versus

DSIDC AND OTHERS D+

..... Defendants

Through: Mr. Mukul Talwar, Sr. Adv. with
Mr. Vipin Singh & Mr. Rana S.Biswas, Advs.
for defendant No.2

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIR, J

1. This suit seeks a decree for permanent and mandatory injunction directing defendant No. 1 to allot Shed No. A-13, Rohtak Road, Industrial Complex, New Delhi (hereinafter referred to as the '**suit property**') in the joint name of the plaintiff and the defendant No. 2 and to also give possession of the suit property to them.

2. The plaintiff and defendant no. 2 (D-2, for short) are residents of Delhi. Defendant no. 1 (hereinafter referred to as '**DSIDC**') is a statutory company having its address at N-Block, Bombay Life Building, Connaught Circus, New Delhi.

3. In January 2004, DSIDC invited bids for the sale of the suit property; the reserve price of the property was listed as Rs. 43.50 lakh and the earnest money was fixed at Rs. 1 lakh. The plaintiff and

defendant no.1 jointly applied for this tender quoting an offer price of Rs. 55,01,000/- . Their bid, being the highest, was accepted by DSIDC vide letter dated 9.2.2004 and the bidders were asked to deposit 25% of the total tender price within 30 days and the remaining 75% within three months of the date of the abovementioned letter.

4. Out of the total sum of Rs.55,01,000/- payable, Rs.13,00,000/- was paid within the stipulated time. Defendant no.2 claims that it was she who had exclusively paid this sum of Rs. 13,00,000; when defendant no.2 approached the plaintiff to pay his half of the Rs. 13,00,000, the plaintiff expressed his inability to pay his share due to certain financial difficulties and vide letter dated 15.3.2004, the plaintiff asked the DSIDC to withdraw his name from the tender form. On 15.3.2004, defendant no. 2 also informed DSIDC that the plaintiff wanted to withdraw from the tender and requested that the name of the plaintiff be deleted from the tender offer. The Plaintiff, on the other hand, contends that the amount of Rs.14,00,000 (Rs.1,00,000 + Rs.13,00,000) was paid jointly by him and D-2 and that he was made to write the letter dated 8.3.2004 under coercion.

5. On 11.05.2004, defendant no. 2 also paid the balance 75% amounting to Rs 41,01,000 to DSIDC the receipt of which was acknowledged vide receipt B/2001 No. 08481. The last date for making payment of 75% of the consideration amount i.e. Rs.41,01,000/- was 9th May. However, the amount was paid on 11th May since 9th and 10th May were holidays.

6. In May 2004, the plaintiff filed W.P. (C) No. 7873/2000 in which an ad-interim ex-parte injunction was passed preventing the suit property

from being allotted to defendant no. 2. After hearing, the Hon'ble Writ Court was pleased to recall the interim order and dismissed the writ on the ground that there were complicated and disputed questions of fact involved and that hence, it was not the right forum to deal with this issue. Subsequently, the present suit was filed.

7. On 20.1.2009, the following issues were framed:

1. *Whether the plaintiff is entitled for injunction giving direction to defendant no.1 to allot shed No.A-13, Rohtak Road Industrial Complex in the joint name of plaintiff and defendant no.2 as claimed by him? OPP.*
2. *Whether the plaintiff had already given up his right in respect of the above shed in favour of defendant no.1 by writing a letter and submitting affidavit to defendant no.1? OPD-2*
3. *Whether the defendant no.2 had paid entire consideration to defendant no.1? OPD-2*
4. *Whether the suit filed by plaintiff was not maintainable in the present form as claimed by defendant? OPD-2*
5. *Whether the plaintiff had received back earnest money of Rs.1 lakh from defendant no.2 against receipt dated 27th February, 2004? OPP.*
6. *Relief.*

8. Mr. Jinendra Jain, the learned counsel for the plaintiff, submits that i) the plaintiff has an equal right along with the defendant no. 2 in the allotment of the suit property as the auction purchase was in the name of both the parties without any distinction being made by DSIDC with respect to who paid the monies ii) that insofar as the DSIDC is concerned, it is required to convey the property in the name of the plaintiff along with that of defendant No.2 and whatever issue may arise apropos by whom the payment was made, is a matter to be settled between the co-bidders iii) that the amount paid to DSIDC was paid by

them jointly and that the receipt issued on the payment of the Rs. 13 lakhs on 8.3.2004 was in the joint name of the plaintiff and defendant no. 2. The learned counsel also submits that till at least 8.3.2004, defendant No.2 herself had accepted that the money of Rs.13 lakhs was jointly deposited because in a communication with the DCIDC, she used the words, 'we are'.

9. To reinforce his above claim he refers to the Written Statement of DSIDC which in para 3 states as under:

“3. That under the terms and conditions of the tender under clause 2 a change in the name of the intending allottee/offeree will not be allowed under any circumstances. Clause 14 provided that “that allottee shall not be entitled to sell, transfer, assign or otherwise part with the possession of the whole or any part of the property before or after the allotment of the industrial shed without the previous consent in writing of the DSIDC. That in view of the terms by letter dated 1.4.2004 the answering defendant intimated the plaintiff and defendant no.2 that the request for deletion of the name of the plaintiff can be considered by the management only after full payment of the cost of the shed. On 16.4.2004 the plaintiff intimated the answering defendant that he had arranged for the funds and in case the defendant no.2 fails to make payment, he would make payment towards the shed. In response thereto the answering defendant by letter dated 30.4.2004 intimated the plaintiff that the last date for making the final payment against the tender was 9.5.2004 and in case he along with defendant No.2 do not make the payment the earnest money deposit would be forfeited.”

10. Although the plaintiff accepts that he wrote letter dated 15.03.2004, through which he requested that his name be deleted from the tender offer, he states that the same was done under coercion and that, in any case, he had cancelled this request through further correspondence with the DSIDC dated 16.04.04. He also submits that he had, on 11th May,

2004, (Ex. PW 1/J) represented to the DSIDC as under:-

“11th May, 2004

*The Deputy Manger (REC)
D.S.I.D.C.
N-Block, Bombay Life Building,
Connaught Circus
NEW DELHI*

Dear Sir,

Reg: SHED No.A-13, ROHTAK ROAD, INDL, COMPLEX

I am in receipt of your Letter dated 30.4.2004 in response to my letter dated 16.4.04 informing me that the last date of payment is 9th May, 2004 and advising therein that in case I along with Mrs. Shalini Arora do not make the payment, the tender will be cancelled and Earnest money for feited.

In this connection, I wish to inform that I have tried to contact Mrs. Sahni Arora on number of occasions but till the time of writing this representation ie. 11.5.04, 4.30p.m. she has not contacted me either personally or on phone.

In the circumstances, I hereby request you to delete the name of Mrs. Shalinii Arora and allow me to deposit the entire amount provided the said shed is allotted in my single name. On receipt of your confirmation, I will deposit the entire amount.

Please acknowledge

Yours faithfully,

(KISHAN LAL) ”

The Court would note that the aforesaid letter- Ex.PW1/J is endorsed to having been received at 5.15p.m. by the DSIDC, i.e., after normal office hours.

11. The learned counsel for the plaintiff further submits that i) if any, the only claim which defendant no. 2 could have was a claim for the specific performance of the agreement to sell dated 27.02.2004 in respect of the property C-25, Rohtak Road Industrial Complex, Nangloi; ii) that this agreement is forged and fabricated and iii) that in any case, defendant no. 2 has neither filed a suit for specific performance nor relied upon the said agreement in her Written Statement/pleadings.

12. The learned counsel also relies on the dicta of *Vidhyadhar v. Manik Rao*, AIR 1999 SC 1441 and submits that as defendant No.2 has not appeared, her Written Statement cannot be taken into consideration. He contends that specific suggestion was put to the husband of defendant No.2 that the said defendant was not appearing since her case was false. He also relies upon *Janki Vashdeo Bhojwani & Anr vs Indusind Bank Ltd. & Ors.* AIR 2005 SC 439, in this regard.

13. He also submits that since the requisite amount has already been paid and as the monies were paid by both the parties, DSIDC should be enjoined from allotting the property only to defendant No.1.

14. Mr Mukul Talwar, the learned Senior Advocate for the defendants, submits that i) the plaintiff has formally relinquished his right in the suit property in favour of defendant no.2 through an affidavit dated 12.03.2004 and also through a handwritten letter to the DCIDC dated 15.03.2004 ii) that DSIDC had already acted upon the plaintiff's request to delete his name from the tender and that retraction of the request was therefore not possible; iii) that as the plaintiff has not sought cancellation of any of the documents by which he relinquished his rights to the suit property, the suit has to be dismissed.

15. It is the case of defendant no. 2 that: since the plaintiff had represented to the DSIDC that he wanted his name to be deleted from the tender offer as he was facing financial problems and that since the plaintiff has not been able to prove that this representation was made under coercion, he cannot still claim to have a right in the suit property as he had already given-up his rights therein in favour of defendant no. 2.

16. Referring to the evidence, Mr. Talwar submits that Ex.PW1/C shows that on 6.2.2004, the first instalment of Rs.1 lakh was paid by both the parties. Further, Rs.13 lakhs was paid on 8.3.2004 purportedly in the name of both the parties. However, Ex.PW1/E is a banker's statement proving that the money was actually paid by Smt. Shalini Arora. He submits that this corresponds with the plaintiff's notarized affidavit dated 12.3.2004 in which he states that, due to some financial constraints, he is unable to pay the money due and thus wishes to withdraw from the tender. Furthermore he wrote a letter in his own hand, on 15.3.2004, i.e. DW1/DA stating that that he would like his name to be deleted from the tender offer and that only the name of Smt. Shalini Arora should be kept in the tender offer. The plaintiff's letter dated 16.4.2004, purportedly to recall the letter of 15.3.2004, communicates that, in the interim, he had made arrangements for the necessary funds and that he wants to remain in the tender. Admittedly, by even this letter, the plaintiff has reiterated that shortage of funds was the reason for his withdrawal from the tender and makes no mention of duress or coercion. The aforementioned affidavit has been signed before a notary public and has been acted upon by both defendant No.2 as well as defendant No.1.

17. Payment of the last instalment to D-1, for sale of the suit property,

was due on 9.5.2004 but, that day being a holiday, the money was paid on 11.5.2004. The learned counsel for D-2, refers to letter Ex.PW1/J dated 11.5.2004 whereby the plaintiff informed defendant No.1 that defendant no.2 had not contacted him and that he was ready to make payment alone. He further refers to receipt B/2001 No.08481, Ex.DW1/3, which shows that defendant No.2, Smt. Shalini Arora, had deposited with DSIDC the balance amount of RS.41,01,000/- . Mr. Talwar contends that the plaintiff has not lead any evidence to show that any money has been paid from his account to DSIDC. He submits that the reason for the same is evident from the plaintiff's conduct.

18. The learned counsel for D-2 submits that out of 12 plaintiff's witnesses originally listed, the plaintiff examined only himself, witness No.2 and the clerk of defendant No.1/DSIDC whereas witnesses No. 3 to 11 are bankers and except for witness No.3 who is the plaintiff's banker, all were the officials of the Standard Chartered Bank, Punjabi Bagh, Delhi and summoned and cross-examined by the plaintiff , evidently because the plaintiffs own records would show that he never had the monies to pay his share of the bid amount.

19. Reference was made to the statement of Mr. Lal Sahai Mishra of Standard Chartered Bank, apropos defendant No.2's bank statement which shows that moneys amounting to Rs15,20,532.69 were deposited in her account between December, 2003 to March, 2006 out of which an amount of Rs.13 lakhs was withdrawn and purportedly used to pay the second instalment to DSIDC. DW-2, through his evidence by way of affidavit, has stated that he is fully aware of the facts and circumstances of the case and that the plaintiff had levelled false allegations against him.

The affidavit includes the following averments:

“9. I say that since, the payment date for effecting 25% of part payment was getting nearer, as had been communicated by the defendant No.1 in its letter dated 9.2.2004, I agreed to the last offer made by the plaintiff. As per discussion on 26.2.2004 I met the plaintiff at my father’s residence at Jaidev Park and from there we went together to Moti Nagar for purchase of the stamp papers. The stamp paper was purchased from “Gupta Typist” at Moti Nagar. Thereafter, I left the plaintiff at Moti Nagar for getting the agreement typed. I had to leave and rushed back home (at Jaidev Park), since it was “Dasvin” of my father and as practice and custom all the in-laws of the sons and daughters of the deceased come and visit to offer their condolences.

10. I say that thereafter the plaintiff came to my father’s residence at Jaidev Park with typed copy of the agreements, one for withdrawal of his name in connection with A-13, Rohtak Road Industrial Complex and two, the agreement to sell with regard to my property at C-25, Rohtak Industrial Complex, Nangloi. On reading of the agreement, when I found that a sum of Rs.10,00,000/- as premium had been added contrary to our understanding, I asked him to get a fresh agreement drafted. The plaintiff took the agreement and instead of getting a new agreement typed, he after carrying out the necessary corrections in the same agreement came back to my father’s residence at Jaidev Park after an hour or so upon finding the agreement to be in order, I called my wife who signed the agreement in my presence.....”

20. In effect, defendant No.2’s witness has stated that Rs.10 lakhs was incorrectly written and that, therefore, it was corrected to Rs.1 lakh and was then signed. However, the plaintiff’s suit is based on a claim of coercion and not on the agreement dated 27.2.2004. Interestingly, in his cross-examination, the plaintiff has admitted that the said agreement dated 27.2.2004 was actually signed on 15.3.2004 (in reply to question No.57 in his cross-examination). Therefore, the plaintiff’s evidence

cannot be relied upon.

21. Defendant no.2's witness further deposed that the plaintiff had deposited Rs.1 lakh, by bank draft, as earnest money along with tender form and that this amount had been paid back to the plaintiff through cheque No.513139 dated 27.2.2004 drawn on Standard Chartered Bank, Punjabi Bagh at the time of execution of the Agreement for withdrawal of the name and/or Agreement for the surrender of his ownership right in the allotment/suit property. However, subsequently, on or around 11.3.2004, the plaintiff said that the cheque had been misplaced and the amount of Rs. 1 lakh was therefore paid to him in cash on 12.3.2004. Apropos property No. C-25, Rohtak Road Industrial Complex, Nangloi, the witness DW-2 states that the plaintiff was under an obligation to pay Rs.12 lakhs in cash. The learned counsel for D-2 submits that the suit is not maintainable as it could only be filed for cancellation of the agreement or for its specific performance and not for an injunction.

22. The plaintiff has also admitted in reply to question No.55 that after delivering the letter before lunch on 12.5.2004, he wanted to meet a senior officer of DSIDC but he was not in his room. He then returned to the office of the 'lower staff' where he was informed that the letter of allotment would be issued in the name of defendant No.2 only. The learned counsel for D-2 submits that the plaintiff had, however, admitted in response to query No.47 that the letter PW1/J dated 11.5.2004 was submitted to DSIDC at about 5.15. p.m. on 11.5.2004; therefore, the letter purporting to arrange for money had not been tendered by the plaintiff during normal working hours and that as it was received in the office of DSIDC after normal working hours it would not, in any way, clothe the

plaintiff with any rightful claim.

23. With regard to the non-appearance of defendant no.2 in the witness box, the learned counsel for D-2 submits that in the case of *Janki Vashdeo Bhojwani* (supra) the Supreme Court held that, in the absence of the plaintiff, the evidence of a power of attorney can be accepted provided that he is fully conversant with the case and has personal knowledge of the facts of the case. The relevant portion of the judgment reads as under:

“17. The aforesaid judgment was quoted with the approval in the case of Ram Prasad v. MANU/RH/0233/1998. Hari Narain and Ors. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

18. ...

19. ...

20. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri (supra) followed and reiterated in the case of Ram Prasad (supra) is the correct view. The view taken in the case of Floriano Armando Luis (supra) cannot be said to have laid down a correct law and is accordingly overruled.”

(emphasis added)

This Court notes that while D-2 may not have examined herself, her husband DW-2, who had personal knowledge of the facts of the case, has

deposed in terms of her Written Statement. Therefore, his evidence is admissible.

24. By virtue of the order dated 04.12.2006, this Court had appointed defendant No. 2 as a receiver and the suit property has been handed over to the said defendant for use. Defendant No. 1 has been paid license fee @ 1,01,000/- per month since 07.05.2008. The property is in possession of the defendant No. 2.

25. The court notes that the plaintiff's letter of 16.4.2004, seeking to withdraw the earlier letter of the plaintiff, states that "*Now I have arranged the fund (sic) of the tender offer and I want to remain in the tender for shed No. A-13, Rohtak Road.*" The earlier sentence reads, "*(p)lease refer to my previous letter through which I gave concent (sic) that I want to withdraw my name from the tender due to shortage of funds.*" Quite clearly, in the letter dated 16.4.2004, he does not mention that his earlier letter of 15.3.2004 along with affidavit dated 12.3.2004 were written/executed under coercion of any nature. The letter reads as under:

*"To: The Chief Manager
DSIDC, New Delhi*

15/3/04

Sub: Withdrawl of my name from offer for Shed No.A-13, Rohtak Road

Sir, Refrance above subject, I wish to inform that I have applied jointly with Ms. Shalini Arora in tender offer for Shed No A-13 Rohtak Road. Do to financial problem I want to withdraw my name from tender offer. An affidavit an this account is enclosed.(sic)

Kindly delete my name and sole name of Mrs, Shalini Arora be kept in this tender offer. Letter from Ms. Shalini Arora along with

affidavit are enclosed. Kindly do the needful.

Thanking You

Yours Faithfully,

Sd.

15/3/04

(Kishan Lal)”

The affidavit reads as under:

“A F F I D A V I T

I, Kishan Lal, S/o Shri B.L. Chhabra, R/o 4045, Gali Ahiran, Pahari Dhiraj, Delhi-110006, do hereby solemnly affirm and declare as under:-

- 1. That I, the above named deponent Kishan Lal, alongwith Shalini Arora, have jointly applied for Tender for allotment of a Industrial Shed, in the office of DSIDC.*
- 2. That DSIDC had accepted the tender offer for Shed No.A-13, at Rohtak Road, Nangloi, Delhi-110041, vide its Acceptance Letter Dated 09.02.2004, in our joint names, for a total consideration amount of Rs.55,01,000/-.*
- 3. Now I with my own will and wish, withdraw my name from the aforesaid Tender due to some financial problems, and all future payments shall be made by Shalini Arora only.*
- 4. That I have NO OBJECTION if the aforesaid Industrial Shed No.A-13, at Rohtak Road, Nangloi, Delhi-110041, may be transferred in the exclusive/sole name of SHALINI ARORA.*
- 5. That in future I shall not raise any objection/claim towards my share in the aforesaid industrial shed against Shalini Arora, if found otherwise, it shall be treated as null and void.*
- 6. That it is my true statement and I shall be responsible for the same.*

Sd/-
DEPONENT

VERIFICATION:-

Verified at New Delhi on this 12th day of March, 2004, that the contents of the above Affidavit are true and correct to the best of my knowledge and belief.

Sd/-
DEPONENT

26. The allegation of coercion cannot be accepted on it merely being stated, instead it has to be supported by substantive evidence. The onus lies on the plaintiff to prove that he was coerced into signing the affidavit. In the absence of any evidence of coercion, the Court is of the view that the plaintiff has failed to discharge this burden. It is also clear that the plaintiff has made no complaint to the police, or even to D-1, DSIDC, stating that he was coerced into executing the affidavit which was duly notarized before the notary public.

27. It is evident that both the defendants had acted upon the letter/affidavit of the plaintiff, which gave clear instructions for transferring of the property in the exclusive/sole name of Smt. Shalini Arora, and the plaintiff would therefore be estopped from resiling from his earlier statement.

28. The husband of defendant No.2 has deposed that Rs.1 lakh, which was initially paid at the time of making the application for tender, was repaid to the plaintiff by cash on 12.3.2004. The plaintiff has agreed that the agreement dated 27.2.2004 was signed by him on 13.3.2004, clearly after the amount of Rs.1 lakh had been repaid to him. Payment of Rs.13 lakhs was made by defendant No.2 to DSIDC from her account, as has

been proven by the record shown by the Standard Chartered Bank. The Court notes that no Demand Draft was ever tendered for the remaining amount of Rs.41,01,000/- by the plaintiff whereas this exact amount had been tendered by defendant No.2 to DSIDC against receipt B/2001 No. 08481. This means that the entire amount for the property was paid to DSIDC by Defendant no.2. Additionally, the plaintiff had explicitly relinquished his rights in favour of defendant no.2, hence as far as the DSIDC is concerned, it would mean that Mrs. Shalini Arora would be entitled to allotment in her name.

29. Having examined the records and considered the submissions of the learned counsel for the parties, the Court is of the view that insofar as the plaintiff did sign an affidavit dated 12th March 2004, explicitly stating that he wished to withdraw his name from the tender and giving his 'no objection' to the allotment of the suit property to defendant no.2, he cannot, without having this document cancelled/revoked, now revert his stance. The right of defendant No.2 in the property got crystallised when she made the final payment to DSIDC, on the basis of the aforementioned unequivocal statement of the plaintiff. From the above, it is evident that the plaintiff has been unable to establish that the affidavit and letter dated 12.3.2004 and 15.3.2004 respectively were executed/written under coercion and he thus cannot reprobate from the position taken therein. In view of the above, issues No.1 & 2 are returned against the plaintiff. Issue No.3 is returned in favour of defendant No.2. Since the plaintiff relies on an agreement dated 27.2.2004, admittedly signed by him on 15.03.2004, any reliance thereon could well form a cause of action in another suit for specific performance but would not be a part of this suit because it does not concern the DSIDC- D-1, nor is it germane to the

issues. Hence, relief regarding the aforesaid agreement cannot be granted in this suit. Apropos issue No. 5, the Court concludes that the earnest money of Rs.1,00,000/- has been received back by the plaintiff from defendant No. 2. Therefore, the suit must fail and the relief sought cannot be awarded.

30. The suit is dismissed.

31. Under the circumstances, costs of Rs.50,000/- each are awarded to defendant No.1 and defendant No.2.

NAJMI WAZIRI, J

FEBRUARY 09, 2016/aj/rtm