

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

% *Judgment Reserved on : January 18, 2017*
Judgment Delivered on : January 25, 2017

+ **RFA (OS) 1/2016**

M/S KEVENTER AGRO LIMITED Appellant

Represented by: Mr.Ravi Gupta, Sr.Advocate
instructed by Mr.P.Choudhar and
Mr.Sachin Jain, Advocates

versus

M/S. KALYAN VYPAR PVT. LTD. & ANR. Respondents

Represented by: Mr.Krishnendu Datta, Advocate with
Mr.Rahul Malhotra, Advocate for R-1
Mr.Rajat Aneja, Advocate with
Mr.Toyesht Tewari, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. On November 30, 2015 suit filed by the appellant for specific performance of a written agreement to sell dated August 03, 2010 (wrongly typed in the plaint as October 03, 2010), for cancellation of a sale deed dated August 04, 2011 executed by defendant No.1 in favour of defendant No.2, permanent and mandatory injunction and damages, was listed for settlement of issues. An application under Order 7 Rule 11 filed by defendant No.2 for rejection of the plaint was also listed before the learned Single Judge.

2. The learned Single Judge has held that the agreement in question was

not between the appellant and defendant No.1 : the owner of the suit property, and thus the suit for specific performance would not lie is the view taken. Since the appellant admitted being dispossessed from the suit property and had pleaded status of a licensee the learned Judge has held that the suit would continue for purposes of damages as claimed.

3. Arguments in appeal were advanced regarding the maintainability of the suit qua the relief of specific performance.

4. The written agreement to sell executed on August 03, 2010 has been signed by one Mr.M.K.Jalan and Mr.Vinay Maloo. It reads as under:-

“The following has been agreed between Mr.M.K.Jalan and Mr.Vinay Maloo:

The Building No.9 at Masjid Moth Commercial Complex, Greater Kailash Part II is currently under the possession of Shri Moti Lal Bothra and Shri M.K.Jalan. Both of them would mutually agree on the market price of the property and if Mr.Jalan wants to buy the property at the agreed market price, he will have the first option on the same. Mr.K.L.Bothra’s (representative of Mr.Vinay Maloo) consent will be taken while determining the market price.

30% of the sale price will be given to Mr.M.K.Jalan (as mutually agreed between Mr.M.K.Jalan and Mr.Moti Lal Bothra), which will be kept in Escrow by Mr.M.K.Jalan for overall settlement of his account.

Mr.Vinay Maloo confirms that this understanding is irrevocable.

Date : 3rd August 2010”

5. The case pleaded in the plaint is that the appellant and defendant No.1 had business transactions and defendant No.1 and its Directors owed

substantial money to the appellant. In September 2007 it was agreed that the appellant would be permitted permissive use and occupation of 9, Masjid Moth, Greater Kailash Part II, New Delhi, owned by defendant No.1 and that it was agreed at that time that the appellant shall have the first option to purchase the building. It is pleaded that subsequently the written agreement dated August 03, 2010 was executed. Relevant would it be to highlight the specific pleadings in the plaint to this effect. It is para 4 of the plaint. It reads as under:-

“4. That the plaintiff and defendant No.1 company had certain business transactions and pursuant to that around September-October 2007 the defendant No.1 permitted the plaintiff permissive use and occupation of the suit property and to set up its office in the suit property and handed over the peaceful and vacant possession of the same to the plaintiff Company. At the time Defendant No.1 handed over the possession of the Suit property, the defendant No.1 agreed that the plaintiff shall have the “first option” to purchase the entire building being 9, Masjid Moth, Commercial Complex, Greater Kailash-II, New Delhi. Defendant No.1 and its directors owed substantial money to the plaintiff on account of business dealings and in part consideration thereof the plaintiff was given the right of license of the suit property and the first option to purchase. The part consideration stated aforesaid is still due and payable. The plaintiff never took any legal step for recovery of the abovesaid amount as defendant No.1 had given the right of license for the suit property and had given right of first purchase of the suit property. The said oral agreement was subsequently reduced in writing vide agreement dated 3.10.2010. Therefore, plaintiff’s possession of the suit property is coupled with part consideration.”

6. It is pleaded in the plaint that Shri M.K.Jalan is the Chairman of the appellant. It is pleaded that in October 2011 the appellant was illegally

dispossessed from the suit property. Damages claimed are in sum of ₹60,29,254/-.

7. Since in appeal arguments were advanced qua the suit being held not maintainable to enforce the agreement to sell, we simply concentrate hereinafter on said issue.

8. The learned Single Judge has, after noting the agreement to sell, noted Section 91 and 92 of the Indian Evidence Act, 1872 and has thereafter reasoned as under in para 9 to 13 of the impugned order:-

“9. Section 91 of the Act states that a contract which is entered into in writing can only be proved by the written document itself and by no other evidence or means. Section 92 of the Act thereafter proceeds to state that once the contract is proved in terms of Section 91 of the Act, no evidence can be led to add or subtract or contradict or vary the terms contained in the written contract. There are of course certain exceptions to looking only into terms which are comprised in the written contract/document and which are contained in the proviso to Section 92 of the Act, and one of these proviso (proviso 2) will be considered subsequently in view of the argument urged relying upon the same by the plaintiff.

10. A reading of the aforesaid Agreement to Sell dated 3.8.2010 shows clearly that the said agreement is entered into between Mr.M.K.Jalan and Mr.Vinay Maloo as stated in the heading of the agreement. Agreement does not in any manner refer to the agreement having been entered into by Mr.M.K.Jalan for and on behalf of either the plaintiff or anybody else. Similarly when the agreement is signed by Mr.Vinay Maloo it is not mentioned that Mr.Vinay Maloo has signed the agreement on behalf of the defendant no.1/Company and all that is stated is that Mr.Vinay Maloo will also take consent of Mr.K.L.Bothra. It may be noted that neither Mr.Vinay Maloo nor Mr.K.L.Bothra are in any

manner stated to be Directors of the defendant no. 1/Company. Also, in the Agreement to Sell dated 3.8.2010, there is no reference to Mr. Vinay Maloo acting in terms of a particular Board of Director's resolution of the defendant no. 1/Company. In fact, it is the case of the plaintiff, as argued before this Court, that Mr. Vinay Maloo was acting as a power of attorney holder on behalf of the defendant no. 1/Company for signing of the Agreement to Sell dated 3.8.2010. In any case, I do not have to go on the aspect as to who has signed the agreement on behalf of the defendant no. 1 or whether it was rightly or incorrectly signed on behalf of the defendant no. 1 i.e. whether Mr. Vinay Maloo or Mr. K.L. Bothra or each of them individually or jointly had power to enter into an agreement on behalf of the defendant no. 1 in the suit property because this is not an issue which is called for determination and what is in issue before this Court is whether the Agreement to Sell dated 3.8.2010 has been entered into by the present plaintiff/Company/M/s Keventer Agro Limited and that whether Mr. M.K. Jalan in terms of the Agreement to Sell dated 3.8.2010 has acted for an on behalf of the present plaintiff/Company/M/s Keventer Agro Limited.

11.As already stated above, once the agreement is proved in terms of Section 91 of the Act; and in this case there does not arise an issue of proof because it is the case of the plaintiff itself of placing reliance on this Agreement to Sell dated 3.8.2010; therefore, the Agreement to Sell dated 3.8.2010 has to be looked into only in terms of what is contained in the said Agreement to Sell dated 3.8.2010 and no further evidence can be considered to decide what are the terms of the Agreement to Sell dated 3.8.2010. Also, in view of Section 92 of the Act no evidence can be led on behalf of the plaintiff to in any manner add or subtract or vary or contradict the terms contained in the Agreement to Sell dated 3.8.2010 subject of course to the case of the plaintiff falling within any of the exceptions contained in Section 92 of the Act.

12. A reading of the Agreement to Sell dated 3.8.2010 leaves no manner of doubt, once we read the agreement to sell only and no other document including any pleading or affidavit of the defendant no.1 in the present case in view of Sections 91 and 92 of the Act, that, the Agreement to Sell dated 3.8.2010 has been entered into only and only by Sh. M.K. Jalan in his individual capacity. The Agreement to Sell dated 3.8.2010 does not refer to Sh. M.K. Jalan acting for an on behalf of the plaintiff/Company or in any manner having been authorized by the plaintiff/Company for entering into of the Agreement to Sell dated 3.8.2010 on behalf of the plaintiff/Company. Applying Section 91 and 92 of the Act, it is therefore clear that the plaintiff cannot set up a case that Sh. M.K.Jalan when he signed the Agreement to Sell dated 3.8.2010 was acting for and on behalf of the plaintiff/Company/M/s Keventer Agro Limited.

13(i). The related issue to be decided is the argument urged on behalf of the plaintiff, by applying the second proviso to Section 92 of the Act, that this Court can look into the pleadings which are filed by the defendant no.1 in this suit being the written statement as also an Affidavit dated 15.11.2011 (attested on 14.11.2011) and once these documents are read, these documents will show that Mr. M.K. Jalan was acting for and on behalf of the plaintiff/Company. Learned senior counsel for the plaintiff argues by placing reliance upon the second proviso to Section 92 of the Act that once a document is silent, courts can look into other evidence to hold that Sh. M.K. Jalan was acting for and on behalf of the plaintiff/Company i.e. it is argued by the plaintiff that the Agreement to Sell dated 3.8.2010 is silent on who has a right of pre-emption under the same and thus pleadings of defendant no. 1 can be looked into to decide that Sh. M.K. Jalan was acting for and on behalf of the plaintiff/Company.

13(ii). I am completely unable to agree with this argument

urged on behalf of the plaintiff because proviso(2) to Section 92 of the Act applies to a situation with respect to a matter where the document is silent and in the present case the document is not silent as to who is the person who had a right of pre-emption, inasmuch as, Sh. M.K. Jalan as per the Agreement to Sell dated 3.8.2010 is specifically written as the person who has a right of pre-emption. Therefore, it cannot be argued on behalf of the plaintiff that the document/Agreement to Sell dated 3.8.2010 is silent with respect to the person who had a right of pre-emption. Once the document is not silent and Mr.M.K.Jalan is mentioned as a person who has a right of pre-emption, the argument urged on behalf of the plaintiff of applying proviso (2) to Section 92 of the Act is misconceived and is accordingly rejected.”

9. Learned Senior Counsel for the appellant urged that the appellant could not be denied an opportunity to lead evidence that Shri M.K.Jalan was acting on behalf of the appellant company when the agreement to sell dated August 03, 2010 was executed and that proviso (2) to Section 92 permitted such evidence to be led.

10. Proviso (2) to Section 92 of the Evidence Act permits the existence of any separate oral agreement to be proved but as to any matter on which a document is silent and which is not inconsistent with its terms.

11. Since the agreement, specific performance whereof is sought is a written agreement, it cannot be lost sight of that the signatories thereto are Mr.M.K.Jalan and Mr.Vinay Maloo. It has not been recorded that Mr.M.K.Jalan is acting on behalf of the appellant company as its Director. It is thus not a case where the document is silent as to who are the parties to the document. The document clearly records that the agreement is between the two executants.

12. The appellant cannot rely upon any prior oral agreement to sell for purposes of maintainability of the suit for the reason the suit is based on the written agreement to sell dated August 03, 2010.

13. It is settled law that a company is a separate entity from individuals and if a company executes an agreement to sell undertaking obligation to purchase a property the same has to be by a person who can bind the company. The document must record that the party to the agreement is the company acting through a living human being.

14. There is yet another problem which the appellant cannot overcome. It is settled law that there cannot be any variance between pleading and proof. In the entire plaint there is no plea that Mr.M.K.Jalan was empowered on behalf of the company to bind the company to enter into an agreement to sell. There is no averment that Mr.M.K.Jalan was acting on behalf of the company. The crux of the pleadings concerning the agreement to sell in question is in para 4 of the plaint and we do not find a word mentioned therein that Mr.M.K.Jalan was acting on behalf of the appellant company. Having not pleaded said fact, the appellant in any case would not be entitled to lead any evidence to prove that Mr.M.K.Jalan was acting on behalf of the company when the written agreement to sell dated August 03, 2010 was executed.

15. We find the pleadings in the plaint concerning monies owed by defendant No.1 and its directors to the appellant extremely vague. A bald allegation is made that defendant No.1 and its directors owed money to the appellant. Which director owed the money and how much? How much money defendant No.1 owes? Nothing has been stated.

16. We concur with the five conclusions arrived at by the learned Single

Judge in para 14 of the impugned order which read as under:-

(i) Admittedly, the plaintiff places reliance upon the Agreement to Sell dated 3.8.2010, an which agreement to sell is said to be the culmination of earlier discussions between the parties with respect to the suit property.

(ii) The Agreement to Sell dated 3.8.2010 is specifically entered into between Sh.M.K.Jalan only as the person who has a right of pre-emption i.e. Sh.M.K.Jalan cannot be said to have acted for anybody else including the plaintiff/Company as is the case which is set up in the plaint.

(iii) Sh.M.K.Jalan is not a party/plaintiff in the present suit, and plaintiff/Company is not seeking to enforce rights under the Agreement to Sell dated 3.8.2010 either as a nominee or for and on behalf of Sh.M.K.Jalan. Even if Sh.M.K.Jalan is now hereafter sought to be added as a plaintiff in the suit, the provision of Section 22 of the Limitation Act, 1963 will apply as per which the suit will be taken to have been filed by Sh.M.K.Jalan only when the application would have been filed to implead Sh.M.K.Jalan as the plaintiff. Of course, I must hasten to add that it is nto the case of the plaintiff argued before this Court today that Sh.M.K.Jalan had individual and personal rights under the Agreement to Sell dated 3.8.2010 and the case of the plaintiff is that it is the plaintiff/Company which acted for taking benefit of the right of pre-emption of the suit property. Accordingly, no observations are made by this Court finally one way or the other with respect to whether the suit if filed by Sh.M.K. Jalan or if Sh.M.K.Jalan is said to be added in the present suit today, whether such claim of Sh.M.K.Jalan would be barred by limitation.

(iv) As per the averments in the plaint, it is not stated that Sh.M.K.Jalan entered into an Agreement to Sell dated 3.8.2010 for and on behalf of the present plaintiff/Company/M/s Keventer Agro Limited.

(v) *Once the Agreement to Sell dated 3.8.2010 is an admitted document and relied upon by the plaintiff itself, and this agreement to sell is to be taken as final for containing the terms and conditions of the right of pre-emption between Sh.M.K.Jalan and defendant no.1/Company acting through Sh.Vinay Maloo, it cannot be argued by the plaintiff in view of the provisions of Sections 91 and 92 of the Act that the Agreement to Sell dated 3.8.2010 signed by Sh.M.K.Jalan is not in his individual capacity and that Sh.M.K.Jalan was in fact acting for and on behalf of the plaintiff/Company in this case. Also, in the facts of the present case, there is no scope for applicability of the second proviso to Section 92 of the Act as there is no silence in the Agreement to Sell dated 3.8.2010 of the person who has the right of pre-emption as it is clearly mentioned in the Agreement to Sell dated 3.8.2010 that the right of pre-emption is of Sh.M.K.Jalan and not anybody else.”*

17. The appeal is accordingly dismissed but without any order as to cost.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

JANUARY 25, 2017
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