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

+ W.P.(C) 685/2008

SUNLIGHT PROJECTS P.LTD.

Through:

..... Petitioner

Mr. R.K. Saini with Mr. Varun
Nagrath, Advocates

versus

D.D.A. & ORS

Through:

..... Respondents

Mr. Ajay Verma, Senior Standing
Counsel with Mr. Vaibhav Mishra,
Advocate for DDA.

Ms. Mini Pushkarna with Ms. Anushruti
with Ms. Vasundhara Nayyar,
Advocates for SDMC

Reserved on : 29th November, 2016

Date of Decision : 6th January, 2017

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed primarily seeking quashing of the letter dated 9th January, 2008 issued by respondent-DDA insofar as it directs the petitioner to pay the balance 75% premium along with interest @15% per annum. Petitioner also prays that respondent-DDA be directed to provide sewage, road, parking and water supply facilities at commercial Plot No. 8, Service Centre, Sector 20, Part 2, Dwarka, Delhi.

2. The relevant facts of the present case are that at an auction held on 16th January, 2007 for Commercial Plot No. 8, Service Centre, Sector 20, Part 2, Dwarka, New Delhi, petitioner was the successful bidder with the bid of Rs. 17.51 crores. Clause 2(iii) of the auction terms and conditions states as under:-

"The bid shall be for the amount of the premium offered for the free hold rights in the plot. The plot is being auctioned on 'as is where is basis'. It is presumed that the intending purchaser has inspected the site and familiarized himself with the prevalent conditions in all respects including status of infrastructural facilities available etc. before giving the bid."

3. On the date of auction, the petitioner made Earnest Money Deposit of Rs. 4.45 crores being the 25% of the bid amount.

4. On 4th May, 2007, respondent-DDA issued letter for demand for balance 75% bid amount, i.e., Rs. 13.06 crores within ninety days. The letter further stated as under:-

"Please note that in case the payment is not received within stipulated, i.e., on or before 01/08/2007 OR the Extension of Time if desired so as per Terms & Conditions of Auction Clause 3.4(i) the Competent Authority may grant Extension of Time for making the balance payment upto 180 days subject to payment of interest as mentioned in related Clause failing which the auction bid shall automatically stand cancelled and the amount on Earnest Money, i.e. Rs. 43,775,000.00 deposited by you on 16/01/2007 shall stand forfeited without any notice."

5. Within the said ninety days, petitioner requested for extension of time to make payment.

6. Petitioner was granted periodic extension of time. Last extension granted was till 28th January, 2008 to make the balance payment. Instead of

making balance payment, petitioner filed the present writ petition seeking quashing of letter dated 9th January, 2008 and for a direction to respondent-DDA to provide infrastructural facilities to the plot in question.

7. Mr. R.K. Saini, learned counsel for the petitioner submitted that the respondent, after auctioning the demised plot to the petitioner on 16th January, 2007, failed to provide the basic amenities at the site despite representations by the petitioner since 2nd February, 2008 and therefore, the petitioner had to keep on asking for extension of time to make payment of the balance amount. He pointed out that the work of consultancy for designing, submission and approval of sewerage system, water supply and storm water drain was awarded to M/s A.K. Sharma Construction on 2nd November, 2007 and was under process for designing till 2008 and internal sewerage work was completed only on 16th March, 2009, internal water supply work was completed on 10th June, 2009 whereas internal drainage work had been awarded on 5th October, 2009 and was slated to start within one week thereafter.

8. He further submitted that in view of Sections 35 and 36 of Delhi Development Authority Act, 1957, respondent-DDA cannot be permitted to act as a private builder/business entity for profit motive and to sell land without providing basic amenities rendering the said piece of land unusable for the purpose for which it had been purchased.

9. Mr. Saini also contended that the respondent-DDA had constituted high-powered committees in the case of big businessmen and builders to help them out of similar situations and refund the money deposited as held in case of Kailash Nath Associates and MGF, but the same treatment was

denied to the petitioner in an arbitrary and discriminatory manner so as to avoid liability of refunding the amount of earnest money to the petitioner and is trying to forfeit it in an unwarranted manner so as to unjustly enrich itself. In support of his submissions, Mr. Saini relied upon following judgments :-

A) ***Kailash Nath Associates Vs. Delhi Development Authority, (2015) 4 SCC 136*** wherein it has been held as under:-

"29. Based on the facts of this case, it would be arbitrary for DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs 78,00,000 (Rupees seventy-eight lakhs) without any loss being caused. It is clear, therefore, that Article 14 would apply in the field of contract in this case and the finding of the Division Bench on this aspect is hereby reversed."

B) ***Rajender Jain Vs. Delhi Development Authority, 2003 (105) DLT 284*** wherein it has been held as under:-

"28. The matter, however, does not rest at this. The alternative plea advanced in the writ petition is for refund of the earnest money, which was forfeited as also for payment of interest thereon. The reading of the terms and conditions of auction would show that Clause 3 relating to 'Execution of the Lease Deed, Payment of Ground Rent and Other Main Conditions' do not arise as only the bid had been accepted and the earnest money was yet to be paid. The reason for forfeiting the earnest money is stated only in Clause 2(viii) in such a case which would be the failure of the successful allottee in making payment within the stipulated period of time. The occasion for

the petitioners to make the said payment did not arise as before the date of expiry for making payment, the Show Cause Notice had been issued to the petitioners, which resulted in cancellation of the successful bid of the petitioners. In my considered view, thus, the respondent could not have forfeited the amount and should have refunded the bid amount after cancelling the bid."

10. On the other hand, Mr. Ajay Verma, learned senior standing counsel for respondent-DDA contended that the plot had been sold on "as is where is basis". In support of his contention, he relied upon Clause 2(iii) of the auction terms and conditions.

11. He also submitted that the petitioner was bound by the contract/auction terms and conditions, in particular, Clause 2(iv) which provides for forfeiture of Earnest Money Deposit.

12. Mr. Verma stated that with the petitioner having failed to abide by the contract/auction terms and conditions by not making the payment of the balance premium within the stipulated/extended time, consequences as per clause 2(iv) would follow as a natural corollary and the EMD of petitioner was rightly forfeited.

13. He stated that even otherwise the allegation of lack of infrastructural facilities was baseless and a desperate attempt by petitioner to cover up its own failure. In support of his contention, Mr, Verma relied upon DDA's short affidavit dated 13th February, 2008 and affidavit dated 7th October 2009. The relevant portions of said affidavits read as under :-

A) Affidavit dated 13th February, 2008:-

"8. A report has been taken from the Engineering branch which has reported that the peripheral services, i.e., water supply, electricity, drainage and sewerage facilities already exist around this pocket. It has been explained that the internal services around and for each plot are laid as and when the construction is proceeding and getting completed since, if internal lines are laid earlier they very often get damages when constructions are made by the by the allottees.

A copy of the site plan of the area is being annexed hereto and marked as Annexure R-2. On the said map the plot in question has been marked. It is also clear from the said map that the basic infrastructure is existing on the roads surrounding the said pocket and even on the 60 metre road right in front of the plot of Petitioner. The yellow coloured plots are the ones where construction is already in process and no search complaint of infrastructure has been received by DDA from any of these set plot owners.

It would also be relevant to point out herein that in fact at the moment, DDA has only auctioned the line of the plot in which the plot of Petitioner exists as also, the adjacent plots since these are next to the main road where services have already been laid and therefore, the internal connection for infrastructural main lines would be easily provided when construction is made. The plots at the back have not yet been auctioned.

B) Affidavit dated 7th October, 2009:-

3.The documents are being and enclosed along with this affidavit to show in detail that when the plot was auctioned, the peripheral services of water supply, storm water drains, sewerage etc. were existing on the main road being road (being number 226) in front of the plot of Petitioner from where, connections to the plot of Petitioner were available, if required.

4. That the list of documents and enclosed indicate the following:

- i) Photographs showing that construction work was, and is, being carried on the adjoining plots to that of the Petitioner;
- ii) Plan showing the location of the plot of Petitioner and the other plots where construction is in progress;
- iii) Contract documents showing the progress of Road No. 226 which was completed on 31.12.2002;
- iv) Contract documents showing the existence of the sewer lines on the road in front of the plot of Petitioner at the time when the auction was conducted. The date of completion of the peripheral sewer lines was 14.11.1998;
- v) Completion plan showing the existence of sewer lines on road no. 226 and around the pocket in question on the date above mentioned;
- vi) Contract documents showing the existence of adequate storm water drains, in section 20 along with a plan for the same. The date of completion of the peripheral storm water drains, was 10.8.1997;
- vii) Contract documents showing the existence of peripheral water supply lines on the road in front of the plot of Petitioner at the time when the auction was conducted. The date of completion of the peripheral water lines was 18.8.2000;
- viii) Completion plan showing the existence of water supply lines on road no. 226 and around the pocket in question on the date above mentioned;
- ix) Letter dated 8.10.2008 showing the existence of street lights in the area."

14. In support of his submissions, Mr. Verma relied upon the following judgments :-

A) **Delhi Development Authority Vs. Grihsthapana Coop. Group**

Housing Society Ltd., 1995 Suppl (1) SCC 751 wherein it has been held as under:-

"8. The aforesaid facts leave no manner of doubt in our mind that what was stated in the communication of 3-11-1992 was in continuation of the earlier offer dated 1-10-1990/25-1-1991. We, therefore, hold that the respondents had accepted the offer contained in the communication of 3-11-1992 and, as such, they were bound to pay premium at the enhanced rate of Rs 1650.65, held as reasonable by the High Court. As they did not comply with the condition mentioned in this Court's aforesaid order dated 10-5-1993, the respondents had made themselves liable to forfeiture of the earnest money. As, however, the earnest money which was deposited was not 10% of the premium as required by the amended Nazul Rules, but was a fixed sum of Rs 5 lakhs in CA No. 931 of 1985 mentioned in the offer of 1-10-1990, the earnest money which had become liable to be forfeited was a sum of Rs 5 lakhs, and not 10% of the total premium calculated at the rate of Rs 1650.65."

B) *Aggarwal Associates (Promoters) Ltd. Vs. Delhi Development Authority & Anr., 69 (1997) DLT 716 (DB)* wherein it has been held as under:-

"7. The dictum laid down by the Supreme Court is that the terms agreed between the parties have to be considered for considering the question of the right to forfeiture by one of the parties to the contract.

8. In Chandigarh Housing Board v. Avtar Singh, (1995) 5 SCC 313, the Supreme Court had again considered and held that the power of forfeiture was intended to prevent fraud and mal practice in allotment.

9. In the instant case, the petitioner Aggarwal Associates must have inspected the site before bidding at the auction. The DDA was bound to deliver possession of the property only on the petitioner's depositing the balance 75% of the bid money. Admittedly, the petitioner had not deposited the amount. The petitioner wanted to project a case that the DDA was not in a

position to put the petitioner in possession. It is merely a make believe affair. The case of the petitioner cannot be accepted. Therefore, the reliefs prayed for by the petitioner cannot be granted in law. The writ petition, accordingly, stands dismissed. There shall be no order as to costs."

15. Having perused the papers, this Court finds that though the payment of balance 75% premium was due on 1st August, 2007, yet the petitioner on 16th July, 2007 requested for extension of time because it was not able to "make payment" due to "some unforeseen circumstances". The petitioner's letter dated 16th July, 2007 is reproduced hereinbelow:-

"Dated: 16th July, 2007

To,

*The Dy. Director(CL)
Delhi Development Authority,
INA Vikas Sadan,
New Delhi.*

F. No. F98(32)/07/CL

Sub: Plot No. 8 measuring 800 sq. mtr, Service Centre Sector 20-(PartII), Dwarka-

Sir,

M/s. Sunlight Project Pvt. Ltd. purchased the above plot No. 8, measuring 800 sq. mtr., Service Centre Sector 20 (Part II), Dwarka held on 16th January, 2007 for an amount of Rs. 17.51 crores and paid earnest money of 4,45,75,000/- and balance payment is due to be paid on or before 01/08/2007. But we have to request you that due to some unforeseen circumstances, we may not be able to make balance payment by due date. Hence you are, therefore, requested to kindly grant extension of

time for a period of 90 days without levy of interest.

Thanking you,

*Yours faithfully,
For Sunlight Project Pvt. Ltd.*

*Sd/-
Authorised Signatory"*

(emphasis supplied)

16. On 31st July, 2007, petitioner reiterated its request. By letter dated 11th September, 2007 the same was accepted and the time was extended till 30th October, 2007 along with payment of interest. Petitioner failed to make the payment and on 12th November, 2007, petitioner informed that it had been unable to "*manage the balance payment*" and requested for further extension of 90 days. The request was again reiterated on 13th December, 2007. The petitioner's letter dated 12th November, 2007 is reproduced hereinbelow:-

"Dated: 12th November, 2007

To,

*The Dy. Director(CL)
Delhi Development Authority,
Vikas Sadan, INA,
New Delhi.*

F. No. 98(32)/07/CL-

*Sub: Request for extension of time- Plot No. 8, Sector 20,
Dwarka-*

Sir,

This refers to our letter dated 15th October, 2007 regarding

extension of time to make balance 75% payment (photo enclosed for ready reference)

It is apprised to you that the balance payment was to be made by 30th October, 2007 which was to be arranged from the bank subsequent to getting permission from DDA to raise loan from the Bank. Hence due to non-receipt of permission to raise bank loan so far, we could not manage the balance payment and hence request for extension was made well in time.

You are, therefore, requested to kindly get us extension for another 90 days so that the payment could be arranged to be made.

Thanking you,

*Yours faithfully,
For Sunlight Project Pvt. Ltd.*

Sd/-

Authorised Signatory"

(emphasis supplied)

17. It was in these circumstances that the final extension was granted by the respondent-DDA vide letter dated 9th January, 2008.

18. Consequently, it is clear that the sole ground urged by the petitioner for not making payment and seeking extension was lack of funds and not lack of infrastructural facilities.

19. No averment with regard to constitution of high-powered committees in the case of Kailash Nath Associates and MGF is to be found in the writ petition. Consequently, as there is no factual base in the writ petition, the plea of discrimination cannot be considered.

20. In any event, in view of DDA's short affidavit dated 13th February, 2008 and affidavit dated 7th October 2009, the issue whether adequate infrastructural facilities were provided on the date of auction is a disputed question of fact, which cannot be adjudicated upon in writ proceedings.

21. Further, the judgment in **Rajender Jain** (supra) is clearly inapplicable as in the said case it was held that the bid had been cancelled prior to the last date for making payment and that the earnest money deposit had not been paid.

22. The judgment in **Kailash Nath Associates** (supra) is not relevant as in the said case a decision was rendered in respect of a civil suit for specific performance of an agreement to sell filed against the respondent-DDA, where the Court after a full trial came to the conclusion that DDA having extended the time for making the payment, could not have terminated the same without issuing a show cause notice. It was held in the case of **Kailash Nath Associates** (supra) that DDA had suffered no loss as it had received much higher amount on re-auction of the same plot.

23. In fact, a Coordinate Bench of this Court in **Trinity Colonizers Pvt. Ltd. Vs. DDA, 2912 I AD (Delhi) 70** in similar facts, has distinguished the judgment of **Kailash Nath Associates** (supra) by observing as under:-

"7. As regards the reliance placed by the learned counsel for petitioner on a judgment of a Single Judge in the case of 'Kailash Nath & Associates (M/S) vs. DDA & Anr.', reported as 2007 IX AD (DELHI) 137, the said judgment would not be of any assistance to the petitioner for the reason that though it dealt with a bid for sale of land, it was a decision rendered in respect of a civil suit for specific performance of an agreement

to sell filed against the respondent/DDA and in the alternative, for recovery of damages with interest, where pleadings were completed, documents filed, issues framed and evidence led and only after examining the facts of the case, the Court came to the conclusion in the said case that having extended the time for making the payment, it would be deemed that the defendant/DDA had treated the contract as subsisting which is why it was at least required to issue a notice to the plaintiff therein to perform the agreement before terminating it. In the present case, vide letter dated 30.10.2009, the respondent/DDA duly put the petitioner to notice that failure to deposit the balance payment would result in forfeiture of the earnest money in terms of the conditions of auction. Despite the same, the petitioner failed to deposit the balance payment. Nothing has been placed on record by the petitioner to indicate that the respondent/DDA had given an impression to it that it was treating the contract as subsisting. Thus the findings in the aforesaid judgment would not have any application to the present case. Furthermore, in the aforesaid case, the Court had pronounced the judgment in the context of the issues framed which were with regard to the entitlement of the plaintiff therein to the plot, for relief of specific performance and in the alternative, for recovery of damages. In the present case, the petitioner has not even bothered to take the aforesaid ground of there being a subsisting contract in its writ petition, which has been argued at length on two running dates and has culminated in the passing of the present order. The arguments urged today are quite apparently an afterthought and an attempt to improve upon the petitioner's case, which cannot be permitted.

8. The terms and conditions of the sale by auction, are a matter of contract between the parties, and the petitioner, who was well aware of those terms, cannot seek alteration/variation thereof at a later date, as per its own whims and fancies. Pertinently, the petitioner has woken up from its deep slumber and chosen to approach the Court only on the eve of the re-auction of the subject plot, which is fixed for today and in

respect of which, the advertisements were issued in the press by the respondent/DDA more than a month ago, on 15.10.2011. Having regard to the clear and categorical stand of the respondent/DDA that the earnest money deposited by the petitioner stands forfeited on account of non- payment of balance 75% bid amount, despite extensions granted to it, this Court is of the opinion that the petitioner is not entitled to grant of any relief in the present proceedings."

24. Also, this Court is of the view that as the petitioner had visited the site in question and had familiarised itself as to the prevalent conditions, particularly, the infrastructural facilities, and as the plot had been sold on 'as is where is basis', the petitioner immediately on acceptance of the bid could not have asked for provisions of all infrastructural facilities.

25. It is common knowledge that civic agencies, like DDA use the amount received in auction to create or improve infrastructural facilities.

26. Delay in construction of an infrastructure project like a commercial plot cannot be condoned as a commercial plot is of public utility and any delay in its construction causes prejudice to the public at large. If the petitioner after construction of the building had found that the infrastructural facilities had not been provided, then its grievance would have been well founded as without basic civic amenities no purchaser can occupy and/or use the said plot.

27. Moreover, from the correspondence reproduced hereinabove, it is apparent that the real reason for not making payment of the balance 75% bid amount was the fact that the petitioner did not have adequate funds. The *alibi* that due to lack of civic amenities the balance bid amount was not paid,

is an afterthought and contrary to contemporaneous documents.

28. Consequently, present writ petition being bereft of merits is dismissed but with no order as to costs.

MANMOHAN, J

JANUARY 06, 2017

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