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* IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : AUGUST 29, 2017
DECIDED ON : OCTOBER 16, 2017

\+ **CS(OS) 2601/2008**

WELLDONE ESTATE PROJECTS PRIVATE LTD
..... Plaintiff

Through : Mr.Vivek Kohli with Ms.Prerna Kohli, Ms.Anubha Singh and Ms.Aishwarya Kaushiq, Advocates.

versus

TODAY HOMES AND INFRASTRUCTURE PRIVATE LTD. AND OTHERS
..... Defendants

Through : Mr.Vivek Sibal with Mr.Jitender Ratta, Advocates for D-1 & 2.
Mr.Sahil Sagar, Sr.Advocate, with Mr.S.Sagar, Advocates, for D-4.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P GARG, J.

1. The present suit has been filed by Welldone Estate 'projects' Private Limited (hereinafter 'the plaintiff') against Today Homes and Infrastructure Private Limited (hereinafter 'defendant No.1'), G.K.Gambhir (hereinafter 'defendant No.2'), Rajesh Arora (hereinafter 'defendant No.3') and Ludhiana Improvement Trust (hereinafter 'defendant No.4') for recovery of ₹7,95,69,000/-.

2. Briefly stated the facts as reflected in the plaint are that the plaintiff is a company, incorporated and registered under the Companies Act, 1956. Bharat Halwasiya, authorized representative of the plaintiff is authorized to institute the present suit. Defendant No.1 is a company duly incorporated and registered under the provisions of a Companies Act and is holding power of attorney in their favour executed by defendant No.4 to take decisions on its behalf in respect of the purported project, namely, Ludhiana City Centre (hereinafter 'project'). Defendant No.2, Director and authorized representative of defendant No.1 company induced the plaintiff to invest ₹5,19,00,000/- into the said 'project'; personally assured and guaranteed repayment of the said amount along with interest and as such is a necessary and proper party in his individual capacity and also being the director of defendant No.1. Defendant No.3 is the authorized representative and recognized broker of defendant No.1 by virtue of a pre-existing understanding between them. Defendant No.3 along with defendant No.2 had also induced the plaintiff to part with money ₹5,19,00,000/- for investing into the said 'project' and had personally guaranteed its repayment. Defendant No.4, is a government entity, claiming to have entered into a Joint Venture Agreement dated 24.05.2005 with defendant No.1 for development and construction of 25-26 acres multi-purpose development at Shaheed Bhagat Singh Nagar, Ludhiana (Punjab) being Ludhana City Centre.

3. It is averred that the plaintiff made payment of ₹5,19,00,000/- in the joint escrow account/designated bank account, namely, Today Homes Infrastructure Pvt.Ltd-Citi Centre-LIT. The amount has been

duly received and utilized by defendants No.1 to 4. Defendant No.4 too is jointly and severally liable to pay the suit amount.

4. It is further averred that in November, 2005, the defendant No.1 through its director and authorized representatives (defendant No.2 and 3) approached the plaintiff and induced him to make investment in their 'project' being developed at Shaheed Bhagat Singh Nagar, Ludhiana, Punjab. It was represented by defendants No.1 to 3 that the Joint Venture Agreement dated 24.05.2005 had already been entered into with defendant No.4 for the purpose of development of the integrated 25-26 acres of land situated at Shaheed Bhagat Singh Nagar, Ludhiana, Punjab. Defendants No.1 to 3 assured the plaintiff that the amount so invested in the 'project' will be fully secured against the execution of appropriate legal documents and in the event of failure of execution of documents for any reason or failure of 'project', the amount paid shall be returned by them along with interest @18% per annum. Being persuaded and influenced by the aforesaid representations and assurances, the plaintiff agreed to buy 1,50,000/- square feet area in the said 'project' @ ₹3,800/- per square feet. The amount was to be deposited in the joint escrow account and it was to be utilized for the development of the said 'project'. In terms of the said understanding, the plaintiff had issued a cheque for the sum of ₹1,50,00,000/- bearing No.005956 dated 9.12.2005 in favour of 'Today Homes Infrastructure Pvt.Ltd.-Citi Centre-LIT duly received by defendants No.1 to 3; receipt dated 10.11.2005 recording the personal guarantee of repayment by defendant Nos.2 and 3 was also issued.

5. Further, case of the plaintiff is that pursuant to the said agreement he handed over two more cheques bearing No.005958 dated 12.12.2005 for the sum of ₹1,50,00,000/- and 005959 dated 14.12.2005 for the sum of ₹1,00,00,000/- to defendant No.1 in the name of its designated bank account. All the said cheques were duly received and encahsed by defendants No.1 to 4.

6. It is urged that defendants No.1 to 3 instead of executing any legal documents, kept on insisting to make further payments to them on the pretext that preparation of the necessary documents was in progress. On the said assurance, the plaintiff made further payment of ₹35,00,000/- vide cheque No.005981 dated 20.02.2006 and ₹84,00,000/- vide cheque No.005986 dated 2.3.2006 in favour of joint escrow account/designated bank account of defendants No.1 to 4 and handed over the said cheques to defendants No.2 and 3. The said cheques were encashed by defendants No.1 to 4. The plaintiff paid a sum of ₹5,19,00,000/- in all to the defendants.

7. The plaintiff's grievance is that the defendants failed to perform their obligation of executing the requisite legal documents in his favour despite receipt of huge money. The plaintiff, thereafter, started demanding repayment of the said amount along with interest which the defendants failed to pay. A legal notice dated 17.03.2008 was served upon defendants No.1 to 4 which was responded by defendant No.1 on 29.03.2008. It was informed by defendant No.1 that the 'project' was not being progressed due to the circumstances beyond their control. Again, the plaintiff issued letters dated 15.05.2008 and 13.06.2008.

Defendants No.1 and 3 accepted and admitted to have received the full amount paid by the plaintiff and affirmed the understanding.

8. It is further averred that defendant No.1 in its reply dated 02.09.2008 took a contrary stand stating to have received only ₹3,19,00,000/- from the plaintiff.

9. Defendant No.3 in its reply dated 25.09.2008 took a different stand of re-selling the space to a third party when admittedly no space was ever allotted or earmarked to the plaintiff. The plaintiff was, thus, cheated in a planned manner and was deprived of the huge amount of ₹5,19,00,000/- by defendants No.1 to 4. The plaintiff initiated criminal proceedings against defendants No.2 and 3 by filing complaints before Economic Offence Wing, Delhi.

10. Under Sections 433 and 434 of the Companies Act, 1956, the plaintiff also initiated winding up proceedings against defendant No.1 by filing a winding up petition being CP No.380 of 2008 before this Court. Since the defendants have failed to return the amount, hence the present suit.

11. The suit is contested by the defendants. In the written statement filed on behalf of defendant No.1 it is stated that the suit is bad for mis-joinder and non-joinder of necessary parties. Defendant No.1 and defendant No. 4 had entered into a concession agreement on 24.05.2005 in terms of which, defendant No.1 was to develop and market the 'project'. Defendant No.4 is a statutory body incorporated under 'The Punjab Town Improvement Act, 1992 and is controlled by the Government of Punjab. On 25.08.2005 a tripartite agreement was executed with defendant No.4 and HDFC bank. The said agreement

stipulated that 30% of the proceeds collected by marketing the 'project' would be credited to defendant no.4 and 70% to defendant no.1 through escrow account in HDFC bank. Defendant no.4 also executed a Power of Attorney in favour of defendant No.1 to carry on the development work and market and sell the 'project' for and on its behalf. After the commencement of the work, the answering defendant engaged M/s HOK, a globally renowned and leading Architectural firm. Defendant no.4 approved the revised plans on 23.12.2005 vide Resolution No.204 and forwarded it for approval of the State Government on 26.12.2005. The State Government vide letter dated 30.06.2006 informed defendant No.4 that the Resolution dated 23.12.2005 stood approved by the government.

12. It is further averred that the plaintiff was aware that Ludhiana City Center 'project' was promoted by the Government of Punjab and was not a private 'project' of the defendant No.1. The said 'project' was widely published and the knowledge that defendant No.1 had bid for the said 'project' and had been awarded the tender for development and sale of the city centre 'project' was always in public domain.

13. Defendant No.1's case is that defendant No.3 approached him for and on behalf of plaintiff to purchase the commercial space in the said 'project'. The plaintiff was never approached by defendant No.1 or defendant No.2 and no inducement, whatsoever, was made to him. All the payments were made by the plaintiff in the designated bank account, he was always aware of the nature of the 'project' and only after due diligence had invested the money in it. Certain payments were received from the plaintiff through defendant No.3. Defendant No.1 had started

the construction of the 'project' and had made substantial investment to the tune of ₹125 crores. In September, 2006 certain disputes arose between defendant No.1 and defendant No.4 and the Government of Punjab illegally revoked the power of attorney and cancelled the escrow account as a result of which the construction of the 'project' came to a complete halt and the work could not be completed in time. It is further informed that defendant No.4 had actually withdrawn ₹23,48,28,128/-, representing 30% share in the amount received in the escrow account. Defendant No.1 instituted arbitration petition being Arbitration Case No.76 of 2007 before the Hon'ble High Court of Punjab & Haryana. Mr.Justice R.C.Lahoti (Retd.) was appointed as the sole arbitrator to adjudicate upon all the disputes vide order dated 4.4.2008. The order was challenged and the Hon'ble Supreme Court vide order dated 14.10.2008 remanded the matter to High Court to decide it.

14. It is claimed that defendant No.1 is not liable to pay any amount to the plaintiff and responsibility in this respect was upon defendant No.4 and the Government of Punjab.

15. Defendant no.2 in the written statement took almost the same defence raised on behalf of defendant No.1. It was claimed that defendant No.2 was not proper or necessary party in the present proceedings. He had never personally induced the plaintiff to invest ₹5,19,00,000/- in the 'project'. Although the amount equivalent to 70% of the deposit so made was received, however, it was spent on the 'project' and defendant No.2 was not liable to pay any amount to the plaintiff.

16. In the written statement on behalf of defendant No.3, it was pleaded that no personal guarantee was ever given to the plaintiff by the document dated 10.11.2005 termed by the plaintiff as 'receipt'. It is not a legal, valid or enforceable document/instrument. Defendant No.3 has no liability towards the plaintiff on the basis of the said alleged guarantee dated 10.11.2005; its genuineness is suspect.

17. It is further averred that all the payments have been made by the plaintiff on various dates by cheuqes and no cheque was drawn in his favour; he is not a beneficiary in the transaction. The suit filed by the plaintiff is barred by limitation; there is no privity of contract between the plaintiff and defendant No.3.

18. Defendant no.4 in its written statement averred that there was no privity of contract between the plaintiff and defendant No.4. This Court has no territorial jurisdiction to entertain the suit against defendant No.4. The suit has been instituted in violation of Section 98 of Punjab Town Improvement Act, 1992 and no prior notice was served upon it. It is further averred that M/s Today Homes & Infrastructure Pvt.Limited (defendant No.1) and the then Chairman of Ludhiana Improvement Trust in an illegal and unauthorized manner entered into an alleged agreement dated May 24, 2005. The then Chairman of the Trust had not obtained any prior approval of the Trust; he had also acted in total violation and disregard to the instructions/directions given by the Government of Punjab from time to time. The said agreement was not binding upon the Trust. An enquiry was ordered vide memo dated 19.09.2006 by the Government of Punjab. It was found that the agreement was invalid as the mandatory provisions of law were not

complied with. On the basis of the vigilance enquiry FIR No.5 dated March 23, 2007 under Sections 409/420/467/468/467/468/471 and 120B IPC and Sections 7, 13(1)(c)(d) read with Section 13(2) and 14 of the Prevention of Corruption Act, 1988 has been registered at Police Station Vigilance Bureau, Ludhiana. Charge-sheet in the said case has been filed where defendant No.1 is one of the accused besides others.

19. It is further informed that earlier defendant No.1 had sought appointment of an Arbitrator to adjudicate the alleged disputes. However, he did not succeed.

20. It is further pleaded that the amounts deposited in escrow account which was opened pursuant to the alleged agreement itself was illegal and invalid and signed by the Chairman in an unauthorized manner was automatically transferred to the accounts of 'Todays Homes & Infrastructure Pvt.Ltd. and M/s Ludhiana Improvement Trust- City Centre in the share of 70% and 30% respectively. The amount automatically transferred in the account of M/s Ludhiana Improvement Trust, is lying intact and has not been utilized at any point of time.

21. On the basis of the pleadings of the parties and the documents on record, following issues were framed on 12.01.2011:-

(i) Whether the suit is liable to be rejected on ground of non-joinder/mis-joinder of necessary parties? OPD 2 & 3

(ii) Whether there is any privity of contract between the plaintiff and defendant Nos.2 and 3, if so, to what effect? OPD 2&3

(iii) Whether the suit is liable to be rejected under Order 7 Rule 11(a) CPC? OPD-3

(iv) Whether the suit is liable to be rejected under Order 7 Rule 11 (d) CPC on account of lack of notice under Section 80 CPC? OPD-4

(v) Whether the plaintiff is entitled to a decree for a sum of ₹7,95,69,000/- from the defendants, if so, from whom and to what amount? OPP

(vi) If answer to issue No.5 is in affirmative, whether the plaintiff is entitled to interest @18%, if so, at what rate and for what period? OPP

(vii) Relief.

22. The plaintiff was directed to adduce evidence in the first instance. It is relevant to note that despite availing various opportunities, the plaintiff was unable to examine any witness. The evidence of the plaintiff came to be closed. Order-sheet reveals that there was non-appearance on behalf of the plaintiff on various dates. Defendants also opted not to lead any evidence.

23. I have heard the learned counsel for the parties and have examined the file. Findings on issues are as under:

<u>Issue Nos.5 and 6</u>

24. Onus to prove both these issues was upon the plaintiff. As observed above, the plaintiff did not produce any evidence to substantiate the averments in the plaint.

25. Relying upon the judgments *Mahendra Manilal Nanavati vs.Sushila Mahendra* Nanavati (1964) 7 SCR 267 and *Raveesh Chand Jain vs. Raj Rani Jain* (2015) 8 SCC 428, learned counsel for the plaintiff urged that non-examination of witnesses is inconsequence due to specific admissions by the defendants regarding receipt of ₹5,19,00,000/- from the plaintiff. This amount was paid by way of

cheques in the escrow account and was withdrawn by defendants No.1 and 4 in the ratio 70% and 30% respectively. The plaintiff has neither been given any plot/piece of land nor the money deposited by him has been returned. The defendants cannot be permitted to retain the money received by them from the plaintiff.

26. Learned counsel for the defendants urged that in the absence of any evidence, the plaintiff cannot be provided any relief. No categorical admission has been made by any of the defendants for receipt of the amount for any specific purpose.

27. Since the onus to prove both the issues was on the plaintiff and he miserably failed to produce any evidence despite availing number of opportunities, in my view, the plaintiff has failed to prove the averments made in the plaint. Adverse inference is to be drawn against the plaintiff for not appearing in witness box and not producing any credible evidence to substantiate the facts stated in the plaint. Mere pleadings or allegations without proof have no substance. Settled position is that when a party to the suit does not appear into the witness box and offers for cross-examination by the other side, a presumption would arise that the case set up by him is not correct. Averments in the plaint have been denied and controverted by the defendants. There is no categorical and specific admission if the amounts so deposited by the plaintiff in the escrow account was to be refunded or returned to the plaintiff. Defendants No.1 and 2 have specifically stated in their written statements that the said amount was regarding investment and was deposited by the plaintiff through defendant no.3 and there was no privity of contract between them. It is further stated in the written

statements that the amount so withdrawn by defendant No.1 from the escrow account has since been invested in the said 'project'.

28. It is relevant to note that the plaintiff had filed Co.Pet.Nos.380/2008, 8/2009 and 107/2009 which came to be disposed of by this Court by a common order dated 13.12.2010. Para 4 of the said order reads as under:

> **Co.Pet.380/2008**
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> *"In the present case, there is no written contract between the petitioner and the respondent. We do not know what was the exact nature of the transaction between the two parties pursuant to which ₹5,19,00,000/- was paid by the petitioner to the respondent. The amount paid is substantial but strangely the petitioner did not feel that it was necessary to enter into a written agreement. In the absence of written contract it cannot be ascertained, what was the exact nature of transaction between the petitioner and the respondent and what is the effect of inter-se disputes between the respondent and the LIT/Government of Punjab and whether the oral understanding between the parties had any condition or precondition, disclaimer or clauses regarding the transaction. We do not know what was agreed and settled between the parties and whether there was a clause/condition for refund. As parties are relying upon oral understanding/agreement, rival contentions cannot be examined and gone into in the summary proceedings before the Company Court. Accordingly, Co.Pet.No.380/2008 filed by M/s Welldone Estate 'project's Private Limited is dismissed. It is clarified that this Court has not expressed any opinion on merits as it is stated that a civil suit is already pending between M/s Welldone Estate 'project's Private Limited and Today Homes and Infrastructure Private Limited.*

Observations made in the present order will not influence the decision in the civil suit.

29. Defendant No.4 has denied to have withdrawn any amount from the escrow account which was illegally and unauthorizedly opened/maintained by the then Chairman of the Trust. It is pertinent to note that criminal case has been registered against many individuals regarding various transactions in question and defendant No.1 is also an accused therein. Status of the said criminal proceedings has not been informed. It is unclear if the cash lying intact in escrow account as claimed by defendant No.4 is a case property in the said proceedings.

30. No materials are on record to infer as to on what terms and conditions, the plaintiff had agreed to pay the huge amount of ₹5,19,00,000/- to defendant No.1. There is controversy as to in what manner the amount was deposited by the plaintiff in the escrow account. It is not clear if the plaintiff was approached or induced by defendant No.2 or defendant No.3 to make investment in the 'project'. There is no agreement in writing between the parties whereby the terms and conditions of the investment were reduced into writing. There is no document on record to show if there was any promise by the defendant No.1 to refund the amount with interest on any specific date or after certain period. It is pertinent to note that no application under Order XII Rule 6 CPC for judgment on 'admission' was moved by the plaintiff during trial. The defendants have denied their liability to pay any amount to the plaintiff on any count.

31. True, a judgment can be given on an 'admission' contained in the written statement. But the admission should be categorical. It

should be a conscious and deliberate act of the party making it, showing an intention to be bound by it.

32. In *M/s Siemens Ltd. vs.M/s Nova Iron & Steel Ltd.* 2012 SCC OnLine Del 4912 decided on 18.09.2012 while deciding issues No.5 and 6, the court observed as under:

> *"In spite of repeated opportunities, plaintiff failed to lead evidence. The evidence of the plaintiff was closed vide order dated 27.04.2010. This order has become final as this order has not been challenged thereafter. As the plaintiff did not lead evidence, the counsel for the defendant also on the same date i.e.27.04.2010 made a statement that defendant also does not want to lead evidence. No doubt, as per the issues framed, onus of issue Nos.2 to 4 is on the defendant, however, onus of issue Nos.5 and 6 is on the plaintiff. The onus of these issues was on the plaintiff inasmuch as it is clear from paras 6 and 10 of the plaint, the plaintiff claims not the total amount of machinery and equipments supplied but only an amount of ₹24,35,837.10/-. Therefore, it is clear that as per the plaint various amounts were paid to the plaintiff and plaintiff has only claimed the balance due of ₹24,35,837.10/- out of amount of approximately ₹1.37 crores. The plaintiff therefore had to lead evidence to show how the amount as claimed in para 10 of the plaint was due to the plaintiff and which is the subject matter of issue No.5.*
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> *XXX XXX XXX XXX*
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> *In view of the fact that it was the plaintiff which had to lead evidence and no evidence whatsoever has been led on behalf of the plaintiff, the plaintiff has failed to prove its case and therefore the suit of the plaintiff is dismissed by deciding issue Nos. 5 and 6 against the plaintiff."*

33. Since there is no evidence on record to substantiate the averments this Court is of the view, the plaintiff has failed to prove both these issues; these are decided against him and in favour of the defendants.

Issues No.1, 2, 3 and 4

34. These issues have not been pressed by the defendants. These are disposed of as 'not pressed'.

Relief

35. In view of the above findings, the suit filed by the plaintiff fails and is dismissed.

36. Decree sheet be drawn accordingly.

S.P.GARG
(JUDGE)

OCTOBER 16, 2017/sa