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

% *Date of Judgment: 01.06.2011*

+ R.S.A.No. 80/2003 & CM Nos. 3148/2009 (U O 41 R-27 CPC) & 253/2003 (for stay)

LAMBA PRESS AND SHEARA PVT. LTD.

.....Appellant

Through: Mr. Sumit Bansal along with Mr. Vaibhav Arora, Advocates.

Versus

UNION OF INDIA & ORS.

.....Respondents

Through: Ms. Anusuya Salwan along with Ms. Neha Mittal, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 14.02.2003 which had endorsed the finding of the trial judge dated 08.03.2001 whereby the suit filed by the plaintiff seeking relief for permanent and mandatory injunction to the effect that

the defendant be restrained from transferring/parting with the possession of the disputed plot (i.e. plot no 209/3, Block-C, Mayapuri Industrial Area, Phase-II, New Delhi measuring 525.93 sq. mts) had been dismissed.

2. The case of the plaintiff is that it was a company having successfully bid at the auction of the defendant/Delhi Development Authority (DDA) held on 23.12.1988. The plaintiff being the successful bidder; 25% of the bid amount i.e. Rs. 6,70,000/- had been paid on the date of the auction and the balance 75% had to be paid within next 30 days, i.e. by 23.01.1989. Contention of the plaintiff is that the land was encroached upon by jhuggis; he made several communications to the department including his letters dated 05.01.1989 as also 09.01.1989 requesting them to remove the said encroachment in order that he could make the payment of the balance amount; DDA had, however, failed to adhere to this request; the proposed action of the DDA seeking to cancel his plot was illegal and arbitrary; present suit was accordingly filed.

3. In the written statement, defense was that the plaintiff had paid 25% of the bid amount; auction was on and as is where is basis; the site was inspected by the plaintiff prior to making his bid; it was denied that the plaintiff learnt about this encroachment

after he had effected the bid; it was stated that the plaintiff had bid after due inspection of the site; letter dated 05.01.1989 was not disputed but its contents were denied; it was denied that the plaintiff was ready and willing to make the payment of the balance amount of 75% within time.

4. On pleadings of the parties, following issues were framed:-

1. Whether the suit of the plaintiff is liable to be dismissed in the absence of notice U/s 53 B of DD Act? OPD

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the plaintiff is liable to pay the court fees on the market value of the land? OPD.

4. Whether the plaintiff is entitled to the relief claimed? OPP

5. Relief.

5. Oral and documentary evidence was led.

6. Suit of the plaintiff was dismissed. Trial judge was of the view that the plaintiff had failed to deposit 75% balance amount within the stipulated time. This period could not have enlarged; he was not entitled to any relief.

7. This finding was endorsed in the first appellate court.

8. This is a second appeal. It is yet at the stage of admission.

Substantial question of law had been embodied at page 7 of the body of the appeal.

9. On behalf of the appellant, it has been urged that the impugned judgment suffers from an illegality as it has failed to consider the law laid down by this court in the Judgment reported in *2003 VIII AD (Delhi) 461 Jakson Engineers Pvt. Ltd. Vs. Delhi Development Authority and Ors.* as also the Judgment of the Division Bench reported in *1996 (39) DRJ DDA Vs. Jackson Engineers Pvt. Ltd (page 1).* It is pointed out that both these judgments had on similar facts; held that where there is an encroachment and the land is not vacant, it was the obligation of the DDA to remove the encroachment; in the absence of this obligation having been performed by the public department; the plaintiff had rightly not paid the balance amount within the stipulated period; on the ratio of the aforenoted pattern, the plaintiff is entitled to relief.

10. Arguments have been countered. Learned counsel for the respondent has pointed out that the period of payment of the balance could not be extended on any count, reliance has been placed upon the Judgment reported in *56 (1994) DLT 37 M/S. Behere Brother Vs. Delhi Development Authority and Another* as also another Judgment of this Court reported in *71 (1998) DLT*

642 V.K. Khosla Vs. Union of India & Ors. It is pointed out that both these judgments had examined the Delhi Development Authority (Disposal of Developed Nazul Land), Rules, 1981 and in this context, it noted that prior to 25.02.1989, there was no discretion even for a sufficient reason to extend the last date of payment in an auction bid; it is pointed out that the instant case clearly relates to the period prior to 25.02.1989; appellant is not entitled to any relief. It is further submitted that the department had rightfully forfeited the amount and for this proposition reliance has been placed upon the Judgment reported in *69 (1997) DLT 716 Aggarwal Associates (Promoters) Ltd. Vs. Delhi Development Authority & Anr.*

11. On the last argument urged by the learned counsel for the respondent, counsel for the appellant has no quarrel; it is not in dispute that if the allotment of the plot is not granted in favour of the appellant/plaintiff, there is no dispute that the amount of earnest money deposited by the appellant can rightfully be forfeited by the department.

12. There are two concurrent findings against the appellant. Both fact finding courts below had noted that PW-3 had himself come into the witness box and admitted in his cross-examination that two to three days prior to the bid, he had inspected the site;

he had bid for the auction with his eyes open and 25% of the bid amount i.e 6,70,000/-.had been deposited by him; terms and conditions of the bid document are also not in dispute. It is also not in dispute that within 30 days from 23.12.1988 i.e. by 23.01.1989, the balance amount of 75% had to be deposited by the defendant. It is also not disputed that the said amount has not since been deposited.

13. Learned counsel for the appellant in the course of these proceedings had filed an application under Order 41 Rule 27 of the Code wherein he has sought to place on record certain documents which as per his content would advance his case and would show that on the date of the auction, there were encroachments found on the suit land. The documents sought to be adduced by way of additional evidence have been noted. They are notings of the department. These notings, in fact, negatived the case of the appellant. Letter of 25.03.2004 reveals that the plot seemed to be free from encroachment; noting of 29.03.2006 also states that on inspection of the site, plot was lying vacant. On a specific query put to the learned counsel for the appellant, there is a little answer; it is stated that this encroachment had been removed only in 2004; even if this is correct, the documents sought to be adduced by way of an additional evidence do not

support the contention that at the time when the auction was conducted, there was an encroachment on the site. There is also no sufficient reason or explanation as to why these documents did not see the light in the two fact finding courts below. The discretion of the second appellate court to admit additional evidence under Order 41 Rule 27 of the Code is undisputed. It, however, has to be exercised to meet the ends of justice and if the said evidence is required for the just decision of the case, such an application must also satisfy the court that in spite of due diligence, appellant could not have adduced the said evidence in the two courts below.

14. None of the aforenoted requirements have been met with. The merits of the documents have also been adverted to; they do not advance the submissions of the appellant. Application under Order 41 Rule 27 had no merit. It is dismissed.

15. The case of the appellant is now hinged upon the judgments relied upon by him and as noted supra. In the Judgment of the Division Bench, the writ of mandamus which had been sought by the petitioner had been declined. The Judgment of the Division Bench was against an order passed in a petition under Section 20 of the Arbitration Act where there was a plea for the appointment of the arbitrator; this plea has not been acceded to; the hardship

suffered by the respondent had been noted but no relief had been granted to him. The Judgment of the Single Judge reported as Jackson Engineers Pvt. Ltd (supra) is vehemently relied upon by the learned counsel for the appellant. This Judgment is distinguishable. In this case, site has not been inspected at the time when the petitioner has made his bid on the auction. This is clear from para 2 and 3; in this case, the petitioner had also showed his bona fides by appending the balance amount of 75% for which he had obtained a loan and the pay order in the said amount had been affixed along with his petition; these circumstances had been singled out to grant him the relief of an allotment. Both these conditions are missing in the instant case. In the case, the testimony of PW-3 shows that the site has been inspected prior to the bid; plaintiff has bid with his eyes open, fully aware of the physical status at site. Submission of the learned counsel for the Department is that encroached plots carry a lower bid and those which are vacant and free carry a higher bid and this also has to be kept in mind; prices of the property vary accordingly.

16 The willingness and readiness on the part of the petitioner to perform his obligation has also not been satisfied. Letters dated 05.01.1989 as also 09.01.1989, although are admitted to

have been received by the department but in the written statement, content of letter dated 05.01.1989 had been specifically denied; in this contingency it was incumbent upon the plaintiff to have placed the said letter on record but it had not done so. The first letter which was proved by the plaintiff is dated 25.01.1989; this was after 30 days from 23.12.1988 i.e.when 75 % of the bid amount had to be deposited by him i.e. by 23.01.1989. The first communication of the plaintiff proved on record is dated 25.01.1989 informing the department that there was an encroachment and that is why he was not willing to pay the balance amount; this was after the stipulated dated of 23.01.1989.

17 Division Bench of this court (in the judgments relied upon by the learned counsel for the DDA) while examining the Nazul Rules had noted that in auction bids for property prior to 25.02.1989, there was no proviso to Rule 29; there was no scope of extension of time for payment of the balance amount even if sufficient reason has been explained; proviso has been inserted
only by the amendment of 25.02.1989; the case of the plaintiff is prior to 25.02.1989. On this count also, extension of time could not have been granted in favour of such party.

18 On no count does the impugned judgment suffer from any infirmity. Substantial question of law is answered in favour of the

respondent and against the appellant. Appeal is without any merit. Appeal as also the pending applications are dismissed.

INDERMEET KAUR, J.

JUNE 01, 2011
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