

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

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Date of decision: 16th July, 2013

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CS(OS) 2363/2010

M/S SIKKA PROMOTERS PVT. LTD. Plaintiff

Through: Mr. Akhil Sibal with Mr. Sudeep
Kumar Shrotriya, Mr. Anwar
Rafiq, Mr. Jatin Mongia,
Advocates

Versus

**NATIONAL AGRICULTURAL COOPERATIVE
MARKETING FEDERATION OF INDIA LTD..... Defendant**

Through: Mr. A.K. Thakur, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

**I.A. No.2293/2011 (of the plaintiff under Order 12 Rule 6 CPC) & IA
No.13401/2012 of the defendant for release of the amount)**

1. The plaintiff in this suit, *inter alia* for recovery of Rs.5,37,50,000/- with interest, seeks judgment on admissions. The defendant while contesting the said application also seeks release unto itself of the said amount lying deposited in this Court together with interest accrued thereon.

2. It is not in dispute:

(i) that the defendant on 06.06.2008 got published in the newspapers a notice of public auction to be held on 25.06.2008

of various residential and industrial properties as per orders of this Court and the description in the said notice of one of the properties with which the suit is concerned was as under:

S. No.	Description of Property	Reserve Price
3.	<i>Property No.E-16/B-1, Mohan Co-operative Industrial Area. An Industrial Building on Plot area admeasuring 1428 Sq. Yds. Covered Area 24300 Sq.ft approx.</i>	<i>Rs.10,00,00,000/-</i>

“Note: All the above properties can be inspected by all intending purchasers between 11.00 A.M. and 3.00 P.M. on 10th, 15th, 17th and 22nd June, 2008”

The other contents of the said notice, relevant for the present purpose, were as under:

- “1. The properties are being sold by the Auctioneers under Instructions from the National Agricultural Co-operative Marketing Federation of India Ltd., New Delhi in pursuance of the order dated 04.04.2008 passed by Hon’ble the High Court of Delhi in WP (CRML) No.:785/2007 & 461/2007 and the auction is subject to confirmation by Court Observer appointed by the Hon’ble High Court of Delhi.*
- 2. Any further information regarding the properties to be auctioned, inspection of title deeds, terms*

and conditions of sale can be had / verified from Sh. Kunwar Singh, Manager Mobile: 9350308630 on any working day between 11.00 AM to 4 P.M.

- 3. The persons interested in inspecting the property / properties may do so on the dates indicated in the catalogue. The area mentioned in respect of each property is based on the documents available on record and / or as intimated by the concerned parties.*
- 4. All the bidders should prior to the auction satisfy themselves about the correctness of the description, measurements, boundaries etc. of the properties. No enquiries in this regard will be entertained at the time of auction. On the property being knocked down in favour of a bidder in the auction, he shall be held to have waived all the objections to the titles, description etc. of the property.*
- 5. NAFED has made its best effort to ascertain the quantum of outstanding amount in respect of properties offered for auction sale. The prospective bidders shall have to bear any further outstanding amounts that may come to light hereafter.*

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- 10. Intending bidders are required to deposit for participation in the auction, a REFUNDABLE*

CAUTION DEPOSIT of Rs.5,00,000/- (Rupees Five Lacs only) with the Auctioneers by a crossed Bankers Pay Order/ Demand Draft drawn in favour of the NAFED, New Delhi payable on any scheduled Bank in Delhi. These deposits will be refunded subject to the terms thereof to the respective bidders except the successful bidder who will be entitled for the refund of the deposit only on payment of Earnest Money. However, if the successful bidder so wants, this amount will be adjusted against the earnest money payable by him. The caution deposit is liable to be forfeited if the bidder concerned causes or attempt to cause disturbance or hurdles in the conduct of the auction or fails to pay earnest money on the fall of hammer. The intending bidder paying Rs.5,00,000/- in the manner indicated above, may be allowed to take one extra person to the auction hall, with the condition that the intending bidder will be responsible for his proper conduct, decorum and observance of rules of the auction sale, failing which the above sum of Rs.5,00,000/- is liable to be forfeited.

- 11. The officer conducting the auction may, withdraw all the properties or any one or more of them from the auction without assigning any reason.*

12. *NAFED, New Delhi reserves the right to cancel or postpone the auction at any time. It also reserves the right to reject any bid, including the highest bid without assigning any reason. In such an event, the money already paid will be refunded to the intending purchaser without any interest, unless the same is forfeited because of the reasons mentioned above.*
13. *The successful bidder shall submit a duly filled in application in the form immediately after the close of the auction of the property in question.*
14. *The successful bidder whose bid has been accepted shall immediately on the spot pay as EARNEST MONEY equivalent to 10% of Reserve Price by A/c payee Bankers Cheque / Bank Draft in favour of the Registrar General Delhi High Court, drawn on any scheduled bank in Delhi. He should confirm in writing and under his own signature that he has purchased the property in the auction on the terms and conditions of sale mentioned herein and thereafter pay 25% of the bid amount (after adjustment of EMD) within 10 days of the auction and the Balance amount equivalent to 75% of bid amount within 30 days from the date of confirmation of the sale.*
15. *Failure on the part of successful bidder to pay the first installment of 25% of the bid amount and the*

remaining part of the bid within the period mentioned in para 14 above shall result in forfeiture of the amounts already paid. No request for extension of time shall be entertained on any grounds.

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- 17. All expenses of conveyance, including legal charges, stamp duty and registration fees as applicable, will have to be borne by the purchaser and paid to the concerned authority. The purchaser will also have to pay any outstanding dues pertaining to the property. Details of outstanding dues known to the NAFED will be announced at the time of the auction.*
- 18. If the purchaser neglects or refuses to comply with any of the above conditions, the money already paid shall be forfeited and shall not be refunded. NAFED will be at liberty to resale all property and the deficiency, if any, arising from such re-sell, shall have to be made good by the defaulting purchaser. The defaulting purchaser shall not, however, be entitled to any advantage arising on re-sale of the property.*
- 19. The purchaser will also have to pay all taxes viz., Transfer Charges, House-Tax, Property-Tax etc., bills for electricity, water and ground-rent etc., which have not been paid and are still*

outstanding. The purchaser has to abide with all the laws of DELHI State or any other Govt. body while doing any act on the above property.

20. *The property are being sold on “AS IS WHERE IS BASIS” and in the same state and conditions as these stand at the time of completion of sale. The said properties shall remain at the sole risk of the purchaser from the date of his taking possession or signing the conveyance deed, whichever is earlier.*

21. *Any other liability being determined after the auction is completed, shall be borne by the successful bidder.*

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27. *The particulars mentioned above have been stated to the best of the information of the undersigned, but the undersigned / Auctioneer shall not be answerable for any error, mis-statement or omission and all the bidders & purchasers shall be deemed to have read and acquainted themselves of the conditions of sale and given their bids subject to these conditions.*

NOTE: THE PURCHASERS ARE REQUESTED TO INSPECT THE PROPERTIES IN ADVANCE AND BID AT THE ABOVE VENUE.”

- (ii) that the bid of the plaintiff of Rs.21,50,00,000/- for the aforesaid property was the highest and was accepted and the plaintiff in accordance with Clauses 13 & 14 supra, filled up the form and deposited Rs.1,00,00,000/- as earnest money in this Court. The said form signed on behalf of the plaintiff, in Clause B (5) thereof, provided as under:

“5. I, the undersigned, being the highest bidder in the auction apply on my own behalf / on behalf of the intended purchaser above named, to the NAFED for the purchase of the immovable property described above under the Terms & Conditions of auction annexed with this form which I have read and understood and hereby accept / which are acceptable to the intended purchaser. I / intending purchaser will pay the balance of the amount in accordance with the said conditions, which have been duly read and understood by me. I also accept all the supplementary terms and conditions pertaining to the above property announced during the auction and agree to pay all the dues outstanding against the properties accordingly.”

- (iii) the plaintiff, again in accordance with Clause 14 supra, under cover of its letter dated 04.07.2008 deposited a

further sum of Rs.4,37,50,000/- and which also as aforesaid is lying deposited in this Court;

- (iv) needless to state that both, in the form filled by the plaintiff on acceptance of its bid as well as in the letter dated 04.07.2008, the property qua which the amount was paid was described as 'E-16/B-1, Mohan Co-operative Industrial Area';
- (v) the defendant vide its letter dated 18.07.2008 confirmed the sale in favour of the plaintiff and directed the plaintiff to deposit the balance 75% of the bid amount i.e. Rs.16,12,50,000/- within a month from the date of issuance of the said letter. The subject of the said letter also says, *"Sale of property No.E-16/B-1, Mohan Cooperative Industrial Estate, New Delhi"*.

In accordance with the said letter, the plaintiff was required to pay the balance amount by 17.08.2008;

- (vi) the plaintiff vide its letter dated 11.08.2008 to the defendant as well as the Observer appointed by the Court for the auction aforesaid, stated having learnt that while the

property in the auction notice was described as situated in 'Mohan Co-operative Industrial Area', it was in fact situated in 'Mohan Co-operative Industrial Area (Extn.)' and sought refund of the amount of Rs.5,37,50,000/- paid till then; and,

- (vii) the defendant also vide its letter dated 11.08.2008 reminded the plaintiff of its liability to pay the balance amount by 17.08.2008 and further informed the plaintiff that the defendant's office would remain closed from 15.08.2008 to 17.08.2008 on account of holidays and asked the plaintiff to pay the balance amount by 14.08.2008. In the said letter, the sale was referred as of property No.'E-16/B-1 (Extn.), Mohan Co-operative Industrial Estate, New Delhi'.

3. The Observer appointed by the Court for auction aforesaid having not looked into the matter, the plaintiff first filed a civil writ petition being W.P.(C) No.5947/2008 and vide interim order in which the amount deposited by the plaintiff was ordered to be not forfeited till further orders, but subsequently on 12.03.2009 withdrew the same with liberty to avail the appropriate remedy. Such liberty was granted and the

interim order earlier granted was extended for two weeks. The plaintiff thereafter filed applications in W.P.(Crl) No.461/2007 vide orders in which the property was put to auction, for the same relief. During the pendency of the said applications also, the amount of Rs.5,37,50,000/- paid by the plaintiff and which was lying deposited in this Court was ordered to be retained in this Court. The plaintiff on 18.08.2010 withdrew the said applications with liberty to file a civil suit and which liberty was granted and the amount of Rs.5,37,50,000/- lying deposited in this Court was ordered to be subject to further orders in the said civil suit. Thereafter, this suit was filed and vide interim order wherein the amount of Rs.5,37,50,000/- was ordered to be retained in this Court during the pendency of the suit and ordered to be kept in an FDR.

4. The defendant, vide IA No.13401/2012 is now seeking release of the said amount unto itself.

5. It is the case of the plaintiff:

- (i) that it bid under the *bona fide* impression that the property was situated in 'Mohan Cooperative Industrial Area' with a covered area of 24300 sq. ft. but had subsequently learnt of the property being situated in 'Mohan Co-operative

Industrial Area Extension' ("Extension") with covered area of 16017.50 sq. ft. only;

- (ii) that if it had known otherwise, it would not have bid for Rs.21,50,00,000/-;
- (iii) that there was a substantial difference in the rates of properties in 'Mohan Cooperative Industrial Area' and in 'Extension';
- (iv) that it was ready to pay the balance price for the property in 'Mohan Cooperative Industrial Area' but is not ready to pay the said price for the property situated in 'Extension'; and,
- (v) that the defendant had misrepresented in the auction notice and had admitted the said fact in response to the applications filed by the plaintiff in W.P.(Crl) No.461/2007 and once the defendant had itself admitted giving the wrong address of the property, it is liable to refund the amounts received from the plaintiff for the property which the defendant is not in a position to convey. It is further the case of the plaintiff that in the subsequent notice for auction

on 12.01.2011 got published by the defendant, the property was described as under:

<i>S.No.</i>	<i>DESCRIPTION OF THE PROPERTY</i>	<i>RESERVE PRICE</i>
<i>1.</i>	<i>Industrial property No.E-16/B-1, Extension, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi – 110 044 admeasuring 1,428 square yards or its thereabouts comprising inter alia, of basement, ground and first floors having an aggregate covered area of 16,000 sq. ft. or its thereabouts.</i>	<i>Rs.11,00,00,000/- (Rupees Eleven Crores)</i>

The plaintiff contends that the matter pertains not merely to description and measurement but to the subject matter of auction itself and the auction by the defendant was thus vitiated as admitted by the defendant itself and the plaintiff cannot be forced to take the property which was not auctioned and for which the plaintiff has not bid.

6. The defendant has contested the suit on the grounds:
 - (i) that the plaintiff was fully aware of the description, measurement, boundary etc. of the property that was put to

- auction as the plaintiff had physically inspected the property and also inspected the title deeds of the property;
- (ii) that while publishing notice for auction held on 25.06.2008, the word '*Extension*' got omitted while giving the description of the property owing to the debtors of the defendant, in realization of dues from whom the said property was auctioned, having in the Court proceedings aforesaid being WPs (Crl.) No.785/2007 and 461/2007 so described the property;
 - (iii) that the plaintiff could not have inspected the property No.B-1/E-16, Mohan Cooperative Industrial Estate in which PCL Exports is functioning, as a running company will not allow a stranger like the plaintiff to inspect its premises without any justifiable reason;
 - (iv) that under Clause 4 supra of the auction notice, the plaintiff was under obligation to check the correctness of the details of the property and cannot subsequently raise any dispute;
 - (v) that the plaintiff was not ready and willing to pay the balance amount as required;

- (vi) that the Property Tax Arrears Report with respect to the property in question was loudly read out by the public auctioneer to all the intending bidders before the start of the auction and a copy of the same was also supplied to all including the plaintiff and the said report also clearly mentions the number of the property as “E-16/B-1 Extension, measuring 1428 sq. yds. situated at Mohan Cooperative Industrial Estate, New Delhi;
- (vii) that a representative of the plaintiff had come to the office of the defendant on 18.06.2008 and met Mr. Kunwar Singh and inspected the title deeds with respect to the property. A copy of the entry made by the representative of the plaintiff in the daily entry register maintained by the defendant has been filed along with the written statement;
- (viii) that the money deposited by the plaintiff is liable to be forfeited;
- (ix) that the plaintiff is taking advantage of an inadvertent error that crept in while publishing the public notice for auction;
- and,

(x) that while the number of the property which was auctioned is 'E-16/B-1 Extension, Mohan Cooperative Industrial Area', the other property which is a freehold property, bears the number 'B-1/E-16, Mohan Cooperative Industrial Estate'.

7. The plaintiff has filed a replication *inter alia* pleading that the defendant in the written statement having admitted existence of a property having the same description in the 'Mohan Cooperative Industrial Area' has admitted the case of the plaintiff. With respect to the plea of the defendant of the visit by the representative of the plaintiff, it is stated that the said visit was only to collect the copy of the auction notice and neither any title deeds were shown nor inspected. It is further pleaded that the auction notice did not give any particulars of the ownership of the property and thus the plea of the defendant of the property in 'Mohan Cooperative Industrial Area' being owned by somebody else is not material. The plaintiff has also denied that Property Tax Arrears Report was read out by the public auctioneer or any copy of it was supplied. In this regard, I may observe that the defendant though has along with its documents filed a property tax

arrears report in which the property is described as 'E-16, Block B-1 Extension' but has not filed any document to show any such report having been read out by the public auctioneer at the time of the auction. It is further the case of the plaintiff that the defendant is discharging a public function and is expected to act fairly, reasonably and in the interest of general public. It is further pleaded that though the defendant in the written statement has described the property put to auction as 'E-16/B-1 Extension, Mohan Cooperative Industrial Area' but in the notice for auction of 2008, the property was described as 'E-16/B-1, Mohan Cooperative Industrial Area'. The plaintiff claims that since the monies were paid by it under a void auction, it is entitled to refund thereof and the defendant cannot hide behind Clause 4 supra.

8. It is the contention of the counsel for the plaintiff that the contract which came into being between the parties on the bid of the plaintiff being accepted is a void contract under Section 20 of the Indian Contract Act, 1872, with both the parties thereto being under a mistake as to a matter of fact essential to the agreement and the plaintiff under Section 65 thereof has become entitled to refund. It is further contended that since the defendant had no right to the property of the same description

situated in 'Mohan Cooperative Industrial Estate', the Agreement which so came into existence between the parties with respect to the said property is void under Section 56 of the Contract Act, it being not possible for the defendant to convey that property to the plaintiff. It was further contended that Clause 4 of the auction notice is not applicable. Reliance is placed on *Delhi Development Authority Vs. S.P. Bansal* 126 (2006) DLT 86 (DB), *Manju Gupta Vs. Delhi Development Authority* 103 (2003) DLT 726 and *Tamil Nadu Electricity Board Vs. N. Raju Reddiar* (1996) 4 SCC 551. It was further highlighted that in the subsequent auction notice qua the same property got published by the defendant, even the area of the property is admitted to be less.

9. Per contra, the counsel for the defendant has contended that there is no admission of the defendant on which the suit can be decreed immediately. Attention was invited to the pleas in the written statement of the defendant of the representative of the plaintiff having inspected the property as well as the title documents with respect thereto and it was contended that all such pleas cannot be decided without trial. In the subsequent written submissions filed, the defendant has referred to *Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha (HUF)*

(2010) 6 SCC 601, *Himani Alloys Ltd. Vs. Tata Steel* (2011) 7 SCR 60, *Charanjit Singh Vs. Kehar Singh* MANU/DE/8646/2006, *Mohan Prasad Jha Vs. Shri Shambhu Prasad Singh* 82 (1999) 3 DLT 281, *Dinesh Kumar Singhania Vs. Calcutta Stock Exchange Association Ltd.* MANU/WB/0518/2003 on the scope of Order 12 Rule 6 CPC and on *State of Karnataka Vs. Saveen Kumar* (2002) 3 SCC 426 and *State of Maharashtra Vs. A.P. Paper Mills Ltd.* (2006) 4 SCC 209 on its right of forfeiture.

10. During the hearing attention of the counsels was drawn to Order 15 of the CPC and it was put to the counsels that even in the absence of admissions, if the Court finds the parties to be not at issue, judgment can be pronounced immediately and the counsels were heard on the said aspect as well.

11. The pleas of the defendant, that the representative of the plaintiff had inspected the property situated in 'Extension' as well as the title deeds thereof and there was thus no mistake on either side and the plaintiff was aware for which property it was submitting the bid; that even at the time of auction, the public auctioneer had read out the Property Tax Arrears Report and supplied copies thereof and from

which also it was apparent that the property is situated in 'Extension' and not in 'Mohan Cooperative Industrial Estate', are definitely such which cannot be decided without evidence. However, what falls for adjudication at this stage is that whether the defendant even if leads such evidence, though has not even filed title deeds of the property, the same would be admissible in the face of the admitted omission in the notice of auction of 'Extension' while describing the location of the property and the terms and conditions of auction notice and the subsequent documents also not describing the property as situated in "Extension", and the effect of such evidence.

12. A Single Judge of this Court in *Manju Gupta* supra held that even where as per the general terms and conditions the shops and stalls were auctioned on as is where is basis and it was stipulated that the bidder shall be presumed to have inspected the shop in question and there was an obligation on the part of the bidder to verify the position of the shop before participating in the bid, there is simultaneously an obligation on the part of the seller to give the correct description and only if there is some minor defect in the shop, the auction purchaser will not be allowed to wriggle out of the auction on the said ground since he is presumed to

have inspected the shop but the area of the shop in question is certainly an aspect which cannot fall within the said category of minor defect as the auction purchaser must know correctly the space sought to be auctioned and the details given by the seller are presumed to be correct and it is not permissible for the seller to contend that even if there is such a large difference in area, the bidder is not concerned with the same. It was further held that public bodies, as the DDA in that case, must act in a fair and reasonable manner. The expression 'as is where is' was held to be not extending to large discrepancies sought to be made good by inclusion of the basement area and it was held to be obligatory on the part of the DDA to have specified that the area includes the basement area. Accordingly, the bidder was held entitled to refund of the earnest money with interest at 10% per annum. The Division Bench of this Court in *S.P. Bansal* supra also directed refund of the earnest money with interest at 9% per annum where the plot auctioned described as a corner plot, did not turn out to be so. The plea of the DDA that the said error in the auction notice was rectified by public announcement before the auction began was disbelieved in the absence of any documentary evidence in support thereof. It was held that the proper

course of action for the DDA upon discovering the mistake would have been to issue a corrigendum in the newspaper well before the auction and if that was not possible then to postpone the auction rather than to depend upon an oral announcement. The auction was held to be vitiated.

13. The counsel for the defendant in the written submissions has sought to distinguish the aforesaid two judgments by contending that the plaintiff in the present case had inspected the property, that there is no difference in the plot area in the present case, that the difference in the built up area is inconsequential. Similarly, the judgment in *S.P. Bansal* is sought to be distinguished by taking the plea of inspection by the plaintiff.

14. The two judgments aforesaid of this Court, apply with full force to the facts of the case and the distinction sought to be drawn by the defendant is in fact no distinction. In those cases also, the auction notice provided for inspection but the plea of the bidder being deemed to have inspected the property and thus being aware of the discrepancies was not accepted. The judgments are in writ petitions and this Court did not find the need for evidence to be recorded and did not relegate the petitioners therein to the remedy of suit.

15. The note immediately below the description of the property as well as Clause 2 of the auction notice in the present case did not make it mandatory for the intending purchaser to inspect the property or the title deeds thereof. They only provide that the same 'can be' done. Similarly, Clause 3 of the auction notice provides that the intending purchasers 'may do so'. It thus cannot be said that it was essential for the intending purchaser to inspect the property or title deeds thereof or the intending purchasers were to be deemed to have done so, as was the position in the judgments aforesaid. Clause 4 of the auction notice dealt with the correctness of description, measurement and boundaries etc. of the property and in this context required that the bidders 'should' satisfy themselves and bars any enquiries in this regard at the time of auction or any subsequent objections in that regard. However, such a clause has been held in the judgments aforesaid to be applicable to minor variations only. The variation in the present case can by no stretch of imagination be said to be minor.

16. In my view the sale in the present case, notwithstanding the option given to the intending purchasers to inspect the property, was by description and the option to inspect cannot change the nature of the

sale. The principle enshrined in Section 15 of the Sale of Goods Act, 1930 with respect to sales by description is that the goods should correspond with the description. I fail to see why the same principle should not be applied to sale of immovable properties also, in the absence of any specific provision in the Transfer of Property Act, 1882.

17. In this context, it cannot be lost sight of that the seller in the present case was a Federation of Co-operative Societies, bound by its Charter and the sale was in the auction notice itself described to be in pursuance to an order passed in a proceeding pending in this Court and subject to confirmation by an Observer appointed by this Court. The intending purchasers, in such circumstances, cannot be said to be unjustified in believing the description given in the public notice and which public notice itself was in pursuance to a Court order. The plaintiff thus, howsoever negligent in either not inspecting the property or its title documents cannot be faulted with in relying upon the property being situated in 'Mohan Cooperative Industrial Area'. Judicial notice can be taken of huge difference in prices of properties situated in different areas even if they are adjoining areas or merely across the road.

It is not the case of the defendant also that the prevalent prices are the same.

18. It is also significant that it is not the case of the defendant that the plaintiff had approached the defendant for extension of time for making the balance payment. The defendant in its written submission has also not cited any other reason which may have caused the plaintiff to within one and a half months of making the bid, change its mind. It is not the case of the defendant that during the said time of one and a half months there was any fall in prices of the properties situated in 'Extension'. The only plea of the defendant is the inability of the plaintiff to pay the balance price. Ordinarily, a person who has agreed to purchase the property and already paid 25% of the sale consideration even if not able to pay the balance price within the agreed time, would approach the seller for extension of time; in the present case even this Court under whose aegis auction was held, could have been approached. The plaintiff did not do so. For all these reasons also, the version of the plaintiff is more believable than that of the defendant.

19. There is another aspect. The contract in the present case is contained in a) Auction Notice published on 06.06.2008, b) Form / Application filled up by the plaintiff in accordance with Clause 13 of the Auction Notice on 25.06.2008, c) Letter dated 04.07.2008 depositing a sum of Rs.4,37,50,000/- in terms of Clause 14 of the Auction Notice, and d) Letter dated 18.07.2008 of the defendant to plaintiff accepting the bid of the plaintiff and confirming the sale and all of which refer to the property subject matter of sale as situated in “Mohan Co-operative Industrial Area”. The contract which thus came into being was of a property situated in “Mohan Co-operative Industrial Area” and not of the property in ‘Extension’ which is offered to be conveyed thereunder. The defendant notwithstanding the contract evidenced by such documents wants to prove by oral evidence that it intended to auction and the plaintiff bid for the property in ‘Extension’ and which is not permissible under Sections 91 & 92 of the Indian Evidence Act, 1882.

20. The version of the defendant, of the representative of the plaintiff visiting the office of the defendant and inspecting the title documents of the property and of the representative of the plaintiff visiting the property and the plaintiff being thus aware that the property being

auctioned was not in 'Mohan Co-operative Industrial Area' but in 'Extension' is unbelievable for the reason that the plaintiff, if had in such inspections discovered the property to be in 'Extension', the defendant would have similarly become aware of the same and in the form aforesaid filled up by the plaintiff on the date of the auction and in the letters of deposit of earnest money and of acceptance of the bid, the error if had been discovered would have been rectified and the property would have been described as in 'Extension'. The same was admittedly not done.

21. The only inference possible is that either the parties were not *ad idem* as to the property subject matter of sale and in which case there cannot be said to be in existence any contract between the parties or that the contract if held to have come into existence was caused by innocent misrepresentation of the defendant within the meaning of Section 18(3) of the Contract Act as to the property being auctioned and is thus voidable at the instance of the plaintiff and which right the plaintiff exercised. In ***Sorabshah Pestonji Vs. Secretary of State for India*** AIR 1928 Bombay 17 a list was circulated amongst the bidders in an auction of liquor shops, which showed the places where different existing liquor

shops were located. Relying upon a statement about location of a particular shop six miles away, the plaintiff purchased the licence of one shop. The statement had not mentioned that that other shop had been relocated closer to the shop of the plaintiff. It was held that the case was not one of fraud, but could fall under Section 18(3), as there was a mistake as to the substance of the thing contracted for, the liquor shop. The defendant, in either situation cannot retain the benefits which it has obtained under such a transaction.

22. In the aforesaid state of affairs no issue on which the parties should be put to trial arises for adjudication and the matter can be decided under Order 15 of the CPC. Even otherwise, the scope of Order 12 Rule 6 stands expanded considerably by the Division Bench of this Court in *Vijaya Myne Vs. Satya Bhushan Kaura* 142 (2007) DLT 483 where it has been held that the Court at the stage of Order 12 Rule 6 can also draw inference from non traverse of the pleas and otherwise appreciate the various pleadings. In the said light also, the result under Order 12 Rule 6 of the CPC would also be the same.

23. The plaintiff is thus found entitled to a decree for refund of monies.

24. As far as interest is concerned, as aforesaid the monies have remained deposited in this Court, in interest bearing deposit and have not gone into the pocket of defendant either. The defendant cannot be thus directed to pay any to the plaintiff. However whatever interest has accrued on the said monies, axiomatically belongs to the plaintiff.

25. Accordingly, a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs.5,37,50,000/- with interest accrued thereon while lying deposited in this Court. The plaintiff shall also be entitled to costs of the suit as per schedule. Decree sheet be drawn up.

26. The Registry is directed to after six weeks hereof release the said amount to the plaintiff in full and final satisfaction of the decree save costs. The costs be also paid by the defendant to plaintiff within four weeks thereafter.

RAJIV SAHAI ENDLAW, J

JULY 16, 2013

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