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

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DECIDED ON: 17.01.2013

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RFA(OS) 5/2013

DDA & ORS.

..... Appellants

Through : Dr. K.S. Sidhu, Sr. Advocate with
Ms. Maldeep Sidhu and Sh. Ashok Kumar Shukla,
Advocates.

versus

RAMA ASSOCIATES PVT LTD.

..... Respondent

Through : Sh. R.C. Vats with Sh. Ashok Gurnani,
Advocates.

RFA(OS) 8/2013

DDA & ORS.

..... Appellants

Through : Dr. K.S. Sidhu, Sr. Advocate with Ms.
Maldeep Sidhu and Sh. Ashok Kumar Shukla,
Advocates.

versus

PRAGATI CONSTRUCTION CO. P. LTD.

..... Respondent

Through : Sh. Amit Prabhat Deshpande, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. These are two appeals by the unsuccessful common defendant Delhi Development Authority (hereafter called “DDA”) against the common impugned judgment dated 16.7.2012 of learned Single Judge in CS (OS) No.

993/1983 and 1633/1983.

2. The facts in both the suits are identical, except for difference in figures. In RFA No.8/2013, the challenge is to the decision in CS(OS) No. 993/1983. The factual matrix is that the DDA had auctioned a commercial plot viz. Plot no.8, Asaf Ali Road, Delhi. An auction was conducted, and the plaintiff was the highest bidder, quoting the price of ₹1.92 crores. At the fall of the hammer, the plaintiff deposited 25% of the amount i.e. ₹48 lakhs, as per the terms and conditions of the auction. Apparently, the plaintiff later found out that the contract was entered into by misrepresentation; it thus cancelled the contract by notice dated 13.4.1982. In RFA No. 5/2013, which impugns the judgment and decree in CS(OS) 1633/1983, all material facts are similar, the only difference being that the amount of earnest money deposited by the plaintiff therein was ₹ 46.5 lakhs, in respect of another plot.

3. The issues framed in CS(OS) No. 993/1983 by order dated 1.12.1983 are:

“1. Whether the plaint has been signed, verified and instituted by a duly authorized and competent person? OPP

2. Whether the present suit is barred under Order II Rule 2 of the Code of Civil Procedure? OPD

3. Whether the present suit is not maintainable as alleged in the preliminary objections? OPD

4. Whether plaintiff has waived its right to sue as alleged in para 3 of the preliminary objections in written statement? OPD

5. What were the terms and conditions for the auction of the plot in suit held on 12th March, 1982? OPP

6. Whether plaintiff has been ready and willing to perform the various

terms and conditions of the auction?OPP

7. Whether the architectural control drawings were not exhibited and/or furnished as per requirement of the terms and conditions of the auction as contained in Annexure „A“ to the plaint?OPP

8. Whether any erasure referred to in para 15 of the plaint was unilaterally made by the defendant after the auction? If so, to what effect?OPP

*9. Whether the architectural control drawings must necessarily conform to the municipal bye-laws, master plan, zonal plan, Delhi Development Act or the building bye-laws thereunder? Don't know
OPP OPD*

10. Whether there is any trade practice of making payment of balance auction money by instalments dependent on the plaintiff negotiating with its prospective purchaser?OPP

11. Whether the plea covered by issue No.10 is not contrary to the terms and conditions of the auction and is available to the plaintiff?OPP

12. Whether defendant violated any of the terms and conditions of the auction?OPP

13. Whether clause 2(iv) of the terms and conditions detailed in Annexure „A“ to the plaint is not enforceable?OPP

14. Whether defendant is entitled to forfeit the sum of ` 48,00,000/- or any other sum?

15. Whether plaintiff is entitled to damages? If so, to what amount?

16. Whether plaintiff is entitled to interest? If so, at what rate and to what amount?

17. Relief.”

4. The issues framed in CS(OS) 1633/1983 by order dated 9.10.1985 are

as follows:

- "1. Whether the plaintiff is a Limited Company and M/s. Essels Properties and Industries is its unit and ShriLakshminarayan is its Director competent to sign, verify the plaint and to file the suit?*
- 2. Whether the supply and exhibition of architectural control drawings to bidders prior to auction is an integral part of the sale by auction. If so, has the defendant violated it or the terms and conditions of auction regarding the sale of plot No. 9?*
- 3. Whether the architectural control drawings were not exhibited or furnished as per the terms and conditions of auction?*
- 4. Whether the architectural control drawings were not in accordance with the Municipal Bye-laws, the Master or the Zonal Plan as alleged? If so, its effect?*
- 5. Whether plot No. 9 in question falls under the Slums Areas (Improvement and Clearance) Act, 1965? If so, its effect?*
- 6. Whether the said plot which was shown in the Master Plan as a main street/tot lot, could no be auctioned by the defendant for commercial and official buildings without changing the land use from residential to commercial, as per Master Plan?*
- 7. Whether the said plot could not be auctioned with a declaration that permissible Floor Area Ratio (FAR) is 400?*
- 8. Whether the defendants had no right to confiscate/forfeit of earnest money of over Rs. 46.50 lakhs when there was an injunction against the plaintiff and the defendants for maintaining status quo in Suit No. 89/82 filed before the Sub-Judge?*
- 9. Whether there is any practice of making payment of balance auction money dependent on plaintiff's negotiations with prospective purchasers and are the defendants bound by it?*
- 10. Whether the plaintiff waived their right to sue, acquiesce in the terms and conditions of auction and are estopped from challenging*

the validity of auction as per preliminary objections in the written statement? If so, its effect?

11. Whether the defendants are liable to refund the earnest money as claimed?

12. Whether the plaintiffs are entitled to interest as claimed? If so, at what rate?

13. Relief."

5. In the impugned judgment, as regards the issues framed in CS(OS) 993/1983, the learned Single Judge noted the following:

"I may note that at an earlier stage the suit CS(OS) No. 1633/1983 was decreed by a learned Single Judge of this Court, however, the appellate Court remanded the matter back for rehearing inasmuch as the appellate Court found that the Single Judge had not dealt with all the issues in the case.

At the outset therefore I put on record that none of the issues which were framed on 1.12.1983, and which pertained to the issue that defendant is guilty of breach of contract and its consequential and related issues of which onus was on the plaintiff are not pressed by the plaintiff, except issue Nos. 13 and 17. These issues are accordingly decided against the plaintiff. The other issues upto issue No. 12 of which onus was on the defendant in view of the detailed discussion below were not pressed by the defendant and are thus decided against the defendant. At one stage counsel for the defendant had sought to place reliance upon Section 65 of the Contract Act, 1872, however, in view of the law as laid down by the Supreme Court under Section 74 of the said Act, that aspect was not argued further. I would also like to further note that there in any case cannot be any issue of acquiescence or estoppel against the plaintiff in view of Section 74 of the Contract Act, 1872 and that there cannot be an estoppel against law.

5. The only issues which I am thus called upon to decide are issue Nos. 13 to 17 above. The main issues are, issue No. 13 as to validity of Clause 2(iv) of Ex.P1 being the terms and conditions of the auction

and the related issue No. 14 with respect to entitlement of the defendant to forfeit the amount of Rs.48 lacs or any other lesser sum. I now deal with them and also the issue of interest.”

6. With respect to the issues left – i.e. those regarding the enforceability of the forfeiture clause, the learned Single Judge, while applying the principles laid down by the Supreme Court in *Fateh Chand Vs. BalkishanDass*, AIR 1963 SC 1405, held that:

(i) Huge amounts which are deposited by the proposed buyer with the proposed seller, and which in terms of covenants of the agreement can be forfeited, then, such covenants are in the nature of penalty and are hit by Section 74 of the Contract Act, 1872.

(ii) In case of breach of contract, a seller under an agreement to sell can only forfeit a reasonable amount out of the amount which has been paid by the proposed seller, the liquidated damages clauses or the forfeiture clauses only provide an upper limit.

(iii) In the absence of loss having been pleaded and proved by the proposed seller to have been caused to him, merely because there is a clause in the contract which allows forfeiture of a huge amount, the said huge amount cannot be forfeited unless to that extent of the said huge amount the proposed seller pleads and proves that loss in fact has been caused to him.

(iv) Even on the loss being pleaded and proved by the proposed seller, the proposed seller can in such a case forfeit amounts lying with him of the proposed buyer, however, what can be forfeited is to the upper limit of the amount of liquidated damages provided i.e. the amounts of liquidated damages are the upper limit of damages and Courts cannot award more than the amount of liquidated damages provided for.

He thus concluded that an amount of Rupees Five lakhs was sufficient for being forfeited, thus the plaintiff was entitled to a decree of Rupees Forty Three lakhs. Without making any observation regarding CS(OS) No. 1633/1983, the learned Single Judge held that in the circumstances, since the

amount of earnest money was ₹ 46.5 lakhs, an amount of ₹ 4.5 lakhs be the amount to be forfeited.

Counsel for the two plaintiffs in the two suits were different. There is nothing to indicate that the plaintiff's counsel in CS(OS)1633/2013 had not pressed issues other what the court decided.

7. This Court notices that the impugned judgment proceeds on the basis that the only controversy that remains between the parties (DDA and Rama Associates, in one case; and DDA and Pragati Construction, in the other) is that amount which the defendant-DDA is entitled to retain as having been forfeited. The learned Single Judge has recorded, with respect to CS(OS) 993/1983 that the other issues were not pressed by the parties, and thus, are held against the party on whom the onus to prove the issue lay.

8. It was argued before this Court, by learned counsel for DDA that the impugned judgment was not sustainable in law, as it had not decided each issue on its merits. Counsel contended that the mere observation by the learned judge that the parties did not press the remaining issues did not discharge the duty upon the Court to pronounce judgment on all the issues. In this regard, he relied upon the provisions of Order XIV, and Order XX. Counsel contested the statement that DDA had agreed to forego a decision on the merits, and that the question of legality of the plaintiffs' action in cancelling a concluded contract had to be decided.

9. Counsel for the respondents, submitted that even though the impugned judgment did not address all issues, the DDA cannot urge now that the suit should have been decided on the basis of those issues. Learned

counsel, however, urged that the matter may be remitted for consideration on merits, especially in view of the earlier order of the Division Bench which had directed the suit CS (OS) 993/1983 to be decided on the entire merits.

10. This Court has considered the submission. To examine the correctness of the issue, we first reproduce the relevant provisions of the Code of Civil Procedure, 1908.

Order XIV – *Settlement of Issues and Determination of Suit on Issues of Law or on Issues Agreed Upon*

Rule 2. *Court to pronounce judgment on all issues—*

(1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force.

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Rule 3. *Materials from which issues may be framed—*

The Court may frame the issues from all or any of the following materials:—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents by either party.

Rule 4. *Court may examine witnesses or documents before framing issues—*

Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court

or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

Rule 5 – *Power to amend and strike out issues.—*

(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Order XX– *Judgment and Decree*

Rule 5 - *Court to state its decision on each issue—*

In suits in which issue, have been framed, the Court shall state its finding or decision, with the reasons therefore, upon separate issue, unless the finding upon any one or more of the issue is sufficient for the suit.

11. From these above, it is clear that the mandate of the Code is that once the Court has framed issues, judgment must be pronounced on all such issues. If the controversy in the case reduces subsequently, due to parties or their counsel's not pressing any particular issue(s), then the proper approach for the Court is to make an order under Rule 5 of Order XIV. Such an order must be based on material specified in Rule 3 of Order XIV. In the present case, in this Court's opinion, even though the learned Single Judge recorded that the counsels in CS (OS) No. 993/1983 did not press any issue other than those which were decided, that alone would not dispense the duty cast on the Court to adjudicate upon all the issues on their merit. Mere non-pressing of a framed-issue by one counsel or the other would not, by itself, strike out the issue, especially when the decision is appealable. This view has been expressed in *Smt. SwaranLataGhosh v. Harendra Kumar Banerjee and Anr.*

[1969] 3 SCR 976 where the Supreme Court emphasised the necessity of recording reasons in a judgment observing:

"Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim, serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to a dispute is ordinarily entitled to know the grounds on which the Court has decided against him and more so, when the judgment is subject to appeal. The Appellate Court will have adequate material on which it may determine whether facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is fortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint."

Furthermore, in *Fomento Resorts and Hotels Ltd. v. CustavoRanato da Cruz Pinto and Others*, [1985] 2 SCR 937 also it was held that where several contentions, factual and legal are urged and when there is scope of an appeal

from the decision of the Court, it is desirable that the court should, when dealing with any matter, dispose of all the points and not merely rest its decision on one single point. Other decisions (*Major S.S. Khanna v. Brigadiar F.J. Dillion* [1964] 4 SCR 409), have adopted an identical approach.

12. In the present case, the order of the Division Bench was to pronounce judgment on the merits of all contentions raised in the suit. Having regard to the above discussion, and submissions on behalf of the plaintiffs, this Court hereby sets aside the impugned judgment and decree in CS (OS) 993/1983 & CS (OS) 1633/1983 and remit the suits for disposal on merits, on the issues framed. It is open to the learned Single Judge to re-cast the issues for convenience and simplification of hearing, after considering submission of counsel for the parties. Since the suits have awaited decision, we request the learned single Judge to hear them expeditiously. The suits shall be listed before the concerned learned Single Judge subject to directions of the Judge-in-Charge of the Original side of this Court. The appeals stand disposed of.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

JANUARY 17, 2013