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IN THE HIGH COURT OF DELHI AT NEW DELHI

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DECIDED ON: 02.08.2016

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RFA (OS) 110/2013

**NATIONAL AGRICULTURE CO-OPERATIVE MARKETING
FEDERATION OF INDIA LTD.**

..... Appellant

Through: Mr. T.K. Ganju, Sr. Advocate with Mr.
Abhishek Bhardwaj and Mr. Manik Ahluwalia,
Advocates.

Versus

SIKKA PROMOTERS PVT. LTD

..... Respondent

Through: Mr. Dayan Krishnan, Sr. Advocate with
Mr. Parminder Singh, Mr. Kanu Agarwal, Mr.
Sudeep Shrotriya, Mr. Varun Singh, Mr. Karan
Sachdeva and Ms. Ashima Bagga, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S. RAVINDRA BHAT, J.(ORAL)

1. This defendant's appeal is directed against the judgment and decree made by the learned Single Judge on 16.07.2013; the plaintiff (hereafter referred to as "Sikka") had filed the suit for recovery of ₹5,37,50,000/-. The defendant (hereafter referred to as "NAFED") contended that the amount was correctly forfeited from the earnest money deposited by Sikka after it succeeded in a public auction.

2. The brief and undisputed facts are that NAFED - pursuant to a settlement/agreement with Mr. Rajesh Khanna and M/s Rital Impex -

auctioned property no.E-16/B-1, Mohan Cooperative Industrial Area. An advertisement published on 06.06.2008 described the property as follows: -

<i>S.No.</i>	<i>Description of Property</i>	<i>Reserve Price</i>
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”

3. The public notice went on to recite the background in which the property was sold, i.e., the order of the Court dated 04.04.2008 in criminal writ proceedings recording the compromise between NAFED and the owner. It also stated *inter alia* that bidders were required to satisfy themselves about the correctness of the description, measurements, boundaries etc. of the properties and that no enquiries could be entertained at the time of the auction (clause 4 of the auction notice). It further stated- by clause 14 that successful bidders had to immediately deposit 10% of the bid amount as earnest money and confirm in writing about the purchase by him in terms of the auction and thereafter pay 25% of the bid amount (after adjustment of EMD) within ten days of the auction and the balance 75% within 30 days of the confirmation. Clause 15 enabled NAFED to forfeit the Earnest Money Deposit (EMD) - in the event of failure by the successful bidder to pay either the first installment of the bid

amount (25%) and the remaining part of the bid within the period mentioned. Sikka's bid of ₹21,50,00,000/- for the property was the highest and was accepted. It deposited - on 04.07.2008 - a sum of ₹4,37,50,000/-. It had earlier deposited the sum of ₹1,00,00,000/-. On 18.07.2008 NAFED confirmed the bid - thus operationalizing the condition for deposit of the balance 75% of the amount (₹16,12,50,000/-) within 30 days or one month. In other words, Sikka was to pay the balance on or before 17.08.2008. While so on 11.08.2008, Sikka contended that there was a mis-description inasmuch as the public auction advertisement described the property as E-16/B-1, Mohan Cooperative Industrial Area whereas in reality it was situated in E-16/B-1, Mohan Cooperative Industrial Area (Extension). Accordingly, Sikka sought for refund of the entire earnest money deposited by it. It also demanded repayment/refund of the entire amount by NAFED on or before 14.08.2008.

4. On 11.08.2008 itself, Sikka filed the writ petition (W.P.(C)5947/2008) claiming a direction for the quashing of the public auction and return of the earnest money deposited by it and also compensation to the extent of ₹2,00,00,000/- in addition to other reliefs. Though the writ proceedings were initially entertained, the Court ultimately relegated the parties to a suit as it involved resolution of disputed question of fact by its order, dated 12.03.2009. It is in these circumstances that Sikka filed its suit claiming the decree for ₹5,37,50,000/-. In its suit, Sikka narrated the material facts, i.e., that the public auction notice described the suit property as No.E-16/B-1, Mohan Co-operative Industrial Area, on Plot area admeasuring 1428 Sq. Yds, with the constructed portion of 24300 sq. ft. It was also alleged that besides public notice, NAFED - even at the stage of auction and at the stage of confirmation described the property as being Mohan Cooperative Industrial Area. That Sikka was a

successful highest bidder and that it deposited a total amount of ₹5,37,50,000/- in compliance with the terms of the bid after receiving the confirmation from NAFED by its letter of 18.07.2008 too was averred in the suit. The suit further emphasized that confirmation letter of 18.07.2008 described the property as E-16/B-1, Mohan Cooperative Industrial Estate, New Delhi. It was further alleged - in the suit in paragraph 14 - that plaintiff became aware of the rumors that it was in effect purchasing a property other than the one which NAFED had advertised for public auction. In this part of the plaint, it was alleged that what was sought to be given in sale was E-16/B-1 Mohan Cooperative Industrial Area (Extension). Thereafter, suit went on to allege that Sikka's authorized signatory went to NAFED's premises and inspected the documents which were proposed to be offered for sale in the public auction to ascertain the truth, upon which, he became aware that NAFED had put up the wrong property for auction over which he had no right title or interest. It was also alleged as follows: -

“Furthermore, it is worth mentioning that the basis of valuation as put up by any builder/company is the Floor Area Ratio (FAR)/Covered area of a particular property and not the area of the plot of the land. The bid of Rs.21,50,000,00/- (Rupees Twenty One Crores Fifty Lakhs Only) as made by the plaintiff was only on the basis of the inspection of the property, and the specification of the property in the auction notice wherein it was mentioned that the covered area of the said property was 24,300 sq. Ft approx, It is most important to mention here that the covered area of the property as mentioned in the Auction notice is 24300 sq. ft approx. whereas the property situated in Mohan co-operative Industrial Area "Extension" (the property which was actually ordered to be put up for auction by this Hon'ble Court) had a sanctioned and factually covered area of 16,017.50 Sq Ft. approx only which is a fact conclusively established by the

records maintained by Municipal Corporation of Delhi (MCD). This fact can be verified by this Hon'ble Court by summoning the relevant records maintained by MCD.”

5. Upon receipt of summons, NAFED resisted the suit claim and stated *inter alia* as follows: -

“3. That the contents of para are false and hence denied. It is respectfully submitted that the Plaintiff was fully aware of the description, measurement, boundaries, 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 thoroughly and to their complete satisfaction. There is no question to allot and handover the possession of the property to the Plaintiff and restraining the Defendant from claiming 25% of the bid amount i.e.Rs.5,37,50,000/-. Plaint is being preferred with, malafide intentions to absolve itself from huge liabilities and also to harass the Defendant.

14. That the contents of para 14 are false and hence denied. It is submitted that while publishing notice for auction, the word "Extension" got omitted, while giving the description of property bearing No. E-16/B-I, Mohan Co-operative Industrial Area. Plaintiff had physically inspected the property and also inspected the title deeds of the property thoroughly and to their complete satisfaction.

15. That the contents of para 15 are false and hence denied. It is submitted that the Plaintiff had completely inspected the property and it is on record. There is no question of claiming other property. Plaintiff has filed the present suit with malafide intentions.”

6. During pendency of the proceedings, on several dates, the suit was listed for admission/denial of documents. NAFED had in its written statement and list of documents filed six documents, i.e., a copy of the order of 4.4.2008 of this Court in the criminal proceedings; a copy of the affidavit of Mr. Rajesh Khanna; a copy of the subsequent order of the Court appointed Observer dated 02.6.2008; a copy of Public notice with respect to the auction; copy of the extracts of entry from the NAFED's register to say that Sikka's representative had visited its office; copies of terms and conditions of the auction duly signed by Sikka; property tax arrears report and the confirmation letter etc. The plaintiff Sikka, on the other hand, had relied upon several documents. In the course of the proceedings in the suit, the Sikka's documents were exhibited (Ex.P-1- P-15). However, the defendant NAFED's documents do not appear to have been exhibited. In this regard it is noteworthy that on several dates of hearing, i.e., 16.3.2011, 29.3.2011, 29.4.2011, 19.5.2011, 12.7.2011 and 03.8.2011 NAFED had not prosecuted the proceedings diligently as evident from the fact that the order sheets reveal that it failed to produce the originals of even the documents, copies of which were part of its list of documents.

7. In the above background of circumstances, the plaintiff Sikka moved an application under Order-XII, Rule-6, Code of Civil Procedure (CPC) (I.A.2293/2011). The application, contended that having regard to the materials on record that is to say the averments in the written statement and the subsequent public auction notice, issued by NAFED which stated that public auction of the property would be carried out, a decree based on admissions was called for. The fresh auction was under orders of the Court. The description of the property was *"Industrial Property No.E-16/B-1 Extension, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi - 110044*

admeasuring 1,428 sq.yds or its thereabouts comprising inter-alia of basement, ground and first floors having an aggregate covered area of 16000 sq. ft. or its thereabouts. Reserved price was fixed at ₹11,00,00,000/ (Rupees Eleven Crores)." In addition to arguing that NAFED had admitted the essential allegations in the suit, Sikka also alleged that the fresh auction notice in fact established that NAFED had sought to auction the property, which never belonged to it, and, therefore, it was entitled to the refund of the amounts sought in the suit. NAFED resisted this application contending firstly that there was no unambiguous admission in its written statement or otherwise within the meaning of the expression under Order-XII Rule-6 CPC warranting a decree and since there were several disputed questions of fact which required a trial and that in any event since Sikka had inspected the property in question and it could not, therefore, claim that it was caught by surprise or that it was a victim of misdescription.

8. The learned Single Judge heard the parties on 13.05.2013 and by the impugned judgment and decree allowed the application of decree on admission. The Single Judge was of the opinion that the nature of the admissions - especially having regard to paragraphs 8, 14 and 15 of the written statement were such as to be called unambiguous - with respect to the property and that the other questions sought to urge as disputed did not in fact warrant a trial. The learned Single Judge relied upon three judgments - two of this Court and one of the Supreme Court (*Delhi Development Authority v. S.P. Bansal*, 126 (2006) DLT 86 (DB), *Manju Gupta v. Delhi Development Authority*, 103 (2003) DLT 776 and *Tamil Nadu Electricity Board v. N. Raju Reddiar* (1996) 4 SCC 551). The impugned judgment thereafter held as follows: -

"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.

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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.

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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.”

9. The Single Judge also held that the contract in the present case was embodied in the auction notice dated 6.6.2008. The application filled by the plaintiff Sikka on 25.6.2008; the deposit made under cover of letter of a part of the earnest money deposit dated 4.7.2008; the letter of NAFED confirming the bid in respect of the property put to auction, i.e., Mohan Cooperative Industrial Area. It was, therefore, held that since the contract was in respect of the Mohan Cooperative Industrial Area property and not the Mohan Cooperative Industrial Area (Extension) property, the attempt on the part of the NAFED to contend that all along the plaintiff was aware as to the true nature of the affairs was unbelievable. Furthermore, the Single Judge relied upon *Vijaya Myne vs. Satya Bhushan Kaura* 142 (2007) DLT 483 to the effect that the Court in the proceedings under Order-XII Rule-6, CPC can also draw a inference during the “non-traverse” of the pleadings and otherwise appreciate them.

10. NAFED contends that if read as a whole neither the written statement nor the materials on the record warrant a decree on admission. It is submitted that the learned Single Judge fell into error in construing the crucial averments in paragraphs, 4, 8, 14 & 15 of the written statement as revealing unambiguous admissions.

11. Mr. T.K. Ganju, learned senior counsel appearing for the NAFED stressed that the question as to whether Sikka had in fact accessed the very same property - the identity of which was known to both parties [Mohan Cooperative Industrial Area and Mohan Cooperative Industrial Area (Extension)] was an issue worthy of trial. Furthermore, the issue, which required resolution through full trial, was whether in fact Sikka inspected the property at the relevant time before submitting its bid. Learned counsel also pointed out that before the bid confirmation information through the letter dated 18.7.2008, which was in fact issued by NAFED, there was adequate time for Sikka to satisfy itself about the details of the properties.

12. It was submitted that the conditions of the bid were forthright. In this regard, Mr. Ganju relied upon the bid terms especially clauses 3, 4, 14 & 12. It was emphasized that since the property was sold on “as is where is basis” and in the same state and conditions, at the time of completion of sale, the purchaser was to bear the risk in terms of the bid. It was, therefore, urged that having regard to these circumstances, the conclusion of the Single Judge that the suit did not warrant a trial is unsustainable in law. Learned counsel relied upon the decisions of the Supreme Court in *Jeevan Diesels & Electricals Ltd. vs. Jasbir Singh Chadha (HUF)* (2010) 6 SCC 601, *Himani Alloys Ltd. vs. Tata Steel* (2011) 7 SCR 60 and other judgments to say that the Court can only draw a decree or direct a part decree of the suit claim under Order-XII Rule-6, if the admission is clear, unequivocal and unambiguous. Submitting that on at least three aspects, the trial was necessary and warranted before passing a liability on NAFED, Mr. Ganju stated that as to whether and if so which property Sikka inspected and later satisfied itself with respect to the title deeds was a matter in dispute. It was also urged having regard to the specific pleadings in the written

statement that even if the plaintiff Sikka is assumed to have inspected the property E-16/B-1, Mohan Cooperative Industrial Area, that property was under the occupation of a going industrial concern and it is unbelievable that such a commercial venture would permit the inspection of its property especially in the context of an appraisal by a judicial procedure.

13. Learned senior counsel for the plaintiff/Sikka, Mr. Dayan Krishnan urged that this Court should not interfere with the judgment and the decree. He relied upon the pleadings in the written statement, especially paragraphs 4, 8 and 14 to say that there was no clear and unequivocal assertion that the title deeds of the property said to have been put to auction and of which parties were allegedly *ad idem*, i.e., E-16/B-1, Mohan Cooperative Industrial Area (Extension) was ever inspected. It was emphasized that despite providing several opportunities, NAFED, the defendant did not produce copy of the register. Furthermore, on an overview of the pleadings, it was quite evident that the plaintiff Sikka never admitted to having inspected the title deeds at all. With respect to the inspection of the property it was submitted that the written statement itself highlights that Sikka caused an inspection of E-16/B-1, Mohan Cooperative Industrial Area and not E-16/B-1, Mohan Cooperative Industrial Area (Extension). Therefore, as to whether E-16/B-1, Mohan Cooperative Industrial Area (Extension) was known to be a property that was put to auction was never in doubt. There was no claim to that effect at all - rather, all of NAFED's pleadings admitted that the auction was of the property and not the Mohan Co-operative Industrial Estate property; the orders of court relied on for public notice also related to the property and not the Mohan Co-operative Industrial Estate property; NAFED's confirmation was of the property and not of auction of Mohan Co-operative Industrial Estate property. Furthermore, the

written statement never stated specifically who showed the title and to what property, to Sikka.

14. Mr. Dayan Krishna, further submitted that the subsequent notice by which the very same property was sought to be put to auction contained the correct description and also revealed the correct dimensions. This, it was submitted, in fact vindicated the plaintiff/Sikka's stand not only with respect to the description and correct location of the property but also with respect to the measurement. It was submitted in this regard that in the suit, the plaintiff had clearly averred - in paragraph 15 & 16 that the built up area was only around 16,017.50 Sq Ft. - a fact established by the NAFED subsequent to the public auction. *Juxtaposed* to this are the circumstances that in the public auction notice of 2008, responded to by Sikka, the total built up area was advertised at 24,300 sq. ft. It was submitted that under these circumstances NAFED could not seek shelter behind its own mis-description or aver mis-representation. Reliance was placed upon the decision of the Supreme Court in *Delhi Development Authority v Kenneth Builders* 2016 (6) SCALE 14. It was submitted that a public body or agency cannot take shelter under the "as is where is" condition in an auction notice to disclaim a fundamental defect in the property or contractual condition. Counsel submitted that NAFED's action clearly smacked of mis-representation, which entitled Sikka to treat the contract void.

Analysis and Findings

15. The following essential facts emerge from the record:

(i) The public auction of property named as E-16/B-1, Mohan Cooperative Industrial Area was offered;

- (ii) The order relied upon, which is the basis for the public auction, i.e., order of this Court dated 4.4.2008 described the property as E-16/B-1, Mohan Cooperative Industrial Area and not E-16/B-1, Mohan Cooperative Industrial Area (Extension);
- (iii) The defendant/NAFED did not assert that the title to E-16/B-1, Mohan Cooperative Industrial Area (Extension) was shown to the plaintiff Sikka;
- (iv) The confirmation of sale was also in respect of E-16/B-1, Mohan Cooperative Industrial Area and not E-16/B-1, Mohan Cooperative Industrial Area (Extension).
- (v) The subsequent auction notice stipulated that the property put to auction was E-16/B-1, Mohan Cooperative Industrial Area (Extension) and not E-16/B-1, Mohan Cooperative Industrial Area.
- (vi) There was a variation in the area put to auction: whereas the earlier public notice stated that the built up area on the plot was 24,300 Sq.ft, the later public notice stated that the area was about 16,000 square feet “or thereabout”.

16. To consider if the evidence in this case and the pleadings establish a clear admission to justify a decree of the plaintiff's suit, it is essential to recount the broad principles of Order XII Rule 6 of the Code of Civil Procedure, 1908. In *Karam Kapahi v. Lal Chand Public Charitable Trust* (2010) 4 SCC 753 the Supreme Court held that the principle of Order XII Rule 6 could be pressed into service when there existed no controversy with regard to a particular claim. The provision is undoubtedly wide in its import and that admissions may be inferred from the facts and circumstances of the case. *Charanjit Lal Mehra and Ors v. Kamal Saroj Mahajan (Smt) & Anr* (2005) 11 SCC 279 is an earlier decision to the same effect. In *M/s Jeevan Diesels* (supra)

it was held:

“Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi (supra) may be unexceptionable they cannot be applied in the instant case in view of a totally different fact situation.”

17. In *Uttam Singh Duggal & Co. Ltd. v. United Bank of India & Ors* 2000 (7) SCC 120 the Supreme Court held, in regard to Order XII Rule 6, that where there is a clear admission of facts on the face of which it is impossible for the party making such admission to succeed, the principle will apply. The Court in this case also categorically refused to restrict the scope of the principle by refusing to hold that only those admissions in the pleadings would attract its applicability; it was held that the provision is discretionary and permissive. The question always is whether the pleadings taken as a whole point to an unambiguous and clear admission of the kind contemplated by law. The relevant standard spelt out in *Uttam Singh and Jeevan Diesel (supra)* that the Courts have to adopt, while considering pleadings and seeing if a decree on admission is to be drawn, is whether there is a “*clear and unequivocal admission of the case*” of the party defending the application. It is also not in dispute that there is no golden rule about what constitute as “*clear and unequivocal admission*”; the Court has to proceed on a case specific approach having due regard to the overall effect of the pleadings and documents. This is discernible from the decision in *Gilbert Vs. Smith*, 1875-76 (2) Ch 686, which was relied upon by the Supreme Court in *Jeevan Diesel case (supra)*.

18. It is clear, consequently that the Court cannot base its decision to decree (or not to grant a decree) in a suit in terms of Order XII Rule 6 CPC only on the basis of a particular pleading or admission; the overall effect of the pleadings and documents of the concerned parties are to be judicially weighed. In other words, the Court has to keep in mind the fact that what seems plainly an admission could well be explained by the litigant making it, during the course of the trial. Likewise, a so-called explanation may really be none at all.

19. Was there a defense pleaded, or to put it conversely, was there no unequivocal admission, as is contended by NAFED. The most significant answer to this, in this court's opinion lies in the fact that in the subsequent advertisement (dated 12-01-2011) NAFED clearly advertised the property in question as "E-16/B-1, Mohan Cooperative Industrial Area Extension". NAFED never denied that this was the same property that it sought to auction earlier, leading to the transaction in dispute. Thus, it is only later that NAFED gave out the correct description of the property for the first time. What is more, even the correct dimension of the property was given as 16,000 sq. ft. built up space- as against the original description of 24300 sq. ft. NAFED did not produce the registers sought to be relied on by it, to say that Sikka in fact inspected the title to "E-16/B-1, Mohan Cooperative Industrial Area Extension"- despite several opportunities to do so. On the other hand, Sikka produced and marked all the relevant documents necessary to prove its case.

20. The basic premise to Sikka's claim in the suit was that the mis-description of the subject matter of the contract on account of NAFED, led to its being a nullity; it relied on Section 20 of the Contract Act. In the suit, it expressly stated that the contract was a nullity due to the mistake of description. In this court's opinion, the conclusions of the single judge on this

aspect are sound. A mistake as to an essential fact, taints the foundation of any agreement between two parties: Section 20 of the Contract clearly stipulates this. The only exception is also spelt out in the Act, i.e when the mistake is to the value of anything, then it is not deemed to be one of fact. In *Tarsem Singh v Gurminder Singh* 1998 (3) SCC 471, the Supreme Court described the effect of a mistake:

“This Section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this Section.

The other requirement is that the mistake, apart from being mutual, should be in respect of a matter which is essential to the agreement.

Learned counsel for the petitioner contended that a mistake of fact with regard to the "price" or the "area" would not be a matter essential to the agreement, at least in the instant case, as the only dispute between the parties was with regard to the price of the land, whether the price to be paid for the area calculated in terms of "bighas" or "kanals".

"Bigha" and "Kanal" are different units of measurement. In the Northern part of the country, the land is measured in some states either in terms of "bighas" or in terms of "kanals". Both convey different impressions regarding area of the land. The finding of the Lower Appellate Court is to the effect that the parties were not ad-item with respect to the unit of measurement. While the defendant intended to sell it in terms of "kanals", the plaintiff intended to purchase it in terms of "bighas", the plaintiff intended to purchase it in terms of "bighas". Therefore, the dispute was not with regard to the unit of measurement only. Since these units

relate to the area of the land. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject matter of agreement for sale, or, to put differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties the suffering, did not relate to a matter essential to the agreement cannot be accepted."

21. NAFED'S submission that Sikka should have and is deemed to have taken care to acquaint itself about the nature and location of the property since it willingly participated in the auction, which contained an "as is where is" term, is, in the opinion of this court, unsubstantial and unpersuasive. Any defect in title - particularly in the light of surrounding circumstances, which is not known to the party bidding for a property, has the potentiality to disturb the legality of the contract. NAFED's plea and position was that it owned "E-16/B-1, Mohan Cooperative Industrial Area Extension". However, it advertised a different property, at a different location. It denies that Sikka was unaware of this defect; yet it placed no materials on the record to show that title to "E-16/B-1, Mohan Cooperative Industrial Area Extension" was shown. All other documents of NAFED - including the auction notice, the confirmation letter, the court orders, which preceded the auction, etc., clearly show that ownership of "E-16/B-1, Mohan Cooperative Industrial Area" was claimed. *Kenneth Builders* (supra) is an authority of recent vintage which says that a public authority or agency cannot take shelter under the "as is where is" condition when the issue is serious and potentially can undermine a contractual relationship, i.e., outcome of an auction. The facts of the present case clearly

show that barring that argument and the allegation (which remained so, without any documentary evidence to that effect, for over 5 years, when the suit was pending) NAFED presented no evidence that Sikka was aware of the true identity of the property. Therefore, NAFED had no defense, with the issuance of the second advertisement.

22. This court, in the light of the above reasoning, concludes that the findings and judgment of the learned single judge cannot be faulted. As a result, the appeal fails and is dismissed. NAFED shall bear the costs of the appeal and the proceedings throughout.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

AUGUST 02, 2016

