

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

+ **RFA No. 791/2017**

% **19th September, 2017**

LALLAN SHAH Appellant

Through: Mr. Satender Kumar Garg,
Advocate.

versus

INDRAPRASTHA POWER GENERATION CO. LTD. & ORS.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 33787/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RFA No. 791/2017

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff impugning the judgment of the trial court dated 9.6.2017 whereby the trial court has dismissed the suit for recovery of Rs.10,50,511/- along with interest filed by the appellant/plaintiff. The earnest money

deposit of the appellant/plaintiff was of the sum of Rs.11,72,495/- with the respondent no. 1/defendant no. 1 and with respect to goods as the appellant/plaintiff had participated in the e-auction. Respondent no. 1/defendant no. 1 forfeited an amount of Rs.10,00,011/- out of the earnest money deposit and for recovery of which amount along with interest the subject suit was filed.

2. The facts of the case are respondent no.1/defendant no. 1 was owning the Pragati Power Station at I.P. Extension, Ring Road, New Delhi – 110002 and it conducted a sale of its scrap by e-auction through the respondent no. 3/defendant no. 3. The e-tender was floated on 1.4.2010 and consisted of 6 lots. For each lot there was a separate bid and the date of the e-auction was 12.4.2010. Prior to conduct of the e-auction on 12.4.2010 a period of 10 days time was given from 1.4.2010 to 10.4.2010 for the bidders to inspect the lots. The case of the appellant/plaintiff was that when he went to inspect the lot no. 1, which lot is in question in this case, on 10.4.2010, he was however not allowed to inspect the goods. Appellant/plaintiff however pleads that he was told by two officers/store officers of the respondent no.1/defendant no.1 namely Sh. Kishan Lal and Sh. Sant Ram, that out of the listed items for lot no. 1/Ex. PW1/2, item no. 34 being of 48

numbers of motors off-size, item no. 37 being of 3 numbers of transformers off-size and item no. 64 being of 9 numbers of Rectoformers (transformers) would be of big-sizes with the fact that motors in the item no. 34 would include motors of 500 Horse Power and other motors between 250 Horse Power and 600 Horse Power. Appellant/plaintiff pleads that he was told by the aforesaid officers that the Rectoformers (transformers) would be of 75 Megawatt capacity, 12.5 Megawatt capacity and 5 Megawatt capacity. Appellant/plaintiff pleads that he believed the version of the two officers/officials of the respondent no. 1/defendant no.1 and consequently in the e-auction gave his bid dated 12.4.2010. Appellant/plaintiff further pleaded that after the date of the auction on 22.4.2010 when he went for clarification of the material he was not allowed to go inside the premises by the security men. It is further pleaded by the appellant/plaintiff that ultimately when he was allowed to go inside the store with great difficulty he found that there were no big-size motors having capacity of 250 Horse Power to 600 Horse Power or Rectoformers (transformers) of 75 Megawatt capacity or 12.5 Megawatt capacity and 5 Megawatt capacity in the store. Appellant/plaintiff pleaded collusion between the officers/officials of

respondent no.1/defendant no. 1 whereby the goods which were available before conduct of the auction were in fact lifted away subsequent to the auction. Appellant/plaintiff, therefore, did not pay the balance amount payable with respect to lot no. 1 and which resulted in forfeiture of sum of Rs.10,00,011/- out of the earnest money deposit amount, and for recovery of which the subject suit was filed.

3. Written statement was filed by the respondent no.1/defendant no. 1 and who pleaded that on account of non-payment of the requisite/bid amount in terms of the e-auction, and by invoking Condition No.10.1, the earnest money deposited for lot no. 1 was forfeited by the respondent no.1/defendant no. 1. It was pleaded that there was a contract between the parties also with respect to lot numbers 2 to 6, for which amounts were paid by the appellant/plaintiff, but since lot no. 1 was of a large amount of Rs. 1 crore, therefore appellant/plaintiff since did not have moneys, therefore on flimsy ground and in disregard of the conditions of the contract did not deposit the requisite amount in terms of the contract. It was pleaded that the subject suit was only filed for avoiding black listing of the appellant/plaintiff. It was also pleaded by the respondent

no. 1/defendant no. 1 that appellant/plaintiff had duly inspected the articles of subject lot no. 1 on 10.4.2010, and even on earlier days, and after satisfying himself about the same, had participated in the e-auction on 12.4.2010, where he was a successful bidder and consequently a contract was awarded to the appellant/plaintiff on 17.4.2010.

4. After pleadings were complete, trial court framed the following issues:-

- “1. Whether the contract dated 17.04.2010 between the parties is voidable under Section 19 of the Indian Contract Act? OPP.
2. Whether the plaintiff has breached special terms and conditions No. 10.1 and 10.3 of the contract and therefore EMD is liable to be forfeited? OPD
3. Whether the plaintiff had not been allowed complete inspection of articles to be auctioned by the defendants as per terms and condition of the auction? OPP.
4. Whether the plaintiff is entitled to recover the suit amount from the defendant? OPP.
5. Whether the plaintiff is entitled to recover interest on the amount, if any, awarded in issue No. 4? If so at what rate for which period? OPP.
6. Relief.”

5. Trial court has decided all the issues in favour of the respondent no. 1/defendant no. 1 and therefore dismissed the suit. Trial court has referred to the terms of the contract as per which materials were offered on ‘as is where is’ basis. Trial court has also rightly held that appellant/plaintiff had complete opportunity from 1.4.2010 to 10.4.2010 to inspect the articles of lot no. 1, and that the

appellant/plaintiff had duly inspected the articles before participating in the e-auction. The documents with regard to e-bidding were proved by the respondent no. 1/defendant no. 1 as Ex. DW1/1 (colly.) The main items in dispute were item numbers 34, 37 and 64 with respect to list of items in lot no. 1 (Ex. PW1/2) being of 48 numbers of off-size motors under serial no. 34, serial no. 37 being of 3 numbers of off-size Transformers and serial no. 64 being of Rectoformers (transformers) total 9 in number, and with respect to which trial court has rightly observed that since the case of the appellant/plaintiff was that the officers of the respondent no. 1/defendant no. 1 Sh. Kishan Lal and Sh. Sant Ram made the appellant/plaintiff believe that the capacity of the motors at serial numbers 34, 37 and 64 were of a particular size then the appellant/plaintiff would have had to prove the same but the appellant/plaintiff failed to prove the so called representations made by the two officers Sh. Kishan Lal and Sh. Sant Ram. I may note that neither Sh. Kishan Lal nor Sh. Sant Ram was summoned as witnesses by the appellant/plaintiff and nor is any document filed which shows any representations having been made by Sh. Kishan Lal and Sh. Sant Ram. The trial court has also referred to the fact that the e-document shows that the bid started at 11:10 a.m. on 12.4.2010, and the bidding

went on till almost 5:00 p.m. and there was neck to neck fight for lot no. 1 between the appellant/plaintiff and another bidder Pappu Iron Store. Trial court has also held that if the appellant/plaintiff was not satisfied with his inspection conducted on 10.4.2010 then there was no reason for appellant/plaintiff to participate in the e-auction on 12.4.2010 and the fact that the appellant/plaintiff participated in the e-auction on 12.4.2010, and made a strong bid for lot no. 1, shows that the appellant/plaintiff was satisfied with the inspection of the items in lot no. 1. Trial court has also held that lot no. 1 was for an amount of Rs.1 crore and since the appellant/plaintiff could not arrange the moneys, hence he did not deposit the further amount required although contract was awarded to the appellant/plaintiff on 17.4.2010. I may note that respondent no. 1/defendant no. 1 pleaded that the entries with respect to items which were in issue were duly entered in the docket book of the respondent no.1/defendant no.1 in the usual course of business, and that this docket book was proved as Ex.DW1/1 (colly). The relevant paras of the judgment of the trial court giving conclusions and reasoning as aforesaid, and with which reasoning and conclusions I agree, are paras 18 to 23, and these paras read as under:-

“18. Issues No.1 & 3:

(1) Whether the contract dated 17.04.2010 between the parties is voidable under Section 19 of the Indian Contract Act? OPP

(3) Whether the plaintiff had not been allowed complete inspection of articles to be auctioned by the defendants as per terms and conditions of the auction? OPP

The onus of proving both these issues was upon the plaintiff. The issues are being taken up together as the same are inter-connected. The learned counsel for the plaintiff has very vehemently argued that on 10.04.2010, the plaintiff and his associates were not permitted to fully inspect the articles of lot No. 1. The employees of defendant No. 1 namely Shri Kishan Lal and Shri Sant Lal made the plaintiff believe that in respect of Entry No. 34, there were 48 motors of the capacity ranging from 250 HP to 600 HP, whereas in respect of Entry No. 37 and 64, there were Rectoformer of the capacity of 75 Mega Watt (MW) and transformers of 12.5 MW and 5 MW and believing the representations of the aforesaid two employees of defendant no. 1, the plaintiff had participated in the Bid on 12.04.2010 and was declared successful bidder. It is further argued that after getting the contract on 17.04.2010 when the plaintiff had participated in the Bid on 12.04.2010 and was declared successful bidder. It is further argued that after getting the contract on 17.04.2010 when the plaintiff made re-inspection of articles of lot No. 1, then he was given to understand that all the aforesaid motors and transformers had been substituted with small motors of coolers and as such, a fraud was committed upon him by the defendants. It is argued that contract dated 17.04.2010 is hit by Section 19 of the Indian Contract Act, 1872.

Per contra, the learned counsel for defendant No. 1 has referred to Condition No. 5, 10.1 to 10.3 and 11, which have already been reproduced in the preceding paragraphs and has emphasized that before entering into the contract, the plaintiff had ample opportunity from 01.04.2010 to 10.04.2010 to inspect the articles of lot No. 1 and the plaintiff had duly inspected the said articles not only on one occasion, but more than once, lastly being on 10.04.2010. Only after getting satisfied with the available articles that he had offered his bid on 12.04.2010 and had neck to neck fight with other bidder namely "Pappu Iron Store". In this regard, the documents with regard to e-Bidding, i.e. Ex.DW1/3 (Colly) have been referred to. ***I have perused the said documents, which clearly show that the bid had started at about 11.10 AM on that day and had gone on till almost 5:00 PM and there was neck to neck fight for lot No. 1 between plaintiff and Pappu Iron Store.***

19. It is next argued by the learned counsel for defendant No. 1 that after becoming successful bidder on 12.04.2010, the plaintiff had time till 19.04.2010 to deposit the EMD, but in his earnest he did not wait till that time and deposited the amount of EMD on 17.04.2010 itself, which shows that the plaintiff was not only eager to have the contract, but had presumably satisfied himself about the quality and quantity of the articles available in lot No. 1.

20. It is admitted case of the plaintiff that for inspection of the material a sufficient time for about ten days i.e. w.e.f 01.04.2010 to 10.04.2010 was stipulated in the notice to the prospective bidders. It is also admitted case of the plaintiff that he had gone to inspect the material only on the last date fixed for inspection. The allegations that he was not allowed to inspect the material is afterthought which cannot be taken into consideration in view of the specific conditions of clause 11 (supra) of the contract. Even otherwise, for arguments sake, if it was so, the plaintiff was not forced by anyone to submit his bid in the e-auction conducted by defendant no. 2. Equally, the allegations of misrepresentation/suppression of facts have no basis whatsoever. Firstly, it is admitted case of the plaintiff that he has already taken lot no. 2 to 6 without any objections wherein against the certain items "off size" was written.

21. It is not disputed that the defendant no. 2 on behalf of defendant No. 1 had floated tender inviting bid through e-auction and a detailed list of the items with their description and quantity was put on its website lot-wise. The bid documents downloaded by the plaintiff consisting of important instructions to the bidders, details description of the quantity of items of each lot. On issuance of the acceptance letter dated 17.04.2010 the contract came into existence. The PW-1 has admitted in his evidence that after the acceptance letter was issued to him the contract was complete, whereas PW-3 stated in his cross-examination that he had made the plaintiff to understand the terms and conditions of contract. It is not the case of the plaintiff that he was not aware of the description of the scrap/machinery against which 'off size' was written. It is admitted case that all the lots i.e. 2 to 6 had been taken away by him without any grievances regarding description given as 'off size', however, because of the fact that the lot No. 1 was more than the value of Rs.1,00,00,110/-, which he could not arrange (as germane from the evidence of PW-1, PW-2 and PW-3) has raised.

22. The legal notice Ex.PW1/7 relied upon by the plaintiff to buttress the stand that the absence of categorical specification of the items in the auction details dated 12.04.2010 amounts to fraud played upon the plaintiff by the defendants, whereby they had induced him to enter into the contract. The case so built up now in afterthought as the Plaintiff was aware of the specification which was displayed on the website of Defendant No. 2. Even otherwise, the plaintiff had offered his bid with an open eye and after understanding the nature of the items to be auctioned and was aware of the contents of conditions of sale. On the face of it, the case so built up is nothing but to avoid the liability of payment of the sale value of lot No. 1 and to avoid the contract. As per terms and conditions of the contract, in case of the failure of deposit of the sale value alongwith the all taxes within 14 days from the date of issuance of the sale order by the defendant No. 2, the security deposit for the corresponding lots was liable to be forfeited.

23. The other grounds taken by the plaintiff is that he was not allowed to inspect the material. The plea on the face of it is unbelievable because

of the fact that a public notice had clearly stipulated 10 day's period for inspection i.e. 01.04.2010 to 10.04.2010. Even if he was not allowed to inspect the entire lots and if the allegation be admitted as correct, it can not, by any stretch of imagination be termed as playing fraud or misrepresentation on the part of defendant No. 2 or on the part of defendant No.1. If the case was so, the plaintiff should not made bid in e-auction. It cannot be said that he was induced or forced to bid in the e-auction. As regards the allegations that he was shown motors of 500 HP and it was assured by Mr. Kishan Lal and Mr. Sant Ram, the official of the defendant No. 1, that motor would be big size having capacity of 250 HP to 600 HP and Rectoformer of 12.5 MW capacity and 5 MW respectively can not be accepted by any person having ordinary prudence. It goes against the 'exception' provided under section 19 of the Indian Contract Act. It is admitted case of the plaintiff that he is a seasoned scrap purchaser-dealer. He is the past master in his profession. It cannot be said that he relied upon the representation of said Mr. Sant Lal or Kishan Lal. Even otherwise, there is no evidence on the record to show that such representation was given by those two officials of defendant no. 1 to the plaintiff, when he visited on 10.04.2010 for the purpose of inspection of material. There is no iota of evidence to prove the allegations, except the bald statement of plaintiff. Even otherwise, the said officials named in the plaint were not the agents of the defendant No. 1, they are merely the employees of it." (underlining added)

6. Learned counsel for the appellant/plaintiff argued that fraud has been played upon the appellant/plaintiff who had the necessary finances, however, on being queried that whether any evidence has been led by the appellant/plaintiff in the trial court to show that he had moneys of Rs.1 crore for making payment of lot no. 1, counsel for the appellant/plaintiff admits that no evidence is led by the appellant/plaintiff as to his financial capacity in April, 2010 when the subject e-tender was issued and thereafter the contract was entered into on 17.4.2010. Therefore, I cannot accept the argument of the appellant/plaintiff that the appellant/plaintiff had sufficient financial

capacity and thus allegedly had no reason not to make payment of lot no. 1.

7. Learned counsel for the appellant/plaintiff then argued that in the cross-examination of DW-1 on 16.3.2013 it is admitted by DW-1 that appellant/plaintiff was not allowed to inspect the goods on 10.4.2010, however it is seen that after admitting that appellant/plaintiff was not allowed to inspect on 10.4.2010, the witness DW-1 stated that inspection was not allowed as the appellant/plaintiff had come after the inspection time. In any case, I note that the case of the respondent no. 1/defendant no. 1 was that the appellant/plaintiff had even prior to 10.4.2010 conducted various inspections, and which aspect was reiterated by the witness DW-1 on behalf of the respondent no. 1/defendant no. 1, who volunteered that the appellant/plaintiff used to come for inspections around lunch time and in fact Sh. Vohra, Junior Engineer had accompanied the appellant/plaintiff for inspection of the goods along with Sh. Kishan Lal, the storekeeper. It was also deposed by DW-1 that the appellant/plaintiff used to come with 4-5 people at the time of inspection. I, therefore, hold that the appellant/plaintiff cannot argue that he was not allowed to inspect the goods before he participated in

the e-auction on 12.4.2010 with the fact that in fact appellant/plaintiff has set up mutually irreconcilable cases of his not being allowed to inspect the goods and pleading on the other hand he participated in e-auction as per the representations of two officers of the respondent no. 1/defendant no. 1 Sh. Kishan Lal and Sh. Sant Ram who represented to him with respect to the capacity of the items of serial nos. 34, 37 and 64 being of motors, transformers and rectoformers.

8. I, therefore, do not find any reason to interfere with the impugned judgment of the trial court. Dismissed.

SEPTEMBER 19, 2017
Godara/AK

VALMIKI J. MEHTA, J

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