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

Date of decision: 22nd April, 2019

\+ LPA 500/2018

M/S ABHILASHA ENTERPRISES ..... Appellant

Through: Mr. S. K. Rungta, Sr. Adv. with Mr. Sanjeev Kumar Singh, Mr. Prashant Kumar and Mr. Sushil Dwivedi, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL ..... Respondent

Through: Mr. Anil Grover, Standing Council with Ms. Noopur Singhal, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J. (ORAL)

The present appeal under Clause 10 of the Letters Patent has been filed by the appellant/ M/s Abhilasha Enterprises, which is a sole proprietorship concern, impugning judgment dated 17.07.2018 rendered by the single Judge in Writ Petition (Civil) No. 2312/2017, whereby the single Judge has dismissed the writ petition filed by the appellant, denying the appellant's claim for refund of earnest money deposit made with the respondent.

2. Notice was issued in the appeal vide order dated 31.08.2018, limited to the legal issue sought to be raised under Section 74 of the Indian Contract Act, 1872, on which date the Court recorded as under:-

> *"2. The primary ground for assailing the impugned judgment is that the learned Single Judge erred in arriving at a conclusion that forfeiture of the earnest money could have taken place even in a case where no final agreement has been executed. It is submitted that in the absence of a final agreement, provision of Section 74 of the Indian Contract Act could not be invoked.*
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> *3. Limited to the aforesaid plea taken by the appellant, issue notice."*

3. The genesis of the matter is a bid placed by the appellant in response to a public notice dated 04.01.2017 released by the respondent/ New Delhi Municipal Council for e-auction of licence for running the NDMC Tourist Lodge (also known as Asian Hotel) situate near Ashoka Road & Jantar Mantar Road Crossing, Janpath Lane, New Delhi.

4. The appellant participated in the aforesaid e-auction; submitted its bid; and made an earnest money deposit of Rs. 29,04,000/- via electronic transfer in accordance with the terms and conditions of the auction. Vide letter dated 13.01.2017, the respondent accepted the petitioner's bid, which was the highest; and sent to the appellant a draft licence deed which was to be executed between the appellant and the respondent.

5. The appellant alleges that there were serious discrepancies as between the representations made by the respondent in the public notice at the time of inviting bids and the contents of the draft licence deed. The major

discrepancy alleged by the appellant is that while in the public notice it was represented that the built-up area of the subject property to be licenced was about 22,592.46 sq. ft., the draft licence deed mentioned an area of only 17,000 sq. ft.; whereby, the appellant contended, the respondent was now offering an area which was much less than that publicized at the time of inviting bids.

6. It transpires however that vide communication dated 06.02.2017 sent in response to appellant's letter dated 25.01.2017, the respondent clarified that the actual area of the subject property was indeed 22592.46 sq. ft. It would appear that the area of 17000 sq. ft. was erroneously mentioned in the draft licence deed.

7. Be that as it may, the appellant persisted in its objection; omitted to take further steps to execute the licence deed; and consequently, vide letter dated 27.02.2017 the respondent sought to appropriate the earnest money deposit made by the appellant on the ground that the appellant had failed to comply with the other terms and conditions of the auction and that the appellant was therefore liable to forfeit the earnest money deposit. It transpires that thereafter the respondent also placed the subject property for re-auction.

8. By order dated 12.05.2017 made in the writ petition the learned single Judge stayed the respondent's decision to appropriate the earnest money deposit made by the appellant; but subsequently dismissed the writ petition.

9. As recorded above, notice in this appeal was issued limited only to the issue as to whether in view of Section 74 of the Indian Contract Act, the appellant would be liable to forfeit the earnest money deposit made with the respondent even when the contract, in this case the licence deed, never came to be executed between the parties. The appellant contends that since the licence deed was never executed; no contract came into existence; and no contract could therefore have been broken.

10. At this point it would be relevant to extract Section 74 of the Contract Act which reads as under:-

> *"**Section 74. Compensation for breach of contract where penalty stipulated for.-** When a <u>contract has been broken</u>, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, <u>whether or not actual damage or loss is proved to have been caused thereby</u>, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*
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> *Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.*
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> *Exception.-When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*

Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

11. Although, as recorded above, notice in this appeal was issued limited to the aspect of Section 74 of the Contract Act, we are compelled to observe that even on point of fact, once the respondent had clarified in writing that the actual area of the said property was 22,592.46 sq. ft. and not 17,000 sq. ft., there was no basis for the appellant to allege any discrepancy as between what was offered by way of the public notice and what was stated in the license deed.

12. There was accordingly no merit in the appellant's contention that the respondent had made any mis-representation by reason whereof the appellant was seeking to withdraw its bid.

13. That apart, the legal issue arising from Section 74 of the Contract Act can be disposed of quite simply on the clear exposition of law as contained *inter-alia* in a recent judgment by the Supreme Court in the case of ***Kailash Nath Associates vs. Delhi Development Authority and Anr.*** reported in ***(2015) 4 SCC 136***, in which case, after a detailed consideration of the legal position, the Supreme Court has held as under:-

"41. It must, however, be pointed out that <u>in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached</u>, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. <u>In such cases,</u>

Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

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43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

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43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

(Emphasis Supplied)

Accordingly, in the case of a public auction, as in the present matter, Section 74 of the Contract Act simply does not apply; and consequently, the entire edifice of the argument raised by the appellant, premised on the application of Section 74, falls.

14. In view of the exposition of law in ***Kailash Nath Associates*** *(supra)*, we find no infirmity in the impugned judgment.

15. The present appeal is accordingly dismissed; without however, any order as to costs.

16. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

CHIEF JUSTICE

APRIL 22, 2019/sr