

(2018) 07 DEL CK 0237

In the Delhi High Court

Case No : W.P.(C) 2312 OF 2017, CM No. 9932 OF 2017

Abhilasha Enterprises @APPELLANT@Hash New Delhi Municipal Council

Date of Decision : 17-07-2018

Acts Referred:

Indian Contract Act, 1872 — Section 74
Constitution of India, 1950 — Article 14, 226

Citation : (2018) 07 DEL CK 0237

Hon'ble Judges : V. KAMESWAR RAO, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following prayers:-

â??In the aforesaid premises it is, therefore, most respectfully prayed that this Honâ??ble Court may be pleased to:

(a) Issue a Writ of Certiorari to call for the cords of the case form the respondent and quash the illegal and arbitrary office Letter No.613/SO/Estate-

I/2017 dated 27.02.2017 issued by respondent; and

(b) Issue a writ of mandamus or an appropriate writ, order or direction in the nature of mandamus and direct the respondent to execute the license

deed with the petitioner after removing the discrepancies pointed by the petitioner; and / or

(c) To pass any further order(s) which this Honâ??ble Court may deem fit in the facts and circumstances of the case and in the interest of

justice.â??

2. The writ petition has been filed challenging communication dated

February 27, 2017 issued by the respondent rejecting the request of the petitioner, not to forfeit Earnest Money deposited by the petitioner at the time of bidding for the grant of license for Tourist Lodge.Â Â

3. The facts as noted from the writ petition are that the respondent on January 04, 2017 issued a public notice for e-auction of NDMC tourist lodge

near Ashoka Road and Jantar Mantar Road crossing, Janpath Lane behind Janpath Hotel, New Delhi.Â It is averred that the petitioner after noticing

the public notice, took part in the e-auction process, which took place on the same day on the MSTC platform after registering itself on the MSTC

portal.Â The petitioner deposited earnest money of Rs.29,04,000/- as per clause 2 of the terms and conditions provided by the Estate Department of

the respondent.Â According to the petitioner, after evaluation of all bids, the petitioner was declared successful being the highest bidder and

accordingly, the NDMC issued a confirmation letter dated January 12, 2017.Â It is averred that the respondent along with the letter, had sent a draft

license deed to be executed by the parties.Â The said license deed was having the figure of 17000 per square ft., as total built up area, which was

contrary to the total area as notified in public notice and other offer/tender documents.Â The aforesaid discrepancies were duly notified by the

petitioner vide its letter dated January 25, 2017 to the respondent.Â It objected to the false representation of area along with other discrepancies.Â

According to the petitioner, as per the public notice, the total commercially usable area was 22592.46 square ft. against which bid was made by the

petitioner.Â It is its case that 17000 square ft was advertised in the year 2016, therefore the area of 22592.46 square ft was prima facie false

representation and thus liable to be clarified.Â Â

4. The respondent vide its letter dated February 06, 2017 replied to the letter of the petitioner dated January 25, 2017 by stating that complete

disclosures were made by the respondent through various means.Â It also stated that as per the terms and conditions, the tourist lodge was to be

licensed on â??as is where is basisâ??.Â In response to the letter of the respondent dated February 06, 2017, the petitioner sent letter dated February

13, 2017, wherein according to the petitioner it clarified that prior to the bidding, the petitioner was not allowed to carry any detailed inspection and

merely by having a look into the building, such deficiencies and drawbacks

cannot be noticed. In the letter dated February 13, 2017 the petitioner has stated that total commercially usable area is 17000 sq. ft and not 22592.46 sq. ft. It is also stated that condition of the building is dilapidated and the stability certificate be procured from IIT, Roorkee certifying that the building is fit for habitation for the license period and more. It is also stated that there is an unauthorized construction in the building and the substation in the basement is illegal. It is averred, pursuant to the communication dated February 13, 2017, to its shock and surprise it received letter dated February 27, 2017, whereby the respondent has forfeited the EMD of the petitioner alleging that the petitioner has not complied with the terms and conditions. According to the petitioner, the said action is arbitrary and malafide. A reference is made to a letter / representation dated March 03, 2017 whereby the petitioner requested the respondent to withdraw the decision of forfeiture of the EMD.

5. A counter affidavit has been filed by the NDMC in which it is stated that the respondent had issued a public notice dated December 18, 2016

inviting bids for licensing of its property situated at 1, Janpath, New Delhi, previously known as Asian Hotel, tourist lodge for a period of 30 years.

The petitioner submitted the highest bid amounting to Rs.45,48,000/- as monthly license fee for taking the said premise on license for 30 years and as

part of the bid, the petitioner had also deposited a sum of Rs.29.04 lakh towards the earnest money deposit. Thereafter, the respondent wrote to the

petitioner on January 12, 2017 asking the petitioner to execute the license deed within seven days as per the terms and conditions of the e-auction.

The petitioner instead of complying with the terms of the acceptance letter dated January 12, 2017 started raising frivolous objections such as (1) the

building not being in conformity with the approved drawings, (2) whether the terrace area would be a part of the licensed premises etc. as an

afterthought and as an excuse to avoid executing the license deed. It is averred that in these circumstances, the respondent was left with no choice

but to issue letter dated February 27, 2017 to the petitioner informing that the petitioner's bid stands cancelled and the earnest money deposited by

the petitioner stands forfeited.

6. Mr. S.K. Rungta, learned Senior Counsel appearing for the petitioner submitted that the forfeiture of the EMD by the respondent is without

authority of law. It was his submission that there has been a willful misrepresentation by the respondent in the public notice / at the time of calling of the bids, inasmuch as there is a discrepancy in the total area of the lodge as stated in the notice and the draft license deed. It was not stated, that, there is a substation in the basement which is impermissible. According to him, various discrepancies were pointed out by the petitioner in its letter dated February 13, 2017, which have not been answered to the satisfaction of the petitioner. He stated that the respondent being an instrumentality of State, was required to act fairly, justly and reasonably in terms of the requirement of Article 14 of the Constitution of India. He also submitted that the forfeiture of EMD in terms of Section 74 of the Contract Act is impermissible, as there was no Contract executed between the petitioner and the respondent. He would rely upon the judgment of the Supreme Court in the case reported as (2015) 4 SCC 136 Kailash Nath Associates v. Delhi Development Authority and Another.

7. On the other hand, Mr. Sri Harsha Peechara, learned counsel for the respondent, apart from reiterating the stand of the respondent in its pleading, would state that there is factually incorrect averment made in the writ petition, inasmuch as the notice was issued on January 04, 2017. According to him, the notice was issued on December 18, 2016. As per the terms and conditions of the bid, the same was to be submitted by the bidders on as is where is basis. That apart, the petitioner has also inspected the property in question before January 04, 2017, i.e the date of e-auction, on two occasions. He also submitted that the public notice clearly stipulated that the detail terms and conditions and other information are available on websites of NDMC and MSTC. He has also placed before me, the documents as were available on the website of the NDMC and MSTC to include a draft license deed, the one relied upon by the petitioner through Mr. Rungta to contend, the same stipulates the built up area as 17000 sq. ft. He further submitted, pursuant to the receipt of letter dated January 25, 2017, the respondent in its communication dated February 06, 2017 has clarified that the total built up area of the property in question is 22592.46 sq. ft. It was also clarified that there was no substation in the basement but only a feeder pillar, which is permissible. Despite that the petitioner did not come forward to execute the license deed. He submitted, the

petitioner had raised frivolous objections only to resile out of the transaction, for the reasons best known to the petitioner.Â He stated that the terms and conditions of the bid were very clear, which stipulated that the earnest money shall be forfeited in favour of the NDMC in case the applicant, after participating in the auction become successful e-bidder, withdraws the offer or makes modification therein or on acceptance of his application, fails to complete any of the formalities of the license within the period stipulated in conditions 6 and 7 and the allotment in such cases shall be deemed to be terminated.Â According to him, it is under the provisions of clauses 6 and 7 that the impugned action has been taken.Â He submitted that the judgment of the Supreme Court as relied upon by Mr. Rungta in Kailash Nath Associates (supra) has no applicability in the facts of this case.Â Â

8. Having heard the learned counsel for the parties, I may state here that when the writ petition was listed on March 14, 2017, this Court had in para 4 of the order recorded the submission made on behalf of learned counsel for the petitioner that if the respondent is willing to confirm the aspect of built up area is 22592.46 sq. feet and not 17000 sq. feet and clarify that the Electric Sub-Station in the basement is permissible in law, the petitioner will not press the other grounds taken in the petition.Â Pursuant thereto, it is noted this Court in its order dated May 12, 2017 has noted the submission of the learned counsel for the respondent that the actual area is 22592.46 sq. feet and in the earlier e-auction notice dated April 19, 2016 the area was inadvertently mentioned as 17000 sq. feet.Â Despite such a submission, a representation was also made on behalf of the petitioner that the petitioner is not willing to take the auction premises on license in view of the deficiencies pointed out.Â Â

9. Having noted the proceedings taken place from time to time in this writ petition, I deal with the submissions made by the learned counsel for the parties.

10. First and foremost is whether the notice for e-auction was issued on January 04, 2017 or on December 18, 2016.Â As is seen from the public notice, it is clear that the e-auction of the lodge was depicted as January 04, 2017.Â In other words, the e-auction was to take place on January 04, 2017.Â If that be so, e-auction cannot take place on the same day when the notice was issued.Â A bidder should have some time to examine / study

the contents of the notice including the terms and conditions of the license of the tourist lodge including the documents available on the website before

bidding for the same.Â So, it must be presumed that the said notice was issued at least before January 04, 2017.Â The public notice clearly stated

that the total built up area of the property including basement is about 22592.46 sq. feet.Â It appears that the notice was accompanied by the terrace

floor plan, front elevation, cross section 80-XY, plans of basement till the sixth floor depicting the area in square meters / square feet.Â This I say so,

the petitioner itself has annexed the plans along with the petition.Â There is no doubt that the total built up area depicted is about 22592.46 sq. feet.Â

I may state here, when the matter was listed on July 06, 2018, on the request of Mr. Peechara, learned counsel for the respondent to produce before

the Court the documents, which were uploaded on the website of the NDMC / MSTC (as stated in the notice), the matter was adjourned to July 12,

2018.Â On that day, Mr. Peechara has produced a compilation of documents, which inter-alia included (1) the terms and conditions for the bidding,

Clause 10 thereof clearly stipulated that the building lodge is being licensed for 30 years from the date of commencement of the license deed on

â??as is where is basisâ?, (2) a draft license fee, on which reliance has been placed by Mr. Rungta to contend that the same depicted 17000 sq. feet,

which area is at variance with the area notified in the public notice, which created confusion.Â Having noted the documents, filed by Mr. Peechara in

the Court, a copy of which was given to Mr. Rungta, it is clear that the draft License Deed was not given to the petitioner for the first time along with

letter dated January 12, 2017, as contended by Mr. Rungta.Â Having said that, it is also clear that the petitioner being in possession of the License

Deed depicting 17000 sq. feet could have raised the contradiction in the License Deed and the public notice before bidding.Â It did not, at least

nothing has been shown to me.Â So, it must be construed before the petitioner had submitted its bid, the petitioner had gone through the terms and

conditions in the public notice including the documents, which were available on the website of the NDMC / MSTC.Â That apart, the lodge was to be

licensed on â??as is where is basisâ?.Â The petitioner was required to inspect the property / building and then bid for the same.Â In fact, I agree

with the submission of Mr. Peechara that, the petitioner had inspected the property.Â Â This I say so because the petitioner has stated that â??the

respondent did not allow detail inspection, which clearly suggest that the petitioner did undertake the inspection of the property before submitting its bid. If the petitioner had an issue, that detail inspection was not provided, the petitioner should have objected to it / raised an issue. It appears no objection was ever raised on the nature of inspection. It is only after the receipt of letter dated January 12, 2017 that too after thirteen days, the petitioner had sought clarification from the respondent with regard to the built up area of the property / lodge; substation in the basement; the building being dilapidated etc. The so-called deficiencies, which have been pointed out by the petitioner could have been seen by the petitioner before bidding and clarification sought. Having not done that and having submitted the bid, which has been accepted, the petitioner has to face the consequence of not complying with the terms and conditions, which includes the forfeiture of the EMD. It must be held that the so-called deficiencies pointed out were as an afterthought.

11. Insofar as the judgment of the Supreme Court in the case of Kailash Nath Associates (supra), as relied upon by Mr. Rungta is concerned, the same is distinguishable inasmuch as the facts of the case are on February 18, 1982, the DDA acknowledged the receipt of Rs.78,00,000/-, accepted the appellant's bid and directed the appellant to deposit the remaining 75% by May 17, 1982. However, as there was a general recession in the industry, the appellant and persons similarly placed made representations sometime in May, 1982 for extending the time for payment of the remaining amount. The DDA set up a High Powered Committee to look into these representations. The High Powered Committee on July 21, 1982 recommended granting the extension of time to bidders for depositing the remaining amount of 75%. Based on the High Powered Committee's report, by a letter dated August 11, 1982, the DDA extended time for payment upto October 28, 1982 with varying rates of interest starting from 18% and going upto 36%. Another High Powered Committee was also set up by the DDA in order to find out whether further time should be given to the appellant and persons similarly situate to the appellant. The second High Powered Committee recommended that the time for payment be extended and specifically mentioned the appellant's name as a person who should be given more time to pay the balance amount. Despite the fact that on May

14, 1984 the DDA accepted the recommendations of the second High Powered Committee, nothing happened till December 01, 1987. Several letters had been written by the appellant to DDA from 1984 to 1987 but no answer was forthcoming from the DDA. By a judgment and order dated September 02, 1993, this Court held that as the auction was held as per terms and conditions of the auction, a dispute regarding the same is a matter of contract and cannot be gone into in proceedings under Article 226 of the Constitution. On facts, the Court found no force in the contention raised on behalf of the appellant regarding discrimination. An SLP against this order was also dismissed on December 16, 1993 by the Supreme Court stating that the appellant is at liberty to take whatever steps are permitted under law to challenge forfeiture of earnest money, which had been done by a letter of October 06, 1993. The appellant then filed a suit for specific performance on February 17, 1994 and in the alternative for recovery of damages and recovery of the earnest amount of Rs.78,00,000/-. Shortly after the suit was filed, on February 23, 1994, the DDA re-auctioned the premises which fetched a sum of Rs.11.78 Crores. The learned Single Judge by a judgment and order dated September 10, 2007 dismissed the appellant's suit for specific performance and damages but ordered refund of the earnest money forfeited together with 9% per annum interest. The learned Single Judge held as under:-

65. Defendant No.1 instead of following the aforesaid course, found merit in the representations received not only from the plaintiff but such similar situated parties. It is in view thereof that the matter went as far as setting up of two committees to repeatedly examine the matter and to come to a conclusion. The case of defendant no.1 was that the material produced by the plaintiff and such similar persons gave rise to a cause to extend the time for making the payment subject to certain terms and conditions. However, in view of the perception of defendant no.1 that the consent of UOI, defendant no.2, would be required, the land being Nazul land, the file was forwarded to defendant no.2. The matter did not rest at this since thereafter UOI did grant such consent but sent back the file of the plaintiff only on account of the fact that the land in question was not Nazul land. The net effect of this is that there was no permission required from the UOI and the decision taken by defendant no.1 to extend the time period for making the

payment, thus, stood as it is.

66. In my considered view, it is not open for defendant no.1 to state that while it recommended the case of other similarly situated parties in case of

Nazul land to the Government and obtained permission for grant of extension of time, in case of non-Nazul land where such permission was not

required, a different parameter was required to be followed. It may be mentioned at the cost of repetition that the plaintiff was a party which

volunteered to pay interest @18% per annum unlike some of the other parties. There is merit in the contention of learned Counsel for the plaintiff that

defendant no.1 after treating the contract as subsistent having extended time for making the payment was at least required to give a notice to the

plaintiff to perform the agreement prior to terminating the agreement and could not straightaway terminate the same. This conclusion can draw

strength from the observations in Halsbury Laws of England (supra) referred to aforesaid as also in Webb v. Hughes (supra). It is clearly a case

where there has been waiver of the time being essence of the contract by conduct of the parties and, thus, defendant no.1 was required to give notice

on the day appointed for completion of the contract failing which only termination could take place.

67. There were numerous communications exchanged between the parties. The recommendations of the two high-powered committees constituted by

defendant no.1 made its recommendations which were accepted by defendant no.1 vide its resolution dated 14.5.1984 (Ex. DW2/P-4). Having

accepted the recommendations, in the case of the plaintiff defendant no.1 was required to do nothing further but mistakenly referred the case to UOI

for its approval assuming the case to be one of Nazul land. Plaintiff sent repeated reminders vide letters dated 9-12-1985 (Ex.P-11), 20-10-1986

(Ex.P12), 10-12-1986(Ex.P-13), 10-02-1987 (Ex.P-14), 11-04-1987(Ex.P-16), 10-08- 1987(Ex.P-17) and 10-10-1987 (Ex.P-18) calling upon defendant

no.1 to give an offer of deposit of balance 25% of the premium so as to bring the total payment equivalent to 50% of the total premium and for release

of the possession of the land to the plaintiff for purpose of construction. Defendant no.1 vide its letter received on 1.12.1987 by the plaintiff (Ex.P-19)

sought the consent of the plaintiff to abide by the recommendations of the high-powered committee and the consent was duly given on the even date

(Ex.P-20). Thereafter no offer was made to the plaintiff and without any notice of compliance for payment, the letter of cancellation dated 6.10.1993

(Ex.P-26) was issued. It appears that defendant no.1 itself was not aware of the land being non-Nazul land as the first communication was addressed to the plaintiff only on 1.3.1990.

68. The present case is one where defendant no.1 has not even suffered a loss. The plot was to be purchased by the plaintiff at Rs.3.12 crores and it was finally sold to a third party at Rs.11.78 crores, i.e. almost three and a half times the price. During this period defendant no.1 continued to enjoy the earnest money of the plaintiff of Rs.78.00 lacs.

69. In view of the prolonged period, exchange of communications, the plaintiff making various offers but not complying with the initial terms, defendant no.1 taking its own time in the decision making process, I am of the considered view that the plaintiff is entitled to the refund of the earnest money of Rs.78.00 lacs but no further amount is liable to be paid to the plaintiff.

The DDA appealed against the Single Judge's judgment to a Division Bench of this Court. The Division Bench set aside the judgment of the Single

Judge holding that the forfeiture of the earnest money by the DDA was in order.

12. The Supreme Court in para 15 held as under-

“15. Having heard learned counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited under sub-clause

(iv) set out hereinabove, only in the case of default, breach, or non-compliance of any of the terms and conditions of the auction, or on

misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not

insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the

appellant, the DDA extended time at least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the

auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any

misrepresentation here by the bidder. Therefore, under sub-clause (iv), without more, earnest money could not have been forfeited.”

13. Similarly, in paras 41, 43.7 and 44 the Supreme Court held as under-41. It must, however, be pointed out that in cases where a public auction is

held, forfeiture of earnest money may take place even before an agreement is reached, 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. In such cases, Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

43.7Â 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.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further,

we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face

of the most basic principle on the award of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.Â??Â

14. From the above, it is clear the Supreme Court held in case of default, breach or non-compliance of any terms and conditions, the earnest money

could be forfeited but in the facts on a finding that the DDA itself had not insisted upon the payment of 75% of the balance amount, as the DDA

specifically requested the appellant therein to give their consent to make balance payment along with 18% interest and also there is a finding that, the

DDA extended the time at least twice; it held therefore, it is very difficult to say that there was a breach of any terms and conditions of auction as the

period of three months, which the DDA could have insisted upon had specifically been waived.Â In the case in hand, the NDMC has called upon the

petitioner to make certain deposit vide its letter dated January 12, 2017 with a stipulation that the same has to be completed within fifteen days.Â In

fact, the NDMC vide its letter dated February 06, 2017 had also granted seven days time to the petitioner to comply with the letter dated January 12,

2017, otherwise it would forfeit the earnest money deposited.Â So there was no waiver in the case in hand. Further, in terms of para 41 of the

judgment, the Supreme Court held forfeiture of earnest money can take place even before an Agreement is reached, which is the case herein.Â The

judgment of the Supreme Court is in the facts of that case, and as such distinguishable.Â Â

15. In view of my aforesaid discussion, I do not see any merit in the petition.Â The same is dismissed.Â No costs.

CM No. 9932/2017 (for stay)

In view of the order passed in the writ petition, the present application has become infructuous.