(2000) 07 DEL CK 0058

In the Delhi High Court

Case No : IA No. 5534/98 and Suit No. 922/76

Om Parkash Jain APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 04-07-2000

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 151

Citation : (2000) 55 DRJ 10 : (2001) 1 RCR(Civil) 589

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. R.K. Anand, Sh. Muneesh Malhotra and Sh. Akshilesh Kr. Rai, for the Appellant; Sh. Sanjeev Khanna, for the Respondent

Judgement

K.S. Gupta, J.—Om Parkash Jain, plaintiff filed this suit alleging that the firm- V. K. Industries and Fabricators was constituted on or about 10th September, 1966 and dissolved on or about 10th May, 1967 by mutual consent of the partners. He was a partner in that firm Along with defendants 4 to 6. Firm- V.K. Industries was duly registered under Small Scale Industries Scheme vide S.S.I. No. D-1/UP/ MTC/4219 dated 4th May, 1963 with the Government of Uttar Pradesh. Under an agreement dated 19th August, 1966, the plaintiff purchased the assets and goodwill of V.K. Industries. Thereafter V.K. Industries and Fabricators Along with the letter dated 1st October, 1966 forwarded the application forms duly completed in triplicate to the Director of Industries, Kanpur for grant of S.S.I. registration number as rerolled in its favor in place of said V.K. Industries.

2. It is alleged that defendants 1 to 3 through their auctioneer - M/s. Thakur and Company held a public auction for sale of re-rollable scrap on 5th November, 1966 at Shakurbasti Track Depot, Delhi. Four conditions of auction in its supplementary clause provided as under:-

(a) Only the bona fide re-rollers who wish to participate in the auction of re-rollers will send their duly authorised representatives to participate in the auction. They should carry with them a proper authority from their firm.

(b) That the Re-rollers'' representing bona fide bidders will produce a power of attorney and certificate from the Iron and Steel Controller, Calcutta and/or Secretary, Steel Re-rolling Mills, Association of India, Calcutta or Directors of Industries of States certifying that the respective bidders are the bona fide ones and are registered with either of the above authorities. These documents will be required to be produced before the depot auctioning authority (viz. Presiding Officer) to his entire satisfaction.

(c) That the material to be auctioned should be inspected and examined before hand at the place of availability and it should be noted that the sale is on ''as is where is basis'' and that no claim with regard to incorrect description of quality, nature of the materials would be tenable at the time of delivery.

(d) It is distinctly understood that although the material offered for sale is described as re-rollable scrap in the Iron and Steel Controller, Calcutta Scrap price schedule, yet it is possible that same percentage of wrought iron might be found mixed in it at the time of delivery. Such wrought iron items, if found, will have to be taken over by the purchaser (s) at the bid accept rate without any compensation to this effect. No sorting, choosing or picking whatsoever, would be permitted at the time of delivery."

3. It is further alleged that at the time of auction it was represented by the said auctioneer at the instance of Presiding Officer that the said conditions had been modified and the purchasers were required to produce the certificate of registration as re-rollers during the course of their taking delivery and in any event before taking delivery of the last Installment of the auctioned goods so purchased and it was not necessary that the bidder should be a re-roller on the date of bid. This declaration was acted upon by defendants 1 to 3 in the case of other bidders including the firm M/s. Altair Steel Rolling Mills who were not the certified re-rollers and obtained the certificate of registration two months after auction. It is stated that V.K. Industries and Fabricators through its representative Janki Prasad Tyagi gave bid and purchased 400 M.Ts. of scrap rails @ Rs.460/- per MT. The firm deposited Rs.46,000/- being 25% of the total sale consideration by way of earnest money with the said auctioneer who issued receipt No. 71 dated 5th November, 1966 on behalf of defendants 1 to 3. It further deposited a sum of Rs.1,38,000/- with the Chief Cashier & Pay Master, Northern Railway, Delhi vide cash receipt No. 162/512472 dated 16th November, 1966 towards the balance sale consideration. Rs.1,400/- were further deposited by the firm towards loading charges vide receipt No.990925 dated 18th November, 1966. It is further pleaded that V.K. Industries and Fabricators took delivery of 61.920 M.Ts. of scrap rails on 21st and 22nd November, 1966 of the total value of Rs.28,699,92 including load- ing charges. It also submitted an attested copy of registration certificate No.D1/UP/MTC/4219 in respect of V.K. Industries Along with letter dated 3rd December, 1966 with the Track Supply Officer for taking delivery of the rails 2ft. to 12 ft. purchased in the auction. It appears that the said certificate was considered insufficient. The firm received a

letter dated 9th December, 1966 from the Track Supply Officer Stating that it should produce a correct certificate in terms of the conditions of auction. The firm, Therefore, sent a reminder dated 12th January, 1967 to the Director of Industries, Kanpur in continuation of its application dated 1st October, 1966 for amendment in aforesaid SSI No.D1/UP/MTC/4219, in the name of V.K. Industries and Fabricators. The Director of Industries, Uttar Pradesh by its letter dated 24th February, 1967 informed the firm that the item of re- rolling and fabrication has been added in the registration certificate with amended name. Thereafter, the firm wrote to the Controller of Stores forwarding therewith an attested copy of the registration certificate being No.D1/UP/MTC/4219 dated 24th February, 1967. By the letter dated 11th May, 1967, the firm called upon the Controller of Stores to release the balance quantity of material in its favor without any delay. On receiving no reply thereto, the firm got a notice dated 17th February, 1968 issued to defendants 1 to 3. Yet another notice dated 30th May, 1968 was got issued through Sh. Bawa Shiv Charan Singh, Advocate by the firm to defendants 1 to 3 calling upon them to deliver the balance quantity of material etc. It is pleaded that a reply dated 5th December, 1968 was received from the said defendants to the notice dated 30th May, 1968 stating that as the balance material sold in the auction was the subject matter of investigation being conducted by the S.P.E., the balance quantity of material could be released on superdari in its favor on obtaining a release order from the competent court by it. It is claimed that the stand taken by defendants 1 to 3 to that effect is illegal and the plaintiff is entitled to the return of the sum of Rs.3,32,204/- paid towards the balance material not delivered with interest thereon @ 12% per annum from 23rd November, 1966 to 23rd March, 1976 and thereafter from 21st April, 1976 till the date of realisation together with Rs.75,000/- towards compensation as detailed in the Schedule annexed to the plaint. The firm got yet another statutory notice u/s 80 CPC served on the defendants. It was prayed that a decree of specific performance of the contract may be passed in favor of the plaintiff and defendants 1 to 3 be directed to deliver 338.080 M.Ts. of scrap rails to the plaintiff. In the alternative, suit be decreed for Rs.4,07,204/- with interest @ 12% per annum on that amount against defendants 1 to 3 in addition to awarding the costs of the suit.

4. Only defendants 1 to 3 have contested the suit by filing a joint written statement. By way of preliminary objections, it is alleged that the suit for specific performance is not maintainable; that the plaintiff has no locus standi to file the suit and that the suit against General Manager, Northern Railway, defendant No.2 and Controller of Stores, Northern Railway, defendant No.3 in their personal capacity is not legally maintainable. Suit is alleged to be barred u/s 69(2) of the Partnership Act. It is claimed that the suit is hopelessly barred by limitation. It is denied that any notice u/s 80 CPC was served by the plaintiff upon the answering defendants. It is pleaded that on 5th November, 1966, the Controller of Stores, Northern Railway held an auction for disposal of scrap steel rails etc. One of the conditions of the auction was that only such of the persons can bid at the auction

was that only such of the persons can bid at the auction who were the members of Steel Re-Rolling Mills Association of India or had been certified to be the bona fide re-rollers of the Iron & Steel Controller, Calcutta or the Director of Industries of the State concerned. Janki Prasad Tyagi gave bid on behalf of V.K. Industries and Fabricators and the bid was initially accepted. V.K. Industries and Fabricators deposited a sum of Rs.1,38,000/- with the Railways. On production of a certificate purported to have been signed by Sh. V.N. Dwivedi, District Industries Officer, Ghaziabad certifying that said V.K. Industries was a registered firm as re-rollers, the delivery of part of material was given to said Janki Prasad Tyagi on 21st November, 1966. Later on, on enquiry it was revealed that the said certificate produced by Janki Prasad Tyagi was a forged one. plaintiff and three others have been challaned for the offences under Sections 420/465/471 and 120-B IPC by CBI and the case is being tried by the Additional Chief Judicial Magistrate, New Delhi. As a result of the fraud perpetuated by the plaintiff and three others, the answering defendants were constrained to withhold the delivery of the balance quantity of material to them.

5. On merits, it is denied that the plaintiff was a partner of V.K. Industries and Fabricators at the relevant time or that the said partner- ship firm had been dissolved, as alleged. It is further denied that on the alleged dissolution of the said firm, the plaintiff alone is entitled to the assets of the firm and the present suit is maintainable at his behest. It is also denied for want of knowledge that said V.K. Industries and Fabricators was constituted on or about 10th September, 1966 or it was dissolved on or about 10th May, 1967 by mutual consent of the partners. It is further denied that the plaintiff purchased the assets and goodwill of V.K. Industries on 9th August, 1966, as alleged. Conditions (a) to (d) in the supplementary clause as set out in para No.6 of the plaint are admitted. It is stated that it was agreed that in case registration certificate as a re-roller from the Iron and Steel Controller, Calcutta or Secretary, Steel Re-Rolling Mills Association of India, Calcutta or Director of Industries of States was not brought by the bidders at the time of auction, they could produce the same before taking delivery of the sold material. Material to M/s. Altair Steel Rolling Mills was delivered after verification of its registration certificate by the competent authority. Rest of the allegations contained in para No.6 of the plaint have been denied. It is admitted that in the auction V.K. Industries and Fabricators purchased 400 M.Ts. of scrap rails @ Rs.460/- per M.T. and the bid sheet on its behalf was signed by Janki Prasad Tyagi. Receipt of the plaintiff''s notice dated 30th May, 1968 and reply thereto dated 5th December, 1968 by the answering defendants are not disputed. It is denied that a concluded contract was entered into between the parties for sale of the scrap rails. It is further denied that the plaintiff is entitled to the return of amount of Rs.3,32,204/- or interest thereon @ 12% per annum as claimed. It is claimed, on the contrary, that the plaintiff is liable to pay the ground rent for the ground occupied and for ensuring its safe custody @ 2% of the value of the material for every fortnight or part thereof or Rs.2/- per day or part of the date for each 1000 sq. ft. whichever is higher w.e.f.

16th November, 1967 and the answering defendants reserve their right to recover the same by filing a separate suit. It is further denied that the plaintiff is entitled to the delivery of 338.08 M. Ts. of scrap rails. Receipt of the notice u/s 80 CPC referred to in para No.21 of the plaint is denied.

6. On the pleadings of the parties, following issues were framed:-

"1. Has plaintiff got transferred in his favor the rights under the contract in dispute from the firm-V.K. Industries and Fabricators? If so, to what effect?

2. Is the suit within time?

3. If issues 1 & 2 are proved, is the plaintiff not entitled to specific performance of the contract?

4. Is the suit against defendants No.2 & 3 maintainable?

5. Did plaintiff serve notice u/s 80 of the CPC before the institution of the suit?

6. To what amount, if any, is the plaintiff entitled?

7. Relief.

7. Consequent upon the death of the plaintiff on 20th February, 1990, in is No.4092/90 under Order XXII Rule 3 CPC read with Section 151 CPC, Ghan- sham Dass Jain and Brij Bhushan Jain, sons of the deceased-plaintiff were allowed to be brought as plaintiffs in place of the deceased while his five daughters and the wife as defendants 7 to 12 by the order dated 14th November, 1990.

ISSUE NO.1

8. Ramdhan Lal, PW-4 deposed that he was a partner in V.K. Industries and Fabricators in 1966. Om Prakash, Manohar Lal and one Bansal were the other partners. He left the firm before 31st March, 1967. After he retired from the said firm, all the rights were given to Om Prakash. In cross-examination, he stated that a formal partnership deed was executed and he being illiterate cannot say whether the document mark ''A'' is the copy of that partnership deed. He admitted that the partnership deed was not got registered. It may be noticed that part of the said statement made by the wit- ness that after he retired from the firm, all rights were given to Om Prakash, plaintiff was not challenged on behalf of the contesting defendants. Sub-section (2) of Section 69 provides that no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. However, clause (a) appended to sub-section (3) of the said Section says that the provisions of sub-sections (1) and (2) shall not affect the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm. This case falls under the last part of said clause (a) and the suit is thus

maintainable at the behest of Om Prakash Jain, plaintiff. Issue is answered accordingly.

ISSUE NO.5

9. This issue seems to have been framed taking note of the averments made in para No.21 of the plaint regarding giving of a statutory notice u/s 80 CPC without disclosing its date to the contesting defendants. In response to the allegations made in paras 15 & 16 of the plaint, in corresponding paras of the written statement the contesting defendants have admitted the receipt of notice dated 30th May, 1968 u/s 80 CPC and also sending reply dated 5th December, 1968 by them to the plaintiff''s counsel. That being so, issue is answered in favor of the plaintiff.

ISSUE NO.2

Photostat copies of the notice dated 30th May, 1968 and the reply thereto dated 5th December, 1968 referred to in the preceding para are placed at pages 42 to 44 and 45 respectively on part-III file of the suit. It was contended by Sh. R. K. Anand, Sr. Advocate appearing for the plaintiffs that in terms of the reply dated 5th December, 1968, the contesting defendants undertook to deliver the balance quantity of the material on superdari with sufficient surety on V.K. Industries and Fabricators obtaining release order from the Court and thereafter at no point of time the defendants refused to release the material to the plaintiff and the present suit is thus within limitation. On the contrary, it was urged by Sh. Sanjeev Khanna for the defendants that after the issue of reply dated 5th December, 1968, the plaintiff filed an application on 25th October, 1971 before the concerned Additional Chief Judicial Magistrate, Delhi and by the order dated 27th October, 1971 passed by that Court, balance quantity of material was ordered to be given on superdari of Rs.1,50,000/- to V.K. Industries & Fabricators. Application filed by Union of India, defendant No. 1 on 23rd December, 1971 for recalling the order dated 27th October, 1971 was dismissed by the said Court by the order dated 11th January, 1972. Dissatisfied with the orders dated 27th October, 1971/11th, January, 1972, defendant No.1 went in revision to the Sessions Court and the Additional Sessions Judge who heard the revision, made reference to the High Court for quashing both the said orders. After notice, both these orders were set aside by the order dated 19th April, 1972 by this Court in Crl. R.No.72/1972. As part of the said submission, it was further contended by Sh. Khanna that through the said order dated 19th April, 1972, the plaintiff must have atleast learnt that defendant No. 1 was unwilling to release the balance quantity of material to V.K. Industries and Fabricators and the limitation for the purpose of filing the suit would have to be reckoned w.e.f. 19th April, 1972 and the present suit instituted on 21st April, 1976, is thus barred by limitation. It is not in dispute that the aforesaid orders dated 27th October, 1971/31st January, 1972 came to be set aside by the order dated 19th April, 1972 mainly on the grounds that in the matter of release of material the two conditions stipulated in Section 516A Cr.P.C. were not satisfied and no notice of the application seeking release was served on Union of India before passing the order dated 27th October, 1971. That being so, said 19th April, 1972 cannot be taken as starting point for computing limitation for the purpose of filing suit by the plaintiff. The retention of the balance material furnished a continuing cause of action to the plaintiff and the suit was thus instituted within the period of limitation.

ISSUES NO.3, 4 & 6

10. These issues are interlinked and can be taken together for discussion.

Let me first dispose of is No. 5534/98 u/s 151 CPC read with Section 33 of the Evidence Act filed by the contesting defendants praying that the certified copies of the statements recorded in R.C. No. 12/67 of C.S. Anand, Trilochan Singh, P.D. Malik, O.P. Saxena, Jadeshwar Singh, T. R. Sahani and S.K. Gour, PWs. be taken on record and read in evidence while deciding this suit. It is alleged that in the auction on 5th November, 1966, V.K. Industries and Fabricators gave bid and later on produced a certificate purported to be signed by V.N. Dwivedi, District Industries Officer, Ghaziabad certifying that V.K. Industries was registered as rerollers. On enquiry, this certificate was found to be forged and CBI filed challan against the plaintiff and three others for the offences under Sections 420/465/471 and 120B IPC. During the course of criminal trial, statements of the said PWs. were recorded and they were also cross-examined on behalf of the accused. Statement of Tilak Raj Sharsar, A.C.O. was recorded by a local commissioner on 4th March, 1993 and in that statement he stated that it is not possible to find out the addresses where the said PWs. are residing at present or if they are alive or not. Statements of the said PWs. are material for the just and fair decision of the case. Needless to say that the plaintiff has contested the application by filing reply.

11. u/s 33 of the Evidence Act the previous depositions of witnesses are admissible in subsequent proceedings when the witnesses cannot be produced by reason of death, cannot be found, are incapable of giving evidence or kept out of the way by the adverse party or if their presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable subject to the fulfilling of three conditions enumerated in the proviso appended to that Section. One of the conditions is that the questions in issue are substantially the same in the first as also in the second proceeding. It may be noticed that the statement of said Tilak Raj Sharsar was recorded on 4th March, 1993 while said is was filed after the expiry of a period of more than six years on 29th May, 1999 and no plausible Explanation has been given regarding that inordinate delay in the application. It has further not been disclosed in the application as to which of the said PWs. are alive or dead. These PWs. being employed with the Railways were the employees of Central Government and, if not dead, must be drawing pension and with slight diligence their present addresses can be ascertained from the concerned department. That apart, statements of the above PWs. had been recorded by the Criminal Court in

connection with the offences under Sections 420/465/471 and 120B IPC allegedly committed by the accused and considering the pleadings of the parties in this suit, the questions in issue in both the said proceedings cannot be substantially the same. The power u/s 33 is to be exercised with great caution and mere unavailability of the witnesses is not enough. In my view, the application does not make out sufficient cause for taking on record the certified copies of the statements of the said PWs. and to read them in evidence as prayed by the defendants. Accordingly, the application is dismissed.

12. Adverting to the issues, it is admitted case of the parties that in the auction held by the contesting defendants through their auctioneer M/s. Thakur and Company on 5th November, 1966, Janki Prasad Tyagi gave bid and purchased 400 M.Ts. of scrap rails @ Rs. 460/- per M.T. and amounts of Rs. 46,000/- and Rs. 1,38,000/- covering the total sale consideration were deposited on behalf of V.K. Industries and Fabricators on 5th November, 1966 and 16th November, 1966 respectively. It is also admitted that delivery of 61.920 M.Ts. of scrap rails was taken by said Janki Prasad Tyagi on behalf of the firm on 21st and 22nd November, 1966 and copy of registration certificate No.D1/UP/MTC/4219 concerning V.K. Industries submitted on behalf of V.K. Industries and Fabricators being found not in order, latter firm was required to produce a proper certificate through the letter dated 9th December, 1966 issued by Track Supply Officer. According to the contesting defendants, on enquiry said registration certificate was found to be fabricated and V.K. Industries and Fabricators was neither a certified rerolled on the date of giving bid i.e. 5th November, 1966 as required by the supplementary conditions nor did it apply for release of balance quantity of material on the strength of the certificate dated 24th February, 1967. It was, however, submitted by Sh. R.K. Anand for the plaintiffs that as pleaded in para No.6 of the plaint, the supplementary conditions had been modified by making announcement at the time of auction by the auctioneer at the instance of Presiding Officer that it was not necessary that the bidder should be a certified rerolled on the date of bid and this modified condition was also acted upon by the defendants in the matter of release of scrap material purchased by M/s. Altair Steel Rolling Mills who were not the certified rerollers on the date of auction. According to the learned counsel the defendants did not specifically traverse the said averments in their written statement and thus those will be deem to have been admitted by them under Order VIII, Rule 5 CPC. To appreciate the submission, said para No.6 of the plaint and also reply thereto on merits in the written statement need to be referred. After reproduction of four conditions in supplementary clause, it is alleged in the said para of plaint that it was further represented by announcement at the time of auction by the auctioneer at the instance of Presiding Officer that four conditions had been modified and the purchasers are required to produce the certificate of registration as re-rollers during the course of their taking delivery and in any event before taking delivery of the last Installment of the auctioned material; that it was not necessary that the bidder should be a re-roller on the date of bid so long as he satisfies the

authority that he is a bona fide re-roller while taking delivery of the material. It is further pleaded that this declaration was acted upon by the contesting defendants in the case of other bidders including M/s. Altair Steel Rolling Mills who were not the certified re-rollers and obtained the certificate of registration two months after auction and took delivery of the scrap material purchased. In said corresponding para of the written statement, conditions (a) to (d) as set out in para No.6 of the plaint have been admitted. It is alleged that it was agreed that in case the registration certificate as re-roller from the Iron & Steel Controller, Calcutta or Secretary, Steel Re-Rolling Mills Association of India, Calcutta or Director of Industries of States was not brought by the bidders at the time of auction, they could produce the same before taking, delivery of the purchased material. Material to M/s. Altair Steel Rolling Mills was delivered after verification of its registration certificate by the competent authority. It is further alleged that rest of the allegations contained in the para under reply are denied. It may be noticed that part of the modification in conditions listed at (a) to (d) in said para No. 6 of the plaint regarding production of registration certificate by a purchaser as re-roller at a later stage, is even admitted by the defendants. In my view, it is not necessary that every allegation in the plaint should be reproduced at length in the written statement for the purpose of denial. The sentence ''Rest of the allegations contained in the para under reply are denied'' in para No.6 of the written statement would mean that by implication it is not admitted by the defendants that it was not necessary that a bidder should be a re-roller on the date of giving bid. Thus, the above submission advanced on behalf of the plaintiff is repelled being without merit.

13. Onus to prove the aforesaid allegation was on the plaintiff. It is in the deposition of J.D. Jain, PW-5 that he was not present at the time the auction took place on 5th November, 1966. It is also in the deposition of Pali Ram Jain, one of the partners of M/s. Altair Steel Rolling Mills, PW-3 that no terms and conditions of auction were read out in his presence. Janki Prasad Tyagi who gave the bid on behalf of V.K. Industries and Fabricators, has not been examined by the plaintiff. In the face of said evidence, plaintiff must be held to have failed to prove that it was announced in the auction that it was not necessary that a bidder should be a rerolled on the date of bid as alleged.

14. This brings me to the objections taken by the defendants regarding V.K. Industries and Fabricators not being the certified re-roller on the date of bid and failure to apply for release of the material by the said firm on the strength of the certificate dated 24th February, 1967. Copies of the deed of agreement dated 19th August, 1966 (at pages 4 & 5), letter dated 12th January, 1967 together with the annexures (at pages 28 to 31), letter dated 29th March, 1967 (at page 35), and letter dated 11th May, 1967 (at page 36 on part-III file) filed by the plaintiff, were admitted on behalf of the contesting defendants on 15th February, 2000. Said agreement dated 19th August, 1966 indicates that Swatantra Kumar, partner of V.K. Industries, Ghaziabad had agreed to sell the existing premises of the factory and also the goodwill of said firm to Om Prakash Jain, plaintiff on the

terms and conditions contained therein. Letter dated 12th January, 1967 was sent by V.K. Industries and Fabricators to the Director of Industries, Kanpur in continuation of its earlier letter dated 1st October, 1966 regarding amendment in SSI registration No.D1-UP/MTC/4219 consequent upon the purchase of firm-V.K. Industries by it. In the copy of the application sent Along with the said letter dated 1st October, 1966 attached to the letter dated 12th January, 1967, against the ''Date of starting production'' at Serial No.5 it is stated that the production is to be started on receipt of material. Against the column of ''Motive Power'' at Serial No.8 it is noted that no power is installed and 250 H.P. is to be installed. Under the column ''Name of the machine with specifications'' on the reverse of page 31 it is mentioned that re-rolling mill plant with accessories is to be installed. Omitting immaterial portion, the contents of the letter Ex. PW-5/1 dated 24th February, 1967 sent by the Director of Industries, U.P. to V.K. Industries and Fabricators, which are material, are reproduced below:-

"Please refer to your application No. Nil dated 12.1.67 forwarded through the Distt. Industries Officer, Ghaziabad for enlistment of additional item in your original registration certificate No.D1/UP/MTC/4219 issued in favor of M/s .V .K. Industries, Ghaziabad, and change of name.

In this connection it is to inform you that the following items have been added in the registration certificate.

Re-Rolling and Fabrication Work (Proposed).

Please keep it Along with the original Certificate already issued in favor of M/s. V.K. Industries, Ghaziabad No.D1/UP/MTC/4219."

15. Aforesaid letter dated 29th March, 1967 was sent by V.K. Industries and Fabricators to the Controller of Stores, Northern Railway seeking release of lot Nos. 1/100, 5/63, 6/63 and 7/63, weighing 400 M.Ts. of steel rolls in its favour. In this letter it is mentioned that Along with letter dated 18th November, 1966, the firm had sent the attested copy of the certificate of registration under small scale unit being No.D1/UP/MTC/4219 and despite deposit of Rs.1,85,610/- with the Northern Railway in the month of November, 1966, the material of the said lots had not been delivered to the firm. It was requested that the Store Keeper at Shakurbasti, Track Depot may be advised to deliver the material to the firm without any further delay. Relevant portion of yet another letter dated 11th May, 1967 referred to above sent by V.K. Industries and Fabricators to the Controller of Stores, Northern Railway seeking release of the balance quantity of material, reads as under:-

"It will not be out of place to mention here that the steel has been de-controlled since 1st May, 67 and hence presently there is no restriction of sale of any type of steel to anybody.

Furthermore, we may also submit for your kind information that this Rolling Mill has been running since last many years. Formerly it was registered under the name of M/s. V.K. Industries which we had purchased outright. The earlier firm was also registered with the Director of Industries as a Re-Rolling Mill and Nut Bolts Manufacturing Unit, but since we purchased the running concern we changed its name to M/s. V.K. Industries and Fabricators, Ghaziabad.

From the above it will be clear that the above factory was a registered Unit with the Director of Industries even before the auction of the material.

Under the circumstances explained above, we are confident that you will very kindly take immediate steps to release the material in our favor without any further delay."

16. Towards the end of examination-in-chief, Ramdhan Lal, PW-4 one of the partners in erstwhile firm-V.K. Industries and Fabricators stated that the business of firm was being looked after either by Om Prakash Jain or his younger brother, J.D. Jain. In cross-examination, he stated that he did not know whether V.K. Industries and Fabricators had no premises, no machines and no electricity connection. J.D. Jain, PW-5 in his cross-examination stated that his elder brother Om Prakash Jain, plaintiff purchased V.K. Industries from Swatantra Kumar and a registered sale deed was executed but he did not have the copy thereof. He admitted that Swatantra Kumar did not have the certificate from the Directorate of Industries as re-roller. On 18th November, 1966, the certificate of V.K. Industries was given and not that of V.K. Industries and Fabricators. It is further in his cross-examination that V.K. Industries and Fabricators sent the reply to the letter dated 9th December, 1966 sometime in February, 1967 but he did not have the copy of that letter with him. Reminder was sent in May, 1967.

17. The plaintiff has not filed the copy of registration certificate No.D1/UP/MTC/4219 in the name of V.K. Industries. From the admission referred to above made in cross-examination by J.D. Jain, PW-5 it is evident that the said firm did not have the certificate from the Directorate of Industries, Kanpur as re-roller. Combined reading of the abovementioned letter dated 12th January, 1967 together with its enclosures and letter dated 24th February, 1967 coupled with the said statement made in cross-examination by Ramdhan Lal, PW-4, would reveal that after the alleged purchase of the firm-V.K. Industries by Om Prakash Jain, plaintiff, firm- V.K. Industries and Fabricators proposed to install a re-rolling plant and in addition to change of name in registration certificate No.D1/UP/MTC/4219 issued in favor of V.K. Industries, Ghaziabad, the item - ''Re-Rolling and Fabrication Work (Proposed), was allowed to be added in the said certificate on 24th February, 1967. Thus, on the date of making bid neither V.K. Industries nor V.K. Industries and Fabricators were the certified re-rollers as required by aforesaid condition (b) of the auction in the supplementary clause. Furthermore, as may be seen from the said letters dated 29th March, 1967 and 11th May, 1967, they were written with reference to aforesaid certificate No. D1/UP/MTC/4219 in the name of V.K. Industries. There is no evidence to suggest that the delivery of balance material was claimed by V.K. Industries and Fabricators on the basis of above certificate dated 24th February, 1967. In my opinion, non

fulfilment of said condition (b) alone which was a prerequisite of auction sale, by V.K. Industries and Fabricators disentitles it from claiming the decree of specific performance prayed for.

18. Relying on the decisions in Tej Singh Vs. State of U.P. and Others, and Indian Iron and Steel Co. Ltd. Vs. C.G. Engineering Private Ltd., , it was argued by Sh. Sanjeev Khanna that the plaintiffs otherwise also are not entitled to the decree of specific performance as it is neither pleaded in the plaint that the balance quantity of material is not an ordinary article of commerce or is of special value or interest to the plaintiffs or that it consists of the goods which are not easily obtainable in the market nor have they lead any evidence to that effect as required by Section 10 of the Specific Relief Act, 1963. There is considerable merit in this submission.

Therefore, on both the said grounds the decree of specific performance of contract prayed for is declined.

The amount of Rs. 4,07,204/- for which decree is sought to be passed in the alternative, includes the amount of Rs. 75,000/- towards compensation and interest @ 12% per annum from 23rd November, 1966 onwards. It is not in dispute that out of the total amount of Rs. 1,85,400/- including the amount of loading charges deposited by V.K. Industries and Fabricators, material of the total value of Rs. 28,699.92 including loading charges was delivered to the said firm through Janki Prasad Tyagi on 21st and 22nd November, 1966. Said claim for Rs. 75,000/- towards compensation is not supported by any evidence adduced by the plaintiffs. As regards claim for interest, from the conditions of auction in supplementary clause referred to in para No. 6 of the plaint, it is manifest that the object behind these conditions was that the scrap steel rails be purchased for re-rolling only by the actual users who were the re-rollers certified by any of the given agencies on the date of bid. V.K. Industries and Fabricators who was not even qualified to bid in the auction, purchased 400 M.Ts. of scrap rails and clandestinely took delivery of 61.920. M.Ts. of scrap rails on 21st and 22nd November, 1966. Not only that, because of the litigation the defendants have been forced to keep in safe custody the balance quantity of material for over a period of 33 years by now for no fault on their part. In these circumstances, the plaintiffs are not entitled to pursuit and pendente lite interest on the amount of Rs. 1,56,700/- to be refunded. Defendants 2 & 3 are the functionaries of defendant No. 1 and, Therefore, decree for the said amount is to be passed only against defendant No. 1. Issues are answered accordingly.

ISSUE NO.7

In view of my findings on the said issues, a decree for Rs.1,56,700/- with proportionate costs is passed against Union of India, defendant No. 1. Defendant No. 1 is, however, allowed one month time to pay the decretal amount to the plaintiffs. In case the payment is not made within the said period, the plaintiffs will be entitled to future interest @ 6% per annum till realisation on the said sum of Rs.1,56,700/-.

