

U.P. AVAS EVAM VIKAS PARISHAD & ORS.

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v.

OM PRAKASH SHARMA

(Civil Appeal Nos. 3908-3909 of 2013)

APRIL 18, 2013

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**[CHANDRAMAULI KR. PRASAD AND  
V. GOPALA GOWDA, JJ.]**

*Contract Act, 1872 – ss. 3 and 4 – Auction of plot – Held by Housing Board – Under supervision of an officer of the Board – Plaintiff being the highest bidder deposited earnest money – Later the bid amount rejected by the competent authority – Suit filed to declare the rejection order as illegal and void – Decreed by trial court – Decree set aside in first appeal – High Court in second appeal confirmed the decree – Held: Until final acceptance of the bid, the highest bidder acquires no-vested right to have the auction concluded in his favour – An authority falling under Article 12 of the Constitution, is not bound to accept the highest bid in the interest of public revenue – In the present case, since the final bid was not accepted, there was no concluded contract in favour of the highest bidder – Thus, no legal right accrued in favour of the plaintiff to invoke remedy available u/s. 34 of Specific Relief Act, seeking declaratory relief – Uttar Pradesh Avas Evam Vikas Parishad Adhinyam, 1965 – ss. 12 and 16 – Uttar Pradesh Avas Evam Vikas Parishad (Delegation of Powers by the Board and the Housing Commissioner) Rules, 1968 – r.3 – Constitution of India, 1950 – Article 12 – Specific Relief Act, 1963 – s.34.*

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*Uttar Pradesh Avas Evam Vikas Parishad Adhinyam, 1965 – s.88(2) – Suit against the Housing Board – Without issuing notice – Maintainability of the suit – Held: Notice u/s. 88(2) is mandatory – Hence suit instituted without issuing notice, not maintainable.*

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A *Practice and Procedure – New plea – Raising of – Permissibility – Held: A plea on legal ground can be raised even at appellate stage.*

B Appellant-authority conducted public auction of the plot in question, under supervision of Assistant Housing Commissioner of the appellant-authority. The respondent offered highest bid, and as per the terms and conditions of the auction, deposited the earnest money. Thereafter, the respondent was informed that the Housing Commissioner of the Board rejected the bid amount of C the respondent.

D The respondent filed a suit seeking declaration that the auction held in favour of the respondent was binding on the appellant-Board and rejection thereof was illegal and void. Trial court decreed the suit. First appellate court allowed the appeal of the appellant-Board setting aside the decree. The High Court, in second appeal, confirmed the decree, setting aside order of first appellate court. Review against the order of the High Court was also E dismissed. Hence the present appeal.

Allowing the appeal, the Court

F HELD: 1.1. The bidder who has participated in tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. So long as an order regarding final acceptance of the bid had not been G passed by the Chairman of the Housing Board, the highest bidder acquires no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. The 'State' or the Authority, which can be held to be a 'State' within the H meaning of Article 12 of the Constitution, is not bound to

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**accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue. [Paras 27 and 28] [219-H; 220-A; 221-C-E]** **A**

**1.2. The plaintiff-respondent had not acquired any right and no vested right has been accrued in his favour in respect of the plot in question, merely because his bid amount was highest and he had deposited 20% of the highest bid amount along with earnest money with the Board. In the absence of acceptance of bid offered by the plaintiff to the competent authority of the first defendant, there is no concluded contract in respect of the plot in question. [Para 29] [224-B]** **B**

***State of U.P. vs. Vijay Bahadur Singh 1982 (2) SCC 365; Rajasthan Housing Board vs. G.S. Investments and Anr. 2007 (1) SCC 477; 2006 (7) Suppl. SCR 868; Laxmikant vs. Satyawalan 1996 (4) SCC 208; 1996 (3) SCR 532; State of Orissa v. Harinarayan Jaiswal 1972 (2) SCC 36; 1972 (3) SCR 784 – relied on.*** **D**

**1.3. The relief sought by the plaintiff in the original suit that non-acceptance of his bid was illegal and void, is not maintainable in law as the plaintiff did not acquire legal right in respect of the plot in question. It is an undisputed fact that the final bid was not accepted by the third defendant. Further, even assuming that the Assistant Housing Commissioner had the authority to supervise and conduct the public auction and the authority to accept the final bid of the plaintiff, he did not accept the bid of the plaintiff in writing and communicated the same to him. Therefore, there was no concluded contract in favour of the plaintiff in relation to the offer made by him, whose offer was highest in public auction. [Paras 32 and 33] [225-D; 226-D-E]** **E**

**1.4. Section 16 of the Act confers power upon the** **H**

- A Board to dispose of its property as per Rule 3 of the U.P. Avas Avam Vikas Parishad (Delegation of Powers by the Board and the Housing Commissioner) Rules, 1968. The Board has power under Section 12(1) of the Act to delegate its power either to a Committee or the Housing Commissioner or any other officer in exercise of its power to discharge its functions. It was the case of the defendants that the Assistant Housing Commissioner was not delegated this power by the Board. In this regard, there was no pleading of the plaintiff except the averments made in the plaint. Further there is no communication by the first defendant regarding acceptance of the proposal of the highest bid of the plaintiff as required under Section 3 of the Contract Act, 1872. Unaccepted offer of the plaintiff does not create any right or any obligation on the part of the defendant to execute the lease deed. [Paras 34 and 35] [227-B-D]

*Bhagwan Das Goverdhan Das Kedia vs. Girdhari Lal and Co.* AIR 1966 SC 543: 1966 SCR 656 – relied on.

- E *Pharmaceutical Society of Great Britain vs. Boots Cash Chemists(Southern) Ltd.* (1952) 2 QB 795 – referred to.

- 1.5. The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case. Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. The communication of acceptance of the highest bid is necessary for concluding the contract. Therefore, there is no concluded contract in favour of the plaintiff in respect of the plot in question and the plaintiff cannot claim any legal right and question of enforcement of the said right as provided under Section 34 of the Specific Relief Act seeking declaratory relief. [Para 36]
- H [228-C-E]

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*Haridwar Singh vs. Begum Sumbrui* AIR 1972 SC 1942: A  
1972 (1) SCR 673 – relied on.

1.6. The substantial questions framed by the court in the second appeal did not arise for its consideration. The High Court ought to have noticed that the legal right claimed by the plaintiff seeking relief under Section 34 of the Specific Relief Act on the basis of the pleadings, is wholly untenable in law. In view of the fact that no legal right accrued in favour of the plaintiff in the absence of a concluded contract, no right was accrued upon the bidder in relation to the property in question. Therefore, the suit itself is not maintainable and the suit filed on the basis of the alleged cause of action did not arise. Hence, the trial court could not have granted any relief by not framing the relevant and proper issue and answering the same. The conclusion arrived at by the first appellate court in dismissing the suit is perfectly legal and valid. The said judgment has been erroneously interfered with by the High Court by framing substantial questions of law. In fact and in law, the aforesaid substantial questions do not arise for its consideration and answer the same in favour of the plaintiff, which are erroneous in law. [Para 37] [228-G; 229-A-E] C D E

2. To institute a suit against the first defendant-appellant, the plaintiff-respondent was required to issue notice under Section 88(2) of the Act which is mandatory in law. No such notice was issued to the first defendant. The plea taken by the plaintiff that the defendants have waived their right in urging their plea that the suit is not maintainable for non-issuance of notice under Section 88(2) to the first defendant for institution of suit, is wholly untenable in law. The maintainability of the suit on the ground of non issuance of a statutory notice to the first defendant prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the F G H

A **second appeal; this is well established principle of law. This aspect of the matter has not been considered by the trial court while answering the relevant contentious issues. The second appellate court too did not consider this important legal aspect of the case. Therefore, the**  
 B **plaintiff has no right to institute a suit in absence of the notice under Section 88(2) of the Act, which is mandatory in law. [Para 31] [224-F-H; 225-A-C]**

*Pradyat Kumar vs. Chief Justice of Calcutta* AIR 1956 SC 285: 1955 SCR 1331; *Sahni Silk Mills (P) Ltd. vs. ESI Corpn.* 1994 (5) SCC 346: 1994 (1) Suppl. SCR 626; *Director General, ESI vs. T. Abdul Razak* 1996 (4) SCC 708: 1996 (3) Suppl. SCR 80; *The Barium Chemicals Ltd. vs. The Company Law Board and Ors.* AIR 1967 SC 295: 1966 SCR 311; *State of Orissa vs. Commissionr of Land Records and Settlement* 1998 (7) SCC 162: 1998 (1) Suppl. SCR 130; *CESC vs. Subhash Chandra Bose* 1992 (1) SCC 441: 1991 (2) Suppl. SCR 267; *Hassan Co-operative Milk Producers's Union Ltd. vs. ESI.* 2010 (11) SCC 537: 2010 (5) SCR 232 – cited.

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**Case Law Reference:**

	1955 SCR 1331	cited	Para 10
	1994 (1) Suppl. SCR 626	cited	Para 14
F	1996 (3) Suppl. SCR 80	cited	Para 14
	1966 SCR 311	cited	Para 14
	1998 (1) Suppl. SCR 130	cited	Para 15
G	1991 (2) Suppl. SCR 267	cited	Para 16
	2010 (5) SCR 232	cited	Para 16
	2009 (6) SCR 663	cited	Para 27
H	1982 (2) SCC 365	relied on	Para 28

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<b>2006 (7) Suppl. SCR 868</b>	<b>relied on</b>	<b>Para 28</b>	<b>A</b>
<b>1996 (3) SCR 532</b>	<b>relied on</b>	<b>Para 28</b>	
<b>1972 (3) SCR 784</b>	<b>relied on</b>	<b>Para 28</b>	
<b>(1952) 2 QB 795</b>	<b>referred to</b>	<b>Para 34</b>	<b>B</b>
<b>1966 SCR 656</b>	<b>relied on</b>	<b>Para 35</b>	
<b>1972 (1) SCR 673</b>	<b>relied on</b>	<b>Para 36</b>	

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3908-3909 of 2013.** **C**

From the Judgment & Order dated 28.5.2010 in SA No. 113 of 2001, dated 18.4.2011 in CMRA No. 215947 of 2010 in SA No. 113 of 2001 of the High Court of Judicature at Allahabad. **D**

Rakesh Dwivedi, Vishwajit Singh, Abhindra Maheshwari, Sansriti Pathak, Pankaj Singh for the Appellants.

Ranjeet Kumar, Varun Goswami, Rajesh Singh, R.C. Kaushik for the Respondents. **E**

The Judgment of the Court was delivered by

**V. GOPALA GOWDA, J. 1. Leave granted.**

2. These appeals are directed against the judgment and orders dated 28.5.2010 and 18.4.2011 passed in Second Appeal No.113 of 2001 and CMRS No.215947/2010 by the High Court of Allahabad in allowing the second appeal by answering the substantial questions of law framed in favour of the respondent-plaintiff and rejecting the CMRS No.215947/2010 in the aforesaid second appeal urging relevant facts and legal contentions in support of the appellant-defendant's case. **F**  
The brief facts are stated for the purpose of appreciating the factual and rival legal contentions urged on behalf of the parties, in view to find out as to whether the impugned judgment and **G**  
**H**

A orders under challenge in these appeals are required to be set aside by this Court in exercise of its jurisdiction.

B 3. The ranking of the parties is referred to in the judgment as has been assigned before the 1st Additional Civil Judge, Bareilly for the sake of convenience.

C 4. The first defendant (appellant herein) is a statutory body created under the Uttar Pradesh Avas Evam Vikas Parishad Adhinyam, 1965 for development of colonies, residential plots, commercial plots and complexes in the State of Uttar Pradesh.

D The first defendant on 4.3.1977 published in the local newspapers for auction of nine shops and a plot earmarked for Cinema Hall measuring 3441.94 sq. meters in Izzat Nagar, Scheme No.1, Block C and D in Bareilly District specifying the date of auction and furnishing necessary information. According to the plaintiff, the reserved price of the Cinema plot was fixed at Rs.1,80,200/- and the auction of the property was conducted on 11.3.1977 under the supervision of one Mr. Raj Kumar Singh Bisen, the then Assistant Housing Commissioner of the first defendant Board. In the auction, the plaintiff (respondent E herein) offered the highest bid of Rs.1,31,500/- and as per the terms and conditions of the auction, he had deposited Rs.26,300/- i.e. 20% of the bid amount, plus Rs.500/- as earnest money.

F 5. In response to the plaintiff's representations made to the first defendant on 24.5.1977 and 1.6.1977 asking for issuance of the allotment letter in his favour, the Assistant Housing Commissioner informed the plaintiff vide his letters dated 26.5.1977 and 8.7.1977 stating that the third defendant Housing Commissioner of the Board had rejected the bid amount deposited by the plaintiff and the same was refunded by way of demand draft.

H 6. The plaintiff filed original suit bearing No.143 of 1977 in the Civil Court, Bareilly challenging the action of the first defendant with regard to the allotment of plot and in the said

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suit the first defendant filed written statement. The learned Civil Judge, Bareilly after conducting the trial, answered the issues framed by it, on proper appreciation of documentary and oral evidence in favour of the plaintiff and passed its judgment and order dated 17.12.1977 decreeing the suit as prayed by the plaintiff.

7. Aggrieved by the aforesaid judgment and order passed by the trial court, the first defendant filed First Appeal No.107 of 1978 before the High Court urging various legal contentions. The High Court by its order dated 20th May, 1987 after examining rival factual and legal contentions set aside the judgment and order of the trial court and remanded the matter to the trial court for its reconsideration. After the remand order passed by the High Court, the first defendant filed its additional written statement before the trial court. The trial court considered the entire pleadings, evidence on record and examined three more witnesses. Again it passed the decree in favour of the plaintiff by order dated 24.9.1993. Against the said judgment, the defendant filed first Appeal No.67 of 98 before the District Judge. The learned District Judge allowed the appeal with costs by setting aside the impugned judgment and decree of the trial court by its order dated 2.2.2000.

8. On 10.2.2000, aggrieved by the impugned judgment and decree passed by the first appellate court, the plaintiff filed Second Appeal No.113 of 2001 before the High Court urging various legal contentions. The High Court on 28.5.2010 allowed the appeal by answering the substantial questions of law framed by it in the Second Appeal and set aside the judgment dated 2.2.2000 of the first appellate court.

9. While answering the substantial questions of law framed by it, the High Court has held that the judgment of the first appellate court was contrary to record as the same is passed without proper application of mind. It is the case of the defendants that the High Court while passing the impugned judgment has completely ignored to consider the provisions of

A Section 12 of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as 'the Act'). Section 12 of the Act, reads as under:

"12. Delegation of powers.-

B (1) Subject to the provisions of this Act and the rules, the Board may by general or special order delegate, either unconditionally or subject to such conditions, including the condition of review by itself, as may be specified in the order, to any committee appointed by it or to the Housing  
C Commissioner or any officer of the Board such of its powers and duties under this Act, as it may deem necessary.

D (2) Subject to the provisions of this Act and the rules, the Housing Commissioner may by general or special order delegate, either unconditionally or subject to such conditions, including the condition of review by himself, as may be specified in the order, to any officer of the Board such of his powers and duties under this Act, not being  
E powers and duties delegated to him under sub-section (1), as he may deem necessary."

Section 12 provides powers to the Board for delegation of its powers to the Housing Committee or to the Housing Commissioner or any officer of the Board.

F 10. The defendants aggrieved by the said judgment filed a review application challenging the findings and reasons recorded in the impugned judgment contending that there was an error apparent on the face of the record and therefore  
G prayed for review of the said judgment and order, which was dismissed by the High Court after hearing the parties vide its order dated 18.4.2011. Therefore, the defendants have filed these appeals urging the following legal questions and grounds:-

H a. Whether the High Court was correct in ignoring the

- fact that the Housing Commissioner had never made any delegation of power with regard to accept/reject the bid in favour of the Assistant Housing Commissioner, hence the question of producing any order of delegation by first defendant Parishad never arose and as it was the plaintiff who based his contention that the power to accept the highest bid was delegated by the Housing Commissioner to the Asstt. Housing Commissioner, therefore, he ought to have produced such delegation power in support of his claim? A
- b. Whether the High Court was correct in ignoring that as per the terms and conditions of the auction of the properties mentioned in the booklet/printed format, the auction was subject to the approval of the Housing Commissioner and, therefore, the conclusion of the High Court in this regard is contrary to the facts and the same is sustainable in law? B C D
- c. Whether the High Court was correct in ignoring that the then Assistant Housing Commissioner was deputed only to supervise and conduct the auction as a ministerial officer and had neither any authority to accept the bid nor did he accept the said bid at any stage? E F
- d. Whether the High Court was correct in ignoring that the Housing Commissioner was the only Competent authority to accept or reject the bid and the bid of the plaintiff was rejected by him and consequently, there was no concluded contract of sale of the property in his favour as claimed by him and no allotment letter was ever issued to him? G
- e. Whether the High Court was correct in ignoring that H

A as per the maxim “delegatum non protest delegare”, the statutory power must be exercised only by the body and office to whom it has been conferred and none else can discharge the function entrusted to it by law?

B f. Whether the Hon’ble High Court was correct in  
 C ignoring the judgment of this Hon’ble Court in the  
 D case of *Pradyat Kumar vs. Chief Justice of Calcutta*<sup>1</sup> wherein the Supreme Court observed that  
 “it is well recognized that the statutory functionaries exercising the power of delegation cannot be said to have delegated such functions merely by deputing responsible and competent officials to enquire and report. This is the ordinary mode of exercise of any administrative power”?

11. Mr. Rakesh Dwivedi, learned senior counsel on behalf of the defendants submitted that the High Court was not correct in ignoring the fact that the Housing Commissioner had never made any delegation of power in favour of the then Assistant  
 E Housing Commissioner of the Board, in regard to accept or reject the bid of the plaintiff, therefore, the question of producing the order of delegation of his power said to have been given by the first defendant in his favour did not arise and it was the plaintiff who based his claim contending that power to accept  
 F the highest bid was delegated by the Housing Commissioner to the then Assistant Housing Commissioner though there is no such specific plea in the plaint presented by the him except pleading the averments at paragraph 5 that as per the terms and conditions of acceptance of bid it was final and binding  
 G on the fall of hammer and the same did not require the acceptance or rejection by defendants or any authority what so ever. Therefore, the High Court has committed serious error in law in framing the substantial question of law in this aspect and

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 1. AIR 1956 SC 285.

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answered the same in favour of the plaintiff, by concurring with the findings of the trial court in drawing an adverse inference under Section 114 of the Evidence Act with regard to non-production of the order of delegation purported to have passed by the Housing Board in favour of the then Assistant Housing Commissioner or the Housing Commissioner delegating his power to the then Assistant Housing Commissioner. In the absence of such pleading, and also in the absence of evidence and contentions urged on behalf of the plaintiff, neither the trial court nor the High Court should have accepted it and it could not have framed the substantial question of law in this regard and answered the same in favour of the plaintiff.

12. It is further contended by the learned senior counsel that the High Court was not right in ignoring the terms and conditions of the public auction mentioned in the booklet/printed format particularly Condition No.5 by which the auction of the property in question was subject to the approval of the Housing Commissioner. The High Court has recorded the finding of fact while answering the substantial questions of law framed at (c) in favour of the plaintiff by placing reliance upon Section 106 of the Indian Evidence Act. Therefore, the finding recorded by the High Court is erroneous in law and the same is liable to be set aside.

13. Further, it is urged by the learned senior counsel that the High Court has committed an error both on facts and in law and also that it has ignored the fact that the then Assistant Housing Commissioner was deputed only to supervise and conduct auction of the property as ministerial officer and he had neither any authority to accept the bid nor he had accepted the bid at any stage.

14. Another ground urged by the learned senior counsel on behalf of the defendant is that the High Court has ignored the fact that Housing Commissioner of the Board was the only competent authority to accept or reject the bid of the plaintiff and in fact he had rejected the offer and there was no

A concluded contract of sale of the plot in favour of the plaintiff  
 as claimed by him. No allotment letter was ever issued in his  
 favour and in the absence of the same, the prayer of the plaintiff  
 that the auction of the property was held in relation to the plot  
 in question under Scheme No.1 at Bareilly in favour of the  
 B plaintiff, is final and binding and non-acceptance of the same  
 by the third defendant-Housing Commissioner who has  
 rejected the bid of the plaintiff and communicated the same vide  
 its letters dated 26.5.77 and 8.7.77 by the then Assistant  
 Housing Commissioner in relation to Cinema Hall was illegal  
 and void and the same has no effect on the status of plaintiff  
 C as owner/allottee thereof is wholly untenable in law. Another  
 contention urged by the learned senior counsel is that the third  
 defendant-Housing Commissioner has no power to delegate  
 his authority to another officer in exercise of authority under  
 Section 12(2) of the Act. Section 12(2) provides for a statutory  
 D bar upon him from further delegation of the functions and  
 powers which have been delegated upon him by the Board. He  
 has placed reliance on the decisions of this Court in *Sahni Silk  
 Mills (P) Ltd. vs. ESI Corpn.*<sup>2</sup>, *Director General, ESI vs. T.  
 Abdul Razak*<sup>3</sup> and *The Barium Chemicals Ltd. vs. The  
 E Company Law Board & Ors*<sup>4</sup>..

15. Further, the learned senior counsel placed reliance  
 upon the judgment of this Court in *State of Orissa vs.  
 Commissioner of Land Records and Settlement*<sup>5</sup>, in support  
 F of the proposition of law that a principal does not lose his  
 powers merely because those powers have been delegated to  
 another body.

Also, placing reliance upon the aforesaid proposition of  
 law laid down by this Court in the decision referred to above, it  
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2. 1994 (5) SCC 346 Para 6-8),

3. 1996 (4) SCC 708 (para 14-15)

4. AIR 1967 SC 295.

H 5. 1998 (7) SCC 162 (para 34).

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is urged by the learned senior counsel that nothing prevents the third defendant from reviewing the order passed by the delegatee, that is, the then Assistant Housing Commissioner which becomes evident from bare reading of Section 12(2) of the Act. Further, he has placed reliance upon Section 11 of the Act which provides that Housing Commissioner shall exercise supervision and control over all officers and servants of the Board.

16. The power of supervision and control has been interpreted by this Court to include power of supervision, management or authority to direct, restrict or regulate. Learned senior counsel placed reliance on the judgments of this Court in support of the above legal submissions in *CESC vs. Subhash Chandra Bose*<sup>6</sup> and *Hassan Co-operative Milk Producers's Union Ltd. vs. ESF*.

17. Further, the learned senior counsel placed strong reliance on the judgments of this Court in *Meerut Development Authority vs. Association of Management Studies*<sup>8</sup>, and *State of U.P. vs. Vijay Bahadur Singh*<sup>9</sup>, regarding rights of the bidder in participating in auction process and contended that though the bidders can participate in the tender process, they will not have any other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda.

18. Further, the learned senior counsel placed reliance on the law laid down by this Court in *Rajasthan Housing Board vs. G.S. Investments & Anr*<sup>10</sup> in support of his submissions that bidder has no vested interest in relation to the auctioned

6. 1992 (1) SCC 441.

7. 2010 (11) SCC 537.

8. 2009 (6) SCC 171.

9. 1982 (2) SCC 365.

10. 1996 (4) SCC 208.

A property unless the bid is accepted, even though the auction is concluded in his favour and the auction proceedings can always be cancelled by the competent authority of the first defendant.

B 19. Further the learned senior counsel placed reliance upon the judgment of this Court in *Laxmikant vs. Satyawani*<sup>11</sup> in support of his legal contention that this Court has repeatedly pointed out that 'State' or the authority which can be held to be 'State' within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid and the Government authority could validly retain its power either to accept or reject the highest bid in the interest of public revenue. In support of this legal contention, learned senior counsel placed reliance upon another decision of this Court in *State of Orissa v. Harinarayan Jaiswal*<sup>12</sup> and submitted that the High Court could have noticed that the trial court has proceeded under impression that the then Assistant Housing Commissioner had been authorized to supervise and conduct the auction in relation to the plot in question and that power automatically carried with him the authority to accept the highest bid to conclude the contract. In this regard the learned senior counsel referred to the decision of this Court in *Pradyat Kumar vs. Chief Justice, Calcutta* wherein this Court has observed that no delegation is involved where the statutory authority requires another person exercising ministerial function to retain the decision and responsibility of it in its hands.

G 20. Further, learned senior counsel contended that the High Court while remanding the case in the earlier first appeal proceedings vide its judgment dated 20th May, 1987 to the trial court after setting aside the impugned judgment of the trial court, it had given specific directions to it for deciding the case afresh in the light of certain observations. The following

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11. 1996 (4) SCC 208.

H 12. 1972 (2) SCC 36 (para 13)

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observations were made with reference to Section 11, which reads as under:

“The Housing Commissioner is thus an overall controlling authority over all officers and servants of the Board. In the provisions referred to earlier, the officers of the Board including the authority and functions. The officers of the Board (which include the Assistant Commissioner) are required under the Act to discharge such functions as are delegated to them.”

21. The High Court has also directed the trial court to trace out the source of power stated to have been delegated by the Housing Commissioner to the then Assistant Housing Commissioner under Section 12 since there must be an order of delegation in favour of another and it is implied that delegation must be in express terms and it cannot be by implication. Further, the High Court also directed the trial court to find out as to whether the Commissioner, the third defendant authorized the then Assistant Housing Commissioner to conduct an auction of the plot in question in writing or oral. Whether in the face of the record, it could be said that it was a case of seeking assistance only or a case of delegation in favour of the then Assistant Housing Commissioner and that finding recorded by the trial court on the basis of mis-reading of statement of evidence of DW-1, the then Assistant Housing Commissioner. Further, the case of the plaintiff was that the auction officer carried with him the authority to conclude the contract, whether such entrustment of authority was by an oral order or in writing. There is no pleading in the plaint regarding the same and therefore, the plaintiff should have been directed to prove the same and the evidence of DW1 could not have been accepted by the trial court to prove the negative fact that no such order was made in writing in favour of the then Assistant Housing Commissioner either by the Board or third defendant as provided under Section 12(1) of the Act. Further, the High Court has noted in its remand order the term of

A condition No.5 which enunciated that the power of final approval by an authority other than the auction officer and issuance of the allotment order in favour of the plaintiff was a condition precedent to the contract. The trial court has neither adverted to the aforesaid aspect of the case nor has referred to the conditions in its judgment. It is contended by the learned senior counsel while answering the contentious issue that the aforesaid observations made by the High Court in the earlier remand order by allowing the first appeal of the defendants which was binding on the trial court, the said directions have not been complied with. Therefore, the High Court could not have exercised its appellate jurisdiction and set aside the judgment of the first appellate court. Learned senior counsel further placed reliance upon the judgment of this Court in *Sahni Silk Mills (P) Ltd.'s case* (supra) regarding the scope of Section 100 of CPC to exercise its jurisdiction. It could not have disturbed the findings of fact recorded by the first appellate court after the judgment was passed by the trial court on remand and set aside the said findings holding that the grant of decree in favour of the plaintiff is erroneous in law, and therefore, the exercise of jurisdiction under Section 100 CPC by the High Court is contrary to the judgment of this Court in *Sahni Silk Mills (P) Ltd.'s case* (supra).

22. On the other hand, the learned senior counsel for the plaintiff, Mr. Ranjit Kumar sought to justify the impugned judgment contending that DW1, the then Assistant Housing Commissioner has admitted that he has got the authority to auction, therefore the finding of fact on the contentious issue is rightly recorded by the trial court, which was erroneously set aside by the first appellate Court. That finding of the first appellate court was found fault with by the High Court and therefore rightly framed the substantial questions of law and answered the same in favour of the plaintiff. The learned senior counsel also placed reliance upon the scheme of the first defendant which does not enumerate the condition for approval of the present bid of the plaintiff by the Housing Commissioner

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in relation to the plot in question. In the absence of the same the Housing Commissioner was ahead of authority in not accepting the bid and it was only a formal allotment letter which was required to be issued by him. The same has not been issued, but on the other hand the third defendant-Housing Commissioner has rejected the bid of the plaintiff which was communicated vide its letters dated 26.5.77 and 8.7.77 by the then Assistant Housing Commissioner and also 20% of the bid amount with earnest money was refunded which is erroneous in law.

23. Further, the learned senior counsel submits that the trial court has recorded the finding of fact in the impugned judgment regarding non-production of the file by the first defendant in relation to the delegation of power in favour of the then Assistant Housing Commissioner for conducting auction and accepting the bid in favour of the plaintiff and rightly adverse inference was drawn against it under Section 114 of the Evidence Act by not accepting the explanation given by the first defendant through its officer that the file was misplaced in transit from Bareilly to Lucknow stating that it is untenable. The burden of proof is on the first defendant by producing record to show that the then Assistant Housing Commissioner was only deputed to supervise and conduct auction of the plot as ministerial officer and did not have any authority to accept the bid. Further, it is stated by the learned senior counsel that three other shops, auction of which was held by the Assistant Housing Commissioner on 11.3.1977, were allotted in favour of the highest bidders by accepting their offer and executing necessary documents. It would clearly go to show that the findings recorded by the trial court accepted by the High Court in exercise of its second appellate jurisdiction and answering the substantial questions of law in favour of the plaintiff in the impugned judgment is based on the pleadings and the legal evidence on record. Therefore, this Court need not interfere with the concurrent findings of fact recorded by the High Court and the findings recorded on the substantial questions of law in the

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A impugned judgment particularly in view of the pleadings at paragraph 5 of the plaint which has been referred to in the earlier portion of the judgment while narrating the legal contentions urged on behalf of the defendants. Therefore, he has prayed for dismissal of the appeals.

B 24. With reference to the aforesaid rival factual and legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court:

C a. What are the rights of the plaintiff/bidder participating in the auction process in relation to the plot in question?

D b. Whether there is any vested right upon the plaintiff/bidder until the bid is accepted by the competent authority in relation to the property in question? Merely because the plaintiff is the highest bidder by depositing 20% of the bid amount without there being approval of the same by the competent authority and it amounts to a concluded contract in relation to the plot in question?

E c. Whether the plaintiff could have maintained the suit in the absence of a concluded contract?

F d. Whether the plaintiff proves that the Assistant Housing Commissioner had the authority to accept the bid in relation to the plot in question which was put to auction and was empowered to allot the plot in favour of the plaintiff being the highest bidder?

G e. Whether the trial court is right in holding that non-issuance of notice to the first defendant as provided under Section 88(2) of the Act for institution of the suit and not taking the plea in this regard by the defendant in the initial stage rather taking the plea subsequently amounts to a waiver of the defence of the defendants?

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- f. Whether the suit for declaratory relief on the basis of the cause of action as pleaded by the plaintiff, in the absence of allotment letter issued by the competent authority in relation to the plot in question as provided under Section 12(1) of the Act, is maintainable? A
- g. Whether the substantial questions of law framed by the High Court in the second appeal would arise for its consideration and whether the findings in the second appeal are erroneous in law? B

25. The points (a) to (d) are required to be answered against the plaintiff by assigning the following reasons:- C

It is an undisputed fact that public auction was held in relation to the property of the first defendant vide public notice dated 4.3.1977 published in the local newspapers by the Parishad for auction of nine shops and the plot earmarked for cinema hall measuring 3441 sq. meters. The auction was supervised and conducted on 11.3.1977 by one Mr. Ram Kumar Singh Bisen the then Assistant Housing Commissioner. It was also an admitted fact that the plaintiff was the highest bidder as he had quoted Rs.1,31,500/- in relation to the plot and he has deposited a sum of Rs.26,500/- that is 20% of the amount of bid plus Rs.500/- as earnest money. D

26. It is also an undisputed fact that the offer of the plaintiff is highest as per the terms and conditions of the sale of plot in question by public auction are concerned, 20% of the bid amount deposited by him that by itself does not amount to accepting his bid by the competent authority for grant of lease hold rights of plot in his favour. E

27. This Court in the case of *Meerut Development Authority case* (supra) has laid down the legal principle that the bidder who has participated in tender process have no other right except the right to equality and fair treatment in the matter F

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A of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. The relevant paragraphs are extracted hereunder:

B “27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

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E 29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority’s action in accepting or refusing the bid must be free from arbitrariness or favouritism.”

F 28. In support of the said proposition, learned senior counsel for the defendant, Mr. Rakesh Dwivedi has also placed reliance upon another decision of this Court in *State of U.P vs. Vijay Bahadur Singh* (supra). The learned senior counsel has G rightly placed reliance upon the judgment of this Court in *Rajasthan Housing Board* case (supra) which reads as under:

H “9. This being the settled legal position, the respondent acquired no right to claim that the auction be concluded in its favour and the High Court clearly erred in

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entertaining the writ petition and in not only issuing a direction for consideration of the representation but also issuing a further direction to the appellant to issue a demand note of the balance amount. The direction relating to issuance of the demand note for balance amount virtually amounted to confirmation of the auction in favour of the respondent which was not the function of the High Court.”

The law laid down by this Court in the aforesaid paragraph in support of the proposition of law that so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquire no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. Further, he has placed reliance on another decision of this Court in the case of *Laxmikant* referred to supra . In support of the proposition of law this Court has rightly pointed out that the ‘State’ or the Authority, which can be held to be a ‘State’ within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue. In support of this contention, he has placed reliance on the *State of Orissa vs. Harinarayan Jaiswal* case (supra), relevant paragraph of which reads as under:

“13. Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order, dated January 6, 1971, can be considered as unconstitutional. As held by this Court in *Cooverjee B. Bharucha* case, one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State’s revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature

A has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review.

B We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price.

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Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids — see *Union of India v. Bhimsen Walaiti Ram*<sup>13</sup>. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges,

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F reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government—nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in *Cooverjee B. Bharucha vs. The Excise Commissioner and the Chief*

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H <sup>13</sup>. 1969 (3) SCC 146.

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*Commissioner, Ajmer & Ors'* case was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the Legislature.

The High Court erroneously thought that the Government was bound to satisfy the Court that there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make-believe one. The real opinion formed by the Government was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one's rights. Hence, in our opinion, the High Court misapplied the ratio of the decision of this Court in *Barium Chemicals Ltd. & Anr. v. Company Law Board* and *Rohtas Industries Ltd. v. S.T. Agarwal.*

(emphasis supplied)

29. In view of the law laid down by this Court in the aforesaid decisions, learned senior counsel Mr. Rakesh Dwivedi has rightly placed reliance upon the same in support

A of the case of the first defendant, which would clearly go to show that the plaintiff had not acquired any right and no vested right has been accrued in his favour in respect of the plot in question merely because his bid amount is highest and he had deposited 20% of the highest bid amount along with earnest money with the Board. In the absence of acceptance of bid offered by the plaintiff to the competent authority of the first defendant, there is no concluded contract in respect of the plot in question, which is evident from letters dated 26.5.1977 and 8.7.1977 wherein the third defendant had rejected the bid amount deposited by the plaintiff and the same was refunded to him by way of demand draft, which is an undisputed fact and it is also not his case that the then Assistant Housing Commissioner who has conducted the public auction had accepted the bid of the plaintiff.

D 30. Therefore, points (a) to (d) are answered in favour of the defendants. In fact, these aspects have not been dealt with either by the trial court or by the second appellate court in the impugned judgments.

E Answer to Point No. (e)

F 31. To institute a suit against the first defendant, the plaintiff was required to issue notice under Section 88(2) of the Act which is mandatory in law. Undisputedly, no such notice was issued to the first defendant. The plea taken by the plaintiff that the defendants have waived their right in urging their plea that the suit is not maintainable for non-issuance of notice under Section 88(2) to the first defendant for institution of suit by the plaintiff is wholly untenable in law and the finding recorded by the trial court while answering the issue Nos. 5 and 6 in the impugned judgment of the trial court dated 24.9.1993 that defendants did not take this plea in its original written submissions is also wholly untenable in law. Also the plea that after the remand order the said plea was taken belatedly by the first defendant, therefore, it has waived its right, is erroneous finding recorded by the trial court. The said finding of the trial

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court, which has been accepted by the second appellate court, also suffers from error in law. The maintainability of the suit on the ground of non issuance of a statutory notice to the first defendant prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the second appeal; this is well established principle of law. This aspect of the matter has not been considered by the trial court while answering the relevant contentious issue Nos. 5 and 6. The second appellate court too did not consider this important legal aspect of the case. Therefore, we have to answer the said point against the plaintiff holding that the plaintiff has no right to institute a suit in absence of the notice under Section 88(2) of the Act, which is mandatory in law.

Answer to Point (f):

32. The declaratory relief sought by the plaintiff in the original suit is not maintainable in law as the plaintiff did not acquire legal right in respect of the plot in question.

The prayer at para 12 (a) of the plaint is extracted below for consideration of this Court:

"12 (a). That the auction held on 11.3.1977 in respect of the Cinema Plot in Izzatnagar (Scheme No.2) Bareilly in favour of the plaintiff is final and binding on the defendants and the non-acceptance thereof by the Housing Commissioner (defendant No.3) as communicated to the plaintiff by the defendant no.1 by letter No.8851/S.P. 3/6 Bareilly/Cinema plot dated 26.5.1977 is illegal and void and has no effect on the status of the plaintiff as owner/allottee thereof."

33. In this regard, it is also necessary to extract Section 34 of the Specific Relief Act, 1963 for the purpose of appreciating the tenability of the above prayer of the plaintiff, which reads as under:

A "34. Discretion of court as to declaration of status or right.- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

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C Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Explanation.- A trustee of property is a" person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

D It is an undisputed fact that the final bid has not been accepted by the third defendant. This is borne out from the letters dated 26.5.1977 and 8.7.1977. Further, even assuming that the Assistant Housing Commissioner had the authority to supervise and conduct the public auction and the authority to accept the final bid of the plaintiff in relation to the plot which was auctioned on 11.3.1977, it is also an undisputed fact that he did not accept the bid of the plaintiff in writing and communicated the same to him. Therefore, there is no concluded contract in favour of the plaintiff in relation to the offer made by him, whose offer is highest in public auction held on 11.3.1977. Hence, the suit filed by the plaintiff seeking for declaratory relief as prayed in the plaint is wholly misconceived and is not maintainable in law. Thus, the judgment and order passed by the second appellate court is wholly unsustainable in law and is liable to be set aside.

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G 34. It is an undisputed fact that Section 16 of the Act confers power upon the Board to dispose of its property as per Rule 3 of the U.P. Avas Avam Vikas Parishad (Delegation of Powers by the Board and the Housing Commissioner) Rules, 1968. The Board has power under Section 12(1) of the Act to delegate its power either to a Committee or the Housing  
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Commissioner or any other officer in exercise of its power to discharge its functions. It is the case of the defendants that the Assistant Housing Commissioner was not delegated this power by the Board. In this regard, there is no pleading of the plaintiff except the averments made at para 5 of the plaint, the relevant para is noted in the submissions made by the learned senior counsel on behalf of the defendants. Further there is no communication by the first defendant regarding acceptance of the proposal of the highest bid of the plaintiff as required under Section 3 of the Contract Act, 1872. This principle of law is well settled as per the decision of the Queen's Bench in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*<sup>14</sup>

35. Further, unaccepted offer of the plaintiff does not create any right or any obligation on the part of the defendant to execute the lease deed. In fact, this principle is well settled by this Court in the case of *Bhagwan Das Goverdhan Das Kedia v. Girdhari Lal & Co.*<sup>15</sup> wherein this Court has held that mere making of an offer does not form part of the cause of action for claiming damages for breach of contract. In the case in hand, the aforesaid principle, without recourse, is applicable in the fact situation for the reason that the plaintiff was the highest bidder and his offer was merely accepted but no communication was sent to him as required under Section 3 of the Contract Act. Therefore, no legal right accrued in favour of the plaintiff to invoke remedy available under Section 34 of the Specific Relief Act, seeking declaratory relief as prayed in the original suit filed by the plaintiff.

36. Further, the communication under Section 4 of the Contract Act speaks of when the communication will complete. It says:

**"4. Communication when complete.** - The communication of a proposal is complete when it comes

14. (1952) 2 QB 765.

15. AIR 1966 SC 543.

A to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

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as against the acceptor, when it comes to the knowledge of the proposer.”

The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case. Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. In this regard, this court in *Haridwar Singh v. Begum Sumbrui*<sup>16</sup> has held that the communication of acceptance of the highest bid is necessary for concluding the contract. In view of the aforesaid factual and legal proposition of law and the highest bid offered to take the property on lease for a period of 90 years with renewal for further 20 years for construction of the cinema hall, the same was neither accepted by the competent authority nor was the same communicated. Therefore, there is no concluded contract in favour of the plaintiff in respect of the plot in question and the plaintiff cannot claim any legal right and question of enforcement of the said right as provided under Section 34 of the Specific Relief Act seeking declaratory relief by the plaintiff the same did not arise in the case in hand. The above important factual and legal aspects have not been examined in proper and constructive manner either by the trial court or by the second appellate court. Therefore, the impugned judgment, order and decree are liable to be set aside.

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**Answer to point (g)**

37. The substantial questions framed by the court in the

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H 16. AIR 1972 SC 1942.

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second appeal did not arise for its consideration. The High Court ought to have noticed that the legal right claimed by the plaintiff seeking relief under Section 34 of the Specific Relief Act on the basis of the pleadings is wholly untenable in law. In view of the fact that no legal right accrued in his favour in the absence of a concluded contract which was said to have existed by mere offering of highest bid in relation to the property in question to obtain the property on lease for a period of 90 years amounting to disposal of the property of the first defendant being an authority under Article 12 of the Constitution, no right was accrued upon the bidder in relation to the property in question. Therefore, the suit itself is not maintainable and the suit filed on the basis of the alleged cause of action did not arise. Hence, the trial court could not have granted any relief by not framing the relevant and proper issue and answering the same. This aspect of the matter is not considered by the trial court. Therefore, the impugned judgment is set aside by the first appellate court by recording reasons. It also did not address and examine the points that arose for consideration as framed by this Court in this judgment. However, the conclusion arrived at by the first appellate court in setting aside the impugned judgment and dismissing the suit is perfectly legal and valid. The said judgment has been erroneously interfered with by the High Court by framing substantial questions of law. In fact and in law, the aforesaid substantial questions do not arise for its consideration and answer the same in favour of the plaintiff, which are erroneous in law.

38. We are of the view that the findings recorded by the trial court and the second appellate court are totally erroneous both on facts and in law and therefore required to be interfered with by this Court and hence the appeals must succeed. The impugned judgment, decree and orders of the High Court are hereby set aside and the original suit No.143 of 1977 filed by the plaintiff is also dismissed. The appeals are allowed, with no order as to costs.

K.K.T.

Appeals allowed.