

(2012) 10 CAL CK 0079
In the Calcutta High Court
Case No : Writ Petition No. 19306 (W) of 2006

Annapurna Engineering and Manufacturing Ltd.	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Constitution of India, 1950 — Article 12
State Financial Corporations Act, 1951 — Section 29, 29(1)

Citation : (2013) 2 CHN 235

Hon'ble Judges : Joymalya Bagchi, J

Bench : Single Bench

Advocate : Aniruddha Chatterjee and S.N. Arefin, for the Appellant; Rudra Sankar De and Subrata Mukherjee, for the Respondent

Judgement

Joymalya Bagchi, J.—The petitioners have prayed for refund of forfeited amount to the tune of Rs. 14.20 lakhs along with interest at the rate of 18 per cent per annum calculated on and from the date of filing of the instant writ petition. The respondent No. 2 corporation claimed to have forfeited the said amount in connection with sale of fixed assets of Bandel Ceramics Pvt. Ltd. (in short BCPL) situated at Delhi Road, Vill. - Jhata, P.O. - Mogra, P.S. - Polba, District - Hooghly in terms of the sale letter dated 22nd December, 2004. The respondent No. 2 corporation established under the State Financial Corporation Act, 1951 (hereinafter referred to as SFA) invited offers for sale of various fixed assets which were purported to be sold in exercise of power u/s 29 of the SFA.

2. The brief description of the fixed assets, relevant to the instant case, in the said advertisement read as follows:

3. In response to such advertisement, the petitioners gave a quotation on 18th February, 2004 of Rs. 42 lakhs for purchase of the aforesaid fixed assets and also deposited 10% of the offer price as earnest money within 15 days of the submission of such offer. Thereafter, the petitioners submitted a revised offer dated 02.12.2004 for a price of Rs. 43 lakhs.

4. In response to such revised offer, the respondent No. 2 corporation issued a sale letter dated 2nd December, 2004 to sale/transfer the fixed assets for a consideration of 43 lakhs on the following terms and conditions:

1. The assets will be sold/transferred to you on as-is-where-is and whatsoever there is basis u/s 29(1) of the State Financial Corporations Act, 1951 (as amended upto date) at a total consideration of Rs. 43.00 lakh (Rupees forty-three lakh only). As you have already deposited Rs. 4,20,000/- (Rupees four lakh twenty thousand only) as earnest money along with your offer on 18.11.2004 the balance consideration of Rs. 38.80 lakh (Rupees thirty eight lakh eighty thousand only) has to be paid by you latest within 27.12.2004.

2. On receipt of the full consideration amount within the stipulated time, possession of the fixed assets of Bandel Ceramics Pvt. Ltd. shall be handed over to you on as-is-where-is and whatsoever there is basis provided that you may take over the assets in your individual capacity/by forming a partnership firm/by forming a private limited company. In the cases of partnership company and private limited company the same are to be formed/registered/incorporated as per the relevant provisions of Indian Partnership Act/Indian Companies Act and to the satisfaction of the Corporation regarding its intended business activities.

3. The aforesaid fixed assets will be sold to you strictly on as-is-where-is and whatsoever there is basis u/s 29(1) of the State Financial Corporations Act 1951 (as amended upto date) and our Corporation will not be responsible for payment of any arrear/current statutory/Government dues/taxes/labour dues and/or any other dues relating to those assets and/or of Bandel Ceramics Pvt. Ltd. or any of their partners/directors.

4. Possession of the said fixed assets will be handed over to you only after receipt of full consideration amount of Rs. 43.00 lakh and in case of failure on your part to deposit the agreed balance consideration as stated above, the Corporation will have the right to forfeit the entire money (including the earnest money) deposited by you in this connection and our acceptance to your offer will automatically stand cancelled.

5. Only after receipt of the full payment of sale consideration necessary Deed of Conveyance for the said fixed assets will be executed in your favour and the Deed will have to be registered at your own cost.

6. In the event the borrower(s) and or any other person file any suit/legal cases in regard to the sale on or before completion of the payment of the entire sale consideration by you to this Corporation and/or before execution of the sale deed in your favour, you shall have to abide by the decision of Court of Law.

7. If you neglect or refuse to comply any of the above conditions, the money already paid by you shall be forfeited and shall not be refunded. This Corporation will be at liberty to release the property/assets further by public auction or private agreement and you will not be entitled to any advantage arising on resale

of the assets.

8. The Corporation reserves the right to cancel/withdraw the above offer for sale without showing any reasons thereof.

5. The petitioners were unable to pay the balance consideration within the stipulated time frame i.e. 27.12.2004 and by letter dated 20.02.2004 asked for extension of time for making such payment by 21 days from 27th December, 2004 and also deposited an additional amount of Rs. 10 lakhs to show its bonafides in the matter. Subsequently, by a letter dated 21.11.2005 the petitioners requested the respondent No. 2 corporation to furnish papers relating to its ownership/charge of the fixed assets on the request of its banker, Vijaya Bank, from whom they have sought a term loan for the purchase of the said fixed assets.

6. By letter dated 25th January, 2005 the petitioners' banker Vijaya Bank informed the petitioners that there was a charge on the said fixed assets of BCPL in favour of the State Bank of India, Chinsura Branch, and requested the petitioners to submit "no due certificate/no objection certificate" from the State Bank of India.

7. In response to the query made by the petitioners and his banker in that regard, the respondent No. 2 corporation by letter dated 27.05.2005 claimed that it had absolute first charge on the said assets and was the deemed owner thereof u/s 29 of the said Act of 1951. On the contrary, by communications dated 28.01.2005 and 03.02.2005 addressed to the banker of the petitioners and to the respondent No. 2 corporation the State Bank of India, Chinsura Branch claimed that it had first charge on a portion of the fixed assets and further submitted that the matter was subjudice before the Debt Recovery Tribunal - II, Kolkata and that none of the parties could dispose of the property without approval of the Debt Recovery Tribunal/competent authority.

8. Faced with such rival claims, the petitioners by another letter dated 05.02.2005 sought confirmation from respondent No. 2 corporation whether the claim of the State Bank of India was corrected so as to enable them to obtain finance from their banker in order to make the necessary payments.

9. Under such circumstances, by letter dated 14th February, 2005 addressed to the Assistant General Manager, State Bank of India, Chinsura Branch (a copy thereof was given to the petitioners) the respondent No. 2 corporation, inter alia, observed that there was no restrain order against the respondent No. 2 corporation from any Court to dispose of the assets in questions and called upon State Bank of India to provide necessary documents to establish their claim by 25th February, 2005.

10. Thereafter, by another letter dated 28th February, 2005 addressed to the selfsame authority the respondent No. 2 corporation clarified that as necessary documents had not been furnished within the stipulated time, as aforesaid, i.e.

25.02.2005, the respondent No. 2 corporation shall proceed to dispose of the fixed assets in accordance with law. However, since clear title to the said fixed assets could not be provided by the respondent No. 2 corporation, the banker of the petitioners namely Vijaya Bank was unwilling to finance the deal and the petitioners was unable to pay the balance consideration within the stipulated time.

11. Finally, the petitioners by a letter dated 22.02.2006 wrote to the Ministry of Industry and Trade, Government of West Bengal to enable them to make payment of the balance consideration and prayed for transfer of the fixed assets to them in terms of the aforesaid sale.

12. In reply to such representation, the respondent No. 2 corporation by letter dated 23.03.2006 communicated to the petitioners that as they had failed to deposit the balance consideration within the extended time the respondent No. 2 corporation had cancelled the sale letter issued to the petitioners and had sold the assets to another company.

13. Thereafter the petitioners by a letter dated 04.04.2006 sought refund of the money deposited by them to the tune of Rs. 14.20 lakhs in respect of the aforesaid transaction. By letter dated 17th April, 2006 the respondent No. 2 corporation intimated the petitioners that it had forfeited the said amount deposited by them in terms of the sale letter since the petitioners failed to deposit the balance consideration in spite of ample opportunity given to it.

14. Under such circumstances, the petitioners made a representation dated 19th April, 2006 against the decision to forfeit the same deposited by them on the ground that they had failed to pay the balance consideration due to fact that the fixed assets was subjudice on account of a charge on the said in favour of the State Bank of India, Chinsura Branch. The respondent No. 2 corporation having failed to give a favourable response thereto the petitioners filed the instant writ petition.

15. The respondent No. 2 corporation has opposed this writ petition and has filed affidavit-in-opposition to the same. In the said affidavit-in-opposition, the respondent No. 2 corporation has admitted that a proceeding was pending at the behest of the State Bank of India, Chinsura Branch being T.A. No. 32 of 2002 against BCPL in Debt Recovery Tribunal - II, Kolkata wherein the respondent No. 2 corporation was served a notice.

16. After hearing the learned counsel appearing for the respondent No. 2 corporation, on 19.12.2003, the Presiding Officer passed the following order:

Ld. Counsel for the WBFC files written statement and also files the agreement with the defendant company wherein in schedule A details of the property under their charge has been given and these details only shows that the property of Khatian No. 31, J.L. No. 150 and Khatian No. 23, J.L. No. 150 and Khatian No. 66, J.L. No. 150 are subject to their charge. This clearly shows that the property

as given in the annexure L-1 of the OA by the bank is distinct and different.

In view of this, WBFC is made clear that the property which is detailed in the schedule L-1 of the OA i.e. Khatian No. 111, Dag No. 129, J.L. No. 150 of Mouza Jhapa be not sold without the prior permission of this Tribunal because any sale of this property will take away the right of the bank as a secured creditor.

17. Mr. Chatterjee, learned advocate appearing for the petitioners submitted that the respondent No. 2 corporation which is a State under Article 12 of the Constitution of India had a duty to act fairly and ought to have intimated the petitioner that pursuant to the aforesaid order dated 19.12.2003, a part of the fixed assets could not have been sold except permission from the DRT - II, Kolkata, as aforesaid. He submitted that the failure to pay the balance consideration on the part of the petitioners was due to the fact its banker Vijaya Bank, backed out since the respondent No. 2 corporation was unable to establish clear title in respect of the fixed assets.

18. In support of his contention, Mr. Chatterjee relied on Haryana Financial Corporation and Another Vs. Rajesh Gupta,

19. Mr. De, learned advocate appearing for the respondent No. 2 corporation submitted that the sale was made on "as is whereis and whatever there is" basis and that under the terms and conditions of the sale letter it was categorically stated if the full consideration was not deposited or the petitioners neglected to comply with any of the conditions in the sale letter, the money already deposited shall be forfeited and shall not be refunded and the offer will stand automatically cancelled. He further submitted that in the terms and conditions of the sale letter it was stated that if the borrower or any other person files any suit/legal case with regard to the sale, the sale consideration paid by the petitioner and/or execution of the sale shall abide by the decision of the Court of Law.

20. In support of his contention, Mr. De relied on Bali Ram Dhote Vs. Bhupendra Nath Banerjee and Others,

21. Now the question which therefore falls for consideration is whether the forfeiture of the money deposited by the petitioners in the instant transaction was justified or not.

22. It is trite law that the respondent No. 2 corporation being a State under Article 12 of the Constitution of India is required to act fairly in the commercial field also. It cannot also be permitted to take advantage of its own wrong. In the case cited on behalf of the petitioners reported in Haryana Financial Corporation and Another Vs. Rajesh Gupta, the Apex Court set aside the decision to forfeit the monies deposited by a proposed purchaser on the premise that the financial corporation had not revealed to the proposed purchaser that there was no independent approach road to the fixed assets which was sought to be sold, and hence, could not take advantage of its own wrong and forfeit the amount deposited once the offer of sale fell through.

23. In the instant case, it is clear that the respondent No. 2 corporation had not disclosed to the petitioners at the time of the deposit of earnest money and/or thereafter when the subsequent deposit of additional amount of Rs. 10 lakhs, was made that a portion of the fixed assets could not be sold except with the express permission of the Presiding Officer, DRT - II, Kolkata in the aforesaid proceeding. On the other hand, in all contemporaneous correspondences, respondent No. 2 Corporation emphatically claimed that they had absolute right to sell/transfer such fixed assets. Such contention of respondent No. 2 Corporation, as admitted by it in its affidavit-in-opposition, was not only untrue but was also known to them from the time of inviting offers for sale of the said fixed assets.

24. The contention of the learned advocate for the respondent No. 2 corporation that the sale is on the basis of "as is where is and whatever there is" basis and that it would be subject to any order passed by a Civil Court in respect of any suit or legal proceeding instituted by the borrower or any other party is of no help to the petitioners. The plain reading of the said clause in the sale letter creates an impression that they indemnify the seller from any future litigation that may be instituted or has been instituted without his knowledge. By no stretch of imagination it creates an impression that respondent No. 2 Corporation was absolved from its responsibility to disclose the fact that a part of the fixed assets offered for sale by it was subjudice and the corporation was suffering an injunction in respect of sale disposal of the same. Not only did the respondent No. 2 corporation withhold such fact at the time when the petitioners deposited the earnest money of 4.2 lakhs and a subsequent sum of Rs. 10 lakhs for the purpose of seeking extension of time to make payment but also in the course of subsequent communications between the petitioners and his banker on the one hand and on the respondent No. 2 corporation on the other, the latter consistently maintained that it had unequivocal right to sell and/or dispose of the entire fixed assets. Such contention on the part of the respondent No. 2 corporation was not only contrary to materials on record but also exposes the gross unfair stand adopted by it in the course of the entire transaction. In fact, in its letters dated 27th January, 2005, 14th February, 2005 and 28th February, 2005 the respondent No. 2 corporation withheld the information that it was suffering an order of injunction in respect of sale of a portion of the fixed assets in spite of being repeatedly queried on this issue. Even in the letter dated 17th April, 2006, wherein the respondent No. 2 corporation intimated the petitioners as to its decision to forfeit the said amount deposited by it, the said corporation maintained the same stance and categorically admitted that they had never communicated about its inability to transfer the said assets in favour of the petitioners.

25. It was only in the affidavit-in-opposition filed in this proceeding, the respondent No. 2 Corporation conceded that it had been enjoined from selling/transferring a portion of the fixed assets.

26. Such stance on the part of the respondent No. 2 corporation make it evident that the deposit made by the petitioners to the tune of Rs. 14.20 lakhs in the instant case was a product of on clear concealment on the part of the respondent No. 2 Corporation that a portion of the fixed assets was subject to an order of injunction by DRT - II, Kolkata and the respondent No. 2 corporation could not have sold/transferred the said portion of the fixed assets without the express permission of the said tribunal. The failure to disclose such fact also contributed to the inability of the petitioners to pay the balance consideration. It is true that under condition 4 of the sale letter dated 2nd December, 2004 if the petitioners failed to pay the balance consideration, the respondent No. 2 corporation had a right to forfeit the amount. However, forfeiture under the said clause must be when the failure to deposit balance consideration is wholly attributable to a vendee and not where any misrepresentation and/or concealment of a material fact has contributed the same. In the facts of the case it appears that the petitioners made payment of the aforesaid deposits without being made aware that the respondent No. 2 corporation did not have a clear title to transfer the fixed assets in favour of the petitioners and was suffering from an order of injunction with regard to such sale/transfer of a portion of the said fixed assets. Failure to disclose such fact also contributed to the inability of the petitioners to make payment of the balance consideration within the stipulated time. The bona fides of the petitioners in the transaction is evident from the fact that he made a further deposit of Rs. 10 lakhs with the respondent No. 2 corporation at the time of seeking extension to make payment of the balance consideration. Nondisclosure of this vital fact, by the respondent No. 2 Corporation therefore, clearly contributed the petitioners' inability to pay balance consideration and the respondent No. 2 Corporation cannot take advantage of its own wrong.

27. In this factual matrix, I am constrained to hold that the conduct of the respondent No. 2 corporation in the instant transaction was not above board and the failure to pay the balance consideration within the stipulated time by the petitioners but to a great extent attributable to the non-disclosure and/or concealment of the aforesaid facts by the respondent No. 2 Corporation.

28. In this regard, the decision reported in Haryana Financial Corporation and Another Vs. Rajesh Gupta, relied by the petitioners is most apposite. In that case, the forfeiture of deposit by the financial corporation was held to be unreasonable and quashed due to non-disclosure of the fact that there was no independent road to the unit which was proposed to be sold.

29. Similarly, in the instant case, the forfeitures by the respondent No. 2 Corporation was made notwithstanding non-disclosure of the material fact that a portion of the fixed assets was subject to an order or injunction restraining the respondent No. 2 corporation from selling and/or transferring the same without leave of the tribunal. Such fact amply contributed to the failure of the petitioners to arrange funds to make deposit the balance consideration within the stipulated time. Admittedly, respondent No. 2 Corporation is not an ordinary trader, but a

statutory Corporation having the trappings of "State" under Article 12 of the COI and is duty bound under law to act fairly and in a just and reasonable manner. No reason was shown on its behalf as to why so concealment of material facts was made on its portion the transaction which appears to have seriously effected the petitioners to discharge its liabilities under the sale agent. Hence, I hold, since the respondent No. 2 corporation is guilty of concealment and/or nondisclosure of relevant facts relating to the transaction which is attributable to the failure on the part of the petitioners to arrange and deposit the balance consideration the decision to forfeit the money deposited on the part of the respondent No. 2 Corporation is arbitrary, unjust and unreasonable.

30. The decisions relied on behalf of the respondent No. 2 corporation are distinguishable on facts. In the case reported in AIR 1978 Cal 599, it was clearly held that there was no pleading on the behalf of the plaintiff that the decision to forfeit the money deposited was either unreasonable or unjust.

31. In the instant case, the petitioners have made out a clear case where it has not been able to comply with the terms of the sale letter due to non-disclosure and/or concealment on the part of the respondent No. 2 corporation and therefore ratio of the decision in AIR 1978 Cal 599 has no manner of application in the facts of the case.

32. In the case reported in Delhi Development Authority Vs. Grihsthapana Co-operative Group Housing Society Ltd., there was no concealment on the part of the financial corporation which contributed to the failure of the vendee to comply with the payment schedule which was fixed by the Court itself. The facts of the instant case are therefore entirely different from the cited decision and the said decision has no manner of application in the instant case.

33. For the aforesaid reasons, I hold that the decision to forfeit the deposited money to the tune of Rs. 14.20 lakhs by the respondent No. 2 Corporation is arbitrary, unreasonable and unjust and is liable to be quashed.

34. I, therefore, dispose of this writ petition directing the respondent No. 2 Corporation to forthwith refund the aforesaid sum of Rs. 14.20 lakhs to the petitioners along with interest at the rate of 12% per annum from the date of institution of the instant writ petitioner till the date of payment. The respondent No. 2 corporation is further directed to pay costs to the petitioners which is assessed at Rs. 20,000/-.