
(2006) 04 BOM CK 0032

In the Bombay High Court

Case No : Writ Petition No. 5991 of 2005

Bholenath Trading Company

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 26-04-2006

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 9(5)

Citation : (2006) 5 BomCR 207 : (2006) 5 MhLj 37 : (2006) 44 MhLj 37

Hon'ble Judges : R.C. Chavan, J;D.D. Sinha, J

Bench : Division Bench

Advocate : R.R. Shrivastava, for the Appellant; Anilkumar, for the Respondent

Final Decision : Allowed

Judgement

D.D. Sinha, J.—Rule. Rule made returnable forthwith by consent of Mr. R.R. Shrivastava, learned Counsel for the petitioner and Mr. Anilkumar, learned Counsel for the Respondent.

2. The counsel for the petitioner states that in the instant case bids were invited by the Respondent-Bank for sale of land with industrial shed, plant and machinery of an oil (Vanaspati) Extraction Plant located in the city of Akola vide tender notice dated 9-10-2004. It is further contended by the learned Counsel for the petitioner that the petitioner was one of the bidder and submitted his tender on 29-11-2004. The bids were opened on 12-2-2005 and the petitioner was the highest bidder. It is further contended that the amount of Rs. 25,00,000/- (Twenty Five Lacs) was required to be deposited by the tenderer at the time of submitting the tender as per the condition of tender document and therefore, the petitioner has deposited the Demand Draft of Rs. 25,00,000/- along with the tender document which was submitted on 29-11-2004. The counsel for the petitioner further contended that for the first time the offer of the petitioner was accepted by the Respondent vide impugned communication dated 17-8-2005. However, before the offer/bid of the petitioner was finally accepted,

the petitioner, because of certain contingencies, did not want to continue with the offer and therefore, issued letter to the Respondent dated 1-8-2005, wherein it is mentioned that the petitioner's offer was frustrated and therefore, the Respondent Bank was called upon to return the security deposit of Rs. 25,00,000/- deposited by the petitioner.

3. The counsel for the petitioner further contended that in view of the terms and conditions of the tender documents, specifically condition No. 7, the successful bidder is required to pay 25% of the amount immediately on acceptance of the bid and the remaining amount within 30 days, failing which the Bank may at its discretion cancel the bid and forfeit the earnest amount and/or charge interest at the rate of 18% per annum with monthly rests on delayed payments or as the bank considers it appropriate. The counsel for the petitioner, in view of this clause, has contended that the successful bidder will be one whose bid is accepted and it is only on such acceptance 25% amount is required to be paid. The counsel for the petitioner has contended that, in the instant case, since the petitioner before acceptance of his bid by the respondent submitted the application for withdrawal of the offer and refund of the amount deposited along with the tender document, the question of forfeiture of the said amount does not arise, since it is not earnest money and petitioner is entitled for refund of the said amount which is security deposit. It is further contended that the respondent, instead of refunding the amount asked by the petitioner vide letter dated 1-8-2005, issued the impugned communication dated 17-8-2005 and asked the petitioner to deposit sum of Rs. 2,58,42,750/- within seven days and further asked to arrange the balance amount in three weeks. It is also mentioned in the communication dated 17-8-2005 that if the petitioner fail to deposit the balance amount, the deposit of Rs. 25,00,000/- shall stand forfeited. The petitioner being aggrieved by the impugned communication issued by the Bank invoked the extra ordinary jurisdiction of this Court by filing the present writ petition.

4. The counsel for the petitioner has submitted that, in the instant case, before the offer of the petitioner was finally accepted by the respondent, the petitioner has moved the application for refund/withdrawal of the amount and therefore, the respondent ought to have granted the request and refunded the amount of Rs. 25,00,000/-. However, the impugned communication dated 17-8-2005 issued by the Respondent-Bank, in the facts and circumstances of the present case, is unsustainable in law.

5. The counsel for the respondent-Bank on the other hand has submitted that the Bank has issued the tender notice dated 9-10-2004, pursuant to which the petitioner has submitted his tender and the bids were to be opened on 29-11-2004. However, the process of opening of bid was postponed and rescheduled on 12-2-2005. On 12-2-2005, the petitioner being the highest bidder, the offer of the petitioner stood accepted. It is contended that as per the requirement of the tender condition, the petitioner has submitted Demand Draft

of Rs. 25,00,000/- along with his tender and after acceptance of offer of the petitioner, the petitioner is not entitled for refund of Rs. 25,00,000/- and the Bank is entitled to forfeit the said amount since the contract between the petitioner and the Bank stand concluded by acceptance of the offer of the petitioner by the Bank and as per the condition of the tender, refund is not permissible.

6. Learned Counsel for the respondent further contended that in view of the provisions of Security Interest (Enforcement) Rules, 2002, the petitioner, is not entitled for refund of the amount. The relevant rule is Sub-rule (5) of Rule (9). It is contended that as per the provisions of Sub-rule (5), "in default of payment within the period mentioned in Sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold". The counsel for the respondent, therefore, contended that, in view of the impugned communication dated 17-8-2005, since the offer of the petitioner was accepted by the Bank and the petitioner was called upon to pay the balance amount within a period of seven days from the date of receipt of the said letter, however, since the petitioner failed to deposit the balance amount as demanded by the Bank, Sub-rule (5) of Rule 9 is attracted and the amount deposited by the petitioner stands forfeited, and therefore, the prayer of the petitioner for refund of the deposit is inconsistent with the above referred Rules.

7. The counsel for the respondent further contended that vide communication dated 11-7-2005 issued by the Bank, the petitioner was advised that in the event of the High Court upholding the action of the bank, he should be prepared to pay the balance consideration as per auction, failing which his earnest money shall stand forfeited. It is, therefore, contended that the offer of the petitioner was accepted by the Bank which is evident from communication dated 11-7-2005 and it is before 1-8-2005 i.e. the date on which the petitioner has made a request to the respondent Bank to refund the deposit. It is, therefore, contended by the learned Counsel for the respondent that the petitioner is not entitled to claim the relief.

8. We have given our anxious thoughts to the various contentions canvassed by the respective counsel. Perused the provisions of relevant rules as well as conditions stipulated in the tender document. In the instant case, the following facts are not disputed.

(i) The tender was floated by the Respondent Bank dated 9-10-2004 whereby the offers were invited in respect of sale of property mentioned therein.

(ii) Pursuant to the said tender, the petitioner along with other tenderers submitted tender along with statutory deposit of Rs. 25,00,000/-.

(iii) On 12-2-2005 the bids were opened and the bid of the petitioner was the highest bid.

(iv) The relevant condition of tender document stipulated in Clause (7) reads thus--

The successful bidder will have to pay 25% of the amount immediately on acceptance of the bid and the remaining amount within 30 days, failing which the Bank may at its discretion cancel the bid and forfeit the earnest amount and/or charge interest at the rate of 18% per annum with monthly rests on delayed payments or as the bank considers if appropriate. In case of resale on account of the cancellation of the bid, if the property fetches less amount than the offer of the successful bidder then the bidder shall indemnify the bank for all such losses arising thereof and also shall be liable for payment of all expenses so incurred for re-auctioning of the said property.

(v) Letter dated 11-7-2005 is issued by the respondent Bank to the petitioner wherein various issues raised by the petitioner in his letter dated 16th June, 2005, were considered and answered by the Bank in this communication. The petitioner is also asked to pay the balance consideration as per the auction, failing which the earnest money would stand forfeited.

(vi) The legal notice/ communication dated 1-8-2005 is issued by the petitioner to the Bank wherein the petitioner has mentioned the reasons for not to continuing with his offer and requested the Bank that the offer being frustrated, to refund the security deposit of Rs. 25,00,000/-.

(vii) The impugned letter/communication dated 17-8-2005 is issued by the Bank to the petitioner wherein the bank for the first time accepted the offer/bid of the petitioner. In the said letter itself the petitioner was called upon to pay the balance amount within seven days from the date of receipt of the said letter and was also informed that if the petitioner failed to deposit the balance amount, the security deposit of Rs. 25,00,000/- shall stand forfeited.

9. In view of the above facts, we have to consider on what date the offer/bid of the petitioner is accepted by the respondent Bank resulting in concluded contract. Language of the communication dated 11-7-2005 issued by the Bank to the petitioner cannot be said to be an acceptance of the offer of the petitioner by the Bank. On the other hand, the contents thereof clearly demonstrate that the letter dated 11-7-2005 is nothing but the communication by the Bank in regard to the queries made by the petitioner vide letter dated 16-6-2005. It is no doubt true that in the letter dated 11-7-2005 there is a passing reference whereby the petitioner is asked to pay the balance consideration as per auction, failing which the earnest money shall be forfeited. However, it is nowhere stated in the said letter dated 11-7-2005 that the offer/bid of the petitioner was accepted by the Bank either on 11-7-2005 or earlier to that date. Similarly the communication dated 11-7-2005 is also not in respect of acceptance of the offer of the petitioner and therefore, the contention canvassed by the learned Counsel for the respondent that the offer of the petitioner was accepted vide communication dated 11-7-2005 is completely misconceived and is not supported by the

contents of the letter dated 11-7-2005 and therefore, cannot be accepted.

10. So far as the contentions canvassed by the learned Counsel for the respondent on the basis of Rule 9 of Security Interest (Enforcement) Rules, 2002, is concerned, it will be appropriate to consider the provisions of the said Rule. The relevant rule is Sub-rule (2) as well as Sub-rule (5) of Rule 9.

Sub-rule (2) reads thus--

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorized officer and shall be subject to confirmation by the secured creditor:

PROVIDED that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under Sub-rule (5) of Rule 9;

PROVIDED FURTHER that if the authorized officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price. Sub-rule (5) reads thus--

(5) In default of payment within the period mentioned in Sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold. Rule 9 deals with time of sale, issue of sale certificate and delivery of possession.

11. The plain reading of Sub-rule (2) and Sub-rule (5) of Rule 9 clearly demonstrate that Sub-rule (5) shall come into play only if the sale is confirmed as per the requirement of Sub-rule (2) and not otherwise.

12. In the instant case, the offer of the petitioner for the first time was accepted by the respondent-Bank vide communication dated 17th August, 2005. However, before that the petitioner has submitted an application for withdrawal of his offer and refund of security deposit on 1-8-2005. In view of this undisputed fact, it is evident that on 1-8-2005 the offer/bid of the petitioner was not accepted by the respondent and therefore, on 1-8-2005 there was no concluded contract between the petitioner and the respondent and therefore, in our considered view, in such situation, Rule 9 is not attracted, consequently Sub-rule (5) has no application in the present case and therefore, the contention canvassed by the learned Counsel for the Respondent in this regard is completely misconceived and devoid of substance.

13. Clause (7) of the tender document referred to hereinabove deals with altogether different situation and contemplates that, "successful bidder will have to pay 25% pay of the amount immediately on acceptance of the bid and remaining amount within 30 days, failing which the respondent-Bank has a discretion to cancel the bid and forfeit the earnest money. In the instant case, since the petitioner has applied for withdrawal of his bid and return of his security deposit prior to acceptance of his bid by the Bank, the question of

payment of 25% of the amount does not arise, consequently the payment of balance amount within 30 days thereafter also does not arise since the petitioner has withdrew his offer before it was accepted by the Bank."

14. The first part of the impugned communication dated 17th August, 2005, reads thus--

We have pleasure in informing you that the Hon"ble High Court upheld the action taken by the bank in proceeding under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in such circumstances, you being the highest bidder in the auction dated 12-2-2005, we hereby communicate you our acceptance having accepted your offer.

Part 2 of the said letter reads thus-

In such circumstances, in terms of clause 7 of the Terms and Conditions, you are hereby called upon to deposit a sum of Rs. 2,58,42,750.00 within seven days, and further arrange the balance payment in further 3 weeks and call upon the undersigned to complete the remaining formalities.

The other relevant para is the last para of the letter which reads thus--

We request you to comply this letter within 7 days of receipt of this letter failing which your Security Deposit of Rs. 25,00,000/- shall stand forfeited and you shall be further liable for payment of all the expenses incurred by the bank for putting the sale property for re-auction.

15. The recitals in Paragraph 1 of the letter makes it evident that the offer of the petitioner for the first time was accepted on 17th August, 2005, and the petitioner was communicated about the same vide impugned communication dated 17th August, 2005. It is, therefore, evident that on 1-8-2005 when the petitioner submitted application to the Bank for withdrawal of his offer and return of his security deposit, the offer/bid of the petitioner was neither accepted by the Bank nor there was any concluded contract between the petitioner and the respondent-Bank. The learned Counsel for the respondent has not shown to us any condition of tender which prohibits the tenderer to withdraw his offer before it is accepted by the respondent-Bank and entitles the respondent-Bank to forfeit the security deposit.

16. The recitals of Paragraph 2 of the said letter dated 17th August, 2005, demonstrate that since the offer of the petitioner was accepted on 17th August, 2005, the petitioner was called upon to deposit the requisite amount within 7 days and the last paragraph of the said letter mentions the consequences of not depositing the requisite amount i.e. forfeiture of the security deposit.

17. It is no doubt true that once the offer is accepted, in a given case it may not be possible for the tenderer to back out from the tender process and will have to be abide by the terms and conditions of the tender. It is also not in dispute that after the offer is accepted and if the balance amount is not paid within the

stipulated time by the tenderer, in such situation the earnest money would stand forfeited. However, in the instant case, none of these contingencies arise in view of the above referred facts and circumstances since the petitioner before the offer is accepted by the Bank has already submitted an application to the Bank for withdrawal of his officer and return of security deposit. In absence of any condition of tender or any other rule applicable in this regard disentitling the tenderer to withdraw his offer once it is given and before it is accepted by the respondent, we are afraid that the action of the respondent-bank of forfeiting the security deposit is not sustainable in law. Hence, the contention of the learned Counsel for the respondent cannot be accepted and the action of the bank cannot be justified.

18. The other contentions canvassed by the learned Counsel for the respondents, for the reasons stated hereinabove, are also misconceived and cannot be accepted.

19. For the reasons stated hereinabove, we direct the Respondent Bank to return the security deposit of Rs. 25,00,000/- (Rupees Twenty Five lacs only) to the petitioner within a period of six weeks from the date of receipt of this order.

With these directions, the writ petition is allowed. Rule is made absolute in the above term.