

(2009) 01 CAL CK 0021
In the Calcutta High Court
Case No : Writ Petition No. 29842 (W) of 2008

Biswanath Shaw

APPELLANT

Vs

The Central Bank of India and Others

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 226
Contract Act, 1872 — Section 10, 9
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Rules, 2004 — Rule 8(6), 9

Citation : AIR 2009 Cal 243

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : A.P. Lahiri, Swapan Banerjee and Lalit Mondal, for the Appellant; V. Raja Rao and A. Rao for Respondent Nos. 1 to 3, for the Respondent

Judgement

Sanjib Banerjee, J.—The writ petitioner challenges the respondent bank's conduct in cancelling a tender and inviting further offers without reference to the petitioner who was the only eligible bidder following the initial invitation. The writ petitioner insists that upon a person being identified as the only eligible or the most qualified bidder, a right vests in such person which cannot be lightly disturbed.

2. The respondent bank, controlled by the government, took possession of an immovable property under the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 and issued a notice under Rules 8(6) and 9 of the Security Interest (Enforcement) Rules, 2002. The petitioner responded to the sale notice of March 13, 2008, deposited the sum of Rs. 1,25,000/- along with his bid and his offer was found to be the only one eligible in terms of the bank's advertisement. On April 22, 2008 the bank acknowledged that the petitioner's was the only qualified bid. The bank's letter contains the following sentence at the end,

We will inform you about the sale of property within 15 days.

3. The sale notice referred to three properties. The last condition of the notice under the heading "Other Terms & Conditions" reads as follows:

8) Authorised officer reserves the right to postpone/cancel or vary the terms and conditions of the tender without assigning any reason.

4. The petitioner made an offer for one of the three properties, the land and building at Mouza Sulandih, JL No. 100, LR Khatian No. 107, 157, 200 and 219, RS Plot No. 31 & 32, PS Neturia, District Purulia. The base price fixed for such property was Rs. 12.50 lakh.

5. After the petitioner's bid was found to be the only eligible, he was required to deposit a further sum of Rs. 1,87,500/- which was received by the bank. The letter of April 22, 2008 promised that the bank would inform the petitioner regarding the sale of the property within 15 days but the bank did not get back to the petitioner within reasonable time of expiry of such period. The petitioner caused a notice to be issued by his advocate on September 16, 2008 demanding that the bank promptly execute and register the conveyance in respect of the property. The letter shows that the petitioner's willingness to put in the balance consideration and receive immediate possession of the property. The petitioner threatened that if the bank did not comply with the reasonable request, he would "take legal steps ... for the specific performance of the contract."

6. The petitioner says that on or about September 27, 2008 he received a letter from the bank requesting him to call at the bank at 11 am on October 1, 2008 "for holding a meaningful discussion in presence (of) the borrower about the tender advertised on 13.03.2008." The petitioner contends that he could not comprehend the purpose of such letter and, thus, wrote to the bank on October 4, 2008 requiring it to inform the petitioner of "the matter of discussion." The bank responded by a letter of October 15, 2008 citing a discussion that the petitioner is said to have had with the regional manager of the bank and inviting the petitioner to call at the bank on October 21, 2008 "to discuss about the tender submitted by you." It is the petitioner's assertion that he was informed on October 21, 2008 "that the bank authority is not in a position to confirm the sale in favour of the petitioner" though no writing to such effect was furnished to him.

7. The petitioner complains of a subsequent letter, by which the bank enclosed two demand drafts covering the amounts deposited by the petitioner in April, 2008 and informing the petitioner that the bank had decided to call a fresh tender. The bank's letter of October 27, 2008 promised to "intimate you the date of tender called by us and the reserve price etc. in due course for your information and for taking participation (sic) in the tender process." The petitioner insists that he complied with all terms and conditions set out in the original sale notice, had been ready and willing to complete the transaction and had demanded that it be concluded promptly. He assails the unilateral decision

by the bank to cancel the original sale notice and the steps taken thereafter and questions the legality and propriety of the bank calling a fresh tender. He says that a right had vested in him which the bank had no authority to undo; without either citing any lapse on his part or, at the very least, without hearing him out before deciding to cancel the initial process.

8. At the time that the petition was received on January 7, 2009 it was submitted on behalf of the bank that one Khan Trading Company of village Inanpur, PO Digha, PS Netania, District Purulia had offered Rs. 16 lakh for the same property following a fresh invitation for offers that had been issued in November, 2008. Upon such submission, the petitioner was required by the order dated January 7, 2009 to serve a copy of the petition on Khan Trading Company and the bank was directed to inform the subsequent highest bidder of the institution of these proceedings.

9. When the matter was taken up on the returnable date on January 14, 2009 Khan Trading Company did not put in an appearance despite both the petitioner and the bank submitting that due notice had been dispatched to it. Thus, an order came to be made restraining the bank from executing any document of transfer in respect of the property in favour of Khan Trading Company and further restraining the bank from processing the subsequent offer without previous leave of Court. The matter was then directed to appear on January 21, 2009.

10. Khan Trading Company has put in an appearance through its authorised representative in person. It had earlier been made clear to the writ petitioner that the purpose for ensuring Khan Trading's presence was to force a bidding between the petitioner and Khan Trading, subject to both parties acquiescing therein. The petitioner asserts a right and, in effect, declines the suggestion to outbid Khan Trading. The petitioner submits that in the circumstances there was a right vested in him that neither the bank nor Khan Trading with its more attractive offer could dislodge. The petitioner says that there is a concluded contract between him and the bank which, unless cancelled in accordance with law, would bind the bank. The petitioner argues that the first step taken by the bank that paved the way for Khan Trading to enter the scene was illegal and the cancellation of the original sale notice cannot be sustained.

11. In support of his contentions, the petitioner refers to a judgment reported at National Properties Ltd. Vs. Bata India Limited, The Division Bench in that case took up an appeal against a decree passed in a suit for specific performance of a contract for grant of a lease. The plaintiff in that case culled out the terms of the agreement from correspondence exchanged between the parties and/or between the plaintiff and the broker who acted on behalf of the to-be lessor. The petitioner here first relies on paragraph 108 of the report:

108. Here the plaintiff was keen for and insisted on the draft lease and to examine the terms for their approval. Admittedly no draft lease was ever

prepared and the plaintiff could not approve the terms. Therefore, in the absence of the terms mentioned in the draft lease which require the plaintiff's approval, the contract has not reached finality.

22. The petitioner also relies on paragraphs 119 and 127 of the report. At paragraph 119, the Division Bench recorded, on its appreciation of the evidence, that no draft lease was required in that case for incorporation of the terms already agreed upon but it was required for approval "of the terms of the bargain." In the absence of the draft lease, the judgment proceeded, "the terms of the bargain ... (had) not been approved by the plaintiff company and (remained) at the stage of negotiation." The Division Bench was of the view that there was no finality to the terms, at least it did not appear from the evidence. In the subsequent paragraphs, parts of the oral testimony were quoted before the applicable legal principles were summarised at paragraph 127:

127. The summary of legal principles appears from the celebrated treatise of Hill and Redman, on Landlord and Tenant, 16th Edition, 106. The relevant portion is quoted below:

(d) The commencement and duration of the term. - Where no commencement of the term is stipulated there is no valid agreement: *Harvey v. Pratt* (1965) 2 All ER 786; *Lowenthal v. Riordan Heating Co.* (1966) Estate Gazette Digest 387; *Fitzmaurice v. Bayley* (1960) 9 HL Cas 78. Nor will the Court cure the invalidity by implying a term that the lease is to commence at a reasonable time or at the date of the agreement: *Marshall v. Berridge* (1881) 19 Ch D 233; *Edwards v. Jones* (1921) 124 LT 740; *Harvey v. Pratt* (supra).

The law in this country is the same. So this Court is of the view that there is no binding contract between the parties.

23. The other judgment that the petitioner cites is one reported at *Tata Cellular Vs. Union of India*, where the Supreme Court discussed the principles of judicial review in the face of an allegation of favouritism in the matter of awarding a contract by the State.

24. To begin with, first the judgment that has been brought by the petitioner to bear on the subject needs to be seen. Apart from the fact that the judgment of the Division Bench in that case was on appreciation of the evidence as a first appellate court sitting in judgment over a decree and disregarding the inapposite reliance on the paragraphs placed, the petitioner cites the judgment for what the petitioner perceives to be the corollary, reverse view. The legal argument of the petitioner appears to be that since on the facts of that case the Division Bench found that there was no concluded contract, if a concluded contract could be discerned in the absence of a formal document, the parties thereto would remain bound thereby. The judgment does not say so, though there are other authorities to such effect.

25. The doctrine of precedent is a cardinal principle of the hierarchical nature of

this judicial system. When a decision is rendered by a forum of superior or concurrent jurisdiction while adjudicating the rights of the parties to a lis embodying a declaration of law, it operates - till such time that it is unsettled - as a binding principle for future cases. Such feature leads to the development of jurisprudence. A judgment as precedent carries the weight of what it actually decides and not matters on the periphery. The National Properties judgment is of no assistance to the petitioner in this case.

26. The petitioner has also attempted to invoke the principle of promissory estoppel to claim the property and has referred to Sections 9 and 10 of the Contract Act, 1872:

9. Promises, express and implied. - In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

10. What agreements are contracts. - All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

27. It cannot be appreciated as to how the petitioner can rely on the principle of promissory estoppel in a matter of this nature where the only act done by the petitioner is to tender payment which the bank returned but the petitioner did not accept. The reliance on the provisions of the Contract Act, again, does not further the petitioner's case.

28. Upon an auction bidder at any sale undertaken by a State or authority within the meaning of Article 12 being identified as the most qualified or as the highest offerer, no indefeasible right ordinarily vests in such auction bidder. Such bidder does not necessarily acquire any right to have the sale concluded in his favour. Though the petitioner has urged that the right that had vested in him in this case could not have been undone without his concurrence or, at least, without reference to him, there is no legal authority brought in support of such argument. Counsel has been reminded that law journals abound with authorities to the contrary.

29. Both the last condition of the sale notice and the final sentence in the bank's writing of April 22, 2008 demonstrate that the matter had not been concluded. Under either, the bank had reserved the authority unto itself to take a decision in the matter. Although in a given case the exercise of the authority so reserved under the omnibus last condition of the sale notice may come up for scrutiny, at the end of the day it is the reasonableness of the action that is called into

question.

30. It is apparent in this case that on the strength of the last condition of the sale notice, the petitioner cannot claim that any inviolable right had accrued to him till the matter was concluded. That the matter was not concluded is evident from the reservation expressed in the final sentence of the letter of April 22, 2008. The petitioner makes no grievance of either the sweeping last condition of the sale notice or the exit line in the letter of April 22, 2008. He insists on his right despite the two. The State or any authority within the meaning of Article 12 of the Constitution is not always bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of the relevant notice and the right claimed by the highest bidder has to be tested as such. If the petitioner's case is accepted, a direction has to issue for confirmation of the sale in his favour by bypassing the bank.

31. A challenge to the cancellation of an auction held by a public body is assessed on the principal consideration of fairness and augmentation of revenue. The principles of judicial review would apply to the exercise of contractual powers by government bodies to prevent arbitrariness or favouritism, but there are inherent limitations in the exercise of such power under Article 226 of the Constitution. Even the Tata Cellular judgment that the petitioner has brought recognises the government, as the guardian of the finances of the State and with authority to protect the financial interest of the State, being entitled to get the best person or the best quotation (paragraph 7).

32. The power of judicial review under Article 226 of the Constitution is not akin to appellate powers. The writ court merely reviews the manner in which the decision was made, rarely is the decision directly tested unless it is shocking. The writ court does not have the wherewithal, in every case, to correct the administrative decision; if it seeks to supplant the impugned decision with its wisdom, it exposes its fallibility. The State or any of its limbs have the freedom to contract, the decision being subject to the Wednesbury principles of reasonableness and being free from arbitrariness. In matters relating to contracts there is a commercial element and the State as a contracting party has as much commercial freedom as a private party, subject again to the decision being reasonable and by and large fair. Even if there is an irregularity in the decision making process the court has to exercise its discretion under Article 226 of the Constitution with caution and only in the furtherance of public interest and not on pedantic legality.

33. The bank in this case was seeking to obtain the best price for its security. It is incumbent on the bank to obtain the highest price whether to cut its losses or to reduce the residuary burden on the borrower or guarantor. If it is seen that a substantially better offer has been received subsequently, the writ court may choose not to exercise its discretion even at the behest of a party in whose favour the sale may earlier have been concluded. Unlike in the case of a contract for rendition of any service or supply of material, when the State seeks to simply

sell an asset the only considerations would be the price and the paying power of the prospective purchaser. In any event, there was no concluded contract in this case.

34. In view of the reservation in the sale notice as amplified by the last sentence of the bank's letter of April 22, 2008, this petitioner cannot claim to have had a vested right in him upon his being identified as the only eligible bidder in the first round.

35. Even if a right had accrued to the petitioner, the motive of the bank to obtain a higher price cannot be faulted. The only criticism that can be levelled against the bank would be its apparent failure to specifically inform the petitioner of the second tender and the bank expecting the petitioner to follow the newspapers and notice the advertisement. It was such minor aberration on the bank's part that was attempted to be rectified by inviting Khan Trading to be present and affording the petitioner a chance to outbid Khan Trading in Court. The petitioner has spurned such opportunity. He may now have to settle only with a possible claim for reasonable interest on the sum that he paid till the date of receipt of the demand drafts that the bank sent to him.

36. The challenge to the cancellation of the original tender fails and the consequential challenge to the second tender has no further legs. The subsisting interim order restraining the bank to process the sale of the property in favour of the subsequent highest bidder is vacated. WP No. 29842 (W) of 2008 is dismissed without any order as to costs.

37. Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.