(2017) 03 OHC CK 0069

In the Orissa High Court

Case No : 10450 of 2015

Damodar Pradhan APPELLANT

Vs

United Bank of India & Others RESPONDENT

Date of Decision : 07-03-2017

Acts Referred:

Constitution of India, Article 14, Article 226 - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Power of High Courts

Citation : (2017) 03 OHC CK 0069

Hon'ble Judges : Kumari Sanju Panda, Shri Sujit Narayan Prasad

Bench : DIVISION BENCH

Advocate : B. S. Tripathy, Ranjit Sahoo, D. K. Moharana, M. Jena, M.K. Acharya, Bibhuti Bhusan Mishra, M. K. Dash, J. Rath

Final Decision : Disposed

Judgement

1. This writ petition is, inter alia, for the following reliefs:- (i) To quash the impugned sale process pursuant to e-auction sale notice under Annexure-1 series; and thereby (ii) To direct/order/command the opposite party nos.1 & 2 to hold a fresh sale process limiting it to the petitioner and opposite party no.3 only and thereafter to finalize the process in accordance with law; and (iii) To pass such other order as may be deemed fit and proper in the bona fide interest of justice. 2. The brief fact of the case, as has been pleaded by the writ petitioner in this writ petition, is that the Union of India, through its Regional Office, Bhubaneswar issued e-auction sale notice on 18.04.2015 publishing it in two daily local newspapers, namely, "Indian Express" (in English) and "Sambad" (in vernacular) on their publication dated 20th April, 2015, in respect of secured assets of the borrowers concerning Puri Branch, Chandaka Industrial Estate Branch, Cuttack Branch & Paradip Branch. The present writ application is confined to secured assets of the borrower, namely, Bijay Kumar Jena with respect to his property situated at Mouza-Puri Sahar, Unit No.16 (Kalikadevi

Sahi), P.S.-Puri Sahar, Tahasil - Puri, District - Puri, bearing Khata No.100, Plot No.441, measuring an area of Ac.0.052 decimal (herein after referred to as the schedule property). The reserved price and EMD of the schedule property was fixed at Rs.11,05,000/- and Rs.1,11,000/- respectively. The amount recoverable from the borrower was indicated to be Rs.6,19,284/- as on 31st January, 2009 + interest, cost and expenses thereon. The date and time of e-auction was fixed to 21st May, 2015 at 10:30 A.M. to 11:30 A.M. with the stipulation that the date/ time of e-auction with unlimited 5 minutes auto extension, if someone bids at the last five minutes. The petitioner, in order to participate in the e-auction sale process, has deposited the required EMD of Rs.1,11,000/- in the prescribed manner and submitted sufficient and acceptable proof of his identity, residence with copy of the PAN card. Finally there was only two participants, namely, the petitioner and opposite party no.3. The bidding process started, as per the notice, at 10:30 A.M. and continued up to 11:45 A.M. since the bids were on with submission of offers by both the participants. By 11:45 A.M. the last offer furnished by opposite party no.3 in respect of the schedule property was at Rs.14,45,000/- since there was 5 minutes auto extension to enable the petitioner to furnish his offer as against the last offer of opposite party no.3 which was at Rs.14,45,000/-, there was failure of link in the computer system for which the petitioner could not be able to submit his offer as against the last offer submitted by opposite party no.3 which was Rs.14,45,000/- as because there was failure of link, the opposite party no.2 closed the e-auction process. The petitioner at that stage, referring to clause-15 of the e-auction notice, requested the opposite party no.2 to postpone the process until restoration of link failure or until 5 P.M. but the same has not given heed to saying that the decision is as per the prerogative of the auction notice, thereafter the petitioner has met with the higher officials of the Bank but however, to no effect. According to the petitioner, as on 03.06.2015, the e-sale in respect of the schedule property so far has not been finalized since the opposite party no.3 has not deposited 75% of the sale price though as per the notice the bidder has to deposit 25% of the sale price (less EMD) immediately and the balance amount of sale price to be paid within 15 days from the date of auction, i.e. by 05.06.2015, hence the sale has not been completed and in the result sale certificate has not been issued in favour of opposite party no.3 in respect of schedule property. The petitioner is concerned for the schedule property and as such he has participated in the e-auction sale process for the reason that he is residing in the schedule property as a tenant of the borrower Bijay umar Jena since 2007. Even he has entered into an agreement with the original borrower on 09.01.2008 who has authorised him to take the schedule property by clearing its entire liability in the Bank, the said written agreement dated 09.01.2008 of the borrower has also been produced before the banking authority, but even in spite of the same the bank authorities have not considered and has gone for e-auction process. It is the case of the petitioner that the banking authority, while disposing of the schedule property, has committed illegality by showing favour to opposite party no.3 as because he was high in bid right from 11:29:03 A.M. to 11:30:18 A.M. and as such it cannot be said that it was continuing process of bid to continue with the bid even after 11:30 A.M. or the 5 minutes auto extension, as has been prescribed in the e-auction, the banking authority has committed illegality by travelling beyond the schedule time as has been fixed in the e-auction tender even crossing the automatic extension of 5 minutes since the opposite party no.3 has quoted more price at 11:39:47 A.M. in comparison to the rate quoted by the petitioner at 11:30:18 A.M., however, the petitioner has again quoted more rate in comparison to opposite party no.3 at 11:39:56 A.M. but again the time schedule has extended till 11:44:59 A.M. by which the opposite party no.3 has quoted Rs.14,45,000/- and when the time of the petitioner has come the system has become closed due to link failure, thus it is evident from the situation that the banking authority has favoured the opposite party no.3 otherwise the e-auction process would have been closed when the petitioner has quoted rate at 11:30:18 A.M. to the extent of Rs.14,05,000/-, this shows the illegality in the decision making process by the banking authority only to favour the opposite party no.3 and on this ground the writ petition has been filed praying therein to quash the entire e-auction process and to direct the bank authority to go for fresh auction strictly complying the terms and conditions of the e-auction notice. 3. While on the other hand, the case of opposite party nos.1 & 2 - the Bank is that the timing for e-auction of the alleged property was fixed at 10:30 A.M. to 11:30 A.M. and accordingly last bid offer in respect of the mortgaged schedule property was given by the opposite party no.3 at 11:50 A.M. and against that offer as no other participants quoted price over and above the bid price of opposite no.3, opposite party no.3 was declared as highest bidder in the said auction sale. The contention of the petitioner regarding the written agreement dated 09.01.2008 has been disputed. The further contention of the petitioner that the required sale price has not been deposited by the opposite party no.3 has also been disputed. 4. The opposite party no.3 has appeared through his counsel who has filed detail counter affidavit refuting the contention of the petitioner regarding failure of link in the computer system for which the petitioner could not be able to submit his further highest offer as against the last offer submitted by opposite party no.3, i.e. Rs.14,45,000/-. According to him he has participated in the e-auction process in which he has been shown to be the highest bidder and as such declared to be the highest bidder in which there is no illegality, since it has been done strictly in terms of the tender notice. So far as the contention of the petitioner that the e-auction should have been continued strictly by 10:30 A.M. to 11:30 A.m., submission has been made that as per the terms and conditions of the e-sale notice the process was to take place on 21.05.2015 from 10:30 A.M. to 5 P.M. with unlimited auto extension of 5 minutes each, finally closing the auction process before 5 P.M. hence the e-auction process has been completed within the time schedule mentioned in the e-auction sale notice. 5. The learned counsel appearing for the opposite party - Bank has produced copy of the e-auction report by serving copy of it upon the learned counsel appearing for the other sides, on the basis of which argument has been advanced submitting that there is no illegality in the e-auction process. 6. We have heard the learned counsels for the parties and perused the documents available on record including the e-auction report submitted by the learned counsel appearing for the opposite party - Bank. We, after appreciating the argument advanced on behalf of the parties, come to the conclusion that the issue related in this writ petition is regarding "as to whether illegality has been committed by the banking authority in proceeding with the e-auction sale of the schedule property?" The admitted position in this case is that a notice has been published by the United Bank of India for disposal of the schedule property of the borrower, namely, Sri Bijay Kumar Jena who has taken loan from the United Bank of India of its Puri Branch, the loan account having become non performing asset, proceeding has been initiated under the SARFAESI Act resulting into publication of e-auction notice by publishing it in the daily newspaper, i.e. "Indian Express" (in English) and "Sambad" a vernacular daily newspaper on 20th April, 2015 in exercise of power conferred under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Security Interest (Enforcement) Rules, 2002 by keeping the reserve price and EMD of the schedule property at Rs.11,05,000/- and 1,11,000/- respectively and the amount recoverable was indicated to be Rs.6,19,284/- as on 31st January, 2009 + interest, cost and expenses thereon, the date and time of e-auction process was fixed on 21st Mat 2015 in between 10:30 A.M. to 11:30 A.M. The online tender process has started, the petitioner and the opposite party no.3 had participated in the process, as per the details furnished by the learned counsel for the bank by way of e-auction report, the process had started at 10:37:42 A.M. on 31st May 2015 by quoting the rate by the opposite party no.3 at Rs.11,05,000/- and it continues up to 11:44:59 A.M. at that time opposite party no.3 has quoted the bid value to the extent of Rs.14,45,000/- and thereafter the bid process has been closed declaring opposite party no.3 as highest bidder which is under challenge by the petitioner on the ground that the decision making process in e-auction process is absolutely illegal, unreasonable and in the teeth of the provision of Article 14 of the Constitution of India, reason being that the e-auction notice provides the initiation of tender at 10:30 A.M. to be completed by 11:30 A.M. with unlimited auto extension of 5 minutes if someone bids at the last 5 minutes. The petitioner contends that when the date and time schedule has specifically been mentioned in the e-auction sale notice, the banking authority should have followed the same strictly in terms of the said conditions, but going beyond that, they have allowed to continue the e-auction process beyond the time limit prescribed and even beyond unlimited 5 minutes auto extension since as per the terms and conditions the time schedule fixed in the e-auction was to be completed by 11:30 A.M. but it has gone up to 11:44:59 A.M. and thereafter the process has been closed on the ground of link failure. However, the opposite party no.3 is disputing the contention of the petitioner regarding link failure and according to him it is after though of the petitioner but the banking authority has not rebutted the specific stand taken by the petitioner regarding link failure. In the light of this factual aspect this court is to decide as to whether the decision making process taken by the banking authority is within the framework of Article 14 of the Constitution of

India or not since the High Court sitting under Article 226 of the Constitution of India has got very limited jurisdiction to judicially review the decision making process taken under e-auction unless the decision taken by the authority is in the teeth of the Article 14 of the Constitution of India as it has already been settled by the Hon''ble Apex Court in the case of Sterling Computers Ltd. v. M. & N. Publications Ltd., reported in 1993 (1) SCC 445 wherein the Hon''ble Apex Court has observed as follows:- "while exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the decision making process xxxxxx the court can certainly examine whether ''decision making process'' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution of India." In the case of Tata Cellular v. Union of India, reported in AIR 1996 SC 11 the Hon''ble Apex Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, observing therein the Hon''ble Apex Court has held that if the decision is for any collateral purpose or infringement of Article 14 the Court certainly can interfere in the decision making process of the authority in the matter of grant of bid. In the case of Air India Ltd. v. Cochin International Airport Ltd, reported in 2002 (2) SCC 617 the Hon''ble Apex Court has observed that where the decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness for the reason that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned and if some defect is found in the decision making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Hon''ble Apex Court in the case of Association of Registration Plates v. Union of India, reported in 2005 (1) SCC 679 has held that Article 14 of the Constitution prohibits Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contracts. At the same time, no person can claim a fundamental right to carry on business with the Government. It is evident from the judicial pronouncements of Hon''ble Apex Court, as referred herein above, that the High Courts, under Article 226 of the Constitution of India, can scrutinize the decision making process in exercise of its power of judicial review in order to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. 7. We have examined the facts of this case in the light of the proposition laid down by the Hon''ble Apex Court as referred above and scrutinize the e-auction report and the e-auction sale notice. The terms and conditions of the e-auction notice contains the schedule of property of different branches inclusive of the schedule property related to the instant writ petition and each of the schedule property branch-wise have been shown their reserved price, amount recoverable, date/ time of e-auction. The date and time of e-auction for the schedule property related with the instant writ petition is 21.5.2015 to be started from 10:30 A.M. to 11:30 A.M. In between the details of schedule property and the terms and conditions one another condition has been given "with unlimited 5 minutes auto extension if someone bids at the last 5 minutes". It is further evident that the e-auction to be completed in between 10:30 A.M. to 5 P.M. with respect to all the schedule property mentioned therein by earmarking time schedule for each property column-wise. So far as the schedule property of the instant case is concerned, as would be evident from the e-auction report, Sandip Patra, the opposite party no.3, Loknath Mahasuara and Damodar Pradhan had participated in the bid. Sandeep Patra has given his bid at 10:37:42 A.M. on 21 May, 2015 by saying his bid to the extent of Rs.11,05,000/-, Loknath Mahasuara has given his bid to the extent of Rs.11,15,000/- at 10:38:44 A.M., then the petitioner, namely, Damodar Pradhan, has given his bid to the extent of Rs.11,25,000/- at 10:58:40 A.M.. Again the petitioner has extended the amount of bid to the extent of Rs.11,35,000/- at 11:14:43 A.M., thereafter opposite party no.3 has quoted his bid to the extent of Rs.11,45,000/- at 11:27:28 A.M. then the petitioner has quoted the rate to the extent of Rs.11,95,000/- at 11:29:03 A.M. and gone up to the extent of the bid amount of Rs.14,05,000/- by 11:30:18 A.M. and thereafter opposite party no.3 has quoted his bid to the extent of Rs.14,15,000/- at 11:39:47 A.M. and again the petitioner has quoted the bid rate to the extent of Rs.14,35,000/- at 11:39:56 A.M. and thereafter the opposite party no.3 has quoted his bid rate to the extent of Rs.14,45,000/- at 11:44:59 A.M. and thereafter the link alleged to have been failed, depriving the petitioner to quote his further rate. The condition mentioned in the e-auction notice "with unlimited 5 minutes auto extension if someone bids at the last five minutes" then there would be unlimited 5 minutes auto extension, this can be demonstrated by way of an example that suppose a rate has been quoted by the bidder at 11:25 A.M. then it will go for further 5 minutes, likewise if at 11:30 A.M. again someone bids, then again it will go for 5 minutes auto extension likewise it will continue in such situation till 5 P.M., we have appreciated the decision making process of e-auction tender from the e-auction report, from which it is evident that the tender process started at 10:37:42 A.M. has continued up to 11:14:43 and up to that point the applicability of unlimited 5 minutes extension will not be applicable, it will be applicable only at 11:25 A.M. but from the table of e-auction report it is evident that on 11:25 A.M. none has quoted his rate rather the rate has been quoted by opposite party no.3 at 11:27:28 A.M. and as such the applicability of unlimited 5 minutes auto extension has come into play and it was to be extended up to 11:32 A.M. and accordingly within that 5 minutes auto extension the rate quoted by the petitioner at 11:30:18 was to the extent of Rs. 14,05,000/- and thereafter allowing auto extension would not be admissible since it can only be admissible if after 11:30:18 A.M. immediately the opposite party no.3 would have quoted the rate, but he has quoted the rate only at 11:39:47 A.M., hence according to us rate quoted by the bidders after 11:30:18 A.M. would be contrary to the time frame provided in the e-auction notice. It is further evident from the terms and conditions regarding maintaining the time of e-auction, the e-auction should have been closed by 11:32:28 A.M. for the reason that in pursuance to the condition of 5 minutes auto extension since the opposite party no.3 has quoted his bid at 11:27:28 A.M. then from that time the 5 minutes will end at 11:32:28 A.M., hence at 11:32:28 A.M. it should have been closed and it can only be allowed to continue if before 11:32:28 A.M. someone bids, but here the position is that after 11:30:18 A.M. no offer has been made, rather the offer has come at 11:39:47 A.M. which is beyond the period of 5 minutes auto extension as provided under the terms and condition. For better appreciation the table of the e-auction report is reproduced herein below:-

Bidder Name	Bid Value	Rank	Bid Date & Time
Sandeep Patra	1445000	H1	21 May 2015 11:44:59 AM
Damodar Pradhan	1435000	H2	21 May 2015 11:39:56 AM
Sandeep Patra	1415000	H1	21 May 2015 11:39:47 AM
Damodar Pradhan	1405000	H2	21 May 2015 11:30:18 AM
Damodar Pradhan	1325000	H2	21 May 2015 11:30:03 AM
Damodar Pradhan	1315000	H2	21 May 2015 11:29:47 AM
Damodar Pradhan	1225000	H2	21 May 2015 11:29:31 AM
Damodar Pradhan	1215000	H2	21 May 2015 11:29:16 AM
Damodar Pradhan	1195000	H2	21 May 2015 11:29:03 AM
Sandeep Patra	1145000	H1	21 May 2015 11:27:28 AM
Damodar Pradhan	1135000	H2	21 May 2015 11:14:47 AM
Damodar Pradhan	1125000	H2	21 May 2015 10:58:40 AM
Loknath Mahasuara	1115000	H3	21 May 2015 10:38:44 AM
Sandeep Patra	1105000	H1	21 May 2015 10:37:42 AM

There is no doubt about the settled proposition that if anything has been provided under the terms and conditions of any auction sale notice or the tender notice, the authority is under its obligation to follow it strictly for the purpose of following the fair and transparent process, but according to us as has been demonstrated in the preceding paragraph, the banking authority has not strictly adhered to what they have reflected in their e-auction sale notice and as such according to our conscious view there is defect in the selection process and applying the principle as has been laid down by Hon''ble Apex Court as discussed herein above, this court is of the considered view that it is a fit case wherein the judicial review of the decision making process is required to be taken and accordingly we have exercised our extra-ordinary jurisdiction conferred to this court under Article 226 of the Constitution of India by quashing the entire e-auction process with respect to the schedule property related to borrower Sri

Bijay Kumar Jena in pursuance to e-auction sale notice dated 20th April, 2015 published in the "Indian Express" and "Sambad" daily newspaper with a direction upon the bank to go for fresh process to be completed at an early date taking into consideration that there is involvement of public money. It is expected that the bank authority will adhere to the terms and conditions which they will come out with the fresh e-auction sale notice so that the public money can be secured at an early date. With these observation and direction the writ petition stand disposed of. The copy of the e-auction notice, which has been produced by the learned counsel appearing for opposite party - Bank is directed to be kept on record.

