
(2011) 01 CAL CK 0096

In the Calcutta High Court

Case No : M.A.T. 1311 of 2010 and C.A.N. 8780 of 2010

Enkon Private Ltd. and Another

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 07-01-2011

Acts Referred:

Calcutta Metropolitan Development Authority Act, 1972 — Section 3

Citation : (2011) 1 CALLT 255 : (2011) 1 CHN 464

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Ashoke Banerjee and Susovan Sengupta, for the Appellant; Fazlul Haque, Gautam Banerjee for State, Partha Sarathi Basu and S. Talukdar for the K.M.D.A., for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This Mandamus-Appeal is at the instance of the writ-Petitioners and is directed against an order dated August 16, 2010 passed by a learned Single Judge of this Court by which His Lordship dismissed the writ-application on the ground that the writ-Petitioner No. 1 by participating in the process of tender waived its alleged accrued right, for enforcement of which, the writ-application was filed.

2. Being dissatisfied, the writ-Petitioners have come up with this Mandamus-Appeal.

3. The following facts have been established from the materials placed before us by the parties:

1) The Appellant No. 1 is a company incorporated under the Companies Act, 1956 and the Appellant No. 2 is one of its directors. The Respondent No. 1 is the State of West Bengal represented by the Respondent No. 2 who is the Principal Secretary, the Department of Information and Cultural Affairs, Government of West Bengal, and the Respondent No. 3 is the Kolkata Metropolitan Development

Authority, a body corporate constituted u/s 3 of the Kolkata Metropolitan Development Authority Act, 1972.

2) On October 25, 2005, the Respondent No. 2 issued an advertisement inviting tenders from the experienced agencies for installation and maintenance of double hoardings in the districts of Jalpaiguri, Bankura, Purulia, Coochbehar, Birbhum, South 24-Parganas and North 24-Parganas. According to the Appellants, by the said advertisement tenders were also invited from the agencies for installation and maintenance of backlit passengers' bus shelters in Kolkata Municipal Area on the same terms and conditions.

3) The Appellant No. 1 along with others became successful and as such, the Respondent No. 2 empanelled fourteen different agencies including the Appellant No. 1 for installation of double hoarding and backlit passengers' bus shelter and pursuant to such empanelment, the Appellant No. 1 has installed various hoardings in different parts of the districts of South 24-Parganas, North 24-Parganas and Hooghly.

4) On September 21, 2009 the Appellants drew the attention of the Respondent No. 2 to the fact that some of the selected agencies similarly placed with the Appellant No. 1, viz. M/s. Karukrit Publicity Private Ltd., M/s. Arun Sign and M/s. Pioneer Publicity Corporation, were already allotted few hording sites on E. M. Bye-Pass, but the Appellant No. 1, in spite of being one of such selected agencies, has not been conferred with such benefit and as such, requested the Respondent No. 2 to pass necessary order for allotment of such hoardings in favour of the Appellant No. 1 for erecting five hoardings.

5) As the said request was not adhered to by the Respondents, the appellants, in the past, made written representation before the Respondent No.2 for allotment of such hoardings on the E.M. Bye- Pass but the Respondents took no notice of the said representation. In view of such inaction of the Respondents, the appellants earlier moved a writ-application being W.P. No. 2067(W) of 2010 before Dipankar Datta, J. on March 1, 2010 after service of notice upon all the Respondents.

6) Dipankar Datta, J. on March 22, 2010 disposed of the said writ-application by directing the Respondent No. 2 to consider and dispose of the grievance of the Appellants by passing a reasoned order after hearing all the parties concerned.

7) Pursuant to the said direction given by His Lordship, the Respondent No. 2 took a decision thereby requesting the Chief Executive Officer of the Respondent No. 3 to give allotment of three sites between Parama Island and Baishnabghata Crossing on the E. M. Bye-Pass to the Appellants for installation of the hoardings.

8) As the Respondent No. 3 paid no heed to the request of the Respondent No. 2 to allot three hoardings in favour of the Appellants, they had drawn attention of such fact to the Respondent No. 2 but no action had been taken.

9) The appellants also drew the attention of the CEO of the Respondent No.3

pointing out the inaction and also complaining that such request of the Respondent No.2 to allot hoardings to the three other successful agencies has been implemented by the Respondent No.3.

10) The appellants, ultimately, filed a fresh writ-application there by praying for direction of compliance with the order dated April 26, 2010 issued by the Respondent No.2 pursuant to the order passed by Dipankar Datta, J. thereby approving the allotment of three sites in favour of the appellants on the E. M. Bye-Pass and for prohibiting the Respondent No.3 from floating any fresh tender in respect of those three sites.

11) At the time of hearing of the said writ-application, the attention of the learned Single Judge was drawn to the fact that the Appellants had already participated in the tender process for those three sites issued by the Respondent No. 3, and that the Appellant No. 1 being the sole bidder in such process, the Respondent No. 3 had decided to call fresh tender by following its norm that the bid of the single bidder is not accepted.

12) The learned Single Judge, by the order impugned in this appeal, dismissed the writ-application on the ground that by the participation in the process of tender, the Appellants have waived their right to get allotment pursuant to the order of the Respondent No. 2 favouring the allotment by acceptance of their plea.

4. Mr. Banerjee, the learned Senior Advocate appearing on behalf of the Appellants, has made twofold submissions before this Court.

5. First, according to Mr. Banerjee, the learned Single Judge erred in law in holding that by mere participation in the process of tender his clients have waived their right to erect the hoardings permitted by the Respondents No. 2 by totally overlooking the fact that his clients obtained the order of allotment pursuant to a judicial order passed by Dipankar Datta, J. in the earlier writ-application filed by his clients where all the Respondents were parties.

6. Secondly, Mr. Banerjee submits that the Respondent No. 3 is not entitled to claim that it is not bound by the order of the Respondent No. 2 as in the previous writ-application filed by his clients, such plea was available to the Respondent No. 3, but it has not challenged the order of Dipankar Datta, J. by which His Lordship directed the Respondent No. 2 to decide the question of allotment to the Appellants and such direction is binding upon the Respondent No. 3 by virtue of the doctrine of constructive res Judicata.

7. Mr. Banerjee, therefore, prays for setting aside the order passed by the learned Single Judge and for passing a direction for implementation of the order of the Respondent No. 2 for allotment of three sites in favour of the Appellants.

8. Mr. Partha Sarathi Bose, the learned Advocate appearing on behalf of the Respondent No. 3, has, on the other hand, supported the order impugned on the question of waiver and has further contended that his client has no obligation to

obey the order passed by the Respondent No. 2. According to Mr. Bose, as the Appellant No. 1 was the sole bidder in the process of tender, his client has decided to call a fresh tender. Mr. Bose submits that in the past, the Respondent No. 3 might have acceded to the requests of the Respondent No. 2 to allot some hoardings to the other empanelled agencies but it has now decided not to allot any hoarding on the request of the Respondent No. 2 and such request is not even binding upon his client. Mr. Bose, therefore, prays for dismissal of the appeal by affirming the order passed by the learned Single Judge.

9. Therefore, the first question that arises for determination in this Mandamus-Appeal is whether the learned Single Judge was justified in dismissing the writ-application filed by the Appellants on the ground of waiver of their right for participation in the process of tender.

10. As pointed out by the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, waiver means abandonment of a right and it may be either expressed or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. In the above mentioned context the following observations of the Supreme Court in that case is appropriate:

Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maule J., pointed out in *Martindale v. Falkner* (1846) 2 CB 706 "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so". Scrutton, L. J., also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in *Evans v. Bartlam*, 1937 AC 473 "...the fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the Appellant had full knowledge of its right to exemption so as to warrant an inference that the Appellant waived such right by addressing the letter dated 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

11. In the aforesaid decision, it was specifically held that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings. In that case, the plea of waiver was not taken in the affidavit but was raised for the first time at the time of hearing of the writ-application and the Apex Court in that context did not permit the said question to be raised. In the

case before us, even before passing a direction for filing affidavit, the learned Single Judge relied upon the plea of waiver raised by the learned Counsel for the Respondent No. 3 based on his instruction. We, therefore, find that the learned Single Judge erred in law in dismissing the writ-application on the ground of waiver of the right of the writ-Petitioner by mere participation in the process of tender.

12. In the case before us, it is established that pursuant to the direction given by Dipankar Datta, J. in the earlier writ-application, the Respondent No. 2 considered the question of allotment and passed an order that the writ-Petitioners should be allotted three hoardings on the E. M. Bye-Pass and conveyed the decision to the Respondent No. 3 for implementation which was not implemented and such fact gave rise to the cause of action for filing the second writ-application out of which the present appeal arises.

13. According to Mr. Bose, the learned Advocate appearing on behalf of the Respondent No. 3, although in the past his client implemented the request of the Respondent No. 2 for allotment of the hoardings in favour of three other empanelled agencies, it is not bound to follow the decision taken by the Respondent No. 2 in favour of the Appellants in this regard.

14. At this stage, it may not be out of place to mention that the decision of Dipankar Datta, J., directing the Respondent No. 2 to take decision as regards the allotments in favour of the Appellants after hearing the parties, was not challenged by the Respondent No. 3 although it was a party to the said proceedings. The plea that the Respondent No. 2 had no authority to take such decision as regards the allotments of sites and that the Respondent No. 3 has the absolute authority in such matters, was available to the Respondent No. 3 before Dipankar Datta, J. but it decided not to contest the claim of the Appellants. Even when the order was passed authorising the Respondent No. 2 to take such decision after hearing the parties, the Respondent No. 3 did not challenge such decision by moving the higher forum. The Respondent No. 2, however, complied with the direction by taking a decision in favour of the Appellants. Thus, the said decision is binding upon the Respondent No. 3 and the plea now sought to be raised by the Respondent No. 3 is barred by the principles of constructive res Judicata. It is now a settled law that the principles of res judicata and constructive res judicata apply to writ-proceedings, *Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others*, and even an ex parte decision in the earlier proceedings operates as constructive res judicata in the subsequent proceedings between the same parties *Saroja Vs. Chinnusamy (Dead) by L.Rs and Another, Aanaimuthu Thevar (Dead) by LRs. Vs. Alagammal and Others*, .

15. Thus, we find that the learned Single Judge erred in law in dismissing the writ-application on the ground of waiver although no affidavit-in-opposition was filed taking the plea of waiver.

16. In the case before us, from the letter being Annexure P-10 dated June 30,

2010 and the lawyer's letter dated July 15, 2010 being P-11 to the application for stay and written on behalf of the Appellants it is clear that their participation in the subsequent tender to be submitted by July 6, 2010 at the latest was never unconditional so as to attract the doctrine of waiver of an accrued right. The Appellant No. 1 did not even fail in the said process of tender but was the sole bidder and on that ground alone, the Respondent No. 3 decided to give fresh advertisement. The Appellants filed the present writ-application without participating in the fresh tender which is not even final. Thus, even on merit, the plea of waiver is not tenable as it cannot be said that the Appellants waived their right and participated in the process of tender without complaint and after being unsuccessful on competition with others have filed the second writ-application.

17. Moreover, in the case before us, in view of the principle of constructive res judicata, the Respondent No. 3 is bound by the decision of Datta, J. and in view of the subsequent decision of the Respondent No. 2 in favour of the allotment of the Appellants in respect of the sites in question pursuant to the decision of Datta, J., it is a fit case of direction for implementation of the said decision upon the Respondent No. 3. At least in the case before us, the Respondent No. 3 is precluded from questioning the authority of the Respondent No. 2 to pass direction for allotment in favour of the Appellants.

18. We, therefore, set aside the order passed by the learned Single Judge and allow the writ-application and the appeal by directing the Respondent No. 3 to allot the three sites pursuant to the decision of the Respondent No. 2 in favour of the Appellants within two months from today. The decision of the Respondent No. 3 to call fresh tender in respect of those three sites is also quashed

19. In the facts and circumstances, there will be, however, no order as to costs.

Sambuddha Chakrabarti, J.

20. I agree.