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**(1998) 08 MAD CK 0073**

**In the Madras High Court**

**Case No :** O.S.A. No. 38 of 1998 and C.M.P. No. 4501 of 1998

M/s. Gemini Foundation

APPELLANT

Vs

V.B. Giri and 13 others

RESPONDENT

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**Date of Decision :** 24-08-1998

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 85, Order 21 Rule 86

**Citation :** (1998) 3 CTC 489 : (1998) 3 LW 460 : (1999) 1 MLJ 193

**Hon'ble Judges :** K. Natarajan, J;C. Shivappa, J

**Bench :** Division Bench

**Advocate :** Mr. A.L. Somayaji, for the Appellant; Mr. T.K. Seshadhri, for the Respondent

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## **Judgement**

C. Shivappa, J.—The appellant herein has challenged the order dated 18.2.1998, passed on Application No. 321 of 1998 in C.S.No. 201 of 1981, by the learned single Judge on the Original Civil Jurisdiction of this Court, refusing permission to withdraw the amount deposited, as the highest bidder for the purchase of two of the suit properties, viz. (i) House Property bearing Door No.1/110, III Block, Java Nagar, Bangalore-II, for Rs.80 lakhs; and (ii) a landed property situated in Old mahabalipuram Road for Rs 1 lakh. The Court accepted this offer for the above-mentioned properties and also laid down conditions to deposit 25% of the bid amount within four weeks from 30.4.1997 and to deposit the remaining amount within eight weeks thereafter and complete the sale.

2. The appellant on 28.5.1997 deposited a sum of Rs. 20,00,000 being the 25% value for the Bangalore property and a sum of Rs. 1,00,000 being the 100% bid amount for the property situated at Old Mahabalipuram Road, He sought for further extension of time till 4.9.1997. Since he did not muster the required balance amount within the time granted, the learned Judge was pleased to cancel the sale order, by his order dated 9.1.1998.

3. The appellant applied for refund of Rs. 20 lakhs deposited by him, which was resisted by the respondents, stating that the amount has to be forfeited in view

of the failure to deposit the balance amount within the time limit stipulated by the Court.

4. The learned single Judge by an order dated 18.12.1998, ordered forfeiture of Rs.20 lakh's and dismissed the Application No. 321 of 1998, but, however, directed to keep the forfeiture alone in abeyance for four weeks from 18.2.1998

5. The learned Senior Counsel Mr. Somayaji contended that the learned Single Judge failed to exercise the discretion judiciously while ordering forfeiture of the amount. He also contended that on an earlier occasion when the court sale did not fructify, the entire amount in deposit was returned, along with Rs. 50,000 as solatium to the erstwhile bidder, and the same yard-stick was not applied to the case of the appellant and that the non- deposit was due to unexpected and unforeseen contingencies beyond his control. The counsel appearing for Respondents 1 to 13, though tried to defend the order in its entirety, but claimed that they are entitled for the loss and the expenses they have incurred in the conduct of the sale in terms of Rule 86 of Order 21.

6. The question involved is whether the forfeiture of the entire amount of Rs.20,00,000 in deposit is valid in law?

7. In order to appreciate the question, it is appropriate to set out Rule 86 of Order 21 CPC, which reads thus:

"86. Procedure in default of payment:- In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."

Where the auction-purchaser failed to deposit the full amount of purchase-money payable by him, then under Rule 86, the sale by which the auction-purchaser purchased the property is automatically cancelled and he can have no interest in the property which was the subject of the sale. Since the sale was nevertheless null and void, the Executing Court was allowed to set it aside and resell the property. The words employed in R. 86, "may, if the Court thinks fit," gives discretion to the Executing Court after taking the circumstances into consideration, to exercise the discretion judiciously in the matter of forfeiture. The words, "if the Court thinks fit" are inserted to remove the hardship caused in certain circumstances. This implies certain amount of discretion about the quantum of amount to be forfeited, commensurate with the loss or damage suffered or expenses incurred on account of the breach or default committed by the purchaser.

8. In Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, , the Apex Court has held thus:

"The provision regarding the deposit of 25 per cent by the purchaser other than the decree- holder is mandatory as the language of the rule suggests. The full

amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of set-off. The provision for payment is, however, mandatory (Rule 85). If the payment is not made within the period of fifteen days the Court has the discretion to forfeit the deposit (*Italics Supplied*) and there the discretion ends but the obligation of the Court to re-sell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property. (Rule 86").

9. The discretionary decision on this aspect requires a statement setting out the findings on material matters of fact giving reasons, making known the standards and consideration that will govern the decision either to forfeit in full or in part or to refund, defraying the expenses. The non-disclosure or non-consideration of the cause set up by the auction- purchaser does not amount to exercise of discretion in the manner known to law. The decision or exercising discretion about the facts be made for reasons which serve the purpose of the statute in an intelligible and reasonable manner, so also, not affecting the interest of a purchaser, whose attempt to meet the requirement of deposit within the time is beyond the unexpected and unforeseen contingencies. In such a situation, justness requires to strike the balance, exercising the discretion to promote the interest of both the decree-holder and the auction-purchaser. In other words, that a litigant who was not guilty of negligence, but some unexpected or unforeseen contingency takes in beyond the last moment, Some allowance has to be made in his favour and it is with that object, the rule contemplates the words "if the Court thinks fit". But, non-exercise of a discretion, blindly forfeiting the amount is causing infraction of the rule. The object of the rule is likely to enhance accountability to help overcome certain difficulties that may confront between the parties. It may be highly rational to proceed according to the justness in a given case even at the cost of certain flexibility, in order to prevent unjust enrichment by a strict construction of the rule. Max Weber has depicted as the very quintessence of law the existence and impartial application of the formal or abstract rules." Discretion, in the exercise of powers in the discretionary context, while notions of rationality, purposiveness and morality constitute basic constraints. Discretion is not a concept which when found to be present, leads to fixed consequences rather it is used in different ways often for different purposes. The approach here has been to emphasise that the sense of discretion depends on the context in which it occurs and the attitudes of the parties who are involved in that. In the instant case, the appellant has stated that he could not muster the required balance amount because the money was not forthcoming from the expected quarters. But the wordings employed in Rule 86 of Order 21 is different, when compared to Rule 85, in the sense, it is just and proper to forfeit the amount after defraying the expenses of the sale. If these things are kept in view, after all, for non-depositing of the amount within the time, forfeiting the entire amount of Rs. 20 lakhs appears to be unreasonable and the rule must not be used as a means of bringing the money into the coffers

of the Government.

10. Though the wording in Rule 86 gives discretion to the Court, which discretion is to be exercised judiciously, the learned Judge neither adverted to reasonable loss incurred nor the circumstances unexpected or unforeseen, took him beyond the last moment. Therefore, the order impugned suffers from non-exercise of the discretion in the manner known to law.

11. Wherever default had occurred and a stipulation is there to procure the sale completed, having regard to the inconvenience, loss suffered including making the allowances for expenses incurred, a calculation can be made regarding the quantum of amount to be forfeited on the basis of a genuine pre-estimate which appears reasonable. When on an earlier occasion the deposit had been refunded, after adding Rupees 50,000 as solatium, then there is no justification to forfeit the entire amount.

12. The next aspect is what may be the reasonable amount to be forfeited from the amount in deposit to meet the expenses, hardship and inconvenience suffered on account of the default in deposit by the appellants.

13. The auction was held on 30.4.1997. The property was brought to re-sale and fresh steps were taken, taking recourse to publication etc. and expenses were incurred to conduct the auction, apart from the pecuniary loss suffered from 28.5.1997 till now. These are the circumstances to be borne in mind while determining the quantum of amount to be forfeited. While making submissions on quantification regarding loss and expenses, keeping in view the bank interest on Rs.80 lakhs from 30.4.1997 till now and having regard to the suffering and inconveniences undergone, both the counsel tentatively pondered that it may be scaled to the advantage of their respective parties. That having regard to the involvement of the decree-holders in the litigation, depriving them of the sale proceeds for a considerable time, even on wise investment basis, computing the interest at the rate of 18% p.a. on Rs.80 lakhs, we are of the view that they would have got or earned considerable amount by way of investment and interest, which may approximately work out not less than six lakhs. (The loss, expenses to be defrayed and the amount liable for forfeiture, to be worked out on the Original side).

14. Since these aspects are not weighed or taken note of by the learned single judge, rather ordered forfeiture of the entire amount, which according to us has resulted in failure to exercise discretion judiciously. The argument of the learned Senior Counsel Mr. Somayaji on this aspect has considerable force.

15. For reasons aforesaid, the order of the learned single Judge, dated 18.2.1998, passed on Application No.321 of 1998 in C.S.No.201 of 1981 is modified, appeal partly allowed and it is ordered that a sum of Rs.14 lakhs to be refunded to the appellant herein and from out of the balance of Rs.6 lakhs, subject to deductions as are prescribed in the lines suggested above, including the expenses of the sale thereout and loss occasioned to the respondents, the

remaining amount to be forfeited to the Government. Parties to bear their own costs in this appeal.