

(2014) 09 DEL CK 0036

In the Delhi High Court

Case No : W.P.(C) 2005/2012 and CM No. 16665/2013

Royal Star Trading Company

APPELLANT

Vs

IFCI Limited

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 379, 454, 457
Sales of Goods Act, 1930 — Section 19, 19(1), 2(7), 20, 21
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)

Citation : (2014) 09 DEL CK 0036

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Amit Sibal, Sr. Advocate, Vikram Mehta, Varun Tikmani and Gaurang Panandiker, Advocate for the Appellant; P.S. Bindra, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Vibhu Bakhru, J.—The petitioner has filed the present petition inter alia praying that respondent no.1 be directed to refund a sum of Rs. 3,31,00,000/- deposited by the petitioner as a bid amount alongwith interest @18% per annum from the date of deposit till the date of payment.

2. The controversy to be addressed in the present petition is whether the petitioner is entitled to refund of the amount paid by the petitioner pursuant to its bid in an auction of movable assets, as the seller has failed to deliver the possession of the auctioned assets.

3. Briefly stated the facts are that respondent no.1 (IFCI) had taken over possession of certain properties of M/s. Parekh Platinum Ltd. (PPL) u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The said assets included plant and machinery which were located at the factory site of PPL. In October 2011, IFCI invited quotation for sale of the movable assets including plant and machinery of

PPL on "as is where is or whatever there is basis". The prospective bidders were also granted opportunity to inspect the plant and machinery. The petitioner, desirous of participating in the auction, inspected the movable assets i.e. assets in respect of which bids were invited (hereafter referred to as the "said assets"), on 20.10.2011 and 21.10.2011. Thereafter, the petitioner submitted its offer of Rs. 80 lacs to purchase the said assets which was revised to Rs. 2,11,00,000/- on 30.11.2011. After receiving the bids, IFCI invited the bidders for an inter se bidding. The said bidding was held on 09.12.2011 and the petitioner's bid of Rs. 2.25 crores was the highest. Thereafter, IFCI conducted a fresh round of inter se bidding on 26.12.2011 and the petitioner raised its offer to Rs. 3.31 crores, which being the highest bid resulted in the petitioner being declared the successful bidder. Immediately thereafter, on 28.12.2011, the petitioner deposited a sum of Rs. 28,90,000/- with IFCI. This was in addition to Rs. 21,10,000/- deposited earlier as earnest money alongwith the petitioner's initial bid. The balance consideration was paid by the petitioner on 05.01.2012.

4. Having paid the entire consideration, the petitioner by its email dated 17.01.2012 called upon IFCI to issue the sale certificate and handover possession of the said assets. The petitioner by the said email also requested IFCI to permit the petitioner to place its security guards at the site till such time as the possession of the said assets was handed over to the petitioner. Apparently, the petitioner did not receive any response to this request. However, on 18.01.2012, a Sale Certificate under Rule 9(6) and Rule 7(2) of the Security Interest (Enforcement) Rules, 2002 was forwarded to the petitioner.

5. Subsequent thereto, the petitioner received an email dated 25.01.2012 informing the petitioner that the said assets would be handed over to the petitioner on 01.02.2012 at around 11:00 a.m. The petitioner proceeded at the site on 01.02.2012 to take possession of the said assets and found that certain components of the said assets/parts of the said assets had been removed.

6. According to the petitioner, the said assets had been stripped of valuable components which had considerably reduced the value of the said assets. The petitioner declined to take possession of the said assets and by letter dated 06.02.2012 called upon IFCI to refund 50% of the purchase price on account of fall in the value of the said assets or in the alternate refund the entire consideration alongwith interest @18% per annum. IFCI carried out fresh inventory and according to the IFCI, the value of the said assets had only dropped by Rs. 2.92 lacs. IFCI, thereafter, called the petitioner to take possession of the said assets and further threatened that on failure to do so the "secured lenders will take all appropriate steps including termination/breach of contract and in such event the amount so deposited shall stand forfeited".

7. It is contended on behalf of the petitioner that the petitioner cannot be compelled to take the possession of the said assets for the amount bid by the petitioner as there had been a significant change in the circumstances. It is contended that since IFCI was not in a position to handover the possession of the

said assets for which bids were invited, the amount collected by the IFCI ought to be refunded. This contention has been disputed by the learned counsel for the IFCI who submits that the assets for which the bids were invited were on "as is where is or whatever there is basis". And, even if there is any reduction in the value, the same would have to be borne by the petitioner. It is also contended that, in any event, the reduction in value is only to the extent of Rs. 2.92 lacs which is not significant in comparison to the value of the assets.

8. I have heard the learned counsel for the parties.

9. It is not in dispute that after the inspection of the said assets by the petitioner in October 2011, there has been a theft of part of the said assets. A complaint was filed by one Prakash Venugopal Nair, power of attorney holder and authorised person of M/s. Shakti Associates Finance Services Pvt. Ltd. with the Judicial Magistrate, Gandhi Nagar inter alia praying for a direction to police authorities to take action and register the complaint. The relevant extract of the said complaint made by Mr. Nair is quoted below:-

"4. Thereafter, Manager of the complainant company namely M.S. Prince had come for spot verification of the seized property of the Parekh Platinum Company Ltd., Bhat and upon inspection window of the seized property has been found broken/cut. So, it had been found by the Manager, Shri M.S. Prince of the complainant company upon further verification that, copper spare parts and important part of the machinery required for the melting of gold of seized property has been found missing. It means some thief has stolen it.

5. That some person has stolen the copper and spare parts from the machinery from the property i.e. Parekh Platinum Ltd., Bhat illegally by breaking window and, approximate value of the spare parts of the machinery is in the knowledge of I.F.C.I.

6. That the complainant company had engaged security guards for the custodianship of the Parekh Platinum Co. Ltd. And machinery lying therein. Though, some person/ thief had broken the window entered in to the premises of the company and stolen valuable copper and spare parts and therefore, Shri M.S. Prince, Manager had given one written complaint before the Police Inspector, Adalaj Police Station, Adalaj on 2.2.2012 to initiate legal action. But, any of the procedure had not been followed nor any of the investigation made and, when it had been inquired about the police officers by the company, it had been replied by the police officer that you have mentioned name Parag Platinum in the complaint but, it is Parekh Platinum. At that point of time the complainant company had informed to have problem of Gujarati language and therefore, through over site, it had been written Parag instead of Parekh due to our pronunciation. But, address is common. And the written complaint has been submitted with regard to the company which is in the custody. Name of the property is not important but, vital is thief. Though, the police officer had informed that your application has been filed. And your application will be paid an

attention only after, approaching of the court and obtaining court order. It had been informed.

7. Therefore, the Parekh Platinum Company having its address - Plot number-66, Near Mother Dairy, G.I.D.C., Bhat, Gandhinagar property lying in the custody of the complainant company, and the complaint company had engaged Vishal Security Agency and Super Security Service , those guard either had hidden or anyhow, some thief had illegally entered in the property of Parekh Platinum Ltd. By breaking or cutting window of the seized property and stolen copper wire and important and valuable spare parts of melting of gold. And, thus, it has been constrained to file complaint under section- 454, 457, 379 of the Indian Penal Code before the Ld. Court."

10. Apparently, IFCI had appointed M/s. Shakti Associates Finance Services Pvt. Ltd. (hereafter referred to as "SAPS") as custodian of the assets of PPL. SAPS had in turn engaged the services of other security agencies (namely Vishal Security Agency and Super Security Services, for securing the assets of PPL). Since SAPS was an agent of IFCI/secured creditors, undisputedly, IFCI remained in the possession and the assets of PPL. It is also clear that the theft had been reported only after the petitioner had come to take possession of the said assets. The date/time of the removal of part of the said assets (hereafter "stolen assets") is not readily ascertainable but it is obvious that the stolen assets were removed after the inspection on 21.10.2011 and before 01.02.2012, when their removal was discovered.

11. It is also not disputed that although a Sale Certificate had been issued to the petitioner on 18.01.2012, the IFCI had not handed over either the constructive or the physical possession of the said assets.

12. The said assets in question are movable assets and fall within the definition of "goods" u/s 2(7) of the Sale of Goods Act, 1930. In terms of Section 19(1) of the said Act, the property in goods is transferred to the buyer at such time as is intended by the parties. Section 19 of the said Act is quoted below for ready reference:-

"19. Property passes when intended to pass.- (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Section 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

13. In the present case, the intention of the parties has to be understood from the "Terms and conditions of sale for sale of plant and machinery of M/s. Parekh

Platinum Ltd." as was circulated by IFCI in October 2011. Although Clause 2.10 of the said terms and conditions provides that "The contract shall be treated as having been entered into as soon as the "Letter of Acceptance" is issued by Authorised Officer, IFCI Ltd., to the successful bidder.", it was, plainly, not the intention of the parties that title of the said assets would be transferred on acceptance of the bid and prior to receipt of the entire consideration by IFCI. The terms and conditions also expressly provided that a Sale Certificate, in terms of the Security Interest (Enforcement) Rules, 2002 (in short "2002 Rules"), would be issued after IFCI had received full consideration. It is also one of the express terms that purchaser would take necessary steps to take over possession of the assets immediately. The relevant clause of the terms and conditions regarding delivery of possession is quoted below:-

"Delivery Period/Possession:

After receipt of full and final payment in lieu of the total sale consideration of the assets, IFCI Ltd., will issue Certificate of Sale as provided under the Rules of SRFA and ESI Act, 2002 in favour of the purchaser and the purchaser will take all necessary steps to take over the possession of the assets immediately."

14. At this stage it is necessary to refer to Rule 7 of the 2002 Rules, which provides for a Sale Certificate to be issued in the form appended as appendix III to the said Rules. Rule 7(2) of the 2002 Rules is relevant and reads as under:-

"(2) On payment of sale price, the authorised officer shall issue a certificate of sale in the prescribe form Appendix III to these rules specifying the movable secured assets sold, price paid and the name of the purchaser and thereafter the sale shall become absolute. The certificate of sale so issued shall be prima facie evidence of title of the purchaser."

15. It is apparent from the above that the transfer of title of the said assets would take place on the sale becoming absolute on the issuance of the Sale Certificate under Rule 7(2) of the 2002 Rules.

16. The form of Sale Certificate as prescribed in Appendix III to the 2002 Rules, clearly indicates that handing over possession is an inseverable part of the transaction which is certified. The said form clearly records the handing over of the possession of the movable property which is certified as sold. Accordingly, the terms and conditions also provided that the purchaser would take over possession of the assets immediately on the issuance of certificate of sale.

17. In the present case, although IFCI received the entire consideration, it neither handed over possession of the said assets nor issued sale certificate at the material time. The petitioner had, by its email dated 17.01.2012, called upon IFCI to issue the sale certificate and requested IFCI to "handover possession immediately". Although, IFCI issued the sale certificate as contemplated under the 2002 Rules on 18.01.2012, concededly, possession of the assets was not handed over to the petitioner. IFCI, by its mail dated 25.01.2012, communicated

to the petitioner that "It has been decided to handover the possession of plant and machinery on 01.02.2012 around 11:00 a.m." This clearly indicates that IFCI continued to be in possession of the assets and even though the sale certificate was issued, the same was non-compliant with the 2002 rules and the sale continued to be inchoate. Moreover, the time/date of removal of the stolen assets is also not ascertained as yet. IFCI has also not canvassed the contention - in my view rightly so - that title to the said assets had passed to the petitioner.

18. It is the stand of IFCI that Clause 2.6 of the terms and conditions absolves IFCI of its responsibility as to the deficiency in the said goods. The said clause reads as under:-

"2.6 All the assets offered for sale are on "AS IS WHERE IS BASIS AND WHATEVER THERE IS BASIS". The quantity indicated, if any, are purely indicative and without any guarantee and IFCI Ltd., shall not entertain any claim/complaint from the buyer for any deficiency in size/number etc., for recovery of whole or any part of the bid/purchase money, loss of profit/interest, damages etc."

19. In my view, the stand of IFCI is patently erroneous and Clause 2.6 has to be read in conjunction with Clause 2.4 of the said terms and conditions which provided for inspection of the assets to the interested parties. In another words, IFCI had made it clear that parties would physically inspect the assets at site and submit their bids. Clause 2.6 only absolved IFCI from any variance between description of the goods and those offered at site. This would certainly not absolve IFCI from delivering the assets as were inspected by the petitioner.

20. In the given circumstances, the writ petition is allowed to the extent that the petitioner is directed to be refunded the amount paid by the petitioner for the said assets and the sale certificate issued by IFCI is cancelled. As IFCI has deposited the entire consideration paid by the petitioner with the Registry of this Court, the Registry is directed to release the said sum alongwith accrued interest, if any, to the petitioner within two weeks from date.

21. Accordingly, the writ petition is disposed in the above terms. CM No.16665/2013 is also disposed of. No order as to costs.