(2010) 02 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 5234 of 2009

Sanket Timber Mart and Others	APPELLANT
Vs	
Conservator of Forest (South Chandrapur) Forest Division and Others	RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:
Forest Act, 1927 — Section 83
Forest Contract Rules — Rule 18, 8
Maharashtra Land Revenue Code, 1966 — Section 176
Sales of Goods Act, 1930 — Section 19(1), 20, 21, 22, 23

Citation : (2010) 4 BC 632 : (2010) 5 BomCR 891

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : S.S. Sanyal, for the Appellant; Patel, learned A.G.P., for the Respondent

Final Decision : Allowed

Judgement

Dharmadhikari B.P., J.—On 3rd December, 2009 this Court has issued notice for final disposal and accordingly, I have heard Shri S. Sanyal with Shri Uke, learned Counsel for petitioners and Shri Patel, learned A.G.P. for respondents. Rule is therefore made returnable forthwith and writ petition is taken up for final hearing by consent of parties.

2. The contention is, property in timber destroyed in fire had not passed on to petitioners and hence recovery for its value cannot made from them by issuing R.R.C., u/s 176 of the Maharashtra Land Revenue Code.

3. The facts are not in dispute. The auction was conducted on 16.4.2008 and 15.5.2008. As per the terms and conditions, the petitioners participated in the auction and deposited initial amount which enabled them to participate in it. After they were declared successful purchasers, balance amount to make total deposit of 25% was also paid by them to the respondents. As per the terms and

conditions the remaining 3/4th of the amount offered by them along with necessary Forest Development Tax, Sales Tax and other duties is to be paid within 60 days after the receipt of communication that their offer has been accepted. Before this could take place, fire broke out on 1.6.2008 at about 1.30 p.m. in the afternoon and the timber for which the petitioners had bidded was completely destroyed. Thereafter, respondent No. 2 called upon the petitioners to make good the loss caused to the Government by depositing entire balance amount of bid quoted by them vide communication dated 26.6.2008. Petitioners protested against it and submitted their reply representation on 13.7.2008. This representation was considered as an appeal by respondent No. 1 and by placing reliance upon the Government resolution dated 29.4.1986 it has been held that as per Clause No. 11 of the terms and conditions of the auction, the goods [timber] was lying in the yard of respondents at the risk of petitioners. Petitioners were therefore found liable to make good the loss to the Government.

4. Shri Sanyal, learned Counsel for petitioners in this background has argued that as per the terms and conditions, the petitioners were supposed to deposit balance 3/4th amount within 60 days and that amount was never deposited. Petitioners were therefore not entitled to even touch the Timber and hence property therein never passed on to them. He points out that as per Clause 21, if amount is not deposited within 90 days along with necessary taxes, dues and interest, the Government has right to re-auction the entire timber. He therefore, argues that in these circumstances, without considering the legal position, respondent No. 1 could not have passed the impugned order and could not have directed respondent No. 3 to recover that amount in R.R.C. from petitioners. He has invited attention to the provisions of the Sale of Goods Act, 1930 for said purpose.

5. Shri Patel, learned Assistant Government Pleader appearing for respondent Nos. 1 to 3 on the other hand has stated that the property in timber has passed on the petitioners and therefore only Clause No. 11 has been incorporated. He argues that the timber was to lie in Forest Depot at the risk of petitioners and loss caused to it by fire cannot shift the responsibility of bearing it on State Government. According to him, the Clauses 11, 12-B and 21 clearly show the transfer of ownership in timber on petitioners. The timber was to lie in forest depot and therefore, the Government has exonerated itself and expressly the entire responsibility is put upon the petitioners. He further argues that the terms and conditions subject to which auction was conducted are not in dispute and hence, no interference is warranted in the matter in exercise of writ jurisdiction. He also relies upon the provisions of Sale of Goods Act and also to the judgment reported at Badri Prasad Vs. State of Madhya Pradesh and Another, to substantiate his contentions.

6. Perusal of provisions of Sale of Goods Act, 1930 reveals that the property in the goods passes when it is intended to pass as per Section 19 thereof. Sub-section [1] stipulates that when there is a contract of sale of specific or

ascertained goods, the properly therein is transferred to the buyer at such time as parties to the contract decide. As per sub-section [3] provisions of Sections 20 - 24 can be used for ascertaining such intention. As per Section 20 when specific goods are in deliverable state and contract for sale is unconditional, the property in the goods passes to buyer when the contract is made. The said provision states that it is immaterial whether the time of payment of price or time of delivery of goods or both is postponed in such circumstances. Section 21 deals with specific goods to be brought in a deliverable state and that section is not relevant as bids here were for a specific good in deliverable state. Section 22 and Section 23 are again not relevant for present controversy. Section 26 stipulates that risk prima facie passes with property and it is also subject to contract to the contrary. The section stipulates that unless otherwise agreed, the goods remains at the sellers risk only till the property therein is transferred to the buyer. When the property is transferred to buyer the goods are at buyer''s risk, whether delivery has been made or not.

7. Shri Sanyal, learned Counsel has relied upon the provisions of Section 31 to point out the duties of Seller and Buyer. The said section casts duty on seller to deliver the goods and on buyer to accept and to pay for that in accordance with the terms and conditions of sale. Section 32 deals with payment and deliver and stipulates that unless otherwise agreed delivery of goods and payment of price are concurrent conditions. In this background, Shri Sanyal, learned Counsel has made an effort to show that in view of the provisions of Section 4, the agreement between the parties was not a sale, but an agreement to sale. Section 4 points out that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the goods to buyer for a price. Its sub-section [2] shows that such contract may be absolute or conditional. Sub-section [3] clarifies that where under a contract of sale the property in the goods is transferred from seller to buyer, the contract is called a Sale, but where, the transfer of property in goods is to take place at future time or subject to some conditions thereafter to be fulfilled, the contract is called as agreement to sale. An agreement to sale becomes a sale when the time elapses or conditions are fulfilled subject to which the property in goods is to be transferred.

8. The terms and conditions of present auction as regulated by the Government resolution dated 29.4.1986 need to be looked into in this background to ascertain the intention of the parties and to find out when the property in timber passes to petitioner. Clause No. 11 is the bone of contention between both the parties and said clause states that "after bid is accepted, timber shall continue to lie in the depot premises at total risk of auction purchaser and if it is destroyed in fire, flood, theft etc., the Government will not be responsible for the same." The petitioners contend that this clause only envisages the exemption to Government from paying any compensation to petitioners in case of loss of timber between the date on which the bid is accepted and the date on which the complete amount/price therefore is paid by the petitioners or till timber is shifted by them. According to them this clause does not enable the Government to claim unpaid

price of destroyed/lost goods from the petitioners. According to the learned A.G.P., this clauses enables the Government to claim balance price of the timber destroyed in fire.

9. Perusal of Clause 12[B], shows that balance 3/4th amount along with Forest Development Tax, Sales Tax and other dues, charges, or cess leviable upon it is to be paid by the petitioner within 60 days of the intimation to them that their bid has been accepted. On record there is no such communication issued by the respondents to petitioners and the impugned order dated 10.9.2009 also does not indicate that any such communication as contemplated by Clause 12[B] was served upon the petitioners. In this background, the provisions of Clause 21 need to be looked into. As per Clause 21, the auction purchaser is expected to remove the timber purchased by him within 90 days. Clause 21 states that if auction purchaser has not obtained extension of time to remove such forest produce beyond 90 days from the date of auction or from the date of communication of acceptance of his bid by Competent Authority, then after expiry of such period of 90 days or expiry of such extended period, the ownership of forest produce will revert back to the State Government. The said clause further states that after expiry of that period, the auction purchaser will have no right whatsoever on remaining forest produce and Government will be free to dispose of the same in mode and manner found fit by it. It also states that even though complete price of such forest produce is paid by the auction purchaser, he will not be entitled to its refund.

10. When all clauses, particularly Clauses 12[B], 16 and 21 are read together, it is apparent that the auction purchaser cannot shift or remove forest produce till he has paid its entire price. This clause further shows that the said period is of 90 days from the date of auction or from the date of communication of acceptance of his bid to such auction purchaser. In present facts, it is undisputed that auction was conducted on 16.4.2008 and 15.5.2008, while fire broke out on 1.6.2008. Thus fire broke out even before expiry of period of 60 days stipulated for making balance payment of 3/4th amount by Clause 12[B]. Perusal of Clause 13[A] shows that in case the auction purchaser commits any default in payment of 1/4th amount or balance 3/4th amount along with Taxes, Cess etc. or he violates any term in relation thereto, without prejudice to other rights available to Government in the matter, the concerned Officer can cancel the sale accepted and in that event the amount of earnest i.e. 25% of amount of sale price deposited by him can be forfeited by the State Government. The clause further enables the State Government to further auction the commodity/timber at the cost and risk of such erring auction purchaser either publicly or privately. It also stipulates that if before such re-auction, the auction purchaser in default pays all arrears with 10% penalty, the Authority can permit him to shift the forest produce without conducting such fresh sale. Clause 13[B] cast obligation of reimbursement on such auction purchaser, if in reauction Government sustains any loss and permits Government to recover such amount as arrears of land revenue. Clause 14 stipulates that the amount can be deposited in Government

Treasury and thereafter Clause 15 deals with removal/shifting of such forest produce.

11. Clause 15 stipulates that after the amounts as stipulated in Clause 12 are deposited, the auction purchaser has to shift the forest produce. Such shifting or removal has to be within 90 days of the date of auction or then from the date of communication of acceptance of his bid. If it is not so removed within 90 days, the same cannot be removed thereafter without previous written permission in writing of the Competent Officers named in that clause. Application for such extension can be made one week in advance before expiry of that period of 90 days. The permission can be granted and the same is subject to payment of land rent to be prescribed in that permission. Clause 15 also gives absolute discretion to Competent Authority to refuse such permission to shift after 90 days or then impose penalty equivalent to 10% of the price of the forest produce as land rent. Clause 17 states that if in relation to any bundle/stack of forest produce entire price is not paid and the competent officer has not issued any transit pass for it, permission to remove that bundle/stack or its part will not be granted. The signature of auction purchaser in token of receipt of possession of forest produce is deemed to be proof of its delivery to him, as per Clause 19. Clause 22 stipulates that any amount recoverable by the State Government on account of terms and conditions mentioned in this resolution dated 29.4.1986, is treated as arrears of land revenue and can be recovered under the provisions of Maharashtra Land Revenue Code, 1966.

12. The above terms and conditions therefore clearly show that unless and until complete sale price is received by the Government, the auction purchaser is not authorized to and cannot remove the forest produce/timber purchased by him. If he does not remove the forest produce within 90 days of the date of auction or the date of receipt of communication of acceptance of his bid after depositing its complete price, the ownership therein goes back to State Government. This therefore shows that the Government retains control till the complete sale price is received by it and its ownership is again restored, if within 90 days as mentioned above the forest produce/timber is not removed by the auction purchaser. The intention of parties therefore as apparent from this document is only to pass property to auction purchaser if he pays complete price thereof. In this matter, it is apparent that balance 3/4th [75%] of the bid amount offered by the petitioners has not been paid by them till date.

13. Perusal of judgment of Hon Tale Apex Court in the case of Badriprasad v. State of Madhya Pradesh [supra], shows that there the public auction was held on 24.12.1956 and timber and arkat trees of coupe No. 9 were purchased by respondent No. 2 before the Hon Tale Apex Court. He was to commence his work of collecting and removing the cut timber within one month after furnishing of copy of the boundary certificate. That certificate was furnished on 5.2.1957 and it also mentioned that respondent No. 2 had taken possession of the standing/ felled/collected materials in the aforesaid coupe. Formal deed of contract was

signed by the Chief Conservator of Forest on 3.5.1957. Perusal of paragraph No. 11 shows that the respondent No. 2 was informed on 23.3.1957 that removal of goods from concerned coupe by him was already in excess of amount deposited by him with the Treasury. He was therefore called upon to send challan of second installment. Fire broke out on 25.4.1957. Thus before the fire broke out, respondent No. 2 had already taken possession of his coupe and already started working in it and also had removed certain timber/goods from it. In this background the Hon''ble Apex Court has considered the contentions that property in cut timber sold and existing in Sections B, C and D of the coupe has not passed on contractor before fire broke out in the last week of April, 1957. The consideration by the Hon''ble Apex Court in paragraph No. 19 shows that there was nothing in the contract that possession of cut timber in these sections would not be delivered to respondent No. 2 till 2nd, 3rd and 4th installments were paid. The provisions of Rule 18 of Forest Contract Rules there applicable have been perused to note that there was no such restrictions. Rule was found to provide only for operations necessary to be conducted by the Contractor and it had nothing to do with the payments of installments by the contractor. This is not the case in present matter. The observations in paragraph No. 28 shows that the Hon''ble Apex Court therefore found that sale of forest produce to respondent No. 2 was finalized on the date of sale, subject to acceptance of his bid by the Competent Authority, namely the Chief Conservator of Forest and the fact that the Conservator signed the deed on 3.5.1957 did not make the sale effective from the date of signature. Putting of signature was found simply to complete the execution of deed of contract and related back its execution to the date on which the sale took place and the contractor and the authorized officer had signed the document. Thus because of facts before it, the Hon''ble Apex Court found that the sale had taken place even before the fire broke out. Perusal of paragraph No. 32 shows that the contract was unconditional. Goods sold were specific and in deliverable state and therefore, property in goods did pass at the time when the contract was made. The Hon''ble Apex Court has noticed that Section 20 of Sale of Goods Act would have applied even when the time of payment of price has been postponed. The Hon''ble Apex Court has also noticed that the payment allowed by the installment was to be deemed payment in full at the time of delivery of goods sold. This is not the position in the present matter. Hon''ble Apex Court considered the provisions of Rule 8 of the Forest Contract Rules to note that it created lien in favour of Government on forest produce for its dues. This right to stop removal of forest produce is held emanating from Section 83 of the Forest Act, 1927 and not from contract between the parties. Here use of that right is not warranted at all. The terms and conditions of Government resolution dated 29.4.1986 does not permit such interpretation.

14. Clause 11 of resolution dated 29.4.1986 therefore does not authorize State Government to call upon petitioners to pay unpaid/balance price of 75%. It only prohibits petitioners from seeking any refund of money paid by them, either in full or in part, in case before removal of timber the same is destroyed, damaged

or lost. It protects the respondents from any liability in that contingency.

15. In view of this, it is apparent that the impugned order passed by respondent No. 1 is unsustainable, the same is accordingly quashed and set aside. Consequently it follows that further steps for recovery initiated by the office of respondent No. 3 are also unsustainable. The order dated 30.9.2008 passed by respondent No. 1, notice dated 26.6.2008 issued by respondent No. 2 are also accordingly quashed and set aside. Writ petition is allowed. Rule is made absolute in the aforesaid terms, with no order as to costs.

