
(2009) 02 PAT CK 0133
In the Patna High Court

Sunil Kumar Paswan

APPELLANT

Vs

Bihar State Financial Corporation and Others

RESPONDENT

Date of Decision : 27-02-2009

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

Citation : AIR 2009 Patna 116

Hon'ble Judges : Shailesh Kumar Sinha, J

Bench : Single Bench

Judgement

Shailesh Kumar Sinha, J.—Heard the parties.

2. Through this writ application petitioner challenges the order dated 14-12-2005 passed by the respondent No. 2 as communicated to the petitioner vide memo No. 541/2-III/05-06 dated 16-12-2005 (Annexure-13) under the signature of the respondent No. 4, whereby sale order No. 118/Z/III/04-05 dated 4-10-2004 (Annexure-4) issued in favour of the petitioner in respect of the assets measuring two acres of land with building and machineries of M/s. Colgong Khandsari Company at Colgong District -Bhagalpur (respondent No. 6) as mentioned at Sl. No. 11 of the advertisement for sale notice issued by the Corporation on 17-7-2002 (Annexure-1) was withdrawn and the amount of rupees twenty seven lakhs being twenty five per cent of the sale price deposited by the petitioner in terms of the above sale order was forfeited purported to be in terms of paragraph 15 of the sale-order dated 4-10-2004 (Annexure-4) read with Clause 6 of the sale notice (Annexure-1). Petitioner challenges the action of the respondent corporation in withdrawing the sale-order as well as forfeiting the amount deposited by the petitioner being wholly illegal and arbitrary since the sale agreement-cum-mortgage could not be executed between the petitioner and the corporation as the land of the Company including its assets could not have been mortgaged since the same was not in physical possession of the Corporation and could not be handed over to the petitioner owing to the unauthorized encroachment over the land for which the respondent-corporation

had initiated encroachment proceeding vide encroachment case No. 7 of 2004. The Corporation failed to get the encroachment removed, which would be evident on perusal of the letter written by the Managing Director to the District Magistrate, Bhagalpur for removal of the unauthorized occupants over the asset in question so that the same could be handed over to the purchaser of the asset of the company vide Annexure-R/4 to the counter affidavit.

3. The short relevant facts for disposal of the writ application are stated in following paragraphs.

4. Petitioner pursuant to the sale-notice as contained in Annexure-1 upon depositing a sum of rupees one lakh as earnest money offered tender for purchase of the assets of the respondent No. 6 a free hold land measuring two acres with building and machineries as mentioned at Sl. No. 11 of the notice. The petitioner's offer of rupees one crore five lakhs was accepted by the Corporation and consequently the sale-order dated 28-9-2004 as per the memo No. 4-10-2004 was communicated to the petitioner vide Annexure-4. In terms of paragraph 2 of the above sale-order the petitioner deposited the required twenty-five per cent of the total consideration price of rupees twenty-seven lakhs including the initial earnest money of rupees one lakh within the time allowed by the Corporation, which was accepted and credited in its account. The remaining balance of seventy-five per cent i.e. rupees seventy-eight lakhs were to be treated as term loan in favour of the petitioner repayable in sixteen quarterly instalments besides payment of interest on due date at the stipulated rate. The first instalment was to fall due on completion of three months from the date of issue of the sale-order. The relevant paragraphs of the sale-order (Annexure-4) are quoted below for ready reference:

Paragraph-2

The purchaser shall make an initial cash down payment of an amount equivalent to 25% of the total consideration price i.e. Rs. 27.00 lakhs (including earnest money of Rs. 1.00 lakh only) to the Bihar State Financial Corporation by a Bank Demand Draft after 21 Days (but not exceeding 30 days) from the date of issue of this order, failing which the tender money will be liable to be forfeited.

Paragraph-3

The remaining balance 75% i.e. Rs. 78.00 lakhs of the consideration amount shall be treated as a term loan to the purchaser on the Corporation's usual terms and conditions, and shall be repaid in 4 (four) years by 16 (sixteen) quarterly instalments besides payment of interest on due date. The first 15 (fifteen) instalments of the loan will be of Rs. 4.88 lakhs each and last 1 (one) will be of Rs. 4.80 lakhs. The first instalment will fall due after completion of 3 (three) months from the date of issue of this sale order.

Paragraph-6

The original promoter(s) of the unit may retain the assets on matching terms

and conditions, if they so agree to pay the consideration amount, and submit a suitable repayment plan for the difference of consideration price and the balance outstanding as on date of payment as well, and make the payment as per provision of Paragraph 2 within 21 days from the date of issue of the sale order accordingly. Further, if payment from original promoter(s) is received and accepted by the Corporation in terms of this sale order, the payment made by the purchaser, if any, will be refunded without any interest thereon.

Paragraph-8

Interest will be realized from the date of execution of sale agreement, or from the date of handing over the mortgaged/hypothecated assets, whichever is earlier, Further, the accrued interest and other charges will be paid by the purchaser(s) on their due dates.

Paragraph-10

If the assets are not retained by the original promoter(s) within 21 days from the date of issue of this sale order and the purchaser(s) makes the aforesaid payment, and after confirmation of encashment of Demand Draft deposited by the purchaser, the Branch Manager, Bhagalpur or his authorized representative, after observing necessary legal formalities in this regard, will execute the sale agreement/documents, and thereafter, hand over the mortgaged/hypothecated assets to the purchaser in the presence of two independent witnesses.

Paragraph-15

This sale order is subject to the condition that the process of execution of sale documents/agreements and handing over the mortgage/hypothecated assets must be completed within a period of 3 (three) months from the date of the crediting of the amount paid by the purchaser in the Bihar State Financial Corporation's Bank account.

5. The dispute between the parties arose on account of the request of the petitioner that payment of interest on the balance seventy-five per cent of the remaining amount should commence only from the date Corporation hands over the assets of the company to the petitioner, on simultaneously, execution of the sale agreement-cum-mortgage be executed by the petitioner. The respondent corporation insisted first for execution of the sale agreement-cum-mortgage. Notwithstanding the physical status of the assets purchased by the petitioner relying upon Clause 6 of the sale-notice which speaks that the proposed sale in question is on an "AS IS WHERE IS BASIS", The relevant extract with Clause 6 of the sale-notice dated 17-7-2002 (Annexure-1) is quoted below for ready reference:

Under notice for sale of the mortgaged/hypothecated assets of assisted units of the Corporation u/s 29 of the State Financial Corporation Act, 1951.

In the prescribed TENDER FORM in sealed cover are invited for purchase of the

mortgaged/hypothecated assets of the mentioned below on an "AS IS WHERE IS BASIS" and on the price equivalent to balance outstanding of the loan/market for the assets.

Clause 6.- After opening of the tender(s), if considered necessary, the Corporation may have negotiation with any or all such tenderer(s) their authorized representative(s) for finalization of the sale" consideration money and or other special conditions, besides the usual terms and conditions of the sale. Once the offer is accepted by the Corporation as per received tender, or on the basis of negotiation. Such tenderer(s)/purchaser(s) SHALL BE BOUND TO ABIDE BY THE CONDITIONS OF SALE SO ACCEPTED, FAILING WHICH THE AMOUNT OF EARNEST MONEY AND OTHER SUBSEQUENT DEPOSITS, IF ANY, SHALL BE FORFEITED WITHOUT MAKING-ENTERTAINING ANY REFERENCE IN THIS REGARD. The earnest money deposited by the other tenderer(s) whose offer is/ are not accepted, shall be refunded on his/their request through a/c payee cheque without any interest thereon.

6. The differences between the parties on the aforesaid issue that payment of interest by the petitioner over the balance seventy-five per cent of the consideration price should commence not from the date of execution of the sale agreement-cum-mortgage, but from the actual date of handing over of the assets of the company. The petitioner and the Corporation could not arrive at amicable settlement and ultimately, the sale-order (Annexure-4) was cancelled/ withdrawn and the amount of rupees twenty-seven lakhs deposited by the petitioner being twenty-five per cent of the consideration price was forfeited by the impugned order dated 14-12-2005 contained in memo No. 541 dated 16-12-2005 (Annexure-13). The same is under challenge.

7. Notwithstanding the above, another important aspect of the matter is that the original promoter of the company (respondent No. 6) settled its loan dues with the respondent-corporation after cancellation of the sale-order in question under ONE TIME SETTLEMENT SCHEME 2004 (OTS) vide corporation's letter No. 25 dated 7-9-2006 as stated in paragraph 10 of the counter affidavit.

8. It is submitted on behalf of the petitioner that the respondent-corporation could not have cancelled/withdrawn the sale-order dated 4-10-2004 (Annexure-4) allegedly on the ground that the petitioner failed to abide by the conditions of sale. As a matter of fact the petitioner abided by the terms of sale-order and deposited twenty-five per cent of the sale price in terms of paragraph 2 of the sale-order. Thereafter, the sale agreement-cum-mortgage as also handing over the assets in favour of the petitioner was to be completed within a period of three months vide paragraph 15 of the sale order and interest over the balance seventy-five per cent of the sale price was to commence from the date of execution of the sale agreement or from the date of handing over the assets whichever is earlier in terms of paragraph 8 of the sale order. Therefore, on conjoint reading of Clauses 8, 10 and 15 of the sale-order, it would appear that process and completion of execution of sale agreement and handing over the

possession runs simultaneously so as to without adversely affecting any liability on the payment of interest on the balance seventy-five per cent of the sale price either on execution of the sale agreement or on handing over physical possession of the assets. In this connection the learned Counsel submits that the petitioner on receiving the sale-order dated 4-10-2004 (Annexure-4) deposited the twenty-five per cent of the sale price and accepted by the corporation vide corporation's letter dated 29-1-2005 (Annexure-6) informing the petitioner that after execution of the sale agreement, mortgaged assets shall be handed over to him. The petitioner vide its letter dated 24-2-2005 (Annexure-8) requested the respondent No. 2 expressing its willingness to execute the sale agreement, however, requested that interest should not commence till assets purchased by the petitioner are not physically handed over to him after removal of encroachment over the land for which corporation had filed encroachment case No. 7 of 2004 as there is no scope to reach over the land in question since some of the persons have constructed house over it, which would be evident on perusal of letter of the Corporation that the land in question is under encroachment vide its memo No. 67 dated 6-7-2004 (Annexure-R/4) written by the Managing Director of the Corporation to the District Magistrate, Bhagalpur requesting him to remove the encroachment so that the assets can be duly handed over to the purchaser. Notwithstanding the above, corporation kept on insisting to execute the sale agreement notwithstanding the encroachments over the land in question. Petitioner had written letter dated 24-2-2005 (Annexure-8) again communicating its willingness to execute the agreement and reiterating its request not to enforce charging of interest on the balance seventy-eight lakhs till the encroachment case No. 7 of 2004 does not end in favour of Corporation as there is no scope to reach over the land due to encroachment. The Corporation replied after long time on 4-6-2005 (Annexure-9) insisting for execution of sale agreement without making any reply on the question of commencement of interest. It is submitted that the petitioner ultimately vide his letter dated 30th July, 2005 and 10th December, 2005 (Annexure-12 series) requested the respondent-corporation that since the corporation is not in position to hand over the assets in question purchased by the petitioner as the same is under encroachment for which the corporation has filed encroachment case and the encroachers have also filed a civil suit in the Court of Sub-Judge, Bhagalpur vide Title Suit No. 296 of 2005 in respect of the land in question. The fact of encroachment was also not mentioned in the said notice, and as such, lastly the petitioner requested to refund back the amount of rupees twenty-seven lakhs with interest at the rate of eighteen per cent. Thereupon the respondent-corporation as per its order dated 14-12-2005, as contained in memo No. 541 dated 16-12-2005 (Annexure-13) withdrew the sale-order dated 4-10-2004 (Annexure-4) and the amount of rupees twenty-seven lakhs deposited by the petitioner was forfeited claiming to be in terms of paragraph 15 of the sale-order read with paragraph 6 of the sale notice (Annexure-1). Learned Counsel submits that from the above it would appear that the corporation cancelled the sale-order and forfeited huge amount of rupees twenty-seven lakhs by taking advantage of

its own wrong on account of its default and inaction as well as concealment of material facts about encroachments over the land a fact known to the Corporation even before issue of the sale order (Annexure-4) evident from the letter of the Corporation contained in Annexure-R/4. The corporation, as such, deserves to be directed to refund back the aforesaid amount of rupees twenty-seven lakhs deposited by the petitioner with interest at the rate of eighteen per cent.

9. The respondent corporation has filed counter affidavit. The stand of the corporation is that the sale of the assets of the respondent No. 6 as per the sale notice dated 17-7-2002 (Annexure-1) was on "AS IS WHERE IS BASIS" with further condition that failure to abide by the terms and conditions of the sale so accepted the amount of earnest money and other subsequent deposits, if any, was to be forfeited without making/entertaining any reference in this regard. The further stand of the corporation is that notwithstanding the encroachment over the assets in question purchased by the petitioner in terms of sale he was to execute the sale agreement and thereafter assets shall be handed over. Of course, both the transactions under the terms of sale order were to be completed within a period of three months from the date of sale-order. So far as the encroachment over the land is concerned, the corporation is making efforts to see that the land is made free from encroachment, but that cannot be made a ground for not executing the sale agreement and postponing the date of commencement of payment of interest over the balance amount of sale price from the date of execution of the sale agreement vide paragraph 8 of the sale-order. The petitioner having failed to execute the sale agreement despite extending the date for execution of the sale agreement, the corporation therefore withdrew the sale-order vide paragraph 15 read with paragraph 6 of the sale-notice and forfeited the amount of rupees twenty seven lakhs deposited by the petitioner. The petitioner made requests (Annexure-14 series) even after withdrawal of the sale-order repeating his earlier request of charging of interest from the date assets is transferred to him and not from the date of execution of the sale agreement.

10. Notwithstanding the above, the corporation has stated in paragraph 10 of the counter affidavit that after cancellation of sale order the corporation has already allowed ONE TIME SETTLEMENT 2004 Scheme (OTS 2004) a facility to the promoter of the respondent No. 6 vide letter No. 295 dated 7-9-2006 which is still operative.

11. Mr. S. D. Sanjay, learned Counsel appearing on behalf of the respondent No. 6 the Company in question submits that dues of the corporation against respondent No. 6 has been settled under ONE TIME SETTLEMENT SCHEME 2004 although no counter affidavit has been filed on behalf of the respondent No. 6, however the fact of one time settlement has been accepted by the corporation in paragraph 10 of its counter affidavit.

12. Considering the aforesaid submissions of the parties and their respective

pleadings it would appear that the company in question was put on auction by the respondent-Corporation vide sale notice (Annexure-1) giving details of the land, plant and machineries inviting tenders from the prospective purchasers. The petitioner submitted the tender and his tender for rupees 1.25 Crore (rupees one crore twenty five lakhs) was accepted by the Corporation and sale order dated 4-10-2004 (Annexure-4) was communicated to the petitioner. The petitioner deposited the twenty-five per cent of the bid amount i.e. rupees twenty-seven lakhs inclusive of the earnest money of rupees one lakh deposited along with the tender in terms of paragraph 2 of the sale order which was accepted by the Corporation and credited to its account. The next requirement under sale order was the execution of the agreement for sale-cum-mortgage between the corporation and the petitioner with respect to the payment of 75 per cent of the rest amount amounting to rupees seventy-eight lakhs and handing over the asset of the company. Both the transactions were required to be completed simultaneously within a period of three months from the date of crediting the amount of twenty-five percent of rupees 1.25 crore by the petitioner in favour of the corporation vide paragraph 15 of the sale order. It further appears that the petitioner expressed his willingness to execute the agreement for sale-cum-mortgage, with request that payment of interest should not commence from execution of the said agreement but from the date of handing over of the asset of the company which was to follow simultaneously or immediately soon thereafter, but must be within three months from the date of crediting the amount paid by the petitioner vide paragraph 15 of the sale order (Annexure-4). However, since assets including the land of the company was required to be physically transferred along with plant and machineries as a part of the land was under encroachment by several persons a fact not in dispute as would be evident on perusal of the letter dated 6-7-2004 written by the corporation to the concerned District Magistrate for removal of the encroachment vide Annexure-R/4 to the counter affidavit of the corporation. It would further appear that the petitioner through its various letters dated 24-2-2005 and 8-6-2005, as contained in Annexures-8 and 10 respectively requested the Corporation to the effect that the land be made encroachment free so that on execution of the sale agreement-cum-mortgage the asset of the company purchased by him could be handed over to him immediately following the execution of said agreement and as the land was under encroachment and not in position to reach over the land, the payment of interest on execution of the agreement for sale-cum-mortgage should commence only from the date of handing over the asset of the company. The corporation could not get the encroachment removed, as such, the petitioner through its letters dated 30-7-2005 and 10-12-2005, Annexure-12 (series), requested for refund of the amount of rupees twenty-seven lakhs deposited by him with interest at the rate of eighteen per cent per annum. The corporation thereafter cancelled/withdrawn the sale order dated 4-10-2004 (Annexure-4) by order dated 14-12-2005 (Annexure-13) communicated to the petitioner as per memo No. 541/2-III/05-06 dated 16-12-2005 and also forfeited the amount of rupees twenty-seven lakhs

deposited by the petitioner. The stand of the corporation that the sale notice dated 17-7-2002 (Annexure-1) clearly mentions that the asset of the company i.e. primarily the land and machineries is under sale on an "AS IS WHERE IS BASIS" and therefore even if the land is under encroachment, the corporation is not bound to remove the encroachment and then hand over the assets although efforts were continuing to remove the same. There is nothing in the sale notice (Annexure-1) to indicate that the land in question is under encroachment so that the prospective purchaser could have known the physical status of the land before giving offer to purchase the company. In my opinion, the words on An "AS IS WHERE IS BASIS" in the common sense of understanding would indicate that the land is under the possession of the corporation along with plant and machineries, however the condition of the land whether plane or stony or any such similar situation as it is, but it cannot be stretched to include the status of the land which is not in physical possession of the corporation. In the instant case there is no dispute to the fact that the land is encroached by several persons on account of which the possession of the asset of the company is not in position to be handed over to the purchaser, an admitted fact evident from the letter of the corporation dated 6-7-2004 vide Annexure-R/4 to the counter affidavit. Therefore, it is not permissible in law for any one specially the State to take advantage of its own wrong/inaction. At one hand the Corporation was not in position to hand over the possession of the asset and on the other hand insisting for sale agreement-cum-mortgage with respect to the balance seventy-five per cent of the bid amount and insisting for charging the interest from the date of execution of sale-cum-mortgage agreement relying on paragraph 8 of the sale order and taking no notice of the fact that in terms of the contract both the transactions have to be completed within three months as stipulated in paragraph 15 of the sale order. It is equally not understandable as to how the assets including the land could have been mortgaged by the petitioner in favour of the corporation without having physical possession over it. In a contract the parties entering into the contract should be in position to fulfil their respective obligations under the contract the same is inbuilt. In the instant case the petitioner as per the terms of the sale order deposited twenty-five per cent of the bid amount and expressed its willingness to execute the agreement for sale-cum-mortgage whereas on the other hand the corporation was not in position to hand over the physical possession of the land of the company under sale, cannot be held to be justified on fact and in law to withdraw the sale order as well as forfeit the amount of rupees twenty-seven lakhs deposited by the petitioner relying upon Clause 6 of the sale notice (Annexure-1). Moreover, the original promoter, the respondent No. 6 before the assets of the company could be handed over to the petitioner, has settled its dues with the corporation for which the company was put on auction sale under ONE TIME SETTLEMENT SCHEME 2000 (OTS 2000) as submitted by the learned Counsel for the respondent No. 6 and accepted by the respondent Corporation in paragraph 10 of the counter affidavit.

13. Considering the materials on record, as discussed above, in my opinion, the

prayer for the petitioner that while cancelling/withdrawing the sale order dated 4-10-2004 (Annexure-4) at least the amount of rupees twenty-seven lakhs should have been refunded with interest cannot be held to be unreasonable or unjustified. As such, in the facts and circumstances of the case, respondent Corporation is, directed to refund back the amount of rupees twenty-seven lakhs to the petitioner along with simple interest at the rate of twelve per cent per annum within a period of two months on receipt/production of the certified copy of the present order.

14. The order dated 5-12-2005 (Annexure-13) is partly quashed to the extent indicated above with cost of Rs. 25,000/- (Rupees Twenty-five thousand only).

15. The writ application is allowed as indicated above.