

(2008) 03 KAR CK 0055

In the Karnataka High Court

Case No : Regular Second Appeal No 438 of 2002

The Hubli-Dharwad Municipal Corporation

APPELLANT

Vs

Chandrashekar Shetty

RESPONDENT

Date of Decision : 07-03-2008

Acts Referred:

Karnataka Municipal Corporations Act, 1976 — Section 64

Citation : AIR 2009 Kar 41

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : R.G. Devadhar, for the Appellant; Ashok R. Kalyanshetty, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—This second appeal is by the defendant in OS No. 421 of 1989 on the file of the Principal Munsiff, at Dharwad who though was successful in resisting the money claim of the plaintiff for recovery of sum of Rs. 13,000/- with interest as the suit was dismissed in terms of the Judgment and decree dated 20.11.1995 by the trial court, was not successful before the lower appellate court in RA No. 2 of 1996 filed by the plaintiff which came to be decreed in terms of the Judgment and decree dated 30.11.2001 by the I Additional Civil Judge [Sr. Dn.,] & CJM at Dharwad, is therefore before this Court.

2. The brief facts leading to the above appeal are that the plaintiff a person who had participated in auction sale of a building which was being used for octroi office by the defendant - Hubli Dharwad Municipal Corporation which auction was held on 2.5.1985, had offered the highest bid of Rs. 18,100/- charges and that the licence could be for a period of three years from the years 1995 to 1998; that the plaintiff who had deposited a sum of Rs. 500/- as earnest money further deposited 50% of the bid amount i.e., Rs. 9,050/- on that day, but later realising that the bid amount of Rs. 18,100/- does not cover three years period, but for every year this amount is to be paid had written a letter withdrawing from his

offer as per his letter dated 20.5.1985; that notwithstanding the defendant - Corporation had sent a letter indicating that the standing Committee had accepted the offer of highest bid of Rs. 18,100/- and calling upon him to pay the balance bid amount; that the plaintiff again represented he has rescinded his offer after realizing the mistake for bid amount for every year and not for three years put together; that therefore the amount should be refunded to him, but on the other hand received a further communication dated 7.9.1985 informing the plaintiff that the amount has been forfeited in terms of the conditions of public auction and where upon the plaintiff had caused issue of legal notice for refund of the amount, the defendant not having acceded to this, had filed a suit for recovery of money etc....

3. The defendant contested the suit While plaintiff averments were generally denied, it was asserted that the conditions of auction sale were made known to the bidders before the auction commenced; that there were four bidders at the auction who all had deposited the initial deposit of Rs. 500/-; that the auction was being conducted in terms of a public notification caused by the Corporation and published in Vishwa Wani Kannada newspaper dated 28.4.1985; that the conditions of auction sale were read over by the person conducting the auction sale and the bidders had after understanding the same acknowledged by putting their signatures in the register maintained for auctioning the property; that the plaintiff having made the highest bid of Rs. 18,100/- and having understood this and having paid a sum of Rs. 9,050/-, 50% of the bid amount, was required to pay the other 50% after the final approval by the standing Committee; that the highest bid amount of the plaintiff had been provisionally accepted by the Officer conducting the auction sale; that the plaintiff having not paid the balance of the bid amount had contravened the conditions laid down in the auction as per the terms and conditions read over at the time of auction and to avoid the consequence the plaintiff had come up with false and untenable allegation and averments in the plaint; that the plaintiff having not acted in terms of the auction sale, the defendant was left with no other option but to forfeit the amount already deposited by the plaintiff; that the conditions of auction sale are binding on the plaintiff and therefore the plaintiff is not entitled to claim refund of the amount deposited and the plaintiff having accepted the terms of auction sale, is estopped from questioning the validity of the auction sale; that the claim is not legal or tenable; that the suit is liable to be dismissed as the claim is baseless and without legal support and prayed accordingly.

4. The trial court in the light of such pleadings of the parties had formulated the following issues:

1. Whether plaintiff proves that resolution of the Standing Committee of the defendant No. 858 dt. 14.6.1985 and letter of the Commissioner dt. Nil received by the plaintiff on 7.9.85 are illegal and void?

2. Whether act of forfeiture of the earnest money deposit is wrongful?

3. Whether plaintiff is entitled to recover the above sum with interest?
4. Whether defendant proves that, the plaintiff violated and contravened the conditions of the auction sale?
5. Whether the defendant proves that the Writ Petition No. 17265/85 is res-judicata to the present suit claim?
6. What order? What decree?

Addl. Issues:

1. Whether the suit of the plaintiff is in time?
 2. Whether the Writ Petition No. 17265/85 save the limitation?
5. On behalf of the plaintiff, the plaintiff himself deposed as PW. 1, documentary evidences Exhibits.P1 to P15 were got marked. On behalf of the defendant, - Chandrashekharagouda Marigouda, the Deputy Revenue Officer of the Hubli Dharwad Municipal Corporation, was examined as sole witness and the documentary evidence Exhibit. D1 the auction register upto Exhibit.D6 were marked.
6. The learned trial Judge, on an appreciation of such evidence, answered issues 1 to 3 against the plaintiff and answered issue No. 4 which was whether the defendant proves that the plaintiff violated and contravened the conditions of the auction sale in the affirmative and accordingly dismissed the suit.
7. The aggrieved plaintiff preferred an appeal before the lower appellate court.
8. It was contended before the appellate court that the Judgment of the trial court was contrary to law and the facts of the case; that the finding on issue No. 4 as to whether the defendant had proved that the plaintiff violated and contravened the conditions of auction sale to be in favour of the defendant and against the plaintiff is not supported by any material on record nor on sound logic; that the trial court failed to appreciate the significance of the signature of the plaintiff contained in the auction register with reference to the provisions of Section 64 of the Karnataka Municipal Corporations Act, 1976; that the Judgment and decree of the trial court was not tenable in law, particularly, the law of contract relating to withdrawal of the bid amount before the final acceptance and therefore prayed for an order to set aside the Judgment and for decreeing the suit as sought for before the trial court.
9. The lower appellate court on such contentions urged which were defended by the defendant - Corporation formulated the following two points.
1. Whether the plaintiffs proves that he has revoked the offer of final bid before acceptance of same and entitled for refund of the earnest money of Rs. 9,050/- deposited by him?
 2. Whether the judgment and decree of the trial court against the facts of the

case irregular and calls for interference of this Court?

3. What order?

10. The lower appellate court found that the plaintiff who had not been clear about the terms and conditions and having realized that the offer of Rs. 18,100/- did not cover three years but was for each year, had withdrawn from his offer in terms of his letter dated 20.5.1985 Exhibit.P2: that this withdrawal was much earlier to the resolution of the Standing Committee of the Corporation which accepted the final bid only in terms of resolution No. 858 dated 14.6.1985; that such acceptance in fact having been communicated to the plaintiff only in terms of letter dated 23.7.1985 Exhibit.P3 and also holding that the terms and conditions of auction sale having not been admittedly furnished to the plaintiff or other bidders as indicated in the evidence of PW. 1 and further admission that the defendant-Corporation in fact refusing to supply the copy of the terms and conditions even on an application and the resolution of the Standing Committee of accepting the highest bid not showing any awareness to the withdrawal of the plaintiff in terms of his letter dated 20.5.1985 and being of the view that there was no concluded contract before the communication Exhibit.P2 from the plaintiff and particularly as the auction conditions were not made known to the plaintiff, held that the further decision of the Standing Committee to forfeit the earnest money was illegal and therefore the plaintiff was entitled for refund of 50% of the highest bid amount deposited by him, answered points 1 and 2 in the affirmative in favour of the appellant - plaintiff and accordingly set aside the Judgment and decree of the trial court, decreed the suit claim for a sum of Rs. 9,050/- with interest at 6% p.a from the date of filing of the suit till satisfaction of the decree.

11. It is aggrieved by this Judgment of the lower appellate court, the defendant is in appeal.

12. At the time of admitting this appeal, this Court had formulated the following two substantial questions of law for examination.

1. Whether the lower appellate Court is justified in reversing the judgment and decree passed by the Trial Court by overlooking the conditions and principles of law regarding conducting of auction sale?

2. Whether the lower appellate Court could have granted a decree in favour of the plaintiff when admittedly, the plaintiff had bid in the auction in question and deposited the earnest money and he admittedly filed an application after 15 days withdrawing from the bid which was not accepted by the appellant since by that time, the bid was already accepted and whether under the said circumstances the plaintiff was entitled to claim refund of the earnest money?

13. Appearing on behalf of the defendant - Corporation, Sri. Devadhar, learned Counsel has very vehemently urged that the lower appellate court has committed a grave error in law in reversing the Judgment and decree of the trial court; that

there was no way of the plaintiff succeeding in the suit; that the Corporation had only acted in accordance with terms and conditions of the auction sale; that the terms and conditions of the auction sale which were clearly made known to the plaintiff and other bidders before the auction sale commenced were all binding on the bidders including the highest bidder - the plaintiff; that the plaintiff knowing fully well, the consequence of his not only offering the highest bid amount but also in not paying the same had come up with lame excuses and being aware of the consequence of default for not paying the balance bid amount; that the defendant - Corporation had in terms of the conditions of auction sale was entitled to forfeit the deposited amount for non-payment of the balance of Rs. 9,050/- in terms of the highest bid; that the action of the Corporation being only in terms of the auction sale conditions, no illegality can be attributed; that it is not as if the plaintiff has been either misled or taken by surprise; that the plaintiff who was very well aware of his actions and consequence of not complying with the requirement has to blame himself and cannot seek refund and therefore submits that the Judgment and decree of the lower appellate court is required to be set aside.

14. It is also submitted that the defendant being a public authority corporation does conduct such auction sales as a matter of routine and bonafide accepts the highest offer and the acceptance of the highest offer eliminates other offers and in the instant case the next highest offer was a sum of Rs. 18,000/- acceptance of which was avoided by the plaintiff's highest bid of Rs. 18,100/- and the plaintiff having participated in a public auction sale and having made his highest offer and when once the offer has been provisionally accepted and in fact the further conduct of the plaintiff in depositing 50% of the amount itself being proof of the fact that he had participated in the auction voluntarily and willing to take the lease for three years on such terms, if he fails to fulfil the further requirements the consequence necessarily visits upon the plaintiff and such consequence cannot be avoided in law and it is therefore submitted no interference is called for as if the version of the plaintiff is to be accepted the Corporation will not be able to conduct its affairs in a proper and methodical manner as even" highest bidder who comes up with lame excuses later and seeks for recovery of the deposited amount, that would obviously affect the functioning of the affairs of the Corporation and would in fact affect public interest also.

15. With reference to the deposition of PW. 1 - the plaintiff himself and particularly the admission elicited during the cross examination of this witness indicating that the plaintiff had very clearly admitted about his knowledge of the terms and conditions of the auction sale and the mere non-furnishing of a copy of the conditions subsequently would not in any way alter the position for binding the plaintiff with regard to terms and conditions of auction sale, it is submitted that in the light of such clear admission about the awareness of the terms and conditions of auction sale and having also subscribed his signature in the register containing the terms and conditions, the plaintiff cannot plead avoidance from

the operation of such terms and conditions on him; that; even in terms of law of contract, such conditions are made when once his highest bid of Rs. 18,100/- was provisionally accepted and the other conditions forming part of condition of acceptance do operate and therefore the plaintiff cannot plead any exception or exemption from the operation of the condition.

16. With particular reference to conditions 4, 5, 6 and 7 of the auction conditions, which read as under,

Sri. Devadhar, learned Counsel for the defendant -Corporation would submit that it is very clear in terms of condition No. 5 that in the event of a bidder not remitting balance 50% within the permitted time, the earlier 50% will be forfeited is a clear condition which was very well known to the plaintiff and if this condition operates due to the failure of the plaintiff, the plaintiff cannot seek to get relinquished of this operation in law and to the detriment of the defendant - Corporation and therefore urges that the learned appellate Judge was in error in interfering with the Judgment and decree of the trial court.

17. It is also submitted that the plaintiff pleading that he was not aware that the lease was for a period of every three years but every year has to pay the highest bid amount is only an after thought which is used as excuse to wriggle out of the obligation to deposit the bid amount and at any rate such excuses cannot constitute a justification to relieve the plaintiff from legal consequences of not remitting the balance bid amount, particularly, in the light of condition 5(b) and therefore urges for allowing the appeal and setting aside the Judgment and decree passed by the lower appellate court.

18. It is also urged that the plaint averment does not indicate that the plaintiff was under the impression that the bid amount was for lease of property for a period of three years and not every year he had to remit this amount and therefore the learned Judge of the lower appellate court has virtually set up a new case for the plaintiff to decree the suit which is not tenable in law and is liable to be set aside etc.,.

19. Let me take up the last submission first. A perusal of the plaint averment in paragraph-6 of the plaint clearly indicates that the plaintiff had pleaded that he was under a mistaken impression about the terms of the auction sale proceedings and had withdrawn his highest bid before the acceptance by the competent authority as per his letter dated 20.5.1985. This letter dated 20.5.1985 is marked as Exhibit. P2 and a perusal of this exhibit clearly indicates that the plaintiff was withdrawing his highest bid offer for the reason that he was not fully conversant with the details of the auction sale; that he was not aware of the terms of the auction sale and particularly as he was under the impression that bid amount of Rs. 18,100/- was not for one year as understood by him, but for a period of three years; that it is not possible for him to remit the amount of Rs. 18,100/- every year and therefore the plaintiff was withdrawing his highest offer. He has expressed the request by refunding the deposited amount. It is

therefore, to be taken that there was sufficient pleading by the plaintiff about he having made the offer under the mistaken impression that the bid amount was covering for the period of three years and not merely for one year.

20. The main contention of Sri. Devadhar is, that the terms and conditions of the auction sale particularly the conditions 4, 5, 6 and 7, as extracted above, bind the plaintiff in terms of the conditions of the auction sale not only because they were the conditions, but the plaintiff had made a clear admission about his awareness as deposed during cross examination and therefore, cannot plead to the contrary either to contend that the condition does not bind him for having not made known clearly or for the reason that the defendant-Corporation had failed to furnish a copy of the conditions even on a specific request which was made by the plaintiff subsequent to his recalling from the offer.

21. An examination of the deposition of PW1, particularly in the cross examination, reveals that this defendant has only accepted suggestions as had been made by the learned Counsel for the defendant with regard to his awareness of the conditions as contained in the register of auction sale and had been read out by the officer conducting the auction sale. It is not any voluntary statement of the witness about his awareness or knowledge of the conditions, but it is attributed to him because of his signature to the register containing the conditions subscribed once before the auction and again after the auction.

22. The officer who was examined on behalf of the Corporation, on the other hand, has also admitted that the copy of the auction conditions were not furnished to bidders nor was a copy given to the plaintiff even subsequent to the auction.

23. Sri. Devadhar, learned Counsel for the defendant-Corporation, has explained that it is not the practice to furnish the copies of the auction sale conditions and all such auctions are conducted by the Corporation in this manner and no exception can be taken to the practice.

24. A perusal of the material placed by the defendants 1, 2 and 3 also indicate that the conditions of auction sale were neither published along with the paper publication nor the copy of the conditions published at the place of auction. Copies of these conditions were never given to the parties i.e. the bidders. What is more intriguing is that even after the provisional acceptance of the highest bid of the plaintiff, the conditions subject to which the bid is accepted is not made known to the plaintiff in writing.

25. In none of the communication to the plaintiff emanating from the defendant Corporation, these conditions have been enumerated. The result is that the conditions never form part of the written contract that has come into existence between the plaintiff and the defendant-Corporation. In fact, no concluding contract is placed before the Court. The only logic on behalf of the defendant is that on the provisional acceptance of the highest bid of the plaintiff i.e. the offer having been accepted that brings about the concluded contract I find this rather

difficult to accept particularly for the reason that the provisional acceptance is made subject to the final approval through a resolution of the Standing Committee or the Commissioner even in terms of condition No. 6 of the auction sale conditions.

26. The auction sale conditions as indicated above by the defendant and which according to the defendant had been made known to the bidder's on the date of the auction i.e. just before the commencement of the bid, comprising of as many as 28 conditions as being read over to the bidders by the officer conducting the auction, are definitely impossible for any bidder to understand and appreciate the legal implications of all these conditions, though claimed to have been read and orally explained to the bidders. If the defendant-Corporation wants to bind the bidders with these conditions, the minimum requirement is that the conditions should have been made known to the bidders clearly and in writing before the auction sale. Mere obtaining the signatures on a register containing these conditions cannot be a good answer to bind these bidders of these conditions particularly, as the condition No. 5(b) is sought to be used against the plaintiff for forfeiting 50% of the amount. Unless and until these conditions have been made known to the bidders, the defendant cannot invoke a term in such conditions to the detriment of the plaintiff while even in general law if the withdrawal of the plaintiff from his highest bid in terms of his letter dated 20.5.1985 had caused loss or additional expenditure to the defendant, it is undoubtedly true that the defendant-corporation is entitled to recover this amount from the plaintiff, but even in terms of Section 74 of the Contract Act such damages can not exceed the stipulated amount. But in the present case, forfeiting an amount of Rs. 9050/- i.e. 50% of the bid amount is certainly in the nature of a penalty and not in the nature of compensation for the damages or for the wrong action on the part of the plaintiff which the defendant has suffered.

27. Even to invoke Section 74 of the contract Act, which provides for recovery of penalty amount mentioned in the contract, there should be a concluded contract interpreting the conditions. When the conditions were not made clear to the bidders and even after the provisional acceptance, the conditions were not made known in writing to the highest bidder, it cannot be taken that the conditions were very much part of the concluded contract between the parties. If such is the factual position even in terms of the provisions of Section 74 of the Contract Act, the defendant cannot later claim to the entire stipulated amount of Rs. 9050/- award of which is in the discretion of the court, which amount the court could have awarded as quantified damages for breach of a contract by the party committing breach. In fact even in terms of Section 74, the stipulated amount constitutes the highest limit and not necessarily the entire amount can be awarded automatically by way of damages.

28. The conditions of the auction sale having not been effectively communicated to the plaintiff and the defendant corporation not having taken any action to incorporate the conditions in any concluded contract between the parties, that

condition cannot be invoked to the detriment of the plaintiff to forfeit the entire deposited amount of Rs. 9050/-.

29. If at all even in terms of the language employed by the communication of the Commissioner that an amount of Rs. 500/- has to be forfeited which had been deposited as earnest money and not 50% of the bid amount which is very much part of the sale consideration. Forfeiture of the sum of Rs. 9050/- is definitely in the nature of penalty enforced, on the plaintiff and there being no legal basis for enforcing that penalty as being a term or a condition of concluded contract between the parties which could have been enforced on the defaulting party, I am of the view that the learned Judge of the lower appellate court has rightly concluded that the plaintiff is entitled to recover this amount though the reasoning given by the learned Judge of the lower appellate court, may not be exactly as indicated in this judgment.

30. In the result, I take the view that the lower appellate court was justified in reversing the judgment and decree passed by the trial Court and decreeing the plaintiff's suit. However, it is made clear that the forfeiture of the earnest money of Rs. 500/- is justified.

31. This appeal is dismissed with no order as to costs in this appeal.