

(2022) 06 CAL CK 0096
In the Calcutta High Court
Case No : F.M.A. No. 707 Of 2013

West Bengal Financial Corporation

APPELLANT

Vs

M/S. Annapurna Engineering And Manufacturing Private
Limited & Others

RESPONDENT

Date of Decision : 29-06-2022

Acts Referred:

State Financial Corporation Act, 1951 — Section 29
Transfer of Property Act, 1882 — Section 55, 55(1)(a), 55(1)(b)

Citation : (2022) 06 CAL CK 0096

Hon'ble Judges : Tapabrata Chakraborty, J; Raja Basu Chowdhury, J

Bench : Division Bench

Advocate : Rudra Sankar De, Syed Nurul Arefin, Rahul Singh

Final Decision : Dismissed

Judgement

Raja Basu Chowdhury, J

1. The present appeal is directed against the judgment dated 19th October, 2012 passed in WP No. 19306(W) of 2006 by which the learned Single Judge was inter alia pleased to direct the appellant to refund the forfeited deposit to the tune of Rs. 14.20 lakhs to the writ petitioners along with interest @ 12 % per annum from the date of institution of the writ petition till the date of payment. The appellant was also directed to pay costs of Rs. 20,000/- to the writ petitioners.

2. Shorn of unnecessary details, the facts are that on 12th May, 2004, the appellant, being the West Bengal Financial Corporation, published a sale notice in exercise of power under Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as the Act of 1951) inviting offers for sale of various fixed assets inter alia including those of Bandel Ceramics Private Limited (hereinafter referred to as the Unit). The fixed assets of the Unit which formed part of the said advertisement was 'Land : About 2 acres with Shed & Building, Jaw-Crusher, Pan Mill, Pulveriser, Muller Mixture, 150 T Friction Scrow Press, Down Draft Kiln etc. with laboratory equipments'. The writ petitioner no.1, namely, M/s

Annapurna Engineering and Manufacturing Private Limited (hereinafter referred to as the Company) being interested had offered to purchase the aforesaid fixed assets of the Unit which was offered to be sold and quoted a purchase price of Rs. 42,00,000/- (Rupees Forty Two Lakhs only). In terms of the sale notice the Company also deposited 10% of the offer price as earnest money. By a letter dated 2nd December 2004 the Company revised its offer to Rs. 43,00,000/- (Rupees Forty Three Lakhs only). In response to the aforesaid revised offer of the Company, the appellant issued a letter of sale dated 2nd December, 2004 thereby agreeing to sell and transfer the fixed assets of the Unit in favour of the Company for a consideration of Rs. 43,00,000/- (Rupees Forty Three Lakhs only). The Company was not in a position to pay the balance consideration within the time stipulated by the appellant. However, in order to show its bona fide, a demand draft of Rs. 10,00,000/- (Rupees Ten Lakhs only) was forwarded to the appellant by cover of a letter dated 23rd December, 2004 with a request to extend the period by 21 (Twenty-One) days from 27th December, 2004 for making payment of the balance consideration of Rs. 28.80 lakhs. The appellant, while acknowledging the aforesaid letter dated 23rd December 2004 and while accepting the request for extension of time, imposed a condition by a letter dated 24th December, 2004 that the Company would be required to pay interest @ 9.5% per annum on the balance consideration, for the extended period with effect from 28th December, 2004. Thereafter by a letter dated 17th January, 2005, the appellant cancelled and withdrew its offer for sale of assets of the Unit and also purported to forfeit the money deposited by the Company including the earnest money since the Company did not make payment of the balance consideration within the stipulated period i.e. within 14th January, 2005.

3. Records would further reveal that the Company's banker, Vijaya Bank, while processing the Company's loan application informed the Company by letter dated 24/25th January, 2005 that there was a charge over the fixed assets of the Unit, which was offered to be sold, in favour of State Bank of India, Chinsurah Branch (hereinafter referred to as SBI) and requested the Company for 'No Due Certificate/No Objection Certificate' from SBI. A copy of the said letter was also marked to the appellant. While acknowledging the letter issued by Vijaya Bank, the appellant by a letter dated 27th January, 2005 clarified that SBI had charge on the current assets for working capital loan of the Unit, while the appellant was having absolute charge on the fixed assets of the Unit and that on account of failure on the part of the Company to make payment of the dues of the appellant, possession of the Unit was taken over without the management and/or liability whatsoever and in terms of Section 29 of the Act of 1951 and that the appellant is deemed to be owner of the fixed assets of the Unit and had got the right to sell, transfer, assign, mortgage and/or hypothecate the Unit to realise its dues. Incidentally, the aforesaid letter did not refer to purported cancellation of the letter of sale dated 2nd December, 2004 or withdrawal of the offer made by the appellant to the Company. In response to the letter dated 25th January, 2005, SBI informed that it had charge on the property of Unit and that the case

is sub-judice at DRT-II, Kolkata. By a further letter dated 3rd February, 2005, SBI claimed that it had first charge on a portion of the land measuring 50 Sataks within the factory premises of the Unit and that the main office building of the Unit which was proposed to be sold was also located on the charge plot. In response to the said letter, the Company by a communication in writing dated 5th February, 2005 informed the appellant that it was extremely difficult for the Company to go ahead with the offer of purchasing the land of the Unit until the title is clear and sought for clarification on the claim made by the SBI.

4. It would further appear from the records that the appellant by letter dated 14th February, 2005 addressed to the Assistant General Manager, SBI inter alia observed that there was no restrain order from any Court to dispose of assets in question and accordingly called upon SBI to provide necessary documents to establish their claim by 25th February, 2005. A copy of the aforesaid letter was also marked to the Company. Thereafter by a letter dated 24th February, 2005 the Company sought for confirmation from the appellant regarding the claim of first charge of SBI on the portion of land on which the main office building of the Unit was situated. Subsequent thereto, the appellant by a communication dated 28th February, 2005 addressed to SBI, asserted, that since, no documents had been furnished by SBI within the stipulated period i.e. 25th February, 2005 the appellant shall proceed to dispose of the fixed asset of the Unit in accordance with law. The aforesaid letter was also marked to the Company. In the midst of such correspondence, the Company came to learn from appropriate authorities that the issue with SBI and the appellant has, amicably been resolved. Accordingly, the Company approached the appellant to accept the balance payment and to transfer the assets but in vain. As such, the Company by a letter dated 22nd February, 2006 approached the Hon'ble Minister of Industry and Trade to resolve the dispute.

5. In response to such representation, the Principal Secretary Cottage & Small Scale Industries Department, Government of West Bengal by letter dated 23rd March, 2006, addressed to the Company claimed that since the Company had failed to deposit the balance consideration within the extended time i.e. 24th January, 2005, the appellant had cancelled and withdrawn its offer and that the assets had subsequently been sold to another company. Having, thus, ascertained that the Unit has been sold, the Company thereafter by letter dated 4th April 2006 sought for refund of Rs. 14.20 lakhs from the appellant. In response thereto, the appellant by letter dated 17th April, 2006 intimated that it had forfeited the said deposit in terms of the condition of sale, since the Company had failed to deposit the balance consideration. The Company by a further letter dated 19th April, 2006 demanded justice but in vain.

6. In such circumstances the Company filed a writ petition being WP no. 19306(W) of 2006 inter alia praying for a direction upon the appellant to immediately refund the forfeited amount of Rs. 14.20 lakhs along with interest @ of 18% per annum. Upon exchange of affidavits and upon contested hearing the

judgment impugned in the present appeal was delivered.

7. At the time of admission of the instant appeal by order dated 4th March, 2013, the Hon'ble Court while directing preparation of paper books inter alia directed the appellant to deposit a sum of Rs. 14.20 lakhs with the learned Registrar General of this Hon'ble Court, with a further direction on the learned Registrar General to keep the same in a suitable interest bearing fixed deposit account in a Nationalised Bank. Such direction was complied with.

8. The appellant assails the aforesaid judgment inter alia on the ground that the learned Judge had erred in directing a refund of deposit. It is the appellant's contention that the appellant is a deemed owner of the assets of the Unit under Section 29 of the Act of 1951 and as such it was within its rights to put up the fixed assets of the Unit for sale. The appellant relies on an order dated 19th December, 2003 passed by the Kolkata Debt Recovery Tribunal passed in TA No. 32 of 2012 (State Bank of India -Vs. - M/s. Bandel Ceramics Pvt. Ltd. and Ors.) to justify its authority to deal with the fixed assets of the Unit.

9. A perusal of the aforesaid order would reveal that SBI had raised an objection that the properties of the Unit which are detailed in Annexure L-1 of the original application that is land measuring 0.25 satak situated at Mouza Jhapa, Khatian No. 111, Dag No. 129, J.L. No. 150 is exclusively mortgaged with the bank and the appellant has got no charge on the said piece of land and structure. It would further appear from the aforesaid order that the appellant had disclosed an agreement with the Unit wherein, in schedule A, the details of the property under their charge has been given and according to the appellant, such details show, that the property in Khatian No. 31, J.L. No. 150 and Khatian No. 23 J.L. No. 150 and Khatian No. 66 J.L. No. 150 are subject to their charge. It would further appear from such order that according to the appellant the property given in Annexure L-1 of the O.A. by the bank is distinct and different. Taking into consideration the aforesaid disclosure made by the appellant, the Kolkata Debts Recovery Tribunal - II had inter alia directed as follows:-

"In view of this, WBFC is made clear that the property which is detailed in the schedule L-1 of the OA i.e. Khatian no. 111, Dag No. 129, J.L. no. 150 of Mouza Jhapa be not sold without the prior permission of this Tribunal because any sale of this property will take away the right of the bank as a secured creditor."

10. Relying on the said order appellant claims that it had offered to sell the assets of the Unit by its sale notice dated 12th May, 2004. The same does not concern the SBI and the said asset is distinct and different from the claim of SBI.

11. Mr. De, learned advocate appearing for the appellant had inter alia argued that by letter dated 17th January, 2005 the appellant had withdrawn its offer to sell the Unit in favour of the Company consequent upon its failure to make payment of the balance consideration along with interest within the stipulated period, that is within 14th January 2005. He contends that the Company was in breach of the payment terms as contained in letter dated 2nd December, 2004

and consequent upon the same and in terms of the letter of sale dated 2nd December 2004, the earnest money along with all further amounts deposited by the Company stood forfeited.

12. He in other words contends that time was the essence of the contract and the Company having failed to comply with such essential terms, the appellant was not only entitled to cancel the contract and/or withdraw their offer, but also to forfeit the money deposited by the Company. According to the appellant since the Company admittedly defaulted in payment of the balance consideration, it was justified in forfeiting the entirety of the money, deposited by the Company and that the contrary argument that the forfeiture is arbitrary is not sustainable.

13. Mr. De argues that the property was directed to be sold on 'as-is-where-is and whatsoever-there-is-basis' and that opportunity was afforded to the Company to take inspection of the assets and the Company having availed such opportunity and having satisfied themselves as regards the title of the appellant over and in respect of the Unit which was put up for sale, had not only offered to purchase the same but had also deposited earnest money along with the offer on 18th November, 2004 and thereafter had also revised their offer on 2nd December, 2004, based on which the sale order was issued.

14. He submits that the Company as on 23rd December, 2004 while seeking extension did not raise any issue as regards the title and/or authority of the appellant to sell the Unit and that the claim of Company, that the appellant did not have title and authority to sell the Unit, was and/or is an afterthought. The appellant claims since the Company did not have funds and was not financially solvent, it had delayed payment and had raised unjustified and unreasonable issues only to delay the payment. Once the contract was terminated, forfeiture was a natural corollary.

15. According to Mr. De the learned Judge had failed to appreciate that it was the responsibility of the Company to go through the particulars of the assets which were put up for sale. The Company having participated in the sale process and having put its offer cannot question the title of the appellant.

16. In reply Mr. Arefin, leaned advocate appearing for the Company refers to the sale notice dated 12th May, 2004 in order to demonstrate that what was proposed to be sold by the appellant was 2 acres of land with shed & building, Jaw Crusher, Pan Mill, Pulveriser, Muller Mixer, 150 Tonne Friction Screw Press, Down Draft Kiln etc. with Lab-Equipment situated at Village- Jhata, Delhi Road, P.O. Mogra, P.S. Polba, District- Hooghly.

17. According to him the Unit was having no other land in the Village Jhapa apart from the one which was proposed to be sold and that the appellant had held back information from the Company that the matter was sub-judice and that SBI had a claim over a portion of the aforesaid asset of the Unit, which was proposed to be sold.

18. According to Mr. De the Company's banker despite seeking clarification as to whether the claim of SBI, having charge on 50 chottak of land as claimed by them is correct or not, no such clarification had been afforded by the appellant.

19. Mr. Arefin contends that a perusal of the order passed by the Kolkata Debts Recovery Tribunal-II dated 19th December, 2003 would reveal that the learned Tribunal had in fact injuncted the appellant from dealing with a portion of land of the Unit, to the extent of 0.25 sataks situated at Mouza Jhapa and as such there was a cloud over title of the appellant. The order was not disclosed by the appellant to the Company at the time of publishing of the sale notice or at any time subsequent date to the Company at least until requisition by Vijaya Bank. The Company's banker was not willing to finance the deal, as the title to the property was un-clear. It was obligatory on the part of the appellant to disclose to the Company, any material defect in the property and/or in the title of the appellant thereto to, which the appellant is and the Company is not aware and which the Company could not with ordinary care discover.

20. He argues that in ordinary course it was impossible for the Company to ascertain whether there was any order of injunction while carrying out inspection of the Unit and any person of ordinary prudence could not have ascertained such facts unless the same was disclosed to them. There was clearly a defect in title and/or was material defect in the property which the appellant as the seller was aware and the Company was not aware and that it was for the appellant to disclose the same. Having failed to disclose the aforesaid material defect the appellant has acted arbitrarily and the claim of the appellant, that it was a deemed owner under Section 29 of the Act of 1951, did not absolve the appellant from disclosing such material defect. There was thus no irregularity on the part of the learned Single Judge in issuing a direction for refund of the money deposited and the appeal should fail.

21. Mr. Arefin argues that it was the appellant who has failed to give a fair disclosure with regard to property which is being offered to be sold and as such there was no illegality on the part of the Company in not making payment without getting proper clarification from the appellant. To buttress the aforesaid contention reliance has been placed upon the case of Haryana Financial Corporation & Ors. -Vs. - Rajesh Gupta reported in (2010) 1 SCC 655. Paragraphs 24 and 25 of the said judgment are set out hereunder:

"24. In view of the aforesaid, we are of the considered opinion that the appellant Corporation cannot be permitted to rely upon Section 55 of the Transfer of Property Act, 1882. The appellant Corporation failed to disclose to the respondent the material defect about the non-existence of the independent 3 "karams" passage to the property. Therefore, the appellant Corporation clearly acted in breach of Sections 55(1)(a) and (b) of the Transfer of Property Act, 1882.

25. The aforesaid section provides as under:

"55. (1) The seller is bound-

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

A mere perusal of the aforesaid provision will show that it was incumbent upon the appellant Corporation to disclose to the respondent about the non-existence of the independent passage to the unit. It was also the duty of the appellant Corporation to inform the respondent that the passage mentioned in the revenue record was not fit for the movement of vehicles. The appellant Corporation also failed to produce to the buyer the entire documentation as required by Section 55(1)(b) of the aforesaid section. We are therefore satisfied that the appellant Corporation cannot seek to rely on the aforesaid provision of the Transfer of Property Act, 1882."

22. We have heard both the parties at length. We have taken note of pleadings and the documents on record. Answering our query, Mr. De has informed that the Unit has been sold to a third party at a higher price higher than which was contracted.

23. We find that the sale notice makes no mention of the order dated 19th December, 2003 passed by the Debts Recovery Tribunal-II. Although Mr. De, has strenuously argued that the appellant in its sale notice has left out the portion of the land over which the SBI claims charge, we do not find any such reference in the sale notice. The appellant having failed to disclose the encumbrances relating to the auctioned property, it cannot later claim protection on the pretext of 'as-is-where-is and whatsoever-there-is' basis.

24. Although Mr. De has argued that the Company having not made payment within the extended time, the appellant was justified in cancelling and/or withdrawing their offer, we find that it is not the case of the parties that time was essence of the contract. It had not been the case of the appellant that it was the intention of the parties that payment should be made within the time provided, on the contrary we find that the appellant had extended time for making payment, subject to making payment of further interest.

25. We have meticulously perused the documents on record and have been able to ascertain that even after 14th January, 2005 the appellant had repeatedly on several occasions, had exchanged communications with the Company and/or its banker and/or marked copies of correspondence exchanged with its banker to the Company. In none of the aforesaid correspondence reference of determination of contract/withdrawal of offer of sale has been made. The appellant having failed to disclose the encumbrances relating to the auctioned property, it cannot later claim protection on the pretext of 'as-is-where-is and

whatsoever-there-is'.

26. We are not impressed by the arguments advanced by the appellant that the contract stood determined way back on 17th January, 2005. We further find substance in the argument of the Company that it was obligatory for the appellant to disclose to the Company, not only the pendency of the proceedings before the D.R.T. but also claim of SBI.

27. We find that despite the Company seeking specific clarification by its letter dated 5th February, 2005 as to the correctness of the claim of SBI, whether it had charge, over the 50 Satak of land as claimed by SBI, there has been no specific reply thereto. On the contrary by letter dated 14th February, 2005 the appellant for the first time while disclosing pendency of proceedings before the D.R.T. claimed that since there was no order restraining the appellant by any Court, the appellant was at liberty to dispose of the assets as per the provisions of the Act of 1951. The aforesaid letter, however, does not deal with the claim of SBI especially with regard to the claim that the land measuring 50 chottak within the factory premises of the Unit is charged in favour of SBI Branch or not.

28. We find that the appellant has disposed of the property which was proposed to be sold, in favour of the third party. Particulars of such sale has, however, not been disclosed. In the facts as stated hereinabove, we find that the conduct of the appellant is arbitrary. The appellant itself prevented the Company from making payment of the balance consideration within the time stipulated, by not making appropriate disclosure.

29. We may, however, add that although the terms of sale authorised the appellant to forfeit the money paid by the Company including the earnest money, we find the decision to forfeit the money deposited by the Company on account of failure to pay the balance consideration, unsustainable for reasons more than one.

30. Firstly, although it was well within the domain of the appellant to safeguard its interest, by incorporating a clause for forfeiture, in light of the fact that there was cloud over the title of the appellant over the asset of the Unit which the appellant failed to appropriately clarify, disentitled the appellant in terms of Section 55(1)(a) of the Transfer of Property Act to forfeit the part consideration money paid by the Company.

31. Secondly, although it may be in appropriate cases, justifiable to forfeit the advance money, being part of 'earnest money' where the same is paid at the time of entering into a contract, as a pledge for due performance, by the depositor, in case of non-performance, such right cannot extend towards part consideration, especially when the appellant is at default.

32. Thirdly, since time was not the essence of the contract, the appellant ought to have afforded opportunity to the Company to remedy the breach by issuing a show-cause. The same was not done.

33. Fourthly, the appellant having suppressed material defect in title, which the appellant as seller is aware and the Company is not aware, could not have proceeded to forfeit the money including the earnest money deposited by the Company, without first affording appropriate clarification and/or opportunity to make payment.

34. The decision of the appellant to forfeit the money paid by the Company is unjustified. The learned Single Judge has rightly held that the appellant is guilty of concealment and/or non-disclosure of relevant facts relating to transaction. We further find that time was never the essence of the contract and as such the appellant could not have walked out of the contract and forfeited the money paid by the Company. We thus find that the appellant itself was in breach of contractual terms.

35. The learned Single Judge, upon dealing with all the factual issues, arrived at specific findings and we do not find any error, least to say any patent error of law in the judgment impugned. The same also does not suffer from any jurisdictional error or any substantial failure of justice or any manifest injustice warranting interference of this Court.

36. For the reasons discussed above, the appeal fails and the same is, accordingly, dismissed.

37. We direct that the deposit of Rs. 14.20 lakhs made by the appellant with the Registrar General of this Court along with all accrued interest thereon be released in favour of the Company, upon compliance of all formalities.

38. There shall, however, be no order as to costs.

39. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.