SUPREME COURT OF INDIA

Suresh Kumar Wadhwa

Vs.

State of M.P.

C.A.No.7665 of 2009

(R.K.Agrawal and Abhay Manohar Sapre,JJ.,)

25.10.2017

JUDGMENT

Abhay Manohar Sapre,J.,

1. This appeal is filed by the plaintiff against the final judgment and order dated 21.11.2006 passed by the High Court of Madhya Pradesh, Bench at Jabalpur in First Appeal No.127 of 1998 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and affirmed the judgment and decree dated 23.12.1997 passed by the 9th Additional District Judge, Bhopal in C.S. No.2-A/97 by which the appellant's suit for declaration and refund of security amount deposited with the respondents was dismissed.

2. Facts of the case lie in a narrow compass. They, however, need mention, in brief, to appreciate the controversy involved in the appeal.

3. The appellant is the plaintiff whereas the respondents (State of M.P. and its officials) are the defendants in a civil suit out of which this appeal arises.

4. Respondent No. 3 (defendant No. 3)-a Nazul Officer, Bhopal issued an advertisement on 07.01.1996 in daily newspaper for and on behalf of State of M.P wherein it was published that four nazul plots of the State would be sold in public auction on 11.01.1996 on the terms and conditions set out therein. Anyone interested could participate in the public auction by following the terms and conditions mentioned in the public notice. It is apposite to reproduce the public notice including its terms/conditions hereinbelow:

> "All are hereby informed that the public auction of Government nazul plots of situated at Mahavir Nagar, Arera Colony, Bhopal is to be carried out. The description of the nazul plots is as follows:

Place Arera	Plot No.	Area

Colony, Bhopal		
	E 5/5	2880 sq ft
	E 5/17	2880 sq ft
	E 2/12	13251.03 sq ft
	E 2/12	9600 sq ft

The public auction of the aforesaid plots will done on 11.01.1996 starting at 11 A.M. in the court of the nazul officer capital city scheme Bhopal and the conditions of the auction will be as follows:

1. Each plot shall be auctioned separately.

2. Bidder must be Income Tax Assessee and proof of Assessment for 1994-95 shall be necessary.

3. Before taking part in the bid, each bidder shall have to deposit a Bank draft of Rs. 3.00 lacs with Nuzul Officer as a security.

4. The highest bidder shall have to deposit 1/4th amount of his bid immediately after closure of auction for the plot in question.

5. Within 7 days from the date of acceptance of his bid, the bidder shall have to deposit entire amount of his bid after adjustment of security deposit and one fourth amount already deposited.

6. After receipt of full payment, the possession of plot after demarcation shall be delivered to bidder on site and he shall be granted a permanent lease for 30 years.

7. Collector, Bhopal shall have power to cancel any auction/bid without assigning any reasons."

5. The appellant was one of the participants in the auction proceedings. The appellant, accordingly, in terms of clauses 2 and 3 of the public notice deposited his Income Tax Return for the year 1994-95 and also deposited a sum of Rs. 3 lakhs vide Bank Draft No. 6858812 dated 10.01.1996 with respondent No. 3 as security.

6. The auction was held on 11.01.1996. The appellant quoted his bid at Rs.53,80,000/- for plot No.E-5/5 situated in Mahavir Nagar, Arera Colony, Bhopal. The appellant's bid was declared the highest amongst those who participated. The Respondent No. 3 accordingly accepted the appellant's bid for plot No. E-5/5.

7. The Respondent No. 3 then asked the appellant to deposit 1/4th amount of the total amount on the same day in terms of public notice. The appellant accordingly deposited a sum of Rs.10.45 lakhs by cheque No. 309991 dated
11.01.1996 drawn in favour of respondent No. 3.

8. On 25.01.1996, the appellant received a letter dated 24.01.1996 from respondent No. 3 informing him that his bid for plot No. E-5/5 is accepted subject to "special terms and conditions". These conditions, which are mentioned in the letter, read as under:

> "1.Annual lease rent @ 7.5% will be charged from the bidders on the accepted bid amount.
>
> 2. If the lease rent for 10 years is deposited in lumpsum, then the remaining 20 years will be free from lease rent.
>
> 3. The lease shall have to be renewed as per rules after 30 years.
>
> 4. All the conditions of auction will be binding on the bidders."

9. The appellant, on receipt of aforesaid letter, replied to respondent No.3 on 29.01.1996 stating that the "special terms and conditions" mentioned in the letter were neither published nor informed to him at any point of time earlier and nor was he ever made aware of any such terms and conditions till he received the letter dated 25.01.1996. The appellant, therefore, declined to accept the "special terms and conditions" and requested respondent No. 3 to return the security amount of Rs.3 lakhs, which he had deposited at the time of submission of the bid.

10. On 08.02.1996, respondent No. 2 issued a show cause notice to the appellant stating therein as to why the amount of Rs.3 lakhs be not "forfeited" and the plot in question is re-auctioned. The appellant, vide his reply dated 12.02.1996 replied that since he has not accepted the "special terms and condition" offered by respondent No. 3 in their acceptance letter, the appellant is entitled to ask for refund of the security amount of Rs.3 lakhs from respondent No. 3 and that respondent No. 2 has no right to forfeit such amount.

11. Respondent No. 2, by his letter dated 24.02.1996 informed to the appellant that a sum of Rs. 3 lakhs deposited by him (appellant) towards security has been forfeited.

12. The appellant, on 28.02.1996, then served a legal notice to the respondents under Section 80 of the Code of Civil Procedure, 1908 and demanded refund of Rs. 3 Lakhs. The respondents, however, did not refund the money. The appellant was, therefore, constrained to file the civil suit against the respondents for a declaration that the letter dated 24.02.1996 forfeiting the security amount of Rs 3 lakhs be declared as bad in law and further prayed for refund of Rs. 3 lakhs along with interest at the rate of Rs. 18% p.a..

13. In substance, the appellant's suit was founded on the allegations, inter alia, that firstly, the appellant was within his right to refuse to accept the "special terms and conditions" contained in the acceptance letter dated 24.01.1996 of respondent No.3 because according to the appellant these terms and conditions were never part of the original public auction notice pursuant to which he had submitted his bid and nor such terms and conditions were communicated to the appellant till his bid was accepted and hence these conditions were not binding on him; Secondly, in the absence of any terms and conditions published in the public notice empowering respondent No. 2 to forfeit the security amount (Rs.3 lakhs), respondent No. 2 had no right/authority to forfeit a sum of Rs. 3 lakhs deposited by the appellant; and lastly, the appellant had performed his part by ensuring compliance of all necessary terms of the public notice whereas it was the respondents, who committed breach of the terms.

14. The respondents filed their written statement. While denying the appellant's claim, the respondents justified their action in forfeiting the security amount of Rs. 3 lakhs. The respondents, however, contended that firstly, the "special terms and conditions" were orally told to the appellant at the time of auction; secondly, these terms and conditions were applicable to the auction proceedings because they are part of the Revenue Book Circular (RBC) which applies to all the plots in question; and lastly, the appellant committed breach of terms by withholding the payment of 1/4th amount, when he directed "stop payment" of his cheque amount for being paid to respondent No.3. These were essentially the grounds taken in the written statement to justify the forfeiture as being legal and proper.

15. The Trial Court framed issues. Parties led evidence. By judgment/decree-dated 23.12.1997, the Trial Court dismissed the suit. It was held that the appellant failed to deposit the 1/4th amount immediately as per the terms of the public notice inasmuch as the appellant deposited the amount by cheque and later stopped its payment, which constituted a breach on his part of the terms of the public notice. It was also held that the demand of certain money by way of "special terms and conditions" mentioned in the acceptance letter dated 24.01.1996 was in accordance with the Rules of RBC and, therefore, such terms and conditions were binding on the appellant for ensuring its compliance and lastly, in the light of the two breaches committed by the appellant, the respondents were justified in forfeiting the security amount deposited by the appellant.

16. The appellant, felt aggrieved, filed first appeal before the High Court. The Division Bench, by impugned order, dismissed the appeal and upheld the judgment/decree of the Trial Court. The High Court held that since the similar issue was the subject matter of another appeal (F.A. No. 794/2000- M/s Priyanka Builders vs State of MP decided on 11.11.2006) and the said appeal having been dismissed, this appeal also deserves dismissal in the light of judgment rendered in Priyanka Builders' case. The impugned judgment, however, neither recorded any reason given in the Priyanka's case and nor mentioned the facts of Priyanka's case with a view to show similarity between both the cases and nor recorded any independent reasoning for dismissal of the appeal.

17. The appellant (plaintiff), felt aggrieved, has filed this appeal by way of special leave before this Court.

18. Heard Mr. Prasenjit Keswani, learned counsel for the appellant and Mr. Mishra Saurabh, learned counsel for respondents 1 & 2.

19. Having heard learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned judgment and the decree of the two Courts below and decree the appellant's (plaintiff's) suit against the respondents as indicated infra.

20. Three questions, basically, arise in this appeal. First, whether the appellant (plaintiff) committed any breach of the terms and conditions of the public auction notice dated 07.01.1996; second, whether the State was justified in forfeiting the security money (Rs.3 lakhs) deposited by the appellant for the alleged breach said to have been committed by the appellant of any terms and conditions of public notice dated 07.01.1996; and third, whether the State had power to forfeit the security money in the facts of this case?

21. These questions need to be answered keeping in view the provisions of Section 74 of the Indian Contract Act, 1872 (hereinafter referred to as "the Act") and some settled legal principles relating to law of contract.

22. Section 74 of the Act reads as under:

> "74. Compensation for breach of contract where penalty stipulated for- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception- When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

> Explanation- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

23. Reading of Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.

24. The learned author-Sir Kim Lewison in his book "The Interpretation of Contracts" (6th edition) while dealing with subject "Penalties, Termination and Forfeiture clauses in the Contract" explained the meaning of the expression "forfeiture" in these words:

> "A forfeiture clause is a clause which brings an interest to a premature end by reason of a breach of covenant or condition, and the Court will penetrate the disguise of a forfeiture clause dressed up to look like something else. A forfeiture clause is not to be construed strictly, but is to receive a fair construction." (See page 838)

25. The author then quoted the apt observations of Lord Tenterden from an old case reported in (1828) Moo. & M.189 Doe d Davis vs. Elsam wherein the learned Lord while dealing with the case of forfeiture held as under:

> "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts" (see pages 840).

26. Equally well settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally "alter" the terms and conditions of the contract and nor they have a right to "add" any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, who adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply such additional terms/conditions.

28. Keeping in view the aforementioned principle of law, when we examine the facts of the case at hand then we find that the public notice (advertisement), extracted above, only stipulated a term for deposit of the security amount of Rs.3 lakhs by the bidder (appellant)

but it did not publish any stipulation that the security amount deposited by the bidder (appellant herein) is liable for forfeiture by the State and, if so, in what contingencies.

29. In our opinion, a stipulation for deposit of security amount ought to have been qualified by a specific stipulation providing therein a right of forfeiture to the State. Similarly, it should have also provided the contingencies in which such right of forfeiture could be exercised by the State against the bidder. It is only then the State would have got a right to forfeit. It was, however, not so in this case.

30. So far as the four special conditions are concerned, these conditions were also not part of the public notice and nor they were ever communicated to the bidders before auction proceedings. There is no whisper of such conditions being ever considered as a part of the auction proceedings enabling the bidders to make their compliance, in case, their bid is accepted.

31. In our considered opinion, it was mandatory on the part of the respondents(State) to have published the four special conditions at the time of inviting the bids itself because how much money/rent the bidder would be required to pay to the State on allotment of plot to him was a material term and, therefore, the bidders were entitled to know these material terms at the time of submitting the bid itself. It was, however, not done in this case.

32. Since these four conditions were added unilaterally and communicated to the appellant by respondent No. 3 while accepting his bid, the appellant had every right to refuse to accept such conditions and wriggle out of the auction proceedings and demand refund of his security amount. The State, in such circumstances, had no right to insist upon the appellant to accept such conditions much less to comply and nor it had a right to cancel the bid on the groundof non-compliance of these conditions by the appellant.

33. Learned counsel for the respondents (State), however, argued that it was not necessary for the State to specify the condition relating to forfeiture and four additional terms/conditions in the public notice because they were already part of RBC, which is applicable to the nazul lands in question.

34. We find no merit in this submission for more than one reason. First, the public notice inviting bids did not even contain a term that all the provisions of RBC will be applicable to the auction proceedings and second, the relevant clauses of RBC which, according to the State, were to govern the auction proceedings ought to have been quoted in verbatim in the public notice itself. It was, however, not done.

35. In our considered opinion, the object behind publishing all material term(s) is/are three fold. First, such term(s) is/are made known to the contracting parties/ bidders; second, Parties /bidders become aware of their rights, obligations, liabilities qua each other and also of the consequences in the event of their non-compliances; and third, it empowers the State to enforce any such term against the bidder in the event of any breach committed by the bidder and lastly, when there are express terms in the contract/pubic notice then parties are

bound by the terms and their rights are, accordingly, determined in the light of such terms in accordance with law.

36. When we read the facts and law laid down by this Court in the case of *Maula Bux vs. Union of India*[1]*, and Shri Hanuman Cotton Mills & Ors. Vs. Tata Air Craft Ltd*[2]*.*, we find that there was a specific clause of forfeiture in the contract in both the cases. Such clause empowered one party to forfeit the earnest money/security deposit in the event of non-performance of the terms of the contract. It is in the light of such facts, Their Lordships examined the question of forfeiture in the context of Section 74 of the Contract Act. Such is not the case here.

37. Our reasoning is supported by a recent decision of this Court in Union of India vs. Vertex Broadcasting Company Private Limited & Ors., (2015) 16 SCC 198 wherein Their Lordships held inter alia that in the absence of any power in the contract to forfeit the license money deposited by the licensee, the action of the Union to forfeit the license fees is held illegal. This is what was held:

> "10. Coming to the aforesaid question of availability of a power to order forfeiture, a reading of the relevant clauses i.e. Clauses 8(f), 10(d) and 12 extracted above would go to show that the Union had not protected/empowered itself to forfeit the licence fee. The forfeiture contemplated by the aforesaid clauses are altogether in different contexts and situations. In the absence of any such power, the forfeiture that has taken place in this case will have to be adjudged as null and void."

38. Learned counsel for the respondents (State) then argued that the appellant had committed the breach of clause 4 of public notice inasmuch as he failed to pay 1/4th amount and "stopped payment" of the cheque amount to the respondents.

39. We do not agree to this argument. In the first place, the appellant ensured compliance of the term because he deposited 1/4th amount of Rs. 10,45,000/- on the same day, i.e.,11.01.1996 by cheque. Secondly, the respondents also accepted the cheque from the appellant because deposit of money by cheque was one of the modes of payment. Had it not been so, the respondents would not have accepted the cheque from the appellant. Thirdly, the stop payment was done when the appellant received the acceptance letter containing four additional conditions to which he was not agreeable. He had, therefore, every right to wriggle out of the auction proceedings and stop further payment towards the transaction. Such action on the part of the appellant (bidder) did not amount to a breach of clause 4 so as to give right to the State to forfeit the security deposit.

40. In the light of foregoing discussion, we are of the considered opinion, that the appellant did not commit any breach of the term(s) and condition(s) of the notice inviting bids and on the other hand, it was the respondents who committed breaches. In these circumstances, the State had no right to forfeit the security amount and instead it should have been returned when demanded by the appellant.

41. Learned counsel for the appellant, however, brought to our notice that after cancellation of the auction proceedings in question, the plot in question was re-auctioned by the State and the same fetched Rs.134.00 lakhs as against appellant's bid amount of Rs.53,50,000/-. Learned counsel for the respondents did not dispute this fact. In such circumstances, we find that the respondent did not suffer any monetary loss in the transaction and on the other hand earned more money as against what they would have got from the appellant. It is for this additional reason also, we are of the view that the action on the part of the respondents(State) in forfeiting the security deposit of the appellant was wholly unjustified.

42. In this case, it was expected from the State officials to have acted as an honest person while dealing with the case of an individual citizen and in all fairness should have returned the security amount to the appellant without compelling him to take recourse to the legal proceedings for recovery of his legitimate amount which took almost 21 years to recover.

43. Indeed, this reminds us of the apt observations made by the Chief Justice M.C. Chagla in a case reported in *Firm Kaluram Sitaram vs. The Dominion of India*[3] The learned Chief Justice in his distinctive style of writing while deciding the case between an individual citizen and the State made the following pertinent observations in para 19:

> "we have often had occasion to say that when the State deals with a citizen it should not ordinarily reply on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent Judges, as an honest person."

44. We are in respectful agreement with the aforementioned observations as, in our considered opinion, they apply fully to the case in hand against the State.

45. We are, therefore, of the considered opinion that both the Courts below were not justified in their respective reasoning and the conclusion in dismissing the appellant's suit. The appellant's suit should have been decreed against the respondents. We hereby do so.

46. The appeal thus succeeds and is allowed with cost throughout. Impugned judgment and decree of the High Court and the Trial Court are set aside and the appellant's (plaintiff) suit is decreed against the respondents (defendants). It is declared that letter dated 24.02.1996 of the respondents forfeiting the security deposit of the appellant is illegal and bad in law. A money decree for refund of Rs.3 lakhs is accordingly passed in favour of the appellant(plaintiff) and against the respondents (defendants) along with interest payable on Rs.3 lakhs at the rate of 9% p.a. from 01.02.1996 till realization.

47. Cost of the appeal Rs.10,000/- be payable by the respondents to the appellant.

Judgment Referred.

[1]*(1969) 2 SCC 0354*
[2]*(1969) 3 SCC 0522*
[3]*AIR 1954 Bom. 0050*