Sudhir Kumar Vs. State of U. P. and Others

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Court : Allahabad

Decided On : Sep-27-2000

Reported in : 2001(1)AWC30; (2001)1UPLBEC237

Judge : Sudhir Narain and ;Krishna Kumar, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Orders 39, Rules 1 and 2 - Order 43, Rule 1; U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 - Sections 117, 237 and 239; Constitution of India - Article 226

Appeal No. : F.A.F.O. No. 689 of 2000

Appellant : Sudhir Kumar

Respondent : State of U. P. and Others

Advocate for Def. : Mr. V.K. Singh, Adv.

Advocate for Pet/Ap. : Mr. B.D. Mandhyan, ;Mr. Dinkar Mani Tripathi, ;Mr. Hussain Khan, Advs.

Judgement :

Sudhir Narain, J.

1. This appeal is directed against the order of the trial court dated 4.5.2000 rejecting the application of the appellant seeking injunction restraining the

defendant-respondents from interfering in realising toll tax in respect of sand and moram at the Markundi and Tilgurva barriers, district Sonbhadra.

2. The controversy between the parties arises on these facts. The Zila Panchayat, Sonbhadra, decided to auction the right to realise toll tax for the barriers Markundi and Tilgurva, district Sonbhadra to the bidders by asking them to participate in the auction. It published the auction notice in its office on 19.2.1999 and also advertised in the newspaper on 17.2.1999. On 4.3.1999 auction took place. Sudhir Kumar Misra, the appellant, made the highest bid for sand and moram for Rs. 5,70,000 for the year 1999-2000. An agreement was executed in respect of the right to realise toll tax on 2.4.1999. In para 2 of the agreement, it was incorporated that for the first year, i.e., for the period 1.4.1999 to 31.3.2000 the amount of Rs. 5,70,000 (auction money) shall be payable. In para 3, it was stated that in the second year (1.4.2000 to 31.3.2001) 20% of the enhanced amount shall be payable and for the third year (1.4.2001 to 31.3.2002) 20% of the enhanced amount of the second year shall be payable. In paragraph 6 of the agreement it was provided that enhanced rate of toll tax could be realised after the rates are enhanced after amendment of bye-law on obtaining approval of the Commissioner. Paragraph 12 of the agreement provided that clauses 3, 4 and 6 of the agreement will be applicable only after the publication of amended bye-law in the Gazette otherwise the period of the agreement shall remain operative till 31st March 2000.

3. The appellant deposited the amount of Rs. 5,70,000 and he continued to realise toll tax at the barriers. The Zila Panchayat, district Sonbhadra, submitted the proposed amended bye-law before the Commissioner who approved it on 3rd July, 1999 and it was published in the Gazette dated 28.8.1999 whereby the bye-law was amended and the rates of toll tax were increased and further it provided that the period of theka can be made for three years on the condition that in the second year 20% of the enhanced amount of the first year and for the third year again 20%of the enhanced amount of second year is offered by the contracting party.

4. The appellant filed an application on 7th March, 2000, to accept 1/4 of the enhanced amount and deposited 1/4 of the amount on 10th March, 2000. The

District Magistrate made an enquiry and found that the agreement was obtained by the appellant collusively and directed for holding auction for the year 2000-2001. The Upper Mukhya Adhikari, Zila Parishad. Sonbhadra, respondent No. 4, in pursuance of the letter of the District Magistrate, cancelled the agreement on 29.3.2000. The appellant filed Writ Petition No. 15747 of 2000 challenging the order of the District Magistrate dated 24.3.2000 whereby he had directed for holding fresh auction. The writ petition was dismissed by this Court on 10th April, 2000, holding that the question as to whether the theka was for the period of one year or three years cannot be decided in the writ petition under Article 226 of the Constitution. Such disputed question of fact can be adjudicated upon by a competent civil court on the basis of evidence. The appellant filed Suit No. 25 of 2000 in the Court of Civil Judge, Senior Division, Sonbhadra for declaration that the order cancelling the agreement dated 29.3.2000 passed by respondent No. 4 was void and further seeking injunction restraining the defendant-respondents from interfering in his right to realise toll tax for the items for which he had made highest bid in the auction. He also filed application for temporary injunction. The application was opposed by the respondents. The trial court dismissed the injunction application on 4.5.2000. It was held that the agreement was only for one year and the plaintiff-appellant has no right to seek injunction to realise toll tax for the period which has already expired.

5. Respondent Nos. 3 and 4 held fresh auction on 4.5.2000. Deen Dayal Gupta made bid of Rs. 65,15,000 (Rupees sixty-five lacs fifteen thousand) for Gitti, Pathar, Bolder,Chuna, Surkhi including sand and moram for the financial year 2000-2001 which was highest bid and it was accepted. He deposited 1/4 of the auction money and it was approved. He entered into agreement with the Zila Panchayat on 6.5.2000 for the financial year 2000-2001.

6. The plaintiff-appellant has filed this appeal against the order of the trial court refusing to grant injunction. Deen Dayal Gupta filed an application in this appeal for impleadment on the ground that he was the highest bidder in the auction for realisation of toll tax for the year 2000-2001 and has a right to be heard. His application for impleadment has been allowed on 9th May, 2000.

7. There are basically two questions. Firstly, whether the auction in favour of the appellant was for three years or it was for one year. Secondly, even assuming that the auction was for one year, whether in view of terms of the agreement between the parties, he is entitled to get a right to realise toll tax on payment of 20% of the enhanced amount for second and third year.

8. As regards first question, it is clear from the evidence adduced by the parties before the Court below that the auction was for the financial year 1999-2000 and the highest bid of the appellant was for Rs. 5,70,000. The learned counsel for the appellant contended that in the auction notice, it was indicated that the auction was for the period 1st April, 1999 to 31st March, 2002, subject to the amendment of the bye-laws after obtaining approval of the competent authority and their publication in the Gazette. The auction bid sheet indicates that the appellant had made the highest bid for the financial year 1999-2000 i.e., 1st April, 1999 to 3lst March, 2000, for a sum of Rs. 5,70,000. The auction was not for the entire period, i.e., 1st April, 1999 to 31st March, 2002.

9. The main plank of submission of the learned counsel for the appellant is that respondent Nos. 3 and 4 had entered into an agreement whereby it was agreed thatthe appellant shall be entitled to realise toll tax for the financial year2000-2001 on depositing 20% of the enhanced amount of the first year and for the financial year 2001-2002 on depositing 20% enhanced amount of the second year and this agreement was binding upon the respondents and they had no right to enter into a fresh agreement with any other person after holding fresh auction for the financial year 2000-2001.

10. The auction notice as well as the agreement entered into between the appellant and respondents clearly indicates that the agreement in respect of second and third year shall be operative only after the bye-law is amended conferring power on the Zila Panchayat to give the theka for three years. The Zila Panchayat was not entitled to enter into a contingent contract. Section 117 of Kshettra Samitis and Zila Parishad Adhiniyam, 1961, provides that Zila Parishad and Kshettra Samitis shall have powers to enter into contracts which may be necessary or expedient for any purpose of the Act. Sub-section (3) of Section 117

lays emphasis that if a contract is executed otherwise than in conformity with the provisions of the Act or any Rules framed for the purpose, it shall not be binding on the Zila Panchayat or Kshettra Samiti. Section 237 confers power on the State Government to make rules and Section 239 confers power on the Zila Parishad to make bye-laws. The bye-laws cannot be framed retrospectively. If bye-laws cannot be framed retrospectively, a contract cannot be entered into between the parties contingent upon amendment/enforcement of a bye-law which was not in existence at the time of making agreement.

11. The appellant had raised this contention in Civil Misc. Writ Petition No. 15747 of 2000 that he should be taken to have granted theka for three years after amendment of the bye-law. The Court repelled this submission with the following observation :

'Mr. Naithani, senior counsel appearing on behalf of the petitioners, submitted that accordingto bye-law dated 28.8.1999, the theka should be granted for the period of three years after realising 20% of the theka money for 2nd and 3rd years. The petitioners' bid was accepted prior to coming into force the said bye-law, hence that part of the argument of Mr. Naithani is misconceived.'

12. Secondly, on practical side, if Zila Panchayat issues a notice inviting the offer for making bid for realisation of toll tax contingent upon happening of certain event, then many people would not like to participate in the auction as it relates to uncertain event, in this auction, it may be noted that not only in regard to period but also in regard to rate of toll tax under the agreement, it was provided that the plaintiff-appellant shall be entitled to realise the higher tax if bye-law is amended permitting to realise higher rate of toll-tax. A person shall bid in the auction on the basis of rate of toll tax which has been prescribed but if the toll tax is to be raised, the people may give higher offer in the auction. If the Adhyaksha, Zila Panchayat or any officer connected with it, is permitted to invite offers by tender or auction when the rates are uncertain in future, the bidder may either not participate in the auction or he will be taking a chance as in gambling. In this case, by amendment of the bye-law not only period for grant of theka was extended but also it enhanced rate of toll tax.

13. There is another aspect of the matter. The amended bye-law No. 3 provides that the period of the theka can be made for three years. It can be extended for second year on payment of enhanced amount of 20% of the first year's amount and for third year 20% on payment of the enhanced amount of the second year. It is only an enabling provision conferring power on the Zila Panchayat to grant the theka for second and third year on enhanced amount of bid money. The term has to be extended in the second year only after completion of the first year. After expiry of period of one year, the situation may change.The number of vehicles which carry sand, moram, etc. may increase. Further the rate of taxes may be enhanced by Zila Panchayat and if after considering all relevant factors, it finds that instead of giving theka after holding auction, it would be in the interest of Zila Panchayat that a person who is already realising toll tax under the agreement should be permitted to continue, it can do so but before doing so, it has to pass a resolution after considering all the aspects. It has to examine whether the grant of theka by public auction is more profitable to it or not. The Supreme Court in Haji T. M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157, held that the public property owned by the State or by any instrumentality of the State should generally be sold by public auction or by inviting tenders. The Court observed as follows :

'The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed 'that though that is the ordinary rule, it is not an invariable rule.' There may be situations necessitating departure from the rule, but then such instances must be justified bycompulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.'

14. In Praveen Kumar Singh v. Nagar Palika Parishad, Deoria and others. 1997 (2) AWC 1100, this Court deprecated the practice of granting contract by increasing 15% from the preceding year. It was held that such contract should be deprecated and to be given complete gobye with a view to ensure transparency and fairness in transaction.

15. The learned counsel for the respondent contended that the agreement was signed only by respondent No. 4 and not by the Adhyaksha. The learned counsel for the appellant contended that the Adhyaksha of Zila Panchayat had also signed the auction notice, the terms and conditions of the agreement and, therefore, it should be taken that she consented to the agreement. It is not necessary to decide this controversial question of fact in the present appeal.

16. Considering the facts and circumstances, we do not find any merit in the appeal. It is accordingly dismissed. In the circumstances both the parties shall bear their own costs.