

Behere Brothers Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Apr-19-1994

Reported in : 56(1994)DLT37; 1994(31)DRJ1

Judge : R.C. Lahoti and; Arun Kumar, JJ.

Acts : Delhi Development Authority (Disposal of Developed Nazal Land) Rules, 1981 - Rule 29

Appeal No. : Civil Writ Appeal No. 3596 of 1991

Appellant : Behere Brothers

Respondent : Delhi Development Authority and anr.

Advocate for Pet/Ap. : Mukul Rohatagi,; Praveen Kumar,; Maninder Kaur,;

Judgement :

R.C. Lahoti, J.

(1) The petitioners seeks a writ of mandamus commanding the respondents to uphold a public auction of a plot and transfer the same to the petitioners, they being the highest bidder.

(2) The facts, in so far as relevant for the purpose of present petition, are not in controversy. An auction was held pursuant to Delhi Development Authority

(Disposal of Developed Nazul Land) Rules 1981 (hereinafter referred to as the Rules). The auction was held on 13.11.1987. The petitioner made a bid of Rs.7,03,000.00 which was the highest bid. An amount of Rs.1,75,750.00 was deposited on the same day as earnest money. On 13.11.1987 the Dda issued a letter Annexure 'B' demanding the balance amount of Rs.5,27,250.00 (plus RS.II.00 documentation charges) to be paid within 30 days of the receipt of the letter. The letter was received by the petitioners on 16.11.1987. On 10.12.1987 the petitioners asked for an extension in the period of payment, atleast by two months, stating that the project of the petitioner was under consideration with Bank of Maharashtra and time was needed to arrange for the money. On 26.2.1988 the petitioners made another request for extension of time stating that the funds were arranged and so the respondents might issue a fresh demand letter accommodating the petitioners. Similar prayers for extension of time and condoning the delay were repeated subsequently on several occasions. On 1.7.1988 the petitioners also sent a pay order of the requisite amount. However, the Dda informed the petitioners vide letter dated 22.7.1988 that the petitioners' bid having already been cancelled on 25.4.1988 the Dda could not accept the balance amount and the same was being returned. However, the amount was redeposited by the petitioners with the Dda on 24th February, 1989. The fact remains that the balance amount was not paid by the petitioners within one month of the date of information of acceptance of bid, the reasons apart.

(3) At this point the relevant provisions of the Rules may be noticed. Allotment by auction is governed by Chapter 3 of the Rules. Rules 29, 30 and 32 provide as under:-

'29.Sale to the highest bidder The officer conducting the auction shall normally accept, subject to confirmation by the Vice-Chairman, the highest bid offered at the fall of the hammer at the auction and the person whose bid had been accepted shall pay as earnest money, a sum equivalent of 25 per cent of his bid and he shall pay the balance amount to the Authority within fifteen days of acceptance of the bid or within such period as the Vice-Chairman may specify in the public notice under rule 27 or in another public notice. 'Provided that Vice Chairman may extend the date of payment where he is satisfied that sufficient reason exists for doing so,

up to a maximum of 180 days subject to payment of interest on the balance amount of the rate of 18% per annum where the delay is thirty days or less and 25% per annum for a period exceeding 30 days.'

'30. Rejection of bid The officer conducting the auction may, for reasons to be recorded in writing and submitted to the Vice-Chairman, reject any bid including the highest bid. 32. Forfeiture of earnest money A person who fails to pay the balance amount of the bid within the period provided in rule 29 shall forfeit the earnest money and it shall be competent for the Vice-Chairman to re-auction the plot.' It is pertinent to note that proviso to Rule 29 was not to be found in the Rules until 25.2.1989. The Central Government made an amendment in the Rules on 27th January, 1989 proposing the insertion of the proviso to Rule 29 above-said. The amendment was published in the Gazette of India dated 25.2.1989 and as provided by the Amendment Rules, it came into force on the date of its publication in the official gazette. It is clear that prior to 25.2.1989 power to extend the last date of payment on satisfaction of existence of sufficient reason to exercise the power was not to be found in the Rules and so it did not exist.

(4) The auction notice annexure 'A' had also notified inter cilia as under:- 2. Bidding at auction and submission of application: (iv) The officer conducting the auction shall normally accept subject to the confirmation by the Vice-Chairman the highest bid offered at the fall of the hammer, at the auction and the person whose bid has been accepted shall pay as earnest money a sum equivalent to 25% of his bid either in cash or by bank draft in favor of the Delhi Development Authority. If the earnest money is not paid the auction already held in respect of the plot shall be cancelled. (vii) After the confirmation of the bid, the bidder will be informed of such confirmation in writing and the bidder shall within one month thereof pay to the Delhi Development Authority the balance amount of the bid in cash or by bank draft in favor of the Delhi Development Authority. No extension of time will be allowed. If the bid is not accepted, the earnest money will be refunded to the bidder without any interest unless it may have been forfeited under Para-2. (viii) A person who fails to pay the balance amount of his bid to the Authority within one month of confirmation of the bid or within such period as may have been specified otherwise in accordance with the Delhi Development Authority (Disposal of

Developed Nazul Land) Rules, 1981, shall forfeit the earnest money and it shall be competent for the Vice-Chairman to re-auction the plot.

(5) The learned counsel for the petitioners submitted that the petitioners were not at all to blame for the delay in depositing the balance amount. They were trying hard to arrange for the finance and the delay was occasioned by belated release of the funds by the bank which were quite substantial. No sooner the funds were arranged the balance amount was tendered. Prayer for extension of time and condoning the delay in making payment of the balance amount was made to the Dda within six months of the date of auction and the Dda ought to have taken a decision thereon within the prescribed period of six months failing which it ought to have forwarded the petitioners' prayer for extension to the Government. Power to extend time vesting with the Dda is meant to be exercised in suitable cases. In any case, the Dda was not justified in its inaction-with holding the prayer from receiving consideration by the Government. For these reasons the action of the Dda is vitiated and deserves to be struck down entailing confirmation of the auction followed by transfer of the plot to the petitioner. Reliance has been placed on three decisions of this court, namely Bombay Builders (1) (Pvt.) Ltd. v. D.D.A. (C.W.P.No-2771/86) decided on 22.3.1990, Reliable Laboratories (P) Ltd. and Anr. Vs . Delhi Development Authority and Anr. : 43(1991)DLT312 and Dimpy Fashions (India) Vs . Delhi Development Authority : 46(1992)DLT176

(6) Before we may examine the question of action or inaction on the part of the authority in refusing to condone the delay on a prayer made by the petitioner, the primary question arising for consideration is whether the Dda had any authority in law to condone the delay and confirm the auction by accepting the balance amount beyond the period of 15 days as prescribed by Rule 29 above quoted or of 30 days as provided by the public notice of auction.

(7) A bare perusal of the Rules indicates that the highest bid stands accepted with the fall of hammer at the auction and the bidder is obliged to deposit a sum equivalent to 25% of the bid forthwith. The balance amount is to be paid within 15 days or within such period as the Vice-Chairman may specify in the public notice which was 30 days in the present case. The consequence of failure to pay the

balance amount of the bid within the period provided in Rule 29 is also provided in Rule 32. The earnest money stands forfeited and the Vice Chairman is then competent to reauction the plot.

(8) The learned counsel for the Dda has invited the attention of the court to a recent decision of their Lordships. of the Supreme Court in Lakshinanasami Gounder Vs . C.I.T. Selvamani & Ors. : (1992)1SCC91 . It was a case of sale by public auction held under the Tamilnadu Revenue Recovery Act 1894. The balance amount was required to be deposited within 30 days which was not done. The authority accepted the amount after a protracted correspondence. It was contended that the amount having been accepted the authority had acquiesced in the deposit. Their Lordship of the Supreme Court held that 'the balance of the sale amount shall be remitted within 30 days from the date of auction and if not the earnest money deposited is liable to forfeiture', made the compliance mandatory. The non-compliance rendered the initial deposit liable to forfeiture, thereforee, the confirmation of the sale without compliance was illegal. In the case at hand the use of the word 'shall' in Rule 29 and the provision of forfeiture of earnest money as a consequence of non payment of the balance amount accompanied by use of word 'shall' in Rule 32 also makes the provision mandatory and squarely attracts the applicability of the law laid down by their Lordships in Laxman Sawhney's case (supra).

(9) Bombay Builders' case (supra) is the first case relied on by learned counsel for the petitioners. It is an unreported decision. We have called for the original decision and perused the judgment. It does not set out the relevant dates. It appears that the auction was of a period prior to 10.9.1986. The bid was cancelled and earnest money forfeited. The petition was filed in 1986. During the pendency of petition, the Rules were amended. The court made an interim direction to respondent to consider the petitioners' prayer for extension of time. The respondents rejected prayer for extension. The court having found that 'in three similar cases the delay was condoned', held 'the petitioner on should be treated at par with other three cases', without mentioning the relevant dates of those 'three cases'.

(10) In Reliable Laboratories case (Supra) the Division Bench decision in Bombay Builders case (C.W.2771/86) was followed. The learned single Judge was persuaded to hold in favor of the petitioner by dual reasoning. There were instances cited where the Dda had accepted the amount after extending the period. Then there was no valid Explanationn coming forth from the respondent as to why the balance amount was accepted from the petitioners and the bid was cancelled only after the petitioner had served a notice on the respondent in which damages were claimed.

(11) In M/s. Dimpy Fashion's case (supra) the action was held on 22.10.1984 on which day the petitioner had deposited the initial amount of earnest money. The balance amount was paid piecemeal on different dates. It was an admitted position that the Central Government had in deserving cases extended the time for depositing the balance bid amount and the Dda had recommended the case of the petitioner to the Central Government seeking such a relaxation. Before the Division Bench the Single Bench decision in Reliable Laboratories case was cited with approval.

(12) It is interesting to note that Bombay Builders' case was decided on 22.3.1990, Reliable Laboratories Case was decided on 21.12.1990 and M/s. Dimpy Fashion's case was decided on 2.12.1991, all after the date of amendment in the Rules. All the three judgments show two things apparently. Similar cases' in which the Central Govt. had exercised its discretion in extending the period for depositing the balance bid amount are not enumerated so as to find out the dates of 'similar cases' whether they were of dates prior to amendment in the Rules or thereafter. The other thing and more important one is, as the judgments show, the attention of the Hon'ble Judges deciding the cases was not invited to the Rules, specially to the fact that power to extend the time for paying the balance amount was neither provided nor contemplated by the Rules prior to 25.2.1989. The judgments relied on by the learned counsel for the petitioner were given per incuriam and hence they do not bind this court as a precedent on the legal issue at hand.

(13) In support of our view that the three decisions relied on by the learned counsel for the petitioners were rendered per incuriam and hence they do not have

a binding authority on the question posed before us, we propose to refer to a few authorities. We extract and reproduce the following passages from the several observations made by their Lordships in *State of U.P. & Another Vs . Synthetics and Chemicals Ltd. & Another* : 1993(41)ECC326 :- 'Incuria literally means 'carelessness'. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratum of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd.*) (para 40)'

'THE English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. 'A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind.' (Salmond on Jurisprudence 12th Edn., P.153) In *Lancaster Motor Company (London) Ltd. V. Bremith Ltd.* the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. (para 41)'

'LAW declared is not that can be called out but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation, (para 42)'

'IN absence of any discussion or any argument the order was founded on a mistake of fact and, therefore, it could not be held to be law declared. (Para 42)'

13.2 *Young V. Bristol Aeroplane Co. Ltd.* 1944 (1) K.B. 718 was cited with approval before their Lordships in *Synthetics and Chemicals Ltd.* case (Supra). It was held in *Young's* case:- 'Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other

decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts...'

'ON a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise; (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.' 13.3 Following the law laid down in Young's case (Supra), a Division Bench of Bombay High Court in Yashbai v. Ganpat Irappa and another : AIR1975 Bom20 :

'NOW, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand such a mistake is again such incuria as to vitiate the decision. These are the commonest illustrations of decision being given per incuriam.' 13.4 Salmond on Jurisprudence (12th edition, 1966) states:- 'A precedent is not binding if it was referred in ignorance of a statute or rule having the force of statute i.e. delegated legislation'.

(14) We have carefully gone through the three decisions of this court relied on by the learned counsel for the petitioners. We are unhesitatingly of the opinion that the statutory changes brought about in the Rules on account of the amendment effected from 25th February, 1989 introducing a power in the authorities to condone the delay in payment of the balance amount of the bid was neither placed before the court nor any arguments were advanced thereon. All the three decisions pass sub silentio and as the relevant rules were not noticed, all the three decisions were rendered per incuriam.

(15) The amendment inserting the proviso to rule 29 is not made retrospective in operation. By interpretative process, we cannot give it retrospective effect so as to make it applicable to such sales as had taken place before 25th February, 1989 and had also stood vitiated for failure of the bidder to comply with the condition as to deposit of the balance bid amount before the last date of payment. In the words of Craies on Statute Law, a statute is retrospective 'which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' Perhaps no rule of construction is more firmly established than this that retrospective operation is not to be given to statute so as to impair an existing right or obligation, other than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. (Maxwell on Interpretation of Statutes, 1969 edition, P.216) 1 It is fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (Ibid P. 215) 15.2 On the-general principle of avoiding injustice and absurdity, any construction will, if possible, be rejected (unless the policy of the Act: requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. 'A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity.' (Ibid P. 212)

(16) The bid in favor of the petitioners' had taken place on 13th November, 1987. On 16th November, 1987 the petitioners were delivered with a communication confirming the acceptance of the bid in their favor. On 16.12.1987 the time for depositing the balance amount expired. With that came into operation rule 32 entailing cancellation of the bid and competence in the authority to reauction the plot. All these were concluded events before 25th February, 1989, the date of coming into existence of power to extend the last date of payment brought about by amendment in the Rules. There is nothing in the text of the Amendment Rules giving it a retrospective operation either expressly or by necessary implication. The rights and obligations which had already come into existence before the date of coming into force of the Amendment Rules cannot be impaired by the amendment. The petitioners had tried to invoke power of the respondent to extend the time assumed to exist which it did not. The prayer made by the petitioners was wholly meaningless. The Rules do not contemplate the power to extend the time being exercised by Central Government. We find the petitioners not entitled to any relief.

(17) The petition is held devoid of any merit and liable to be dismissed. It is dismissed accordingly though without any order as to the costs.