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Court : Chennai

Decided On : Apr-30-2008

Reported in : 2008(5)MhLj1496

Judge : P. Jyothimani, J.

Acts : Tamil Nadu Housing Board Act, 1961 - Sections 138; [Constitution of India](#) - Articles 12, 14 and 226

Appeal No. : Writ Petition No. 6764 of 2006

Appellant : S.A. Abdul Rasheed

Respondent : The Tamil Nadu Housing Board Rep. by Its Managing Director and the Executive Engineer

Advocate for Def. : G. Masilamani, Adv. General assisted by ;R. Girirajan, Adv.

Advocate for Pet/Ap. : R.N. Amarnath, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

P. Jyothimani, J.

1. The respondents called for application for the sale of 11,245 sq.ft. of land in site No. 2B at Sowripalayam Non-Housing Scheme situate at Coimbatore. As per the notification, the sale has to be conducted in the form of sealed tender cum open auction in April,2005. The upset price was fixed at Rs. 46,10,500/- and every tenderer was directed to deposit 2% of the upset price as Earnest Money Deposit. There is a further condition that when the tenders are opened, the highest bid will be treated as upset price and public auction will be conducted. It is also a condition that only persons who presented the tender forms are permitted to participate in the public auction. The person who would offer highest price in public auction will be confirmed to be the highest bidder and on such confirmation, 15% of the highest bid amount has to be deposited on the very same day apart from the earnest money deposit. After getting the Board's approval, confirmation will be sent to the highest bidder and on receipt of such confirmation, within three weeks 35% of the bid amount has to be paid by the allottee and the balance 50% will be paid within six weeks from the date of receipt of confirmation. While paying the balance 50%, the 2% earnest money deposit amount will be adjusted.

2. Earlier, tenders were called for on 24.06.2004 and 25.07.2004, fixing the upset price at Rs. 46,11,000/- and inasmuch as there were no tenderers, the above said notification was issued for the third time. The last date for submitting sealed tenders was fixed as 19.08.2005. The petitioner has made an application in Application No. 000014 with demand draft for a sum of Rs. 92,230/-, which represented the 2% of upset price, towards Earnest Money Deposit. On 19.08.2005 at about 4.00 p.m. the sealed tenders were opened and the petitioner's tender was found to be the highest one, viz., he quoted a sum of Rs. 46,15,786/- as sale price. Open auction was conducted and the persons who have submitted the tender forms participated in the open auction. The offer made by the petitioner was Rs. 54,65,000/-, which is the highest amount and the same was accepted and the petitioner was directed to pay 15% of the amount offered and the petitioner has also paid a sum of Rs. 8,20,000/- by way of cheque.

2(a). The first respondent by proceedings dated 12.09.2005 has confirmed the sale, which was communicated to the petitioner by the second respondent in the letter dated 21.09.2005, intimating the payment schedule. The petitioner has paid 35% of the sale amount, viz., Rs. 19,12,750/- on 26.09.2005. He has also paid Rs. 20,00,000/- on 25.10.2005 and the remaining amount of Rs. 6,40,020/- has been adjusted towards earnest money deposit paid by the petitioner on 08.11.2005. Therefore, according to the petitioner, he has paid the entire amount in respect of the sale effected in his favour.

2(b). The petitioner has requested the respondents to remove some of the pipelines, sunshades and electric pillars found in the property, which was refused by the respondents on the ground that the sale was effected on the basis, 'as is where is condition'. While so, by the impugned communication dated 30.12.2005, the second respondent has informed that the allotment to the petitioner has been cancelled due to administrative reasons, enclosing a cheque for a sum of Rs. 55,17,000/-. The petitioner has sent back the cheque to the second respondent with a letter dated 01.01.2006 that the cancellation of the allotment is against the conditions of allotment and requested for registration of sale deed. The petitioner has sent another reminder on 25.01.2006, seeking registration of sale deed. Further, the letter dated 09.02.2006 was sent to the first respondent with a copy to the second respondent.

2(c). The impugned order of the second respondent is challenged by the petitioner on various grounds including that after confirmation of sale, the contract has been completed and the respondents have no right to cancel the tender and therefore, the cancellation is arbitrary and abuse of power; that showing administrative reasons is a non-existing reason and the cancellation is a colourable exercise of powers for extraneous consideration.

3. In the counter affidavit filed by the respondents it is admitted that the auction sale of commercial site No. 2B measuring to an extent of 11245 sq.ft. at Sowripalayam through sealed offer cum open auction was conducted and the auction was scheduled on 19.08.2005 fixing the upset price at Rs. 46,10,500/- and the petitioner was the highest bidder quoting the bid amount of Rs. 54,65,000/-

and as per the terms and conditions, the petitioner has remitted Rs. 8,20,000/- being 15% of the bid amount on the date of auction and the Sale Confirmation Committee has also confirmed the sale in favour of the petitioner for a sum of Rs. 54,65,000/- and communicated the same to the second respondent, who in turn sent the confirmation letter dated 21.09.2005 to the petitioner directing him to remit 35% of bid amount within three weeks and balance 50% within six weeks.

3(a). It is stated that there was some variation in the upset price, which was not brought to the notice of the Sale Confirmation Committee during the meeting held on 08.09.2005 and it was in those circumstances, the sale already confirmed in favour of the petitioner was cancelled by the first respondent on 30.12.2005 and the order of cancellation was issued by the second respondent on the same day and the sale price remitted by the petitioner with interest, viz., Rs. 55,17,000/- has been returned by way of cheque. It is also admitted that the petitioner has returned the cheque and there is an order of interim injunction against bringing the property for sale.

3(b). It is also admitted that in the previous auction, tenders were called for on 23.06.2004, which was cancelled since there was no response and again tenders were called for on 25.07.2004. The highest bidder was M/s.Sri Annapoorna Gworisankar Hotel Private Ltd., and the same was confirmed for the sale price of Rs. 46,17,000/- and subsequently, it was also cancelled due to certain contempt proceedings and it was in those circumstances, the site was brought to sale by auction notification dated 02.08.2005 fixing the date of auction as 19.08.2005.

3(c). The only point raised in the counter affidavit filed by the respondents is that while at the time of confirming the offer of the petitioner for sale, there was some variation in the upset price, and that was not brought to the notice of the Sale Confirmation Committee and it is in the interest of revenue of the respondents, the confirmed sale has to be cancelled. The said difference in upset price came to limelight only at the time of subsequent review made by the Tamil Nadu Housing Board and it was found that the upset price was not updated for the year 2005-2006 and therefore, in order to avoid any loss of revenue, the impugned order of cancellation came to be passed.

3(d). It is also the case of the respondents that as per Condition No. 21 of terms and conditions of sale, in case of any dispute between the parties to the sale proceedings, the decision of the Managing Director, Tamil Nadu Housing Board is final and shall be accepted and acted upon by the purchaser. Therefore, the order passed by the first respondent has become final as per the terms of the contract.

4. While the learned Counsel for the petitioner would contend that on the admission of the factual issues involved in the case, viz., that the respondent Board has confirmed the sale in favour of the petitioner and the petitioner has also paid the entire amount of sale consideration, it was the legal duty on the part of the respondents to execute sale deed in favour of the petitioner. According to the learned Counsel, Clause 21 of the Terms and Conditions referred to by the respondents in the counter affidavit is not applicable in the case of concluded contract.

5. On the other hand, learned Advocate General appearing for the respondent Board would submit that when the upset price fixed at the time of auction was made on the basis of wrong information, the same should be treated as a mistake and such mistake cannot confer any right on the petitioner over the property. It is his submission that while fixing the upset price, it was not brought to the notice of the Committee regarding the actual upset price which should have been Rs. 66,15,451/- as claimed by one of the highest bidders Thiru.Thangavel during September,2004 and therefore, fixation of upset price and the auction effected at Rs. 54,65,000/- on 19.08.2005 are mistakes and therefore, immediately after the mistakes were found, the order of confirmation given to the petitioner was cancelled.

5(a). It is also his submission that the sale in favour of the petitioner was only confirmed and no possession was given and no document was executed in favour of the petitioner and therefore, the petitioner has no right over the property. It is his submission that the petitioner can also participate in re-auction to be conducted. His further submission is that in fact the amount returned to the petitioner includes the interest for a period of two months. Placing reliance on the provisions of Tamil Nadu Housing Board Act he would also submit that in such an event the petitioner

can only file a suit for specific performance after giving 60 days notice.

5(b). According to him, filing of this writ petition is only to get over the provision of the Act requiring the petitioner to file a suit for specific performance. In effect, his submission is that when the upset price in the impugned public auction was fixed by mistake, it is the duty of the respondent Board, which is a public authority to set right the revenue loss and therefore the impugned order of cancellation is bona fide and that the petitioner has no right over the property. His submission is that if there is any right on the petitioner, it is only under the contract, which cannot be enforced in writ jurisdiction. He would submit that when there is actually revenue loss or where there is a mistake which is a vitiating factor of the contract, the validity or otherwise of cancellation order is a matter to be decided on evidence. Merely because the Tamil Nadu Housing Board is a Government body, it does not mean that the petitioner could give a go-by to the filing of specific performance suit. It is his submission that even if there is a breach of contract committed by the respondents, the remedy of the petitioner lies only in filing a suit for damages and therefore, by challenging the impugned order the petitioner cannot be allowed to get the contract restored, which has been rescinded due to proper reasons.

6. I have heard learned Counsel for the petitioner and learned Advocate General for respondents and perused the records produced by the Tamil Nadu Housing Board.

7. On the admission of most of the factual issues involved in this case, the questions to be decided are, whether the respondents are bound to execute sale deed in favour of the petitioner based on the confirmation of auction sale in his favour due to the reason that the petitioner has complied with all conditions in making payment of the entire sale consideration and whether, for enforcing such right, the present writ petition is maintainable.

8. It is true that the respondent Board being a Government body governed by the statutory provisions of the Act, has passed the impugned order cancelling the confirmation of sale given in favour of the petitioner. As far as the status of the respondent Board is concerned, there is no difficulty to arrive at the conclusion that the Tamil Nadu Housing Board is 'State' within the purview of Article 12 of the

[Constitution of India](#), but the issue involved in this case is purely civil and contractual in nature.

9. A perusal of the file produced by the Housing Board shows that in respect of the same property, on an earlier occasion when the same was brought for sale by public auction in September, 2004, one Thangavel had offered to purchase the property for a sum of Rs. 66,15,451/-, however, that offer was rejected for non-remittance of 15% of the bid amount, which is one of the conditions for acceptance of the offer.

10. On facts and on perusal of the file, it is seen that in September, 2004, the upset price was fixed at Rs. 66,15,451/- in favour of Thangavel, which transaction could not be materialised due to various facts including non-remittance of bid amount and also subsequent case filed, but, instead of fixing the upset price at Rs. 66,15,451/- in the auction sale in which the petitioner has participated on 19.08.2005, the upset price was fixed at Rs. 46,15,786/-, based on the amount quoted by the petitioner in his tender. The said upset price of Rs. 46,15,786/- was fixed in the year 2004 and as there was appreciation of value in the subsequent years, viz., 2005 and 2006, the upset price ought to have been increased and refixed. However, what was fixed in 2003-2004 as upset price at the rate of Rs. 46,15,786/- was fixed in 2005-2006 also and such an anomaly made the Managing Director of the respondent Board to take a decision to cancel the confirmation of sale made in favour of the petitioner. Therefore, as rightly submitted by the learned Advocate General, on perusal of the file, there is no suspicion that the impugned cancellation order is due to any other reason.

11. It is also relevant to point out at this stage that the said N.Thangavel, who is stated to have participated in the public auction earlier in September, 2004 in respect of the same property filed a petition along with affidavit for impleading himself as a party, wherein he has stated that he has quoted a sum of Rs. 66,15,451.70 on 24.05.2002 and he was declared as 'highest price quoted tenderer'. It is true that the said N.Thangavel, in the petition for impleading him as a party, having served notice on the counsel, has not taken any further steps to implead him. The fact remains that in the affidavit he has stated about the earlier

upset price which is also borne out of the records submitted by the respondent Housing Board.

12. The terms and conditions of sale to which the petitioner, by applying for the purchase, has become a party are contractual in nature. In fact, in the application given by the petitioner, he has made an offer to purchase the property for the value of Rs. 46,15,786/-. One of the terms and conditions which the petitioner has accepted is, as it is seen in Condition No. 9, the highest amount found in the sealed tender will be fixed as upset price for open auction and thereafter, open auction will be conducted. Participants with valid applications will alone be eligible to participate in the open auction. The highest bid in the open auction will then be taken into consideration. Condition No. 15 states, the possession of the plot for which sale is confirmed by the auction Sale Confirmation Committee will be handed over to the successful applicant soon after payment of full cost. Condition No. 16 states, if for reasons beyond the control of the Tamil Nadu Housing Board, the possession of a plot, in respect of which sale is confirmed, cannot be handed over to the successful applicant, he/she shall be entitled only to refund of the amount paid by him/her. No interest on any amount paid by him/her will be paid. Condition No. 21 states, if any doubt or dispute arises between the parties to the sale proceedings, the decision of the Managing Director/Tamil Nadu Housing Board shall be final and shall be accepted and acted upon by the purchaser.

13. Therefore, a combined reading of the entire terms and conditions to which the petitioner has adhered to makes it clear that the transaction was purely contractual in nature. Merely because the Tamil Nadu Housing Board being the Government organisation, the said contract under which the sale has been effected in favour of the petitioner would not enable the petitioner to approach this Court by filing writ petition under Article 226 of the [Constitution of India](#).

14. Law of contract in this regard is well settled that in cases of this nature, there can only be a suit for specific performance, when it is proved that payment of any compensation is not going to adequately compensate the interest of the purchaser. In all other cases, where damages are adequate compensation, specific performance cannot be granted as a matter of rule. It is true that the

respondent Housing Board has passed the impugned order by cancelling the confirmation of sale and that alone is not sufficient for the petitioner to invoke the jurisdiction of this Court under Article 226 of the [Constitution of India](#). The impugned order does not mean that the petitioner cannot approach the civil court for the remedy available in law.

15. The Tamil Nadu Housing Board, which is a statutory body under the Tamil Nadu Housing Board Act, 1961 is amenable to the civil Court jurisdiction. Section 138 of the Act provides for 60 days notice to the Housing Board before filing a suit against the Board. The said section is as follows:

138. Notice of suit against Board etc.,

No suit shall be instituted against the Board, or any member, or any officer or servant of the Board, or any person acting under the direction of the Board, or of the Chairman or Managing Director of any officer or servant of the Board, in respect of any act done or intended to be done under this Act or any rule or regulation made there under until the expiration of sixty days next after written notice has been delivered or left at the Board's office or the place of abode of such officer, servant or person, stating the causes of action, the name and place of abode of the intending plaintiff, and the relief which he claims, and the plaint must contain a statement that such notice has been so delivered or left.

Therefore, Section 138 of the Tamil Nadu Housing Board Act, 1961 enables any person to file a suit against the Tamil Nadu Housing Board against any breach of contract, if the same has been committed by the Board. The impugned order of cancellation can always be a subject matter of a suit, subject to the condition that 60 days clear notice has to be given.

16. The point raised in this case, viz., whether the petitioner is entitled for direction against the Housing Board to execute sale deed in his favour for the sale consideration of Rs. 54,65,000/-, which has been paid by him to the Housing Board or whether the petitioner is entitled for damages for breach of contract, is a matter which cannot be decided by a mere reference to affidavits filed in the writ proceedings. Likewise, the claim of the Housing Board that there has been a

mistake in fixing the upset price at Rs. 46,10,500/- instead of Rs. 66,15,451/- or Rs. 54,42,580/- is also a matter of evidence. Again, while stating that prima facie there is no mala fide on the part of the Housing Board, it is yet open to the petitioner to prove that the cancellation of confirmation of sale effected in his favour is for extraneous consideration by letting in proper evidence. It is always open to the Housing Board, being the Government organisation to impress upon the competent civil Court to show that it is only in the interest of Government revenue the impugned order of cancellation came to be passed.

17. It has been the categoric pronouncement of the Apex Court that writ petition is not ordinarily maintainable for enforcement of terms of a contract or for claim of damages arising out of a concluded contract, even if one of the parties to the contract happens to be the State. The law is well settled that writ jurisdiction can be invoked and the power of judicial review can be exercised only in the extraordinary circumstances in respect of contractual matters. The law in this aspect came to be decided by the Full Bench of this Court presided over by Shivaraj Patil, J. (as he then was) in Aluminium Industries Ltd., Madras represented by its Commercial Manager Laboi, Madras-18 v. Minerals & Metals Trading Corporation of India Ltd., Chennai : (1998)IMLJ1 . The Full Bench, while considering whether the act of the State or authority even in respect of contractual matters can be tested under Article 14 of the [Constitution of India](#), has held that it is in extraordinary and exceptional cases relating to contractual obligations, the remedy is available under Article 226 of the [Constitution of India](#). The relevant portion of the judgement is as follows:

46. The portions extracted from the Judgements aforementioned in paragraphs 40 to 43, with emphasis supplied, clearly indicate that power of judicial review available under Article 226 of the Constitution, in extra-ordinary and exceptional cases relating to contractual obligations even in regard to concluded contracts with State or authority, is not excluded in testing the action of the State or Authority, even in such matters on the touch stone of Article 14 of the [Constitution of India](#), because application of Article 14 to any action of the State or authority cannot be excluded.

47. It is one thing to say that there is total bar to entertain writ petition under Article 226 of the [Constitution of India](#) for enforcement of contractual obligations in cases where one of the parties being a State or Authority within the meaning of Article 12 of the Constitution; and it is yet another thing to say that the power under Article 226 of the [Constitution of India](#) should be exercised rarely and sparingly in exceptional and extra-ordinary cases in such contractual matters. While reiterating that ordinarily writ petitions cannot be entertained under Article 226 of the [Constitution of India](#) for enforcement of terms of contract, or to claim damages arising out of concluded contract for breach of contract, one of the parties being the State or Authority to such contract, we hold that the jurisdiction to exercise the power of judicial review under Article 226 of the Constitution is not totally curtailed or absolutely excluded in examining and testing the validity of State action, even in such matters in extra-ordinary cases as to whether the requirement of Article 14 of the Constitution were satisfied by the State/Authority, though ordinarily the courts may not entertain writ petitions, and decline to grant relief exercising powers under Article 226 of the Constitution for enforcement of terms of contract or to get remedy for a breach of contract on the basis of concluded contracts, one of the parties being State or Authority to such contracts. This conclusion, we have reached in the light of the aforementioned decisions and the Constitutional scheme and in particular the provisions contained in Art.14 and 226 of Constitution.

18. It was further held that, even in respect of a State or Authority, normally suit for specific performance or recovery of damages can be made in the ordinary civil Court and in extraordinary circumstances the High Court should exercise its powers under Article 226 of the [Constitution of India](#) only rarely and sparingly. The relevant portion of the judgment is as follows:

48. Normally for specific performance of a contract or for recovery of damages claimed in breach of contract, even against State or Authority coming within the ambit of Article 12 of the Constitution, the parties have to approach ordinary civil courts. But there may be cases where facts and circumstances of the case warrant, and the situations demand exercise of power of judicial review available under Article 226 of the [Constitution of India](#); may be such cases are

extraordinary. The Courts may exercise power of Judicial review under Article 226 of the [Constitution of India](#) in the matters of enforcement of contractual obligations rarely and sparingly. But having regard to the Constitutional scheme, and in particular the requirements of Article 14 of the Constitution relating to all actions of the State or instrumentality of State or Authorities within the meaning of Article 12 of the [Constitution of India](#), they have to act fairly, justly, and reasonably in all their actions.

19. Applying the dictum as laid down above, there is no difficulty to come to the conclusion that the remedy available to the petitioner is not by filing the present writ petition and circumstances are not extraordinary warranting this Court to interfere. As correctly pointed out by the learned Advocate General, by cancelling the confirmation of sale it does not make the petitioner to lose his right of participation in the subsequent auction sale to be conducted by the Housing Board. Even otherwise, if at all there is any damage caused due to the conduct of the respondent Housing Board in not executing the sale deed by passing the impugned order, it is for the petitioner to work out his remedy before the appropriate forum.

In view of the same, leaving it open to the petitioner to avail the remedy in the manner known to law, the writ petition is dismissed without costs. Connected miscellaneous petitions are closed.

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