

CASE NO.:
Appeal (civil) 1650 of 2004

PETITIONER:
M/s S.J.S. Business Enterprises (P) Ltd.

RESPONDENT:
State of Bihar and Ors.

DATE OF JUDGMENT: 17/03/2004

BENCH:
Ruma Pal & P.Venkatarama Reddi.

JUDGMENT:
J U D G M E N T

(Arising out of SLP(C) No. 10766/2003)

RUMA PAL, J.

Leave granted.

The appellant had been sanctioned a sum of Rs.70 lakhs by the Bihar State Credit and Investment Corporation Ltd. (hereinafter referred to as 'BICICO') in April 1992 for financing the construction of a hotel. According to the appellant, BICICO only disbursed a sum of Rs.44.56 lakhs in instalments as a result of which the appellant could not complete the project without a huge cost overrun. From time to time upto 2001-2002, the appellant repaid about Rs.14.23 lakh to BICICO. However, the outstanding amount, due from the appellant according to BICICO as on March 2002, was Rs.191.3 lakhs including interest. Proceedings were therefore commenced by BICICO under Section 29 of the State Financial Corporations Act, 1951 for sale of the hotel which had been mortgaged by the appellant to BICICO by way of security against the loan.

The hotel was valued on 3rd July 2001 by BICICO through its valuer. According to this valuation, the property was worth Rs.2.16 crore. After this, a publication was made on 31st January 2002 offering the hotel for sale on an "As is where is basis". Offers were required to be made by 28th February 2002. The respondent No. 6 offered to purchase the hotel for Rs.41 lakhs. The offer was rejected by BICICO because the bid was too low.

The property was again re-valued on 24th January 2002 by BICICO. By what, according to BICICO, was only an "in-house assessment", the value of the hotel was estimated at Rs.1.58 crores. But when a third valuation was again made at the instance of BICICO in February 2002, the total value of the property including of the building and land was only Rs.94.81 lakhs. On 26th March 2002, a second sale notice was published by BICICO in respect of the hotel on "As is where is basis". This notice has been impugned before us. Under this notice offers were to be given by way of a sealed cover by 29th March 2002 i.e. within three days. Of these three days 28th March 2002 was 'Holi' and 29th March 2002 was 'Good Friday'.

It appears from the records that on the same day the second sale notice was published, the respondent No. 6 made an offer to purchase the hotel for Rs.95.50 lakhs and in fact paid Rs. 95.50 lakhs to BICICO. On 30th March 2002, which was a Saturday, the offer of the respondent No. 6 was negotiated and the consideration was finalised at Rs. 1 crore. The difference between Rs.94.50 lakhs and Rs.1 crore had

already been paid to BICICO by the respondent No. 6 on 7th March, 2002. Therefore by the 26th March, 2002, before the last date for receiving offers was over and the tenders were opened, the Respondent No. 6 had deposited the entire consideration of Rs. 1 Crore. Nevertheless a letter accepting the respondent No.6's offer was issued by BICICO on 31st March 2002 (which was a Sunday) asking the respondent No. 6 to pay the amount of Rs. 1 crore by 31st March 2002 failing which its offer would stand rejected. The respondent No. 6 apparently received the letter on the same day from BICICO and also replied on that day stating that the amount of Rs. 1 crore had already been paid. After this, a letter was written again on the same day by BICICO to the appellant and its two Directors asking them to match the offer of respondent No. 6 within 10 days from the date of the issue of the letter, failing which the sale would be concluded in favour of the respondent No. 6.

On 4th April 2002, a suit was filed by the appellant before the Court of the Sub-Judge, Patna, inter-alia, challenging the action of BICICO. An application for interim relief was made to restrain BICICO from selling the hotel. The prayer for interim injunction was refused by the Sub Judge on 8th April 2002 and notice was directed to be issued to BICICO. The next day, a writ petition was filed by the appellant for the same reliefs as had been prayed for in the suit. An interim order was passed by the learned Single Judge on 9th April 2002 after hearing counsel for the appellant as well as for BICICO by which a schedule of repayment by instalments was prescribed. Subject to payment of the first instalment of Rs. 10 lakhs possession of the hotel was to be handed over by BICICO to the appellant. An undertaking was also given by one of the Directors of the appellant to the Court to abide by the schedule so fixed. The appellant paid a sum of Rs. 10 lakhs in terms of the Court's order to BICICO but the possession of the hotel was not handed back to the appellant.

It may be mentioned that during this period, BICICO announced a settlement policy under which concerns which had taken a loan less than 10 years earlier could settle their dues by paying double the original principal amount lent by the BICICO to such defaulters. The appellant applied for settlement of its outstanding dues. However, the prayer of the appellant for a one time settlement was rejected by BICICO under the settlement policy.

When the writ petition came up for disposal, the learned Single Judge dismissed it holding that as the appellant had suppressed the fact that it had filed a suit prior to the initiation of writ proceedings its conduct verged on fraud and that the appellant had, disentitled itself from any relief in the extraordinary prerogative writ jurisdiction. It was also held that the BICICO had acted bonafide in taking action under Section 29 and selling the hotel. While dismissing the writ petition, the learned Single Judge directed BICICO to consider the appellant's application for one time settlement in accordance with law. BICICO was directed to hand over the possession of the hotel to respondent No. 6 and the appellant was directed to pay Rs.10,000/- by way of costs to the respondent no. 6.

The Division Bench dismissed the appeal preferred by the appellant after rejecting the explanation given by the appellant that the two proceedings had been initiated independently by the two Directors of the appellant each without the other's knowledge. The Division Bench held that the Court would not interfere with the Single Judge's order because of the material suppression of facts by the appellant.

When the special leave petition was initially entertained by this Court, we directed the issuance of notice subject to

the appellant's depositing a sum of Rs. 1 crore by way of bank draft/ draft with the Registry of this Court. We also recorded that the appellant was willing to recompense the respondent No. 6 to the extent of any loss incurred by way of interest on the amount paid by it. The demand draft of Rs. 1 crore was deposited with the Registry of this Court by the appellant and the amount has since been invested in a nationalised bank in a short term fixed deposit.

Affidavits have been filed by BICICO and the respondent No. 6 in which they have claimed that possession of the hotel was handed over by BICICO to the respondent No. 6 on 27th May 2003. However, it is not clear whether any resolution of the Board or any other formal agreement or conveyance deed in respect of the hotel has been executed by BICICO in favour of the respondent No. 6 till today.

The principal basis on which the Single Judge and the only ground on which the Division Bench of the High Court refused relief to the appellant was because they found that the appellant was guilty of suppression of a material fact viz., the filing of the suit prior to approaching the Court under Article 226.

As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken. Thus when the liability to Income Tax was questioned by an applicant on the ground of her non-residence, the fact that she had purchased and was maintaining a house in the country was held to be a material fact the suppression of which disentitled her from the relief claimed. Again when in earlier proceedings before this Court, the appellant had undertaken that it would not carry on the manufacture of liquor at its distillery and the proceedings before this Court were concluded on that basis, a subsequent writ petition for renewal of the licence to manufacture liquor at the same distillery before the High Court was held to have been initiated for oblique and ulterior purposes and the interim order passed by the High Court in such subsequent application was set aside by this Court. Similarly, a challenge to an order fixing the price was rejected because the petitioners had suppressed the fact that an agreement had been entered into between the petitioners and the Government relating to the fixation of price and that the impugned order had been replaced by another order.

Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable, the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an

adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If however a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for

the Court to entertain the writ petition. The Rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But this Court has also held in *C. B. Gosain Bhan V. State of Orissa* 14 STC 766= 1963 (2) SCR 879 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.

In this case, admittedly the appellant has withdrawn the suit two weeks after the suit had been filed. In other words the appellant elected to pursue its remedies only under Article 226. The pleadings were also complete before the High Court. No doubt, the interim order which was passed by the High Court was obtained when the suit was pending. But by the time the writ petition was heard the suit had already been withdrawn a year earlier. Although the appellant could not, on the High Court's reasoning, take advantage of the interim order, it was not correct in rejecting the writ petition itself when the suit had admittedly been withdrawn, especially when the matter was ripe for hearing and all the facts necessary for determining the writ petition on merits were before the Court, and when the Court was not of the view that the writ petition was otherwise not maintainable.

As the issue of suppression was the only ground on which the High Court has rejected the appellant's plea for relief, we would ordinarily have set aside the order of the High Court in view of our finding and remanded back to the High Court for decision of the matter on merits. But the matter has been argued on merits before us and we are in a position to dispose of the matter which we accordingly proceed to do.

We are of the view that the sale effected in favour of respondent No. 6 cannot be sustained. It is axiomatic that the statutory powers vested in the State Financial Corporation under the State Financial Corporation Act, must be exercised bonafide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabalize the abuse of that power. In such event it is for the concerned officer to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the Court can assume that the impugned action was improper [See : *M/s. Pannalal Binraj & Ors. v. Union of India & Ors.* AIR 1957 SC 397, 409]. Doubtless some of the restrictions placed on State Financial Corporations exercising their powers under Section 29 of the State Financial Corporation Act, as prescribed in *Mahesh Chandra V. Regional Manager, U.P. Financial Corpn.* 1993 (2) SCC 279, are no longer in place in view of the subsequent decision in *Haryana Financial State Corporation V. Jagdamba Oils Mills*. However, in over-ruling the decision in *Mahesh Chandra*, this

Court has affirmed the view taken in Chairman and Managing Director, SIPCOT, Madras V. Contromix Pvt. Ltd. 1995 (4) SCC 595 and said that in the matter of sale under Section 29, the State Financial Corporation must act in accordance with the statute and must not act unfairly i.e. unreasonably. If they do their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold. "This can only be achieved when there is a maximum participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interesting in purchasing the property and generally secures the best price".

Adequate publicity to ensure maximum participation of bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on 'As is where is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required.

In this case, the first notice of sale was given on 31st January 2002. A period of about four weeks was given to the purchasers to submit their offers by 28th February 2002. The period of four weeks can therefore be taken to be the ordinary norm. But when the second impugned notice of sale was given on 26th March 2002, less than three days were given for the purchasers to inspect the premises, make necessary arrangements and submit their offers to BICICO. Of these three days, two were public holidays when banks would have also been shut. The period of notice was, in the circumstances, entirely inadequate. Besides, we have not been told the reason for this unusual haste. Such precipitate action was not called for unless there were some other considerations weighing with the authorities, considerations which have not been disclosed to the Court.

The method in which the sale was conducted is also questionable. Three valuations were obtained between 3rd July 2001 to February 2002 before the property was sold to the respondent No. 6. What was valued in July 2001 as worth Rs. 2.16 crores is valued at Rs. 94.81 about 10 months later, a fall of over Rs. 1.50 crores.

The third extra ordinary circumstance is that the respondent No. 6 had submitted his offer on the day on which the sale notice was published and made payment of the entire consideration on the same day before the last date for submission of tenders was over and even before its offer could have been accepted. It is unlikely that this would have been done unless the respondent No.6 knew (i) the valuation made and (ii) that its offer would be accepted. Indeed a portion of the respondent No. 6 's offer had already been paid on 7th March 2002 i.e. prior to the sale notice itself. According to the Respondent No. 6 this was pursuant to the earlier infructuous sale notice, a payment which, again for some undisclosed reasons, had not been returned by BICICO to the respondent No. 6.

No satisfactory explanation is forthcoming from the authorities to explain these deviations from the norm. The concatenation of inexplicable and unexplained circumstances is sufficient for us to hold that the sale was unfair and consequently invalid.

In Jagdamba Oils Mills Ltd. (supra), It was observed

that, "the Court may assist the borrower who has intention to repay but is prevented by insurmountable difficulties in meeting the commitment". The borrower in that case had made no payment whatsoever to the State Financial Corporation of its outstanding loan. As not even "a minimal portion of the amount borrowed had been paid the Court refused to help the defaulter. The borrower, in this case had paid over Rs.14 lakhs as against the principal amount of Rs.44.56 lakhs. A further amount of Rs.10 lakhs was paid on 27th March 2002 by the appellant to BICICO i.e. the day after the impugned sale notice was published. Before the High Court a sum of Rs.10 lakhs was paid pursuant to the interim order. In addition, the appellant had approached the BICICO to settle its outstanding dues under the one time settlement policy. As we have already recorded, we entertained the special petition on the condition that the appellant would deposit a sum of Rs. 1 crore over and above the amount already paid by it to BICICO. This the appellant has also done. All this shows that the appellant could not be termed to be such a defaulter who deserved no sympathy or assistance by the Court.

The respondent No 6 has pleaded that it has been deprived of Rs. 1 crore, had been kept out of the possession for 14 months and has, after taking possession, made substantial investments in the property. As far as the first factor is concerned, the appellant has offered to pay interest on the amount of Rs. 1 crore to the respondent No. 6. On the second, we have not been told whether any formal agreement has been concluded between BICICO and the respondent No. 6 or whether any conveyance has been executed or any other formality completed by BICICO to transfer the title in the hotel in favour of the respondent no. 6. It appears to have handed over possession to the Respondent No. 6 only upon the direction of the High Court. As far as the third ground is concerned, the appellant was fully aware that the appellant was fighting tooth and nail to redeem its property and that the sale was the subject matter of scrutiny by Court. If it has chosen to make renovation or investments in the hotel, it has done so despite the knowledge of the precarious nature of its possession. The investments, if any, were a calculated risk taken by the respondent No.6 itself the consequence of which cannot be foisted on the appellant.

In the circumstances, we set aside the decision of the High Court and grant the appellant the reliefs claimed in the writ petition. The sale of the appellant's hotel to the respondent No. 6 is set aside. The Respondent No. 6 is directed to hand over the possession of the hotel to BICICO who will hand over the same to the appellant. BICICO is at liberty to withdraw the sum of Rs. 1 crore (except for the interest thereon) deposited with the Registry of this Court and will refund the amount of Rs. 1 Crore received by it from the respondent No.6 to it. BICICO will adjust the sum withdrawn by it from this Court towards its claim against the appellant without prejudice to the rights of either party. The appellant may withdraw the interest on the amount of Rs. 1 Crore deposited by it with the Registry and shall pay the amount to the respondent No.6. The appellant shall also pay the balance of the interest on Rs. 1 crore to the respondent No. 6 at the rate at which banks grant interest on fixed deposit for the relevant time i.e. between the dismissal of the writ petition by the learned Single Judge till the date of making the payment less the amount already paid by it as aforesaid. The handing over of the possession of the hotel by BICICO to the appellant and the payment of the interest on the amount of Rs.1 crore to the respondent No.6 by the appellant shall be simultaneously

done.

The appeal is thus allowed with costs.

JUDIS