IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

SECOND APPEAL NO. 26 OF 2016
WITH
CIVIL APPLICATION NO. 357 OF 2016

Rajendra s/o. Kisanrao Patkar **....Appellant.**

Versus

Hon'ble Managing Director,
Maharashtra Rajya Vittiya Mahamandal,
New Exelessar Building, 5, 7 & 9
Amrut Keshav Nayak Marg, Fort,
Mumbai-4000 001 & Ors. **....Respondents.**

Mr. V.J. Dixit, Senior Counsel i/b. Mr. A.N. Nagargoje, Advocate for appellant.
Mr. S.B. Bhapkar with Mr. S.M. Mutha, Advocate for respondent Nos. 1 to 3.
Mr. V.D. Hon, Senior Counsel i/b. Mr. A.V. Hon, Advocate for respondent No. 4.

CORAM : T.V. NALAWADE, J.
DATED : 9th June, 2016.

ORDER :

1. The appeal is filed against judgment and decree of Special Civil Suit No. 195/2003, which was pending in the Court of Civil Judge, Senior Division, Ahmednagar and against the judgment and decree of Regular Civil Appeal No. 12/2008, which was pending in the District Court, Ahmednagar. The suit filed for specific performance of contract of sale of immovable property

by the present appellant is dismissed. Both the sides are heard. During the course of arguments, the learned Senior Counsel for appellant submitted that the suit property was released from attachment by respondent, Finance Corporation during pendency of suit even when there was order of statusquo and the property was sold by the original owner to one of the present respondents and so, the purchaser is made party to the present proceeding.

2. It is the case of appellant, plaintiff that he had filed tender in response to tender notice published by defendant, Corporation in daily newspaper Lokmat dated 28.6.2003 and he had offered to purchase the suit property for the consideration of Rs. 1.5 lakh. The suit property is one plot situated in Industrial Estate bearing No. 8 and it is part and parcel of property bearing C.T.S. No. 6/1/B/2. The area of the plot is 288 Sq. Mtrs. and it is situated within local limits of Ahmednagar. In the tender notice, it was informed that the property was to be sold in auction.

3. It is the case of plaintiff that his tender was opened in Regional Office, in the office of defendant No. 2 on 17.7.2003 and during negotiations, he increased the price and gave offer of Rs. 1.67 lakh. It is his case that the officers of defendants

accepted the offer and informed him that the sale deed will be executed within 15 days.

4. It is the case of plaintiff that along with tender, he had deposited Earnest Money Deposit, which was 10% of the amount offered by him and after negotiations, he deposited the amount of Rs. 1950/- to make the Earnest Money Deposit as 10% of the amount offered by him. It is his case that he was always ready and willing to perform his part of contract, but the defendants have refused to execute the sale deed in his favour. According to the plaintiff, notice was given by him on 14.10.2003, but false reply was given by defendants and so, the suit was required to be filed for specific performance of contract of sale.

5. Defendant No. 1, Head Office of the Corporation did not appear in the suit. The other two defendants, Regional Office and Branch Office appeared and contested the suit by filing joint written statement. They contended that right was reserved by the Corporation either to accept or reject the tender. It is also contended that right was reserved by the Corporation to negotiate with persons, who had filled the tenders and also with other private tenderers to see that proper price was received. It

is the case of defendants that the tender of plaintiff was never accepted though negotiations were held with plaintiff and plaintiff had offered more price than the initial tender price of Rs. 1.5 lakh. It is the case of defendants that the tender is not accepted and as offer is not accepted, there is no question of giving relief in favour of plaintiff.

6. Issues were framed on the basis of aforesaid pleadings. Both the Courts below held on the basis of evidence and pleadings that there was no enforcible agreement in existence and there was only offer from the side of plaintiff. Both the Courts below have held that the defendants had reserved the right not to sell the property and reject all the tenders.

7. This Court has carefully gone through the conditions mentioned in the tender notice published in newspaper and also the conditions mentioned in the tender form. The relevant conditions for the present purpose were as under :-

(i) The property was to be sold only as per the conditions mentioned in the tender application form.

(ii) The Corporation had reserved right to reject any or all tenders without giving any reason. If all the tenders were rejected, the Corporation had reserved the right to negotiate with either any of the persons, who had filled tenders or with other private tenderers.

The aforesaid two conditions were published in the tender notice itself. As per the condition No. 1 mentioned in the tender notice, it is clear that the other conditions mentioned in tender form were also there and tender notice was subject to those conditions also. In view of this circumstance, the remaining condition mentioned in the tender form need to be considered which are as under :-

(iii) 3. These tenders should be accompanied by a non refundable tender Fee of Rs. 500/250 by D.D. or in cash and also Earnest Money Tender Deposit equal to 10% of the highest bid offered (vide condition No. 5 below) in case the Tender is in response to the advertisement and 10% in case the Tender is by way of private offer,by a D.D. drawn in favour of Maharashtra State Financial Corporation. The tenders not accompanied by the Tender Fee and/or Earnest Money Tender Deposit shall be treated as invalid. The earnest money deposit will be refunded to the unsuccessful bidders within two months from the date of the opening of the tenders. The tenderers will not be entitled to claim any interest if the refund of Earnest Money Tender Deposit is delayed for any reason whatsoever.

(iv) 5. The offers can be either on the basis of lumpsum payment of the entire offer amount or on the basis of payment by deferred installment. The offer is free to give both the options in his tender in which case the Earnest Money Tender Deposit mentioned in the condition No. 3 above shall be calculated on the higher bid amount.

(v) 6. The successful bidders will have to pay the balance amount of cash down offer / initial cash down payment as under :

If the amount of cash down offer / initial cash down payment is up to Rs. 5.00 lakhs it shall be paid within a period of 15 days from the date of communication of the decision. If the said amount exceeds Rs. 5.00 lakh it shall be paid within a period of 30 days from the date of communication of the decision. For any delay in payment beyond prescribed time limit interest @ 16% p.a. shall be charged for the delayed period.

(vi) 12. If the offerer withdraws his offer for whatsoever reasons before the decision of the corporation on the proposal for sale of the assets is communicated : the Earnest money Tender deposit paid by the offerer is liable to be forfeited.

(vii) 14. Tenders with conditional offers will be treated as invalid. Likewise correspondence about any change in the offers will not be entertained. If any tenderer wishes to give a fresh offer for a unit on or before the last date prescribed for submission of the tenders in the concerned advertisement, he may file a fresh tender with appropriate Earnest Money Tender Deposit and Tender Fees.

(viii) 17. The Corporation reserves its right to accept or to reject any or all offer/s without assigning any reasons and in case all the offers are rejected either to hold negotiations with any of the bidders / tenderers or to sell the property through private negotiations with any of the bidders / tenderers or any other party / parties. The Corporation's decision in this behalf shall be final.

8. This Court has gone through the oral evidence from the paper book which is supplied by the learned Senior Counsel

for the appellant. Both the sides produced copies of documents which were accepted by the Trial Court in evidence.

9. It is the case of plaintiff that he had given 2 offers like offer of Rs. 1.5 lakh in response to the tender notice published in newspaper and offer of Rs. 1.67 lakh, the offer which he gave during negotiations after opening of the tenders. It is the case of Corporation that both these offers were never accepted by the Corporation. The learned Senior Counsel for the plaintiff relied much on a circumstance like on 17.3.2003 after negotiations plaintiff deposited more amount, the amount of Rs. 1950/- in the Regional Office, Pune.

10. The relevant terms and conditions of the tender are already quoted. They show that 10% of the amount of price offered was to be deposited and only after that the offer was to be considered by the Corporation. Along with the first tender form, plaintiff had deposited the amount of Rs. 15,250/- when offer was given by him of the price of Rs. 1.5 lakh. Thus, he had deposited Rs. 250/- more than the requirement of aforesaid condition. Subsequently, after negotiations, he deposited amount of Rs. 1950/- and thus, the total amount deposited by the plaintiff was 10% of thr offer price viz. Rs. 1.67 lakh.

Receipts of both these amounts were issued by the Corporation and both these amounts are described as Earnest Money Deposit (EMD). Thus, deposit of the amount was only as Earnest Money Deposit as per the conditions mentioned in the tender form. The subsequent receipt in respect of the amount of Rs. 1950/- shows that part of the amount was deposited as earnest money and part of the amount, Rs. 500/- was deposited towards the tender fees. Thus, on the second occasion also, the amount deposited was as per the condition laid down in the tender form and amount was not deposited due to acceptance of the offer given during negotiations. These circumstances are considered by the Courts below. Admittedly, there was no written correspondence with regard to the acceptance of offer given by the plaintiff. Aforesaid conditions show that if offer was accepted, it was to be informed in writing.

11. The burden of proof of the case that the offer given by the plaintiff was accepted by the defendants was on plaintiff. The examination in chief of the plaintiff is as per the pleadings in the plaint. In the cross examination, the plaintiff has specifically admitted that during negotiations, he had first refused to increase the price of Rs. 1.5 lakh offered by him in the first tender form. He has given evidence that he had then given offer

of Rs. 1.67 lakh and the admission is as follows :-

> "It is true that my total offer was Rs. 1.67 lakh"

12. The plaintiff has tried to say that the concerned authority, Corporation had given letter to inferior office about accepting the offer, but no such correspondence is produced by the plaintiff. If there was such acceptance, the Corporation would have certainly supplied copy of it to the plaintiff. The plaintiff has admitted in the cross examination that his act of depositing more amount was in furtherance of terms and conditions of tender form and the admission specifically is as under :-

> "It is true that I have to deposit the amount of Rs. 1700/- Earnest Amount Tender Deposit along with tender form."

Thus, no other inference is possible than the inference that the subsequent amount was also deposited to give one more offer by plaintiff and only after depositing of such money, the Corporation would have considered the offer given by plaintiff. These circumstances cannot lead to inference that the amount was deposited as the offer of the plaintiff given during negotiations was accepted. The plaintiff has given one more admission as follows :-

> "It is true that I have not received the written

> order about the sanction of tender. It is true that I have not sent cheque or demand draft of Rs. 1.67 lakh towards the Corporation within one month from 17.7.2003."

This admission needs to be read with condition No. 6 of tender form already quoted. Thus, there was no acceptance of the offer by the Corporation and due to that the entire amount was not deposited by the plaintiff which was necessary as per the condition No. 6. Only if the Corporation had accepted the entire amount, it could have been said that the offer of the plaintiff was accepted by the Corporation.

13. In rebuttal, there is evidence of Shri. Walzade, Deputy Manager of Corporation. His evidence is as per the aforesaid pleadings of written statement. He has specifically stated in the evidence that there was no acceptance of offer given by the plaintiff of Rs. 1.67 lakh. He has given evidence that as per the procedure, the Corporation makes correspondence in writing and there is never oral communication. Nothing is brought on the record in the cross examination of this witness to create a probability that the offer of Rs. 1.67 lakh given by the plaintiff was accepted by the

Corporation.

14. One more witness Shri. Shivankar is examined by the Corporation. The evidence of these two witnesses of Corporation shows that the offer given by the plaintiff was communicated to Head Office and it was up to the Head Office either to accept or reject the offer given by the plaintiff. The circumstance of sending the offer to Superior Officer also cannot lead to inference that the offer given by plaintiff was accepted by the Corporation.

15. The suit was filed in respect of offer given by plaintiff of Rs. 1.67 lakh during negotiations. The learned Senior Counsel for appellant placed reliance on the case reported as **AIR 2002 SUPREME COURT 834 [The State Financial Corporation and Anr. Vs. M/s. Jagdamba Oil Mills and Anr.]** and submitted that defendant is a Corporation of Government and the officers of the defendant were expected to act fairly. There cannot be any dispute over this proposition. The submissions made and the record show that there was no other tender. There is nothing on the record to show that the offer given by the plaintiff is reasonable and due to that defendant ought to have accepted the offer given by plaintiff. There was only one tender

and this circumstance cannot be ignored in the present matter as the property which was to be sold by Corporation was immovable property. Further all the rights were reserved by the Corporation to see that reasonable price is received. The submissions made and the record show that during pendency of the suit the Corporation had given offer to plaintiff to sell the property for consideration of Rs. 1.79 lakh and time was fixed by the Corporation to deposit the amount. The evidence of plaintiff in cross examination shows that he did not make the payment in response to this offer and he did not accept this offer. Thus, the plaintiff was insisting defendants to sell the property for the consideration of Rs. 1.67 lakh and Corporation was not ready to do so. This circumstance can be considered against the plaintiff though the acceptance of the offer by plaintiff would have given another cause of action. Submissions were made by the learned Senior Counsel during arguments that after getting permission of the Corporation, the owner sold the property for consideration of Rs. 12 lakh to respondent No. 4. The submissions made show that the debtor, the owner of the property had paid the entire dues of the Corporation. This circumstance also cannot be ignored.

16. The findings of the Courts below are concurrent and

they are on question of facts. No substantial question of law as such is involved in the matter.

17. In the result, the appeal stands dismissed. Civil Application is disposed of. Learned Senior Counsel Shri. Dixit for the appellant requests for time of six weeks as he wants to challenge the decision of this Court. Other side has opposed this prayer. Time of six weeks is granted. During this period the statusquo is to be maintained.

[T.V. NALAWADE, J.]

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