

TRANSASIA TRADING COMPANY
v.
D.B.S. FINANCE LIMITED
(M.V. MENG KIAT)

SUPREME COURT
FERNANDO, J.
J.A.N. DE SILVA, J., AND
WEERASURIYA, J.
SC APPEAL NO 62/2002
CA APPLICATION NO. 617/98 (REV.)
H.C.COLOMBO ACTION IN REM NO. 69/97
29TH JULY, 2003

Action in rem – Sale of ship by auction – Forfeiture of deposit of “unsuccessful bidder” – Interpretation of “unsuccessful bidder” – Does it apply only to the highest bidder who fails to complete purchase?

A vessel was sold by auction on 13.2.98 by the Marshal upon the order of the High Court of Colombo, in the exercise of its admiralty jurisdiction, in an action *in rem* against that ship.

All prospective bidders were required to deposit with the Marshal US\$ 50,000 each before the auction, to become eligible to make bids at the auction. A bid will be accepted subject to the order of the Court which will normally be the highest bid. The successful bidders deposit will be applied against the purchase price and the balance has to be paid within 14 days from the auction. If the highest bidder fails to complete the purchase, other bidders in their respective orders will be considered subject to the same procedure applying to the deposit and payment of the full price less the deposit. The deposits of the unsuccessful bidders will be refunded.

There were two bids. The highest bid was US\$ 775,000. The next bid by the appellant was US\$ 770,000.

The highest bidder defaulted payment. Consequently the appellant suggested a reduced offer of US\$ 600,000. By his order on 17.3.1998 the High Court accepted the appellant's original bid of US\$ 770,000 and directed the payment of the balance US\$ 720,000. The appellant failed to make payment and moved that his deposit of US\$ 50,000 be refunded. The High Court rejected the claim.

It was argued that the appellant was an “unsuccessful” bidder and hence entitled to the refund of his deposit.

Held :

Even though the appellant was the 2nd highest bidder, he was a successful bidder though not a successful purchaser. Thus he was not an unsuccessful bidder who was entitled to the refund of the deposit.

APPEAL from the judgment of the Court of Appeal.

Shibly Aziz, P.C. with R.S. Srikantha and S.Ahamed for appellant.

K.Kanag-Iswaran, P.C. with Chandaka Jayasundera and Shivan Kanag-Iswaran for respondent.

Cur.adv.vult

August 08.2003.

FERNANDO, J.

This appeal involves the interpretation of the conditions upon which a vessel was sold by auction on 13.2.98 by the Marshal upon the order of the High Court of Colombo, in the exercise of its admiralty jurisdiction, in an action in *rem* against that vessel. 01

The advertisement of the auction set out the following conditions of sale:

“... All prospective bidders will be required to deposit with the Marshal a sum of US Dollars 50,000.00 each before the commencement of the auction by bank draft in favour of ... in order to become eligible to take part and make bids at the auction. This deposit will be applied towards the amount of the bid that is to be deposited by the *successful* bidder ... *The successful* bidder will be required to deposit the balance bid amount ...within 14 bank working days of the date of auction in Sri Lanka Admiralty Account No. ... The deposit of US Dollars 50,000 will be forfeited if the *successful* bidder fails to deposit the balance bid amount as set forth above. Time is of the essence of the contract and no extensions of time will be granted under any circumstances whatsoever.... 10

In the event of the first highest bidder failing to complete the purchase within the stipulated time, then the next highest bidders in their respective orders may be called upon to deposit the balance amount of their bids within 14 bank working days, from being called upon to do so, and complete the purchase *as set forth above* if their bid is accepted by Court. Deposits of *unsuccessful* bidders will be refunded within 30 days of the completion of the sale of the vessel. All bids will be subject to the final approval of the Court in the exercise of its absolute discretion. ..." [emphasis added]

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At the auction there were only two bids: the "first highest bidder" offered US\$ 775,000, while the petitioner-appellant company ("the appellant") offered US\$ 770,000. It was common ground that the sale was confirmed by the High Court, and that the highest bidder became obliged to deposit the balance sum of US\$ 725,000 on or before 6.3.98, but failed to do so.

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On 16.3.98 the appellant's agent in Sri Lanka sent the following fax message to the plaintiff-respondent's attorneys-at-law:

"We understand that the highest bidder ... has defaulted payment... and therefore the second highest bidder... will automatically be entitled for the purchase of the above vessel.

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This development has been advised to us by our principal.

We wish to bring to your notice that it is more than (30) days from the date of the auction... and that the condition of the vessel is rapidly deteriorating.

In order to resolve the sale of this vessel speedily we suggest a revised price of US\$ 600,000 for the vessel.

On confirmation of your acceptance of our proposal, we can arrange for remittance..."

On 17.3.98. the High Court ordered the Registrar and the Marshal to inform the appellant that the Court had accepted its bid, and had directed the deposit of the balance sum of US\$ 720,000 within the required period. The Marshal so informed the appellant, which failed to make payment, and moved that the deposit of US\$ 50,000 be refunded.

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The High Court rejected that claim, and ordered the forfeiture of the deposit. The appellant filed an application in revision in the Court of Appeal, which was dismissed. Against that order, the appellant now appeals to this Court having obtained special leave to appeal. The Appellant also applied, unsuccessfully, to the Court of Appeal for leave to appeal against the High Court order, and now seeks special leave to appeal from this Court (in SC SLA Application No 176/2002). Counsel agreed that the same questions of law are involved, and that if this appeal succeeds the appellant will withdraw that application; and that if this appeal fails, that application will be dismissed.

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Learned President's Counsel for the appellant contended that the conditions of sale only provide for the forfeiture of the deposit of "the successful bidder", and not of an "unsuccessful bidder"; that the "first highest bidder" was the only "successful bidder" contemplated in the conditions of sale, and that the appellant was an "unsuccessful bidder"; that in the absence of any specific provision for the forfeiture of the deposit of the "next highest bidder", the conditions of sale ought not to be interpreted as authorising forfeiture; and that, at the least, there was some ambiguity or doubt in the conditions of sale, which ought therefore to be interpreted *contra proferentem* and in favour of the appellant.

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The conditions of sale must be interpreted in their entirety, and not piece-meal. In regard to the deposit, they made express provision: that the deposit will be applied towards the amount of the bid that is to be deposited by the *successful* bidder, that if the *successful* bidder fails to deposit the balance the deposit will be forfeited, and that the deposits of the *unsuccessful* bidders will be returned. Immediately upon the conclusion of the auction, the "first highest bidder" would be (subject to High Court approval) the only "successful" bidder. But it does not follow that all the other bidders would immediately become "unsuccessful" bidders. Their status would be uncertain. If the "first highest bidder" completes the purchase, then the other bidders would be "unsuccessful" bidders. But if the "first highest bidder" defaults and if the Court accepts the bid of the second (or failing him, the third) highest bidder, that bidder would then become a "successful" bidder, though not yet a successful *purchaser*. The conditions of sale do not treat such a bidder

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as being an “unsuccessful” bidder at any stage thereafter. The consequence of the Court order of 17.3.98 was that the appellant became a “successful” bidder, and was thereupon not entitled to the refund of its deposit.

Furthermore, when the Court decided to accept the bid of the appellant, and notified the appellant, and called for payment within the required period, the appellant became obliged to complete the purchase “*as set forth above*”. That made the preceding provisions of the conditions of sale - in regard to the completion of the purchase – binding upon the appellant. Those provisions as to completion of the purchase included, but were not restricted, to the bank account to which payment had to be made. They included also other stipulations regarding forfeiture, time, and extensions.

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The conditions of sale set out a mechanism for recovery of the purchase price, in situations in which many bids would be received from persons outside the jurisdiction. Providing for deposits and for forfeiture of deposits upon default by bidders, despite acceptance of their bids, was part of that mechanism – uniformly applicable to all such bidders.

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I find no ambiguity or doubt in the conditions of sale, and accordingly the *contra proferentem* rule is inapplicable.

I therefore hold that the appellant’s deposit was liable to forfeiture, and was lawfully forfeited. The orders of the High Court and the Court of Appeal are affirmed, and the appeal is dismissed with costs in a sum of Rs 50,000 payable by the appellant to the plaintiff-respondent. In terms of the agreement between Counsel, SC SLA Application No 176/2002 is dismissed without costs.

DE SILVA, J. - I agree.

WEERASURIYA, J. - I agree.

Appeal dismissed.