

CASE NO.:
Appeal (civil) 2694-2695 of 2005

PETITIONER:
M/s Makhija Construction & Enggr. P. Ltd

RESPONDENT:
Indore Development Authority and Ors

DATE OF JUDGMENT: 19/04/2005

BENCH:
Ruma Pal & C.K. Thakker

JUDGMENT:
J U D G M E N T

(Arising out of SLP) Nos. 21113-21114 of 2001)

RUMA PAL, J.

Leave granted.

The appellant's grievance is that his tender for allotment of land reserved for educational use was not accepted by the respondent- authority. The tender notice was published on 22nd September 1993. It invited tenders from "registered institutions who manage educational activities or are constituted for this purpose" for 10,340 sq. mtrs. of land reserved for educational purposes under the respondent-authority's scheme. Of the tenders submitted the three tenderers were the appellant, Jagriti Bal Mandir Society (hereafter referred to as 'Jagriti') and Crescent Public school (hereafter referred to as 'Crescent') who bid Rs. 261 per Sq.m., Rs.201 per Sq.m. and Rs. 177.60 per Sq.m. respectively. The appellant, as its name suggests, is a construction company. However, one of its objects in its Memorandum of Association is claimed to be to construct and establish schools. Because the appellant did not have any experience of managing an educational institution its tender was rejected on 28th December 1993 and, the respondent authority allotted the land in equal halves to Jagriti and Crescent.

The appellant and Jagriti filed writ petitions in the Gujarat High Court. The appellant's grievance was that he was the highest tenderer having quoted for the land at Rs.261 per sq. mtr. and that his tender was rejected unreasonably. Jagriti's grievance was that it had bid for the land at Rs.201 per sq. mtr. which was higher than the bid of Crescent which had offered only Rs.177.60 per sq. mtr. Jagriti, therefore, claimed that the whole of the land should have been made available to it.

Both the writ petitions were disposed of by an order dated 4th March 1998 by which the Court directed the respondent-authority to consider the representations of the appellant and Jagriti. The matter was re-considered by respondent No. 1 and again by resolution dated 7th December 1998, the decision taken earlier was re-affirmed. Pursuant to the decision, a letter of allotment was issued to Jagriti and Crescent.

This led to a second round of litigation by the appellant and Jagriti reiterating their earlier stand. Both the writ petitions were allowed by a common order on 29th February 2000. The learned Single Judge was of the view that the requirement in the tender that the tender would be accepted only from

registered institutions which are engaged in educational activities had an alternative which was ignored by the respondent No.1, namely, that the institutions constituted for that purpose could also participate. Since the appellant's memorandum showed that the appellant was constituted, inter-alia, for setting up schools, it could not be disqualified on this ground. The respondent No. 1 was accordingly required to decide the representations of the appellant and Jagriti afresh with a speaking order without being influenced by the earlier recommendations or earlier resolutions.

Three appeals were preferred from this order before the Division Bench. One appeal was by Jagriti and two by Crescent. Jagriti's appeal was dismissed for default. One of Crescent's appeal was dismissed on the ground that the Single Judge had done substantial justice.

The respondent No. 1 \026 authority then reconsidered the matter again and by a resolution dated 18th September 2000, in keeping with the observations of the High Court, held that the appellant was competent to tender and accept the tender. Its tender was accepted and allotment of the entire plot of 10,340 sq. mtrs. was made to the appellant.

Immediately after this, Jagriti's Letters Patent Appeal was restored and ultimately after hearing the parties allowed by the impugned order. The learned Single Judge's decision was set aside and the respondent No. 1 was given the liberty to implement and give effect to the advertisement published by it on 22nd September 1993.

The appellant has challenged the decision of the Division Bench contending that the dismissal of Crescent's Letters Patent Appeal from the order of the learned Single Judge operated as res judicata and that in any event, the advertisement had been misconstrued by the Division Bench to mean that the tenderers had to be engaged in education without considering that the advertisement allowed institutions which were merely constituted for the purpose of education to apply.

The respondents have submitted that there was no question of the order of the Division Bench dismissing Crescent's appeal operating as res judicata against Jagriti because Jagriti was only a co-respondent in Crescent's appeal. It is also argued that the principle of res judicata would only apply if there was a hearing and a decision - both which were absent when the order on Crescent's appeal was passed. On the question of the eligibility of the appellant to apply, it was contended that irrespective of the construction of the advertisement since Jagriti had established experience in the field of education it was better qualified than the appellant. It is submitted that the appellant could not be said to have been constituted for the purpose of education. The objects of Memorandum of Association merely list possible fields of diversification. It is also submitted that there was nothing in the advertisement from which it could be assumed that the tender would be given to the highest bidder. In fact, money was not the sole governing factor. In this connection, reference was made to Government Order dated 28th August 1986 from Madhya Pradesh Tender Advertisement Law Manual. It records that the Government had taken a decision that public institutions like educational, religious and charitable institutions may be allotted space for the purposes for which they were set up by determining the price of land allotted on the principle of 'No Profit No Loss' basis. On the merits, Jagriti's submissions appear to be correct. The tender notice had asked for bids from registered institutions carrying on educational activities. The clear implication of the language is that the institution must be one which is constituted

for the purpose of educational activities, if it does not already manage educational activities. The tender notice specified, inter alia, that the tender form had to be accompanied with "description of activities managed earlier by the society". In response to the appellant's tender, by letter dated 1st December, 1993, the respondent No.1 had informed the appellant that it was required to submit the detailed particulars of the educational activities of the institution. The appellant admittedly has no experience in educational activities of any sort. The question then is- Was it constituted for educational purposes? Out of 67 objects mentioned in its Memorandum of Association, the main objects of the appellant were to carry on the business of constructing, building, roads, bridges etc. and to act as a supplier of hardware, paints, sanitary fittings, construction material and so on. The objects incidental or ancillary to the attainment of the main objects, are specified in Clauses 3 to 28. Other objects are mentioned in Clauses 30 to 67. These include a wide variety of possible diversification of the appellants businesses. The last Clause reads:

" 67. To establish and construct shopping markets, show rooms Nursing homes, schools, clubs houses, cinemas, office premises and other buildings for commercial purposes on lands seized and licence basis".

We do not read this as in any way justifying the appellant's claim that it was constituted for educational purposes. To be 'constituted for' means the primary objective of the constitution. The primary objective of the appellant was certainly not to carry on educational activities. Besides the language of Clause 67 does not indicate that even this object is to carry on the running of the management of the school, but rather pertains to the construction of school buildings. Where the object was to carry on the business, this has been specifically so stated in the remaining objects clauses, for example in Clauses 30-31, 34-37, 40-42, 44-64 and 66 of the Memorandum.

The importance of the requirement for being involved with educational activities will also appear from the Regulations for Transfer of Property and Other Ancillary Matters, 1987 framed under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam 1973, where Regulation 33 (which refers to the respondent No.1 as 'the Authority') says that:-

(i) The Authority may transfer any property earmarked in the layout of any scheme for fulfillment of any community needs like education, medical, social, etc. by direct negotiations with such registered institutions which run hospitals, schools or to such bodies dedicated to science, art, music, literature etc. or engaged in other social or community purposes.

(ii) The Authority shall determine the rate of premium on "No profit No loss basis", each year commencing from 1st October, at which such property shall be transferred to such institutions or bodies."

The fact that the appellant had bid the highest was, in the circumstances, immaterial as the object of allotting the land to an educational institution was not the making of profit. The

learned Single Judge was therefore wrong in construing the advertisement dated 22nd September, 1993 in the manner he did and the Appellate Court erred in dismissing Crescent's appeal. In our opinion the appellant was not competent to participate in the tender.

However, the appellant is entitled to succeed on the ground that the order of the Division Bench disposing of Crescent's appeal operated as *res judicata* to bind not only Crescent but also Jagriti and the appellant. It makes no difference that Jagriti was a co-respondent with the appellant.

The principle of *res judicata* has been held to bind co-defendants if the relief given or refused by the earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the law has been approved as far back as in 1939 in *Munni Bibi vs. Trilokinath* 58 I.A. 158, 165, where it has been said that to apply the rule of *res judicata* as between co-defendants three conditions are requisite.

"(1.) There must be a conflict of interest between the defendants concerned; (2.) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3.) the question between the defendants must have been finally decided."

This view has been consistently followed by this Court.

[See: *Iftikhar Ahmed Vs. Sahid Meharban Ali*, (1974) 2 SCC 151 where the principle was extended to bind co-plaintiffs; *Mahboob Sahab vs. Syed Ismail* AIR 1995 SC 1205].

In the present case the facts show that all the three conditions were fulfilled. There was a conflict of interest between the two co-respondents in Crescent's appeal, namely between Jagriti and the appellants. For the purposes of deciding the relief, if any, to be granted to Crescent it was necessary for the Appellate Court to decide whether the appellant was entitled to participate. Although, the decision of the Appellate Court is cryptic, nevertheless, it cannot be said that the Court had not applied its judicial mind to the merits of the case. The exact language of the order disposing of the Crescent's appeal reads as follows:-

" Heard.

Dismissed as the order of the Hon'ble Single Judge has done substantial justice, it also says that I.D.A. would decide the matter by all considerations. This order is passed after hearing the L/C for the parties for about an hour."

Jagriti's counsel was recorded as being present. The fact that the Appellate Court was wrong in affirming the decision of the learned Single Judge would not make the decision less binding. [See: *State of West Bengal vs. Hemant Kumar Bhattacharjee* AIR 1966 SC 1061; *Gorie Gouri Naidu vs. Thandrothu Bodemma* AIR 1997 SC 808, 809]

The counsel for Jagriti has referred us to several decisions viz. *Gopal Upadhyaya and Ors. vs. Union of India* and Ors. 1986 (Supp) SCC 501, *Ambica Quarry Works vs. State of Gujarat & Ors.* (1987) 1 SCC 213, *Deena Alias Deen Dayal & Ors. vs. Union of India & Ors. etc.etc.* (1983) 4 SCC 645 and *Krishena Kumar Vs. Union of India & Ors.* (1990) 4 SCC 207. None of the decisions are apposite. They refer to the principle of precedent which is distinct from the principle of

res judicata. A precedent operates to bind in similar situations in a distinct case. Res judicata operates to bind parties to proceedings for no other reason, but that there should be an end to litigation.
In the circumstances, the appeals are allowed without any order as to costs.

JUDIS