
(1996) 09 KAR CK 0063
In the Karnataka High Court
Case No : Writ Petition No. 2581 of 1996

Heritage Paper Mills Limited

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 10-09-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 226
State Financial Corporations Act, 1951 — Section 29

Citation : (1998) ILR (Kar) 1003

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : Rangarajan and Prabhakaran, for the Appellant; S. Udayashankar, AGA for R-1 and Ashok B. Hinchigeri, for R-2, for the Respondent

Judgement

R.V. Raveendran, J.—The second Respondent Corporation (KSIIDC) had taken over the as sets of its Borrower M/s Ramgopal Paper Mills Limited situated at Gopalan Industrial Estate, Thandavapura, Nanjangud Taluk, Mysore District u/s 29 of the State Financial Corporation Act, 1951 ("Act" for short) and issued a public notice for the sale of the as sets consisting of land, building, plant and machinery, on "as is where is" condition. The tenders were given the option to make offers for all the as sets or for land and building and plant and machinery separately. The tenders were required to indicate the total sale consideration, up-front payment, mode of balance payment, background of the person making the offer etc. The Corporation reserved the right to accept/reject/negotiate any offer without assigning any reasons.

2. The last date for submission of sealed offers with E.M.D. of Rs. 1 lakh was 22.12.1994. The public notice provided that the tenders will be opened on the same day, ie., 22.12.1994 at 4.15 p.m. in the presence of General Manager (Operations) and the tenderers. The petitioner was one of the tenderers, and gave an offer of Rs. 208 lakhs. The petitioner and several other tenderers, participated in the negotiations on 22.2.1995. As there was keen competition,

the consortium of creditors led by KSIIDC (consisting of KSIIDC, KSFC, Corporation Bank and State Bank of Mysore) arranged for an open bidding. Petitioner was the highest bidder at such open bidding with an offer of Rs. 305 lakhs. The petitioner gave a letter dated 23.2.1995 (Annexure-B) setting out the terms of its offer and seeking confirmation of acceptance from KSIIDC. The terms offered are extracted below :

"1. We agree to take over the entire as sets of land, building and Machinery belonging to Ramgopal Paper Mills at a consolidated lumpsum price of Rs. 305 lakhs.

2. We further agree to settle the dues of Karnataka State Electricity Board and wages for the employees of the unit on mutual discussions and settlement with the KSEB and also the employees.

3. No other liability is to be on our account.

4. We further agree to pay 10% of the total value within 10 days of getting the confirmed letter from you and balance amount within three months as one time settlement.

5. We may be permitted to take over the Company in our name or in the name of any of our Group Companies or in a separate name."

3. KSIIDC sent a reply dated 26.4.1994 (Annexure-C) stating that it was pleased consider petitioner"s offer favourably subject to the following stipulations and seeking petitioner"s acceptance for such conditions :

"1. The as sets are being sold on "as is where is" basis.

2. The total sale consideration for the as sets of the Company (land, buildings, plant and machinery and other equipment to the extent secured to the institutions) shall be Rs. 305 lacs (Rupees Three Hundred and Five lacs only) payable within a period of 3 months before taking possession of the as sets.

3. The above sale consideration is exclusive of the liabilities of the Company to KEB, PF etc. which should be borne by the purchaser.

4. The purchaser should clear the labour dues, after negotiation with the labour association.

5. The as sets should be utilised to restart the paper mill operations.

6. The purchaser should comply with all legal formalities to the satisfaction of the Corporation.

7. The sale of as sets is subject to obtaining statutory clearances, wherever applicable.

8. The cost of stamp duty/registration etc. should be borne by the purchaser."

4. The petitioner, sent a rejoinder dated 17.5.1995 (Annexure-D) stating that it

would like to confirm its acceptance of the conditions stipulated by the Corporation subject however to the following three conditions :

"1. That the actual liabilities for KEB, PF, Labour dues etc. were indicated to us during the discussions at the maximum about Rs. 40.00 lakhs. We need a confirmation to this effect.

2. At the time of bidding and making the offer, it was made known to us that sufficient quantity of underground water shall be available through 7 nos. of bore wells for the paper mill operations. On checking with the records available in Irrigation and Revenue Departments at Mysore, we understand that all the bore wells and boiler for the plant Is situated outside the SF Nos. of land allotted for the paper mill as mentioned in the auction notice. We need a clarification on this point and preferably a joint meeting with all details.

3. In case, we find it difficult to run the mill in the existing premises for any reasons, we should be allowed to shift the movable as sets of the company to a place convenient to us.

5. In the meanwhile, as KSIIDC had stated at the meeting on 22.2.1995 that the highest bidder had to deposit 10% of the offer amount within 10 days, to enable it to process the sale offer, the petitioner had paid a sum of Rs. 29.5 lakhs in March 1995, in addition to Rs. 1 lakh paid as EMD, to makeup Rs. 30.5 lakhs being 10% of Rs. 305 Lakhs offered as sale price, even though there was no concluded contract for sale.

6. As there was no reply to petitioner's letter dated 17.5.1995 seeking confirmation that the dues to KEB, PF and Labour will not exceed Rs. 40 lakhs and about the situation of borewells etc., petitioner withdrew its. offer and sought refund of Rs. 30.5 lakhs, by letter dated 25.10.1995 (Annexure-E), the relevant portions of which are extracted below:

"you have in your letter dated 26.4.1995 indicated that the price is exclusive of the liabilities of the company due to Karnataka Electricity Board and the workers. But these liabilities have not been quantified. Subsequently we were informed that the liabilities of KSEB and workers claim would be a maximum of Rs. 40 lakhs. Therefore, we wrote a letter on 17.5.1995 requesting you to confirm the actual liability due. You never quantified the liabilities due, Neither did you inform us that there was litigation with regard to the worker's claim.

Subsequently we were surprised to be served with summons in writ petition 5405 of 1995 from the High Court of Karnataka initiated by the workers wherein the workers have sought issue of writ of mandamus to direct you to make provisions for the entire wages, P.P., etc. due to them and for an interim order to direct you not to finalise sale of property.

It is thus apparent that the workers are not amenable for any discussions and their claims cannot be settled easily or amicably. In view of the litigations, the transaction will not materialise. The workers are not likely to co-operate for take

over of the unit. We feel aggrieved by the procedure adopted by you for the following reasons ;

a) The liabilities and other claims have been uncertain and litigation in respect of the take over was not thought of initially. When quotations were called, nothing was mentioned about the other liabilities to be discharged. Therefore, we were not in a position to indicate the actual price.

b) The factory had water supply when the tenderers were allowed inspection. But we find that five of the borewells of the company are located outside the Company's land.

c) The boiler without which the paper mill cannot operate is also situated in the adjacent private land."

7. KSIIDC sent a reply dated 30.11.1995 (Annexure-F) stating that petitioner had accepted the offer of KSIIDC for sale of the fixed assets of Ramgopal Paper Mills Ltd., for a total sale consideration of Rs. 305 lakhs subject to the terms and conditions laid down in the negotiation meeting held on 22.2.1995 and the subsequent letter dated 22.2.1995, by making payment of 10% of the bid amount in March 1995; and the petitioner was liable to pay balance of Rs. 274.5 lakhs within three months from 26.4.1995; and the petitioner did not make the said payment and as the sale was on "as is where is" basis and as petitioner was not willing to proceed with the matter and had not complied with the terms of sale, the initial deposit made by the petitioner was forfeited. Petitioner thereafter sent a notice dated 27.12.1995 demanding payment of Rs. 30.5 lakhs. It was not paid.

8. KSIIDC issued a fresh public notice dated 17.1.1996 (Annexure-H) for sale of the said unit without settling the claim of the petitioner and without disclosing the liabilities.

9. Petitioner contends that there was no concluded contract at all and therefore neither breach nor forfeiture does not arise. Hence petitioner has filed this petition (i) for quashing of the letter dated 30.11.1995 (Annexure-F) and seeking a direction to KSIIDC to refund the 10% deposit amount of Rs.30,50,000/- together with interest at 18% from 1.3.1995 till date; and (ii) to quash the fresh tender notification dated 17.1.1996 (Annexure-H) and declare the same as null and void.

10. Sri Ashok B. Hinchigeri, learned Counsel for KSIIDC, submitted that as the matter related to a contract and involves determination of questions as to whether there was breach of contract, this Court should not entertain the writ petition and determine questions of fact; and the petitioner's remedy, if it is aggrieved by the forfeiture, is by way of suit. KSIIDC has also produced the record of the proceedings of the joint negotiation meeting held on 22.2.1995 as Annexure-R1.

11. It is no doubt true that this Court in its Writ jurisdiction will not entertain

petitions requiring determination of questions relating to performance of contracts and breach of contracts; but if the matter related to the formation of the contract and the petitioner is able to demonstrate unreasonableness or arbitrariness in the action of the authority concerned, this Court can certainly interfere. Reference may be made to the following observations of the Supreme Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, .

"There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases, the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional, contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions."

Further there is a difference between Writ Petitions involving determination of questions of facts and Writ Petitions involving determination of disputed questions of fact requiring oral evidence. Jurisdiction under Article 226 will not normally be exercised in regard to the second type of cases; but there is no impediment to entertain and decide the first type of cases on the basis of undisputed facts or facts which can be gathered from the undisputed documents produced by the parties. Let me test the action of KSIIDC in the light of the aforesaid principles and the undisputed facts.

12. The "E.M.D" specified in the public notice was Rs.1 lakh. The Corporation made it clear as its meeting dated 22.2.1995 (vide Annexure-R1 produced by KSIIDC said to be the record of proceedings of the joint meeting) that 10% of the highest offer should be deposited within ten days to enable further processing of the sale offer. In other words, 10% of the offer amount was required to be paid not as an advance on acceptance of the offer and formation of a contract, but as a condition for considering the offer, that is to show the earnestness of the offerer, in regard to its offer. The payment of Rs. 29.5 lakhs was made by the petitioner in March 1995, long before KSIIDC wrote the letter

dated 26.4.1994 stipulating the terms of the sale. Thus, it is evident that payment of 10% of the offer was not paid as part of the consideration towards a concluded contract, but was paid as a deposit to enable KSIIDC to process the offer made by the petitioner.

13. The contention of KSIIDC that the 10% of the bid amount paid by the petitioner is forfeited, rests on three assumptions :

- a) There was a concluded and binding contract between KSIIDC and petitioner regarding the assets of Ramgopal Paper Mills;
- b) Ten percent of Bid amount was paid as earnest money deposit for performance of such a concluded and binding contract.
- c) An amount paid as earnest money could be forfeited even in the absence of a provision for forfeiture.

If the said three assumptions are correct, then the action of KSIIDC is not open to question in a writ proceedings; and the petitioner will have to seek its remedy in a suit, where the further question whether there was any breach of contract will have to be examined. If on the other hand, the aforesaid three assumptions are without basis, the action of KSIIDC will be arbitrary, unreasonable and unfair.

14. It is a fundamental principle of contracts that there cannot be a concluded and binding contract unless there is an offer and acceptance. A conditional acceptance of an offer is not an acceptance, but merely a counter-offer. In that event, unless there is an acceptance of the "acceptance (counter-offer)" by the party who first made the offer, there is no contract. In other words unless there is consensus ad idem, there is no contract.

15. In this case the offer by the petitioner is by letter dated 23.2.1995 (Annexure-B). Even assuming that the offer was made on 22.2.1995 at the negotiation meeting, there was no "acceptance" till 26.4.1995. The Record of proceedings dated 22.2.1995 (produced as Annexure-R1 by KSIIDC) shows that there was no acceptance on 22.2.1995. It records that the offer will be processed only on payment of 10% of highest offer amount. Further, the consortium of creditors led by KSIIDC gave the borrower (Ramgopal Paper Mills Ltd.) a final opportunity to avoid sale of its unit as is evident from the following last portion of the proceedings:

"As a final opportunity, it was indicated to Sri Ramarathnam (Managing Director of Ramgopal Paper Mills Ltd.) that he should arrange to deposit Rs. 50 lakhs, latest by 6.3.1995, to take up processing his request, failing which the sale in favour of the highest bidder may be processed."

It is thus evident that KSIIDC proposed to consider and process petitioner's offer for acceptance, only if the borrower company whose assets were the subject matter of the sale, did not pay Rs. 50 lakhs by 6.3.1996. By then, petitioner gave its offer dated 23.2.1995. The reply dated 26.4.1995 of KSIIDC shows that

there was no unconditional acceptance, but there was an acceptance subject to stipulations requiring acceptance by petitioner. Thus the letter dated 26.4.1996 was only a counter offer. The rejoinder dated 17.5.1995 from petitioner shows that it did not agree to the conditions/ stipulations mentioned in KSIIDC's letter dated 26.4.1995, but sought to accept the counter-offer, subject to certain conditions. There was no reply from KSIIDC to petitioner's letter dated 17.5.1995. Thus, there was no offer and acceptance in the eye of law and, therefore, petitioner could withdraw the offer, as it did, by letter dated 25.10.1995. In the absence of a commitment from petitioner to keep the offer open for a particular period, the petitioner, as offerer, is entitled to withdraw the offer, before acceptance. Hence, there was no contract between the parties and the stand of KSIIDC in its letter dated 30.11.1995 that there was a concluded and binding contract is without basis.

16. An "earnest money deposit" is something paid at the time of the bargain to show that negotiation had been changed into a binding contract and as a security for its due performance by the depositor, to be forfeited in case of non-performance by his default. In regard to earnest money deposits sought from tenderers along with their offers, the deposit is to merely ensure that the offer is kept open for a stipulated period to enable the other party to accept the offer. An "earnest money deposit" paid towards a concluded and binding contract cannot be equated to an "earnest money deposit" paid by offerer before acceptance. In either case, the "earnest money deposit" cannot be subjected to forfeiture, in the absence of an express provision in the contract or in the conditions relating to invitation of Tenders, as the case may be, providing for forfeiture. In this case Rs. 1 lakh was paid as earnest money deposit, for processing and consideration of the offer, and Rs. 29.5 lakhs as deposit to enable KSIIDC to process petitioner's offer. Neither of the amounts was paid as earnest for performance of any contractual obligations. Nor is there any provision for forfeiture of such amounts.

17. Hence there is no basis for any of the three assumptions made by KSIIDC and consequently its action relating to forfeiture of Rs. 30.5 lakhs paid by petitioner has to be held to be arbitrary, unreasonable and unfair. If an offerer is required to pay a particular amount as a condition for processing or considering the offer and subsequently if there is no agreement between the parties, the said amount has to be refunded.

18. Learned Counsel for KSIIDC relied on the following portion of the letter dated 25.10.1995 (Annexure-E) from petitioner to contend that there was a concluded contract between KSIIDC and Petitioner:

"As required by you, we remitted Rs. 30,50,000/- being 10% of the sale consideration offered. In pursuance of your tender, the offer made by us on 23.2.1995 was a conditional offer. We had agreed to take over the industry for a consolidated lumpsum price Rs. 305 lakhs provided there was no further liability to our account. We had further indicated that the dues of KSEB and workers

could be settled on mutual discussions."

A careful reading of the said paragraph will show that there is nothing to support the contention of KSIIDC that there was a concluded contract. On the other hand a reading of the said letter shows that petitioner proceeded on the basis that there was no concluded contract, as its offer was never accepted.

19. KSIIDC next contended that on account of withdrawal of the offer by the petitioner, it was put to financial loss. In the absence of an acceptance by KSIIDC, of the conditions of offer, the question of financial loss has no relevance. The only question is, in the absence of a concluded contract, whether a payment made as a condition for consideration of the offer could be said to be forfeited for non-performance. That question is clearly answered in favour of the petitioner.

20. In view of the forgoing, the petition is allowed in part and Second Respondent Corporation is directed to refund the said 10% payment (Rs. 30,50,000/-) to the petitioner, within three months from this date.

21. Petitioner is not however entitled to interest in the absence of any contract between parties to pay interest on the deposit. Further there is no demand for interest in Annexure-E dated 25.10.1995. Even the notice dated 27.12.1995 (Annexure-G) does not specify the rate of interest or from what date interest is demanded. On the facts and circumstances, question of grant of interest in a writ proceedings does not arise.