

(2011) 03 GUJ CK 0043

In the Gujarat High Court

Case No : Special Civil Application No. 12867 of 2007

Jayant Shantilal Sanghvi and Others

APPELLANT

Vs

Vadodara Municipal Corpn. and Another

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21

Contract Act, 1872 — Section 7

Transfer of Property Act, 1882 — Section 108

Citation : AIR 2011 Guj 122

Hon'ble Judges : K.A. Puj, J;D.H. Waghela, J

Bench : Division Bench

Advocate : Shalin N. Mehta, for the Appellant; Pranav G. Desai, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—Since common issue is involved in both these petitions, the same are heard together and are being disposed of by this common judgment and order.

2. Special Civil Application No. 10105 of 2007 is filed by the petitioner, namely, Star Infrastructure requesting this Court to allow the petitioner to rescind and repudiate its original contract with the Corporation concerning the sale to it of Final Plot Nos. 98 & 162 by holding that the Corporation has unilaterally altered the original terms of the auction sale vide order dated 23.03.2007, and that has resulted in a material variation of the original auction terms. The petitioner has also prayed for the direction to the Corporation to refund the Earnest Money Deposit (EMD) of a sum of Rs. 10 Lacs given by the petitioner on 07.02.2007 to the respondent Corporation. The petitioner has further prayed for the direction commanding the Corporation not to forfeit the EMD of a sum of Rs. 10 Lacs deposited by the petitioner with the respondent Corporation. The petitioner has further made alternative prayer for quashing and setting aside the impugned

condition requiring the petitioner to pay premium of an amount equal to 20% of the sale price of the Final Plot in case of a further sale, which is inserted/added by the respondent Corporation after the auction held and conducted on 08.02.2007. Lastly, the petitioner has prayed for the declaration from this Court that the auction of the respondent Corporation of inserting / adding the impugned condition as being inconsistent and incompatible with the provisions of the Indian Contract Act, 1872, is violative of constitutional provisions like Articles 14, 19 & 21 of the Constitution of India and illegal and null and void.

3. Special Civil Application No. 12867 of 2007 is filed by Triveni Developers making more or less similar prayers as that of the petitioner in Special Civil Application No. 10105 of 2007, in connection with the Final Plot Nos. 24, 142 & 143. Over and above the said prayers, the petitioner has also prayed for the direction to the respondent Corporation to refund 10% of the initial payment made for Final Plot Nos. 24, 142 and 143 aggregating to a sum of Rs. 1,70,75,500/-.

4. In Special Civil Application No. 10105 of 2007, notice was issued by this Court on 16.04.2007. On 12.06.2007, this Court passed order directing the respondents not to forfeit the EMD. On 10.12.2007, the petition was admitted and the stay granted against forfeiture of the EMD was continued with a clarification that in the meantime, the petitioner would make a representation to the respondents for refund of the EMD within one week from the date of the said order and the respondents would thereafter decide the representation by 31.01.2008. The Court has also made it clear that the petition was now confining to the prayer for refund of the EMD and the petitioner would not claim any right in respect of the land in question.

5. Similarly, in Special Civil Application No. 12867 of 2007, notice was issued on 10.05.2007 and ad-interim relief was granted in terms of paragraph 7 (E). It was ordered to be heard along with Special Civil Application No. 10105 of 2007. This petition is also admitted on 10.12.2007 and Court has passed detailed order directing the respondent Corporation to refund the amount of Rs. 1,70,75,500/- to the petitioner within one week from the date of the said order and with regard to the EMD of Rs. 10 Lacs, the petitioner was directed to make a representation to the respondent Corporation on the same line as indicated in the order passed in Special Civil Application No. 10105 of 2007. The Court has also made it clear that the petition was confining to the prayer for refund of EMD of Rs. 10 Lacs and for the interest on the amount of Rs. 1,70,75,500/- for the period from 13.02.2007 till the date of refund.

6. Pursuant to the aforesaid order, the petitioners made representation on 17.12.2007 which came to be rejected by the respondent Corporation on 21.02.2008. Both the petitions have thereafter come up for hearing on 19.01.2011 and after hearing the parties to some extent, the Court has passed a common order on that day observing therein that in order to take last chance for an amicable and reasonable settlement, the petitioners have agreed to make,

within two days, a concise and precise representation clearly stating their claim and the amounts proposed to be waived in consideration of immediate payment and end of the litigation; and it is agreed on behalf of the respondent that such representation shall be duly considered and decided in writing by the Commissioner of respondent-Corporation within a period of ten days of receipt of the representation, without being influenced by the earlier decision and proceedings.

7. Pursuant to the said order, the petitioners again made representation on 21.01.2011 which came to be rejected by the Commissioner vide his order dated 08.02.2011 which is placed on record by the respondent Corporation along with affidavit filed on 10.02.2011.

8. In the above background of the matter, both these petitions are heard at length. Mr. Shalin Mehta, learned advocate appearing for the petitioners in both these petitions has made the following submissions for their prayer of refund of EMD with interest @ 9% p.a. from 08.02.2007 till the date of payment. Mr. Mehta has, however, waived on instruction, the claim regarding interest on Rs. 1,70,75,500/- for the period from 13.2.2007 to 21.2.2008.

i. A material alteration in terms and conditions of the auction sale cannot be done without consent of the bidder. In the present case, the respondent Corporation has imposed additional conditions over and above the original terms and conditions of the auction sale by order dated 23.03.2007 without consent of the petitioners.

ii. 20% premium condition never existed before the auction sale held on 08.02.2007. It also did not find any mention in the original terms and conditions of the auction sale supplied to the petitioner. A condition that did not exist at the time the auction sale was held cannot be incorporated subsequently without notice to the bidder. In other words, such imposition of a new condition cannot be unilateral. Otherwise, it would be contrary to the basic notions of fair play and good faith. The respondent Corporation has unilaterally incorporated the 20% premium condition to form a part of the original terms and conditions of the auction sale by order dated 23.03.2007. This is absolutely contrary to all notions of fair play and good faith.

iii. u/s 7 of the Indian Contract Act, 1872, acceptance of an offer must be absolute and unqualified. A conditional acceptance is no acceptance at all. The petitioners' offer of price for the plots was governed by the original terms and conditions of the auction sale. This offer of the petitioners was required to be accepted or rejected by the respondent Corporation under the same terms and conditions of the auction sale. However, the respondent Corporation's acceptance by order dated 23.03.2007 is a conditional acceptance inasmuch as totally new condition which does not form part of the original terms and conditions of the auction sale, was inserted. This makes the respondent Corporation's acceptance conditional acceptance and, therefore, no acceptance u/

s 7 of the Indian Contract Act, 1872. In support of this submission, reliance is placed on the decision of the Orissa High Court in the case of Vishwa Industrial Company Pvt. Ltd. Vs. Mahanadi Coalfields Ltd. and Others,

iv Unilateral variation by Vadodara Municipal Corporation of the original terms and conditions of the auction sale is arbitrary and capricious and violative of Article 14 of the Constitution of India. If the petitioner had been informed in advance of the 20% premium condition, he would have never made any bid. The 20% premium condition is a fundamental variation as it creates additional liabilities and obligations on the petitioners. u/s 108 (j) of the Transfer of Property Act, 1882, a right of further transfer to a sub-lessee in absence of a written contract to the contrary is recognized. Thus, under the terms and conditions of the auction sale, the petitioner had a right u/s 108 (j) to effect a further transfer without any condition of qualification. However, the 20% premium condition imposed unilaterally by the respondent Corporation takes away or appropriates the petitioners' statutory right u/s 108 (j) to effect a further transfer of the property without any condition or qualification. Severe prejudice is caused to the petitioners.

v. The petitioners are entitled to withdraw its offer as the 20% premium condition imposed unilaterally by the respondent Corporation amounts to a counter-offer, and which counter-offer, is not accepted by the petitioners.

vi. The respondent Corporation's contention that 20% premium condition is binding on the petitioners as the same was made known to the bidders orally on the day of the auction, is not required to be taken into consideration, for the simple reason that once the contractual terms are reduced in writing, no oral evidence can be adduced to prove that a term that is not reduced to writing did form a part of the contract. The respondent Corporation is, therefore, wrong in contending that since the 20% premium condition was made known orally to the bidders at the time of auction, it now forms part of the original terms and conditions of the auction sale.

vii. The respondent Corporation is an agency and instrumentality of the State. It is bound by Part-III of the Constitution of India. Fairness and reasonableness must pervade all actions that the respondent corporation takes. The conduct of the respondent Corporation of forcing 20% premium condition upon the innocent bidders without a proper, full and fair disclosure strikes at fairness and reasonableness.

9. In support of the above submissions, Mr. Mehta relied on the decision of the Apex Court in the case of Polymat India P. Ltd. and Another Vs. National Insurance Co. Ltd. and Others, wherein it is held that when terms of contract have been reduced to writing, it cannot be changed without mutual agreements of both the parties.

10. He further relied on the decision of the Apex Court in the case of Delhi Development Authority, N.D. and Another Vs. Joint Action Committee, Allottee of

SFS Flats and Others, wherein it is held that a party to the contract cannot at a later stage, while a contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even a subject-matter of the public notice. Moreover, when a contract has been worked out a fresh liability cannot be thrust upon a contracting party. Any such act is impermissible in the eye of law.

11. He further relied on the decision of the Patna High Court in the case of Scorpion Express Pvt. Ltd. Vs. The Union of India (UOI) and Others wherein it is held that unilateral action of one contracting party to the prejudice of other party is not only dehors contractual obligation, but is also contrary to the specific provision of contract itself. Such action was held to be arbitrary and violative of Article 14 of the Constitution of India.

12. Lastly, Mr. Mehta relied on the decision of the Apex Court in the case of Syed Israr Masood v. State of Madhya Pradesh, AIR 1981 SC 2010 wherein it is held that when the State Government has substantially altered the contract, it was open to the plaintiff to repudiate the contract and claim a refund of the first instalment of sale price.

13. Based on the above facts and circumstances of the case and the decided case law on the subject, Mr. Mehta has strongly urged that the respondent Corporation be directed to refund the EMD with interest @ 9% p.a.forthwith.

14. Mr. Pranav G. Desai, learned advocate appearing for the respondent Corporation, on the other hand and while opposing the petitions, has submitted that there is no change of condition as alleged by the petitioners. The respondent Corporation has not inserted any new condition in the auction terms. From the averments and documents furnished by the petitioners along with the petitions, it is very clear that the condition was already there much prior to the auction by resolution passed by the Standing Committee of the respondent Corporation. He further submitted that the petitioners were aware about this condition at the time of auction which was conveyed to all the participants for all the plots as can be seen from the affidavit filed on behalf of the respondent Corporation as well as the reasoned order passed by the Commissioner of the respondent Corporation along with the affidavit filed on 10.02.2011. He further submitted that the auction is held on 08.02.2007 and prior to the auction, public advertisement as well as the newspaper report was given in the leading vernacular newspaper in the city of Vadodara dated 17.01.2007 regarding condition of 20% premium in the event of sublease of the property. The auction was held on 08.02.2007. Information was given much prior to the date of auction and the petitioners wrote letters on 13.02.2007 i.e. within 5 days from the date of auction. The petitioners' correspondence referred to in the petitions are vague and uncertain about the exact date on which the alleged information came to the knowledge of the petitioners. He further submitted that the petitioners were aware about the newspaper information of 17.01.2007 as well as about the said

condition. There was a newspaper report of the same date of 17.01.2007 which clearly indicates the said condition. Thus, it can certainly be proved that the petitioners were aware about the said condition even prior to the date of publication as well as from the date of public auction. He has, therefore, submitted that the decision of the respondent Corporation produced on the record of this Court is just, legal, proper and in public interest and for non-payment of the auction bid price and/ or failure to fulfill the terms and conditions of the auction terms, the respondent Corporation is justified in forfeiting the EMD and the same is in consonance with the terms and conditions of the auction. He further submitted that the condition to levy 20% non-refundable premium in the case of further sublease is in public interest and the respondent Corporation is justified in forfeiting the amount of EMD. He further submitted that the petitioners' claim for refund of EMD along with interest is not tenable in law. Even as per the interim order, the petitions were kept pending only for consideration of refund of EMD and nothing is indicated in the said order to consider the issue regarding interest on the EMD. The relief prayed for by the petitioners in these two petitions is also in respect of the refund of the EMD and there is no prayer with regard to claim of any interest amount.

15. Mr. Desai further submitted that 20% premium in case of sub-lease cannot be made ground for non-payment of tender amount as per the tender terms and conditions. The petitioners cannot take shelter of the same for the purpose of non-payment of the agreed tender price as per the tender terms and conditions. If the petitioners could convince and establish their case concerning the said condition, the same can be agitated so far as execution of sale deed in pursuance of full payment of tender amount is concerned, but shelter of the same cannot be taken for the purpose of non-fulfillment of the terms and conditions of the tender and, therefore, the respondent Corporation is justified in not refunding the EMD. He has, therefore, submitted that the action of the respondent Corporation is just, legal and proper and in public interest and the petitioners are not entitled to the relief of refund of EMD as well as the interest on such EMD, in view of the fact that the condition was not introduced subsequently and it was well within the knowledge of the petitioners. The said condition was widely published. It was imposed much prior to the auction date and the petitioners were aware about this condition which is made abundantly clear while perusing the documents furnished along with the petitions. He has, therefore, submitted that both the petitions deserve to be dismissed.

16. Having heard learned counsel appearing for the parties and having considered their rival submissions in light of the facts and circumstances of the case and terms and conditions of the tender-original as well as revised, the Court is of the view that the respondent Corporation is not justified in withholding the amount of earnest money deposited by the petitioners and the said amount is liable to be refunded with interest. At the out set, the Court makes it clear that the amount of Rs. 1,70,75,500/- paid by the petitioner of Special Civil Application No. 12867 of 2007 being first instalment is already refunded to the

petitioner pursuant to an interim order passed by this Court on 10.12.2007. Mr. Shalin Mehta, learned advocate appearing for the petitioner has waived the claim of interest on this amount and hence the Court is not concerned with this point. The Court is, therefore, concerned only with the refund of EMD with or without interest and, if any interest is to be awarded, at what rate. It is borne out from the fact that only after accepting the tender of the petitioners they were communicated that any further sale of final plots by them would invite payment of premium of an amount equivalent to 20% of sale value of the respective plot. Such a condition did not form part of public advertisement which was issued by the respondent Corporation on 13.1.2007, published in the vernacular newspaper known as "Gujarat Samachar" on 14.1.2007. Such a condition also did not form part of the 21 terms and conditions of the auction sale. It is the case of the petitioners that they were never made aware of this condition of payment of premium equivalent to an amount of 20% of the sale value of the plot in case of a further sale, till the auction was held, conducted and concluded by the respondent Corporation. As against this the case of the respondent Corporation is that, the auction in question was for lease of the concerned final plot for a period of 99 years and not for sale of the plots or sale of the plots on lease basis. The condition No. 16(a) inserted vide order dated 23.3.2007 requires the petitioners to pay premium of an amount equivalent to 20% of the amount of bid of the petitioners, in case they decide to sublease the said final plots. It is also the case of the respondent that neither the said condition amounts to materially altering the original terms given to the bidders prior to the auction, nor does it amount to novation as alleged by the petitioners. According to the respondent Corporation this condition would only come into existence in contingency, if the petitioners were to sub-lease the property at a later stage. It is also their case that it is not after the auction, but was prior to auction that the concerned officers of the Corporation had informed all the bidders regarding such a condition. The stand of the respondent Corporation is that in past when the Corporation had conducted auctions to lease out plots, very few parties participated because of the reason that the Corporation did not permit the successful bidders to further lease the said plots. The Corporation, vide a proposal dated 14.11.2006 by the Municipal Commissioner to the Secretary of the Corporation had, inter alia, proposed to permit lease-holder to further sub-lease the property on payment of premium amounting to 20% of the value deposited by the party with the Corporation. This proposal came to be adopted by way of Resolution dated 23.11.2006 by the Standing Committee of the respondent Corporation, whereby it was decided to permit the lease-holder to sub-lease the property on payment of premium equivalent to 20% of the amount deposited with the Corporation. The said Resolution by the Standing Committee of the respondent Corporation came to be approved by the general body of the respondent Corporation vide Resolution dated 2.1.2007. The said change brought about had also been reported in vernacular various newspapers. It is also the stand of the respondent Corporation that the petitioners could not claim to have been taken by surprise nor could they claim that such a condition is alien to the whole process.

17. The above contentions of the respondent Corporation were taken into consideration even while passing interim order on 10.12.2007 and the Court observed that even as per Municipal Corporation, though the Resolution was passed for imposing 20% premium upon sub-lease of the land in question as far back on 23.11.2006 by the Standing Committee, the same was neither incorporated in the terms and conditions of the public auction issued in February, 2007 nor was it contained in any written communication and hence the Court has granted interim relief to the extent of paying back the amount of the first instalment to the petitioner. This observation holds good even for the purpose of refunding the EMD to the petitioners. There is nothing on record which establishes that prior to the order dated 23.3.2007 the petitioners were ever informed in writing about the payment of premium of amount equivalent to 20% of the amount of bid in case the petitioners decide to sub-lease the final plots. The change effected subsequent to the acceptance of the tender would therefore certainly entitle the petitioners to repudiate the contract.

18. The Courts have taken the view in similar such circumstances that where the terms of contract have been reduced to writing, it cannot be changed without mutual agreement of both the parties. In *Delhi Development Authority and another v. Joint Action Committee* (supra) the Apex Court took the view that a party to the contract cannot at a later stage, while contract was being performed, impose terms and conditions which were not part of the offer. In *M/s. Scorpion Express Private Limited v. Union of India* (supra) the Patna High Court took the view that unilateral action of one contracting party to the prejudice of other party is not only dehors contractual obligation, but is also contrary to the specific provision of contract itself. In *Syed Israr Masood v. State of Madhya Pradesh* (supra) the Apex Court took the view that when the State Government has substantially altered the contract, it was open to the plaintiff to repudiate the contract and claim refund of the first installment of sale price.

19. In *Shah and Patel Construction Co. v. Baroda Municipal Corporation*, 2009 (1) GLH 663 : (AIR 2009 (NOC) 2163) (Guj), this Court took the view that the Municipal Commissioner while permitting change of conditions of auction had changed the basic condition of auction without putting other interested persons to notice and without prior approval of General Body. The Court, therefore, held that the action of the Municipal Commissioner is dehors the powers and is bad in law.

20. Considering the above facts and circumstances of the case and the legal position, the Court is of the view that the petitioners are entitled to get the refund of their EMD of Rs. 10 lacs with interest at the rate of 7.5% per annum from the date of withdrawal of their offer till the date of payment. The respondent Corporation is, therefore, directed to grant the refund of Rs.10 lacs being amount of EMD with interest at the rate of 7.5% per annum as against their claim of interest @ 9% per annum to each of the petitioners within one month from the date of receipt of the writ or from the date of receipt of certified

copy of this order, whichever is earlier, failing which the Corporation would be liable to pay interest at the rate of 9% p.a. for the subsequent period. The Court has awarded interest to the petitioners, keeping in mind the fact that the amount is lying with the respondent Corporation for more than four years, on which the Corporation, must have earned interest or it might have borrowed less amount to that extent. Even otherwise, some of the plots in relation to which the petitioners have repudiated the contract, were reaucted and the Corporation is stated to have received much higher amount. Thus, the Corporation has not suffered any monetary loss.

21. With these directions and observations, both these petitions are allowed and rule is made absolute to the aforesaid extent without any order as to costs.