

(2011) 07 KL CK 0062
In the High Court Of Kerala
Case No : W.A. No. 1322 of 1997

K.M. Basheer Moulavi and Others

APPELLANT

Vs

K.S.I.D.C.

RESPONDENT

Date of Decision : 05-07-2011

Acts Referred:

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

Citation : (2011) 3 KLJ 581

Hon'ble Judges : P.R. Ramachandra Menon, J;J. Chelameswar, J

Bench : Division Bench

Advocate : T.M. Abdul Latheef and P.S. Sajid, for the Appellant; Saji Varghese, for the Respondent

Final Decision : Dismissed

Judgement

J. Chelameswar, C.J.—This is an appeal against the judgment in O.P. No. 9348 of 1997 dated 01.07.1997, by the petitioner therein. The sole respondent is the Kerala State Industrial Development Corporation. The respondent "took over" certain properties of a private limited company known as "Salih Industrial Enterprises Pvt. Ltd". The property is popularly known as "Fort Manor" is located at Power House Road, Thiruvananthapuram. Such "take over" was made in exercise of the power conferred on the respondent u/s 29 of the State Finance Corporation Act obviously on the ground that the abovementioned Salih Industrial Enterprises defaulted in repayment of certain loans due to the respondent Corporation. Subsequent to the take over, the respondent put up the abovementioned property for sale by inviting tenders from interested parties and an advertisement (marked as Ext. P1 in the Original Petition) in this regard was Eventually the appellant became the successful bidder who published in the Indian Express Daily dated 28.02.1997. The tender notice in so far as it is relevant for the purpose of the present appeal reads as follows:

Details of the tender-cum-auction:

If interest, sealed tenders or a tender-cum-auction basis needs to be submitted to the undersigned on or before 15.00 Hrs on 15.04.1997 along with a Demand Draft for 006010 lakhs in a separate cover in the name of KSIDC payable at Trivandrum as Earnest Money Deposit The auction of the hotel will be conducted at 15.30 Hrs on 15.04.1997 in the office of KSIDC, Keston Road, Kowdiar, Trivandrum. Participants in the auction will have to provide a Demand Draft/Bank Guarantee of Rs. 10 lakhs as above. Immediately after the auction, the tender bids will be opened KSIDC reserves the right to accept or reject any tender/ auction bid without assigning any reason whatsoever,. The acceptance of the offer will be on the basis of the Tender-Cum-Auction. The selected bidder has to remit the full consideration within 45 days of confirmation of sale.

2. The appellant was one of the persons who responded to the abovementioned advertisement. He submitted a sealed tender along with two demand drafts drawn on the Canara Bank for a cumulative amount of Rs. 10 lakhs. Eventually the appellant became the successful bidder who offered Rs. 15 Crores for the property. The respondent vide a communication dated 13.04.1997(Ext.P5) informed the appellant that the offer of the appellant for Rs. 15 Crores for the purchase of the property in question was accepted. It further called upon the appellant to make the payment of the amount of Rs. 15 Crores in three instalments as indicated in the said communication. It is also indicated in the said communication that the amount of Rs. 10 lakhs already deposited would be adjusted towards the purchase price of the property. The communication reads as follows:

With reference to the Tender-cum-Auction conducted at the office of KSIDC, Trivandrum at 3.30 p.m. on 15.04.1997 and also with reference to your offer of an amount of Rs. 15 Crores (Rupees fifteen crores only) towards the consideration of the assets of Salih Industrial Enterprises (p) Ltd., we hereby accept your offer of Rs. 15 Crores for the purchase of the assets of Salih Industrial Enterprises (P) Ltd., taken over by KSIDC u/s 29 of the SFC's Act, situated in Sy. No. 2741/1,2,3,4 and 2742/A in Chenganassery Village, Trivandrum Taluk, Power House Road, Trivandrum in your favour subject to the following terms and conditions:

1. 1/3rd of the quoted amount, i.e., Rs. 5 Crores (Rupees Five Crores only) has to be paid by D/D in favour of KSIDC payable at Trivandrum within 7 days of receipt of this letter (ii) another 1/3rd of the quoted amount i.e. Rs. 5 Crores (Rupees Five Crores only) has to be paid by D/D within 30 days of receipt of this letter: and (iii) the balance amount, i.e. Rs. 4.90 Crores (Rupees Four Crores Ninety Lakhs only) has to be paid within 45 days of acceptance of this letter. (This is after adjusting the earnest money deposit of Rs. 10 Lakhs made by your along with the tender). If your fail to make the full payment of the consideration as mentioned above, the earnest money deposit of ?10 Lakhs will stand forfeited to KSIDC.

2. You will have to enter into a purchase Agreement with KSIDC in the prescribed

format and in the prescribed manner incorporating the terms and conditions for the purchase at the time of payment of 1st instalment.

3. The Hotel and the other assets of Salih Industrial Enterprises (P) Ltd., taken over by the KSIDC will be transferred to you in "as is where is condition" and the Corporation do not undertake any obligation to make any changes/modifications on the said assets.

4. The statutory dues, if any on the assets including the electricity charges, water charges, etc., will have to be paid by you.

5. On receipt of the final instalment, the assets taken over by KSIDC u/s 29 will be transferred in your favour and the necessary expenses for the documentation like Stamp Duties, registration charges, etc. are to be borne by you.

We request you to make the 1st instalment of payment, i.e. Rs. 5 Crores (Rupees five Crores only) within 7 days of receipt of this letter and enter into an Agreement with KSIDC in the format required, failing which the offer will stand cancelled, and the earnest money deposit by you shall stand forfeited to KSIDC and your will have no claim or right on the said assets and KSIDC shall have the full liberty and right to dispose of the assets to any other bidders without further notice to you.

3. Aggrieved by Clause (1) of Ext.P5 which called upon the appellant to make the payment in three instalments, the appellant approached this Court in O.P. No. 3438 of 1997 with prayers as follows:

i. to call for me records relating to Exts.P1 to P7 and to issue a writ of mandamus declaring that the condition laid down in Ext.P5 to remit 1/3rd of the quoted amount within 7 days failing which the offer will be cancelled and EMD will be forfeited and also to pay another 1/3rd on the 30th day etc. are illegal, unjust and contrary to auction condition and to cancel the same;

ii. to issue a writ of mandamus directing the respondent to confirm the sale in the name of the petitioner and to declare that respondent's right to cancel the auction sale arises only on the failure of the petitioner to pay the sale consideration on the 45th day of receipt of Ext.P5.

iii) to issue a writ of mandamus declaring that the respondent has no right to insist for part payments as stated in Ext.P5 and to cancel the sale in favour of the petitioner on the reason of failure to make part payments as stated in Ext.P5;

iv) to issue a writ of mandamus declaring that the respondent has no right to forfeit the entire money under deposit.

v) any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

4. The Original Petition itself was filed on 02.07.1997. However, it is averred in the Original Petition that though Ext.P5 is dated 30.04.1997 it was actually

delivered to the petitioner on 28.05.1997. Admittedly the said communication was dispatched to the appellant on an earlier date and the same was not received by the appellant. The appellant claims that he was out of station at the relevant point of time when the communication initially reached his address and therefore he could not receive it. But, on his return, the appellant wrote Ext.P4 letter to the respondent on 28.05.1997. The relevant portion of the same reads as follows:

Kindly refer to my letters quoted above with regard to the Tender cum Auction of Hotel Fort Manor, at Trivandrum. I understand that the Corporation has sent a reply letter in my favour. Since the letter was sent under registered post, the same could not be received by me in my absence as I was out of station for a short while. I request that the same may please be handed over to Sri. Sunil. S, whose signature is here with attested."

5. In other words, by the date the appellant received the communication (Ext.P5) of acceptance of the offer made by the appellant, there was a lapse of 27 days admittedly because of the reasons for which the respondent cannot be blamed.

6. On receipt of Ext.P5 communication, as already noticed, the appellant approached this Court. There was no interim order during the pendency of the matter and the Original Petition itself was disposed of by the judgment under appeal dated 01.07.1997, almost within a period of four weeks from the date of filing.

7. The question raised by the appellant whether the respondent Corporation was legally right in calling upon the appellant to remit the purchase price of 15 Crores in three instalments as against the stipulation in Ext.P1; ("the selected bidder has to remit the full consideration within 45 days of confirmation of sale.") is not answered by the judgment under appeal.

8. The learned Judge opined that the instalment facility offered in Ext.P5 is advantageous to the appellant and in the event the appellant does not wish to avail the advantage, he can make the entire amount in lump sum. The learned Judge also took note of the submission made on behalf of the appellant that the appellant needs some more time to remit the entire amount. The learned Judge also opined that the appellant cannot claim further time, as a matter of right. However, taking into account the facts and circumstances, the learned Judge granted time to the appellant to remit Rs. 15 Crores on or before 15.07.1997. The relevant portion of the judgment reads as follows:

The instalment facility provided in Ext.P5 is to the advantage of the petitioner. If the petitioner does not wish to avail of that advantage, he can remit it in lump sum. The petitioner submits that he wants sometime to remit the amount. The petitioner cannot take that stand because admittedly by the petitioner, Ext.P5 had been served on him on 28.05.1997. He does not want to avail of the instalment facility. Naturally, he has to remit the entire amount within seven days of the date of receipt of Ext.P5. That, the petitioner had not done. Anyhow, the

petitioner is given 15 days time i.e. until 15.07.97 to remit Rs. 15 Crores. That is beyond the final limit of 45 days mentioned in Ext.P5. If the petitioner fails to remit that amount, naturally he has to suffer the consequences. The petitioner submits that he may be given time till 31.07.1997. When the amount is not paid, in spite of the sale, the interest is accruing against the defaulter. After quoting a price and delaying payment, the petitioner cannot mulct the liability of interest on the defaulter. Therefore, if the petitioner wants more time until 31.07.97, necessarily, for the period from 16.07.97 to 31.07.97, the petitioner has to pay 18% interest on Rs. 15 Cores. With that condition time is granted till 31.07.97. With the above directions, O.P. 9438/97 is disposed of".

Hence the appeal.

9. The only submission made by the learned counsel for the appellant is that the condition indicated in Ext.P5 that, failure on the part of the appellant to make the payment as directed in Ext.P5 would entail the forfeiture of the deposit of Rs. 10 lakhs made by the appellant at the time of the submission of the tender, is illegal as such a stipulation came to be made subsequent to the deposit of the abovementioned amount of Rs. 10 lakhs, though Ext.P1 tender notice did not contain any such stipulation. The learned counsel also submitted that in view of the subsequent developments i.e., the respondent Corporation itself decided to offer a One Time Settlement to the original defaulter i.e., the Salih Industrial Enterprises Pvt. Ltd., forfeiting the amount deposited by the appellant would be unjust and inequitable.

10. In support of the submissions, the learned counsel for the appellant relied upon the following decisions in *Maula Bux Vs. Union of India (UOI)*, , *Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited*, , *State of Uttar Pradesh v. Kishori Lal Minocha*, (1980) SCC 680, *Muthu Mohammed Rawther v. Pathanamthitta Municipality*, 1991 (2) KLT 514 *Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others*, and *Ramgarh Cantonment Board and Another Vs. State of Jharkhand and Others*, .

11. Heard learned counsel for the respondent Sri. Saji Varghese who argued that at least from the date of Ext.P5 the amount of deposit acquired the character of earnest money. He further submitted that irrespective of the fact whether the amount of 10 Lakhs deposited by the appellant is a deposit of earnest money or not, the relief such as the one sought by the appellant cannot be granted for more than one reason. Firstly, there is no clear pleading or prayer in the Original Petition for a relief such as the one sought now in the appeal. Secondly, the conduct of the appellant does not justify indulgence of this Court in exercise of the discretionary jurisdiction under Article 226 of the Constitution of India.

12. Ext.P1 tender notice does not specify either the fact that the amount of Rs. 10 lakhs is to be treated as "earnest money" in the case of the successful bidder or the fact that the same would be appropriated towards the sale price of the property, nor the said amount would be forfeited in the event of the successful

bidder failing to fulfill his obligations arising out of a contract pursuant to his successful bid. It is for the first time in Ext.P5 the respondent categorises the abovementioned deposit as "earnest money deposit" and also indicates for the first time that the same shall stand "forfeited" in the event of the appellant not fulfilling his obligations to pay the purchase price of the property. As can be seen from Ext.P5, the respondent also indicated that the mere failure to pay the first instalment of Rs. 5 Crores within a period of 7 days of the receipt of the said Ext.P5 itself would entail cancellation of the offer made by the appellant and the earnest money deposit would stand forfeited to the respondent.

13. The legal concept of earnest money and the consequences of the failure on the part of a party to the contract who deposited the earnest money to fulfill the obligations arising under the contract fell for elaborate consideration of Supreme Court in AIR 1970 SC 1986(supra). The Supreme Court on a review of number of earlier authorities dealing with "earnest", (at paragraph 24) stated as follows:

24. From a review of the decisions cited above, the following principles emerge regarding "earnest":

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
- (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

14. None of the other judgments referred to by the appellant lay down any principle contrary to the one laid down by AIR 1970 SC 1986(supra). AIR 1970 SC 1986 deals with the case of performance guarantee, but not earnest money.

15. Coming to AIR 1980 SC 680, it was a case where the successful bidder in an excise auction in the State of U.P. failed to make deposit of the first instalment in accordance with the relevant rules. Therefore, the privilege was, put to auction again by the State. In the second auction, the best bid was less than the best bid in the first auction. Therefore, the State filed a suit for recovery of the differential amount from the successful bidder at the first auction. Though the trial court decreed the suit, it was reversed by the High Court in appeal and the same was confirmed by the Supreme Court holding that the State could not recover the differential amount. The right to make a recovery such as the one proposed by the State of U.P. was conferred u/s 77 of the U.P. Excise Act. The Supreme Court opined that such a right could not be enforced against the respondent therein on the ground that, on the facts of the case there was no concluded contract which enables the State to invoke Section 77 as there was no confirmation of the

original bid by the Chief Commissioner as required under the relevant rules. The question decided by the Supreme Court was entirely different and it has nothing to do with the earnest money.

16. 1991 (2) KLT 514 (supra) is relied upon by the counsel for the appellant in support of the submission that there is no concluded contract between the parties and therefore the question of deposit being treated as earnest money does not arise. It was held at paragraph 7 as follows:

7. A Division Bench of Madras High Court in *Somasundaram Pillai v. Provincial Government of Madras*, AIR 1947 Mad.366 held that for an enforceable contract there should be an offer and on unconditional acceptance, and a person who makes such an offer has the right to withdraw it before acceptance, in the absence of a condition to the contrary supported by consideration, he decision proceeded to hold that a provisional acceptance cannot make a binding contract. The court held:

A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfillment of the condition on which a provisional acceptance is based."

This decision was followed by a Division Bench of this Court in *State of Kerala v. A.R.A.S Arumughaswamy Nadar & Co.*, 1964 KLT 203. A Division Bench of the Patna High Court in *Abdul Rahim Khan Vs. Union of India (UOI) and Others*, also followed the decision in *Somasundaram Pillai's* case, AIR 1947 Mad.366 and held that one who bids at an auction thereby does not conclude a contract, but only makes an offer; and it is open for him to withdraw the offer before acceptance. The decision also held that where the auctioneer has full power to confirm the sale, the sale would be complete when the hammer falls. The Supreme Court in the decision in *Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram*, held that till the confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid.

There cannot be any dispute about the proposition of law laid down in the judgment. But on the facts of the case as we have already noticed, the respondent by Ext. P5 expressly stated that they accepted the offer of the appellant and the appellant never expressed any intention not to conclude the contract. On the other hand, at every stage he expressly made it clear that he wanted to purchase the property and the respondents be prohibited from rescinding the contract. His only objection was that he be permitted to pay the sale price in a lump sum within 45 days from the date of the confirmation of the sale but not in instalments. Therefore, it does not lie in the mouth of the appellant to say that there is no concluded contract.

17. In *Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others*, the dispute was regarding the purchase of immovable property. The question which fell for consideration before the Supreme Court was regarding the interpretation of certain clauses of the contract and whether the amount deposited by the

purchaser pursuant to the agreement of sale is to be treated as earnest money or not. At paragraph 14 of the judgment the Supreme Court held as follows:

14. The further aspect that requires to be noticed is as to the nature and character of earnest money deposit and in that context the distinguishing features, which help to delineate the differences, if any. The matter is not, at any rate, *res integra*. In (Kunwar) Chiranjit Singh v. Har Swarup it was held that the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. This statement of law had the approval of this Court in *Maula Bux v. Union of India*. Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as "a deposit or earnest money" may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part-payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

18. It can be seen from the above the Supreme Court opined that it is not the description by words used in the agreement alone that determines the character of deposit but the intention of the parties and the surrounding circumstances are also required to be examined in determining the nature and character of deposit in the context of a transaction or sale of a property. In the instant case as already mentioned, at least from the date of Exhibit P5, the respondent made its intention clear to treat the deposit made by the appellant as earnest money and the appellant never objected to the same.

19. Coming to the decision reported in (2008) 11 SCC 223(supra) relied upon by the appellant, appellant relied upon paragraph 27 of the said judgment. In our opinion, it does not lay down any principle of law. It was made clear therein that the directions contained in that judgment are made only on the "peculiar facts and circumstances of that case".

20. Now we apply the principles laid down by the Supreme Court in AIR 1970 SC 1986 (supra) to the facts of the instant case. The deposit of the amount of Rs. 10 lakhs was made initially in response to the condition laid down in the tender notification. At that stage, obviously, the amount being earnest money did not arise as there was no concluded contract. But after the appellant became the successful bidder offering to purchase the property for an amount of Rs. 15 Crores which bid was accepted by the respondent and acceptance communicated to the appellant by Ext.P5, the respondent clearly indicated therein that the amount of Rs. 10 lakhs deposited by the appellant would be treated as Earnest Money and the same would be adjusted towards the sale consideration payable by the appellant herein. It was also indicated in Ext.P5 that if the appellant failed to make the full payment of the consideration as mentioned above the earnest

money deposit of Rs. 10 lakhs will stand forfeited to the KSIDC. The appellant never protested against the said stipulation contained in Ext.P5. On 30.05.1997 the appellant communicated his willingness to proceed with the purchase of the property and requested " that the auction may be confirmed", if only he is permitted to make the payment of Rs. 5 Crores within a period of 45 days, but not in instalments as indicated in Ext.P5. The relevant portion of the communication (Ext.P7) reads as follows:

I have participated in the auction on the basis of your notification. At the time of auction and thereafter I was told that re-auction condition are as stated in the advertisement published in the newspaper. I have made all arrangements for paying the amount on confirmation of sale within the period of 45 days I am ready to pay the same within the period itself. But however as per your letter dtd.30.04.97 received by me on 28.05.97. It is stated that my tender is accepted subject to certain condition. Such conditions stated in your letter were not part of the auction conditions & unilateral change of conditions are also not contemplated. Hence I request that the auction may be confirmed in my name and I shall deposit the entire amount within 45 days as notified by you earlier. Your direction to deposit Rs. 5 Crores within days and another Rs. 5 Crores on the 30th day may be cancelled and I may be permitted to remit the amount within 45 days from the date of confirmation of sale."

21. On the other hand, as can be seen from the prayer in O.P. No. 9348 of 1997 (which is already extracted earlier), his grievance was against the other condition stipulated under Ext.P5 calling upon the appellant to make the payment of the amount of 15 Crores in three instalments the first of which was called upon to be paid within a period of 7 days from the date of the receipt of Ext.P5.

22. We may also notice that even before the learned Single Judge the petitioner never expressed his intention to rescind the contract. All that the petitioner prayed was for some more time to make the payment of the money. The relevant portion of the judgment is already extracted earlier, wherein the learned Judge categorically recorded that the petitioner wanted some more time to remit the amount and more specifically he pleaded for time till 31.07.1997.

23. By the judgment under appeal the learned Judge, taking the totality of the circumstances into consideration, did in fact grant time to the appellant for making the payment even beyond the period of 45 days originally stipulated in Ext.P1. The appellant did not even take advantage of the judgment and now turns back to say that the forfeiture of the amount deposited by him is unjust and inequitable, apart from being illegal.

24. We are of the opinion that at least from the date of Ext.P5 the amount acquired the character of "earnest money" and therefore there was nothing illegal in the decision of the respondent to forfeit the said amount, in view of the failure of the appellant to comply with the obligations arising under the contract.

25. Apart from that, the conduct of the appellant in not fulfilling the obligation

arising under the contract notwithstanding the fact that time was extended by this Court by the judgment under appeal to enable the appellant to make payment of the money, in our opinion, does not justify any interference with the judgment under appeal or granting of any consideration for the plea of refund of deposit of Rs. 10 lakhs on equitable considerations. The other submission that the subsequent conduct of the respondent in offering One Time Settlement to the original defaulter is only stated to be related. Because by the time of the said OTS offer, the appellant clearly failed to fulfill all the obligations under the contract and it was open to the respondent Corporation to deal with the property in such manner that it bona fide believes to be in the best interest of the Corporation, a public body.

In the circumstances we do not see any merits in the appeal. The appeal is dismissed. In view of the conclusion,