

(2005) 07 KL CK 0004
In the High Court Of Kerala
Case No : W.A. No. 1295 of 2005

Puravankara Projects Limited

APPELLANT

Vs

Hotel Venus International Ltd. and Others

RESPONDENT

Date of Decision : 20-07-2005

Acts Referred:

Contract Act, 1872 — Section 23
Kerala Land Reforms Act, 1963 — Section 81(3), 82, 83, 83(1), 85
Specific Relief Act, 1963 — Section 13
Urban Land (Ceiling and Regulation) Act, 1976 — Section 27

Citation : (2005) 07 KL CK 0004

Hon'ble Judges : Rajeev Gupta, C.J.; K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : K. Parasaran and V. Giri, for the Appellant; Kurian George Kannanthanam, for Respondent 1 and M. Ajay, Standing Counsel, G.I.D.A. for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—The legal impact of Section 81(3)(b) of the Kerala Land Reforms Act, 1963 on the underlying contract between the parties, is the question that has come up for consideration in these cases.

2. Government of Kerala by its order dated 27-7-2000 had accorded sanction for the Vypin Bridges Project to Goshree Islands Development Authority at a cost of Rs. 84 crores as a self financing scheme. Construction work including reclamation of 25 hectares of kayal land in Marine Drive was entrusted with the Cochin Port Trust and Goshree Islands Development Authority (for short G.I.D.A.) and G.I.D.A. will have to pay the cost of reclamation to Cochin Port Trust by selling the land reclaimed. State Government as per order dated 22-8-2001 had accorded sanction to assign 25 hectares of kayal puramboke land comprised in survey No. 843 of Ernakulam village to G.I.D.A. for Vypin Bridges Project subject to the rules governing assignment of land in Municipal Corporation area without realising the land value. Tripartite agreement between Cochin Port Trust, G.I.D.A.

and Government in the Local Self Government Department was executed on 21-4-2002. Clause 9 of the agreement provides for permitting G.I.D.A. to sell 25 hectares of reclaimed land in full or in part subject to prior approval of the Government regarding the extent and price of the land. Government later by its order dated 7-1-2003 accorded sanction to G.I.D.A. to sell in public auction 25 hectares of reclaimed land comprised in survey number 843 of Ernakulam Village in part or in full. G.I.D.A. on the basis of the sanction obtained from the Government had tendered reclaimed land previously on three times. Subject-matter of these cases is with regard to the fourth auction. Pre-bid meeting was also conducted on 1-9-2004 prior to the third public auction wherein Secretary, G.I.D.A. had pointed out that regarding holding of more than 15 acres of land by a single person, as per the provisions of the Land Ceiling Act Government is empowered to give exemption. Due to poor response third public auction did not materialise.

3. G.I.D.A. issued fourth global tender notice dated 10-1-2005. Notification invited sealed and competitive tenders for 5196 cents either in part or in full (four options available) at the northern extension of Marine Drive, Kochi with a waterfront stretch of 1.5 kms. Tender notification also stipulated that pre-bid meeting would be held at 3 p.m. on 10-2-2005 at Taj Residency, Marine Drive, Kochi. Pre-bid meeting was accordingly held on 10-2-2005 as scheduled. Rules and regulations of the tender and the different terms were explained by the Secretary, G.I.D.A. One of the queries raised at the pre-bid meeting was with regard to the general exemption to be obtained from the Government u/s 81(3) (b) of the Kerala Land Reforms Act and it was pointed out that the same would be obtained in a few days. Petitioner and others had participated in the pre-bid meeting. Later tender documents were received on payment of Rs. 10,000. Petitioner had submitted tenders in three different names.

4. Petitioner then submitted his tender with the deposit of an amount of Rs. 6.68 crores towards earnest money. General Council of G.I.D.A. later met on 28-2-2005 and opened the tenders. Petitioner was the highest bidder for all the plots except one. Petitioner's offer was accepted by the General Council, G.I.D.A. vide Ext. P-6 proceedings dated 28-2-2005. Ext. P-6 would indicate the details about the plots bid, name of the bidder and the rate quoted and the confirmation of the bids. Petitioner came to know about the decision from the news media and sent a letter to the Chief Minister, Chairman of G.I.D.A. to expedite the execution and registration of the sale deeds on or before 31-3-2005 so that the Petitioner could save the amount of Rs. 18 crores by way of stamp duty, since duty was to be revised from 1-4-2005. Petitioner then offered to pay the entire bid amount for the whole plot which would approximately come to Rs. 299 crores vide its letter dated 16-3-2005. Petitioner also addressed Secretary, G.I.D.A. vide letter dated 31-3-2005 for getting the order of exemption from the Government u/s 81(3)(b) of the K.L.R. Act, the relevant portion of the same is extracted below:

Before the tenders were submitted there was a pre-bid meeting on the 10th

February 2005 at Hotel Taj Residency, presided over by the District Collector, Ernakulam who is also the Secretary to G.I.D.A.

It was assured therein that exemption u/s 81(3)(b) of the Kerala Land Reforms Act would be obtained in a few days. This meeting was held on 10-2-2005. It was solely on this assurance that we had decided to participate in the tender.

Presuming that this exemption would come through before we are compelled to part with money, we had made arrangements with our Bankers to finance our project.

On enquiry it is learnt that the Government has not yet issued orders giving exemption from holding land in excess of the ceiling area, u/s 81(3)(b) of the K.L.R. Act.

If it is not ordered, I may not be in a position to legally hold this property, even for a day and the Banks have expressed their difficulties to finance us, as it is.

It is therefore prayed that immediate orders may be issued to exempt us from the provisions of the Land Reforms Act u/s 81(3)(b) thereof.

It is therefore prayed that the period of furnishing bank guarantee and payment of instalments, may be counted only from the date on which the Government, passes orders u/s 81(3)(b) of the Land Reforms Act and the same is communicated to us.

Another letter was sent on 20-4-2005 to address the Government for exemption and to communicate the same to the Petitioner. Petitioner did not get any communication from the first Respondent or the order of exemption from the Government. Instead, Petitioner received a letter dated 30-3-2005 on 23-4-2005 informing that the tender made by the Petitioner was confirmed and as per the terms and conditions, which form part of the tender, Petitioner has to produce two reputed Bank guarantees for 20% of the total bid amount within ten days from the date of receipt of the letter. Further, it was also stated that after remitting the bid amount sale deed would be registered and possession would be handed over to the Petitioner on payment of full value of the land. It was also informed that all expenses including stamp duty and registration fee for the execution and registration of the sale deed should be borne by the Petitioner. But nothing has been stated about the exemption notification, or restriction and condition to be imposed u/s 83(1)(b).

5. Petitioner had to furnish Bank guarantee for an amount of Rs. 118-16 crores before 3-5-2005. Petitioner then made a request to Union Bank of India for furnishing Bank guarantee. The Bank by their letter dated 26-4-2005 informed the Petitioner that the Bank is interested in financing the project but enquired whether Petitioner has received exemption notification under the Kerala Land Reforms Act.

6. Petitioner then received a letter from the G.I.D.A. dated 13-4-2005 on

29-4-2005 stating that G.I.D.A. had already taken steps to get the land exempted by the Government and the matter is pending finalisation with the Government. Further it was stated that the exemption is required only when the purchaser is put in actual possession of land on payment of full purchase value to G.I.D.A. Petitioner's request for furnishing the bank guarantee from the date of government order granting exemption from the K.L.R. Act was not accepted. Petitioner again wrote a letter on 30-4-2005 to the Secretary, G.I.D.A. stating that the bidders cannot hold or own the property unless the lands are exempted from the provisions of the K.L.R. Act and that by paying the first instalment or by furnishing the Bank guarantee for payment of money, the party is entering into an unenforceable agreement because of operation of law. Further it is also stated that the said aspect was discussed at the pre-bid meeting and the District Collector had assured that the land would be exempted from the purview of the K.L.R. Act within a few days. Though the meeting was held on 10-5-2005 no order of the Government exemption the land was forthcoming. Petitioner reiterated that the Bank guarantee would be furnished within ten days from the issuance of the order of exemption. Petitioner was later furnished with a draft copy of Bank guarantee. G.I.D.A. did not take any steps to get the land exempted by the Government before furnishing the copy of Bank guarantee.

7. Additional fifth Respondent in W.P. (C) No. 15032 of 2005, the second highest bidder, then filed W.P. (C) No. 13735 of 2005 for a declaration that the tender in relation to plots Nos. D3, D4 and D5 stands cancelled by operation of clause 10 of the tender conditions and opportunity be given to it to furnish Bank guarantee. When the writ petition came up for hearing on 16-5-2005 Standing Counsel for G.I.D.A. submitted before court that G.I.D.A. has rejected the offer of the Petitioner and the communication was produced as Ext. P-18. Petitioner then challenged Ext. P-18 order of cancellation by filing W.P. (C) No. 15032 of 2005. By Ext. P-18 series it is stated that the earnest money deposited by the Petitioner has been forfeited. Petitioner has then sought for a declaration that he is entitled to have ten days time for furnishing bank guarantee after the order is issued granting exemption u/s 81(3)(b) of the K.L.R. Act.

8. Detailed counter-affidavit has been filed on behalf of Respondents 1 and 2 stating that exemption from Kerala Land Reforms Act is required only at the time of transferring possession and executing and registering the sale deed. Further it is pointed out that the notification G.O. (P) 405/05 dated 20-5-2005 was issued granting exemption to the reclaimed land. Second highest bidder has filed W.P. (C) No. 13735 of 2005 for accepting his offer.

9. Learned Single Judge has considered all the rival contentions and noticed that the only dispute is when the exemption notification is to be made available, whether it should be at the time of furnishing Bank guarantee or at the time of execution of sale deed. Learned Single Judge noticed that the Petitioner is entitled to insist on exemption notification before he gives the Bank guarantee. Learned Judge also noticed that G.I.D.A. had promised to get exemption with a

few days from the pre-bid meeting. Even after many months no action has been taken by the G.I.D.A. to get exemption. Learned Judge noticed that the availability of exemption notification is an implied condition of the tender and the exemption is legally required for owning and holding the land in question. Learned Judge therefore allowed the writ petition and quashed Ext P-18 and directed to issue fresh confirmation letter and pro forma of Bank guarantee within seven days from the date of receipt of a copy of the judgment and the Petitioner was given ten days' time to furnish Bank guarantee as contemplated in the tender conditions. Writ Petition, W.P. (C) No. 15032 of 2005, was therefore allowed and W.P. (C) No. 13735 of 2005 was disposed off. Aggrieved by the same, these writ appeals have been preferred by additional fifth Respondent in W.P. (C) No. 15032 of 2005.

10. The question that has come up for consideration is whether the successful bidder is entitled to know the terms and conditions of the exemption notification before he complies with the terms and conditions of the tender conditions or only at the time of executing the sale deed. Petitioner had offered and remitted an amount of Rs. 6.69 crores towards earnest money deposit and has to pay further amount of Rs. 299 crores in all, out of which he had to furnish Bank guarantee for Rs. 118.16 crores in connection with plots B1, C3, C4, C5, D3, D4 and D5. Exemption notification is a pre condition of owning and holding the property in question. In the counter-affidavit filed by Respondents 2 and 4 it is stated as follows:

Further, while G.I.D.A. has an obligation to obtain exemption under the K.L.R. Act before the sale is completed, it is under no obligation to obtain the exemption prior to receiving the bank guarantee as mandated by Clause 10 of the Terms and Conditions of sale of Goshree Land. In fact, the State Government have issued notification G.O. (P) No. 148/05/RD dated 20-5-2005 granting exemption to the reclaimed land.

Obligation to get order of exemption under the K.L.R. Act is cast on G.I.D.A. and in our view it is a fundamental term of the contract between the parties. Petitioner and others were informed at the pre-bid meeting held on 10-2-2005 as notified in the global tender notice dated 10-1-2005 that G.I.D.A. have moved for general exemption from Section 83(1)(b) of the K.L.R. Act from the Government and the same would be obtained in a few days. Though all tenderers were informed that Government exemption would be obtained in a few days no steps have been taken to get exemption. Petitioner who has entered into the present contract worth nearly Rs. 300 crores would always be anxious to know the terms and conditions of the exemption notification. Petitioner and others were informed as early as on 10-2-2005 that Government exemption would be obtained in a few days. On the said assurance Petitioner and several others had quoted and the highest offer was that of the Petitioner for a total amount of Rs. 299 crores. He has deposited Rs. 6.19 crores towards earnest money. Though G.I.D.A. has promised that exemption would be obtained within a few days the

same was not obtained. Even after the bid was confirmed in favour of the writ Petitioner on 30-3-2005 no Government notification exempting the land was forthcoming. Petitioner was all along enquiring with G.I.D.A. about the exemption notification which is statutory and vital for entering into the contract. Bank had also sought clarification as to whether exemption has been obtained since person cannot hold more than 15 acres of land without the order of exemption.

11. We have to examine whether order of exemption u/s 83(1)(b) is an implied term of the agreement between the parties. A term will be implied, if it is necessary to carry out the presumed intention of the parties. Parties therefore must have intended to apply to the contract and thereafter thought it unnecessary to stipulate in express terms. Chapter in of the Kerala Land Reforms Act, 1963 deals with "Restriction on ownership and possession of land in excess of ceiling area and disposal of excess lands". Section 82 of the Act deals with ceiling area. Section 83 states that no person shall be entitled to hold or own land in excess of the ceiling area after 1-1-1970. Section 81(3)(b) however enables the Government to exempt any land from the provisions of Chapter III, in public interest, subject to such restrictions and conditions as the Government deems fit to impose. Section 81(3)(b) of the Act is extracted below for easy reference.

(3) The Government may, if they are satisfied that it is necessary to do so in the public interest-

(a) ** ** *

(b) on account of any land being bona fide required for the purpose of conversion into plantation or for the extension or preservation of an existing plantation or for any commercial, industrial, educational or charitable purpose, by notification in the Gazette, exempt such land from the provisions of this Chapter, subject to such restrictions and conditions as they may deem fit to impose:

Provided that the land referred to in Clause (b) shall be used for the purpose for which it is intended within such time as the Government may specify in that behalf; and, where the land is not so used within the time specified, the exemption shall cease to be in force.

Grant of exemption by the Government is discretionary and be issued only in public interest, that too when the land is bona fide required for any commercial, industrial purpose etc. Section 81(3)(b) enables the Government to impose such restrictions and conditions as they may deem fit to impose. Further proviso to Section 81(3)(b) also enables the Government to prescribe a time-limit within which land is to be used, failing which the exemption shall cease to be in force. Considerable powers have been conferred by the Act on the Government to impose such restrictions and conditions as they may deem fit to impose for the issuance of the notification. Proviso has also conferred powers on the Government to fix a time-limit within which the land is to be used failing which exemption notification shall cease to be in force.

12. Petitioner who has to spend crores of rupees will be anxious to know the terms and conditions which are fundamental so far as the underlying contract is concerned, the violation of which would render the contract void and unenforceable. Clause 10 of the tender conditions will not override legal efficacy of exemption notification to be issued u/s 81(3)(b). We cannot accept the contention of G.I.D.A. or the Appellant that G.I.D.A. is bound to obtain exemption notification only before the execution of the sale deed. Such a stipulation is absent in the tender condition. Clause 10 of the tender stipulates that within ten days of receipt of confirmation letter, the bidder shall furnish two bank guarantees each covering 20% of the bid amount for a period of 180 days. On failure of compliance, the tender shall stand cancelled without further notice and the earnest money deposit shall be forfeited. Further, Clause 11 also stipulates that the successful tenderer shall remit the bid amount in instalments; first instalment of 40% within thirty days, second instalment of 40% within 120 days and the third instalment of 15% within 150 days of receipt of the confirmation letter. It is also stated that on remittance of first and second instalments, one guarantee of 20% would be returned.

13. Section 23 of the Contract Act states that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral, or opposed to public policy. Every agreement of which the object or consideration is unlawful is void. Illegality may arise from any contract or statutory rule. The expression "law" used in Section 23 would include any enactment or rule of law and takes in all provisions of any legislative enactment. Section 83 of the Kerala Land Reforms Act places restriction on a person to hold any land in excess of the ceiling area unless it is exempted u/s 81(3)(b) of the Act. Legislature expects a person not to violate the said provision. Person holding land in excess of the ceiling area u/s 83 of the Kerala Land Reforms Act will have to surrender that excess land u/s 85. After the coming into force of the Kerala Land Reforms Act, on the notified date there is a total restriction on any person holding land in excess of the ceiling area. Law has prohibited any person owning and holding excess land u/s 83 of the Act, conferring power on the Government to grant exemption u/s 81(3)(b) subject to certain terms and conditions.

14. Statutory notification issued u/s 81(3)(b) is so fundamental which forms an implied term of the contract. Chitty on contract, 25th edition, at page 451, says that implication of a term is a matter of law for the courts and whether or not a term is implied is said to depend upon the intention of the parties as collected from the words of the agreement or surrounding circumstances. Cheshire and Fifoot on Law of Contracts, 10th edition, at page 13, say that the basic philosophy of the Will theory confines the function of a court to enforcing the contract which the parties have made; when a contractual dispute arises for which the express terms of a contract make no advance provision the court has of necessity to employ in resolving the dispute, material not to be found in the

terms of the express contract. Supreme Court in *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* 1986 (3) S.C. C. 300, examined the scope of Section 13 of the Specific Relief Act and applied the doctrine of feeding the estoppel and held that there is always in such contracts an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission for the transfer of the property. Such a term would be implied if it is necessary in the business sense, to give efficacy to the contract. Reference may also be made to the decision of the Privy Council in AIR 1930 287 (Privy Council) , where the court held that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. The Andhra Pradesh High Court in *Col. Denzyl Winston Ferries Vs. Abdul Jaleel and others* , after referring to Section 27 of the Urban Land (Ceiling and Regulation) Act, 1976 held that in view of Section 27 of the Act, the provisions of the Act have overriding effect and notwithstanding anything contained in any other law for the time being in force, no alienation can be made except with the previous permission in writing of the competent authority. The court held that the agreement to sell such land without obtaining permission under the Act is opposed to public policy hit by Section 23 of the Contract Act. A Division Bench of the Madhya Pradesh High Court in *State of Madhya Pradesh Vs. Board of Revenue, Gwalior and Others* , examined the scope of Section 16(2)(ii) of the M.P. Ceiling on Agricultural Holdings Act. The court examined the legality of the transfer made without the permission of the Collector. Referring to Section 5 of the said Act, the court held that there being a public policy behind Section 5, the requirement of permission of the Collector must be construed as mandatory and transfers made in contravention of the requirement must be held to be void for all purposes.

15. The duty is cast on the Government as well as G.I.D.A. to inform the prospective bidders including the Petitioner as to whether they propose to place any restriction or condition in granting exemption u/s 81(3)(b) which, in our view, is a vital term of the contract between the parties. Entire agreement of tender depends upon this statutory requirement. Entire contract will fall to the ground if exemption is not obtained. Restrictions and conditions which could be imposed u/s 81(3)(b) is also intrinsically linked with the tender conditions and the Government and G.I.D.A. before receiving earnest money deposit, executing agreements like Bank guarantee etc., should disclose the possible restrictions and conditions which the Government would impose while issuing the statutory notification u/s 81(3)(b) of the Act.

16. G.I.D.A. in the pre-bid meeting had informed the bidders that they would obtain general exemption u/s 81(3)(b) of the Kerala Land Reforms Act within a few days. Petitioner evidently with the hope that statutory exemption would be obtained deposited the amount of Rs. 6-68 crores without knowing what would be the restriction and condition that the Government would impose while issuing

the statutory exemption u/s 81(3)(b) of the Act. Later he was asked to furnish bank guarantee worth Rs. 118-16 crores. Petitioner again made enquiries with G.I.D.A. as to whether they had obtained statutory exemption from the Government u/s 81(3)(b) of the Act. Petitioner evidently wants to know what would be the restrictions and conditions that the Government would impose in the said notification. Considerable power is conferred on the Government u/s 81(3)(b) to impose such restrictions and conditions as they deem fit to impose. Looking at the powers conferred on the Government by the legislature and also on the assurance given by G.I.D.A. at the pre-bid meeting held on the basis of the global tender and other attendant circumstances, we are of the view the statutory exemption u/s 81(3)(b) is an essential implied term of the contract and the Petitioner was justified in requesting G.I.D.A. to disclose the restrictions and conditions which the Government would impose in the statutory notification u/s 81(3)(b) of the Act.

17. The Government and G.I.D. A. are well aware of the necessity of issuing a statutory notification in the gazette u/s 81(3)(b) of the Kerala Land Reforms Act failing which the entire contract would be rendered void and unworkable. Once the Government refuses exemption the entire contract would be frustrated, so also restrictions and conditions the Government may impose in a given case may not be acceptable to the parties. Disregard of statutory requirements may render the contract illegal. Contract if entered into in violation of those statutory requirement would be opposed to public policy which may violate Section 23 of the Contract Act. In our view, G.I.D.A. and the Government should have issued the notification u/s 81(3)(b) before inviting the global tender, therefore the bidders would know what are the restrictions and conditions which the Government would impose while granting exemption. In our view, the bidders should have been made known about the terms and conditions of the statutory notification at least before the auction was confirmed.

18. The Government after a few days of the cancellation of the Petitioner's tender came out with the notification dated 20-5-2005 which was published in the gazette (extra-ordinary) dated 20-5-2005 granting exemption to the properties bid by the Petitioner subject to certain terms and conditions. Duty is cast on the Government as well as G.I.D.A. to steer clear of all doubts in the mind of intending bidders considering the enormous statutory powers conferred on the Government for the issuance of the notification. Petitioner came to know about Ext. P-9 cancellation only when the same was made available to the court in W.P. (C) No. 13735 of 2005. Petitioner filed the writ petition on 19-5-2005 and the Government issued exemption notification on 20-5-2005.

19. Petitioner was the highest bidder in the global tender in respect of all the items B, C-3, C-4, C-5, D-3, D-4 and D-5 while the Appellant is concerned with only plot Nos. D-3, D-4 and D-5. The Government and G.I.D.A. in our view, have rightly accepted the Judgment of the learned Single Judge. We therefore find no reason to admit these appeals and they are accordingly dismissed.