

(2013) 02 MP CK 0106

In the Madhya Pradesh High Court

Case No : Writ Petition No. 9343 of 2010

Samdariya Builders Pvt. Ltd.

APPELLANT

Vs

Jabalpur Development Authority

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Contract Act, 1872 — Section 23

Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 — Section 3, 58, 73

Citation : (2013) 2 MPLJ 114

Hon'ble Judges : K.K. Trivedi, J

Bench : Single Bench

Advocate : Kishore Shrivastava, assisted by Prem Francis, for the Appellant;
Naman Nagrath, assisted by Himanshu Mishra, for the Respondent

Final Decision : Allowed

Judgement

K.K. Trivedi, J.—The petitioner, a Builder and Developer, has approached this Court by way of filing this petition under Article 226 of the Constitution of India raising dispute with respect to the claim made by the respondent vide letter dated 15-1-2009 for payment of ground rent and also the rejection of representation made by the petitioner against the said letter vide order dated 17-3-2009. It is contended by the petitioner that in fact such a demand made by the respondent from the petitioner towards the payment of ground rent was wholly unjustified, illegal and de hors the rules, which are in force. It is contended that in terms of the amended provisions of Rule 47 of the Madhya Pradesh Nagar Tatha Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao Ka Vyayan Niyam, 1975 (hereinafter referred to as "Rules"), the demand made by the respondent is per se illegal and the same is liable to be quashed. It is contended that in somewhat similar circumstances, this Court has quashed the said demand in case of other lease holders and, therefore, the similar benefit is to be granted to the petitioner. Brief facts giving rise to filing of this writ petition are that the respondent is a Development Authority constituted

under the provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as "1973 Act"). A scheme was made by the said authority and thereafter a notice inviting tender was published initially on 16-7-2004. It was made known that in Scheme No. 18, a commercial complex was to be constructed within Civic Center, Jabalpur for which tenders were invited. Terms and conditions were laid-down. By publication dated 20-9-2004, the tender period was extended. The petitioner took part in the tender proceedings and its offer was accepted. A letter was issued to the petitioner calling upon it to enter into an agreement with the respondent for the purposes of grant of such lease of land for construction of commercial complex. The agreement was executed on 1-5-2006. In terms of said agreement, it was agreed under Clause 8(f) that the petitioner would be liable to pay 2% of premium amount as yearly ground rent amounting Rs. 14,81,620/- or the rent as decided by the Board of the respondent in its next meeting. Certain other conditions were mentioned in the said agreement. In Clause 39, again the annual ground rent was described saying that the same would be 2% of the premium every year or as decided by the Board of the respondent in its next meeting, proportionate to the constructed area of the building. Since multistory building was to be constructed, it was said in this clause that for the ground floor of the building, the lease rent would be calculated at the rate of 40%, for the first floor 25%, for second floor 20% and for third floor 15%. The lease holder will be liable to pay all taxes to the Municipal Corporation.

2. After execution of this agreement, it was said that an area of 41179 Sq.ft. was allotted to the petitioner for the purposes of construction of the commercial complex. The lease deed was executed in favour of the petitioner on 30-5-2008 and the premium of the said lease was fixed at Rs. 7,40,81,021/- and for the first time a demand was raised that the petitioner was required to pay yearly ground rent at Rs. 14,81,620/-. On receipt of this lease deed, the petitioner made a representation stating that when the agreement was executed and when the lease deed was granted in favour of the petitioner, an amendment in Rule 47 of the Rules was made by the State Government and in accordance to the provisions of the said Rule, since petitioner was required to deposit only Rs. 13,590/- as yearly ground rent, the demand of ground rent at Rs. 14,81,620/- was not justified. However, such a representation made by the petitioner has been rejected on 15-1-2009, a demand is raised for deposit of the ground rent at the aforesaid rate, therefore, this writ petition is required to be filed.

3. It is vehemently contended by learned senior Counsel for the petitioner that since the land in question was allotted to the respondent by the State Government, it being the Nazul land, squarely the amended provisions of Rule 47 of the Rules would be attracted and at the best 10% service charge on the ground rent fixed by the State Government, or payable to the State Government could be charged from the petitioner. This particular aspect was taken note of by the respondent itself as in the note-sheet, after obtaining guidance from the State Government, the calculations were already done. Only because in the

agreement a condition contrary to the provisions of Rule 47 of the Rules was made, the petitioner could not be forced to deposit the amount of ground rent at the rate claimed by the respondent. It is contended that such a condition mentioned in Clause 8(f) of the agreement is contrary to law and, therefore, is not enforceable in view of section 23 of the Contract Act. This being so, the claim made by the respondent was not justified. However, these aspects have not been taken note of and such an arbitrary and illegal demand has been made from the petitioner, therefore, such a demand notice is liable to be quashed. It is contended by learned senior Counsel for the petitioner that the law is well settled in this respect. Any condition stipulated in an agreement, which is void in accordance to the provisions of law, cannot be enforced.

4. Per contra, it is contended by learned senior Counsel for the respondent that if the entire action of the respondent is scrutinized, step by step, it would be clear that there was no illegal demand made by the respondent. Admittedly, amendment in the Rules was made on 7-10-2005 by the State Government. Notice inviting tender was published by the respondent on 16-7-2004, much before the amendment in the Rules. The terms and conditions were already prescribed in the notice inviting tender as was specifically said in the said publication that the terms and conditions have already been fixed, which could be examined by the prospective tenderers. After examining the conditions, the petitioner extended the offer, which was duly accepted. The offer was culminated in an agreement on 1-5-2006 and allotment was made. Thus, to say that agreement had taken place after coming into force of the amendment in the Rules is incorrect. The agreement though was reduced in writing subsequently but terms were agreed much before and, therefore, in view of the agreed terms if conditions were stipulated in the agreement, the respondent was entitled to claim the ground rent on the agreement. It is contended that the petitioner is now estopped by its own conduct to claim any benefit of amendment in the Rules as the amendment is not made with retrospective effect. It is contended that estoppel is not being claimed against the law but against the conduct of the petitioner and, therefore, in view of the principles laid-down by law, the petitioner was liable to pay the ground rent at the agreed rate. This being so, it is contended that if a justified demand is made, it cannot be said that the respondent has acted illegally. In view of this, it is submitted by learned senior Counsel for the respondent that the petition being misconceived, deserves to be dismissed.

5. Heard learned senior Counsel for the parties at length, minutely perused the record and examined the law.

6. To appreciate the rival submissions made by learned senior Counsel for the parties, it is required to examine the law relating to making of such a scheme. Undisputedly, respondent is a Development Authority established within the meaning of 1973 Act. On making of a development plan, the same is required to be sanctioned by the State Government. The Development Authority is

established for the purposes of implementation of such a plan. For the purposes of implementation of the plan, the State Government is empowered to give directions. Section 58 of 1973 Act prescribes disposal of land, buildings and other development works, which reads thus:

58. Disposal of land, buildings and other development works. -- Subject to such rules as may be made by the State Government in this behalf, the Town and Country Development Authority shall, by regulation, determine the procedure for the disposal of developed lands, houses, buildings and other structures.

Any development or disposal of land, buildings and other ancillary works are subject to such rules as may be made by the State Government in this behalf. There is power available with the State Government u/s 73 of the 1973 Act to give directions, which reads thus:

73. Power of State Government to give directions. -- (1) In the discharge of their duties the officers appointed u/s 3 and the authorities constituted under this Act shall be bound by such directions on matters of policy as may be given to them by the State Government.

(2) If any dispute arises between the State Government and any authority, as to whether a question is or is not a question of policy, the decision of the State Government shall be final.

It is not in dispute that earlier in exercise of its powers the State Government has made the rules and the provision of Rule 47 of the Rules before its amendment reads as follows:

47. The lessee shall annually pay the ground rent at 2 per cent of the premium in the case of Authority plots and at 6-1/2 per cent of the premium in the case of Government or Nazul plot in advance on or before the 1st June every year, the first of such payments being due on the 1st June of the financial year in which the lease commences.

It is also not in dispute that this provision was in vogue when the NIT was published on 16-7-2004, the period of which was extended by publication dated 20-9-2004. Apparently the terms and conditions were formulated in the NTT under the provisions of the unamended Rules as has been referred to herein above. However, rate of payment of ground rent of land was further subject to any decision taken by the Board of the respondent and, therefore, the same was not final. What was required to be seen was whether at the time of agreement or when finally the offer extended by the petitioner was accepted, any ground rent of the land in question was actually fixed or not. If no decision was taken by the Board of respondent in respect of the ground rent, prior to coming into force of the amendment in the Rules, the matter was still open for consideration. In the meanwhile, amendment was made in the Rules and new provisions were inserted in Rule 47 of the Rules, which read as under:

47. The lessee, who obtains a plot from the Authority, shall annually pay in

advance such amount as ground rent or lease rent, on or before 1st June of the Financial Year, in which the lease is executed, as determined by the authority. The amount to be paid as ground rent or lease rent shall be arrived at by adding 10 percent service charge to the ground rent or lease rent payable by the Authority to the District Collector/Revenue Department in respect of the total area of the land of which the plot of lease is a part and then such amount shall be divided proportionately on all the plots comprised within the total area.

In the cases where the Authority has constructed any dwelling units, commercial complex or office building, as the case may be on any land or gave on lease, in such a case, the rent on the land or lease rent by adding 10% service charge thereto payable to District Collector/Revenue Department in respect of that land shall be levied by the Authority by dividing proportionately on the total built up area of such land and each lease holder of dwelling units, commercial complex or office building, as the case may be shall pay such divided proportionate amount of lease to the authority on the basis of area held on lease by him:

Provided in the case of lease executed prior to enforcement of this amended rule, the rent of land or lease rent shall be payable as per the terms of agreement between Authority and Lessee.

7. Now the question would be whether the provisions as amended in Rule 47 would be applicable or the provisions of unamended Rules, which were in fact reflected in the NIT have to be adhered to. For the said purposes, Rule 47 of the Rules has to be examined exhaustively. First part of Rule 47 of the Rules as amended and as reproduced hereinabove deals with the payment of the ground rent or lease rent and the said clause is made applicable only in such cases where the lease is executed. Admittedly the lease was not executed in case of the petitioner in this case on the date prior to coming into force of the amendment in the Rules. The other part of the amended provisions of Rule 47 of the Rules is in relation to the constructing dwelling units, commercial complex or office buildings, as the case may be. The proviso to the amended provision has been added where it is specifically provided that in case of lease executed prior to enforcement of amended Rules, the rent of land or lease rent shall be payable as per the terms of agreement between the authority and lessee.

8. If in context of this the Rules as amended is examined, it would be clear that where the lease deeds have been executed in respect of lands by the respondent authority, prior to coming into force of the amended provision in Rule 47 of the Rules, the ground rent or the lease rent would be in terms of the agreement. In all other cases where the lease deed is not executed, the ground rent and lease rent is required to be fixed in accordance to the first part of amended Rule 47 of the Rules. This particular aspect is required to be examined in terms of the law laid-down by this Court in case of Anil Kumar Rathore and another vs. Jabalpur Development Authority, W.P. No. 3507/2008, decided on 10-2-2009. This Court has dealt with such a situation and has given its findings in paragraphs 8 and 9 of the order in the following manner, which reads thus:

8. True it may be that, the amendment Rule 47 being in the domain of delegated legislation cannot have a retrospective effect unless so empowered by the statute and the respondent may be right in a way, but the proviso appended to the newly added Rule 47 makes the entire difference because it restrains the expanse of retrospectively. It is already noted that the proviso stipulates that "In case of any lease executed prior to enforcement of this amendment rule, the ground rent or lease rent shall be payable as per the terms of agreement between the authority and the lessee." This proviso is based on well known principle that its "normal function is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment" (please see: AIR 1947 200 (Privy Council) , Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, ; Kush Sahgal and Others Vs. M. C. Mitter and Others, and Romesh Kumar Sharma Vs. Union of India (UOI) and Others,

9. Given facts of the case at hand indisputably divulge that no deed is executed till the date when new Rule 47 was inserted w.e.f. 7-10-2005 and in wake of this fact that there is no execution of deed, the proviso to newly substituted Rule 47 of the Niyam 1975 excludes the petitioner from the applicability of the provisions contained in Clause 3 of temporary allotment order dated 6-4-2004. The inevitable conclusion of the aforesaid analysis is that the petitioners cannot be forced to pay lease rent as per the earlier clause, i.e., unamended Rule 47. Instead, the petitioners' liability to pay ground rent/lease rent arises under newly added Rule 47.

Though it is contended by learned senior Counsel for the respondent that the order passed by this Court in case of Anil Kumar Rathore (supra) is subjudice before the Division Bench of this Court but it is fairly stated that the matter has not finally been decided, therefore, this Court will not hesitate in reiterating the law laid-down by the co-ordinate Bench, unless the same is set aside by any higher forum.

9. Yet another aspect is required to be examined. As has been pointed out by learned senior Counsel appearing for the petitioner, before issuance of the letter on 1-5-2006 asking the petitioner to execute an agreement, the matter was referred to the State Government in view of the amendment made in the Rules by the respondent itself asking a clarification from the State. The State Government has issued the instructions on 31-10-2005 (Annexure P-8) and categorically said that there was no provision made under Rule 47 of the Rules to interfere in the matter of fixation of ground rent or lease rent by the State Government. However, the Rule 47 of the Rules was already amended and the new amendment has been enforced, copy of which was enclosed and the respondent authority was called upon to act according to the Rules. Thus, in fact it was a direction of the State Government to act in accordance to the amended provisions of the Rules, precisely because by the time the guidance was sought, no agreement whatsoever was executed in between the petitioner and the

respondent. The agreement itself was executed on 1-5-2006 and on that day, the fixation of ground rent and lease rent prescribed under Rule 47 of the Rules was completely changed by making an amendment in the Rules. As it was reflected in the NTT while making the terms and conditions that the payment of ground rent was required to be made in terms of Rule 47 of the Rules, the provision in the agreement was to be made in terms of the amended Rule 47 of the Rules. If that was not done, something which was not provided in the Rules after amendment but remained in terms and conditions and reproduced in the agreement, were not to be enforced at all. In such a situation, in fact the agreement or the contract itself was void in terms of section 23 of the Indian Contract Act. These aspects have been considered by the various High Courts in number of occasions and have been tested by the Apex Court also. In the case of Smt. Harbans Kaur Vs. Manna Singh, , the Punjab and Haryana High Court has dealt with such a situation and has categorically held that in case an agreement contains a condition, which is barred by law or which is not in consonance to the law, the same would be hit by vice of being of such a nature that it would defeat the provisions of law and, thus, the agreement would be unlawful to that extent in terms of provisions of section 23 of the Indian Contract Act and the same is required to be held as void. In case of Universal Petrochemicals Ltd. Vs. Rajasthan State Electricity Board, the Division Bench of Calcutta High Court has categorically held that it is well settled that there can be no contract which could defeat the provisions of any law. This is one of the important facets of section 23 of the Contract Act. In the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , their Lordships of the Supreme Court have considered even a contract, which is in fact violative of the public policy said to be void u/s 23 of the Indian Contract Act. If such a clause is inserted in the agreement, which runs contrary to the provisions of law, the same cannot be saved merely on the saying that the condition was agreed at the time when such a provision was not made in the Act or the Rules and in fact by executing the agreement subsequent to the amendment, the earlier terms and conditions agreed by the parties were being introduced. The agreement is to satisfy the law as was available on the date the agreement is executed. If such analogy is made applicable, it would be clear that terms and conditions prescribed in Clauses 8(f) and 39 of the agreement dated 1-5-2006 were contrary to the provisions of amended Rule 47 of the Rules, which were not taken note of despite the instructions issued by the State Government way back on 31-10-2005 by the respondent. The respondent being an authority within the meaning of Article 12 of the Constitution of India, cannot be allowed to impose upon the petitioner such a condition, which is just contrary to the amended provision of Rule 47 of the Rules only on the ground that at the initial stage when the tender proceedings were started, the petitioner has agreed on such terms of payment of ground rent or lease rent as stipulated in the agreement. In the case of Hindustan Times and Others Vs. State of U.P. and Another, the Apex Court has dealt with such a situation and has categorically held that enforcement of such a condition would in fact be violative of the doctrine of equality enshrined in Article

14 of the Constitution of India and even the provisions of section 23 of the Indian Contract Act. The law laid-down by the Apex Court in paragraph 39 reads thus:

39. The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of "take it or leave it". The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution of India as also section 23 of the Indian Contract Act. See *Central Inland Water Transport Corpn. Ltd. vs. Brojo Nath Ganguly* and *Delhi Transport Corpn. vs. D.T.C. Mazdoor Congress*. It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any Court of law. The impugned action of the State does not fulfil the aforementioned criteria.

In view of this, the submissions made by learned senior Counsel for the respondent cannot be accepted.

10. Lastly, it is submitted by learned senior Counsel for the respondent that the principle of estoppel would be attracted in case of the present petitioner because of the conduct of the petitioner. Such a submission made by learned senior Counsel for the respondent is liable to be rejected outrightly in view of the fact that whatever was agreed by the petitioner at the initial stage when the tender proceedings were initiated, was in fact provided under the unamended Rules. However, the land which is granted to the petitioner on lease is in fact belonging to the State Government and is transferred to the respondent and, therefore, all instructions of the State Government would be squarely applicable in such a case. Upon own showing, the State has directed the respondent to take action in accordance to the amended provisions of Rule 47 of the Rules. The lease deed was executed much after the amendment was made in Rule 47 of the Rules. In view of this, if a condition is prescribed in the agreement, or in the lease deed, the same would be contrary to the provisions of the amended Rule 47 of the Rules. The respondent in fact is stopped by law to make such claim from the petitioner without implementing the amended provisions of Rule 47 of the Rules. The petitioner would not be stopped by any conduct as there was nothing in the hands of the petitioner to agree except as was intimated in terms of the Rules at the time when the initial process was started. However, there cannot be estoppel against the law as has been held in catena of cases and as has been reiterated by this Court also in the case of *M. Wagi Mohd. Vs. State of M.P. and Others*, . It has to be held that there can be no estoppel against the law. In view of the discussion hereinabove, this writ petition has to be and is allowed. The order dated 15-1-2009 issued by the respondent is hereby quashed. The demand made for payment of ground rent at Rs. 14,81,620/- is hereby quashed. The

respondent is directed to calculate the amount of yearly ground rent at the rate prescribed under the provisions of amended Rule 47 of the Madhya Pradesh Nagar Tatha Gram Nivesh Vikasit Bhoomiyo, Griho, Bhavano Tatha Anya Sanrachanao Ka Vyayan Niyam, 1975 and issue a letter of demand to the petitioner, which the petitioner would be obliged to deposit within the stipulated period in the notice. However, there shall be no order as to costs.