
(2001) 01 KL CK 0042
In the High Court Of Kerala
Case No : O.P. No. 14752 of 2000

Tenet Homes and Resorts Pvt. Ltd.

APPELLANT

Vs

G.C.D.A.

RESPONDENT

Date of Decision : 02-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 23

Citation : AIR 2001 Ker 279 : (2001) 3 RCR(Civil) 645

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : P.C. Chacko, Roy Chacko and P.S. George, for the Appellant; P.R. Ramachandra Menon, for the Respondent

Final Decision : Dismissed

Judgement

M. Ramachandran, J.—The petitioner is a company registered under the Companies Act. In response to invitation made by the first respondent-Greater Cochin Development Authority- for sale of an extent of 61.27 cents of land in the Marine Drive, Ernakulam, the tender submitted by the petitioner had been accepted. Acceptance letter dated 10.10.1994 is Ext. P3.

2. Within 30 days of the allotment letter, the petitioner as per the tender conditions, was to remit 50% of the land cost. As regards balance, option was open for the purchaser to remit it in instalments in six monthly instalments, with 21% interest. Non-payment of instalments on the due dates attracted penal interest of 22%. The successful tenderer was also obliged to start the construction work as per the control drawings and finish the work within three years.

3. The initial payment of Rs. 3.6 crores was made within the stipulated time. The instalment payment was to commence by 18.12.1994 and conclude by 18.5.1995, as per the terms of the agreement. According to the petitioner, full land value had been paid by 25.3.1996. After such payments, the first

respondent had expressed their readiness to hand over possession to the petitioner, as per their request. Ext. P5 is the letter. Ext. P6 was the agreement entered into thereafter, on 8.5.1996, and the petitioner got possession on 22.5.1996. Ext. P5 dated 17.4.1996 was to the following effect:

"With reference to the above, I am to inform you that, the Executive Committee of G.C.D.A, vide, its decision No. 11/96-97 dated 9.4.96 had resolved to give you 6 months time to remit the interest and penal interest for the belated payment of the balance cost of land. It was also decided to give possession of the land in advance after executing an agreement. It was also resolved to issue an NOC to you for entering into an agreement with the prospective buyers of the flat being constructed at the land allotted to you. The last date of remittance of the interest will be within 6 months from the date of execution of the agreement".

4. The petitioner after getting possession had not been able to carry out the construction, nor was the balance amount, referred to in Ext. P5 paid. The reason pointed out by the petitioner was that it was illogical for directing him to pay penal interest, and because of impossibility, he could not carry out the construction, as there was statutory stay because of the impact of Coastal Zone Regulations, and there were stay order issued by the Supreme Court, and the High Court. The stay was vacated only on 16.7.1987. in the meanwhile, the first respondent had initiated recovery proceedings against the petitioner. Even though the original claim was Rs. 1,63,64,596/-, by Ext. P9, it was scaled down to Rs. 88,27,150/-. But the Tahsildar had made a claim for Rs. 1,24,90,381/- and it was in that context the Original Petition is filed.

5. The petitioner prayed that as the land cost had been paid, interest and interest thereon was inadmissible and condition in Ext. P1 to that extent was not binding. Only interest at 21% was payable, from 18.12.1994 to 25.3.1996 and it was submitted that provision for penal interest and recovery steps were unenforceable. In the alternative, it was submitted that if at all penal interest was payable, it was admissible only for the period from 18.12.1994 to 25.3.1996. By amending the Original Petition, an additional prayer also was added for a declaration that Clause 9 of Ext. P2 tender conditions was unconstitutional.

6. Sri. P.C. Chacko, senior counsel appearing for the petitioner, on instructions, submitted that the contract entered between the GCDA and the petitioner was one between unequals and since the petitioner had to sign on dotted lines, and stood disabled from negotiating, the contract was unenforceable. He had relied on S. 23 of the Contract Act. Citing case law on the subject, the senior counsel had submitted that the parties were unequal, and the tender conditions worked arbitrariness. It was a contract impossible of performance in view of the stay in the matter of construction. The demand for interest, and penal interest can be made only if the allottee is able to start construction within one year. But this was made impossible because of stay, and the respondent-GCDA had done this aware of the situation. The company could have made the payments only if it

was possible for them to sell the properties and because of the stay orders this became an impossible condition, and consequently the petitioner was not able to make the remittances. This operated as a frustration on the terms of the contract. According to him, the GCDA was aware of the prohibition in the matter of constructions and without disclosing the details, the petitioner had been caused to enter into an agreement knowing that the construction was impermissible. Till the State Government cleared the coastal management plan on 27.9.1996, therefore the hands of the petitioner were tied down and the enforcement of tender conditions forgetting the supervening impossibility was therefore not logical or warranted.

7. Sri. P.R. Ramachandran Menon, appearing for the first respondent very stoutly refuted the allegations. According to him, the conditions of tender were open, to be seen, and the petitioner had not been compelled in any manner to enter into any contracts with the petitioner. He submitted that in a number of cases, this Court had held that after signing a contract, there was no justification for a contesting party to move the Court for opting out of the contract liabilities. Mr. Menon relied on a Bench decision in W.A. No. 1026/99 which laid down as follows:

"The appellant having submitted Ext. P2 and participated in the auction along with other SC/ST members, cannot now turn round and say that the condition imposed is onerous. The appellant was also declared as the highest bidder and because of the same shop room No. 11 in Ext. P1 was allotted to him. Therefore, as rightly pointed out by the learned single Judge and also as alleged in the counter affidavit the appellant is estopped from challenging Ext. P1."

The counsel however submitted that on the facts, since there was an agreement between the parties, it may not be permissible for the first respondent to levy interest on interest. He had also fairly refrained from making submissions for justifying such action. He submitted that the payment of purchase money, and the construction of building was two different and distinct aspects, and the former did not depend on the latter. The payment of the purchase price, and such payment with the stipulated interest, could not have been avoided by urging that only by attempting negotiations with the third parties, the petitioner could arise funds for payment of the purchase price. The submission of the petitioner, it was pointed out, lacked credibility. He was bound to make the payments without excuses and as there was default recourse made for recovery was totally legal.

8. The contentions of the petitioner on the basis of S. 23 of the Indian Contract Act could be examined first. The argument is that the agreement is contrary to law. At the time of notification of tender, there was a stay and constructions within 500 meters of landward side from the coast had been prohibited. Of course, every agreement of which the object or consideration is unlawful, is void. But S. 23 can have application only in cases where the consideration or object is unlawful. This is not the case of the petitioner, for obvious reasons. It is never argued that the object of the contract is unlawful. It might have caused the

petitioner inconvenience previously not anticipated. It would have been difficult to find purchasers for the buildings that had been proposed to be put up. But this do not attract the vice of S. 23. Finding the difficulty, petitioner submits that clause 9 of the agreement is to be struck down, since, as contended, if the contract as a whole is set aside, that may work against the interests of the petitioner. But I do not find anything in S. 9 of the agreement, which requires a declaration that it is tainted with illegality. The senior counsel invited my attention to the decision of the Supreme Court in *Motor General Traders and Another Vs. State of Andhra Pradesh and Others*, and especially paragraph 26 thereof. The principle laid down pertains to severability of a statute. A statute bad in part is not necessarily bad in its entirety. But since I find that the contract could not have been termed as unreasonable or bad, the issue does not assume any worthwhile significance.

9. In the above view, the array of decisions that have been relied on by the petitioner, on the subject of unconscionable contracts have no relevance. The first decision was *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, . Reference was also made to the Division Bench decision reported in *Issac Ninan v. S.I.B. Ltd.* 1995 (2) KLT 848 . These two cases were cited as authorities, where there was contract between unequal persons and the terms of such contract were ultimately held as unconscionable, and therefore not enforceable. The case of *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, also had been rendered in the said context. Though there can be no dispute about the propositions that have been laid down, the principles have little application when a company had in its discretion submitted tenders in an open contract, and were successful in their quotation. It was not been pointed out as to the point at which the contract became unequitable. The petitioner had no grievances at the earlier stages, and the correspondence entered into between the parties show that the relations were warm and cordial. It could be seen that the respondent had initially over reacted, and amounts which were not really payable towards interest and penal interest had been demanded. But the terms of the contract were such that it was transparent, and especially in the circumstances that the counsel for the respondent has submitted that demand for interest on interest not being pressed, the petitioner in fact has sufficiently been relieved of liability. The petitioner could not have successfully made an issue regarding the terms in the contract for starting that construction activities in a time frame suggested, since it could not have been the look out of the G.C.D.A. as to the source of flow of cash which was in the expectation of the petitioner, or the method conceived for finding the resources. They were interested only in the remittance of the price agreed to be paid. The petitioner was not justified in mixing up the above relying on the Coastal Regulations or restrictions with his liability for payments. It is also to be noticed that the G.C.D.A. had not pressed on with the demand for expediting the constructions.

10. Therefore, the contentions of the petitioners as against the recovery

proceedings cannot be countenanced. Sri. Ramachandra Menon is justified in relying on the unreported judgment of a Division Bench of this Court, extracted earlier in the judgment. On principles of estoppel, a tenderer is not entitled to urge that he is not liable to pay the agreed amount, pleading that there is change in circumstances. He also submitted that the petitioner had not ever challenged Ext. P6, the basic agreement executed between the parties. In any case, this was not a matter coming within the jurisdiction of this Court under Art. 226 of the Constitution of India. After conceding liability, it was admitted, there was no grace in putting up excuses and the petitioner was not putting forward the contentions with bona fides.

11. Taking into account the nature of the contract, and the involvement of the parties thereto, I do not think that it is a case where the prayer of the petitioner could be granted. Recording the submission of the learned counsel for the respondent that interest on interest would not be charged, the Original Petition is dismissed. Ext. P11 may not therefore be enforced as such, and an opportunity should be given to the petitioner for a settlement of accounts.