
(2001) 11 KL CK 0089
In the High Court Of Kerala
Case No : O.P. No. 9933 of 2001

Woody's Hotels (P) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 07-11-2001

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226
Contract Act, 1872 — Section 23, 29

Citation : (2001) 11 KL CK 0089

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : S. Ramesh Babu, for the Appellant; N. Nagaresh, A.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

K.A. Abdul Gafoor, J.—Admittedly there is a loan agreement between the petitioner and the second respondent a Company registered under the Companies Act. Of course it is a Government owned Company. The business of the second respondent includes granting of loans to hoteliers including the petitioner. It is in that regard Ext. P1 agreement was entered into between the parties providing for repayment and the relationship interse until the repayment is fully effected. Therefore, the rights and obligations of the parties arise, concerning the load transaction from out of Ext. P1 agreement which provides for various situations. The loan has to be repaid completely by 2007 as per the revised schedule. But the petitioner sought for early settlement of the transaction. That was finally answered in Ext. P34 the impugned order herein that in terms of the agreement settlement of accounts in respect of the loan prior to the scheduled period shall result in prepayment premium and interest which the respondent has qualified as Rs. 37,45,892.57. This letter is dated 8.2.2000.

2. Clause 4.8 of Ext. P1 provides that

"The borrower shall not prepay the outstanding principal amounts of the loan in

full or in part before the due dates except after the conversion right is exercised in full of has elapsed and after obtaining the prior written approval of the lead institution."

So the complete payment before the scheduled date can be effected only after obtaining the prior written approval. But inspite of that remittance made by the petitioner fully on 8.3.2000 has been accepted by the second respondent subject to the condition in Exts. P1 and P4. It is in the above circumstances the petitioner has approached this court concluding that Ext. P4 is arbitrary. It is submitted that Clause 4.8 itself is arbitrary and unconstitutional. There is a further contention that it is a vague Clause as well. Therefore Ext. P24 has to be set aside as if there is no Clause like Clause 4.8.

3. With regard to the maintainability of the Writ Petition it is submitted relying on the decisions in *Hindustan Construction Co. Ltd. v. K.S.E.B.* (1999 (2) KLT 30) and by the Supreme Court in *Life Insurance Corporation of India v. Asha Goel* (2001) 2 SCC 180) that the jurisdiction vested under Article 226 is wide enough to cover a situation like this. When there is totally arbitrary order and unconscionable stipulation by an authority under Article 12, necessarily this court can entertain a petition under Article 226 of the Constitution. The former case was in respect of a contract with Electricity Board and the latter case was an insurance contract with Life Insurance Corporation.

4. But it has to be borne in mind that the Kerala State Electricity Board as well as the Life Insurance Corporation are statutory bodies whereas the second respondent herein is only a limited company. A Division Bench of this Court in *Sophi v. F.A.C.T.* (1984 KLT 32) has held that a Writ Petition against a Limited Company though fully owned by Government, can be entertained only when there is violation of any of the fundamental rights. This view had been again upheld by a five Judge Bench of this Court in *Kunju Mohammed v. State of Kerala* (1984 KLT 403). This Court has held in the former case that a writ will issue against a Company owned by Government "only if there is an encroachment of any of the fundamental rights." This had been approved by the latter case. Therefore what is to be examined is whether there is any violation of the fundamental rights in this case. Therefore the decision in *Hindustan Construction Company Ltd's* case and *Life Insurance Corporation of India's* case do not have any application because those are in respect of contracts with statutory Boards and Corporations and not with Limited Companies against which writ can be issued even in situations other than violation of fundamental rights even. So what is to be examined in this case is whether there is violation of fundamental rights, going by the decision of *Sofhi's* case and of the five Judges Bench in *Kunju Mohammed's* case.

5. Admittedly the rights and obligations of the parties arise out of Ext. P1 agreement Ext. P1 agreement has been signed with both eyes open by the petitioner. What is contained in Section 4.8 reads as follows:

"The Borrower shall not prepay the outstanding principal amounts of the Loans in full or in parts before the due dates except after the conversion right is exercised in full or has elapsed and after obtaining the prior written approval of the Lead Institution (which may be granted conditionally)".

Thus the borrower cannot prepay the outstanding principal without prior approval. Prior approval has not been obtained in this case though applied for in Ext. P21 in reply therefore it was made clear to the petitioner in the impugned letter Ext. P24 that prepayment premium or additional interest is payable by the petitioner to the extent made mention of therein. So this is a matter emerging out of the contract entered into by the parties. Any right arising out of the agreement cannot be said to be a fundamental right or any exercise of right in terms of such contract could be treated as arbitrary exercise of power. It is the duty of the petitioner in terms of Clause 4.8 of the contract to obtain prior approval. So it cannot be taken that obligation to obtain prior approval or denial of prepayment without penalty is a fundamental right violating Article 14 of the Constitution.

6. It cannot also be contended that a Clause in an agreement entered into with a Public Sector undertaking with both the eyes open is unconscionable. Ext. P1 is not a unilateral conditions to attach to it any unconscionability to attract the decision in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . It was a case of contract of service entered into by the statutory Boards with the employees of the Board who had no option but to accept it. Therefore, there was absence of meeting of mind of persons with equal bargaining capacities. The parties therein were placed in unequal position of the employer dictating terms to the employees who did not have any option but to accept the conditions willingly or unwillingly. It was in the above circumstances that the apex court in that case treated certain clauses in the agreement as unconscionable.

7. The situation does not arise here because it is not an agreement between unequal parties. The terms of the contract were understood by both the parties, and the status of both the parties is very high. It is an agreement for loan of very large amount. The party taking loan was not compelled to avail loan if the terms suggested by the principal were hard or harsh. In such circumstances whether any of the terms in the agreement is unconscionable or violative of Section 23 of the Contract Act is a matter to be decided by the Civil Court. Whether there was consensus ad idem between the parties is a factual controversy. Whether a particular agreement is vague or whether one party has understood the real meaning conceived by the other to avoid a contract in terms of Section 29 of the Contract Act is a matter to be decided by the Civil Court based on evidence to be tendered by the contesting parties.

8. In such circumstances this Writ Petition is not maintainable because the subject matter between the parties arise out of a contract entered into with open eyes as revealed by Ext. P1.

9. The Original Petition fails. It is dismissed.