

R. Rathinasamy Vs The Government of Tamil Nadu

Court: Madras High Court

Date of Decision: Feb. 24, 2011

Acts Referred: Constitution of India, 1950 " Article 14, 226, 38
Contract Act, 1872 " Section 23

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: Mohammed Fayaz Ali, for Sarvabhauman, Associates, for the Appellant; K. Balasubramanian, Spl. G.P. for R1 and A. Vijayakumar, for R2 and R3, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P. Jyothimani, J.

Mr. K. Bal Subramanian, learned Special Government Pleader takes notice for the first Respondent. Mr. A.

Vijayakumar, learned Counsel takes notice for second and third Respondents. With the consent of both sides, the Writ Petition itself is taken up

for final disposal.

2. The Writ Petitioner has participated in the auction held for the purchase of house in HIG Group in ""Kalapatti Rural Scheme"" as per the

advertisement issued by the Housing Board on 12.5.1993. He was allotted a house bearing No. A40 at Kalapatty, N.H.S. Phase - I, Coimbatore

as per the orders of the Respondents dated 22.3.1996.

3. It is the case of the Petitioner that he has paid the entire sale consideration towards the house and took possession on 06.12.1996. The

afterwards, he found certain defects in the house like cracks on the wall, leakage of water from the roof through the wall, window grills were falling

apart, rainwater outlet pipes had fallen down and plastering of the walls were washed away by the rain water. He has brought to the notice of the

Respondents about the deficiencies on 22.1.1999. Since there was no reply from the Housing Board, the Petitioner has approached the District

Consumer Redressal Forum, Coimbatore in O.P. No. 205 of 1999 for a direction to the Respondents to allot a new house and also for payment

of amount of compensation. It appears that since the amount claimed is beyond the jurisdiction of the District Forum, the case has been transferred

to the State Consumer Disputes Redressal Commission and the complaint was re-numbered as O.P. No. 161 of 2001. When the pecuniary

jurisdiction of the District Forum was increased, the complaint was again re-transferred and renumbered as O.P. No. 151 of 2003. It appears that

an Advocate Commissioner was appointed in the District Forum and ultimately, the District Forum dismissed the petition on 23.3.2006. Thereafter

he has filed an appeal before the State Consumer Commission in F.A. No. 391 of 2006 challenging the clause, namely, Clause 12(21) of the

agreement as unconscionable and opposed to Section 23 of the Indian Contract Act as the Government cannot enter into such an agreement with

the citizens which is opposed to public policy and does not provide for an equal bargaining power.

4. It is stated that the State Consumer Commission has permitted the Petitioner to work out the remedy by approaching the appropriate forum and

accordingly, the appeal came to be dismissed. Thereafter, the Petitioner has filed the present Writ Petition for a declaration that Clause 12(21) of

the lease-cum-sale agreement entered between the Petitioner and the Housing Board dated 21.8.1996 as unconscionable, opposed to public

policy as hit by Section 23 of the Indian Contract Act and violative of Articles 14 and 38 of the Constitution of India.

5. It is the contention of the learned Counsel appearing for the Petitioner that the said clause, in effect, compels the participant in the bidding to

take up the property, whatever may be the condition and thereafter, the right of questioning about the defective nature has been taken away.

Therefore, the said clause is unconscionable and it takes away the legal right and has to be treated as opposed to public policy. He would also

submit that even though, the clause in the contract entered between the Petitioner and the Housing Board, which is being challenged in the Writ

Petition, as per the judgment of the Supreme Court reported in LIC of India and Another Vs. Consumer Education and Research center and

Others, even in respect of the contractual matters, the jurisdiction of this Court under Article 226 of the Constitution of India is available in cases

where the action is unreasonable or opposed to public policy and unfair.

6. The Writ Petition is liable to be dismissed on various grounds. Before adverting to that, it is relevant to extract the clause, which is being

challenged in this Writ Petition. The said Clause, viz., 12(21) of the agreement, which is a lease-cum-sale agreement, entered into between the

Petitioner and the Housing Board dated 21.8.1996, is as follows:

21. The board shall not be responsible for any defects, structural or otherwise in the property and the Lessee/Purchaser shall be bound to

purchase the property notwithstanding the defects, if any, in construction, without any claim for compensation from the Board.

7. The Petitioner has consciously participated in the bidding effected by the Housing Board after inspecting the property before participation.

Thereafter, he has signed the contract, a clause of which is being challenged, consciously knowing about the terms of the contents. Therefore, even

if it is an unconscionable clause, if a party signs the contract, the presumption is, that he, having understood the terms of the contract, consciously

signed the contract. Therefore, the contention of the learned Counsel appearing for the Petitioner now that at the time of signing the contract, he

had no time to go through the terms is totally unacceptable. That apart, the Petitioner having signed the contract in the year 1996 and having taken

possession in the year 1996 has chosen to approach this Court in 2011 after approaching the Consumer Court and failed therein. Even otherwise,

as per the terms of the contract, which is impugned, I do not see any reason to hold that the same is opposed to public policy; the term only

contemplates that any person, who participated in the public bid, who is the highest bidder, shall take up the property in ""as is where is"" condition.

The purchaser having been given an opportunity to inspect the property before taking part in the bid, has certainly bound by such clause ""as is

where is"" and that cannot be termed as unconscionable or opposed to public policy. There was no compulsion exercised on the part of the

Respondent that the Petitioner should necessarily sign the contract without knowing the terms of the contract and it is the Petitioner, who had

voluntarily purchased the property after having inspected the property. Therefore, the contention, as if the terms of the contract is unconscionable,

is meaningless.

8. As far as the maintainability of the Writ Petition, even in contractual matter is concerned, law is well settled that even in a contractual matter, if it

is a Government contract, the jurisdiction of Article 226 of the Constitution of India is not ousted. While exercising the contractual power, the

Government or Governmental Agency must exercise its power uniformly and no arbitrariness is exercised and in cases where there is arbitrariness,

certainly the jurisdiction under Article 226 of the Constitution of India will be enforced. As far as the terms of contracts are concerned, it is not in

respect of the terms of contract, which may be interfered by this Court under Article 226 of the Constitution of India, unless such terms of contract

are patently illegal or opposed to public policy or against the national interest or allowing such condition would amount to permitting unjust

bargaining power.

9. The Supreme Court in the case of LIC of India and Another Vs. Consumer Education and Research center and Others, where the Supreme

Court after referring to the judgment in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, and also

the case of Union of India and others Vs. M/s. Graphic Industries Co. and others, , in categorical terms held as follows:

In Sterling Computers Ltd. v. M & N Publications Ltd. (SCC at p.464, para 28) it was held that even in commercial contracts where there is a

public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. In Union of India v.

Graphic Industries Co. this Court held that even in contractual matters public authorities have to act fairly; and if they fail to do so approach under

Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution.

10. It is also relevant to note the observation made by the Supreme Court in paragraph 27, which is as follows:

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action

to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into

consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and

it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure

envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and

guided by the public interest.

11. By applying the yardstick made by the Apex Court to the facts of the present case, I do not see any reason to hold that the clause in the

agreement, which is impugned in the Writ Petition, as either unconscionable or it treats the equally situated person as unequal, thereby violating

Article 14 of the Constitution of India.

12. In such view of the matter, looking at any angle, the Petitioner is not entitled to any relief as claimed in the Writ Petition. Hence, the Writ

Petition fails and the same is dismissed. No costs.