(2012) 10 CAL CK 0086

Calcutta High Court

Case No: Writ Petition No. 19516 (W) of 2012

M/s. Seven Hill Bytes Pvt. Ltd and Another		APPELLANT
	Vs	
The State of West Bengal and Others		RESPONDENT

Date of Decision: Oct. 1, 2012

Acts Referred:

- Constitution of India, 1950 - Article 265

Citation: (2013) 3 CHN 107

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Kishore Dutta, Mr. Srijib Chakraborty and Mr. Sirsanya Bandopadhyay, for the Appellant;Susovan Sengupta for the State, for the Respondent

Final Decision: Allowed

Judgement

Hon''ble Justice Jyotirmay Bhattacharya

1. A question has cropped up in this proceeding as to whether the terms and conditions of the contract can be modified unilaterally by one of such contracting parties without the consent of the other contracting party? Another question has also cropped up in this proceeding as to whether the Governor can issue any notification on a subject on which the State Legislature is incompetent to legislate? The other question which has cropped in this proceeding is as to whether the applications for change of use of the land which were filed before the notification dated 8th December, 2011 was issued, can be governed by the provisions contained in the said notification dated 8th December, 2011? These are the three questions which this Court is required to answer in this writ proceeding. The basic facts which are relevant for the present purpose may be summarized hereunder as follows:

a) A lease deed was executed between the Governor of the State of West Bengal and M/s. Resin and Allied Products on 27th March, 1989 by which a plot of land at Bidhannagore was leased out to the said Resin and Alloyed Product for a period of 999 years for setting up a Small Synthetic Resin Marketing Unit therein on the terms and conditions as mentioned in the lease deed. The term of the lease deed with which this Court is presently concerned is the restrictive clause as mentioned in Clause 9 which runs as follows:

9. Not to use or allowed to be used the land and/or the structure thereon or any part thereof for any purpose other than for setting up of Small Synthetic Resin Making Unit purpose without the prior permission in writing of the Government or other authority prescribed in that behalf.

2. There was another restrictive Clause mentioned in the said lease deed which provides that the lessee shall not subdivide or sublet the demised land or the building to be constructed without the consent in writing of the Government first had and obtained and the Government shall have the right and is entitled to refuse its consent at its absolute discretion.

3. This contract is not guided by any statutory law and/or any regulation made by the Government. The terms and conditions of the said contract are binding on the parties to the contract as lawful agreement between the parties. The rights and obligation of the contracting parties are, thus, governed by the terms and conditions of the said contract.

4. The said lessee, with an intention to transfer the said plot of land to the petitioner herein, applied for permission before the competent authority of the State Government and the State Government permitted the said lessee to transfer the said demised premises in favour of the petitioner subject to payment of the permission fees for such transfer as per the notification issued under the order of the Governor of the State on 6th May, 2005 and 17th April, 2007. Ultimately after realizing the permission fees from the petitioner, the State Government and the original lessee jointly executed deed of assignment on 27th August, 2009 for assigning the lease hold interest in respect of the demised premises in favour of the petitioner for the residuary period of the said lease. The said deed of assignment contained various terms and conditions including a condition which provides that the principal lease deed dated 27th March, 1989 shall remain in force and the terms and conditions of the said lease will be binding upon the assignee with such modifications as mentioned in the said deed of assignment with a further rider that the new lessee viz. the assignee may obtain permission from the Government for change of land use as per notifications No. 1722-UD/0/M/SL(AL/NR)/8L-8/2004(PT) dated 6th may, 2005 and No. 1395-UD/0/M/SL(AL/NR)/8L-8/2004 dated 17th April, 2007.

5. The petitioner (assignee) wanted to change the use of the land as it wanted to set up an IT unit therein. As such, in pursuance of the said restrictive clause, the petitioner submitted an application before the competent authority on 2nd August, 2011 seeking permission from the Government for change of use of the said land. The petitioner''s said application was allowed by the concerned authority and the petitioner was directed to deposit permission fees for change of use of the land from the original purpose to IT/ITES at rate of Rs. 5 lakhs per kattah in respect of plot no. EN-34 measuring 10.00113 kattah in Sector 5, Salt Lake in terms of the Department''s notifications dated 6th May, 2005, 7th April, 2007 and 8th December, 2011.

6. The notifications dated 6th May, 2005 and 17th April, 2007 were part of the contract between the parties as those notifications were mentioned in the deed of assignment dated 27th August, 2009 wherein it was provided that the petitioner may obtain permission for change of use of the land by following the provisions contained in those two notifications. The notification issued on 6th May, 2005 provides that permission for change of land use will be granted subject to payment of :-

i. Rs. 10,000/- only per kattah, if an IT related project is proposed;

ii. Rs. 20,000/- only per kattah for non-it project.

7. By subsequent notification issued on 17th April, 2007, the Governor was pleased to revise the said permission fees by enhancing it to Rs. 1,00,000/- only per kattah for both IT and non-IT projects. The said notification came into operation with immediate effect.

8. The petitioner cannot deny application of those two notifications to the present case as while executing the deed of assignment, the petitioner agreed to bind himself by the said restrictive clause mentioned in those two notifications. The said part of the contract is equally binding upon the State Government viz. the head lessor. But in stead of demanding the permission fees at the rate prescribed in those two notifications, the Government demanded permission fees at the enhanced rate i.e. Rs. 5,00,000/- per kattah as prescribed in the subsequent notification issued on 8th December, 2011 which was not a part of the contract between the parties.

9. It is notified in the said notification dated 8th December, 2011 that the Governor was pleased to revise the earlier permission fees by enhancing it from Rs. 1,00,000/- per kattah as mentioned in the notification dated 17th April, 2007 to Rs. 5,00,000/- per kattah for both IT and non-IT project with a rider that the said order will take immediate effect and all cases not yet settled will come under the purview of the said order.

10. In this aforesaid context the above three questions were raised.

11. Let me now try to answer those questions in the facts as stated above.

12. I have already indicated above that there is no statutory law and/or rules and/or regulation which controls the terms and conditions for grant of lease of any commercial or industrial plot in Bidhannagore. As such, the terms and conditions for grant of lease of such a plot is settled between the Government and the lessee through negotiation and the rights and obligations of the lessor and the lessee are governed by the terms and conditions mentioned in the lease deed. Since the right of the parties is governed by the terms of the agreement, the terms and conditions of such contract cannot be modified and/or varied and/or altered unilaterally by any one of the contracting parties without the consent and concurrence of the other contracting parties. The deed of assignment clearly provides that such permission for change of land use may be obtained by the petitioner from the Government as per the provisions contained in the notifications dated 6th May, 2005 and 17th April, 2007. As such, the permission fees at the rate of Rs. 1,00,000/- per kattah which was prescribed in the notification dated 17th April, 2007 can be legally demanded by the Government as a condition for a grant of such permission for change of use of the land. Thus, if the first question which is raised in the instant proceeding is considered in the light of the discussion held hereinabove then no doubt the State respondent is not entitled to demand the permission fees as per the subsequent notification of 2008 which was neither a part of the contract between the parties nor the parties agreed in the said contract that the lessee will have to pay the permission fees at the revised rate which may be introduced by the Government from time to time after execution of the said deed of assignment.

13. Now, a submission was made before this Court by Mr. Sengupta, learned Advocate for the State respondent, that though it is true that the contractual rights cannot be altered unilaterally by one of such contracting parties without the consent of the other contracting parties but the State Government is not powerless to modify and/or alter such contract between the parties by legislating on the subject and if the State Government has such power then the Governor certainly enjoys such power to issue notification by introducing certain conditions which may even result to alteration and/or change the term of the contract between the parties.

14. To refute such submission of Mr. Sengupta, Mr. Dutta, learned Advocate, appearing for the petitioner, submitted that the Governor can no doubt issue an ordinance and/or notification on a subject on which the State Legislature has power to legislate. By referring to the provision contained in Article 265 of the Constitution of India Mr. Dutta submitted that tax cannot be imposed by the Government without any authority of law. He further submitted that Schedule VII of the Constitution of India does not authorize the State Legislature to legislate on the subject of imposition of tax and as such, the Governor is also incompetent to issue such notification by introducing a provision regarding payment of tax in the guise of permission fees as a condition for grant of permission for change of use of the land.

15. In support of his submission, he has also relied upon a decision of the Hon''ble Supreme Court in the case of Ahmedabad Urban Development Authority vs. Sharad Kumar reported in AIR 1992 SCC 2038 and the decision of this Court in the case of ABL International Limited and Another Vs. Kolkata Municipal Corporation and Others, . In reply to that Mr. Sengupta submitted that constitution clearly draws a distinction between the imposition of tax by a money bill and the imposed of fees by any other kind of bills. According to Mr. Sengupta, the concept of imposition of tax by the State authority cannot be confused with the concept of imposed of fees by any other kind of bills. He thus, submitted that since the Governor has simply imposed fees for grant of such permission and revised the same from time to time by issuance of those notifications, the legality of such notifications cannot be challenged by the petitioner by contending that the Governor has no competence to issue such notifications.

16. I find some substance in such submission of Mr. Sengupta as it is well settled that the tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered but fee is a charge for special services rendered to individual by some governmental agencies and such a charge has an element in it of a quid pro quo.

17. By those notifications tax was not imposed by the Governor, rather certain fees were imposed as a condition for grant of permission for change of use of the land. As such this Court cannot hold that those notifications are unconstitutional because of lack of competence of the Governor to issue such notifications on the ground as agitated by Mr. Dutta.

18. Of course, fees are always realizable and/or chargeable for special services rendered to the individuals by some governmental agencies and such a charge has an element in its of quid pro quo. But at the same time this Court cannot be unmindful about the reasons for which payment of such permission fees was introduced by these notifications. The reason for issuance of such notification, as it appears from these notifications, is the economic viability of the changed projects and the financial benefit that would accrue to the lessor as a result of the change in use. Thus, the object of issuance of such notifications for introducing the concept of realisation of permission fees does not match with the concept of fees which can be realized by the State Government against service to be rendered by the Government to the applicants.

19. In the instant case the legality of such notifications has not been challenged on the ground that such demand of permission fees is illegal as the Governor has not specified the services which the Governmental agency will provide to such applicants who will seek permission for change of use of the land. As such, this Court is not required to enter into this part of the dispute presently.

20. The second question is, thus, answered.

21. Let me now consider the other question which was raised in the instant case i.e. applicability of 2011 notification to the fact of the instant case.

22. I have already indicated above that the application for change of use of the land was submitted by the petitioner on 2nd August, 2011. At the relevant time, the notification issued on 17th April, 2007 was in force. The parties agreed to observe the provisions contained in the said notification of 2007 in the deed of assignment. As such, the petitioner cannot avoid implementation of the said notification. However, the State Government, instead of implementing the said notification, demanded the enhanced permission fees which was introduced by the subsequent notification issued on 8th December, 2011. The said notification had its immediate effect. It was also provided in the said notification that the pending applications will come under the purview of the said order.

23. Let me now consider as to how far the said notification can be applied to the pending applications.

24. Mr. Sengupta, Learned Counsel, supported the state action by relying upon two decisions of the Hon''ble Supreme Court which are as follows:

i) In the case Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others,

ii) In the case of Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others,

25. In both the aforesaid decisions the Hon''ble Supreme Court held that the law which is to be applied is the law prevailing on the date of decision making. As such, Mr. Sengupta submitted that the State respondent did not commit any illegality by considering the petitioner''s application by applying the provisions of the notification dated 8th December, 2011 which was the law on the date when the concerned authority ultimately considered the petitioner''s prayer for change of use of the land.

26. In this context this Court has considered the aforesaid two decisions of the Hon''ble Supreme Court. On consideration of the decision of Howrah Municipal corporation''s case this Court finds that the Hon''ble supreme Court held that the building rules or regulations prevailing at the time of sanction would govern the subject of sanction and not the rules and regulations existing on the date of application for sanction. The aforesaid conclusion was arrived at by the Hon''ble Supreme Court by considering primarily two factors; namely, building regulations and bye laws are framed for public safety and security and the municipal authority had no control over such legislation inasmuch as such legislation were enacted by the State Legislature and as such even if any delay is caused in considering the application for sanction by the Municipal authority, such delayed action of Municipal Corporation cannot be held to be malicious as the Corporation had no bonafide and

malafide hand in the process of amendment of the Building Rules by the State Legislation. The Hon''ble Supreme Court also held that even though the right of the petitioner to get his application considered immediately on submission of such application is a legitimate or settled expectation but such settled expectation does not create any vested right to obtain sanction. The Hon''ble Supreme Court further held that such a settled expectation or a so called vested right cannot be countenanced against public interest and convenience which was sought to be served by amendment of building rules. Thus, in effect this Court finds that when public interest and public convenience play a pivot role, amendments and/or revision can be given effect retrospectively.

27. In the other decision cited by Mr. Sengupta, it was held by the Hon''ble Supreme Court that the law which is to be applied is the law prevailing on the date of decision making. The said conclusion was drawn in a service matter where the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the government without the consent of the employee.

28. But here is the case where this Court finds that no public law element is involved in the contractual field. The contract is not a statutory contract. The rights of the parties are not governed by any statutory law or bye law. The rights of the parties are governed by the terms and conditions mentioned in the deed of assignment executed by the parties. As such, the principles which were laid down by the Hon''ble Supreme Court in the aforesaid decisions, in my view, cannot be applied in the facts of the instant case. As such this Court holds that the notification issued on 8th December, 2011 cannot be applied in the present set of facts.

29. Let me now consider the present problem from another angle.

30. Suppose ten applicants applied for identical reliefs before the concerned authority on a particular day when 2007 notification was in force and prayer of eight of such applicants were allowed before the 2011 notification was issued by applying the provision of 2007 notification, then if the remaining two applicants'' prayer which could not be considered before issuance of 2011 notification for any reason whatsoever, are allowed by applying the provision of 2011 notification then there will be unreasonable discrimination amongst the equally circumstanced applicants as the additional payment which the applicants are required to pay for allowing their prayer, cannot be realized from the other eight applicants whose application were earlier allowed, even though they submitted their applications along with those two applicants for an identical relief on a same day. As such, this Court hold that in such fiscal matter notification cannot be given effect retrospectively as retrospective effect to such notification will create a class within a class which

amounts to discrimination by imposition of additional burden upon those unfortunate applicants who were not favoured by the State respondent by taking prompt action on their applications. That apart since the legislative body and the implementing authority are the same in the present case, the reasons for the delay in considering the petitioner''s application for such permission, will also play a pivot role on the issue regarding applicability of this 2011 notification in the facts of the instant case. No reason for such delay in considering the petitioner''s application is forthcoming from the State respondents. As such, this Court is of the view that the application of 2011 notification in the instant case, is not at all justified.

31. this Court, thus, holds that the State respondent was not justified in demanding permission fees at the revised rate as prescribed in the notification published on 8th December, 2011. The impugned demand being Annexure ''P/10'' to this writ petition appearing at page 66, stands quashed. The concerned authority is, thus, directed to permit the petitioner to change the use of the land for setting up an IT Unit therein subject to deposit of permission fees as per the notification issued on 6th May, 2005 followed by notification dated 17th April, 2007. The concerned State respondents are thus directed to raise a fresh demand towards permission fees at the rate as mentioned above within two weeks from the date of communication of this order and the permission for change of use of the land will become effective subject to the deposit of the fresh demanded amount by the State respondent as per the direction given above.

32. The writ petition is, thus, allowed. Urgent xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.