Dda vs M/S Kenneth Builders Developers Ltd. ... on 29 June, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3026, 2016 (13) SCC 561, 2016 (4) ADR 669, AIR 2016 SC (CIVIL) 2225, (2016) 5 MAD LJ 292, (2016) 4 ANDHLD 149, (2016) 6 SCALE 14, (2016) 2 WLC(SC)CVL 392, (2016) 4 RECCIVR 444, (2016) 165 ALLINDCAS 218 (SC), (2017) 3 ALL WC 2817, (2016) 118 ALL LR 206, (2016) 230 DLT 706

Author: Madan B. Lokur

Bench: N.V. Ramana, Madan B. Lokur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDCITION
CIVIL APPEAL NO. 5370 OF 2016
(Arising out of S.L.P. (Civil) No. 35374 of 2010)

Delhi Development Authority …Appellant

Versus

Kenneth Builders & Developers Ltd. & Ors. ...Respondents

WITH

CIVIL APPEAL NO.5371 OF 2016
(Arising out of S.L.P. (Civil) No. 13146 of 2011)

J U D G M E N T

Madan B. Lokur, J.

1. Delay condoned. Leave granted in both petitions.

2. The appellant (Delhi Development Authority or the DDA) in the first appeal is aggrieved by the judgment and order dated 30th July, 2010 passed by a Division Bench of the High Court of Delhi in W.P.(C) No. 10647 of 2009.[1] The grievance of the DDA is that even though the High Court held that the project land that we are concerned with was "Residential" as contended by the DDA, yet the High Court held that in the event construction activity thereon is not permitted by the Delhi Pollution Control Committee (or the DPCC) the developer (Kenneth Builders) would be entitled to a refund of the entire amount deposited with the DDA pursuant to the acceptance of the developer's bid in an auction, along with interest thereon.

3. In the connected appeal, the appellants (Government of the National Capital Territory of Delhi or the GNCTD and its Department of Forests) are aggrieved by the same judgment and order to the extent that it has been held that the DDA is the final authority to determine land use, even though its determination pertains to the Ridge in the National Capital Territory of Delhi.

4. Before referring to the facts of the case, which we have taken from the appeal filed and argued by the DDA, we would like to mention that there has been protracted correspondence between the DDA, Kenneth Builders and the Secretary (Environment) cum Chairman of the Delhi Pollution Control Committee of the GNCTD. However, we are of opinion that it is not necessary to detail the contents of every letter between them and we propose not to burden this judgment with avoidable details, as long as the narrative does not suffer.

5. The principal question that arises for our decision is whether the development agreement between the DDA and the developer Kenneth Builders was frustrated within the meaning of Section 56 of the Indian Contract Act, 1872 due to some intervening circumstances not contemplated by either party. Our answer to the question is in the affirmative. The facts of the case

6. The DDA proposed a public-private partnership project for the development of an area of 14.3 hectares of prime land at Tehkhand in South Delhi for the construction of 750 premium residential flats in a self contained community to be sold by private real estate development on free sale basis. In addition to the premium residential flats, the developer would have to construct 3500 resettlement houses for the economically weaker sections of society with each house having a super area of 26 sq. metres. These resettlement houses and the developed common facilities relating thereto would be handed over to the DDA for allotment.

7. According to the DDA (and there is no dispute about this) the project land was notified on 1st August, 1990 for “Recreation” (District Park) in the Master Plan for Delhi - 2001 (MPD-2001). According to the DDA (and again there is no dispute in this regard) two notifications were issued by the Ministry of Urban Development of the Government of India on 8th January, 2002 and 23rd February, 2006 converting the project land from “Recreation” (District Park) to “Residential”.

8. On 20th March, 2006 the DDA issued an advertisement for involving the private sector in Delhi’s development and for the development of the project land for the construction of 750 residential flats and 3500 resettlement houses. Pursuant to the advertisement, an auction was held by the DDA in terms of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 on an “as is where is basis” and as per the terms and conditions prescribed for the auction.

9. The terms and conditions for the auction specifically mentioned that the bid would be for the amount of premium offered for the project land to execute the project and that the project was being offered on an “as is where is basis”. It was stated that the presumption is that the intending purchaser has inspected the site and has familiarized himself with the prevalent conditions in all respects including status of infrastructure facilities available etc. before giving its bid. It was stated that on acceptance of the bid, the highest bidder would be required to deposit 25% of the bid amount as earnest money and the balance 75% of the bid amount was required to be deposited with

90 days of the issuance of the allotment- cum-demand letter. It was also stated that possession of the project land would be handed over on payment of the entire bid amount and on execution of the development agreement, except an area of approximately 4 hectares on which there is a JJ cluster. The terms and conditions also required the developer to comply with all the statutory requirements and rules and regulations of all public bodies including payment of fees and taxes etc.

10. Kenneth Builders was the highest bidder in the auction held on 26th April, 2006 and its bid was accepted. On 15th June, 2006 a demand-cum- allotment letter was issued to it requiring payment of balance 75% of the bid amount. It is not in dispute that Kenneth Builders deposited the entire bid amount of Rs. 450.01 crores with the DDA on 11th September, 2006.

11. Pursuant to the deposit of the entire bid amount by Kenneth Builders, a no objection certificate was issued by the DDA on 6th November, 2006 for submission of building plans for the project to the Planning Department of the DDA. Thereafter, on 4th December, 2006 possession of 11.70 hectares of the project land was handed over to Kenneth Builders but an area of approximately 2.60 hectares covered by the JJ cluster was left out and possession thereof was not given.

12. On 5th September, 2007 a Development Agreement was signed between the DDA and Kenneth Builders whereby it was agreed, inter alia, that Kenneth Builders would construct 3500 houses for the resettlement of slum dwellers and 750 free sale flats which Kenneth Builders would be entitled to dispose of. Kenneth Builders would also develop roads and peripheral services for the entire project.

13. In terms of the development agreement it was the responsibility of Kenneth Builders to obtain various approvals and clearances from the appropriate authorities including environmental agencies of the State and the Central Government. Clause 6 of the Development Agreement is important in this regard and this reads as follows:

> "6. Responsibility of Developer to get various approvals and clearances 6.1 The Developer shall be responsible for approval of drawings and for obtaining other "No Objection Certificate; from the appropriate authorities and Deptts not limited to MCD, Delhi Jal Board, Electric supplying agency concerned, Delhi Fire Services, DUAC, the environmental agencies of the State and Central Government. Authority or its authorized officers who are duly authorized to give approval on behalf of the Authority. (sic) 6.2 The delay in submission of applications, drawings, construction plans and compliance of the observation: shall be the responsibility of the Developer, and any delay in grant of approvals by the aforesaid Government bodies shall not relieve the Developer of any of its responsibilities under the Contract."

14. Kenneth Builders was also deemed to have inspected the site and its surroundings and checked the information available in connection therewith including the sub-surface conditions, the hydrological and climatic conditions etc. It was also deemed to have satisfied itself of the correctness and sufficiency of all the material and all its obligations under the contract, including dealing with concerned authorities such as environmental agencies of the State and Central Government. Clause

11.1 of the Development Agreement in this regard is important and this reads as follows:

> "11.1 Sufficiency of Information The Developer shall be deemed to have satisfied itself of the correctness and sufficiency of all the material and all its obligations under the Contract, including dealing with the concerned authorities not limited to MCD, Delhi Jal Board, Electric supplying agency concerned, Delhi Fire Services, DUAC, the environmental agencies of the State and Central Government, Authority or its authorized officers who are duly authorized to give approval on behalf of the Authority at its own cost and expense, as well as all the contingencies and all matters and things necessary for the proper execution and completion of the project and the remedying of any defects therein, before submitting the tender. The Developer has agreed and understood that no request for change in the terms and conditions of the Contract shall be entertained at any stage on any ground whatsoever."

15. The problems for Kenneth Builders began when, pursuant to the Development Agreement, it attempted to establish infrastructure facilities on the project land such as its site office, DDA office, sample flat for the economically weaker sections etc. sometime in February/March 2008. It was then that the Department of Forests of the GNCTD raised objections to carrying out such activities on the ground that the project land falls in the Ridge and hence all activities were required to be suspended.

16. The objection of the Department of Forests compelled Kenneth Builders to stop all building activity on the project land and that resulted in an exchange of letters for the next several months between the DDA, the GNCTD and Kenneth Builders. To cut a long story short, the DDA insisted that the project land was "Residential" and that the project could be undertaken thereon. The GNCTD was equally clear that the project land falls within the Ridge and no construction activity could be carried out without the consent of the Ridge Management Board and the permission of this Court. On its part, the Ministry of Environment and Forest, Government of India (or the MoEF) kept aloof from the controversy and gave environmental clearance for the project on 15th July, 2008 subject to the condition that a "consent to establish" shall be obtained by Kenneth Builders from the DPCC under the Water (Prevention and Control of Pollution) Act, 1974 (for short the Water Act) and the Air (Prevention and Control of Pollution) Act, 1981 (for short the Air Act) and a copy submitted to the said Ministry before the start of any construction work at the site. The relevant extract of the environmental clearance given by the MoEF reads as follows:

> "Subject: Construction of residential housing project at Tehkhand New Delhi by M/s Kenneth Builders & Developers Pvt. Ltd. Environmental Clearance – Reg.
>
> Dear Sirs, This has reference to your application No. nil, dated 15.01.2008 and subsequent letters dated 23.04.2008 and 23.05.2008 seeking prior Environmental Clearance for the above project under the EIA Notification, 2006. The proposal has been appraised as per prescribed procedure in the light of provisions under the EIA Notification, 2006 on the basis of the mandatory documents enclosed with the application viz., the Questionnaire, EIA, EMP and the additional clarifications

furnished in response to the observations of the Expert Appraisal Committee constituted by the competent authority in its meetings held on 13th 14th March 2008, 1st & 3rd May 2008 and 26th May, 2008 and awarded "Silver" grading to the project.

2. xxx xxx xxx

3. The Expert Committee after due considerations of the relevant documents submitted by the project proponent and additional clarifications furnished in response to its observation have accorded environmental clearance as per the provisions of Environmental Impact Assessment Notification – 2006 and its subsequent amendments, subject to strict compliance of the terms and conditions as follows:

PART A – SPECIFIC CONDITIONS Construction Phase.

"Consent for Establishment" shall be obtained from Delhi Pollution Control Committee under Air and Water Act and a copy shall be submitted to the Ministry before start of any construction work at the site.

to (xxvi) xxx xxx xxx

II. Operation Phase
xxx xxx xxx

PART B - GENERAL CONDITIONS:
xxx xxx xxx

4. and 5. xxx xxx xxx

6. The Ministry reserves the right to add additional safeguard measures subsequently, if found necessary and to take action included revoking of the environment clearance under the provisions of the Environmental (Protection) Act, 1986, to ensure effective implementation of the suggested safeguard measures in a time bound and satisfactory manner.

7. All other statutory clearances such as the approvals for Storage of diesel from Chief Controller of Explosives, Fire Department, Civil Aviation Department. Forest Conservation Act, 1980 and Wildlife (Protection) Act, 1972 etc. shall be obtained, as applicable by project proponents from the respective competent authorities.

8. These stipulations would be enforced among others under the provisions of Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and control of Pollution) Act 1981, the Environment (Protection) Act, 1986 the Public Liability (Insurance) Act, 1991 and EIA Notification, 2006.

> 9. Environmental clearance is subject to final order of the Hon'ble Supreme Court of India in the matter of Goa Foundation v. Union of India in Writ Petition (Civil) No.460 of 2004 as may be applicable to this project.
>
> 10. xxx xxx"

17. In view of the above, Kenneth Builders applied to the DPCC for "consent to establish" on 4th November, 2008. In response, the DPCC required Kenneth Builders to submit a "ridge demarcation report" at the earliest. Despite its asking by Kenneth Builders, the DDA did not give any such report to Kenneth Builders on the ground that the issue had already been clarified to the GNCTD in a letter dated 17th October, 2008. The letter dated 17th October, 2008 is a little ambiguous inasmuch as it mentions that the boundaries of the Ridge have been delineated, but they have not been identified at the site. The letter dated 17th October, 2008 reads as follows:

> "Subject: Regarding Residential housing Project at Tehkhand, New Delhi by M/s Kenneth Builders & Developers Pvt. Ltd.
>
> Sir, This has reference to letter No. DPCC/MCIII/3154: dated 6th August, 2008, enclosing the copy of the letter of Secretary (Environment) cum Chairman, Delhi Pollution Control Committee, Government of National Capital Territory of Delhi dated 13th June, 2008. In the Master Plan for Delhi-2001, Ridge has been defined in an area of 7777 hectares which is to be preserved in its pristine glory. In the Preamble of the said Master Plan for Delhi- 2001, one conceptual sketch indicating the ridge has been shown as one of the eight concepts only, whereas the land use Plan is the legal documents/plan showing the details which are to be referred for the purpose of establishing the area/land use, in this case for the ridge/regional park.
>
> Delhi Government through its notification dated 24.05.1994 has delineated the boundaries of the ridge but the same has not been identified on the site. This notification is under Section 4 for the areas to be earmarked as reserved forests under the Delhi Forest Act.
>
> The land pocket where DDA has proposed residential development, was clearly shown under District Part in-MPD-2001, and the land use of the same has already been changed from Recreational Use (District Park) to residential vide Gazette of India notification Nos.A-13011/30/1995-DDIB dated 08.01.2002 and 23.02.2006 (copies enclosed). The said notifications were issued following the due process of law and taking relevant factors into consideration. No objection in respect of the land use of the Project land were raised by any departments including the Forest Department at that stage.

The Ministry of Environment & Forest, after considering and taking on record the representation from both Delhi Pollution Control Committee and DDA (Letter No.F.3(60)MP/D.116 dated 30.6.08) with respect to land use of the Project land, has accorded the Environment Clearance to our project

on 15th July, 2008, copy of the same is attached herewith.

All the facts, documents and detailed plans have been shared and discussed in detail between the two departments, in meeting. In the light of facts been legally converted from recreational use (District Park) to residential.

In view of the facts, it is requested that the "Consent to Establish" from Delhi Pollution Control Committee under Air & Water Act be granted to the applicant at the earliest."

18. Faced with this impasse and unable to obtain the ridge demarcation report and therefore the "consent to establish" from the DPCC, Kenneth Builders approached the Delhi High Court by way of a writ petition on 1st August, 2009 resulting in the impugned judgment and order. In the writ petition, Kenneth Builders prayed, inter alia, for setting aside of the tender/auction notice dated 20th March, 2006 as also the allotment letter dated 15th June, 2006 and a declaration that the project was incapable of performance. It was further prayed that the auction had become void and that Kenneth Builders was entitled to a refund of the amount paid to the DDA along with interest at 18% per annum till realization. Decision of the High Court

19. The High Court has elaborately discussed the various letters exchanged between the concerned parties and has thereafter very succinctly put the controversy in focus in paragraphs 26 and 27 of the impugned judgment and order. These paragraphs read as follows:

> "26. The foregoing demonstrates the controversy between the parties. The petitioner's stand is that it had made the bid for the project and had aid the entire amount of Rs.450.01 crores on the clear understanding that the project site was residential. This understanding, according to the petitioner, was based on the representation made by the DDA as the detailed facts referred to above would reveal. In fact, the DDA has maintained and continues to maintain its stand that the project site is not within the ridge area and the land use of the same has been clearly shown as residential. According to the DDA, the land in question was earlier earmarked for recreational (District Park) purposes. However, that was subsequently altered by the two notifications dated 08.01.2002 and 26.02.2006 by carrying out modifications in the Master Plan (MPD-2001).

The stand of the DDA is also this that the land use of any particular area is to be determined under the Master Plan and the authority which does such determination is the DDA and not any other authority, such as the DPCC. The clear stand of the DDA is that the DPCC has no right or business to raise any objection with regard to the land use and that is solely within the domain and powers of the DDA. The stand of the DDA is, however, not accepted either by the DPCC or the Department of Forests, Government of NCT of Delhi. In fact, both the DPCC and the Department of Forests (respondents 2 and 4 herein) along with the Government of NCT of Delhi (respondent No.3) have taken a unified stand that the land in question falls within the ridge and more so because the Department of Forests has found the said land to be part of Khasra Nos. 444 and 445 of village Tehkhand which, in the revenue record, has been shown as "gair mumkin pahar". Thus, according to

the said respondents, no construction activity can be carried out in the land in question inasmuch as, according to them it falls within the ridge area. Consequently, the DPCC has refrained from issuing the "consent to establish" under Water and Air Acts, which was a requirement and a condition of the clearance given by the Ministry of Environment and Forests, Government of India.

27. It is in this backdrop that the petitioner felt that there is virtually no chance of the project going ahead in view of the stalemate between the DDA and the various governmental departments. It is on the basis of this situation that the petitioner has sought the setting aside of the tender/auction as also the allotment letter dated 15.06.2006 in its favour and has sought the return of the money paid by it along with interest thereon."

20. By the impugned judgment and order, the High Court held that Kenneth Builders was not entitled to have the tender/auction in which it had participated and in which it was a highest bidder set aside. Kenneth Builders was also not entitled to have the letter of allotment issued to it pursuant to the acceptance of its bid in the auction conducted by the DDA set aside or to the return of money paid by it to the DDA. However, it was held that Kenneth Builders would be entitled to have the DPCC examine its application for the grant of "consent to establish" from the stand point of the Water Act and the Air Act within two months for carrying out the project which was the subject matter of the writ petition. It was also held that in the event the DPCC does not give its "consent to establish" and the project cannot be carried out then Kenneth Builders would be entitled to a return of the entire amount (with interest at the rate of 6% till realization) paid by it to the DDA since the project would stand frustrated and would be incapable of performance.

21. For arriving at the above conclusions, the High Court held that once the Master Plan for Delhi prepared by the DDA earmarks land for a particular use, then no other authority can challenge the same. As far as the project land was concerned, the DDA had earmarked it for residential use and this could not be challenged. The High Court also held that after the MoEF had given the environmental clearance, the role of the DPCC was limited to the grant of "consent to establish" under the Air Act and the Water Act. It was not open to the GNCTD, the Department of Forests or the DPCC to question the land use of the project land as determined by the DDA on the ground that it was within the Ridge.

22. At this stage, it is necessary to mention that during the pendency of the writ petition in the High Court, it came out that during a meeting convened by the Lieutenant Governor on 23rd June, 2009 on some other issue, the case of Kenneth Builders came up, perhaps for an informal discussion. Nevertheless, it was decided in that meeting that the question of the status of the project land should be referred to the MoEF (even though it had already granted environmental clearance) and that the decision of the MoEF would be accepted as final. These facts were put to the learned Additional Solicitor General appearing in the matter and he sought time to take instructions. Eventually, the following response dated 3rd December, 2009 was sent by the MoEF to the learned Additional Solicitor General:

> "Sub: Opinion of the Ministry of Environment and Forest in regard to WP (C) Ref.: Secretary, Environment, NCT's D.O. No. F.11 (105/PA/CF/Part/09/4582 dated

27.11.2009).

> Sir, This is with regard to Writ Petition (C) 10647/2009 of Kenneth Builders and Developers Ltd. v. UOI & Ors. in the High Court of Delhi. An opinion was sought from Ministry of Environment and Forests to the effect that the land in the subject matter of the Writ Petition mentioned under subject is a part of Ridge or not. The opinion of Ministry of Environment and Forests in this regard is as follows:
>
> "Keeping in view the purely legalistic position taken by DDA and exercise undertaken for identification of ridge, based upon one or more criterion decided by NCT of Delhi, as relevant for classification of any land as "ridge" in Delhi, the said piece of land measuring 14.3 ha falling in Khasra No.444 and 445 reflected as "Gai Mumkin Pahar" in revenue land, needs to be considered as ridge in accordance to the spirit of various orders of Hon'ble Supreme Court in WP (C) 4677/1985, morphological features and revenue records. The Hon'ble Apex Court is still looking into various aspects of protection & conservation of Delhi ridge, in WP (Civil) No. 4677/1985 from time to time. However, the Hon'ble High Court of Delhi, if deemed appropriate, the opinion of Central Empowered Committee, set up by Hon'ble Supreme Court may be taken".
>
> It is requested to intimate the Hon'ble Court about the opinion of the Ministry of Environment and Forests when the case will come up on 4th December, 2009." It will be seen from the above that the MoEF had taken a virtual volte face and had opined that the project land needs to be considered as Ridge, but if deemed appropriate the opinion of the Central Empowered Committee might be taken. This was apparently not brought to the notice of the High Court.

23. Be that as it may, the DDA has challenged the order of the Delhi High Court which has effectively directed the DDA to refund the tender amount to Kenneth Builders since "consent to establish" and continue with the project had not been granted by the DPCC. The GNCTD as well as the Department of Forests also filed a Petition for Special Leave to Appeal being SLP (C) No. 13146 of 2011 challenging the decision of the Delhi High Court to the effect that the DDA is the competent authority to decide the land use.

Subsequent events

24. After the decision of the Delhi High Court, Kenneth Builders requested the DPCC on 3rd August, 2010 in terms of the order of the Delhi High Court, for "consent to establish". By its letter of 28th October, 2010 the DPCC made it quite clear that since Kenneth Builders did not have any clearance to carry out any construction on the project land from the Ridge Management Board or from this Court or from the Department of Forests, "consent to establish" under the Air Act and Water Act could not be given. It was also mentioned that the Department of Forests would be challenging the order of the Delhi High Court in this Court. The letter dated 28th October, 2010 reads as follows:

"Sub: - Refusal of Consent under Water (Prevention & Control of Pollution) Act, 1974 and (Prevention & Control of Pollution) Act, 1981 as amended to date.

Whereas, you M/s KENNETH BUILDERS & DEVELOPERS PVT. LTD., MAA ANANDMAYI MARG, TEHKHAND, DELHI (hereinafter referred as addressee) have applied for Consent to Estab. (Orange Category) on 30.05.08 vide I.D. No.25891 under section 21 of Air (Prevention & Control of Pollution) Act, 1981 and u/s 25/26 of the Water (Prevention & Control of Pollution) Act, 1974 for activity of Residential Construction Project.

And whereas, a letter dt. 27.03.08 addressed to the Commissioner (L.M.), DDA was received from Deputy Conservator of Forest, South to provide a copy of Environmental Clearance w.r.t. large scale earth work undertaken by you (the addressee) And whereas, a copy of letter dt. 04.04.08 addressed to the Commissioner (L.M.) DDA was received from the Deputy Conservator of Forest, South to stop all construction activity on the said land until the permission for the same is accorded by the Ridge Management Board.

And whereas, as decided by the Consent Management Committee (Orange) in its meeting held 03.06.08, a letter was issued to the Deputy Conservator of Forest, South, on 13.06.08 regarding status of Forest Clearance w.r.t. the said project.

And whereas, a D.O. letter issued by the Chairman, DPCC on 13.06.08 to the Vice Chairman, DDA regarding immediate cessation of all construction work on the project site till the clearance from the same obtained from the Competent Authorities including the Ridge Management Board & the Hon'ble Supreme Court.

And whereas, a letter dt. 23.06.08 has been received from the Deputy Conservator of Forest Dept. informing that the clearance from the Ridge Management Board & the Hon'ble Supreme Court has not been communicated by DDA so far.

And whereas a letter was issued to the Deputy Conservator of Forest, South on 19.02.09 to confirm whether any forest clearance and ridge demarcation report to the said project has been granted or not.

And whereas, a reply was received from the Deputy Conservator of Forest, South on 17.03.09 informing that no forest clearance has been accorded so far.

And whereas, a letter was issued to the Deputy Conservator of Forest, South on 16.04.09 along with the site plans of the project to inform the status of the area as per the ridge demarcation report.

And whereas, the Hon'ble High Court vide its judgment dt. 30.07.10 directed the DPCC to examine the application of the petitioner for grant of "Consent to Establish"

from the standpoint of the Water & Air Acts alone within two months from the date of judgment.

And whereas, after examination, as decided by the Consent Management Committee (Orange) in its meeting held on 22.09.10, a letter was issued to the Forest Deptt. on 01.10.10 to send the opinion on the judgment at the earliest as the issue pertains the Forest Department.

And whereas, the case was again taken up by the Consent Management Committee (Orange) in it meeting held on 1.10.10 & it was decided:

"Forest department is going for appeal, therefore, consent be refused." Now, therefore, as decided by the said Committee aforementioned consent to establish application under Air & Water Acts to the addressee unit is hereby refused with immediate effect.

Please note that the activity of Residential Construction Project without having valid consent under the Air & Water Acts is a punishable offence and attracts penal action under the provisions of the said Act."

25. In view of the categorical response, broadly speaking, the controversy remains whether the project land is a part of the Ridge or not and whether the contract between the DDA and Kenneth Builders has been frustrated due to supervening factors or not. To resolve the first controversy, this Court passed an order on 6th October, 2015 for ascertaining whether the project land falls within the Ridge or not. This was in view of the uncertainty in the status of the project land as well as the view expressed by the MoEF in the letter dated 3rd December, 2009 addressed to the learned Additional Solicitor General appearing in the High Court that the issue could be best resolved (if deemed appropriate) by a reference to the Central Empowered Committee set up by this Court. Accordingly, we referred this issue to the Central Empowered Committee (CEC) set up in T.N.Godavarman v. Union of India[2].

26. Pursuant to the order of 6th October, 2015 the CEC submitted its Report dated 18th November, 2015 in which it was concluded that non- forestry use of land falling in the Ridge was permitted only after a development project was cleared or recommended by the Ridge Management Board and permitted by this Court. However, a decision was rendered by the Delhi High Court in a case filed by Ashok Kumar Tanwar [W.P. (C) No. 3339 of 2011 decided on 30th November, 2011] to the effect that a development project on land outside the notified Ridge area but having morphological features conforming to the Ridge would also require clearance from the Ridge Management Board and this Court. Therefore, as far as the present case is concerned though the project land falls outside the Ridge but has morphological features conforming to the Ridge bringing it within the extended Ridge, the project of the DDA involving non-forestry use of the land could be permitted only after obtaining clearance from the Ridge Management Board and after obtaining the permission of this Court. The CEC in its Report stated in this regard as follows:

"6. The non-forestry use of land falling in Delhi Ridge for implementation of the various development projects are being permitted only after the proposal is cleared/recommended by the Ridge Management Board and permitted by this Hon'ble Court. Such permissions have been granted by this Hon'ble Court subject to deposit of 5% of the estimated project cost with the Ridge Management Board Fund for conservation and development of Delhi Ridge and compensatory afforestation over equivalent non-forest land/Ridge land at project cost.

7. Earlier, the clearance from the Delhi Ridge Management Board and the permission of this Hon'ble Court was being insisted upon only in respect of the notified Ridge areas. One Shri Ashok Kumar Tanwar filed Writ Petition (Civil) No.3339 of 2011 before the Hon'ble High Court of Delhi against the construction of buildings and other infrastructure facilities being done by the Directorate General, Border Road Organisation in 2.25 acres of land belonging to Ministry of Defence at Naraina, Delhi Cantonment on the ground that the said land falls in the Central Ridge and wherein pursuant to the directions of this Hon'ble Court the non-forestry uses are prohibited. The Government of NCT of Delhi after considering the view of the Delhi Ridge Management Board filed before the Hon'ble High Court of Delhi an affidavit dated 30th November, 2011 wherein it was stated that the land in question is situated outside the notified ridge areas but is having morphological features conforming to the Ridge. The Hon'ble High Court of Delhi by order dated 30th November, 2011 disposed of the said Writ Petition with the directions that the Border Road Organisation is restrained from carrying out any further construction works on the land till it obtains necessary clearance from the Delhi Ridge Management Board or (and) this Hon'ble Court through the CEC. A copy of the said order of the Hon'ble High Court of Delhi is enclosed at ANNEXURE-R-2 to this Report. Since then, non-forestry use of any land having morphological features conforming to the Ridge but falling outside the notified ridge areas (commonly referred to as "extended ridge areas") is also being permitted only after obtaining clearance from the Delhi Ridge Management Board and permission of this Hon'ble Court.

8. The said project of the Border Road Organisation was subsequently cleared/recommended by the Delhi Ridge Management Board, recommended by the CEC and thereafter this Hon'ble Court by order dated 2nd November, 2012 granted permission for implementation of the project on 2.25 acre of land falling on the "extended ridge areas". This Hon'ble Court by another order dated 21.10.2013 has granted permission for implementation of a project by Delhi Metro Rail Corporation (DMRC) involving use of lands falling in "extended ridge area". The copies of the abovesaid orders of the Hon'ble Court dated 2nd November. 2012 and 21st October, 2013 are enclosed at ANNEXURE-R-3 and ANNEXURE-R-4 respectively to this Report.

9. In the present case the Delhi Forest Department has found that the project area falls in "extended ridge area" i.e. outside the areas identified as Ridge area in the

> MPD 2001/MPD 2021 but having morphological features conforming to the ridge and that a large extent of areas in and around the project site are recorded as "Gair Mumkin Pahar" in the revenue records. The stand taken by the Forest Department has been verified by the CEC during the site visit. Copies of the photographs of the project site taken during the site visit of the CEC are collectively enclosed at ANNEXURE-R-5 to this Report. A copy of the sketch map prepared by the Forest Department showing the details of Gair Mumkin Pahar areas in and around project site is enclosed at ANNEXURE–R-6 to this Report. A copy of the satellite imagery made available by the DDA showing the project area in question and the adjoining areas is enclosed at ANNEXURE-R-7 to this Report.
>
> 10. From the above it may be seen that in the present case the land falls in the "extended Ridge area" i.e. outside the Ridge areas identified in MPD 2001/MPD 2021 having morphological features conforming to Ridge.

Implementation of all the similarly placed cases i.e. the projects involving non-forestry use of the areas falling in "extended ridge areas" have been permitted only after obtaining clearance from the Ridge Management Board and permission of this Hon'ble Court. In two similarly placed projects of the Border Road Organisation and DMRC this Hon'ble Court by orders dated 2nd November, 2012 and 21st October, 2013 respectively has granted permission from the non-forestry use of the lands falling in the "extended Ridge area".

11. In the above background the CEC is of the considered view that in the present case the proposed construction of buildings can be undertaken only after obtaining clearance from the Ridge Management Board and permission of this Hon'ble Court." Discussion

27. The first submission of learned counsel for the DDA was that a writ petition under Article 226 of the Constitution was not maintainable for the reliefs claimed by Kenneth Builders. The reliefs arise out of a contractual dispute and the High Court ought not to have entertained the writ petition. We are not inclined to consider this submission for the reason that no such objection was raised by the DDA before the High Court or even in the petition filed in this Court. The submission has been advanced by learned counsel for the DDA for the first time during the final hearing of these appeals. It is too late in the day for learned counsel to raise such an objection and we are not inclined to entertain it.

28. On merits, it was submitted that in view of the terms and conditions of the auction and the development agreement between the DDA and Kenneth Builders, it was the duty and responsibility of the developer to obtain all necessary clearances including environmental clearance and consent from the DPCC for completing the project. It was pointed out that the MoEF had given environmental clearance for the project on 15th July, 2008 subject to the developer obtaining "consent to establish" from the DPCC under the Air Act and the Water Act. It was therefore the obligation of Kenneth Builders to approach the DPCC and obtain the necessary consent which it failed to do.

29. What has been overlooked by learned counsel is that the fresh view of the MoEF is that the project land needs to be considered as Ridge. Consequently, no construction activity is permissible on the project land. That apart, Kenneth Builders did apply to the DPCC for "consent to establish" for starting construction activity on the project land. For considering the request, the DPCC required a ridge demarcation report which was not given by the DDA to Kenneth Builders or to the DPCC. Therefore, the DPCC was not inclined to give its consent in the absence of the ridge demarcation report. Even after judgment was delivered by the High Court, Kenneth Builders applied to the DPCC for "consent to establish" but to no effect in the absence of a ridge demarcation report and forest clearance.

30. It does appear from the record that the exact boundaries of the Ridge had not been identified by anybody and this is apparent from a letter dated 13th June, 2008 sent by the Secretary (Environment) of the GNCTD to the DDA wherein it was pointed out that there is some discrepancy between the areas notified by the Ministry of Urban Development of the Government of India in the notifications dated 8th January, 2002 and 23rd February, 2006 and the boundaries of the Ridge. It was further pointed out that the process of identification had been initiated by the Department of Forests of the GNCTD but it appears that the demarcation was not completed by the time the writ petition was filed by Kenneth Builders. According to the DDA the letter was based on an incorrect appreciation of facts, but that does not concern us. All that is relevant is that the GNCTD believed that the construction could not go on in the project land since it fell within the boundaries of the Ridge.

31. In this context, it must not be forgotten that even after having given environmental clearance to Kenneth Builders, the MoEF had second thoughts regarding the status of the project land. This led the MoEF to send the letter dated 3rd December, 2009 referred to above. In other words, the status of the project land was generally 'unclear' at least to the GNCTD and the MoEF.

32. Be that as it may, it appears to us that Kenneth Builders did take all necessary steps to commence the construction activity on the project land but due to the impasse created by the governmental agencies, it could not proceed in the development activity. We agree with learned counsel for Kenneth Builders that under these circumstances, the provisions of Section 56 of the Indian Contract Act, 1872 (the Contract Act) would be attracted to the facts of the case. Section 56 of the Contract Act reads as follows:

> "56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.
>
> Contract to do act afterwards becoming impossible or unlawful - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful - Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must

make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

33. The interpretation of Section 56 of the Contract Act came up for consideration in Satyabrata Ghose v. Mugneeram Bangur & Co.[3] It was held by this Court that the word "impossible" used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, "there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens." This is what this Court had to say:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promissor finds it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says[4] "If substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible." xxx xxx xxx It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the

> contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in Matthey v. Curling[5] "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies ... or vis major". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."
>
> 34. In so far as the present case is concerned, the DDA certainly did not contemplate a prohibition on construction activity on the project land which would fall within the Ridge or had morphological similarity to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance.
>
> 35. It is true that the Government of India had notified the project land as "Residential" and that the project land was shown as "Residential" in the MPD-2001 and MPD-2021. But that fact alone would not change the position at law. The exact boundaries of the Ridge do not appear to have been demarcated and in the absence of demarcation, it could not be said with any degree of certainty by the DDA that merely because of the two notifications issued by the Ministry of Urban Development the project land could be used for residential purposes even if it fell within the Ridge.

This would be ignoring the position at law and would be stretching the argument a little too far. The DDA was unaware that even if the project land did not fall within the Ridge yet any development activity thereon would require permission from the Ridge Management Board as well as from this Court since there was morphological similarity between the Ridge and the project land. It is this intervening circumstance which eventually frustrated the implementation of the contract.

36. It is one thing for the DDA to now contend before us that Kenneth Builders could have applied to the Ridge Management Board for permission to carry out development activity and also approached this Court for necessary permission but it is another thing to say that these requirements were not within the contemplation of the DDA and certainly not within the contemplation of Kenneth Builders. For a statutory body like the DDA to contend that in the face of the legal position (with which the DDA obviously does not agree), Kenneth Builders ought to have persisted and perhaps initiated or invited litigation cannot be appreciated.

37. When the DDA informed Kenneth Builders that the project land was available on an "as is where is basis" and that it was the responsibility of the developer to obtain all clearances, the conditions related only to physical issues pertaining to the project land and ancillary or peripheral legal issues pertaining to the actual construction activity, such as compliance with the building bye-laws, environmental clearances etc. The terms and conditions of "as is where is" or environmental clearances emphasized by learned counsel for the DDA certainly did not extend to commencement of construction activity prohibited by law except after obtaining permission of the Ridge

Management Board and this Court. On the contrary, it was the obligation of the DDA to ensure that the initial path for commencement of construction was clear, the rest being the responsibility of the developer. The failure of the DDA to provide a clear passage due to an intervening circumstance beyond its contemplation went to the foundation of implementation of the contract with Kenneth Builders and that is what frustrated its implementation.

38. Reliance by learned counsel for the DDA on the "as is where is" concept as well as clauses 6 and 11 of the Development Agreement in this context is misplaced. As mentioned above, this primarily pertains to physical issues at site. This is clear from the following passage referred to by learned counsel from Punjab Urban Planning & Development Authority v. Raghu Nath Gupta[6]:

> "Evidently, the commercial plots were allotted on "as-is-where-is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as-is-where- is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on "as-is- where-is" basis, they should not have accepted the allotment and after having accepted the allotment on "as-is-where-is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted. Over and above, the facts would clearly indicate that there was not much delay on the part of PUDA to provide those facilities as well. As noted, the electrical works and health works were completed by 24-12-2002 and 22-11-2002 respectively and all the facilities like parking, lights, roads, water, sewerage, etc. were also provided."

39. On a conspectus of the facts and the law placed before us, we are satisfied that certain circumstances had intervened, making it impracticable for Kenneth Builders to commence the construction activity on the project land. Since arriving at some clarity on the issue had taken a couple of years and that clarity was eventually and unambiguously provided by the report of the CEC, it could certainly be said that the contract between the DDA and Kenneth Builders was impossible of performance within the meaning of that word in Section 56 of the Contract Act. Therefore, we reject the contention of the DDA that the contract between the DDA and Kenneth Builders was not frustrated.

40. Learned counsel for Kenneth Builders urged that the amount deposited with the DDA ought to be returned with interest at 12% per annum and not 6% per annum as directed by the High Court. We are not inclined to accede to this request. Kenneth Builders had prayed for interest at 18% per annum in the High Court but that was declined and only 6% per annum was awarded. Kenneth Builders is not in appeal before us on this issue. However, we make it clear that the calculation of interest on the amount deposited would be with effect from 11th September, 2006 when the entire amount of Rs. 450.01 crores was deposited by Kenneth Builders with the DDA.

41. The GNCTD and the DPCC raised an issue before us that the DDA was not the final authority in the matter of determining the land use particularly when it related to the Ridge. In the view that we

have taken, it is not necessary to go into this question.

Conclusion

42. The appeal filed by the DDA is dismissed. The DDA should now refund the deposit made by Kenneth Builders with interest at 6% per annum calculated from 11th September, 2006 till realization. The question raised in the connected appeal filed by the GNCTD and the Department of Forests of the GNCTD is left open for consideration in an appropriate case.

43. There will be no order as to costs.

……J
(Madan B. Lokur)

…….J
(N.V. Ramana)

New Delhi;
June 29, 2016
---

[1] Kenneth Builders and Developers Ltd. v. Union of India and others, MANU/DE/1815/2010 [2] (2013) 8 SCC 198 [3] (1954) SCR 310 [4] Tamplin Steam Ship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd., (1916) 2 AC 397, 403 [5] (1922) 2 AC 180 at 234 [6] (2012) 8 SCC 197