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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 6751/2007

% ***Judgment Delivered on: 16.11.2009***

STAR CITY ENTERTAINMENT Petitioner
Through: Mr.Neeraj Kishan Kaul, Sr. Advocate
with Mr.Tanuj Khurana and
Mr.Bhuvan Mishra, Advocates

versus

D.D.A. Respondent
Through: Mr.M.K. Singh, Advocate

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

G.S.SISTANI, J. (ORAL)
C.M.No.14227/2009

1. This is an application seeking waiver of costs, which was awarded by this court vide its order dated 12.8.2009.
2. Notice. Counsel for non-applicant accepts notice and submit that he does not wish to file any reply and in fact he has no objection if the application is allowed.
3. For the reasons stated in the application and taking into consideration that the application is supported by the affidavit of the counsel, the application is allowed. Order dated 12.8.2009 awarding costs is recalled.
4. Application stands disposed of.

W.P.(C) 6751/2007

5. Rule. With the consent of counsel for the parties, present petition

is taken up for final hearing and disposal. Brief facts of the case which have led to filing of the present petition are that respondent – DDA vide public notice in the year 2001 invited sealed tenders for lease of Cinema-cum commercial plots on “as is where is basis” at Laxmi Nagar, Nehru Place and Pitampura, New Delhi, as per the terms and conditions prescribed in the tender document. On 30.10.2001 the petitioner submitted its tender application for lease of a Cinema cum Commercial Complex at Community Centre Road No.44, Pitampura and offered a premium of Rs.6.0 crores for the said plot and accordingly deposited EMD of Rs.1.50 crore being 25% of the bid amount as per the terms of the tender. As per the tender conditions 25% amount was to be paid within 90 days from the date of issue of demand/ allotment letter and balance 50% of the amount was to be paid within 180 days of issuance of demand cum allotment letter i.e. by 3.5.2002. The respondent scrutinized the technical and financial bid of the petitioner and accepted the offer made by the petitioner vide letter dated 5.11.2001. By the said acceptance letter, respondents called upon the petitioner to deposit the balance amount as per para 3.7 of the tender document. It is the case of the petitioner that after paying 25% of the bid amount, the petitioner started working with an Indian and foreign firm of architects for development of appropriate designs and layouts of the said project, based on the specifications as provided by respondents. As the development specifications given by respondent did not allow the necessary flexibilities to develop an

efficient cinema complex in the manner provided by the DDA, accordingly the petitioner did not deposit 25% amount on time and sought extension of time from the DDA on 11.3.2002 which request was turned down by the DDA. Meanwhile, petitioner received a letter dated 18.3.2002 from the DDA regarding cancellation of the allotment of cinema cum commercial plot, whereby petitioner was also intimated that earnest money stood forfeited as per para 3.9 of the tender document. As the amount was forfeited without any show cause, on 2.5.2002 the petitioner requested the DDA to afford a personal hearing to the petitioner to arrive at a workable solution as the project would involve an investment of over Rs.25.0 crores and technical and development issues were to be sorted out. As the petitioner did not receive any response from the DDA, the petitioner deposited Rs.4.50 crores with the DDA on 6.8.2002. The petitioner was informed by letter dated 7.8.2002 that the restoration of the plot cannot be considered as the allotment stood cancelled by the competent authority.

6. Petitioner again requested the respondent for restoration of the plot and in the meanwhile without prejudice requested the DDA for refund of Rs.1,12,50,000/- after forfeiting 25% of the earnest money as per clause 3.9 of the tender document. As the amount was not refunded, the petitioner addressed letters dated 15.11.2002 and 8.10.2003 requesting the respondent to refund the earnest money after deducting 25% of the earnest money as per the tender document which amount was lying with them since

30.8.2001. The respondent was also requested to refund the amount with interest @18% per annum from the date of cancellation of the allotment, till the date of actual payment.

7. The respondent admittedly returned the balance amount after deducting 25% of the earnest money on 20.5.2004 without paying any interest. The petitioner demanded 18% interest for the delayed refund of the amount from the date of cancellation i.e. 18.03.2002 vide letters dated 2.6.2004, 20.6.2004, 27.4.2006 and 3.1.2007. The respondent replied to these communications as late as on 5.4.2007 and informed the petitioner that the request of the petitioner for payment of interest on delayed payment had been rejected.
8. Aggrieved by the communication dated 5.4.2007, present petition has been filed. Counsel for petitioner submits that the allotment was cancelled by the DDA on 18.3.2002 and the DDA in the concluding portion of this communication had informed the petitioner that the allotment stood cancelled and the earnest money of Rs.1,50,00,000/- forfeited as per para 3.9 of the tender document.
9. It is contended that para 3.9 of the tender document permits the DDA to forfeit 25% of the earnest money. It is contended that once having taken recourse to para 3.9 of the tender document the DDA was bound to refund the balance amount after forfeiting 25% of the earnest money at the earliest and since the DDA for the reasons best known to them did not refund the balance amount for approximately two and a half years, petitioner would

be entitled to interest on the balance amount and DDA cannot be allowed to enrich themselves at the cost of the petitioner.

10. It is submitted by senior counsel for the petitioner that the act of the respondent in withholding the amount of the petitioner for a unusually long period and thereafter declining to pay interest, is arbitrary, unreasonable and irrational and there is no justifiable reason as to why the amount was illegally withheld without any just cause. It is thus contended that respondent has retained the amount illegally and has utilized the same for its own benefit. The action of the respondent is thus arbitrary in nature and is in violation of Article 14 of the Constitution of India.
11. Counsel for respondent – DDA submits that as per para 3.5 of the tender document, the DDA was entitled to forfeit the entire earnest money, however, DDA has taken a lenient view in the matter and has only forfeited 25% of the earnest money and thus petitioner is not entitled to any interest. Counsel for respondent – DDA also relies upon paragraph 3.19 of the tender document in support of his plea that in the event of any dispute the matter is to be referred to the Vice-Chairman, DDA, who is empowered to adjudicate and decide the dispute, if any, between the parties and his decision is to be final, conclusive and binding on both the parties. It is contended that upon the request received from the petitioner, Vice-Chairman, DDA has considered the matter and thereafter has decided to forfeit 25% of the earnest money. Counsel further contends that the scope and power of the High Court under Article 226 of the Constitution to interfere in

contractual matter is very narrow, hence present petition would not be maintainable.

12. In response to the submission of counsel for the DDA, learned senior counsel for the petitioner has relied upon **Food Corporation of India & Anr. Vs. Seil Ltd. & Ors.** (2008) 3 SCC 440 more particularly paragraphs 16, 21, 23, 25. In support of his submission that there is no limitation on the exercise of power of this Court to do complete justice in the course of the matter, counsel has also relied upon **Ashok Kumar Gupta & Anr. Vs. State of U.P. & Ors.** (1997) 5 SCC 201 and more particularly para 60 as well as on **B.C. Chaturvedi Vs. Union of India & Ors.** (1995) 6 SCC 749 and more particularly para 23.
13. I have heard counsel for the parties and given my thoughtful consideration to the matter. The basic facts are not in dispute. Pursuant to a public notice issued by the DDA inviting sealed tenders for lease of cinema-cum-commercial plots, petitioner submitted its application. Petitioner offered a premium of Rs.6.00 crores which was accepted. Rs.1.50 crores being 25% of bid amount was deposited. As the balance amount was not paid within the time allowed vide letter dated 18.3.2002 cancelled the allotment made in favour of the petitioner and also informed the petitioner that the earnest money stood forfeited, as per Para 3.9 of the tender document. By communication dated 2.5.2002 petitioner requested DDA to provide an opportunity to discuss the matter and also requested DDA to keep the decision of cancellation of the allotment in abeyance. Simultaneously without

prejudice petitioner brought to the notice of DDA that forfeiture of entire earnest money was in violation of clause 3.9 of the tender document. Despite the petitioner making further payment, the DDA did not revoke the cancellation of the allotment. Petitioner requested for refund of Rs.1,12,50,000/- after forfeiting 25% of earnest money as per clause 3.9 of the tender document from the date of cancellation of allotment till the date of payment with interest @ 18% per annum till date of actual payment, vide various letters including letters dated 15.11.2002 and 8.10.2003.

14. It is the case of the petitioner that allotment was cancelled vide letter dated 18.3.2002 and the DDA returned the balance amount after deducting 25% of earnest money after 2 ½ years on 20.5.2004 without interest.
15. Counsel for respondent – DDA, however, submits that initially the DDA had decided to forfeit the entire amount, but it is only at the request of the petitioner, the Vice-Chairman of the DDA reconsidered the matter and came to the conclusion that only 25% of the earnest money be forfeited. A short affidavit has been filed by the DDA. It would be useful to reproduce the relevant portion of the affidavit:

“That the petitioner vide its letter dated 19.8.2002 requested for refund of 75% of the EMD after forfeiting 25% of the EMD as per para 3.9 of the tender document and thereafter vide its letter dated 15.11.2002 demand the refund along with interest from the date of cancellation as per the terms and conditions contained in para 3.9 of the tender document. The request of the petitioner for refund of 75% of the EMD was examined by the respondent. It is stated that as per Nazul Rule 32 describing the allotment by auction allows forfeiture of EMD on failure of the bidder to pay the balance amount within the specified period. In para

3.9 (ii) of the tender document states that for non production of the proof of the payment of balance premium in time, the offer is liable to be cancelled and 25% of the earnest money shall be forfeited. It is further stated that as per the practice followed for the auction allotment, the forfeiture of full EMD which is 25% of the lease amount offered. It is further stated that as per para 3.5 of the tender document, if the bidder withdraws his offer within the period of 6 months, Earnest Money deposit paid by him shall be forfeited. It is also pertinent to state that there is no past precedent under which EMD has been forfeited/released contrary to the similar conditions stipulated in the tender documents.

That after interpretation of the aforesaid clauses by different departments of the respondents, the respondent through VC on 15.5.2004 allowed the refund of 75% of the EMD after forfeiting 25% of the EMD without interest and the same was refunded vide cheque dated 19.5.2004.

That the petitioner vide their letter dated 3.1.2007 received by the respondent on 11.1.2007 demanded interest for delay refund of the EMD. The respondent after examining the request at length informed vide their letter dated 5.4.2007 that the request for payment of interest has been declined. It is stated that the Hon'ble VC, DDA had decided for the refund of the 75% of the EMD without interest. It is further stated that as per para 3.19 of the tender documents the decision of the VC shall be final, conclusive and binding on both the parties."

16. As per the stand taken by the DDA Rule 32 of Nazul Rule allows forfeiture of earnest money deposited on failure of the bidder to pay the balance amount within the specified period. It has also been stated that in para 3.9 (ii) of the tender document for non production of balance premium in time the offer is liable to be cancelled and 25% of the earnest money is liable to be forfeited.
17. The allotment made in favour of the petitioner was cancelled by a letter dated 18.3.2002 which reads as under:

"
DELHI DEVELOPMENT AUTHORITY
No.87(31)01/CL/678

From

Dy. Director (CL),
DDA, Vikas Sadan,

To

M/S Star City Entertainment,
50, West Regal Building,
Connaught Place, New Delhi – 11001.

Sub: Cancellation of allotment of Cinema-cum-Commercial plot bearing No.04 situated at Community Centre along Road No.44 Pitampura on perpetual lease hold right basis.

Sir,

WHEREAS you were the highest tenderer for the aforesaid plot and offered the highest bid of Rs.6,00,00,000/- and deposited an amount of Rs.1,50,00,000/- as earnest money with the tender application dt. 30.8.2001.

AND WHEREAS, the balance of tendered amount of the plot was Rs.4,50,00,050/- and was to be paid in two instalments i.e.

Rs.1,50,00,050/- by 02.02.02 and
Rs. 3,00,00,000/- by 3.5.02 respectively as per allotment-cum-demand letter dt 5.11.2001 and as per the tender document of the Cinema plot.

AND WHEREAS you have failed to deposit the 1st instalment of Rs.1,50,00,00,050/- by 02.02.2002.

AND WHEREAS as per terms & conditions of tender framed under Delhi Development Authority (Disposal of developed Nazul Land) Rules 1981 Para 3.7 "no time extension to make the payment beyond the due date will be granted under any circumstances".

NOW THEREFORE, the allotment has been cancelled by the Vice Chairman, DDA and Earnest Money of Rs.1,50,00,000 is forfeited as per para 3.9 of the tender document.

Yours faithfully,

(Neeraj Bharti)
Dy. Dir. (CL)

Copy forwarded for favour of information to:

1. Sr. Accounts Officer (CL), DDA with the request to make entries to their accounts and forfeit the EMD.
2. Ex. Engineer, ND IX, DDA for information.
3. Asstt. Engineer (CL), DDA."

18. Bare reading of this letter would show that DDA has placed reliance on para 3.9 of the tender document. Relevant portion of Para 3.9 (ii) of the tender document reads as under:

"(ii) For non-production of proof of the payment of balance premium in time, the offer is liable to be cancelled and 25% of the earnest money shall be forfeited."

19. By communication dated 18.3.2002 the DDA had cancelled the allotment of the petitioner and relied upon paragraph 3.9 of the tender document. As per para 3.9 of the tender document in case of non-payment of the balance amount DDA is entitled to forfeit 25% of the earnest money, thus there is no force in the submission of counsel for the DDA that DDA could well have relied upon para 3.5 of the tender document as the Vice-Chairman after due consideration, rightly relied upon paragraph 3.9 of the tender document which is binding on the parties. At this stage, to say that the DDA could have placed reliance on para 3.5 would have little or no relevance as factually DDA did not rely upon the same, even otherwise paragraph 3.5 deals with a situation where the bidder withdraws his offer within the period of six months. Once the DDA has sought to rely upon paragraph 3.9 then all consequences arising therefrom are bound to follow. No doubt para 3.9 of the tender document does not mention payment of any interest, but it is not expected that a public body will withhold the payment for an unreasonable long period of time. In this case the amount has been withheld for a period of approximately over two years without any just and cogent reason and that too without payment of any interest. The counter affidavit is silent as to why the amount which was ultimately refunded by the DDA on 20.5.2004 was not refunded at the earliest opportunity available by the DDA.
20. I find no force in the submission made by counsel for the

respondent that dispute between the parties arises out of a contract and thus present writ petition would not be maintainable.

21. The Supreme Court in the case of ***Food Corporation of India*** (supra) has succinctly dealt with the questions with regard to the scope and power of the High Court under Article 226 of the Constitution of India. It has been reiterated that contractual disputes involving public law element are amenable to writ jurisdiction. The Court has held that while exercising power of judicial review under Article 226 of the Constitution of India, the High Court not only acts as a Court of law but also as a Court of equity and upheld the judgment of the High Court where interest was granted on the principal sum in a review which had been filed. Paras 16, 21, 23 and 25 of the judgment read as under:

16. It is now no longer res integra that contractual disputes involving public law element are amenable to writ jurisdiction. In these cases, the Central Government not only scrutinized the bills but also verified the claims of the respondents. A direction was issued to make payment. The appellant, which is "State" within the meaning of Article 12 of the Constitution of India, withheld payment without any legal jurisdiction.

21. Jurisdiction of the High Court to entertain a writ application involving contractual matter was considered by a Bench of this Court in ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors. MANU/SC/1080/2003 : (2004)3SCC553 wherein upon referring to a large number of decisions, it was held:

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can

issue suitable directions to set right the arbitrary actions of the first respondent.

23. Article 14 of the Constitution of India has received a liberal interpretation over the years. Its scope has also been expanded by creative interpretation of the court. The law has developed in this field to a great extent. In this case, no disputed question of fact is involved.

25. We do not, thus, find any substance in the contention of Mr. Sharan that while exercising its review jurisdiction, no interest on the principle sum could have been directed to be granted by the High Court. A writ court exercises its power of Review under Article 226 of the Constitution of India itself. While exercising the said jurisdiction, it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim on its part would be subject to review; amongst others on the principle of *actus curiae neminem gravabit* (an act of the court shall prejudice none). We appreciate the manner in which the learned Judge accepted his mistake and granted relief to the respondents.

22. I find force in the submission made by counsel for the petitioner while relying upon the case of **Ashok Kumar Gupta & Anr.** (supra) and more particularly Para 60 and the case of **B.C. Chaturvedi** (supra), that this Court has the power to do “complete justice in the cause or matter”.
23. The respondent has been unable to satisfy this Court as to why the earnest money was not refunded in terms of Para 3.9 of the tender document within a reasonable period.
24. In **Ghaziabad Development Authority Vs. UOI** reported in (2000) 6 SCC 113, Supreme Court granted 12% interest, per annum was awarded by the Court to meet the ends of justice as the authority was found to be at fault in spite of the fact that as per the brochure the authority was not liable to pay interest.

Similar view has also been expressed by the Supreme Court in the case of ***South Eastern Coalfields Limited Vs. State of M.P.***, (2003) 8 SCC 648. The DDA has failed to render any satisfactory explanation or cogent reason as to why the amount was not refunded within a reasonable period to the petitioner.

25. Accordingly, the petition is allowed. The DDA shall pay 7% simple interest on the amount of Rs.1,12,50,000/-. As the demand was made by the petitioner for the refund of the amount on 2.5.2002, this Court is of the view that at least 3 months time is considered to be reasonable to be taken by the DDA to return the money. Accordingly, DDA will be liable to pay interest on the amount from 2.8.2002 upto date of payment @ 8 % per annum, within four weeks from receipt of this order. Petition stands disposed of.

G.S. SISTANI, J.

November 16, 2009

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