

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

Judgment Reserved on : 11th August, 2010
% Judgment Pronounced on: 18th October, 2010

+ **LPA 264/2010**

ABW INFRASTRUCTURE LTD. & ANR. Appellants

Through: Mr. Sunil Kumar, Senior Advocate
with Mr. Harsharan Singh and
Mr. Dhiraj, Advocates.

versus

RAIL LAND DEVELOPMENT AUTHORITY Respondent

Through: Mr. Soli J. Sorabjee, Senior Advocate
with Mr. Amit Kumar, Mr. Ashish
Kumar, Mr. Ritesh Ratnam and
Mr. Shashank, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

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

DIPAK MISRA, CJ

In this intra court appeal, the legal substantiality and vulnerability of the order dated 10.12.2009 passed by the learned Single Judge in W.P.(C) No.13590/2009 is called in question.

2. The factual scores as undraped are that the appellants – petitioners (hereinafter referred to as ‘the appellants’), M/s ABW Infrastructure Ltd., on the basis of the highest tender bid of Rs.1026 crores, was awarded project for development of plot at Sarai Rohilla, Kishanganj, New Delhi as per letter

of acceptance dated 19.5.2008 with the stipulation that the said amount was to be paid by the appellants to the respondent, Rail Land Development Authority (for short 'the RLDA'), in installments. The first installment was fixed at Rs.513 crores which was to be paid within 30 days from 19.5.2008, i.e., the date of issue of letter of acceptance. The appellants did not pay the first installment. It had only given a performance guarantee of Rs.10 crores and had made other payments amounting to Rs.29 crores to the respondents towards interest and success fee.

2. It is worth noting, at one point of time, the RLDA, the respondent herein, desired to review the project allotted to the appellants and resile from the letter of acceptance which compelled the appellants to file WP(C) No.4320/2008 wherein this Court, on 12.8.2008, directed the respondents to abide by the contract awarded to the appellants vide letter dated 19.5.2008. Be it noted, in the said order, this Court had quashed the communication dated 24.5.2008 by which the respondent had taken a decision to review the order.

3. After the said order was passed, the appellants did not pay Rs.513 crores but approached the RLDA for amendment of the tender terms. The said amendment was sought on 24.4.2009 after expiry of 8 months from the date of order passed in WP(C) No.4320/2008, i.e., 12.8.2008. The appellants sought renegotiation of the terms of the tender. Similar request was reiterated by letter dated 16.7.2009. As set forth, the RLDA, by letter dated 20.8.2009, agreed to examine the request of the appellants for

modification of the existing agreement to the extent mentioned therein. The learned Single Judge, as is evincible from the order impugned, has referred to the said letter and analysed the same to arrive at the conclusion that the said communication clearly mentions that the modifications suggested and pending consideration would be applicable and valid only if a renewed Joint Bidding Agreement was submitted to the RLDA and the agreement was signed and, hence, till the signing of the agreement, the parties were obligated to be bound by the original obligations. The learned Single Judge further held that on a scrutiny of the said letter, it was clear as crystal that the appellants should communicate their willingness to go ahead with the project within 10 days of issuing the aforesaid letter. In pursuance of the aforesaid letter, the appellants sent a letter dated 29.8.2009 which indicated, according to the learned Single Judge, no unconditional and absolute acceptance. Thereafter, the RLDA, on 18.9.2009, circulated a draft modified development agreement asking the appellants to offer comments on the said document clearly outlining the paragraph / clause which was not in accord with the decision communicated by the RLDA through their letter dated 20.8.2009. It has further clarified that the agreement sent to the appellants for their comments was merely a draft and would be finalized only after approval of the competent authority. As is evincible, the appellants, on 7.10.2009, entered into correspondence with the RLDA raising various objections to several clauses of the draft agreement and suggested amendment. They gave a list of suggestions / amendments for favourable consideration and incorporation in the modified development

agreement. The RLDA, by letter dated 9.10.2009, informed the appellants that on consideration of the suggestions for amendment and modification, the same were not acceptable. Thereafter, the appellants sent two letters dated 16.10.2009 and 19.10.2009 which were responded to by the RLDA expressing its inability to accept the same. The RLDA invoked the bank guarantee and the appellants, vide CM No.15228/2009, assailed the action for invoking the bank guarantee and for quashment of the communications dated 1.12.2009 and 2.12.2009.

4. Before the writ court, it was prayed that a mandamus should be issued to the RLDA to agree to the suggestions and the amendments proposed by them to the draft agreement since the stand of the RLDA is absolutely arbitrary and smacks of unreasonableness. The learned Single Judge, after exposition of the facts and the stand and stance put forth by the parties, came to hold that the appellants had themselves accepted the communication dated 19.5.2008 and this Court had opined that the letter of acceptance would constitute the contract between them; that the appellants wanted to renegotiate the terms of the contract which was considered by the RLDA and a draft agreement was circulated and the appellants wanted change in the draft agreement which was not accepted by the RLDA; that in the case at hand, there has been no wrongful termination of a contract by a government company which enjoys monopoly status; that the State or instrumentalities of the State can evolve rational method to arrive at a decision and can fix their own terms of invitation to tender which are normally not to be interfered with; that on the earlier occasion, the appellants had filed a writ

petition contending, inter alia, that there was a concluded contract and the amendments and suggestions requested by the appellants have not been accepted by the RLDA; that the appellants had not deposited Rs.513 crores till the date of filing of the writ petition; that the decisions referred in *Mahabir Auto Stores and others v. India Oil Corporation and others*, AIR 1990 SC 1031, *ABL International Limited and Anr. v. Export Credit Guarantee Corporation of India Limited and Ors.*, (2004) 3 SCC 553, *K.N. Guruswamy v. State of Mysore and others*, 1955 (1) SCR 305, *the DFO, South Kheri and others v. Ram Sanahi Singh*, AIR 1973 SC 205, *Gujarat State Financial Corporation v. Lotus Hotels Private Limited*, AIR 1983 SC 848 and *Life Insurance Corporation of India v. Escorts Limited and others*, 1986 (8) ECC 189, *Purvankara Projects Ltd. v. Hotel Venus International*, (2007) 10 SCC 33, *Air India Limited v. Cochin International Airport Limited*, (2000) 2 SCC 617 and *Monarch Infrastructure Private Limited v. Commissioner, Ulhasnagar Municipal Corporation*, (2000) 5 SCC 287 are not applicable to the case at hand and that the writ petition was devoid of any substance. Being of this view, the learned Single Judge dismissed the writ petition.

5. Questioning the legal sustainability of the order passed by the learned Single Judge, Mr. Sunil Kumar, learned senior counsel for the appellants, has raised the following contentions:

(i) The learned Single Judge has failed to appreciate the necessity for making suitable and necessary changes in the draft development agreement

failing which the project had become unworkable and the said amendments were imperative in the facts and circumstances of the case.

(ii) The writ court has not appreciated that the appellants were not praying for issue of mandamus to the respondents to accede to the suggestions and amendments proposed by the appellants to the draft agreement, but were agitating a plea that the respondents, after having accepted to revise the development agreement in terms of the suggestions made by the appellants, as is evincible from the communication dated 20.8.2009, declined to carry out the consequential changes which exhibits unfair and arbitrary action on the part of the respondents which is impermissible in law.

(iii) The respondent has acted totally arbitrarily and unreasonably inasmuch as the lease deed which had been executed for the first track of land could not have been cancelled and the amount paid on that score could not have been forfeited. The respondent is under obligation to permit development of area in proportion to the investment made enabling private equity players and others referred to by the appellants in its communications dated 16.10.2009 and 19.10.2009 to invest in the project and achieve financial closure. The action of the respondent smacks of unfairness since during the pendency of the writ petition, the respondent issued a notice of termination dated 1.12.2009 requiring the appellants to make the payment within seven days but invoked the bank guarantee furnished by the appellants on 2.12.2009.

(iv) The learned Single Judge has committed illegality by not taking note of the fact that the issue of entering into a contract or not entering into a contract by an instrumentality of the State rests on the touchstone of reasonableness and when it is manifest that the respondent has shown total unreasonableness, the writ court would have been well advised to interfere and not throw the writ petition as not being entertainable.

6. Mr. Soli J. Sorabjee, learned senior counsel appearing for the RLDA, resisting the aforesaid submissions and supporting the order of the learned Single Judge, has advanced the following proponentes:

(i) The appellants committed breach of contract on many an occasion putting the RLDA to immense jeopardy and, therefore, it is not entitled to invoke the equitable and extra-ordinary jurisdiction of this Court.

(ii) The RLDA has not acted in an arbitrary or unfair manner but as a prudent owner would behave under such circumstances within the reasonable parameters and, hence, the communication terminating the contract cannot be found fault with.

(iii) Once a finding had been arrived at in the earlier writ petition that there was a concluded contract and was binding on the parties, the appellants could not have sought amendments in the original contract in a unilateral manner putting forth terms which suited them.

(iv) The amendments which were proposed by the appellants were considered by the Board of RLDA and the same were not accepted by the

Board and such non-acceptance is based on a commercial principle and, therefore, the writ court has correctly not delved upon the same.

(v) The conduct of the appellants, as is evident from the communications and actions, would not entitle them to any kind of relief in exercise of jurisdiction under Article 226 of the Constitution of India inasmuch as it not only pertains to disputed questions of fact but also certain aspects which are founded on commercial norms and are difficult to be delved into in a writ petition.

(vi) The changes sought for in the agreement and denial thereof by the RLDA involve many a factor and the said aspects cannot be adverted to by the writ court and, therefore, the learned Single Judge has appositely declined to entertain the writ petition.

7. To appreciate the rivalised submissions raised at the Bar, it is essential to refer to certain chronology of events. The Railways (Amendment) Act, 2005 [No.47 of 2005] came into force on 15.9.2005 by bringing certain amendments to the Railways Act, 1989. The purpose of bringing the amendment was to supplement their financial resources through non-tariff measures like commercial utilization of land and the air space by constituting a separate authority called the RLDA under the Railways Act, 1989 which could exclusively deal with the commercial development of railway land and the air space above such land. Section 4-E confers power on the authority to enter into agreements and execute contracts. In pursuance of the amended provisions, the Railways took certain areas for

development and, accordingly, the bids were called for a project for development of plot at Sarai Rohilla, Kishanganj, New Delhi. A letter of acceptance was sent on 19.5.2008. In the said letter of acceptance, it was mentioned that the financial bid of Rs.1026 crores (rupees one thousand and twenty six crores only) was accepted and the consortium of the appellants had been declared as the 'Selected Bidder' for the project subject to the fulfillment of certain terms and conditions incorporated therein. Clause (g) of the said letter of acceptance dealt with 'Payments by the Developer'. The relevant clauses (g)(i) and (g)(vii), being germane for the present purpose, are reproduced below:

"Payments by the Developer

(g) You shall pay to RLDA the Upfront Lease Premium quoted by you / your Consortium as under:

(i) A sum of Rs.513,00,00,000/- (Rupees Five hundred and thirteen Crores only) being the First Instalment i.e. 50% (Fifty percent) of the Upfront Lease Premium, vide demand draft / banker's cheque in favour of Rail Land Development Authority and payable at Delhi, within 30 days from the date of the issue of this Letter of Acceptance. You shall also furnish alongwith the first instalment, Bank Guarantees in the format prescribed in the RFP, for the amounts equal to the second and third instalments of the Upfront Lease Premium plus applicable taxes, as mentioned in paras (ii) and (iii) below, which shall remain valid for a period of 30 days beyond the respective due dates.

(vii) If at the time of handing over of the land, the area of the plot leased is found to be at variance from that stated in the RFP document, then the difference in Upfront Lease Premium payable to RLDA / receivable by you will be determined pro-rata, based on the total Upfront Lease Premium payable. It is clarified that such adjustment in area shall be effected only for the leased site area, without any change in the Redevelopment Area of 4.37 Hectares given on license basis."

8. Clause (4) deals with execution of the development agreement and lease deed and the same, being relevant, is reproduced below:

“(4) RLDA shall execute the Development Agreement with the Developer after all the following conditions have been met:

- a) Receipt of the first installment of the Upfront Lease Premium along with bank guarantees for the second and third installments from the Developer within the specified time limit,
- b) Receipt of Performance Bank Guarantee from the Developer
- c) Incorporation of the SPV (the Developer)
- d) Minimum paid up capital subscribed by the SPV as required under law.
- e) Payment of Success Fees to IL&FS Infrastructure Development Corporation Limited as mentioned above.
- f) Any other condition mentioned in this LOA.”

9. From the aforesaid communication, it is clear as crystal that the first, second and third installments were to be paid by 18.6.2008, 18.2.2009 and 18.11.2009 respectively. When the matter stood thus, the RLDA issued communication dated 24.5.2008 for review as the Government was desirous of reviewing the allotment of the Railway land. Being grieved by the said communication, the appellants preferred W.P.(C) No.4320/2008 which was disposed of on 12.8.2008 by a Division Bench of this Court and it was held as follows:

“7. We have perused the records of the case and heard the Counsel for the Parties. In the circumstances and the submissions made hereinabove, we are of the view that the grievances of the Petitioners are justified. The concluded contract had come into existence evidenced by

the Letter of Acceptance issued on 19th May, 2008 to the Petitioners. The said contract is also in public interest as the bid of the Petitioners is about Rs. 250 Crores higher than the next bidder. The Petitioners, after the acceptance of the contract, have committed themselves financially. Even upto date no decision on the proposed review has been taken. The Respondent No. 1 cannot be permitted to frustrate the said contract when no decision on the review has been taken.

8. We, therefore, allow this writ petition. The impugned communication dated 24.5.2008 is quashed and the Respondents are directed to abide by the Contract awarded to the Petitioners vide letter dated 19th May, 2008. We, however, make it clear that, as also agreed by the Counsel for the petitioners on instruction that the Petitioner shall not claim any equity or damages against the Respondents for any delay caused by the issuance of impugned communication and will abide by the terms of the Original Letter of Acceptance dated 19th May, 2008, deeming as if the same was issued with effect from today. All financial and other commitments/obligations will be completed on the basis of the said Letter of Acceptance dated 19th May, 2008. No order as to costs.

10. On a perusal of the aforesaid order, it is clear as crystal that the Division Bench held that the contract was a concluded one and the appellants cannot claim any equity or seek damages against the respondent for any delay caused by the issuance of the impugned communication and would abide by the terms of the original letter of acceptance dated 19.5.2008 deeming the same was issued with effect from that day and all financial and other commitments / obligations would be completed on the basis of the said letter of acceptance dated 19.5.2008. It is not in dispute that extensions were granted for payment of the amount as earlier agreed. Despite the aforesaid verdict, the appellants did not pay Rs.513 crores but approached the RLDA for amendment of the tender notice. The first communication

was made on 24.4.2009. The said letter was a communication to the respondent whereby the respondent had required the appellants to honour the obligations by 30.4.2009. As is patent, in the said communication, the appellants had asked for amendments and renegotiation of the terms of the tender. In the said letter, many a term and condition was incorporated. We think it appropriate to quote the following portion from the said letter:

“In such a scenario, there is a pressing need for the RLDA to apprise itself more fully of actions taken by other Government organization seeking to preserve existing contracts and not having to face the rigors of retendering in rapidly changing market conditions.

Further, the following facts would reveal that RLDA don't want to appreciate the prevailing economic and financial downturn in the market and is not interested in successful execution of the subject project.

1. That whereas the reserve price for the subject project by RLDA was fixed at Rs.675 crores, the second highest bidder had offered a price of Rs.757 crores only. It was our Consortium which had given an offer of Rs.1,026 crores representing, even at that point of time an excellent value realization for the RLDA. It would be apparent to mention here that since the award of the contract, the property prices have gone down by 35 to 40% and the present market value of the subject Plot is not more than INR 650 Crores.

2. That surprisingly, after accepting our bid and creating a valid contract, RLDA signified to us its intention to “review” the matter of allotment of railway land at Sarai Rohilla on 90 years lease for essentially residential purpose. This step of RLDA forced us to seek necessary remedy through the courts at Delhi. After a crucial period of three months, the sanctity of the contract was upheld by the Honorable Delhi High Court by its judgment order dated 12th August, 2008. Even after the judgment of the Honorable High Court the uncertainty remained in the matter as RLDA intended to file appeal in the Apex Court against the judgment. As such, the position of uncertainty created by the RLDA affected our efforts to tie up the financial arrangements

with various institutions. The time when the Project was awarded was ripe and the banks / financial institutions were anxious to finance the project. Had RLDA not created uncertainty in the matter after the issue of Letter of Award, we would have certainly achieved the financial closure in due time. With the prevailing uncertainty in the matter the banks and the financial institutions started losing their interest in the Project.

3. That since November, 2008 we have been requesting RLDA to consider the alternative proposals submitted by us. Although, time and again RLDA has been convening meetings with us but they remain inconclusive even after spending long hours in the meetings.

4. That in the last few months there has been an unprecedented economic and financial crisis all over the world. Real estate has been especially hard hit. Correct in real estate prices, globally and in India, is a well documented fact which requires little elaboration. All over the globe, the governments and authorities are giving bail out packages to the companies to protect them from financial meltdown. Apex bank has given guidance to Banks / Financial Institutions to revise the payment schedule of loans given to real estate companies.”

After so stating, the appellants referred to their earlier letter dated

21.1.2009 and ultimately stated thus:

“We also propose to submit a Development Agreement Plan before signing of the development agreement in which we will demarcate the entire project size of 11.37 hectares of land five equal parts including the structures to be built thereon and one part will be leased to us with the respective installment.

We guarantee that we will not have any claim on the land until the same is specifically leased to us on payment of installment as specified herein above.

We are also enclosing herewith the business plan mentioning clearly how the payments will be made to RLDA over the period of time. We would like to mention here that we shall bring our contribution for payment of the upfront lease premium through internal

accruals / Pvt. Equity and Bank Loan over the period of time.

We wish to reiterate that we are committed to pay the contractual amount of Rs.1,026 crores to the RLDA and are keen to execute the project without any further delay.”

11. After the said letter, the correspondences continued between the parties and the respondent intimated the appellants on 29.6.2009 that the letter of acceptance is liable to be terminated and the Bid Security submitted by the appellants shall be forfeited by the RLDA without being liable for any consideration to them whatsoever in case of failure by the consortium/ developer to comply with the terms and conditions contained in the letter of acceptance and the provisions of the RFP document. Thereafter, the appellants, vide letter dated 16.7.2009, apart from enumerating many aspects, stated thus:

“In case the Development Agreement is executed and the contract proceeds, the maximum period for which the interest could be payable by us would be only for about three months (viz. 12.10.08 to 18.11.08 and 12.03.2009 to 30.04.2009. The decision for implementation and payment of first installment was conveyed by RLDA only on 11.09.2008 after the court case).

As an alternative and to be fair to both the parties, we request that the issue of amount of accrued interest payable till the date of payment of first installment of the upfront lease premium may be referred to arbitration by an independent committee or arbitrator for decision on the matter. We undertake to abide by the decision of the committee in this regard and will pay the interest as determined within 18 months from the date of signing of the Development Agreement, in installments.

Though we have no doubt on the success of the project and payment of upfront lease premium to RLDA as proposed, yet for the comfort of RLDA and to allay its

fears we would like to inform you that we have a 'Land Bank' of about 200 Acres at Manesar, Gurgaon, under our various group companies. These group companies are under the same management as of ABW Infrastructure Limited. The approximate value of this land is around 600 crores as substantiated by the valuation reports attached herewith.

Although the present market value of land is highly discounted and realty sector have not been able to attract the clients despite their best efforts, we still wish to execute the project and tender the entire amount of bid as per the above revised payment schedule. We do hope that RLDA will now accord their approval to our above proposal leaving apart the payment of interest which we hereby undertake to pay if so determined by the independent committee constituted by RLDA. Alternatively, if RLDA agrees for charging interest for a reasonable period of about three months, we agree to pay the same without any demur provided the Development Agreement is executed as per our above proposal.”

12. Thereafter, as is evident from the material brought on record, a letter was issued by the respondent on 20.8.2009 indicating the revised payment consideration of lease premium. The same reads as follows:

“Revised payment consideration of lease premium

The payment schedule for lease premium of Rs.1026 crores has been agreed to be revised as under:

i) First installment to be paid shall be of Rs.380 crores (Rupees Three Hundred and Eighty Crores only). Second installment of Rs.200 crores (Rupees Two Hundred Crores only) shall be paid within 12 months from the date of payment of first installment. Third installment of Rs.446 crores (Rupees Four Hundred and Forty Six Crores only) shall be paid within 18 months from the date of payment of first installment. The Consortium/Developer shall make payment of the First installment within 60 days of issue of this letter or within 15 days of issue of draft modified Development Agreement whichever is later.

ii) Interest @15% p.a. on the outstanding lease premium shall continue to be payable. The interest accrued on the second and third installment of lease premium shall be paid alongwith the respective installment on the due dates.

iii) The accrued interest on the outstanding amount of Rs.1026 crores for the entire period w.e.f 11.9.2008 upto the date of payment of first installment shall be paid by the developer to RLDA within 24 months from the date of signing of Development Agreement as per the RFP.”

In the said letter, it was also mentioned as follows:

“2. Above terms shall be applicable and valid if and only if renewed Joint Bidding Agreement is submitted to RLDA. The renewed Joint Bidding Agreement and SPV documents shall be submitted to RLDA within 30 days of issue of this letter.

3. In view of the above, please communicate your willingness to go ahead with the execution of the project within 10 days of the issue of this letter.

4. The Draft Development Agreement suitably modified on the lines enumerated in para-1 above will be sent to you on compliance of action under para 2 & 3 above.

5. It may be noted that till such time the documents / compliances as mentioned under para 2 & 3 above are submitted to RLDA and all other obligations including signing of Development Agreement as per above terms are met with by the developer, you continue to remain obligated to comply with the original obligations as per RLDA's letter No.RLDA/2008/Project/Sarai Rohilla/RFP/Vol.II dated 31.1.09 and 02.02.09.

It may also be noted that communication of the above relaxations by RLDA will neither entitled you for any claim whatsoever against RLDA nor does it restrict RLDA's rights to seek the compliance of the terms and conditions of LOA as partially modified vide this office letter dated 31.01.09 & 02.02.09 and take appropriate consequential action and any other alternative remedy in case of your failure-

- i) to communicate your willingness as per para – 3 above; or
- ii) to submit the joint Bidding Agreement within the stipulated time as in para – 2 above; or
- iii) to deposit the First installment of Rs.380 crores within the stipulated time as above.”

13. The appellants responded to the said letter vide letter dated 29.8.2009.

The same has been reproduced by the learned Single Judge. We think it apt to reproduce the relevant portion of it:

“We hereby convey our willingness to go ahead with execution of the project as per the terms and conditions contained in your above said letter. However, as regards payment of accrued interest on the upfront lease premium of Rs. 1026 crore for the entire period with effect from 11.09.2008 upto the date of payment of the first installment, we have already conveyed our reservations vide our various letters to you. In this regard we reserve our right to seek an amicable settlement through dispute resolution mechanism.”

14. Thereafter, the RLDA, on 18.9.2009, sent a modified draft development agreement requiring the appellants to offer comments on the said document outlining the paragraph / clause which was not in accord with the decision communicated by the RLDA through their earlier letter dated 20.8.2009. It was also clarified in the said communication that the agreement that was sent to the appellants for their comments was merely a draft and was to be finalized only after approval of the competent authority. The appellants, on 7.10.2009, communicated to the RLDA raising various objections to several clauses of the draft agreement and suggested certain amendments. The said letter was responded by the RLDA on 9.10.2009. The relevant portion of the same reads as follows:

“There are no signs so far on your part for compliance of any of the actionable points leading to signing of Development Agreement except extension of bid security BG, and there appears to be a deliberate attempt on your part to delay the process.

Your attention is again invited to para 5 of this office letter dated 20.8.2009 under reference (i) above. It was clearly advised to you that till such time the documents / compliances as mentioned under para 2 and 3 above are submitted to RLDA and all other obligations including signing of Development Agreement as per above terms are met with by the developer, you continue to remain obligated to comply with the original obligations as per RLDA's letter No. RLDA/2008/Project/Sarai Rohilla/RFP / Vol.II dated 31.01.09 and 02.02.09. The same is once again reiterated.

Despite not receiving the JBA from you, the Draft Development Agreement was sent to you on 18.09.09 vide letter under reference (iii) above. While your comments on the Draft Development Agreement have been received vide reference (v) above, they do not deserve to be given any cognizance in the absence of JBA. Nevertheless, your observations have been considered and RLDA's response is enclosed. Modified Development Agreement proposed to be signed with the SPV on compliance of various requirements listed under RLDA's letter dated 20.08.09 & 16.09.09, is enclosed herewith.

Thus RLDA has given you all reasonable opportunity for survival of this contract and the onus of failure squarely lies on you.

Now through this letter you are hereby notified that the first installment of Rs.380 crore be paid to RLDA on or before 19.10.2009 (60 days of issue of RLDA's letter dated 20.08.09) along with compliance of various requirements well before the same, failing which the Contract will be terminated and consequential action will follow. In case of failure to make the payment this may be treated as Notice of Termination.”

15. On 12.11.2009, the RLDA again notified the appellants to comply with the documentary requirements and to make payment of the first

installment within a fortnight. As the same was not done, on 1.12.2009, the following letter was issued:

“Your attention is invited to RLDA’s letter dated 12.11.2009 under reference (vii) above wherein you were notified to comply with the documentary requirements and to make payment of first installment of Rs.380 crores within 15 days (Fifteen days) of receipt of the letter failing which consequential action for default would follow. It is observed that you have failed to deposit the first installment of Rs.380 crores and also failed to submit other required documents even after lapse of 15 days days.

2. Despite being given adequate and all reasonable opportunities by RLDA to make payment of first installment and to comply with the documentary requirements, your consortium has failed to honour the obligations and it appears that your consortium is not in a position to honour the obligations.”

16. After terminating the rent lease, the respondent invoked the bank guarantee and, on 10.12.2009, issued the final termination of agreement on the ground that the appellants have failed to implement any of the obligations by the stipulated date and the contract (LOA and modified terms thereof) stood terminated with immediate effect and the bid security of Rs.10 crores and all other payments made to the RLDA stood forfeited accordingly.

17. Be it noted, in the writ petition as well as in the LPA what is vehemently urged is that the respondent has acted in an extremely arbitrary and unfair manner whereby the whole action invites the wrath of Article 14 of the Constitution of India. The stand and stance of the respondent is that there is no unfair act on the part of the respondent but there is a series of breach on the part of the appellants and, hence, the termination took place.

At this juncture, it is apposite to note that this Court, on 6.7.2010, had passed the following order:

“Heard Mr. Raju Ramchandran, learned senior counsel for appellants and Mr. Soli J. Sorabjee, learned senior counsel for respondent.

In course of hearing this appeal, a consensus was arrived at being initiated by Mr. Soli J. Sorabjee that if the appellants deposit a sum of Rs. 75 Crores by 20th July, 2010, the financial bid shall not be opened.

Needless to emphasise that the debate went on for some time with regard to reduction of area and prorata reduction of amount and as a consequence, the factum installment. The aforesaid aspects shall be dwelled upon on the next date of hearing.

As further conceded to, if the amount as agreed is not deposited, it would tantamount that appellants have conceived the idea that Court is a laboratory where children come to play. It needs no special emphasis to state that the LPA shall meet the fate of dismissal, as an inevitable corollary.

List on 22nd July, 2010. The matter shall be taken up at 2.15 p.m.

Order dasti under the signature of Court Master.”

18. On 22.7.2010, the following order came to be passed:

“This Court on 6th July 2010 on the basis of a consensus arrived at had directed that if the appellants deposit a sum of Rs.75 crores by 20th July, 2010, the financial bid shall not be opened and if the amount is not deposited, the appeal shall meet the fate of dismissal. We have been apprised at the bar that a sum of Rs. 75 crores has been deposited within the stipulated time. In course of further hearing, we have been told that the first instalment is Rs.380 crores. A suggestion was given to the learned counsel for the parties that if the appellant deposits Rs.135 crores by 25th August, 2010 and further depositing Rs.135 crores on 25th September, 2010, the draft Agreement, keeping in view the pro rata reduction of the land and increase F.A.R., shall be handed over to

the appellant. Be it noted, we have calculated the sum regard being had to the factum that Rs.35 crores was forfeited by the respondent after termination of the contract. We must appreciably state that Mr.Soli J.Sorabjee, learned senior counsel appearing for the respondent fairly submitted that the appellant must deposit the amount barring the amount that has been forfeited and then only a draft Agreement, as has been suggested by this Court, can be filed before this Court.”

19. On 27.7.2010, the following order came to be passed:

“In pursuance of the aforesaid order, a sum of Rs.75 crores has been deposited with the respondent-corporation. It is submitted by Mr. Raju Ramachandran, learned senior counsel appearing for appellant and Mr. Soli J. Sorabjee, learned senior counsel appearing for respondent-corporation that there is difficulty to carry out the said arrangement that was recorded on 22nd July, 2010.

In view of the aforesaid as agreed to by learned counsel for parties, the sum of Rs.75 crores that has been deposited by the appellant with the respondent-corporation shall be refunded within a period of one week from today.”

20. The purpose of referring to the aforesaid orders is that despite the initial efforts, no consensus could be arrived at.

21. The singular question that emanates for consideration in this intra court appeal is whether the learned Single Judge committed any illegality in not entertaining the writ petition. The submission of the learned counsel for the appellants is that the conclusion arrived at by the learned Single Judge is sensitively susceptible inasmuch as a writ court has jurisdiction to address itself even with regard to an unfair practice adopted before entering into the agreement and also after entering into the agreement. In support of the

same, he has placed reliance on *Mahabir Auto Stores* (supra). In the said case, it has been held thus:

“12. ...Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3: (AIR 1974 SC 555); *Maneka Gandhi v.* (1978) 1 SCC 248 : (AIR 1978 SC 597); *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722: (AIR 1981 SC 487); *R.D. Shetty v. International Airport Authority of India*, (1979) 3 SCC 489 : (AIR 1979 SC 162) and also *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*, (1989) 3 SCC 293 : (AIR 1989 SC 1642). It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.”

22. The said observations were made as the Indian Oil Corporation discontinued the supply of lubricants. Their Lordships observed that when the State enters into a contractual arena, it would be governed by the terms of the contract but in appropriate case, the writ court, in exercise of power

under Article 226 of the Constitution of India, can interfere and interdict when the acts of the State smack of arbitrariness.

23. In *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC

617, it has been ruled thus:

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.”

24. In *New Bihari Biri Leaves Co. v. State of Bihar*, (1981) 1 SCC 537,

their Lordships have opined thus:

“48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbate non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say,

no party can accept and reject the same instrument or transaction.”

25. In *Assistant Excise Commissioner & Ors. v. Issac Peter & Ors.*, (1994) 4 SCC 104, it has been held that the doctrine of fairness and reasonableness can be read into the contracts to which the State is a party on the ground that the State has acted unreasonably or unfairly while acting under a contract involving State power. It has been further opined that duty to act fairly cannot be sought to be imported into the contract to modify and alter its term and to create an obligation upon the State which is not there in the contract.

26. The aforesaid principle was reiterated in *Puravankara Projects Ltd. v. Hotel Venus International and Ors.*, (2007) 10 SCC 33.

27. In *Cochin International Airport Ltd. v. Cambatta Aviation Ltd. & Ors.*, (2000) 2 SCC 617, it has been ruled thus:

“6. Challenging this decision of the High Court, Air India has filed Civil Appeal No. 3641 of 1999 and CIAL has filed Civil Appeal No. 3642 of 1999. Mr. Nariman, learned senior counsel appearing for Air India and Mr. Venugopal, learned senior counsel appearing for CIAL contended that the Division Bench had gone wrong in its conclusion as it adopted a wrong approach in a matter of this type. They submitted that the Division Bench committed a grave error in considering this to be a case of public tender. They also submitted that the decision of CIAL to award the contract to Air India was taken bona fide in the financial and overall interest of CIAL and, therefore, the High Court while exercising its power under Article 226 ought not to have interfered as no substantial amount of public interest was involved.

7. ...The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own

method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”

28. In *ABL International Ltd. & Anr.* (supra), the question arose with regard to the maintainability of the writ petition. The Apex Court referred to the decision in *Gunwant Kaur v. Municipal Committee, Bhatinda*, (1969) 3 SCC 769 and adverted to the concept of applicability of public law principles into government contracts and the liability of State in contractual matters and keeping in view the facts which arose before the Apex Court, it was held as follows:

16. ...A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the

Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit...”

29. Thereafter, their Lordships referred to the decision in *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, (1970) 1 SCC 582 wherein it has been held that merely because a question of fact was raised, the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the appellants in this case were elementary.

30. After analyzing the facts, it was opined thus:

“28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: *Whirlpool Corporation v. Registrar of Trade Marks*, (1998) 8 SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.”

31. Eventually, as is perceivable, the Apex Court adverted to the facts and came to hold as follows:

“51. ...Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this Court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact. [See: *Gunwant Kaur* (supra)].”

32. In the said case, ultimately, their Lordships interfered holding that in such a factual situation, the facts of the case do not and should not inhibit the High Court or the Apex Court from granting relief sought for by the petitioner.

33. In *Noble Resources Ltd. v. State of Orissa & Anr.*, (2006) 10 SCC 236, the Apex Court, referring to number of authorities how the State action is to be tested on the touchstone of Article 14 of the Constitution of India and thereafter referring to the decisions in *Radhakrishna Agarwal v. State of Bihar*, (1977) 3 SCC 457 and *ABL International Ltd.* (supra), held thus:

“18. It may, however, be true that where serious disputed questions of fact are raised requiring appreciation of evidence, and, thus, for determination thereof, examination of witnesses would be necessary; it may not be convenient to decide the dispute in a proceeding under Article 226 of the Constitution of India.

19. On a conspectus of several decisions, a Division Bench of this Court in *ABL International Ltd.* (supra) opined that such a writ petition would be maintainable even if it involves some disputed questions of fact. It was stated that no decision lays down an absolute rule that in all cases involving disputed questions of fact, the party should be relegated to a civil court.”

34. The obtaining factual matrix is required to be adjudged on the aforesaid enunciation of law. We have referred to the facts in extenso. The appellants, as is demonstrable, had preferred the writ petition and this Court, on earlier occasion, had come to hold that there was a concluded contract as there had been offer and acceptance. Be that as it may, after the concluded contract came into existence, the parties entered into correspondences. Certain terms were put forth by the appellants and they were not acceded to in entirety by the respondent. The appellants requested for amendment in the original contract. While entering into communication, it put forth its conditions and emphasis was laid on leasehold or prorata reduction and many other facets. The respondent, as we have stated hereinbefore, had sent a draft agreement and the communication. The same was not accepted by the appellants. The claim of the appellants is that they should be granted permission for development of the area in proportion to the investment made. That apart, the appellants contend that the respondent has acted in a manner by which certain conditions of the contract were not workable. Therefore, prorata should be computed and the benefit should have been extended. Resisting the same, it is urged by the respondent that the appellants never showed their bonafide by depositing the first installment of Rs.513 crores and, hence, there has been breach of the terms and conditions of the agreement, which had attained finality as is evident from the order of the earlier writ petition. It is also highlighted that though discussions and negotiations went on, the appellants unilaterally tried to impose certain conditions. From the entire gamut of facts which have been brought on

record and projected, it is well nigh impossible to say whether the termination of contract and the forfeiture of the earnest money by the respondent is unreasonable or arbitrary and thereby invites the frown of Article 14 of the Constitution of India. It is extremely difficult to state that there are no disputed questions of fact. Thus, we are inclined to think that the view expressed by the learned Single Judge that the petitioner should approach the appropriate legal forum as advised in law cannot be found fault with.

35. Consequently, we perceive no substance in the appeal and, accordingly, the same stands dismissed. However, we hasten to add that if the appellants approach the appropriate legal forum, neither the observations of the learned Single Judge nor our observations made in this appeal shall be pressed into service as they have only been stated for the adjudication of the writ petition as regards its entertainability in a controversy of this nature. There shall be no order as to costs.

CHIEF JUSTICE

MANMOHAN, J

OCTOBER 18, 2010
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