

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

% Judgment delivered on: 06.05.2015

+ **WP(C) 1831/2012**

M/S. MAPSA TAPES PRIVATE LTD.PETITIONER

Versus

DELHI STATE INDUSTRIAL AND
INFRASTRUCTURE DEVELOPMENT
CORPORATION LTD.RESPONDENT

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioners : Mr. P.D.Gupta and Mr.Kamal Gupta, Advocates
For the Respondent : Ms. Anusuya Salwan and Ms. Renuka Arora, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

WP(C) 1831/2012 and CM No.733/2014

1. This is a writ petition in which several reliefs have been prayed for. Some of these reliefs have been rendered infructuous on account of the fact that during the pendency of the writ petition, the grievance stands addressed. This is more particularly so, with regard to a direction sought by the petitioner in prayer clauses (a), (b) and (c) which, in effect, seek a mandamus qua the respondent for release of Architectural Control Drawings (in short the ACDs).

1.1 The proceedings held on 19.02.2013 would show that because of change in the policy, the requirement for obtaining ACDs has been done away with by the respondent. Therefore, in effect, no relief is sought in so far as prayer clause (a), (b) and (c) are concerned.

2. Which brings me to the remaining reliefs, that are articulated in prayer clause (d), (e) and (f). The said prayer clauses are extracted hereinafter :-

“(d). Issue a writ, order or direction in the nature of mandamus thereby directing that the petitioner is entitled to complete the construction within the period of two years from the supply/completion of the necessary documents / formalities by DSIIDC.

(e). Issue a writ, order or direction in the nature of mandamus thereby directing that the initial period of first five years for the purpose of levy of ground rent shall commence from the date when the DSIIDC supplies / completes all necessary documents / formalities enabling petitioner to get building plan sanction and not from any other date prior thereto.

(f). Issue a writ, order or direction in the nature of mandamus thereby directing the respondent/DSIIDC to refund the sum of Rs.2,41,972/- to the petitioner deposited by it under protest towards ground rent erroneously levied.”

2.1 In so far as prayer clause (d) is concerned, according to me no direction is required by this court in view of the additional affidavit filed by the respondent dated 16.01.2015, pursuant to order dated 13.01.2015, passed by this court, which inter alia indicates that the petitioner could have carried on construction on the subject plot without waiting for execution of the perpetual lease deed / rectification deed. Examples of allottees who have carried out construction on their respective plots even before lease deeds were executed is set out in the said affidavit. Evidently, the respondent has no objection to the Petitioner carrying out construction on the subject plot.

2.2 The real rub therefore, really, is with respect to the petitioner’s prayer concerning shifting of the date from which the liability to pay ground rent should commence. According to the respondent, in terms of the contract between parties, the liability of the petitioner towards ground rent

commenced from the date of issue of letter of allotment. The relief sought in this respect finds reflection in prayer clause (e).

2.3 Prayer clause (f) is in substance, a consequential relief whereby, refund of the sum of Rs.2,41,972/- is sought; a sum which the petitioner says it paid towards ground rent, albeit under protest.

2.4 The respondent has taken a preliminary objection to the maintainability of the writ petition. It is stated that there is an arbitration agreement obtaining between the parties and because there are disputed questions of fact arising in the case, in particular, qua the aspect as to who is responsible for the alleged delay, this court ought not to entertain the writ petition.

2.5 On this aspect of arbitration, clause 9 of the General Terms and Conditions of the auction (hereinafter referred to as the brochure) is sought to be relied upon, by the respondent.

2.6 This objection is buttressed with a supplementary plea; a plea which is articulated in the counter affidavit filed on behalf of the respondents, that in terms, of the relevant provision of the lease deed dated 26.08.2010 (in short the lease deed) obtaining between the parties, disputes and differences had to be resolved, in the first instance, at the level of Commissioner of Industries of the Government of NCT of Delhi, prior to their reference to a sole arbitrator, duly appointed by him. The reliance in this regard is placed on clause 16(VIII) of the lease deed.

2.7 It is on this issue that the matter is presently pivoted. I, therefore, do not intend to examine the merits of the matter and will, therefore, touch upon the facts only to deal with the issue of maintainability.

2.8 Mr. Gupta who argued on behalf of the petitioner does not dispute the existence of an arbitration agreement obtaining in the parties. As indicated

above, the arbitration agreements obtains both in the brochure as well as in the lease deed. Mr. Gupta, however, contends that existence of an alternative remedy by way of an arbitration does not exclude the jurisdiction of this court to entertain a petition under Article 226 of the Constitution. In support of this submission, Mr. Gupta has relied upon two judgments of the Supreme Court in the case of *Union of India and Ors., Vs. Tania Construction Private Ltd., (2011) 5 SCC 697* and *Harbanslal Sahnia and Anr. Vs. Indian Oil Corporation Ltd. and Ors., (2003) 2 SCC 107*.

2.9 Furthermore, Mr. Gupta says that the aspect pertaining to the period from which ground rent should commence is already covered by the judgment of a single Judge of this court in *CM No.4845/2008 in WP(C) 6704-05/2004, titled : Parmod Kumar and Anr. Vs. Lt. Governor of Delhi and Ors., decided on 03.12.2008*.

3. On the other hand, Ms. Salwan, who appears for the respondent, has contended that a single Judge of this court in the case of *Videocon Industries Ltd. Vs. Delhi Development Authority*, passed in WP(C) 14961/2004, decided on 29.01.2007, has repelled the very same assertion, which entailed the shifting of the date from which ground rent was to commence.

3.1 Apart from the above, it was also contended by Ms. Salwan, based on the judgment of the Supreme Court in the case of *State of UP and Ors. Vs. Bridge Roof and Company (India Ltd.), (1996) 6 SCC 22* that in contractual matters parties should exhaust the remedy provided therein and that failure to do so would itself be a good ground for court not to entertain a petition under Article 226 of the Constitution. In support of this submission, reliance was also placed, by Ms. Salwan, on the judgment of a single Judge of the Madras High Court, dated 06.04.2006, passed in *WP(C) 6379/2006*

titled : ***B. Prasanna Kumar Vs. The Deputy Commissioner of Customs (Docks) and Anr.***

3.2 The learned counsel further contended that, in any case, the petitioner, could not seek shifting of the date for commencement of the period for payment of ground rent contrary to the provisions of clause 7 of the brochure. It was submitted that as per clause 7(i), for the first 5 years, from the date of allotment, the petitioner was required to pay ground rent at the rate of Rs.1 per annum and thereafter, ground rent was payable by it per annum, at the rate of 2.5% of the premium originally paid.

3.3 This ground rent, according to the learned counsel, was subject to enhancement after a period of 30 years from the date of allotment as per sub clause (ii) of clause 7. Furthermore, according to the learned counsel, the respondent could levy interest at the rate of 10% p.a. or such other rate as it may decide in its absolute discretion, from time to time, on delayed payments, in respect of ground rent, as per the provisions of sub-clause (iii) of Clause 7. This right was available to the respondent without prejudice to its right for re-entry under the lease.

4. Before I proceed further, let me just sketch out the broad facts, which obtain in the case :-

4.1 The respondent was appointed as a implementing agency qua a scheme formulated to relocate industries and to develop infrastructure, as per the Master Plan, pursuant to the order of the Supreme Court dated 19.04.1996, passed in IA No.22, in Civil Writ Petition (C) No.4677/1985, titled : ***M.C. Mehta Vs. Union of India.***

4.2 Accordingly, in an auction held on 30.10.2006 vis-a-vis a commercial plot, located in the Bawana Industrial Complex, the petitioner, was declared successful.

4.3. The auction was held on ***“as is where is” basis***. The petitioner’s bid was successful in respect of a commercial plot situate at : 1/07, Sector-1, Cluster ‘O’ situate at DSIIDC Complex, Bawana Industrial Complex, Delhi (hereafter referred to as the plot). The plot, which admeasures 1000 sq. mtrs. was auctioned on the basis that perpetual leasehold rights, in it would be granted in favour of the petitioner.

4.4. The petitioner, was required to pay a total sum of Rs.6,81,00,000/- towards total consideration. The petitioner, in two tranches of 25% and 75% each, paid the consideration for the plot.

4.5. There was a delay in the execution of the lease deed, in respect of which, correspondence was exchanged between the parties between January 2007 and August 2010. Pertinently though, in the interregnum, physical possession of the plot was handed over to the petitioner on 19.6.2007.

4.6. Finally, as indicted hereinabove, a perpetual lease deed came to be executed in favour of the petitioner on 26.08.2010.

4.7. Upon execution of the lease deed, the petitioner sent several communications to the respondent with regard to, broadly involving the following aspects: (i) grant of No Objection Certificate (NOC), for obtaining approval of building plans from the Municipal Corporation; (ii) copies of site plan, with requisite demarcations; (iii) incorporation of changes and / or correction in the lease deed with regard to the period within which the construction had to be carried out; and (iv) the period from which payment of ground rent had to commence. These issues obtained between the parties right upto March 2012, which is when, this petition was filed.

4.8 In effect, the petitioner claims that there has been a delay on the part of the respondent in respect of the obligations cast upon it. Consequently, it is the petitioner’s stand that the period for commencement for payment of

ground rent should begin from the date when the lease deed was executed and not from the date of the allotment. This plea is advanced on the ground that, because of the respondent's failure in fulfilling its obligations, it was not able to fully utilize the full potential of the plot purchased by it from the respondent.

4.9. On the other hand, the respondent's defence is that the possession of the plot was given to the petitioner on 19.06.2007. The respondent was aware that it did not require an NOC for commencing construction. The delay, if any, was explainable and in event not attributable to it.

5. In this context, it was stated that the respondent was charged with the responsibility of re-locating the industries to Bawana Industrial Complex. Upon auctions being held, in respect of plots, located in the said Industrial Complex, the lease deed formats had to be finalized by the Govt. of NCT of Delhi which, took some amount of time, and therefore, the petitioner was given possession of the plot even prior to the execution of the lease deed, so that it could be utilized to its full potential.

5.1 The petitioner, according to the respondent was avoiding Government dues towards ground rent which, as on 31.12.2013, had accumulated to a figure of Rs.37,12,915/- inclusive of interest in the sum of Rs.3,21,357/-. According to the learned counsel, the ground rent, in the sum of Rs.33,91,558/- was calculated for the period 13.11.2011 to 31.12.2013. The interest, as indicated above, was calculated at the rate of 10% p.a., over the same period. It was stated that each year the petitioner was liable to pay towards ground rent alone, a sum of Rs.17,02,500/-. Therefore, if the amounts payable towards 2014 and part of 2015 are factored, in the outstanding dues would much larger.

6. I have heard the learned counsel for the parties.

7. According to me, what is required to be noticed is that the liability to pay the ground rent by the petitioner is provided in clause 7 of the brochure. For the sake of convenience, the said clause is extracted hereinbelow :-

“..7. Ground Rent

(i). Every successful bidder / allottee shall be liable to pay, in addition to the premium payable, ground rent for holding land allotted to him at the rate of rupee one per annum per plot for the first five years from the date of allotment i.e., the date of issue of the letter of allotment, and thereafter it shall be payable at the rate of two and half percent (2.5%) of the premium originally payable per annum...”

(emphasis is mine)

7.1 If one were to read the plain language of the clause, it would require the petitioner to pay ground rent at the rate of Rs.1 per annum for the first five years from the date of issue of letter of allotment. Thereafter, the petitioner is required to pay, per annum, ground rent at the rate of 2.5% of the premium originally paid by it. There is no dispute that premium which the petitioner had to pay qua the plot is Rs.6,81,00,000/-.

7.2 There is also no dispute that the letter of allotment is dated 30.10.2006, and therefore, the “first five years” would come to an end in October 2011. This is, virtually, a holiday period, as the petitioner is required to pay for this period premium at the rate of Rs.1 per annum. The petitioner, contends, that the holiday period should commence from the date when the lease deed was executed i.e., from 26.08.2010.

7.3 Therefore, the question which arises is : whether the court can, in any proceedings, modify by a writ/order/direction the plain terms of the contract. The answer to that, in my view, is clearly that, the court, has no such jurisdiction to modify and/or vary the terms of a contract obtaining between the parties.

7.4 However, the matter cannot rest here because the petitioner claims that the respondent by its conduct has put the petitioner in a position whereby, it could not utilize the full potential of the plot. In other words, the burden of the petitioner's case is that it suffered injury on account of the acts of omission and/or commission of the respondent. Though, craftily, no relief, is sought in the petition, for damages, the effect of the relief sought in the petition would be to accord to the petitioner a pecuniary relief. Any shift in the holiday period, would immediately result in a revenue loss to the respondent. The question is: Does the petitioner has no remedy in law against alleged breach of obligations by the respondent. The petitioner, to my mind, in an appropriate action, may be able to claim damages, provided it is able to establish that its injury, flowed from the alleged acts of omission and/or commission of the respondent. This petition, however, is not the appropriate action. Any relief granted in this petition would result in according in favour to the petitioner what, in my opinion, it could not have sought directly. Damages and/or recovery of moneys ordinarily cannot be the subject matter of a writ petition. There are exceptions to this general principle. This case, however, does not fall within the exceptions, which courts have crafted in that regard.

7.5 The argument of Mr. Gupta that a single Judge of this court in *Pramod Kumar's* case has taken a view which, is in line with his submissions, according to me, is met by Ms. Salwan, quite appropriately, by adverting to a judgment of another single Judge of this court in the case of *Videocon Industries Ltd.* The facts in *Pramod Kumar's* case would show that the plot purchased by the petitioner in that case had trees planted on it, which DDA, was required to remove by obtaining necessary permission from the concerned Tree Officer. The DDA failed to do the needful. The

net effect was that the petitioner was not handed over the possession of the plot even till the date the court delivered judgment in the matter. In these peculiar facts, the learned Judge proceeded to issue a direction to modify the relevant clause of the lease deed.

7.6 On the other hand, in the case of *Videocon Industries Ltd.*, where an identical clause¹ obtained for payment of ground rent, the court rejected the plea. The submissions qua this aspect are recorded in paragraph 8² of the judgment and are dealt with, succinctly, in paragraph 35 of the very same judgment. The relevant observations of the learned judge are recorded herein for the sake of convenience.

“..35. As far as the other contention of the petitioner with regard to the date of payment of ground rent is concerned, I am of the opinion that there is no merit in those submissions. The terms of auction, and the allotment letter, as also the

¹ ..3. Ground Rent

(i). Every successful tenderer/allottee shall be liable to pay, in addition to the premium payable, ground rent for holding Nazul land allotted to him at the rate of rupee one per annum per plot for the first three years from the date of allotment i.e., the date of issue of the allotment letter, and thereafter it shall be payable at the rate of two and half percent (2 ½%) of the premium originally payable per annum.

(ii). The rate of ground rent shall be subject to enhancement after a period of thirty years from the date of allotment.

(iii). An interest @ 10% per annum or such other rate, as the DDA/lessor may in its absolute discretion decide from time to time will, without prejudice to the right of re-entry under the lease, be charged on all delayed payments in respect of ground rent. Such interest will be calculated for full fortnight on month, as the case may be, and not for fraction thereof.

² 8. The petitioners have challenged the impugned ground rent demand as contrary to Rule 42 of the Nazul Rules which mandate that nominal ground rent would be payable for five year period from date of lease as opposed to the three year period, stipulated in the lease deed. It is also claimed that the possession of the property was handed over on 07.04.95. Though the lease had been registered earlier on 24.02.95 and though the sanction of plans for the property was applied for on 04.08.95, yet DDA sanctioned the plans only on 05.02.1998 which was an unreasonable period and was responsible for a further delay in issuing the occupancy certificate, which was actually furnished on 08.03.99. It is claimed that since the DDA was responsible for the delay, the petitioner could not be saddled with the liability, although it had done everything within its power in paying, the consideration as demanded, applied for sanction of the plan and the occupancy certificate within the time. It is also claimed that the DDA was under an obligation to bifurcate the cost paid by the petitioner while demanding ground rent i.e. towards the land and super structure separately. According to the petitioner's allegations, the land could be valued only at Rs. 12,84,19,20/- at Rs. 50,400/- per sq. mtr. for an area of 2548 sq.mtr. of the plot on the basis of the published lease rates, on such areas, by the Land and Development Office, Central Government. Hence, the basis for calculating ground rent, it is claimed could not be Rs. 70.1 crores is a much smaller value at Rs. 12,84,19,200/-.

perpetual lease deed categorically and unambiguously stipulated that the higher ground rent of 2.5% of the premium was payable three years from the date of issuance of the allotment letter, i.e., 06.12.1997. On the face of such a clear stipulation, the petitioner cannot contend that either possession was given later, or that sanction was applied for early, but granted late, or that the occupancy certificate was granted late. These contentions are hopeful, not convincing, ungrounded on facts, and legally merit-less. The last submission with regard to calculation of ground rent only on the land value, is similarly devoid of merit..”

7.7 To my mind, the reasoning given in *Videocon Industries Ltd.’s* case accords with the facts obtaining in the present case. In any event, as stated above, the petitioner in effect is seeking to get pecuniary relief which, in my opinion, cannot be given in the present proceedings. One of the reasons for this is also that if at all pecuniary relief is to be given, the quantification can be done only after the defence the respondent is taken into account. For this short reason alone, the matter would have to go to trial.

7.8 I may note that *Pramod Kumar’s* case was distinguished by another learned Single Judge of this Court in the judgment dated 4.8.2011, passed in W.P.(C) 2317/2007 titled: *Bansi Lal Kanhaiya Vs. Delhi Development Authority*.

7.9 Therefore, the argument of the petitioner that it ought not to be relegated to a remedy by way of arbitration is, really not of much significance in view of the reasoning supplied by me hereinabove. It is for the petitioner to choose the nature of the action that it seeks to trigger qua the respondent. Arbitration perhaps could be one such remedy. What is certain, however, is that writ petition is not an appropriate remedy in the facts and circumstances of this case. Judgments have been cited by both sides for and against the proposition. One cannot quibble with the principle

that relegating parties to an alternative remedy is a rule of discretion rather than one, which binds the court. However, in applying its discretion, the court takes into account the facts and circumstances obtaining in the case. A writ court can entertain a petition even when an alternative remedy is available where the petitioner seeks enforcement of fundamental rights; there is a breach of the principles of natural justice; or where, an order is passed or proceedings are carried out which are wholly without jurisdiction or even where the vires of an enactment is challenged. (See: *Harbanslal Sahnia and Anr.*). The present case does not fall in any one of the aforesaid categories. It is a pure and simple contractual dispute, which requires trial and adjudication.

8. Having regard to the aforesaid, the writ petition is dismissed. The petitioner though will be at liberty to avail of an appropriate remedy that may be available to it in law.

9. Needless to say, the observations made hereinabove, will not come in the way of the petitioner if, it were to institute a suitable action against the respondent as they were made only decide the issue at hand.

10. Parties are, however, left to bear their own costs.

11. With the aforesaid observations in place, the writ petition and the pending application are disposed of.

RAJIV SHAKDHER, J.

MAY 06, 2015

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