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

% *Judgment delivered on: 18th May, 2015*

+ **W.P.(C) 3332/2012 & CM. No. 6219/2015**

M/S S.D.BUILDWELL PVT.LTD. Petitioner
Represented by: Mr. Sudhir Nandrajog,
Sr. Adv. with Mr. Salman Hashmi,
Mr. Zeeshan Hashmi and Mr. Harsh
Prabhakar, Advs.

Versus

RAIL LAND DEVELOPMENT AUTHORITY Respondent
Represented by: Mr. Saurabh Mishra,
Mr. Dhan Rai and Mr. Anshuman Upadhyay,
Advs.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

W.P.(C) 3332/2012

1. Vide the present petition, the petitioner *inter alia* has prayed as under:

- a) Issue a writ of certiorari or any other suitable writ (s) / order (s) / direction (s) quashing the letter dated 14.03.2012 addressed by respondent to the petitioner;
- b) Issue a writ of mandamus or any other suitable writ (s) / order(s)/direction (s) directing the Respondent to refund to the

Petitioner the following sums: (i) The upfront premium of Rs.26.23 Crores paid by the petitioner, (ii) the sum of Rs.2.06 Crores, which was paid as stamp duty by the petitioner, (iii) the sum of Rs.1.55 Crore which was paid as registration charges by the petitioner, (iv) the sum of Rs.12.92 Lakhs which was paid as consultancy fee by the petitioner and (v) the sum of Rs.33.29 Lakhs which was paid as interest by the petitioner, together with interest at the rate of 18% p.a.;

2. Mr. Sudhir Nandrajog, Id. Sr. Counsel appearing on behalf of the petitioner submitted that the respondent made conscious and grave misrepresentations on the basis of which the petitioner was induced to part with a sum of Rs.30.32 Crores in exchange for commercially developing a plot of land, whose title purportedly belonged to the respondent / Authority. Respondent had invited expressions of interest for the commercial development of a plot of land, which *ad-measured* 13216.64 Sq. Mtrs., located at Gola Ka Mandir, Gwalior, Madhya Pradesh.

3. Id. Sr. Counsel further submitted that the petitioner was the successful bidder and subsequently on 12.08.2009, the petitioner and the respondent entered into Development Agreement-cum-Lease Deed, whereby the petitioner paid an upfront premium of Rs.26.23 Crores to the respondent on the basis of the following representations made by the respondent:

(a) That a plot of land, which was being handed over to the petitioner *ad-measuring* 13216.64 Sq. Mtrs., comprises in Khasra Nos. 1340-1341.

(b) The respondent / Authority had title to the entire plot of land, which was being handed over to the petitioner.

4. Ld. Sr. Counsel submitted that vide the present petition, the petitioner seeks redressal against the arbitrary action of the respondent / authority whereby the petitioner was inducted to part with large sums of money on the basis of certain grave misrepresentations as under:-

(a) The respondent misrepresented to the petitioner in Article 8.1.1 of the lease agreement that “it has good and valid title to the site and has power and authority to grant the lease”, thereby implying that it had good and valid title to 13,216.64 Sq. Mtrs. at the site when in fact it did not have title to the same.

(b) The respondent misrepresented to the petitioner in clause 9 of the RFP document that the total area of the site was 1.36 Hectares, thereby implying that it had the good and valid title to the said area when in fact it did not have such title.

(c) The respondent misrepresented to the petitioner in recital ‘B’ of the development agreement that the total area of the site was 13,216.64 Sq. Mtrs., thereby implying it had good and valid title to the said area when in fact it did not have such title.

(d) The respondent misrepresented to the petitioner in Article 1.1.37 of the development agreement that the total area of the site was 13,216.64 Sq. Mtrs, thereby, implying it had good and valid title to the said area when in fact it did not have such title.

(e) The respondent misrepresented to the petitioner in the 'Joint handing over note' dated 12.08.2009 that "Railway is in the possession of title land bearing no. 1340 and 1341 at Gola Ka Mandir, *ad-measuring* 13,216.64 Sq. Mtrs. of land has been entrusted to the respondent by the Central Government in exercise of its power under Section 4 (D) of the Railways Act, 1989 and Rule 5 of the Rail Land Development Authority, 2006."

(f) The respondent misrepresented to the petitioner in the said "joint handing over note" that the total area of the site was 13,216.64 Sq. Mtrs. thereby implying that it had good and valid title to the said area when in fact it did not have such title.

5. Mr. Nandrajog, Id. Sr. Counsel further submitted that the land for which the petitioner had applied through tender, the land which was offered as per RFQ has been substantially altered and a completely new land with much reduced commercial viability and different features is being offered. It is undisputed that the land whose possession was given to the petitioner as per the tender has changed and is not the same land now. It is also not disputed that the petitioner

cannot be restored to the position viz-a-viz the land in which the petitioner stood before 30.01.2012. It is also not disputed that the respondent in W.P. (C) No. 1433/2012 before the High Court of Madhya Pradesh agreed to the exchange of land and thus a compromise order dated 23.07.2014 was passed without adjudication on merits. Thus, what the petitioner is being offered is a completely different land. The respondent authority rather than returning the huge sum of Rs.30.32 crores to the petitioner is rather trying to force the petitioner to accept the alternative site. It is admitted fact that the land of 2777 square meters which has been utilized by the State of Madhya Pradesh cannot be returned to the petitioner. Thus, the respondent admits that the plot of land was available to the petitioner nearly 4 years after signing of the development agreement, now the same is completely in different shape, size and viability from the plot of land, for which the petitioner had bid in the first place.

6. The petitioner participated in a tender in response to the advertisement of the respondent for commercially developing a plot in Gwalior. The advertisement, which is at page 48 of the paper book, gave information about the land, its accessibility and the portion of land that could be taken for road widening alongwith the illustrative layout plan. A map of the location and the layout of the land was also given alongwith the portion of land that was to be taken for road widening for which the petitioner bid as this land had better accessibility, better frontage which could have been commercially

exploited and was a commercial viable land compared to what is being offered at present. The portion of land on which the State of Madhya Pradesh has built a road was the portion which provided better accessibility and frontage, due to its shape it provided the petitioner an opportunity to increase the commercially exploitable area. Accordingly, the petitioner paid the upfront lease premium along with allied charges totalling to Rs.30.32 crores. The petitioner was given possession of the land, the lease deed, and joint handing over note, wherein Khasra Nos. 1340-1341 was mentioned comprising an area of 13216.64 square meters. Subsequently, on 30.01.2012, the Administration of State of Madhya Pradesh took away a major portion of the land from the front 2777 square meters of land and proceeded to build a road on it, on enquiry the petitioner came to know that the State of Madhya Pradesh claimed that the land belonged to them. The petitioner, thereafter, terminated the agreement and sought refund of the amount of Rs.30.32 crores with a reasonable rate of interest, however, the respondent refused to pay any amount.

7. Learned senior counsel further submitted that as per Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') an application should be filed before the party files their first statement on the substance of the dispute. In the instant case, before filing the application dated 07.09.2012 under Section 8 of the Act, the respondent had filed its first counter-affidavit dated 08.08.2012, which is on record at page Nos.337-575. Since the respondent chose to file

their application under Section 8 of the Act after filing of their first counter-affidavit, the said application is not maintainable.

8. Also admitted that the total area comprised in Khasra Nos. 1340 and 1341 amounts to only 8470 Sq. Mts. as opposed to the misrepresentation made by the respondent that the said area amounts to 13216.64 Sq. Mtrs.

9. To strengthen his case on maintainability of the petition, Id. Sr. Counsel has relied upon a case of ***Union of India and Ors. vs. Tania Construction Pvt. Ltd. (2011) 5 SCC 697*** wherein held as under:

“34. We endorse the view of the High Court that notwithstanding the provisions relating to the Arbitration Clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the Writ Petition filed on behalf of the Respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the Writ Petition and also on its merits.”

10. Further relied upon a case of ***ABL International Ltd. And Another vs. Export Credit Guarantee Corporation of India Ltd. and Ors. (2004) 3 SCC 553***, wherein the Court held as under:

“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. In this view of ours, we are supported by a judgment of this Court in the case of Smt. Gunwant Kaur and Ors. v. Municipal Committee, Bhatinda and Ors. 1969 3SCC769 where dealing with such a situation of disputed questions of fact in a writ petition this Court held:

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined: In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector."

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to 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 above said requirement of Article 14, then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the Memorandum of Association of the first respondent at Para 10 read:

"To undertake such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus:

"To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

25. The learned counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a 'money claim' which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned counsel also cannot be accepted in its absolute terms. This court in the case of U.P. Pollution Control Board and Ors. v. Kanoria Industrial Ltd. and Anr.20012 SCC 549 while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held :

"12. In the Para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment, etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions."

11. Also relied upon a case of ***Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. (1979) 3 SCC 489***, wherein held as under:

“10.....Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Democracy, Equality and Freedom," "substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government

must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.”

12. Further relied upon a case of ***Piramal Healthcare Ltd. vs. Union of India and Anr.***, decided by this Court in ***W.P.(C) 2673/2011*** on 02.07.2013, wherein held as under:

“18. Having regard to the above, it is quite clear that the Supreme Court has undoubtedly veered from a conservative position that a writ petition would not lie for entertaining disputes which emanate from a breach of contract to now conclude or let me say explain that this is not an absolute rule and much would depend on the facts and circumstances of each case. The position as it obtains today is that, a mandamus can be issued for recovery of money, provided it is a consequential relief.”

13. Ld. Sr. Counsel further submitted that earlier, the land was different and thereafter, different land was given. If the nature of the land has been changed, then the builder is not liable to develop the same as held in case of ***Sohanlal and ors. vs. Bal Kishan Ghanu Mal, AIR 1960 Punjab 275 (V 47 C 92)*** wherein held as under:

“(4) Mr. Mahajan then contends that the plaintiff was aware of the defect of title and entered into the contract of sale with open eyes. Now, it is a well established rule of law that under section 55(2) of the Transfer of Property Act the implied warranty of title on the part of the seller in favour of the buyer is

irrespective of the question whether the buyer has or has not notice of the infirmity of the title of the seller, vide Lachhman Das v. Jowahar Singh 70 Ind Cas 250: (AIR 1924 Lah 476), Adikesavan Naidu v. Gurunatha Chetti ILR 40 Mad 338: (AIR 1918 Mad 1315) (fb), Mt. Saraswatibai v. Madhukar AIR 1950 Nag 229, Sheokumar Tewary v. Central Co-operative Bank, Dinapur: AIR 1947 Pat 477 and Avadesh Kumar v. Zakaul Husnain : AIR 1944 All 243. In the instant case the defendant had given express warranty of title which is contained in Exhibit P. 7 where he had stated that the land exclusively belonged to him without the partnership of anybody. The position taken by the defendant in the said agreement was obviously false and untenable and he was later forced to admit that he was only one of the co-sharers in the shamilat area of which the land in dispute formed a part. Apart from the above, there is no proper evidence on this record to prove that the plaintiff had knowledge of the defect of title at the time he entered into the agreement of sale. It appears that he acquired knowledge of the defect of title some time later and then took steps to claim back his earnest money by means of telegrams and letters commencing with 28-4-1947. It is obvious that where a seller's title would be doubtful and where there is a reasonable probability of litigation in respect of the property agreed to be purchased, the buyer would be quite justified in declining to carry through the transaction of sale and to accept the delivery, and the Court will not, in a case like this, force a doubtful title upon the purchaser.

(5) In Tulsi Das Ramchand v. Pritbai, AIR 1943 Sind 92, it was held that where at the time fixed for completion of the contract the vendors are not able to give the vendee a title free from reasonable doubt,

the vendee properly declines to complete the transaction. The fact that after judicial investigation the title of the vendor is ultimately found to be clear does not disentitle the vendee to claim the return of the earnest money. Weston J. who delivered the main judgment in that case quoted with approval a passage in Fry on Specific Performances, Edn. 6, at page 416, where it is stated-

"The Court would, it is conceived, consider the title doubtful in the following cases-

(1) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or, as it was put by Alderson B. (Cattell v. Corral(1840) 4 Y & C. 228), where there is 'a reasonable decent probability of litigation.' The Court, to use a favorite expression, will not compel the purchaser to buy a law suit"

In the present case the matter did not merely stand at a threat of litigation but had gone to the extent that litigation with respect to the property was actually pending on the date when the contract to sell was made and an injunction restraining the defendant from constructing any building on the site in question was actually in operation. The plaintiff was perfectly justified in the circumstances of the case not to accept a defective title of the nature which the defendant wished to give him. There can be no doubt the plaintiff is in these circumstances entitled to the refund of the earnest money paid by him."

14. On the other hand, Mr. Saurabh Mishra, learned counsel appearing on behalf of the respondent, submitted that the respondent/Railway Land Development Authority (hereinafter called as “the RLDA”) is a statutory authority under the Railways Amendment Act, 2005 and having its office at Delhi. It is set up for development of vacant Railway land for commercial use for the purpose of generating revenue by non-tariff measures. Accordingly, a request was made for commercial development of Railway land measuring 13216.64 sq.mtr. at Gola ka Mandir, Gwalior, Madhya Pradesh, and leased to the petitioner for a period of 30 years with effect from 12.08.2009 as per the Development Agreement annexed as P-10 and lease deed dated 12.08.2009 annexed at Annexure P-11, whereby the said land was leased to the petitioner. The vesting of the site had taken place on “as is where is basis” as per Article 2.2.1 of the Development Agreement and the possession of the land was also given to the petitioner on the same day, i.e., 12.08.2009. These facts have been fully acknowledged by both parties vide execution of Development Agreement-cum-Lease Deed dated 12.08.2009. A joint handing over by RLDA and possession by the petitioner was also entered on 12.08.2009.

15. Learned counsel further submitted that as per previous provision of the Development Agreement, prior to acceptance of the site, the petitioner had acknowledged the complete examination and evaluation of the site with respect to the existence of any associated risks as per

Articles 2.2.3 and 2.2.4 of the Development Agreement. Even, as per RFQ document, the petitioner was to conduct its own investigation and analysis regarding correctness or otherwise of the same.

16. Learned counsel further submitted that the leased land was in possession of the petitioner undisturbed for about two and a half years. Only on 30.01.2012, the petitioner informed that the District Administration, Gwalior, had demolished the boundary wall and part of old structure at the site, without issuing any notice to the developer or the respondent. Accordingly, it had forcibly occupied approximately 2777 sq. mtrs. of land out of total 13216.64 sq.mtrs. for widening of the road crossing at Gola ka Mandir. Mr. Mishra submitted that as a lease holder and the party in possession of the land, it was the duty of the petitioner to protect the land and take appropriate legal action, however, the petitioner only chose to write a formal letter dated 30.01.2012 to the Commissioner, Gwalior Municipal Corporation. It was the respondent who took up the matter with the District and State Administration, Gwalior, and ultimately filed W.P.(C) No.1433/2012 before High Court of Madhya Pradesh at Gwalior, arraying the petitioner as a respondent.

17. Despite the notice issued to the petitioner, appeared none before the said Court and instead of defending case in High Court of Madhya Pradesh, the petitioner preferred to file the present petition.

18. Learned counsel submitted that as per the joint handing over note, the land bearing Nos.1340 and 1341 having an area of 13216.64 sq. meters was jointly surveyed by the respondent/Zonal Railway in the presence of authorized representative of the petitioner and thereafter, handed over physically on 12.08.2009 on lease to the petitioner for a period of thirty years. Though the revenue records pertain to Khasra Nos.1340 and 1341 mentioned in the Agreement covers an area of 8470 sq.mtrs. of land only, other khasra numbers, viz., 1567 and 1568 were inadvertently left out, however, the entire land area of 13216.64 sq.mtrs. which belongs to Railways was handed over to the petitioner. Thus, the petitioner had full knowledge of the fact that being a corner plot, a portion of the leased out land may be acquired by the State Government for widening of the road. This fact was repeatedly mentioned in the RFQ document in paras 2.6, 5.6 and 5.7 which are Exhibit 01 and 2. Moreover, to this effect, the petitioner made correspondence with respondent vide its letter dated 15.02.2010.

19. Learned counsel further submitted that the land so leased to the petitioner belongs to the Railway and the State Government in lieu of the land taken for widening/construction of road, has agreed to exchange equivalent land area with the Railways. This has been stated in detail in affidavit dated 11.02.2013 filed by the respondent.

20. Learned counsel submitted that the petitioner has failed to raise an objection with respect to respondent's application under Section 8 the Act, being later than the first written statement. No such averment

has been made by the petitioner in its reply to respondent's application under Section 8 of the Act. In ***P. Anand Gajapathi Raju & Ors. Vs. P.V.G. Raju (Dead) & Ors. (2000) 4 SCC 539***, the Supreme Court had held that such non-objection put no bar on the court in referring the parties to arbitration. Relevant part thereof reads as under:-

“5. The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the Court referring the parties to arbitration.”

21. Learned counsel submitted that the aforesaid objection must have been included in the pleadings. To allow the petitioner to come up with an entirely new objection at the time of final arguments would be flouting the basic rules of pleadings and proof enunciated under the

Civil Procedure Code, 1908, as the respondent could not address appropriate reply to such a plea in its rejoinder affidavit. In fact, the respondent was taken by complete surprise.

22. Learned counsel further submitted that even the first preliminary objection raised by the respondent in its counter-affidavit dated 08.08.2012 is on maintainability of writ petition on the basis of presence of an arbitration agreement between the parties and the subject matter of petitioner's present action being arbitrable.

23. To support his submissions, learned counsel has relied upon the case of ***Sharad P. Jagtiani vs. M/s. Edelweiss Securities Limited, 2015 (2) RAJ 165 (Del.)***, whereby it has been held that an application, separate from the written statement, is not necessitated for the purpose of Section 8 of the Act. An assertion with regard to the presence of an arbitration agreement between the parties and the subject matter of dispute being arbitrable if made in the written statement itself would be sufficient.

24. Learned counsel further submitted that without prejudice to the respondent's contention, the counter-affidavit dated 08.08.2012 was never taken on record, which is clear from the order dated 19.11.2012 passed by this Court. Relevant part of the said order is reproduced below:-

“Without prejudice to the rights of respondent, let respondent file counter affidavit to this petition within six weeks while taking the preliminary objection of applicability of Section 8 of Arbitration and Conciliation Act, 1996, which of course would be dealt with first.”

25. Learned counsel submitted that the petitioner was aware of this likelihood of widening of roads around the site, it is just and logical to assume that it signed the contract with open eyes and a willingness to go ahead with the contract with open eyes and a willingness to go ahead with the contract thereby preventing itself from making an argument, at this belated stage, that acquisition of area from the site causes material variance to site for which petitioner had placed its bid. In fact, the petitioner never had the intention to undertake construction and development of the site as evidenced by its own letter to the respondent dated 18.03.2011 whereby the petitioner conveyed the following to the respondent:-

“This is in reference to your latest letter dated 08.02.2011. We will once again like to reiterate that still the market is not conducive enough for the construction of the Commercial Mall in Gwalior. It will take some time to actually commence the construction at site. [...] we do not want to construct the mall during the non-favourable market condition and incur the cumulative losing preposition for the remaining lease period.”

26. Further submitted the terms of Development Agreement-cum-Lease Deed obligate upon the petitioner to have ‘deemed knowledge’ and its ‘disclaimer’. Clause 2.2.7 of the Development Agreement-cum-Lease Deed reads as under:-

“2.2.7 Deemed Knowledge and Disclaimer

Subject to the provisions of this Agreement, the developer shall be fully and exclusively responsible for, and shall bear the financial, technical commercial, legal and other risks in relation to the development of the Assets regardless of whatever risks, contingencies, circumstances and/or hazards may be encountered (foreseen or not foreseen) and notwithstanding any change (s) in any of such risks, contingencies, circumstances and/or hazards on exceptional grounds or otherwise and whether foreseen or not foreseen and the Developer shall not have any right whether express or implied to bring any claim against, or to recover any compensation or other amount from RLDA in respect of the Project other than for those matters in respect of which express provisions is made in this Agreement.”

27. Learned counsel submitted that the abovementioned clause is self explanatory and needs no elaboration. The presence of such clauses in the agreement between the parties makes it palpable that the subject matter in this writ petition is apt for adjudication by an Arbitral Tribunal, as agreed between the parties.

28. Further submitted, case of **Bal Kishan Ghanu** (*supra*), is not relevant in the facts and circumstances of this case. The observations made in the aforesaid judgment were in relation to transfer of title on an immovable property from a seller to a buyer in which context the High Court of Punjab and Haryana held that the warranty of title on part of seller is irrespective of the buyer's notice of any infirmity of the same. However, in the present case, there is no transfer of title, therefore, the question of any warranty of title on the part of respondent is incorrect. The respondent has established its title on the property beyond any comprehensive doubt. The anomaly was just a typographical error and nothing more. Also, the likelihood of acquisition of land from the site was known to the petitioner at the time it made its bid.

29. Learned counsel further submitted that vide the present petition, the petitioner seeks refund of money for which there are other equally efficacious remedies available. The remedy of writ petition being an extraordinary remedy cannot be invoked for the purpose of seeking refund of money. The dispute, if any, is purely a contractual dispute. The alleged, though not admitted by the respondent, can be compensated in terms of money.

30. Learned counsel submitted that for the relief of recovery of money and party seeking recovery should pay *ad valorem* court fee. By filing the present petition, the petitioner has deliberately avoided the payment of requisite court fee, thus, trying to circumvent the

process of law.

31. Learned counsel further submitted that the petitioner has failed to establish as to how the present petition is maintainable when the main prayer is for recovery of money and now trying to cover up the same by raising the *alibi* of arbitrariness and violation of Article 14 of the Constitution. The petitioner has raised this issue, only after the same being raised by the respondent in the application under Section 8 of the Act. Moreover, the petitioner has failed to submit the Development Scheme/plan etc. as per Article 4.2.2 of the Development Agreement in spite of several written requests made by respondent vide letters dated 05.10.2009, 30.11.2009, 27.01.2010, 15.02.2010 etc. which is an express breach of the completion guarantee. From the facts above, it is established that the petitioner is a defaulter and has no right to take any relief against the respondent.

32. To strengthen his above argument, learned counsel has relied upon case of ***State of U.P. vs. Bridge & Roof Co.(India) Ltd. (1996) 6 SCC 22***, wherein held as under:-

“16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act. or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the

contract or for the Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition.....”

33. Further relied upon the case of ***State of H.P. v. Raja Mahendra Pal & Ors. (1999) 4 SCC 43***, whereby held as under:-

“6.....It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature which can be invoked for the enforcement of any fundamental right or legal right but not for mere contractual rights arising out of an agreement particularly in view of the existence of an efficacious alternative remedy. The Constitutional Court should insist upon the party to avail of the same instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the Court from granting the appropriate relief to a citizen under peculiar and special facts notwithstanding the existence of an alternative efficacious remedy. The existence of the special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article. In the instant case, the High Court did not notice any special circumstance which could be held to have persuaded it to deviate from the settled proposition of law regarding the exercise of the writ jurisdiction under Article 226 of the Constitution. For exercise of the writ jurisdiction, the High Court pressed into

service the alleged fundamental right to livelihood of the respondent which was found to have been violated by not making him the payment of the amounts claimed in the writ petition. It is true that Article 21 of the Constitution is of the utmost importance, violation of which, as and when found, directly or indirectly, or even remotely, has to be looked upon with disfavour. The violation of the right to livelihood is required to be remedied. But the right to livelihood as contemplated under Article 21 of the Constitution cannot be so widely construed which may result in defeating the purpose sought to be achieved by the aforesaid Article. It is also true that the right to livelihood would include all attributes of life but the same cannot be extended to the extent that it may embrace or take within its ambit all sorts of claim relating to the legal or contractual rights of the parties completely ignoring the person approaching the court and the alleged violation of the said right. The High Court appears to have adopted a very generous, general and casual approach in applying the right to livelihood to the facts and circumstances of the case apparently for the purpose of clothing itself with the power and jurisdiction under Article 226 of the Constitution. We are sure that if the High Court had considered the argument in the right perspective and in the light of various pronouncements of this Court, it would not have ventured to assume jurisdiction for the purposes of conferring the State largess of public money, upon an unscrupulous litigant who preferred his claim on his proclaimed assumption of being as important as the Government of the State and equal thereto. Despite holding that the High Court had wrongly assumed the jurisdiction in the facts of the case, as earlier noticed, we are not inclined to dismiss the writ petition of the respondent No. 1 on this ground at this

stage because that is likely to result in miscarriage of justice on account of the lapse of time which may now result in the foreclosure of all other remedies which could be availed of by the respondent in the ordinary course. The alternative remedies available to the respondent admittedly not being efficacious at this stage has persuaded us to decide the claim of the respondent on merits.

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16. We are, therefore, satisfied that the impugned judgment of the High Court cannot be sustained even on merits and is liable to be quashed inasmuch as no statutory right enforceable under law existed in favour of the respondent No. 1 regarding the enforcement of which a command could have been issued in the form of a writ of mandamus. The appeal of the State is accordingly allowed and the judgment of the High Court is set aside dismissing the writ petition filed by respondent No. 1. Interim order issued in the case shall stand vacated and the respondent No. 1 held liable to refund all the sums of money which he has received in pursuance of the judgment of the High Court and interim order of this Court dated 16.10.95. The excess amount shall be refunded within a period of three months. In case the excess amount is not refunded within the time specified, the respondent No. 1 shall be liable for its refund along with interest at the rate of 12 per cent per annum from the date of this order till the actual payment is made. Respondent No. 1 is also held to pay costs which we quantify at Rs. 5,000. The amount of costs be deposited in the Registry for the Funds of the Supreme Court Legal Services Committee.”

34. Also relied upon the case of ***P.Anand G.Raju & Ors. vs.***

P.V.G.Raju (dead) & Ors., (2000) 4 SCC 539, whereby held as under:-

“8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in Clause (e) of Section 2 of the new Act and not the Court to which an application under Section 8 of the new Act is made. An application before a Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act.”

35. Also relied upon the case of **State of Bihar & Ors. vs. Jain Plastics & Chemicals Ltd. (2002)1 SCC 216**, the Apex Court held as under:-

“7. In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a Court exercising prerogative of issuing writs.”

36. Further relied upon the case of ***Project Equipment & Materials Co. vs. Union of India, 2001(57) DRJ 684***, whereby held as under:-

“3. In a recent case State of Himachal Pradesh v. Raja Mahendra Pal and Ors. 1999(2) SCALE 381 = 111 (1999) SLT 462, it was observed by the Supreme Court that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature which can be invoked for the enforcement of any fundamental right or legal right but not for mere contractual rights arising out of an agreement particularly in view of the existence of efficacious alternative remedy. The Constitutional Court should insist upon the party to avail of the same instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the Court from granting the appropriate relief to a citizen under

peculiar and special facts notwithstanding the existence of alternative efficacious remedy. The existence of the special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article. In the instant case, we do not notice any special circumstance which could be held to be sufficient to deviate from the settled proposition of law regarding the exercise of the writ jurisdiction under Article 226 of the Constitution. Courts cannot adopt a very generous, general and casual approach in applying the right to livelihood to the facts and circumstances of the case apparently for the purpose of clothing itself with the power and jurisdiction under Article 226 of the Constitution in contractual matters.

4. In Bareilly Development Authority and Anr. v. Ajay Pal Singh and Others, AIR 1989 SC 1076, it was observed that there is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract. No writ or order can be issued under Article 226 of the Constitution so as to compel the authorities to remedy a breach of contract pure and simple (See: Radhakrishna Agarwal v. State of Bihar, AIR 1977 SC 1496, Premji Bhai Parmar v. Delhi Development Authority, AIR 1980 SC 738; and D.F.O. v. Biswanath Tea Company Ltd., AIR 1981 SC 1368.

5. Even in the case of Hindustan Petroleum Corporation Ltd. (Supra) relied upon by the petitioner, it was held that in the absence of constitutional or statutory rights being involved, a writ proceeding would not lie to enforce contractual

obligations even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. In the absence of any statutory right Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise. Paras (8) and (9) of the judgment on which reliance has been placed by petitioner deal with contextually different issues and views related to facts peculiar to that case. They have no application to the facts of present case. That being the position, petition is without merit and is dismissed.”

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

38. The petitioner is aggrieved by the order dated 14.03.2012, whereby, respondent directed the petitioner to withdraw the letter dated 10.02.2012; submit the plans, maps and current status of the project; submit a written undertaking to responsibly comply with the provisions of agreement and not to use letters or documents similar to the letter dated 10.02.2012; submit liquidated damages as per Article 4.7.1 of the development / agreement; and any other documents as may be desired by respondent / RLDA. It is further directed that in the event of failure to comply with the aforesaid directions within 30 days, the respondent shall be constrained to initiate action in accordance with law without any notice.

39. The said directions were in reply to letter dated 10.02.2012 of the petitioner, wherein stated that the petitioner had confirmed that the Gwalior Administration has taken over a major chunk of RLDA's land to an extent of 2777 Sq. Mtrs. out of 13216.64 Sq. Mtrs. land leased to

petitioner for 30 years. By the said letter, the petitioner brought to the notice of the respondent that the loss of 21% (2777 Sq. Mtrs. out of 13216.64 Sq. Mtrs.) of front part of the land has caused the following damages to the petitioner and causing material adverse effect on the developer's ability to perform its obligations under the agreement:

- (i) Loss of leasable area equal to 26%.
- (ii) Loss of overall revenue by virtue of slashing of major chunk of plot and hence depriving the petitioner of the revenue of Rs.167 Crores, which is to an extent of 30% loss of total revenue.

40. Thus, the respondent made grave misrepresentations on the basis of which the petitioner was induced to part with a sum of Rs.30.32 Crores in exchange for commercially developing a plot of land, whose title purportedly belonged to the respondent / authority.

41. Accordingly, the respondent had invited expressions of interest for the commercial development of a plot of land, which admeasured 13216.64 Sq. mtrs., located at Gola Ka Mandir, Gwalior, Madhya Pradesh.

42. It is not in dispute that the petitioner was the successful bidder and subsequently on 12.08.2009, the petitioner and respondent entered into development agreement-cum-lease deed, whereby the petitioner had paid an upfront premium of Rs.26.23 Crores to the respondent on the basis of the representations of the respondent that the land *ad-*

measuring 13216.64 Sq. mtrs. comprising in Khasra Nos. 1340-1341 which was being handed over to the petitioner, the respondent had title on the entire plot of land.

43. However, subsequently on 30.01.2012, the state of Madhya Pradesh asserted title over 2777 Sq. Mtrs. of the above parcel of land without any sort of prior intimation. The petitioner came to know that respondent had preferred a Writ Petition against the State of Madhya Pradesh concerning the title of the said plot of land which had ostensibly been handed over to the petitioner. It has further come to know that the total area comprising in Khasra Nos. 1340-1341 was 8470 Sq. Mtrs. as opposed to 13216.64 Sq. Mtrs. which was the unequivocal representation made by the respondent and the same is recorded in the Development Agreement-cum-Lease Deed.

44. The petitioner seeks redressal against the arbitrary action of the respondent whereby the petitioner was induced to part with larger sums of money on the basis of certain misrepresentations as under:

(a) The respondent misrepresented to the petitioner in Article 8.1.1 of the lease agreement that “it has good and valid title to the site and has power and authority to grant the lease”, thereby implying that it had good and valid title to 13,216.64 Sq. Mtrs. at the site when in fact it did not have title to the same.

(b) The respondent misrepresented to the petitioner in clause 9 of the RFP document that the total area of the site was 1.36

Hectares, thereby implying that it had the good and valid title to the said area when in fact it did not have such title.

(c) The respondent misrepresented to the petitioner in recital 'B' of the development agreement that the total area of the site was 13,216.64 Sq. Mtrs., thereby implying it had good and valid title to the said area when in fact it did not have such title.

(d) The respondent misrepresented to the petitioner in Article 1.1.37 of the development agreement that the total area of the site was 13,216.64 Sq. Mtrs, thereby, implying it had good and valid title to the said area when in fact it did not have such title.

(e) The respondent misrepresented to the petitioner in the 'Joint handing over note' dated 12.08.2009 that "Railway is in the possession of title land bearing no. 1340 and 1341 at Gola Ka Mandir, *ad-measuring* 13,216.64 Sq. Mtrs. of land has been entrusted to the respondent by the Central Government in exercise of its power under Section 4 (D) of the Railways Act, 1989 and Rule 5 of the Rail Land Development Authority, 2006."

(f) The respondent misrepresented to the petitioner in the said "joint handing over note" that the total area of the site was 13,216.64 Sq. Mtrs. thereby implying that it had good and valid title to the said area when in fact it did not have such title.

45. Thus, the land for which the petitioner had applied through tender, the land which was offered as per RFQ has been substantially altered. As per the petitioner, the offered land is having reduced commercial viability, which is not acceptable to the petitioner.

46. It is undisputed that the land whose possession was given to the petitioner as per the tender has changed. It is also not in dispute that the petitioner cannot be restored to the position viz-a-viz the land in which the petitioner stood before 30.01.2012. It is also not in dispute that the respondent in W.P. (C) No. 1433/2012 before the High Court of Madhya Pradesh agreed to the exchange of land and thus a compromise order dated 23.07.2014 was passed without adjudication on merits. Thus, what the respondent offered to the petitioner was completely a different land.

47. In such eventuality, instead of forcing the petitioner to accept the alternative site, the respondent / authority was duty bound to ask the petitioner whether it wishes to continue with the project or take refund of the amount deposited.

48. It is an admitted fact that the land of 2777 Sq. Mtrs. which has been utilized by the State of Madhya Pradesh cannot be returned to the petitioner.

49. The case of the petitioner is that it participated in a tender in response to an advertisement, which is at page 48 of the paper book, for commercially developing a plot of land. Vide the aforesaid

advertisement the respondent gave an information about the land, its accessibility and the portion of land that could be taken for road widening along with illustrative lay out plan. A map of location of lay out of the land was also given along with the portion of land that was to be taken for road widening for which the petitioner had given a bid.

50. Further, the case of the petitioner is that the said land had better accessibility, better frontage, which could have been commercially exploited and it was a commercially viable land as compared to what is being offered at present. The portion of land on which the State of Madhya Pradesh has built a road was the portion which provided better accessibility and frontage due to its shape and it provided the petitioner an opportunity to increase the commercially exploitable area. Accordingly, the petitioner paid the upfront lease premium along with allied charges totalling to Rs.30.32 Crores. If it is presumed that the parcel of land given in exchange of land taken over by the State of Madhya Pradesh, is having better accessibility and commercially exploitable, even then the petitioner cannot be compelled to go with the project. The petitioner was bound with the agreement, if the same land was handed over, but not in the present situation. It is the wish of the petitioner and he cannot be compelled to accept the new parcel of land. If it is so, it would be arbitrary on the part of respondent which is not acceptable in law.

51. Undisputedly, on 30.01.2012, the administration of Madhya Pradesh took away major portion of land from the front 2777 Sq. Mtrs.

and proceeded to build a road on it. Accordingly, the petitioner terminated the agreement and sought refund of the amount of Rs.30.32 Crores, which the respondent refused to pay.

52. On the issue raised by the respondent that there was an Arbitration Clause, therefore, the petitioner should approach the Arbitration Tribunal. It is relevant to note that as per Section 8 of the Arbitration and Conciliation Act, 1966, an application should be filed before the party files its first statement on the substance of the dispute. However, the respondent had filed its counter-affidavit on 08.08.2012 whereas the application under Section 8 of the Act was filed on 07.09.2012. Therefore, since the respondent chose to file its application after filing of its first counter-affidavit, the said application is not maintainable.

53. Moreover, in the case of *Tantia Construction Pvt. Ltd. (Supra)*, the Hon'ble Supreme Court held that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court is fully within its jurisdiction to entertain and dispose of the Writ Petition filed before it.

54. Admittedly, land has been changed and petitioner has not accepted the same. This fact is not disputed. In this eventuality, the petitioner cannot be asked to approach the Civil Court for recovery of amount which may take substantial time. Though, vide present petition, the petitioner seeks refund of amount, still this petition is

maintainable. Discretion of the Court should not be used against the rights of the petitioner.

55. In view of above discussion and settled position of law, the petitioner deserves to succeed in the present petition.

56. Accordingly, the petition is allowed with no order as to costs.

57. Consequently, the respondent is directed to refund the amount of Rs.30.32 Crores to the petitioner with interest @ 12% *per annum* from the date of deposit till the amount is paid to the petitioner within two months from the date of receipt of this order.

CM. No. 6219/2015 (for stay)

With the disposal of the petition itself, the present application has become *infructuous*. The same is accordingly dismissed.

**SURESH KAIT
(JUDGE)**

MAY 18, 2015/jg/'sn'/sb/RS