IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10711 of 2011

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1. Mrs.Arti Mishra D/o Late Madhukant Mishra,
2. Sri Sanjay Kumar Gupta, S/O Late Swami Nath Gupta, residents of Kumalya, Ram Jail Pal Singh Path, Near B.R. Ambedkar Dental College, Bailey Road Patna

.... Petitioner/s

Versus

1. Bihar Industrial Area Development Authority 1st Floor, Udyog Bhawan, East Gandhi Maidan, Patna through it Executive Director
2. M/s Institute of Chartered Accountant of India, through Arun Kumar, Chairman of its Patna Branch, 309, Jagat Trade Centre, Frazer Road, Patna
3. The State of Bihar through the Principal Secretary, Department of Industries

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Abhay Kumar Singh, Sr. Advocate
Mr. AJAY KUMAR SINHA
For the Respondent/s : Mr. LALIT KISHORE

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
ORAL JUDGMENT
Date: 25-01-2016

The two petitioners herein are the entrepreneurs and partners of M/S Maa Janki Drinks. They question the allotment of 19500 sq. ft of land by the respondent Bihar Industrial Area Development Authority (for short 'BIADA') in favour of the Institute of Chartered Accountants of India (respondent no. 2).

Prefatorial facts are briefly recounted. M/S Ellen Drinks Pvt. Ltd applied for allotment of land in the industrial area for setting up an industry. On 11.8.1979, 55380 sq. ft. of land was allotted by BIADA. On similar application filed, the said respondent was allotted on two successive occasions i.e. 6.5.1980 and 8.3.1983, 12500 and 7000 sq.ft. of land respectively. M/S Ellen Drinks obtained loan from Bihar State Credit and Investment Corporation Ltd (for short 'BISCICO') mortgaging 55380 sq. ft of land allotted by BIADA in the first phase. It later defaulted in setting up the industry and paying off the dues of BISCICO. The plot of land along with the machinery, tools thereon was auction sold and purchased by the petitioner (plot no. B-1 and B-4) and a memorandum of understanding (MoU) was signed between the BICICO and the petitioner in 2004 (Annexure-2). Vide an order dated 14.6.2007, the Managing Director of BIADA noted as under:-

> "In my opinion, BIADA should have avoided allotting plot inside somebody else's boundary wall. I am, accordingly, of the opinion that this plot should be cancelled because the unit could not be given a lawful possession. However, since the fault was not with the unit, BIADA shall not forfeit the money deposited by this company. If M/S Karlo Automobiles is interested in some other plot in the Patliputra Industrial Area they can reapply in the auction process and take a land. BIADA shall, therefore, cancels this allotment and orders return of the money already deposited back to M/S Karlo Automobiles. The Executive Director should then offer the new purchaser of M/S Ellen Drinks Pvt. Ltd. to deposit the money (as deposited by M/S Karlo Automobiles) in BIADA to get the allotment of this piece of land."

The said communication was, however, neither addressed nor forwarded to the petitioner. According to the said communication, the tract of land measuring 12500 and 7000 sq.ft (19500 sq.ft in total) allotted to M/S Ellen Drinks in later phases were required to be allotted to the petitioner. Suppressing the aforesaid order which entitled the petitioners to get allotment thereof, the respondent BIADA allotted the land to the respondent Institute who had applied for such allotment along with the project report and required fee on 13.10.2009. Registered lease deed was executed subsequently on 28.1.2011. The writ application has thereafter been filed to question the aforesaid allotment of 19225 or 19500 sq.ft of land to the respondent of Chartered Accountant of India (for short 'the institute')

Heard Mr. Abhay Kumar Singh, Sr. Counsel in support of the application, Mr. Piyush Lall for the respondent-BIADA as well as Mr. Satyabir Bharti who appeared for the respondent-Institute.

It has been urged, inter alia, that vide order dated 14.06.2007 (Annexure-A; at page 123 of the brief) the Managing Director of BIADA cancelled the allotment/settlement of the subject land in favour of M/s Karlo Automobiles(P) Ltd. and noted that the Executive Director should offer the plot to the auction-purchaser of M/s Allen Drinks to deposit the amount to get the allotment of the land/plot. The main thrust of the argument of Mr. Singh is that the aforesaid order of the Managing Director was suppressed by the authorities of the BIADA inasmuch as the same was not made known to the petitioner. Contrary to the order, the respondent-BIADA subsequently on 31.10.2009 vide Annexure-B (at page 126 of the brief) allotted the land in favour of the respondent-Institute. Referring to different clauses of allotment letter dated 31.10.2009, it is urged that such allotment was made in favour of the respondent-Institute for setting up of factory/industry after getting the map thereof approved by the BIADA. The respondent-Institute is an examining body of the Chartered Accountant or at best may be treated as a teaching institute. Such allotment could not have been made in favour of the Institute which is not an industry. Even if the Institute is treated an amenity permitting the BIADA to allot the land the same could not have been done unless the government notified the respondent Institute as an amenity. The Bihar Industrial Areas Development Authority Act 1974 (for short 'the Act') defines amenity to include road, water supply, drainage, sewerage, housing, hospital and recreation facilities and such other convenience and facility as the State Government may, notify in the official gazette. There is no such notification issued by the Government. The respondent-Institute is only an examining body. It shall not fall within the mischief of amenity. After the allotment of 55,380 sq. ft of land the petitioner had taken steps to make the industrial unit functional/operational but finding the industry not feasible the petitioner desired to change or diversify the industry. In the submission of Mr. Singh the BIADA has not acted fairly in allotting subject land/plot to the respondent-Institute in spite of the order passed in this regard by the Managing Director to offer the land to the petitioner no. 1. The petitioner has a legal right to fair consideration of the claim by the respondent-BIADA which has been arbitrarily denied.

Combating the submissions of the petitioners, the counsel for the BIADA contended that no enforceable right is vested in the writ petitioner(s) to get the subject land allotted. The original allottee of 55,380 sq.ft land defaulted in paying off the dues of the respondent BISCICO and the said plot of land was auction sold by BISCICO and purchased by the petitioners on 06.11.2004. A tripartite memorandum of understating was reached between the writ petitioner, the respondent BISCICO and the original allottee. The petitioners were immediately required to approach the respondent BIADA seeking transfer of the land in favour of the petitioners and a request in this regard was filed by the petitioners on 12.06.2007 (Annexure-3). The BIADA by a communication dated 30.06.2007 (Annexure-4) required the petitioners to submit an application in appropriate form/format together with the fee for conveyance. No prompt action was taken by the petitioners. However, the petitioner no. 1 had earlier applied on 09.12.2004 for allotment of the additional land held by the original allottee. Although, the petitioners have stated in paragraph 8 of the writ petition that they deposited all required documents and fee(s) and also paid dues of the BIADA but, in truth, no such steps was taken by them. In the meantime, on an application filed by M/s Karlo Automobiles, the subject land was allotted to it whereafter a representation (Annexure-7) was filed by the petitioners against such allotment/settlement. On 14.06.2007 the BIADA cancelled the allotment made in favour of M/s Karlo Automobiles (Annexure-B to I.A. No. 7640 of 2014). The Executive Officer was directed to make an offer to the petitioners. Since the writ petitioners had not taken any steps on urgent basis in getting the original land transferred in their names (auction purchaser) in the records of BIADA after making an application and depositing fee therefor, the land was allotted to the respondent Institute who was an applicant along with the project report and the fees. The petitioners had not utilized the land which was auction purchased by them inasmuch as no industrial unit was installed/established and made operational. The 55,380 sq.ft land was also never got transferred in favour of the petitioner owing to their indolency/insensitivity in taking needful steps in this regard. The respondent BIADA issued notice after notice against the proposed cancellation of allotment of 55,380 sq. ft land. The writ application merits to be dismissed as the petitioners have not come with clean hands. The affidavit filed in response to the order of this Court by the petitioners is contrary to their stand taken in the writ petition with regard to the unit auction-purchased by the petitioner making operational. The equitable writ jurisdiction cannot be exercised in favour of the petitioners.

Mr. Bharti representing the subsequent allottee (the respondent Institute) has, however, supported the allotment/settlement made in favour of the respondent-Institute. He highlighted that even after the auction purchase of 55,380 sq. ft of land in 2004 the petitioners failed to establish/set up any industry/industrial unit. The aforesaid land was also not got transferred and re-allotted to the petitioners as required steps were not taken in right earnest in spite of several letters issued in this behalf by the BIADA. The respondent-BIADA, vide letter dated 08.08.2007(Annexure-E at page 139) and letter dated 14.01.2008 (Annexure-E/1 at page 140) issued notices to the petitioners against the proposed cancellation of the land in their favour stating that no industry was set up and made functional/operational by the petitioners after the auction purchase of the land from the BISCICO. The conduct of the petitioner graduated for cancellation of the original auction-purchased land by the petitioners. A right of preemption in such circumstance will not vest in the petitioners. The order dated 14.06.2007 passed by the Managing Director of the respondent BIADA, which is the foundation of the claim of the petitioners, was never communicated to the petitioners. No vested legal right is created in the writ petitioners as complained in the writ petition. That apart, the conduct of the petitioners makes them not liable to be granted any relief by the writ court. The petitioners have made false statements that they got the land transferred after auction purchase after depositing the required fee and documents as also about setting up of the industry and making it functional.

Arguing further, he submits that the Institute is a statutory body set up under the Central Act. It had made an application with requisite fee to the respondent-BIADA for allotment/settlement of the land. The Institute provides training to Chartered Accountant and the successful candidates are associated with the industry. It is incorrect to say that the Institute is not an industry and entitled to allotment/settlement of the land in the industrial campus. Referring to Bihar Industrial Incentive Policy 2011 (at page 217/232), he contended that the higher/technical educational institutions are thrust areas of the State Government and entitled for incentives under the industrial policy of the State Government which necessarily includes allotment of the land. The Institute undertakes various activities for regulating the Chartered Accountant apart from providing training. The Institute therefore qualifies under the definition of industry defined in section 2(d) of the Act.

The Court would first examine what right enforceable under the public law exists in the petitioner no.1 to have the additional/subject land allotted. Indisputably, the petitioner(s) obtained right under the MOU dated 10.11.204 (Annexure-2). Clause 18 thereof contemplates that the petitioners shall form a company/partnership firm for finally getting the property transferred in its/their name and the first party shall transfer it as per the MOU on any other condition. Apart from MOU, nothing has been placed to show that the respondent BIADA transferred or registered in its record the property in favour of the petitioner(s) upon constitution of company/partnership firm and on paying the entire dues of the BICICO. No auction sale or lease document has been enclosed to the writ petition. Moreover, even if the petitioners had paid all the dues of the BISCICO and became the auction purchaser of 55,380 sq.ft. of land, the petitioner(s) was required to get the land transferred in the records of respondent BIADA upon filing an application together the requisite fee and the project report etc. which admittedly was not done by the petitioner(s). The respondent BIADA, in such circumstance, had to issue diverse notices against the proposed cancellation of the plot/land which the petitioners obtained under MOU from the BISCICO. In spite of the notice(s) dated 30.06.2007 and 08.08.2007 issued by the respondent BIADA requesting the petitioners to get the plot/land transferred in their favour by the BIADA, no step forthwith was taken. In this factual scenario, the writ petition was filed in 2011 challenging the allotment of the subject land in favour of the respondent Institute. Subsequently, by a communication dated 01.09.2011 (Annexure- F to the counter affidavit of BIADA), the petitioner no.1 submitted an application to the respondent BIADA that they have now formed a company in the name of M/s Kwality Liquor P.Ltd incorporated on 30.03.2010 inasmuch as the licence to manufacture/brew liquor was also obtained. A request for transfer of land for production/manufacturing /brewing of liquor was made. The Respondent BIADA, vide letter dated 15.10.2011 Annexure-G, called upon the petitioner no.1 to deposit the project report, other documents and other charges, so that her application could be processed for effecting transfer of 55,380 sq. ft. of land. Incidentally, this may be noted that brewing of liquor/soft drinks is an industry falling in the negative list of industry in Industrial Incentive Policy, Bihar-2006 (Annexure-R/2/J). Same position continues in Industrial Policy of the State Government formulated in 2011 when such industry was included in the list of industry not eligible for incentives under item no.36. This Court would further note here that in the said Industrial Incentives Policy-2011 the higher/technical educational institution has been treated as thrust areas of the State Government. This is probably because such institutions are ancillary to the development of industry.

Seen thus, the petitioner no.1 was not even an allottee of 55,380 sq.ft. of land by the BIADA when the writ petition was filed. The aforesaid situation continues if the statement made in the counter affidavit of the respondent-BIADA is, prima facie, accepted as there is no categorical denial thereof by the petitioner(s). What crystallizes further from the materials on records that the petitioner(s) did not take step to utilize the land auction purchased from the BISCICO for production/manufacture by making the industry set up by the original allottee functional. In this connection, the petitioner(s) has asserted about some notices issued by the Tax department of the government to show that the production was made and sale was effected. The Counsel for the respondent BIADA, on the other hand, has countered stating that no document of the company/partnership firm producing/manufacturing/brewing items by petitioner no.1 in this regard was ever presented before the respondent BIADA. Even before this Court also no invoice or audited account of sales, tax registration, tax returns etc. has been produced. On the contrary, after filing of the writ petition the petitioner no.1 represented before the respondent BIADA about the formation of new company called M/s Kwality Liquor P. Ltd. allegedly incorporated on 30.03.2010. Even along with the said communication dated 01.09.2011 the project report thereof was not submitted. In this fact situation, no legal right exists with the petitioner no.1 to get the additional allotment of the adjoining plot/land for which the writ petition has been filed. Even the right of preemption applied in loose terms is not vested in petitioner no.1 as the petitioner(s) till date has not been registered with BIADA as an allottee. The Apex Court in the case of **State of Orissa vs. Ram Chandra (AIR 1964 SC 685 at paragraph 8** noted that the writ jurisdiction of the court is meant for enforcement of existing legal right and not for creation of any right.

The Counsel for the petitioner has vehemently argued that a fair consideration of the claim of the petitioner was not afforded by not providing the petitioner no.1 the order the Managing Director passed. Firstly, such order was passed in the context of refusal to allot the land/plot to applicant M/s Karlo Automobiles and therefore purposely not addressed to or communicated to the petitioner no.1. Secondly, even if the order would have been made available to the petitioners, enabling the petitioner(s) to take steps accordingly, the land could not have been allotted to petitioner no.1 as she was not even the legal allottee of 55,380 sq.ft. of land by BIADA and was running in default by not responding to diverse communications of the respondent BIADA requesting the petitioners to submit the application in appropriate format together with the project report and the requisite fee etc. for allotment of the auction purchased plot/land by the BIADA. As noted, except the MoU no other document of lease or sale order from the BISCICO has been produced.

The case, as presented, can be viewed from different angle also. Considering the rival stand of the parties on setting up of the industry after auction purchase of the land from the respondent BISCICO and making it operational the petitioner was directed to file an affidavit. In the supplementary affidavit, the petitioner no.1 asserted that she tried her best to continue manufacturing/bottling process of soft drinks which remained in production till 2009 whereas the respondent BIADA has candidly refuted the said stand of the petitioner stating that the petitioner has not produced any invoices or audited account or any other reliable document to support the said claim. In paragraph 8 of the writ petition, the petitioner asserted that all required documents and fee as also the dues of BIADA were paid whereas from the counter affidavit and even the stand of the petitioner in another affidavit, filed subsequently, it appears that the same was not done. The writ petition was filed with incorrect statement. The basis of the claim was not correct. In **K.D. Sharma vs. Steel Authority of India Ltd. [(2008) 12 Supreme Court Cases 481],** the Apex Court in the context of exercise of the prerogative writ jurisdiction observed as under in paragraph 34,36 and 38:-

> "34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material

facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court. If the applicant makes false statement or suppress material act or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by starting,' we will not listen to your application because of what you have done.'' The rule has been evolved in the larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it.

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all materials facts without any reservation even if they are against him. He cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of he writ courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because 'the court knows law but not facts'."

Considering thus, the writ petition is also liable to be dismissed on this count.

As a result of my discussion above, the writ application is found devoid of merit. It is accordingly dismissed.

(Kishore Kumar Mandal, J)

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