

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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WP.nos.3165 of 2011 and 30132 of 2012
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COMMON ORDER:

WP.no.3165 of 2011 is filed seeking the following relief/s:

'to issue an appropriate writ, order or direction more particularly one in the nature of a WRIT OF MANDAMUS declaring the action of the respondents in failing to consider the petitioner's representation dated 5-6-2010 and 2.2.2011 for allotment of site for constructing shops as per the orders of the respondent dated 20-7-2004 is illegal, arbitrary and unconstitutional and consequently, direct the respondent to forthwith hand over the contract land to the petitioner by duly considering the representation dated 5-6-2010 and 2-2-2011 with possession and to pass such other order or orders....'

[Reproduced verbatim]

1.1 WP.no.30132 of 2012 is filed seeking the following relief/s:

'to issue an appropriate writ, order or direction more particularly one in the nature of a Writ of mandamus declaring the action of the respondent in issuing the proceedings ROC.no.429/2011/G-3, dated 24.08.2012 dropping the proposal for construction of shopping complex in the place of old Municipal Sanitary Building at Old Bus Stand, Kurnool as illegal, arbitrary, unreasonable, violative of Article 14 of the Constitution of India and contrary to the lease agreement vide proceedings dated 20-07-2004 issued by the respondent and consequently direct the respondent herein to handover the site for construction of shopping complex in the place of old Municipal Sanitary Building at Old Bus Stand, Kurnool and to pass such other order....'

[Reproduced verbatim]

2. I have heard the submissions of the learned counsel for the writ petitioner and the learned Standing Counsel appearing for the respondent/Kurnool Municipal Corporation. I have perused the material record.

3. The case of the writ petitioner as per the affidavits filed in support of the writ petitions and as per the submissions made is as follows:

The standing committee of the respondent Corporation *vide* its resolution dated 03.07.2004 granted permission to the petitioner to construct four shops each on ground floor and first floor of old Sanitary Building near

Old Bus Stand and further granted lease of the shops to be constructed for a period of three years from the date of handing over possession. In fact for construction of the said shops and for grant of lease, bids were called for. The petitioner became the highest bidder. A further resolution was passed by the committee of the respondent Corporation on 20.07.2004 granting lease for a period of three years subject to the construction of eight shops as per the terms and conditions fixed under the lease deed. The petitioner had paid the bid amount of Rs.1,12,000/-. The covering letter dated 08.07.2004 shows the payments made on 07.07.2004 and 28.06.2004 towards the total amount of Rs.1,12,000/-. On such payment the petitioner had requested the respondent Corporation for allotment of the property for construction of the shops to enable him to reap the benefits of the lease. On the day of allotment of the property it was found that the open land was occupied by some encroachers and, therefore, the property could not be allotted. The petitioner came to know that some third parties who are flower merchants had occupied the land of the Corporation and are doing their respective businesses in the encroached portions of the land of the Corporation and that they had filed a suit in OS.no.1228 of 2004 on the file of the Court of the learned Munsif Magistrate, Kurnool and had obtained some orders. However, the Corporation *vide* proceedings dated 26.10.2005 directed the police concerned to remove the encroachment to enable it to allot the property to the petitioner. The petitioner and the Corporation are parties to the said suit. After several steps that were taken by the petitioner, the said suit was dismissed on 03.05.2010. In the meanwhile several representations were filed by the petitioner requesting the Corporation to permit him to construct the shops. On 05.06.2010, that is, after the dismissal of the suit and the encroachments were removed, the petitioner made a representation to the Corporation that he had already paid an amount of Rs.1,12,000/- towards goodwill and that the property is not yet handed over to him and that the property may be handed over to him, as expeditiously as possible, considering his advanced age and poor health condition. On non consideration of the said representation, the petitioner had made a further representation dated 02.02.2011 reiterating his stand. In spite of the

representations by the petitioner, no action was taken by the respondent Corporation. For non consideration of the aforementioned representations, the petitioner filed the first of the two WPs viz., WP.no.3165 of 2011; and this court by interim order dated 08.02.2011 passed in WP.MP.no.3925 of 2011 directed that the respondent Corporation shall not allot the site in question to any others. For violation of the said orders of this Court, the writ petitioner had filed a contempt case. That contempt case was closed on the representation of the learned standing counsel for respondent Corporation that the Corporation is not taking steps to allot the site to a third party. Thereafter the petitioner made another representation dated 11.07.2012 to permit him to construct the shopping complex as per the terms agreed to between the parties. However, to the utter surprise and shock of the petitioner, the respondent Corporation had issued the proceedings vide Roc.no.429/2011-/G-3 dated 24.08.2012 intimating that the proposal for construction of the shopping complex in the site in question is dropped by the Corporation and to take return of the amount deposited by the petitioner with the respondent Corporation. The said proceedings are impugned in the second the writ petition viz., WP.no.30132 of 2012. As per the proceedings dated 20.07.2004 originally issued, the agreed term of lease is three years from the date of handing over of the possession of the site and it is further extendable by another three years on payment of rent on enhancement @ 33.33%. Because of the pendency of the suit aforementioned, the possession of the land was not handed over by the respondent Corporation to the petitioner. Even after the dismissal of the suit and representations made by the petitioner, the possession of the property was not handed over. In WP.no.3165 of 2011, the Corporation had taken a stand that the request of the petitioner could not be considered as the Town Planning Staff were busy with Census 2011. The facts of the case clearly disclosed that the respondent Corporation violated its own proceedings dated 20.07.2004 and had issued the proceedings dated 24.08.2012 impugned in WP.no.30132 of 2012 without fulfilling its obligation in regard to handing over the possession of the site for construction of the shopping complex. The petitioner who is of 66 years of age was put to irreparable loss and hardship. In the absence of

any effective alternative remedy, the petitioner is constrained to file the latter writ petition seeking the aforementioned relief in paragraph 1.1 supra.

4. In the counter affidavit filed in WP.no.30132 of 2012, the then Commissioner of the Corporation while admitting the case pleaded by the petitioner had *inter alia* contended as follows:

As per the proceedings dated 20.07.2004 the petitioner was informed that permission was accorded to construct four shops on ground floor and four shops in the first floor after demolition of old sanitary building situate in old bus stand area of Kurnool and that the lease period would be 3 years from the date of handing over of the possession of the property subject to conditions nos.8 and 13. According to the terms in the said conditions, the petitioner is required to deposit six months rent in advance before taking possession of the site and enter into a lease agreement in the prescribed proforma and have it registered at his own cost and shall abide by the terms and conditions in the proceedings. In view of the suit filed by the encroachers of the site and the interim orders obtained in the said suit not to interfere with the possession of the encroachers/plaintiffs therein till the disposal of the said suit, the property could not be handed over to the petitioner. The said IA was dismissed on 12.07.2005 and there is no injunction order in operation restraining the petitioner from making constructions over the property as per the proceedings dated 20.07.2004. Therefore, the Corporation issued a note dated 26.10.2005 to the Municipal Engineer and the Assistant City Planner to remove the encroachments in front of the site in question and allot the above site to the petitioner herein at an early date. The Municipal Engineer was further instructed to see that the construction work should be as per the plan and under his supervision. Though the Staff of the Corporation was ready to handover the site in question, the petitioner had never approached the Corporation till 05.06.2010. He did not also deposit 6 months rent and get the lease deed registered as per the aforementioned conditions in the proceedings. After lapse of six years, he had filed an application on 05.06.2010 stating that the Court case was dismissed on 03.05.2010 and had requested to handover the site in question to him to proceed further in the

matter. As the petitioner had violated the conditions in the proceedings dated 20.07.2004 issued by the Corporation, the permission accorded to him stood automatically cancelled long time back. It is true that the petitioner has filed WP.no.3165 of 2011 for non consideration of his representations dated 05.06.2010 and 02.02.2011. It is also true that this Court granted an interim order as stated by the petitioner. The contempt case was closed by observing that it is not feasible to entertain the contempt case unless the petitioner asserts that the site was allotted in favour of a third person or agency. The site was not handed over to any other person or agency for construction of shopping complex. In the year 2009 heavy floods had occurred in Kurnool City and most of the city was inundated in flood waters; and, roads and drainage systems were badly damaged at various places including at the site in question. Therefore, the site could not be allotted for construction of any shopping complex to anybody as the roads and drainage system needed to be repaired. The said works were attended to by the Corporation. Still the said work is going on, as on the date of the filing of the counter affidavit. Keeping in view the situation, the general body of the Corporation passed a resolution dated 18.08.2012 resolving to cancel the lease of the petitioner herein for the following reasons: 'The live water distribution lines are passing through the subject site and that the said lines are serving water to the East side city of old bus stand and, hence, the pipelines cannot be disturbed. There is a mineral water plant existing in the premises of the said site, which is serving drinking water, free of cost, to the needy and thirsty people of the old bus stand area. There is no alternative site to shift the same. The mineral water plant, therefore, cannot be disturbed. There is a sanitary office existing in the proposed site, which is an identified location, for reporting of the workers and allotment of duties to the sanitary workers of that division. As such it cannot be shifted. There is no proposal for demolishing the old sanitary building in question and to construct a shopping complex in the said site by the Corporation due to change in circumstances. There is a proposal to improve the water supply system in future to be taken up under the scheme APMDP and as such the said premises is essentially required for extension of some more pipelines. There

is a proposal of widening to some extent, the old bus stand road before the site in question as there is heavy traffic in the said area. As such, the said site may be required for the said purpose.’ Because the proposal for construction is dropped by the Corporation, the proceedings, which are impugned in the second writ petition, were issued cancelling the earlier proceedings. The writ petitions are devoid of merit and are liable to be dismissed.

5. The learned counsel for both the sides made submissions in line with the pleadings.

6. It is an admitted fact that on the petitioner becoming a successful bidder, both the parties agreed that the site in question shall be handed over to the petitioner for construction of four shops in ground floor and four shops in the first floor of the Old Sanitary building site and that in that regard the proceedings dated 20.07.2004 were also issued by the Corporation to the writ petitioner. A perusal of the said proceedings would disclose that *vide* proceedings in SCR.no.428 dated 03.07.2004 permission is accorded to the petitioner to construct four shops in the ground floor and four shops in the first floor of Old Sanitary Building near Old Bus stand for a lease period of three years from the date of handing over possession subject to certain conditions. Some of the said conditions are as follows: “The lease period of three years from the date of handing over possession of the site is subject to further extension on enhancement of rent by 33.33%. The lessee should take possession of the site within seven days of the receipt of the order. The construction work should be strictly as per the type and design and under the supervision of the municipal engineer. The lessee should pay monthly rent by the 10th of every month in advance; else a penalty of 3% shall be imposed.

The lessee should deposit six months rent in advance before taking possession of the site. The lessee should enter a lease agreement in the manner prescribed and in the proforma and get it registered at his own cost.”

6.1 The fact of the matter is that in view of the suit filed by the encroachers some of whom are in fact carrying on business in flowers in the encroached

portions of the subject site, the Corporation could not handover possession of the subject site to the petitioner. In the said suit, there was an interim order of injunction and later that injunction petition was dismissed. However, the suit was dismissed on 03.05.2010. The petitioner admittedly filed two representations dated 05.06.2010 and 02.02.2011 requesting the Corporation to fulfil its obligation in the matter. For non compliance of the requests in the representations, the petitioner filed the first writ petition. In the said writ petition, the respondent Corporation filed a counter affidavit along with the vacate petition. In the said counter affidavit filed by the then Commissioner of the Corporation, while admitting the case pleaded by the writ petitioner, it is stated that no reply was sent to the first representation dated 05.06.2010 since there are encroachments in front of the site proposed for construction of shop premises under goodwill system and that the town planning staff were busy with census 2011. However, the receipt of the representation dated 02.02.2011 was denied. Thus the petitioner was not blamed and no complaints were made against the petitioner in regard to non-compliance of the conditions. By an interim order granted in the said writ petition on 08.02.2011, it was directed that the respondent Corporation shall not allot the site in question to any others. The contempt case that was filed complaining against the violation of the said orders was closed on the representation of the learned standing counsel for respondent Corporation that the Corporation is not taking steps to allot the site to a third party. Thus, the contentions which are taken in the counter affidavit filed in the second writ petition were not at all taken in the said counter affidavit filed on 12.11.2011 in the first writ petition by the then Commissioner of the respondent Corporation and it is not stated that for non compliance of certain conditions by the writ petitioner, the proceedings stood automatically cancelled long time back. Even after the dismissal of the suit, despite representations made by the petitioner, the possession of the site was not handed over to the petitioner though the petitioner had deposited Rs.1,12,000/-, which he was called upon to deposit by the Corporation. When the Corporation is not in a position to handover the site for construction and when the terms indicate that the lease period commences from the date of handing over possession, the question of the

writ petitioner performing the obligations which he is required to perform does not arise. The main reason for the Corporation not handing over possession is that it was not in a position to handover the site for various reasons including the suit filed by the encroachers and that its staff are busy in census 2011. Though the respondent Corporation contended that the injunction application in the said suit filed by the encroachers of the site was dismissed on 12.07.2005 and that there is no injunction order in operation restraining the petitioner from making constructions over the property as per the proceedings dated 20.07.2004 and that the Corporation had issued a note dated 26.10.2005 to the Municipal Engineer and the Assistant City Planner to remove the encroachments in front of the site in question and allot the above site to the petitioner herein at an early date and that the Municipal Engineer was further instructed to see that the construction work should be as per the plan and under his supervision and that the petitioner had never approached the Corporation till 05.06.2010, though the Staff of the Corporation was ready to handover the site in question, admittedly no replies were given to the representations of the petitioner and the petitioner was never informed in writing about the Corporation's readiness and willingness to hand over the possession of the subject site. Further even in the Counter affidavit of the then Commissioner filed on 12.11.2011 in the first writ petition a whisper is not even made to the effect that the petitioner did not come forward to take possession of the property though the Staff of the Corporation was ready to handover the site in question. And, on the other hand it is only stated that no reply was sent to the first representation dated 05.06.2010 of the petitioner since there are encroachments in front of the site proposed for construction of shops and that the town planning staff were busy with census 2011. Therefore, there were no complaints against the petitioner at any time prior to the cancellation proceedings and the filing of the Commissioner's Counter affidavit in the second writ petition. Thus the belated stand and the defence throwing the blame on the petitioner is conveniently taken by the Corporation as an after thought and to wriggle out and shift the blame. The matter and the issues were kept pending till the proposal to proceed further with the construction was dropped on 24.08.2012 by the cancellation proceeding. A

perusal of the proceedings dated 24.08.2012 would disclose that under the said proceedings, the Corporation had informed the petitioner that the permission accorded to him to construct shops after demolition of old sanitary building situate in old bus stand coupled with the lease for a term of three years from the date of handing over possession was cancelled for the following reasons: 'The Corporation issued a note dated 26.10.2005 to the Municipal Engineer and the Assistant City Planner to remove encroachments in front of the site in question as the injunction petition was dismissed by the civil Court and allot the site to the petitioner at an early date. Though the said staff of the Corporation were ready to handover the site in question, the petitioner, who is very well aware of the facts, never approached the Corporation till 05.06.2010. He had failed to deposit 6 months rent as per conditions. He made a representation on 05.06.2010 after lapse of six years stating that the Court case was dismissed on 03.05.2010 and requesting to handover the site in question to him to proceed further in the matter.' Apart from the said reasons the other reasons for cancellation were also mentioned in the said proceedings. The said other reasons assigned for cancellation, are already referred to supra. However, none of the above reasons mentioned in the cancellation proceedings hurling the blame on the petitioner are stated in the counter affidavit filed in the year 2011 in the first writ petition, as already noted. For emphasis it is necessary to restate that the main reasons, which are assigned at the first instance by the Corporation for not handing over the possession of the site, are - (i) that there are encroachments in front of the site; and, (ii) that the staff of the Corporation were involved in census 2011. Therefore, as rightly contended on behalf of the petitioner, the reasons that are assigned in the cancellation proceedings are only invented as an after thought is patently evident from the record. Coming to some of the other reasons assigned by the Corporation, the respondent-Corporation cannot be heard to say that by the time the first proceedings were issued, it is not aware of the existence of water distribution lines, mineral water plant, office of the sanitary division, the requirement of improvement of water supply system in future and the proposal for widening of the road at the old bus stand. If that is so, the Corporation ought not to have ventured to call for the

bids and entered into a transaction with the petitioner for the construction of the shops and lease. Obviously the venture was undertaken without any prescience in the matter and for which the Corporation has to blame its officers concerned and not the petitioner. However, the respondent Corporation also relies upon the floods in the year 2009, which indubitably caused havoc in major part of the Kurnool City and the events subsequent thereto to justify its stand in regard to cancellation. For whatever reasons, the Corporation is now not willing to go ahead with the proposal of constructions of shops in the site in question and had issued the cancellation proceedings dated 24.08.2012, having dropped the proposal once and for all. In the circumstances stated by the Corporation it cannot be compelled to act in accord with the earliest proceedings dated 20.07.2004. Be that as it may.

6.2 Nevertheless, the fact that remains to be taken note of is that an amount of Rs.1,12,000/-, which was deposited by the petitioner is withheld by the Corporation since the date of its deposit. A reading of the letter of the petitioner adverted to supra would show that earlier to 08.07.2004 the petitioner had paid Rs.56,000/- and that along with the said letter he had made an additional payment of Rs.56,000/- towards goodwill amount by way of pay order dated 07.07.2004. The receipt of the said amount of Rs.1,12,000/- by the respondent Corporation is not in dispute. At the hearing, it is stated that the said amount is not yet refunded. Therefore, the Corporation is obliged under facts and in law to return the said amount with interest to the petitioner. There are also no qualms on the aspect that the amount shall be refunded with interest as the money of the petitioner was unduly withheld by the respondent Corporation and the petitioner was deprived of making use of that money for quite a long time and the Corporation has undoubtedly incurred the liability to refund the money with interest to the petitioner in the facts and circumstances of the case. Therefore, it is just and fair to direct the respondent Corporation to refund the said amount to the writ petitioner with interest. Hence, the short question is as to what is the rate of interest to be awarded. Since the amount paid by the petitioner was lying with the respondent since 07.07.2004 i.e., for over a

period of about 12 years and considering the fact that the venture is a commercial transaction from the point of view of both the parties, it is just and fair to direct the respondent-Corporation to refund the said amount to the writ petitioner with interest at 24% per annum simple from 08.07.2004 till the date of payment. The Respondent-Corporation shall pay the said amount with interest as directed within a month from the date of the receipt of a copy of this order. Failing which, the petitioner would be entitled to and the Corporation would be liable to pay further/future interest on the said amount of Rs.1,12,000/- @ 36% per annum simple from the date of this order and till the date of payment.

7. Accordingly, both the writ petitions are disposed of.

The petitioner is entitled to costs as per scale in both the writ petitions.

Miscellaneous petitions, pending if any, in these writ petitions shall stand closed.

M. SEETHARAMA MURTI, J

22nd April, 2016
Vjl