IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

HON'BLE JUSTICE SUBRATA TALUKDAR

WP No. 5324 (W) of 2011

M/s. Bajoria Holdings Private Limited & Anr.
-Vs.-
The State of West Bengal & Ors.

For the Petitioners	:	Mr. Anindya Kumar Mitra Mr. Mohit Gupta Mr. A. P. Agarwala
For the KMDA	:	Mr. Partha Sarathi Basu Mr. Satyajit Talukdar
Heard on	:	06/03/2020
Judgment on	:	25/09/2020

Subrata Talukdar, J:

Under challenge in this writ petition is a communication dated 21st February, 2011 issued by the Special Secretary, Marketing & Management Unit (for short the *M&M* Unit) of the Kolkata Metropolitan Development Authority (for short the *KMDA*), addressed to the petitioners cancelling the allotment of Bulk Land (for short the said Land) made in favour of the petitioners *vide* a Memo of the *KMDA* dated 23rd October, 2007. The said land was allotted in favour of the petitioner

No.1 Company (for short, the Company or the said Company) also represented by the petitioner No.2 in this writ petition, measuring more or less 23.54 cottahs at Plot No.IND-3B/6, Sector-J, Zone-I for the purpose of developing an Outsource Management Hub (for short the *OMH*).

Reasons for the cancellation of the allotment as stated in the impugned communication dated 21st February, 2011 relate to violation of the terms of the License Deed and particularly *Clause No.4 (iii)* thereof executed by and between the parties on the 12th of March, 2008. In terms of the said *Clause No.4 (iii)* the allottee/the petitioner No.1/the Company was required to start construction of the project *OMH* within 24 months and complete the same within 36 month from the date of issue of the allotment letter.

The said impugned communication records that the petitioner No.1 has *neither started construction nor requested KMDA for extension of time within the said stipulated period*. It is further stated that the petitioners did not submit any evidence as to the progress of work on the allotted Plot inspite of four hearing notices. Accordingly, in terms of *Clause No.6 (i)* of the Licence Deed, the offer of allotment of land stood cancelled. The petitioner No.1/the Company was entitled to refund of the sum deposited at the time of allotment after deducting 20 per cent towards service charge.

Mr. Mitra, Learned Senior Counsel appearing on behalf of the petitioners, takes the point that the petitioner had taken every possible step to start the construction within the period stipulated. As part of the construction work the petitioners have invested a total sum of Rs. 1.5 crores which, *inter alia*, includes costs towards obtaining sanctioned building plan, architect's fees, property tax, construction of boundary walls, fees for soil testing, survey work, fire and emergency services etc. It is submitted that the above investment is in addition to the amount of approximately Rs. 2.5 crores deposited by the petitioners with the respondent No.2 (*R*2)/the *KMDA* towards cost of land.

It is further submitted that by a communication dated 24th November, 2009 addressed to the Administrative Officer and Estate Manager, *M&M* Unit, *KMDA*, on behalf of the petitioner No.1, extension of time was prayed for to complete the work of construction by 31st December, 2011. The delay in making progress with the work of construction has been attributed to a global economic meltdown that is purported to have occurred in September-October of 2008. In addition to the above factual scenario, Ld. Senior Counsel argues that the letter of allotment dated 23rd October, 2007 was subsequently followed by the Deed of License dated 12th of March, 2008. There has been thus an acceptance by the petitioner No.1 of the offer of allotment dated 23rd October, 2007. It is submitted that with the acceptance of the offer of allotment, the contract *inter se* the petitioners and the *KMDA* stood concluded. Such concluded contract cannot be unilaterally changed and/or adversely acted upon to the disadvantage of one party, viz. the petitioners, by the other, i.e. *KMDA.*

Referring to the interim order of the Hon'ble Single Bench in this writ petition dated 23rd of March, 2011, Mr. Mitra submits that the petitioners were able to make out a *prima facie* case on the strength of several *No Objection Certificates* as well as having applied for extension of time to complete the construction *vide* their letter dated 24th November, 2009. It is submitted that the interim protection granted by the Hon'ble Single Bench restraining *KMDA* from giving any effect or further effect to the impugned communication dated 21st February, 2011 as well as prohibiting the creation of third party rights over the said land, has been subsisting till this day.

In support of his submissions, Mr. Mitra relies upon the authorities reported in *2004 (2) SCC 177* and *2001 (4) SCC* 510. It is submitted that the steps taken by the petitioners for raising construction over the said plot are admittedly matters of record. So is the letter sent on behalf of the petitioner No.1/the Company dated 25th November, 2009 praying for extension of time to complete the construction. Having regard to the admitted evidence as referred to above, Mr. Mitra submits that the impugned action of the Respondents/*KMDA* cancelling the allotment is arbitrary on the face of the record.

Per contra, Mr. Talukdar, Learned Counsel for *KMDA,* strongly asserts that this writ petition is not maintainable. Relying on several judicial authorities, it is submitted that both the parties are bound by terms which are purely contractual. The cancellation of the letter of allotment arises out of a term of the contract and therefore is only subject to adjudication before a competent Civil Court. Such contract lies within the realm of private contractual law. Accordingly, this Court cannot adjudicate on such issue sitting in writ jurisdiction. With reference to this proposition, Learned Counsel relies on the authority of *2009 (1) CLT 156* and *2000 (6) SCC 293* (at *Paragraphs 10 and 11*).

Next, Ld. Counsel for *KMDA* submits that the Letter of Allotment (*LoA*) dated 23rd October, 2007, upon its acceptance by the allottee/the petitioner No.1 and, on fulfilment of its payment norms, matured into the Deed of License dated the 12th of March, 2008. The *LoA* (at *Clause 15 thereof*) speaks of the mandatory requirement on the allottee to take up construction work as per Kolkata Municipal Corporation (for short the *KMC)* approved plan within 3 years from the month of receipt of physical possession of the said land/plot failing which the plot shall be resumed by *KMDA*. The *LoA* states that the terms and conditions enumerated in the *LoA* are not to be treated as exhaustive.

Learned Counsel takes this Court to the Deed of License dated 12th of March, 2008 wherein and whereunder the Licencee/the petitioners covenant at *Clause 4 (iii)* as follows:-

> *"4.The Licensee Hereby Agrees and Covenants With The Authority As Follows:*
>
> *iii) At the own cost of the Licensee, within 24 months from the date of issue of allotment letter or within such further time as the Authority may as its option allow in writing on sufficient and reasonable grounds. To start Construction for the purpose of setting up an Outsource Management Hub in East Kolkata Area Development Project with boundary walls. Sewers and drains in accordance with plans sanctions and specifications as shall be approved by the appropriate authorities on payment of such fees as required. In accordance with the Building Rules of the Kolkata Municipal Corporation with the requirement of any Land Use and Development*

> *Control Regulations of the Authority or the requirements of any other statutory rules and regulations of local or statutory body framed for the purpose and licensee shall complete the construction works of the project within 36 months from the date of issue of allotment letter.*
> *Failure on the part of the Licensee to start construction within two years or within the time as extended by the AUTHORITY and/or complete the construction works of the project within three years from the date of issue of allotment letter of the plot of land. The License shall be terminated by the AUTHORITY, with the deduction of 20% of premium as paid by the Licensee as service charge and remaining amount shall be refunded without any interest thereon."*

Ld. Counsel, Mr. Talukdar, further points out that the terms of the *LoA* and the Deed of License are not separable. On the contrary, the Deed of License is an extension of the *LoA*. It is disputed therefore that a breach of a term of the Deed of Licence cannot, *ipso facto*, result in a cancellation of the *LoA*.

Ld. Counsel argues that the claim of the petitioner to have written to the *KMDA* on 24th November, 2009 seeking extension of time to complete the construction is a disputed question of fact, since the *KMDA* denies that such communication was ever received by it. Such disputed question of fact cannot be settled before the Writ Court and, relies upon the law settled in *2001 (10) SCC 513* and *2004 (8) SCC 321*. It is submitted that factual issues are to be settled upon exchange of evidence before a competent Civil Court, particularly in the light of the stand taken by *KMDA* that the purported letter of the petitioners dated 24th November, 2009 does not show any proof of receipt by *KMDA*.

Learned Counsel for *KMDA* submits that the so-called claims of the petitioners to have embarked on a construction activity are merely cosmetic. There is no evidence that construction was commenced in right earnest on the basis of a sanctioned plan. Arguing on the limits of Judicial Review in contractual matters, it is submitted that although *KMDA* is a public authority, all contracts entered into by and between a public authority do not fall in the realm of public law. It is submitted that the petitioners have not alleged any *mala fides qua KMDA*. There is a perceptible distinction between issues connected to reasonable action by a public authority in conformity with Article 14 of the Constitution of India which may arise *qua* a contract and, issues directly touching upon breach of a contract. In the latter scenario, the scope of invoking Writ Jurisdiction stands excluded.

It is submitted that issues raised in this writ petition touch upon breach of contractual terms by the petitioner No.1 and therefore belong to the realm of a Civil Court. In support of such proposition, reliance is placed on the authority of *AIR 2007 SC 119* and *2015 (7) SCC 728* (at *Paragraphs 55, 56, 69* and *84*). It is therefore submitted that the writ petition is not maintainable and requires to be dismissed *in limine*.

Having heard the parties and considering the materials placed, this Court must notice at the outset the provisions of *Clause 4 (iii)* of the *Deed of License*. Such provisions (supra), *inter alia*, provide for the exercise of discretion by *KMDA* to allow extension of time. It therefore stands to reason that arguably in the event the disputed letter dated 24th November, 2009 would have reached the desk of *KMDA*, it would be within the jurisdiction of *KMDA* to consider whether the petitioner qualified for grant of an extension of time to complete the construction.

While this Court finds persuasive force in the stand taken by *KMDA* that the *LoA* and the *Deed* have merged and therefore their terms must be conjointly considered, at the same time this Court must notice the situation prevailing *qua* the petitioners corresponding to the period when the communication dated 24th November, 2009 was purportedly addressed by the petitioners to *KMDA*.

With further regard to the discussion just above, it would be useful to refer to *Paragraphs 7, 8, 9* and *10* of the application for further interim orders and numbered as *CAN No. 5331 of 2012* as filed by the petitioners, which state as follows:-

> *"7. The said Building Permit and Sanctioned Plan was made over to the petitioner by a letter dated 22.06.2011 of the Executive Engineer, Borough no. XII in the office of the Municipal Commissioner, Kolkata Municipal Corporation. The said letter contains inter alia the following conditions of sanction.*
>
> *"2. The Building Permit no. 2011130174 dated 13 June 11is valid for 5 years from date of sanction"*
> *6# The Building work for which this Building permit is issued shall be completed within 13 June 16"*
> *# Commencement of Erection/Re-Erection not within two years will require fresh application for sanction"*
> *A copy of the said letter is annexed hereto and marked Annexure "P"*
> *8. In terms of the said sanction your petitioner are required to commence construction work of building at the said plot within 12.6.2013 and to complete the same within 13.6.2016. Failure to do so will require a fresh application for sanction.*

9. As stated hereinbefore in addition to making payment of Rs.2,35,40,000/- to the respondent no.2 and various other expenses in connection with preparatory work for construction of building at the said plot of land, your petitioners have paid sanction fees of Rs.44,58,870/- to the Kolkata Municipal Corporation. Unless your petitioner is able to commence construction of building in terms of the said building sanction the entire sanction fees of Rs.44,58,870/- paid by the petitioners will go to waste and your petitioners will be required to make fresh application for sanction which will need payment of sanction fees all over again.

10. Your petitioners have so far incurred expenditure of Rs.3.34 crores approximately in connection with the said plot of land and the building to be constructed thereon as details given below:

(i)	*Cost of land paid to the respondent no.2*	*Rs. 2,35,40,000.00*
(ii)	*Building Permit sanction fees paid to the Kolkata Municipal Corporation.*	*Rs.44,58,870.00*
(iii)	*Security Deposit and Service Charges paid to CESC Ltd.*	*Rs. 95,776.00*
(iv)	*West Bengal Fire & Emergency Service*	*Rs. 21,383.00*
(v)	*M/s. Mathew & Ghosh Architect Pvt. Ltd. for preparation of Building Plan.*	*Rs. 15,00,000.00*
(vi)	*Property Tax of Kolkata Municipal Corporation for 4th quarter 2007-08 to 4th quarter 2010-11.*	*Rs. 21,42,140.00*
(vii)	*Cost of construction of boundary wall at the said plot.*	*Rs. 10,00,000.00 (Approx)*
(viii)	*Cost of construction of bore well at the said plot.*	*Rs. 1,00,000.00 (Approx)*
(ix)	*M/s. Engineers Forum, the structural engineers*	*Rs. 75,000.00 (Approx)*
(x)	*Expenses for soil testing, survey charges, security, clearing and salary of dedicatd staff and other miscellaneous expenses.*	*Rs. 5,00,000.00*
		Rs.3,33,93,169.00

The expenditure for above amounts were incurred bill April 2011. The expenses of security, salary of dedicated staff, electricity expenses and day to day maintenance are recurring expenses are being incurred every month over and above the amount mentioned above. For the financial year 2012-13 the Kolkata Municipal Corporation has raised demand for

> *property tax in the sum of Rs. 1,62,780/-. A copy the Property Tax bill of Kolkata Municipal Corporation for 2012-13 is annexed hereto and marked Annexure "Q". The petitioner company has committed a further sum of Rs. 100 lacs approximately for filing work to M/s. Bhomick Construction, Kolkata."*

From the Paragraphs (supra) the petitioners claim to have committed and/or invested around Rs. 3.35 crores to the *OMH*. In the face of such commitment on paper now, the actual situation on the ground as existing on 24th November, 2009 in relation to setting up the *OMH* requires a detailed examination by *KMDA*. The *KMDA* shall be thereafter free to arrive at any decision on merits after giving an opportunity of hearing to the petitioners.

To sustain the final directions as above, this Court finds succour from the interim order dated 12th March, 2011 passed in this writ petition which, reads as follows:-

> *"Since I find that pursuant to the offer letter dated 23rd October, 2007, the permissive possession was allotted by letter dated 4th February, 2008, the petitioners had deposited a sum of Rs. 2,35,40,000/- on 5th December, 2007 and, thereafter, the deed of licence was entered into on 12th March, 2008 and as it appears from the documents that the petitioners have obtained 'no objection certificates' from various authorities and have paid certain charges and the petitioners by letter dated 24th November, 2009 had prayed for extension of 2 time before the authority as stipulated in Clause 4(3) (iii) of the deed of licence, in my view, a prima facie case has been made out for granting an interim order. Therefore, let there be an interim order in terms of prayers (e) and (f) of the writ petition till 15th July, 2011.*
>
> *Petitioners are also directed not to raise any further construction without the leave of the Court.*

> *The point of maintainability of the writ petition raised by the learned advocate for the K.M.D.A. is kept open. This order is passed without prejudice to the rights and contentions of the parties and subject to the further that may be passed.*
>
> *Liberty to mention upon notice."*

Before parting with this discussion, it is however clarified that with the long passage of time since February, 2011 when the impugned communication was addressed by *KMDA* to the petitioners, neither the touted Economic Meltdown of 2008 nor, the present Pandemic of 2020, can be of any assistance to the petitioners since the *KMDA* will examine on merits the ground realities *qua* the *OMH* as existing on 24th November, 2009. To reiterate, the *KMDA* shall be entitled to achieve at an independent decision on merits.

Only for the above reasons the impugned communication dated 21st February, 2011 stands permanently stayed.

W.P. No. 5324 (W) of 2011 is accordingly **disposed of**.

There will be no order as to costs.

Parties are permitted to act on a server copy of this order downloaded from the official website of the Hon'ble Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Subrata Talukdar, J.)