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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8879 OF 2012

M/s Drushti Engineers & Developers
A Partnership Firm,
Registered under Indian Partnership Act
Having its Office at Terminal 9, Besides Vile Parle
East Police Station, Nehru Road, Vile
Parle (East), Mumbai,
Through its Authorized Signatory
Mr Narendra Sakharam Sawant,
Manager
Liasioning of the Petitioner

..PETITIONER

VERSUS

1. Union of India,
Through its Secretary,
Ministry of Textiles,
New Delhi
2. Aurangabad Textile Mills,
A Unit of National Textile Corporation,
(South Maharashtra) Ltd., Subsidiary of
National Textile Corporation, A Government
of India Undertaking, Kotwalpura,
Station road, Aurangabad-431001
3. National Textile Corporation Limited
(Western Region) NTC House,
15, N. M. Marg, Ballard Estate,
Mumbai-400001.

..RESPONDENTS

Mr Sachin S. Deshmukh, Advocate for petitioner;
Mr A. B. Dhongade, Standing Counsel for respondent No.1;
Mr M. N. Navandar, Advocate for respondent Nos.2 & 3

**CORAM : DIPANKAR DATTA, CJ
AND
RAVINDRA V. GHUGE, J.**

**Reserved on : 21st January, 2021
Pronounced on : 25th January, 2021**

JUDGMENT (Per : Ravindra V. Ghuge, J.) :-

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. By this petition, the petitioner has putforth prayer clauses A, B and C as under :

(A) That this Hon'ble court may be pleased to issue a writ of certiorary and/or a writ in nature of certiorary and/or any other appropriate writ, order or direction under Article 226 and 227 of the Constitution of India, thereby quashing and setting aside the impugned communication dated 29.5.2012 issued by the Respondent no.3.

(B) That this Hon'ble court may be pleased to issue a writ of Mandamus or any other appropriate writ, order or direction to the Respondents thereby directing to conclude the sale proceedings in respect of free hold land – Taxi stand, bearing City Survey No.20666 of Aurangabad Textile Mills, Aurangabad, which were initiated pursuant to the E-tender dtd. 24.2.2011 and for that purpose issue necessary directions.

(C) Pending the hearing and final disposal of the present Writ Petition, respondents be restrained by an order of injunction from creating any third party interest in respect of free hold land – Taxi stand bearing City Survey No.20666 of Aurangabad Textile Mills, Aurangabad, which were initiated pursuant to the E-tender dtd. 24.2.2011 and for that purpose issue necessary directions.

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3. The impugned communication dated 29/05/2012, issued by respondent No.3 informs the petitioner as under :

“Dear Sir,

Please refer to the letters cited above and earlier correspondence exchanged between us regarding sale of the subject property. As informed you earlier we had referred the matter to the Asset Sale Committee (ASC). The ASC after due deliberations and considering all the relevant facts have come to the conclusion that though there was no stay / legal impediment for executing the sale deed and that despite number of opportunities given to you by NTC to comply with the terms & conditions of tender, you failed to avail the same. In view of this the ASC has decided to forfeit the EMD paid by you.

In view of the decision taken by the ADC, we inform you that your EMD amount of Rs.19,55,000/- (Rupees Nineteen Lacs Fifty Five Thousand Only) stands forfeited.

This is for your information.

Thanking you,

Yours faithfully,

For National Textile Corporation Ltd. (WR),

Sd/

(P.M. Bidri)

Chief General Manager – Region Head.”

4. The contention of the petitioner is that respondent No.3 had floated an E-tender in 2011, for inviting offers to sell the freehold land - taxi stand, bearing CS No.20666, opposite MSRTC, Central Bus

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Depot, Station Road, Aurangabad, which belongs to respondent No.2. The auction was to be conducted by an on-line procedure. The floating of E-tenders was duly approved by the competent authority, which is the Board of Industrial and Financial Reconstruction (BIFR), by its order dated 25/07/2002, which had sanctioned the rehabilitation scheme of the erstwhile NTC (SM) Mills Ltd. An area of 5927.70 sq.mtrs. was put up for auction on “as is where is” and “as is what is”, basis. The schedule of the finalization of the sale was mentioned in the public notice. The last date of submission of the Earnest Money Deposit (EMD) and the documentation fees along with necessary documents, was 24/02/2011 and the date of on-line forward auction was 05/03/2011. The E-tender document published by respondent No.3 indicates a pending litigation in the form of MARJI No.120 of 2007, Aurangabad Textile Mills Vs. Abdul Khalid, filed by respondent No.2 for challenging the judgment and order passed in Civil Suit No.11 of 1981.

5. The petitioner tendered the required documents with the EMD of Rs.19.55 lakhs, on 23/02/2011 and quoted a bid price of Rs.10.58 Crores. As the petitioner was the highest and successful bidder in the on-line auction procedure, the Asset Sale Committee (ASC) of respondent No.3, approved the sale of the subject property. Respondent No.3, therefore, informed the petitioner of its acceptance of the highest bid, vide letter dated 05/04/2011.

6. In view of the above, respondent No.3 issued a letter dated 13/05/2011, indicating to the petitioner that the former will provide the sale acceptance letter to the latter on the vacation of the stay granted by the Court. Pending litigation was also brought to the notice of the petitioner, in details, vide the said communication.

7. Vide letter dated 22/07/2011, respondent No.3, issued a letter of acceptance in favour of the petitioner and further directed it to make the balance payment towards the purchase of the land. As per the payment schedule, 50% of the amount was to be deposited with respondent No.3, within a period of 45 days and the remaining amount was to be paid within 90 days thereafter.

8. The petitioner contends that respondent No.3 was under a legal obligation to resolve the pending litigation and issues arising therefrom, before floating the E-tender and, as such, it has suppressed the material information from the petitioner and was inappropriately demanding the balance payment. Appeal from Order No.106 of 2011, pending before the High Court at Aurangabad, Suit No.13 of 2011, pending before the Wakf Tribunal, Aurangabad and Civil Appeal No.130 of 2011, pending before the learned District Judge-2 at Aurangabad, were not divulged to the petitioner. This was a

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deliberate attempt to defraud and deceive the petitioner and the E-tender process suffered from material suppression of facts, which dis-entitles respondent No.3 to forfeit the earnest amount deposited by the petitioner. The petitioner had requested the said respondent to resolve the litigation expeditiously so as to enable it to make the payment of the remainder amounts.

9. It is an admitted position that despite further demand communications by respondent No.3, the petitioner has not deposited the amounts as per the terms of the tender document. It is contended that as the District Court had restrained the respondents from creating third party interest in the concerned property, the petitioner was justified in not making the payments. It is also contended that the proceeding before the Wakf Tribunal was initiated after the publication of the tender notice and hence, respondent No.3 could not have forfeited the EMD. The petitioner was ready and willing to perform the terms of the contract subject to the litigation being put to rest.

10. The learned Counsel for the petitioner has relied upon **AI Champdany Industries Ltd. Vs. Official Liquidator and Anr., (2009) 4 SCC 486** and **Delhi Development Authority Vs. Kenneth Builders and Developers Pvt. Ltd. and ors., (2016) 13 SCC 561**.

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11. The learned Counsel representing respondent Nos.2 and 3, relies upon its affidavit-in-reply in support of the contention that the tender notice made it more than obvious that the land was being sold on the principle of “as is where is” basis. The pending litigation was made very much clear to the petitioner and it is obvious that further litigation would arise at the behest of the litigating parties. The contention of the petitioner that only existing litigation, as set out in the tender document, would be within the ambit of the principle “as is where is”, is misconceived and denied. The petitioner had participated in the tender process with open eyes and cannot plead ignorance as regards further litigation at the behest of the encroachers. The encroachment by unauthorized occupants on the land admeasuring 1710.69 sq.mtrs., out of the total land of 5927.70 Sq. mts., being available for sale on “as is where is” and “as is what is” basis, was published in the opening paragraph of the tender document.

12. The learned Counsel for respondent No.3 relies upon **Punjab Urban Planning and Development Authority Vs. Raghu Nath Gupta, (2012) 8 SCC 197 and Telangana State Southern Power Distribution Co. Ltd. Vs. Srigdhaa Beverages, (2020) 6 SCC 404.**

13. Having perused the notice for sale of land through E-tender, in the light of the pleadings and submissions of the parties, we deem it

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appropriate to reproduce the details of the lands and encroachment set out in the tender document hereunder :

NOTICE FOR SALE OF LAND THROUGH E-AUCTION

Quotes are invited through Online Forward Auction for sale of freehold land on outright basis of Aurangabad Textile Mills situated at the following address on “AS IS WHERE IS” & “AS IS WHAT IS” BASIS :-

Particulars/ Location	CS No.	Total Area of Land	Approx. Area under encroachm ent	Approx. Area in possession with Mill	Reserve Price (Starting Price)	EARNEST MONEY DEPOSIT (EMD)
		Sq.mts.	Sq.mts.	Sq.mts.	Rs. Crores	Rs. Lakhs
Plot outside Mill – Taxi Stand, Opp. Central Bus Depot of Aurangabad Textile Mills, Kotwalpura, Station Road, Aurangabad – 431 001.	20666	5,927.70	1,710.69	4,217.01	3.91	19.55

14. The tender document lists out the location of properties, existing position and the pendency of the litigation with regard to the said land. Encroachment by unauthorized occupants and the land being illegally used for taxi parking, was also disclosed on internal page Nos.2 and 3 below Clauses 1.1, 1.2 and 1.3.

15. In addition to the above, the bidder was instructed to carry out due diligence vide the highlighted portion in the tender document which reads as under :

“DUE DILIGENCE TO BE CARRIED OUT BY THE BUYER

Although the documents such as PR Cards/ City Survey Maps / DP Plans, etc. are available with NTC or mills, the tenderer should verify before submission of tender bid necessary information on their own from AMC / Urban Development Department and any other Government Departments, Authorities regarding Zoning Regulations, Land Area, Build-up area, allowable FSI, Ground Coverage, and Landscaped Area and / or regarding any other issues as deemed necessary by the prospective Tenderers.

The details of the existing encroachments have been provided. Tenderers are required to verify the same on their own as the sale is on ‘as is where is’ basis.

Tenderers may carryout due diligence in respect of all the points including encroachment and Complaints / disputes, if any, with regard to all the points mentioned above shall not be entertained at later stage.”.

16. It is, therefore, apparent from the above that the buyer was preempted as regards the encroachment and litigation with regard to the land and it was, hence, open to the buyer to carry out due diligence and participate in the bidding or choose to remain away from the e-auction. We do not find any pleading in the petition, which would indicate that the petitioner had conducted a due diligence exercise prior to participating in the e-auction. It is unconscionable on the part of the petitioner to contend that it could not foresee further litigation out of the existing litigation or at the behest of the encroachers, the extent of encroachment having been clearly set out in the tender notice.

17. With regard to the contention of the petitioner that his withdrawal of the offer and for the reason of fresh litigation, the EMD could not have been forfeited, we find Clause 11 of the E-tender document to be a complete answer. Clause 11 reads as under :

“11. WITHDRAWAL OF OFFER :

In case the successful tenderer withdraws his offer subsequent to being accepted by the Asset Sale Committee, all payments made by the tenderer including EMD would be forfeited by NTC Ltd. (WR).”

18. The thrust of the petitioner's submission is that forfeiture of the EMD would not be permissible in view of fresh litigation pursuant to the e-auction notice. Reliance is placed upon paragraph Nos. 5, 10 to 18 and 21 to 23 of AI Champdany Industries Ltd. (supra). It was held in the said judgment by the Honourable Apex Court that the terms of the sale must be construed as a whole and be given purposive interpretation. Encumbrance would constitute a charge if such burden on the land is capable of being found out on inspection of related record. We are of the view that, on the one hand, the petitioner has not conducted a due diligence exercise and on the other hand, the fact of encroachment by unauthorized persons and pending litigation was well within the knowledge of the petitioner who could have certainly perceived that the litigation could be at the behest of any person who was an encroacher and unauthorized user of the land.

19. The petitioner's reliance on Delhi Development Authority (supra), was to buttress the contention of there being “impossibility of performance of the contract”. The facts and discussion thereon, in this judgment of the Honourable Apex Court, are set out in paragraph nos. 25 to 36, which read as under :

“25. What has been overlooked by learned counsel is that the fresh view of the MoEF is that the project land needs to be considered as Ridge. Consequently, no construction activity is permissible on the project land. That apart, Kenneth Builders did apply to the DPCC for “consent to establish” for starting construction activity on the project land. For considering the request, the DPCC required a ridge demarcation report which was not given by the DDA to Kenneth Builders or to the DPCC. Therefore, the DPCC was not inclined to give its consent in the absence of the ridge demarcation report. Even after judgment was delivered by the High Court, Kenneth Builders applied to the DPCC for “consent to establish” but to no effect in the absence of a ridge demarcation report and forest clearance.

“26. It does appear from the record that the exact boundaries of the Ridge had not been identified by anybody and this is apparent from a letter dated 13th June, 2008 sent by the Secretary (Environment) of the GNCTD to the DDA wherein it was pointed out that there is some discrepancy between the areas notified by the Ministry of Urban Development of the Government of India in the notifications dated 8th January, 2002 and 23rd February, 2006 and the boundaries of the Ridge. It was further pointed out that the process of identification had been initiated by the Department of Forests of the GNCTD but it appears that the demarcation was not completed by the time the writ petition was filed by Kenneth Builders. According to the DDA the letter was based on an incorrect appreciation of facts, but that does not concern us. All that is relevant is that the

GNCTD believed that the construction could not go on in the project land since it fell within the boundaries of the Ridge.

27. In this context, it must not be forgotten that even after having given environmental clearance to Kenneth Builders, the MoEF had second thoughts regarding the status of the project land. This led the MoEF to send the letter dated 3rd December, 2009 referred to above. In other words, the status of the project land was generally 'unclear' at least to the GNCTD and the MoEF.

28. Be that as it may, it appears to us that Kenneth Builders did take all necessary steps to commence the construction activity on the project land but due to the impasse created by the governmental agencies, it could not proceed in the development activity. We agree with learned counsel for Kenneth Builders that under these circumstances, the provisions of [Section 56](#) of the Indian Contract Act, 1872 (the [Contract Act](#)) would be attracted to the facts of the case.

29. [Section 56](#) of the Contract Act reads as follows:

'56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful - Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.'

30. The interpretation of [Section 56](#) of the Contract Act came up for consideration in *Satyabrata Ghose v. Mugneeram Bangur & Co.* It was held by this Court that the word “impossible” used in [Section 56](#) of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, ‘there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.’ This is what this Court had to say: (AIR pp.46-49, paras 9-10 & 17)

‘9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment.

This much is clear that the word ‘impossible’ has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says

‘If substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.’

17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling*:

‘a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies ... or vis major.’

This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of [Section 56](#) of the Indian Contract Act cannot be accepted.’
(emphasis supplied)

31. *In so far as the present case is concerned, the DDA certainly did not contemplate a prohibition on construction activity on the project land which would fall within the Ridge or had morphological similarity to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance.*

32. *It is true that the Government of India had notified the project land as 'Residential' and that the project land was shown as 'Residential' in the MPD-2001 and MPD-2021. But that fact alone would not change the position at law. The exact boundaries of the Ridge do not appear to have been demarcated and in the absence of demarcation, it could not be said with any degree of certainty by the DDA that merely because of the two notifications issued by the Ministry of Urban Development the project land could be used for residential purposes even if it fell within the Ridge. This would be ignoring the position at law and would be stretching the argument a little too far. The DDA was unaware that even if the project land did not fall within the Ridge yet any development activity thereon would require permission from the Ridge Management Board as well as from this Court since there was morphological similarity between the Ridge and the project land. It is this intervening circumstance which eventually frustrated the implementation of the contract.*

33. *It is one thing for the DDA to now contend before us that Kenneth Builders could have applied to the Ridge Management Board for permission to carry out development activity and also approached this Court for necessary permission but it is another thing to say that these requirements were not within the contemplation of the DDA and certainly not within the contemplation of Kenneth Builders. For a statutory body like the DDA to contend that in the face of the legal position (with which the DDA obviously does not agree), Kenneth Builders ought to have persisted and perhaps initiated or invited litigation cannot be appreciated.*

34. When the DDA informed Kenneth Builders that the project land was available on an 'as is where is basis' and that it was the responsibility of the developer to obtain all clearances, the conditions related only to physical issues pertaining to the project land and ancillary or peripheral legal issues pertaining to the actual construction activity, such as compliance with the building bye-laws, environmental clearances etc. The terms and conditions of 'as is where is' or environmental clearances emphasized by learned counsel for the DDA certainly did not extend to commencement of construction activity prohibited by law except after obtaining permission of the Ridge Management Board and this Court. On the contrary, it was the obligation of the DDA to ensure that the initial path for commencement of construction was clear, the rest being the responsibility of the developer. The failure of the DDA to provide a clear passage due to an intervening circumstance beyond its contemplation went to the foundation of implementation of the contract with Kenneth Builders and that is what frustrated its implementation.

35. Reliance by learned counsel for the DDA on the 'as is where is' concept as well as clauses 6 and 11 of the Development Agreement in this context is misplaced. As mentioned above, this primarily pertains to physical issues at site. This is clear from the following passage referred to by learned counsel from *Punjab Urban Planning & Development Authority v. Raghu Nath Gupta*:

'14. Evidently, the commercial plots were allotted on 'as-is-where-is' basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on 'as-is-where-is' basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on 'as-is-where-is' basis, they should not have accepted the allotment and after having accepted the allotment on 'as-is-where-is' basis, they are estopped from contending that the basic amenities like parking, lights, roads, water,

sewerage, etc. were not provided by PUDA when the plots were allotted. Over and above, the facts would clearly indicate that there was not much delay on the part of PUDA to provide those facilities as well. As noted, the electrical works and health works were completed by 24-12-2002 and 22-11-2002 respectively and all the facilities like parking, lights, roads, water, sewerage, etc. were also provided.'

36. On a conspectus of the facts and the law placed before us, we are satisfied that certain circumstances had intervened, making it impracticable for Kenneth Builders to commence the construction activity on the project land. Since arriving at some clarity on the issue had taken a couple of years and that clarity was eventually and unambiguously provided by the report of the CEC, it could certainly be said that the contract between the DDA and Kenneth Builders was impossible of performance within the meaning of that word in [Section 56](#) of the Contract Act. Therefore, we reject the contention of the DDA that the contract between the DDA and Kenneth Builders was not frustrated."

20. It is quite obvious that the facts in Delhi Development Authority (supra), are quite distinct from those before us in the case in hands. The petitioner's reluctance in performing the contract was only on the ground that the land would have been of no use, until the entire encroachment was removed and the litigation was brought to an end. We find this to be a feeble ground to resist the fulfillment of the contract in view of the fact that the petitioner was made fully aware of the area of encroachment, the factum of litigation commenced against respondent No.3 and the possibility of the further journey of litigation. Despite having this knowledge, the petitioner chose to run the risk of

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purchasing the land. If subsequently the petitioner, by way of an afterthought, found it to be unproductive to perform the contract, would not absolve it from the obligation of performing the contract and such failure was therefore, squarely covered by Clause 11 reproduced above.

21. Our view is fortified by the law laid down by the Honourable Apex Court in Punjab Urban Planning and Development Authority (supra), in which it was concluded in paragraph Nos.11 to 15, which read as under :

“11. We are of the view that the terms and conditions stipulated in the auction notification for allotment of commercial plots, published by PUDA, has got considerable bearing in resolving the disputes between the parties.

We, therefore, called for the auction notification published by PUDA and the same was made available to us. There was no dispute that the plots were auctioned on 16.3.2001 on the basis of the terms and conditions stipulated therein. Clause 25 is the most important clause, which binds both the parties, reads as follows:

‘25. The site is offered on ‘as is where is’ basis and the Authority will not be responsible for leveling the site or removing the structures, if any, thereon.’

In other words, the plot in question was auctioned on ‘as is where is’ basis and the same was accepted by the respondent on ‘as is where is’ basis. Plot was allotted to the respondent by PUDA vide Memo No. A- 5/2001/3192 dated 25.5.2001. The relevant terms and conditions of the allotment have already been referred to by us in the earlier

part of the judgment. Respondents could have paid the entire amount in lump sum, however, they availed off the installment facility offered. It was made clear in the allotment letter that, in case, there was a failure to pay the installment by the 10th of the month following the month in which the payment fell due, the Estate Officer should proceed to take action for imposition of penalty charged @ 2% per month of the amount i.e. from the due date in addition to normal simple interest. Further, it was also stated in the allotment letter that in case of non-payment of installment along with interest due thereon for a continuous period of three months, the whole or any parts of the money paid in respect of the site, should be forfeited and the Estate Officer could even cancel the allotment.

12. We notice that the respondents had accepted the commercial plots with the open eyes, subject to the above mentioned conditions. Evidently, the commercial plots were allotted on 'as is where is' basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on 'as is where is' basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage etc. If the allottees were not interested in taking the commercial plots on 'as is where is' basis, they should not have accepted the allotment and after having accepted the allotment on 'as is where is' basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage etc. were not provided by PUDA when the plots were allotted. Over and above, the facts would clearly indicate that there was not much delay on the part of PUDA to provide those facilities as well. As noted, the electrical works and health works were completed by 24.12.2002 and 22.11.2002 respectively and all the facilities like parking, lights, roads, water, sewerage etc. were also provided.

13. On facts, we find that this is not a case where PUDA was callous or indifferent or had caused an inordinate delay in providing the basic facilities to allottees. In our view, the High Court has not properly comprehended the scope of the judgment

of this Court in *Shantikunj Investment (supra)* and the terms and conditions of the auction. This Court, in that case, has specifically held as follows:

'26. .It is the common experience that for full development of an area it takes years. It is not possible in every case that the whole area is developed first and allotment is served on a platter. Allotment of the plot was made on an as is where is basis and the Administration promised that the basic amenities will be provided in due course of time. It cannot be made a condition precedent.

28. It is true that once allotment of the land has been made in favour of the allottee, he can take possession of the property and use the same in accordance with the Rules. That does not mean that all the facilities should be provided first for so called enjoyment of the property as this was not the condition of auction. The party knew the location & condition prevailing thereon. The interpretation given by the Division Bench of the High Court of Punjab & Haryana and contended before us cannot be accepted as a settled proposition of law.'

We may also refer to another judgment of this Court in UT Chandigarh Administration and Anr. v. Amerjeet Singh and Ors. (2009) 4 SCC 660, in which, after having referred to the judgment of this Court in Shantikunj Investment case, this Court held as follows:

'19. In a public auction of sites, the position is completely different. A person interested can inspect the sites offered and choose the site which he wants to acquire and participate in the auction only in regard to such site. Before bidding in the auction, he knows or is in a position to ascertain, the condition and situation of the site. He knows about the

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existence or lack of amenities. The auction is on 'as is where is basis'. With such knowledge, he participates in the auction and offers a particular bid. There is no compulsion that he should offer a particular price.

20. Where there is a public auction without assuring any specific or particular amenities, and the prospective purchaser/lessee participates in the auction after having an opportunity of examining the site, the bid in the auction is made keeping in view the existing situation, position and condition of the site. If all amenities are available, he would offer a higher amount. If there are no amenities, or if the site suffers from any disadvantages, he would offer a lesser amount, or may not participate in the auction. Once with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the ground rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are not provided.'

14. We are of the view that the judgment in Amarjeet Singh (supra) is a complete answer to the various contentions raised by the respondents. We may reiterate that after having accepted the offer of the commercial plots in a public auction with a super imposed condition i.e. on 'as is where is' basis and after having accepted the terms and conditions of the allotment letter, including installment facility for payment, respondents cannot say that they are not bound by the terms and conditions of the auction notice, as well as that of the allotment letter. On facts also, we have found that there was no inordinate delay on the part of PUDA in providing those facilities.

15. We are of the view that the High Court was not justified in holding that the respondents are not liable to pay the interest, penal interest and penalty for the period commencing from 1.6.2001 to 31.12.2002 for the belated payment of installments.

Consequently, the judgments of the High Court are set aside and the writ petitions would stand dismissed and the appeals would stand allowed as above. There will be no order as to costs.

22. Similarly, the Honourable Apex Court has held in paragraph nos.13 to 15 in Telangana State SPDCL (supra) as under :

“13. We may notice a slightly contra view in Haryana State Electricity Board v. Hanuman Rice Mills, Dhanauri & Ors., in a given scenario where the pendency of electricity dues was not mentioned in the terms & conditions of sale, and it was held in those facts that the dues could not be mulled on to the subsequent transferee.

14. We may notice that in Special Officer, Commerce, North Eastern Electricity Supply Company of Orissa (NESCO) v. Raghunath Paper Mills Private Limited & Anr., (2012) 13 SCC 479 (2 Judge Bench) a distinction was made between a connection sought to be obtained for the first time and a reconnection. In that case, no application had been made for transfer of a service connection from the previous owner to the auction-purchaser, but in fact, a fresh connection was requested. In light of the regulations therein, previous dues had to be cleared only in the case of a reconnection. Hence, the respondents were held to be free from electricity liability. This Court in Southern Power Distribution Company of Telangana Limited (through its CMD) & Ors. 9 found that the facts were similar to 7 (2010) 9 SCC 145 (2 Judge Bench) 8 (2012) 13 SCC 479 (2 Judge Bench) 9 (supra) the NESCO¹⁰ case, and thus followed the same line.

15. We have gone into the aforesaid judgments as it was urged before us that there is some ambiguity on the aspect of liability of dues of the past owners who had obtained the connection. There have been some differences in facts but, in our view, there is a clear judicial thinking which emerges, which needs to be emphasized:

A. That electricity dues, where they are statutory in character under the [Electricity Act](#) and as per the terms & conditions of supply, cannot be waived in view of the provisions of the Act itself more specifically [Section 56](#) of the Electricity Act, 2003 (in pari materia with [Section 24](#) of the Electricity Act, 1910), and cannot partake the character of dues of purely contractual nature.

B. Where, as in cases of the E-auction notice in question, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser and the sale is on 'AS IS WHERE IS, WHATEVER THERE IS AND WITHOUT RECOURSE BASIS', there can be no doubt that the liability to pay electricity dues exists on the respondent (purchaser).

C. The debate over connection or reconnection would not exist in cases like the present one where both aspects are covered as per clause 8.4 of the General Terms & Conditions of Supply."

23. The letter of application and intent tendered by the petitioner in response to the e-auction tender document, that has been placed before

(24)

us in the writ petition, indicates at Clause 7 that the petitioner has declared in the following terms :

“We have read the terms and conditions of the tender document and are willing to abide by them unconditionally, so also, the earlier ad interim order of the District court dated 30/04/2011, was stayed by this Court, in as much as the Wakf Tribunal had not issued any restraining order in Wakf Suit No.13 of 2011, which was eventually dismissed by Judgment dated 09/12/2013.”

24. In view of the fact situation as above, we do not find that the impugned communication dated 29/05/2012, could be termed as being unsustainable.

25. This petition, devoid of merits, is therefore, dismissed. Rule is discharged. No order as to costs.

(RAVINDRA V. GHUGE, J.)

(CHIEF JUSTICE)

sjk