

**IN THE HIGH COURT AT CALCUTTA**

**Civil Appellate Jurisdiction**

**(Appellate Side)**

**M.A.T. 309 of 2022**

**With**

**I.A. CAN 1 of 2022**

**Damodar Prasad Agarwal**

**Vs.**

**State of West Bengal & Ors.**

**Before: The Hon'ble Justice Arijit Banerjee**

**&**

**The Hon'ble Justice Rai Chattopadhyay**

**For the Appellant**

**: Mr. Partha Chakraborty.  
Ms. Sharmistha China.**

**For the State**

**: Mr. Samrat Sen, Id. AAAG.  
Mr. Nilotpall Chatterjee.**

**For the K.M.D.A**

**: Mr. Satyajit Talukdar,  
Mr. Abhishek Sarkar.**

**Hearing Concluded on**

**: 27.06.2022**

**Judgment On**

**: 12.09.2022**

**Rai Chattopadhyay, J.:**

- (1) The sole appellant, since deceased, has been substituted by his legal heirs, vide this court's order dated 08.06.2022.
- (2) The appellant/substituted appellants are aggrieved by the action of the respondent authority in cancelling the allotment of a plot granted in favour of the appellant, since deceased, on December 12, 1996, on the ground of non fulfilment of the stipulated conditions of agreement and challenged the cancellation order in the Court of Ld. Single Judge. However, Ld. Single Bench has not allowed the prayer of the appellant/writ petitioner and dismissed the writ petition, vide judgment and order dated February 10, 2022. The appellants are aggrieved by that order of Ld. Single Bench and have challenged the same in this appeal.
- (3) The questions that fall for consideration by this appeal court are whether the Ld. Single Judge was justified in coming to

the findings in the order impugned; whether or not by the purported action, the respondent authorities have infringed any legal or constitutional right of the appellants which was required to be remedied by an order of the court; whether in the decision making process, Ld. Single Judge has failed to consider infringement if any, as mentioned above and has come to an erroneous conclusion; whether the impugned judgment and order dated February 10, 2022, is liable to be set aside or not.

- (4) Before discussing the arguments advanced by the respective parties, the factual background of the case may be narrated in a nut shell for better understanding of the perspective thereof, which follows hereunder :

The writ petitioner/appellant, since deceased, was inducted as a licensee for 99 years in respect of Plot No.268 in MIG II category in Block B, at East Kolkata Area Development Project, Phase 1 in Dist:-South 24 Paraganas, measuring

about approximately 173 sq. meter. The license commenced with effect from the date of execution of the agreement, i.e, from December 11,1996. The appellant/writ petitioner, since deceased, duly submitted the consideration money as well as the subsequent premium amount including the interest. He was given possession over the land with effect from May 23,1997. The appellant/writ petitioner, since deceased, was unable to raise/complete construction of his residential house on the said land in terms of Clause 2 (III) of the deed dated December 11,1996, within the stipulated period of 5 years. In spite of that he deposited the entire license fee before the authority within the year 2010, which was duly accepted by it.

On February 16, 2018, a show cause notice was issued by the respondent authority to the appellant since deceased, requiring him to show cause as to why the deed of license would not be cancelled on the ground of violation of Clause 2 (III), as mentioned above. In reply, the then writ petitioner

(now deceased), prayed for extension of time to raise construction vide his letter dated February 28, 2018. On August 9, 2018, the authority again sent a letter to the erstwhile writ petitioner, since deceased, demanding penal charges to the tune of Rs.99,48,452/- for extension of time to complete construction i.e, within December 10, 2019. As the writ petitioner exclaimed his inability to pay the penal amount as calculated by the respondent authorities, the deed of license in his favour, granted earlier on December 11, 1996, was cancelled by the authority and the possession of the land was withdrawn, by its Memo No.1029/K.M.D.A/37 dated December 31, 2018, issued by the Secretary, K.M.D.A.

- (5) Thus being aggrieved by the alleged violation of his legal and rightful claim, the writ petitioner/appellant, since deceased, had filed the writ petition being W.P No.3443 (w) 2019 to challenge the impugned memo of the respondent no.2 dated December 31, 2018. After hearing the parties, Ld.

Single Bench has delivered its judgment dated February 10, 2022, there by rejecting the writ petitioner's prayer.

- (6) In the impugned judgment Ld. Single Judge has *inter alia* held that the appellants/writ petitioner has failed to comply with the terms of the license agreement/deed as the construction over the demised land could not be raised within 5 years from the date of issuance of the said deed. It has been observed that the writ petitioner did not act proactively to seek additional time from the authority for due compliance of the terms of the license but only responded to the show cause notice issued to him on February 16, 2018. Ld. Single Bench has found that while cancelling the deed in terms of Clause 2 (III) of the license deed, the authority has acted within its rights and jurisdiction, irrespective of the fact whether any penal charges were claimed or not. It decided that even payment of license fee by the writ petitioner/appellant since deceased

would not come in the way in case the respondent authority has taken action upon violation of the terms of agreement by the appellant/writ petitioner. These reasons prompted the Court to reach to the decision that the writ petition would not be maintainable.

- (7) The main answering respondents, i.e, respondents no.2, 3 and 4 being Kolkata Municipal Development Authority and its various other officials, have contested the appeal by filing affidavit-in-opposition to the stay petition. Respondent has stated *inter alia* that it has been continuously following the rate chart prepared by the Land and Flat Allotment Committee (L.F.A.C), in its meeting dated October 1, 2012, which duly propagates regarding penal charges for delayed construction in respect of residential plots. It has categorically enumerated the calculations and the break up by dint of which the penal charge of Rs. 99,48,452/- was arrived at. The said answering respondents categorically

state that there has been no illegality and irregularity in their action as alleged and that the appellant is not entitled to any relief as sought for.

- (8) The appellants have argued that they obtained allotment of the land in question, in accordance with due process of law. They say that possession of the land was duly handed over to them and all these happened only after execution of a proper licence deed dated December 11, 1996. Appellants state that after expiry of the period of 5(five) years, within which period they were stipulated to complete the construction but failed to comply with the said condition, the respondent authority has never come up requiring him to comply with the conditions of the license deed or cancellation thereof. Instead, the respondents accepted licence fee upto the year of 2010. Thus, according to the appellants, the respondent authority is now estopped to claim withdrawal of licence or cancel the licence deed, as it

has done. Hence, the impugned action, by dint of Memo No.1029/K.M.D.A/37 dated December 31, 2018, is wholly illegal. Appellants have further stated that claim of penal charges by the respondent is wholly arbitrary and malafide in so far as the same was not stipulated in the license deed. They say that the respondent's action after acceptance of the licence fee beyond the period of 5(five) years without taking any action against the appellants would justify appellant's possession and right over the landed property and imposition of penal charges by the respondents beyond the scope of the agreement between the parties, is an after thought and arbitrary action which jeopardises the appellant's rightful claim and possession over the property in question. The appellants further state that Ld. Single Judge, in the judgment impugned, failed to appreciate the facts in their proper perspective, has wrongly directed himself not to understand the prejudice to the appellants

and has come to a wrong finding and decision. Appellants pray for setting aside of the order impugned dated February 10, 2022.

- (9) Per contra the respondent authority justifies its action by pointing out firstly that the appellants have failed to comply with the stipulated condition of the licence deed executed between themselves to have a construction made within 5(five) years of execution of the said deed dated December 11, 1996. Respondents have further relied on the decision of Land and Flat Allotment Committee (L.F.A.C) dated October 1, 2012, to state that the penal charges have been levied in case of the appellants, in accordance with the policy decision and there is no element of arbitrariness in the same as alleged or at all. Respondents support the impugned judgment of Ld. Single Judge to the effect that the terms of licence deed are violated and as per stipulations in the deed, the same is liable to be cancelled in view of such

violation. Respondents have urged that there may not be any interference with the judgment impugned.

(10) The facts (i) that a licence deed was executed between the parties on December 11, 1996, (ii) that the possession of the land in question was handed over to the appellant (since deceased) on May 23, 1997, (iii) that the appellant paid the consideration money and the subsequent premium amount with interest applicable, (iv) that the appellant failed to make any construction on the land within a period of 5(five) years from the date of execution of the deed, (v) that the respondent claimed penal charges which the appellant has refused to pay, and (vi) that the respondent cancelled the licence deed and withdrew possession of land vide its letter dated December 31, 2018 – are facts admitted by the parties in this appeal.

(11) Relevant portions of the licence deed dated December 11, 1996 may be set out as hereunder :

**2(iii)** *At the own cost of the LICENSEE within five years from the date hereof or within such further time as the authority may at its option allow in writing on sufficient and reasonable grounds, to erect, construct and complete a house or building on the said land for being used for residential purposes with boundary walls, sewers and drains in accordance with plans, sections and specifications as may be approved by the appropriate body according to the rules and regulations framed for the purpose.*

- (12) The other clauses of the agreement may be of some relevance, as narrated below :

**2(i)(b)** *The LICENSEE shall be liable to pay to the Authority the charges as may be imposed by the Authority from time to time in respect of the said land and in such cases where the said payments are not made within due dates then the Authority shall be at liberty to determine the LICENCE hereby granted after due notice.*

**4(i)** *If the premium hereby agreed or any part thereof shall remain unpaid for six months after becoming payable (whether formally demanded or not) or if there by any breach of any covenant on the LICENSEE's part herein contained and to be performed or observed or any of the terms and conditions hereof then in the said cases it shall be lawful for the Authority at any time thereafter to re-enter upon the said land or any part thereof in respect of- any breach of the LICENSEE's covenants herein contained.*

**4(iii)** *Any relaxation or indulgence granted by the Authority to the LICENSEE or by the said LICENCEE to the Authority shall not in any way prejudice the rights of the parties under this Deed of LICENCE.*

- (13) Appellant admits not to have complied with clause 2(iii) of the deed, as mentioned above. However, he claims that the

respondents are estopped to espouse their rights under the said deed to cancel the allotment in case of noncompliance by the appellant of its stipulations, as the respondent authority has not been prompt in taking action, accepted fees and allowed the appellant to retain the land beyond such period of time.

- (14) The deed of licence does not stipulate the time within which the respondent authority should act, in case of noncompliance of the settled clauses in the deed. However, certain actions including cancellation of the deed have been stipulated therein upon noncompliance of the terms. The deed does not even specify any action like acceptance of fees by the authority, during the period from the date of expiry of five years span from the date of execution of the deed, till the date of taking action by the authority, to determine the fate of the contract in any other way, than to be terminated on the ground of noncompliance. Therefore, the appellant,

being bound by the terms of the said deed, is found to have argued the point, not to the satisfaction of this court.

- (15) Here this court should also meet the point, whether concerning a contract between the parties, the appellant is right or not in espousing his cause before this court of equity.

Rights and responsibilities of the respective parties in this case arise out of the agreement/ contract entered into between them on December 11, 1996. Appellant is aggrieved by respondent's alleged inaction/ non compliance of the terms of the said agreement. Admittedly their relationship is governed by the said terms of the deed dated December 11, 1996. The observation of the Apex Court on this aspect as held in the case of *M/S Radhakrishna Agarwal & Others vs. State of Bihar & Others* reported in *AIR 1977 SC 1496*, may be relied on, which is as follows:

***“After the State or its agent have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally***

***valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or any of other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confer some special statutory power or obligation on the State in the contractual field which is apart from contract”.***

Another Apex Court verdict may also be relied upon, i.e, ***Bareilly Development Authority and Another vs Ajay Pal Singh and Others*** reported in ***(1989) 2 SCC 1496*** wherein it has been held that once the parties after voluntarily accepting the conditions of the contract enter into such contract they can only claim the right conferred upon them by the said contract and are bound by the terms of the contract.

Findings of the Apex Court as mentioned above, squarely apply in case of the appellant/appellants. Hence, decision may be arrived at that the appellants could not have maintained their case successfully in a court of equity.

- (16) Finally, we may discuss the point raised by the appellants that the respondent authorities could neither claim penal

charges as the same was not envisaged in the deed as entered into between the parties nor could they terminate the agreement due to non payment of such penal charges by the appellants.

As discussed earlier, after handing over possession of land to the appellant on May 23, 1997, the respondent authorities issued a letter to him, dated February 16, 2018, to show cause, reason being non fulfilment by him of the terms of the deed, i.e, his inaction in completing the construction within five years of allotment of the land. Appellant replied with the request to extend such time for him.

Respondent authority says that during the period from allotment of land to the appellant, till the time he requested for extension of time for him, the authority has undertaken a policy to allow extension of time for any allottee, in lieu of 'penal charges'. Such policy was formulated on October 1, 2012, pursuant to the decision of the Land and Flat

Allotment Committee (L.F.A.C). Obviously no such term was mentioned in the license deed dated December 11, 1996, entered into between the parties and the appellant had no knowledge of such a policy of the respondent authority. In such circumstance, the appellant raises the question if such policy of the respondent could be applicable to him.

A recent decision of the Supreme Court may be mentioned, i.e, ***Punjab State Power Corpn. Ltd. v. Emta Coal Ltd., (2022) 2 SCC 1***, wherein the Hon'ble Court has been pleased to determine that the decision-makers' freedom to change the policy in public interest cannot be fettered, that so long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review; that if the decision of the authority is not vitiated by illegality, irrationality or procedural impropriety, the same should not be interfered with by the Court.

In this case the change in policy decision by the authority shall withstand the tests as enunciated by the Apex Court in the judgment mentioned above in absence of any challenge to the same. Therefore, the appellant's plea of prejudice, having been bedevilled with 'penal charges' without any prior knowledge about the same shall also not be substantiated and succeed.

Pertinent to mention here that clause **2(i)(b)** of the license deed dated December 11, 1996, as mentioned above, categorically provides for imposition of charges by the authority, liability of the allottee to pay the same and right of the authority to terminate allotment in case of failure by the allottee to pay the same. This provision of the deed will also operate against the appellant/appellants.

Under these facts and circumstances, change in policy made by the concerned authority in the midst of the period of subsistence of the agreement between the parties

and its implementation cannot be held to be improper or illegal. There is no doubt about the correctness of the findings of Ld. Single Judge that respondent's action of termination of lease deed falls within the purview of the terms and conditions of the contract entered into between the parties, upon non-fulfilment of the terms of covenant and irrespective of payment or non-payment of the 'penal charges' by the appellants. Even the appellants could not have embraced success, had their allotment been terminated due to non-payment of said 'penal charges'. Needless to mention here that the terms of the licence deed dated December 11, 1996, have independent application, in case of violations as stipulated and would not necessarily require to be qualified with any further conditions.

- (17) Discussions as made above would indicate the findings of this court regarding the legality and propriety of the

judgment of Ld. Single Judge, dated February 10, 2022 and the same is hereby affirmed.

(18) The present appeal being MAT 309 of 2022 is dismissed.

**Arijit Banerjee, J.:**

- (1) I have had the advantage of reading the judgment of my Sister Justice Rai Chattopadhyay. While agreeing with the conclusion reached by my learned Sister, I take this opportunity to add a few words.
- (2) The Deed of Licence executed by KMDA in favour of the appellant essentially constituted a contract between the appellant and KMDA. The contractual relationship between the two parties were to be governed by the terms of the contract. One of the conditions of the Licence Deed was that the licensee/allottee of the plot of land in question would construct a building on the land within five years from the date of the Licence Deed. Admittedly the appellant failed to

make any construction within the stipulated time period or even long thereafter.

- (3) The Licence Deed was dated December 11, 1996. Hence, the appellant was contractually obliged to put up a building on the land in question by December 10, 2001. He failed to make any construction within that time or thereafter. On February 16, 2018, a show-cause notice was issued to him by KMDA calling for an explanation as to why the licence should not be cancelled. The appellant requested for extension of time for complying with the stipulation in the Licence Deed as regards constructing a building within 5 years from the date of the Licence Deed. By a letter dated August 9, 2018, KMDA demanded penal charges in the sum of Rs. 99,48,452/- for granting extension of time for putting up the building within December 10, 2019. Upon the appellant expressing his inability to make such payment, by its memo dated December 31, 2018, KMDA cancelled the

Deed of Licence and possession of the land in question was withdrawn. This was under challenge before the learned Single Judge.

- (4) The relationship between the appellant and K.M.D.A. was purely contractual. The appellant was admittedly in breach of a contractual term. The contract/Licence Deed authorised KMDA to cancel the Licence Deed upon breach by the appellant of any of the covenants in the Licence Deed. KMDA exercised such right and cancelled the Licence Deed. Prior thereto, in terms of a policy formulated by KMDA, it agreed to accede to the appellant's request for extension of time for making construction upon payment of penal charges. The appellant pleaded inability to pay such charges. Thereupon KMDA cancel the licence.
- (5) In my opinion, KMDA need not have shown any indulgence to the appellant and the indulgence shown did not in any way affect its contractual right to terminate the licence.

While operating in the realm of a private contract having no statutory flavour, like in the present case, the State or a Statutory Authority should be allowed to act as any other private party and there action should not be interfered with lightly as being unreasonable or arbitrary.

- (6) The Competent Authority in K.M.D.A. has framed a schedule of charges to be levied on defaulting allottees of land as a pre-condition for extension of time to make construction. It is a financial policy of a statutory authority with which the writ court should not easily interfere. The schedule of charges in terms whereof KMDA demanded money from the appellant for granting extension of time to make construction, is not under challenge in the present proceedings.
- (7) There is also a clause in the licence deed to the effect that any relaxation granted or indulgence shown by KMDA to the licensee shall not in any way prejudice the rights of the

parties under the Licence Deed. KMDA offered to extend time for construction against payment of charges. Such offer was not accepted. This indulgence shown by KMDA in no manner affected its right to repossess the land in question upon termination of the licence in view of the appellant's failure to make construction on the land within the contractually stipulated period or even much beyond such time.

- (8) Accordingly, in my considered view, there is no infirmity in the order under appeal. The appeal deserves to be and is dismissed.
- (9) Interim order, if any, stands vacated. Application, connected with this appeal, if any, stands disposed of.
- (10) Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

**(Rai Chattopadhyay, J.)**

**(Arijit Banerjee, J.)**