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W.P.A. 3443 of 2019
(Damodar Prasad Agarwal vs. State of West Bengal & Ors.)

Mr. Partha Chakraborty
Ms. Sharmistha China
... For the Petitioner

Mr. Satyajit Talukder
Mr. Abhishek Sarkar
... For the KMDA

The factual aspect of the matter as made out in the writ petition and submitted on behalf of the parties has been recorded in the order dated 28th January, 2022 as hereunder:

“The contention of the petitioner is that he was granted licence in respect of the property in question by the Kolkata Metropolitan Development Authority by virtue of deed dated 11th December, 1996 and was handed over possession of the said property by virtue of possession certificate on 23rd May, 1997. The petitioner was unable to raise/complete construction of his residential house on the said land in terms of Clause 2(iii) of the deed within a period of five years though he deposited the entire licence fee before the Authority which was lastly accepted by the Authority in 2010. On 16th February, 2018 a show-cause notice was issued upon the petitioner requiring him to show cause as to why the licence deed would

not be cancelled on the ground of violation of Clause 2(iii) of the deed by the petitioner. The petitioner sent a reply to the said notice on 28th February, 2018 praying for extension of the period for raising construction. The Authority, by a notice dated 9th August, 2018 demanded penal charges to the tune of Rs.99,48,452/- from the petitioner for extension of time to complete construction till 10th December, 2019. The petitioner expressed his inability to pay the said amount by a letter dated 5th September, 2018 following which the Authority cancelled the deed and withdraw possession of the land by a letter dated 31st December, 2018.

Learned counsel for the petitioner submits that he was unable to complete the construction on the land in question due to financial stringency as well as on medical grounds and admittedly did not approach the Authority for extension of the said period before expiry of the stipulated time frame. According to the petitioner, as the Authority accepted lease rent till 2010, such acceptance amounts to waiver of the right of the Authority to cancel the deed of licence on the ground of violation of Clause 2(iii) of the deed by the petitioner, as according to the said clause, the period for completion of construction expired in 2001-2002. There being no provision of imposing penal charges upon the petitioner, the Authority could not have charged such penalty and as such, the Authority should be directed to extend the time frame for completion of construction on the land in question by the petitioner.

It is submitted on behalf of the Kolkata Metropolitan Development Authority that pursuant to the show-cause notice

issued by the Authority the petitioner was called for a hearing by the Authority and subsequent orders were passed upon hearing the petitioner on 1st November, 2018. The petitioner did not pray for extension of time before the Authority within the stipulated time frame. The policy decision of the Authority permits the Authority to impose penal charges on the petitioner by way of which the petitioner was given another opportunity to retain the land and raise construction therein upon payment of the same.”

Learned counsel for the petitioner draws the attention of the Court to the third paragraph in page 24 (Annexure P/1 to the writ petition) which demonstrates that in case of default by the licensee in payment of three consecutive installments of premium and default to clear the same within six months from the due date, the Authority shall have the right to determine the agreement and re-enter possession of the demised premises. Learned counsel points out that in terms of clause 4(i) of the deed, the Authority was only entitled to re-enter the premises on breach of any of the terms of the contract and no specific authority was given to the lessor for determination of the lease.

Learned counsel further submits that there being no provision for demanding penal charges for extension of time to raise construction in the plot, no such charge could have been claimed by the Authority. The Authority has, in fact, cancelled the deed upon the petitioner’s inability to pay the penal charges as demanded by them.

Learned counsel for the petitioner has placed reliance on a judgment of a co-ordinate Bench of this Court in *W.P. No. 1631 of 2010* wherein it is recorded that in absence of any provision for charges in the lease deed itself, such charges cannot be imposed upon the lessee by the Authority. The relevant portion of the judgment is set out:-

“Under the lease, the appellants were entitled to the lease rents during the pendency of the lease. Neither the lease deed nor the provisions of the Calcutta Improvement Act, 1911, contemplates the levying of transfer-cum-mutation fees. The decision of the appellants to impose such charges in lieu of granting permission to assign or transfer the lease-hold interest in the demised premises appears to be extraneous both to the terms and conditions of the lease and the provisions of the aforesaid Act.”

In refuting the contention on behalf of the petitioner, learned counsel for the KMDA submits that the deed was cancelled in terms of clause 4(i) due to breach of clause 2(iii) by the petitioner. The Authority, in its meeting dated 1st August, 2017, adopted a policy decision to safeguard the rights of the lessees defaulting in raising construction in the leasehold property within the stipulated period of time. The policy decision says that in case of delayed construction or non-construction in the leasehold property, cancellation notice should be issued to the allottee immediately and if the allottee agrees to pay penal charges for delayed construction at current market

value through written prayer against such cancellation notices, a fresh/modified lease deed shall be executed on payment of the delay charges by the lessee. Learned counsel submits that the said policy decision was adopted in addition to the terms of the deed in order to extend relief/protection to lessees who are in breach of any of the terms of the contract.

Learned counsel further submits that the premium deposited by the lessee has been sought to be refunded to the lessee and cheque in this regard has already been issued.

Learned counsel has relied upon the judgments of the Hon'ble Supreme Court in *Bareilly Development Authority and Another vs. Ajai Pal Singh and Others* reported in (1989) 2 *Supreme Court Cases 116* and in *M/s Radhakrishna Agarwal & Others vs. State of Bihar & Ors.* reported in *AIR 1977 Supreme Court 1496* in support of his contention.

It is not in dispute that the petitioner has failed to raise construction in the plot in question within five years from the date of execution of the deed in breach of Clause 2(iii) of the deed. A show-cause notice was issued upon the petitioner on 16th February, 2018 in this regard and in reply to the said notice, the petitioner prayed for extension of time for the said construction on the ground that he was unable to raise construction within the stipulated period of time due to acute financial crisis and also ignorance of the fact that the deed may be cancelled due to non-construction within the stipulated time

period. Following the said reply dated 28th February, 2018 KMDA issued a demand notice for penal charges on 9th August, 2018. Upon the petitioner failing to comply with the notice, the allotment was cancelled by a notice dated 31st December, 2018.

It is a fact that the provision of payment of penal charges as recorded in the policy decision of the Authority is not included in the deed itself and admittedly such policy decision was not intimated to the petitioner or the other allottees prior to execution of the deed or even subsequently. Therefore such policy decision cannot be given much weight and the deed could not have been cancelled for non-payment of penal charges as demanded by the Authority {W.P. No. 1631(W) of 2010} in terms of the policy decision. Of course, the respondents submit that the lease was cancelled in terms of clause 4(i) of the deed and not for non-payment of penalty. The provision for payment of penalty as a pre-requisite to extension of the period of construction is only an additional leverage offered to the lessee to rectify his omission .

Be that as it may, even without such demand of penal charges being taken into consideration, it appears that the deed was cancelled due to breach of the terms thereof by the petitioner. A technical lapse in clause 4(i) of the deed has been pointed out by the petitioner. Such provision enables the Authority to re-enter into the land upon breach of any of the terms of the deed, but does not specifically indicate that the lease may be determined by the Authority. It is needless to say that re-entering of the Authority into

the property presupposes determination of the deed of lease and as such, it can be inferred that the provision entitles the Authority to determine the deed of lease in terms of clause 4(i) of the deed and thereafter re-enter the premises in question.

It has been observed by the Hon'ble Supreme Court in the case of *M/s Radhakrishna Agarwal & Others(supra)* as under:

“But, after the State or its agents 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 of any 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 confers some special statutory power or obligation on the State in the contractual field which is apart from contract.”

In the judgment in *Bareilly Development Authority and Another(supra)* Hon'ble Apex Court has held that once the parties after voluntarily accepting the conditions of the contract enters 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.

In the case in hand, both the parties are governed by the deed of lease entered into by and between them on 11th December, 1996. Admittedly the petitioner failed to raise construction in the demised land within five years from the date of issuance of the deed in breach of clause 2(iii) of the deed and no extension was prayed for before the Authority either within the stipulated period of time or at all. It was only when the show-cause notice was issued to the petitioner that he woke up from slumber and chose to raise his claim for extension before the Authority in the reply submitted by him to the show-cause notice. The deed has been cancelled by the Authority in terms of clause 4(i) irrespective of the claim of penal charges by the Authority. Even if the claim for penal charges is ignored, the Authority still had the right to cancel the deed in terms of clause 4(i) thereof and as such, the Authority has acted well within its rights and jurisdiction. As pointed out by learned counsel for the respondents, acceptance of license fee by the Authority till 2010 does not preclude the Authority from cancelling the deed in view of clause 4(iii) of the deed which indicates that “any relaxation or indulgence granted by the Authority to the LICENSEE or by the said LICENSEE to the Authority shall not in any way prejudice the rights of the parties under this Deed of License.” It is also submitted that the Authority has taken steps for refund of the premium deposited by the petitioner.

In view of the above, this Court is of the view that there is no illegality or irregularity in the act of the respondent Authority which calls for intervention by this Court in the present writ petition and as

such, the writ petition is devoid of any merit and is liable to be dismissed.

Accordingly, W.P.A. 3443 of 2019 is dismissed.

There shall be no order as to costs.

Since no affidavit has been invited, allegations contained in the writ petition shall be deemed not to have been admitted.

Urgent certified website copy of the order, if applied for, be given to the parties on compliance of requisite formalities.

(Suvra Ghosh, J.)