

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present:

The Hon'ble Justice Aniruddha Roy

WPO 672 of 2010

Saroj Shah

Vs.

The State of West Bengal & Ors.

For the petitioner:

**Mr. Reetobrata Mitra, Adv.,
Ms. U. Chakraborty, Adv.,
Mr. S.K. Kanodia, Adv.**

For the West Bengal Housing Board:

**Mr. Tapan Coomaar Dey, Adv.,
Ms. Shreya Chatterjee, Adv.**

For the State:

**Ms. T. Samanta, Adv.,
Mr. Arindam Mandal, Adv.**

Reserved on:-

08.06.2022

Judgment on:-

10.06.2022

ANIRUDDHA ROY, J.:

Facts:-

1. The second respondent, The West Bengal Housing Board (for short, the Housing Board) since about 2004 was engaged in the process of construction of a Mega Housing Complex at New Town, Rajarhat under the name and style "**Eastern High**" (for short, the Housing Project) comprising of about 440 nos. of residential units/flats. Under the scheme of allotment, the flats were to be allotted on the basis of lottery only. The possession of the flats were scheduled initially to be delivered in December, 2008.

2. The writ petitioner came to know that there were several flats which remained either unallotted or the allotments were cancelled and were to be offered for purchase amongst the public at large on the basis of lottery on certain revised terms and conditions and at an increased consideration than the original terms.
3. On the basis of the said information the writ petitioner obtained the necessary brochure from the Housing Board and applied to obtain one such residential flat in his name. The petitioner duly deposited the application money for a sum of Rs. 2 lakhs on December 13, 2007, such deposit was duly received and acknowledged by the Housing Board.
4. After compliance of all the procedures and formalities a provisional allotment letter dated April 23, 2008 was issued by the Housing Board in favour of the petitioner. The total consideration for the said allotted flat to the petitioner was Rs. 48,81,700/-. After giving credit to the said application money of Rs. 2 lakhs paid by the petitioner, the petitioner was required to pay a further sum of Rs. 46,81,700/- within 60 days from the date of issue of the said letter of allotment in the manner and mode specified therein. In the said letter of allotment it was stipulated that a penal interest at the rate of 18 per cent per annum would be levied in case there is any delay in payment of any amount in stage payment during the construction period. It was also stipulated that in case there would be any delay in depositing the amount with penal interest after 120 days from schedule date of payment, then the allotment will stand automatically cancelled without any further reference to the petitioner and the amount already deposited would be refunded in due course as per the General Terms & Conditions. The allotted flat (for short, the said flat) was earmarked as **Flat No. T9/F14/C/4** and the car parking space (for short, the said car parking space) was earmarked as **Space No. T9/C/4** at the said Housing Project.

5. By a letter dated July 24, 2008 the housing board informed the petitioner that there would be a delay in completion of the said housing project due to certain unforeseen circumstance as mentioned in detail in the said letter. It was also informed that there would be a deferment of completing the project by 12 months from the schedule time. It was specifically mentioned in the said communication that the project work was expected to be completed at the end of December, 2009 instead of December, 2008 as indicated in the Scheme Brochure, which was the original date for completion. The housing board had also mentioned in the letter that since the above delay and the causes and reasons thereof were completely unforeseen and beyond the control of the board, the target period of completion of the project was, therefore, to be shifted to end of December, 2009 in place of December, 2008 and the provision for providing the compensation by way of making payment of interest as specified in the scheme brochure for such delay was accordingly not made applicable at the given situation due to the unforeseen circumstance. The said communication also mentioned the allottees whose payments fall due then onwards should have a grace period of one year to pay the same without any interest. Those who had paid the penal interest on instalment due on February, 2008, would be eligible to get the same back by way of refund/adjustment during final payment.
6. By a letter dated October 10, 2009 the board informed the petitioner that from the record of the board it appeared that the petitioner had not furnished the payment particulars or the receipt of the allotment money/installment payment to it. The petitioner was asked that if such payment had already been made the proof may be furnished within 15 days from the date of issue of the said letter positively for necessary steps to be taken by the board. In reply to the said notification dated October 20, 2009 the petitioner by its letter dated November 04, 2009 requested the

board to allow him to deposit the allotment money in respect of the said flat with penal interest at the earliest.

7. Soon thereafter by a letter dated December 11, 2009 (signed on December 08, 2009) the housing board cancelled the allotment of the petitioner due to non-payment of allotment money and informed that the amount deposited by him would be refunded in due course.
8. By an undated letter which was received by the housing board on December 23, 2009, the petitioner informed the housing board that the petitioner did not pay the necessary amount within 180 days from the date of issuing of allotment letter as he was under the impression that a grace period was offered within which he could pay without any penal interest or charges. The board was also requested by the petitioner not to deprive him of his allotment. By a letter dated March 29, 2010 the housing board replied to the said letter dated December 23, 2009 confirming the cancellation of the allotment of the said flat and the said car parking space in favour of the petitioner.
9. In the circumstances stated above, the petitioner filed the present writ petition seeking cancellation of the said two communication dated December 11, 2009 and March 29, 2010 respectively by which the housing board cancelled the allotment of the said flat in favour of the petitioner.

Submissions:-

10. Mr. Reetobrata Mitra, learned counsel appearing for the writ petitioner, at the outset, in his usual fairness, submitted that, save and except the said sum of Rs. 2 lakhs which was paid by the petitioner at the time of making application for an allotment, the petitioner had not paid any further sum to the housing board and there was an

erroneous factual recording in the order dated December 16, 2021 that the writ petitioner paid the consideration for the said flat.

11. Referring to the clause relating to **Mode of Payment** and the table containing the schedule showing payment during construction period forming part of the Scheme Brochure, Mr. Mitra submitted that, the allotment would be made on full payment basis within construction period and the allottees had to make full payment of the contractual amount before completion of the project and before possession of the flats handed over to them. The allotment letter dated April 23, 2008 also provided, inter alia, that within 60 days from the date of the issue of the said letter, the sum of Rs. 46,81,700/- to be paid. It was further stipulated that the penal interest at the rate of 18 per cent per annum would be levied in case there is any delay in payment of any amount in **stage payment** during construction period. In case there is any delay in depositing the amount with penal interest after 120 days from the schedule date of payment then the allotment would stand automatically cancelled without any further reference to the petitioner. He submitted that, pursuant to the payment schedule (**at page 71 of the writ petition**) read with the stipulation in the said allotment letter dated April 23, 2008, the petitioner was to pay Rs. 14,13,800/- on or before June 23, 2008 and in default with a penal interest at the rate of 18 per cent per annum on or before 120 days from the said schedule date of payment, **i.e. on October 22, 2008**. However, before the said 120 days could elapse the Housing Board by its letter dated July 24, 2008 extended the period for completion of the project from December, 2008 till December, 2009 and specified that the provision for providing compensation by way of making payment of interest as specified Scheme Brochure for such delay was accordingly not applicable. Hence, he submitted that, the entire period for making payment automatically got extended simultaneously with the extension of the period

for completion of the project and the Housing Board agreed specifically for waiver of the interest on delayed payment. Before the said extended period till end of December, 2009, as extended by the said letter of the board dated July 24, 2008 had elapsed, the housing board by its impugned communication dated December 11, 2009 purported to have cancelled the allotment of the said flat and the said car parking space allotted in favour of the petitioner. Such an act on the part of the housing board was not only illegal and wrongful but also arbitrary and dehorse to its own promise. Hence the purported decision of the housing board for cancellation of the allotment of the said flat and the said car parking space allotted in favour of the petitioner be set aside or quashed.

12. Mr. Mitra drew attention to various paragraphs from the affidavit-in-opposition affirmed on November 03, 2011 on behalf of the respondents/housing board and submitted that, no defence or bona fide defence could be established by the housing board to defeat the claim of the petitioner. He drew attention of this court to **sub-paragraph V** to **paragraph 3** from the affidavit-in-opposition and submitted that the statements therein are bold in nature and devoid of any particular and as such no reliance can be placed thereupon.
13. Mr. Tapan Coomar Dey appearing for the Housing Board submitted that, the petitioner had failed to comply with the Terms and Conditions of the Scheme Brochure and the terms of allotment mentioned in the allotment letter. The petitioner did not pay the allotment money as stipulated thereunder within the stipulated period or otherwise and as such in any event the extension of time for period of completion of the project or the waiver of payment of penal interest mentioned in the communication dated July 24, 2009 would not favour the petitioner and bind the housing board. The allotment which was provisional in nature made in favour of the petitioner was lawfully and

rightly cancelled. Referring to the said letter dated July 24, 2008 by which the housing board extended the period for completion for construction and waived the payment of penal interest, the learned counsel submitted that, this letter was issued in favour of the petitioner by the housing board erroneously and would not bind the housing board. He submitted, that save and except the said sum of Rs. 2 lakhs of account of application money, the petitioner did not pay sum. The petitioner had violated the schedule of payment read with the terms mentioned in the said allotment letter. He, thus, submitted that, the allotment of the flat and the car parking space allotted in favour of the petitioner stood automatically cancelled. The writ petition is not maintainable. The petition is otherwise misconceived, frivolous and is liable to be dismissed.

14. The petitioner had filed its written notes.

Decision:-

15. After hearing the submissions made on behalf of the parties and upon perusal of the materials on record, it is evident that the documents disclosed by the parties through their respective pleadings as annexed thereto are not denied or disputed by either of the parties, save and except the housing board contended that the letter dated July 24, 2008 was erroneously issued in favour of the petitioner.
16. The issuance and existence of the said document dated July 24, 2008 being ***Annexure P-6*** to the writ petition by which the housing board extended the period for completion of the project and waived the payment of penal interest was never denied or disputed by the housing board. There was no contemporaneous communication or document to show that the said document was denied or disputed or its existence or denied or disputed or that the same was withdrawn immediately after the same was issued by the housing board in favour of the petitioner. It was for the first time in the

affidavit-in-opposition affirmed on November 03, 2011, a statement was made on behalf of the housing board that the said document was erroneously issued. It was not the case of the housing board that the author of the said document had issued the same without authority or in excess thereof. Therefore, the defence sought to be taken on behalf of the housing board in its affidavit in respect of the said document dated July 24, 2008 being erroneously issued cannot sustain in law and is clearly an afterthought.

17. From a close scrutiny of the terms and conditions for making payment in respect of the said flat as stipulated under the said Scheme Brochure and also under the said provisional allotment letter dated April 23, 2008, it appeared to this court, the time was of the essence for making payment and construction. Subsequently by the said letter dated July 24, 2008 the housing board extended the time for completion for construction of the project and waived the payment of penal interest on default of the stage wise payment. As a result the time became no more the essence of the contract for making payment of consideration for the said flat. The payment terms under the schedule of payment read with the terms mentioned in the provisional allotment letter stipulated was that the allotment money was payable **within 60 days** from the date of the said letter of allotment dated April 23, 2008 **i.e. within about June 22, 2008**. A penal interest at the rate of 18 per cent would have been levied in case there was any delay in payment of any amount in stage payment during the construction period. It was also stipulated that in case there would be any delay depositing the amount with penal interest **after 120 days** from the schedule date of payment **i.e. on or about October 22, 2008** (from June 22, 2008), then the allotment would stand automatically cancelled without any further reference to the allottee. In the present case before the said 120 days after default in depositing the amount with penal

interest would expire **on October 22, 2008**, the said communication dated July 24, 2008 intervened and the construction period was extended till end of December, 2009 and the provision for compensation by way of penal interest for such delay was accordingly waived. Such extension of time for completion of the construction and the waiver of payment of penal interest by the Housing Board altered and/or modified the original terms under the contract entered into by and between the parties and the Housing Board could not take the plea that the time was the essence of the contract any further.

18. The petitioner by its letter dated November 04, 2009 had agreed to pay penal interest on the deposit of allotment money and requested the housing board to allow him to deposit the same at the earliest. However, despite such request the housing board purported to have cancelled the allotment by its letter dated December 11, 2009 even before expiry of the extended period for completion of the project as stipulated under the said communication dated July 24, 2008, such an act on the part of the housing board in issuing the said communication dated December 11, 2009 cancelling the allotment of the petitioner was clearly wrongful and arbitrary. Consequently the said communication dated March 29, 2010 issued by the housing board was also bad, wrongful and arbitrary.
19. The writ court sitting in an equitable jurisdiction while adjudicating a writ petition should also balance the equity between the parties, in an appropriate case. Had it been a case that the allotment of the petitioner of the said flat and the car parking space not cancelled then the petitioner would have to pay the entire consideration in or about December, 2009 to take possession of his properties. Even though the Housing Board had waived the provision for payment of penal interest but it could have received the entire consideration from the petitioner at least in or about

December, 2009 or contemporaneously immediately after completion of the construction of the Housing Project, at least 12-13 years back and would have earned benefit out of the said consideration in usual course of business.

20. In view of the fore going discussions and reasons the two purported communication dated December 11, 2009 and March 29, 2010 by which the housing board cancelled the allotment of the said flat and the said car parking space mentioned in the said allotment letter dated April 23, 2008 stand quashed and set aside subject to the following conditions:

- (a) The writ petitioner shall pay the balance consideration in terms of the allotment letter dated April 23, 2008 for a sum of Rs. 46,81,700/- after adjusting the said sum of Rs. 2 lakhs already paid as and by way of application money, positively within a period of fortnight from date.
- (b) The petitioner is further directed to pay and shall pay a further consolidated sum of Rs. 4 lakhs in addition to the said sum of Rs. 46, 81, 700/- to the Housing Board within a period of four weeks from date.

21. Upon receipt of the said entire payment as directed above the housing board and /or any of its duly authorized officer shall immediately execute the necessary conveyance and/or title documents and have the same registered in favour of the petitioner positively within a period of fortnight after receiving the said entire payment as directed above and shall positively make over possession of the said flat and the said car parking space mentioned in the said allotment letter dated April 23, 2008 in favour of the petitioner simultaneously free from all encumbrances . All costs, incidental expenses for execution of the conveyance/title documents and the registration thereof including the applicable and ad valorem stamp duty in accordance with law should be borne and paid by the petitioner.

22. In default of any of the aforesaid conditions regarding payment to be made by the petitioner in favour of the housing board as directed above, the said allotment of flat and the car parking space as mentioned in the allotment letter dated April 23, 2008 shall stand automatically cancelled and revoked without any further reference to this court.
23. On the above terms, the writ petition **WPO 672 of 2010** stands allowed and accordingly disposed of.
24. There shall, however, be no order as to costs.

(Aniruddha Roy, J.)