

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 8587 OF 2015
WITH
CIVIL APPLICATION NO. 2382 OF 2018**

M/s. Kartik Enterprices,

a partnership firm having its office
at C-404, City Tower, Plot No. 55,
Sector 15, Belapur-400 614,
through its partner, Shri R.K. Diwakar,
Age: adult, Occ: business,
address C-404, City Tower, Plot No. 55,
Sector 15, Belapur 400 614.

...Petitioner

V/s.

1. City and Industrial Development
Corporation Ltd.(CIDCO), having
its office at CIDCO Bhavan, CBD
Belapur, Navi Mumbai 400 614,
through its Managing Director,

2. Navi Mumbai Municipal Corporation,
having its office at Plot 2, Sector 15A,
Palm Beach Junction, CBD Belapur,
Navi Mumbai 400 614, through its
Municipal Commissioner.

...Respondents.

Mr. Drupad S. Patil, for the Petitioner.

Mr. Roop Basu i/b. The Law Point, for Respondent No. 1 CIDCO.

Mr. Tejesh Dande a/w. Mr. Bharat Gadhavi, advocate for respondent
No. 2 NMMC.

**CORAM : R.D. DHANUKA &
KAMAL KHATA, JJ.
DATED : OCTOBER 6, 2022**

P.C. :

1. Rule. Respondents waive service. Rule is made returnable forthwith.

2. Heard the learned Counsel for the Petitioner and the learned Counsel for the Respondent No. 2. By this Petition filed under Article 226 of the Constitution of India, the Petitioner prays for a Writ of Mandamus against the Respondent No. 1 CIDCO to take possession of the land bearing Plot No.4, Sector 13, Nerul, Navi Mumbai and to take various necessary steps before handing over the possession of the said land to the Petitioner. In the alternative, the Petitioner also prays for a refund of the entire amount deposited by the petitioner towards the allotment of land bearing Plot No. 4, Sector No. 13, Nerul, Navi Mumbai.

3. The Respondent No. 1 was appointed as the New Town Development Authority on 20th March, 1971 under the provisions of section 113(3A) of the MRTP Act. It is the case of the Respondent No. 1 that on 15th March, 2002, the plot of land admeasuring 5000 sq. mtrs.

was handed over by the Respondent No. 1 to Respondent No. 2 under the High Tension Line on leave and licence for a period of 10 years. However, there was no demarcation done for the said area admeasuring 5000 sq. meters. On 22nd May, 2015, Respondent No.1 invited offers from the public for leasing out certain pieces of land including the subject property on “as is where is” basis.

4. On 12th June, 2015 Respondent No. 1 issued a letter of allotment in favour of the Petitioner in response to the bids submitted by the Petitioner. The total lease premium payable by the Petitioner in the said letter of allotment was Rs. 58,09,60,533/- including the Earnest Money Deposit of Rs. 1,48,69,350/- and the balance amount in two installments. On 18th June, 2015, the petitioner addressed a letter to respondent No. 1 informing them about the existing garden on the subject property. On 24th June, 2015 Respondent No. 2 requested Respondent No. 1 to hand over the subject property for public space development purposes. On 15th July, 2015, the Petitioner made an application for the extension of the time to pay the first installment. The Petitioner has already paid the Earnest Money deposit of Rs. 1,48,69,350/- prior to the date of addressing the said letter dated 15th

July, 2015 and within the time prescribed in the letter. Respondent No. 1 granted an extension of time for the payment of the installment upto 2nd September, 2015 vide letter dated 15th July, 2015. On 11th August, 2015 and 22nd August, 2015 the Petitioner requested to the respondent No. 1 to remove the encroachment and agreed to pay the lease premium thereafter. The petitioner filed this Petition on 24th August, 2015.

5. The learned Counsel for the Petitioner invited our attention to the various documents annexed to the Petition. He submitted that much prior to the date of issuance of the advertisement, the respondent No. 1 had already entered into a leave and licence agreement in respect of the land which was the subject matter of the advertisement with the respondent No. 2 Corporation. The Petitioner had visited the site. However, they found an existing garden on the said land. The Petitioner brought this fact to the notice of CIDCO. However, in view of the assurances given by CIDCO and since such assurances are not made over, the Petitioner made various representations.

6. The learned Counsel invited our attention to the avernments made by the respondent Nos. 1 and 2 in their respective affidavits. He submitted that since there was already an existing garden on the said plot, which was to be allotted to the Petitioner on lease for carrying out construction, the Petitioner sought a prayer for a writ of mandamus against the respondent No. 1 CIDCO for possession of the writ land. The Petitioner is also seeking a direction for the repayment of the earnest money deposited by the Petitioner towards the allotment of land bearing Plot No. 4, Sector No. 13, Nerul, Navi Mumbai. .

7. The learned Counsel for the CIDCO, on the other hand invited our attention to various clauses of the advertisement issued by the CIDCO and submitted that it was made clear in the advertisement that the plot, that was the subject matter of the advertisement, was to be granted on lease on “as is and where is” basis. All the bidders were informed in advance under various clauses of the said advertisement that before the submission of the bids, the bidders were to visit the site and may inspect the status of the plots before making any offer. It is submitted that it was made clear in the advertisement that if the lease

premium is not paid by the Petitioner within the time prescribed, the earnest money deposit is liable to be forfeited.

8. It is submitted by the learned Counsel that as on date the said land is already reserved for a private development plan for a public garden. It is submitted by the learned Counsel for the CIDCO that even otherwise the Petitioner is not entitled to seek any reliefs in this Petition filed under section 226 of the Constitution of India on the ground that the Petitioner has alternate remedy for the recovery of the earnest money deposit.

9. Learned Counsel for the respondent No. 2, on the other hand, states that when the leave and license agreement was entered into between the Respondent Nos. 1 and 2 for the land admeasuring 5000 sq.mtrs., the plot which was to be handed over by the respondent No. 1 to Respondent No. 2 was not demarcated. It is submitted that as on date, the garden is already existing on the said plot which was the subject matter of the leave and license agreement and the Respondent No. 1 does not propose to remove that garden from the existing plot. Even otherwise, the said plot is reserved for a garden in the proposed

development plan. It is not in dispute that the said plot, which is the subject matter of the said advertisement, cannot be made available to the Petitioner even today.

10. Insofar the first issue raised by the Respondent No.1 that this Writ Petition is not maintainable, as the alternate remedy is not exhausted by the Petitioner before filing this petition is concerned, since action on the part of the Respondent No. 1 Corporation is totally illegal and without authority of law, this Court has the power to entertain this Writ Petition under Article 226 of the Constitution of India. The alternate remedy in these circumstances is not an efficacious remedy that is available to the Petitioner.

11. It is not in dispute that the area which was the subject matter of the advertisement and was to be handed over to the Petitioner on lease was clearly an area marked in the advertisement. It is the case of the respondent No. 1 and respondent No. 2 that in the agreement entered into between the respondent No. 1 and the respondent No. 2, there was no demarcation of the area of the plot ad-measuring 5000 sq. mtrs. which was to be handed over to the

Respondent No. 2. It is the case of the Respondent No. 1 that the plot on which the garden has been made by the Respondent No. 2 was not demarcated, which was handed over under High Tension Line to the respondent No. 2. According to the respondent No. 2, the entire area of plot for which the advertisement was issued by the respondent No. 1 for granting plot on lease and for carrying construction has already been developed with a garden erected by the respondent No. 2. It is thus clear that the plot which was made available to the Petitioner pursuant to the said advertisement was not available on the date of issuance of such advertisement by the respondent No. 1 at the first instance.

12. There is no dispute that in the advertisement issued by the respondent No. 1, there was a clause that the plot was offered on “as is where is” basis. The learned Counsel for the respondent No.1 could not dispute that on the date of issuance of such advertisement by the respondent No. 1, the garden was already erected by respondent No. 2 on the plot, which was subject matter of the said advertisement. The respondent No. 1 however, issued an advertisement for granting a lease of the same plot for carrying out construction. The respondent No. 1

cannot accept the bid of the plot on lease to carry out construction on the garden area handed over to respondent No. 2 by respondent No. 1 which was already under a leave and license agreement.

13. It is a common ground that the said plot of land is reserved for garden. Today respondent No. 1 is not in a position to hand over the vacant plot of land. Even today that was the response by the learned Counsel for the respondent No. 1 on the query raised by this Court. Respondent No. 2 is not willing to remove the portion of the said garden for which the advertisement is issued by the respondent No. 1 and the letter of allotment is issued in favour of the Petitioner.

14. In view of these facts of the case, the Petitioner is entitled to a refund of the Earnest Money Deposit made by the Petitioner, having found that it was not possible to get possession of the writ land at the time of filing of this Petition or even today. In our view, since the respondent No. 1 was fully aware of the development of the said land, the respondent No. 1 at the first instance could not have notified the said plot of land for the purpose of carrying out development on lease. The respondent No. 1 cannot be allowed to withhold the amount

of the Earnest Money Deposit having failed to hand over the possession of the land allotted by the issuance of Letter of Allotment. It is vehemently urged by the learned Counsel for the respondent No. 1 that the provisions of the said advertisement clearly proved that in case of a failure on part of depositing the Earnest Money Deposit of lease rent, the Earnest Money Deposit would stand forfeited. The learned Counsel for the Respondent No. 1 fairly conceded that no order of forfeiture was communicated to the Petitioner. He however, urged that there was internal correspondence which would reflect the said decision of the Respondent No. 1 to forfeit the Earnest Money Deposit.

15. In our view, even if there is any such internal decision taken by the respondent No. 1, thereby forfeiting the Earnest Money Deposit, unless the said decision is communicated, the same cannot be enforced. In our view, withholding the Earnest Money Deposit by the Respondent No. 1 is totally illegal and without authority of law.

16 We accordingly pass following order :-

- (a) The respondent No. 1 is directed to refund the amount of the Earnest Money Deposit made by the Petitioner within 3

weeks from today without fail. Since there is no prayer for payment of interest, we are not inclined to grant interest on the oral request of the learned Counsel for the Petitioner.

(b) The Respondent is directed to pay a cost of Rs. 50,000/- to the Petitioner within one week from today. Rule is made absolute accordingly.

(c) The Writ Petition is allowed in the above terms.

(d) The Civil Application is also disposed of accordingly.

(e) Parties to act on the authenticated copy of this order.

(KAMAL KHATA, J.)

(R.D. DHANUKA, J)