

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

WPA No. 20144 of 2010

**Smt. Champa Daniari, since deceased, substituted by her legal
heirs and representatives Sri Ananda Kumar
Daniari & Anr.**

Vs.

The Special Secretary, KMDA & Ors.

**For the petitioners : Mr. Partha Sarathi Das,
Ms. Shanta Sarkar,
Mr. Debojyoti De**

**For the KMDA : Mr. Satyajit Talukdar,
Ms. Piu Karmakar**

Judgement on : 19.06.2023.

Bibek Chaudhuri, J.

At the outset, it is mentioned that during the pendency of the writ petition the original writ petitioner died and she was substituted by the present petitioners.

The petitioners have invoked writ jurisdiction of this Court with a prayer to issue a writ of mandamus commanding the respondents to act in accordance with law by recalling, rescinding and/or revoking the impugned order of cancellation of allotment of land dated 11th May, 2010 by allowing the written representation filed by the petitioner dated 19th May, 2010, writ of certiorari and other consequential

reliefs. Factual aspect leading to the instant writ petition is as follows:-

On the prayer of the petitioner she was allotted a piece of land measuring about 200 square meter by the Kolkata Metropolitan Development Authority (hereafter described as KMDA) by a letter of allotment dated 20th December, 1984. Subsequently on 20th April, 1989 a long-term deed of lease was executed by the KMDA and the present petitioner being lessee. There are various terms and conditions, the relevant of which are proposed to be delineated at the appropriate time. Further case of the petitioner is that though deed of lease was executed in 1989 possession letter was issued and possession of the land was handed over in 1997 in favour of the petitioner. Thereafter he mutated his name in respect of the said plot of land in the year 1997 itself. The petitioner obtained sanctioned building plan in the year 2005 from the Kolkata Municipal Corporation which was in force till 19th May, 2010. In the year 2009, soil test was done and subsequently construction of the building was started. However, vide letter dated 5th January, 2009 the appropriate authority under the KMDA wrote a letter to the petitioners stating, inter alia, that as per Clause 2(i)(b)(iii) of the lease deed, the petitioner was supposed to construct the residential house at the said plot within five years. However, on the date of issuance of the letter, i.e., 5th January, 2009 the allotted land in favour of the petitioner was found to be vacant. Therefore, the petitioner was directed to show cause as to why allotment would not be cancelled as per Clause 4(i) of the said lease deed. The petitioner issued series of representations, first on 13th January, 2009, second on 5th March, 2009. The petitioner was directed to appear before the competent authority of KMDA for

hearing. She was given opportunity of being heard and finally the Special Secretary, KMDA issued an order on 11th May, 2010 cancelling the deed of lease in respect of the said plot.

It is submitted by the learned Advocate for the petitioner at the outset that though the deed of lease was executed on 20th April, 1989 possession of the land was handed over in the year 1997. Thereafter the petitioner mutated her name and subsequently she got the sanctioned plan from the KMC and only in the year 2010 she started constructing the house. The said house is still under construction. In the meantime, she has spent more than Rs.4,00,000/- for the purpose of construction. Therefore, equity demands that the order of cancellation issued by the Special Secretary, KMDA on 11th May, 2010 should be set aside and petitioner should be given opportunity to continue with the possession of the land in question as a lessee on due consideration of her representation that she was physically ill due to her old age she is suffering from Parkinson and she has already engaged a developer to develop the property. The principal respondents being the KMDA and its officers are being represented by Mr. Satyajit Talukdar, learned Advocate. Though the State of West Bengal was made a party to the instant writ petition, when the matter is taken up for hearing the learned Advocate on behalf of the State is found absent. This Court is also of the view that for proper adjudication of the instant writ petition presence of the State respondent is not necessary.

The KMDA being the respondent nos. 1 and 2 have filed an affidavit-in-opposition mainly alleging the maintainability of the writ petition. It is stated by the contesting respondents that the dispute between the parties cannot adjudicate in a proceeding under Article

226 of the constitution of India because the rights and liabilities as well as the obligation of the lessor and lessee arose out of a contract duly executed by the parties and violation of any term of the contract will not render a writ petition maintainable even if the lessor is a State authority. On factual issue it is contended on behalf of the respondents that the petitioner was given ample opportunity to construct his house within the stipulated period of time as contained in Clause 2(b)(i)(iii) of the lease deed. Even assuming that the petitioner obtained physical possession of the land in the year 1997 she failed to make construction over the land in question within five years from the receipt of possession of the land which ended in the year 2002. Process of cancellation of the lease was initiated in the year 2009-2010. The petitioner was given opportunity of being heard. Therefore, the respondents again cannot be held to be arbitrary, illegal and mala fide as alleged by the petitioner.

In support of his contention that a contractual agreement is not amenable to writ jurisdiction the learned Advocate for the respondents first refers to a decision of the Hon'ble Supreme Court in ***M/s. Radhakrishna Agarwal & Ors. -Vs.- the State of Bihar & Ors. : (1977) 3 SCC 457***. In paragraph 10 of the said report it is held by the Hon'ble Supreme Court that when the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. 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.

The learned Advocate for the respondents next refers to another decision of the Hon'ble Supreme Court in the case of ***Rajasthan State Industrial Development and Investment Corporation & Anr. -Vs.- Diamond & Gem Development Corporation Limited & Anr.*** reported in **(2013) 5 SCC 470**. In the aforesaid report, the Hon'ble Supreme Court had opportunity to discuss in detail the scope of contractual disputes and writ jurisdiction. It is held by the Hon'ble Supreme Court that the matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. A prerogative writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondents. Thus, the writ does not lie to create or to establish a legal right but to enforce one that is already established. While dealing with a writ petition the Court must exercise discretion taking into consideration a wide variety of circumstances, inter alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

Similar question came up for consideration before this Court in ***Haldiram Ltd. -Vs.- The State of West Bengal & Ors. : (2009) 1 Cal LT 158(HC)***. Paragraph 60 of the said judgment is very relevant for our purpose and the same is reproduced below: -

"In my view, the test that should be applied for getting answer to the question is what is the basis of the action complained of. If the action is taken in exercise of any power or right the sole source whereof is not the contract itself, then a writ petition questioning the action is maintainable. On the other hand, if the action leading to the

impugned decision is taken in exercise of a right conferred on the State by the contract, then no writ petition questioning such action and decision is maintainable. When any action leading to a decision is taken by a statutory authority in exercise of a right conferred on it by an ordinary contract, the authority does not act in the discharge of its any public law or statutory power, duty, or obligation conferred on it by any provision of the Constitution or any statute, nor does it act in the discharge of its any executive or administrative duty, obligation or function, but it acts wholly in exercise of its pure private law contractual right, and in such case the remedy of the aggrieved party, qua a party to the contract, is before the ordinary Civil Court or any other forum, if provided by the contract. A public law right or obligation is one the source whereof is the Constitution or a statute, or an executive or administrative decision or instruction, and for enforcing it a writ petition under Article 226 of the Constitution can be filed. But for enforcing a right or obligation the source whereof is a pure ordinary non-statutory contract, a writ petition under Article 226 is not maintainable, even if one of the parties to the contract is a State within the meaning of Article 12. In such case remedy, if any, of the aggrieved party is before the ordinary Civil Court or the forum provided by the contract”.

It is also pointed out by the learned Advocate for the respondents that an unreported decision in **WPA 3443/2009 (Damodar Prasad Agarwal –Vs.- State of West Bengal & Ors.)** also decided the same point regarding contractual obligation and its remedy and the said order was also upheld by the Hon’ble Division Bench in **MAT 309/2022** and also by the Hon’ble Supreme Court in **Special Leave Petition (Civil) No. 40499/2022**.

Having heard the learned Advocates for the petitioners and the respondents and on careful perusal of the materials-on-record as well as the points of law decided by the Hon'ble Supreme Court as well as this Court on the issue as to whether a contractual obligation is amenable to writ jurisdiction this Court has no other alternative but to hold that a personal contract executed by KMDA in favour of the petitioners in the nature of long term lease cannot be amenable to the writ jurisdiction. Clause 2(b)(iii) of the said lease deed runs thus:-

"At the own cost of the LESSEE who has been allotted plot, 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 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".

Clause 4(i) of the lease deed states as follows:-

"If there be any breach of any covenant on the Lessee'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 demised premises or any part thereof in respect of any breach of the Lessee's covenants herein contained".

Clause 4(iii) of the said lease deed runs thus:-

"Any relaxation or indulgence granted by the Authority to the Lessee or by the said Lessee to the Authority shall not in any way prejudice the rights of the parties under this Deed of Lease".

Therefore, on careful perusal of the lease deed it appears that the lease deed is absolutely provided in the nature granted in favour of the petitioner by KMDA. The KMDA is bound by the terms of the lease deed and accordingly the same was cancelled. This Court does not have any jurisdiction to consider the prayer of the petitioner or even to direct the respondents to re-consider the representations of the petitioner in the instant writ petition under Article 226 of the Constitution.

Therefore, I do not find any merit in the instant writ petition and accordingly the same is dismissed on contest.

However, the respondent nos. 1 and 2 is directed to take appropriate step on their assurance vide letter dated 11th May, 2010 that the amount paid by the petitioner will be refunded after deduction of 20 per cent as service charge.

(Bibek Chaudhuri, J.)

Srimanta, A.R.(Ct.)
Item No. 36.