

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

The Hon'ble **JUSTICE SUVRA GHOSH**

WPA 8340 of 2022

**Genesis Institute of Management & Technology.
Vs.
The State of West Bengal & Ors.**

For the Petitioner:	Mr. Partha Chakraborty, Adv., Ms. Paulomi Dutta, Adv.
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For the KMDA:	Mr. Satyajit Talukdar, Adv., Ms. Rutika Verma, Adv.
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For the State:	Md. T.M. Siddiqui, Adv., Mr. Suddhadev Adak, Adv.
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Hearing Concluded on:	12.03.2024
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Date:	28.03.2024
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SUVRA GHOSH, J. :-

1. The petitioner has prayed for issuance of writ in the nature of mandamus commanding the respondents to recall, withdraw, terminate, cancel or rescind the memo dated 30th March, 2016 cancelling the allotment of the plot of land granted in his favour and to allow the petitioner to commence and complete the construction of the proposed building in the said plot.

2. The Kolkata Metropolitan Development Authority (hereinafter referred to as the KMDA) allotted about 10 cottahs of land in plot no. I-11, sector-C within the East Kolkata Area Development Project @ Rs. 15,00,000/- lakhs per cottah amounting to a total of Rs. 1,50,00,000/- for setting up of health care related institute under the terms and conditions set out in the memo dated 23rd November, 2010. The entire consideration amount was paid by the petitioner and permissive possession in respect of the plot was granted in his favour by virtue of possession certificate issued on 4th May, 2012. Deed of lease was granted by the KMDA in favour of the petitioner on 27th July, 2012 for a period of 30 years from the date of delivery of possession of the plot with an option for renewal and other terms and conditions contained in the deed.
3. Learned counsel for the petitioner has submitted that the petitioner applied for mutation immediately after execution of the deed and the property was mutated in his favour on 1st July, 2013. The petitioner faced local resistance which delayed the work further. Building permit was sanctioned in favour of the petitioner on 17th July, 2015. The petitioner received a demand notice from the KMDA issued on 2nd June, 2015 requesting him to deposit a sum of Rs. 84,26,880/- as penal charges for the delay in construction and service tax thereon within 30 days from the date of issuance of the letter failing which the allotment would be deemed to be cancelled. By a letter issued on 5th January, 2016 the petitioner requested waiver of the penal charges imposed upon him and sought to commence the proposed construction shortly. By a letter issued on 30th March, 2016, the KMDA cancelled the

lease deed and resumed the land in question. The petitioner, by a letter issued on 28th April, 2016, further requested the authority to allow him to commence the construction.

4. Learned counsel has further submitted that since the petitioner is a charitable non profit organisation, the authority could not have imposed penalty upon the same or cancel the lease solely on the ground of non payment of penalty and not for violation of any of the covenants of the deed. The policy decision of the authority for imposition of penal charges with regard to delayed construction was not made known to the petitioner. No notice was served upon the petitioner in terms of clause 4.7 of the lease deed.
5. The delay in approaching the Court may also be condoned since no third party interest has been created in the plot in question by the authority in the meantime.
6. Learned counsel has placed reliance on the authorities in Punjab State Power Corporation Limited and Another v/s Emta Coal Limited reported in (2022) 2 Supreme Court Cases 1, Kerala State Beverages (M and M) Corporation Limited v/s. P.P. Suresh and Others reported in (2019) 9 Supreme Court Cases 710, Tukaram Kana Joshi and Others v/s. Maharashtra Industrial Development Corporation and Others reported in (2013) 1 Supreme Court Cases 353, H.D. Vora v/s. State of Maharashtra reported in AIR 1984 Supreme Court 866 and Kolkata Metropolitan Development Authority & Others v/s. Dinabandhu Andrews Institute of

Technology Management & Another reported in M.A.T. 839 of 2018 in C.A.N. 6085 of 2018 in support of his contention.

7. Speaking for the KMDA, learned counsel, at the outset, has challenged the maintainability of the writ petition on two fold grounds: - first, the cancellation of allotment was informed to the petitioner by a letter issued on 30th March, 2016. The writ petition has been filed on 5th May, 2022, the delay not being explained. Second, the petitioner has alleged that the petitioner was not granted an opportunity of hearing or for rectification of the breach complained of prior to cancellation of lease in terms of clause 4.7 of the lease deed. But fact remains that a show cause notice was issued upon the petitioner by the authority on 11th November, 2014 asking him to show cause as to why the allotment would not be cancelled for violation of clause 2.5 of the deed. The petitioner replied to the said notice by a letter issued on 19th November, 2014 stating that he was ready to pay such penalty within reasonable rate as may be fixed by the KMDA, for grant of extension of time to commence, complete and commission the project on the demised premises. The request of the petitioner was acceded to by the authority who by a letter issued on 2nd June, 2015, requested the petitioner to deposit Rs. 84,26,880/- as penal charges for delay in construction and service tax thereon within 30 days from the date of issuance of the letter failing which the allotment would be deemed to be cancelled. Final notice of payment was issued upon the petitioner on 19th August, 2015. By a letter issued on 24th November, 2015, the petitioner sought waiver of the penal

charges. These correspondences were suppressed by the petitioner in the writ petition which amounts to suppression of material facts.

8. Learned counsel has drawn the attention of this Court to agenda no. 4.12 of the proceedings of the 27th meeting of the Land and Flat Allotment Committee held on 21st December, 2015 which demonstrates that since the Chairman, KMDA had granted extension of time to the petitioner for payment of penalty, the matter of cancellation of allotment of land due to failure to pay the penal charges within the scheduled time would be put up for decision. In agenda no. 4.12 of the proceedings of the meeting held on 29th December, 2015, it was decided to cancel the allotment of the land granted in favour of the petitioner. Therefore such cancellation was made in terms of the policy decision of the authority. In terms of the letter of cancellation, an amount of Rs. 1,15,50,000/- was sought to be refunded in favour of the petitioner by a cheque dated 21st July, 2016 which is yet to be encashed.
9. The contract between the parties is a concluded contract and the petitioner is in breach of a contractual term. The contract is a purely private contract having no statutory flavour. Therefore the petitioner is not entitled to claim any relief under Article 226 of the Constitution.
10. Learned counsel has placed reliance on the authorities in New Delhi Municipal Council v/s Pan Singh and Others reported in (2007) 9 Supreme Court Cases 278, State of Maharashtra v/s Digambar reported in (1995) 4 Supreme Court Cases 683, Banda Development Authority, Banda v/s. Motilal Agarwal and Others reported in (2011) 5 Supreme Court Cases 394,

Ekta Shakti Foundation v/s. Govt. of NCT of Delhi reported in (2006) 10 Supreme Court Cases 337, Leelawanti and Others v/s. State of Haryana and Others reported in (2012) 1 Supreme Court Cases 66, S.J.S. Business Enterprises (P) Ltd. v/s. State of Bihar and Others reported in (2004) 7 Supreme Court Cases 166, Dalip Singh v/s. State of Uttar Pradesh and Others reported in (2010) 2 Supreme Court Cases 114, Punjab State Power Corporation Limited and Another v/s. Emta Coal Limited reported in (2022) 2 Supreme Court Cases 1, M/s. Radhakrishna Agarwal and Others v/s. State of Bihar and Others reported in (1977) 3 Supreme Court Cases 457, Bareilly Development Authority and Another v/s. Ajay Pal Singh and Others reported in (1989) 2 Supreme Court Cases 116, St. Mary's Education Society and Another v/s. Rajendra Prasad Bhargava and Others reported in 2022 SCC Online Sc 1091, Damodar Prasad Agarwal v/s. State of West Bengal & Others reported in W.P.A. 3443 of 2019, Damodar Prasad Agarwal v/s. State of West Bengal & Others reported in M.A.T. 309 of 2022 with I.A. CAN 1 of 2022, and Niranjana Kundu v/s State of West Bengal and Others reported in 2022 SCC Online Cal 3585 in support of his contention.

11. I have considered the rival contention of the parties, material on record and the law on the point.
12. It is not in dispute that about 10 cottahs of land in plot no. 1-11, sector-C within the East Kolkata Area Development Project was allotted in favour of the petitioner and deed of lease executed to that effect on 27th July, 2012 for a period of 30 years upon payment of entire consideration by the petitioner. Possession of the plot was made over to the petitioner on 4th May, 2012.

Clause 2.5 of the deed which is relevant for adjudicating the issue raised herein is set out:

“To commence construction of the Proposed Building within 24 months from the date of execution of this Deed of Lease/handing over of possession, whichever is earlier and to complete construction and commission the HEALTH CARE RELATED INSTITUTE proposed to be set up on the demised premises within a period of 36 months from the date of execution of this Deed of Lease PROVIDED HOWEVER that the Authority may at its discretion, on an application being made to it by the Lessee and on payment of such fees or penalty by whatever name called, as may be fixed by the Authority from time to time, grant to the Lessee such extension of time to commence and/or complete and commission the project on the demised premises for such period as the Authority may determine PROVIDED HOWEVER that upon failure of the Lessee to comply with such covenant to set up, complete construction and commission the project within the time originally fixed or as may be extended by the Authority, the lease of the Lessee shall be liable to be terminated by the Authority and the Authority shall be entitled to re-enter into or upon the demised premises and obtain possession thereof and after such re-entry and resumption of possession, the Authority

shall be liable to refund to the Lessee a sum equivalent to the premium paid in terms of this lease less 20% thereof to be deducted as service charge.”

13. Admittedly the petitioner was unable to commence construction in terms of the said clause. According to the petitioner, a demand notice was issued upon him by the KMDA on 2nd June, 2015 requesting him to deposit penal charges for the delay in construction within 30 days from the date of issuance of the demand and subsequently by a letter issued on 30th March, 2016, the KMDA cancelled the lease and resumed the plot in question.
14. At the outset, learned counsel for the respondents has challenged the maintainability of the writ petition primarily on two counts:- First, the delay in filing the writ petition has not been explained and second, the writ petitioner is guilty of suppression of material facts. It is a fact that the memo which is challenged in the writ petition was issued on 30th March, 2016. The writ petition was filed on 5th May, 2022 i.e., after lapse of more than six years. The said delay remains unexplained. The Hon’ble Supreme Court, in the authority in New Delhi Municipal Council (supra) has observed that “discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction.” Similar proposition of law has been laid down in the authorities in Leelavanti and Others (supra), Banda Development Authority, Banda (supra) and State of Maharashtra (supra). A different view has been taken by the Hon’ble Supreme Court in the authorities in H.D. Vora (supra) and Tukaram Kana Joshi and Others

(supra). In *Tukaram Kana*, the Court has held that there is no hard and fast rule as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay. Discretion must be exercised judiciously and reasonably. In the event the claim made by the applicant is legally sustainable, delay should be condoned.

15. Therefore this Court finds it prudent to deal with the issue on merits to ascertain whether the claim of the petitioner is legal sustainable, justifying condonation of delay.
16. The petitioner has alleged that no notice under clause 4.7 of the deed was served upon him prior to cancellation of the lease. The relevant clause demonstrates that if the lessee is in breach of any of the terms, conditions and covenants contained in the deed and upon the authority calling upon the lessee to rectify the breach, the lessee does not cure or rectify the same within six months from the date of service of such notice, the authority shall without any further notice treat the lease as determined and re-enter into the demised premises without being liable to pay any cost or compensation in respect thereof. The report in the form of affidavit submitted by the respondents portrays a different picture altogether. It appears that being unable to commence construction within the stipulated time frame, the petitioner wrote to the respondents on 2nd May, 2014, requesting extension of six months to commence construction. The authority issued a show cause notice to the petitioner on 11th November, 2014 directing the petitioner to show cause as to why the allotment would not be cancelled in view of violation of clause 2.5 of the lease deed. The petitioner replied to the said

notice by a letter issued on 19th November, 2014 agreeing to pay penalty in terms of clause 2.5 within reasonable rate as may be fixed by the KMDA for grant of extension of time to commence, complete and commission the project on the demised premises. The petitioner's request was granted by the authority by a letter issued on 24th March, 2015 and the authority, vide letter dated 2nd June, 2015, imposed penalty of Rs. 84, 26, 880/- including service tax thereon. On failure of the petitioner to pay such amount, final notice of payment was issued upon the petitioner on 19th August, 2015 stating that the penal amount should be paid within one month from the date of issuance of the letter failing which the allotment would stand cancelled. All these correspondences were not disclosed by the petitioner in the writ petition. The letters suggest that the respondents complied with clause 4.7 of the deed and granted sufficient opportunity to the petitioner to rectify the breach despite which the petitioner failed and neglected to do so for which the lease was terminated and possession of the land in question resumed.

17. In the authority in Dalip Singh (supra), the Hon'ble Supreme Court has held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case. The observation of the Hon'ble Supreme Court in the authority in S.J.S. Business Enterprises (P) Ltd. is reproduced hereinbelow:-

“As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of

the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken.”

18. It is needless to state that the fact suppressed by the petitioner herein has a strong bearing on the merits of the case in so much as the respondents would have been held guilty of violation of the clauses of the deed in the event the correspondences were not brought before the Court by the respondents. A coordinate Bench of this Court, in a judgment delivered on 15th November, 2022 in 2022 SCC Online Cal 3585 also held that suppression of facts material to the adjudication of the relief prayed for goes to the root of the matter. In the case in hand, the petitioner is guilty suppression of material facts and is not entitled to any relief herein on that score alone.
19. Clause 4.6 of the deed indicates that terms and conditions of the lease shall be subject to changes of policy of the authority from time to time and the lessee shall abide by the same. It was decided in the meeting of the Land And Flat Allotment Committee, KMDA held on 21st December, 2015 that the Chairman had extended the time for payment of penalty but waiver of penal charges was not considered. The decision with regard to cancellation of allotment due to failure to pay penal charges within the scheduled time was

deferred. In the meeting held on 29th December, 2015, it was decided to cancel the allotment of the petitioner.

20. It is trite law that the writ Court should ordinarily refrain from interfering with a policy decision of a statutory authority. In the authority in Kerala State Beverages (supra), the Hon'ble Supreme Court has held as follows:

“The decision-makers’ freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation. 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 on the ground of a legitimate expectation of an individual or a group of individuals being defeated.”

21. Such principle has also been discussed in the authority in Punjab State Power Corporation Limited and Another (supra). The Hon'ble Supreme Court in the authority in Ekta Shakti Foundation (supra) has emphasised that the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. So long as infringement of fundamental rights is not shown the Courts will have no occasion to interfere and should not substitute its own judgment for the judgment of the executive in such matters. In the case in hand, the resolution taken by the authority in its meeting is in terms of clauses 2.5, 4.6, and 4.7 of the lease deed and not in contravention of the

same. Therefore this Court finds no reason to hold that the decision taken by the authority in its meeting needs to be interfered with.

22. The lease deed executed by and between the parties is essentially a contract between them and such contractual relationship is governed by the terms of the contract. The contract is purely a private contract having no statutory flavour though executed by a statutory authority. The rights of the parties are governed only by the terms of the contract and no writ or order can be issued under Article 226 of the Constitution of India to compel the authorities to remedy a breach of contract. The concept of private law element and public law element has been elaborately dealt with by the Hon'ble Supreme Court in the authority of *St. Mary's Education Society and Another* (supra). The Hon'ble Supreme Court has held that the act complained of must have a direct nexus with the discharge of public duty for it to be a public law action. The contract between the parties herein is a non-statutory concluded contract wherein the parties are governed only by terms of the contract. The action of the KMDA herein cannot be interfered with by a writ Court.

23. The judgment of the Hon'ble Division Bench of this Court in M.A.T. 839 of 2018 delivered on 14th December, 2018 referred to by the petitioner deals with a fact situation where there was no clause in the lease deed for imposition of penal charges for granting extension of the time period for raising construction. The present case can be distinguished from that of the said case which therefore has no manner of application herein.

24. Admittedly the petitioner failed to commence construction in the plot in question within 24 months from the date of execution of the deed. Clause 2.5 authorises the respondents to extend the time for commencement, completion and commission of the project upon payment of fees/penalty. On an application made by the petitioner for such extension, the authority agreed to extend the same subject to the petitioner paying penalty in terms of the deed. The petitioner initially agreed to pay the penalty but upon assessment of the penalty to the tune of Rs. 84, 26, 880/- requested waiver of the same. On non payment of the penalty by the petitioner, further opportunity for payment was granted to him by a notice of demand issued on 19th August, 2015. Since the petitioner failed to comply with the same, the allotment was cancelled by the memo impugned dated 30th March, 2016 and the land resumed. The memo impugned clearly demonstrates that upon non compliance of clause 2.5 by the petitioner, penalty was imposed upon him for extension of time for construction. The petitioner having failed to deposit the penalty and assign any reason for violation of clause 2.5, the lease was cancelled and the land resumed.
25. It is crystal clear that the respondents acted in terms of the deed of lease and granted sufficient opportunity to the petitioner for rectification of the breach which was not availed of by the petitioner.
26. At this juncture, it is pertinent to refer to the authority in Bareilly Development Authority and Another (supra) wherein the Hon'ble Supreme Court has held that once the parties after voluntarily accepting the conditions of a 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. The observation in the Hon'ble Supreme Court in the authority in M/s. Radhakrishna Agarwal and Others (supra) is required to be set out:-

“After, 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 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.”

27. The petitioner not only violated clause 2.5 of the deed, but also failed to pay the penal charges claimed by the authority as stipulated in the deed for rectification/regularization of the breach. The respondent authority has acted in terms of the deed of lease and was well within its authority to terminate the lease and resume the plot in question on account of breach of contract by the petitioner. The claim of the petitioner not being legally sustainable, there is also no reason to condone the delay in filing the writ petition.

28. In the result, the writ petition fails.

29. The writ petition being W.P.A. No. 8340 of 2022 is dismissed.
30. There shall however be no order as to costs.
31. Since no affidavit is invited, the allegations contained in the writ petition are deemed not to have been admitted.
32. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.

(Suvra Ghosh, J)