

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

The Hon'ble **JUSTICE SUVRA GHOSH**

WPA 18294 of 2022

**Excellent IT Services Pvt. Ltd. & Anr.
Vs.
K.M.D.A & Ors.**

For the Petitioners:

Mr. Abhrajit Mitra, Sr. Adv.,
Mr. Sarvapriyo Mukherjee, Adv.
Mr. S.K. Singhi, Adv.
Mr. Riti Basu, Adv.
Mrs. Piyali Pan, Adv.,

For the KMDA:

Mr. Kishore Dutta, Sr. Adv.,
Mr. Satyajit Talukdar, Adv.
Mrs. Rutika Verma, Adv.,

Hearing Concluded on:

28.03.2024

Date:

18.04.2024

SUVRA GHOSH, J. :-

1. The petitioners have primarily prayed for issuance of writ in the nature of mandamus commanding the respondents to grant extension of time for construction in terms of clause 4(iii) of the licence dated 12th March, 2008, by recalling the impugned decision communicated to the petitioners by the memo dated 12th July, 2022.

2. The first petitioner was formerly known as M/s. Bajoria Holding Private Limited which was changed to M/s. Excellent I. T. Services Private Limited with effect from 26th July, 2022. The first petitioner was allotted land measuring more or less 23.54 cottahs in plot no. IND/3B/6 sector – J at EKADP, Zone 1 @ Rs. 10 lakhs per cottah aggregating to total sum of Rs. 2,35,40,000/- for the purpose of developing Outsource Management Hub vide letter of allotment issued by the Kolkata Municipal Development Authority (hereinafter referred to as the KMDA) on 23rd October, 2007. Possession of the land was handed over to the petitioners on 4th February, 2008 and deed of licence executed by and between the first petitioner and the KMDA on 12th March, 2008 upon payment of the entire consideration amount by the first petitioner. The petitioners approached the Kolkata Municipal Corporation (in short the KMC) for mutation of the said land, appointed a surveyor to undertake survey of the land, appointed architects for architectural, interior and landscape services in relation to the proposed construction and also obtained electricity connection upon payment of requisite charges. Upon the property being mutated in favour of the first petitioner, the petitioners have been paying all applicable taxes in respect of the property till date. Provisional no objection certificate for the proposed construction was granted by the Director General, West Bengal Fire and Emergency Services on 15th September, 2010. The building plan was recommended for sanction by the KMC by its resolution taken in a meeting held on 15th December, 2010.

3. In terms of clause 4 (iii) of the deed, the petitioners were to start construction within 24 months from the date of issuance of allotment letter or within such further time as allowed by the authority in writing on sufficient and reasonable grounds, in accordance with plans, sanctions and specifications approved by the appropriate authorities on payment of such fees as required, in accordance with the building rules of the KMC and upon compliance of other statutory rules and regulations framed for the purpose. The petitioners were supposed to complete the construction work within 36 months from the date of issuance of the allotment letter. The petitioners were unable to abide by the said clause due to delay caused by various State authorities to grant the necessary clearances for the construction work to proceed and applied before the KMDA for extension of time to commence and complete the work. The KMDA, by a letter issued on 21st February, 2011, cancelled the allotment/licence deed and withdrew possession of the land delivered in favour of the first petitioner. The cancellation order was challenged by the petitioners in an earlier writ petition being W.P. No. 5324 (W) of 2011 and by a judgment delivered on 25th September, 2020, a coordinate Bench of this Court directed the KMDA to examine on merits the ground realities qua the construction as on 24th November, 2009 and take an independent decision thereafter. Pursuant thereto, notice of hearing was served upon the first petitioner by the KMDA and upon hearing the petitioner, the committee of the KMDA decided to place the matter before the next authority meeting of the KMDA for taking a decision. The petitioners were communicated vide letter issued on 12th July, 2022 that the matter

was placed in the authority meeting and the authority decided that the allotment stood cancelled.

4. Policy decision was taken by the KMDA in the meeting of the Pricing Committee held on 12th February, 2009 that where construction could not be started within the specified time, penalty would be levied upon the licensees. The policy was applicable to projects where construction had started and also where construction was yet to start.
5. Learned counsel for the petitioner has submitted that the alleged delay in commencing the construction work was caused on account of the various authorities who failed to grant the necessary approvals/sanctions within the stipulated time frame. The KMC mutated the land only on 28th August, 2008 after which the petitioners applied for fire NOC which was granted on 15th September, 2010. The building plan was approved on 15th December, 2010 and sanctioned only on 13th June, 2011. Unfortunately the allotment was cancelled on 21st February, 2011, i.e., prior to receipt of the sanctioned plan. Therefore the delay, if any, is not attributable to the petitioners. The prayer for extension of time ought to be considered by the authority in terms of the policy decision taken by it with regard to delayed commencement of construction. Also, the petitioners were not able to proceed with the construction work from 23rd March, 2011 to 25th September, 2020 due to the order passed in the earlier writ petition directing the petitioners not to raise any further construction without the leave of the Court.

6. Learned counsel has placed reliance on the authorities in Teri Oat Estates (P) Ltd v/s. U.T., Chandigarh and Others reported in (2004) 2 Supreme Court Cases 130, South City Project (Kolkata) Limited & Anr. v/s. Kolkata Metropolitan Development & Ors. reported in 2017 SCC Online Cal 16449, Madras Aluminium Company Limited v/s. Tamil Nadu Electricity Board and Another reported in (2023) 8 Supreme Court Cases 240, Hymayun v/s. Harendra reported in 1945 Supreme Court Cases OnLine Pat 225, Novopharm Limited v/s. Eli Lilly and Company and Eli Lilly Canada Inc. reported in 1998 Supreme Court Cases Online Can SC 57, Managing Director, Haryana State Industrial Development Corporation and Others v/s. Hari Om Enterprises and Another reported in (2009) 16 Supreme Court Cases 208, Austin Distributors (P) Ltd. & Anr. v/s. The State of West Bengal & Ors. reported in W.P. No. 449 (W) of 2010 With CAN 6712 of 2010 With CAN 1498 of 2011, and Kolkata Metropolitan Development Authority & Anr. v/s. South City Projects (Kolkata) Limited & Anr. reported in FMA 59 of 2018 with CAN 7235 of 2017 with FMA 60 of 2018 with CAN 5157 of 2017 with CAN 5345 of 2017 with COT 44 of 2017 with CAN 5690 of 2017 with FMA 1387 of 2018 (MAT 57 of 2018) with CAN 626 of 2018 in support of his contention.
7. At the outset, learned counsel for the respondents has challenged the maintainability of the writ petition on the ground that the contract between the parties is a purely private concluded contract having no statutory flavour or public law element therein.

8. Permissive possession of the plot in question was made over to the petitioners on 4th February, 2008. Clause 4 (iii) of the deed of licence requires the petitioners/licensee to start the construction within 24 months from the date of issuance of allotment letter or within such further time as the authority may allow in writing on sufficient and reasonable grounds and complete the construction within 36 months from the date of issuance of the allotment letter. Clause 6 of the deed provides that in case of breach of any covenant on the part of the licensee, it shall be lawful for the authority at any time thereafter to re-enter the land after determining the license, upon service of notice to the licensee. Allotment of the petitioners was cancelled by the authority due to breach of covenant by the petitioners and such cancellation was challenged before this Court in a writ petition being W.P. No. 5324 (W) of 2011. By a judgment delivered on 25th September, 2020, the writ petition was disposed of directing the KMDA to examine on merits the ground realities qua the construction as on 24th November, 2009 and take an independent decision on merit. In compliance with the said direction, the KMDA proceeded to consider the matter on merits by forming a committee and upon granting sufficient opportunity of hearing to the petitioners and consideration of the submission/representation made by the petitioners, the authority cancelled the allotment of the petitioners and communicated the same to them. The allottee did not pray for extension either within the time prescribed in the license deed or thereafter and therefore, question of extension of time upon applying the policy of the KMDA did not arise. Several notices were issued upon the licensees requesting production of

documents relating to the proposed construction as well as progress of construction work. Since the petitioners failed to abide by the terms and conditions laid down in clause 4 (iii) of the deed and did not request the KMDA for extension of time within the stipulated period, the licence was cancelled in terms of clause 6 (i) of the deed upon granting reasonable opportunity of hearing and production of evidence as to the progress of work in the allotted plot. The authority agreed to refund the amount deposited by the petitioners after deduction of 20% of the amount as service charge.

9. The petitioners applied to the KMC for building permit on 9th December, 2010 whereas the notices issued by the authority upon the petitioners were prior thereto. The KMDA wrote to the KMC on 22nd April, 2008 requesting mutation and separation of the plot in question and stating that since possession of the plot was handed over on 4th February, 2008, KMC tax and other charges of the land would be payable by the license from the date of possession. The authority has cancelled the license and resumed possession of the plot upon taking into consideration the entire facts and circumstances as well as submission made by the petitioners and there has been no infringement of any legal right of the petitioners which requires enforcement by issuance of a writ in the nature of mandamus.
10. Learned counsel has placed reliance on the authorities in A. Shanmugam v/s. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and Others reported in (2012) 6 Supreme Court Cases 430, Maria Margarida Sequeira Fernandes and Others v/s Erasmo Jack De Sequeira reported in (2012) 5 Supreme Court Cases

370, Andhra Pradesh Industrial Infrastructure Corporation Limited v/s. Team-Asia Lakhi Semiconductors Limited (in Liquidation) represented by the Official Liquidator, Hyderabad and Another reported in (2014) 14 Supreme Court Cases 716, Director of Settlements, A.P. and Others v/s. M.R. Apparao And Another reported in (2002) 4 Supreme Court Cases 638, Kisand Sahkari Chini Mills Limited and Others v/s. Vardan Linkers and Others reported in (2008) 12 Supreme Court Cases 500, St. Mary's Education Society and Another v/s. Rajendra Prasad Bhargava and Others reported in 2022 Supreme Court Cases OnLine SC 1091 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. Facts which are admitted are enunciated hereunder:-

On an application made by the first petitioner the plot in question was allotted in favour of the petitioners vide letter of allotment issued on 23rd October, 2007. The entire requisite cost was deposited by the petitioners. Possession of the plot was handed over to the petitioners on 4th February, 2008.

13. Clause 4 (iii) of the license deed executed on 12th March, 2008 stipulates that the licensee should start construction within 24 months from the date of issuance of allotment letter and complete the same within 36 months. It shall be useful to reproduce clause 4 (iii) of the deed of lease.

“4(iii) At the own cost of the Licensee, within 24 months from the date of issue of allotment letter or within such further time as the Authority may as its option allow in writing on sufficient and reasonable grounds, to start Construction for the purpose of setting up an Outsource Management Hub in East Kolkata Area Development Project with boundary walls, sewers and drains in accordance with plans, sanctions, and specifications as shall be approved by the appropriate authorities on payment of such fees as required, in accordance with the Building Rules of the Kolkata Municipal Corporation, with the requirement of any Land Use and Development Control Regulations of the Authority or the requirements of any other statutory rules and regulations of local or statutory body framed for the purpose and licensee shall complete the construction works of the project within 36 months from the date of issue of allotment letter. Failure on the part of the Licensee to start construction within two years or within the time as extended by the AUTHORITY and/or complete the construction works of the project within three years from the date of issue of allotment letter of the plot of land. The License shall be terminated by the AUTHORITY, with deduction of 20% of premium as paid by the Licensee as service charge and remaining amount shall be refunded without any interest thereon.”

14. The respondents, by a letter issued on 22nd April, 2008 to the KMC informed the latter about the license deed executed in favour of the petitioners and

delivery of possession of the plot in question. The KMDA requested the KMC to complete the mutation and separation accordingly. The petitioners were responsible for setting up the Outsource Management Hub in accordance with plans, sanctions and specifications as approved by the appropriate authorities, in accordance with Building Rules of the KMC, with the requirement of any Land Use and Development Control Regulations of the authority or the requirements of any other statutory rules and regulations of local and statutory body. In other words, the petitioners could commence construction only upon receipt of the approvals/sanctions from the appropriate authorities as mandated by the license agreement. The KMC mutated the land in favour of the petitioners only on 28th August, 2008. Fire NOC was granted on 15th September, 2010. The building plan was sanctioned by the KMC on 13th June, 2011, all these approvals/sanctions being pre-condition to commencement of construction by the petitioners. Therefore the delay in commencement of construction is not entirely attributable to the lessee.

15. Clause 4 (iii) provides for extension of time stipulated therein on sufficient and reasonable ground, meaning thereby, that the time stipulation for commencement and completion of construction was not meant to be rigid and inflexible. In the words of the Hon'ble Supreme Court in Managing Director, Haryana State Industrial Development Corporation (supra), when time granted is flexible, the constructions of the term may not lead to a conclusion that it is imperative in character. Since there was no question of commencement of construction before obtaining the requisite clearances,

clause 4 (iii) would therefore, have to be construed to require the lessee to commence and complete construction within 24 months and 36 months respectively from the date of receipt of the clearances (W.P. No. 449 of 2010). Discretion lay in the hands of the KMDA to extend the time for commencement and completion of construction on sufficient and reasonable grounds. In the present case, the delay not being entirely attributable to the petitioners, the authority ought to have extended the time in terms of clause 4 (iii). If only such delay was caused due to any lapse on the part of the lessee could the authority terminate the lease and resume the plot. It is trite law that the drastic power of resumption and forfeiture should be taken recourse to as a last resort [Teri Oat Estates (P) Ltd (supra) and Managing Director Haryana State Industrial Development Corporation (supra),]. Also, construction of contracts should be interpreted to promote or advance the true intent of the parties at the time of entry into the contract. The literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which it was contracted. [Novopharm Limited (supra)].

16. The authority in Mahanand Sahai and Others (supra), in dealing with construction of a deed, has observed that the construction to be placed on a deed ought to be such as will rendered it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. The said proposition of law has been echoed in the authority in Hymayun (supra)

17. Doctrine of proportionality has been elaborately discussed in the authority in Tery Oats Estates (P) Limited (supra). The Hon'ble Supreme Court has held that it is for the Court to see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.

18. The present situation, in my considered view, warrants application of the doctrine of proportionality. The petitioners requested the respondent for extension of time to complete the construction by 31st December, 2011 by a letter issued on 24th November, 2009. In the earlier writ petition challenging the communication dated 21st February, 2011 issued by the KMDA cancelling the allotment, a coordinate Bench of this Court, by a judgment delivered on 25th September, 2020 directed the KMDA to examine on merits the ground realities qua the construction as existing on 24th November, 2009. It does not appear that the request for extension of time made by the petitioners was considered by the authority prior to cancellation of the allotment. Pursuant to the judgment, hearing was held by the KMDA and by an order passed on 28th January, 2022; the authority recorded the facts of the case and also notices issued to the allottee for submission of documents like proposed building plan, fire NOC and the like. The authority has not taken into account the dates when the petitioners obtained the requisite permissions as also the request for extension made by them and has recorded that no such request was made by the licensee for extension of

time. No decision was taken by the authority by the said order since the authority had already cancelled the allotment which was ratified and approved by the KMDA. The matter was placed before the next authority meeting to achieve an independent decision on merits with regard to the prayer of the licensee. Thereafter communication was made to the petitioners on 12th July, 2022 stating that the matter was placed in the authority meeting of the KMDA and the authority examined the matter and decided that the allotment stood cancelled. The communication is silent as to whether a reasoned independent decision on merits was arrived at by the authority in considering the prayer of the petitioners and in any event, no such reasoned decision was communicated.

19. The authorities in *Maria Margarida*, Director of Settlements and *A. Shanmugam* (supra) deal with the right or interest of a person holding property of the principal as a watchman, caretaker or agent only on behalf of the principal. There is no quarrel with the said proposition of law. In the case in hand, the petitioners have been in possession of the property by virtue of a deed of licence executed in their favour by the respondents for a period of 99 years and determination of legal rights of the petitioners in respect of the plot is not subject matter of the writ petition. Therefore the ratio decidendi of the authorities can be distinguished from that of the present case.
20. Last but not the least, learned counsel for the respondents has challenged the maintainability of the writ petition on the ground that the license deed executed by and between the parties is a concluded contract having no

statutory flavour. No public law element is involved herein and it remains a private contract between the parties. Breach of such contract is not amenable to writ jurisdiction under Article 226 constitution of India. Learned counsel has placed reliance on the authorities in *St' Mary's Education Society* (supra) and *Kisan Sahkari* (supra) in support of his contention.

21. The issue has been elaborately dealt with in the authority in *Austin Distributors* (supra). In the said judgment, the coordinate Bench has held that "wherever there is arbitrariness in State action, Article 14 would spring and judicial review strike such an action down. If an action of the State in the contractual field is unreasonable and arbitrary, the writ Court would be justified in interfering that the action The Courts, as a matter of policy, exercise judicial restraint and refrain from entertaining writ petitions where the issues raised involve adjudication of hotly disputed questions of fact, which can better be determined by adducing oral evidence and by cross examination of witnesses. It is perhaps too late in the day to contend that an action of the State in contractual field would be immune from attack on the ground of violation of Article 14 or any other fundamental right. Arbitrariness in State action strikes at the root of Article 14. Whenever there is arbitrariness, this Court would interfere in exercise of its power of judicial review." The recent authority in *Madras Aluminium* (supra) echoes the same view.
22. In the present case, termination of the lease by the KMDA is, for the reasons aforesaid, totally arbitrary, unreasonable and violative of Article 14 of the

Constitution of India in view of which the writ Court would not hesitate to grant relief to the petitioner herein.

23. In the light of the observation made hereinabove, this Court is of the view that the decision impugned communicated to the petitioners vide memo dated 12th January, 2022 ought to be recalled/set aside and the respondents be directed to consider the application made by the petitioners for extension of time to commence and complete the construction upon such terms and conditions as the authority may deem fit and proper, in accordance with law. Since the petitioners are ready and willing to pay penal charges that may be imposed upon them by the KMDA for the delay in commencement of construction, in terms of the policy decision of the KMDA taken in the meeting of the Pricing Committee held on 12th February, 2009, the KMDA is at liberty to consider imposition of such penalty in terms of the aforementioned policy decision despite the fact that there is no such provision in the license deed.
24. Accordingly, the writ petition being W.P.A. 18294 of 2022 is allowed.
25. The impugned decision communicated to the petitioners vide memo dated 12th January, 2022 is set aside/quashed
26. The respondents are directed to consider the request made by the petitioners for extension of time to commence and complete construction in the plot in question upon granting reasonable opportunity of hearing to the petitioners and on such terms and conditions as the authority may deem fit and proper, in accordance with law.

27. The entire exercise is expected to be completed within two months from the date of communication of this judgment.
28. There shall however be no order as to costs.
29. 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)