

(2016) 04 CAL CK 0090

In the Calcutta High Court

Case No : M.A.T. No. 25 of 2016 with C.A.N. No. 247 of 2016

ABP Pvt. Ltd. and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Urban Land (Ceiling and Regulation) Rules, 1976 — Rule 18, 20, 26, 27, 38, 5(1), 5(3), 6(1), 9, 2(L)

Citation : (2016) AIRCC 2012 : (2016) 3 CalHCN 683 : (2016) 2 CalLJ 649 : (2016) 2 CalLT 469 : (2016) 4 WBLR 496

Hon'ble Judges : Soumitra Pal and Mir Dara Sheko, JJ.

Bench : Division Bench

Advocate : Mr. Abhrajit Mitra, Senior Advocate, Mr. A.N. Mukherjee, Mr. Jishnu Chowdhury and Mr. Navneet Mishra, Advocates, for the Appellant; Mr. Abhrajit Mitra, Senior Advocate, Mr. A.N. Mukherjee, Mr. Jishnu Chowdhury and Mr. Navneet Mishra, Advocates, for the Re

Final Decision : Dismissed

Judgement

Soumitra Pal, J.—This appeal, being MAT No. 25 of 2015, has been preferred by ABP Private Limited (for short "ABP") and its Constituted Authority, the appellants against the judgement and order dated 16th December, 2015 passed by the learned Single Judge in the writ petition, being W.P. 33381 (W) of 2014 (ABP Private Limited and another v. State of West Bengal and others), whereby it was dismissed. In the said writ petition Merlin Projects Ltd ("Merlin" for short) was the respondent no.4. Being aggrieved by the said judgment and order, Merlin too has filed an appeal being MAT No. 26 of 2016 in which ABP is the respondent no.4. Since issues involved are similar, by consent of the learned advocates for the parties, both the appeals were heard analogously.

2. For proper appreciation, facts which emerge from the stay petition in MAT No. 25 of 2016, to which the writ petition has been annexed, are as under.

3. ABP, the writ petition no.1, a private limited company, at all material times was the owner of land with buildings and structures having 19 dwelling units, driveway, pathway, compound wall, garden, tank, tank bank, etc, comprising an area measuring about 12,898.49 square meters situated at 147 Roy Bahadur R.N Guha Road, Kolkata 700028 within the jurisdiction of the South Dum Dum Municipality. On 17th February, 1976 the Urban Land (Ceiling Act and Regulation) Act, 1997 (hereinafter referred to as the "Act") came into force. On 19th September, 1976 ABP filed a statement under section 6(1) of the Act. On 28th April, 2008 ABP filed an application for obtaining "No Objection" certificate from the competent authority, Barrackpore as per provisions of the Bengal Municipal Act which culminated in departmental proceedings under the Act. In the said proceedings the Competent Authority in its first report/order dated 4th March, 2009 held that there was excess vacant land to the extent of 2988.08 square meters. Against the said order an appeal was filed before the Appellate Authority which directed the Competent Authority to draw up a formal proceeding and to pass appropriate order after giving an opportunity of hearing in respect of the property held by the appellant. Challenging the said order, ABP filed a writ petition, being W.P. No. 327 (W) of 2010, wherein an interim order was passed on 31st March, 2010 directing survey of the said premises. Survey was conducted and report dated 3rd May, 2010 was filed in Court. As per the said report, as stated in the petition, there was no excess vacant land. Ultimately the said writ petition was disposed of on 10th May, 2010 by setting aside the order dated 4th March, 2009. Pursuant to the said order an order was passed on 30th June, 2010 whereby the Competent Authority determined the excess vacant land to the extent of 2889.29 square meters. It further appears that by order dated 1st July, 2011 a report was submitted in connection with appeal filed by ABP under section 33 of the Act where the Competent Authority found 1251.86 square meters as excess vacant land. Thereafter again appeal was filed before the Appellate Authority. While disposing of the appeal, the Appellate Authority directed the Competent Authority to consider and calculate the vestable portion and retainable portion and also directed the parties to give consent for consideration of the matter afresh by the Competent Authority from the stage of filing of the report under Section 6(1) of the Act ignoring the subsequent inspection. Challenging the said order a second writ petition, being W.P. 7378 (W) of 2012, was filed by ABP which was disposed of by the by a learned Single Judge by setting aside the order dated 9th September, 2011 on the ground that it was devoid of reasons and the Appellate Authority was directed to take a decision. Since the order passed in W.P. No. 7378(W) of 2012 was not complied with by the respondent authorities, a contempt application being CPAN No. 1480 of 2013, was moved which was disposed of on 29th November, 2013 by the learned Single Judge recording that "it is only after filing of this contempt application that the order, violation of which has been alleged, has been complied with, accordingly, the contempt application is disposed of". (page 7 of the Stay Petition) According to the petitioner "Going by the findings and directions of the Appellate Authority, the petitioner reasonably expected that there would be no

excess vacant land in the premises in question". "Accordingly", (page 7 of the Stay Petition) ABP on 27th March, 2014 executed a conveyance deed in respect of the entire premises in favour of the respondent no.4. Since nothing was communicated by the Competent Authority, ABP made necessary enquiries. On 30th October, 2014 an application under Right to Information Act, 2005 was filed on behalf of ABP before the Competent Authority. Reply was received on 24th November, 2014 and it appeared that after hearing and after an enquiry on spot on 25th August, 2014 a decision had been taken and according to the petitioner it was evident there was no vacant land in terms of the Act. It has been stated that "The formality of the Competent Authority making an order recording that there is no vacant land was the only thing outstanding. This was a mere procedural matter. The petitioner and its transferee, thus proceeded on the premise that there is no excess vacant land". (page 8 of the Stay Petition) "But due to bias and extraneous consideration, they are bent upon not issuing "No objection Certificate" for the reasons best known to them" (page 9 of the Stay Petition) and ABP was harassed. Thereafter ABP received the memo dated 1st December, 2014 by which the Special Secretary to the Government had dismissed its appeal on the ground that ABP had suppressed a material fact that "in the year 2010 or so" it had transferred the land in question to Merlin. According to the applicant as appeal had already been disposed of by order dated 17th May, 2013, there was no scope for considering the appeal afresh. The said memo dated 1st December, 2014 is without jurisdiction and a nullity as the Special Secretary is not the Appellate Authority. Since it is evident from the decision of the Appellate Authority and Competent Authority dated 17th May, 2013 and 25th August, 2014 respectively, there is no vacant land in the said premises under the Act, the sale and/or transfer made is just and legal. In the meantime, on an application filed, the South Dum Dum Municipality had sanctioned a plan for construction of residential houses in the said property being Sanction Plan No. 692 dated 2013-2014.

4. In such facts and circumstances, the said writ petition was filed by ABP and its Constituted Authority praying for several reliefs, relevant of which are as follows:-

"(a) A Writ of and/or Writs in the nature of Mandamus directing the respondent authorities to rescind, cancel and withdraw the Memo No. 2135- UL./APC-1/2009 (PT) dated Kolkata, 1st December, 2014 issued by Special Secretary to the Government of West Bengal, Urban Development (Urban Land Ceiling) Department being Annexure "P-8" hereof;

(b) Declaration that the letter dated 1st December, 2014 is void ab-initio and is hereby quashed and/or set aside;

(c) Declaration that the petitioner No.1 and/or its assignees and or transferees is entitled to make construction on the said premises on the basis of the plan sanctioned;

(d) Declaration that the petitioners do not hold any land in excess of ceiling limit

nor the said premise contains any vacant land in terms of the provision of the Urban Land (Ceiling & Regulation) Act, 1976 and/or otherwise;

(f) Declaration that the order of the Appellate Authority dated 17th May, 2013 read in conjunction with the report/decision of the Competent Authority dated 25th August, 2014 clearly state that there is no excess vacant land in the premises No. 147, R.N. Guha Road, Kolkata and issuance of "No Objection Certificate" is a mere formality;

(g) A writ of and/or writs in the nature of Prohibition directing the respondents, each one of them, their men and agents from taking any action and/or further actions pursuant to and in furtherance of the Memo No.21350UL./APC/1/2009(PT) dated Kolkata, 1st December, 2014 issued by Special Secretary to the Government of West Bengal, Urban Development (Urban Land Ceiling) Department being Annexure "P-8" hereof;"

5. The writ petition was moved on 27th January, 2015 when the learned Single Judge, apart from issuing direction to file affidavits, had passed an interim order staying the operation of the impugned memorandum dated 1st December, 2014. Though State had filed its affidavit in opposition, Merlin did not file its affidavit. The learned Single Judge, as it appears from the order dated 28th September, 2015, after perusing the affidavit of the State, issued direction upon the Merlin to file an affidavit. Thereafter Merlin filed an affidavit affirmed on 1st October, 2015. After the said affidavit was filed by Merlin, State had filed its affidavit in reply affirmed on 23rd November, 2015. Significantly ABP chose not to file any affidavit-in-reply either to the affidavit-in-opposition filed by the State or to the affidavit filed by Merlin. After affidavits were exchanged, the writ petition was heard by the learned Single Judge and was dismissed. Hence, these appeals.

6. Mr. Abhrajit Mitra, learned senior advocate appearing on behalf of the appellant in MAT 25 of 2016, relying on the grounds contained in the Memorandum of Appeal and reiterating the statements made in the writ petition annexed to the application for stay, submitted since pursuant to the order dated 20th November, 2012 passed in W.P. 7378(W) of 2012 the Appellate Authority by order dated 17th May, 2013 had disposed of the appeal by issuing directions on the Competent Authority, which under section 33(3) is final, the impugned order dismissing the self same appeal is without jurisdiction and a nullity. Therefore, the learned Single Judge erred in dismissing the writ petition. Assuming the State had the authority to exercise revisional power under section 34, as no opportunity of hearing was granted under the proviso to section 34, the order is bad in law. Since it is evident from the order dated 17th May, 2013 that the land in question was within the ceiling limit, the appellants did not commit any breach of the statutory provisions. Referring to the provisions in the Act, submission was as section 26(1) bars transfer of vacant land within the ceiling limit without notice to the Competent Authority and as an agreement for sale does not create any interest, the agreement for sale dated 2nd April, 2012 entered into between ABP and Merlin is of no consequence. In view of section 26(1), assuming the

deed of sale dated 27th March, 2014 entered into between ABP and Merlin is held to be null and void under section 5(3) of the Act, ABP would still remain the owner of the land and at most the consequences under section 38(4) may follow. Mr. Mitra had relied on the following judgments in support of his submission:- (i) B.O.I. Finance Ltd. v. The Custodian, AIR 1997 SC 1952; (ii) Kapra Mazdoor Ekta Union v. Management of M/s Birla Cotton Spinning and Weaving Mills Ltd., AIR 2005 SC 1782 (iii) Industrial Supplies Pvt. Ltd. v. Union of India, (1980) 4 SCC 341; (iv) Dwarka Das v. State of M.P., (1999) 3 SCC 500; (v) State of Maharashtra v. B.E. Billimoria, (2003) 7 SCC 336; (vi) Hindustan Petroleum Corpn. v. Darius Shapur Chenai, (2005) 7 SCC 627; (vii) Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express, (2006) 3 SCC 100, (viii) Rajeev Hitendra Pathak v. Achyut Kashinath Karekar, (2011) 9 SCC 541, (ix) Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi, AIR 1960 SCC 1368 (x) Prasanta Kumar Pahari v. Goutam Ghosh, 2014 (2) CHN (Cal) 579; (xi) Krishna Narayan Mukherjee v. State of West Bengal, 1979 (1) CLJ 427; (xii) East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1951 (2) All ER 587; (xiii) The Knight Sugar Co. Ltd. v. The Alberata Railway and Irrigation Co., 173 Indian cases 88 AT 90 (Manupatra Version) (xiv) SRM Exploration Pvt. Ltd v. N & S & N Consultants S.R.O., (2012) 4 Comp Law Journal 178 and (xv) Rameshchandra Shamjibhai Raniga v. State of Gujarat, (2000) 4 GLR 1 (Manupatra Version).

7. Mr. Sarvopariya Mukherjee, learned advocate for Merlin in MAT 25 of 2016, adopting the submission of the Mr. Mitra, submitted that at the most the sale of the vacant land, pursuant to the conveyance dated 27th March, 2014, is void to the extent of the land in excess of the ceiling limit under the Act and it cannot be extended to the entire land.

8. Mr. Pranab Kumar Datta, learned senior advocate appearing on behalf of the State authorities, the respondents, submitted that on 27th January, 2015 on the writ petition direction was issued to file affidavits. The State had filed its affidavit in opposition, stating, inter alia, that the facts and circumstances have been concocted and are vague and the petition is a glaring example of suppression and distortion of facts as State had come to learn from an advertisement dated 9th July, 2014 published in a newspaper that the premises had already been transferred to Merlin as evident from the "No Objection Certificate" issued by the State Level Environment Impact Authority. After State had filed its affidavit, as in spite of directions it did not file its affidavit in opposition, the learned Single Judge on 28th September, 2015 directed Merlin to file an affidavit. From the said affidavit by Merlin, State authorities for the first time came to learn that on 23rd February, 2008 development agreement was entered into by ABP with Merlin. Pursuant thereto irrevocable power of attorney had been granted by ABP in favour of Merlin, inter alia, to obtain clearances from the environmental authorities, urban land ceiling authorities and other authorities. Thereafter environment clearance was obtained on 27th June, 2014. In the meantime, on 2nd April, 2012, ABP had entered into an agreement for sale with Merlin.

Submission was in the writ petitions, being W.P. no. 327 (W) of 2010 and in W.P. 7378 (W) of 2012, ABP did not disclose that it in 2008 it had entered into a development agreement with Merlin and subsequently had granted irrevocable power of attorney empowering Merlin to take certain steps for developing the property. ABP had also suppressed each of the transactions - the development agreement, the grant of power of attorney, the agreement for sale and the deed of sale, as evident from each of the orders, including the order dated 25th August, 2014 passed by the statutory authority and the appellate authority. As orders were obtained by ABP in total suppression and distortion of material facts in the writ proceedings in W.P. 327 (W) of 2010 and in W.P. 7378 (W) of 2012 and in the proceedings before the Competent Authority and the Appellate Authority, as noted, each of the orders passed therein are non est in the eye of law.

9. On the merits of the matter, referring to section 2(L), its Explanation and section 3 of the Act it was submitted that "to hold" means not only owning the land but also to hold land under an irrevocable power of attorney. Referring to sections 5(3), 26 and 27 of the Act submission was as Statute bars transfer of the land either by way of sale, mortgage, gift, lease or even by other modes of transfer, even one cannot be put in permissive possession. Since by entering into the development agreement, which was as good as a sale deed, ABP had virtually relinquished its title and had put Merlin in permissive possession, the sale agreement was a mere formality. The development agreement, agreement for sale and the deed of sale make sections 2(L), 5(I) and section 20 nugatory. As under sections 26(1) and 27(2) even in the case of "intended transfer" of a vacant land or even in case of "desiring to make a transfer" of urban property prior notice or application to the competent authority is mandatory and as development agreement, irrevocable power of attorney and agreement to sale was entered into by ABP with Merlin intending to transfer the land, there was violation of the said provisions of the Act. As evidently appellant had filed statement under section 6(1) in September, 1976 stating the excess vacant and had also filed an application under section 20 praying for exemption, which has not been disclosed in the writ petition and as even draft statement with regard to the vacant land in excess of ceiling limit has not been published, not to speak of the final statement under section 9, and proceedings before the authority have not been concluded, the argument on behalf of ABP that the transfer of the excess land is null and void under section 5(3) is not tenable as the Competent Authority on behalf of the State Government, under section 26(1) has the statutory right to exercise the first option to purchase such land. Submission was as the fact of sale of the land was mentioned for the first time in the writ petition, being W.P. 33381 (W) of 2014, and it has come to light that ABP had suppressed facts, and as the ABP neither filed its affidavit-in-reply to the affidavit-in-opposition filed by the State and as in the affidavit-in-reply filed by the State to the affidavit by Merlin it had pleaded that orders passed by the High Court and by the Authorities were obtained by non-disclosure of material facts which amounted to an order obtained by fraud which was not countered by ABP by

filing an affidavit, the appeal is liable to be dismissed. In such facts and circumstances ABP cannot complain of breach of the provisions of the Act and violation of the principles of natural justice. Hence State was justified in issuing the order contained in the memorandum dated 1st December, 2014 passed under Article 162 of the Constitution of India. Mr. Datta had relied on the following judgments in support of his submissions:- (i) H.C Sarin v. Union of India, (1976) 4 SCC 765; (ii) Union of India v. Ramesh Gandhi, (2012) 1 SCC 476; (iii) Madhukar Sadbha Shivarkar v. State of Maharashtra, (2015) 6 SCC 557; (iv) Lazarus Estates Ltd v. Beasiey, 1956 QBD 702 and (v) Macfoy v. United Africa Co. Ltd., (1961) 3 All. E.R. 1169.

10. Be it noted that during hearing, on 10th March, 2016, to a specific query put by the Court, Mr. Amiya Narayan Mukherjee, learned advocate for ABP submitted that the development agreement with regard to the premises entered into in 2008 between ABP and Merlin was not disclosed in the writ petitions, being W.P. 327 (W) of 2010 and in W.P. 7378(W) of 2012.

11. The issues which require to be considered are - i) Whether the State was justified in issuing the Memorandum dated 1st December, 2014 dismissing the appeal filed by ABP on the ground of suppressing the fact regarding the sale of the premises to Merlin; ii) Whether ABP in the writ proceedings in W.P. 327 (W) of 2010 and in W.P. 7378 (W) of 2012 had suppressed facts and whether orders passed therein and the consequential orders passed by the authorities are nonest in the eye of law; iii) Whether in the instant writ petition, that is W.P. 33381 (W) of 2014, as the statements made by the State in its affidavit in opposition and by Merlin in its affidavit before the learned Single Judge have gone uncontroverted as ABP did not file affidavit in opposition, the fact of suppression of facts by ABP was established; iv) Perusing the clauses in the development agreement and the agreement for sale, in view of section 2(L) and its Explanation, whether the land in question is held by both - ABP and Merlin; v) Whether the development agreement and the agreement for sale was in contravention of sections 26(1) and 27(2) of the Act; vi) Whether Courts have the jurisdiction to declare that a person does not hold vacant land under the provisions of the Act, as prayed for by the appellant in prayer "b" of the writ petition, particularly when proceedings are pending before the Competent Authority after the appellant had filed statement under section 6(1) of the Act; vii) Whether, in view of the order dated 17th May, 2013 and the decision of the Competent Authority dated 25th August, 2014, as prayed for in prayer "f" of the writ petition, issuance of "No Objection Certificate" is a mere formality and viii) Since by development agreement, power of attorney and agreement for sale ABP had intended to transfer the land, whether prior notice was issued under section 26(1) or any application was made in writing under section 27(2) before the Competent Authority by ABP intimating that it was intending to transfer or desiring to make a transfer of the land and if not, whether it was in violation of the statutory provisions.

12. So far as the first issue is concerned, there is no dispute that after the Act

had come into force, ABP on 19th September, 1976 had filed a statement before the Competent Authority under section 6(1) of the Act. It is noteworthy that such statement is filed by a person who holds excess vacant land. Subsequently ABP had also filed an application praying for exemption under section 20 of the Act. Such application can be filed by a person who holds excess vacant land under the Act. Therefore, according to its own estimation, at the commencement of the Act, ABP was holding excess vacant land. After statement was filed, proceedings were initiated by the Competent Authority. Against some of the orders, appeal was preferred before the Appellate Authority. As evident from the order dated 25th August, 2014, before the authorities ABP did not disclose that by a deed of sale dated 27th March, 2014 (page 456 of the Stay Petition) it had sold the premises to Merlin at a consideration of Rs.18 crores (page 471 of the Stay Petition). Facts reveal that after having come to learn about the sale of the land from an advertisement in a daily newspaper published on 9th July, 2014, State had issued the impugned memorandum dated 1st December, 2014 dismissing the appeal. Since admittedly the fact regarding the sale of the plot of land was not disclosed and suppressed by ABP before the authorities, by the impugned memorandum the State was justified in dismissing the appeal. In fact the said transfer of land was in clear violation of section 5(3) of the Act. In such circumstances, before passing the impugned memorandum dated 1st December, 2014, compliance of the principles of natural justice, as contended on behalf of the appellant, does not arise at all.

13. So far as the second issue is concerned it is evident that some of the orders passed by the authorities, including the order dated 17th May, 2013, issued by the Appellate Authority was pursuant to the directions passed by the High Court in the writ proceedings in W.P. 327 (W) of 2010 and in W.P. 7378(W) of 2012. In the said proceedings before the High Court admittedly ABP did not disclose at all and suppressed the fact that it had entered into a development agreement on 23rd February, 2008 (page 362 of the Stay Petition) and had subsequently granted power of attorney in favour of Merlin, and as evident from the clauses of the agreement had put Merlin in permissive possession of the land which is prohibited under the Act. Had these transactions been brought to the notice of the Writ Court, proceedings could have taken a different turn. Since Writ Court is a Court of Equity and ABP had suppressed facts which are material to the adjudication and had obtained orders, the orders passed by the High Court and by the Competent Authority and the Appellate Authority under the Act are non est in the eye of law and those orders cannot be relied upon. In this regard it is appropriate to refer to the judgment in *Union of India v. Ramesh Gandhi* (supra) relied on by the State respondents wherein Supreme Court while allowing the appeal had relied on the judgment in *S.P. Chengalvaya Naidu v. Jagannath* wherein it was observed as under:- "1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled position of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the

law. Such a judgment/decreed-by the first court or by the highest court-has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings." (paragraph 25) Subsequently Supreme Court had referred to the following passage "If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party." (paragraph 29). Since orders were obtained by ABP by deliberately suppressing facts before the authorities and the High Court in the first two writ proceedings and the though the orders passed therein have attained finality, in view of the law laid down in *Madhukar Sadbha Shivarkar* (supra), wherein the Supreme Court dealing with land ceiling proceedings on the issue of fraud had held "that the power exercised by the State Government to pass the orders impugned in the writ petitions is traceable to its executive power under Article 162 of the Constitution of India." (paragraph 28), the impugned memorandum dated 1st December, 2014 is proper and valid. Since ABP had obtained orders by admittedly by suppression of facts, it cannot plead that the impugned memorandum dated 1st December, 2014 was passed in violation of the principles of natural justice as a party seeking equitable relief under the writ jurisdiction should come with clean hands. In this regard it is appropriate to refer to the passage in *R.V. Secretary of State for the Home Department Ex parte Mughal* quoted in paragraph 25 in *H.C. Sarin*(supra) wherein it was held "The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke "the rules of natural justice" so as to avoid the consequences." That a party cannot take advantage by practising fraud has been discussed in *Lazarus Estates* (supra) wherein it was held that "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: ??? So here I am of opinion that if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it." The same principles of law found echo in *Macfoy*(supra) wherein it was held "There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

14. So far as the third issue is concerned while moving the writ petition, being W.P. No. 33381(W) of 2014 challenging the memorandum dated 1st December, 2014 and stating that it had transferred the property to Merlin by deed of sale dated 27th March, 2014, ABP did not disclose and suppressed the fact that it had earlier entered into a development agreement and power of attorney had been executed and on 2nd April, 2012 agreement for sale had been entered into with

Merlin. It requires to be mentioned that the sale of the property was brought to light by the State authorities which lead to the issuance of the impugned memorandum. Now from the tenor of the clauses in the development agreement and agreement for sale it is clear that it had intended to transfer or had transferred the property to Merlin which was prohibited under the Act and thus illegal. In this regard there is an interesting aspect. Though the learned Single Judge by order dated 27th January, 2015 had directed filing of affidavits to the writ petition, being W.P. 33381(W) of 2014 and State had filed its affidavit in opposition, Merlin, the private respondent, chose not to file its affidavit. It is after State had filed its affidavit disclosing that ABP had suppressed and distorted material facts, such as grant of environmental clearance on an application by Merlin, and as thereafter Merlin had filed its affidavit disclosing the development agreement, which was not disclosed in the writ petition, the suppression of facts by ABP - regarding the grant of power of attorney and agreement for sale of land with Merlin came to the fore. In this context it is appropriate to refer that the State in its affidavit in reply, affirmed on 23rd November, 2015, to the affidavit of Merlin had stated in paragraph 6(E) that "I submit that any order obtained by non-disclosure of all material facts tantamounts to an order obtained by fraud. Hence, such an order is a nullity and is to be treated as nonest for all purposes and also the sale took place between the ABP and respondent no.4 which does not debar the state taking necessary decision in accordance with law." Admittedly ABP chose not to file any affidavit in reply to the affidavit in opposition filed by the State. Nor it chose to file an affidavit in reply to the affidavit of Merlin or an affidavit countering the affidavit-in-reply filed by the State to the affidavit of Merlin. Merlin also did not file affidavit opposing the stand of the State that orders obtained by ABP were by practising fraud and the proceedings are a nullity. Since the statements made by the State in its affidavits have gone uncontroverted and as during hearing there was virtually no effort on the part of ABP to counter the submission made on behalf of the State respondent, as even in the instant writ petition, being W.P. 33381(W) of 2014, ABP has suppressed the fact of entering into development agreement, the grant of irrevocable power of attorney and the agreement for sale and since facts suppressed were crucial for determination of the issue and was intentional, we are constrained to hold that orders were obtained by ABP by practising fraud not only before the Competent Authority and the Appellate Authority but also before the High Court in the writ proceedings in W.P. No. 327(W) of 2010 and in W.P. 7378(W) of 2012. Therefore, the learned Single Judge was justified in passing the judgment and order and the appeal requires to be dismissed

15. Now let the matter be also considered on merits.

16. With regard to the fourth issue admittedly under section 2(L) of the Act, ABP owns the land. In accordance with the provisions contained in section 6(1) ABP had filed a statement. Subsequently ABP filed an application under section 20 praying for exemption which has neither been pleaded in the writ petition nor in the stay petition in appeal. On 23rd February, 2008, as already noted, ABP had

entered into a Development Agreement with Merlin, inter alia, "a) To prepare plans an essential documents etc and apply to the appropriate authority for sanction of the said plan;" "b) To obtain any clearance from required authorities", such as land Ceiling authorities, environmental authorities and other authorities and also to "(i) To enter into agreement of sale, take advance or advances from the intending purchaser or purchasers of flat or flats, car park/other constructed space in respect of Developer's share of allocation only. (j) To receive sale proceeds of flat or flats, car park/other constructed space by issuing valid receipts thereof and to register deed or deeds of conveyance by appearing before the registering authority for Developer's share only. It also contained this clause "Developers Allocation shall mean the remaining portion of the said building/project including the proportionate right over common facilities, common parts and common amenities and the said property together with proportionate undivided share in the land which shall absolutely belong to the Developer after providing for the Owner's allocation as aforesaid and together with the absolute right on the part of the Developer to enter into agreement for sale, transfer, lease, let out or in anyway deal with the absolute ownership thereof." (page 384 of the stay petition). Further "Article III" of the said agreement contained a clause that "This Agreement shall be deemed to have commenced on and with effect from the date of its execution." (page 387 of the stay petition). "Article IX" of the development agreement contained clauses under "Owner's Obligation" such as:-

"9.1 The Owner shall handover the vacant possession of the entirety of the said property to the Developer after approval and sanction of plans for construction of the building on the said property from the appropriate Authorities in terms of this Agreement.

9.2 The Owner hereby agrees and covenants with the Developer not to cause any interference or hindrance in the construction and completion of the said building/project at the said property by the Developer provided the constructions are strictly in accordance with the sanctioned plan.

9.3 The Owner hereby agrees and covenants with the Developer not to do any act, deed or thing whereby the Developer may be prevented from selling, assigning and/or disposing of any of the Developer's allocation in the building at the said property.

9.6 The Owner hereby agrees and undertakes that the Owner shall cause to join such party or parties in the Deed of Conveyance as Vendor or Confirming Parties at its own costs and expenses so as to transfer the Developer's allocation.

9.7 To enable the Developer to develop the said property, the Owner shall grant in favour of the Developer General Power of Attorney and such General Power of Attorney shall remain irrevocable. (pages 405 to 406 of the stay petition).

17. The said development agreement contained a clause 10.1 under the heading "Developer's Obligation", the relevant portion of which is as under:-

"In the event the Developer fails to obtain the sanctioned plan within the said period of 12 months this Agreement shall automatically stand terminated and the Owner will be entitled to execute other developmental agreement or agreements with other Developers for development and promotion of the said property and also sell the said property if the Owner so decides." (page 408 of the stay petition).

18. It is to be noted that on the strength of the Development agreement, as evident from the argument on behalf of ABP, an irrevocable general power of attorney was granted in favour of Merlin. Thereafter, on 18th October, 2010 Merlin (page 437 of the Stay Petition) had applied before the State Level Environment Impact Assessment Authority, Government of West Bengal, Department of Environment praying for environmental clearance which was granted on 27th June, 2014 (page 318 of the Stay Petition). We have referred to some of the clauses in the development agreement to highlight the fact that Merlin on the strength of the development agreement and power of attorney is possessing the land along with ABP, the owner, and thus the land, in view of Explanation to section 2(L), is held by both such persons.

19. Again on 2nd April, 2012 with the intention to transfer the land, agreement for sale was entered into between ABP and Merlin. The fifth issue is whether the said agreement to transfer the land is in contravention of section 26(1) and 27(2). In order to understand the issue it is appropriate to refer to the relevant portions of the said sections 26(1) and 27(2) which are as under:-

26. Notice to be given before transfer of vacant land. - (1) Notwithstanding anything contained in any other law for the time being in force, no person holding vacant land within the ceiling limit shall transfer such land by way of sale, mortgage, gift, lease or otherwise except after giving notice in writing of the intended transfer to the competent authority."

(Emphasis supplied)

27. Prohibition of transfer of urban property. - (2) Any person desiring to make a transfer referred to in sub-section (1), may make an application in writing to the competent authority in such form and in such manner as may be prescribed.

(Emphasis supplied)

20. As seen, section 26(1) bars even an "intended transfer" of vacant land even within ceiling limit not only by way of sale, mortgage, gift, lease but also by any other instrument or means. The inclusion of the word "otherwise" in the section is significant as it may encompass a development agreement or an agreement for sale or even power of attorney if a person intends to transfer or desires to transfer vacant land or urban property, as has happened in this case. In the instant case, though ABP claims to have land within the ceiling limit, which is not, as statement has been filed under section 6(1) and exemption has been prayed under section 20, since from the development agreement and the

agreement for sale, intention was to transfer the land, ABP was statutorily bound to give notice to the Competent Authority which it did not and thus had violated the provisions contained in section 26(1). In view of the facts, under section 27(2) it was incumbent upon ABP to file an application in writing intimating that it was "desiring to make a transfer" of the urban property and having failed to do so it has contravened the provisions contained therein too.

21. So far as the sixth issue is concerned, it is an admitted fact that ABP had filed a statement under section 6(1) as it was holding land in excess of the ceiling limit. Consequently the Competent Authority was/is proceeding with the matter and it is yet to prepare a draft statement under section 8(1) in respect of ABP who had filed the statement. Therefore, there is no question of publication of final statement under section 9 by the Competent Authority after disposal of the objections. From a perusal of section 6 to 11 of the Act it is explicit that statute provides adequate provisions with regard to declaration of excess vacant land. If any person is aggrieved by an order passed by the Competent Authority under section 11, such person under section 12 can prefer appeal to the Tribunal. If still aggrieved, under section 13, he can prefer second appeal to High Court. Hence, Writ Court has no jurisdiction to issue a declaration that a person does not hold any land in excess of the ceiling limit or that the premises contains any vacant land in terms of the Act. The position of law is made explicit as section 5(3) stipulates that ".No person holding vacant land in excess of the ceiling limit immediately before the commencement of this Act shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement under section 6 and a notification regarding the excess vacant land held by him has been published under sub-section (1) of section 10; and any such transfer made in contravention of this provision shall be deemed to be null and void."

22. So far as the seventh issue is concerned, since we have held that orders dated 17th May, 2013 and 25th August, 2014 were obtained by suppression of material facts and the Writ Court has no power to issue a "declaration", the prayer for issuance of a direction on the respondents to issue "No Objection Certificate" does not arise at all. Moreover, the submission in paragraph 1 of the writ petition that issuance of order dated 17th May, 2013 and 25th August, 2014 tantamount to grant of "No Objection Certificate" cannot be accepted as no final statement has been issued under section 9 of the Act. Though it has been alleged in paragraph 17 of the Stay Petition that due to bias and extraneous consideration the respondents are bent upon in not issuing the "No Objection Certificate", in the absence of any statement or supporting document in the petition in support of such pleading, it is uncalled for and thus deprecated.

23. So far as the eighth issue is concerned, as ABP before entering into development agreement or power of attorney or agreement for sale with Merlin, neither under section 26(1) gave notice of the "intended transfer" to the Competent Authority nor made any application in writing to the Competent

Authority under section 27(2) that it was "desiring to make a transfer" of the urban property, it was in clear violation of the express provisions of the said sections.

24. So far as the law laid down in the judgments relied on behalf of the appellant is concerned, the judgment in BOI Finance Ltd.(supra) is not applicable as therein Supreme Court was considering the provisions in the Banking Regulation Act, 1949, Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992 and Securities Contracts (Regulations) Act, 1956 and not the provisions contained in the Urban Land (Ceiling and Regulation Act), 1976 which is a special Act having distinct statutory provisions.

25. As Urban Land (Ceiling and Regulation Act), 1976 is the special Act "to take measures for exercising social control over the scarce resource of urban land with a view to ensuring its equitable distribution amongst the various sections of society and also avoiding speculative transactions relating to land in urban agglomerations" (Statement of Objects and Reasons of the Urban Land (Ceiling and Regulation) Act, 1976) and as under the Act the owner of the land is under an obligation to disclose the intended sale of the land, the judgments in Industrial Supplies Private Limited (supra) dealing with the provisions contained in Coking Coal Mines (Nationalization) Act, 1972 and in East End Dwelling (supra) dealing with the provisions in Town and Country Planning Act, 1947 are not applicable.

26. The argument that the Appellate Authority became functus officio after order was passed on 17th May, 2013 and the impugned memorandum is bad in law cannot be accepted as admittedly orders were obtained by ABP by suppressing the fact that it had entered into a development agreement and had granted power of attorney in favour of Merlin intending to transfer or desiring to transfer the property which was in complete violation of sections 5(3), 26(1) and 27(2) of the Act and thus the judgment in Dwarka Das (supra) is not applicable.

27. The judgment in State of Maharashtra v. B.E. Billimoria (supra) is not applicable as therein Competent Authority had determined the excess vacant land which was upheld by the Appellate Authority and the question of applicability of sections 5(3), 26, 27 and 38 did not arise, whereas in the case in hand ABP had admittedly obtained orders from the Writ Court and before each of the authorities by suppressing facts regarding the intended transfer and the transfer of the land. The judgment of the Supreme Court in Hindusthan Petroleum (supra) is inapplicable as it deals with the provisions of the Land Acquisition Act, 1894 which are not akin to the provisions in the Urban Land (Ceiling and Regulation Act), 1976.

28. Since the fact of entering into development agreement, grant of power of attorney, agreement for sale and deed of sale have been suppressed before each of the authorities and the High Court, the principles of law laid down in paragraph 20 in Mayar (H.K) Ltd. (supra) are not applicable. For the same reason

the judgment in Kapra Mazdoor Ekta Union (supra) is not applicable which is a case dealing with procedural illegality.

29. Since ABP had obtained orders by suppression of material facts before the High Court as well as before the authorities and thus orders passed by the Authority and Court are non-est in the eye of law, the principles of law laid down in paragraph 34 in the judgment of the Supreme Court in Rajeev Hitendra Pathak (supra), which deals with the provisions of Consumer Protection Act, 1986, are not applicable.

30. The law laid down in paragraphs 12 and 13 in Radhakishan Laxminarayan (supra) is not applicable as therein Supreme Court was considering the provisions of the Transfer of Property Act, 1882 - a general Act and not of a special Act.

31. Since statute postulates that notice in writing is to be given for "intended transfer" and "any person desiring to make a transfer" of urban property shall have to make an application, the law laid down in paragraphs 6, 7 and 8 in Prasanta Kumer Pahari (supra) is not applicable. Moreover it is a case of contract having an arbitration clause as evident from paragraph 7 of the said judgment.

32. The judgment in Krishna Narayan Mukherjee (supra) is not applicable as it deals with the question of agricultural land in an urban agglomeration and not with a case of intended transfer.

33. The principles of law laid down in SRM Exploration (supra) that "the same shows a legislative intent to not void the transaction even if in violation of the said Act." (paragraph 11) cannot be applied to the facts of the instant case in view of the specific provisions contained in sections 5(3), 18, 26(1), 27(2) and 38 of the Act.

34. The proposition of law in paragraph 11 in Rameshchandra Shamjibhai (supra) is inapplicable as the appellant had not only violated the provisions contained in section 26(1) and 27(2) but also section 5(3) of the Act.

35. The principles of law laid down in paragraph 12 in The Knight Sugar (supra) is not applicable as under the Act notice has to be issued before a person intends to transfer and under the Act State has the right to make preemptive purchase.

36. Since admittedly ABP had suppressed facts and the conduct of the Merlin is far from encouraging as it had belatedly disclosed by filing affidavit in opposition only the development agreement upon the renewed direction of the Court on 15th September, 2015 to file affidavits and did not disclose the irrevocable power of attorney, agreement to sale and deed of sale and as no one cannot get away with misrepresentation, distortion and suppression of material facts which, as noted, have been perpetrated at every stage of the proceedings - before the Competent Authority and before the Appellate Authority and also before the High Court in the writ proceedings, in W.P. 327 of 2010 and in W.P. 7378 (W) of 2012 and even this proceedings, the learned Single Judge was justified in dismissing

the writ petition.

37. Hence, for the reason as aforesaid the appeal, being MAT No. 25 of 2016 is dismissed. Accordingly the application being CAN 247 of 2016, is also dismissed.

38. The appeal, being MAT No. 26 of 2016 is also dismissed. Accordingly the application being CAN 248 of 2016 is dismissed.

39. Since by development agreement, by the power of attorney and by the agreement for sale, ABP had intended to transfer the land and by deed of sale it had subsequently transferred the land to Merlin, the respondent no.1 to 3 are at liberty under section 26(2) of the Act to exercise option to purchase the land and to take steps under sections 18 and 38 of the Act.

40. In the facts and circumstances ABP, the appellant no.1 and Merlin, the respondent no.4 in MAT No. 25 of 2016 shall pay costs of Rs.8500/- and Rs.1700/- respectively to the Special Secretary to the Government of West Bengal, Urban Development (urban Land Ceiling) Department, Kolkata, the respondent no.3.

41. In the facts and circumstances Merlin, the appellant no.1 and ABP, the respondent no.4 in MAT No. 26 of 2016 shall pay cost of Rs.8500/- and Rs.1700/- respectively to the Special Secretary to the Government of West Bengal, Urban Development (Urban Land Ceiling) Department, Kolkata, the respondent no.3.

Mir Dara Sheko, J.—I agree.

42. Later:

43. After judgment is delivered, Mr. Sarvopriyo Mukherjee, learned advocate appearing for the Merlin and Mr. Navneet Mishra, learned advocate appearing for the ABP pray for stay of the operation of the judgment and order which is opposed by Mr. Pranab Kumar Dutta, learned senior advocate for State.

44. Since we find that no such prayer was made before the learned Single Judge and in view of the facts and circumstances as discussed hereinbefore, the prayer for stay is considered and refused.

45. Urgent photostat certified copy of this judgment and order, if applied for, be furnished to the appearing parties on priority basis.