

(2023) 11 CAL CK 0053

In the Calcutta High Court

Case No : WPA No. 4014 Of 2011, 7176 Of 2012, I.A. NO. CAN 1 Of 2011 (OLD NO. CAN 7477 Of 2011)

Ajay Kumar Mishra

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 30-11-2023

Acts Referred:

Right to Information Act, 2005 — Section 19(1)

Citation : (2023) 11 CAL CK 0053

Hon'ble Judges : T.S. Sivagnanam, CJ;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Anindya Lahiri, Anish Chakraborty, Sirsanya Bandopadhyay, Tirthankar Dey, Arka Kumar Nag, Saptangsu Basu, Kumar Gupta, Ayan Banerjee, Piyush Jain

Final Decision : Dismissed

Judgement

1. Since the prayer sought for in both the writ petitions are more or less identical and concerns the very same property, the writ petitions were heard together and are disposed of by this common judgment and order.

2. At the request of the learned advocates appearing for the writ petitioner WP No. 7176 (W) of 2012 is taken as the lead case and the facts stated therein are noted which would suffice for arriving at the decision in both the writ petitions.

3. We have heard Mr. Anindya Lahiri, Mr. Anish Chakraborty, advocates appearing for the petitioners, Mr. Sirsanya Bandopadhyay, Mr. Tirthankar Dey and Mr. Arka Kumar Nag, advocates appearing for the respondents, Mr. Saptangsu Basu, Ld. Senior Advocate, Mr. Kumar Gupta, Mr. Ayan Banerjee, Mr. Binay Kumar Jain and Mr. Piyush Jian advocates appearing for the respondent no. 4 and for the respondent no. 9.

4. The writ petitioner is an association consisting of residence in the HB Block in Salt Lake, Kolkata. The association has prayed for an issuance of a writ of

certiorari to quash the Memo dated 25.02.2010 permitting the transfer and change of the original purpose of the land being HV 334, Sector III, Salt Lake City to the 9th Respondent M/s. Synergy IT Infrastructure Private Limited and the two notifications issued earlier by the Government of West Bengal dated 06.05.2005. The Government of West Bengal Urban Development Department by order dated 10.03.1993 allotted 33 cottahs of land in Plot No. 334 Block HV in Sector III in Bidhannagar to the Nightingale Diagnostic and Eye Care Research Center Private Limited for a period of 999 years on payment of a provisional salami of Rs. 30,000/- per cottah for the purpose of construction of a hospital. The allottee was directed to make requisite deposit and it was ordered that unless the full amount is paid within 90 days from the date of issue of allotment order, interest will be charged at the rate of 7% per annum for the first two years and 10% per annum for the third year. Upon payment of the amount possession of the plot will be given to the allottee after the execution and registration of the lease deed on usual terms and conditions. One of the conditions in the letter of allotment was that the allottee shall reserve 10% of the hospital beds for the needy and deserving patients and only would be referred by the Government of West Bengal and shall provide free treatment to 40 patients as already proposed by the allottee in their letter dated 07.05.1992. The said allottee had paid the entire salami and the lease was entered into between the State and the allottee on 12.01.1995. The allottee was put in possession of the property. Some of the relevant covenants in the lease deed were that the allottee has to construct the building in conformity with the building rules as may from time to time be framed by the Government or other authority prescribed in that behalf and according to the plans, specifications, elevations, designs and sections sanctioned by the authority within three years from the date of possession of the land or such extended time as may be allowed by the Government in writing. Clause 8 of the lease deed stipulated that the lessee/allottee shall not assign or transfer the land or any part of the land or structure retained thereon without the previous permission of the Government in writing. In case of transfer or assignment of the lease, the lessor shall have the right of pre-emption and upon the exercise of this right, the building constructed by the lessee on the land shall be taken over by the lessor (Government) at a valuation of the building made by the lessor on the basis of the cost of construction of the building less depreciation at the usual rate or market value thereof, whichever is less. Clause 9 states that the allottee shall not use or allow to use the land or the structure thereon or any part thereof for any purpose other than the residential purpose without the prior permission in writing of the Government or other authorities. Clause 11 states that the lessee shall not remove any part from the demise land or carry or allowed to carried on in the land any unlawful, illegal or immoral activities which may be considered offensive or the source of any annoyance, inconvenience or nuisance to the areas surrounding the premises. Further the lease deed provides that if there is any breach of any of the terms and conditions and covenants as contained in the lease deed, the lessor (Government) shall have the right to reenter into the possession of the land or any part thereof and there upon lease shall forthwith

stand determined.

5. Before we examine the effect of the conditions contained in the lease deed as was emphasized by the learned advocates for the petitioners we need to point out that Clause 9 in Page 34 of the lease deed is redundant and inapplicable to the lessee. In the said clause there is an embargo that the land should not be use for any other purpose other than the residential purpose. This condition cannot be made applicable since admittedly the order of allotment which preceded the lease deed was for a non-residential purpose namely construction of a hospital. Probably the authorities have adopted a standard format and this error has crept in and consequently it has to be held that Clause 9 in page 34 of the lease deed is not applicable to the lessee.

6. Pursuant to the deed of lease, the possession was handed over to the allottee on 20.06.1995 as seen from the possession certificate which mentions the extent of the land as 34.4071 cottahs. The petitioner association has prayed for setting aside the order dated 25.02.2010. The said order has been passed by the Government of West Bengal, Urban Development Department granting permission to M/s. Nightingale Diagnostic and Eye Care Research Center Private Limited to transfer the land in favour of the 9th Respondent herein M/s. Synergy IT Infrastructure Private Limited. The order records the allotment of the land to M/s. Nightingale for the purpose of construction of a hospital, possession was handed over on 20.05.1995. It is seen that the said lessee by letters dated 03.03.2008 and 24.09.2009 requested for permission to transfer of the leasehold interest in respect of the said plot of land in favour of the 9th Respondent and that the land will be used for IT/ITeS purposes by the transferee company and enclosed the requisite documents. The matter was considered by the appropriate authority of the Government of West Bengal and permission for transfer of the leasehold right and change of land use purpose was granted. Further it has been recorded that in terms of the order of the department dated 08.01.2010, the lessee has deposited the requisite permission fees for both the cases namely the transfer of leasehold right and change of land used to the tune of Rs. 1,03,22,130/- and Rs. 34,40,710/- respectively. The Government after taking note of the notification dated 06.05.2005 read with notification dated 17.04.2007 and Clause 2(8) of the lease deed dated 10.01.1995 allowed M/s. Nightingale to transfer their leasehold interest in respect of land in question in favour of the 9th Respondent and in terms of the notifications and Clause 2(9) of the lease deed, the Governor was pleased to allow the 9th Respondent to use the said land for IT-ITeS purposes subject to the execution of a deed of assignment of a lease not deviating from the terms and conditions of the original lessee.

7. On 30.08.2010, the application was made by the residents of HB Block under the Right to Information Act stating that the plot in question was lying vacant for more than 25 years and during the previous month the entrance gate was constructed by certain persons and they reliably came to know that a high-rise building is to be constructed in the said plot and therefore various questions were

posed to the authorities and information was called for. It appears that requisite information was not forthcoming and an appeal under Section 19(1) of the Right to Information Act, 2005 was filed after which the reply furnishing certain information was given on 09.11.2010. Thereafter in the year 2012, the present writ petition had been filed. The contentions of the learned advocates appearing for the petitioner are hereunder:

(1) The plot of land does not bear any plot number in the working plan dated 09.04.1981 and earmarked by a "square mark" which depicts the same as a park if compared with the "legends" of the plan since all other similar square marked areas have been converted into parks.

(2) An area which has been earmarked as a park cannot be converted for a commercial use.

(3) No notification was issued under the relevant provisions of the West Bengal Town and Country (Planning and Development) Act, 1979 for amending the plan.

(4) As per the brochures issued by the Government of West Bengal in the year 1982 Sector I, II and III are residential sectors and in view of such position, the allotment made to the 9th Respondent for using the land for IT and IT enabled services is contrary to the pre-dominant residential character of the area which has been recognized by the Government of West Bengal in their notification dated 05.04.2010.

(5) The impugned permission to transfer has caused substantial loss to the Government Exchequer.

(6) In terms of the Clause 11 of the lease deed, there is a restriction from doing anything which will cause annoyance, inconvenience or nuisance in the area and IT services which would cater to population of 2523 persons per day will cause great annoyance, inconvenience and nuisance.

(7) The impugned transfer made in 2010 is bad as it relies on notification dated 06.05.2005. By relaxing clause 2(8) of the lease deed and the said notification applies only to industrial and commercial plots and not to plots which have been granted for being used for residential purposes. Further the impugned permission has been granted as a special case without there being any provisions for treating any case as a "special case".

8. The respondent State Government sought to sustain the impugned order contending that the appropriate procedure has been followed and there is no error or illegality in the same and the plot in question was always a commercial plot and transfer of lease was permissible in the terms of the notification issued by the State Government and change of usage is also permissible and upon decision being taken the requisite fees has been remitted and the transfer has been affected and at that juncture this writ petition has been filed as a result of which the plot remains unutilized. It is submitted that to the best of the knowledge of the 9th Respondent there is no master plan for Salt Lake City

which was developed as a planned township under the control and management of the Department of Irrigation and Waterways, Government of West Bengal and the land utilization was done on the basis of working plans drawn from time to time.

9. The first working plan was drawn on from April 09, 1981 and the writ petitioner has referred to the said working plan. It is submitted that in the first working plan the plot had not been allotted with any number and was shown as "reserved for future use".

10. In the second working plan which was drawn during 1988-89 plot no. 334 was assigned and the plot was earmarked as a commercial plot. On March 10, 1993, the said commercial plot was allotted to M/s. Nightingale, they could not construct a hospital in the said land. The Government of West Bengal took a policy decision as notified in notification dated 06.05.2005 in respect of plot lying unutilized. Subsequently another notification dated 17.04.2007 was published for enabling charging of fee for change of usage and for allowing transfer of the plots by enhancement of rates.

11. In the Third working plan which was drawn during 2005, the plot was earmarked as Nightingale Hospital. M/s. Nightingale made an application on September 29, 2009 for change of purpose from construction of hospital to IT and ITeS projects which was granted on 25.09.2010 upon payment of requisite fee, transfer fee and change of lessor fee. Further it is submitted that none of the plots which were shown as "reserved for future use" have been converted into parks. There is no document produced to show that the plot was earmarked as a park. The plans are not master plan but working plan which will be evident from the judgment of the Hon'ble Supreme Court in *Humanity and Another Versus State of West Bengal and Others* 2011 6 SCC 125. It is further submitted that HB Block has less than 350 plots and the block has got three green areas one huge park and playground and one community center with a play area and this will go to show that the plot in question was never earmarked as a park. The original allotment was for the purpose of hospital and the change of usage permitted is for IT sector and both of which are industries and the same will not change the character of the said plot.

12. The Government of West Bengal in WP No. 4014 of 2011 has taken a stand that as per the present policy decision of the Government of West Bengal, hospital is considered as an industry. Therefore, the change of use of the land from a hospital to IT services cannot be held to be change of lessor. There is no restriction that Sector III is wholly a residential sector and even the brochure states as "mainly residential" plots between the eastern metropolitan by-pass and the plot in question are being used for commercial/industrial purposes, the plot opposite is the Eastern Zonal Cultural Centre and the building next to it is a mall with a multiplex. The writ petition cannot be treated to be a public interest litigation.

13. As noted in the preceding paragraphs, the writ petitioner association has not only challenged the transfer of allotment in favour of the 9th Respondent dated 25.02.2010, but has also challenged two of the Government notifications both of which are dated 06.05.2005. Both the notifications were published in the Kolkata Gazette and made known to the public on and after its publication. There is no explanation whatsoever given by the association as to why the association has not questioned those notifications at any earlier point of time and the present writ petition has been filed in the year 2012 after the allotment was transferred in favour of the 9th Respondent by order dated 25.02.2010. The first notification which was issued by the Government dated 06.05.2005 states that it has come to the notice to the Government of West Bengal that quite a good number of industrial/commercial plots and industrial/commercial plots with industrial/commercial units in Bidhannagar are still lying unutilized although the lessees have taken the delivery of possession of such plots of land from the Government long ago and in some cases the lessee of industrial/commercial plots becomes unable to carry on their industrial/commercial units in long run. The notification also states that the lessee approached the Government for permission to transfer the plots of land to other entrepreneurs for various reasons and one of the major reasons being financial inability, to implement the project or to carry on their projects for them. The Government had been dealing with such proposal case by case according to the. Further it was noted that the process becomes lengthy and time consuming. The plots of land in the process, remains unutilized although there is a huge demand for land for expansion of industries in the state. Therefore, in order to streamline the entire process and to ensure that all unutilized plots of industrial and commercial land and industrial and commercial land with industrial/commercial units in Bidhannagar are put to effective use the Government in terms of Clause 2(8) and Clause 2(6) (a) of the lease deed as well as other relevant clauses restricting the transfer to order that the Government of West Bengal shall allow the lessee of the land to out-right transfer the leasehold right either partly or wholly for the unexpired period of lease subject to certain conditions laid down in the said notification. The notification states that the lessee shall have to apply to the Principal Secretary to the Government of West Bengal, Urban Development Department for permission for transfer setting out the reasons.

14. The Government by another notification dated 06.05.2005 stated that it has come to the notice of the Government of West Bengal that a quite a good number of industrial plots in Sector V and commercial plots in Sector V and outside Sector V are lying unutilized even after delivery of possession of the said plots to the lessee which were made long ago and with a view to streamline the entire process, the Government in terms of Clause 2(9) of the lease deed allowed the lessee or transferee of lease right to change his old project for which the land was allotted to him/her subject to the observance of the formalities mentioned in the notification. Formalities being the payment of the fees at the requisite rate. Further it was stated that the character of the land "industrial/commercial" shall

have to be retained and cannot be changed. The first notification dated 17.04.2007 by which the Government revised the rate of the permission fees and enhanced the same to Rs. 1,00,000/- per cottahs for both IT and Non-IT projects. On the same date namely 17.04.2007, there was another notification where the Government increased the permission fees for transfer of leasehold right from Rs. 1,50,000/- to Rs. 3,00,000/- per cottahs for industrial land and instead of Rs. 3,00,000/- for commercial land, it was increased to Rs. 6,00,000/-.

15. The foundation of the writ petitions is by referring to the plan. Admittedly the plan which was relied on by the petitioner is not a master plan for the Salt Lake City and appears to be only a working plan and the working plan has been revised from time to time. The petitioner has referred to and relied upon the first working plan where the land in question as well as the adjacent land and several other land have been marked as "reserved for future use". The contention of the writ petitioner is that several of such lands which were earmarked as "reserved for future use" have been converted into parks and the site in question has to be retained as a park. In the second working plan plot no. has been given for the said plot and it has been designated as a commercial plot. The theory that the land was earmarked as a park has not been established by the petitioner. Admittedly in the first working plan, the plot in question along with the adjacent areas was shown as "reserved for future use" and admittedly the adjoining properties have been used for construction of houses and the properties situated opposite to the plot in question are commercial or for other non-residential activities. Therefore, the contention of the petitioner that the land in question has to be retained as a park deserves to be rejected.

16. The second embargo which prohibits the petitioner from contending that the land has to be retained as a park is on account of the fact that in the second working plan the land in question was classified as a commercial property and plot number. was assigned. This second working plan was drawn in the year 1988-1989. There was no challenge to the said plan and therefore in the year 2012, the petitioners cannot be permitted to maintain the challenge to something done in the year 1988-1989 which was well within the jurisdiction of the Government of West Bengal since the land in question was "reserved for future use" and the Government thought fit to use the land for commercial purpose and accordingly delineated the same as commercial property and also assigned the plot number. In the year 1992, the plot has been allotted for the construction of hospital which is undoubtedly a non-residential activity. There was no challenge to such proceedings and lease was granted to Nightingale for 999 years and the entire salami was paid by the Nightingale and they were put in possession of the property, however, no construction was put up by Nightingale. In the year 2005, the Government took note of the fact that several such plots though allotted, possession handed over remained unutilized. Since the land in question was leased out, the Government had full authority to put the land in question for the best possible use. Even prior to the issuance of the notification in the year 2005-2007, the Government has been permitting transfer of the lease

by original lessor and also change of user of the land in question on the case to case basis. This was found to be time consuming and in order to streamline the entire process, a policy decision was taken in the year 2005 which was published as a notification in the Government Gazette. The policy decision has not been shown to either arbitrary or unreasonable more so, when the Government was the lessor and it is for the lessor to consider as to how best the project originally developed should be put to best use. The petitioners cannot maintain a challenge to the notification issued in the year 2005 by filing the writ petition in the year 2012. That apart, though there is a prayer sought for to quash the notification issued in the year 2005, the petitioner has not made out any ground to demonstrate as to how the notifications are bad in law. Admittedly, the Government had jurisdiction to pass the orders and did not lack competency and such is never the case of the petitioner. The petitioner has not been able to demonstrate as to how the notification in question is manifestly arbitrary or unreasonable. It would be a different matter if the Government takes a decision and issues a notification permitting transfer of a land earmarked for park or children's playground for a commercial or any other activities. In fact, the court has entertained a writ petition in respect of one such matter and also granted the interim orders. This is so because once the land in question is earmarked as a park or children's playground, the authority becomes the custodian and the custodian cannot do something which will amount to be in breach of trust on their own part when the land which has been reserved for a public purpose has been preserved as such as the authority concerned is only a custodian. However, in the instant case, the land in question was never allotted as a park or a children's playground and the first working plan had earmarked the land in question as "reserved for future use". In WP No. 4014 (W) of 2011, the Government of West Bengal has contended that as per the recent policy decision, the Government considers hospital as industries. Be that as it may, the plot in question was originally earmarked for commercial use and at present it is to be used for a commercial purpose. The 9th Respondent has asserted that none of the areas which was earmarked in the first working plan as "reserved for future use" has been converted into park.

17. The learned advocate appearing for the writ petitioner referred to the affidavit-in-reply filed by the writ petitioner to the affidavit-in-opposition filed by the respondent and elaborately referred to the water requirements for the area and submitted that if the IT infrastructure is allowed to be established and the building is constructed, the total water requirements could be 144 KLD and since it is a commercial activity, the 9th Respondent has to make arrangement for the water and inevitably the ground water has to be drawn and this will grossly affect the residential area.

18. In our view, the scope of the writ petition cannot be expanded by the writ petitioner by raising such new points in the affidavit-in-reply to the affidavit-in-opposition filed by the said respondent. This is because the affidavit-in-opposition is to the averments set out in the affidavit filed in the writ petition,

and the respondent will controvert the allegations made therein. In the reply to such affidavit-in-opposition the petitioner cannot be permitted to set up a new case and those new points cannot be taken up for adjudication in the present writ petition.

19. Since we find that the issue pertaining to the alleged depletion of ground water resource in the areas etc. on account of the construction which may be put up in the property in question was never the ground of challenge in the writ petition and therefore the same is not permitted to be canvassed by petitioner in this proceeding. However, it will be well open to the petitioner to approach the concerned authorities with their grievance if so advised.

20. For all the above reasons, we find that no relief can be granted in the writ petition and both the writ petitions are dismissed. No costs.

I Agree.