

(2015) 08 AHC CK 0228

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 41458 of 2007

D.L.F. Ltd.

APPELLANT

Vs

Chief Executive Officer, Noida

RESPONDENT

Date of Decision : 31-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2015) 8 ADJ 601 : (2015) 113 ALR 411 : (2015) 6 AWC 5856 :
(2016) 1 BC 405

Hon'ble Judges : Krishna Murari and M.C. Tripathi, JJ.

Bench : Division Bench

Advocate : Shesh Kumar and T.P. Singh, for the Appellant; R.P. Singh, S.C. and V.P. Mathur, for the Respondent

Final Decision : Partly Allowed

Judgement

Krishna Murari, J.—The petitioner is a company duly incorporated under the provisions of Indian Companies Act, 1956 and is engaged in the business of developing and setting up housing colonies and commercial complex. The tender submitted by the petitioner for commercial plot No. 003 at Block No. M, Sector 18, before the respondent No. 1 New Okhla Industrial Development Authority (hereinafter referred to as the "Development Authority") was accepted and allotment letter dated 12.4.2004 was issued to the petitioner. The petitioner was put under an obligation to pay a sum of Rs. 40,25,24,433.25 being 25% of the allotment money after adjusting the earnest money of 3 crore already deposited within fifteen days from the date of the acceptance letter. The balance 75% of the premium amount was payable within 90 days from the date of issuance of the acceptance letter. In the meantime, public interest litigation was filed by one Anil Kumar Srivastava being writ petition No. 10137 of 2004 alongwith an application for stay challenging the scheme for allotment of the aforesaid commercial plot without impleading the present petitioner as a party. The High Court vide order dated 12.3.2004 issued notices but did not grant any interim

order, against which the said Anil Kumar Srivastava filed a Special Leave Petition before the Hon"ble Apex Court being S.L.P. No. 7790 of 2004. Again the present petitioner was not impleaded as a party. Hon"ble Apex Court vide order dated 28.4.2004 while issuing notice on the Special Leave Petition was pleased to grant an interim stay to the following effect:

"Until further orders, all the proceedings by the respondent-authority shall remain stayed."

2. The present petitioner moved an application before the Hon"ble Apex Court for being impleaded in the proceedings and also applied for vacation of the stay order dated 28.4.2004. A request was made by the parties before the Hon"ble Apex Court on 9.7.2004 to transfer the Public Interest Litigation pending before this Court, which was accepted and the proceedings of Civil Misc. Writ Petition (PIL) No. 10137 of 2004 pending before this Court was transferred to the Hon"ble Supreme Court and directed to be listed on 23.7.2004. After hearing the parties vide judgment and order dated 20.8.2004 the petition was dismissed by the Hon"ble Apex Court and on the request made by the petitioner herein, time for payment of balance 75% amount as per Clause 12 of the allotment letter was extended and the petitioner herein was directed to pay the same within one week of the date of judgment i.e. by 27.8.2004. It may be relevant to quote the operative portion of the judgment and order dated 20.8.2004 [Anil Kumar Srivastava Vs. State of U.P. and Another, :

"For the foregoing reasons, we do not find any merit in the Civil Appeal No. 50 of 2004, arising out of SLP (C) No. 7790 of 2004, as well as in the Transferred Case No. 54 of 2004 (Writ Petition No. 10137 of 2004 of Allahabad High Court) and the same are accordingly dismissed, with no order as to costs. We direct the respondent No. 3 to pay respondent No. 2 the balance 75% of the premium in terms of Item 12 of allotment dated 12.4.2004 within one week from the date of pronouncement of this judgment."

3. It is an admitted case between the parties that the petitioner deposited the balance premium amounting Rs. 129.75 crore by 27.8.2004 as directed by the Hon"ble Apex Court and thus discharged the liability imposed upon him by Clause 12 of the allotment letter dated 12.4.2004. It has been pleaded that after making payment, as aforesaid, and despite repeated request made by the petitioner the respondent Development Authority failed to execute the lease deed and hand over possession of the said commercial plot, vide letter dated 2.2.2005, the Development Authority for the first time intimated the petitioner that since the balance amount was not paid by 10.7.2004 as stipulated in the terms and conditions of the allotment letter dated 12.4.2004, as such, a sum of Rs. 74,15,735/- being interest on interest would be payable by the petitioner additionally. This amount of interest was being claimed by the respondent No. 4 for the period between 10.7.2004, the date of deposit as per clause-12 of the letter of allotment and 27.8.2004 when the said deposit was made by the petitioner under the direction of the Hon"ble Apex Court extending the time to

make said deposit. The petitioner made protest that that no interest is chargeable as the time for deposit was extended by the Hon''ble Apex Court and the deposit was made within the time extended under the order but in order to avoid further delay on the execution of the project, vide letter dated 22.2.2005 the petitioner deposited a sum of Rs. 2,74,92,733.25 towards interest and interest on interest calculated up to 22.2.2005 and requested the Development Authority to immediately execute the lease deed and to hand over the possession of the plot. The said deposit was made by the petitioner under protest and without prejudice to the contention that it was not payable by it. Still the respondent Development Authority did not execute the lease deed or hand over possession of the plot. In order to discuss the matter, the representative of the petitioner called upon the respondent Development Authority to expedite the matter. During the course of discussion, the representative of the petitioner was informed that a sum of Rs. 59.25 lacs towards penalty was also payable and only upon payment of penalty, the lease deed will be executed and possession would be handed over. In order to avoid delay in implementation of the project, the petitioner again deposited a sum of Rs. 59.25 Lacs towards the alleged penalty again under protest vide challan No. 17077 dated 25.2.2005. The petitioner vide letter dated 25.2.2005 informed the Development Authority that no penalty was payable but the same was being deposited under protest and without prejudice to the contention that it was not payable and this amount alongwith illegally charged interest and interest on interest was refundable.

4. Subsequently, the petitioner made an application before the Hon''ble Supreme Court being I.A. No. 3 of 2005 making following prayer:

"(a) to direct the respondent No. 2, Noida Authority, to refund to the applicant, DLF Universal Ltd., Rs. 2,74,15,735/- alongwith interest @ 15% p.a. From 22.2.2005 and Rs. 59,25,000/- alongwith interest @ 5% p.a. From 25.2.2005 totaling Rs. 4,05,26,807/- (Rupees Four Crores Five Lacs Twenty Six Thousand Eight Hundred Seven only).

(b) to pass such other and further orders as it deems fit and proper."

5. Hearing of the aforesaid application is alleged to have been adjourned on the request of of Additional Solicitor General appearing on behalf of the respondent Development Authority that the Development Authority has been advised to refund the amount to the petitioner. However, when no refund was made, the petitioner herein made another application being I.A. No. 7 of 2006. Both the applications came up for hearing on 24.1.2007 when the following order was passed:

"Over and above the bid amount, the petitioner was made to pay a sum of Rs. 2,74,15,735/- for delay payment and a sum of Rs. 59,25,000/- towards penalty for delay in execution of the lease deed. DLF, the applicant herein, paid the said amount "Hinder protest".

Applicant has filed the application for recovery of the amount of interest and the

penalty paid the applicant. The counsel for the respondent states that the sum of Rs. 2,74,15,735/- has been paid back to the applicant by cheque No. 612668 dated 6th January, 2007 drawn on Vijaya Bank, Noida. Amount towards interest stands paid. Amount of penalty has not been paid.

Counsel for the applicant submit that the amount deposited by way of penalty should also be refunded.

We are not inclined to opine on the claim of the applicant for the refund of the amount of penalty and dismiss the present application qua that amount, reserving liberty with the applicant to take any appropriate steps in a Court of law for the recovery of the said amount.

We dismiss the application as the claim does not fall in the scope of the litigation."

6. The issue in this petition is thus only confined to the refund of Rs. 59.25 Lacs deposited by the petitioner towards alleged penalty alongwith interest @ 5% per annum from 25.2.2005 till the date of refund and also interest? 15% per annum on sum of Rs. 2,74,92,733/- deposited by the petitioner under protest towards the claim of interest with effect from the date of deposit till the refund of the said amount vide cheque dt. 6.1.2007.

7. So far as the claim of interest 15% per annum on a sum of Rs. 2,74,92,733 is concerned, it was open to the petitioner to have made claim of payment of interest on the said amount, when its I.A. Nos. 3 and 7 were disposed of by the Hon"ble Supreme Court on 24.1.2007 after recording that the said amount has been paid back to the applicant. Since the petitioner did not make any claim interest on the said amount before the Hon"ble Supreme Court it is now not open to it to claim the said amount in the present writ petition.

8. In such view of the matter, the issue remains confined to question as to whether the petitioner is entitled to refund of Rs. 59.25 Lacs deposited by it towards penalty for late execution of the lease deed and any interest thereon.

9. Learned Senior Advocate appearing for the petitioner contended that there was no delay or default of any kind on the part of the petitioner in depositing the amount in accordance with the terms of the allotment letter and the balance 75% amount could not be deposited on account of the interim order passed by the Hon"ble Supreme Court staying all further proceedings and the said amount was deposited on 27.8.2004 within a period of one week allowed by the Hon"ble Supreme Court vide order dated 20.8.2004. It has further been submitted that delay thereafter in execution of the lease deed has been on the part of the respondent Development Authority as despite repeated request and letters, lease was not executed and illegal and unwarranted demand of interest and penalty was made though the said amount were deposited by the petitioner under protest. Reference has been made by learned counsel for the petitioner to the letters dated 22.9.2004, 15.11.2004 and 11.1.2005 filed as annexure Nos. 4, 5

and 6 to the writ petition requesting to the Development Authority to execute the lease deed and hand over possession of the plot.

10. A counter-affidavit has been filed on behalf of the respondent Development Authority wherein the factual aspect noted above has not been denied. It is an admitted case in the counter-affidavit that interest amount realized from the petitioner has been refunded back. Relying upon the averments made in paragraph 14 of the counter-affidavit, learned counsel for the Development Authority submitted that there was a delay of 140 days on the part of the petitioner out of which the petitioner was given benefit 115 days when the matter was drawing attention of the Hon"ble Supreme Court and the delay now comes to only 25 days for which the appropriate penalty, according to the letter of allotment, was charged and the same is totally in accordance with the terms and conditions of the allotment letter. It has further been submitted that in view of the order of the Hon"ble Supreme Court giving liberty to the petitioner to raise the dispute with respect to penalty before the Court of law for recovery of the said amount, a suit ought to have been filed and the writ petition is not maintainable.

11. We have considered the argument advanced on behalf of the parties and perused the record.

12. Penalty could be imposed in terms of clause 11 of the terms and conditions of the scheme for delay in execution of the lease deed and taking over possession. The scheme is annexed as Annexure-SA-1 to the supplementary-affidavit filed by the petitioner. Clause 11 reads as under:

"11. EXECUTION OF LEASE DEED AND POSSESSION--The successful tenderer/allottee will have to execute lease deed and take over possession of the plot within 180 days from the date of allotment after making full payment and completing of formalities as indicated in the allotment letter and check list. In case of allottee's failure to do so within the above stipulated period, the allotment of plot will be cancelled and 30% of the premium of the plot shall be forfeited. The interest and other penalties, if deposited, shall also be forfeited. However, in exceptional circumstances the extension maximum upto 90 days for execution of lease deed and taking over possession may be permitted. But these extension will be subject to payment of penalty @ 5% of total premium annually which will be calculated on day to day basis. After execution of lease, allottee will take over the possession of plot within 15 days from the concerned Project Engineer."

13. Admittedly, the amount could not be deposited by the petitioner on account of stay order by the Hon"ble Apex Court staying further proceedings. It has also not been disputed that the balance amount was deposited by the petitioner within 7 days allowed by the Hon"ble Supreme Court vide its order dated 20.8.2004. Thus the delay, if any, in making the deposit cannot be attributed to the petitioner and the deposit made by it has to be treated within time.

According to the terms and conditions of the allotment letter dated 12.4.2004, balance premium was payable within 90 days from the date of issue of the letter without any interest and thus the said amount was payable by the petitioner by 10.7.2004. The Hon''ble Apex Court stayed proceedings before the respondent Development Authority vide order dated 28.4.2004. The proceedings were disposed of by the Hon''ble Apex Court on 20.8.2004 whereby while dismissing Public Interest Litigation, the petitioner herein was allowed 7 days time for payment of balance 75% premium, which admittedly was deposited on 27.8.2004 within time. Thus, we failed to understand how the Development Authority is alleging delay on the part of the petitioner so as to invoke the penalty clause. Despite our repeated queries, learned counsel for the Development Authority failed to explain as to how there has been delay of 25 days for which penalty was charged as alleged in paragraph 14 of the counter-affidavit. He has failed to come up with any explanation. We have also not been able to understand as to how the delay of 25 days is being alleged so as to justify levy of penalty on the part of the petitioner.

14. From the aforesaid facts and discussions, it is clear that whatever the delay in making deposit by the petitioner is not attributable to it as the deposit could not be made within time on account of stay order passed by the Hon''ble Supreme Court. Since the deposit was made within the time allowed by the Hon''ble Apex Court vide its order dated 20.8.2004 the same has to be treated within time in accordance with the terms and conditions of the allotment letter.

15. The matter can be viewed from another angle. The respondent Development Authority of its own refunded the interest and interest on interest for delayed payment made by the petitioner treating the deposit made under the directions of Hon''ble Supreme Court to be within time. Thus when no interest was chargeable as delay could not be attributed to the petitioner, the demand of penalty on account of delay cannot be said to be justified.

16. The next question which arises for our consideration whether the writ petition is maintainable and the relief claimed could be granted in view of the objection raised on behalf of the respondent Development Authority that suit is the remedy and the writ petition is not maintainable. The Hon''ble Apex Court left it open to the petitioner to take appropriate steps for recovery of the said amount before a Court of law.

17. It is contended that since the dispute between the parties is one arising out of contract between them, hence, a writ petition under Article 226 of the Constitution is not maintainable nor it can be construed as an appropriate remedy and a civil suit was the only remedy available to the petitioner.

18. Admittedly, the petitioner was made to deposit the penalty, which it did under protest, for an alleged violation of the terms of contract between the parties, providing a time of making the deposit. -Thus essentially the question is whether a writ petition under Article 226 of the Constitution of India is

maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

19. In our view, the issue is no longer *res integra* and stands settled by the judicial pronouncements of Hon'ble Apex Court. Reference may be made to the decision in the case of *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, wherein after considering the views expressed in the case of *K.N. Guruswamy Vs. The State of Mysore and Others*, *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, and *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, has observed in paragraph 28 as under:

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others*]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

20. There is yet another aspect of the matter. Admittedly, the dispute in the case in hand arose between the parties in 2004 when litigation started in respect of plot allotted to the petitioner. This petition was filed before this Court in 2007 and has remained pending till date i.e. 2015. The question is whether the petitioner should be relegated to the remedy of suit at this stage when the writ was entertained by the Court and has remained pending for such a long time. The Hon'ble Supreme Court also considered the issue where the matter has remained pending for a long time in the case of *ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Limited and others* (Supra). The Hon'ble Apex Court after noticing its earlier judgment has observed as under:

"54. Apart from the above reasons given by us to interfere with the judgment of the Appellate Bench of the High Court, we have one other reason - why we should drive the appellants to a suit. The claim of the appellants was rejected by the respondent in the year 1994. The respondent challenged the basis of rejection by way of a writ petition in the year 1996. The objection as to the maintainability of the petition was rejected by the High Court by its judgment dated 15.5.1997. We are now in the end of year 2003. We at this distance of

time and stage of litigation do not think it proper to relegate the parties to a suit. To direct the appellants to approach a Civil Court at this stage would be doing injustice to the appellants. In this view of ours, we are supported by a number of decisions of this Court like in *Shambhu Prasad Agarwal and others v. Bhola Ram Agarwal*, wherein this Court though noticed the fact that the appellants had an alternate remedy for issuance of a letter of administration it refused to dismiss the appeal on the grounds-

"Since considerable time has elapsed the interest of justice demands that the proceeding should come to an end as early as possible and that the appeal should not be dismissed merely on highly technical ground."

55. In *Dr. Bal Krishna Agarwal v. State of U.P. and others*, this Court held:

"Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternate remedy under Section 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than 5 years. Since the question that is raised involves a pure question of law and even if the matter is referred to the chancellor under Section 68 of the Act it is bound to be agitated in the Court by the party aggrieved by the order the chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy. We therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and respondents 4 and 5. We may, in this context, mention that respondent 4 has already retired in January 1994."

56. Similar is the view taken by the Court in the case of *Kerala State. Electricity Board and another v. Kurien E. Kalathil and others* and also in *VST Industries Ltd. (Supra)*."

21. In view of the aforesaid law laid down by Hon"ble Apex Court, we also do not feel it appropriate to relegate the petitioner to alternate remedy of suit particularly, when no complicated disputed question of fact is involved for adjudication and thus the contention advanced on behalf of the petitioner in this regard is not liable to be accepted.

22. For the aforesaid reasons and discussions hereinabove, writ petition is partly allowed to the extent that the petitioner is entitled to refund of a sum of Rs. 59.25 Lacs deposited by it under protest towards penalty on 25.2.2005 alongwith simple interest @ 9% per annum from the said date till the date of actual payment.

23. However, the relief No. (B) in respect of claim of 15% per annum on a sum of Rs. 2,74,92,733/- till 21.3.2007, the date of refund of the said amount is not liable to be granted and is refused.

24. Writ petition accordingly stands allowed in part to the extent directed above.

However, there shall be no order as to costs.