

**(2015) 02 CAL CK 0051**

**In the Calcutta High Court**

**Case No : M.A.T. 1937 of 2014 and C.A.N. 10421 of 2014**

Nagendra Rai

APPELLANT

Vs

Howrah Improvement Trust and Others

RESPONDENT

**Date of Decision : 23-02-2015**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11  
Constitution of India, 1950 — Article 14, 226, 299  
Contract Act, 1872 — Section 20, 21  
Specific Relief Act, 1963 — Section 20  
Transfer of Property Act, 1882 — Section 4

**Citation : (2015) 1 CALLT 629 : (2015) 3 CHN 87**

**Hon'ble Judges : Manjula Chellur, C.J.;Arijit Banerjee, J.**

**Bench : Division Bench**

**Advocate : Jishnu Saha, Kishore Dutta, Gurudas Mitra, Pradeep Kumar and Ashok Pandey, for the Appellant**

**Final Decision : Disposed off**

## **Judgement**

Dr. Manjula Chellur, C.J.

1. At the time of hearing CAN 10421 of 2014 by consent of both the parties the matter was taken up for final disposal on merits. Facts in brief that led to filing of the present appeal are as under:--

"Second respondent herein Howrah Improvement Trust (for short known as HIT) represented by its Chairman issued a notice inviting tender for sale of a plot of land measuring 4 cottahs 5 chittaks 9 sq. ft. i.e. 289.298 sq. mt. at premises No. 147, Salkia School Road, P.S.-Golabari, Howrah. In response to such notice, except appellant-writ petitioner, no other person came forward to bid. When HIT extended time to receive bids, the appellant filed Writ Petition No. 8036(W) of 2001. By order dated 14.5.2001 the notice inviting tender was quashed and directed HIT to issue fresh tender notice for sale of the said land." 2. By fixing base price at 6.36 lakhs per cottah, a fresh notice of tender was issued on

17.5.2001 for the aforesaid land. In response to the said tender, petitioner-appellant submitted his tender within the last date fixed for submission and acceptance of the offer. One Omprakash Singh approached the Court contending that respondent HIT authorities did not clearly indicate in the notification where to drop the tender papers. Meanwhile, the tender box was opened and out of three tenderers, offer of the appellant petitioner was found to be the highest bidder. The bid of Omprakash Singh was not accepted as his application for submission of bid was beyond the stipulated time. By letter dated 7.6.2001 Chief Executive Officer of HIT informed the appellant petitioner that his tender was accepted wherein they also mentioned that a joint measurement of the plot of land would be fixed to ascertain the actual measurement of the land so as to fix the poles for the purpose of demarcation of the land. They intimated the date as 15.6.2001 at 12.00 hrs. In fact, measurement of the plot was undertaken in the presence of both the parties and the parties signed the rough sketch as well.

3. On the very same date, in the writ petition filed by the third party, Omprakash Singh being W.P. No. 10445(W) of 2001, learned Single Judge granted an interim order directing respondent authorities not to give effect to the tender for a period of three weeks. An application came to be filed for vacating the interim order but by order dated 12.7.2001 the writ petition itself was disposed of directing the respondent authorities not to give effect to the earlier tender and to initiate fresh tender process by proper publication. Meanwhile, HIT authorities intimated the appellant-petitioner to take back the earnest money. The appellant-petitioner filed F.M.A. 187 of 2003 challenging the judgment dated 12.7.2001. In the said appeal, by an order dated 17.10.2001 the Division Bench granted stay of the operation of the order till disposal of the appeal. F.M.A. 187 of 2003 the intra court appeal was dismissed on 27.7.2010 confirming the judgment of the learned Single Judge. Thereafter, respondent authorities issued fresh notice inviting tender for sale of the plot.

4. Meanwhile, appellant-petitioner preferred a special leave petition which came to be admitted and Civil Appeal No. 9364 of 2013 was disposed of on 21.10.2013 by Hon''ble Supreme Court setting aside the orders of the learned Single Judge as well as Division Bench. Hon''ble Supreme Court held, as the offer of the appellant-writ petitioner, pursuant to the notice inviting tender, had been accepted, the notice inviting tender could not have been cancelled at that stage. It was further made clear, the Apex Court was not expressing any opinion on the merits of the claim put forth by the appellant or respondent HIT authorities with regard to the question as to whether or not there was a binding contract for sale of the plot of land in question. Thereafter, appellant-petitioner called upon HIT authorities by notice dated 8.11.2013 to complete the transaction by executing a deed of conveyance of the plot of land in his favour at an early date. Further, appellant forwarded necessary documents and Pay Order for the balance consideration of Rs. 24,88,000/-.

5. In response to the said move of the appellant, HIT authorities mentioning that

circumstances have substantially changed and consequential value of the plot has enhanced exorbitantly in the intervening period of 12-13 years, called upon the appellant to deposit balance consideration at the market rate. When the appellant refused to comply with the directions of the HIT authorities, HIT issued notice dated 24.12.2013 calling fresh tender and the said notice came to be impugned in the present Writ Petition 38345(W) of 2013 by appellant petitioner.

6. Respondent Authorities, inter-alia, filed affidavit-in-opposition putting forth their defence why writ petition should not be allowed. According to them, after disposal of the Writ Petition No. 10445(W) of 2001 they intimated the appellant-petitioner to withdraw the money deposited by him but at the instance of appellant further litigation was taken up for which HIT authorities cannot be found fault with. They further pleaded that during the pendency of the litigation for about 12-13 years value of the plot in question has exorbitantly increased, therefore, in the interest of public exchequer, HIT refused to comply with the request of appellant-petitioner. According to HIT, they were not responsible for the delay in completing the transaction, therefore, public interest should not be kept at stake.

7. On appraisal of the materials placed on record and also after referring to the case laws relying upon by the parties, learned Single Judge opined that HIT had accepted the bid of the appellant-petitioner for the purchase of plot of land at a rate which was considered as reasonable way back in 2001. The transaction could have proceeded further in completing the transaction but for intervening litigation at the behest of an unsuccessful tenderer and further, move of the appellant in continuing the litigation before the Apex Court, the delay has occurred. Therefore, respondent, HIT could not be found fault with as HIT at the earliest opportunity offered to refund the earnest money which was refused by the appellant. Learned Single Judge opined that after balancing the equities qua the parties to the contract does not lead to conclusion that appellant must have the relief in his favour. According to learned Single Judge, as the facts and circumstances do not indicate that the State's procrastination or indifference being the cause for the situation to bind the State, by referring to ITC Ltd. Vs. State of Uttar Pradesh and Others, , opined that the parameters applicable to a public authority while rescinding a contract in public interest to avoid loss to public exchequer is somewhat different from the normal or general principles pertaining to a private contract as the State is trustee of public assets vested in a "public trust" principles, therefore, enjoin upon the State a pious duty to maximize returns to exchequer from auction of such assets. Learned Single Judge, further opined, such duty which the State is under obligation performing towards public is not enjoining on a private party whose obligations are governed simpliciter by the terms of the contract. Hence, opined that duty of the State to ensure maximum return to exchequer from sale of public assets is justified and specific performance not being a legal right of a party to the contract but is a discretion of the Court would leave to the claim on equitable principles. Further held, the decision of HIT authorities to rescind the agreement with the petitioner

and to issue fresh notice inviting tender to maximize the returns to the public exchequer by auction cannot be termed as arbitrary, unreasonable or unjust so as to necessitate interference in judicial review. Accordingly, the writ petition was disposed of directing HIT authority to refund earnest deposit of the petitioner along with interest at 10% per annum from the date of deposit till repayment within 15 days from the date of judgment.

8. Aggrieved by this judgment this appeal is preferred. According to learned Senior Advocate, Mr. Saha for the appellant, there was no non-compliance on the part of the appellant-petitioner as he was prevented from depositing the balance of payment in the light of interim order dated 15.6.2001. According to him, the judgment rendered in the writ petition filed at the instance of Omprakash Singh amounts to res judicata and the judgment of the Apex Court is binding on the respondent authorities. He further contends that the stand now raised by the HIT authorities regarding escalation of price of the land and the loss that is caused to the public exchequer ought to have been raised in the earlier litigation. Therefore, the stand or the defence of the appellant-petitioner is not only hit by principles of res judicata but also amount to abandonment of right. In other words, the stand of equity was never raised before the Supreme Court, therefore, in the light of concluded contract even according to the stand of HIT in the affidavit-in-opposition filed in the previous litigation, the appellant-petitioner was entitled for the relief sought. According to him, Section 20 of Specific Relief Act clearly tilts in favour of appellant in the light of principles expressed by Apex Court in *S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others*, and *Kumar Dharendra Mullick and Others Vs. Tivoli Park Apartments (P) Ltd.*, . Learned Advocate for appellant, Mr. Jishnu Saha also brought to our notice that escalation of price cannot be a ground to refuse to execute document of conveyance which is clear dictum of the Supreme Court in several cases. He refers to *Bareilly Development Authority Vs. Vrinda Gujarati and Others*, . He further contended that writ petition was the best remedy available to him and there was no need for him to file a separate suit for specific performance as his right is crystallized.

9. So far as arguments of respondents trust, learned Senior Counsel, *ITC Ltd. Vs. State of Uttar Pradesh and Others*, . Learned Advocate for the respondent further contended that principles of res judicata or constructive res judicata would not apply to facts of the present case as the lis in the previous litigation of Omprakash Singh is entirely different from present litigation. He refers to Division Bench Judgment in *F.M.A. 187 of 2003* to contend that the lis not being the same in the previous suit and the present suit, question of issue directly in controversy would not arise. Therefore, argument of the learned Advocate for the appellant that Section 11 Explanation IV CPC applies to present appeal has to be rejected. He further contends that all the citations referred to by learned Advocate for the appellant pertain to litigation where lis was between two parties to the contract and in the present case it was at the instance of a third party. He further contends that the prayers in the present writ petition, if read, clearly

indicate that it is nothing but a relief what a plaintiff could seek in a suit for specific performance. Therefore, there is no justification in filing the writ petition by the appellant as many factual issues could not be gone into. He relies upon 1991(1) CLJ page 467 (para 19) in the case of Marine Engineer and Ors. Siddeswar Halder and Ors. to distinguish difference between writ petition from a regular suit. He contends that in the absence of any pleading of arbitrariness or mala fide on the part of the State, it is clear that the writ petition was not the solution but a regular suit. He further contends that Page 91 of the stay application shows the peculiar situation that existed as except the present appellant-writ petitioner none of the other applicants" tendered application money. Therefore, in the light of only one applicant coming forward earlier and two applicants not offering application money in the second round of tender clearly indicates all was not well in the case of the appellant-writ petitioner. Therefore, judgment of the learned Single Judge deserves to be upheld as the entire discussion in the judgment of the learned Single Judge clearly indicates on the question of equity and the respondent authorities have a stronger stand than the appellant-petitioner so far as public interest issue.

10. In the light of the above arguments we proceed to analyse the respective stand of the parties with reference to the material and citations relied upon by both the parties.

11. In order to understand whether the present writ petition is barred by principles of res judicata or constructive res judicata, we have to see the dispute between Omprakash Singh and other parties. Section 11 of Code of Civil Procedure clearly indicates that once the matter is finally adjudicated by a competent court, no party can be permitted to reopen it in a specific litigation. It is also not in dispute that principle of res judicata intends in giving finality to judicial decision. Admittedly, said principle applies to parties in respect of past litigation and future litigation, be a question of fact or a question of law which was already decided between two parties in a suit or proceeding and the decision is final, either no appeal was filed before a higher Court or appeal was filed and dismissed or no appeal lies, neither party is allowed to file future suit or proceeding between the same parties to canvass the matter once again. It is well settled that doctrine of principle of res judicata applies equally to all courts and it is immaterial in which court or in what form earlier proceedings were taken, provided it was a court of competent jurisdiction and it was really for the same cause. It applies to writ petition as well. It is well settled that the litigation or the issue which was directly and substantially in issue in the earlier suit between the same parties wherein the litigation has been finally settled between the parties and such issue cannot be re-adjudicated in a subsequent litigation between the same parties.

12. It is not in dispute, in the earlier Writ Petition No. 10445(W) of 2001 petitioner therein was seeking direction to issue a writ in the nature of mandamus commanding the respondent No. 1 and 2 and each of them and/or

their concerned authority to forthwith open the offer of writ petitioner as submitted on June 4, 2001 and consider the same in accordance with law for the sale of plots as per advertisement and intimate the decision to the petitioner within a specific time. The ground for said relief was that the writ petitioner therein after obtaining the application form normally went to the office of the HIT for submitting the same on 4.6.2001 at about 12.40 p.m. along with the earnest deposits of 10% but he was not able to find out the tender box where he could drop the application. It was further contended that after several queries he could ultimately discover the officer who had to accept such forms but the said officer did not receive the form of the writ petitioner and made an endorsement on the application "1.10 p.m. amounts to late submission". Learned Single Judge was pleased to allow the writ petition in part directing the respondent authorities not to give effect to the said tender process and call fresh tender by publishing proper notice inviting tenders with due publicity. This came to be challenged in F.M.A. 187 of 2003 and said appeal came to be dismissed. Subsequently, the appellant herein again approached the Hon'ble Supreme Court wherein Their Lordships setting aside the judgment of the learned Single Judge and of Division Bench opined that the learned Single Judge and the Division Bench were not right in directing a fresh tender process.

13. So far as F.M.A. 187 of 2003, it is the present appellant, who was the appellant. The lis that came up for consideration in the pleadings is mentioned as under:--

"The subject lands are plots at 147, Salkia School Road in Golabari area of HIT Scheme No. 11, which were acquired earlier by the trust and later found not to be needed. The said Howrah Improvement Trust (HIT), being the respondent herein in exercise of the power to sell and dispose of lands inviting tenders to dispose of excess lands, which it does not need. In 2000, the Trust issued notice inviting tenders. Only one offer was received in response thereto. The HIT extended time for dropping of tenders. On an application filed by private respondent No. 3 (lone offerer), the Court was pleased to quash the said tender and directed that fresh tender to be issued.

It is the further case of the writ petitioner that there was no instruction or statement in the notice inviting tenders where the forms were to be deposited. However, the writ petitioner finally discovered the officer who had accepted such forms. The said officer refused to accept the form of the petitioner and made an endorsement on the application "1.10 P.M. late submission" and refused to open the bids of the petitioner on such ground. Hence, the writ petitioner made it a case that he has been denied the opportunity to participate in the said tender proceedings on account of the vague advertisement published by the respondents inviting tender application form without indicating therein the place where the tenders would be authorized to receive the same.

It will reveal from the facts that there was only one valid offer, the other two offers did not deposit the application money and the offer of the writ petitioner

was not opened as it was received at 1.10 P.M. The Learned Trial Court scrutinized the facts and found from the notice inviting tenders, Annexure P-1 to the writ petition found that the place where the applications have not been specified. Neither the name of the officer who will accept the sealed tenders nor the place where the box sealed tenders can be dropped has been specified. It is only stated that the application in the prescribed form along with the requisite application money will be received up to 1.00 P.M. on June 4, 2001. The application so received will be opened at 2.00 P.M. on June 4, 2001 in the presence of the applicants or their authorized representatives.

His Lordship was also held that the notice inviting tender suffers from vagueness and thereby the writ petitioner has been denied the opportunity of participating in the selection process vitiating the same and came to a conclusion that the application money submitted by the respective parties are liable to be refunded to them with liberty to such tenderers to submit fresh tender if they wish to participate in the tender process which shall be initiated by issuing fresh notice inviting such tenders.

It is to be noted that after scrutinizing the tender paper and the tabulation sheet which was prepared by the authority for accepting successful tenderers it was found that no other tenderers whose offer could have been accepted at that point of time and thereby, the Hon'ble First Court came to a conclusion that this is nothing but it is a case of only one tenderer and there cannot be any offer of others which has been accepted by the authority.

Mr. Mukherjee, learned Senior Advocate appearing in support of the appeal contended before us that the ground mentioned by the writ petitioner could not have been accepted and nobody can believe the facts which tried to be placed before the Court that the tenderers could not find out the drop box and that is the reason for failure on the part of the tenderes to drop the tender in the box or there could have been delay in filing such tender beyond the period mentioned in the tender notice. We have considered the said argument of Mr. Mukherjee but in the said decision, the question arose for rescinding the contract which was entered into between the parties and in the instant case no agreement has yet been entered into between the parties. In the instant case, there is no concluded contract between the parties. The tender was not finalized. The parties came before this Court at the stage when the matter was yet to be finalized. Therefore, we do not think that the said decision can be a help to Mr. Mukherjee's client."

14. The appeal came to be dismissed affirming the judgment of learned Single Judge dated 12.7.2001. Against this, Special Leave Petition came to be filed. The observation of Apex Court is relevant in order to understand what exactly was the opinion of the Hon'ble Apex Court binding the parties. Their Lordships opined that the appellant thereunder submitted tender for purchase of the commercial land at the rate of Rs. 6,40,000/- per cottah in response to the notice inviting tenders, but had not filed any writ petition before the High Court claiming any relief on the basis of the communication dated 7.6.2001 of the HIT accepting the

highest offer for purchase of the land. This is the notice informing the appellant that a joint measurement with the appellant on 15.6.2001 would be held. They further observed appellant (the present appellant) cannot be granted any relief against the HIT as the appellant has not resorted to either writ petition or a civil suit when the HIT was not willing to sell the land to the appellant on the basis of the highest tender of the appellant.

15. It is further argued on behalf of the present appellant that he could not have claimed any such relief until the orders passed by learned Single Judge or by the Division Bench of the High Court in the writ petition were set aside. According to him, the learned Single Judge and the Division Bench of the High Court were not right in directing a fresh tender. It is relevant to reproduce paragraph Nos. 6 and 7 in order to understand the import of the judgment of the Apex Court.

"6. Learned counsel for the appellant, however, submitted that he cannot claim any such relief until the orders passed by the learned Single Judge or by the Division Bench of the High Court in the writ petition and in the appeal are set aside by this Court and according to him the learned Single Judge and the Division Bench of the High Court were not right in directing a fresh tender process. We find a lot of force in the aforesaid submission of the learned counsel for the appellant. The notice inviting tender is no doubt an opportunity given to different tenderers to submit their tenders and participate in the tender process but if an offer is made pursuant to the notice inviting tender and the same is accepted and the terms and conditions of the bid documents and the law provide that such acceptance will bind the authority inviting tenders then the notice inviting tender cannot be cancelled at this stage. The view taken by the learned Single Judge and of the Division Bench of the High Court, therefore, is not correct.

7. We, accordingly, set aside the judgments of the learned Single Judge as well as that of the Division Bench of the High Court but we make it clear that we have not expressed any opinion on the merits of the claim of the appellant or that of the HIT with regard to the question as to whether or not there is a binding contract for sale of the land in question."

16. In the present case, the reliefs sought in the writ petition are as under:--

"(a) Issue a Writ of and/or in the nature of mandamus commanding the respondents and each one of them accept the balance consideration amount from the petitioner and to execute and register the Deed of Conveyance in favour of the petitioner in respect of a plot of land measuring 4 cottahs 5 chittaks 9 sq.ft. i.e. 289.298 sq. mt. at premises No. 147, Salkia School Road, P.S. Golabari, Howrah-700001 forthwith;

(b) Issue a writ of and/or in the nature of Mandamus commanding the respondent authorities, each one of them, them men, agents, servants, subordinates and/or assigns to cancel/rescind/withdraw the notice inviting tender published on 24.12.2013 by the respondent No. 2 in the daily "Sanmarg" Patrika



inviting tender for sale of the plot of land measuring about 4 cottahs 5 chittaks and 9 sq.ft. situate at 147, Salkia School Road, P.S. Golabari, Howrah-1, being Annexure-P/11 herein forthwith;

(c) Issue a Writ of and/or in the nature of mandamus commanding the respondents to rescind/withdraw/cancel the decision, if any, to cancel the bid of the petitioner and/or to cancel the tender process;

(d) Issue a Writ of and/or in the nature of certiorari commanding the respondents and each one of them and their men, agents and subordinates to transmit the entire records of the case including the order and/or basis of formation thereof if any, for not executing and registering Deed of Conveyance in respect of the aforesaid plot in favour of the petitioner and to certify them and on being so certified quash the same;

(e) A writ in the nature of Certiorari commanding the respondent authorities, each one of them, them men, agents, servants, subordinates and/or assigns to transmit the entire records of the case including the notice inviting tender published on 24.12.2013 by the respondent No. 2 in the daily "Sanmarg" Patrika inviting tender for sale of the plot of land measuring about 4 cottahs 5 chittaks and 9 sq.ft. situate at 147, Salkia School Road, P.S. Golabari, Howrah-1, being Annexure - P/11 herein including the order and or basis of formation of opinion for issuing the said tender, if any so that conscionable justice may be done and to certify the same and on being so certified quash the same;

(f) Issue a writ in the nature of Prohibition prohibiting the respondent authorities, each one of them, them men, agents, servants, subordinates and/or assigns from proceeding with and/or taking any steps pursuant to the notice inviting tender dated 24.12.2013 published by the respondent No. 2 in the daily "Sanmarg" Patrika inviting tender for sale of the plot of land measuring about 4 cottahs 5 chittaks and 9 sq.ft. situate at 147, Salkia School Road, P.S. Golabari, Howrah-1, being Annexure - P/11 herein;

(g) Issue a Writ of and/or in the nature of prohibition prohibiting the respondents and each one of them and their men, agents and subordinates from transferring and/or alienating and/or parting with possession and/or executing and/or registering any agreement or deed or any other document in favour of any other person or persons save and except the petitioner in respect of the aforesaid plot of land measuring 4 cottahs 5 chittaks 9 sq.ft. i.e. 289.298 sq.mt. at premises No. 147, Salkia School Road, P.S. Golabari, Howrah-700001 forthwith;

(h) Rule nisi in terms of prayers (a), (b), (c), (d), (e), (f) and (g) above;

(i) An order directing the respondents and each of them to execute and register the Deed of Conveyance in favour of the petitioner in respect of a plot of land measuring 4 cottahs 5 chittaks 9 sq.ft. i.e. 289.298 sq.mt. at premises No. 147, Salkia School Road, P.S. Golabari, Howrah-700001 forthwith;

(j) An order of injunction restraining the respondents from giving effect to or

further effect to the decision, if any, to cancel the bid of the petitioner and/or to cancel tender process till the disposal of the petition;

(k) An order of injunction restraining the respondent authorities, each one of them, their men, agents, servants, subordinates and/or assigns from giving any effect to or further effect and/or taking any step pursuant to the notice inviting tender dated 24.12.2013 published by the respondent No. 2 in the daily "Sanmarg" Patrika inviting tender for sale of the plot of land measuring about 4 cottahs 5 chittaks and 9 sq.ft. situate at 147, Salkia School Road, P.S. Golabari, Howrah-1, being Annexure - P/11 herein;

(l) An order of injunction restraining the respondents and each one of them and their men, agents and subordinates from transferring and/or alienating and/or parting with possession and/or executing and/or registering any agreement or deed or any other document in favour of any other person or persons save and except the petitioner in respect of the aforesaid plot of land measuring 4 cottahs 5 chittaks 9 sq.ft. i.e. 289.298 sq.mt. at premises No. 147, Salkia School Road, P.S. Golabari, Howrah-700001 forthwith;

(m) To pass an ad-interim order in terms of prayers (i), (j), (k) and (l) above;

(n) Costs and incidentals of this proceeding;

17. On going through these reliefs sought in the present writ petition and the lis in the earlier round of litigation, the subject matter of litigation in the earlier round of litigation was with regard to providing an opportunity to different tenderers to submit their tenders and participate in the tender process. As a matter of fact, Apex Court opined that the appellant herein has not resorted to either writ petition or a civil suit when the HIT was not willing to sell the land to the appellant on the basis of the highest tender of the appellant. Therefore, the subject matter in the earlier round of litigation being entirely different from the present subject matter, one cannot come to conclusion that the present controversy is hit by principles of res judicata. Nothing came to be decided between the parties, i.e., HIT and the present appellant. On the other hand, Apex Court clearly said that they were not expressing any opinion so far as merits on the claim of the appellant or that of HIT with regard to the question as to whether or not there is a binding contract for sale of the land in question. When such issue or controversy is kept open, it has to be held that nothing is decided between the parties so as to bar one of the parties to raise the controversy in question.

18. In the case of Marine Engineer and Ors. Siddeswar Halder and Ors. reported in 1991(1) CLJ 467, the relevant paragraphs 26, 29, 30 and 31 are quoted under:--

26. When the ground for cancellation of the agreement is in no way referable to any of the terms of the agreement and the action impugned is arbitrary, unreasonable and violative of Article 14 of the Constitution, then writ application

under Article 226 of the Constitution is maintainable. This can be appreciated by an example. After execution of an agreement in accordance with Article 299 of the Constitution, the contractor is asked by the authority concerned not to proceed with the construction of the project on the ground that later it has been discovered that such contractor is not resident of the district in which the project is to be constructed. Can it be urged in such a situation, that as the contractor has entered into an agreement with the State Government, he cannot invoke the jurisdiction of this Court under Article 226 of the Constitution and he should be directed to knock the door of civil court for damages or specific performance of the contract, although the order is per se violative of Article 14 of the Constitution?

29. At the same time it should be pointed out that the High Court while exercising jurisdiction under Article 226 of the Constitution, which is discretionary, cannot issue a writ of mandamus in the nature of a decree for specific performance of contract. However it can direct the authority concerned to follow the rule of fair play and to act in a reasonable manner.

30. The facts of the present case are different from the facts of the case of Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., relied on by the learned Counsel for the appellants where a formal deed of lease had been executed and the petitioner company was seeking to enforce one of the terms of the deed of lease while invoking the writ jurisdiction of the High Court under Article 226 of the Constitution. In the present case it is difficult to hold that the petitioners are enforcing any terms of the contract or seeking a decree for specific performance of the contract while invoking the writ jurisdiction of this Court. Their grievance is that the order accepting their highest tenders in respect of purchase of two Marine Crafts has been cancelled without disclosing any reason. Even after an interim direction given by the Appellate Court, the ground which has been disclosed to them is arbitrary, because it is not borne out from the materials on record referred to above; as such the cancellation of the order of acceptance of their tenders is violative of Article 14 of the Constitution.

31. The State and its instrumentalities do not have the absolute right like a private individual to enter into contract with any one and to cancel the same. While cancelling a contract they have not only to follow a procedure which should be consistent with Article 14 of the Constitution i.e. after observing the rules of fair play and the principles of natural justice but the grounds for such cancellation should also be reasonable and not arbitrary. Any executive decision has to be tested on the touchstone of Article 14 of the Constitution not only so far as its procedural part is concerned but also in respect of its substantive part. Even in a case where the procedural part has been followed still the Court can examine whether the ultimate decision is consistent with the requirement of Article 14 of the Constitution. While doing so, it should not be overlooked that in exercise of the power of judicial review, the High Court should not substitute its own judgment for the decision taken by the executive authority. Such decision

should be interfered with only if this Court is satisfied that the action taken or order passed even from the administrative point of view is arbitrary or unreasonable."

19. On going through the prayers of the present writ petition as referred above, the writ petitioner is seeking reliefs what could be sought in a suit for specific performance. In the present case, when HIT offered to return the security deposit, appellant refused to accept the same. This was immediately after disposal of writ petition. He has not accepted the refund. Many factual issues have to be gone into in a suit for specific performance especially whether the parties were ready and willing to perform their respective part of the contract. The appellant is seeking to enforce a contractual obligation in public law domain. Whether there was a concluded contract between the parties is one aspect of the matter and even if there was a concluded contract between the parties whether this Court is bound to grant the reliefs sought in the writ petition is another aspect of the matter. Acceptance of bid amount will not amount to concluded contract as many other formalities have to be complied with especially remitting balance consideration of the land and other formalities like measurement of the land acceptable to the purchaser, etc. Appellant never came forward to tender balance consideration. According to him, he could not do so as at the instance of one Mr. Omprakash the matter was pending till it was disposed of by Apex Court. If the appellant had offered balance consideration and HIT refused to accept the same, it is altogether a different matter except saying that the appellant was always ready and willing to deposit the balance consideration. He has not come forward to deposit the money subsequent to the offer of refund of the security deposit by HIT till disposal of matter before Apex Court. Even otherwise whether there was concluded contract between the parties and whether discretionary relief of specific performance could be granted in favour of the appellant are all matters to be decided in a regular suit. In the absence of allegation of mala fide or arbitrariness which is not pleaded in the present writ petition, we fail to understand how the writ petition is maintainable for grant of present reliefs which could be sought in a regular suit.

20. On the other hand, HIT has now gone back in offering the land to him because of passage of time especially keeping in mind the public interest, i.e., loss to public exchequer. Having regard to the market value of the property in question, HIT took a decision to issue a fresh notice inviting tender. Whether such action of the HIT could be said to be unfair, arbitrary or whimsical in order to exercise power of judicial review. According to respondent HIT, it is a policy decision to safeguard the public exchequer since public property is involved.

21. Learned Advocate for appellant pressed into service the decision in the case ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, to contend that a concluded contract for the sale of plot of land is the basis for the writ petition. Apparently, in the above referred case no disputed question of fact existed.

22. Therefore, the above decision is of no assistance to the appellant. Next argument was with regard to the demand of market value for the land in question. According to appellant, escalation of price of the property cannot be considered as undue hardship on the part of the vendor to refuse specific performance of an agreement of sale. To substantiate his contention he placed reliance on S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, and Narinderjit Singh Vs. North Star Estate Promoters Ltd., and Union of India v. Hariram Shamji Thakkar in 1974 UJ (SC) 562.

23. As against this argument of the appellant Id. Senior Counsel representing HIT contends that the facts and circumstances in the present case compel the respondent trust to take a decision to issue fresh tender so that there is maximization of returns to the public exchequer. He further contends that the authority took decision keeping in mind interest of the public as they are the custodians of not only public property but their duty is to see that maximum returns are secured. Therefore, decision of HIT is for bona fide reasons and amounts to fair one. It appears from records that because of the inordinate delay in executing agreement in favour of the appellant by HIT on account of various factors which were not within the control of the respondent trust, there is steep increase in the market price of the plot, therefore, HIT decided to retender so as to ensure maximum returns to public exchequer when appellant refused to pay market value. Whether such decision or action of HIT is justifiable and could be approved. In a similar situation, Hon"ble Apex Court had an occasion to deal with the situation in ITC Ltd. Vs. State of Uttar Pradesh and Others, . In the said case the issue rose for consideration was whether rescission of a contract which had been erroneously entered into by a statutory authority causing loss to public exchequer was justified or not. Clearly distinguishing between the contractual obligation of a private party qua public authority in the field of contract, Apex Court opined as under:--

"105. If after effecting a transfer, the transferor finds that he had stipulated a lesser consideration (sale price or lease premium) for the transfer, due to a mistake of fact or wrong understanding or misreading of any law (and such mistake was not caused on account of any fraud, coercion or misrepresentation by the transferee) what is the remedy of the transferor? In private law, the transferor may have no remedy, as completed transactions of transfers cannot be re opened or cancelled. 106. A `transfer of property is an executed contract. Section 4 of Transfer of Property Act, 1882 provides that the chapters and sections of that Act relating to contracts, shall be taken as part of the Indian Contract Act, 1872. Section 20 of Contract Act provides that:

"20. Agreement void where both parties are under mistake as to matter of fact. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." But the Explanation thereto provides that: "Explanation. An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a

mistake as to a matter of fact." Section 21 of Contract Act provides that a contract is not voidable because it was caused by a mistake as to any law in force in India. Therefore, having regard to the provisions of Transfer of Property Act and Contract Act, a transfer can not be cancelled on the ground that parties were mistaken about the consideration.

107. The position is however different in public law. Breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider two questions. The first question is whether the transferee had any role to play (fraud, misrepresentation, undue influence etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable. 107.1. If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short recovery of the consideration, the transfer may be saved by giving the transferee an opportunity to make good the short fall in consideration.

107.2. The aforesaid exercise may seem to be cumbersome, but is absolutely necessary to protect the sanctity of contracts and transfers. If the government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the government will be shaken. To save the credibility of the government and its instrumentalities, an effort should always be made to save the concluded transactions/transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation.

107.3. If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made by him and all expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming public interest and public exchequer, grant of such equitable

relief should also be considered."

24. In the instant case, for no fault of HIT they were precluded from completing the tender process as third party Omprakash Singh approached Court and an interim order was passed against HIT not to proceed further in the tender process. When the writ petition of third party was allowed giving him an opportunity to participate in the tender, present appellant filed writ appeal which was pending for quite sometime. Meanwhile, he did not make any attempt to tender balance consideration though he refused to accept the offer of refund of security deposit. W.P. No. 10445(W) of 2001 was allowed on 12.7.2001. Appeal was filed challenging the same on 17.10.2001, Division Bench granted stay of order dated 12.7.2001. Such situation continued till 27.7.2010. But appellant did not attempt to deposit balance amount. It was within his control. No interim order of any nature was coming in the way of appellant to offer balance amount. When he was unsuccessful in the appeal he again knocked at the doors of the Apex Court and the Apex Court disposed of the matter in the above terms. Therefore, for reasons beyond the control of HIT they were not allowed to complete the process. The transferor's action was bona fide and cannot be blamed as they even offered the appellant to take the security deposit when the litigation did not favour the appellant. On the other hand, the transferee who could have tendered the balance amount never came forward to tender the money in the year 2001. We are in 2015. Action of HIT cannot be found fault with, it cannot be termed as arbitrary or illegal. HIT had no role to play for the circumstances stated above. The dispute is not between two private parties. It is between a private party and the trust created under a statute. Ultimately, individual interest must yield to the public interest. In 2001, HIT accepted the bid of the appellant at a rate which was considered as reasonable at that time. At the behest of a third party, the matter was kept pending till 2013. HIT took a decision to retender the plot in 2010 after disposal of the matter by Division Bench, however, orders of the Single Bench and Division Bench were quashed by Apex Court keeping the question open as to whether there was a concluded contract of sale between the parties. Meanwhile, value of the property has gone up by leaps and bounds. The highest offer is 46.1 lakhs per cottah as against 6.3 lakhs per cottah. When the delay is not attributable to the State and its functionaries this Court cannot find fault with the intention of the respondent trust to secure maximum returns by auction of public assets. It was open to the appellant also to participate in the auction as he had not parted with balance amount way back in 2001. It is not on account of mala fide intention on the part of the functionaries of the State or indifference of them which has led to this situation. In *Bareilly Development Authority Vs. Vrinda Gujarati and Others*, issue of loss of public exchequer never fell for consideration. Ordinarily inadequacy of price cannot be considered as a hardship to avoid a concluded contract. The parameters applicable to public authority while rescinding a contract in public interest with the sole intention to avoid loss to public interest, has to be viewed in a different manner. The bounden duty of the State who is the

trustee of the public asset creates pious duty on the State not only to protect public assets but to deal with them in a fair manner without causing any loss to the public exchequer. Individual interest must yield to the public interest. One more aspect is relevant. Page 91 of the Paper Books contains the details pertaining to opening of tender. Total four persons came forward to participate in the above tender in 2001. Except this appellant two other persons never deposited application money. Another application was received at 1.10 p.m., beyond the scheduled time to receive application. Virtually there was single tender which was in order to consider. It is well settled that when a single tender alone comes up in response to inviting tender, it is open to the authorities to refuse single tender and proceed with tender process afresh.

25. As public interest vis-à-vis loss to public exchequer is involved in the present case, the same cannot be a factor constituting undue hardship to the vendor as a ground to resist the prayer for specific performance. Consideration has to be entirely different where the State functionaries are exercising their public responsibility in the realm of public law. The decision of HIT cannot be termed as arbitrary or unfair. In the facts and circumstances of the present case, the decision of the respondent to rescind the agreement with the appellant cannot be found fault with. Their decision to issue fresh notice inviting tenders to maximize the returns to the public exchequer cannot be found fault with. It is neither arbitrary, unreasonable nor unjust warranting judicial review of the policy decision in the above circumstances. The learned Single Judge was justified in directing the relief of refund of earnest money along with interest. However, we are of the opinion, the rate of interest has to be 15 percent per annum from the date of deposit till its refund. The above exercise has to be done by HIT within four weeks from date.

26. Accordingly, the appeal as well as application is disposed of.

Arijit Banerjee, J.

27. I agree.