

**(2020) 02 CAL CK 0017**

**In the Calcutta High Court**

**Case No : C. Appeal From Order (FMA) No. 299 Of 2019**

Rupa & Co. Ltd & Anr

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

**Date of Decision : 10-02-2020**

**Acts Referred:**

Constitution Of India, 1950 — Article 14, 73, 162, 226, 246, 299, 300A, 358

**Citation : (2020) 02 CAL CK 0017**

**Hon'ble Judges : I. P. Mukerji, J;Md. Nizamuddin, J**

**Bench : Divison Bench**

**Advocate :** Jishnu Saha, Arindam Banerjee, Arpita Saha, Surabhi Banerjee, Sachidananda Pandey, Ishan Saha, Abhrotosh Majumder, T. M. Siddiqui, Nilopal Chatterjee, Jishnu Chowdhury, Chayan Gupta, Sandip Dasgupta, Ayan De

**Final Decision : Allowed**

## Judgement

I. P. Mukerji, J

The point involved in this appeal is very interesting.

It concerns a parcel of land in greater Kolkata measuring 30 cottahs, numbered as plot No.IIE/17 in Jyoti Basu Nagar, also known as New Town. It was owned by the state government, the respondent No.1. Through legal technicalities, the

ownership and control of the law was transferred to the respondent No.2 (hereinafter referred to as HIDCO). For all purposes the state is the legal owner of an entire tract of land in New Town. In response to an offer made by the appellant

No.1 (hereinafter referred to as the appellant), HIDCO by its letter dated 6th April, 2011 promised to convey to them on a freehold basis, the entirety of the said parcel of land @ Rs.13.364 lakhs per cottah aggregating to Rs.4,00,92,000/-.

Earnest representing 25% of the amount of Rs.1,00,23,000/- was to be paid

within 30 days of the said letter followed by the payment of the balance amount of Rs.3,00,69,000/- within a further period of 60 days. The land was to be used to build a modern showroom and for other commercial purposes. HIDCO promised to handover physical possession of the land on payment of the balance consideration and registration of the deed of conveyance. It reserved the right to cancel

the letter of allotment in default of payment of consideration.

The entire payment under this letter of allotment was made by the appellant.

On 24th August, 2012 HIDCO wrote to the appellant saying that the letter of allotment was issued during the period the model code of conduct was in force before the West Bengal Assembly General Election, 2011. In those circumstances, the decision to allot was reviewed. It had come to a decision that the allotment would not be on freehold basis but on leasehold basis for a period of 99 years. The sale price was to be treated as premium. It was said that this letter was issued

further to the decision of the Board of directors at its 67th meeting held on 30th July, 2012.

After receiving this letter, the appellant took legal opinion. Relying on it, it responded on 16th November, 2012. Amongst other things they said that the model code of conduct did not forbid transfer of land by HIDCO or as a matter of fact any

government company. They also said that the effect of the grant of lease for 99 years and sale was the same, in as much as both were transfers under the Transfer of Property Act, 1882. They tried to contend that if the sale was hit by the

code, transfer by lease was also similarly hit as both resulted in transfer. The appellant asked HIDCO to revoke their letter dated 24th August, 2012.

On 12th October, 2012 HIDCO forwarded a draft deed of lease to the appellant asking them to execute it. After writing this letter the managing director of the appellant had discussion with HIDCO officials on 26th November, 2012. On 6th

December, 2012 HIDCO wrote to the appellant's managing director saying that by allotment of the land and acceptance of consideration, the transfer of title had not taken place. This could only happen on registration. It was reiterated

that the transfer to the appellant would be by lease with a right of assignment. On 21st December, 2012 the appellant replied to this letter asking HIDCO to execute the deed of conveyance. Without prejudice to their other rights the appellant

also wanted to have a look at the proposed draft deed of lease.

After exchange of this correspondence, the government decided on 26th December, 2012 to formally announce its policy.

The material terms of the policy of the government made on 26th December, 2012 are as follows:-

2. And whereas there is need to introduce uniformity reduce discretion and avoid case by case decision making to ensure transparency while dealing with public assets.

3. Now, the Governor, after careful consideration of the matter, is pleased hereby to make the following Land Allotment Policy when will be applicable to land owned or held by any Department of the State Government or agency funded by the State Government in any manner:-

(i) The land allotted to any individual/company/institution etc. under the policy would be transferred to them by the Government and its parastatals by way of long terms lease for a period not exceeding 99 years. With the opinion of renewal of

such lease for the like period on the same terms and conditions and to such other terms and conditions as may be imposed and included in such renewal lease deed.

(ii)(a) The lessee under any lease granted by the State Government or its parastatals can mortgage the leasehold interest only (and not the demised land itself) on the demised land, whether in full or in part, only with the prior written permission

of the lessor.

(b) The lessee is not entitled to assign his leasehold interest, whether in full or in part, without prior written approval of the lessor and assignee shall hold the same on the same terms and conditions as in the original lease and to such other terms

and conditions as may be considered to be imposed by the lessor while granting such approval. In case of such assignment of leasehold interest the assignee concerned shall have to obtain fresh lease after expiry of the unexpired period of the

lease on payment of such consideration money and annual rent based on the prevailing market value as may then be fixed by the Lessor in granting such lease.

..

(iv) Land meant for commercial use shall invariably be auctioned to the highest bidder for which adequate publicity should be given including through the internet. Commercial use will mean use for office, shops, shopping malls, housing not



part thereof.â??

The appellant did not like this. They approached this court in or about February, 2013 by filing the instant writ application. They challenged the decision taken in the meeting of the directors at HIDCO on 30th July, 2012 cancelling the allotment.

They also challenged the letter of cancellation of allotment dated 24th August, 2012 made by HIDCO. They also attacked the letter dated 12th October, 2012 forwarding the draft lease deed as also the letter dated 6th December, 2012 and 14th

January, 2013 of the organization.

The question which falls for consideration is not unknown in administrative law. Yet it is of great importance in the administration of land matters in this state. HIDCO, which is an organ of the Government of West Bengal entered into a

contract with the appellant by issuing the letter of allotment of this large parcel of land, to be conveyed as a freehold to them. The entire consideration was paid by the latter. After receiving the entire consideration HIDCO resiled from this

transaction citing policy considerations. HIDCO was no longer interested in conveying this land freehold but proposed to grant a lease with conditions attached to it like restrictions on sub-leasing, division etc. Could the obligations accepted by

the government be avoided by citing policy? In fact, the formal policy came on 26th December, 2012 after cancellation of the allotment on 24th August, 2012. The essence of the policy was that it was not proper on the part of the government

to have offered the land freehold. It could only be offered on freehold terms.

The question is whether there was at all an enforceable contract between the government and the appellant because the letter of allotment was not properly stamped or registered to assume the character of an agreement for sale. Another significant issue is whether this court in the exercise of its writ jurisdiction should entertain this matter or it should be relegated to a civil court or civil forum?

Before proceeding to discuss the issues, I propose to give a summary of the arguments of learned counsel appearing for the parties.

Mr. Saha, learned senior counsel, appearing for the appellant viewed the transaction between the parties as conferring a right to acquire property which he described as a constitutional and human right, which could only be taken away in

accordance with law. He relied on Bishambhar Dayal Chandra Mohan & Ors. Vs. State of Uttar Pradesh & Ors reported in (1982) 1 SCC 3, 9Chandigarh Housing

Board Vs. Major-General Devinder Singh (Retd.) & Anr. reported in (2007)

9 SCC 67 and State of Madhya Pradesh & Anr Vs. Thakur Bharat Singh reported in AIR 1967 SC 1170.

Then he argued that unilateral termination of a contract, which had been done in this case was illegal referring to 1 Bharat Sanchar Nigam Limited Vs. Vodafone Essar Gujarat Limited reported in (2016) 16 SCC 1 T.o prove his argument that an allotment was a concluded contract, he cited Kumari Shrilekha Vidyarthi Etc. Vs. State Of U.P. & Ors reported in AIR 1991 SC 537. Lastly, he contended that an executive action should be prospective.

Thereafter, arguments were made for the state by the learned Additional Advocate General.

He referred to Article 246 of the Constitution as the source of power of the state legislature. Then he referred to Entry No.18 of List II of the 7th Schedule to the Constitution which empowered the state to enact laws with regard to land. He

argued that in the absence of any legislation in that field, under Article 162 of the Constitution the state had executive power over the matters with regard to which its legislature had power to make laws. The policy of the government of 26th

December, 2012 was an exercise of such power to convert agreements or allotments of freehold land into leasehold transactions.

Learned counsel submitted that the policy decision of HIDCO and the government was in consonance with the law laid down by the Supreme Court. A khil Bhartiya Upphokta Congress Vs. State of Madhya Pradesh and Ors. reported in (2011)

5 SCC 29 declared and reiterated this law. He further said that there was no difference between sale and lease admitted in the letter of the appellant dated 16th November, 2012. Learned counsel also said that the government had only

interfered with the allotments made in the above area from the last quarter of 2010-11 and not interfered with any allotment made prior to that period.

An action to cancel an allotment of lease in similar circumstances was supported by the Supreme Court in City Industrial Development Corporation Vs. Platinum Entertainment and Ors. reported in (2015) 1 SCC 558. Even if the transaction

was described as a contract entered into by HIDCO and the Government of West Bengal under Article 299 of the Constitution of India, the appellant could not show that they had a right to property under Article 300A of the Constitution,

inasmuch as the contract could not be termed as a concluded one. He referred to Jilubhai Nanbhai Khachar & Ors. Vs. State of Gujarat & Anr. reported in (1995) Supp 1 SCC 59 6 and Andhra Pradesh Industrial Infrastructure

Corporation Ltd. & Ors. Vs. S. N. Raj Kumar & Anr. reported in (2018) 6 SCC 410.

Furthermore, a contention was made that this policy decision had been taken by the government to discharge its obligation under Article 14 of the Constitution to maintain equality amongst the applicants for allotment or amongst the allottees

and also to maintain the basic constitutional principle of equality before the law and equality in the protection of the laws, in the matter of land allotment.

Lastly, learned counsel argued that the subject matter of the dispute involved, inter alia, interpretation of contractual terms, adjudication of alleged breach of contract, law of specific performance, damages and so on which could be more

properly adjudicated in a suit in a civil forum. He made a statement that HIDCO was prepared to refund the amount deposited with them by the appellant.

Mr. Jishnu Chowdhury, learned advocate made submissions, thereafter, on behalf of HIDCO. He reiterated the submission made by the learned additional Advocate General. He had a few things to add. He said that the contract was non-

statutory. Contractual rights had been modified by an administrative act proposing to convert freehold into a lease. The remedy if at all was a civil forum.

He cited Chiranjit Lal Chowdhuri Vs. Union of India & Ors. reported in AIR 1951 SC 41 to assert that a contractual right was not a right to property. He also referred to Union of India & Ors Vs. M/S. Indo-Afghan Agencies Ltd. reported in

AIR 1968 SC 718 and an unreported decision of a learned single judge of this court rendered on 29th August, 2019 upholding cancellation of allotment.

In reply Mr. Saha cited Sunil Pannalal Bantia & Ors. Vs. City & Industrial Development Corporation of Maharashtra Ltd. & Anr. reported in (2007) 10 SCC 67 for the proposition that after an allotment was made or promised the plea of

illegality or public policy could not be taken by the government. The letter of allotment of this large parcel of land was issued by HIDCO, an organ of the government on 6th April, 2011, in favour of the appellant. Further the appellant had paid

Rs.4.92 crores which was appropriated by the vendor HIDCO. Possession was retained by them, he said.

## DISCUSSION AND CONCLUSIONS

First, I would deal with the point raised by the respondents, of relegating the appellant to the alternative remedy of a civil suit.

The fundamental principle is that if the writ court is to relegate a litigant to an alternative remedy, it has to do so at the earliest, preferably at the motion stage before filing of affidavits. Once the writ application is entertained and admitted,

normally, it is not desirable to send the writ petitioner to an alternative forum.

Here, the writ application was entertained. Directions for affidavits were made. Affidavits were filed. Thereafter, the writ was decided. Now, on appeal, it would

not be proper to ask the appellant to seek an alternative remedy. More importantly, the appellant has a substantive right to maintain the writ. The reliefs sought do not ask for specific performance of the alleged agreement or for possession of

the land, as would have been the case had an ordinary civil action been instituted. Neither is any damages claimed. The appellant has challenged the decision of the government and HIDCO to convert their promise of transferring the land

freehold to them into one for transfer of a leasehold. The various grounds urged in this appeal point towards arbitrariness, unreasonableness and mala fide conduct on the part of the respondents. Now, it is well settled that if a public law

element is involved in a commercial transaction between the parties and the dispute can be resolved by affidavit evidence, the court may exercise its discretionary jurisdiction under Article 226 of the Constitution to remedy the wrong, if proved.

The appellant, in my opinion has certainly framed a substantial cause of action on the above grounds. Therefore, the writ was rightly entertained. We also propose to entertain the appeal on merits. Hence, the point raised by learned counsel for

the respondents regarding availability of and relegation of the appellant to an alternative remedy is rejected.

Let us see what happened in this case.

On 6th April, 2011 the allotment was made. Thereafter the consideration was paid. On 30th July, 2012 a board meeting of HIDCO was held where a decision was taken to convert the allotment from freehold basis to leasehold, in

modification of its decision of 6th April, 2011. This decision was neither in exercise of any executive power nor supported by any legislation.

Once, a decision is taken by the government which has attained finality, without any change of circumstances it cannot be changed. This is because the government is required under Article 14 of the Constitution to act predictably, consistently,

fairly, reasonably, uniformly and without caprice. Apart from anything else, the letter of allotment was a firm decision of the government, which ordinarily in the absence of breach of contract on the part of the appellant, the government could

not revoke. However, the government could do so by a valid exercise of administrative or legislative powers.

When there is no legislation, covering the field, the government can take an administrative decision which includes a policy decision by properly exercising its executive power under Article 162 of the Constitution. When the rights which include

property rights of a citizen are affected by a decision it could only be made by a legislative act. The Supreme Court opined in this way in *Bishambhar Dayal Chandra Mohan & Ors. Vs. State of Uttar Pradesh & Ors.* reported in (1982) 1 SCC 39, by the following words:-

“The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kapur v. State of Punjab*, Mukherjea, C.J., dealt with the scope of Articles 73 and 162 of the Constitution. The learned

Chief Justice observed that neither of the two Articles contains any definition as to what the executive function is or gives an exhaustive enumeration of the activities which would legitimately come within its scope. It was observed: "Ordinarily

the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away". It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of

executive functions which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general

administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a

particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill.

27. The quintessence of our Constitution is the rule of law. The State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. In *State of Madhya Pradesh*

*v. Thakur Bharat Singh*, the Court repelled the contention that by virtue of Art. 162, the State or its officers may, in the exercise of executive authority, without any legislation in support thereof, infringe the rights of citizens merely because the

legislature of the State has power to legislate in regard to the subject on which the executive order is issued. It was observed:

Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority.

41. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or

order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament

or of a State legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law.

The right to acquire property is a "Constitutional and human right" declared by the Supreme Court in Chandigarh Housing Board Vs. Major- General Devinder Singh (RETD) & Anr. reported in (2007) 9 SCC 67. It could only be taken

away in accordance with law. In State of Madhya Pradesh & Anr. Vs. Thakur Bharat Singh reported in AIR 1967 SC 1170, the Supreme Court said:-

"5. All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take

legislative or executive action provided such action was competent for the State to make or take."

6.....Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the

State has the power to legislate in regard to the subject on which the executive order is issued.

It cannot be disputed that the letter of allotment, unregistered and unstamped did not create a legal right to property (see Chiranjit Lal Chowdhuri Vs. Union of India & Ors. reported in AIR 1951 SC 41). Nevertheless, some right concerning

property had been created in favour of the appellant. It could not have been taken away by an administrative act.

There was a change of mind or an alteration in the attitude of the government. It was of the opinion that it should not divest itself of the legal ownership of the land. The entire swath of land in New Town should continue to belong to it. So, the

conveyance of land in favour of the appellant was to be abandoned. Instead, they would get only a leasehold subject to stringent conditions like restriction on subletting, partition etc., as the government did not like fragmented holdings in that

area. In my opinion, the government should have realized this when they proposed to make the allotment in the appellant's favour. Once having consciously taken the decision to make the allotment and having made it, they could not

change this decision unilaterally. In the contractual field it could be changed only by mutual agreement. The unilateral decision to change the terms of allotment by converting it into an allotment of leasehold interest with the above restrictions without a valid piece of legislation or a lawful administrative act or policy was arbitrary, unreasonable, wrongful and illegal.

The subsequent policy of the government, even assuming it to have been validly made, which was prospective in its letter and spirit announced on 26th December, 2012 could not have cured this irregularity, with retrospective effect. Any

decision if at all may have been taken after announcement of the policy.

Look at the equities. The intending purchaser had paid the entire consideration which HIDCO had accepted and appropriated. Surely, the appellant had altered their position, anticipating a speedy transfer of the freehold. This was their legitimate expectation.

I also observe that the learned judge has supported the action of the government on the ground that the allotment was made without following a transparent 'selection' process. First of all this point does not seem to have been properly

raised or argued by the respondents.

Secondly, having taken a conscious decision to make the allotment in favour of the appellant after legitimate negotiation, the government could not victimize the appellant by turning around and saying that the process of allotment was not

transparent or fair. This plea is most arbitrary, unfair and is rejected. Hence City Industrial Development Corporation Vs. Platinum Entertainment and Ors. reported in (2015) 1 SCC 558 has no application, in my opinion.

For those reasons, the appeal and the writ succeed. The decision taken in the 67th Meeting of the Board of Directions of HIDCO on 30th April, 2011 the letter of HIDCO dated 24th August, 2012, 6th December, 2012 and 14th January, 2013

are set aside. The appeal (FMA 299 of 2019) is allowed. The impugned Judgment and order dated 7th March, 2019 is set aside.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[illegible]

FMA 299 of 2019

After pronouncement of the judgement and order, learned counsel for HIDCO prays for stay of operation of this order. Such prayer is considered and refused.

I agree,