

**HIGH COURT OF JUDICATURE MADHYA PRADESH,
JABAPLUR**

Single Bench: Hon'ble Shri Justice Subodh Abhyankar,J

WRIT PETITION NO.5080 OF 2014

Mrs. Kalpana Khiwani & another.

Vs.

Madhya Pradesh Housing & Infrastructure
Development Board

Shri Atul Anand Awasthy, learned counsel for the petitioners.

Shri V.S.Shroti, learned senior counsel with Shri Sourabh
Soni, learned counsel for the respondent.

ORDER

(Passed on the 7th day of April, 2017)

The petitioners before this Court are the residents of Bhopal, they are aggrieved by the order/letter dated 12.3.2014 (Annexure P-20) issued by the respondent to the petitioners for refund of partial registration fee of Rs.30 Lakhs back to the petitioners which was deposited by them initially and consequently impliedly cancelling registration of the petitioners, who were the highest bidders in the auction proceedings.

2. In brief the facts of the case are that the petitioners are the residents of Bhopal and were declared as successful bidders for sale of the property known as "Departmental Store-

B” situated at Centre Point, New Market, Bhopal whereby the petitioners had offered the bid amount of Rs.2,37,01,000/- as total sale consideration for the said property, against which the petitioners also deposited the earnest money and registration fee of Rs.40 Lakhs on 7.10.2008 and subsequently allotment order dated 22.10.2008 was issued in favour of the petitioners by the respondent directing them to pay the balance amount of Rs.2,14,39,912/- within 30 days against transfer of said auctioned property as mentioned above. In compliance of the allotment order, the petitioners deposited the additional amount of Rs.8 lakhs by way of cheque within 8 days so as to complete 20% of the total payment as margin money from the personal sources of the petitioners.

3. It is further the case of the petitioners that after depositing the aforesaid money, the balance amount was to be obtained from the bank loan, and hence it was requested to the respondent to issue the receipt in respect thereof, but neither the aforesaid cheque has been encashed nor the receipt for the same has been issued till date.

4. It is further contended by the petitioners that prior to issuance of above allotment order dated 22.10.2008, another letter of allotment was issued to Smt. Bhagwati (Roma) Chugh in respect of which a dispute had arisen

between Smt. Bhagwati Chugh and the respondent and in pursuance of the stay/injunction order obtained by her on 21.10.2008 against the respondent from selling the aforesaid property, the petitioner could not deposit the amount as the respondent confirmed about the pendency of the case filed by earlier allottee Smt. Bhagwati Chugh. The aforesaid stay order was subsequently vacated on 6.11.2009 and the respondent directed the petitioners to pay the balance amount immediately.

5. Thereafter on 10.11.2008 the petitioners wrote a detailed letter (Annexure P-5) to the respondent whereby they have stated that in order to make the balance payment, they need to get the funds from the financial institutions, who are demanding an acknowledgment of the amount which has already been deposited by the petitioners. In this letter, the petitioners also sought some time to make the balance payment which was to be intimated by the respondent. On 11.11.2009 the Estate Officer wrote a letter to the petitioners that the matter with other earlier allottee has been resolved and therefore they should deposit the remaining amount immediately and to this letter the petitioners replied on 15.11.2009 and informed the respondent that they are depositing a sum of Rs.39,39,912/- and balance amount

would be deposited within 3-4 weeks and total amount which is required to be paid is Rs.1.75 crores, which is to be deposited by managing it from the Bank. Vide letter dated 9.12.2009 (Annexure P-10) the respondent again wrote a letter to the petitioners to the effect that since the dispute between the earlier allottee and them has reached the Hon'ble Supreme Court, hence till the case is pending before the Supreme Court, they should not deposit the amount.

6. On 31.12.2009 the respondent returned five cheques of various amounts to the petitioners mentioning therein that as per the directions issued by the Hon'ble Supreme Court, they are directed not to take any amount as deposit towards the aforesaid property till the final disposal of the case. On 10.5.2010 the petitioners again wrote a letter to the Estate Officer regarding the status of the said case but the same was replied to them reiterating that the case before the Hon'ble Supreme Court is still pending.

7. In the meantime, in the civil litigation between Smt. Bhagwati Chugh and the respondent, Second Appeal No.1160/2008 was also preferred by earlier allottee Smt. Bhagwati Chugh, but the same was dismissed vide judgment dated 13.8.2013 by this Court, and subsequently the SLP filed before the Supreme Court by the earlier allottee Smt. Bhagwati

Chugh was also dismissed on 8.10.2013. Hence the petitioners wrote a letter dated 12.11.2013 to the respondent that they are ready and willing to deposit the amount so the instructions may kindly be given and also informed that IDBI Bank is ready to mortgage the property, and is ready to provide the loan of Rs.2 crores. On 12.3.2014 the respondent finally wrote a letter to the petitioners in the following manner.

"आपके द्वारा नियत अवधि में शेष राशि जमा नहीं की गयी। आपको पत्र क्रमांक-4898 दिनांक 11.11.2009 के द्वारा भी सूचित किया गया है, कि वांछित शेष राशि शीघ्र जमाकर सम्पत्ति का विधिवत विक्रय विलेख निष्पादित उपरांत आधिपत्य प्राप्त करें, परंतु आपके द्वारा शेष राशि दिनांक 01.12.2009 तक जमा नहीं की गयी। अतः ऑफर पत्र की शर्त क्र-09 के अंतर्गत आपकी धरोहर राशि रू.40.00 लाख में से 25 प्रतिशत राशि रू.10.00 लाख राजसात कर शेष राशि रू.30.00 लाख का चैक क्रमांक 880832 दिनांक 12.03.2014 द्वारा वापस की जाती है। कृपया पत्र एवं चैक की पावती प्रेषित करें।

According to this letter, a sum of Rs.30 lakhs was returned to the petitioners, whereas Rs.10 lakhs was forfeited for not complying with the offer conditions. Thereafter the petitioners made a detailed representation to the respondent that in what manner and how they are restrained from depositing the amount and they cannot be declared as defaulter and requested that the aforesaid letter be recalled. Since no action

has been taken by the respondent on the petitioner's representation, hence they have filed the present writ petition under Article 226 of the Constitution of India.

8. The contention of learned counsel for the petitioners is that the impugned order dated 12.3.2014 is illegal and arbitrary in nature for the reason that the petitioners were ready to perform their part of the offer but as the dispute was already pending before the Hon'ble Apex Court in respect of the same property between the erstwhile allottee Smt. Bhagwati Chugh and the respondent and the respondent vide their letters dated 9.12.2009 (Annexure P-10), 31.12.2009 (Annexure P-11) and 5.6.2010 (Annexure P-13) had directed the petitioners not to pay the balance amount until final disposal of the pending court case before the Hon'ble Supreme Court.

9. The petitioners by way of additional rejoinder have also filed a circular No.13/12 dated 20.6.2012 prescribing the procedure for cancellation of registration/allotment. It is submitted that in the said circular it is mentioned that if an allottee does not pay the installments within time then notices have to be issued to such allottee within a period of 15 days and thereafter the same be published in newspaper and even then if the amount is not paid then the Estate Officer shall

refer the matter to the Deputy Commissioner and the Estate Officer himself would not cancel the allotment. In this circular other provisions have been given, which, according to the petitioners, are binding on the respondent and as such the order dated 12.3.2014 passed by the Estate Officer in the present case is without jurisdiction and is liable to be quashed.

10. In return, a preliminary objection has been raised by Shri V.S. Shroti, the learned senior counsel for the respondent and it is submitted that the dispute between the petitioners and respondent is purely a contractual dispute and as such the petition under Article 226 of the Constitution of India is not maintainable. To support his submission, learned counsel for the respondent has also relied upon various judgments of the Apex Court viz. **National Highways Authority of India vs. Ganga Enterprises and another (2003) 7 SCC 410** (para 6); **State of Kerala vs. M.K. Jose, (2015) 9 SCC 433** (para 13, 15); and **Joshi Technologies International Inc. vs. Union of India and others, (2015) 7 SCC 728** (para 70.5 to 70.8).

11. In addition to that, learned senior counsel for the respondent has submitted that the petitioners have not been able to make out a case even on merits as the petitioners have

not deposited the amount as per the auction condition and hence no equity can be claimed by the petitioners. It is further submitted that the petitioners were well aware of all the proceedings pending between the erstwhile purchaser of the property Smt. Bhagwati Chugh and the respondent and after the dispute between the erstwhile purchaser and the respondent finally came to an end i.e. after dismissal of the second appeal by this Court as also the dismissal of the SLP by the Apex Court, the petitioners were duty bound to pay the amount immediately and on their failure to deposit the amount as per the auction conditions, the petitioners are not entitled to any relief. The learned senior counsel has also submitted that the Circular No.13/12 dated 20.6.2012 relied upon by the petitioner is not binding on the respondent.

12. Heard learned counsel for the parties and perused the record.

13. From the perusal of the record, the undisputed facts of the case are that the petitioners participated in the auction proceedings for the plot in question and were held to be successful bidder and accordingly on 22.10.2008 a letter of allotment Annexure-P/3 was issued to the petitioners with certain conditions. Clauses (8) and (9) of the conditions, which are relevant, read as under :-

(08) उपरोक्त शर्तों के अतिरिक्त भाड़ाकय अनुबंध नियमावली एवं आवंटन ऑफर पत्र एवं समय-समय पर मण्डल द्वारा घोषित नियम आवंटी पर प्रभावशाली और बन्धनकारी माना जावेगा।

(09) किसी भी प्रकार के विवाद पर अपर गृह निर्माण आयुक्त, मध्यप्रदेश गृह निर्माण मण्डल मुख्यालय भोपाल का निर्णय अन्तिम होगा।

14. A bare perusal of the aforesaid two conditions reveals that firstly, the letter of allotment is subject to conditions and rules issued by the Board from time to time and secondly, in case of any dispute, the decision of Additional Commissioner, M.P. Housing Board Bhopal would be final. Condition No.9 as stated above is unambiguous and is binding on the parties.

15. At this juncture, it would be apposite to refer to the law laid down by the Hon'ble Apex court in the matters of entertainment of writ petitions in the contractual matters. In the case of **Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co.**, reported in (2008) 8 SCC 172, the relevant paras of the same read as under:-

"7. The High Court found that though Clause 58 of the agreement provided for in-house remedy of representation for settlement of disputes that cannot stand in the way of the writ petition being entertained. It was submitted by the writ petitioners that the cost of completing the work would be much

higher than what would have been payable to the writ petitioners. The High Court referred to the minutes of the Corporation and held that the writ petitioners were justified in challenging the Corporation's action to invite fresh tenders for the work allotted to it. It also referred to the undertaking given by the writ petitioners to the effect that they were ready and willing to execute the work but were unable to do so for several reasons. The High Court, therefore, directed the Corporation not to complete the work and to maintain status quo in respect of Phase III of Telco Road as well as the tenders received for the said work in response to the advertisement which was impugned before the High Court.

8. In support of the appeal, learned counsel for the Corporation and its functionaries submitted that the High Court lost sight of the objections raised as regards to the maintainability of the writ petition. It was submitted that there was cancellation of tender and fresh advertisement was issued. The agreement provided **in-house mechanism** in relation to the dispute arising out of the contract. The High Court did not consider this aspect. The High Court also did not take note of the difference between the statutory contracts and non-statutory contracts. Before the High Court the writ petition was questioned on three grounds: (i) disputed questions relating to facts were involved; (ii) to enforce the terms of contractual rights, remedy under the civil law is available, and (iii) in any event, the writ petition was not maintainable in respect of contractual matters. It was pointed out that the writ petitioners were seeking relief of enforcement of their contractual rights, and that several relevant and material facts have been suppressed. In essence, it was submitted that the above aspects have not been considered by the High Court.

10. So far as existence of the alternative remedy is concerned Clause 58 of the agreement is relevant. The same reads as under:

"58. All disputes and differences of any kind whatever arising out of or in connection with the contractor the carrying out of the work (whether during the progress of the work or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the City Engineer."

11. In matters relating to maintainability of writ petitions in contractual matters there are a catena of decisions dealing with the issue.

12. In *National Highways Authority of India v. Ganga Enterprises*¹ it was inter alia held as follows: (SCC p. 415, para 6)

"6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings

before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in *Kerala SEB v. Kurien E. Kalathil*², *State of U.P. v. Bridge & Roof Co. (India) Ltd.*³ and *Bareilly Development Authority v. Ajai Pal Singh*⁴. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon *Verigamto Naveen v. Govt. of A.P.*⁵ and *Harminder Singh Arora v. Union of India*⁶. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed."

13. In *Kerala SEB v. Kurien E. Kalathil*² this Court dealt with the question of maintainability of petition under Article 226 of the Constitution and the desirability of exhaustion of remedies and availability of alternative remedies, as also difference between statutory contracts and non-statutory contracts. In paras 10 and 11 of the judgment it was noted as follows: (SCC pp. 298-99)

"10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell

into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.”

14. Reference can also be made to *State of Gujarat v. Meghji Pethraj Shah Charitable Trust*⁷. In para 22 it was observed as follows: (SCC pp. 568-69)

“22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (*audi alteram partem*) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was—as ¹⁷⁸ has been repeatedly urged by Shri Ramaswamy—a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field e.g. where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further.”

15. Again, in *State of U.P. v. Bridge & Roof Co. (India) Ltd.*³ this Court dealt with the issue in paras 15 and 16 in the following manner: (SCC p. 30)

"15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings i.e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz. to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer."

17. Therefore, the High Court ought not to have entertained the writ petition....."

(emphasis supplied)

16. Thus, applying the aforesaid dictum in the facts of the present case, from the entire record of the case, it becomes amply clear that the dispute between the parties is purely contractual in nature and there are many disputed questions of facts exist between the parties like who was at fault, whether the petitioners were ready to perform their part of offer, whether the earnest money could be forfeited or whether

the Circular No.13/12 dated 20.6.2012 is binding or not under condition no.8 is also a question to be decided by Additional Commissioner, but, after passing of the impugned order by the Estate Officer, the petitioners, without approaching the Additional Commissioner, M.P. Housing Board, Bhopal as provided in condition no.9 have directly filed the present petition. Although the objection regarding the alternative remedy has been raised by the respondent but no reference to the aforesaid condition no.9 has been made.

17. In the facts and circumstances of the case, this court finds that since the parties have not exhausted the in-house remedy for resolution of the dispute provided in the Allotment order itself by approaching the Additional Commissioner, M.P. Housing Board, Bhopal before invoking the writ jurisdiction of this court, it would suffice if the petition is disposed of with a direction to the petitioners to first approach the competent authority i.e. the Additional Commissioner, M.P. Housing Board, Bhopal for the resolution of this dispute by filing a detailed representation/application within 30 days from today and the Additional Commissioner shall, after giving the petitioners an opportunity of hearing decide the matter in accordance with law, by passing a reasoned and speaking order, expeditiously, within a period of

3 months from the date such representation/application.

18. It is however made clear that this Court has not expressed any view on the merits of the case.

19. With the aforesaid directions, this petition is disposed of finally. No costs.

(Subodh Abhyankar)
Judge
07/04/2017