

IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH
AT HYDERABAD

TUESDAY, THE FIFTH DAY OF MARCH
TWO THOUSAND AND THIRTEEN

PRESENT

THE HON'BLE SRI PINAKI CHANDRA GHOSE, THE CHIEF JUSTICE
AND
THE HON'BLE SRI JUSTICE VILAS V.AFZULPURKAR

WRIT APPEAL NO.1407 OF 2012

Writ Appeal under clause 15 of the Letters Patent against the Judgment/Order, dated 12-03-2012 in WP:21733 of 2009 on the file of the High Court.

Between:

1. M/s.Puravankara Projects Limited, A Company Incorporated and Registered under the Companies Act, 1956, Having its office at No.130/1, Ulsoor Road, Bangalore - 560 042, represented herein by its Director Mr.Nani R Choksey
2. Mr.Nani R.Choksey S/o.Late Sri Rusi R.Choksey R/o.No.130/1, Ulsoor Road, Bangalore - 560 042.

..... APPELLANTS/PETITIONERS

AND

1. The State of Andhra Pradesh, Represented by Infrastructure and Investment Department, Secretariat, Saifabad, Hyderabad.
2. Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC), An undertaking of the Government of Andhra Pradesh, having its Registered Office at 5-9-58/B, Parisrama Bhavanam, 6th Floor Basheer Bagh, Hyderabad - 500 004, represented by its Managing Director

..... RESPONDENTS/RESPONDENTS

WAMP NO. 3069 OF 2012

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the writ petition, the High Court may be pleased to order directing the Respondents to refund/pay the Petitioners the sum of Rs. 403 crores paid by the Petitioners under the Tender dated 05/11/2007, on such terms and conditions as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

**Counsel for the Appellants: SRI S.K.KAPUR, SENIOR COUNSEL FOR
SRI. CH.PUSHYAM KIRAN**

Counsel for Respondent No. 1: GP FOR INDUSTRIES & COMMERCE

**Counsel for respondent No. 2: SRI. B. P.MOHAN, SC FOR APIIC
THE ADVOCATE GENERAL**

The Court delivered the following: **JUDGEMENT**

JUDGMENT: (Per Hon'ble Sri Justice Vilas V. Afzulpurkar)

The unsuccessful petitioner is in appeal against the order of the learned single Judge dated 12.03.2012 whereby WP.No.27133 of 2009, filed by the petitioner, was dismissed primarily on the ground that several disputed questions of facts arising in the matter cannot be adjudicated in a writ petition under Article 226 of the Constitution of India. Hence, while dismissing the writ petition, the learned single Judge left the parties to resolve the disputes by approaching appropriate forum other than by way of a writ petition.

2. It would be appropriate to notice the relief sought for in the writ petition:

"... the Hon'ble Court may be pleased to issue an appropriate Writ, direction or order especially in the nature of a writ of Mandamus, directing the Respondents to restitute / refund the amount of Rs.403 Crores paid by the First Petitioner, pursuant to the tender Notification dated 5.11.2007 in respect of Plot No.15 in Survey No.83/1 of Raidurg known as Hyderabad Knowledge City, together with interest @ 18% p.a., on the amount of Rs.403 Crores from the date of receipt of payment till the date of payment to the First Petitioner..."

3. The order of the learned single Judge is assailed, *inter alia*, on the ground that remedy under Article 226 of the Constitution of India is available even in respect of contractual matters by placing reliance on decisions of the Supreme Court in **ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD.**¹; **ZONAL MANAGER, CENTRAL BANK OF INDIA v. DEVI ISPAT LTD.**²; **RELIANCE ENERGY LIMITED v. MAHARASHTRA**

¹ (2004) 3 SCC 553

² (2010) 11 SCC 186

STATE ROAD DEVELOPMENT CORPORATION LTD.³; M.D., H.S.I.D.C. v. HARI OM ENTERPRISES⁴. It is also assailed on the ground that correspondence between the parties commencing with invitation of bid issued by the respondent corporation clearly spells out the terms of the contract/bargain and appropriate appreciation thereof would entitle the petitioner to the relief under Article 226 of the Constitution of India as no other disputed questions arise.

4. Mr. S.K. Kapur, learned senior counsel appearing the appellant, therefore, contended that only if oral evidence is required to prove a fact, the petitioner may be relegated to a remedy of suit but the present case does not require any evidence to be led, as the exchange of correspondence between the parties, which is not in dispute, is sufficient to adjudicate on the controversy involved in the writ petition. So far as the merits of the claim are concerned, learned senior counsel for the appellant, contended that essential terms of the contract having not been settled, merely on the basis of vague and ambiguous terms, the respondent corporation cannot contend that a concluded contract exists between the parties. He, therefore, justified the relief sought for refund of sale consideration as the negotiations between the parties continued and never did finally settle all the terms of any agreement between them.

5. Per contra, the learned Advocate General appearing for the respondents submitted that the offer of the petitioner having been accepted by the respondent corporation a concluded contract was formed and the petitioner has deposited first two instalments and on

³ (2007) 8 SCC 1

⁴ (2009) 16 SCC 208

their request, the third instalment was waived. Further, from time to time, the petitioners have asked for various concession and with a view to encourage the project, the respondent corporation has agreed to almost all the requests of the petitioner including putting the petitioner's in possession of the proportionate land to the extent of consideration paid by them. He, therefore, submits that the petitioners are trying to resile from a concluded contract only on account of drop in real estate prices and have devised and invented the grounds resiling from contract when there exists none. He also contended that the contract being purely non-statutory, petitioners were rightly relegated to the remedy of common law courts, particularly, as the controversy on the disputed terms and conditions require adjudication on factual aspects. He also submitted that the correspondence between the parties is exclusively with respect to technicalities and details of the project, which cannot be construed as part and parcel of the contract. Learned Advocate General also placed strong reliance upon various decisions of the Supreme Court, reference to which will be appropriately made hereinafter.

6. In this background, it would be appropriate to notice the basic facts:

(a) On 05.11.2007, the second respondent corporation published a notice offering for sale 3 parcels of 30 acres each (Plot Nos.14, 15 and 16) covering total extent of 90 acres of prime land on 'as is where is basis', to reputed developers for developing the said land for mixed use development including office space for knowledge based industry/IT/ITES sector, commercial space,

recreational and retail use, hospitality industry, star hotels, service apartments etc. In the said notification, the second respondent had fixed reserve price of Rs.20 crores per acre and sealed tenders in the shape of technical bid and financial bid were invited from reputed developers fulfilling the minimum technical and financial qualifications apart from the manner of fulfilling tender condition, it was also stipulated that successful bidder, whose offer is accepted, should deposit price bid through demand draft drawn from schedule commercial banks and payable at Hyderabad on or before the following dates:

- (a) First instalment of 30% - 11.12.2007
- (b) Second instalment of 30% - 11.01.2008
- (c) Third instalment of 30% and balance - 11.02.2008

(b) It was also notified that for inspection of the property and further details, Chief General Manager with the address and telephone numbers noted, may be contacted during office hours on or before 19.11.2007, which is before the last date of submission of tenders. The said notification also stipulated that the land offered for sale was surplus land acquired by the Government under Urban Land (Ceiling and Regulation) Act, 1976 and the claim of the Government of Andhra Pradesh and the respondent corporation for the aforesaid land was already upheld by the High Court of Andhra Pradesh but the said litigation is pending before the Hon'ble Supreme Court, which had declined any interim order. The land is, therefore, offered, as per the opinion of the Solicitor General of India, subject to final outcome of the pending case before the Supreme Court and in case the Supreme

Court holds against the corporation, the amounts received including EMD shall be refunded without interest.

(c) In response to the said notification, petitioner submitted their offer under covering letter dated 20.11.2007 offering Rs.20,01,00,000/- per acre for price of 30 acres of land .e. parcel of either plot No.14, or 15 or 16.

- 20.11.2007 - on coming to know of acceptance of its offer, the petitioner offered to pay first instalment.
- 20.11.2007 - Respondent corporation accepted the offer of the petitioner/appellant and asked to deposit instalments as stipulated to enable the Corporation to issue allotment orders followed by execution of sale deed.
- 10.12.2007 - The appellant raised certain queries requiring certain documents; additional information relating to demarcation of land and the commencement of time period for completion of development, written confirmation for refund of amount on result of the litigation before the Supreme Court, permissible FSI and height restrictions and the road width; ground coverage regulations etc.
- 10.12.2007 - Second respondent corporation confirmed that in the event of the case before the Supreme Court is decided against the corporation either acquisition of the land under the Land Acquisition Act will be taken or otherwise the amount paid would be refunded without interest as per conditions of paper publication. It was also clarified that FSI and height restrictions would be governed by building regulation, as notified through G.O.Ms.No.86 Municipal Administration & Urban Development Department dated 03.03.2006. It was also confirmed that the road width in front of the land allotted

would be 100 feet and the developmental works giving road access would be completed by June 2008.

- 11.12.2007 - The petitioner/appellant requested the Corporation to defer payment of second and third instalments till final disposal before the Hon'ble Supreme Court. They also requested to confirm, whether they will be given possession of the proportionate land to the extent of the payments made in the interregnum and as to whether five years period for completion of development work will commence from the date of final orders of the Supreme Court or execution of sale deed or sanctioning of plan, whichever is later. They also requested to confirm whether developer will be able to build 50 Mtrs. and above and the Mean Sea Level (MSL) of the proposed road abutting the entire land will not be less than or equal to 600 Mtrs. It was also desired by the appellant that in the event of minimum building height of 50 Mtrs. is not been able to be achieved, the appellant reserves right to ask alternative land with clear title and similar road width.
- 11.12.2007 - The appellant paid first instalment of Rs.189 crores, as per letter of confirmation and the tender terms and conditions.
- 11.12.2007 - Respondent corporation accepted the appellant's request to defer the payment of third instalment till final disposal of the matter before the Supreme Court. The respondent corporation also confirmed that possession of proportionate extent of land will be handed over with permission to develop the project. The Corporation also agreed that completion of developmental work for five years period will be reckoned from the date of final order of the Supreme Court or execution of sale deed or building plan approvals, whichever is later. The appellant also informed that road

level is 600 - 605 Mtrs. AMSL approximately and the Airports Authority of India (AAI) is giving No Objection Certificate up to 649 Mtrs. AMSL in the said area. It was further informed that in case of NOC from AAI is not possible, alternate site will be examined.

- 21.01.2008 - The appellant paid second instalment of Rs.189 crores, thus deposited, Rs.25,00,000/- (EMD) + Rs.189 crores (I instalment) + Rs.189 crores (SECOND instalment), total Rs.403 crores.
- 01.07.2008 - The appellant requested the respondent corporation to hand over the vacant possession of 20 acres of land proportionate to the payment made to undertake developmental activities.
- 30.08.2008 - The appellant sought relief from payment of stamp duty of the value of the land and registration expenses and if the said payments are not adjustable, hand over possession through letter. They also requested that possession be handed over to their subsidiary company.
- 05.09.2008 - Respondent corporation informed the appellant of allotting 19.19 acres undeveloped land in plot No.15A to the appellant. The cost of which works out to Rs.402,90,00,000/- and that petitioner has already paid the said amount. Other terms and conditions were also enclosed calling upon the petitioner to obtain agreement of sale or sale deed and that physical possession will be handed over etc.
- 30.09.2008 - The appellant raised certain queries regarding paras 1, 4, 5, 18, 7, 9 to 11 and 12 and requested deletion of paras 15 and 16 of the letter dated 05.09.2008.

- 25.10.2008 - The respondent corporation agreed to almost all the requests of the petitioner and clarified the doubts of the petitioner/appellant including agreeing for deletion of the clauses pointed out by the petitioner/appellant.
- 06.11.2008 - Petitioner informed the corporation that it has inspected alternate land and selected one of the alternate lands and raised certain queries relating thereto requesting the corporation to clarify.
- 01.12.2008 - The respondent corporation confirmed payment received by specifically cancelling third instalment and offered possession of 19.19 acres to the petitioner/appellant. The said possession was handed over and accepted by the petitioner on 20.12.2008, as per the possession certificate.
- 06.07.2009 - Petitioner raised disputes with regard to plot No.15 on the ground that they are not able to depict the exact contour and exact location of the land and are very much concerned that the matter in the Supreme Court was not decided. They were also concerned that the development work giving road access was not completed and the petitioner was unable to develop and therefore, communicated withdrawal of bid/final offer and requested refund of Rs.403 crores with interest at 18% and Rs.500 crores towards damages.
- 20.07.2009 - request for refund was reiterated by the petitioner again seeking refund of Rs.403 crores alone by duly reserving the claim for interest and damages.
- 10.09.2009 - Again request for refund was reiterated cautioning the respondent corporation that the petitioner will have to resort to appropriate legal proceedings, as

there is no concluded contract and reiterated the demand for refund of amount.

➤ 06.10.2009 – WP.No.21733 of 2009 was filed.

7. The prayer in the writ petition is sought to be supported by various contentions that the actions of the second respondent corporation, as the instrumentality of the State, are neither reasonable, fair nor just and as such, intervention of this Court under Article 226 of the Constitution of India was justified. It was also pleaded that the conduct of the second respondent corporation entitles the petitioner to be discharged or released from further obligations under the tender. It was also contended that there is no concluded contract, as a result of pendency of the matter before the Supreme Court and on account of AAI giving clearance only up to a height of 49 MTRS. and failure to identify the exact location of the plot, the contract is frustrated and became impossible and incapable of performance etc.

8. The respondent corporation filed a counter affidavit specifically asserting that the plots were sold, as per paper publication on as is where is basis and subject to final disposal of the matter before the Supreme Court. The allegation of the petitioner that the plots with exact contour and location were not informed to the petitioner was denied and it was asserted that the sketch provided at the time of the bid was very clear, as to the location of the plot offered in the bid and in fact, that sketch was annexed as Annexure – R.3 to the counter. It was also stated that the petitioner is fully aware of the facts and circumstances and the second respondent did arrange for site visits to each and every bidder before hand and the plots were identifiable.

It was also asserted that with a view to encourage the developer, the respondent corporation agreed to defer third instalment till final disposal of the matter before the Supreme Court. Regarding accessibility, it was asserted that the plot allotted to the petitioner is approachable and accessible by road and further possession of the land was also arranged as desired by the petitioner. It was also stated that amenities and support services will be provided to the land including 100 feet road. It was stated that the land is approachable and other infrastructure is also available and as and when petitioner starts work, required water and electricity connection will be made available. It was stated that the petitioner can take up developmental work, as the land is already handed over. It is stated that only after delivery of possession of 19.19 acres, petitioner came up with the proposal for alternate land, which was not considered thereafter. The allegation regarding height, FAR/FSI is concerned, it was stated that building regulation under G.O.Ms.No.86 dated 03.03.2006 was already in force and after issuance of NOC from the AAI, development can be taken up. Request for refund was, therefore, found to be wholly unjustified and in view of the concluded contract, it was not open for the petitioner to resile after obtaining several concession much beyond the purview of the tender notification. It was also denied that the contract is impossible to perform or is otherwise frustrated and it is denied that there is any conditional offer or conditional acceptance involved in the matter, as the contract is already concluded. With regard to the permissible height clearance, paras 26(j) and (l), are extracted hereunder, for the sake of convenience.

"26(j). In reply to Para No.26(o), it is submitted that it is incorrect to say that 1st Petitioner has obtained height clearance for only 29 Mtrs. It is evident from the clearance letters issued by AAI to the 1st Petitioner that the height clearances were issued for 29 Mtrs, 44 Mtrs, 38 Mtrs, 39 Mtrs and 29 Mtrs in the same land basin on the AMSL of the respective locations in the allotted land. Further, the letter by the 2nd Respondent on the details of the height clearance by the Airport Authority of India, is based on the earlier experience and is just and advisory in nature. But, the Petitioners had considered all the possible aspects even before they participated in the bid. As of now, the height clearance details given above indicate that the Respondents experience is correct and the Petitioners can proceed with the development immediately.

26(l). In reply to Para No.26 (q), the averments in this para are not correct. It is evident from the clearance letters issued by AAI to the 1st Petitioner that the height clearances were issued for 29 Mtrs, 44 Mtrs, 38 Mtrs, and 29 Mtrs, in the land, basing on the AMSL of the respective locations. Further, the 1st Petitioners was given option to choose the alternative location to get maximum height clearance in the same area to take up development of the project. Having taken the possession of 19.19 Acres of proportionate land for the amounts paid, the Petitioners cannot now turn around and attempt to undo what has been already finalized."

9. Mr. S.K. Kapur, learned senior counsel for the appellant/petitioner, placed strong reliance upon the decision of the Supreme Court in **RICKMERS VERWALTUNG GMB H v. THE INDIAN OIL CORPORATION LTD.**⁵ particularly, the following passage:

"In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract

⁵ (1991) 1 SCC 1

between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

He also submitted that the said view is reiterated further in the decision of the Supreme Court in **DRESSER RAND S.A. v. BINDAL AGRO CHEM LTD. AND K.G. KHOSLA COMPRESSORS LTD.**⁶

10. There is no dispute with regard to the proposition, as cited, that irrespective of written contract between the parties, the contract can be culled out from the correspondence. The further contention of the learned senior counsel that jurisdiction of this Court under Article 226 of the Constitution of India can be invoked when the relief is based on undisputed factual aspects borne out by the contract or the correspondence between the parties also is not in dispute.

11. We had considered similar questions in WA.No.477 of 2010 and batch dated 27.12.2012 wherein the concept of judicial review on

⁶ (2006) 1 SCC 751

contractual obligations was discussed in great detail after noticing all the decisions of the Supreme Court. The Hon'ble the Chief Justice while delivering the aforesaid judgment held in paras 50, 64 and 65 as under:

"50. It is true that an action of state instrumentality even in contractual matters of private nature is amenable to writ jurisdiction if it acts unfairly, unjustly and unreasonably as held by the Supreme Court in ABL International Ltd. case and Tata Cellular case. In the instant case there is no material to show that the state authorities had acted unfairly, unjustly or unreasonably. The only contention is that it had not disclosed about the dispute as to the title of the State to the property. As already stated, according to the state instrumentality it has unimpeachable title to the property; therefore, question of non-disclosure of any material defect does not arise. Even after the expiry of the time limit, the respondents had enlarged time for payment of balance sale consideration on two occasions but the petitioners have not availed of it and even when the respondents have agreed to refund the amounts paid, the petitioners have not chosen to furnish the bank guarantee as requested. Clause (b) of Confirmation-cum-provisional allotment of terms of and conditions of agreement provide that final allotment letter will be issued on payment of full sale price. Clause (c) of Initial Deposit provides that in case of cancellation of allotment for non-payment of balance sale price as stipulated or for any other reason, the entire ID amount in full stands forfeited. Clause (e) provides that any part payments made towards ID and failed pay the balance sale price within the prescribed time, both EMD and whatever amount of ID paid is liable for forfeiture. As already stated, the contract between the parties is a concluded one. Therefore, the petitioners having failed to fulfil the conditions of the contract cannot complain arbitrariness or illegality in the action of the respondents declining to refund the amounts paid and claim refund in a writ proceeding.

64. In **GODAVARI SUGAR MILLS v. STATE OF MHARASHTRA AND OTEHRS** [(2011) 2 SCC 439] question arose for consideration s whether a writ petition for recovery of money (interest) is maintainable. This is a case where excess land of the appellant was taken over and interest at 3% was only awarded on the compensation determined as against the claim of 6% under Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961. The High Court of Bombay dismissed the writ petition placing reliance on the decision of the Supreme Court in *SUGANMAL v. STATE OF MAHDYA PRADESH* (AIR 1965 SC 1740) holding that the prayer in the writ petition being one of payment of interest, it should be considered to be a writ petition filed to enforce a money claim and therefore, not maintainable. The Supreme Court referring to various decisions on the issue held:

“The observations in *Suganmal*³ related to a claim for refund of tax and have to be understood with reference to the nature of the claim made therein. The decision in *Suganmal* has been explained and distinguished in several subsequent cases, including in *U.P. Pollution Control Board v. Kanoria Industrial Ltd.* {(2001) 2 SCC 549} and *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.* {(2001) 3 SCC 553}. The legal position becomes clear when the decision in *Suganmal* is read with the other decisions of this Court on the issue, referred to below:

(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. *But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. (Vide Burmah Construction Co. v. State of Orissa (AIR 1962 SC 1320).*

(ii) If a right has been infringed—whether a fundamental right or a statutory right—and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court,

while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law. (Vide *State of M.P. v. Bhailal Bhai* (AIR 1964 SC 1006).

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, *though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money.* (Vide *Suganmal v. State of M.P.*)

(iv) *There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc.* While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide *Salonah Tea Co. Ltd. v. Supdt. of Taxes* {(1988) 1 SCC 401}).

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and

circumstances of a given case. (Vide *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*)

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. (Vide *Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd.* (2005) 8 SCC 242).

We are therefore of the view that reliance upon Suganmal was misplaced, to hold that the writ petition filed by the appellant was not maintainable."

65. The Supreme Court held that though a petition under Article 226 of the Constitution of India is not maintainable to enforce a civil liability arising out of a contract or a tort to pay an amount of money due to the claimants and aggrieved party has to agitate in a civil suit, but an order of payment of money may be made in a writ proceeding in enforcement of statutory functions of the State or its Officers. The High Court while enforcing fundamental or statutory rights has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law. The High Court has also the power to pass appropriate orders in exercise of the power conferred under Article 226 for payment of money. Power to order for refund of money under Article 226 has to be exercised sparingly depending on facts and circumstances of each case where the collection of money was without the authority of law etc. Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of public law remedy under Article 226 of the Constitution will not be denied.

We are of the view that the case of the petitioners herein is not covered by any of the above exceptions. There is no enforcement of any statutory function of the State or its Officers involved herein nor there is any infringement of fundamental or statutory right involved so that payment of

money realized by the Government without the authority of law can be ordered. The case also does not arise out of any assessment of tax so that the taxes collected without any authority may be ordered to be refunded. This is also not a case where on the fact and circumstances of the case this Court can exercise the power under Article 226 and order for refund of the amounts deposited by the petitioners. This is also not a case arising out of any public law functions on the part of the instrumentality of the State. The case herein arises out of a private contract pure and simple where the petitioners have not fulfilled the contractual obligations cast on them. In our view, this Court, in such circumstances, where disputed questions of fact are to be resolved, will not issue a writ of mandamus ordering refund of the amounts..."

12. Learned senior counsel for the appellant/petitioner had laid great stress on his contention that no disputed question of act arises in this matter, as the correspondence between the parties is very clear and as such, contended that there is no impediment for entertaining the writ petition under Article 226 of the Constitution of India. Since all those contentions are required to be examined with reference to the correspondence, as in the documents, relied upon, we have considered the said contentions assuming that the present writ petition under Article 226 of the Constitution of India is entertainable.

13. Questions, therefore, which are to be considered on the aforesaid premise, are:

1. Whether there was no concluded contract between the petitioner and the respondent corporation with respect to the invitation to bid of the second respondent dated 05.11.2007?
2. Whether the petitioner is entitled to resile from its offer on the grounds as raised by it in their letter dated 06.07.2009?

Questions 1 and 2:

14. In order to appreciate the contentions on either side, it would be appropriate to first notice Section 7 of the Indian Contract Act, which is extracted hereunder:

"7. Acceptance must be absolute.- In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance."

15. It would be evident that publication notifying the bid cum tender issued by the second respondent corporation dated 05.11.2007 is invitation for offer and the bid cum tender submitted by the petitioner is an offer in response thereto. The said offer letter dated 20.11.2007 is unqualified and unconditional for any of the plots 14 or 15 or 16. The said offer of the petitioner was accepted by the respondent corporation for consideration at Rs.21 lakhs per acre under the letter of confirmation the respondent corporation dated 20.11.2007. Under petitioner's letter of even date, accepting the said confirmation, petitioner confirmed payment of first instalment as per the terms of the tender. At this stage, therefore, it has to be noted that acceptance of petitioner's offer by the second respondent corporation converts the said offer into contract thereby implies that it is not open for the parties to resile from the contract unilaterally.

16. After about a month of the acceptance, petitioner again confirmed acceptance of offer under its letter dated 10.12.2007 and requested certain clarifications from the respondent corporation and reiterated that petitioner has always been ready and willing to perform the tender terms and conditions and to show bonafides enclosed photocopy of the demand draft of proposed payment of Rs.189 crores. Under Corporation's letter dated 10.12.2007 petitioner was duly informed of the contingency in case the respondent corporation loses the litigation before the Supreme Court, either land will be acquired under the Land Acquisition Act or the amounts paid will be refunded within 30 days, as per the terms of the tender. Petitioner was also informed of the building regulations in force as well as assured of 100 feet road width and informed no objection for petitioner to develop through special purpose vehicle as desired. Under petitioner's letter dated 11.12.2007, petitioner requested for possession of proportionate land to the extent of payment made and the possibility of availability of alternate land in case of MSL being less than or equal to 600 Mtrs. Under Corporation's letter dated 11.12.2007, petitioner's request for postponement of third instalment was accepted so also the corporation agreed to give possession of proportionate extent of land and indicated approximate road level and the extent to which the AAI is giving clearance. Under the covering letter dated 11.12.2007, petitioner paid first instalment of Rs.189 crores, as per letter of confirmation under the tender terms and conditions. Thereafter, petitioner also made payment of second instalment of Rs.189 crores on 21.01.2008. About six months thereafter, under petitioner's letter dated

01.07.2008, they sought possession of the proportionate land, as they are going to start development of the land.

17. Under further letter of the petitioner dated 30.08.2008, petitioner requested possession to be handed over to their subsidiary company and also sought adjustment of stamp duty and if that is not possible, to give possession through letter. Under allotment letter of the respondent Corporation dated 05.09.2008, proportionate land of 19.19 acres was allotted to the petitioner confirming receipt of total cost of land of Rs.402,90,00,000/- and requested to take physical possession and general terms and conditions of the letter of allotment were also informed. Under petitioner's letter dated 20.09.2008, petitioner requested certain clarifications with regard to paras 1, 4, 7, 18, 9 to 11 and 12 and requested deletion of paras 15 and 16. Almost all the clarifications were answered and accepted by the respondent corporation in their letter dated 25.10.2008 and once again petitioner was requested to take possession of the land. Under further letter of the corporation dated 01.11.2008, possession of land was offered in continuation of allotment letter confirming that third instalment payable by the petitioner is cancelled and possession of 19.19 acres was, in fact, delivered by the corporation and received by the representative of the petitioner on 20.12.2008. After about seven months, for the first time, petitioner sought to resile from the contract due to loss suffered on account of unrealized capital and mounting interest on capital in view of unviable market condition and sought refund of Rs.403 crores together with interest and damages of Rs.500 crores.

18. It is clear and apparent from the above that having proceeded on the tender terms and conditions and having taken allotment of land proportionate to the payment made and having received various concession from the respondent corporation beyond the terms of the tender including cancellation of payment of third instalment, petitioner had tried to resile from the contract by claiming:

(a) that from the sketch provided at the time of the bid, it was not possible to depict exact contour or the location of the plots, as the sketches were not to scale;

(b) that the delay in disposal of the litigation before the Hon'ble Supreme Court was contrary to the assurance of three months given at the time of the bid;

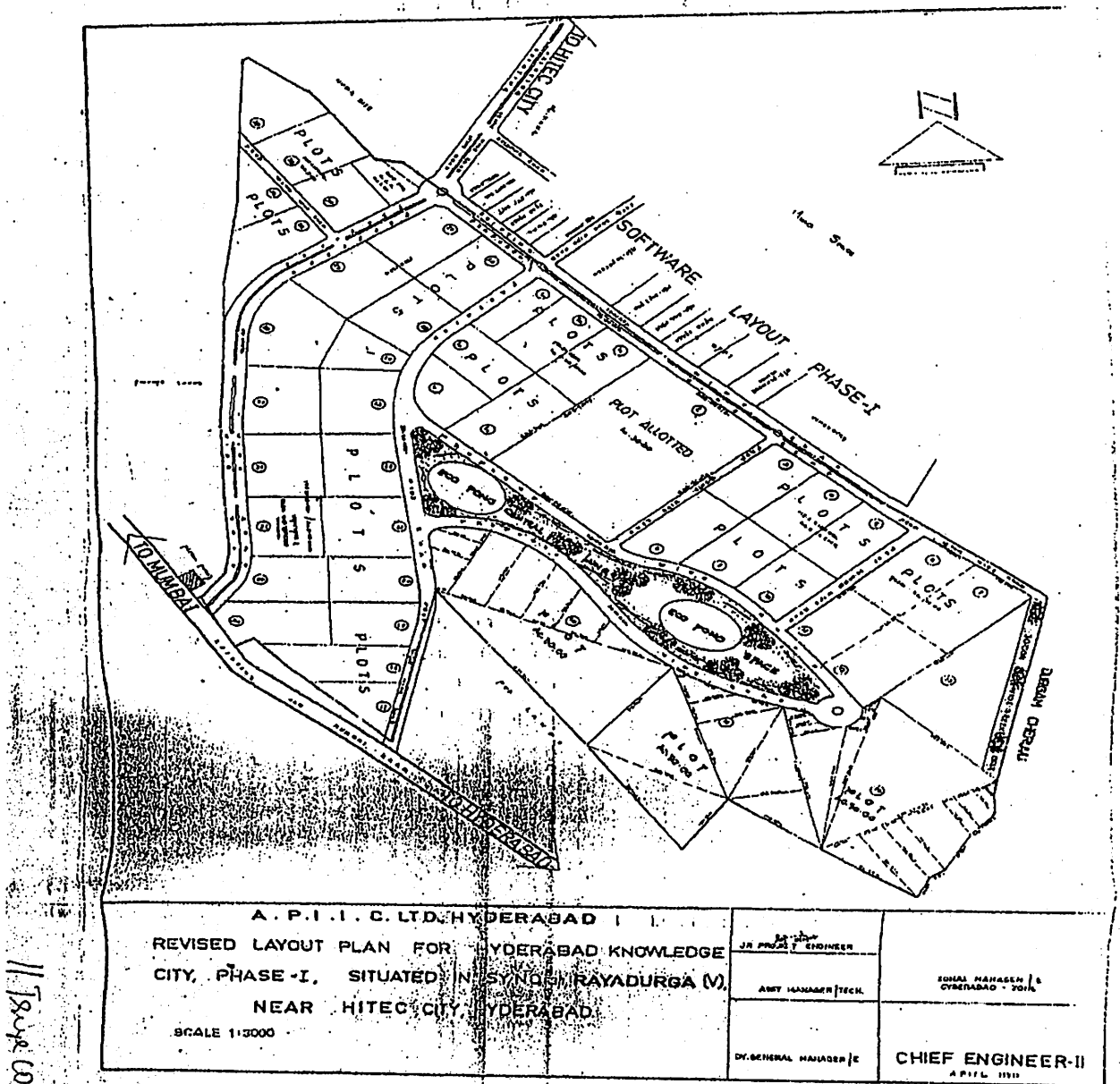
(c) that there was no progress in the development work or expeditious disposal of the appeal before the Supreme Court;

(d) that the height clearance given by the AAI was permissible only for 29 Mtrs. because of which the project became unviable contrary to the corporation's confirmation that minimum height would be 44 Mtrs. on account of which proposal for alternate land was not considered by the corporation.

The demand for refund of payment was reiterated in two subsequent letter dated 20.07.2009 and 10.09.2009 followed by the present writ petition.

19. So far as objection (a), referred to above, is concerned, it was already noticed that the respondent corporation denied the said allegation in their counter affidavit and have filed Annexure - R3 sketch to substantiate that the said sketch was given to the prospective bidders to enable them to submit bids. The said Annexure

- R3 to the counter affidavit is sketch plan drawn to scale showing dimensions of area, which includes plot Nos.14, 15 and 16. For the sake of convenience, the said Annexure - R3 is reproduced hereunder:



It would be evident therefrom that the contention that the location or the contour of the plots, offered for sale, were not identifiable or that the sketch was not to scale does not appear to be correct and sustainable.

So far as objection (b) relating to litigation before the Supreme Court is concerned, neither there was any assurance nor the Corporation could have given any time frame with regard to the disposal of the matter before the Supreme Court. Subsequently, the said civil appeal was decided in favour of the respondent corporation by the judgment of the Supreme Court dated 08.10.2010 in **OMPRAKASH VERMA v. STATE OF ANDHRA PRADESH**⁷, which was brought to our notice by the learned counsel for the second respondent corporation by filing memo dated 17.12.2012 after due service on the counsel for the appellant.

Learned senior counsel for the appellant/petitioner raised serious contentions that the respondent corporation had assured that MSL and the height requirement would enable to the petitioner to take up the construction up to a height of 44 Mtrs. to 49 Mtrs., as per para 4 of the letter of the corporation dated 11.12.2007. For the sake of convenience, the aforesaid para 4 is extracted hereunder:

"4. The road level as 6000 to 605 Mt. AMSL approximately, Airport Authority of India is giving NOC upto 649 MT AMSL in the subject area. In case the NOC from AAI is not possible, alternative site available will be examined."

20. We are unable to see any assurance on the part of the respondent corporation from the aforesaid extracted part of their letter. The portion of the counter of the respondent corporation, extracted as above, would clearly show that there was no assurance, as the height clearance was issued by the AAI based upon AMSL of the respective location in the allotted land. Further in the tender conditions

⁷ (2010) 13 SCC 158

or any correspondence depicting terms and conditions, neither the respondent corporation had given any assurance on that respect nor the petitioner's conduct and correspondence from 20.11.2007 till 06.07.2009, referred to above, ever raise any such prerequisite as is sought to be now contended. It is evident from the correspondence of the petitioner in the aforesaid period that even while seeking clarification on various queries from time to time, after payment of two instalments and after seeking concession regarding third instalment in the petitioner's letter dated 11.12.2007, the aspect relating to height restriction was raised, which was duly clarified by the corporation. We are, therefore, unable to see any basis to contend that the permissible height was the very crux of the contract to enable the petitioner to resile therefrom on the ground that the AAI has not permitted the minimum height, as desired by the petitioner.

21. Further, even after payment of two instalments and availing of concessions, the petitioner sought delivery of possession, secured possession along with allotment letter for proportionate land; secured concession as to third instalment was requested by the letter of 30.09.2008, which was duly accepted by the respondent corporation under their letter on 25.10.2008; received possession on 20.12.2008 and having received clearance from the AAI in February 2009, for the first time, in July 2009, a letter demanding refund of the amounts paid with damages and interest emanates from the petitioner. In the facts and circumstances, therefore, we are of the view that there was a concluded contract between the parties in terms of Section 7 of the Contract Act and it would not be open for the petitioner to resile

therefrom on any ground, particularly, as the contract was already partly performed. We also do not see any substance in the contention that the terms and conditions of the tender were vague and ambiguous, particularly, when both parties have clearly understood the same and have entered into correspondence and formed a contract. The petitioner, who claims to be in the business of real estate, development and construction as a pioneer with over 27 years exposure, cannot be believed to have given its offer without examining all prospects relating to real estate development over the plots and having paid Rs.403 crores cannot now be allowed to resile from the contract by citing unviable market conditions. Questions 1 and 2 are, therefore, decided against the petitioner.

22. At this stage, it is necessary to also deal with one decision of the Supreme Court, strongly relied upon by the learned senior counsel, in **HARYANA FINANCIAL CORPORATION v. RAJESH GUPTA**⁸. In the aforesaid decision, when the corporation had invited offers by publication of advertisement, the respondent had given his offer and in the negotiations held on 06.03.1998, respondent's offer was accepted. However, on the very next day i.e. 07.03.1998, the respondent sent a fax to the corporation pointing out about the non-existence of approved and authorized passage to the factory sufficient to pass a truck through it and, in fact, it was found that there was no such approach road existing and as such, sought refund of the EMD, which was forfeited by the corporation. The Supreme Court, on facts, found that if there is failure on the part of the respondent to deposit the amount, the corporation would be entitled to forfeit the earnest money

⁸ (2010) 1 SCC 655

and the respondent had deposited the earnest money on clear understanding that there would be clear and independent approach road to the unit. However, non-existence of independent access was not disclosed by the corporation to the respondent. It is, in those circumstances, the Supreme Court affirmed the order of the High Court to refund the forfeited amount with interest. The said decision also reiterated the principle that the corporation being an instrumentality of the State must act fairly and reasonably.

23. In the present case, as is discussed on the facts above, we do not see any reason as to how the said decision could assist the appellant/petitioner inasmuch as unlike the said case, the appellant/petitioner, in the present case, had sought to resile from the contract almost after two years on the grounds for which there was no assurance whatsoever by the respondent corporation.

In the circumstances, therefore, the writ appeal is liable to be dismissed and is accordingly dismissed. As a sequel, the miscellaneous application, if any, shall stand closed. There shall be no order as to costs.

//TRUE COPY//

SDI-S.SUBBA RAO
DEPUTY REGISTRAR


SECTION OFFICER

To,

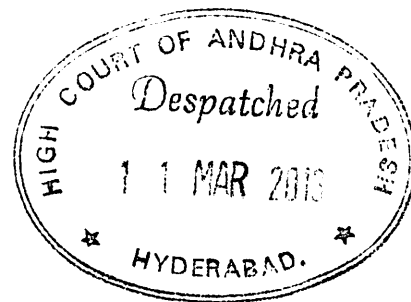
1. One CC to Sri. Ch. Pushyam Kiran, Advocate (OPUC)
2. One CC to Sri.B.P. Mohan, Advocate (OPUC)
3. Two CCs to G.P. for Industries & Commerce, High Court of Andhra Pradesh, Hyderabad (OUT)
4. Two CCs to G.P. for Advocate General, High Court of Andhra Pradesh, Hyderabad (OUT)
5. Two C.D. Copies.

PM



45/1
HIGH COURT

DATED:05/03/2013



JUDGEMENT

WA.No.1407 of 2012

67

**Dismissing the WA
Without costs.**

8
24
11/3/13