THE HON'BLE THE CHIEF JUSTICE
SHRI PINAKI CHANDRA GHOSE

AND

THE HON'BLE SHRI JUSTICE VILAS V. AFZULPURKAR

Writ Appeal Nos.477, 478, 479, 480, 481, 482, 650, 808, 484, 485 and 954 of 2010 and W.P.Nos.2776 of 2009 and 12786 of 2010

27.12.2012

W.A. No. 477 of 2010

BETWEEN:
Hyderabad Urban Development Authority, reconstituted as Hyderabad Metropolitan Development Authority, Secunderabad and others.

...APPELLANTS

AND

M/s. IBC Knowledge Park Pvt.Ltd., Represented by its Managing Director, Yunus Zia and others.

...RESPONDENTS

Counsel for the Appellants: Advocate General
Counsel for the Respondents: Sri T.N. Subramanian, Senior Counsel

The Court made the following:

THE HON'BLE THE CHIEF JUSTICE
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AND
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Writ Appeal Nos.477, 478, 479, 480, 481, 482, 650, 808, 484, 485 and 954 of 2010 and W.P.Nos.2776 of 2009 and 12786 of 2010

COMMON JUDGMENT: (Per the Hon'ble the Chief Justice)

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1. Whether, in the realm of private contracts, not involving statutory provisions, an auction purchaser who is declared successful bidder in a public auction conducted by the State through its instrumentality, for sale of land owned by it, but failed to pay the balance sale consideration in terms of the terms and conditions of agreement and provisional order of allotment, on the plea that litigation had ensued as to the title of the property, can maintain a writ petition under Article 226 of the Constitution of India for refund of the amount deposited with interest, is the question involved in this batch of appeals filed by the Hyderabad Metropolitan Development authority against the order of the learned single Judge directing refund of the amount deposited within three months.

2. While W.A.Nos.477, 478, 479, 480, 481, 482, 484, 485 and 954 of 2010 are directed against the common order passed in W.P.No.18341 of 2009 and batch dated 22.4.2010, W.A.Nos.650 and 808 of 2010 are directed against the order dated 14.6.2010 passed by the learned single Judge in W.P.Nos.28553 and 28566 of 2009 respectively allowing the writ petitions in terms of the order passed in W.P.No.18341 of 2009 and batch. Inasmuch as W.A.Nos.477, 478, 479, 480, 481, 482, 650 and 808 of 2010 are filed by the Hyderabad Urban Development Authority (now reconstituted as Hyderabad Metropolitan Development Authority); W.A.Nos.484, 485 and 954 of 2010 are filed by some of the auction purchasers in not granting interest by the learned single Judge on the amounts directed to be refunded.

Since a similar question arose for consideration in Writ Petition Nos.2776 of 2009 and 12786 of 2010 filed by other auction purchasers, they were also heard together and are being disposed of by this common judgment.

Background facts:

3. Before we consider the issue, it is necessary to refer to few facts leading to the controversy:

For convenience sake, the parties will be referred to by their status in the writ petitions. We will first refer to the facts leading to the filing of the Writ Petitions out of which the Writ Appeals arose.

The Hyderabad Metropolitan Development Authority (for short 'HMDA') launched a project known as "Golden Mile" for auction of about 100 acres of land owned by the State of Andhra Pradesh in Sy.Nos.100, 109, 114, 116, 117 and 147 part situated on the outer ring road at Kokapet Village, Rajendera Nagar Mandal, Rangareddy District, both for residential and commercial ventures. The land was divided into Sites I, II and III. Site No.1 consists of 12 plots in Sy.Nos.100, 109 and 114. Site II consists of 4 four plots in Sy.No.116 and 117 and Site III also consists of four plots in Sy.No.147 part, totaling to 20 plots in all. Each plot consists of an extent ranging from 1 to 6 acres. Advertisement was issued by HMDA in local

news papers on 27.6.2006 for sale of the plots through a public auction proposed to be held on 20.7.2006 through sealed tenders on 'as is where is condition' basis. The advertisement says that the plots proposed for sale is ideal for development of Star Hotels, Health Care, Financial Institutions, IT/TES Companies, Corporate Offices and High-rise apartments etc. and the land use of the plots is multiple use zone as per the Master Plan. Participation in the auction was by way of purchase of application from HMDA. The sale of plots will be on public-auction-cum sealed tender basis. The upset price per acre was fixed at Rs.4.50 crores and the EMD at Rs.2.00 crores.

The brochure supplied to the applicants contains statement showing the details of each site with survey number and approximate extent of land. As per the terms and conditions of auction, applicants having the tokens issued by HMDA on the day of auction are only permitted to participate in the auction with permit pass. 50% of the sale price shall be payable towards Initial Deposit (ID) which includes Earnest Money Deposit (EMD). After deducting the EMD amount, the balance amount of Initial Deposit shall be payable on or before 26.7.2006, failing which bid will not be confirmed and the auction of plot will be deemed to have been cancelled by forfeiting the EMD and the balance sale price shall be paid on or before 4.8.2006, failing which the entire amount will be forfeited. Allotment of plot will be made to those eligible Persons/Institutions/Societies/Company whose highest bid is confirmed by the Vice-Chairman, HMDA and thereafter a letter of confirmation-cum-provisional allotment will be issued. 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. Conditions relating to cancellation/surrender/withdrawal provide that "withdrawal from allotment or surrender of allotment by the applicant amounts to cancellation for the purpose of refund of the amount paid by the applicant". As regards possession and conveyance of the land, it was provided that the allottee/authorised representative shall take over the physical possession on or before the date as may be prescribed in the pre-final allotment letter, failing which an amount of Rs.50,000/- will be levied per month towards penalty till the date of taking over of the physical possession. The petitioners in all the writ petitions out of which the present appeals arose participated in the open auction conducted by HMDA on 20.7.2006 in respect of Golden Mile project and became the highest bidders. They were accordingly issued letters of confirmation-cum-provisional allotment of land. The provisional allotment letter, however, stipulates that the balance sale price (remaining after payment of Initial Deposit) shall be paid in two installments one installment on or before 9.8.2006 and the final installment on or before 24.8.2006 as per the terms and conditions of the Brochure. All the petitioners paid 1st installment and some of them paid 2nd installment also.

4. It appears that the HMDA has also launched another project known as 'The Empire' for auction of four premium Plots of 25 acres each in Sy.Nos.239 and 240 situated at Kokapet Village, Rajenderanagar Mandal and accordingly an advertisement was issued in Hindu on 7.12.2007 proposing to hold the auction on 20.12.2007. Rs.12.00 crores was fixed as upset price and EMD at Rs.7.00 crores. Pursuant to the same, the petitioner in W.P.No.2776 of 2009 M/s Eden Buildcon Pvt. Ltd., New Delhi participated in the auction and became the highest bidder in respect of Plot No.1 to the extent of Ac.25.00 and accordingly confirmation-cum-provisional allotment letter dt.12.1.2008 was issued.

5. Similarly, HMDA launched The Empire Phase-II proposing for auction of 75 acres of land in Sy.Nos.239 part and 240 situated at Kokapet Village and accordingly advertisement was published on 31.1.2008. Upset price and EMD were fixed at Rs.10.00 crores each. The Petitioner in W.P.No.12786 of 2010 – DLF Home Developers Ltd., Hyderabad became the highest bidder in respect of 75 acres of land and intimation of award of land was communicated by letter dated 18.2.2008.

6. For better appreciation, it is appropriate to mention the details of plots allotted to the petitioners, amounts paid by them and the balance amount payable in a separate statement (Annexure) at pages 4(a) and 4(b), annexed as part of this judgment.

7. From the particulars mentioned in the statement, it is seen that the petitioners have not paid the bid amounts in full as per the terms and conditions for allotment of plot and the confirmation-cum-provisional allotment letter. Some of the petitioners have paid only 1st installment and defaulted thereafter and some paid full or part of 2nd installment and defaulted.

8. Almost similar facts were narrated in all the writ petitions out of which the present appeals arose, except relating to some correspondence made with the respondents and the writ petitions. For the purpose of deciding the crucial issue involved in the writ appeals, however, it is not necessary to refer to the facts narrated in each and every writ petition. Suffice if we refer to the facts stated in one writ petition and wherever it is necessary to refer to any particular fact the same will be referred to with reference to the particular writ petition. Therefore, we take the facts stated in W.P.No.18341 of 2008 out of which writ Appeal No.477 of 2010 arose as a lead case for the purpose of analyzing the fact situation arising out of the auction of lands under 'Golden Mile' project.

9. The reason putforth by the petitioners in not paying the balance bid amounts was that they came to know through a news item published in Telugu Newspaper 'Andhra Jyoti' dated 2.8.2006 that litigation was pending in the High Court in respect of title to the land auctioned. They learnt that one Mr. K.S.B. Ali and others claiming to be the legal heirs of one Nawab Nusrat Jung Bahadur filed writ petitions claiming title to the lands in question. W.P.No.19400 of 2004 filed for a direction for the fencing of available land at Kokapatet village was pending as on the date of auction, but the same was dismissed as infructuous by orders dated 1.8.2006. K.S.B. Ali also filed W.P.No.10084 of 2006 on 13.7.2006 representing 203 legal representatives of late Nusrat Jung-I for a direction to make survey, demarcation and to hand over possession after fixing the boundaries of open land measuring 719 acres at Kokapaet village as per Mandal Revenue Officer's Report out of total extent of Ac.1635.55 gts as per Muntakhab No.57/1955 dated 7.5.1955 and for a direction to the respondents to determine and pay compensation for the remaining land usurped by the Government, whether allotted to third parties or retained by

ANNEXURE

(Golden Mile Project & The Empire Phases I & II)

W.P.No/ W.A.No.	Name of auction purchaser	Site No/Plot No.	Extent	Date of provi-sional allotment	Total bid amount Rs. (Crores)	Date of payment	EMD paid Rs. (Crores)	1st Instal-ment Rs.	2nd me Rs
1	2	3	4	5	6	7	8	9	
WP.18341/2008 W.A.477/2010 WA.484/2010	M/s IBC Knowledge Park Pvt. Ltd. Bangalaore	Site 1 Plot 10	Ac.5.35	29.7.2006	64,26,00,000	19.7.2006 24.7.2006 9.8.2006	2.00	19,42,00,000	-- 21,
WP.24037/2008 W.A.478/2010	M/s Kailash Ganga Constructions Pvt. Ltd. Secunderabad	Site 1 Plot 11	Ac.4.50	29.7.2006	65,02,50,000	19.7.2006 22.7.2006	2.00	3,50,00,000	--
-d0-	-do-	Site 1 Plot 12	Ac.4.03	29.7.2006	38,28,50,000	19.7.2006 27.7.2006	2.00	3,50,00,000	--
WP.28792/2008 W.A.479/2010	M/s Water Markes Pvt. Limited	Site 1 Plot 2	Ac.6.10	29.7.2006	60,14,41,000	20.7.2006 26.7.2006 9.8.2006	2.00	18,04,80,335	20,
WP.5742/2009 W.A.480/2010	M/s Lake Point Builders Pvt. Ltd. Mumbai	Site No.1 Plot No.7	Ac.4.05	29.7.2006	42,72,75,000	19.7.2006 26.7.2006 9.8.2006	2.00	12.24,25,000	14,
-do-	-do-	Site 2 Plot 1	Ac.1.47	29.7.2006	18,05,65,000	19.7.2006	2.00	4,01,88,335	6,0
1	2	3	4	5	6	7	8	9	10
WP.12845/2009 W.A.481/2010 W.A.485/2010	M/s Prestige Garden Estates	Site 1 Plot 9	Ac.6.35	22.7.2006	82,98,18,000	19.7.2006 26.7.2006 9.8.2006	2.00	25,66,06,000	27,
-do-	-do-	Site 2 Plot 2	Ac.4.53	29.7.2006	40,80,60,000	19.7.2006 26.7.2006 9.8.2006	2.00	11,60,20,000	13,
-do-	-do-	Site 2 Plot 3	Ac.3.33	29.7.2006	37,62,90,000	19.7.2006 26.7.2006 9.8.2006	2.00	10,54,30,000	12,
WP.13483/2009 W.A.482/2010	M/s Pioneer Tel. Pvt. Ltd.	Site 1 Plot 1	Ac.5.39	29.7.2006	53,95,39,000	19.7.2006 26.7.2006	2.00	15,98,46,335	--
WP.28553/2009 W.A.650/2010	M/s My Home Constructions	Site 3 Plot 1	Ac.5.50	29.7.2006	42,66,37,500	19.7.2006 26.7.2006 9.9.2006	2.00	12,22,12,500	14,
WP.28556/2009 W.A.808/2010	M/s My Home Constructions	Site 3 Plot 2	Ac.2.70	29.7.2006	16,48,22,000	19.7.2006 26.7.2006 9.9.2006	2.00	3,49,40,670	5,4
-				Empire	Project I				
WP.2776/2010	M/s Eden Builders Construction		Ac.25.00	12.1.2008	300,25,00,000	19.12.2007 29.12.2007	7.00	68,06,25,000	--
-				Empire	Project II				
WP.12786/2010	M/s DLF SBPL		Ac.75.00		751,50,00,000	18.2.2008 25.2.2008	10.00	187,87,00,000	--

itself or alternatively to deliver land of equivalent and adequate value. This Court by orders dated 21.6.2006 directed that any steps taken by the Government in respect of the lands would be subject to further orders. Another writ petition being W.P.No.14439 of 2006 was filed by K.S.B. Ali seeking a declaration that the tender called for by HMDA for sale of lands in dispute was unconstitutional. The writ petition was dismissed on 14.7.2006 and the appeal W.A.No.887 of 2006 filed there against was also dismissed on 26.7.2007.

10. The petitioners claim that in view of the litigation pending in the High Court as on the date of auction, it is clear that the respondents are not transparent in its dealings and wantonly suppressed the material facts relating to the title of the State to

the property and thus misrepresented the petitioners. The petitioners by letter dated 9.8.2006 brought the position to the notice of the respondents and sought for extension of time to deposit the amounts and thereafter a meeting was called and time was extended upto 30.9.2006. In the meanwhile they were impleaded as parties to W.A.No.887 of 2006. Petitioners addressed letter dated 14.9.2006 to the 1st respondent intimating that the petitioner was prepared to go ahead with the transaction only in the event of first respondent complying with

a) Terms and conditions committed at the time of the auction would be strictly adhered to.
b) All infrastructure committed by the first respondent including identification and visible boundaries of sites, laying of roads, provision of water supply, sewerage etc. are provided forthwith;
c) All cases against the auctioned sites are withdrawn/closed before the due date for paying the final instalment i.e. 30.9.2006.
d) That the plots are surveyed, identified and shown to the petitioner.
e) Payment of balance would only be made at the time of registration of plots.
f) Undertaking to be given by the first respondent that all plots made by the petitioner in line with applicable guidelines would be approved within 30 days of submission and preference in the rant of various other clearances, such pollution etc

and in the event the 1st respondent was not able to comply with the above, the amount should be refunded on or before 12.10.2006 at 12% interest. However, by letter dated 18.9.2006, the petitioner intimated the 2nd respondent that the petitioner was not agreeable to deposit the balance amount of Rs.21,42,00,000/- without sufficient proof that litigation in respect of the lands in question had been closed. The petitioners have also referred to the letter dated 28.3.2007 of the 1st respondent that in view of the pendency of W.A.No.887 of 2006 and as per the representation of the petitioner, it had agreed in principle to refund the amounts paid towards the first and the second installments and that the process of refund would be taken up in due course subject to the petitioner furnishing equivalent bank guarantee for the EMD and by letter dated 31.3.2007, the 2nd respondent informed that the refund would be made in the second fortnight of April, 2007. W.A.No.887 of 2006 was dismissed on 26.10.2007 and the SLP No.23392 (SLP) of 2007 filed against the same was dismissed on 13.12.2007 permitting Sri K.S.B. Ali to withdraw the writ petition with liberty to initiate appropriate proceedings. The 1st respondent issued a revised schedule for payment of balance amount by letter dated 14.12.2007. By letter dated 28.12.2007 addressed to the 1st respondent the petitioner requested for allotment of alternate land or to refund the amount within a week with interest thereon at 12% p.a. Subsequently a meeting of all the auction purchasers was held on 9.1.2008 and thereafter the 1st respondent by letter dated 21.1.2008 further revised the schedule for payment of balance amounts. According to the petitioners, subsequent to the orders of the Supreme Court, writ petitions were filed viz., W.P.Nos.3421, 8761 and 1298 of 2008, 3750 and 6425 of 2009 challenging Government Memo dated 21.5.2005, 22619 and 7747 of 2008 challenging the public auction apart from W.P.No.10084 of 2006 already pending.

11. The facts leading to the filing of Writ Petition Nos.2776 of 2009 and 12786 of 2010, which relate to The Empire Projects I and II respectively, also arise on the same lines as is in the case of writ petitions filed in respect of "Golden Mile'. According to the petitioner, as on 29.12.2007, it paid an amount of Rs.75,06,25,000/-towards Initial Deposit Amount and EMD. It is stated that the controversy as to whether the subject land belongs to the State or to the legal heirs of late Nusrat Jung-I under the Muntakhab No.57 of 1995 dated 7.5.1995 remains unresolved and the same is left to be agitated in a Civil Court which will take years to reach finality, therefore, they sought for refund of the deposits made. It is stated that as on the date of publication of auction in Hindu newspaper dated 7.12.2007, W.P.No.10084 of 2006, involving Mutakhab No.57 of 1955 and the SLP.No.23392 of 2007 are pending and the said fact was concealed by the respondents and misrepresented the petitioners. The respondents misinterpreting the order of the Supreme Court dated 13.12.2007 represented that the order of the Supreme Court has no application. The request of the petitioners for refund was erroneously rejected and notice in Letter No.B5/15980/07 dated 22.1.2009 was issued as a final notice to remit balance sale consideration within 15 days which is arbitrary and illegal and cannot be sustained.

12. On behalf of respondents 1 to 3 a counter affidavit was filed stating that the respondents have taken all the measures to safeguard the land in question and filed appeal against the order of the learned single Judge in W.P.No.10084 of 2006 and batch dated 2.6.2009. It is stated that a similarly situated auction purchaser namely M/s Today Hotels (Andhra) Pvt. Ltd. has paid the entire sale consideration to the respondents in respect of an extent of Ac.4.608 in S.No.109 of Kokapet village and possession was handed over to them on 26.3.2008. The Government of Andhra Pradesh has allotted lands in S.No.239 and 240 of Kokapet village to I.T. companies in SEZ and sale deeds were executed in their favour and they developed the property. In fact the respondents have agreed to the request of the petitioner for executing an indemnity bond for payment of the balance sale consideration by the petitioners and a draft indemnity approved by the Government was communicated to the petitioner on 7.2.2009. It is clearly averred that the respondents are in a position to execute the sale deed and handover the possession of the lands to the petitioner, but the petitioners have not come forward by paying the balance sale consideration. The respondents denied that there was a cloud/fetter over the title to the property. Counter denies that respondents have failed to provide the infrastructural facilities. It is categorically averred that 80% of the infrastructural facilities were approved and the remaining 20% could not be approved because of non-payment of balance sale consideration by the petitioners. The petitioner has not come forward to pay the consideration till date.

13. The brief facts leading to filing of W.P.No.12786 of 2010 are that respondent No.1 by letter dated 18.2.2008 intimated that the petitioner was selected and awarded for sale and development of Ac.75.00 of land under The Empire-II project. On 25.2.2008 petitioner paid Rs.187,87,50,000/- towards 1st installment. The petitioner by letter dated 18.3.2008 informed the respondents about the litigation as to the title of the property and requested for supply of documents and also intimated about the quarry activity and encroachment on sites. Respondent No.2 by their letter dated 24.4.2008 intimated that survey and demarcation of the site was completed and quarry activities are stopped and requested the petitioner to remit 75% of

the balance amount. Respondent No.1 by letter dated 23.6.2008 intimated that respondent No.1 decided to execute the sale deeds for Ac.25.00 out of Ac.75.00 in the first instance and requested to arrange for payment of Rs.113.20 crores before 29.6.2008. On 28.6.2006 petitioner submitted a representation to the Hon'ble Chief Minister that an amount of Rs.580.50 paid in the public auction of the lands situated at Raidurg conducted by APIIC was blocked and the same may be transferred for the Empire-II lands and the same was referred to the 2nd respondent to take needful action. In spite of repeated requests, the respondents have not supplied necessary documents regarding title to the property. It is admitted that the Deputy Tahsildar of Respondent No.1 handed over the possession of Ac.18.75 of land surveyed by the surveyor in S.No.239 of Kokapet village along with sketch on 29.12.2008 in the presence of panch witnesses and respondent No.2 in his letter dated 19.1.2009 issued no objection to the petitioner to carry out development of the project work subject to certain conditions. However, on 10.7.2009 the petitioner requested respondents 1 and 2 for refund of the amount of Rs.197.875 crores on account of litigation pending in the court regarding the title of the state to the property and the obstacles being faced by them.

14. In the counter it is stated that the land in S.Nos.239 and 240 of Kokapaet village was notified as SEZ by the Government of India and published in extraordinary Gazette of India dated 13.6.2007. The respondent authority has been allotted an extent of Ac.218.13 gts. in S.No.239 and an extent of Ac.291.14 gts in S.No.240 of Kokapet village for raising financial resources of the organization to meet the expenditure of the projects on hand through Government Memo dated 17.11.1999. The MRO, Rajendranagar has delivered possession of a total extent of Ac.499.05gts. in favour of HUDA free from encroachments and litigations under the cover of panchanama dated 6.1.2000. Nowhere in the judgment in W.P.No.10084 of 2006 finding was recorded that the lands in question are not of the Government or HMDA. Suspecting the title of the respondents the petitioners have violated the conditions and trying to avoid further payment, which is a serious lapse. There is no basis for the petitioners to allege that there is a cloud on the title to the land. The petitioner having participated in the tender process and accepted letter of award shall have to go by the conditions of tender, letter of award and the agreement and they cannot resile from their obligations. Therefore, they cannot seek any refund of the amounts paid by them. The obligations between the petitioners and the respondents being contractual in nature, writ petition under Article 226 is not maintainable and petitioners cannot complain violation of Article 14.

Proceedings before the learned single Judge

15. On the factual matrix in W.P.No.18341 of 2009 and batch cases out of which the respective appeals arose, it was argued before the learned single Judge on behalf of the writ petitioners that by means of the brochure supplied to the petitioners it was represented that the state has clear title over the subject land and it is free from litigation, but since it has emerged that the land is the subject matter of dispute before this Court, the respondents are under obligation to refund the amounts deposited by the petitioners. There was infraction of section 55(1)(a) of the Transfer of Property Act and the respondents did not disclose the defect in title and pendency of litigation. It was also contended that at one stage the respondents themselves offered to refund the amounts, but they have not fulfilled the promise.

On the other hand, it was argued by the learned Advocate General on behalf of HMDA that when the brochure was printed and applications were sold, no litigation was pending, litigation ensued only subsequently and the same was passed on to the petitioners and they participated in the auction being fully aware of the litigation and as such they deemed to have waived the objection in regard thereto. It was also argued on behalf of HMDA that the transaction between the petitioners and the respondents being purely commercial in nature, governed by various terms and conditions of the agreement, the writ petitions are not maintainable. A prayer for refund of the amount paid towards part of sale transaction can be made only in a civil suit and writ petition is not a proper remedy. Since the petitioners did not pay the balance of sale consideration, there was a clear breach of terms of the contract on the part of the petitioners.

16. Placing reliance on the observations of the Supreme Court in **ABL INTERNATIOINAL LTD. AND ANOTEHR v. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD. AND OTHERS**[1] **and TATA CELLULAR v. UNION OF INDIA**[2] the learned single Judge was of the view that the High Court cannot decline judicial review just because the lis in a writ petition arises out of a contract and where there does not exist much dispute as to facts, or any controversy as to interpretation of clauses, the parties cannot be driven to Civil Courts and to spend their time and money in litigating before the Civil Courts. The learned single Judge taking note of the letters dated 28.3.2007 and 31.3.2007 of the 2nd respondent wherein the respondents have agreed for refund of the deposited amounts, it was held that for all practical purposes, the dispute between the petitioners and the respondents is no longer in the realm of contractual obligations, therefore, the writ petitions are maintainable.

As regards the refund of the amounts deposited, disbelieving the statement of the respondents that the filing and pendency of the writ petitions was informed to the petitioners orally at the time of auction, the learned Judge held that there was a failure on the part of the respondents in disclosing the defect or cloud upon their title, as required under section 55(1)(a) of the Transfer of Property Act at least as on the date of the auction. Placing reliance on the letters of the 2nd respondent for refund of the amounts, it was held that the respondents are under obligation to refund the amounts deposited by the petitioners. However, it was held that the respondents cannot be mulcted with the liability to pay the interest, if the amount is refunded within three months. Accordingly, the writ petitions were allowed directing the respondents to refund the amount deposited by the petitioners within three months failing which it was directed that the amounts shall carry interest at 9% per annum from the date of deposit till the date of payment and that the respondents are liable for other legal consequences.

17. Aggrieved by the aforesaid findings of the learned single Judge, the present batch of appeals are preferred by HMDA except W.A.Nos.484, 485 and 954 of 2010 which are preferred by the writ petitioners against that part of the order of the learned single denying interest on the amounts directed to be refunded.

18. We have heard the learned Advocate General for HMDA in all the appeals, Sri T.N. Subramanian, learned Senior

Counsel for the respondents in W.A.No.481 and 477 of 2010, Sri S. Ravi, learned Senior Counsel for the respondents in W.A.Nos.479, 480 and 482 of 2010, Sri E. Manohar, learned senior Counsel for the petitioner in W.P.No.2776 of 2009 and Sri D. Prakash Reddy, learned Senior Counsel for the petitioner in W.P.No.12786 of 2010 and the appellant in W.A.No.808 of 2012.

Submissions of the Respondents (Appellants):

19. The learned Advocate General reiterating the contentions urged before the learned single Judge submitted that as on the date of auction and thereafter the petitioners are aware of the litigation, but, still they have chosen to pay the installments, therefore, they having paid the amounts without demur or protest, are bound by the contractual obligations. The learned single Judge failed to appreciate that some of the petitioners did not pay the second installment thereby contravened the terms and conditions of the auction even though this Court by order dated 28.8.2006 in W.A.M.P.No.1835 of 2006 in W.A.No.887 of 2006 categorically observed that pendency of writ appeal would not be a ground to withdraw from their obligations in the auction. He further submitted that after dismissal of the said appeal on 26.10.200, the respondents by letter dated 12.11.2007 intimated the petitioners to pay the balance amounts within 15 days, but they failed to pay the amounts. Refund of the amounts as agreed by the respondents in their letters dated 31.3.2007 and 28.3.2007 was conditional in that the petitioners were asked to furnish bank guarantee to take up the process for refund, therefore, the finding recorded by the learned single Judge that the respondents committed to refund the amounts is not correct. The learned single Judge failed to appreciate that the petitioners did not furnish the bank guarantees for refund of the amounts; therefore, question of refund of the amounts does not arise. In the meeting held on 9.1.2008 all the successful bidders had agreed to pay the balance amount on furnishing indemnity bond by the appellant, but the petitioners had failed to pay the balance amounts. The learned Advocate General vehemently contended that the learned single Judge failed to appreciate that the State has been in peaceful possession of the lands in question for over several decades and that the Civil Court as long back in the year 1973 in O.S.No.512 of 1973 held that Nazim Atiyat Court had no power to confer rights over Jagir lands except to the extent of cash grants and the appeal filed against the said judgment has been dismissed by this Court in C.C.C.A.No.142 of 1976, which clearly establishes that the State has absolute title over the land in question. The finding of the Civil Court on legal aspect having become final, the State has unimpeachable title to the property and on mere suspicion the writ petitioners cannot breach the terms and conditions of agreement. Once the bid was accepted, the contract has been completed; therefore, writ petition would not be maintainable to rescind a contract. The judgment in W.P.No.10084 of 2006 and batch dated 2.6.2009 has been set aside by the Division Bench in W.A.No.1159 of 2009 and batch dated 18.7.2012, therefore, there was no impediment for the enjoyment of the property and making further developments by the petitioners. In fact possession of the land was delivered to some of the auction purchasers by executing registered sale deeds in their favour. He further submitted that in spite of extending time on two occasions, petitioners did not come forward to pay the balance sale consideration, as such, the petitioners, who breached the terms and conditions of the agreement and resiled from the contract, are not entitled to seek for refund the amounts paid. The learned Advocate General placed reliance on various decisions of the Supreme Court to contend that where the matter arises out of contractual obligations and where one party has failed to discharge its obligation, the remedy for refund of the amounts, if at all permissible by the terms and conditions of the contract, is to approach the civil court by way of a suit, and, the High Court in exercise of its jurisdiction under Article 226 of the Constitution, cannot entertain such matters to resolve the disputed questions of facts or title to the property and direct refund of the amounts paid and prayed for dismissal of the writ petitions. We will refer to the decisions relied upon by the learned Advocate General while considering the scope of judicial review of contractual obligations at the appropriate time.

Submissions of the writ petitioners:

20. Sri T. N. Subramanian, learned Senior Counsel appearing for some of the writ petitioners submitted that the respondents have concealed the fact that they did not possess clear title over the land put for public auction, as such, petitioners are not bound by the contractual obligations. The state has not acted fairly in the matter, therefore, the writ court has jurisdiction to entertain the matter and consider the issue. Referring to the various cases filed before the Court, Sri Subramanian submitted that the matters filed before the High Court clearly shows that the land put for auction is not free from dispute as on the date of auction and as such the petitioners are right in rescinding the contract and seek for refund of the amounts paid. He further submitted that the respondents having realized that a cloud has created over the title of the State to the property have agreed to refund the amounts, but it failed to fulfill the promise, therefore, this Court can go into the same and the learned single Judge rightly did so and directed for refund of the amounts and as such no interference is warranted with the order under appeal.

Elaborating his arguments, Sri Subramanian submitted that a State instrumentality is amenable to writ jurisdiction in contractual matters if it acts unfairly, unjustly and unreasonably and placed reliance on the decisions of the Supreme Court in **ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPN. OF INDIA** (1 supra)**, NOBLE RESOURCES LTD. v. STATE OF ORISSA**[3]**, FOOD CORPORATION OF INDIA v. SEIL**[4]**, KARNATAKA STATE FOREST INDUSTRIES CORPN. v. INDIAN ROCKS**[5]**, GUJARAT STATE FINANCIAL CORPN. v. LOTUS HOTELS P. LTD.**[6]**, UNITED INDIA INSURANCE CO. LTD. v. MANUBHAI DHARMASINHIBHAI GAJERA**[7]**, MANAGING DIRECTOR, HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION v. HARI OM ENTERPRISES**[8]**, ZONAL MANAGER, CENTRAL BANK OF INDIA v. DEVI ISPAT LIMITED**[9]**, POPCORN ENTERTAINMENT v. CITY INDUSTRIAL DEVELOPMENT CORPN.**[10]**, MAHABIR AUTO STORES v. INDIAN OIL CORPORATION**[11]**, KUMARI SHRILEKHA VIDYARTHI v. STATE OF UP**[12]**, HARYANA FINANCIAL CORPORATION v. RAJESH GUPTA**[13]**.**

He further submitted that there is no blanket bar for enquiry into questions of fact in writ jurisdiction, issue being one

of discretion and not of jurisdiction. Reliance was placed on **SHANKARA COOPERATIVE HOUSING SOCIETY LTD. v. M. PRABHAKAR**[14], **GUNWANT KAUR V. MUNICIPAL COMMITTEE, BATINADA**[15], **AIR INDIA LTD. v. VISHAL CAPOOR**[16].

Placing reliance on the decisions of the Supreme Curt in **ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPORATIOIN OF INDIA** (1 supra) and **FOOD CORPORATION OF INDIA v. SEIL** (4 supra), Sri Subramanian submitted that a writ petition seeking monetary claim as a consequential relief can be entertained by the Court under Article 226 of the Constitution of India.

He also submitted that a seller is bound in law to disclose to the buyer any material defect in the property which he is aware of and an omission to such a disclosure amounts to fraudulence. Section 55(1) of the Transfer of Property Act casts a duty on the seller to disclose any material defect in the property or in the seller's title thereof of which the seller is and the buyer is not aware. The respondents failed to disclose the pendency of litigation in respect of the property of which they admittedly had notice and referred to the decisions of the Supreme Court in **HARYANA FINANCIAL CORPORATION AND OTHERS v. RAJESH GUPTA** (13 supra) and referred to Halsbury's Laws of England Vol.42 (Sale of Lands) Fourth Edn. Re-issue at paras 41 and 55. The learned single Judge disbelieved the statement of the respondents that the filing and pendency of the writ petitions was informed to the petitioners orally at the time of the auction.

Sri Subramanian further submitted that a seller has an obligation in law to disclose any change in circumstances before his representation is acted upon and such non-disclosure shall amount to continuing misrepresentation and placed reliance on the decision in **WITH v. O'FLANAGAN**[17]. He submitted that no instrumentality of the State can act contrary to law, arbitrarily or unreasonably even in the contractual field.

21. Sri E. Manohar learned counsel appearing for the petitioner in W.P.No.2276 of 2009 submitted that as on the date of publication for auction of the land, W.P.No.10084 of 2006, involving Mutakhab No.57 of 1955 and the SLP.No.23392 of 2007 are pending and the said fact was concealed by the respondents. The Supreme Court by order dated 13.12.2007 while permitting the petitioner therein to withdraw the writ petition set aside the order passed by the learned single Judge in W.P.No.14439 of 2006 as also the order passed in W.A.No.887 of 2006 leaving the issues raised open. Therefore, as on 20.12.2007, when the auction was conducted, the issue relating to Muntakhab No.57 of 1955 is unresolved, therefore, there is a cloud over the title of the State to the property and as such the respondents are bound to refund the amounts paid by the petitioners. The respondents, being a State, are governed as per the doctrine of public trust and are obligated to disclose the true facts. As per sections 54 and 55 of the Transfer of Property Act even a private vendor is obligated to disclose any defect in title and the respondents being a State cannot conceal such factual aspect. The respondents have not acted bona fide in the process of auction and the tender process adopted by them has failed to qualify the test of a valid tender and thus the whole process of tender in respect of auction of land is against public policy and vitiated and is *non-est,* invalid and *ex facie* illegal. Since the claim of the respondents in the publication issued in the newspaper dated 7.12.2007 that the proposed land has 100% clear title, suitable for immediate possession, totally free from any encumbrance or litigation is disproved by the factum of writ petitions pending in the High Court and the Supreme Court, the action of the respondents in issuing the impugned notice dated 22.1.2009 to forfeit the sale price deposited by the petitioner as a bona fide purchaser is mala fide, illegal, amounts to unjust enrichment and violative of Articles 14, 19(1)(g) and 21 of the Constitution of India and petitioner is entitled for refund of the amounts paid. He placed reliance on the decisions of the Supreme Court in **HARYANAA FINANCIAL CORPORATION AND OTHERS V. RAJESH GUPTA (13** supra**)** and **GODAVARI SUGAR MILLS v. STATE OF MAHARASHTRA AND OTHERS**[18].

22. Sri Prakash Reddy, learned counsel appearing for the petitioner in W.P.No.12786 of 2010 submitted that the respondents deliberately suppressed the information relating to the orders passed in W.A.No.887 of 2006 arising out of the order dated 14.7.2006 in W.P.No.14439 of 2006 and the order passed in SLP.(Civil) No.23397 of 2007 on 13.12.1997 in their letter dated 24.4.2008 while asserting their title. The pendency of litigation and non-supply of the documents evidence the cloud on the title of the lands in question, therefore, the respondents are not in a position to convey clear, perfect and valid marketable title to the lands till the conclusion of the litigation. The state has not acted fairly as regards the title of the State to the property and the same is contrary to the doctrine of fairness being violative of Article 14 of the Constitution of India. Reliance was placed on **UNITED INDIA INSURANCE CO. LTD. v. MANUBHAI DHARMASINHIBHAI GAJERA** (7 supra) **KARNATAKA STATE FOREST INDUSTRIES CORPN. v. INDIAN ROCKS (SUPRA), NOBLE RESOURCES LTD. v. STATE OF ORISSA** (3 supra), **ABL INTERNATIONAL LTD.** case, **GUJARAT STATE FINANCIAL CORPN. v. LOTUS HOTELS P. LTD.** (6 supra) and **FOOD CORPORATION OF INDIA v. SEIL** (4 supra).

23. Sri S. Ravi, learned counsel appearing for the respondents-petitioners in W.A.Nos.479, 480 and 482 of 2010 supported the contentions urged by the learned senior counsel and submitted that in view of the suppression of material facts regarding title of the State to the property in question the respondents are not justified in not refunding the amounts paid by the petitioners.

24. The scope of judicial review of contractual obligations in the realm of private law and maintainability of the writ petitions for violation of the terms and conditions of contract under Article 226 of the Constitution is very limited. Before we deal with this aspect in the light of the submissions made by the learned counsel for the parties with reference to the case law and facts on hand, though whether the State has title to the property in question is not a matter to be gone into to consider the issue of contractual obligations of the parties by way of judicial review under Article 226, since it has some bearing on the issue, so far as it is relevant and necessary to know the filing of various writ petitions, we may briefly refer to the background facts of Kokapet land and possession thereof by the State as culled out from the material placed on record.

Background facts of Kokapet Land:

25. One Nawab Nusrat Jung Bahadur-I (Nusrat Jung-I) purchased an extent of Ac.1653.34 gts in Kotham Kunta also

known as Asadnagar (now Kokapet village) by registered sale deed in 1852. He died issueless in 1895 leaving behind his widow Smt. Rahimunnisa Begum, who died on 10.10.1916. During her life time, succession enquiry commenced in the Court of Nazim-E-Atiyat on 7.8.1905. Nusrat Jung-I had two paternal first cousins – Nawab Gulam Hussain and Nawab Md. Sardar. During the pendency of the enquiry in 1341 F (1932 AD) Sarf-E-Khas Mubarak (the private Secretariat of the Nizam) took custody of the property to enure to the benefit of the successors-in-interest of Nusrat Jung-I. The enquiry could not be concluded and in the meanwhile the A.P. (T.A.) Atiyat Enquiries Act, 1952 came into force and the matter stood transferred to the Court of Nazim Atiyat. On 15.2.1954 the Atiyat Court declared the respective shares of the heirs in the mash i.e. the property dealt by the Atiyat and the succession was settled. The order of the Atiyatat was submitted to the Revenue Minister on 24.12.1954 and the same was approved and Muntakhab was issued on 7.5.1955 in favour of various shareholders. After formation of the State of Andhra Pradesh, the land vested in the State but the Muntakhab was not implemented. Some of the share holders filed W.P.No.227 of 1960 for amendment of the Munthakhab to be in consonance with the order of the Atiyat Court and for payment of mash, which was allowed on 1.4.1963.

26. At this stage, it would be appropriate to mention that the Muntakhab dated 7.5.1955 came to be considered by IV Additional Judge, City Civil Court, Hyderabad in O.S.No.512 of 1973 in a dispute between one M. Feroz Khan and another and some of the legal heirs of Nusrat Jung-I represented by their GPA holder Sri J.H. Krishnamurthy in regard to property in S.Nos.41, 42 and 43 of Kokapet village. The trial Court after an elaborate trial in its judgment dated 30.6.1976 recorded a finding that lands under the Muntakhab do not belong to Nusrat Jung-I and his heirs were not in possession and enjoyment of the lands. It was held that Nazim-e-Atiyat had clearly held that Kokapet village was abolished under the A.P. (Telangana Area) (Abolition of Jagirs) Regulation 1358F and what was released to the heirs of Nusrat Jung-I under the Muntakhab was only commutation sums which alone were atiyat grants within the meaning of Section 2(1)(b)(i) of Hyderabad (Telangana Area) Atiyat Enquiries Act, 1952 and the same was upheld by the High Court in C.C.C.A.No.142 of 1976 dated 11.12.1985.

27. Subsequently, it appears that without properly examining the legal effect of the judgment and decree of the Civil Court, the District Collector, Hyderabad by letter dated 14.2.1978 directed the Tahsildar, Hyderabad to implement the mutation as per the Munthakhab. The Tahsildar by report dated 28.8.1984 addressed to the Revenue Divisional Officer, Chevella informed that out of Ac.1635.34 gt.s an extent of Ac.891.26 gts was granted as pattas to various individuals by the Government during its custody and an extent of Ac.719.28 gts comprising poramboke and gairan (barren) land was vacant and Ac.134.06gts was converted into village site, Naddinala, road, temples etc. Ultimately, the Chief Commissioner, Land Administration and the Commissioner of Land Revenue (CLR) submitted a report dated 21.6.2001 to the Government for implantation of the Muntahakhab. In W.P.No.20298 of 1998 filed by some of the share holders, this Court by judgment dated 9.7.2001 directed the Government to consider the report of the CLR and take further action in accordance with law. In his letter dated 15.4.2002, the Principal Secretary took objection that the Muntakhab cannot be implemented since the Nazim Atiyat had no jurisdiction on account of A.P. Amendment Act 28 of 1956 (Amending the 1952 Act) to adjudicate the matter, it had not verified the jagir administration and other records and the muntakhab lands were villagers patta lands and Government lands. However, a memo dated 6.5.2004 was issued withdrawing the letter dated 15.4.2002 and CLR was directed to implement the Muntakhab to the extent of open land of Ac.719.00 and a similar memo dated 31.7.2004 was also issued. However, by memo dated 21.5.2005 the earlier orders dated 6.5.2004 and 31.7.2004 were rescinded.

Writ Petitions filed before the High Court:

28. In the meanwhile the HMDA taken up the auction of the lands covered by Golden Mile project. Challenging the same, Sri K.S.B. Ali also filed W.P.No.14439 of 2006 on 22.5.2006 to declare the action of HMDA in conducting public auction to sell Ac.100.00 of land in Kokapat village as *mala fide,* illegal and arbitrary. By order dated 13.7.2006 a learned single Judge dismissed the writ petition as not maintainable taking the view that dispute relating to title to immovable property cannot be resolved in a writ proceeding, however, giving liberty to the petitioner to approach the Civil Court. Writ Appeal No.887 of 2006 filed against the said order was also dismissed by Division Bench of this Court of this Court on 26.10.2007. It appears, however, that the Division Bench has gone into the title of the property in question and recorded findings against the appellant. K.S.B. Ali carried the matter before the Supreme Court in SLP (Civil) No.23392 of 2007 wherein he sought permission to withdraw the W.P.No.14439 of 2006. The Apex Court by order dated 13.12.2007 dismissed the writ petition as withdrawn, consequently the judgment of the learned single judge as well as the judgment of the Division were set aside and the issues raised were left open.

29. Challenging the Memo dated 21.5.2005, W.P.Nos.3421, 8761 and 12938 of 2008, 3750 and 6425 of 2009 are filed to invalidate the memo and for a direction to implement the muntakhab No.57 of 1955 dated 7.5.1955 as stated above. The petitioners therein claim to be owners and in possession of specified extents of land covered by S.No.239 and 240 of Kokapet village executed by one Mr. J.H. Krishnamurthy. W.P.No.10084 of 2006 filed by K.S.B. Ali representing 203 legal heirs of Nusrat referred to earlier for implementation of Muntakhab No.57/1955 was also pending. W.P.No.22619 of 2009 and W.P.No.7747 of 2008 are filed by one Moizuddin Mahamood and Ghouse Mohiuddin Siddiqui respectively seeking invalidity of the public auction and sale of Ac.100.00 land which is part of Kokapet village consequent to memo dated 21.5.2005 and for a direction to survey, demarcate and handover physical possession of the land to the heirs of the petitioners from out of the land admeasuring Ac.719 by implementing the order of Nazim Atiyat dated 15.2.1954 and the Muntakhab.

30. A learned single Judge of this Court by order dated 2.6.2009 allowed the aforementioned writ petitions in W.P.No.10084 of 2006 and batch setting aside memo dated 21.5.2005 directing the Government to pass fresh orders and that it shall be open to the legal representatives of late Nawab Nusrat Jung Bahadur-I or their authorized agent to pursue the proceedings before the Government and the dispute, if any among them, may be agitated before a competent forum. Against the said order, the HMDA preferred appeals W.A.Nos.1159 to 1166 of 2009 and a Division Bench of this Court by a detailed order dated 18.7.2012 allowed the appeals setting aside the order of the learned single Judge. The Division Bench concluded:

(a) Neither the State nor any Officer of the State, including the Principal Secretary or the Special Chief Secretary to the Government, Revenue Department is conferred judicial or quasi judicial jurisdiction, power or authority, either as Court, a Tribunal or a persona designata, to adjudicate disputed questions of title to immovable property, even where one of the competing claimants to such title is the State;

(b) Consequent on conclusion (a) supra, none of the instruments/decisions/orders dated 15-4-2002; 6-5-2004; 31-7-2004, or the impugned Memo dated 21-5-2005 (impugned in the writ petitions), could be considered as having efficacy or operative force as determinative or deprivatory of title in or entitlement to possession of immovable property of an extent of Ac.1635-34 guntas in Kokapet village of Ranga Reddy District, in favour of the State itself or any other private individual or individuals, including the writ petitioner and/or the non-official respondents in this batch of writ appeals;

(c) The decision/order in Memos dated 06-5-2004 and 31-7-2004 were not formally communicated to any of the writ petitioners including Sri K.S.B.Ali, the representationist at whose instance and on whose representation these Memos were issued;

(d) In the light of conclusion (c) above, the Memos dated 6-5-2004 and 31-7-2004, being uncommunicated administrative orders, are inoperative, inexecutable and sterile;

(e) The instruments/decisions/orders dated 15-4-2002; 6-5-2004; 31-7-2004 or the impugned Memo dated 21-5-2005 not having been expressed or authenticated in the manner ordained by Article 166 (1); or established to have been decisions taken at the specified level of authority, in accordance with the Rules of Business issued by the Governor of the State under Article 166 (2) and (3), cannot be regarded as orders issued by the State in exercise of its executive power under Article 162 of the Constitution;

(f) Consequent on conclusions (a) to (e) above, the impugned Memo dated 21-5-2005 is not susceptible to invalidation by this Court in exercise of its power of judicial review under Article 226 of the Constitution. Since the impugned Memo rescinds uncommunicated and inoperative Memos dated 6-5-2004 and 31-7-2004, violation of the audi alterem partem principle (even if applicable in the facts and circumstances of the case), is of no legal consequence and would not result in resuscitation of the unauthorized and sterile memos dated 6-5-2004 and 31-7-2004;

(g) Having withdrawn W.P.No.14434 of 2006 (sic 14439 of 2006) and obtained invalidation of the judgment in the said writ petition and in W.A.No.887 of 2006, in SLP (Civil) No. 23392 of 2007, by the order of the Hon'ble Supreme Court dated 31-7-2007, while obtaining permission "to take appropriate remedy", Sri K.S.B.Ali is disentitled either to file another writ petition for the same relief as in W.P.No. 14434 of 2006 or to pursue the pending writ petition No. 10084 of 2006, as this would not be an appropriate remedy; and pursuit of public law remedy by Sri K.S.B.Ali, for substantially the same grievance as in the earlier abandoned proceedings constitutes an abuse of process of the Court; and

(h) Neither has Sri K.S.B.Ali established by specific pleadings nor by due authorization on record that he is authorized to represent the cause of 203 legal heirs of Nusrat Jung-I; nor have the other petitioners pleaded or established the basis for their claims, to be the heirs of Nusrat Jung-I.

Findings:

31. The material placed on record discloses that Kokapet village was taken over by the Government as a part of abolition of Jagirs. It is the contention of the State neither the Atiyat Court (15.2.1954) nor the Revenue Minister in the revision (22.12.1954) conferred rights on the legal heirs in respect of the lands in Kokapet village and what was granted under the Muntakhab was only commutation sums which alone were atiyat grants within the meaning of Section 2(1)(b)(i) of the 1952 Act. It is contended by the learned Advocate General that the Muntakhab No.57 of 1955 dated 7.5.1955 issued by the Atiyat Enquires Branch, Revenue Department, Secretariat, Government of Hyderabad has erroneously included the property rights in the Mutakhab which were not granted either by the Atiyat Court or the Revenue Minister, therefore, the Muntakhab dated 7.5.1955 which is at variance is unenforceable. Therefore, it is argued by the learned Advocate General that what was not granted by the Atiayat Court and Hon'ble Revenue Minister cannot be included in the Muntakhab. After the death of Nusrat Jung-1 the entire property was taken over by Sarf-e-Khas Mubarak (the private Secretariat of the Nizam) for supervision and later transferred to the Court of Nazim Atiyat under the provisions of 1952 Act and after coming into force of A.P. (Telangana Area) (Abolition of Jagirs) Regulation, 1358 F it vested in the State of Hyderabad and after formation of the State of Andhra Pradesh it stand vested in the State and continues to be under the possession of the State.

32. In the proceedings before us, we cannot examine what rights were granted to the legal heirs of late Nusrat Jung-I under the Muntakhab. However, from the aforementioned background facts, the fact remains that after the death of Nusrat Jung-I the land in dispute continues to be in the possession of the State, whether it is under the erstwhile State of Hyderabad or the State of Andhra Pradesh. It is not difficult for the petitioners to verify from the revenue records of the Government to know whether the land was in the possession of the private individuals or in the possession of the State. Therefore, the contention of the petitioners that they were misrepresented by the State as to the title to the property needs to be examined in the above background in appropriate forum.

33. At this stage, we may refer to the terms and conditions to the extent relevant and the letter of confirmation-cum-provisional allotment issued by the HMDA, which are extracted below:

CONFIRMATION AND PROVISIONAL ALLOTMENT:

a. intimation of confirmation-cum-provisional allotment or otherwise as the case may be, will be sent by registered post. In case of non-receipt of such intimation it shall be the responsibility of the applicant to personally obtain a duplicate copy of the notice from the office of HUDA. Non-receipt of notice by the applicant

shall not be a ground for non-payment of the sale price or for delayed payment.

b. Final allotment letter will be issued on payment of the full sale price.

MODE OF PAYAMENTS:

XX XX

EARNEST MONEY DEPOSIT (EMD)

a. EMD carries no interest.

Xxx

INITIAL DEPOSIT (ID):

a. ID is equivalent to 50% of the sale price and includes EMD.

b. ID carries no interest in case of refund.

c. 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.

d. In case of non-confirmation of the bid/tender amount by the concerned authority, (HUDA) for any unforeseen reasons, the ID will be refunded along with the intimation by way of cheque without any interest.

e. Any part payments made towards ID and failed to pay the balance sale price within the prescribed time, both EMD and whatever amount of ID paid is liable for forfeiture.

CANCELLATION/SURRENDER/WITHDRAWAL AND REFUNDS:

a. All the payments by the applicant shall be made within the stipulated time. For non-payment of the sale price within the stipulated time, the allotment will be cancelled without any intimation of whatsoever nature.

b. For the purpose of prompt accounting, the successful bidder/s may intimate the payment particulars as and when made as per time schedule.

c. The allotment is also liable for cancellation for violation of any other terms and conditions as contained herein as may be communicated from time to time.

d. In case of cancellation, for whatsoever reason, the ID in full will be forfeited.

e. Withdrawal from allotment or surrender of allotment by the applicant amounts to cancellation for the purpose of refund of the amount paid by the applicant.

f. In all cases of refunds, the applicant shall surrender the original challans of payment and submit advance stamped receipt to the Chief Accounts Officer, HUDA and seek refund either in person or by post giving specific address and such refund will be made through an A/c payee cheque. HUDA will not be responsible for loss or misplacement of the cheque sent by post or for its mis-utilisation.

POSSESSION AND CONVEYANCE:

a-. The area of the plot is subject to variation. In case the actual area is less, the excess payment made by the allottee, if any will be refunded and no interest on such excess payment is payable by HUDA. In case the actual area is more, the cost of excess area will be calculated at the bid rate/tender rate upto a period of one year from the date of auction and thereafter interest on bid rate will be levied @ 12% p.a.

b. Pre-final letter will be issued after receipt of full sale price within stipulated time.

c. Possession of the land/plot will be handed over on payment of the full sale price or any other dues as per the terms and conditions.

d. The allottee/authorised representative shall take over the physical possession on or before the date as may be prescribed in the pre-final allotment letter date, failing which @ Rs.50,000/- shall be levied per month towards penalty till the date of taking over of the physical possession.

e. Final allotment letter will be issued after payment of full sale price and any other dues including cost of excess area, if any.

f. Conveyance of the plot through a registered Sale Dee will be made on the names of applicants only at the cost and expenses of the applicants after payment of the full sale price and any other dues and after taking over the possession of plot. Registration should be completed within the stipulated time as prescribed in the Final Allotment Letter failing which a penalty of Rs.1,00,000/- per month shall be levied till the date of submission of documents for registration. With respect o NRI allottees, the original allottees shall furnish the GPA authorizing agent/representative for execution of sale deed duly notarized in their countries and sign in the prescribed for by the registration authorities and to directly forward to HUDA.

GENERAL:

a. The site plan is displayed in the office of the HUDA and also at the site.

b. The allotment shall be subject to cancellation for violation of any of the terms and conditions or stipulations or instructions.

c. The allotment is also subject to such rules and regulations of the A.P. Urban Areas (Development) Act, 1975 or directions of the government and such other terms and conditions as may be communicated by HUDDA from

time to time.

d. All rates, taxes, charges, fees, assessment and other levies etc. of whatsoever nature shall be paid by the allottee to the concerned authority/body including HUDA from the date of allotment.

Xx xxx

SPECIAL CONDITIONS:

Xx xxx

11. In all matters of doubts or disputes or in respect of any matter not provided for in these terms and conditions, the decision of the Vice-Chairman, HUDA shall be final and binding.

12. The plot put for auction is on 'as is where is condition'. The applicants shall inspect the plot and satisfy themselves of the condition and location of the plot before participating in the auction. HUDDA will not carry any development work within the plot.

13. HUDA will provide external trunk services like roads, water supply line & electricity. These works will be completed within a period of six months from the date of auction and may extend in the circumstances beyond the control of HUDA.

14. The successful bidders of the plots after registration can apply for the building permission without waiting for the external infrastructure facilities like proposed roads, electricity and water supply lines as they are all intended to be completed in six months period.

15. The connecting 120 ft. road from the Financial District laid by APIIC will be laid upto the Golden Mile layout site and, extended upto Gandipet Road as shown in the sketch.

16. Site inspection will be arranged from the office of HUDA, Begumpet everyday from 11.00 a.m to 5.00 p.m. w.e.f. 10.7.2006-19.7.2006 for those who have purchased the placation form/Brochure. "

Confirmation-cum-provisional allotment Letter:

HYDERABAD URBAN DEVELOPMENT AUTHORITY
1-8-323, Paigah Place, Police Lines, Rasoolpura,
Secunderabad-500003

Lr.No.B2/7768/2006 Dated: 29.7.2006

CONFIRMATION-CUM-PROVISIONAL ALLOTMENT LETTER

Sub: HUDA—Auctions—Auction of Government Land at Kokapet Village of Rajenderanagar Mandal—Sy.No.100, 109 & 114—Provisional allotment letter communicated—Reg.

Ref: 1. Application No.0056.
2. Auction held on 20.7.06.

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I am happy to inform that your highest bid for the Government land in P.No.2 of Site No.1 approximately with an extent of Ac.6.106 situated at Kokapet village of Rajendra Nagar Mandal, has been confirmed in your favour and herby provisionally allotted on the sale basis as detailed below:

1. Site No.I	: P.No.2, Kokapet Village Rajendranagar Mandal.
2. Name of the allottee	: M/s Watermark Estates 8-2-29/82/L/104A MLA Colony, Road No.12 Banjara Hills, Hyd-34.
3. Approximate Area	: Ac.6.106
4. Bid/Tender rate (Toke No.054)	: Rs.9,85,00,000/- per acre
5. Total sale price	: Rs.60,14,41,000/-
6. Initial Deposit paid (Including EMD)	: Rs.20,04,80,335/-
7. Balance sale price	: Rs.40,09,60,665/-.

The confirmation cum provisional allotment letter is issued as per the terms and conditions, Condition No.6(A) of the Auction Brochure subject to realization of DD/Payment
Order.

The balance sale price (remaining after payment of ID) shall be paid in two instalments i.e. one instalment on or before 9.8.2006 and the final instalment shall be paid on or before 24.8.2006 as per terms and conditions of the Brochure.

All the payments should be made in DD drawn in favour of Vice Chairman, HUDA from any nationalized bank and remit through challan in the Indian overseas Bank, Himathnagar Branch, Ground Floor, near old MLA Quarters Road, Himathnagar, Hyderabad-500029 or its Extension Counter at HUDA Office, Begumpet.

The plot size is subject to variation and in case the actual area is less, the excess payment made by the allottee, if any will be refunded and no interest on such excess payment is payable by HUDA. In case the actual area is more, the cost of excess area will be calculated at the the Bid rate/Tender rate.

The applicant may specifically note that without any notice the above provisional allotment shall stands cancelled for non-payment of balance sale price as stipulated in the brochure and initial deposit stands forfeited.

This provisional allotment letter is subject to other terms and conditions as indicated in the brochure.

Yours faithfully,
Sd/-

Secretary.

To
M/s Watermark Estates
8-2-29/82/L/104A
MLA Colony, Road No.12
Banjara Hills, Hyderabad-34.

34. A reading of the above terms and conditions of agreement and the confirmation of provisional allotment clearly show that it is pure and simple, a private contract, not involving any statutory provisions. The petitioners have accepted the above terms and conditions of the agreement and participated in the auction proceedings and paid EMD. Pursuant to the letter of provisional allotment of land dated 29.7.2006, some of the petitioners' paid 1st installment and some paid 2nd installment and defaulted thereafter. Thus, the petitioners have also accepted the confirmation-cum-provisional allotment of land. Therefore, prima facie the contract is a concluded one and the parties are bound by the terms and conditions of the agreement and conditions of the confirmation-cum-provisional allotment.

Concept of judicial review of contractual obligations:

35. Before we consider the issue involved herein let us have a brief analysis of the concept of judicial review of contractual obligations arising out of public law and private law and the principles laid down by the Apex Court in various decisions.

It is settled position of law that the scope of judicial review of contractual obligations in the realm of private law under Article 226 of the Constitution is very limited. In the area of exercise of contractual powers by governmental authorities, the function of the courts is to prevent arbitrariness and favoritism and to ensure that the power is exercised in public interest and not for a collateral purpose. After awarding of the contract, it is the duty of the parties to fulfil the contractual obligations. Even when the courts had veered round to the view that the award of a contract by the government and its agencies would be amenable to the writ jurisdiction, to some extent, they still maintained the position that the question of breach of a contract was one which fell primarily within the area of private law under the Contract Act and that the remedy therefor lay in a Civil Court and not under the writ jurisdiction of the High Courts under Article 226. The view was held for long that a writ petition would not be an appropriate remedy for imposing contractual obligations on the government. (See **STATE OF BIHAR V. JAIN PLASTICS AND CHEMICALS LTD.**[19]**).**

36. In **RADHAKRISHNA AGARWAL v. STATE OF BIHAR**[20] the Supreme Court maintained that after the government had entered into a contract with a private party, the relations *inter se* between the contracting parties were not governed by any constitutional provision but by the provisions of the Contract Act which would determine the rights and obligations of the concerned parties. No question arose regarding the violation of Article 14 or any other constitutional provision, when the government was acting within the contractual field.

37. In **STATE OF PUNJAB v. BALBIR SINGH**[21] the Supreme Court held that a High Court had no jurisdiction to enforce the liabilities arising out of mutually agreed conditions of contract, in a writ proceeding under Article 226 of the Constitution.

38. In **D.F.O. v. BISWANATH TEA CO.,**[22] the Supreme Court held that a party could not claim under Article 226 enforcement of contractual obligations and recover damages. Proper relief for the party would lie to seek specific performance of the contract or damages in a Civil Court. The question of breach of contract would depend on facts and evidence. Such seriously disputed questions regarding breach of contract ought to be investigated and determined on the basis of evidence which may be led by the contesting parties. This can be done in a properly instituted civil suit rather in a writ petition. The Supreme Court reiterated that it will not enforce the terms of a contract qua contract. Therefore, it appears that on the given facts that pure money claim could not furnish a cause of action under Article 226 of the Constitution of India.

39. In **SHRILEKHA VIDYARTHI V. STATE OF UTTAR PRADESH** (12 supra) the Supreme Court held:

"The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies providing for adjudication of purely contractual disputes:

The Court also observed:

"However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the state of its obligation to comply with the basic requirements of Art.14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Art.14 of non-arbitrariness at the hands of the State in any of its actions."

40. In **SOHAN LAL v. UNION INDIA**[23] the Supreme Court held:

5. We do not propose to enquire into the merits of the rival claims of title to the property in dispute set up by the appellant and Jagan Nath. If we were to do so, we would be entering into a field of investigation which is more appropriate for a Civil Court in a properly constituted suit to do rather than for a Court exercising the prerogative of issuing writs.

41. In **ABL International Ltd. v. Export Credit Guarantee Corporation of India Limited** (1 supra) on which reliance has been placed by the learned single Judge, it was also held:

When the petition raises questions of fact of a complex nature, which may for their determination requires oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition *in limine* will normally be justified".

42. Professor Wade in his well-known treatise, Administrative Law stated the principle:

"…A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunctioin, specific performance, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies.

43. In **LIC OF INDIA V. ESCORTS LTD.**[24] it was held:

The action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field.

44. In **STATE OF GUJARAT AND OTHERS V. MEGHJI PETHRAJ SHAH CHARITABLE TRUST AND OTHERS**[25] it was held "if the matter is governed by a contract/agreement between the parties, the writ petition is not maintainable since it is a public law remedy and is not available for any private law field e.g. where the matter lis governed by a non-statutory contract."

45. In **HINDUSTAN PETROLEUM CORPORATION LIMITED V. ALI JAFFAR**[26] this Court held:

46. We are required to bear in mind that the plenary right of the High Court to issue writs in exercise of its jurisdiction under Article 226 of the Constitution of India, will not normally be exercised by the Court to the exclusion of alternative and effective remedies available unless the impugned action of the State or its instrumentality is so arbitrary and unreasonable so as to violate the guaranteed constitutional rights or for other valid and legitimate reasons, for which the Court may consider it necessary to exercise its jurisdiction.

47. Suffice it to hold that this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, normally cannot entertain writ petitions where the dispute raised lies in the realm of private law field for the reason that enquiry into such dispute may involve adjudication of disputed questions of facts for which purposes the proceedings under Articles 226 of the Constitution of India are ill-suited.

46. **BAREILLY DEVELOPMENT AUTHORITY AND ANOTHER v. AJAI PAL SINGH AND OTHERS**[27] is a case where the Bareilly Development Authority undertook construction of dwelling units for people belonging to different income groups. The respondents therein got themselves registered for allotment of the flats in accordance with the terms and conditions contained in the brochure issued by the Authority. The general information table stated that the cost of the flats was only estimated cost and was subject to increase or decrease according to the rise or fall in the price at the time of completion of the property. Under Clauses 12 and 13 of the Brochure the Authority reserved its right to change, enhance or amend any of the terms and/or conditions as and when felt necessary and also the right to relax any of the conditions at its discretion. Subsequently, the respondents were issued revised notices intimating the revised cost of the houses/flats and the monthly instalment rates which were almost double of the cost and rate of installments initially stated in the General Information Table. The revised terms and contentions of the Authority were challenged before the High Court on the ground that unilateral enhancement of cost much beyond the means and to the prejudice of the respondents was arbitrary. The High Court accepted the said ground and directed Authority to re-determine the cost of the flats and the rate of instalment payable. The Supreme Court held when State or 'other authority' within the meaning of Article 12 enters into ordinary contract with private persons, parties are governed by the terms of the contract and aggrieved party is not entitled to seek redress under Article 226 for breach of contract. It was held:

21. … Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly installments to be paid, the 'authority' or its agent after entering into the field of ordinary

contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (ie. BDA in this case in the said contractual field.

22. There is a line of decisions where contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple –Radhakrishna Agarwal v. State of Bihar, Premjit Bhai Parmar v. Delhi Development Authority[28] and DFO v. Biswanath Tea Company Ltd.)

47. In **STATE OF U.P. V. BRIDGE & ROOF CO. (INDIA) LTD.**[29] it was held:

First, 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 may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions 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. .."

In **BURMAH CONSTRUCTION CO. V. STATE OF ORISSA**[30] it was held:

Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil labiality arising out of a breach of a contract or a tort to pay an amount of money due to the claimants.

The Supreme Court in Tata Celluar case held that the Court can review administrative discretion in awarding a contract on the grounds of illegality, irrationality and procedural impropriety and the said principles have been reiterated in number of cases.

48. On an analysis of the above decisions of the Supreme Court, it is clear that contractual obligations may fall under judicial review if there is some public law element involved therein. Where the dispute lies within the contractual field pure and simple in the realm of private law a writ petition is not maintainable. In such cases, the relations between the parties are governed by the contract which determines the rights and obligations of the parties *inter se.* However, where there is an element of arbitrariness or unreasonableness, illegality, irrationality or procedural impropriety in the action of state authorities offending Article 14 of the Constitution of India, even in respect of a dispute arising out of a private contract, the Court, in exercise of its power of judicial review under Article 226, can entertain the matter and grant relief as per law.

Thus, though judicial review in matters of contractual obligations is permissible, but such review must be within the permissible limits and in public interest and in accordance with the principles laid down by the Supreme Court. It must be intended to prevent arbitrariness or favoritism and it must be exercised in the larger public interest. It depends upon the facts and circumstances of each case. In cases where there is an element of arbitrariness, illegality or irrationality in the action of the State or its instrumentality the Court can interfere and grant relief. Here we are concerned with the contractual obligations of the parties pure and simple and violation of the same by the parties. Therefore, the Tata Cellular case relied upon by the learned single Judge has no application as the said case deals with award of contract. In Bareilly Development Authority case, the Supreme Court categorically held when the State or its instrumentality enters into ordinary contract with private persons, parties are governed by terms of the contract and aggrieved party is not entitled to seek redress under Article 226 for breach of the contract. In **STATE OF GUJARAT AND OTHERS v. MEGHJI PETHRAJ SHAH CHARITABLE TRUST AND OTHERS** (25 supra) also it was held if the matter is governed by a contract or agreement between the parties, writ petition is not maintainable since it is a public law remedy and is not available for any private law filed. Since the parties herein are governed by the terms of the contract pure and simple the aggrieved party has to seek the relief in appropriate forum but not by way of judicial review under Article 226 of the Constitution of India.

49. Learned counsel for the petitioners placed strong reliance on the decision of the Supreme Court in **HARYANA FINANCIAL CORPORATION v. RAJESH GUPTA** (13 supra) to contend that this Court has jurisdiction to entertain the writ petitions. The respondent therein entered into an agreement with the Haryana Financial Corporation for purchase of a defaulting unit for Rs.50.00 lakhs and deposited an amount of Rs.2.5 lakhs by way of EMD. The respondent informed the Corporation that the premises did not have an independent appropriate passage from the road and requested to apprise in the matter. It appears that the Corporation failed to apprise the respondents in the matter and failed to perform its obligations in giving a fair description of the property offered for sale. Under those circumstances the respondents did not pay the balance amount 25% of the bid amount. The Corporation thereafter called for fresh tenders forfeiting the EMD. When challenged before the High Court, a direction was issued for refund of the amount with interest at 12% p.a. The Supreme Court found that it was the appellant Corporation that failed to perform its obligations in giving a fair description of the property offered for sale. It was found that the Corporation failed to disclose to the respondent the material defect about the non-existence of the independent passage to the property and acted in breach of Sections 55(1)(a) and (b) of the Transfer of Property Act, 1882.

We are of the view that the above case is distinguishable on facts with the case on hand. In that case, the Corporation had failed to rectify the material defect pointed out by the respondent even after a complaint was lodged. In the case on hand, dispute arose as to the title of the respondents to the property consequent on the filing of writ petitions before the High Court by the persons claiming to be the heirs of Late Nusrat Jung-I and the contention of the petitioners is that the respondents have concealed the title of the State to the property. The writ petitioners' claim as real estate developers ought to be presumed to have assessed all parameters of proposed venture, including title of seller, before participating in auction and offering huge offers. Merely because some persons are litigating and claiming rival title is no ground to doubt title of

seller and to avoid contractual obligations. The respondents assert that it has unimpeachable title to the land as it stood vested in the State and it was in continuous possession of the property from decades and the persons claiming title over the property were never in possession of the land. Under those circumstances, non-disclosure of any material defect by the respondents as alleged does not arise. Further, all the writ petitions ended in favour of the respondents and such issues were left open by the Supreme Court. Such disputed questions of title, if at all exists, are to be resolved in a properly instituted suit. We may also notice that maintainability of the writ petition was not the issue before the Supreme Court in Haryana Financial Corporation case. In our view, the said case has no application to the facts on hand.

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.

51. In **NOBLE RESOURCES LTD. v. STATE OF ORISSA** (3 supra) the Supreme Court referring to the decisions in Radhakrisnna Agarwal v. State of Bihar, ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., Bareilly Development Authority v. Ajai Pal Singh etc. while reiterating that contractual matters are not beyond the realm of judicial review, however, held that to a limited extent of scrutinizing the decision making process, it is always open to the court to review the evaluation of facts by the decision-maker and in such cases writ petition is maintainable. In our view, the said decision has also no application. Review of evaluation of facts by the Court in the decision making process no doubt can be exercised to find out whether there was any arbitrariness or unreasonable in the decision making process of the State or its instrumentality. In our view, the present case is not one where there existed any decision making process to find out whether there was arbitrariness or unreasonableness. The petitioners were provisionally allotted plots on payment of ID for which there was no grievance.

52. Another case relied upon by the learned counsel for the petitioners is **FOOD CORPORATION OF INDIA v. SEIL Ltd**. (4 supra) the Supreme Court while reiterating that contractual disputes involving public law element are amenable to writ jurisdiction, held that while exercising jurisdiction under section 226 the High Court acts not only as a court of law but also as court of equity and in an appropriate case the Court may grant such relief to which the writ petitioner would be entitled to in law as well as in equity. This case has no application. Firstly, the case on hand is not a case arising out of public law; it is purely in the realm of private law. Secondly, the petitioners' having failed to pay the balance sale consideration contrary to the terms and conditions of agreement and letter of allotment wants the amount paid to be refunded suspecting the title of the state to the property. We are of the view that in a case where a party to a contract has failed to discharge his obligation as per the terms of the contract/agreement, the High Court, in exercise of the power of judicial review under Article 226, cannot direct for refund of the amounts deposited exercising the power of equity. The petitioners herein have failed to pay the balance sale consideration as per the terms of contract and the confirmation-cum-provisional allotment of plot. If a direction is issued by the Court to refund the amount, it amounts to endorsing the suspicion of the petitioners that the State has no title and this virtually amounts to adjudicating the issue without enquiring into the matter on the basis of the evidence, which cannot be done in exercise of the writ jurisdiction. Such disputed questions of fact are to be adjudicated before the appropriate forum but in a writ proceeding. Therefore, the case has no application.

53. **KARNATAKA STATE FOREST INDUSTRIES CORPN. v. INDIAN ROCKS** (5 supra) is a case where the Corporation was engaged in sale of seized and confiscated granite blocks to persons who intended to purchase in the tender-cum-allotment sale on "as is where is basis". The successful tenderers deposited the requisite portion of the bid amount and taxes. However, requisite permits were not issued to them and they could get only part of the granite sold to them. There arose a dispute as to the quantum of the balance amount payable by the respondent tenders. Though the Government suggested to the Corporation for refund of the excess amounts paid, the amounts were not paid to the respondents. On challenge before the Karnataka High Court, a learned single Judge directed refund of the amount which was upheld by the Division Bench. It was contended before the Supreme Court that the High Court could not have exercised its jurisdiction under Article 226 to enforce a contract qua contract, particularly when the same involved disputed questions of fact and the respondents being bound by the terms and conditions of tender could not have been given any relief in derogation thereof. Upholding the decision of the High Court, the Supreme Court held that although the writ court would not enforce the terms of a contract qua contract, but where an action of State is arbitrary or discriminatory and violative of Article 14, a writ petition would be nonetheless be maintainable. It was also held that a writ of *mandamus* can be issued only when there exist a legal right in the writ petition and corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary; the superior courts are not powerless. In our view, the facts of this case are distinguishable and have no application to the case on hand. Here non-fulfillment of the terms and

conditions of the contract was on the part of the petitioners and not on the part of the respondents.

There is no dispute that the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a

significant facet. As already held there is no arbitrariness or illegality in the action of the respondents declining to refund the amounts. Respondents afforded fair opportunity to the petitioners to take steps in respect of the contract by extending time to deposit the amounts, but the petitioners did not deposit the amounts. Therefore, the petitioners cannot complain violation of the provisions of Article 14.

54. In **ZONAL MANAGER, CENTRAL BANK OF INDIA V. DEVI ISPAT LIMITED AND OTHERS** (9 supra) it was held:

> 28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India it is contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and correspondent legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power.

As already stated there is no material to show that the respondent-authorities had acted unfairly, arbitrarily or unreasonably.

55. In **DEFENCE ENCLAVE RESIDENTS SOCIEITY v. STATE OF UP. AND OTHERS**[31] the Supreme Court held that a pure contractual dispute between a Development authority and allottees of plots without involving violation of any fundamental rights of the allottees cannot be gone into by the Supreme Court under Article 32 of the Constitution of India. It was held that the facts have to be investigated, the terms of the contract between the authority and the allottees have to be determined on evidence and construed before the dispute can be satisfactorily adjudicated.

56. In **ORISSA STATE FINANCIAL COPORATION v. NARSINGH CH. NAYAK AND OTHERS**[32] the Supreme Court held that the High Court can neither ignore the scope of the writ petition before it nor the nature of dispute presented and enter the field pertaining to contractual obligations between the parties and issue directions annulling the existing contract and introduce a fresh contract in its place.

57. In **POPCORN ENTERTAINMENT AND ANOTHER V. CITY INDUSTRIAL DEVELOPMENT CORPN. AND ANOTHER** (10 supra) the appellant made an application for allotment of a plot for construction of a multiplex at Khareghar Railway Station. The first respondent City Industrial Development Corporation (CIDCO) directed payment of EMD of Rs.20 lakhs being 10% of the tentative price of the plot in order to consider the application of the appellant. The appellant deposited EMD. However, subsequently, the appellant was issued show cause notice seeking to cancel the allotment in favour of the appellant on the ground that the allotment was contrary to Section 23 of the Contract Act as being opposed to public policy on the ground that the allotment was without issuance of tender. A contention was raised by the appellant that only the appellant was singled out for cancellation whereas hundreds of allotments made without issuance offender were allowed to remain, which was also a matter of record and which was established by the appellants seeking information from CIDCO under the Right to Information Act. On a consideration of the material, the High Court of Bombay dismissed the writ petition as not maintainable on the ground of availability of alternative remedy. The Supreme Court held that relegating the appellant to the alternative remedy by the High Court is not proper inasmuch as the action of the respondent therein was illegal, violative of principles of natural justice and fundamental right of the petitioner had been violated. The facts of the said case are distinguishable and have no application to the present case.

58. The learned single Judge placing reliance on the decisions of the Supreme Court in **ABL International Ltd. v. Export credit Guarantee Corporation of India Ltd.** (1 supra) and **Tata Cellular v. Union of India** (2 supra) held that the writ petitions are maintainable. As already held there is no dispute that in an appropriate case a writ petition as against a state or an instrumentality of a state arising out of a contractual obligation is maintainable where there is an element of arbitrariness or unfairness in the exercise of power by the State the same can be set right by judicial review. As rightly pointed out by the learned single Judge if there doesn't exists much dispute as to facts or any controversy as to interpretation of clauses, the parties cannot be driven to Civil Courts. But the fact remains that the dispute raised herein is with regard to title of the State to the property put for public auction, which cannot be adjudicated in a writ court. The learned single Judge refers to certain developments in the form of filing of writ petitions by third parties in respect of the land and passing of orders by this Court agitated the minds of the parties and almost rendering the conclusion of the contact either by the petitioners or by the respondents difficult. In our view, there is no basis to come to such a conclusion. The fact that the respondents had agreed to refund the amounts deposited cannot be taken a ground to come to the conclusion that the writ petitions are maintainable. The letters of the HMDA for refund of the amounts is qualified by a condition i.e furnishing of bank guarantee for EMD, but the petitioners have not complied with the said condition, therefore, the amount was not refunded. The letters dated 28.3.2007 and 31.3.2007 reads asunder:

" Lr.No.B4/7768/2006 dated 28.3.2007

To
M/s IBC Knowledge Park Pvt. Ltd.
Sherieff Centre, 73/1
St. Marks Road
Bangalore-560001.

Sir,

Sub: HUDA—Auctions—Kokapet Village—Golden Mile Project— Request by the successful bidders for return of the payment—Intimation issued—Reg.
Ref: 1. Application of successful bidders.
2. Auction conducted on 20.7.2006.
3.Writ Appeal No.887/2006 pending before the High Court of Andhra Pradesh.

4. Representation from Watermark Estates Pvt. Ltd. & others.

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Please the references cited above and it is to inform that in view of pendency of the court case in W.A.No.887/2006 and as per your representation it is agreed in principle to refund the amount paid towards the 1st and 2nd instalment for the plots auctioned by HUDA in Golden Mile Project.

This total amount payable towards the cost of the plot has to be paid before registration as per the payment schedule to be intimated after the disposal of the court case.

The process for refund of amount will be taken up in due course subject to giving the equivalent bank guarantee for EMD paid, depending upon the outcome of the court case and availability of funds with HUDA.

Yours faithfully
Sd/-
For Vice Chairman

Letter dated 31.l3.2007:

In continuation of this Office reference dated 28.3l2007, further it is to inform that refund of amount paid towards 1st and 2nd instalments for the plots auctioned by HUDA in Golden Mile Project will be done in the 2nd fortnight of April, 2007."

59. Even in the letter dated 28.3.2007 also the respondents informed that the schedule for payment of total amount payable towards cost of the plot before registration as per the payment schedule will be intimated after the disposal of the court case. This clearly shows that the respondents were always willing to perform their part of contract and it is the writ petitioners who have not come forward to fulfill the conditions. However, in the letter it was stated process for refund of amount will be taken up in due course subject to giving equivalent bank guarantee for EMD paid pending upon the outcome of the court case and availability of funds with HUDA. Therefore, the letter agreeing to refund the amount is a qualified one. If the petitioners want refund they can do so on furnishing bank guarantee for EMD paid subject to the outcome of the court case. The aforesaid correspondence also shows that even at that point of time, auction purchasers had no intention to resile from the contract on the alleged defect in title of seller. The petitioners did not furnish bank guarantee. Consequently, the respondents have not returned the amounts paid. Having regard to the fact that the petitioners have themselves breached the conditions of agreement and having failed to furnish the bank guarantee they cannot say that the action of the respondents is unreasonable or arbitrary or unfair.

60. The respondents never expressed their inability to convey title and deliver possession to the petitioners and in fact possession of land was delivered to some of the auction purchasers. Merely because some litigation had cropped up one cannot jump to the conclusion that the State has no title to the property. The record discloses that the State continues to be in possession of the property from the last several decades and the land stand vested in the State consequent on the abolition of Jagirs. Be that as it may, the dispute relating to title to the property, if there is, according to the petitioners, is certainly a disputed question of fact and such a fact cannot be resolved by the High Court in exercise of the power under Article 226 of the Constitution of India, because, the writ court is ill-equipped to enquire into the same by examining the witnesses with reference to documentary evidence. It has to be done only in a properly instituted civil suit. There is no element of arbitrariness or unfairness or unreasonableness involved or suffered by the petitioners so that the Writ Court can entertain the petition and grant the relief. Therefore, the learned single Judge erred in holding that the writ petitions are maintainable.

61. The decision in **GUJARAT STATE FINANCIAL CORPN. V. LOTUS HOTELS P. LTD.** (6 supra) relied upon by the learned counsel for the petitioner has no application to the case on hand. That was a case where there was breach of the terms and conditions of agreement by the Gujarat State Financial Corporation in advancing a loan. It was argued before the Supreme Court that the dispute raised between the parties is in the realm of a contract and the Corporation can at best be charged with breach of contract for which the remedy is by way of damages or any other remedy available and a mandamus cannot be issued compelling the Corporation to perform its part of the contract. The Supreme Court rejected the contention and held that the Gujarat State Financial Corporation being an instrumentality of the State is bound by the agreement to disburse the loan and it cannot be allowed to act arbitrarily or unreasonably. In the instant case, the breach of the contract was on the part of the writ petitioners only.

62. **UNITED INDIA INSURANCE CO. LTD. v. MANUBNHAI DHARMASIMNGHIBHAI GAJERA** (7 supra) is a case where question arose for consideration is whether renewal of a medi claim policy would be automatic on payment of the amount of premium. The Supreme Court placing reliance on **ABL International Ltd. v. Export Credits Guarantee Corpn.**

of India Ltd. and other cases held that while determining a lis having public law domain, the courts would be entitled to take a broader view. It would not consider it to be a case involving contract-qua-contract question only. Even cases involving contract may be determined by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India where interpretation of the statues and contract is involved. We are of the view that the said decision has no application to the case on hand. In the case before the Supreme Court interpretation of Insurance Regulatory and Development Authority Act, 1999, Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2002, Insurance Act, 1938 and other enactments was also involved. Under those circumstances, the Supreme Court held that judicial review of the action of the insurance authorities is permissible. The agreement/contract in the instant case is pure, non-statutory and simple and no interpretation of any statutory provision is involved.

63. **HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION v. HARI OM ENTERPRISES** (13 supra) is a case where the Corporation issued notice resuming the plot allotted to the respondent therein on the ground that the respondent had failed to pay the balance price. The High Court set aside the order of resumption. The Supreme Court declined to uphold the order of the High Court. This case is of no help to the case of the petitioners.

64. In **GODAVARI SUGAR MILLS v. STATE OF MHARASHTRA AND OTEHRS** (18 supra) question arose for consideration is 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**[33] 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*[3] 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 (AIRC 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 1964SC 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.

The decisions relied upon by the learned counsel for the petitioners in **SHANKARA COOPERATIVE HOUSING SOCIETY LTD. v. M. PRABHAKAR, GUNWANT KAUR V. MUNICIPAL COMMITTEE, BATINADA AIR INDIA LTD. v. VISHAL CAPOOR** have no application to the facts of the case.

66. The analysis of various decisions referred to above leads us to the irresistible conclusion that the writ petitions which arise out of private, non-statutory, pure and simple contractual obligations cannot be entertained by the High Court in exercise of its power of judicial review under Article 226 of the Constitution of India, where a party had failed to conform to the terms and conditions of the agreement/contract, and grant the relief of refund of amounts deposited.

Once we come to the conclusion that the writ petitions are not maintainable it is not necessary to go into the other aspect whether the petitioners are entitled for refund of the amounts deposited. However, since a finding has been recorded by the learned single Judge we are inclined to consider the same.

Before we go into this aspect, let us consider the terms and conditions for allotment of plot by way of sale in auction-cum-sealed-tender again.

67. The terms and conditions of the agreement for allotment of plot and a perusal of the confirmation-cum-provisional allotment order clearly stipulates the terms and conditions which an auction purchaser has to fulfil and the time schedule to be adhered to. The terms clearly stipulate that in the event of non-payment of the sale price within the stipulated time, the allotment will be cancelled without any intimation whatsoever nature and in case of cancellation, for whatsoever reason, the ID in full will be forfeited. 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. Before participating in the auction, an intending bidder has to pay the EMD fixed for a particular site. After became successful bidder in the auction, auction purchaser has to pay the initial deposit equivalent to 50% of the sale price and includes EMD and thereafter confirmation-cum-provisional allotment letter will be issued. The confirmation-cum-provisional letter also clearly indicated that without any notice the provisional allotment shall stands cancelled for non-payment of balance sale price as stipulated in the brochure and initial deposit stands forfeited. The provisional allotment letter provisionally allotting plot stipulated that the balance sale price (remaining after payment of ID) shall be paid in two installments i.e. one installment on or before 9.8.2006 and the final installment shall be paid on or before 24.8.2006 as per terms and conditions of the Brochure. In the batch of Golden Mile project all the successful auction purchasers have to pay the 1st installment on or before 9.8.2006 and admittedly as reflected in the statement (Annexure) all the petitioners paid the 1st installment. When it surfaced that litigation had ensued in the High Court regarding the title of the State to the property some of them have not paid the 2nd installment. It is seen from the statement (Annexure) that except in one or two cases even after payment of the two installments, balance sale consideration were payable by the petitioners and they did not pay the final amounts due till date even though an opportunity was given by HMDA in their letter dated 21.1.2008 to pay the balance amount in three instalments. We may also quote the revised schedule for payment of the bid amount issued pursuant to a meeting held with all successful bidders of Golden Mile Project, held on 9.1.2008 in the Chambers of the Secretary, HUDA.

Lr.No.B2/7768/2006 dated 21.1.2008.

To
M/s Prestige Garden Estate Pvt. Ltd.
The Falcon House # 1, Main Guard
Cross Road, Bangalore-560001.

Sir,

Sub:HUDA Auctions --Auctions of Government Lands at Kokapet Village-Golden Mile Project—Time extended for payment of balance amount intimated and meeting minutes senind—Regarding.

Ref: 1. Meeting held with all successful bidders of Golden Mile Project, held on 9.1.2008 in the Chambers of the Secetary, HUDA.
2. Note Orders of the V.C. HUDA dated 21.1.2008.

Please see the reference cited and it is to inform that during the meeting held with all successful bidders of Golden Mile Project on 9.1.2008, in the Chambers of the Secretary, HUDA the successful bidders have requested the HUDA authorities to extend the time line for payment of balance amount towards land cost in respect of Golden Mile Project. The request of the successful bidders has considered.

Regarding the payment of balance amount the time allowed is as mentioned below:

1st 1/3rd balance amount to be payable on or before 29.2.2008.
2nd 1/3rd balance amount to be payable on or before 31.3.2008
3rd 1/3rd balance amount to be payable on or before 30.4.2008.

Yours faithfully,
Sd/-
For Vice-Chairman.

68. In spite of affording an opportunity to the petitioners to pay the balance amount in installments after conclusion of the proceedings before the High Court and Supreme Court, the petitioners have not chosen to pay the amount. In cases where the entire amount has been paid, possession of the land was delivered to the parties. The condition relating to delivery of possession of the land/plot is that plot will be handed over on payment of the full sale price or any other duties as per the terms and conditions and the allottee shall take over the physical possession on or before the date as may be prescribed in the pre-final allotment letter failing which Rs. 50,000/ shall be levied per month towards penalty till the date of taking over of the possession and final allotment letter will be issued after payment of full sale price & any other dues including cost of excess area, if any. Admittedly, the petitioners did not pay the amounts as agreed even after the extended time allowed by the respondents on the ground that litigation had surfaced. Therefore, primarily, the breach of terms and conditions of agreement was on the part of the writ petitioners only. It is not their case that though they paid the entire sale consideration the property was not transferred in their favour or possession of property was delivered. We may also take note that this Court in W.A.M.P.No.1835 of 2006 and batch in W.A.No.887 of 2006 dated 28.8.2006 while directing the parties to maintain status quo in respect of possession of the property obtaining as on that day, this Court, made it clear that the interim order passed by the Court shall not entitle the highest bidders to withhold the balance amount, which they are required to deposit in terms of the conditions of auction. In spite of the said orders also, the writ petitioners maintained silence and have not chosen to pay the balance sale consideration due and discharged their obligation to fulfil the contract. Further, even after the dismissal of the W.A.887 of 2006 also no payment was made. When the matter was carried in appeal before the Supreme Court, Mrs. K.S.B. Ali sought permission to withdraw W.P. No.14439 of 2006 which was permitted. Even after that also, the petitioners had not chosen to fulfil their contractual obligation to pay the amount. No doubt the Supreme Court set aside the order of the learned single Judge and the order of the Division Bench and the issues raised were left open. But the Supreme Court has not passed any order staying the process of sale transactions nor there was any order affecting the title of the State to the property in question. That being so, nothing prevents the writ petitioners to perform their part of contract in paying the balance sale consideration. Further, the respondents conducted meeting with the auction purchasers and time to pay the balance amounts was extended by letter dated 29.1.2008, but the petitioner did not pay the amounts. The record discloses that instead of paying the amounts, they sought for refund of the amounts deposited. Therefore, even though the petitioners were given an opportunity to fulfill their part of contractual obligation, they did not avail it and have chosen not to pay the amounts and want to wriggle out of their contractual obligations.

69. Some how or the other, in view of the peculiar situation that has emerged, the respondents have agreed to refund the amounts in their letters dated 28.3.200 and 312.3.2007 subject to the condition of furnishing equivalent bank guarantee for EMD paid, depending upon the outcome of the court case and availability of funds. It appears that the petitioners concerned did not furnish the bank guarantee; consequently the respondents did not pay the amounts by furnishing the bank guarantees. If the petitioners really suspect the title of the State, they should have availed the opportunity and obtained refund of the amounts furnishing bank guarantee.

We may hasten to add that in W.P.No.2276 of 2008 the State has even agreed to furnish an indemnity bond for the amounts pay vale by the petitioners, but the petitioners therein did not avail it by paying the balance sale consideration.

70. At this stage, we may also notice the letter dated 7.2.2009 of the Metropolitan Commissioner, HMDA, Hyderabad addressed to the writ petitioners regarding furnishing of indemnity bond, which is extracted below:

"Lr.No.B2/7768/2006 dated 7.2.2009

To
M/s Pioneer Talaphone Pvt. Ltd.
M/s Water Mark Estates Pvt. Ltd.
M/s Madhucon Properties Ltd.
M/s Late Point Builders Pvt. Ltd.

M/s Prestige Garden Estates Pvt. Ltd.
M/s IBC Knowledge Park.
M/s Kailash Ganga Construction Pvt. Ltd.
M/s My Home Constructions Pvt. Ltd.
M/s Soma Enterprises Ltd.
M/s Today Hotels Pvt. Ltd.
M/s Unison Hotel South Pvt. Ltd.

Sir,

Sub: HMDA—Auctions, July, 2006, Kokapet Village of Rajenderanagar Mandal, Golden Mile Project—Representation by successful bidder—Issue of letter of Indemnity—Reg.

Ref: Discussions during the meeting held on 7.2.2009 in the chambers of Metropolitan Commissioner, HMDA.

***

On the representation of successful bidders of land auction held for the Golden Mile Project a draft letter of indemnity submitted by the successful bidders was examined at the Government level and the same has been agreed by the Government. Accordingly, you are hereby informed that you are requested to come for signing the same with HMDA. Further, you are also requested to complete the payment of balance amount and get the land Registered in your favour immediately.

With regard to infrastructure works that are taking place, HMDA desires to inform that road from WIPRO junction to ORR would be completed by 20th March, 2009 and from ORR to Golden Mile layout the service road would be completed by March end subject to finalization court cases pending in the Hon'ble High Court on which our legal counsels are confident to closing it by next week. HMD also like to inform that the court cases pertaining to Kokapet are coming up for detailed hearing from 18th February, 20098 onwards in High Court of A.P. Finally you are requested to make balance payment, get the indemnity signed and the land registered in your favour.

Yours faithfully,

Metropolitan Commissioner
HMDA, Hyderabad."

71. From the above it is clear that the HMDA expressed its willingness to give indemnity for the amounts payable by the petitioners, but they failed to pay the amounts. When the State itself has come forward to furnish the indemnity bond for the sums deposited and to be deposited, the petitioners did not come forward and discharge its contractual obligation. The writ petitioners have not pointed out a single instance where the State or its instrumentality had failed to discharge its obligation except stating that the State has defective title to the property in question. On the other hand, it is the petitioners who have violated the obligation cast on them by not paying the amounts as per the original schedule and extended schedule of time.

72. The main contention of the writ petitioners is that the State has concealed about their defective title to the property and induced the petitioners to participate in the auction and that prevented them from discharging their obligation, therefore, they have not paid the balance sale consideration and requested for refund of the amounts paid. We are not inclined to accede to the contention of the writ petitioners. The fact that the State was in uninterrupted physical possession of the land in dispute is not doubted by the writ petitioners at any point of time. No where they raised any issue that the state was never in possession of the property or dispossessed from the land for some period or the other. When the State was in continuous possession of the property and enjoying it uninterruptedly for decades and when it strongly believes that it has unimpeachable title, we do not think that the petitioners are justified in not fulfilling their contractual obligations on the ground of alleged misrepresentation about the title of the State to property or concealment about the pendency of writ petitions particularly when the Division Bench of this Court by orders dated 28.8.2006 in W.A.M.P.No.1835 of 2006 and batch in W.A.No.887 of 2006 ordered that the interim order shall not disentitle the petitioners to withhold the balance sale consideration. In fact in W.P.No.12786 of 2010 to the extent amount was paid part of possession of land was handed over to the petitioner. This clearly shows that the respondents were always ready and willing to execute the title deeds and handover possession of the land, but the petitioners are not coming forward to perform their part of contract. Further, it is the specific case of the respondents that sale deeds were executed in respect of many I.T. Companies in respect of Kokapet land and possession of the land was also handed over and constructions have been made by the Companies.

73. We have earlier noted that the land in dispute stand vested in the State way back several decades and the successors of Late Nusrat Jung-I were never in possession of the land and the State continues to be in possession uninterruptedly for decades. Sri KSB Ali who is fighting for the restoration of the land on behalf of the so called legal representatives of Late Nusrat Jung-I was unsuccessful in all his attempts to obtain possession of the land either before the Governmental authorities or the High Court. In W.A.No.1159 of 2009 and batch dated 18.7.2012 this Court held that consequent to the order of the Supreme Court, KSB Ali is disentitled either to file another writ petition for the same relief as in W.P.No.144349 of 2006 or to pursue the pending writ petition No.10084 of 2006 as the same would not be an appropriate remedy and pursuit of public law remedy by Sri KSB Ali for substantially the same grievance as in the earlier abandoned proceedings constitutes an abuse of process of the Court.

74. The Civil Court in O.S.No.512 of 1973 dated 30.6.1976 categorically held that Nazim-e-Atiyat had clearly held that Kokapet village was abolished under the A.P. (Telangana Area) (Abolition of Jagirs) Regulation, 1358-F and what that was released to the heirs of Nusrat Jung-I under the Muntakhab dated 7.5.1955 was only commutation sums which alone were atiyat grants within the meaning of Section 2(1)(b)(i) of Hyderabad (Telangana Area) Atiyath Enquiries Act, 1952 and they acquired no property rights. It is true that K.S.B. Ali is not a party to the said proceedings. But it may be noted that such

conclusion of the Civil Court based on legal provisions of the statute which has become final, no appeal having been preferred thereagainst, has a bearing. We are, however, not inclined to examine the issue whether the Muntakhab No.57/1955 is at variance with the decision of the Atiyat Court or the decision of the Revenue Minister on revision as contended on behalf of the respondents-authorities. The statement (Annexure) discloses that even though the matters were pending the petitioners did pay the 2nd installment on 9.8.2006. Having paid the 2nd installment, the writ petitioners cannot withhold the balance sale consideration. Prima facie, therefore, breach of contractual obligations was on the part of the writ petitioners only. In such view of the matter, the learned single Judge erred in coming to the conclusion that the writ petitioners are entitled for refund of amounts. The learned single Judge failed to note that the refund offered by the respondents in their letter dated 28.3.2007 is qualified and that the writ petitioners have failed to furnish the bank guarantee for the EMD. Once the petitioners are not entitled for refund of the amounts, the question of award of interest also does not arise.

75. The allegations whether there was concealment of facts as to title or pendency of writ petitions on the part of the respondents or there was misrepresentation are factors which have to be established in a properly instituted suit before the Civil Court. This Court, in exercise of the power of judicial review cannot enquire into the same. If the petitioners strongly believe that they are justified in withholding the balance sale consideration on account of defective title of the state to the property or that the respondents have not acted fairly or there was misrepresentation or fraud or inducement as defined under the provisions of Indian Contract Act, they have to initiate proceedings in proper forum for refund of the amounts by adducing evidence, but not in a writ proceeding.

76. Sri Subramanyam vehemently contended that it is the imperative duty of a seller to disclose even a change in circumstance before the completion of the contract. An inducement to purchase without disclosing material facts would amount to a continuing representation if the contract is closed without such disclosure having been made. The State instrumentalities did not whisper about the pending litigation at any stage and at least as on the date of the auction, the appellant ought to have disclosed the dispute over title of which it was fully aware. In support of his contention, Sri Subramanyam placed reliance on the decision of the Court of Appeal in **WITH v. O'FLANAGAN** (17 supra) This is a case where defendant desiring to sell his medical practice got into touch with the plaintiff in January, 1934 and stated that his practice had brought in 2,000 pounds per annum for the three previous years and that he had a panel of 1,480 patients. This statement was true when made. Negotiations lasted until May 1, when the contract of sale was signed. During this period the defendant was ill and was forced to absent himself from time to time from the practice, with the result that the takings of the practice dwindled to 1,260. These facts were not disclosed to the purchaser, and upon discovering them immediately after completion he brought this action for rescission of the contract. The Court of Appeal held that the statements made, though true at the time, had become untrue during the negotiations and there was an obligation to disclose this fact to the purchaser. No disclosure having been made the plaintiff was entitled to rescind. It was also held such an obligation to disclose arises in the case of all contracts and not only in the case of those *uberrima fidei* or where the representation is in respect of an intention. Learned counsel also placed reliance on the following lines at pages 734, and 735:

"…the position is based upon the duty to communicate the change in circumstances"

"..a representation made as a matter of inducement to enter into a contract is to be treated as a continuing representation"

"…this doctrine is not limited to cases of contracts uberrimae fidei or to any cases in which owing to confidential relationship there is a peculiar duty of disclosure".

77. As already stated, whether there is any misrepresentation or inducement or fraud on the part of the appellants or that they have not furnished the true facts or acted unfairly are all factors which are required to be established by adducing evidence and the same cannot be adjudicated under writ jurisdiction. Such factors are required to be established in a properly instituted suit in civil Court. Therefore, reliance placed by Sri Subrahmanian on the decision of the court of Appeal in **With v. Flagnan** cannot have application unless the allegations of misrepresentation or fraud are established by evidence. The conclusions arrived at by the Court of Appeal were based on an appreciation of the evidence adduced by the Court below. Therefore, in the absence of any enquiry or evidence into the allegations in the case on hand, what was held in **With v. Flagnan** cannot have application to the case on hand.

78. At the cost of repetition, we may state that the details of payments made as evidenced by the Statement annexed to the judgment would discloses that even after the petitioners came to know about the pendency of W.P.No.10084 of 2006 and during the pendency of W.A.No.887 of 2006, the petitioners paid the amounts towards sale consideration on 9.8.2006. If really they suspect the title to the property, they should have informed the authorities that they are rescinding the contract immediately after they came to know about the litigation on 2.8.2006 through local newspapers, they have not done so, but continued with the contract by paying the 2nd installment or part thereof. Further, the petitioners have not come forward to furnish the bank guarantee for refund of the amounts. Even though the Government has come forward to furnish indemnity for the amount payable by the petitioners they have not come forward to fulfill their contractual obligations.

79. So far as the contention of learned counsel for the appellants, based on Section 55(2) of the Transfer of Property Act as well as the passage from Halsbury's Laws of England is concerned, we are not satisfied that there is any breach of Section 55(2) of the Transfer of Property Act, as aforesaid. Firstly, the appellants, as auction purchasers, were free to make all diligent inquiries on the principles of caveat emptor and would have certainly being satisfied with the title of the seller, as there was no patent defect in the said title. The ownership and possession of the seller over the years was open and recorded in the revenue records and was evident to any person desiring to participate in the auction. Mere rival claim by third parties is, therefore, not sufficient for the appellants to claim recession of contract, as the purchasers would have

already assessed the marketable title of the seller before participating in the auction. We accordingly hold that the writ petitions are not maintainable and the writ petitioners are required to avail such remedies as may be available to them in law, in which event, the matters may have to be considered on its own merits uninfluenced by dismissal of the writ petitions.

80. We make it clear we have not expressed any opinion on any one of the controversial issues and the observations, if any, made in this judgment are confined only for the disposal of the writ appeals and the writ petitions and shall have no bearing on the merits of the claim.

81. In the view we have taken, the orders of the learned single Judge out of which the writ appeals arose are set aside. The appeals are allowed and the writ petitions are dismissed as not maintainable. Writ Petition Nos.2776 of 2009 and 12786 of 2010 are also dismissed as not maintainable. It is open to the petitioners to raise the issues in appropriate forum if they so wish. However, there shall be no order as to costs.

PINAKI CHANDRA GHOSE, CJ

27th December, 2012. **VILAS V. AFZULPURKAR, J**

LR Copy to be marked: Yes.
vtv

[1] (2004) 3 SCC 553
[2] AIR 1996 SC 11= (1994) 6 SCC 651
[3] (2006) 10 SCC 236
[4] (2008) 3 SCC 440
[5] (2009) 1 SCC 150
[6] (1983) 3 SCC 379
[7] (2008) 10 SCC 404
[8] (2009) 16 SCC 208
[9] (2010) 11 SCC 186
[10] (1997) 9 SCC 593
[11] AIR 1990 SC 1031
[12] AIR 1991 SC 537
[13] (2010) 1 SCC 655
[14] (2011) 5 SCC 607
[15] (1969) 3 SCC 769
[16] (2005) 13 SCC 42
[17] [1936] 1 ALL.E.R 726
[18] (2011) 2 SCC 439
[19] AIR 2002 SC 206
[20] AIR 1977 SC 1496

[21] AIR 1977 SC 1717 = (1977) SC 1717

[22] AIR 1981 SC 1368 = 1981(3) SCC 238

[23] Air 1957sc 529

[24] AIR 1986 SC 1370

[25] (1994) 3 SCC 552

[26] 2004(3) ALD 463

[27] (1989) 2 scc 116

[28] (1980) 2 SCC 129

[29] (1996) 6 SCC 22

[30] AIR 1962 SC 1320

[31] (2004) 8 SCC 321

[32] (2003) 10 SCC 261

[33] AIR 1965 SC 1740