

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition No.2055/2007**

% **Date of Decision: 04.09.2009**

Bhushan Kumar Petitioner
Through Mr.Vinay Kumar Garg, Advocate.

Versus

Delhi Development Authority Respondent
Through Ms.Rajdipa Behura, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner seeks a writ of mandamus or a direction to the respondent/DDA to permit him to pay the balance sum towards the cost of the flat allotted to him at par with the direction dated 12th August, 2004 passed in W.P.C. No.3296 of 1999.

2. The petitioner had applied for allotment of a MIG flat in New Pattern Registration Scheme 1979 and he had initially deposited an amount of Rs.4,500/- on 25th September, 1979.

3. The priority of the petitioner matured in 1999 and in a draw of lots, Flat No.327, Third Floor, Sector 14, Pocket B, Dwarka, Phase II, New Delhi, was allotted to the petitioner and a demand-cum-allotment letter dated 20th/24th February, 1999 was issued. The petitioner was liable to pay a cost of Rs.7,61,043.33 out of which Rs.20,000/- was payable within 30 days as acceptance of the offer and the remaining amount was payable by 10th May, 1999. The flat was allotted on cash down basis and entire consideration with interest was payable till 25th May, 1999. The petitioner was liable to pay a total sum of Rs.7,32,483.33.

4. The petitioner deposited the confirmation amount of Rs.20,000/- and thereafter petitioner sought extension of time to pay the balance amount. Extension of 90 days time was granted to the petitioner to pay the balance sale consideration and other charges indicated in the demand cum allotment letter. Another extension for payment of balance consideration was sought by the petitioner and the time for payment

was extended till 24th October, 1999. The petitioner, however, did not pay the balance consideration till the 24th October, 1999, extended time granted to him.

5. The petitioner has contended that he did not make balance payment as the basic civil amenities like water and electricity had not been provided in Pocket B, Sector 14, where the flat had been allotted to him. To substantiate his plea of lack of basic amenities, the petitioner had placed reliance on the fact that large numbers of allottees of flats in Pocket B, Sector 14 had not made deposit of balance payment and one of such allottees, Shri Omkar Chaddha had filed a Writ Petition (Civil) No.3296 of 1999 which was allowed by order dated 12th August, 2004. While allowing the writ petition, it was observed by the court that the basic facilities had not been provided in the said Pocket B, Sector 14, however, in May 2001, the basic amenities were provided for and on the basis of a letter dated 24th May, 2001 which was in the record in that case, Shri Omkar Chaddha was held liable to pay the balance consideration for the flat along with interest at 18% per annum which was computed to Rs.50,000/- and on the payment of the balance consideration with interest, the respondent was directed for execution of the conveyance deed.

6. The petitioner has contended that he was not informed till the date of filing of the petition that basic amenities had been made available and petitioner came to know about the judgment dated 12th August, 2004 in W.P.C. No.3296 of 1999, Omkar Chaddha v. DDA, sometime in the end of 2006 and, therefore, he approached the respondent and also offered to deposit the balance consideration along with Rs.50,000/-, however, the amount was not accepted and thereafter the present writ petition has been filed.

7. The petitioner also filed an additional affidavit contending that till the respondent/DDA had made basic amenities, i.e., water and electricity available in the area, the respondent could not raise any demand and the respondent would not be entitled to any interest on the demanded amount till May 2001. It was also asserted that most of the allottees had made payments in terms of the judgment dated 12th August, 2004. The petitioner also contended that he left India on 23rd October, 2002 and stayed in the United Kingdom and came back briefly for short period and therefore could not immediately come to know about the directions given in the order dated 12th August, 2004 given in the case of Omkar Chadha (supra). It is pleaded that the delay in approaching the court is not deliberate nor on account of any negligence but largely due to the petitioner being unavailable.

8. The counsel for the petitioner also relied on (2006) 5 SCC 558, Anil Rishi v. Gurbax Singh and others and (1998) 1 SCC 626, National Insurance Company Limited v. Jugal Kishore and Others to contend that when a person is bound to prove the existence of any fact, the burden of proof lies on that person and that it is the duty of the party which is in possession of document which would be helpful in doing justice in the cause, to produce the said document and in that case such party cannot be permitted to take shelter behind the abstract doctrine of burden of proof.

9. Reliance has also been placed on (2004) 2 SCC 447, Mangilal v. State of M.P. and (2001) 1 SCC 610, State Government Houseless Harijan Employees Association v. State of Karnataka and others to contend that even if a statute is silent and there are no positive words in the Acts or the Rules made therein, there could be nothing wrong in spelling out the need to hear the party whose rights and interest are likely to be affected by the orders that may be passed and the principle of natural justice must be read into unoccupied interstices of the statute, unless there is clear mandate to the contrary.

10. The petition is contested by the respondent contending inter alia and admitting that the petitioner was a registrant under the scheme of 1979 for allotment of MIG flat and that he was assigned the priority No.23419 and when his priority matured, in a draw of flats, he was allotted a MIG flat No.327, Third Floor, Sector 45, Pocket B, Phase II, Dwarka, in a computerized draw held on 15th September, 1998 on cash down basis. It is contended that the demand cum allotment letter dated 20th/24th February, 1999 was sent to Shri Bhushan Kumar, petitioner, at his residential address and the last date for making the payment with interest was 25th May, 1999.

11. The respondent asserted that the petitioner deposited only Rs.20,000/- and for balance payment by letter dated 24th May, 1999 sought extension of time on the ground that he has to get the loan from his employer, Government of India. The petitioner was granted three months time up to 24th August, 1999 to pay the balance amount of consideration. The petitioner again sought extension of time and he was granted time up to 24th October, 1999. According to the respondent, the petitioner failed to deposit the balance payment and therefore the allotment of the petitioner was cancelled by letter dated 20th November, 2002 and the petitioner was advised to apply for refund of deposited amount by furnishing the original document as mentioned in the said

letter and the flat which was allotted to the petitioner, thereafter, had been allotted to another wait-listed registrant vide File No.F.312(2544)/03/DW/NP and possession of the flat has already been handed over to another registrant on 27th April, 2004. The respondent also relied on AIR 1997 SC 2847, New Delhi Municipal Committee Vs State of Punjab to contend with that the Writ Courts should decide the petitions on the points raised in them and in rare cases keeping in view of the facts and circumstances of the case, if any additional points are to be raised, then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice and the parties should not be taken by surprise.

12. The petitioner did not file rejoinder to the reply filed by the respondent and, therefore, petitioner is deemed to have admitted various factual pleas raised by the respondent, including that the show cause notice dated 5th June, 2002 was sent to him and after receiving no reply to show cause notice the flat of the petitioner was cancelled and cancellation letter dated 20th November, 2002 was also sent to him. The allegation of the respondent about re-allotting the flat allotted to the petitioner to some other person after cancelling his allotment and handing over the possession to another allottee on 27th April, 2004 has also not been denied.

13. Learned counsel for the petitioner has very vehemently relied on the observation made in order dated 12th August, 2004 in Omkar Chadha (supra) that civil amenities like water and electricity had not been provided in Pocket B, Sector 14, made in W.P.C. No.3296 of 1999. Learned counsel for the petitioner has contended that the judgment in Omkar Chadha (supra) is in rem and is applicable even in the case of the petitioner.

14. Though the petitioner has taken the plea in the present petition that the civic amenities like water and electricity were not provided in the Pocket and therefore he was not liable to pay the balance sale consideration by 25th May, 1999, however in his communication addressed to DDA seeking extension of time, it was never disclosed that the petitioner is seeking extension of time in order to await providing of amenities like electricity and water in the flat which has been allotted to him. The plea of the petitioner, rather, was that he was seeking extension of time to pay the balance sale consideration, by availing a loan from the Government of India which will take some time. After the extension of time was granted up till 24th October, 1999, there had never been any communication by the petitioner to the

respondent/DDA that the petitioner is not liable to pay the balance sale consideration till the basic amenities like electricity and water are provided in the flat. The plea of the learned counsel for the petitioner that the judgment in Omkar Chaddha (supra) is in rem cannot be accepted in the facts and circumstances.

15. In any case, the petitioner had been given a show cause notice dated 5th June, 2002. There is a specific averment by the respondent in its counter affidavit that the show cause notice was issued to the petitioner on 5th June, 2002 and thereafter a cancellation letter dated 20th November, 2002 was also sent to the petitioner. These facts have not been rebutted by the petitioner. From the additional affidavit filed by the petitioner, it is apparent that the petitioner was in India till 23rd October, 2002 and therefore the show cause notice dated 5th June, 2002 must have been served on the petitioner. Learned counsel for the petitioner has also very emphatically contended that the respondent should have produced the copy of the show cause notice and the copy of the order dated 20th November, 2002 cancelling the allotment of the petitioner.

16. In National Insurance Company Limited, New Delhi (*supra*), the Supreme Court had held while dealing with the case of a claimant under the Motor Vehicles Act, 1939 from the Insurance that the claimants seeking compensation under the Act are invariably not possessed of either the policy or a copy thereof and it is the duty of the party which is in possession of a document which would be helpful in doing justice in the case, to produce the said document and such party could not be permitted to take shelter behind the abstract doctrine of burden of proof and this duty is greater in case of instrumentalities of the State cannot be applied to the present facts and circumstances. The precedent is apparently distinguishable because the averments made by the respondent that a show cause notice was given to the petitioner has not been denied. Had the petitioner denied the show cause notice given to him and denied its receipt, in that case it would have become incumbent upon the respondent to produce the copy of the show cause letter to show that the addressee of the show cause letter was that of the petitioner and the address was correct and in that case the respondent was also liable to produce the proof of sending the letter. However, the petitioner chose not to refute or rebut the averment by the respondent and therefore non production of the copy of the letter dated 5th June, 2002 will not be of any help to the petitioner. If the plea raised by the respondent that the show cause notice was sent has not

been denied, then it is deemed to be admitted. In the petition it was not denied that no show cause notice was received by the petitioner. Rejoinder to the counter affidavit filed by the respondent was not filed. A plea which has not been taken about non receipt of show cause notice, therefore, cannot be allowed to be taken by the petitioner. The Supreme Court in New Delhi Municipal Committee (supra) had held that for additional points not taken in the writ petition, the opposite party should have been put to the notice to comply with the principles of natural justice. The petitioner in the facts and circumstances cannot succeed that the show cause notice was not given to him.

17. Similarly, on account of not denying the receipt of cancellation letter dated 20th November, 2002, non-production of the copy of the same will not entail any benefit to the petitioner. The precedent relied on by the petitioner Anil Rishi (supra) is also distinguishable as that matter pertained to section 101 to 110 of the Evidence Act and the court was concerned with burden of proof and onus of proof. The Supreme Court had held that a distinction exists between a burden of proof and onus of proof. It was held that the right to begin follows *onus probandi* and it assumes importance in early stage of a legal proceeding. The question of onus of proof has greater force, where the question is, as to which party has to begin. It was further held that the burden of

proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. Apparently in the present case since the petitioner has not denied about the show cause notice and cancellation letter, it cannot be held that the burden was on the respondent and the respondent has failed to discharge its burden.

18. Learned counsel for the petitioner has also contended that the rejoinder refuting the allegations made by the respondent could not be filed on account of lack of communication with the petitioner. This cannot be a ground to hold that the respondent has failed to make necessary averments in its reply or has not discharged its burden. Had the petitioner refuted or denied the averments, the onus would have been on the respondent to prove the averments made by producing the relevant documents. However, in absence of refutation of the averments of the respondent, non production of the copies of the show cause notice and the copy of the cancellation letter will not be construed against the respondent who has categorical assertion about serving of show cause notice and cancellation letters on petitioner. The petitioner had been granted a number of opportunities to file the

rejoinder and despite the last and final opportunity granted to the petitioner, the rejoinder was not filed. In the circumstance, the petitioner cannot raise the grievances as has been alleged on his behalf.

19. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In P.S.Rao Vs State, JT 2002 (3) SC 1, the Supreme Court had held as under:

" . There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it

is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

In Ragiq Vs State, 1980 SCC (Crl) 946 it was observed as under:

“The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases.”

20. Learned counsel for the petitioner has also contended that in the case of petitioner the principle of natural justice have been violated. In Mangilal (*supra*), in each case it was directed to pay a compensation of Rs.30,000/- to the victims of the offence. The decision of the High Court directing the accused to pay the compensation was challenged on the ground that the object underlying grant of compensation under Section 357 of the Code of Criminal Procedure was not kept in view. Rejecting the said plea it was held that the power of the court to award compensation to victims under Section 357 of Code of Criminal Procedure is not ancillary to other sentences but it is in advantage thereto. It was further held that if an appellate court award compensation, then before awarding compensation it must give an opportunity of hearing so that relevant aspects like the need to award

compensation, capacity of the accused to pay and several other relevant factors can be taken note of. Apparently, the case relied on by the petitioner is distinguishable and on the basis of the same it cannot be inferred that in case of the petitioner there is a denial of the principle of natural justice. In State Government Houseless Harijan Employees' Association (*supra*), it was held that the requirement of natural justice will be read into the statutory provision unless excluded expressly or by necessary implication. However, in the case of the petitioner, there is no denial of principle of natural justice because even after expiry of the period of extension granted to him on the ground that he has to avail a loan from the Government, petitioner did not pay the balance consideration and despite that a show cause notice was given to him and after not receiving a reply thereof, allotment was cancelled. Since the petitioner has not denied the receipt of show cause notice or the cancellation letter, it cannot be held that there is denial of principle of natural justice as the respondent had not produced the copy of the show cause notice and the copy of the cancellation letter along with their counter affidavit.

21. Therefore, on the basis of order passed in Omkar Chadha (*supra*) it cannot be held that the flat of the petitioner has been cancelled without complying with the principles of natural justice and the

petitioner has a right to pay the balance sale consideration and for allotment of another MIG flat, as the flat which was allotted to the petitioner has been cancelled and allotted to someone else. This is also apparent that the petitioner was not vigilant about his flat allotted to him in 1999 as after seeking extension of time to pay the balance consideration, the petitioner did not pay the balance consideration and left India in 2002. The petitioner has alleged that he came back in 2006, when he came to know about Omkar Chadha (supra) case and thereafter, he demanded the respondent to take the balance consideration in instalments along with Rs. 50,000/-towards interest which amount was not accepted by the respondent. From these facts, it is apparent that petitioner was not concerned about his allotment.

22. Therefore, in the facts and circumstances, the petitioner is not entitled for a direction to respondent to permit the petitioner to pay balance sum towards cost of flat in terms of the direction dated 12th August, 2004 passed in W.P.C. No.3296 of 1999 titled Omkar Chaddha v. DDA. The order of the respondent canceling the flat of the petitioner cannot be quashed on any of the grounds raised by the petitioner. The petitioner in the facts and circumstances is not entitled for the relief claimed.

23. The case of the respondent is also that by show cause notice dated 5th June, 2002 and thereafter on cancelling the allotment of the petitioner, by cancellation letter dated 20th November, 2002, the petitioner was advised to apply for refund of deposited amount of Rs.20,000/- by furnishing the original documents as the flat was cancelled and thereafter it was allotted to another wait-listed registrant and the possession was given to new allottee on 27th April, 2004. Because of this plea of the respondent, it is apparent that the amount of Rs.20,000/- deposited by the petitioner was not forfeited while canceling the allotment of the petitioner. Therefore the petitioner is entitled for the refund of the same on furnishing the original documents. Consequently the petitioner shall be entitled for the refund of Rs.20,000/- subject to petitioner fulfilling the necessary formalities and furnishing the original documents.

24. Therefore, for the foregoing reasons, prayer of the petitioner to direct the respondent to accept the balance sale consideration and allot a MIG flat to the petitioner in terms of the demand-cum-allotment letter dated 20th/24th February, 1999 is declined and the writ petition is, therefore, dismissed. However, in the facts and circumstances and for

the foregoing reasons, the petitioner shall be entitled to claim refund of deposited amount on furnishing the original documents as has been indicated by the respondent. The writ petition is, therefore, disposed of in terms hereof and the parties are left to bear their own costs.

September 4, 2009.
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ANIL KUMAR, J.