

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2489 OF 2016

Mrs Snehankita Gurunath Kulkarni ... Petitioner
v/s
The State of Maharashtra and another ... Respondents

Mr Shyam Kapadia with Ms Swati Sawant i/b M/s S.K. Legal Associates for Petitioner.
Mr Amar Mishra, AGP for Respondent Nos.1 and 2 – State.

**CORAM: A.S. OKA AND
SMT ANUJA PRABHUDESSAI JJ.
DATE : 13TH DECEMBER 2016.**

P.C. :-

1. The submissions of the learned counsel appearing for the Petitioner were heard on the earlier date. Under the provisions of Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 (for short “the ULC Act”), in large number of cases, exemption has been granted subject to compliance with the condition of the owners/developers transferring certain flats/premises to the State Government at the concessional price stipulated by the Government. These flats formed a part of what is popularly known as the Hon'ble Chief Minister's 10% or 5% discretionary quota. The first

Government Resolution in that behalf was issued on 14th July 1986 which provided for Hon'ble the Chief Minister allotting flats in 10 % quota (which was reduced to 5 % quota) to various category of persons. Under the Maharashtra Housing and Area Development Act, 1976 (for short "MHADA Act"), various Regional Boards have been established. Under clause (1) of Regulation 16 of the Maharashtra Housing and Area Development (Estate Management, Sale, Transfer and Exchange of Tenements) Regulations, 1982 , the Regional Boards are under an obligation to allot tenements in any buildings to any person according to the directions issued by the State Government. Clause (2) of Regulation 16 of the said Regulations provides that the number of tenements to be allotted to the State Government shall be restricted to the extent of 2 % of the total number of tenements in the buildings constructed by the Boards. The Government Resolution dated 14th July 1986 deals with even the said 2 % quota. Even this quota is a part of the discretionary quota of the Hon'ble the Chief Minister. The said Government Resolution provided for 10 categories of various applicants to whom flats can be allotted under the quota of Hon'ble

the Chief Minister. The last category was of the persons who are in “dire need” of premises. The Government Resolution dated 14th July 1986 was modified from time to time by various Government Resolutions. The last modification was in the form of the Government Resolution dated 30th November 2011.

2. We may note here that a Division Bench of this Court in the case of Chandrabhan S. Sangle and others v/s Urban Development Department and others¹, held that the aforesaid Government Resolutions and especially Government Resolution dated 30th November 2011 were arbitrary and illegal and therefore, the State Government was restrained from making any further allotment on the basis of said Government Resolutions. It was held that the said Resolutions provided for grant of the tenements vesting in the Government without following a fair and transparent procedure.

3. Coming back to the present case, admittedly the Petitioner is the beneficiary of an allotment under 5 % quota of

¹ 2014(3) Bombay C. R. 692

Hon'ble Chief Minister. The allotment was made in the year 2004. We may note here that the allotment to the Petitioner was of two flats bearing Flat Nos.301 and 302 in Parimal Park, 'A' Wing, 3rd Floor, Hari Om Nagar, Eastern Express Highway, Mulund Check Naka, Mulund (East), Mumbai 400 081. We may note here that in none of the aforesaid Government Resolutions, there was a provision made for allotment of two residential tenements to one individual.

4. By a letter dated 21st August 2004, addressed to the Petitioner by the Urban Development Department of the State Government, she was informed that in the category of “dire need”, Flat Nos.301 plus Flat No.302, totally admeasuring 89.59 sq.mtrs. have been allotted as per the approval granted by the Hon'ble the Chief Minister. Along with the letter dated 29th December 2000, the Additional Collector and Competent Authority forwarded the letter of allotment to the Petitioner which again refers to the allotment of Flat Nos.301 and 302.

5. An agreement dated 18th January 2005 was executed by M/s Gautam Enterprises, the Developer in favour of the Petitioner by

which he agreed to sell Flat Nos.301 and 302 on the Third Floor, 'A' Wing, Parimal Park, Hari Om Nagar, Mulund (East), Mumbai. The built up area of the said two flats is stated to be 964.31 sq.ft. The flats were agreed to be allotted at the price of Rs.6,18,039/-. The per sq.ft. rate of built up area comes only to Rs.641/- per sq.ft which was much less than the prevailing market value. The said agreement refers to the orders of exemption issued by the State Government under section 20 of the ULC Act. As per the terms and conditions of the order sanctioning the Scheme of exemption, the Developer was required to allot 5 % flats to the State Government at a concessional price. That is how flats were allotted by the said Developer to the petitioner at the price which was much less than the market price prevailing at the time of allotment.

6. On 28th December 2015, an order was issued by the Additional Collector and Competent Authority, Urban Agglomeration, Mumbai Suburban District recording that a Committee was constituted to look into the legality and validity of allotment of the flats in Hon'ble Chief Minister's quota. Allotment of

one flat in favour of the Petitioner was found to be illegal. Therefore, a direction was issued to the Petitioner to vacate both the flats. By another order dated 15th January 2016, the aforesaid order was modified and out of the two flats, the allotment of only Flat No.302 was cancelled and the Petitioner was ordered to handover vacant possession of the said flat within a period of 30 days to the Government representative. It appears that the Petitioner's mother who was her Constituted Attorney made an application dated 19th January 2016 to the Additional Collector and Competent Authority. In the said application made by the Petitioner's mother, it was prayed that the order dated 28th December 2015 be set aside. The Additional Collector passed an order dated 10th March 2016 directing the Petitioner to handover the possession of Flat No.302 to the State Government. He concluded that the allotment of second flat was illegal.

7. The challenge in this Petition under Article 226 of the Constitution of India is to the aforesaid orders dated 20th December 2015, 15th January 2016 and 10th March 2016.

8. The first submission of the learned counsel appearing for the Petitioner is that the Petitioner had prayed for allotment of a flat having a larger area. He submitted that on the basis of the said application, Flat Nos.301 and 302 which are adjacent flats were allotted to the petitioner way back in the year 2004. His submission is that after following the due process, the allotment was made to the Petitioner under the quota of Hon'ble the Chief Minister only after the Petitioner complied with all the necessary requirements. He submitted that the allotment made in favour of the Petitioner is only one allotment of a premises having larger area considering the need of the Petitioner. He pointed out that even the Developer executed only one agreement for sale dated 18th January 2005 which was registered along with the Deed of Confirmation dated 6th October 2005. He submitted that the application dated 19th January 2016 submitted by the Petitioner's mother has not been correctly read by the Additional Collector and therefore, he has made an erroneous observation that the contention raised by the mother of the Petitioner was that the Petitioner never demanded allotment of two flats and the prayer was only for grant of one flat under the

Chief Minister's quota. Lastly, the learned counsel for the Petitioner submitted that the impugned orders which have effect of cancellation of allotment of one of the two flats allotted to the Petitioner cannot be passed after lapse of 11 to 12 years and that also without following due process of law. He, therefore, submitted that at this stage, when the Petitioner has paid the price of both the flats , he cannot be deprived of one of the two flats. The learned Additional Government Pleader supported the impugned orders.

9. We have considered the submissions of both the sides. It cannot be disputed that under the various Government Resolutions to which we have made a reference earlier, there was no provision for allotment of more than one residential premises to any applicant who applied for allotment under 5 % or 2 % quota of Hon'ble Chief Minister, as the case may be. We have perused the Agreement for Sale dated 18th January 2005. The Agreement is in respect of two flats as is very clear from clause 2 of the said Agreement. Annexure 'F' which is forming a part of the said Agreement is a typical floor plan of first to seven floors of the building Parimal Park. Clause (oo)

of the recitals specifically refers to Annexure 'F' as the typical floor plan. Perusal of Annexure 'F' shows that Flat Nos.301 and 302 constituted two different and distinct flats which are adjacent to each other. There are separate entrances to the said flats and there are separate kitchens provided in the said two flats. Even the letter dated 21st August 2004 addressed to the Petitioner by Urban Development Department of the State Government as well as the order of allotment dated 29th December 2004 (Exh.'F' to the Petition) refer to the two flats. As per the terms and conditions on which the exemption was granted under Section 20 of the ULC Act that the Developer was under obligation to allot certain flats to the persons nominated by the State Government. Thus, allotment made to the Petitioner by the builder/Developer under an Agreement was as per the direction of the State Government.

10. Thus, it is crystal clear that while exercising the power of allotting flats in discretionary quota of 5 %, the Hon'ble Chief Minister approved the allotment of not one but two flats to the Petitioner. Neither the petitioner nor the State Government have

shown any policy decision which provides for allotment of more than one residential flats to one Applicant. As pointed out earlier, the allotment of flats to the Government nominee or to the Government is at a concessional price which much less than the prevailing market value.

11. The flats forming a part of 5 % quota under the ULC Act become property of the State Government as held by this Court in the case of Chandrabhan S. Sangle (supra). A property vesting in State could be disposed of only on the basis of a fair and transparent policy. When the allotment of two flats was made to the Petitioner, the policy was not declared to be illegal which was declared to be so in the said case of Chandrabhan S. Sangle (supra). Nevertheless, the policy did not allow the allotment of more than one residential tenement to one individual who applied for allotment either 5 % or 2 % discretionary quota of Hon'ble the Chief Minister. Therefore, in law, the Petitioner was never entitled to allotment of two flats under the discretionary quota of Hon'ble Chief Minister. We must note that the Petitioner secured allotment of an additional flat at a

concessional price though she was not entitled to the same. Any other deserving applicant falling in the category of “dire need” could have got the allotment of the additional flat allotted to her. It is not possible to comprehend that the Petitioner had a “dire need” to secure allotment of two flats at a concessional price under the discretionary quota.

12. If the submissions made by the learned counsel appearing for the Petitioner are accepted, by setting aside the impugned orders, the Petitioner will have to be permitted to retain both the flats though allotment of one of the two flats was certainly illegal.

13. Writ jurisdiction under Article 226 of the Constitution of India is always discretionary. The jurisdiction under Article 226 of the Constitution of India is not only discretionary but it is an equitable jurisdiction. It will be necessary to make a reference to the case in *M.P. Mittal v/s State of Haryana and others*¹. The Apex Court held that the writ Court has power to refuse relief where the

¹ (1984) 4 SCC 371

Petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain.

14. There is one more decision of the Apex Court which is relevant. The said decision is in the case of K.D. Sharma v/s Steel Authority of India Ltd. and others². In paragraphs 34 and 35 of the said decision, the Apex Court held that a prerogative writ under Article 226 of the Constitution of India is not a matter of course. The Apex Court reiterated that remedies under Articles 32 and 226 of the Constitution of India are extraordinary, equitable and discretionary. The Apex Court reiterated that the prerogative writs mentioned therein are issued for doing substantial justice.

15. Coming back to the fact of the present case, on the face of it, there could not have been an allotment of two flats at Mulund in Mumbai to the Petitioner at a concessional rate under 5 % or 2 % discretionary quota of Hon'ble Chief Minister. No policy provided for allotment of more than one residential tenement to any applicant. As held earlier, the letter of allotment as well as the Agreement

² (2008) 12 SCC 481

clearly show that the Petitioner has been allotted two flats at a price which was much less than the market price.

16. Assuming that there is any illegality committed while issuing impugned orders, if the impugned orders cancelling the allotment of one of the two flats are set aside, it will amount to restoring completely illegal and unconstitutional action on the part of the State Government of allotting more than one flat in 5 % or 2 % quota of Hon'ble the Chief Minister to one individual. Setting aside the impugned orders would mean that writ Court will be allowing the Petitioner to perpetuate an unjust gain.

17. It is well settled that by issuing prerogative writs under Article 226 of the Constitution of India, by setting aside one illegal order, another illegal order cannot be restored. The effect of setting aside the impugned orders will be reviving a blatantly illegal action on the part of the State Government of allotting more than one flat under the Hon'ble Chief Minister's discretionary quota to the Petitioner.

18. Therefore, this is a fit case where even assuming that there is some illegality associated with the impugned orders, no interference should be made in extraordinary jurisdiction under Article 226 of the Constitution of India.

19. As stated earlier, the Petitioner could acquire two flats at a very concessional rate of Rs.641/- per sq.ft. In Mulund at Mumbai only in view of illegal action of allotting more than one residential tenement to the Petitioner. The Petitioner has used both the flats for last about 11 to 12 years. Therefore, in view of unjust gain by the Petitioner, it is not even open to the Petitioner to claim any refund of any amount paid towards the price of Flat No.302.

20. Apart from all this, we must note here that after realizing that the Petitioner could not have been allotted more than one flat in the discretionary quota of the Hon'ble the Chief Minister, the State Government has taken action of restoration of one flat. We may note here that initially an order was made on 20th December 2015 directing the Petitioner to vacate both the flats. The said order was

modified as narrated earlier and therefore, in terms of the modified impugned order, the Petitioner is entitled to retain Flat No.301.

21. Hence, we decline to entertain this Petition under Article 226 of the Constitution of India. Petition is accordingly rejected.

22. The learned counsel appearing for the Petitioner at this stage seeks time to vacate the flat for a period of six months from today. As the Petitioner is in possession of Flat No.302 for last more than 11 years, by way of indulgence, we are inclined to grant time of six months subject to the condition that the Petitioner shall give an undertaking to this Court to vacate the said flat within a period of six months from today and to deliver possession thereof in terms of the impugned order to the concerned authority. The Petitioner will have to give an undertaking not to part with possession of the said flat No.302 and not to create third party interests therein. Accordingly, we direct that the impugned order shall not be executed by disturbing possession of the Flat No.302 subject to the Petitioner giving an undertaking before this Court within a period of six weeks

from today stating therein that he will handover vacant and peaceful possession of the said flat to the Officer named in the impugned order dated 15th January 2016 (Exh.'B' to the Petition) and that she will not to create any third party rights and will not part with the possession of the said Flat No.302 to anyone.

23. We make it clear that on the failure of the Petitioner to file an undertaking within the stipulated time of six weeks, on the expiry of the stipulated period of six weeks from today, it will be open for the Respondent to dispossess the Petitioner of the Flat No.302 without any further reference to this Court.

(SMT ANUJA PRABHUDESSAI J.)

(A.S. OKA J.)