

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

% **Date of decision: 27th August, 2018.**

+ **W.P.(C) 3225/2011 & CM No.15492/2013 [of R-1(iv) for recalling of order dated 3rd April, 2013].**

DDA

..... Petitioner

Through: Mr. Pawan Mathur, Adv.

versus

KUMUD MAKHIJA (DECEASED THROUGH LRS)

& ANR

..... Respondents

Through: Ms. Ankita Chaudhary Rathi, Adv.
for R-1(i) to (iii).

Mr. Neeraj Kumar Shah and Mr.
Pradeep Kumar, Advs. for R-1(iv).

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order [dated 16th October, 2010 in PP Act Case No.14/2008 of the Court of the District Judge-VIII, Rohini acting as Appellate Officer under Section 9 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act)], of allowing the appeal preferred by the respondent No.1 against the order [dated 28th March, 2007 under Section 5 of the PP Act of the respondent no.2 Estate Officer of the petitioner Delhi Development Authority (DDA)] of eviction of Somati Devi and whosoever else may be found in possession of, from flat no.108-C, Pocket-C, Block-C, Shalimar Bagh, New Delhi.

2. This petition came up first before this Court on 13th May, 2011 and after calling for the records of proceedings before the respondent no.2 Estate Officer, notice of the petition was issued on 28th July, 2011. Since then, the proceedings have been adjourned from time to time. The respondent No.1 has filed a counter affidavit. The counsel for the petitioner

DDA and the counsels for the respondent no.1 have been heard.

3. It is not in dispute that one Smt. Somati Devi resident of 2092, Tilak Chowk, Mukim Pura, Subzi Mandi, Delhi – 110 007, vide letter dated 01/07/1987-06/07/1987 of the petitioner DDA, was declared successful for allotment of the flat No.108-C, Pocket C, Block C, Shalimar Bagh, New Delhi on the terms and conditions contained in the said letter and as also in terms of Delhi Development Authority (Management & Disposal of Housing Estate) Regulations, 1968. The disposal cost of the flat as disclosed in the said letter was Rs.1,26,300/- and which was to be paid by an initial deposit of Rs.30,800/- and the balance amount was payable in instalments of Rs.1278.25p per month w.e.f. 10th September, 1987. The allotment letter *inter alia* provided the following terms of “Hire Purchase”:-

“3. This allotment is subject to the terms and conditions stipulated in the brochure for registration in New Pattern of 1979 framed under the provisions of the Delhi Development Authority (Management & Disposal of Housing Estate) Regulations, 1968 which are as under:-

(i) The amount demanded should be paid in the form of Demand Draft drawn in favour of the DDA (Housing Deptt.) or in cash by means of a challan in quadruplicate (enclosed) in the following branches of the State Bank of India Central Bank of India by or before the stipulated date i.e. within one months from the date of issue of this letter, failing which the allotment shall be liable to be cancelled without any further reference. Out of the two copies of the Challan returned to you by the bank, one may be retained by you and the other should be sent to the undersigned alongwith a forwarding letter.

Names of the branches of the State Bank of India

<i>Central</i>	<i>North</i>	<i>South</i>	<i>East</i>	<i>West</i>
<i>Chandni Chowk, Parliament Street (H.O.)</i>	<i>Azadpur, Jahangirpuri, Wazirpur (Ind. Area)</i>	<i>R.K. Puram, Malviya Ngr., Lajpat Ngr. (Ring Raod), Kalkaji</i>	<i>I.P. Estate, Trilokpuri, Himmat Puri, D.D.A. Bldg. Vikas Minar</i>	<i>Kamla Nagar, Punjabi Bagh, Ajmal Khan Road, Karol Bagh, Tilak Nagar, Janakpuri, Naraina, Delhi Cantt., Rajouri Garden, Mayapuri, Jwala Heri</i>

Name of the branches of the Central Bank of India

<i>Central</i>	<i>North</i>	<i>South</i>	<i>East</i>	<i>West</i>
<i>10/19, Connaught Circus</i>	<i>Lawrance Road</i>	<i>55, Madhuban Nehru Place, 2-E, South Extn. Petitioner.II</i>	<i>Link House, B.S. Zafar Marg, D.D.A. Bldg. Vikas Minar</i>	<i>2/14, East Patel Nagar, B-1/29, Community Centre (Near Super Bazar, Janak Puri</i>

In case, he/she cannot make the payment within the stipulated time, he/she should also submit an application within this time seeking extension of time for making the payment.

The maximum extension of time for payment can be given, taking into consideration the circumstances of every individual case, for 4 months from the due date, on payment of interest @ 12% per annum for the 1st month and @ 18% per annum for the subsequent months. No further extension would be given under any circumstances and any application submitted for this purpose will be summarily rejected. It may be noted that if the payment is not made even within the extended time, the allotment shall be liable to be cancelled. In that case, the defaulter allottee shall be liable to pay a penalty equal to 20% of his/her registration deposit and the interest accrued on the total cost of the flat at the rates mentioned above. A broken period of less than 15 days will be treated as 15 days and

above 15 days, a month for the purpose of calculation of interest.

It should also be noted that DDA is hardly concerned with the sanctioning of House Building Advance/Loan for financing the allotment and as such no request for deferment of the payment and waiving of payment of interest will be entertained.

The DDA reserves the right to refuse permission applied for extension of time of payment without assigning any reason.

(ii) If the allotment is cancelled at the request of the allottee or due to his/her failure to comply with the terms and conditions of allotment after expiry of the due date of payment submission of documents, the allottee shall be liable to pay the penalty equal to 20% of his/her registration deposit and the interest accrued on the total cost of the flat at the rates mentioned in the proceeding paragraph.

(iii) If the allottee has given the non-acceptance of allotment of the flat within one month from the date of issue of this letter, then no penalty will be charged from him/her by the DDA.

7. The allottee will be required to pay monthly instalments as indicated on first page of this letter which will be started from 1st of the preceding month after the expiry of one month from the date of issue of this letter. If the payment of any instalment is delayed, he/she shall be liable to pay penalty at the rate of 1% per month or Rs.2/- (or the first month of default, 2% per month or Rs.5 for the second month of default. 4% per month of Rs.10/- for the third month of default, whichever is more and so on. In case of default of more than six consecutive months, tenancy of the flat is liable to be determined and you shall be liable to eviction. All the outstanding dues of the Authority shall be recoverable as arrears of Land Revenue.

8. The monthly instalment is to be paid on or before 10th of every month by means of a Bank Draft Cash in favour of Delhi Development Authority (Housing Deptt) at the branches of State Bank of India/Central Bank of India mentioned in para (3) above through the prescribed challan form available from these branches. To avoid wrong posting of your deposits please mention full particulars of flat, file No. etc. in all copies of challan.

9. *Payment of monthly instalment or any other dues made by you without express permission of the Authority after cancellation of the allotment for any reason whatsoever shall not be deemed to prejudice the rights of the Authority that may accrue to it after the cancellation of the Allotment and the said payment shall not in any circumstances be deemed to have condoned any breach of the terms and conditions of the allotment.*

11. *With a view to avoid hardship to the allottee, it has been decided to hand over possession of the flat to him/her before the execution and Registration of Conveyance Deed and for this purpose he/she has to submit an Undertaking (specimen enclosed) on a non-judicial stamp paper of Rs.2/- duly attested by a Magistrate 1st Class/Notary Public to the effect that he/she will get himself/herself enrolled as a member of the Registered Agency to be formed under the Provisions of DDA (Management & Disposal of Housing Estates) Regulations, 1968. In case, the Undertaking is attested by a Notary Public extra notarial stamp worth Rs.3/- shall be affixed on the Undertaking.*

12. *The flat shall not be used for any purpose other than of residence. The allottee shall also not be entitled to sub-divide the dwelling unit or amalgamate it with any other dwelling unit or to make any structural additions/alterations without prior written permission of the DDA.*

In case of violation of the above conditions, the allotment shall be liable to be cancelled and possession of the flat resumed by the DDA.

17. *The allottee shall not be entitled to transfer, mortgage or otherwise part with the possessions of the whole or any part of the flat without the previous consent of the Authority in writing and the Authority shall be entitled to refuse the permission in its absolute discretion.*

Provided that in the event of transfer being made without obtaining previous consent of the Authority in writing, such transfer shall not be recognised by the Authority, it has right to cancel the allotment and resume the flats.

Provided further that in the event of the consent being given, the Authority may impose such terms and conditions as it may think fit and the Authority shall be entitled to claim & recover a portion of the unearned increase in the value of the land (i.e. difference between the premium paid and the market value of the land prevailing on the day of transfer) at the time of the sale, transfer assignment or parting with the title, the amount to be recovered being 50% of the unearned increase. The decision of the Authority in respect of the market value of the land shall be final and binding.

Provided further that the Authority have the pre-emptive right to purchase the property from the allottee after paying the price paid for the flat (less depreciation) and 50% of the unearned increase in the cost of land.”

4. It is also not in dispute that Somati Devi, without obtaining prior permission in writing of the petitioner DDA, agreed to sell and assign her rights in the aforesaid flat in favour of another and the rights in the flat continued to so exchange hands. The respondent no.1 claims to be the fourth successive purchaser thereof.
5. There was also a default in payment of hire purchase instalments with respect to the aforesaid flat.
6. The petitioner DDA, after giving a notice dated 10th June, 1996 to Somati Devi to show cause as to why the allotment in her favour of the aforesaid flat be not cancelled, for default in payment of hire purchase instalments, vide letter dated 7th August, 1996 cancelled the allotment of aforesaid flat in favour of Somati Devi and called upon Somati Devi to deliver possession of the flat.
7. Upon Somati Devi not so delivering possession of the flat, the Deputy Director LAB (Housing) of petitioner DDA, on 13th November, 1996 required respondent No.2 Estate Officer to initiate eviction

proceedings due to the non-payment of dues, with respect to the aforesaid flat. The proceedings so initiated by respondent No.2 Estate Officer, by issuance of notice under Section 4 of the PP Act, remained pending for 11 years and resulted in the respondent no.2 Estate Officer ultimately on 28th March, 2007 passing an order under Section 5 of the PP Act, of eviction of Somati Devi and whosoever else may be found in possession of the aforesaid flat.

8. The respondent no.1 preferred an appeal under Section 9 of the PP Act against the order aforesaid of the respondent No.2 Estate Officer and the District Judge, vide the impugned order, has allowed the said appeal, reasoning (i) that though the show cause notice dated 10th June, 1996 was issued at the correct address but subsequent show cause notices issued on 24th January, 1997, 3rd March, 1997, 26th April, 1998, 30th April, 1998, 20th May, 1998, 11th December, 1998 and 8th July, 1999 were issued at the wrong address i.e. flat 103-C, Block-C, Pocket-C, Shalimar Bagh, Delhi instead of 108-C, Pocket-C, Block-C, Shalimar Bagh, New Delhi; (ii) that the subsequent show cause notices superseded the initial show cause notice dated 10th June, 1996 at the correct address; (iii) that therefore passing of the eviction order by the Estate Officer with regard to flat in question by taking recourse to the initial show cause notice dated 10th June, 1996 was not proper and the show cause notice dated 10th June, 1996 stood superseded by subsequent show cause notices aforesaid which were issued at the wrong address; (iv) that on the demise of the respondent no.1 Kumud Makhija, there were disputes amongst her heirs and a compromise was arrived at amongst the heirs of the respondent no.1 whereby it was agreed

that the purchase by the respondent no.1 Kumud Makhija was also on behalf of her husband; (v) that no show cause notice had been issued to the respondent no.1 Kumud Makhija; (vi) that the respondent no.1 Kumud Makhija and one Rajan Kumar had been appearing before the Estate Officer and had agreed to pay the outstanding amount which had been told to them by the Upper Divisional Clerk (UDC) of the Accounts Branch of the petitioner DDA; (vii) that the UDC of the Accounts Branch of the petitioner DDA had informed the Estate Officer that all the instalments had been received but the penalty amount of Rs.1.72 lac was still payable; and, (viii) that since the respondent no.1 Kumud Makhija and Rajan Kumar were entertained by the Estate Officer and their request for making of the instalments was also entertained, the respondent no.1 Kumud Makhija was recognised as having vested right in the flat in question but still no show cause notice was issued to the respondent no.1 Kumud Makhija. It was however clarified, that the petitioner DDA could initiate fresh proceedings, if any warranted, before the Estate Officer.

9. I am afraid, the reasoning aforesaid of the learned District Judge is contrary to settled law and material on record and is perverse and cannot be sustained.

10. The counsel for the petitioner DDA has rightly pointed out from record, that the show cause notice dated 10th June, 1996 fructified into the cancellation of the allotment of the flat vide letter dated 7th August, 1996 aforesaid. The subsequent notices, dates whereof have been enumerated by the District Judge in the impugned order, are not show cause notices issued by the petitioner DDA but notices in pursuance to the proceedings before

respondent No.2 Estate Officer commencing with notice under Section 4 of the PP Act. The counsel for the petitioner DDA has further rightly drawn attention to the fact that the error in the address in the subsequent notices is of no avail, since w.e.f. 8th May, 2001 the respondent no.1 Kumud Makhija and Rajan Kumar were appearing before the respondent no.2 Estate Officer and participating with the proceedings. The same is borne out from the order sheet from page 43 of the paper book. I may also highlight that the dates of all notices bearing the wrong address, enumerated by the District Judge in the impugned order, are prior to 8th May, 2001 and merit is thus found in the contention of the petitioner DDA, that once the respondent no.1 Kumud Makhija was appearing before the respondent no.2 Estate Officer and participating in the proceedings and had notice thereof, the error in the address on the notices dated 24th January, 1997, 3rd March, 1997, 26th April, 1998, 30th April, 1998, 20th May, 1998, 11th December, 1998 and 8th July, 1999 is immaterial.

11. Another reason given by the learned District Judge for setting aside of the order of eviction is, of the respondent No.2 Estate Officer, inspite of having entertained the respondent No.1, allowed her to participate in the proceedings under the PP Act, granting her time to deposit the deficit instalments and which were deposited and having recognised her vested right in the flat, having not issued any notice in the name of respondent No.1. The learned District Judge however failed to notice that as per clause 17 reproduced above of allotment/hire purchase letter vide which the flat was allotted to Somati Devi, Somati Devi was not entitled to alienate, encumber or part with possession of the flat. The said clause 17 also

provides for cancellation of allotment and resumption of possession. The learned District Judge forgets that the respondent No.2 Estate Officer was only exercising powers under Section 4 of the PP Act and had no power to restore allotment or exercise powers under clause 17 supra. Not only so, the learned District Judge, though notices appearance of respondent No.1, ignores that such appearance was not in own right but for and on behalf of allottee Somati Devi. There is nothing in the proceedings before the respondent No.2 Estate Officer, to indicate that respondent No.1 disclosed the change in hands which the flat had undergone or that there was any application for mind thereon. The appearance and participation of respondent No.1 before/in the proceedings before respondent No.2 Estate Officer was no different from that of counsels for respondent No.1 before this Court. The counsels for respondent No.1, inspite of being asked, have been unable to show a single order where the presence of the respondent no.1 Kumud Makhija may not have been recorded on behalf of Somati Devi. I say that the order of the learned District Judge is perverse, because the learned District Judge reasons recognition by respondent No.2 Estate Officer of the vested right of respondent No.1 in the flat when there are no documents of creation of vested right in respondent No.1 in the flat, as indeed there cannot be in law. In fact, Somati Devi herself had no vested right in the flat. Neither a mere contingent letter of allotment nor assignment of rights therein, when such assignment as per its terms is prohibited, do not create any vested right. Similarly, payments of instalments, belatedly by respondent No.1, after cancellation of allotment, as per clause 9 reproduced above, was/is of no avail.

12. The reasoning given by learned District Judge, of no show cause notice having been issued to respondent No.1, is equally faulty. The respondent No.1 had no privity of contract with the petitioner DDA and there was no need for petitioner DDA to issue show cause notice to respondent No.1.

13. Rather, it is the contention of the counsel for the petitioner DDA, that only Somati Devi could have challenged the order of eviction and the respondent no.1 Kumud Makhija had no locus to prefer the appeal before the District Judge. It is contended that the District Judge has failed to consider the said fact as well.

14. I have thus enquired from the two sets of counsels appearing for the legal heirs of the respondent no.1, as to why the order of the respondent no.2 Estate Officer should not be restored.

15. The first counsel for the legal heirs has contended (i) that as per the dicta of the Supreme Court in ***Suraj Lamp and Industries Private Limited Vs. State of Haryana*** (2012) 1 SCC 656, the documents such as Agreement to Sell, Power of Attorney etc. of a date prior to the pronouncement of the said judgment on 11th October, 2011 are documents of title; (ii) that the respondent no.1 Kumud Makhija has been in possession of the flat since 1996; (iii) that the respondent no.1 Kumud Makhija has paid a large part of instalments; and, (iv) that the respondent no.1 Kumud Makhija was entertained by the respondent no.2 Estate Officer.

16. I may in this regard notice that the mode prescribed in the Letter of Allotment for payment of hire purchase instalments was, of filling up the prescribed *challan* and depositing the money in any of the banks in which

the petitioner DDA had an account. It was thus not as if the making and acceptance of payments under the Letter of Allotment was a bilateral act. In fact, it was a unilateral act, required to be done by filling up the prescribed *challan* and making the deposit in the bank account of the petitioner DDA. It is for this reason only that clause 9 reproduced above, of the terms of the allotment/hire purchase letter provided that payment of monthly instalment or any other dues made without express permission of the petitioner DDA after cancellation of the allotment for any reason whatsoever shall not be deemed to prejudice the rights of the petitioner DDA that may accrue to it after the cancellation of the allotment. The learned District Judge has unfortunately overlooked the said terms as well, inspite of the same being available on record requisitioned from his Court. Thus, the argument of the respondent no.1 Kumud Makhija having made payments, did/does not confer any right on the respondent no.1 Kumud Makhija.

17. As far as the argument of the counsel, of the respondent no.1 Kumud Makhija being in possession since 1996 is concerned, it has been held by the Supreme Court in ***Sant Lal Jain Vs. Avtar Singh*** (1985) 2 SCC 332 as well as by a Division Bench of this Court in ***Prabhu Dayal Vs. Roop Kumar*** AIR 2005 Del 144 that occupation for howsoever long of immovable property does not confer any rights. It is also not as if the respondent no.1 Kumud Makhija can claim any adverse possession. Neither has any such claim been made nor can any such claim be made. The claim of the respondent no.1 Kumud Makhija is of lawful possession and it has been consistent judgments of Supreme Court in ***Annasaheb Bapusaheb***

Patil Vs. Balwant (1995) 2 SCC 543, *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC 639, *Karnataka Board of Wakf Vs. Govt. of India* (2004) 10 SCC 779, *T. Anjanappa Vs. Somalingappa* (2006) 7 SCC 570, *PT. Munichikania Reddy Vs. Revanma* (2007) 6 SCC 59 and *LN Aswathama Vs. P. Prakash* (2009) 13 SCC 229 that lawful possession is antithetical to adverse possession.

18. Though the *challans* of payment are not immediately found on the file but the counsel for the respondent no.1 Kumud Makhija, on enquiry as to how the payments were made and whether the name on the *challans* for payment was of Somati Devi or of respondent no.1 Kumud Makhija, states that the payments were made by filling up the *challan* with the name of Somati Devi and by depositing in the prescribed bank account of the petitioner DDA.

19. As far as reference to *Suraj Lamp and Industries Private Limited* supra is concerned, the counsel is misconstruing the same. The said judgment overrules the dicta of the Division Bench of this Court in *Asha M. Jain Vs. The Canara Bank* (2001) 94 DLT 841 holding that considering the large-scale transfer of properties in Delhi by the mode of Agreement to Sell, Power of Attorney etc, the said documents have to be considered documents of title. Supreme Court however did not agree therewith. All that was said in para 27 of the judgment as reported in SCC, to which reference is made, is as under:-

“27. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a

relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding "SA/GPA/WILL transactions" are not intended to apply to such bona fide/genuine transactions."

The aforesaid paragraph cannot be construed as holding that the overruling of the judgment of this Court in **Asha M. Jain** was prospective. All that is qualified in the aforesaid paragraph is that the Agreement to Sell and Power of Attorney will continue to be valid for what they are i.e. as Agreement to Sell and Power of Attorney and if entitled to be enforced, can be enforced.

20. The remedy of the respondent no.1 Kumud Makhija under the aforesaid paragraph was to sue Somati Devi and/or others from whom the respondent no.1 Kumud Makhija claims to have agreed to purchase the flat and which the respondent no.1 Kumud Makhija has not done.

21. The other two arguments of the counsel for respondent No.1 have already been dealt with above.

22. The second counsel for the legal heirs of the respondent no.1 Kumud Makhija has argued, (i) that the respondent no.1 Kumud Makhija was appearing not only on behalf of Somati Devi but also as GPA holder;

attention in this regard is drawn to the order dated 8th May, 2001 of the respondent No.2 Estate Officer; (ii) that the eviction order was passed after the UDC of the petitioner DDA, on 13th October, 2006, reported that all the instalments had been paid; and, (iii) that after the order of eviction of the respondent no.2 Estate Officer, the penalty amount has also been paid and the *challan* therefor is in the name of the respondent no.1 Kumud Makhija; however, the said *challan* is not on record, though copy thereof has been filed by the first counsel for the legal heirs, but is under objection.

23. No merit is found in any of the aforesaid contentions also. As far as the order dated 8th May, 2001 is concerned, the same records the presence of the respondent no.1 Kumud Makhija and Rajan Kumar with 'GPA' written in brackets against Rajan Kumar only and "on behalf of the respondent" i.e. Somati Devi. Therefrom it cannot be said that the appearance of the respondent no.1 Kumud Makhija or Rajan Kumar was on their own behalf and not on behalf of Somati Devi.

24. The respondent no.2 Estate Officer, in the eviction order dated 28th March, 2007 i.e. subsequent to the order dated 13th October, 2006 supra noticed that the penalty amount which was required to be paid had not been paid. Moreover, as aforesaid, the payments received subsequent to the cancellation effected on 7th August, 1996 are of no avail and do not vest any right as already provided in the allotment letter.

25. In fact Rule/Regulations 51 & 52 of the Delhi Development Authority (Management & Disposal of Housing Estate) Regulations, 1968 aforesaid provide that during the hire purchase period, a hirer shall remain the tenant of the DDA and shall not have any other rights except that of tenancy and

that the hirer shall abide by the tenancy stipulations as specified in the Hire Purchase Agreement. Regulation 54 also provides for transfer of ownership to hirer only after the last instalment of hire purchase and all other dues have been paid and when in pursuance thereto, a Conveyance Deed is executed.

26. Somati Devi thus, as per the said Regulations, which have a statutory flavour, did not have any rights in the flat save as a hirer/tenant and which rights stood terminated on cancellation effected vide letter dated 7th August, 1996 which has attained finality and which has not been challenged. The question then, of Somati Devi transferring the flat or any rights therein in favour of any other persons did not arise.

27. The petition thus succeeds. The order of the District Judge impugned in this petition is set aside and the order of the respondent no.2 Estate Officer, of eviction of Somati Devi and whosoever else, including the respondent no.1 Kumud Makhija, who may be found in possession of flat no. 108-C, Pocket-C, Block-C, Shalimar Bagh, New Delhi, is upheld.

28. The petition is disposed of.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 27, 2018

‘pp’..