
(2008) 04 DEL CK 0210

In the Delhi High Court

Case No : Writ Petition (C) No's. 7967, 8142, 8167, 8181, 8506, 8616 and 9093 of 2007 and 69, 1040, 1045, 1046, 1074, 1085, 1086, 1142, 1188, 1189, 1294, 1405, 1590 and 1593 of 2008

Chhanga Lal and Others

APPELLANT

Vs

M.C.D.
 Jai Parkash and Others Vs M.C.D. and Another

 Dharamvir Singh Vs Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-04-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 19, 19A, 2, 39, 53

Citation : AIR 2008 Delhi 146 : (2008) 149 DLT 460 : (2008) 102 DRJ 555

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Pankaj Kumar, in W.P.C Nos. 1590 and 1593/2008, Sugriv Dubey, in W.P.C Nos. 7967, 8167, 8181 and 8616/2007, S.K. Sinha, Parvinder Kaur Malhotra and Ritika Gupta, in W.P.C Nos. 1040, 1045, 1046, 1074, 1085, 1086, 1142, 1188, 1189 and 1405/2008 and D.K. Sharma, in W.P.C 9093/2007, Prabhat Ranjan, in W.P.C Nos. 8142 and 8506/2007 and Ajit Prasad, in W.P.C 1294/2008, Shiv Kumar Sharma, for the Appellant; Madhu Tewatia and Sidhi Arora, in WP(C) Nos. 7967, 8142, 8616 and 8167/2007, Mansi Gupta in WP(C) Nos. 1074, 1294 and 1593/2008, Sumita Kapil, Standing Counsel and G.P. Dwivedi in WP(C) No. 1590/2008, Smita Shankar and G.P. Dwivedi, in WP(C) No. 1189/2008, Sanjeev Sabharwal in WP(C) Nos. 9093/2007 and 1189, 1040 and 1405/2008 and Anoop Bagai, in WP(C) No. 8181/07, S.S. Sahu, for Sonia Sharma, for G.N.C.T. in WP(C) No. 1294/2008, Mukesh Gupta in WP(C) No. 1085/2008, Sanjay Goel in WP(C) No. 1045/2008, Rajeev Sharma, in WP(C) No. 8506/2007, S.P. Sharma and Shishir Singh for respondent No. 2 in WP(C) No. 8142/2007, P.L. Gautam in WP(C) No. 1142/2008, Ajay Arora in WP(C) No. 1040/2008, Sanjeev Sabharwal, in WP(C) Nos. 1046, 1074, 1142, 1085, 1086, 1188 and 1198/2008 and Smita Shankar, in WP(C) No. 1188 and 1198/08 and V. Babu Joseph, for UOI and Suparna Srivastava, for MCD, for the Respondent

Judgement

Sanjiv Khanna, J.—Menace of stray cattle in Delhi has resulted in a series of directions being issued by this Court in WP(C) No. 3791/2000 titled as "Common

Cause v. Union of India". Municipal Corporation of Delhi (hereinafter referred to as MCD for short) prepared a re-settlement scheme for shifting of unauthorized dairies to Ghogha on the outskirts of Delhi. Approximately 180 acres of land has been earmarked and allotted to MCD to develop a colony on self-financing basis. Allotment of dairy plots was to be made on first come first serve basis as per circular No. 539/Dir./VS./2006 dated 1/8/2006 issued by MCD. Public notices were thereafter issued inviting applications for allotment of dairy plots. The relevant public notice taken on by MCD reads as under:

Hon"ble Delhi High court has issued directions in writ petition No. 3791/2000 Common Cause v. Union of India and Ors. that all the unauthorized dairies run in the Urban area of Delhi be got closed. In compliance the Government has taken the decision to relocate in developed area in Ghogha the unauthorized dairies. There is permission to carry on dairy activities in this area in the master plan as also this area can be approached conveniently through road.

All the dairy owners are Therefore informed by this notice that the Delhi Municipal Corporation is going to start development in Ghogha a dairy colony and is also inviting applications from the dairy owners operating within the city area for booking of plot which is as follows:

1. 60 sq.mtr. plot for dairy with five cattles.
2. 96 sq.mts. plot for dairy with eight cattles.

The rate/price of the developed plot would be Rs. 2500/- per sq.mts. The rate/price of the plot is inclusive of development charges i.e. of civil work, road, sewerage, electricity, water, gardening and cleaning. It does not include the expenses required for putting of the shed for the cattle. The said expense will have to be borne by the owner of the plot.

The owner of the cattles according to the requirements can book plot in the office of the Veterinary Office of the concerned zone. The price of the plot will have to be deposited only after acceptance of the booking by the department. Thereafter date for deposit of the amount will be notified.

Those persons who will not book the plot, they will have to close down their dairies immediately otherwise will have to suffer consequences. Plot can be booked by 20th September, 2004.

/- Rakesh Mehta

Commissioner

Delhi Municipal Corporation.

2. The form prescribed by MCD in column 4 required the applicant to state the place where the dairy was being presently run and column 5 required the applicant to give details of number of cattles and the size of the plot for which application was being made i.e. 60 sq.mts. or 96 sq.mts. The applicant was also

required to verify the application form by declaring that the information furnished by him was true and correct to his knowledge and nothing was concealed and in case any information given in the form was found to be incorrect, the applicant would be responsible for the same and would face legal consequences.

3. 5857 applications were received for booking of as many as 8344 dairy plots out of which 2569 applications were for plots measuring 60 sq.mts., while the remaining 5775 applications were for plots measuring 96 sq.mts. Thereafter by public notices published in news papers on 13.10.2004, the applicants were required to deposit 50% of the developed cost of the plot i.e. Rs. 1250/- per sq. mts. The balance amount was payable after layout plan, roads and drains were constructed. The last date of payment of Rs. 1250/- per sq. Mts. was extended up to 31.1.2005.

4. Said applications were examined and thereafter in the month of May and August, 2005 allotment letters were issued by MCD. The allotment letter stated as under:

This is to certify that the aforesaid plot(s) is/are allotted in the Ghogha Dairy Colony for the purposes of running the dairy activities only. The possession of the plot(s) shall, however, be handed-over only on payment of the remaining 50% of the plot(s) cost, within one month subject to terms and condition of allotment.

5. Thus, the respondents had sufficient time to verify and examine the applications and thereafter allotment letters were issued. In all cases petitioners have paid 50% or 100% towards the price of plot as demanded in the allotment letter. However, possession of the plots has not been handed over to them.

6. Allegations about fraudulent allotment of plots led the court to pass an order in the Common Cause case (Supra) on 30th August, 2006 directing that running of dairy business would be the sole criteria for allotment and if anyone was found ineligible on that criteria, possession of the plot shall not be delivered to him. In a connected writ petition titled "Vikash Jain v. Govt. of NCT of Delhi bearing W.P. (C) No. 14715/2005, the court directed that even provisional allotment should be made after verification and not otherwise. Allegations were also made against the members of the Monitoring Committee which was formed. In these circumstances the court in the Common Cause case (Supra) vide order dated 18th March, 2007 re-constituted the Monitoring Committee. On 5th May, 2007 the court recorded that MCD had admitted in their additional affidavit that 67% allotments made in Ghogha dairy complex by the Veterinary Officer were found to be wrong and bogus after verification as the applicants concerned did not meet the eligibility criteria of having a dairy. The Veterinary Officer was suspended but it appears that he approached a civil court and obtained a stay order. The case of the Veterinary Officer was that allotments were subject to verification of the eligibility of the allottee to be carried out by the Micro Chipic Agency. [see in this regard detailed order passed by this Court in case of Common Cause (Supra) dated 31st May, 2007) reported in 141 (2007) DLT 164.

7. The Monitoring Committee constituted by this Court held several meetings to examine and verify the applications and ensure that plots are allotted to eligible persons and bogus allottees are weeded out. Zonal Committees were formed to visit premises of each and every applicant and verify, whether he was having an illegal or unauthorized dairy. The team consisted of the Zonal Officer, Veterinary Doctor from the Govt. of NCT of Delhi and SHO in each of the 12 zones. In this manner about 1373 applications have been verified out of which 535 applications are found to be valid and meeting the eligibility criteria and 838 applications are found to be made applicants who do not meet the eligibility criteria.

8. There is no dispute that applicants or persons not meeting the eligibility criteria cannot be and should not be allotted plots. In the present case I am satisfied that the petitioners do not meet the eligibility criteria. I have also examined the writ petitions and find that in most of the cases there is no evidence or material to show that the petitioners were in fact running or are running an illegal dairy. Cases where there is some reliable material or document, which creates a doubt have been segregated and MCD has been asked to file reply on merits. To be fair to the counsel for the petitioners in most of the cases they did not press and gave up their claim for allotment of plots after initial hesitation.

9. Thus, there has been misrepresentation on part of the petitioners herein. MCD has submitted the original files maintained by them with respect to each of the individual applicant-petitioner for the plots at Ghogha Dairy Colony. I will make reference to the application filed by Mr. Rishabh Kumar Jain, the petitioner in WP (Civil) No. 7967 of 2007, the lead case in the present bunch of petitions. The petitioner in unequivocal terms had stated that he had been running a dairy business from the premises bearing No. 484/5A-3B Shalimar Park, Shahadara, New Delhi. He has further mentioned that he had 15 cattle and for the said purpose he has sought allotment of three plots measuring 60 sq Mtrs.; each at Ghogha. MCD had issued him an allotment letter on the basis of this representation by the petitioner. However, on inspection it was found that the petitioner was running a sweet shop and was not having any illegal dairy. While the petitioner does sell dairy products from the said shop but that by itself does not satisfy the eligibility criteria- "running an illegal/unauthorised Dairy within Delhi". The said being the sole criterion for allotment of plots, non-fulfilment of the said condition disqualifies the petitioner. The petitioner knew that he is not entitled to allotment of plot and had made a misrepresentation. Therefore MCD is well within its rights to rescind the consent so granted, as the same is vitiated on account of the misrepresentation played by the petitioner. In view of the above, the claim for allotment of plots is liable to be rejected.

10. The main issue in question is whether the petitioners are entitled to refund of 50% or 100% of amount deposited by them towards purchase of plot. The petitioners have made a prayer that the entire amount deposited by them should be refunded. MCD on the other hand has taken the stand that the entire amount

is liable to be forfeited. In the counter affidavit filed by the MCD in the lead case of Rishab Kumar Jain v. MCD bearing W.P.(C) No. 7967/2007 it is stated that the decision to forfeit the money deposited by the petitioner was taken by the Stray Cattle Committee for the following reasons:

4. Refund of money in respect of ineligible applicants

The Committee recommends that the earnest money deposited by the ineligible applicant dairy owners be not refunded and the same would stand forfeited in pursuance of directions dated 30.04.2006 of the Hon''ble High Court of Delhi and separate action should also be contemplated against such ineligible applicant dairy owners in consultation with the Law Department for booking of the dairy plots fraudulently. The applicants in their applications for allotment had categorically declared that -

It is certified that the above information is true and correct to the best of my knowledge and belief and nothing has been concealed there from. In case, the same (in part &/or in whole) is found incorrect at any stage, I shall solely be responsible and shall be liable for action, as per law.

11. Thereafter, letters were written by the MCD stating inter alias as under:

2. The Hon''ble High Court of Delhi, vide its orders dated 30.08.2006, inter-alia, directed as under:

...The running of dairy business will be the sole criteria to allot the plots with possession and if anyone found to be ineligible on the aforesaid criteria the possession shall not be given to such applicants. Similarly, if a person after taking possession of the plot is found misusing the same for the purpose other than running of dairy, the allotment will stand cancelled and money deposited will be forfeited by the MCD....

3. As per the verification reports furnished by the Zonal Committee, constituted in pursuance of the decision of the Stray Cattle Committee (appointed by the Hon''ble High Court of Delhi vide its orders dated 08.03.2007), you have not been found running dairy at the address as mentioned in the application form while seeking booking of the dairy plot(s).

4. In compliance of direction of the Hon''ble High Court of Delhi dated 31.05.2007 in CWP No. 3791/2000 (Common Cause Society v. UOI and Ors.), you are hereby informed that your booking/allotment of dairy plot(s) under Ghogha Dairy Colony Project stands cancelled and the amount deposited towards cost of the dairy plot(s) is forfeited by the MCD pursuant to the directions dated 30.08.2006 of the Hon''ble High Court of Delhi.

5. This is without prejudice to the rights of MCD to take legal action against you in accordance with law for booking the dairy plot(s), in question, on false declaration.

12. It is apparent that MCD has misread the order dated 30th August, 2006 of

this Court passed in Common Cause case (Supra). This is clear from the portion of the said order quoted in the letter of cancellation itself. I have also read the order passed on 30th August, 2006. The relevant portion of which reads as under:

With regard to the development of Dairy Colony at Ghogha (Narela) although vide order dated 10.11.2005 we had directed the MCD to hand over the possession of the plots to the dairy owners but it seems that the statement was made by the MCD without realizing that adequate electricity and water lines are not available and infrastructure has not been developed. It has been stated in the report that by the end of October, 2006 the NDPL and Delhi Jal Board will be in a position to complete the electrification and water pipelines and thereafter the possession of dairy plots to the eligible applicants after due verification of cattles through Micro chips shall be started. It is stated in the report that the process of verification will start in the first week of December, 2006 and only those persons who are carrying on the dairy business in Delhi and will carry on the same in future will be provided the possession of dairy plots as per the undertaking given by them at the time of provisional booking of their dairy plots. The running of dairy business will be the sole criteria to allot the plots with possession and if anyone found to be ineligible on the aforesaid criteria the possession shall not be given to such applicants. Similarly, if a person after taking possession of the plot is found misusing the same for the purpose other than running of dairy, the allotment will stand cancelled and money deposited will be forfeited by the MCD. The MCD has assured that no plot would be allotted with possession to any applicant without proper verification and permission from the Chairman of the Committee. It has also been noted in the report that MCD has provided a reprieve to illegal dairy owners in Delhi to continue their dairy work in their houses so long the plots applied by them at Ghogha dairy colonies are not provided to them in order to achieve mischievous object of continuing illegal dairies in Delhi.

13. Two directions have been given by the Court in the said order. Firstly that allotment of plots should be made after proper verification by MCD and the sole criterion for allotment should be that the applicant should be carrying on dairy business. Any person who was not eligible would not be given possession of a plot. The second direction given by the court in the said order was that if a person after taking possession of the plot is found misusing the same i.e. using the plot for any purpose other than using the same for the purpose of running of a dairy, he will incur penalty of cancellation of the plot and forfeiture of the money deposited by him. The distinction between the two directions given by the Court has been completely overlooked by the Committee and the MCD. The order has been misread and misunderstood. No direction was given by the Court for forfeiture of the money deposited by an applicant in case the applicant was not eligible. Onus was put on MCD to verify the applications for allotment. MCD was to ensure that only persons carrying on or running an illegal dairy business are given possession of plots.

14. The Committee has also committed a mistake by incorrectly recording that the petitioners/applicants had paid or deposited any earnest money. The petitioners/applicants had not deposited any earnest money with MCD. I have quoted the public notice inviting offers. Public notice did not mention or state that any earnest money was to be deposited by the applicant. Public notices issued thereafter asking the applicants to deposit 50% of the purchase price as advance payment did not state that what was being paid was earnest money or an amount that could be forfeited. Rs. 1250/- was required to be deposited purchase cost/price. The allotment letter also did not state that the amount deposited or to be deposited was earnest money. The petitioners/applicants Therefore have deposited part or whole consideration for purchase of the plot. No earnest money was required to be deposited under the scheme, nor was the same deposited by the petitioners. The reasons recorded by the Committee, Therefore, proceed on entirely wrong assumption. The factual foundation itself is incorrect and based on wrong premise. Error has been committed by the respondent/MCD in their decision making process.

15. Learned Counsel for the respondent/MCD submitted that the petitioners had made false and incorrect representation and Therefore, the amount deposited by the petitioners being 50% of the price of the plot or 100% of the price of the plot is liable to be forfeited. This Court thereafter asked the parties to examine the provision of the Contract Act, 1872 and it was pointed out that even in case of factual or fraudulent misrepresentation, doctrine of Restitution applies subject to right of MCD to deduct or set off damages suffered. Doctrine of *Pari Delicto* was referred to. Learned Counsel for the respondent/MCD thereafter prayed for some time to get instructions but on 10th March, 2008 it was stated that MCD is not ready to reconsider their decision to forfeit the entire amount deposited by the petitioners.

16. At the outset I may note that in the public notices and in the application form there is no clause for forfeiture. Even in the allotment letter it is not stated that the amounts deposited by the petitioners can be forfeited. The original scheme and the resolution passed by the MCD on 25/10/2004 do not contain any provision for forfeiture of money deposited by an applicant. The scheme as prepared states that the applications for allotment of plots may be invited for shifting of dairies, scrutinized and verified by MCD. If found eligible, applicants were to be allotted plots for establishing a dairy on, no profit, no loss basis.

17. Law of Contract is codified law. Though the Contract Act is not a complete Code but where the Act is applicable and covers a case, it is not necessary to look beyond the statute and apply principles of equity, justice and good conscious. (Refer, *Kapur Chand Godha Vs. Mir Nawab Himayat Ali Khan Azamjahi*,).

18. Sections 2(g) - 2(i) of the Contract Act define the terms "contract", "void contract" and "voidable contract". An agreement enforceable by law is contract. The contract is an agreement or set of promises giving rise to obligations which can be enforced or are recognized by law. Public notices issued by MCD invited

offers. It was an invitation but restricted to unauthorized dairy owners. The petitioners, Therefore, have made a misrepresentation of fact in their applications seeking allotment, which as per law of contract was an offer. The respondent/MCD on the basis of misrepresentation initially/provisionally had made allotment to the petitioners but subsequently rescinded/cancelled the allotment but before possession is given.

19. The terms "void" and "voidable" contract are separate and distinct. A void contract is invalid since inception. It is no contract and is still born. Void contracts have to be distinguished from voidable contracts or contracts which become void subsequently after they have been validly executed and entered into. Voidable contracts are not still born and are contracts in the eyes of law. Voidable contracts are enforceable in law at the instance or option of the innocent party or can be rescinded by the said party. They remain a contract till the right to rescind is exercised.

20. Voidable contracts can be divided into two groups. Contracts which are voidable at the inception itself and contracts which are not voidable at the inception but become voidable due to subsequent defaults. (See, Sections 39, 53, 55 of the Contract Act). Sections 19 and 19A deal with voidable contracts at their inception. The said Sections read as under:

Sections 19. Voidability of agreement without free consent: When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception. - If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation - A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

19A. Power to set aside contract induced by undue influence - When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there under, upon such terms and conditions as to the Court may seem just.

21. In a case of fraudulent misrepresentation, the innocent party can rescind the

contract or claim damages or both. MCD is, Therefore, justified in rescinding the contract and also has a right to claim damages. In cases of misrepresentation of fact at pre-contractual stage the innocent party (MCD in the present case) is entitled to recover damages for misrepresentation only and not for "expectation or interest" in the contract as if the same has been executed and performed. Damages are awarded in such cases on the assumption that the contract had not been made and not on the basis as if the contract had been made. The claimant i.e. MCD is entitled to be put back in the same position as if the contract had never come into existence. [See; Doyle v. Olby (Ironmongers) reported in (1969) 2 QB 158. Thus, MCD is entitled to be put back in the same financial position as they would have been, if no false mis-representation had been made.

22. Once an innocent party exercises the option and rescinds the contract, the contract becomes void and thereafter right to restitution in terms of Section 64 of the Contract Act gets attracted. In AIR 1932 89 (Privy Council) , it was observed that once a voidable contract has been avoided, any person who has received any advantage under such contract is bound to restore it to the person from whom he had received it, or make compensation therefore. Quoting from Kerr on Fraud and Mistake it was held that a party exercising his option to rescind is entitled to be restored as far as possible to his former position.

23. Section 64 of the Contract Act applies in such cases and reads as under:

Section 64. Consequences of rescission of voidable contract - When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall if, he has received any benefit there under from another party to such contract, restore such benefit, so far as, may be, to the person from whom it was received.

24. Thus in cases of voidable contracts a party rescinding the contract must restore the benefit received under the contract to the other side in terms of Section 64. This is, however, subject to the principle of restituito integrum. The intention is that status quo ante should be restored. This necessarily implies that expenditure wasted and spent by the innocent party by relying on the wrong statement should be paid to the said party. Damages are paid to the aggrieved or the innocent party as a consequence of the representation being untrue. (Refer, Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd. reported in 1996 (4) All.ER 769.

25. It is in this context that the legislature has been careful to use the words "restore as far as may be" in Section 64 of the Contract Act. A person rescinding the contract is bound to return the benefit he has received under the contract and is entitled to set off damages suffered at the hands of the defaulting party. In AIR 1943 34 (Privy Council) , it was held that a party that has rightfully rescinded a contract can recover damages from the party at default and is afforded facility of set off. His just claims have to be met but further exaction is

not justified by the default in view of Section 64 of the Contract Act. Where a payment has been made under a contract which -for what so ever reason - becomes void, duty of restitution would seem to emerge.

26. Doctrine of *Pari Delicto* applies to immoral or illegal contracts and is based upon the principle that no Court will lend its aid and entertain action founded upon an immoral or illegal act that forms basis of a cause of action. Courts do not assist a plaintiff who is guilty of having entered into an immoral or illegal agreement with a third party. In such cases sometimes, right to restitution is not granted on the ground that the Court will not help *particeps criminis* and could reject the claim on the line of principle "let estate lie where it lies". The Black's Law Dictionary defines the term *Pari Delicto* as follows-

In equal fault, in a similar offence or crime, equal in guilt or in fault.

Doctrine of *Pari Delicto* is not applicable to the facts of the present case. Parties were not entering into an illegal or immoral contract forbidden by law. It cannot be said that MCD was entering into an illegal or immoral transaction with the petitioners. As far as MCD is concerned, MCD was entering into a legal transaction or a contract. The present case is one of fraudulent representation by one party. As far as Contract Act in India is concerned the respondent/MCD is entitled to rescind the contract and also claim damages. (Reference can also be made to *Sita Ram Vs. Radhabai and Others*,). The allegation that there was illegality perpetuated between an officer of MCD and the petitioners and other applicants and Therefore Doctrine of *Pari Delecto* applies cannot be accepted. Firstly, the allegation that the petitioner -applicants had joined hands is not pleaded but mentioned only in written submissions. No such plea has been taken in the counter affidavit filed in the case of *Rishabh kr. Jain (WP (Civil) No. 7967/2007)* the lead case in which counter has been filed and the counter is being read as reply to other writs also. There is no conclusive evidence to support the allegation, though FIR against the officer is pending investigation. Secondly the contract is not between the petitioners and the officer but between the petitioners and MCD. In *Kedar Nath Motani and Others Vs. Prahlad Rai and Others*, it was observed:

Where both parties do not show that there was any conspiracy to defraud a third person or to commit any other illegal act, the maxim, in *pari delicto* etc., can hardly be made applicable. The appellants and the answering respondents were not in *pari delicto*. The respondents claimed to be innocent parties, who had acquired the lands themselves, and the appellants, on the other hand, stated that the respondents knew nothing about the matter and were not even consulted. In our opinion, the application of the maxim was erroneous.

27. In the same case the Supreme Court also examined doctrine of *ex dolo malo non oritur actio* and it was observed in paras 12 and 15 as under:

12. The law was stated as far back as 1775 by Lord Mansfield in *Holman v. Johnson* in the following words:

The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*.

There are, however, some exceptions or "supposed exceptions" to the rule of *turpi causa*. In Salmond and William on Contracts, four such exceptions have been mentioned, and the fourth of these exceptions is based on the right of *restitutio in integrum*, where the relationship of trustee and beneficiary is involved....

15. The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.

28. Again in *Sita Ram Vs. Radhabai and Others*, it was observed:

11. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim *in pari deucto portior est conditio defendantis*. But as stated in Anson's Principles of the English Law of Contracts, 22nd Edn., p. 343: there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered - cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not *in pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim.

29. In *Euro-diam Ltd. v. Bathurst* reported in (1988) 2 WLR 517 the following three propositions have been laid down

1. The *ex turpi causa* defense rests on a principle of public policy. It applies where the plaintiff has been guilty of illegal or immoral conduct, if in all the circumstances it would be an affront to the public conscience to grant the plaintiff relief, because the court would thereby appear to assist or encourage others in similar acts.

2. The main situations where the defense will *prima facie* succeed are:

i) Where the plaintiff seeks, or is forced, to found his claim on an illegal contract or to plead illegality in order to support his claim, either in the statement of claim or in a reply.

ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct.

iii) Where the situation is residually covered by the general principle in (i) above.

3. However, the *ex turpi causa* defense must be approached pragmatically and with caution depending on the circumstances.

30. The terms mentioned in the advertisements required verification of the contents of the application by the respondent-MCD. Reference in this regard can be made to Explanation (1) to Sections 19 of the Contract Act which stipulates that contract would not be voidable on the ground of misrepresentation or silence which is fraudulent, if the parties whose consent was so caused had the means to discover the truth by ordinary diligence. This is not to say that the said Explanation is applicable to the present case, but reference is to highlight pre-condition mentioned in the invitation to offer issued by MCD that all applications shall be scrutinised and verified for their contents and only legible persons would be allotted plots. Normal presumption is that MCD has competent and efficient staff and allotment would be made to eligible persons only and others would be weeded out. The petitioners belong to lower strata of society and the most of them are not well educated. There is no forfeiture clause in any of the advertisements or even in the allotment letter. No warning was given. The petitioners have not been given possession and the contract has not culminated into a lease deed or a sale deed.

31. The contention of the MCD that the petitioners should be denied discretionary relief under Article 226 of the Constitution of India on the ground that they have made false and incorrect averments in the Writ Petition and have approached the Court with unclean hands is also liable to be rejected. The petitioners have given up their claim to allotment of land and did not press the same before the Court. I do not think that the Petition is abuse of the process of Court/law. In this regard, reference may be made to a recent decision of the Supreme Court in *Arunima Baruah Vs. Union of India (UOI) and Others*, wherein it has been observed:

11. The court's jurisdiction to determine the lis between the parties, Therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny

equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question.

12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

32. Reference can also be made to an earlier judgment of the Supreme Court in the case of S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others, .

33. MCD is not entitled to retain the entire sale consideration received and paid by the petitioners. Section 64 of the Contract Act is applicable. The respondent is entitled to deduct the financial expenditure incurred by them on examining the applications, sending Committee members for verification as well as some punitive damages. MCD is entitled to set off the said amount. Keeping in view facts of the present case, I feel that interest of justice would be met if MCD is allowed to set off Rs. 20,000/- for each plot measuring 60 sq. mtrs. and Rs. 30,000/- for each plot measuring 96 sq. mtrs. towards damages, but the balance amount should be refunded to the petitioners. The amount being forfeited is also punitive in nature and in accordance with the provisions of the Contract Act. Respondent/MCD will refund the balance amount to the petitioner within a period of 6 weeks from today by crossed cheques. The respondent MCD will write letters by registered post to the petitioners calling upon them to furnish details of their bank account and personally come and collect the cheques. Payment will be made after properly identifying the person who had made the deposit. In case the MCD does not make payment within 6 weeks from today, it shall be liable to pay interest from the date of the order till payment @ 10% per annum.

34. In the facts and circumstances of the present case, there will be no order as to costs.