
(2010) 11 AHC CK 0325

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 44529 of 2005 connected with
Civil Miscellaneous Writ Petition No. 40515 of 2008

Oscan Enterprises Private Limited

APPELLANT

Vs

New Okhla Industrial Development Authority and Another

RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (2011) 1 ADJ 602 : (2011) 3 AWC 2315

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—Both the aforesaid writ petitions are arising out of a plot of land, being Plot No. A-40, Sector-62, Noida, Uttar Pradesh.

2. The first writ petition, being Civil Misc. Writ Petition No. 44529 of 2005, has been filed in the nature of mandamus for getting order or direction by the writ Court upon the Respondents to allot the plot to the Petitioner on the basis of its application dated 8th August, 2001. This writ petition was filed in this Court on 3rd June, 2005 praying inter alia as follows:

(i) to issue a writ, order or direction in the nature of mandamus directing the opposite parties to allot the plot No. A-4 (?) (A-40), Sector 62, NOIDA for which the Petitioner had applied on 8.8.2001 accordingly the scheme known as "SCHEME FOR INSTITUTIONAL PLOTS" by treating the Petitioner similarly to the other applicants of the same scheme for other plots;

(ii) to issue a writ, order or direction in the nature of mandamus directing the opposite parties not to discriminate the Petitioner from the identically situated other applicants of the scheme for institutional plots by adopting a different policy for allotment of the disputed plot No. A-40, Sector 62, NOIDA.

(iii) to issue a writ, order or direction in the nature of mandamus directing the

opposite parties to Act in accordance with law and not to Act upon on their unilateral decision differently taken for the disputed plot contrary to the policy adopted for allotment regarding the other plots of the same scheme; and

(iv) to pass such other and further order which this Hon''ble Court may deem fit and proper, according to circumstances of the case;

(v) to award the costs.

3. Second writ petition, being Civil Misc. Writ Petition No. 40515 of 2008, has been filed by the Petitioner before this Court on 17th August, 2008 praying inter alia as follows:

(i) Issue a writ, order or direction in the nature of certiorari quashing the allotment made by Noida authorities of disputed plot No. A-40 Sector 62 Noida made in favour of Respondent No. 3.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the Respondents not to complete the further proceedings in pursuance of allotment of Plot No. A-40, Sector 62, Noida.

(iii) issue any other writ, order or direction which this Hon''ble Court may deem fit and proper in the circumstances of the case.

(iv) Award the cost of the writ petition to the Petitioner.

4. From the composite reading of the aforesaid prayers it appears to us that the Petitioner is an applicant of the year 2001 for the purpose of allotment of institutional plot and when the same was not allotted to it, after about a period of four years the Petitioner filed the first writ petition, wherein no interim order was granted. Again when a third party interest has been created, the Petitioner filed the second writ petition after another period of three years from the date of filing of the first writ petition.

5. Before taking into consideration any other issue, we have to consider why long lapse of time was there in making both the writ petitions.

6. Admittedly, the Petitioner had filed a civil suit, being Original Suit No. 82 of 2006 (Oscan Enterprises Pvt. Ltd. v. New Okhla Industrial Development Authority, NOIDA), in the appropriate Civil Court of Ghaziabad, U.P. for permanent injunction against the NOIDA authority from allotment of disputed Plot No. A-40, Sector 62, Noida, to any third person i.e. against creation of third party right. The second writ petition, which has been filed in the year 2008, being Writ Petition No. 40515 of 2008, is in respect of creation of third party right. In such writ petition at an initial stage a Division Bench of this Court was pleased to hear the writ petition and pass the following order on 27th August, 2008:

Standing Counsel represents Respondent No. 1. Sri R.P. Singh has put in appearance on behalf of Respondent No. 2.

Issue notice to Respondent No. 3. Petitioner to take steps within a week.

Learned Counsel for the Petitioner contends that Plot No. A-40, Sector 62, NOIDA was earlier offered by the NOIDA for allotment under a scheme, with regard to which the Petitioner made an application. Since his application was not being processed, he filed a Writ Petition No. 44529 of 2005 which is pending in this Court. A civil suit in respect of the same is also stated to have been filed. He submits that a fresh advertisement was issued in newspaper "Amar Ujala" dated 08th February, 2008 by NOIDA without disclosing details of the plots. On the strength of the said advertisement, plot referred to above has been allotted to Respondent No. 3 under the open ended scheme for IT/ITES at the rate of Rs. 4,900/- per square meter. He submits that there has been no proper advertisement and further since Suit No. 82 of 2006 and writ petition filed by the Petitioner were pending consideration, the Respondents were under obligation to intimate to the writ Petitioner the proposed allotment, if any. He submits that the Petitioner is ready to take the allotment of the plot at the rate of Rs. 18,000/- per square meter, whereas the NOIDA has allotted the same at the rate of Rs. 4900/- per square meter only.

Counsel for the NOIDA submits that the allotment was made in the March, 2008 and the lease deed has also been executed on 21st August, 2008, as is apparent from the amendment application. He prays time to file counter-affidavit.

The allotment having already been made in favour of Respondent No. 3 and lease deed having already been executed there is no good ground to restrain the Respondent No. 3 from raising constructions at this stage. It goes without saying that any further action taken shall abide the results of the present writ petition.

List this writ petition on 29th September, 2008 alongwith Writ Petition No. 44529 of 2005. The counter-affidavit be filed by the Respondents by the next date fixed.

7. At the time of entertaining the second writ petition, the Division Bench of this Court has already observed that not only a third party right has been created by way of execution of lease deed in favour of the private Respondent No. 3 but it has also started raising constructions. Therefore, instead of passing any interim order, the Court was pleased to hold that further action taken shall be abide by the result of the writ petition, being Writ Petition No. 40515 of 2008.

8. Against this background, it is very difficult to come to any conclusion in the second writ petition. Neither the Petitioner became successful in getting any affirmative order in any application for interim injunction in the civil suit filed in the year 2006 nor any decree has been passed in respect of the said suit. Privity of contract, if any, lies in between the Petitioner and the NOIDA authority in one hand and the private Respondent No. 3 and the NOIDA authority on the other hand. No privity lies between the Petitioner and the Respondent No. 3 nor it can be adjudicated by the writ Court even if there is a privities between two private parties. It is further required to be mentioned herein that success of the Petitioner is based on the success of the earlier writ petition, being Civil Misc.

Writ Petition No. 44529 of 2005, wherein it has prayed for allotment of land. But if the Petitioner becomes unsuccessful, it shall have no right in respect of the allotment made in favour of the Respondent No. 3 in the second writ petition. Therefore, if the Petitioner succeeds then only the consequential effect will be taken care of that too in the first writ petition. Against this background, no affirmative order can be passed in favour of the Petitioner in the second writ petition, being Civil Misc. Writ Petition No. 40515 of 2008, therefore, the same is dismissed, however, without imposing any cost.

9. So far as first writ petition is concerned, admittedly the Court cannot direct a governmental authority to allot a plot of land to a private party. It is to be visualized from various aspects of the matter. The writ Court is only concerned about the decision making process but not the decision. If there is any case of discrimination, the Court can enter into the arena of dispute. Legitimate expectation will lie only on that occasion and on the basis of such legitimate expectation the Court can, at best, direct the authority concerned to consider the cause of the Petitioner. We are very much concerned about the power of the writ Court. We know that the writ Court has tremendous power to utilize the same but as the power is wide, the sense of restraint is wider. Moreover, this is not a cast-iron case, where any mandatory order can be passed by the Court.

10. Factually, the Petitioner is an offered of the year 2001 to the NOIDA authority for allotment of land at a price of Rs. 2,750/- per square meter. According to the Petitioner, as per the brochure it was likely to be allotted at first come first serve basis but the authority has changed the policy and put the plot for auction and in that way deprived the Petitioners interest. According to us, mere offer letter does not create a concluded contract The offer is as per brochure. If any policy decision is taken by the governmental authority to avoid congestion, which is good and transparent in the eyes of law, a private party cannot have any right to upset the same. As we have already discussed that the Petitioner expected on the basis of its application as per the brochure to get the land but such expectation was not fulfilled. Though the Petitioner wanted to get the plot at a price of Rs. 2,750/- per square meter and it has been allotted to the Respondent No. 3 at a price of Rs. 4,900/- per square meter but it appears that the Division Bench of this Court has recorded at an initial stage in the order dated 27th August, 2008 passed in Writ Petition No. 40515 of 2008 that the Petitioner is ready and willing to pay a sum of Rs. 18,000/- per square meter. Having so, no concluded contract can be said to be executed between the parties to apply the principle of promissory estoppels nor even a question of legitimate expectation can be said to have arisen in view of the policy of the Government or authority to allot the plot by way of public auction. Had there been a concluded contract between the Petitioner and the authority, no question of further offer could have arisen. Of late, the Petitioner became desperate to get the plot but why it slept over its right from 2001 till 2005 is totally unknown to this Court. Even when the suit was filed in the year 2006, why the same has not been persuaded till the time of allotment of plot in favour of third party in March, 2008 and lease deed

executed on 21st August, 2008, is also unknown to this Court. According to us, in such circumstances the writ petition is a chance application to get an order from this Court.

11. A further important aspect is that in the Appendix-I regarding terms and conditions for allotment of plot attached to the application form, which has been filled up by the Petitioner on 08th August, 2001, there is a clause, being Clause-22, which speaks as follows:

22. In case of any dispute in the interpretation of any word or Terms and Conditions of the allotment/lease, the decision of the Chief Executive Officer or any officer authorized by Chief Executive Officer, Noida, shall be final and binding on the allotted/lessee and his/her/their successor.

12. We are not aware whether the Petitioner raised any dispute in connection therewith to the Chief Executive Officer of the NOIDA Authority as yet or not. We also find from Annexure-12 (A) & (B) to the first writ petition that a complaint was lodged by the Petitioner before the District Consumer Forum, NOIDA, Uttar Pradesh, which was subsequently withdrawn. Therefore, the Petitioner for the selfsame cause of action invoked the jurisdictions of the Consumer Forum and Civil Court but not invoked the jurisdiction of the Chief Executive Officer and waited unnecessarily in approaching the appropriate forum and, as such, when third party right has been created in respect of the plot it would not be proper for us to make a robbing or probing inquiry and come to a conclusion in the writ jurisdiction by converting it into a Court of evidence.

13. If we go by the submissions of the Respondent authority and the Respondent No. 3 in the second writ petition, we shall be able to find that as per Clause-2 of the scheme, the application form was to be accompanied by the registration money equivalent to 10% of the total cost of the plot. The cost of plot as well as cost of registration money can easily be calculated by multiplying the area of the plot with the rate. In addition thereto, a non-refundable and non-adjustable processing fee of Rs. 5,000/- was also to be paid. The area of the plot is 20,000 square meter as mentioned in Column-1 of the application form filed by the Petitioner. Therefore, the total price of plot @ Rs. 2,750/- per square meter would be Rs. 5.5 crores and 10% of the same would be Rs. 55 lacs, which was not deposited by the Petitioner. Moreover, Plot No. A-40, Sector-62, Noida was not part of the scheme for allotment as institutional plot, but it is a builder's plot, which is required to be allotted through tender even as per the scheme prior to 2001 i.e. of the year 1998. The Petitioner has invoked various jurisdictions inclusive of third writ petition, being Civil Misc. Writ Petition No. 9065 of 2008 [Oscan Enterprises Pvt. Ltd. v. Civil Judge (Senior Division), Gautam Budh Nagar and Ors.] for interim order and expeditious disposal of the suit. However, no interim order was granted by the Court but the Court while disposing of the writ petition by its order dated 15th February, 2008 had directed for expeditious disposal of the application. The Petitioner has indulged in forum shopping. Now, the Petitioner is praying for discretionary relief from the writ

Court. The writ petition is likely to be dismissed on the ground that for the selfsame relief the suit was instituted by the Petitioner which was dismissed in default and no step for restoration has been taken. The dispute in the writ petition is purely contractual in nature, which is not required to be adjudicated by the writ Court. The land, which was sought for by the Petitioner, is not presently available for allotment since the allotment of the same has been made at much higher rate and lease deed has been executed in favour of the Respondent No. 3 in the second writ petition.

14. Having no crystal clear foundation with regard to the decision making process by the authority concerned, we are not inclined to pass any favorable order even in the first writ petition.

15. Even thereafter the Petitioner wanted to file a written notes of arguments annexing various judgments, which are mostly on the point of power of the writ Court, fairness in action and non-arbitrariness. Though the judgments cited before us are mostly academic in nature in view of the facts and circumstances of the case as above and cannot have independent leg to stand in absence of the factual matrix, but for the satisfaction of the parties we deal with the same.

16. As far as the judgments cited by the Petitioner are concerned, we find that in *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others*, it has been held by the Supreme Court that existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 of the Constitution will consider for exercising the discretion to issue a writ under Article 226. From *Secretary, Andhra Pradesh Social Welfare Residential Educational Institutions v. Pindiga Sridhar and Ors.* 2007 (13) SCC 352 , we find that it is well settled principle of law that the principles of natural justice cannot be applied in a straitjacket formula. Their application depends upon the facts and circumstances of each case. From *Raja Shri Shivrai Pratishthan v. State of Maharashtra and Ors.* 2008 (10) SCC 799, we find the Supreme Court has held that ordinarily when the matter is required to be remitted back but facts of the case are so telling that it would not be advisable to remit, a direction deserves to be given to the State Government. In *United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others*, it has been held by the Supreme Court that Article 14 of the Constitution which encompasses within its fold obligations on the part of the State to Act fairly which operates also in the contractual field, but the said principle would be applicable more in a case where bargaining power is unequal or where the contract is not a negotiated one and/or is based on the standard form contracts between the unequal's, the writ Court can interfere with the same. In *Jagdish Mandal v. State of Orissa and Ors.* 2007 (14) SCC 517 , it has been held by the Supreme Court that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tendered or contractor with a grievance can always seek damages in a Civil Court Therefore, before entering in such

disputes, the writ Court will consider whether the process adopted or decision made by the authority is mala fide or intended to favour someone, or, whether the process adopted or decision made is so arbitrary and irrational, and whether public interest is affected. From *Meerut Development Authority Vs. Association of Management Studies and Another*, we find the Supreme Court has held that tender conditions are not open to judicial scrutiny unless action of tendering authority is found to be malicious and a misuse of statutory powers. In *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, it has been held by the Supreme Court that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it. Otherwise, it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. In *Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others*, it has been held by the Supreme Court that it is now a well-settled principle of law that having regard to the provisions of Article 14 of the Constitution, State within the meaning of Article 12 thereof cannot distribute its largesse at its own sweet will. The Court can ensure that the statutory functions are not carried out at the whims and caprices of the officers of the Government/local body in an arbitrary manner. But the Court cannot itself take over these functions. From *Sunil Pannalal Banthia and Others Vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Another*, we find that the Supreme Court based upon the facts therein with regard to allotment has held by saying that the same was not opposed to public policy but cancellation of the same was opposed to public policy. Since the authority cannot take any unilateral decision to cancel the allotment after a party acted on the basis thereof and expended large sums of money towards construction which has progressed to some extent. In *Aslam Mohd. Merchant Vs. Competent Authority and Others*, it has been held by the Supreme Court that once the show-cause notice is found to be illegal, the same would vitiate all the subsequent proceedings. A Constitution Bench of the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, has held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In *Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others*, the Supreme Court has held that a statutory authority cannot be permitted to support its order relying on or on the basis of the statements made in the affidavit de hors the order or for that matter de hors the records. From *S.N. Chandrashekar and Another Vs. State of Karnataka and Others*, we find the Supreme Court has held that the order passed by the statutory authority, it is trite, must be judged on the basis of the contents thereof and not as explained in affidavit.

17. So far as the judgments relied upon by the learned Counsel appearing for the Respondents are concerned, we find that in *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, the Supreme Court has held that in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution, of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the Rule of law. Even though the highest tendered can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. In *Skyline Contractors Pvt. Ltd. and Another Vs. State of U.P. and Others*, factually it has been held by the Supreme Court that the reason given for not making the deposits, as per the allotment order, is not very convincing. The Court was not inclined to accept the other submissions made on behalf of the Respondents therein that since the deposits subsequently made by the Appellant therein had not been accepted by NOIDA, the ratio of the decisions cited on behalf of the Appellant therein would not apply to the facts of the case, particularly when third-party interests have intervened and a fresh allotment order had been made in favour of such third party and no prayer has been made in the writ petition for setting aside such allotment. In *Udyami Evam Khadi Gramodyog Welfare Sanstha and Another Vs. State of U.P. and Others*, the Supreme Court has held that a writ remedy is an equitable one. A person approaching a superior Court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. It was held in *Advocate-general, State of Bihar Vs. Madhya Pradesh Khair Industries and Another*, , that repeated filing of writ petitions amounts to criminal contempt. In *Tamilnad Mercantile Bank Share Holders Welfare Association Vs. S.C. Sekar and Others*, it has further been held by the Supreme Court that forum shopping, it is well settled, is not encouraged by the Court by following the ratio of earlier judgments in *Udyami Evam Khadi Gramodyog Welfare Sanstha (supra)*. The superior Courts of this country must discourage forum shopping. A person seeking equity must do equity. A party cannot take recourse to a machination which amounts to abuse of process of Court.

18. We have already discussed the factual aspects herein and principles of law laid down by the Supreme Court on numerous occasions, as above. We cannot have any quarrel with the proposition of law, but we have to see the factual aspect at first to get its attraction Factual matrix of the instant case, as discussed

above, does not attract the ratio of any of the judgments affirmatively.

19. Therefore, first writ petition, being Writ Petition No. 44529 of 2005, is also dismissed, however, without imposing any cost.

I agree