

**(2014) 08 CAL CK 0094**

**Calcutta High Court**

**Case No:** W.P. 11533 (W) of 2013

Bikas Sen

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Aug. 7, 2014

**Hon'ble Judges:** Harish Tandon, J

**Bench:** Single Bench

**Advocate:** Subrata Santra, Advocate for the Appellant; Prosenjit Basu and Parikshit Basu, Advocate for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Harish Tandon, J.

Pursuant to the advertisement inviting applications for allotment of flats for Low Income Group, Middle Income Group-L and Middle Income Group-U together with the car parking facilities, the petitioners made an application for allotment of the flat pertaining to Middle Income Group-L.

2. The terms and conditions appended to the said invitation depicts three types of flats viz. Flat Type "A", where the family income should be between Rs. 10,001/- to Rs. 15,000/- per month; Flat Type "B", where the family income should be between Rs. 15,001/- to Rs. 25,000/- per month and Flat Type "C", where the family income should be between Rs. 25,001/- to Rs. 40,000/- per month. The aforesaid eligibility criteria is enshrined in Paragraph III(d) of the General Terms & Conditions appended to the said publication. Sub-paragraph (e) expressly provides that the gross monthly income of an applicant shall include income of the member of his/her family and such eligibility will be determined accordingly.

3. In the event the applicant is self-employed, it was made imperative to include the Income and Expenditure/Profit and Loss Account and Balance Sheet for the preceding financial year duly certified by a Chartered Accountant along with documentary evidence of the gross income and photocopy of acknowledgement

from the Income Tax Officer evidencing the receipt of Income Tax return for the Financial Year 2009-2010 duly attested by a Gazetted Officer.

4. It is further provided that in case of an application is made jointly by two persons and the second applicant has no income, a declaration to that effect should be given in all cases and the total family income should be disclosed by documentary evidence duly certified by a Chartered Accountant.

5. It is not in dispute that the application was made jointly by the petitioners for allotment of Flat Type "B", which is assigned to Middle Income Group-L, where the total family income should not exceed Rs. 25,000/- per month.

6. Since the allotments are to be made by drawing a lottery, the petitioners' application was selected and the intimation to that effect had been given to the petitioners with a letter dated 6th July, 2011. Though in the opening paragraph of the said application it is written that their application has been accepted for allotment of Flat Type "A", but it is unanimously submitted by the respective parties that the same is a typographical mistake, in fact the application was accepted for Flat Type "B".

7. By the said letter the respondent no. 3 asked the petitioners to submit a valid declaration/affidavit duly affirmed by the 1st Class Judicial Magistrate declaring that the applicants are not owning any flat/house/building in Calcutta Metropolitan area and in the event of any misrepresentation of fact detected, even at the stage of execution of the deed of conveyance, the allotment shall be cancelled.

8. According to the petitioners, the compliance was made in terms of the requisitions made in the said letter. Subsequently the allotment made to the petitioners was cancelled, as the respondent no. 3 found that the family income of the petitioners exceeds the limit of Rs. 25,000/- per month. The said cancellation was communicated to the petitioners with a letter dated August 17, 2011, which contains the refund of the application money of Rs. 1,22,000/-. Thereafter the petitioners made several representations stating uniformly that the family income does not exceed Rs. 25,000/- per month without encashing the amount refunded to the petitioners.

9. The letter dated August 01, 2012 issued by the respondent no. 3 would depict that the cheque, containing the amount paid at the time of an application, was revalidated and was resent to the petitioners. On being questioned the aforesaid act, the petitioners demanded justice through the learned advocate on 2nd August, 2012, which was duly replied by the said respondent vide letter dated 6th September, 2012. It would be relevant to quote the stand taken by the respondent no. 3 in the said letter dated 6th September, 2012:

Ref: AVD-B-S383/3126

6th September, 2012

Mr. Srikanta Sahoo

Advocate

"Godhuly" Flat-B

404, 388, Baghajatin Place

Kolkata-700 086.

Re: Your letter dated 02-08-2012 on behalf of your client Mr. Bikas Sen & Mrs. Trina Sen.

Dear Sir,

In response to your aforementioned letter, we would like to say as follows:

- i) On 28th February, 2011 your clients had applied for a MIG-L Category of flat in our "AVIDIPTA" wherein they declared the gross monthly income of the 1st applicant (Bikas Sen) as Rs. 20,000/- and of the 2nd applicant (Trina Sen) as Rs. 5,000/-. Along with the Application, the 1st applicant submitted the Income Tax Return for AY-2009-10 although according to Terms & Conditions we wanted IT Return for AY-2010-2011. Anyway, we have taken the income of the 1st applicant as Rs. 20,000/- as declared by him.
- ii) So far as the income of the 2nd applicant is concerned, no documentary evidence was attached along with the Application in terms of Clause-III(e) of the Terms & Conditions to verify the declared income of Rs. 5,000/- and we, therefore, requested to furnish the current Income Tax Return of the 2nd applicant, which was submitted by your client for AY-2011-12 showing gross total income Rs. 1,95,000/-.
- iii) Further, a certificate dated 01.12.2011 from the Chartered Accountant was also submitted wherein the said Chartered Accountant had certified that the income of Trina Sen was Rs. 5,000/- for AY-2011-12 from tuition after discussion with Trina Sen.
- iv) The declaration given in the Application by the 2nd applicant and the I.T. Return and the Certificate of the Chartered Accountant are thoroughly contradictory with each other and, as such, after verification it is apparent the gross family income of your clients exceeds the Eligibility Criteria, and hence, the allotment of your client was rejected and Application money was refunded.
- v) However, on your request, once again we have reviewed the matter and found that your client is not eligible for MIG-L flat.

Yours faithfully,

For Bengal Peerless Housing Dev. Co. Ltd.

Sd/-

(A Vaidya)

Dy. General Manager.

10. The petitioners filed the instant writ petition on 17th April, 2013 challenging the action of the respondent authorities, more particularly the respondent no. 3, in rejecting the application and refunding the amount paid at the time of filing the same.

11. According to the petitioners, the grounds set-forth either in the letter of termination as well as the subsequent letter dated September 06, 2012 are based on extraneous considerations and in clear contravention to the Terms and Conditions embodied in the advertisement or publication made for inviting applications for allotment of the aforesaid flats. It is further submitted that there was strict compliance of the conditions enshrined therein and the rejection of the application was an afterthought and made with oblique motive, which would be apparent from the conduct of the respondent authorities.

12. In the affidavit-in-opposition to the writ petition, the respondent nos. 3 and 4 took a defence that the writ petition should not be entertained because of the gross delay and negligence on the part of the petitioners. It is further submitted that the petitioners are guilty of suppression of material facts, which is sufficient enough to deny the equitable relief to the petitioners in exercise of the power of judicial review.

13. The learned advocate for the respondents says that the eligibility criteria incorporated in the General Terms & Conditions would manifest that Flat Type "B" can be allotted to the applicant, whose monthly family income is between Rs. 15,001/- to Rs. 25,000/- and from the documents produced before the said respondents, it would be deciphered that the monthly income of the family exceeds Rs. 25,000/- and, therefore, the petitioners' application was rightly rejected. It is further submitted that the Income Tax Return submitted by the applicants including the certificate issued by the Chartered Accountant would clearly reveal that the family income exceeds Rs. 25,000/- per month and there is no illegality committed by the respondent no. 3 in rejecting the application.

14. Taking the first plea of delay and laches, as indicated above that though an application was rejected by the respondent no. 3 and communicated to the petitioners by a letter dated August 17, 2011, but the petitioners were constantly approaching the authorities for reviewing the decision that has been taken, even by a letter issued through the learned lawyer, wherein it was specifically stated that the said decision to cancel the application was in contravention to the Terms and Conditions and that there is no basis in arriving at the conclusion that monthly income of the family exceeds Rs. 25,000/-. It is pertinent to record that the cancellation letter dated August 17, 2011 does not contain any reasons in relation to a decision that the family income of the applicants/petitioners exceeds Rs. 25,000/- per month. The reasons could only see the light of the day when a letter issued by

the learned advocate was replied by the respondent no. 3 on September 06, 2012. The said reply has been quoted hereinabove, which on meaningful reading would indicate that the income shown in the assessment year 2011-12 was the main ingredient to arrive at the conclusion that the total income of the petitioners exceeds Rs. 25,000/- per month.

15. The writ petition came to be filed on 17th April, 2013, which in no way can be said to have been filed belatedly even after a span of eight months from the date of the letter disclosing the reasons for rejecting the application. Furthermore the petitioners were constantly knocking the door for justice and time and again the appearing respondents were communicating with the petitioners.

16. Though delay and laches is one of the grounds when the Writ Court should refuse to entertain the writ petition, but that cannot be a sole ground, unless it is successfully demonstrated that there has been gross negligence and laches on the part of the petitioners in approaching the Court.

17. The sequence of events as quoted above does not suggest that the petitioners have occasioned delay and laches in approaching this Court and, therefore, the plea that the writ petition should be dismissed on the ground of delay is not tenable.

18. So far as the plea of suppression of material facts is concerned, it admits no ambiguity that a person, who does not come to the Court with clean hands, is not entitled to be blessed with the relief as claimed in the writ petition.

19. The Writ Court seriously views the conduct of the petitioner, who approaches the Court by suppressing the material facts and does not extend the benefit unless a ground of violation of fundamental rights is pleaded therein. The distinction is to be drawn between the "suppression of facts" and "suppression of material facts". A fact, which does not constitute the cause of action, if not pleaded, does not entail the dismissal of the writ petition on the ground of suppression, but when the fact, which is material and constitutes the cause of action, if suppressed, would disentitle the petitioner to get the relief claimed in the writ petition.

20. The appearing respondents could not demonstrate before the Court that the petitioners could be branded a persons, who are guilty of suppression of material facts. The petitioners run the writ petition plainly on the ground that the rejection of an application on the plea that the total monthly income of the family exceeds Rs. 25,000/- is not based on any material and also not in conformity with the Terms and Conditions appended to the application filed by the petitioners.

21. This Court, therefore, does not feel that the writ petition should be thrown at the nascent stage on the plea of suppression of material facts as alleged by the appearing respondents.

22. Reverting the core issue whether the respondent no. 3 was justified in rejecting the application of the petitioners on the ground as indicated above, this Court at the

very outset must say that the letter indicating the rejection of the application was not supported by any reasons. The reason was communicated in reply to the letter issued by the petitioners through the learned advocate.

23. From a bare reading of the said letter it would be reasonably ascertained that the only criterion for rejection of an application was the income shown in the I.T. Return submitted for the Assessment Year 2011-2012. There is no dispute that those Return would show that the income of the family is marginally higher than the cap indicated in the eligibility criteria.

24. Clause III(f)(iii) of the General Terms & Conditions makes it imperative to include the Income and Expenditure/Profit and Loss Account and Balance Sheet for the preceding financial year duly certified by a Chartered Accountant along with documentary evidence of the gross income and photocopy of acknowledgement from the Income Tax Officer evidencing receipt of Income Tax Return for Financial Year 2009-2010.

25. The Return submitted for the said Financial Year 2009-2010 would show that the total family income of the petitioners is much below Rs. 25,000/- per month. The application is to be adjudicated or decided and/or determined on the facts up to the date of making it and not on the facts, which arose subsequently.

26. The aforesaid terms and conditions explicitly provided the income for the Financial Year 2009-2010 and, therefore, the determination of the total family income for the Assessment Year 2011-2012 de hors the said terms and conditions.

27. An income at the time of making the application may not be the same in the subsequent years. The said income may increase or decrease depending upon various conditions. When it is specifically provided in the General Terms & Conditions that the income pertaining to the Financial Year 2009-2010 is the eligibility criterion for making an application, the said criterion is imperative while determining the total monthly income of the applicants. The authorities cannot detract or deviate from their own Terms & Conditions and whimsically, arbitrarily and/or capriciously take a decision affecting the right of a person. The motive behind the curtain is evident.

28. This Court has no doubt in mind that the petitioners have been subjected to an unfair treatment and have been denied their legal right. It is undisputed that even after the return of the refund amount, the petitioners have not encashed the same. This Court, therefore, finds that the action on the part of the respondent no. 3 in rejecting the application of the petitioners is illegal, arbitrary and whimsical and in clear contravention to the Terms & Conditions appended to the advertisement and/or publication.

29. The order of rejection dated August 17, 2011 is hereby quashed and set aside.

30. The respondent no. 3 shall issue a letter of allotment of flat, being Flat Type "B", to the petitioners within a period of three weeks from the date of the communication of this order.

31. The said respondent is directed to execute an agreement with the petitioners indicating the amount to be paid simultaneously with the execution thereof, which shall not exceed the amount, which would become due in the event the agreement entered into at the time when the allotment was made, to be paid within three months and in addition thereto the petitioners shall also be permitted to pay the installments month by month as has been allowed to other successful applicants.

32. The writ petition is thus allowed.

33. There will be no order as to costs.