

REPORTABLE

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

+ WRIT PETITION (CIVIL) NO. 8101 OF 2007

Date of Decision : April 08, 2008.

SACHIN J. JOSHI & ANR.

.... Petitioners.

Through_Sr. Advocate with Ms. Pinky
Anand with Ms. Reeva Gujral,
Advocates.

VERSUS

LIEUTENANT GOVERNOR & ANR.

.... Respondents.

Through Mr. Ajay Verma, Advocate for
DDA.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be
allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported

in the Digest ?

YES

SANJIV KHANNA, J:

1. M/s. Asrani Inns and Resorts Private Ltd.-petitioner no.2, has
purchased two adjacent hotel plots measuring 7220.40 sq.mt.

(hereinafter referred to as plot no.1, for short) and 7030 sq.mts (hereinafter referred to as plot no.2, for short) at Wazirpur District Centre, Delhi for Rs.1,27,00,00,000.00 (One hundred and twenty seven crores only) and Rs.1,02,40,00,000.00 (Hundred and two crores and forty lacs only) respectively in the auction held on 4th May, 2006. The permissible built up area or Floor Area Ratio on plot no.1 is 15,500 sq.mt. and 14,500 sq.mts. on plot no.2. One of the terms and conditions of allotment is that the petitioners will construct two hotels, one on each plot, within a period of 42 months. The petitioners have given two bank guarantees of Rs.6,35,00,000.00 and Rs.5,12,00,000.00 for plot no.1 and plot no.2 respectively, which can be invoked in case of delay in construction beyond the agreed period. Two separate Conveyance Deeds dated 3rd November, 2006 have been executed in favour of the petitioners.

2. The petitioner-Company in December, 2006 approached Delhi Development Authority (hereinafter referred to as DDA, for short) for amalgamation of the two plots. A letter dated 14th December, 2006 was written. It is the case of the petitioners that they are entitled to amalgamation of the two plots in view of the Resolution No. 7 dated 7th Jan.,1991 of DDA permitting amalgamation of commercial plots read with the letter dated 29th Jan.,1992 of the Union of India, subject to payment of 10% of the bid amount or on

payment for additional FAR, whichever is higher. It is the case of the petitioners that initially the officers of the DDA were agreeable and on this basis the petitioners started their project with excavation work. Plans were submitted for construction of a single hotel on the two plots. A number of letters were written after December, 1996 till April, 1997, but there was no response from the respondent-DDA. Thereupon, the petitioners filed Writ Petition (Civil) No. 4521/2007 and by Order dated 29th May, 2007, this Court directed DDA to consider the application/representation dated 14th December, 2006 of the petitioners for amalgamation and communicate their decision within 15 days. By letter dated 13th June, 2007, the petitioners were informed that their request for amalgamation of plot no.1 with plot no.2 was under examination and for consideration of queries raised by the Finance Department. It was further stated that after calculation of the amalgamation charges, the file would be put to the competent authority, i.e.; Lt. Governor for approval. It was also clarified that amalgamation would be allowed as per the policy and subject to payment of amalgamation charges as under :-

“Flat rate of 10% of the market value prevalent at the time of application, or the market value of the extra floor space generated by virtue of amalgamation, whichever is greater be recovered. This will be charged for the actual area of plot involved.”

3. Subsequently, DDA informed the petitioners that the request for amalgamation had been rejected vide order dated 30th July, 2007 passed by the Lt. Governor. The reasons recorded by the Lt. Governor are as under :-

“The proposal of DDA to allow amalgamation of two hotel plots sold independently, is in contradiction to the conditions mentioned in auction document at 3.10(vii). If the decision was taken to auction the plots as smaller size plots, there should not be an occasion to allow post-auction amalgamation of two plots particularly when it violates the auction conditions. The proposal is rejected.

V.C. may also conduct an inquiry and fix responsibility at the supervisory level, as to how this case was processed for approval.”

4. The petitioners have impugned the said rejection in the present Writ Petition. The contention of the petitioners is that in terms of Resolution No. 7 dated 7th January, 1991 and letter dated 29th January, 1992, the petitioners are entitled to amalgamation of the two commercial plots. The petitioners rely upon doctrine of legitimate expectation and submit that the order dated 30th July, 2007 passed by the Lt. Governor rejecting the request of the petitioners is amenable to judicial review. It is stated that DDA has not taken into consideration the relevant and material fact that amalgamation of commercial plots is permissible under the resolution passed by DDA and as approved by the Ministry of Urban Development by their letter dated 29th January, 1992. It is

also submitted that by allowing amalgamation of the two plots, DDA will only become richer and will be entitled to further payment of Rs.20,00,00,000.00. Besides the petitioners have highlighted the ecological aspect and submitted that if the two plots are amalgamated there will be substantial saving of valuable resources like water, electricity and energy.

5. Power of Judicial Review under Article 226 of the Constitution of India is not an appellate power. It confers limited jurisdiction upon the Court to ensure that the administrative authority is bound by the norms, standard of procedure laid down etc. It protects individuals against arbitrary actions and ensures equality before law as enshrined in Article 14 of the Constitution of India. Even in contractual matters, State actions should conform to Article 14 and cannot be arbitrary. It has been repeatedly observed by the Supreme Court that the Courts while exercising the power of judicial review do not examine the merits of the decision but are concerned with the decision-making process. If the public authority has exercised its discretion malafidely or ignored relevant material or taken into consideration irrelevant material, Courts can interfere and Writs can be issued. Courts have also applied Wednesbury's Principle of Reasonableness to examine whether there was fair-play in action and there was no abuse or unfair exercise of discretion. The petitioners have relied upon

following decisions : ***The Comptroller and Auditor General of India, Gian Prakash, New Delhi & others versus K.S. Jagannathan and others*** reported in AIR 1987 SC 537, ***Ramana Dayaram Shetty versus International Airport Authority of India and others*** reported in (1979) 3 SCC 489, ***D.T.C. Versus D.T.C. Mazdoor Congress*** reported in 1991 Supp (1) SCC 600, ***Union of India versus Hindustan Development Corporation*** reported AIR 1994 SC 988, ***Delhi Science Forum versus Union of India*** reported in AIR 1996 SC 1356 and ***Bannari Amman Sugars Ltd versus Commercial Tax Officer and others*** reported in 2005 (1) SCC 625.

6. I have examined the reasons given by the respondent-DDA in rejecting the request for amalgamation in light of the aforesaid principles. I have also examined the original files of DDA in which the request of the petitioners for amalgamation was considered and ultimately the decision to reject the said request was made. The noting on the files reveal that the officers of DDA were of the opinion that the request for amalgamation should be accepted. They had relied upon Resolution No.7 dated 7th January, 1991, which permits amalgamation of commercial plots.

7. Two reasons have been given by the respondent-DDA for rejection of the request for amalgamation. It is firstly stated that

the plots in question are hotel plots and not commercial plots and therefore Resolution no.7 dated 7th January, 1991 and approval dated 29th January, 1992 of the Government of India is not applicable. Secondly, it is stated that as per the terms and conditions of auctions, under Clause 3.10(vii) it was specifically mentioned :

“3.10 (vii). The successful bidder/allottee shall not deviate in any manner from the layout plan nor alter the size of the plot for the said purpose either by sub-division, amalgamation or otherwise.”

8. The DDA (Disposal of Developed Nazul Land) Rules, 1981 (hereinafter referred to as the Nazul Rules, for short) do not make any distinction between commercial plots and hotel plots. The term “*commercial plots*” is much broader, a generic term and includes hotel plots. The Nazul Rules treat all commercial plots alike. Thus the first contention of the respondent-DDA cannot be accepted.

9. Rules 42 and 43 of the Nazul Rules read as under :-

“42. Allottee to be lessee of the Central Government.-(1) Save as otherwise provided in rule 44, all Nazul land allotted under these rules, whether at predetermined rates or at fixed premium under rule 7, or by auction or by tender, shall be held by the allottee as lessee of the President of India on the terms and conditions prescribed by these rules and contained in the lease-deed to be executed by the allottee.

(2) Every such allottee shall be liable to pay, in addition to the premium payable in accordance with these rules, ground rent, for holding the Nazul land allotted to him under these rules, at the rate of rupee one per annum per plot, for the first five years from the date of allotment.

Provided that in the case of Nazul land allotted to group housing cooperative societies; the ground rent shall be charged at the rate of rupee one per flat for the first five years from the date of allotment.

(3) The annual ground rent payable after the first five years referred to in sub-rule (2) shall be at the rate of two and half per cent of the premium originally payable.

(4) The rate of ground rent in all cases shall be subject to enhancement after a period of thirty years from the date of allotment.

[Provided that notwithstanding anything contained in this rule, the Authority may allot Nazul land on free hold basis either through auction or by tender for residential purpose or commercial purpose;

Provided further that in the case allotment on free hold basis, the allottee shall execute a conveyance deed in Form BA.]

43. Lease to be executed by the allottee.-

Every allottee of Nazul land execute a lease-deed in accordance with Form C appended to these rules. In addition, a lease-deed may contain such other covenants, clauses or conditions not inconsistent with the provisions of Form C as may be considered necessary in the circumstances of each case.”

10. Commercial leases or freehold commercial plots are governed by the two aforesaid Rules and are treated as one single class under the Rules. To this extent there is merit in the submissions of the petitioner.

11. Rule 43, however, provides that DDA can in individual cases fix terms and conditions of a lease deed but these cannot be contrary to the terms and conditions mentioned in the statutory forms prescribed under the Nazul Rules. The above stipulation will equally apply to free hold land sold through public auction. In such cases a conveyance deed has to be executed in form BA. Thus, DDA cannot modify and prescribe different terms and conditions contrary to the terms and conditions mentioned in the statutory forms. The said forms are binding and cannot be modified and amended by an executive policy i.e. by a Resolution passed by DDA or even by a letter written by Union of India. Rules are statutory and executive policy cannot amend or re-write the Rules. Executive policy can supplement the Nazul Rules but supplant or override them.

12. I have examined the back ground in which the Resolution No.7 dated 7th January, 1991 and the letter of the Government of India dated 29th January, 1992 had been passed and issued.

13. Sub-clause (4) of condition No. II of the lease deed for commercial plots executed under Rule 43 of the Nazul Rules as amended in 1989 prohibits amalgamation of commercial plots. The bar is absolute and is applicable to all leases after 1989. The relevant Clause is as under:-

“4) The lessee shall not deviate in any manner from the layout plan nor alter the size of the commercial plot for the said purpose either by subdivision, amalgamation or otherwise.”

14. Prior to 1989 amalgamation/sub-division etc. prohibition was not absolute or total. Specific permission of the lessor was required. The relevant Clause as it existed reads as under:-

“The lessee shall not deviate in any manner from the layout plan nor alter the size of the plot whether by sub-division, amalgamation or otherwise, unless specifically permitted to do so by the lessor.”

15. In 1991, DDA recommended that the absolute prohibition in Clause (4) of Condition No.II should be diluted and with prior permission and subject to payment of prescribed charges, amalgamation should be permitted. It was accordingly proposed to modify the terms and conditions of all commercial leases with the specific stipulation:

“The lessee shall not deviate in any manner from the lay-out plan nor alter the size of the commercial plot for the said purpose either by sub-division, amalgamation or otherwise unless specifically permitted to do so by the lessor”.

16. On 7th January, 1991 the following Resolution was passed :-

“Resolution

Resolved that the proposal be approved subject to the following:-

1. A flat rate of 10% of the market value prevalent at the time of application be recovered irrespective of the period of lease. This will be charged for the total area of the plots involved.
2. No reference to Building Cell or any other Section of the Planning Wing is necessary.
3. The approval of the Central Government for the proposed modification of the format of the lease be obtained, as per rules.”

17. Ministry of Urban Development, Union of India thereafter by letter dated 29th January, 1992 informed DDA that the issue has been examined and it has been directed as under:-

“This issue has been examined in this Ministry, and it is suggested that insofar as the part 'A' of the Resolution is concerned the following may be substituted :-

Flat rate of 10% of the market value prevalent at the time of application, or the market value of the extra floor space generated by virtue of amalgamation, whichever is greater be

recovered. This will be charged for the total area of plots involved.

It is also suggested that such market value of the extra floor space generated by calculated not later than 6 months from the date of application for amalgamation.”

18. It is apparent from the above that the amendment proposed to Sub-clause (4) of condition No. II of the lease deed for commercial plots executed under Rule 43 of the Nazul Rules was not specifically approved and accepted but the Government of India accepted the Resolution permitting amalgamation of commercial plots subject to the conditions specified therein.

19. It is clear from the said correspondence that the Nazul Rules i.e. the statutory forms prescribed under Rules 42 and 43 have not been amended or modified. Modification and amendment of the Nazul Rules requires prescribed procedures under Sections 56, 57 and 58 of the DDA Act to be followed. The relevant portions of the said Sections read as under:-

“56. Power to make rules.- (1) The Central Government, after consultation with the Authority, may by notification in the Official Gazette, make rules to carry out the purposes of this Act:

Provided that consultation with the Authority shall not be necessary on the first occasion of the making of rules under this section, but the

Central Government shall take into consideration any suggestions which the Authority may make in relation to the amendment of such rules after they are made.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) x x x x

(b) x x x x

(c) x x x x

(d) x x x x

(e) x x x x

(f) x x x x

(g) the form and manner in which notice under sub-section (3) of section 11A shall be published;

(h) the fee to be paid on an application for permission under sub-section (1) of section 13 and the factors and circumstances to be taken into consideration in determining such fee;

(j) the manner in which nazul lands shall be dealt with after development.

57. Power to make regulations.-(1) The authority with the previous approval of the Central Government, may, by notification in the Official Gazette make regulations consistent with this Act and the rules made thereunder, to carry out the purposes of this Act, and without prejudice to the generality of this power, such regulations may provide for-

x x x x

58. Laying of rules and regulations before Parliament.- Every rule and every regulation made under this Act shall be laid, as soon as may be after such rule or regulation is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, or both Houses agree that the rule or regulation should not be made, the rule or regulation shall, thereafter, have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.”

20. Admittedly, the said procedure has not been followed. The net effect of the above discussion is that statutory forms of leases prescribed under Rules 42 and 43 are binding. These statutory forms cannot be modified and amended by the DDA nor can a private party make any such request. If the statutory form prescribed under the Nazul Rules does not permit amalgamation of two or more plots, such amalgamation cannot be permitted. Similarly, if the statutory form permits amalgamation with prior permission, then in the said cases amalgamation can be allowed and fee or charge as prescribed has to be paid. Letter dated 29th January, 1992 by Ministry of Urban Development does not modify

or amend the terms and conditions of the statutory forms/leases. Ministry of Urban Development cannot in fact modify the prescribed terms which are part and parcel of the Nazul Rules. Forms can be amended by amending the Nazul Rules, after following the prescribed procedure. Letter dated 29th January, 1992 of Ministry of Urban Development will apply to only leases executed prior to 1989 when amalgamation of plots was allowed with prior permission. It will not apply w.e.f. 1989 to leases executed under the amended Nazul Rules as under the said leases there is an absolute bar. The said letter does not modify the terms of the statutory form that no amalgamation or subdivision is permitted.

21. I have examined the file noting in F.No.30(1)/06/CL. From the said file noting it is apparent that DDA has not been following the statutory forms prescribed under the Nazul Rules. It is clear from the file noting that after 1989, DDA has executed leases with specific term and condition that no amalgamation shall be allowed, but in some other cases, the term stipulates that amalgamation would not be allowed unless specifically permitted by the lessor. This should not happen. The format of lease in such cases is contrary to the statutory form and is not permitted in view of Rules 42 and 43 of the Nazul Rules. Uniformity must be maintained by the DDA. This is the object and purpose behind the

Nazul Rules and prevents discrimination, arbitrariness and promotes Rule of Law.

22. In the present case, auction was for freehold plots. In such cases conveyance deed in form 'BA' is to be executed in terms of the Nazul Rules. The said form is different from the forms prescribed for lease deeds. The said form does not have any specific stipulation with regard to amalgamation of plots and whether or not the same can be permitted and allowed. It is however stipulated that terms of auction will be binding. Clauses 6 and 7 of the form BA reads as under:-

“(6) That the purchaser shall abide by the terms and conditions of allotment/auction/tender, which shall be treated as a part of these presents.

(7) That the vendor reserves the right to cancel this deed in event of breach of conditions of allotment/auction/tender and of this deed.”

23. Therefore, DDA was competent and authorized to fix terms and conditions of auction and decide whether or not amalgamation of plots should be permitted. DDA had specifically stipulated in the terms and conditions of auction that amalgamation of plots would not be allowed. The said term of auction is now binding between the parties. Clause 3.10 (VII) therefore stands incorporated and is one of the terms of the form BA or the conveyance deed executed in favour of the petitioners. Reliance placed by the petitioner on the Circular/letter dated 29th

January, 1992 is misconceived for the said Circular/letter relates to lease deeds executed in terms of the Nazul Rules, where amalgamation was permitted subject to permission by the lessor. This letter or policy decision will not apply to cases of freehold sale or to leases which have been executed under the Nazul Rules prohibiting amalgamation or division of plots. A policy decision cannot override or supplant the statutory Rules or the statutory form including the terms prescribed. In the light of the above discussion, it is held that amalgamation of plots cannot be permitted in the present case and letter dated 29th January, 1992 is not applicable as it applies to lease deeds which permit amalgamation and not to freehold plots or lease deeds which do not permit amalgamation. The petitioner has not challenged the terms of auction or the terms of the conveyance deed. Circular dated 29th January, 1992 is the edifice of the petitioners' case but the said circular is not applicable. The terms of auction on the basis of which the petitioner had given his bids, which have been accepted cannot be modified. They have been given statutory incorporation in the form BA prescribed under the Nazul Rules. DDA cannot modify and amend terms of form BA and allow amalgamation of two plots contrary to Nazul Rules.

24. In view of the above the Writ Petition is liable to be dismissed.

No costs.

(SANJIV KHANNA)

JUDGE

APRIL 08 , 2008.

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