

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

Reserved on: 06.11.2009

% Date of decision: 18.12.2009

+ LPA No.1097 of 2006

DELHI DEVELOPMENT AUTHORITY ...APPELLANT
Through: Ms. Sangeeta Chandra,
Advocate.

Versus

SHRI GURCHARAN SINGH ...RESPONDENT
Through: Mr. H.D. Talwani, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The mother of the respondent was the original owner of property bearing No.B-2/17, Janak Puri, New Delhi, purchased by her in an auction conducted by Delhi Development Authority (for short 'DDA'). The prescribed user of the property is residential. The ground floor of the said property was let out by the respondent for the residence of the Principal of a school. There were some

disputes between the respondent and the tenant as the tenanted premises were not vacated and the tenant was found running a school. The appellant issued show cause notice on 27.12.1995 followed by a final show cause notice dated 18.3.1996 asking the respondent to stop misuse. It is not necessary to go into further details in respect of this dispute but suffice to say that when the respondent applied for conversion of property into freehold, the application was not processed on account of misuse charges.

2. The respondent filed Civil Writ Petition No.3211/2001 which was disposed of on 8.1.2003. In terms of the said order the respondent agreed to pay misuse charges in respect of the ground floor portion and the period for which the misuse charges were held payable was 1.4.1993 to 31.3.1996. The appellant was directed to send a fresh demand of misuse charges in terms of the said order. This order has become final.
3. The second round of litigation began by filing WP (C) No.15897/2004, which has resulted in the impugned judgement dated 15.12.2005. A reading of the impugned order shows that the respondent, once again, sought to raise the issue of levy of misuse charges which was negated by the learned single Judge in view of earlier order passed on 8.1.2003. Apart from this, two other issues were raised by the respondent: (i) The permissible covered area is only the ground floor coverage excluding the coverage of the floors above and thus the misuse charges have been

calculated incorrectly; (ii) the rebate admissible for such conversion having been increased from 25 per cent to 40 per cent, the excess charges paid were liable to be refunded.

4. The learned single Judge found that though the demand raised by the appellant was as per formula applied and while applying the formula the permissible covered area had been determined only in the context of the ground floor while it ought to have been in the context of the Floor Area Ratio (for short 'FAR') for the plot meaning thereby the built up area on the plot as a whole as permissible in law. The respondent was also entitled to refund of rebate of 40 per cent instead of 25 per cent.
5. The appellant/DDA is aggrieved by the aforesaid two directions.
6. Insofar as the second direction is concerned, it is not in dispute that the misuse charges in respect of the respondent have been determined only for 750 sq.ft. for the period of 1.4.1993 to 31.3.1996. Learned counsel for the appellant has pointed out that the rebate had increased from 25 per cent to 40 per cent vide circular dated 18.5.2003. The order was made effective from 27.6.2003. The plea, thus, advanced was that the respondent cannot take benefit of lower conversion charges based on the date of the application, being application No.338601 dated 12.12.1994, while seeking a higher percentage of rebate as applicable subsequently after almost ten (10) years.

7. We find force in the aforesaid contention for the reason that undisputedly there has been increase in the conversion charges from the date of the application. The respondent himself had, in fact, asked for a rebate of 25 per cent as is apparent from a reading of the impugned order. This was the rebate prevalent when the application for conversion was made. The circular enhancing the rebate to 40 per cent is effective prospectively from 27.6.2003. The actual conversion in the case of the petitioner was allowed on 4.9.2003 after the circular but by that time the conversion rates had increased considerably. We are in agreement with the submission of the learned counsel for the appellant that the respondent cannot take advantage of this circular on the basis of the date when the conversion application was allowed while simultaneously claiming that he is entitled to pay conversion charges only as on the date the application was filed in the year 1994.
8. The other plea arises from the meaning of what is understood by “permissible covered area”. The conversion policy has been explained in the “Information for the Guidance of the Leaseholders”. Clauses 1.7 and 1.8, which are relevant are reproduced hereinunder:

“1.7. The formula for calculation of charges for change of use are as under:-

Size of the plot

X

Misused area

Permissible covered area

X

Prior to 1.4.1981

Present commercial rate of land for purpose for which the property is misused

Minus

The land rate on the date of last transaction for the purpose for which land was leased.

10½%

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From 1.4.1981 to 31.8.1981, the percentage multiplier in the above formula was 12½ & from 1.9.89 onwards it is 13.9.

In the case of the residential leases in Rehabilitation Colonies, misuse charges are recoverable from 5.5.1982 onwards in accordance with the following formula:-

$$\begin{array}{c} \text{Size} \\ \text{of} \\ \text{the} \\ \text{plot} \end{array} \times \frac{\text{Misused area}}{\text{Permissible covered area}} \times \left\{ \begin{array}{l} \text{Present} \\ \text{determined} \\ \text{commercial} \\ \text{value of the} \\ \text{land for the} \\ \text{purpose for} \\ \text{which the} \\ \text{property is} \\ \text{misused} \end{array} \right. \text{Minus} \left\{ \begin{array}{l} \text{Present} \\ \text{pre-} \\ \text{determined} \\ \text{value of} \\ \text{the land for} \\ \text{the} \\ \text{purpose it} \\ \text{was leased} \end{array} \right\} \times 6\frac{1}{4}\%$$

1.8 In cases where whole of the premises is under misuse, the misused area will be taken as a total built up area i.e. plint area including thickness of all the walls, garages and servant quarters. In cases of misuse of part of the premises, the misused area will be calculated according to actual measurements of the area under misuse, such area being assessable/verifiable from the building plan as sanctioned by the local municipal body."

9. There is no dispute about the size of the plot or the misused area. The dispute is only about '*permissible covered area*'. It is the plea of the respondent that since the building consists of more than the ground floor, appropriate adjustments should be made and the permissible covered area should be construed to mean the, '*total covered area on all floors*' as used in clause 2.36 of the Delhi Building Bye-Laws, 1983, which define the Floor Area Ratio or FAR. On the other hand learned counsel for the appellant submitted that the respondent cannot ask the Court to re-write the formula and the formula must be strictly adhered to. In this behalf learned counsel drew our attention to the Delhi Building Bye-Laws 1983 where covered area is defined under Clause 2.19 which reads as under:

“2.19. *Covered area.* – Ground area covered immediately above the plinth level covered by the building but does not include the space covered by:

(a) Garden, rockery, well and well structures, plant nursery, waterpool, swimming pool (if uncovered), platform round a tree, tank, fountain, bench, CHABUTRA with open top and unclosed on sides by walls and the like;

(b) Drainage culvert, conduit, catch-pit, gully, pit, chamber, gutter and the like; and

(c) Compound wall, gate slide swing, canopy, areas covered by Chajja or alike projections and staircases which are uncovered and open at least on three sides and also open to sky.”

The FAR is defined under Clause 2.36, which reads as under:

“2.36 *Floor area ratio (FAR).* – The quotient obtained by dividing the total covered area (plinth area) on all floors multiplied by 100 by the area of the plot:

$$\text{FAR} = \frac{\text{Total covered area of all floors} \times 100}{\text{Plot Area}}$$

10. Learned counsel, thus, rightly submitted that the concept of covered area is different from the concept of FAR. Clause 2.19 clearly states that covered area is the ground area covered immediately above the plinth level covered by the building while excluding certain aspects as specified in the Clause. On the other hand FAR is the quotient obtained by dividing the total covered area (plinth area) on all floors multiplied by 100, by the area of the plot.
11. We had in terms of our order dated 5.5.2009 directed the appellant to file an affidavit whether in all cases of conversion of plots from leasehold to freehold while calculating misuse charges the ‘*permissible covered area*’ has been treated as analogous to the definition ‘*covered*

area' as defined in Clause 2.19 of the Delhi Building Bye-Laws, 1983 and does not include the covered area of floors above the ground floor. The affidavit dated 9.5.2009 has been filed by Shri S.S. Gill, Director (Residential Lands), DDA which categorically states that the term '*permissible covered area*' as per Bye-Law 2.19 is not including the covered area of floors above the ground and the said expression is being treated as analogous to covered area given by Bye-Law 2.19. As an illustration various cases of conversion have been annexed to the affidavit to show the said consistent policy.

12. We find that the Building Bye-Laws clearly define two different terminologies i.e., '*covered area*', and, '*FAR*' or '*Floor Area Ratio*'. Since, the conversion policy uses the words '*permissible covered area*', it is apparent that the only addition is of the adjective, '*permissible*', to the expression, '*covered area*'. This means that non-permissible covered area is not to be included. Under Clause 2.19 of the Delhi Building Bye-Laws, 1983, '*covered area*' is defined as the ground area covered immediately above the plinth area covered by the building and does not refer to the area constructed on other floors. This approach is being consistently followed by the Department.
13. However, the FAR or the, '*Floor Area Ratio*', is a quotient arrived at by applying the prescribed formula. For this purpose, Clause 2.36 requires that the '*total covered area*' ... '*on all the floors*', must form a part of the prescribed

calculation. In that clause, after the words, '*total covered area*', the words, '*plinth area*' are inserted in parenthesis followed by the words, '*on all the floors*'. The use of this terminology makes it apparent that even the framers were conscious of the limited scope and meaning ascribed to the expression, '*covered area*', in Clause 2.19, and the fact that by itself, the expression, '*covered area*', cannot be taken to mean the total covered area on all the floors.

14. The aforesaid treatment accorded to the expression, '*covered area*', while determining the quotient denoting the FAR shows two more things :-
 - a) Whenever any special or extended meaning is to be given to the expression, '*covered area*', appropriate words are added.
 - b) Whenever the framers intended that the total covered area on all floors should be considered, they have no hesitation in saying just that.
15. In this case, for calculating misuse charges, the framers have employed another expression altogether. They've used the expression, '*permissible covered area*'. In substance, the argument of the respondent's counsel is that this should be taken to mean the same thing as, '*total covered area (plinth area) on all floors*' used in the formula for arriving at the FAR. There is nothing to warrant such a conclusion. The fact that the framers have chosen to use this form of words only in relation to FAR, and not in relation to misuse charges, can only mean that the framers did not intend either the original Clause 1.7 or the amended

clause 13.9, prescribing misuse charges, to have any such meaning.

16. If the respondent's contentions are accepted then in the formula prescribed for calculating misuse charges, the misused area, which forms the numerator, would become much smaller in comparison to the denominator. Consequently, the resultant quotient would yield a much lower figure which would then result in a lesser misuse charge. Learned counsel for the respondent states that his client must be held entitled to that benefit, but we do not agree.
17. To our mind, the circumstances in which the expression '*permissible covered area*', is used are a better guide. This expression forms the denominator in a formula dealing with charges to be levied for misuse where the numerator is stated to be, '*misused area*'. Therefore, what we have is, '*misused area*', divided by '*permissible covered area*'. Whilst the expression '*area*' in the numerator is defined by the adjective, '*misused*'; the expression '*covered area*' in the denominator is defined by the adjective '*permissible*'. It is elementary that the larger the denominator, the smaller the quotient. It would therefore be logical to assume that the framers intended that the calculation of misuse charges leviable should be carried out by prescribing a denominator that is clearly defined and unambiguously excludes impermissible area. There is nothing to warrant that it must be construed to include

further elements, as suggested by the respondent, that would only result in increasing the denominator and consequently reducing the quantum of misuse charge to be levied.

18. Before departing from the subject, we might mention that the scope of the relevant clause of the policy is to levy misuse charges in respect of area which is admittedly misused. It is not the function of the courts to proactively interpret such provisions with a view to whittling down their scope and impact and to benefit the wrong doer beyond what is necessarily contemplated by the policy itself.
19. For all the above reasons, we hold that the expression '*permissible covered area*' is used in the bye-laws by way of abundant caution to mean the area defined by Clause 2.19 excluding anything impermissible and nothing more; and the conclusion of the learned Single Judge to the contrary, cannot be sustained.
20. We are of the considered view that it is not the function of this Court to re-write the formula. The creators of the formula have understood the same in a particular manner and have uniformly applied the same. Not only that the expressions in the formula have been given their interpretation on the basis of the Delhi Building Bye-Laws, 1983 which cannot be faulted.
21. The legal position is not in doubt in respect of judicial review in respect of policy decisions. It is not the function of the Court to re-write a policy as observed by a Division

Bench of this Court in Shri Ram Niwas v. Lt. Governor and Ors.; 2007 (8) AD Delhi 493. In fact, what is to be seen by the Court is whether a uniform principle is followed and whether the subjects are treated fairly and reasonably. It is only in cases of palpable arbitrary exercise of power that the Court can interfere. Thus, all that the Court has to see is whether the Scheme applies uniform principles and whether it is fair and reasonable {Federation of Ashok Vihar Residents Welfare Association (Regd.) v. Union of India; 2000 (1) AD (Delhi) 519}.

22. The present case is not one where any *mala fides* are attributed. There is nothing patently arbitrary, unconsciously unfair, discriminatory or *mala fide*, which is either pleaded or proved. once the respondent has been treated at par with other applicants for conversion from leasehold to freehold there is no reason for us to lay down a policy or interfere in the policy already put in place by the appellant by recasting a formula which is the natural consequence if we give a different meaning to the expression '*permissible covered area*'. We are fortified in our view by the observations of the Supreme Court in Ugar Sugar Works Ltd. Vs. Delhi Admn. AIR 2001 SC 1447.
23. We are, thus, of the considered view that the calculation made by the appellant cannot be faulted on this account and the expression '*permissible covered area*' cannot include, apart from the area covered immediately above plinth area covered by the building, the construction made

on the other floors. We have already observed that the rebate entitlement of the respondent is also 25 per cent as that was the rebate prevalent on the date of the application for conversion and the conversion rates have been taken as on that date and not the higher rates prevalent in 2003 when the rebate was increased to 40 per cent.

24. The appeal is accordingly allowed setting aside the impugned order and the writ petition filed by the respondent is dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

DECEMBER 18, 2009
b'nesh

SUDERSHAN KUMAR MISRA, J.