

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.35/2010 & CM No.679/2010

Mahesh Chand Goyal & Ors. Appellant through
Mr. Ravinder Sethi, Sr. Adv.
with Mr. Rajiv Kumar
Gawana, Mr. Anil Grover &
Mr. Puneet Sharma, Advs.

versus

Genious Promoters & Developers
Pvt. Ltd. Respondent through
Mr. T.K. Ganju, Sr. Adv. with
Mr. A.K. Thakur & Mr. R.K.
Mishra, Advs.
Mr. Rajiv Bansal, Adv. for
the DDA

% Date of Hearing: May 05, 2010

Date of Decision: May 31, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK

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

VIKRAMAJIT SEN, J.

1. A neat question of law has arisen before us, the answer to which will indubitably have widespread repercussions. The Appellants contend that since user of premises for a Banquet Hall is commercial in nature, wherever commercial user is postulated and is permissible in law, no further restrictions are imposable. By a Perpetual Lease dated 10.11.2003, a parcel of land was leased

out by the Delhi Development Authority (DDA) in favour of the Appellants. The first recital in the Perpetual Lease Deed makes a mention that – “an auction was conducted on 21.7.2003 for the grant of the lease hold rights of a commercial plot of land to be used as Retail/departmental Store purpose hereinafter described, belonging to the Lessor”. The proviso to Clause 14 of the perpetual Lease Deed reads – “PROVIDED that, if the Lessee is desirous of using the said commercial plot or the building thereon for a purpose other than that Retail/Deptt. Store the Lessor may allow such change of user on such terms and conditions including payment of additional premium and additional rent, as the Lessor may in this absolute discretion determine”. The DDA has subsequently issued an Occupancy Certificate dated 23.12.2005, which, in the description of ‘Construction’, clarifies that Ground Floor, First Floor, Second Floor and Third Floor is “retail space (hall)” on each Floor. The Appellants have thereafter got the Perpetual Lease Deed converted to Freehold, as is evident from a perusal of the Conveyance Deed dated 21.4.2006. The Deed speaks of “a piece and parcel of commercial/mixed use land measuring 1998 sq. mts. situated at Central Business Distt. at CBD(East)”. Clause 2 of the Conveyance Deed reads as follows:-

2. That notwithstanding execution of this deed, use of the property in contravention of the provisions of Master Plan/Zonal Development Plan/Lay-out Plan/Architectural Development Controls/sanctioned building plan shall not

be deemed to have been condoned or permitted in any manner and Delhi Development Authority shall be entitled to take appropriate action for contraventions past, present or future, of Section-14 of the Delhi Development Act or any other law in force for the time being. Likewise any future violation of the above mentioned provisions shall invite action as per law.

2. The Promoter/Respondent has executed a Conveyance Deed dated 21.6.2006 in respect of Commercial Space measuring 1928 square feet on the First Floor along with proportionate undivided, indivisible and impartible ownership rights in the Plot bearing No.3, CBD (East), Shahdara, Delhi in favour of Mrs. Sahiba Aggarwal. Mrs. Sahiba Aggarwal, along with her husband and other relatives, are the Appellants before us who had intentions to use the said property for purposes of a Banquet Hall.

3. Apprehending this user, the Respondent/Plaintiff filed Suit No.1899/2009 in this Court. On the first date of hearing, the learned Single Judge recorded that whilst the premises were commercial in nature, Clause 14 of the Conveyance Deed postulates change of user subject to the concurrence of the superior lessor on conditions imposed by the latter. The learned Single Judge recorded that no change of user has been lawfully obtained. He, therefore, allowed the Plaintiff's application under Order XXXIX Rules 1 and 2 injunctioning the Defendants/Appellants from running a Banquet Hall in the suit premises. It is these Orders dated 9.10.2009 which have been assailed before us.

4. Mr. Ravinder Sethi, learned Senior Counsel for the Appellant, contends that since the premises are commercial in nature and postulate commercial user, the Appellants are fully empowered and entitled to use them for any commercial purpose, which avowedly and undisputedly includes user as a Banquet Hall. We have already reproduced Clause 2 of the Conveyance Deed dated 21.4.2006. In addition thereto, Mr. Sethi places reliance on Clause 9 of the Conveyance Deed between the parties which stipulates that –“The Vendee shall not use/cause to be used the said Premises for any other purpose except permissible commercial use, as specified by the DDA in its Zoning Plan/Master Plan, Guidelines etc., and/or shall not cause any violation of any terms and conditions of the Master Plan/Zoning Plan, guidelines as applicable to the Premises. The Vendee specifically undertakes not to use the said premises for any prohibited/irregular/illegal activity. In the event, the Vendee allowing the use of the said premises, under any arrangement, by a third party, the indenture(s) so to be executed between the Vendee and such third party, shall be intimated to the Maintenance Service Provider to ensure all statutory compliances, clearance of outstanding dues, if any, to prevent breach/violation of any of the applicable laws”. The contention of Mr. Sethi is that Clause 5(1) of the Master Plan - 2021 elaborates a 5 tier system of commercial areas and under the sub-head of ‘District Centre’ makes a mention not only of ‘retail

shopping’ but also of ‘restaurants, banquet halls, etc’. Mr. Sethi clarifies that a reading of Clause 5.4 of Master Plan – 2021 leaves no manner of doubt that Laxmi Nagar, where the building is located, falls under the category of a ‘District Centre’. He further emphasizes that Chapter 15 of the Master Plan – 2021 contains the ‘Mixed Use Regulations’, Clause 15.7.4 whereof poignantly mentions that a Banquet Hall shall also be permissible in industrial and commercial areas including notified commercial streets under Mixed Use Regulations etc. Predicated on these provisions, he forcefully contends that the Appellants/Defendants are fully entitled to use the suit property as a Banquet Hall.

5. Mr. T.K. Ganju, learned Senior Counsel for the Respondent/Plaintiff, has substantially rested his case on an Affidavit dated 13.3.2010 filed by the Director (Master Plan), DDA, which merits reproduction:-

3. That Plot No.3, Central Business District (CBD) (East), Shahdara, Delhi – 110 092 is an integrated part of comprehensive Scheme of Sub CBD Shahdara having been designed and disposed of as per MPD 2001 norms. The detail of plot No.3 as per approved Layout Plan of Sub CBD Shahdara is as under:-

Plot No.	Area	B.U.A.	Phase	Land Use	No. of Floors
3	1998	5770.69	1	Retail, Departmental Store	4

A copy of the approved layout Plan is annexed hereto and marked as 'Annexure-A'

4. That as per the drawing prepared by Housing and Urban Project Wing (HUPW) the user of the Plot is "Retail Departmental Store". The Sub Central Business District (Sub CBD) was planned under MPD-2001 norms and Banquet Hall was not a permissible activity in such centers. Whereas, it is included as an 'activity permitted' under MPD-2021 which is enforced from 7-2-07 onwards. A copy of Table 5.1 : setting out "Five-Tier System of Commercial Areas" under MPD-2021 is annexed hereto and marked as Annexure-B.

5. That the Commercial Centers namely Metropolitan City Centers, District Centers, Community Centers etc. are planned in a comprehensive manner as an 'Integrated Plan' and the use on premises/plot level are demarcated at a design level only and further auctioned for the specified uses as per the approved plan from all the statutory authority authorities like DDA/MCD, DUAC, Delhi Fire Services.

6. That within the commercial land use the different activities like retail business, offices, cinemas, hotel etc. fetch different price value in an auction. This implies that the change of activity permitted on a plot from the activity designated at the time of planning and disposal to any other activity shall have a bearing on the auction value and the property owner/occupier has no right to use the property for an activity other than the designated activity.

7. That the change of activity from that of designated/designed/auctioned activity, to any other permitted use/activity as per MPD 2021 as on date has

implications such as financial, provision of services, traffic management and other safety measures etc. therefore would require examination at a scheme level for grant of such permission.

6. Mr. Ganju has also drawn our attention to two letters addressed to the Respondent by the DDA. In the first, dated 12.12.2005, the Respondent had been informed that – “Plot No.3, CBD (East) Shahdara is a commercial plot of Central Business District. As per the Master Plan, Shopping (Retail, Service, Repair & Limited Wholesale), Informal Shopping, Commercial Offices are allowed in the commercial plot. As per the specific architectural controls, the use is retail/departmental store”. The second letter is dated 22.2.2007 and informs the Respondent that – “Plot No.3, CBD(East) Shahdara is a commercial plot of Central Business District. As per the Master Plan, Shopping(Retail, Service, Repair & Limited Wholesale), Informal shopping, Commercial Offices are allowed in the commercial plot. As per the specific architectural controls, the use of ground floor, First Floor, Second Floor, Third Floor & Basement floor are for retail departmental store as the basement area has already been taken in the FAR”.

7. We are unable to agree with the contentions of the learned Senior Counsel for the Appellants, and though the impugned Order is conspicuous by its brevity, we concur with its outcome. Town Planning is a specialization and work of art. It requires the Planner to look into myriad needs of society and in that intricate

perspective specify the manner in which the portions of the city are to be used. This user has several shades and hues; to predicate that commercial user encompasses and accepts all such enterprise, is a dangerous oversimplification. A reading of the Perpetual Lease Deed between the Respondent and the DDA makes it elaborately and uncontrovertedly clear that a land was allotted to the Respondent for use as retail/departmental store. This covenant was the determinate factor of the price procured at the auction conducted in this regard. As has already been noted, the Occupancy Certificate makes a similar stipulation. A reading of these documents would, therefore, should have made it unquestionably clear to the Appellants that the building constructed on the plot was to be used for a particular aspect of commercial activity, namely, retail/departmental store. There is no gainsaying that the land could have been auctioned even for a 'Banquet Hall' which would subsequently have been in conformity with MPD-2021. Had the subject building been constructed on a plot earmarked for a Banquet Hall or a restaurant or any other purpose specifically mentioned at the time of auction and/or in the perpetual Lease, the Appellants could not have been prohibited from resorting to such user. We had mentioned at the commencement of the Judgment that the problem posed before us has ubiquitous ramifications. Let us take the case of a Local Shopping Centre. The Authorities, as City or Town Planners, are

duty bound to conceptualize the possible needs of residents of the area and accordingly provide for shops for hairdressers, butchers, vegetable vendors etc., as also other multifarious commercial activities. Shops or spaces earmarked for user as hairdressers and meat shop etc. would obviously not fetch the same offers as those for more profitable commercial ventures. To permit a person to make a bid for a barber shop and thereafter run a restaurant would be doing violence to the Town Planners scheme of things. It would also force residents of the area to travel distances to other markets in order to avail of services which were intended to be available in the local area. We have seen several aberrations in this regard in Delhi, leading to grave inconvenience and harassment to the local residents. To name only a few, Local Shopping Centre in the Diplomatic Enclave area, New Delhi has been transformed into various restaurants and eateries. Areas of Greater Kailash-II Market, New Delhi are now either sanitary goods shops or restaurants. This makes the local residents face not just inconvenience of having to travel to other markets for services which were initially intended to be available there, but also to suffer the nuisance of customers coming from all other areas to shop at the local area. This is impermissible. The parties must be strictly governed by the terms on which the Conveyance Deed was granted regardless of whether the land has metamorphosed from Leasehold to Freehold.

8. Mr. Sethi has contended that the Respondent has converted the property from perpetual Lease to Freehold. In our view, this does not enable anyone tracing rights to the principal Conveyance Deed to use the property for purposes other than the original allotment. Residential properties which were taken on lease are frequently changed to freehold. That does not release the parties from the obligation to use the premises only for residential purposes. The fact that the property is Leasehold in character has no relevance to the user thereof. That user must be in conformity with the initial prescribed user of the Master Plan.

9. There was some argument on whether it would be permissible to refer to the provisions in the MPD-2021. The user stipulated in the initial document would continue to hold force until and unless a change is effected by the Authority concerned, which, in the present case, is the DDA. Having said this, we may also put in a word of caution for the reasons already expanded upon above. The Authorities may not be empowered to whimsically change the user only because the party concerned is willing to pay conversion charges. In the context of the present case, it matters little whether an understanding is arrived at between the Respondent (who remains the owner of the Basement) and the Appellants, since regardless thereof it will not be legal for the Appellants to use the property for a Banquet Hall.

10. Our research has led us to three decisions which justify mention. We are fortified in the view we have taken by the dictum of Supreme Court in this aspect of law concerning town planning as expounded in *Union of India -vs- Dev Raj Gupta*, (1991) 1 SCC 63 where the issue was whether the owners of residential property became automatically entitled to use it for commercial purpose after coming into force of new Master Plan describing the area as commercial. The Supreme Court in its considered opinion held that the High Court failed to appreciate that the change of user of the land permitted by the Plan was only enabling in nature. It lifted the restriction which was otherwise there for using the land for commercial purpose. The land has to be used as per the agreement between the contracting parties, and no change of the user can be made contrary to the agreement even if the Plan permits such user. The Plan helps the parties to change the user, if the parties mutually agree to do so. It does not permit the occupant to change the user unilaterally. It is not, therefore, correct to say that no permission of the landlord is needed to change the user of the land. In the case of *State of Rajasthan -vs- H.V. Hotels (P) Ltd.*, (2007) 2 SCC 468 the Court was confronted with an agreement between the State of Rajasthan and the Respondent wherein the parameters of construction were set out and the floor area ratio was given as 1.0. There was also a stipulation that consequent upon any change in building bye-laws framed by the local

authorities, including the Jaipur Development Authority, if the buyer got additional floor area ratio or any relaxation, the State would have no objection, so long as the same are permitted by the bye-laws prevailing from time to time. The plea of the State was that such a clause cannot act as an estoppel against them from enforcing the bye-laws applicable at the time of auction which pinned down the purchaser to the FAR prescribed at the time of purchase. Upholding this argument, the Hon'ble Supreme Court observed thus:-

14. ... The power to relax a building rule, regulation or requirement is an exception to the rule and it is to be used with caution and to justify or condone minimum bona fide violations or deviations. The purchaser bid at the auction with eyes open and with the knowledge that the floor area ratio, as one of the parameters applicable, was 1.0 at the relevant time. The purchaser in fact was able to get the land user changed, whether it was proper to permit such change of user. But, merely because subsequently the bye-laws have been amended, it does not mean that the parameters should be relaxed in favour of the purchaser. That would be clearly an erroneous approach to the question of relaxation and assumption of such a power would mean the nullification of building rules themselves and the object sought to be achieved by the building rules and the need to have planned development of cities and towns in the interests of posterity. Therefore, in our view, there is no merit in the plea based on the power to relax contained in the amended bye-laws.

15. We do not see anything inequitable in the purchaser being pinned down to his obligation under the sale by auction. Building regulations are in public interest. Courts have a duty to protect public interest particularly when they do not interfere with any of the fundamental rights of the purchaser. The plea based on alleged equity cannot be accepted.

11. In *Lawntown Ltd. -vs- Camenzuli*, [2008] 1 WLR 2656 the Court of Appeal was concerned with the conversion of a single dwelling house into two self contained flats. In a detailed Judgment, which we respectfully recommend to be read fully, the Court took several factors into view, including density of occupation, traffic noise, fumes and congestion and parking as well as preservation of the character of the neighborhood. Interestingly, the Court of Appeal also considered that when confronted with first time to deviate from a particular scheme, since a precedent would be set, careful and detailed consideration was imperative. Coincidentally but significantly, the Developer was a freehold owner.

12. The Appeal and the pending application are devoid of merit and are dismissed, but with no order as to costs.

(VIKRAMAJIT SEN)
JUDGE

(A.K. PATHAK)
JUDGE

May 31, 2010
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