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

Decided on : 21st March, 2013.

+ **LPA No. 1084/2004**

D.D.A. Appellant
Through: Mr. Sushil Dutt Salwan & Ms. Latika
Dutta, Advocates
versus

ASHA PAL GULATI THR. LRS & ORS. Respondents
Through: Mr. L.K. Garg, Advocate with
Mr.Pawan Gulati, LR-1 in person

AND

+ **LPA No. 1133/2004**

D.D.A. Appellant
Through: Mr. Sushil Dutt Salwan & Ms. Latika
Dutta, Advocates
versus

KRISHAN VERMA Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

S. RAVINDRA BHAT, J. (OPEN COURT)

1. These two appeals challenge separate judgments of two learned Single Judges dealing with identical issues concerning the true and correct interpretation of clause II (3)(b) of the Perpetual Lease Deed executed by the DDA in favour of the lessees/writ petitioners.

2. Briefly, the facts in LPA No. 1084/2004 are that the petitioner succeeded in a public auction held by the DDA i.e. the appellant on 16.01.1971 for sale of a commercial plot i.e. No. 30, Basant Lok Community Centre, Vasant Vihar, Delhi. The total consideration paid was Rs. 50,000/-; eventually a Perpetual Lease Deed was executed on 26.10.1976 and the possession of the plot was handed over. Concededly, the building comprising of several floors i.e. basement, ground, mezzanine, first, second and third floor, was constructed in accordance with the plan sanctioned by the authorities and the entire building was let out to one M/s. SAE India Ltd. on 16.07.1977. While so, the DDA issued a show cause notice on 6.6.1984 alleging that the petitioner had indulged in misuse since third floor was not being used for a residential purpose; the DDA also sought to recover misuse charges. The respondent/petitioner protested this move by separate letters and representations stating that though the sanction given was for a residential portion of the premises i.e. the third floor; in reality, there was no such compulsion in the Master Plan or the Zonal plan in question. However, in the alternative, the lessee sought to put an end to the dispute by offering to pay composition fee. The DDA did not agree and initiated proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971; this led to the lessee approaching this Court under Article 226 of the Constitution by preferring CWP No. 926/1986. By the impugned judgment, the learned Single Judge quashed the demand notice and the eviction proceedings. After considering the submissions of the parties, as well as the material on record, the learned Single Judge ruled that the concerned stipulations in the lease deed, did not in any manner compel the petitioner to use the third floor for residential purposes exclusively. In arriving at such a finding, the learned Single Judge considered the

architectural controls annexed in the form of a Map to the lease deed as well as the sanction plan, obtained by the lessee.

3. The DDA is in appeal before this Court, aggrieved by the said decision. The facts in LPA No. 1133/2004 are similar; except that the property is Plot No. 5, Community Centre, Basant Lok, Vasant Vihar. The lease deed in question in this case was executed on 27.02.1976. The DDA's demand notice was issued on 5.4.1990. Aggrieved, the lessee, Shri Krishan Verma approached this court by filing CWP No. 1441/1990. This petition was allowed on 2.8.2004. By the impugned judgment in LPA 1133/2004, the DDA like in the other case, is aggrieved by the judgment and order which has drawn inspiration and followed the previous ruling in CWP 926/1986.

4. It is argued by Mr. Sushil Dutt Salwan, learned counsel for the DDA that the findings of the learned Single Judge are unsustainable. He emphasized that in terms of the auction notice, the lessees were well aware of the fact that upon construction of the plot of land, the third floor was to be necessarily used for residential purposes. This was further clarified, according to counsel, upon plain reading of Clause 3(b), which had to be construed along with the map that formed an integral part of the lease deed. Counsel also relied upon the extract of the then prevailing Master Plan – MPD 62, especially Paras 12 and 13 which dealt with the Use Zone C.1 and submitted that the interpretation placed by the DDA is the correct one and the learned Single Judge fell into error in holding otherwise.

5. It was argued that if, in fact, the understanding of the parties was that the entire premises could be used for commercial purposes, the reserve price

and consequent bid, would have been much higher. Counsel also relied upon an additional affidavit filed in LPA No. 1084/2004 to say that it is not the writ petitioners/lessees only who were singled out but consistently action has been taken against all recalcitrant lessees.

6. Learned counsel for the lessees submitted that a plain reading of Clause 3(b) and Clause 4(a), could lead to only one conclusion i.e. that there was no condition that the third floor of the constructed premises had to necessarily be used for residential purposes. Learned counsel emphasized that in fact, the bids were accepted for a commercial plot and paid in accordance with the market price. It was also urged that there was no compulsion in the provisions of the Master Plan so far as use of the premises were concerned; on the contrary, the relevant conditions only enabled some portion of the buildings constructed upon commercial plots in commercial areas (such as retail shopping areas) to be used for residential purposes. In the absence of a compulsion in law or a direct stipulation, in the concerned instrument i.e. the lease deed, the DDA could not have insisted upon such use or levied substantial misuse charges as is sought to be done in this case.

7. The relevant portions of the learned Single Judge's reasoning in WP(C) No. 926/1986 which was followed in the subsequent writ proceeding, are reproduced below:

“22. In my considered view it is the terms of the perpetual lease deed which have to be looked into to appreciate the rights and obligations of the parties. The plot in question is indisputably located in a commercial area and as per the Master Plan, is earmarked for community centre which is a commercial user. This fact

is also abundantly clear from the terms and conditions of the perpetual lease deed including clause 3(a) and 4(a) which require the petitioner to construct a commercial building on the plot and refer to the plot as a commercial plot. Thus, the only question is as to what is the ramification of clause 3(b) which provide that the architectural restrictions to be observed in regard to the construction of the building will be as per Schedule II.

23. A copy of the Plan in this behalf has been produced which is the architectural control drawing. The notes specified therein clearly provide that only shaded part comes under architectural control restrictions and rest is only suggestive. On the top floor in question the shaded part is the open portion of the roof and the terrace. Thus, this aspect cannot be varied and is not negotiable. The note on the Plan, thus, makes it clear that it is, thus, shaded part which falls under the architectural control restrictions which are referred to in clause III(b) of the perpetual lease deed. There is no doubt that the Plan provided for living room, bedroom and adjoining room. However, it has been stated in the Plan itself as suggestive and not forming part of the architectural control restrictions. Thus, in so far as the remaining area of the terrace floor is concerned, there can be no question of application of clause III(b).

24. In my considered view the aforesaid implies that a residential user is possible on the terrace floor as per the Plan. However, this cannot be deemed to be the only user. This is so since as per clause 3(a) of the perpetual lease deed it is the commercial building which has to be constructed. The plot is also commercial. The user is, thus, prescribed as commercial and the architectural restrictions cannot include the user itself. The Plan itself, as stated above, excludes the remaining areas which are not shaded from architectural control restrictions. In such a situation, there can be no question of the violation of the perpetual lease deed by the petitioner by using of the third floor for commercial or office purposes.

25. *This aspect has also to be appreciated taking into consideration that the area is a complete commercial area and even the Master Plan provided so. I fail to appreciate in such a situation what can be the object of specifying the third floor of the building as meant for residence. The respondents have not cared to produce the original records of the property in question. The decision making process is, thus, not available. In fact, the decision to bring the lease to an end itself has not been placed on record.*

26. *There is also silence on the part of the respondents on the issue of discrimination as it is stated that no action has been taken against the other plots. This is stated by the petitioner on the basis that the respondents are, in fact, permitting the third floor using for commercial/office purposes.*

27. *Even assuming for the sake of arguments that some charges are to be levied for the said purpose for the so-called conversion of the third floor into commercial use, it has been brought to the light that the DDA itself has applied a formula prescribed by the Ministry of Works and Housing on 9.9.1964 and as contained in the Resolution of the Authority dated 21.6.1966. However, it is not necessary to dwell further into this aspect as no notice has been issued to the petitioner in terms of these resolutions or seeking recovery of any charges for conversion in this behalf as per that Resolution.*

28. *I am, thus, of the considered view that the action of the respondents in determininig the lease of the petitioner or initiating proceeding under the said Act cannot be sustained are hereby quashed. The consequence is that the petitioner continues to be a perpetual lessee of the plot in question in terms of the lease deed already executed in favour of the petitioner and is not liable to pay the charges as claimed in the subsequent communication of the respondents dated 14.12.2001. The petitioner shall, however, pay the normal ground rent charges which were apparently not being received by the respondents on account of the determination of the*

lease. The same will be without any charge of interest.”

8. The relevant clause of the lease deed i.e. 3(b) reads as follows:

“The architectural restrictions to be observed in regard to the constructions of the building will be as given in drawing No. 116/4 R-1 annexed hereto as Schedule –II.”

9. Clause 4(a) which is also relevant for the purposes of the present discussion reads as follows:

“The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of ten years from the commencement of this Lease unless, in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent.

PROVIDED FURTHER that in the event of the consent being given the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the property after deducting fifty % of the unearned increase as aforesaid.”

10. It would be immediately apparent that there is no prohibition or condition one way or the other in the express terms of the lease, containing

the demise for the commercial plot that any portion of it has to be used for residential purposes. Furthermore, this Court notices that clause II (13) deals with prohibitions in respect of the use of the property. It disentitles the lessee to use the premises for trade, business or manufacture which in the opinion of the lessor may be “noisy, noxious or offensive”. Even this is relieved through the proviso which enables a lessee to use the “residential plot or building thereon for a purpose other than of private dwelling”. Now it is apparent that the different terms of the lease indicate that a common form was apparently used by the DDA. Clause (13) clearly points to a condition applicable to residential properties. The relevance of this stipulation is that it specifically enjoins or prohibits a lessee from using the premises in a particular manner and at the same time, gives leave to the lessee to do so provided permission is granted for change of user. In other words, the conditions are not inflexible or carved in stone as it were. More pertinently, the relevant clauses in this case i.e. 3(b) and 4(a) unequivocally point to the nature of the plot being commercial; they do not anywhere expressly engraft any prohibition with regard to the use of the property. It was in this background that the learned Single Judge considered DDA’s contentions with regard to the architectural controls being determinative vis-a-vis the use of the property, and ultimately held that the contentions were unsubstantial.

11. In order to test the submissions of the DDA, this Court considered the relevant conditions in the Master Plan, especially use zone C-1, which reads as follows:

“Use Zone C.1

Uses permitted:

Retail shops; business and professional offices; service uses like barbers and tailors; laundry and dry cleaner's shops etc. Restaurants and entertainment places; residences, social and welfare institutions provided they are located in first and higher floors; clinics; meat, fish and fruit markets; roofed storage for legitimate retail business; public and semi-public recreational uses; public utilities and buildings. Parking area requirements for all uses must be approved.

Uses permissible if allowed by competent authority after special appeal.

Social and welfare institutions, petrol filling, stations, coal, wood or timber yards, service garages; light manufacturing without nuisance or hazard and employing not more than 4 persons with or without power provided the goods manufactured are sold on the premises in retail; taxi and scooter stand, bus terminal. Parking area requirement for all uses must be approved.

Uses prohibited.

All uses not specifically permitted herein."

An analysis of the above extract of the Master Plan would reveal that in retail shopping plots or areas, the uses permitted have been clearly spelt out. These include residential, social and welfare institutions provided, "*they are located in first and higher floors*". Clearly, the intention here was not to compel a lessee to construct a building and then require him to earmark or dedicate exclusively one floor for residential purposes. The intention, on the other hand, was to ensure that if residences were constructed, they were to be located in the first and higher floors, no less no more. Such being the case, this Court sees no condition in law to compel or constraint the limited use of the third floor for residential purposes only.

12. As far as the architectural controls alluded to in Clause 3(b) go, this

Court sees no reason to differ from the conclusions of the learned Single Judge, who went into this aspect of the matter and appreciated in detail the plans. Furthermore, this Court has also considered the plan and further noticed that at the foot of the document in the notes, there is a clear indication that the use indicated is only suggestive.

13. In view of the above, this Court is of the opinion that there is no error or infirmity in the findings and conclusions arrived at by the learned Single Judge in CWP No. 926/1986, which was followed in the subsequent decision in CWP No. 1441/1990. If the DDA really had wished that the third floor in these premises were to be used only for residential purposes, it would have ensured that end in more explicit and clearer terms.

14. For these reasons, this Court is of the opinion that the appeals are meritless. They are accordingly dismissed with no order as to costs.

S. RAVINDRA BHAT, J

SUDERSHAN KUMAR MISRA, J

MARCH 21, 2013
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