

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

% *Reserved on: 17th October, 2012*
Date of Decision: 28th January, 2013

+ **L.P.A. 393/2012**

DDA

Through: Petitioner
Mr. Harish Malhotra, Sr. Adv. with Mr.
Shobhana T

versus

SACHIN J. JOSHI & ANR.

Through: Respondents
Mr. Pinky Anand, Sr. Adv. with Mr.
Trideep Pais and Mr. Shivam Sharma and
Mr. Natasha Sahrawat, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

This is an appeal from the judgment of a learned single judge of this court in W.P (C) No.8496/2008 rendered on 02.02.2012 on a writ petition filed by Sachin Joshi, for and on behalf of M/s. Asrani Inns & Resorts Private Limited, (“hotel”) against the order passed by the Lieutenant Governor, Delhi, (“LG”) acting as competent authority of the Delhi Development Authority (“DDA”), on 10.04.2008 refusing permission to the hotel (petitioner in the writ petition) to amalgamate two hotel-plots at Wazirpur District Centre which were acquired by it under an auction held by the DDA.

2. This is the second round of litigation. Shorn of unnecessary details, the facts are that the hotel (respondent herein) acquired two separate, adjacent plots of land measuring 7220.40 sq. mts. and 7030 sq. mts. in Wazirpur District Centre, Delhi in the auction held by DDA on 04.05.2006. The purchase price was ₹127 crores and ₹102.40 crores respectively. They were freehold plots. One of the conditions of the auction

was that “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” vide sub-clause (vii) of clause 3.10 of the general terms and conditions of the auction of hotel plots under the DDA (Disposal of developed Nazul land) Rules, 1981. The permissible built-up area or “floor area ratio” (FAR) for the first plot was 15,500 sq. mts. and for the second plot it was 14,500 sq. mts. The necessary bank and performance guarantees were given. Two separate conveyance deeds, both dated 03.11.2006 were executed by the DDA in favour of the hotel.

3. On 14.12.2006 the respondent herein wrote to the DDA seeking permission to amalgamate the two plots and pointed out the benefits of amalgamation. Permission for excavation was sought on 15.12.2007 pending approval of the request for amalgamation and the plans and other issues. The respondent was informed by the DDA that the request was being processed and thereafter it would be put up to the LG, who is the competent authority, for approval of the request for amalgamation. It was also informed that if the request was approved the necessary charges for amalgamation and other charges will have to be paid, subject to the procedure outlined in the Resolution dated 07.01.1991 of the DDA and the letter dated 20.01.1992 issued by the Ministry of Urban Development (MOUD). It appears that at this stage the hotel filed a Writ Petition (C) No.4251/2007 before a learned single judge who, besides issuing certain directions on the same, also directed that the LG’s decision on the request for amalgamation shall be communicated to the writ petitioner on or before 13.08.2007.

4. When the matter was placed before the LG, he passed an order on 30.07.2007 in the following terms:

“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.

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

5. Against the above decision of the LG, the hotel filed W.P. (C) No.8101/2007 before a learned single judge of this court. The writ petition was rejected holding- (a) the statutory forms under Rule 42 of the Nazul Rules did not permit amalgamation of the plots; (b) the letter of the MOUD cannot change or modify the terms and conditions of the statutory forms/leases and in any case the letter would apply only to leases executed prior to 1989 when amalgamation of plots was allowed with prior permission; after the amendment of the Nazul Rules in 1989 the notification/letter of the MOUD did not apply; (c) the conveyance deed executed in form BA did not contain any specific clause permitting the amalgamation and it was different from the format for lease deeds; clause 3.10(vii) in any case prohibited amalgamation and (d) the terms and conditions of the auction were binding on the purchaser-hotel. The learned single judge eventually held that the amalgamation of the plots cannot be permitted and thus upheld the decision of the LG.

6. Aggrieved, the respondent-hotel preferred an appeal in LPA No. 210/2008 before a Division Bench of this court. In its decision rendered on 20.10.2008 the Division Bench allowed the appeal and ruled as under:-

- a) Rule 42 of the Nazul Rules which incorporates Form BA into the said Rules does not contain any prohibition against amalgamation of plots. Even if clause 3.10 (vii) of the general terms and conditions would apply, by virtue of clause (6) in Form BA, that clause- i.e., clause 3.10(vii)- is only a prohibition against unilateral alteration and is not a fetter upon the DDA which is empowered under clause (4) of the said form to permit any alteration.

- b) Clause 3.10(vii), in the context of a freehold plot, is not a fetter upon DDA's power to exercise its discretion if an application is made in terms of clause (4) of Form BA.
- c) DDA's own resolution of 07.01.1991 and the notification of the MOUD issued on 29.01.1992 provide guidelines for the exercise of the discretion. These two documents are not inconsistent with the power of the DDA to grant amalgamation of commercial plots. The view of the learned single judge that these two documents do not hold the field cannot be upheld.
- d) Counsel for the DDA did not "seriously pursue" the argument that hotel plots are not commercial plots and therefore would not be governed by the two documents noted above.

On the basis of the above reasoning, the Division Bench ruled in paragraph 26 of its judgment as under:

"In the considered view of this Court, the Lt. Governor's opinion that clause 3.10(vii) of the general terms and conditions of the auction constituted a prohibition against permitting amalgamation of the two hotel plots, is based on an incorrect interpretation of the relevant statutory rule as well as the clauses of the conveyance deed. While the learned counsel for the DDA may be right in contending that there was no vested right in the appellants to seek amalgamation, as far as this Court is concerned, the factor that has weighed with the Lt. Governor in rejecting the request for amalgamation, was not a relevant one. The decision is therefore unsustainable in law."

7. In paragraph 28, the Division Bench observed that interference was called for in the present case *"because the Lt. Governor appears to have proceeded on the erroneous footing that clause 3.10(vii) of the general terms and conditions of the*

auction constituted a fetter on the power of the DDA to consider the application of the appellant for amalgamation of the plots”.

8. In paragraph 29, the following directions were issued to the LG for consideration:

“The matter will have to go back to the Lt. Governor for a fresh decision on the application of the appellant seeking amalgamation. In our view, it would be necessary for the Lt. Governor, while considering the matter afresh, to also consider the certain other relevant factors which have emerged during the course of the hearing of this appeal. The appellants contended that the amalgamation is sought of adjacent plots and as a result of the amalgamation no additional FAR would be gained by them. Learned Senior Counsel for the appellants also desired that this Court should place on record the offer of the appellants to pay an additional sum of ₹23 crores, or the amount that may be calculated by the DDA in terms of its Resolution dated 7th January 1991 and the MOUD letter dated 29th January 1992 (as a condition for grant of permission for amalgamation) of the plots. Further, it is submitted that having a single hotel on the combined plots would be beneficial from an architectural standpoint and from the point of lesser consumption of electricity and availability of larger parking space. While this Court would not like to express any opinion on these submissions, it would be for the Lt. Governor to consider them well (sic) taking a fresh decision on the application of the appellants for amalgamation.”

9. Pursuant to the directions of the Division Bench, the LG took up the matter for consideration and by letter dated 10.11.2008 the following decision of the LG was communicated to the respondent-hotel:

“(1) The auction as mentioned at point No. (vii) (on page 10) of the brochure for the auction of the hotel plots states that successful bidder shall not deviate in any manner from the layout plan or alter the size of the plot by sub-division, amalgamation or otherwise. Changing of auction conditions post-auction would vitiate the entire procedure as the

amalgamation will totally change the type of hotel that can be constructed on the auctioned plots.

(2) By stipulating in the auction conditions that amalgamation shall not be permitted, DDA, in fact, prevented many of the leading International Hoteliers from bidding for the plots. It would be seen that by allowing amalgamation of plots post auction, DDA has favoured the auction purchaser while keeping away the renowned international hoteliers from participating in the auction procedure.

(3) Commercial plots and hotel plots stand on different footings have different usages have different architectural controls and are distinct from one another. While amalgamation is permitted in one category it is not permitted in the other. DDA in its history has not allowed amalgamation of hotel plots and by doing so would be setting a bad precedent”.

The request of the respondent-hotel for amalgamation was accordingly rejected.

10. Questioning the above decision of the LG, the respondent herein filed W.P. (C) No. 8496/2008 before a single judge of this court who allowed the petition and issued a writ of mandamus to the appellants herein to grant permission for amalgamation within 10 weeks in accordance with the Resolution dated 07.01.1991. The writ petitioner had deposited a sum of ₹4 crores; the court directed that it will not be entitled to any interest and further directed the writ petitioner to deposit the balance amount towards amalgamation charges in accordance with the aforesaid Resolution within the time-frame allowed. The time allowed for construction was also extended by the period for which the matter remained pending in the courts.

11. It is the judgment of the learned single judge in W.P. (C) No.8496/2010 that is impugned in this appeal filed by DDA.

12. The main contention of the appellant-DDA is that there is no arbitrariness in the decision of the competent authority refusing amalgamation, that no mala fide has

been alleged by the respondent, that clause 3.10(vii) of the conveyance deed does not confer any vested right on the respondent-hotel and so long as the decision does not suffer from the vice of arbitrariness or mala fide the court should be reluctant to interfere in a matter that is essentially one of policy. It is, on the other hand, contended for the respondent-hotel that its request for amalgamation is entitled to be considered fairly and reasonably, that the reasons given by the competent authority for refusing the request are not germane to the decision and is opposed to the Resolution of 1991 which embodies the policy permitting amalgamation on conditions being fulfilled, that ultimately the amalgamation would only benefit the DDA by way of additional charges of ₹23 crores and further that the basic postulate of the decision of the competent authority, i.e., that the terms and conditions of the contract between the parties would over-ride the statute, is flawed and invalidates the decision itself. Written submissions running into 16 pages were filed on behalf of the respondent and they have also been considered.

13. The question for consideration is whether the competent authority failed to take into account relevant material or took into account irrelevant material in rejecting the respondent-hotel's application for amalgamation. As pointed out by the learned single judge in the impugned judgment, the judgment of the Division Bench overturning the judgment of the earlier single judge became final, the consequence being that it was no longer permissible for the competent authority to consider himself fettered by clause 3.10(vii) of the document; in other words, he cannot hold the view that under the said clause no amalgamation was permissible. He had to consider and balance such factors as (i) that no additional FAR would be gained by the respondent; (ii) that DDA would be richer by the sum of ₹23 crores which the respondent had offered to pay as prescribed in the Resolution and the MOUD document; (iii) that a single hotel on the combined plots would be beneficial from the architectural point of view; (iv) that there would be lesser consumption of electricity and (v) that there would be availability of larger parking space. In the decision taken on 10.11.2008 which was impugned before

the learned single judge, the competent authority – to our mind – appears to have taken due note of these considerations. The Division Bench itself was not inclined to express any opinion on those factors as it was the exclusive domain of the LG. He gave three reasons for again refusing the request of the respondent. They have already been quoted. The first reason, i.e., that changing of auction conditions post-auction would vitiate the entire procedure as the amalgamation will totally change the type of hotel that can be constructed on the plots is not, in our view, open to the criticism that it merely reiterates one of the conditions of the auction which has been interpreted by the Division Bench as not imposing a fetter on the competent authority to approve amalgamation of plots post-auction. Now it cannot be disputed that it is the discretion of the LG – the competent authority – to approve or reject the request for amalgamation on relevant considerations. The auction of the plots was in the background of the ensuing commonwealth games; hotels were to be constructed in the two plots to accommodate the tourists expected to watch the games. That both the plots were successfully bid by the respondent can confer no right of any expectation – legitimate or otherwise – that their request for amalgamation of the plots would be accepted. When the DDA had auctioned the plots separately for the purpose of putting two separate hotels to accommodate the tourists attending the games, it is in our opinion quite a relevant consideration that changing of the auction condition (that amalgamation would not be unilaterally allowed) would vitiate the entire procedure as it will totally change the type of hotel that can be constructed on the plots. In applying this criterion the competent authority, in our view, committed no error; and in doing so, he was not misinterpreting clause 3.10(vii) of the document which prohibited only a unilateral amalgamation without due permission.

14. The second reason given by the competent authority is equally relevant and weighty. It impinges on the image and reputation of the DDA as a fair body which would like to maintain its image unblemished by allegations of favouritism and unfairness. It reflects the concern the competent authority has for the rules of the game.

He has, in our opinion, rightly given due weight to the damage that the approval for amalgamation is likely to cause and the possible criticism that may be levelled against DDA for changing the condition, post-auction, without valid reasons.

15. The last reason has no doubt mixed up two distinct and separate criteria, one that is not relevant because DDA itself does not subscribe to that view, but on that score the decision itself cannot be rendered invalid. In the first part, it says that commercial plots and hotel plots are different and distinct and different considerations apply to them and so amalgamation of plots, normally permitted in commercial plots, cannot be allowed in the case of hotel plots. This runs counter to the stand taken by DDA – noted both in the judgment of the Division Bench and in the impugned judgment – that hotel plots are no different from commercial plots. Even if the first part of the third reason is considered irrelevant or as an erroneous intrusion into the decision-making process, the later part of the reason can stand independently on its own. It takes into account the history of DDA where no amalgamation of hotel plots was ever permitted and proceeds to say that doing so now “would be setting a bad precedent”. These two parts of the third reason given by the competent authority are severable. Again as pointed out earlier, it was well within the realm of considerations which the LG ought to take into account while exercising his discretion in dealing with an application for amalgamation of plots that granting the request, considering the past record of DDA, would set a bad precedent. It is not for this court to embark upon an enquiry as to whether the amalgamation, if granted, would set a bad precedent or not. What we must consider, however, is whether the effect of setting what the LG considers to be a bad precedent is a relevant consideration in the decision-making process. We are clearly unable to say it is not.

16. It is essentially for the competent authority to weigh the impact of different criteria or considerations before taking a decision on the request for amalgamation of hotel plots. What emerges from the reasons given by the competent authority is a

concern for fairness in dealing and an anxiety not to set a precedent which he considered to be bad. It may be true that the DDA would be richer by a handsome amount of ₹23 crores, but that was perhaps considered to be a small price to pay to ensure fairness and transparency in dealings. The other considerations, such as lower electricity bills, more parking space, bigger hotel being advantageous from the architectural point of view etc. have apparently not been considered by the LG to outweigh what he thought was the appropriate and relevant considerations. There seems to be no arbitrariness in his decision; mala fides have not even been suggested.

17. The contention taken on behalf of the respondent before us that the terms of the contract cannot over-ride the statute and the Nazul Rules have statutory force, as they have been held to be by the earlier Division Bench whose judgment has become final, is undoubtedly meritorious but we are afraid it is no solution to the question that arises in the appeal. Even accepting the contention, we must still enquire into the decision of the competent authority to find out if it is based on relevant considerations. In this, judicial review has a limited role. The decision itself cannot be questioned if the decision-making process has been properly gone through in letter and spirit. If relevant considerations or criteria have been kept in view and given the consideration that they deserve, we do not think that the decision itself can be disturbed merely because the court, on the same material, might have come to a different decision. As rightly pointed out on behalf of the appellant-DDA, the respondent-hotel does not have any vested right to get approval for the amalgamation of the plots; it only has a right to apply for the approval and to be fairly considered. The impugned decision of the competent authority satisfied these basic postulates.

18. It was then said on behalf of the respondent that the learned single judge has rightly held the first reason given by the LG to be contrary to the judgment of the earlier Division Bench. The contention is right to the extent it limits itself to saying that clause 3.10(vii) is not to be understood as a fetter imposed upon the competent

authority to allow amalgamation of plots. But if it is also meant to convey that in the light of the judgment of the Division Bench it is not even open to the LG to refuse permission on the ground that changing of the auction condition would vitiate the entire procedure and result in changing the type of hotel that can be constructed on the plots, it does not appeal to us to be the correct way of understanding the reason. It was clarified that the contention is that if such a view is taken, then in no case can approval be granted and clause 3.10(vii) conferring power upon the competent authority to allow amalgamation of plots would remain a dead-letter. But then, if it is correct that the respondent (or any auction-purchaser of a commercial plot) does not get any vested right to amalgamate the plots and that it is the discretion of the competent authority (to be exercised properly) to permit amalgamation or not, then it should also be proper and lawful that a refusal can be based upon the ground that changing the condition, post-auction, would amount to vitiating the auction procedure and would further result in construction of a hotel which is entirely different from what was in contemplation when the auction was made. In other words, it was a fundamental objection raised by the competent authority. The fact that the objection was so fundamental only strengthens the decision of the competent authority and does not whittle down the conferment of the discretion nor does it negate the very existence of the discretion. We must, in the circumstances, view it as a reason germane to the decision.

19. It was then contended for the respondent that the second reason – that the permission would lay DDA open to the charge of favouritism since many international hoteliers did not participate in the auction because of the condition relating to amalgamation – is wholly irrelevant because clause 3.10(vii) merely prohibited the unilateral amalgamation of the plots and that it cannot therefore be said that reputed names in the international hotel business did not participate in the auction because of any absolute prohibition against amalgamation; their decision not to participate could have been due to various other reasons which can only be speculated. The opinion of the learned single judge that this is a whimsical and arbitrary reason is sought to be

supported on the ground that even otherwise the reason is irrelevant because of the Resolution dated 07.01.1991 which merely regulates the approval by laying down certain conditions for amalgamation. It is pointed out that so long as the conditions are fulfilled, there should be no refusal. The argument impinges upon the doctrine of legitimate expectation without being explicit; nevertheless, it cannot be accepted. The resolution merely lays down certain conditions to be fulfilled once a request to amalgamate the plots is granted approval; it does in no way confer any right on the applicant to claim that since he is prepared to fulfill the conditions, he has a right, or even a legitimate expectation to be allowed to amalgamate the plots. Holding to the contrary would actually render the discretionary power of the competent authority in terms of clause 3.10(vii) meaningless. We do not think it would be proper to hold that the Resolution binds the competent authority. It is different from saying that he should give valid reasons for his refusal and cannot reject the application for amalgamation whimsically or capriciously.

20. With regard to the third reason, it was argued on behalf of the respondent that the learned single judge has rightly held that the LG has not pointed out to any norm that was violated, when he observed that permitting the amalgamation would set a bad precedent. But then, he has stated that in the history of the DDA amalgamation of hotel plots had not been permitted and making an exception in the case of the respondent would set a bad precedent. We are of the view that the reason cannot be read and understood in isolation; it needs to be read with the other two reasons, particularly the second reason which reflects the anxiety of the LG to protect the DDA from the charge of favouritism. It may be perfectly right to say that no violation of any norm has been shown; but it is also true that setting what is perceived to be a bad precedent may erode the credibility of DDA and the principles of transparency, both vital for its existence. These are relevant considerations.

21. It may not be proper, in our opinion, to treat the reasons given by the competent authority for his decision as provisions of a statute and examine them in that perspective. Our approach should be broad-based, the scrutiny confined to seeing whether the decision suffers from the vices of arbitrariness and to ensuring that irrelevant considerations have not been taken into consideration. It was for the LG to weigh and balance the factors that were advantageous to the respondent-hotel against the tenets of fair treatment, transparency, reputation of the DDA, the signals that would emanate from and the impact of setting what was perceived to be a bad precedent or changing the rules of the game post-auction. Taking all the three reasons together, and having regard to the absence of any suggestion of mala fide, we would hold ourselves back from interfering with the decision of the LG.

22. The result of the discussion is that the judgment of the learned single judge is set aside and the appeal stands allowed. The amount of ₹4 crores deposited by the respondent shall be refunded within six weeks. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JANUARY 28, 2013
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