

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No.21942 of 2013 (O&M)

Date of Order: 26.08.2015

Pawan Bhatia and others

.....Petitioners

Versus

State of Haryana and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE SHEKHER DHAWAN**

Present: Shri Puneet Bali, Sr. Advocate, with
Shri Vinod S. Bhardwaj, Advocate, for the petitioners.

Shri Lokesh Sinhal, Addl. AG, Haryana.

Shri R.S. Cheema, Senior Advocate, with
Shri Shekhar Verma, Advocate, for respondent Nos. 4 and
5.

Shri Aashish Chopra, Advocate, for respondent No.6.

Shri Arun Monga, Advocate and
Shri Kanwal Goyal, Advocate, for respondent No.7.

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

Hemant Gupta, J.

The petitioners have claimed a writ of mandamus directing an inquiry into the functioning of the Department of Town and Country Planning, Haryana, whereby the licences and/or the change of land use has been granted in an arbitrary manner and for illegal consideration. The petitioners have also sought to set aside the order dated 20.9.2013 (Annexure P.17), whereby an appeal filed by the petitioners against the rejection of their claim for grant of licence,

stands dismissed. Such appeal was directed against an order dated 16.9.2011 passed by the Director General, Town and Country Planning, Haryana.

The petitioners are owners of land measuring 108 kanal 19 marla (13.61875 acres) in the revenue estate of village Ullawas, Tehsil and District Gurgaon. As per the petitioners, the minimum area for grant of licence for a Group Housing Colony is 10 acres. The petitioners applied for licence for developing a Group Housing Colony in terms of the Haryana Development and Regulation of Urban Areas Act, 1975 (for short 'the 1975 Act') on 10.9.2010, received by the respondents on 13.9.2010. The petitioners state that they meet the criteria for grant of licence even if partition of the land measuring 13 kanal 15 marla was pending at that time as it came to be decided on 22.12.2011. It is pointed out that, on the other hand, the Director General, Department of Town and Country Planning, Haryana, has granted licences to the private respondents by seeking removal of deficiencies by such respondents, though the similar treatment was not extended to the petitioner.

The undisputed facts are that earlier a Final Development Plan was published on 5.2.2007 under Section 5 of the Punjab Schedule Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (for short 'the 1963 Act'). The land of the petitioners falls within the Municipal limits of Gurgaon and is located towards southern side of Sector 60 but was not assigned any use under the said Development Plan. The petitioners sought a licence for Group Housing by depositing security to the tune of Rs.9.65 lacs vide demand draft dated 7.9.2010. As per the petitioners, no deficiency was pointed out in respect of the application submitted.

Another Draft Development Plan- 2025 was published on 4.10.2010 on the basis of layout drawing dated 25.8.2010. The

southern side of Sectors 59, 60 and 63 was given a nomenclature of Sector 63-A. In terms of the Draft Development Plan published, public at large was given 30 days' time to file objections. It is also pointed out that a public notice (Annexure P.6) was published in the newspapers on 4.10.2010 though the same is dated 1.10.2010. The public advertisement reads as under:-

“It is informed to the General Public that amendment in Final Development Plan, Gurgaon Manesar Urban Complex published vide Haryana Government Gazette (Extra Ordinary) Notification No.CCP9NCR/FDP (G) 2007 / 359, dated 05.02.2007 is being carried out for which the state level committee meeting was held 27.09.2010. It has been observed that application are being received in the Department for granting Change of Land Use permission and licence application are being received in the Department for granting Change of Land Use permission and licence applications on the basis of such proposed amendment. The draft Development Plan of said Gurgaon-Manesar Urban Complex for perspective year 2025 will be published as per Section 5 (4) of the Punjab Schedule Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 for inviting the objections and suggestions. Though a person can apply on the basis of the Draft Development Plan- 2025 after publication in the Official Gazette, it does not confer any right in favour of the applicant with respect to grant of change of Land Use Permission and Licence which will not granted till the publications of Final Development Plan Gurgaon-Manesar Urban Complex-2025 under Section 5(7) of the ibid Act in the Official Gazette. It is informed that the General Public that the applicant may apply at his/her own risk fully knowing the above stated position. Any application received on the basis of proposed proposals in Draft Development Plan, Gurgaon-Manesar. Urban Complex – 2025 before its publication in official Gazette will be rejected.”

The petitioners applied for licence on 10.9.2010 in Sector 60 though in the Draft Development Plan published later, such land now forms part of Sector 63-A, Gurgaon.

The private respondents submitted their respective applications for Group Housing Licences on 4.10.2010 itself, the day draft development plans was published in the official gazette and a public notice in the news papers was published. It is pointed out by the petitioners that some of the respondents have prepared the demand draft(s) of the requisite amount for licence on 1.10.2010 itself.

A show cause notice dated 6.10.2010 was given to the petitioners that the application for grant of licence for 13.61875 acres cannot be considered in terms of Section 3(3)(b) of the 1975 Act. Subsequently, the request for grant of licence was declined on 9.11.2010. The reasons communicated in the forwarding letter read as under:-

“3. The applied land was falling outside the limits of Final Development Plan of Gurgaon-Manesar Urban Complex-2021 as on the date of the application i.e. 13.09.2010.

4. Apart from above, 20% of the residential zone is 18.10 acres which is permissible for Group Housing Colony and Department has already granted license for area measuring 17.99 acres and only 0.301 acres Net Planned Area is available and minimum area required for grant of licence for developing residential Group Housing Colony in hyper Potential zone is 10.00 acres (as per Policy Memo No.7/16/2006-2TCP, dated 19.12.2006 duly hosted on website namely www.tcpharyana.gov.in) and thus area applied for grant of licence for area measuring 13.61875 acres cannot be considered.

Detailed orders are enclosed.”

The detailed order dated 9.11.2010, inter-alia, gave liberty to the petitioners to apply for a licence in Sector 63-A, Gurgaon Manesar Urban Complex on the basis of the Draft Development Plan – 2025.

The petitioners earlier filed CWP No. 18838 of 2010 challenging the show cause notice as well as the public notice issued claiming that the petitioners be granted licence for which application had been submitted on 10.9.2010 on the basis of seniority of submitting

application on 10.9.2010. This Court passed an order on 14.10.2010 directing the parties to maintain status-qua regarding grant of change of land use. Since an order rejecting the claim of the petitioners for licence was passed in the meantime, the petitioners filed another petition bearing CWP No. 21236 of 2010.

Both the writ petitions filed by the petitioners were decided on 9.8.2011 with a direction to the Director, Town and Country Planning, to decide the petitioners' application for grant of licence irrespective of the Sectors in which the land falls. The operative part of the order reads as under:-

“In view of the statement made by counsel for respondents No.1 and 2, and the statement made by counsel for the petitioners, the present petition has been rendered infructuous and is disposed of accordingly, with a direction to the Director, Town and Country Planning, Haryana, to decide the petitioners' application for grant of license irrespective of the sector in which the land falls in accordance with law obtaining on the date of the application and within 15 days from receipt of a certified copy of this order. In case, the application is decided against the petitioner, and a license is granted to any other party, the license so granted, shall remain in abeyance, for a week so as to enable the petitioners to file an appeal. The order dated 04.10.2010 (Annexure P-6) is consequently set aside. No order as to costs.”

It is thereafter the request of the petitioners for grant of licence was declined on 19.9.2011 vide Annexure P.14. The petitioners challenged the said order in CWP No. 18511 of 2011, which was disposed of with liberty to the petitioners to file an appeal against the impugned order. It is thereafter the Principal Secretary, Government of Haryana passed the order on 20.9.2013. The relevant extracts from the said order read as under:-

“7.....The appellants land, though not a part of the Development Plan as published on 05.02.2007, on the date of submission of their application for license, intentionally

mislead the department, claiming it to be falling in Sector- 60, Gurgaon. Similarly there is no merit in the contention of the appellant that the grounds of rejection were not mentioned in the notice dated 30.08.2011. The application of the appellant was rejected vide order dated 09.11.2010. The Hon'ble High Court vide order dated 09.08.2011, has specifically directed the appellate authority to decide the appeal of the appellants in accordance with the law as applicable on the date of submission of application. The appellants were given proper opportunity of the hearing on 05.09.2011 and even the representation dated 08.09.2011 submitted by the appellants after the date of hearing was also examined before passing the order dated 16.09.2011. Therefore, there is no merit in the above said plea of the appellant. It is also on record that the Takseem Intkal of the land measuring 13K- 15 M was sanctioned only on 22.02.2011 i.e. much after the date of submission of application. The mutation of the land measuring 61K- 7M was also approved only on 18.09.2010. The appellants had no clear title on the land applied for licence as on the date of the submission of the application on 10.09.2010. The representative for respondent no.4 & 5 rightly pointed out that the appellants being aware that the Draft Development Plan of GMUC was going to be published soon, with the provision for a new residential sector i.e. Sector 63-A, submitted application in advance to gain seniority, though as on that date, the applied area was not a part of any Development Plan.

In view of the above said discussion, I do not find any merit in the plea raised by the appellant. There is no reason to interfere in the order dated 16.09.2011 passed by respondent no.2, which is just and legal. Accordingly, the appeal is hereby dismissed.”

The present petition is directed against the above said order. In reply to the present petition, the official respondents have sought to justify the rejection of the application of the petitioners for grant of licence. In an affidavit dated 4.1.2014, it is mentioned that as per the Policy of the State Government only 20% of the area of the residential area is permissible for Group Housing component. The said component in Sectors 59, 60, 63 and 67 was already utilized. The

petitioners applied for grant of licence for Group Housing Colony in agricultural zone, whereas the private respondents submitted applications for licences in Sector 63-A for setting up of Group Housing Colonies. Separate replies have filed on behalf of the private respondents.

Various interim orders have been passed from time to time in the present writ petition. However, on 13.8.2015, the following two questions were framed to be considered:-

- “1. How the licence for development of a colony can be granted on publication of draft development plans published in terms of Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963?
2. As to how the policy for grant of licence on first come first served basis is fair and reasonable, in view of the Hon’ble Supreme Court judgment titled as Centre for Public Interest Litigation and others v. Union of India and others, 2012(3) SCC page 1?

In pursuance of such order, an additional affidavit of the Chief Town Planner, Haryana dated 19.8.2015 was filed relying upon the policy dated 5.7.2012. The said policy reads as under:-

“The matter pertaining to fixing the effective date for acceptance and consideration of licence applications vis-à-vis the publication of Development Plans has been considered by the Government keeping in view the present practice of accepting such applications after notification of the Draft Development Plans in the Official Gazette and at times even grant of licences before the publication of Final Development Plans, except the practice followed in case of Gurgaon Manesar Urban Complex where licences were granted only after publication of Final Development Plan. Taking into account the fact that the Draft Development Plan is notified primarily for the purpose of inviting objections from public at large and several changes are possible in the Draft Development Plans at the time of publication of Final Development Plan, this practice has been reviewed for amendment. In order to avoid legal complications arising out of any such change at the time of publication of the Final Development Plan, the Government is of the opinion that the date of publication of the Final

Development Plans of Hyper and High Potential towns be fixed as the effective date for acceptance and consideration of licence applications. So as to prevent the abrupt stoppage of licences in the low and medium potential towns, the said policy shall be extended to such towns and for CLU applications at a later date for which separate instructions shall be issued.

Accordingly, in accordance with the powers conferred under Section 9-A of the Haryana Development and Regulation of Urban Areas Act, 1975, the Governor of Haryana is pleased to pronounce the following policy parameters in this regard:-

- (i) In the towns/urban areas falling in Hyper & High Potential Zone, the date of publication of Final Development Plan shall be the effective date for acceptance and consideration of the licence applications.
- (ii) In towns/urban areas falling in Medium & Low Potential Zones, the date of publication of Draft Development Plan shall be the effective date for acceptance and consideration of licence applications provided:
 - (a) No further change is envisaged in any subsequent Development Plan of that area for which 'in-principle' approval of the Government has been obtained;
 - (b) There is no recommendation of DPC/ SLC to effect amendments in the Development Plan proposals already in vogue of the applied area.
- (iii) In case of any Development Plan falling in more than one Potential zone, the policy prescribed for the higher category zone shall be considered to be applicable.
- (iv) On account of availability of information regarding Development Plan proposals in the public domain, demand drafts of scrutiny fee and licence fee of any date prior to publication of Draft/Final Development Plan, as the case may be, shall also be accepted provided the same is valid for at least one month from the date of submission of the application. However, the effective date for acceptance and consideration of licence applications shall continue to remain as prescribed under Sr. No. (i) and (ii) above.

- (v) Any application submitted prior to the prescribed effective date shall be considered as premature and shall be returned for re-submission after publication of the respective Development Plan.”

In the affidavit, it has been stated that the 1963 Act is umbrella legislation for the purpose of regulating the development in the scheduled area and hence the land use proposal of the development plan forms basis for consideration of the licence applications under the 1975 Act. The Department continued to receive the licence applications on the basis of revised draft development plans, but the licences were granted only after publication of the Final Development Plan in the year 1996 and later revised on 5.2.2007. It is said to the following effect:-

“4. That in this regard, it is submitted that as per practice followed after 05.07.2012, the licence applications have been considered for grant of licence in High and Hyper Potential Zones only on the basis of the Final Development Plan published under Section 5 of the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963. A copy of the Government instructions dated 5.7.2012 is enclosed as Annexure R.1. In this regard, it needs to mention that the Development Plan prepared under Punjab Scheduled Roads & Controlled Areas Restriction of Unregulated Development Act, 1963 is an umbrella for purposes of regulating the Development in the Controlled Areas, hence, the land use proposal of Development Plan forms basis for considering the licence applications under the Haryana Development and Regulation of Urban Areas Act, 1975 (Act No. 8 of 1975). It is further clarified that the Department continued to receive the licence applications and considered these for grant of licence on the basis of Draft Development Plan 2001 AD of controlled area Gurgaon published in 1982 till its final publication in 1996. Although, the licence applications were received on the basis of revised Draft Development Plan Gurgaon – Manesar Urban Complex (GMUC)-2021AD, but the licences were granted only after the publication of Final Development Plan – GMUC-2021AD on 5.2.2007. The codified policy for receiving the applications vis-à-vis publication of

Development Plan was put in place on 05.07.2012. It is further informed that there was no prescribed policy before 5.7.2012 pertaining to considering licence applications on the basis of Draft/Final Development Plan, though neither the Punjab Scheduled Roads and Controlled Area Restriction of Unregulated Development Act, 1963 or the Act of 1975 laid any restrictions on grant of licence based on Draft Development Plan. Further the instructions dated 5.7.2012 issued by the State Government also clarified that in the towns/urban areas falling in Hyper and High Potential Zones, the date of publication of the Final Development Plan shall be the effective date for acceptance and consideration of licence applications. However, it is only in Towns/Urban Areas falling in medium and low potential zones that the date of publication of the Draft Development Plan is the effective date for acceptance and consideration of licence application provided that no further change is envisaged in any subsequent development plan of that area for which in-principle approval of the Government has been obtained and that there is no recommendation of DPC/SLC to effect amendments in the Development Plan proposals already in vogue of the applied area. Even this is done with the prior approval of the State Government. Hence, at present, no licence application in High and Hyper Potential Zones is considered for grant of licence on the basis of the Draft Development Plan.

5. That regarding second observation as to how the policy for grant of licence on first come first served basis is fair and reasonable in view of the Hon'ble Supreme Court judgment titled as Centre for Public Interest Litigation and others v. Union of India and others, it is clarified that the said policy of first come first served has been adopted as a 'Principle of Natural Justice'. It is further added that since no natural resource in the ownership of Government is being offered through a licence under Act No. 8 of 1975, the Hon'ble Supreme Court judgment in Centre for Public Interest Litigation and others v. Union of India and others does not appear to be applicable in such licence cases. The applications for grant of licence are accordingly considered on merits of the case and as per provisions laid down in the Act of 1975 and the Rules made there-under. However, the Government is seized of the matter and devising an alternate transparent system for the purpose is under active consideration."

When the matter came up for hearing on 20.8.2015, learned counsel appearing for respondent No.7 argued that the legality and validity of a licence granted to the said respondents on the principle of 'first come first served' basis was not raised earlier. Therefore, he requested for grant of an opportunity to address arguments on the said questions. Accordingly, the matter was adjourned for today.

Learned Senior Counsel for the petitioners has vehemently argued that the process of grant of licence on first come first served basis is a principle of pure chance and accident and gives rise to an unholy race amongst the aspiring candidates for licences. Still further, the applications for licences have been sought on publication of Draft Development Plan, though the same are said to be considered after publication of a Final Development Plan. There is no reason as to why the applications should have been accepted on the basis of Draft Development Plan even before the finalization of the plans. It is argued that though the application of the petitioners was in respect of the land which then formed part of Sector 60, yet the licence has to be granted in respect of the land, which is now located in Sector 63-A. Such application could not have been rejected for the reason that the petitioners applied for Group Housing Licence for and in respect of the land situated in Sector 60.

Shri Lokesh Sinhal, learned Additional Advocate General, Haryana, categorically stated that the licences were being granted on first come first served basis and that the Government is seized of the matter to devise an alternative transparent system for the said purpose.

On the other hand, Shri R.S. Cheema, learned Senior Counsel, appearing for respondent Nos. 4 and 5 argued that since the process of grant of licence is dependent upon many factors, such as total landholding, density permissible, financial resources, neighbourhood

plans as contemplated under Rule 8 of the 1976 Rules, therefore, the principle of first come first served basis is the reasonable basis for grant of licences. It is also argued that the judgment in Centre for Public Interest Litigation and others v. Union of India and others, 2012(3) SCC page 1, is materially different as it was a case of licence(s) of the natural resources, but in the present case, the licence is not for a natural resource but in respect of a property owned by the respondents. Therefore, the principles laid down in the aforesaid case cannot be extended to the facts of the present case.

Shri Arun Monga, learned counsel representing respondent No. 7 argued that the principle of first come first served basis is not a principle followed by the State. In fact said respondent was applicant No. 17 on 4.10.2010 but has been granted licence. Therefore, it is the suitability of an applicant which is taken into consideration for the grant of licences.

Shri Aashish Chopra, learned counsel representing respondent No.6 argued that the petitioners applied for a licence of Sector 60 and in respect of which no density was available. The density is explained to mean the extent of area available for Group Housing Licence, which as per the State Government is 20% of the area of the residential area is permissible for Group Housing component. The petitioners applied for a licence in Sector 60 though the total available licensed area stood utilized. The petitioner was not an applicant for a licence in Sector 63-A and had applied even before the publication of the publication of the Draft Development Plan, which is not permissible in view of the public notice published on 4.10.2010. It is argued that even if on the basis of the judgment in Centre for Public Interest Litigation's case(supra), the principle of first come first served basis is

found to be unreasonable, the same should be extended prospectively and not to the licences already granted.

Before we consider the respective contentions of the learned counsel for the parties, certain statutory provisions need to be noticed:-

The Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963

“5. Publication of plans etc. in controlled area.- (1) The Director shall, not later than three months from the declaration under sub-section (1) of section 4 or within such further period as the Government may allow, prepare plans in the prescribed manner showing the controlled area and signifying therein the nature of restrictions and conditions proposed to be made applicable to the controlled area and submit the plans to the Government.

(2) Without prejudice to the generality of the powers specified in sub-section (1), the plans may provide for any one or more of the following matters, namely :—

(a) the division of any site into plots for the erection or re-erection of any building and the manner in which such plots may be transferred to intending purchasers or lessees;

(b) the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets and other public purposes ;

(c) the development of any site into a township or colony and the restrictions and conditions subject to which such development may be undertaken or carried out;

(d) to (j) xxx xxxx xxxx

(k) any other matter which is necessary for the proper planning of any controlled area and for preventing buildings being erected or re-erected haphazardly in such area.

(3) The Government may either approve the plans without modifications or with such modifications as it may consider necessary or reject the plans with directions to the Director to prepare fresh plans according to such directions.

(4) The Government shall cause to be published by notification the plans approved by it under sub-section (3) for the purpose of inviting objections thereon.

(5) Any person may, within thirty days from the date of publication of the notification under sub-section (4), send to the Director his objection and suggestion in writing, if any, in respect of such plans and the Director shall consider the same and forward them with his recommendations to the Government within a period of sixty days from the aforesaid date.

(6) The Director shall also give reasonable opportunities to every local authority, within whose local limits any land included in the controlled area is situated, to make any representation with respect to the plans.

(7) After considering the objections, suggestions and representations if any, and the recommendations of the Director thereon, the Government shall decide as to the final plans showing the controlled area and signifying therein the nature of restrictions and conditions applicable to the controlled area and publish the same in the Official Gazette and in such other manner as may be prescribed.

(8) Provision may be made by rules made in this behalf with respect to the form and content of the plans and with respect to the procedure to be followed, and any other matter in connection with the preparation, submission and approval of the plans.

(9) Subject to the foregoing provisions of this section, the Government may direct the Director to furnish such information as the Government may require for the purpose of approving the plans submitted to it under this section.”

The Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Rules, 1965

“2. **Definitions.-** In these rules unless the context otherwise requires:-

(a) to (c) xx xx xx

(d) “Development Plan” means the final plan notified in the official Gazette under sub-section (7) of section 5;

(e) and (f) xx xx xx

(g) “Sector” means any part of the controlled area indicated as such in the Development Plan;

(h) “Sector Plans” shall mean the Plan as proposed under rule 8 and kept in the office of the Director showing the layout of a sector and in particular defining the main road system and approximate location of sites for shopping centre, school and

other public buildings and major open spaces within the sector.

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9. Publications of development plans for inviting objections. [Sections 5(4) and 6] - A copy of the development plan notified by Government under sub-section (4) of section 5 shall be sent by the Director to every local authority within whose limits any land included in the controlled areas is situated so as to enable it to make any representation within a period of three months it may like to make with respect to the plan.

10. Publication of final development plans. [Sections 5(7) and 25(2) (b)]- The development plan as notified by the Government under sub-section (7) of Section 5 shall in addition to its publication in the official gazette be published by displaying copy thereof at a conspicuous place at the office of the-

- (i) Director;
- (ii) Estate Officer, if any, having jurisdiction in the controlled area;
- (iii) Deputy Commissioner of the district in which the controlled area is situated; and
- (iv) Panchayat Samiti or Samitis in which the controlled area is situated.”

Haryana Development and Regulation of Urban Areas Act, 1975

3. Application for licence – (1) Any owner desiring to convert his land into a colony shall, unless exempted under Section 9, make an application to the Director, for the grant of licence to develop a colony in the prescribed form and pay for it such fee and conversion charges as may be prescribed. The application shall be accompanied by an income-tax clearance certificate:-

Provided that if the conversion charges have already been paid under the provisions of the Punjab Scheduled Roads and controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963), no such charges shall be payable under this Section.

(2) On receipt of the application under sub-section (1), the Director shall, among other things, enquire into the following matters, namely:-

- (a) title to the land;
- (b) extent and situation of the land;
- (c) capacity to develop a colony;
- (d) the layout of a colony;
- (e) plan regarding the development works to be executed in a colony;
- (f) conformity of the development schemes of the colony land to those of the neighbouring areas.

xx xx xx

(3) After the enquiry under sub-section (2), the Director, by an order in writing, shall-

Haryana Development and Regulation of Urban Areas Rules, 1976

“2 – Definitions. – In these Rules unless the context otherwise requires:-

(a), (b) and (c)

xx xx xx

(cc) “development plan” means the plan prepared under the provisions of the Punjab Scheduled Roads and controlled Areas Restriction of Unregulated Development Rules, 1965.

xx xx xx

3. Application for licence. (1) Any owner of land desirous of setting up a colony shall make an application in writing to the Director in form LC-1 and shall furnish there-with;-

- (a) a demand draft for licence fee at the rates (given in the Schedule to these rules) for the plotted colony, group housing colony and commercial/office complexes in residential sectors and for industrial colony;
- (b) xx xx xx

xx xx xx

8. Enquiry by Director [Section 3(2)]. (1) On receipt of application in the prescribed form and complete in all respects, the Director shall enquire into the following matters and such other matters as he may consider necessary:-

- (a) title to land;
- (b) Extent and situation of the land;
- (c) Capacity to develop the colony;
- (d) Layout plan of the colony;
- (e) Plan regarding the development works to be executed in the colony;
- (f) Conformity with the development scheme of the land in question and the neighbouring areas; and
- (g) Conformity with the development plan.

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9. Rejection of application [Section 3]. The Director may after making inquiry as mentioned in sub-rule (1) of rule 8 and after giving reasonable opportunity of being heard to the applicant by an order in writing reject the application to grant licence in form LC II, if:-

- (a) it does not conform to the requirements of rules 3, 4 and 5 and 8;
- (b) the plants and designs of the development works submitted with the application are not technically sound and workable; or
- (c) the estimated expenditure on water-supply mains or extramural and outfall sewers is not commensurate with the size of the colony.”

We have heard learned counsel for the parties and find that there exists a policy for grant of licence on first come first served basis. Such is admitted position by all the parties appearing before this court except Respondent No.7. Respondent No.7 got a licence earlier in point of time though it was at Serial No. 17. The question to be examined is as to whether the licence granted on the basis of first

come first served basis is fair and reasonable method of allotment of licence?

The 1963 Act is the umbrella legislation dealing with the controlled area and also prescribes the procedure for preparation and publication of the development plans regulating the construction within the controlled area. Such Act does not contemplate the grant of licences for development of a Group Housing Colony but contemplates grant of licences for change of land use. Under 1975 Act, an application for a licence can be filed with the documents of title of the land; extent and situation of the land; capacity to develop a colony and the layout of a colony. There is no reference to the requirement of conformity with any development plan at the time of submission of the application for the Group Housing Licence. It is only at the time of grant of licence, the development plan becomes relevant in terms of Rule 8 of 1976 Rules that too after such clause was inserted by amendment on 29.1.2007.

The development plan as contemplated by the 1975 Act is a Final Development Plan. Still further, we find that the decision of the State Government, to accept application on the basis of Draft Development Plan, in High and Hyper Potential Zones and applications in respect of other areas on the basis of Final Development Plan is without any reasonable basis. It is not a classification based on an intelligible differentia, which can be sustained. The 1975 Act contemplates only the Final Development Plan. Therefore, the action of the respondents in accepting the applications on the basis of the Draft Development Plan is wholly unwarranted, unjustified, illegal, irrational, arbitrary and against the express provisions of the 1975 Act.

The licences have been granted on the basis of first come first served basis. The principle of first come first served basis has been

commented adversely in Centre for Public Interest Litigation and others v. Union of India and others, (2012)3 SCC 1. The Court examined *inter-alia* the following questions:-

“(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

xx xx xx

(iv) Whether the policy of first-come-first-served followed by DoT for grant of licences is ultra-vires the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as ‘the Minister of Communications and Information Technology’), without consulting TRAI, with a view to favour some of the applicants?”

The Court answered the said questions when it held to the following effect:-

“94. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim.

95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair

opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.”

The issue of grant of state privileges by the process of auction alone came up for answer in the Presidential Reference, since reported as Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1. The Constitution Bench held that action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. The Court held:-

“107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the

Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *State of A.P. v. McDowell & Co.*, (1996)3 SCC 709, has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

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129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.

130. *A fortiori*, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resource discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

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146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a

comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables: it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.”

In the light of the aforesaid judgments, we do not find any merit in the argument that the grant of licence on the basis of first come first serve basis is fair, reasonable or transparent method. It is wholly

immaterial that the licence is sought in respect of the land owned by them. The fact is that without licence, the Group Housing cannot be set up. The licence is a pre-requisite condition to develop a colony which is a privilege granted by the State and is largesse. In the absence of a licence, a land owner continues to be owner of the land. There is no compulsion for him to change the land use or to set up a colony, but once it is proposed to set up a colony, then the statutory conditions, pre-requisite for grant of a licence, are to be satisfied.

We further find that the principle of first come first served basis has led to an unholy race. The petitioners submitted their application dated 10.9.2010 which was received on 13.09.2010 soon after the finalization of the lay out plan on 25.08.2010. Some of the other aspirants submitted applications for licences on the day the Draft Development Plan was published on 4.10.2010. We find that the public notice does not give any starting time for submission of an application nor the last date. It is an open ended scheme. Any applicant can apply at any point of time. Such application would be considered if the density is available. It does not take into consideration as to whether the external developments have been completed or shall be completed by the time the constructed apartments in the Group Housing shall be offered for possession. It does not reflect the preparedness of the State for the grant of licence. Since Gurgaon is a fast developing urban complex, there is large demand for licences, but we find it is not fair and reasonable to accept the application(s) on the basis of Draft Development Plan and grant the licence(s) on first come first served basis.

Though there is a provision of rejection of the application yet the action of permitting some of the applicants to make up the deficiencies, while declining such permission to the other, is an arbitrary process of grant of licence. Since, to develop a colony is a

privilege; the consideration of the same has to be fair and reasonable manner. What should be transparent and fair method of grant of licence, it is for the State Government to prescribe such policy. Whether the policy is to go for an auction the licences after determining the eligibility of the applicants or by draw of lots or any other method, it is for the State Government to frame such policy subject to the test of reasonableness, in accordance with law.

Since the licences have been granted on the basis of the doctrine of first come first served basis, which is not a fair, reasonable and transparent method, we find that the licences granted to the private respondents, cannot be sustained.

In view of the above, while allowing the present writ petition, the licences granted to respondent Nos. 4 to 7 are cancelled. The State Government may consider the grant of licences after framing a transparent and fair policy to grant privilege of licence.

(Hemant Gupta)
Judge

(Shekher Dhawan)
Judge

26.08.2015
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