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HIGH COURT OF DELHI AT NEW DELHI

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W.P. (C) No.1974/2014

Decided on : 16th May, 2016

SANTOSH MALIK & ANR.

..... Petitioners

Through: Mr. L.K. Singh, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr. Sanjeev Sabharwal, SC for the DDA.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. The petitioners have filed the present writ petition under Article 226 of the Constitution, which is third in the series wherein the petitioners have prayed as under:-

(a) for quashing of order dated 2.1.2014 rejecting the regularization in respect of Plot No.17, Block-A, Sector-12, Dwarka, New Delhi-75;

(b) to declare that the entire construction was within the permissible FAR and liable to be regularized or

(c) alternatively direct the DDA to compound the excess FAR and regularize the building plan submitted by the petitioners dated 3.10.2013.

2. Briefly stated the facts of the case are that the petitioners are the owners of plot No.17, Block-A, Sector-12, Dwarka, New Delhi measuring 209 square meters. The building as on date which is raised on

the aforesaid plot, consists of basement, ground, first, second and third floors. The building plan of the ground floor was sanctioned in the year 2001. Thereafter in the year 2005 a fresh application was made by the petitioner for grant of sanction in respect of the basement and ground floor. The completion certificate in respect of these two was granted in the year 2006. On 1.3.2007, the petitioners made a fresh application for raising first, second and third floors in terms of the DDA notification dated 22.7.2006. The sanction was accorded subject to payment of Rs.2,37,854/- as processing charges. On 7.5.2007, the Supreme Court in a batch of writ petitions had banned construction of third floor on the plotted houses in Delhi. Thus, the permission which was given to the petitioner was confined only to the first and second floor subject to payment of a sum of Rs.91,349/-. This sanction was granted on 3.9.2007. Pursuant to the sanction granted, the petitioner raised the construction on the plot of land in question. The petitioner applied for permission in terms of the provisions of MDP 2021 to run a bank on the ground floor and the basement from the DDA which was granted to the petitioner on 15.2.2008 subject to his depositing a sum of Rs.2,22,676/- with the MCD. This was despite the fact that the services of the colony were not transferred to the MCD and the aforesaid charges stood deposited on 1.1.2009 and thus the permission to run the bank from the ground floor and the basement was granted. On 1.9.2008 only a fresh application for construction of third floor was made as the ban imposed by the Supreme Court was lifted. The DDA inspected the site on 20.9.2008 and after charging the processing fee of Rs.2,07,000/-, the permission to raise the third floor construction was granted which was completed on 15.12.2008.

On 24.12.2008, a notice was received from the DDA for stopping the construction which was duly replied on 05.01.2009. Another notice was also received on 22.1.2009 to which also reply was sent by the petitioners. It was at this stage that the DDA started taking into consideration the area of the basement as a part of the FAR and declared third floor as unauthorized. The basement area was declared a part of FAR by the DDA on the ground that it was being used by the bank as a cellar for keeping lockers and it was alleged to be in violation of the master plan. A show cause notice dated 26.4.2011 was issued and the same was duly replied vide reply dated 12.05.11. Thereafter, the petitioner filed a writ petition in High Court which was disposed of vide order dated 31.5.2011 giving direction to the respondent/DDA to consider the compounding of building plan and pass a final order. The petitioner accordingly made another application before the DDA for regularization of the plan on 21.6.2011 claiming that the structure which has been raised on the plot of land in question is within the permissible limit of FAR as the basement is not to be counted towards the total FAR because of the fact that it is being used as a cellar for the bank and this is permissible. Alternatively, the petitioners had also prayed that the excess FAR may be regularized on payment as per notification issued by the DDA on 23.12.2008 and 22.9.2006 but the DDA did not relent and took the stand that the basement was to be counted towards the FAR as a consequence of which the top floor, that is, the third floor was illegal and cannot be compounded. Demolition order was passed on 25.7.2011.

3. The petitioner was constrained to file another writ petition in High Court of Delhi and the court disposed of the writ petition by directing the

DDA to pass a speaking order with regard to the compounding and regularization.

4. It is the case of the petitioner that the respondent/DDA without complying with the orders of the court passed a fresh demolition order on 14.10.2011 which was assailed before the MCDAT. The said appeal was disposed of on 17.11.2011 and on the statement that DDA did not pass any order in respect of sealing or demolition. Thereafter, the petitioner applied number of times to the DDA for regularization but instead of considering the applications of the petitioner, a show cause notice dated 30.5.2012 was issued stating therein the number of violations on part of the petitioner. Reply to the same was filed by the petitioner on 18.6.2012. The respondent/DDA again rejected the application and passed a fresh demolition-cum-sealing order on 4.4.2013 which was challenged before the Ld. MCDAT, who was pleased to dismiss the interim injunction application along with the appeal vide order dated 25.04.13. Thereafter, an appeal was preferred before learned District Judge, who was pleased to pass an order of status quo vide order dated 07.06.13.

5. On 3.10.2013, a fresh application for regularization of the third floor was submitted along with the complete set of documents and levy charges of Rs.1,15,000/-. The DDA has rejected the fresh application for regularization despite the charges having been deposited vide order dated 2.6.2014. Feeling aggrieved by this repeated harassment of the DDA, the present writ petition has been filed.

6. The respondent/DDA has filed its reply wherein it has not denied either the dates or the various actions taken by the DDA on different

dates or the orders passed by the High Court or the MCDAT. But the sum and substance of the stand of the DDA has been that the basement is being used by the petitioner as a cellar which is not permissible according to the MPD 2021 and therefore, the area of the basement has to be counted towards the FAR and if done so, then the permissible FAR is 627 square meters while as the petitioner is user of the FAR which is much more than that and which can be brought in line with the Building Bye Laws and the MPD 2021 only in case the same is demolished. Accordingly, the respondent/DDA has prayed for dismissal of the writ petition.

7. I have heard the learned counsel for the parties and have also gone through the record. The only question which arises for consideration is with regard to the fact as to whether the basement, if it is used for a purpose other than the domestic storage, can be counted towards the FAR or not.

8. It may be pertinent here to mention that during the pendency of the aforesaid writ petition, the Delhi Development Authority has issued new Unified Building Bye Laws of 2016 on 22.03.2016. This building bye laws supersede the building bye laws of 1983 and therefore they shall be applicable to all the building activities in respect of urban villages, rural villages, unauthorized regularized colonies and all the areas notified by the DDA. The relevant notification reads as under:-

*“DELHI DEVELOPMENT AUTHORITY NOTIFICATION
New Delhi, the 22nd March, 2016
(Unified Building Bye Laws for Delhi 2016)*

S.O. 1191 (E). – *In exercise of the powers conferred under sub-section (1) of Section 57 of Delhi Development Act, 1957 the Delhi Development Authority, with the previous approval of the Central Government hereby make the following regulations.*

The regulations earlier notified under these clauses vide Notifications No.S.O.513, dated 26-2-1959 Gazette of India, Part-II, Section 3 (ii) dated 7-3-1959, as adopted by the Delhi Development Authority, vide Resolution No.229 dated 1-5-1965 and the Building Bye Laws 1983, published in Extra Ordinary Part IV of Delhi Gazette, published by Government of India (Delhi Administration) vide S.O. No.104, dated 23.06.1983, in force and subsequent resolutions and amendments in Building Bye Laws 1983 shall stand superseded from the date these Unified Building Bye-Laws for Delhi 2-016, shall come into force.

1.0 Short Title, Extent and Commencement

These bye laws shall be called “UNIFIED BUILDING BYE LAWS FOR DELHI 2016”. These shall be applicable to the National Capital Territory of Delhi. It shall come into force on such date as the appropriate Government / Authority / Body, by notification in the Official Gazette, appoint.

1.1 Jurisdiction

These Unified Building Bye-Laws shall be applicable to the area under jurisdiction of the Delhi Development Authority and concerned local bodies.

1.2 Applicability

These building bye-laws shall be applicable to all building activities and read in conjunction with specific notifications in respect of urban villages/rural villages, unauthorized regularized colonies and for special areas with regard to regularized resettlement colonies (as mentioned in Chapter 6 – Regulations Notified by Delhi Development Authorities). These Bye-laws shall be reviewed at the end of every five years. The system of implementation of these building bye-laws shall be

uniform in the Delhi Development Authority and all the concerned local bodies.”

9. In the Unified Building Bye-Laws of 2016, 7.4 deals with the basement. 7.4.10 categorically lays down that basement is not to be counted in FAR if uses for parking, household storage and services. 7.4.11 further clarifies the usage under which the basement can be put. The said bye-laws read as under:-

“7.4.10 Basement is not to be counted in FAR if used for parking, household storage and services.

7.4.11 Parking in basement can also be permitted by means of a car lift. In case of residential buildings (except group housing), ramps are not mandatory. However, for other than residential buildings, ramps are mandatory for plot size above 3000 sq. m.

The basement can be used for storage of households, for other goods, for nonflammable material, dark rooms, strong rooms, bank cellars, stack rooms of libraries, air conditioning equipment/s and other machines used for services and utilities of the buildings etc. as per MPD.”

10. A perusal of the aforesaid bye-laws clearly lays down that firstly, the basement can be used for the purposes of storage households storage, parking and services and in a particular case it can be used for parking vehicles where the cars would be taken in a car lift. This has been further elaborated in the second part of the bye-laws 7.4.11 which specifically says that it can be used as strong rooms, bank cellars, rooms of libraries or the air conditioning equipments. Therefore, on the strength of these bye-laws one thing is clear that user of the basement of the Bank which happens to be the tenant of the petitioner for the purpose of strong room,

bank cellar cannot be treated to be a user which is prohibited by Rule. 7.4.10.

11. Similarly, the provision of the MPD 2021 also laid down the following provisions which deal with the user of basement for various purposes, which are reproduced hereunder :-

“vi) Basement: Basement shall not be counted towards FAR if used for purposes permissible under Building byelaws namely household storage and parking. Basement area shall not extend beyond the coverage on the ground floor as per permissible and sanctioned built up area, but may extend to the area below the internal courtyard and shaft. Basement if used in terms of Chapter 15.0. Mixed Use regulations shall count towards FAR and shall be liable to payment of appropriate charges, if it exceeds the permissible FAR.”

12. A perusal of the aforesaid two provisions of the Unified Building Bye-Laws of 2016 and the MPD-2021 would clearly show that there is no apparent conflict between the provisions of the Unified Building Bye Laws and the provisions of the MPD. There is no dispute or denying of the fact that the basement can be used for domestic storage purpose but elsewhere under the Building Bye Laws itself it has been specifically laid down that the basement can be used for specified purposes; one of which is as a cellar which would mean as a locker in the event of the basement being used by the bank. It may also be pertinent here to mention that the petitioner has already deposited the necessary charges with the MCD at the instance of the DDA itself in respect the basement as well as the ground floor being used as a bank. The very fact that these charges have been paid clearly indicates that the basement can be used for cellar and

that in no way it can be construed to be a user which is not permissible by the MPD 2021.

13. The respondent DDA is taking a very conservative, pedantic and an illogical view of the entire matter and perceiving there is a conflict in the Building Bye Laws and the MPD 2021 while as there is none.

14. If the legislature intended that the basement is to be used only for the purpose of domestic storage then in the year 2006, when the Unified Building Bye Laws were promulgated or even in 2016 building bye-laws they would not have clarified as has been done previously that it can be used for various purposes which have been enumerated therein. They would have completely deleted 7.4.11 stating that the basement cannot be used by a cellar or for locker purpose by a bank. Because of these reasons, I feel that the view which is taken by the respondent/DDA is not only totally illegal but is also highly improper and not at all conducive to the correct interpretation to be attached to the Building Bye Laws. I, therefore, feel that the basement, even though it is used for cellar by a bank, it cannot be counted by the respondent/DDA towards the total FAR.

15. It is also not in dispute between the parties that the total FAR which is permissible is 300% which comes to 620 sq. mts. in terms of Clause 4.4.3 of Chapter 4 of MPD-2021. The said permissible FAR has also been repeated under the new Unified Building Bye-Laws of 2016.

16. It has been contended by the learned counsel for the petitioner that if the basement is not counted towards FAR then he has not exceeded the permissible maximum FAR fixed by the respondent. It has also been alternatively contended by him that even if for the sake of argument

without prejudice to its first submission the basement is counted towards FAR then the total FAR used would be 554.65 + 140.77 which would come to 695 sq. mts. while as the permissible FAR is 627 and thus, if 627 is deducted from 695, the excess FAR used by the petitioner is 68.42 sq. mts. It has been further contended that according to Clause 4 of the terms and conditions of sub-Clause 4.4.3 of Chapter 4 of MPD-2021 relating to residential plots and Sub-Clause 15.12.3 (7) of Chapter 15 of MPD-2021, the DDA only is liable to recover appropriate charges for excess FAR. Meaning thereby, the respondents are at best entitled to recovery of appropriate charges for this 68.42 sq. mts.

17. This is not disputed by the learned counsel for the respondent.

18. Be that as it may, the fact of the matter remains that in terms of Unified Building Bye-Laws of 2016 under Regulation 7.4.11, I hold that the basement can be used for a strong room or for cellar by the Bank and that being the position, it cannot be counted towards the total FAR.

19. Accordingly, without counting the basement towards the calculation of FAR, the respondents shall conduct an inspection of the building and issue necessary order for regularization of the building. In the event of there being any excess coverage, appropriate charges shall be levied.

20. A copy of the order be given *dasti* to the learned counsel for the parties and a copy be also sent to the DDA.

21. With these directions, the writ petition stands allowed.

V.K. SHALI, J.

MAY 16, 2016/‘AA’