IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No.2226 of 2016 (O&M)
Date of Decision: 26.07.2017

Suncity Projects Pvt. Ltd. …..Petitioner

versus

State of Haryana and others …..Respondents

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU, JUDGE.

Present : Mr. Aashish Chopra, Advocate and
Mr. Gurpreet Randhawa, Advocate, for the petitioner.

Mr. Deepak Balyan, Additional Advocate General, Haryana.

Mr. Amar Vivek, Advocate and
Mr. Rashmi Gosain, Advocate, for respondent No.3-HUDA.

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S.J.VAZIFDAR, CHIEF JUSTICE

The petitioner has sought a writ of certiorari to quash clause-23 of the Letter of Intent dated 11.12.2013 issued by respondent No.2 granting the petitioner a licence for setting up a "Affordable Group Housing Colony" on land admeasuring 5 acres. The petitioner also seeks a writ of certiorari to quash the policy/instructions dated 17.06.2010 to the extent that it provides that no government dues namely licence fee, conversion charges, Infrastructure Development Charges (IDC), shall be refunded and that the interest accrued due to non-payment of government dues as well as External Development Charges (EDC) shall be recovered in the event of surrender/conversion of a licence. Having paid the amount, purportedly under protest, the petitioner has sought a writ of mandamus for refund thereof together with interest or adjustment thereof against other dues.

2. On 16.07.2008, the respondents had granted the petitioner a licence No.141/2008 under the Haryana Development & Regulation of Urban Areas Act, 1975 ( for short 'the Act') and the Rules framed thereunder for setting up an IT Park in Gurgaon in respect of land admeasuring 14.168 acres. The licence was valid upto 15.07.2010. A bilateral agreement under the provisions of the Act was entered into between the petitioner and respondent No.2 which inter-alia provided for the payment of EDC by the petitioner.

4. Respondent No.1 issued instructions dated 20.04.2010 to the second respondent which read as under:-

> "Subject: Cut-Off Date for Charging of Interest on EDC/IDC Dues in cases pertaining to conversion of Group Housing Colonies to Plotted Colonies and Vice Versa and for surrender of licence cases.
>
> In the cases pertaining to the request of licenses for conversion of licensed Group Housing Colonies into Plotted colonies and vice-versa as well as in surrender of license cases, it has been observed that the processing of such cases takes quite some time leading to uncertainty on the cut-off date, upto which the interest on the EDC/IDC dues is to be recovered.
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> 2. In this regard, it has been decided that for the cases pertaining to the conversion of licensed group housing colonies into plotted colonies and vice-versa, the cut off date for recovery of interest on the EDC/IDC dues shall be the date of receipt of application submitted by the colonizer, if it is complete in all respects, so that the colonizer is not penalized for any delay in the processing of such case.
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> 3. Similarly, in case of surrender of license cases also, the cut-off date for recovery of interest on the EDC/IDC dues shall be the date of receipt of application from the colonizer, accompanied by relevant documents like non-creation of third party rights etc.
>
> This policy shall be made applicable with immediate effect. It is, however, clarified that any additional recoveries, if earlier made, before this policy comes into effect shall not be refundable."

5. Respondent No.1 issued further instructions to respondent No.2 dated 17.06.2010 which read as under:-

> "Subject: Policy instructions in cases pertaining to surrender of licence including cases where surrender of Group Housing Portion of Licence is proposed by getting it converted into plotted colony.
>
> Reference: In continuation of the instructions issued vide memo no.5/29/2010-2TCP dated 20.04.2010.
>
> In continuation of the policy instructions issued vide memo referred above, the matters pertaining to surrender of licences including cases where group housing portion of licence is surrendered by getting it converted into plotted colony has been further considered.
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> 2. In this regard, it has been decided that, no Government dues, viz. Licence fees, scrutiny fees, conversion charges, IDC shall be refunded as these are statutory charges.
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> 3. <u>However, EDC being a user charge shall be refunded/adjusted, if the services have not been availed by the colonizer</u>.
>
> 4. <u>Nevertheless, interest accrued because of non-payment of Government dues as well as EDC shall be recovered</u>. The cut-off date for recovery of interest on the EDC/Government dues shall continue to be the date of receipt of application from the colonizer, <u>accompanied by relevant documents</u> like non-creation of third party rights etc.
>
> This policy shall be made applicable with immediate effect. It is, however, clarified that any additional recoveries, if earlier made, before this policy comes into effect shall not be refundable……(emphasis supplied)"

6. On 19.08.2013, the Hayana Government issued a notification introducing a comprehensive 'Affordable Housing Policy-2013' under section 9A of the Act and other corresponding statutes governing development of group housing colonies on the subject. The policy was intended to encourage the planning and completion of 'Group Housing Projects' wherein apartments of 'pre-defined sizes' are made available at 'pre-defined rates' within a prescribed "Targeted time-frame' to ensure

increased supply of "Affordable Housing" in the urban housing market to the deserving beneficiaries. The licences were to be granted under this policy.

7. On 20.08.2013, the petitioner submitted an application for the grant of a licence under the Affordable Group Housing Policy-2013" in respect of 5.80625 acres which formed a part of the land admeasuring 14.168 acres in respect whereof said licence dated 16.07.2008 was issued. The application inter-alia stated as follows:-

> "19. Undertaking for (sic to) bear all dues for surrender of Licence No.141 of 2008 dated 16.07.2008 (duly notarized)."

The separate undertaking recorded that the petitioner had in the application submitted the undertaking to respondent No.2 to de-license the land to the extent of 5.80625 acres which fell under the earlier Licence No.141/2008.

8. Mr. Chopra, the learned counsel appearing on behalf of the petitioner stated that the petitioner had thereby surrendered the earlier licence to the extent of 5.80625 and had migrated to the new licence under the Affordable Group Housing Policy-2013.

9. Accordingly on 11.12.2013, a Letter of Intent was issued by respondent No.2 in favour of the petitioner for the development of the petitioner's land admeasuring 5 acres under the "Affordable Group Housing Policy-2013". Clause 23 of the LoI impugned in this petition reads as under:-

> "23. That you shall deposit an amount of ₹ 2366.45 lacs on account of interest on the EDC and an amount of ₹ 298.32 lacs on account of IDC against the De-licensing of Licence No.141 of 2008 for setting up of IT Park in terms of policy dated 17.06.2010 before the grant of the licence".

Mr. Chopra relied upon the fact that clause 2(A) of the LoI required the payment of EDC as under:-

> **"2. EXTERNAL DEVELOPMENT CHARGES (EDC)**
>
> A) Charges for GH Development = ₹ 412.9488 lacs
> @ ₹ 86.031 Lac/acre equal to plotted)"

10. After the LoI the petitioner as a developer is to apply for a licence. The petitioner submitted the documents in support of the alleged compliance. The respondents, however, by a letter dated 19.11.2014 rejected the petitioner's application for a licence on the ground that the petitioner had not complied with clause-23 of the LoI within the prescribed time and even till the date of that letter. The respondents granted the petitioner a personal hearing.

11. The petitioner by a letter dated 07.01.2015 addressed to the Director General, Town and Country Planning, Haryana stated that clause 23 is illogical and not applicable to it. It contended that when no EDC/IDC is payable for de-licensed land and if paid is liable to be refunded, there can be no question of interest accruing thereon. This was Mr. Chopra's main contention even at the hearing before us. It was further alleged that the respondents had not carried out any external development works pursuant to the said licence No.141/2008 and even on that ground reserved its right to claim refund of the amounts paid. The petitioner, however, forwarded the payment under cover of the said letter under protest.

12. By a letter dated 12.01.2015 the petitioner withdrew its allegations in the letter dated 07.01.2015 regarding clause-23 of the LoI being illogical and inapplicable to it and the payment having been made under protest. Mr. Chopra, however, rightly contended that this letter was written under coercion as respondent No.2 threatened to refuse the licence if

the petitioner did not retract the same. Considering the facts of the matter, Mr.Chopra's contention is well founded. In the normal course of the human conduct, it is clear to us that the letter dated 12.01.2015 would never have been written unless the petitioner was compelled to do so under the threat of being refused the licence. There is no reason why the petitioner would suddenly have retracted those allegations and statements in the letter dated 07.01.2015. There is nothing to suggest that the petitioner did so for any other reason unconnected with the demand for the same by the respondents.

13. Ultimately, on 19.06.2015 the 2nd respondent granted the petitioner a licence No.3 of 2015 for setting up a 'Affordable Group Housing Colony". On the same day i.e. 19.06.2015 respondent No.2 passed an order de-licensing license No.141 of 2008 and annulling *ab initio* all sanctions/approvals pertaining to the same.

14. Mr. Chopra placed considerable reliance upon a fresh policy dated 08.02.2016 titled as "Policy For Migration Of License Into Other Use". It was stated to be in continuation of the policy/instructions dated 20.04.2010 and 17.06.2010 referred to earlier. The policy/instructions inter-alia stated that it had been decided to review the existing policies pertaining to surrender of licences and to finalize a fresh policy pertaining to the migration of licences. The policy stated that the term "migration of licence" shall imply conversion of any licenced land partly or fully to any other category of licence under the prevailing policy provisions but limited in scope to the existing land schedule. The policy/instructions stated:-

> "Accordingly, it has been decided that in case any existing licencee desires to migrate from any existing licenced project, partly or fully, to any category/categories of licence/policy then the same shall be allowed on following conditions:-

(d) EDC (Principal amount and interest) paid for the area under migration shall be adjusted in the licence to which he migrates. Further, he would be absolved of the liability to deposit the unpaid interest amount on EDC & IDC of the existing project from which he wants to migrate. However, rates of EDC & IDC at the time of grant of fresh licence would be applicable".

15. The petitioners case with respect to Licence No.141 of 2008 dated 16.07.2008 is governed by the policies dated 20.04.2010 and 17.06.2010. As the subject of the policy dated 20.04.2010 itself states it is " ……..AND FOR SURRENDER OF LICENSE CASES". Paragraph-3 of the policy states that in case of surrender of licence, the cut-off date of recovery of interest on EDC/IDC shall be the date of receipt of the application from the colonizer accompanied by relevant documents like non-creation of third party rights etc. Further paragraph-3 of the instructions/policy dated 17.06.2010 provides that EDC being a user charge shall be refunded/adjusted, if the services have not been availed by the colonizer. Paragraph-4 provides that nevertheless, interest accrued because of non-payment of EDC shall be recovered. Thus under these policies interest on unpaid EDC is payable.

16. Mr. Chopra submitted that this stipulation of interest in paragraph-4 is illogical and illegal in view of the provision in the policy that EDC itself being a user charge shall be refunded/adjusted if the services have not been availed by the colonizer. He contended that once the principal amount namely the EDC is to be refunded, the respondents cannot possibly charge interest on the amount for it would amount to charging interest on amounts which are not payable.

17. The submission is not well founded. It is undisputed that in respect of the license No.141/2008, EDC was payable. It was bound to pay the EDC under the Act of 1975 as well as on the terms and conditions of the LoI read with the terms and conditions of the license itself. Sections 2(g) and 3(3)(a)(ii) of the Haryana Development and Regulation of Urban Areas Act, 1975 reads as under:-

> "**2(g)** "external development works" include water supply, sewerage, drains, necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal, slaughter houses, colleges, hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area ;
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> ***3. Application for licence***:-
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> (3) After the enquiry under sub-section (2), the Director, by an order in writing, shall:-
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> (a) grant a licence in the prescribed form, after the applicant has furnished to the Director a bank guarantee equal to twenty-five per centum of the [estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty-seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purposes] as certified by the Director and has undertaken—
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> (i) …………..
>
> (ii) to pay proportionate development charges in the external development works as defined in clause(g) of section 2 are to be carried out by the government or any other local authority. The proportion in which and the time within which, such payment is to be made shall be determined by the Director."

The right to claim interest on EDC has been upheld in an order and judgment of this Court dated 15.12.2015 *M/s VPN Builtech Pvt. Ltd. v.*

*State of Haryana and others* to which one of us (S.J.Vazifdar, C.J.) was a party.

18. The respondents carried out the external development works of the nature and to extent required in the area. Each colonizers activities are but a part of the larger area in which the external development works are carried out. The external development works are not for the benefit of any particular colonizer alone but for the entire area for which it is carried out. The petitioner was in respect of its activities to be carried out under License No.141/2008 entitled to avail the benefit of external development works carried out by the respondents. Having applied for and obtained the licence in this larger scheme, it is not open to a developer absent anything else to contend subsequently that it has not availed of the benefits of the external development works and is, therefore, not liable to pay the same. A view to the contrary would place the respondents in an unfair position. Having planned the nature and extent of the works, after keeping in mind the demands and requirements of each licensee and other factors as well, they alter their position to their detriment by expending large amounts for the same. Licensees/colonizers/developers cannot at their option midstream abandon the projects and claim a refund of the EDC alleging that they do not now wish to avail the facilities.

19. We mentioned earlier that this would be absent anything else. In the present case, the respondents modified their rights by introducing the policies of 20.04.2010 and 17.06.2010. They were entitled to modify their rights to their detriment. They were not bound to make a concession but were entitled to do so. These policies were enacted in exercise of this right. It is obvious that the respondents did so by seeking to protect themselves against

any financial loss in respect of fresh licensees. The respondents were entitled to retain the EDC and to charge interest in accordance with the Act and in accordance with the terms and conditions of the LoI and the licence. Merely because they extended the facility of refunding or adjusting the EDC paid by the licencee to surrender its licence, it does not follow that they are not entitled to insist upon the payment of interest and/or retain the interest paid thereon. Once it is accepted that this is a concession that the respondents were entitled to make, the fallacy in the arguments on behalf of the petitioner becomes clear.

20. Absent any statutory or contractual bar, the respondents were entitled to give up the whole or any part of their claim including for EDC or IDC by a principal and/or interest. Merely because they have given up a part of their dues, it does not compel them to give up all their dues.

21. Mr. Chopra then relied upon the policy/instructions dated 18.02.2016, the relevant part of which we set out earlier to contend that the interest is not payable at least in respect of the 5 acres for which it obtained the LoI under the “Affordable Group Housing Scheme” This submission is, therefore, limited to the 5 acres in respect of which the petitioner sought a fresh licence under the ‘Affordable Group Housing Scheme”. Mr. Chopra placed considerable reliance on sub-paragraph-D of the policy which we reproduce again:-

> “Accordingly, it has been decided that in case any existing licencee desires to migrate from any existing licenced project, partly or fully, to any category/categories of licence/policy then the same shall be allowed on following conditions:-
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> (d) EDC (Principal amount and interest) paid for the area under migration shall be adjusted in the licence to which he migrates. Further, he would be absolved of the liability to deposit the unpaid interest amount on EDC & IDC of the existing project from which he wants to migrate. However,

rates of EDC & IDC at the time of grant of fresh licence would be applicable".

22. The reliance upon this policy is unfounded for more than one reason. The policy clearly operates only prospectively and not retrospectively. As the subject of the policy/instructions dated 18.02.2016 itself states it is a "Policy For Migration Of Licence Into Other Use". The word "for" refers to applications to be made and not to applications already made. In any event it cannot apply to applications already processed as in the petitioner's case. This is also clear from the opening words quoted above "accordingly it has been decided that in case any existing licencee desires to migrate from any existing licenced project…………"(emphasis supplied). The petitioner's licence No.141 of 2008 was not existing on the date of the policy i.e. 18.02.2016. It had been surrendered earlier on 20.08.2013 and a fresh LoI dated 11.12.2013 was issued in respect of part of the land, namely, 5 acres out of 14.168 acres that formed a part of the earlier licence No.141 of 2008. The petitioner's rights were crystallized by the LoI dated 11.12.2013. The policy dated 18.02.2016 stipulates various conditions which were not there in the earlier policy. Thus an application for migration of a licence into other use under the 18.02.2016 policy, would have to be considered in accordance with that policy read with the earlier policies but only in respect of the licenced projects in existence on the date of the policy.

23. Moreover, clause-D of the 18.02.2016 policy also clearly indicates that it applies to applications for migration from one licence to another in accordance with or pursuant to the 18.02.2016 policy. The opening words of clause-D 'EDC' (Principal Amount and Interest) paid for the area under migration ………..'' (emphasis supplied) itself indicate that

the clause deals with the proposals for migration under the 18.02.2016 policy. As far as the petitioner is concerned it had already migrated from 16.07.2008 licence to 11.12.2013 licence in respect of the area admeasuring 5 acres. These 5 acres, therefore, cannot be stated to be "under migration" within the meaning of those words in the 18.02.2016 policy.

24. Clause-D read as a whole also militates against Mr.Chopra's contention. It is a composite provision for future applications i.e. applications made pursuant to the 18.02.2016 policy. The three sentences of clause-D make this clear. The concession is granted in the first sentence by adjusting the principal amount of EDC and interest thereon, already paid for the area under migration, in the licence to which the licencee migrates. The respondents, therefore, have protected themselves against any financial loss for they merely adjust the amounts paid in respect of the existing licence against the amount payable for the fresh licences to which the licencee migrates.

The second and third sentences must be read together. The second sentence absolves the licencee of the liability to deposit the unpaid interest amount on EDC & IDC of the existing project from which it migrates. However, the third sentence specifies that the rates of EDC & IDC "at the time of grant of fresh licence" would be applicable. The respondents have sought to protect themselves against any loss on account of unpaid interest by stipulating that the licencees who wish to migrate must pay EDC and IDC at the rate prevalent at the time of grant of fresh licence. The respondents obviously proceeded on the basis that the rate of EDC and IDC at the time of grant of licence would be higher. It is for the respondents to decide the manner in which they protect their financial interests. If the rates of EDC and IDC for any reason are lower at the time of grant of fresh licences, their financial interest may suffer. These, however, are commercial decisions which must be left to the discretion of the party concerned in this case the respondents. It is not for the Courts to advise them. In any event it is for the respondents to stipulate the terms and conditions so long as they are not contrary to any law. Clause-D of the policy dated 18.02.2016, however, cannot come to the assistance of the petitioner whose rights and obligations were crystallized prior to its introduction.

25. The petitioner does not seek a fresh LoI under the 18.02.2016 policy. In other words the petitioner does not seek to migrate from its LoI dated 11.12.2013 to a fresh licence on the terms and conditions contained in the policy of 18.02.2016. Even if the petitioner had obtained a licence pursuant to the 11.12.2013 LoI which it has not on account of non-compliance of clause 23 thereof, it may have been entitled to migrate from that licence to another one. The fresh licence would be considered in accordance with all the terms and conditions of 18.02.2016 policy and not merely selective clauses thereof.

26. In the circumstances, the petition is dismissed.

**(S.J. VAZIFDAR)**
**CHIEF JUSTICE**

26.07.2017
ravinder

**(HARINDER SINGH SIDHU)**
**JUDGE**

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|---|---|
| Whether speaking/reasoned | √Yes/No |
| Whether reportable | √Yes/No |