
(2012) 04 DEL CK 0115
In the Delhi High Court
Case No : LPA 904 of 2010

A.R. Banerjee

APPELLANT

Vs

R.S. Verma and Others

RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Citation : (2012) 04 DEL CK 0115

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Anup Banerjee with Md. Naved, for the Appellant; Anand Nandan, for R-1, Mr. Arun Birbal, for DDA. and Mr. Gautam Awasthi, for Indian Bank, for the Respondent

Judgement

Pratibha Rani, J.—The appellant, A.R.Banerjee has impugned the order dated 16.07.2010 passed by the learned Single Judge in W.P. (C) No. 14090/2009 whereby six months" time was granted to the appellant to obtain requisite permission for using a part of the ground floor for banking purposes and the basement for a coaching centre; needless to state the permission had to be from the competent authority, which as we were given to understand is the Municipal Corporation of Delhi. As per the order, on appellant"s failure to do the needful, the Competent Authority was given liberty to take appropriate action as per law. The directions have been issued on a writ petition filed by the respondent who owns the second floor of the building in question.

2. Relating back to the year 2001, we note that the appellant the allottee of plot No. A-100, Chittaranjan Park, New Delhi, ad-measuring 320 sq.yd., entered into a collaboration agreement with respondent No. 1 Sh.R.S.Verma, to develop said property. As per the collaboration agreement, the building had to be constructed by Sh.R.S.Verma from out of his own funds and the basement and ground floor thereof were to be the property of the appellant, the second floor was the property of respondent No. 1 and the first floor was to be sold and was sold after the property was constructed.

3. Chittranjan Park is a re-settlement colony and as per MPD-2021 is to be treated as a re-settlement colony. The plots allotted to the allottees, as per perpetual sub-lease deed executed requires a building to be constructed on the plot allotted and used for a residential purpose. The appellant is also under said obligation to do so.

4. There is a dispute between the parties i.e. the appellant and respondent No. 1 on the subject to excess construction, beyond the sanction obtained and admittedly, the Municipal Corporation of Delhi has yet to compound the excess construction and there is not even finality on the subject: Whether the entire unauthorized construction is compoundable or not?

5. The appellant leased out the basement permitting the same to be used by the tenant as a coaching centre i.e. respondent No. 6 and the ground floor to Indian Bank, respondent No. 5.

6. Admittedly, no prior sanction has been obtained from the Competent Authority i.e. the Municipal Corporation of Delhi for the same.

7. The first respondent filed a writ petition seeking mandamus against the statutory authorities to compel them to prevent commercial activities being carried out as afore-noted.

8. Inter-alia, it was informed by the Municipal Corporation of Delhi that there is excess built up construction in the entire house and till the same is got regularized, the property cannot even be occupied. With respect to commercial activities permissible on residential plots, it was admitted that under MPD-2021, under the Mixed Land Use Policy notified under MPD-2021 the same was contingent upon obtaining a permission from the authorities concerned and that no such permission was obtained from the Municipal Corporation of Delhi.

9. The learned Single Judge, after considering the status report and that commercial activities were being carried on without required permission, observed in the impugned order as under:-

7. Unless the respondents No. 4 & 5 satisfy all the conditions subject to which such activities are permitted, they cannot said to be entitled to carry on the aforesaid activities.

8. However since the said activities are already going on for sometime now and there does not appear to have been any application of mind as to whether respondents No. 4 & 5 satisfy all conditions subject to which such activity is permissible, rather than giving directions for stoppage of such activities, it is deemed expedient to give an opportunity to respondents No. 4 & 5 to represent to the authorities that they do satisfy the requisite condition. A time of six months is deemed appropriate in this regard.

9. The counsel for the respondents No. 4 & 5 states that the petitioner is also required to join/cooperate in obtaining the said permissions and is arm twisting

the respondents No. 4 & 5. It is contended that the petitioner having sold the property to the respondent No. 4, is bound by law to so cooperate. It shall be open to the respondent No. 4, if so entitled to take appropriate proceedings against the petitioner in this regard.

10, Accordingly, this petition is disposed of with the directions that if the respondents No. 4 & 5 do not have the requisite permissions for use of the ground floor for Bank and basement for coaching centre within six months hereof, the respondents MCD, DDA and police authorities shall take appropriate action for stopping all unauthorized activities in the ground floor and basement of the property. The authorities from which such permissions are required shall consider the objections of petitioner before taking any decision. Needless to state that the parties shall have their remedies in law if aggrieved from said decision. The MCD/DDA if so approached by respondents No. 4 & 5 for permission to consider the case within the time frame aforesaid.

10. The contentions urged by counsel for the appellant are that mixed land use is permissible under MPD-2021 and no notification is required where the required ROW is there as per Clause 15.7 of MPD, in terms of which public and semi public activities are permitted in residential plots abutting roads of minimum ROW prescribed in 15.7.2 whether or not the road is notified for mixed land use. It was also urged on behalf of the appellant that the property in question i.e. A-100, C.R.Park, New Delhi is a plot of 320 sq. yds. and the road abutting is 60 ft. (18 meters) which is much more than the required 13.5 meters.

11. Since the respondents did not question the eligibility of the property in question with respect to the mixed land use policy and nobody raised the issue of the width of the road on which the building abuts, the contention urged by learned counsel for the appellant need not be dealt with by us for the reason it is nobody's case that as per MPD-2021 the building is eligible to be put to a mixed land use. And thus we have to consider as to what is the mixed land use.

12. Chapter 15 of MPD-2021 contains mixed use regulations. Relevant clauses for purposes of disposal of this appeal are extracted as under:-

15 MIXED USE REGULATIONS

15.1 GOVERNING PRINCIPLES FOR MIXED USE

- i. Mixed use means the provision for non-residential activity in residential premises.
- ii. The policy aims to balance the socio-economic need for such activity and the environmental impact of the said activity in residential areas.

15.2.2 TYPES OF MIXED USE

- i) Commercial activity in the form of retail shops as per conditions given in para 15.6 in plots abutting notified mixed use streets.

ii) "Other activity" broadly in the nature of "Public and Semi-Public" facilities listed in para 15.7.1 and as per conditions specified in para 15.7, in plots abutting roads of minimum ROW prescribed in para 15.3.2.

iii) Professional activity as per conditions specified in para 15.8.

2. In colonies falling in categories C & D

Mixed use in the form of Retail shops shall continue to be permissible as per conditions in para 15.6, in plots abutting notified mixed use streets.

"Other activity" in terms of para 15.7 shall be permissible in plots abutting roads of minimum 18m ROW in regular plotted development 13.5m ROW in rehabilitation colonies and 9m ROW in Walled City, regularized - unauthorized colonies, resettlement colonies, Special Areas, and urban villages, subject to conditions in para 15.7.

Mixed use shall be permissible in pedestrianized shopping streets as per para 15.3.3.

Professional activities shall be permissible as per conditions laid down in para 15.8.

15.4 GENERAL TERMS AND CONDITIONS GOVERNING MIXED USE

In residential plotted development

(i).....

(ii) Where there are more than one dwelling units in a residential plot, each of the dwelling units will be permitted to have only type of mixed use activity (either retail shop as per para 15.6 or professional activity or any one of the other activities listed in para 15.7)

15.7 OTHER ACTIVITY

15.7.1 Subject to the general conditions given in para 15.4 and additional conditions given in para 15.7.3, the following public and semi-public activities shall also be permitted in the residential plots abutting roads of minimum ROW prescribed in 15.7.2, whether or not the road is notified as mixed use street:

(a) Pre-primary school (including nursery/Montessori schools, cr?che.)

(b) i. Nursing home

ii. Clinic, Dispensary, Pathology lab and Diagnostic center.

(c) Guest house (including lodging houses) irrespective of number of rooms.

(d) Bank.

(e) Fitness Centre (including gymnasium, yoga/meditation centre)

(f) Coaching centres/tuition centres other than those imparting structured

courses leading directly to the award of a degree or diploma or conducting classes such as a regular school.

15.7.2 The minimum ROW of a street or stretch of road on which the above-mentioned other activities are permissible is as follows:-

In C & D colonies: 18m ROW in regular residential plotted development, 13.5m ROW in rehabilitation colonies and 9m ROW in regularized-unauthorized colonies, resettlement colonies, Walled City, special area and urban villages; and in pedestrian shopping streets (of less than 6m ROW)

15.7.3 The above mentioned public and semi-public activities shall be subject to the following additional conditions in addition to general conditions prescribed in preceding paras:-

ii. Banks shall be permissible on maximum 2/3rd of FAR subject to 600 sqm, while guesthouse and nursing homes will be permissible upto 3/4th of the floor area.

vii. Coaching centres and tuition centres referred to in para 15.7.1 (f) shall be permissible in upto 2/3rd of the maximum permissible FAR in plots of less than 250 sqm. There shall be no restriction as to minimum size of plot. Other existing coaching/tuition centres may be allowed to continue till end of May 2008 and shift to conforming locations by then.

15.9 REGISTRATION OF MIXED USE PREMISES AND PAYMENT OF CHARGES

i) In respect of a residential premises already under mixed use or intended to be put to mixed use, the owner/allottee/resident of the plot/dwelling unit, in case of plotted development and dwelling unit in the case of group housing, shall be required to declare such mixed use by filling up a form in this respect and depositing it with the local body concerned and pay one-time registration charges at rates to be notified with the approval of the Central Government.

iv) In addition to other penal action available under the relevant act, properties found to be under mixed use, a penalty amounting to 10 times the annual conversion charges for mixed use.

13. Now, as per Regulation 15.4(ii) if there are more than one dwelling units in a residential plot, each of the dwelling units will be permitted to have only one permissible activity in the nature of a public or semi-public facility. Regulation 15.7.1(d) and (f) list a bank and a coaching centre as a permissible activity. Thus, the questions of law that have arisen for determination before us are:

1) Could a building meant for residential use be occupied without Completion Certificate?

2) If the answer to question No. 1 is in negative, then could the appellant put the building to commercial use without required permission from the competent authority just because MPD-2021 permits mixed use in that area as the road on

which the plot is situated satisfies the required conditions regarding width of road and ROW?

3) Can the basement be treated as a dwelling unit for running commercial activity without its area being counted towards FAR?

4) The building if regularised, can two commercial activities be carried on from basement and ground floor when there is only one dwelling unit i.e. ground floor?

14. For the purpose of question No. 1, suffice it to say that it is appellant's own case that:-

first floor was sold to Ambika Thakur and the builder retained the ownership and residence of the second floor. Possession of the two floors were given to the petitioner on the basis of C and D form which were actually certificates regarding the plumbing and drainage work done and in no way can be regarded as a substitute for a regularization of completion certificate after paying any compounding fee, if any. In any case the builder cannot create impediment for the owners to obtain the completion certificate and/or any other certificate from the MCD if he is otherwise entitled for the same in a bonafide.

15. Nobody disputed that as per the mandate of the Delhi Municipal Corporation Act 1957 a building cannot be occupied unless a completion certificate is obtained and it would be immaterial, on the facts of the instant case, whether respondent No. 1, as the builder of the building, is responsible for effecting excess construction. The consequence thereof has to follow. The remedy of the appellant is to take resort to a civil action against respondent No. 1. He cannot tell the Municipal Corporation of Delhi that because he is not responsible for the mess, he is free to act as per his will and fancy. Some money has admittedly been deposited by the appellant with the Municipal Corporation of Delhi and it is not clear whether these are compounding charges to compound the excess unauthorized construction or by way of charges payable for permitting use of the property, by his tenants for a banking purpose and a coaching centre. As per the Municipal Corporation of Delhi, the appellant has deposited some money of his own calculation, without proper applications and without the Corporation intimating any demand. Thus, the appellant has to pursue the matter with the Municipal Corporation for regularizing the excess construction. He has to take positive steps to get over the hurdle and not seek victory by default.

16. Unilateral act of the appellant to deposit around `3 lacs with Municipal Corporation of Delhi is thus neither here nor there.

17. We are fortified in the view we have taken with reference to the decisions reported as Union of India and Others Vs. Dev Raj Gupta and Others, and M.C. Mehta Vs. Union of India (UOI) and Others,

18. We proceed to answer Questions No. 2, 3 and 4, upon the assumption that the building is an authorized construction.

19. MPD-2021 permits, under its mixed land use policy, each dwelling unit to be used for a non-residential purpose, but restricted to the mixed land uses listed and undoubtedly a bank and a coaching centre are so listed.

20. The appellant is the owner of the basement and the ground floor and suffice would it be to highlight that the basement has not been taken into account for purposes of FAR being utilized i.e. the basement has been sanctioned for a domestic storage use and not as a dwelling unit. Thus, the appellant can only permit one non-residential activity or can himself engage in only one non-residential activity and not two. Thus, in any case, the appellant has to elect and choose one and leave the other.

21. That apart, the mixed land use policy does not entitle a person to put a residential building to a non-residential use as a matter of right, with reference to the permissible nonresidential activities. An application has to be filed in a proper manner and sanction obtained from the authority concerned. Further, merely because an activity is permissible would not mean that the Competent Authority is bound to accord sanction. Issues pertaining to civic amenities enjoyed by the inhabitants of the colony have to be kept in mind. Say for example, the application pertains to commence banking business from a residential unit. The commercial banking activity permissible is a neighbourhood bank. In the colony in question four banks are already operating. The application in question is the fifth in number. It happens that one of the four banks is in the immediate neighbourhood building. An issue of the customers parking their cars on the road on which the two buildings abut requires a consideration and if the Competent Authority feels that two banks operating from two adjoining buildings would seriously impede the flow of traffic, to and fro, through the public street in question, to and from the colony, permission can be denied.

22. We thus agree with the conclusion arrived at by the learned Single Judge and for which we have given additional reasons as afore-noted. We dispose of the appeal leaving it open to the appellant to elect as to which one out of the two non-residential activities he intends his tenant to continue with and this he must do within 30 days from today. Within this period the appellant would be free to file a proper application before the Engineering Division of the Municipal Corporation of Delhi who would pass an order with respect to the permissible compoundable deviations and the charges payable for the same. Upon paying the same, the compoundable deviations would be compounded and if there are non-compoundable deviations, if the appellant does not rectify the same, the Municipal Corporation of Delhi would be free to take action as per law. Further, within a month therefrom, the appellant would be permitted to seek permission to use or permit to use the portions in his ownership and possession for a non-residential user (only one) and the said application shall be processed by the Municipal Corporation of Delhi as per law. Directing that one out of the two users shall be discontinued within 30 days, we direct that if within the next six months the issue pertaining to regularization and/or appellant being entitled to use the

portions owned by him for a mixed land use are not sorted out, the appellant would discontinue even said use. No costs.