(2004) 02 DEL CK 0001

In the Delhi High Court

Case No : Civil Writ No. 5370 of 2001

Association of Property Consultants APPELLANT

Vs

Delhi Development Authority RESPONDENT

Date of Decision : 27-02-2004

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 19(6)
Finance Act, 1994 — Section 65, 65(35), 65(36)
Haryana Urban Development (Disposal of Land and Buildings) Regulations, 1978 — Regulation 2

Citation : (2004) 138 PLR 16

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : S.K. Rungta, for the Appellant; Amita Singh, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—Can a property dealer, property broker or real estate agent be construed as a "consultant"? This is the seminal question in this petition. It arises in the context of the alleged misuse of residential flats allotted to members of the petitioner association by the respondent (Delhi Development Authority - DDA" for short).

2. The residential flats allotted to the members of the petitioner association (which is registered under the Societies Registration Act, 1860) are admittedly governed by the policy of the DDA incorporated in the document entitled "Guidebook on Housing Department" published by the DDA. The said Guidebook stipulates as under: @Z_PARA = "Penal action for misuse of flats-

A flat is to be used for residential purpose only. In case the flat is used for purposes other than residential, apart from action under the terms of allotment, prosecutions under the Delhi Development Act, 1957, shall be lodged.

Professional activity by the professionals such as Doctors, Architects, Engineers, Lawyers, Chartered Accountants, Advocates, Consultants, Journalists, Artists, Designers/Consultants is permissible to the extent of 25% of the covered area or 50 sq. mtrs. whichever is less, provided the flat is in occupation of the professional."

It is also an admitted position that some of the members of the petitioner association have and are using part of their said residential flats for their offices. Because they have done so, they have been issued show-cause notices from the DDA proposing to cancel their allotments. One such notice, which is annexed as Annexure-C to the petition, has been issued on the premise that the allottee has put the residential flat to "non-residential use for commercial activities."

3. The learned Counsel for the petitioner contended that its members are "consultants" and Therefore it is permissible for them to use 25% of the covered area or 50 sq. mtrs., whichever is less, of their residential flats for office purposes. Accordingly, he prayed that the show cause notices be quashed. The learned Counsel for the DDA, on the other hand, argued that members of the petitioner association were property dealers, property brokers or real estate agents. They cannot be construed to fall within the ambit of the expression "professional"s or "consultants".

4. In support of the contention that property dealers are "consultants", it was submitted that their job profile was such that they were clearly covered by the description "consultants". It was also submitted that the Haryana Urban Development Authority introduced analogous provisions with regard to permissive user in residential flats and, by virtue of those provisions, "property consultants" have, inter alia, been included in the definition of "non-nuisance professional consultancy". It was also submitted that by virtue of the Finance Act (Act No. 2), 1998, the Finance Act, 1994 was amended and in particular Section 65 thereof which contained the definitions. Earlier, real estate agents were not under the Service Tax net. However, consequent upon the amendment brought about in 1998, "real estate agents" were included. For this purpose Sections 65(35) and 65(36) were inserted in the Finance Act, 1994. These provisions read as under:

"(35) ''real estate agent'' means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, or real estate and includes a real estate consultant''

(36) ''real estate consultant'' means a person who renders, in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception design, development construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate."

From the above provisions it becomes clear that the definition of real estate agent includes a real estate consultant which is turn has also been defined. And thus, according to the petitioner, a property dealer, broker, or agent would also mean and include the real estate consultant or property consultant. This would imply that property dealers were and are included in the expression "consultants" appearing in the said guidebook.

5. Both the parties referred to Direction arise in support of their contentions. As per the said Guide book, which is permissible is "professional activity by the professional" including "consultants" to the extent of 25% of the covered area or 50 sq. metres, whichever is less, provided the flat is in the occupation of the professional. It is, Therefore, to be seen as to what is the meaning of the expressions "professional activity", "professional" and "consultant". The Concise Oxford English Dictionary defines "profession" inter alias as "a paid occupation, especially one involving training and a formal qualification." The same dictionary defines "professional" as "of relating to, or belonging to a profession. Worthy of or appropriate to a professional person. Engaged in an activity as a paid occupation rather than as an amateur." The same dictionary defines "consultancy" to mean "a professional practice giving expert advice in a particular field." Consultant means a person who provides expert advice professionally. The New Webster''s Dictionary and Treasures of the English Language, 1992 Edition gives the meaning of "profession" as "one of a limited number of occupations or vocations involving special learning and carrying a certain social prestige, especially the learned professionals" law, medicine and the Church'' any vocation or occupation, a dancer by profession'' the people engaged in such an occupation." "Professional" is shown to mean "of or relating to a profession'' showing a sound workman''s command; engaging in some activity as a remunerated occupation." It is also stated to mean "someone who engages in an activity, especially sport, to earn money, someone engaged in one of the learned and salaried professions." The same dictionary defines consultant as "a person (engineer, doctor, etc.) giving expert or professional advice, "Black''s Law Dictionary, Sixth Edition gives the following meaning to the word "profession" - "A vocation or occupation requiring special, usually advanced, education, knowledge and skill, e.g. Law or medical professions. Also refers to whole body of such profession. The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual. The term originally contemplated only theology, law, and medicine, but as application of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill." "Professional" means one engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency. This dictionary does not give the meaning of the word "consultant." However, the word "consultant" has been ascribed the meaning "Act of consulting or conferring'' e.g. patient with doctor'' client with lawyer. Deliberation of persons on some subject." K.J. Aiyar''s Judicial Dictionary, 13th Edition defines the word "Profession", inter alias as a "calling, vocation, known employment. A profession ordinarily, is an occupation requiring intellectual skill, often coupled with manual skill. Thus, a teacher uses a purely intellectual skill while a painter uses both. In any even, they are not engaged in an occupation in

which employers and employees co-operate in the production or sale of commodities or arrangement for their production or sale or distribution and their services cannot be described as material services The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, ."

The said Judicial Dictionary goes further to say - "Profession in the present use of the language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled as in painting and sculpture, or surgery by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production of sale of commodities. The line of demarcation may vary from time to time [Indian Medical Association v. V.P. Shantha, " According to the dictionary the word "professional" means "belonging to, or connected with a profession having or showing the skill of a professional".

6. Distilling these dictionary meanings, it is clear that the word "professional" is no longer limited to the traditional learned professions of law, medicine and the ''church''. It now has a much wider connotation as "a paid occupation". In similar vein, a "consultant" is one giving expert or professional intellectual skill which "professional" or "consultant" must have some specialised intellectual skill which may or may not be coupled with manual skill or dexterity. And, as indicated by the Supreme Court in the case of Dr. Devendra M. Surti v. State of Gujarat 1969(1) S.C.R. 235," a professional activity must be an activity carried on by an individual by his personal skill and intelligence." In fact, it is this individual nature of activity that is, in most cases, vital in determining whether it is a "professional" activity or a "commercial" activity.

7. The learned counsel for the respondent also relied upon the following decisions:

1. Sakharam Narayan Kherdekar Vs. City of Nagpur Corporation and Others, ;

2. N.E. Merchant and Another Vs. State, ''

3. L.M. Chitale and Another Vs. The Commissioner of Labour, .

In Sakharam (supra), the petitioner''s case was that he carried on the profession of law and was a lawyer and did not have a commercial establishment which carried on a profession of an Advocate. In that case the Bombay High Court was called upon to examine, inter alia, the expressions "commercial" and "commercial activity" as well as "commercial establishment". In that context the Court held that"

"Thus, the very concept of any activity which can justly be called a commercial activity, must imply some investment of capital and the activity, must run the risk of profit or loss. Understood in this sense, Therefore, we are inclined to hold that it is not every establishment in the sense of premises or buildings where business, trade or profession is carried on that is intended to be governed by the Act, but only those premises though carrying one or other of these kinds of activities which are of a commercial nature."

Then, further in paragraph 29, the Bombay High Court held that:

"Thus it is clear that an activity to be a profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics, as observed by Their Lordships of the Supreme Court in The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others, which was a case regarding work of solicitors and also attorneys. It is the personal skill, intelligence, study, integrity, which is a core of a professional activity. If that is the test by which one has to determine whether an activity is a profession as distinguished from trade, or business, then it will be difficult to hold that the profession of law carried on by an Advocate or a legal practitioner in any manner or to any extent partakes of a commercial character or is a commercial activity. As we have held, unless the trade, business or profession carried on also partakes of a commercial nature or venture, the premises in which such activities are carried on will not attract the provisions of the Shops Act."

8. In the case of N.E. Merchant (supra) once again the provision of the Bombay Shops and Commercial Establishment Act, 1948 came up for interpretation. In this context, the meanings of "commercial establishment" and "profession" were considered. It was held by the Court that the office of a Chartered Accountant was not a commercial establishment so as to attract the provisions of the said Act. In this context, the Court observed at page 286:

"And all these matters help to consider whether the activity of the chartered accountant is a profession or not. In Currie v. Inland Revenue Commissioners (1921)2 K.B. 332, Scrutton, L.J. Dealing with a case of an Income Tax Practitioner observed:-

''......I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organized professional body with a recognised standard or ability enforced before he can enter it and a recognised standard of conduct enforced while he is practicing it.

Indeed, that would not be a conclusive test, but that is an important element to be considered when the question is whether particular activity is a professional activity. We further think that in considering whether an activity is a profession or not we may perhaps be guided by the fact that the Church, the Medicine and the Law have been for centuries regarded as learned professions. In each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. These qualities displayed by the practitioners of these learned professions inspire confidence in persons approaching them for advice or guidance. The priest is approached for spiritual comfort and guidance, the doctor for physical or mental ailment, and the lawyer for legal advice. But in each case the person who approaches them chooses them according to his own conception of the skill, intelligence and integrity of the person approached, and since he approaches in entire confidence, the priest, the doctor and the lawyer have a corresponding obligation not to betray the confidence and advise his client as best as he can. The same element of trust and confidence must be a test in more or less degree in modern professions. A charactered accountant is approached by his client for advice and guidance in his problems with regard to trade, business or industry, and it is expected that the chartered accountant, to the best of his ability, would be in a position to help him in his difficulties and not betray the confidence that is placed in him. This, in our opinion, is one of the elements which should be sought when considering whether a particular person is practicing a professional is merely doing a business."

9. In the case of L.M. Chitale (supra) a Single Judge of the Madras High Court considered the Madras Shops and Establishment Act, 1947. It was held that the office of a Chartered Accountant was not a shop within the meaning of the said Act. In that case, it was observed as under :

"The question that 1 have to determine is whether the office of a chartered architect is a premises where any trade of business is carried on or where services are rendered to customers. At the outset, I may mention that there is certainly a fundamental difference between a profession and a trade or business. That seems to be implicit in the reference to "profession, occupation, trade or business" found in Art. 19 of the Constitution, It is normally understood that trade or business is carried on with a profit motive. I do not think it is necessary to cite any authority for that view. But when we come to the question of a profession or an occupation, though they are carried on for the purpose of earning a livelihood, it would certainly be far from correct to say that a profit motive underlines the carrying on of these activities. Article 19(6) of the Constitution which enables the State to make laws imposing reasonable restrictions on the exercise of the right conferred by Art. 19(1)(g) clearly makes a distinction between the carrying on of a profession on the one hand and the carrying on of a trade or business on the other. It, Therefore, seems to me that it cannot be said that the carrying on of a profession is the same thing as the carrying on of a trade or business. Section 2, Sub-section (16), defining a shop is, in my opinion, restricted in its scope. It clearly envisages an activity which as commonly understood is associated with the carrying on of trade or commerce and cannot take in establishments where professional services are rendered."

10. These decisions, though cited by the learned Counsel for the DDA, do not militate against ''he case of the petitioner. Indeed, they shed light on the vexed question of what is a professional activity? In tact, the decisions speak of a distinction between "professional activity" and "commercial activity". And, in the case of N.E. Merchant (supra) it does appear that "professional activity" has been seen as involving individual activity characterised by personal skill and intelligence dependent upon personal study, character and integrity. It is very

easy to fit lawyers and doctors within such an activity. The decisions have included chartered accountants within The fold of "professionals" and their activities as ''''professional activity." Now, what exactly does a property agent, dealer, broker or consultant actually do? There is no doubt that his is a paid occupation. Therefore, he is clearly within the wider concept of ''profession''. But, there is something more. While it is true that he does not have pass professional examinations like the M.B.B.S. or the L.L.B. as is required by doctors and lawyers, it is also true that he has, may be through sheer dint of experience, acquired a specialised knowledge with regard to real estate and property. Then, his activity is quite individualistic inasmuch it is based on his personal skill or expertise. The job of a property consultant whether he be called a broker or a dealer or an agent is essentially to give expert advice with regard to the sale and purchase of property. The nature of his activities may involve the verification of title documents of the property in question, advise in preparing the proper documentation, ensuring that the purchaser gets the property with full title thereto and that the seller the consideration thereof. He also provides assistance and advice with regard to mutation, conversion from freehold to leasehold; to give expert opinion and advice with regard to market prices of properties and trends. The property consultant is a person who by virtue of a specialised knowledge acquired by experience in the field aids and advises his clients in acquiring or disposing of properties. The property consultant by himself does not buy and sell properties. He does not stock any goods for sale. He merely offers his services to his clients in the sale, purchase, and management of properties. There is no investment of the property consultant in the properties which are sold or purchased or leased by his clients. He merely renders his professional services for which he is remunerated byway of commission. If the property, after the purchase by his client appreciates in value, no benefit is derived by the property consultant. Similarly, if the property depreciates in value, no loss is incurred by him either. Thus, unlike a businessman he docs not share in the loss or profits of the property transaction.

11. Moreover, as pointed out above, the learned counsel appearing for the petitioner had referred to the Haryana Urban Development (Disposal of Land and Buildings) Amendment Regulations, 1998 whereby Clause (bb) was inserted in Regulation 2 of the Haryana Urban Development (Disposal of Land and Building) Regulations, 1978. The newly inserted Clause (bb) reads as under:

"(bb) ''Non-nuisance professional consultancy'' means an activity'' carried on by an individual by his personal skill and intelligence and includes-

(a) Doctors (without Nursing Home);

(b) Lawyers;

(c) Tax Consultants;

(d) Architect (without studio);

(e) Contractor Consultants''

(f) Chartered Accountant/Company Secretaries;

(g) Property Consultants;

(h) Government Guides."

From the aforesaid definition it becomes clear that in an analogous provision a contemporaneous understanding of the word "consultants" includes property consultant. Not only this, it includes the concept of "professional consultancy". The definitions given in the Finance Act, 1994, which have been referred to earlier also point in the same direction. In such a situation, it would not be possible to conclude that under no circumstances a "property consultant" could be treated as a "professional" or a "consultant". When there are statutes and regulations which have statutory effect where under" property consultants" are referred to specifically and are included in expression "non-nuisance professional consultancy", it would be extremely difficult to construe the Guidebook and particularly the provisions with regard to the misuse of flats in a manner so as to exclude "property consultants" from the ambit and scope of the expression "professional activity by professionals such as ....consultants."

12. Thus, property consultants would also be entitled to the benefit of using 25% of the covered area or 50 sq. metres, whichever is less, of their residential flats for their professional activity as property consultants provided such flats are in the occupation of such property consultants. It goes without showing that the property consultant to whom the residential flat has been allotted must not only be in occupation of the same but must also only use the flat to the extent permissible for purely professional activity i.e., the providing consultancy to their clients in property matters. They cannot carry on any commercial activity. It is clear that activity of a "property consultant", ipso facto, is not a commercial activity. Perhaps, the show cause notices were issued under this mistaken belief. However, if a property consultant uses his residential flat for a commercial activity such as punning a shop, he would not have the protection of the said provisions. In this view of the matter the DDA is directed to dispose of the show cause notices issued to the property consultants (members of the petitioner association) of Sarita Vihar in terms of the observations hereinabove within a period of two months.

13. The writ petition is, Therefore, allowed to the extent indicated above. There shall be no order as to costs.