
(2008) 05 AHC CK 0056
In the Allahabad High Court

Government and Public Sector Employees Welfare Housing
Organization (Regd.)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 95, 97

Citation : (2008) 3 AWC 2987

Hon'ble Judges : Prakash Krishna, J;Anjani Kumar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Anjani Kumar and Prakash Krishna, JJ.—The petitioner, a Society, registered under the Societies Registration Act, in October, 2001 submitted that its bid for allotment of a parcel of land bearing No. D-13, Sector 44, Noida under Group Housing Scheme No. GHP/03/2001. Petitioner's bid for Rs. 4,92,23,702/- was accepted by the respondent authority being the highest one. The cost of the land was charged at the rate of Rs. 9, 600/- per Sq. Mtr. The total area of the said piece of land, as represented by the Noida Authority was measuring 5127.47 Sq. Mtrs. and was marked and delineated. It is no longer in dispute that the petitioner Society has paid the requisite amount as per the demand of the Noida Authority in respect of the aforesaid plot of the aforesaid area. Subsequent to the finalization of the deal, on 23.4.2002 physical possession of the said plot was also handed over by the Noida Authority to the petitioner Society. In the letter delivering the possession, the area of the plot was again mentioned as 5127.47 Sq. Mtrs. The petitioner Society got the construction plan sanctioned for the Group Housing Complex which was also approved by the respondent authority on 17.6.2002. The constructions and the development of the plot were taken accordingly and on 11.7.2006 completion certificate and no dues certificate as well were issued by the respondent authority to the petitioner Society. It was done after making a spot inspection and the inspection report is dated

30.5.2006. In all 75 flats were constructed by the petitioner Society and they have been allotted to its members. All of sudden on 27.8.2007, as stated in the writ petition the petitioner Society was slapped with a demand notice of Rs. 1,09,64,520/- issued by the respondent authority vide annexure-1 to the writ petition. On actual measurement it was found that the area of the said piece of land is 5,304.01 Sq. Mtr. instead of 5,127.47 Sq. Mtrs. The impugned demand was raised as per policy of the respondent authority to charge the price of the excess area at the prevalent market value on the date of issue of the notice together with the interest from the date of actual allotment to the date of actual notice. Thus, a sum of Rs. 51,35,730/- was demanded towards the interest which is included in the aforesaid demand of Rs. 1,09,64,520/-. The said notice was objected to by filing a letter dated 4.2.2008 but in vain. By the letter dated 22.2.2008 the stand of the petitioner Society that it is not liable to pay any further sum, was rejected. Being aggrieved by the said demand the present writ petition has been filed claiming the following reliefs:

(I) to issue a writ of certiorari and any other appropriate order or directions thereby quashing the demand letters dated 27.8.2007 and 22.2.2008 (Annexure-1 and Annexure-2 issued by Respondent Authority demanding Rs. 1,09,64,520/- in respect of Plot No. D-13, Sector-44, Noida;

(II) to direct the Respondent Authority not to take any adverse action in respect of the above plot of land pursuant to the impugned demand letters; and in the alternative

(III) to direct the Respondent Authority to carry out a fresh survey of the Housing Complex of the Petitioner Society built on plot No. D-13, Sector 44 Noida by qualified and competent officials by giving due notice to the Petitioner Society and in the presence of the its representatives;

(IV) to direct the Respondent Authority to charge the cost of additional land, if found after the fresh survey, @ Rs. 9,600/- without any interest thereon;

(V) to pass any other appropriate order or directions as the Hon"ble Court may deem fit and proper in the facts and circumstances of the present case.

It has been averred in the writ petition that besides the fact that petitioners have already paid the amount as demanded by the respondent authority as per mutual terms agreed upon and also the fact that a lease deed has been executed in favour of the petitioner Society, the petitioner Society was not associated in any manner while making the actual measurement whereby it was found that the area measuring 176.63 Sq. Mtrs. has been handed over in excess to the petitioner Society.

2. A counter affidavit on behalf of the contesting respondents sworn by Shri S.C. Verma, Assistant Law Officer wherein the allotment of a piece of land measuring 5127.47 Sq. Mtrs to the petitioner society has not been disputed, has been filed. It has been mentioned therein that it subsequently transpired that the petitioner

on spot had encroached upon a surplus area measuring 176.63 Sq. Mtrs in respect of which neither any allotment was made in favour of the petitioner nor the petitioner ever paid any consideration. In this state of affair, according to the counter affidavit, only two courses were available to it i.e. the first option was to have evicted the petitioner from the surplus area and the second option was to regularise the surplus land measuring 176.63 Sq. Mtrs. by charging the current price of land with interest. If the petitioner has not agreed to the second course which has been followed by giving the impugned notice, authority will be willing to withdraw the settlement of the land in favour of the petitioner and follow the other course available of evicting it from the surplus land. The fact is that the possession of the petitioner over an area of 176.63 Sq. Mtrs. is without any right, title or interest. The averment of the petitioner that the plot was never surveyed carried in its presence, has been denied with the allegation that at the time of the survey the residents of the petitioner society were present and the same was within their knowledge, vide para 7 of the counter affidavit. Also in para 8 it has been stated that the allegation that the petitioner society was never aware about the physical survey conducted by the authority is incorrect and denied.

3. In the rejoinder affidavit filed by the petitioner society, the averments made in the writ petition have been reasserted and the allegation that the survey of the plot was carried out in the presence of the residents of the petitioner society is disputed.

4. Heard the learned Counsel for the parties and perused the record. In the para 3 of the writ petition the following questions have been posed for consideration and adjudication by this Court:

I. Whether the Respondent Authority can be permitted to raise a highly belated but huge demand against the Petitioner Society for additional land area, whereas in last six years it has repeatedly confirmed the smaller size of the land in its letters/communications including the allotment letter, possession and tease deed?

II. Whether the impugned demand of Rs. 1.09 Crores can be raised by the Respondent Authority after the expiry of six years from the date of the allotment of the plot on the ground that the plot allotted to the Petitioner Society is bigger in size?

III. Whether the Respondent Authority is justified in raised the aforesaid arbitrary demand on the basis of a survey report conducted without any knowledge of and intimation to the Petitioner Society?

IV. Whether the Respondent Authority having repeatedly maintained the size of the plot as 5,127.47 Sq. Mtrs. in their different communications including the possession letter, can be permitted on the basis of a unilateral survey report to claim that the size of the plot is bigger and Petitioner Society is liable to pay the cost with interest?

V. Whether the Respondent Authority is justified in demanding the cost of the

additional land area, whereas due to such delayed intimation, the Petitioner Society has suffered a huge loss of not using the said additional area which could be utilized for constructing more flats which would have fetched the Petitioner Society a substantial amount?

VI. Whether the Respondent Authority can apply the present land rate in respect of the part of the plot which was purchased by the Petitioner in auction in 2001 and no intimation was given to the Petitioner about the bigger size of the plot in next six years?

VII. Whether in the absence of any lapse, negligence or omission on the part of the Petitioner Society, the Respondent Authority is entitled to claim the cost of the additional area, even if it is there, at the current land rate or also to claim interest from the date of the allotment?

VIII. Whether the Respondent Authority can insist on its arbitrary and illegal demand without conducting the physical survey of the entire plot in the presence of and to the satisfaction of the Petitioner Society?

IX. Whether the Respondent Authority is justified in rejecting the representation of the Petitioner Society submitted against the impugned demands, by passing a mechanical and non speaking order which completely ignores and overlooks the grounds and contentions of the Petitioner Society raised against the said illegal demand?

5. However, in the course of argument Shri Shashi Nandan, the learned senior Counsel appearing for the petitioner has confined is only on the point that the petitioner society has paid the entire consideration for 5127.47 Sq. Mtrs. and there is no material to show that the petitioner society is in possession of an area in excess thereof. So far as the alleged survey is concerned, the said survey is nothing but a waste paper as the same was not carried in the presence either of the petitioner society or its office bearers or of its any of the members. Elaborating the argument he submits that in the lease deed which is the title deed of the petitioner society, the area transferred to the petitioner society has been described by the boundaries as well as by measurements with the rider that the said area "may be a little more or less". This according to him signifies that the area was not mentioned with meticulous precision and the executants of the document intended that if there is a slight variation in the area either side, the land as described by the boundaries has been demised by the respondents in favour of the petitioner society for total consideration of Rs. 4,92,23,712/-.

6. The learned Counsel for the respondents, on the other hand, submits that on actual measurement, it was detected that the petitioner society is in excess of the possession of an area measuring 176.63 Sq. Mtrs and as per policy decision of the respondent authority, the petitioners are bound to pay the price of the said excess land as demanded by the impugned notice. The contention that the survey in question was carried out ex parte by the respondents has been refuted.

7. Considered the respective submissions of the learned Counsel for the parties and perused the record. It is a common case of the parties that the respondent authority settled the land measuring 5127.47 Sq. Mtrs. in favour of the petitioner society for the aforesaid sum. The respondent authority on 23.4.2002 delivered the physical possession of the said plot and the petitioner society on 17.1.2002 got construction plan sanctioned for the Group Housing Complex for the said area as approved by the respondent authority. The respondent authority had also issued completion certificate as also no dues certificate towards the cost of the land demised to the petitioner society after the inspection report dated 23.5.2006. The petitioner society has allotted 75 flats to its allottees. On these facts in our considered opinion the following two questions are mooted in the present writ petition:

1. Whether on the facts and circumstances of the case, there is any justification under law to issue the impugned notice demanding a further sum of Rs. 1,09,64,520/- towards the price for the excess area of the land measuring 176.63 Sq. Mtrs. unilaterally vide annexure-1 to the writ petition?

2. Whether the alleged survey was conducted, a copy of which has not been placed on record in the presence of the petitioner society or its members or office bearers, if so, what would be its effect on the rights of the parties?

8. Taking the first point first, a bare perusal of the impugned notice dated 27.8.2007 filed as annexure 1 to the writ petitioner would show that it is a simple notice of the impugned demand on the ground that after the execution of the lease deed 23.10.2002 and the payment of the consideration, now it has transpired from the letter dated 2nd of August, 2006 of the Sector Niyojak (Civil Construction) that the area has been increased to 5, 304.01 Sq. Mtrs. and thus, there is increase of 176.63 Sq. Mtrs. in area and the petitioner society is liable to pay the amount towards the increased area and then get the deed rectified. The said letter on its plain and simple reading does not show in any manner that the petitioner society is responsible for the increase in the area, if any. Strangely enough in the counter affidavit a new case has been set out by the respondent authority that the petitioner on the spot has encroached upon a surplus area measuring 176.63 Sq. Mtrs. vide para 3 thereof.

9. So far as the plea of trespass is concerned, it is well settled that statutory authority cannot supplement the reason by way of counter affidavit. It has been laid down in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

10. The above proposition of law has been reiterated from time to time including

in Union of India (UOI) and Another Vs. G.T.C. Industries Limited., Bombay, The material portion is reproduced below:

It is well settled that a quasi-judicial order has to be judged on the basis of reasoning contained therein and not on the basis of the pleas put forward by the person seeking to sustain the order in its counter-affidavit or oral arguments before the Court.

11. Recently in Bhikhubhai Vithlabhai Patel and Ors. v. State of Gurjrat and Anr. AIR 2008 SCW 2446 in para 35 reiterating the above principle it has been observed as follows:

It is very well settled, public orders publicly made, in exercise of a statutory authority, cannot be construed in the light of explanations subsequently given by the decision making authority. Public orders made by authorities are meant to have public effect and must be construed objectively with reference to the language used in the order itself. See Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

12. Respectfully following the aforesaid proposition of law, since in the impugned order it has not been even whispered that the petitioner society is in occupation of in excess of land of what was given to it under the lease deed and is trespasser, the impugned demand cannot be supported on the basis of the allegation of trespasser as made in the counter affidavit.

13. Even otherwise also, to us it appears that the plea of trespasser has been put forward as an after thought. Along with the counter affidavit, no material has been placed or annexed to show that at any point of the time the petitioner society was considered as a trespasser over the disputed area of 176.63 Sq. Mtrs. The basis of the impugned demand is the letter dated 2nd of August, 2006 of the Sector Niyojak which has been annexed along with the counter affidavit as the last document. The said letter is in the form of covering letter informing the concerned authority that as a result of survey of various plots including the disputed one being D-13 there is a difference in the area in between the area allotted to the person concerned and as per the survey plan. It necessarily follows that at the most it is a case of calculation mistake or of wrong measurement or of miscalculation but the fact remains that even in the said letter dated 2.8.2006 it is not mentioned that the petitioner society has trespassed over a piece of land of the respondent authority. In absence of any material before us as to in which direction or directions, the petitioner society has taken possession over the land beyond the boundaries as described in the lease deed, the respondent's contention of trespass, is unfounded. The plea of trespass is, thus, discarded.

14. The next aspect of the case is that the boundaries are clearly described in the lease deed and there is no dispute between the parties on this score. In the

instrument in question besides delineating the boundaries of the plot, leased to the petitioner society, the area of the land has also been mentioned as 5127.47 Sq. Mtrs. The relevant portion from the lease deed is extracted below:

And also in consideration of the yearly lease rent hereby reserved and the covenants, provisions and Agreement herein contained and on the part of the Lessee to be respectively paid, observed and performed, the Lessor doth hereby demise on lease to the Lessee, all that plot of land numbered as Plot No. D-13. Sector-44, in the New Okhla Industrial Development Area, Distt. Gautam Budh Nagar contained by measurement 5127.47 Sq. Mtrs. be the same, a little more or less and bounded:

On the North by : Vacant Land On the South by : D-11/44 On the East by : 18 Meter Wide Road On the West by : Khasra No. 279-280

And the said plot is more clearly delineated and shown in the attached plan and therein marked red.

15. The use of the underlined words would clearly show the intention of the respondent authority that the measurement of the land was not shown with precise meticolation but by way of estimate. The use of the words "but be the same, a little more or less" and "bounded" emphasize the intention of the parties that the land as bounded in the said document as per the boundaries mentioned towards the North, South, East and West was sought to be given to the petitioner society on lease for the said consideration and the parties were not very firm and definite about the exact area.

16. At this stage Section 97 of the Evidence Act may be looked into and the maxim Falsa Demonstrate Non Nocet may also be looked into. Sometimes the said maxim as per Broom's Legal Maxims, means "if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it."

17. In Jagdish Prasaid and Anr. v. Mahendra Pratap 1998 (89) RD 128 a Learned Single Judge of this Court has held that in case of conflict between the area and the boundary the boundary would prevail. The relevant portion from the judgement is extracted below:

If there be an conflict between the area and the boundary the boundary would prevail. There may be some misdescription or mis-measurement of the area but when for any land in addition to an area, boundary is also given, the boundary being identifiable, there may not be any difficulty to locate the land from the boundary.

18. Applying the aforesated proposition of law in the given facts of the case on hand we are of the considered opinion that the land in question is sufficiently described by the boundaries of all sides and in the absence of the case of the respondent authority that the petitioner society has taken possession of any piece of land beyond the boundaries described in lease deed, there is no

justification for the respondent authority to issue the impugned notice demanding the additional amount for 176.63 Sq. Mtrs. of land which according to them is in excess of the area as described in the said instrument.

19. In the Commentary by S.C. Sarkaron Law of Evidence 14th Edition at Page 1320 (Vol.1) the renowned Author has laid down as follows:

Admissibility of Extrinsic Evidence in Cases of Latent Ambiguity Covered by the Section.- "Where lands are described as lying within certain boundaries, and there is a mis-statement as to the area within such boundaries, the boundaries must prevail and the error in the quantity should be considered as a mere false description *Pahalwan v. Maheswar* 16 WR 5 PC : 9 BLR 150; *Zeenat Ali v. Ram Dayal* 18 WR 25; *Eshan Ch v. Pratap* 20 WR 224; *Shib Ch v. Brojonath* 14 WR 301; *Abdul Mannath v. Baroda* 15 WR 394; *Moniuddin v. Sandes* 12 WR 439; *Virjivandas v. Md Ali* 5 B 208, see also *Tribhoban v. Krishnaram* 18 B 283; *Karuppa v. Periathambi* 30 M 397 : 2 MLT 336; *Harimohan v. Rameshwar* 64 IC 737; *Shk Bara v. Rajendra* 64 IC 751; *Nga Cho v. Mi Se* 10 Bur LT 245; *Johri v. Jowahra* 58 IC 67; *Ritlal v. Spilingford* 57 IC 2; *Narain v. Jawahir* 50 PLR 1922; *Bholanath v. Mrityunjoy* 59 CLJ 532, and other cases as to false description noted u/s 95. Where there is seeming inconsistency as between boundaries and the area stated in an instrument, it is permissible to have recourse to extrinsic evidence and evidence of user by acts of parties for the purpose of gathering the real intention *Sattendra v. Girijabhusan* 58 C 686 : A 1931 C 596 ; *Alla Basavapunnareddy Vs. Kalaga Krishnayya and Others*,

20. It is, thus, firmly established that if there is any discrepancy in the area as described in the deed and the boundaries mentioned in the said deed, the boundaries mentioned in the deed will prevail over the area as mentioned in the deed. This being the position in law, even if for the sake of argument it is assumed that an area of 176.63 Sq. Mtrs. in excess has been given in possession to the petitioner society the impugned demand cannot be sustained leaving undecided the petitioner's plea regarding the quantum of the amount, thus demanded.

21. We, thus, decide the first point in favour of the petitioner holding that the impugned demand cannot be sustained.

Now, we take up the second point raised by the respondent authority that on actual survey it was found that the total area of the land covered under the lease deed is 5, 304.110 Sq. Mtrs. i.e. in excess of 176.63 Sq. Mtrs which was intended to be handed over, what would be its effect on the rights and the obligations of the parties?

22. Coming to the pleadings of the parties it has been averred in para 19 of the petition that the petitioner society was never intimated by any one nor had any prior knowledge about the survey conducted by the Civil Construction Department. Its reply has been given in para 8 of the counter affidavit wherein it has been stated that survey of the plot was carried out by the authority "in

presence of the residents of the area and it is inconceivable that the petitioner society has no knowledge of it". Pleadings as they stand do show that it is not the case of the respondent authority that any prior notice was given to the petitioner society informing the date and time of the intended survey, at least. In other words, it is beyond pale of doubt that no prior notice was given to the petitioner society by the respondent authority. So far as the allegation in the counter affidavit that survey was carried out in the presence of the residents of the area is concerned, the same is as vague as it could have been. The respondents have consciously not disclosed the name or names of any such residents either in the survey report (which is not on the record) or in the counter affidavit. What is most striking is why the respondents have not even dared to place on the record the survey report which is the sheet anchor of their case. In absence of any material to show that the petitioner society had any actual or constructive knowledge of the survey or they were in any manner got associated with the survey work, the allegation made in para 8 of the writ petition that the survey, if any, was carried out, was ex parte and without notice to the petitioner society, stands established. Assuming even for the sake of argument that some of the residents of the area were present at the time of survey, it would not mean any knowledge actual or constructive to the petitioner society vicariously. However, also it is not the case of the respondents that the purpose and object of the survey was disclosed to the residents of the area who were allegedly present at the time of survey. In nutshell the averment made in para 8 of the writ petition deserves credence in the absence of any contrary material which the respondent authority failed to produce before us. This ground itself is sufficient to discard the survey report and vacate the impugned notice as the said notice has been issued in violation of fair play.

23. There is another fact of the problem. The respondents have averred in the counter affidavit that an excess area has been given possession of to the petitioner society than the one mentioned in the registered deed, unless it is established beyond doubt that the averment made in the registered document is incorrect, the respondent authority cannot unilaterally say any thing which may amount to variation or modification of the contents of a registered document. It is for them to establish that if there is misstatement with regard to the area in the lease deed, to get it rectified and then claim, if so permissible under law, the price of the excess land. Because the respondent authority is a statutory authority, it does not mean that they are not bound by the terms and conditions of the lease deed and may act arbitrarily or whimsically by asking the petitioner to cough out a sum of Rs. 1,09,64,520/-.

24. Even otherwise also, according to the own showing of the respondent authority that the petitioners are in settled possession of the entire area in question, nobody has a right under the Indian Law to take law in his own hands to pass a mandatory order. Assuming that the petitioners are trespassers, they cannot be evicted except in due course of law.

25. We are of the opinion that the contesting respondents have utterly failed to establish that the petitioner society is a rank trespasser in respect of 176.63 Sq. Mtrs of land and therefore, the contention that the writ petition at the instance of the trespasser is not maintainable, is liable to be rejected. The material available on the record is sufficient to hold that the impugned notice suffers from arbitrariness and there is no application of mind and therefore, liable to be quashed in exercise of power conferred under Article 226 of the Constitution of India. The judgment, however, will not preclude the respondent authorities to have recourse to institute a suit if so advised for recovery of any amount which according to them is due from the petitioner society wherein the parties will have opportunity to lead evidence and to establish that the lease deed has been executed in respect of a particular area but certainly no otherwise.

26. In the result, the writ petition succeeds and is allowed. The impugned notice dated 27.8.2007 (Annexure-1 to the writ petition) is quashed with cost of Rs. 10,000/- (Rupees Ten Thousands Only).