(2013) 09 P&H CK 0077

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. No. 12786 of 2011

M/s. Conscient Infrastructure Pvt. Ltd. and Others — APPELLANT

Vs

State of Haryana and Another — RESPONDENT

Date of Decision : 19-09-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Haryana Development and Regulation of Urban Areas Act, 1975 — Section 3
Land Acquisition Act, 1894 — Section 6

Citation : (2013) 09 P&H CK 0077

Hon'ble Judges : Satish Kumar Mittal, J;Mahavir S. Chauhan, J

Bench : Division Bench

Advocate : Sanjeev Sharma and Mr. Shekhar Verma and Mr. Mukul Aggarwal, for the Appellant; Rahul Sharma, Additional Advocate General Haryana, for the Respondent

Final Decision : Allowed

Judgement

Mahavir S. Chauhan, J.—Where there is arbitrariness in the State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by the reason. So, whatever be the activity of the Public Authority, it should meet the test of Article 14...", ruled the Hon''ble Supreme Court of India in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, . Is action of the respondents in refusing a licence for development of a commercial colony to the petitioners, in consonance with equality clauses enshrined in Article 14 of the Constitution of India, is the conundrum that craves resolution in these Civil Writ Petitions, i.e., C.W.P. No. 12786 of 2011, M/s. Conscient Infrastructure Pvt. Ltd. and others versus State of Haryana and another, C.W.P. No. 14752 of 2011, M/s. Casting Properties Pvt. Ltd. and others versus State of Haryana and another, and C.W.P. No. 14822 of 2011, M/s. Vishnu Apartments Pvt. Ltd. and others versus State of Haryana and another, which, in view of commonality of questions of fact and law, are proposed to be disposed of by this common judgment being passed in C.W.P. No. 12786 of 2011, M/s. Conscient Infrastructure Pvt. Ltd. and Others versus State of Haryana and another. Facts are also taken from this very petition. The petitioners, who own 02.31 acres of land in Sector 66, Gurgaon (revenue estate of village Badshahpur), vide their application dated 24.12.2010 (Annexure P7) applied to the Director, Town and Country Planning, Haryana (respondent No. 2) for grant of permission/licence, u/s 3 of the Haryana Development and Regulation of Urban Areas Act, 1975, for developing a commercial colony on their aforesaid land. Vide notice dated 14.03.2011 (Annexure P8) second respondent informed the petitioners that since the site under reference was not covered within 50% of the commercial belt of Sector 66, Gurgaon Manesar Urban Complex, their request for grant of licence could not be considered, still, before refusal to grant the requisite licence they were granted an opportunity of personal hearing. Petitioners'' representative appeared for personal hearing and also submitted a written reply dated 18.04.2011 (Annexure P9) justifying their claim for grant of a licence and pointing out that in similar circumstances a commercial licence was granted for land falling in residential zone in Sector 62, Gurgaon, which was beyond availability of commercial zone in either of the two categories, i.e. 50% of commercial belt or 3.5% residential sector. However, vide order dated 03.06.2011 (Annexure P10) petitioners'' request for grant of the licence was rejected reiterating that "the applied site is not covered within 50% of the net planned area of commercial belt of Sector 66, GMUC".

2. To seek quashing of order dated 03.06.2011 (Annexure P10) and issuance of a mandate to the respondents directing them to consider petitioners'' request for grant of a licence in accordance with law, petitioners have invoked extra-ordinary jurisdiction of this Court by way of this civil writ petition under Articles 226 and 227 of the Constitution of India.

3. Respondents, instead of filing a para-wise reply, have placed on record a short reply of Chief Town Planner, Haryana reiterating contents of order dated 03.06.2011 (Annexure P10), besides filing affidavit of Chief Town Planner, Haryana.

4. We have heard learned counsel for the parties and have perused the record very minutely.

5. On behalf of the petitioners it is argued that respondents'' plea that a private developer cannot be allowed to develop more than 50% of the total land in a particular commercial belt is, ex facie, arbitrary and unreasonable because the condition of 50% development by private developers and 50% by Government Enterprises is applicable only to sectors reserved for commercial use in the Final Development Plan (for short, FDP) and not to commercial belts in residential sectors. The learned senior counsel representing the petitioners points out that in addition to commercial sectors and commercial belts, at the peripherals of residential sectors there are commercial zones to the extent of 3.5% of the total residential sector, within the residential sectors, which are meant to be developed only by private developers and this also fortifies petitioners'' claim that the ratio

of 50:50 development by private and public enterprises is meant only for sectors exclusively reserved for commercial use in the FDP and not for commercial zones and commercial belts.

6. It is further argued on behalf of the petitioners that the second respondent has rejected petitioners'' application for grant of a licence primarily on the ground that if the licence is granted to the petitioners the stipulation of 50% reservation shall be breached but a similar licence has already been granted to M/s. R.S. Infrastructures Pvt. Ltd. (hereinafter referred to as, the company) in excess of the 50% limit and plea of the respondent that that the company had applied for such a licence on 31.07.2006, i.e. before FDP was approved, is factually incorrect because as per information collected by the petitioners, which is not denied by the respondents, the company applied for a licence for the third time in the month of April, 2010 and grant of a licence in its favour was recommended on an imaginary consideration that it was deprived of the licence because width of the commercial belt had been reduced from 400 meters to 200 meters while finalising the FDP after it had submitted application for grant of the licence and, at the same time, application submitted by the petitioners on 24.12.2010 has been rejected in spite of the fact that petitioners'' land is situated in the commercial belt which was earlier notified to be of 400 meters and was later reduced to 200 meters at the of finalisation of the FDP. In fact, according to learned senior counsel for the petitioners, ''the company'' had applied for refund of the licence fee in the month of April 2009, which was approved also. It then made several applications for the same very land and, as such, the application submitted in the year 2006 by it had lost its significance and relevance.

7. On the contrary, Mr. Rahul Sharma, learned Additional Advocate General, Haryana with the aid of clause VII(2) of notification dated 05.02.2007 (Annexure P3) has argued that the limit of 50% development by private developers also applies to residential sectors having commercial belts/zones because, according to him, the term "Sector" as defined in clause II(q) means the area bound within roads, and then, with the aid of a coloured copy of FDP (which has been retained on record), has attempted to demonstrate that the area shown in blue colour depicts the commercial belts/zones and it would be seen that wherever such area appears it is bound within roads.

8. It is next contended on behalf of the respondents that the petitioner cannot claim parity with ''the company'' because said company had applied for a licence in the year 2006 when width of the commercial belts was shown as 400 meters in the Draft Development Plan (DDP) and by the time the licence was granted to it width of commercial belt had been reduced to 200 meters at the time of finalisation of the FDP and for that reason a licence was granted to that company as a special case. But the petitioners had applied for a licence after finalisation of the FDP wherein width of the commercial belts was shown as 200 meters.

9. When confronted with grant of licence beyond 50% in Sector 65, the learned

Additional Advocate General has said that it has happened on account of a bona fide calculation mistake.

10. Towards the end, it is argued on behalf of the respondents that grant or refusal to grant a licence is within the discretion of the licencing authority and such a licence cannot be claimed as a matter of right and even if there is no rule to restrict grant of licences to private developers such a bar can be imposed in view of the practice in vogue and the Government can even reserve the entire area for Government Enterprises.

11. Nothing more has been urged on either side.

12. It may be relevant to state at the very outset that the respondents rejected application of the petitioners for grant of a licence saying,

The case was examined by the office and it was observed that earlier the area of commercial Belt of Sector 66, Gurgaon-Manesar, Urban Complex (GMUC) was 54.30 acres however, later on, the area of commercial Belt of this Sector was reduced to 33.30 acres. As per policy of the Department, only 50% area of the commercial Belt is permissible for commercial licence. The Department has already granted seven licences for the area measuring 23.4677 acres. Therefore, case of the applicants for grant of licence for 2.31 acres for setting up of a Commercial Colony cannot be considered.

13. However, in our view, above-cited conclusion of the respondents runs contrary to the policy notified vide notification dated 05.02.2007 (Annexure P3).

14. It is seen that the area covered by the plan has been divided into twelve land uses under the head "Proposed Land Uses". These are, (1) residential=14930 hectares, (2) commercial=1404 hectares, (3) industrial=5441 hectares, (4) transport & communication=4231 hectares, (5) public utilities=564 hectares, (6) public & semi public use (institutional) =1630 hectares, (7) open spaces=2675 hectares, (8) special zone=106 hectares, (9) defence land=633 hectares, (10) special economic zone=4570 hectares, (11) existing town=406 hectares, and (12) village abadies=428 hectares.

15. The plan further elaborates that the "new commercial areas proposed in the Development Plan shall be developed in the form of big commercial malls and corporate commercial complexes. In addition, the commercial belts with a width of 200 meters have also been provided along the selected roads to cater to the needs of the surrounding areas". A plain reading of the above would indicate that the commercial belts along selected roads are in addition to the area of 1404 hectares reserved for commercial use under the head "Proposed Land Uses" because were it the intention of the FDP that the area of 1404 hectares reserved for commercial use was to include commercial belts also, it would not have used the words "in addition" rather the word "including" would have been used.

16. The plan, under the head "Major Land Uses/Zones", further divides the area into nine zones, namely, Residential Zone, Commercial Zone, Industrial Zone,

Transport and Communication Zone, Public Utility Zone, Public and Semi Public Zone (Institutional Zone), Special Zone, and Agriculture Zone. Here also the commercial zone is distinct from other zones which is indicative of the intention of the FDP that the norms for development of each zone have to be distinct from one another, or say norms for development of the commercial zone have to be different from development of other zones. To put it otherwise, the bar of 50% development by private developers is peculiar to the commercial zone only and it cannot be applied to all the sectors universally.

17. On behalf of the respondents an effort has been made to project that every area bounded by roads has to be taken to be a Sector Area and that being so the bar of 50% development by private developers has to apply to commercial belts/ zones in residential areas also as these belts/zones are bounded by roads. The contention, in our considered opinion, is fallacious. ''Sector Area'' and ''Colony Area'', according to clause 2(q) of the notification, Annexure P3, ''shall mean the area of sector or colony as bounded within the major road system shown on drawing". The term "Sector" has been further elaborated under the head "Division into Sectors". It says, "Major Land Uses mentioned at Serial Nos. (i) to (viii) in zoning regulation-Ill above, which are land uses for building purposes, have been divided into sectors as shown bounded by the major road reservations and each sector shall be designated by number as indicated on the drawing". The areas shown in blue colour in the drawing relied upon on behalf of the respondents though are bounded within roads but these roads are subsidiary roads and not major roads and these enclosures are not designated by numbers. Therefore, the contention put forth on behalf of the respondents cannot be accepted. As a necessary fall out, Clause VII(2) of the notification, Annexure P3, cannot be read to mean that bar of 50% development by private developers applies to all sectors, rather, it has to be interpreted to mean that the embargo applies only to the sectors reserved for commercial use and not to the commercial belts falling in residential sectors along roadside. Clause VII(2) of the notification reads as under:

For the development of sectors reserved for commercial use, private developers shall be permitted to develop to the extent of 50% of the sector area as per the lay out plan approved by competent authority, after obtaining licence under Act No. 8 of 1975. Balance 50% are shall be developed exclusively by the Government or a Government Undertaking or by a public authority approved by the Government.

18. Were it the intention of the plan that the embargo of 50% was to apply to all the sectors, commercial and residential, there should have been no necessity to make provision as aforesaid and, instead, it would have sufficed to provide that the embargo would apply to all the sectors or to commercial and residential sectors and so on and so forth. A glance across drawing shown on behalf of the respondents clarifies the position beyond doubt. In this drawing the areas reserved for commercial activity have been shown in blue colour. These areas

include the areas which are bounded within subsidiary roads but are not designated by numbers, as also the areas bounded within major road system and designated by numbers. Thus, two areas are distinct from each other and the areas which are bounded within subsidiary roads but are not designated by numbers cannot be said to be "Sector Area", but the areas bounded within major road system and designated by numbers fall within the description "Sector Area". Thus, the two areas are distinct from each other.

19. Further, in the "Sector Area", in addition to commercial sectors and commercial belts at the peripherals of residential sectors there are commercial zones to the extent of 3.5% of the total residential sector, within the residential sectors, and these commercial zones are meant to be developed only by private developers. This also fortifies petitioners'' claim that the ratio of 50:50 development by private and public enterprises is meant only for sectors exclusively reserved for commercial use in the FDP and not for commercial zones and commercial belts.

20. The petitioners in reply dated 05.09.2013 filed to the affidavit dated 21.08.2013 of Chief Town Planner Haryana have demonstrated, with the aid of a table, that in Sector 66 an area measuring 13.437 acres (being 3.5% of the total area of the sector) was reserved for commercial use but licences have been issued for development of an area measuring 14.6856 acres which evidently is in excess, by 1.2486 acres, of the permissible limit of 3.5% area of the sector. This also runs contrary to respondents'' plea that the embargo of 50% development by private developers applies to all the sectors as a universal rule. Interestingly, this assertion of the petitioners has not been controverted by the respondents.

21. From the above it is crystal clear that the embargo of 50% development by private developers in sectors other than the sectors reserved for commercial use is not there in the notification, Annexure P3 and it is brainchild of the respondents only.

22. As regards case of the company (M/s. R.S. Infrastructure Pvt. Ltd.), the impugned order, Annexure P10 says,

The case cannot be compared with the case of M/s. R.S. Infrastructure Pvt. Ltd. as the said company had applied for licence on 31.07.2006, i.e. immediately after the publication of the DDP of GMUC 2021. But as already pointed out, the present application for licence was received only on 24.12.2010, whereas, the land was purchased in the years 2005, 2006, & 2007. Therefore, your case cannot be considered in accordance with the provisions of 400 meters commercial belt as provided in DDP of GMUC 2021...

23. In the affidavit dated 21.08.2013 of Chief Town Planner, Haryana grant of licence to M/s. R.S. Infrastructure Pvt. Ltd., beyond 50% limit is sought to be justified by saying that that company had applied for grant of a licence for commercial colony on 31.07.2006 in the commercial belt of Sector 62 of the Draft Development Plan-2021 of Gurgaon-Manesar Urban Complex for an area of

30.5125 acres, however, licence was granted to that company after publication of FDP of Gurgaon-Manesar Urban Complex-2021 wherein width of the commercial belt was reduced from 400 meters to 200 meters and the request of the company was considered according to the by 1.2486 acres-2021 and licence for an area of only 17.893 acres was granted on 16.01.2008. The company then represented that its application may be considered for balance area as it had purchased land for development of commercial colony and had applied for the same at the time when the width of the commercial belt was 400 meters. The respondents considered case of the company as a special case and granted licence to it in commercial belt of Sector 62 in excess of 50% of the planned area.

24. We find ourselves unable to subscribe to what the respondents have said to justify grant of a licence to M/s. R.S. Infrastructures Pvt. Ltd. in excess of the 50% embargo. In fact, in our opinion, there is no such embargo as regards the sectors other than the sectors reserved for commercial use, or say the 50% limit is confined only to sectors reserved for commercial use and it does not extend to the commercial belts alongside roads and commercial zones within the residential sectors.

25. If the above argument of the respondents is taken to be correct then their action is hit by the equality clauses enshrined in Article 14 of the Constitution of India. Admittedly land was purchased by the petitioners and the aforesaid company before finalisation of the FDP. The contention that M/s. R.S. Infrastructures Pvt. Ltd. had made an application for grant of the licence before finalisation of the FDP, however, has not impressed us because the respondents, by omitting to file a para-wise reply and to deal with the plea in the affidavit dated 21.08.2013 of the Chief Town Planner, Haryana, have allowed to remain uncontroverted, and, as such, are deemed to have admitted as correct, an assertion made by the petitioners in paragraph (27) of the petition to the effect that in the month of July, 2006, M/s. R.S. Infrastructure applied for commercial licence on 30.5125 acres in village Ghata, Tagra and Nangli Umarpur, now Sector 62, Gurgaon but vide its application dated 09.02.2007, the company applied for a Group Hosing licence for 13.6225 acres out of the aforesaid 30.5125 acres and it was granted a commercial licence for 17.893 acres; it then made one application after the other or changed/converted its requests from commercial to group housing to three independent commercials under 3.5% category in residential sector to ''Affordable Low Cost/Mass Housing'' and/or vice versa or made fresh applications in substitution of the applications made earlier and after these applications were rejected, the company, in the month of April, 2009, applied for refund of the licence fee amounting to Rs. 20,00,000,00/- (approximately), which was even approved by the Chief Minister in the month of May, 2009, but before approval of request for refund, it applied for reconsideration of its application for grant of commercial licence whereupon, in the month of July, 2009, case of the company was forwarded to the quarters concerned for grant of commercial licence for an area measuring 12.55 acres which was not covered under 3.5% Commercial Colony Policy as also orders on

release of land by the Government, and simultaneously it applied for grant of a licence to develop ''Affordable Low Cost/Mass Housing'' on an area measuring 15 acres; thereafter, in the month of July, 2009 case/application of the company was rejected for the second time and, consequently, in the month of August, 2009, it applied for grant of a licence to develop a Group Housing Society; thereafter, in the month of April, 2010, the second respondent recommended case/application of the company for grant of commercial licence for 12.35 acres as also grant of a commercial licence for the balance area measuring 10.35 acres on the plea that the company was deprived of a licence on account of reduction of width of the commercial belt from 400 meters to 200 meters while finalising the FDP; and this was done as some important policy decisions were taken at higher level of the Government at the behest of the company.

26. From the above averment, it comes out that M/s. R.S. Infrastructure Pvt. Ltd. had given up its effort to have a commercial licence and had switched over to Group Housing when its case for grant of a commercial licence was rejected in the month of July, 2009 and later on it applied for a commercial licence much after finalisation of the FDP. It may be hastily added here that the petitioners crave for grant of a commercial licence only for 3.21 acres of land whereas M/s. R.S. Infrastructure Pvt. Ltd. applied for and were granted such a licence for 10.35 acres and justification put forth by the respondents that it was done in view of the fact that M/s. R.S. Infrastructure Pvt. Ltd. had applied for the licence before finalisation of the FDP when width of the commercial belt was 400 meters, is wholly imaginary and fanciful.

27. Be that as it may, grant of licence to M/s. R.S. Infrastructure Pvt. Ltd. in excess of 50% of the total area and denying it to the petitioners on the plea that the limit of 50% meant for private developers has already been reached is, ex facie, unreasonable and discriminatory and hit by the provisions of Article 14 of the Constitution of India and smacks of arbitrariness. Arbitrariness and discrimination have inbuilt elements of uncertainty as the decisions of the State would then differ from person to person and from situation to situation, even if the determinative factors of the situations in question were identical. This uncertainty must be avoided because discrimination not only breeds corruption, but also disrespect for governance and leads to frustration.

28. As regards the other submission that even if there is no rule to support action of the Government it has ample power and discretion to follow a practice not to grant licences to private developers beyond 50% of the area of a sector or to reserve to itself the entire area for development through State/Public Sector enterprises, there is no denying the fact that the Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances and the Court may not be justified to strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser, or more scientific or logical. But, we must add a word of caution that the principle of transparency,

reasonableness and non-arbitrariness in governmental actions is the corner stone of the scheme and our Constitution. To put it straight, every action of the Government must pass the test of reasonableness and fairness. Though sufficiency or otherwise of the reasoning in support of a particular action of the State may not be a valid ground for consideration within the scope of judicial review, but rationality, reasonableness, objectivity and application of mind are some of the prerequisites of proper decision making. When the decision-making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, and where the process of decision making is duly followed but proper reasoning is not recorded in support of the conclusion arrived at, such an action can normally be termed as "arbitrary". Action of the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. Arbitrariness in State action, even where the rules vest discretion in an authority, has to be impermissible. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature. The standard of fairness is also dependent upon certainty in State action, that is, a class of persons must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Unfortunately, the learned Additional Advocate General has not been able to bring to our notice any decision of the Government to follow a practice not to issue licences to private developers beyond 50% of the area of a sector or to reserve the entire area for State/Public Sector enterprises as also valid reasons therefore. Except for M/s. R.S. Infrastructure Pvt. Ltd., no other case could be brought to our notice where a private developer had applied for a licence for development of area more than its 50% and licence was denied to that applicant for that reason.

29. Ad finem, it is argued on behalf of the respondents that the instant writ petition is rendered only of academic importance in so far as land of the petitioners is under acquisition and a notification u/s 6 of the Land Acquisition Act, 1894 (copy Annexure P6) has already been issued and grant or non-grant of the licence in their favour would be of little significance.

30. True, land of the petitioners is under acquisition. It is also equally true that Civil Writ Petition No. 17280 of 2010 praying release of that land from acquisition is pending and vide order dated 08.07.2011 parties therein have been directed to maintain status quo as regards possession of the land under acquisition and the petitioners are banking upon policy decision of the State of Haryana as circulated vide memorandum dated 26.10.2007 according to which, "Any land in respect of which an application u/s 3 of the Haryana Development and Regulation of Urban Areas Act, 1975 has been made by the owners prior to the award for converting the land into a colony, may also be considered for release... Therefore, examined from all possible angles, order dated 03.06.2011 in CWP No. 12786 of 2011,

order dated 22.06.2011 in CWP No. 14752 of 2011 and order dated 22.06.2011 in CWP No. 14822 of 2011 are found to be unreasonable, arbitrary besides being discriminatory and are, thus, quashed and the writ petitions are allowed. Director, Town and Country Planning, Haryana (respondent No. 2) is directed to examine the matter afresh in view of the observations made in this judgment and pass orders afresh after hearing the petitioners within three months after receipt of the certified copy of the order.

