D. L. F. Housing Construction (P) Ltd.

Vs

Delhi Municipal Corpn. and Others

Civil Appeal No. 1298 of 1970

(CJI A. N. Ray, M. H. Beg, R. S. Sarkaria, P. N. Shinghal JJ)

04.12.1975

JUDGMENT

SARKARIA, J. -

1. This appeal by certificate arises out of a judgment of the High Court of Delhi dismissing the appellant's writ petition under Article 226 of the Constitution.

2. The appellant D.L.F. Housing Construction (P) Ltd. (hereinafter referred to as the Coloniser) carries on the business of colonisation and development of lands in Delhi. Among the colonies which were developed by it are : New Delhi South Extension Part I and Part II Shivaji Park, Hauz Khas, Kailash, Greater Kailash I and Greater Kailash II. The coloniser submitted applications for the development of these colonies and obtained sanctions of the layout plans under the extent laws. Sanctions for five of these colonies were granted by the Delhi Development Provisional Authority in the year 1956 under the Delhi (Control of Building Operations) Act 53 of 1955 and the Regulations framed under Section 19 of the Delhi (Control of Building Operations) Ordinance No. V of 1955.

3. Under Regulation 5(3)(ii), before a coloniser undertaken to subdivide a plot of land into building plots, he is required to enter into an agreement with the Central Government for the internal development of the land to the satisfaction of the authority. A coloniser seeking permission to develop an area of land as a colony has to submit an application for the purpose together with a layout plan in which he has to set apart, among other things, open spaces for roads, parks, etc. and open sites for other public utility services such as schools, dispensaries, etc. The principles and conditions on which the sanction is accorded are indicated in the Regulations. Sanctions for development of the first five colonies mentioned above were obtained by the coloniser in 1956 and of Greater Kailash II in 1959.

4. On January 12, 1965, the municipal corporation (respondent No. 1) by a letter required the coloniser to hand over, free of cost, the total land in its colonies under roads, public parks and such other public utility services, including the land set apart for schools, hospitals and similar other public institutions, and provided under Regulation 5(3) of the Delhi (Control of Building Operations) Regulations. It also reminded the coloniser of its obligation under sub-paragraph (iv) of Regulation 5 (3) to transfer all such land to it. It further asserted that all such plots in all the colonies developed by the coloniser which had been set apart for public utility services, vest in Delhi Municipal Corporation in accordance with the Regulations.

5. On June 28, 1965 the coloniser received a notice, dated June 24, 1965, from the Delhi Municipal

Corporation (respondent No. 1) through its Deputy Commissioner (respondent No. 2) regarding vacant plots in N.D.S.E. Parts I and II that had been set apart for public utility services. The material part of this notice runs as under :

The services of the colony of N.D.S.E. I and II have been taken over by the Municipal Corporation, Delhi long ago; and as provided under Section 313(b) of D.M.C. Act, 1957, vacant plots and other services indicated in the layout plans automatically vest in the Municipal Corporation of Delhi.

It is, therefore, understood that the possession of the plots in N.D.S.E. Part I and II earmarked for Primary School and High School in both the above colonies now vests in the Municipal Corporation of Delhi and further action to utilize these plots will be taken in the interest of the public/residents of these colonies.

In reply to this letter the coloniser informed respondent No. 1 that it had no authority under the law to treat these sites, and similar sites in the other colonies as vesting in respondent No. 1. The coloniser asserted that it was holding these plots as owner thereof.

6. The coloniser on July 27, 1965, filed a petition under Article 226 of the Constitution for impugning the aforesaid notices dated January 12, 1965 and June 24, 1965 whereby the municipal corporation directed the coloniser to transfer such plots to it free of cost. The coloniser pleaded that neither the Acts concerned, nor the Regulations framed under Ordinance V of 1955 authorise the municipal corporation to take over free of cost the vacant plots of land earmarked for schools and hospitals, etc. The coloniser, however, made it clear that it is holding such plots to be utilised only for the purposes for which they were earmarked, and for no other purpose. The coloniser's case in the petition was that the principles embodied in Regulation 5 were only general guiding principles which did not fetter the discretion of the authority in any way whatsoever in granting or refusing permission. It was further alleged that in any event the regulations had not force of law because Ordinance V of 1955 under which they were framed, had been repealed by Delhi Act No. 53 of 1955 without preserving the continuity of the Regulations. In the alternative, it was pleaded that these Regulations were hit by Article 31(1) and (2) of the Constitution and as such were ultra vires and void. It was further stated that the coloniser had already made arrangements with various trusts and charitable organisations and leased out various such plots with the express stipulation that the same would be utilised only for the purposes for which they had been earmarked in the layout plans but respondent No. 1 had refused to sanction the building plans submitted in respect thereof. The lessee of two such plots - One situated in N.D.S.E. Part I and the other in Greater Kailash - Submitted building plans for sanction but the same were rejected by respondent No. 1. According to the coloniser, in rejecting the building plans, the municipal corporation had acted without jurisdiction. On the preceding facts, the petitioner prayed for the issuance of :

> (a) a writ of mandamus or any other appropriate writ, direction or order, restraining the respondents, their agents, and servants, from interfering with the peaceful possession and ownership of the petitioner coloniser in respect of the said plots of land earmarked for schools, hospitals, etc. in these six colonies developed by it;
>
> (b) a writ of mandamus or any other appropriate writ, direction or order, directing the respondents to treat the said plots of land earmarked for schools, hospitals, etc., in the various colonies developed by the petitioner as described in prayer (a) hereinabove;

(c) a writ of mandamus or any other appropriate writ or direction restraining the respondents from rejecting the building plans submitted and being submitted in respect of the said plots of land earmarked for schools and hospitals, etc.;

(d) a writ of mandamus or any other appropriate writ directing the respondents to grant sanction of the building plans submitted, and being submitted, in respect of the said plots.

7. In the counter-affidavit filed on behalf of respondents Nos. 1 and 2, the Deputy Commissioner asserted that the ownership of the open spaces and sites in question had vested in the municipal corporation, and the coloniser was no longer the owner thereof. While admitting the petitioner's allegation that the transfer of these plots were being claimed by the municipal corporation free of cost, the Deputy Commissioner averred that in one of the plots in dispute the municipal corporation had already built a municipal school which was functioning. It was stated that

so far as the petitioner's other schemes were concerned, i.e. in Model Town, Rajori Gardens and in Hauz Khas, all streets, open spaces, parks, schools, markets, etc. had already been handed over by the petitioner to the respondent without any protest.

8. The south Extension (II) Plot Holders and Residents Welfare Association (Registered), New Delhi also joined (with the permission of the High Court) as respondent No. 4 to oppose the petition. They are interested in the open spaces which in the sanctioned layout were set apart for public utility services such as parks, lawns, streets, etc. They had instituted a regular suit in the court of the Subordinate Judge, Delhi in regard to one such plot earmarked as open space in N.D.S.E. (II) to restrain the coloniser from building a private school on it. In its affidavit the association inter alia stated that the plotholders (who were members of this association) had purchased the plots on the faith of the sanctioned layout plans which provided for parks, roads, sites for schools, hospital, public places and other public utility services. They filed a copy of Resolution No. 63, dated April 16, 1956, of the authority, together with a copy of the amended layout plan in respect of New Delhi South Extension Part II. They alleged that the beneficial interest in all such open spaces and vacant sites earmarked and set apart in the sanctioned layout vests in the plotholders of the respective colonies and that both under the law and the agreements executed by the coloniser, the authority entitled to maintain and control these parks, sites for schools, hospitals and public places was the municipal corporation.

9. In the rejoinder affidavit the petitioner stated that no agreements were entered into between the coloniser and the Delhi Development provisional Authority at the time of getting the layout plans sanctioned. The petitioner categorically denied that the

alleged agreements provided that the coloniser shall transfer to the corporation free of cost vacant land in the colonies which was under roads, public parks and such other public utility services, including the land set apart for schools, hospitals and similar public institutions.

10. The High Court held that Regulation 5(3)(vi), taken in conjunction with the applications submitted for sanction of the layout plans to the authority and the agreements, amounted to "an unequivocal declaration" on the part of the coloniser of its "willingness to use lease lands for the purposes for which they were reserved in the plans". The High Court reasoned that having so agreed to the user of these lands and having obtained sanction of the authority on that basis under the Act, certain consequences follow in law as a matter of course. Firstly, the petitioners were estopped from

going back on their solemn undertaking that the plots so reserved would be used for any purposes other than those for which they were reserved in the proposed layout plans. Secondly, a fiduciary relationship in the nature of a trust came into existence, with the result that the beneficial use of these plots passed on to "others" and the coloniser's ownership rights stood modified, they became trustees. The High Court, however, found it unnecessary to determine the exact kind of trust that thus came into being in respect of these plots and the person and persons in whom the beneficial interest came to vest after the creation of this trust. It observed that

this subject cannot appropriately be dealt with when the matter is being considered in the abstract without reference to the facts of any particular case.

In its opinion it was sufficient to say

that the petitioners by their own conduct and operation of law ceased to be full and complete owners of the plots and held them only as trustees,

and they could not deal with these plots other than in the manner permitted by the law under which the sanctions were granted or any valid rules or regulations made thereunder. Sub-para (iv) of Regulation 5(3) was held to be the law, according to which, the coloniser was bound to transfer its rights in these plots free of cost to the authority.

11. There, as here, it was contended on behalf of the coloniser :

> (1) That the Regulations, which were being relied upon by the respondents stood repealed by the Act 53 of 1955;
>
> (2) that sub-para (iv) of Regulation 5(3) requiring the coloniser to transfer to the authority free of cost the plots reserved for public utility services, was beyond the regulation-making powers conferred by the Ordinance/Act 53 of 1955 and as such, was invalid;
>
> (3) that these Regulations in any case, were no more than guiding principles giving the authority a discretion to make all or any one of them, in whole or in part, a condition of the sanction and to get them incorporated in the agreement, and that in any event, sub-para (iv) of Regulation 5(3) of its own force did not become a part of the conditions of the sanctions or a term of the agreement;
>
> (4) that sub-para (iv) of Regulation 5(3) is hit by Article 31 of the Constitution and it is void.

12. The High Court found that Section 24 read with Section 30 of the General Clauses Act in terms saves and continues the operation of the Regulations, notwithstanding the repeal of the ordinance; that sub-para (iv) of Regulation 5(3) simply lays down a "principle" and was therefore within the rule-making power conferred by Section 19 of the Act.

13. Regarding the contention that these Regulations were directory, the High Court said that although it could plausibly be argued that sub-para (xii) of Regulation 5(3) gave a discretion to the authority to waive or not to waive any of the conditions specified in the earlier "clauses", it was not possible to accept this argument in this case because

no material has been placed on the record to show that this "clause" (iv) was ever waived by the authority in the case of these six colonies, which formed the subject-matter of the petition.

In the absence of any such material the High Court held that the principle contained in Regulation 5(3)(iv) would be considered to be an "integral para of the conditions", subject to which the layout plans were sanctioned.

14. The High Court further held that the residuary interest left with the colonisers in the plots earmarked for public utility services was only a right of management of the trust in respect of these lands, and that Article 31 of the Constitution was not attracted in such a case. For this conclusion it relied upon the dictum of this Court in Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi ((1962) Supp 1 SCR 156 : AIR 1962 SC 458). In the result it dismissed the petition. Hence this appeal.

15. Apart from reiterating the arguments with regard to the vires and constitutional validity of Regulation 5(3)(iv) and the effect of the repeal of Ordinance V of 1955 on the operation of these Regulations, Dr. Singhvi, appearing for the appellant, has advanced these contentions before us :

> (1)(a) Clause (6) of the agreements executed between the coloniser and the authority in respect of the five colonies, in 1956, provides that open sites reserved for such public utility services (as distinguishable from open spaces earmarked for roads, parks, etc.) shall be transferred to the authority or persons or institutions approved by the authority, at a price to be determined by the authority on no-profit basis. This stipulation provides for a price and does not require transfer free of cost. Clause (6) of the agreements (which relates to open sites) stands out in contra-distinction to clause (5) of the agreements particularly in the matter of payment of price. The impugned action is not in conformity with this condition incorporated in the agreements, which are an integral part of the orders according the sanctions.
>
> (b) No such stipulation for transfer of school sites was made in the order sanctioning the layout for Greater Kailash II, under Act 66 of 1957.
>
> (c) The sanctions granted are valid in law and it is not open to the authority to resile from them or to read into them any other conditions.
>
> (2) In view of the clarification in sub-para (xii) of Regulation 5(3) the sanctioning authority had a discretion to adopt all or any of the principles embodied in Regulation 5 and make the same a condition of the sanction. Sub-para (iv) of Regulation 5(3) contains two alternatives, any one of which could be adopted by the sanctioning authority in the present case. While granting the sanction the authority did not make the grant subject to the first alternative contained in this sub-para (iv) but adopted the second alternative, according to which the plots in question were to be transferred to the authority or its nominee or some other institution with the permission of the authority on 'no-profit no-loss' basis. (Reliance for this contention has been placed on a document which is said to be the draft agreement attached to the order of sanction.)
>
> (3) Having granted the sanctions on the terms in the agreements which did not contain any condition that the plots in question would be transferred free of cost to

the authority, the respondents, who stand in the shoes of the authority, are estopped, in equity from denying that these plots had to be taken over on payment of a price determined on 'no-profit no-loss' basis. (Reliance for this contention has been placed on Union of India v. Indo-Afghan Agencies ((1968) 2 SCR 366 : AIR 1968 SC 718) and Century Spinning Co. v. Municipal Council ((1970) 3 SCR 854 : (1970) 1 SCC 582).)

(4) The obligation of the parties in this case were contractual and were governed by the agreements which were appendages to the sanctions. The sanction orders-cum-agreements did not create any fiduciary relationship between the promises and the promisee. There was no transfer, no divesting and no vesting in the obligation created by these agreements. There was only an agreed restriction in the matter of land use and this could not amount to the creation of a trust nor to an undertaking to transfer the land free of cost. Clause (6) of an agreement shows that there was no automatic vesting but that the transfer could be directed to be made on the payment of a price. This clause (6) is in the nature of an agreement to sell for a particular purpose at a concessional or at no-profit price.

16. On the point that a contractual obligation is different from an obligation amounting to a trust, reference has been made to Chhatra Kumari v. Mohan Bikram (AIR 1931 PC 196 : 58 IA 279) and Rama Rao v. Venkataratnam (AIR 1947 PC 88).

17. In any event in a trust there should be a settled, a trustee and a beneficiary. According to the High Court it could not be said as to who were the beneficiaries.

(5) The impugned notice dated June 24, 1965 requiring the appellant to hand over free of cost the plots in question in N.D.S.E. I and II is invalid on the face of it, because -

(a) Section 313(1)(b) of the Delhi Municipal Corporation Act, 1957, on the basis of which the automatic vesting of these plots, free of cost, in the municipal corporation is claimed, does not provide for such vesting. Section 313(1)(b) is concerned primarily with "streets" and has no application whatever to "open sites" reserved for public utility services such as schools, hospitals, etc.;

(b) The sanction of the layout plans of the N.D.S.E. I and II was accorded in 1956 under Act 53 of 1955, when the Delhi Municipal Corporation Act, 1957 was not on the statute book.

18. Mr. Rameshwar Dayal appearing for the municipal corporation, has at the outset raised an objection that none of the documents now relied upon by the appellant was produced in the High Court. He stoutly opposes the entertainment of these documents for the first time in appeal. These documents, the admission of which is objected to by Counsel, include an affidavit dated August 14, 1969 purporting to be from one R. K. Jain, Secretary to the coloniser company, and a copy of a letter dated April 24, 1956, purporting to be signed by one "G. L. Mittal for the Secretary of the Authority", conveying to the coloniser the sanction of the authority to the layout plan submitted by the appellants for New Delhi South Extension colony on the conditions contained in the draft agreement annexed thereto. These documents, particularly the sanction letter and the agreement annexed thereto, constitute the factual basis of contentions Nos. 1, 2, 3 and 4 canvassed by Counsel

for the appellant. The municipal corporation disputes the authenticity of these documents.

19. Thus in these proceeding under Article 226 the Court has been called upon to decide disputed questions of fact and law relating to the precise nature and extent of right, title and interest of the parties in the plots in question. Even the basic documentary evidence, such as the orders granting the sanctions, the conditions of the sanctions, and the agreements in which they are said to have been incorporated, were not produced before the pronouncement of judgment in the High Court. Even the questions of law relating to the validity and effect of Regulation 5 (3) could not be properly decided in the absence of proof or admission of such primary facts. The High Court also felt this difficulty in reaching the finding that a fiduciary relationship in the nature of a trust came into existence in regard to the user of these open sites. It conceded that this matter was being considered "in the abstract without reference to the facts of any case", and had to leave undetermined the exact nature of the trust that had come into being and the person or persons in whom the beneficial interest in these open sites was supposed to vest under such trust. Nevertheless, it concluded that

the petitioners had by their own conduct and operation of law ceased to be the full and complete plots and held them only as trustees.

This "conduct" of the petitioners according to the High Court consisted of the acts of making applications for sanction of the layout plans to the authority and the execution of the requisite agreements. But the evidence of those agreements and the terms and conditions of the sanctions were conspicuous by their absence from the record. Again in the absence of relevant material on the record, the high Court found it difficult to record a categorical finding as to whether the provisions of Regulation 5(3) (iv) were only optional and could be waived, or had in fact been waived by the authority while granting sanction of the layout plans in case of any of these six colonies in question.

20. In our opinion, in a case where the basis facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course for the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may, if so advised, seek their remedy by a regular suit.

21. Before we part with this judgment we may note here in fairness to respondent No. 4, a concession made by Dr. Singhvi on behalf of the coloniser. The concession is that all "open spaces" set apart for roads, streets, public parks, public lawns, etc., and other services, as distinguished from "open sites" earmarked for schools, hospitals and other public utility buildings, shown in the sanctioned layout plans in these colonies vest in the municipal corporation free of cost and that his client has no objection to the transfer of such open spaces free of cost to the municipal corporation if such transfer has not already been made. The colonisers however reserve their right to dispute whether a particular plot in the sanctioned layout was set apart as on "open space" for a public park, road, etc. or as an "open site" meant for a public utility building.

</html