

RAJASTHAN HIGH COURT

Jawahar Sons Enterprises Pvt. Ltd.

Vs.

State (Rajasthan).

Civil Writ Petn. No. 2736 of 2000

(Rajesh Balia, J.)

09.01.2002

ORDER

Rajesh Balia, J.

1. Heard learned counsel for the parties.
2. This litigation has little chequered history. The petitioner which is a private limited company has purchased the land in question from Sri Balveer Kumar Jain, Smt. Manju Jain, Dr. Gautam Jain and Dr. Veena Jain, which originally formed a part of Patta No. 53 issued in Case No. 635/30-31 by the erstwhile Ruler of Jodhpur in favor of Sarva Sri Anand Swaroop, Niranjana Swaroop and Vishambar Swaroop. The Patta while entailed a condition that the land shall be used for the purposes of construction of a building, contained no condition as to the nature of the use for which the construction could be used. At the time when the petitioner had purchased the land, the constructed building was already there which was occupied by a privately run school viz. Lal Bahadur Shastri School. The petitioner, desirous of constructing a Hotel on the land in question, submitted a plan for approval and permission for construction on the land in question before the Urban Improvement Trust, Jodhpur. The Building Committee of the Urban Improvement Trust, Jodhpur, in its meeting held on 6-5-98, approved the plan of construction of Hotel on the land. Minutes of said meeting goes to show that it approved a plan for construction of hotel by noticing the existence of building at site, the amendment made in the rules regarding set-backs, and the permissible deviation vis-a-vis rules of building line existing prior to said amendment in 1997 and as existing at the time of approving the plan for construction of a Hotel. It also noticed that all lands abutting the road from Paota choraha to

Mahamandir have already been approved for commercial use by earlier resolution dated 31-3-95. However, the demand was made on account of conversion charges for the use of land from residential to commercial purposes, for grant for permitting deviations in the setbacks and the penalty for reconstitution totalling Rs. 39,24,8882.80 (sic) for which a demand was issued on 11-5-98. This demand included a sum of Rs. 34,89,416 by way of conversion charges for permitting change in user of land to some other purpose than permissible before such permission, which is subject-matter of the instant litigation.

3. In the first instance, the petitioner filed Writ Petition No. 1738/98 challenging the legality of levying conversion charges in respect of lands which have not been allotted to the petitioner under the Municipal Act or by any local authority including the UIT and was not subject to any condition as to use of the land for particular purpose. The said Writ Petition No. 1738/98 was disposed of on 11-11-99 by directing the petitioner to file appeal within one month from the date of the decision of the writ petition before the appellate authority which in the present case is Addl. Collector and that if such appeal is filed then the appellate authority were to entertain and decide the same on merit in accordance with law. This was directed in view of request made by the petitioner that if the petitioner is now relegated to avail the alternative remedy, it would have become barred by time.

4. In pursuance of the above order, the petitioner filed an appeal before the Addl. Collector, Jodhpur, who decided the appeal on 21st April, 2000. The Addl. Collector referred to Circular issued by the Govt. in its Urban Development and Housing Department dated 9-11-89 by which it has authorized the Improvement Trusts to charge conversion charges whenever any residential land is being used for commercial purposes at the rate prescribed therein. It also envisaged that a person desirous of such conversion of the use of land may deposit such charges in four equal annual installments. It held that in view of Circular dated 9-11-89 the UIT is entitled to demand conversion charges in the present case. It also held that there was no irregularity in the reconstitution of the plot in question by noticing that the land at the time of original allotment was one single unit and though it has been sold intermediately in two pieces has again been purchased by one entity as one unit and has been brought to its original shape and, therefore, it is not a case of any irregularity in bringing the plot in its original shape by purchasing it from two owners and bring to its original shape.

5. The ADM also noticed that the construction has already taken place on site and it is

not in the interest of justice to pass order of demolition particularly keeping in view that in the meeting of the Building Committee dated 6-5-98, plans have been approved. With these findings, it directed the petitioner to pay the amount demanded by the Urban Improvement Trust through its letter dated 11-5-98 in four equal installments which is payable in accordance with the Govt. Circular dated 9-11-89 and the Rajasthan Urban Improvement (Conversion of Residential Land or Premises into Commercial Use) Rules, 1974 and directed the Urban Improvement Trust to deliver the plans approved by the Building Committee on 6-5-98 to the petitioner when the petitioner pays the amount of first installments and delivers cheques for the other three installments.

6. Aggrieved with this, the petitioner has filed this writ petition on 8th August, 2000 challenging the demand affirmed by the Addl. Distt. Magistrate. The petitioner has also challenged the order dated 12-6-2000 issued by the respondents under Section 90/91 of the Urban Improvement Act directing the petitioner to stop construction at site until the copy of the approved plan is not delivered to him.

7. It has been contended by learned counsel for the appellant that the land in question being covered by a Patta issued for sale of the plot by erstwhile Marwar State in 1931 on payment of necessary consideration was a free-hold land and said Patta does not contain any restriction on the use of land in question except as to construction of building within 2 years of its grant, and that the holder shall have to keep all his constructions including chabutara, latrine etc. within the bounds of land unless otherwise permitted. However, his right to use the construction for any purposes, whether commercial, residential or composite, was not restricted under the title under which the land was held. It was further contended that since he was free to make use of the building constructed on land in question in any manner he liked, the question of conversion of the use of the land from the purposes for which has been allotted to another purpose, would not arise. Therefore, no charges for putting the land in use for same purposes other than for which it was allotted could be levied. A like provision for levying conversion charges under the Rajasthan Municipalities Act, 1959 was held to be not applicable to land like the one in question. Reference was made to a Bench decision of this Court in *Municipal Corporation, Jodhpur v. Rajendra Bhandari*.¹ It was further stated that Special Leave Petition filed against said judgment has since been also dismissed.

8. Aforesaid facts have not been disputed. However, in this connection, it has been contended by Mr. Dinesh Maheshwari, learned counsel for the Trust that the

provisions of the Rajasthan Improvement Trust Act, 1959 are vitally different in this regard. Section 73-B of the Urban Improvement Act not only authorizes the Trust to demand conversion charges where it permits any person to use the land for the purposes other than for which it was originally allotted or sold to him by any local authority or State Govt. but further authorizes the State Govt. to permit a person to use the land for purposes other than purposes restricted in any scheme framed under Section 29, on demand of such conversion charges as may be prescribed and thus the ratio laid in Rajendra Bhandari's case (AIR 2001 Rajasthan 9) (*supra*) does not *ipso facto* apply to the cases arising under the UIT Act.

9. To the extent permitting a person to use the land for the purpose other than purposes restricted under the Scheme framed under Section 29 is concerned, the contention raised by the learned counsel for the respondent has substance insofar as raising of demand can be related to permitting use of land for any purpose which is prohibited under any scheme framed under Section 29 of the Act. In the provision as is contained in Section 73-B which authorises the State Govt. to permit change in use of land for different purposes, than what is permitted under the scheme framed under Section 29 does not find place in the Municipalities Act and it has to be examined even in the case of a free-hold land, not restricted by any condition about the user of the property, whether the purpose for which such land is sought to be put to use is restricted by any scheme framed under Section 29 of the Act for the area in which the land is situated and if so, the State Govt. is authorised to permit user of such restricted purpose by charging a sum at the rate that may be prescribed.

10. On a specific enquiry made in this behalf, learned counsel for the respondent after seeking time and instructions from the Trust candidly stated that no such scheme as envisaged under Section 29 exists for the area in question.

11. Attention of the Court was also invited to Section 41-A of the Act of 1959 for contending that all improvement and development schemes falling within the purview of this Act, framed by a former Trust or otherwise and sanctioned by the State Govt. in relation to any area within the State, prior to the establishment of an Urban Improvement Trust under this Act, for that area, shall be deemed to be the schemes duly sanctioned and notified under and in accordance with the provisions of this Chapter (in which Section 29 falls) and urged that even if a scheme is not framed under Section 29, if any, other pre-existing scheme duly approved by the State Govt. or the competent authority was operative, shall be deemed to be a scheme under section 29 of the Act by dint of Section 41-A.

12. However, the learned counsel for the respondents was not able to substantiate on facts whether any such scheme sanctioned by the State Govt. in relation to area in question prior to establishment of the Improvement Trust, Jodhpur was operative for area under which any restriction on the commercial use of the land in question was imposed, was operative so as to invoke Section 41-A. Therefore, this provision does not help the respondents any further, even if, on principle the correctness of proposition is accepted.

13. Thus, the distinguishing feature in Section 73-B vis-a-vis Municipalities Act, does not assist the respondents in the present case for coming to different conclusion.

14. It was next contended by learned counsel for the respondent that though strictly speaking the area in which plot in question is situated, may not be governed by any scheme framed under Section 29 or 41-A, still the provisions under Section 73-B which confer power on the State Govt. to allow change in the use is subject to provisions of Secs. 72 and 73 and, therefore, demand raised by the respondents for permitting the construction of a hotel on the land in question, which amounts to commercial use of the land, is justified because of its deviation from the master plan envisaged under Section 72. Learned counsel in this connection emphasized on proviso to Section 72(2). He contends that the provisions of Section 73-B are subject to provisions of Sections 72 and 73 and Section 73-B do not operate dependent (independent) of it.

15. Sections 72 and 73-B respectively read as under:

Section 72 : Restriction on improvement in urban areas.- (1) In an urban area, no improvement shall be undertaken or carried out by any person or department of the Government unless-

(i) it is in accordance with the master plan where it is in operation; or

(ii) it is in accordance with the scheme sanctioned and notified under section 38; or

(iii) where neither any master plan nor any scheme is in force, it is according to the general approval of the Trust.

(2) No person or department of Government shall use or permit to be used any land or building in any urban area otherwise than in conformity with the master plan where it is in operation or with the scheme sanctioned and notified under

Section 38 or with the general approval of the Trust, and unless the permission of the Trust for such use has been obtained under Section 73 :

Provided that subject to the provisions of Section 73-B, it shall be lawful for any person or department to continue to use, upon such terms and conditions, as may be prescribed by regulations made in this behalf, any land or building for the purpose and to the extent for and to which, it is being used upon the date on which such plan or scheme comes into force or as the case may be, the area as an urban area under this Act.

Section 73-B : Power of State Government to allow change in use of land.- (1) Notwithstanding anything contained in Section 72 or 73-A, the State Government or any authority authorized by the State Government may, in the public interest allow any person to use the land for purposes other than for which it was originally allotted or sold to him by any local authority or State Government or for purposes restricted in a scheme framed under Section 29, on payment of such conversion charges as may be prescribed :

Provided that the rates of conversion charges may be different for different areas.

(2) The conversion charges so realized shall be credited to the Consolidated Fund of the State or to the fund of the Trust as may be determined by the State Government.

(3) Such charge shall be the first charge on the interest of the person liable in the land the use of which has been changed and shall be recoverable as arrears of land revenue.

16. Section 73-B starts with a non-obstante clause 'Notwithstanding anything contained in Sections 72 and 73-A of this Act', giving overriding effect to it over any part of Section 72 as well as Section 73-A of the same Act. In contrast proviso to subsection (2) of Section 72 reads 'subject to the provisions of Section 73-B'.

17. The effect of any provision containing non obstante clause and the ambit and scope of a provision which has been made 'subject to' some other provision or enactment and distinction between the two, is well established. When a provision of any enactment is made 'subject to' some other provision, it conveys the idea that such provision shall yield to another provision to which it is made subject. Whereas a non obstante clause is a legislative device to give overriding effect to certain provisions

over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions, to which such non obstante provision has been given overriding effect.

18. The Supreme Court in *Chandavar-kar S. R. Rao v. Ashalata S. Guram*² stated :

"A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned in the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."

19. Coming to this conclusion, the Court has in reliance referred to principle enunciated in Supreme Court in *South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum*.³ It was a case in which distinction between expression 'subject to other provisions' on the one hand and 'notwithstanding anything contained in other provisions of the Act' on the other hand was clearly brought out while considering the interplay of Articles 372 and 278 with each other. Subha Rao, J. speaking for the Court said:

"The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject the phrase 'notwithstanding in the Constitution' is equivalent to saying that in spite of other articles of the Constitution or that the other articles shall not be an impediment to the operation of Article 278".

20. Thus, laying down the scope of the two expressions, the Court explained the effect on the interplay of Articles 378 and 278 with each other as under :

"While Article 372 is subject to Article 278, Article 278 operates in its own sphere in spite of Article 372."

21. A Division Bench of this Court in a recent decision in D. B. I.T. Ref. No. 67/2001 decided on 2-11-2001 (2002 (172) Cur Tax Rep 297) had expressed similar view about

the effect of a non obstante clause.

22. With these principles in mind it can be said : while Section 72 is subject to Section 73-B, Section 73-B operates in its own sphere in spite of Section 72 which includes proviso to Section 72(2).

23. In this connection it would be relevant to notice that the basic distinction between the provisions of sub-section (2) of Section 72 and Section 73-B. Sub-section (2) of Section 72 does not touch the authority of State as a paramount controlling authority over the Trust established under the Act. It merely prohibits any person or department of Govt. in control of any land falling in the master plan to use or permit someone else to use it contrary to any provisions of the master plan. The proviso as an exception permits such person or department of the Govt. to continue to use or permit to be used such land or building upon such terms and conditions, as may be prescribed under the regulations made in this behalf, for the purpose and to the extent, to which it is being used upon the date on which such plan or scheme comes into force or as the case may be, the area is declared as an urban area under this Act. Therefore, it is apparent that proviso to sub- section (2) only relates to continued use of the land for the purpose for which it was being used at the time as on the date on the commencement of the plan or scheme made under it coming into force and such continued use was also made subject to provision of Section 73-B. The expression 'subject to provisions of Section 73-B' is indicative of clear legislative mandate that Section 72 is subordinate to Section 73-B and it does not control the scope of Section 73-B.

24. On the other hand, Section 73-B entrusts power on the State Government in spite of provisions of Sections 72 and 73-A of the UIT Act to permit any person to use the land for purposes other than for which it was originally allotted or sold to him by any local authority or the State Govt. or for purposes restricted in a scheme framed under Section 29, on payment of such conversion charges as may be prescribed.

25. Unlike Section 73-B, the provision of Section 72 (2) permits only the person concerned or the department concerned of the Govt. which may be holding the land or building for its own use or to be used under their instructions as was being used on the date of commencement of the plan or the scheme as the case may be, for its continued use in spite of prohibition contained in Section 72 (1). Such continued use is not dependent on any permission by any authority. But is only subject to conditions laid down in regulation framed by any competent authority to frame regulation. In the absence of regulations no inhibition can be placed on such user. However, the

exception is limited to the continued use for the purpose for which it is being used. If there is any change in the purpose to which the land is being used such charge can be permitted only under the provisions of Section 73-B by the State Govt. and on conditions mentioned therein. Such charge in existing use is not within the domain of any other authority then prescribed under Section 73-B. Only any alteration in continued use permitted under Section 72 (2) which is made subject to provision of Section 73-B; which is in consonance with overriding provision made under Section 73-B.

26. In the present case there is no dispute that the land in question was being used for commercial purposes since before commencement of any master plan.

Thereafter, its continued use for commercial purposes did not require any permission of change in user from the State under Section 73-B. Nor does continued use for commercial purposes permitted under Section 73-B could be subjected to any conversion charges. If any charges were envisaged to be levied on continued use, it would have been clearly envisaged as it has been so expressly required under Section 73-B in the case of change in use.

27. Moreover, while permitting the continued use of the land for the same purposes by the statute itself, no additional financial burden was envisaged in the statute as has been so envisaged in the case of permitting in change of user under Section 73-B. The regulation of continued use was envisaged only through any terms and conditions which could be prescribed only by way of regulation made in the prescribed manner. Prescribed by regulation means that such regulatory terms and conditions can be laid by way of subordinate legislation by way of framing rules, orders or bye-laws in this regard in the manner prescribed under the provisions of the Act by the authority designated for that purpose. No regulation framed in prescribed manner as such has been brought to our notice laying any such terms or conditions. Moreover, the field in respect of terms and conditions can be prescribed by a competent authority is also clearly laid in the proviso. It can relate to any area which comes within the plan or the scheme, and to purpose for which it is being used or to the extent such land can be continued to be used for the existing purpose. However, no condition or term is envisaged to put the continued use by putting the holder of the land under additional financial burden.

28. It has already been discussed above that if the land in question would have fallen under any of the Scheme made under Section 29 of the Act the State Govt. would have

been entitled to make a demand for permitting the holder of the land to put to use such land for which restriction is envisaged under the concerned Scheme, but the present is a case in which admittedly no scheme as such was framed for putting any restriction on the use of land in question under Section 29. Therefore, the authorisation of the State Govt. to demand conversion charges under the circumstances similar to one under Rajasthan Municipalities Act is not permissible as per the decision of this Court referred to above, and the circumstances in which demand of conversion charges could have been made, does not exist. Section 73-B does not lay down that unless conditions for levy of demand exist no permission for use of land for any purpose cannot be granted. In other words livability of conversion charges in all circumstances not envisaged, nor such levy of a conversion charges is a condition precedent for exercise of authority by the State Government under Section 73-B, while permitting change from current user. It may be noticed that where as a condition of allotment of land by the State or local authority in the use of land to which it can be put is restricted for any particular purpose, in such event change of user of land from permissible user to any other user is subject to levy of conversion charges. But where land is not subject to any such restrictive grant as to its user, mere change of current user from residential to commercial or vice-versa does not entail levy of conversion charge. In such event permission by State cannot be subject to charges for permitting such change. In fact in such circumstances it does not become a prohibited change in user on that account. Likewise, if the case is not governed by Scheme under Section 29, though the State Govt.'s authority to permit such change is not eroded merely because in such event no charge on account of change in use of land is envisaged. The prohibition contained in sub-section (1) or sub-section (2) of Section 72 stands overridden by provisions of Section 73-B.

29. Moreover, it is apparent from defendant's own document that prohibition of Section 72 was not applicable to land in question when permission was sought.

30. In this connection my attention was invited to the resolution approving plan submitted by the petitioner dated 6-5-98. It goes to show that while granting permission by the Building Committee it was noticed by the Committee that the construction over the land in question was already put to commercial use inasmuch as it was being used for running a commercial school and it also said in clear words in respect of lands abutting the road from Paota choraha to Mahamandir on which land in question is situated, the Urban Improvement Trust by its Resolution No. 12 dated 31st March, 1995 has declared such lands to be meant for commercial use.

31. The impugned order of Collector dated 21-4-2000 may be examined in the light of principles discussed above.

32. The Addl. Collector has sustained the demand of Rs. 34,89,416 on twofold ground. It has reasoned that it is an important source of income for the Trust to fulfil its objects and the Trust cannot be deprived of such resources. However, it does not justify the authority of law under which such demand can be raised. Secondly it says that though this land is neither allotted by State nor by a local authority for any specified purpose, nor the area in question is covered by any Scheme under Section 29, nor there is any violation of rule in reconstitution of plots, because the plot in fact was always one united piece of land, still demand could be raised in terms of Govt. Order dated 8-11-89, as per formulae contained therein.

33. As discussed above, when there was no restriction as to use of land for any purpose, and the area is not covered by any scheme framed under Section 29, no demand can be levied under Section 73-B by the State. Thus the order of Addl. Collector is apparently not backed by any authority of law. The Govt. Order dated 9-11-89 shows that it only lays formulae for levying conversion charges from permissible to other use. It does not commend that even in cases where there is no restriction on the purpose for which any land could be used under terms of allotment still conversion charges could be levied. In fact such a direction even if issued would (be) have ineffective in terms of Bench decision of this Court in Rajendra Bhandari's case (AIR 2001 Rajasthan 9).

34. Viewed from any angle, the impugned order of Addl. Collector dated 21-4- 2000, suffers from apparent errors and is contrary to law, which cannot be sustained.

35. As per the principles laid down in Rajendra Bhandari's case, (AIR 2001 Rajasthan 9) (supra) in respect of authority to levy conversion charges in the cases of free hold lands, use of which is not restricted by the title, under which such land is held, no conversion charges are leviable and in view of the fact that though under non obstante provision of Section 73-B the State Govt. has necessary authority to permit the use of the land for purposes other than for purposes restricted under the Scheme framed under Section 29 in spite of the provision of Section 72, but there being no scheme framed under Section 29 or deemed to be framed under Section 41-A under which the user of the land in question for commercial purposes was restricted, no demand for change in user could be made on that basis also, and in view of the fact that Trust itself in resolution approving the plan as referred to the fact that land in question was

permitted to be put to commercial use way-back in 1995, when the permission was sought no change in user of the land for any restrictive purpose was to happen, which could entail levy of charges, and taking into consideration that land abutting on the road from Paota to Mahamandir was factually used for commercial purposes for long time and would not require any permission for change in user inviting levy of conversion charges, a demand on account of permitting the land in question to be used for commercial purposes is not sustainable under the provisions of the Urban Improvement Act, 1958 in the present case.

36. In view of the aforesaid circumstances, the clause under which the conversion charges could be demanded under Section 73-B, cannot operate in the present case in view of the decision of this Court in Rajendra Bhandari's case (AIR 2001 Rajasthan 9).

37. As a result, this petition succeeds. The demand raised in pursuance of Resolution dated 6-5-98 vide demand notice dated 11-5-98, and the order of Addl. Collector dated 21-4-2000 sustaining such demand to the extent it relates to conversion charges for change in use by construction of Hotel, are quashed. The approved plan in terms of Resolution dated 6-5-98 be delivered to the petitioner by the respondents.

There shall be no orders as to costs.

38. Before parting with this case, it may be clarified that this decision is no reflection on the validity of any such other action which the UIT may have taken on any alleged violations of the building laws or bye-laws for the construction of buildings in the urban area and any dispute regarding any question arising there under shall not be affected on merit by this decision.

Petition allowed.

Cases Referred.

1. AIR 2001 Raj 9
2. (1986) 4 SCC 447
3. AIR 1964 SC 207