

Gulshan Kumar Vs. Ndmc and Ors.

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Court : Delhi

Decided On : Jul-15-2015

Judge : Vibhu Bakhru

Appellant : Gulshan Kumar

Respondent : Ndmc and Ors.

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

15. 07.2015 W.P.(C) 9462/2009 ASHA RANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9458/2009 SAT RAM DASS Petitioner versus NDMC & ORS. + Respondents W.P.(C) 9459/2009 RAJESH SETHI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9460/2009 DURGA DEVI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9461/2009 MUKESH KUMAR GUPTA Petitioner versus W.P.(C) 9462/2009 & connected matters Page 1 of 21 NDMC + Respondents W.P.(C) 9463/2009 SUMAN PRABHA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9464/2009 NARINDER PRAKASH Petitioner versus NDMC & ORS + Respondents W.P.(C) 9465/2009 JAGDISH CHANDWANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9466/2009 RAVINDER KALRA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9467/2009 GULSHAN KUMAR Petitioner versus NDMC & ORS. + Respondents W.P.(C) 9468/2009 W.P.(C) 9462/2009 & connected matters Page 2 of 21 ANIL

KUMAR LALWANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9469/2009 SUDHIR KUMAR Petitioner versus NDMC & ORS + Respondents W.P.(C) 9470/2009 SACHIN CHOPRA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9471/2009 KANSHI RAM SAPRA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9472/2009 AMAR NATH Petitioner versus NDMC & ORS Respondents W.P.(C) 9462/2009 & connected matters Page 3 of 21 + W.P.(C) 9477/2009 PRADEEP WADHWA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9488/2009 ADARSH BIR SINGH BEDI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9501/2009 ATUL ABROL Petitioner versus NDMC & ORS + Respondents W.P.(C) 9537/2009 KULDEEP SINGH (DECEASED) Petitioner versus NDMC & ORS + Respondents W.P.(C) 9538/2009 GANGA VISHAN KALRA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9539/2009 SEEMA SHARMA Petitioner W.P.(C) 9462/2009 & connected matters Page 4 of 21 versus NDMC & ORS + Respondents W.P.(C) 9540/2009 SUDHIR KUMAR SHARMA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9541/2009 ANIL KUMAR LALWANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9542/2009 BALWINDER AHUJA Petitioner versus NDMC & ORS + Respondents W.P.(C) 9543/2009 LAL CHAND Petitioner versus NDMC & ORS + Respondents W.P.(C) 9544/2009 HARISH KUMAR NAGPAL Petitioner versus NDMC & ORS Respondents W.P.(C) 9462/2009 & connected matters Page 5 of 21 + W.P.(C) 9550/2009 ASHOK SETHI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9559/2009 PRAKASH GANGWANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9560/2009 DEEPAK AMLANI Petitioner versus NDMC & ORS + Respondents W.P.(C) 9668/2009 RAM BHAJ Petitioner versus NDMC & ORS Respondents Advocates who appeared in these cases: For the Petitioners : Mr Sachin Chopra for petitioners in all petitions except W.P.(C) Nos. 9544/2009 & 9668/2009. Mr Keshav Dayal, Sr. Advocate with Mr Sandeep Kumar in W.P.(C) 9458/2009. Mr Kamal Bansal for petitioners in W.P.(C) Nos. 9544/2009 & 9668/2009. For the Respondents : Mr Gaurang Kanth with Mr Umang Joshi for respondent/NDMC in all petitions. CORAM:HONBLE MR JUSTICE VIBHU BAKHRU W.P.(C) 9462/2009 & connected matters Page 6 of 21

JUDGMENT

VIBHU BAKHRU, J1 The present petitions have been filed by shopkeepers in Sarojini Nagar market seeking quashing of Demand Notices (hereafter impugned demand notices) issued by North Delhi Municipal Council (NDMC) directing the petitioners to deposit conversion charges for conversion of first floor of the properties at Sarojini Nagar market from residential area to commercial area.

2. As the petitions have similar facts and common principal issues were raised, the petitions were heard together and petition W.P.(C) 9462/2009 was considered as the lead matter.

3. Briefly stated, the relevant facts of petition W.P.(C) 9462/2009 necessary to deal with the controversy are as follows:

3. 1 It is relevant to note that in the notifications, communications etc. issued by the Government of India, the first floor of the Sarojini Nagar Market has been referred to as Flat(s) and the ground floor has been referred to as Shop(s). The same terminology has been followed herein. 3.2 Sarojini Nagar market came into existence around the year 1951 and shops were allotted to the shopkeepers on licence basis. In 1979, administrative and complete control of Sarojini Nagar market was transferred to Land & Development Officer, Ministry of Urban Development (hereinafter L&DO) and lease deeds were executed in favor of the shopkeepers. W.P.(C) 9462/2009 & connected matters Page 7 of 21 3.3 By an office order dated 22.03.1983 bearing no.7/1983, the Ministry of Urban Development, Land and Development Office, condoned certain breach mentioned therein including Use of top floor of commercial premises for commercial purposes even if the plans for the top floor were sanctioned for residential purposes. 3.4 Two separate lease deeds dated 27.07.2000, were executed in favor of the Petitioner-Smt Asha Rani, with respect to the Shop and Flat of the property in question, being property No.13, Sarojini Nagar Market, New Delhi (hereafter the said property), including the attributable land beneath the said property. 3.5 The lease deed executed in respect of the Shop specifically indicated that 2/3rd of the land underneath the said property was attributable to the Shop and 1/3rd of the land underneath building was attributable to the Flat. 3.6 Thereafter, by

Conveyance Deeds dated 27.07.2000 and 28.08.2000, the Shop and Flat respectively of the said property were converted to freehold. 3.7 In June 2003, the Ministry of Urban Development & Poverty Alleviation, Land and Development Office, issued a Brochure titled Conversion from Lease Hold into Free Hold wherein it provided for the Formula for Calculation of one time conversion Fee for various Industrial, Commercial and mixed land use properties as under: Notified land rates 10 Area X (Commercial/Industrial) X100 on the date of application W.P.(C) 9462/2009 & connected matters Page 8 of 21 3.8 In 2004, Smt Asha Rani and other shopkeepers of Sarojini Nagar market, applied for conversion of lease hold plot to free hold. By a letter dated 14.10.2004, the Public Relation Officer, Ministry of Urban Development, Land and Development Office - in response to an enquiry made by the President, Sarojini Nagar Market Shopkeepers Association (Regd.) - stated that the conversion fee for conversion of lease hold into freehold of the flats of Sarojini Nagar Market is calculated based on the notified commercial rates of the area as on the date of application. The present rates are Rs.24,100/- Per Sq.mtr.

3.9 Subsequently, two separate Conveyance Deeds dated 19.10.2004 and 29.04.2006, were executed with respect to the Shop and Flat of the said property respectively, including the attributable land beneath the said property. 3.10 Thereafter, by notification dated 24.03.2006 the Sarojini Nagar market, comprising of the Shops and Flats, was transferred from L&DO to New Delhi Municipal Council (NDMC) with effect from 01.04.2006 on as is where is basis. 3.11 Smt Asha Rani, by a letter dated 16.01.2008, and other shopkeepers of the Sarojini Nagar market by differently dated letters, applied to NDMC for change of use of Flat from residential to commercial. 3.12 By the impugned demand notice dated 06.02.2009, Smt Asha Rani was directed to pay provisional conversion charges of `23,83,409/- (with W.P.(C) 9462/2009 & connected matters Page 9 of 21 respect to first floor Flat) and `11,70,984/- (with respect to Barsati floor Flat) by 16.02.2009.

4. The learned counsel for the petitioners contended as under:- 4.1 That the premises in question, namely, the built up portion above the ground floor have been converted from leasehold to freehold and conveyance deeds were executed.

The land beneath the built up structure attributable to Flats was conveyed at commercial rates. Thus, user of the property was accepted as commercial and no further charges for the said purpose could be levied. 4.2 That the Sarojini Nagar Market was established as a commercial centre and it is classified as a Non Hierarchical Commercial Centre under successive Master Plans including MPD2021. Since the land use has been accepted as commercial, the Flats, which were converted to freehold, could be used for commercial purposes and no further charges for the same could be levied. 4.3 That the Master Plan itself contemplated change of user in respect of certain uses on payment of conversion charges and had so specified in several cases such as change of use of an industrial plot to use as a banquet and change of use of an industrial plot to commercial use, subject to payment of conversion charges. However, no stipulation as to the payment of conversion charges was required for use of building as commercial, in areas that were specified as non hierarchical commercial centres, thus, no charges could be levied. W.P.(C) 9462/2009 & connected matters Page 10 of 21. 4.4 That the restriction stipulated in the conveyance deed regarding the use of the Flats as residential was not enforceable and binding by virtue of Section 11 of the Transfer of Property Act, 1882. 4.5 That the formula applied for calculating the conversion charges was incorrect, inasmuch as the demand for conversion had been raised for the entire plot in question, while 2/3rd of the land on which the building was constructed was attributable to the Shops which was in any event, leased for use as a shop only and subsequently converted to freehold for the said use. Thus, any conversion could only be contemplated with respect to the Flats i.e. in respect of the 1/3rd of the land in question. It was contended that the formula for charging conversion charges applied by the NDMC entailed charges in respect of the entire plot which was not permissible. 4.6 The learned counsel for the petitioners relied upon the decision of this court in *Satinder Sabharwal & Anr. v. N.D.M.C. & Ors.*:

114. (2004) DLT600 in support of his contention that commercial use of the Flats could not be denied. 4.7 That by virtue of the Office Order no.7/83 issued by the Government of India on 22.03.1983, use of the top floor of commercial premises for commercial purposes was a condonable breach and, thus, no charges could be levied on that account. The learned counsel for the petitioners urged that the

expression condonable could not be interpreted as compoundable and the use of the word condonable clearly indicated that no charges for the same could be levied. W.P.(C) 9462/2009 & connected matters Page 11 of 21 5. Respondents controverted the arguments advanced on behalf of the petitioners and submitted as under: 5.1 That the Flats were permitted to be used only for residential purposes and this express stipulation was contained in the lease deed. The conveyance deed executed in respect of the Flats also expressly stipulated that the conveyance deed would be revoked if the property was put to any use other than what is stipulated in the lease deed. Thus, the Flats could only be used for residential purposes. 5.2 That conversion of property from leasehold to freehold and permission to change the user of the property were two different and independent issues. The conversion of property from leasehold to freehold did not necessarily entail that the property was permitted to be used for purposes and other than for which approval had been granted.

6. The principal controversy to be addressed is whether charges for conversion of the Flats from residential to commercial in Sarojini Nagar Market could be levied by NDMC.

7. It is not disputed that, initially, the buildings constructed in Sarojini Nagar Market were allotted on licence basis. Subsequently, the buildings were converted from licence basis to leasehold. Admittedly, two lease deeds were executed in respect of the land and building. Separate lease deeds were executed in respect of Shops and Flats (including the attributable land beneath the building) of the properties in question. Admittedly, the lease deed executed in respect of the Shops specifically W.P.(C) 9462/2009 & connected matters Page 12 of 21 indicated that 2/3rd of the land underneath the building was charged to the Shop and 1/3rd of the land underneath was charged to the Flat. Thereafter, separate conveyance deed was executed in respect of the built up portion of the entire property and the entire building was conveyed by two separate deeds, with respect to Shops and Flats, to the petitioners/their predecessors.

8. The Shops were conveyed with a stipulation that the same would be used as a shop only and the Flats were conveyed with an express stipulation with the same

would be used only for the purpose of residence and not for any other purpose. It is not disputed that separate deed(s) were executed for the conveyance of land beneath the building.

9. Thereafter, a separate conveyance deed was executed in respect of the Shop along with land charged to the Shop i.e. 2/3rd of the land underneath the building. In the case of Asha Rani (W.P.(C) 9462/2009), the land beneath the building measured 596.36 sq. ft., 1/3 rd of the said land, computed at 191.12 sq. ft., was charged to the Flat and the balance was apportioned to the Shop. A conveyance deed dated 19.10.2004, was executed for the Shop including the land underneath (i.e. 2/3 rd of 596.36 sq. ft.). A separate conveyance deed - conveyance deed dated 29.04.2006 was executed in respect of the Flat including the land underneath (i.e. 191.12 sq. ft which was allocated to the Flat). The said conveyance deed erroneously indicated that the land charged to the Shop and the Flat tenements was on the 50:50 basis. This is an apparent error as the lease deeds executed earlier and the conveyance deed executed in respect of the W.P.(C) 9462/2009 & connected matters Page 13 of 21 Shop and the land underneath the Shop indicated that 2/3 rd of the land underneath the building was allocated to the Shop.

10. It, thus, cannot be disputed that insofar as the Shop is concerned, the same was from inception meant to be used as a shop; initially the same was on licence basis and, subsequently, the ground floor i.e. the Shop, was conveyed absolutely and the land underneath was leased. Thereafter, the Shop including the 2/3rd of the land underneath was conveyed absolutely by L&DO on behalf of the President of India. Since the ground floor i.e. the Shop was allotted and thereafter conveyed for being used as a shop, it cannot be disputed that no charges for conversion are required to be paid for the Shop. The only controversy, thus, is with regard to the demand of charges for conversion of the use of the structure above the ground floor i.e. Flat, from residential to commercial.

11. Insofar as the part of the Flat is concerned, it is not disputed that the same was not permitted to be used for any purpose other than for residence. This stipulation was contained in the conveyance deed with regard to the Flat as well as in the

lease deed in respect of the land underneath the building. Admittedly, the land beneath the building which is attributable to the Flats has been conveyed in favour of the petitioners/their predecessors, who became the absolute owners of the land as well as the entire structure thereon including the Flat. However, no permission was granted for use of the Flat for any purpose other than residence.

12. At this stage, it is relevant to refer to Section 252 of the New Delhi Municipal Council Act, 1994 which reads as under:- W.P.(C) 9462/2009 & connected matters
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252. Restrictions on uses of buildings.-No person shall, without the written permission of the Chairperson, or otherwise than in conformity with the conditions, if any, of such permission- 13. (a) use or permit to be used for human habitation any part of a building not originally erected or authorised to be used for that purpose or not used for that purpose before any alternation has been made therein by any work executed in accordance with the provisions of this Act and the bye-laws made thereunder; (b) change or allow the change of the use of any land or building; (c) convert or allow the conversion of one kind of tenement into another kind.

It is apparent from the above that irrespective of whether the Flats are held by the petitioners on freehold basis or on leasehold basis, the same cannot be used for purpose other than for which they are permitted. Thus, unless the change of the use of the building is permitted by the Chairperson of NDMC, the petitioners cannot use the same for any purpose other than residential purpose. It is necessary to bear in mind that the use of the Flats was restricted to residential use, not only because of the covenants of the lease deeds (subsequently the conveyance deed) but also for the reason that no permission under Section 252 of the New Delhi Municipal Council Act, 1994 was obtained. Thus, even if it is assumed that after the execution of the conveyance deed, the restriction as to the use of the Flats as contained in the lease deed does not survive, nonetheless, the Flats could not be used for the purposes other than for residence, as the necessary permission for the same has not been accorded under Section 252 of the New Delhi W.P.(C) 9462/2009 & connected matters Page 15 of 21 Municipal

Council Act, 1994. In Vishwa Mitter Thukral v. Union of India and Anr.: W.P.(C) 18129/2005, decided on 08.08.2011, a co-ordinate bench of this court considered a case of property situated in Sarojini Nagar Market and accepted the contention that the issue of conversion of a property from leasehold to freehold was different from the issue of conversion of the use of a property from residential to commercial. In that case, the petitioner, one Sh Vishwa Mitter Thukral, had applied for conversion of the Flat from leasehold to freehold. While the said application was pending, a demand for charges for conversion of the property from residential to commercial, was issued. The said conversion charges were deposited by the petitioner therein under protest and the petitioner assailed the said levy before this court and, inter alia, claimed refund of the conversion charges paid under protest. The petitioner therein also relied on the Office Order No.7/83 issued on 22.03.1983 by virtue of which the breach for the use of the top floor of the shop for commercial purposes was stated to have been condoned. The Court considered this contention and observed that There is merit in the submissions of the NDMC that the issue of conversion of the property in question from leasehold to freehold should not be confused with change of use from residential to commercial. The Petitioner has admittedly paid the charges both for conversion in respect of the shop and flat and also for the change of use in respect of the flat from residential to commercial. On this score therefore the NDMC will not hereafter raise any fresh demand. Consequently, there is no case made out for any refund of any amount by the NDMC to the Petitioner. W.P.(C) 9462/2009 & connected matters Page 16 of 21 14. The aforesaid decision, squarely covers the issue whether conversion charges for change of use from residential to commercial are payable in addition to the charges for converting a property from leasehold to freehold. I, respectfully, concur with the aforesaid view that both the above charges are separate and independent. Whilst, conversion charges for leasehold to freehold represent the consideration payable by the lessee for acquiring the residuary title and interest of the lessor in the property in question, the conversion charges for change in use of the property are charges levied for permitting change in the usage of the premises.

15. Insofar as the contention that commercial use of the Flat was permissible by virtue of the Office Order No.7/83 is concerned, I do not find any merit in the same. Undeniably, by virtue of the said office order, the commercial use of the Flat could

not be denied. This view has also been accepted by a Coordinate bench of this Court in *Satinder Sabharwal & Anr. v. N.D.M.C. (supra)*. In that case, the commercial use of the first floor of the premises in Khan Market had been denied. This Court had referred to various communications which indicated that NDMC had been taking conflicting stands and allowed the writ petitions by noticing that NDMC had in certain cases acted on the said Office Order and condoned the non residential use of Flats in certain cases and had allowed the conversion of the first floor of the properties from residential use to commercial use. However, the same does not imply that the conversion has to be unconditional because the misuse of the first floor is condonable. It would be open for NDMC to condone the same by imposing certain conditions. This is also clearly borne out by the opening sentence of Section 252 of the W.P.(C) 9462/2009 & connected matters Page 17 of 21 New Delhi Municipal Council Act, 1994 which expressly proscribes any person from changing or allowing change of use of any land or building except by a permission of the chairperson of NDMC and in conformity with the conditions, if any, imposed with such permission.

16. In my view, the decision of this Court in *Satinder Sabharwal & Anr. v. N.D.M.C. (supra)* is not an authority for the proposition that conversion of use from residential to commercial must be allowed unconditionally.

17. I am unable to accept the petitioners contention that since the property in question is classified as non hierarchical commercial centre, the entire building can be used as commercial purpose as per development control norms without seeking any conversion. The development control norms only indicate the use that the property can be brought to; the same does not mean that the necessary statutory permission under the New Delhi Municipal Council Act, 1994 or that of a lessor, is not required. Admittedly, the Flats in question were permitted to be used only for residential purposes. Undeniably, in terms of the MPD2021 the Flats in question can be used for commercial purposes. However, the same does not necessarily mean that no permission for conversion is required. At this stage, it is also relevant to bear in mind that as per the standard plan for the buildings, the first floor had been sanctioned only for residential purpose, thus, irrespective of the title of the property, the plan for the first floor of the properties in question had

been sanctioned only for residential purposes.

18. The learned counsel for the petitioners had laid much emphasis on the fact that the Flats in question had been converted to freehold at W.P.(C) 9462/2009 & connected matters Page 18 of 21 commercial rates and therefore, it was implicit that the use of the Flats had been accepted as commercial.

19. As indicated above, the charges payable for conversion from leasehold to freehold and the charges payable for conversion of use from residential to commercial are separate issues and must not be confused with each other. And, therefore, the rate at which the conversion charges from leasehold to freehold have been computed, has no relevance in determining the issue whether charges for conversion of use from residential to commercial could be imposed.

20. Having stated above, it is necessary to observe that it was not disputed by NDMC that the property in question had been converted from leasehold to freehold on commercial rates and not on residential rates. Thus, in my view, there may be merit in the petitioners grievance that the charges for conversion from leasehold to freehold at rates for commercial property were unjustified. Undeniably, the leasehold property was for residential purposes and the conveyance deed executed on conversion of the property to freehold also included an express stipulation that the conveyance could be cancelled if the property was used for purposes other than that specified in the lease deed. In view of the aforesaid, it is undeniable that the property was residential and had been converted to freehold as such. In the circumstances, the rates applicable for conversion of residential properties ought to have been applied instead of rates for commercial properties. However, this Court is not called upon to deliberate on the aforesaid issue as the conversion charges levied for conversion of the W.P.(C) 9462/2009 & connected matters Page 19 of 21 property from freehold to leasehold are not the subject matter of challenge or debate in these proceedings.

21. The petitioners also contended that the calculation of the conversion charges is erroneous. It is urged that the calculation of the conversion charges takes into account the entire land underneath the building and the same is erroneous, since only 1/3rd of the land was attributable to the first floor and, therefore, conversion of

only that portion of the land ought to have been considered.

22. In my view, the aforesaid contention is misconceived as a bare perusal of the formula for calculation of the conversion charges indicates that only a proportionate area of land, attributable to the built up portion of the first floor and the barsati floor has been considered. The area of the land underneath the building which is proportionate to the built up area of the Shop has not been considered for levy of conversion charges. In the case of Smt. Asha Rani, it is admitted that the total area of the land is 73.16 sq. meters and the total built up area is 165.49 sq. meters. The built up area of the first floor is 62.69 sq. meters. Thus, the proportionate area of the land attributable to the first floor, being the fraction of the built up area of the first floor i.e. $62.69 \text{ sq. meters} / 165.49 \text{ sq. meters}$ has been considered for levy of conversion charges in respect of the first floor. The said fraction has been multiplied with the total land area to arrive at the proportionate land attributable to the first floor. Similar formula has been applied in respect of the barsati floor where the built up area is 30.80 sq. meters and thus, the fraction of $30.80 \text{ sq. meters} / 165.49 \text{ sq. meters}$ has been multiplied with the W.P.(C) 9462/2009 & connected matters Page 20 of 21 total land area to arrive at the proportionate land attributable to the barsati floor. Thus, the contention that the area of the entire plot has been taken into account and conversion rates have been applied thereon, is not correct.

23. According to the petitioner, the land attributable to the first floor is only 1/3rd as reflected in the lease deed and thus, only 1/3 rd of the total land area of 73.16 sq. meters could be charged at the conversion rate and not the entire land area. As indicated above, the entire land beneath the building has not been charged to at the conversion rate. But only 56.5% of the land beneath the building has been charged, as the same is the proportion of the built up area of the building. More importantly, the conversion charges are not for the use of the land but for the use of the building and, therefore, the maximum permissible covered area of the first and second floor area of the building have been considered to calculate the levy of conversion charges. The difference between the circle rate of commercial and residential land is only a parameter which is used for calculating the conversion charge.

24. In view of the aforesaid, the petitions are unmerited and are, accordingly, dismissed. No order as to costs. VIBHU BAKHRU, J JULY15 2015 RK/MK W.P.(C) 9462/2009 & connected matters Page 21 of 21

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