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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 10451/2015

ACTION COMMITTEE UNAIDED RECOGNIZED PRIVATE SCHOOLS ..... Petitioner

Through: Mr. Amit Sibal, Sr. Adv. with Mr. Kamal Gupta, Ms. Pragya Agarwal and Mr. Yudhishter, Advs.

versus

DELHI DEVELOPMENT AUTHORITY ..... Respondent

Through: Mr. Rajiv Bansal, Sr. Adv. for DDA with Mr. Shlok Chandra, Ms. Parul Panthi, Ms. Vaishali Rawat and Mr. Ritesh Kr. Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

% 24.01.2020

1. The petitioner, a society registered under the Societies Registration Act, 1860, comprising approximately 300 private unaided recognised schools in Delhi, seeks, by means of this writ petition, to espouse the cause of various primary and middle schools, who, consequent to modified recognition granted by the DoE and the CBSE, are functioning at the senior secondary level. The schools claim to be aggrieved by the demand, by the DDA, for payment, by the said schools, of additional charges, for being allowed the facility of additional Floor Area Ratio (FAR). In other words, the claim of the petitioner is that the members of the petitioner should be allowed to run as senior secondary schools,

without requiring payment, by them, of any additional charges, to the DDA.

2. The petitioner's case is that, despite clear cut instructions, having been circulated by the respondent-Delhi Development Authority (DDA), allowing such upgradation, subject to the schools having the requisite land area, the DDA is, for no justifiable reason, refusing such upgradation until and unless additional charges are paid, by the said schools, for being allowed additional FAR, which such upgradation would entail.

3. The petitioner contends that the demand for additional FAR charges, as raised by the DDA, has no legs to stand on, and is, in fact, contrary, not only to the notification and instructions issued by the DDA itself, but also to orders passed by this Court as well as the Supreme Court.

4. Having thus set out the issue in conspectus, the facts may, to the extent necessary, be set out thus

Facts

5. Plots were allotted, by the DDA, to the Societies, whose cause this writ petition espouses, for setting up primary and middle schools, under the Delhi Development Authority (Disposal of Developed Nazal Lands) Rules, 1981.

6. The petitioner contends that the premium payable, to the DDA, at the time of allotment of plots, was the same for all educational

institutions, irrespective of the level thereof, i.e. irrespective of whether they were primary, middle, secondary or senior secondary.

7. The said premium, it is pointed out, was paid by the societies.

8. On 1st August, 1990, the Master Plan for Delhi (MPD) 2001 came into force. Under the MPD 2001, the area required, for establishing nursery, primary and secondary/senior secondary schools, as well as the FAR and ground coverage permitted to such schools, was stipulated thus:

Level/ Category of School	**Area required (in hectare)**	**FAR permitted**	**Ground coverage permitted (%)**
Nursery	0.08	66.66	33.33
Primary	0.40	100	33
Secondary/ Senior Secondary	1.60	120	30

9. The writ petition candidly concedes that, till the coming into force of the subsequent MPD viz. the MPD 2021, the stand of the DDA was that, under the MPD 2001, separate standards had been stipulated for different categories of schools, and that it was consciously decided to allot specific sites depending on the use to which the sites were to be put, depending on the category of school to be established thereon. As such, the DDA was of the view, at that point of time, that, on a site, which had been leased by the DDA for establishing a school of a particular category/level, no school, of any higher category/level, could be established or run. In other words, a site which was allotted for

establishing a primary school could not, in any circumstances, be used for setting up a middle, secondary or senior secondary school.

10. As such, *vide* circular dated 8th May, 2003, the DoE directed that applications, by societies, seeking upgradation of the category of school, above the category for which, expressly, land had been allotted to them, were not to be entertained.

11. On 12th January, 2014, a meeting took place in the office of Hon'ble Lieutenant Governor (hereinafter referred to as "the Hon'ble LG"), which examined the land norms to be followed by the Directorate of Education (hereinafter referred to as "DoE"), Government of National Capital Territory of Delhi, in granting recognition to private schools. The meeting discussed the land norms stipulated by the DoE, for various categories of schools in 1999 and, later, in December, 2002. It was decided, in the said meeting, that the DoE would follow the affiliation norms of the Central Board of Secondary Education (CBSE) for recognition of schools, whereunder secondary schools were required to be situated on land admeasuring not less than 2000 sq. m., whereas the area of the land, on which senior secondary schools could be run, was required, in the case of schools with less than two streams, to be not less than 3000 sq. m. and, in the case of schools with all four streams, to be not less than 4000 sq. m. Middle schools could be located on land admeasuring not less than 1000 sq. m. Insofar as the land norms stipulated by the DDA were concerned, it was noted, in the said meeting, that these norms were for planning of the city, and allotment of land, and not for granting of recognition. Ultimately, a decision was taken, in the

said meeting, that recognition be granted, by the DoE, to any applicant school, at one level *above* that mentioned in the lease deed and letter of allotment issued by the DDA, subject to satisfaction of the aforesaid area norms. It was directed that the proposal be put up to the Delhi School Education Advisory Board for recommendation.

12. The writ petition also adverts to an order, passed by the Hon'ble LG on 2nd June, 2004, in an appeal, in the case of Happy Home Public School, Rohini (hereinafter referred to as "HHPS"), preferred under Section 4(3) of the Delhi School Education Act, 1973 (hereinafter referred to as "the DSE Act"), against the decision, of the District Education Officer, rejecting the request, of HHPS, for upgradation to senior secondary level.

13. HHPS had been allotted 4515 square metres of land by DDA, for establishing a middle school. Recognition for upgradation to senior secondary level, as sought by HHPS, was refused, by the DoE, on the ground that land had been allotted, to it, by the DDA, expressly for running a middle school. The Hon'ble LG, allowing the appeal of HHPS, observed that the norms of the DDA were for planning and allotment and that, insofar as recognition was concerned, no set norms were to be found in the DSE Act. It was observed that, as per norms set by the DoE itself in 1999, the issue of recognition was to be decided keeping in mind the adequacy of the facilities available in the institution. Inasmuch as the CBSE norms required senior secondary schools to be run on land admeasuring not less than 4000 sq. m., and HHPS had been allotted 4515 sq. m. by the DDA, the Hon'ble LG held HHPS to be entitled to upgradation to the senior secondary level, as claimed by it.

14. With effect from 7th February, 2007, the MPD 2021 came into force. Under the MPD 2021, the minimum required land area, for the various categories of schools, was reduced, and the FAR and ground coverage, permitted to the schools, were increased. The required land area, FAR and ground coverage, for nursery, primary and secondary schools, under the MPD 2021, may be depicted, in a tabular fashion, thus:

	Area required (in hectares)	**Ground coverage permitted (%)**	**FAR permitted**
Nursery		33.33	100
Primary	0.02-0.04	30	120
Senior Secondary	0.6-0.8	35	150

15. The writ petition refers to a resolution, dated 9th September, 2007, of the DDA, wherein the following proposal was mooted:

> "i. Primary schools and Sr. Secondary schools being different Use Premises, the conversion of Primary schools/middle schools to Sr. Secondary School involves modification and approval of the Layout Plan. The conversion of Primary School/Middle Schools having minimum area of 0.8 ha to Sr. Secondary school may be considered on minimum 13.5m ROW roads.
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> ii. The conversion of Primary School/Middle school shall be applicable on the building component of school site and benefit of FAR shall be applicable only on the school building area. Conversion of Playground/ open area for construction of building shall not be permitted Maximum 'Building Area' of such schools shall be 50% of plot area.
>
> Sr. Secondary School sites, however, which has been allotted as such, shall continue to have a 'Building Area' of 0.6 ha.

iii. Parking provision shall be as per the norms of MPD-2021. The front boundary of the school shall be recessed by 6m for visitors parking within the setback area.

iv. In all conversion cases, where enhanced FAR shall be given as per MPD-2021, the same shall be against payment of prescribed charges as may be applicable.

v. No building activity shall be undertaken without approval of the building plan and building shall be used only after obtaining completion certificate. Special care shall be taken for safety of the children from any kind of hazard i.e. fire and other accident, etc. including the structural safety.

vi. All clearance/NOCs shall be obtained by the applicant school."

Approval, to the proposal was accorded, by the DDA, in para 2 of the Resolution, thus:

"2. After detailed discussion, the Authority approved the proposals contained in the agenda item subject to deletion of the condition regarding and dispensed with the condition regarding minimum ROW. The Authority clarified that conversion rates, if any, shall be charged at current market rates.

II. Shri Mahabal Mishra pointed out that most of the plots allotted to the higher education institutes were of small sizes and suggested that they should be permitted to provide libraries in their basements to encourage better educational environment. He suggested that such a usage should not be counted towards FAR otherwise the students will continue to be deprived of this facility. This suggestion was endorsed, in principle."

16. On 29th August, 2008, the following office order was issued by the DDA.

" **Dated: 29.08.2008**

OFFICE ORDER

As per decision of the Authority, the Primary School/Middle School plots having 0.8 hec. of land or more can be converted into Sr. Secondary School, if a formal request is received from the Society. Such converted plots shall be treated as one unit as applicable to Sr. Secondary Schools and will be allowed over all 35% ground coverage, 150 FAR and 18 meters height as prescribed for Sr. Secondary Schools under the Development Control Norms of MPD-2021.

For additional FAR, Societies shall have to pay premium at the rate applicable when the plot was allotted and with 10% upto date annual increase.

The lease deed shall be amended by the Lands Disposal Wing to Sr. Secondary School from Primary School on specific request of the Society.

The conversion will be totally optional and will be considered only on a specific request of the society.

Sd/-
(Asma Manzar)
Commissioner (LD)"

(Italics and underscoring supplied)

17. *Vide* Notification dated 10th October, 2008, issued under Section 57 of the Delhi Development Act, 1957 (hereinafter referred to as "the DD Act"), relating to "fixation of rates to be applied for use conversion mixed land use and other charges for enhanced FAR arising out of MPD-2021", the following "Regulation" was, *inter alia*, notified:

S.No.	Item	Recommendation
6	(g) Institutional Plots	@50% of the updated zonal market rate of institutional properties for those disposed by

		auction as well as for those properties which were allotted to private parties. This is not applicable to those institutions which were allotted land @ Re 1/- for whom no such charge is recommended.

18. This was succeeded by Notification dated 23rd December, 2008, also issued under Section 57 of the DD Act, in a tabular format. Serial No. 6, of the said table reads thus:

S.No.	**Item**	**Recommendation of the Ministry**	**Rates worked out on the basis of the recommendations of the Ministry (Rates in Rs. Per sqm)**
6	(g) Additional Far charges for institutional plots, i.e., including hospital plots.	@50% of the updated zonal market rate of institutional properties for those disposed by auction as well as for those properties which were allotted to private parties. This is not applicable to those institutions which were allotted land @ Re. 1/- for whom no such charges is recommended	South & Dwarka Rs. 29525/- North, East, West & Rohini Rs. 13008/- Narela Rs. 9691/- This is not applicable to those institutions which were allotted land @ Re.1/ - for whom no such charge is recommended.

19. Section 57 of the DD Act, to clarify, confers power, on the DDA to, "with the previous approval of the Central Government, make regulations consistent with" the said Act "to carry out the purposes" thereof. Section 58 requires all rules and regulations, made under the DD Act, to be laid for 30 days before each House of Parliament, as soon as may be after they are made.

20. It needs to be noted that, while the Notification dated 10th August, 2008 *supra*, was apparently recommendatory in nature, the recommendations were formalised only in the later Notification dated 23rd December, 2008. Whereunder educational institutions seeking additional FAR would have to pay ₹ 29,525/– per sq. m. in South Delhi and Dwarka, ₹ 13,008/– per square metres in North Delhi, East Delhi and West Delhi and Rohini, and ₹ 9691/–, per sq. m., in Narela.

21. The writ petition avers that these rates were burdensome, on the societies and institutions concerned, resulting in their validity being questioned, before this Court, in a batch of writ petitions, headed by WP (C) 9572/2009 (***South Delhi Educational Society v. DDA***).

22. During the pendency of the said writ petitions, the aforesaid two Notifications dated 10th October, 2008 and 23rd December, 2008, were modified by the DDA, *vide* Notification dated 17th July, 2012, also issued under Section 57 of the DD Act, which may be reproduced, *in extenso*, thus:

"DELHI DEVELOPMENT AUTHORITY
LAND COSTING WING
VIKAS SADAN INA

NEW DELHI

NOTIFICATION

Subject: - Exempting additional FAR charges in respect of Educational institutions/ Trusts, Health-care and other social welfare societies etc. having exemption from income-tax.

In exercise of powers conferred by section 57 of the Delhi Development Act, 1957 (No.61 of 1957), the Delhi Development Authority with the previous approval of the Central Government hereby makes the following modification to Notification S.O. 2432(E), dated 10-10-2008 and S.O. 2955 (E), dated 23-12-2008 published in the Gazette of India, Part II, Section 3, Sub-section (ii) with regard to fixation of rates to be applied for additional FAR charges for Institutional plots. 6(g) for Educational Societies/ Health-care, Social Welfare societies etc. where mode of disposal of land is still allotment.

Accordingly Para 6(g) of these notifications dated 10-10-2008 and 23-12-2008 shall be amended by the following:

Sl.No.	**Item**	**Modified Rates approved by the Ministry**
1	Additional FAR charges for Institutional plots. 6(g).	*No additional FAR charges to be recovered from Educational societies / Health care and Social welfare societies having Income Tax Exemption.*

The other contents of the notification dated 23/12/2008 will remain unchanged.

The exemption of additional FAR charges will remain in force till further modification and notification by the Government of India.

File No. F2[163] 07/AO(P)/Pt-Il/ Dated: 17 July, 2012

D Sarkar

Commissioner-cum-secretary
Delhi Development Authority"

(Emphasis supplied)

23. Consequent on the issuance of the said Notification dated 17th July, 2012, by the DDA, WP (C) 9572/2009 (***South Delhi Educational Society v. DDA***), along with other writ petitions connected thereto, were disposed of, by a Division Bench of this Court, *vide* order dated 20th July, 2012, which may be reproduced thus:

> "The learned counsel appearing for the DDA as well as for the UOI points out that a notification has now been issued and the same has been sent for publication which is most likely to be published in the official gazette within the next ten days or so. The notification reads as under:-
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> **DELHI DEVELOPMENT AUTHORITY**
> **LAND COSTING WING**
> **VIKAS SADAN INA**
> **NEW DELHI**
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> **NOTIFICATION**
>
> Subject: - Exempting additional FAR charges in respect of Educational institutions/ Trusts, Health-care and other social welfare societies etc. having exemption from income-tax.
>
> In exercise of powers conferred by section 57 of the Delhi Development Act, 1957 (No.61 of 1957), the Delhi Development Authority with the previous approval of the Central Government hereby makes the following modification to Notification S.O. 2432(E), dated 10-10-2008 and S.O. 2955 (E), dated 23-12-2008 published in the Gazette of India, Part II, Section 3, Sub-section (ii) with regard to fixation of rates to be applied for additional FAR charges for Institutional plots.6(g) for Educational Societies/ Health-care, Social Welfare societies etc. where mode of disposal of land is still allotment.
>
> Accordingly Para 6(g) of these notifications dated 10-10-2008 and 23-12- 2008 shall be amended by the following:

S. No.	Item	Modified Rates approved by the Ministry
1	Additional FAR charges for Institutional plots. 6(g).	No additional FAR charges to be recovered from Educational societies / Health care and Social welfare societies having Income Tax Exemption.

The other contents of the notification dated 23/12/2008 will remain unchanged.

The exemption of additional FAR charges will remain in force till further modification and notification by the Government of India.

File No. F2[163] 07/AO(P)/Pt-Il/ Dated: 17 July, 2012

D Sarkar
Commissioner-cum-secretary
Delhi Development Authority"

In view of the above notification it is absolutely clear that no additional FAR charges are to be recovered from the Educational societies/ Health care and Social welfare societies having income tax exemption. As such no additional FAR charges would therefore be recoverable from the present petitioners. If any of the petitioners have made deposits in this court pursuant to any order passed by this court the shall be returned to the respective petitioners. In case of any Bank Guarantees that may have been furnished on account of directions of this court in view of the additional FAR charges, the petitioners concerned would also be entitled to have the same revoked.

In view of the fact that now no FAR charges are to be recovered from the Educational societies/ Health care and Social welfare societies having income tax exemption, any action which may have been made conditional on the payment of the additional FAR charges would now not have the said condition. In other words, the non-payment of the FAR charges will not come in the

way of the petitioners to proceed with their release of sanctioned building plans, occupancy certificates, extension of time and NOCs etc. if the other conditions prescribed in law are fulfilled."

With these observations and directions, the writ petition stands disposed of. This order is being made only with regard to the petitioners before us."

(Emphasis supplied)

24. Special Leave Petitions, preferred against the above order, dated 20th July, 2012, were also dismissed, by the Supreme Court.

25. Though the order, dated 20th July, 2012, of this Court in WP (C) 9572/2009 and connected cases, extracted hereinabove, concludes with the observations that it was being made only with regard to the petitioners in the said writ petitions, the order was subsequently followed, by this Court, in various decisions, of which reference may, usefully, be made to ***DDA v. Jagan Nath Memorial Education Society***[1] and ***Rohini Educational Society v. D.D.A.***[2], each of which was rendered by a Division Bench of this Court.

26. In ***Jagan Nath Memorial Education Society***[1], this Court, having set out the Notification, dated 23rd December, 2008 *supra*, of the DDA, summarised the grievance, of the respondents before it (who had succeeded before the learned Single Judge), thus (in para 4 of the report):

4. Various representations were made by many non profit bodies to whom institutional land had been allotted by Delhi Development Authority. They pleaded that so steep were the charges that what was given by the right hand was taken away by

[1] **(2014) 210 DLT 750 (DB)**
[2] **(2014) 143 DRJ 94 (DB)**

> the left hand. To put it in simple language, they prayed that benefit of additional FAR should be made available to them at no extra cost. In the representations these bodies highlighted that if required to pay the charges as per the notification they would not be able to expand their activities keeping in view the meagre resources with them. These representations were duly considered by a special committee constituted; and as we find in India, wheels in the Government Departments move excruciatingly slowly. The wheels of consideration in the instant case also move slowly. As time passed by, some institutions/bodies approached this Court by filing writ petitions in the Year 2009 laying a challenge to the notification dated December 23, 2008. In the said writ petitions, a prayer was made that by way of interim orders the writ petitioners may be permitted to avail the benefit of the additional FAR. Interim orders were passed that subject to the writ petitioners depositing additional FAR charges or furnishing bank guarantee the building plans may be sanctioned so that the writ petitioners could affect further construction on the existing lands owned by them. The respondent of LPA No. 107/2014 and the writ petitioners in the three captioned petitions chose to deposit the additional FAR charges with Delhi Development Authority, albeit under protest, and obtain sanction for the building plans so that they could construct additional floors on the existing buildings owned by them. In the letters under which they tendered the additional FAR charges they clearly indicated that since a committee had been constituted to revisit the issue of additional charges, payment tendered by them should be treated as subject to the decision taken by the committee or the decision by this Court in the writ petitions filed by a few similarly situated bodies/institutions."

This Court, thereafter, went on to reproduce the Notification, dated 17th July, 2012 *supra*, issued by the DDA, and to observe that a perusal, thereof, revealed that, though it used the expression "modification", the Notification was, in a sense, emendatory of the earlier Notification dated 23rd December, 2008. It was further observed that the order, dated 20th July, 2012, passed by this Court in WP (C) 9572/2009 and connected cases, accorded retrospective operation to the Notification, dated 17th July, 2012. It was in these circumstances, noted this Court, that the

respondents before it, who had paid additional FAR charges, pursuant to the Notification dated 23rd December, 2008, sought refund thereof. By way of opposition to the claim, the DDA contended, firstly, that the order, dated 20th July, 2012, passed by this Court in WP (C) 9572/2009 and connected cases, was expressly limited to the petitioners in those writ petitions and, secondly, that no retrospective effect could be accorded to the Notification, dated 17th July, 2012, in the absence of any such indication in the Notification itself.

27. This Court repelled both the submissions. Analysing, first, the circumstances in which legislation could be accorded retrospective application, this Court opined, relying on ***Government of India v. Indian Tobacco Association***[3] and ***Vijay v. State of Maharashtra***[4], that procedural provisions, which were beneficial in nature, were required to be applied retrospectively. In view thereof, it was held that, in the order dated 20th July, 2012, this Court was justified in applying the Notification, dated 17th July, 2012, of the DDA, retrospectively. Holding that the object of the Notification, dated 17th July, 2012, was "to confer a benefit without taking away anybody's vested right and without inflicting a corresponding detriment on some other person or on the public generally", this Court held that the presumption would be "that the intent was to give a retrospective effect". Applying the principle of parity in judicial dispensation, this Court upheld the right of the respondents, before it, to be refunded the additional FAR charges, paid by them, consequent on the Notification, dated 23rd December, 2008 *supra*, of the DDA.

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[3] **(2005) 7 SCC 396**
[4] **(2006) 6 SCC 289**

28. The challenge in ***Rohini Educational Society***[2], which was contextually similar, was directed against a notice, issued by the DDA, seeking to penalise the petitioner-Society, for having availed additional FAR, without paying additional FAR charges. The petitioner-Society, before this Court, contended that the demand was violative of the Notification, dated 17th July, 2012 *supra*, of the DDA itself. This Court quashed the demand, as being unsustainable, as the Notification, dated 17th July, 2012, waived the additional FAR charges.

29. The land area requirement, stipulated by the CBSE, for recognition of schools of various categories, were further reduced *vide* Circulars dated 2nd August, 2013 and 28th May, 2014, to which, too, the writ petition alludes.

30. The petitioner contends that, in view of the Notification, dated 17th July, 2012 *supra*, of the DDA, and the aforementioned orders, passed by this court, whereunder various schools, and the societies establishing them, were allowed upgradation of category without having to pay any charges for additional FAR to which they would become entitled thereby, all societies and schools, which were entitled to income tax exemption, and which were located on lands having the requisite area as per the reduced norms of the MPD 2021, were entitled, *mutatis mutandis* to upgradation of category, without having to pay any additional charges for increased FAR.

31. Attention is invited, in this context, to the case of one such society, namely, Mount Abu Education Society (hereinafter referred to as "MAES") which had applied for upgradation of category.

32. *Vide* communication dated 22nd November, 2013, the North Delhi Municipal Corporation wrote, to MAES that, under Section 335 (1) and (2) of the Delhi Municipal Act, 1957, MAES was required to furnish the modified lease deed, issued by the DDA, allowing it to run a senior secondary school on the land allotted to it, as well as the modified layout plan, indicating change of land use from primary/middle to senior secondary school. On the MAES contacting the DDA, the DDA responded, *vide* communication dated 7th November, 2014, which reads thus:

"**DELHI DEVELOPMENT AUTHORITY**
INSTITUTIONAL LAND BRANCH
Room No.216, A-Block. 2nd Floor, Vikas Sadan. INA.
New Delhi-110023

No. F. 18(83)90/IL/2270 Dated: 7.11.14

To

The Secretary,
Mount Abu Education Society.
Sector-5. Pkt-B/8,
Rohini, DelhI-110085

Sub: - Regarding availing norms of MPD-2021 for Sr. Sec. School In respect of land measuring 0.756 Hect. allotted to Mount Abu Education Society at Sector-5, Rohini, Delhi.

This has reference to your letter dated 30.10.2014 on the subject cited above.

In this regard, it is to inform that as per MPD-2021 the plot earmarked for Primary/Middle School having area 0.6 Hect.-0.8 Hect. (6000 Sqm.-8000 Sqm.) of land (including playfield/green area) can be converted into Sr. Sec. School. Such converted plot shall be treated as one unit, as applicable to the Senior Secondary School, and *will be allowed over all 35% ground coverage, 150 FAR and 18 meters height as prescribed for Senior Secondary School under the Development Control Norms of MPD-2021. Other terms & conditions of allotment letter/Lease deed will remain same.*

Sd./-
7.11.14
Dy. Director (IL)/DDA"

33. In the aforesaid circumstances, the petitioner represented, to the Hon'ble Minister for Urban Development (MoUD), on 17th August, 2015. It was emphasised, in the said representation, that the initial pre-determined rate at which premium was paid by the societies, at the time of allotment of land by the DDA, was uniform, irrespective of the category of school specified in the lease deed. It was pointed out that, under the MPD 2021, the land area requirement, for running a senior secondary school, was only 0.6 Ha. Even so, complained the petitioner, institutions, located on land, admeasuring more than 0.6 Ha. were unable to function as senior secondary schools, owing to the fact that the original lease deeds, executed by the DDA, stipulated that the land was allotted for setting up primary, or middle schools.

34. Attention was also invited, in the representation, to the fact that this Court had clearly held that schools, which were entitled to income tax exemption, would not be required to pay any charges for availing

additional FAR, and that, *vide* Notification dated 17th July, 2012, the DDA had itself withdrawn the additional FAR charges.

35. As the aforesaid representation, of the petitioner, met with no favourable response, the petitioner has moved this Court, by way of the present writ petition.

36. The prayer clause in the writ petition reads thus:

> " In the facts and circumstances, stated above, it is therefore, prayed that this Hon'ble Court may be pleased to
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> (i) issue a writ, order or direction in the nature of mandamus directing the Respondent/DDA to modify/upgrade the lease (s) of nursery/primary/ middle/secondary schools to Senior Secondary School, in favour of such educational Societies which have an area more than minimum area stipulated under MPD- 2021 for Senior Secondary School, without levy of any charges whatsoever, and
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> (ii) issue a writ, order or direction in the nature of mandamus directing the Respondent/DDA to allow the educational Societies to avail of the benefit of additional FAR and maximum permissible ground coverage as permitted under MPD-2021, again without levying any charges under any name whatsoever;
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> (iii) issue a writ, order or direction in the nature of mandamus directing the Respondent/DDA to consequently amend/modify the lay out plans of the respective areas to depict the aforesaid upgradation, if at all the same is required under the law, and
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> (iv) pass any other and further orders granting relief in favour of the Petitioner, which this Hon'ble Court may deem fit in the facts and circumstances of the case; and
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> (v) grant costs of this petition"

Affidavits, and further developments during the course of proceedings before this Court

37. Contesting the writ petition, the DDA has filed, in the first instance, a short counter-affidavit, on 12th May, 2016, in which it was merely contended that in order to deliberate on the issue in the writ petition, a meeting stood convened under the chairmanship of the Principal Commissioner (Land Disposal), but that, as the decision would have wide ranging policy implications, further time was required.

38. Following the filing of the aforesaid "short counter-affidavit", the DDA, submitted, before this Court, on 17th November, 2016, that still further time was required to arrive at the aforesaid decision, as all members of the petitioner association had been called upon to furnish their income tax exemption certificates, so as to understand the financial implications. Keeping in view the fact that the DDA was examining the issue at a macro level, this Court granted extension of time, as sought by the DDA.

39. On the next date of hearing, i.e., 27th March, 2017, this Court was informed that the DDA had completed the aforesaid exercise, but had not taken further steps in view of the notification, by the State Election Commission, of the MCD Elections, 2017 and the consequent enforcement of the Model Code of Conduct.

40. Subsequently, on 19th November, 2018, a further affidavit was filed by the DDA wherewith the following decision, dated 9th May, 2018, by way of office noting, on the file, was placed on record:

" With respect to agenda Grant of additional FAR and charges to be levied due to up gradation from Primary/Middle School to Sr. Secondary School, it is submitted that in 2007 MPD-2021 came into existence which provided inter alia that Senior Secondary School, instead of 1.6 Ha (building area 0.6 Ha as per MPD 2001) of land can be located on plot sizes between 0.6 to 0.8 Ha. From 1999 onwards, school societies were allotted 2 acres of land out of which 6000 sqm, (75%) is for building area and 2000 Sqm. (25%) is for play field area. MPD-2021 provides for FAR of 150, ground coverage of 35% and height of the building restricted to 18 Mtrs. MPD-2021 increased FAR of Primary / Middle and Sr. Secondary School. Simultaneously, upgradation of Primary / Middle Schools to the Sr. Sec. Schools resulted in increase of FAR.

Two issues came up during the course of handling the cases of upgradation of primary/middle school into Senior Secondary School. One was regarding the additional FAR arising out of building area and play field area on upgradation of school and second how to charge for additional FAR in case of Primary/Middle to Sr. Sec. School especially in respect of societies/trusts having Income Tax exemption.

On dated 24.01.2014, a Gazette notification was issued which notified that, 'no additional FAR charges, are to be recovered from educational societies / trusts, health care, social welfare having income tax exemption under Income Tax 1961'.

Vide DDA's office order, dated 21.02.2014 conversion, to Sr. Secondary School was allowed in respect of primary school plots haying 0.6 Ha of land. For Additional FAR, societies shall have to pay premium at the rate applicable when the plot was allotted and with 10% up to date annual increase. Further it was mentioned that the conversion of Primary/ Middle school shall be applicable on the building component of school sites and benefits of FAR shall be applicable only on the school building area. Conversion of play ground/open area for construction of building shall not be permitted. Maximum building area of such school shall be 50% of plot area. Therefore, DDA's office order dated 21.02.2014 did not exempt educational societies / trusts having income tax exemption under Income Tax Act 1961 from paying additional FAR charges in case of conversion of Primary/ Middle school to Sr. Secondary school.

DDA's office order dated 21.02.2014 was challenged in the Hon'ble High Court vide W.P. (C) 10451/2015 titled Action Committee Unaided Recognized Private School Vs. Delhi Development Authority.

Further, in view of the ongoing court case, a draft agenda regarding 'Grant of additional FAR and charges to be levied due to up gradation from Primary/Middle School to Sr. Secondary School' was prepared and sent to Hon'ble LG, Delhi for approval for placing in Authority Meeting. However, Hon'ble LG, Delhi desired a detailed presentation on the whole issue.

Accordingly, a presentation was made before Hon'ble LG, Delhi. In the presentation, various issues were discussed related to the agenda. It was agreed that additional FAR / up gradation charge for Educational Societies / Trust should be charged from all Societies instead of exempting them completely. It was also expressed by officials present in the meeting that Educational Societies / Trust should not be exempted from additional FAR / upgradation charges as the land allotted to Societies by DDA is already less than the market rates, therefore any further exemption is not warranted and a suitable mechanism to be worked out for the proper utilisation of the charges collected. *In view of the above, it is proposed that the charges which will be collected due to levy of additional FAR / upgradation charges may be deposited in Urban Development Fund (UDF) under MoHUA. The Societies which have already availed the additional FAR may not be charged but the Societies which apply afresh or have not availed additional Far as yet will have to pay to the charges as applicable after withdrawal of Gazette notification dated 24.01.2014. After this proposal is approved by the Authority, a proposal would be sent to MoHUA requesting to review the Gazette notification dated 24.01.2014 which notified that, 'no additional FAR charges are to be recovered from educational societies / trusts, health care, social welfare having income tax exemption under Income Tax Act 1961' and for utilization of such charges through UDF*.

Therefore, before a revised agenda is put up on lines of discussion held in the presentation the concurrence of Finance Wing of DDA may be obtained and the file may be submitted to worthy Vice Chairman, DDA for consideration and order.

It is also submitted that the next date of hearing in the matter of W.P. (C) 10451/2015 titled Action Committee Unaided Recognized Private School Vs. Delhi Development Authority is 15.05.2018 and the above factual position may also be allowed to apprised to the Hon'ble High Court.

Submitted Please.

Sd/-
AD (IL)"

(Emphasis supplied)

41. In view of the afore-extracted decision, it was submitted, in the affidavit, that the members of the petitioner association, which desired upgradation of the category of schools established by them, would have to pay charges, for being entitled to the benefit of additional FAR, which would become available consequent thereto.

42. The petitioner has filed a formal reply to the aforesaid affidavit of the DDA, submitting that, by way of a file noting, the Notification dated 17th July, 2012, which had been accorded the imprimatur of this Court in several decisions, as well as of the Hon'ble Supreme Court, could not be eviscerated or even modified. The decision taken in the official noting, filed by the DDA, therefore, it was submitted, was unenforceable in law.

43. *Vide* Notification dated 24th January, 2014, issued under Section 57 of the DD Act, the Notification, dated 17th July, 2012 *supra* was further liberalised, by extending the benefit of exemption from payment of additional FAR charges to educational trusts, apart from educational societies, to which the exemption already applied. The said Notification may be reproduced thus:

"**DELHI DEVELOPMENT AUTHORITY**
(LAND COSTING WING)

NOTIFICATION

New Delhi, the 24th January, 2014

Subject:- Exempting additional FAR charges in respect of Educational Institutions/Trusts, Health-care and other Social Welfare Societies etc. having exemption from income-tax under Income Tax Act, 1961.

S.O. 240(E).- In exercise of powers conferred by Section 57 of the Delhi Development Act, 1957 (No. 61 of 1957), the Delhi Development Authority with the previous approval of the Central Government hereby makes the following further modification to Notification No. S. O. 1606(E), published on 17.07.2012 in the Gazette of India, Part-II, Section 3, Sub-section (ii) with regard to fixation of rates to be applied for additional FAR charges for Institutional plots for Educational Societies/Health-care, Social Welfare Societies having Income Tax Exemption.

Item	Existing Provision	Modified Provision
Additional FAR charges for Institutional plots 6(g) of notification No. S. O. 2955(E) dated 23.12.2008	No additional FAR charges to be recovered from Educational Societies/Health-care, Social Welfare Societies having Income Tax Exemption.	No additional FAR charges to be recovered from Educational Societies/Trusts, Health-care, Social Welfare Societies having Income Tax Exemption under Income Tax Act, 1961.

The other contents of the notification No. S.O. 2955(E) dated 23/12/2008 will remain unchanged.

The exemption of additional FAR charges will remain in force till further modification and notification by the Government of India.

[F.No. F2 (163)07/AO(P)/Pt-II]

D. SARKAR, Commissioner-cum-secretary"

(Emphasis supplied)

44. On 21st February, 2014, however, the following Office Order was issued by DDA:

" **DELHI DEVELOPMENT AUTHORITY**
OFFICE OF THE PRINCIPAL COMMISSIONER (LD)
D-Block, 1st Floor, Vikas Sadan, INA, New Delhi-23

No. F. 18(35)95/IL/354 **Dated : 21/2/14**

OFFICE ORDER

In partial modification to this office order no. F.18(Misc) / 08/ Authority/ Schools/ 1L/ 1765, dated 29.8.2008, the Primary School/ Middle School plots having 0.6 Hect. to 0.8 Hect. of land or more can be converted into Senior Secondary Schools as per the Development Control Norms of MPD-2021, if a formal request is received from the society. Up to 10% variation in plot size is also permitted. Such converted plots shall be treated as one unit as applicable to Senior Secondary Schools and will be allowed over all 35% ground coverage. 150 FAR and 18 meters height as prescribed for Senior Secondary Schools under the Development Control Norms of MPD-2021.

For additional FAR, societies shall have to pay premium at the rate applicable when the plot was allotted and with 10% up to date annual increase.

The conversion of Primary / Middle School shall be applicable on the building component of School sites and benefit of FAR shall be applicable only on the school building area. Conversion of play round / open area for construction of building shall not be permitted. Maximum building area of such school

shall of 50% of plot area. Parking provisions shall be as per the norms of the MPD-2021."

45. Considerable deliberations were undertaken, in the office of the DDA, to resolve what was felt to be an apparent discrepancy between the dispensation, as contained in the Notification dated 17th July, 2012 *supra* and 24th January, 2014 *supra*, issued by the DDA under Section 57 of the DD Act, vis-à-vis the Office Order dated 21st February, 2014 *supra*. The petitioner has, with its affidavit, submitted in reply to the affidavit, dated 19th November, 2018 *supra*, placed the said file notings on record.

46. It is not necessary to refer to the said notings. Suffice it to say that, in respect of societies enjoying benefit of exemption from income tax, the following proposal was submitted for consideration:

> "**2.** In respect of Income Tax exempted societies, land allotted for Primary / Middle Schools, additional FAR accruing due to modification in MPD 2021 and upgradation to Sr. Secondary school may be waived/exempted as the FAR is on the building area for which premium has been taken in view of the notification dated 24.01.2014 (Annexure 9) and the office order no. F. 18 (35) 95/IL/354 dated 21.2.2014 may be allowed to be withdrawn in order to bring parity amongst all such societies."

Rival submissions

47. Detailed submissions were advanced, before me, by Mr. Amit Sibal, learned Senior Counsel as well as Mr. Kamal Gupta, learned counsel, on behalf of the petitioner, and Mr. Rajiv Bansal, learned Senior Counsel appearing for the DDA.

48. The sole issue for consideration is whether, in order for being allowed to function as senior secondary schools, and to have the lease deeds, originally executed by the DDA, modified accordingly, the members of the petitioner association, possessing the requisite land area as per the MPD 2021 and entitled to income tax exemptions, would, further, in addition, be required to pay additional charges for being permitted enhancement of FAR.

49. Mr. Sibal premised his arguments, essentially, on the Notifications dated 17th July, 2012 and 24th January, 2014, issued by the DDA. It is pointed out that these Notifications have not been withdrawn or rescinded till date and continue to reflect the extant and applicable legal position.

50. It is also pointed out that the Notifications dated 17th July, 2012 and 24th January, 2014, having been issued in exercise of powers conferred by Section 57 of the DD Act, partake of the character of statutory regulations and would, in any event, therefore be entitled to precedence and predominance over the Office Order dated 21st February, 2014 *supra*.

51. Mr. Sibal also drew my attention, in the above context, to paras 3 and 4 of the affidavit, dated 19th November, 2018, filed by the DDA, which read thus:

> "3) In this matter, a meeting was also held in Raj Niwas where it was decided that Educational Societies/Trust should not be exempted from additional FAR/upgradation charges as the land allotted to Societies by DDA is already less than the market rates, therefore any further exemption is not warranted and a suitable mechanism to be worked out for the proper utilization of the charges collected.

> 4) It was proposed that the charges which will be collected due to levy of additional FAR/upgradation charges may be deposited in Urban Development Fund (UDF) under MoHUA and a proposal would be sent to MoHUA requesting to review the Gazette notification dated 24.01.2014."

Mr. Sibal submits that the above two paragraphs acknowledged that the position in law, as it exists as on date, is that *no additional FAR charges would be payable*, while allowing upgradation of the category of schools, who enjoy income tax exemption and are situated on lands admeasuring the requisite area. Reliance has been placed, in this context, on ***T. Vijayalakshmi v. Town Planning Member***[5].

52. Mr. Rajiv Bansal, learned Senior Counsel for the DDA submits, *per contra,* with emphasis, that the terms of the original lease deeds, executed by the DDA with the concerned societies, could not be altered and, inasmuch as they have been executed under Section 3 of the Government Grants Act, 1895, prevailed, irrespective of any statutory prescription or order to the contrary.

53. The petitioner, contends Mr. Bansal, was effectively seeking novation of the said lease deeds. He submits that the DDA was agreeable thereto, subject to additional charges being paid by the petitioners, as demanded by the DDA. Mr. Bansal emphasizes that the petitioners have no vested right to change of category of school without paying requisite additional charges levied by the DDA.

5 (2006) 8 SCC 502

54. Mr. Bansal further points out that the Office Order, dated 29th August, 2008 *supra*, issued by the DDA, which specifically stipulated that, for additional FAR, the societies were required to pay premium at the rate applicable when the plot was allotted with 10% up to date annual increase, was never challenged by the petitioner. Equally, he submits, the petitioners have not assailed the Office Order dated 21st February, 2014, issued by the DDA, in accordance wherewith additional FAR charges were being demanded by the DDA.

55. Substance, therefore, Mr. Bansal submits that modification of the lease deed, and lay out plan, as sought by the petitioner, could not be allowed gratis.

56. Mr. Bansal submits, in conclusion, that the DDA was agreeable to allow additional FAR, to the petitioners, without levying charges therefor, but that, if the petitioners wanted upgradation of the category of schools being run on the land allotted to them, they would have to pay the charges claimed by the DDA.

57. Mr. Sibal submits, in rejoinder, that, in fact, the question of upgradation does not arise in this case at all, inasmuch as, consequent to the orders passed by the Hon'ble LG, the members of the petitioner association are running schools of the categories commensurate with the land area on which they are situated. In other words, he submits, all societies, whose cause the present writ petition espouses, are already running senior secondary schools, and the question of upgradation does not survive for consideration. All that is required to be decided, submits

Mr. Sibal, is whether, for modification of the lease deed, additional FAR charges could be claimed by the DDA.

58. Mr. Sibal has drawn attention to the following passages from clause 13.2 of the MPD 2021:

> "Keeping the need for expansion and diversification as brought out above, the availability of land could become a major constraining factor. It has, therefore, become necessary to develop policies and norms, which would enable optimal utilisation of land and available educational infrastructure. As far as school education is concerned, the policy should be geared to encourage integrated schools from the pre-primary to the higher secondary level, rather than allocating space separately for Nursery Schools, Primary Schools and Middle Schools. Primary Schools may specifically be set up by the Delhi Government or the Local Civic Bodies.
>
> Following planning policy parameters are proposed:
>
> > i) Differential norms and standards for various educational institutes / institutions shall be applicable *in the light of the norms of the concerned controlling authorities* e.g. University Grants Commission (UGC) / All India Council for Technical Education (AICTE) / Directorate of Education, GNCTD / *Central Board of Secondary Education (CBSE) etc.* "
>
> (Emphasis Supplied)

In view of the afore-extracted passages, Mr. Sibal submits that the decision of the DDA had to be in accordance with the norms of the CBSE. He points out that increased FAR of 150 sq. meters was itself provided in the MPD 2021, for Senior Secondary Schools, and that this was much prior to 2008 as well as 2013, when the Office Orders, on which Mr. Bansal places reliance, were issued by the DDA.

59. Mr. Sibal further submits that the Office Orders, dated 29th August, 2008 and 21st February, 2014, were not issued by following the procedure stipulated in Sections 57 and 58 of the DD Act and did not, therefore, have the force of law.

60. The extant legal position prior to the issuance of the Notification dated 17th July, 2012 *supra*, Mr. Sibal would therefore seek to submit, would be reflected by the Notification dated 10th October, 2008, and not by the Office Order dated 29th August, 2008, inasmuch as the Notification had been issued in accordance with Section 57 of the DD Act. The said Notification, dated 10th October, 2008 and 23rd December, 2008, he points out, was challenged by various schools, before this Court, in WP (C) 9572/2009, and it was during the pendency of the said writ petition that, *vide* Notification dated 17th July, 2012, also issued under Section 57 of the DD Act, it was decided that no additional FAR charges would be recovered from educational societies having income tax exemption.

61. Mr. Sibal points out that there was no dispute that all the members of the petitioner association were entitled to income tax exemption.

62. The Notification, dated 17th July, 2012, he re-emphasises, was to remain in force, "till further modification and notifications by Government of India" and not till the issuance of any Office Order by the DDA. The Office Order dated 21st February, 2014 could not, therefore, in his submission, derogate from the effect of the Notification dated 17th July, 2012. In view thereof, he submits, there was no necessity for the petitioner to challenge the office order dated 21st February, 2014, which

was devoid of all legal force. Mr. Sibal relies, in this context, on ***Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise***[6]**.**

63. Mr. Sibal further draws my attention to the order dated 20th July, 2012 of this Court in WP (C) 9572/2009 (***South Delhi Educational Society v. DDA***) and submits that, in view of the said decision, the DDA could not legally resuscitate, or modify, the Office Order, dated 29th August, 2008 – which, in his submission, was dead and gone – by the Office Order dated 21st February, 2014.

64. In case of any inconsistency between the said Office Orders, and the Notifications issued by the DDA under Section 57 of the DD Act, Mr. Sibal submits that the notifications had necessarily to prevail. The Office Orders, therefore, he submits, could safely be ignored.

65. Mr. Sibal further submits that the conditions of individual leases executed by the DDA with the societies, were a matter of public policy and that, with the amendment of the MPD 2021, the requirement of amendment of the individual lease deeds was rendered a superfluity.

66. Without prejudice, however, Mr. Sibal emphasises, that, at the time of allotment of the land, premium had been paid by the affected petitioners, in full, to the DDA. There could not, therefore, be, in his submission, any occasion for charging of premium all over again, in whole or in part, by the DDA, under the aegis of the Office Order, dated 29th August, 2008, or the Office Order dated 21st February, 2014. In fact,

6 (2016) 3 SCC 643

submits Mr. Sibal, charging of additional FAR charges would completely defeat the very purpose of grant of additional FAR in the MPD 2021.

67. Mr. Sibal reiterates his submission that the MPD 2021 itself amounted to amendment of the lease deeds executed by the DDA with the individual societies and no separate amendment of the lease deeds was required in law. Once additional FAR was allowed by the MPD 2021, Mr. Sibal's submission is that the DDA could not refuse to act in accordance with, or implement, the said dispensation, on the tenuous ground that the individual lease deeds had not been amended.

68. On his request, Mr. Bansal was permitted to advance arguments in surrejoinder.

69. In the course thereof, Mr. Bansal submits that individual lease deeds executed by the DDA with the societies, annexed therewith, the lay out plan which necessarily required change. It was for this reason, he submits, that the writ petition, prays for amendment of the lease deeds. Responding thereto, Mr. Sibal draws my attention to para 7 of the writ petition, in which it is contended that, if the lease deeds were amended by the DDA, in accordance with the terms of the MPD 2021, no further requirement of any amendment in the layout plan would be necessary to make the lease deeds effective.

70. Mr. Bansal submits that there is a distinction between charges for grant of additional FAR and charges for upgradation of the category of

school, and that the DDA is claiming, from the petitioners, the upgradation charges, not charges for being granted additional FAR.

71. He also pleads delay and laches, submitting that, at this late point of time, the petitioner could not be permitted to challenge the Office Order dated 29th August, 2008. He submits that the Office Order dated 29th August, 2008 could not be merely wished away, as the petitioner seeks to contend, but had necessarily to be challenged, and that no such challenge was forthcoming.

72. In fact, submits Mr. Bansal, the petitioners are not entitled to any relief as they are illegally running schools in violation of the terms of the lease deeds executed by the DDA.

Analysis

"Upgradation charges" or "additional FAR charges"?

73. Before proceeding to the merits of the petitioner's claim, I may advert to the submission, of Mr. Rajiv Bansal, learned Senior Counsel, that the charges being claimed by the DDA, from the petitioner, were not for permitting additional FAR, but for permitting upgradation of the category of school established by them. In other words, Mr. Bansal would seek to submit that the DDA was demanding "upgradation charges", and not "additional FAR charges".

74. This, in my view, is merely a distinction without a difference, and the argument requires merely to be urged, to be rejected. The Office Orders, dated 29th August, 2008, and 21st February, 2014, on which the DDA itself places reliance, specifically refer to charges payable *for grant of additional FAR*. There is not a single document, in the entire record of the case, which distinguishes between amounts chargeable by the DDA, from the societies, for permitting upgradation of the schools established by them, and amounts chargeable for allowing additional FAR.

75. Indeed, a perusal of the MPD 2021 itself indicates that grant of additional FAR goes hand-in-hand with upgradation of the category/level of the school being run on the land, and is inalienable therefrom. They are, as it were, two sides of the same coin.

76. That apart, Mr. Bansal has not been able to point out a single provision, which entitles the DDA to charge "upgradation charges", over and above, or apart from the charges payable for grant of additional FAR, on upgradation of the school. A bare reading of the Office Orders dated 29th August, 2008 and 21st February, 2014, issued by the DDA, make it clear that, though the charges proposed to be levied by the DDA, *vide* the said office orders, is on account of upgradation of the level of the school, established on the land allotted by it, the charges are, in fact, being levied because of the additional FAR, to which the schools would become entitled, by virtue of such upgradation.

77. The distinction between "upgradation charges" and "additional FAR charges" has, therefore, no legs to stand on. In fact, para 3 of the

affidavit, filed by the DDA, on 19th November, 2018 itself states that "it was decided that Educational Societies/Trust should not be exempted from *additional FAR/upgradation charges* as the land allotted to Societies by DDA is already less than the market rates…" In a similar vein, the office noting, dated 9th May, 2018, of the DDA, placed, by the DDA, on record under cover of an affidavit dated 19th November, 2018, records that "it was also expressed by officials present in the meeting that Educational Societies/Trust should not be exempted from *additional FAR/upgradation charges*…" This, too, goes to indicate that there is no distinction between charges for upgradation and charges for being allowed for additional FAR.

Right to seek modification of lease deeds

78. Referring to the prayer, of the petitioner, for a mandamus, to the DDA, to modify the lease deeds, executed by them, with the members of the petitioner society, upgrading the level of school stipulated therein, to "senior secondary", Mr. Bansal has, while seeking to submit that this would amount to novation of the lease deed, also gone on to submit that the DDA had no objection to modifying the lease deeds, as sought by the petitioner, provided the petitioners were agreeable to paying the amounts claimed by the DDA in return therefor. In view of this submission, the right of the members of the petitioner to modification of the lease deeds, executed by them, with the DDA, by upgrading the category of school, as stipulated therein, is not seriously open to question.

79. Indeed, the Office Order, dated 29th August, 2008 *supra*, issued by the DDA, on which the DDA placed reliance, itself acknowledges the responsibility, of the DDA, to amend the lease deeds, entered into, by it, with the members of the petitioner. Mr. Sibal points out that the grievance of his clients is, fundamentally, against the second para of the said Office Order, which, as a precondition for conversion of primary/middle Schools, situated on plots at measuring 0.8 hectares or more, requires that the Societies pay premium at the rate applicable when the plot was allotted with 10% up-to-date annual increase. In the very next para of the Office Order, it is declared that "the lease deed *shall be amended* by the Lands Disposal Wing to Senior Secondary School from Primary School on specific request of the Society." The DDA does not, therefore, disputed its responsibility to amend the lease deeds, and Mr. Bansal admitted as much.

Could additional FAR charges be claimed by the DDA as a condition for permitting the schools to run as senior secondary schools?

80. The core issue that arises for consideration is whether the DDA could, legally and legitimately, enforce payment of charges, for allowing additional FAR, to the members of the petitioner society, as a condition for allowing them to run their schools at the senior secondary level, or for amending the lease deeds, executed between the DDA and the said members of the petitioner-Society, to the said effect.

81. This issue, in my view, is no longer *res integra*, being covered by the three decisions cited hereinabove, viz. the judgment dated 20th July,

2012 of Division Bench of this Court in WP (C) 9572/2009 (***South Delhi Educational Society v. DDA)***, ***Jagan Nath Memorial Educational Society***[1] and ***Rohini Educational Society***[2]**.**

82. The Division Bench of this Court had, before it, in all these cases, the Office Order dated 29th August, 2008, as well as the Notifications, dated 23rd December, 2008 and dated 17th July, 2012, issued by the DDA. The Division Bench of this Court has accorded the Notification dated 17th July, 2012, retrospective application, and has held that, in view of the issuance thereof, societies running educational institutions, which were entitled to income tax exemption, would not be required to pay additional FAR charges. Para 6(g) of the Notification, dated 23rd December, 2008 *supra*, which required institutional plots to pay additional FAR charges, was amended thereby.

83. This Court held that, with the issuance of the Notification, dated 17th July, 2012, the liability, of the society, running educational institutions which were entitled to income tax exemptions, to pay additional FAR charges, had ceased to exist.

84. In ***Jagan Nath Memorial Educational Society***[1], this Court went one step further, and directed refund, to the society, of the additional FAR charges already paid by them.

85. Special Leave Petition (SLP), preferred against the judgment in ***South Delhi Educational Society*** *supra*, also stood dismissed by the Supreme Court.

86. The imprimatur of the highest court of the land having been placed on this legal position, it is clearly not open to the DDA, in my view, to demand additional FAR charges, in order to permit the petitioners to run their establishments as senior secondary schools.

87. Does the position change with the issuance of the Office Order dated 21st February, 2014? Obviously not. The Office Order, dated 21st February, 2014, is merely an attempt to resuscitate the Office Order dated 29th August, 2008 which, as Mr. Sibal correctly submits, had perished by then. Life breath cannot be infused in a dead body. Neither can an entity, which has already perished, be resuscitated.

88. In any event, even if such a re-incarnation of the Office Order, dated 29th August, 2008, *vide* the Office Order dated 21st February, 2014, were to be presumed to be at all permissible, side by side, the Notification, dated 17th July, 2012, also stood reinforced by the Notification, dated 24th January, 2014.

89. If, while the Office Order dated 29th August, 2008 *supra* was in existence, the Division Bench, in as many as three judgments, held that the Notification, dated 17th July, 2012 *supra*, would prevail, and there was no requirement, for societies running educational institutions which were entitled to income tax exemption, to pay additional FAR charges, the same position must, of needs, obtain when the Notification dated 24th January, 2014, and Office Order, dated 21st February, 2014 are juxtaposed and seen side-by-side.

90. Applying the law laid down in the aforesaid three judgments in WP 9572/2009 (***South Delhi Educational Society v. DDA)***, ***DDA v. Jagan Nath Memorial Educational Society[1] and Rohini Educational Society[2]*,** therefore, in the wake of the Notification, dated 24th January, 2014 *supra*, no additional FAR charges could be demanded from the members of the petitioner Society, who were running up educational institutions at senior secondary level and were entitled to income tax exemption.

Notifications dated 17th July, 2012 and 24th January, 2014, vis-à-vis Office Orders dated 29th August, 2008 and 21st February, 2014

91. That apart, as Mr. Sibal correctly points out, the Notifications, dated 17th July, 2012 and 24th January, 2014, having been issued under Section 57 of the DD Act, are possessed of additional sanctity, as compared to the Office Orders dated 29th August, 2008 and 21st February, 2014.

92. In fact, *stricto sensu*, the Notification, dated 17th July, 2012 and 24th January, 2014, are in the nature of regulations, issued in accordance with the procedure stipulated in Sections 57 and 58 of the DD Act.

93. The Notifications, dated 23rd December, 2008, of the DDA, commence with the following declaration:

> "S.O. 2955(E) In exercise of powers conferred by section 57 of the Delhi Development Act, 1957 (No.61 of 1957), the Delhi Development Authority with the previous approval of the Central Government, hereby *makes the following Regulations* in

pursuance to Notification No. S.O. 2432(E) dated 10th October, 2008:-"

(Emphasis supplied)

The stipulations contained in the Notification dated 23rd December, 2008, therefore, constituted "regulations" though they were set out in a tabular form. Serial No. 6(g) of the said Regulations – which may, therefore, alternatively, be referred to as "Regulation 6(g)", required institutional plots, to pay additional FAR charges, which varied depending on the area in which the plots were located, with plots in South Delhi and Dwarka being charged @ ₹ 29,525/- per sq. mtr, plots in North Delhi, East Delhi, West Delhi and Rohini being charged @ ₹ 13,008/- per sq. mtr and plots at Narela @ ₹ 9,691/- per sq. mtr.

94. It was this dispensation, contained in Regulations 6(g), as notified *vide* Notification dated 23rd December, 2008, which was amended by the subsequent Notification dated 17th July, 2012. The amendment was also, therefore, in the nature of a regulation, whereby the pre-existing Regulation 6(g) (S. No. 6(g) of Notification dated 23rd December, 2008), was amended. By the said amendment, the stipulation, in Regulation 6(g), of payment of additional FAR charges by institutional plots, was excepted in the case of educational societies/health-care and social welfare societies having income tax exemption.

95. Regulation 6(g) was further amended by the Notification dated 24th January, 2014, which, therefore, was also in the nature of a regulation, issued under Section 57 of the DD Act, in accordance with procedure prescribed, in that regard, by Section 58 thereof.

96. By the said second amendment, Regulation 6(g) was further modified to extend the exemption, from payment of additional FAR charges, to educational trusts. The Notifications, dated 23rd December, 2008, 17th July, 2012 and 24th January, 2014, were all, therefore, in the nature of statutory regulations, issued in exercise of powers conferred by Section 57 of the DD Act, in conformity with the procedure prescribed, in that regard, by Section 58 thereof.

97. These notifications, therefore, were entitled to far greater sanctity than the Office Order, dated 29th August, 2008 and 21st February, 2014 which, at best, could be regarded as administrative instructions. It is trite, in law, that regulations issued in exercise of powers conferred by the statute, in accordance with procedure prescribed therein, would prevail over administrative instructions.

98. For this reason, too, in the face of the Notifications, dated 17th July, 2012, and 24th January, 2014, issued by the DDA under Section 57 of the DD Act, the reliance, by Mr. Bansal, on the Office Orders, dated 29th August, 2008 and 21st February, 2014, is obviously misplaced.

99. It is apparently keeping in view of the fact that they are in the nature of statutory regulation, issued under section 57 of the DD Act, that the last paragraphs of the Notifications dated 17th July, 2012 and 24th January, 2014 observe that they would remain in force until amended by the Government of India. The application of these Notifications could not, therefore, be whittled down by the Office Orders dated 29th August, 2008 and 21st February, 2014.

100. That apart, if one were to carefully peruse the Office Orders, dated 29th August, 2008, and 21st February, 2014, vis-à-vis, the Notifications, dated 17th July, 2012 and 24th January, 2014, there is really no disharmony between them.

101. The Notification, dated 17th July, 2012, was by way of an exception, carved out, *in the case of educational institutions/health-care and welfare societies, having income tax exemption*, from the normal requirement of having to pay additional FAR charges, as stipulated by Regulation 6(g), applicable to institutional plots/allotments.

102. Similarly, the Notification, dated 24th January, 2014, too, excepted, from the normal requirement of payment of additional FAR charges, as applicable to institutional plots administered by *educational societies/trusts, health-care and social welfare societies, having income tax exemption.*

103. The beneficial dispensation, conferred by the Notifications, dated 17th July, 2012, and 24th January, 2014, therefore, extended only to educational, healthcare, and social welfare societies having income tax exemption.

104. As against this, *there is no reference to such societies, in the Office Orders dated 29th August, 2008, and 21st February, 2014.*

105. Indeed, if one were to read the judgment dated 20th July, 2012, in WP 9572/2009 (***South Delhi Educational Society supra)***, the Division Bench of this Court has noticed precisely this.

106. Till the issuance of the Notification, dated 17th July, 2012, societies, which were running educational institutions on institutional plots, were required by Regulation 6(g), to pay additional FAR charges as notified *vide* Notification dated 23rd December, 2008. Educational institutions which were exempted from income tax, however, were exempted from this requirement, by the amending Notification, dated 17th July, 2012.

107. The Division Bench of this Court, therefore, noticed, in ***South Delhi Educational Society (supra)***, as well as in ***Jagan Nath Memorial Educational Society***[1] that educational institutions, who were entitled to income tax exemption, would not have to pay additional FAR charges. It is the very same dispensation which has been continued by the Notification, dated 24th January, 2014, which extends the benefit, thereof, to educational trusts.

108. This dispensation, which is especially intended only to apply to educational institutions which are entitled to income tax exemption, does not, therefore, conflict, in any way, with the Office Orders dated 29th August, 2008 and 21st February, 2014.

109. The said Office Order, may, possibly, continue to apply to all other category of institutions; however, educational institutions which are

entitled to income tax exemption, would, indisputably, be exempted from the requirement of payment of additional FAR charges, by virtue of the Notifications dated 17th July, 2012 and 24th January, 2014.

Has the petitioner defaulted in failing to challenge the Office Orders dated 29th August, 2008 and 21st February, 2014?

110. The submission, of Mr. Sibal, that his client was not required, in the circumstances, to challenge the Office Orders dated 29th August, 2008 and 21st February 2014, is, in the above circumstances, well taken.

111. In the first place, the petitioners, being educational institutions, who were entitled to income tax exemption, would be covered by the Notifications dated 17th July, 2012 and 24th January, 2014, the effect of which would not, in any manner, be affected by the Office Orders dated 29th August, 2008 and 21st February, 2014.

112. Secondly, the Notifications, dated 17th July, 2012 and 24th January, 2014, having been issued in exercise of powers statutorily conferred by Section 57 of the DD Act, in accordance with the Section 58 of the said statute, would, undoubtedly, prevail over the office Orders, dated 29th August, 2008 and 21st February, 2014 – assuming that there were, if at all, any conflict between them.

113. Thirdly, this Court having held, on repeated occasions, that educational institutions, entitled to income tax exemption would, by virtue of the Notification dated 17th July, 2012, not be required to pay additional FAR charges, no occasion arises, for the petitioners to

challenge either Office Order dated 29th August, 2008 or Office Order dated 21st February, 2014.

114. The submission, of Mr. Bansal, that the petitioner had failed to challenge the said Office Orders, dated 29th August, 2008 and 21st February, 2014, is, therefore, also bereft of substance.

115. One may refer, profitably, in this context, to para 29 of the report in ***Shree Bhagwati Steel Rolling Mills***[6], in which, the Supreme Court held that, "where rules or regulations were found to be conflicting with the parent statute and, consequently, *ultra vires*, they are bound to be ignored by the courts when the question of their enforcement arises and the mere fact that there is no specific relief sought for to strike down or declare them *ultra vires* would not stand in the court's way of not enforcing them".

116. *Mutatis mutandis*, there can be no question of this Court enforcing the Office Orders dated 29th August, 2008 and 21st February, 2014, in the face of the Notifications, dated 17th July, 2012 and 24th January, 2014, even if the petitioners have not challenged the said Office Orders.

An unfortunate case

117. This case highlights, unfortunately, a situation in which the DDA and the DoE/CBSE are working at cross purposes. Admittedly, pursuant to recognition having been granted, to them, for the said purpose, the affected institutions of the petitioner-Society are functioning at the senior

secondary level. In fact, submits Mr. Sibal, the issue of permission to function at the senior secondary level does not, in view of this fact, survive for consideration. A reading of the various file notings, which have been placed on record, indicates that the opinion, of the Hon'ble LG, while examining the issue of grant of recognition, to the institutions, and recommended permitting of the institutions to function at one level higher than that stipulated in the lease deeds executed by the DDA, was that the policy of the DDA was essentially with respect to allotment, and not recognition. This view, though superficially in order, however, effectively misses the wood for the trees, as is apparent from the controversy that has arisen in the present case, in which the institutions have been permitted, by the CBSE and the DoE, to function at senior secondary level, and are so functioning, but are being inhibited from doing so, by the DDA, by the demand for exorbitant additional FAR charges.

118. It would be wise to remember that, in cases dealing with educational institutions, there is an overwhelming element of public interest. Education, earlier a directive principle of State policy, contained in Article 45 of the Constitution of India has, with the insertion of Article 21A by the 86th Amendment to the Constitution in 2002, been elevated to the status of a fundamental right, relatable as much to Article 21 of the Constitution of India, as to Article 21A. The right to education also stands statutorily sanctified in what has come, popularly, to be known as the Right to Education Act[7]. Maximising the reach of education is therefore, not only an avowed constitutional objective but is, indeed, a treasured

[7] The Right of Children to Free and Compulsory Education Act, 2009

constitutional imperative. Every effort has to be made towards achieving this end, and financial considerations of the Government, though undoubtedly entitled to their due weight, have to cede place to the right to education.

119. I am constrained to enter these observations in view of the somewhat unsettling submission, advanced by Mr. Bansal on behalf of the DDA, that the DDA was willing to allow additional FAR to the petitioner, but, if the petitioner desired to have its lease deeds amended, it would have to pay the charges, demanded by the DDA therefor. To my mind, this stand is completely unreasonable, and amounts to an attempt to take away, with the left hand, that which is given with the right. As the Office Order, dated 29th August, 2008, issued by the DDA itself, clearly demonstrates, modification of the lease deeds is but a procedural sequitur, to the upgradation of the institutions to senior secondary level, which entails, in its wake, right to additional FAR and extra ground coverage. In fact, the said Office Order makes it clear that the petitioners would be entitled to such upgradation, as well as to the additional FAR and additional ground coverage which follows as a consequence thereto. I am in agreement with the submission, of Mr. Sibal, that entitlement to additional FAR and ground coverage are statutory sequiturs, granted by the MPD 2021, to the grant of permission to the schools to function at the senior secondary level, and cannot, therefore, be made dependent on payment, to the DDA, of any additional amount. The Office Order also makes it clear that the DDA would be obliged to amend the concerned lease deeds appropriately – as is manifested by the use of the word "shall". The only covenant, in the said Office Order, with which the

petitioners are aggrieved, is the stipulation that, in order to be able to enjoy the additional FAR, additional FAR charges would have to be paid by the concerned societies. Today, before this Court, the contention of Mr. Bansal is that the DDA has no objection to allowing additional FAR to the petitioner, and its member-Societies, but that, if the lease deeds have to be modified or amended, that would be allowed at a price. This stand, in my view, is directly contrary even to the Office Order dated 29th August, 2008, and is unavailable to the DDA. Once this Court has held that additional FAR charges would not have to be paid by the members of the petitioner-Society, all other stipulations, in the Office Order dated 29th August, 2008, would kick in, and modification/amendment of the lease deeds – which, in the peculiar circumstances of this case, is only a procedural requirement – would necessarily have to be effected by the DDA.

120. For the same reason, I am of the opinion that the layout plan, annexed to the lease deeds, cannot affect the right of the petitioners to function as senior secondary schools, without having to pay any additional FAR charges, or, indeed, any other additional charges, to the DDA.

Judgments cited by the DDA

121. I proceed, in conclusion, briefly, to advert to the judgments, cited by the DDA, though, in my view, none of them can be said to be of substantial significance.

122. The DDA has relied on ***Rai Shivendra Bahadur v. Governing Body of the Nalanda College***[8], ***Deepak Khosla v. U.O.I.***[9] and ***R. K. Singh v. U.O.I.***[10] to contend that no writ of mandamus can issue, in the absence of a legal right in favour of the petitioner, and a corresponding legal duty, on the respondent, both of which must be enforceable at law. *Ubi jus ibi remedium*, declares the law from time immemorial, and there cannot, seriously, be any cavil with this proposition, as advanced by the DDA. In view of my findings, hereinabove, that the DDA was bound to permit the respondents to function as senior secondary schools, without levying any additional FAR charges, a clear right, in favour of the petitioners, to so function, is made out, with a corresponding duty, on the DDA, to permit the petitioners to do so. The twin requirements of right and duty are, therefore, amply satisfied in the present case.

123. The DDA further relies on ***Ajit Singh v. Delhi Development Authority***[11]. The said decision essentially deals with making of changes to the layout plan, and cannot impact this judgment, in view of the findings in paras 119 and 120 *ibid*.

124. Reliance has, further, been placed, by the DDA, on ***Bachhittar Singh v. State of Punjab***[12], oft cited for the proposition that no legal right can emanate from office notings. Again, the contention, while it brooks no cavil, does not impact the present decision, inasmuch as I have not relied on any office notings, as a basis to arrive at my conclusions.

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[8] AIR 1962 SC 1210
[9] AIR 2011 Del 199
[10] AIR 2001 Del 12
[11] (2005) 123 DLT 639
[12] AIR 1963 SC 395

A hope in passing

125. It is hoped, fondly, that, in future cases, statutory authorities, such as the DDA, the DoE and the CBSE, would avoid adopting conflicting stands, with respect to the functioning of educational institutions, so that, in the ultimate analysis, the right to education is in a position to prosper and thrive. One must bear in mind the fact that, at the end of the day, the voiceless students are the ones who are sacrificed, in the tussle between the bureaucracy and the educational institutions. In a welfare state, such as ours, this is unthinkable.

Conclusion

126. Following on the above discussions, it is hereby declared that the members of the petitioner-Association/Society, which are entitled to income tax exemption, would be also entitled to run their schools at the senior secondary level, without having to pay any additional charges to the DDA, whether by way of additional FAR charges, or otherwise. The DDA is also directed to modify the lease deeds, executed with the individual societies, to the said effect; however, it is clarified that the right of the societies to run their institutions at the senior secondary level would not be conditional, or dependent, upon such modification.

127. The writ petition is, accordingly, allowed in the above terms, with no orders as to costs.

C. HARI SHANKAR, J.

JANUARY 24, 2020
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