

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

% *Judgment Reserved on: 4th December, 2009*
Judgment Delivered on: 8th December, 2009

+ **LPA No.28/2004**

DDA Appellant
Through: Mr.Pawan Mathur, Advocate.

Versus

M/S.MAHABIR PRASAD AND SONS & ANR. Respondents
Through: Mr.Sumit Bansanl, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

PRADEEP NANDRAJOG, J.

1. On 1st April 1975 a partnership firm was constituted to carry on business under the name and style: "M/s.Mahabir Prashad & Sons". Respondent No.2 Satendra Kumar Jain was one of the many partners of the firm. The other partners were Shri Ajit Prasad Jain, Shri Mahendra Prasad Jain, Shri Vijendra Prasad Jain, Shri Narender Kumar Jain, Shri Jitender Prasad Jain, Shri Ravinder Prasad Jain and Shri Arun Jain i.e. the real paternal uncles and first cousins of Satendra Kumar Jain.

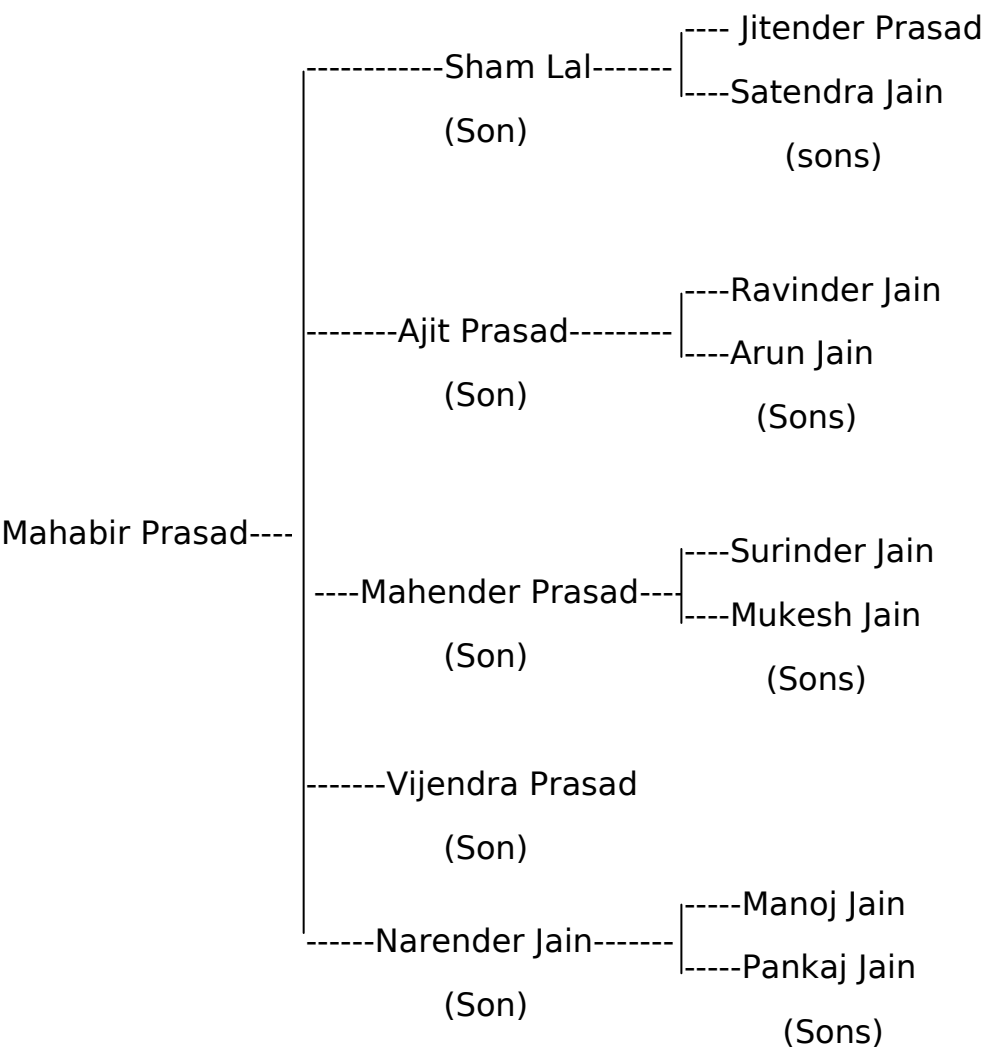
2. DDA allotted a plot of land in the name of the partnership firm bearing Municipal No.D-54 Okhla Industrial Area, Phase-I, New Delhi and in respect of the allotment executed a perpetual lease deed in favour of the partnership firm on 12.12.1983. Inter-alia, the lease deed stipulates that the firm shall not sell the leasehold rights without the prior permission of DDA and in case permission is applied for and granted, DDA would be entitled to charge 50% unearned increase in the price of the land. It was further stipulated in the lease deed that in case there was a change in the constitution of the partnership firm the unearned increase of 50% proportionate to the share affected of a partner(s) on reconstitution would be charged.

3. In other words, the lease deed contemplated that if a partner having 10% share in the profits of the firm was replaced by another partner, the 50% unearned increase would be charged as if 10% interest in the leasehold rights has been transferred.

4. The partnership was reconstituted from time to time. At no stage did outsiders become partners of the firm. Ultimately, a family settlement took place under which the lease-hold rights in the property were assigned solely in the name of Shri Satendra Jain.

5. DDA stepped in and demanded unearned increase in sum of Rs.18,50,146/- alleging that with the reconstitution of the firm from time to time and ultimately the dissolution of the firm resulting in the perpetual lease-hold rights being assigned solely to Shri Satendra Jain, unearned increase was payable with reference to the share of the partners who had retired.

6. At this stage, the relationship between the parties may be noted. We note relationship in the form of a pedigree table. The same reads as under:-



7. It is not in dispute that DDA had issued a policy circular notifying that: *'where a deed has been registered, addition and substitution of family members shall be allowed without any charge but on execution of a regular conveyance/gift deed'.*

8. Clause-VII of the said policy decision defines 'family member' as under:-

“(VII) The terms 'family member' mean the allottee's husband/wife, father, mother, sister, brother, son, daughter, grand-son/grand-daughter. (For the purpose of this definition grand-son/grand-daughter means a son or a daughter's child). In cases where the allottee has no family of his own, the family members will mean the heirs as defined in the law of Succession applicable to him.”

9. It would be apparent to the reader that the dispute between Satendra Jain and DDA centered around whether Satendra Jain was entitled to the benefit of the policy decision taken by DDA or not. The precise question which was debated between the parties was what was the exact span of the definition of the term 'family members'.

10. Whereas DDA alleged that the family member would be as defined and no more; Satendra Jain alleged that meaningfully read, the definition of the term 'family members' would include a transfer inter-se the cousins. Secondly, the debate was whether at all a transfer had taken place i.e.

whether with the dissolution of the firm from time to time and reconstitution within the family members as partners thereof, a transfer inter-vivos was taking place.

11. Since DDA did not agree with the stand taken by Satendra Jain, he was constrained to file a writ petition. The first writ petitioner was M/s.Mahabir Prashad & Sons and the second was Satendra Jain. Prayer in the writ petition was to quash the demand raised by DDA vide letter dated 17.10.1991; demand being in sum of Rs.18,50,146/-. Mandamus was prayed that DDA be directed to grant time to the petitioner to raise construction on the plot.

12. The learned Single Judge has held in favour of the writ petitioners and has quashed the demand and directed that a mutation letter be issued in favour of Satendra Kumar Jain. Further direction has been issued that on the petitioner making a representation for extension of time to construct on the plot, the same would be considered and decided in accordance with law within two months.

13. The reasoning of the learned Single Judge is as under:-

“13. In my considered view, the limited question to be considered is whether the transfer in the present case falls within the ambit of family members as defined under the policy of DDA. The object and purpose of inclusion of the restrictive clause in the lease deed is to prevent transfer in cases of holding by limited

Companies and partnership through their process of change in shareholding and re-constitution of partnership. It is in such a situation that the same should be construed as a transfer and merely because the property happens to be allotted to a limited Company or partnership should not be an excuse not to pay unearned increase when a transfer takes place. It is to be further appreciated that the partnership consists of really the partners themselves. Thus whether there is addition and substitution of the partners, the same is permissible but on payment of 50 per cent unearned increase in terms of the lease deed read with the policy of DDA.

14. A specific exception has been carved out in case of substitution of family members where no charge is to be levied. The object of this clause is to exclude inter se arrangement between the family members where really no transfer takes place. The term "family-member" has been further explained in the policy and includes almost all the blood relations. Thus father, brother, son and grand-son fall in this definition. In my considered view, they definitely fall within the concept of a family member. Brother does fall within the definition directly under the family member and so does the son and the grandson. In the present case the partners are sons of two brothers and grandsons of one of the brothers whose sons are also partners in the partnership firm. A true interpretation of the definition of the family members should include such members and there cannot be a question of any unlimited expansion of clause. This aspect has to be considered taking into consideration the family members involved, their relationship and the very basis of this policy to exclude such parties in the family members.

15. The second aspect to be considered is the consequence of the dissolution deed which seeks to allocate shares of different partners and it is really a rearrangement of the business as a consequence of the dissolution of the firm. This can hardly be stated to be a ruse for evasion of unearned increase. The judgment referred to by learned counsel for the petitioner provided that there is no really transfer or

sale in such cases. In fact a reference has been made in the case of S.V.Chandra Pandian & Ors. (supra) to the concept of distribution of assets on dissolution of a partnership firm which can also occur by mutual settlement between the parties. This is what has happened in the present case. Thus even otherwise this is not a transfer. There is no doubt that the judgments relate to a different case and in the present case we are concerned with the perpetual Lease Deed and the terms thereof read with the policy of the DDA but these judgments are useful from point of view of appreciating the concept of transfer in the context of dissolution of a firm.

16. It is also to be appreciated that if the contention of the learned counsel for the respondent was to be accepted, it would create an anomalous situation with the same group of partners merely by reason of the fact that the assets would vest in some other partner. In the present case 86 per cent share is stated to have been transferred for which unearned increase is levied. If instead of Satender Kumar Jain it would be Ajit Prashad Jain who would have been the sole holder of this property, the consequences would be that no unearned increase would be chargeable insofar as share of Mohinder Kumar Jain, Vijender Kumar Jain and Narinder Kumar Jain is concerned since they are real brothers. Similarly, no unearned increase would be chargeable for share of Ravinder Kumar Jain and Arun Jain, who are his sons. A different configuration would arise where the property to vest to Arun Jain since in that case the share of Ravinder Kumar Jain and Ajit Prashad Jain would not result in liability of unearned increase.

17. In my considered view, such an anomaly cannot be envisaged and the whole transaction has to be considered in the light of the general principles which requires that no unearned increase should be payable for adjustments within family members while such charges should be levied to prevent actual transfer in case of partners being brought in or resigning from a partnership firm who are outsiders. In view of the statement, I am of the considered view that the impugned demand dated 17th October, 1991 cannot

be sustained and is thereby quashed. It is directed that a mutation letter be issued in favour of Shri Satender Kumar Jain within a period of four weeks from today. In case the said petitioner No.2 is required to execute any other document, an intimation should be sent to the petitioner within a period of eight weeks from today.”

14. Suffice would it be to state that the learned Single Judge has held that under the restrictive clause in the lease deed the intention was to prevent transfer of holding to third parties; and the transfer being for consideration. Therefrom, the learned Single Judge has deduced that where the transfer is within the family members ‘as conventionally understood’ and there is no consideration involved, the transfer would not attract the levy of unearned increase. The learned Single Judge has given a second reason; being that, between father and son, between brothers and sisters, between grandsons and granddaughters, their parents and grand-parents, the policy circulated by DDA excluded liability to pay unearned increase by treating all of them to be family members.

15. With reference to the pedigree of the family, the learned Single Judge, in para 16 of the decision, has highlighted that if the route adopted was that the sons of Ajit Prasad, Mahinder Prasad and Narender Prasad relinquished their respective shares in favour of their fathers, then as defined under the policy, the said transfer had to be treated as

within the family members and hence said relinquishment of interest would not have attracted the levy of unearned increase. Thereafter, if Ajit Prasad, Mahinder Prasad, Vijendra Prasad and Narender Prasad transferred their interest in favour of their brother Sham Lal even the same would not have attracted the levy of unearned increase for the reason it would have been a case of brothers relinquishing their shares in favour of a brother. Thereafter, if Sham Lal relinquished his share in favour of Satendra Jain and likewise Jitender Prasad relinquished his share in favour of Satendra Jain; said relinquishments between father and son and brother and brother would not have attracted the levy of unearned increase. The learned Single Judge has held that merely because the afore-noted route of relinquishment was not adopted it would make no difference for the reason Mahabir Prasad's family consisting of his five sons and his grandsons was an extended family.

16. Lastly, the learned Single Judge has held that in view of the decision reported as JT 1993 (1) SC 278 SV Chandra Pandian & Ors. vs. S.V.Sivalinga Nadar & Ors. it cannot be said that it was a case of sale by transfer.

17. At the hearing of the appeal Mr.Pawan Mathur, learned counsel for DDA urged that as held in the decisions reported as 2002 (4) SCC 510 State of Himachal Pradesh vs.

Padam Devi & Ors., 2003 (5) SCC 437 Union of India & Anr. vs. International Trading Co. & Anr. and 1994 Supp (1) SCC 44 K.Narayanan & Ors. vs. State of Karnataka & Ors., it was settled law that a policy decision was not subject to a judicial review. Second contention urged was that the term 'family members' had been exhaustively defined and the learned Single Judge could not have interpreted it by supplying words to the definition. It was urged that the drafter of the policy did not include cousins within the family members. It was lastly urged that the lease deed was executed under the Government Grants Act and hence the same overrides all other laws.

18. Frankly speaking, we fail to understand the last argument. The learned Single Judge has not applied any other law while construing the lease deed or setting at naught the terms of the lease deed. Under the Government Grants Act a Government Grant takes precedence if the grant comes into conflict with any law.

19. With respect to the first two pleas urged by learned counsel for the appellant we may note that in the decision reported as 1971 (3) SCR 406 SIT vs. Bankey Lal Vaidya, a decision noted by the learned Single Judge, it was held that where, in the course of dissolution of assets of a firm, respective shares are allotted to the partners by assigning an

estate or paying money value equivalent thereto, the receipt thereto was not to be treated as the consequence of a sale, exchange or transfer of asset. Similarly, in the decision reported as 68 ITR 240 Commissioner of Income Tax vs. Dewas Cine Corporation it has been held that a property allotted to a family member in satisfaction of a claim in the share of a partnership, cannot be deemed, in law, to be a sale.

20. With respect to the property of a partnership firm, through the medium of the firm, all partners thereof have a unity of title and unity of possession, akin to joint ownership in a property. Where this relationship is brought to an end; in the case of a partnership by means of dissolution thereof, the division of assets results in unity of title and possession being severed. Henceforth each one of them holds to the exclusion of the other whatever share is allotted to each partner. No transfer of interest takes place. The severing of interest takes place and no more. The resultant thereof is conferment of exclusive title and possession in favour of the respective partner vis-à-vis the total assets of the partnership firm.

21. We concur with the view taken by the learned Single Judge that unearned increase as a jural concept requires a sale, for the reason, without a sale what would be the measure to determine the increase in the price of the land? Obviously none.

22. What is the concept of an unearned increase? Where land is allotted at a concessional rate and later on is sold at the market rate, the differential premium paid vis-à-vis the sale price would be the unearned increase. Thus, “No sale - No unearned increase”.

23. That apart, even the other reasoning of the learned Single Judge is sound. The definition of family members includes husband/ wife, father, mother, sister, brother, son, daughter, grand-son, grand-daughter, daughter-in-law and the wife of the grand-son as also the son-in-law and the husband of the grand-daughter as a family member.

24. The definition goes on to include all heirs defined in law to succeed to the interest of the allottee. In the case of male Hindus, it would include the children of the pre-deceased brother and sister, if the allottee would have no Class-I heir.

25. It is obvious that the intention is to broadly define the term ‘family members’ so as to include all blood relations within the family i.e. the original allottee, his or her children and his or her grandchildren. It is in this context that the grandchildren of the allottee i.e. the cousins would come within the ambit of the term of ‘family members’ as defined in the policy.

26. It is settled law that while interpreting a policy a purposive approach has to be adopted. It is equally settled

law that negative covenants have to be construed narrowly, for the law frowns upon restraint of trade and transfer of immovable property.

27. The intention under the lease-deed is to charge unearned increase if the allottee or a co-allottee makes a profit by sale of his/her lease-hold interest in a plot of land demised under the perpetual lease. Thus, any interpretation which results in levy of unearned increase without there being an actual profit by way of sale of the perpetual lease-hold interest is to be avoided.

28. The submission made by learned counsel for the appellant that in matters of policy decisions the Court should be hesitant to interfere does not exclude the jurisdiction of the Court to interpret a policy.

29. The decisions cited are most inappropriate and have no relevance to the facts of the instant case inasmuch as the same related to questions pertaining to the vires of a policy decision in the context of same being reasonable or unreasonable. The law is clear on the subject. Unless it is held that a policy is so unreasonable that it violates a constitutional mandate or the apparent statute, a Writ Court would not interfere with a policy decision to re-write the same as an expert body. But this question does not arise in the instant case. We are only called upon to interpret the policy.

30. We find no merit in the appeal.
31. The appeal is dismissed.
32. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

December 08, 2009
Dharmender