

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

Date of decision: 10th August, 2011

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W.P.(C) 6678-81/2005

SATYA MOHAN SACHDEV & ORS.

..... Petitioners

Through: Mr. Arun Varma with Mr. Kishore
M. Gajaria & Mr. Arun Malik, Adv.

versus

UOI & ANR.

..... Respondents

Through: Mr. Jatan Singh & Mr. Kunal Singh,
Adv. for UOI.
Ms. Sangeeta Chandra, Adv. for
DDA.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petitioners impugn the notices dated 14th June, 2000, 20th July, 2004 and 18th October, 2004 of the respondent no.2 DDA claiming, the property constructed over land bearing Plot no.8 Block-C-6, Safdarjung Development Area to have been used for purposes other than that specified

in the perpetual lease of the land underneath the property and demanding misuse charges for the period 1st January, 1983 to 5th July, 2000 of ₹10,73,56,566/- from the petitioners including as a pre-condition for converting the leasehold rights in the said land to freehold. The petitioners also seek a mandamus directing conversion of the leasehold rights to freehold in terms of the application filed by the petitioner on 15th December, 1999.

2. Notice of the writ petition was issued and it being the plea of the petitioners that the alleged misuse was by their tenant, the petitioners directed to produce copy of the lease/rent agreement executed with the tenant. Pleadings have been completed. The counsels have been heard.

3. The case of the petitioners is, that they had in the year 1983 rented out the property to one Mr. Rakesh Mahajan, Managing Trustee of Ram Lal Mahajan Charitable Trust and a Nursing home by the name of Mother & Child Nursing Home was being run by the said tenant in the property; that the petitioners in the year 1989 filed for ejectment and which was decreed on 24th November, 1998 and the tenant vacated on 5th July, 2000.

4. It is further the case of the petitioners that they applied for freehold conversion on 15th December, 1999 and also supplied the documents/particulars asked from them but the respondent no.2 DDA vide notice dated 14th June, 2000 supra, instead of converting the leasehold rights into freehold, claimed that the property was under misuse and asked the petitioners to stop the misuse. The petitioners claim that the misuse was in fact stopped on 5th July, 2000 upon the tenant vacating the property and which fact was intimated to the respondent no.2 DDA also, but the respondent no.2 DDA still raised the demand for misuse charges aforesaid.

5. The petition was filed contenting, that the petitioners had never misused the property and the misuse if any was by the tenant proceeding for eviction against whom was taken and remained in the courts for 16 years; that the demand for misuse charges is arbitrary, whimsical and illegal when the property after eviction of the tenant was being used strictly for residential purposes; that the respondent no.2 DDA had itself in the year 2004 introduced a Policy whereunder nursing homes were allowed in residential premises subject to certain terms and conditions; though the petitioners had also applied for regularization of the past use as a nursing

home but the same had not been allowed. The petitioners further contend that there is no provision for levy of such misuse charges and rely upon the judgment of this Court in ***Jor Bagh Association (Regd.) v. Union of India*** 112 (2004) DLT 690.

6. The petitioners in compliance of the direction aforesaid to produce the lease/rent agreement with their tenant have filed before the Court a Collaboration Agreement dated 5th January, 1984 with the tenant, whereunder the tenant was to w.e.f. 1st January, 1983 operate a nursing home in the said property with the earnings therefrom being shared between the petitioners and the so-called tenant.

7. Undoubtedly, a Single Judge of this Court in ***Jor Bagh Association (Regd.)*** (supra), on a interpretation of a perpetual lease deed of land in that case, held that the same did not allow the Land & Development Office as the Lessor to levy or claim misuse charges. However the perpetual lease deed in the present case is not the same as for consideration in ***Jor Bagh Association (Regd.)*** . The perpetual lease deed dated 10th January, 1975 in the present case describes the land as a residential plot and *inter alia* provides:-

“(3) The Lessee shall, within a period of two years from the 19th day of April one thousand nine hundred and seventy two (and the time so specified shall be of the essence of the contract) after obtaining sanction to the building plan, with necessary designs, plans and specifications from the proper municipal or other authority, at his own expense, erect upon the residential plot and complete in a substantial and workmanlike manner residential building for private dwelling with the requisite and proper walls, sewers and drains and other conveniences in accordance with the sanctioned building plan and to the satisfaction of such municipal or other authority.

(6) Notwithstanding the restrictions, limitations and conditions as mentioned in sub-clause (4) (a) above, the Lessee shall be entitled to sublet the whole or any part of the building that may be erected upon the residential plot for purpose of private dwelling only on a tenancy from month to month or for a term not exceeding five years.

(13) The Lessee shall not without the written consent of the Lessor carry on, or permit to be carried on, on the residential plot or in any building thereon any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of private dwelling or do or suffer to be done therein any act or thing whatsoever which in the opinion of the Lessor may be a nuisance, annoyance or disturbance to the Lessor and persons living in the neighbourhood.

PROVIDED that, if the Lessee is desirous of using the said residential plot or the building thereon for a purpose other than that of private dwelling, the Lessor may allow such change of user on such terms and conditions, including payment of additional premium any additional rent, as the Lessor may in his absolute discretion determine.

111. *If the yearly rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for one calenderer month next after any of the days whereon the same shall have become due, whether the same shall have been demanded or not, or if it is discovered that this Lease has been obtained by suppression of any fact or by any mis-statement, mis-representation or fraud or if there shall have been, in opinion of the Lessor, whose decision shall be final, any breach by the Lessee or by any person claiming through or under him of any of the covenants or conditions contained herein and on his part to be observed or performed, then and in any such case, it shall be lawful for the Lessor, notwithstanding the waiver of any previous cause or right for re-entry upon the residential plot hereby demised and the buildings thereon, to re-entry upon and take possession of the residential plot and the buildings and fixtures thereon, and thereupon this Lease and everything herein contained shall cease and determine and the Lessee shall not be entitled to any compensation whatsoever nor to the return of any premium paid by him. Provided that, notwithstanding anything contained herein, to the contrary, the Lessor may without prejudice to his right of re-entry as aforesaid, and in his absolute discretion, waive or condone breaches, temporarily or otherwise, on receipt of such amount and on such terms and conditions as may be determined by him and may also accept the payment of the rent which shall be in arrear as aforesaid together with interest at the rate of six per cent per annum.”*

8. The counsel for the petitioners has not even argued that the use as a Nursing home and to which use the property on the residential plot

aforesaid was admittedly put from 1st January, 1983 to 5th July, 2000 can be said to be a private dwelling. On the contrary the counsel for the respondent no.2 DDA has urged that the lease deed aforesaid sufficiently empowers the respondent no.2 DDA as the Lessor, to in the event of use of the building on the plot of land for a purpose other than that of a private dwelling, allow the same on such terms and conditions including payment of additional premium and any additional rent as the respondent no.2 DDA in its absolute discretion may determine. It is further contended that the aforesaid clauses permit and entitle the respondent no.2 DDA as the Lessor to, without prejudice to its right of re-entry for use contrary to the prescribed, condone the misuse on payment of such amount as may be determined by it. It is thus the case of the respondent no.2 DDA that its demand for misuse charges cannot be found fault with and the petitioners without paying the same are not entitled to freehold conversion.

9. The counsel for the petitioners has not been able to urge that the clauses as set out herein above which clearly permit the respondent no.2 DDA to claim misuse charges existed in the lease for consideration before the Court in ***Jor Bagh Association (Regd.)***. Thus the sole ground on which

the challenge to misuse charges was made in the writ petition fails. The counsels for the respondents of course have stated that the intra court appeal against the judgment in *Jor Bagh Association (Regd.)* is also pending consideration before the Division Bench.

10. The thrust of the argument of the counsel for the petitioners however today is on the basis of the documents filed with an additional affidavit dated 5th August, 2011. I may notice that the counsel for the respondent no.2 DDA has had no opportunity to obtain instructions with respect to the said additional documents but for the reasons hereinafter appearing, need was not felt to adjourn for the said purpose. The petitioners in the additional affidavit have stated that they have now learnt that the respondents including DDA have always had a Policy of permitting Nursing homes in residential areas. Reliance in this regard is invited to:-

A. the DDA (Clinics and Nursing Homes) Regulations, 1980 providing as under:-

“i) *Nursing Homes may be permitted in the commercial areas or in the special locations indicated in the Zonal Development plans.*

ii) *A premises may be used for a nursing home located in a residential area after obtaining necessary permissions of the Authority which shall grant permission only after having satisfied itself and the proposed nursing home has adequate parking space;”*

B. Resolutions, proposals and notes leading to the said regulations but such intermittent observations in the process ultimately concluding in framing of regulations are of no avail and only the regulations are to be seen.

11. The aforesaid however does not rescue of the petitioners. The Regulations, though permitting Nursing homes in residential areas, permit so only after obtaining the permission of the authorities concerned; there was/is no omnibus permission for Nursing homes in residential areas; admittedly in the present case no such permission even was taken.

12. Even otherwise, the same would be irrelevant. What we are concerned with in the present case is the term and condition of a grant of a lease of a land. The Apex Court in ***UOI Vs. Dev Raj Gupta*** AIR 1991 SC 93 has held that the user permitted in a perpetual lease does not *ipso facto* change with the change in the user prescribed under the Master Plan/Zone

Development Plan and the Lessee is to apply to the Lessor for change in accordance with the Master Plan. In the present case nothing of that sort has been done.

13. The counsel for the petitioners next urged that the respondent no.2 DDA is at best entitled to charge misuse charges in the present case w.e.f. 14th June, 2000 when the notice was given and till 5th July, 2000 only when the misuse stopped on the tenant vacating and cannot claim misuse charges w.e.f. 1983. Reliance in this regard is placed on ***Rattan Kaur v. DDA*** 145(2007) DLT 283 laying down that misuse charges are governed by the law of limitation and are leviable only if on the date of filing of application for conversion misuse was continuing.

14. The counsel for the respondent no.2 DDA besides contending that an intra court appeal against ***Rattan Kaur*** (supra) is pending, has also invited attention to the counter affidavit of the respondent DDA where it is stated that upon report of misuse by the field staff a show cause notice was issued by the respondent no.2 DDA on 6th June, 1986 and then on 15th September, 1986 but no reply was received from the petitioners; that another notice dated 29th March, 1988 was also given in this regard. The

petitioners in their rejoinder have denied receiving the said notices and have suggested that the notices sent at the address of the premises in occupation of the tenant could not be expected to be received by them and that it was in the interest of the tenant to not disclose the said notices to the petitioners. They have rather called upon the respondent no.2 DDA to explain as to why, if the respondent no.2 DDA was aware of misuse as far back as in the year 1986, no action was taken for long.

15. The counsel for the petitioners has also contended that the respondent no.2 DDA initiated action for misuse only after the petitioners had applied for freehold conversion.

16. I have considered the effect of the respondent no.2 DDA as Lessor having not taken any action for misuse inspite of admitted knowledge thereof from 1986 till the year 2000. The question which arises is, could the respondent no.2 DDA in the year 2000 claim misuse charges with effect from 1st January, 1983 or for the previous three years only.

17. To find an answer to the aforesaid, the nature of misuse charges is to be seen. The perpetual lease prohibits the lessee from using or allowing to be used the building on the leased land for any purposes other than that of

a private dwelling and entitles the respondent no.2 DDA to forfeit the lease and/or effect re-entry for breach thereof. However a discretion has been given to the respondent no.2 DDA as a perpetual Lessor to allow use for the purposes other than that permitted on payment of additional amounts or to instead of effecting forfeiture/re-entry, waive the past misuse on payment of misuse charges etc. That being the nature of the dues, in my view the question of limitation would not arise. During the hearing also an option was given to the counsel for the petitioners that if the petitioners were to contend that the respondent no.2 DDA was not entitled to levy misuse charges as they have done, an opportunity will have to be given to the respondent no.2 DDA to effect re-entry. The counsel had unequivocally stated that his instructions are that the petitioners do not desire re-entry. That being the position, can the right of the respondent no.2 DDA to waive misuse be limited to three years prior to exercising the discretion. In my opinion no. Once discretion has been vested in the respondent no.2 DDA lessor of the land to instead of exercising the right of forfeiture/re-entry for breach of lease covenant, condone/waive the breach on payment of such charges, such charges have to be for the entire

period of misuse and discretion cannot be whittle down. If that were to be so, then the respondent no.2 DDA would well nigh be in a position to say that instead of recovering misuse charges for the preceding three years only it was opting to exercise the right of re-entry/forfeiture.

18. The misuse charges are in the nature of public money. The Full Bench of this Court in ***BSES Rajdhani Power Ltd. Vs. Saurashtra Color Tones Pvt. Ltd.*** 161 (2009) DLT 28 and the Division Bench of this Court in ***Mrs. Madhu Garg Vs. NDPL*** 129 (2006) DLT 213 (DB) and the Apex Court in ***Swastic Industries Vs. Maharashtra State Electricity Board*** AIR 1997 SC 1101, in relation to electricity charges have held that even though the electricity supply company may not be entitled to recover electricity charges barred by time but would be entitled to exercise the right to deny supply and/or new connection for non-payment even of amounts recovery whereof is barred by time. I do not see any reason as to why the same principle ought not be applied to such misuse charges also.

19. Moreover, if the petitioners were to be permitted to raise the plea of limitation, the same becomes a disputed question of fact as to when the cause of action would arise and till when the respondent no.2 DDA would

have a right of recovery and all of which cannot be adjudicated in the present proceedings. I may notice that the perpetual lease deed provides for arbitration.

20. The counsel for the petitioners has also invited attention to the circular dated 26th March, 2010 rationalizing the procedure for levying misuse charges and providing *inter alia* as under:-

“III	<i>Particulars</i>	<i>Views finalized during meeting</i>
	<i>Cases where complaint/report about misuse is available on file and Show Cause Notices were issued but the allottee denied violations but no further action/inspection was undertaken by DDA.</i>	<i>Fresh inspection to be done. In case the misuse is noticed then misuse charges to be levied for a period from initial date of detection to the date of filing of conversion application. Before levying such misuse, SCN to be issued. However if the misuse is not found during the fresh inspection, then misuse charges should not be levied.”</i>

“(iii) The unsettled cases where the demand of misuse charges has been raised by DDA but the lessees have not deposited it and consequently their cases of conversion are pending should be reviewed and fresh demand to be raised under this proposed policy. However cases where misuse charges have already been paid will not be re-opened and no refund will be made on this account.”

21. However I fail to see as to how aforesaid can come to the rescue of the petitioners, use as a Nursing home from 1st January, 1983 to 5th July, 2000 being not in dispute.

22. The counsel for the petitioners has also argued that the respondent no.2 DDA in its notice dated 14th June, 2000 having only called upon the petitioners to have the misuse stopped and having not made any claim for misuse charges, is deemed to have dropped its claim if any for misuse charges. I am unable to hold so. The respondent no.2 DDA in the said notice notified that the petitioners were in breach and the said notice can in no way be understood as giving up rights under the lease.

23. It is further contended, that the respondent no.2 DDA inspite of the notice dated 14th June, 2000, having claimed the misuse charges for the first time only on 25th May, 2004; the petitioners were under the impression that the respondent no.2 DDA was not claiming misuse charges and the respondent no.2 DDA is deemed to have elected only to seek stoppage and not claim misuse charges. The said argument also cannot be accepted.

24. The counsel for the petitioners has also contended that petitioners have applied on 18th March, 2011 to the respondent no.2 DDA for computing the fee which it would have charged for permitting the misuse but no order thereon has been made. However the same cannot be allowed to come in the way of the disposal of the writ petition and it is open to the petitioners to pursue the same.

25. The counsel for the respondent no.2 DDA has also invited attention to the circular dated 11th August, 2003 of the respondent no.2 DDA regarding levy of misuse charges and prescribing levy thereof from the date of misuse irrespective of the date of actual detection.

26. The counsel for the petitioners has lastly contended that there are calculation errors in the computation of misuse charges by the respondent no.2 DDA. The counsel for the respondent no.2 DDA has fairly stated that if any such errors are pointed out and/or if the petitioners point out that they are entitled to any other benefit under any other applicable Policy, the misuse charges can be computed again.

27. I am therefore unable to find any illegality in the demand of the respondent DDA on the petitioners for misuse charges or in the refusal of

the respondent no.2 DDA to convert the leasehold rights into freehold without the said misuse charges being not paid.

28. I have in judgment dated 9th August, 2011 in W.P.(C) No.3637/1998 titled *M/s J.S. Furnishing Co. (P) Ltd. Vs. UOI* even qua L&DO lease held that even though L&DO as per *Jor Bagh Association (Regd.)* may not be entitled to recover misuse charges but as a condition for freehold conversion is always entitled to claim the same.

29. The parties have also generally referred to *J.K. Bhartiya & Ors. v. U.O.I.* 126 (2006) DLT 302 but I am unable to find as to how same would advance the arguments of either of the parties. The petitioners have not been able to show that they, under the Freehold Policy are entitled to conversion without payment of such misuse charges. Rather the petitioners have not filed even the Policy in force at the time of their application.

30. There is thus no merit in the petition; the same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

AUGUST 10, 2011

pp (corrected and released on 1st September, 2011)