

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

**Reserved on:02.05.2012
Pronounced on: 27.07.2012**

+ **LPA 565/2003, C.M. No. 1289/2003**

DELHI DEVELOPMENT AUTHORITY & ORS..... Appellants
Through: Ms. Sangeeta Chandra, Advocate.

versus

SHRI SHANTI SWAROOP GOYAL AND ORS. Respondents
Through: Sh. Jagdeep Kishore, Advocate, for
Resp. No.1.

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG**

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellant, Delhi Development Authority, claims to be aggrieved by the judgment and order of a learned single judge of this Court, dated 19-02-2003 allowing WP 1001/2002, (a petition under Article 226 of the Constitution of India).

2. The facts necessary to decide this appeal are that Plot No. D-1061, New Friends Colony, New Delhi, measuring 284.4 square yards (hereafter referred to as “suit property”) was leased in through a deed executed on behalf of the President of India, on 22-09-1978 in favour of Smt. V.D. Marwah (hereafter described either by her name or as “the original lessee”).

On 06.11.1978, the original lessee executed a Will in favour of Ms. Saroj Kumari. The original lessee died on 16-12-1982. The legatee, Ms. Saroj Kumari applied for probate; the Court issued citation and called for objections on behalf of all persons interested in the estate of the late Ms. Marwah. By its judgment, the Civil Court held that the will was proved in accordance with law, and granted probate to the said Ms. Saroj Kumari, on 06-08-1983. She applied for mutation (or recording of her name in the records of DDA) on 19-06-1984. The DDA granted the application, and entered her name, in its mutation register, as the recorded owner/ lessee, on 19-06-1985. Later, Ms. Marwah entered into an agreement to sell, and parted with possession of the suit property, to the original writ petitioner, Shanti Swaroop Goel, through a Power of Attorney transaction, on 15-12-1987. In the year 1994, the Central Government announced a scheme for conversion of leasehold rights into freehold rights. Mr Goel applied for conversion. The application met with no favourable order, and on 8th April, 2001, he received a demand from DDA for Rs. 2,54,619/- towards restoration charges relating to the transaction between the original lessee and Ms. Saroj Kumari. He received a further demand for Rs. 11,01,944/- on 16-10-2001 reiterating the earlier demand. Since Shri Goel did not comply with the demands, he received a letter dated 18th January, 2002 cancelling the lease. He sought for quashing of the demands and the cancellation of lease order, through the writ petition, and also sought a direction that his application for conversion of the property into freehold should be granted.

3. The DDA's contention, in its counter affidavit was that mutation in favour of Ms. Saroj Kumari had been suspended on 14th April, 1986, and a

demand for unearned increase on account of transfer of the property by the original lessee, had been raised by letter dated 8-05-1986. It was this demand which was reiterated and sought to be satisfied from Shri. Goyal. DDA argued that since Ms. Saroj Kumari was not a member of the original lessee's family, the bequest by the latter, through the will was not acceptable, and was therefore, treated as a transfer by the DDA. Therefore, the demand for unearned increase amounts was in order; until that was paid, there was no question of withdrawn of the cancellation order, or grant of the application for conversion. The DDA justified its position in court, saying that the testamentary disposition, through will amounted to a transfer under Clause II (6) (a) and (b) of the Lease Deed dated 22-9-1978 in respect of the suit property.

4. After considering the submissions of the parties, and considering the relevant materials, including the conversion policy in question, the learned single judge, allowed Shri Goyal's writ petition. The impugned judgment held that:

"I have considered the submissions advanced by the learned counsel for the parties. It is apparent from the facts set out in the writ petition that a mutation letter was issued in favour of Smt. Saroj Kumari on 19th March, 1985. It is not a case of misrepresentation where Smt. Saroj Kumari had claimed to be a family member. Respondent/DDA after due consideration of the documents in question mutated the property in favour of Smt. Saroj Kumari. Smt. Saroj Kumari entered into a Power of Attorney transaction with the petitioner. The petitioner was never informed about any recall of the mutation and it is only in 2001 when the petitioner was informed of some pending dues in view of the fact that the case had been reopened in respect of mutation in favour of Smt. Saroj Kumari.

9. *The policy of conversion came into force in May 1994 and instructions were issued from time to time. The whole concept of the Power of Attorney transactions being converted into freehold was that where persons had purchased property through such modes, the title should be perfected but on payment of an extra one third of the conversion fee. This amount the petitioner has paid.*

10. *The instructions issued by the DDA refer(red) to above also show that there is no question of charging of any unearned increase including multiple transactions on Power of Attorney. In fact the unearned increase has to be refunded back in such cases.*

11. *In such a situation, there would be no question of recovery of any unearned increase or interest on the same from the petitioner. The petitioner has deposited the said amount without prejudice to the rights and contentions of the parties and in the order dated 21st August, 2002, it was noticed that the issue of refund of this amount along with interest would be considered at the stage of disposal of the writ petition.*

12. *I am, thus, of the considered view that the amounts deposited by the petitioner towards unearned increase, interest and cancellation charges would not be payable by the petitioner and are liable to be refunded to the petitioner. This is so as the decision to cancel the lease has been taken only in 2001 on account of non-payment of unearned increase which has been held not to be payable. The said amount be refunded back to the petitioner within a period of six weeks from today. Learned counsel for the petitioner does not press for interest so long as the refund is made within the said period of time. It is, however, directed that on the failure of the respondent, DDA, to refund the amount within six weeks, the petitioner, apart from any other remedy shall be entitled to interest at the rate of 18 % per annum for the period of delay in making the refund.*

13. The impugned demands towards the aforesaid amounts as also the decision taken for cancellation of the sub-lease deed are hereby quashed and the rule is made absolute...”

DDA's contentions

5. Ms. Sangeeta Chandra, learned counsel for DDA, urged that the impugned judgment is in error of law, because it ignored the stipulation contained in Clause II (6) (a) and (b) of the Lease Deed that the sub-Lessee/unit owner could not transfer or assign his or her rights, without previous permission of the Lessor, DDA in writing. The embargo was in absolute terms and its breach entailed drastic consequences, even the cancellation of the lease itself.

6. It was argued that the alienation by the original allottee through a bequest was unacceptable, notwithstanding that it was with consent. Counsel for DDA urged that as the Lessor, the DDA had the sole prerogative to decide whether the transaction (of transfer through a will) was genuine, and valid. In case the transfer, through will was not to a family member, DDA was not obliged in terms of the Lease Deed, to recognize it. It was submitted that there was no question of penalty or exercise of liberty of the original allottee being implicated in this case; it was only that such transfer to non-family members entailed payment of unearned increase; even the formula for payment of such amount was known to all, transparently. Being contractual in nature the allottee was bound to honour the commitment, made in the Lease Deed. This aspect was lost sight of.

7. It was submitted on behalf of the DDA that if there are any lingering doubt on this aspect, the same got settled by the judgment in *Delhi*

Development Authority v Vijaya C. Gurshaney & Anr 2003 (7) SCC 301 where the Supreme Court upheld the DDA's decision not to permit mutation in 1985 of leasehold property in favour of third party (non-family) beneficiary of the lessee, who died in 1978 (and where letters of administration had been granted by the competent court) except on payment of 50% unearned increase. The DDA had relied on a policy formulated on 26-7-1988, the guidelines to be followed with regard to payment of unearned increase in land value, in such cases. The Supreme Court held that:

"In this case the alleged will is executed on 26th October, 1977. Ram Dhan died on 18th September, 1978. Letters of Administration were granted on 7th May, 1980. Admittedly, the respondent is not related to the deceased Ram Dhan. The" High Court clearly erred in holding that merely because Letters of Administration are granted the appellants cannot inquire into the true nature of the transaction. It is settled law that a Testamentary Court whilst granting Probate or Letters of Administration does not even consider particularly in uncontested matters, the motive behind execution of a testamentary instrument. A Testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased. Thus, it is always open to a person to dispute title even though probate or Letters of Administration have been granted.

9. DDA is a creature of the Statute. The aims and objects of Delhi Development Act, 1957 are contained in Section 6 of the Act. It reads:

"6. The objects of the Authority shall be to promote and secure the development of Delhi according to plan and For that purpose the Authority shall have the power to

acquire, hold, manage and dispose of land and other property, to carry out building, engineering, mining and other operations, to execute work in connection with supply of water and electricity, disposal of sewage and other services and amenities and generally to do anything necessary or expedient for purposes of such development and for purpose incidental thereto:

Provided that save as provided in this Act nothing contained in this Act shall be construed as authorising the disregard by the Authority of any law for the time being in force."

10. The rationale behind the formulation of its policies and guidelines issued by DDA is to curb illegal transactions in favour of persons not of blood relations of the allottee, being practiced rampantly and the property being transferred by an under hand sale in the garb of Will and power of attorney etc. DDA has formulated a policy that in such cases the department would ask for 50% of unearned increase in the value of property. It is always open to appellants to inquire whether an alleged Will is in actuality a sale in the garb of Will in total disregard of the policy decision of the authority. Merely because Probate/Letters of Administration are granted would not preclude DDA from so inquiring. It must be grasped that DDA has been given no notice of the testamentary proceedings. Therefore, it would have no right to appear or oppose such proceedings. As already said, DDA is a creature of the Statute and any policy decision or guidelines formulated by such authority will have a binding effect on the parties, in absence of rules to the contrary.

11. Furthermore, Clauses 4, 5 and 8 of the lease deed, as extracted, envisage that the lessee cannot sell, transfer or part with the possession of the whole or any part of the commercial plot except with the previous consent of the lessor in writing, with a rider that the lessor can refuse the transfer. It is also provided in proviso to Clause 4(b) that in the event of sale or foreclosure of the mortgaged or charged property, the lessor

shall be entitled to claim and recover the 50% of unearned increase in the value of the plot. It is further provided in Clause 8 that in the event title of lessee in the plot is transferred in any manner whatsoever the transferor and the transferee shall within three months of the transfer give notice of such transfer in writing to the lessor. The respondent herein has not complied with any of the conditions stipulated in the lease agreement and, therefore, it was within the competence of DDA to invoke the terms and conditions stipulated in the lease agreement by charging 50% of unearned increase in the value of the plot. The letters dated 19.6.1992 and 17.9.1992, impugned in the Writ Petition before the High Court, were in the terms of invoking of Clauses 4, 5 and 8 of the lease agreement and policy decision and guidelines of DDA as noticed above. The impugned judgment and order of the High-Court runs contrary to the terms and conditions stipulated in the lease agreement and the same is unsustainable. It is accordingly set aside.

12. Regarding the quantum of 50% unearned increase to be paid, counsel on both sides arrived at a consensus that in the facts and circumstances of this case, the respondent - Mrs. Vijaya C. Gurshaney shall pay a sum of Rs. 3,73,745/- to DDA towards the 50% of unearned increase in value of the plot in question. Respondent's counsel, on instructions, agreed to pay the entire amount by 31st December, 2003. We order accordingly. Till the entire amount is paid to DDA, the possession of the plot shall not be delivered to the respondent."

Respondent's contentions

8. It is submitted on behalf of the writ petitioner/ respondent that the decision in *Gurshaney* is inapplicable in the facts of this case. It is submitted that in this case, the petitioner had applied for conversion of the plot into freehold. In *Gurshaney* however, the DDA, at the stage of mutation itself, did not accept the plea that the applicant was owner. It was in that context,

that the instructions of 1988 were pressed into service. Counsel emphasized that the mutation in this case had been made in favour of Ms. Saroj Kumari, and the DDA, after two or three years, without any new material, did a *volte face* and suspended the mutation. Arguing that mutation is only by way of a municipal or revenue entry, and cannot be characterized as title, it was urged that the right to property accrued in this case, with the grant of probate which was a proceeding *in rem*, and binds the whole world. There was no dispute about the validity of the civil court judgment, which was neither challenged in appeal, nor was an application made for setting aside or revoking the probate. In these circumstances, the DDA, without any new material could not have held that the mutation in favour of Saroj Kumari was suspended, and that the petitioner's application for conversion into free hold would be processed only on payment of 50% unearned increase.

9. Learned counsel for the respondent argued that the various schemes announced by the Central Government and the DDA, from time to time, are premised on, and provide for grant of conversion of property into freehold, by recognizing what are not even transfers, such as power of attorney "sales", and even provide for conversion benefit to be given where the lease itself is re-entered or cancelled. In this case, no such circumstance had occurred; on the contrary Saroj Kumari had become the only legally recognized heir to the estate of Ms. Marwah, as far as the suit property was concerned. The right to property having vested in that heir, without following any known procedure established by law, the DDA could not have deprived the right, merely by saying that it had suspended mutation, when no fraud, or misrepresentation had been made, and when there was no

enquiry. In other words, contended counsel, the mere formulation of a later policy did as to how mutation pursuant to bequests by wills were to be treated, or reviewed did not empower DDA to re-open the issue, and base its decision not to grant conversion of the property.

10. In the present case, the records of the DDA were produced during the hearing. They reveal that the mutation had been finalized and approved in favour of Saroj Kumari, in 1985; it “suspended” the mutation in 1986 unilaterally. Significantly, at that time no new material was unearthed, or brought to its notice. Saroj Kumari’s representations went unheeded. Later, on 26.7.1988 DDA formulated a policy and issued guidelines to be followed with regard to payment of 50% of the unearned increase in the value of the land in cases where bequests were made to heirs who were not family members of a deceased allottee. The guidelines are extracted in *Gurshaney’s* decision. They read as follows: -

“1. In cases where a request is received for transfer of property on the basis of 'WILL' to a person outside blood relation who is not within the definition of 'family member' under the guidelines issued earlier, the following documents should necessarily be obtained from the applicant/legatee for the purpose of mutation:

1) Certified copy of will left by the allottee;

2) Death certificate of the allottee;

3) Affidavit disclosing the particulars of the legal heirs whom the allottee had survived;

4) No objection of the legal heirs regarding mutation of the interest of the deceased in favour of the legatee(s);

5) Affidavit from the legatee declaring that the property in question had not passed on to him during the lifetime of the Testator and no sale agreement/agreement for construction etc. had been executed by the Testator in his/her favour, nor any GPA/SPA had been executed in his favour or in favour of a person nominated by him;

6) Legatee may be asked to produce certified copy of assessment order of income-tax and house tax receipt showing the name of the person in whose name the property is being assessed;

7) An undertaking from the applicant/legatee to the effect that if at any stage it is found out that the property had passed on to the legatee during the lifetime of the Testator then it will be deemed to be a case of misstatement of facts, misrepresentation or fraud and the mutation in his/her favour shall stand terminated and the property shall automatically vest in the Lessor;

8) Indemnity Bond from the legatee duly registered;

9) In case the plot/flat was allotted through Co-operative society, the NOC from the Society;

10) Original registration Certificate. Fixed Deposit receipt, Challan form, wherever necessary; and

11) Such other documents as required to be obtained as per instruction issued from time to time or procedure laid down therefore.”

It would be immediately apparent that the guidelines were made in 1988, after the DDA had accepted the will and probate in favour of Saroj Kumari in the present case. These guidelines are non-statutory, in the sense that they do not have the force of law, and in the absence of any statutory provision in the parent Act, cannot be made effective from a date previous to their being

framed. Therefore, the fact that the mutation made in favour of Saroj Kumari was suspended for no discernible reason, and in an arbitrary manner, could not have been the occasion for DDA to enforce the 1988 guidelines.

11. In the deed of Perpetual Sub-Lease dated 22-09-1978, the President of India (through whom DDA claims its rights) was described as the Lessor; the Lessee was the New Friends Co-operative House Building Society, and Ms. V.D. Marwah, (original lessee) was described as the “Sub-lessee”. Clause II (6) (a) and (b) of the Lease Deed in this case, read as follows:

“II The sub-Lessee for himself, his heirs, executors, administrators and assigns covenants with the Lessee and the Lessor in the manner following, that is to say:-

.....
.....

(6)(a) The Sub-lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot in any form or manner, benami or otherwise, to a person who is not a member of the Lessee.

(b) The Sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot to any other member of the Lessee except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion:

PROVIDED that, in the event of the consent being given, the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e the difference between the premium paid and the market value) of the residential plot at the time of sale, transfer, assignment or

parting with possession the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.”

12. It is apparent from the above extracts that the restriction placed on the assessee is not to “transfer” the property, without previous consent of the Lessor. The expression “transfer” has not been defined; however, it has to be understood in the context to mean conveyance of an interest, or divesting of one’s title, in respect of immoveable property. Necessarily, the conveyance is during the lifetime of the owner of the said property. “Transfer” has been defined by Section 5 of the Transfer of Property Act, in the following terms:

“5. Transfer of property defined

In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.”

Thus, the concept of transfer is transfer *inter vivos*, or by a living person to another. The language of Clause II (6) in the present case also favours this interpretation, as it talks of transfer by a member (i.e a sub lessee like late Ms. Marwah) of the Lessor society to another. In other words, the transfer referred to is a transfer *in prasenti*. In the case of a testamentary document such as a will, the bequest remains only a wish of the testator; it is only upon

her (or his) death that the title passes to the legatee (or nominated heir). There is no indication in the Lease Deed – contrary to the submission of the DDA- that testamentary transfers cannot be made. If such a wide proposition were to be accepted, the legal consequence would be startling, as that would lead to altering the character of the property rights of an allottee. During his or her lifetime, he might choose to validly gift the property to some one, including one amongst many heirs. However, if he or she chooses to will it to only one heir, or even a charitable institution, the will would not be recognised, (even though there is no prohibition in the general law, or rules under the DDA Act, or provisions thereof), and the beneficiary would have to pay 50% unearned increase.

13. The other aspect which has to be kept in mind is that according to the general law of succession, particularly provisions of the Indian Succession Act, 1925, in the case of a will, where an Administrator is appointed, the moment probate is granted by court, the property of the testator and her (or his) estate vests in such Administrator. In the case of a probate, where executor is appointed, by the will, the property vests as soon as the testator dies. The reason for this is that the law abhors a hiatus or vacuum; that would be the natural consequence if it is held that the estate vests only upon the court issuing probate. This position was explained by the Supreme Court, in the decision reported as *Crystal Developers v Asha Lata Ghosh* AIR 2004 SC 4980, in the following manner:

*“Chapter IV of part IX deals with practice in the matter of granting and revoking **probates** and letters of administration. Section [273](#) inter alia states that a **probate** or letters of administration shall have effect over all the **properties** and*

estate of the deceased and shall be conclusive as to the representative title against all debtors of the deceased and against all persons holding the **property** of the deceased and shall afford full indemnity to all debtors discharging their debts and to persons delivering up such **property** to the grantee. Section [278](#) states that every application for letters of administration shall be made by a petition in the prescribed form. Section [297](#) inter alia states that when a grant of **probate** is revoked, all payments bona fide made to an executor under such grant before revocation shall be a legal discharge to the person making payment. Under section [307](#), an executor or an administrator has the power to dispose of the **property** of the deceased, vested in him under section [211](#), either wholly or in part, in such manner as he may think fit.

.....

39. In the case of **Akshay Kumar Pal v. Nandalal Das** reported in ILR (1946) 1 Cal. 432 it has been held that where the grant of **probate** is revoked, the grant does not become void ab initio and the revocation will not invalidate any previous dealing of the executor as long as they are done in due course of administration of the estate or they are with persons acting in good faith. That an administrator derives his authority from his appointment by the Court whereas an executor derives his authority from the will. That the letters of administration confer rights on the administrator but the **probate** is an evidence of the pre-existing rights of the executor appointed by the will and the **probate** does not confer any new right on such executor. That the **vesting** of the **property** of the deceased in the executor under section [211](#) is independent of the grant of **probate**. That section [211](#) does not say, with reference to an executor, that he becomes the legal representative only on obtaining **probate**. On the other hand, section [307](#) indicates that an executor can exercise the power of disposition without obtaining the **probate**. However, the executor must administer the estate in accordance with the will. His acts must not be incompatible with the administration of the estate. That under section [211](#), the estate of the testator vests in the executor even before the grant of

probate, but by virtue of section [213](#), the executor can establish his right in a Court on production of the **probate**. When a competent Court grants **probate** or letters of administration, it can never be absolutely sure that the deceased left no subsequent will. There is always a possibility of subsequent will being discovered later on. There is always a risk of fraud on the Court. However, such possibility of risk cannot indefinitely hold up the administration of the estate. Therefore, section [273](#) makes the grant conclusive. As soon as the grant is made, section [273](#) comes into play. However, the law takes note of the possibility of error, irregularity or fraud and accordingly makes provisions for revocation of grant for just cause. (section [263](#)). If a grant is made in any of the circumstances falling in the explanation to section [263](#), the Court can revoke the grant. However, such revocation can only be prospective and not retrospective. In this connection, section [297](#) of the Act is important. That section provides that when grant of **probate** is revoked, all payments made bona fide to any executor under such grant before revocation shall constitute a legal discharge to the person making such payment. The object of the aforesaid Scheme of the Act is to make it safe for the public to freely deal with the grantee. The theory of **vesting** of the estate in the executor at the moment of death of the testator, even before the will is probated, is true enough for the administration of estate but it is subject to the qualification that the grant even if erroneously made is revocable if the circumstances in the explanation to section [263](#) exist. However, till the grant is revoked, the grantee is the only legal representative of the deceased and people may safely deal with such representative in good faith in due course of administration and such dealings will be protected even if the grant is subsequently revoked. Accordingly, it was held that revocation of the grant does not make the grant void ab initio and will not invalidate any intermediate acts done in good faith in due course of administration of estate.

40. In the case of Valerine Basil Pais (dead) by LRs v. Gilbert William James Pais and Anr. reported in 1992(2)KarLJ301 it has been observed that even in cases where grant has been

obtained by fraud, so long as the grant remains unrevoked, the grantee represents the estate of the deceased.”

14. To summarize, it is held that in this case, the DDA has been unable to show how the later policy, embodied in its guidelines of 1988 could validly apply and cover the petitioner's case; the property had been mutated in 1985, and there was no new material disclosed in the records, suggesting that the legatee (Ms. Saroj Kumari) had practised fraud or misrepresentation of facts. Thus, the reasoning in *Gurshaney* would not apply to this case. Furthermore, the transfer prohibited under terms of the lease, would be transfer *inter vivos*; in the absence of any prohibition in law, or express terms of the lease, the property rights – which are indefeasible and vest as an incident of ownership, - to bequeath any property to anyone, cannot be indirectly, through sleight of interpretation, of a mere lease deed, extinguished, as was sought to be done by DDA, by refusing to recognize the will, which was proved in accordance with procedure established by law. The DDA's refusal to recognize it, and insist upon payment of unearned increase, in such cases, at least, would attract the odium of violation of Article 300-A of the Constitution of India. Lastly, the DDA cannot refuse to convert the property into lease hold in this case, because in terms of its policies, framed from time to time from 1994 onwards, completely irregular transactions like power of attorney sales, and even in cases where the lease had been cancelled were eligible for conversion into lease hold, in the hands of the applicant transferee.

15. As a result of the above discussion, this court is of opinion that the appeal has to fail. The findings and directions of the learned single judge are

hereby affirmed. The direction quashing the impugned demands, and restoring the lease, and further ordering the DDA to process the application for conversion in accordance with the application made by respondent, without insisting on payment of the 50% unearned increase, are hereby upheld. The DDA shall complete the process and convert the property into free hold, after completion of the formalities, in that regard, within six weeks from today. The appeal is dismissed, but subject to the above directions. No costs.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

JULY 27, 2012