

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

Date of decision: 14th November, 2011

+ **LPA No. 411/2007**

% **DELHI DEVELOPMENT AUTHORITY** **...Appellant**
Through: Mr. Rajiv Bansal, Adv.

Versus

M/S VIDEOCON INDUSTRIES LTD. & ANR. Respondents
Through: Mr. B.S. Nagar, Adv.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 appellant DDA impugns the order dated 29.01.2007 of the learned Single Judge partly allowing the W.P.(C) No.14961-62/2004 filed by the respondent and, while upholding the claim of DDA for unearned increase, quashing the demand of ₹15,09,31,495/- on account thereof and

directing the appellant DDA to charge unearned increase at the rate of ₹100/- per floor / flat and at which rate the demand for unearned increase stands reduced to approximately ₹1,500/- only.

2. The demand aforesaid for the unearned increase was with respect to commercial plot admeasuring 2548 sq. mtrs. bearing No.E-1, Jhandewalan Extension, New Delhi. The said plot was in the year 1980 put to auction and the bid of M/s Skipper Construction Co. (Pvt.) Ltd. accepted. However, upon the bid amount being not paid, the said transaction did not materialize and the plot was re-auctioned by the appellant DDA.

3. This time, the bid of M/s Banganga Investments Pvt. Ltd. (BIPL) being the highest was accepted and in whose favour, in the year 1995, a Perpetual Lease Deed with respect to the said plot of land came to be executed. BIPL raised construction of a multi-storeyed building on the said plot of land and Completion Certificate with respect thereto was issued on 08.03.1999.

4. BIPL initiated proceedings for merger / amalgamation with the respondent No.1 M/s Videocon Industries Ltd. and in which proceedings

vide order dated 10.05.1999 merger / amalgamation was allowed. Upon intimation thereof being given to the appellant DDA, appellant DDA raised the demand *inter alia* of the unearned increase of ₹15,09,31,495/- and impugning which the W.P.(C) No. 14961-62/2004 was preferred by the respondent.

5. The provisions in the Perpetual Lease Deed aforesaid with respect to the unearned increase are contained in Clause 6 thereof and which is as under:

- “6) a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot 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 commercial plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty percent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the whole property or any part thereof that may be subject of sale, transfer, assignment or otherwise parting with the possession as the case may be after deducting

fifty percent of the unearned increase as aforesaid.

PROVIDED FURTHER that notwithstanding the limitations and conditions as mentioned in sub-clause 6(a) the Lessee may sell or transfer the floor space constructed on the plot subject to the permission of the Lessor in writing on payment of ₹100/- for each flat/floor space for the first sale/transfer. For subsequent sale/transfer the Lessor may on payment of proportionate 50% of the unearned increase (i.e. the difference between the premium already paid by the purchaser/transferor and the market price at the time of sale/transfer towards the portion of the land) grant permission to the sub-Lessee/transferor for such subsequent sale / transfer of the floor space to be transferred. Prior permission of the Lessor for such second and subsequent sale/transfer of floor space shall be subject to the conditions of getting the Deed of apartment and the sub-lease (as defined under the Delhi Apartment Ownership Act, 1986) executed by the Lessee in favour of such floor space buyers / transferee.

PROVIDED FURTHER that the Lessee shall be required to intimate the first list of the floor space buyer/transferees giving full details of the name, address and quantum of floor space to the Lessor, simultaneously with the grant of the completion certificate. However, completion certificate shall be issued only on furnishing the valid list of the first purchasers of floor space along with copies of deed of apartment duly executed with each one of them.

The grant of permission by the Lessor to the Lessee for transfer of floor space or subsequent transfer of floor space to another person, shall not absolve the Lessee from the responsibility for violation of the terms and conditions of the Lease. The Lessee shall also be responsible for making all arrangements as are necessary for the fire fighting system and the common services.

- b) Notwithstanding anything contained in sub-clause (a) above, the Lessee/sub-Lessee/floor space buyer may with the previous consent in writing of the Vice Chairman of DDA (hereinafter called the Vice Chairman) mortgage or charge the said commercial plot/space to such person as may be approved by the Vice Chairman in his absolute discretion.

PROVIDED THAT first mortgage permission shall be or deemed to have been granted, on handing over the possession of the plot and on execution/registration of the lease deed for the purpose of construction of the building in favour of the Scheduled/Nationalized Banks and Govt. Institutions which allow loan against mortgage permission issued by DDA to the Lessee.

PROVIDED further that in the event of the sale or foreclosure of the mortgaged or charged property the Lessor shall be entitled to claim and recover the fifty percent of the unearned increase in the value of the commercial plot/apartment as aforesaid and the amount of the Lessor's share of the said unearned increase shall be first charge, having priority over the said mortgage or charge. The decision of the Lessor in respect of the market value of the said commercial plot/apartment shall be final and binding on all parties concerned.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the mortgaged or charged property after deducting fifty percent of the unearned increase as aforesaid.

- c) The Lessor's right to the recovery of fifty percent of the unearned increase and the pre-emptive right to purchase the property as mentioned hereinabove shall apply equally to an involuntary sale or transfer whether it be by or through an executing or insolvency Court."

6. The learned Single Judge in the judgment impugned in this appeal, relying on ***Indian Shaving Products Ltd. Vs. DDA*** 95 (2002) DLT 87 has held that merger/amalgamation of BIPL, which was the Lessee under the Perpetual Lease aforesaid, with the respondent amounted to transfer by BIPL of the plot aforesaid to the respondent. The said finding of the learned Single Judge is not assailed by the respondent also. We may notice that the respondent has filed written notes of submissions in appeal and no challenge to the said finding is made therein also. The counsel for the respondent has also during the hearing admitted that the said finding is not challenged. We may notice that in ***General Radio & Appliances Co. Ltd. Vs. M.A. Khader*** AIR 1986 SC 1812, ***Cox & Kings Vs. Chander Malhotra*** (1997) 2 SCC 687, ***Parasram Harnand Rao Vs. S.N. Jain*** AIR 1980 SC 1655 & ***Singer India Ltd. Vs. Chander Mohan Chadha*** AIR 2004 SC 5039 are also judgments on the proposition that such amalgamation/merger amounts to transfer.

7. The question therefore before us for consideration is only as to the amount of the unearned increase.

8. The learned Single Judge has held that though the measure of unearned increase under the Perpetual Lease Deed, as provided in the first proviso of Clause 6(a) thereof is the difference between the premium paid by the Lessee and the market value on the date of the transfer but under the third proviso of Clause 6(a) the unearned increase payable for the first sale/transfer was only ₹100/- for each flat/floor space. The learned Single Judge accordingly held DDA entitled to unearned increase at the rate of ₹100/- per floor/flat only and as per which direction only approximately ₹1,500/- instead of ₹15,09,31,495/- would be due.

9. Though it appears that before the Single Judge there was also some controversy as to whether the transfer from BIPL to the respondent was the first or the second transfer, with it being contended that the first transfer was from M/s Skipper Construction Co. (Pvt.) Ltd. to BIPL and the transfer from BIPL to the respondent could thus not be the first transfer but we are clearly of the view that there is no scope of any ambiguity in this regard. The title of the said plot at no time stood transferred in favour of M/s Skipper Construction Co. (Pvt.) Ltd. (which had failed to pay the bid amount) for it

to be said that the title in favour of BIPL flowed from M/s Skipper Construction Co. (Pvt.) Ltd. The plot was accordingly re-auctioned by the appellant DDA and pursuant whereto Perpetual Lease Deed with respect thereto stood executed by DDA in favour of BIPL. The transfer aforesaid by BIPL in favour of the respondent was thus a case of first transfer / sale.

10. We are however unable to sustain the finding of the learned Single Judge of the third Proviso providing for unearned increase of ₹100/- for each flat / floor space for first sale / transfer being attracted. The said proviso was applicable to cases of the Lessee of the plot of land selling the floor space constructed on the plot to another. Even though as on the date of transfer by BIPL to respondent No.1, construction stood completed and Completion Certificate with respect thereto issued but the transfer from BIPL to the respondent was not a case of sale of floor space and for which situation only, in the cases of first sale / transfer, the unearned increase was limited to ₹100/- per flat / floor. The present was a case where the Lessee i.e. BIPL transferred its leasehold rights in the plot of land as well as the multi-storeyed building constructed thereon, lock, stock and barrel to the

respondent. We are clearly of the view that the proviso applied by the learned Single Judge had no application to the transfer in question.

11. The counsel for the respondent has contended that the third proviso is applicable since on the date of transfer the multi-storeyed building existed on the plot of land and the transfer was of the plot including the building. It is contended that even though the third proviso does not refer to transfer of plot and mentions only transfer of flats/floor space but there could in law be no sale or transfer of the floor space without sale/transfer of proportionate rights in the plot of land. Reliance in this regard is placed on the Delhi Apartment Ownership Act, 1986.

12. We are unable to agree for the following reasons:

- A. Clause 6(a) supra of the Perpetual Lease Deed prohibits sale, transfer, assignment or parting with possession of the plot or any part thereof except with the previous consent in writing of the lessor DDA. The first proviso empowers the lessor DDA to while granting consent for transfer of plot claim unearned increase in value thereof to the extent of 50%;

- B. the third proviso commences with the non-obstante clause (noticed by the learned Single Judge also). The purport of the said non-obstante clause is to exclude from the purview of the prohibition aforesaid first sale/transfer of “floor space constructed on the plot” as distinct from the plot of land or part thereof. Thus, the flats/floor space constructed on the plot of land could in the first instance be sold/transferred by the lessee of the plot of the land and who was under obligation to also raise construction thereon without requiring any prior consent of the DDA and on payment, instead of unearned increase @ 50%, at the rate of only ₹100 for each flat/floor space;
- C. the plot of land aforesaid was intended for construction of a commercial tower. What Clause 6 of the Perpetual Lease Deed discloses is that the lessee of the plot of land after constructing the commercial tower could sell flats/floor space therein without complying with the rigours otherwise contained in the Perpetual Lease Deed on transfer. The use of the word “each” before the words “flat/floor space” in the third proviso is indicative of the same being

applicable to sale by the lessee as the developer of the multi-storeyed commercial tower of flats/commercial spaces therein to different persons. The same cannot be applied where the plot of land and the entire building are sold lock, stock and barrel as in the present case;

D. the third proviso itself provides for the unearned increase of 50% in the case of second sale/transfer of the said flats/floor spaces. While doing so, mention is made of the transfer of “portion of the land” also alongwith the flat/floor space. It thus cannot be said that the parties to the Perpetual Lease were unaware that the transfer of the flats/floor space would also entail transfer of proportionate rights in land. Rather the third proviso contemplates execution of a Deed of Apartment under the Apartment Act in favour of such subsequent purchasers / transferees of flats/floor space;

E. the fact that the first proviso was not intended to apply to transfer lock, stock and barrel of the plot of land as well as the building constructed thereon is also borne out from the fourth proviso of Clause 6(a) supra which envisages the lessee as an entity different

from the first space buyers; the same requires the lessee to furnish to the DDA the list of first space buyers/transferees. This is also reiterated by the last part of Clause 6(a) supra which provides that the permission granted in the third proviso to the lessee to sell the flats / floor space would not absolve the lessee from liabilities/obligations under the Lease Deed. This is also indicative of the state of affairs in which the third proviso will apply being of the sale by the lessee of the flats/floor spaces. The third proviso can thus obviously have no application to a state of affairs where the leasehold rights in the plot of land itself stand transferred to the buyer of the entire built up space;

F. the position is further fortified from:

(a) Clause 7 of the Perpetual Lease which provides that notwithstanding Clause 6(a) the buyers of flats/floor spaces shall be entitled to their floor spaces only on tenancy under the prevalent law.

(b) Clause 8 binding the transferee of the plot of land from the lessee and not the space buyers with the covenants in the Lease Deed;

- G. reading the Perpetual Lease in the manner done by the learned Single Judge will make the first proviso of Clause 6(a) and portions of other covenants in the Perpetual Lease otiose. It is a settled principle of law that an attempt has to be made in the first instance to read all clauses of a contract harmoniously so as to give effect to each of them and to avoid an interpretation which would render some of the clauses/covenants redundant;
- H. the interpretation aforesaid is according to us not only the literal interpretation of the Perpetual Lease but also a harmonious construction of all clauses thereof; and,
- I. though undoubtedly under the Apartment Act, sale of an apartment (as flats/floor spaces in multi-storeyed buildings are) is accompanied with entitlement to a proportionate share in common areas and facilities which includes the land underneath the building but the right to deal with the common areas and facilities under Section 4(8) of the Apartment Act even is of the Association of the Apartment Owners and not of individual apartment owners. It thus cannot be said that

the purchaser of an apartment steps into the shoes of a lessee of land.

Section 8 of the Apartment Act also envisages execution of separate deeds of sub-lease by the lessee of the land underneath the multi-storeyed building in favour of each apartment owner, again indicating that the lessee does not extinguish on sale of apartment.

There is thus no merit in the argument of the counsel for the respondent.

13. The counsel for the respondent has next contended that the respondent is also impugning the market price assumed by the appellant DDA while computing the unearned increase as ₹15,09,31,495/-. It is contended that the market price cannot be anything more than the rates declared by the Delhi Government from time to time.

14. The counsel for the appellant DDA has in this regard invited attention to the additional affidavit dated 26.04.2011 filed in this regard to the effect that the appellant DDA from time to time publishes market price for the purposes of unearned increase. The appellant DDA has along with the said affidavit filed a copy of the Circular dated 25.05.1999 and has contended that the unearned increase has been computed as per the prices notified on

the date of transfer.

15. In the absence of any challenge to the said Circular of the appellant DDA, appellant DDA cannot be held bound to compute the market price on the basis of the prices declared by any other agency.

16. We therefore allow the appeal and set aside the order of the learned Single Judge insofar as limiting the claim of the appellant DDA for unearned increase at the rate of ₹100/- per flat / floor space and the demand of the appellant DDA for unearned increase is upheld.

No order as to costs.

RAJIV SAHAI ENDLAW, J.

ACTING CHIEF JUSTICE

NOVEMBER 14, 2011

‘gsr.’