

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

Reserved on: July 26, 2012

Pronounced on: August 16, 2012

+ **W.P.(C) No.1885/2011 &
C.M.No. 4025/2011**

NALWA SONS INVESTMENT LTD. & ANR. Petitioners

Through: Mr. Sudhir Chandra Agarwal, Senior
Advocate with Ms.Samar Ahsan,
Advocate

versus

DELHI DEVELOPMENT AUTHORITY Respondent

Through: Mr.Arun Birbal, Advocate

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

JUDGMENT

1. On 1st June, 2005, first petitioner had applied for conversion of a commercial plot bearing No.12, Bhikaji Cama Place, New Delhi (*hereinafter referred to as the subject premises*) from leasehold to freehold. Thereupon, respondent had raised a demand vide impugned Communication of 5th August, 2010 (Annexure P-17) of unearned increase and had called upon the first petitioner to pay the misuse charges, as indicated in the aforesaid impugned demand letter (Annexure P-17). Respondent's notice of 13th January, 2011 (Annexure P-20) calling upon the first petitioner to pay the amount of unearned increase and the misuse charges is also impugned in this petition.

2. The second petitioner in its Representation of 6th September, 2010 (Annexure P-18) had requested the respondent to withdraw the impugned demand and to process the conversion of the subject premises

from leasehold to freehold by pointing out that the second petitioner was the wholly owned subsidiary of the first petitioner and that the Stainless Steel business now stood vested with the second petitioner in pursuance to the approval of the scheme and arrangement of de-merger by the High Court of Punjab & Haryana vide its order of 30th May, 2003 (Annexure P-4).

3. It was also highlighted in the aforesaid Representation (Annexure P-18) that there was no monetary consideration for the devolution of properties and there was no change of ownership of the leasehold rights as the second petitioner was wholly owned subsidiary company of the first petitioner and thus, it was asserted that the second petitioner be treated as original Lessee of the subject premises in place of the first petitioner. List of Board of Directors of the second petitioner-company was also enclosed with the Representation to show that the Directors in both the petitioner companies were the same and the first petitioner-company had given no objection to conversion of the subject premises from leasehold to freehold in the name of the second petitioner but in complete disregard of the above factual position brought to the notice of the respondent, impugned demand notice (Annexure P-20) was issued to the first petitioner against which the instant petition has been preferred.

4. In the counter affidavit, the stand taken by the respondent is that the first petitioner has no locus standi to withdraw the application for mutation and to seek conversion of the subject premises from leasehold to freehold without paying the unearned increase as leasehold rights of the subject premises cannot be assigned by the first petitioner in favour of the second petitioner without permission of the Lessor in terms of the Perpetual Lease Deed of 28th September, 1993 between the respondent and the first petitioner and thus, the petitioners are liable to pay the

unearned increase as it is apparent that the second petitioner-company had been floated by the first petitioner for the purpose of handing over the portion of its business to the second petitioner. According to the respondent, assignment of the rights in the subject premises by the first petitioner in favour of the second petitioner who is a separate juristic entity attracts the payment of unearned increase alongwith the misuse charges, as demanded.

5. In the rejoinder filed by petitioners, it is asserted that the petitioner companies are the part of the same group and controlled and owned by the same management and therefore it cannot be said that there was any effective transfer of the subject premises to the third party and thus unearned increase is not leviable and by applying the principle of lifting the corporate veil it becomes evident that the petitioners are not two separate entities and infact the second petitioner is almost fully owned subsidiary of the first petitioner.

6. During the course of the hearing, it was stressed by learned senior counsel for the petitioners that all the normal indicia of sale and consequent unearned increase namely: - (i) related arm length's commercial transaction between seller and buyer (ii) commercial market price or the consideration and (iii) physical transfer between unrelated arm length's commercial entity is conspicuously absent and so, imposition of unearned increase prior to the conversion of the subject premises from leasehold to freehold is unwarranted. It was emphasized by learned senior counsel for the petitioners that the second petitioner-company is a subsidiary of the first petitioner-company and is wholly owned by the first petitioner to the extent of 98.7% and so, there is no transfer substantially. Impugned demand is assailed by learned senior counsel for the petitioners urging that the de-merger order (Annexure P-

14) has attained finality, and so the respondent cannot go behind it, to render the aforesaid de-merger order (Annexure P-4) nugatory, as it is evident from the de-merger order (Annexure P-4) that no new company was formed and to contend that no unearned increase is payable for getting the property converted from leasehold to freehold, reliance was placed on behalf of the petitioners upon the decision in W.P.(C) No. 2422/2006 *Kiran Kohli vs. DDA*, rendered on 30th January, 2008 and thus, it was urged that the impugned demand is liable to be quashed.

7. Learned counsel for the respondent drew the attention of this Court to clause 6(a) of the Perpetual Lease Deed (Annexure P-2) to assert that upon transfer of the property, 50% of the unearned increase is payable and the decision in *Kiran Kohli* (Supra), relied upon on behalf of the petitioners is clearly distinguishable as line of distinction between a transfer by way of General Power of Attorney etc and on the basis of Will was found to be discriminatory and in any case, clause 2(d) of Respondent's Instructions of 6th September, 1988 (Annexure P-23) makes 50% of the unearned increase chargeable where the management of the separately floated company and the original company remains the same and so, justifying the impugned demand, learned counsel for the respondent asserts that this petition deserves dismissal. Reliance was placed by the Respondent's counsel upon the decision in *Indian Shaving Products Limited vs. Delhi Development Authority and Anr*, 95(2002) DLT 87 (DB) to substantiate the plea of merger/de-merger amounting to transfer/selling attracting imposition of unearned increase.

8. In rebuttal, learned senior counsel for the petitioners drew attention of this Court to clause 1(a) of the respondent's Instructions (Annexure P-23) to point out that deletion, addition or substitution in the constitution of the company would not invite imposition of unearned

increase and so, the impugned demand is apparently unsustainable.

9. Upon considering the submissions advanced, material on record and the decisions cited, this Court is of considered view that even without lifting the corporate veil, it is abundantly clear from the scheme of arrangement and de-merger of the petitioner companies as reflected in the order (Annexure P-4) that the assets of the first petitioner stands transferred to the second petitioner, thereby attracting clause 2(d) of Instructions (Annexure P-23) making 50% of unearned increase chargeable and clause 1(a) of the instructions (Annexure P-23) are inapplicable as they relate to partnership firms or private limited companies only and not to public limited companies like the petitioners.

10. Even clause 6(a) of the Perpetual Lease (Annexure P-2) between the first petitioner and the respondent prohibits the transfer of possession of the whole or any part of the commercial plot without previous consent of the respondent and stipulates that sale/transfer/assignment or parting with the possession of the commercial plot would attract 50% of the unearned increase and thus, the first petitioner is bound by it. It is quite elementary that without mutation of the subject premises being there in the name of the allottee, i.e., the first petitioner, there cannot be any conversion of the subject premises from leasehold to freehold and therefore substitution of the Lessees of commercial plots like the instant one, clearly attracts the imposition of unearned increase, in view of a Division Bench decision of this Court in *Indian Shaving Products* (Supra). The single bench decision in *Kiran Kohli* (Supra) relied upon by the petitioners is distinguishable on facts and is not applicable to the instant matter, as it does not deal with the Instructions (Annexure P-23), which squarely governs the dispute raised herein.

11. Logically speaking, Respondent's right to levy unearned increase

cannot be defeated by first effecting de-merger and then to further assign, transfer etc. without previous consent of the respondent/lessor. Consequentially, impugned demand (Annexure P-17) and the Notice (Annexure P-20) are held to be valid and this writ petition is dismissed with costs of ₹50,000/, while vacating the interim order.

(SUNIL GAUR)
Judge

August 16, 2012
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