

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

%

Date of decision: 27th February, 2013

+

CO.APP. NO.39/2004
&
CM NO.14208/2004 (for Stay)

DELHI DEVELOPMENT AUTHORITY **Appellant**
Through: Ms. Sangeeta Chandra, Adv.

Versus

M/S AEROSHINE **Respondent**
Through: Mr. V.N. Kaura, Adv. with Ms.
Paramjeet Benipal & Mr. Sumit Singh
Benipal, Adv.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal under Section 483 of the Companies Act, 1956 is preferred by the appellant Delhi Development Authority (DDA) against the order dated 31.08.2004 of the learned Company Judge of this Court in CA No.504/1983 in CA No.358/1980 in CA No.161/1983 in CP No.78/1968 filed for winding up of M/s Globe Associates (P) Ltd. Though the complete chronology of facts is not available in the paper book of this appeal and inspite of records of CP No.78/1968 having been requisitioned, the files relating to CAs in which the orders impugned in this appeal were made were

not found, but the same does not deter disposal of this appeal, considering the limited nature of the controversy subject matter of this appeal.

2. We gather from the files that appellant DDA had granted the leasehold rights of Plot No.16A Rani Jhansi Road, Motia Khan, New Delhi to one M/s Amar Singh & Co. who, prior to the order of winding up of M/s Globe Associates (P) Ltd. had agreed to sell / transfer the same to the said M/s Globe Associate (P) Ltd. As per the terms and conditions of the perpetual lease deed executed by the appellant DDA to M/s Amar Singh & Co., the same were transferable after obtaining permission of DDA and on payment of 'unearned increase'.

3. Upon the said M/s Globe Associates (P) Ltd. being ordered to be wound up, application under Section 446 of the Companies Act, 1956 was filed seeking specific performance of the said Agreement to Sell and during the pendency of which proceedings, rights of the company in winding up as an agreement purchaser were purchased by the respondent M/s Aeroshine and which was approved by the learned Company Judge vide order dated 18.08.1983.

4. The Official Liquidator (OL) filed an application being CA No.504/1983 for review of the order dated 18.08.1983 *inter alia* on the ground that the value of the land in question was much more and even DDA (appellant herein), which was arrayed as respondent in CA No.504/1983, was demanding a sum of Rs.4,58,175.89p towards unearned increase for transferring the property in favour of the respondent M/s Aeroshine.

5. During the pendency of the said application i.e. CA No.504/1983, a settlement was arrived at between the respondent M/s Aeroshine and the OL and the respondent M/s Aeroshine agreed to pay certain further monies to the OL and the order dated 14.05.1985 was passed, whereunder it was further agreed that the respondent M/s Aeroshine would be responsible for the payment of unearned increase to the appellant DDA for transfer of the leasehold rights in their favour.

6. Notice was accordingly sent by the learned Company Judge to the appellant DDA. The counsel for the appellant DDA appeared before the learned Company Judge on 21.05.1985 and following order was passed:

“A draft of settlement deed has been drawn. It is still to be examined by the O.L. to whom a copy has been

furnished. According to the order of 27/1/82 in CA 358/80, DDA appears to be willing to favourably consider the transfer of land in favour of the company in liquidation on receiving the necessary unearned increase etc., subsequently, some quantification was also done by the DDA but the counsel for the DDA explains that DDA never made any commitment to effect the transfer. It was only willing to consider, the question of transfer on appropriate terms having regard to the various legal requirements. It appears that before the settlement can be arrived at between the parties, it would be necessary for the Aeroshine to approach the DDA with a view to have the transfer effected in accordance with the requirements of the DDA. It would perhaps be necessary for Aeroshine to associate the surviving partners of Amar Singh and Co. in pursuing the matter with the DDA. Aeroshine may therefore, take the necessary steps in that behalf. The matters be listed for further directions on July 16, 1985. Copy of the order be furnished to the counsel for the parties, including DDA.”

7. It was the case of the respondent M/s Aeroshine before the learned Company Judge, that in pursuance of the above order, it submitted an application with the appellant DDA for registration of the Lease Deed.

8. The proceedings before the learned Company Judge were adjourned from time to time to await the consideration by the appellant DDA of the aforesaid application of the respondent M/s Aeroshine and the counsel for the appellant DDA took adjournments for this purpose and owing whereto the recording of the settlement, as agreed on 14.05.1985, was held up.

9. The matter so remained languishing till 19.09.1990, when it was finally ordered that M/s Aeroshine will pay the amount of Rs.4,50,000/- (being the additional amount which it had agreed on 14.05.1985 to pay to OL) with 12% interest from 14.05.1985 to 13.10.1990 in the manner mentioned therein to the OL. The said amount was paid by the respondent M/s Aeroshine to the OL and the OL, as recorded in the order dated 12.11.1990, relinquished all his claims and rights in the plot in question.

10. When the matter was listed next thereafter on 24.12.1990, the counsel for the appellant DDA again sought time to take instructions as to the amount of unearned increase payable for registration of the Lease Deed in favour of respondent M/s Aeroshine.

11 On 11.01.1991, the appellant DDA informed that a sum of Rs.70,59,773/- was payable.

12. The respondent M/s Aeroshine took a stand that the amount claimed by the appellant DDA was exorbitant.

13. The learned Company Judge in the impugned order has observed that though there may be a doubt whether the said dispute, as to the unearned increase, was required to be adjudicated in the company proceedings but for the reason of the matter having remained pending for long in the company proceedings and to give quietus to the problem and the appellant DDA having not taken any such objection, the learned Company Judge proceeded to decide the question.

14. The appellant DDA justified the demand of Rs.70,59,773/- aforesaid, pleading that no application for permission to sell the leasehold rights had been made to the appellant DDA; that the perpetual lessee is liable to pay unearned increase at such rates as are prevalent on the date of grant of approval for transfer; no such approval had been granted till then and the demand for unearned increase was thus provisional with the final amount

due to be calculated at the rate prevalent at the time of approval as and when the said approval was asked for. It was further stated that such approval could not be given till the misuser of the lease and damages / compounding charges, as applicable were paid. It was further informed that as on 31.03.1996, the unearned increase payable was in the sum of Rs.1,02,98,379/-.

15. The respondent M/s Aeroshine on the contrary contended that the appellant DDA was taken into confidence in the matter from the beginning and the compromise between the respondent M/s Aeroshine and OL was on the basis of unearned increase then got worked out from the appellant DDA and therefore appellant DDA was bound by the same. It was further their case that 50% unearned increase had to be calculated on Rs.7,42,000/- which was the total consideration given by respondent M/s Aeroshine to the Company in winding up inclusive of interest. It was yet further their case that unearned increase could at best be calculated by the appellant DDA at the rates prevalent on the date when the application was first submitted to the appellant DDA and which was much prior to 16.08.1985.

16. The learned Company Judge, in the impugned order, has held:

- i) that unearned increase is to be calculated as on the date when the application for transfer is made;
- ii) that though it was the case of the DDA that no application for transfer had been made till then but the order dated 06.08.1985 recorded that DDA till then had not considered the application owing to the earlier orders dated 29.07.1980 and 30.03.1981 and on that date DDA was directed to consider the application;
- iii) that on the next date i.e. 10.09.1985, the counsel for the DDA took further time to take decision on the application;
- iv) that it was only thereafter on 09.10.1985 that DDA stated that no such application has been made and which claim had been disputed by the counsel for the respondent M/s Aeroshine;
- v) that the partner of M/s Aeroshine had also filed an affidavit that applications were filed and copy of the application was handed over to the counsel for M/s Aeroshine for handing over to the counsel for the appellant DDA pursuant to order dated 09.10.1985;
- vi) that no reply had been filed by the appellant DDA to the said affidavit;
- vii) that in the entirety of the facts, it was safe to infer and conclude that an application was submitted before 16.08.1985 with the appellant DDA with request to indicate unearned increase;

viii) that the Supreme Court in *Union of India Vs. Dev Raj Gupta* (1991) 1 SCC 63 has held that DDA can claim unearned increase at the rates prevailing as on the date of the application; and,

ix) that the delays by the appellant DDA in passing orders on the application would not make unearned increase payable at the rates prevalent on the date of grant of approval.

The learned Company Judge accordingly directed the appellant DDA to calculate unearned increase on the basis of application dated 02.07.1985, copy whereof had been furnished by respondent M/s Aeroshine along with its affidavit supra and taking into consideration the pre-fixed market rate as on that date and not on the date of approval of mutation. The appellant DDA was also held entitled to interest at the rate of 9% per annum from 02.07.1985 till the date of payment.

17. Notice of this appeal was issued. Vide subsequent order dated 13.12.2004, the appellant DDA was directed to calculate the unearned increase on the basis of application dated 02.07.1985, without prejudice to its rights and contentions and to make a demand in accordance with the judgment of the learned Single Judge on the respondent M/s Aeroshine and the respondent M/s Aeroshine was directed to deposit the amount with the

appellant DDA. The appeal was admitted for hearing on 07.03.2006. The counsels have been heard.

18. The counsel for the appellant DDA has drawn our attention to the affidavit along with which a copy of the application dated 02.07.1985 was filed. The said affidavit dated 08.07.2002 is of one Mr. Avtar Singh of M/s Amar Singh & Co., partner of the respondent M/s Aeroshine, deposing that the said plot belonged to one M/s Amar Singh & Co. who sold the said plot *inter alia* to the respondent M/s Aeroshine who constructed a building thereon; that M/s Amar Singh & Co. had made an application to the appellant DDA for determination of unearned increase and which application was referred to in the orders dated 23.07.1985, 06.08.1985 and 10.09.1985; that as far as he was aware, a copy of the said application was handed over to the counsel for respondent M/s Aeroshine for handing over to the counsel for appellant DDA pursuant to the directions contained in the order dated 09.10.1985. The counsel for the appellant DDA has argued that the deponent of the said affidavit has not unequivocally said that the application was handed over to the counsel for the appellant DDA and there is no proof whatsoever of the original of the application dated 02.07.1985

having been submitted with the appellant DDA. She has argued that the order of the learned Company Judge is based on conjectures and surmises and there was no material whatsoever before the learned Company Judge to hold and conclude that any such application was submitted with the appellant DDA before 16.08.1985. She has contended that in fact no application has been filed till the impugned order dated 31.08.2004 and thus the question to be determined in this appeal is whether the unearned increase payable by the respondent M/s Aeroshine was to be computed on the basis of the rates of the year 1985 as has been held by the learned Company Judge or on the rates of the year 2004.

19. The counsel for the appellant DDA has next invited our attention to the order dated 15.06.1999 of the appellant DDA on the subject of “Crucial date for working out the unearned increase” and prescribing the said date as the date when all required documents are filed in the office of the appellant DDA, complete in all respects. It is yet further argued that the application dated 02.07.1985, copy of which was filed along with the affidavit aforesaid is also not for permission to transfer but only of enquiring the unearned

increase due and cannot be said to be an application for permission to transfer.

20. The counsel for the respondent M/s Aeroshine has contended that the relevant date for computation of the unearned increase is the date of the application and because of the delays by the appellant DDA in processing the application, the applicant cannot be prejudiced. He has further argued that the considerations generally agreed to between the parties for transfer of such immovable property are higher than the notified rates. It is further informed that pursuant to the interim orders aforesaid in this appeal, unearned increase of approximately Rs.33,62,115/- inclusive of interest has been paid to the appellant DDA. The counsel has further argued that there is no basis whatsoever for the appellant DDA to demand unearned increase at the pre-determined rates of several years after the transfer of the property.

21. The counsel for the appellant DDA in rejoinder has relied on ***La Medica Manufacturing Pvt. Ltd. Vs. Delhi Development Authority*** 73 (1998) DLT 362 in para 19 of which, the Division Bench has held that an application can be said to be complete in all respects only when it is substantially in the form if any prescribed and gives all the particulars

requisite for granting the permission. She has argued that the application dated 02.07.1985 even if were to be held to be submitted, cannot be said to be complete in all respects.

22. We have bestowed our consideration on the controversy. It is deemed appropriate to set out herein below the application dated 02.07.1985 being the only application on record:

*“The Deputy Director,
Delhi Development Authority,
Old Scheme Branch,
Vikas Sadan, ‘A’ Block,
NEW DELHI.*

*REG:- C.P.78’ OF 1978 OFFICIAL
LIQUIDATOR GLOBE ASSOCIATES PVT.
LTD. (IN LIQUIDATION) VS. AMAR
SINGH & CO.*

Dear Sir,

*Pursuant to the order of the Company Judge,
Hon’ble Justice H.I. Anand, we have been directed to
enquire from your office the transfer ‘LEVY’ leviable by
your office for the transfer of Plot No.16-A, Motia Khan
Dump Scheme in the 3rd name. This information has to be
submitted to the High Court by or before the 8th instant,
being the next date of hearing.*

*In view of the above you are requested to please treat
this as URGENT.*

Thanking you,

*Yours faithfully,
For AMAR SINGH & COMPANY*

2nd July, 1985

*(KARTAR SINGH)
GENERAL ATTORNEY”*

23. Though undoubtedly the aforesaid application is only of enquiry of the quantum of the unearned increase payable and not of seeking transfer or offering to pay the unearned increase, but it is not as if the learned Single Judge was not conscious of the said fact. The reasons which have prevailed with the learned Company Judge nevertheless for directing payments of unearned increase at the rates as of 1985 are set out in Paras Nos. ‘A’ to ‘F’ at pages 14 to 16 of the impugned judgment and need is not felt to reproduce the same here. Suffice it is to state that the learned Company Judge has directed payment of unearned increase as on the rates prevalent in the year 1985 for the reason of approval to the transaction having been finally given in the year 1985 and the appellant DDA having been called to the Court in the same year in this respect. The learned Company Judge has thus concluded that the question of unearned increase was raised with the

appellant DDA in the year 1985 itself and the rates applicable should be for that year only.

24. We see no reason to take any different view of the matter. It is not the case of the appellant DDA, neither before the learned Company Judge nor in this appeal that the application for transfer of leasehold rights has to be in any prescribed form. Moreover, even if there was any prescribed form, the same is certainly not statutory or sacrosanct. The claim of the appellant DDA for unearned increase is based on a lease condition which prohibits the lessee of the land from transferring the land without obtaining permission of the lessor DDA and entitles the lessor DDA to, as a condition for the grant of such permission, demand unearned increase, being 50% of the difference between the rates prevalent on the date of the grant of the lease and on the date of transfer. The requirement thus stands satisfied as soon as the appellant DDA is informed of the intended transfer. In the present case, the transfer is under the aegis of the Company Judge of this Court. The counsel for the appellant DDA has throughout been involved in the same. The appellant DDA was thus fully conscious that the transfer of the leasehold rights had been approved by this Court and the respondent M/s Aeroshine

had taken over the responsibility to pay the unearned increase and for which purpose the appellant DDA had been called to the Court. In our opinion, in these circumstances, it matters not as to whether a well drafted application seeking permission for transfer was filed or not. The dealings as aforesaid were not in the office of the appellant DDA but before the Court in the presence of the counsels who well understood the purport of the proceedings; the counsel for the appellant DDA well understood the role of the DDA in the said transfer. The appellant DDA is thus estopped from arguing that no application was made to it till 2004 or even till now. If such arguments were to be accepted, it would make the pendency of the proceedings in this Court a laughing stock. If the said argument of the appellant DDA were to be accepted, then no application as desired by the appellant DDA having been filed with the DDA till date, the unearned increase should be computed, why at the rates of 2004 but at the rates of current year.

25. There is another aspect of the matter. The purport of unearned increase is to, in addition to the premium charged by the appellant DDA at the time of granting the lease, entitle the appellant DDA to share 50% of the

increase in value of the leasehold rights from the date when the lease was given and till the date of transfer. The transfer of the leasehold rights in the present case, as aforesaid, is under the aegis of this Court. There is no doubt as to the consideration for the said transfer. It is not in dispute that the matter has throughout been pending in this Court on the issue of unearned increase. We are of the opinion that it would be highly unjust and unfair to ask the respondent M/s Aeroshine who though has purchased the leasehold rights at the rates of the year 1983-85, to pay unearned increase to the appellant DDA of the year 2004 or of today.

26. We therefore see no reason to interfere with the order of the learned Company Judge, insofar as directing unearned increase to be payable at the rates of the year 1985. However, we are of the opinion that the interest at the rate of 9% per annum awarded by the learned Company Judge, on the arrears of unearned increase, is on the lower side. It cannot be lost sight of that owing to the pendency of the litigation, the unearned increase which was payable by the respondent M/s Aeroshine in the year 1985, remained in the pocket of the respondent M/s Aeroshine, till the same was ultimately paid in the year 2005 i.e. over a period of 20 years. Considering all the facts

and circumstances and the fact that the appellant DDA itself generally charges interest at the rate of 12% per annum, we are of the opinion that interest of justice would be served if the rate of interest is enhanced from 9% per annum to 12% per annum.

27. We thus, while dismissing this appeal, direct the respondent M/s Aeroshine to within four weeks hereof deposit with the appellant DDA the amount due towards such additional interest for the period from 03.07.1985 to 31.01.2005. On payment of the said amount, the demand earlier made under interim order in this appeal and the documents if any executed pursuant thereto and all of which was subject to the further order in this appeal, shall stand regularized.

28. The appeal is disposed of.

No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

FEBRUARY 27, 2013
'gsr'