

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

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Date of Decision: 10.12.2013

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WP(C) No.2324 of 2013

M/S K.G.ELECTRONICS PVT. LTD

..... Petitioner

Through: Mr. S.S. Jain and Mr. R.K. Sharma,
Advs.

versus

DSIIDC LTD.

..... Respondent

Through: Ms. Anusuya Salwan and Mr. Vikas
Sood, Advs. for DSIDC

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

The petitioner before this Court, which is a private limited company, applied to the respondent – DSIIDC for allotment of an industrial plot in Narela Industrial Complex under its Relocation Scheme. Vide letter dated 7.7.1990, plot no.A-102 at Narela Industrial Complex was allotted to the petitioner on provisional basis. The possession of the said plot was handed over to the petitioner on 17.5.1993 Vide letter dated 9.10.2006, the respondent – DSIIDC sent lease papers in respect of the aforesaid plot to the petitioner. However, the lease deed of the aforesaid plot has not been executed so far in favour of the petitioner company. Being aggrieved from the failure of the respondent to execute the sale deed in its favour, the petitioner is before this Court seeking the following relief:

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to issue writ in the nature of mandamus thereby directing the respondent no.2 to execute lease deed in respect of industrial plot bearing no.A-102, DSIDC, Narela Industrial Area Complex, Delhi-110040 allotted to the petitioner on 7.7.1990.

2. It is stated in the counter affidavit filed by the respondent – DSIIDC that at the time the petitioner company applied for allotment of a plot under Relocation Scheme, there may be only two (2) Directors in the company namely Mr. Davender Kumar Gupta and Mr. Dinesh Kumar Gupta, both of whom are the real brothers. It is further stated in the counter affidavit that in the year 2007, the petitioner was asked to furnish the details of the change in the shareholding pattern and directorship of the petitioner company so that the unearned increase payable by the company could be calculated. It is also stated that since there were changes in the shareholding pattern and the shares were transferred outside the family, the lease deed could not be executed. Thus in nutshell, the case of the respondent – DSIIDC is that since the shares have been transferred to the persons who do not fall within the definition of the 'family' as given in their guidelines, the unearned increase is payable by the petitioner company, in respect of the aforesaid transfer of shares outside the family, before the lease deed can be executed in favour of the petitioner company.

3. A perusal of the documents filed along with the counter affidavit would show that at the time of allotment of the plot Mr. Davender Kumar Gupta and Mr. Dinesh Kumar Gupta had 50% shares each in the

petitioner company. However, as on 30.9.2004, Mr. Davender Kumar Gupta and Mr. Dinesh Kumar Gupta held only 28.814 % share each in the aforesaid company. Smt. Anju Gupta, wife of Davender Kumar Gupta held 14.124% shares, Smt. Rekha Gupta, sister-in-law of Mr. Davender Kumar Gupta and Dinesh Kumar Gupta held 14.124% shares and Mr. Tarun Gupta held 14.124% share in the petitioner company. Thus, Mr. Davender Kumar Gupta and Mr. Dinesh Kumar Gupta held more than 57% shares in the petitioner company even on 30.9.2004 and they along with Smt. Anju Gupta, wife of Davender Kumar Gupta held more than 71% share in the petitioner company on that date. Only 28.248% share were held by the persons who are not the family members as defined in the guidelines for management of industrial land managed by Delhi Government, which the respondent have placed on record, which defines the family to mean, an individual, wife or the husband, as the case may be, father, brother, major son, married daughter/ sister and minor children of the lessee. The sister-in-law, nephews are not included in the said definition.

However, a perusal of the shareholding on 29.9.2007 shows that on that date Mr. Davender Kumar Gupta and Mr. Dinesh Kumar Gupta were the only two (2) shareholders in the said company who held 50% shares each in the company.

4. Two questions arose for consideration in this writ petition. The first being whether any unearned increase is payable to the respondent in terms of the guidelines for management of industrial land in Delhi and if so whether the said guidelines are binding upon the petitioner company and the second being whether any unearned increase is payable to the respondent in terms of the condition contained in the lease document the

format of which was sent to the petitioner company way back on 9.10.2006.

5. The aforesaid guidelines, to the extent they deal with the payment of unearned increase on substitution/ addition/deletion of the lessee/ sub-lessee read as under:

“Substitution/ addition and deletion of name in lease/ sub lease of industrial plots.

1. Where plots have been allotted but deed has been registered.

(i) Where no need has been registered the auction purchaser allottee shall be permitted, free of charge, to add, delete or substitute the number of “family member” which may where necessary, take the form of partnership firm.

(ii) Where the change asked for will result in the formation of a limited or pvt. Ltd. Or vice versa, 50% of the unearned increase in the value of plot calculated on the current market rate on the date of application will be charged.

(iii) In case of substitution/ addition/ deletion in the name of person, who are not family member, the same will be allotted on the payment of following fee:-

(a) In the case of proprietorship or partnership concerned a sum equal to 50% of the unearned increase in the market value of the plot calculated on the basis of the proportionate share in the profits of the incoming or outgoing persons. The market value will be same as prevalent on the date of application.

(b) In case the application is for changing the constitution of the lease firm from a proprietorship or partnership firm into a private limited/ limited company or vice

versa 50% of the unearned increase in the market value of the plot as on the data application will be charged.

- (iv) In order to obviate the possibility of clandestine transfer clause shall be added in deed to the following effect:

“This lease/ sub lease shall stand automatically terminated if there is any change in the constitution of the proprietorship partnership firm as on the date of execution of the deed without the prior approval of the Lessor, except change due to the death of the proprietor or any of the partners.”

- (v) A copy of partnership deed / memorandum and article of association and certificate of incorporation with list of directors/ subscribers/ promoters as on the date of the deed (as the case may be) shall be annexed to the deed.
- (vi) Changes done between the date of application and the date of offer of allotment/ demand letter will be accepted without any charge. The date of offer of allotment will be the date of issue of offer of allotment letter demand letter.

- 2. Where deed has been registered – (i) where deed has been registered addition/ deletion and substitution of “Family Member” shall be allowed without any charge but no execution of a regular conveyance/ gift deed.
(ii) Addition deletion substitution of outsiders shall also be allowed through a conveyance deed but on the payment of the following amounts:-

- (a) In the case of proprietorship or partnership concern a sum equal to 50% of the unearned increase in the market value of the plot calculated on the basis of the proportionate shares in the profits of the incoming or outgoing persons. The market value will be same as prevalent on the date of application.
- (b) In case the application is of changing the constitution of the lessee firm from partnership firm into a Pvt. Ltd./ limited company or vice versa, 50% unearned increase in the market value of the plot as on the date of application will be charged.”

It would thus be seen that there is no provision in the aforesaid guidelines for charging unearned increase wherever the share in a private limited company are transferred to a person who is not a family member in terms of definition given in the said guidelines. Clause 1(iii)(a) applies to proprietorship or partnership concerned whereas clause (b) applies to a case where an application is made seeking change in the constitution of the lessee from the proprietorship or partnership to a company or vice versa. Clause 2(ii)(a) applies to a case where there is addition/ deletion/ substitution of outsiders in a proprietorship or partnership concerned whereas clause (b) of the said clause applies where the application is made for changing of the constitution of the lessee from a partnership to a private limited company or vice versa.

6. The learned counsel for the respondent – DSIIDC has drawn my attention to clause (ii) of the Minutes of Meeting held on 11.6.2009 in the Chamber of Secretary-cum-Commissioner of Industries, Govt. of NCT of Delhi where the following decision was taken:

11. Policy decision regarding change of constitution in respect of private limited and limited company

It was clarified that change of Directors in a Pvt. Ltd. Co. is permissible on payment of proportionate UEI wherever required as per Land Management Guidelines. It was also clarified that change of Directors in relocation cases is only allowed among the family members. Whereas only deletion of non-family directors are allowed on payment of UEI in relocation cases.

It would be seen from a perusal of the aforesaid decision that it applies to the case where the land management guidelines provide for payment of unearned increase. As noted earlier, the said guidelines do not provide for payment of unearned increase in case there is transfer of shares in a company to a person who is not a member of the family as defined in the said guidelines. Therefore, the aforesaid policy decision does not entitle respondent to claim unearned increase from the petitioner company.

7. It would thus be seen that the guidelines framed by the respondent – DSIIDC for management of industrial land in Delhi, do not provide for recovering the unearned increase in cases where the shares in a company are transferred, to a person, other than a family member, as defined in the said guidelines. Therefore, no unearned increase can be sought from the petitioner on the strength of the aforesaid guidelines. Hence, in the present case, I need not go into the question as to whether the said guidelines would bind the petitioner company or not.

8. Coming to the lease conditions, contained in the lease format, which the respondent has sent to the petitioner and which binds the respondent to relevant clause read as under:

“(5)(a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of ten years from the commencement of this lease unless, in the opinion of the Lessor exceptional circumstances exist for the grant of such consent.

PROVIDED FURTHER 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 Industrial Plot at the time of sale, transfer, assignment, or parting with the 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.”

It would be seen from a perusal of the aforesaid clause that the lessee/allotee is prohibited from selling, transferring, assigning or otherwise parting with possession of the whole or any part of the leased land without prior written consent of the lessor. It is also quite clear from a perusal of the said clause that in the event of such permission

being given the lessor is *inter alia* entitled to recover 50 per cent of the unearned increase from the lessee before such a permission is granted.

9. The petitioner before this Court is a company which by itself is a legal entity. The land in question was allotted to a company and continues to be owned by the said Company irrespective of the change in the shareholding pattern. However, there may be cases where the leased land may be transferred indirectly, instead of being transferred directly by the Company to an individual or another legal entity. That can be done either by transferring the majority shares or by issuing additional equity which would give majority shareholding in the company to the persons other than those who were shareholders of the company at the time the land was leased to it. In such cases, the lessor shall certainly be entitled to charge unearned increase while granting permission for transfer of the shares in the Company or for issue of additional shares in the company. If for example, more than 50 per cent shares in the allottee/lessee company are sold to persons who are not included in the definition of family members as contained in the guidelines framed by the respondents, the lessor would certainly be entitled to charge unearned increase while permitting granting permission for such transfer. Similarly in a case where the Company allots additional shares to person(s) who are not family members of the existing shareholders and such additional issue of equity results in persons who are not members of the family as defined in the guidelines getting control of the company by owning more than 50 per cent shares in the Company, the lessor would be entitled to charge unearned increase while granting such permission.

However, in a case where the transfer of shares or issue of additional equity does not result in transfer of control of the company from the existing shareholders to the new shareholders and the existing shareholders continue to own more than 50 per cent shares in the company, that cannot be treated to be a case of transfer of the leased land to the new shareholders. If there arises a situation where the control in the company passes from the existing shareholders to the new shareholders without the new shareholders getting at least 50% shares in the company, that also may be in appropriate cases, entitle the lessor to demand unearned increase while permitting the transfer of shares. But that cannot be the position when the shareholders on the date of allotment, continue to hold more than 50% share in the company. Therefore, what is relevant is the extent of the shareholding of such shareholders i.e. the shareholders at the time the allotment was made

10. In the case before this Court, as noted earlier Mr. Davender Kumar Gupta & Mr. Dinesh Kumar Gupta always continued to hold more than 50 per cent shares in the petitioner-Company. Therefore, control of the Company never shifted from them to an outsider. In fact, they along with Smt. Anju Gupta, continued to hold more than 71 per cent shares in the Company and as on today both of them have 100 per cent shares in the petitioner-Company as stated by the learned counsel for the petitioner-Company. Therefore, in the case before this Court, the respondent is not entitled to recover any unearned increase from the petitioner-Company.

11. For the reasons stated hereinabove, the writ petition is disposed of with a direction to the respondent to execute the lease deed in favour of

the petitioner-Company within six (6) weeks from today subject to completion of all formalities, if any, in this regard.

There shall be no orders as to costs.

DECEMBER 10, 2013/*rd*

V.K. JAIN, J.