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

+ ***W.P.(C) 2064/2012***

% **Judgment dated 10.04.2013**

M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFOR SENIOR SEC. SCHOOL & ANR Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2065/2012***

M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SEC. SCHOOL & AN Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2067/2012***

M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SECONDARY SCHOOL Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2068/2012***

MCD Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SEC.SCHOOL,VIKAS Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2111/2012***

M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SECONDARY SCHOOL Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2112/2012***

M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SECONDARY SCHOOL Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2114/2012***
M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SENIOR SECONDARY SCHOOL Respondent
Through: Mr.B.B. Jain, Advocate for respondents

+ ***W.P.(C) 2115/2012***
M.C.D. Petitioner
Through: Ms.Amita Gupta and Mr.P.Kumar, Advs
versus
OXFORD SR.SEC.SCHOOL VIKAS PURI & ANR..... Respondent
Through: Mr.B.B. Jain, Advocate for respondents

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Parties in these writ petitions are common. The writ petitions pertain to different assessment years. Counsel for the parties agree that all the writ petitions can be disposed of by a common order. For the sake of convenience, the facts of the Writ Petition No.2067/2012 are being noticed.
2. Aggrieved by the judgment dated 13.1.1999 passed in House Tax Appeal No.485/1997 by the Additional District Judge, Delhi, the petitioner has preferred the present writ petition. The facts as set out in the petition are that that Oxford Senior Secondary School society acquired land measuring 3.57 acres at a premium of Rs.12.0 lacs and out of the total land of 3.57 acres, the land measuring 2 acres were meant for construction

of a school building and the remaining land measuring 1.57 acres was meant for a playground and was not being constructed upon. While assessing the rateable value the assessing authority took into consideration the market value of only 2 acres of land for the purposes of fixing the rateable value of the property in question. The assessing authority also took into account the cost of construction, as per the balance-sheet of the assessee. The assessing officer also considered that the construction at the premises was carried out at different phases and the first phase of construction was carried out during February and March, 1984 and thus the rateable value of the first phase of construction was fixed at Rs.1,15,800/- w.e.f. 1.4.1984 by taking the market value of land at Rs.12.0 lacs and the cost of construction at Rs.3,59,653/- as given by the assessee. It was also noticed that w.e.f. September, 1985 regular construction was commenced on the basis of a sanctioned plan and after demolishing the temporary construction built on 1984; the market price of the land in the year 1985 was taken in as Rs.8.0 lacs per acre, and the cost of construction as declared by the assessee was taken at Rs.20,59,277/- and accordingly the rateable value was fixed at Rs.2,71,700/- w.e.f. 1.7.1986 after giving 10% rebate for maintenance. Similarly the third phase of construction was carried out in the year 1987. The rateable value of the additions was fixed at Rs.2,57,680/- w.e.f. 1.7.1987 on cost of construction as declared by the assessee at Rs.31,70,464/- plus cost of demolished structure at Rs.3.0 lacs.

3. The fourth phase of construction was carried out in 1988 by spending Rs.9,35,238/-, on which additional rateable value was fixed at Rs.69,440/- w.e.f. 1.7.1988, thus the total rateable value was fixed at Rs.5,98,820/- w.e.f. 1.7.1988.
4. Due to amendment in the Delhi Rent Control Act, the rateable value was

calculated at Rs.7,25,850/- by calculating standard rent @ 10% instead of 8.25%.

5. The rateable value at Rs.3,87,810/- w.e.f. 1.7.1989, at Rs.1,25,320/- w.e.f. 1.4.1992 were fixed on additional cost of construction at Rs.43,09,012 and Rs.13,92,406/-, vide assessment order dated 4.6.1993.
6. Aggrieved by the assessment order dated 6.4.1993 the respondents herein filed an appeal under Section 169 of the DMC Act in the Court of the Additional District Judge, Delhi. The order was assailed *primarily* on the ground that the assessee was entitled to the exemption under Section 115 of the DMC Act and the market value of the land was wrongly taken; the assessing authority had wrongly added Rs.3.0 lacs in the cost of using material of demolished portion and a deduction was sought of Rs.3,59,653/- which was the cost of construction for the first phase, which is said to have been demolished.
7. Ms.Gupta, counsel for the petitioner submits that the learned Additional District Judge has held that the price of the land allotted to the school would not change even by the passage of time because such land has no other market value on it and it is not transferable and in case it is transferred 100% of the unearned increase could be charged by the superior lessor.
8. The appeal filed by the respondent was allowed and as per this petition, the learned Additional District Judge re-fixed the following rateable value:
 - “(i) Rs.1,15,800/- w.e.f. 1.4.84
 - (ii) Rs.2,28,663/- w.e.f. 1.7.86 by taking market value of land at Rs.12 lakhs and cost of construction at Rs.28,99,624/-.
 - (iii) RV at Rs.4,64,070/- w.e.f. 1.7.87 due to additional construction.
 - (iv) RV at Rs.5,33,510/- w.e.f. 1.7.88 due to additional construction.

- (v) RV at Rs.6,46,667/- w.e.f. 1.12.88
- (vi) RV at Rs.10,34,480/- w.e.f. 1.7.89
- (vii) RV at Rs.11,59,800/- w.e.f. 1.4.92 on account of additional construction”

9. The order of learned Additional District Judge, is a subject matter of challenge in the present writ petitions. The main thrust of the argument of Ms.Gupta, counsel for the petitioner, is that the learned Additional District Judge has erred in holding that the market value of the land allotted to a school will not change even by the passage of time on the ground that such a land would have no market value, as it is not transferable. Counsel for the petitioner has relied upon the perpetual lease, relevant clause of which is reproduced below:

“(5) (a) The Lessee shall not sell, transfer, assign or otherwise part with possession of the whole or any part of the said land or any building thereon 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 the whole or a portion (as the Lessor may in his absolute discretion determine) of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the said land at the time of sale, transfer, assignment, or parting with the possession and the decision of the Lessor in the respect of the market value, shall be final and binding.

PROVIDED FURTHER that the Lessor shall have pre-emptive right to purchase the property after deducting such

percentage as decided by the Lessor of un-earned increase as aforesaid.

(b) Notwithstanding anything contained in sub-clause (a) above, the Lessee may with the previous consent in writing of the Lt. Governor of Delhi (herein after called “the Lt. Governor”) mortgage or charge the said land to such person as may be approved by the Lt. Governor in his absolute discretion.

PROVIDED that, in the event of the sale or fore-closure of the mortgaged or charged property, the Lessor shall be entitled to claim and recover such percentage as decided by the Lessor of the unearned increase in the value, of the said land as aforesaid, and the amount of the Lessor’s share of the said unearned increase shall be a first charge, having priority over the said mortgage or charge. The decision of the Lessor in respect of the market value of the said 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 such percentage as decided by the Lessor of the unearned increase as aforesaid.”

10. Counsel for the petitioner submits that respondents cannot derive any the benefit of this clause of the lease as the lessor has a discretion to recover the whole or portion of the unearned increase and in view thereof the market value of the land would be subject to change with the passage of time. Ms.Gupta submits that it is not necessary that the lessor would recover 100% of the unearned increase as he has the discretion even to recover a part.
11. Mr.Jain, counsel appearing on behalf of the respondent submits that the question sought to be raised by counsel for the petitioner is no longer res integra and has been a subject matter of a decision rendered by a Single Judge of this court in the case of **Salwan Education Trust Vs. MCD**

[CM(M)No.429/1998], which was upheld by the Apex Court in *MCD Vs. Salwan Education Trust* [Civil Appeal No.4471/2002]. Mr.Jain has relied on the following paragraphs of Salwan Education Trust (Supra), which are reproduced below:

“The case of the learned counsel for the petitioner in all these petitions is just confined to the submissions that the value of the land should be considered in the light of the following observations of the Supreme Court in the case of *Commissioner of Wealth Tax Vs. P.N. Sikand* AIR 1977 Supreme Court 1657, para 7 which reads as under:

“That takes us to the question as to how the leasehold interest of the assessee with the burden or limitation attaching under clause (13) of the lease-deed should be valued. It is clear from the language of section 7, sub- section (1) that what the Revenue is required to do for the purpose of determining the value of an asset is to assume that the asset which is to be valued is being sold in the open market and to fix its value for the purpose of wealth tax upon that hypothesis. Now, whenever the value of an asset has to be determined on the basis of a hypothetical sale, the court has necessarily to embark upon speculations which may be quite difficult and in some cases, even artificial. Here the asset to be valued is the leasehold interest in the land with the burden or restriction contained in clause (13) of the lease deed and the inquiry has, there- fore, to be directed to the question as to what is the price which this asset would fetch if sold in the open market. What would be the realisable value of this asset? It would indeed be difficult to speculate as to what the leasehold interest in the land would fetch in the open market when it is affected by the burden or restriction contained in clause (13) of the lease deed. If the lease- hold interest were free from this burden or restriction, it would be comparatively easy to determine its market value, for there are recognised methods of valuation of leasehold interest, but where the leasehold interest is cut down by this burden or restriction and some right of interest is abstracted from it, the problem of valuation becomes a difficult one and some method has to be evolved for resolving it. The only way it

can be done in a case of this kind is by taking the market value of the leasehold interest as if it were. unencumbered or unaffected by the burden or restriction of clause (13) and deducting from it, 50 per cent of the unearned increase in the value of the land on the basis of the hypothetical sale, as representing the value of such burden or restriction.”

12. Reference has also been made by the Single Judge to Dr.Balbir Singh & Ors. V. MCD & Ors. AIR 1985 SC 339 page 15, which reads as under:-

“That takes us to the question as to how the leasehold interest of the assessee with the burden or limitation attaching under Cl. (13) of the lease-deed should be valued. It is clear from the language of S.7, sub-section (1) that what the Revenue is required to do for the purpose of determining the value of an asset is to assume that the asset which is to be valued is being sold in the open market and to fix its value for the purpose of wealth tax upon that hypothesis. Now, whenever the value of an asset has to be determined on the basis of a hypothetical sale, the court has necessarily to embark upon speculations which may be quite difficult and in some cases, even artificial. Here the asset to be valued is the leasehold interest in land with the burden or restriction contained in Cl. (13) of the lease deed and the inquiry has, therefore, to be directed to the question as to what is the price which this asset would fetch if sold in the open market. What would be the realisable value of this asset? It would indeed be difficult to speculate as to what the leasehold interest in the land would fetch in the open market when it is affected by the burden or restriction contained in Cl.(13) of the lease deed. If the leasehold interest were free from this burden or restriction, it would be comparatively easy to determine its market value, for there are recognized methods of valuation of leasehold interest, but where the leasehold interest is cut down by this burden or restriction and some right or interest is abstracted from it, the problem of valuation becomes a difficult one and some method has to be evolved for resolving it. The only way it can be done in a case of this kind is by taking the market value of unencumbered or unaffected by the burden or restriction of Cl. (13) and deducting from it, 50 per cent of the unearned increase in the value of the land on the basis of the hypothetical sale, as representing the value of such burden or restriction.”

13. Mr.Jain has also relied upon the order passed by the Apex Court and more particularly paragraphs 4 & 5 which are reproduced below:

“4. Assailing the said direction, learned counsel appearing for the Municipal Corporation submits that the facts of present case are clearly distinguishable from the facts obtaining in Balbir Singh’s case (supra) because unlike in that case, in the present case, there is no specific stipulation with regard to the rate of unearned increase and moreover the land in question was allotted to the Society at a very low rate. It is, thus, submitted that the High Court erred in applying the ration of Balbir Singh’s case (supra) on facts at hand.

5. We are unable to persuade ourselves to agree with the learned counsel. As aforestated, the High Court has directed the Assessing Authority to determine the market price of the land by applying the principles laid down in Balbir Singh’s case (supra). As to what extent the deduction on account of restriction on transferability contained in the sub-lease is to be taken into consideration would depend on the terms of the lease deed, which would be before the Assessing Officer. We do not find any infirmity in the impugned direction warranting our interference.”

14. Mr.Jain, counsel for the respondent also submits that in the present state of affairs to expect that a public body to charge only a portion of the unearned increase is hypothetical in nature as no guidelines have been laid down by any of the statutory body to charge a portion of the unearned increase when a discretion vests in them to charge 100% unearned increase. Counsel also submits that this would be true especially in these cases where the land was granted on concessional rates and many years ago.
15. I have heard the learned counsel for the parties and considered the rival submissions. The only argument raised by the counsel for the petitioner is with regard to the decision rendered by the District Judge, where it has been held that the market value of the land allotted to the school will not

change with the passage of time. Clause 5(a) of the lease deed has been reproduced above. Clause 5(a) imposes a restriction on the lessee with regard to the sale of the land. It may be noted that the land was allotted to the school on a concessional rate. As per the terms of the lease there is an express restriction on the lessee from selling, transferring, assigning or parting with possession of the land, in whole or a part thereof except with the permission of the lessor. An absolute discretion has been vested in the lessor to refuse the same, moreover no permission can be granted for the first ten years. Similar issue was a subject matter in CM(M) No.429/1998 Salwan Education Trust's case (supra). While relying upon the observation of the Apex Court the contentions in the writ petition filed by the owner was allowed. Counsel for the petitioner is unable to show that the case of Salwan Education Trusts's (supra) is not applicable to the facts of this case.

16. The order of the High Court was also upheld by the Supreme Court. The District Judge in the order dated 13th January 1999 has rightly relied upon the terms of the lease.
17. Accordingly no grounds made out to entertain the present writ petition. Dismissed.
18. No costs.

G.S. SISTANI, J.

APRIL 10, 2013

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