

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

Date of decision: 6th September, 2011

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W.P.(C) 6513/2011

VIKRAMADITYA BHARTIA

..... Petitioner

Through: Mr. S.K. Rungta, Sr. Adv. with Ms.
Neha Tanwar, Adv.

versus

DDA

.... Respondent

Through: Ms. Sangeeta Chandra, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 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 petition impugns the demand, contained in the letter dated 1st October, 2010, of ₹13,00,286/- of the respondent DDA on the petitioner, on account of misuse charges and as a pre-condition for conversion of the leasehold rights in land underneath property no.A-94, Okhla Industrial Area, Phase-II, New Delhi into freehold. The petitioner claims to have paid the said amount to the respondent DDA under protest and seeks a mandamus to the respondent DDA to refund the said amount to the petitioner along with interest @6% per annum.

2. It has at the outset been enquired from the senior counsel for the petitioner as to how, the challenge to the demand can be entertained at this stage when the petitioner has already complied with the demand and on the basis of the said compliance made the respondent DDA convert the leasehold rights in the land into freehold. It has been enquired, whether the petitioner after having made the respondent DDA alter its position, is entitled to challenge the demand; challenge if any desired by the petitioner to the said demand ought to have been made before complying with the said demand and if the petitioner during the said challenge was desirous of having the leasehold rights converted into freehold, could have obtained the permission from the Court for making the payment without prejudice to his rights and contentions and subject to the final outcome of the petition. The Court could have then considered whether the respondent DDA could be directed to so change its position. However the petitioner having unequivocally led the respondent DDA into believing that the petitioner was agreeable to the said demand, it appears, cannot now be heard to challenge the same.

3. In this regard, it may also be noticed that though the petitioner claims to have paid the said amount under protest but the petitioner has not shown any protest having been lodged to the said demand. The petitioner after the

demand contained in the letter dated 1st October, 2010 did not write to the respondent DDA objecting to the said demand. The claim of having made the payment under protest is based on the copy of a letter dated 20th November, 2010 under cover of which the cheque for ₹13,00,286/- in favour of the respondent DDA is claimed to have been forwarded. However there is no acknowledgment of receipt by the respondent DDA on the said letter. Moreover, the cheque is shown to have been deposited in the bank account of the respondent DDA and there is nothing to show that the petitioner, before making the respondent DDA convert the leasehold rights into freehold, notified the respondent DDA that the petitioner was keeping alive his right to claim refund of the said amount. Though the said letter dated 20th November, 2010 refers to the earlier letters of protest dated 18th October, 2010 and 8th November, 2010 but no copies thereof have been filed before this Court. Nothing has been placed before this Court for this Court to believe the issuance of or delivery of any such letters on the respondent DDA. Similarly, though the *challan* of deposit is shown to contain the words “under protest” but the protest in a document submitted to the bank cannot be expected to have been registered with the decision making bodies of the respondent DDA.

4. The petitioner has preferred this remedy of equity jurisdiction of this

Court. This Court in exercise of equity jurisdiction would balance equity qua both the parties and not qua the petitioner alone. The petitioner having not shown to have notified the respondent DDA of its objection if any to the demand of ₹13,00,286/- ,the respondent DDA cannot be said to have agreed to convert the leasehold rights into freehold with knowledge of the said protest of the petitioner or with knowledge of the pending claim of the petitioner for refund of the said amount. The respondent DDA has irreversibly changed its position and it will be inequitable to, in exercise of writ jurisdiction, direct the respondent DDA to refund the said amount.

5. Lord Atkin in the House of Lords in *United Australia Ltd. v. Barclays Bank Ltd.* (1940) 4 ALL.E.R.20 held that if a man is entitled to one of the two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. The said principle has also been applied by the Courts in dealing with challenges to orders of the Court after acceptance of costs. It has been held that acceptance of costs amounts to acceptance of the order as correct and having taken benefit of one part of the order, a party cannot turn around and say that he will also challenge the order. It has been held that by allowing the party to challenge the order

amounts to nullifying the acceptance of costs; a litigant cannot approbate and reprobate; he had two options, either to accept the costs and treat the order as correct or not to accept the costs and to challenge the order; having elected to accept the costs, he is estopped from thereafter challenging the order.

6. As far as the plea of the petitioner of payment under protest is concerned, as aforesaid there is nothing before this Court to show that the payment in fact was under protest. In the present case, there is no pleading of the petitioner being under any compulsion to have the leasehold rights converted into freehold and/or to have been under any disability from challenging the demand if aggrieved therefrom, before complying therewith. The Apex Court in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267 has held that whether a case of coercion is made out or not is a question of fact and dependent upon several factors. The adjudication of the said questions also is not possible in writ jurisdiction and the appropriate fora for adjudication of the said disputed questions of fact is the one where witnesses can be examined and cross examined.

7. The senior counsel for the petitioner has contended that the demand was misconceived even as per the circular dated 26th March, 2010 of the respondent DDA filed at page 51 of the paper book. Reliance in this regard

is also placed on the notings dated 27th April, 2010 and 4th June, 2010 of the dealing assistant of the respondent DDA to contend that the charges as levied were not to be levied.

8. However the final decision of the Competent Authority of the respondent DDA of a date after the said notings and as communicated to the petitioner vide letter dated 1st October, 2010 challenged in this petition, was of levying the misuse charges. The Supreme Court in *Sethi Auto Service Station v. DDA* (2009) 1 SCC 180 and in *Jasbir Singh Chhabra v. State of Punjab* (2010) 4 SCC 192 had held that such notings of officers junior to the authority competent to take the decision, in the process of decision making process cannot be relied on. The said argument of the petitioner thus has no merit.

9. The senior counsel for the petitioner has next contended that since in the inspection carried out by the officials of the respondent DDA while considering the application of the petitioner for freehold conversion did not find any misuse, no misuse charges could have been levied.

10. As aforesaid, the final decision of the Competent Authority of the respondent DDA was to levy the misuse charges and the petitioner did not challenge the same and after complying therewith, is not entitled to challenge the same.

11. I may in this regard notice the recent judgment dated 10th August, 2011 in W.P.(C) 6678-81/2005 titled *Satya Mohan Sachdev v. DDA* where it has been held that the lease deed of the DDA permits the DDA to claim such misuse charges and that DDA even if under the lease deed not entitled to recover the misuse charges, is certainly entitled to insist upon payment thereof as a condition of freehold conversion.

12. The senior counsel for the petitioner has also argued that the misuse charges with respect to the building are illegal for the reason of the freehold rights in the building having been earlier conveyed to the petitioner and lease being only of the land. The said argument is also misconceived. The lease permitted the respondent DDA to impose condition with respect to the use of the superstructure above the land also.

13. The counsel for the respondent DDA appearing on advance notice has also invited attention to page 57 of the paper book being the reply dated 23rd July, 1985 of the petitioner to show cause notice then issued to the petitioner regarding misuse and in which the petitioner had admitted the misuse and sought condonation thereof.

14. I may also notice that the perpetual lease of the land in Clause 20 thereof provided for the reference of any question, dispute or difference arising under the lease or in connection therewith to be referred to

arbitration. If the petitioner intended to raise a dispute about the levy of misuse charges, the petitioner ought to have got the same referred to arbitration. The petitioner having not done so, is deemed to have waived the right to raise objection even if any to such claim for misuse charges and/or acquiesced to the demand and cannot now be heard to contend otherwise.

15. Mention also may be made of *Kanhaya Lal Madan v. NDMC* MANU/DE/1296/2011 where also such claim for refund was dismissed. The intro court appeal being LPA No.636/2011 preferred thereagainst was dismissed on 5th August, 2011.

16. There is thus no merit in the petition; the same is dismissed. I refrain from imposing any costs. Though the senior counsel for the petitioner has not sought any liberty to approach other appropriate fora but since in *Kahnaya Lal* (supra), such opportunity was given, it is deemed expedient to grant such opportunity to the petitioner also. It is further clarified that in the event of the petitioner availing such remedy, the observations hereinabove in the context of maintainability of the petition shall not come in the way of the petitioner.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**SEPTEMBER 6 , 2011/pp
(corrected and released on 19th September, 2011).**