

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

+ RSA 23/2009

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21st May, 2014

DDA

.....Appellant

Through: Mr. Rajiv Bansal, Ms. Arpita and Mr.
Ray Chaudhary, Advocates.

VERSUS

SHERI ROSHAN LAL CHOPRA & ORS. Respondents

Through: Mr. R.K.Saini, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This second appeal is filed under Section 100 CPC, 1908 by the Delhi Development Authority (DDA)/appellant/defendant impugning the concurrent judgments of the courts below; of the trial court dated 1.2.2002 and the first appellate court dated 29.8.2008; by which the appellant has been directed to mutate the suit property bearing Plot no.14, Naraina Industrial Area, Phase II, New Delhi in the name of the respondent-plaintiff without claiming the 50% unearned increase.

2. The facts of the case are that the suit property was leased out by the appellant to one M/s Asia Press. Against M/s Asia Press, there was a money decree and execution of the same, the suit property was put to auction on 12.11.1979. Plaintiffs/respondents were the highest bidders in the auction and therefore they purchased the rights of the JD/M/s Asia Press in the suit property. Appellant challenged the confirmation of sale in favour of the plaintiffs by means of filing objections in the executing court. The objections were dismissed by the order of the executing court dated 14.2.1980. For the sake of completion of narration, it may be stated that said objection of the appellant was earlier dismissed in default on 18.9.1979. The case of the respondents-plaintiffs was that after the sale certificate was executed in favour of the respondents/plaintiffs by the executing court they applied for mutation of the suit property in their names with the appellant, but the same yielded no result in spite of follow up and sending of a legal notice inasmuch as the appellant refused to mutate the suit property in the name of the respondents/plaintiffs till they paid 50% unearned increase as per Clause II (6) of the lease executed between the appellant and lessee M/s. Asia Press. The suit for mandatory injunction was hence filed directing the appellant-defendant to mutate the suit property in the name of the respondents/plaintiffs without claiming 50% unearned increase payment.

3. The only issue which was urged on behalf of the appellant-defendant before the courts below, and also in this Court, is that by virtue of Clause II (6) of the perpetual lease deed executed in favour of the M/s Asia Press, whenever there is a transfer of interest of the lessee /M/s Asia Press in the suit property, then, the transfer is subject to the appellant-defendant being paid unearned increase and therefore, the respondents-plaintiffs were bound to pay unearned increase, to the appellant/defendant if they wanted mutation of the suit property in their name.

4. Before I turn to the only relevant issue in the suit being issue no.2 as to entitlement of the appellant-defendant to the unearned increase, let me at this stage reproduce Clauses II (5) (6) and (7) of the lease deed and also dilate on the meaning of the expression 'unearned increase' inasmuch as this term has a peculiar meaning with respect to plots which are leased out in Delhi either by the appellant-defendant or by the Land & Development Officer acting under the Ministry of Housing and Urban Development. The lease in favour of M/s Asia Press was cancelled by the appellant on account of certain breaches, but the same was subsequently restored in favour of M/s Asia Press. Though there were also some disputes with regard to perpetual lease having been signed between the appellant and M/s Asia Press, however

I need not dwell on this aspect because it is the common case of both the parties before me that M/s Asia Press was bound by the clauses of the perpetual lease deed.

5. The relevant clauses of the perpetual lease deed being clauses II(5) (6) and (7) read as under:-

“II. xxxxxxxxxxxxxx

(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 think 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 as the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty percent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the property after deducting fifty per cent of the unearned increase as aforesaid.

(b) Notwithstanding anything contained in sub-clause (a) above the Lessee may, with the previous consent in writing, of the Lieutenant Governor of Delhi (hereinafter called “the Lieutenant-Governor”) mortgaged or charge the Industrial plot to such person as may be approved by the Lieutenant 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 the fifty percent of the unearned increase in the value of the industrial plot 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 industrial plot 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 deduction fifty per cent of the unearned increase as aforesaid.

(6) The Lessor’s right to the recovery of fifty per cent of unearned increase and the pre-emptive right to purchase the property as mentioned herein before shall apply equally to an involuntary sale or transfer whether it be by or through an executing or insolvency court.

(7) Whenever the title(sic) of the Lessee in the industrial plot is transferred in any manner whatsoever the transferee shall be bound by all the covenants and conditions contained herein and be answerable in all respects therefore.

6. First of all let us at this stage understand the meaning of the word ‘unearned increase’. This expression is best explained by means of an example. Where a lessee is granted a perpetual lease or sub-lease by the DDA for a sum of let us say Rs.100, and the sub-lessee/lessee voluntarily or

involuntarily through sale etc transfers the suit property to a third person for Rs.1000/-, then, Rs.900/- becomes the unearned increase. Unearned increase is therefore the price which the sub-lessee/lessee receives on transfer of the property which is more than the price which has been paid by the sub-lessee/lessee to the DDA. Out of the unearned increase, the appellant in terms of the relevant clauses claims 50% of the amount i.e in the theoretical example before us a sum of Rs.450 ie half of Rs.900/-. The historical background and the reason for governmental authorities like the DDA and the L&DO claiming unearned increase by incorporation of a clause in the lease/sub-lease deed was that when the properties were given on lease/sub-lease to various persons in Delhi, the same used to be transferred to them at concessional rates/preferential rates and not at the market rates. Since the transfer was at concessional rates, the lessee such as the DDA retained with it the right that in case the suit property is further transferred/assigned/sold etc, then, DDA becomes entitled to claim 50% of the unearned increase because the original sub-lessee/lessee cannot take benefit of the market price although he had transferred the property by means of a sub-lease/lease on concessional rates. To conclude this aspect I would like to state that over the last decade or so, the DDA and L&DO have now come out with policies whereby on payment of conveyance charges the

properties have been converted from lease hold to free hold and once the property becomes free hold then the person in whose name the conveyance deed is executed becomes the exclusive owner (and not sub-lessee/lessee) and the person who becomes an owner under the conveyance deed does not have any further restrictions on transfer of the property such as of payment of unearned increase. The DDA receives in a way market price of the property by taking such charges which are called as the conversion/free hold charges. With this background let us now examine the relevant facts and issues in this case.

7. The trial court framed the following issues:

- “i. Whether plaintiff has fully served notice u/s 53-B of DD Act on the defendant and the effect thereof?OPP
- ii. Whether the defendant/DDA is entitled to 50% unearned increase in terms of clause (ii) sub-section 6 of the lease deed, from the plaintiff?OPP
- iii. Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?OPP
- iv. Relief.”

8. The only relevant issue is issue no.2. Trial court has decided this issue in favour of the respondents-plaintiffs giving the following observations and conclusions:-

“8. **Issue No.2 & 3:-** Both these issues being connected together are discussed together. Defendant DDA has taken the plea that they are entitled for the 50% unearned increase in terms of provision of the lease deed. PW-1 deposed that property No. A-14 Naraina Industrial Area Phase II was purchased by him in the court auction. This fact has already admitted by the DDA. He further deposed that certificate was issued by the court of Sh. Jagdish Chander and then Ld. ADJ. He proved the same as Ex.PW-1/1. He further deposed that at that time also DDA raised objections for 50% unearned increase before the court of Sh. Jagdish Chander and vide their application dt. 30.11.79 and 29.9.80 in execution. Both these objections were considered and rejected by the then court or Learned ADJ. He further deposed that these objections are available in the court file which at the time of his evidence summoned in the court. Thus, it stands proved that at that time when the property was put to auction and further at the time of execution, DDA Deptt. has also taken these objections before the court of learned ADJ. PW-1 further deposed that he made several applications to the DDA for mutation of the plot in his name but same has not been done so far. It is further admitted case that the property has not been mutated in the name of plaintiff. If the DDA Deptt. Raised objections before the then Ld. ADJ regarding the payment of 50% of unearned increase then now at this stage they are barred from taking these objections again and again. DW-1 further deposed that as per the terms and conditions of the allotment, the lease is not entitled to sell or transfer the plot without a prior permission of the govt. It may be mentioned that this condition in this lease deed is binding upon the lease and not upon the auction purchaser of the property. In this case, the lease did not sell or transfer the plot but the same was put into the court auction. The plaintiff purchased the same in the court auction. The privity of contract of defendant DDA was that the lease in whose favour the plot was allotted. DDA has no privity of contract who purchases the same

in the court auction, therefore, it cannot be said that the conditions which were applicable to the lease will apply to the auction purchaser also. The original allottee or the lease was bound by those terms and conditions And it cannot be said that any person who purchased the plot in court auction shall be bound by the same. Moreover, as discussed earlier, DDA has already taken these objections before the court of Learned ADJ at that time in the year 1979 vide their application dt. 30.11.79 and 29.09.80 in the execution. In such circumstances, now when this question has already been decided, and their application stands rejected, DDA Department is barred from raising this issue again and again.”

9. The first appellate court has dismissed the appeal of the appellant on the ground that there were two earlier judgments which operate as *res judicata* against the appellant preventing it from claiming the unearned increase, and which judgments are said to be dated 18.9.1979 and 14.2.1980. I may also state that the first appellate court arrives at a conclusion that the respondents-plaintiffs in fact will step into the shoes of the original allottee/lessee/M/s Asia Press , and which in my opinion in fact is in favour of the appellant herein and not the respondents/plaintiffs, though the first appellate court uses that logic to hold against the appellant-plaintiff. Though substantial questions of law were framed by a learned Single Judge of this Court on 6.3.2013, I in exercise of sub-Section 5 of Section 100 CPC

read with its proviso re-frame the substantial questions of law for disposal of this regular second appeal as under:-

“(i) Whether the courts below have committed a gross illegality and perversity in not even referring to the relevant clauses of perpetual lease between the appellant and the original lessee M/s Asia Press?

(ii) Whether the courts below have committed a gross illegality and perversity in holding in favour of the respondents-plaintiffs that no unearned increase payable in spite of the categorical Clause II (5) (6) and (7) as contained in the perpetual lease?

(iii) Whether the courts below have committed a gross illegality and perversity in holding that because in the auction sale there was no term fixed of payment of unearned increase by the respondents-plaintiffs, consequentially, the appellant-defendant could not claim unearned increase including for the reason that respondents-plaintiffs have stepped into the shoes of the original lessee M/s Asia Press?”

10. All the aforesaid questions of law have to be answered in favour of the appellant and the reasoning given by me hereinafter.

11. A reference to the impugned judgments of the courts below shows that the height of perversity and mis-application resulting in grossest

injustice to the appellant because issues with respect to entitlement or disentitlement of the appellant to claim unearned increase have been decided without even reproducing and referring to the relevant clauses of the perpetual lease which was binding between the appellant and M/s Asia Press. Surely, the appellant was claiming entitlement on the basis of the clauses of the perpetual lease deed entered into by it with M/s Asia Press and an indication of this is clearly found in issue no.2 which was framed by the trial court, however, none of the courts below have referred to the applicable clauses of the perpetual lease which have been reproduced above by this court.

12. A reading of the aforesaid relevant clauses, and more particularly Clause II(6), makes it clear beyond doubt that even if transfer by the original lessee M/s Asia Press is involuntary ie transfer is through a court auction or any other method of involuntary transfer, unearned increase would still be payable by the transferee like in a voluntary transfer. A transferee no doubt on the conclusion of the auction sale proceedings would step into the shoes of the original lessee M/s Asia Press, however, by stepping into the shoes of M/s Asia Press, the other clauses of the perpetual lease cannot be obliterated. It is not as if DDA was a consenting party to the

auction sale proceedings because it is an undisputed fact on record that the DDA/appellant at no point of time ever consented to transfer of the property in favour of the respondents-plaintiffs without payment of unearned increase. Auction sale proceedings were not conducted by the appellant/DDA/defendant consenting to a term and condition that transferee will get the property without payment of unearned increase. Merely because the auction sale proceedings were auction sale proceedings pursuant to the court orders in execution of a money decree it cannot mean that the court order of an auction sale can in any manner whittle down or obliterate the terms of the perpetual lease between the appellant and the original lessee/M/s Asia Press.

13(i) At this stage, it is relevant to mention; and though this has not been argued before any of the courts below; that the lease deed which was binding between the appellant/DDA/defendant and M/s Asia Press was granted under the Government Grants Act, 1895. Sections 2 and 3 of the Government Grants Act, 1895 specifically provide that contractual clauses of the documents/deeds executed under the Government Grants Act will prevail notwithstanding anything contained in any other law to the contrary. Government Grants Act was introduced by the legislature to give primacy to

the clauses of deeds entered into by the Government or governmental authorities with private citizens if the transfer of the property was under the Government Grants Act. The need for Government Grants Act was because certain sections such as Sections 9 and 10 of the Transfer of Property Act, 1882 provided that on a transfer of an ownership interest in a property the transferee can enjoy the property ignoring the restrictions in the documents of transfer. By virtue of the provisions of the Government Grants Act, in spite of the provisions of the Transfer of Property Act to the contrary, the clauses in the transfer documents executed by the government or the governmental authorities under the Government Grants Act were to prevail and therefore there could be clauses which were different than the obligations which are contained in any law dealing with properties in India.

(ii) In the perpetual lease deed binding the appellant and M/s Asia Press, in para 11 it is specifically mentioned that the lease is granted under the Government Grants Act. For this additional reason of applicability of the Government Grants Act I hold that the Clauses of the perpetual lease deed executed between the appellant and M/s Asia Press will prevail notwithstanding any law to the contrary, and therefore, appellant was entitled to payment of the unearned increase in accordance with the contractual clauses contained in the perpetual lease deed.

(iii) I am in fact surprised by the conclusions arrived at by the courts below and which have been arrived at without referring to the very clause which was in question. How that can be done, I do not understand, but all that I can say is that the same amounts to gross perversity. I therefore hold that appellant in terms of the Clause II (5) & (6) of the Perpetual Lease was entitled to claim the unearned increase.

14. So far as the conclusion of the first appellate court that the respondents-plaintiffs stepped into the shoes of M/s Asia Press, the said conclusion is wholly perverse if the conclusion is intended to transfer the lessee rights to the respondents-plaintiffs without payment of the unearned increase. As already stated above, auction sale proceedings were not with the consent of the appellant/defendant/DDA ie the appellant/defendant/DDA had agreed to the auction sale proceedings by agreeing to transfer the rights of the lessee M/s Asia Press to a third person such as the respondent-plaintiff without payment of the unearned increase. This conclusion of the first appellate court in that the respondents/plaintiffs can become transferees of the lessee rights of M/s Asia Press without payment of unearned increase is therefore wholly illegal and perverse and is accordingly set aside.

15(i) So far as the aspect that there were earlier judgments which operated against the appellant as *res judicata*, nothing can be more astonishing and perverse in holding so. The so-called judgment dated 18.9.1979 is in fact a two line order of dismissal in default of the objections. I fail to understand that how courts can hold orders of dismissal in default of a case/objections as amounting to *res judicata*. Way back in 1966 Supreme Court in the case of ***Sheodan Singh Vs. Smt. Daryao Kunwar AIR 1966 SC 1332*** has held that a dismissal in default will not result in *res judicata* because there is no element of 'heard and finally decided' as required by Section 11 CPC. Therefore, the courts below have committed a gross illegality and perversity in holding the two line order of dismissal of the objections as *res judicata*.

(ii) So far as the judgment dated 14.2.1980 of Sh. Jagdish Chandra ADJ is concerned, and which dismissed the objections of the appellant/DDA in the execution petition filed against M/s Asia Press, the same will also not be *res judicata* on the aspect of unearned increase inasmuch as what was argued in the objections which was decided in the judgment dated 14.2.1980 was that there was no right in the court to conduct auction sale proceedings. Therefore, the appellant/defendant/DDA had claimed in the objections that

there could not at all be transfer of the rights of the M/s Asia Press, and which issue was decided against the appellant, however, that is not the issue of present proceedings because in the present proceedings/suit we have to proceed on the finality of the auction sale proceedings and the issue is of applicability of Clause II (5) & (6) of the perpetual lease which talk of payment of unearned increase to the appellant/defendant/DDA for effecting mutation and transfer in its records of the lessee rights of M/s Asia Press in favour of the respondents-plaintiffs. Therefore, the issue in the present case was not an issue in the objections which were dismissed by the court of Sh. Jagdish Chandra, ADJ on 14.2.1980, and accordingly that judgment cannot operate as res judicata against the appellant-defendant.

16. In view of the above, the substantial questions of law are answered in favour of the appellant-plaintiff. The appeal is allowed by setting aside the impugned judgments of the courts below and the suit of the respondents/plaintiffs will accordingly be dismissed. Parties are left to bear their own costs.

MAY 21, 2014
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VALMIKI J. MEHTA, J.