

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 19.01.2015

+ **W.P.(C) 3573/2012 & CM 7541/2012**

**LALA DIWAN CHAND TRUST
THROUGH ITS TRUSTEE MR. RAJENDRA
KUMAR GUPTA**

..... Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr P.S. Bindra.

For the Respondent : Mr Arvind Shah for NDMC.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner impugns communications dated 23.11.2010 and 06.05.2011 calling upon the petitioner to pay 50% of the unearned increase, in respect of the property bearing no. 12/172, Jor Bagh Market, New Delhi (hereafter 'the said property'), as a condition for substitution of the said property in the name of the petitioner.

2. The controversy to be addressed is whether a person who receives a bequest of an immovable property, by virtue of a Will, is liable to pay unearned increase in respect of the said property, for the same to be mutated in his favour or for his name to be substituted as a lessee in place of the original lessee.

3. The brief facts necessary to consider the aforesaid controversy are as under:

3.1 A lease in respect of the said property was executed between the President of India and M/s Verma Brothers. Thereafter, M/s Verma Brothers sold the said property to Smt. Prakashwati Awal and her name was substituted as a lessee in place of M/s Verma Brothers on 28.06.1962.

3.2 Smt. Prakashwati Awal expired on 24.08.1976 and by virtue of a Will executed on 24.11.1973, the said property was bequeathed in equal shares to the petitioner and M/s Sat Bharawan Arya Girls Sr. Sec. School (hereafter 'SBAGSS School'). The petitioner paid a sum of ₹30 lacs to SBAGSS School towards acquiring SBAGSS School's 50% share in the said property. On receipt of the said amount, SBAGSS School, by a letter dated 10.09.2008, acknowledged the receipt of ₹30 lacs as full and final consideration for its share in the said property and also gave its no objection for the said property to be mutated in the name of the petitioner.

4. The learned counsel for the petitioner submitted that Smt. Prakashwati Awal did not have any class I heirs and, therefore, had willed the said property in favour of the petitioner and SBAGSS School. It was submitted that the bequest in favour of the petitioner was not for any consideration but was in the natural course of events as the petitioner trust was formed by the late husband of Smt. Prakashwati Awal and his two wives, namely, Smt. Sat Bharawan and Smt. Prakashwati Awal. In the given circumstances, it was only natural that Smt Prakashwati Awal bequeathed the said property in favour of the petitioner trust. The learned

counsel for the petitioner also referred to a judgment of this Court delivered in CS(OS) 598/1978 whereby this Court had observed that in view of the fact that Smt. Prakashwati Awal had died issueless, her desire to bequeath the said property to a charitable trust appeared to be quite natural. He submitted that the transmission of the said property in favour of the petitioner was not a camouflage or subterfuge for any transaction entered into for a consideration.

5. The learned counsel for the respondent stated that there was no dispute as to the petitioner's right to the said property, being the beneficiary of Smt. Prakashwati Awal's estate by virtue of her Will. He, however, submitted that as per the respondent's guidelines, the petitioner would be liable for payment of unearned increase, as exemption from payment of unearned increase is granted only in cases where the transfer of property is amongst the members of the same family at the time of succession. He referred the Clause 5 of the relevant guidelines that reads as under:-

“5. UNEARNED INCREASE:

- (i) Unearned increase shall not be demanded in case of transfer of property among members of the same family at the time of succession. “Family” for this purpose shall mean “husband/wife, as the case may be, mother, father, son, daughter, grand son/daughter, as the case may be.
- (ii) In case of transfer of property subsequent to such substitution, either by way of Relinquishment Deed/Release Deed/Gift Deed in favour of a person who is not in the direct line of succession of the recorded lessee shall be treated as transfer and unearned increase shall be recoverable.”

6. The learned counsel for the respondent further pointed out that the petitioner had acquired interest with respect to 50% of the said property by acquiring the same from SBAGSS School and not by virtue of being a beneficiary of Smt. Prakashwati Awal's estate and, therefore, the petitioner would be liable to pay unearned increase with respect of SBAGSS School's share of the said property.

7. I have heard the learned counsel for the parties.

8. At the outset, it is necessary to observe that there is no dispute that the petitioner is entitled to the said property by virtue of being a legatee of Smt. Prakashwati Awal (to the extent of 50%) and by virtue of acquiring the balance share from SBAGSS School. The only question that remains is whether the petitioner is liable to pay unearned increase for substitution of its name in place of Smt. Prakashwati Awal.

9. The perpetual lease executed between the President of India and M/s Verma Brothers (the initial lessees) specifically provided that the lessee would not be entitled to assign or transfer the demised premises without obtaining approval from the lessor/Chief Commissioner of Delhi. It was also specifically provided that the lessor would be entitled to claim and recover unearned increase, the difference between the premium already paid and the current market value of the land at the time of transfer. Clause 13 of the perpetual lease is relevant and is quoted below:-

“13. The Lessee shall before any assignment or transfer of the said premises hereby demised or any part thereof obtain from the Lessor or the Chief Commissioner of Delhi or such officer or body as the Lessor may authorise in this behalf

approval in writing of the said assignment or transfer and all such assignees and transferes and the heirs of the Lessee shall be bound by all the covenants and conditions herein contained and be answerable in all respect thereof.

PROVIDED also that the Lessor shall be entitled to claim and recover a portion of the unearned increase (i.e. the difference between the premium already paid and current market value) in the value of land at the time of transfer (whether such transfer is an entire site or only a part thereof) the amount to be recovered being 50 per cent of the unearned increase.”

10. The rationale for demanding unearned increase in cases where the property is transmitted by way of a Will is to ensure that the parties are unable to escape payment of unearned increase by disguising a transaction of sale and purchase of the leasehold property as a bequest. It has been a well established practice in Delhi for persons to enter into transactions for sale and purchase of immovable property by execution of various documents such as General Power of Attorney, Affidavits, Will etc. Undisputedly, in these circumstances, the demand for unearned increase would be warranted. The guidelines exempt payment of unearned increase where a lessor bequeaths the leasehold property in favour of his natural heirs. This only indicates that the respondent did not intend to recover unearned increase in cases of genuine transmission of property by a testator. In **DDA v. Vijaya C. Gurshaney: (2003) 7 SCC 301** the rationale of the policy to charge unearned increase in respect of properties sought to be transferred by way of a Will was explained as under:-

“10. The rationale behind the formulation of its policies and guidelines issued by DDA is to curb illegal transactions in favour of persons not of blood relation of the allottee, being

practised rampantly and the property being transferred by an underhand sale in the garb of will and power of attorney etc. DDA has formulated a policy that in such cases the Department would ask for 50% of unearned increase in the value of property. It is always open to the appellants to inquire whether an alleged will is in actuality a sale in the garb of will in total disregard of the policy decision of the authority. Merely because probate/letters of administration are granted, would not preclude DDA from so inquiring. It must be grasped that DDA has been given no notice of the testamentary proceedings. Therefore, it would have no right to appear or oppose such proceedings. As already said, DDA is a creature of the statute and any policy decision or guidelines formulated by such Authority will have a binding effect on the parties, in absence of rules to the contrary.”

11. The Supreme Court upheld the policy of DDA to demand unearned increase in the value of land in cases where the leasehold property was sought to be transacted under the garb of a Will. However, in cases where Will represented a genuine desire of a testator to bequeath its property to a particular legatee, a demand for unearned increase would not be sustainable.

12. There is no reason to sustain a distinction between the bequest to the family members or other persons if there is no doubt as to the genuineness of the transaction. In case of a bonafide transmission of property by a Will, no distinction could be drawn on the basis of the relationship between the testator and the legatee.

13. A Coordinate Bench of this Court in the case of **Aroti Das v. Union of India**: W.P.(C) 8081-82/2005 had considered the challenge relating to the demand of unearned increase by L&DO in respect of the immovable

property bequeathed by a lessor to one of his relatives who did not fall within the definition of a family member under the guidelines. It is noteworthy that the language of the guidelines applicable in that case was similar to the language of clause (5) of the guidelines as referred to by the learned counsel for the respondent. This Court set aside the demand of unearned increase and held as under:-

“**10.** In the face of these facts, the demand for unearned increase, in my opinion, on a blind application of a policy which dictates that only specified heirs would be recognized and others have to pay unearned increase as a pre-condition for transfer of leasehold rights appears to be utterly unreasonable.”

14. In my view, the decision in the case of *Aroti Das (supra)* would squarely apply insofar as unearned increase demanded in respect of 50% of the said property, bequeathed in favor of petitioner, is concerned.

15. The remaining 50% share in the said property was acquired by the petitioner by payment of ₹30 lacs to SBAGSS School; the petitioner cannot claim that the said share has been acquired by virtue of being a legatee of late Smt. Prakashwati Awal's estate. I am inclined to accept the contention of the learned counsel for the respondent that in respect of this share of the said property, the petitioner would be liable to pay unearned increase.

16. Accordingly, the petition is partly allowed and the pending application stands disposed of. The impugned communications dated 23.11.2010 and 06.05.2011 are set aside. It is directed that the respondent will recalculate the unearned increase payable with respect to only 50% share of the said property and communicate the same to the petitioner.

Further, the respondent shall substitute the name of the petitioner in place of Smt. Prakashwati Awal, on the petitioner making the payment of the unearned increase in respect of 50% share in the said property and other applicable charges.

VIBHU BAKHRU, J

JANUARY 19, 2015
RK

