

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

Reserved on: 13.07.2016
Pronounced on: 03.08.2016

+ **EFA(OS) 40/2015, C.M. APPL.20731-20732/2015**
DIN COOPERATIVE HOUSING SOCIETY LTD.....Appellant
Through: Sh. Rakesh Munjal, Sr. Advocate with
Sh. D.S. Patial and Sh. Mohd. Arif, Advocates.

Versus

SH. A.S. RANA AND ORS.Respondents
Through: Sh. Dhanesh Relan with Ms. Akshita
Manocha and Sh. Harshit Malhotra, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal is against an order made in the course of execution proceedings. The learned Single Judge held that the respondent/applicant, the Delhi Development Authority (DDA) was entitled to 50% unearned increase from the proceeds of sale of unallotted flats that belonged to the appellant.

2. The brief facts are that an arbitral award was made (dated 24th October 2005) in the dispute between one A.S. Rana, (the Decree Holder, hereafter "DH") and the appellant, Din Cooperative Group Housing Society Ltd. (hereafter "the Society", the Judgment Debtor also "JD") in terms of which, the DH was entitled to recover from the JD ₹ 75,19,230 together with interest @12% pa from 1st January 2000 till the date of payment along with costs of ₹ 50,000. The society's challenge to the award under Section 34 of

the Arbitration and Conciliation Act, 1996 failed; equally unsuccessful was its appeal, FAO (OS) No.154/2007 which was dismissed by the Division Bench. The DH filed execution proceedings (Ex.P. No. 144/2013). On 19th July, 2013, learned counsel for the JD, on instructions, informed the Court that it would have no objection if its Flat Nos. 53 and 164 were auctioned to satisfy the decree. The Court appointed a Court Commissioner to conduct the auction. At the public auction Mr. Amit Khanna was the successful bidder for Flat No. 53.

3. There was a dispute regarding the bid offer of Ms. Kanika Marwah for Flat No. 164; eventually, this court decided the matter and in the *inter se* bidding, Ms. Marwah was the highest bidder, with her bid for ₹1.01 crores for Flat No. 164, which was confirmed by the Court. On the date of the bid confirmation, DDA pressed its application EA(OS) No.671 of 2013 seeking impleadment. The Court recorded the DDA's argument that its objection was *"only limited to unearned increase in terms of the lease deed applicable to flat nos. 53 and 164"*. The Court disposed of the application stating that as and when an application is filed by the DDA on that aspect, it would be considered. It was further observed that *"this aspect will be borne in mind by the successful bidder."* The DH's claim under the decree was satisfied to the extent of ₹1.59 crores; the balance was directed to be kept in deposit. It was in these circumstances that DDA preferred the application which was eventually allowed.

4. The DDA's argument, which found favour with the learned Single Judge, was that in terms of the Lease Deed executed on 17th December 1996, between the DDA and the Society, particularly Clause II (4) (c), (d)

and second proviso to Clause II (4) (e) of the lease deed the unearned increase was payable. It was argued that being an unallotted flat, the Society had no right to sell it and in fact, DDA was entitled to it as the society was under an obligation to surrender it in the first instance. The society had argued- without success- that DDA had changed its policy in terms of which it would collect conversion charges as and when flat purchasers applied for conversion from leasehold to freehold and would not insist on unearned increase. It is further submitted that the Society cannot be considered to be an allottee for the purposes of the lease deed and, therefore, the unearned increase could not be collected from it. The learned Single Judge, *inter alia*, held that:

"(ii) Since the two flats in question were not allotted, they were not conveyed or taken possession of by any allottee. Therefore, in terms of the Clause (d) above, the Society was to surrender the flats to the lessor (i.e. DDA) which in turn was free to dispose them in any manner it sought fit. However, the Society did not do so. Instead it offered the flats for auction sale in order to meet its liability to pay the decretal amount.

(iii) Thus the Society itself was the beneficiary of the public auction sale of the flats and was therefore the recipient of the 'unearned increase'. , it is the Society which should enjoy the unearned increase.

(iv) Under the second proviso to Clause (e), the DDA has the right to recover the unearned increase...."

5. It is urged on behalf of the society, i.e the appellant, by Mr. Munjal, learned senior counsel, that DDA deliberately concealed the fact that it is "the allottee" only who is liable to pay the alleged unearned increase/conversion charges and not the lessee in terms of clause 4 (c) of the

Perpetual Lease entered between DDA as lessor and the JD/Society as Lessee. Particular reference is made to the said provision, Clause II (4) (c):

“(c) A member of the Lessee to whom a dwelling unit will be conveyed as herein provided is hereinafter referred to as “the allottee” and the dwelling unit to be conveyed to him as “the said dwelling unit”.

6. Learned counsel submits that the DDA relied on the terms of the Lease Deed, which are unenforceable, because they are based on the *Delhi Development Authority (Management and Disposal of Housing Estates) Regulations, 1968*, which apply to group housing clusters and colonies built and managed by the DDA. The allotment and conditions governing use of land by co-operative societies, on the other hand, is governed by Rule 6 (vi) of the *DDA (Disposal of Developed Nazul Lands) Rules, 1981*. If this distinction were to be kept in mind, the mere fact that the Lease Deed contained conditions that are not part of the rules governing *nazul* rules would mean that the society is not bound by such conditions. It is argued that in any event, the condition regarding surrender of unallotted flats cannot apply to co-operative societies, which pay land cost at rates higher than those offered to individuals. It was submitted that there is no authority of law to justify DDA's demand for unearned increase, because it never paid for the construction of flats by the co-operative society.

7. Mr. Dhanesh Relan, argues that DDA was entitled to recover the unearned increase for the flats in terms of the lease deed executed between it and the Society. He submits that even if it were held that the auction purchasers were not liable to pay the unearned increase, then the Society would be liable to pay. Reliance was placed on the DDA's resolution of

23.01.1985, according to which the conditions in second proviso to Clause II (4) (e) were incorporated.

8. Learned counsel relied on the decisions reported as *Delhi Development Authority v Vijaya C. Gurshaney* 2003 (7) SCC 301; *Delhi Development Authority v Sheri Roshan Lal Chopra & Ors* 2014 (210) DLT 558 and *M/s Monoflex India (P) Ltd v Commissioner of Income Tax* 2004 (1) AD (Del) 37. It was submitted that in terms of the law declared in *Gurshaney (supra)*, DDA is entitled to claim unearned increase, regardless of the nature of the transfer, as long as it is not with its permission. Elaborating, it is submitted that the society was permitted to build flats for all its members and not for retaining some of them, to be sold at a premium. Since this was sought to be resorted to, the transaction was commercial- and not a conveyance to its member. Therefore, it had to be treated as a sale or transfer, thereby justifying the demand for unearned increase.

9. It is evident from the above discussion that the demand for unearned increase payment arose for the first time, in the execution proceeding. It is immediately noticeable that the DDA made a demand on the basis of 50% of the auction price, deeming that to be the market price for the flat. Now, to justify this demand, the DDA relies on the resolution of 23.01.1985 which contains a *verbatim* reproduction of second proviso to Clause II (4) (e) of the Lease Deed. Clause II (4) (c), (d) and (e) of the lease deed read as under:

“(c) A member of the Lessee to whom a dwelling unit will be conveyed as herein provided is hereinafter referred to as “the allottee” and the dwelling unit to be conveyed to him as “the said dwelling unit”.

(d) If any of the dwelling units is not conveyed or is surrendered by any of the allottees or is taken possession of by the lessee in any manner whatsoever the Lessee shall forthwith surrender such dwelling unit to the Lessor and the Lessor may pay such compensation and make such reduction in the yearly rent as the Lessor may in his absolute discretion think proper. The Lessor may dispose of such dwelling unit in any manner and to whomsoever he thinks proper.

(e) The allottee shall not transfer, assign or otherwise part with the possession of the whole or any part of the said land and/or the flat except with the previous consent of the lessor in writing which it shall be entitled to refuse in its absolute discretion.

Provided that in the event of transfer being made without obtaining previous consent of the lessor in writing, such transfer shall not be recognized by the lessor and it shall be open to the lessor to terminate the lease.

Provided further that in the event of the consent being given the lessor may impose such terms and conditions as it thinks fit and the lessor shall be entitled to claim and recover the portion 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 the amount to be recovered, being 50% of the unearned increase and the decision of the lessor in respect of the market value shall be final and binding.”

10. This court is of opinion that there is a basic fallacy in the judgment of the learned Single Judge. The allotment of the land took place in 1995; the construction was completed a few years later. It is undeniable that in terms of the policies of the Govt of NCT of Delhi, allotment of flats to members of co-operative societies is with the approval of the DDA. In fact, the draw of lots is under its supervision. Apparently, the two flats which were ultimately sold, were allotted to some individuals, who for some unknown reason, did

not pay, or did not seek possession of those units. Whatever be the reason, the society continued in possession. DDA never cared to seek any clarification. Now, after lapse of 12 years, in the course of execution proceedings at the behest of a Decree Holder, who wishes to realize his dues, the DDA is, for the first time, asserting a claim towards unearned increase. This delay in asserting its so-called right itself should have defeated its application. That apart, the Court notices that at no stage did the DDA ever raise a demand from the society, or seek its clarification. In these circumstances, the learned Single Judge erred in proceeding to hold that the amounts were due and owing to DDA.

11. What cannot be lost sight of is that the proceedings were by way of execution. While a garnishee order by the creditor of a judgment debtor, seeking to appropriate proceeds, is understandable, the nature of DDA's claim is such that adjudication was required by the court, which could not have assumed that the demand itself amounted to a valid debt. Nor is DDA's claim in the nature of a revenue demand, which would have justified the summary nature of the order made. In short, the Court could not, without a valid adjudication of the rival claims, have directed that the proceeds of sale should be made over to anyone other than the DH.

12. As far as the reasoning is concerned, this court finds the JD's argument merited, as far as it deals with the lack of legal sanction for the demand. Allotment of land in terms of the DDA (Disposal of Developed Nazul Lands) Rules, 1981, Rule 6 explicitly deals with allotment to co-operative societies. Neither the said Rules, nor the forms attached thereto, make a reference to any condition akin to Clause II (4) (d) or (e). During the hearing

too, learned counsel was unable to justify the basis for such condition. The DDA is governed in all its function by Rules and Regulations. When the entire field of allotment and conditions relating to such allotment, to co-operative societies is governed by rules which clearly spell out the conditions and disqualifications, the introduction of clauses that have no basis in such rules, and insistence that they should be given effect, because parties have agreed to it, would be facially illegal. In *Shri Sitaram Sugar Mills v Union of India* [1990 (3) SCC 223], a Constitution Bench of the Supreme Court held that:

"Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterized as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See Leila Mourning v. Family Publications Service [411 US 356]. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorized end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires": per Lord Russel of Killowen, C.J. in Kruse v. Johnson (1898) 2 QB 91."

13. As far as cases cited by the DDA are concerned, *Gurshaney (supra)* is an authority for the issue that a probate granted in respect of a will is inconclusive with respect to the DDA's right to consider whether the bequest in favour of a non-relative is genuine, for deciding if the testamentary transfer calls for dealing unearned increase. In the other two cases, the court had ruled that a compulsory acquisition of DDA leasehold property would

not attract unearned increase demands in the hands of a purchaser. In the present case, however, the flat was never allotted; it was always with the society. It presumably did not recover the cost- which it would have, normally, if the flat were allotted. The society's agreement with its contractor resulted in dispute over payments. The society eventually lost in arbitration proceedings. In execution of the decree, it had to sell the two flats. In that sense, there is an involuntariness to the entire transaction. Without a clear liability that can be validly invoked in law, in the form of an award or adjudicated claim, DDA cannot, in the opinion of this court, assert its contractual demand (its pound of flesh) which does not seem rooted in any legal provision or principle.

14. For the foregoing reasons, the appeal has to succeed. EFA(OS) 40/2015 is allowed. The impugned order of the learned Single Judge is set aside; the DDA's application, therefore, stands rejected. No costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

AUGUST 03, 2016