

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

Reserved on: 19.03.2018

Pronounced on: 09.07.2018

+ **LPA 398/2016, C.M. APPL.24869/2016**

M/S. MOOLCHAND KHARAITI RAM TRUST AND ORS.

..... Appellants

Through: Sh. Shanti Bhushan, Sr. Advocate with Ms. Medha Sachdev, Ms. Sanjana Sharma and Sh. Sumant Bhushan, Advocates.

versus

UNION OF INDIA

..... Respondents

Through: Sh. Dev. P. Bhardwaj, CGSC, for UOI with Ms. Anubha Bhardwaj, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Appellant (hereafter “trust”) was aggrieved by a decision of the Union Land and Development Office (L&DO) dated 1st September, 2015 rejecting its application for conversion, into free hold rights, of lease hold property in land measuring nine acres at Lajpat Nagar, New Delhi. The trust holds the leasehold rights; the other Appellants are trustees. The Moolchand Khairati Ram Hospital and Ayurvedic Research Institute was constructed on the said land. The L&DO stated that the request for conversion into freehold could not be considered because of pending litigation between the trust and the L&DO, and, that there was no policy for conversion of leasehold into

freehold in respect of hospitals and institutions. It approached this court in writ proceedings under Article 226 of the Constitution of India. A learned Single Judge rejected its writ petition.

2. The facts of the case are that the trust had established and was operating a charitable hospital of considerable repute in undivided India. That institution was given up at the time of partition and was left behind in Lahore, Pakistan. In furtherance of a policy of the Union Ministry of Rehabilitation, to incentivize and rehabilitate "displaced institutions", the trust was allotted nine acres of land at Lajpat Nagar, New Delhi by a letter of allotment dated 17.04.1951. On this land, the trust built and set up a hospital. A formal Lease Deed dated 24.04.1968 was executed between the President of India and the trust for a term of 99 years from 17th April 1951 for construction and use of a hospital. The Appellant contends that the lease is a rehabilitation lease and the land is a commercial land/property. On 1st June, 2015, it applied to the L&DO for conversion of a leasehold hospital land into freehold as per the Conversion Brochure issued by the L&DO in June, 2003 and also paid ₹5,27,75,109/- towards conversion fee. The L&DO, acting for the Union of India, refused to give the freehold rights, resulting in the trust approaching the court under Article 226 of the Constitution.

3. After hearing the parties and considering the material relied upon by them, the learned Single Judge held that the Appellant could not be given the relief. He firstly noticed a Division Bench ruling in *Union of India v Hotel Excelsior* [2013 (1) ILR 157] and held as follows:

“12. As would be noticed axiomatically from the above, the issue raised by the petitioners, if not fully, is at least partly covered by the dicta aforesaid of the Division Bench of this Court. This writ petition was filed, perhaps, in ignorance of the said judgment and for this reason only, neither does the petition deal with it nor the counsel for the petitioners, after attention being invited thereto, has not submitted anything with respect thereto. The only thing which remains for investigation is the contention of the senior counsel for the petitioners, of the subject lease being a commercial lease eligible for conversion under the Policy aforesaid.

13. The petitioners in the paper book have annexed a copy of the judgment dated 28th April, 2014 of the Division Bench of this Court in W.P.(C) No. 1478/2012 supra filed by the petitioner No. 1 Trust impugning the applicability of the Policy of the government providing for treatment free of cost to 25% OPD patients and 10% IPD patients of the hospital of the petitioner No. 1 Trust on the subject land. On a perusal thereof, it appeared that the stand of the petitioners as in this petition, of the lease of the subject land being for commercial purpose and being thus eligible for conversion into freehold under the Policy contained in the Brochure aforesaid of the respondent L&DO, is contrary to the stand taken by the petitioner No. 1 Trust in W.P.(C) No. 1478/2011. While reserving judgment, the file of W.P.(C) No. 1478/2012 was requisitioned and has been perused. The petitioner No. 1 Trust in the said writ petition is not found to have anywhere pleaded that the lease in its favour is a commercial lease. Rather, the flavour of that petition is that the lease is for the purpose of setting up and running of a hospital on secular/non-sectarian and non-communal basis.

14. The petitioner, as Annexure P-5 to the petition, has filed the Minutes of the Meeting held on 10th June, 1949 of the Ministry of Rehabilitation regarding allotment of sites at concessional rates to charitable institutions in pursuance to which the land aforesaid was allotted and leased to the petitioners. I highlight that the same was for allotment of land to charitable institutions and not for commercial institutions. The same also

shows that the premium of the land so allotted was determined taking into consideration that the premium at a market rate may not be easily payable by a charitable institution much less by a displaced institution. It was also directed that a close scrutiny of the charitable institution seeking allotment should be made.

15. The petitioners have similarly also filed the Summary dated 15th April, 1953 prepared by the Ministry of Works, Housing and Supply, Government of India for the Cabinet on the subject of "Grant of land on concessional terms". The recital thereto notices that a number of requests "for concessional grant of land in Delhi, from social, cultural, charitable and political or semi-political organizations" were pending. The same also notices that the earlier decision for allotment of land to trusts and institutions at 'nominal premium' was approved and it was further stipulated that the institutions being granted concession should be charitable institutions to "be run for good of the public and should be non-profit making". It was further stipulated that it should be entirely in public interest to locate the institution in Delhi. It was yet further stipulated that while the schools and hospitals should be given lands at nominal costs, the other non-profit making institutions for social or cultural purpose may be allotted land at market value.

16. A perusal of the lease deed dated 24th April, 1968 in favour of the petitioner No. 1 Trust also shows the demise of the premises and building thereon to be only for purposes of hospital and for the construction of residential accommodation for the House Surgeons, Nurses, Compounders and some menial staff forming a part of the Hospital Staff and no other purpose.

17. The petitioners have shied away from pleading whether the property aforesaid for the purposes of Property Tax is assessed at commercial rates or the petitioners have claimed exemption from payment of Property Tax on account of being a charitable institution. Similarly, the petitioners have shied from disclosing how its income is assessed for tax under the Income Tax laws.

The petitioners cannot, in this petition, contend that the lease of the land is a commercial one and before other authorities contend their activities to be non-commercial and charitable.

18. Under the Master Plan - 2021 also, institutional land is distinguished from commercial land. The user prescribed of the subject land under MPD-2021 is found to be institutional and not commercial.

19. Note under Clause 1.5 supra of the Brochure, expressly provides that the properties which are not specifically mentioned in Clauses 1 to 1.5 above are not covered by the concerned Policy and expressly mentions institutional allotments. The allotment in favour of the petitioners clearly is an institutional allotment. The allotment for the purposes of a hospital is more akin to the allotments for institutions, press, hotels, cinemas etc. as mentioned in the note, rather than commercial allotments.

20. Merely because the L&DO, for the purpose of standardising the format of the leases to be granted by it has in its Compendium of Information clubbed the leases granted under the Displaced Persons (Compensation and Rehabilitation) Act into residential, commercial and industrial only, will not change the nature and character of the lease granted in favour of the petitioner No. 1 Trust from what it otherwise expressly professes, as evident from aforesaid documents. Moreover, the lease aforesaid is a government grant which, as per Section 3 of the Government Grants Act, 1895, takes effect according to its own tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding and to which, as per Section 2 of the Government Grants Act, the provisions of Transfer of Property Act, 1882 do not apply. The subject grant in the form of lease of land for 99 years in favour of petitioner No. 1 Trust, as per its own tenor is for hospital purpose only and which hospital, as per other documents afore-noticed was to be a charitable one and not a commercial one. The petitioner No. 1 Trust having obtained the lease on terms as applicable to charitable institutions, is now estopped from contending the

lease in its favour to be falling in the category of 'commercial'. In fact I doubt that the petitioner No. 1 Trust can at all engage in commercial activities.

21. It is also a term of the lease of the land in favour of petitioner No. 1 Trust that if it is proved to the satisfaction of the lessor i.e. the President of India or the Chief Commissioner of Delhi whose decision shall be final that the demised premises have ceased to be used for the purpose of hospital or that the said hospital is improperly or inefficiently managed then it shall be lawful for the lessor to re-enter the land and building thereon and the petitioner No. 1 Trust as lessee would then only be entitled to compensation not exceeding the premium paid alongwith the value of the building. The said clause also unequivocally indicates that no ownership rights were conferred on the petitioner No. 1 Trust as lessee and that the lease is not commercial. Moreover, once the land is converted to freehold, the UOI will loose this important right under the lease, ensuring continued availability of a properly and efficiently managed hospital for the citizens of Delhi.”

4. The impugned judgment rejected the Appellant’s argument that the plot in question was commercial. The learned Single Judge relied on a previous ruling reported as *Sachin J. Joshi v. Lieutenant Governor*[187 (2012) DLT 317] and held that the Delhi Development Act, 1957 (“DD Act”) does not define "commercial" and the classification in the Delhi Master Plan for 2001 is also restricted to residential, industrial, commercial and other purposes only. *Sachin Joshi (supra)* also noted that Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (“Nazul Rules”) provided for allotment of Nazul Land for public utilities, community facilities, open spaces, parks, playgrounds, residential purposes, industrial and commercial uses only. The learned Single Judge, thereafter observed that:

“23. However, a perusal of Master Plan for Delhi, 2021 shows that under the head "Major Highlights of the Plan", "Health Infrastructure" is listed separately from "Trade and Commerce" and in Clause 3.3.2 titled "Guidelines for Redevelopment Schemes", hospitals, dispensaries, colleges, schools, police stations, fire stations, post offices, local government offices, parking etc. have been clubbed under "Public and Semi-public uses and services". Similarly, in Table 7.2 thereof prescribing the 'Norms for Land Distribution in Industrial Areas', hospital is listed under the head of "Facilities" i.e. separately from "Commercial" which includes Shopping Centre, Petrol Pumps, Guest House/Budget hotels, Lodging and Boarding, Service and Repair shops, Communication/Telephone Exchange, etc. Even in Chapter 13 thereof titled "Social Infrastructure", hospitals are dealt with separately. Even while sub-dividing use zones under Chapter-17 titled "Development Code", hospitals find mention under the head "Public and Semi-Public" facilities as distinct from commercial. It is thus obvious that the hospital would not fall in the category of "commercial".

Appellant's contentions

5. Mr. Shanti Bhushan, learned senior counsel, highlighted that the land, i.e. 9 acres was allotted by the Department of Rehabilitation. He relied upon the compendium of information, issued by the Union Ministry of Urban Development, to say that the lease in question was entered into pursuant to the allotment, had to be classified as residential, commercial or industrial and that the form in which the lease was executed in this case was in accordance with the Appendix XIII. It was stated that the land allotted to the Trust, therefore, could be considered either industrial or commercial, both of which were eligible for conversion in terms of the Central Government's policy.

6. Learned senior counsel highlighted that even the Union considered the land as commercial and relied upon two inspection reports, prepared for this purpose which are part of the record (dated 26.12.2007 and 04.10.2013). Both these inspection reports, it is emphasized, clearly set out that the use of the property was for the purpose of a hospital and that it amounted to commercial use. It is also submitted that the learned Single Judge's observations with respect to payment of municipal property tax are erroneous. Learned senior counsel in this context relied upon the property tax returns for the period 2014-15 and to demonstrate that the Trust paid property tax at a commercial rate i.e. @ 20% of the value of the property on the ground that it was "special commercial" institution. These returns were self assessed documents, were approved and accepted by the local municipal authorities in their terms.

7. Mr. Bhushan also relied upon a tabular chart containing details of land allotments made by the Union Ministry of Urban Development and submitted that this list contains particulars relating to institutional allotments by L&DO from 1930 to 2002. It was pointed out that significantly the allotment to the Trust and the hospital is not listed in this document. Learned senior counsel argued that the inference consequently, is that even according to the Union of India the demised premises are not institutional but rather are to be treated as commercial.

8. The Appellant's learned senior counsel argued that the judgment in *Hotel Excelsior (supra)* was not properly appreciated having regard to the facts and circumstances on the record in this case. Relying heavily upon the terms of the lease deed, it was argued that the Appellant Trust had paid premium for land. Thus, a premium, it is stated, is always treated at par with

price and it amounts to a capital receipt separate from rent. In the context of a lease, it is in the nature of a price for the lease and a premium in fact amounted to consideration for the conveyance which resulted in conferment of ownership rights.

9. It was argued that para 23 of *Hotel Excelsior (supra)*, while observing the rationale behind the conversion policy of the Government, had relied upon the judgment passed in *Bal Kishan Chhabra vs. UOI* [127 (2006) DLT 460] where it was observed that the “*the scheme for free hold conversion was thus, found to be intended for earning revenue for the government through conversion charges.*” The court found that Hotel Excelsior’s lease provided for a rent of ₹1,56,11,983/- p.a. with increase by 30% every 10 years. Thus, such lease, which was given on terms beneficial for the Government was ineligible for conversion.

10. The Appellant urged that the demise at a nominal rent of ₹900 per annum later increased to ₹9000 per annum, and at the end of 99 years the Government would only be able to earn ₹8,91,000. Upon conversion, however, it was pointed out, the charges alone will be approximately ₹5.27 crores, on which even at the rate of 12% p.a. the Government will get ₹55 lacs per year as interest. Learned senior counsel also submitted that *Excelsior* had listed 6 elements in the leases of which free-hold conversion was being allowed each of which are present in the case of the first Appellant-trust.

- (i) The Trust was granted the lease by the Rehabilitation department in the format prescribed by the L&DO manual Appendix XIII.
- (ii) The Trust had to pay both premium and rent. Thus, in the present case, ownership rights had been conferred onto the trust.

- (iii) The lease deed executed in favour of the Trust does not contain any stipulation for security deposit and thus, meets the test.
- (iv) Clauses IV and VII of the lease deed executed with the Trust clearly provide for payment on accretions to the land, upon re-entry or expiry of lease
- (v) The extant case is admittedly a lease deed executed with the Government and not through a share purchase agreement.

11. It is thus argued that the documents relating to the allotment of land to the Trust, as well as the Lease Deed show that the allotment was by the Department of Rehabilitation in which, on account of a charge of premium, ownership rights had also been conferred. Further, it was a built up commercial plot, as a hospital building has been built thereupon. Thus, the allotted land qualified for conversion under Clause 1.5 of the Conversion Policy. Learned senior counsel argued that the 'note' to Clause 1.5 only applied to property which is not otherwise covered under clauses 1.1 to 1.5 and thus, does not apply to the Trust as it is squarely covered under clause 1.5. Moreover, hospitals have been consciously left out from the note.

12. It was submitted that the Trust's application for conversion was rejected by L&DO vide letter dated 01.09.2015 on two arbitrary grounds, viz (i) pending litigation between the Lessee and Lessor and (ii) that there was no policy for conversion in respect of hospitals/institutions. The senior counsel argued that the materials on record clearly established that the Trust's case was covered by the conversion policy. Dealing with the rejection on the ground of pending litigation it was urged that Clauses 20.2 and 20.3 of the Policy relate to 'pending litigation' as a ground for rejecting

conversion applications both of which provide for litigation relating to disputes arising out of the lease itself.

13. Mr. Bhushan emphasized that the litigation relied upon by the Union in the case of the Trust relates to the Government's executive order requiring all hospitals which had been allotted lands by the Government to provide free treatment to poor patients. This litigation cannot be regarded as litigation between the lessor and the lessee because the obligation sought to be imposed by the Government is not by exercising its rights as the lessor but as a sovereign Government under Article 162 of the Constitution. Counsel relies on *Union of India v Vinay Kumar* [AIR 2005 Del 41] in this regard.

14. It was argued that medical relief by itself is regarded in law as a charitable activity because of Section 2(15) of the Income Tax Act as well as Section 2 of the Charitable Endowments Act, 1890. To say so, the Appellant relies on *Dharamadeepti v. Commissioner of Income Tax, Kerala* [(1978) 114 ITR 454] at page 458; *Aditanar Educational Institution v. Addl. CIT* [(1997) 224 ITR 310] and *Venu Charitable Society & Anr. vs. Director General of Income Tax* [(2017) 393 ITR 63]

Union's arguments

15. It is argued on behalf of the Union that the land allotment to the Trust was of institutional land for the purpose of building a hospital and as per clause 1.5 of brochure there is no provision for the conversion of the hospital into something else. In terms of Master Plan for Delhi 2021 ("MPD 2021 hereafter") hospitals are mentioned under the head "*Public and Semi Public*" facilities, distinct from commercial. It is thus obvious that hospitals do not

fall in the category of "commercial". It is argued that the hospital premises were inspected from time to time to control unauthorized construction and misuse if any. At the time of generating the inspection report, the upper part of the report inadvertently carried the term "commercial". The counsel argued that according to the official record, the land is an institutional allotment, given for the purpose of building a hospital and not for commercial purpose.

16. It was argued that the land allotted on lease to the Appellant-trust was for 99 years and was not a perpetual lease. Therefore, urged the learned counsel, the learned Single Judge correctly concluded that the issue of discrimination did not arise. The counsel argued that no lessee has a right of such conversion and merely because the lessor has granted such privilege to some lessees, does not entitle others, who are from a different class or category, to claim such privilege/ benefit. The Trust was allotted institutional land for the purpose of hospital use. There is no policy of conversion from leasehold into freehold in respect of the hospital. Reliance is placed on Para 1.5 of the Conversion Brochure. The learned Single Judge, argues the Union, correctly examined all documents and papers and passed the order that the President of India or Chief Commissioner of Delhi's decision shall be final regarding the demised premises. If it has been ceased to be used for the purpose of hospital or that the said hospital is improperly or inefficiently managed, then it shall be lawful for the lessor to re-enter the land and building thereon and the Appellant (Trust) as lessee would then only be entitled to compensation not exceeding the premium paid, along with the value of the building. That condition also unequivocally indicates that no ownership rights were conferred on the Trust as lessee and that the lease was

not commercial. Moreover, once the land is converted to freehold, the Union will lose this important right under the lease which ensures continued availability of a property and efficiently managed hospital for the citizens of Delhi.

17. It was pointed out that the learned Single Judge thoroughly analyzed the MFD 2021. As per MFD 2021 "Health Infrastructure" is listed separately from "Trade and Commerce" Hospitals, Dispensaries, Colleges, School, Police stations, Fire Stations, Post Offices, Local Government Offices, Parking etc. were clubbed under "Public and Semi Public uses and services". The Counsel submitted that it is obvious that the hospital would not fall within the category of "Commercial". It is argued that the Union rightly examined the conversion appeal of the Appellant-trust, and after approval by the competent authority, rejected the case vide letter dated 01.09.2015 on the following grounds: (i) As per the brochure of conversion from lease- hold into freehold, there is no policy for conversion of lease-hold into freehold in respect of hospitals and (ii) there is apending litigation between the lessee and lessor (Reference to Clause 20.3). The question of payment of dues does not arise. The correct position in this matter is that as per para 1.5 of the brochure of conversion from lease hold into freehold, the properties which were not specifically covered under the conversion policy e.g. institutional allotment including allotment to the press, hotels, cinemas, properties covered by the disinvestment policy of the Government, petrol pumps, fuel depots, CNG Stations etc., includes hospitals.

18. The Union argued that the Appellant was allotted land on lease for 99 years for the purpose of hospital use, and not a perpetual lease, so it could not claim conversion of the leasehold into freehold, or compel the lessor to

grant conversion. The Appellant was granted the land for a charitable hospital with no profit or loss. The minutes of the meeting held on 10.06.1949 regarding the allotment of sites at concessional rates to charitable institutions was relied upon. The lease deed dated 24.04.1968 executed by the Union is also relied upon.

19. Regarding the inspection reports, it is submitted that the inspection reports dated 26.12.2007 and 04.10.2013 use the term “commercial” inadvertently. It is urged that in terms of official records, the allotment is an institutional allotment meant for purposes of a hospital. Likewise, it is submitted that the Union had published the list of land allotment to institutions from 1930 to 2002. However, that list does not contain any reference to the allotment made to the Appellant-trust, because it is concerned only with allotments to social, religious, cultural, educational and government institutions and the Appellant-trust's land was institutional land allotted for the purpose of a hospital.

Analysis and Conclusions

20. In this case, the Appellant principally founds its claim for conversion into freehold, on an interpretation of a document i.e. the Conversion Brochure titled "*Conversion from Leasehold into Freehold*" including the application form published by the respondent L&DO in June, 2003. The Brochure, pertinently states as follows:

"The Government had decided to sanction the conversion to freehold in respect of purely residential leases of all flats/tenements and built up plots up to 500 sq. mts. of area and the orders conveying the sanction of the President of India for such conversion were issued on 14-2-1992 by the Ministry of

Urban Development. In June 1999, it was also decided to remove the ceiling of area of the plots for the conversion. It was also decided that w.e.f. 1.4.2000 the conversion fee would be charged/calculated based on the land rates prevailing on the date of submission of the conversion application.

In response to the long pending demand of the lessees in respect of leases other than 'residential', it has now been decided to allow conversion of Industrial, Commercial and mixed land use premises also. Further, keeping in view the request of lessees in residential colonies, it has also been decided to rationalise the remission of conversion fee available to the lessees.

This brochure gives information that a lessee would like to know before applying for the conversion to freehold. It is expected that the public will find the Brochure useful and helpful in getting their properties converted into freehold.

WHAT ARE THE PROPERTIES UNDER THE CONTROL OF LAND AND DEVELOPMENT OFFICE ELIGIBLE FOR CONVERSION FROM LEASEHOLD TO FREEHOLD?

1.1

1.2

1.3

1.4

1.5 All built up commercial and mixed land use properties allotted by the department of Rehabilitation, L&DO or the Directorate of Estate, for which ownership rights have been conferred and lease deed executed and registered.

Note: The properties which are not specifically mentioned above are not covered under the conversion policy (e.g. institutional allotment including allotment to press, hotels,

cinemas, properties covered under the disinvestment policy of the Govt., Petrol pumps, Fuel Depots, CNG Station etc.)"

21. The following extracts from the "Compendium of Information" published by the L&DO are relevant:

"TYPES OF LEASES

There are three types of leases in respect of old Nazul lands namely (i) residential, (ii) commercial, and (iii) institutional. In respect of rehabilitation colonies, leases granted under the Displaced Persons (Compensation & Rehabilitation) Act are for residential, commercial and industrial and are in Appendix-XI, Appendix-XII, Appendix-XIII and Appendix-XXXI.

Nazul leases are perpetual whereas Rehabilitation leases are for 99 years. In the case of Nazul leases, Ground Rent is revisable at the option of the lessor at the end of each span of 30 years in accordance with the procedure laid down in the Lease Deed and M/o UD's letter No. J-22011/1/70-L-I dt. 24.12.1983. Ground Rent in Appendix-XI leases is nominal i.e. Rs. 1/- per 100 sq. yds. or as fraction thereof and is revisable @2 1/2 of the value of the land at the time of 2nd sale/assignment shall be completed and thereafter at the end of each successive period of not less than thirty years. In case of leases in Appendix-XII and XIII, for the first 20 years, the ground rent is the sum equivalent to the interest on the cost of land at the Govt. borrowing rate of interest prevailing on the date of lease. For the remaining 76 years of lease, the ground rent is the sum equivalent to the interest on the market value of land calculated at Govt. borrowing rate of interest on the 1st April of 21st year of the lease. Appendix-XXXI-A, XXXI-B and XXXI-C leases are also nominal leases granted for 'A' type and 'C' type tenements or three storeyed markets in various Rehabilitation colonies in Delhi. In these nominal leases also, ground rent is revisable, as in the case of Appendix-XI leases, at the time of 2nd sale/assignment on the same lines as in the case of Appendix-XI leases."

22. The deed dated 24.04.1968 shows that the land in question has been leased for 99 years and it is not a perpetual lease. The lease clearly states *inter alia*, that the Union government demised to the Appellant-trust, for a premium of ₹18,000/- “...to hold the premises demised unto the lessee for a term of 99 years from 17th April, 1951 YIELDING AND PAYING therefor the yearly rent paid in advance of Rs. 900/- (Rupees nine hundred only) or such other sum as may hereafter be assessed under the covenant and the conditions hereafter contained...” Therefore, it is clear that the terms unequivocally state that what is demised is a lease and not absolute title to the land.

23. The true nature of a transaction and the intention of the parties to any document, particularly one that transfers property or interest in property, is not reflected in the nomenclature given; it is in the terms of the provisions contained in the document. The nomenclature of the transaction – given by the parties is not always conclusive of its true nature, rather, it is to be gathered from the intention of the parties entering into the transaction, in addition to the conditions of repurchase and the extent of a debtor-creditor relationship between the parties, contained within such document. In *Vanchalabai Raghunath Ithape (D) by L.Rs. Vs. Shankarrao Baburao Bhilare (D) by L.Rs. and Ors.* [(2013) 7 SCC 173] the question to be addressed by the Court was whether the transaction in question was a mortgage by conditional sale or a sale transaction with a condition of repurchase. The Supreme Court, in an appeal by special leave by the plaintiff, noticed the findings of the lower appellate court, and highlighted how there is a presumption that the transaction was a mortgage by conditional sale in cases where the whole transaction is in one document, but

the mere incorporation of a term in the same document cannot always mean that the transaction agreed to by the parties was a mortgage transaction. It was held that it was not in dispute that after the transfer of the land to the Respondent, the Appellants took possession and used and enjoyed the suit property as an absolute owner. In *C. Cheriathan Vs. P. Narayanan Embranthiri and Ors.*[AIR2009SC1502], in interpreting the vexed question of whether a deed amounted to one of absolute conveyance with a condition of repurchase or a mortgage with conditional sale, reading the ingredients of section 58(c), the Supreme Court held as follows:

“...One of the ingredients for determining the true nature of transaction, therefore, is that the condition of repurchase should be embodied in the document which effects or purports to effect the sale. Indisputably, the said condition is satisfied in the present case....A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefore circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question.”

24. In the present case, the terms of the lease deed clearly stipulated that the building had to be according to the approval of the Lessor. Renovation and repairs that required structural alteration had to be approved by the lessor. Any breach of the obligations embodied in Clauses 7,11 and 12 of the Lease Deed could result in a show cause notice, followed by demolition and/or forfeiture and re-entry into the lease. These conditions, in the opinion of this court, clearly demonstrate that an absolute title (or perpetual lease) was not intended by the parties to the Deed. It was, on the contrary, a leasehold right, with the title always vesting with the paramount owner, i.e. the

Union of India. For these reasons, it is held that the said lease deed did not confer title or similar interest. It was a demise of land by lease reserving specific restrictions. The premium paid at the time of the initial allotment, therefore, was not for conveyance, but as lease premium money. The learned Single Judge has cited judgments to support the conclusion that the mere period of a lease, or that it is heritable, does not advance the case that what the parties had envisioned at the stage of a demise of leasehold rights creates permanent rights. These conclusions are sound. The Appellant's argument, therefore fails.

25. In *Excelsior (supra)*, the Division Bench of this Court was concerned with the right of the lessees of the land supporting disinvested hotels to have them converted into freehold. A learned Single Judge of this Court held the leasehold land underneath the disinvested hotels and cinemas was entitled to freehold conversion under the policy introduced by the government and quashed the decision of the Respondent L&DO refusing freehold conversion of such land. The reason cited was that the L&DO was not entitled to discriminate between lands underneath the disinvested hotel and cinema and other leasehold lands which were being converted into freehold. Setting aside the said judgment of the learned Single Judge, the Division Bench held:

" 24. We find the following other differences between the leases of which freehold conversion is being allowed and the subject leases :-

i.) The leases of which conversion is being allowed are in the format prescribed in the L&DO Manual. We find the leases of

the disinvested hotels to be not in that format and in an entirely different format;

ii.) While the leases of which conversion is being allowed are in consideration of premium and the rent to be paid, the leases in favour of the respondents are in consideration only of payment of rent and without payment of any premium whatsoever; the unearned increase for allowing transfer of rights in land, from in favour of ITDC to HEPL, paid out of the share price, cannot be equated to premium - the same in any case was only 50% of the increase in the value of the land between the date when first leased/licensed and the date when assigned to HEPL and can by no stretch be called the price for the grant of lease. A Division Bench of the Bombay High Court recently in Smt. Jaikumari Amarbahadursingh v. State of Maharashtra MANU/MH/0909/2008 held that the claim towards unearned increase is essentially a levy/charge in respect of the property, legally claimable by the grantor from the grantee or the transferee in exercise of rights over the land. The claim for unearned increase was held ascribable to power of regulation and control in respect of the land and was further held referable to land revenue. It was also described as a price for enabling the grantee/lessee to transfer his rights, the government being the real owner of the land. A Division Bench of this Court in the Commissioner of Income Tax v Monoflex India P. Ltd held payment of unearned increase to be a condition of leasehold rights, restricting right of lessee to make third party transfers. Unearned increase cannot partake the character of premium also for the reason that while premium is the consideration for acquisition of leasehold rights, unearned increase is payable by a lessee already holding leasehold rights and as a condition for transfer thereof. Unearned increase is thus payable by the lessee and not by the transferee of the lessee. It is a different matter that under the agreement between the lessee and its transferee, the transferee pays the same. The payment, even if by the transferee, is on behalf of the lessee and thus cannot qualify as a consideration paid by the transferee for acquisition of leasehold rights. The unearned increase cannot also be said to be premium paid by the respondents for

transfer/grant of lease in their favour for the reason that the same does not find any mention whatsoever in the leases in favour of the respondents and finds mention only in the share purchase agreements. Moreover, every payment / consideration flowing from the lessee to the lessor cannot be termed as premium or price, within the meaning of Section 105 of the Transfer of Property Act. A Full Bench of the High Court of Andhra Pradesh in Vinay Construction and Development Company v Inspector General of Stamps, A.P. AIR 1967 AP 90 held that the amount required to be spent on new structures during lease term could not be considered as premium. A research in law shows that high rent or even security deposit cannot be a substitute for premium. Premium has always been treated at least in the Income Tax laws at par with price and a capital receipt as distinct from rent which is treated as a revenue/recurring receipt and refundable security deposit which is not even treated as income for taxation purposes. In Abdul Rahim v. State of Madras AIR 1962 Madras 272, Veeraswami, J. after referring to the well known judgment in King v. Earl Cadogan L.R. (1915) 3 KB 485 pointed out that the term premium as ordinarily understood is a lump sum payment made outright as a price for lease. It was further held that what is contemplated by premium is something other than the agreed rent and premium in the context of a lease is in the nature of price for the lease and money which is refundable cannot be called premium. Similarly in Ranganayaki Ammal v M. Chockalingam (1996) II MLJ 139 also it was held that premium as defined in Section 105 of the Transfer of Property Act is the price paid for the lease and consideration for the lease and/or for the purposes of getting a lease. The Supreme Court in Commissioner of Income Tax v Panbari Tea Company Ltd AIR 1965 SC 1871 was faced with the question whether the amount described as premium in the lease deed is really a rent and therefore a revenue receipt. It was held that Section 105 (supra) brings out a distinction between the price paid for transfer of a right to enjoy the property and the rent to be paid periodically to the lessor; when the interest of the lessor is parted with for a price, the price paid is premium or salami but

a periodical payments made for continuous enjoyment or benefits under the lease are in the nature of rent. Accordingly it was held that premium was not a revenue but a capital receipt. A Full bench of the Madras High Court in the Chief Controlling Revenue Authority v S.M. Abdul Jammal AIR 1970 Madras 288 also held that the premium is the consideration of the conveyance implied in the lease and is quantified in lump sum whether paid outright or by way of installments over a period; that though rent is also in consideration of lease but is in lieu of enjoyment which the lessee has and particularly as consideration therefor. Though even payment of premium does not make the lessee an owner (See Municipal Corporation of Delhi v Shashank Steel Industries (P) Ltd. (2009) 2 SCC 349) but we are in these proceedings to not so dissect the differences between the premium on the one hand and high rent and security deposit on the other hand. All that we are required to determine is whether the appellant while formulating the policy of freehold conversion can be said to have held bonafide belief that leases where no premium had been paid are not eligible for freehold conversion. We are of the view that the appellant clears the said test. Significantly, the Policy was intended to cover all leases.

iii.) While the leases of which conversion is being allowed do not contain any provision for payment of security deposit by the lessee to the lessor, the respondents have under the lease deed paid security deposit to the appellant L&DO which is free of interest and is to be enhanced with enhancement in rent and is refundable on expiry of the term of the lease against delivery of vacant peaceful physical possession;

iv.) While under the leases of which conversion is being allowed, the rent payable is nominal, under the leases in favour of the respondents the rent payable is not only substantial but is also subject to increase;

v.) While under the leases of which conversion is being allowed, on the expiry of the term of the lease, though the accretions on the leased land are to vest in the lessor but on payment by the lessor of value thereof to be determined, but under the leases in favour of the respondents, the accretions are

to vest in the appellant L&DO, without any obligations to pay the value thereof; vi.) While the leases, of which conversion is being allowed, are by way of a government grant and as a developmental act, the leases in favour of the respondents were in pursuance to the share purchase agreements.

25. We are of the opinion that the aforesaid differences are sufficient to belie any case of discrimination and it is not for this Court to go into the insufficiency even if argued of the differences to mete out a different treatment to the respondents. These are policy matters and freehold conversion, as aforesaid is in the sole discretion of the lessor and if the lessor in its wisdom does not want to allow such conversion to certain categories of lease, no case for judicial review thereof is made out in the face of differences aforesaid. The Supreme Court recently in Union of India v Nitdip Textile Processors Pvt. Ltd (2012) 1 SCC 226 held that a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. It was further observed that in this imperfect world, perfection even in grouping is an ambition hardly ever accomplished and that the question of classification is primarily for the governmental judgment and ordinarily does not become a judicial question. It was yet further held that a power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature merely treads. Similarly, in N. Vasundara v State of Mysore (1971) 2 SCC 22 it was held that once the classification is on reasonable basis, the Courts are not expected to interfere with the manner and method of classification. The differences aforesaid in the two kinds of leases/transactions are found to bear a just and reasonable relation to the Policy of freehold conversion.

26. We are further of the opinion that owing to the differences aforesaid the appellant L&DO can be said to have bonafide held the view that the leases of the land underneath disinvested hotels would not be eligible under the Policy/Scheme for

conversion, since no ownership rights had been conferred thereunder. It is also worth highlighting that such policies/schemes of freehold conversion are enunciated in the exercise of executive function. It is up to the appellant L&DO as lessor of the land to grant or not grant freehold rights in the land that was granted on leasehold and to whom. However, the lessor herein being the State, cannot discriminate arbitrarily. It thus falls for consideration whether the leases in favour of respondents fall in the same category, where such conversion is being permitted and whether the appellant is discriminating against the respondents. The respondents herein do however, as aforesaid, form a class by themselves carved out by the learned Single Judge, as disinvested hotels. Though the learned Single Judge has held that the Conversion Policy does not carve out any exception qua disinvested hotels and that the exception if any to the policy has to be in the policy only and cannot be by way of executive instructions but losing sight of the fact that the policy itself is an executive instruction and does not have a legislative colour. Thus, even if it were to be held that the subsequent decision to not allow freehold conversion of land underneath disinvested hotels is not borne out from the policy, the same is at best a modification/amendment of the Policy and it is not the case of the respondents that the officials/authority who took such subsequent decision were any inferior to those who had framed the original Policy or that they were not entitled to take the subsequent decision. The appellant in the matter of implementation/working of such a policy is always entitled to exclude certain persons who may be forming a class by themselves and we are unable to find any bar to such modification/amendment of the policy. The Supreme Court in *Chairman Ramappa Gundappa Sahakari Samayakta Besva Sangha Ltd v State of Mysore* (1974) 2 SCC 221 held that if every policy statement or direction of Government especially regarding disposal of State Property were construed as irreversibly creating right to property in prospective beneficiaries, strange consequences would follow and the government cannot be held prisoner to its administrative decisions which are required to be altered from time to time.

Reference with benefit can also be made to A.K. Kraipak Vs. UOI (1969) 2 SCC 262 and U.P. Financial Corp. Vs. Gem Cap (I) P. Ltd. (1993) 2 SCC 299 laying down that if the High Court cannot sit as an appellate authority over the decision and order of quasi judicial authorities, it follows equally that it cannot do so in the case of administrative authorities and that if there is more than one choice available to the administrative authorities they have a right to choose and the Court cannot substitute its judgment for the judgment of the administrative authorities in such cases.”

It is apparent that the court emphasized the pre-eminence of executive judgment in matters of administrative policy, when acknowledging the fact that freehold conversion “*is in the sole discretion of the lessor and if the lessor in its wisdom does not want to allow such conversion to certain categories of lease, no case for judicial review thereof is made out*”. The court, however, cautioned that if a particular property fell within the scope of discretion, the State could not validly discriminate between two similarly situated leases. The court also underscored the importance of *executive choice as regards disposal of property or property rights*.

26. The lynchpin of the Trust’s appeal is that, since it gave up valuable property during partition, the Union compensated its loss through a rehabilitation lease, for which then prevailing commercial rates were charged as a premium and that what is recovered annually as rent is only a nominal amount. This feature, according to the senior counsel, sets apart the Trust’s property and distinguishes it from subsequent allotments, where lessees are made to pay a higher annual rent, which compares with the annual market rental values of like properties. This Court is unable to agree with this logic. The form adopted by the Union, has to be judged within the context. At the

dawn of the nation's existence, when the executive government exercised its choice to grant a lease, its decision was calculated and conscious. It wished that the Trust set up a hospital for public use and it is for that purpose that a lease with a definite tenure was preferred. For over five decades, the arrangement has been considered as a lease by the Trust. Now, opportunistically, since the Union published a freehold conversion scheme to convert some categories of its leasehold properties, it argues that the lease was not really a lease, but that the Trust had been conferred title to the property. This is plainly against the intent and text of the Lease Deed entered into, when the Trust accepted the terms of the demise. The written deed clearly says that the interest created is as a lease for 99 years, and spells out the annual rent. A word about the rent at this stage; though the sum of ₹ 900 is a pittance today, that cannot be said of the time when the arrangement was entered into (with effect from 17.04.1951). The Appellant has made no attempt in this regard to demonstrate or establish that the sum was nominal at that time, and what was the so-called "market rate" in 1951. This Court consequently holds that the learned Single Judge correctly concluded that the lease did not confer any absolute title.

27. This Court is also of the opinion that apart from the clear intention of the terms of the lease deed, the Appellant is also precluded by reason of Section 116 of the Evidence Act from questioning the nature of the transaction, as it would amount to disputing the landlord's title. That provision enjoins that "*no tenant of immovable property, or person claiming through such tenant as follows shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of*

the tenancy, a title to such immovable property...". In this Court's considered view, the Trust's payment of annual rents for over five decades, acknowledging the title of the Union, precludes it from urging that absolute title had in fact been *de facto* conferred upon it, with effect from 17.04.1951.

28. The argument that the Trust's property is a rehabilitation lease and, therefore, falls within the terms of the conversion policy, i.e Clause 1.5, was negated by the learned Single Judge, who held that the reference to institutional allotment in the note to that provision excluded applicability of the conversion policy. The Appellant argues that the note to Clause 1.5 only applied to properties, which are not otherwise covered under clauses 1.1 to 1.5 and, therefore, does not apply to it because it is squarely covered under clause 1.5. It points out that moreover, hospitals have been consciously left out from the note. A specific plea with regard to provisions of the Displaced Persons Rehabilitation Act and leases executed under its provisions was made, with reference to Appendix XIII. In this regard, the Court notices that the learned Single Judge discussed this issue, elaborately and gave findings in paras 20 and 21 of the impugned judgment. The first reason that persuaded him to reject the argument was that the categorization of leases was for the purpose of convenience and management. It was held that the express terms and tenor of the grant had to be respected and lastly, that since the demise was a grant under the Government Grants Act, its terms overbore other laws and the language of the grant had to be respected. This Court affirms those findings.

29. This Court is also of the opinion that the clear intent of the parties while entering into the lease was that the demise was for charitable and institutional purposes. The restricted construction urged by the Trust, i.e. that hospitals were not excluded by the note is unpersuasive. The use of the term “etc.” in the opinion of this Court only meant that the express allusion to certain *kinds of allotment or leases, was illustrative and not exhaustive*. Thus, allotment of lands for the purposes of a charitable object, i.e. hospitals, did not in any manner take away its broad classification as an institutional allotment. The Union’s reliance on Master Plan 2021 to say that hospital land is institutional, is reasonable in this context. Furthermore, that the property does not find mention in the L&DO’s list of institutional allotment, or that the inspection reports mentioned the allotment to be commercial, is not determinative of the question which has to be primarily decided upon the terms of the grant and the lease, and the conduct of the parties, having regard to what classes of properties can apply for freehold conversion. The erroneous inclusion or exclusion of some leases in the list of institutional leases of L&DO in its records, or the erroneous description of properties, cannot bind that executive authority.

30. This Court is mindful of the fact that what is in question is the property rights of the Union. That it has always been treated as the unquestioned owner and paramount title holder till the initiation of this litigation in 2015 (i.e. as owner for 64 years) *is a matter of fact*. Such being the case, its decision on whether to grant freehold rights to a lessee or a class of lessees upon an interpretation of its policies has to be viewed from a narrow rather than a broad lens in judicial review. It has been repeatedly iterated by numerous decisions that in regard to terms of disposal of property

or grant of largesse, the state's discretion as the owner of the resources, holding them for public good, cannot be lightly undermined. Unless the person or concern aggrieved establishes *mala fides*, procedural irregularity, illegality or manifest arbitrariness, the courts would not intervene to upset executive judgment. In the present case, this Court is satisfied that the arguments made for directions to the Union to grant freehold rights to the Trust were considered and correctly rejected by the learned Single Judge.

31. In view of the foregoing discussion, the appeal has to fail; it is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 09, 2018

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