2024 INSC 273

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8336 OF 2009

M/s. Jaiprakash Industries Ltd.
(Presently known as M/s. Jaiprakash Associates Ltd.) **... Appellant**

versus

Delhi Development Authority **... Respondent**

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The Hon'ble President of India executed four separate perpetual lease deeds on 12th August 1983 in favour of M/s. Jaiprakash Associates Pvt Ltd in respect of the plots more particularly described in Schedule-I to the lease deeds (for short, 'the said plots'). In July 1986, a joint application was made by M/s. Jaiprakash Associates Pvt Ltd and M/s. Jaypee Rewa Cement Ltd before the High Court of Judicature at Allahabad, praying for amalgamation of M/s. Jaiprakash Associates Pvt Ltd with M/s. Jaypee Rewa Cement Ltd. By the order dated 30th July 1986, the High Court sanctioned the scheme of amalgamation. The said plots were included in the Schedule of the properties to the scheme of

amalgamation. While passing the order dated 30th July 1986 approving amalgamation, the High Court directed that the properties in Parts I, II and III of Schedule II to the said order shall stand vested in the transferee company (M/s. Jaypee Rewa Cement Ltd). After the amalgamation, in September 1986, the name of M/s. Jaypee Rewa Cement Ltd was changed to M/s. Jaiprakash Industries Ltd. Subsequently, the name was changed to M/s. Jaiprakash Associates Ltd, which is the present appellant. Thus, in short, the appellant is a company created as a result of the amalgamation of the erstwhile M/s. Jaiprakash Associates Pvt Ltd and M/s. Jaypee Rewa Cement Ltd. In short, the present appellant is the transferee company.

2. An application was made by the appellant to the respondent-Delhi Development Authority (for short, 'DDA') for a grant of permission to mortgage the said plots in favour of the Industrial Finance Corporation of India. By the letter dated 14th March 1991, the respondent-DDA demanded an unearned increase value of Rs.2,13,59,511.20. Being aggrieved by the said demand, representations were made by the appellant which were not favourably considered by the respondent-DDA. Therefore, the appellant filed a writ petition before a learned Single Judge of the High Court of Delhi. By the order dated 30th January 2003, the learned Single Judge dismissed the said petition filed by the appellant by relying upon a decision a Division Bench of the same High Court in the case of ***Indian Shaving Products Limited v.***

Delhi Development Authority & Anr.[1] Being aggrieved by the decision of the learned Single Judge, the appellant preferred an appeal before a Division Bench of the High Court of Delhi. By the impugned judgment, the said appeal had also been dismissed.

SUBMISSIONS

3. The learned senior counsel appearing for the appellant invited our attention to clause II(4)(a) of the lease deed, which puts an embargo on the lessee not to sell, transfer, assign or otherwise part with the possession of the whole or any part of the said plots except with the previous consent in writing from the lessor. The proviso to the said clause entitled the lessor to impose a condition while granting consent, of payment of a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value). He submitted that the amalgamation of the lessee with another company under the orders of the Company Court will not amount to the sale, transfer or assignment of the said plots. His submission is that in the case of ***Indian Shaving Products Limited***[1], the High Court had dealt with a completely different set of factual and legal nuances. In the said case, the submission of the petitioner was that Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA') would have an overriding effect over the terms and conditions of the lease deed. He submitted that the merger or amalgamation was taken up in the said

[1] 2001 SCC Online Del 1123: 2002 1 AD (Del) 175

case for rehabilitation of a sick company and that it was a distressed company merger. Therefore, the said decision will have no application to the facts of this case.

4. The learned senior counsel for the appellant further submitted that the amalgamation or merger of the two companies does not involve any transfer within the meaning of the Transfer of Property Act, 1882 (for short, 'TPA'). He submitted that only in view of the operation of Section 394 of the Companies Act, 1956, the assets and liabilities of the lessee had merged and devolved on the appellant. He urged that the order sanctioning the scheme of amalgamation is an order *in rem,* which binds everyone. He pointed out that in the scheme of amalgamation, there was no element of sale consideration or consideration for transfer. The learned senior counsel submitted that in the scheme subject matter of this appeal, the transferor personality ceased to exist and merged with the transferee. The learned senior counsel relied upon a decision of the High Court of Delhi in the case of ***Delhi Development Authority v. Nalwa Sons Investment Ltd. & Anr***[2]. He also relied upon a decision of the Division Bench of the High Court of Delhi in the case of ***Vijaya C. Gursahaney v. Delhi Development Authority & Ors***[3].

5. The learned senior counsel appearing for the respondent-DDA invited our attention to the order passed by the High Court of Judicature at Allahabad on 30th July 1986.

---

[2] (2020) 17 SCC 782

[3] 1994 SCC Online Del 306 : 1994 II AD (Delhi) 770

He submitted that clause (1) of the order provides that the transferor company's properties, rights and powers in respect of the property described in the first, second and third parts of schedule II shall be transferred without any further act or deed to the transferee company. He would, therefore, submit that the demand for unearned increase was lawful.

CONSIDERATION OF SUBMISSIONS

6. We have given careful consideration to the submissions. In the perpetual leases, clause (II)(4)(a) was incorporated, which reads thus:

> **"**II. The Lessee for himself, his heirs, executors, administrators and assigns covenants with the Lessor in the manner following that is to say:-
>
> .. ..
>
> .. ..
>
> (4) (a) **The lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial 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 thinks 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 plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty percent of the unearned increased 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.**"**
>
> (emphasis added)

The same clause has been incorporated in all four perpetual leases with which we are concerned. Therefore, the perpetual leases put an embargo on the lessee selling, transferring, assigning or otherwise parting with the possession of the whole or any part of the commercial plots except with the previous consent of the lessor in writing. The second proviso makes it clear that the respondent-DDA, which has stepped into the shoes of the lessor, will be entitled to recover a portion of the unearned increase in the value.

7. Now, the question is whether amalgamation will amount to transferring the said plots. We have carefully

perused the order dated 30th July 1986 of the High Court of Judicature at Allahabad sanctioning the scheme of amalgamation. In the said scheme, M/s. Jaiprakash Associates Private Ltd (the erstwhile company) was shown as the 'transferor company' and M/s. Jaypee Rewa Cement Ltd was shown as the 'transferee company'. Clauses (1) and (2) of the operative part of the order dated 30th July 1986 read thus:

> ".. .. ..
>
> 1. **That all the properties, rights and powers of the Transferor Company specified in the first, second and third parts of the Schedule II hereto and all other properties, rights and powers of the Transferor Company be transferred without further act or deed to the transferee company and accordingly the same shall pursuant to section 394(2) of the Companies Act, 1956 be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Company therein but subject, nevertheless to all charges now affecting the same;** and
>
> 2. That all the liabilities and duties of the Transferor Company be transferred without further act or deed to the Transferee company and accordingly the same shall pursuant to section 394(2) of the Companies Act, 1956 be transferred to and become the liabilities and duties of the transferee company, and

.. ..
..”

(emphasis added)

8. The said plots are a part of the Schedule of the properties referred to in clause (1). Thus, there is a specific clause in the order of amalgamation which holds that the said plots stand transferred from the original permanent lessee to the transferee M/s. Jaypee Rewa Cement Ltd, which is now known as M/s. Jaiprakash Associates Ltd. Clause II(4)(a) covers all the categories of transfers as it provides that the lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plots without the written consent of the lessor. The said clause does not exclude involuntary transfers. In the facts of the case, it cannot be said that there is an involuntary transfer, as the transfer is made based on a petition filed by the lessee and the transferee for seeking amalgamation. In a sense, this is an act done by them of their own volition.

9. A similar issue arose for consideration before this Court in the case of ***Nalwa Sons Investment Ltd***[2]. The Court was dealing with a case where the Company Court passed an order of arrangement and demerger. As a result, the plot given on lease to a company was transferred to another company. In paragraph 5 of the decision, this Court had set out the policy instructions regarding charging an unearned increase. Paragraph 5 reads thus:

> **5.** The instructions followed by the competent authority in regard to

charging of UEI have been articulated in document Annexure P-1, which reads thus:

XXX XXX XXX

Sub. : Substitution/addition/deletion of names in lease/sub-lease of industrial/commercial plots unearned increase

In supersession of previous instructions on the subject, the Lt. Governor, Delhi is pleased to order that henceforth in the matters of addition/deletion and substitution of names in respect of industrial/commercial lease/sub-lease to be executed or already executed, the following procedure shall be followed:

1. No unearned increase to be charged:

(*a*) The auction-purchaser/allottee shall be permitted free of charge, to add, delete or substitute the names of family members which may, where necessary, take the form of partnership firm or private limited company.

(*b*) In case of conversion of partnership firm into private limited company comprising original partners as Directors/Subscribers/Shareholders.

(*c*) In case of addition, deletion or substitution of partners in a firm or Directors and conversion of sole proprietorship firm or partnership concern into private limited company when change in constitution is limited, for approval by the DDA, within one year from the date of purchase of plot in auction. This will to apply in case of

plot obtained by the party by way of allotment.

(*d*) Change from private limited company to public limited company where a private limited company becomes a public limited company under Section 43-A of the Companies Act, 1956.

2. *Where unearned increase is to be charged*:

(*a*) Addition of outsiders not falling within the family members shall be allowed through a conveyance deed on payment of 50% unearned increase on his proportionate shares. The unearned increase shall be calculated at the market rate prevalent on the date of receipt of the application in the office of the DDA.

(*b*) Substitution of the original allottee/auction-purchasers shall be allowed on payment of 50% unearned increase of his shares in the value of the plot which will be calculated at the market rate. The market rate shall be the rate prevalent on the date of receipt of the application. It is irrespective of the fact whether the lease deed has been executed or not.

(*c*) 50% unearned increase will be charged in respect of proportionate shares of the plot parted with by way of addition, deletion or substitution of partner/partners in case of single ownership or partnership firm and Director/Directors/Shareholders/Sub scribers in case of private limited company. This is applicable where the

incoming persons do not fall within the definition of family. Unearned increase would be charged on the basis of market rate prevalent on the date of intimation for each and every change in the constitution. This would be applicable in all cases where the lease deed has been executed or not.

(d) In case where a private limited company/public limited company separately floating a new company although Directors may be the same and the name of old company has not changed and it still exists as it was, 50% unearned increase will be chargeable in such cases.

3. Interest @ 18% p.a. on the unearned increase from the date of receipt of the application intimating the change till the payment by the company or individual or firm shall be charged on the amount of the unearned increase payable to the DDA.

4. The administrative conditions prescribed in the UO No. F.1(23)/78/C(L) Part II dated 8-5-1979 will remain unchanged.

XXX XXX XXX"

(emphasis added)

In paragraphs 14 to 18, this Court held thus:

14. For answering the seminal question, we must first advert to the obligation of Respondent 1 springing from the stipulation in the perpetual lease deed. **Clause 6(*a*), as extracted in para 2 above, envisages a bar to**

sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot, except with the previous consent in writing of the lessor (appellant), which the appellant would be entitled to refuse in its absolute discretion. While granting consent in terms of the proviso to Clause 6(*a*), it is open to the appellant to impose such terms and conditions as may be deemed appropriate and claim and recover a portion of the unearned increase in the value of the commercial plot, being 50% of the unearned increase. The decision of the appellant in this behalf is final and binding upon the original lessee (Respondent 1). The amount towards the unearned increase is computed on the basis of the difference between the premium paid and the market value of the commercial plot. In doing so, the fact that the transfer under consideration did not involve any consideration amount or the value paid by the transferee is below the market value, would not inhibit recovery of 50% of the prescribed unearned increase amount on actual or, in a given case, notional basis. This is the plain meaning of the stipulation. This position is reinforced from the contemporaneous instructions issued by the competent authority of the appellant about the manner in which the unearned increase should be charged and from whom such charges should be recovered. That can be discerned from the instructions dated 6-9-1988.

15. Indeed, the said instructions advert to the category of persons from whom no unearned increase should be charged, despite being a case of transfer of the property as mentioned in Clause 1 thereof. The Division Bench of the High Court has relied upon the category mentioned in Clause 1(*b*). The same reads thus:

"1. No unearned increase to be charged:

(*a*)***

(*b*) In case of conversion of partnership firm into private limited company comprising original partners as Directors/Subscribers/Shareholders."

From the plain language of this clause, we fail to fathom how the said clause will be of any avail to the respondents. For, we are not dealing with a case of conversion of a partnership firm into a private limited company as such. The fact that the instructions extricate the category of transfers referred to in Clause 1 of the instructions from the liability of paying an unearned increase despite being a case of transfer, cannot be the basis to exclude the other category of transfers/persons not specifically covered by Clause 1, such as the case of present respondents. That is a policy matter. The respondents were fully aware about the existence of such a policy. That policy has not been challenged in the writ petition. Concededly, the reliefs claimed in the writ petition were limited to quashing of the demand letter dated 5-8-2010 and notice dated 31-1-2011,

demanding unearned increase; and to direct the appellant to convert the said property from leasehold to freehold in favour of Respondent 2, without charging any unearned increase. The reliefs are founded on the assertion that the transfer was not to any outsider, much less for any consideration.

16. In the first place, it is not open to the respondents to contend that the arrangement and demerger scheme does not result in transfer of the subject plot from the original lessee (Respondent 1) to Respondent 2. Inasmuch as, Clause (2) of the order passed by the Company Judge approving the scheme of demerger, as reproduced above, makes it amply clear that all property, assets, rights and powers in respect of the specified properties, including the subject plot, shall stand transferred to and vest in Respondent 2. Once it is a case of transfer, it must abide by the stipulation in Clause 6(*a*) of the lease deed of taking previous consent in writing of the lessor (appellant) and to fulfil such terms and conditions as may be imposed, including to pay any unearned increase amount. We find force in the argument of the appellant that the fact situation of the present case would, in fact, be governed by Clause 2(*d*) of the instructions which reads thus:

"2. **Where unearned increase is to be charged:**

(*a*)***

(*d*) In case where a private limited company/public limited company separately floating a new company although Directors may be the same and the name of old company has not changed and it still exists as it was, 50% unearned increase will be chargeable in such cases."

This clause plainly applies to the present case. The demand of unearned increase from the respondents is founded on that basis. The High Court misinterpreted the said clause and erroneously opined that it is not applicable to a case of demerger of a public limited company.

17. The principal clause is Clause 6(*a*) of the lease deed. The clause referred to in the instructions is equally significant. Indeed, the latter merely provides for the mechanism to recover the unearned increase from the original lessee. The fact that the same group of persons or Directors/promoters/ shareholders would be and are associated with the transferee company does not cease to be a case of transfer or exempted from payment of UEI, as envisaged in Clause 6(*a*) of the lease deed. Rather, Clause 2(*d*) of the policy, noted above, makes it expressly clear that unearned increase be charged irrespective of the fact that the Directors in both companies are common and the old (parent) company has not changed its name.

18. The fact that it was a case of transfer is reinforced from the order of demerger passed by the Company

> Judge and once it is a case of transfer, coupled with the fact that the respondents are not covered within the categories specified in Clauses 1(*a*) to 1(*d*) of the policy of the appellant, reproduced in para 5 above, they would be liable to pay unearned increase ("UEI") in the manner specified in Clause 6(*a*) of the lease deed. The obligation to pay UEI does not flow only from the instructions issued by the competent authority of the appellant but primarily from the stipulation in the perpetual lease deed in the form of Clause 6(*a*). Viewed thus, the Division Bench of the High Court committed a manifest error in allowing the appeal and setting aside the judgment of the learned Single Judge, who had rightly dismissed the writ petition and upheld the demand notice and the show-cause notice calling upon the respondents to pay the unearned increase amount in terms of Clause 6(*a*) of the perpetual lease deed. That demand was final and binding on the respondents, so long as the stipulation in the form of Clause 6(*a*) of the perpetual lease was in force.**"**
>
> (emphasis added)

This Court was dealing with an order of the Company Judge, which provided that the property of a company shall stand transferred to the respondent before this Court, and therefore, it was a case of transfer to which clause 6(a) of the lease deed will be attracted. Clause 6(a) in the lease subject matter of the said case was identical to clause II(4)(a) of the perpetual lease in the present case. This Court also held that

clause 2(d) of the policy determining unearned income was attracted in the case of transfer due to demerger. In our view, the same principles will apply to a merger, and an unearned increase will be payable. In the case of ***Indian Shaving Products Limited***[1], the High Court of Delhi dealt with the amalgamation of companies under the SICA and not under the Companies Act. In any event, this court confirmed the said decision by summarily dismissing the petition. In the present case, the relevant clause II(4)(a) of the leases covers involuntary transfers as well.

10. An argument is also sought to be canvassed that the transfer in this case is not covered by the transfer defined under Section 5 of the TPA. Section 5 of the TPA reads thus:

> **"5. "Transfer of property" defined.**— In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and "to transfer property" is to perform such act.
>
> In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.**"**

11. The relevant clause II(4)(a) in the perpetual leases subject matter of this appeal is very wide. It not only covers

transfers but also parting with possession. Therefore, the transfer contemplated by the said clause is much wider than what is defined under Section 5. Importantly, Section 5 clarifies that nothing contained therein shall affect any law for the time being in force in relation to the transfer of property to or by companies. Therefore, Section 5 of the TPA will not be of any assistance to the appellant.

12. Therefore, we find nothing illegal about the impugned judgment. Accordingly, we dismiss this appeal with no order as to costs.

13. By the order dated 3rd January 2008 of this Court, an interim stay was granted to the impugned judgment subject to a condition of the appellant depositing a sum of Rs.2,13,59,511.20 with this Court. The office report shows that the amount and the interest accrued thereon have been separately invested. Therefore, it will be open for the respondent-DDA to withdraw the principal amount of Rs.2,13,59,511.20 along with the interest.

.....J.
(Abhay S. Oka)

.....J.
(Pankaj Mithal)

New Delhi;
April 5, 2024.