

(2007) 05 DEL CK 0011

In the Delhi High Court

Case No : Writ Petition (C) No. 11131 of 2005

Engineering and Industrial Corp.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-05-2007

Acts Referred:

Constitution of India, 1950 — Article 265
Government Grants Act, 1895 — Section 3
Income Tax Act, 1961 — Section 45

Citation : (2007) 141 DLT 222 : (2007) 97 DRJ 623 : (2007) 2 ILR Delhi 823

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Vijay Kishan and Vikram Jetly, for the Appellant; Sanjay Katyal, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The petitioner is aggrieved by the demand raised for damages for unauthorized construction in terms of the letter dated 15.03.2005 issued by the Land and Development Officer. The petitioner had applied for conversion of property No. 8/29, Industrial Area, Kirti Nagar, New Delhi from leasehold to freehold under the conversion policy notified by the Government of India, Ministry of Urban Development and Poverty Alleviation, Land and Development Office in 2003. The respondent L&DO is agreeable to convert the property from leasehold to freehold but on the condition that the petitioner pays damages for unauthorized construction from 07.08.1982 to 14.07.2005, the total of which amounts to roughly Rs. 88,91,932/-. The said letter dated 15.03.2005 also has reference to nominal ground rent and 10% interest on the ground rent from 15.07.1982 till date. The petitioner is agreeable to pay the same and does not dispute these payments. The only dispute is with regard to damages for unauthorized construction.

2. It has been contended on behalf of the petitioner that the relationship between the petitioner and the respondent is governed by the lease deed in favor of the petitioner's predecessor-in-interest, which was made on 19.10.1966. He

submits that the lease deed has been admitted by the respondent to be a government grant in paragraph 2 of the counter-affidavit filed on behalf of the respondents. He submits that the lease being a government grant will have to be considered on its own tenor irrespective of any other provisions including statutory provisions. According to the learned Counsel for the petitioner there is no provision in the lease for raising any demand for damages for unauthorized construction. Therefore, according to him, the demand raised in the letter dated 15.03.2005 cannot be sustained and this Court ought to strike it down.

3. He further submitted that the petitioner's case is covered by the decision of this Court in the case of Jor Bagh Association (Regd) and Others Vs. Union of India (UOI) and Others, wherein this very issue of damages for unauthorized construction under a government grant was raised. This Court had observed in the said decision that once it is recognized that a particular lease is a grant contemplated under the Government Grants Act, 1895 then, it shall take effect according to its tenor and any contrary statutory provision or rule of law will have no effect. In other words, the entire relationship between the grantor and the grantee will be governed by the terms of the grant itself. No other document or statutory provision is required to be looked into. The Court then examined the provisions of Clause 2(2) of the lease involved in that case which is *pari materia* to the Clause 1 (1) of the present case. After examining the said clause, this Court observed that charging of damages for temporary regularization of alleged unauthorized construction was not provided for in the lease in question. The same is the position in the present case.

4. The learned Counsel for the petitioner also referred to a decision, in the same light, of an earlier Single Bench of this Court in the case of Sunil Vasudev etc. v. DDA 1988 RLR 23. Paragraph 11 of the said decision reads as under:

11. Let us now revert to Clause (vii) which is reproduced above and a perusal thereof shows that the said clause does not visualise charging of any fee, levy, cess or payment in the matter of grant of consent by the DDA and consequently orders of the DDA to charge fee, levy or payment cannot be held as valid and are rather bad in law. It may be that for cogent reasons it is open to the DDA in the circumstances to refuse to grant its consent, but once it has decided and agreed to grant the consent it cannot make it subject to the condition of payment of any levy, charge or tax. The amount charged in the instant case would partake as levy or transfer cess for the grant of consent which cannot be held to be valid in the circumstances and the language of the lease deed Ex.P.1. Learned Counsel for the DDA has urged that the DDA has evolved a policy of charging such an amount as and when such consent is granted but such policy cannot alter the provisions of Section 3 of the Government Grants Act so as to enable the DDA to charge the amount. The charge in the instant case partakes as sort of tax of the nature as is visualised by provisions of Section 45 of the Income Tax Act, 1961 on capital gains which I am afraid the DDA cannot do except under the authority of law. The learned Counsel for the DDA has not been able to draw my attention

to any such power which is vested in the DDA by law to enable it to charge the amounts as has been done in the instant case. The DDA cannot withhold the consent unreasonably and likewise no unreasonable condition can be imposed while granting the consent. It has been submitted by the learned Counsel for the plaintiff that it was for this very reason that the DDA has in all post 1957 leases inserted a specific stipulation for charging of 50 per cent on unearned increase in the event of transfer.

The learned Counsel also referred to a decision of the Division Bench of this Court in the case of DMA Nursing Home and Medical Establishment Forum v. Union of India and Ors. 2001 V AD (Del) 1093 to indicate that any compulsory exaction of money would amount to taxation and there can be no taxation except by authority of law as provided in Article 265 of the Constitution. He submits that since there is no provision for raising any demand for damages for unauthorized construction, the demand that is sought to be raised by the respondent would amount to compulsory exaction which would be in the nature of a tax for which the respondents have no authority in law and would be hit by Article 265 of the Constitution. Finally, the learned Counsel for the petitioner submitted that since the matter stood entirely covered by the decision in the case of Jor Bagh Association (*supra*), he is not raising other issues, at this juncture.

5. The learned Counsel appearing on behalf of the respondents made a clever argument by referring to the conversion brochure. He referred to paragraphs 12 and 13 of the brochure which read as under:

12. WHETHER CONVERSION WILL BE GRANTED EVEN IF THERE IS UNAUTHORISED CONSTRUCTION?

Conversion will be granted to the leasehold properties even if there is unauthorised construction, subject to payment of damages charges, whether earlier demanded or not. However the applicant will be liable for action under Municipal Bye-Laws. The conversion to freehold in the presence of misuse/ unauthorised construction does not act as a waiver of any action which is liable to be taken under the building bye-laws by the Local Body.

13. IF PAST MISUSE AND UNAUTHORISED CONSTRUCTION WERE TAKEN COGNIZANCE OF BY THE Lesser HOW THESE CASES WILL BE HANDLED?

In respect of these properties where any amount earlier claimed by the Lesser and not paid by the lessees will have to be paid before the application for conversion can be considered. In respect of those properties where misuse and/ or unauthorised construction exists, conversion may be allowed only after recovering the misuse charges and/ or damages, irrespective of whether earlier demanded or not.

With reference to the above paragraphs, the learned Counsel submitted that the present case was distinguishable from the case of Jor Bagh Association (*supra*). He submitted that in the latter case the question of conversion was not in issue

whereas in the present case the issue is of conversion. He submitted that in paragraph 12 it has been provided that conversion would be granted to leasehold properties even if there is unauthorized construction subject to payment of damages / charges whether earlier demanded or not. Therefore, according to the learned Counsel, the petitioner had applied for conversion with open eyes being aware of the fact that the conversion policy itself required that damages would have to be paid for unauthorized construction even if not demanded earlier. According to the learned Counsel for the respondents the case of Jor Bagh Association (supra) applies to situations where demands had been raised unilaterally whereas in the present case it was a bilateral agreement between the petitioner and the respondents on the basis of an invitation as indicated in the brochure. The petitioner accepted the invitation to offer and made its offer for converting its property from leasehold to freehold and, Therefore, it ought to be governed by all the clauses of conversion brochure itself.

6. The learned Counsel for the respondents also relied upon a decision of the Supreme Court in the case of Shangrila Food Products Ltd. and another Vs. Life Insurance Corporation of India and another, to submit that the question of damages would have to be gone into because the petitioner had enjoyed the fruits of unauthorized construction and there must be some penalty suffered by petitioner on that count. He also referred to paragraph 11 of the said decision which says that those who seek equity must bow to equity. The learned Counsel for the respondent also referred to a decision of a learned Single Judge of this Court in the case of Bal Kishan Chhabra and Ors. v. Union of India 2006 III AD (DEL) 182. He, particularly, referred to the observation made in paragraph 10 that if there is any inconsistency between the conversion policy and the lease, the policy would override the terms of the lease.

7. I have considered the arguments advanced by the learned Counsel for the parties and at the outset it may be said that I am in agreement with the submissions made by the learned Counsel for the petitioner that this case is entirely covered by the decision in the case of Jor Bagh Association (supra). The argument advanced by the learned Counsel for the respondent though ingenious, cannot be accepted. The reason is that paragraph 12 of the brochure refers to damages and charges for unauthorized construction "whether earlier demanded or not". This has reference to a period prior to the date of conversion. In other words, to a period covered entirely by the lease. Any payments that have to be made would have to fall within the terms of the lease. The lease itself does not provide for any collection of such damages or charges for unauthorized construction. Therefore the inclusion of this provision in paragraph 12 of the brochure relates to the lease and is not an independent charge levied by the respondents under the conversion policy. It must be noted that till the property is converted from leasehold to freehold, the relationship between the petitioner and the respondent is governed by the lease. The moment it is converted from leasehold to freehold the lease gets extinguished and the relationship of Lesser and lessee comes to an end. The petitioner becomes the full owner of the

property and the Lesser ceases to have any control or ownership rights over the same. The damages and charges that are mentioned in paragraph 12 and 13 are entirely referable to the period prior to the conversion, that is, to the period covered during the subsistence of the lease and would stand or fall according to the tenor of the lease. Since in the case of Jor Bagh Association (supra) it has been held that damages for unauthorized construction which are not permitted by the leases and which are government grants, cannot be recovered by the respondents, in this case also I feel that the demand raised by the respondents cannot stand. The decision referred to by the learned Counsel for the respondents have no application to the facts of the present case. In the case of Shangrila Food Products Ltd. (supra), the case was one under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and was not a case where the terms of a government grant were in question. Similarly, in the case of Bal Kishan Chhabra (supra), the consideration of a government grant was not in issue and the Court did not advert to any provisions of the Government Grants Act. The observation that was referred to by the learned Counsel for the respondents was not the ratio of the decision. In any event, the question with regard to government grants has been settled in the Supreme Court decisions which have been noted in the case of Jor Bagh Association (supra). For instance, in Hajee S.V.M. Mohamed Jamaludeen Bros. and Co. Vs. Govt. of T.N., , the Supreme Court, with reference to Section 3 of the Government Grants Act, 1895 observed as follows:

Section 3 places the terms of such grant beyond the reach of any restrictive provision contained in any enacted law or even the equitable principles of justice, equity and good conscience adumbrated by common law if such principles are inconsistent with such terms.

8. Before parting with this case, it must be noted that the petitioner had paid the entire amount of purported damages demanded by the respondents, under protest, sometime in June, 2005. The learned Counsel for the petitioner submitted that the said amount be refunded to the petitioner.

9. In view of the foregoing discussion, this writ petition is liable to succeed. The demand for damages for unauthorized construction as raised in the letter dated 15.03.2005 stands quashed. The petitioner would be liable to pay the amount for ground rent and 10% interest thereon as charged in the said letter. The balance amount shall be refunded to the petitioner. The said amount be refunded within six weeks to the petitioner.

This writ petition stands disposed of. No costs.