(2006) 08 DEL CK 0083

In the Delhi High Court

Case No : CM. No. 15170/05 and R.P. No. 317/05 in WP (C) 15058-59/04

Hotel Excelsior Ltd. and Another APPELLANT

Vs

Union of India (UOI) and Another RESPONDENT

Date of Decision : 25-08-2006

Acts Referred:

Citation : (2006) 132 DLT 320

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Jayant Bhushan, Malini Sood, Aman Lekha and S. Ali, for the Appellant; Y.P. Narula and Madalsa Singh, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Notwithstanding that sufficient cause justifying delay to be condoned in seeking review of the order dated 29.8.2005 has not been shown, learned Counsel for the petitioner states that since the issue decided by this Court is of importance delay may be condoned and review petition decided on merits. Accordingly CM. No. 15170/05 is allowed. Delay in filing the review petition is condoned.

2. Vide order dated 29.8.2005, writ petition was disposed of holding that counsel for the petitioner could not point out any exception carved out in the conversion policy excluding hotels which was disinvested from the scheme of conversion notified by the Government. Contention of respondents that Ministry of Finance had issued some clarificatory directives was noted and it was held that an exception to a policy cannot be carved out by way of clarification or directives. It was held that petitioner was entitled for consideration under the conversion policy.

3. It is settled law that a notified policy can be amended, abrogated or clarified only be means of an amending, abrogating or clarifying policy, duly notified to the public.

4. Needless to state, under the conversion policy, notified in June, 2003 by the Union of India, leasehold tenure could be converted into freehold tenure. Petitioner had sought conversion of leasehold tenure to freehold tenure pertaining to the land which was subject matter of a perpetual lease dated 8.10.2002, which request was rejected.

5. Seeking review, it is stated that the land in question together with building thereon was assigned to the petitioner only for the purpose of business operations i.e. operating and managing a hotel. Thus, the leasehold interest cannot converted from leasehold tenure to freehold tenure.

6. Learned Counsel for the applicant, Shri Y.P. Narula, Senior Advocate, during arguments relied heavily on para 2(k), part of para 8 and sub-para (i) of para 9 of the review application and Therefore, at the outset, I note the said pleadings.

7. In para 2(k) of the review application, it is pleaded as under:

2(k) That the said commercial property forming the subject matter of this petition has been leased out to the lessee only for operating and managing the commercial business of hotel by way of dis-investment policy of the Government. The petitioners were verbally made aware of the position of the pending application every time they used to visit the office of Land & Development Officer for enquiry that without complying with the condition laid down in the Brochure and without paying the requisite conversion fee it is not legally possible to convert the property into freehold as per the guidelines framed by the Government.

8. In para 8 of the review application, it has been averred as under:

8. That it is pertinent to mention at this stage here that in connection with dis-investment of these hotels, the value of land underneath the disinvested properties were initially assessed on the basis of the proposed revised rates effective from 1.4.2000 and accordingly the land value of the Hotel Kanishka measuring 12790 sq.mtr. was approximately Rs. 148 crores and the annual ground rent on the basis of this amount was to be fixed at Rs. 3,70,65,420 per annum. The rates were conveyed to the Ministry of dis-investment vide L&DO letter No. L-III/8/13(48)3-5 dated 19.9.2001, a true copy of the said letter is annexed hereto as Annexure-RA-5. These rates were to be taken into account for fixation of reserve price for auction. However, the Department of dis-investment fixed the reserve price on the basis of the discounted cash flow method on the grounds that the land was not being sold and that only the business was being sold. It is thus amply clear that the value of the land was not received for dis-investment of Hotel Kanishka as only the business was being disinvested. This is clear from the tabulated statement given below:

Area of Kanishka Hotel 12790 sq.mtr. Land rates for calculation of value of land Rs. 1,15,920/- per sq.mtr. Land value as assessed by Ministry of Urban Development for dis-investment Rs. 148.26 crores. Annual Ground Rent received as per the lease agreement. Rs. 1.56 crores per annum (No other premium/ value for land is mentioned in the lease agreement) From the above, it is evident that no consideration has been received under the lease agreement by the Lesser for the land of Kanishka Hotel. It is also evident that only the business of management and operation of the hotel premises was leased to the petitioner company and, Therefore, the premises under issue can not be converted into freehold on the lessee had only a right to occupy and manage the premises.

9. Emphasis was laid by the learned Counsel on the pleadings in para 8 to the effect that no consideration had been received under the lease agreement by the Lesser.

10. Sub-para (i) of para 9 of the review application, which was relied upon, reads as under:

(i) That in the lease agreement executed with disinvested hotels, there is no clause regarding premium in consideration of the lease. In all other leases eligible for conversion, it is specifically indicated that the indenture of lease is in consideration of the premium of Rs. __ (value of the land) whereas in the instant case it is indicated in Article 2 of the lease agreement that in consideration of the lease granted hereunder the lessee shall pay to the Lesser an annual lease rent and ground rent (Annual Rent) of Rs. 1,56,11,983/0.

11. Learned Counsel for the respondents referred to the proforma of perpetual lease executed by L&DO and sought to draw distinction between the terms of the instant lease i.e. lease dated 8.10.2002 executed in favor of the petitioner and other leases.

12. Notwithstanding the fact that law pertaining to review requires a party to establish that inspire of due diligence, it was unable to place documentary material before the court or was unable to present a particular facet of the case, since issue raised would have a ramification qua other similar situate persons, as conceded by the learned Counsel for the petitioner, said technical aspect of the matter is being ignored and review is being decided by taking on record the additional material placed on the file and additional pleadings.

13. Let me start with the conversion policy. In 1992, Union of India notified a conversion policy under which leasehold tenures were liable to be converted to freehold tenure on payment of premium called "conversion charges". The policy was restricted to residential leases for plots up to 500 sq.meter area. The policy was extended from time to time to different category of leases as also plot areas. I am concerned with the latest conversion policy notified in June, 2003. Relevant clause thereof is Clause 1.5. It reads as under:

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

14. Lease in favor of the petitioner executed on 8.10.2002 is by the L&DO. Lease

relates to a plot of land demised in perpetuity i.e. 99 years.

15. Submission of counsel for the applicant that what was assigned to the petitioner was a right for operating and managing the commercial business of hotel has to be considered in light of the lease in question and other documents executed between the parties.

16. With the era of liberalisation, it is common knowledge that the socialist philosophy propounded by the State was considerably watered down. Theory of State control was jettisoned and private participation became the mantra of the day.

17. Economists had been publishing research papers showing that huge investment from public funds were yielding no return. Public sector undertakings were becoming a drain on the national economy. They were becoming personal fiefdom of those involved with the affairs of the Government.

18. Globalisation required a competitive market. No economy could remain in isolation much less prosper in isolation. The Ministry of Tourism, Government of India through its Tourism Department was maintaining large number of hotels. inspire of being in prime areas and land being allotted at throw away price, these hotels were running at a loss. This loss was being shared by the citizens of India inasmuch as from the consolidated funds of India, each year, grants were given by the Government for running of these hotels.

19. Came dis-investment. The Government created subsidiary companies, share capital whereof was held by the Government. Different hotels became properties of these subsidiary companies. In the instant case, under one such scheme of demerger, Kanishka Hotel was severed from the tourism department and became the asset of "Hotel Excelsior Pvt. Ltd.". Shares of the said company were held by Union of India (89.97%), Indian Hotels Co. Ltd. (10%). The said company in turn was a Government owned company. Only 0.03% shares were held by residual share holders.

20. Vide a share purchase agreement dated 8.10.2002, the entire share holding of Hotel Excelsior Pvt.Ltd. was purchased by Nehru Place Hotel Ltd. The share purchase agreement is a tripartite agreement executed by the President of India acting through the Joint Secretary, Ministry of Tourism, Government of India, Nehru Place Hotels Pvt.Ltd. and Hotel Excelsior Pvt.Ltd. Under the said share purchase agreement, shares held by the Government were purchased by Nehru Place Hotels Ltd. Thus, the management and control of Hotel Excelsior Pvt.Ltd. went into private hands. Relevant for the purpose of present decision is a representation and a warranty by the Government of India to the purchaser as recorded in Article 6.9 of the share purchase agreement. It reads as under:

6.9 The Government shall make best efforts to co-operate with the purchaser in making all filings and applications necessary to perfect or register ownership of the assets of the purchaser.

21. It is interesting to note that the bid of Nehru Place Hotels Ltd. for the share holding of the Government was in the sum of Rs. 95,95,01,000/-. While evaluating the bid, the Government of India assigned Rs. 31,22,39,658/- for payment of 50% of unearned increase on leased land to L&DO.

22. Simultaneously, with the execution of the share purchase agreement, perpetual lease was executed on the same date. Clause 8(a) to (g) of Article 1 of the lease agreement defined (a) agreement; (b) leased premises; (c) financial year; (d) hotel; (e) lease; (f) terms; and (g) unearned increase.

23. "Leased premises", "lease" and "unearned increase" respectively was defined as under:

(b) "Leased Premises" shall mean the plot of land measuring approximately 12,790 square metres situated at 19, Ashoka Road, New Delhi-110001 bounded as at the foot of this Agreement, on which the hotel named Hotel Kanishka and Kanishka Shopping Plaza are situated.

x x x x x x x x x x

(e) "Lease" shall have the meaning assigned to it in Article 2.1(a).

x x x x x x x x x x

(g) "Unearned Increase" shall mean the excess of the market value of the leased premises determined for the purpose of sub-lease or transfer by the lessee over a value calculated at the rate of 40 times the lease rent for the financial year ended March 31, 2003.

24. Clause 2.1(a), under the caption "Grant of Lease" recorded as under:

(a) The Lesser hereby grants and the lessee hereby accepts on lease ("Lease") the leased premises for a period of 99 years from the date of execution of this agreement.

25. Article 4.3 of the lease reads as under:

4.3 The lessee shall be entitled during the term of the agreement to be in peaceful possession and use of the leased premises. It is understood that the leased premises shall be used for such activities as allowed by the Master Plan of the city in force from time to time, including for operation and management of the Hotel with all modern amenities. Change of use should be done only after prior permission of the Lesser.

26. Article 8.5 of the lease reads as under:

8.5 The lessee shall, before any assignment or transfer or mortgage or sub-lease of the said premises hereby demised or any part thereof obtain from the Lesser or such officer or body as the Lesser may authorise in this behalf, approval in writing of said assignment or transfer or mortgage or sub-lease and all such assignees/ transferees/mortgagees/sub-lessees and the successors of the lessee shall be bound by all the covenants and conditions herein contained and be liable in all respects therefore.

(i) Provided that upon such assignment/ transfer/sub-lease the Lesser shall be entitled to claim and recover a portion of the unearned increase as defined at Article 1.1(g) in the value of land at the time of transfer (whether such transfer is of entire site or only a part thereof) the amount to be recovered being 50 percent of the unearned increase.

(ii) Provided also that the Lesser shall have a pre-emptive right to purchase the property after deducting 50 percent of the unearned increase mentioned above, and

(iii) The new sub-lessee and/or transferee shall execute a supplementary lease/ sub-lease/ undertaking in the form and manner specified by the Lesser to abide by the terms of this agreement and such other conditions as may be specified by the Lesser in writing.

27. A perusal of the lease shows that the leased premises is a plot of land measuring approx. 12,790 sq.mtrs. situated at 19, Ashoka Road, New Delhi. The leased premises is not a building. Submission of learned Counsel for the respondent that the words on which the hotel named "Hotel Kanishka" and "Kanishka Shopping Plaza" are situated, in Sub-clause (b) of Article 1 shows that building was leased is an ex facie misreading of the definition. The definition has two parts. The first part defines and the second part is clarificatory or explanatory. It is only the plot of land which is the leased premises. Reference to the hotel and the shopping plaza is merely descriptive of land.

28. Article 1.1(d) of the lease defines "hotel" to mean the building situated in the leased premises. The definition reads as under:

(d) "Hotel" shall mean all the buildings situated in the leased premises including the structures (surface and subsurface) and other improvements therein.

29. Obviously, structures would fall within the definition of the word "hotel". Land would be encompassed in the definition of the leased premises.

30. Under Article 8.5 unearned increase in case of assignment of lease entitled the Lesser to recover a portion of the unearned increase in relation to "value of land at the time of transfer".

31. The representation and warranty of the Government under Article 6 of the share purchase agreement becomes important to be noted for the reason, Article 6.9 mandates that the Government shall make efforts to perfect or register ownership of the assets of the purchase under the share purchase agreement.

32. The lease is the Government''s act of fulfilling the commitment under Article 6.9 of the share purchase agreement.

33. That the lease was a derivation of dis-investment policy is neither here nor

there. That Union of India executes different kinds of leases is also neither here nor there.

34. The lease in question does not state that the leasehold tenure is incapable of being converted to freehold tenure.

35. The claim of the petitioner is under the conversion policy.

36. Learned Counsel for the respondent did not dispute that if the case of the petitioner falls within the ambit of Clause 1.5 of the conversion policy, benefit of conversion could not be denied.

37. Learned Counsel for the respondent also did not deny that for Clause 1.5 to apply, only thing to be established was that the lease was executed by the Department of Rehabilitation, L&DO or the Directorate of Estates and that ownership was conferred under the said deed.

38. Conceding that commercial and mixed land use leases were eligible for conversion from leasehold to freehold, only thing urged by counsel was that ownership rights were not conferred upon the petitioner under the lease in question.

39. Now, a leasehold tenure would be distinct from ownership in the context of the normal jurisprudential concept of ownership which attaches to a freehold land. The conversion policy applies to leasehold tenure and, Therefore, the concept of ownership rights would have to be understood and appreciated in the context of leasehold tenures.

40. Hithertofore, land owning agencies in Delhi were executing only perpetual lease i.e. lease for 99 years. But, a right of sale, mortgage, right to construct and deal with the property was conferred upon the lessee. As explained by their Lordships of the Supreme Court in the decision reported as 1987 (2) RCJ 382, Smt. Shanti Sharma and Ors. v. Smt. Ved Prabha and Ors. in the modern context where it is more or less admitted that all lands belong to the State, the persons who hold properties will only be lessees and in that context, the term "ownership" would have to be viewed.

41. Referring to the concept of ownership under Delhi Rent Control Act, 1958, where the landlord who had a leasehold tenure qua a plot was seeking eviction, their Lordships held that the concept of ownership envisaged by Delhi Rent Control Act, 1958 would have to be viewed in the present context.

42. Indeed, in today''s world and particularly in India, absolute ownership in the sense that one has an absolute unrestricted right to deal with the property is non existent.

43. As observed in Halsbury''s Laws of England, 3rd Edition Volume 36 page 893, words may have to be construed not strictly etymologically but in their contextual set up.

44. What rights are conferred under the lease in question? The first is to hold the land for 99 years. The second is to enjoy the land and building i.e. hotel standing thereon. The third is to use the land for purposes allowed under the Master Plan. The fourth (Article 5.1) is to re-develop and re-construct the building but as per the Master Plan. The fifth is to mortgage, assign, transfer or sub-lease the land, of course, with prior permission of the Lesser and on payment on unearned increase.

45. All these are facets of ownership.

46. It was sought to be urged that one has to buy ownership i.e. pay a price for acquiring ownership. Shri Y.P. Narula, senior counsel urged that the lease in question was a premium free lease. Counsel urged that all other leases executed by the Government are on payment of premium.

47. In my opinion, where a person pays a premium, lease rental would be less and where he pays no premium or less premium, rental may be more. But, payment of premium has no relation to the lease and would have no relationship to the concept of ownership as understood in the contextual sense in the city of Delhi. But, I need not bother myself for the reason, while evaluating the bid, premium towards land i.e. money payable to L&DO was apportioned by the Government. It is obvious that money has flowed to the land owning agency i.e. L&DO which, prior to the transaction in question, had given land free of cost or on notional basis to another department of the Government of India.

48. I eschew the submission of learned Counsel for the respondent pertaining to the difference in the language of the lease in question and the lease executed by L&DO for the reason, I am of the opinion that difference in language is neither here nor there. What was important for consideration was the concept of ownership, reference whereof is to be found in Clause 1.5 of the policy relied upon.

49. That the lease in question does not stipulate that leasehold tenure can be converted to freehold tenure is meaningless for the reason, in no lease in Delhi such a clause is to be found. Entitlement for conversion is not to be found in the lease but in the conversion policy.

50. I find no merits in the review application. The same is accordingly dismissed.

51. No costs.

