

(2012) 09 DEL CK 0532

In the Delhi High Court

Case No : L.P.A. 2298-99 of 2006 and CM No. 16584 of 2006

Union of India and Another

APPELLANT

Vs

Hotel Excelsior Ltd and Another

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 108, 108(B)(d), 108(B)(f), 108(B)(j)

Citation : (2013) 1 ILR Delhi 157

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Mohan Parasaran, ASG with Ms. Aarthi Rajan, Mr. B.V. Niren, Mr. Manav Gupta, Mr. Alok Prasanna Kumar and Mr. Meyyappan Nagappan, in L.P.A. 2298-99/2006 and CM No. 16584/2006, L.P.A. 147 and 297/2007 and CM Nos. 2839 and 6320/2007 and in L.P.A. 161/2009, Mr. Jatan Singh, CGSC, Mr. Brijesh Chaudhary and Mr. Karan Burman, for UOI in L.P.A. 161/2009, for the Appellant; Harish Malhotra, with Ms. Malini Sud and Ms. Vidhi Goel, in L.P.A. 2298-99/2006 and CM No. 16584/2006 and LPA 297/2007 and CM No. 6320/2007, Ms. A. Poddar and Mr. Sidharth Aggarwal, in LPA 147/2007 and CM No. 2839/2007 and None in L.P.A. 161/2009, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—These four intra-court appeals, though against separate judgments in separate writ petitions, are listed together since the judgments of the learned Single Judge under challenge in LPA Nos.147/2007, 297/2007 and 161/2009 merely follow the judgment of the learned Single Judge under challenge in LPA No. 2298-99/2006. Further, all appeals are stated to entail the same question of law i.e. the right, of the lessees of land underneath disinvested hotels, to have the same converted into freehold. Though the land subject matter of LPA No. 297/2007 is not underneath a disinvested hotel but underneath a cinema hall but the learned Single Judge has qua the same also, followed the dicta under challenge in LPA No. 2298-99/2006 and the counsels in LPA No. 297/2007 also have not argued the same any differently. Rather, arguments have

been addressed with respect to LPA No. 2298-99/2006 only, with the counsels in other matters merely adopting the arguments. LPA No. 2298-99/2006 arises from order dated 29.08.2005 allowing W.P.(C) No. 15058-59/2004 preferred by the respondents therein and also impugns the order dated 25.08.2006 in review petition preferred thereagainst. The same concerns land underneath erstwhile Kanishka Hotel and Kanishka Shopping Plaza. LPA No. 147/2007 arises from judgment dated 01.09.2006 allowing W.P.(C) No. 450/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Qutub Hotel. LPA No. 297/2007 arises from the judgment dated 25.08.2006 allowing W.P.(C) No. 14696/2004 preferred by the respondents therein and pertains to land underneath the Eros Cinema Building. LPA No. 161/2009 arises from judgment dated 04.12.2008 allowing W.P.(C) No. 24033-34/2005 preferred by the respondents therein and pertains to the land underneath erstwhile Lodhi Hotel at Delhi.

2. The learned Single Judge has held the leasehold land underneath the disinvested hotels and cinema to be entitled to freehold conversion under the Policy introduced by the Government and has thereby quashed the decision of the Land and Development Office (L&DO) refusing freehold conversion of such land and held L&DO to be not entitled to discriminate between the land underneath the disinvested hotels and cinema and other leasehold lands being converted into freehold.

3. W.P.(C) No. 15058-59/2004 from which LPA 2298-99/2006 has arisen, was filed pleading:-

A. that by a Scheme of Demerger sanctioned by the Central Government on 5th August, 2002, Hotel Kanishka including Kanishka Shopping Plaza was hived off from Indian Tourism Development Corporation (ITDC) and merged into Hotel Excelsior Pvt. Ltd. (HEPL);

B. thereafter vide two Share Purchase Agreements dated 8th August, 2002, the shares of HEPL held by Union of India and Indian Hotels Company Ltd. were purchased by the respondent No. 2 Nehru Place Hotels Ltd. for a total price of Rs.1,01,38,22,146/- (Rupees One hundred one crores thirty eight lakhs twenty two thousand one hundred forty six only);

C. that thereby the ownership and management of Hotel Kanishka including Kanishka Shopping Plaza stood transferred/handed over to Nehru Place Hotels Ltd.;

D. a lease deed dated 8th October, 2002 for a period of 99 years was executed by the President of India acting through the L&DO in favour of HEPL and whereunder a sum of Rs.4,68,35,949/- was paid as security deposit;

E. that on 6th June, 2003, L&DO came out with a policy/scheme for conversion of leasehold rights into freehold; as per Clause 1.5 of the Scheme of Conversion, all commercial and mixed land use properties allotted by L&DO "for which ownership

rights had been conferred and lease deed executed and registered" could be converted into freehold;

F. as per the Master Plan for Delhi, the aforesaid property i.e. Kanishka Hotel and Kanishka Shopping Plaza falls under the category "Commercial";

G. that HEPL being desirous of taking advantage of the said policy of conversion of leasehold rights into freehold, applied thereunder with respect to the land underneath Kanishka Hotel & Kanishka Shopping Plaza and sought adjustment of the security deposit of Rs.4,68,35,949/- in the conversion charges;

H. however neither any response was received nor were the leasehold rights converted into freehold.

Accordingly the writ petition aforesaid was filed seeking mandamus for conversion of the land underneath Hotel Kanishka & Kanishka Shopping Plaza into freehold on adjustment of conversion charges of Rs.4,44,78,504/- out of the security deposit of Rs.4,68,35,949/-.

4. Notice of the said writ petition was issued. A counter affidavit was filed by the L&DO contesting the petition. It was inter alia stated in the said counter affidavit:-

a. that the land aforesaid had been leased out to HEPL under the Disinvestment Policy of the Government of India;

b. that the scheme for conversion was not applicable to disinvested hotels which formed a separate and distinct category;

c. that the matter was examined in consultation with the Ministry of Finance which had also affirmed that private parties which had acquired the commercial business of hotel, cinema houses etc. by way of disinvestment are a different category altogether and are not to be treated at par with the allottees of other properties eligible for conversion;

d. that conversion could not also be granted since HEPL had encroached upon service lane;

e. that conversion could also not be granted for the reason that HEPL, instead of depositing the conversion charges, had sought adjustment of the security deposit which was not permissible;

f. along with counter affidavit, a copy of the letter dated 25th February, 2005 rejecting the request for conversion was also filed.

5. Needless to state the respondents in their rejoinder to the aforesaid counter affidavit controverted the averments therein. It was pleaded that neither the conversion policy carved out any exception qua the disinvested hotels nor did the lease deed for 99 years executed in favour of HEPL restricted conversion from leasehold to freehold. It was further pleaded that the rejection of the application for conversion was after the filing of the writ petition.

6. The Learned Single Judge, holding that, i) interest in land was vested in HEPL as perpetual lessee under the lease agreement dated 8th October, 2002; ii) the conversion policy did not carve out any exception qua disinvested hotel; iii) the exceptions if any to the policy have to be in the policy only and cannot be by executive instructions; iv) the conversion policy was applicable to commercial properties, as the Kanishka Hotel & Kanishka Shopping Plaza was; v) as such the said property could not be discriminated against; and vi) the lease deed and the share purchase agreement did not prohibit freehold conversion, vide order dated 29.08.2005 allowed the writ petition and directed the L&DO to convert the leasehold rights into freehold and also allowed adjustment of the security deposit under the lease agreement into conversion charges.

7. Appellant L&DO applied for review of the aforesaid order. The judgment dated 25th August, 2006 of the Learned Single Judge thereon records that the counsel for the respondents/writ petitioners conceded that the said review petition be decided on merits. The Learned Single Judge thereafter proceeded to decide the writ petition afresh and noticed the pleas of the L&DO in the review application to the effect that, a) the land had been leased out to HEPL only for operating and managing the commercial business of hotel by way of Disinvestment Policy of the Government; b) the reserve price for the auction (pursuant to disinvestment) was not fixed having regard to the value of the land; c) even in the lease deed dated 8th October, 2002 executed in favour of HEPL, no premium was charged and the said lease deed was as such different from leases conversion of which into freehold was being permitted.

8. Clause 1.5 of the Scheme of Conversion / Conversion Policy, relied upon by the learned Single Judge is as under:-

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

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.

The Learned Single Judge, in the judgment dated 25th August, 2006 held:-

I. that the share purchase agreements required the government to co-operate with the purchaser of shares of HEPL, in perfecting or registering ownership of the assets;

II. that out of the bid amount, a sum of Rs.31,22,39,658/- was assigned for payment to the L&DO of 50% of the unearned increase on leased land;

III. that the lease deed dated 8th October, 2002 was executed simultaneously with the execution of the share purchase agreements;

IV. that for Clause 1.5 aforesaid of the Conversion Policy to apply, only thing to be established was that the lease was executed either by the Department of

Rehabilitation or the L&DO or the Directorate of Estates and that ownership rights were conferred under the lease deed;

V. that the concept of ownership rights would have to be understood and appreciated in the context of leasehold tenures;

VI. that the very fact that a right of sale, mortgage, construction and of dealing with the property was conferred on the lessee showed conferment of ownership rights on the lessee, even if the lease was for 99 years. Reliance in this regard was placed on Shanti Sharma and Others Vs. Ved Prabha and Others, where the holder of a leasehold tenure, in the matter of seeking eviction of tenant under the Delhi Rent Control Act, 1958, was viewed as the owner;

VII. that in today's world particularly in India, ownership in the sense of absolute unrestricted right to deal with the property is non-existent;

VIII. the rights to enjoy the land and the building thereon, to re-develop and re-construct as per the Master Plan, mortgage, assign, transfer or sub-lease conferred under the lease deed dated 8th October, 2002 are all facets of ownership. The argument of the L&DO that for acquiring ownership, a premium had to be paid and which had not been paid under the lease in question was negated holding that payment of premium had no relation to the concept of ownership as understood in the contextual sense in the city of Delhi, since when premium is paid rent is less and vice versa;

IX. that out of the payments under the share purchase agreements, monies had 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 Government of India;

X. that the difference in language of the lease in question and the other leases of the L&DO was irrelevant;

XI. entitlement for conversion is to be found in the Conversion Policy and not in the lease.

Accordingly the review application was dismissed.

9. The Learned ASG appearing for the appellant L&DO has argued that, i) the land aforesaid was earlier allotted in favour of ITDC and no lease was ever executed in favour of ITDC; ii) that the stamp duty on the lease deed dated 8th October, 2002 was also computed on the basis of the ground rent payable thereunder; iii) comparison is sought to be drawn with the lease deed contemporaneously granted in favour of HUDCO with respect to the land where Ansal Plaza is situated; iv) that what was sold under the share purchase agreement was only the shares; and v) that the Learned Single Judge has wrongly confused the unearned increase with the premium.

10. Mr. Harish Malhotra, Sr. Advocate for the respondents in LPA No. 2298-99/2006 has, i) invited attention to the Public Notices issued at the time of

disinvestment and has contended therefrom that it was in fact the property of Kanishka Hotel which would include the land, which was offered for sale, and further contended ii) that permission was given for mortgage and sale of the property and which would have been given only when ownership rights were conferred, even though the lease was for 99 years; iii) that under the new Stamp Act, the stamp duty payable on lease of duration of over ten years is the same as a conveyance deed. Attention is also invited to the clause of the lease deed dated 8th October, 2002 giving the lessor i.e. L&DO a pre-emptive right of purchase in the event of sale/transfer of rights by the lessee and the same is also urged to be a facet of ownership.

11. We may at the outset state, that a lessee has no right to claim conversion of the leasehold into freehold or to compel the lessor to so grant conversion. The respondents also did not peg their case so high. All that which thus requires determination is, whether the respondents, under the Policy floated by the L&DO, have a right to such conversion and if not, whether the appellant L&DO, in denying such conversion to the respondents, is discriminating against the respondents.

12. It is not as if the appellant L&DO allows such conversion, with respect to all leases. Judicial notice can be taken of the fact that the Policy/Scheme for conversion, when first introduced in the year 1992, was qua residential plots only and that too of size not exceeding 500 sq. mtrs. Subsequently in the year 1999 all residential plots irrespective of size were brought within the ambit of the Scheme. It is only in the next stage in the year 2003 that the Policy/Scheme was extended to commercial/mixed use plots of land. Even now, the Scheme/Policy does not state that all leaseholds under the L&DO are eligible for conversion to freehold, as would have been the case, had the intent been so. Instead, in Clauses 1.1 to 1.5 of the Scheme/Policy, the leases eligible for freehold conversion are specified. Significantly, while mentioning (in Clause 1.1) residential plots as eligible for conversion, it is not mentioned, "for which ownership rights have been conferred", as has been mentioned in Clause 1.5 while including commercial and mixed land use properties in the list of properties eligible for freehold conversion. The only inference can be, that while leases of all residential properties were eligible for conversion, irrespective of whether the ownership rights thereunder were conferred or not, it was not so qua the commercial/mixed land use properties. Only those commercial/mixed land use properties were/are, under the Scheme/Policy, eligible for conversion, "where ownership rights have been conferred".

13. We have not come across any challenge having been made, since the year 1992 when the Scheme/Policy of freehold conversion was first introduced, on the ground of discrimination, for allowing such conversion qua one category of leases and not others. The question of discrimination in our view in such a situation does not arise since as aforesaid, 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 form a distinct class/category, to also claim such privilege / benefit.

14. The appellant L&DO claims leases of lands under disinvested hotels to be forming a separate class/category since no ownership rights were conferred under the said leases. To support the said plea, non-payment of premium under the said lease is cited. As aforesaid, under the Scheme/Policy itself, appellant L&DO had made only such commercial and mixed land use properties eligible for conversion, "for which ownership rights had been conferred". The learned Single Judge also has noticed the paradox in the said expression. A lease is different from ownership and a lease in which ownership rights are conferred would cease to be a lease (see *Byramjee Jeejeebhoy (P) Ltd. Vs. State of Maharashtra*,). However the fact remains that the appellant L&DO while formulating the Scheme/Policy for freehold conversion did intend to exclude certain categories of leases of commercial/mixed land use properties from eligibility for conversion. We are unable to agree with the reliance placed by learned Single Judge on *Smt. Shanti Sharma* (supra) for holding that ownership rights are conferred in a lease for 99 years. *Smt. Shanti Sharma* was a dispute between a landlord and a tenant in the regime of the rent control laws which protected the tenant from eviction except on the grounds mentioned in the Act; one of the said grounds was of bonafide requirement by the landlord of the tenanted premises. However, such ground was made available only to a landlord who was also the owner of the premises. It was in this context that the Supreme Court held that all that was required to be owner was to have a title better than the tenant and thus the landlord who was himself a lessee for 99 years of the land underneath the property was held to be the owner. The said judgment has been wrongly relied upon in a dispute between the lessor and lessee of the land, for holding a lessee of 99 years to be having ownership rights in the property. A lease, even if for 99 years, does not confer ownership rights on the lessee.

15. The Division Bench of the Bombay High Court in the *The Collector of Bombay Vs. Khatizabai Dharsi Somji Dossa*, held that whether the term of the lease be 5 years, 50 years, 99 years or even 999 years, the transaction is only a lease and there is always a reversion which continues to vest in the owner in the entire term of the lease and the lessee even if for 999 years does not become the owner. The Privy Council in AIR 1929 156 (Privy Council) held the length of the lease to be not indicative of even permanency of the lease much less of transfer of ownership. The Calcutta High Court also in *Kamal Kumar Datta and Another Vs. Nandalal Dubey*, expressly held the lease for 99 years to be not qualifying as a permanent lease. Even a clause of heritability of the lease was in *Chapsibhai Dhanjibhai Danad Vs. Purushottam*, held to be not an indice of permanency. Thus, in law no ownership rights can be said to be conferred on the respondents for the reason of the leases in their favour being for the long term of 99 years. Even a perpetual lessee of Nazul land, in *Kiran Tandon Vs. Allahabad Development Authority and Another*, was held to be not entitled to get full compensation for acquisition thereof, observing that only a full owner gets the

entire amount of compensation.

16. We are similarly of the opinion that the learned Single Judge was unduly swayed by conferment under the lease dated 8th October, 2002 for 99 years of right to mortgage, construct and otherwise deal with the property, to hold ownership rights having been conferred therein. Conferment of such rights is not inconsistent with a lease and in fact u/s 108 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, a lessee is entitled to make accession to the property [Section 108 (B)(d)], make repairs to the property [Section 108 (B) (f)], transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property [Section 108 (B) (j)] and erect on the property any permanent structure with the consent of the lessor [108 (B) (d)]. It thus cannot be said that the reasons which prevailed with the Learned Single Judge to find ownership rights to have been conferred on HEPL are anything out of the extraordinary or for the reasons whereof it can be said that something more than lease hold rights were vested in the respondent No. 1.

17. In Mohd. Noor and others Vs. Mohd. Ibrahim and others, it was held that a tenant may be entitled by law to transfer his interest in the property but that is not transfer of ownership and a lessee from a local body or a State Government may be having right to raise building and such rights may be heritable and transferable but right of transferring subordinate rights does not make it transfer of ownership. Similarly in Hamidullah (Dead) by his Legal Representatives and Others Vs. Sheikh Abdullah and Others, long possession for generations and the factum of the tenant making construction on the land of permanent structures at own cost were held to be not factors capable of raising presumption of the tenancy being a permanent one. The onus of proving the lease/tenancy to be a permanent one was also held to be on the tenant. Even in Bhatia Co-operative Housing Society Ltd. Vs. D.C. Patel, the reasoning of the High Court that the lessee of the land is the owner of the building constructed thereon at the lessee's cost was set aside holding that the limitations on the use of the building and the restrictions on transfer etc. indicate that the lessor has the dominant voice and the real ownership and the erection by the lessee of the building at its own cost is for the lessor.

18. Markby in his "Elements of Law" explained the position succinctly by stating "however numerous and extensive maybe the detached rights (in the favour of lessee), however insignificant may be the residue (with the lessor), it is the holder of this residue of right whom we always consider as the owner."

19. Though when a lease is for building purposes an inference of permanency is drawn (see Sivayogeswara Cotton Press, Devangere and Others Vs. M. Panchaksharappa and Another,) but the lease in favour of the respondents cannot be said to be for building purposes inasmuch as the same already has a building constructed thereon and the lease is of the land with building with the right to the respondents as lessees to make additions/alterations thereto or to reconstruct the same. Moreover, subsequently in Chapsibhai Dhanjibhai Danad

Vs. Purushottam, a provision in the lease, though for building purposes but permitting the lessee to on the expiry of the term thereof remove the structures was held to be not indicative of the lease being a permanent one.

20. We are further of the opinion that once the Policy/Scheme for freehold conversion had made only such commercial and mixed land use properties eligible for freehold conversion, where ownership rights had been conferred, a meaning was/is required to be given to the said words and the same cannot be rendered otiose and redundant, as would be the case if the opinion of the learned Single Judge was to prevail. To look into the mind of the framers of the said Policy, our research led us to the very constitution of the L&DO. It is an attached office of the Ministry of Urban Development and is responsible for the properties of the Government of India in Delhi. These properties fall into two broad categories i.e. Nazul Lands which were acquired in 1911 for formation of the Capital of India at Delhi and rehabilitation lands which were acquired by the Government of India for the speedy rehabilitation of displaced persons from Pakistan. These properties were given out on leases for residential, commercial and institutional purposes. Leases on old Nazul land are perpetual leases and ground rent is revisable at the option of the L&DO as lessor after every 30 years. Rehabilitation leases are for a period of 99 years and revision of ground rent is due after 20 years.

21. The Lease Deed dated 8th October, 2002 was not granted by the L&DO in exercise of its powers of administration of the properties of the Government of India in Delhi. L&DO as aforesaid had allowed the said land to be used by ITDC, a Government company for construction of Kanishka Hotel and Kanishka Shopping Plaza. However, when the Government decided to disinvest Kanishka Hotel and Kanishka Shopping Plaza, the need arose for creation of some right in land underneath in favour of the highest bidder. This distinguishes the subject lease from the other leases granted by the L&DO.

22. Though neither the Policy/Scheme for conversion cites the objective thereof, nor has the appellant placed the same before us but we find this Court in Bal Kishan Chhabra Vs. Union of India (UOI), to have observed that the properties of which leases had been granted had virtually moved out of the hands of the government because of the execution of long term leases of 99 years and the rent whereof was so nominal that even administrative costs were not recoverable. It was further observed that it would be most sanguine to expect that these lands or buildings could be resumed by the government even after the tenure of 99 years had run out inasmuch the public will be incensed to such an extent that political parties are likely to steer clear from any such attempt. The Policy/Scheme for freehold conversion was thus found to be intended to earning revenue for the government through conversion charges and at the same time reducing administrative obligations and costs. The intra court appeal being LPA No. 1659/2006 against the said judgment was dismissed on 12.08.2010. Applying the said objective of the Policy/Scheme for freehold conversion, we do

not find the subject leases to be falling in the category where the rents are nominal, not enough to recover even the costs of administration of the lease. The lease deed dated 8th October, 2002 in LPA 2298-99/2006 is at a rent of Rs.1,56,11,983/- per annum to be increased by 30% every 10 years. The position in the other leases is the same.

23. 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 and Others Vs. The State of Maharashtra and Another, 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, Delhi-IX Vs. Monoflex India P. Ltd. and Others, 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, Hyderabad Vs. Inspector General of Registration and Stamps, Andhra Pradesh, Hyderabad and Another*, 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, Assam etc. Vs. The Panbari Tea Co. Ltd.*, 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 Vs. Shashnak Steel Industries (P) Ltd.*,) 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.

24. 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 (UOI) and Others Vs. Nitdip Textile Processors Pvt. Ltd. and Another*, 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 Vs. State of Mysore and Another*, 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.

25. 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 Samyakta Besava Sangha Ltd. Vs. State of Mysore and Others*, 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 and Others Vs. Union of India (UOI) and Others*, and *U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others*, 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.

26. The matter can be looked at from another aspect. What the respondents, by claiming freehold conversion are seeking is, to become absolute owners of the prime commercial properties belonging to the people at large held by the appellant L&DO in trust and which absolute ownership rights were not intended to be given at the time of disinvestment of the hotels standing thereon. The respondents did not come to this Court with the case that instead of lease deeds, sale deeds ought to have been executed. On the contrary, after becoming lessees, they are seeking to become owners. The appellant L&DO in the matter

of disposal of public properties partakes the character of a trust and is entitled to the best price of such properties and ownership cannot be smuggled in through the backdoor of lease. Reference with benefit in this context can be made to Centre for Public Interest Litigation and Others Vs. Union of India (UOI) and Others, . The Division Bench of this Court speaking through one of us (Acting Chief Justice) in Aggarwal and Modi Enterprises (Cinema Project) Pvt. Ltd. and Another Vs. New Delhi Municipal Council, repelled the plea of discrimination observing that before a claim based on equality clause is upheld it must be established that the claim is just and legal and that the doctrine of discrimination is founded upon existence of an enforceable right. The attempt of the owners of Chanakya Cinema in that case to equate their case with small shopkeepers was held to be meaningless holding that they constitute a separate class. Interestingly, in that case the plea of the owners of Chanakya Cinema was that NDMC was giving longer leases to hotels and the same treatment should be extended to the cinema sites. This argument was also rejected.

27. The appellant and other governmental agencies are known to grant leases viz. of markets, shops etc. Infact one such leases granted by NDMC to Chanakya Cinema at New Delhi was held to have lapsed and the eviction was upheld till the Supreme Court vide judgement reported as Aggarwal and Modi Enterprises Pvt. Ltd. and Another Vs. New Delhi Municipal Council, . The very fact that the entitlement to freehold was confined only to those leases where ownership rights had been conferred signifies that such conversion was not intended where according to the appellant, ownership rights had not been conferred. In the light of the differences pointed out above, the appellant can well be believed to have entertained an opinion that conversion is to be granted only of those leases for which premium had been paid and not to other leases. We therefore do not find any right in the respondents to compel the appellant L&DO to convert the leasehold rights in the land underneath disinvested hotels and cinema aforesaid into freehold. We also do not find any arbitrariness or discrimination in the refusal of the appellant L&DO to grant freehold conversion sought by the respondents. Axiomatically, we are unable to uphold the judgments of the learned Single Judge under appeal and set aside the same, allowing these appeals. Resultantly, the writ petitions filed by the respondents are dismissed. However, in the circumstances, no costs.