
(2012) 03 DEL CK 0421

In the Delhi High Court

Case No : LPA 787 of 2011 and CM APPLS. 17974 of 2011 (for stay)

Union of India

APPELLANT

Vs

Ravi Kanta Madhok

RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Delhi Rent Act, 1995 — Section 14(1)(k)

Citation : (2012) 03 DEL CK 0421

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

Bench : Division Bench

Advocate : A.S. Chandhiok, ASG with Mr. Sachin Datta, Mr Ritesh and Ms. Gayatri Verma, for the Appellant; Mithilesh Kumar Singh, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, Acting Chief Justice

CM APPL. 17975/2011

1. This is an application for condonation of delay in filing the appeal. No reply is filed by the respondent. For the reasons stated in this application, we are convinced that the appellant has made out sufficient cause for condoning the delay of 100 days in filing the appeal. The prayer made in this application is accordingly allowed.

2. CM stands disposed of.

LPA 787/2011 & CM APPL. 17974/2011

Admit.

3. With the consent of the learned counsel for the parties, final arguments have been heard.

4. This is an intra court appeal preferred by the appellant/UOI questioning the validity of the judgment dated 10.5.2011 rendered by the learned Single Judge

in Writ Petition (C) No. 3696/2010, thereby, quashing the demand of the appellant of Rs.5,74,743/- towards misuse charges and damages for unauthorized construction of/in property No. 11/4 West Patel Nagar, New Delhi. The sole ground on which the said demand is set aside is that it was highly belated. The learned Single Judge has taken note of the fact that the inspection of the premise was carried out in the year 1980 but no demand for misuse charges or damages for unauthorized construction was raised till the time the respondent applied for mutation in her name. Referring to and relying upon the judgment of this Court in Prof. Ram Prakash Vs. Delhi Development Authority 2007 8 AD (Del) 313 which was upheld by the Division Bench in Delhi Development Authority Vs. Prof. Ram Prakash, and further confirmed by the Supreme Court in Delhi Development Authority Vs. Ram Prakash, wherein it is held that no such demand for misuse charges could be made for the first time after a lapse of 25 years of detection of such misuse.

5. It is the contention of Mr. Chandhiok, learned ASG that the learned Single Judge did not take into consideration many other relevant facts which would clearly demonstrate that the aforesaid judgment in Prof. Ram Prakash (supra) has no application insofar as the present case is concerned. He has highlighted the following factual position appearing on record of this case in support of his aforesaid submission.

6. There was unauthorized construction and misuse of the premises by the lessee which resulted in passing of the order of re-entry way back in the year 1973. However, thereafter, on application preferred by the lessee, agreeing to pay the misuse charges and also giving an undertaking to the effect that he would remove all the breaches by 14.1.1975 the order of re-entry was recalled. In the said undertaking furnished by him, he also agreed to pay misuse charges for the period during which such misuse persisted. It is further pointed out that in the year 1994 the respondent filed a suit against the appellant herein claiming the relief of mutation in which the respondent prayed for mutation of 1/6th share in the property. During the pendency of this suit, order for inspection was passed by the Court on 21.11.2002. The property was inspected and it was found that misuse was continuing. The said suit was dismissed in the year 2007. However, the respondent preferred appeal against the dismissal of the suit and appeal was allowed on 22.10.2008 directing the mutation of the property in favour of the respondent herein. The case for mutation, in compliance with the said decree was processed and when application dated 5.12.2008 was preferred by the respondent, the property was inspected again and it was found that the misuse was continuing. Our attention is also drawn to the impugned order passed by the learned Single Judge which would show that the respondent herself, in her writ petition had admitted that on the ground floor there were three shops under the occupancy of tenants and the respondent had filed proceeding for getting them evicted on the plea of misuse. The respondent made specific admission to this effect even in her reply dated 10.8.2009 to the notice given by the appellant directing the respondent to remove the breaches of unauthorized construction/

misuse. In the said reply the respondent had inter alia stated as under:-

So far as misuse on leased land is concerned, I submit that on ground floor, three shops are being run by the persons mentioned in the notice itself and I have filed a civil suit against Shri Sanjeev Sood for the recovery of the possession of the premises which is pending and earlier also the suit filed against his father for his eviction continued for a long time and finally went to the stage of High Court. For other two shops also I have filed eviction petition which are pending before the Ld. Additional Rent Controller, Tis Hazari Delhi. All those shop area are under the possession of the tenants and misuse if any are being done by those tenants.

7. It is thus argued by the learned ASG that when the respondent admits that breaches were continuing even in the year 2009, while effecting the mutation, it was permissible for the appellant to demand payment of misuse charges which is in consonance with the Clause-II of the Lease Deed which is to the following effect:-

II. Provided always that if the payments herein before specified or any part thereof shall be in arrears and unpaid for one calendar month after the same shall have become due whether the same shall have been demanded or not or if the lessee makes default in payment of any penalty imposed under the presents or becomes insolvent or if the lessee shall not observe and perform any of the covenants hereinbefore contained the lessor may not withstanding waiver of any previous breach or right of re-entry, cancel the lease and take possession of this land and the building and the fixtures that may then be thereon and also initiate appropriate proceedings for recovery of rent, penalty or other sums payable by the lessee to the lessor under the presents.

8. Learned counsel for the respondent, on the other hand, submits that the learned Single Judge has rightly relied upon the judgment of Prof. Ram Prakash (supra) which had been upheld by the Supreme Court as well.

9. After considering the aforesaid submission of learned counsel for the parties, we are of the view that the impugned order is not sustainable in law and is liable to be set aside.

10. It is rightly pointed out by Mr. Chandhiok that except making an observation that inspection was carried out in the year 1980 and there was no demand of misuse charges till the time the respondent applied for mutation, no other facts which are mentioned above have been taken into consideration by the learned Single judge. In the process, following vital facts are ignored namely:-

(i) There was an undertaking by the lessee himself given way back in the year 1975 to the effect that not only the lessee would pay the misuse charges and but he will continue to pay the same for the period of misuse;

(ii) It is not as if the appellant kept quiet after detection of misuse and raised the demand belatedly;

(iii) It is a case of continuing misuse which fact is admitted by the respondent himself. In a situation like this where there was misuse even on the date when the application for mutation was filed, on the basis of inspection carried out, at that time and finding the misuse, it was legally permissible for the appellant to demand the misuse charges for the continuing breach. The demand, in these circumstances, could not be treated as belated or stale.

11. The controversy in this respect is set at rest by a recent Division Bench judgment of this Court in a batch of matters with leading case entitled Union of India & Anr. Vs. Jor Bagh Asscn. Regd. & Ors. LPA 415/2005. The judgment of Prof. Ram Prakash (supra) has been lucidly explained by the Division Bench in the said judgment in the following manner:-

72. The decisions were cited on the subject of procedural fairness while levying a demand towards misuse charges or charges towards unauthorized construction. In Hari Prakash's case (supra) the Division Bench emphasized that before effecting re-entry for breach of a term of the lease, procedural fairness required the lessor to put the lessee to notice granting reasonable time to remedy the breach, before passing an order to re-enter the property. In Sahib Singh's case (supra) and Sant Ram Sodhi's case (supra), two learned single Judges of this Court held that where the misuse or the unauthorized construction was not by the lessee but by the tenant of the lessee and if the lessee established that the same was not with his consent and that the lessee resorted to the legal remedy available to the lessee by either evicting the tenant or requiring the tenant to remedy the wrong, no charges towards misuse or damages could be levied upon the lessee. In Ram Prakash (Prof.) case (supra), the learned Single Judge, on facts of the case, had highlighted that the lessor had been sending notices, being five in number, on various dates which were being responded to by the lessee and the lessor did not bother to consider the response filed as also the fact that the lessee had taken legal remedy against the tenant for the wrong committed by the tenant. The learned Single Judge quashed the demand. The view was upheld till the Supreme Court.

73. Suffice would it be to state that where the lessee is not at fault and it is the tenant of the lessee who commits the offending act and the lessee takes resort to all means which he can possibly resort to; to either evict the tenant or to compel the tenant to remedy the breach, it would be unjust on the part of the State, as the lessor, to penalize the lessee for the same would violate the jurisprudential norms that no person can be penalized for no fault of his and that constructive liability cannot be fasten except when a law expressly so fastens.

12. After taking note of the provisions of law as well as policy of mutation/conversion from lease hold to free hold, the position is summarized by the Division Bench in the following manner:-

78. We hold that it would be perfectly reasonable for the State, acting as the lessor, to insist that misuse charges and/or damages on account of unauthorized

constructions are paid before the lessor is compelled to convert the lease-hold tenure to a free-hold tenure.

80. We summarize our opinion and then proceed to frame the question of law to be referred to a larger Bench:-

(A) If the term of a grant granting a lease-hold tenure prohibits transfer of the interest without the prior permission of the lessor and does not expressly state that the lessor would be entitled to demand a percentage of the increase in the value of the land, the lessor would be entitled to put a condition granting approval that a percentage of the increase of the value of the land would be paid to the lessor.

(B) Since the conversion policy promulgated on February 14, 1992 acknowledges eligibility to be converted from a free-hold tenure to lease-hold tenure of such leases where possession has been transferred without the consent of the lessor and without paying unearned increase, but upon the condition that the transferee pays 33.1/3% consideration over and above the normal consideration to be paid for conversion, cases of breach of the condition of the perpetual lease that the said interest would not be transferred without the prior consent of the lessor would not require any unearned increase to be paid and the transferee would be entitled to have the lease-hold tenure converted to free-hold tenure upon payment of 33.1/3% consideration over and above the normal.

(C) The perpetual lease-deeds executed by the State or its instrumentalities are government grants and are governed by the Government Grants Act 1895. Damages on account of misuse and/or unauthorized construction by a lessee having a lease-hold tenure in a property can be recovered by the lessor if the lease has a condition regulating the use and extent of construction under the lessor, under pain of the lease being determined for breach of either or both conditions. The same would be recoverable if the lessee prays that the breach be condoned and the lessor is prepared to do so but upon being recompensed for the breach. This power is inherent in the lessor and need not flow from the lease.

(D) Office Order No. 23/1976 dated March 31, 1976 is not the source of the power of the lessor to assess and recover damages on account of misuse or unauthorized construction.

The same brings transparency by guiding the manner in which the damages have to be assessed.

(E) The policy guidelines dated June 28, 1999, June 26, 2001 and June 24, 2003 do not entitle the perpetual lessees to have the lease-hold tenure converted into free-hold tenure by ignoring the past misuse and/or unauthorized construction. Damages on said account would be recoverable on the strength of the said circulars, but this would be subject to the view which may finally emerge, upon reference being made by us to a larger Bench on the scope of the policy guideline dated August 02, 1996.

(F) Procedural fairness in the levy and demand of damages on account of misuse and/or unauthorized construction as explained in Hari Prakash's case (supra), Saheb Singh's case (supra), Sant Ram Sodhi's case (supra) and Ram Prakash (Professor)'s case (supra) would have to be observed by the lessor on the subject of levy and demand of damages on account of misuse and/or unauthorized construction.

(G) If limitation has expired for a municipality, to enforce the municipal law, pertaining to an unauthorized construction, thereby preventing the municipality from demolishing the unauthorized construction would not be a bar for the lessor to take action as per the lease for violation of a term of the lease.

(H) A demand towards damages on account of misuse and/or unauthorized construction, if barred by limitation for the purposes of recovery thereof, would not denude the lessor the power to demand the same as a condition to convert a lease-hold tenure into free-hold tenure.

13. We may also record that even before this judgment of the Division Bench, one of us (Rajiv Sahai Endlaw,J.) in Laj Gandhi Vs. Delhi Development Authority, 2011 X AD (Del) 377 laid down the principle of law in the following manner:-

8. Attention of the counsel for the petitioner was invited to J.S. Furnishing Co. (P) Ltd. Vs. Union of India (UOI), , Satya Mohan Sachdev and Others Vs. Union of India (UOI) and Another and Vikramaditya Bhartia Vs. DDA laying down:

(i) That freehold conversion cannot be claimed as a matter of right and can be availed of only on the terms offered;

(ii) That it being a term of the Policy of freehold conversion that the same will not be entertained without payment of misuse charges, no mandamus for freehold conversion without payment of the said misuse charges can be issued;

(iii) Even though in accordance with Jor Bagh Association (Regd) and Others Vs. Union of India (UOI) and Others, , L&DO may have been held to be not entitled to claim or recover misuse charges, since the Policy for freehold conversion is subject to payment thereof, payment of the said charges is a must before availing of freehold conversion. Reliance was placed on Mrs. Madhu Garg and Another Vs. North Delhi Power Ltd., and BSES Rajdhani Power Ltd. Vs. Saurashtra Color Tones Pvt. Ltd and Another, holding that even though the claim for electricity charges may be barred by time, it would not prevent the electricity supply company from denying supply of electricity for the reason thereof;

(iv) That the Perpetual Leases of the respondent DDA are different from those of the L&DO which were for consideration in Jor Bagh Association (Regd.) (supra). The leases of the respondent DDA empower DDA to recover charges for misuse;

(v) Misuse charges are in the nature of public money and thus the principle enshrined in Saurashtra Color Tones Pvt. Ltd. (supra), Mrs. Madhu Garg (supra) & M/s. Swastic Industries Vs. Maharashtra State Electricity Board, would apply;

(vi) That if a plea of limitation is raised in opposition to the claim of misuse charges, the same becomes a disputed question of fact as to when the cause of action would arise and till when the respondent DDA would have a right to recover and all of which cannot be adjudicated in the writ petition. The arbitration clause in the Perpetual Lease of the DDA was also noticed in this regard.

10. The counsel for the petitioner has based the case on the judgments of the Single Judge reported in 2007 8 AD (DEL) 313 of the Division Bench reported in Delhi Development Authority Vs. Prof. Ram Prakash, and culminating in the judgment dated 15.03.2011 of the Apex Court in SLP(C) No. 27278/2009 titled DDA v. Prof. Ram Prakash and in which case, finding that the DDA after issuing show cause notice had not taken any follow up action, the claim for misuse charges after 25 years was held to be bad and directions for conversion of leasehold rights into freehold issued. The counsel for the petitioner has contended that the respondent DDA in the present case also did not raise any demand whatsoever for misuse charges between the year 1983-90 when the property was under misuse and cannot after nearly 18 years make a demand therefor. It is contended that the petition is thus entitled to succeed in accordance with the said judgments.

11. Undoubtedly, the judgments in Ram Prakash have not been considered in any of the judgments (supra). It thus falls for consideration whether the demand of the respondent DDA for misuse charges and owing to non compliance wherewith the freehold conversion applied for by the petitioner is held up, is bad for the said reason.

13. The counsel for the respondent DDA has invited attention to the passages in the judgment of the Supreme Court from wherein it is shown that in the case of Ram Prakash no action whatsoever had been taken by the respondent DDA for the alleged misuse in question and the respondent DDA had never informed the lessee in that case that it was required to pay any misuse charges. It is contended that it was in such factual scenario that the Supreme Court struck down the demand as barred by limitation. The counsel for the respondent DDA has further contended that on the contrary in the present case, the respondent DDA did take action. It is also contended that the petitioner herself immediately upon initiation of such action by the respondent DDA had initiated proceedings for eviction of the tenant EDCIL u/s 14(1)(k) of the Rent Act.

19. The claim of the respondent DDA for misuse charges in the present case has to be thus seen in the light of the aforesaid facts which are considerably different from the facts in Ram Prakash case. In the present case, the respondent DDA cannot be said to have slept over its right and not taken any action. The respondent DDA admittedly prosecuted not only the lessee but also the tenant and also issued notices under the lease to the petitioner and which resulted in the petitioner seeking eviction of the tenant u/s 14(1)(k) of the Rent Act. The respondent DDA therefore can well be said to have rest assured that the misuse

charges have to be determined by the Rent Controller and not by the Curewell (India) Ltd. Vs. Sahib Singh (dead) by L.Rs. and others, The petitioner on the contrary by compromising with the tenant relieved the tenant from liability for any misuse charges. The occasion for the respondent DDA to recover the misuse charges would have arisen only upon knowledge of the said compromise. The petitioner in the present case in view of the compromise cannot also say that, had she been informed earlier of the misuse charges, she would have recovered it from the tenant.

20. Also, as already observed above the said misuse charges are public dues. The claim therefore may be barred but the respondent DDA can certainly insist upon the payment thereof as a condition for freehold conversion. I fail to see why the principle aforesaid applied by the Apex Court and by the Full Bench of this Court in relation to the electricity dues would not apply. On the said aspect also, the judgments in Ram Prakash are sub silentio.

14. Thus, it is held in no uncertain term that it would be perfectly reasonable and justified for the State, acting as a lessor, to insist that misuse charges are paid before the lessor is compelled to convert lease hold tenure to free hold tenure. These observations would apply even when the application for mutation is made.

15. Accordingly this appeal is allowed, the order of the learned Single Judge is set aside and as a consequence Writ Petition(C) 3696/2010 filed by the respondent herein is dismissed. There shall, however, be no order as to costs.