DELHI DEVELOPMENT AUTHORITY

v.

NALWA SONS INVESTMENT LTD. AND ANR.

(Civil Appeal No. 4260 of 2019)

APRIL 24, 2019

[A. M. KHANWILKAR AND AJAY RASTOGI, JJ.]

Lease – Lease deed – Recovery of unearned increase (UEI) in the value of the commercial plot at the time of sale, transfer assignment – Respondent no.1-public Ltd. company was allotted a commercial plot by the appellant-DDA – Pursuant thereto, a perpetual lease deed was executed by the appellant in favour of respondent no.1 – Respondent no.1 and respondent no.2 entered into an arrangement and invited an order of demerger from the Company Judge, of the High Court – The order of demerger was passed – Consequent to which, all the assets rights, powers, debts and liabilities of respondent no.1 stood transferred to respondent no.2 – As the subject plot transferred to another company-respondent no.2, appellant demanded respondents u/cl.2(d) of the appellant's policy to pay Rs.6,17,53,998/- towards UEI and an amount of Rs.10,44,394/- towards misuse charges – Respondents failed to pay – Show cause notice issued by the appellant – Writ petition by respondents challenging the said show cause notice – Single Judge of the High Court held that the notice issued by the appellant was valid – However, Division Bench of High Court set aside the demand notice and show cause notice issued by the appellant – Respondents contended that the two companies were admittedly group companies and respondent no.1 continued to have control over the property in question – Also, the transfer of property was not to an outsider and, in any case, was without any consideration and on no-profit basis – As a result, the respondents were not liable to pay UEI – Held: The order passed by the Company Judge approving the scheme of demerger made it clear that all property, assets, rights and powers in respect of the specified properties, including the said plot, transferred to and vested in respondent no.2 – Once it is a case of transfer, it must abide by the stipulation in cl. 6(a) of the Lease Deed of taking previous consent in writing of the lessor (appellant)

A *and to fulfill such terms and conditions as may be imposed, including to pay any unearned increase amount – Further, cl.2(d) of the appellant's policy relating to the charge of unearned increase plainly applied to the present case – The obligation to pay UEI did not flow only from the instructions/policy issued by the competent authority of the appellant but primarily from the stipulation in the Perpetual* B *Lease Deed in the form of cl.6(a) – Going by the plain language of cl.6(a) of the Lease Deed, there is no reason to extricate the respondents from the obligation of the lessee (transferor) flowing therefrom – Therefore, judgment of the Division Bench of the High Court set aside and the order passed by the single judge restored –* C *DDA policy/instructions No.LSAI/ 1(6) 87/Policy Case/ Unearned Increase dated 06.09.88 – cl.2(d)*

Allowing the appeal, the Court

HELD: 1. In the first place, it is not open to the D **respondents to contend that the arrangement and demerger scheme does not result in transfer of the subject plot from the original lessee (respondent No.1) to respondent No.2. Inasmuch as, clause (2) of the order passed by the Company Judge approving the scheme of demerger, as reproduced above, makes it amply clear that all property, assets, rights and powers in respect** E **of the specified properties, including the subject plot, shall stand transferred to and vest in respondent No.2. Once it is a case of transfer, it must abide by the stipulation in clause 6(a) of the Lease Deed of taking previous consent in writing of the lessor (appellant) and to fulfill such terms and conditions as may be imposed, including to pay any unearned increase (UEI) amount. There is** F **force in the argument of the appellant that the fact situation of the present case would, in fact, be governed by clause 2(d) of the instructions. This clause plainly applies to the present case. The demand of unearned increase from the respondents is founded on that basis. The High Court misinterpreted the said clause and** G **erroneously opined that it is not applicable to a case of demerger of a public limited company. [Para 13][799-G-H; 800-A-E]**

2. The principal clause is clause 6(a) of the Lease Deed. The clause referred to in the instructions is equally significant. Indeed, the latter merely provides for the mechanism to recover

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the unearned increase from the original lessee. The fact that the same group of persons or directors/ promoters/shareholders would be and are associated with the transferee company does not cease to be a case of transfer or exempted from payment of UEI, as envisaged in clause 6(a) of the Lease Deed. Rather, clause 2(d) of the policy, makes it expressly clear that unearned increase be charged irrespective of the fact that the directors in both companies are common and the old (parent) company has not changed its name. [Para 14][800-E-G]

3. The fact that it was a case of transfer is reinforced from the order of demerger passed by the Company Judge and once it is a case of transfer, coupled with the fact that the respondents are not covered within the categories specified in clauses 1(a) to 1(d) of the policy of the appellant, they would be liable to pay unearned increase (UEI) in the manner specified in clause 6(a) of the Lease Deed. The obligation to pay UEI does not flow only from the instructions issued by the competent authority of the appellant but primarily from the stipulation in the Perpetual Lease Deed in the form of clause 6(a). Viewed thus, the Division Bench of the High Court committed a manifest error in allowing the appeal and setting aside the judgment of the Single Judge, who had rightly dismissed the writ petition and upheld the demand notice and the show cause notice calling upon the respondents to pay the unearned increase amount in terms of clause 6(a) of the Perpetual Lease Deed. That demand was final and binding on the respondents, so long as the stipulation in the form of clause 6(a) of the Perpetual Lease was in force. [Para 15][800-G-H; 801-A-C]

4. In the present case, the fact that it is a case of transfer of the subject plot from the lessee (respondent No.1), a public limited company, to the transferee (respondent No.2), another public limited company, is indisputable. That is reinforced from the order of the Company Judge, formulating the scheme for demerger of the lessee company. It is not an involuntary transfer as such. The only issue is whether, by virtue of the fact that the affairs of the transferee company (respondent No.2) are controlled by the same set of directors/shareholders of the original lessee (respondent No.1) with about 98.62% of the shares of the

A **transferee company (respondent No.2), that would or would not absolve the respondent No.1 of its obligations under the Lease Deed. The answer is an emphatic "No". For, under clause 6(a) of the Lease Deed, it is incumbent to seek previous consent in writing from the lessor (appellant) and to abide by the terms and conditions specified by the appellant in that behalf, including the payment of unearned increase determined as per the said clause. Going by the plain language of clause 6(a) of the Lease Deed, there is no reason to extricate the respondents from the obligation of the lessee (transferor) flowing therefrom. Therefore, the decision of the Single Judge in dismissing the writ petition restored. [Paras 16 and 18][801-E-H; 802-D-E]**

M/s. Parasram Harnand Rao v. M/s. Shanti Parsad Narinder Kumar Jain and Anr. **(1980) 3 SCC 565 : [1980] 3 SCR 444 ;** *Cox & Kings Ltd. and Anr. v. Chander Malhotra (Smt.)* **(1997) 2 SCC 687 : [1996] 10 Suppl. SCR 1 ;** *M/s. General Radio and Appliances Co. Ltd. and Ors. v. M.A. Khader (dead) by LRs.* **(1986) 2 SCC 686 : [1986] 2 SCR 607 ;** *Indian Saving Products Ltd. v. Delhi Development Authority and Ors.* **(2004) 120 Com. Cases 818 (Delhi) ;** *Singer India Ltd. v. Chander Mohan Chadha and Ors.* **(2004) 7 SCC 1 : [2004] 3 Suppl. SCR 535 ;** *Madras Bangalore Transport Co. (West) v. Inder Singh and Ors.* **(1986) 3 SCC 62 – referred to.**

K. Devarajulu Naidu v. C. Ethirajavalli Thayaramma and Ors. **(1949) 2 MLR 423 ;** *State of U.P. and Ors. v. Renusagar Power Co. and Ors.* **(1988) 4 SCC 59 : [1988] 1 Suppl. SCR 627 ;** *New Horizons Limited and Anr. v. Union of India and Ors.* **(1995) 1 SCC 478 : [1994] 5 Suppl. SCR 310 – held inapplicable.**

Case Law Reference

[1980] 3 SCR 444	**referred to**	**Para 8**
[1996] 10 Suppl. SCR 1	**referred to**	**Para 8**
[1986] 2 SCR 607	**referred to**	**Para 8**
[2004] 3 Suppl. SCR 535	**referred to**	**Para 8**

(1986) 3 SCC 62	**referred to**	**Para 9**
[1988] 1Suppl. SCR 627	**held inapplicable**	**Para 9**
[1994] 5 Suppl. SCR 310	**held inapplicable**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4260 of 2019.

From the Judgment and Order dated 30.04.2014 of the High Court of Delhi at New Delhi in L.P.A. No. 735 of 2012.

Ms. Binu Tamta, Dhruv Tamta, Advs. for the Appellant.

Jayant Bhushan, Sr. Adv., Suman Ahsan, Abhimanyu Bhandari, Sanjeev Kapoor, Akshay Mahajan, Ms. Roohina Dua, Cheitanya Madan, M/s. Khaitan & Co., Advs. for the Respondents.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. Leave granted.

2. The seminal question involved in the present appeal is: if the original lessee (respondent No.1, a public limited company) in respect of the plot given on lease by the appellant, transfers the same to another public limited company, albeit an alter ego of the former, consequent to an order of arrangement and demerger passed by the Company Judge, then whether it is liable to pay 50% unearned increase (UEI) on the market value of the plot to the appellant (lessor)?

3. Briefly stated, in an auction conducted by the appellant, respondent No.1 (former name Jindal Strips Limited) was allotted a commercial plot in Bhikaji Cama Place, New Delhi, on 23rd March, 1993. Possession of the plot was handed over to respondent No.1 on 6th September, 1993 and a Perpetual Lease Deed dated 28th September, 1993, was executed by the appellant in favour of respondent No.1. It is apposite to reproduce stipulation 6(a) of the said Lease Deed, which reads thus

> "6. (a) **The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the Commercial Plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.**

A PROVIDED that in the event of the consent being given, **the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the Commercial plot at the time of sale, transfer assignment, or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding**:

C PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the whole property or any part thereof that may be subject of sale, transfer, assignment or otherwise parting with the possession as the case may be, after deduction fifty percent of the unearned increase as aforesaid.

D PROVIDED FURTHER that notwithstanding the limitations and conditions as mentioned in sub-clause 6(a), the lessee may sell or transfer the floor space constructed on the plot subject to the permission of the Lessor in writing on payment of Rs.100/- for each flat/floor space for the first sale/transfer, for subsequent sale/ transfer the lessor may on payment of proportionate 50% of E the unearned increase (i.e. the difference between the premium already paid by the purchase/transferor and the market price of the time of sale transfer towards the portion of the land) grant permission to the sub-lessee/transferor for such subsequent sale/ transfer of the floor space to be transferred. Prior permission of F the lessor for such second and subsequent sale/transfer of floor space shall be subject to the conditions of getting the Deed of Apartment and the sub-lease (as defined under the Delhi, Apartment Ownership Act, 1986) executed by the lessee in favour of such floor space buyers/transferee.

G PROVIDED FURTHER that the lessee shall be required to intimate the first list of the floor space buyer/transferees giving full details of name, address and quantum of floor space to the Lessor, simultaneously with the grant of completion certificate. However, completion certificate shall be issued only on furnishing the valid list of first purchaser of floor space alongwith copies of H deed of apartment duly executed with each one of them. The

grant of permission by the Lessor to the Lessee for transfer of floor space or subsequent transfer of floor space to another persons, shall not absolve the lessee from violation of the terms & conditions of the lease. The Lessee shall also be responsible for making all arrangements as are necessary for maintenance of the building including but without limitation affecting the fire fighting system and the common services."

(emphasis supplied)

4. Respondent No.1 and respondent No.2 entered into an arrangement and invited an order of demerger from the Company Judge of the High Court of Punjab and Haryana at Chandigarh. On 30th May, 2003, the High Court of Punjab and Haryana passed the order of demerger of the companies. It would be apposite to reproduce paragraphs (2) and (3) of the said demerger order, which read thus:

"xxx xxx xxx xxx xxx

2. That with effect from the appointed date, the Stainless Steel Undertaking of Jindal Strips Limited with all the property, assets, rights and powers specified in Parts I, II, and III of the Schedule hereto **shall stand transferred to and vest in Jindal Stainless Limited**, without further act or deed and accordingly the same shall pursuant to Section 394(2) of the Companies Act, 1956 **be transferred to and vest in Jindal Steel Limited with effect from the said date for all the estate and interest of Jindal Strips Limited therein, subject to the existing charges thereon more particularly described in the said scheme of arrangement and demerger**; and

3. That all the debts, liabilities dues and obligations, secured or unsecured as more particularly described in the Scheme of Arrangement and Demerger, whether provided in the books of account of Jindal Strips Limited, whether disclosed or undisclosed in the balance sheet, pertaining to the Stainless Steel Undertaking and accordingly the same shall pursuant to Section 394(2) of the Companies Act, 1956 **be transferred to and become the debts, liabilities, duties and obligations of Jindal Stainless Limited**; ..."

(emphasis supplied)

A 5. Respondent No.2 then moved a formal application for mutating the property in its name vide application dated 22nd August, 2003. Respondent No.2 was then advised to withdraw the said application on 16th January, 2004. Thereafter, respondent No.2 applied to the appellant on 19th January, 2004, for conversion of the property from leasehold to freehold. Under the conversion policy of the appellant, the lessee was B obliged to pay all dues, including the charges towards use, damages, sub use, unearned income (UEI), ground rent, certificate/maintenance charges etc. The instructions followed by the competent authority in regard to charging of UEI have been articulated in document Annexure-P1, which reads thus:

C "**ANNEXURE P-I**

DELHI DEVELOPMENT AUTHORITY

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

D In supersession of previous instructions on the subject, the Lt. Governor, Delhi is please to order that hence forth in the matters of addition/deletion and substitution of names in respect of Industrial/commercial Lease/Sub-Lease to be executed or already executed, the following procedure shall be followed:-

E 1. No unearned increase to be charged:

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

F b) In case of conversion of partnership firm into private limited company comprising original partners as Directors/Subscribers/ Share-holders.

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

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

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

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

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

c) 50% Unearned increase will be charged in respect of proportionate shares of the plot parted with by way of addition, deletion or substitution of partner/partners in case of single ownership or partnership firm and Director/Directors/ Shareholders/Subscribers in case of Private Limited Company. This is application where the incoming persons do not fall within the definition of family. Unearned increase would be charged on the basis of market rate prevalent on the date of intimation for each and every change in the constitution. This would be applicable in all cases where the lease deed has been executed or not.

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

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

A 4. The administrative conditions prescribed in the UO No.F.1(23)/ 78/C(L) Part II dated 8.5.79 will remain unchanged.

Sd/-
S.C. VARSHNEYA
DEPUTY FINANCIAL ADVISOR (HOUSING)
B No.LSAI/1(6)87/Policy Case/Unearned Increase
dated 6.9.88"

(emphasis supplied)

6. In light of the prevailing policy, the appellant called upon the respondents to pay an amount of Rs.6,17,53,998/- (Rupees Six Crore C Seventeen Lakh Fifty Three Thousand Nine Hundred Ninety Eight only) towards UEI and an amount of Rs.10,44,394 (Rupees Ten Lakh Forty Four Thousand Three Hundred Ninety Four only) towards misuse charges. As the demanded amount was not deposited, a show cause notice was issued to the respondents on 13th January, 2011. The D respondents challenged both the said show cause notice and the demand notice by way of a writ petition filed before the High Court of Delhi at New Delhi, bearing Writ Petition (Civil) No.1885 of 2011. The learned Single Judge of the High Court, after considering the rival submissions, eventually dismissed the said writ petition by recording following reasons:

E "9. Upon considering the submissions advanced, material on record and the decisions cited, this Court is of considered view that even without lifting the corporate veil, it is abundantly clear from the scheme of arrangement and de-merger of the petitioner companies as reflected in the order (Annexure P-4) that the assets of the first petitioner stands transferred to the second petitioner, thereby F attracting clause 2(d) of Instructions (Annexure P-23) making 50% of unearned increase chargeable and clause 1(a) of the instructions (Annexure P-23) are inapplicable as they relate to partnership firms or private limited companies only and not to public limited companies like the petitioners.

G 10. Even clause 6(a) of the Perpetual Lease (Annexure P-2) between the first petitioner and the respondent prohibits the transfer of possession of the whole or any part of the commercial plot without previous consent of the respondent and stipulates that sale/transfer/assignment or parting with the possession of the commercial plot would attract 50% of the unearned increase

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and thus, the first petitioner is bound by it. It is quite elementary that without mutation of the subject premises being there in the name of the allottee, i.e., the first petitioner, there cannot be any conversion of the subject premises from leasehold to freehold and therefore substitution of the Lessees of commercial plots like the instant one, clearly attracts the imposition of unearned increase, in view of a Division Bench decision of this Court in *Indian Shaving Products* (Supra). The single bench decision in *Kiran Kohli* (Supra) relied upon by the petitioners is distinguishable on facts and is not applicable to the instant matter, as it does not deal with the Instructions (Annexure P-23), which squarely governs the dispute raised herein.

11. Logically speaking, Respondent's right to levy unearned increase cannot be defeated by first effecting de-merger and then to further assign, transfer etc. without previous consent of the respondent/lessor. Consequentially, impugned demand (Annexure P-17) and the Notice (Annexure P-20) are held to be valid and this writ petition is dismissed with costs of ₹50,000/, while vacating the interim order."

7. The respondents carried the matter in Letters Patent Appeal before the Division Bench of the High Court, being L.P.A. No.735 of 2012. Upon examining the relevant clauses of the Perpetual Lease Deed and the policy documents of the appellant, the Division Bench, vide its order dated 30th April, 2014, was pleased to allow the appeal and set aside the demand notice and show cause notice issued by the appellant and direct the appellant to take consequential steps as per law regarding the conversion of the property to freehold, without charging UEI, for the following reasons:

"12. We have a look at the clause 6 of the perpetual lease deed dated September 28, 1993 which reads as follows:-

'(6)(a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the Commercial Plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

PROVIDED that in the event of the consent being given, the Lessor may impose such terms and conditions as he thinks fit

A and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the Commercial plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty percent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.'

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13. A perusal of the above Clause shows that DDA, when giving consent for sale, transfer, assignment or otherwise parting with possession of the commercial plot, may (emphasis supplied) impose such terms and conditions as it thinks fit and shall be entitled to claim and recover a portion of the unearned increase. The object of the said Clause is to protect DDA and to permit it to recover a part of the unearned increase which the lessee obtains on sale of the property.

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14. In other words, the intent is to recover a part of the profit made by the lessee.

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15. In the present facts it is obvious that no consideration whatsoever has passed. It is a case of reorganisation of business.

16. The impugned order relies on Clause 2(d) of the Policy for charge of unearned increase to hold that the appellants are covered by the said clause and are hence liable to pay unearned increase. Clause 2(d) of the policy reads as under:-

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

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17. Reference may also be had to clause 1(b) (which deals with situations where no unearned increase is to be charged) of the policy which reads as follows:-

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

18. Clause 2(d) of the policy does not deal with a situation of demerger of companies within the same group with common

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Directors and Promoters/shareholders. It is dealing with a situation where a new company is being floated. In our view the said clause would have no application to a case of demerger which is a mere reorganisation of business like in the present case.

19. There is no specific Clause of the Policy dealing with a case of de-merger. The facts of the present case are somewhat akin to a situation as stipulated in Clause 1(b) of the said policy, inasmuch as clause 1(b) deals with a situation of conversion of a partnership firm into a private limited company comprising only original partners as Directors/Subscribers/Share Holders, namely, mere reorganisation of the business. The Policy specifically provides for no unearned increase to be charged in such a situation.

20. We may clarify that it is not every case of demerger that the unearned increase will not apply. There may be cases where an element of sale is involved. In such a situation the issue would be different.

21. Hence, in our view, the respondent is not entitled to charge any unearned increase in the facts and circumstances of the present case keeping in mind a meaningful reading of Clause 6(a) of the perpetual lease and the policy for unearned increase. Even in equity no such amount can be claimed by DDA.

22. Regarding the judgment of the Division Bench of this Court in Indian Shaving Products Limited vs. DDA (supra), in our view, the said judgment would not be applicable to the facts of the present case. That was a case where the petitioner had bought the entire shareholding of a company called Sharpedge Limited in 1987. The said company became a sick company under SICA. Under a proposal of rehabilitation a scheme of amalgamation was approved by BIFR in 1992 under which all the properties of the transferor company Sharpedge Limited vested with the transferee company i.e. petitioner. It was in those facts that the Court held that DDA is entitled to recover unearned increase.

23. In view of the above, we allow the present appeal and set aside the impugned order dated August 16, 2012 passed in W.P.(C)1885/2011. The impugned demand dated August 05, 2010 and the notice dated January 13, 2011 are quashed. Respondent will take consequential steps as per law regarding conversion of

A the property to freehold without charging the said unearned increase."

8. This decision has been challenged by the appellant on the ground that the Division Bench has completely misconstrued the relevant clauses in the Lease Deed and the policy document. According to the appellant, B clause 6(a) of the Lease Deed uses the expansive expression "sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot." Further, the proviso thereto stipulates that the lessor shall be entitled to claim and recover UEI on the value (i.e. difference between the premium paid and the market value) of the C commercial plot at the relevant time. The appellant contends that clause 6(a) cannot be construed to mean that if no sale consideration is involved in the transaction, then the appellant would not be entitled to recover the UEI. For, the words "sell, transfer, assign or otherwise parting with the possession" could be even without consideration and the stipulation makes it amply clear that the appellant is entitled to recover UEI towards the D "premium paid" on the "market value" of the commercial plot and not the "Agreement value/amount" *per se*. It is contended that the fact that the demerger had taken place as a result of which the right, title and interest in the plot in question stood transferred to another company, is not in dispute. As a consequence whereof, the respondents were liable to pay UEI as demanded by the appellant. The effect of demerger of a E public limited company has been examined in ***M/s. Parasram Harnand Rao Vs. M/s. Shanti Parsad Narinder Kumar Jain and Anr.,***[1] ***Cox & Kings Ltd. and Anr. Vs. Chander Malhotra (Smt.)***,[2] ***M/s. General Radio and Appliances Co. Ltd. and Ors. Vs. M.A. Khader (dead) by LRs.***[3], ***Indian Saving Products Ltd. Vs. Delhi Development Authority F and Ors.,***[4] and ***Singer India Ltd. Vs. Chander Mohan Chadha and Ors.***[5] The appellant would also contend that the Division Bench erred in observing that there was no specific clause dealing with the case of demerger in the instructions (regarding implementation of the policy) relied upon by the appellant. Further, it wrongly applied clause 1(b), which relates to conversion of a "partnership firm" into a "private limited G company", to the present case, which was admittedly a demerger of a

[1] (1980) 3 SCC 565
[2] (1997) 2 SCC 687
[3] (1986) 2 SCC 686
[4] (2004) 120 Com. Cases 818 (Delhi)
H [5] (2004) 7 SCC 1

public limited company (lessee). In such a case, clause 2(d) of the instructions would come into play, which stipulates that when another company is formed, even though the directors of the two companies remain the same and the name of transferee company is same, UEI is still chargeable.

9. The respondents, on the other hand, have supported the view expressed by the Division Bench and would contend that on proper construction of the stipulation in the Lease Deed and the policy document, including instructions relied upon by the appellant, it would be clear that charging of UEI would depend upon whether the property or part thereof is being effectively transferred to outsiders and for consideration. If the transaction is not for any consideration but is merely an arrangement and demerger of the public limited companies resorted to under the aegis of the order passed by the Company Judge of the jurisdictional Company Court, the question of paying any UEI in respect of such transaction cannot be countenanced. It is submitted that such a view is reinforced from the other illustrations noted in the policy/instructions (clause 1 thereof), such as substitution of a family member, conversion of a partnership firm into a private limited company or addition, deletion or substitution of partners in a firm, or change from private limited company to public limited company, which although, are cases of transfer, but no UEI is chargeable. In the present case, contends the learned counsel for the respondents, the two companies are admittedly group companies and respondent No.1 (original lessee) owned 98.62% of the shares of respondent No.2 at the relevant time. In reality, therefore, the respondent No.1 (original lessee) continued to have control over the property in question and, by invoking the principle of lifting or piercing of corporate veil, it must be concluded that the transfer of property in terms of the scheme of demerger is effectively not to an outsider muchless for consideration. The respondents have distinguished the decisions relied upon by the appellant. According to the respondents, the exposition in the said decisions must be understood in the context of the fact situation of the concerned case. In the present case, however, the transfer of property is not to an outsider and, in any case, is without any consideration and on no-profit basis. As a result, the liability to pay UEI does not arise. To buttress the above submissions, the respondents have relied upon the decisions in ***K. Devarajulu Naidu Vs. C. Ethirajavalli***

A ***Thayaramma and Ors.***[6]***, Madras Bangalore Transport Co. (West) Vs. Inder Singh and Ors.***[7]**, **State of U.P. and Ors. Vs. Renusagar Power Co. and Ors.***[8] and ***New Horizons Limited and Anr. Vs. Union of India and Ors.***[9] It is contended that being a case of demerger, the concerned companies were not even required to pay any stamp duty, which pre-supposes that it was not a case of a voluntary transfer. It is
B urged that the respondents have fulfilled the test of substantial identity as the lessee (respondent No.1) was holding 98.62% shares of the transferee (respondent No.2) at the relevant time. In other words, the transaction between the respondents inter se is a genuine, bona fide case of reorganization of the business with demerger sanctioned by the
C High Court and, for which reason, no liability towards UEI would arise.

10. We have heard Ms. Binu Tamta, learned counsel for the appellant and Mr. Jayant Bhushan, learned senior counsel appearing for the respondents.

11. For answering the seminal question, we must first advert to
D the obligation of respondent No.1 springing from the stipulation in the perpetual Lease Deed. Clause 6(a), as extracted in paragraph 3 above, envisages a bar to sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot, except with the previous consent in writing of the lessor (appellant), which the appellant
E would be entitled to refuse in its absolute discretion. While granting consent in terms of the proviso to clause 6(a), it is open to the appellant to impose such terms and conditions as may be deemed appropriate and claim and recover a portion of the unearned increase in the value of the commercial plot, being 50% of the unearned increase. The decision of the appellant in this behalf is final and binding upon the original lessee
F (respondent No.1). The amount towards the unearned increase is computed on the basis of the difference between the premium paid and the market value of the commercial plot. In doing so, the fact that the transfer under consideration did not involve any consideration amount or the value paid by the transferee is below the market value, would not
G inhibit recovery of 50% of the prescribed unearned increase amount on actual or, in a given case, notional basis. This is the plain meaning of the

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[6] (1949) 2 MLR 423
[7] (1986) 3 SCC 62
[8] (1988) 4 SCC 59
H [9] (1995) 1 SCC 478

stipulation. This position is reinforced from the contemporaneous instructions issued by the competent authority of the appellant about the manner in which the unearned increase should be charged and from whom such charges should be recovered. That can be discerned from the instructions dated 6th September, 1988.

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

> "1. No unearned increase to be charged:
>
> (a) xxx xxx xxx
>
> (b) In case of conversion of partnership firm into private limited company comprising original partners as Directors/Subscribers/ Shareholders."

From the plain language of this clause, we fail to fathom how the said clause will be of any avail to the respondents. For, we are not dealing with a case of conversion of a partnership firm into a private limited company as such. The fact that the instructions extricate the category of transfers referred to in clause (1) of the instructions from the liability of paying an unearned increase despite being a case of transfer, cannot be the basis to exclude the other category of transfers/persons not specifically covered by clause (1), such as the case of present respondents. That is a policy matter. The respondents were fully aware about the existence of such a policy. That policy has not been challenged in the writ petition. Concededly, the reliefs claimed in the writ petition were limited to quashing of the demand letter dated 5th August, 2010 and notice dated 31st January, 2011, demanding unearned increase; and to direct the appellant to convert the said property from leasehold to freehold in favour of respondent No.2, without charging any unearned increase. The reliefs are founded on the assertion that the transfer was not to any outsider, much less for any consideration.

13. In the first place, it is not open to the respondents to contend that the arrangement and demerger scheme does not result in transfer of the subject plot from the original lessee (respondent No.1) to respondent No.2. Inasmuch as, clause (2) of the order passed by the

A Company Judge approving the scheme of demerger, as reproduced above, makes it amply clear that all property, assets, rights and powers in respect of the specified properties, including the subject plot, shall stand transferred to and vest in respondent No.2. Once it is a case of transfer, it must abide by the stipulation in clause 6(a) of the Lease Deed of taking previous consent in writing of the lessor (appellant) and to fulfill
B such terms and conditions as may be imposed, including to pay any unearned increase amount. We find force in the argument of the appellant that the fact situation of the present case would, in fact, be governed by clause 2(d) of the instructions which reads thus:

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

(a) xxx xxx xxx

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

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

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

15. The fact that it was a case of transfer is reinforced from the order of demerger passed by the Company Judge and once it is a case of transfer, coupled with the fact that the respondents are not covered

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within the categories specified in clauses 1(a) to 1(d) of the policy of the appellant, reproduced in paragraph 5 above, they would be liable to pay unearned increase (UEI) in the manner specified in clause 6(a) of the Lease Deed. The obligation to pay UEI does not flow only from the instructions issued by the competent authority of the appellant but primarily from the stipulation in the Perpetual Lease Deed in the form of clause 6(a). Viewed thus, the Division Bench of the High Court committed a manifest error in allowing the appeal and setting aside the judgment of the learned Single Judge, who had rightly dismissed the writ petition and upheld the demand notice and the show cause notice calling upon the respondents to pay the unearned increase amount in terms of clause 6(a) of the Perpetual Lease Deed. That demand was final and binding on the respondents, so long as the stipulation in the form of clause 6(a) of the Perpetual Lease was in force.

16. Reverting to the decisions pressed into service by the appellant, to wit, ***Parasram Harnand Rao*** (supra), ***Cox & Kings Ltd.*** (supra), ***M/s. General Radio and Appliances Co. Ltd.*** (supra), ***Indian Saving Products Ltd.*** (supra), and ***Singer India Ltd.*** (supra), dealt with the effect of such a transfer which results in unlawful subletting within the meaning of the concerned rent legislation. In the present case, the fact that it is a case of transfer of the subject plot from the lessee (respondent No.1), a public limited company, to the transferee (respondent No.2), another public limited company, is indisputable. That is reinforced from the order of the Company Judge, formulating the scheme for demerger of the lessee company. It is not an involuntary transfer as such. The only issue is whether, by virtue of the fact that the affairs of the transferee company (respondent No.2) are controlled by the same set of directors/ shareholders of the original lessee (respondent No.1) with about 98.62% of the shares of the transferee company (respondent No.2), that would or would not absolve the respondent No.1 of its obligations under the Lease Deed. The answer is an emphatic "No". For, under clause 6(a) of the Lease Deed, it is incumbent to seek previous consent in writing from the lessor (appellant) and to abide by the terms and conditions specified by the appellant in that behalf, including the payment of unearned increase determined as per the said clause. Going by the plain language of clause 6(a) of the Lease Deed, there is no reason to extricate the respondents from the obligation of the lessee (transferor) flowing therefrom.

A 17. Having said thus, the decisions pressed into service by the respondents in ***K. Devarajulu Naidu*** (supra), ***Madras Bangalore Transport Co.*** (supra), ***State of U.P. and Ors.*** (supra), and ***New Horizons Limited*** (supra), will be of no avail. The same in no way contradict the stand of the appellant that as a consequence of a demerger, being a case of transfer of the subject property in terms of the order of
B demerger passed by the Company Judge, the rigours of clause 6(a) of the Lease Deed read with the policy of the Corporation/Authority regarding levy and determination of UEI would clearly apply *proprio vigore,* irrespective of the fact that the control of the newly established public limited company (respondent No.2) is with the directors of the
C lessee (respondent No.1), a public limited company, or that the transfer of the subject property was without consideration. Thus understood, the grounds on which the demand letter dated 5th August, 2010, and the show cause notice dated 13th January, 2011, have been challenged, cannot be countenanced. Resultantly, the decision of the learned Single Judge in dismissing the writ petition deserves to be restored.
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18. Accordingly, this appeal succeeds. The impugned judgment and order passed by the Division Bench of the High Court is set aside and instead, the judgment and order passed by the leaned Single Judge dated 16th August, 2012, dismissing W.P.(C) No.1885 of 2011, is restored. There shall be no order as to costs.
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All applications are also disposed of.

Ankit Gyan Appeal allowed.