D.D.A. And Ors vs Joginder S. Monga And Ors on 12 December, 2003

Equivalent citations: AIR 2004 SUPREME COURT 3291, (2004) 14 ALLINDCAS 825 (SC), 2004 (1) ALL CJ 454, 2003 (10) SCALE 707, 2004 (1) LRI 243, 2004 (2) SCC 297, (2004) 2 SUPREME 559, (2003) 10 SCALE 707, (2004) 14 INDLD 588, (2005) 1 LANDLR 251

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Bench: Ashok Bhan, S.B. Sinha

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           CASE NO.:
Appeal (civil)  1781 of 2000
Appeal (civil)  1782 of 2000

PETITIONER:
D.D.A. and Ors..

RESPONDENT:
Joginder S. Monga and Ors.

DATE OF JUDGMENT: 12/12/2003

BENCH:
Ashok Bhan & S.B. Sinha

JUDGMENT:
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J U D G M E N T S.B. SINHA, J :

These appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

BACKGROUND FACTS :

The admitted facts are : the lands in question being Nazul lands are governed by the provisions of the Delhi Development Act, 1957 (The Act) and the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (The Rules) framed thereunder. Pursuant to or in furtherance of the provisions of 'The Act' and 'The Rules', the appellant herein granted lease in favour of a Cooperative Society known as the Government Servants Cooperative House Building Society Limited, Shri Mangal Singh Monga, Shri N.R. Pillai and Shri Satish Chander Malhotra were the members of the said Cooperative Society. They in terms of the provisions of 'The Rules' were required to execute deeds of sub-lease in favour of the lessee as also the President of

India.

The factual matrix of the matter is being considered from the case involved in Civil Appeal No.1781 of 2000.

On 13.12.1968, a statutory sub-lease was executed in favour of Shri Mangal Singh Monga in respect of residential plot of 1568 sq. yards in Vasant Vihar on payment of Rs.17560/- towards premium and Rs.26656/- towards the cost of development. In terms of proviso appended to sub clause (b) of clause 6 of the dead of sub lease, the lessor was entitled to recover a portion of the unearned increase in the value i.e. "the difference between the premium paid and the market value of the residential plot at the time of sale". Determination of the lessor in respect of the market value therefor was to be final and binding.

By reason of clause X(a), of the said deed the President delegated his power to the Chief Commissioner of Delhi who is now the Lt. Governor of Delhi. The said Mangal Singh Monga died on 13.11.1983. Purported to be in exercise of such delgated power, the Delhi Administration fixed the market price of the nazul lands situated in different localities for the purpose of recovery of increase in the cost of the land upon sale for the periods from 1.4.1988 to 31.3.1990, 1.4.1990 to 31.3.1991 and 1.4.1991 to 31.3.1992 in terms whereof the price of the land in Vasant Vihar area was determined at Rs.10500/- per sq. metre. Admittedly, the said circular letter was communicated to the concerned officers. Although there appears to be some notings in the file by some officers to the effect that actual market value of the land should be recovered from the parties but it does not appear that any concrete decision was taken in that behalf. Respondent No.1 herein being heir of the original sub lessee entered into an agreement for sale with Respondent Nos. 8 and 9 wherein the amount of consideration was shown as Rs.5,00,00,000/-. The proposed purchaser, however, besides the said amount and other expenses also agreed to bear 50% of the amount towards unearned increase. The Income Tax Department also granted a No Objection Certificate on or about 12.5.1994 showing the consideration of Rs.5,00,00,000/- in respect of the plot in question. Respondent No.1 herein thereafter filed an application before the competent authority of the Appellant on or about 23.5.1994 for sale of the leasehold property indicating the cost of construction and price of the plot as Rs.5,00,00,000/-.

The Government of India, however, without enforcing any increase in the sale price of the land extended the validity of the land rates in force till 31.3.1992 for a further period from 1.4.1994 to 31.3.1996 by a circular letter dated 11.11.1994. The appellant herein despite the same proceeded on the basis that having regard to the fact that the purchaser had agreed to pay the consideration of Rs.5,00,00,000/- and further agreed to bear the cost of difference in unearned increase, the market value of the land would be Rs.7,50,00,000/- and on that basis demanded a sum of Rs.3,62,44,420/- as a condition of grant of permission by a demand letter dated 22.2.1995. Such amount was to be paid within a period of sixty days.

The respondents thereafter filed writ petitions before the Delhi High Court questioning the said demand letter dated 22.2.1995. During the pendency of the aforementioned proceedings, however, a purported resolution was passed by the D.D.A. to the effect that unearned increase should be

worked out on the basis of sale consideration shown in the agreement of sale or income tax clearance certificate, as the case may be, if it is higher than the floor level rate of D.D.A. HIGH COURT JUDGMENT :

> The High Court in its impugned judgment referring to the circular letters issued by the Lt. Governor as also the Union of India and upon taking notice of the fact that only the difference in increase price on the basis of such circular letters had been demanded from the persons similarly situated allowed the writ petition directing :
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> "We are of the view that the DDA , had no power to issue the demands in these writ petitions. Accordingly, the writ petitions are allowed and following directions are issued :
>
> The DDA shall issue fresh demand to the petitioners in all these three writ petitions on the basis of Order dated 24.6.1992. In case any amount had been paid on the basis of the impugned demand, the DDA shall be entitled to appropriate only that portion of the amount calculated in accordance with fixation of market rate of land as issued by the Delhi Administration on the 24th of June, 1992 and accepted by the DDA on the 11th of August, 1992 and shall pay back the balance with interest @ 18% p.a. from the date of payment by the petitioner concerned."

The Division Bench in its impugned judgment noticed various orders passed by the authorities of the appellant herein, inter alia, in of the writ petition being C.W. No.350 of 1995 wherein it was noted :

> "It is further stated that 50% of the unearned increase was also calculated on the basis of the market value/rate of Rs.5,400/- per sq. meter, which was the rate notified by the Government of India by letter dated 1.6.1987 and the said rates were considered for 100 FAR and since total FAR is 824 sq. meter, the amount of 50% of the unearned increase was worked out to Rs.15,04,300/-".

In another case relating to Plot No. S-23, Panchshila CHBS Ltd., it was noted by the authorities of the Appellant :

> "...On the basis of those rates i.e. Rs.15,120/- per sq. mtrs, the 50% unearned increase comes to Rs.48,54,764.00. As stated above, this is the second sale, but the 50% unearned increase deposited at the time of first sale permission has not been deducted from the amount of 50% unearned increase calculated now for the second sale because, though, the issue regarding deduction of unearned increase paid earlier has been approved by the Authority, but this matter is under consideration of the Ministry. The approval or otherwise, of Ministry in this regard has not been received as yet. If approved, this amount may be conveyed to the appellant. Further, it may also be communicated to him that this demand is provisionally subject to revision on receipt of rates for the period 93-94 from Delhi Admn. For this, management shall be

> asked to obtain an affidavit from the legatee."

Relying on or on the basis of the practice adopted by the D.D.A. and having regard to the orders dated 24.6.1992 issued by the Delhi Administration and that of the Government of India as also the resolution dated 28.11.1995, it was held :

> "It does not require any argument to say that the DDA was well aware of this clause and had issued the Order dated 11.8.92 on the basis of the Order issued by the Delhi Administration on the 24th of June, 1992. In the light of this, it is not open to the DDA to put forth the case that the market value, within the meaning of the clause (6) of the perpetual sub-lease deed could be what is stated in the agreement for sale."

SUBSEQUENT EVENTS :

> When the matter was taken up for hearing, before different Division Benches, the respondents herein sought to bring to this Court's notice certain subsequent event, namely, adoption of a purported policy by reason of a circular letter dated 28.6.1999 purported to have been given a prospective effect in terms whereof the leasehold was sought to be converted into freehold. The relevant portion of the said scheme reads as under :
>
> "1. COVERAGE OF THE SCHEME:
>
> i) The existing scheme of freehold conversion is extended to all residential leasehold built up properties irrespective of size.

As such, leased properties, situated on land, for which the land use prescribed in the Master Plan/Zonal Development Plan in force is residential, will be covered under the scheme, irrespective of size.

ii) The scheme will also extend to premium free leases i.e. leases where premium has not been charged by agencies administering the leases.

2. COMPUTATION OF CONVERSION FEE:

> i) In respect of properties with land area upto 500 sq. meters, the conversion fee will be charged on the basis of already approved graded scale circulated vide Ministry's letter dated 14.2.1992 and land rates as applicable with effect from 1.4.1987, as indicated in the Annexure.
>
> ii) In respect of properties with areas above 500 sq. meters, the conversion fee will be charged on the basis of slab rates as per Annexure and land rates as applicable with effect from 1.4.1987.

iii) In respect of premium free leases, the conversion fee will be computable on the basis of the prevailing land rates as notified by the Government, from time to time, on a graded basis as applicable to other leases."

It is not in dispute that one Rajeev Gupta also filed a writ petition before the High Court acting on the basis of a power of attorney executed by Smt. Kaushalya Rani Bhusari on similar grounds. In the case of J.S. Monga, Abdul Rasool Virji as well as Rajeev Gupta, the High Court passed interim orders directing them to deposit the entire amount/part amount demanded by the D.D.A. Rajiv Gupta, however, did not pay the said amount and as such no sale deed was executed. The respondents herein, however, complied with the directions of the High Court.

Relying on clause (3) of the said scheme which is to the following effect :

3. "It is further clarified that these orders will have prospective effect and the cases already decided will not be re-opened.

Note: In respect of pending applications, where conveyance deeds are yet to be executed/registered, refund in respect of conversion fee paid, if any, on account of these instructions should be allowed.

4. This issues with the approval of Finance Division's U.O. No.1066-F dated 21.6.99."

Rajeev Gupta was permitted to execute the aforementioned deed by paying only the conversion charges, i.e. without payment of even 50% of the unearned increase. It is not disputed that Civil Appeal No. 1783 of 2000 titled D.D.A. vs. Rajeev Gupta was disposed of on 30.4.2003 in terms of a signed order as the case was said to be covered by the policy of conversion from leasehold to freehold and the proposal of the D.D.A. to compromise was noted. The respondents herein thereafter filed an application for raising additional pleas, inter alia, on the ground that having regard to the interim order passed in the writ petition by the High Court of Delhi, the deed of sale having been executed by them pursuant to or in furtherance thereof, they were entitled to be treated similarly as Rajeev Gupta. An objection to the said application had been filed by the appellant, inter alia, on the ground that subject matter of the writ petition leading to filing of these appeals has no nexus with the aforementioned scheme dated 28.6.1999.

SUBMISSIONS :

> Mr. P.P. Rao, learned senior counsel appearing on behalf of the appellant, inter alia, would submit that: (1) As the statutory sub lease refers to the market value of the residential plot, the circular letters cannot override the same and, thus, are illegal. Strong reliance in this behalf has been placed on Sant Ram Sharma vs. State of Rajsthan & Anr. [(1968) 1 SCR 111] and State of M.P. & Anr. etc. vs. G.S. Dall & Four Mills etc. [(1992) Supp. 1 SCC 150]. (2) Notings made in different files would show that except in one of the three cases, the fact situation prevailing in other cases were different. (3) As the circular letter dated 24.6.1992 showed locality wise market rates for the earlier period, the fixation of market rates was retrospective and not

prospective. (4) Such a circular letter in any event having not been issued by the Lt. Governor, was illegal. (5) Resolution No.98/1995 dated 28.11.1995 being applicable to pending cases, the High Court committed a manifest error in not giving an effect thereto and in any event, any past transaction on the basis of the said circular could not have been made the basis for determination by the High Court by applying the principle of estoppel as there is no estoppel against the statute. (6) In any event, only because a mistake has been committed in other cases, the same by itself would not entitle the respondents to claim any benefit on the basis thereof as in such an event Article 14 would have no application (7) The interim order having been passed by the High Court on the asking of the respondents whereby and whereunder an option was given to them to deposit the amount in the event they intend to get the sale deed executed registered, upon execution and registration thereof on the exercise of option by the respondents, the subsequent policy decision which has been given a prospective effect cannot have any application.

Mr. A.N. Haskar, learned senior counsel, appearing on behalf of the respondents, on the other hand, would submit : (1) The fact of the matter in pending cases as also in the case of Rajeev Gupta would clearly demonstrate that they stood on a common footing and as such the respondents herein cannot be treated differently to that of Rajeev Gupta. (2) The market value as determined by the Central Government or the Delhi Administration refers to the market value and the same do not say that thereby any benchmark has been provided. (3) The submissions raised hereinbefore on behalf of the appellant were not raised before the High Court nor had been adverted to in the counter affidavit. (4) Any mistake on the part of the Delhi Administration had never been pleaded nor urged. (5) As three opportunities had been granted to the respondents to clarify their stand as regard the existing policy decision and they having failed and/or neglected to do so, it is not open to them to raise the plea of inequities before this Court. (6) Even in the form of application required to be filed for conversion of leasehold into freehold, it having been stated that unearned increase would be recoverable, the same cannot be recovered from case of the respondents only because the sale deeds had been executed by them pursuant to the interim order granted by the High Court. (7) The interim order passed by the High Court must be construed in such a manner so as to have a bearing in the pending appeals.

ARE THESE TWO CASES SIMILAR TO THAT OF RAJEEV GUPTA :

The following chart will show that the cases of J.S. Monga and Shri Abdul Rasool Virji stand on a similar footing as that Rajeev Gupta :

S. No. Particulars J.S. MONGA Plot No.A-5/3, Vasant Vihar, N. Delhi ABDUL RASOOL VIRJI Plot No.A-1, Maharani Bagh, N.D. RAJIV GUPTA Plot No.4, Palam Marg, Vasant Vihar, N.D.

1.

Date of Execution of Sub Lease Deed 13.12.1968 1.1.1965 27.4.1971

2. Name of Sub Lessee Sh. Mangal Singh Monga & after his death mutation allowed in the joint names of his legal heirs :

1. Smt. Harbans Monga (wife)

2. Smt. Prabha Sehgal (daughters)

3. Smt. Indira Batra "

4. Smt. Ella Bajaj "

5. Sh. Joginder Singh Monga (son)

6. Sh. Mohinder Singh Monga (son)

7. Sh. Jagjit Singh Monga (son)

8. Sh. Upjeet Singh Monga (son) Sh. N.R. Pillai.

After his death mutated in favour of (1) Sh. R.A. Pillai (2) Sh. R.S. Pillai.

Mutated on 28.5.93 (in the names of sons of sub lessee) Sh. Satish Chander Malhotra.

Transferred on the basis of Sale Permission, in favour of Smt. Kaushalya Rani Bhusari w/o Sh.

Sampuran Singh, on dated 2.12.1988

3. Name of Purchaser

1. Sh. Rattan Chand Burman 2. Smt. Brij Rani Burman Sh. Abdul Rasool Virji Sh. Rajiv Gupta

4. Date of Agreement of Sale 19.2.1994 16.1.1994 24.10.1993

5. Date on which Sale Permission applied 23.5.1994 17.4.1994 30.4.1994

6. Amount of 50% UEI demanded Rs.3,62,44,420/-

Dt. 22.2.1995 Rs.2,23,34,725/-

Dt. 12.6.1996 Rs. 4.13 crores Dt. 1.12.1994

7. Date & amount of 50% UEI paid Dt. 16.5.1995 Rs.3,62,44,420/-

Dt. 12.6.1996 Rs.1,49,72,225 paid as per the Order of the High Court of Delhi, Dt. 22.5.1996 Not paid

8. Date of execution of Sale Deed/Registration of the same 6.6.1995 17.1.1997 Not executed

9. Date on which Sale Permission granted/Transfer allowed 25.1.1996 (Transfer allowed) 30.7.1996 Not granted

10. Date on which conversion from lease hold to freehold applied 24.12.1999 24.12.1999 17.12.1999 From the aforementioned chart it would appear that not only the application of Rajeev Gupta was contemporaneous, all other relevant facts are almost identical. Rajeev Gupta was to pay a sum of Rs. 4,13,00,000/-, whereas J.S. Monga and Abdul Rasool Virji were to pay sums of Rs.3,62,44,420 and Rs.2,23,34,725/- respectively, pursuant to interim order passed by the High Court. Whereas J.S. Monga deposited the entire amount as demanded, Abdul Rasool Virji deposited a sum of Rs.1,49,72,225/-, as per the directions of the High Court. The contention of the learned counsel appearing on behalf of the respondents, therefore, must be held to have some substance that whereas Rajeev Gupta has received the benefit of the purported new policy of conversion from lease hold to free hold, the respondents herein were deprived therefrom for no fault on their part.

STATUTORY PROVISIONS :

> Section 22 of the D.D.A. Act reads as under :
>
> "22. Nazul lands (1) xxx xxx xxx (2) xxx xxx xxx (3) After any such nazul land has been developed by, or under the control and supervision of, the Authority, it shall be dealt with by the Authority in accordance with rules made and directions given by the Central Government in this behalf."

Section 56 of the Act reads as under :

> "56 Power to make rules (1) The Central Government, after consultation with the Authority may, by notification in the Official Gazette, make rules to carry out the purposes of this Act :
>
> Provided that consultation with the Authority shall not be necessary on the first occasion of the making of rules under this section, but the Central Government shall take into consideration any suggestions which the Authority may make in relation to the amendment of such rules after they are made.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely ... ..."

Rule 23 of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1961, provides as under :

> "23. Agreements between the cooperative societies and their members. Where Nazul land has been allotted to a cooperative society, such members of the society who are allotted a plot or flat by such society shall execute a sub- lease in favour of the society in respect of each plot or flat allotted to them. The terms and conditions of such sub-lease shall, as nearly as circumstances permit, be in accordance with Form 'A' and Form 'B' appended to these rules. In addition, such sub-lease may contain such covenants, clauses or conditions, not inconsistent with the provisions of Form 'A' or Form 'B' as may be considered necessary and advisable by the society, having regard to the nature of a particular sub-lease."

Sub-lease is granted in Form 'B'. Sub clauses (a) and (b) Clause (6) of the Perpetual Sub Lease read as under :

> "(a) The sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot in any form or manner, benami or otherwise, to a person who is not a member of the Lessee.
>
> (b) The Sub-Lessee shall not sell transfer assign or otherwise part with the possession of the whole or any part of the residential plot to any other member of the Lessee except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

Provided that the Lt. Governor reserves the right to resume, 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 residential 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 :

> Provided further that the Lessor shall have the pre-emptive right to purchase the property after deducting fifty per cent of the unearned increase as aforesaid."
>
> Clauses X(a) and (b) of Sub-Lease reads as under :
>
> "X.(a) All powers exercisable by the Lessor under this Sub Lease may be exercised by the Lt. Governor, the Lessor may also authorize any other officer or officers to exercise all or any of the powers exercisable by him under this Sub-Lease"

(b) The Lt. Governor may authorize any officer or officers to exercise all or any of the powers which he is empowered to exercise under this Sub-lease except the powers of the Lessor exercisable by him by virtue of Sub-Clause (a) above."

Clause XI of the Sub Lease reads as under :

"In this Sub-Lease, the expression "the Lt. Governor" means the Lt. Governor of Delhi for the time being or, in case his designation is changed or his office is abolished, the officer who for the time being is entrusted, whether or not in addition to other , of the Lt. Governor by whatever designation such officer may be called. The said expression shall further include such officer as may be designated by the Lessor to perform the functions of the Lieutenant Governor under this Sub-Lease."

EFFECT OF THE CIRCULARS :

It is not in dispute that the grant of lease or sub-lease is in consonance with the provisions of the D.D.A. Act and the rules framed thereunder. The sub-lease had been executed in Form 'B'. Delhi was an Union Territory. It used to be governed by the Chief Commissioner on behalf of the Governor General in Council. The Chief Commissioner is now designated as the Lt. Governor. Delhi has now also become a Part 'B' State. The authority of the Lt. Governor, therefore, is to be exercised by the Delhi Administration but such an authority being delegated one, the Union of India cannot be said to have denuded of its power to issue statutory directions as and when necessary or to issue policy decision in terms of the said Act or the rules. The power to fix market value is that of the lessor. Whereas the Chief Commissioner has been delegated with the power of the lessor, he in terms of clause X(a)(b) of the deed of sub-lease cannot sub delegate the same to any officer or officers to exercise such power.

When a market value is fixed in case of a locality by the lessor or his delegated authority, the same would be binding on them. Although the sub-lease is a statutory one, the rules provide for suitable modifications. In terms of Rule 23, the terms and conditions of the sub-lease shall as nearly as circumstances permit be in accordance with Forms 'A' and 'B'. The lessor or lessee, therefore, not only could have agreed to vary the terms and conditions, any unilateral action taken by the lessor and accepted by the lessee cannot be questioned as they are not imperative in character. From a perusal of the order dated 24.6.1992, it appears that the practice of fixation of such market value for the purpose of recovery of unearned increase had been in vogue for a long time. The relevant portion of the said order is as under :

"ORDER "Subject : Fixation of Market rate of land for the purpose of recovery of unearned increase in the value of land/plot consequent upon Sale/Transfer of residential plots allotted under the Scheme of Large Scale Acquisition, Development & Disposal of land in Delhi.

Lt. Governor of National Capital Territory of Delhi is pleased to revise the market rates of land for the purpose of recovery of unearned increase in the cost of land/plot consequent upon the transfer/sale of residential plots allotted under the Scheme of Large Scale Acquisition, Development & Disposal of land in Delhi, superseding his previous orders conveyed vide order No. F.R. 16(7)/82-L&B/3026-34 dated 31.1.92,

as given below :-

xxx xxx xxx"

The appellant itself issued the following circular, relevant portion of which reads as under :

"Sub: Fixation of market rate of land for the purpose of Recovery of unearned increase in the value of land/plot consequent upon the Transfer or Sale of residential plots allotted under the "Scheme of large Scale Acquisition Development and Disposal of land in Delhi" for the period from 1.4.90 to 31.3.91 and 1.4.91 to 31.3.92.

A copy of the Joint Secretary (Admn.) L&B Deptt. Delhi Admn. Letter No. F-16 (7)/82/L&B/20369-75 dated 24.6.92 conveying the market rates of land in different areas of Delhi for computation of unearned increase recoverable in case of transfer/sale of Resdl. Plots allotted under the scheme of Large Scale Acquisition Development and Disposal of land in Delhi is enclosed :

1. These rates would be applicable to the plots measuring upto 500 sq. meters. In respect of Sale/Transfer of plots measuring more than 500 sq. meters., a rebate of 15% on the market price of area in excess of 500 sq. meters. would be allowed."

It is not in dispute that the question as regard enhancement of the market value @ 20% per year was under consideration of the Central Government and it by a circular letter dated 11.11.1994 issued the following directions :

"Subject : Schedule of Market Rate Sir, The question of fixation of market rates of land in different areas of Delhi/New Delhi w.e.f. 1.4.1994 has been under consideration of the Government and it has been decided not to increase the land rates w.e.f. 1.4.1994 but to extend the validity of the land rates of commercial/residential purposes as well as the guidelines/principles laid down in this Ministry's letter No.J-22011/1/91-LD dated 3rd March, 1993 for two more years i.e. w.e.f. 1st April, 1994 till March, 1996 as per schedule attached."

In terms of clause 6(a), a sub-lessee is prohibited from making any sale, transfer, assign or otherwise part with possession of the whole or any part of the residential plot in any form or manner, benami or otherwise, to a person who is not a member of the lessee, but such sale, transfer, assignment and parting with possession is permissible with the previous consent in writing of the lessor. The proviso appended thereto states that in the event such consent is given, the lessor would be entitled to impose such terms and conditions as it may think fit and shall furthermore be entitled to claim and recover a portion of the unearned increase in the value.

Sub clause (b) of Clause (6) of the deed of sub-lease and the proviso appended thereto, therefore, confers a discretion upon the lessor. The decision of the lessor in respect of the market value is to be final and binding. A market value, thus, fixed by the lessor in exercise of such power either in

general or in particular case, would, therefore, be binding on it. The lessor in a case of this nature cannot be said to be inhibited in any manner to fix the market value for a locality which would be applicable to all the plots of lands situated therein. As the market value has to be fixed in terms of the provisions contained in the statutory lease, the lessor is not precluded from fixing it for an area in question and thereby avoid any arbitrary or unreasonable action by any of its officers. Market values are fixed by the authority for different purposes. Fixation of such market value, therefore, for the purpose of recovery of unearned increase cannot be said to be de' hors the D.D.A. Act and the Rules framed thereunder.

It is not a case where a conflict has arisen between a statute or a statutory rule on the one hand and an executive instruction, on the other. Only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. The lessor under the deed of lease is to fix the market value. It could do it areawise or plotwise. Once it does it area wise which being final and binding, it cannot resile therefrom at a later stage and take stand that in a particular case it will fix the market value on the basis of the price disclosed in the agreement of sale.

Reliance placed by Mr. Rao on the decision in Jawajee Nagnatham vs. Revenue Divisional Officer, Adilabad, A.P. and Others [(1994) 4 SCC 595] is wholly misplaced. Therein the question which arose for consideration as to whether the compensation should be awarded for acquisition of land on the basis of Basic Valuation Register maintained by registering authority for collection of stamp duty which had been fixed by the revenue authority at the market value for commercial as also residential area. Keeping in view the provisions contained in Section 23(1) of the Land Acquisition Act, it was held that in determining such market value, the Court has to take into account either one or the other of the three methods laid down therein, keeping in view the date of issuance of notification under Section 4(1) of the Act and, thus, Basic Valuation Register prepared and maintained for the purpose of collecting stamp duty has no statutory base or force and cannot form a foundation to determine the market value mentioned thereunder.

In Land Acquisition Officer, Eluru and Others vs. Jasti Rohini (Smt.) and Another [(1995) 1 SCC 717] it was held :

> "The question of fixation of market value is a paradox which lies at the heart of the law of compulsory purchase of land. The paradox lies in the facts that the market value concept is purely a phenomenon evolved by the courts to fix the price of land arrived between the hypothetical willing buyer and willing seller bargaining as prudent persons without a medium (sic modicum) of constraints or without any extraordinary circumstances. But the condition of free market is the very opposite of the condition of the compulsory purchase which is ex hypothesi, a situation of constraints. Therefore, to say, that for compulsory purchase, compensation is to be assessed and market value is to be determined in that state of affairs has to be visualized in terms by its direct opposite. To solve the riddle, courts have consistently evolved the principle that the present value as on the date of the compulsory acquisition comprised of all utility reached in a competitive field as on the date of the notification and the price on which a prudent and willing vendor and a similar

> purchaser would agree. The value of the land shall be taken to be the amount that the land if sold in the open market by a willing seller might be expected to realise from a willing purchaser. A willing seller is a person who is a free agent to offer his land for sale with all its existing advantages and potentialities as on the date of the sale and willing purchaser taking all factors into consideration would offer to purchase the land as on the date of the sale...."

In State of Punjab and Others vs. Mahabir Singh and Others [(1996) 1 SCC 609], this Court observed that the guidelines provided under Section 47A of the Stamp Act would only serve as prima facie material available before the Registering Authority to alert him regarding the value, holding :

> "...It is common knowledge that the value of the property varies from place to place or even from locality to locality in the same place. No absolute higher or minimum value can be predetermined. It would depend on prevailing prices in the locality in which the land covered by the instrument is situated. It will be only on objective satisfaction that the Authority has to reach a reasonable belief that the instrument relating to the transfer of property has not been truly set forth or valued or consideration mentioned when it is presented for registration. The ultimate decision would be with the Collector subject to the decision on an appeal before the District Court as provided under sub- section (4) of Section 47-A."

(See also R. Sai Bharathi Vs. J. Jayalalitha & Ors. [JT 2003 (9) SC 343]) The aforementioned decisions have no application in the instant case. In those cases, registers of land acquisition was being maintained for the purpose of evasion of stamp duty. In the instant case, not only, as rightly submitted by Mr. Haksar, it was not only remained unsaid in the impugned circular, but have been issued for the very purpose of recovery of unearned increase in the market value of the property on a general basis to which the Union of India or the Lt. Governor was entitled in law.

In Sant Ram (supra), this Court has categorically stated :

> "...It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

Yet again in G.S. Dall & Four Mills (supra), this Court observed as under :

> "...Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect..."

The matter may be considered from another angle. Nazul lands had been leased out to a cooperative society formed by the persons who intended to have roofs over their heads. The society in question was formed by the Government servants; the premium of which, having regard to the fact that the

sub-lease was to be a perpetual one for all intent and purport, would denote the amount of consideration for transfer. The undeveloped lands had been developed by the appellant wherefor also the Appellant had realized the development charges.

The appellant becomes entitled to invoke clause 6(b) of the sub- lease at the time of each and every transaction in relation to sale, transfer and assignment of the lands in question by a member of a cooperative society to a non-member. Such subsequent purchaser indisputably would have to become a member of the cooperative society. It was, therefore, not unusual on the part of the lessor to fix the market price for the entire area which had been developed by it keeping in view the fact that save and except some cases, the market value of the land would be same or similar.

It is also not in dispute that the Central Government was the ultimate authority for determination of the market value. The proposal of the appellant before the Union of India to enhance such market value @ 20% per annum did not receive any favourable response. They thought it fit to continue with the same valuation till 1996. Such a decision on the part of the Union of India was a conscious one. It is really surprising that on the one hand a stand is taken that clause 6(b) of the sub-lease contain a statutory provision and, thus, cannot be altered either by the Union of India or by the Lt. Governor, recourse is sought to be taken to the provisions of Sections 2 and 3 of the Government Grants Act in terms whereof the term of any grant or term of any transfer of land made by the Government would stand insulated from the tentacles of any statutory law as thereby unfettered discretion of the Government has been conferred to enforce any condition or limitations or restrictions in all types of grants and the right, privilege and obligations of the grantee would be regulated thereunder.

It is all the more surprising that the appellant being a delegatee has even questioned the policy decision of the delegator, namely, the Union of India. Furthermore, such a stand is being taken despite the fact that the circular letter dated 28.6.1999 as contained in Annexure R-3 to I.A. 6 of 2003 which has also not been issued by the Union of India in terms of the D.D.A. Act or the rules framed thereunder has been relied and acted upon by the D.D.A. despite ex facie the same steers on the face of the condition of the statutory lease to the effect that lease cannot be transferred without consent of the lessor.

Clause 6(b), as noticed hereinbefore, if construed to be imperative in terms thereof a member of the society is prohibited from transferring his interest in any manner whatsoever. Even delivery of possession of the premises pursuant to or in furtherance of the agreement is prohibited. But by reason of the said circular letter dated 28.6.1999, which has not been issued even in terms of Article 77 of the Constitution, not only such permission is not required to be taken but even the right to recover 50% of the unearned increase is waived and only on payment of conversion charges a leasehold is made freehold, pursuant whereto or in furtherance whereof only upon payment of conversion charges any member of the society would become entitled to transfer or assign his interest in the land or the building constructed thereupon without even obtaining any prior consent of the lessor.

We, therefore, are of the opinion that the said circular letters are valid. Determination of market value by reason of such circular letters, thus, became a part of the terms of the lease having regard to the finality clause attached thereto.

MISTAKE :

A mistake is not a fraud. It may be discovered and in a given case it must be pleaded. Such plea must lead to a fundamental error. It can be a subject matter of acquiescence. In Kerr on the Law of Fraud and Mistake, 7th Edn. at page 599, it is stated "Where one party makes a mistake either of law or fact and the other party to a transaction allows him to act upon it, then (even though such other party may himself not know of the mistake) he may be estopped from setting up the mistake for having in effect ratified it. In one case where parties had acted on one construction of a deed for forty years the House of Lords held that neither party was estopped from setting up the mistake, and that rent underpaid for so long as it was not barred by the Statute of Limitation could be recovered."

It is not disputed that the said question had not been raised in the counter affidavit; on the other hand, it appears that the High Court specifically granted three opportunities to the respondents to place on its records any other policy decision whereupon it intended to place reliance as would appear from the following :

"16.10.1996 Present : Mr. A.N. Haksar, Sr. Advocate with Mr. R.K. Virmani for the Petitioner.

Ms Sudha Bhandari for Counsel for the Respondents There is no counter filed on behalf of the Respondents. There is no appearance on behalf of the Union of India today. Learned Counsel for the Petitioner has invited the attention of the Court to the averments made in paragraph 23 of the petition and the documents Annexure-1 at page 50 of the paper book which according to him is the policy governing unearned increase during the relevant period. Reply to this paragraph 23 of the counter is evasive.

Learned Counsel for the petitioner has also invited the attention of the Court to yet another circular issued by the DDA on unearned increase calculations which is dated 28th November, 1995. Let Counsel for the Respondents seek specific instructions and make clear statement preferably on affidavit as to whether they admit or deny the policy dated 11th November, 1994 Annexure-1 and the circular dated 28th November, 1995. If there be any other policy operating, let Respondent DDA disclose it.

Compliance within six weeks.

To come up for hearing on 24th February, 1997.

R.C. Lahoti, J.

S.N. Kapur, J."

"24.02.1997 Present : Mr. A.N. Haksar, Senior Advocate with Mr. R.K. Virmani for the Petitioner.

Mr. Sumit Bansal fore the Respondent/DDA On October 16, 1996, six weeks time allowed to the DDA to make a clear statement on affidavit as to whether it admits or denies the policy dated November 11, 1984 and the circular dated November 28, 1995. it was also directed that if there be any other policy operating, the same should also be disclosed by DDA. The said order has not been complied with. Two weeks further time by way of last opportunity is allowed to the DDA to comply with these directions.

To be taken up for disposal towards the end of the short matters on April 10, 1997.

Within a period of four weeks the parties will also place on record short synopsis or notes.

Devinder Gupta, J.

K.S. Gupta, J."

"10.04.1997 President : Mr. A.N. Haksar Senior Advocate with Mr. R.K. Virmani for the Petitioner.

Mr. Ravinder Sethi, Senior Advocate with Mr. Sumit Bansal for the Respondent/DDA Mr. Sethi states that additional affidavit of Shri Jagdish Chandra, Director (R) DDA., has been filed pursuant to the last order. Learned counsel for the petitioner states that information contained in the affidavit does not comply with the court's order. List on August 21, 1997, at the end of the "after Notice Miscellaneous matters". Synopsis will be filed by the parties within four weeks from today.

Devinder Gupta, J.

K.S. Gupta, J."

NEW POINTS :

The instances relied upon by the High Court in its judgment had not been distinguished. Such an attempt has been made only before us for the first time. Even in relation to A-14, Anand Lok, no distinction is to be found as it is stated :

"In the case of A-14, Anand Lok, New Delhi, the date of application is 26.6.1989 and the permission was granted on 26.7.1989 by receiving unearned increase calculated with reference to the market rate of the land in the locality contained in the relevant circulars but not on the basis of the Circular dated 24.6.1992 relied on by the High Court."

Keeping in view of the fact that the Appellant despite being given several opportunities by the High Court did not disclose its policy, we do not think that they should otherwise also be given an opportunity to raise new grounds.

DETERMINATION OF THE AMOUNT OF UNEARNED INCREASE BY THE APPELLANT:

The Appellants proceeded on the premise in the case of the Respondents, that the Circular letters issued by it or the Union of India need not be given effect to and the valuation of the land should be worked as Rs. 7,50,00,000/- for the purpose of computing the unearned increase. However, it must be presumed that the vendees proceeded on the basis that the amount of unearned increase would be determined in terms of the said circulars. Furthermore, 50% of the unearned increase was to be paid to the Appellant as a condition of lease. While determining the amount, the Appellant was required to take into account the amount of consideration specified in the agreement and/or clearance certificate issued by the Income Tax Officer. They even did not do so.

INTERIM ORDER EFFECT OF :

The respondents herein questioned the demand of Rs.3,62,44,420/- made by the DDA. The DDA calculated the aforementioned demand on the basis that the total consideration for the transaction was Rs.7,50,00,000/-. The calculation was made having regard to the fact that Respondent Nos.8 and 9 agreed to pay 50% of the unearned increase, the total amount of Rs.7,50,00,000/-. It failed to notice that after circulars are to be applied, the unearned increase must be calculated on the basis thereof and no demand can be raised hypothetically that the purchaser would be agreeable to pay a further sum of Rs.7,50,00,000/-. Such an assumption is wholly on wrong premise.

A prayer therefore was made before the High Court that sale deed be permitted to be executed. Keeping in view the stand taken by the parties before it, it was directed :

"...In case the Petitioner are interested in the grant of sale permission the adjournment of the matter in any case before the 13.7.1995 they may pay the demanded sum lf Rs.3,62,44,420/- under to DDA. In case ultimately it is held that amount payable is less, the excess amount can be ordered to be refunded to the Petitioner with interest at the rate of interest (sic for 18%) per annum. In case the payment is made under protest it is subject to fulfillment of other formalities would

consider application for sale permission."

The respondents complied with the order of the High Court whereas Rajeev Gupta did not. Having regard to the subsequent events, he got the benefit of 1999 Circular and as indicated hereinbefore, the D.D.A. ignoring the fact that he was a power of attorney-holder and had already entered into possession and, thus, clause 6(b) stood attracted. It may be true that by such an action, the respondents herein stood discriminated.

The appellant being a State, it was required to act fairly and reasonably in all circumstances even in the matter of eviction of a tenant. [See M/s Dwarkadas Marfatia and Sons vs. Board of Trustees of the Port of Bombay, AIR 1989 SC 1462]. But the respondents herein are victims of situation. Stricto sensu they cannot take advantage of the order passed by the High Court. The High Court gave them opportunities to get their deed registered. They could have refused to do so and in that event like Rajeev Gupta they were not required to deposit the amount. The parties did not contemplate that the Central Government would come out with another policy decision, which would be more beneficial to the sub-lessee. A fortuitous circumstance like the issuance of the said circular dated 28.6.1999 was not in contemplation. The appellant, therefore, cannot, keeping in view the prospective effect given to the said circular, take any benefit thereof. Furthermore, they have not filed any application to amend their writ petition. They merely have urged additional grounds. It is no doubt true that this Court can take into consideration subsequent events and mould relief accordingly but thereby it cannot substitute a new relief based on a fresh cause of action. We are, therefore, of the opinion that the interim order passed by the High Court does not come to the aid of the respondents.

RATE OF INTEREST :

By reason of the aforementioned interim order, the High Court directed payment of 18% interest. The rate of interest which was prevailing at the relevant time was 18%. However, the bank rate of interest has since gone down drastically. Grant of interest pendente lite and for future is a discretionary remedy. The court of appeal can, therefore, exercise the same power while finally disposing the lis as that of the High Court keeping in view the principle engrafted in Section 34 of the Code of Civil Procedure. The rate of interest may have to be fixed having regard to the principle of restitution.

Recently, this Court has examined this principle in South Eastern Coalfields Ltd. vs. State of M.P. & Ors. [(JT 2003 (supp. 2) SC 443] stating :

"Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (See : Chitty on Contracts, Edition

> 1999, Vol. II, Para 38-248, at page 712). Interest in equity has been held to be payable on a market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many."
>
> Despite the same, the Court reduced the statutory rate of interest from 24% to 12% stating :
>
> "So far as the appeal filed by the State of Madhya Pradesh seeking substitution of rate of interest by 24% per annum in place of 12% per annum as awarded by the High Court is concerned, we are not inclined to grant that relief in exercise of our discretionary jurisdiction under Article 136 of the Constitution especially in view of the opinion formed by the High Court in the impugned decision. The litigation has lasted for a long period of time. Multiple commercial transactions have taken place and much time has been lost in between. The commercial rates of interest (including bank rates) have undergone substantial variations and for quite sometime the bank rate of interest has been below 12%. The High Court has, therefore, rightly (and reasonably) opined that upholding entitlement to payment of interest at the rate of 24% per annum would be excessive and it would meet the ends of justice if the rate of interest is reduced from 24% per annum to 12% per annum on the facts and in the circumstances of the case. We are not inclined to interfere with that view of the High Court but make it clear that this concession is confined to the facts of this case and to the parties herein and shall not be construed as a precedent for overriding Rule 64A of the Mineral Concession Rules, 1960.

It is also clarified that the payment of dues should be cleared within six weeks from today (if not already cleared) to get the benefit of reduced rate of interest of 12%; failing the payment in six weeks from today the liability to pay interest @ 24% per annum shall stand."

In K.T. Venkatagiri and Others vs. State of Karnataka and Others [(2003) 9 SCC 1], it is stated :

> "We are, therefore, of the opinion that with a view to do complete justice between the parties and having regard to the order passed by this Court in Khoday Distilleries case, the following directions should be issued :
>
> (1) xxx xxx xxx (2) xxx xxx xxx (3) xxx xxx xxx (4) xxx xxx xxx (5) xxx xxx xxx (6) xxx xxx xxx (7) On the amount found to be due and owing to MSIL by any of the appellants the same shall be paid and interest at the rate of 18% per annum shall be leviable from the date of realisation till 12.2.1997 and thereafter at the rate of 9% per annum, within twelve weeks from the date of final determination."

We may notice that in Pure Helium India Pvt. Ltd. vs. Oil & Natural Gas Commission [2003 (8) SCALE 553], the rate of interest awarded by the arbitrator was reduced to 6% in exercise of its

power under Article 142 of the Constitution of India.

CONCLUSION :

In the facts and circumstances of this case, we are of the opinion that grant of 9% interest shall meet the ends of justice. We, therefore, while dismissing the appeals direct that in stead and place of 18% interest, the appellant shall be liable to pay interest @ 9% per annum. The amount payable to the respondents must be paid within a period of six weeks from this date together with interest failing which the respondents would be entitled to claim 18% interest on the expiry of the said period till actual payment is made.

We, keeping in view the facts and circumstances of the case, also direct that the application for conversion filed by the respondents herein should be disposed of expeditiously. Keeping in view the conduct of the appellant herein, we think that they should bear the costs of the respondents. Counsel's fee is assessed at Rs.25,000/- in each appeal.