

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 23rd December, 2015.**

+ **LPA No.2514-15/2005**

UNION OF INDIA & ANR **Appellants**
Through: Mr. Ruchir Mishra along with Mr.
Mukesh Kumar Tiwari, Adv.

Versus

M/S MAHALAXMI SAW MILLS P. LTD. **Respondent**
Through: Mr. Kirti Kumar, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra court appeal impugns the judgment dated 10th June, 2005 of the learned Single Judge of this Court allowing W.P.(C) No.2546/2003 filed by the respondent M/s Mahalaxmi Saw Mills Pvt. Ltd. by quashing the communications dated 5th September, 2001 and 26th March, 2003 of the appellants Land & Building Officer (L&DO) and issuing a mandamus directing the appellants to mutate the leasehold rights in the land underneath property No.3/13, Industrial Area, Kirti Nagar, New Delhi from the name of Mahalaxmi Saw Mills, a partnership firm to the name of the respondent, a private limited company, without treating the same as a sale of the property.

2. The appeal, vide order dated 9th January, 2007, was admitted for hearing and the statement of the counsel for the respondent that he would not press for compliance of the direction / writ issued by the leaned Single Judge was recorded. The appeal, when came up for hearing on 28th January, 2010 was dismissed for non-prosecution. After a long delay of more than four years, the appellants applied for restoration of the appeal and which was allowed vide detailed order dated 19th January, 2015. We heard the counsel for the parties and reserved judgment giving them liberty to file written submissions. Though the counsel for the respondent has filed written submissions, no written submissions have been filed by the appellants.

3. The facts which are not in dispute are as under:

(i) the lease of land admeasuring 207 sq. yards bearing No.3/13, Industrial Area, Kirti Nagar, New Delhi was granted by the President of India to one Sh. Jagjodh Singh vide Lease Deed dated 31st December, 1962 for a term of 99 years commencing from 1st August, 1962;

(ii) Clauses (b) & (c) of the said Lease Deed are as under:

“(b) The Lessee shall before any assignment or transfer of the said premises hereby demised or any part thereof obtain from the Lessor approval in writing of the said

assignment or transfer and all such assignees and transferees and the heirs of the Lessee shall be bound by all the covenants and conditions herein contained and be answerable in all respects therefor.

(c) The Lessee can transfer the land after obtaining the permission of the Lessor aforesaid and the Lessor will not share any unearned increment in the value of the land (being the difference in the premium paid by him to the Lessor and the market value of the land then prevailing) for permitting such transfer. The Lessor will, however, be entitled to claim and recover the unearned increment in the value of land in the event of any subsequent transfer of the land by a transferee the amount so to be recovered being 50% of the unearned increment in the value of the land.”

In the case of any subsequent transfer the Lessor shall have the pre-emptive right to purchase the premises as hereby demised and all the buildings and structures standing thereon, after deducting 50% of the unearned increment as aforesaid.

(iii) the lessee Sh. Jagjodh Singh sought and was granted permission vide letter dated 14th July, 1966 to transfer the leasehold rights in the said property to M/s Mahalaxmi Saw Mills, a partnership firm of (1) Sh. Moolji Gopal, (2) Sh. Bhanji Moolji, (3) Sh. Panna Lal Moolji, (4) Sh. Bhanji Nathu and (5) Sh. Harji Moolji and the leasehold rights were accordingly transferred in the name of M/s Mahalaxmi Saw Mills;

(iv) the constitution of the said M/s Mahalaxmi Saw Mills changed

from time to time but no intimation thereof was given to the appellants L&DO; as on 7th May, 1986, M/s Mahalaxmi Saw Mills was a partnership firm of (1) Sh. Harji Moolji, (2) Sh. Damodar Moolji, (3) Sh. J.C. Gupta, (4) Smt. Anuradha Gupta, (5) Smt. Maneesha Gupta, (6) Smt. Sushila Gupta and (7) Sh. Satish Gupta;

(v) the aforesaid seven partners of M/s Mahalaxmi Saw Mills on 26th August, 1986 got incorporated the respondent Company and transferred the business, assets and liabilities of partnership firm M/s Mahalaxmi Saw Mills to the respondent Company at their net book value and became shareholders of respondent Company in proportion of their shares in the partnership firm of M/s Mahalaxmi Saw Mills;

(vi) the respondent Company thereafter applied to the appellants L&DO for mutation of the leasehold rights in the land aforesaid from the name of M/s Mahalaxmi Saw Mills (partnership firm) to the name of the respondent Company;

(vii) the appellants L&DO vide their letter dated 5th September, 2001 informed the respondent Company that such transfer would be affected *inter alia* upon payment of unearned increase of Rs.13,04,294/- together with penalty of Rs.35,532/- for sale without

permission;

(viii) the respondent Company vide its letter dated 15th October, 2001 represented to the appellants L&DO that the appellants L&DO were not entitled to charge unearned increase as there was no transfer of property and it was merely a change of name of the existing lessee from that of a partnership firm with seven partners into a private limited company with the same seven shareholders;

(ix) the appellants L&DO vide their letter 26th March, 2003 reiterated its demand aforesaid and further threatened that upon non-payment, further action under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 would be taken;

(x) the respondent Company filed the writ petition from which this appeal arises contending that there was no transfer of leasehold rights within the meaning of the clauses of the lease of the land set out herein below and thus the appellants L&DO were not entitled to charge unearned increase;

(xi) the appellants L&DO contested the writ petition contending (a) that a partnership firm and the company are two separate and independent legal entities, even though the partners / shareholders of

the two may be the same; (b) that a company is an independent juristic entity having independent existence than its shareholders; (c) that the same constitutes a transfer within the meaning of the clauses aforesaid of the Lease Deed; (d) that in the present case, the constitution of the partnership also had changed from the time when the appellants L&DO vide letter dated 14th July, 1966 had granted permission to Sh. Jagjodh Singh to transfer the leasehold rights in the name of the partnership firm M/s Mahalaxmi Saw Mills and which also clearly shows that first the constitution of the partnership firm was changed and then a company was incorporated, making it a clear case of transfer.

4. The learned Single Judge has allowed the writ petition of the respondent Company by quashing the demand for unearned increase and by directing the appellants L&DO to mutate / record the leasehold rights in the property from the name of the partnership firm M/s Mahalaxmi Saw Mills to the name of the respondent Company reasoning:

(a) that though the constitution of the partnership firm M/s Mahalaxmi Saw Mills had, after acquiring the leasehold rights in the land underneath the property pursuant to the permission dated 14th

July, 1966, changed several times but some of the original partners continued to be partners till the conversion of the partnership firm into a company, though certain persons who were not partners at the time of acquiring the leasehold rights had also become partners in the firm;

(b) that the appellants L&DO, inspite of directions, had failed to file any policy in force in this regard;

(c) that the counsel for the appellants had also failed to make any arguments;

(d) that as per *Addanki Narrayanappa Vs. Bhaskara Krishtappa* AIR 1959 Andhra Pradesh 380 (FB) and *Commissioner of Income-Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Dewas Cine Corporation* AIR 1968 SC 676 cited by the counsel for the respondent Company, mere reconstitution of a partnership firm cannot be *per se* be treated as a transfer;

(e) that the appellants L&DO and other governmental agencies granting such leases of land have become wiser with the passage of time and had specifically inserted clauses for charging unearned increase in case of conversion of a partnership firm into a limited company; however there is no such clause in the lease of the said

property;

(f) thus, it cannot be held that any transfer took place on that account;

(g) that the Division Bench of Andhra Pradesh High Court in *Vali Pattabhirama Rao Vs. Sri Ramanuja Ginning and Rice Factory (P) Ltd.* AIR 1984 Andhra Pradesh 176 relying on Section 575 of the Companies Act, 1956 has held that if a partnership firm registered as a company, there was a statutory vesting including of all immovable property and no separate conveyance was required for the same;

(h) that if no conveyance deed is required for vesting of a property from a partnership firm to a company, it could not be said that any transfer of the property takes place which would require levy of unearned increase;

(i) that the appellants L&DO, apart from stating that it is a case of transfer, have not rendered any further assistance in the matter.

5. The counsel for the appellants has, besides reiterating the appellants' stand before the learned Single Judge, (i) contended that properties of shareholders are not properties of the company and vice-versa properties of the company are not properties of the shareholders; (ii) contended that

conversion of a partnership firm into a private limited company is a voluntary transfer and not a deemed transfer; (iii) relied on ***Delhi State Industrial Development Corporation Ltd. Vs. Vikas Pharma (India) Pvt. Ltd.*** 117 (2005) DLT 644 (DB). No policy is shown to us either.

6. Per contra, the counsel for the respondent Company while supporting the judgment of the learned Single Judge has additionally relied on (a) ***Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala*** (1979) 4 SCC 766 to contend that upon the partners converting the partnership into a private limited company, the vesting of property in the company, is a legal consequence; (b) judgment dated 7th November, 2014 in LPA No.391/2014 titled ***Delhi State Industrial and Infrastructure Development Corporation Ltd. Vs. K.G. Electronics Pvt. Ltd.***; (c) ***Human Care Medical Charitable Trust Vs. DDA*** 186 (2012) DLT 395; and (d) ***DDA Vs. Mahabir Prasad and Sons*** MANU/DE/3308/2009.

7. We have considered the rival contentions and for the reasons hereinafter appearing are unable to concur with the view taken by the learned Single Judge and / or with the additional arguments of the counsel for the respondent Company before us.

8. Clause (b) supra of the Lease Deed of the land aforesaid requires the

lessee to obtain approval in writing of the appellants L&DO before any “assignment or transfer” of the leased premises.

9. Clause (c) supra of the Lease Deed entitled the appellants L&DO to claim and recover unearned increase at the time of ‘transfer’ subsequent to the first ‘transfer’.

10. The ‘transfer’ if any by M/s Mahalaxmi Saw Mills (partnership firm) to respondent Company is a transfer subsequent to the first transfer which was effected by Sh. Jagjodh Singh in favour of M/s Mahalaxmi Saw Mills. Thus, if it is a transfer or assignment within the meaning of clauses aforesaid of the Lease Deed, as is contended by appellants L&DO, unearned increase would be payable thereon.

11. A firm under the Indian Partnership Act, 1932 is not a juristic person and has no entity independent from that of its partners and is merely a compendious name for its partners. The property of a firm is the property of all its partners in proportion to their share in the partnership firm. Reference in this regard can be made to (i) *Addanki Narayanappa Vs. Bhaskara Karishtappa* AIR 1966 SC 1300; (ii) *Commissioner of Income Tax, Madras Vs. R.M. Chidambaram Pillai* (1977) 1 SCC 431; and, (iii) *Munshi Ram Vs. Municipal Committee, Chheharta* (1979) 3 SCC 83. Thus, seen, the

property of the partnership firm M/s Mahalaxmi Saw Mills was the property of its partners.

12. The said partners of the partnership firm M/s Mahalaxmi Saw Mills converted the partnership firm into a private limited company i.e. the respondent Company herein and further provided in the Memorandum of Association of the respondent Company that all the assets of the partnership firm stood vested in the respondent Company by so doing, what was earlier the property of the partners of the partnership firm M/s Mahalaxmi Saw Mills became the property of the respondent Company.

13. Even though all the erstwhile partners of M/s Mahalaxmi Saw Mills were shareholders of the respondent Company in proportion to their share in the partnership firm but a company incorporated under the Companies Act, 1956 as distinct from a partnership firm is not only a juristic person and a corporation sole but also, as distinct from a partnership firm, a legal entity different from its shareholders. Thus, notwithstanding the partners of M/s Mahalaxmi Saw Mills who as aforesaid were the owners / lessees of the aforesaid property of M/s Mahalaxmi Saw Mills being the shareholders of respondent Company, the ownership / leasehold rights in the aforesaid property vested not in them as shareholders but in the respondent Company.

14. A Division Bench of this Court in *New Delhi Municipal Council Vs. Ram Kishan Kulwant Rai & Sons* MANU/DE/4961/2012, in the context of assessment of property tax of an immovable property, and relying on *Western Coalfield Limited Vs. Special Area Development Authority, Korba* (1982) 1 SCC 125 and *Electronics Corporation of India Ltd. Vs. Secretary, Revenue Department, Government of Andhra Pradesh* (1999) 4 SCC 458, held that (i) a company incorporated under the Companies Act has a corporate personality of its own, distinct from that of its shareholder; (ii) the lands and buildings are vested and owned by the company and the shareholders own only the shares; (iii) a company registered under the Companies Act is a legal person separate and distinct from its individual members; (iv) property of the company is not the property of the shareholders; (v) a shareholder has merely an interest in the company arising under its Articles of Association, measured by a sum of money for the purpose of liability and by a share in the profit; (vi) the mere fact that the entire share capital of a company may be contributed by the Central Government and the fact that all its shares were held by the President and certain officers of the Central Government did not make the company Central Government or the State for its income to be exempted from union

taxation; (vii) even though a company may be controlled by the State Government, it has a separate entity than the State Government; (viii) a clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one; (ix) in the eye of law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or the entities that hold its shares.

15. In the aforesaid state of law, it cannot be said that the change in the ownership / title to leasehold rights from that of the partners of M/s Mahalaxmi Saw Mills to the respondent Company did not result in change of ownership / title to leasehold rights. Transfer is defined in Black's Law Dictionary, 8th Edition as any mode of disposing of or parting with an asset or an interest in an asset; Assignment is defined as transfer of rights or property. A change in ownership of leasehold rights in the land underneath the property from partners of M/s Mahalaxmi Saw Mills to respondent Company would thus amount to the said partners parting with the leasehold rights to the respondent Company and would constitute a transfer or assignment of leasehold rights within the meaning of Clauses (b) & (c) supra of the Lease Deed.

16. The learned Single Judge also in the impugned judgment has not

observed anything contrary to the above well established legal position. What the learned Single Judge, relying upon *Vali Pattabhirama Rao* supra has however held is that since under Section 575 of the Companies Act, there is a statutory vesting of the property of the partnership in the company and no separate Conveyance Deed is required to be executed, there is no transfer.

17. Though we entertain doubts about the applicability of Section 575 to the instant facts as discussed by us in the succeeding paragraphs but even if the same were to be applicable and the property of the partners of the partnership firm statutorily vested in the company got incorporated by them thereby obviating the need for a separate Conveyance Deed, we fail to see as to how it would still not constitute a transfer or assignment of the leasehold rights in the property. We are unable to garner any proposition of law that if a disposition or change of ownership of property or any rights therein, instead of being effected by execution of a Conveyance Deed is effected by law, it is not a transfer or assignment of property. Transfer, as aforesaid is disposition or parting with an asset or an interest in the asset and vesting thereof in another. It matters not whether it is by Conveyance Deed or by law. Once there is a transfer, the liability for unearned increase is incurred.

Notice in this respect may also be taken of Section 9 of the Transfer of Property Act, 1882 which provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law.

18. The clauses aforesaid of the Lease Deed however entitle the lessor i.e. the appellants L&DO to unearned increase when the lessee transfers the leasehold rights. It suggests a voluntary act of transfer on the part of the lessee and not an involuntary transfer as happens in the case of succession on death. Section 6 of the Transfer of Property Act also, though not affecting any law relating to transfer of property to or by companies, associations or bodies of individuals, defines transfer of property as an act by which a person conveys property to another person or to himself. Thus, for a transfer to incur liability for unearned increase, it has to be by a voluntary act.

19. It is not as if the vesting even if any under Section 575 of the Companies Act of the property is an involuntary act. The conversion of a partnership firm into a private limited company was a voluntary act of the partners of M/s Mahalaxmi Saw Mills and it is not the case of the respondent Company that there was any legal compulsion therefor. The vesting of leasehold rights in the property from the partners of Mahalaxmi Saw Mills

(partnership firm) to the name of the company, even if under Section 575 supra was thus a voluntary act to qualify as a transfer.

20. We say that we entertain doubt as to the applicability of Section 575 supra because Section 575 is situated in Part IX of the Companies Act titled “Companies Authorised to Register under this Act”. Section 565 thereunder provides for companies entitled to register and we are unable to find the word “company” therein to be including a partnership firm. Proviso (iv) thereunder expressly provides that a company that is not a joint stock company as defined in Section 566 shall not register in pursuance of the said provision as a company limited by shares. A partnership firm is definitely not a joint stock company. To us, thus it appears that a partnership firm is not entitled to register as a company under Section 565 and once that is so, Section 575 also would have no application. The partners of a partnership firm can of course otherwise than under Part IX of the Companies Act incorporate a company and vest the assets and liabilities of the partnership in the company. However, we refrain from giving any final opinion in this respect, being not relevant for our purposes.

21. The learned Single Judge has based his judgment on *Vali Pattabhirama Rao* supra. The questions for adjudication in the said judgment were, whether a conveyance is necessary to vest the property of a firm when the same was converted into a company and whether such a conveyance is necessary for the company to claim title to the property. The said questions arose in a suit for eviction. It was *inter alia* the contention of landlord that though the lease granted was permanent and transferable but upon conversion of the tenant which was a partnership firm into a company, there was no assignment / conveyance of leasehold rights to the company and hence the company did not become a tenant under him. It was held that the property of the firm vests in the company, which is incorporated by partners of firm and in which company all assets and liabilities of firm are vested, under Section 575 of Companies Act and no separate conveyance is necessary. It was further held that Section 5 of the Transfer of Property Act requires a transfer to be *inter vivos* i.e. between living persons; since a company is not a living person before its inception, vesting of property in the company at the time of its inception, is not transfer within the meaning of Section 5 and hence does not require an instrument or Conveyance Deed and is a transfer within the meaning of Section 9 of the Transfer of Property Act

which is possible without an instrument or Conveyance Deed.

22. It would thus be seen that the judgment of the Division Bench of Andhra Pradesh High Court relied upon by the learned Single Judge also does not hold that vesting of property of a partnership firm into a company, to which the partnership firm converts itself, is not a transfer.

23. We will however be failing in our duty if do not mention *CIT Vs. Texspin Engineering & Manufacturing Works* MANU/MH/0197/2003 (DB); *CIT Vs. Rita Mechanical Works* MANU/PH/3828/2010 (DB); and, *CIT Vs. Hansa Footwear* MANU/AP/1017/2011 (DB) holding that when an erstwhile partnership firm converts to a company under Part IX of the Companies Act, even though there is transfer of assets from firm to newly constituted company but it is not a transfer within the meaning of Section 45 of the Income Tax Act, 1961 attracting Capital Gains Tax.

24. However the said judgments proceed on the interpretation of Income Tax Act and in any case also do not hold there to be no transfer. Moreover, the Lease Deed aforesaid is a government grant and qua which not only is it statutorily provided in the Government Grants Act, 1895 but otherwise is the settled proposition of law that the grant has to be interpreted as per its own tenor and any rule of law, statute or enactment of legislature to the contrary

notwithstanding. The provisions of Transfer of Property Act have been expressly made inapplicable to government grants. For this reason also, the transfer of the leasehold rights from the partners of M/s Mahalaxmi Saw Mills to the respondent Company, and who are two different persons, would constitute a transfer or assignment of leasehold rights within the meaning of Clause (b) & (c) of the Lease Deed and attract unearned increase.

25. The present, even as per *Vali Pattabhirama Rao* supra, is at best a case of transfer of leasehold rights of the partnership firm which was the lessee under the Lease Deed aforesaid into the respondent Company by operation of law i.e. Section 575 of Companies Act. Other instances of transfer of property by operation of law can be found in the various Land Acquisition Laws under which also transfer is effected by operation of law and without requiring any Conveyance / Transfer Deed to be executed.

26. As far as the judgments cited by the counsels are concerned, we find no applicability thereof to the matter in hand. *M/s. Vikas Pharma (India) Pvt. Ltd.* supra cited by the counsel for the appellants L&DO merely affirms the judgment of the learned Single Judge without any discussion or consideration of the issues involved. A perusal of the judgment of the learned Single Judge reported as *Vikas Pharma (India) Ltd. Vs. Lt.*

Governor of Delhi MANU/DE/1968/2002 shows that the learned Single Judge passed the judgment on the statement of the counsel for the petitioner therein agreeing to pay the unearned increase. As far as the judgments cited by the counsel for the respondent before us are concerned, (i) ***Malabar Fisheries Company*** supra merely holds that distribution of assets between erstwhile partners as a consequence of dissolution does not amount to transfer of assets within the meaning of Section 34(3)(b) read with Section 2(47) of the Income Tax Act; (ii) ***K.G. Electronics Pvt. Ltd.*** and ***Human Care Medical Charitable Trust*** supra were cases of change of shareholders / directors of a company and trustees / members respectively of the company and society respectively which were lessees and hold the same to be not constituting transfer; and thus have no application to present controversy.

27. We may however notice that the learned Single Judge in the impugned judgment has also observed that since it was a case of mere transfer of the property from partners of a partnership firm to a company in which the said partners were shareholders, no transaction requiring levy of unearned increase had taken place. The Division Bench of this Court in ***Mahavir Prasad and Sons*** supra also, though not concerned directly with the issue has observed that levy of unearned increase requires a 'sale', for the reason

that without a 'sale' there would be no measure to the price of land.

28. We are however of the view that the Clauses (b) & (c) supra of the Lease Deed do not require the transfer or assignment to be for consideration. The measure for unearned increase provided therein, of the difference between the premium paid and the market value of the land prevailing, also does not require exchange of any consideration for computation of unearned increase. We are unable to find any requirement of monetary consideration as a necessary concomitant of transfer, neither in Transfer of Property Act nor in any other law. If it were to be so, a gift, for consideration of natural love and affection, would also cease to be a transfer and would not attract any stamp duty or unearned increase. It is also not as if there was no consideration in the subject transaction. The consideration for the partners of M/s Mahalaxmi Saw Mills (partnership firm) to transfer their property to the respondent Company was the issuance of shares of the respondent Company to the partners in lieu thereof. However, that consideration has got nothing to do with the computation of unearned increase as above.

29. We thus allow the appeal and set aside the judgment of the learned Single Judge and dismiss the writ petition filed by the respondent Company.

In the circumstances, no costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

DECEMBER 23, 2015
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