Uoi and Others Vs. Jor Bagh Asscn. Regd. and Others

Uoi and Others Vs. Jor Bagh Asscn. Regd. and Others

SooperKanoon Citation : sooperkanoon.com/948295

Court : Delhi

Decided On : Feb-28-2012

Judge : Pradeep Nandrajog &Amp; Sunil Gaur

Appeal No. : LPA 415 of 2005, 1125 & 1233 of 2007, 134, 301 & 381 of 2008, 464 & 581 of 2009 & 397, 635 & 650 of 2011

Appellant : Uoi and Others

Respondent : Jor Bagh Asscn. Regd. and Others

Judgement :

PRADEEP NANDRAJOG, J.

1. LPA No.415/2005 lays a challenge to the judgment and order dated 9.7.2004 pronounced by a learned Single Judge of this Court allowing WP(C) No.1458/1984, in which writ petition, of the 4 prayers made, only first 3 were pressed during arguments and in respect whereof 3 reliefs were granted. The 3 prayers which were pressed read as under:-

“(a) Grant a writ, direction or order in the nature of prohibition restraining the respondents from recovering/levying damages on the properties of the petitioners without any authority of law;

(b) Grant a writ of mandamus directing the respondents to disclose the principle/basis on which such damages are levied.

(c) To declare the respondents cannot impose penalty under the garb of regularization charges."

2. The 3 directions issued by the learned Single Judge read as under:-

"(i) The alleged unauthorized construction in respect of the lease-hold property belonging to the petitioner No.17 cannot now be demolished;

(ii) The lease in respect of the petitioner No.17?s lease-hold property does not provide for the imposition of any damages by Land DO for temporary regularization of the alleged unauthorized construction.

(iii) The pending demands made by the Land DO from the petitioner No.17 towards temporary regularization of the alleged breaches are quashed and set aside."

3. Only 8 petitioners joined in a common action when WP(C) No.1458/1984 was filed. Petitioner No.1, Jor Bagh Association Regd. owns no property and was obviously litigating on behalf of its members; and from time to time copetitioners were added when applications for further impleadment were filed, and by the time the judgment was pronounced the number of co-petitioners swelled to 17 and we find that some of them were neither residents nor owners of properties in Jor Bagh. From the relief granted by the learned Single Judge it is apparent that the writ petition was ultimately argued with reference to petitioner No.17, impleaded as respondent No.17 in the appeal; and it concerned a plot of land and building constructed thereon at 17 Prithvi Raj Road, New Delhi. We wonder as to why are the appellants litigating on the issue with respect to other persons who were copetitioners in the writ petition and are impleaded as respondents before us in the appeal; and the reason for our wonder is that no relief has been granted to them. The directions issued by the learned Single Judge, while allowing the writ petition, are singularly in favour of petitioner No.17 before the learned Single Judge and no analogous relief has been granted to the other co-petitioners.

4. Though the reasoning is to the benefit of the other co-petitioners as well, but no relief being granted to them and the writ petition being disposed of only with

respect to relief granted in favour of petitioner No.17, in law, it has to be held that qua the other co-petitioners the writ petition is dismissed.

5. Briefly put, the dispute raised in the writ petition was to the demands raised by Land DO, as a condition to condone breaches, either in terms of misuse or construction in excess of what was sanctioned when building plans were passed or constructions effected without any sanction. Qua some writ petitioners, these demands became an issue when under a conversion policy notified by Land DO to convert leasehold tenure to free-hold tenure, apart from the conversion charges payable as per the policy, additional demands were raised to regularize the alleged breaches. At that stage the writ petition was filed with 8 co-petitioners and as the journey was travelled, 9 more joined the band wagon.

6. Save and except Jor Bagh Association, which owned no property, the writ petitioners before the learned Single Judge were persons to whom, under a lease-hold tenure, various parcels of land were demised in perpetuity either by Land DO or by the Governor General in Council; the successor-ininterest of whom is Land DO.

7. Since the writ petition has been decided with reference to the lease-hold tenure in favour of respondent No.17, executed on 3.7.1941 by the Governor General in Council in favour of respondent No.17, it may be highlighted that the demise, in perpetuity, was a lease of a parcel of nazul land bearing No.17 Prithvi Raj Road, New Delhi, for a premium of `1376/- and an annual rent of `69/- or such other sums as may be assessed under the covenants and conditions contained. The operative part of the registered perpetual lease deed reads as under:-

“TO HOLD the premises hereby demised unto the lessee in perpetuity from the 19th day of April 1933 YIELDING AND PAYMENT (thereof the yearly rent payable in advance of `69/- (Rupees Sixty Nine only) or such other sum as may herein after be assessed under the covenants.”

8. Being relevant for the adjudication of the appeal, Covenants No.2(2), 2(3), 2(4), 2(5), 2(6), 2(10), 2(11) and 3 ofthe perpetual lease are relevant and hence we note the same as under:-

“2. The Lessee for himself, his heirs, executors, administrators and assigns covenants with the Lessor in manner following (that is to say)

(1) …….

(2) The Lessee will from time to time and at times pays and discharge all rates, taxes charges and assessments of every description which are now or may at any time hereafter during the continuation of this lease be assessed, charged or imposed upon the premises hereby demised or on any buildings to be erected thereupon or on the Landlord or Tenant in respect thereof.

(3) All arrears of rent and other payments due in respect of the premises hereby demised shall be recoverable in the same manner as arrears of land revenue under the provisions of the Punjab Land Revenue Act, XVII of 1887, and any amending Act for the time being in force.

(4) The Lessee will in all respects comply with and be bound by the building, drainage and other bye-laws for the time being in force in the New Capital of Delhi.

(5) The Lessee will not without the previous consent in writing of the Chief Commissioner of Delhi or of such officer or body as the Lessor or the Chief Commissioner of Delhi may authorize in this behalf erect or suffer to be erected on any part of the said demised premises any buildings other than and except the building erected thereon at the date of these presents.

(6) The Lessee will not without such consent as aforesaid carry on or permit to be carried onthe said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a residence or do or suffer to be done thereon any act or thing whatsoever which in the opinion of the Chief Commissioner of Delhi may be an annoyance or disturbance to the Governor General in Council or his tenants in the New Capital of Delhi.

(7) ……..

(8) …….

(9) …….

(10) The Lessee will on the determination of this lease peaceably yield up the said demised premises and the said residence and buildings thereto appertaining unto the Lessor.

(11) The Lessee will upon every assignment, transfer or sublease of the said premises hereby demised or any part thereof and within one calendar month thereafter deliver a copy of the deed of assignment, transfer or sublease to the Lessor or the Chief Commissioner of Delhi, and all such assignees, transferees and sublessees shall be bound by the covenants and conditions herein contained and be answerable in all respects thereof. PROVIDED ALWAYS THAT the Lessee shall not assign, transfer or sublease a part only of the said premises hereby demised without the previous approval in writing of the Chief Commissioner of Delhi.

(3) If the year rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for one calendar month next after any of the said days whereon the same shall have become due, whether the same shall have been demanded or not or if there shall have been in the opinion of the Lessor or the Chief Commissioner of Delhi whose decision shall be final any breach by the Lessee or by any person claiming through or under him of any of the covenants or conditions hereinbefore contained and on his part to be observed or perform then and in any such case it shall be lawful for the Lessor or any person or persons duly authorized by him notwithstanding the waiver of any previous cause or right of re-entry upon any part of the premises hereby demised or of the buildings thereon in the name or the whole to re-enter and thereupon this demise and everything herein contained shall cease and determine and the Lessee shall not be entitled any compensation whatsoever, nor to the return of a premium paid by him."

9. Land DO had raised demands calculated in terms of a policy notified vide Office Order No.23/1976 dated 31.3.1976, on the subject of condoning breaches pertaining to change of use or unauthorized constructions in properties of which it was the lessor.

10. From a perusal of the impugned decision and in particular para 13 thereof, it is apparent that the debate before the learned Single Judge was on 2 principal

issues; firstly, whether alleged unauthorized constructions in the buildings constructed by the writ petitioners on the lands demised to them under a lease-hold tenure could at all be demolished, and if not, the effect thereof (on the subject of damages charged for unauthorized construction); and secondly, whether Land DO had the power to raise any demand at all for misuse and/or unauthorized construction.

11. We may highlight that in fact issue No.2 would be the principal issue and has to be treated as issue No.1, for the reason, if Land DO had no power to raise any demand to regularize the breach in the shape of an unauthorized construction or misuse, the first question would lose significance for the reason Land DO was not threatening any demolition action. It was only demanding damages due to unauthorized constructions.

12. The case of the petitioners before the learned Single Judge was that the lease was a government grant and thus the Government Grants Act 1895 applied to the same and the mandate of Section 2 and Section 3 of the said Act made it clear that the terms of a grant would take effect according to their tenor and the government had the unfettered discretion to impose any condition, limitations or restrictions in the grant, notwithstanding any contrary provision of a statute or of common law. It was urged that there being no power under the grant i.e. the perpetual lease deeds executed, to levy any damages for any kind of misuse or unauthorized construction; by an executive instruction i.e. Office Order No.23/1976 no such right could be created in favour of Land DO. On the issue of the unauthorized constructions not being liable to be demolished, it was urged that all subject properties were comprised in an area within the jurisdiction of New Delhi Municipal Committee, governed in its functioning by the Punjab Municipal Act 1911; and as per Section 195 thereof, period of limitation prescribed to demolish an unauthorized construction was 6 months from the date the unauthorized construction was noted. It was urged that the alleged unauthorized constructions were admittedly detected long time back i.e. preceding much beyond 6 months of the date of the demand and thus it was urged that if the unauthorized constructions could not be demolished, no demand for regularization/condonation thereof could be raised nor could such a demand be put as a condition of it being

satisfied before permission was accorded to convert the lease-hold tenure to free-hold tenure.

13. Land DO had urged that while conveying the perpetual lease-hold right it was made manifestly clear that the tenure would be held by the lessee on payment of the yearly rent or such other sums as may hereinafter be assessed under the covenants. With reference to sub-clause 2 of clause 2 of the perpetual lease deed it was urged that it was the obligation of the lessee to pay and discharge all rates, taxes, charges and assessments of every description which may be assessed with respect to the demised land or a building erected thereon. It was highlighted that under sub-clause 3 of Clause 2, it was expressly clear that payments due in respect of the premises shall be recoverable as arrears of land revenue. It was highlighted that vide sub-clause 4 of Clause 2 the lessee was obliged to comply with the bye-laws in force in the New Capital of Delhi and vide sub-clause 5 of Clause 2 the lessee was obliged to ensure that building erected on the land would be as per the consent of the Chief Commissioner of Delhi or the lessor or such other office so empowered, meaning thereby, that the construction on the plot of land had to be with the consent of the lessor. Sub-clause 6 of Clause 2 enjoins upon the lessee to use the plot and the building thereon for residential purpose and none else. Sub-clause 10 of Clause 2obliges the lessee to yield peacefully the possession of the demised plot on the determination of the lease and vide subclause 11 of Clause 2 the assignees would be bound by the terms of the perpetual lease. It was urged that vide Clause 3 of the lease deed the breach of the covenants or conditions or failure to observe or perform the same or any part thereof, would entail the lease to be forfeited notwithstanding the waiver of any previous cause or right of re-entry and that upon the lease being determined, all rights of the lessee would come to an end. In a nutshell, it was urged that the obligation of the lessee to use the land and building for a residential purpose and construct the building strictly as per sanction was under pain of forfeiture of the lease and if the two or any one of the obligation was breached, the lessor could terminate the lease and additionally make an assessment with respect to the damages payable for breach of the terms of the lease and recover the same.

14. It seriously not being disputed by Land DO that the Government Grants Act 1895 governed the perpetual leasedeed executed in favour of the various writ petitioners, the learned Single Judge proceeded to consider, whether under the lease deed, the lessor i.e. Land DO, had the power to assess any sum on account of breach committed by the lessee and recover the same. Naturally, the debate took the learned Single Judge to the expression: „The lessee will from time to time and at all times pay and discharge all rates, taxes, charges and assessments of every description?in sub-clause 2 of Clause 2 of the perpetual lease deed.

15. In para 16 of the impugned decision the learned Single Judge has held:-

“From a reading of clause 2(2) it is clear that it is a covenant by the lessee and he shall, from time to time, pay and discharge all rates, taxes, charges and assessments of every description which may be assessed, charged or imposed upon the premises in question or on any buildings to be erected thereupon or on the landlord or the tenant in respect thereof. A plain reading of the said clause 2(2) makes it clear that it speaks of the lessee?s liability in respect of the premises in question with regard to payments to third parties (local authorities, etc.) and that too pertaining to rates, taxes, charges and assessments of every description. The liability that is spoken of in this clause is in the nature of payments to other local bodies in the realm of taxation. The words used are „rates?, „taxes?, „charges? and „assessments?. All these words are descriptive of levies relatable to taxes. They have nothing to do with damages for temporary regularization of unauthorized construction which belonged to an entirely different genus.”

16. On the reasoning aforesaid in para 16 of the impugned decision, in para 18 thereof, the learned Single Judge held that Office Order dated 31.3.1976 on the subject: „Breaches (charges for change of use/unauthorized constructions etc.) procedure to deal with?cannot empower the lessor to do something which was not provided for in the lease deed, for the reason the lease operate as a government grant notwithstanding any rule of law or statutory provision. The Office Order has been held at a level inferior to a statutory provision and therefore not capable of empowering Land DO to charge damages or recover any; as indicated in the said Office Order.

17. With respect to the question whether the alleged unauthorized construction could be demolished, on the strength of Section 195 of the Punjab Municipal Act 1911 and a decision of a Division Bench of this Court reported as AIR 1973 Delhi 198 Delhi Municipality vs. Surjit Kaur , the learned Single Judge has held that if within 6 months of the unauthorized construction being booked the notice of demolition is issued, no action for demolition could be taken beyond the said period. With respect to the property of respondent No.17, i.e. petitioner No.17, it is held that the alleged unauthorized construction was carried out over 50 years back. We note that the learned Single Judge has noted an argument in para 14 of the impugned decision that the demolition of an unauthorized construction not being possible due to limitation had no bearing on damages payable for the unauthorized construction, but has not dealt with the same.

18. Qua respondent No.17, i.e. petitioner No.17, the learned Single Judge has held that assuming Land DO was empowered to levy misuse or damages in terms of the Office Order dated 31.3.1976, it could not do so qua the property of respondent No.17 for the reason the Office Order provided that „No inspection of the premises occupied by foreign mission will be carried out nor any misuse/damage charges will be levied in case of residential buildings owned/hired by foreign missions?. It has been held that the property was leased to a foreign mission.

19. The decision dated May 11, 2007 which has been challenged in LPA No.1125/2007, holds that in view of the law declared in WP(C) No.1458/1984, the demand for damages in respect of the unauthorized construction had to be quashed. The result would be that the subject lease-hold property would require to be converted into free-hold upon payment of the applicable conversion charges. The damages paid by the writ petitioner in respect of the unauthorized construction have been directed to be refunded.

20. The decision under challenge in LPA No.1233/2007 is dated March 30, 2007 and follows the law declared in WP(C) No.1458/1984. The subject matter of the demand raised by Land DO, which was questioned in the writ petition, partly pertained to misuse and unauthorized construction, and largely towards unearned

increase. The facts were that vide perpetual lease-deed dated December 14, 1920, the Chief Commissioner, Delhi conveyed a lease-hold tenure with respect to 3.4 acre land currently bearing No.3, Bhagwan Das Road, New Delhi, to Lal Sukhbir Sinha and vide Clause 11 of the perpetual lease-deed, the lessee could assign or transfer his interest only with the prior permission of the lessor. Upon the death of the lessee, at a family partition, the property was allotted to Rai Bahadur Lal Anand Swarup, Lala Janaradan Swarup and Lala Raghuraj Swarup. Who, vide indenture dated May 4, 1938 transferred their right to Lala Murli Dhar, as per whom, he purchased the property on behalf of M/s Madan Mohan Lal Shri Ram and Company Pvt. Ltd. and upon the death of Lala Murli Dhar, his sons Lala Shridhar and Lala Bansi Dhar executed a formal release-deed on April 10, 1956 conveying title to the company M/s Madan Mohan Lal Shri Ramand Company Pvt. Ltd. The said company executed a saledeed on May 25, 1993 in favour of M/s Aditya Estates Pvt. Ltd., the respondent No.1 in LPA No.1233/2007. The said sale was pursuant to a scheme of arrangement filed and registered as CP No.65/1991 in this Court, for which scheme, the Central Government had granted no objection on August 14, 1991. The scheme envisaged that M/s Madan Mohan Lal Shri Ram and Company Pvt. Ltd. would execute a conveyance deed in favour of M/s Aditya Estates. The demand pertaining to unearned increase pertained to the last transfer of interest. It has been held that since the lease-deed dated December 14, 1920 did not have a condition that the lessor could recover a part of the unearned increase upon transfer of the lease- hold interest, the demand was beyond authority of law.

21. The decision under challenge in LPA No.134/2008 is dated April 27, 2007 and quashes the demand for damages on account of unauthorized construction pertaining to property No.4, Tolstoy Marg, which was requisitioned by the Government of India on February 23, 1977 and was derequisitioned on December 31, 1996. The demand pertains to the period when the property was under requisition.

22. The decision under challenge in LPA No.301/2008 is dated February 28, 2008 and quashes the demand for damages towards misuse and unauthorized construction. The decision follows the decision in WP(C) No.1458/1984.

23. The decision under challenge in LPA No.381/2008 is also dated February 28, 2008 and quashes the demand for damages towards misuse and unauthorized construction. The decision follows the decision in WP(C) No.1458/1984.

24. The decision under challenge in LPA No. 464/2009 is dated February 10, 2009 and quashes the demand with respect to unauthorized construction following the law declared in WP(C) No.1458/1984.

25. The decision under challenge in LPA No.581/2009 is dated May 4, 2009 and quashes the demand with respect to unauthorized construction following the law declared by a Division Bench of this Court in the decision reported as 2005(1) AD (Delhi) 634, Union of India vs. Vinay Kumar Aggarwal.

26. The decision under challenge in LPA No.397/2011 is dated October 28, 2010, as clarified vide order dated 29.11.2010, quashes the demand on account of misuse charges following the law declared by a Division Bench of this Court in the decision reported as 2005(1) AD (Delhi) 634, Union of India vs. Vinay Kumar Aggarwal.

27. The decision under challenge in LPA No.635/2011 is dated December 10, 2010. Damages levied on account of unauthorized construction have been quashed following the law declared in WP(C) 1458/1954.

28. The decision under challenge in LPA No.650/2011 is dated December 13, 2010 and quashes the demand with respect to misuse charges following the law declared by a Division Bench of this Court in the decision reported as 2005(1) AD (Delhi) 634, Union of India vs. Vinay Kumar Aggarwal.

29. Pertaining to the view taken by the learned Single Judge in the decision dated 09.07.2007 disposing of WP(C) No.1458/1984, Sh.Amarjit Singh Chandhiok, learned Additional Solicitor General, who appeared for the appellants, did not dispute the position that the perpetual lease-deeds, conveying lease-hold tenure, executed by the Union of India or its agencies such as Land DO, as also the perpetual lease-deeds executed by Delhi Development Authority, would be governed by the Government Grants Act 1895; but vehemently argued that vide

Clause-2(2) of the perpetual lease-deed which was considered by the learned Single Judge, the lessee was obliged to pay and discharge all rates, taxes, charges and assessments of every description which were being levied or could be levied during the continuation of the lease. Learned Solicitor urged that the principle of ejusdem generis could not be applied by the learned Single Judge while interpreting the said clause and thus challenged the finding returned that the clause pertained to levies which may be imposed by third parties such as local authorities; a finding returned in para 16 of the impugned decision. Learned Additional Solicitor General urged that vide Clause-2(5) of the perpetual lease-deed, the lessee could neither erect nor suffer to be erected a building on the land except with the previous consent, obtained in writing, of the lessor, and vide Clause-2(6) was obliged to use the premises for a purpose which was residential and that nonresidential use could be resorted to only with the permission of the lessor. There from, learned Additional Solicitor General urged that the expression „assessments?in Clause-2(2) of the perpetual lease-deed would encompass damages levied by the lessor for misuse or unauthorized construction. With reference to Clause-3 of the perpetual lease-deed, learned Additional Solicitor General highlighted that as per the clause, breach of the covenants or conditions of the lease-deed, rendered the lease to be determined and re-entry effected by the lessor and urged that said clause had to be given a meaning. The meaning given was that the said clause empowered the lessor to regularize the breach by levying a penalty, which was by way of an assessment, and hence Clause-2(2) could not be read on applying the principles of ejusdem generis. Alternatively, learned Additional Solicitor General urged, that undoubtedly the lease-deed empowered the lessor to determine the lease, if covenants or conditions thereof were breached, and, stated that it would be inherent in the power of the lessor to assess and recover damages for breach if the lessee wanted re-entry to be waived. Learned Additional Solicitor General took the argument to its logical conclusion by urging, that if the lessor did not have the power to assess damages for breach, the lease had to be determined; and gleefully did the learned Solicitor urge that the lessor would be happy if this Court were to hold that the land and the building thereon can be re-possessed.

30. Where two or more words, which are susceptible of analogous meaning, are coupled together, a noscitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general. One application of this general principle is the ejusdem generis rule. To invoke the rule, there must be a distinct genes or category; where this is lacking, the rule cannot apply.

31. Normally, as held in the decision reported as 2009 (8) SCALE 82 Commissioner of Income Tax, Udaipur v. McDowell and Co. Ltd. the four expressions: „Tax?, „Duty?, „Cess?and „Fee?, constitute a class denoting various kinds of imposts by a State in its sovereign power of taxation to raise revenue for the State. So understood, the expressions: „Charges?and „Assessments?, in Clause-2(2) of the perpetual lease-deed do tend to negate the application of the principle of ejusdem generis rule, for the reason, a „Charge?means: „To impost a burden, duty. Obligation or lien. A claim or an encumberance. And „Assessment? would mean: „A valuation or a determination qua a property. A determination of value of something. Estimate the size or quality or value and especially of a property.?But, that would be a hasty conclusion arrived at, for the reason, law recognizes the same word having a different meaning when the context differs. In the decision reported as L.R.2 C.P.326 Tidswell v. Whitworth „Assessments?, in the collocation of the covenant in a lease to pay „Taxes, Rates and Assessments? was interpreted to mean assessments of a nature similar to that of levies imposed by local authorities and was held not comprising exceptional burdens imposed.

32. However, this would not mean that the lessor cannot levy damages for misuse or unauthorized constructions effected, without the permission of the lessor. The reason is obvious. The perpetual lease in question is a government grant and the term of the grant, vide Clauses-2(4) and 2(5), oblige the lessee not to misuse the premises or to construct, without the sanction of the lessor, and if the lessee does so, vide Clause-3 of the perpetual lease-deed, the lessor is entitled to determine the lease and effect re-entry. Now, where a party is in breach of a condition or a covenant under a contract or a grant, the contract or the grant becomes determinable at the option of the party wronged, and law gives an option to the

party wronged, to seek compensation (for the wrong committed) and as a result, to forego the right to determine the contract or the grant. Indeed, if the view taken by the learned Single Judge it to be accepted, it would mean that the lessor cannot waive the right to determine the grant upon breach of a condition or conditions thereof and the sequitor would be, that the lessor would be left with no remedy other than to determine the grant and re-enter the premises, a situation which would be most detrimental to the interest of the lessee/grantee. We clarify that the power to condone a breach is an inherent power of the lessor and need not be expressly manifest in the grant.

33. This is the error committed by the learned Single Judge.

34. The Office Order No.23/1976 dated 31.03.1976 has been misread by the learned Single Judge as the source of the power of the lessor to condone breaches by levying a penalty. The source of the power, as held by us herein above, is the law, which recognizes an inherent right in the lessor/grantor to condone a breach of the lease/grant, but upon a term. It is then for the lessee/grantee to opt for the lesser evil. The office order in question brings transparency to the manner in which the damages for condoning the breach of a condition or conditions of a lease/grant shall be determined. In a democratic set up, where the Rule of Law is supreme, transparency brought about by guidelines to guide the manner in which discretion should be exercised is to be welcomed. The office order precisely does so.

35. The argument pertaining to Section 195 of the Punjab Municipal Act 1911 and the applicability of the decision of a Division Bench of this Court reported as AIR 1973 Delhi 198 Delhi Municipality v. Surjeet Kaur, has been noted by the learned Single Judge in para 14 of the impugned decision; on the subject that an unauthorized construction which cannot be demolished due to bar of limitation, is a matter distinct vis-vis the breach of a lease which prohibits a construction without sanction from the lessor and the right of the lessor to condone the breach by seeking damages. But we find that the learned Single Judge has not dealt with the same.

36. The power of a Municipality to demolish unauthorized constructions, with reference to a Municipal Law, is a power distinct. The rights and the powers of a lessor/grantor are a matter distinct and are referable to the lease/grant. As we have already held, it is the inherent right of a lessor/grantor to condone a breach of a condition of a lease/grant but upon payment of damages to the lessor/grantor; we discuss no further and hold that merely because the Municipality was prevented, due to the bar of limitation, to take action against an unauthorized construction, the same would have no bearing on the power of the lessor/grantor, who could, as a condition of condoning a breach of the lease/grant, claim damages.

37. Regarding petitioner No.17, with reference to whose lease-deed the impugned decision has been penned on the subject of misuse, the learned Single Judge has noted a term of the office order dated 31.03.1976, as per which, premises occupied by foreign missions would neither be inspected nor damages charged for any misuse.

38. We note that the premises in question had been let out for a certain duration to a foreign mission, and thus, only for said period no misuse charges could be charged. However, we need not take this issue to its logical conclusion for the reason, as recorded in the order dated September 21, 2011, Mr.Akshay Makhija, learned counsel who appeared for Jor Bagh Association stated that neither the association nor its members were desirous of contesting the appeals, and Mr.Manu Nayar, Advocate who appeared for respondent No.17 i.e. petitioner No.17, stated that his client had paid whatever dues were demanded and has got the property converted from lease-hold tenure to free-hold tenure.

39. Bringing the curtains down with respect to the decision dated 09.07.2004 allowing WP(C) No.1458/1984, we hold that the view taken by the learned Single Judge on all counts is incorrect and is thus overruled.

40. The remainder issues which arose for consideration in the other writ petitions pertain to interpreting the policy decisions taken by the Ministry of Urban Development, Union of India, which were adopted by Land DO, DDA and MCD on the subject of lease-hold tenure granted under perpetual lease deeds being

converted into free-hold tenures.

41. Till India gained independence, when partition took place in August 1947, there was not much pressure for urban land in the city of Delhi. A few private colonizers, the half a dozen Notified Area Committees, the Urban Improvement Trust and the Governor General in Council acting through the Chief Commissioner of Delhi, were making available urban land either by way of free-hold tenure or by way of lease-hold tenure. The lease-hold tenures were generally restricted to lands allotted by the Urban Improvement Trust and the Governor General in Council acting through the Chief Commissioner of Delhi. An initial premium was charged and a yearly or half-yearly rent was charged during the duration of the perpetual lease. The terms of the lease were incorporated, which in the case of residential plots restricted user of the land and the building which would be constructed thereon to a residential user and likewise there were similar stipulations for commercial and industrial land. The lease-deeds required a consent to be obtained from the lessor before effecting construction. The lease-deeds required a consent from the lessor if the user was to be changed. The covenants clearly stated that the discretion of the lessor would be absolute. The lease-deeds contained a clause that any violation of the conditions or covenants would entitle the lessor to determine the lease and effect re-entry. All the lease-deeds had a clause that without the prior permission of the lessor, the lessee could not transfer the lease-hold title held. The applicable clause, being Clause 2(11) in the standard form lease-deeds, read as under:-

”(11) The lessee will upon every assignment, transferor sub-lease of the said premises hereby demised or any part thereof and within one calendar month thereafter deliver a copy of the deed of assignment, transfer or sub-lease to the lessor or the Chief Commissioner of Delhi, and all such assignees, transferees and sub-lessees shall be bound by all the covenants and conditions herein contained and be answerable in all respect thereof. Provided always that the lessee shall not assign, transfer or sub-lease a part only of the said premises hereby demised without the previous approval in writing of the Chief Commissioner of Delhi”.

42. Qua these leases the issue was whether unearned increase could be charged by the lessor if lease-hold interest was transformed.

43. As a result of partition which took place in the year 1947, there was large scale migration of Hindu population into independent India. A large floating mass of people settled in Delhi. Land was required for housing, commercial and industrial purpose. The Delhi Development Act 1957 was promulgated and a body called the Delhi Development Authority was constituted to frame a master plan for Delhi. The Act envisaged that the Central Government would acquire land in Delhi and place the same at the disposal of DDA; to be used for the planned development of Delhi. The Large Scale Acquisition Policy 1961 was framed, which envisaged allotment of land to the residence of Delhi at pre-determined rates. The Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 were framed. The idea was to prevent unplanned growth of the city and provide land at reasonable rates to the migrant population. Since lands were allotted at pre-determined rates, which were far below the market rates, there was a stipulation in the lease-deeds that if the lessee transfers the perpetual lease -hold rights, prior permission from the lessor would be obtained and that the lessor would be entitled to recover 50% of the increase in the value of the land.

44. This express power was not reserved in the prepartition lease-deeds.

45. Nobody, not even an animal likes shackles. Much less trade and business. A free economy frowns upon restrictions. Animals are smart enough to either break or run away from shackles, so how can humans be far behind. The smart citizens of Delhi found a way out to circumvent the restrictive covenant in the perpetual lease-deed which required not only prior consent of the lessor before the leasehold right could be transferred but even obliged the lessee to pay 50% of the unearned increase to the lessor. The way found was to enter into an agreement to sell, confer the right to assign the right, and record receipt of the entire sale consideration; thereby protecting the possession of the transferee under Section 53A of the Transfer of Property Act. The second device was, in tandem with the first, to execute an irrevocable power of attorney in favour of the transferee or his nominee, empowering the attorney to deal with the land in any manner the

attorney thought fit, including the power to let out the land and/or the building constructed thereon and even sell the same, with further power to sub delegate the authority. Thus, effectively full ownership rights were being transferred and under the garb of an agreement to sell and an irrevocable power of attorney, sales were being transacted.

46. The situation was akin to a civil mutiny; it was more than mass disobedience. Taking cognizance of the ground realities, the Ministry of Urban Development thought it better to condone all such sale transactions, masquerading as agreement to sell, and regularize the same and simultaneously get rid of the cause of the problem; at the same time enrich the Government coffers, by converting all lease-hold tenures to free-hold tenures. A scheme of conversion was notified on February 14, 1992 as per which the lessee could pay a price charged and thereupon obtain a conveyance transferring title in the land to the lessee, free from any encumbrance or condition. The policy also envisaged that those who had obtained possession under agreements to sell and power of attorney could also regularize their title as a free-hold title. These persons had to pay a surcharge of 33.1/3% of the charge otherwise payable to have the land tenure converted into free-hold. The policy also took note of either there being a misuse in the land or the building or an unauthorized construction, which as per the covenants of the lease-deeds, had made liable the lease-hold interests to be determined and in some cases the determination had already taken place and re-entry notices had been issued. The policy required, in cases of misuse or unauthorized construction, to stop the misuse and/or remove the unauthorized constructions and pay damages for the period the misuse continued and/or the unauthorized construction existed. Clause 1.14 of the Policy stipulated:-

“In case of re-entered properties, conversion would be allowed only when re-entry notice has been withdrawn and the lease restored.”

47. The properties which were re-entered, were the ones where the lessor had found a violation of the term of the perpetual lease and on said account had cancelled the lease. These violations were three in number. Firstly, an illegal transfer of the lease-hold tenure without the consent of the lessor i.e. under the

garb of an agreement to sell and power of attorney. Secondly, on account of misuse. Thirdly, on account of unauthorized construction.

48. The policy formulated in the year 1992 did not provide the manner in which re-entry would be withdrawn. Vide a clarificatory guideline dated April 28, 1994, the Ministry of Urban Development directed that wherever re-entry were effected on the allegation of the lease-hold tenure being transferred without the prior consent of the lessor and without paying 50% unearned increase, a notified restoration charge, was to be charged and conversion effected by recovering a surcharge of 33.1/3% of the amount otherwise payable.

49. Unfortunately, the Ministry of Urban Development did not clarify on the subject of misuse or unauthorized construction.

50. But a bureaucrat always finds a way to trouble the citizen and especially where money is involved. A rolling stone may gather no moss, but a stationary bureaucrat gathers a lot of moss (nay:money). The bureaucrat then took a stand that where, on account of land being sold under the garb of an agreement to sell and an irrevocable power of attorney, the department had already quantified the unearned increase payable and had raised a demand, the same had to be satisfied by the transferee. Yet another clarificatory directive, by way of a guideline, was issued by the Ministry of Urban Development on May 16, 1994, clearly stating that such demands would stand withdrawn and conversion was to be allowed, upon the applicant paying the conversion fee plus 33.1/3% by way of surcharge. It was clearly stipulated that in no case unearned increase in the price of land be insisted to be paid.

51. But what would be the condition upon which the determined leases were to be restored and re-entry orders revoked?

52. The bureaucrat has the uncanny eye to catch something missing and surprisingly the same uncanny eye refuses to see the obvious. The uncanny eye of the bureaucrat did not see the obvious i.e. the intention behind the conversion policy, which was progressive in its ethos and the signature tune of the policy was „March Ahead?. The pounds which would have flown to the coffers of the

Government by implementing the conversion policy got mired in the pennies.

53. On August 2, 1996, another policy circular was issued stating as under:-

“6. In the cases where the property has been reentered, the re-entry orders will be got revoked from the competent authority on payment of restoration charges of `100/- per day or `3000/- per annum from the date of determination of the lease-deed to the date of restoration. No damages in such cases would be recoverable.”

54. An another problem was encountered. It related to interpretation of Clause 6 of the policy guideline circular dated August 2, 1996. Whether restoration charges @ `100/- per day subject to a maximum of `3000/- per annum, pertaining to leases which were determined and were being restored, were restricted to only regularizing the unauthorized possession of the allottee; possession being treated unauthorized since the lease was determined; or whether the said amount was by way of damages condoning all kinds of breaches?

55. The decision of the Division Bench reported as 2005(1) AD (Delhi) 634, Union of India vs. Vinay Kumar Aggarwal, which decision has formed the basis of the decisions under challenge in LPA No.581/2009, LPA No.397/2011 and LPA No. 650/2011, took the view that the effect of the policy guideline circular dated August 2, 1996 was to charge `100/- per day subject to a maximum of `3000/- per annum to regularize the breach. It be highlighted that the demand which was a subject matter of consideration before the Division Bench pertained to misuse charges.

56. Another policy circular dated June 28, 1999 was then promulgated, and vide Clause 6 thereof stipulated, that where unauthorized construction or misuse continues to exist, the property concerned may be converted from a lease-hold tenure to a free-hold tenure, leaving it to the concerned municipal authority to take appropriate action.

57. Another issue of debate sprung up with reference to the said policy circular dated June 28, 1999. The issue was whether the past misuse charges or charges towards unauthorized construction which were determined by the lessor upto the date of conversion were required to be charged or waived. On June 26, 2001,

another clarificatory guideline was issued stipulating that past misuse charges or charges for unauthorized constructions would be levied only upto June 28, 1999 i.e. the date when the Government of India notified the policy guideline dated June 28, 1999. On June 24, 2003, the Government of India once again clarified that the concerned lease administrating authority must permit conversion but subject to recovery of misuse charges or damage charges as applicable under the existing guidelines, leaving the continued misuse or unauthorized construction to be taken care of by the concerned municipal authority.

58. We fail to understand as to why the bureaucrat cannot speak in one tune at the same time. We cannot understand why the bureaucrat would not apply the simple mundane experience that if a meal is to be served, all the dishes must be on the table simultaneously, so that the one who is to eat the meal chooses the dish and the appropriate portion which he would like to consume. Applied analogous, why could not a consolidated policy guideline be promulgated if it was noted from time to time that the application of the policy notified on February 14, 1992 was creating a problem with respect to Clause 1.14 thereof. As noted hereinabove, clarificatory guidelines were issued in the year 1994 on two occasions, followed by further clarification in the years 1996, 1999, 2001 and the year 2003.

59. Three further issues need to be considered. The first pertains to the demand towards unearned increase in such leases where the clause pertaining to transfer of the lease-hold tenure only requires a prior permission from the lessor without specifically stating that the lessor would be entitled to recover 50% of the unearned increase. The secondissue pertains to the misuse charges or damages levied with respect to unauthorized construction in light of the policy guidelines circular dated August 2, 1996, which has been interpreted by the Division Bench of this Court in Vinay Kumar Aggarwal?s case (supra) as entitling the lessor to charge a sum of `100/- per day subject to a maximum of `3000/- per annum towards misuse charges. Lastly, and this issue arises if the view of the Division Bench in Vinay Kumar Aggarwal?s case (supra) is not followed; the issue being the effect of the policy guideline circulars issued on June 28, 1999 and clarified subsequently, and as above noted, pertaining to the dispute whether the said circulars enjoin upon the lessor to convert the lease-hold tenure to free-hold tenure

without charging anything towards misuse or unauthorized construction and leave it to the municipality concerned to take appropriate action.

60. The issue pertaining to the demand towards unearned increase in a lease-deed conveying lease-hold tenure requiring prior sanction from the lessor to transfer the lease-hold right, but without expressly recording that the lessor would be entitled to raise a demand on said account, was considered by a Division Bench of this Court in the decision reported as 74 (1998) DLT 152 (DB) Ansal and Saigal Properties and Ors. vs. Land DO and Ors. Clause 2(11) of the leasedeed which was considered by the Division Bench was identical to the clause noted by us in para 41 above. It read:-

”(11) The lessee will upon every assignment, transferor sub-lease of the said premises hereby demised or any part thereof and within one calendar month thereafter deliver a copy of the deed of assignment, transfer or sub-lease to the lessor or the Chief Commissioner of Delhi, and all such assignees, transferees and sub-lessees shall be bound by all the covenants and conditions herein contained and be answerable in all respect thereof. Provided always that the lessee shall not assign, transfer or sub-lease a part only of the said premises hereby demised without the previous approval in writing of the Chief Commissioner of Delhi”.

61. The Division Bench held in favour of Land DO and reasoning is to be found in para 47 of the decision.

62. Apart from the process of reasoning adopted by the co-ordinate Bench of this Court, we would add that where the grantor reserves the right, while making a grant, to permit the transfer of the grant by the grantee, it would be within the power of the grantor to subject the approval granted to a condition. The grantee cannot insist that it is entitled to an unconditional approval without a term. Of course, where thegrantor is a State or its instrumentality, the term of approval would be expected to be reasonable and not arbitrary for the reason the Constitution of this country enjoins upon the State to act with reason and with fairness while dealing with its subjects.

63. The pre-independence grants were not by way of public auctions and the leases were at concessional rates. They were not intended to be wind falls in the hands of the lessee. We see nothing unreasonable or unfair in the State demanding 50% of the unearned increase i.e. 50% value of the subject land which is sought to be transferred.

64. Thus, on the first of the three issues noted by us in para 59 and above, we conclude by holding that where the term of the lease is in a language noted in para 41 above, the lessor would be entitled to raise a demand towards unearned increase.

65. But, we would hasten to add that in view of the policy guideline pertaining to the conversion policy promulgated on February 14, 1992, no unearned increase has to be paid where lease-hold interest has been transferred without the prior permission of the lessor and the transferee can seek conversion by paying an additional surcharge of 33.1/3% of the conversion charges otherwise payable. 66. Since we are on the subject, we would also terminate the debate in LPA No.1233/2007 that the last transfer therein, pertaining to the scheme of arrangement sanctioned by this Court, requiring a conveyance-deed being executed in favour of M/s Aditya Estates was with the approval of the Central Government inasmuch as the Central Government did not oppose the scheme of arrangement filed and registered as CP No.65/1991 and at the time no condition pertaining to unearned increase was imposed as a term of the sanction granted. Sh.Ravinder Sethi, learned Senior Counsel for M/s Aditya Estates urged that as per the requirement of law, the scheme of arrangement filed was put to notice of the Central Government for its approval or opposition and that it was notified therein that the scheme of arrangement embraces a transfer of the lease-hold interest of M/s Madan Mohan Lal Shri Ram and Company Pvt. Ltd. in favour of M/s Aditya Estates. Learned senior counsel highlighted that the Central Government conveyed its approval to the learned Company Judge of the Delhi High Court and only then the scheme was sanctioned and it being a terms of the sanction scheme that the conveyance deed would be executed, M/s Madan Mohan Lal Shri Ram and Company Pvt. Ltd. executed a conveyance-deed on May 25, 1993.

67. Suffice would it be to record that the scheme of arrangement, as per the rules of this Court, was notified to the Registrar of Companies as also the Regional Director, Ministry of Company Affairs, through the official liquidator attached to the Delhi High Court; seeking the response of the Registrar of Companies and the Regional Director, Ministry of Company Affairs to the scheme in question. The nodal ministry pertaining to lands in Delhi i.e. the Ministry of Urban Affairs was not put to notice. Its office dealing with Government leases in Delhi i.e. Land DO was also not put to notice. It is trite that a notice to the Union of India is treated as a valid notice where the notice in question is served upon the ministry concerned or such officer, with reference to the Business Allocation Rules of the Union of India. Thus, it cannot be urged by M/s Aditya Estates that the transfer in its favour is with the approval of the Union of India.

68. However, we reiterate once again that M/s Aditya Estates, while seeking free-hold conversion, can always rely upon the clause in the conversion policy which enables a transferee to seek and obtain a conversion upon paying 33.1/3% surcharge over and above the normal conversion fees/charges.

69. With respect to the second and third issue noted in para 59 and above, we find that the decision in Vinay Kumar Aggarwal?s case (supra) against which leave to appeal was initially granted but ultimately, under a non reasoned decision, the appeal was dismissed by the Supreme Court, the issue is once again pending before the Supreme Court, on leave to appeal being granted against a subsequent decision of this Court in Anu Mehra?s case and the decision of the Division Bench in said case has been stayed.

70. There is an issue with respect to the decision in Vinay Kumar Aggarwal?s case (supra), which in our opinion needs a reconsideration; and the same is that in Vinay Kumar Aggarwal?s case (supra), the Division Bench did not consider, probably it was not argued, that the policy guideline dated August 2, 1996 was intended to take care of the period post determination of the leases and re-entry effected till the reentry was withdrawn. Post determination of lease, since status of the allottee was that of an unauthorized occupant, the policy guideline was laying down the amount to be recovered for the period of unauthorized occupation and

probably this view would emerge if clause 6 is to be pursued microscopically with reference to the language thereof in light of the words used „that restoration charges in sum of `100/- per day or `3000/- per annum would be charged from the date of determination of the lease-deed to the date of restoration?. The issue needs to be considered with reference to the last sentence of para 6 of the policy circular dated August 02, 1996, which sentence reads: „No damages in such cases would be recoverable?. Qua which sentence, the debate would be whether the damages referred to pertain to the misuse and or unauthorized construction or they pertain to the period of unauthorized occupation. Judicial propriety demands that we should make a reference, after framing an appropriate Question of Law, to a larger Bench and seek a correct interpretation of the policy guideline dated August 02, 1996.

71. We would thus be obliged to make a reference, after framing a question to a Larger Bench, but before doing so, would be constrained to give an opinion on a supplementary issue which was argued before us with respect to the law declared in the decisions reported as 2000 (VIII) AD (Delhi) 363 Hari Prakash Edn. Welfare Society and Ors. vs. DDA and Anr., 2007 (VIII) AD (Delhi) 313 Ram Prakash (Prof.) vs. DDA,which decision was upheld by a Division Bench of this Court in LPA No.22/2008 and finally by the Supreme Court in SLP (C) No.27278/2009; 1987 (12) DRJ 170 Sahib Singh vs. DDA and Anr. and 2005 (V) AD (Delhi) 135 Sant Ram Sodhi vs. LG and Anr.

72. The decisions were cited on the subject of procedural fairness while levying a demand towards misuse charges or charges towards unauthorized construction. In Hari Prakash?s case (supra) the Division Bench emphasized that before effecting re-entry for breach of a term of the lease, procedural fairness required the lessor to put the lessee to notice granting reasonable time to remedy the breach, before passing an order to re-enter the property. In Sahib Singh?s case (supra) and Sant Ram Sodhi?s case (supra), two learned single Judges of this Court held that where the misuse or the unauthorized construction was not by the lessee but by the tenant of the lessee and if the lessee established that the same was not with his consent and that the lessee resorted to the legal remedy available to the lessee by either evicting the tenant or requiring the tenant to remedy the wrong, no

charges towards misuse or damages could be levied upon the lessee. In Ram Prakash (Prof.) case (supra), the learned Single Judge, on facts of the case, had highlighted that the lessor had been sending notices, being five in number, on various dates which were being responded to by the lessee and the lessor did not bother to consider the response filed as also the fact that the lessee had taken legal remedy against the tenant for the wrong committed by the tenant. The learned Single Judge quashed the demand. The view was upheld till the Supreme Court.

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

74. But, this would be an aspect to be gone into on the facts, if any pleaded, in each case.

75. The policy guidelines issued on June 28, 1999, June 26, 2001 and June 24, 2003, on the subject of conversion being permitted in properties where misuse and/or unauthorized construction continues to exist: leaving it to the municipal authorities to take appropriate action have to be understood with reference to the power of the municipal authorities to demolish the unauthorized construction and seal the property if the same is misused. The municipalities do not have the power to levy damages for misuse and/or unauthorized construction, a power vested in the lessor under the leases. The two powers being distinct and operating in different domains, it is apparent that the said policy guidelines do not mean that before converting the lease-hold tenure to a free-hold tenure, the lessor would not be entitled to recover the misuse and/or damages on account of unauthorized constructions. In any case, the policy circular dated June 26, 2001 clearly clarifies that misuse charges or charges for unauthorized constructions could be levied only up to June 28, 1999 i.e. when the policy circular dated June 28, 1999 was

promulgated.

76. The argument that where the demands were created but not enforced, and the period of limitation to recover the same has expired, to permit the lessor to recover the same as a condition for conversion would breach the well recognized jurisprudential principle that what cannot be done directly cannot be done indirectly, as observed and applied in the decision reported as JT 2009 (10) SC 645 Subhash Chandra and Anr. vs. Delhi Subordinate Services Selection Board and Ors., has no application on the subject at hand, for the reason it is settled law that where the bar of limitation prevents a person from suing to recover the amount due, it does not mean that the amount ceases to be due. The right remains unaffected. Only the remedy is barred. If the lessor has a demand with respect to a property, before the lessor is compelled to relinquish its title and convey free-hold tenure, the lessor would be permitted to insist that dues payable to it must be cleared.

77. It cannot be lost sight of that conditions controlling use of a land and extent of construction on the land are for the benefit of the persons in the neighbourhood. They are a part of town planning laws, where the planning balances the delicate relationship between the need of the society as a result of urbanization to have more and more urban land and the need of the same society regarding environment, peaceful living by the members of the society, their health, access to air and sun shine. Regulating FAR on a land results in persons in the neighbourhood enjoying air and light. Municipal services such as water, disposal of solid and liquid waste generated in buildings, electricity supply etc. are planned on projected estimates of number of people residing, occupying or carrying on activity in buildings and if this delicate balance is upset, the interest of the society is adversely affected. It is the duty of the State to ensure that this delicate balance is maintained. The power vested in the lessor to control misuse and unauthorized construction is in public interest and has to be upheld in its widest amplitude. Besides, if a person takes on lease a parcel of land to construct a residential building thereon and use the same for residence, he pays to the lessor a premium and a rent commensurate with the use. If this person is permitted to use the property for a commercial or an industrial purpose, it would amount to cheating the

revenue and the fellow citizens who could have well done so.

78. We hold that it would be perfectly reasonable for the State, acting as the lessor, to insist that misuse charges and/or damages on account of unauthorized constructions are paid before the lessor is compelled to convert the lease-hold tenure to a free-hold tenure.

79. An individual word needs to be spoken with respect to LPA No.134/2008, where we find that the property was requisitioned by the Government vide order dated February 23, 1977 and was de-requisitioned on December 31, 1996. The demand for damages on account of unauthorized construction pertains to the period when the Government itself was an occupant and thus if the Government, in its capacity as the lessor would insist from the lessee that damages should be paid on account of the unauthorized construction, the same government, being the occupant of the property upon its requisition, must recompense the lessee the same amount and hence the demand would be squared off.

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

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

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

33.1/3% consideration over and above the normal.

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

(D) Office Order No.23/1976 dated March 31, 1976 is not the source of the power of the lessor to assess and recover damages on account of misuse or unauthorized construction. The same brings transparency by guiding the manner in which the damages have to be assessed.

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

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

(G) If limitation has expired for a municipality, to enforce the municipal law, pertaining to an unauthorized construction, thereby preventing the municipality from demolishing the unauthorized construction would not be a bar for the lessor

to take action as per the lease for violation of a term of the lease.

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

81. We now frame the question of law and refer the same to a larger Bench with respect to the policy guideline dated August 02, 1996:

Question: Whether Clause-6 of the Policy Circular is restricted to restoration charges to be paid towards unauthorized occupation of the demised property upon the lease being determined and re-entry order passed, till the date of the lease being restored and re-entry order withdrawn and does not encompass damages payable on account of misuse and/or unauthorized construction or (Clause-6 is as interpreted in Vinay Kumar Aggarwal?s case (supra).

82. In view of the statements made by Mr.Akshay Makhija, Advocate and Mr.Manu Nayar, Advocate as noted in paras 38 and 39 above, over-ruling the decision dated 09.07.2004 allowing WP(C) No.1458/1984, and not making any reference in the said appeal for the reason neither writ petitioner, impleaded as a respondent in the appeal, was desirous of litigating further, we allow LPA No.415/2005 and dismiss WP(C) No.1458/1984.

83. For the reasons noted in paragraph 79 above LPA No.134/2008 is dismissed.

84. We refer the Question of Law settled in para 81 above, to be answered by a larger Bench only in LPA No.1125/2007 and would simultaneously observe that counsel for all the parties in the various appeals would be permitted to advance arguments since the said issue would affect all the owners of the properties; we are doing so for the reason it would be a waste of manpower to transmit 9 bulky files to the Court at each hearing as also it would be a waste of paper to pass orders in 9 appeals. Thus, we adjourn final directions to be passed in LPA No.1233/2007, LPA No.301/2008, LPA No.381/2008, LPA No.464/2009, LPA No.581/2009, LPA No.397/2011, LPA No.635/2011 and LPA No.650/2011

anddirect the Registry to list the said appeals before a Division Bench after the larger Bench answers the reference in LPA No.1125/2007 and directs the said appeal to be listed before a Division Bench for final order keeping in view the reference answered.

85. LPA No.1125/2007 would be placed before a larger Bench after obtaining necessary orders from Hon?ble the Acting Chief Justice.