

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

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Date of decision: 8th March, 2016

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RFA No.382/2005

RAJENDRA JAIN

..... Appellant

Through: Mr. Rajesh Aggarwal, Adv.

Versus

D.D.A. & ANR

..... Respondents

Through: Mr. Nikhil Bhardwaj, Adv for DDA.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 7th January, 2005 of the Court of Shri Vimal Kumar Yadav, Additional District Judge, Delhi of dismissal of Suit No.283/2004 (instituted on 24th February, 1994) filed by the appellant for the relief (i) of declaration that the cancellation by the respondent/defendant Delhi Development Authority (DDA) of the lease of plot of land bearing No.G-2, Kalkaji Shopping Centre, New Delhi is void and of no legal consequence; and, (ii) of permanent injunction restraining the respondent/defendant DDA from dispossessing the appellant/plaintiff from the said property.

2. Before coming to the course chartered by this appeal, it is expedient to notice the course which the suit from which this appeal arises took.

3. The appellant, in the auction held by the respondent DDA on 30th July, 1984, was the highest bidder for leasehold rights in respect of commercial Plot No.G-2, Kalkaji Shopping Centre, New Delhi; plans for raising construction on the said plot of land were sanctioned by the respondent DDA on 21st December, 1984 and a perpetual lease deed executed in favour of the petitioner on 15th February, 1985. The petitioner, on completion of construction, was granted Completion Certificate dated 21st November, 1986.

4. The respondent DDA issued a notice dated 3rd May, 1989 to the appellant to show cause why the perpetual lease should not be determined on the ground of the appellant having raised unauthorized construction in the form of 13 stalls / shops in place of one shop hall sanctioned on the ground floor and having opened two shops unauthorizedly. Though the said show cause notice was replied to by the appellant but the respondent DDA vide communication dated 27th July, 1989 informed the appellant of the perpetual lease having been determined on 18th July, 1989; the appellant was accordingly directed to hand over possession to the respondent DDA.

5. The appellant preferred Civil Writ Petition No.2240/1989 in this Court impugning the determination of perpetual lease but which writ petition was dismissed vide order dated 27th March, 1990. The appellant preferred a Special Leave Petition (SLP) to the Supreme Court and which was disposed of vide order dated 25th July, 1990 by directing the respondent DDA to, after hearing the appellant, pass a fresh order, without being influenced by the earlier determination.

6. The appellant on 24th February, 1994, as aforesaid, filed the suit from which this appeal arises pleading, (i) that in accordance with the opportunity granted by the Supreme Court, the appellant filed a representation dated 3rd August, 1990 with respect to the communication dated 27th July, 1989 of determination of perpetual lease; (ii) that though the appellant was vide communication dated 12th September, 1990 of the respondent DDA called for hearing but when the appellant went therefor, no hearing took place; (iii) that the appellant vide communication dated 22nd October, 1990 of the respondent DDA was informed that his representation dated 3rd August, 1990 had been rejected; (iv) that the appellant again sought appointment and submitted that there was no violation of Building Bye-laws and that the determination of lease was not in accordance with law but did not hear anything further from

the respondent DDA; (v) that another show cause notice dated 8th April, 1991 referring to the earlier show cause notice dated 12th May, 1989 was received by the appellant and to which a reply dated 19th April, 1991 was given by the appellant; (vi) that though no hearing was given but after about three years a communication dated 15th February, 1994 was received by the appellant from the respondent DDA to the effect that the perpetual lease had been determined by order dated 27th November, 1993 and again calling upon the appellant to deliver possession; (vii) that in the interregnum proceedings under Section 30(1) and Section 31(A) of the Delhi Development Act, 1957 were also initiated with respect to the alleged unauthorised construction and an order dated 6th March, 1991 of demolition / removal of unauthorized construction was passed; (viii) that the appellant preferred a statutory appeal thereagainst which was allowed and the matter remanded; (ix) that on remand, again a demolition order dated 29th January, 1993 was passed and which was again challenged before the Appellate Tribunal; (x) that during the pendency of the said appeal, a fresh order dated 5th March, 1993 was passed for sealing of the property and which was also challenged before the Appellate Tribunal; (xi) that the Appellate Tribunal vide order dated 26th March, 1993 set aside the

order of sealing and the appeal against the demolition order was pending consideration at the time of institution of the suit.

7. It was the contention of the appellant in the suit from which this appeal arises:

- (a) that the ground of determination of lease also being unauthorised construction and with respect to the order of demolition of which appeal was pending before the Appellate Tribunal, the determination of perpetual lease could not have been effected;
- (b) that the appellant vide communication dated 15th February, 1994 had only been informed of the order dated 27th December, 1993 of determination of lease but the said order was never served on the appellant;
- (c) that the determination of lease was not in accordance with the procedure required to be followed for effecting the same;
- (d) that the lease could have been determined only by the President of India and the Lt. Governor of Delhi who had purported to determine the lease was not authorised to do so;

- (e) that the appellant had not been given proper opportunity of being heard;
- (f) that the determination of perpetual lease is without application of mind;
- (g) that the determination of the lease was also in violation of the order dated 25th July, 1990 supra of the Supreme Court;
- (h) that there were no violations of Building Bye-laws;
- (i) that even if there were any violation of Building Bye-laws, the remedy thereagainst was of removal of unauthorised construction and not of determination of lease;
- (j) that the action of determination of lease could be taken only as a last resort;
- (k) that the appellant has always been ready and willing to remove the unauthorised construction in the property.

8. The respondent DDA contested the suit by filing a written statement pleading:

- (I) that the appellant after obtaining Completion Certificate had altered the building and unauthorisedly raised shops in the basement,

first and second floors and also constructed one room on the terrace floor;

(II) that as per the terms and conditions of auction, the use of the basement is restricted to storage, plant, machinery and maximum of 10% of the basement area was allowed to be utilised for strong room and locker room for having a bank in the building and the ground floor should be used exclusively for retail shops and the first and second floors for office and commercial purposes;

(III) that the appellant had also removed the facility area such as staircase, toilet block and erected number of partitions which did not conform to the Building Bye-laws;

(IV) that the show cause notices dated 3rd May, 1989 and 12th May, 1989 were issued, after inspection of the building on 28th March, 1989 and the reply filed by the appellant was not found satisfactory;

(V) accordingly, Hon'ble the Lt. Governor of Delhi vide order dated 18th July, 1989 determined the lease and communication whereof was given to the appellant on 28th July, 1989;

(VI) that opportunity was given to the appellant in accordance with the order of the Supreme Court and the representation made by the

appellant was considered and rejected vide letter dated 22nd October, 1990 and final notice dated 8th April, 1991 issued to the appellant;

(VII) that no permission for partition of the basement had been obtained and the same is contrary to the Building Bye-laws;

(VIII) that as per Building Bye-law 14.12.2(viii), the basement shall not be partitioned and in case partition in basement are allowed, no compartment is to be less than 500 sq. ft. in area and each compartment shall have ventilation standards and conform to the norms laid down by the Chief Fire Officer, Delhi;

(IX) that the appellant has constructed 14, 31, 16 and 22 cubicles in the basement, ground, first and second floors without approval;

(X) that complaints were also received from “Tulsi Tower Users Association, G-2, Shopping Complex, Kalkaji” regarding deviations in the building, unauthorised construction of shops in the basement, coverage of passage etc.;

(XI) that the order of determination of lease was passed upon the failure of the appellant to remove the unauthorised construction inspite of repeated opportunities;

(XII) denying that determination of lease was not in accordance with the law or without following the principles of natural justice.

9. Though a replication is found to have been filed by the appellant but the need to refer thereto is not felt.

10. On the pleadings of the parties, the following issues were framed in the suit:

“1. Whether the suit is liable to be dismissed for want of notice under Section 53-(B) of Delhi Development Act? OPD

2. Whether the suit is properly valued for the purposes of court fee and jurisdiction?

3. Whether the defendants have ever communicated the order dated December 27, 1993 to the plaintiff? OPD

4. Whether in the facts and circumstances of the case the defendants could terminate the lease dated February 15, 1985? OPD

5. Whether the defendants can take possession of the premises as alleged in notice dated February 15, 1994? OPD

6. Whether the defendants can take any action against the plaintiff under Public Premises (Eviction of Unauthorised Occupants) Act, 1971? OPD

7. Whether the plaintiff is entitled to declaration, injunction and mandatory injunction as prayed for? OPD

8. Relief.”

11. The appellant examined himself in evidence and the respondent DDA examined two of its officers in evidence.

12. The learned Additional District Judge (ADJ) vide the impugned judgment:

(A) has decided Issue Nos.1&2 supra in favour of the appellant and against the respondent DDA;

(B) with respect to Issue No.3 has held that the order dated 27th December, 1993 of determination of lease was not communicated to the appellant but the factum thereof was communicated to the appellant vide letter dated 15th February, 1994;

(C) has dealt with Issues No.4 to 6 together.

(D) has held that the respondent DDA had proved violation of Building Bye-laws by the appellant of constructing 14 cubicles in the basement, 31 cubicles on the ground floor, 16 cubicles on the first floor and 22 cubicles on the second floor;

(E) has held that the appellant had admitted to the said deviations by stating that he was willing to remove the same or to have the same compounded;

(F) has held that once it was established that the appellant had carried out illegal development / construction in the property leased out by the respondent DDA, the respondent DDA as per the terms of the perpetual lease was entitled to determine the lease;

(G) has held that the Lt. Governor of Delhi was authorised to determine the lease;

(H) has held that sufficient opportunity of hearing had been afforded to the appellant;

(I) has held that the respondent DDA was left with no option but to determine the lease;

(J) has held that determination of lease was within the rights of the respondent DDA and upon such determination, the respondent DDA had a right to recover possession of the property;

(K) has held that on determination of lease, the property would be public premises within the meaning of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act);

(L) accordingly, has decided Issues No.4 to 6 against the appellant and in favour of the respondent DDA;

(M) held that the appellant was thus not entitled to the relief of declaration and injunction.

13. This Court in appeal, while issuing notice thereof on 30th May, 2005 directed the appellant to remove all unauthorised constructions, additions and alterations carried out in violation of the sanctioned building plan and ordered a joint inspection; subject thereto the respondent DDA was restrained from re-entering into the property.

14. The order dated 17th August, 2006 in the appeal notices that the appellant avoided the joint inspection ordered and ultimately when the inspection was carried out on 27th June, 2005, extensive unauthorised constructions, additions and alterations were found in the property. However, on the asking of the appellant, another joint inspection on 9th September, 2006 was ordered.

15. Objections were filed to the report of such joint inspection and the order dated 27th November, 2006 in this appeal, owing to the controversy persisting as to whether the appellant had removed the unauthorised construction or not, directed another inspection.

16. CM No.14806/2006 was filed in this appeal by Tulsi Tower Alaknanda Traders Welfare Association claiming to be an association of purchasers from

the appellant of different shops in the building on the subject land and seeking impleadment in the appeal.

17. The order dated 24th September, 2007 in the appeal records the statement of the Advocate for the said Association that the applicant Association shall remove the partitions from the basement and inspection to verify the same be carried out.

18. The appeal on 16th July, 2008 was admitted for hearing and ordered to be taken up for hearing as per turn. It was further ordered that the application of the Association aforesaid for impleadment would also be taken up at the time of hearing of the appeal.

19. The appeal though thereafter was listed from time to time for hearing but adjourned on request of either of the counsels.

20. The appeal on 12th October, 2009 was dismissed in default of appearance of the parties. However, on application of the appellant, the same was on 9th February, 2010 restored.

21. The order dated 1st December, 2014 records that the Director (CL) of the respondent DDA had indicated that encroachment on the ground floor and terrace except one antenna had been removed and the basement was also lying

vacant and used for storage purpose but still certain partitions were existing at the time of inspection. Again, inspection was ordered.

22. The appeal was taken up for hearing on 14th July, 2015, when though the counsel for the appellant and the counsel for the respondent DDA appeared (none appeared for the applicant Association) but were not ready with the arguments. Finding that the appeal was already ten years old, judgment was reserved giving opportunity to the counsels to file written submissions.

23. Written submissions have been filed by the counsel for the appellant and the counsel for the respondent DDA. While the appellant in the written submissions, besides reiterating the pleadings has contended that the action of determination of lease on the ground of unauthorised construction is contrary to the principle of proportionality and has relied on *Teri Oat Estate Pvt. Ltd. Vs. U.T. Chandigarh* (2004) 2 SCC 130 and *Devinder Singh Pannu Vs. Chandigarh Administration* (2004) 2 SCC 149 in this regard, the counsel for the respondent DDA besides a summary of the pleadings of the Trial Court has referred to the inspections carried out during the pendency of this appeal on 9th September, 2006, 9th December, 2006 and 6th July, 2015 and contends that during the last inspection on 6th July, 2015, the basement was found to be

still in use for commercial activities i.e. small offices, a mobile repair shop and a leather bag shop and unauthorised construction in the form of partitioning of basement and creation of small cubicles therein was still found.

24. I have perused the Trial Court record and considered the controversy.

25. The perpetual lease of the land aforesaid proved as Ex-DW2/2 on the Trial Court record is found to contain covenants:

(i) requiring the appellant as lessee to within one year, after obtaining sanction to the building plan, with necessary designs, plans and specifications from the proper municipal or other authority, at his own expenses, erect upon the commercial plot and complete in a substantial and workmanlike manner a commercial building strictly based on the architectural control drawing in respect of the said plot available with the office of the DDA and in accordance with the sanctioned building plan to the satisfaction of the municipal or other authorities;

(ii) enabling the appellant to with the previous consent in writing of the DDA sell or transfer floor space constructed on the plot and vesting the discretion in the DDA to allow the same on payment of Rs.100/- for each sale or transfer and subject to such other terms and conditions as

may be imposed by the DDA and further entitling the DDA to in its discretion allow further sale or transfer after obtaining 50% unearned increase on the proportionate land / floor space;

(iii) making the appellant as lessee liable for violation of terms and conditions of the lease, notwithstanding having been permitted to sell the floor space;

(iv) binding the appellant as lessee to in all respects comply with and be bound by the building, drainage and other bye laws of the proper municipal or other authorities;

(v) prohibiting the appellant as lessee from, without sanction or permission in writing of the proper municipal or other authority, erecting any building or making any alteration or addition to the building on the subject plot of land;

(vi) prohibiting the appellant as lessee from, without the written consent of the respondent DDA using the plot or permitting the same to be used for any purpose other than that of office for business purposes only;

- (vii) entitling the respondent DDA to allow the appellant as lessee from using the building on the said plot for purposes other than shops or offices on such conditions as the respondent DDA may deem proper;
- (viii) Clauses III, IV, VI, VII, VIII, XI and XII are as under:

“III. if the sum or sums payable towards the premium or the yearly rent hereby reserved or any part thereof shall at any time be in arrears & unpaid for one calendar month next after any of the days whereon the same shall have become due, whether the same shall have been demanded or not, or if it is discovered that this Lease has been obtained by suppression of any fact or mis-statement, mis-representation or fraud or if there shall have been, in the opinion of the Lessor, 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 contained herein and on his part to be observed, or performed, then and in any such case, it shall be lawful for the Lessor, notwithstanding the waiver of any previous cause or right of re-entry upon the Commercial plot hereby demised and the buildings thereon, to re-enter upon and take possession of the Commercial plot and the buildings and fixtures thereon and thereupon this Lease and every thing herein contained shall cease and determine and the Lessee shall not be entitled to any compensation whatsoever nor to the return of any premium paid by him.

Provided that, notwithstanding anything contained herein to the contrary the Lessor may without prejudice to his right of re-entry as aforesaid, and in his absolute discretion, waive or condone breaches, temporarily or otherwise, on receipt of such amount and on such terms and conditions as may be determined by him and may also accept the payment of the rent which shall be in

arrear as aforesaid together with interest at the rate of ten percent per annum or as decided by the Lessor.

IV. No forfeiture or re-entry shall be effected until the Lessor has served on the Lessee a notice in writing:

(a) Specifying the particular breach complained of; and

(b) if the breach is capable of remedy requiring Lessee to remedy requiring Lessee to remedy the breach.

and the Lessee fails within such reasonable time as may be mentioned in the notice to remedy the breach, if it is capable of remedy; and in the event of forfeiture or re-entry, the Lessor may, in this direction, relieve against forfeiture on such terms and conditions as he thinks proper.

Nothing in this clause shall apply to forfeiture or re-entry:

(a) for breach of covenants and conditions relating to sub-division or amalgamation, erection and completion of building within the time provided and transfer of the commercial plot as mentioned in clause II or

(b) in case this Lease has been obtained by suppression of any fact, mis-statement, mis-representation or fraud.

.....

VI. In the event of any question, dispute or difference, arising under these presents, or in connection therewith (except as to any matters the decision of which is specially provided by these presents), the same shall be referred to the sole arbitration of the Lieutenant Governor or any other person appointed by him. It will be of no-objection that the arbitrator is a Government servant and that he has to deal with the matters to which the Lease relates or that in the course of his duties as a Government servant he has expressed views on all or any

of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties.

The arbitrator may, with the consent of the parties, enlarge the time, from time to time, for making and publishing the award.

Subject as aforesaid, the Arbitration Act, 1940, and the Rules thereunder and any modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

VII. All notices, orders, directions, consents, or approvals to be given under this lease shall be in writing and shall be signed by such officer as may be authorised by the Lieutenant Governor and shall be considered as duly served upon the Lessee or any person claiming any right to the commercial plot, if the same shall have been affixed to any building or erection whether temporary or otherwise upon the commercial plot or shall have been delivered at or sent by post to the then residence, office or place of business or usual or last known residence, office or place of business of the Lessee or such person.

VIII. (a) All powers exercisable by the Lessor under this Lease may be exercised by the Lieutenant Governor. The Lessor may also authorise any other officer or officers to exercise all or any of the powers exercisable by him under this Lease.

(b) The Lieutenant Governor may authorise any officer or officers to exercise all or any of the powers which he is empowered to exercise under this lease except the powers of the Lessor exercisable by him by virtue of sub-clause (a) above.

.....

XI. This lease is granted under the Governments Grants Act, 1895 (Act XV of 1895).

XII. The provisions of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981, shall,

mutatis mutandis also apply in respect of matters not herein expressly provided for.”

(emphasis added)

26. It thus follows that as per the perpetual lease deed, which is a government grant which, as per the law applicable thereto has to be constrained strictly as per its own terms, the appellant as lessee was required to raise construction on the land in accordance with the sanctioned building plan and to from time to time comply with the building bye-laws and prohibited from making any addition / alteration and that the respondent DDA as lessor upon non compliance by the appellant was / is entitled to determine the lease after issuing a notice to the appellant and upon the appellant failing to remove the unauthorized construction.

27. It is not in dispute that the respondent DDA being of the view that the appellant had carried out / permitted to be carried out unauthorized construction, contrary to the sanctioned building plan, issued notice to the appellant. As would be obvious from the narrative aforesaid and as has been factually found by the learned ADJ on the evidence led and which conclusion I find on a re-appreciation of the evidence to have been rightly reached and as is also evident from the inspections got carried out during the pendency of the appeal before this Court, the appellant notwithstanding the notice failed to

remove the unauthorized construction and which persists till date. There is thus no room for doubt that the respondent DDA has/had a power to determine the lease upon deviations from sanctioned building plan being made and that such deviations have been made. It thus cannot be said that the said power has been exercised in violation of the terms of the perpetual lease. The appellant has been given abundant opportunity. The lease was cancelled way back on 18th July, 1989 and the challenge by the appellant thereto by way of filing a writ petition failed. However, Supreme Court without going into the merits granted another opportunity of hearing to the appellant. Though lease was again determined on 27th December, 1993 and more than 20 years has lapsed but the respondent DDA has been unable to repossess the property owing to the appellant having kept the respondent DDA embroiled in litigation. Needless to state that in the interregnum the appellant has continued to benefit from the unauthorized construction in the form of creation of slum like conditions inside the building by dividing the sanctioned spaces into small cubicles to earn maximum amount therefrom and has continued to profiteer.

28. Though the appellant at the time of institution of the suit on 24th February, 1994 from which this appeal arises had stated that an appeal against the order of demolition was pending in the Appellate Tribunal but at the time

of filing his affidavit by way of examination-in-chief on 20th November, 2002 i.e. after about eight years also maintained the same stand. It is thus obvious that the power of demolition exercised by the respondent DDA under provisions of the law have also not met with any success. The counsel for the appellant in his written submissions also has not disclosed the outcome of the appeal. Even otherwise, once the government grant as per its terms entitled the grantor i.e. the DDA to, upon unauthorised construction being carried out and failure to remove the same, determine the lease, such determination cannot be found fault with and term of government grant negated by contending that instead, action for demolition / removal of unauthorised construction should be taken. The powers of removal / demolition of unauthorised construction and of determination of lease are independent of each other and one cannot defeat the other. It is not the case of appellant that the construction has been held to be not unauthorised by the Appellate Tribunal.

29. As far as the argument of the appellant of proportionality is concerned, the same in my view would have no applicability to a government grant which has to be construed strictly as per its terms and to which the provisions of Transfer of Property Act, 1881 also do not apply.

30. Moreover, from the application for impleadment of Association of Occupiers it appears that the appellant is today not even left with any right, title or interest in any part of the building constructed over the said land, having sold different portions thereof. For this reason also, the appellant is not found entitled to the relief.

31. There is thus no merit in the appeal and the same is liable to be dismissed.

32. As far as the application for impleadment by the Association is concerned, not only has the same not been pursued but it is not the case that any of the occupiers / purchasers have acquired rights by complying with the terms of the lease in this regard. They even otherwise cannot have any better rights than the appellant.

33. The appeal is accordingly dismissed with costs of Rs.15,000/- to the respondent DDA.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 08, 2016

‘pp/bs/gsr’..