

Suresh Sharma and ors. Vs. SteIn Doshi and Bhalla

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Court : Delhi

Decided On : Oct-29-2001

Reported in : 96(2002)DLT54; 2002(61)DRJ129

Judge : J.D. Kapoor, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151; [Constitution of India](#) - Article 226; DDA Act - Sections 29; Public Premise (Eviction of Unauthorised Occupants) Act, 1971

Appeal No. : I.A. 10875/2000 in Suit No. 1044/92

Appellant : Suresh Sharma and ors.

Respondent : SteIn Doshi and Bhalla

Advocate for Def. : P.N. Lekhi, Sr. Adv. and ; Amitabh Narayan, Adv.

Advocate for Pet/Ap. : Rakesh Tikoo and; Aruna Tikoo, Advs

Judgement :

J.D. Kapoor, J.

1. This is an application moved under Section 151 CPC by the plaintiffs for restraining the defendants from misusing the premises as the demand of Rs. 5 crores has been made by the L&DO; upon the plaintiff against misuse of the

premises and also for directions to give security of Rs. 5 crores to secure dues.

2. The defendant has, by way of writ petition, challenged the validity of the demand of the L&DO; as according to him the use of the premises by him is not against the terms of the lease and the L&DO; is not justified in making the demands towards the misuse of the premises. However, in CM. No. 4537/97 & 7132/94 in CW. 3898/94 the Division Bench declined to restrain the respondent from using the premises which is being used as per agreement of tenancy between the plaintiff and defendants 3 and 4 but to protect the interest of the plaintiff, the defendant was directed to furnish security of Rs. five crore within four weeks failing which all interim orders passed in the writ would stand vacated.

3. Vide order dated 6.2.1998, the prayer of the defendant for permission to deposit a sum of Rs. 20,000/- by way of security pursuant to the order dated 24th October, 1995 was declined with the following observations:-

'We have heard learned counsel for the petitioner and also gone through our order dated 24th October, 1997. The contention made on behalf of the petitioner is wholly misconceived since the order in clear terms states that the petitioner must furnish adequate security for payment of the up to date misuse charges and for the misuse charges likely to occur till the date of final decision of the writ petition. Misuse charge levied for which security was required to be furnished are known to the petitioner since the same are under challenge by it. The security has to be furnished for the misuse charges as levied and demanded and which will accrue due at the rates as demanded as L & D.O. and not as per the petitioner's version. These are also reflected in Annexures P-6 & P-11 and all have to be worked out by the petitioner in the same purportation.'

4. Vide order dated 8.9.1998, the Division Bench observed that the 'The scope of hearing in this petition is limited to the demand raised by the L&DO; and the pendency of this petition does not come in the way of civil suit filed by respondents Nos. 3 & 4 being proceeded further and taken up for hearing on merits.'

5. Vide order dated 4.5.2000, writ petition was dismissed with the following observations:-

'There has been a consistent defiance on the part of the petitioner in complying with various orders of this court. This conduct of the petitioner has also resulted in a liability being foisted on the property to the tune of Rs. 5 crores as of today. The liability is likely to keep on mounting. There is no security so far as respondents 3 & 4 are concerned in the event of the petitioner having to leave the property. The jurisdiction of this court under Article 226 is not completely as a matter of right. We are of the view that the conduct of the petitioner does not entitle it to invoke the jurisdiction of this Court under Article 226 of the [Constitution of India](#). This petition is accordingly dismissed with costs.'

6. However in the S.L.P. before the Supreme Court, the said order was set aside with the request to decide the writ petition on merits.

7. Admittedly neither the defendants have furnished the security till date nor have they stopped the misuse of the premises.

8. Mr. P.N. Lekhi, learned senior counsel for the defendant has challenged the very authority of the L&DO; to send such demand of misuse charges, firstly that there is no document or law through which L&DO; derives any power or authority to levy the misuse charges which tantamount to levying a penalty as penalty can only be levied if it is not sanctioned by law; secondly, lease agreement executed in favor of the plaintiff does not provide that in case of misuse, plaintiff-landlord shall be liable for misuse charges or penalty or any action in the form the misuse charges.

9. It is contended by Mr. Lekhi that unless and until the demand is supported by the law or authority given under the law, the said demand is illegal and is not enforceable. In support of this contention, Mr. Lekhi placed reliance upon AIR 1931 P C wherein view was taken 'that in accordance with the British Jurisprudence, no member of the Executive can interfere with the liberty or property of the British subject to the condition that he can support his action before the court of justice.' The pronouncement by the Privy Council has been adopted by the Supreme Court in : 1950 CriLJ1383

10. According to Mr. Lekhi, whenever question of imposing of penalty for the purpose of levy of misuse of charges arises it has to be by a legal authority under the statute and not by way of issuing administrative instructions or by way of making manual in the form of guidelines for the officers and official responsible for levying such penalty or damages.

11. In the alternative, Mr. Lekhi also contended that according to the Master Plan the user of one floor in an accommodation like the present one is permitted for professional use as it was provided in the Master Plan that in case of residential plot any one floor may be used for professional activities provided that whole premises is occupied by the same person. This is also the case when the premises is let out to the tenant as well.

12. Questioning the authority of L&DO;, Mr. Lekhi also contended that even if it is presumed that user of the premises is in contravention of the master plan, still it was DDA which has the legal authority to initiate proceedings under Section 29 of DDA Act and not the L&DO.;

13. In the opinion of Mr. Lekhi, the Executive has no inherent power in the scheme of our law to affect the property on the basis of instructions in a manual. The property is affected by a statutory law. Mere administrative instruction will not work. Thus, according to Mr. Lekhi by virtue of the aforesaid position of law and the Master Plan, any demand for damage or misuse charges was illegal, unwarranted and uncalled for and without any statutory authority and therefore the imposition of the condition upon the respondent to furnish the security in order to secure the payment to be made by the landlord is illegal and unjust. Mr. Lekhi further contended that since in the instant case neither is there any change of user nor any violation of the Master Plan, the penalty or the damages imposed as misuse is illegal and cannot be acted upon wither by the landlord or the tenant.

14. While assailing the legal value of the agreement to lease, Mr. Lekhi contended that the agreement to lease is only an offer and not an actual transfer of the land and the plea of the Land & Development Officer that the manual instructions or guidelines were framed by virtue of the terms and conditions appearing in Clause 20 of the lease agreement is of no avail as the agreement to lease does not

transfer the rights of lease in the land till a proper lease is executed.

15. In the alternative Mr. Lekhi contended that even if it is assumed that draft perpetual lease deed annexed to the agreement is taken as an executory contract by which the parties to this litigation would be bound, the breaches or unauthorised use or misuse charges will have to be calculated on the basis provided in Chapter 18 of Office Manual of Land & Development Office. The relevant extracts are as under:-

'Where a breach of unauthorised construction misuse is noticed, a show cause notice shall be sent to the lessee asking him to remove the breach within 30 days from the date of notice. This period of notice may however be extended to 60 days if the lessee gives cogent reasons to the satisfaction of the Lesser. Where, however, the lessee neither removes the breaches nor sends any communication to the satisfaction of the Lesser after the receipt of the notice, action shall be taken to re-enter upon the property whereupon the lease will stand forfeited. The re-entry order shall be communicated to the lessee requesting him to handover possession of the leased premises to the nominated official of the Lesser. If the lessee does not handover possession to the said officer, action under the Public Premise (Eviction of Unauthorised Occupants) Act, 1971 for the eviction of the ex-lessee shall be initiated in the Court of Estate Officer in addition to the recovery of Govt. dues including damages charges etc.'

16. The formula for calculation provided in the said chapter is as under:

Misused Present TheSize are commercial rate onof the X ---- X rate of (-) the date X 10 1/2%plot Permissible land for of lastcovered the purpose transactionarea for which for whichthe property land wasis misused leased

17. Mr. Lekshi contends that this charge is not annual charge but one time charge and thereforee the rate prevalent at that point of time i.e. in 1965 will be chargeable even today.

18. At this stage, the above theory propounded by Mr. Lekhi is difficult to accept. These rates are offered every year to a lessee and if these are acceptable, they

will regularise the breaches with an undertaking that breaches will be stopped unless further regularised failing which property shall be re-entered.

19. On the contrary, Mr. Rakesh Tikku, learned counsel appearing for the plaintiff has contended that since the defendant has not raised any plea as to the legality and validity of the demand made by the L&DO; or the legal authority of the L&DO; to impose such penalty or levy of such demand as misuse charges nor has any issue been framed in this regard nor has any representation been made to the L&DO; in this regard and since the parties have already concluded to evidence, it is no more open to the defendant to raise these issues so far as the relief sought in the present application is concerned. Moreover the contention raised in the application are subject matter of the writ petition filed by the defendant.

20. The instant suit is for ejectment and mesne profits and rendition of accounts based upon the demand made by the L&DO; stemming from the terms and conditions of the agreement to lease. Again no such dispute or plea was raised in reply to the notice sent by the plaintiff that the defendant/respondent is not liable to pay the demand raised by the L&DO.; Rather the defendant admitted in reply to the notice dated 22nd November, 1990 that the misuse charges that may be demanded by the L&DO; shall also be paid by him directly to the authority concerned.

21. The pleas now raised by the defendants were also raised before the Division Bench in the said writ petition but still the defendant was directed to furnish the security of five crores. In this backdrop, the defendant has no right to challenge the authority and legality of the demand or the plea that the user is not in contravention of the Master Plan or that no notice was issued as all the disputes are neither the subject matter of the suit in question nor has any issue been framed in this regard.

22. Landlord is not expected to wait for the decision of L&DO; on his representation and allow the tenant to continue the misuse resulting in mounting of misuse charges. Nor can be tenant be allowed to continue the misuse, even if it is as per tenancy agreement and put the landlord in such a situation that there is no other course left for the authorities than to make re-entry and take possession. To

expect a landlord to first have the defense of the tenant determined by the authorities and then resort to the action against the tenant is too much and is nothing short of subjecting the landlord to tremendous sufferance and hardship.

23. Taking overall view of the matter and in order to be fair to the plaintiff and in the interest of equity and to avoid mounting of misuse charges as the writ petition is still pending decision coupled with the fact that L&DO; continues to level the misuse charges, there is no other alternative or option open to this court than to direct the respondent to stop the misuse forthwith, if already not stopped, till final outcome of the writ petition.

24. In order to securities the interest of the landlord, the defendant shall for the time being furnish security for Rs. 1 crore within two months. This security will be without prejudice to the orders of the Division Bench passed in this regard and this is only being done as an interim arrangement so as to avoid the hardship to the plaintiff-landlord in case the misuse charges levied by L&DO; may re-examine the case so far as interest is concerned as prima facie the interest cannot be claimed with retrospective effect particularly in the absence of any demand. No party can be allowed to take advantage of its own wrongs or delinquency or remissness. Any observation made in this order shall not tantamount to expression of opinion on merits of the case.

25. I.A. stands disposed of in above terms. The defendants shall file affidavit in compliance of order dated 24th September, 2001.

26. Copy be given dusty for the benefit of L&DO.;

S. No. 1044/92

27. Renotify on 8th January, 2002 for arguments in the category of 'Short Cause'.