

(2011) 01 DEL CK 0114

In the Delhi High Court

Case No : Writ Petition (C) 403 of 2008 and CM No. 816 of 2008 (for stay)

Allied Fruits and Florists Pvt. Ltd. and Another

APPELLANT

Vs

NDMC and Another

RESPONDENT

Date of Decision : 10-01-2011

Acts Referred:

Citation : (2011) 180 DLT 60 : (2011) 6 RCR(Civil) 226

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rakesh Tiku and Prakash Gautam, for the Appellant; Kanika Agnihotri, Vaibhav Agnihotri for R-1 NDMC and Mukul Talwar, for R-2, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The Petitioners claim that the Petitioner No. 2 Sh. Panna Lal has been carrying on business of sale of fruits and vegetables from Shop No. 58-B, Khan Market, New Delhi since 1960s; that the shop was acquired by Ms. Neelam Chopra (not imp leaded as a Respondent by the Petitioners but imp leaded as Respondent No. 2 vide order dated 17th January, 2008) in the year 1969 and the Petitioner No. 2 being already a sitting tenant under an oral tenancy became a tenant under the Respondent No. 2 and continued to pay the rent to the Respondent No. 2; that over the period of time the rent was increased to Rs. 2,000/- per month and the Respondent No. 2 also used to take away vegetables and grocery items free of charge from the said shop. The Petitioners further claim that earlier the Petitioner No. 2 was carrying on business from the said shop in the name and style of M/s Allied Fruits & Florists but when the children of the Petitioner No. 2 joined the business, the Petitioner No. 1 company was incorporated in which the Petitioner and his children only are share holders and directors. The Petitioners claim that the Respondent No. 2 to coerce the Petitioners into vacating the shop started lodging complaints against the Petitioners and with the same design also complained to the Respondent No. 1 NDMC of the Petitioners carrying on business in the said shop without license. It is the case of the Petitioners that considering the nature of the business being

run in the said shop, the Petitioners do not require any license from the Respondent No. 1 NDMC but by way of abundant caution applied for a license. The Respondent No. 1 NDMC asked the Petitioners to produce a "No Objection Certificate" (NOC) from the landlord. The Petitioners claim that owing to the disputes with the landlord i.e. Respondent No. 2, it is not possible for them to obtain the NOC from the Respondent No. 2. The Respondent No. 1 NDMC accordingly vide order dated 2nd January, 2008 impugned in the present writ petition rejected the application of the Petitioners for health license owing to the objection by the Respondent No. 2 landlord. The present writ petition has been filed seeking declaration that considering the business and activities of the Petitioners of sale of fresh fruits and vegetables and other branded grocery items from the shop of the Petitioners, there is no requirement for the Petitioners to obtain any license u/s 327/331 of the New Delhi Municipal Council Act, 1994 and alternatively claiming direction to the Respondent No. 1 NDMC to grant license to the Petitioners without insisting upon the NOC from the Respondent No. 2.

2. Notice of the writ petition was issued and vide interim order dated 17th January, 2008 the operation of the order dated 2nd January, 2008 stayed.

3. The Respondent No. 2 has filed a counter affidavit denying that the Petitioner No. 2 was a tenant in the shop or had been paying any rent. It is stated that the Respondent No. 2 after purchase of the shop in the year 1969 started a business of sale of fresh fruits and vegetables there from in the name and style of M/s Allied Fruit Mart and is the sole proprietor thereof and the Petitioner No. 2 was employed as a Manager in charge of the said shop. The Respondent No. 2 along with her counter affidavit have filed the affidavits submitted by the Petitioner No. 2 in the year 1970 and in the year 2001 as employee/Manager of the shop and admitting the Respondent No. 2 as the proprietor of the business, for the purposes of enhancement of electricity load and obtaining the Sales Tax registration. It is further pleaded that the Respondent No. 2 vide notice dated 25th June, 2007 terminated the services of the Petitioner No. 2 and the Petitioners are illegal trespassers in the shop. The counsel for the Respondent No. 2 has argued that the Petitioners having concealed the documents admittedly signed by the Petitioner No. 2 (and signatures whereon are accepted in the rejoinder) admitting the Respondent No. 2 to be the proprietor of the business of M/s Allied Fruit Mart and employment of the Petitioner No. 2, are not entitled to any relief on this ground alone.

4. The Respondent No. 1 NDMC in response to the contention of the Petitioners that the insistence of the Respondent No. 1 NDMC on NOC from the landlord is without any authority of law, has referred to Section 327 of the NDMC Act empowering the Commissioner, NDMC to lay down the terms and conditions of grant of license and has referred to the technical instructions (annexed to the counter affidavit of the Respondent No. 1 NDMC) requiring "proof of legal occupation of the premises" as a condition for obtaining health license and which technical instructions were approved by the Respondent No. 1 NDMC.

5. Though the Petitioners as aforesaid have also sought a declaration that the Petitioners for the business being carried on in the shop do not require any license from the Respondent No. 1 NDMC but the counsel for the Petitioners has given up the said relief. The only question which thus survives is whether the Respondent No. 1 NDMC is right in demanding NOC from the Respondent No. 2 landlord as a condition for grant of health license to the Petitioners.

6. The requirement as aforesaid in the technical instructions of the Respondent No. 1 NDMC is of submission of "proof of legal occupation of the premises". In working out of the said requirement, the Respondent No. 1 NDMC insisted upon NOC from the landlord. The question which arises is as to what is legal occupation of the premises.

7. The admitted position is that the Petitioner No. 2 instituted CS(OS) No. 574/2007 against the Respondent No. 2 in this Court for restraining the Respondent No. 2 from forcibly dispossessing the Petitioner No. 2 and his sons from the said shop by any illegal or unfair means except by due process of law. The counsel for the Respondent No. 2 on 27th May, 2008 made a statement in the said suit that the Respondent No. 2 has no objection to the suit being decreed in terms of the said prayer and further made a statement that the Respondent No. 2 shall not dispossess the Petitioner No. 2 or his sons from the suit premises except by following due process of law. The Respondent No. 2 is also stated to have filed a counter claim in the said suit for mandatory injunction to the Petitioner No. 2 to vacate the shop and to deliver the possession thereof.

8. I have enquired from the counsel for the Respondent No. 2 whether the Respondent No. 2 has claimed any miens profits for use and occupation of the shop also from the Petitioner No. 2. It is informed that miens profits at the rate of Rs. 5,00,000/- per month have been claimed from the Petitioner No. 2 and which are also under adjudication in the suit/counter claim aforesaid.

9. I am of the opinion that once the Respondent No. 2 admit the possession of the Petitioner No. 2 and his sons of the shop and has taken recourse for vacation of the shop and also has claimed miens profits, the Respondent No. 2 cannot at the same time prevent the Petitioner No. 2 from use of the said shop and which would be the result if the Petitioners are denied license. Miens profits are expected to represent the profits which had accrued from the property of which the person against whom manse profits are claimed is in unauthorized possession of. The claimant for manse profits cannot on the one hand claim manse profits and on the other hand create circumstances which would prevent the person against whom the same are claimed from earning any profits therefore. Section 2(29) of the NDMC Act includes within the definition of "occupier", any person who is liable to pay to the owner damages for the use and occupation of any land or building. Thus, any person against whom a claim for damages for use and occupation is made would necessarily be said to be in lawful occupation of the premises.

10. The MCD is not competent to consider or investigate and adjudicate title to the property and find out the right of a person to occupy the property with respect to which license is sought. Here, the Respondent No. 2 being the recorded owner of the property has admitted the possession of the Petitioner No. 2 and taken recourse to legal proceedings for eviction of Petitioner No. 2. In these circumstances, the Respondent No. 1 NDMC cannot refuse grant of license at least to the Petitioner No. 2. The Indian jurisprudence respects possession and the Petitioner No. 2 by reason of being in admitted possession also would be entitled to the licence. The same view was also taken by the Division Bench of the Calcutta High Court in Abdul Rashid Vs. Calcutta Minicipal Corporation and others, .

11. Insofar as the claim of the Petitioner No. 1 company is concerned, the counsel for the Petitioners on enquiry confirms that the Petitioner No. 1 company is nothing but an alter ego of the Petitioner No. 2 and has no independent claim to the premises.

12. The petition therefore succeeds to the aforesaid extent. The Respondent No. 1 NDMC is directed to consider the application of the Petitioners for grant of license without insisting upon production of NOC from the Respondent No. 2. It is however made clear that the grant of license be it in favor of Petitioner No. 1 or Petitioner No. 2 shall not create/vest any rights in favor of Petitioners and shall be subject to the outcome of the proceedings aforesaid initiated by the Respondent No. 2 against the Petitioner No. 2.

The writ petition is disposed of. No order as to costs.