

(2008) 03 MP CK 0032
In the Madhya Pradesh High Court

Cine Exhibitors Pvt. Ltd.

APPELLANT

Vs

Gwalior Development Authority and Others

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 10, 111

Citation : (2008) ILR (MP) 1872 : (2008) 2 JLJ 172 : (2008) 3 MPHT 91 :
(2008) 3 MPJR 21 : (2008) 3 MPLJ 389

Hon'ble Judges : A.P. Shrivastava, J;A.K. Gohil, J

Bench : Division Bench

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Collector, Distt. Gwalior and Another Vs. Cine Exhibitors P. Ltd. and Another, AIR 2012 SC 1239 : (2012) 4 SCC 441 : (2012) AIRSCW 1281

A.K. Gohil, J.

Appellant has filed this Writ Appeal u/s 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, against the order dated 21-2-2007 passed by the learned Single Judge in W.P. No. 1718/02, whereby dismissed the Writ Petition with certain observations.

Briefly stated, it is the case of the appellant that the appellant is a Company incorporated under the Companies Act, 1956. The respondent No. 1 Gwalior Development Authority issued an advertisement for auction of plot for construction of Cinema Theater at Plot No. B-2 in the locality known as Mayur Market, Thatipur area. The bid of the company being highest was accepted and on 18-3-1983 a lease agreement was executed between the petitioner-Company and Gwalior Development Authority. Said lease agreement was for a period of 30 years with further right of renewal. Thereafter, petitioner-Company constructed Cinema Hall on the plot and started business of exhibiting cinema. It was

submitted the Cinema Hall was constructed and started in 1995. On account of some dispute between the Directors of the petitioner-Company, the Managing Director without any resolution and without any consent of other Directors, sent a letter to the Collector District Gwalior informing him to cancel the cinema licence. Thereafter the Collector without verifying the contents of the letter cancelled the cinema licence. It was submitted that because the Managing Director acted contrary to the interest of the Company, therefore he was removed by passing the resolution in the Board meeting and some other person was appointed as Managing Director and the newly appointed Managing Director filed an application to the Collector on 16-8-2002 for renewing the cinema licence, but no order is passed thereon. In the meantime vide letter dated 9-8-2002 (Annexure P-I) cinema licence was cancelled by the Collector. Thereafter respondent G.D.A. vide order dated 9-8-2002 has also cancelled the lease deed dated 18-3-1983 on the same ground, against which the Writ Petition was filed.

Before the Writ Court, return was filed by the respondent No. 1 GDA and it was submitted that the respondents having right to re-enter on the demised premises in case of breach of any condition of the agreement. Collector vide letter dated 1-3-2002 informed that licence of the appellant for exhibition of cinema was cancelled by the District Magistrate on 22-11-2001 on the application of the appellant himself. Therefore the purpose for which the lease was granted has ended with the cancellation of cinema licence. Therefore, show-cause notice to the appellant on 18-3-2002 was issued that why lease deed should not be cancelled. No reply of show cause was filed. Therefore, the order dated 9-8-2002 (Annexure P-1) was issued, which is legal and valid and direction was given to hand over the possession of the leased property. It was further submitted that without obtaining any permission, the appellants have sold part of the land to Ankit Grih Nirman Sahkari Samiti through registered sale deed dated 21-1-1999 and prayed for dismissal of the Writ Petition.

Reply was also filed by the respondent Nos. 2 and 3, i.e., the Collector and it was submitted that it was the Government land and registered as PWD Nazool Parade in the revenue entries. The Gwalior Sudhar Nyas made a request for transfer of various lands including the land in question, but no transfer has been taken place and the GDA has wrongly granted the lease on 18-3-1983, agreement is void ab initio and the State has supported the order dated 9-8-2002 passed by the GDA on the ground that appellant has violated the terms and conditions of the lease deed.

The learned Writ Court held that since the petitioner is not running the cinema at present in the said premise and GDA has simply issued Annexure P-I, in which it is directed to surrender the possession of the property within 7 days, failing which action shall be taken and no action has been taken except terminating his lease, the learned Single Judge was of the view that whenever the Appropriate Authority shall dispossess the petitioner from the suit premises, he will have an

opportunity to raise all the objections and declined to interfere in the extra-ordinary jurisdiction under Article 226/227 of the Constitution of India and liberty was granted that the petitioner is free to raise all the points raised in this petition before the Appropriate Authority before whom an action for dispossession shall be taken and dismissed the petition, against which the appellant has filed this appeal.

We have heard Shri H.D. Gupta and Shri K.N. Gupta, learned Senior Advocates for the appellant and Shri M.P.S. Raghuwanshi, learned Counsel for the respondent No. 1 and Shri Brijesh Sharma, learned Govt. Advocate for respondent Nos. 2 and 3. Both the parties argued the matter at length and raised various objections and counter-objections and supported their stand. There is no dispute between the parties that as per the lease agreement, the period of lease is 30 years with right of renewal. As per Annexure P-1, dated 9-8-2002 the lease has been cancelled on the ground that his cinema licence has been cancelled. It was also argued that no notice of terminating lease as required under the law was issued to the appellant. It was also mentioned in the letter that the possession be handed over within 7 days to the GDA, failing which action shall be taken in accordance with law. It was further argued that Condition No. 5.3 provides regarding the construction of cinema building only in accordance with the building bye-laws and regulations of the lessor as amended from time to time and there is no condition in the lease deed that if the cinema licence shall be cancelled for any reason or if the party will not run the cinema, lease shall be liable to be cancelled. It was further argued that no action can be taken beyond the purview of the terms and conditions of the lease deed. It was also submitted that the application for renewal of lease is also pending. Learned Counsel for the appellant placed reliance on the Condition No. 5.3 of the lease agreement and on decisions in the case of Raghuram Rao and Others Vs. Eric P. Mathias and Others, and submitted that violation can only be considered when there is an "express condition" and "express violation" of the same, otherwise lease cannot be cancelled.

Shri M.P.S. Raghuwanshi, learned Counsel for the respondent No. 1 argued and submitted that the action taken by the respondents regarding cancellation of lease deed is in accordance with the provisions of the lease agreement. If the property is not being used for the purpose for which it is allotted, the lease can be cancelled and possession can be taken, but he could not satisfactorily replied on the question that whether for taking possession he will get the matter adjudicated before the Court of law and will be able to get possession after obtaining decree from the Court or under law he is having any power directly to take possession over the property. He was unable to show any provisions of law under which the GDA was entitled to take possession over the property. He argued on the arbitration clause in the agreement and submitted that in view of the arbitration clause, the Writ Petition is not maintainable and matter should be referred to the arbitrator.

Learned Govt. Advocate also argued on the same lines and supported the arguments of the Counsel for the GDA.

Having heard the learned Counsel for the parties firstly we have considered the objection relating to the arbitration clause in the agreement. In reply it was submitted on behalf of the appellant that no such objection about the existence of the arbitration clause was taken in the return filed by the GDA before Writ Court or by the State nor any such objection was raised in the arguments before learned Single Judge, therefore there is no occasion for taking such an objection at a late stage or at the appellate stage. It is true that GDA has not taken any such objection in the return nor before the learned Single Judge. Therefore learned Single Judge had also no occasion to consider the aforesaid question.

It is the clear position under the law that the objection about the existence of arbitration clause should be taken immediately at the first instance, but admittedly in this case, the respondents have not taken any such objection before the Writ Court, but the same has been raised first time in this Writ Appeal. Therefore, it would not be proper to consider this objection at this stage. More so, if the dispute arose between the parties and the dispute is covered by the condition of agreement for referring the matter to the arbitrator instead of passing the order of cancellation of lease and direction for handing over the possession, the GDA ought to have referred the dispute to the arbitrator for its adjudication in accordance with law, but GDA itself has not taken any such decision. Therefore, now the GDA cannot be allowed to raise the same at this belated stage.

So far as the question about directly exercising right of re-entry is concerned, it is true that under the Transfer of Property Act, notice of termination of lease is necessary and only thereafter the suit can be filed for possession and possession can be obtained on the basis of the decree of the Court and not directly taking the law in hand. It is also true that question of breach of lease deed and violation of terms and conditions is also required to be adjudicated before the Competent Court and the learned Single Judge has also dealt with the matter on the same line and therefore the learned Single Judge was also of the view that whenever the Appropriate Authority shall dispossess the petitioner from the suit premises, he will have an opportunity to raise all the objections and on this ground declined to interfere at this stage in the writ jurisdiction.

Whether the land has been transferred by the State to the GDA or not is the inter se dispute between the Government and the GDA. When GDA has granted lease through auction within the knowledge of the State, therefore State is estopped from raising any such ground that land has not been transferred to GDA, after lapse of 30 years. GDA also cannot be allowed to take law in its hand. The cancellation of lease is on a specific ground of cancellation of cinema licence, therefore the other grounds as alleged are not required to be considered being after thought.

Next, we have considered that under Clause 5.3 of the lease agreement, there is no provision for cancellation of lease agreement on the termination of the cinema licence. Clause 5.3 of the lease deeds reads as under:

5.3. That the lessee will construct/erect up on the said land CINEMA THEATRE only and no other in accordance with the building Bye-laws and regulations of the lessor as amended from time to time. The plans for construction shall be submitted to the Executive Engineer for approval before commencement of any construction within 6 months from the date of execution of this Indenture. The lessee shall also have to plant at least 5 (five) trees and specific space shall also have to be shown in the building plans. Completion certificate shall only be granted by the Authority when the trees are duly planted.

The aforesaid clause does not grant any permission to the lessor to cancel the lease on the cancellation of the cinema licence. Admittedly there is no stipulation in the aforesaid lease deed.

The Supreme Court in the case of Raghuram Rao and Others Vs. Eric P. Mathias and Others, , has elaborately clarified the position under the Transfer of Property Act and held that Section 10 of the Transfer of Property Act does not carve out any exception with regard to perpetual or permanent lease. So far as the notice in writing as contemplated u/s 111(g) before terminating the lease, after the amendment in the Transfer of Property Act (1-4-1930), the notice is necessary and issue is concluded by the decision in the case of Ratan Lal v. Vardesh Chander (1976) 2 SCC 228. It was further held that in the matter of forfeiture of lease u/s 111(g) of the Transfer of Property Act, the lessee should commit breach of "an express condition" which provides that on breach thereof, the lessor may re-enter. The words "express condition" themselves stipulate that condition must be clear, manifest, explicit, unambiguous and there is no question of drawing any inference. It was held that if there is no express condition restraining partial alienation of the leasehold property, it would not be open to the transferee of the lessor's right to invoke the forfeiture clause for determining the perpetual lease and such conditions cannot be inferred by implication. The question of alienation was considered and it was held that perpetual alienation will not be treated as forfeiture under the clause.

Therefore, from the aforesaid law laid down by the Hon''ble Supreme Court, it is clear that the notice of termination of lease is necessary and secondly the lessee should commit breach of "an express condition" which provides that on breach thereof, the lessor may re-enter. It was further held in the aforesaid decision that when there is no express condition, it would not be open to the lessor to invoke the forfeiture clause for determining the perpetual lease and such conditions cannot be inferred by implication.

In view of the aforesaid discussion, this position under the law is very clear that when right of re-entry not given on breach of that covenant, the lease can only be forfeited on that ground and this position is also clear that lessor has to

determine the lease. Thus, it is clear that lease can only be forfeited when there is express violation of express condition. From bare reading of aforesaid condition No. 5.3 of the lease agreement, prima facie, we do not see that there is any provision in the condition regarding forfeiture. Admittedly Annexure P-1 is not the notice of determination or termination of lease as required u/s 111(g) of the Transfer of Property Act. Therefore, such an action of forfeiture of lease cannot be held to be legal. In such circumstances, the authority also cannot assume the jurisdiction of taking possession without taking recourse of law and any such attempt made out would also be without jurisdiction. The question of the existence of any condition and its violation is also the subject matter of adjudication and any action beyond adjudication would also be illegal and without jurisdiction. Consequently, this Writ Appeal is allowed, Annexure P-1 is set aside. Parties to bear their own costs.