(2008) 03 PAT CK 0064

In the Patna High Court

Case No : CWJC No''s. 7352, 7357, 7358, 7359, 7361, 5730, 7345, 11119, 11799, 11235, 12006, 12949, 11670, 8362, 13377, 13617, 13718, 10801, 10800,12028,12169,13540, 14395, 14378,14442, 11226, 14654, 12236, 12379, 13663, 14769, 15453,15565,15566, 15561, 15377, 15589

Deepak Paints (P) Ltd. and Others — APPELLANT

Vs

The State of Bihar and Others etc. etc. — RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : (2008) 2 PLJR 293

Hon'ble Judges : Ajay Kr. Tripathi, J

Bench : Single Bench

Advocate : Vikash Kumar in 7352, 7357, 7359, 7361, 11119, 14395, 15948, Yogesh Kumar in 16764; Satyabir Bharti in 11799, 12949; Khurshid Alam, S.D. Sanjay, Basant Kumar Choudhary, Vikash Kumar, Suraj Samdarshi, Raj Kishore Prasad, Tej Bahadur Roy, Gautam Kejriwal, Alok Kumar, P.C. Agrawal, Mrs. Shalina Rubale and Akash Chaturvediin 12236, 12279, 13663, for the Appellant; K.K. Jha, K.C. Jha (in 17150, 14665); Nilu Agrawal, Manoj Kumar (in 7352, 7359, 7361, 7345, 8362); Jashawir Singh Arora, Ajay Kumar @ Srivastav, Ravi Bhatia (in 912 for Resp. 6); Ajit Kumar Sinha, Naresh Dixit, A. Amanullah, Sharad Kumar Sinha, Rajesh Kumar and Yashraj Bardhan (for BIADA in all cases), for the Respondent

Judgement

Ajay Kr. Tripathi, J.—Purported exercise of power by the Managing Director of Bihar Industrial Area Development Authority (hereinafter to be referred to as BIADA under a State Legislation, namely, The Bihar Industrial Area Development Authority Act, 1974 and the Rules thereunder by virtue of which he has embarked upon an exercise of large scale cancellation of lease and repossession, if not creating third party rights by auctioning the properties to the highest bidders have driven hundreds of petitioners before this Court seeking protection under Article 226 of. the Constitution of India. The battle lines between the petitioners on the one side and the respondent BIADA on the other has been drawn up based on their respective understanding of law. There are some basic issues which require determination in these writ applications. The Court, therefore, decided that instead of taking up every writ application individually it would like to test the legal provisions from where the so called power is being derived by the Managing Director. The matters came to be heard on different dates. Learned counsel for BIADA at the outset submits that these writ applications are not maintainable in the first place. If the answer to maintainability is negated, the person who can exercise the power of cancellation of allotment/lease etc. and the scope and ambit of power of repossession or re-entry into the leased property, which is being resorted to by the respondent BIADA will have to be answered. It is in this background that the Court has decided to test the matters on the above parameters.

2. The Court has been addressed first by learned counsel appearing on behalf of BIADA, where the main thrust of his argument was that these writ applications are not maintainable because they fall within the realms of a concluded contract. The petitioners may have remedy under civil law but this Court ought to restrain itself from exercising any power under Article 226 of the Constitution of India. He also submits that there are many a disputed questions of facts and it may not be advisable to delve in those areas. Since the respondent Managing Director has taken steps for cancellation of the lease under the lease agreement itself and the clauses in the agreement permit repossession, therefore acts of repossession and further allotment or auction are in conformity with the agreement and the common law. He further urges that the right of repossession is inherent in the lease agreement.

3. Counsels appearing on behalf of the petitioners strongly refute the legal proposition urged on behalf of the respondents.

4. A few things however are being recorded for a better appreciation of the facts as well as the issues emerging from the same. To provide for planned development of industrial area and promotion of industries in the State of Bihar the legislatures of the State in the 25th year of the Republic enacted a law known as the Bihar Industrial Area Development Authority Act, 1974 (hereinafter referred to as the Act). The law envisaged setting up of an "Authority", which was conferred with the powers of providing amenities, infrastructure, buildings etc. in industrial areas for which land was acquired by the State. The "Authority" was a body corporate and consists of a Chairman, a Managing Director and five other Directors to be appointed by the State Government. They are to hold office on the terms and conditions prescribed in this regard and at the pleasure of the State Government.

5. Chapter-II of the Act gives the details of the structure of the "Authority". Clause 3(4) states that the Managing Director shall be a whole time officer and the Chief Executive of the Authority, who shall perform amongst others the following duties under the general guidance of Chairman. The duties are

enumerated u/s 3(4)(a) to (d), which are quoted hereinbelow:-

"3. (4) The Managing Director shall be a whole time officer and the Chief Executive of the Authority and shall perform, among others, the following duties under, the general guidance of the''Chair-man:-

(a) he shall receive all the money on behalf of the Authority and issue receipt and maintain proper account for the same;

(b) he shall draw money from the fund of the Authority for disbursement of salaries, allowances and meeting the expenses of the Authority;

(c) he shall authenticate any order of the Authority;

(d) he shall perform any order only that may be assigned to him by the Authority or the State Government from time to time.

6. Chapter-Ill of the Act lays down the powers and duties of the "Authority". Section 6(1) and (2) which reads as under are being reproduced for easy and ready reference:-

"(6) General duties and powers of the authority.-(1) Subject to the provisions of this Act, the Authority shall be responsible for the planned development of the Industrial Area (including preparation of the Master Plan of the area) and promotion of industries in the area and other amenities incidental thereto."

(2) The Authority shall be responsible for planning, development and maintenance of the Industrial Area and ameni-ties thereto and allotment of land, execution of lease and cancellation of such allotment or lease, (emphasis mine) realisation of fees rent charges and matters connected thereto.

7. The Act also talks in terms of the Rule making power of the State Government u/s 14. Section 14 reads as under:-

"14. The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Ordinance and in particular provided for-

(a) a removal of encroachments on lands belong to the Authority;

(b) removal of unauthorized structures;

(c) demolition of buildings which may interfere with the planning or which may have been erected in contravention of the Regulations of the Authority;

(d) the submission of reports and returns by the Authority to the State Government on matters relating to the duties, power and responsibilities of the Authority;

(e) the issue of directions by the State Government laying down broad principles for the fulfillment of aims and objects of the Act."

8. The BIADA Act of 1974 underwent an amendment in the year 1992. The

statement of aims and objects of the amending Act 27 of 1992 gives the background why the said amendment was necessitated, they are quoted hereinbelow:-

"[Statement of Aims and Objects.- Section 6(2) of the Bihar Industrial Area Development Authority Act, 1974 provides adequate power to the Authority for cancellation of allotted plots but it does not provide specifically about taking possession after cancellation of allotment order/lease deed. As a result of this it has become difficult to take possession of the cancelled plots/sheds due to various legal provisions.

As such to overcome various legalhurdles, it has become necessary to amend Section 6(2) of the Bihar Industrial Area Development Authority Act, 1974. The objective of the bill is to enact the above said provisions.]

9. The legislators, therefore, incorporated the following amendments u/s 6(2) to read:-

"2(a). In case necessary effective steps are not taken within the fixed period to establish the industry the authority shall in such condition cancel the allotted plot/ shed and also forfeit the amount deposited in this connection, (emphasis mine) The authority shall before canceling the allotment allow one month time to the allottee to put up his case. The allottee on being dissatisfied with the order of the authority may file an appeal to the State Government within one month and the State Government shall, after due consideration dispose of within two months from the date of receipt of appeal.

2(b). The Authority shall, after cancellation of allotment of the plot/shed take possession of the said plot."

10. The above amendments have significance for the issues under adjudication. The Court would also like to take note that under the rule-making power, Section 14 of the Act, a Rule 1981 was notified on 2nd February, 1982. Rule 3 has also some significance because the same has been notified in furtherance of Section 3(4)(d) of the Act.

11. After the legislative enactment and creation of the body alt those persons or entrepreneurs who were interested in setting up various industries in the industrial areas were allotted land or sheds as the case may be. Broadly there are various steps involved in the process of allotment. On an application by an entrepreneur the Project Clearance Committee puts its seal of approval and on the price fixed an initial letter of allotment is issued. The letter of allotment contains the terms and conditions regarding payments etc. before the possession of land/shed are handed over. With the required formality completed land is handed over with the stipulation to start the project or industry by a time frame. Subsequently with things falling in place a final lease agreement between the entrepreneur and the respondent BIADA ranging from 33 years to 99 years used to be executed. The lease agreement permits mortgaging the land in favour of

financial institutions if there is financing or borrowing involved. All the petitioners who have approached the High Court are by and large lease holders of various periods and have been carrying on their industrial activities for a long period of time. It is another issue that despite investment and hard work put in by the entrepreneurs, for many a reason not all of them turned out to be successful in their venture.

12. There are allegations made on behalf of the respondents that many an allottees have not carried out their activity for many a years. A lot of them are defunct or dead and many have also indulged in diversion and subletting. There are diverse allegations and diverse reasons but the action taken against all of them are more or less identical in nature. The Managing Director of BIADA wants to start industrialization of the State with a clean slate for which spring cleaning is required.

13. The petitioners on the other hand have alleged persecution, threat, strong arm methods and even lodging of false criminal cases against the industrialists. In case of Dipak Paints 14 cases in number ranging from defamation to various offences under I.P.C. has been filed. This has been done by the Managing Director or at his behest to compel the industrialists to an abject surrender. The Court is informed that to prevent the aggrieved persons from moving the courts a circular was issued by the Managing Director by virtue of which varied litigation costs was to be recovered from them if they knocked at any judicial door. A criminal contempt has been initiated for such a move and the matter is under consideration of a division bench. If what has been narrated or stated is true than it does not speak well of functioning of an institution like BIADA, or its Chief Executive Officer i.e. M.D. These are elements of arbitrariness which fall foul of not only Article 14 of the Constitution of India but also the Wedensbury principle. It is well settled that our Constitution envisages the rule of law and not rule by men. No authority, however, high has the privilege of exercising authority not vested under him. The power must be exercised strictly within the four corners of the law or statute. The ''Shock and Awe'' could be an effective battle strategy paying rich dividend on the battlefield but adopting the same strategy in matters of exercise of statutory powers can only draw serious reprimand if not a chide for irresponsible behaviour from a court.

14. The Court now reverts back to the initial submissions which have been made on behalf of the BIADA with regard to maintainability of the writ applications and the power of this Court to entertain the same under Article 226 of the Constitution of India. Learned counsel has relied on a plethora of decisions to strongly reiterate the position that a writ Court has no role to play in matters of contract. Some of these decisions, which were cited are:-

(1) State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo, .

(2) Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, .

(3) Radhakrishna Agarwal and Others Vs. State of Bihar and Others, .

(4) Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.,

(5) Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

(6) National Highway Authority of India Vs. Ganga Enterprises and Another, .

15. The proposition of law laid down in these cases are not in dispute because these are settled principles occupying the field for a long period of time. The question which primarily arises for consideration of this Court is whether the action of cancellation and repossession of the land, plant and the machinery, most of them hypothecated, is an action under the lease agreement entered between the parties? The answer in the opinion of this Court is a categorical No. A bare perusal of the orders of termination, which are mechanical, printed orders with names of units scribbled on it, are under the purported exercise of powers u/s 6(2) of the BIADA Act read with the necessary amendments of 1992 as well as the 1981 Rules. None of the orders in any manner states that the so called breaches/ reasons for cancellation are referable to the so-called lease agreement. If the order of termination and consequent action are part and parcel of the exercise of power under the Act, which itself is under challenge and subject of present litigation then it is difficult for this Court to accept that this is a matter falling strictly within the ambit of a concluded contract. The objection to the maintainability of the writ applications is therefore rejected. If the Managing Director has invoked his authority under the BIADA Act, especially Section 6(2), then the Court has powers under Article 226 of the Constitution of India to critically analyse whether the power has been exercised in conformity with law? And whether the power is exercisable by the Managing Director under the statute or someone else?

16. Learned counsel appearing on behalf of the BIADA thereafter embarked on his next line of submission. He submits that the Managing Director has drawn powers u/s 3(4) of Chapter-II, Section 6 and Rule 3 of the 1981 Rules. He submits that since the Managing Director is the Chief Executive Officer, the "Authority" functions through the Managing Director and all decisions being taken by him has due authority of law. His contention is that Rule 3 of 1981 especially Rule 3(a) gives him power of allotment of land and its cancellation. This conferment of power by the State Government under the Rule formulated u/s 14 is a complete answer to all those doubts having been raised with regard to the exercise of power by the Managing Director. He also placed emphasis on amendment to Section 6 where according to him the legislatures in their wisdom have conferred powers of repossession of the plots and the sheds after cancellation. If the powers are there and if it has been exercised by him. he is not violating any common law principles but only implementing the objects and purpose of the amendment which was brought about in the year 1992 to the Act. To further buttress his position he submits that even the lease agreement talks in terms of repossession.

17. Counsels appearing on behalf of the petitioners have their own submissions to make on these issues. They urge that the Managing Director has usurped jurisdiction even in areas where no power has been conferred upon him. A plain reading of the Act and the various provisions would show that the legislatures in their wisdom envisage exercise of power by various functionaries and the Managing Director has misread those powers and usurped jurisdiction. According to the petitioners the body incorporate is the "Authority" and it is the "Authority" headed by the Chairman alongwith the Board of Directors, who are supposed to exercise such powers under the Act. The Managing Director has been conferred very specific powers which would be evident from reading of Section 3(4)(a) to (d). The power which the Managing Director has exercised u/s 6(2) is a power vested in the "Authority" and by no stretch of imagination or interpretation "Authority" can be read to mean Managing Director. They further expand this submission by stating that even by a liberal interpretation of Rule 3(4) power is given to the Managing Director only in matters of initial allotment of land or cancellation. The power of cancellation or repossession under the limited circumstances conferred u/s 6(2) of the amended Act is vested in the "Authority". The power conferred on the Managing Director under Rule 3(4) cannot be expanded to bring within its ambit the exercise of power u/s 6(2) of the Act. It is not in dispute that in none of the cases the power u/s 6(2) has been exercised by the "Authority". The actions against the petitioners have been taken by the Managing Director or his subordinates under him.

18. There seems to be force in the arguments made on behalf of the petitioners on this issue. A reading of the sections which are in interplay alongwith the Rules does lead credence to the submissions of the petitioners that the exercise of power u/s 6(2) is not vested in the Managing Director. This power has to be exercised by the "Authority", which means the Board of Directors headed by the Chairman of which Managing Director is only a part. Rule 3(1) power is conferred on the Managing Director limited to the case of initial allotment or its cancellation. The sections and rule cannot be read so widely as to expand its ambit beyond the powers which the legislatures have conferred. If the legislators in its wisdom have delegated the powers u/s 6(2) to the "Authority" then it is "only the Board of Directors who can exercise powers thereunder. This power too will be exercised in the limited circumstance i.e. "in case necessary effective steps are not taken within the fixed period to establish the industry the authority shall in such condition cancel the allotted plot/shed and also forfeit the amount deposited in this connection", Rule 3(a) by no stretch of imagination or rules of interpretation will provide overriding powers to the Managing Director to effect cancellation of lease or repossession.

19. Yet another aspect where submissions have been made is with regard to the power of the Managing Director to repossess land, plant and machinery and resettle or reauction them in favour of the third parties. The stand of the respondents are that the Act does visualize such a situation and even the lease agreement provides for such contingencies but then in view of what has already

been held by this Court that the Managing Director has no powers and authority to exercise u/s 6(2) then the power of repossession given therein cannot be exercised by him. There is a bar in such exercise of power and if it has been exercised it is de hors the Act and the Rules. Any action taken by him would be a nullity, illegal and arbitrary exercise of power not vested in him. There is a serious doubt on the other proposition too that the Managing Director can claim right of repossession under the lease agreement after exercise of power of cancellation under the Act. As for the "Authority" the law confers power u/s 6(2) only in a given situation and for a limited reason. This power is not all inclusive and it does not encompass situation where a right of forfeiture of lease is exercised under the agreement. If it is so the Transfer of Property Act will come into play and the lessor cannot have power of repossession unilaterally without due process of law.

20. Counsels appearing on behalf of the petitioners submit that the stand taken on behalf of the respondents with regard to repossession under the agreement of the lease deed is a misplaced submission alien to rule of law in this country. They submit that the Courts have time and again held that there cannot be any right conferred on a lessor to indulge in the adventurism of repossession of a property due to determination of lease at his own level without initiating the process of a Court of law. In this regard reliance has been placed on a Division Bench decision of the High Court in the case of Gait Public Library & Institute vs. State of Bihar, 1995(1) PLJR 585. Emphasis has been placed on some paragraphs which are reproduced herein below:-

"17. Thus, it is clear that if the lessee has remained in possession even after the expiry of the lease his possession is juridical possession and he can be evicted only according to the procedure known in law. He cannot be evicted forcibly or in any manner not authorized in law. No doubt, if there is a forfeiture and cancellation of the lease the matter cannot be agitated under Article 226 of the Constitution as the determination on the said point requires investigation as to factual matters and the writ application would not be an appropriate remedy but even after cancellation of forfeiture of the lease the lessor can take possession only in a matter known or recognized by law. He cannot take possession by adopting a manner not authorized by law.

25. There is another hurdle in the way of the respondents. Rule 22 provides inter alia that when in a lease deed it is provided that, in the event of certain contingencies occurring, the Collector will enter upon and take khas or direct possession of the property, it must be understood that, where the settlement holder objects possession cannot be taken save under the orders of a competent Civil Court.

27. By the impugned order the State has attempted to take possession of the land in a purported exercise of Rule 21. It has no applicability in the case and as such the impugned order has no sanction in law and has to be quashed. The action of the respondent State and the Collector and his Subordinate officers in

taking forcible possession on the basis of the said order is also unauthorized. As stated above, the petitioner is continuing in possession for more than 70 years over the land and has constructed building and the same is being used as a library and institute and for some other purpose also. Even after the expiry of the lease its possession is juridical one and that can be taken away only by the process known in law. The respondents have no authority in law to resume and taken possession of the land by virtue of an order which stated above is non est in the eye of law. Accordingly, the impugned order is quashed and it is held that the act of the respondents in taking possession of the land in question is unauthorized and arbitrary. In view of such high handed act on the part of the State and its officers this Court with a view to maintain majesty of law has to pass an order for restoration of possession of the petitioner."

21. The Division Bench relied on a decision of the Hon''ble Supreme Court in laying down the law in this regard by relying in the case of State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, . If the opinion of the Courts on this issue is so categorical then it is difficult for this Court to accept the submission of learned counsel appearing on behalf of the respondents that they have a right of repossession, unilaterally, under the lease agreement.

22. From the varying submissions which have been made by the contending parties to the present dispute, the Court records its opinion as under on the issues:- 1. For the reasons stated and indicated in the earlier part of the order the writ applications filed on behalf of the petitioners against the action taken by the Managing Director or his nominees are maintainable before this Court as their acts of omission and commission relate to the exercise of power under the ambit of a statute and the Act and not under the lease agreement.

2. The power of cancellation u/s 6(2) of the Act is vested in the "Authority" i.e. the Board of Directors of which the Managing Director is a part. In view of the same any unilateral exercise of power of cancellation u/s 6(2) of the Act by the Managing Director or his subordinates is an illegal exercise of authority de hors the law and the same are liable to be struck down. The power of cancellation u/s 6(2) has to be exercised by the "Authority" and none else. Therefore, in all such matters the power of cancellation exercised by the Managing Director is declared null and void.

3. Since steps taken by the Managing Director or his subordinates in the direction of cancellation of lease, repossession, resettlement or auctioning is an illegal exercise of power, the BIADA authorities would be liable to restore possession and hand over the land, property, plant and machinery to the respective lessees as if the power u/s 6(2) was never exercised against them.

4. The power of allotment and cancellation of land under Rule 3(1) of 1981 Rules is vested in the Managing Director only to the extent of initial allotment and cancellation and not beyond. This exercise of power vested in the Managing Director under the Rule cannot be read to confer on him and all inclusive power

or authority exercisable under the Act muchless section 6(2).

5. In all such matters where a lease agreement stands executed and concluded and the parties have thereafter enjoyed the lease hold property the only way the respondent BIADA authorities can dispossess them would be by moving a Civil Court of competent jurisdiction by adopting due process of law and only on such a declaration in favour by the competent court in this regard,

6. Any third party interest which may have/has been created because of such illegal acts of BIADA will not create any right, title or interest in the leased property since a right or claim flowing from an illegal act will not confer any legal right in them.

The principles of law laid down by this Court shall cover all the cases accordingly. The writ applications are disposed of with a direction upon the Board of Directors of BIADA headed by the Chairman to take steps for carrying out the directions of the Court.

