(2014) 09 P&H CK 0136

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 12134 of 1997 (O&M)

Hem Chander and Others APPELLANT

Vs

Commissioner, Municipal Corporation and Others RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Citation : (2015) 177 PLR 703

Hon'ble Judges : Kuldip Singh, J;Hemant Gupta, J

Bench : Division Bench

Advocate : Ashish Aggarwal, Senior Advocate and Kunal Mulwani, Advocates for the Appellant; Sanjeev Sharma, Senior Advocate and Vikram Vir Sharda, Advocates for the Respondent

Judgement

Hemant Gupta, J.—The challenge in the present writ petition is to the communication dated 18.10.1996 (Annexure P-4) whereby allotment of Shop-cum-Office (for short ''SCO'') Site No. 861 situated in 61.21 Acres Development Scheme in Mani Majra was cancelled. The challenge is also to an order passed by the Commissioner, Municipal Corporation, against the order of cancellation dated 18.10.1996 passed on 04.07.1997 maintaining the order of cancellation. Shop-cum-Office Site No. 861 situated in 61.21 Acres Development Scheme was auctioned on 20.11.1988 for an amount of Rs. 18,07,000/-. Apart from the 25% of the amount which was deposited, the balance six annual installments were payable up to 20.11.1994. However, there was default in depositing the installments which led to cancellation of the allotment letter.

2. The petitioner challenged the cancellation, inter alia, on the ground that sewerage connection was granted in respect of the premises on 24.05.1990. But there are no tenants to take the premises on rent on account of Mandal Agitation; strikes, imposition of curfew etc. and that market had yet to be developed. It is also pointed out that Mr. O.P. Bansal, father of petitioners No. 1 and 2 and husband of petitioner No. 3 died on 20.12.1994 after prolonged illness, and therefore, all the installments could not be paid. It is also pointed out

that during the pendency of the writ petition, the petitioners have deposited a sum of Rs. 7,50,000/- in the year 1997 and also Rs. 13,70,000/- on 17.10.1997. An amount of Rs. 4,07,568/- was found due from the petitioners, which can be made out from the order dated 09.01.1998. The said amount was deposited on 04.02.1998.

3. Learned counsel for the respondents relied upon a Division Bench judgment of this Court in Narain Dass Mahen v. Union Territory, Chandigarh and others, (2003-1) 126 PLR 1, wherein order of resumption for non-payment of installments was upheld Learned counsel for the respondents also referred to an order passed by Division Bench of this court in Adviser to the Adviser to the Administrator and Others Vs. B.K. Nanda, was a member. It was held that equitable consideration for extension of time of cancellation of lease or resumption of a residential plot would be materially different from cancellation of lease of a commercial property. It was held to the following effect:-

"12. The equitable considerations for extension of time of cancellation of lease or resumption of a residential plot would be materially different from cancellation of a lease of a commercial property. The residence is a basic necessity fundamental to decent human existence, whereas commercial property is purchased for profit motive either to make a living out of it or to exploit the same commercially by renting out the same. The allottee is a purchaser of a commercial property in an open auction knowing fully well that the balance premium amount has to be paid in three annual installments. Having purchased the commercial property in an open auction, then to raise a plea of lack of insufficient funds is wholly unjustified and untenable. If the allottee has no funds, he should not have ventured into the arena of purchase of commercial property. The terms of allotment have to be strictly adhered to as it is a commercial motive, which prompted the allottee to participate in an open auction. Therefore, he is bound to honour such commercial commitments in terms of the allotment letter."

4. Relying upon the said judgment it is pointed out that petitioners are claiming restoration of a commercial property, and therefore'', the equitable considerations cannot be taken into consideration.

5. We have heard learned counsel for the parties and find that the order of resumption cannot be sustained. After the judgment in Narain Dass Mahen''s case (supra), the Hon''ble Supreme Court in Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others, examined the conditions in which the order of resumption can be passed. The Court held that resumption or a cancellation of lease should be resorted to as a last resort. It was observed as under:

"42. The respondents were entitled to pay interest on the unpaid amount @ 7% p.a. which in the event of non-payment was to be paid at a penal rate of 12% and subsequently enhanced to 15 per cent and then to 24 per cent as well the amount of penalty to be levied thereupon. The entire amount was recoverable through the process of law. In a situation of this nature, having regard to the rival claims made by the parties, if the default is not absolute willful or a dishonest one but occasioned due to situation which may be beyond one''s control, the statutory right of the respondent in resuming the land may not be appropriate, if the entire dues stand discharged.

43. In terms of the provisions of the Act, the respondents are entitled to, (1) resumption of the land, (2) resumption of the building and (3) forfeiture of the entire amount paid or deposited. Having regard to the extreme hardship which may be faced by the parties, the same shall not ordinarily be resorted to.

44. The situation, thus, in our opinion, warrants application of the doctrine of proportionality.

45. The said doctrine originated as far back as in 19th century in Russia and later adopted by Germany, France and other European countries as has been noticed by this Court in Om Kumar and Others Vs. Union of India, .

46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve."

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56. The land in question for all intent and purport had been transferred in favour of the appellants. They were merely to pay the balance amount of 75% of the consideration amount in installments. The rate of interest, as noticed hereinbefore, had. been increased from 7% to 24%. Penalty was levied by the appellant authority at 1%. and the revisional authority at 2%. Contrary thereto the Estate Officer, however, in terms of his original order directed payment of penalty at 10% F.F.

57. We may, however, hasten to add that we do not intend to lay down a law that the statutory right conferring the right of the respondent should never be resorted. We have merely laid down the principle giving some illustrations where it may not be used. There cannot be any doubt whatsoever that if the intention of the allottee is dishonest or with an ill motive and if the allottee does not make any payment in terms of the allotment or the statute with a dishonest view or any dishonest motive, then Section 8(1) can be taken recourse to."

6. In view of the aforesaid judgment, the power of resumption should not be exercised mechanically but after considering all the facts and circumstances of each case. It would be facts of each case which would determine whether the default in payment of installments is contumacious or it is on account of factors

which may be justified.

7. In B.K. Nanda''s case (supra), the Court has pointed out that equitable considerations have to be examined differently in case of residential properties and the commercial properties but the fact remains that the amount of installments in the present case was payable by 1992 but the same were paid in the year 1994 in terms of the interim orders passed by this Court. The entire amount stands paid way back in the year 1995.

8. In respect of another commercial property situated in Mani Majra this Court in CWP No. 1512 of 2009 titled Smt. Vimlesh Garg and others v. U.T. Administration and others, decided on 15.02.2012 set aside the order of resumption relying upon the Full Bench of this Court in Ram Puri, Chandigarh Vs. Chief Commissioner, Chandigarh and Others, and that of Hon''ble the Supreme Court in Ten Oat Estates (P) Ltd. (supra).

9. In view of the fact that the amount stands deposited and the building is complete, we find that order of cancellation of allotment cannot be said to be justified. Learned counsel for the petitioners undertakes that if any amount is still due and payable, the petitioner shall deposit the same within a reasonable time. In view of the above, we find that the order of resumption cannot be sustained and consequently, orders dated 18.10.1996 (Annexure P-4) and 14.02.1997 (Annexure P-8) are set aside. The respondents are directed to communicate if any amount is due and payable by the petitioners within one month and that the petitioner shall deposit the same within one month thereafter.