

(2003) 09 AHC CK 0139
In the Allahabad High Court
Case No : C.M.W.P. No. 13556 of 2003

International Hospital (P.) Ltd.	Vs	APPELLANT
State of U.P. and Another		RESPONDENT

Date of Decision : 26-09-2003

Acts Referred:

Uttar Pradesh Industrial Area Development Act, 1976 — Section 7

Citation : (2004) 1 AWC 300

Hon'ble Judges : R.S. Tripathi, J;M. Katju, J

Bench : Division Bench

Advocate : Rakesh Dwivedi, Kumkum Sen and Yashwant Verma, for the Appellant; Vinod Mishra, S.C., for the Respondent

Final Decision : Allowed

Judgement

M. Katju and R. S. Tripathi, JJ.—Heard Sri Rakesh Dwivedi, learned senior counsel, Ms. Kumkum Sen and Shri Yashwant Verma, learned counsel on behalf of the petitioner and Sri Vinod Mishra and learned standing counsel for the respondents.

2. The petitioner has challenged the demand of change in constitution charge made by the respondent No. 2-New Okhla Industrial Development Authority (hereinafter referred to as the N.O.I.D.A.) and the revised lease rental demanded by the letters dated 15.3.2002, 23.10.2002 and 21.2.2003 vide Annexures-G, L and O to the writ petition.

3. The petitioner is a private limited company registered under the Indian Companies Act, having its registered office at B-9 Maharani Bagh, New Delhi. The petitioner is engaged in the business of establishing state of the art hospitals of international standard of technological excellence and quality of medical and related services. It is also alleged in para 4 of the writ petition that in consonance with its objectives to establish a Super Speciality Hospital and Research Institute and to provide medical facilities of International standards,

the petitioner applied for and was allotted a plot of land bearing No. B-22, Sector 62. N.O.I.D.A., measuring 22,400 sq. mtrs. in response to the issue of a tender floated by the respondent No. 2. The respondent No. 2 is a statutory authority constituted u/s 3 of the Uttar Pradesh Industrial Area Development Act, 1976 and has been established for the purpose of setting up an Urban and Industrial Township and is entrusted with the responsibility of allotment of land for institutional purposes, and for the planned development of the district.

4. Sometimes in the year 1994, the respondent No. 2 through its Chairman/Chief Executive Officer, invited sealed tenders along with detailed technical project report, land area requirements and land rate offered for it from renowned corporate houses/institutions/NRI's for allotment of land for establishment of a Super Speciality Hospital and Research Institute in the N.O.I.D.A. Complex through public advertisements. The petitioner applied against that advertisement and was successful in the bidding for the hospital in Sector 62, and was allotted a plot bearing No. B-22, Sector 62 in the N.O.I.D.A. complex for a total consideration of Rs. 1,79,20,000. Subsequently a lease deed was also executed between the petitioner and the respondent No. 2 on 2.1.1996. A copy of the allotment letter dated 19.4.1995 is contained in Annexure-B and a copy of the lease deed is contained in Annexure-C to the petition. A copy of the tender document containing the terms and conditions of allotment, is contained in Annexure-D to the petition. The lease deed provided in Clause II (g) that the terms of the allotment order and the terms and conditions of the tender shall be deemed to be part of the lease deed.

5. It is alleged in para 7 of the petition that the project involves a huge amount of investment in terms of experience, financial funding and technological know-how. Since the petitioner was facing certain financial and other constraints in proceeding further with the project in spite of best efforts, the petitioner approached Fortis Healthcare Ltd., a company incorporated under the Indian Companies Act, having its registered office at 25, Nehru Place, New Delhi, for obtaining financial and other assistance for the project with a proposal to also invest in the equity share holding of the petitioner company as majority shareholder. Fortis Healthcare Limited is inter alia engaged in the business of setting up a network of world class super speciality hospitals linked with a large network of Multi Speciality Hospitals to provide the best quality health-care to the people of North India.

6. It is alleged in para 8 of the petition that on the basis of the petitioner's above proposals, representations and assurances, Fortis Healthcare Ltd. agreed to develop the said project by way of financial assistance and otherwise in order to provide quality care and medical infrastructure in N.O.I.D.A. Under this understanding, Fortis Healthcare Ltd. and/or its nominees were to fund the project of the petitioner company. It was agreed that Fortis Healthcare Ltd. would fund the project to the extent of rupees five crores. The payment modality would include making of loans by Fortis Healthcare Ltd., and issuance of fresh

equity shares by the company to Fortis Healthcare Ltd. with the intent that Fortis Healthcare Ltd., achieve a 75% majority stake in the petitioner's company in the first instance and to have nominee directors appointed on the Board of the petitioner company, Accordingly, the above, arrangement was finalised and the petitioner transferred 75% of its share to Fortis Healthcare Limited. It is on this transfer of 75% of its shares that the respondent No. 2 has imposed a sum of Rs. 83,16,000 as change in the constitution charges which is challenged in this petition. The petitioner has also challenged the revised lease rental imposed by the impugned order.

7. We have also perused the counter-affidavit in which the impugned demands have been sought to be justified and have also perused the rejoinder-affidavit.

8. We are of the opinion that this demand in change of constitution charges and revised rental is wholly illegal.

9. It may be mentioned here that the imposition of any charge can either be under a statutory provision or by a contractual agreement. Article 265 of the Constitution provides that :

"No tax shall be levied or collected except by authority of law."

10. We have not been shown any statutory provision by the learned counsel for the respondents as to under which law the change in constitution charges or revised rental could be imposed. We have, therefore, to see whether there was any contract between the parties for imposition of such charges. Annexure-E of the writ petition contains the Policies and Procedures for Institutional Premises Management issued by the N.O.I.D.A.. This document indicates what N.O.I.D.A. itself means by change in constitution. In Clause (c) (1) thereof it is mentioned that "the application for change in constitution from proprietorship to partnership, Pvt. Ltd. Co., Public Ltd. Co., or vice versa should come from the original lessee (s)/lessee/allottee(s) transferee(s).

11. Thus, the expression "Change in constitution" according to N.O.I.D.A, itself means a change in the legal entity, i.e., from proprietorship to partnership or to a private limited or public limited company. Hence, it is evident that the understanding of N.O.I.D.A., itself, which issued this document, was that a change of constitution means a change of the legal entity as mentioned above and not transferring of shares of a company.

12. Shri Vinod Mishra learned counsel for the respondents submitted, however, that Sub-clause (5) of Clause (c) of this document indicates that change within a company amounts to change in the constitution of the company. We do not agree. It is well-settled that a company is a distinct legal company separate from its share-holders, as held in the leading case of *Salomon v. Salomon and Co. Ltd.* 1897 AC 20 (HL). A company, once incorporated, has an entity, which is different from its shareholders and directors vide *State Trading Corporation v. C.T.O.* AIR 1963 SC 1811 ; *Ram Chand and Sons Sugar Mills Pvt. Ltd. Vs. Kanhaya Lal*

Bhargava and Others, ; M/S. Electronics Corporation of India Ltd. Etc. Etc. Vs. Secretary, Revenue Department Govt. of Andhra Pradesh and Others Etc. Etc., and Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay, , etc. Hence, if the shares of a company are transferred, it does not mean that the legal entity of the company is changed. In any event, even if the submission of Shri Mishra is accepted, in the present case, there is no charge which can be imposed on the petitioner as change in the constitution charges as the petitioner has retained 25% of the share as required by Clauses 7 and 9 read with Clause 14 of Annexure-E to the writ petition.

13. Shri Dwivedi also invited our attention to para 12 of Annexure-E of the writ petition which states "No CIC charges would be levied if CIC is applied for after a period of 5 years from the date of allotment/ transfer/ last CIC letter. If change in constitution is applied for within 5 years from the date of allotment/ transfer/ last CIC letter, then CIC charges will be levied in proportion to transfer of shares. However, no CIC charges would be levied if the same is within blood relation as defined above in 7."

14. He pointed out that in the present case, the allotment was made as far back as on 19.4.1995 vide Annexure-B to the writ petition whereas the application for transfer of shares was dated 18.2.2002 vide Annexure-F to the writ petition. Hence, it was beyond 5 years. He has also referred to Clause 14 of Annexure-E of the writ petition which states "No CIC charges are levied if the CIC is in favour of Public Ltd. Then there would be a minimum requirement of shareholding with the original allottee(s)/transferee(s) and any subsequent change in share holding would be without charges."

15. In the present case, the shares have been transferred to Fortis Healthcare Limited which is a public limited company. Hence, also no charge can be imposed.

16. Sri Dwivedi also invited our attention to Annexure-D of the writ petition which contains the terms and conditions of allotment of plots. He has referred to Clause 11 of the tender document which states :

"The allottee would not be entitled to transfer the plot partly and/or fully before or after the erection of the building without prior permission of the authority. The permission for transfer shall not normally be given. In exceptional circumstances, however, the permission may be given subject to the condition that the plot is transferred to similar such institution and subject to such terms and conditions including payment of transfer charges as decided by the authority at the time of granting such permission. No charges would be imposed in case of changes in the constitution of Board of Directors/Member(s)/Shareholder(s) company/ management control provided there is no change(s) in the legal entity of the allottee of the authority,"

17. Sri Dwivedi submitted that the terms and conditions in Annexure-D override the terms and conditions in Annexure-E to the writ petition. This is because Clause (K) of Annexure-E clearly states :

"In case of Institutional premises allotted on tender/ auction basis then the terms and conditions of allotment/lease would supersede the term(s)/ condition(s) mentioned in this document."

18. This is also clear from the title page of Annexure-E which states :

"These guidelines are only indicative subject to amendment/ modification/ alteration without any notice

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shall be superseded by the term(s) and condition(s) framed for allotment on tender/auction basis,"

19. Thus, Annexure-E itself mentions that its terms shall be superseded by the terms mentioned in Annexure-D to the writ petition. Hence, we agree with Sri Dwivedi.

20. In our opinion, the last sentence in Clause 11 to Annexure-D (quoted above) makes the position clear. Charges are imposed on transfer of land but no charges can be imposed merely because of change of directors, shareholders or management control unless there is also change in the legal entity. In the present case, there is no transfer of land at all, as already mentioned above. What was transferred was shares, but the legal entity remained the same. As already stated above, a company is distinct from its share holders and directors. Hence, if the company is owner of the land and if it transfers its shares to some one, then there is no transfer of the land because the owner of the land remains the same company.

21. Once we keep this legal concept firmly in mind, the legal position becomes clear. The last sentence of Clause 11 of Annexure-D of the writ petition makes it clear that no charges would be imposed in case of changes in the constitution of Board of the Directors/Member(s)/ Shareholder(s) company/management control provided there is no change(s) in the legal entity of the allottee.

22. In the present case, no doubt, there is change in the Board of Directors because some nominees of Fortis Healthcare Limited will come in the Board of the petitioner company, but the legal entity will remain the same. In the case of BALCO Employees Union (Regd.) Vs. Union of India and Others, , it has been held that merely because the shares are transferred, the legal entity does not change.

23. Sri Dwivedi invited our attention to Section 7 of the U. P. Industrial Area Development Act which states :

"7. Power to the authority in respect of transfer of land.--The authority may sell, lease or otherwise transfer whether by auction, allotment or otherwise any land or building belonging to the authority in the industrial development area on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose."

24. Sri Dwivedi submitted that the terms and conditions of tender (Annexure-D to the writ petition) are incorporated in the lease deed as is expressly stated in the last sentence of Clause 11 (g) of Annexure-C which reads :

"Allotment letter dated 19.4.1995 and terms and conditions of the tender shall be deemed to be a part of lease deed."

25. Hence Shri Dwivedi submitted that in view of Section 7 of the U. P. Industrial Area Development Act, 1976 (quoted above), the terms and conditions in Annexure-D to the writ petition are statutory in nature, and will override other decisions/ guidelines of N.O.I.D.A. which have not been incorporated as a term and condition of the lease. Hence, respondent No. 2 is not entitled to demand any change in constitution charges or revised rental from the petitioner. He further submitted that there is no provision in the Act which authorises N.O.I.D.A. to impose change in constitution charges.

26. We agree with the submissions of Sri Dwivedi. In view of Section 7 of the Act, N.O.I.D.A. cannot impose charges or rental in violation of the terms and conditions of the lease. It may be mentioned that while the lease deed is of 2.1.1996, the policy relied on by the respondents (Annexure-E) is of September, 2000. Hence Shri Dwivedi has rightly contended that neither the policy framed subsequent to the lease nor the resolution dated 14.5.2001 can be used to impose CIC charges or revised rental. In *Firm Gulam Hussain Haji Yakub and Sons Vs. State of Rajasthan*, it was held that a charge cannot be imposed without legislative sanction. In *Co-operative Sugars (Chittur) Ltd. v. State of Tamilnadu* 1993 4 SCC 42 (vide para 8) and in *District Mining Officer v. T.I.S.C.O.* (2001) 7 SCC 358 (vide para 19), it was held that a tax can only be levied by statutory provision. In *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others*, , it was held that whenever there is compulsory exaction of money, whether as a tax or a fee, there should be a specific statutory provision for the same.

27. In our opinion, the parties entered into a contract which is contained in Annexures-C and D to the writ petition. Hence, they are bound by that contract and in our opinion, the respondent No. 2 cannot unilaterally change the terms of the contract except in accordance with the terms and conditions which are in Annexure-D to the writ petition.

28. Since there is neither any statutory provision nor any contractual provision for imposing change in constitution charges we are of the opinion that the said imposition is clearly illegal.

29. As regards the demand of revised lease rental, Shri Dwivedi has invited our attention to Clause 10 of Annexure-E to the writ petition which states :

"As consequence of change in constitution cases with/without charges lease rent would not be revised."

30. This clause makes it clear that such rent cannot be revised even if there is

change of the constitution. In the present case, there is no change in the constitution, hence there is no justification in revising the lease rent. In our opinion, the lease rent can only be revised in accordance with part B of Annexure-D (the terms and conditions of the above contract) and it cannot be done unilaterally by the respondents. Hence, revision in rental is also illegal.

31. The writ petition is, therefore, allowed. The impugned orders are quashed. The interim order passed on 13.8.2003, is recalled and we leave it open to the respondent No. 3 to consider the application of the petitioner for permission to mortgage the land.

32. There is no order as to costs.