
(2024) 03 PAT CK 0060

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9622 Of 2022, Letters Patent Appeal
No. 1201 Of 2013 In Civil Writ Jurisdiction Case No. 4006 Of 2012,

M/S Peerage Industries Pvt. Ltd.

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 12-03-2024

Acts Referred:

Constitution of India, 1950 — Article 226
Bihar Industrial Area Development Act, 1974 — Section 6(2)
Transfer of Property Act, 1882 — Section 58, 108(j)

Citation : (2024) 03 PAT CK 0060

Hon'ble Judges : K. Vinod Chandran, CJ; Harish Kumar, J

Bench : Division Bench

Advocate : Brisketu Sharan Pandey, Binita Singh, Subhash Prasad Singh,
S.N.Pathak, Santosh Kumar Singh, Ashok Kr. Sinha, Divyam Verma, Prashant
Bhushan

Final Decision : Dismissed

Judgement

1. The above writ petition and appeal is concerned with a plot of land bearing Plot No. B-20 and B-21 admeasuring 32670sq.ft./43560 sq.ft. within the industrial area, Hajipur. The land was acquired for the purpose of industrialization and is in the possession and ownership of the 4th respondent, the Bihar Industrial Area Development Authority, (for brevity, the 'BIADA'). The allotment of the land, its mortgage and the eventual cancellation as also the further allotment and its cancellation are respectively challenged in the appeal and the writ petition. We first take up the appeal insofar as the same being first in point of time and also dealing with the first allotment made of the said land.

2. The appeal is filed by the BIADA from the order of the learned Single Judge in a writ petition filed by the State Bank of India, (for brevity, the 'SBI'). The Bank had accepted mortgage of the land allotted by the BIADA to one M/S Vaishali Mineral Water Pvt. Ltd., the 3rd respondent in the writ petition. The Bank, based on allotment of a plot of land to the 3rd respondent, sanctioned a loan based on

the lease deed dated 03.12.2001, produced as Annexure-1 after accepting mortgage of the land over which the unit in question was supposed to be raised. Annexure-1 lease deed was executed by the North Bihar Industrial Development Authority, Muzaffarpur (for brevity, the NBIDA') the predecessor of BIADA.

3. Before the learned Single Judge, it was contended that the loan was sanctioned on the security of the mortgage. The mortgage made is after receipt of no objection from the NBIDA under letter dated 11.12.2001, produced as Annexure-2. The 3rd respondent failed to comply with its part of the obligation and the defaulted loan amount came to Rs. 34,57,208.59/-; for recovery of which the bank instituted a proceeding before the Debt Recovery Tribunal. The Tribunal allowed the original application and based on the certificate of recovery a sale was proclaimed by the Tribunal, then it transpired that the unit leased out in favour of the 3rd respondent was rerallotted to the 4th respondent after cancelling the initial lease deed. The 4th respondent has filed the other writ petition against the cancellation of the subsequent allotment.

4. We heard Smt. Binita Singh learned counsel appearing for the appellant BIADA and Sri Ashok Kumar Sinha, learned Senior Counsel appearing for the respondent bank in the appeal. Sri Brisketu Sharan appeared for the 4th respondent; the subsequent allottee, in both the appeal and the also the writ petition.

5. Before us it was argued by the learned Senior Counsel that the cancellation of the lease executed in favour of the 3rd respondent was not in accordance with Section 6(2) of the Bihar Industrial Area Development Act, 1974. It was also contended that before cancelling the lease, the bank was not informed of the same. The learned Senior Counsel to support the contention of the bank regarding the mortgage executed and the security interest created in favour of the bank relied on two decisions, one of this Court and the other of the Hon'ble Supreme Court; M/s Vikramshila Transformers (Pvt.) Ltd.; 1994 (1) PLJR 601 and New Okhla Industrial Development Authority (NOIDA) vs. Anand Sonbhadra; (2023) 1 SCC 724. The learned Senior Counsel specifically relied on Sections 58 and 108(j) of the Transfer of Property Act, 1882.

6. Learned counsel appearing for the BIADA submitted that the lease in favour of the 3rd respondent was cancelled on 18.06.2007, and intimation was given to the Rajendra Nagar branch of the bank from where the loan was obtained. There was no requirement to issue a notice to the bank before cancellation of allotment, even then it was issued.

7. The learned Single Judge found that there was unilateral cancellation of the allotment made, to the 3rd respondent by the BIADA. We cannot accept the same, since the ground of unilateral cancellation was raised for having not issued a proper notice to the bank and not for absence of notice to the 3rd respondent itself; who is the allottee. The mortgage if properly created would not be affected even if the cancellation is effected and the mortgagee could proceed against the

mortgaged land, in which event the allottee or even the lessor/owner; who consented to the mortgage would only have a claim of redemption. The learned Single Judge also directed that the amounts found due against the 3rd respondent would be made good by the BIADA and that the bank would be entitled to recover the same from BIADA by impleading BIADA as a party in the recovery proceeding. We are not inclined to sustain the aforesaid directions also, since, if the mortgage is proper, the remedy of the bank is against the property, the security interest created is of the interest, the lessee, the mortgagor, has in the property.

8. We are with the learned Senior Counsel insofar as a lease also being capable of mortgage, since Section 58 specifically refers to any interest in immovable property. Section 108(j) also provides that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in a property. By a specific caveat it is also provided that nothing in Clause(j) would authorize a tenant having a non-transferable right of occupancy to assign his interest as such. The stipulation in the agreement to create mortgage of the allotted land or the interest created in it, with consent of the original owner or lessor; here the BIADA, would save any mortgage created, on the rights on the land transferred to the allottee; but only if there is explicit written consent by the BIADA.

9. The interest created on the 3rd respondent is available from the lease deed. The reliance placed by the bank is also on Clause 8 (1) of the terms and conditions of the lease which is extracted hereunder: -

8. The lessor and the lessee hereby covenants and agreed as follows: I) That the lessee will not assign mortgage, under let or part with the possession over the land and shed or right or interest therein or in respect thereof without the previous written consent of the lessor or the lessor's authorised nominee.

PROVIDED that in case of registered Small Scale Industry no separate permission will be required to be obtained by the lessee for mortgaging it with any financial institution.

For raising loan for the purpose of industry for which the land was allotted. And in that case the dues of the lessor shall also be first charge on the mortgaged property. 'Pari Passu' properties offered as security against the loan of the financial institution should be adequate to cover the full dues of the lessor as well as the loans given by the financial institutions.

In that case also the lessor will retain 'Pari Passu' interest with the financial institutions.

10. It is pertinent that even if a proper mortgage is created, with consent or in the case of SSI's, without consent, then the lessor would retain pari passu interest with the financial institution, on the land mortgaged. Hence, there could not have been any direction issued to the bank to recover the amounts from the BIADA. The Bank could only proceed against the security interest created, which

if realized will have to be proportionately shared to satisfy the liability of both the Bank; the mortgagee and the BIADA; the owner who allotted the property for industrial purposes.

11. We are also not satisfied that a proper mortgage has been created. We first look at the judgment of the Division Bench of this Court in *M/s Vikramshila Transformers (Pvt.) Ltd.* (supra) wherein almost an identical situation came up for consideration. The initial allottee mortgaged the property with a financial institution and defaulted, upon which the financial institution brought the property to sale and sold the same to the *M/s Vikramshila Transformers (Tvt.) Ltd.* The allotment itself was cancelled by the Patna Industrial Area Development Authority. The writ petition was filed since the industrial area development authority, for the transfer of lease, demanded the price of the land in question at the new rate. What distinguishes the above case from the present one is that therein the lease was for 99 years subject to terms and conditions. The original allottee was also a small-scale industry, which created the mortgage with the financial institution. The proviso of Clause 8(i) specifically indicates that in the case of registered small-scale industries no separate permission will be required to be obtained for mortgage to any financial institution.

12. It is in such circumstances, that the demand for the current price of the land, made by the development authority, was set aside and the petitioner company's prayer allowed conceding the land to its possession, but governed by the terms and conditions of the original lease deed. In the present case, the specific contention of the bank is that there was a consent obtained from the BIADA; in which event the 3rd respondent the original allottee cannot be said to be a registered small-scale industry. If the 3rd respondent was a registered small-scale industry, there was no requirement for a consent to mortgage. Any allottee other than a small-scale industry would have to have a consent issued, for creating mortgage, under-letting or parting with the possession of allotted land as per Clause 8(i) itself.

13. The reliance placed by the Bank was on Annexure-2. Annexure-2 only refers to Clause 8(i) and asserts title of the BIADA and certifies no requirement for an encumbrance certificate. This is not a consent as required under the lease deed. Though the learned Senior Counsel would assert that the 3rd respondent was also a registered small-scale industry, there was no such pleading at any point of time and nothing was produced to indicate that. There is no such averment made by the bank in the writ petition or the appeal.

14. The writ petition proceeded on the basis that there was a consent obtained. We cannot but also observe that even if there was a mortgage then the recovery proceedings ought to have been continued against the property and there is no cause for the bank to approach this Court under Article 226 of the Constitution of India. We have already found that there cannot be any direction issued for recovery of money from the BIADA merely because it was the lessor of the property mortgaged to the respondent bank. We have noticed that the BIADA,

who was the lessor had pari passu interest in the land, even if the mortgage was properly made. We have found that the mortgage was not one properly carried out in accordance with the lease deed and its terms and conditions.

15. The decision in New Okhla Industrial Development Authority (NOIDA) (supra) also would not be of any relevance or aid to the respondent bank. The decision in fact works against the appellant Bank. After quoting Section 108(j) of the Transfer of Property Act their lordships held, in the context of deciding whether the rights assigned is transferable or not; 'the lease in question must be probed in order to find out whether there is a contract placing restrictions on the right of the lessee to transfer'(sic-para169). We also extract paragraph 170 from the cited decision:

170. Undoubtedly, in law, generally the lessee can assign his rights as a lessee which amounts to assignment of his right. A lessee may create a sub-lease. A lessee can also create a mortgage. All of these rights vest with a lessee, subject to a contract to the contrary. In the lease in question what is prohibited in Clause 12 under other clauses is the right to assign his rights as lessee. Any reward which the lessee could have obtained if it wished to absolutely assign its right, is clearly denied by virtue of the provision in the lease which acts as a contract to the contrary.

(underlining by us for emphasis)

In the instant case since the mortgage could only be in accordance with the specific terms and conditions; ie: a prior written consent from the lessor, it acts as a restriction on the lessee to create a mortgage, a contract to the contrary.

16. The writ appeal, hence has to be allowed setting aside the judgment of the learned Single Judge.

17. Insofar as the writ petition is concerned it is by the subsequent allottee. The subsequent allotment was cancelled by Annexure-F produced along with the counter affidavit. The 0.25 acre land was allotted to the petitioner for setting up a Noodles Industry and later 0.75 acres of land was also transferred for establishing an energy food industry. The said allotments were respectively made in the year 2010 & 2011. Despite passing of considerable time there was no industrial activity commenced, upon which on 14.10.2011, there was a notice issued based on a report of 02.08.2011. The petitioner unit then claimed that the work could not be started because of non-availability of an approach road and there was a request made for changing the utility of the remaining 0.75 acres.

18. Despite repeated notices having been issued, the unit was not commenced. Even in the year 2017, after having given an undertaking to establish the industry within a period of six month from 27.05.2013 there was only a boundary wall constructed, and a half-constructed building which was not worthy of any utilization.

19. The cancellation order at Annexure-F was challenged in appeal, which

appellate order is produced at Annexure-G. Annexure-G specifically required the appellant, the petitioner herein to clear the pending dues to BIADA, with interest, pay a penalty of Rs. 75,000/-, furnish a bank guarantee of Rs. Six lakhs and commence the business within four months from the date of the appellate order. The petitioner complied with the directions to pay up the amounts and also furnishing of bank guarantee, but again failed to commence the industry within the four months provided in the appellate order. The appellate order itself was dated 10.12.2018, and in accordance with the directions, the establishment of the industry should have been carried out by 09.04.2018, four months from the date of the order.

20. Again, a cancellation was made as per Annexure-I order dated 16.07.2021. Though renovation and civil construction was found to be taking place, the production work had not commenced, even on 08.01.2021, after more than two years from the appellate order; as per the site inspection report of even date. The petitioner submitted a reply ascertaining that a machine for a sum of Rs. 2898 lakhs had been ordered which would be installed by 15.04.2021. There was nothing produced to substantiate the same and the site inspection report also found that there was no work carried out at the spot. It was specifically found that the appellate authority had granted four months' time from 01.12.2018, and there was no commencement of production even in the year 2021. Again the allotment was cancelled as per Annexure-J.

21. An appeal was filed by the petitioner in which the appellate authority recorded the submission of the petitioner's Advocate that the commercial production would be commenced within three months from the date on which BIADA approve the name change, for the purpose of obtaining electric connection and that the appellant would furnish a bank guarantee of Rs. 1 lakh for a period of one year to the BIADA. It is also submitted by the BIADA that the bank guarantee was submitted delayed. The petitioner contends that the delay was only of three days and that was due to the laxity of the bank.

22. In any event, we cannot but find that the cancellation was made for reason of neither the industry having been established nor the commercial production commenced even in the year 2021, when the allotment was of the year 2011. The learned counsel for the BIADA has also submitted that the plot was kept idle all these years by reason of the various litigation. It has to be reiterated that despite the assertion of the petitioner that machinery worth lakhs have been ordered there is nothing substantiating the said contention either by way of production of an invoice or receipt of payments made as claimed. The petitioner's counsel submitted that there is considerable construction carried out in the property and that a commission may be appointed from this Court.

23. We do not find any reason to carry out a physical inspection at our instance. We cannot but notice that the petitioner had consistently failed to comply with his part of the terms and conditions as is required under the allotment. The last appellate order also was not complied with, though the delay is said to be only of

three days. The fact that the industry was not commenced despite passage of a decade from the allotment stands against any equitable relief to the petitioner/allottee. In the totality of the circumstances, we find no reason to entertain the writ petition also, the writ petition would stand dismissed.

24. Ordered accordingly.