

(2016) 06 DEL CK 0055

In the Delhi High Court

Case No : W.P.(C) 3698 of 2014 & CM No. 7479 of 2014

South India Club

APPELLANT

Vs

Land And Development Office & Ors.

RESPONDENT

Date of Decision : 03-06-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 157 DRJ 694

Hon'ble Judges : Mr. Vibhu Bakhru, J.

Bench : Single Bench

Advocate : Ms. Pooja Sahgal, Mr. Sudhir Chandra, Mr. Kumar Anurag Singh and Mr. Sunil Magon, Advocates, for the Appellant; Mr. R.V. Sinha and Mr. A.S. Singh, Advocates, Ms. Sakshi Popli with Ms. Mansha Mehmood, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Vibhu Bakhru, J.(Oral) - The petitioner is a Society registered under the Societies Registration Act, 1860-has filed this petition under Article 226 of the Constitution of India, inter alia, praying as under:-

"(a) Issue writ of Certiorari for quashing letter dated 21.11.2013 issued by Respondent No. 1 cancelling the NOC granted to the Petitioner for the construction of Club.

(b) Issue writ of Certiorari for quashing letter dated 10.01.2014 issued by Respondent No. 2 cancelling the sanctioned plan granted to the Petitioner for the construction of Club.

(c) Issue writ of Mandamus and/or any other appropriate writ directing the Respondent No. 1 and Respondent no. 2 to enable the petitioner to resume construction work and quashing letter dated 21.11.2013."

2. The petitioner is aggrieved as the building plan sanctioned by Respondent No.2-New Delhi Municipal Council (hereafter "NDMC") for constructing a new

club building has been cancelled. It is urged that the same has been cancelled as the "No Objection Certificate" (hereafter "NOC") granted by the lessor, Respondent No. 1 (hereafter "the L & DO"), was withdrawn. The petitioner asserts that the sole reason for withdrawal of the NOC issued by L&DO and for consequent cancellation of the building plans is the non-removal of encroachment on Government land made by Respondent No. 3-Delhi Tamil Education Association, which is stated to be a sub-lessee of the petitioner on Government land. The petitioner contends that it has no authority to carry out any demolition and in absence of any cooperation from Respondent No. 3, the petitioner is not in a position to comply with the condition of removal of encroachment on the Government land which is adjoining the leasehold land in question.

3. The controversy in the present petition arises in the context of the facts narrated hereafter.

4. In 1931, a piece of land measuring 0.75 acres at Reading Road was allotted to the South India Association at the rate of Rs. 1,000/- per acre for construction of a Dharamshala and buildings to be used for religious and social purposes. Subsequently, on 20th November, 1934, perpetual lease deed was executed. The petitioner was substituted as a lessee in 1942. The petitioner constructed a building at the site in question, apparently, for use as a "Club House".

5. In 1945, the petitioner agreed to sub-lease a part of the land in question to Madras Education Association, inter alia, on the following terms and conditions:-

"1. The M.E.A. will pay to the S.I.C. a nominal rent of one rupee per annum.

2. The M.E.A. will construct such building or buildings required for holding its classes without involving any liability on the S.I.C.

3. The sub-lease will be in force as long as S.I.C. owns the site under the perpetual lease deed by the Chief Commissioner of Delhi, until otherwise relinquished by either party by mutual consent.

4. The S.I.C. will always continue to be responsible for the fulfilment of the conditions attaching to the perpetual lease."

6. This was duly communicated to the L&DO by a letter dated 16th February, 1945. By a letter dated 4th May, 1945, the L&DO granted its NOC for sub-lease of a part of the land for construction of a school building subject to certain conditions.

7. The petitioner applied to the L & DO for NOC for construction of a building which was granted by the L&DO on 2nd December, 2005.

8. As the then existing building of the club had become uninhabitable, the petitioner on 27th February, 2006 submitted building plans to NDMC for demolition and reconstruction of the building. On 26th June, 2006, NDMC rejected the request of the petitioner for sanction of the new building plans, inter

alia, on the ground that Respondent No. 3 has raised unauthorised construction on the leased property.

9. The petitioner made yet another application for reconstruction of the building on 1st June, 2011. The said application was considered by the competent authority of NDMC and an order dated 22nd July, 2011 was passed. By a letter dated 22nd July, 2011, the petitioner was informed of the said decision of the competent authority and was directed to comply with several conditions for further action. One of the conditions communicated to the petitioner was the demolition of the unauthorised structure being used by Respondent No. 3.

10. Thereafter, the petitioner once again requested the L&DO for an NOC for construction of a building and also submitted proposed building plans. The request of the petitioner was referred by the L&DO to its technical section for examining the proposed building plans. On 4th June, 2012, the land in question was inspected by a surveyor appointed by the L & DO. During the course of inspection, inter alia, it was found that there was unauthorised construction on the lease land and there was also encroachment on the Government land. By a letter dated 20th July, 2012, the L&DO pointed out the contraventions/breaches of the lease deed and called upon the petitioner to remedy the breaches. Subsequently, by a letter dated 2nd August, 2012 the L&DO demanded a sum of Rs. 81,38,844/- for temporarily regularising the breaches in the premises upto 14th January, 2013, and after receiving the aforesaid amount issued an NOC on 23rd August, 2012 for sanction of the said building plans.

11. With respect to the objection of NDMC of unauthorized construction raised by Respondent No.3, the petitioner gave an undertaking to NDMC on 18th October, 2012 that "unauthorized structure will be demolished during summer vacations reasons being the session is in progress at this moment."

12. On 10th January, 2013, NDMC granted sanction to the building plans subject to certain conditions including the petitioner complying with the undertaking given on 18th October, 2012.

13. On 2nd September, 2013, the L&DO directed the petitioner to remove the encroachments on public land within 15 days as pointed out in the inspection report dated 4th June, 2012 failing which the NOC issued by L & DO for sanction of the building plans would be cancelled. L&DO also issued a show cause notice dated 8th October, 2013 for cancellation of the NOC on the failure of the petitioner in removing encroachments within 15 days.

14. On 9th October, 2013, NDMC also issued a notice under Section 248 of the New Delhi Municipal Council Act, 1994 directing the petitioner to discontinue the building operations on account of non-compliance of condition no. 22 (in respect of compliance of the undertaking dated 18th October, 2012) of the sanctioned letter dated 10th January, 2013.

15. On 21st November, 2013, the L&DO intimated NDMC regarding withdrawal of

the NOC granted on 23rd August, 2012 and advised NDMC to cancel the sanctioned plans. On 9th December, 2013, NDMC directed the petitioner to stop the construction at the leased property. In reply, the petitioner informed NDMC that they are not the competent authority to demolish the encroachments made by respondent no.3 on Government land.

16. On 10th January, 2014, NDMC cancelled the sanctioned plans and observed that "The sanctioned plans have been cancelled due to withdrawal of the NOC by the L&DO and intimated to NDMC vide letter No. L&DO/LII-B-17 (24)/442 dated 21.11.2013."

17. I have heard the learned counsel for the Petitioner, NDMC and L&DO. Although notice has been served on Respondent No.3, none entered appearance on its behalf and consequently by an order dated 5th December, 2014, Respondent No.3 was proceeded ex-parte.

18. It is the case of the Petitioner that it is not responsible for any encroachment made by Respondent No. 3 on Government land and also does not have any authority to remove such encroachment. It was contended that in the circumstances, the Petitioner could not be penalised for such encroachment.

19. At a hearing held on 9th October, 2015, the learned counsel appearing for the NDMC contended that the sanction of building plans was also cancelled because the Petitioner had failed to adhere to its undertaking dated 8th October, 2012. This was stoutly disputed by the learned counsel for the petitioner who contended that the undertaking dated 8th October, 2012 was in respect of unauthorized construction raised by Respondent No.3 on the demised premises and the same had since been removed. In the circumstances, on 9th October, 2015, this Court passed the following order:-

"It has been argued on behalf of the petitioner that they had complied with the undertaking and removed the unauthorized structure within the leased premises and the only issue that remained was encroachment made by respondent No. 3 on Government land. This issue needs to be clarified. Accordingly, it is directed that the respondent Nos. 1 and 2 file an affidavit unequivocally stating whether the undertaking as given by the petitioner on 18.10.2012 has been complied with and the unauthorized structure in question within the demised premises (including the premises sub-leased to the petitioner has been removed.) Let the said affidavit be filed within a period of three weeks."

20. In compliance with the aforesaid order dated 9th October, 2015, an affidavit has been filed on behalf of NDMC affirming that encroachment on Government land has not been removed. However, there is no mention as to whether there is any unauthorised construction by respondent no.3 on the leased land. An affidavit dated 16th December, 2015 has been filed on behalf of the L & DO wherein it has been affirmed as under:-

"2. The present writ petition filed by the Petitioner has no merit and is liable to

be rejected. The Petitioner has filed the present writ petition inter alia seeking the following prayers:-

- a) Issue writ of Certiorari for quashing letter dated 21.11.2013 issued by Respondent No.1 cancelling the NOC granted to the Petitioner for the construction of the Club.
- b) Issue writ of Certiorari for quashing letter dated 10.1.2014 issued by Respondent No. 2 cancelling the sanctioned plan granted to the Petitioner for the construction of Club.
- c) Issue writ of Mandamus and/or any other appropriate writ directing the Respondent No. 1 and Respondent No. 2 to enable the Petitioner to resume construction work and quashing letter dated 21.11.2013."

21. Ms. Sakshi Popli, learned counsel for NDMC contended that the petitioner would be responsible for the acts of respondent no. 3; since it is undisputed that respondent no. 3 has encroached on the Government land, NDMC has rightly cancelled the sanctioned plans. Mr. Sinha, learned counsel appearing for the L&DO also contended that NOC granted by L&DO was rightly withdrawn as the petitioner had failed to remove the unauthorised construction.

22. As the facts as narrated hereinbefore indicate, the L & DO had granted permission to the petitioner to sub-lease a part of the demised premises on the express condition that the petitioner shall "always continue to be responsible for the fulfilment of the conditions attaching to the perpetual lease deed". This was unconditionally accepted by the petitioner.

23. Thus, the petitioner would be responsible for any action of the sub-lessee which amounts to the breach of the terms and conditions of the perpetual lease deed. It follows that it would be incumbent upon the petitioner to take expeditious action to prevent such breach or to take such steps to cure the same.

24. It is relevant to note that the L&DO had granted the NOC for construction of a club building subject to the terms and conditions as communicated in the letter dated 2nd August, 2012 which read as under:-

"2. a. You are required to furnish to this office an amount of Rs. 8138844/- (Rupees Eighty One Lakh Thirty Eight Thousand Eight Hundred Forty Four only) (details attached) along with duly filled-in Deposit slip enclosed herewith.

b. The present letter offering terms will not act as a waiver for recovery of any other charges which may in the discretion of the Lessor, be found payable by you at a later stage.

c. Furnishing an undertaking on non-judicial stamp paper of Rs. 10/- witnessed by two persons to the effect that you will pay the difference of misuse/damage charges etc, if the landrates are revised w.e.f. 01.04.2000 by the Government of India and will also remove the breaches by 14.01.2013 or got them regularised beyond."

25. The petitioner had paid a sum of Rs. 81,38,844/- as demanded by the L&DO. Apparently, the petitioner had also furnished the undertaking as required by the L&DO in terms of the above referred letter dated 2nd August 2012. A reference to the L & DO's letter dated 20th July, 2012 indicates that the breaches pointed out by the L&DO also included encroachments. Thus, it does appear that the petitioner had also undertaken to remove unauthorised encroachment by respondent no. 3, which it has admittedly failed to do.

26. It is not disputed that the petitioner had also given an undertaking to the NDMC by way of affidavit affirming, inter alia, that "the unauthorized structure will be demolished during summer vacations reasons being the session is in progress at this moment".

27. In the letter dated 10th January, 2014, the only reason stated by NDMC for cancelling the sanctioned plans is withdrawal of NOC by L&DO. However as noticed above, NDMC had by a letter dated 9th October, 2013 directed the petitioner to stop construction for failure to comply with condition no.22 of the sanction letter dated 10th January 2013. The said condition read as under:

"22. Party shall ensure the compliance of their affidavit/undertaking dated 18.10.2012 regarding demolition of unauthorised structures being used by DTEA School during summer vacation."

28. It is apparent from the above that sanctioned plans have been cancelled on account of failure on the part of the petitioner to remove the unauthorised construction and encroachment by respondent no.3 on Government land. According to the L & DO, the conditions of the perpetual lease deed dated 20.11.1934 had been breached and as the petitioner had failed to remedy the breach, the L&DO was entitled to withdraw its consent for construction.

29. In my view, the issue as to unauthorised construction on the leased premises and encroachment on Government land have to be viewed separately. Insofar as the unauthorised construction carried on at the leased land is concerned, the petitioner cannot be absolved of his responsibility for ensuring compliance by respondent no. 3. The petitioner was granted the permission to sub-lease the property on an express condition that it would continue to be responsible for the fulfilment of the conditions attaching to the perpetual lease. In terms of the perpetual lease, the lessee was proscribed from making any alteration in the buildings constructed on the leased premises without the permission of the lessor (the L & DO). Thus, the petitioner cannot now be heard to state that it has no control over respondent no.3 and, therefore, cannot ensure compliance of the perpetual lease deed by respondent no.3. Thus, the insistence on the part of L&DO that the unauthorised construction on the demised land be regularised or removed cannot be faulted. The petitioner had also undertaken to regularise/remove such unauthorised construction and, in my view, the petitioner cannot be absolved of its obligation in this regard.

30. Insofar as encroachment on Government land is concerned, the learned

counsel disputes that it had given any undertaking to remove such encroachment as it is incompetent to do so. The learned counsel for the petitioner sought to draw a distinction between any unauthorised construction raised by respondent no. 3 on the demised premises and encroachment on Government land; in respect of the former, the petitioner could maintain an action and or pay the requisite charges/fine for regularising the same, however, in respect of encroachment, the petitioner was powerless to take any action. However, the learned counsel for the petitioner, on instructions, volunteered that the petitioner would be willing to pay such penalty or charges in respect of the encroachment in question as may be imposed by the L & DO or NDMC.

31. Although the petitioner now disputes that it had undertook to remove the encroachment made by respondent no. 3, it is difficult to accept the said contention. The L&DO had insisted on the undertaking for removal of breaches which included encroachments as a condition for granting the NOC and it does appear the petitioner did give that undertaking. The sum of Rs. 81,38,844/- also includes charges for encroachments.

32. Having stated the above, the issue that would arise is whether the L&DO could insist on the petitioner removing the encroachment made by respondent no. 3 on Government land. Here, I am inclined to accept the petitioner's contention that it cannot be called upon to remove the said encroachment as the petitioner would have no power to do so.

33. Admittedly, the encroachment is on the Government land which does not form a part of the demised premises. It is also a matter of record that there are disputes between respondent no. 3 and the petitioner and thus, the petitioner would be powerless to take any steps with regard to the illegal encroachment made by respondent no. 3.

34. On a pointed query, as to how the petitioner could be held responsible for an illegal encroachment on Government land, Mr Sinha contended that it is possible that the petitioner and respondent no.3 may be in collusion.

35. I find this contention difficult to accept since there is no material on record which would justify such apprehension. Mr Sinha could provide no other justification for the L & DO to withhold the NOC on account of an illegal encroachment by a third party.

36. Insofar as NDMC is concerned, it had sanctioned the building plans on an express undertaking that the unauthorised structure would be demolished. It is not clear as to which unauthorised structure is referred to in this undertaking. According to the petitioner, the unauthorised structure referred to in the undertaking was a structure on the demised land and not the encroachment made by respondent no. 3 on Government land. The affidavit filed on behalf of NDMC in compliance with the order dated 9th October, 2015 also does not throw any light on this aspect. Be that as it may, the dispute would still boil down to the question, whether NDMC can withhold sanction of the building plans on

account of an encroachment made by a third party on adjoining land?

37. Insofar as unauthorised construction on leased premises is concerned, there could be no dispute that NDMC would be well within its right to withhold their sanction for construction of buildings on the premises where unauthorised structures exist. Surely, NDMC cannot be called upon to disregard existing structures while considering approval for further construction. NDMC would also have to take into account the structures already raised on the leased premises for considering the extent of construction permissible on the land remaining with the petitioner. The petitioner asserts that this has already been done. Whilst NDMC's insistence on an undertaking for removal of unauthorised structures on the leased premises is fully justified, it is difficult to accept that NDMC could withhold sanctioning of plans on account of any illegal encroachment by another party on Government land adjoining the leased premises.

38. As indicated hereinbefore, it is clear that the petitioner is not in a position to remove the encroachments made by respondent no. 3 on Government land; therefore, it cannot be called upon to do so. However, the petitioner is willing to pay such penalty/damage charges as may be imposed by L & DO till the encroachment is removed.

39. In view of the aforesaid, it would be necessary for the L & DO to reconsider the petitioner's request for grant of NOC, without any condition for removal of encroachment. There is also a dispute between the parties whether the unauthorised construction raised on the leased premises still continues to exist; the petitioner asserts that the same have been removed but according to the L&DO, 76 square feet of unauthorised construction still exists on the leased premises. It would be appropriate if the said issue is first considered by the L & DO.

40. In view of the above, I direct the L&DO take a fresh decision regarding grant of NOC keeping in view the observations made herein and after giving the petitioner an opportunity to be heard. In the first instance, the petitioner shall appear before the Office of the L & DO on 13th June, 2016 at 03:30 p.m. On the said date, the L & DO shall provide the details as to the alleged unauthorised construction on the demised premises to the petitioner. The L&DO shall take an informed decision and communicate the same to the petitioner within a period of two weeks thereafter.

41. In the event the NOC is issued by the L & DO, the Chief Architect, NDMC will re-examine the sanctioned plans and communicate its decision within a period of one week thereafter.

42. It would be open for the concerned authorities to take steps for removal of encroachment made on Government Land in accordance with law and the petitioner shall fully cooperate in the same.

43. The petition is disposed of in the aforesaid terms. Pending application also

stands disposed of.

44. Dasti under the signature of Court Master.