* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: February 8, 2007
12

\+ W.P.(C) 2406/2004 & CM No 2244/2004

M/S SMITA INDUSTRIES ..... Petitioner
Through Mr. A.S. Chandhiok, Senior Advocate with Mr. Maneesh Goyal and Ms. Swati, Advocates

versus

D.D.A. ..... Respondent
Through Mr. J.M. Sabharwal, Senior Advocate with Ms. Sangeeta Chandra and Mr. Ranjeet Kumar Jha and Mr. S.K. Sabharwal, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER

: Dr. S. Muralidhar, J. (open court)

1. This writ petition is directed against the order dated 27.5.2002 passed by the Deputy Director (Industrial), Delhi Development Authority ('DDA') cancelling the sub-lease in favour of the petitioner here in respect of plot No. B-II/8, Mohan Cooperative Industrial Estate, New Delhi.

2. On 8.4.1981 a tri-partite perpetual sub-lease was executed between the President of India ('Lessor') of the first part, the Mohan Cooperative Industrial Estate Limited ('Lessee') of the second part,

and the petitioner here ('Sub lease') of the third part in respect of the property in question. The relevant clauses of the said deed of perpetual sub-lease reads as under:

> “6 (a) The sub Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot in any form or manner, benami or otherwise, to a person who is not a member of the lessee.
>
> (b) The sub-lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot to any other member of the lessee except with the previous consent in writing of the lessor which he shall be entitled to refuse in his absolute discretion.
>
> Provided that, in the event of the consent being given, the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the industrial plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.
>
> Provided that the Lt. Governor reserves the right to resume any plot or part thereof on payment of reasonable compensation which may be required for the development of the area like laying of sewerage, Trunk services, electric and telephone wires and water supply lines etc. or such by such other purposes, which may be deemed to public and general utility.
>
> Provided that, in the event of the sale or fore closure of the mortgaged or charged property, the lessor shall be entitled to claim and recover the fifty per cent of the unearned increase shall be a first charges, having priority over the said mortgage or change. The decision of the lessor in respect of the market value of the said industrial plot shall be final and binding on all parties concerned.

Provided further that the lessor shall have the preemptive right to purchase the mortgaged shall have the preemptive right to purchase the mortgaged or changed property after deducting fifty per cent of the unearned increase as aforesaid.

.....

14. The sub lessee shall not without the written consent of the lessor use or permit to be used the industrial plot or any building thereon for residence or for carrying on any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of carrying on the manufacturing process or running the industry of or such other manufacturing process or running the industry of **Item As per Master Plan** or such other manufacturing process or industry as may be approved from time to time by the Chief Commissioner or do or suffer to be done therein any act or thing whatsoever which in the opinion of the lessor may be a nuisance, annoyance or disturbance to the lessor, lessee and other sub-lessees and persons in the neighbourhood.

Or any unforeseen expenditure to be made hereinafter by the lessee on any item of development to be carried out in terms of clause III of the Agreement or the instructions issued by the Lt. Governor or the directions given by the local bodies in this behalf.

Provided that, notwithstanding anything contained herein to the contrary, the Lessor in his absolute discretion or the Lessee with the prior consent in writing of the lessor, may, without prejudice to the right of re-entry as aforesaid, waive or condone breaches, temporarily or otherwise, on receipt of such amount by the lessor or by the lessee on behalf of the lessor and on such terms and conditions as may be determined by the lessor and the lessor or the lessee whoever may be entitled may also accept the payment of the said sum or sums or the rent which shall be in arrear as aforesaid together with interest at the rate of six percent per annum. The amounts for waiver or condonation received by the Lessee from the sub-lessee shall be paid forthwith by the lessee to the lessor subject to such deductions as the lessor may, in his absolute discretion allow to be retained by the lessee."

3. On 26.8.1998, a show cause notice was issued to the petitioner by the DDA stating that a site inspection had been carried out which had revealed the following:

> "1. You have sold out the plot to Sh. Sanjay Jain.
>
> 2. You have sub-letted the premises to M/s LG unauthorisedly.
>
> 3. Premises is being misused by M/s. LG as godown of electronic items. No industrial activities were ....during inspection.
>
> which is/are contrary to the terms and conditions of auction/allotment and thereby you have committed the breach of the clause (s) II (5-a) (6a)(b) and (14) of the auction/allotment."

4. The last portion of the said show cause notice reads as under:

> "Now, therefore, take notice that in case of your failure to remove the above said breach(s) within 15 days from the issue of this notice, action for cancellation of Auction bid/allotment in respect of the plot referred to above will be initiated without further notice to you."

5. The petitioner replied to the show cause notice dated 26.6.1998 denying the allegation that it had committed breach of clauses 6(a) and (b) and asserted that it was still "in possession and control of the above mentioned plot as contemplated in clause 6 (a) and (b)." As regards the allegations of breach of clause 14, the petitioner's reply was:

> "The premises are being used for warehousing/storage of electronic goods along with their repair and related assembly, loading/unloading, and dispatch by Road Transport which do not constitute any breach of clause 14 of the sub-lease deed and are integral part of any service industry. In fact the above activity is perfectly legal and is allowed as per Master Plan of Delhi notified

> by Ministry of Urban Development notification S.0.606 (E) dated 1.8.1990.
>
> Also M.C.I.E. is allotted M status which clearly sates that storage, godown and warehousing are permissible and given as S.No. 020 in sub-clause 8(2) of Delhi Master Plan (Photocopy attached).
>
> In view of the above the plot in question is being used as per Master Plan of Delhi and there is no breach of any terms of the sub-lease. In fact as per letter of Master Plan department letter no. F3(29)/63-MP dated 3.10.69 written (photocopy attached) from the office of Additional Secretary DDA to the society Mohan Cooperative it was clearly clarified that "Warehousing for the purposes of land use which includes industrial use". Therefore, both warehousing and industrial use are synonymous to each other and would include each other was decided by the DDA way back in 1960's."

6. Another letter was issued on 11.9.1998 by the DDA to the petitioner seeking attested copies of income tax and sales tax returns, assessment orders for the last three years, M.C.D. Licence, water bill and latest electricity bill. The petitioner replied to this on 30.9.1998.

7. Thereafter, on 27.5.2002 the impugned order was passed by the DDA cancelling the sub-lease. The relevant portion of the said order reads as under:

> "And whereas show cause notice on account of the aforesaid breaches under clause II (5) (II), (6) (a & b) & II 14 were issued to you on 30.3.1998, 26.6.1998 and 23.12.1999. Neither your reply dated 27.7.1998 to the show cause notice dated 23.6.1998 was found to be satisfactory nor you have removed the aforesaid breaches in spite of the opportunity given to you.
>
> Now, therefore, the sub lease of the aforesaid plot has been determined by the lesser/Lt. Governor, Delhi vide his order dated 9.5.2002 for violation of the aforesaid clauses of the lease deed. Your occupation over the aforesaid premises has become unauthorized.
>
> You are, therefore, requested to hand over

> the possession of the said premises along with superstructure standing thereon tour Jr. Engineer on 2.6.2002 at 11.00 A.M. failing which proceedings under the provisions of Public Premises (Unauthorized Occupant Act, 1971) shall be initiated against you and all other occupants for eviction from the aforesaid public premises."

8. By an order dated 24.2.2004 while directing the notice to issue to the writ petition, this Court stayed the operation of the order dated 27.5.2002. In reply to the writ petition, the DDA has stated that the inspection of the premises taken place on 13.6.1996 and 11.2.1998 by the Field Staff which had discovered the breach referred to in the show cause notice. As regards the breach of clause 14 it is averred by DDA in its reply affidavit that "at the time of inspection it is noticed that no industrial activities have been carried out and the premises has been sub letted (sic) to M/s. LG Electronic. No industrial activities have been carried out by the sub-lessee. The petitioner has violated the terms and conditions of perpetual lease deed and the plot has been sold to Sh.Sanjay Jain."

9. Mr. A.S. Chandhiok, learned senior counsel appearing for the petitioner submits that the impugned order gives no reasons at all for the conclusion it records to the effect that the petitioner had violated the terms and conditions of the sub-lease. He points out that the reference in the impugned order to the violation of clause II (5) of the sub lease, which requires the petitioner to construct an industrial building, did not form part of the original show cause notice. In any event, it was not the case of the DDA that the said clause had been violated. The impugned order, according to him does not deal with the petitioner's reply to the show cause notice where the petitioner had specifically denied any breach of clauses 6 (a & b) as well as 14 of

the sub lease. Further, the impugned order makes a reference to an order dated 9.5.2002 passed by the Hon'ble Lieutenant Governor (LG) which the latter had determined that there was a violation of the sub-lease. A copy of the said order had not been enclosed to the impugned order or given to the petitioner till date. Mr. Chandiok submits that the impugned order suffers non-application of mind and being a non-reasoned order is in violation of the principles of natural justice. Mr. Chandhiok, also refers to the relevant provisions of the Master Plan foe Delhi (MPD) where the use Zone M-1 which covers the case of the petitioner, contemplates the use of the premises for storage purposes. He urges that since this use of the premises is not in violation of the Master Plan there was no violation of clause 14 of sub lease.

10. Mr. J.M. Sabharwal, learned senior counsel appearing for the DDA states that the impugned order dated 27.5.2002 is self-explanatory and contains the reasons why the respondent DDA sought to cancel the sub-lease. He further states that there is no requirement of enclosing a copy of the order dated 9.5.2002 passed by the LG and that in any event the petitioner made no request for being supplied a copy of the said order. According to him, it was for the petitioner to show that it had either not sold the premises in question or sub-let the premises. Since the petitioner failed to do so, the violation of clauses 6 (a) and (b) of sub-lease stood established. The violation of clause 14, according to Mr. Sabharwal, was admitted in the reply of the petitioner to the show cause notice. Mr. Sabharwal submits that the provisions of Master Plan only postulates a permissive user and it is not automatic that premises falling within the use Zone can put to the use indicated thereunder in the MPD. The petitioner would have to apply for such permission and if such

permission is granted then the petitioner could possibly have a defence to the breach of clause 14.

11. After considering the materials on record and submissions of the counsel, this Court is of the view that the impugned order dated 27.5.2002, does not contain any reasons whatsoever for the conclusion arrived at therein that there has been a violation of the clauses of the sub-lease by the petitioner. Apart from making a reference to the contents of the show cause notice, and the fact that a reply was sent to the show cause notice, the explanation offered by the petitioner in reply to the show cause notice has neither been discussed nor dealt with. Although the impugned order refers to the LG's order dated 9.5.2002, no copy of such order is enclosed either with the impugned order or even the counter affidavit filed by the respondent. Therefore, the Court is handicapped in knowing the reasons that weighed with the LG while passing the order dated 9.5.2002 which has resulted in the cancellation of the sub-lease. On this ground itself, the impugned order dated 27.5.2002, being a non-speaking order having adverse civil consequences for the petitioner, cannot be sustained in law.

12. The grounds on which the impugned order of cancellation of the sub-lease is posited, viz. that there was a sub-lease of the premises in question to one party and there has been a transfer by way of sale to another, are mutually inconsistent and contradictory. Neither has been sought to be established by any material placed on record by the respondent DDA apart from stating that the site inspection carried out by its Field Staff revealed that the property has been sold by the petitioner to Shri Sanjay Jain and the same property has also been

sub-let by the petitioner to M/s. LG Electronics. The reasons in this regard that may have prevailed with the respondent DDA, should be self evident from the impugned order cancelling the sub-lease. Unfortunately such reasons are not to be found to be in the impugned order at all.

13. As regards the breach of clause 14 of the sub-lease in regard to use the premises for storage purposes, reliance has been placed by Mr. Chandhiok, learned senior counsel on the decision of ***Darshan Lal v. Delhi Development Authority*** 119 (2005) DLT 440 which in turn to a earlier decision of this Court in ***Rajandheer (India) Pvt. Ltd. v. Delhi Development Authority*** 109 (2004) DLT 442. Both these decisions refer to provisions of the MPD that stipulate storage, godown and warehousing as permissible uses in the Use Zones, including M-I, where the petitioner here is located. Be that as it may, where the clause 14 of the sub-lease itself incorporates by way of a reference, the MPD and where the petitioner in its reply had specifically denied the contention of the respondents and asserted that certain clauses of the MPD permit the user of the premises for warehousing and storage, it was incumbent on the respondent to deal with the said explanation and give reasons why such explanation cannot be accepted. The impugned order is completely silent on this aspect. Even the counter affidavit filed before this Court does not advert to it, although it is settled law that a counter affidavit cannot substitute the reasons for a decision which have to be found in the order communicating such decision. Also, it appears that even if there was such breach, it could have been compounded by either requiring the petitioner to remove such breach or apply for permission, and consider that application in accordance with law. Instead, the DDA

has taken the extreme step of cancelling the sub-lease without giving any reasons for its decision. Lastly, the Court is constrained to note that the decision was taken nearly four years after the show cause notice was issued. No reasons are forthcoming for this delay. All these are factors that contribute to the arbitrariness of not only the decision making process but the decision itself.

15. For all the above reasons, the impugned order dated 27.5.2002 is unsustainable in law and is hereby quashed. The writ petition is allowed with costs of Rs.5,000/- which shall be paid by the DDA to the petitioner within a period of four weeks from today.

Dasti.

S. MURALIDHAR, J

FEBRUARY 08, 2007
rk