

Restrictive Orders on Commercial Land: A Possible Interpretation

Priyesh Sharma¹, Kanika Mangal²

Assistant Vice President - Legal, Nucleus Office Parks, a Blackstone Company (India)

priyesh.sharma[at]nucleusofficerparks.com

Assistant Manager, Nucleus Office Parks, a Blackstone Company (India)

Abstract: *Interim restrictive orders are common in all judicial systems across the jurisdictions. More so in case where real properties are involved. Whereas the intent is to safeguard's a (valid) claim of a claimant, at the same time a need to balance to avoid any unintended hardship to the owner and occupants cannot be more emphasised.*

Keywords: restrictive order, non - alienation, commercial purpose, leasing, judicial interpretation

1. Introduction

Interpretation of statutes has always been an interesting area for the attorneys spread across different practise areas. I remember this as one of my favourites courses as a law school undergraduate as well. The mischief behind the "mischievous rule of interpretation" and the bona fide of the "golden rule of interpretation" are still the first ones to click my mind as a Real Estate counsel whenever I read any controversial law. Having said that that, the importance of at times sticking to the "literal rule" cannot be denied.

Far more interesting zone I believe is the interpretational issues with the judicial pronouncements. Any ambiguity in the scope of judicial orders may have a far more specific consequence on a private party than a statutory ambiguity, for which we still have a possibility of judicial clarity. Imagine, an interim adverse order against a property owner during a never - ending litigation. The kind of hardship it may cause to the owner vis a vis the need to protect the third - party claimant's possible rights is a debatable issue and entirely depends upon the genuineness of the claim and the chain of transactions involved in the title flow. Saying this, one could not imagine a crystal - clear title flow specifically in converted non - agricultural family lands.

The main purpose of this write up is to analyse the use of simple word "no alienation" vis a vis commercial land in a restrictive order of a court.

"Alienation": Scope?

The expression "alienate" is not defined in any statute, however, it is dealt with in the Law Lexicon by P. Ramanatha Aiyar, which reads as follows:

"Alienate is to transfer property from one person to another. The word "alienate" in Code of Civil Procedure, 1908, Schedule III, para 11 is used ejusdem generis with the words preceding it, namely, mortgage, charge and lease, and manifestly contemplates a transfer which would have a present effect....."

The relevant provisions of the property law [1] in India defines "transfer of property" as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and "to transfer property" is to perform such act.

Now let's try and analyse the "no alienation order" considering above and rules of interpretation. At the first instance it gives the impression that no movement or transfer of land or property is permissible till the time this order is active. Let's go one step ahead, most of the commercial buildings are for leasing purpose and are occupied with "leasehold rights". So, an obvious question is the order intended to restrict the transfer or "ownership" only or even the "leasehold" or "license" rights? At this stage, let me remember the first rule of interpretation i. e., a no brainer "literal rule". Using this, my inference would be a clear "No" for any movement of interest, whether ownership or leasehold, and a conventional view on maintain the status quo till the order gets nullified.

2. Interpretation

But is that the intention? Are we taking the words too narrowly? Certainly, hard to believe that the intention of the judiciary could be to impact a bonafide lessee/ tenant or in fact commercially impact the owner till the time dispute is going on - which unfortunately in our system is an indefinite process. Let's try and use the "Golden rule" here. The rule requires the intention and "purpose" behind the law to be given effect too. Here the possible purpose in such scenarios is to protect the interest of any claimant on the title of the property. Would any benefit or safeguard be extended by restricting the commercial activities on the premises during the pendency of the litigation? Certainly, No. the interpretation clearly indicates a non - inclusion of commercial activities including leasing or creation of leases or transfer thereof even if the order is active.

Now let's go even a step ahead and try to find the mischief the law is trying to solve. In my opinion the same is any unwarranted transfer of disputed property to any hands and

thereby increasing the risks of transferring back the ownership to the rightful owner. With this rule, the apt interpretation would be to restrict the application only to transfer of ownership on the disputed property, i. e., the land (and not even the building). While giving due regards to this intent, a creative legal restructuring by way of business transfer or asset transfer with no change in ownership of land would till be perfectly valid. Also, any change at the shareholding level anyway is far away from the intended scope of this temporary restriction as the owner legal entity would remain unchanged. Therefore, a wide restrictive order which at the first sight seemed like a big hardship to the owner gets diluted to a reasonable restriction to protect any just claim of a third party.

3. Exceptions: Judicial Treatment

Keeping the above logic aside, there are exceptions and different possible views. For example, the Kerala High Court in the case of *M. C. Thomas vs. Sree Emoor Bhagavathy Devaswom* [2] discusses if the term “alienation of property” covers “leases”. It highlights that the term “alienation of the property” has not been defined under the TP Act. However, the heading of Section 10 of the same Act [3] is “condition restraining alienation”, and the body of the section refers to alienation as “**parting with or disposing of**” a person’s interest in the property. It further held that, “*Creation of a lease by a person having absolute title is a transfer. Transfer of his rights by such lessee is also a transfer. In both cases, there is alienation - - alienation of the rights of the transferor.*” In view of the above, leasing of the disputed property will mean alienation of such property.

4. Conclusion

To conclude, the logic, intention and a just interpretation probably gives a different colour altogether to a non - alienation restriction. However, depending upon the circumstances involved and merit of the case, there could be a requirement of a stricter interpretation which might find support in judicial precedents as well. Hence, its advisable to go by the “purpose” related interpretation and try to get the orders set aside (as the obvious choice for the owner) or at least seek a clarificatory order from the court to avoid any ambiguity and probable nuisance from the private parties involved. From the litigating party’s perspective also its always beneficial to have a clarificatory order to put boundary on the scope of restrictions and safeguards available. Needless to say, the safeguards should be for the limited safeguarding purpose and not to extend any additional or disguised benefit.

References

- [1] (India) Transfer of Property Act of 1882, Section 5
- [2] (OP (C). No. 181 of 2011)
- [3] (India) Transfer of Property Act of 1882