

REPORTABLE

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

+ WRIT PETITION (CIVIL) NO. 9937 OF 2005

Date of Decision : April 23rd, 2008.

M/S.PANACEA BIOTEC LTD.

.... Petitioner.

Through Mr. Ravinder Sethi, Sr.Advocate
with Mr.Maneesh Goyal, Mr. Kamal Nain,
Mr.P.N. Chandran and Mr.Puneet
Sharma, Advocates.

VERSUS

D.D.A. & ANR.

.... Respondents.

Through Ms. Alpana Poddar, Advocate.

%23.04.2008

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be
allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported
in the Digest ? YES

SANJIV KHANNA, J:

1. The petitioner-M/s.Panacea Biotech Limited has filed the present Writ Petition for restoration of the Sub-lease Deed dated 17th April, 1978 relating to property no. B-1 Extension, A-27, Mohan Cooperative Industrial Estate, New Delhi (hereinafter referred to as 'property', for short) and for quashing of notice/order dated 19th October, 2000 issued by Delhi Development Authority (hereinafter referred to as DDA, for short) cancelling the Sub-lease Deed. Another prayer made in the Writ Petition is for issue of Writ of Mandamus directing the respondent-DDA to convert "leasehold rights" in the 'property' into freehold rights.

2. The "property" was originally allotted to one, Mr.Ram Prakash under a perpetual Sub-Lease Deed dated 17th April, 1978. The petitioner, which is a company incorporated under the Companies Act, 1956 is a subsequent purchaser who bought the property in July 1995. The question relating to transfer of the "property" without permission of DDA and contrary to the terms of the sub-lease is today of academic interest in view of the conversion scheme launched by DDA in 2003, under which leasehold right in a property can be converted into freehold right on payment of conversion charges and penalty. Averments to this effect have been made in paragraph 8 of the Writ Petition to which there is no specific denial in the counter affidavit filed by the DDA. Learned counsel for the petitioner in this regard had also drawn my attention to decision of this Court in ***J.K. Bhartiya (Mr.) and others versus Union of India***

and another reported in 2006 (I) AD (Delhi) 408, wherein it has been held that conversion is permitted even in the case of re-entered properties on the ground that there was transfer of property without prior permission and contrary to the sub-lease.

3. The substantive issue involved and raised in the present case relates to the question whether there is violation of Clause II Sub-Clause 14 of the Sub-lease deed. The said Sub-Clause reads as under:-

“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 **as per master plan for Delhi except the Industries emitting excessive smoke, fame nuisance, cold storage, refrigerator, fruit canning and preservation** 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.”

4. I may also note here that Sub-Clause 5 of Clause II of the Sub-lease deed also states that the sub-lessee shall construct an industrial building for carrying on approved manufacturing process or industry. The above-mentioned clauses of the sub-lease deed become pertinent as vide letter dated 19th October, 2000, the erstwhile owner, Mr. Ram

Prakash was informed that the Sub-lease deed was cancelled on account of transfer without prior permission and for violation of Sub-Clause 14 of Clause II. I may mention here that the aforesaid letter is silent and does not state how and in what manner Sub-Clause 14 of Clause II of the Sub-lease deed was violated. It does not specifically state the activity undertaken in the 'property' resulting in violation of Sub-Clause 14 of the Sub-lease deed.

5. I may also note here that the cancellation order dated 19th October, 2000 refers to show cause notices dated 17th November, 1997, 15th July, 1998 and 20th May, 1999. It is the case of the petitioner that these show cause notices were never served. Statement in this regard has been specifically made in the Writ Petition. It is stated that notices were never served on the petitioner or the premises in question. In the counter affidavit filed by DDA, it is stated that the aforesaid show cause notices were issued and were also served through the process server. Service report of the process server has not been enclosed and filed with the counter affidavit nor the service report was produced in the Court. Section 43 of the Delhi Development Act, 1957 (hereinafter referred to as the Act, for short) provides for service of notice in the following manner :-

“43. Service of notices, etc.—(1) All notices, orders and other documents required by this Act or any rule or regulation made thereunder to be served upon any person shall, save as otherwise provided in this Act or such rule or regulation, be deemed to be duly served—

(a) where the person to be served is a company if the document is addressed to the secretary of the company at its registered office or at its principal office or place of business and is either—

(i) sent by registered post, or

(ii) delivered at the registered office or at the principal office or place of business of the company;

(b) where the person to be served is a partnership, if the document is addressed to the partnership at its principal of business, identifying it by the name or style under which its business is carried on, and is either—

(i) sent by registered post, or

(ii) delivered at the said place of business;

(c) where the person to be served is a public body or a corporation or society or other body, if the document is addressed to the secretary, treasurer or other head officer of that body, corporation or society at its principal office, and is either—

(i) sent by registered post, or

(ii) delivered at that office;

(d) in any other case, if the document is addressed to the person to be served and—

(i) is given or tendered to him, or

(ii) if such person, cannot be found, is affixed on some conspicuous part of his last known place of residence or business, if within the [National Capital Territory of Delhi] is or is given or tendered to some adult member of his family or is affixed on some conspicuous part of the land or building to which it relates, or

(iii) is sent by registered post to that person.

(2) Any document which is required or authorised to be served on the owner or occupier of any land or building may be addressed “the owner” or “the occupier”, as the case may be, of that land or building (naming that land or building) without further name or description, and shall be deemed to be duly served—

(a) if the document so addressed is sent or delivered in accordance with clause (d) of sub-section (1); or

(b) if the document so addressed or a copy thereof so addressed, is delivered to some person on the land or building or, where there is no person on the land or building to whom it can be delivered, is affixed to some conspicuous part of the land or building.

(3) Where a document is served on a partnership in accordance with this section, the document shall be deemed to be served on each partner.

(4) For the purpose of enabling any document to be served on the owner of any property the secretary to the Authority may by notice in writing require the occupier (if any) of the property to state the name and address of the owner thereof.

(5) Where the person on whom a document is to be served is a minor, the service upon his guardian or any adult member of his family shall be deemed to be service upon the minor.

(6) A servant is not a member of the family within the meaning of this section.

6. In view of the failure of the respondent to establish service of notices, I have to hold that the petitioner appears to be correct that the show cause notices were never served.

7. However, there are other grounds as well on which I feel that the cancellation order dated 19th October, 2000 is liable to be quashed and matter remanded for fresh consideration.

8. Sub-Clause 14 of Clause II of the Sub-lease deed quoted above, permits the 'property' to be used for carrying on “*manufacturing process*” or running of an “*industry*” as permitted under the Master Plan except industries emitting excessive smoke, causing nuisance, or involved in cold storage, refrigeration, food processing and preservation. It also stipulates that the property can be used for other manufacturing process or industry as may be approved from time to time by the Chief Commissioner but which do not cause nuisance, annoyance or disturbance to persons in the neighbourhood can also be permitted. The

Sub-lease also states that permission to carry on non-permitted manufacturing process or industry can be granted on the condition of payment of additional premium and rent at the discretion of the superior lessor.

9. It is the contention of the petitioner that the 'property' in question was/is pre-dominantly used for the purpose of production of computer software, programming and for providing Information Technology enabled services and only part of the premises was being used for storage/godown and for office purposes. Pursuant to the Order of this Court dated 5th March 2007, a joint inspection was carried out on 26th March 2007. A joint inspection report is filed as per which basement was found to be used for storage, ground floor was found to be used for software programming (computers installed) and the first and second floors were found to be used for office purposes with computers installed on the first floor. An Industrial licence was also shown. The inspection report further states that the nature of trade carried out by the occupier was computer installed software programming.

10. In this regard, I may refer to a decision of this Court in ***Rajandheer (India) Pvt. Ltd versus DDA*** reported in 109 (2004) DLT 442, wherein Sub-Clause 14 had come up for consideration. It was held that the first part puts a clear restriction, on use of the plot or building for residence or for carrying on of a trade or business without consent of the lessor. Reference was made to the Master Plan of Delhi 2001 along with the

Development Code as was applicable. It was mentioned that the Development Code prescribes select use of premises in each use zone, which determines the nature of industrial activities that were permitted. Annexure III of the Development Code classifies industries for the Development Code and use zone and a reading of 'Use Activities' shows that apart from manufacturing and industrial activities, a part of the premises could be kept and used as residential flats, administrative offices, sale outlets. Keeping in view the use permitted and allowed under the Master Plan of Delhi, 2001 and with a reference to Sub-Clause 14 of the Sub-lease deed, it was accordingly observed as under :-

“ 6. In view of the aforesaid, in order to appreciate whether a particular property is being put to use contrary to the Master Plan, an inspection must take place to find out as to the extent of the premises being put to non-manufacturing and non-industrial use, since part of the premises can be put to such use. This has not been done in any of the cases. Really speaking, the test is of the predominant purpose of the use of the plot with permission to carry on the other incidental activities as prescribed in the use zones. There is also no doubt that mere carrying on of a trade or business is prohibited under the terms of the sub-lease without prior permission of the lessor. The respondent has filed a chart on the basis of the counter affidavits filed to show that show-cause notices were issued from time-to-time, but in most cases, there was no reply or the reply was not satisfactory.

7. In my considered view, the petitioners are also to be blamed for the position which has emerged in view of the fact that in a number of cases, there was no reply sent at all.

However, the petitioners have disputed the receipt of the show-cause notices itself. This aspect has to be considered along with the obligation on the part of the respondent to inspect the premises to find out predominant user of the premises. The petitioners have justified the user as a recognised activity along with the corresponding Development Code.

8. In my considered view, it is, thus, necessary that the respondent must examine each of the cases after due inspection of the properties to reconsider the matter within the parameters of the Development Code before it comes to the conclusion whether the particular user in question is or is not in violation of the Master Plan and consequently in violation of the sub-lease deed. In view thereof, the impugned orders of determination of the sub-lease deeds cannot be sustained.”

11. The Cancellation order dated 19th October 2000, issued in this case is totally silent and does not meet the requirement specified in the above judgment. In this regard, the “finding” in the said termination letter are as under:-

“AND WHEREAS show cause notices on account of the aforesaid breaches under clauses II 6(a) & (b), II (12), (13) and II (14) of the sub-lease deed were issued to you on 17.11.97, 15.7.98 and 20.5.99. But you have not given any response even after opportunity given to you.

Therefore, the sub-lease of the aforesaid plot has been determined by the lessor/L.G. vide his order dated 4.7.2000 for violating of the aforesaid clauses of the sub-lease deed, your occupation over the said premises has become unauthorisedly. You are now requested to handover the possession of the said premises along with super structures standing thereon to our Asstt. Engineer on 7/11/2000 at 11.00 AM

failing which proceedings under the provisions of public premises unauthorised occupant Act 1971 shall be initiated against you and all the occupants of eviction from the aforesaid public premises.”

12. There is no discussion or reasoning and the order communicating the termination of the Sub-lease deed is cryptic and a non-speaking order. Cancellation of the Sub-lease deed is an action that affects substantial rights of parties and is penal in nature. Order communicating cancellation of Sub-Lease deed should be elaborate and clearly specify the reasons for the said cancellation.

13. During the course of hearing, it was submitted by the learned counsel for the DDA that software development and Information Technology enabled services cannot be categorised as a “manufacturing process” or “industry” and therefore there is no reason or cause to remand back the matter. It was stated that in view of the admitted facts that the property was/is being used for software development termination of the Sub-lease deed is justified.

14. Learned counsel for the petitioner has drawn my attention to Notification dated 13th July, 1999 issued by the Lt. Governor approving a proposal for addition of sub-para (5) in para (6) of the existing guidelines for land management industrial estates. It stipulates that units involved in software development and Information Technology enabled services would be exempt from the purview of the said Rules and even sub-lease charges are not required to be paid. The said Circular is not

directly on the point but indicates that software development and Information Technology enabled services are permitted and categorised as an industrial activity. Master Plan of Delhi 2001 did not specifically categorise 'computer software, I.T. enabled services' under any heading. The said Master Plan was silent. It is apparent that the Master Plan was enforced in the year 1990 and at that time software industry and Information Technology enabled industry was more or less treated as part and parcel of electric/electronic industry. Classification of industry was done in Annexure III and manufacture of electronic goods was categorised in Group G-1 at serial No. 30. Similarly, under Group A at serial Nos. 2 and 3 the Master Plan listed Assembly and Repair of electronic and electrical gadgets and goods respectively.

15. "Manufacturing process" or "industry" are plain words which are not ambiguous or obscure and have to be interpreted in a manner they are normally and reasonably understood by a common man. Object and purpose behind Sub-Clause 14 has to be kept in mind. The object and purpose is to permit and allow a Sub-lessee or occupant to carry on manufacturing process or industrial activity on the plot with liberty to decide and chose, nature of activity which the sub-lessee wants to undertake. Sub-Clause 14 under the Sub-lease permits use of the 'property' for approved manufacturing process or industry. The word "approved" therefore requires industry to comply with the Zonal Development Plan and the Development Code. Industry must be one which is permitted and allowed in the said area as per the Zonal

Development Plan and Development Code. It is obvious that the sub-lessee/occupant has a choice to select any of the industrial or manufacturing activities permitted in the said area and to change from one activity to the other.

16. The contention raised by the respondent is that software development and Information Technology cannot be regarded as manufacturing process or industry. It is not possible to accept the said contention. The Black's Law Dictionary defines "Industry" as "Any department or branch of art, occupation or business conducted as a means of livelihood or for profit: especially one which employs much labour and capital and is a distinct branch of trade." Industry can be defined as the habitual activity, either bodily or mental, to manufacture by way of processing, assembling and creating goods or saleable commodity. Software development is done with the aid and help of manpower. It results in creation of a product which may be intangible initially but when is transferred to floppies, CD roms, punch card, magnetic tapes, etc, it becomes a marketable commodity or goods. It is saleable and has value even in it's intangible form. Sub-Clause 14 of the Sub-lease deed has to be interpreted in a reasonable manner and with sufficient flexibility and should not be given a very strict interpretation as to prevent the Sub-lessee from using the property in a manner he wants. Computer software is a marketable product and are 'goods' under Article 366(12) of the Constitution of India as held in **TATA**

Consultancy Services versus State of Andhra Pradesh reported in (2005) 1 SCC 308. Use of intellectual rights and resources which are otherwise intangible to produce a product can be regarded as a manufacturing process/activity for the purpose of Sub-Clause 14. Sub-Clause 14 of the Sub-lease deed draws a distinction between a property used for “running of industry” or “carrying on manufacturing process” and a property being used for “carrying on trade or business”. Development of software is not equivalent to carrying on trade or business. Trading involves sale and purchase of commodities and excludes development or manufacturing process which results in creation of a new product. The term “business” is very wide, and almost synonymous with the term “trade”, but as used in Sub-Clause 14 it has to be given a restrictive meaning. It has been used as *contra* to the expressions “carrying on manufacturing process or running of an industry”.

17. I may mention here that as per the Master Plan of Delhi, 2021 computer hardware and software industry and industries doing system integration with computer hardware and software have been regarded as an industrial activity. Reference can be made to the relevant portion of Clause 7.7 which reads as under:-

“7.7 NEW INDUSTRIAL AREAS

Development of new industrial areas in Greenfield areas of NCT of Delhi should be largely planned for the purpose of relocation of existing industries and for the development of a

limited type of new industries for the following purposes :

(a) x x x x

(b) Green field sites for Hi-tech industries.

New industrial activity in the NCT of Delhi should be restricted to hi-tech areas as given below :-

- i. Computer hardware and software industry and industries doing system integration using computer hardware and software.
- ii. Packaging.
- iii. Industries integrating and manipulating the interfaces of the computers and telecom facilities.
- iv. Industries catering to the information needs of users by providing databases or access to databases spread throughout the globe.
- v. Industries providing the facilities for sophisticated testing of different or all components of the information technology.
- vi. Electronic goods.
- vii. Service and repair of TV and other electronic items.
- viii. Photo composing and desktop publication.
- ix. TV and video programme production.
- x. Textile designing and fabric testing, etc.
- xi. Biotechnology.
- xii. Telecommunications and enabling services.
- xiii. Gems and jewellery.”

18. A reading of the said Clause indicates that under the new Master Plan of Delhi 2021, a limited type of new industries have been permitted and these include computer hardware and software industries which are regarded as hi-tech areas. Contention of DDA in their affidavit dated 26th September, 2007 that under the Master Plan of Delhi 2001 computer software was not considered as an industry and was not permissible in industrial premises and under the Master Plan of Delhi 2021, computer software is permissible only in new industrial areas and is to be restricted to hi-tech areas, is to be rejected. It cannot be said that Master Plan of Delhi 2001 did not consider development of computer software to be an industry or involving manufacturing process. Further interpretation given to Clause 7.7 of Master Plan of Delhi 2021 by DDA is incorrect. The said Clause stipulates that new industrial activity in Delhi would be restricted to hi-tech areas like computer software industry and also industries involving system integration using computer hardware and software. The term "hi-tech area" is used for the purpose of referring to the nature of industry rather than expanding the scope of the terms industry or manufacturing process by deeming fiction. Certain other industries are also mentioned.

19. The lease deed in question is a statutory document prescribed under the Nazul Rules. Nevertheless while interpreting its clauses, one has to keep in mind that the lease is for a term of 99 years and therefore the clauses have to be interpreted considering changes and

development that take place over a period of time and construction of the words used in the Sub-lease deed has to be alive and one which takes into account relevant changes that take place with new technology and need and requirement of the society. The lease deed has to be read in a dynamic manner and the expressions used have to be understood by updating construction and meaning to be assigned to the expressions used lest they become totally outdated and ill-tuned with the ground reality. The words have to be interpreted in accordance with the current understanding and not in a theoretical manner. If reality requires adjustment and liberal interpretation of expressions used in the Sub-lease deed, they should be interpreted liberally. [On the question of updating construction of words used in the statute, see observations of the Supreme Court in ***Commissioner of Income Tax versus Podar Cement*** reported in (1997) 5 SCC 482].

20. Though Clause 7.7 of the Master Plan of Delhi 2021 has not been specifically given retrospective or retroactive effect, the aforesaid clause reflects the legislative intent that development of software was always treated as an industry or a manufacturing process. Clause 7.7 of the Master Plan of Delhi 2021 is explanatory in nature and has clarified doubt or ambiguity (if any) in what was implicit earlier. It cannot be said that the intention behind Clause 7.7 of the new Master Plan of Delhi 2021 is to expand the meaning of the term “manufacturing process” or

“industry”, when it stipulates that computer hardware and software development is an industry. The provision is declaratory in nature and seeks to only clarify the existing position. In ***Zile Singh versus State of Punjab and others*** reported in (2004) 8 SCC 1 it has been observed as under :-

“14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is “to explain” an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (*ibid.*, pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (*Statute Law*, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general

scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to “explain” a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General v. Pougett* (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p.134)

“The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;” (Price at p. 392)

17. Maxwell states in his work on *Interpretation of Statutes* (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it “may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it” (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the “inhibition of the rule” is a matter of degree which would “vary *secundum materiam*” (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be

prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).”

21. In view of the above, the impugned Order dated 19th October, 2000 is quashed with liberty to the respondent-DDA to issue a fresh show cause notice clearly elucidating and pointing out the irregularities and violation of Sub-Clause 14 of Clause II of the Sub-lease deed. The petitioner will be given opportunity to file reply and thereafter a speaking order will be passed dealing with the defence raised by the petitioner. In case the petitioner is still aggrieved he will be at liberty to challenge the said order. All other issues and questions are left open.

22. Writ Petition is accordingly disposed of. In the facts and circumstances of the case there will be no order as to costs.

(SANJIV KHANNA)

JUDGE

APRIL 23rd , 2008.

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