IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 28.07.2015

CWP No.13571 of 2015

M/s Smagh Bhullar ..Petitioner

Vs.

Punjab State Agriculture Marketing Board, Punjab & others ..Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Arun Takhi, Advocate, for the petitioner.

Mr. J.S.Toor, Advocate, for the respondents.

HEMANT GUPTA, J.

Challenge in the present writ petition is to an order dated 26.06.2015 (Annexure P-4), whereby Memorandum of Understanding (MOU) (Annexure P-1) was cancelled.

Respondent No.1-Punjab State Agriculture Marketing Board (for short 'the Board') invited tenders on 20.11.2013 for out-sourcing the "Pack House" situated in New Grain Market, Sabzi Mandi, Phagwara Road, Hoshiarpur. Pursuant to the selection of the petitioner – firm, a Memorandum of Understanding (Annexure P-1) was entered between the parties. As per the said MOU, the contract period was 5 years and the petitioner was to deposit performance security of Rs.5 lacs by way of Bank Guarantee. The petitioner – firm was also to deposit four months advance lease money and that if tenderers fails to deposit lease money within time, the penalties as contemplated under Clause 8.2 of the MOU shall be imposed. The petitioner was handed over the possession of the Pack House on 14.01.2014. It is pointed out that the petitioner has deposited all the payments of lease money up to 12.05.2015, but the lease money from 13.05.2015 and the electricity bill could not be deposited due to unavoidable family circumstances. It is further pointed out that notices dated 27.04.2015, 14.05.2015, 27.05.2015 & 03.06.2015, as mentioned in the impugned order, were never served upon the petitioner, therefore, the order of cancellation of MOU and forfeiture of bank guarantee is illegal. It is also pointed out that the order in respect of black-listing of petitioner-firm for 10 years is in violation of the rules of natural justice, as no notice was served upon the petitioner in respect of such penalty of black-listing.

The petitioner invoked the writ jurisdiction of this Court after a notice was published on 04.07.2015 for giving the Pack House in question on lease without three months' notice to the petitioner. The said notice was also challenged by the petitioner in the present petition.

In the written statement, the stand of the respondents is that there is an Arbitration clause in respect of disputes arising between the parties. The petitioner was granted lease for 5 years from 13.01.2014 to 12.01.2019 at the rate of Rs.3.10 lacs for the first year. It is pointed out that MOU contemplated increase of 10% in lease money every year. The petitioner deposited the installments prior to 13.01.2015, but failed to deposit the lease money thereafter. The petitioner was served with notices, but lease money was not deposited. Still further, the Pack House is lying closed since February, 2015. The Pack House was established to provide the scientifically ripened fruits to the local citizens. By closing the Pack House, the purpose of establishment is forfeited. Even the payments of electricity and water bills were also not paid. Since the petitioner defaulted in complying with the terms of the MOU, it was cancelled.

During the course of hearing, Mr. Toor, learned counsel representing the respondents, pointed out that, in fact Sukhdeep Bhullar, an employee of the Board, is husband of the Proprietor of the petitioner-firm and he is facing prosecution for an offence under the Prevention of Corruption Act, 1988 for which FIR was lodged on 12.02.2015. A copy of the said FIR has been handed over by Mr. Toor in Court.

The argument of learned counsel for the petitioner is that lease is for a period of five years; therefore, such lease could not be curtailed without giving notice of three months. The petitioner – firm is ready and willing to deposit the arrears of lease money. Reliance is placed upon Niranjan Singh Vs. Chandigarh Housing Board & others 2015 (1) PLR 659 and Chander Kala and another Vs. Union Territory Chandigarh through its Chief Commissioner & others 22015 (1) Law Herald 549, wherein cancellation of 99 years lease in respect of immoveable property at Chandigarh was set aside on the undertaking of the lessee that they are reading and willing to pay the arrears of lease.

On the other hand, learned counsel for the respondents has vehemently argued that though the MOU uses expression 'lease', but in fact it is a license to operate cold stores and ripening chambers on payment of license fee payable monthly at annual rates. The Pack House is a facility for storage, ripening, grading, washing, packing etc. of the fruits and vegetables. Since the fruits and vegetables have a limited shelf life, any suspension of work of the Pack House defeats the purpose of establishing the same. After the lease period, the operator such as the petitioner has to handover entire facility fully operational and in good working condition. Since the MOU is for running of a plant, it is not a lease of land, but license for use of plant & machinery. Therefore, it is a case of a license and not of lease. It is contended that a lease creates interest of the lessee in the immoveable property, whereas the permission to use the plant & machinery is only a licence and the dominant purpose of the agreement was not to grant permission to use land and building but plant and machinery.

The impugned order dated 26.06.2015 points out various notices issued to the petitioner. It mentions that the petitioner was required to deposit four months advance lease money and if there is default, the petitioner was liable to pay penalty up to 30%. The relevant extract from the order reads as under:

> "Even then the Firm fails to deposit the lease money then the security will be forfeited and company will be blacklisted for ten years and same will be circulated to all the departments of Punjab State 30% Penalty amounting to Rs.34,100/- has been imposed. In this way, total Rs.1,47,767/- alongwith penalty is due on account of lease money. In this connection, vide this office letter No.Project/1208 dated 08.06.2015, a notice was issued to you and it was written that as per the condition of MOU of the Pack House set up in Sabzi Mandi, Hoshiarpur, the due lease money alongwith penalty of Rs.1,47,767/- be deposited within 7 days. But you have not deposited the lease money within the stipulated period. Therefore, as per the terms and conditions of MOU, the undersigned has full right to blacklist and to forfeit the Bank Guarantee deposited by you.
>
> Due to non-payment of lease money by you on time, the pack house being kept closed for such a time and due to non-payment of electricity and water bills, gross violation of conditions of MOU has been done. Therefore, the MOU entered into with you in order to run the pack house on lease set up at Punjab Mandi Board, Hoshiarpur is hereby cancelled. The bank guarantee deposited by you for running the pack house at Hoshiarpur is forfeited and your firm M/s Smag and Bhullar Fruit Products, New Grain Market, Phagwara Road, Hoshiarpur is blacklisted for ten years."

The MOU (Annexure P-1) describes that the Pack House consists of (i) two cold stores (2 to 10 C of 50MT capacity) approximately 350.79 cu.mtr. each cold room; (ii) six ripening chambers each of 10 ton capacity approximately 77.02 cu.mtr. each ripening chamber; & (iii) pack house, reconditioning/holding room with all required facilities approximately 1409 sq.feet. The Scope of Work is mentioned in Clause 2 of the MOU, which reads as under:

> "2. Scope of Work
>
> The 'M/s SB Fruit Products' shall be responsible for the following:
>
> (a) Procurement and installation of necessary equipments like fort lift, plastic crates, plastic pallets, hand pallet trucks etc. and other necessary facilities for efficient operations of the facility.
>
> The lease / 'M/s SB Fruit Products' shall not modify/create/add/remove any civil structure in the Facility without prior approval of PSAMB.
>
> (b) Operation, Maintenance and Management of the Facility.
>
> (c) Deployment of adequate trained staff for service, operation, maintenance and management of the Facility.
>
> (d) Undertaking recurring expenditure and all necessary activities to run and maintain the Facility and ancillary facilities.
>
> (e) Collection of revenues from the Facility."

The total amount of lease for five years is Rs.18,92,581/-, which is calculated as under:

	Monthly lease money
Cost of 1 year lease money of pack house Rs.3,10,000	25,833/- per month
Cost of 2 year lease money of pack house Rs.3,41,000	28,416/- per month
Cost of 3 year lease money of pack house Rs.3,75,100	31,258/- per month
Cost of 4 year lease money of pack house Rs.4,12,610	34,384/- per month
Cost of 5 year lease money of pack house Rs.4,53,871	37,823/- per month

Total lease money of Pack House Hoshiarpur for five years Rs.18,92,581/-
(Rupees Eighteen Lakhs Ninety Two Thousand Five Hundred Eighty One Only)

The MOU further contemplates that the Board has a right to withdraw and lease components from this project after giving three months' prior notice to 'M/s SB Fruit Products'.

Section 105 of the Transfer of Property Act, 1882 defines 'lease' to mean the transfer of a right to enjoy the immoveable property, made for a certain time, express or implied. Section 106 of the said Act prescribes that the lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice, in the absence of a contract or local law or usage to the contrary.

The question; whether the agreement to use plant & machinery alongwith building in which such plant & machinery is fixed, is letting of a building or plant & machinery, was subject matter of interpretation before the Courts. In Uttamchand Vs. S.M.Lalwani AIR 1965 SC 716, the Hon'ble Supreme Court, while examining the provisions of M.P.Accommodation Control Act, 1965, found that *Dal Mill* building with fixed machinery in sound working order is not a lease of a building, but that of *Dal Mill*. The Court examined that what was the dominant intention of the parties, when they entered into transaction. The relevant extract from the judgment reads as under:

> "12. What then was the dominant intention of the parties when they entered into the present transaction? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal Mill. It is true that the document purports to be a lease in respect of the Dal Mill building; but the said description is not decisive of the matter because even if the intention of the parties was to let out the Mill to the appellant, the building would still have to be described as the Dal Mill building. It is not a case where the subject matter of the lease is the building and alongwith the leased building incidentally passes the fixture of the machinery in

> regard to the Mill, in truth, it is the Mill which is the subject matter of the lease, and it was because the Mill was intended to be let out that the building had inevitably to be let out alongwith the Mill…….”

Later, in Dwarka Prasad Vs. Dwarka Das Saraf AIR 1975 SC 1758, the Hon’ble Supreme Court examined the lease of cinema building; as to whether such lease is an accommodation governed by the U.P. (Temporary) Control of Rent and Eviction Act, 1947. The Court examined the provisions of the Act to hold that if the dominant intention is to lease the building qua building, then the rent control law protects. But if a going undertaking such as a running or ready-to-launch and full equipped cinema house is let out, the emphasis is not so much on the building, but on the business, actual or imminent, therefore, would not be covered by such expression ‘accommodation’. The Court observed as under:

> “8. Looking at the three problems posed, unaided by the many decisions cited by counsel, we are inclined to the view that a lease of an 'accommodation' must essentially be of a building not a business or industry together with the building in which it is situated. of course, a building which is ordinarily let, be it for residential or non residential purposes, will not be the bare walls, floor and roof, but will have necessary amenities to make habitation happy. That is why the legislature has fairly included gradens, grounds and out houses, if any, appurtenant to such building. Likewise, leases some times are of furnished buildings and that is why 'any furniture supplied by the landlord for use in such building' is treated as part of the building. In the same strain, we may notice, as a matter of common occurrence, many fittings 'such as electrical fittings, sanitary fittings, curtains and venetian blinds and air-conditioning equipment being fixed to the building by the landlord so that the tenant's enjoyment of the tenement may be more attractive. The crucial point is that these additions are appurtenant, subservient and beneficial to the building itself. They make occupation of the building more convenient and pleasant but the principal thing demised is the building and the additives are auxiliary.

'Where the lease is composite and has a plurality of purposes, the decisive test is the dominant purpose of the demise.

xx xx xx

25. Respondent's counsel did try to approximate the definition in the Act to that found in the enactments with reference to which decisions in his favour had been rendered. We do not agree. To hair-split is an unhappy interpretative exercise. Here the plain intendment is to encompass leases of building only (inclusive of what renders them more congenial) but not of businesses accommodated in buildings nor of permises let out with the predominant purpose of running a business. A lease of a lucrative theatre with expensive cinema equipment, which latter pressed the lessee to go into the transaction, cannot reasonably be reduced into; mere tenancy of a building together with fittings which but make the user mole comfortable."

The aforesaid judgments were referred to by a Full Bench of this Court in a judgment reported as <u>Dalip Singh Vs. Bharwan Bai (deceased) & others 11989 (2) PLR 370</u> to hold that it is the dominant purpose of the demise, which is required to be taken into consideration. In the aforesaid case, a flour mill was found to be governed by the provisions of the East Punjab Urban Rent Restriction Acct, 1949, as it was not a building, which was leased, but a flour mill. The Bench concluded as under:

"25. We are, therefore, of the considered view that the lease in question is not covered under the definition of non-residential building as defined in the Act. We are further of the view that the test to be applied for determining the true character of the lease in such a case is of dominant intention and applying the said test the lease under consideration was of the flour mill, the building being let out incidently. We, therefore, hold that such a lease is not covered under the provisions of the Act and the Civil Court had jurisdiction……"

Though the aforesaid judgments examine the nature of lease for the purpose of determining the applicability of rent protection laws, but the fact remains that while construing a document; whether it is a lease or a license, it is the dominant intention, which is required to be taken into consideration.

In another judgment reported as Delta International Ltd. Vs. Shyam Sundar Ganeriwalla & another (1999) 4 SCC 545, the plaintiff has leased a petrol service station for sale of motor spares and components. The issue examined was; whether in terms of the document executed, the parties have entered into lease agreement or a license agreement. The Hon'ble Supreme Court noticed the following propositions to determine as to whether a document creates a lease or a license:

"9. x x x

(1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(2) The real test is the intention of the parties-Whether they intended to create a lease of a licence;

(3) If the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negatived the intention to create a lease."

After examining the judgments referred, the Court found that:

"16. x x x

(1) To find Out whether the document creates lease or license real test is to find out `the intention of the parties'; keeping in mind that in cases where exclusive possession is given, the line between lease and licence is very thin.

(2) The intention of the parties is to be gathered from the document itself; Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the

> agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.
>
> x x x
>
> (6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act inter alia provides that leases of immoveable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be Interpreted or construed on the well laid principles for construction of contractual terms, viz, for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or haying double intendmcnt one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do."

The Court concluded that the agreement is a deed of licence and not lease. In the present case, a perusal of the MOU shows that the purpose of the agreement is operation, maintenance and management of a facility of Pack House consisting of cold storage & ripening chambers etc. There are onerous duties of fulfilling the term of the agreement on the petitioner. The dominant purpose of agreement is running of the Pack House and is not a lease creating interest in the immoveable property. It is, thus, an agreement of license and not of lease. In fact, learned counsel for the petitioner has not raised any argument that the document provides protection from eviction in terms of the East Punjab Urban Rent Restriction Acct, 1949. Thus, the MOU in question does not create a lease, which may have a statutory protection, but it is a case of license, which stands terminated on account of violations of the terms of the MOU.

The argument that the Board has a right to withdraw from the project after giving three months' notice is not applicable to the defaults committed by the petitioner. Such notice period is contemplated if the Board wishes to terminate the arrangement, but will not be applicable where a licensee, the petitioner itself, defaulted in performance of the obligations created under the agreement. The consequences of default of non-payment of lease money are mentioned in the agreement itself i.e. forfeiture of security, payment of penalty and also blacklisting of the firm for ten years. Therefore, the argument that the petitioner was required to be given three months' notice is not applicable in the present case, when the petitioner – firm is a defaulter as per its own stand.

We also find that the purpose of grant of license is to provide facility of storage of fruits and vegetables. Such facility is in public interest. The petitioner has shut down the services since February, 2015. The very purpose of the agreement stands defeated, when the petitioner failed to run the Pack House, to pay the lease money or to electricity dues. The only reason given in the writ petition is unavoidable family circumstances, which as per Mr. Toor is the involvement of the husband of the proprietor of the petitioner – firm, an employee of the Board under the Prevention of Corruption Act. Since the petitioner has not paid monthly lease money or electricity bills and shut down the facility meant for the benefit of the general public, the public interest does not warrant any delay in re-allotting of the contract.

However, Mr. Toor has offered to re-examine the issue of blacklisting of the petitioner – firm and the period thereof.

Therefore, while dismissing the present writ petition challenging the cancellation of MOU, we direct that the issue regarding blacklisting and its period be decided afresh by the Board in accordance with law.

(HEMANT GUPTA)
JUDGE

28.07.2015
Vimal

(LISA GILL)
JUDGE