Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.12668 OF 2016

INOX LEISURE LTD.] Petitioner
Vs.
CHIEF CONTROLLING REVENUE AUTHORITY]
AND OTHERS.] Respondents

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Mr. Darshit Jain a/w Chaithra Rao i/b Jatin Sheth, for Petitioner.
Mr. Akshay Shinde 'B' Panel Counsel for State, for Respondents No.1 to 3 a/w S.H. Kankal, A.G.P, for State.

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CORAM : R.G. KETKAR, J.

DATE : 20th DECEMBER, 2018.

P.C.

Heard Mr. Jain, learned Counsel for the petitioner and Mr. Shinde, learned Counsel for the respondent at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 22nd June, 2015 passed by respondent No.1, Chief Controlling Revenue Authority, Maharashtra State, Pune (for short 'Authority') as also order dated 4th April, 2016 passed by the Authority in Appeal No.181 of 2015. By order dated 22nd June, 2015, the Authority, in exercise of powers under section 52B of the Maharashtra Stamp Act (for short 'Act') rejected the application dated 10th June, 2010 filed by the petitioner under section 48 (1) of the Act for refund of the stamp duty. Aggrieved by that decision, the petitioner preferred appeal under section 53 (1A) of the Act. By order dated 4th April, 2016, the Authority dismissed the appeal on the ground that it is not maintainable.

3. Rule. Mr. Kankal waives service on behalf of the respondents. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing. The relevant and material facts that are necessary for disposal of this Petition, briefly stated, are as under.

4. On 3rd February, 2010, a registered leave and licence agreement was entered into by and between Adlabs Shringar Multiplex Cinemas Private Limited (for short 'Adlabs') on one hand and Fame India Limited (formerly known as Shringar Cinemas Limited) (for short 'Fame India') on the other. The premises agreed to be given on licence to Fame India were City Mall on the piece or parcel of land bearing Survey No.41, situate lying and being at Village Oshiwara in registration and sub district of Andheri, District Mumbai Suburban, bearing CTS No. 621 (part) more particularly described in the Schedule-I thereunder written (for short 'premises'). Fame India (licencee), *inter alia*, is engaged in the business of setting up and running a chain of multiplex cinema theaters in prominent locations in various cities.

5. The parties agreed that Fame India (licencee) would take on leave and licence basis the premises for the purpose of carrying on business of operation of the multiplex cinema theatre under the brand name and trade name “Fame”. Clause 1 dealt with Definitions and Interpretations. Commercial Operations Date was 1st March, 2010. Year was defined to mean each successive period of 12 (twelve) months with the first such period of 12 months starting from the Commercial Operations Date. Clause 2 dealt with Grant of Licence. Clause 2.1 provided that Adlabs (licensor) hereby exclusively grants to Fame India (licencee) and Fame India hereby accepts from the licensor the premises on leave and licence basis on and from the Commercial Operations Date for the purpose of carrying on the business of a exhibiting

Cinematic Films within the Premises and shall also be entitled to carry on Associated Retail Activities either by itself or through its sub-licensees/nominees/concessionaries/Affiliates etc.

6. By sub-clause (i), the parties agreed that Adlabs (licensor) shall on and from the Commercial Operations Date, give exclusive charge and control of the premises to the licensee as specified in the plan attached herewith and marked as Annexure-II. Sub-clause (ii) permitted Fame India (licencee) to modify the Fit Outs as per its won requirement, subject to prior written permission from Adlabs (licensor) in this regard. Clause 2.2 dealt with 'Term'. Clause 2.2.1 provided that agreement shall be effective from the date of execution, hereof. However, the licence of the premises granted herein by Adlabs (licensor) to the licencee (Fame India) will come into force and effect from the Commercial Operations Date and shall be in force for a period of 10 years starting from the Commercial Operations Date.

7. Clause 3 dealt with License Fees, Security Deposit and Taxes. Clause 3.1 (a) provided that in consideration of the lease, the licencee shall pay to the licensor monthly licence fees @ Rs. 74/- per square feet per month of the chargeable area (the “Licence Fees”) for the initial three years i.e from Commercial Operation Date to 28th February, 2013. Clause 3.4 provided that licencee confirms that on and from the Commercial Operation Date all payments in relation to the use of electricity and water at the premises and property taxes in respect of the premises shall be paid by the licencee. Licencee shall be liable to pay service tax if payable on the licence fees. Clause 18.10 dealt with Stamp Duty, Registration Fee and Legal Expenses and provided that all the costs and expenses incurred towards the stamping and registration of the agreement shall solely be borne by Fame India (licencee).

8. On 15th February, 2010, Cancellation Agreement was entered into between Adlabs (licensor) and Fame India (licencee). Recital (A) sets out that the premises were given on leave and licence basis for a period of 10 years with effect from 1st March, 2010. Leave and licence agreement is not registered and the licencee has not advanced any amount to the licensor under the leave and licence agreement since the licence was to take effect from 1st March, 2010. Recital (B) sets out that due to some commercial reasons the parties have now mutually decided to unconditionally and irrevocably cancel the leave and licence agreement and discharge them from their respective obligations under the leave and licence agreement with immediate effect. The licence granted by the licensor in favour of the licencee stood forthwith cancelled. The parties agreed and acknowledged that the cancellation of the leave and licence agreement was unconditional and irrevocable and both the parties stood duly discharged of their respective obligations under the leave and licence agreement.

9. On 2nd March, 2010, Adlabs executed registered leave and licence agreement in favour of Swaston Multiplex Cinemas Print Limited Company (for short 'Swaston Multiplex') in respect of the premises. The expression “Commercial Operations Date” was 1st March, 2010. Leave and licence agreement was to remain in force until 28th February, 2013.

10. On 10th June, 2010, Fame India filed application for refund of the stamp duty under section 47 of the Act along with affidavit, statement and cancellation agreement dated 15th February, 2010**.** By communication dated 5th June, 2012, Stamp Collector , Mumbai called upon Fame India to furnish photo copy of Ink Cartridge which was used for franking. On 23rd June, 2012, Fame India submitted Ink Cartridge used for franking leave and licence agreement. By communication dated 30th July, 2012, Stamp Duty Collector addressed to

Fame India raised objections calling upon them to remove those deficiencies. On 29th August, 2012, Fame India submitted the requisite information.

11. By order dated 10th May, 2013 passed by this Court in Company Scheme Petition No.308 of 2013 and companion Petitions, composite scheme of amalgamation of;

[1] Fame India Limited;

[2] Fame Motion Pictures Limited;

[3] Big Pictures Hospitality Services Private Limited;

[4] Headstrong Films Private Limited

with

INOX Leisure Limited (petitioner herein) was sanctioned.

By order dated 22nd June, 2015, even Gujarat High Court sanctioned composite scheme of amalgamation of Fame India Limited with petitioner INOX Leisure Limited.

12. By order dated 22nd June, 2015, respondent No.1, Authority rejected the application on the following grounds;

[1] as per clause 2.2.1, leave and licence agreement became effective from the date of execution thereof namely 3rd February, 2010.

[2] the leave and licence agreement is cancelled by notarized agreement dated 13th February, 2010.

[3] the intended purpose of the leave and licence agreement was fulfilled.

Aggrieved by this decision, the petitioner preferred appeal under section 53A (1) of the Act before respondent No.1. Respondent No.1 as noted earlier dismissed the appeal on the ground of maintainability itself. Against these orders, the petitioner has instituted the present Petition.

13. Mr. Jain has invited my attention to section 47 (c) (5) of the Act and submitted that the leave and licence agreement was cancelled mutually by the parties on 15th February, 2010 and the application for refund was made on 10th June, 2010 i.e within the prescribed period of 6 months as per section 48. He submitted that by refusal to act under the leave and licence agreement, intended purpose totally failed. He, therefore, submitted that respondent No.1 ought to have allowed application under section 47. He has taken me through various clauses of the leave and licence agreement dated 3rd February, 2010 as also cancellation agreement dated 15th February, 2010.

14. In support of his submission, Mr. Jain relied on paragraphs 8,14 and 16 of **Sanman Trade Impex Pvt. Ltd Vs. State of Maharashtra and others, AIR 2005 Bombay 94.** In paragraph 14, the learned Single Judge of this Court observed that section 47 provides that instruments should be ineffective and unenforceable in the sense that the purpose for which it was executed should "totally fail". In the present case, even possession of the premises was not handed over to the petitioner. Commercial Operation Date was 1st March, 2010. Prior thereto, leave and licence agreement was revoked on 15th February, 2010. He, therefore, submitted that the impugned orders deserve to be set aside.

15. On the other hand, Mr. Shinde supported the impugned order. He submitted that as per section 3 of the Act, stamps duty is charged on the instrument and not the transaction. Section 47 (c) deals with the stamp used for an instrument executed by the party. In other words, it does not require instrument to be registered and merely contemplates execution of instrument. Section 47 (c) (5) does not provide for mutual cancellation of transaction. He

invited my attention to clause 2.2.1 of the leave and licence agreement dated 3rd February, 2010 which provided that the said agreement became effective from the date of execution namely from 3rd February, 2010. As the agreement became effective from 3rd February, 2010, intended purpose was fully achieved. The Authorities below were, therefore, justified in rejecting the application.

16. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Before dealing with rival submissions advanced by learned Counsel for the parties, it is necessary to deal with various clauses of the leave and licence agreement dated 3rd February, 2010. It is evident from receipt at Exhibit A that stamp duty of Rs.58,64,000/- was paid by Fame India Limited who was predecessor in title of the petitioner. Clause 18.10 of the agreement dated 3rd February, 2010 required licencee to bear all the costs and expenses incurred towards stamping and registration of the agreement. Recitals (i) (ii) of the agreement read thus;

> "(i) The Licensor is seized possessed and absolutely entitled as the valid owner of a premises admeasuring approximately 46426 sq.ft super built up area, comprising five auditoriums on the second floor and projection levels and a box office at ground floor, which are fully fitted out and furnished as per the specification as given in **Annexure I** herewith, in the building known as 'Citi Mall" on the piece or parcel of land bearing Survey No.41, situate lying and being at Village Oshiwara in registration and sub district of Andheri, District Mumbai Suburban, bearing CTS No. 621 (pt) more particularly described in the **Schedule-I** hereunder written (hereinafter referred to as **"the Multiplex/the Premises**"). The Multiplex was fitted out in the year 2002 and was renovated in the year 2005 and 2009 subsequently and is being commercially operated since April, 2002.
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> (ii) The Licensee is *inter alia* engaged in the business of setting up and running a chain of multiplex cinema theaters in

prominent locations in various cities and proposes to operate the Multiplex,as its fit-Outs are already done by the Licensor as per Annexure I with 1281 seating capacity and 5 screens in the Premises and also proposes to carry out Associated Retail Activities therein. The Licensee has the expertise, infrastructure, trained and experienced manpower, systems and manuals for operating multiplex cinema and carrying on Associated Activities.

(v) The Parties have agreed that the Licensee would take on leave and license basis the Premises for the purpose of carrying on the business of operation of the multiplex cinema theater under the brand name and trade name **"Fame"** (or such other name as the Licensee may use for its multiplex cinema theaters and the Licensee shall also be entitled to carry on Associated Retail Activities (defined later) either by itself or through concessionaries/licencees/associates/nominees/affiliates).

17. Expression "**Commercial Operations Date**" shall be 1st March, 2010.

"Term" shall have the same meaning as ascribed to it in clause 2.2 hereinabove.

"Year" shall mean each successive period of 12 (twelve) months with the first such period of 12 months starting from the Commercial Operations Date.

2. **GRANT OF LICENSE**

Clause 2.1 reads thus;

"2.1. The Licensor hereby exclusively grants to the Licensee and the Licensee hereby accepts from the Licensor the Premises on leave and license basis on and from the Commercial Operations Date for the purpose of carrying on the business of a exhibiting Cinematic Films within the Premises and shall also be entitled to carry on Associated Retail Activities either by itself or through its sub-licensees/nominees/concessionaries/Affiliates etc. The Parties have agreed that;

(i) the Licensor shall, on and from the Commercial Operations Date, give exclusive charge and control of the Premises to the Licensee as specified in the plan attached herewith and marked as Annexure II;

(ii) the Licensee shall be entitled to modify the Fit-outs as per its own requirement, subject to prior written permission from Licensor in this regard, which consent shall not be unreasonably withheld. Provided that no such prior written consent shall be required for any modifications and/or replacement only on account of normal wear and tear and provided further that any replaced Fit-outs will be first offered to the Licensor without any costs, charges and expenses before disposal.

2.2. **Term:**
Clause 2.2.1 reads thus;

"2.2.1. This Agreement is effective from the date of execution hereof. However, the license of the Premises granted herein by the Licensor to the Licensee comes into force and effect from the Commercial Operations Date and shall be in force for a period of 10 years starting from the Commercial Operations Date, (hereinafter referred to as **"Term"**).

<u>3. LICENSE FEES, SECURITY DEPOSIT AND TAXES</u>

Clause 3.1 (a) reads thus;

"a) At the rate of Rs.74.00 (Rupees Seventy Four only) per sq. ft. per month of the Chargeable Area (the **"License Fees"**) for the initial three years i.e from Commercial Operation Date to 28th February, 2013.

Clause 3.4. reads thus;

"3.4. The Licensee confirms that on and from the Commercial Operation Date all payments in relation to the use of electricity and water at the Premises and property taxes in respect of the Premises shall be paid by the Licensee. Licensee shall be liable to pay service tax if payable, on the License Fees.

Clause 18.10 reads thus;

> "18.10 **Stamp Duty, Registration Fee and Expenses**
> All the costs and expenses incurred towards the stamping and registration of this Agreement shall solely be borne by the Licesee"

18. It is not in dispute and is rather a matter of record that by cancellation agreement dated 15th February, 2010, leave and licence agreement was revoked. Recitals A and B of that agreement read thus;

> A. The Parties have entered into a Leave and License Agreement dated 03rd February, 2010 (hereinafter **"Leave and Licensee Agreement"**) under which the Licensor agreed to grant the premises admeasuring approximately 46426 sq.ft super built up area, comprising five auditoriums on the second and mezzanine floor and a box office at ground floor, in the building known as "Citi Mall" on the land bearing Survey No. 41, at village Oshiwara, Andheri ("Premises") on leave and license basis to the Assignees for a period of 10 (ten) years with effect from 01st March, 2010. A copy of the Leave and License Agreement is contained in Annexure A hereto. The Leave and License Agreement is not registered and the Licnesee has not advanced any amount to the Licensor under the Leave and License Agreement since the license was to take effect from 01st March, 2010.
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> B. Due to some commercial reasons the Parties have now mutually decided to unconditionally and irrevocably cancel the Leave and License Agreement and discharge them from their respective obligations under the Leave and License Agreement as more particularly contemplated hereinafter.

Clause 1 reads thus;

> "The Parties hereby mutually terminate the Leave and License Agreement with immediate effect. The license granted by Licensor in favour of the Licensee stands forthwith cancelled. The Parties agree and acknowledge

> that the cancellation of the Leave and License is unconditional and irrevocable and both Parties stand duly discharged of their respective obligations under the Leave and License Agreement".

19. Thus, a fair reading of various clauses of leave and licence agreement dated 3rd February, 2010 clearly shows that the premises were taken by the predecessor of the petitioner on leave and licence basis for the purpose of carrying on business of exhibiting Cinematic Films within the premises as also for carrying on Associated Retail Activities. Commercial Operation Date was 1st March, 2010. Expression "Year" was defined to mean each successive period of 12 (twelve) months with the first such period of 12 months starting from the **Commercial Operation Date.** A perusal of clause 2.1 shows that the licensor granted licence to the predecessor of the petitioner on leave and licence basis on and from Commercial Operation Date (1st March, 2010) for the purpose of carrying on business of exhibiting Cinematic Films within the premises as also for carrying on Associated Retail Activities. The licensor was to give exclusive charge and control of the premises to the licencee on and from Commercial Operation Date i.e 1st March, 2010. Clause 2.2.1 provided that the agreement is effective from the date of execution hereof. (3rd February, 2010). However, the licence of the premises granted by the licensor to the licencee **was to come into force and effect from the date of Commercial Operation Dates and was to remain in force for a period of 10 years**.

20. A perusal of clause 3.1 (a) also shows that the licencee was to pay the licence fee @ Rs. 74.00 per square feet per month of the Chargeable Area **for the initial three years from Commercial Operation Date (1st March, 2010)** to 28th February, 2013. Clause 3.4 provided that the licencee confirmed that on and from the Commercial Operation Date, all payments in relation to the use of electricity and water at the premises and property taxes in respect of

the premises shall be paid to the licencee. The licencee was liable to pay service tax if payable on the licence fees.

21. A perusal of the impugned order shows that Authority has picked up only first sentence of clause 2.2.1 and observed that as leave and licence agreement became effective from the date of execution namely 3rd February, 2010, it became enforceable from 3rd February, 2010. After implementation of the agreement, by notarized deed, leave and licence agreement was revoked on 13th February, 2010. As the intended purpose of the leave and licence agreement is fully achieved, the petitioner is not entitled to refund. In my opinion, respondent No.1 committed serious error while construing leave and licence agreement. It is settled principle of law that every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. In the case of **Provash Chandra Dalui Vs. Biswanath Banerjee**, **1989 Supp. (1) Supreme Court Cases 487,** the Apex Court was considering the provisions of Calcutta Thika Tenancy Act, 1949 in the context of registered lease deed dated 26th September, 1946. In paragraph 10, it was observed thus;

> "10. 'Ex praecedentibus et consequentibus optima fit interpretatio'. The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected 'ex antecendentibus et consequentibus', every part of it may be brought into action in order to collect fro the whole uniform and consistent sense, if that is possible. As *Lord Davey said in N.E. Railway Co. v. Hastings:*
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> > "...the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and .. the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation

> does no violence to the meaning of which they are naturally susceptible...”
>
> In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used as if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply”.

Applying the principles laid down in the aforesaid decision to the facts of the present case, it is apparent that respondent No.1, Authority has merely picked up one sentence of clause 2.2.1 and failed to consider whether the purpose for which the leave and licence agreement was entered into is achieved. As mentioned earlier, the purpose was for exhibiting Cinematic Films within the premises as also for carrying on Associated Retail Activities. The leave and licence agreement was entered into on 3rd February, 2010. The Commercial Operation Date was 1st March, 2010. The licensor had agreed to hand over possession from Commercial Operation Date i.e 1st March, 2010. Even prior to that, by cancellation agreement dated 15th February, 2010, leave and licence agreement was cancelled.

22. In the case of **Sanman Trade Impex Pvt. Ltd** (supra), learned Single Judge considered section 48 (1) and 47 (c) (5) and observed thus;

> “14.Considering the provisions of law referred to above, the contention on behalf of the respondent that payment of entire consideration price under the deed dated 27th March, 2003 would render the instrument to be a deed of conveyance and not an agreement and, therefore, would not be entitled to claim refund under Section 48 (1) read with 47 (c) (5) is totally devoid of substance. Clause (c) (5) of Section 47 nowhere distinguishes between agreement of sale and the deed of sale. It applies to all instruments irrespective of the fact whether it is deed of sale or a mere agreement for sale. What it provides is

> that the instruments should be rendered ineffective and unenforceable in the sense that the purpose for which it was executed should "totally fail". Once the party is able to establish that the purpose for which instrument was executed has totally failed, certainly the case would fall within the parameters of the provisions comprised under Section 47 (c) (5) of the said Act. Indeed, this is also clear from plain reading of Section 48 (1) along with proviso thereof. In fact, clause 1 of Section 48 does not distinguish between the sale deed and agreement for sale. Such a differentiation is to be found only under the proviso to the said clause. Explanation 1 to Art. 25 of Schedule I of the said Act nowhere provides that the mere payment of entire consideration amount would transform the agreement for sale into deed of sale. On the contrary, it specifically refers to delivery of possession and not the payment therefor. In other words, even under the agreement for sale with part payment of consideration, if the possession of property is delivered, it would warrant stamp duty which is payable in respect of conveyance of such property in view of provisions of law contained in explanation 1 of Art.25 of Schedule I of the said Act".

23. In the present case, intended purpose for which leave and licence agreement was executed was not achieved fully. In fact, the purpose for which the leave and licence agreement was executed totally failed.

24. Mr. Shinde submitted that the duty is chargeable on the instrument and not on the transaction and that under section 47 (c) (5), mutually cancellation is not permissible. For the reasons recorded earlier, I do not find any merit in this submission.

25. In the light of the aforesaid discussion, the order dated 22nd June, 2015 is liable to be set aside and is accordingly set aside. In view of setting aside the order dated 22nd June, 2015, challenge to the order dated 4th April 2016 does not survive. Rule is made absolute in terms of prayer clauses (a) and (b). Refund shall be made in accordance with law within 8 weeks with

express understanding that request for extension shall not be made and entertained by this Court. Order accordingly.

[R.G. KETKAR, J.]