

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.238 OF 2020
ALONG WITH
CIVIL APPLICATION NO.233 OF 2020

Hindustan Petroleum Corporation]
Limited.] ... Appellant

Vs.

Shirish Ramchandra Godbole & Anr.] ... Respondents

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Mr. Javeed Hussein with Mr. Mubashir Hussein, Mr. Sakib Gufran, Ms. Amina Momin i/b Hussein & Co. for the appellant.

Mr. Atul Damle, senior counsel i/b Mr. Prasad P. Kulkarni for respondent No.1.

Mr. G.S. Godbole with Ms. Shruti Tulpule for the caveator.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 07TH APRIL, 2022.

P.C. :-

1. The present appeal is filed by the appellant, Hindustan Petroleum Corporation Limited (for short, “**HPCL**”) being aggrieved by the concurrent findings rendered by the Civil Judge, Senior Division, Solapur in Special Civil Suit No.173 of 2013 and

by the District Judge-5, Solapur in Special Civil Appeal No.104 of 2016.

2. I have heard Mr. Hussain, the learned counsel for the appellant, Mr. Damle, the learned senior counsel for respondent No.1 and Mr. Godbole, the learned counsel for the caveator.

3. Mr. Godbole has tendered a list of dates and events in the background of which the second appeal is instituted. The necessary compilation of documents is also placed on record by the learned counsel for the appellant for appreciating the question of law arising in the appeal.

4. The brief sequences of facts, leading to the filing of the appeal would reveal that, on 08/12/2004, a Lease Agreement came to be executed between the plaintiff (respondent No.1 herein) and defendant No.1 (respondent No.2 herein) (for short, **“the Head Lease”**), where the plaintiff, the owner of the suit property, an open plot of land, admeasuring 748.91 sq. metres, situated at layout Plot No.8, Gat No.15/1 of Village Majrewadi, District Solapur, within the limits of Solapur Municipal Corporation, leased out the said open plot, to defendant No.1 Suhas Doijode for a period of 29 years on the terms and conditions stated in the said Lease Agreement. The lease rent in respect of the said open plot and several arrangements between the parties were set out in the said Lease Agreement. The lease was granted to defendant No.1 for

running a petrol pump. Defendant No.2 is a public limited company, engaged in the business of petrol pump products. In terms of the Lease Agreement, defendant No.1 entered into an Agreement of sub-lease with respect to the said open plot with defendant No.2 on 18/03/2005 and defendant No.1 was appointed as dealer for operating the petrol pump on the said open plot.

5. The Head Lease executed between the plaintiff and defendant No.1 contained a clause fastening the liability upon the Lessee to pay the agreed lease rent and the Head Lease also provided for determination of lease upon the contingencies stipulated in clause 7 therein.

The Head Lease specifically permitted sub-lease with HPCL and contemplated an agreement to be executed by defendant No.1 in favour of HPCL for a period not beyond the period of lease under the Head Lease.

6. As the dispute between the parties revolves around clause 7 of the Head Lease, it is necessary to reproduce the same along with clause No.8. Clauses 7 and 8 of the Head Lease read as under:

“7. It is hereby agreed that the Party of The Second Part shall pay the agreed lease rent for the earlier completed English calendar month on or before 5th day of the next English calendar month. An interest of 2% per month

will be payable by the Party of the Second Part for any delay in payment of the lease rent. It is agreed that in case the agreed lease rent is not paid for a period of 90 days or an amount equivalent to 3 months' rent at the then prevailing rate remains unpaid and continues to remain unpaid for further period of 90 days after issuance of a written notice (a copy given to Hindustan Petroleum Corporation Limited) by the Party of the First Part, the Party of the First Part may forthwith reenter upon the said land and this lease shall there upon come to an end and the Party of the First Part would be entitled to receive the vacant possession of the said open plot. In such an eventuality, Hindustan Petroleum Corporation Limited would have the option to step into the shoes of the party of the second apt by getting executed a direct lease agreement on the same terms and conditions without payment of separate deposit (as per clause 4 above) at the ten applicable rent (as per this lease) and the further applicable increments and for the unexpired (remaining) period of this Lease. In case of termination of this lease and Hindustan Petroleum Corporation Limited exercising its option of being a lessee of the lessor herein, the deposit of the Lessee herein i.e. of Shri Suhas Suryakant Doijode, will remain with the Lessor till the expiration of the period of 29 years and till the vacant possession of the "The Said Open Plot" is received by the Lessor, even if the Lessee herein would not be a lessee in case of such termination occurring.

8. The Party of The Second Part shall execute a suitable sub lease with Hindustan Petroleum Corporation Limited only and with

no other party and such sub lease shall not contain any terms, which are contradictory to the terms of this lease. The Sub Lease to be executed by the Party of The Second Part in favour of Hindustan Petroleum Corporation Limited would not be for a period beyond the period of present lease.”

7. In terms of the Head Lease, defendant No.1 executed a registered Agreement of sub-lease in favour of HPCL before the Sub-Registrar of Solapur, North-2 on 18/03/2005. This sub-lease pertaining to the said open plot stipulated the schedule of rent to be paid by defendant No.2 (Lessee) to defendant No.1 (the Lessor) and contained the following clause:

“(g) Both the Lessor and Lessee will abide by and will be governed by the Head Lease Agreement between Shri Shirish Ramchandra Godbole and Shri Suhas Suryakant Doijode executed on 08/12/2004.”

The Sub-Lessor was to be appointed as an agent of HPCL and, consequently, the rent payable by HPCL to the Sub-Lessor was less than the lease rent payable under the Head Lease executed between the plaintiff and defendant No.1.

8. The case of the plaintiff i.e. the owner of the subject open plot is, defendant No.1 paid the agreed lease rent till November, 2012 but, from December, 2012 to February, 2013, there was a default. Therefore, on 06/03/2013, the plaintiff served a notice

calling upon defendant No.1 to cure the default in terms of the Head Lease and a copy of the said notice was also forwarded to the Sub-Lessee i.e. HPCL, at their Head Office and Regional Office and the copies were duly served upon both the defendants. There was failure to respond to the said notice by either of them nor did respondent No.1 cure the defaults, which could have been cured with further three months by end of May, 2013. Even the rent for the period remained unpaid.

9. On account of failure to cure the default, despite notice being issued in terms of clause 7 of the Head Lease, the plaintiff served a notice of termination of the lease, on defendant Nos.1 and 2 and the acknowledgments of notices dated 06/03/2012 and 11/06/2013 were procured. The defendants did not bother to reply to either of the notice nor defendant No.2-HPCL exercised its option of becoming direct Lessee of the plaintiff. The contingency stipulated as per clause 7 of the Head Lease, which contemplated that in an eventuality of the lease of defendant No.1 being terminated, defendant No.2-HPCL would have an option to step into the shoes of defendant No.1 by getting executed a Direct Lease Agreement on the same terms and conditions, without payment of separate deposit at the then applicable rent.

10. Upon default on the part of defendant Nos.1 and 2 culminating into termination of the lease of defendant No.1, the plaintiff filed Special Civil Suit No.173 of 2013 in the Court of

Joint Civil Judge, Senior Division, Solapur, seeking relief of recovery of possession of the said open plot and payment of arrears of rent with interest thereon. The plaintiff specifically pleaded the default on the part of defendant No.1 in payment of rent and also pleaded about the notice being issued to defendant No.1, with a copy being forwarded to defendant No.2-HPCL and the demand being raised to pay the due amount along with interest at 2% per month. The notice stated that in terms of the Head Lease, if the lease rent payable by defendant No.1 remains unpaid for 90 days i.e. till end of May, 2013, the lease will come to an end and the plaintiff will be entitled to receive the vacant possession of the said open plot. It was specifically pleaded that defendant No.1 received the notice on 07/03/2013 and even a copy of the notice dated 06/03/2013 was forwarded to defendant No.1-HPCL on three distinct addresses set out in the plaint.

The plaintiff specifically pleaded as under:

7. Defendant No.1 did not pay the rent which had become due and payable by him to the Plaintiff. Neither the Defendant No.1 nor the Defendant No.2 Company responded in any way to the notice of the Plaintiff. Defendant No.1 did not pay any rent up to the end of May 2013 and did not bother to rectify the defect of nonpayment of the rent of 90 days even in the further period of 90 days from the receipt of notice. According to the specific clause No.7 of the lease deed dated

08.12.2004, because of the nonpayment of rent for 90 days and which remained unpaid for further period of 90 days after issuance of the notice, the lease has come to an end and the Plaintiff is entitled to receive vacant possession of the said open plot.

11. The cause of action was pleaded in paragraph 10, by stating that after the determination of the Head Lease with defendant No.1, the plaintiff had forwarded copies of the notices to defendant No.1 as well as defendant No.2-HPCL and since there was no response from defendant No.2 in any way, nor did it communicate its desire to be the direct Lessee of the plaintiff, after the determination of the Head Lease on 31/05/2013 and since it was informed about the termination on 30/06/2013, the suit filed on 31/10/2013 was stated to be within limitation.

The plaint also pleaded about the rent due from defendant Nos.1 and 2 towards past mesne profits from 01/07/2013 to 31/10/2013 and the interest as set out in the table, which was part of the plaint.

12. In the aforesaid background, the following relief was sought by the plaintiff:

“a. Defendant No.1 be ordered and decreed to pay unto Plaintiff the sum of Rs. 3,67,925/- as per details given in para 12 of the plaint.

b. Defendant No 1 and/or 2 be further ordered

to deliver the vacant and peaceful possession of the plot described in para 1 of the Plaint after removing the structure and the fuel tanks etc. buried in the ground, at the cost of Defendant No 1 and/or 2. Defendant No 1 and/or 2 be further ordered not to effect any structural or other changes in the site described in para 1 of the plaint.

- c. Defendant No 1 and 2 be jointly and severally ordered to pay full cost of the suit to the Plaintiff.*
- d. Defendant No 1 and 2 be jointly and severally ordered to pay interest at Rs. 1.50% per month on the decretal amount and cost of the suit from the date of filing of the suit till realization of the said amount by the Plaintiff.”*

13. Defendant No.1 filed written statement and admitted the default by pleading that the sub lease rent being paid to defendant No.1 by defendant No.2, was being recovered by HPCL as additional service station license fee from defendant No.1 and effectively, HPCL was not paying any rent, as a result of which, he was incurring losses. It was stated that on 18/01/2012, a letter was written to defendant No.2, calling upon it to pay the lease rent directly to the plaintiff and thereby, defendant No.1 would operate only as a dealer or defendant No.2-HPCL should pay the agreed sub lease rent without any deductions. Defendant No.1 pleaded hardship and losses, including borrowing from banks and after highlighting the differences between the two, it ultimately urged

that the suit of the plaintiff be decreed with costs against defendant No.2-HPCL and technically, against defendant No.1, only to the extent of possession of the leasehold land. Alternatively, it was stated by defendant No.1 that in case, it is decided that defendant No.2 will directly become a tenant of the plaintiff, then defendant No.1 be absolved from its monetary obligations and he will only continue as the dealer of defendant No.2.

14. Defendant No.2-HPCL also filed its written statement admitting the execution of sub-lease and claiming that there was no privity of contract between the plaintiff and defendant No.2. Defendant No.2-HPCL, however, pleaded a collusion between the plaintiff and defendant No.1 by pleading that defendant No.1 was not interested in continuing the business of petrol pump. Receipts of notice dated 06/03/2013 and 11/06/2013 issued by the plaintiff was admitted by pleading that it had instructed defendant No.1 to cure the default by paying the rent. Pertinent to note that defendant No.2-HPCL did not assert, as to any steps being taken by it to continue the lease directly with the principal Lessor i.e. the plaintiff.

15. In support of their claims, the parties filed their respective affidavit evidence, the plaintiff's evidence being recorded at Exh.-27 and he exhibited the lease deeds as well as notices issued to defendant Nos.1 and 2 and also the acknowledgments obtained by him, upon service of the said notices.

16. Defendant No.2-HPCL filed the affidavit evidence of it's Senior Manager, who deposed that the plaintiff and defendant No.1 have purposely and with a predetermined way, acted to show that clause 7 of the Head Lease is violated. The suit filed by the plaintiff was alleged as collusive one and it was projected as a ground for it's dismissal. The termination of the tenancy was said to be a show managed by defendant No.1 and it was denied.

17. In cross-examination, defendant No.2 admitted that no reply was given to the notices of the plaintiff and even no rent was paid by HPCL. A specific admission in the cross-examination has come on record to the following effect.

“Defendant No.2 company has not tried to step into the shoes of Defendant No.1 and paid the rent to the Plaintiff. It is true that inspite of knowledge that Plaintiff has terminated tenancy of Defendant No.1 for non-payment of rent vide Exh.34, Defendant No.2 Company is selling oil to Defendant No.1 and the Petrol Pump is still running.”

18. Pertinent to note that defendant No.1 did not lead any evidence.

19. The learned Civil Judge, Senior Division, Solapur, in the light of evidence adduced before him, decreed the suit and

defendant No.1 was directed to pay the arrears of rent as claimed by the plaintiff with interest. Defendant No.1 and defendant No.2 were directed to handover vacant possession of the suit property, after removing the structures and underground tanks, etc. However, the court refused to grant order for inquiry into mesne profits from the date of institution of suit until delivery of possession, as contemplated under Order XX Rule 12 of the Civil Procedure Code (for short, **“the CPC”**).

20. Being aggrieved by the above, defendant No.2-HPCL filed Regular Civil Appeal No.219 of 2015 in the District Court at Solapur and Defendant No.1 also filed an appeal, which was numbered as Regular Civil Appeal No.104 of 2016.

The plaintiff filed cross-objections in both the appeals by invoking Order XLI Rule 21 of the CPC, seeking a limited modification and a direction to hold an inquiry about the mesne profits, from the date of institution of the suit.

21. The learned District Judge, Solapur, delivered a common judgment in the two appeals filed by the defendants and dismissed both the appeals along with the cross-objections filed by the plaintiff.

This is the cause for two appeals before me, being Appeal No.238 of 2020 filed by HPCL and Appeal No.233 of 2020 filed by original plaintiff, limited to the extent of rejection of his cross-objections / appeal pertaining to conduct of inquiry for mesne

profit. As regards this appeal, I have issued 'Rule' on noting the substantial question of law, arising.

22. On hearing the respective counsel, it is manifest that the Head Lease entered by the plaintiff with defendant No.1 is in respect of an open plot of land and, therefore, necessarily governed by the provisions of the Transfer of Property Act. The termination of such a lease does not contemplate the quit notice under Section 106 of the Transfer of Property Act and the lease can be determined, according to the terms agreed between the parties.

23. The relationship between the parties i.e. the plaintiff and defendant No.1 on one hand, and defendant Nos.1 and 2 on the other hand, is governed by Head Lease and, the Sub-Lease executed on 22/06/2005 specifically recites that the Lessor and the Lessee will abide by and will be governed by the Head Lease dated 08/12/2004. Clause 7 of the Head Lease casts an obligation on the Lessee to pay the agreed lease rent on or before 5th day of next English calendar month and delay in payment of rent would invite an interest at 2% per month. The said clause also contemplate re-entering upon the land by the Lessor, in case if the agreed lease rent is not paid within 90 days or an amount equivalent to three months' rent at the then prevailing rate remains unpaid and continues to remain unpaid for further period of 90 days, after issuance of a written notice, with a copy to be given to

HPCL i.e. the Sub-Lessee. Upon such a contingency, the original Lessor is entitled to receive vacant possession of the said open plot.

24. The plaintiff specifically deposed in support of his claim that the said contingency arose, which resulted in termination of the Head Lease with defendant No.1. The plaintiff proved the notices issued to defendant Nos.1 and 2 and also its receipt, through the acknowledgment produced on record. Defendant No.2, in the cross-examination, admitted the receipt of the said notices.

In such an eventuality, it was open to the HPCL to step into the shoes of defendant No.1 by getting executed a direct Lease Agreement, on the same terms and conditions, without payment of separate deposit as was contemplated in clause 7 of the Head Lease. However, no such step was taken by HPCL and this was specifically admitted by its witness, that it neither took any steps to step into the shoes of the plaintiff nor paid the lease rent to the plaintiff. In absence of such steps being taken by HPCL, the plaintiff filed a suit for possession and recovery of rent from defendant No.1 by specifically pleading that he has no privity of contract with defendant No.2 and, therefore, the lease rent was payable to the plaintiff by defendant No.1. However, on termination of the lease with defendant No.1 and, failure on the part of the HPCL to substitute defendant No.1, as Lessee by executing a direct Lease Agreement with the plaintiff, the two courts below, are perfectly justified in granting the relief sought by

the plaintiff i.e. recovery of possession.

25. From the concurrent findings rendered by the courts below to the effect that neither defendant No.1 nor defendant No.2 expressed their willingness to pay arrears of rent along with interest in order to protect their possession in terms of Section 114 of the Transfer of Property Act, it is apparent that the lease rent is not paid for 11 months, despite notice being issued by the plaintiff demanding arrears of rent and forfeiting the tenancy. The courts below, have concurrently recorded that defendant Nos.1 and 2 have not come forward with any offer about payment of arrears of rent and on termination of lease agreement, defendant No.2 did not come forward for getting the Lease Agreement executed in it's favour, which possibility was stipulated in clause 7 of the Head Lease. The admissions given by defendant No.1 to the effect that it has received notices issued by the plaintiff terminating the lease deed and, despite this, no steps were taken to cure the defaults and the admissions to the effect that no steps were taken by defendant No.2 to get the Head Lease executed in it's favour from the owner of the property, subsequent to termination of the Head Lease of defendant No.1 annihilate the claim in the appeal.

26. Finding that no substantial question of law arises in the wake of the concurrent findings recorded by the two courts below, the appeal filed under Section 100 of the Code of Civil Procedure does not warrant any consideration and, it is accordingly,

dismissed. Decree be drawn accordingly.

27. At this stage, the learned counsel for the appellant makes an earnest request to grant some time to move themselves from the said open plot and handover the premises as per the decree. I consider the said request to be reasonable, since the appellant has it's own infrastructure and it will take some time to remove itself from the suit land and to rehabilitate itself to some other location. I, therefore, deem it expedient to grant the request made by the learned counsel for the appellant and accept his oral undertaking that the HPCL shall handover the vacant possession of the said open plot to defendant No.1 (original plaintiff) within a period of six months from today.

[SMT. BHARATI DANGRE, J.]