In the High Court at Calcutta

Constitutional Writ Jurisdiction

Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

<u>W.P.O. No. 764 of 2022</u>

Alpha Stitch-Art Private Limited and Another
Vs.
The West Bengal Small Industries
Development Corporation Ltd. and Others

For the petitioners	:	Mr. Krishnaraj Thaker, Adv., Mr. Raghunath Ghose, Adv., Ms. S. Santra, Adv., Ms. Pritha Ghose, Adv.
For the respondent nos.1 to 7	:	Mr. Joydip Kar, Sr. Adv., Mr. Debdeep Sinha, Adv.
For the respondent no.9	:	Mr. Alok Kr. Ghosh, Adv., Ms. Manisha Nath, Adv.
Hearing concluded on	:	28.08.2023
Judgment on	:	25.09.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1 is a registered Company.

2. The predecessor-in-interest of the petitioners, one Sona Promoters Private Limited, obtained a lease from the respondent no.1, the West Bengal Small Industries Development Corporation Ltd. (WBSIDCL) by way of two lease deeds dated December 14, 2007 and March 04, 2009.

3. The WBSIDCL subsequently terminated the lease by a notice dated December 9, 2019, which was challenged by Sona Promoters Pvt. Ltd.

in WP No. 36 (W) of 2014. An *ad interim* order was granted on January 29, 2014 by the learned Single Judge, restraining the respondent no.2 from giving effect to the impugned notice of termination.

4. The respondent no.2 preferred an appeal numbered as APOT No. 175 of 2014, against the said order. On September 19, 2014, the Division Bench taking up the appeal dismissed the appeal and allowed the writ petition itself.

5. The respondent no.2 preferred a special leave petition numbered as SLP No. 036170 of 2014, which was admitted and numbered as Civil Appeal No. 2201 of 2020. The Supreme Court ultimately dismissed the appeal on March 18, 2020.

6. During the pendency of the appeal before the Supreme Court, the petitioner no.1 entered into a scheme of amalgamation with five group companies including Sona Promoters Pvt. Ltd. in terms of all assets and liabilities of the said group companies, which were to vest in the petitioner no.1. By an order dated March 5, 2020 passed by the National Company Law Tribunal (NCLT), Kolkata Bench, the scheme of amalgamation was sanctioned and the leasehold rights of Sona Promoters stood transferred and vested in the petitioner no.1-company.

7. By its letter dated July 15, 2020, the petitioner no.1 called upon the respondent no.1 to mutate the lease in the name of the petitioner no.1 pursuant to the amalgamation order dated March 5, 2020.

8. *Vide* letter dated September 29, 2020, the respondent no.1 called upon the petitioner no.1 to furnish several documents which were submitted by the petitioners on October 5, 2020. Thereafter, respondent no.2, the Chairman of the WBSIDCL, called the petitioners for a meeting at his office on December 8, 2020, which was attended by the petitioners. According to the petitioners, the respondent no.2 made further enquiries about the Constitution of the Companies which were parties to the amalgamation Scheme in the said meeting. Further documents were also submitted by the petitioners as per the discussion in the said meeting.

9. However, *vide* letter dated February 2, 2021, the respondent no.2 asked the petitioners to pay Rs.18,76,000/- with 18% on account of GST, treating the petitioners' application as one for transfer of lease to a third party.

10. On the query of the petitioners as to the reason of such claim, the respondent no.2 cited the opinion of "senior counsel", which was never furnished to the petitioners.

11. Learned counsel for the petitioners argues that as per the relevant clause of the lease deeds, if the leasehold interest is transferred to group companies, where the identity of the transferor and transferee is same, it would not be treated as transfer and only a service charge of Rs.10,000/- is payable. However, if the lease is transferred to a new entity, full transfer fees are chargeable in terms of the schedule prescribed by respondent no.2.

12. Such provisions find place in the minutes of the 353rd Meeting of the Board of Directors of respondent no.2, dated June 3, 2019 annexed to the opposition of the said respondent.

13. In terms of the present case, the petitioners argue that the leasehold interest of Sona Promoter stood vested in the petitioners. As per the annual returns of the petitioner no.1, the shareholders of Directors of Sona Promoters and the petitioner no.1 are the same, which is not disputed by respondent nos. 1 and 2.

14. As per the General Policy for transfer of lease recorded in the 353rd meeting of the Board of Directors of respondent no.1, the respondents have set up a plea that prior approval of respondent no.1 was necessary before entering into the scheme of amalgamation. The respondent no.1 has also held out a threat of eviction if the petitioners does not pay the transfer fees of Rs.18,76,000/-. The respondent no.1 has relied on Section 108 of the Transfer of Property Act, and Clauses 3(j) and 3(l) of the Deed of Lease.

15. Apropos such argument, learned counsel for the petitioners submits that the stipulation of taking prior approval before entering into a scheme of amalgamation is neither a pre-condition nor is mandatory, inasmuch as no penal consequence is specified for non-compliance of the same.

16. Clause 3(l) indicates that only if there was a change in identity or character of the lessee would the lessee be liable to pay transfer fees. It is submitted that the respondents have cited *Maan Concast Pvt. Ltd. and Another Vs. West Bengal Industrial Development Corporation Ltd.*

and Others, reported at *2017 SCC OnLine Cal 19426* and *Allenby Garments Pvt. Ltd. & Anr. Vs. West Bengal Industrial Development Corporation Ltd. and Others*, reported at *2018 SCC OnLine Cal 3508* both of which are not applicable to the present case. It is argued that the amalgamation between the two companies having the same directors and shareholders, as in the present case, should not be treated as transfer and only service charges would be payable.

17. The judgments cited by the respondents were rendered prior to change in the General Policy of the respondent no.2 in 2019 and, as such, the ratio of the said judgments is not applicable in the present case, it is contended.

18. In the decision *Uttar Pradesh State Industrial Development Corporation Limited Vs. Monsanto Manufacturers Private Limited and another,* reported at *(2015) 12 SCC 501*, relied on by the respondents, the Supreme Court has recorded a finding on fact that the transferor and transferee companies had no common shareholders or directors. It is argued by the petitioners that the said circumstances are not applicable to the present case, as the petitioner no.1 and the amalgamated companies are group companies and the shareholding structure and Board of Directors of the companies are identical.

19. In fact, it is argued that the provision for obtaining prior approval has been expressly waived by the positive and overt acts and conduct of the respondents in seeking particulars of shareholding structure and Board of Directors of the petitioner no. 1 and Sona Promoters by its letter dated October 5, 2020 and in the meeting dated December 8, 2020, both of which were after receipt of the petitioners' application for mutation.

20. Learned counsel for the petitioners argues that the amalgamation scheme was entered during the pendency of the appeal before the Supreme Court. Seeking approval from the respondent no.2 prior to entering into the scheme of amalgamation at that juncture would be idle and empty formality as the respondent no.1, which was hotly contesting the lease and had preferred the appeal, would not, in any event, have considered the request of prior approval by any stretch of imagination, since it would be contrary to the termination of the lease, which act was sought to be validated by the respondents before the Supreme Court.

21. Learned counsel for the petitioners relies on *Chairman, All India Railway Recruitment Board and another Vs. K. Shyam Kumar and others*, reported at *(2010) 6 SCC 614* for the proposition that the doctrine of Wednesbury unreasonableness and proportionality have universal application in matters involving executive action, as in the present case.

22. In reply, learned senior counsel for the respondent no.1-WBSIDCL argues that as per the lease deeds dated December 14, 2007 and March 04, 2009, Sona Promoters Pvt. Limited was precluded from transferring the land and/or subletting, assigning and/or parting with possession without prior permission of the lessor.

23. The scheme of amalgamation was filed before the NCLT, Kolkata Bench by five companies including the petitioner no.1 in terms of

Section 230 read with Section 232 of the Companies Act, 2013. Hence, it was a voluntary transfer between the four transferee companies and the transferor company. By virtue of such amalgamation, the leasehold property of Sona Promoters, which was shown as an asset of the said entity, got transferred to and vested in the petitioner no.1-company.

24. By reason of such transfer, it is argued, a sub-tenancy was created, in support of which proposition learned counsel for the respondent no.1 cites *M/s. General Radio and appliances Co. Ltd. and others Vs. M.A. Khader (Dead) By LRS.*, reported at *(1986) 2 SCC 656*. It is argued that admittedly no permission of the lessor was taken before parting with possession. Even in case of an involuntary transfer or transfer of tenancy by virtue of a scheme of amalgamation sanctioned by the court, it would be deemed to be a transfer of tenancy right in violation of the agreement between the parties as well as the statute governing tenancy.

25. Learned senior counsel for the respondent no.1 argues that the amalgamation scheme was sanctioned behind the back of the WBSIDCL, which had no opportunity to object to the same, not being a party or having been put on notice.

26. The lease agreements, it is argued, clearly stipulate that the lessee must not change its identity or character without prior consent of the Corporation. By reason of the amalgamation, the lessee has merged into the petitioner no.1, losing its identity and existence.

27. Such transfer by way of amalgamation was without the consent of the lessor. Therefore, it is argued, the respondent no.1 never had any relationship of lessor and lessee with the transferee company/petitioner no.1, which is, thus, an unauthorized occupant of the premises.

28. The demand of the respondents from the petitioners for transfer charges was an offer to regularize the tenancy/lease, which was turned down by the petitioner no.1 on the ground that it is under the same management and beneficiary as the lessee.

29. It is argued that the general policy for transfer of lease is based on a public policy as contained in Section 108(j) of the Transfer of Property Act, 1882. Where there is a contract to the contrary as in this case, the lessee does not have the authority to deal with the leasehold interest. At the point of time when the lessee dealt with the lessor's property, it did not have the authority to do so. Thus, the transfer of lease was wholly unauthorized in law.

30. Learned senior counsel for the respondent no.1 argues that a transfer contrary to the contractual provision and in the absence of prior consent of the landlord would entail transfer fee. On such proposition, the respondent no.1cites the following judgments:

i) *Uttar Pradesh State Industrial Development Corporation Limited (supra)* ;

ii) *Maan Concast Pvt. Ltd. (supra);* and

iii) *Allenby Garments Pvt. Ltd. (supra).*

31. While distinguishing the judgment of *All India Railway Recruitment Board (supra)*, cited by the petitioners, learned senior counsel appearing for the respondent no.1 argues that the same pertains to service jurisprudence and has no manner of application in the present case. The demand of respondent no.1 for transfer fee is not arbitrary but based on a commercial contract entered into between the parties.

32. It is next argued by respondent no.1 that the litigation between the parties before the Supreme Court was confined to construction of structures on a vacant land within the stipulated time provided under the lease as contained in Clause 2(g) of the lease deeds. Seeking prior permission for a scheme of amalgamation had nothing to do with the said litigation.

33. In any event, the order of eviction had been set aside by the Division Bench of this Court on September 19, 2014 and the order of NCLT dated March 5, 2020 was passed six years thereafter. The writ petitioner, in the meantime, treated the leasehold property as a subsisting property of Sona Promoters and as one of the assets for the transfer for the purpose of amalgamation. Therefore, 'pendency of litigation' is merely an afterthought. It is reiterated that prior consent was mandatorily to precede transfer.

34. Thus, it is argued, the petitioners are trespassers and the writ petition ought to be dismissed.

35. To adjudicate the issues involved herein, the Agenda Notes of the 353rd meeting of the Board of Directors of the WBSIDCL held on June 03, 2019 acquire importance. The said Notes, annexed to the affidavitin-opposition of the respondent no.1, under Agenda Item No. 19-353, records that BCC & I and Aquilaw have given their recommendation regarding transfer and surrender of lease, the suggestion being that certain transactions would not be considered to be 'Transfer' by the lessor, only upon examination of the applications for prior intimation made to the lessor by the lessee.

36. Clause (iv) under the same contemplates merger, arrangement and amalgamation of the lessee with its group company.

37. In the present case, the petitioner amalgamated with its group companies, thus otherwise falling within the exceptions which would not be considered transfer. However, it is noteworthy that even as per the recording in the said agenda, for the non-consideration as transfer, the lessee would have to make a prior intimation to the lessor and the lessor would decide the same upon examination of such application of prior intimation.

38. Under the General Policy for transfer of lease, adopted by the WBSIDCL, the WBSIDCL allows transfer of lease subject to obtaining prior approval in writing. Thus, the transfer of lease contemplated therein has to be preceded by prior approval in writing.

39. It is reiterated thereafter that the transferor and transferee shall make an application in the prescribed form of WBSIDCL for seeking such prior approval for the transfer upon payment of Rs.10,000/- as application/processing fees. Prior to giving approval, the lessor is to ascertain that there are no outstanding dues to the lessor by the lessee. In the present case, the provision of prior approval which is repeated in several places of the General Policy of Transfer and the Agenda Notes as indicated above, is, however, considerably diluted due to the conduct of the WBSIDCL/lessor.

40. The question of prior approval is not an absolute bar to grant permission for transfer, but is one of the initial rungs of such approval. The WBSIDCL, being the lessor, can at any point of time waive such prior approval, if it takes up for consideration an application for approval after the transfer.

41. In the present case, the communication dated February 02, 2021, which contains the impugned claim of transfer charges, itself indicates that, on the basis of the prayer made by the petitioners dated October 5, 2020 and December 9, 2020 for proposal of amalgamation, the same "may be considered as treated as Transfer case as per norms of this Corporation" as per the WBSIDCL itself, subject to fulfillment of certain terms. Hence, the WBSIDCL waived the precondition of prior approval by taking up for consideration the request of the petitioners for approval of transfer, after the actual transfer was effected.

42. Being a public authority, the respondent no.1/WBSIDCL has to be placed on a higher pedestal in terms of transparency and reasonableness of action. The actions of the respondent no.1, unlike a private lessor, cannot be arbitrary or contrary to its own guidelines.

43. In the present case, the WBSIDCL insisted upon payment of Rs.18,76,000/- as transfer charges plus GST Rs.3,37,680/-.

44. However, as indicated earlier, the General Policy for transfer excludes cases of amalgamation of the lessee within its group companies from the purview of 'transfer'.

45. The only rider is that there has to be a prior intimation, which has been waived in the present case by the WBSIDCL itself by taking up for consideration the petitioners' request for such transfer.

46. In the present case, nothing has been produced by the respondents to rebut the contention of the petitioners that the companies among which there was an amalgamation of the petitioners are "group companies" of the petitioner no.1. The annexures to the writ petition indicate that the shareholding and Board of Directors were common between the said companies. Hence, the amalgamation of the petitioner no.1 squarely comes within the exception clause carved out of 'transfer' as per the General Policy of the respondent no.1 itself.

47. Thus, the respondent no.1 is not entitled to claim transfer charges, as applicable to other entities, in case of the petitioners. Only the processing fee of Rs.10,000/- can be claimed by the respondent no.1.

48. Considering the judgments cited by the respondents, in *Maan Concast Pvt. Ltd. (supra)* the coordinate Bench of this Court was considering schemes of amalgamation generally. The stress therein was on change in identity of the lessee. The court observed that the transfer and vesting of the rights of the lessee in respect of the deed of lease is not binding on the first respondent as the lessor. It was further observed that it is open to the first respondent to demand a consideration for recognizing an entity as its lessee, in the given facts of the said case. In the said case, there was no mitigating circumstance of the entities which were amalgamated; hence, the said general proposition is distinguishable from the present case.

49. In the Division Bench judgment of *Allenby Garments (supra)*, the court stressed the fact that the two entities which were amalgamated were two different legal entities, which was the plinth of consideration in respect of claim of transfer fee.

50. In *Uttar Pradesh State Industrial Development Corporation Limited (supra)* the Supreme Court, similarly, was considering a case of amalgamation between different and separate entities. It was observed that as per the amalgamation scheme, the property rights and power of one of such entities was transferred without further act or deed by which it was clear that there was a transfer of premise in favour of the other company.

51. There is no dispute that there is a transfer on amalgamation between the petitioner no.1 and its group companies. The question, however, is whether such transfer is between entities identical on point of shareholding and directorship, thus coming within the exclusion contemplated in the General Policy and minutes of meeting of the WBSIDCL itself, as annexed to the opposition of the WBSIDCL. As pointed out above, an amalgamation of the lessee within its group companies is not considered as transfer for the purpose of charging transfer fees under the said policy of the WBSIDCL. Thus, even if there was a transfer as contemplated in the cited judgments, the same did not fall within the purview of 'transfer' for the purpose of charging transfer fees by the WBSIDCL in the present case.

52. The petitioners have cited *K. Shyam Kumar*'s case, where the Supreme Court, while adjudicating in judicial review on a recruitment process in service law, observed that the Wednesbury principle and principle of proportionality applied to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue could have arrived at it. It was observed that proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed.

53. There cannot be any quarrel with the same as a general proposition of law. However, the said proposition is not applicable in terms to the present case, since we are not exactly dealing with patent unreasonableness. The context here is that the respondents have flouted their own General Policy and guidelines in charging transfer fees by treating the amalgamation-in-question between group companies of the petitioners as a regular transfer, in contravention of the exception curved out in the General Policy of the respondent no.1.

54. There has been a mix-up regarding the other aspect of the matter. The petitioners claim that the transfer by amalgamation in the petitioners' favour is to be formalized by the respondents by accepting such transfer and mutating the same.

55. However, the respondents have sought to place reliance on the relevant clauses in the lease-deeds between the respondent no.1 and the predecessor-in-interest of the petitioner, that is, Sona Promoters Pvt. Ltd. for arguing that in the event of subletting without prior approval of the lessor, the lessor is entitled to eviction.

56. The respondents have a strong case there, insofar as the lease-deeds contemplate prior approval before subletting.

57. However, the said proposition is also arguable, since amalgamation between group companies having same shareholding and directorship may not tantamount to transfer in favour of a third party. However, the same depends on the facts and circumstances of the case, which can only be gone into in a proper proceeding, if instituted by the respondents for eviction.

58. The present writ petition only pertains to the claim of transfer fees by the respondent no.1. Hence, there is no use widening the scope of the present writ petition.

59. In any event, as the respondent no.1 is already considering the transfer in favour of the petitioner, if the same is otherwise eligible for acceptance, there is no question of initiating any eviction proceeding as such.

60. Thus, the judgments of *M/s. General Radio (supra)*, cited by the respondents, is not germane in the present context, since the same pertains clearly to rent control and eviction. In the said judgment, it was observed that voluntary amalgamation of the tenant company tantamounts to subletting.

61. The question there was whether such an amalgamation, if voluntary, tantamounts to subletting.

62. In the present case, although voluntary, the amalgamation was between group companies having the same shareholding and directorship, which was not a bone of contention or matter for consideration in the said judgment. Hence, the said judgment is not germane for the present consideration.

63. Thus, upon a comprehensive assessment of the materials on record, this Court is of the opinion that the respondent no.1 acted *de hors* its own General Policy and meeting resolutions in claiming full transfer fees from the petitioners by treating the amalgamation between the petitioners no.1 and its companies as a 'transfer' within the contemplation of the General Policy of the respondent no.1, although it falls within the exception clause thereof.

64. Hence, WPO No. 764 of 2022 is allowed, thereby setting aside the claim of the respondent no.1 to the tune of Rs.18,76,000/- as transfer charges and Rs.3,37,680/- as GST thereon and directing the respondent no.1 to accept and ratify the transfer of lease in favour of the petitioner no.1-company upon acceptance of Rs.10,000/- as processing fees.

65. There will be no order as to costs.

66. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)