

22.05.2024

Ct. no.654

Sl. Nos.7

ss

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION**

WPA 14366 of 2024

**Nupur Halder Mistri
Vs.
Union of India & ors.**

Mr. Firdous Samim
Mr. Gopa Biswas
Ms. Payel Shome
Ms. Purba Mukherjee
Ms. Mohana Das

... for the petitioner

Mr. Amit Kumar Nag
Mr. Partha Banerjee
Mr. Pritha Bhaumik

... for the respondent nos.2 to 5

Affidavit of service filed on behalf of the petitioner is taken on record.

By the present writ petition, the writ petitioner has sought for withdrawal/cancellation/rescission of the letter dated 9th May, 2024 of the respondent no.3/Indian Oil Corporation Limited, Kolkata, Divisional Office (hereinafter referred to as the "IOCL") whereby the petitioner was found ineligible.

The petitioner's case in nutshell is that she applied for retail outlet dealership on 27th September, 2023 as per the advertisement of respondent-IOCL published in '*Ananda Bazar Patrika*' on 18th July, 2023 at location RHS of NH 34 (New NH 12) between KM stone 122 to KM stone 130, while going from Dhubulia to Plassey.

The petitioner was the lone applicant in respect of vacancy under Group-I of the advertisement. The last date for submission of such application was 17th October, 2023. The petitioner was informed by the respondent-IOCL vide its letter dated 20th October, 2023 (communicated by email dated 5th December, 2023) that she has been provisionally selected. By the letter dated 9th May, 2024, it was informed to the petitioner that upon perusal of the land document submitted by the petitioner she was found to be ineligible on the ground that the offered land made in the application by way of lease deed was not in her possession. The petitioner thereafter on 13th May, 2024 made a representation before the respondent-IOCL to reconsider her application. By letter dated 13th May, 2024 such prayer was turned down. Hence, this writ petition.

Mr. Firdous Samim, learned Advocate for the petitioner submits that as per Clause 4(vi)(a) of the brochure the offered land should be available with the applicant as on the date of application and the minimum period of lease should be 19 years and 11 months from the date or after the date of advertisement but not later than the date of application. The brochure does not in clear terms spell out that the applicant should have possession of land on the date of application. Therefore, rejection on the sole ground of not having possession of the lease hold land is not within the scope and ambit of rules of the brochure of respondent-IOCL. Be that as it

may, the lease deed was executed on 27th September, 2023 which is much prior to the last date of application as required and as per the said lease deed the lease period of 29 years 6 months is to start from 1st January, 2024. Referring to the decision of this Court passed in ***Sri Baneswar Paul versus Sm. Nirmala Jyoti*** reported in ***AIR 1979 Cal 396*** he submits that the actual interest of the lessee commences on the execution of the lease and therefore, even if the period of the lease is to start on a future date the interest of the lessee was created on the date of its execution which is sufficient compliance that the land offered by the lessee was available with her. The period mentioned in the lease deed is only for the sake of computation of rent and it has got no relation whatsoever with the commencement of the lease. Since it is palpable from the lease document that it has been registered on 27th September, 2023 the right of the petitioner as a lessee over the offered land was created on such date. As per Section 105 of the Transfer of Property Act, the lease of the immovable property is a transfer of right to enjoy such property for a certain time on payment of consideration of a price paid or promised and it does not provide that lease would commence from the date of delivery of possession and not from the date of execution of lease deed. In light of the aforesaid submission, he prays that the finding of respondent-IOCL that the petitioner is ineligible vide letter dated 9th May, 2024 is pervasive and arbitrary and should be set aside and the

matter should be remanded to the respondent-IOCL for fresh consideration of the application of the petitioner for appointment of retail outlet dealership.

On the contrary, Mr. Amit Kumar Nag, learned Advocate for the respondent-IOCL submits that the clause of the lease deed clearly says that it would be effective from 1st January, 2024 till 30th June, 2054. The transfer of enjoyment of the property and delivery of possession of the property and rent stipulated by way of consideration of such grant is *sine quo non* for creation of a lease and until and unless the possession of lease hold land is delivered to the lessee no lease comes into existence. In support of his contention, he relies on the decisions of **Anwar Ali Bepari versus Jamini Lal Ray Chaudhuri**, reported in **ILR 1939 page 254** and **Smt. Rajbir Kaur and Another versus M/s. S. Chokesiri And Co.**, reported in **(1989) 1 SCC 19**. Since the lease deed says that it would be effective from a future date i.e. 1st January, 2024 hence neither there was any lease subsisting on the date of application nor there was any delivery of possession of land. Further in the lease deed there is no clause containing delivery of possession of the lease hold land on the date of execution of the lease deed and as such there was no lease subsisting on the date of application. To buttress his contention, he relies on the decisions of the Hon'ble Supreme Court passed in **2021 SCC OnLine SC 852 (Anapurna Jaiswal versus Indian Oil Corporation Ltd. and others)** and **2022 SCC**

OnLine Cal 3032 (Indian Oil Corporation and Others versus Soma Saha and Another). He also indicates that the petitioner in her representation has categorically stated that she acquired to enjoy leasehold land from 1st January, 2024. Therefore, it is admitted position that the petitioner was not in possession of the land on the date of application. Therefore, the respondent-IOCL has rightly rejected the application of the petitioner on the ground that she was not in possession of the offered land. In light of his aforesaid submission, he prays for dismissal of the writ petition.

Having heard the learned Advocates for the respective parties, the issues which has fallen for consideration is whether the lease of the petitioner in respect of the offered land was subsisting on the date of application and whether the offered land was available with her on the date of application.

It is not in dispute that on the date of application, that is, 27th September, 2023 the petitioner entered into a lease deed in respect of the offered land which is prior to the date of application as required. As per lease deed, the period of lease would be effective on and from 1st January, 2024 till 30th June, 2054.

Section 105 of the Transfer of Property Act defines lease as follows:

“Lease defined. – *A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money,*

a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”

The Hon’ble Supreme Court in *Smt. Rajbir Kaur (supra)* held as follows:

“19. This case, indeed, presents once again the recurring facets of a familiar controversy, whether the transaction between a tenant and the person — alleged by the landlord — to be his subtenant is in law really one of subtenancy which often resembles, and is most liable to be confounded with, a licence. One of the twin principal tests by which a lease is distinguishable from the relationship created under a licence is the element of the right to exclusive possession involving the transfer of an interest in the property; the other being the “rent” stipulated for the grant.”

Moreover, in *Anwar Ali Bepari (supra)*, it is observed as follows:

“A lease is, therefore, the outcome of the rightful separation of ownership and possession. The essential characteristic of a lease is that the subject is occupied and enjoyed, but the corpus of the subject does not disappear by user. Before the lease the owner had the right to enjoy possession of the land, but by the lease he excludes himself during its currency from that right. A lease is, therefore, not a mere contract, but is a transfer of interest in land. It creates a right in rem.”

Upon going through the above definition of lease and bearing in mind the proposition laid down in *Smt. Rajbir Kaur (supra)* and *Anwar Ali Bepari (supra)* one of essentials for creation of a lease is the right to exclusive possession involving the transfer of an interest in the property by such grant. A lease, therefore, is the outcome

of the rightful separation of ownership and possession. Prior to lease the owner had the right to enjoy possession of the land, but after lease he excludes himself from such right of possession during its subsistence.

Clause 4(vi)(a) of the brochure (at page 38 of the writ petition) clearly indicates that the offered land should be available with the applicant as on date of application. Upon going through the lease deed dated 27th September, 2023 nothing has been spelt out in clear terms that the offered land was made available to the petitioner on the date of execution of the lease deed or the possession of the lease hold land was handed over to writ petitioner.

It is a fact that in her representation dated 13th May, 2024 the petitioner in clear terms has stated that she acquired to enjoy the leasehold land with effect from 1st January, 2024. She has further stated that the enjoyment of the land was deferred till 1st January, 2024 to avoid payment of rent amounting of Rs.55,833/- per month. Now taking into consideration the clauses in the lease deed which shows that it is to take effect from 1st January, 2024 and the statement made in the representation by the petitioner it goes without saying that there was no transfer of possession/right to enjoyment of the offered land in favour to the petitioner on the date of execution of the lease and was the take effect from a future date i.e. 1st January, 2024.

In *Anapurna Jaiswal (supra)* the respondent-Corporation took the view that the lease dated 8th November, 2011 which was the foundation for the offer made by the appellant would commence from date of approval of the petrol outlet. This meant that the possession over the premises did not amount to a lease and on the date of the execution of the lease deed the lease had not come into force. The lease deed was more of a firm offer than owned proposition. Subsequently, rectification/clarificatory deeds were registered. Several representations were made which were rejected and it led to filing of the writ petition. The Hon'ble Court in the aforesaid set of fact observed as follows:

“17. A perusal of clause 5 would reveal that lease period is explained as after ‘the expiry of 30 years’ and it speaks about the renewal of the lease period. The completion of the lease period which is after the expiry of the 30 years again would have to be reckoned only with effect from the date of approval of the petrol pump. Therefore, it is clear that the lease which the appellant laid store by contemplated the period of the lease commencing not on the date of the lease but at a point of time in the future. In fact, the point of time or the event upon which the period of lease was to begin with itself uncertain. Maybe it is true that it could come into effect upon future events taking shape on the principle that in equity on the future event happening relating to the subject matter of the lease, the lease could have affected the property in the future. But we need not explore the matter on those lines any further as it is clear that the lease did not take effect on the date of the lease namely 8.11.2011. If that be so there was also no lease in place as on the date of the application namely 11.11.2011.”

The Hon'ble Division Bench of this Court in *Soma Saha (supra)* relying on *Anapurna Jaiswal (supra)* in similar facts observed as follows:

“54. So far as decision relied on by Mr. Bandopadhyay, learned Senior Counsel appearing for the Respondent No. 1 in the case of *Prasad Technology Park (P) Ltd. supra* is concerned, it speaks of a relationship between the lessor and the lessee in the event of alteration made in the lease deed afterwards and we do not dispute the proposition of law that unless the essential ingredients as contained in Section 105 of the Transfer of Property Act are altered, it cannot be said that the parties to the contract entered into a fresh transaction. The aforesaid decision in any manner does not answer our question. Per contra the decision of Hon'ble Supreme Court in the case of *Annapurna Jaiswal* relied on by Mr. Mitra, learned Counsel appearing for the Appellants squarely applies to the facts of the present case as found from paragraphs 14 to 20 of the said Judgment.

55. In view of our discussion we are constrained to hold that on the last date of submission of application i.e. 18.10.2017, there was no subsisting lease in favour of Respondent No. 1 though the lease was commencing from a posterior date and it was rectified later by action of the lessor and the lessee.”

Bearing in mind the above proposition, since the land was not available to the petitioner on the date of lease deed there was no subsisting lease on the date of application.

Mr. Firdous Samim, learned Advocate for the petitioner referring to *Sri Banerwar Paul (supra)* tried to impress upon the Court that actual interest of the lessee commences on execution of the lease deed. It is relevant to note that in the cited decision the question before the

Hon'ble Court considering the effective period of lease whether the lessee would not come within the meaning of the provisions of clause (b) of Sub-Section (5) of Section 2 of the *Calcutta Thika Tenancy Act, 1949*. There was no *lis* as to what would be the status of a lease without transfer of possession. The fact is distinguishable and does not apply to this case.

Thus it manifests from the above that there was no transfer of possession of the offered land which leads to the analogy that such land was not available with the petitioner as required under the brochure on the date of application.

The decision in *Soma Saha (supra)* reiterates the proposition that offer can be accepted only if it is in conformity with invitation. Relevant paragraphs 27 and 49 are reproduced hereinbelow:

“27. It is no more res integra that the advertisement for appointment of LPG dealership is an invitation to offer and the particulars mentioned in an application filed is the offer in terms of the condition mentioned in the invitation to offer. So, when the application is filed (offer is made) in response to the invitation to offer, it must be filed or made with the eyes open and mind cognizant of the conditions. The offer can be accepted by the principal only if the offer is in conformity with the invitation to that effect and not otherwise. On acceptance of the offer only a letter of intent is to be issued culminating in agreement/contract between the parties.

x x x

49. The aforesaid decision of Hon'ble Supreme Court in the case of Ramana Dayaram Shetty by now has attained the status of locus classicus. Taking a cue from

the aforesaid Judgment we feel it expedient to say here that any act done in contravention of the norms vitiates the action irrespective of whether it involves “affectation of some right or denial of some privilege”. In the present case as we have discussed supra and as found from the statement of Respondent No. 1 in Annexure-P4 to the Writ Petition the land for godown offered by her by the last date of submission of application i.e. 18.10.2017 was not in accordance with the norms specified in the advertisement i.e. the invitation to offer. Any development that took afterward has no consequence whatsoever so far as rejection of her application on the ground stated in Annexure-P6 to the Writ Petition is concerned.”

Therefore, when an application for engagement is filed or an application is made in response to the invitation it must be in conformity with the terms and conditions provided therein. Thus the letter dated 9th May, 2024 of respondent-IOCL finding the petitioner as ineligible does not call for interference. The writ petition falls short of merit.

In light of the above discussion, the writ petition being **WPA 14366 of 2024** stands dismissed.

All connected applications, if any, stand dismissed.

There will be, however, no order as to costs.

Interim order, if any, stands vacated.

All concerned parties shall act in terms of the copy of the order duly downloaded from the official website of this Court.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)