

Constitutional Writ

PRESENT: The Hon'ble JUSTICE I.P. MUKERJI

Judgment on: 15.03.2010

W.P. NO. 18790(W) OF 2009

M/S. GREEN HUT PVT. LTD & ANR.

Versus

STATE OF WEST BENGAL & ORS.

POINTS:

Grant of lease in Salt Lake ----Lease deed containing a clause relating to non-transferability of the lease hold plot----Change of shareholders in company, if amounts to transfer of leasehold land----Writ Petition if can be entertained---Constitution of India, Article 226.

FACTS:

The disputes in this Writ Application arise out of a lease dated 27th November, 1998, between the Writ Petitioner Company and the State of West Bengal .The said Respondent alleges breach of some covenants in the lease deed, by the Writ Petitioner and seeks to enforce the alleged consequence of it. The lease was a demise of Plot No. 167 in Block IB in Sector III, Salt lake in favour of the Writ Petitioner Company for a period of 999 years. The lease was duly registered. Clause 2(8) of the lease did not permit the lessee to assign or transfer the demised land. It could do so with the permission of the Government in writing.

The subject matter of challenge in this Writ Application is a letter dated 10th September 2009, by the Government of West Bengal to a director of the Writ Petitioner Company. The letter said that when the lease was granted the writ Petitioner Company had five share holders. But on the date of the letter there were three share holders, all different persons from the original share holders. According to the Government this amounted to assignment or transfer of the lease in violation of Clause 2(8).

HELD:

The dispute in the Writ Application arises out of a lease deed between the Writ Petitioner and State of West Bengal. The Respondent no.1 alleges the violation of some covenants in the lease deed and seeks to enforce their consequences. This kind of dispute is entirely a private dispute and no public law element is involved or any other circumstance exists for the exercise of Writ Jurisdiction. Whether there is a breach of any covenant of a lease , the same is to be properly determined by a Civil Forum.

PARAS 1 &8

The Government at the time of preparing the terms of lease could not contemplate a situation whereby the five shareholders of the Company at the time of execution of the lease would disappear and their shares would be held by three other shareholders. The Government never expressed any intention of entering into a contract with the individual five shareholders but

entered into the contract, that is the, lease agreement with the Company. If it had entered into the lease agreement with those five persons then it could have rightly claimed that there was assignment or transfer of the lease. But the lease agreement was with an incorporated company and just because there is change in the membership of the Company does not mean necessarily that there is assignment or transfer as the Company remains the lessee. The above letter of the Government of West Bengal alleges assignment or transfer of the lease on just this basis.

PARA 10

It is true that a Company is a different entity from its shareholders. Unless there is express transfer or assignment of a lease by the Company in favour of some other party it cannot be ordinarily said that there is assignment or transfer of the lease merely because there is transfer of shareholding. The letter of the Government of West Bengal alleges transfer of shareholding only. On the basis of the allegations in the body of the letter in the opinion of the Court no case for transfer or assignment is made out.

PARA 11.

CASES CITED:

Mrs. Bacha F. Guzdar, Bombay – v – Commissioner of Income Tax, Bombay, AIR1955SC74

Kapila Hingorani – v – State of Bihar, (2003)6 SCC 1 (paragraph 21).

Aron Salomon (Pauper) and A. Salomon and Company Limited the House of Lords 1897 Appeal Cases page 22.

For the petitioners : Mr. Shaktinath Mukherjee
Mr. Ratnanko Banerjee
Mr. Srijib Chakraborty
For the State Government : Mr. Ashok Sarkar

THE COURT:

1. Before proceeding to deliver judgment in this application, I make an observation that this writ application ought not to have been entertained by this court at all. I say so because the disputes in this writ application arise out of a lease dated 27th November 1998 between the writ petitioner company and the State of West Bengal being the respondent No.1. The said respondent alleges breach of some covenants in the lease deed, by the writ petitioner and seeks to enforce the alleged consequence of it. In my opinion, this kind of a dispute is entirely a private dispute between the writ petitioner and the Government and no public law element is involved or any other circumstances exists, strictly speaking, for exercise of writ jurisdiction. But since this writ application was admitted and directions for affidavits made, and affidavits are filed I thought it was unjust at this stage to relegate the writ petitioner to a remedy in the civil forum.

2. The lease was a demise of plot No. 167 in Block IB in Sector III, Saltlake in favour of the writ petitioner company for a period of 999 years. The lease was duly registered.

3. One clause of the lease has become important in this writ application. That is clause 2(8). That clause is set out below:

(8) The Lessee shall not assign or transfer the demise land or any part of the demised land and/or the structure erected thereon without the previous permission of the Government in writing. In case of transfer or assignment of the lease the Lessor shall have the right of pre-emption and upon the exercise of this right the building constructed by the Lessee on the land shall be taken over by the Lessor at a valuation of the building made by the Lessor on the basis of the costs of construction of the building less depreciation at the usual rate or the market value thereof, whichever is less. The value of the land will be the amount of the salami or premium paid by the Lessee. In the event of difference between the parties as to the value of building, the matter in dispute shall be referred to the arbitration of an arbitrator if the parties can agree upon one or otherwise to two arbitrators, one to be appointed by each party with an Umpire. The award of the arbitrator or arbitrators or the Umpire, as the case may be, shall be final and binding on both the parties.

Provided however that in case the Lessee transfers or assigns the leasehold interest in the land and/or structure standing thereon in favour of L.I.C. or Nationalised Bank or Government or Semi-Government Organisation or registered Housing Cooperative Society, or Statutory Body by creating mortgage for repayment of loan for house building purpose, Life Insurance Corporation of India or Nationalised Bank or Government or Semi-Government Organisation, or registered Housing Cooperative Society or Statutory Body, "as the case may be, it may claim priority over the Government of West Bengal in respect of right or pre-emption on the demised land and/or structure standing thereon subject to the condition that all the dues of the Government as provided herein shall be payable and recoverable to the Government of West Bengal either from the Lessee or from the Life Insurance Corporation of India, or Nationalised Bank or Government or Semi-Government Organisation, or registered Housing Co-operative Society, or Statutory Body, as the case may be. Provided however such charge if created shall be subject to the terms and conditions of the lease."

3. That clause did not permit the lessee to assign or transfer the demised land. It could do so with the previous permission of the Government in writing. On 6th May 2008 the Government of West Bengal published what it called a 'notification'. In that 'notification' the Government noted that some lessees had transferred their leases without permission and that the Government proposed to grant 'post facto permission' upon payment of a liquidated sum described as a penalty.

4. As I read it that notification is nothing but a bargain by the Government of West Bengal. It would give permission for transfer or ratify prior transfer upon payment of consideration. If the consideration was paid it would waive its legal rights available, if not paid, a concealed threat of legal action.

5. The subject matter of challenge in this writ application is a letter dated 10th September 2009 by the Government of West Bengal to a director of the writ petitioner company. The letter said that when the lease was granted the writ petitioner company had five share holders. But on the date of the letter there were three share holders, all different persons from the original share holders. According to the Government this amounted to assignment or transfer of the lease in

violation of clause 2(8). The writ petitioner company was asked to pay up the penalty mentioned in the letter according to the above notification.

6. Mr. Sarkar, on behalf of the Government of West Bengal has taken an extremely fair stand in, submitting that the contents of the letter were merely an offer which the writ petitioner may or may not avail of. According to him, the change in the membership of the company amounts to assignment of the lease.

7. As was expected, Mr. Shaktinath Mukherjee, senior advocate assisted by Mr. Ratnanko Banerjee on behalf of the writ petitioner submitted that the writ petitioner company was a different entity from that of its shareholders. The lease was in favour of the company. A change of shareholding did not imply any assignment of the lease as the lease is properly vested in the company. He has relied on **Mrs. Bacha F. Guzdar, Bombay – v – Commissioner of Income Tax, Bombay, reported in AIR 1955 SC 74 and Kapila Hingorani – v – State of Bihar, reported in (2003)6 SCC 1 (paragraph 21).**

8. In my opinion, whether there is a breach of any covenant of the lease is to be properly determined in any civil forum. Only the letter dated 8th September 2009 is challenged before me.

9. When the terms of the lease dated 27th November 1998 were being finalised by the Government of West Bengal it forgot the case of **Aron Salomon (Pauper) and A. Salomon and Company Limited** decided by the House of Lords on 16th November 1896 and reported in 1897 Appeal Cases page 22. In that case Salomon had a prosperous business as leather merchant and wholesale boot manufacturing. He transferred that business to a joint stock company or a public company as we call it which had seven shareholders including him. But, he was the controlling force. Its business collapsed and the company became insolvent. The question was inter alia whether the creditors of that company were to be paid out of the personal assets of Salomon. It was held by the House that the company had been properly incorporated and was a separate legal entity different from Mr. Salomon. It said “either the limited company was a legal entity or it was not. If it was, the business belongs to it and not to Mr. Salomon. Also, “the Company is at law a different person altogether from the subscribers to the memorandum..... the Company is not in law the agent of the subscribers or trustee for them”. Having held that it was a properly constituted limited company the House refused to make Salomon liable for the debts of the company. The Supreme Court in **Mrs. Bacha F. Guzdar, Bombay – v – Commissioner of Income Tax, Bombay, reported in AIR 1955 SC 74 (paragraph 7) and Kapila Hingorani – v – State of Bihar, reported in (2003)6 SCC 1 (paragraph 21)** has applied and followed this principle. In the former decision the Supreme Court said: “A shareholder has no interest in the property of the Company. ... The Company is a juristic person and distinct from its shareholders. It is the Company which owns the property, and not the shareholders.”

10. There is no doubt in my mind that the Government at the time of preparing the terms of lease could not contemplate a situation whereby the five shareholders of the company at the time of execution of the lease would disappear and their shares would be held by three other shareholders. The government never expressed any intention of entering into a contract with the individual five shareholders but entered into the contract, that is the, lease agreement with the

company. If it had entered into the lease agreement with those five persons then it could have rightly claimed that there was assignment or transfer of the lease. But the lease agreement was with an incorporated company and just because there is change in the membership of the company does not mean necessarily that there is assignment or transfer as the Company remains the lessee. The above letter of the Government of West Bengal alleges assignment or transfer of the lease on just this basis.

11.It is true that a company is a different entity from its shareholders. Unless there is express transfer or assignment of a lease by the company in favour of some other party it cannot be ordinarily said that there is assignment or transfer of the lease merely because there is transfer of shareholding. The letter of the Government of West Bengal alleges transfer of shareholding only. It says that by such transfer there is assignment or transfer of the lease in breach of the above covenant. On the basis of the allegations in the body of the letter in my opinion no case for transfer or assignment is made out. I hereby declare as such. I also restrain the Government of West Bengal from taking any steps on the basis of the letter dated 10th September, 2009.

12.But however, this will not prevent the respondent No.1 to bring an appropriate action in any forum as they may be advised in law for establishing that there is a breach of the above covenant in the lease. If such an action is brought then my observations would be limited and confined to construction of the allegations in the letter dated 10th September 2009 and should not be read as deciding any point which is not mentioned in that letter. The writ application is allowed to the above extent.

13.Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

(I.P. MUKERJI, J.)