IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Adnan Iqbal Chaudhry

High Court Appeal No. 171 of 2018
[Mst. Sajeda Mushtaq v. Federation of Pakistan and others]

Dates of hearing	:	28-09-2018, 09-10-2018 and 12-10-2018
Date of decision	:	15-11-2018
Appellant	:	Mst. Sajeda Mushtaq through M/s Anwar Hussain & Shafqat Ali Shah Masoomi Advocates.
Respondents 1&2	:	Secretary, Ministry of Interior and Secretary, Aviation Division through Mr. Muhammad Shoaib Mirza, Assistant Attorney General for Pakistan.
Respondents 3&4	:	Civil Aviation Authority and Civil Aviation Club through Dr. Shah Nawaz Memon, Advocate.

JUDGMENT

Adnan Iqbal Chaudhry J. – The Appellant has impugned the order dated 23-05-2018 passed by a learned Single Judge in Suit No. 2278/2016 (said Suit), whereby the plaint of the said Suit was rejected, and consequently all other applications in the said Suit, including the Appellant's application for a temporary injunction, were dismissed as infructuous.

On the request of learned counsel, this appeal was heard by us for final disposal at the *katcha peshi* stage.

1. The Appellant is proprietor of Al-Mubarak Caterers & Decorators. By a contract dated 30-08-2011 titled "License Agreement for Utilizing Jogging Track Area for Ceremonial Functions", the President of the Civil Aviation Club (Respondent No.4) as "Licensor", granted to the Appellant as "Licensee", the

right to carry on the business of a Marriage Lawn in an area referred to as "the Jogging Track Area" within the Civil Aviation Club for *"a period of five years, further extendable to another five years by mutual consent"*.

2. When the National Accountability Bureau and the Federal Investigation Agency raised certain queries asking the Civil Aviation Authority (Respondent No.3) to demonstrate compliance of the Public Procurement Regulatory Authority Rules in awarding the subject contract to the Appellant, the Respondent No.4 invoked Clause 14 of the subject contract and terminated the same by notice dated 10-08-2015, the termination to take effect on the expiry of 30 days from the said notice. Clause 14 of the subject contract read as follows:

> *"14. The Club reserves the right to cancel this agreement by giving 30 days notice on any ground. In such a case, after formal intimation of cancellation, the balance of Security deposit will be refunded through crossed cheque to the "LICENSEE" within 30 days of the cancellation, provided that nothing is out-standing in any manner against the Contractor."*

The reason cited in the aforesaid termination notice was as follows:

> *"FIA Anti Corruption Circle, Karachi conducted an enquiry into the award of "License Agreement" for utilizing Jogging Track Area for Ceremonial Functions between Civil Aviation Club & M/s Al-Mubarak Caterers & decorators. Subsequently, Case/FIR No.35/2015 was registered against CEO of m/s Al-Mubarak Caterers & decorators and others on account of illegal award of Jogging Track of CAA land measuring 19,066 Sq. Yds. in 2011, causing wrongful pecuniary loss of millions of rupees to public exchequer and corresponding wrongful gain to M/s Al-Mubarak Caterers & Decorators. FIA also indicated that Clause-14 of License Agreement dated 30-08-2011 for award of above said land may be considered which states that "the Club reserves the right to cancel this agreement by giving 30 days notice on any ground".*

3. The aforesaid termination notice dated 10-08-2015 was challenged by the Appellant by way of the said Suit filed on 27-10-2016 which was essentially for the relief of specific performance of the subject contract, all other reliefs claimed being consequential or ancillary.

Para 20 of the plaint acknowledged that the *"…ending date of the contract is 31-12-2016 ….".* Para 35 of the plaint again acknowledged that *"… the agreement in question is to end in the year 2016."* On the other hand, in paras 22, 26 and 28 of the plaint it was pleaded that though the initial term of the subject contract was for 5 years, the contract stipulated that it was extendable by mutual consent for another term of 5 years, meaning thereby that the rights under the subject contract had been granted for 10 years, as alleged. It was pleaded that the Appellant had expended/invested a substantial sum in the subject premises. In para 16 of the plaint it was averred that the Appellant had erected structures of a permanent nature on the subject premises worth more than Rs.550,000. In para 24 it was averred that the Appellant had spent a total of Rs.170,345,000/- to develop the Marriage Lawn which included the constructing of bridal rooms, office, washrooms, prayer area, underground water tank, storage rooms; the installation of electrical works/equipment, air-conditioning, generator, furniture, carpeting, tiling, crockery etc. In paras 26 and 27 of the plaint the Appellant referred to the subject contract as a 'license', while in para 34 it was averred that it was a 'lease'. It was further the case of the Appellant that the termination notice dated 10-08-2015 was without just cause in that, it did not allege any breach of contract by the Appellant, rather it was issued by the Respondent No.4 to avoid an inquiry by the NAB and the FIA. In para 38 of the plaint it was disclosed that the Appellant's partner namely Muhammad Raza had also filed Suit No.1575/2015 to restrain the Respondents from removing the set-up of the same Marriage Lawn.

The prayer clause of the subject Suit No.2278/2016 reads:

"a) To declare that the agreement dated 30-08-2011 executed by the defendant No.4 in favour of the plaintiff was for a period of 10 years w.e.f. 30-08-2011 to 30-08-2021, as the agreement dated 30-08-2011 does not notify that after completion of 1st term of 5 years further term of 5 years shall not be extended and the memo of agreement does not notify that the period of further 5 years shall be extended;

b) To declare the defendant No.4 to perform the Specific Performance of Contract dated 30-08-2011 with the plaintiff as the plaintiff has paid the rent amount of Rs.28,98,918/-. In case the defendant No.4 refused to accept the same, the Nazir of this Hon'ble Court may be pleased to direct the plaintiff to deposit the same amount in the office of the Nazir of this Hon'ble Court on account of rent of the suit property for the year 2017;

c) To declare that the defendant No.4 has no right to issue the impugned notice dated 10-08-2015 without defining allegations and violation of rules mentioned in the contract agreement dated 30-08-2011;

d) To declare that the plaintiff has paid the entire amount of the rent every year from 2011 to 2016 and plaintiff has also paid the rent of the year 2017 amounting to Rs.28,98,918/- vide cheque No.1281256 dated 26-10-2016 but defendant No.4 has refused to accept;

e) To grant permanent injunction to restrain the defendants from interfering, creating any let or hindrance in the smooth running of the Marriage Hall / Marquee / Crystal Ball Room which are lying under the occupation and control of the plaintiff under valid agreement with the plaintiff and the defendant No.2 to 4 or anybody else acting by or under their behalf shall be restrained not to take any attempt to the dispossess the plaintiff;

f) Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case;

g) To award cost to the plaintiff."

4. In the said Suit, the Respondents 3 and 4 moved CMA No.16151/2016 under Order VII Rule 11 CPC for rejection of the plaint on the grounds: (i) that the subject contract was a license and specific performance of such license was barred by the Specific Relief Act, 1877; and (ii) that after withdrawing the previous Suit No.1575/2015 that had been filed on the same cause of action, the Appellant was barred from filing a fresh suit. It was also averred that the subject license had already expired.

In her counter-affidavit to CMA No.16151/2016, the Appellant contended that the subject contract was a tenancy, not a license; that the tenancy was valid for 10 years; that rental for the 6th year of the contract had been deposited in a Miscellaneous Rent Case; that Muhammad Raza was not the Attorney of the Appellant

and Suit No.1575/2015 filed by him was without any authority and that is why it was withdrawn.

5. By an interim order dated 03-11-2016 passed in the said Suit in favour of the Appellant, the termination notice dated 10-08-2015 was suspended, and the Respondents were also restrained from taking any coercive action against the Appellant, thereby allowing the Appellant to continue with the Marriage Lawn at the subject premises. Though the aforesaid interim order was recalled vide order dated 02-02-2017 for the reason that the Appellant was avoiding to proceed with the matter, it was restored in High Court Appeal No.125/2017. That appeal was eventually disposed off on 15-02-2018 by directing the Single Judge to decide the injunction application and the application under Order VII Rule 11 CPC in the said Suit within one month, during which time the interim injunction passed in favor of the Appellant in the said Suit remained intact.

6. In passing the impugned order dated 23-05-2018, the learned Single Judge perused the subject contract and the correspondence leading thereto, which were all admitted documents, and concluded that the subject contract was a license under Section 52 of the Easements Act, 1882, and not a tenancy. Having concluded so, the learned Single Judge held that since the subject license was revocable, a suit for specific performance or for declaration was not maintainable in view of the law laid down in the cases of *M.A. Naser v. Chairman Pakistan Eastern Railways* (PLD 1965 SC 83), and *Zaidis Enterprises v. Civil Aviation Authority* (PLD 1999 Kar 181). For such reasons, the learned Single Judge rejected the plaint and dismissed all other applications including the injunction application of the Appellant as having become infructuous. The other ground urged by the Respondents for rejection of the plaint, viz. that the said Suit was barred by reason of the previous Suit No.1575/2015, that did not find favor with the learned Single Judge.

7. This appeal was presented on 29-05-2018, and by an interim order of even date it was ordered that the Respondents shall not dispossess the Appellant from the subject premises. However, right thereafter, the Respondent No.3 moved CMA No.1541/2018 under Order XXXIX Rule 4 CPC to state that the Appellant had already been evicted from the subject premises on 23-05-2018 when the plaint was rejected, and that such fact had been suppressed by the Appellant in filing this appeal. Such contention of the Respondents 3 and 4 was recorded in the order dated 31-05-2018. On the other hand, the Appellant moved CMA No.1549/2018 alleging that she had been dispossessed by the Respondents from the subject premises on 30-05-2018 and prayed that possession thereof be restored to her. By order dated 20-06-2018 passed in this appeal, the Nazir was appointed as Commissioner to prepare an inventory of the articles at the Marriage Lawn and the Respondents were directed that such articles should not be sold or removed till further orders. The inventory prepared by the Nazir in compliance of the said order was submitted in this appeal vide report dated 19-07-2018.

8. When confronted with the unambiguous language of the subject contract and the nature of the grant, M/s. Anwar Hussain and Shafqat Ali Shah Masoomi, learned counsel for the Appellant did not press before us the ground that the subject contract was a tenancy. In fact, they conceded that the subject contract was a license. However, the case advanced by learned counsel for the Appellant was that the words in the opening recital of the license that it was *"…. initially for a period of five years, further extendable to another five years by mutual consent…."*, signified that the license was in fact granted for a period of 10 years; that since the Appellant had incurred substantial expense and constructed structures of a permanent nature at the subject premises with the tenure of 10 years in mind, the license was not revocable by the licensor prior to its expiry as provided by Section 60(b) of the Easements Act, 1882; and

therefore not only was the suit for specific performance maintainable, the Appellants were also entitled to a temporary injunction. Further, learned counsel submitted that the learned Single Judge did not consider the fact that the revocation notice dated 10-08-2015 impugned before him had never been addressed to the Appellant. In support of their case, learned counsel for the Appellant relied on the cases of *Green Fuels v. Shell Pakistan Ltd.* (2005 CLC 1602); *Pervaiz Hussain v. Arabian Sea Enterprises Ltd.* (2007 SCMR 1005); *Jagat Singh v. District Board, Amritsar* (AIR 1940 Lah 18); *Hafis Manzoor Ahmed v. Mohammad Abdul Jamil* (AIR 1933 Allahabad 842); and *Mathuri v. Bhola Nath* (AIR 1933 Allahabad 517).

9. On the other hand, Dr. Shah Nawaz Memon, learned counsel for the Respondents 3 and 4 submitted that the license was limited only to a term of 5 years which period has expired; that the license clearly stipulated that it could be extended for another term of 5 years only if there was "mutual consent"; that under Clause 14 of the license, the Respondent No.4 was entitled to revoke the license for any reason; that since the license was revocable, the said Suit for specific performance and injunction was barred by Sections 21(d) and 56(f) respectively of the Specific Relief Act, 1877 and thus the plaint was rightly rejected. In support of his submissions, learned counsel for the Respondents 3 and 4 relied on the cases of *M.A. Naser v. Chairman, Pakistan Eastern Railways* (PLD 1965 SC 83); *Noorani Traders v. Pakistan Civil Aviation Authority* (PLD 2002 Kar 83); *Bank Alfalah Ltd. v. Neu Multiplex & Entertainment Square Co.* (2015 YLR 2141); *Aftab Hussain v. Government of Sindh* (2015 MLD 1688); *M/s Zaidi's Enterprises v. Civil Aviation Authority* (PLD 1999 Kar 181); and *Royal Foreign Currency v. Civil Aviation Authority* (1998 CLC 374).

10. We have heard arguments of both sides and perused the record.

Regards the argument of the learned counsel for the Appellant that the revocation notice dated 10-08-2015 was addressed to

Muhammad Raza and not to the Appellant, in our view nothing turns on that when it is not the case of the Appellant that she remained unaware of the revocation notice or that her remedy against it was prejudiced. In any case, in para 38 of the plaint the Appellant admitted that Muhammad Raza was her business partner in the Marriage Lawn. The record also shows that pursuant to an authority letter given by the Appellant, Muhammad Raza had been dealing and corresponding as her agent with the Respondent No.4, *albeit* the Appellant claims to have revoked such authority later on. Even the address for service filed by the Appellant in the said Suit named Muhammad Raza as her Attorney. Therefore, the said argument is misconceived.

11. Since learned counsel for the Appellant accept that the subject contract was a license as defined under Section 52 of the Easements Act, 1882, in our view, the foremost question for consideration before us is whether the subject license was granted for a period of 5 years or for 10 years. If the license was granted for a period of 5 years, then by efflux of time it stood expired and was "deemed to be revoked" under Section 62(c) of the Easements Act, 1882. Consequently, none of the reliefs prayed for in the said Suit had survived, and all other questions raised by this appeal would become irrelevant. However, should this be a case where it can said that the license may have been intended for 10 years, only then the questions arises whether the license was, or was not revocable by the licensor, and whether any of the reliefs sought in the said Suit under the Specific Relief Act, 1877 were maintainable. For the sake of clarity we observe here that Section 21(d) of the Specific Relief Act, 1877 does not allow for specific enforcement of a contract "which is in its nature revocable".

12. We are mindful that though for the purposes of deciding rejection of a plaint it is primarily the contents of the plaint that are to be looked into, but it is also settled law that apart from the plaint,

other material on the record which is admitted by the plaintiff can also be taken into consideration for said purpose[1]; and that the Court is not obligated to accept each and every averment contained in the plaint to be true, nor does the provision of Order VII Rule 11 CPC contemplate that the plaint must be deemed to contain the whole truth and nothing but the truth[2].

13. The correspondence leading to the license shows that by letter dated 28-07-2011 the Respondent No.4 had invited proposals from caterers & decorators for *"…hiring of Jogging Track (whole area) on yearly basis under a license agreement ……"*. By letter dated 06-08-2011 the Appellant responded with the following proposal:

> *"We propose if will be given chance to utilize Jogging Track area of the C.A. Club to organize the functions as a single cater for 5 years tenure and it could be renewed for further term by mutual consent, for that we offer as under:*
> *1. ……*
> *2. ……*
> *3. …….*
> *4. …….*
> *This could be possible only as a single cater for minimum 5 years (Five years) tenure to makeup the investment made by us in development of the lawns."*

By letter dated 19-08-2011 the Respondent No.4 accepted the Appellant's proposal *inter alia* in the following terms:

> *"2. We have the pleasure to inform you that your proposal for utilizing Jogging Track Area for ceremonial functions on yearly rental basis initially for a period of 05 five years (renewable with mutual consent) has been approved with the following terms of reference:-"*

Consequent to the above correspondence, the opening recital of the subject license reads as follows:

> *"This license agreement is made on 30th August, 2011 initially for a period of five years, further extendable to another five years by mutual consents and shall be effective after completion of mobilization period."*

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[1] *Jewan v. Federation of Pakistan* (1994 SCMR 826); *Muhammad Saleemullah v. Additional District Judge, Gujranwala* (PLD 2006 SC 511); and *S.M. Shafi Ahmed Zaidi v. Malik Hasan Ali Khan* (2002 SCMR 338).

[2] *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247).

Clause 1(c) of the license also contemplated the annual subscription payable by the licensee only for 5 years.

Therefore, the correspondence leading to the subject license and the terms of the license itself manifest that the license was granted for a period of 5 years, and its extension for a further period of 5 years was conditioned on "mutual consent" of the parties. Since the license was revoked by the Respondent No.4 (licensor) prior to expiry of the initial 5 years, the question of its extension did not arise. There is nothing that even remotely suggests that the parties had agreed at the outset that the license would be for 10 years. Learned counsel for the Appellant wanted us to infer from the improvements made by the Appellant to the subject premises that the license was intended for 10 years. But the following terms of the license show that the making of such improvements was a condition to the grant of the license itself :

> "2. *The Licensee will be solely responsible for providing the following at his own risk and cost: -*
>
> *(a)* ………
>
> *(b)* *Up-gradation of Jogging Track / Maintenance of lights*
> *It shall be the sole responsibility of the "LICENSEE" for the up-gradation/worthiness of whole Jogging Track including greenery alongwith maintenance of Street Lights of Jogging Area.*
>
> *(c)* *Development Work*
> *The Licensee shall make his own investment for construction of washrooms for functions, dressing room, store, office and pantry/food warming place, whereas NO RCC construction/building is allowed anywhere in Jogging Track Area. On the termination of contract the "LICENSEE" shall not dismantle the installations/construction and shall hand over the same to CA Club.*
>
> *(d)* ………"

The above reproduced clause of the license manifests that the improvements made by the Appellant to the subject premises was primarily in consideration for the grant of the license and in no manner can it be construed as having extended by implication the agreed tenure of the license.

14. Learned counsels for the Appellants had relied heavily on the case of *Green Fuels v. Shell Pakistan Ltd.* (2005 CLC 1602) and tried to draw a parallel with the instant case to contend that the license is to be interpreted as a grant for 10 years. In *Green Fuels* the license was for operating a CNG Station and relevant terms of the license were as follows:

> *"16. <u>Terms and Renewal</u>*
> *16.1 This license is valid for an initial period of 5 years beginning from the date, month and year first above written and may be renewed for two additional terms of five years each.*
>
> *17. <u>Termination</u>*
> *17.1 If at any time after the grant of this license or the installation of the CNG filing station, the space where the CNG filling plant is installed is required by the Company for surrendering to its landlord or if the licensee fails to discharge any of its obligations under this license, the Company may terminate this license by serving upon the licensee a six months advance written notice of such termination upon the expiry of which this license shall stand terminated. The licensee upon receipt of such notice shall surrender the licensed space to the Company within the notice period after removal of the CNG filling plant in accordance with clause 5.4 hereof."*

In *Green Fuels*, the plaintiff impugned the notice of revocation on the ground that clause 16 of the license intended a grant for 15 years which intent was fortified by a prior parallel license of 15-years given by the Government to the plaintiff for operating a CNG Station, and therefore the word "may" appearing in clause 16 was to be read as "shall" and the license could not be revoked before the expiry of 15 years. Such contention found favor with a learned Single Judge to grant a temporary injunction pending suit, primarily for the reason that under clause 17 of the license it could only be revoked on specific grounds, none of which grounds and been cited by the licensor for revoking the license.

However in the instant case, the extension of the license for a further period of 5 years was conditioned on "mutual consent" of the parties, which was not the case in *Green Fuels*; nor does the instant case involve an extrinsic document as in the case of *Green Fuels* to support the contention that the license was intended beyond

the initial term of 5 years; so also the revocation clause of the license in the instant case is not conditional as was the case in *Green Fuels*. Therefore the case of *Green Fuels* is clearly distinguishable.

Regards the reliance placed by the Appellant's counsel on the case of *Pervaiz Hussain v. Arabian Sea Enterprises Ltd.* (2007 SCMR 1005), in that case the suit had been brought by the licensor after revoking the license and evicting the defendants. It was the case of the defendants that they were tenants not licensees. A temporary injunction was passed in the suit to restrain the defendants from re-entering the premises, but on appeal, the Division Bench of the High Court held that there was no sufficient material on record to give a *prima facie* finding about the status of the parties, therefore the parties should maintain *status quo* pending suit. The defendants who were out of possession appealed to the Supreme Court. The Supreme Court held that where the Division Bench of the High Court was of the view that the plaintiff had been unable to make out a *prima facie* case, then it ought to have set aside the injunction because in the circumstances of the case, the balance of inconvenience was in favour of the defendants. As would be seen, the case of *Arabian Sea Enterprise* is on the point of balance of convenience for the grant of a temporary injunction pending suit, and therefore has no relevance to the instant case where the said Suit was found to be barred by law.

The cases of *Jagat Singh v. District Board Amritsar* (AIR 1970 Lahore 18); *Hafis Manzoor Ahmed v. Muhammad Abdul Jamil* (AIR 1933 Allahabad 842); and *Mathuri v. Bhola Nath* (AIR 1933 Allahabad 517) relied upon by the Appellant's counsel, are all on Section 60 of the Easements Act, 1882, which provision is not relevant for the present purposes.

15. The subject license stipulates that the period of 5 years would commence *"after completion of mobilization period"*. Per Clause 2(d) of the license, the mobilization period was 90 days from the date of

delivery of possession of the subject premises. Per letter dated 09-09-2011, possession of the subject premises was delivered to the Appellant on 09-09-2011 and therefore the term of the license commenced from 09-12-2011, and its five year period expired on 08-12-2016. As already discussed in para 11 above, on the expiry of the license it stood revoked by operation of law under Section 62(c) of the Easements Act, 1882. In other words, as the matter presently stands, since the reliefs prayed for in the said Suit can no longer be granted after expiry of the license, there is no point in considering whether the subject license was revocable by the grantor or not.

16. The proceedings during the said Suit as narrated in para 5 above shows that by virtue of interim protective orders passed in favor of the Appellant in the said Suit from 03-11-2016 and up until the rejection of the plaint on 23-05-2018 or thereabouts when the Appellant was evicted, the Appellant continued to remain in possession of the subject premises and continued to enjoy the license not only for its full term of 5 years, but for also for an additional period of 1 year and 5 months over and above the agreed term of the license.

17. Having concluded that the said Suit abated on the expiry of the license, we see no purpose in interfering with the impugned order. Therefore the appeal is dismissed. Pending applications stand disposed off accordingly. However, the Respondents 3 and 4 are directed to intimate to the Appellant a date and time within 1 week hereof for lifting/collecting the inventory annexed to the Nazir's report dated 19-07-2018.

J U D G E

J U D G E

Karachi

Dated: 15-11-2018