
(2001) 11 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : OMP No. 91 of 2000 in C.S. No. 18 of 2000

Eicher Limited

APPELLANT

Vs

Himachal Pradesh Housing Board

RESPONDENT

Date of Decision : 29-11-2001

Acts Referred:

Himachal Pradesh Housing Board Act, 1972 — Section 27

Citation : AIR 2002 HP 135

Hon'ble Judges : K.C. Sood, J

Bench : Single Bench

**Advocate : B.P. Singh and Bimal Gupta and M.M. Khanna, for the Appellant;
Deepak Gupta and J.R. Thakur, for the Respondent**

Judgement

Kuldip Chand Sood, J.—By this petition, under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, plaintiff-applicant seeks to restrain the defendant/non-applicant from taking any steps to recover unearned increase demanded by- it and from cancelling the lease in favour of the plaintiff-applicant also pray for a restrain on the defendant from interfering with the possession of the Plaintiff/applicant on Plot No. 29 and 30. Industrial Area. II. Parwanoo.

2. Facts necessary for the disposal of this petition may be noticed :

Plaintiff/applicant "Eicher Limited" is a Company incorporated under the Companies Act, 1956 with a registered office at New Delhi. The Plaintiff is the successor company of Eicher Tractors Limited. According to the Plaintiff, Eicher Tractors Ltd. amalgamated with "Royal Enfield Motors Limited" in accordance with the Scheme of amalgamation approved by the Delhi High Court and Madras High Court vide orders dated January 29, 1996 and April 3, 1996. Respectively, and the name of the Company was changed to "Eicher Limited". Defendant H.P. Housing Board is a Statutory Authority constituted under the H.P. Housing Board Act. 1972 with Us Head Office at Shimla.

3. The defendant-Housing Board, allotted plot No. 29 Industrial Area, Sector-2,

Parwanoo, to "Eicher Farm Machinery Ltd.", a subsidiary of Eicher Goodearth Ltd., on February 7, 1979. On the same date, adjacent plot No. 30 was allotted to "Continental Auto Ancillary Ltd.", again a subsidiary of "Eicher Goodearth Ltd." Formal lease deeds in respect of both the plots were executed between the defendant and allottees on February 15, 1979 for a period of 95 years in consideration of the premium prescribed in the Premium Payment Schedule annexed with the lease deed.

4. It is the case of the Plaintiff that in the year 1985, re-organization of Eicher Group of Companies took place. Petitions u/s 391 to 394 of the Companies Act, 1956 were filed in the Delhi High Court for the merger/amalgamation of "Eicher Farm Machinery Ltd." (allottees of Plot No. 30). During the merger/amalgamation proceedings in the High Court no objection certificate for the proposed merger/amalgamation were sought from various authorities, including the defendant. The defendant vide its letter dated April 16, 1986, informed the plaintiff that it had no objection to the amalgamation of Continental Auto Ancillary Ltd.", and "Eicher Farm Machinery Ltd.", with "Eicher Tractor Ltd.", subject to the condition that Eicher Tractors Ltd., shall have to pay the charges in respect of unearned increase for the two plots. The plaintiff sent a letter to the defendant Housing Board on June 18, 1986 pointing out that merger/ amalgamation does not involve any sale, transfer, assignment or parting with the possession and, therefore, Clauses 2 V(a) of the Lease Deed would not be applicable in the case of amalgamation of the two Companies and therefore, unearned increase is not payable.

5. On July 25, 1986, the defendant Board wrote to the plaintiff requesting for the copy of the decision of Delhi High Court sanctioning the scheme of amalgamation. The Delhi High Court sanctioned the Scheme of merger/ amalgamation of the two Companies "Eicher Garm Machinery Ltd.", and Continental Ancillary Ltd." with Eicher Tractors Ltd., on September 30, 1986. Thus, "Eicher Farm machinery Ltd.", and "Continental Ancillary Ltd.", ceased to exist from the date of amalgamation/merger of these two Companies, i.e. September 30, 1986.

6. It is the case of the Plaintiff Company that copy of the order of Delhi High Court dated September 30, 1986 was sent to the defendant Board. The defendant did not raise any demand for any unearned in-crease. The two Industrial Plots, after amalgamation/merger of the two Companies, vested in the Eicher Tractors Ltd., and the premium thereafter was paid by the "Eicher Tractors Ltd.", to the defendant Housing Board from year to year in accordance with the Payment Scheme. The premium was re- ceived by the defendant-Housing Board without any protest or objection. On June 5, 1990, Eicher Tractors Ltd., approached the defendant for a no objection letter to enable the Company to mortgage the two industrial plots with ICICI, as security for the loan to be raised by the Company from ICICI. It was only on August 14, 1990 that the defendant-Board addressed a letter to Eicher Farm Machinery Ltd., which had ceased to

exist, demanding Rupees 45, 92, 420.45 paise on account of 50% unearned increase and interest from April 16, 1986, the date on which No Objection Certificate was issued by the defendant Board on August 15, 1990. Rupees 28, 57, 443.45 paise were claimed as transfer charges on account of unearned increase on the basis of the rates approved by the defendant for the year 1986-87. Rupees 17, 34,977/- were demanded as interest at the rate of 14% per annum from April 16, 1986 to August 15, 1990. In the letter of demand, it was stated that the amalgamation/merger involves transfer of the land to the transferee company and, therefore, as per the provisions of Clause 2 V (a) of the lease deeds, the Housing Board is entitled to the unearned increase.

7. The "Eicher Tractors Ltd.", by its various letters and representations persisted that the merger/amalgamation does not involve any transfer. According to the plaintiff, these properties stood vested in "Eicher Tractors Limited" by operation of law and therefore, "unearned increase" clause was not invocable. It was also pointed out that the merger/amalgamation took place on September 30, 1986 and demand raised by the defendant-Housing Board on August 14, 1990 after four years, was belated and barred by limitation.

8. Ultimately on December 10, 1990, a notice was sent by the defendant demanding Rupees 45, 92, 420.45 paise on account of unearned increase within one month from the date of the notice. It was stated in the notice that if the amount of unearned increase is not paid within the stipulated period of one month, the lease would be terminated and action for the eviction of Eicher Farm Machinery Ltd.", shall be initiated under the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act. 1971. The "Eicher Tractors Limited" replied to the notices through their Advocate and maintained that the defendant Board is not entitled to any unearned increase and, therefore, no breach of the lease deed has been committed. On August 1, 1991, the Secretary-cum-Chief Engineer of the defendant-Housing Board passed two orders, one was addressed to "Eicher Farm Machinery Ltd." and the other was addressed to "Continental Auto Ancillary Ltd.". In these two identical orders, the lease deeds in favour of "Eicher Farm Machinery Ltd.", and Continental Auto Ancillary Ltd., were terminated and the two plots were resumed by the defendant Corporation without payment of any compensation.

9. Aggrieved, Eicher Tractors Limited, filed a civil suit (No. 81 of 1991) in this Court for declaration and mandatory injunction. Along with civil suit, a petition (OMP No. 367 of 1991) was filed for interim relief. The Court vide its order dated September 5, 1991, passed ad interim injunction staying the operation of the two orders of August 1, 1991 passed by the defendant-Board cancelling the allotment of the lease. The defendant-Board was also restrained from taking any action pursuant to the said two orders. The stay was made absolute on March 16, 1992.

10. When the matter came up for final hearing (civil suit No. 81 of 1991), the counsel for the defendant-Housing Board made a statement that defendant has

withdrawn the earlier two notices and order passed pursuant thereto and further stated that the defendant Housing Board shall proceed in the matter against the Eicher Tractors Limited as successors of M/s Eicher Farm Machinery Limited and M/s Continental Auto Ancillary Limited, in accordance with law and the terms of the allotment order and the lease deed. In view of the statement made on behalf of the defendant-Housing Board, the plaintiff withdrew the suit with a liberty reserved to challenge the action of the defendant, if necessary. In view of the statement of learned counsel for the parties, the Court passed the following order :

"As per the statements of the learned Counsel for the parties recorded separately, the present suit is dismissed as having been withdrawn. It is, however, directed that the defendant will proceed against M/s Eicher Tractors Ltd., as successor to M/s Eicher Farm Machinery Limited and M/s Continental Auto Ancillary Limited, in accordance with law and the terms of the allotment orders and the lease deeds afresh and pass necessary actions thereon. The plaintiff shall be at liberty to assail such actions of the defendant by way of Civil Suit or otherwise, if need be. It is further clarified that in case of action proposed to be taken by the defendant against the Plaintiff M/s Eicher Tractors Ltd., it shall not raise the question of limitation with regard to the issuance of the notices for the period during which the stay order passed by this Court in the present suit was in operation. The parties are left to bear their own costs."

11. According to the plaintiff, it was aggrieved by the portion of this order dated May 24, 1999 whereby the Court directed that the question of limitation shall not be raised with regard to issuance of the fresh notices for the period during which the stay order passed by this Court in the present suit was in operation. An appeal against this part of the orders of the learned Single Judge, it is stated, is pending before this Court.

12. After the withdrawn of the earlier notices, the defendant issued two fresh notices on 28-6-1999 demanding unearned increase in respect of Industrial Plots No. 29 and 30. By two notices defendant raised fresh demand of Rupees 2,12,75,163 and Rupees 83,91,511 on account of unearned increase relating to industrial plots No. 29 and 30, respectively. The amount was calculated on the basis of the market value approved by the defendant for the year 1999.

13. It is the case of the plaintiff that in the earlier notice issued on August 14, 1990, the defendant had claimed an amount of Rupees 28,57,443.45 paise as unearned increase on the basis of the rate allegedly approved and fixed by the defendant for the year 1986-87.

14. These two notices dated June 28, 1999, according to the plaintiff, are illegal and unwarranted. Plaintiff replied to the notices reiterating its stand but without any success. Plaintiff sent a representation to the Chief Secretary to the Government of Himachal Pradesh requesting for the directions of the Government to the defendant-Board to withdraw the two notices demanding

unearned increase. Plaintiff brought to the notice of the Government that in case of amalgamation of lessee Company with another Company, under the rules framed by the Department of Industries, Government of Himachal Pradesh, no unearned increase is payable. Only 5% of the amount of differential cost of the plot is charged as administrative fee and, therefore, two Departments of the concerned Government cannot have two different stands on a same issue and it is not open to the defendant-Board to claim unearned increase.

15. The Plaintiff Company, on February 12, 2000, received an order dated February 10, 2000 issued by the Chief Executive Officer-cum-Secretary of the defendant-Board to the effect that if the plaintiff Company failed to pay the amount claimed in the two notices within two weeks, the defendant Corporation would be entitled to recover the possession of the plots and amount of Rupees 2,96,66,674/- along with interest at 18% per annum w.e.f. June 28, 1999 till realization in full.

16. Now, it is the case of the Plaintiff that Clause 2 V(a) of the lease deed is invocable only in case of sale, transfer or assignment or parting with the possession. In the present case, according to the Plaintiff, there has not been either sale or transfer and/or assignment or parting with the possession of the two Industrial Plots at Parwanno and therefore, the plaintiff is not liable to pay any unearned increase in terms of Clause 2V (a) of the Lease deeds. It is the further case of the Plaintiff Company that "if the Corporate Veil is pierced, it would be found that the ultimate beneficial ownership in the said two plots was always of Eicher Goodearth Ltd., and continues to be with Eicher Goodearth Ltd., the holding company."

17. It is also the case of the Plaintiff company that defendant Board cannot compute and demand unearned Increase on the basis of the market value fixed by the Board for the year 1998-99 for the reason that the merger/amalgamation of the two Companies took place on September 30, 1986 when it was approved by the Delhi High Court. From that date, Eicher Farm Machinery Limited and Continental Auto Ancillary Limited ceased to exist without winding up and the said two plots vested in Eicher Tractors Limited. At worst, it is pleaded, the defendant Board is entitled to claim unearned Increase at the time of sale, transfer, assignment or parting with possession in terms of Clause 2V (a) of the Lease Deed and, therefore, it is not open to the defendant to raise demand on the basis of the value fixed by the defendant Board for the year 1999. It is pleaded that the demand is barred by the period of limitation as it could be raised only within three years w.e.f. September 30, 1986. According to the plaintiff, no breach of any covenant of the lease deed has been committed which may entitle the defendant to re-enter the said plots after eviction of the Plaintiff Company. The demand of unearned increase raised by the defendant, pleads plaintiff, is not a covenant "to be abided by the lessee". The lessee's covenant was only to seek previous consent of the defendant before any sale, transfer, assignment or parting with the possession which condition was complied with,

18. The defendant-Housing Board, in its written statement, controverts the allegations. The maintainability of the suit is disputed. It is pleaded that there is no privity of contract between the plaintiff "Eicher Limited" and the defendant "Board". It is, however, admitted that permission was granted for the transfer of the property to M/s Eicher Tractors subject to payment of 50% of the unearned increase in Income. According to the defendant Board, the plaintiff should have disclosed in civil suit No. 81 of 1991 that "M/s Eicher Tractors had been changed to M/s Eicher Limited". It is also the case of the defendant that suit is not maintainable in view of the provisions of the H.P. Land Revenue Act without deposit of the entire amount. On merits, it is pleaded that pursuant to the letter of the plaintiff Company dated February 25, 1986, the Board examined the case in reference to the provisions of the lease deed and Issued no objection certificate for amalgamation of the two Companies with M/s Eicher Tractors Limited before the Hon"ble High Court of Delhi. However, such "no objection" was subject to the condition that Etcher Tractors Limited shall pay usual charges as prescribed under Clause 2 of the lease deed executed by the original lessee with the defendant Board for the payment of unearned increase for industrial plot No, 29 and 30. According to the defendant-Board, amalgamation amounts to transfer and, therefore, the Plaintiff Company is liable to pay necessary transfer charges (unearned Increase) in terms of Clause 2 of the lease deed and the condition of the "letter of no objection". Defendant Board admits to have received various notices and letters from M/s Eicher Tractors Limited but maintains that as the Eicher Tractors Limited failed to pay the amount of unearned increase, which it was liable to pay as per the provisions of the lease deed, therefore, there was violation of the terms of the lease deed. The defendant Board maintains that the main grievance of Eicher Tractors in civil suit No. 81 of 1991 was that the orders were passed against M/s Eicher Limited and M/s Continental Auto Ancillary Limited which were non existent. The Defendant Board in para 18 of the written statement state.

"The Hon"ble Single Judge, Hon"ble Justice R. L. Khurana had orally observed that the said notices and final orders were bad and illegal since some of them had been addressed to a defunct company, common notices were given with regard to both the leases, notices were addressed to some other company and the final order was passed against another company. The Hon"ble High Court was also of the view that the board may consider withdrawing the notices with liberty to file fresh ones and which can be decided after giving hearing to the plaintiff. The Hon"ble Court thereafter directed the counsel for the Board to put these matters before the defendant Board. The counsel accordingly Informed the defendant Board....."

19. According to the defendant, the counsel Informed the defendant Board about the proceedings vide letter dated May 15, 1999. Thereafter, the counsel for the Board sent a tentative proposal to the counsel for Eicher Tractors Ltd., in which it was mentioned that the Board shall withdraw the earlier notices and order under challenge and fresh notices would be issued to M/s Eicher Tractors who would

accept the same in its own capacity and also for M/s Eicher Farm Machinery Limited and M/s Continental Auto Ancillary Limited. Reply to the notices were to be filed within one month and the matter thereafter to be heard by the Chief Executive Officer or other senior Officer of the Board and M/s Eicher Tractors were not to raise any objection regarding limitation for the period during which civil suit No. 81/ 91 was pending in the Court and both sides would be entitled to raise the plea (s) already raised or any ground (s) available to them. It is pleaded that representative and counsel for the M/s Eicher Limited did not object to the order relating to the limitation passed by this Court. It is the case of the defendant that as the fresh notices were issued on June 26, 1996 to M/s Eicher Tractors Limited in respect of the payment of unearned increase on account of transfer of the leased premises to Eicher Tractors Limited, therefore, unearned increase was calculated as per the value fixed for the year 1999. It is the further case of the defendant Board that it was open to M/s Eicher Limited to have voluntarily paid the amount of unearned increase. As the amount of unearned increase was not paid inspite of various notices, therefore, fresh notices had to be issued in the year 1999 and Housing Board is entitled to recover the unearned increase on the basis of the market value of 1999.

20. In the replication, the applicant maintains:

(a) Plaintiff is not liable to pay any amount to the defendant Board as unearned increase as Clause 2 V (a) of the lease deed is not invocable in the case of the plaintiff/ applicant;

(b) the demand for unearned increase had been raised by the defendant on the basis of the market value of the land for the year 1999-2000, whereas, admittedly, the two Industrial Plots stood vested with Eicher Tractors Ltd., on September 30, 1986 and thereafter, if at all the defendant is entitled to unearned increase, the same is leviable only with effect from September 30, 1986 on the basis of the valuation for the year 1986-87 :

(c) the demand raised by the defendant is barred by the period of limitation;

(d) the plaintiff has a prima facie case and balance of convenience is also in its favour. No harm or injury would be caused to the defendant if the defendant Board is restrained from taking steps to recover the unearned increase and cancelling the lease or interfering with plaintiffs possession.

21. On April 17, 2000 ex parte ad-interim relief was granted to the plaintiff-appellant and the operation of the impugned order of the Executive Officer-cum-Secretary, Housing Board, Nigam Vihar, Shimla dated February 10, 2000 was stayed till further orders subject to the plaintiff/applicant depositing rupees 28.58 lacs, the amount which was determined as unearned increase in terms of transfer charges by the Secretary-cum-Chief Engineer, H.P. Housing Board vide his notice dated August 14, 1990, in the Registry.

22. The application is opposed on the grounds, inter alia :

(a) the suit is not maintainable ;

(b) the suit is barred under the provisions of the H.P. Land Revenue Act;

(c) as the plaintiff company has failed to pay the amount determined by the Chief Executive Officer, therefore, the defendant Board is within its right to direct the cancellation of the lease and resumption of the plots. The plots are to be resumed under the provisions of Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971, Section 15 of which bars the jurisdiction of the Civil Courts. As the fresh notices were issued in the year 1999, therefore, the market value of the plots in the year 1999 had to be taken into consideration for computing the unearned increase.

23. I heard Mr. B. P. Singh, learned senior counsel for the plaintiff and Mr. Deepak Gupta, learned counsel for the defendant.

24. So far the question of the Civil Courts to entertain the suit is concerned, it has to be decided by this Court after the parties have led appropriate evidence. However, prima facie, at this stage, it is difficult to say that Civil Courts do not have the jurisdiction to entertain the suit.

25. From the pleadings of the parties and documents on record, it emerges that two plots in question were leased out to M/s Etcher Farm Machinery Limited and M/s Continental Auto Ancillary Ltd. By separate lease deeds dated November 15, 1979, sub-clause V (a) of Clause 2 of the lease deed stipulates:

"The lessee shall not sell, transfer, assigns or otherwise part with the possession of the whole or any part of industrial plot except with the previous consent in writing of lessor which he shall be entitled to refuse in his absolute discretion. PROVIDED that such consent shall not be given for a period of ten years from the commencement of this lease unless, in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent. PROVIDED FURTHER, that, in the event of the consent being given the lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the industrial plot at the time of sale, transfer, assignment, or parting with the possession the amount to be recovered being fifty percent of the unearned increase and the decision of the lessor in respect of the market value shall be final and finding. PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the property after deducting fifty percent of the unearned increase as aforesaid.

26. The bare reading of sub-clause V(a) noticed above, shows that the lessee is not entitled to sell, transfer, assign or otherwise part with the possession of the industrial plot except with the previous consent in writing of the lessor Housing Board. It further provides that if the consent is given by the lessor, then lessor can impose such terms and conditions if it thinks fit and lessor "shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the

difference between the premium paid and the market value) of the industrial plot at the time of sale, transfer, assignment or parting with the possession the amount to be recovered being 50% of the unearned increase". It thus prima facie apparent that unearned increase has to be computed between the premium paid and the market value of the industrial plot at the time of such sale, transfer, assignment or parting with the possession. It is an admitted position that merger/ amalgamation of the two Companies took place on September 30, 1986 when necessary sanction was granted by the Delhi High Court. Evidently, prima facie, the defendant, at the most was entitled to the unearned Increase in terms of sub-clause V(a) of Clause 2 of the lease deed dated September 30, 1986 and such unearned increase has to be calculated on the market value as on September 30, 1986. Thus, prima facie, it appears that the defendant Board is not entitled to unearned increase on the market value of the plots fixed for the year 1999 when notices were issued to the Plaintiff company.

27. The defendant board in its letter dated August 14, 1990 raised the demand for the unearned increase for the first time and determined the amount of unearned increase to be rupees 28.58 lacs. The Board also claimed interest at the rate of 14% w.e.f. April 16, 1986 the date on which "no objection certificate" was issued by the Board.

28. The defendant-Housing Board during the course of the pendency of the earlier suit (civil suit No. 81 of 1991) realized that the notices issued by them to the Companies, to which the plots were leased, were defective and accordingly withdrew the notices with a liberty to issue fresh notices to Eicher Tractors Ltd., with which the two companies had merged.

29. By the ad-interim directions dated April 17, 2000, the operation of the impugned order of the Chief Executive Officer-cum- Secretary of the defendant Board dated February 10, 2000 was stayed till further orders subject to the plaintiff company depositing rupees 28.50 lacs., the amount of unearned Increase as determined by the Secretary-cum-Chief Engineer of the Housing Board in August, 1990.

30. Taking into consideration the entirety of the circumstances, the fact that the suit involves serious questions to be decided by the Court, the fact that prima facie the unearned Increase cannot be calculated on the marked value of the plots in the year 1999-2000 and the further fact that the plaintiff Company deposited rupees 28.58 Lacs in the Registry of this Court in terms of the order dated April 17, 2000, the fact that the balance of convenience is in favour of the plaintiff and comparative mischief would be greater if interim orders are not made in favour of the plaintiff Company, it will be fair and reasonable to make the interim orders dated April 17, 2000 absolute till the decision of the suit. Order accordingly. Any observation made herein above shall not be construed to be any reflection on the merits of the case.