
(2010) 11 DEL CK 0012

In the Delhi High Court

Case No : Company Petition No. 193 of 2007

Manju Bagai

APPELLANT

Vs

Magpie Retail Ltd.

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 73

Citation : (2011) 161 CompCas 382 : (2011) 105 SCL 55

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Arun Kathpalia and Attin Shankar Rastogi, for the Appellant;
Nityanand Singh and Vimanoharan, for the Respondent

Judgement

Sanjiv Khanna, J.—Manju Bagai, the petitioner seeks winding up of M/s. Magpie Retail Limited, the respondent company u/s 433(e) of the Companies Act, 1956 (hereinafter referred to as Act, for short).

2. It is stated that the petitioner is the owner landlady and had rented out commercial space No. UGF-1, Wedding Souk (now known as Gold Souk), Local Shopping Centre, Sharda Niketan, Pitampura, Delhi, (hereinafter referred to as the premises, for short) to the respondent company on a monthly rent of Rs. 1,29,580/- excluding water, electricity charges. The respondent company started paying rent with effect from 1st November, 2006 and while the same was continuously paid till the end of February, 2007, the respondent company did not pay the agreed rent for the months of March, April and May, 2007 and handed over the possession of the premises on 31st May, 2007. Thus the respondent company is liable to pay rent from March, 2007 to May, 2007 of Rs. 3,88,740/-.

3. The petitioner relies upon Clause 5 of the "Agreement to Lease" dated 5th September, 2006 and submits that the respondent company is liable to pay liquidated damages in form of rent for a period of 29 months i.e. unexpired portion of the lease of three years starting with effect from 1st November, 2006. For the sake of convenience, the said clause is reproduced below:

5 That this Agreement to Lease shall not be cancelled before the lock-in-period of 3 years. A monthly rent will be liable to be enhanced by 15 % of the last paid rent after every 3 years. In case Tenant surrenders the Unit/Shop/Space before the lock-in-period then the Landlord/owner will be entitled to the liquidated damages from Tenant at the rate of rent for the balance period of 3 years" lock-in-period. To illustrate, if Tenant surrenders the Unit/Shop/Space, after 6 months from the date of offer of the possession of the said Unit/Shop/Space, then he will have to pay the liquidated damages at the rate of rent for the period of remaining 30 months.

4. Thus in all, the petitioner claims that the respondent company is liable to pay Rs. 3,88,740/- towards arrear of rent and liquidated damages of Rs. 37,57,820/-; total Rs. 41,46,560/- and interest.

5. Agreement to Lease dated 5th September, 2006 is an unregistered document and is stamped on Rs. 100/- stamp paper. The contention of the petitioner is that the said document is an Agreement to lease and not an Agreement of Lease. The distinction between the two is well known. Agreement of Lease has the effect of demise of the property in praesenti. An Agreement for/to lease merely entitles the parties to execute another deed or agreement in future. It does not create any right in praesenti. It is only an executory agreement in form of a promise to enter into a future agreement. An agreement of lease requires registration but agreement to lease in future does not require registration. It does not create any interest in an immovable property as has been observed by the Supreme Court in Food Corporation of India and Others Vs. Babulal Agrawal,

6. In State of Maharashtra and Others Vs. Atur India Pvt. Ltd., it has been observed as under:

24. The facts mentioned above are clearly indicative of an agreement to lease and not an agreement of lease. The distinction between the two may be seen first with reference to English law. Woodfall in Law of Landlord and Tenant, Vol. I, 28th Edn., 1978 at page 127 states as under:

A contract for a lease is an agreement enforceable in law whereby one party agrees to grant and another to take a lease. The expressions "contract for lease" and "agreement for lease" is to be preferred as being more definite, agreement frequently means one of many stipulations in a contract. A contract for a lease is to be distinguished from a lease, because a lease is actually a conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date.

(emphasis supplied)

In contradistinction to this, in the case of a lease, there must be words of demise. On this Woodfall states at page 184 as under:

The usual words by which a lease is made are "demise" and "let"; but any words which amount to a grant are sufficient to make a lease. Whatever words are

sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for any determinate time, whether they run in the form of a licence, covenant or agreement, are sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose; for if the words used are sufficient to prove a lease of land, in whatsoever form they are introduced, the law calls in the intent of the parties, and moulds and governs the words accordingly.

Again at page 185, it is stated:

Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise, therefore, where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease. (Doe d. Bingham v. Cartwright)

25. Hill & Redman in Law of Landlord and Tenant, 17th Edn., Vol. 1 at page 100 dealing with this aspect of the matter states as under:

DISTINCTION BETWEEN LEASE AND AGREEMENT FOR LEASE

40. (1) A lease is a transaction which as of itself creates a tenancy in favour of the tenant.

(2) An agreement for a lease is a transaction whereby the parties bind themselves, one to grant and the other to accept, a lease.

(3) If the agreement for a lease is one of which specific performance will be granted the parties are, for most but not all purposes, in the same legal position as regards each other and as regards third parties as if the lease had been granted.

(4) Whether an instrument operates as a lease or as an agreement for a lease depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances.

50. An instrument in proper form (a); by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee ... either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently ... is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the lessee (b). An instrument which only binds the parties, the one to create and the other to accept a lease thereafter, is an executory agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created.

7. I have examined and read Agreement to Lease dated 5th September, 2006. The said document cannot be regarded as Agreement to Lease inspite of the

nomenclature or the heading given to the document. The petitioner has placed reliance on the introductory clauses which refer to the discussions between the parties prior to execution of the documents. On reading of the main or recital clauses it is apparent that the said document is a lease deed in itself in praesenti which was executed on 5th September, 2006 but the lease was to begin with effect from 1st November, 2006. Clause 13 no doubt refers to execution of another document but this clause is not to be read in isolation. Other clauses indicate that the document dated 5th September, 2006 is a lease deed. No other document was executed between the parties. It is well settled that the document has to be read as a whole in entirety to find out the character/nature of the said document. The main clauses of the lease refer to the rent, the date of payment of rent, the security deposit, the right to terminate the rent agreement, subletting, maintenance charges and interest. It also talks about the method of termination i.e. how notice of termination was to be issued.

8. The petitioner had written a letter dated 11th April, 2007 to the respondent making allegation that the respondent company being a tenant as per the rent agreement dated 5th September, 2006 was in arrears of rent in violation of Clause 2 of the agreement and asking for the rent for March and April, 2007 within ten days. The respondent company neither paid the rent nor replied to the said letter. Legal notice dated 19th May, 2007 was issued on behalf of the petitioner. This notice referred to Clause 5 of the agreement and has described the agreement as a lease agreement. It is also stated that there was violation of Clause 12 of the agreement due to non-payment of the rent and other charges for two months and therefore, the petitioner had right to terminate the agreement and claim liquidated damages. Notice u/s 434(1)(a) and 433 of the Act issued by the petitioner dated 25th June, 2007 states as under:

2. The premises were let out to you for commercial purpose at the monthly rent of Rs. 1,29,580/- (Rupees One Lakh Twenty Nine Thousand Five Hundred & Eighty Only) per month excluding water, electricity charges, etc. for a initial period of three years commencing from 01.11.2006 by means of agreement dated 05.09.2006.

3. The above said agreement of lease which was duly acted upon by you and our client inter-alia contained the following clause:

para 5:....

4. That you in violation of the above said clause and without any default attributable to our client, unilaterally vacated the premises and handed over the possession on 31.05.2007, without complying with requirements of the above said clause viz. that you will not terminate the lease or vacate the premises until expiry of term of 3 years of lease and in case you do so during this period, you will be liable to pay as a result of violation of the above said amount of Rs. 37,57,820.00 (Rupees Thirty Seven Lakhs Fifty Seven Thousand Eight Hundred & Twenty Only) which have incurred by you as debt to our client. You have also

defaulted in the payment of monthly rent of premises from March 2007 to May 2007 amounting to Rs. 3,88,740.00 (Rupees Three Lakhs Eighty Eight Thousand Seven Hundred & Forty Only).

9. Thus the petitioner did not regard the said document as an agreement to lease but a lease deed in itself. The document dated 5th September, 2006 being an unregistered lease deed cannot be relied upon by the petitioner. The tenancy in question was a monthly tenancy and nothing more. The petitioner cannot rely upon Clause 5 of an unregistered document. In these circumstances, reliance placed by the counsel for the petitioner on the decision of the Supreme Court in Food Corporation of India and Others (Supra) is misplaced and cannot be accepted.

10. Even otherwise the claim for "liquidated" damages is not sustainable. It may be noted that Clause 5 relied upon by the petitioner uses the term "liquidated" damages in case the tenant vacates the property during the lock-in-period of first three years. It is a contention of the petitioner that the respondent company, as a tenant, is liable to pay the balance rent for the unexpired period of the lease of three years. The distinction between "liquidated" and "un-liquidated" damages is well settled. Mere use of the term "liquidated" damages in a document cannot be the criteria to determine and decide whether the amount specified in the agreement is towards "liquidated" damages or "un-liquidated" damages. Amount specified in an agreement is liquidated damages; if the sum specified by the parties is a proper estimate of damages to be anticipated in the event of breach. It represents genuine covenanted pre-estimate of damages. On the other hand "un-liquidated" damages or penalty is the amount stipulated in terrorism .The expression "penalty" is an elastic term but means a sum of money which is promised to be paid but is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained in consequence of the breach. Whether a clause is a penalty clause or a clause for payment of liquidated damages has to be judged in the facts of the each case and in the background of the relevant factors which are case specific. Looking at the nature of the Clause and even the pleadings made by the petitioner, I am not inclined to accept the contention of the petitioner that Clause 5 imposes liquidated damages and is not a penalty clause. No facts and circumstances have been pleaded to show that Clause 5 relating to lock-in-period was a genuine pre-estimate of damages which by the petitioner would have suffered in case the respondent company had vacated the premises. No such special circumstances have been highlighted and pointed out.

11. The decision in the case of Food Corporation of India and Others (supra) is distinguishable. In the said case a civil suit was filed and there was evidence to show that the plaintiff therein had performed his part of the contract and altered his position, having constructed the plinths according to specifications of the defendant i.e. FCI. The defendant had promised to plaintiff that on completion of the construction, they would hire the premises for a period of three years but

later on backed out. The trial court and the finding of the Supreme Court was that the construction was made in accordance with the design and specification prescribed by the defendant. Therefore, it was held that the defendant cannot back out from the promise held out and escape from the liability.

12. It may be also noted that the Doctrine of Unavoidable Consequence or Mitigation of Damages is applicable in cases of un-liquidated damages. It was observed in *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*, as under:

9. The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (*British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London*). These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

(emphasis supplied)

13. A person therefore, must take reasonable steps to minimize the loss and refrain from taking unreasonable steps which would increase the loss. Defence cannot be held liable to pay a loss which the claimant could have avoided or which arises due to the neglect and failure of the claimant to take such reasonable steps. Damages is compensation for the wrong suffered by the claimant and the loss incurred by him but this is subject to the rule that the claimant must take reasonable steps to avoid their avoidable accumulation. It is difficult to accept that the petitioner was unable to rent out the premises for the lock-in-period of three years despite the highly commercially viable location of the premises. Decline in the rate of rent is not pleaded. The onus in this regard is on the petitioner and no evidence and material has been placed on record to show that the premises could not be rented out. Even the date on which the

premises was subsequently rented out has not been stated.

14. It is accepted by the petitioner that they had security deposit of Rs. 3,88,740/-. In the petition and the two legal notices dated 19th May, 2007 and 25th June, 2007 it is not alleged that the security deposit was required to be adjusted on account of arrears towards electricity, water or damages caused to the premises. There are no such allegations or averments. In these circumstances, the security deposit given by the respondent company to the petitioner can be adjusted towards the rent for the months of March to May, 2007. No further amount is due and payable by the respondent company to the petitioner towards admitted liability or debt due and payable, for the purpose of Section 433(e) r/w 434(1)(a) of the Act.

In view of the aforesaid, I do not find any merit in the winding up petition and the same is dismissed.