

(2022) 05 CAL CK 0009

In the Calcutta High Court

Case No : F.M.A No. 51 Of 2022, I.A. No. C.A.N. 1 Of 2021

M/S. Western Engineering Works.

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 05-05-2022

Acts Referred:

Transfer Of Property Act, 1882 — Section 111(g), 112

Citation : (2022) 05 CAL CK 0009

Hon'ble Judges : Arijit Banerjee, J;Kausik Chanda, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Aniruddha Chatterjee, Rahul Karmakar, Asif Sohail Tarafdar, Sounak Mukherjee, Amitesh Banerjee, Ipsita Banerjee, Suddhadev Adak

Final Decision : Disposed Of

Judgement

Arijit Banerjee, J

1. The writ petitioner/appellant had approached the learned Single Judge essentially challenging a notice dated 6/18 April, 2018 (in short the 'Impugned Notice'), issued by the Joint Secretary to the Government of West Bengal, the material portion whereof reads as follows:-

"Now, therefore, after careful consideration of this matter and in terms of the Clause 4 of the Lease Deed, the Governor of the State of West Bengal is pleased to determine the lease of Plot No. CN-3, Sector – V, Salt Lake, Kolkata for violation of Clause 2(6) of the lease deed and re-enter into possession of the demised land."

2. The other prayer in the writ petition was for a mandamus commanding the respondent authorities to allow the writ petitioner's prayer made vide letter dated December 15, 2015, for change of purpose of use of the concerned land, from construction of a Motor Training School to a Hotel with Banquet and Restaurant facility upon accepting fees in terms of the Government Notification No. 4004-UD/

M/SL(AL/NR)/8L-08/04 dated 8th December, 2011. The learned Single Judge dismissed the writ petition. Hence this appeal by the writ petitioner.

3. Before the learned Single Judge as also before us, the writ petitioner submitted as follows:-

(a) An Indenture of lease dated July 24, 1985, was executed by the Governor of the State of West Bengal in favour of the writ petitioner in respect of land measuring approximately 10 katthas in Block CH in Sector (v) of Bidhan Nagar, for a period of nine hundred ninety nine years, for erection of a building thereon for the purpose of setting up of a weigh bridge/Motor Training School. The relevant clauses of the said deed of lease read as follows:-

“(i) To construct the building in conformity with such building rules as may from time to time be framed by the Government or other authority prescribed in that behalf and according to plans, specifications, elevations, designs and sections sanctioned by the government, or that authority within three years from the date of possession of the demised land or such extended time as may be allowed by the Government in writing.

(ii) Not to use or allow to be used the land and/or the structure thereon or any part thereof for any purpose other than for the purpose as mentioned in para 1 without the prior permission in writing of the Government or other authority prescribed in that behalf.

(iii) Provided always that if there be any breach of any of the terms and conditions and covenants herein on the part of the lessee contained the lesser shall have the right to re-enter into possession of the demised land or any part thereof in the name of the whole and thereupon this demise shall forthwith stand determined.

Provided nevertheless the lessor shall not exercise the right without serving the lessee a notice in writing giving six months’ time to remedy the breach.”

(b) Due to acute financial crisis, the writ petitioner could not complete the proposed construction within the prescribed period of time.

(c) In the year 2006, a notice was served on the writ petitioner by the Government to show-cause as to why the lease in favour of the writ petitioner should not be determined by reason of breach of Clause 2(6) of the lease deed which required the lessee to complete the proposed construction within 3 years from the date of possession being made over to the lessee, or such extended time as may be allowed by the Government in writing.

(d) Written explanations dated December 4, 2006, and December 14, 2007, submitted by the writ petitioner, were found to be unsatisfactory and unacceptable to the Government. A notice dated February 19, 2010, was issued by the Government, addressed to the writ petitioner, the material portion whereof reads as follows:-

"And whereas the explanation dated 4th December, 2006 and subsequent explanation dated 14-12-2007 submitted by the lessee have been found to be unsatisfactory and unacceptable to the Government;

And whereas the Governor of the State of West Bengal was pleased to serve upon him a final and peremptory notice under proviso to Clause 4 of the aforesaid Indenture to remedy the breach caused by violation of Clause 2(6) of the lease deed within six months from the date of receipt of this notice and if it fails/neglects to remedy the breach within the stipulated period, the aforesaid lease granted by the Government shall stand determined and the Government will re-enter into possession of the aforesaid land in full or in part thereof in the name of the whole after expiry of the aforesaid period of six months in terms of Clause 4 of the aforesaid Indenture;

And whereas the said M/s. Western Engineering Works have failed and/or neglected to take any action substantial to remedy the breach caused by violation of Clause 2(6) of the aforesaid Indenture within the aforesaid notice period;

Therefore the Governor of the State of West Bengal has already determined the lease granted in favour of M/s. Western Engineering Works in respect of the Plot No. 3 in Block – CN in Sector-V of Bidhannagar, District 24 Parganas (North) and started process of resumption of the said plot of land and re-enter into possession in part thereof in the name of the whole."

(e) The said notice was challenged by the writ petitioner by filing a writ petition being W.P. 6670 (W) of 2010. By an order dated December 19, 2013, a learned Judge of this Court quashed the said notice and directed that "provided the writ petitioners complete the building by 31st March, 2015, the respondents are permanently restrained from issuing any notice of termination of the lease on the ground of Clause 2(6)."

(f) The writ petitioner filed CAN 11946 of 2014 praying for modification of the aforesaid order dated December 19, 2013, by extending the time to complete the proposed construction. It was submitted that after the order dated December 19, 2013, was passed, the sanctioned plan lapsed. Clearances from various authorities were required in order to obtain a fresh sanction. Necessary clearances had been obtained from the authorities except from the Airport's Authority of India. The learned Judge disposed of the application by an order dated December 19, 2014, "directing the Airport Authority of India to process the application of the writ petitioners and take a decision within 4 weeks from the date of communication of this order. Thereafter, the writ petitioners will apply before the respondent Nos. 7, 8 for sanction of the plan. They will process the same, taking a decision within 8 weeks of submission of the application. If the plan is sanctioned, the writ petitioners will complete the building by 31st December, 2017."

(g) The writ petitioner has in fact constructed a G+1 storeyed building on the

concerned plot of land in terms of the sanctioned plan of 2008 and has applied for issuance of Part Completion Certificate before the concerned authorities.

(h) On July 18, 2015, the writ petitioner addressed a letter to the Joint Secretary, Urban Development Department, Government of West Bengal, essentially stating that keeping in mind the market viability of a Motor Training School in the concerned area it is not advisable to go for the same. Instead, a commercial building is more viable in the location. The last two paragraphs of the said letter read as follows:-

"Sir, as per the order of the Hon'ble High Court, Calcutta, the deadline for completing construction of building is 31.12.2017 and accordingly we got all approvals from all the concerned authorities required for construction. The building plans and structural design from our architect is also ready. Now "Nabadiganta Industrial Township Authority" is not giving us approval of sanction plan till the time we obtain permission from your department for change of use. Only because of this we are unable to start construction.

Hence, we request you to grant us permission to change the use of plot from "Motor Training School" to "Commercial Building" at your earliest opportunity to enable us to complete the construction as per the deadline given by High Court, Calcutta."

(I) On December 15, 2015, the petitioner addressed a letter to the principle Secretary, Urban Development Department, requesting the latter to grant 5 years time "to Complete building of the Hotel so that there is no deadline pressure of December 2017 as granted to us by the Hon'ble High Court of Calcutta." This was followed by a letter to the same effect written on February 13, 2017.

(j) Without responding to the writ petitioner's letters dated December 15, 2015, or February 13, 2017, the Government of West Bengal issued the impugned notice dated 6/18 April, 2018, the operative portion whereof has been extracted in the first paragraph of this judgment.

(k) In the aforesaid factual matrix, Mr. Mukherjee, learned Senior Counsel appearing for the appellant, has made two-fold legal submission.

(l) Firstly, he submitted that the respondent authorities by their conduct have waived the forfeiture. He submitted that the right of the respondents to enforce the forfeiture clause in the lease deed arose long time back. However, the language of the notice impugned in the present proceedings indicates that the respondents treated the lease as subsisting till the date of the impugned notice. He submitted that the very fact that the lease was sought to be determined by the impugned notice goes to show that the Government treated the lease to be subsisting and valid till the date of that notice although the Government could have terminated the lease much earlier by acting on the basis of the forfeiture close in the lease deed. Thus, by their acts and conduct the respondents, with

the knowledge that forfeiture has been incurred, have shown an intention to treat the lease as subsisting. This amounted to waiver of forfeiture under Section 112 of the Transfer of Property Act, 1882. In this connection learned Senior Counsel relied on a decision of the Patna High Court in the case of Shiv Prasad Singh v. Smt. Mandira Kumari Debi reported at AIR 1940 Pat 478 and a decision of a coordinate Bench of this Court in the case of M/s. Bungo Steel Furniture (Private) Ltd. v. Pulin Chandra Daw reported at (1987) 1 CHN 116. We will revert back to these decisions later in this judgment.

(m) The second point made by learned Senior Counsel was that the lease has been determined without taking a decision on the appellant's application for change of user. Clause 2(9) of the lease deed permits the lessee to use the land for a purpose other than the purpose for which it was leased out to the lessee with the prior written permission of the Government or other authority prescribed in that behalf. The appellant has made an application for such permission. Without taking a decision on such application, the lease has been sought to be determined. Mr. Mukherjee referred to Notifications dated May 6, 2005, April 17, 2007, May 6, 2008 and December 8, 2011, issued by the Urban Development Department of the Government of West Bengal, copies whereof have been brought on record by way of a supplementary affidavit affirmed on behalf of the appellant on December 3, 2021. Relying on such Notifications, learned Senior Counsel submitted that the Government, having noticed that a good number of industrial and commercial plots are lying unused in Bidhan Nagar, has taken a conscious decision which is reflected in Paragraph 4 of the Notification dated May 6, 2005, which reads as follows:-

"The lessee of a land or a transferee of leasehold right of a land in Bidhannagar industrial and commercial plots, if they intend to change the original purpose of allotment, shall have to apply to the Government seeking such permission. The Government of West Bengal in the Urban Development Department shall examine the proposal and if it is found suitable, shall allow such change of purpose subject to payment of fees at the following rates and execution and registration of a deed of rectification to the original lease-deed following the usual rules of registration of the Government:

(i) Rs. 10.000/- (Rupees ten thousand) only per cottah if an I.T. related project is proposed;

(ii) Rs. 20. 000/- (Rupees twenty thousand) only per cottah for non-I.T. projects.

In no case any concession of registration fees shall be allowed."

The subsequent notifications merely enhanced the fees payable for obtaining permission for change of user. He said that in a plethora of cases, this Court has directed the authorities to grant permission for change of user upon payment of applicable fees. The appellant's case stands on the same footing. The Government should have allowed the appellant's application for change of user. The Government sat tight on the application and suddenly determined the lease.

This was wholly unreasonable on the part of the Government. The decisions of this Court relied upon by Mr. Mukherjee were those rendered in W.P. No. 6858(W) of 2008 (Ashis Kumar ghosh v. The State of West Bengal & Ors.), W.P. No. 16410 (w) of 2009 (Smt. Deepa Chakraborty & Ors v. The State of West Bengal & Ors.), W.P. No 20739 (w) of 2010 (B.M. Pal Chowdhury & Co. Pvt. Ltd. & Anr v. The State of West Bengal & Ors.), W.P. No. 18668 (w) of 2012 (M/s. Din Chemicals & Coatings Pvt. Ltd. & Anr v. The State of West Bengal & Ors.), W.P. No. 19516(w) of 2012 (M/s. Seven Hill Bytes Pvt. Ltd. & Anr v. The State of West Bengal & Ors). and W.P. No. 12224 (w) of 2014 (GPT Health Care Private Limited & Anr v. The State of West Bengal & Ors.).

4. Appearing for the State respondents, Mr Amitesh Banerjee, learned Senior Standing Counsel, submitted as follows:-

(i) The terms and conditions of the lease deed imposed an obligation on the appellant to construct the proposed building on the concerned land within 3 years from the date of possession of the demised land or such extended time as may be allowed by the Government in writing, failing which the Government could repossess the land in question whereupon the demise would stand determined.

(ii) Possession of the land in question was taken over by the appellant on September 5, 1985, as would be evident from a possession certificate of that date. The first show-cause notice was issued to the appellant on November 24, 2006, calling for an explanation within 90 days as to why the concerned plot of land shall not be resumed by the Government in view of the appellant's failure to construct the proposed building on the said plot of land.

(iii) Notice of resumption of the concerned land was issued on February 19, 2010. This was challenged by the appellant before the Writ Court. The notice was quashed. The appellant was granted time till March 31, 2015 to complete the building. Such time was extended by a subsequent order, till December 31, 2017.

(iv) The appellant applied for permission for change of user on July 18, 2015. Apart from writing a couple of letters after that, the appellant did not take any step for ensuring that its application is decided one way or the other. The appellant did not approach the Court with a grievance that the Government was unreasonably withholding permission for change of user. This suited them. Land price was continuously increasing in the meantime. The appellant cannot be permitted to put a premium on the breach on its part.

(v) There was or is no act of waiver of forfeiture on the part of the State.

(vi) There is no infirmity in the order of the learned Single Judge which warrants inference. The appeal should be dismissed.

Court's View:-

5. I am unable to accept the first contention of the appellant that the

respondents had waived their right to forfeit the lease. Section 112 of the Transfer of Property Act, 1882 (in short 'TPA'), insofar as the same is relevant for the present purpose, reads as follows:-

"112. Waiver of forfeiture. - A forfeiture under Section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting.

Provided that the lessor is aware that the forfeiture has been incurred."

The argument of the appellant that by issuing the impugned notice the respondents showed an intention to treat the lease as subsisting even after right accrued in their favour to forfeit the lease, is rather stretched. The respondents had initially issued a notice dated February 19, 2010, to the appellant recording that the lease granted in the latter's favour already stood determined and process for resumption of the concerned plot of land had started. This notice was set aside by a learned Single Judge by an order dated December 19, 2013 passed in W.P. 6670(W) of 2010. The learned Judge restrained the respondents from issuing any notice of termination of the lease on the ground of Clause 2(6) of the lease deed subject to the writ petitioner/appellant completing the building by March 31, 2015.

6. On an application filed in connection with the said writ petition being CAN 11946 of 2014, by an order dated December 19, 2014, the same learned Judge extended the time for the appellant to complete the building till December 31, 2017. Upon the appellant's failure to complete the building even within such extended time period, the impugned notice dated 6/18.04.2018 was issued by the respondents, determining the lease and re-entering into possession of the demised land. Learned Senior Counsel for the appellant submitted that the language of the impugned notice shows that by that notice the lease was determined. It follows that till such notice was issued, the respondents had treated the lease as subsisting even after forfeiture occurred. Hence, the respondents must be taken to have waived the forfeiture. I am unable to agree. The earlier determination of the lease was set aside by an order of this Court which, not having been challenged, attained finality. Time was granted to the appellant to complete the building initially by March 31, 2015, which was extended till December 31, 2017 and in the meantime the respondents were restrained from issuing termination notice on the ground of Clause 2(6) of the lease deed. Upon the appellant failing to complete the building even by December 31, 2017, the impugned notice was issued. The respondents had no option but to treat the lease as subsisting at least till December 31, 2017, because of restraint orders of this Court. Soon thereafter, in April 2018, upon the appellant's failure to take advantage of this Court's order and complete the building by the end of 2017, the respondents issued the termination notice. I do not find any act on the part of the respondents to voluntarily treat the lease as subsisting even after forfeiture occurred.

7. A waiver is an intentional relinquishment of a known right. Blacks Law dictionary, 11th Ed, defines waiver as the voluntary relinquishment or abandonment - express or implied – of a legal right or advantage with knowledge of such right. 'Implied waiver' is a waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive. An implied waiver may arise where a person has pursued such a course of conduct so as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. Merely lying by and witnessing the breach is no waiver. Some positive act must be done.

8. In the present case we do not find any express or implied waiver of forfeiture on the part of the respondents. Initially the respondents had exercised their right of forfeiture and had determined the lease that had been granted in favour of the appellant. Such action of the respondents was set aside. Due to interdiction of the Court the respondent's right to forfeit stood suspended till the end of 2017, subject to the condition that the appellant would complete construction of the building in question by that time. Upon the appellant's failure to complete the building by the end of 2017, the right of the respondents to forfeit the lease relying on Clause 2(6) of the lease deed, stood resurrected. The respondents exercised such right and determined the lease by the notice impugned in the present litigation. The respondents cannot be said to have waived the forfeiture whether within the meaning of Section 112 of TPA or otherwise. The first contention of the appellants therefore fails.

9. The two decisions relied upon by the appellant do not help the appellant. In *M/s. Bungo Steel Furniture (Private) Ltd. (supra)*, a notice of forfeiture under Section 111(g) of the TPA was served by the lessor on the lessee on 18-9-1971 which was received by the lessee on 23-9-1971. The lessor issued another notice of forfeiture on November 8, 1971 which was received by the lessee on November 10, 1971. In paragraph 13 of the plaint of the suit filed by the lessor for evicting the lessee, the lessor/plaintiff asserted that the lessee/defendant had become a trespasser, liable for mesne profits and damages on and from 10-11-1971. In the plaint the plaintiff categorically stated that "the defendant has not complied with the said notice dated 8-11-1971 and is still continuing in unlawful occupation of the lease hold premises as described in the Schedule below as a trespasser making himself liable for mesne profits and damages @ Rs. 50 p.d. from 10-11-1971 till eviction". In such factual background, a Division Bench of this Court held that when the second notice of forfeiture was issued on 08-11-1971 and when the plaint was filed in May, 1972, the lessor/plaintiff was fully aware that forfeiture had been incurred by the lessee and that the first notice dated 18-9-1971 was also issued for that purpose. If still, thereafter, the lessor clearly manifested his intention to treat the lease as subsisting up to 10-11-1971, the lessor must be taken to have waived the forfeiture for which the first notice was issued on 18-9-1971 and for which the suit for ejectment was eventually filed.

The facts of the present case are completely different. In the above case, after occurrence of forfeiture, the lessor voluntarily treated the lease as subsisting and thereby waived the forfeiture. In the present case at hand, the lessor/respondent has not done anything to evince such intention.

10. The decision in *Shiva Prasad Singh*, (Supra), was also rendered in completely different set of facts. In that case, the plaintiff, with full knowledge of the breach of a covenant in the lease deed, gave the defendant notice to quit and thus recognised the existence of the tenancy. Further, with full knowledge of the breach, the plaintiff had accepted rent. Still further, in the plaint, the plaintiff had stated that if he was not given possession of the property, he was willing to allow the defendant to remain on the land in question at a certain rental per annum. In such factual background it was held that if there had been a breach of covenant, the plaintiff after knowledge of the same recognized the existence of the tenancy and thereby waived any right which he might have had to forfeit the tenancy. In our opinion, this decision does not advance the appellant's case to any extent.

11. The other point urged on behalf of the appellant, in our view, has substance. It is true that the lease was executed in favour of the appellant in 1985 and the appellant was put in possession of the land in question in the same year. No doubt, the lease deed contained a covenant requiring the appellant to complete the proposed construction on the leased out land within 3 years from the date of possession of the demised land or such extended time as may be allowed by the Government in writing. It is also not in dispute that construction has not been completed by the appellant. However, although the appellant was in breach of the aforesaid covenant requiring it to complete construction within 3 years, i.e. by 1988, the Government took no action for 18 long years. It was only in 2006 that the Government issued a notice calling upon the appellant to show cause as to why the concerned lease should not be determined by reason of breach of the construction clause in the lease deed. The appellant responded to such notice by its letters dated December 4, 2006 and December 14, 2007. Again there was a long silence on the part of the Government. By a notice dated February 19, 2010 the Government recorded that the lease has been determined. Such notice was set aside by a learned Single Judge of this Court by order dated December 19, 2013 subject to the appellant completing the building by March 31, 2015. Subsequently, the time for completing of the building was extended till the end of December, 2017, by order dated December 19, 2014. The aforesaid 2 orders attained finality, not having been challenged before any higher forum. Consequently, the delay on the part of the appellant in completing the building and resultant breach of the construction clause in the lease deed stood condoned by orders of Court till December 31, 2017.

12. In view of the appellant's failure or inability to complete construction of the building even by the extended date i.e. December 31, 2017, the Government issued the impugned notice dated 6/18 April, 2018, for resumption of the land in question. However, in the meantime, in July, 2015, the appellant made an

application to the competent authority for granting permission for change of user of the land in question, from "Motor Training School" to "Commercial Building". The application was followed up by 2 letters dated December 15, 2015 and February 13, 2017. However, without taking any decision on the appellant's application for permission to change the user of the land in question, the impugned notice of resumption was issued.

13. I am of the considered opinion that the Government should have disposed of the appellant's application for permission to use the concerned land for a purpose, other than what was originally contemplated, prior to terminating the lease. Had the Government taken a prompt decision on the appellant's said application and had the decision been a favourable one, may be the appellant could have completed the requisite construction by the end of December, 2017. We are inclined to give the appellant the benefit of doubt on this ground.

14. Learned Senior Counsel for the appellant has drawn our attention to several Notifications issued by the Urban Development of the Government of West Bengal starting with the Notification dated May 6, 2005, which we have referred to above. The said Notifications reflect a conscious policy decision on the part of the State Government to allow change of user to the lessees upon payment of prescribed fees if the proposed new user is found to be suitable. Mr. Mukherjee, relying on several orders of learned Single Judges of this Court, argued that the Competent Authority should be directed to allow the appellant's application for change of user against payment of requisite fees. I do not think that such a mandate should be issued since as per the Notifications, the permission for change of user shall be granted if the same was found to be suitable by the Competent Authority. However, I am of the view that the State Government should take a decision on the appellant's application for permission to put the land to a different use before forfeiting the lease in question.

15. I accordingly direct that the notice impugned in the present proceedings will be in abeyance till the time the Government takes a decision on the appellant's application for change of user of the land in question. The concerned authority in the State Government shall grant an opportunity of hearing to the appellant's representatives and dispose of the appellant's application for change of user in accordance with law within 3 months from the date of communication of this order. If the concerned authority allows the appellant's application, the Government through its Competent Officer shall grant reasonable extension of time to the appellant to complete the requisite construction on the land in question. If the appellant's application for change of user is rejected by the concerned authority for reasons to be recorded in writing, the notice impugned in the present proceedings shall stand resurrected and become operative after 7 days from the date of communication of the rejection order by the concerned authority to the appellant.

16. The order under appeal is set aside. The appeal and the connected applications are accordingly disposed of.

17. There will be no order as to costs.

18. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.