IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A NO.186/2016

Present: Munib Akhtar & Yousuf Ali Sayeed, JJ

Appellants:	Shell Pakistan Limited, through Mr. Salahuddin Ahmed, Advocate, assisted by Mr. Rajendar Kumar and Mr. Nadeem Ahmed, Advocates.
Respondent No.1:	Federation of Pakistan, through Mr. Asim Mansoor Khan, DAG.
Respondent No.2:	Cantonment Board Malir, through Mr. Umer Riaz, Advocate.
Respondent No.3:	Jamal A. Ansari, through Mr. S. Ahsan Imam Rizvi, Advocate.
Date of hearing:	08.05.2017
Date of Judgment:	

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellant has assailed an interlocutory Order dated 03.06.2016 (the "**Impugned Order**") made by a learned single Judge of this Court, dismissing the Appellant's Application under Order 39, Rules 1 & 2 CPC bearing CMA Number 14210/2015 (the "**Injunction Application**") in Suit Number 1875 of 2015 (the "**Underlying Suit**"), whereby it had been prayed that the Respondents Nos. 1 and 2 be restrained from interfering in the Appellant's possession of a plot bearing Survey No.59/1/A, Class "C" land, measuring 0.716 acre (3465.44 Square Yards), situated opposite Piccadilly Cinema, Quid-e-Azam Square, Malir Cantonment (the "**Subject Premises**") and from interfering with the operation of the petrol/CNG station being run by the Appellant thereon.

2. It is common ground that the Subject Premises had been leased for the specific purpose of the establishment of a petrol/CNG pump to the predecessor in interest of the Respondent No.3, namely one Furqan Ahmed, by the Respondent No.2 for a period of 10 years vide a registered Indenture dated 10.10.2005, who sub-leased the Subject Premises to the Appellant vide registered sub-lease dated 18.11.2005 and then subsequently, on 04.04.2008, assigned his interest in the Subject Premises to the Respondent No.3 through a registered Deed of Assignment, with the consent of the Respondent No.2. Within this framework, the Appellant has admittedly been operating a petrol/CNG station at the Subject Premises through its licensee and authorized dealer, namely the Respondent No.3, whose interests are thus not adverse to that of the Appellant.

3. It was submitted on behalf of the Appellant that in view of the relatively short period of the lease the Appellant had been wary of developing a facility at the Subject Premises, which required a considerable financial outlay, and thus sought an assurance of continuity beyond the 10-year period of the lease, which was forthcoming in the form of a letter dated 18.11.2005 addressed on behalf of the Respondent No.2 to the attorney of Furqan Ahmed, confirming that "*Upon your request, for facilitation of license from Shell vis-à-vis the circumstances explained in your application, it is intimated that after successful establishment and commissioning of Petrol Pump/CNS station at the given site at the Petrol Pump site Quaid-e-Azam Square, Aziz Bhatti Road, Malir Cantt that after the expiry of 10 years lease period, this lease may be renewed for another period of 10 years at the discretion of cantt. Board Malir, however in case of re-auction of the site the present lessee shall be given preference if he continue with the Shell-branded site*" (Sic). It was submitted that acting on such assurance, the Appellant entered into the aforementioned sub-lease and proceeded to develop the Subject Premises at considerable expense so as to establish the petrol/CNG station presently in existence.

4. The dispute between the Appellant and Respondent No.3 on the one hand and the Respondent No.2 on the other is said to have arisen near to the expiry of the original lease period (i.e. 09.10.2015), when the Respondent No.3 addressed a letter dated 02.03.2015 to the Respondent No.2 requesting renewal of the lease for a further 10 years. It is stated that the Respondent No.2 received this letter on 05.03.2015, and it has been alleged that while willingness to renew was initially expressed by its functionaries, the matter was nonetheless kept in abeyance. Thereafter, on 29.09.2015 the Respondent No.2 addressed a notice to the Respondent No.3 in his capacity as retailer of the Appellant, ordering that possession of the Subject Premises (along with entire station constructed thereon) be handed over on 9.10.2015. Apparently, no notice was ever issued to the Appellant directly.

5. Thereafter, the Respondent No.2 is said to have pressed the Appellant and Respondent No.3 to vacate the Subject Premises, extending threats as to forcible disruption of operations, and apprehending coercive action, the Appellant filed the Underlying Suit eliciting a declaration as to its status as a sub-lessee of the Subject Premises, cancellation of the notice dated 29.09.2015 issued by the Respondent No.2, an injunction to restrain the Respondents Nos.1 and 2 from dispossessing the Appellant or interfering with the operation of the petrol/CNG station, and directing the Respondents Nos. 1 and 2 to execute a lease for a further period of 10 years. It was prayed, in the alternative, that the Respondents Nos. 1 and 2 be restrained from ejecting the Appellant without due course of law under the relevant rent laws, pleading that after expiry of the lease period, the lessee and hence the sub-lessee continued to enjoy the status of a statutory tenant holding over and could not be arbitrarily removed by the landlord/lessor except through due process.

6. While issuing notice on the Injunction Application, a learned Single Judge was pleased to make an Order on 08.10.2005 restraining the Respondents No.1 and 2 from interfering with the possession and peaceful functioning of the station. However, after hearing the parties the Injunction Application was dismissed by a learned single Judge vide the Impugned Order, albeit with the direction that since the Cantonment Board intended to offer the Subject Premises to a third party for use as a petrol pump/CNG Station, hence the Appellant should have the benefit of the right of first refusal.

7. Learned counsel for the Appellant submitted that the learned single Judge had erred in his understanding and assessment of the matter, and pointed out that the Impugned Order was based on a fundamentally erroneous proposition that upon expiry of the stipulated lease period, the lease "transforms into a license requiring the consent of the lessor for holding on to possession". It was submitted that, contrarily, the status of a tenancy for a defined contractual period, upon expiry of said period, converts to a statutory tenant holding over and the tenant may only be ejected through due process of law by having recourse to the appropriate forum as per the applicable rent laws, and the principle of "self-help" or the use of "reasonable force" by a landlord to dispossess a tenant staying on beyond the lease period or, indeed, anyone who is in "settled possession" of an immoveable property were not countenanced in law. Reliance was placed in this regard on the judgments in the cases reported as Azim Khan v. State of Pakistan PLD 1957 (W.P) Karachi 892, Musarat Masood Lodhi v. Masood Hameed Lodhi 2003 MLD 9, Abid Ali v. Bazaar e Faisal Builders 2015 CLD 1257, and Climax Printers v. HBL 2008 CLD 761.

8. Learned counsel for the Respondent No.3 supported the case of the Appellant and fully endorsed the aforementioned arguments advanced at the bar.

9. Conversely, learned counsel for the Respondent No.2 strongly controverted the case advanced on behalf of the Appellant, and submitted that vide the Indenture dated 10.10.2005, a non-renewable lease had been granted for a period of ten years from 10.10.2005 to 09.10.2015, and that the Respondent No.3, having stepped into the shoes of the original lessee, Furqan Ahmed, was bound to hand over possession of the Subject Premises on expiry of the said lease period (i.e. 09.10.2015), and the Appellant had no right/claim over the site on any pretext whatsoever. In this regard, he placed reliance on Condition No.12 of the Indenture, which states that "*On the expiry of the lease period, the superstructure constructed thereon shall become the property of the Cantonment Board Malir and the lessee shall claim no compensation, whatsoever, on this account. The possession, after expiry of the lease period shall be handed over to the Cantonment Board Malir peacefully.*"

10. It was also contended by learned counsel for the Respondent No.2 that the letter dated 18.11.2005 relied upon by the Appellant as having been issued by way of an assurance as to continuity of possession had been contrived by the Appellant and Respondent No.3, as the same had never been issued by the Respondent No.2. With reference to the plea taken in this regard in the written objections to the Appeal, it was contended in furtherance thereof that the said letter had not been issued on the official letterhead of the Respondent No.2, and, on the face of it, was not genuine.

11. It was averred that there was no statutory tenancy/sub-tenancy as alleged by the Appellant, and the Respondent No.2 had even otherwise exercised its powers under Section 5 of the Federal Government Lands and Buildings (Recovery of Possession) Ordinance, 1965 (the "**Recovery Ordinance**") on behalf of the Respondent No.1 in order to evict an unauthorized occupant.

12. Learned counsel for the Respondent No.2 contended that the provisions of the Cantonment Rent Restriction Act, 1963 were not applicable to land belonging to the Federal Government and in cases where the property fell within the definition of the "property owned and controlled by Government", the Recovery Ordinance was applicable, and in the matter at hand the Respondent No.2 had acted thereunder. He contended that upon the expiry of the specified period of any lease, any officer authorized on behalf of the Federal Government can, at any time, enter upon the demised premises and recover the possession thereof by evicting the occupants. It was submitted that in the instant case, before making any attempt to evict the Appellant, the Respondent No.2 had duly served a notice for handing over peaceful possession of the Subject Premises to the Respondent No.3. It was submitted that the concept of holding over/statutory tenancy/sub-tenancy was not applicable in the circumstances of the instant case as there had been no assent by the landlord by way of acceptance of rent. In order to show that Section 5 of the Recovery Ordinance was applicable in the exigencies of the given situation, learned counsel for the Respondent No.2 sought to demonstrate that the Appellant was an 'unauthorized occupant' within the contemplation of the said provision in as much as it was contended that the sub-lease in favour of the Appellant constituted a violation of Clause 11 of the Indenture which forbade the creation of any interest in the Subject Premises "in favour of a foreigner, either directly or indirectly, without the previous permission in writing of the Federal Government". It was contended that notwithstanding the fact that the Appellant was a corporate entity incorporated in Pakistan, the sub-lease in its favour fell afoul of this negative covenant, as the Appellant was a subsidiary of a foreign company. For the purpose of demonstrating the competence of a Cantonment functionary to act in exercise of the Recovery Ordinance, reliance was placed upon a notification dated October 9, 1970 whereby the Government had delegated the powers exercisable by it under Sections 3, 4, 5, 6 and 7 thereof to the Military Estate Officers within their respective jurisdictions and to Cantonment Executive Officers within notified bazaar areas.

13. Learned counsel for the Respondent No.2 also submitted that the Appeal was otherwise not maintainable as no declaration and/or injunction could be granted to enforce the lapsed Indenture dated 10.10.2005, and that too in favour of a stranger (i.e. the Appellant). On this basis, it was contended that the Suit was not maintainable, as the main relief could not be granted to the Appellant under such circumstances, ergo interim relief could not be granted either. It was also asserted that the prayer as to execution of a lease for a further period in favour of the Appellant and/or the Respondent No.3 could not be granted as the initial lease was stated not to be renewable, and the Court could not substitute the terms and conditions of the agreement inter se the parties by compelling the parties to enter into such an agreement for a further term.

14. Lastly, as mentioned in the written objections to the Appeal, it was submitted that the learned single Judge, while making the Impugned Order, had already granted relief to the Appellant in as much as he had factored in the aspect of the right of first refusal over the Subject Premises, and that the Impugned Order was quite equitable, reasonable and just and the Appeal was liable to be dismissed on this ground. It was stated that the Respondent No.2, vide Board Resolution No.25 dated 11.09.2015, had approved re-auction of the Subject Premises and the case in this respect had been forwarded to the Competent Authority for approval of re-auction, and that the Respondent No.3/the Appellant could thus participate in the auction.

15. By way of rebuttal, it was contended on behalf of the Appellant that the Recovery Ordinance was inapplicable to the Subject Premises, as Section 2(a) and (b) thereof clarify that same only applies to land and buildings that "vests in, or is in the possession or under the management and control of" the Federal Government, whereas Class 'C' land, such as the Subject Premises, has been vested in the Cantonment Board pursuant to

section 108 of the Cantonment Act 1924. Furthermore, whilst, under Section 9 of the Recovery Ordinance, the Federal Government may delegate any of its powers thereunder to any subordinate officer (which are claimed by the Cantonment Board to have been delegated to the concerned Cantonment Executive Officer), the jurisdictional prerequisite for the delegation and exercise of such powers is that the land/buildings in relation to which such powers are to be exercised must vest in or be in the possession, management or control of the Federal Government. It was pointed out that in the instant case the Federal Government (i.e. the Respondent No.1) had not taken any action, and had not even so much as filed a counter affidavit in the instant proceedings or the Underlying Suit. It was also pointed out that even the notice dated 29.9.2015 directing that the Subject Premises be vacated, as relied upon by the Respondent No.2 and as impugned in the Underlying Suit, had been issued by the Respondent No.2 and not the Federal Government, and makes no mention of the Recovery Ordinance. Moreover, whilst the notification dated October 9, 1970 purported to delegate powers exercisable by the Federal Government under sections 3, 4, 5, 6 and 7 thereof to Cantonment Executive Officers within notified bazaar areas, it had neither been pleaded by the Respondent No.2 in the Underlying Suit nor in the instant Appeal that the Subject Premises fell within a notified bazaar area nor had any map or notification been produced to this effect. Additionally, it was pointed out that both Sections 3 and 5 of the Recovery Ordinance – as amended by the Federal Government Lands and Building (Recovery of Possession) Amendment Ordinance 1984 – mandate that before any recovery of possession is effected, the lessee/licensee/unauthorized occupant must be issued notice and granted an opportunity of hearing, which was not afforded vide the Respondent No.2's notice dated 29.9.2015. On this basis, it was contended that the Respondent No.2's effort to invoke the Recovery Ordinance was an afterthought, as the action taken towards dispossession were not actually taken under cover thereof.

16. We have considered the record and the submissions made by learned counsel for the respective parties. As pointed out, the learned Single Judge appears to have proceeded on the premise that upon expiry of the lease period in terms of the Indenture, the lease converted to a license and, as such, the Appellant ceased to have an interest in the Subject Premises. We are afraid that we cannot bring ourselves to accept such a premise, placing the Appellant on the footing of a mere licensee, especially in view of the assurance held out on the face of the letter dated 18.11.2005. The effect of this letter, with respect, does not appear to have been properly considered and weighed by the learned Single Judge, and the Impugned Order, for this and other reasons, appears to have drifted from the well-established principles for grant of temporary injunction.

17. In our view, the Appellant appears at this stage to have a prima facie case that certain assurance(s) were held out in terms of the letter dated 18.11.2005 and as to having acted on the basis of such assurances. In our opinion, necessarily tentative though it may be, such assurance gives rise to an inference that the understanding was meant to preserve the interest of the Appellant in the Subject Premises through the Respondent No.3, and, in the absence of evidence to the contrary, we are not inclined to interpret the letter dated 18.11.2005 so as to mean that the Appellant had to vacate the Subject Premises upon completion of the lease period. In our view, such an interpretation yields so onerous an obligation as to effectively negate the purpose of the aforesaid letter and virtually set the very object of any assurance made thereunder at naught. Whilst the authenticity of this letter has been brought into question through the objections filed by the Respondent No.2, we are at a loss to understand as to how the Respondent No.2 can outrightly disavow the same and yet embrace the finding of the learned Single Judge as to the right of first refusal being correct and equitable, when such right emanates from that very letter. Additionally, we have noted that the authenticity of the letter was not questioned in this manner in the counter-affidavit filed in the Underlying Suit. Even so, we are of the opinion that this question

would fall to be decided after evidence, as would the status of the sub-lease executed in favour of the Appellant and the full import of the letter in question as regards the future rights and obligations of the parties in relation to the Subject Premises.

18. In view of the investment and ongoing business of the Appellant and Respondent No.3 in the form of the functioning petrol/CNG station, the balance of convenience also appears to be in favour of preserving this state of affairs, and thus lies with the Appellant, especially when the Respondent No.2 has confirmed that its intention is to continue utilization of the Subject Premises for this very purpose, and its principal concern appears to thus be confined to that of realizing fresh terms vide auction. It also falls to be considered that in the event of divestiture of the Appellant from the Subject Premises, the investment already made would potentially be laid waste. The Appellant has at least an arguable case that it is inferable if not implicit from the Letter of assurance that the lease be renewed for a further ten-year period in as much as such renewal would not be unreasonably withheld in the event of continued utilization of the Subject Premises for the same purpose.

19. As such, in our opinion, ouster of the Appellant from the Subject Premises, whether by way of purported recourse to the Recovery Ordinance or otherwise, would not be permissible at this stage under the prevailing circumstances, particularly in light of the letter of assurance dated 18.11.2005, which, in our tentative view, serves to indicate that a commitment was held out to the predecessor in interest of the Respondent No.3 for the express purpose of satisfying and thereby inducing the Appellant to transact with the predecessor of the Respondent No.3 and establish a petrol/CNG station at the Subject Premises whilst presenting the prospect of a renewal and the assurance of continuity on the basis of a right of first refusal, subject of course to the same being exercised in accordance with its terms, thus obviating recourse to any repossession in the interregnum.

20. In this regard, it also merits consideration that Section 5 of the Recovery Ordinance, being the instrument on which the Respondent No.2 has placed reliance as providing legal sanction for unilaterally dispossessing the Appellant, states as follows:

> "**5. Eviction of unauthorized occupants**. (1) If the Federal Government is satisfied after making such enquiry as it thinks fit that a person is an unauthorized occupant of any land or building, it may, after giving such person an opportunity of being heard, by order in writing, direct such person to vacate the land or building within the period specified in the order.
>
> (2) If any person refuses or fails to vacate any land or building as directed by an order under subsection (1), any officer authorized in this behalf by the Federal Government may, notwithstanding anything contained in any other law for the time being in force, enter upon such land or building and recover possession of the same by evicting such person and may also demolish and remove the structures, if any, erected or built by that person."

Furthermore, Section 2(e) of the Recovery Ordinance defines the term "unauthorized occupant" as follows:

> "(e) "unauthorized occupant" means a person who is in occupation of any land without the express permission or authority of the Federal Government, and includes –
>
> (i) a person inducted into any land or building by the lessee or licensee thereof; and
>
> (ii) every member of the lessee's or licensee's family who remains in occupation of any land or building after the determination of the lease or license in respect of the same.

At this stage, in the context of the Respondent No.2's plea as to the recourse said to be available and adopted in terms of this particular section of the Recovery Ordinance, we are not persuaded by the contention that the Appellant was an 'unauthorized occupant' of the Subject Premises. The contention of the Respondent No.2 in this regard is that the Appellant is a 'foreigner', within the contemplation of Clause 11 of the Indenture (as reproduced herein above), hence the sub-lease claimed as having been executed in its favour by the Respondent No.3 is in contravention of Clause 11, thus invalid. In our view, the Appellant, which is admittedly a locally incorporated

company, cannot be deemed to be a 'foreigner' for the purposes of Clause 11 merely due to there being a foreign element to its shareholding, and it cannot be said that the sub-lease contravened Clause 11 of the Indenture on this basis, and that the Appellant was hence an unauthorized occupant for the purposes of Section 5 of the Recovery Ordinance. Furthermore, in the instant case, it is also apparent that the Respondent No.2's notice dated 29.9.2015 made no mention whatsoever of the Recovery Ordinance, nor afforded any opportunity of hearing. On the contrary, the said notice merely referred to certain conditions of the Indenture, and called for the prompt handover of the Subject Premises along with the entire superstructure of the petrol/CNG station, even though there is no provision in the Recovery Ordinance for forfeiture of the structure. Even if it be assumed that the Respondent No.2 acted in purported exercise of Section 5 of the Recovery Ordinance, it merits consideration that sub-section 1 thereof requires an objective enquiry, hearing and action reasonably predicated thereon on the part of the Federal Government, communicated through an order in writing directing the person found to be an unauthorized occupant to vacate the land in question. It is in the event of non-compliance on the part of the unauthorized occupant with an order so issued under sub-section 1 that an officer authorized by the Federal Government may then take further steps under sub-section 2 to enter upon such land or building and recover possession of the same by evicting the unauthorized occupant(s) and demolishing/removing the structures thereon. Whilst the Respondent No.2 has relied upon a notification whereby the Federal Government has apparently delegated the powers exercisable by it under Section 5 to the relevant Cantonment Executive Officer within notified bazaar areas, it remains to be determined whether the Subject Premises falls within such an area, following production of the relevant notification(s), if any, in that regard. Furthermore, even if it is assumed that such is the case, even so, the preceding framework that would enable the Respondent No.2 to so act in exercise of such powers appears to be lacking, in as much as the prerequisites of sub-section 1 have apparently not been met.

21. Furthermore, it also merits consideration that the term "land", has been defined in Section 2(b) of the Recovery Ordinance as follows:

> "(b) "land" means land which vests in, or is in the possession or under the management and control of, the Federal Government, and is used or held for purposes other than agriculture:"

However, it is noteworthy in the context of the matter at hand that Section 108 of the Cantonments Act, 1924 provides *inter alia* that the property which has been acquired or provided or is maintained by a Cantonment Board, including all land or other property transferred to the Board by the Federal or Provincial Government, shall vest in and belong to that Board and shall be under its direction, management and control. Whilst the provisions of Rule 9 of the Pakistan Cantonment Property Rules 1957 confer a right upon the Federal Government to prescribe conditions under which Class 'C' land can be leased or otherwise alienated by a Cantonment Board, this does not negate the ownership of the property by the Board, which, as held by the Honourable Supreme Court in the case reported as Pakistan through the Secretary, Ministry of Defence v. Province of Punjab and others PLD 1975 SC 37, vests in the Board in terms of both possession and title. As such, on this score as well, the action sought to be taken by the Respondent No.2 in respect of the Subject Premises, prima facie, does not appear to fall within the framework of the Recovery Ordinance. Needless to say, the Respondent No.2 may lead evidence so as to demonstrate that the terms and conditions under which the Subject Premises were granted/transferred to it yield a result to the contrary.

22. In view of the foregoing, we are constrained to say with utmost respect that the Impugned Order suffers from certain material infirmities, as discussed, and cannot be sustained. Thus, the Impugned Order is set aside and it is hereby directed that possession of the Appellant over the Subject Premises ought not to be disturbed and operation of the petrol/CNG station thereat may be carried on by the Appellant unabated until disposal of the Underlying Suit.

23. Needless to say, the observations made herein above are tentative in nature and without prejudice to further proceedings in the Underlying Suit.

24. The Appeal stands allowed in the above terms, with no order as to costs.

JUDGE

JUDGE

Karachi
Dated _____