

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

SUIT NO.1768 OF 2016

BEFORE:**MR.JUSTICE ARSHAD HUSSAIN KHAN*****H. Nizam Din & Sons (Pvt.) Limited******Versus******Pakistan Defence Officers Housing Authority & others***

Plaintiff: Through Mr. Arshad Tayyabali, Advocate

Defendants

No.1&2 Through Malik Naeem Iqbal, Advocate

Date of hearing: 23.08.2017

ARSHAD HUSSAIN KHAN, J: By means of this order, I intend to dispose of application bearing CMA No. 12239 of 2016 filed by defendant No.1 under Order VII, Rule 11, C.P.C. for rejection of the plaint.

The plaintiff through instant suit has sought relief as follow:-

- 1. Declare that the Agreement is a lease and the Plaintiff is lessee of the Defendant No.1;*
- 2. Declare that the Plaintiff being a lessee cannot be evicted from the Premises except through eviction proceedings as per rent laws;*
- 3. Permanently restrain the Defendants, their employees, agents, servants, attorneys and/or another person acting on their behalf or under their authority, from creating any third party interest in the Premises, and from removing, evicting, dispossessing, or interfering in any manner whatsoever with peaceful and vacant possession of the Premises by the Plaintiff, and from taking any coercive action including but not limited to*

that of removing the Plaintiff from the panel of caterers and/or cancelling events or other contracts with the Defendants and/or cancelling events or other contracts with the Defendants and/or banning or restricting the Plaintiff in any manner whatsoever from carrying out its normal business of organizing events within the regulatory domain of the Defendant No.1 including but not limited to DHA Golf Club and D.A. Marina Club;

4. *Costs of this sui;*
5. *Any other relief(s) which this Hon'ble Court may deem fit having regard to the circumstances of the case.*

2. Brief facts leading to the filing of present case as averred in the plaint are that the plaintiff is a company, inter alia, engaged in the business of catering and event management since several years and in this regard enjoys good reputation amongst the leading event management and catering services in Karachi. The plaintiff being panel caterers of defendants No.1 (Pakistan Defence Officers Housing Authority) and 2 (DA Marina Club Karachi) has been organizing various events to the satisfaction of defendants No.1 and 2. The defendants No.1 and 2 recognizing the quality of services provided by the plaintiff entered into and executed an Agreement title as Memorandum of Understanding [MoU] dated 07.5.2013. Through the said MoU defendant No.1 being the owner of the premises namely "Area III" in D.A. Marina Club, situated at Phase VIII, Pakistan Defence Officers Housing Authority, Karachi [said premises], has permitted to plaintiff to organize wedding and related functions, dinners corporate events and other events of similar nature at the premises on license fee for a period of three years starting from 01.05.2013 and expiring on 30.04.2016 on the terms and conditions mentioned in the said MoU. It is also averred that though the agreement has been titled as Memorandum of Understanding and the plaintiff has been allegedly referred to as a Licensee but the agreement is a legally valid and is binding agreement and is, in fact, a lease. Further averred that upon taking

possession of the premises made huge investment in installing an 'All-Weather Marquee which required the works of permanent nature. Furthermore, various other works of permanent nature have also been carried out by the plaintiff including but not limited to the installation of various air conditioners, generators, other valuable furniture and fixtures, and an office for taking bookings has also been established. It is also averred that the plaintiff has been duly performing its obligations under the agreement and payment of rent and the commissions to defendants No.1 and 2 as per the agreement, to the satisfaction of defendants No.1 and 2. Further averred that in or around May 2016, the plaintiff keeping in view a long term relationship and assurances of defendants No.1 and 2 that the lease will be continued/renewed further through its letter dated nil, inter alia, proposed an increase in rent from Rs.110,000/- per event (with guaranteed 100 events) calculating to Rs.916,666/- per month to Rs.133,000/- per event (with guaranteed 110 events) calculating to Rs.1,219,166/- per month. Nevertheless, on 8.8.2016 in a meeting defendants No.1 and 2 threatened the plaintiff to immediately vacate the premises or else the defendant No.1 will forcefully remove the plaintiffs' Marquee and other equipment and installations etc. The plaintiff apprehending forceful dispossession filed the present suit.

3. Upon notice of the present suit, defendant No.1 filed application under order VII Rule 11 of CPC challenged the very maintainability of the present suit on the ground that as the same is barred under sections 21, 42 and 56 of the Specific Relief Act, 1877. It is also stated in the application that the plaintiff was allowed permission/license to use Area III of D.A. Marina Club for the purpose of organizing wedding and related functions etc. Further stated that the plaintiff was allowed to manage and cater afore-mentioned events for a period of three years starting from 01.05.2013

to 30.04.2016, which has been ended. Since the license agreement in favour of the plaintiff has already come to an end, which has neither been renewed nor has been extended, as such, the relief claimed by the plaintiff is hit under the provisions of Sections 60 and 64 of the Easement Act, 1882, as well as Section 42 of the Specific Relief Act, 1877. It is also stated that MoU merely conferred a right to carry on business of catering and management in the subject premises. The plaintiff was not given any general right of occupation, but only a right to use the subject premises for purposes as defined in the MoU. Such right does not amount to an interest in the property and definitely does not confer the rights of a lessee in favour of the plaintiff. Hence, the plaintiff has no right to file the present suit and as such the same is liable to be dismissed.

4. Learned counsel for defendant No.1, during the course of his arguments, has contended that a bare perusal of MoU dated 7.5.2013 reflects that the same merely confers a right upon the plaintiff to use the subject premises as a licensee and a license neither confers any vested right in the licensee nor a licensee can claim its continuation for an unlimited period of time. He further contended that clause 18 of the MoU clearly reflects that the plaintiff did not have exclusive possession of subject premises, which is one of the essentials for a `lease` to exist and in absence thereof, the plaintiff cannot claim any entitlement to possession of property on the basis of being a alleged lessee. Further contended that, clauses 8, 10, 11.1, 17 and 20 also reflects that the arrangement between the plaintiff and defendant No.2 is that of a licensee and a licensor. He further contended that Section 105 of the Transfer of Property Act, 1877, clearly defines the status of a lessee over an immovable property, a claimant has not only to show a transfer of a right to enjoy such property in consideration of a price paid or promised,

but also has to show an exclusive possession over such property, as the lessee under Section 108 of the Transfer of Property Act, 1877, is entitled to be put in possession of such property and the lessor parts with his right to enjoy such property during the course of the lease. Whereas, in the instant case, the plaintiff has expressly agreed to allow other caterers to provide food and other services under clause 18 of the afore-referred MoU, besides, the fact that defendant No.2 has retained exclusive control over the subject premises and the role of plaintiff was only to provide catering and management services, therefore, the plaintiff cannot claim the status of a lessee. He further contended that the investment made during the course of business cannot be termed as expenditure on works of permanent nature. Further submitted that as per clause 16 of the MoU, the license was for a period of three years, which expired on 30.4.2016 and further extension was not a compulsion, but was at the sole discretion of the defendants. Moreover, as per clause 28.4, defendant No.2 had the right to terminate the said MoU on two months written notice, whereas, in the instant case, the initial term agreed by the parties have come to an end and the same has not been extended, therefore, the plaintiff has no right whatsoever in the subject premises. Consequently, in view of the clear fact that the plaintiff is a licensee and defendant No.2 is a licensor, as such, the plaintiff does not disclose a cause of action and, therefore, the plaintiff is liable to be rejected. In view of various clauses of the MoU, instant arrangement has all the attributes of a license, which has come to an end, therefore, the plaintiff cannot claim its continuation. Needless to emphasize that it is settled principle of law that under Section 21 of the Specific Relief Act, 1877, those contracts cannot be specifically enforced, where compensation of money is an adequate relief. The MoU merely conferred a right to carry on business of catering

and management in the subject premises. The plaintiff was not given any general right of occupation, but only a right to use the subject premises for purposes as defined in the MoU. Such right does not amount to an interest in the property and also does not confer the rights of a lessee in favour of the plaintiff. Lastly, contended that the suit is barred under Sections 21, 42 and 56 of the Specific Relief Act, 1877 as well as Sections 60 and 64 of the Easement Act, 1882, as such, the plaint merits rejection forthwith. Learned counsel in support of his arguments has relied upon the following case law:

- (I) PLD 1999 Kar 181 Messrs ZAIDI'S ENTERPRISES and others v. CIVIL AVIATION AUTHORITY and others.
- (II) 2009 MLD 322 GULISTAN KHAN (MEHMAND) V. FEDERATION OF PAKISTAN through Secretary Ministry of Railways, Islamabad and 3 others.
- (III) 2015 MLD 1688 AFTAB HUSSAIN though Attorney v. GOVERNMENT OF SINDH through Chief Secretary and 2 others
- (IV) PLD 1965 SC 83 M.A. NASER v. CHAIRMAN, PAKISTAN EASTERN RAILWAY and others.
- (V) 2007 SCMR 1005 PERVAIZ HUSSAIN and another V. ARABIAN SEA ENTERPRISES LIMITED

5. Learned counsel for the plaintiff in reply to the above arguments contended that the application is not maintainable as the dispute whether the MoU is license and or lease could only be decided by leading evidence and this exercise cannot be done at this stage. Furthermore, various terms of the MoU dated 07.5.2013 were amended through an agreement dated 15.8.2015 proposed by the plaintiff, which agreement though was never signed as such by defendant No.1 but it has since been acted upon by the parties as the plaintiff has been duly paying rent as per the agreed/enhanced rent and the defendants have been accepting the same. The effect of the amendments is that under Clause 2 the security deposit

was increased from Rs.2.5 million to Rs.2.745 million, under Clause 12, the per head Catering Commission was increased from Rs.50 to Rs.150 and under Clause 15, the rent was increased from Rs.100,000/- per event (with guaranteed 100 events per year) to Rs.109,800/- per event (with guaranteed 100 events per year). However, in actual, the plaintiff has been paying the rent at the rate of Rs.110,000/= per event (with guaranteed 100 events per year). It is also contended that though the agreement has been titled as Memorandum of Understanding and the plaintiff has been allegedly referred to as a Licensee but the said MoU is a legally valid and is binding agreement and is in fact a lease. Such fact is clear from various clauses of the agreement including the amended Clause 2, which specifies the amount of security deposit and Clause 15 which specifies the amount of rent. It is also argued that the agreement is in fact a lease and the plaintiff has vested interests in the premises under the agreement and a forceful removal without notice or due process of law, would tantamount to an unconscionable action on part of the defendants. Further contended that the plaintiff is a lessee of defendants No.1 and 2, hence cannot be evicted from the premises without due process of law. Any act of forceful removal of the plaintiff by the defendants without due process of law would result not only in grave and irreparable loss to the plaintiff but also in severe inconvenience to the customers of the plaintiff who have confirmed advance booking of the events in the premises. Learned counsel in support of his stance in the case has relied upon the following case law:

- (I) 1987 CLC 393 NOOR MUHAMMAD v. CIVIL AVIATION AUTHORITY and another.
- (II) PLD 1962 Kar 663 AHMED DIN v. ABDULLAH BHAI and others.
- (III) 2007 YLR 2287 Messrs SIGN SOURCE through Partners v. HUMAYUN H. BAIG MUHAMMED

- (IV) PLD 1985 Kar 407 EBRAHIM BROTHERS LTD. v. WHEALTH TAX OFFICER CIRCLE III, KARACHI and another.

6. I have heard the learned counsel for the parties, perused the record and the case law cited at the Bar. The entire controversy in the present case revolves around the point whether the relationship between defendant No.1 (Pakistan Defence Officers Housing Authority) and plaintiff is that of Landlord/lessor and Tenant/lessee or Licensor and licensee. In order to ascertain such fact, it would thus be appropriate to reproduce the salient clauses of the Memorandum of Understanding (MOU) entered into between the parties on 07.05.2013, which have been highlighted and relied upon by both the sides in support of their contentions.

"Pakistan Defence Housing Authority, Karachi through its Secretary having office at 2/B, East Street, Phase-I, DHA Karachi (herein after called the "LICENSOR" which expression shall wherever the context so admits include its successors-in-interest and assigns) of the one Part.

AND

H. NIZAM DIN & SONS (PVT.) LTD, through its Director, Usman Ahmed hereinafter referred to as the "LICENSEE" (which means and includes its executors legal representatives and /or assigns) of the OTHER PART;

Whereas the Pakistan Defence Housing Authority, Karachi confirms that it being the owner is legally competent to License Fee "AREA-III" DA MARINA CLUB SITUATED AT PHASE VIII, PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY, KARACHI, herein after referred to as the "PREMISES"

AND WHEREAS the Licensee as one of the caterers on the panel of DA Marina Club has agreed to take on the above said premises (demarcated sketch of the premises is attached with this MoU) License Fee for a period of three (03) Years commencing from 01 May 2013 and expiring on 30 April 2016 on the terms and conditions mentioned below:-

PREMISES RENT:

1. That Licensee shall pay Rs.100,000/- Rupees One Hundred Thousand only) to Marina Club for each event

held at the agreed premises. Licensee will guarantee a minimum of 100 events in a contracted year to Marina Club. Event rates will be reviewed annually on mutual understanding.”

“8. Licensee will install mobile Generator(s) at the agreed premises to provide adequate electricity for the functions in the area. Marina Club shall provide emergency connections for basic lighting in case any unforeseen emergency of generator (s) failure.

9. The Licensee will organize wedding and related functions, dinner exhibitions, corporate events, exams and other events of similar nature at the agreed premises.

10. The licensee shall provide security of the premises and will maintain the premises according to the requirements of Marina Club. All expenditure on repair and maintenance of the premises will be borne by Licensee during the contractual period.”

“11.1 Setup their office for the purposes of securing bookings. The office shall be semi-permanent in nature and will also be used as bridal room in the evening/during function timings. A sketch of the area in Sq. Yds. Including area for other facilities is attached with this MoU.”

“12. In addition to premises License Fee, Licensee will also pay Marina Club Rs.50/- per head Catering Commission for each event subject to change.”

“17. All Rules of DHA/DA Marina Club will be followed by Licensee in true letter and spirit.

18. The Licensee will give permission to other caterers to provide food and service, thus keeping options of clients open to all.

19. Discount on Area Rentals
 10%- Members of DA Marina Club
 50%-DHA serving employees (Self & wards)
 25%-Sisters/Brothers of DHA serving employee,
 DHA Retd employees, Retd Armed forces
 personnel”

“20.5 It shall not sub-let the premises or part thereof to any one for any purposes.”

“20.7 All alteration, installations, additions and improvements made by the Licensee upon or in the premises shall be removed by Licensee upon the expiry of this memorandum of understanding without causing any damage to the club property.

20.8 it shall not make any permanent alterations or

additions to the premises without the consent of Licensor.”

“21.7 In case any dispute arising over the usage of the premises the same shall be referred to Secretary DHA, and whose decision shall be final”.

“23. It will be the responsibility of Licensee to ensure upon expiry of this memorandum of understanding to hand over the agreed premises in its original condition to DA Marina Club/ONE PART.”

“26. In case Licensee fails to operate its business or keep the premises in order as per the clauses of this MoU, Marina Club will have the right to issue notice to Licensee. If after repeated warnings situation does not improve, Marina Club/DHA will have the right to levy fine at its discretion and eventually terminate the MoU immediately.

“28.4 Both the parties will have the right to terminate this MoU after giving a notice of two months in writing. In this case clause 28.2 shall apply.”

“29. The understanding shall be governed by the Rules of Defence Officers Housing Authority, Karachi and the Administrator, DHA Karachi shall have the exclusive jurisdiction to entertain any claim or disputes arising out of the arrangement Under this MoU. The decision of Administrator, DHA Karachi shall be final and binding on both the said parties.”

7. Before going into further discussion, it would be appropriate to reproduce the term ‘lease’ and ‘license’ as defined in the Transfer of Property Act and Easement Act respectively as under:-

A **‘lease’** is defined in Section 105 of the Transfer of Property Act, 1882, which reads as under:

“A transfer of a right to enjoy such property, made for a certain tenure express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be tendered periodically or on specified occasions, to the transfer by the transferee, who accepts the transfer on such terms.”

Whereas a **‘license’** is defined in Section 52 of the Easements Act as follows:-

"Where one person grants to another, or to a definite number of other persons; a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be

unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence".

8. The line of distinction between a 'lease' and 'license' is very thin and one will have to look at the actual wordings and the spirit of the agreement rather than the terminology used therein to find out the real nature of the relationship between the parties. The relationship of the parties is to be determined by law on a consideration of all relevant provisions of the agreement. A license is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof; or, the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is for the use of property in a certain way and on certain terms, while the property remains in the possession and control of the owner, the agreement will operate as a license even though the agreement may employ words akin to a lease. The instance of agreements to create licenses, include, the letting of bookstalls on a railway platform, letting of space for a stall in an exhibition, permission to use a shed for particular purposes, an exclusive right to put pleasure boats on a canal, power to dig for fire clay, liberty to fasten a coal hulk to a mooring in a river, liberty to lay and stack coal on land, liberty to search and dig for coal and permission to erect or affix advertisements; *whereas*, a relationship of landlord and tenant, held to be existing, when one party confers on another the right to the exclusive possession of land, mines or buildings for a time, which is either subject to a definite limit originally, as in the case of a lease for a certain tenure, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from years to years. As a rule, the most significant

determinative factor of a tenancy is the right to receive from the tenant payments for the use of the property in the shape of rent. The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy; but it is a consideration of the first importance. Reliance in this regard can be placed on the cases of *ABDUL REHMAN V. Haji Mir AHMAD KHAN AND ANOTHER (PLD 1982 Karachi 532)* and *MUHAMMAD HASHIM V. ZULFIQAR ALI KHAN General Manager, West Pakistan, Road Transport Board and others (PLD 1963 Lahore 418)*.

The learned Division Bench of this Court in the case of *AHMED DIN v. ABDULLAH BHAI and others (PLD 1962 Karachi 663)*, inter alia, has observed as under:-

"The most distinctive feature between a lease and a licence is that, in the former there is a transfer of interest in immovable property whereas in the latter that element is expressly excluded. The transfer of interest in a case of a lease consists of the grant to the lessee the exclusive right of possession of the demised premises. This right, in the first instance, vests in the lessor and is one of the most important incidents of ownership. In granting a lease the lessor transfers this important right to the lessee. The right of exclusive possession involves an element of ouster and when the lessor grants this right to the lessee he totally excludes himself from that right, though it may be only for a certain time. This right is assignable and heritable and constitutes property. On the other hand, in the case of licence there is a total absence of transfer of interest in the immovable property. A licence is a personal right granted to an individual or to an ascertained number of individuals, to do or continue to do something in or upon the immovable property of the grantor which in its absence would be unlawful. It is purely a permissive right and is neither assignable nor heritable. Notwithstanding the permission the grantor retains control over the property. The fact that a licensee occupies the property, that occupation does not confer upon him the right of exclusive possession as understood in law."

The principles enunciated above were confirmed by the Hon'ble Supreme Court of Pakistan in the case of *ABDULLAH BHAI and others v. AHMED DIN (PLD 1964 SC 106)*.

Somewhat similar view was taken by the learned Division Bench of this Court in the case of *SAJID ALI KHAN v. MUHAMMAD AHMED FAROOQUI* (PLD 1959 Karachi 24), where the respondent had been given a catering contract and allowed the use of three rooms and a kitchen situated on the first floor of the Customs House, Karachi, for running a canteen, he was held to be a licensee on the ground that the use of the premises was allowed to him so that he could cater for the staff of the Customs Department and that the respondent could not use the premises for any purpose he liked, nor could he carry on the business for general public.

In *M.A. NASER v. CHAIRMAN, PAKISTAN EASTERN RAILWAYS* (PLD 1965 SC 83), by an agreement, dated 12.12.1953 between Eastern Bengal Railways and M.A. Naser, proprietor of Gulistan Restaurant, Dhaka, the Railways granted to M.A. Naser (the appellant) for a period of three years the right to sell refreshments both solid and liquid of the best quality to the upper class passengers at the Refreshment Rooms at Chittagong, Laksam, Sylhet and Dacca etc., and on Buffet Cars on the trains. The said agreement was terminable on 17-12-1956 on not less than six months' notice in writing by either party and if it was not so determined the agreement was to continue subject to termination at any time in any subsequent year on not less than six months' notice in writing given by either party desiring to cancel it. In consideration of the grant of the contract, the contractor agreed to pay to the Railways a licence fee of Rs.2,740 each year in advance, and deposit a sum of Rs.11,000 as security. In 1962 when the contract was terminated on alleged breach of contract, without giving the specified notice, the appellant filed a suit for a declaration that the contract was still subsisting and for an injunction restraining the Railways from interfering

with his right of catering in terms of the agreement. The appellant was granted special leave to appeal mainly to consider "whether the contract of this kind is one for which protection in law by method of injunction could be claimed against termination otherwise than in accordance with the terms of the contract". After discussing the law of easements and specially Section 60 of the Easements Act, the Hon'ble Supreme Court observed as follows:-

"From the above provisions it is clear that this agreement merely conferred a right to carry on business of catering in the Refreshment Rooms and on the Buffet Cars. They were not given any general right of occupation but only a right to use the Refreshment Room allotted to them for the exclusive purpose of catering refreshments. Such a right does not amount to easement as defined in Section 4 of the Easements Act or an interest in the property. Nor can it be suggested that the contractor was required to execute any work of permanent character in connection with the business. No doubt his business may involve complex arrangements for continued supply of refreshments both solid and liquid but this cannot be regarded as 'execution of a work of permanent character'."

In conclusion the Court held that the agreement was a revocable license, the revocation of which could not be prevented by an injunction. It further held that in a case like the one under consideration the licensee was entitled to a reasonable notice in accordance with the provisions of Section 63 of the Easements Act. If, however, the license was revoked without reasonable notice, the remedy for the licensee, which could be availed, was to seek damages and not by way of an injunction.

In light of the above discussion, lease and license may be summarized as follows:

That 'license' is a personal privilege to do some particular act or series of acts on the land of licensor without possessing any estate, title or interest therein. It is purely a permissible right. Notwithstanding the permission, the grantor retains control over the property.

Thus, a license is not a contract between the licensor and licensee but a mere personal permit, therefore, a license is distinguishable from an 'easement' which implies an interest in the land and a "lease" or right to take the profits of land. Whereas, lease is a legal right in its strict sense is one which is an ascertainable claim, enforceable before Courts and administrative agencies. In its widest sense, a legal right has to be understood as any advantage or benefit conferred upon the person by a rule of law.

9. Reverting to the case in hand, if we read the provisions of MoU, copies of which have been filed and relied upon by all the parties, the following position emerges:

The terms of MoU clearly establish that the defendant-Pakistan Defence Housing Authority, Karachi has not transferred any interest or right in the property and has retained complete control over the same. The permission to occupy the premises is personal in nature and is not assignable or transferable. The permission to occupy the premises has been given for a specified business and for no other business. From the perusal of the term of MoU, it also appears that the entire conduct of the plaintiff in the said premises is controlled by licensor. Furthermore, the clauses take care of the possibility of creation of interest in the property as envisaged by Section 60 of the Easement Act, 1882 and confirms that the plaintiff would not acquire any right or interest in property.

10. The upshot of the above discussion, following the dictum laid down in the above referred cases, I am of the considered view that the plaintiff has no cause of action and the suit is hit by Sections 42 and 56 of the Specific Relief Act. Accordingly, application under Order VII Rule

11, C.P.C. is allowed and the plaint is rejected. The security amount that has been deposited with the defendant may be returned to the Plaintiff after deduction of any outstanding dues.

Karachi;
Dated: 31.10.2017

JUDGE

jamil