

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1344 of 2016

[Aviserv Limited versus Civil Aviation Authority]

Plaintiff : Aviserv Limited through Mr. Jam Zeeshan Ali, Advocate.

Defendant : Civil Aviation Authority through Mr. Blosch Ahmed Junejo, Advocate.

Dates of hearing : 16-08-2022, 31-08-2022, 22-09-2022 & re-hearing on 24-10-2023.

Date of decision : 27-10-2023

ORDER

Adnan Iqbal Chaudhry J. - The Plaintiff (Aviserv Ltd.) is the lessee of the Defendant (Civil Aviation Authority), and by CMA No. 9031/2016 it prays for a temporary injunction to restrain the Defendant from cancelling the lease and evicting the Plaintiff. By an interim order dated 30-05-2016, the Defendant was restrained from disturbing the Plaintiff's possession, hence CMA No. 16162/2016 by the Defendant under Order XXXIX Rule 4 CPC for vacating that interim order while submitting that the Plaintiff has defaulted in payment of the lease rentals at the revised rate. By CMA No. 7921/2018, the Plaintiff prays for a direction to the Defendant to accept lease rentals at the previous rate.

2. The facts are as follows. By a registered Lease Agreement dated 19-05-1994, the Defendant leased 10,325 square yards to the Plaintiff at 14-A, Survey No. 149, deh Safoorah, near the Jinnah International Airport Karachi, for a period of 30 years (expiring on 2024) for constructing a Flight Kitchen and ancillary facilities. Per clause 2 of the Lease Agreement, lease rentals were payable by the Plaintiff as follows:

"2(a) During first ten years, at the rate of 10% of the premium which will be Rs.4,64,625/-.

- (b) *During the next ten years at the rate of 1/30th of the market value of the leased land as on the date coinciding with the end of the first ten years of the term of the lease, and;*
- (c) *During the last ten years at the rate of 1/30th of the market value of the leased land as on the date coinciding with the end of the 20th year of the lease.*
- (d) *The "market value" for the purpose of clauses (b) and (c) above means value of the land based upon authentic information of transaction of similar type of land in the vicinity of the building site as determined by the Lessor. The Lessor may also seek assistance from the Collector of the District for verifying the market value of the land."*

(For the present purposes, it is clauses 2(c) and (d) that are relevant).

3. While the Plaintiff paid lease rentals for the first decade of the lease, it could not commence construction of the Flight Kitchen. As per the Plaintiff, that was due to the consequences that followed in 1998 after Pakistan had tested a nuclear bomb, leading to the freezing of foreign currency bank accounts including that of the Plaintiff. Highlighting such circumstances, the Plaintiff requested the Defendant by letter dated 30-04-2004 to forego an increase in the lease rental for the second decade of the lease, to increase the lease period from 30 years to 40 years, and on expiry thereof to renew the lease for a further period of 30 years on mutually acceptable terms. By its decision dated 26-07-2005, communicated to the Plaintiff by letter dated 25-08-2005, the Defendant accepted the request to extend the period of the lease and to its renewal but subject to an increase in the lease rental as follows:

"CAA Board has approved your request for enhancement of 10 years in the existing lease period culminating into 40 years commencing from 19th May 1994 to 18th May 2034 subject to payment of dues on account of annual ground rent @ 1/30th of the revised market value of leased land i.e. Rs.5,500/- per sq. yd. from 19th May 2004 and renewal for another 30 years on mutually agreed and legally reasonable terms & conditions with no premium at the time of renewal."

4. The above-mentioned counter-proposal of the Defendant was accepted by Plaintiff *vide* letter dated 18-10-2005. The Plaintiff then drafted an addendum to the Lease Agreement dated 19-05-1994 and sent it to the Defendant for execution. That draft was not accepted by the Defendant. Under cover of letter dated 10-10-2006, the Defendant

sent its own draft of an Addendum to the Plaintiff for execution. That is when the first dispute arose between the parties as the Plaintiff took issue to clause 5 of the Addendum proposed by the Defendant which read as follows:

"5. The Lessee shall commence construction of the Flight Kitchen building as early as possible so that construction is completed within two years hereof or as may be extended by the Lessor on the request of the Lessee, supported with the solid reasons. Failure to commence construction or delay in launching of a refurbished project within the aforesaid period, shall result in termination of the lease or penalty of Rs.100/- to Rs.300/- per sq. yard per annum as non-utilization fee, as may be decided by the Lessor. The imposition of fine shall in no way be construed as waiver and the Lessor may terminate the lease any time due to failure(s) of the Lessee."

5. The Plaintiff contended that clause-5 of the proposed Addendum was not part of the agreement arrived between the parties for extending the period of lease. On the other hand, the Defendant insisted upon the insertion of that clause. The issue remained pending between the parties. In the meanwhile, the Plaintiff paid lease rentals as per the Defendant's letter dated 25-08-2005 viz. @ 1/30th of Rs. 5500 per sq. yd. The second decade of the lease went by in this fashion.

6. Nearing the third decade of the lease, the Defendant once again called upon the Plaintiff by letter dated 05-09-2014 to execute the Addendum to the Lease Agreement, to get it registered, and to meet for a revision in the lease rental for the third decade of the lease. By letter dated 26-09-2014, the Plaintiff wrote that it was trying to ascertain the jurisdiction of the Registrar who was to register the Addendum, hence the delay in its execution. As regards the revision in the lease rental, the Plaintiff sought further time to consult its holding company.

7. Eventually, by letter dated 19-02-2015, the Defendant informed the Plaintiff that it had determined the market value of the demised land @ Rs. 30,000/- per sq. yd. for the third decade of the lease, and consequently the lease rental was charged @ 1/30th of that value which came to Rs. 10,325,000/- per annum, and called upon the Plaintiff to pay the same and to execute the Addendum within 3

months failing which the demised land would be resumed. When the Plaintiff questioned the basis of said market value, the Defendant furnished the Mukhtiarkar's letter dated 08-04-2014. This market value became the other dispute between the parties. The Plaintiff refused to make payment at the enhanced rate and continued payments at the previous rate.

8. It is the case of the Plaintiff firstly, that there was a concluded contract between the parties for extending the period of the lease by 10 years, and for its renewal for another term of 30 years; that it is entitled to specific performance of such contract; and that clause 5 of the proposed Addendum to the Lease Agreement was contrary to the such contract. Secondly, that the increase in the lease rental for the third decade of the lease was exorbitant and unilateral; that it had been determined contrary to clause 2(d) of the Lease Agreement dated 19-05-1994 which stipulated that the market value of the demised land would be determined on the basis of similar transactions within the vicinity; and that the Plaintiff is entitled to specific performance of clause 2(d).

9. The case of the Defendant is that it had agreed to extend the period of the lease so as to enable the Plaintiff to construct the Flight Kitchen, and therefore clause 5 of the proposed Addendum was necessitated; that since the Addendum was not executed by the Plaintiff, there was no contract between the parties to extend the period of the lease or for its renewal; that the market value of the demised land determined for the third decade of the lease was not contrary to clause 2(d) of the Lease Agreement; that since the Plaintiff did not the pay lease rentals accordingly, the Defendant was entitled to resume the demised land. On 21-11-2017, the Defendant also filed Suit No. 2424/2017 for rescission of the Lease Agreement dated 19-05-1994, and for recovery of the outstanding lease rentals at the enhanced rate.

10. By 29-10-2020, the differential between the lease rentals paid by the Plaintiff (@ 1/30th of Rs. 5,500/- per sq. yd.) and lease rentals claimed by the Defendant at the enhanced rate (@ 1/30th of Rs. 30,000/- per sq. yd.), had accumulated to Rs. 58,872,542/-. Therefore, by order dated 29-10-2020, the Court directed the Plaintiff to deposit that differential amount in Court. That order remains suspended in HCA No. 237/2020 filed by the Plaintiff, however both counsel agreed that such suspension did not restrain a final decision on the interlocutory applications.

11. Heard learned counsel and perused the record.

12. I advert first to the Court's order dated 21-12-2021 as it was contended by Mr. Jam Zeeshan Ali, learned counsel for the Plaintiff, that such order had addressed the dispute on the assessment of the market value of the demised land. By that order the Court had observed that the dispute between the parties could be narrowed down if the Defendant was to make an exercise strictly in accordance with clause 2(d) of the Lease Agreement and ordered accordingly. On or about 04-02-2022, the Defendant submitted a report that since land in the vicinity of the airport is used primarily for aerodrome operations, there was nothing comparable to the Plaintiff's lease, and that where the Defendant had leased land to petrol pumps and ground handling agencies around the airport, the lease rentals had been determined in the same manner as that for the Plaintiff. Be that as it may, the order dated 21-12-2021 was only an order made by the Court for assistance in determining the miscellaneous applications. It was not a final order and did not dispose of any application.

13. Mr. Jam Zeeshan Ali, counsel for the Plaintiff, had submitted that by virtue of letters dated 30-04-2004, 25-08-2005 and 18-10-2005 exchanged between parties, there was an offer and acceptance to arrive at a concluded contract for extending the period of the lease for an additional 10 years and a renewal thereafter by mutual consent, and it was immaterial that such contract was not formalized by way

of the proposed Addendum; and therefore the Plaintiff was entitled to seek specific performance of such contract. That argument of course acknowledges that the contract so arrived between the parties was only an 'agreement to lease' as opposed to a 'lease deed', and hence the need to seek specific performance of that agreement. It is axiomatic that by virtue of section 107 of the Transfer of Property Act, 1882 and section 17(1)(d) of the Registration Act, 1908, a lease of immovable property for any term exceeding one year can be made only by a registered instrument,¹ and that the agreement to lease the demised land for an additional period of 10 years, which is sought to be specifically enforced, was not a registered instrument.

14. Taking the Plaintiff's argument at face value that there was a concluded contract for extending the period of the lease, the settled test in a suit for specific performance of a contract is to see whether the Plaintiff has demonstrated that it was at all times ready and willing to perform its part of the contract.²

15. Under clause 4 of the Lease Agreement dated 19-05-1994, the Plaintiff's covenant was:

"4(e) To erect and finish fit for use on the premises hereby demised a Flight Kitchen building together with all necessary ancillary buildings, drains and other appurtenances in accordance with the plan already approved by C.A.A. (on November 30, 1985) and not to erect or suffer to be erected on any part of the premises hereby demised any building other than a building for a Flight Kitchen, its allied/associated offices, restaurant and accommodation to the aircrews, in keeping with the building plans and consent already given by the C.A.A.

(f)

(g) *At all times during the said term to keep the said Flight Kitchen premises and its allied/associated offices restaurant and accommodation to the aircrews in good and substantial repair and on the expiration or sooner determination (as elucidated in Para 5 herebelow) of the said term peaceably to yield up the same in good and substantial repair unto the Lessor."*

¹ Also see *Government of Sindh v. Muhammad Shafi* (PLD 2015 SC 380) and *United Bank Ltd. v. Shoaib Ahmed* (PLD 2021 Sindh 394).

² *Muhammad Yaqub v. Muhammad Nasrullah Khan* (PLD 1986 SC 497); *Noor Jehan v. Saleem Shahadat* (2022 SCMR 918); *Muhammad Jamil v. Muhammad Arif* (2021 SCMR 1108).

Thus, the demised land was leased to the Plaintiff for the specific purpose of constructing a Flight Kitchen and ancillary facilities which would service airlines using the Karachi airport. The Plaintiff's request *vide* letter dated 30-04-2004 for extending the period of the lease was explicitly on the ground that it needed more time to construct the Flight Kitchen. Therefore, Mr. Blosch Junejo, counsel for the Defendant is right to submit that the reason why the Defendant agreed to an extension in the lease period was to see that the Flight Kitchen is constructed, hence clause 5 in the proposed Addendum to seek that commitment from the Plaintiff. Though the Plaintiff refused to execute that Addendum, it was nonetheless bound by the covenant under clause 4 (*supra*) of the Lease Agreement dated 19-05-1994 to construct the Flight Kitchen. The fact that the Plaintiff was not willing to make any further commitment to construct the Flight Kitchen reflects that it had no intention to do so. Admittedly, the Plaintiff has not done so in the two decades since 2005 even though, according to it, the parties had already contracted to extend the period of lease for that specific purpose. In the plaint also, it has not been pleaded that the Plaintiff is ready and willing to construct the Flight Kitchen.

16. The other obligation of the Plaintiff under the Lease Agreement dated 19-05-1994 was to pay lease rentals as per clauses 2(c) read with clause 2(d) of the Lease Agreement @ 1/30th of the market value of the demised land as on the date coinciding with the end of the 20th year of the lease i.e. on 18-05-2014. As discussed above, the Plaintiff disputes the market value determined by the Defendant at Rs. 30,000/- per sq. yd. which was based on the Mukhtiarkar's letter dated 08-04-2014. Mr. Jam Zeeshan Ali submitted that such determination was contrary clause 2(d) of the Lease Agreement which mandated that the market value was to be based upon transactions of similar type in the vicinity, and for which assistance could be sought from 'the Collector', not the Mukhtiarkar. Reliance was placed by learned counsel on *House Building Finance Corporation v. Shahinshah Humayun Cooperative House Building Society* (1992 SCMR 19) to submit

that the terms of the Lease Agreement had to be construed strictly. However, the ratio of that case is that while interpreting the terms a contract the Court has to first ascertain the intention of the parties gathered from the document as a whole.

17. It is not disputed that under clause 2(c) read with clause 2(d) of the Lease Agreement dated 19-05-1994, the market value of the demised land was to be determined by the Defendant. Clause 2(d) further provided that the market value would be *“based upon authentic information of transaction of similar type of land in the vicinity of the building site as determined by the Lessor. The Lessor may also seek assistance from the Collector of the District for verifying the market value of the land.”* It is apparent that the intent of clause 2(d) was two-fold. It was not only to see that the Plaintiff is not prejudiced by any arbitrary determination of market value, but also to see that the Defendant, a public authority, receives fair rent of its land. Therefore, resort to similar transactions in the vicinity was not intended to be the sole or the principal measure of market value, nor was that the submission of the Plaintiff’s counsel, for it could well be that no similar transaction had occurred, or that if it did, it was not due for a revision in market value at the same time. Either way, both measures per se were not market value but a ‘basis’ for determining market value, and once that was determined, the lease rental was fixed @ 1/30th of that value.

18. For determining the market value of the demised land, the Defendant relied on the Mukhtiarkar’s letter dated 08-04-2014 which informed that deh Safoorah near the Jinnah International Airport, where the demised land was situated, had been categorized by the Government as ‘A-1’ land; that the Government rate for such land was Rs. 25,000/- per sq. yd.; and that its market value was approximately Rs. 30,000 per sq. yd. Given that the demised land was situated in an area declared a ‘deh’ by the Board of Revenue,³ the reference to ‘Government rate’ was apparently to the market price determined by the Provincial Government under clause 8 of the

³ Section 4(9) of the Sindh Land Revenue Act, 1967.

Statement of Conditions dated 25-02-2006 notified⁴ under section 10(2) of the Colonization & Disposal of Government Lands (Sindh) Act, 1912. That clause provides for a Price Committee and a guideline for determining the base price for auctioning State Land for non-agricultural purposes. The fact that the Provincial Government had categorized deh Safooran as 'A-1' land with a base price of Rs. 25,000/- per sq. yd., is verified by Notification No. 09-294-03/SO-I(i)/868 dated 05-07-2012.⁵

19. With the notified base price of Rs. 25,000/- per sq. yd. in the field in 2012, the determination of market value of such land on 18-05-2014 at Rs. 30,000/- per sq. yd. cannot be said to be arbitrary, exorbitant or contrary to clause 2(d) of the Lease Agreement. It is not implausible that in 10 years time, from 2004 to 2014, the market value of a commercial plot just next to the Karachi airport had increased from Rs. 5500 per sq. yd. to Rs. 30,000 per sq. yd. In such circumstances, there is no point to the argument that the information relied upon by the Defendant was received from the office of the Mukhtiarkar and not the Collector. While it is correct that the Defendant did not cite similar transactions within the vicinity, in its report dated 04-02-2022 submitted pursuant to order dated 21-12-2021, it had explained that the land in the vicinity of the airport is used primarily for aerodrome operations and no lease was made by the Defendant that was comparable to the Plaintiff's lease.

20. On the other hand, the Plaintiff has not brought forth any document whatsoever to doubt the Defendant's determination of the market value, or to show that the market value could be anything less. It is not the Plaintiff's case that the market value of the demised land had not increased, but simply that it could not have increased as much. Yet, since 2014, the Plaintiff has not paid any increase whatsoever, nor is it willing to secure the differential.

⁴ Notification No. 09-294-03-SO-I/336.

⁵ Copy obtained by the Research Officer of this Court.

21. Given the foregoing, where the Plaintiff is not willing to construct the Flight Kitchen for which the demised land was leased, and where it has not paid nor secured the lease rentals at the increased rate since 2014, it does not demonstrate that it was ever ready and willing to perform its part of the contract for extending the period of lease. Consequently, the Plaintiff does not bring forth a *prima face* case for the grant of a temporary injunction. The balance of convenience is also in favor of the Defendant who continues to suffers loss due to non-payment of the increased lease rentals. Therefore, CMA No.9031/2016 and CMA No. 7921/2018 by the Plaintiff are dismissed. Resultantly, CMA No. 16162/2016 by the Defendant becomes infructuous.

JUDGE

Karachi
Dated: 27-10-2023