

LEX/BDAD/0046/2017

Equivalent Citation: 14ADC(2017)769, 71 DLR(AD) (2019) 28

IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Appeal No. 55 of 2012

Decided On: 22.08.2017

Appellants: **Government of Bangladesh**
Vs.

Respondent: **Friends Industries Corporation**

Hon'ble Judges:

Surendra Kumar Sinha, C.J., Syed Mahmud Hossain and Mirza Hussain Haider, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahbubey Alam, Attorney General instructed by Mahmuda Begum, Advocate-on-Record

For Respondents/Defendant: Ajmalul Hossain, Senior Advocate and Shah Monjurul Hoque, Advocate instructed by Mvi. Md. Wahidullah, Advocate-on-Record

JUDGMENT

Surendra Kumar Sinha, C.J.

1. This appeal by leave is from a judgment of the High Court Division discharging the rule and maintaining the judgment of the lower appellate court. Respondent instituted the suit seeking title to the suit land with a declaration that the defendants had no right to cancel deed No. 489 dated 10.02.1966. Admittedly the government leased out the suit land measuring an area of 99 acres by a registered lease deed executed on 10.02.1966 for 25 years for the purpose of coconut palm plantations. Before expiry of the period he instituted the suit on 13.09.1987 apprehending that the powerful persons were trying to cancel the lease. On the other hand, the government claimed that the plaintiff did not plant cocoanut orchard and thereby he had violated the terms of the contract. Subsequently, government cancelled the lease for the purpose of afforestation by the coastal Forest Department.

2. The trial court dismissed the suit but the court of appeal below decreed the suit which decree was affirmed by the High Court Division. Leave was granted to consider as to whether the plaintiff was entitled to retain the land without fulfilling the purpose for which lease was granted and secondly, whether the government is justified in cancelling the lease pursuant to the inquiry report submitted by the Additional Divisional Commissioner, Chittagong.

3. There is no dispute that the land was leased out for the purpose of coconut plantations. It was recited in the agreement that "the lessee has applied for the purpose of cultivating coconut palms for the land- ----" There is another clause to the effect that the lease is for a term of 25 years 'from the first day of Baishak 1972 B.S. with the option of renewal for a further period of 25 years on such fair rents as may be settled by the Collector/Deputy Commissioner at the time of renewal and subject to such revision of rent as may be occasioned -in the course of any general revision or rent. Provided that before renewing the lease, the Collector/Deputy Commissioner may require that the lessee agrees as a condition of the renewal lease to replant forthwith or at times to be prescribed the whole or any part or parts of the

land'. In clause (4) of the lease deed, It was clearly recited that the lease was granted for "the purpose of growing coconut trees only. The lessee shall plant according to the following arrangement; plantation of coconut must start within the first plantation season following 2 months or more of the date of the execution of the lease and at the conclusion of that season, with the 10% of the area must be under plantation. By the end of the following season 40% must be planted and by the next following season 70% and the plantation must be planted at the end of the season following that". It was further recited therein that "any failure to reach the above program shall, unless the Collector/Deputy Commissioner otherwise orders be deemed to be a breach of terms of the lease".

4. Therefore, there is no doubt that the lease was granted for a particular purpose and the land cannot be used for any purpose other than the purpose for which it was granted. The authority reserved the right of cancellation if the land is utilized for other purposes. There is a renewal which is conditional. The lessee must fulfill the terms of the condition, that is to say, he must use the land for the purpose for which the lease was granted and otherwise not. In paragraph 6 of the plaint, the plaintiff claimed that it had purchased 2500 coconut sapling for plantation in the current year. There is no other statement in the plaint regarding plantations. So admittedly the plaintiff did not make any plantation of coconut till the date of institution of the suit in 1987 although the lease was granted long ago.

5. The trial court after assessment of the evidence on record came to a definite finding that after taking lease the plaintiff did not plant coconut palms and thereby, it had violated the terms and conditions of contract and that it had set up a salt manufacturing field in a portion of the suit land which was evident from the enquiry report of the Additional Divisional Commissioner. The appellate court did not advert to those findings. It did not look into the lease deed and held that under the general law of land, if any government khas land was leased out for a certain period containing a clause for renewal, the lessee is entitled to renewal if all conditions were fulfilled and that the lease could be taken as perpetual lease. This finding is sufficient to maintain the judgment of the trial court but without noticing the findings of the trial court, it has decreed the suit without application of judicial mind. Admittedly the plaintiff did not fulfill the terms of the lease. The High Court Division also committed similar error in maintaining the judgment of the appellate court by making irrelevant findings which are not relevant in determining the issues involved in the suit.

6. A contractual promise may be absolute or conditional. A conditional promise is one where the liability to perform the promise depends upon something or event which may or may not happen, or on one of the parties doing or obtaining from doing an act. Section 38 of the Contract Act states the duty of performance. A promisor under a contract is under an obligation to perform his promise or, at least to offer to perform it. The basic rule is that the promisor must perform exactly what he has undertaken to do. The obligation to perform the part of the promisor is absolute. The parties are bound by the terms of the contract. The promisor must perform within the time specified and the standard required by the contract. As to failure in performing particular terms of a contract, no positive general rule can be laid down as to its effect. The question in every case is whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and nature of the transaction, to evince an intention not to be bound by the contract.

7. Section 55 of the Contract Act applies when the parties have specified the time for the performance of any application under the contract. While a party who has promised to do a certain act at a specified time, fails to do it at or before that time,

the contract becomes voidable at the option of the promisee, if the intention of the party was that time should be the essence of the contract. But if it is not the intention of the parties that time should be the essence of the contract, the contract does not become voidable by such failure, but the promisee is entitled to damages for loss caused to him by such failure. The question, whether time is the essence of the contract. Does not depend upon express stipulation to that effect made by the parties, but it depends upon the intention of the parties.

8. When one party has terminated contract under the provisions of the express terms of the contract, then the other party can claim damages for breaches up to the date of termination, but not for the benefit of the defendant's future performance loss because of termination. (*Financings Ltd. V. Baldock* (1963) 1 All ER 443). The first paragraph of section 73 of the Contract Act deals with compensation for loss or damage caused by the breach of contract. It states that where a contract is broken, the party suffering from a breach of contract is entitled to receive compensation from the party who has broken the contract. The second paragraph provides that no compensation is payable for any remote or indirect loss or damages. The third paragraph applies the same principles where breach occurs of obligations resembling contracts (section 68-72). The fourth paragraph provides that while assessing damage, the means which existed to the person claiming damages of remedying the inconvenience caused by nonperformance must be considered.

9. Now turning to the merit of the case, the long term lease of the land in question was given for the purpose of coconut plantations and the manner of plantation has been specifically stipulated in the deed. So the intention of the parties is discernible. The land cannot be utilized for any other purpose but the lessee did not make any plantation within 21 years. There is no finding either by the appellate court or the High Court Division that the plaintiff has planted coconut palm for which purpose the lease was granted and that the finding of the trial court in this regard is wrong. This fact has been admitted by the plaintiff itself in the plaint. The High Court Division and the appellate court ignored that aspect of the matter and decreed the suit as if plaintiff has right, title and interest in the suit land taking the lease as one of perpetual. The renewal of lease is conditional and the plaintiff has not legally entitled to renewal, inasmuch as, it has not utilized the land for the purpose for which the lease was taken. It has converted a portion of the land for other purpose. More so, the lease has been cancelled for nonperformance of the obligation.

10. The plaintiff has no subsisting lease hold right at present. If it has no subsisting interest, it cannot claim lease hold right in the suit land under section 42 of the Specific Relief Act, even if it is assumed that the cancellation was illegal. For such illegal cancellation its remedy is to claim damages. More so, the tenure of lease has already expired. Both the appellate court and the High Court Division committed fundamental error in treating the lease as perpetual one without perusing the lease deed and its terms. When these facts were drawn to the attention of Mr. Ajmalul Hossain, learned counsel relented. Learned Counsel has failed to meet the court's query that under the lease whether the plaintiff could maintain the suit before expiry of the period particularly when the plaintiff did not utilize the land for the purpose for which the land was leased out.

11. There is another vital law point involved which has been overlooked by all the courts. The suit land comprises 99 acres which is located in the coastal area. There is no doubt that the suit land is the government khas land. Therefore, the lease was made in violation of section 90 of the State Acquisition of Tenancy Act, inasmuch as, the lease has been granted for the purpose of coconut plantations. The plaintiff is not a co-operative society or has taken lease for the purpose of mechanized

cultivation in accordance with the proviso to sub-section (2) of section 90. Nor the plaintiff took lease for the purpose of cultivation of tea or sugar cane for the purpose of manufacture of sugar in accordance with second proviso to sub -section (2) of section 90. So the lease is hit by section 90 of the State Acquisition and Tenancy Act. Sub-section (5) of section 90 clearly stipulates that any transfer of holding or tenancy or of a share or a portion thereof made in contravention of provisions of section 90 shall be void and the land comprised in the holding or tenancy or share or portion thereof so transferred shall vest absolutely in the government free from all encumbrances.

12. After the commencement of part V of the State Acquisition of Tenancy Act, a person cannot retain or acquire by purchase or otherwise any land beyond the ceiling provided in the land holding limitation except for the purpose of mechanized cultivation by a co-operative society or the cultivation of tea or sugarcane for the purpose of manufacture of sugar. None of these conditions is present in the lease deed. The lease was granted in contravention of law and a look into the lease deed clearly reveals that a powerful person on influencing in the government has obtained the lease overlooking the law.

13. Mr. Ajmalul Hossain, learned counsel appearing for the respondent has failed to meet this question when his attention has been drawn in this regard. His submission is pure and simple. Even if there is apparent illegality in granting lease, since the plaintiff has been enjoying the land on execution of a registered instrument, he has acquired a lease -hold right and if the land is leased out to any other person, the plaintiff should be given preference over others. We would like to observe here that the government cannot lease out any khas land to any person in violation of law. If the government wants to lease out the suit land such lease should be granted in due process of law keeping in mind the prevailing law of the land. The appeal, is therefore, allowed without any order as to costs.

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