2020 INSC 395

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 1305 OF 2010**

**RAMNATH AGRAWAL & ORS. ….. APPELLANT(S)**

**VERSUS**

**FOOD CORPORATION OF INDIA & ORS. ….. RESPONDENT(S)**

# J U D G M E N T

**KRISHNA MURARI, J.**

The present appeal arises out of the judgment and final order dated 02.07.2008 passed by the High Court of Madhya Pradesh, Bench at Indore in first appeal bearing F.A. No. 64/90. The High Court vide impugned order dated 02.07.2008 allowed the first appeal preferred by the respondents – Food Corporation of India thereby dismissing the Civil Suit No. 3-B/81 and setting aside the judgment and decree dated 29.04.1990 passed by the VI-Additional District Judge, Indore in favour of the appellant – plaintiffs.

2. The facts giving rise to the dispute in brief can be summarized as under :-

In 1976, Food Corporation of India (hereinafter referred to as 'FCI') invited offers for construction of godowns on the lands of interested parties and subsequently taking over possession of the godowns on lease. The offers so made also included a stipulation to provide assistance for securing loan for the purpose of construction from State owned banks. The loan was to be repaid in the form of FCI depositing the rent with the banks.

3. The offer made by the appellants herein was accepted by the FCI and accordingly an agreement dated 16.12.1976 was entered between the parties. As per the terms and conditions of the agreement the appellants had to construct six godowns, which would be subsequently taken over by FCI on rent. On 16.12.1976 itself, loan was sanctioned to the appellant by State Bank of Indore on the recommendation of FCI.

4. FCI vide letters dated 06.02.1977, 27.07.1977, 06.11.1977 and 02.12.1977 notified the progress of the construction of the godowns to the bank on the basis whereof the funds were disbursed to the appellants by the bank. The appellants asserts that the letter dated 02.12.1977 of the FCI certified cent percent completion of the godowns.

5. However, FCI vide a subsequent letter dated 17.12.1977 called upon the appellants to complete the construction of godowns and handover the possession of the same latest by 31.12.1977. The

appellants vide letter dated 25.12.1977, informed FCI that the construction of the godowns was complete and the possession of the same be taken over.

6. On 05.01.1978, inspection of the godowns was conducted by the officials of the FCI and on the basis of the inspection report submitted by one Shri K. N. Rao, the competent officer of FCI vide letter dated 14.02.1978, recommended taking over the possession of only four out of six godowns by the FCI and pointed out certain defects in respect of remaining two godowns. The case set up by the appellants is that possession of the four godowns was already taken over on 08.02.1978.

7. The appellant issued a legal notice dated 14.05.1978 calling upon FCI to pay rent with interest @ 11% in respect of all six godowns for the period of January to April, 1978 along with charges towards electricity and wages for the security guard.

8. FCI vide its reply dated 09.06.1978, informed that rent is payable from actual date of possession i.e., 08.02.1978 and not from 01.01.1978. It was also stated that in respect of the four godowns, the appellants have not issued the necessary bills for payment of the rent and as far as the two disputed godowns are concerned, no rent is payable as the possession of the same was not taken over by FCI and

the rent in respect thereof would become payable only after the said two godowns are handed over after rectification of the defects pointed out.

9. The possession of the remaining two godowns was subsequently taken over by FCI on 14.05.1979 which fact was duly acknowledged by FCI vide letter dated 15.05.1979. The appellants vide letter dated 11.08.1979, sought damages from FCI on account of non-realization of rent towards the remaining two godowns.

10. As the demands of the appellants were not complied with, the appellants filed Civil Suit No.3-B/81 for damages amounting to Rs.5,90,000/- before the Trial Court at Indore, averring the above-mentioned facts. The claim of the appellants consisted of arrears of rent for the periods when the possession of the godowns was not taken over by FCI, non-payment of rent at enhanced rates, along with wages for security guard, electricity charges and interest.

11. FCI filed its written statement before the Trial Court denying the assertions of the appellants on the following grounds:-

i. The letter dated 02.11.77 was not a certificate of final completion as no inspection was carried out by the competent officials of the FCI by the said date.

ii. After carrying out the inspection on 05.01.1978, the Deputy Manager had recommended taking over the

possession of only four godowns and had pointed out the defects in respect of the other two godowns.

iii. Rent was payable to the plaintiffs as per measurements from the date of actual possession i.e., 08.02.1978. In respect of the remaining two godowns no rent was payable as the possession of the said godowns were not handed over to FCI, after rectification of the defects pointed out in letter dated 05.01.1978.

iv. The alleged possession on 14.05.1979 was taken by officials of FCI who were not competent to do so and the said officials were punished in departmental enquiry.

12. During the pendency of the suit before the Trial Court, the appellants and the FCI entered into a lease agreement dated 06.02.1986 in respect of all six godowns.

13. The Trial Court vide judgment and decree dated 29.04.1990 decreed the suit in favour of the appellants and directed the respondents to pay a sum of Rs.5,77,274.59/- along with interest @11% per annum and also an enhanced rent of Rs.20,68,950/- along with interest @ 11 % per annum. According to the Trial Court, the plaintiff had proved the completion of all the six godowns on the basis of the evidence of PW-1,2 & 5 who had issued certificates in respect of completion and fitness of the godowns. While returning the finding, the

Trial Court also placed reliance upon the letter dated 15.05.1979 issued by FCI, whereby it had acknowledged the handing over the possession of the two godowns.

14. FCI preferred the first appeal bearing F.A. No.64/90 before the High Court challenging the judgment and decree of the Trial Court dated 29.04.1990. Cross objections were also preferred by the appellants herein in respect of certain claims which was rejected by the Trial Court.

15. The High Court vide impugned judgment dated 02.07.2008 allowed the appeal primarily on the ground that agreement dated 16.12.1976 was not a lease agreement and merely a contract simplicitor and the rights and liabilities of the parties were governed strictly as per the covenants prescribed by the agreement. Therefore, the claim for arrears of the rent was not made out.

16. The evidence of PW-1,2 & 5 which was relied upon by the Trial Court was discarded by the High Court on the grounds that the inspection carried out by them was in the absence of the officials of FCI and not in accordance with the specification laid down by FCI and as agreed between the parties.

17. The sole question which arises for consideration before us is whether the agreement dated 16.12.1976 was a lease agreement under

Section 105 of the Transfer of Property Act, 1882 or an agreement for lease giving rise to only obligations arising out of the said contract.

18. It may be relevant to reproduce Clauses 6 and 7 of the agreement dated 16.12.1976, which read as under :-

> *" 6. Upon completion of the godowns and the services referred to above in all respect, and after obtaining a completion certificate from party no. 2 or any of its officers nominated by Party no. 2 in this behalf, party no. 1 would hand over the godown/godowns to party no. 2 under a lease agreement to be executed between parties in the standard form obtaining in the FCI.*
>
> *7. It shall be understood that in the event of any delay in completion of the building or services or if there is a faulty workmanship or the structure is defective on the basis of the findings of the FCI officers, which will be final, party no. 2 would not be bound to take the structure on lease."*

19. A perusal of the aforesaid, the two Clauses of the agreement go to show that it was not a lease agreement but rather an agreement to enter into lease.

20. One of the earliest precedent, wherein the question whether an agreement can be termed as lease arose in the case of ***Rani Hemanta Kumari Debi Vs. Midnapur Zamindari Company Ltd, AIR 1919 PC 79***, wherein it was held as under :-

> *"Their Lordships are of opinion that it cannot be so regarded. An "agreement to lease", which a lease is by the statute declared to include, must in their Lordships' opinion be a document which effects an actual demise and operates as a lease. They think that Jenkins*

*C.J.., in the case of Panchanam Bose v. Chandra Charan Misra, correctly stated the interpretation of s. 17 in this respect. The present agreement is an agreement that upon the happening of a contingent event at a date which was indeterminate and having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not in their Lordships' opinion, satisfy the meaning of the phrase "agreement to lease," which, in the context where it occurs and in the statute in which it is found must in their opinion relate to some document that creates a present and immediate interest in the land."*

21. The decision of the Privy Council in ***Rani Hemanta Kumari Debi (supra)*** was referred to by this Court in ***Tiruvenibai v. Lilabai [1959 Supp 2 SCR 107 : AIR 1959 SC 620****)* wherein at page 111, it was held as under:-

*"Before dealing with these points, we must first consider what the expression an agreement to lease' means under Section 2(7) of the Indian Registration Act, hereinafter referred to as the Act. Section 2(7), provides that a lease includes a counterpart, Kabuliyat, an undertaking to cultivate and occupy and an agreement to lease. In Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd. (LR (1919) 46 IA 240 : AIR 1919 PC 79) the Privy Council has held that 'an agreement to lease, which a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease'. In other words, an agreement between two parties which entities one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included under Section 2, sub-section (7). In Hemanta Kumari Debi case (LR (1919) 46 IA 240 : AIR 1919 PC 79) a petition setting out the terms of an agreement in compromise of a suit stated as one of the terms that the plaintiff agreed that if she succeeded in another suit which she had brought to recover certain land, other than that to which the compromised suit*

*related she would grant to the defendant a lease of that land upon specified terms. The petition was recited in full in the decree made in the compromised suit under Section 375 of the Code of Civil Procedure, 1882. A subsequent suit was brought for specific performance of the said agreement and it was resisted on the ground that the agreement in question was an agreement to lease under Section 2(7) and since it was not registered it was inadmissible in evidence. This plea was rejected by the Privy Council on the ground that the document did not effect an actual demise and was outside the provisions of Section 2(7). In coming to the conclusion that the agreement to lease under the said section must be a document which effects an actual demise the Privy Council has expressly approved the observations made by Jenkins, C.J., in the case of Panchanan Bose v. Chandra Charan Misra (ILR (1910) 37 Cal 808 : 14 CWN 874) in regard to the construction of Section 17 of the Act. The document with which the Privy Council was concerned was construed by it as "an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted" and it was held that 'until the happening of that event, it was impossible to determine whether there would be any lease or not'. This decision makes it clear that the meaning of the expression 'an agreement to lease' 'which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land'. Ever since this decision was pronounced by the Privy Council the expression 'agreement to lease' has been consistently construed by all the Indian High Courts as an agreement which creates an immediate and a present demise in the property covered by it."*

22. This court in ***State of Maharashtra & Ors. v. Atur India Pvt. Ltd. (1994) 2 SCC 497***, quoting Hill & Redman distinguished between an agreement to lease and a lease. The relevant paragraph of ***Atur India Pvt. Ltd. (supra)*** are reproduced as under:-

*“25. Hill & Redman in Law of Landlord and Tenant, 17th Edn., Vol. 1 at page 100 dealing with this aspect of the matter states as under:-*

*22. "DISTINCTION BETWEEN LEASE AND AGREEMENT FOR LEASE*

*40. (1) A lease is a transaction which as of itself creates a tenancy in favour of the tenant.*

*(2) An agreement for a lease is a transaction whereby the parties bind themselves, one to grant and the other to accept a lease.*

*(3) If the agreement for a lease is one of which specific performance will be granted the parties are, for most but not all purposes, in the same legal position as regards each other and as regards third parties as if the lease had been granted.*

*(4) Whether an instrument operates as a lease or as an agreement for a lease depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances.*

*50. An instrument in proper form (a); by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee - either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently - is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the lessee (b). An instrument which only binds the parties, the one to create and the other to accept a lease thereafter, is an executory agreement for a lease, and although the intending lessee enters the legal relation of landlord and tenant is not created."*

23. This Court in **Atur India Pvt. Ltd. (supra)** also relied upon Mulla on The Transfer of Property Act to enumerate the distinction between a lease and an executory agreement to lease in the Indian Context, which is as under :-

> *27. We will now turn to Indian law. Mulla in The Transfer of Property Act (7th Edn.) at page 647 dealing with agreement to lease states as under:*
>
> > *"An agreement to lease may effect an actual demise in which case it is a lease. On the other hand, the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. As to such an executory agreement the law in England differs from that in India. An agreement to lease not creating a present demise is not a lease and requires neither writing nor registration.*
> >
> > *As to an executory agreement to lease, it was at one time supposed that an intending lessee who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the Privy Council that the equity in Walsh v. Lonsdale does not apply in India."*

24. From the aforesaid it is evident that for an agreement to be considered as a lease and not as an agreement to lease it is important that there must be an actual demise of property on the date of the agreement.

25. A perusal of the terms and conditions quoted herein above and the legal position discussed clearly demonstrates that the agreement dated 16.12.1976 was not a lease but simply an agreement giving rise to contractual obligations. The terms and conditions clearly demonstrate that the execution of the lease deed was contingent upon

the construction of godowns being completed and the same being approved by issuance of completion certificate by the Competent Authority of FCI.

26. The suit preferred by the appellants is a suit for damages arising out of breach of agreement dated 16.12.1976. It is well settled law that the rights and obligations of the parties have to be decided in accordance with the terms and conditions of the contract.

27. Clause 6 of the agreement dated 16.12.1976 made it imperative for the appellants to obtain a completion certificate from the competent officers of FCI, prior to execution of lease agreement and handing over the possession of the godowns. In case of defects and faulty workmanships, the findings of the officials of FCI were final. The appellants have contended that letter dated 02.12.1977 issued by FCI was the completion certificate and no subsequent certificate was to be issued. However, it is noteworthy to point out that inspection was carried out on 05.01.1978, whereafter FCI vide letter dated 14.02.1978 had recommended taking over the possession of only four out of six godowns. There arises no question of waiver, acquiescence or estoppel, as all along FCI has contended that two godowns were defective and the possession of the same can not be taken over till the rectification of the defects. The reliance placed by the appellants on the letter dated 15.05.1978, wherein FCI is said to have acknowledged

taking over possession is totally misplaced. No reliance can be placed on the said letter which was manufactured in connivance with the delinquent officers of the FCI who were charge-sheeted and subsequently punished in a departmental enquiry for the same.

28. The appellants have not disputed the facts that the officers of FCI refused to take over the possession of the two godowns in view of the defects pointed out by the officers of FCI and the said defects were never rectified. As per Clause 6 of the agreement dated 16.12.1976, in case of defects, the findings of the officers of FCI were to be final and there was no obligation to take such structure on lease. The High Court has rightly discarded the evidence of PW-1,2 & 5 as neither the inspection was carried out by an independent agency in presence of the representatives of the appellants and respondents nor the same was in accordance with the specifications laid down by FCI in the agreement dated 16.12.1976. Therefore, no rent was payable in respect of the two disputed godowns as they were not completed as per the specifications of FCI and the possession of the disputed godowns were not taken over by FCI at the time of filing of the suit by the appellants.

29. Insofar as claim for rent prior to 08.02.1978 is concerned, the appellants were not entitled for any such claim as rent was payable only after taking over of possession as per Clause 8 of the agreement dated 16.12.1976.

30. The other question which remains to be considered is whether the appellants were entitled to claim enhanced rent in respect of the godowns. We fail to find any such covenant in the agreement dated 16.12.1976, which admittedly is not a lease, stipulating enhancement of the rent after particular period once possession of the godowns has been taken over by FCI, which may entitle the appellants for payment of an enhanced rent.

31. In view of the above facts and discussions, we find no reason to take a view different from the one taken by the High Court while allowing the first appeal of the respondents and dismissing the Civil Suit of the appellants herein. Accordingly, the appeal stands dismissed.

32. In the circumstances, we do not make any order as to costs.

**.....J.**
**(N.V. RAMANA)**

**.....J.**
**(SANJIV KHANNA)**

**.....J.**
**(KRISHNA MURARI)**

**NEW DELHI;**
**MAY 13, 2020**