

**(2010) 08 CAL CK 0090**

**Calcutta High Court**

**Case No:** Writ Petition No. 22038 (W) of 1999

Hirak Ranjan Dutta and Others

APPELLANT

Vs

The State of West Bengal and  
Others

RESPONDENT

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**Date of Decision:** Aug. 18, 2010

**Acts Referred:**

- General Clauses Act, 1897 - Section 27

**Citation:** (2010) 4 CALLT 453

**Hon'ble Judges:** Prabhat Kumar Dey, J; Bhaskar Bhattacharya, J

**Bench:** Division Bench

**Advocate:** Achyut Basu, Mr. Purna Chand Gharai and Ms. Madhuri Das, for the Appellant; Pradip Kumar Guha and Mr. Dipak Chakraborty, for the Respondent

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### **Judgement**

Bhaskar Bhattacharya, J.

This writ application has been assigned to this Bench by the Hon'ble Chief Justice on a reference made by a learned single Judge (Kargupta, J.) on this writ application by which His Lordship by relying upon Clause 9(c) of the agreement for lease in question held that the Respondent No. 5 had the authority to pass the order impugned dated November 3, 1999 by disagreeing with a view taken by another learned single Judge of this Court (P. C. Ghose, J.) dated December 8, 1998 in Subhas Sarkar & Anr. v. State of West Bengal and Ors. (In Re: W. P. No. 22718 (W) of 1998) on the question of interpretation of Clause 9(f) of the said agreement for lease.

2. The facts give rise to the filing of the writ application and referring the same before this Bench may be summed up thus:

a) The disputed plot lying in Kalyani was allotted to the Petitioner No. 1 by the State of West Bengal by executing an agreement for lease dated June 5, 1969 and possession of the said plot was handed over to the Petitioner No. 1 on June 28, 1983. The Petitioner No. 1 paid all dues together with interest in connection with the

allotment of the plot of land.

b) A general power of attorney was executed by the Petitioner No. 1 in favour of the Petitioner No. 2 on June 22, 1992 in respect of the said plot of the land. The Respondent No. 5 informed the Petitioner No. 1 by a communication dated May 7, 1997 that the aforesaid general power of attorney was not acceptable. Thereafter, the Petitioner No. 1 submitted an application dated February 9, 1999 to the Respondent No. 5 seeking permission for transfer of the plot in favour of the Petitioner Nos. 2 and 3. It appears that no answer was given to the said application dated February 9, 1999.

c) However, the Respondent No. 5 by order dated November 3, 1999 cancelled the allotment of the plot of land in terms of provision of Clause 9C of the agreement for lease. Hence, the writ application was filed.

d) It was contended on behalf of the learned Counsel for the writ Petitioner before the learned single Judge that in terms of Clause 9(f) of the above agreement for lease, the Respondents were under obligation to take a decision with regard to the application for transfer within 30 days and if no such decision was taken, it should be presumed that the permission had been granted for transfer of the plot of land in favour of the Petitioner Nos. 2 and 3. According to the learned Counsel for the writ Petitioner before the learned single Judge, the impugned order was passed beyond the period of 30 days from the date of submission of the application for permission to transfer and, therefore, the order impugned was bad in law. In support of such contention, the learned Advocate for the writ Petitioner relied upon an order passed by another learned single Judge of this Court (P. C. Ghose.J) dated Decembers, 1998, as indicated above.

e) The learned single Judge while referring the matter to the larger Bench held that the Petitioner No. 1 was under the obligation to construct the building on the plot of land within 5 years from the date of acceptance of the offer and admittedly, he failed to comply with that provision. The learned single Judge further recorded that the Respondent No. 5 issued a notice dated April 1, 1986 which is Annexure F at page 23 of the affidavit-in-opposition giving the Petitioner No. 1 one more chance to start construction on the land within June 13, 1986 but the Petitioner No. 1 did not comply with that direction.

f) The learned single Judge further recorded in the order under reference that the Respondent No. 5 issued another notice dated October 3, 1987 which is Annexure G to the affidavit-in-opposition calling upon the Petitioner No. 1 to complete registration of lease deed in respect of the plot of land latest by December 31, 1987 and also to start construction within March 31, 1988 but undisputedly the Petitioner No. 1 failed to comply with that direction. It is further recorded that by a communication dated May 22, 1997 a draft lease deed was sent to the Petitioner No. 1 calling upon him to comply the execution and registration of the same within 90

days but the Petitioner No. 1 failed to comply with that direction.

g) The learned single Judge thereafter took into consideration Clause 9(f) of the agreement for lease and on consideration thereof held that His Lordship did not find any deeming provision in the aforesaid clause as claimed by the learned advocate for the Petitioner. While referring the matter, the learned single Judge further relied upon the following observations of the Division Bench of this Court in the case of *Nomita Chowdhury v. State of West Bengal and Ors.*, reported in 1999 (2) CLJ 21 which is quoted below:

4. Having heard the learned Counsel for the parties, we are of the opinion that the impugned order cannot be sustained. It is true that in terms of recruitment rules framed by the Director of School Education in exercise of his power conferred under Clause (ii) of sub- rule (1) and by Clause (1) of Sub-rule (4) of Rule 28 of the Rules for Management of Recognised Non Government Institution (Aided and Unaided), 1969, the District Inspector of Schools is expected to pass an order relating to approval of panel sent to him by the Managing Committee within a period of 30 days from the date of receipt thereof. But the learned trial Judge in our considered opinion, proceeded wholly on a wrong premise that the same is mandatory in nature. It is well settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory in nature and not mandatory. Reference in this connection may be made to a Full Bench decision of Patna High Court in (1) [Shiveshwar Prasad Sinha Vs. The District Magistrate of Monghyr and Another](#), . In view of the settled principle of law, there cannot be any doubt that the learned trial judge could not have proceeded on the presumption that only because time prescribed on passing an order relating to approval of panel has lapsed, the said panel stood automatically approved.

3. In order to appreciate the question involved in this writ application it will be appropriate to refer to the entire agreement for lease admittedly executed between the parties, which is quoted below:

Dated the 11th JAN, 1969.

TO

THE GOVERNOR OF THE STATE OF WEST BENGAL,

Through: Estate Manager, Development and Planning Department, Government of West Bengal.

Sir,

Re: Plot No. A 11 /151 in Sub-Block No. "A" of Block A in the KALYANI TOWN (Kanchrapara Development Scheme.)

I/We beg to apply for the grant of lease of Plot No. A 11/ 151 in Sub-Block No. "A" of Block A of the proposed town planned to be established in pursuance of the scheme

commonly known as "Kalyani Town" (Kanchrapara Development Scheme) of the Government of West Bengal (hereinafter for the sake of brevity referred to as the "Government") in the subdivision of Ranaghat in the district of Nadia for the period of nine(sic) hundred and ninety-nine years on the following terms and conditions.

1. I/We agree to pay premium or salami at the rate of Rs. 14225/- per cottoh of the said plot of land which contains an area of approximately ... bighas 4 cottahs..... Chattacks.....square feet, more or less, and to pay annual rent for the land to be demised at the rate of Rs. 1.00(one).

2. That out of the said premium or salami in respect of the said plot[ am/we are depositing Rs. 570/- being 10 per cent, of the amount of the said premium or salami. Such deposit will not cany any interest. Should my/our application and offer for lease of the said plot be accepted the said sum of Rs. 570/- shall be deemed and treated as earnest and in part payment of the said premium or salami payable in respect of the lease of the said plot of land and shall be appropriated by you accordingly.

In the event of my/our offer not being accepted the amount deposited by me/us in respect of the said plot shall be refunded to me/us on demand and I/we shall not be entitled to claim any interest on the said amount on any ground whatsoever.

3. That I /we shall pay at least one-third of the premium or salami in respect of the said plot (inclusive of the amount deposited as earnest money) at the rate of Rs. 1425/- per cottah within two months from the date of acceptance of this offer. In default of payment as aforesaid of the one-third of the premium or salami I/we shall pay interest on the amount thereof at the rate of 6 per cent, per annum from the date of acceptance to the date of payment and should I/we make default in payment of one-third of the premium or salami as aforesaid with interest, if any, payable thereon, for the period of six months from the date of the acceptance of this offer. I/we shall be liable to fore feit the amount deposited as earnest money to the Government.

I/we shall pay interest at the rate of 6 per cent, per annum from the date of acceptance on the balance of the premium or salami or any part thereof which may be allowed by you to remain outstanding in respect of the said plot and interest will be the first charge on the deposited amount and the said amount so remaining outstanding will from a first mortgage and charge on the demised land and the building or buildings as may be erected thereon. The balance of the premium or salami so remaining outstanding together with interest due thereon in respect of the said plot shall be paid by me/us in six equal annul instalments, the first of such payments to be made within one year from the date of acceptance of the offer and the subsequent five instalments, together with interest payable in five successive years. Should I/We make default in payment of three such instalments of premium or, salami and interest payable within the period of said six years, and any

instalment or any portion thereof or any amount of interest payable within the specified period after expiry of the sixth year, I/we shall be liable to forfeit the amount already paid to the Government who will also have the right and be at liberty to determine the agreement and re-enter possession of the said premises together with the buildings as may be erected thereon and the Government shall not be liable to pay any damages, or make any compensation there for to me/us.

provided however that should I/We pay the annual instalments of the balance of premium or salami payable by me/us with the interest payable thereon duly and punctually the Government shall accept interest on the said balance of premium or salami at the rate of 5 per cent, per annum in lieu of 6 per cent, per annum. I/We may pay more than one instalment of the outstanding price. In case of short payment I/We may be treated as defaulter/defaulters.

Provided further that nothing hereinbefore stated shall be deemed to preclude me/us from paying any instalment or instalments before due date, but the manner and time of such payments of instalment or instalments before due date shall be specified and approved by you.

Should on actual measurement after demarcation of the boundaries of the plot at the site, the area of the said plot be found to be more or less than the area mentioned above, then the premium or salami payable at the rate aforesaid shall accordingly be increased or decreased and in case it be increased. I/we shall pay the additional amount within the fortnight from the date of the demand made by you on your behalf or by the Government for payment of the said additional sum and in case it is decreased, I/we shall be entitled to a proportionate refund and shall get from the Government the amount by which the said premium or salami be decreased or abated, within forty-five days from the date of measurement.

5. Any notice to me/us by way of request, demand or otherwise howsoever may be given by the Governor or the Government by leaving the same at or sending the same by post at my/our address given below. Any notice sent by post shall be "deemed" to have been given at the time when it would be delivered in due course of post and in proving such notice when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by the Government's officer-in-charge of the Despatch Department that the envelope was duly posted shall be conclusive. The Government shall not be bound to give any notice of demand. If, however, any notice is issued, non-receipt or delay in receipt of such notice shall not be any ground for default or delay in payment.

6. That I/we shall duly complete the lease of the said plot of land in duplicate within such period as may be fixed by the Government after demarcation of the plot at the site.

7. That I/we shall not have the right or be entitled to raise any question regarding the title of the said plot of land or about your right to grant the lease aforesaid(sic)

and the title of the said land and your right to grant the lease of the land is and shall be deemed to be accepted by me/us.

8. That I/we shall use the said land for the purpose of erecting a building for residential purpose/for the purpose of carrying on business/for industrial purpose.

9. That besides the usual covenants contained in a lease of similar nature in respect of lands. I /we shall observe and perform as follows:

(a) To pay the annual rent reserved on the date and in the manner as may be prescribed by you.

(b) To pay all rates taxes outgoings and other impositions whatsoever payable in respect of the demised land whether by the owner or by the Lease/Lessees.

(c) To construct the building, according to the rules as may be prescribed and according to plans elevations, designs and section as may be sanctioned by the Government or by any local or statutory authority in that behalf, within five years from the date of acceptance and on default Government shall have the right to resume possession of the land and forfeit all or part of the money paid by the lessees provided that the lessee may be given extension of time at the discretion of Government.

(d) Not to subdivide the plot.

(e) To use the land only for the purpose of erecting a building for residential purpose/for carrying on business/for industrial purpose and for no other purpose whatsoever without the previous consent in writing of the Government.

(f) Not to transfer or assign the leasehold interest without the previous consent in writing from the Government. The decision of the Government shall be communicated to the Lessee within thirty days from the date of the receipt of the application. And the Government will have the right of Pre-emption. Upon exercise of this right and upon the Government taking over possession of the premises, compensation for the buildings constructed by the lease/leasees will be paid at a valuation to be made by Government on the basis of the costs of construction less depreciation or the market value thereof, whichever is less. The value of the land will be the amount of the premium or salami paid by the lessee/lessees after deducting interest due upto the date of the exercise of the right of such Pre-emption.

(g) Not to mortgage or charge the leasehold interest of the Lessee/ Lessees and the building to be erected thereon without the previous consent in writing of the Government, such consent not being unreasonably withheld in case of bona fide necessity.

(h) Should the Lessee/Lessees die after having made of request of the leasehold premises and the building to be erected thereon in favour of more than one person or die intestate having more than one heir then in such case the persons to whom

the leasehold premises with the buildings thereon be so bequeathed or the heirs of the deceased Lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same by metes and bounds or or they shall nominate one person amongst their number in whom the same shall vest.

(i) To observe and perform and comply with all requisitions as may from time to time be made by the Government any or any local or statutory body in respect of the land and the buildings and structures that may be erected by the Lessee/Lessees in the demised premises.

(j) Not to allow the demised premises or the buildings and structures to be erected thereon to be so used as to cause any annoyance or inconvenience to the Occupiers of adjoining or neighbouring premises.

(k) To bear and pay all expenses incurred in respect of preparation execution and registration of the Lease to be executed by you in my/our favour including the stamp duty and registration fees payable therefor.

10. In case of failure by the lessee/lessees to observe and perform all or any of the usual terms and conditions of the covenant and those contained in Clause 9 of the agreement the Government shall have the right to terminate the lease and re-enter possession of the demised premises.

11. On being called upon by the Government I/we shall within a week have the lease deed executed and registered upon payment of the appropriate stamp duty payable therefor.

12. Should I/we fail to observe any of the terms and conditions herein contained then and in that event you shall have the right and be entitled to forfeit the amount as may have been deposited so far by me/us.

I am/we are depositing herewith the sum of Rs. 570/- being 10 per cent of the premium and salami aforesaid as mentioned in Clause 2 hereof. Should you accept my/our offer, then please appropriate the said sum of Rs. 570/- towards part payment of the premium or salami as aforesaid.

4. After hearing the learned Counsel for the parties and after going through to Clause 9(f) of the agreement for lease, we find that by the said clause a prohibition has been imposed from transferring or assigning the "leasehold interest" without previous consent in writing from the Government, the lessor. It however, is mentioned therein that the decision of the Government should be communicated to the lessee within 30 days from the date of the receipt of the application for transfer.

5. From the aforesaid Clause, it is apparent that failure to comply with the 30 days" time mentioned therein cannot lead to the conclusion that the permission has been deemed to have been granted. In the absence of any specific clause in the agreement disclosing that the consequence of non-consideration of the said

application with the said period would amount to grant of permission, it is preposterous to contend that if nothing is heard from the lessor about the fate of the application for permission, it should be presumed that such permission has been granted. In order to have such presumption, specific clause must be incorporated in the agreement to that effect. In the absence of such clause, in our opinion, Kargupta, J. was quite justified in holding that in the absence of any response from the lessor within 30 days, the presumption of grant of consent cannot be drawn.

6. Moreover, in the case before us, in our opinion, even the aforesaid Clause 9(f) is not attracted because the said clause refers to transfer of "leasehold interest" and decision should be communicated to the "lessee". Therefore, so long a deed of lease has not been executed and registered, no question of grant of permission or making prayer for permission to transfer "leasehold interest" arises. In this case, merely an agreement for lease has been entered into and the formal deed of lease has admittedly not been executed, and registered. Therefore, the writ Petitioner No. 1 did not attain the status of a lessee so as to invoke Clause 9(f). On that ground also, the contention of the learned advocate for the writ Petitioner is not tenable.

7. We, therefore, approve the conclusion of Kargupta, J. that for not giving answer to the prayer for transfer within 30 days, no presumption of grant of permission arose and respectfully disagree with the view taken by P. C. Chose, J. dated December 8, 1998 in the case of Soua Sarkar and Anr. v. State of West Bengal and Ors., W.P. No. 22718 (W) of 1998 which is annexed as Annexure H of the writ application.

8. Apart from the aforesaid point involved in the writ-application, the writ-Petitioner has also challenged the letter of termination of the agreement for lease dated November 3, 1999 which is Annexure G to the writ-application. In the said letter, it was first alleged that the terms of the notice sent by the Government dated 1st April, 1987 were not complied with. It was further alleged that although the plot was allotted to the writ-Petitioner No. 1 in the year 1969, he had failed to construct any residential building on the plot within the time prescribed in Clause 9(c) of the lease agreement and the writ-Petitioner No. 1 had also failed to furnish any satisfactory explanation for such violation in reply to the notice dated 28th September, 1992 sent earlier. It was further alleged that a draft lease deed was sent to him in the month of May 1997 but he failed to resubmit the said draft lease deed and thus, in terms of Clause 9(c) of the lease agreement, the allotment was liable to be cancelled.

9. In the affidavit-in-opposition the State Government has relied upon the notice dated May 22, 1997 allegedly sending a draft of the lease-deed to be executed. In the affidavit-in-reply, the writ-Petitioners specifically denied having received such draft agreement for lease.

10. In view of such denial, we directed the State Government to produce receipt of such letter. The State could, however, produce only a certificate of posting issued by

the postal authority.

11. It was strenuously contended by the learned advocate appearing on behalf of the State Respondent that from the production of such certificate of posting, the presumption of service should be drawn. We are afraid, by mere production of certificate of posting, no presumption of service can be taken, in order to take such presumption, it must be sent by registered post as provided in Section 27 of the General Clauses Act. Moreover, in this case, once the writ-Petitioner has denied having received such letter, even the alleged presumption is rebutted unless it is established from other materials on record that his denial is a palpable wrong statement.

12. No such material has been produced showing that such denial was a Blatant lie on the part of the writ Petitioner.

13. The learned advocate for the State in this connection strongly relied upon Clause 5 of the agreement for lease, which is quoted below:

Any notice to me/ us by way of request, demand or otherwise howsoever may be given by the Governor or the Government by leaving the same at or sending the same by post at my/our address given below. Any notice sent by post shall be deemed to have been given at the time when it would be delivered in due course of post and in proving such notice when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by the Government's officer-in-charge of the Despatch Department that the envelope was duly posted shall be conclusive. The Government shall not be bound to give any notice of demand. If, however, any notice is issued, non-receipt or delay in receipt of such notice shall not be any ground for default or delay in payment.

14. The aforesaid clause merely indicates that in case of any notice by post, a certificate signed by the Government's officer-in-charge of the Despatch Department that the envelope was duly posted shall be conclusive to prove sending of such notice. In this case, no such certificate by the then officer-in-charge of the Despatch Department has been filed but only the certificate of posting by the postal authority has been filed. Secondly, if it is proved that in spite of such sending of the draft-deed by post somebody did not receive the same, such fact is sufficient to overcome the consequence of non-compliance of the demand contained in the notice. Moreover, the last three lines of the Clause 5 to the effect that "If, however, any notice is issued, non-receipt or delay in receipt of such notice shall not be any ground for default or delay in payment." is relevant only for the purpose of default or delay in payment of dues under the agreement but is inconsequential for the purpose of complying with the demand of registration of the draft deed sent if it is proved that the same did not reach the writ-Petitioner No. 1.

15. Moreover even if according to the State Government, the agreement for lease should be terminated for not making construction of any building within 5 years of

acceptance of agreement for lease, by the conduct of the State Government in allegedly sending the Memo dated 22nd May, 1997 asking the writ-Petitioner No. 1 to execute the lease deed, the State Government has waived(sic) his right to invoke Clause 9(c) for not making construction within 5 years of acceptance of agreement when the State Government itself allegedly offered the draft lease deed in the year 1997 for execution. We have already found that service of such draft deed has not even been proved.

16. We, therefore, dispose of the present appeal by holding that in the present case Clause 9(f) of the agreement for lease is not attracted for the simple reason that no formal lease deed has been executed between the parties and as such, the writ Petitioner No. 1 could not attain the status of a lessee and, therefore, his transfer of leasehold interest did not convey any right in favour of writ-Petitioner Nos. 2 and 3 and the said transaction should be ignored.

17. We further hold that in the case before us, Clause 9(c) is also not attracted for not making construction within five years of acceptance of the offer, because of the conduct of the State Government as no draft lease deed has been served upon the writ Petitioner No. 1 within 5 years of the agreement and even till today. According to the case of the State Government, the draft deed of lease was sent in the year 1997 long after the expiry of five years from the date of acceptance of the offer and it has been established from the materials on record that such draft deed has not been received by the writ Petitioner No. 1.

18. In the result, we, therefore, set aside the order dated 3rd November, 1996, the Annexure G to the writ-application and at the same time, hold that the writ-Petitioner No. 1 has acquired no right to transfer the property in favour of writ Petitioner Nos. 2 and 3 before execution of formal lease deed in his favour. We further hold that till date no draft lease deed as required according to the agreement for lease has been served upon the writ-Petitioner No. 1 and so long the same is not served, the writ Petitioner was under no obligation to start construction of the building so as to attract Clause 9(c) of the agreement.

19. The writ application itself is thus disposed of with the above observation.

In the facts and circumstances, there will be, however, no order as to costs.

Prabhat Kumar Dey, J.

I agree.