IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

WP (C) No. 27 of 2019

Mrs. Menuka Devi Bhattarai,
Aged about 49 years,
W/o Shri Mani Kumar Bhattarai,
R/o: Luing Busty,
P.O. Luing & P.S. Sadar Thana,
East Sikkim.

… Petitioners

Versus

1. State of Sikkim,
Represented by and through
Chief Secretary,
Government of Sikkim,
Tashiling, Gangtok.

2. Tourism and Civil Aviation Department
Represented by and through the Secretary,
Tourism & Civil Aviation Department,
Government of Sikkim,
Tadong, Gangtok.

… Respondents

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For the Petitioners	:	Mr. J.B. Pradhan, Sr. Advocate with Mr. D.K. Siwakoti, Advocate.
For the Respondent Nos. 1 & 2	:	Dr. Doma T. Bhutia, Additional Advocate General, Sikkim
Dates of hearing	:	22.11.2019 & 30.11.2019
Date of judgment	:	14.12.2019

JUDGMENT

Heard Mr. J.B. Pradhan, learned Senior Counsel as well as Mr. D.K. Siwakoti, learned counsel for the petitioner. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General, Sikkim for the respondents.

2. The case of the petitioner, as presented in the writ petition, is that in the year 2004, respondent no. 2, i.e., Tourism and Civil Aviation Department purchased a plot of land belonging to the father-in-law and husband of the petitioner as well as a few others for the purpose of construction of Banjhakri Falls Energy Park, hereinafter referred to as the Park. A Notice Inviting Tender (for short, 'NIT') was issued on 14.06.2016, inviting sealed tenders for taking the Park on lease. Tenders were opened on 09.07.2016 and bid of the petitioner having been found to be the highest, a lease agreement was entered into on 01.09.2016 and the Park was handed over to the petitioner. It is stated that the petitioner was not given any opportunity to examine the document or to consult any other person and besides, the petitioner having studied only up to Class VIII in a Nepali School, she had to sign and execute the deed without understanding the terms and conditions of the lease deed. In terms of Clause 3.2 of the agreement she had paid advance rent for three months amounting to Rs.51,00,000.00 (Rupees Fifty-one Lakhs) and she had also deposited a sum of Rs.20,00,000.00 (Rupees Twenty Lakhs) as interest free refundable security deposit. As the Park did not have proper infrastructure like swimming pool, adventure sports, restaurant, etc., the petitioner apprised the officers of respondent no.2 to create such infrastructure indicating that if such infrastructure is not provided, it would be difficult for her to raise revenue to pay the lease amount. Respondent no.2 informed her that for construction of additional facilities and infrastructure a Memorandum of Understanding, for short, 'MoU', has to be entered into and accordingly, an MoU was prepared by respondent no.2. The said MoU was executed on 12.11.2016 and an order dated 12.11.2016 was issued granting permission to the petitioner for construction of infrastructure as indicated therein, besides granting permission for revenue collection from the shops within the Park.

3. It is pleaded by the petitioner that she informed the authorities that when the lease period was only for five years it would not be possible for her to make investment for establishment of such infrastructure which may run into a few crores of rupees and in response, the petitioner was given to understand that in view of a Circular dated 25.02.2013, her lease period will be extended to 20 years from 5 years. Relying on the said assurance as well as on the assurance that she would be compensated at a reasonable market rate for investment made for creation of permanent immovable assets, she started to make investments for creating additional infrastructure and she completed the construction of swimming pool, fish pond, traditional food court and eco hut at a cost of about rupees three crores. In addition, some construction for adventure sports was still continuing. It is further pleaded that there was an indefinite shut-down including many cases of arson from the month of June, 2017 in view of protests raised by Gorkha Janmukti Morcha in the wake of Government of West Bengal declaring that 'Bengali' subject would be a compulsory subject from Class I to X in the entire State of West Bengal including in the hill district of Darjeeling. Such violent protests disrupted vehicular movement in the National Highway connecting Sikkim and during the "bandh" period, which was called off on 27.09.2017, spanning about 100 days, not even a single tourist visited the Park. In view of the aforesaid circumstances, the petitioner submitted a representation on 28.11.2017 to the Chief Minister, which was endorsed by the Member of Legislative Assembly (MLA) of the constituency. However, instead of fulfilling the given assurances, a termination order dated 22.07.2019 came to be issued terminating the lease of the Park. It is pleaded that the petitioner did not receive any letter/order other than the termination order and that the petitioner was neither heard personally nor granted an opportunity to justify her case before issuing the termination order, which was issued only to bestow undue favour to a blue-eyed person. It is pleaded that Clause 6.24 of

the lease deed and Clauses 4 and 5 of the MoU are arbitrary, unjust and unconscionable. The petitioner had submitted a notice through her advocate but the same having failed to evoke any response, the writ petition was filed.

4. In the counter affidavit filed on behalf of the respondents, it is stated that the petitioner was declared successful as she was the highest bidder amongst seven tenderers and she had executed the lease deed voluntarily without there being any coercion or deception. The petitioner being a politically influential person, she had submitted a representation to the Minister, Tourism and Civil Aviation, Government of Sikkim for allotment of shops and permission for construction of various infrastructures which was forwarded for consideration of respondent no.2 and, accordingly, in terms of Clause 5.4 of the lease deed, a MoU dated 12.11.2016 was executed after the terms of the same were explained in Nepali language to the petitioner. In the said MoU, it was made clear that the construction or renovation of additional infrastructure as indicated therein would have to be made at her own expense for which no claim for compensation at the time of surrendering possession after expiry of the lease period would be entertained, though moveable assets belonging to the petitioner in the nature of removable fittings, fixtures, furniture and other moveable installations as laid down in the agreement would be allowed to be removed and taken away. It is stated that request made by the petitioner vide letter dated 14.06.2017 for relaxation of payment of quarterly rent in respect of the Park was declined by a letter dated 26.07.2017 and by the said letter, the petitioner was also asked to pay due rent as stipulated in the lease deed. A number of reminders were issued asking the petitioner to pay due rent but the petitioner did not pay any heed and did not pay rent causing huge loss to the respondents and resulting in difficulty in making payment of salaries to the staff engaged in the Park. A letter dated 27.06.2019 was issued

asking the petitioner to deposit arrear rent amounting to Rs.4,25,00,000.00 with effect from May, 2017 to May, 2019 within 7 days from the date of receipt of the letter failing which it was indicated that legal action would be initiated as per the lease deed. Even thereafter, the petitioner did not pay any rent as a result of which the notice of termination dated 22.07.2019 was issued.

5. It is stated in the affidavit that land of the Park was not acquired by respondent no.2 but by the Rural Management and Development Department and the same was handed over to respondent no.2 on 29.08.2011. The allegation of not having proper infrastructure is denied and it is stated that the infrastructure such as swimming pool, adventures sports, fish pond and restaurant were already in existence but they needed additional repair works, improvements, alterations, modifications, etc. Statements made by the petitioner that assurances were given by the authorities that compensation would be paid for the investment made and lease period would be extended are denied. It is also stated that the Park is the main tourist spot and being close to Gangtok, a large number of tourists visit the Park throughout the year and the petitioner had earned huge income running the Park but despite opportunities being granted, the petitioner failed to pay outstanding arrears of rent. It is stated that once the possession is taken back of the leased out property, fresh tender notice will be issued. It is denied that the terms of the lease agreement and MoU are unconscionable as pleaded by the petitioner.

6. A reply affidavit is filed by the petitioner reiterating the assertions made in the writ petition but conceding that the land in question was acquired by the Rural Management and Development Department.

7. Mr. J.B. Pradhan, learned Senior Counsel for the petitioner submits that the petitioner is not a businesswoman in the real sense of the term and

she and her husband were farmers before venturing into the present contract. She is barely illiterate having read up to Class VIII and she was not even granted an opportunity to consult any person before executing the lease deed. It is contended by him that the petitioner does not raise any issue relating to breach of contract or interpretation of terms of the contract for the purpose of determining the rights and liabilities of the petitioner under the lease deed. He, however, submits that Clause 6.24 of the lease deed and Clauses 4 and 5 of the MoU are unjust and unconscionable and, therefore, same are not enforceable in law. It is contended that the petitioner made investment for creation of permanent immovable assets only on the assurance that the lease term would be extended to 20 years in terms of Government Circular dated 25.02.2013 and that she would be compensated at a reasonable market rate for the investment made. However, assurances were not fulfilled leaving the petitioner high and dry. He strenuously argued that in the circumstances of the case where the petitioner had made huge investments, the petitioner was entitled to a show cause notice as well as an opportunity of personal hearing and the same having not been granted the impugned termination order cannot withstand the scrutiny in law. According to him, apart from the fact that the impugned order had been passed in violation of principles of natural justice, action of the state is also in violation of Articles 14, 19(1)(g), 21 and 300-A of the Constitution of India. In support of his submissions, learned Senior Counsel relies on the judgments in the cases of ***Union of India and Anr. Vs. Tulsiram Patel***, reported in ***(1985) 3 SCC 398***, ***Express Newspapers Pvt. Ltd. & Ors. Vs. Union of India & Ors.***, reported in ***(1986) 1 SCC 133***, ***Central Inland Water Transport Corporation Limited and Anr. Vs. Brojo Nath Ganguly & Anr.***, reported in ***(1986) 3 SCC 156***, ***State of U.P and Ors. Vs. Maharaja Dharmander Prasad Singh & Ors.***, reported in ***(1989) 2 SCC 505***, ***Kumari Shrilekha Vidyarthi & Ors. Vs. State of***

U.P & Ors., reported in ***(1991) 1 SCC 212***, ***Janab Salehbhai Saheb Safiyuddin Vs. The Municipal Corporation of Greater Bombay And Ors.***, reported in ***(1993) SCC OnLine Bom 74***, ***Canara Bank & Ors. Vs. Debasis Das & Ors.***, reported in ***(2003) 4 SCC 557***, ***Joshi Technologies International Inc. Vs. Union of India & Ors.***, reported in ***(2015) 7 SCC 728*** and ***Indian Oil Corporation Limited Vs. Nilofer Siddiqui & Ors.***, reported in ***(2015) 16 SCC 125***.

8. Dr. Bhutia, learned Additional Advocate General, submits that petitioner was also the earlier lessee of the Park and therefore, the submission of Mr. Pradhan that the petitioner is a lay person in the business arena is not correct. Being fully aware, she had executed the lease deed and had also initially followed the terms and conditions of the lease deed. It was only at the instance of the petitioner that permission for repair, addition, etc., of permanent structures was allowed and in that regard an MoU was entered into between the parties. It is not correct that the petitioner had made new constructions and had created assets but she had only made improvements and undertaken repair works in already existing assets. The petitioner had undertaken such work as an experienced businesswoman in order to generate more revenue and the plea that she had incurred huge investments in this regard only on the assurance that lease would be extended for a period of 20 years and that reasonable compensation at market rate shall be paid is wholly without any basis. The request made by the petitioner for reduction of rent was also not permissible and therefore, the same was also rejected. Yet, the petitioner, while continuing to run the business of the Park and earning handsome revenue, had not paid rent from May 2017 till date, which is more than two and a half years and therefore, on the face of it, the petitioner is not entitled to any discretionary relief in the equitable jurisdiction under Article 226 of the Constitution of India. The petitioner is bound by the terms and conditions incorporated in the lease

deed and the MoU and the submission that Clause 6.24 of the lease deed and Clauses 4 and 5 of the MoU are unconscionable and unjust has no merit. In a case of the present nature, the principles of natural justice is not attracted and when the termination order was issued on the basis of the lease deed, no interference with the order of termination order dated 22.07.2019 is called for in this writ petition. In support of her submissions, learned counsel places reliance on the judgments in the cases of ***M/s Radhakrishna Agarwal & Ors. Vs. State of Bihar & Ors.***, reported in ***(1977) 3 SCC 457***, ***Bareilly Development Authority & Anr. Vs. Ajai Pal Singh & Ors.***, reported in ***(1989) 2 SCC 116***, ***State of Gujarat & Ors. Vs. Meghji Pethraj Shah Charitable Trust & Ors.***, reported in ***(1994) 3 SCC 552***, ***State of Orissa & Ors. vs. Narain Prasad & Ors.***, reported in ***(1996) 5 SCC 740***, ***State of M.P & Ors. Vs. M.V Vyavsaya & Co.***, reported in ***(1997) 1 SCC 156***, and ***State of Bihar & Ors. Vs. Jain Plastics and Chemicals Ltd.***, reported in ***(2002) 1 SCC 216***.

9. I have considered the submissions of the learned counsel appearing for the parties and have perused the materials on record.

10. A perusal of the NIT dated 14.06.2016 goes to show that the tenders were invited for taking the Park on lease on "As is where is basis". The terms and conditions of the NIT, amongst others, lay down that the lease deed shall be valid for a period of 5 years which is extendable by another 5 years based on the performance of the lease holder and timely payment of lease rental. The entry fees to the Park for the visitors as well as vehicles are indicated. It is also indicated that the successful bidder shall not be permitted to construct any commercial or recreational assets within the premises during the period of lease and all existing shops and commercial units shall not be covered in the lease deed of the successful bidder.

11. The petitioner was the highest tenderer with bid amount of Rs.2,04,00,000/- (Rupees two crores four lakhs) only per annum. The lease deed dated 01.09.2016 reflects that the lease commenced from 01.09.2016 and that the same shall remain in force for a period of 5 years i.e. till 31.08.2021. Clause 4.1 prescribes quarterly payment of rent for the first three years of the lease at the rate of Rs.51,00,000/- per quarter and for the last two years at the rate of Rs.53,55,000/-. Four quarters are divided from 1st September to 30th November, 1st December to 28th February, 1st March to 31st May and 1st June to 31st August. The rent is payable on 10th of next month of each quarter i.e. 10th December, 10th March, 10th June and 10th September.

12. It is considered appropriate to reproduce Clauses 5.2, 5.3, 5.4, 6.5, 6.12, 6.16, 6.24, 6.32, 9.1, 10 and 13.1 of the lease deed herein below as under:

> "5.2. The Lessee shall have the right to renovate and reorganize the "BANJHAKRI FALLS ENERGY PARK" at his own cost and expenses, so as to run the said premises in the best possible manner, however, prior permission has to been obtained by the Lessee from the Lessor for such renovation and reorganization.
>
> 5.3 The Lessee shall have the right to bring in any new/ additional moveable assets and or to replace any such moveable assets in the said leasehold premises at his own costs, and such assets shall at all times be the properties and belong to the Lessee and she shall have the right to deal with the same in any manner. On the expiry of the lease period or earlier determination thereof, the Lessee shall have the right to take away such moveable assets.

5.4 In case, the Lessee makes any improvements, additions, alterations in the leasehold premises, summing up to a valuation of Rs.5 lakhs and below per year, all such improvements, additions, alterations shall always be the absolute properties of the Lessor and the Lessee shall not be entitled to claim any cost or expenses for such improvements, additions, alterations, relocations nor shall the Lessee claim any return in the yearly rentals payable or the interest free refundable security deposit. For any improvements, additions, alterations above the sum of Rs.5 lakhs per year the lessee shall take prior permission and approval in writing of the lessor before undertaking the works, for which a separate agreement shall be drawn on the modalities of payment and execution of works.

x x x

6.5 The Lessee shall not erect, built or permit to be erected to built any permanent structure in the premises "BANJHAKRI FALLS ENERGY PARK", situated at Lower Sichey, East Sikkim nor make any addition or alteration thereto save and except with the permission and approval in writing from the Lessor. Excluding repair/s and renovation/s to the existing structure, the costs of which shall be responsibility of the Lessee, all civil works involving alteration/s to the existing structures, must have the prior written approval and consent of the Lessor.

x x x

6.12 The lessee shall not collect rent from the existing shops of commercial unit as the same is not covered in the lease deed. The rent so collected shall be deposited to the

Department under the revenue head 1452/TD 105/- Rent & Catering.

x x x

6.16 The lessee shall fix the tariff as per the rates prescribed in the tender documents which are as follows:

(Sl. No. 3.9) The entry fee of Asset chargeable to visitors of the asset shall be as follows:

Sl. No.	ENTRY FEE	Amount in INR
1	Single Adult	Rs.40
2	Group of 10	Rs.300
3	Group of 20	Rs.600
4	Group of 20 or more	Multiple of Sl no 3
5	Students with ID	Rs.10
6	Children below 4 years	Exempted

PARKING FEE	Amount in INR
Two Wheeler/small vehicle	Rs.10 for 3 hours
Medium Vehicle (Passenger)	Rs.20 for 3 hours
Large Vehicle	Rs.40 for 3 hours
Night Parking charges for all types of vehicles	Rs.50 per night

(The lessee shall have to provide for automation and dispensation of ticket through a ticketing machine only and ensure CCTV surveillance at the entrance and main locations of the complex and the footage shall be produced to the Government of Sikkim as and when asked for).

x x x

6.24 The Lessee shall not claim any title to the superstructure already put up or claim any compensation at the time of surrendering possession after the expiration of the Lease period.

x x x

6.32 That in the event of failure of the Lessee to vacate the said leasehold premises and hand over the possession thereof to the Lessor upon expiry of the lease or earlier determination thereof, the Lessee shall pay mesne profit/compensation to the Lessor as per the prevailing market rate at the point of time. Till the Lessee hands over possession of the leasehold premises to the Lessor, notwithstanding the right of the Lessor to recover possession of the said premises through due process of law at the cost of the Lessee, deductible from the interest free refundable security deposit, and the payment of such mesne profit/compensation will not in any way dilute the Lessor's right to recover possession of the same.

x x x

9.1 That in the event of the quarterly rent remaining arrears for one month after the due date or that there has been a breach of any of the covenants herein contained or that if there has been violation of any of the terms of this lease deed by the Lessee, the Lessor by giving one month's notice in writing to the Lessee may cancel the lease deed and re-enter the demised premises/property i.e. "BANJHAKRI FALLS ENERGY PARK", situated at Lower Sichey, East Sikkim.

10. <u>TERMINATION</u>

10.1 In the event of the Lessee committing breach of this Lease Deed Agreement, the Lessor shall have the right in case of default/delay or of breach of any of the terms, conditions and stipulations of this Lease to impose and levy the penalties in accordance with the terms contained herein or

to terminate this Lease Deed Agreement within two weeks from the date of giving such notice of such breach in writing by the Lessor to the Lessee and the Lessee does not make good the breach complained of.

x x x

13. Waiver

13.1 No waiver of any default of Lessor or Lessee hereunder shall be implied from any omission to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the express waiver and that only for the time and to the extent therein stated."

13. The last page of the lease deed is not annexed with the writ petition. However, the same was produced before this Court by Dr. Bhutia.

14. Though NIT was issued on "As is where is basis", barely after one month from the date of taking possession, on 03.10.2016, the petitioner made a request to the Minister, Tourism and Civil Aviation for permitting her to collect revenue from the shops of the Park as was allowed in the previous term, so as to enable her to make payment of rent to the Department. Though contention was advanced by Mr. Pradhan that the petitioner was new in business, such a claim is, ex facie, not correct as demonstrated by petitioner's own assertion that she be allowed to collect revenue from the shops of the Park as was allowed in the previous term. The petitioner also wanted to undertake construction of swimming pool with restaurant and bar, eco huts, rock climbing and traversing and Brahma Bridge, musical hall (traditional song & music), traditional dress & photography stalls, traditional food court, kids playing kingdom, fishing pond, etc. Though not stated so in the letter dated 03.10.2016, the petitioner in the writ petition had made a

categorical statement that unless the facilities and infrastructure as indicated by her were not provided or created it would be difficult for her to pay the lease amount. A request was also made to approve the rates of entry and parking fees as indicated in the said letter. The petitioner being the previous lessee, it is reasonable to hold that the petitioner was aware of the potential of the Park and accordingly, had submitted her tender and therefore, the stand taken by the petitioner barely one month after the lease period had commenced raises many questions.

15. Pursuant to the above request made by the petitioner, having regard to Clauses 5.2, 5.4 and 6.5, MoU dated 12.11.2016 was executed on 12.11.2016. Clauses 2, 3, 4, 5, 6 and 7 are relevant for the purpose of the case and as such the same are quoted herein below:

> "2. That the First Party has granted the allotment and revenue collection of shops to the Second Party.
>
> 3. That the First Party has granted permission to the Second Party for construction/renovation/addition of various infrastructures at the premises of Banjhakri Falls Energy Park as per clause (6.5) of the Lease Deed Agreement dated 01.09.2016 which is as under:-
>
> 1. Swimming Pool with Restaurant Bar.
> 2. Eco Huts.
> 3. Rock Climbing & Traversing, Brahma Bridge.
> 4. Musical Hall (traditional song & music).
> 5. Traditional dress and Photography.
> 6. Traditional Food court.
> 7. Kids playing kingdom.
> 8. Fishing pond.
>
> 4. That the Second Party shall undertake the construction/ renovation/addition of the following infrastructures at her

own expense within the premises of Banjhakri Falls Energy Park.

5. That the Second Party shall not claim any right, title or interest in the leasehold property (said premises) and shall not claim any compensation for the construction/ renovation/addition of various infrastructures at the premises of Banjhakri Falls Energy Park as mentioned in clause-2 of this MOU at the time of surrendering possession after the expiry of the lease period/term.

6. That the Second Party shall collect/charge the rates of Entry and Parking Fees till the expiry of lease period as under:

    1. Entry fee-Rs.50 per head.
    2. Parking fees – Small vehicle Rs.20/- per vehicle.
    3. Medium vehicle- Rs.30/- per vehicle.
    4. Larger vehicle – Rs.40/- per vehicle.
    5. Two wheeler-Rs.10/
    6. Entry for students with School Uniform and ID card Rs.10/- per head.
    7. Camera charge Rs.10/-
    8. For shooting extra charge as per the duration.
    9. Installation of Transformer for smooth supply of electricity.
    10. Water supply.

7. That after the expiry of the Lease Period, the Second Party may be allowed to remove and take away all other moveable assets belonging to her in the nature of removable fittings, fixtures, furniture and other moveable installations as laid down in the Lease Deed Agreement.''

16. A perusal of the MoU would go to show that despite a clear stipulation in the terms and conditions of the NIT that all existing shops and

commercial units shall not be covered in the lease deed and despite rates of entry fees, etc. being fixed, the revenue collection from the shops was allowed in favour of the petitioner, besides increasing the entry and parking fee in respect of some categories such as single adult, small vehicle, medium vehicle, etc.

17. Though pleas are taken in the writ petition that petitioner was unaware of the contents of the lease deed, it is to be remembered, as is evident from the letter dated 03.10.2016, the petitioner was also the lessee in the previous term. Contents of the letter dated 03.10.2016 also belies the contention of the petitioner that she was unaware of the terms and conditions of the lease. It cannot be countenanced that the petitioner was not aware of the requirement of payment of lease rent in terms of lease deed inasmuch as the petitioner had paid an amount of Rs.51.00 lakhs as advance rent for one quarter. Even otherwise, such a contention cannot be accepted in a writ proceeding in respect of a commercial contract entered into by the petitioner with the State, the same being a disputed question of fact.

18. Contention is advanced by the petitioner that an assurance was given to her that investment made by her towards making permanent constructions would be compensated and that the lease deed would be extended to 20 years on the basis of the Circular dated 25.02.2013. It is to be noted that NIT was issued on 14.06.2016 inviting tenders for grant of lease for five years, despite the aforesaid Circular holding the field. The Circular reads as follows:

"CIRCULAR

Whereas, the Department has notified that the properties valued at an annual basic price of Rs.10.00 lakhs and above are

unable to be leased out due to short lease term and publicity of the newly created properties.

Now in order to overcome this, the Government has been pleased to fix the lease term as under:

	Valuation of Property	Lease term	Category
1.	Upto 30.00 lakhs	5 years	'D'
2.	From Rs.30 lakhs to Rs.60 lakhs	10 years	'C'
3.	From Rs.60 lakhs to Rs.90 lakhs	15 years	'B'
4.	Above Rs. 1 crore	20 years	'A'

The above is in partial supersession of circular No. 10(351)08/TD dated 17.01.2009."

19. Perusal of the Circular goes to show that the properties valued at an annual basic price of Rs.10.00 lakhs and above was difficult to be leased out due to short term of lease and lack of publicity of the newly created properties. Valuation of property up to Rs.30.00 lakhs is placed at category 'D' and lease term is fixed at 5 years. The NIT goes to show that offered lease rent per annum, which is to be taken as the annual basic price, is Rs.24,70,000/- in respect of the Park. It is the considered opinion of the Court that annual basic price being less than Rs.30.00 lakhs, the lease term conforms to the Circular dated 25.02.2013.

20. The assertion of the petitioner is that the petitioner was given to understand that lease rent would be lowered in view of her request made in the letter/representation to the Chief Minister praying for reduction of lease rent at the rate of "Rs.1.20 lakhs". The letter is undated but there is an endorsement of the Chief Minister dated 28.11.2017 to consider the request as per norms. It is to be noted that the Department had already rejected the prayer for relaxation of payment of rent by letter dated 26.07.2017 in

response to the letter of the petitioner dated 14.06.2017, about which the petitioner made no mention in the writ petition. The petitioner submits that she had not received the aforesaid letter dated 26.07.2017. It will be unrealistic to proceed on the assumption that the petitioner never enquired about the outcome of the request for relaxation of payment of rent even if it is assumed that the petitioner had not received the letter dated 26.07.2017. It was the responsibility of the petitioner to make payment of rent in terms of lease deed.

21. The Park was handed over to the Tourism Department by the Rural Management and Development Department on 29.03.2011 and a perusal of the document evidencing handing and taking over goes to show that the cost of the project of the Park in 3 phases amounted to Rs.3.82 crores. On the date of such handing over, the petitioner was the lessee and 29 assets, a list of which was enclosed, were already created. A list of renewable energy exhibits mentioning 36 items is also enclosed.

22. In the letter dated 14.06.2017 and the representation to the Chief Minister, the petitioner had not indicated that any assurance was given by any authority that for the improvement or for new construction, compensation would be paid to her. Even the assurance stated to have been given as indicated in paragraph 24 of the writ petition was not specific : the investment could be adjusted against the rent or compensation may be paid at the time of determination of the lease after verification and Government approval. Except for self-serving statements of the petitioner, there is no material on record to suggest even remotely that any such assurance was given. There is no document on record evidencing any assurance being given by the authorities that the lease term would be extended to 20 years. There was no compulsion for the petitioner to have undertaken such constructions. It was on the own volition of the petitioner that such construction works

were taken up on her own initiative and therefore, it must be understood that the plea of assurance given by the authorities for payment of compensation as canvassed by the petitioner is a hollow claim with no foundation, either in law or in equity, and a ruse contrived for the purpose of the case. Therefore, not to pay rent in terms of the lease deed on the plea that a request was pending or an assurance was given cannot be accepted in a matter of the present nature.

23. In ***Central Inland Water Transport Corporation Ltd.*** (supra), the Hon'ble Supreme Court had held that right to terminate the employment of a permanent employee by giving him three months' notice, or pay in lieu of the notice as contained in the Service Rules, is unconscionable, unfair, unreasonable and opposed to public policy and void under Section 23 of the Contract Act, 1872. It was held that the Rules formed part of the contract between the corporation and its employees, but the employees had no voice in the framing of the Rules and they had to accept the Rules as part of their contractual employment. It had been entered into between the parties between whom there is gross inequality of bargaining power. The Supreme Court further held that such a contract of employment between a powerful employer and a weak employee cannot be equated with a mercantile transaction between two businessmen.

24. In ***Kumari Shrilekha Vidyarthi*** (supra), the Government of State of Uttar Pradesh had terminated by a general order the appointments of all Government Counsel by resorting to the spoils system and directed preparation of fresh panels to make appointment in place of the existing incumbents. The question that had fallen for consideration before the Hon'ble Supreme Court was as to whether the impugned circular was amenable to judicial review and, if so, whether it was liable to be quashed as violative of Article 14 of the Constitution of India. In the aforesaid context,

the Hon'ble Supreme Court held that the requirement of Article 14 should extend even in the sphere of contractual matter for regulating the conduct of the state activity, as Article 14 casts a duty on the state to act fairly, justly and reasonably. It was held that every state action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law. The Hon'ble Supreme Court further held that bringing the state activity in contractual matters also within the purview of judicial review is inevitable and it was found that arbitrariness was writ large in the impugned circular.

25. In **Nilofer Siddiqui** (Supra), the respondents 2 and 3 before the Supreme Court started their business without standard agreement being signed by both of them and therefore, the said standard agreement in question was held to be not a completed contract between the parties in law and thus, it was held that the same cannot be made binding upon the allottees of distributorship of Indian Oil Corporation Ltd. (IOCL). Condition No.8 of the letter of allotment was held to be unconscionable as it gave IOCL an unfettered right to terminate the distributorship without assigning any reason and it was also noted that the respondent 2 was far weaker in economic strength and had no bargaining power with the IOCL. In the aforesaid context, Condition No.8 of the letter of allotment providing for unilateral termination of distributorship without assigning any reason was read down in the light of Article 14 of the Constitution of India as well as observations of the Supreme Court in ***Central Inland Water Transport Corpn. Ltd*.** (supra), as made in paragraph 89, essentially mandating that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between parties who are not equal in bargaining power.

26. Though Mr. J.B. Pradhan had contended that Clause 6.24 and Clauses 4 and 5 of the MoU are unconscionable, such argument does not have any merit. Clause 6.24 of the lease deed provides that the lessee shall not claim any title to the superstructures already put up or claim any compensation at the time of surrendering possession after expiration of the lease period. It is not understood how any title can be claimed by a lessee in respect of superstructures already put up by the lessor or a claim can be put up for compensation within the ambit of Clause 6.24. Clause 5.2 provides that the lessee shall have the right to renovate and reorganize the Park at her own cost and expenses by taking prior permission so as to run the premises in the best possible manner. Clause 5.4 of the lease deed seems to suggest that improvements, additions, alterations in the leasehold premises up to Rs.5.00 lakhs would not require any prior permission. However, for any improvement above Rs.5.00 lakhs per year prior permission and approval in writing shall be taken and for the said purpose a separate agreement shall be drawn on the modalities of payment and execution of works. Clause 6.5 also prohibited erection, addition, alteration, or building of any permanent structure without permission and approval in writing from the lessor. It also laid down that cost of repair/renovation shall be borne by the lessee. The modality of payment and execution of works as indicated in Clause 5.4 are embodied in the MoU in Clauses 4 and 5. Clause 4 of MoU provides that the petitioner shall undertake construction/ renovation/addition of the following infrastructures at her own expense. The word “following” at Clause 4 is not the appropriate word and it must be understood that infrastructure mentioned at Clause 3 was referred to. Clause 5 of the MoU provides that the petitioner shall not claim any title or interest on the leasehold property and shall not claim any compensation for the construction/renovation/ addition of various infrastructures as mentioned in Clause 2 (This is also wrong. It should have been Clause 3) at the time of surrendering possession

after the expiry of lease period. Though Clause 2 is wrongly referred, intent is explicit that it referred to the infrastructure for which permission was accorded. It is to be remembered that it was the petitioner, being the previous lessee and having responded to the NIT issued on "As is where is basis", had raised issues within a month of taking the lease that unless certain infrastructures are created as indicated by her, she will not be able to pay rent. That begs the question as to why in that circumstance the petitioner had quoted the rate as she did. Respondents had not asked the petitioner to make any constructions or improvements and it was at the instance of the petitioner that the respondents had permitted her to raise constructions/ improvements on the basis of terms and conditions as envisaged in the MoU. And as agreed upon and on her volition construction works were taken up by the petitioner. In the MoU, collection of revenue from the existing shops within the Park by the petitioner was permitted though the NIT had specifically laid down that all existing shops and commercial units shall be outside the purview of the lease. Not only that, at the request of the petitioner rates of entry and parking fees in respect of some categories had been changed from what was stated in the NIT to her advantage by increasing the rates and therefore, it cannot be accepted that the petitioner was coerced into accepting terms of the MoU or that Clause 4 and 5 had been imposed upon her by the state taking advantage of its position. In my considered opinion, the ratio of the aforesaid judgments will not be applicable in the facts of the instant case. In ***Narain Prasad*** (supra), the Hon'ble Supreme Court laid down that a person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round and question the validity of those obligations.

27. The MoU, however, does not indicate specifically whether the permission was granted for construction or renovation/ addition of various

infrastructures. While in the petition it is asserted that the swimming pool, fish pond, traditional food court and eco hut were constructed along with the infrastructure for adventure sports, such assertion is denied in the affidavit by contending that the swimming pool, fish pond, restaurant and bar were already in existence but additional work of repair, improvements, additions and alterations of infrastructure were to be carried out on the existing infrastructure. Assets created as on 29.03.2011 goes to show that, amongst others, there was a cafeteria, fish pond with decorative dragon, filtration pond at catch-pit etc. In absence of any other materials on record, this Court will not venture into the disputed question as to whether the infrastructures were newly created or the existing structures/assets were repaired, altered or improved by the petitioner pursuant to the execution of the MoU.

28. In the case of ***Maharaja Dharmander Prasad Singh*** (supra), the Hon'ble Supreme Court had observed that a lessor, with the best of title, has no right to resume possession extra judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise and a lessee cannot be dispossessed otherwise than in due course of law.

29. In the aforesaid case, by notice dated 19.11.1985, the Government had cancelled the lease under deed dated 07.10.1961 comprising of 9885 Sq. Metres of Nazool land, which was to expire on 31.03.1991. Another controversy had arisen out of the order dated 19.04.1986 issued by the Vice-Chairman, Lucknow Development Authority (LDA) cancelling the earlier order dated 31.01.1985 granting permission in favour of the respondent lessees to develop the leasehold property by erecting thereon a multi-storeyed building comprising of flats. With regard to the cancellation of lease in respect of the land, the Hon'ble Supreme Court held that whether the purported forfeiture and cancellation of lease deed were valid or not should

not have been allowed to be agitated in a proceeding under Article 226 of the Constitution of India. So far as cancellation of granting permission was concerned, though a show cause notice was issued preceding the cancellation, the Hon'ble Supreme Court held that where the stakes are high for the lessees who claim to have made large investments on the project and where a number of grounds required the determination of factual matters of some complexity, the statutory authority, in the facts of the case, should have afforded a personal hearing to the lessees.

30. In ***Express Newspaper Pvt. Ltd.*** (supra), the Hon'ble Supreme Court observed that the lessor must enforce its right of re-entry upon forfeiture of lease under Clause 5 of the lease deed in question executed by the parties by filing a suit due to breach of terms of lease and not by taking law into its own hands.

31. In the instant case, the termination order itself indicates that if the possession is not delivered by the petitioner consequent upon termination of the lease, the authorities will take recourse to filing of a suit for eviction of the petitioner.

32. ***Tulsiram Patel*** (supra) is a judgment rendered primarily in the context of the second proviso to Article 311 (2) dealing with dismissal, removal or reduction in rank in respect of persons employed in civil services or a civil post and in that context had considered the scope and expanse of principles of natural justice. In ***Canara Bank*** (supra), in a matter arising out of dismissal from service, the Hon'ble Supreme Court had laid down that even an administrative order which involves civil consequences must be consistent with the rules of natural justice. In ***Janab Salehbhai Saheb Safiyuddin*** (supra), a notice of termination was issued because of a complaint of alleged malpractices and irregularities in the management of a cemetery and the Corporation had decided to take over the management of

the cemetery departmentally. It was in view of the above grounds, the Bombay High Court held that the principles of natural justice required that complaints and any material in support thereof ought to have been disclosed to the petitioner and he ought to have been given an opportunity of making a representation against the proposed termination of licence.

33. In the instant case, the termination notice was issued on account of admitted fact of non-payment of lease rent by the petitioner for more than two years. In ***M/s Radhakrishna Agarwal*** (supra), the Hon'ble Supreme Court observed that when contract is sought to be terminated by the officers of the state, under the terms of an agreement between the parties, such action is not taken in exercise of any statutory power at all and the limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only action which normally arises in such cases as to whether the action complained of is or is not in consonance with the terms of the agreement.

34. In ***M.P. Shah Charitable Trust*** (supra), the contention advanced on behalf of the respondent Trust that the contract between the parties could not have been terminated unilaterally without observing the principles of natural justice was found to be without any substance. It was observed that if the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, where the matter is governed by non-statutory contract.

35. In ***Bareilly Development Authority*** (supra), the Hon'ble Supreme Court noted that there is a line of decisions laying down that where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as compel the authorities to remedy a breach of

contract pure and simple. It was also noted that after voluntarily accepting the conditions imposed by the Bareilly Development Authority, the respondents had entered into the realm of concluded contract with Bareilly Development Authority and hence they can only claim the right conferred upon them by the said contract and were bound by the terms of contract.

36. In ***Jain Plastics and Chemicals Ltd.*** (supra), the Hon'ble Supreme Court had laid down that writ is not the remedy for enforcing contractual obligations and it is always open for the aggrieved party to approach the court of competent jurisdiction for appropriate relief for breach of contract.

37. In ***M.V. Vyavsaya*** (supra), the Hon'ble Supreme Court observed that where there are disputed questions of fact, the High Court does not normally go into or adjudicate upon the disputed questions of fact and that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Article 226 of the Constitution.

38. In ***Joshi Technologies International Inc.*** (supra), at paragraphs 69 and 70, the Hon'ble Supreme Court held as under: -

> "**69.** The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such discretion:
>
> **69.1.** The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination

of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the

decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

39. A perusal of the aforesaid judgment goes to show that occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It is also laid down that if the contract between the private party and the state or instrumentally of the state is under the realm of private law with no element of public law the appropriate remedy for the aggrieved party is to approach the ordinary civil court and that writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

40. The controversy in the instant case is purely in the realm of private law. In the writ petition, averments have been made that advance payment of rent of three months to the tune of Rs.51.00 lakhs had been paid and the same has also been admitted by the respondents. Letter dated 14.06.2017 of the petitioner (Annexure R-2 of the affidavit) goes to show that an amount of Rs.30.00 lakhs for the months of January, 2017 to March, 2017 was also paid. Letter dated 08.09.2017 goes to show that the petitioner had not paid an amount of Rs.51.00 lakhs being the rent for the period from April, 2017 to June, 2017 as also Rs. 21.00 lakhs for the months of January, 2017 to March, 2017, thus admitting payment of Rs.30.00 lakhs for the

aforesaid period. Letter dated 22.11.2017 also goes to show that apart from not clearing the dues of Rs.21.00 lakhs, the petitioner had not paid any amount of rent for the period from April, 2017 to November, 2017. Letter dated 10.01.2019 goes to show that total dues from May, 2017 to December, 2018 was Rs.3,40,00,000/-. It appears that in the meantime defaulted amount of Rs.21.00 lakhs for the period from January, 2017 to March, 2017 and some payment for the months of April, 2017 was paid. Letters dated 22.05.2019 and 27.06.2019 were on the subject of payment of arrears amounting to Rs.4,25,00,000/- for the period from May, 2017 to May, 2019. By the said letters, the petitioner was directed to make the payment within seven days from the date of receipt of letter failing which it was indicated that legal action shall be initiated as per lease deed. In spite of clear indication in the said notices that legal action shall be initiated on failure to deposit the arrear rent, the petitioner did not make good the breach complained of. It was in this background, in terms of the lease deed, termination order dated 22.07.2019 was issued stating that the lease deed will stand cancelled within 30 days of receipt of the same. Though the contention advanced by the petitioner is that the aforesaid letters except order/letter dated 22.07.2019 was not received, which is denied by respondents, this Court ought not to go into such disputed fact. The writ petitioner has continued to run the Park and it is an admitted position that even during the pendency of the writ petition no amount towards payment of rent has been paid by the petitioner. Thus, from May 2017 till the date of hearing spanning over a period of more than 2 years 6 months, no rent has been paid by the petitioner. In a matter of the present nature, when the impugned action had been taken in terms of the lease deed, I am of the considered opinion that the submission advanced by the petitioner that the impugned order is vitiated as no opportunity of hearing was afforded to the petitioner is without any merit.

41. In view of the above discussions, I find no merit in this writ petition and, accordingly, the writ petition is dismissed. No costs.

Chief Justice

Approved for reporting: Yes / No
jk/