JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.881 OF 2023.

PETROSIN SERVICES HARO RIVER (PVT.) LTD.

Versus

NATIONAL HIGHWAY AUTHORITY and another.

Petitioner by	**:**	**M/s Afnan Karim Kundi, Misbah ul Mustafa and Adeel Aftab, Advocates.**
Respondent by	**:**	**Sardar Haroon Sami, Advocate.** **Mr. Muhammad Bilal Hassan, A.D./Rev.Row/NHA** (For Respondent No.1)
Date of Decision	**:**	**31.03.2023.**

SAMAN RAFAT IMTIAZ, J.:-

1. Through the instant writ petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the Petitioner is seeking setting aside of the Order dated 16.02.2023 ("**Impugned Order**") passed by the Respondent No.2/the learned Additional District Judge (West), Islamabad ("**Civil Court**") and a temporary injunction in the form of status quo restraining the Respondent No.1 from allowing any further construction in the Concession Area to take place and from creating any third party interest therein.

2. The brief facts as per the Memo of Petition are that the Petitioner is a private limited company incorporated under the laws of Pakistan, which is an associated undertaking of a Singapore based company, Petrosin Corporation

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Pte. Limited. The Petitioner is operating as a Special Purpose Vehicle (SPV) designated for carrying out a project under Build-Operate-Transfer ("**BOT**") arrangement awarded by the Respondent No.1 [National Highway Authority] through a Concession Agreement dated 25.03.2013 ("**Concession Agreement**").

3. Review of the Concession Agreement reveals the following salient provisions: As per sub-section 1.90 of the Concession Agreement the term 'Project' bears the meaning attributed to it in sub-section 2.1, which in turn describes 'Project' as the design, finance, construction, development, insurance, operation, management, and maintenance of Service Area A and Service Area B constituting the Concession Area located at Km 37+300 on the Islamabad-Peshawar Motorway (M-I) during the Concession Period. The Concession Area is defined under sub-section 1.21 as the right of way required for the Project as well as all other land, including the existing carriageway and land obtained for the Petitioner by the Respondent No.1 for the purpose of the Project, which is more particularly delineated in Annexure "E" and shall consist of Service Area A and Service Area B. It is relevant to note that under sub-section 3.4 of the Concession Agreement, the Petitioner is entitled to the exclusive right to undertake the Project. The said provision also provides that no other entity shall have the right to enter block or otherwise impede the domain of the Petitioner inconsistent with the Concession Agreement.

4. Whereas, sub-section 1.21 provides the Concession Period as 15 years commencing from the Effective Date, which date is the date of execution of the Concession Agreement i.e. 25.03.2013 therefore the Concession Period is due to expire on 24.03.2028. The said definition further provides that the Concession Period may be renewed but upon expiry thereof, the Petitioner

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shall transfer to the Respondent No. 1 the Project Assets which as per the definition provided in sub-section 1.91 are listed in Annexure 'A' as (i) Restaurants and Food Courts, (ii) Toilets, (iii) CNG/LPG Filling Stations with Tuck Shop, (iv) Diesel/Petrol Filling Stations with Tuck Shop, (v) Tyre Shop and Mini Workshop, (vi) Mosque, Parking Area, (vii) Internal Roads, Sewerage, (viii) Water Supply and Electrification.

5. Sub-section 3.1 of the Concession Agreement envisages that subsequent to the Effective Date the Respondent No.1 shall expeditiously grant to the Petitioner the right and license to enter upon and to occupy the Concession Area including the right to perform all activities necessary for the completion of the Project in consideration for the benefits drawn by the Respondent No. 1 pursuant to the Concession Agreement. The Respondent No.1 is obligated to make available the Concession Area free from encumbrances under sub-section 5.1(c) and if any delay is caused the Respondent No.1 shall under Section 5.3 provide to the Petitioner such remedy or relief as shall adequately compensate the Petitioner including but not limited to the extension of the Concession Period. However, Section 5.1(a) contains a proviso that prior to Financial Close the Petitioner shall only be authorized to undertake such specifically identified activities as approved by the Respondent No.1 in writing. 'Financial Close' has been defined in sub-section 1.46 to mean the date by which the Financial Agreements entered into with the Lenders and the Shareholders have been executed and become effective. Clauses (a) and (b) of sub-section 12.2 provide that the Respondent No.1 shall have the right to terminate the Agreement if the Petitioner fails to achieve Financial Close within six months from the Effective Date.

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6. Sub-section 8.1 of the Concession Agreement requires the Petitioner to commence the preparation of the Construction Performance Standards, Design Proposal and specifications immediately after execution of the Concession Agreement and shall submit copies thereof etc. within eight weeks from the Effective Date. The Respondent No.1 shall submit its comments within the stipulated period of time and in case deficiencies or shortcomings are identified, the Petitioner is required to address the same within a certain time period. The Respondent No. 1 may approve, reject, partially approve or partially reject the Detailed Design, construction drawings and specifications in which case the Petitioner is required to revise the same, however, subject to the timelines as stipulated. The Petitioner is to immediately commence Works on matters that have been accepted provided that no Work is to commence prior to achievement of Financial Close except with the prior written consent of the Respondent No.1. The term 'Work' is defined under sub-section 1.122 as all works at the Concession Area require to be undertaken by the Petitioner in accordance with Constructions Performance Standards and Approved Design Proposal. Upon completion of all the Works, the Concession Agreement contemplates issuance of Certificate of Completion under sub-section 8.9. According to Annexure "K" the timeframe for completion of total construction is 18 months from the Effective Date. The commercial operations of the Project shall be deemed to have commenced under sub-section 9.2(a) on the date of issuance of the Certificate of Completion.

7. Under sub-section 13.1 the Petitioner is authorized to levy and demand charges and fees for various facilities and amenities forming part of the Project from the users thereof. As per sub-section 12.4, the consideration payable by the Petitioner to the Respondent No.1 has been described as NHA

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Lease Money, which is to be paid annually starting from the second year of the Concession Period as detailed in Annexure "H" of the Concession Agreement. The Lease Money is a percentage of the revenue of the Petitioner ranging from 20 to 30% but not less than the amount stipulated as the Minimum Guaranteed Lease Money for each year till the 15th year of the Concession Period. According to sub-section 20.1 on the Expiry Date the Petitioner shall transfer to the Respondent No.1 all rights, title and interest in the Project. The Concession Agreement may be terminated on the grounds stipulated in sub-section 19.1.

8. Coming back to the contents of the Memo of Petition, it has been alleged that the Petitioner spent a huge amount to hire well reputed firms for the purpose of conducting survey and for designing of the Project site, and also on purchase of expensive machinery to develop the Project but when the Petitioner's survey team visited the Project site they faced resistance from the local villagers of the area. The villagers informed the Petitioner that the Project land is disputed and threatened the survey teams with dire consequences if they visited again. The Petitioner duly informed the Respondent No.1 about this alarming situation in detail vide its letter dated 01.04.2013 requesting them to clear the land of all such disputes. The Respondent No.1 vide its letter dated 21.05.2013 informed the Petitioner that the land is clear for survey. But when the Petitioner's team visited the Project site for survey again the resistance by the locals was even worse and the Petitioner's survey team barely managed to escape from the site. This was duly intimated to the Respondent No.1 vide letter dated 26.11.2013.

9. According to the Petitioner, it was unable to proceed with the execution of the Works under the Concession Agreement without possession of the site being handed over to them. However, the Respondent No.1

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apparently did not pay heed to the Petitioner's grievances whereupon the Petitioner was compelled to invoke the arbitration clause as per the Concession Agreement by filing an application under Section 20 of the Arbitration Act, 1940 (**"Arbitration Act"**) before the Senior Civil Judge, Islamabad (**"First Arbitration Application"**) in the year 2015. The First Arbitration Application was decided vide Order dated 18.02.2017 whereby the matter was referred to arbitration.

10. It has been pointed out that the Respondent No.1 has not terminated the Concession Agreement to date nor has any notice of default or termination been issued to the Petitioner. The Petitioner thus claims vested rights in the Concession Area under the Concession Agreement. Therefore, the Petitioner was alarmed by the construction activity taking place in some parts of the Concession Area. Suspecting that the Respondent No.1 might be creating third party interest in the Concession Area, the Petitioner filed an application under Section 41(b) of the Arbitration Act on 12.09.2022 before the Civil Court at Islamabad in the First Arbitration praying for an injunctive order restraining the Respondent No.1 to restrain it from creating any third party interest anywhere in the Concession Area. The Respondent No.1 filed its reply to the abovementioned application on 27.09.2022 and it was only from that reply that the Petitioner came to know that the Respondent No.1 had awarded a contract in the Concession Area on 08.03.2022 to one M/s IMEX ASSOCIATES ("**IMEX Associates**") for construction, operation, management and maintenance of filling stations along with allied facilities.

11. In view of the allegedly illegal award of the IMEX Concession Agreement, the Petitioner sought indulgence of the learned Civil Court by filing a fresh application under Section 20 of the Arbitration Act on

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09.02.2023 (**"Second Arbitration Application"**) for referring the following disputes to the arbitrators:

i. Whether the Concession Agreement was ever cancelled or was the Petitioner ever given any notice of default relating to termination as required under sub-section 19.1 (c) thereof?

ii. Whether the Respondent No.1 awarded a new contract for the Works which are already awarded to the Petitioner and whether this new contract is illegal and void?

iii. Whether the Respondent No.1 can issue tenders for work scope when said work scope is already part of the Concession Agreement with the Petitioner?

iv. Whether the damages to the tune of Rs. 250,000,000/- (Two Hundred and Fifty Million only) can be awarded to the Petitioner on account of material breach of the Concession Agreement committed by the Respondent No.1 alongwith other claimed costs?

12. The Second Arbitration Application is still pending before the learned Civil Court in which the Respondent No.1 has filed its reply. In the meantime, the Petitioner through its application under Section 41 (b) of the Arbitration Act sought an interim injunction for direction to the Respondent No.1 to maintain status quo with respect to the Concession Area and to restrain it from taking any adverse action against the Petitioner till the announcement of the arbitral award. The Petitioner is aggrieved of and hereby impugns the Order dated 16.02.2023 ("**Impugned Order**") passed by the learned Trial Court whereby the said application seeking interim injunction has been dismissed.

13. The learned counsel for the Petitioner submitted that the Concession Agreement grants to the Petitioner the exclusive right to undertake the Project. He highlighted that the Concession Agreement has not been

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terminated and therefore, is still subsisting to date. He contended that despite the foregoing the Respondent No.1 has entered into an agreement with IMEX Associates for construction, operation, management and maintenance of filling station, which is therefore illegal. He stressed that it is admitted by the Respondent No.1 by way of its comments filed in response to the instant petition that the agreement executed with IMEX Associates is for the same land as the Concession Area and that IMEX Associates has started work thereupon which constitutes and proves the Petitioner's allegation that IMEX Associates has encroached upon the Concession Area of which the Petitioner is entitled to exclusive possession under the terms and conditions of the Concession Agreement. As such he argued that the Petitioner is entitled for temporary injunction as all three ingredients thereof are satisfied and that the Arbitration proceedings to the extent of the claim of specific performance shall be rendered infructuous if stay is not granted. He denied that the IMEX Associates is a necessary or proper party by stating that the relief sought for is only to the extent of the Petitioner's rights under its own Concession Agreement. He also relied upon Section 37 of the Specific Relief Act, 1877 ("**Specific Relief Act**") to assert that the damages claimed by the Petitioner in the Second Arbitration Application are in the form of alternate relief which does not have any bearing on its prayer for specific performance. The Petitioner has filed CM. No.1192 and 1193 of 2023 seeking permission to place an additional document on record i.e. Respondent No.1's reply to the Petitioner's application under Section 20 of the Arbitration Act filed in the Second Arbitration Application. However the said reply has already been filed by the Respondent No.1 along with its comments and as such the said C.M. is misconceived.

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14. On the other hand, the learned counsel for the Respondent No.1 argued that there are certain pre-requisites stipulated in the Concession Agreement which the Petitioner was required to satisfy before possession of the Concession Area could be handed over to the Petitioner which have not been complied with to date despite passage of 10 years since the execution of the Concession Agreement. He also submitted that despite the fact that the application filed by the Petitioner under Section 20 of the Arbitration Act in the First Arbitration Application was allowed by way of Order dated 18.02.2017 and matter was referred to arbitration, the proceedings thereunder have not commenced to-date by the Petitioner. The learned counsel for the Respondent No.1 highlighted that the injunction sought by the Petitioner in the First Arbitration Application for restraining the Respondent No.1 from creating third party interest in the Concession Area was also denied. He stressed upon the fact that the Project is for the benefit of the public who are inconvenienced due to lack of facilities on the motorway and that the Project has already suffered undue delay due to lack of performance of the Petitioner which is why IMEX Associates has been engaged and that it is the public who will suffer in case stay is granted as prayed for by the Petitioner.

15. Arguments advanced by the learned counsel for the parties have been heard and documents placed on record have been examined with their assistance.

16. It is an admitted fact that possession of the Concession Area is not with the Petitioner. The Petitioner alleges that possession could not be handed over to them due to the Respondent No. 1's failure to clear disputes with third party claimants whereas the Respondent No. 1 cites the Petitioner's failure to satisfy financial conditions precedent stipulated in the Concession Agreement as the reason for not handing over possession of the Concession

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Area to the Petitioner. In any event, the matter regarding possession of the Concession Area has already been referred to arbitration pursuant to the First Arbitration Application. Therefore the issue is not before this Court.

17. For purposes of this petition, what is important is that despite the Respondent No. 1's allegations of breach of the terms of the Concession Agreement on the part of the Petitioner, no notice of termination of the Concession Agreement has been served by the Respondent No. 1 upon the Petitioner to date. Yet the Respondent No. 1 has entered into agreement with IMEX Associates admittedly in respect of the Concession Area. The question of legality of the agreement entered into by the Respondent No.1 with IMEX Associates during pendency of the Concession Agreement executed by and between the Respondent No.1 and the Petitioner is to be decided through arbitration in case the Petitioner's Second Arbitration Application is allowed and the matter is referred to arbitration. The question before this Court is whether the Respondent No. 1 ought to be restrained from allowing further construction on the land which comprises the Concession Area and from creating third party interest therein by way of a temporary injunction, which injunction has been denied by the learned Civil Court?

18. It is trite law that the plaintiff must establish the co-existence of three ingredients in order for a temporary injunction to be granted. The first ingredient is a *prima facie* good case. In respect thereof, the learned counsel for the Petitioner has submitted that the Concession Agreement is essentially a BOT agreement i.e. Build-Operate-Transfer by relying upon sub-section 2.2.1 (a) thereof to suggest that the Concession Agreement envisages a transfer of the Concession Area to the Petitioner. The learned counsel for the Petitioner referred to clauses wherein the word 'lease' has been used. He

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referred to sub-section 12.4 read with Annexure "H" of the Concession Agreement which provides for 'NHA Lease Money' to argue that the Concession Agreement envisages a lease in favour of the Petitioner.

19. However, clause (b) of sub-section 5.1 provides that the Respondent No.1 shall convey, *inter alia*, a lease where the applicable laws of Pakistan require it to enable the Petitioner to undertake the Works which indicates that the Concession Agreement is not a lease but where the law so requires a lease may be conveyed. No lease has been conveyed by the Respondent No.1 in favour of the Petitioner to date nor any law has been identified where under lease is required for the Petitioner to undertake the Works. Furthermore, under sub-section (d) of Section 17 of the Registration Act, 1908, a lease of immovable property for any term exceeding one year is a document of which registration is compulsory. Under Section 49 *ibid* the effect of non-registration of a document required to be registered under the said Act is that such document shall not operate to *inter a*lia, create or assign any right, title or interested in immovable property. The Concession Agreement has a term of 15 years and yet is not a registered document. Therefore, regardless of whether its terms constitute a lease or not, the Concession Agreement cannot operate as creating or assigning any right in the Concession Area in favour of the Petitioner due to non-registration.

20. The learned counsel for the Petitioner likened the terms of the Concession Agreement with that of a sale agreement to argue that it is an agreement to lease therefore the Petitioner is entitled to specific performance thereof and in the meantime a temporary injunction against the encroachment by a third party otherwise it shall suffer irreparable harm. He emphasized that under sub-section 3.4 (a) of the Concession Agreement the Petitioner is

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entitled to exclusive rights. Let us therefore consider how lease has been defined in law and what it is entails.

21. A 'lease of immovable property' has been defined in the Transfer of Property Act, 1882 ("**Transfer of Property Act**") by way of Section 105 as *'a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms'*. [Emphasis added].

22. The term 'transfer of property' has been defined under Section 5 of the Transfer of Property Act to mean an act by which a living person (including a company) conveys property to one or more other living persons. There are various forms of transfer of property. A 'sale' is essentially a *transfer of ownership* as per the definition provided under Section 54 of the Transfer of Property Act whereas 'mortgage' is a *transfer of an interest in specific immovable property* pursuant to Section 58 *ibid* while 'lease' is a *transfer of a right to enjoy immovable property* under Section 105 *ibid*.

23. On the other hand, a 'License' has been defined in Section 52 of the Easements Act, 1882 ("**Easements Act**") as *'where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license'*. [Emphasis added].

24. Both concepts have been discussed in the following cases:

***(i) Abdullah Bhai and others Vs. Ahmad Din*, PLD 1964 SC 106**

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"The line of demarcation between a lease and a licence will sometimes be a very thin though there is no doubt as to the principle applicable. A lease as will appear from section 105 of the Transfer of Property Act is a transfer of an interest in immovable property. ***Ownership of physical property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part of the rights of ownership, i.e., the right of enjoyment of the property,*** *for a period, for consideration.* ***During the continuance of the lease the right of enjoyment of the property belongs to the tenant and not to the landlord. The right of ownership as well as the rights of which it is composed are rights in rem and not in personem and by the lease a right in rem is transferred to the lessee.*** *On the other hand a* ***"licence"*** *as will appear from its definition in section 52 of the Easements Act* ***is merely a competence to do something which except for this permission would be unlawful. It does not confer any rights in physical property. There is in the case of a licence only a personal agreement between the licensor and the licensee whereby the licensor agrees not to interfere with the doing of particular acts on property which is in his possession. No right in rem passes to the licensee.*** *Examples of a licence are a permission to cut grass from the land of another or to hold fares or run stalls on land in the possession of another. The right to cut grass from land belongs to the owner of land, being a part of the right of ownership. When the owner grants to another person a licence to cut grass, it does not even mean that the right to cut grass in so .far as it is a right in the land (a right in rem) passes to the licensee. If a right in the land itself passed an interest in the land would pass and it would not be a licence. When the owner of land grants licence to another to cut grass there is a simple personal contract that the owner will not interfere with the cutting of grass by the licensee. This contract may be specifically enforced, but it grants only a right in personem."* [Emphasis added]

(ii) ***Muhammad Hashim Vs. Zulfiqar Ali Khan, General Manager, West Pakistan, Road Transport Board and others,*** **PLD 1963 (W.P.) Lahore 418**

"6. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the decisive consideration is the intention of the parties, according to Halsbury's Laws of England, Third Edition, Volume 23, paragraph 1022. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licence or by describing it as such. The relationship of the parties is determined by law on a consideration of all relevant provisions of the agreement; nor will the employment of words appropriate to a lease prevent the agreement from conferring a

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licence only, if from the whole document it appears that it was intended merely to confer a licence. ***A licence is normally created where a person is granted the right to use premises without becoming entitled to excelusive possession thereof or the circumstances and conduct of, the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is for the use of property in a certain way and on certain terms, while the property remains in the possession and control of the owner, the agreement will operate as a licence even though the agreement may employ words appropriate to a lease.*** *The instance of agreements which have been held in English Courts to create licences include the letting of bookstalls on a railway platform, letting of space for a stall in an exhibition, permission to use a shed for particular purposes, an exclusive right to put pleasure boats on a canal, power to dig for fire-clay, liberty to fasten a coal-halk to a mooring in a river, liberty to lay and stack coal on land, liberty to search and dig for coal and permission to erect or affix advertisements, etc., etc. The relationship of landlord and tenant arises as a rule when one party confers on another the right to the exclusive possession of land, mines or buildings for a time, which is either subject to a definite limit originally, as in the case of a lease for a term of years. or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from year to year. As a rule, there is incident to it the right to receive from the tenant payment for the use of the property in the shape of rent. The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy ; but it is a consideration of the first importance.*

7. ....

8. ....

What has been conferred upon the petitioner is a right to do in or upon immovable property of the grantor which he could not lawfully do otherwise. He was permitted to put up a catering stall, which would have been unlawful for him to do without the licence, and it conferred no exclusive interest in the property. A `lease' is defined in section 105 of the Transfer of Property Act as a transfer of a right to enjoy such property, made for a certain tenure express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be tendered periodically or on specified occasions, to the transfer by the transferee, who accepts the transfer on such terms. ***Thus while in the case of a licence there is conferred a right to do something on the immovable property of another which he could not otherwise***

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lawfully do, there is in the case of a lease a creation of interest in and a right to enjoy such property. This is the essential distinction between them. *The distinction in some cases may be difficult to draw, but there is a distinction as indicated above".* [Emphasis added]

25. The difference between a 'lease' and a 'license' has been discussed more recently in the following case law:

(i) ***Muhammad Tobria Vs. The Board of Trustee,*** **2021 YLR 2278**

"A lease under Transfer of Property Act is defined as transfer of an interest in the immovable property. The ownership of immovable property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part or some parts of rights of ownership which may include right of enjoyment of the property for a period, for consideration. ***During the continuance of lease the right of enjoyment of the property belongs to the tenant/lessee and not the landlord/lessor.*** *The right of ownership as well as right of which it is composed, are rights in rem i.e. it may pass on under the law and not in personam and by the lease a right in rem is transferred to the lessee whereas in case of a* ***license****, it is only seen as a permission to do something which in the absence of such permission would be unlawful. It* ***does not confer any right in physical property.****"* [Emphasis added].

(ii) ***H. Nizam Din and Sons Pvt. Ltd. Vs. Pakistan Defence Officers Housing Authority,*** **2018 MLD 802 [Sindh]**

"8. The line of distinction between a 'lease' and 'license' is very thin and one will have to look at the actual wordings and the spirit of the agreement rather than the terminology used therein to find out the real nature of the relationship between the parties. The relationship of the parties is to be determined by law on a consideration of all relevant provisions of the agreement. ***A license is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof; or, the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is for the use of property in a certain way and on certain terms, while the property remains in the possession and control of the owner, the agreement will operate as a licensee even though the agreement may employ words akin to a lease.*** *The instance of agreements to create licenses, include, the letting of bookstalls on a railway platform, letting of space for a stall in an exhibition, permission to use a shed for particular purposes, an exclusive right to put pleasure boats on a canal, power to dig for fire clay, liberty to fasten a coal*

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hulk to a mooring in a river, liberty to lay and stack coal on land, liberty to search and dig for coal and permission to erect or affix advertisements; ***whereas, a relationship of landlord and tenant, held to be existing, when one party confers on another the right to the exclusive possession of land****, mines or buildings for a time, which is either subject to a definite limit originally, as in the case of a lease for a certain tenure, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from years to years. As a rule,* ***the most significant determinative factor of a tenancy is the right to receive from the tenant payments for the use of the property in the shape of rent.****"* [Emphasis added].

(iii) ***Messrs Zaidi's Enterprises Vs. Civil Aviation Authority,*** **PLD 1999 Karachi 181.**

"(a) In a lease there is transfer of interest in property whereas in a license this element is expressly excluded;

(b) in a lease exclusive right of possession is granted to the lessee and the lessor totally excludes himself from this right;

(c) the right granted to the lessee is assignable and transferable while in alicense it is not so;

(d) a license is a personal right. It is purely a permissible right. There is no right of exclusive possession. Notwithstanding the permission, the grantor retains control over the property.*"* [Emphasis added].

26. In short, the distinction highlighted by past precedents between a 'lease' and a 'license' is that the former involves a transfer of a right of enjoyment in the immovable property whereas the latter is simply permission or a privilege to use the immovable property in a way which would be unlawful in the absence of such permission but such permission does not confer any physical rights in the immovable property. One chief consideration while determining whether an agreement creates a lease or a license is whether there is any right of exclusive possession given, which when present indicates a lease rather than a license. A lease involves the transfer of a right in *rem*, which is heritable / assignable whereas a license is a right in *personam* which is neither assignable nor transferable.

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Transfer of Right to Enjoy Immovable Property or Permission to Use Immovable Property

27. The examination of the Concession Agreement shows that there is no provision entailing a transfer of any right in respect of the Concession Area rather the Petitioner is only permitted to enter and occupy the Concession Area to carry out the Works for purposes of the Project provided that till Financial Close is achieved the Petitioner can only undertake such of the Works as are approved by the Respondent No. 1. The exclusive rights that have been granted under sub-section 3.4(a) of the Concession Agreement are only in respect of the Project which include the exclusive right to design, finance, construct, develop, insure, operate, manage and maintain Service Area A and Service Area B, constituting the Concession Area located on the Islamabad-Peshawar Motorway (M-I).

Exclusive Possession

28. There is no provision in the Concession Agreement, which expressly provides the Petitioner with exclusive possession of the Concession Area. In fact, pursuant to sub-section 4.2 of the Concession Agreement the Respondent No.1 is entitled to have a representative present at the Concession Area for which the Petitioner is liable to provide an office thereat. It is thus clear that the Concession Agreement provides the Petitioner the exclusive right to undertake certain activities in the Concession Area for the Project but not the exclusive right to the Concession Area.

29. That being the case, sub-section 3.4(a) which guarantees that no other entity shall have the right to enter, block or otherwise impede the domain of the Petitioner inconsistent with the terms of the said Agreement cannot be construed to imply that no other entity has the right to enter the Concession Area as the domain of the Petitioner is the Project not the Concession Area.

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30. Moreover, the Respondent No. 1 has the right to accept or reject the Detailed Design, construction drawings and specifications in respect of the Project in which case the Petitioner is required to revise the same. Thus the time and manner in which the Works are to be carried out is specified, which shows that the Respondent No. 1 has control of the Project to be undertaken at the Concession Area.

Right to Assign

31. The Petitioner is expressly barred from assigning, transferring or substituting without the prior written consent of the Respondent No. 1 under sub-section 6.1.

Consideration

32. Sub-section 12.4 which refers to lease money which read with Annexure "H" of the Concession Agreement provides the consideration payable by the Petitioner for the use of the Concession Area to the Respondent No.1 on an annual basis as a percentage of its revenue. Whereas, consideration of a lease is not dependent on revenue and as such the consideration provided for in the Concession Agreement is not in the form of rent. Admittedly no revenue has been realized by the Petitioner as possession of the Concession Area has not been granted to this date as such no consideration has been paid to the Respondent No.1.

33. The above analysis of the material provisions of the Concession Agreement in light of case law shows that p*rima facie* the Concession Agreement does not envisage a transfer of any right in the Concession Area. Therefore, the right granted to the Petitioner therein in respect of the Concession Area is merely a license to undertake the Project at the Concession Area.

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34. Section 60 of the Easements Act provides that the license under the Easements Act is revocable in nature unless (a) it is coupled with a transfer of property and such transfer is in force: (b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution. The learned counsel for the Petitioner also attempted to argue that the Petitioner would at least qualify as a licensee coupled with interest. However, in order for a finding of license coupled with interest, the licensee must have executed work of permanent character. In this case admittedly possession is not with the Petitioner therefore, the question of execution of work of permanent character does not arise. At the most the allegation made by the Petitioner is that it has incurred cost in hiring firms for conducting the survey and design of the Project site and for purchase of expensive machinery. However, firstly, there is no evidence of the same before me and even otherwise it would not constitute work of permanent character. The alleged expenses incurred by the Petitioner can be easily compensated for by way of damages.

35. A license being revocable in nature cannot be specifically enforced in view of the bar contained in Section 21(d) of the Specific Relief Act and as such an injunction does not lie pursuant to Section 56(f).

36. The emphasis of the learned counsel for the Petitioner was on the fact that the Concession Agreement has till date not been terminated by the Respondent No. 1 which fact has not been denied. However, under Section 61 of the Easements Act revocation of a license may be express or implied. In the case of *Sharif Ullah Khan Vs. Pakistan International Airlines Limited*, 2023 CLC 372, it was held that retendering of the subject agreement was an implied termination despite non-receipt of a termination letter. By the same token, the execution of the IMEX Agreement could be an implied

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termination of the Concession Agreement with the Petitioner. In case however, the license is revoked without reasonable notice, the remedy of the licensee is by way of damages and not by way of injunction as per the *M.A. Naser Vs. Chairman, Pakistan Eastern Railways and others,* PLD 1965 SC 83.

37. Moreover, IMEX Associates has not been impleaded as a party to these proceedings nor before the learned Civil Court. The Petitioner has alleged that IMEX Associates has undertaken construction activity at the Concession Area which has not been denied by the Respondent No.1. In fact it has been stated by the Respondent No.1 in its comments that fuel station in the Concession Area has been completed and the general public is purchasing fuel from there and further that a mosque and ancillary facilities have been erected and site has been brought to a running position which has not been denied by the Petitioner. It is therefore clear that IMEX Associates has admittedly been in possession of some parts of the Concession Area prior to the institution of the Second Arbitration Application therefore the stay sought by the Petitioner will necessarily impact the rights of IMEX Associates. As such IMEX Associates is a necessary and proper party and no order adverse to the rights of IMEX Associates can be passed in their absence. In this regard reliance is placed on *Ali Asghar Vs. Raja M. Asghar*, 2021 CLC 1348, and *Muhammad Din Vs. Sher Muhammad*, 1999 CLC 1526.

38. Last but not least, the question whether the Petitioner is entitled to possession of land under the Concession Agreement is pending Arbitration. In case the Petitioner succeeds in the pending Arbitrations, regarding possession as well as regarding the legality of the agreement between the Respondent No. 1 and IMEX Associates, the Petitioner will not suffer any irreparable harm as the Respondent No.1 will be required to hand over

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possession of the Concession Area to the Petitioner. On the other hand if the stay is granted and the Petitioner fails in one or the other pending Arbitration matters in respect of the Concession Agreement, the Respondent No. 1 will be unnecessarily prejudiced by delay and along with it the public who is deprived of access to basic facilities required while travelling on the motorway and as such balance of convenience is also against the Petitioner.

39. Notwithstanding the foregoing, it is clarified that all the observations made hereinabove are tentative in nature and as such shall not influence the Civil Court in deciding the main case of the Petitioner pursuant to the Second Arbitration Application.

40. In view of the above discussion instant petition along with CM. No.1192 and 1193 of 2023 is hereby **dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

JUNAID

Approved for Reporting
Blue Slip added.

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