ORISSA HIGH COURT: CUTTACK

C.M.P NOS.384 AND 385 OF 2014

(In the matter of applications under Articles 226 and 227 of the Constitution of India)

C.M.P NO.384 OF 2014

M/s Shoppers Stop Ltd. ..... *Petitioner*

-Vs-

M/s Lalchand Builders Pvt. Ltd. ..... *Opp. Party*

For Petitioner : M/s. Rajat Kumar Rath, Satyajit Mohanty, D.P Sahu and S.Das

For Opp. Party : M/s Pratap Ch. Mohapatra, R.C.Pattnaik and B.D.Sahu

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-Vs-

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For Petitioner : M/s. Rajat Kumar Rath, Satyajit Mohanty, D.P Sahu and S.Das

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P R E S E N T :

THE HONOURABLE KUMARI JUSTICE S.PANDA

Date of Judgment : 20.06.2014

S.Panda, J. As both the Civil Miscellaneous Petitions involve common questions, parties are same and the dispute arises out of a suit, the matters are taken up for hearing together and are disposed of by this common judgment.

2. C.M.P No.384 of 2014 has been filed by the petitioner-Company challenging the judgment dated 05.12.2013 passed by the learned District Judge, Bhubaneswar in F.A.O No.134 of 2013 dismissing the appeal thereby confirming the order dated 28.09.2013 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A No.686 of 2013 arising out of C.S No.1361 of 2013 rejecting the application filed by the petitioner-Company under Order 39, Rules 1 and 2 read with Section 151 of C.P.C. for an interim order of injunction restraining the opposite party-Company from acting upon the undated termination letter received on 07.8.2013 and for a direction to the opposite party-Company to act in accordance with the terms and conditions of the Memorandum of Agreed Terms dated 17.5.2013 in true letter and spirit and further to restrain the opposite party-Company for entering into any contract / agreement / Memorandum of Agreed Terms / Lease Agreement or any other Deed with any third party to create third party interest in respect of the suit premises.

2.1 Similarly C.M.P No.385 of 2014 has been filed by the petitioner-Company challenging the judgment dated 05.12.2013 passed by the learned District Judge, Bhubaneswar in F.A.O No.135 of 2013 dismissing the appeal

thereby confirming the order dated 28.9.2013 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A No.740 of 2013 rejecting the application filed by the petitioner-Company for an interim order of injunction restraining the opposite party-Company from making any construction over the suit premises beyond the specification / layout provided by the petitioner-Company in the Memorandum of Agreed Terms dated 17.5.2013.

3. The brief facts of the case are that the petitioner-M/s Shoppers Stop Ltd., is a Company incorporated under the Companies Act, 1965 having its Registered Office at Mumbai. The petitioner-Company is represented through its Vice President (Legal) and Company Secretary. The opposite party-M/s Lalchand Builders Pvt. Ltd., is also a Company like the petitioner having its Registered Office at Bhubaneswar. The opposite party-Company is represented through its Managing Director. The opposite party-Company was setting up and constructing an interconnected Shopping-cum-Entertainment Complex/Mall at Plot No.795, Sahidnagar, Bhubaneswar for general and commercial user. The petitioner-Company by assessing the unique location and commercial advantage of the place approached the opposite party-Company for taking on lease the said Mall and finally the opposite party-Company agreed to lease out the Mall to the petitioner-Company. Accordingly, both the parties entered into a Memorandum of Agreed Terms (hereinafter referred to as 'MOAT') agreeing to the basic and essential commercial terms and conditions on a lease of a premise as huge investments are to be made and each retailer has a specific formant. The agreement was executed even before completion of the construction so that the constructions are to be made in accordance with the requirements of the specific

retailer. After several communications made between the parties, the terms and conditions of the MOAT finally fixed on 15.5.2013. The petitioner-Company by an email under Annexure-1 sent the draft MOAT along with other requisites and lay out intimating the opposite party-Company to comply the requirements. Consequent upon receipt of the said email communication, the Authorized Signatory of the opposite party-Company executed the MOAT on 17.5.2013 and sent the same to the Registered Office of the petitioner-Company at Mumbai, which was received on 20.5.2013. As the opposite party-Company sent only one copy of the MOAT, contrary to the instructions given in the email dated 15.5.2013, the petitioner-Company by further email communication dated 20.5.2013 instructed to the opposite party-Company to send another copy of the MOAT duly executed on a Rs.100/- Stamp Paper along with two copies of B1/B2 and layout duly signed on each page as per the requirement to make out a complete set of MOAT for the purpose of executing the same by the Authorized Signatory of both the parties. Ultimately the opposite party-Company executed two copies of the MOAT and the layout as agreed and sent the same to the petitioner-Company, which was received on 04.6.2013. The petitioner-Company after receiving the same executed the MOAT and prepared a cheque bearing No.069104 amounting to Rs.25,84,000/- drawn on IDBI Bank towards first installment of the security deposit in compliance of Clause No.10 (1) of MOAT. As there was some discrepancy in the Termination Clause in MOAT, the petitioner-Company by email communication dated 04.6.2013 requested the opposite party-Company to correct the Termination Clause in accordance with the original agreement. However, as the opposite party-Company had already sent the executed copies of the MOAT,

it was not possible to make unilateral correction of the MOAT. The suggestion for correction of the Termination Clause in the MOAT was considered by the opposite party-Company and ultimately on 10.6.2013 the opposite party-Company through SMS under Annexure-3 intimated the petitioner-Company that the Managing Director of the opposite party-Company had approved the suggestions made regarding changes in the Terminal Clause and intimated the petitioner-Company to go ahead with the changes. In the said SMS, it was clearly mentioned that the approval for correction of the Termination Clause in the MOAT was made one day before the SMS was sent by the opposite party-Company. Accordingly, the petitioner-Company carried out the correction by hand in the MOAT and returned back the duly executed amended MOAT along with B1/B2 and layout accompanied by the cheque bearing No.069104 dated 04.6.2013 for Rs.25,84,000/-, which was received by the opposite party-Company on 18.6.2013. Thus a valid and enforceable contract came into existence in terms of the Indian Contract Act. The opposite party-Company till date has not raised any objection with regard to delay in executing the MOAT by the petitioner-Company or delay in payment of the first installment security deposit in compliance of Clause No.10 (1) of the MOAT. After receipt of the MOAT by the opposite party-Company, the petitioner-Company fixed the meeting to 19.7.2013 to discuss the up to date progress of construction and other connected matter relating to the building etc. as per the MOAT. During course of discussion in the said meeting on 19.7.2013 the petitioner-Company found indifferent attitude of the opposite party-Company and could learn that the opposite party-Company is illegally trying to wriggle out its obligations. Also the petitioner-Company sent a letter through

Speed Post on 01.8.2013 to the opposite party-Company to abstain from indulging in any such un-contractual activities. The petitioner-Company on 07.8.2013 received an undated letter under Annexure-6 from the opposite party-Company intimating that the commercial relationship created under the MOAT had been terminated and the cheque amounting to Rs.25,84,000/- was also returned back to the petitioner-Company.

3.1 As the aforesaid termination of contract was illegal and violation of the terms and conditions of the MOAT, the petitioner-Company filed C.S No.1361 of 2013 before the learned Civil Judge (Senior Division), Bhubaneswar with the following prayer:-

i) Let a decree be passed declaring that the MOAT dated 17.5.2013 signed by both the parties is still subsisting and the terms and conditions embodied in the said MOAT is binding on both the parties and both the parties are required to abide by the same;

ii) Let a decree be passed declaring that the undated letter issued by the opposite party-Company purportedly terminating MOAT dated 17.5.2013 which was received by the petitioner-Company on 07.8.2013 is illegal, invalid, inoperative, unenforceable and void in law;

iii) Let a decree for mandatory injunction be passed directing the opposite party-Company not act upon the aforesaid termination letter and furthermore the opposite party-Company be directed to act in

accordance with the terms and conditions of MOAT dated 17.5.2013 in true letter and spirit;

iv) Let a decree for permanent injunction be passed restraining the opposite party-Company from acting upon the aforesaid termination letter and from entering into any contract / agreement / MOAT / Lease Agreement or any other Deed with any third party to create third party interest in respect of the schedule premises.

Along with the plaint the petitioner-Company also filed an application under Order 39, Rules 1 and 2 read with Section 151 of C.P.C for ad interim injunction. In the plaint the petitioner-Company have specifically pleaded that the literal meaning of 'on signing of the MOAT' is that consequent upon signing of the MOAT by both the parties as stipulated at Clause 10 (1) of the MOAT regarding disbursement and payment of security deposit. It was also stated that the agreement was executed on 04.6.2013 and on the same day the cheque amount was drawn up. Subsequently suggestion was given for correction of the Termination Clause in MOAT, which was approved by the opposite party-Company on 10.6.2013. Thereafter, the correction was carried out in the MOAT and the Authorized Signatory of the petitioner-Company put his initially on the corrections made in the MOAT. The duly executed MOAT along with cheque was received by the opposite party-Company on 17.6.2013. The opposite party-Company cannot be allowed to take advantage of its own wrong regarding unilaterally changing the termination clause. Therefore, the undated letter under Annexure-6 was illegal and not enforceable since the contract was completed and duly executed by the

parties. The last paragraph of Clause 41 of the MOAT deals with closure of MOAT which is only at the discretion / option of the petitioner-Company's. The last paragraph of Clause-41 of the MOAT is given hereunder:-

> *"In case Lessee (petitioner-Company) is unable to go ahead with the property due to any defect in the title etc. as ascertained in due diligence and/or technical feasibility, such decision shall be communicated by the Lessee (petitioner-Company) to the Lessor (opposite party-Company) in writing and the Lessor agrees to refund the amounts paid on account of security deposit etc., if any, within seven days of such notice by the Lessee, and thereafter this MOAT shall come to an end."*

The aforesaid clause being a negative covenant, the opposite party-Company has no option to terminate the MOAT unilaterally.

3.2 The opposite party-Company appeared before the court below and filed his objection to the interim application without filing any written statement. In the objection it was stated that the petitioner-Company has no cause of action to file the application against the opposite party-Company, who is admittedly the true owner, developer of the land and the construction being carried out by the opposite party-Company. It was further stated that the petitioner-Company intended to be a tenant under the opposite party-Company in future after execution of the lease deed as per Clause-6 of the MOAT dated 17.5.2013. Hence the intending tenant, who has not acquired monthly tenancy right under any lease and is not in possession of the suit property cannot seek any relief of

temporary injunction against the true owner, who is in possession, as such the application is liable to be rejected. It was also stated that the petitioner-Company is not a lessee as yet as the lease agreement has not been made per Clause-6 of the MOAT. The petitioner-Company also failed to pay the sum of equivalent one month's rent on signing of the MOAT as per Clause-10 (1), hence the MOAT dated 17.5.2013 is void. The opposite party-Company has already entered into a lease agreement on 28.8.2013 with another incorporated Company and received payment by cheque dated 21.6.2013. Therefore, the prayer in the plaint and the prayer in the interlocutory application if read together will establish that the main relief is sought for in the Interlocutory Application and the second prayer has been rendered infructuous as the opposite party-Company has already entered into a lease agreement with another incorporated Company. The petitioner-Company has no prima-facie case, and the balance of convenience does not lie in favour of the petitioner-Company. The petitioner-Company has falsely taken a plea that he has paid the money as required in the MOAT dated 17.5.2013 as the cheque was received after more than one month from the date the MOAT was executed. The opposite party-Company has returned the said cheque without encashing the same. The petitioner-Company has not come to the Court with clean hands, hence he is not entitled to any relief.

4. Considering the above respective plea and after hearing the parties, the court below by order dated 28.9.2013 rejected the application with the following findings:

> *"Adverting back to the matter at hand, it is seen from Clause-4 of the MOAT under the captioned heading 'Type of Agreement to be signed'*

that the agreement to lease with attached form of lease deed as Annexure in lessee's format with mutual discussion. Further more Clause-13 of the aforesaid MOAT under the captioned heading 'Commencement date for rent' also indicates that the commencement date for payment of rent shall be immediately the next day after the expiry of the fit-out period subject to the Lessor completing construction of the demised premises according to the specification as confirmed by the lessee, obtaining the occupation certificate and so also permission from all competent authorities and so also the execution and registration of the lease deed between the Lessor and the lessee. On a combined reading of all the aforesaid clauses and taking note of the material advanced by the rival parties in toto, in my earnestly considered view, the tone and tenor of the aforesaid MOAT indicates that the same is not a completed document in itself which require many other things to be fulfilled before a lease agreement for letting out the suit schedule premises on lease can be executed. xx xx xx As per Section 107 of the Transfer of Property Act, 1882, a lease of immovable property for any term exceeding one year can only be made by a registered instrument. xx xx xx However, in the matter at hand no registration of the aforesaid MOAT has been done. Besides it is harped upon by the petitioner that the aforesaid MOAT was executed on 17.5.2013. However, by his own admission, for correction of the said document and for want of certain other aspects, the said document was completed in all respect on 04.6.2013 and the cheque was drawn / issued in favour of the opposite party. If the aforesaid MOAT was allowed to be finally executed on 04.6.2013 on which date the cheque amount of Rs.25,84,000/- was drawn and sent to the opposite party, it cannot by any stretch of imagination be stated that the MOAT was executed on 17.5.2013. If the version of the petitioner to the effect that on 17.5.2013, the MOAT was executed is given credence, it goes without saying that the part of the consideration amount was not paid

of that date to the opposite party which was admittedly drawn/paid on 04.6.2013. In such view of the matter, the contention raised by learned counsel for the opposite party that such MOAT has no force of law in view of Section 25 of the Indian Contract Act, 1861 to the effect that any contract without consideration is void cannot be brushed aside lightly. The court below has also held that the opposite party has already executed an agreement with a third party on 28.8.2013 and in pursuance of the said agreement construction work is going on, which has not challenged by the petitioner, who has only averred that such deed if any is illegal. Admittedly, the opposite party being the owner in respect of the suit demised premises cannot be injuncted as he is found to be in possession of the suit schedule premises."

5. Being aggrieved the petitioner-Company preferred F.A.O No.134 of 2013 before the learned District Judge, Bhubaneswar. The lower Appellate Court by the impugned judgment dated 05.12.2013 rejected the appeal thereby confirmed the order of the trial court without going into the merits of the appeal.

6. Mr.Rath, learned Senior Counsel appearing for the petitioner-Company submitted that both the courts below in the Interim Application instead of considering the prima-facie case as pleaded by the petitioner-Company has gone into the merits of the case and given erroneous finding as if they have concluded the trial in the suit itself, which is perverse and is liable to be quashed. He further submitted that Clause 32 of the MOAT stipulates that the Lessee has the option to terminate the Agreement, after lock-in period of 36 months by providing three months advance written notice to the Lessor of its intention to terminate the agreement and Lessee may give this advance any time after the end of 33 months. The Lessor shall terminate the said lease in case of default by

the Lessee in payment of lease rent or conducting of any illegal activities from the leased premises (not caused due to any default by the Owner/Developer/Lessor or due to any force majeure) for a continuous period of two months and the same is not rectified after the notice period of 30 days. Payment was made by the petitioner-Company through cheque as stipulated under Clause-10 of the MOAT, which was received by the opposite party-Company and in absence of any fact that the cheque was dishonored it must be taken into consideration that payment had been effected on the date the cheque was issued. In those circumstances the MOAT was completed in its terms and conditions. Further at the end of MOAT it was specifically stipulated that in case the Lessee is unable to go ahead with the property due to any defect in the title, etc. as ascertained in due diligence and/or technical feasibility, such decision shall be communicated by the Lessee to the Lessor in writing and the Lessor agrees to refund the amounts paid on account of Security Deposit etc., if any, within 7 days of such notice by the Lessee, and thereafter this MOAT shall come to an end. He also submitted that both the courts below have not considered the fact that in view of the aforesaid specific clause in the MOAT the Lessor has no option to terminate the MOAT unilaterally it is only the Lessee/petitioner who can only terminate the agreement, which is a valid one. The plaintiff in the plaint as well as in the Interim Application has pleaded about the negative covenant as stipulated under Section 42 of the Specific Relief Act, therefore considering the prima-facie case, the court below should have allowed the application of the petitioner-Company. It is stated that denial of an order of injunction will almost amount to dismissal of the suit of the plaintiff at the interlocutory stage and it is the duty of the Court to implement the solemn

agreement between the parties. It is further stated that in view of the negative covenant in the MOAT the question of balance of convenience and whether damages would be adequate remedy or not, becomes immaterial. Therefore, the petitioner-Company has only raised question of prima-facie case.

7. Learned counsel appearing for opposite party-Company submitted that the alleged MOAT was executed on 17.5.2013 and as per Clause 10 (1) of the said MOAT, the amount has to be paid on execution of the MOAT, which admittedly not being paid the document dated 17.5.2013 is an invalid one, which was rightly considered by the courts below. He has further submitted that the opposite party-Company being the owner in possession, no injunction can be granted against him and the interference of this Court in exercise of the jurisdiction under Article 227 of the Constitution of India does not warrant as those are findings of facts.

8. The Apex Court in the case of **Mohd. Mehtab Khan & others Vs. Khushnuma Ibrahim Khan and others** reported in **(2013) 9 SCC 221** held that:

> *"Ordinarily and in the normal course, by this time, the suit itself should have been disposed of. Tragically, the logical conclusion to the suit is nowhere in sight and it is on account of the proverbial delays that have plagued the system that interim matters are being contested to the last court with the greatest of vehemence and fervour. Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the courts is neither feasible nor practicable. Courts, therefore, will*

have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. The courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima facie and tentative, meant or intended only for deciding the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.

There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the appellate Bench of the High Court in the present case is a mandatory direction to hand over possession to the plaintiffs. Grant of

mandatory interim relief requires the highest degree of satisfaction of the court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden v. Coomi Sorab Warden and others has come to be firmly embedded in our jurisprudence. Paras 16 and 17 of the judgment in Dorab Cawasji Warden and others extracted below, may be usefully remembered in this regard:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound

judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

8.1 In the case of **Rama Metal Works and others Vs. The National Small Industries Corporation Ltd.** reported in **AIR 1977 Kant 24** the Court held that mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, it was clear implication of signing of the agreement in due course though desirable was not essential. The effect of the correspondence and the conduct of the parties are not such as to lead to the inference that the parties intended to be bound only when a formal agreement is executed. However, there were ample materials to show that both the parties intended to make and believed that they had made a binding agreement.

In view of the above settled position of law, the orders passed by the courts below are perverse as the courts below have not referred to the similar Clauses of the MOAT. The courts below should have considered the fact that when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and the proposal when accepted, whether it becomes a promise or not?

8.2 Further in the case of **Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb** reported in **AIR 1996 CAL 67** the Court held that if there had been a negative covenant a Court of Equity would have had no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that particular

thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience or of the amount of damage or of injury – it is specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open between themselves.

In view of the aforesaid decision, the court below should have considered the negative covenant term incorporated in the MOAT also.

9. Considering the above and as both the courts below have gone into the merits of the suit itself instead of hearing the Interim Applications filed by the petitioner-Company, this Court quashes the impugned judgments dated 05.12.2013 passed by the learned District Judge, Bhubaneswar in F.A.O Nos.134 and 135 of 2013 as well as the order dated 28.09.2013 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A Nos.686 of 2013 and 740 of 2013 arising out of C.S No.1361 of 2013 and remits the matter back to the trial court for disposal of the Interim Applications on its own merits, as expeditiously as possible, preferably within a period of three months from the date of production of certified copy of the judgment.

Accordingly, both the Civil Miscellaneous Petitions are disposed of.

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S.Panda, J.

Orissa High Court, Cuttack
20th June, 2014/ **B.K.Panda**