

I.A No. 686/2013
(Arising out of C.S No. 1361/2013)

M/s Shoppers Stop Limited, a Company incorporated under the Companies Act, 1965 having its registered office at "Eureka Towers, B-Wing, 9th floor, Mind Space, Link Road, Malad(West) Mumbai-400 064 represented through its Vice President (Legal) & Company Secretary Mr. Prashant Mehta, aged about 58 years, Son of Sushil Chandra Mehta.

..... Petitioner

- Versus -

M/s Lal Chand Builders Pvt. Ltd., a Company incorporated under the Companies Act 1965 having its registered office at Lalchand Market Complex, Unit-3, Station Square, Bhubaneswar-751 001 Odisha represented through its Managing Director Mr. Ajit Hans.

..... O.P

15.09.2014

This is an application filed U/o 39 Rule 1 & 2 read with Section 151 of CPC by the petitioner to restrain the O.P from acting upon the undated termination letter which was received by the petitioner on 07.08.2013 and for a direction to act in accordance with the terms and conditions of the MOAT (Memorandum of Agreed Terms) dt. 17.05.2013 in true letter and spirit and from entering into any contract or agreement, creating any third party interest over the suit schedule premises.

2. The case of the petitioner is that in pursuant to a negotiation between the parties, the O.P being the owner of the schedule premises agreed to lease out the same to the petitioner for a commercial shopping mall and before the execution of the lease deed, both parties mutually decided to entered into a Memorandum of Agreed Terms (MOAT) specifying the agreed commercial terms and conditions. Accordingly after several communications between the parties to finalise the terms and conditions of the MOAT, the petitioner on 15.05.2003 by an email communication sent the draft MOAT along with other requisites and lay out and intimated the O.P to comply with the requirements for final signing of the MOAT. On receipt of the aforesaid email communication, the authorised signatory of the O.P signed the said MOAT on 17.05.2013 which was received by the petitioner on 20.05.2013. Since it was only one copy of the MOAT, on

20.05.2013, again the petitioner asked the O.P through email to send another copy of MOAT duly signed on Rs. 100/- stamp paper along with two copies of B1/B2 and layout duly signed on each page. After several communications between the parties to make out a complete set of MOAT, the petitioner got the same on 04.06.2013 from the O.P and on the same day, the petitioner signed the MOAT and prepared a cheque amounting to Rs.25,84,000/- towards the first installment of security deposit to be made with the O.P in compliance to Clause No. 10(1) of the MOAT. As the petitioner found some error in the termination clause of the MOAT, he requested the O.P by email dt. 04.06.2013 to consider the suggestions regarding correction of the termination clause and the O.P on consideration of such suggestion, approved the same through SMS on 10.06.2013 and accordingly the petitioner duly carried out the said correction in the MOAT and sent a set of duly signed MOAT along with B1/B2 and lay out accompanied by the cheque dt. 04.06.2013 amounting to Rs. 25,84,000/- to the O.P on 19.06.2014 through courier service and the same was received by the O.P on 20.06.2013. It is the case of the petitioner that there was no latches on his part for correction of MOAT and for delivery of the cheque prior to 19.06.2013 and till 18.06.2013, the O.P has not raised any complain with regard to delay in signing of the MOAT by the petitioner or the delay in payment of the 1st installment security deposits in compliance to Clause No.-10(1) of the MOAT. It is the further case of the petitioner that on 17.07.2013, a meeting was convened in between them so far as the updates are concerned and during such discussion, the representatives of the petitioner found indifferent attitude of the O.P and could learn the O.P is illegally trying to enter into a lease agreement with third party ignoring the MOAT already signed for which they requested the O.P to abstain from indulging in such illegal activities and on that score, issued a letter to the O.P by speed post on 01.08.2013. But on 07.08.2013, the petitioner received an undated letter from the O.P intimating therein that the commercial relationship created under the MOAT has been terminated and the O.P also returned the said cheque to the petitioner. To sum up the case of the petitioner is that the MOAT executed on 17.05.2013 is a concluded and valid contract and the O.P is bound by such contract and the O.P has no right or authority to terminate the said contract by his undated letter which was received by the petitioner on 07.08.2013. Challenging the said undated letter which was

received by the petitioner on 07.08.2013, the petitioner has filed this suit bearing C,S No. 1361/2013 for declaration that the MOAT dt. 17.05.2013 is still subsisting and is binding on both the parties along with other prayers.

3. The OP appeared and filed his show cause challenging the I.A on the grounds of maintainability. It is averred by him that the petitioner intended to be a tenant under the O.P in future after the execution of a lease deed (ATL) as per the Clause-6 of the MOAT dt. 17.05.2013 and as such, he has not acquired any monthly tenancy right and also not in possession of the suit property. So the petitioner has not acquired any right of tenancy over the suit property and he cannot pray for a relief of temporary injunction against the true owner in possession i.e. the O.P. The MOAT dt. 17.05.2013 and Clause-6 of the same read together will show that the petitioner is not a lessee as the lease agreement has not been made as yet as per Clause-6. Since the petitioner failed to pay as per Clause-10(1) of the MOAT dt. 17.05.2013, the same is void. It is the further case of the O.P that he has already entered into a lease agreement on dt. 28.08.2013 with M/s Future Life Style Fashion Limited as per agreed term sheet dt. 24.06.2013 and also received a cheque dt. 21.06.2013 under the same. So the petitioner has no prima-facie case and the balance of convenience is also not leaning in his favour. The O.P being the owner in possession over the suit property is carrying on construction over the same. As such, the petitioner will also suffer no irreparable loss on the basis of the aforesaid MOAT which is a still born document from its very beginning on dt. 17.05.2013. As the petitioner failed to comply the Clause-10(i) of the same in paying the amount, he is not entitled for the relief sought by him and when the petitioner has not paid a single pie to the O.P and the O.P has already returned the cheque amounting to Rs. 25,84,000/- to the petitioner, he is not going to suffer any irreparable loss. Submitting the above, it is urged by the O.P to dismiss the I.A.

4. In order to succeed in a petition U/o.39 Rule-1 & 2, the petitioner has to establish his prima-facie case so also the balance of convenience in his favour. Moreover, it is also to be seen whether the petitioner will suffer any irreparable loss, if the prayer is denied.

5. From the very outset, it can be stated that the fact giving rise to the said MOAT dt. 17.05.2013 till the fact of receiving the undated letter of the O.P on 07.08.2013 by the petitioner are not disputed by the O.P. It may be stated here

that the Hon'ble High Court in C.M.P No. 384/2014 vide judgment dt. 20.06.2014 has been pleased to remit the matter back to this Court for disposal on its own merit. The learned counsel for the petitioner while submitting the case contended that the Hon'ble High Court while disposing this CMP has been pleased to make the observations that the MOAT is an agreement. In this respect, he draws the attention of this Court to the sentence "*However there are ample materials to show that both the parties intended to make and believed that they had made a binding agreement*" in Para-8.1 of the judgment. On perusal of the said para, it is found that this sentence is the part and parcel of the judgment reported in AIR 1977 Kant 24 which the Hon'ble Court has been pleased to reflect in the said para i.e Para-8.1. In the said para, the Hon'ble Court has been pleased to hold that "*In view of the above settled position of law, the orders passed by the Court 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 ?*". So with great respect to the Hon'ble High Court, it can be held that the Hon'ble Court has not been pleased to observe and hold that the said MOAT is a Contract.

When the fact of execution of the MOAT is not disputed, the only dispute from the side of the O.P is that as per Clause-10(1) of the said MOAT as the petitioner has not paid a sum equivalent to one month rent i.e. Rs.25,84,000/- on the date of signing of the said MOAT i.e on 17.05.2013. The MOAT has no force in law in view of Section-25 of the Indian Contract Act to the effect that any Contract without consideration is void. From the case of the petitioner, it is found that on 04.06.2013 on receiving the duly executed MOAT from the O.P, instantly the authorised signatory of the petitioner signed the MOAT on the same day and prepared the cheque bearing no. 069104 amounting to Rs. 25,84,000/- drawn on IDBI bank towards 1st installment of security deposit. But as there was some error in the termination clause of the MOAT, a request was made to the O.P by email on the same day i.e. on 04.06.2013 to consider the suggestion regarding termination clause and the said suggestion was approved by the O.P through telephonic SMS on 10.06.2013. Accordingly, on 19.06.2013, the petitioner sent the MOAT along with B1/B2 and the layout

and the said cheque dt. 04.06.2013 by courier service to the O.P. From this averment of the plaint, it is found that even though the said cheque was signed on 04.06.2013, but it was sent to the O.P through courier service only on 19.06.2013. At this juncture, the learned counsel for the O.P submitted that when the petitioner has not paid the amount as agreed as per Clause-10(1) i.e on the date of signing of the MOAT, the said MOAT can not be treated as an agreement. The learned counsel for the O.P further submitted that this MOAT is not a concluded contract as the lease deed required under law has not been executed which finds place in clause-6 of the MOAT.

From the admitted MOAT, it is found that the terms and conditions for the lease of the demised premises have been decided and reflected therein and this MOAT has been executed for the construction of shopping mall over the land belong to the O.P which has been clearly described in the schedule of the plaint. Though the document termed as a Memorandum of Agreed Terms, but it bears the terms and conditions of the proposed lease and even the parties to the said MOAT describes themselves as lessor and lessee in the said document. As per clause-14 of the said MOAT, the lease tenure shall be for 24 years with initial tenure of 9 years. When a proposal is accepted, it becomes a promise and every promise and every set of promises, forming the consideration for each other is an agreement. Contract is an agreement which is enforceable in law. Law is well settled that a document creating a lease in respect of an immovable property for a period of one year or more requires a registration compulsorily under the T.P Act so also the Registration Act. Admittedly this MOAT has not been registered. In this MOAT, certain terms and conditions are formulated and accepted by both the parties on the basis of which or in accordance of which, the lease deed is to be executed and registered. Unless a lease deed is executed and registered, may be formal in view of this MOAT, but in absence of such registered lease deed, no interest is created in favour of the petitioner over the schedule property. In the instant case, there is a reference to a future contract in the MOAT which shows that the parties did not intend to the agreement to be a concluded contract rather intended to create another contract between the parties. Moreover in this case both the parties only signed the MOAT even not on same day and the petitioner after signing the same subsequently has sent the same with the cheque. But after that no subsequent events like encashment of

cheque, delivery of title deeds and possession or any other action has been taken by either of the party to show that they were in an intention to give effect to the said MOAT. On the other hand except signing the MOAT on 17.05.13, the Opp Party has not done any act in pursuance to the terms of the MOAT with intention of giving effect to the same. Further, it necessarily follows that what was proposed has to be understood as an arrangement by virtue of the MOAT and the same might have its binding nature and could have culminated itself into a contract had the terms contained therein were specifically performed by the O.P. Moreover, unless a lease agreement is executed and registered, no concluded contract between the parties deemed to have been come into existence. From the above discussion it is amply clear that even though both parties have signed the MOAT but nothing came about from either side to give effect to the MOAT, except the sending of the cheque of Rs. 25,84,000/- by the petitioner to the O.P. Admittedly, the petitioner has not spent anything in pursuance to the said MOAT except the drawing of the cheque. So in the aforesaid circumstances it cannot be said that the MOAT is a concluded contract especially when the same does not create any interest in respect of the suit property in favour of the petitioner to make out a prima facie case in his favour. Here in this I.A, the petitioner has prayed for an order of ad-interim injunction restraining the O.P from acting upon the undated letter received on 07.08.2013 and for a direction to the O.P to act in accordance with the terms and conditions of the MOAT dt. 17.05.2013 in true letter and spirit. This is also the prayer of the petitioner in the suit itself. By allowing such prayer in this I.A will amount to allowing the prayer of the suit. In such a situation, when allowing the I.A. amounts to decreeing the suit itself, same shall not be allowed at this stage, specially when the as discussed above the petitioner lacks a prima facie case. When the petitioner has not gone ahead in pursuance to the MOAT as discussed above neither the balance of convenience leans in his favour nor he will suffer any irreparable loss if the prayer for the injunction is refused as compared to the O.P.

6. So far as the other prayer of the I.A is concerned, the petitioner has prayed for an order of ad-interim injunction restraining the O.P from entering into any contract agreement/MOAT/lease agreement or any other deed with any third party to create a third party interest in respect of the schedule premises. The learned counsel for the petitioner submitted that in view of the last clause of

the MOAT i.e Clause-41, the lessor (Opp.) shall not negotiate to lease out or sell this property to anyone unless the decision of not going ahead with the property is communicated by the lessee (the petitioner). According to him, when the aforesaid clause is incorporated and admitted in the MOAT by both the parties, the O.P can not negotiate to lease out or sell the property to anyone else and the Court can grant injunction to perform the negative agreement. So far as this prayer is concerned, the mischief of negative agreement or negative covenant comes to play. Section-42 of the Specific Relief Act says notwithstanding anything contained Clause-(e) of Section-41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement express or implied, not to do certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the plaintiff has not failed to perform the contract as far as it is binding on him. So in order to get an order U/s.42 of the Specific Relief Act, a concluded contract with negative agreement is required, may be either expressed or implied. In case of a negative covenant the question of balance of convenience and the redressal by damages are not material. As discussed above, when the MOAT is not a registered one and it was decided in the MOAT to go for a deed of lease in future and in absence of any lease deed in respect of the suit schedule property in favour of the petitioner, we cannot say that the MOAT is a concluded contract which binds the immovable property. If no interest has been created in favour of the petitioner in respect of the suit property by the said MOAT, it has no binding effect either in the property itself or in the rights of the O.P, over the schedule property. On the other hand, for the sake of argument, if it is held that the MOAT is a concluded contract then also in view of the clause-41 of the MOAT, the petitioner cannot restrain the O.P to raise construction over the same for himself or for any other purpose. It is the further case of the O.P that, he has entered into an agreement with M/s Future Life Style Fashion Limited as per agreed term sheet (ATS) dt. 24.06.2013 and also received a cheque dt. 21.06.2013 under the same. While dealing with negative agreement, we must keep in mind that the said MOAT is not for the performance of any other purpose in a commercial transaction but for the purpose of construction of a shopping Mall as per the agreed specification annexed to the MOAT over the

suit land. So the involvement of the immovable property in the said MOAT makes it mandatory for creation of an interest over the said land in favour of the petitioner. But the interest of the petitioner over the suit and can only be created only on the execution of and registration of the lease deed as per law. Without the land one cannot think of a construction may be a structure or interior or of a Shopping Mall or creation of any right in favour of anybody else concerning the land. So the question of interest in land touches the very root of the terms and conditions which may be affirmative or negative. Had it been a contract for any other purpose than that of a land the matter would have been otherwise. As the petitioner has not derived any interest by virtue of the MOAT he is not entitled to any order restraining the Opp. for any purpose concerning the land in question even though it may be in a negative form.

Hence, ordered :

ORDER

The I.A be and the same is hereby dismissed on contest against the O.P, under the circumstances without any cost.

**Civil Judge (Sr. Divn.)
Bhubaneswar.**

The order of the I.A is typed to my dictation by the Stenographer attached to this Court directly on the Computer provided under e-court project, corrected and pronounced by me in the open court today i.e. the 15th day of September, 2014 under my signature below.

**Civil Judge(Sr.Divn.)
Bhubaneswar.**