

OCD-5

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
[COMMERCIAL DIVISION]

IA NO. GA (COM) No. 1 of 2024

in

CS (COM) No. 1 of 2024

KONSORTIA PROJECT PRIVATE LIMITED

Vs.

MOHIT LAL SEAL & ORS.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Date: 04.01.2024

Appearance:

Mr. Krishnaraj Thakker, Adv.
Mr. Chayan Gupta, Adv.
Mr. Rittick Chowdhury, Adv.
Mr. Dwip Raj Basu, Adv.
...for the petitioner

Mr. Surojit Nath Mitra, Sr. Adv.
Mr. Sudarshan Roy, Adv.
Mr. Deep Narayan Mukherjee, Adv.
Mr. Debayan Ghosh, Adv.
...for the respondent nos. 1 to 9

Mr. Rahul Karmakar, Adv.
Abir Lal chakraborty, Adv.
Mr. S.K. Poddar, Adv.

...for the respondent nos. 10 and 11
Mr. Sabyasachi Chowdhury, Adv.
Mr. S. Mukhopadhyay, Adv.
Mr. Kallol Saha, Adv.
Ms. Anwasha Guha Roy, Adv.
...for the respondent no. 12.

ORDER

1. The petitioner has filed the present application being GA (Com) 1 of 2024 praying for ad interim injunction restraining the respondents from carrying out any construction at the premises No. 39, Bentinck Street, Kolkata – 700 069 and other reliefs.
2. The respondent nos. 1 to 9 are the owners of the premises No. 39, Bentinck Street, Municipal Ward No. 46, P.S. Hare Street, Kolkata – 700 069, out of which the respondent nos. 2 to 9 are the owners of the 2/3rd portion on the front side, admeasuring an area of approximately 13 cottahs, 9 chittacks and 20 sq.ft. and the respondent no. 1 is the owner of the balance area of 1/3rd portion on the rear side admeasuring approximately 6 cotthas 14 chittacks and 5 sq.ft. The total premises comprising an area of 20 cottahs, 07 chittacks and 25 sq.ft. and the said premises is called as Paradise Cinema as it is one of the oldest cinema theaters in Kolkata. The cinema theater stopped exhibiting cinematograph films for several years and the said premises were not being put in any use.

- 3.** On 11th October, 2012, the respondent nos. 1 and 2 to 9 have entered into two similar deeds of lease with the respondent no. 10 for a term of 30 years. The respondent no. 1 had informed the petitioner that for the last 4 years, the respondent no. 10 is not paying the rent and the respondent no.1 had negotiated with the respondent no. 10 to surrender the deeds of lease and to vacate the premises upon payment of Rs. 7,20,00,000/- out of which 1,37,00,000/- had already been paid. The respondent nos.1 to 9 have informed the petitioner that they were interested to develop the said property by constructing a modern office complex which could be let out for commercial purposes but they did not have requisite funds to pay the balance amount to the respondent no.10 to vacate the premises.
- 4.** On negotiation between the petitioner and the respondent nos. 1 to 9, the petitioner agreed to provide financial help to the respondent nos. 1 to 9 for a sum of Rs.7,20,00,000/- which the respondent nos. 1 to 9 will utilize the said amount to settle with the respondent no. 10. The respondent nos. 1 to 9 have agreed to appoint the petitioner as developer for construction of new building at the premises in which the respondents would be entitled to deal with an aggregate area of 22,300 sq.ft. built-up area along with proportionate area for car parking. The remaining built up/covered area along with car parking space would be allocated to the petitioner or its Assignees for a period of 199 years. It was also agreed that the respondent nos. 1 to 9 would appoint the petitioner as their constituted attorney for undertaking all the steps.

- 5.** The petitioner entered into two identical agreements with the respondent no.1 and respondent nos. 2 to 9 on 27th October, 2023 which were duly registered. The respondent nos. 1 and 2 to 9 have also executed Development Powers of Attorney on 27th October, 2023 in favour of the petitioner which were also duly registered. Pursuant to the agreement, the petitioner has paid an amount of Rs. 44,94,000/- to the respondent nos. 1 to 9 and Rs.10,00,000/- to the respondent no. 1, total amounting to Rs. 54,94,000/-. After from the said amount, the petitioner also sent an amount of Rs. 35,000/- per month being the monthly rent as per Article IV Clause 1(v) of the development agreement but the respondents refused to accept the same. In the month of December' 2023, the petitioner came to know that the cinema theatre constructed at the premises was being modified to convert the same into commercial building for sale of garments. The petitioner has approached the respondent nos. 1 to 9 and they informed the petitioner that they are aware of the same and have lodged a complaint with the authorities.
- 6.** The petitioners came to know that the premises was being converted into a retail clothing store under the name and style of "*M-Bazar*" in association with the respondent no. 12. The petitioner also came to know that the respondent nos. 10 and 11 have subleased the premises to the respondent no. 12 by a deed of sublease dated 10th November, 2023. The petitioner by a letter dated 19th December, 2023, requested the respondent nos. 1 to 9 to take necessary steps to stop illegal construction

at the premises. On receipt of the letter of the petitioner, the respondent nos. 1 to 9 has served the copies of caveat to the petitioner.

- 7.** The respondent nos. 10 to 12 have removed the furniture and fixtures of the cinema theatre including chairs which were affixed to the ground floor of the theatre and have also levelled the gradient at the ground floor of the cinema theatre and have concrete casted the basement underneath the screen in order to convert the ground floor of the cinema theatre into one level floor.
- 8.** The petitioner has filed supplementary affidavit in Court today by serving the copy of the same to the Counsel for the respondents wherein the petitioner has enclosed the paper publication as well as the photographs of the premises to show that the respondents are making construction over the premises.
- 9.** The petitioner came to know the respondent no. 1 has withdrawn the complaint made against the illegal construction over the premises in question which the respondent no. 1 has filed before the Authorities on 11th December, 2023.
- 10.** It is submitted that inspite of the obligation of vacating the premises by the respondent no. 10, the respondent nos. 1 to 9 have fraudulently in connivance with the respondent no. 10 actively assisted to enter into the Deed of Sublease with the respondent no. 12. Learned Counsel for the

petitioner submitted that the respondent nos. 1 to 9 have fraudulently permitted the respondent nos. 10 to 12 to change the nature and character of the premises by converting the cinema theatre situated at the premises into a commercial space under the name and style of "*M-Bazar*".

- 11.** Learned Counsel for the respondent nos. 1 to 9 had submitted that the petitioner has not stated anywhere in the application or in the plaint, how the defendants have breached that development agreement entered between the plaintiff and the defendant nos. 1 to 9. He submitted that the premises in question is debuttar property and before taking any step by the petitioner in terms of the development agreement, an order is to be obtained from this Court as well as permission is required to be taken from the concerned authorities.
- 12.** Learned Counsel for the respondent nos. 1 to 9 submitted that no document is placed by the petitioner on record to establish that the petitioner has paid the amount of Rs. 54,94,000/- as stated in the application.
- 13.** Learned Counsel for the respondent nos. 1 to 9 submitted that the complaint dated 11th December, 2023 alleged to have been submitted by the respondent no. 1 is a fabricated document as the respondent no. 1 has not submitted any complaint to any authorities with regard to the construction made by the respondent no. 12 and when the respondent no. 1 came to know about the alleged complaint, the respondent no. 1 has

withdrawn the said complaint from the concerned authorities and has filed caveat before this Court after serving copy to the plaintiff.

- 14.** Learned Counsel for the respondent nos. 1 to 9 submitted that the premises No. 39, Bentinck Street is known as Paradise Cinema but for the last several years, the said cinema theatre is closed as it is not possible to run the cinema theatre and as such the defendants are modifying the same with a small auditorium with a shopping complex in the downstairs without disturbing the building. He submits that the petitioner has not made out any case for grant of ad-interim injunction and the respondent nos. 1 to 9 may be given liberty to file affidavit-in-opposition to the injunction application.
- 15.** Learned Counsel for the respondent no. 12 submitted that unless and until the property is vacated, the petitioner cannot perform his part in terms of the development agreement. He submits that the property is a debuttar property and for construction of new building an order is required from this Court.
- 16.** Learned Counsel for the respondent no. 12 submitted that the suit filed by the petitioner itself is not maintainable as the petitioner has not prayed for any specific performance of contract. He submits that the respondent no. 10 is having valid lease deed uptill the year' 2042 and the respondent no. 12 has paid rent of the premises uptill date and no dues is pending.

- 17.** Learned Counsel for the respondent no. 12 submitted that as per Clause (g) of Article IV of the agreement, the petitioner is allowed to dismantle and demolish the existing structure, if any, at its own cost, risk and responsibility and for the same the petitioner has to take the possession of the property but till date the petitioner is not in possession of the property and the defendant no. 10 is having valid lease up till the year 2042 and is in occupation of the property and has paid all the dues to the respondents.
- 18.** Learned Counsel for the respondent no. 12 submitted that as per Section 41(e) of the Specific Relief Act, 1963, no injunction can be granted to the petitioner. He submits that the petitioner has not made out any prima facie case for grant of injunction and as such the respondent may be allowed to file an affidavit-in-opposition to the injunction application.
- 19.** Learned Counsel for the respondent nos. 10 and 11 has adopted the submissions made by the Counsel for the respondent nos. 1 to 9 and respondent no. 12. He submitted that the petitioner has no right to evict the respondent nos. 10 and 11 as the respondent nos. 10 and 11 are having valid contract to have possession of the property and have paid all the dues up till date.
- 20.** Heard the Learned Counsels for the respective parties, perused the application and the materials on record. It is admitted by the parties that the respondent nos. 1 and 2 to 9 have entered into two separate

development agreements with the petitioner on 27th October, 2023 which were duly registered. Prior to execution of development agreements between the petitioner and the respondent nos.1 and 2 to 9, the respondent nos. 1 and 2 to 9 have entered into two separate deeds of lease with the respondent no. 10 on 11th October, 2012 and both the deeds are registered deed and the period of lease is 30 years with effect from 11th October, 2012. As per Clause 3(c) of the lease deed dated 11th October, 2012 *“the Lessee has agreed to take the leased premises inter alia, for the purpose of distribution, exhibition and exploitation of feature films at the said premises”*.

- 21.** In paragraph 2(g) of Article-I of the development agreement dated 27th October, 2023 reads as follows : *“that the said property at present is being occupied by the Lessee Arun Mehra (HUF) and other occupiers under them, who have not been paying the lease rent for past 4 (four) years and shall be dealt with by the landlord with the help of the developer. If any monetary compensation is to be paid to the lessee and or the occupiers under the said defaulting lessee for vacating the leased out portion, the same shall be paid by the developer, but the same shall no exceed Rupees seven crore twenty lakhs only. The landlord has already paid Rupees one crore thirty seven lakhs to Arun Mehra (Huf) for vacating the premises and this amount shall be reimbursed by the developer to the landlord on getting vacant possession of the said premises.”*

- 22.** The respondent nos. 1 to 9 have also executed Power of Attorney in favour of the petitioner which is also registered. Clause 40 of the said Power of Attorney reads as follows : *“To use, occupy and possess the said property in a manner akin to that of a lessee under the principal, until such time as the required permissions of construction and development are granted and construction activities on the said property commence.”*
- 23.** In the development agreement, it is also mentioned that disputes and litigation, if any, of any nature arising out of and/or in respect of the said property, the same shall be resolved by the developer at its own cost and expenses. The respondents have also admitted that the respondent nos. 10 and 11 have executed a sublease deed in favour of the respondent no. 12 and as per the sublease deed, the respondent no. 12 is making construction/ alteration in the premises.
- 24.** In one hand, the respondent nos. 1 to 9 have executed a development agreement with the petitioner and have stated that the respondent no. 10 and other occupier under them are not paying the rent for the last 4 years and shall be dealt by the respondents nos. 1 to 9 with the help of the petitioner and the respondent nos. 1 to 9 have also paid an amount of Rs. 1,37,00,000/- to the respondent no. 10 out of the total amount of Rs.7,20,00,000/- for vacating the premises and the said amount shall be reimbursed by the petitioner to the respondent nos. 1 to 9 on getting the vacant possession of the land on the other hand now the respondents

have submitted that the respondent no. 10 has paid the total rent and all dues uptill date.

25. The respondent nos. 1 to 9 have entered into a development agreement with the petitioner and the petitioner has paid Rs.44,94,000/- to the respondent nos. 1 and 2 to 9 and Rs. 10,00,000/- to the respondent no. 1 total amounting to Rs. 54,94,000/- and even after receipt of the said amount, the respondent nos. 1 to 9 instead of taking any steps against the respondent nos. 10 and 11 have colluded with the respondent no. 12 and are supporting the respondent nos. 10 to 12 by allowing the respondent no. 12 to make addition and alteration in the premises.

26. In the case of **Ashok Kumar Jaiswal & Ors. -vs- Ashim Kumar Kar & Ors.** reported in **2014 SCC Online Cal 3497**, the Full Bench of this Court held that :

“73. ... it would be preposterous to say that only the owner can maintain a suit against the developer for enforcing his rights and not vice-versa. If the developer has a right under the contract he must be having a remedy in the form of approaching a forum for appropriate redressal. ... A question of maintainability of a suit is completely different from the question of whether the suit will succeed or not on the facts of the case and in the light of the applicable law. Section 14(3)(c) of the Act can in no manner be interpreted as debarring a developer from approaching the legal forum for redressal of his grievance.”

27. The supplementary affidavit filed by the petitioner also proves that the respondent no. 12 making construction over the suit property for

establishing of new business. The respondent nos. 10 and 11 have entered into a sub-lease deed agreement with the respondent no. 12 after execution of development agreement between the petitioner and the respondent nos. 1 to 9 as well as after the Power of Attorney executed by the respondents nos. 1 to 9 in favour of the petitioner and now the respondent nos. 1 to 9 are supporting the respondent nos. 10 to 12 which prima facie established that the respondent nos. 1 to 9 are in hand in glove with the respondent nos. 10 to 12 to deprive the right of the petitioner over the property.

- 28.** This Court finds that the petitioner has made out a prima facie case and balance of convenience and inconvenience in its favour. If at this stage, an ad-interim order is not passed, the petitioner will suffer irreparable loss and injury which will not be compensated later on. In view of the above, the respondents, their men, agents and servants are restrained for making any construction over the Premises No. 39, Bentinck Street, Municipal Ward No. 46, P.S. Hare Street, Kolkata -700 069 till 7th February, 2024.
- 29.** Let affidavit-in-opposition be filed within two weeks, reply, if any, be filed within a week thereafter. List the matter on 7th February, 2024.

(Krishna Rao, J.)

p.d/-