

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

CS 27 of 2011

Utsav Projects Private Limited & Anr.

Versus

Wadhawan Retail Private Limited

Mr. Rupak Ghosh

Ms. Nilanjana Adhya

Mr. Debdut Mukherjee

Mr. Tapan Sil

... for the plaintiffs.

Hearing Concluded On : 27.09.2023

Judgment on : 11.10.2023

Krishna Rao, J.:

1. The plaintiffs have filed the instant suit against the defendant for a decree of Rs. 3,01,83,003/- with an interest and for declaration that the letter of termination dated 29th October, 2009, is null and void and illegal.

2. The plaintiff nos. 1 and 2 are the owners of the ground and the first floor premises situated at 193, N.S.C Bose Road, Kolkata – 700 040.
3. The defendant is a company, registered under the provisions of the Companies Act, 1956, which runs its retail business. The defendant was formerly known as Wadhawan Food Retail Private Limited.

CASE OF THE PLAINTIFF

4. Sometime in or around March, 2018, the defendant had approached the plaintiffs for taking on lease the ground floor and first floor space situated at premises No.193, N.S.C. Bose Road, Kolkata – 700 040.
5. After negotiations between the plaintiffs and the defendant, the plaintiff no. 1 and plaintiff no. 2 have entered into two separate lease deeds on 1st April, 2008 with respect of 5040 sq.ft (each) approximately on the ground floor and first floor on a monthly rent of Rs. 17.00 per sq. ft. each per month for a minimum period of 108 months with the provision that the lessor and lessee shall not terminate the lease agreement at any time within first 36 months and further conditions.
6. The plaintiff no.1 and plaintiff no. 2 have entered into another separate amenities agreement with the defendant on 1st April, 2008 wherein the plaintiffs being owners of the premises have agreed to provide various amenities as mentioned in the agreement at a monthly compensation of Rs. 50 sq. ft. and other charges including electricity, maintenance and water tax with service tax.

- 7.** In the said agreement, it is mentioned that first 45 days will be rent free (fitment period) for which there will be no claim and demand of any rent. The lessee shall be liable to pay rent on and from 16th May, 2008. The lessee shall deposit interest free security deposit a lumpsum of Rs. 5,14,080/- equivalent to 6 (Six) months rent. The parties have agreed that the deeds shall not be terminated for entire term of 36 months which shall be the Lock-in-period.
- 8.** The defendant had breached the terms and conditions of lease agreements and the amenities agreements by delaying in making payment of the lease rent and amenities charges for the period 16th May, 2008 till 15th September, 2008 inspite of receipt of necessary bills.
- 9.** The defendant paid lease rent and amenities charges for the period 16th May, 2008 to 15th June, 2008, at a belated stage on 11th August, 2008 on the ground of financial constraints and with regard to the monthly rent and amenities charges for the period 16th August, 2008 to 15th September, 2008, the defendant had paid such charges after much delay on 6th February, 2009.
- 10.** By a letter dated 8th May, 2008 the defendant in breach of the terms and conditions of the agreement, in particular, the lock-in period of 36 months intended to surrender the first floor of the demised premises with effect from 5th May, 2009 on the ground of financial shortfall and the plaintiffs were requested to take back peaceful and vacant possession of the first floor with effect from 14th May, 2009.

- 11.** In reply to the letter dated 8th May, 2009, the plaintiffs denied to accept such request made by the defendant and refused to take back the possession of the premises and sent a letter to the defendant mentioning about the same on 20th May, 2009 and requested the defendant to clear all outstanding dues together with an interest at the rate of 24% per annum.
- 12.** By a letter dated 29th October, 2009, the defendant through its advocate had purported to terminate the agreements for alleged breach of the contract for not allowing the defendant to conduct business/commercial operation and has purported to make wrongful claims against the plaintiff.
- 13.** The plaintiffs replied to the said letter dated 29th October, 2009, by its letter dated 30th November, 2009, wherein the plaintiffs had denied all the allegations made by the defendant and also intimated the defendant regarding proceedings instituted by the plaintiffs in the High Court of Judicature at Bombay.
- 14.** The plaintiffs on or about February, 2010, for realization of their claims against the defendant instituted proceedings for winding up of the defendant company in the High Court of Judicature at Bombay which was numbered as C.P. No. 101 of 2010.
- 15.** In pursuance of the said winding up proceedings which was instituted by the plaintiffs, by orders dated 28th June, 2010 and 4th August, 2010 the High Court of Judicature at Bombay directed the defendant to

remove its furniture, fixtures and other belongings from the demised premises and hand over vacant and peaceful possession to the plaintiffs under the supervision of a Commissioner appointed by the Hon'ble Court.

16. In obedience to the orders by the Hon'ble High Court of Judicature at Bombay, the defendant vacated the premises on 21st August, 2010 and the winding-up petition was disposed of by an order dated 17th September, 2010 directing the defendant to deposit a sum of Rs. 85,00,000/- with the Prothonotary and Senior Master of the Bombay High Court with further directions on the plaintiffs to file a suit before this Hon'ble Court as regards to the subject matter of the petition within a period of four weeks from receipt of written communication regarding deposit of such amount. The defendant pursuant to the said order duly deposited a sum of Rs. 85,00,000/- with the Prothonotary and Senior Master of the Bombay High Court with further on 11th January, 2011.

17. The amount deposited by the defendant in compliance of the order passed by the Hon'ble High Court of Judicature at Bombay, the said amount was transferred to this Court and the said amount is lying in the office of the Registrar, Original Side of this Court.

CASE OF THE DEFENDANT

18. The defendant had entered appearance in the suit and had filed Written Statement. The defendant has admitted with regard to the

agreements entered between the parties and made out the following case in the Written Statement :

- a.** The defendant prior to April' 2008 was interested in setting up more stores at various places with the objective of serving general public with quality products. Pursuant to which, in Kolkata, the defendant had identified the area in and around N.S.C. Boad Road to set up a store and was in search for a premises which would amount to an area of around or in excess of approx. 10,000 sq. ft.
- b.** Pursuant to negotiation and discussion between the parties the defendant and the plaintiff nos. 1 and 2 entered into the agreements as mentioned aforesaid.
- c.** The defendant deposited an aggregated sum of Rs. 40,52,160/- as security deposit with the plaintiff nos. 1 and 2. Out of the sum of Rs. 40,52,160/-, a sum of Rs. 20,26,080/- was deposited with plaintiff no. 1, Rs. 20,26,080/- deposited with the plaintiff no. 2 in terms of the agreement.
- d.** The defendant was also paying rent aggregating to sum of Rs. 6,75,360/- comprising of Rs. 3,37,680/- paid to plaintiff no.1 and similarly Rs. 3,37,680/- paid to plaintiff no. 2 on and from 16th May, 2008 to 15th September, 2008.
- e.** The defendant after taking over the possession of the said premises, interms of the lease agreement and also for carrying on its business spent a sum of Rs. 47,87,000/- for the purpose

of interior works of the said premises by installing furniture, fixtures and fittings.

f. By its letter dated 22nd May, 2008, the defendant had informed the plaintiff nos. 1 and 2 that due to some unavoidable circumstances, they were unable to take and use the possession of the first floor of the said premises.

g. In terms of the lease agreements, the plaintiff nos.1 and 2 were to obtain commercial sanction from the concerned authority for carrying on business from the said premises prior to the expiry of the rent free period i.e. 45 days after execution of the lease agreements. However, in spite of expiry of the rent free period and couple of months thereafter, the plaintiff nos. 1 and 2 have failed to provide the defendant commercial sanction in the said premises. By reason of such breach on the part of the plaintiff nos. 1 and 2, the defendant was unable to commence its business operations by opening a store in the said rented premises.

h. The plaintiffs thereafter insisted the defendant to pay rent for the months prior to obtaining commercial sanction and the plaintiffs stated that the same can only be adjusted towards the future rent after obtaining the commercial sanction, to which the defendant having seen no other way, agreed and paid the rent. The commercial sanction thereafter was obtained on 27th October, 2007.

i. Sometime in the month of September, 2008 in connection with refurbishing of the said premises, the defendant had arranged for a survey of the entire premises, wherein the defendant found out that the premises was only measuring an area of about 9040 sq.ft. which was much less than the representation of the plaintiff nos. 1 and 2 that the premises was of 10,080 sq. ft. of carpet area. After the defendant communicated about the misrepresentation done by the plaintiff nos. 1 and 2 to Mr. Pawan Kajaria, who was one of the owners of the said premises, Mr. Kajaria had assured the defendant that as compensation, an amount would be adjusted from the rent paid from 16th May, 2008 to 15th September, 2008, by the defendant. The plaintiff nos. 1 and 2 had failed to adjust such amount and therefore the defendant was unable to make payment of the rent on 16th September, 2008.

j. Due to substantial changes in the economic situation of the country, and global recession having struck the economic condition of the country resulting in decrease in demand of goods and services and increase in costs, the performance of the lease agreements and the amenities agreements for all practical purposes stood frustrated, which was duly informed by the defendant to the plaintiff nos. 1 and 2 by a letter dated 8th May, 2009.

k. Upon receipt of the said letter dated 8th May, 2009, Mr. Pawan Kajaria of the Plaintiff Nos. 1 and 2, contacted the

defendant and said that a meeting will be fixed up soon to discuss modality to modify the lease deed and the amenities agreements by accepting the possession of the first floor and also resolving the pending issues of reduction of the amount of compensation to be paid to the defendant in view of the shortfall of the area.

I. During the pendency of the above mentioned discussion between the defendant and the plaintiffs, sometime on 22nd May, 2009, the Store Representative of the defendant was shocked to find out that without any prior intimation, the representative of the plaintiff nos. 1 and 2 put the additional lock over and above the lock put on the door of the said premises and thereby prevented the defendant or its representatives to enter the said premises to conduct any business operations. However, the same premises continued to be locked for over five months, even after the defendant tried to contact the plaintiffs for unlocking of the said premises.

m. The plaintiff nos.1 and 2 prevented the defendant from performing its obligation to pay any rent in respect thereof for the purpose of business, neither the defendant was allowed to enter the said premises. Being aggrieved by the acts done by the plaintiff nos. 1 and 2, on or about 29th October, 2009, the defendant constrained to issues a letter to terminate the lease agreements and the amenities agreements.

n. Then defendant had also initiated a case against the plaintiffs being C.S No. 300 of 2012 but the defendant has not proceeded with the same, accordingly, by an order dated 20th July, 2023, the suit was dismissed for default.

ISSUES:

19. Learned Counsel appearing on behalf of the parties have exchanged their suggested issues. On the basis of the pleadings and the suggested issues, the following issues are framed :

“(i) Is the suit maintainable in its present form according to law?”

“(ii) Was there a lock-in- period of 36 months commencing from 1st April, 2008 to 31st March, 2011?”

“(iii) Was there any breach in respect of the agreements?”

“(iv) Was the defendant prevented by the acts and conduct of the plaintiffs from using the premises in question for the purpose for which the lease had been obtained?”

“(v) Was the defendant prevented by the plaintiffs from having any access to the premises in question on and after May 22, 2009 by reason of the plaintiffs having wrongfully and illegally obtained possession on May 22, 2009 and in continuing in possession of the said premises by the plaintiffs after such date, wrongfully and illegally?”

“(vi) Are the plaintiffs entitled to get decree as prayed for in the plaint?”

“(vii) To what relief or reliefs, if any, the plaintiffs are entitled to?”

EVIDENCE OF PLAINTIFFS:

20. Thereafter the plaintiffs have examined one witness namely Mr. Harsh Vardhan Kajaria and a total number of '22' Exhibits were exhibited , marked as 'Exhibit-A to Exhibit-V'.

(i) Exhibit-A; A1 and A2 : A copy of a term sheet executed between Utsav Projects Pvt. Ltd., Millennium Projects Pvt. Ltd. and Wadhawan Food Retail Pvt. Ltd., and signatures of Mr. Pawan Kumar Kajaria and Debyeet Kar.

(ii) Exhibit-B; B1 and B2: Amenities Agreement executed between Utsav Projects Pvt. Ltd. and Wadhawan Food Retail Pvt. Ltd., and signatures of Mr. Pawan Kumar Kajaria and Debyeet Kar.

(iii) Exhibit-C: Amenities Agreement executed between Millennium Projects Pvt. Ltd. and Wadhawan Food Retail Pvt. Ltd.

(iv) Exhibit-D: An unregistered Lease Deed document exhibited between both the parties.

(v) Exhibit-E; E1 and E2: A copy of a letter dated 7th June, 2008, written by Pawan Kumar Kajaria for Millennium Projects Pvt. Ltd. and Utsav Projects Pvt. Ltd., in reply to a Letter dated 22nd May, 2008 which was sent by Wadhawan Food Retail Pvt. Ltd., along with postal registration slip and the acknowledge card.

(vi) Exhibit-F: A copy of a letter sent by Wadhawan Retail Private Limited, wherein they intimated the plaintiffs regarding to their surrender of the first floor of the property.

(vii) Exhibit-G: A letter dated 20th May, 2009, which was written by Millennium Project and Utsav Project to the Director of Wadhawan Retail Private Limited, reminding them to clear their dues and informing them to surrender tenancy is not possible as the entire area leased out in this particular deed cannot be segregated and they had a lock-in period of 36 months.

(viii) Exhibit-H: Letter dated 25th/27th August, 2009, which was written to Wadhawan Food Retail (P) Ltd., sent by the Solicitor of the plaintiffs Mr. R.L. Gaggar.

(ix) Exhibit-I: A copy of a letter dated 29th October, 2009, which was a reply to the letter dated 25th August/27th August, 2009, sent by the Advocates and Solicitors Hirani & Co., of Wadhawan Food Retail (P) Ltd.

(x) Exhibit-J: A copy of an order dated 17th September, 2010, by the Bombay High Court, wherein a Sheriff was appointed and the possession was given back to the plaintiffs.

(xi) Exhibit-K: A Letter dated 30th November, 2009, issued to Hirani & Co. and their client Wadhawan Retail Private Limited, by the plaintiffs.

(xii) Exhibit-L: A copy of statements of accounts prepared by Millennium Projects Pvt. Ltd. and Utsav Projects Pvt. Ltd. for the

dues receivable from Wadhawan Retail Private Limited, upto 07.02.2011.

(xiii) Exhibit-M: Letter issued by Millennium Projects Private Limited and Utsav Projects Private Limited, reminding the defendant to pay the deposit amount of Rs. 40,52,160/- which they were supposed to pay immediately after execution of Lease Agreement, but it was delayed. Along with the letter there are enclosed monthly rent bills and amenities bills of the said premises.

(xiv) Exhibit-N: A letter dated 20th June, 2008, issued by Millennium Projects Private Limited and Utsav Project Private Limited, to the defendant reminding them to clear the interest free Security Deposit of Rs. 40,52,160/- and also clear lease rent and amenities charges for 16.05.2008 to 15.06.2008

(xv) Exhibit-O: A letter dated 17th July, 2008, issued by Millennium Projects Private Limited and Utsav Project Private Limited, to the defendant reminding them to pay their dues and amenity charges for the period from 16.05.2008 to 15.07.2008.

(xvi) Exhibit-P: A bunch of documents dated 15th December, 2016, exhibited collectively, which were letters and invoices raised by the plaintiffs, and duly sent to the defendant to discharge their liabilities.

(xvii) Exhibit-Q: A bunch of documents dated 15th December, 2016, exhibited collectively, which were letters and invoices

raised by the plaintiffs, and duly sent to the defendant, along with postal receipts of few documents.

(xviii) Exhibit-R: Letters exhibited collectively which were sent to Wadhawan Retail Private Limited to clear their outstanding lease rent and amenity charges, along with acknowledgment card which shows that the defendant had received the letters.

(xix) Exhibit-S: Invoices exhibited collectively, which were sent to the defendant by the plaintiffs with acknowledgment due card.

(xx) Exhibit-T: TDS Certificates issued by the defendant against lease rent for the invoices which were raised by us.

(xxi) Exhibit-U: Money receipts issued by the plaintiffs for the lease rent and amenities charges for the period from 16.08.2008 to 15.09.2008 for the lease rent and amenities charges as the payment was received on 10.02.2009.

(xxii) Exhibit-V: A copy of the report dated 20.08.2010, given by the officer appointed by the Hight Court at Bombay to give the possession of the property to the plaintiffs.

DECISION WITH REASONS.

21. The defendant has filed written statement but has not fully cross examined the plaintiff's witness no.1 and thereafter the defendant has not appeared in the suit and had also not adduced any witness in support of his defence. Thus, all the issues are taken up together for consideration.

- 22.** After filing of the suit, the record was placed before this Court on 10.2.2011 and this Court has granted leave to the plaintiff under Clause 12 of the Letters Patent and plaint was admitted. The plaintiff has paid requisite Court fees.
- 23.** By an e-mail dated 19th June, 2023, the plaintiffs have informed the defendant that the plaintiffs will mention the matter before this Court on 22.06.2023 for listing the suit for hearing but inspite of receipt of the e-mail none appears on behalf of the defendant. After mentioning the matter on 22.06.2023, this Court had fixed the matter on 26th June, 2023 and the said date was also informed to the defendant by an email dated 23.06.2023. On 26th June, 2023, none appears on behalf of the defendant and this Court has fixed the matter on 19th July, 2023 for further cross-examination of the plaintiff's witness no. 1. The plaintiffs were directed to inform the next date to the defendant and to file affidavit of service. On 20th July, 2023, the matter was taken up for hearing but none appeared on behalf of the defendant and the plaintiff has filed affidavit of service. As none appeared on behalf of the defendant to cross-examine the plaintiff's witness no. 1 and the cross-examination of the plaintiff witness was closed and the suit filed by the defendant was dismissed for default.
- 24.** During argument, this Court found that the suit filed by the plaintiff is commercial in nature and the suit was filed prior to commencement of The Commercial Courts Act, 2015, this Court had transferred the suit from the Original Division to Commercial Division and directed then

plaintiff to take appropriate steps in terms of The Commercial Courts Act, 2015. Even after transfer of the case to this Court, the plaintiff while complying with the provisions of The Commercial Courts Act, 2015, the plaintiffs have sent another notice to the defendant but none appeared on behalf of the defendant.

- 25.** On 14th January, 2020, the cross-examination of the plaintiff's witness was concluded but thereafter the defendant has not come forward to cross examine the plaintiff witness further.
- 26.** It is admitted with respect of the terms and conditions of Exhibit A and Exhibit B. On completion of rent free period of 45 days, the defendant is liable to pay monthly rent and other charges with effect from 16th May, 2008. It is also admitted that the defendant has taken possession of the tenanted premises. Monthly rent as well as the amenities charges of the premises for the period from 16.05.2008 to 15.06.2008 was paid belatedly by the defendant only on 11.08.2008. The defendant has paid the monthly rent and other amenities charges of the premises to the plaintiff till 15th September, 2008 and thereafter the defendant has not paid either the monthly rent or the amenities charges to the plaintiffs as agreed by the defendant.
- 27.** By a letter dated 8th May, 2009, the defendant expressed its intension to surrender the first floor of the suit premises with effect from 5th May, 2009 but the plaintiff has rejected the request and called upon the defendant to pay all the arrears along with interest at the rate of 24 %

per annum. As per Exhibit A, Clause 2 (ii) “Lessor and lessee shall not terminate the Lease Agreement at any time within the first 36 months.” In spite of the said clause, the defendant by a letter dated 29th October, 2009 (Exhibit I) has terminated the agreement. The defendant had the knowledge that there is lock-in-period of 36 months but without waiting the lock-in period, has terminated the tenancy by a letter dated 29th October, 2009. The lock-in period is admitted by the defendant in paragraph 9(d) of the written statement.

- 28.** The defendant has alleged that the defendant has taken the premises for commercial purpose and the plaintiff had to obtain commercial sanction within the free rent period of 45 days but the plaintiff has not obtained commercial sanction prior to expiry of rent free period. The defendant in his written statement in paragraph 14 stated that the plaintiff has obtained Commercial Sanction on 27th October, 2007, and in contrary, the defendant has not adduced any evidence that there was any delay for commercial sanction due to which the defendant was not able to establish its business.
- 29.** The defendant has also taken the stand that after conducting survey of the premises it was found that the premises having only 9040 sq.ft instead of 10,080 sq.ft. carpet area but in paragraph 12 of the written statement, the defendant has stated that due to some unavoidable circumstances, the defendant unable to take possession of the first floor. The defendant has also not adduced any evidence to prove that the defendant had got the premises surveyed and found less area.

- 30.** The defendant has alleged that on 22nd May, 2009, the store representative of the defendant was shocked to find out that without prior intimation or agreement, the representative of the plaintiffs have put the additional lock above the lock put on the door of the premises and the plaintiffs refused to unlock the same due to which the defendant was prevented to access the premises. Other than the averments in the written statement, the defendant has not proved the said allegation of putting lock by the plaintiff. As per the order passed by the Hon'ble High Court of Judicature at Bombay, the defendant has removed all his belongings in presence of the Learned Commissioners appointed by the Hon'ble Bombay High Court.
- 31.** As per agreements entered between the parties, the defendant has taken the possession of the premises for establishing his business and has also taken possession of the said premises and had paid monthly rent and amenities charges till 15th September, 2008 and thereafter, the defendant has not paid the monthly charges and amenities charges. As per Exhibits M, N, O, P, Q, R and S the balance rent as per two lease deeds dated 1st April 2008 for 30.5 months with effect from 16th September, 2008 till 31st March, 2011 is Rs. 52,26,480/-, balance amenities in terms of the amenities agreements dated 1st April 2008 from 16th September, 2008 to 31st March, 2011 is Rs. 1,53,72,000/-, Maintenance Charges at the rate of Rs. 1.00 per sq.ft is Rs. 3,47,760/- and Service Tax Rs. 22,40,937/-.

32. In view of the above, the plaintiff is entitled to get decree. The defendant is directed to pay Rs. 2,31,87,177/- being the balance lease rent, amenities charges, maintenance charges and service tax to the plaintiff with interest at the rate of 15% per annum from 16th September, 2011 till the realisation of the amount.

33. C.S No. 27 of 2011 is thus **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)