
(1923) 05 CAL CK 0045
In the Calcutta High Court

J.C. Galstaun

APPELLANT

Vs

E.D. Sassoon and Co., Ltd.

RESPONDENT

Date of Decision : 16-05-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6

Citation : AIR 1924 Cal 190

Judgement

1. This is an appeal from a judgment on admission pronounced by Mr. Justice Greaves under Order 12, Rule 6 of the Code of Civil Procedure, 1908.

2. The suit was instituted on the 7th May 1921 by E.D. Sassoon & Co. against Ebrahim Soleman Saleji & Co. and J.C. Galstaun for recovery of money. The claim, so far as Galstaun was concerned, was based on the following letter of guarantee written by him to the Plaintiffs on the 6th January 1921:

In consideration of your advancing to Ebrahim Soleman Saleji & Co. of No. 1, Amratolla Lane in Calcutta at my request the sum of Rs. 5,00,000 as a loan bearing interest at nine percent, per annum I, the undersigned John Carapiet Galstaun, hereby agree with you as follows:

1. To make good any default on the part of the said Ebrahim Soleman Saleji & Co. or their successors in interest, in the payment of the said loan and all interest due thereon.

2. You are to be at liberty without discharging me from liability here-under to grant time or other indulgence to the said Ebrahim Soleman Saleji & Co. and to treat them in all respects as though I was jointly liable with them as a debtor to you instead of being a surety for them and in order to give full effect to the provisions of this guarantee I hereby waive all surety ship and other rights inconsistent with such provisions which I otherwise might be entitled to claim and enforce.

3. This guarantee shall not be revocable by notice or by reason of my death, but it shall remain in full force until the said sum of Rs. 5,00,000 with interest is

repaid to you or until such time as the proposed mortgage for Rs. 10,00,000 secured on certain properties of the said Ebrahim Soleman Saleji & Co. shall be completed.

4. This guarantee shall be enforceable against me notwithstanding the fact that any other securities may be held by you against this loan at the time of any proceedings being taken against me on this guarantee.

3. There was an arrangement whereby the Plaintiffs were to advance to the first Defendant a loan of Rs. 10,00,000 secured on certain properties. The execution of the mortgage, after investigation of title, would of course occupy a certain amount of time, but apparently the first Defendant was very anxious to obtain some money as soon as possible, and accordingly before the mortgage was executed or the title investigated, the Plaintiff advanced to the first Defendant the sum of Rs. 5,00,000 in consideration of tins being guaranteed by the second Defendant as in fact it was by the letter of the 6th January 1921. The mortgage was never executed and accordingly this suit was commenced.

4. The written statement of the first Defendant was filed on the 23rd August 1921. This was followed by the written statement of the second Defendant on the 21st December 1921. The present application for judgment under Order 12, Rule 6 was made on the 23rd February 1923. The Plaintiffs rely upon admissions contained in three documents. The first is a letter written on the 26th February 1922 by Galstaun to the Plaintiffs; the second is another letter addressed by Galstaun to the Plaintiffs on the 15th August 1922; the third is a deposition intermediate in date, namely, a statement made by Galstaun in the course of an examination u/s 36 of the Presidency Towns Insolvency Act on the 19th May 1922 in the matter of the insolvency of the first Defendant. Mr. Justice Greaves has come to the conclusion that there is no such admission in either of the two letters as would justify a judgment under Order 12, Rule 6. He has held, however, that the deposition of Galstaun contained an admission which afforded foundation for such a judgment.

5. As regards the letters, we agree with Mr. Justice Greaves that they do not contain such admission as would justify a judgment under Order 12, Rule 6. In the first letter, Galstaun applied to the Plaintiffs for a loan and stated that if the loan were sanctioned, he would allow the Plaintiffs to deduct Rs. 5,00,000 on account of Saleji. In the second letter, Galstaun applied to the Plaintiffs for another loan and stated that if the loan were arranged, the Plaintiff could deduct Rs. 5,00,000 advanced by them to Saleji. Mr. Justice Greaves has held that neither of these constitutes an unqualified admission of the type contemplated by the rule. We hold with him that they merely amount to this that if the Plaintiffs agreed to make the requisite advance, he was prepared to allow Rs. 5,00,000 to be deducted from the loan, on Saleji's account.

6. We have next to consider the third admission made on the 19th May, 1922, In the course of his examination Galstaun was asked with regard to the title deeds

which had been handed over to him.

Q.--How came these to be in your possession?

A.--All these documents were with Morgan & Co. Mr. Thornton Jones of Morgan & Co. had them.

Q.--How did they get them?

A.--Kassuni Ebrahim Saleji deposited the letters of administration with me and promised to make over the title deeds of the property to Morgan & Co.

Q.--Who told you that?

A.--Kassim and Hashim. They wanted a loan of five lacs urgently and they deposited the title deeds of these properties.

* * * *

7. They took the five lacs from E.D. Sassoon & Co. on my guarantee, Kassim deposited the letters of administration and undertook to deposit with Messrs, Morgan & Co. the title deeds of his properties as security.

* * * * 8. The loan of ten lacs was never put through; out of five lacs four and a half lacs was paid to him and the insolvent got Rs. 50,000.

Q.--Did you advance any money?

A.--No, Sassoons advanced the money.

Q.--You were not lending the money?

A.--No, but I was guaranteeing the money.

Q.--Up to now you have had nothing to pay as guarantor?

A.--But I shall have to pay.

9. This last statement, it was urged before Mr. Justice Greaves, constituted an unqualified admission that he was liable to pay five lacs to the Plaintiffs. After a careful consideration of the deposition taken as a whole, we have come to the conclusion that it does not contain an admission of the requisite description.

10. The written statement of Galstaun makes it abundantly clear that he had in substance taken a two fold defence, namely, first, that the conduct of the Plaintiffs had been such as to absolve him from liability under the guarantee, and secondly, that the suit was premature. We are not prepared to construe his statement in the deposition to imply that he had abandoned these defences in their entirety.

11. This case is in some respects similar to that of Koramall v. Mongilal (1919) 23 C.W.N. 1017, where reference was made to the observation of Lopes, L.J., in Landergan v. Feast (1886) 34 W.R. 691; "There must be a clear admission that

the money is due and recoverable in the action in which the admission is made. There is no such admission here. The Defendant's statement that the action is premature may be untrue, but we cannot go into that." Lindley, L.J. said : The first thing necessary is an admission that the sum is due and recoverable in the action, and I can find no such admission here. The affidavit gives the Defendant's view that the action was brought too soon." To the same effect are the observations of Fry, L.J., in *Hughes v. London, Edinburgh and Glasgow Assurance Co. Ltd.* (1891) 8 T.L.R. 81, that he held a strong view that final judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal. The observations of Sargant, J. in *Ellis v. Allen* (1914) 1 Ch.D. 904 may also be usefully recalled,-

The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. This applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed." We must further remember that the power of the Court is discretionary and that its exercise cannot be claimed as a matter of right, *Premasuk Das v. Udairam* (1917) 45 Cal. 138, *Mellor v. Sidebottom* (1877) 5 Ch.D. 342, *In re Wright*, *Kirki v. North* (1895) 2 Ch.D. 747 and *Gilbert v. Smith* (1876) 2 Ch.D. 688. We are of opinion that the present case is not one in which judgment on admission should have been pronounced.

12. The result is that this appeal is allowed, and the order of Mr. Justice Greaves discharged. The Appellant is entitled to his costs both here and in the Court below.