
(2016) 11 CAL CK 0032
In the Calcutta High Court

Case No : GA NO.93 of 2016, APOT NO. 14 of 2016 and CS No.386 of 2014

Martin Burn Information Technology

APPELLANT

Vs

Dipankar Banerjee

RESPONDENT

Date of Decision : 25-11-2016

Acts Referred:

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

Citation : (2017) 1 ICC 171

Hon'ble Judges : Girish Chandra Gupta, CJ. and Arindam Sinha, J.

Bench : Division Bench

Advocate : Mr. Jayanta Mitra, Sr. Advocate, Mr. Sakya Sen, Advocates, for the Appellant; Mr. S.K. Kapoor, Mr. Amitesh Banerjee, Sr. Advocate with Mr. Suman Dutta, Mr. A.P. Agarwal and Mr. Biswanath Chatterjee, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Girish Chandra Gupta, C.J.—The appeal is directed against a judgement and order dated 18th November, 2015 by which the learned Trial Court directed the defendant to execute a deed of conveyance in favour of the plaintiff within a period of two weeks upon payment of the balance consideration amounting to a sum of Rs.14,65,840/- and in default to refund the entire consideration money. This was an order passed in an application for judgement upon admission. The suit was filed claiming a decree for a sum of Rs.2,25,05,383/- together with interest pendente lite and further interest at the rate of 18% per annum, costs and other reliefs. The case of the plaintiff briefly stated is as follows :-

The State of West Bengal granted a lease to Weighmatic India Private Limited hereinafter referred to as the lessee. The lessee entrusted the construction work with the defendant. After the construction was completed, permission was granted by the lessor to the lessee to demise a portion of the building by way of sub-lease in favour of the defendant. The defendant in its turn by a Letter of Allotment dated 19th September, 2013 allotted to the plaintiff Office Unit Nos.5

and 6 on the 8th Floor at Martin Burn Business Park, Plot No.BP-3, Salt Lake, Sector-V, measuring 2091 sq. ft. and 1466 sq. ft. respectively at a total consideration of a sum of Rs.2,09,65,845/-. Subsequent thereto sometime in June, 2014 the agreed consideration was enhanced to a sum of Rs.2,22,31,691/-. The plaintiff paid a sum of Rs.1,95,00,000/- in three instalments. The first instalment of a sum of Rs.15 lacs was paid on 19th September, 2013. The second instalment of a sum of Rs.80 lacs was paid on 23rd October, 2013 and the third instalment of a sum of Rs.1 crore was paid on 24th February, 2014.

On or about 21st April, 2014, a draft agreement for sub-lease was submitted by the defendant to the plaintiff from which it transpired that (a) there was no sub-lease in favour of the defendant; (b) there was no demarcation of the area in respect whereof the defendant could exercise its right; (c) the area allotted to the plaintiff could only be used for the purpose of IT Park; and (d) the defendant had already mortgaged the area intended to be conveyed to the plaintiff with the Federal Bank Ltd.

The defendant also insisted upon payment on account of fees for obtaining permission of the State of west Bengal for transfer of the area allotted to the plaintiff including costs, charges and expenses for obtaining such permission. The plaintiff in the circumstances contended that the defendant had no transferrable right or title in respect of the two office units purportedly allotted to the former. The defendant was, as such liable to refund the sum of Rs.1,95,00,000/- together with interest at the rate of 18% per annum.

2. The defendant filed a written statement alleging, inter alia that the State of West Bengal by its letter dated 9th June, 2011 granted permission to the lessee to create a sub-lease of 243831 sq. ft. of the demarcated portion together with proportionate share in the plot of land and on that basis the defendant was entitled to transfer the same to third parties. The case of the defendant, in that regard is as follows :-

"The defendant can induct any third party in the said allocated and demarcated portion by way of sub-lease deed wherein the Weighmatic India Private Limited would be the sub-lessor, the said third party would be the sub-lessee and the defendant would be the developer. Permission with regard thereto has already been obtained by the said sub-lessor from the necessary department. Further permission was required to be obtained from the Government of West Bengal, Urban Development Department against payment of prescribed fee for transfer of the said office space to the plaintiffs."

3. From the aforesaid narration of the case of the respective parties the following facts appear to have been admitted by the defendant :-

(A) by the letter dated 9th June, 2011 permission was granted to the lessee "to sub-lease 243831 sq. ft. (57.7%) of built up space out of a total of 422584 sq. ft. of built up space"..... subject to execution of a Deed of Assignment of Lease

in conformity with terms and conditions of the original Lease Deed."

(B) The area allotted to the plaintiff can only be used for the purpose of IT Park which was never disclosed to the plaintiff.

(C) The Deed of Assignment of lease has not been executed in favour of the defendant which is or may be the reason why further permission of the State is required.

(D) The defendant has created a mortgage in respect of a portion of the building, including the office space allotted to the plaintiff, in favour of the Federal Bank Ltd.

(E) The defendant insisted upon payment of permission fee and other expenses besides the agreed consideration money.

4. The defendant in its written statement has made a counter-claim which reads as follows :-

"(a) Decree for specific performance of the agreement by and between the parties herein entered on 19th September, 2013 as pleaded herein above.

(b) Alternatively the defendant claims a decree for a sum of Rs.52,28,000/- as damage."

5. The learned Trial Court granted an opportunity to the defendant by the impugned order dated 18th November, 2015 to execute a deed of conveyance upon payment by the plaintiff of a sum of Rs.14,65,840/- together with the amount of stamp duty and registration fees within a period of two weeks and in default to refund the entire consideration money.

6. By a letter dated 23rd November, 2015 addressed by the advocate of the plaintiff cheque for a sum of Rs.14,88,576/- drawn in favour of the defendant and costs of stamp duty and registration fees were tendered. The defendant, however, refused to accept the same by its letter dated 24th November, 2015 on the ground that the order dated 18th November, 2015 was intended to be challenged in an appeal. Before the Appellate Court, the defendant agreed to execute a deed of conveyance in favour of the plaintiff with respect to the allotments upon payment of a sum of Rs.27,32,686/-.

7. An order to that effect was passed on 28th January, 2016. In pursuance of the said order, the defendant by its advocate's letter dated 12th February, 2016 wrote to the advocate for the plaintiff as follows :-

"Enclosed please find draft Agreement for Sub-Lease and Agreement for Facility and Maintenance for the Unit Nos.805 and 806. Kindly let us know when your clients will be available for executing the aforesaid agreements enabling our client to hand over the possession of the said Units to your clients against receipt of balance payment of Rs.27,32,686/-, as directed by Their Lordships the Hon"ble Chief Justice and the Hon"ble Justice Joymalya Bagchi by the order

dated 28th January, 2016 passed in the above matter."

8. The draft agreement for sub-lease forwarded by the defendant to the plaintiff for approval goes to show, inter alia as follows :-

(a) The sub-lease shall be executed by Weighmatic India Private Limited and not by the defendant;

(b) Clause - XII thereof goes to show that the area to be demised in favour of the plaintiff can be used "for electronics/information technology and/or I.T. enabled activities & services and/or end users therein."

(c) "The Sub-Lessee shall not deal with, let out, encumber, the said sub-demised space in any manner whatsoever without obtaining consent in writing from MARTIN BURN."

(d) "The Sub-Lessee shall pay to the Sub-Lessor monthly Lease Rent at the rate of Rs.0.20/- (Twenty Paise Only) per sq. ft. of super built-up area per month which is to be enhanced at the rate 20% every five years and Sinking Fund @ Rs.1 (Rupee One Only) per sq. ft. per month of super built-up area and various service and maintenance charges."

(e) "The Sub-Lessee shall pay to the Sub-Lessor electricity charges for the electricity consumed in the said Sub-demised space including AHU together with the Demand and other Charges of WBSEDCL every month punctually and without any default together with an additional charges of 5% on the electricity debit note on account of transmission and distribution losses and the sub lessee shall also pay 5% towards transmission and distribution losses on all other electrical consumption for Air conditioning in the said sub-demised space and on all other proportionate electrical consumption in the common area and facilities."

(f) "The Sub-Lessee shall pay to the Sub-Lessor, initially estimated, a monthly sum of Rs.8,796/- (Rupees Eight Thousand Seven Hundred and Ninety Six Only) calculated @ Rs.6/- (including 20% management fees) per Sq. ft. per month together with service tax as may be applicable, until such time, final computation of such charges and adjustments are carried out as envisaged herein."

(g) "Under no circumstances the possession of the said sub-demised space shall be given by MARTIN BURN to the Sub-Lessee until and unless all the payments required to be made under this Agreement payable by the Sub-Lessee has been paid in full to the Sub-Lessor and/or MARTIN BURN and the Indenture of Sub-Lease and Agreement for Facility and Maintenance Charges in respect thereof is executed and registered unto and in favour of the Sub-Lessee immediately thereafter but not more than 30 days after receipt of the notice of possession of the said sub-demised space."

9. The draft agreement for lease forwarded by the defendant to the plaintiff also contained a recital that the defendant had created mortgage in respect of its entire allocated area including the portion allotted to the plaintiffs in favour of

the Federal Bank Ltd. which, the defendant assured, shall be redeemed before registration of the indenture of sub-lease.

10. The plaintiff, in the circumstances made an interlocutory application in the pending appeal which was registered as GA No. 1893 praying for recalling of the order dated 28th January, 2016 which was allowed by an order dated 16th September, 2016 wherein this Court advanced the following reasoning:-

"It appears that the appellant did not act strictly in accordance with the aforesaid directions contained in the order dated 28th January, 2016 though the plaintiff/respondent was ready and willing to pay a sum of Rs.27,32,686/-. Considering that, the appellant is not willing to follow the directions, the order dated 28th January, 2016 passed by the Division Bench, seeking to bring about an amicable settlement of the matter, is recalled the appeal shall be taken up for hearing." Mr. Mitra, learned Advocate General appearing for the appellant submitted that a judgement upon admission should not have been passed in the facts and circumstances of this case. According to him there are disputed questions of fact which need to be tried. He in support of his submission relied upon the following judgements.

11. The first judgement cited by Mr. Mitra is in the case of J.C. Galstaun v. E.D. Sassoon & Co. Ltd. reported in AIR 1924 CAL 190. What had happened, in that case was that a suit was filed against the principal debtor and the guarantor. The guarantor in his written statement had taken a plea that he stood absolved of his liability as a guarantor by the conduct of the plaintiff and that the suit was premature. In the course of his deposition, in another proceeding, before the Registrar Insolvency, the defendant in answer to a question had made the following reply.

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

A. "But I shall have to pay."

On the basis of the aforesaid answer a judgement upon admission was entered. In an appeal a Division Bench of this Court disagreeing with the Trial Court held that the object of Order 12, Rule 6 "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."

12. This judgement, in our opinion does not apply to the facts and circumstances of the case which we already have narrated.

13. The second judgement cited by Mr. Mitra is in the case of Uttam Singh Duggal and Co. Ltd. v. UBI and Ors. reported in (2000) 7 SCC 120. The judgement passed on admission, in that case was upheld by the appellate Court and a special leave petition was dismissed holding as follows :-

"As to the object of Order 12, Rule 6 , we need not say anything more than what

the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled". We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed.

The next contention canvassed is that the resolutions or minutes of the meeting of the Board of Directors, resolution passed thereon and the letter sending the said resolution to the respondent Bank cannot amount to a pleading or come within the scope of the Rule as such statements are not made in the course of the pleadings or otherwise. When a statement is made to a party and such statement is brought before the court showing admission of liability by an application filed under Order 12, Rule 6 and the other side has sufficient opportunity to explain the said admission and if such explanation is not accepted by the court, we do not think the trial court is helpless in refusing to pass a decree. We have adverted to the basis of the claim and the manner in which the trial court has dealt with the same. When the trial Judge states that the statement made in the proceedings of the Board of Directors" meeting and the letter sent as well as the pleadings when read together, leads to unambiguous and clear admission with only the extent to which the admission is made in dispute, and the court had a duty to decide the same and grant a decree, we think this approach is unexceptionable."

14. The third judgement cited by Mr. Mitra is in the case of *Western Coalfields Ltd. v. Swati Industries* reported in AIR (2003) Bombay 369 wherein a learned Single Judge held that where "the admission is qualified and it is specifically pleaded that the said amount has been appropriated against another claim under contract between the parties, the Court should not have proceeded to pass the impugned order which would be discretionary."

15. It is well-settled that pleadings cannot be dissected like the depositions. It is on that principal that this judgement was rendered which has no manner of application to the facts and circumstances of the case.

16. The fourth judgement cited by Mr. Mitra is in the case of *Dinesh K. Singhanian v. Calcutta Stock Exchange Association Limited* reported in 2005 (2) CHN 601 wherein the following views were taken :-

"From a perusal of the aforesaid decisions and the dictum of Sargant J. in *Ellis*, it is clear that in order to found a judgment upon admission, the Court must find that the admission is clear and unequivocal. Any admission which admits of two

interpretations or some arguments cannot be the basis of a judgment within the meaning of this rule. An admission which is clear, specific, and puts an end to any adjudication enables the Court to give a quick judgment to the party in whose favour the admission has been made and the judgment must be limited to that extent of the admitted claim which may not be the whole of the claim. Even then no party can, as a matter of right, claim a judgment upon admission. The discretion lies with the Court whether or not to give such a judgment in the facts of the case."

17. The fifth and the last judgement cited by Mr. Mitra is in the case of S.M. Asif v. Virender Kumar Bajaj reported in (2015) 9 SCC 287 wherein the Apex Court opined as follows :-

"The words in Order 12, Rule 6 CPC "may" and "make such order..." show that the power under Order 12, Rule 6 CPC is discretionary and cannot be claimed as a matter of right. Judgement on admission is not a matter of right and rather is a matter of discretion of the Court. Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12, Rule 6 CPC. The said rule is an enabling provision which confers discretion on the court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim."

18. There can be no quarrel with the proposition laid down in the aforesaid judgement, but the question remains whether the discretion was properly exercised in passing the judgement by the learned Trial Court.

19. The following facts are not in dispute and have expressly or impliedly been admitted.

(a) The defendant does not have a transferable right in the premises allotted to the plaintiff.

(b) The terms and conditions contained in the draft agreement of lease forwarded by the learned advocate of the defendant to the plaintiff's advocate do not find place in the letter of allotment dated 19th September, 2013.

(c) The defendant has pleaded an oral agreement contradicting, varying, adding to, or subtracting from the terms and conditions of the disposition of property contained in the aforesaid letter of allotment which is plainly contrary to Sections 91 and 92 of the Indian Evidence Act and not permissible in law.

20. The question to be considered is whether it would be possible for the defendant in the face of the admitted facts to succeed in its claim for specific performance of a contract not evidenced by the letter of allotment dated 19th September, 2013 but is in reality a largely modified version thereof as pleaded in the written statement? In the case of J.C. Galstaun (supra), the Division Bench laid down the law as follows :-

"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."

21. The aforesaid principle was upheld by the Apex Court in the case of Uttam Singh Duggal (*supra*) and in the case of S.M. Asif (*supra*). We are of the considered opinion that it would be impossible for the defendant to succeed in its claim for specific performance of the alleged contract pleaded in the written statement. The learned Trial Court by the impugned order and the Appellate Court by its order dated 28th January, 2016 allowed specific performance of the contract evidenced by the allotment letter dated 19th September, 2013 but the defendant was not in a position to perform or was not ready and willing to do so. The defendant wants the plaintiff to perform the contract pleaded in the written statement. It is impossible for him to succeed. Claim for specific performance at the instance of the vendor is in any case not permissible in law.

22. We are, as such, of the opinion that it would be grossly unjust to upset the judgement entered by the learned Trial Court.

We, as such, are not in a position to upset the judgement rendered by the learned Trial Court nor is it possible for us to hold that the learned Trial Court did not exercise discretion along sound principles of law and justice.

The appeal is, therefore dismissed.

Parties shall, however bear their own costs.

Arindam Sinha, J.—I agree.