

(1988) 01 CAL CK 0010
In the Calcutta High Court
Case No : Suit No. 12060 of 1987

Sitac Pvt. Ltd.

APPELLANT

Vs

The Statesman Ltd.

RESPONDENT

Date of Decision : 18-01-1988

Acts Referred:

Specific Relief Act, 1963 — Section 14(3), 37, 9

Citation : (1988) 2 CALLT 84 : 92 CWN 858

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Advocate : Somnath Chatterjee, for the Appellant; Bhaskar Gupta, for the Respondent

Judgement

Umesh Chandra Banerjee, J.—Plaintiff's right to the remedy of specific performance as envisaged under the Act of 1963 is dependant upon the basic fact of the contract being concluded. The statute provides that the contract in question must be fair in all parts free from any misrepresentation or fraud and without any undue advantage to the plaintiff not unconscionable and capable of being executed through a decree of Court.

2. In a suit for specific performance the plaintiff is required under the law to show that there exists a concluded contract capable of being specifically performed, whereas the defence may be raised that in fact there was never any contract concluded.

3. Surrounding circumstances permit the defence to raise a defence successfully that an agreement relied upon by the plaintiff is not an agreement but a mere proposal and there was in fact no acceptance. A proposal differs from an agreement; whereas, a proposal is an act of one party-the agreement is that of both. There must be a proper acceptance of the proposal and the acceptance in that regard must always be absolute, unconditional and unequivocal in nature. There must be clear consensus of mind of the parties and nothing should be left to be done in the future, though, however, working out of the details of the

agreement may be left outstanding till a future date. The factum of a document being executed does not by itself prove that there was in fact a concluded agreement, if, however, it can be shown that a material particular has been left outstanding.

4. In this application for interlocutory injunction plaintiff has prayed for the grant of an order on the basis of a document said to be a contract entered into by and between the parties on 7th January 1985. Strong reliance has been placed on the document itself which used the expression "agreed and signed" on the body of the document".

5. Before, however, proceeding further in the matter it is to be noted that the equitable remedy by way of an injunction whether mandatory or interlocutory in nature is discretionary and is never granted as a matter of course. It would never be a sufficient ground to grant an order of injunction that the order would do the defendant no harm-neither the Court will grant an order of injunction simply because it is discretionary since this discretion is not an unregulated discretion but must be based on sound legal principles.

6. Mr. Somnath Chatterjee appearing in support of the application contended that the document dated 7th January, 1985 records the true intent of the parties in the matter of creation of a legal relationship and, reading the document as a whole, the inevitable conclusion is that the same is a self-contained instrument capable of being enforced without any fresh and positive further agreement. It was further submitted that the parties were ad idem as regards the development of property of the Statesman House at Barakhamba Road, New Delhi, by the petitioner and detailed terms and conditions were set out in the agreement, though termed as "Memorandum of Understanding". The further agreement as envisaged in the agreement is a mere matter of formality. As a matter of fact, it was contended that definite steps have been taken for the purpose of carrying out the terms of the agreement, viz., an Architect of repute was engaged for starting the work on the project and preparation of all necessary drawings and models, etc., have already been effected. It was submitted that the petitioner also prepared extensive floor space plans, structural drawings, detailed drawings as the "Statesman House" and submitted the same to the defendant. The petitioner's further contended that a property dealer has also been engaged to locate suitable premises in South Delhi for re-location of the Press and staff quarters of the defendant and as a matter of fact, the location has also been inspected by both the petitioner and the representative of the defendants. Strong reliance was also placed on 2 telex messages from the defendant to the plaintiffs in regard to further dealings in the matter of the acceptance of the terms and conditions in general. Since detailed submissions have been made on the above-noted 2 telex messages, the same are quoted in extense for convenience sake at this stage :

"Ramaji Ganguly from Barun Das Eye shall be in Bombay on 2nd September Mr. Dhruba Chowdhury will also be there on 2nd and 3rd September and therefore

suggest that you also be there.

Regards

Time 12-25 Dated 31.8.85.

7. The 2nd Telex reads as follows:

"Ramaji Ganguly from Barun Das refer our Telephone conversation. Please ring me immediately in office. Mr. Irani agreeable to most terms and conditions and is essential that we talk immediately if indications are satisfactory Eye shall make the trip to Delhi itself tomorrow. Please ring me in the office till 5-30 P.M. and thereafter at my residence".

8. Admittedly, the 2nd telex message was sent on 28th/29th September 1985. The plaintiff submitted that after the agreement, the defendant commenced negotiations with Grindlays Bank, but subsequently the defendant dropped the negotiations and further discussions followed which has resulted in the issuance of the above-noted telex from Sri Barun Das, the Secretary of Statesman Ltd. Thereafter, however, there was a total silence on the defendant's side and the plaintiff being apprehensive after making some enquiries came to learn that in breach of the said agreement the defendant was trying to negotiate secretly with other Property Developer including one Som Datta Builders Pvt. Ltd., though no concluded agreement or arrangement had yet been arrived at.

9. The defendants, on the other hand, submitted that the question of the Memorandum of Understanding between Statesman Ltd., and the plaintiff cannot ever be termed to be an agreement capable of being enforced. Mr. Dipanker Gupta appearing for the defendants submitted the paragraph 2 of the Memorandum which categorically records that the above-noted understanding would subject to the approval of the Statesman Ltd. and since no approval has yet been given to the plaintiff, it cannot thus be stated that a concluded contract has been arrived at between the parties. On the factual aspects, it was submitted by the defendants that apart from an Artist's impression and a model of the proposed new building, which is not to scale nothing further has taken place excepts, however, that a draft of an agreement was sent to the defendant by the plaintiff and the same was returned to the plaintiff on 3rd May 1985.

10. In paragraph 11 of the counter affidavit, the Managing Director of the Statesman Ltd. stated "..... Mr. Malvinder Singh met me on Monday, 6th May 1985 in my office. At this meeting I once again made it clear to him that his offer was not acceptable. It was also confirmed to him that the defendant was about to enter into an agreement with Grindlays Bank PLC for developing the project under which the building was to be constructed by a contractor chosen by Grindlays Bank. Mr. Malvinder Singh wanted to know, if he could be the contractor under Grindlays. I made it clear to him that this was a matter entirely for Grindlays to decide. At Mr. Malvinder's request, the defendant used its good offices to introduce him; to Mr. Dhruba Chowdhury, General Manager, Special

Projects of Grindlays Bank at Bombay. This is borne out by one of the telexes annexed to the petition.....as hereinbefore stated the plaintiff wanted to be appointed a contractor under Grindlays to construct the building and if that was not possible, at least put up the temporary accommodation to house the machinery when the building was demolished under the arrangement with Grindlays Bank. All the telex messages enclosed with the petition and in particular the telex dated 27th September 1985 were written in this context and not as alleged in the petition".

11. In an application for interlocutory injunction in a suit for specific performance, there must be at least the prima facie satisfaction of the Court in regard to the conclusiveness of the agreement which the plaintiff claims to specifically enforce. In order to ascertain the conclusiveness of the agreement, the intent of the parties ought to be clear and unequivocal as regards the factum of such an agreement. The Court must be satisfied at least prima facie that there was an intention to create the legal relationship between the parties for the purpose of an interlocutory application for injunction. On this aspect the communication from the plaintiff to the defendant dated 3rd May, 1985 ought to be looked into with care and caution. The document recorded the following :

"We must humbly and respectfully beseech you to finalise our agreement.....we shall strive to resolve your problems with full cooperation and sincerity. Further asking us to bid another offer would not only be unfair and unjust but an affront to the spirit all of us have endeavoured to work towards this project".

12. Mr. Gupta strenuously contended that the language and the tone of the letter does not but unmistakably suggest that the parties had not entered into a final agreement till at least 3rd of May 1985 and in my view rightly so. The language may be polite as submitted by Mr. Chatterjee but that does not by itself mean and imply that one would not insist on his rights to be implemented. Secondly, the letter, dated 3rd May 1985, in my view, runs counter to the case made out by the petitioner himself. There is a delightful silence, in the matter of assertion of right and rather than an effort to implore the defendant to finalise the agreement. Can the letter, dated 3rd May 1985 be a prima facie evidence of the conclusion of the agreement capable of being specifically enforced in a Court of Law ? In my view, the answer is in the negative. The letter records as to what has been done by the plaintiff in the matter of the work of construction. As a matter of fact, letter recorded. "Accordingly we asked our Architect and the Inhouse Engineers to work at full speed to prepare the concept design, model and lay out drawings. We went out to locate suitable alternative accommodations". This, however, does not have due corroboration from the affidavit of the Architect which is annexed to the affidavit-in-reply. The architect Shri Jasbir Sachdev stated that around the middle of January 1985 Mr. Malvinder Singh intimated Shri Sachdev that the former had entered into an agreement with Statesman Ltd. and that he would like the deponent to undertake the project on his behalf in doing architectural design of the building. In the affidavit

Sri Sachdev stated that: "During next 4 weeks myself and my firm worked at full speed and prepared a set of concept plans, models and Artist's perspective of the proposed buildings.....Mr. Malvinder Singh returned and stated that the plans were greatly appreciated by the Statesman. There were one or two very minor observations and I could proceed at full speed to prepare further plans. The models and plans were returned to me for further work. Shortly thereafter Mr. Malvinder Singh approached me and asked for the model and plans as Statesman wanted to have them in Calcutta to show some body". This statement also, in my view, however, does not go very close to the case as made out in the petition and the comments of Mr. Gupta are justified on that score. In paragraph 7 of the petition the petitioner categorically stated : "The petitioner engaged Mr. Jasbir Sachdev, an Architect of repute for the purpose of starting work on the project and preparation of all necessary drawings, models, etc.,.... the petitioner also prepared extensive floor space plans, structural drawings, the detailed drawings and the model of the building proposed to be constructed as the "Statesman House" and submitted the same to the defendant." The affidavit of Shri Jasbir Sachdev seems to contradict the statement in the petition, though, however, this view of mine is only prima facie without going into further evidence in the matter. As regards the relocation of Press and staff quarters, the United Estates Agencies is said to have written on 2nd February 1985 the following ;

"In pursuance of a request from you for the selection of suitable premises in South Delhi for re-location of Press and living accommodation for about 100 workers the following built-up premises were shown to your representatives..... we look forward to hear from you soon".

On 26th March, 1985 United Estates Agency further wrote to the plaintiff:

"We have not received any firm decision from you - even after representatives and the officers of the Statesman visited the Okla Industrial Area accompanied by us."

13. On 14th June 1985 the United Estates Agency also wrote to the plaintiff to take immediate action, otherwise they will be left with no alternative but to take recourse to legal action. Significantly, however, the reply to this letter has not been disclosed. Does it mean and imply that the plaintiff has taken all necessary steps for the purpose of finalisation even prima facie of the relocation of the Press and the staff quarters ? In my view, it does not seem so even prima facie on the basis of the evidence available at this stage of the proceeding.

14. Admittedly, the document on the basis of which specific performance has been sought has been termed to be a "Memorandum of Understanding" between the parties. Clause 2 records that the plaintiff has made a commercial proposal for the development of the property belonged to Statesman Ltd. at No. 148, Barakhamba Road, New Delhi for the acceptance of the Statesman. Clause 2 further records : "It is agreed that, subject to the approval of the Statesman Ltd., "Sitac (P) Ltd. will develop the property of the Statesman". Clause 2 sub-

clause (a) provides that a detailed agreement will be entered into: Clause 2(b) provides, staff quarters are to be relocated permanently at a suitable place (Kashmir Gate or any other location). Clause 2(c) provides, site and place to be identified by the developer and the amount to be payable within 30 days of the signing of the contract. Clause 2(e) provides that 51000 sq. ft. of built up area of upper floors (continuously from 3rd floor- upwards in a building which shall have a ground floor and upper ground floor). It includes proportionate share of all common areas, staircase, transformers, sub-station, elevators, etc., as applicable to standard development progress. Cl. f(2) provides, Rs. 24 lakhs will be available for expenditure in relocating the staff quarters and any unallocated amount shall be given to the Statesman Ltd. after 30 days of the final estimate and plan and clearance to proceed with work for relocation. The plaintiff contended that mere reference to a future formal contract will not prevent a binding bargain between the parties. While it is true that there cannot be any dispute as a proposition of law but the fact and circumstances of the case under consideration and the terms of the agreement noted above does not lend any assistance to the plaintiff's contention in that regard. Mere fact that the parties agree to execute a future contract by itself would not have a binding obligation. A future contract referred to in the agreement may very well depict an intention so as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the facts and circumstances in regard to each case. The clauses noted above in the Memorandum of Understanding, in my view, does not lend any assistance to Mr. Chatterjee's contention that the parties intended to be bound by that obligation. The agreement, in my view, suffers from being uncertain. How many floors in the building, what would be the total built-up area - the agreement is silent on that score. Simply because 51000 sq. ft. would be given to the plaintiff from 3rd floor and above in a building having a ground and upper ground floor, in my view, does not by itself clarify the position. Even the total area to be constructed, is not mentioned. A faint attempt has been made by Mr. Chatterjee to suggest that the defendant is not really interested in regard to other details since, the agreement provides that the plaintiff would be at liberty to dispose of the remaining portion upon consideration. In my view, however, that cannot cure the defect in the Memorandum of Understanding being uncertain.

15. In that view of the matter, the decision of the Supreme Court in the case of Kollipara Sriramulu Vs. T. Aswathanarayana and Others, , does not lend any assistance to the plaintiff. The decision is also distinguishable on facts since there was mere omission to settle the mode of payment which has been held not to affect the completeness of contract. The unreported judgment of the Delhi High Court in the case of Kailash Nath & Associates v. Shri Badri Prasad Seth and Ors. in LA. 975/81 and IA 1671/81 in Suit No. 221 of 1981 is clearly distinguishable on facts again, since the plaintiffs in that case admittedly paid a sum of Rs. 1 lakh to the defendants on the defendant's confirmation of the terms and conditions and sum of Rs. 1 lakh on December 12, 1979. In that decision the

plaintiff had also taken immediate steps for the preparation of plans and forwarded the plans to the defendant No. 1 for the suggestion. It also appears on the factual aspect in the unreported decision of Delhi High Court noted above that by a letter, dated December 17, 1979, the plaintiff sent copies of the indemnity bonds, affidavits, undertakings and plans of the project for the signatures of the defendant and the plans were duly signed by the defendants which were ultimately sent to the architect S. K. Associates for the presentation to the Corporation and accordingly were submitted to the Corporation on 3rd March 1980. The objections raised by the corporation were also sent to the defendant for their clarification and the defendants furnished the clarifications and the plan was eventually sanctioned. The facts of the case under consideration are not such and in that view of the matter the unreported decision of the Delhi High Court cannot be said to be of any assistance to the plaintiff in this suit.

16. It was contended that the plaintiff has done his part of the agreement. But, unfortunately there is no such evidence. In terms of the agreement, in particular Clause 2(f) provides that in addition to the other amounts to be paid by the plaintiff to the defendant, the plaintiff would pay the final payment due to L & DO on behalf of the Statesman Ltd., as a betterment levy due on 31-3-85 and pay to the Statesman the amount of betterment levy already paid by the Statesman to L & DO in two instalments. Some payments, therefore, has fallen due on 31-3-85. There" is no evidence before this Court evidencing the aforesaid payment. Admittedly, plaintiff has not paid any amount of money to the defendant - neither the suitable place for re-location as mentioned in Clause 2(b) has been identified as yet. No definite evidence has also been adduced as regards the approval of the Statesman Ltd. It is in the stage of proposal and an agreement to enter into a detailed agreement. The language used, subsequent conduct and the letter, dated 3rd May, 1985 if read together, there is no manner of doubt that it was in the stage of negotiation only and the parties did not agree to bind themselves by a concluded agreement. In this context the decision of the House of Lords in the case of *Thomas Hussey v. John Home Payne* reported in L.R. 4 Appeal Cases 311 and the observation of Lord Selborne seems to be very apposite. Lord Selborne observed :

"The observation has often been made, that a contract established by letters may sometimes bind parties, who, when they wrote these letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said, when sitting in the Court of Chancery, in the case of *Jarvis v. Berridge* that the statute of frauds "is a weapon of defence, not offence", and "does not make any signed instrument, a

valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties,"

17. In my view, a contract for specific performance requires a greater degree of certainty than in an action for damages. It is not practicable to lay down any general rule as to sufficient certainty in a contract and that varies from case to case. But there cannot be any denial of the factum that certainty is required which must also be of reasonable one having regard to the subject matter of the contract. The intent of the parties play a pre-dominant role and as such, where the terms of the contract have been originally uncertain but by reason of subsequent events, it became certain, Courts will not. hesitate to grant specific performance of such a contract. But in the facts and circumstances of the case under consideration, certainty cannot even be inferred. Strenuous submissions have been made on this score that whatever had to be done by the plaintiff had been done. Admittedly, a model and an artist's impression were sent but that was about all. There is not even structural drawings which have been sent by the plaintiff to the defendant. Drawings produced before this Court go on to show that only the frontal elevation and the artist's impression have been sent. Can it be said that the parties were intending to bind themselves in a contract which significantly lacks in the particulars as noted above. In my view, at this stage the answer is in the negative.

18. The other aspect of the matter being a requirement of law ought also to be noted at this juncture. Section 14 of the Specific Relief Act, 1963 provides to contracts which cannot be specifically enforced. The statute, however, in particular Section 14(3) goes on to add that notwithstanding anything contained in earlier Clauses, the Court may enforce specific performance in the following cases :

(a) where the suit is for enforcement of the contract.....

(b).....

(c).....

where the suit is for enforcement of a contract for construction of any building or the execution of any other work on land :

Provided the following conditions are fulfilled, viz., the building or other work is described in the contract in terms sufficiently prescribed to enable the Court to determine the exact nature of building or work;

(ii)

(iii) the defendant has in pursuance of the contract obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

19. Sub-section 3(c) can only be had upon compliance of the three conditions mentioned in the proviso. The third condition ought also to be noted with care

and caution. The original concept of actual physical possession is no longer required in law but some form of possession ought to be given in terms of the agreement between the parties. In this context, Mr. Gupta's submission seems to be significant, viz., that Sub-section 3(c) postulates a suit by the owner and not against the owner as in the facts of the case under consideration. The contractor here Messrs SITAC (P) Ltd. has not been given any possession of the land as yet. The relocation of office has not been effected - neither any site finally selected. Total floor space has not been identified : Can it still then be said that the parties entered into an agreement capable of being enforced ? In the view I have noted above, I need not deal with the statutory provision in detail. Suffice it to say that the submission of Mr. Gupta seems to be very attractive.

20. Contention has also been raised by the defendant as regards the delay involved here. But, in my view, the same cannot be accepted. Mere delay in moving the Court cannot be termed to be a bar in the plaintiff's right unless there is waiver or acquiescence. From the facts it does not appear to be so. As such, I am unable to accept the contention of Mr. Gupta in that regard.

21. In the result, this application fails and is dismissed. Cost in the Cause.

22. Prayer for stay made. Stay is granted for a week.

23. Mr. Bhaskar Gupta appearing for the defendant waives service of the summons. The suit is expedited. Written statement is to be filed within two weeks from date ; cross order for discovery within three weeks thereafter ; inspection forthwith thereafter and the suit to appear in the appropriate prospective list six week hence. Liberty to mention for an early hearing.