

(2011) 09 CAL CK 0011

Calcutta High Court

Case No: CO. No"s. 3164 and 3931 of 2010

India Carbon Limited

APPELLANT

Vs

Ganesh Prasad Singh

RESPONDENT

Date of Decision: Sept. 29, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 34(5)(6a), Order 7 Rule 11, 115
- Companies Act, 1956 - Section 297
- Constitution of India, 1950 - Article 227

Citation: (2012) 1 CHN 152**Hon'ble Judges:** Dipankar Datta, J**Bench:** Single Bench**Advocate:** B.R. Bhattacharya, Jishnu Saha and Arindam Banerjee, for the Appellant; S.P. Mukherjee, Raja Basu Chowdhury and Kaushik Dey, for the Respondent**Final Decision:** Allowed

Judgement

Dipankar Datta, J.

In a suit for specific performance of contract instituted by Sri Ganesh Prasad Singh (hereafter the plaintiff), India Carbon Ltd. is the defendant (hereafter the defendant). After nearly 8 (eight) years of institution of the suit and while it had progressed to the stage of recording of evidence, the defendant filed an application under Order 7 Rule 11, CPC on August 13, 2010 praying for rejection of the plaint. By an order dated September 6, 2010, the learned Judge of the trial Court rejected the application on contest without costs. This order is impugned in CO. 3164 of 2010, being an application u/s 115 of the Code, presented before this Court on September 20, 2010. While the said application was pending for consideration, the learned Judge of the trial Court had fixed December 10, 2010 for further cross-examination of the PW1. The defendant applied for adjournment. The learned Judge was of the view that since this Court had not granted stay and the defendant even after filing

the said revisional application had cross-examined the PW1 on November 29, 2000, there was no reason to allow the prayer for adjournment and while refusing the prayer of the defendant requested the parties to get ready for further cross-examination of PW1 by 1.15 p.m. Later, by an order of even date, the learned Judge recorded that the learned Advocate for the defendant had declined to cross-examine PW1 and in such circumstances the witness was discharged on closure of his evidence. Since the learned Advocate for the defendant could not apprise the learned Judge as to whether the defendant would adduce evidence or not, the evidence of the defendant was also closed. The order dated December 10, 2010 forms the subject matter of challenge in CO. No. 3931 of 2010, being an application under Article 227 of the Constitution.

2. Since both the revisional applications arise out of the same suit, the same have been heard together and shall stand disposed of by this common judgment and order.

3. Mr. Bhattacharya, learned Senior Advocate for the defendant, duly assisted by Mr. Jishnu Saha, learned Advocate contended that the learned Judge acted illegally in not rejecting the plaint filed by the plaintiff. According to him, although the suit was one for specific performance of contract, there was no valid subsisting contract between the parties, which could be enforced; therefore, the suit, was instituted in abuse of the process of law and ought to have been nipped in the bud. He further contended that by not rejecting the plaint, the defendant had been subjected to unnecessary inconvenience and harassment.

4. Mr. Bhattacharya next contended that the plaintiff had instituted a previous suit for a declaration that he is a tenant in respect of the flat (bearing no. 303) (hereafter the said flat), being the subject matter of the suits pending between the parties. The suit was dismissed and the issue is pending in an appeal. It was also submitted that the suit for eviction of the plaintiff from the said flat instituted by the defendant is also pending. The suit, out of which the revisional applications arise, is nothing but an attempt on the part of the plaintiff to prolong his unauthorised occupation in the said flat and, in the interest of justice, the Court ought to reject the plaint.

5. In support of his submissions, Mr. Bhattacharya relied on the following decisions:

- i) [Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others,](#)
- ii) 1974(2) ALL ER 967 (Fairline Shipping Corporation vs. Adamson);
- iii) AIR 1954 Bombay 491 (Baroda Oil Cakes Traders vs. Parshottam Narayandas Bagulia & Anr,)
- iv) [Mayawanti Vs. Kaushalya Devi,](#)
- v) [J.K. Industries Limited Vs. Mohan Investments and Properties Private Limited,](#)

- vi) [Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another,](#)
- vii) [Azhar Hussain Vs. Rajiv Gandhi,](#)
- viii) [T. Arivandandam Vs. T.V. Satyapal and Another,](#)
- ix) AIR 1937 Madras 571 (Bengal Insurance and Real Property Co. Ltd. &Anr. vs. Velayammal);
- x) [U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others,](#)
- xi) AIR 2004 Calcutta 99 (Md. Akhtar Hossain vs. Suresh Singh & Ors.);
- xii) AIR 1958 Calcutta 644 (Hulas Kunwar vs. Allahabad Bank Ltd.);
- xiii) AIR 1941 Oudh 529 (Rani Huzur Ara Begam & Ors. vs. Deputy Commissioner, Gonda & Ors.); and
- xiv) [Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi,](#)

6. Mr. Mukherjee, learned Advocate for the plaintiff, contended that the defendant utterly failed to convince the learned Judge that the plaint did not disclose any cause of action and, consequently, the application under Order 7 Rule 11 was rightly rejected. The plaint, according to him, did disclose cause of action for suing the defendant for specific performance and, therefore, no question of interference does arise. It was further submitted by him that the application was filed by the defendant with the mala fide intent of stalling a decision on the suit filed by the plaintiff, which had matured to the stage of recording of evidence and by reason of the subsequent orders, even the evidence of the parties had been closed. While praying for dismissal of the revisional applications, Mr. Mukherjee relied on the following decisions:

- i) AIR 2000 Bombay 161 (M/s Crescent Petroleum Ltd. vs. "MONCHEGORSK" & Anr.);
- ii) [Indira Kaur and Ors Vs. Sheo Lal Kapoor,](#)
- iii) [Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another,](#)
- iv) AIR 1932 Allahabad 543 (Bhajja vs. Mohammad Said Khan);
- v) AIR 1986 Calcutta 120 (British Airways vs. Art Works Export Ltd. & Anr.);
- vi) [Rajasthan High Court Advocates Association Vs. Union of India and Others,](#)
- vii) [Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others,](#)
- viii) [Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat,](#)
- ix) [Bloom Dekor Limited Vs. Subhash Himatlal Desai and Others,](#)

7. I have heard the parties at length and considered the materials on record.

8. It is settled principle of law that for deciding whether a plaint deserves rejection under Order 7 Rule 11 of the Code or not, it must be read as it is without any addition or subtraction.
9. Since the defendant has invited the Court to render a decision on its claim that the plaint does not disclose any cause of action and, therefore, clause (a) of Rule 11 of Order 7 of the Code is attracted, it would be necessary to ascertain whether it at all discloses a cause of action or not.
10. The plaint is comprised of 24 (twenty-four) paragraphs and number of documents are enclosed thereto as annexures. In the plaint, the plaintiff states/claims, in its various paragraphs, as follows:
- i) Particulars of the defendant;
 - ii) Appointment of the plaintiff in the defendant in 1968 and particulars regarding his service therein;
 - iii) Providing of Flat No. 304 owned by the defendant to the plaintiff in terms of the contract of employment and subsequent allotment of the said flat with effect from March 31, 1972;
 - iv) At the time of allotment of the said flat, the defendant expressly promised that it would be sold to the plaintiff at cost price in terms of the contract of employment;
 - v) Between 1967 and 1969, the defendant purchased three flats including the said flat which were registered in the name of one Mr. B. Himatsinghka and one Mr. K. Mehata;
 - vi) The plaintiff was requested to shift to the said flat on the representation and assurance that it would ultimately be sold to him at the cost price;
 - vii) Due to complications arising out of purchase of flats by the defendant at 4, Mayfair Garden Road, Kolkata, the Board of Directors of the defendant at its meeting held on July 27, 1974 at Bombay requested one of its directors, Sri J.B. Dadachanji to look into the matter and to make suitable recommendations so that future complications in regard to the ownership of the flats could be avoided;
 - viii) In the subsequent board meeting held on October 17, 1974, the Board of Directors approved the recommendations of the said Sri J.B. Dadachanji and it was decided to sell the flats including the said flat to the persons occupying the same, subject to the condition that if the employees resign from service of the defendant within three years, they would resell the same to the defendant at the price at which it was sold to them. (In my view, the contents of paragraph 8 read with the document marked annexure A conveys what has been noted above and not as claimed in the said paragraph by the plaintiff).

- ix) In terms of the said resolution, another resolution dated September 18, 1979 was adopted whereby a flat of the defendant at Bombay was decided to be sold to its then occupier Smt. Usha Himmatsingka at the price mentioned therein;
- x) Death of the said Ms. Usha Himmatsingka led to adoption of another resolution to sell and transfer the flat at Bombay to one Ms. Rohini Himmatsingka. The purpose of selling the flat first to the said Ms. Usha Himmatsingka and on her death to the said Ms. Rohini Himmatsingka was intended to deprive the defendant and that in none of the two cases, previous approval of the Central Government was sought as required u/s 297 of the Companies Act;
- xi) Due to non-receipt of permission from the Registrar of Cooperative Societies, the flats owned by the defendant were being held in the names of its Managing Director and Secretary;
- xii) By letter dated January 25, 1978, the defendant in a clandestine manner relieved the plaintiff of his service.
- xiii) Although a promise had been made to the plaintiff to sell the said flat occupied by him, the Board resolution dated October 17, 1974 was completely suppressed from the plaintiff at the time when the plaintiff was relieved from his service;
- xiv) The plaintiff recently came to learn about the aforesaid Board resolution;
- xv) Since the aforesaid Board resolution had been completely suppressed from the plaintiff, immediately thereafter he made an offer by his letter dated July 6, 2000 to the Company Secretary of the defendant stating the full background under which he sought for compliance and requested the defendant to sell the said flat at Calcutta to the occupant thereof. The defendant replied by its letter dated July 10, 2000, which was received by the plaintiff at 4, Mayfair Road within the jurisdiction of the concerned Court. In the said letter addressed to the plaintiff, the defendant refused to comply with the aforesaid Board resolution. Both the letters were annexed and collectively marked "B";
- xvi) The defendant is bound by the promise made to the plaintiff and is estopped from saying anything to the contrary;
- xvii) That the aforesaid contract for sale of the said flat was thus concluded between the plaintiff and the defendant and price of the said fiat was settled at Rs. 8,00,000/-. Accordingly, the defendant is bound by the aforesaid concluded contract for sale of the said flat and to execute and register the conveyance on receipt of the total consideration money from the plaintiff for which he was and still is ready and willing to complete the sale. In fact the plaintiff has been and still is in possession of the said flat since 1974 in part performance of the contract and such possession of the plaintiff is valid and absolutely legal;

xviii) Refusal on the part of the defendant to sell the flats in terms of the Board resolution dated October 17, 1974 was first communicated to the plaintiff by the defendant by its letter dated July 10, 2000 (which was received by the plaintiff on September 22, 2000) requiring the plaintiff to hand over vacant possession of the said flat;

xix) The plaintiff has recently been able to ascertain that the defendant is trying to dispose of the said flat so as to deny the plaintiff right, title and interest therein;

xx) The plaintiff's earlier suit was instituted, inter alia, for a declaration that the plaintiff has a right to use and occupy the said flat, for a decree for cancellation and delivery of the letter dated August 22, 1978 and for permanent injunction restraining the defendant from interfering with the possession of the plaintiff in respect of the said flat or to dispossess him therefrom. Despite filing of the said suit, the defendant has wrongfully instituted a suit and prayed that an order be passed directing him to deliver up vacant possession of the said flat on the allegation that the said flat is the property of the defendant;

xxi) That the plaintiff all along is ready and willing to complete the aforesaid purchase by paying the total consideration of Rs. 8,00,000/- to the defendant and that he is still now ready and willing to complete the purchase in respect of the said flat on payment of the total consideration money, but the same could not be done due to the default on the part of the defendant. Accordingly, the plaintiff is entitled to have specific performance of the aforesaid contract for sale and the plaintiff is entitled to decree as prayed for;

xxii) That the defendant is illegally and wrongfully trying to alienate the said flat to a third party and the defendant is threatening the plaintiff regularly that it will dispossess the plaintiff therefrom forcibly. The aforesaid threatening of the defendant is very imminent, high-handed and wrongful for which the defendant, its men, agents and servants are required to be restrained by an appropriate order of injunction from transferring, alienating or encumbering the said flat in any way or in any manner to any third party and from disturbing the peaceful possession and enjoyment of the plaintiff therein in any way or in any manner, for ends of justice, otherwise the plaintiff will suffer irreparable loss and injury which cannot be compensated by money value and the multiplicity of proceedings will be invoked; and

xxiii & xxiv) Statements regarding accrual of cause of action and valuation of the subject matter of the suit.

9. On the basis of the aforesaid pleadings, the plaintiff claimed the following relief:

a) A Decree for specific performance of the aforesaid contract for sale directing the defendant to execute and register the sale deed in question in favour of the plaintiff in respect of the suit property which is fully described in the schedule hereinbelow

on receipt of total consideration money from the plaintiff.

b) A Decree directing the defendant to execute and register the sale deed in favour of the plaintiff within the specified time failing which the necessary sale deed and/or Deed of Conveyance in respect of the property fully described in the schedule hereinbelow may be executed and registered according to the provision of Order 21 Rule 34 (5) (6a) of Civil Procedure Code; For appointment of such persons which is necessary as the learned Court may deem fit and proper and for appointment of a Special Officer and/or Commissioner in order to settle execute and register the necessary conveyance in respect of the suit property which is fully described in the schedule hereinbelow on behalf of the defendant in fulfilling the obligations on their behalf in case the defendant fails to and/or neglect to act in terms of the order/decreed of the Court for the purpose of registering the deed in favour of the plaintiff.

c) A Decree for permanent injunction restraining the defendant, their men, agents, and servants from selling, transferring, alienating and/ or encumbering the suit property which is fully described in the schedule hereinbelow to any third party in any way or in any manner and from disturbing the peaceful possession and enjoyment of the plaintiff in suit property which is fully described in the schedule hereinbelow in any way or in any manner whatsoever.

d) A Decree for temporary and ad-interim injunction in terms of the aforesaid prayer (iv).

e) Costs of the suit.

f) For such other reliefs to which the plaintiff is entitled to under the law and equity.

11. Before ascertaining whether the material facts pleaded in the plaint disclose existence of a contract between the parties or not, it would be profitable to note the relevant provisions of the Contract Act, 1872 The same read as under:

2. Interpretation clause.--In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:--

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to

abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(h) An agreement enforceable by law is a contract;

3. Communication, acceptance and revocation of proposals.--The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

4. Communication when complete.--The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete,--

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,--as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete, as against A, when the letter is posted; as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against

B when the telegram is despatched, and as against A, when it reaches him.

7. Acceptance must be absolute.--In order to convert a proposal into a promise, the acceptance must-

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

9. Promises, express and implied.--In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

10. What agreements are contracts.--All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in 1[India] and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

13. Paragraphs 4 and 6 of the plaint refer to a promise that the said flat would be sold to the plaintiff. However, no legal action seems to have been initiated by the plaintiff to bind the defendant based on such promise. If the present suit were to be founded on such promise, the plaintiff's claim would have been thoroughly time-barred. Rightly, the plaintiff did not walk in that direction and averred further regarding the resolution adopted in the meeting of the Board of Directors and the subsequent incidents.

14. For the purpose of persuading the Court to believe that the plaint does disclose a cause of action, it was necessary for the plaintiff to aver in the plaint itself material facts which would enable the Court to form an opinion that there is an agreement which is enforceable by law amounting to a contract and that specific performance of that contract could be claimed having regard to the disclosures therein. I am afraid, the plaint itself does not disclose any proposal having been communicated and there being no question of acceptance, no promise came into existence. It is the plaintiffs specific claim that the resolution of the Board of Directors dated October 17, 1974 was suppressed from him. Once it is clear on the plaintiffs own showing that the resolution adopted in the said meeting was not made known to him and there was no action taken by the officers of the defendant to give effect to such resolution of the Board of Directors, there was no agreement between the parties amounting to a contract that is enforceable by law. Mr. Bhattacharya has rightly argued that no contract surfaced that could be specifically enforced. A bare resolution of the Board of Directors of the defendant approving the recommendations of a director to sell the flats of the defendant to the occupiers thereof, without anything more in this respect, does not give rise to any right in

favour of the occupants thereof.

15. As has been observed in the case of T. Arivandandam (supra), since followed in the decisions in Sopan Sukhdeo Sable vs. Assistant Charity Commissioner, reported in 2004(3) SCC 137 and [Abdul Gafur and Another Vs. State of Uttarakhand and Others](#), , while considering a petition under Order 7 Rule 11(a) of the Code, the trial Courts ought to remember that if on a meaningful and not formal reading of the plaint it is found to be manifestly vexatious and meritless in the sense that it does not disclose a clear right to sue, it should exercise the power under such provision taking care to ensure that the ground mentioned therein is fulfilled.

16. I am convinced, on a meaningful reading of the plaint, that the plaint does not make out any case that there was indeed a contract between the parties and, therefore, no occasion for performance arose and this is a fit case where the trial Court ought to have activated itself to reject the plaint in exercise of power conferred by Order 7 Rule 11 of the Code. In the result, the orders impugned stand set aside. The revisional applications stand allowed, without costs. The trial Court shall pass further order in the light of the observations made above as early as possible, preferably within a month from date of receipt of this order. Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.