(1991) 04 CAL CK 0040

Calcutta High Court

Case No: First Appeal No. 2 of 1981

Biren Roy Trust		APPELLANT
	Vs	
Hindustan Steel Works Construction Ltd.		RESPONDENT

Date of Decision: April 4, 1991

Acts Referred:

- Contract Act, 1872 - Section 7

Citation: (1992) 2 ILR (Cal) 156

Hon'ble Judges: Mahitosh Majumdar, J; Abani Mohan Sinha, J

Bench: Division Bench

Advocate: Karuna Shankar Roy and Prabir Chandra Bose, for the Appellant;Tapas Banerjee and Aloke Chdkraborty, for the Respondent

Final Decision: Dismissed

Judgement

Abani Mohan Sinha, J.

This appeal is directed against the judgment and decree of dismissal passed (sic) the learned Subordinate Judge (Assistant District Judge) First Court, Alipore, in Money Suit No. 19 of 197(sic) The Plaintiff is a trust body known as. ''Biren R(sic) Trust'' and is the owner of premises No. 24/1/1, Alipore Road, P.S. Alipore. They let out the ground and the first floor of the premises to State Bank of India Alipore Branch. The 2nd and 3rd floors of the building were completed in the month of April 1974. It is alleged that the Defendant company, M/s. Hindustan Steel Works Construction Limited through their official expressed their intention to the Plaintiff that they would take lease of both the 2nd and 3rd floors of the building. They inspected the building and pointed o(sic) to some special items of construction in both the floors for their use. The Plaintiff, it is alleged, agreed to give lease of the two floors with those special construction on suitable terms. It is further claimed that the rental of the two floors, 8000 sq. ft each, would be Rs. 20,800 per month inclusive of Corporation tax There was also a term of payment of advance on Rs. 2,49,600 by the

Defendant in favour of the Plaintiff which would be adjusted against rent payable by them. There were further proposals by the Defendant for lifted Darwan''s quarter and a garage, but the Plaintiff does not agree to provide for such things. It is the further case of the Plaintiff that they effected addition and alteration as proposed by the Defendant. When the asked for payment of advance, the Defendant did not agree to pay any advance as agreed and there were exchange of letters between the parties and the agreement ultimately failed. Thereupon, the Plaintiff through his lawyer gave notice to the Defendant and claimed damages.

2. The Defendants in their written statement deny the material allegations of the Plaintiff and assert that the negotiation of taking lease of the disputed premises was not materialized and there was no agreement or settlement of terms of lease as alleged. According to them, the Plaintiff did not carry any construction and sustain any loss. They pray for dismissal of the suit. The teamed trial Judge on consideration of the evidence, both oral and documentary, came to the finding that there was no final lease agreement entered into between the parties in respect of the disputed premises and that the Plaintiff suffered no loss for the agreement which was never materialized. On this finding he dismissed the suit of the Plaintiff. Being aggrieved by such judgment and decree of dismissal, the Plaintiff has come up with the present appeal.

3. Mr. Karuna Shankar Roy, the learned Counsel duly assisted by Mr. Prabir Chandra Bose, Advocate, has urged on behalf of the Appellant that the learned Court below failed to appreciate the evidence, in its proper perspective and came to a wrong finding on the points at issue raised in the suit. It has further been submitted by him that the Court below should have found at least that the Plaintiff incurred expenditure and suffered loss for making addition and alteration in the disputed premises at the instance of the Defendant and as such should have allowed the claim for damages made by the Plaintiff to that extent.

4. Mr. Tapas Banerjee, the learned Counsel duly assisted by Mr. Alok Chakraborty, Advocate, on the other hand, has urged that as there was no agreement and the alleged agreement failed at the. negotiation stage, the Plaintiff could not recover any damage for breach of the agreement. In the next place he has submitted that the Plaintiff failed to substantiate his story of addition and alteration in respect of the suit premises by any cogent evidence and as such could not legally claim any damage from the Defendant. The relevant case of/the Plaintiff as to the term of the agreement have been stated in para 5 of the plaint. It has never been asserted in the plaint that the alleged lease was entered into. It was instead stated that the terms were settled on or about September 25, 1974, in the matter of creating lease. The letter Ex. 4(1) written to the Defendant company on October 30, 1974, would clearly indicate that there was only offer and counteroffer. There was nothing to indicate'' that the Defendant company came forward to pay the advance of Rs. 2,49,000 and odd for taking lease of the suit premises. The 2nd letter dated October

31, 1974 (Ex. 4(k) was in the same line. The Plaintiff demanded payment of advance which the Defendant failed, to pay. It was followed by letter, Ex. 4(j), dated November 27, 1974, wherein the same demand was made. This letter in its para 3 clearly stated that the Plaintiff would have the matter finally settled by October 15, 1974, after completing the laying, of the tiles etc. The next letter Ex. 4(e) would indicate that the Plaintiff gave out that the deal would be finalized by Saturday, i.e. December 7, 1974. The next letter Ex. 4(h) dated January 14, 1975, given by the Plaintiff to the Defendant company only complained of non-payment of the advance by the Defendant and it also spoke-of non-approval of the draft agreement. The Plaintiff requested the Defendant to approve of the draft agreement and to make the payment of advance. From the trend" of the letter it would appear that the Defendant expressed that they were unable to advance except on loan bond or by way of security against the sum to be advanced by the Defendant, vide letter Ex. 4(g) dated January 15, 1975. Exhibit 1(a), the letter given by the Hindustan Steel Works Ltd. to the Plaintiff dated December 25, 1974, would lend support to this fact that they demanded security for the money to be advanced. It would further appear that the Defendant by their letter Ex. 1(b) dated January 11, 1975, forwarded a draft copy of the lease agreement for examination and further necessary action by the Plaintiff. In their next letter dated February 6, 1975, Ex. 1(c), the Defendant demanded that the security against loan to be advanced proposed to be furnished by the Plaintiff was not considered by the Defendant to be sufficient and was not acceptable to them. The next two letters Exs. 1(d) and 1(e) dated March 22, 1975, and April 8, 1975, would indicate that they reiterated that the agreement was at negotiation stage that the talk regarding agreement was never finalized and no agreement was brought about between parties and they denied that the Plaintiff could ever make any claim on the alleged agreement.

5. The learned Subordinate Judge, of course, touched this point, though not in derails. But his findings that there was no final agreement or contract of lease between the parties and that the talk fell through in the stage of negotiation is, in our view, correct. The oral evidence given by the Plaintiffs witnesses, in our view, correct. The oral evidence given by the Plaintiffs witnesses, in our view, does not inspire any confidence. P.W. 1 is the Supervisor of the disputed building where the construction was undertaken. He admitted that he did not see any man of the Hindustan company in the premises. But he could not show any document to prove his appointment. P.W. 2 although reiterated the plaint case on oath in his cross-examination said that he did not remember whether there was any paper prepared incorporating the talks held between them and the Defendant over lease matter. He admitted that they had detailed accounts regarding money spent on construction of the structure. He flatly denied that there was any talk for giving security to the Defendant for advance on lease. The plaintiff's own letter and the Defendant''s letter referred to above specially Exs. 4(g) and 1(c) would indicate that there was in fact a talk of giving security for the loan to be advanced and the

Plaintiff''s security was not accepted as satisfactory. P.W. 1 is an interested witness. His statement, in our view, cannot be accepted as they are contradictory to the statement contained in the written document in the shape of fetters given by the Plaintiff and also by the Defendant. P.W. 3 is a Labour Contractor of the firm, S. Walkar. But he could not produce anything to indicate in support of his case that he worked in such capacity and specially in respect of the disputed premises. The Defendant''s witnesses categorically denied the Plaintiff''s case on the point of entering into agreement and also on the story of making construction at the request made by the representatives of the Defendant company. The letters Exs. 1 to 1(d) unequivocally support the defense case that they did never ask the Plaintiff to make any construction on their specification. The Plaintiff could not produce any document whatsoever excepting some letters written by them to the company in support of their case that the Defendant in fact ordered them to carry on any construction as alleged. The learned trial Judge was right in holding in the absence of any definite and specific proposal for making addition and alteration the Plaintiff claimed that the Defendant should pay for the alleged addition and alteration was not at all tenable. The Defendant being a Government undertaking cannot ask anybody to do any work on behalf of such undertaking without work order or document in the shape of letter of request or document in writing. The Plaintiff being a sophisticated landlord is not expected to do any work without any written order.

6. Besides P.W. 3, the Labour Contractor who claimed to have carried on the work of addition and alteration in the disputed premises in his cross-examination admitted that no plan was shown to him. So, the submission of plan before the trial Court could not advance the case of the Plaintiff inasmuch as there is nothing on record to indicate that this plan was drawn according to the requisition made by the Defendant or if any work was done at all in terms of such plan. The Plaintiff did not take out any commission for inspection of the addition and alteration instead of relying on the oral testimony of his employees, the interested witnesses. In our view, the learned trial Judge is right in holding that there is nothing on record to support the Plaintiff''s story that any addition and alteration was made in the suit premises at the instance of the Defendant.

7. On a thorough appreciation of the evidence of both sides we find that there was only an offer by the Plaintiff to the Defendant company, and the Defendant company made counter-offer and the offers were not accepted and the parties were not ad idem as to the taking of lease of disputed premises. Mr. Banerjee has referred to a decision in Brewer Street Investments Ltd. v. Barclays Wollen Co. Ltd. (1954) 1 Q.B.D. 428 in support of his contention that the Plaintiff in the facts and circumstances of the case and in view'' of the fact that the negotiation for taking lease having not been arrived at, the Plaintiff could not claim any damage on a quantum merit as the work had been abandoned before it was finished and not there was breach of contract, for there had been no breach. It has further been

held, if the work was abandoned before it was finished and the negotiation for lease broke down and both sides realized that the work must be stopped, the landlord cannot sue for the price as on a completed contract. Nor can the landlord sue the prospective tenant for damages for breach of contract, because the prospective tenants have not been guilty of a breach. It is apparent from the evidence on record that the negotiation fell through and the Defendant did not agree to advance any money towards the cost of construction of items by altering the existing structure, as there is nothing on record to show that the addition and alteration and if any addition and alteration was made at all. So, the Plaintiff could not recover anything by way of damage from the Defendant.

8. A comment has been made by Mr. Roy that the Defendant did not reply to any of the letters clinching the claim of the Plaintiff as to the damage for not taking lease of the disputed premises by them. Mr. Banerjee appearing for the Respondent has referred to a decision in Edwards v. Towels 134 E.R. Man and G. 709 that mere non-reply to the Plaintiffs letters would not authorize the Plaintiff to carry on the work of construction. The next case relied upon by him, Widemann v. Walpore 1891 Q.B.D. 534 is not of much importance in the present case as it related to promise of marriage and its breach. It would be seen that the letters were given to the Defendants unilaterally by the Plaintiff and in none of these letters the Plaintiff demanded any positive answer. In our view, the Plaintiff had not made out a case that a default clause was put in the letter which might be to the effect that non-reply of the letters or non-response of the Defendants would be taken as acceptance of the Plaintiff''s offer or proposal. In our view, mere non-reply to the Plaintiffs letters would not amount to admission of the Plaintiff''s claim. A party must speak when there is a duty to speak. The sequence of the correspondence would only indicate that the Plaintiff and the Defendants were negotiating and making offers which were never accepted. Offers never ripened into a contract by acceptance. So there could not be any question of any breach. Mr. Banerjee has further strengthened his argument by referring to the case of Fairlie v. Denton 172 E.R. 343 which lays down that mere commission of answer to a letter would not amount to admission of truth of the statements that letters contained.

9. A reference may usefully be made to Section 7 of the Indian Contract Act. It lays down that in order to convert a proposal into a promise, the acceptance must--(i) be absolute and unqualified; (ii) 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, be accepts the acceptance. As already stated, the Plaintiff, in the present case did not receive any acceptance of the offer made to the Defendant in any absolute and unqualified terms or any expressed and usual and reasonable manner. It is in evidence that the

Defendant agreed to advance a sum of Rs. 21/2 lakhs as a loan to be adjusted against rent after taking lease of the disputed premises on condition the Plaintiff would execute a security bond or a loan bond against the same to be advanced by the Defendant. It is also in evidence that the draft agreement of lease was not also accepted by the Defendant. In a Calcutta case, Baijnath Vs. Kshetrahari Sarkar and Others, it was held that where a prospective lessee demands title deeds from the prospective lesser for investigation and approval, it cannot be said that there is a final and concluded agreement. It was also found by the Court that the Plaintiff did not intend any final lease being made until a good title had been made and until it had been approved by the Plaintiffs Solicitor after investigation. In the present case, the Defendant in response to Plaintiff''s invitation to give lease came out with two conditional offers. The first is that they would advance the loan only on a properly executed loan bond in favour of the Defendant. Secondly, the party should reduce the terms of agreement into writing and would formally accept the same. Otherwise there would not have been any scope for sending draft agreement to the Defendant for approval. These two conditions having not been complied with, it cannot be said with certainty that there was an agreement of lease or in fact, a lease in respect of the disputed premises. It, at best, may be said that the parties were at the preparatory stage leading to complete lease. In such preparatory stage letters were written mostly by the Plaintiffs and most of the letters remain unanswered and unrepaired. But the Defendant cannot be affected by principle of estoppel or acquiescence inasmuch as the Defendant owed no duty to reply to the letters of the Plaintiff and there is no evidence to indicate that the Plaintiff changed his position at the instance of Defendant. See Kishori v. Collector of Etah 38 C.W.N. 344.

10. Thus having regard to the entire facts and circumstances of the case and the evidence on record, we are of the view that the Plaintiff could not prove his case in the Court below and we do not also find any merit in the appeal. The appeal shall stand dismissed on contest with cost. The judgment and decree of dismissal of the trial Court are hereby affirmed.

Mahitosh Majumdar, J.

11. I agree.

12. Appeal dismissed.