

Arun

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 270 OF 2016

IN

SUIT NO. 3762 OF 2002

K Raheja Corp Pvt Ltd ...Applicant

In the matter between

K Raheja Corp Pvt Ltd ...Plaintiff

Versus

Maharashtra Tourism Development Corporation ...Defendant
Ltd

**Mr Pradeep Sancheti, Senior Advocate, with Ms Sanidha
Vedpathak, i/b Maneksha & Sethna, for the Applicant/Plaintiff.
Mr SP Bharti, for the Respondent/Defendant.**

**CORAM: G.S. PATEL, J
DATED: 12th February 2019**

PC:-

1. The Applicant/Plaintiff seeks a judgment on admission against the sole Defendant on the basis of an averment made in paragraph 2 of the Written Statement. I have heard Mr Sancheti for the Applicant/Plaintiff at some length and considered his submissions and the authorities that he places. I am not persuaded

that there is sufficient cause made out for the grant of relief. I have also briefly heard Mr Bharti for the Respondent/Defendant in opposition and considered his submissions as well.

2. Order XII Rule 6 of the Code of Civil Procedure 1908 (“CPC”) reads thus:

“6. Judgment on admissions.—(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

3. This branch of the law is well settled. An admission, to serve as the foundation for judgment, must be clear, unambiguous and unequivocal.¹ There is a material distinction between an admission in a pleading and an admission in evidence: the former stands on a higher footing than the latter.² An admission in a pleading cannot be withdrawn by amendment.³ None of this means, of course, that a judgment on admission must be delivered or granted merely for the

1 *Jeevan Diesels & Electricals Ltd v Jasbir Singh Chadha*, (2010) 6 SCC 601.

2 *Nagindas Ramdas v Dalpatram Iccharam*, AIR 1974 SC 471.

3 *BK Narayana Pillai v Parameswaran Pillai*, (2000) 1 SCC 712.

asking. Any such application must necessarily satisfy these established principles. Further, it is settled law that Order 12 Rule 6 is subject to the provisions of Order 8 Rule 5, and that despite any such admission, a Court may nonetheless demand proof.⁴ This is the jurisprudential context.

4. The Plaintiff claims that a Memorandum of Understanding (“**MoU**”) between the parties dated 20th May 1995 came to be wrongfully and unlawfully terminated by the sole Defendant by its letter of 29th November 1999, a copy of which is at Exhibit “Q” to the Plaint. The first prayer in the suit is for a declaration in these terms. The second prayer is for a refund of an amount of Rs.29 lakhs with interest and further interest at the rate of 24% per annum. The next prayer is a money claim in the amount of Rs.11,61,325/- with interest as per the particulars of claim at Exhibit “Y” to the Plaint. This Exhibit makes it clear that the relief in prayer clause (c) is for cumulative interest. The previous Exhibit “X” sets out expenses allegedly incurred by the Plaintiff while preparing the plot in question at MIDC. Next the Plaintiff seeks a declaration that the property that is the subject matter of the MoU is charged with the repayment of these amounts. Then there are the usual prayers for enforcement of that charge in default of payment.

5. There is no prayer whatsoever for specific performance of the MoU. A copy of that MoU is at Exhibit “B” to the Plaint from page 31. The agreement is between the Defendant, Maharashtra Tourism Development Corporation Ltd (“**MTDC**”), a Government of

4 *Razia Begum v Sahebzadi Anwar Begum*, AIR 1958 SC 886.

Maharashtra undertaking, and the Plaintiff. It is in respect of a lease of land at village Erangal Taluka Borivali, Mumbai.

6. MTDC entered a Written Statement on 3rd December 2007. In paragraph 2 of this Written Statement, this is what the Defendant said:

"2. **At the further outset, the Defendants say that they have always been and are still willing to perform their part of the Memorandum of Understanding (MOU) dated 20th March 1995** (Exhibit "B" to the Plaint and referred to as 'the suit Agreement') whereby the subject matter of the present Suit constituting the immovable property at Survey No.129/2 admeasuring about 18 Acres and Survey No.130 admeasuring about 17 Acres situated at Village Erangal, Taluka Borivli, District Mumbai was agreed to be leased out by the Defendants to the Plaintiffs for a period of 30 years."

(Emphasis added)

7. This is the so-called admission that the Plaintiff now seeks to use. I believe it is necessary before going further to also reproduce certain other paragraphs of that Written Statement. Paragraphs 7, 13, 17 and 18 read thus:

7. The Plaintiffs forthwith confirmed their acceptance of the said terms and conditions vide their letter dated 15th January 1994. Thereupon, the Defendants vide their letter dated 19th February 1994 requested the Plaintiffs to pay Rs.2,14,29,000/- being 27½% of the total value of Rs.7,79,24,000/- along with execution of the Agreement. Hereto annexed and marked Exhibits '3' and '4' are copies

of the said letters dated 15th January 1994 and 19th February 1994.

13. Thereafter the Defendants continuously persuaded the Plaintiffs to comply with the conditions of advance payment and execute the Agreement. However, only on 20th March 1995, an MOU ('the suit Agreement' and annexed as Exhibit 'B' to the Plaint), was entered into between the Plaintiffs and the Defendants. The Defendants say that under clause 4 of the suit Agreement, the Plaintiffs were required to pay 27½% of the value as arrived at finally by the Town Planning and Valuation Officer before executing the lease being an advance lease rent for three years and shall pay 15% of the balance 75% of the value of the said suit property or 5% of the gross turnover, whichever was higher, every year, commencing from fourth year from the date of execution of the lease deed between the Defendants and the Plaintiffs.

17. **The Defendants submit that without paying the balance amount of Rs.81,21,587/- and the remaining lease rents which were to be paid thereafter, the Plaintiffs now allege that the Defendants failed to execute the lease deed. The Defendants submit that it is evident from the above facts that the Plaintiffs failed to perform their part of the Agreement under the suit Agreement. In fact, despite the said default on the part of the Plaintiffs in paying the initial 27½% of the total value of the said value under the suit Agreement, the Defendants prepared a draft lease deed, which draft was pending finalisation on the Plaintiffs paying the balance sum of Rs.81,21,587/- to the Defendants. The Defendants submit that the Plaintiffs were given a copy of the draft lease deed for their perusal and several oral discussions took place in order to finalise and execute the lease deed. Therefore, the Defendants submit that it**

is incorrect for the Plaintiffs to say that the Defendants did not take any steps to execute the lease deed. The Defendants submit that the Plaintiffs did not take steps to enter into the final lease deed and the delay was caused by the Plaintiffs on some pretext or the other. Hereto annexed and marked Exhibit '12' is a copy of the said draft lease deed.

18. The Defendants say that due to the failure on the part of the Plaintiffs to take any steps pursuant to the suit Agreement and to develop the suit property, encroachments started developing on the property. Therefore, in view of clause 9 of the suit Agreement, the Defendants issued the Notice of Termination dated 29th November 1999 terminating the suit Agreement for the delay caused and the breach of conditions and further called upon the Plaintiffs to forthwith handover vacant and peaceful possession of the said property. The Plaintiffs failed to handover the possession of the suit property despite the said Notice and therefore the Defendants were constrained to re-enter the suit property and take possession of the same on 1st March 2000."

(Emphasis added)

8. The net result of this, at least on any fair reading, is that MTDC does not disavow or disown its termination. On the contrary, it reaffirms that its termination of 29th November 1999 was not only lawful and proper, but was perfectly justified in light of the Plaintiff's alleged repeated defaults to perform its reciprocal obligations under the MoU. MTDC says in its Written Statement that for its part it was always ready and willing to perform its obligations and continued to be so. I believe Mr Sancheti

emphasises the words “*and are still willing to perform*”. He would have me read these to mean that, despite the paragraphs that follow in the Written Statement, MTDC has now entirely distanced itself from its termination and disclaimed it altogether. I do not think it is possible to read the Written Statement in this fashion. The pleading must be read as a whole, and this is as true in the context of an application for a judgment on admission as otherwise.⁵ This, then, is the first problem in the Plaintiff’s way; for this so-called admission cannot possibly be said to be clear, unambiguous or unequivocal. If there are two contradictory portions of the pleadings, or there are averments that are perceived to be inconsistent, then at some point they will have to be reconciled in a manner permissible in a trial. I do not think that there is any law that justifies the selection of one averment without having regard to the rest of the pleadings and the entirety of the case placed before the Court. No party could be disadvantaged like this.

9. There is another reason why the Plaintiff cannot possibly succeed on this application. After this Written Statement was filed, the Plaintiff did seek an amendment. Mr Sancheti confirms that this amendment (by Chamber Summons No. 924 of 2014) was one in which the Plaintiff specifically sought specific performance of the MoU. It asserted that what the Defendant said was an offer and the Plaintiff was willing to accept that offer. The Defendant opposed the Chamber Summons. It was dismissed by an order of 12th January 2014 (KR Shriram J). A copy of this order is at Exhibit “B” to the Affidavit in Reply from page 20. That is an elaborate and detailed order. The learned single Judge noted that the Chamber Summons

⁵ *Western Coalfields Ltd v Swati Industries*, (2004) 1 Bom CR 322.

was itself filed some seven years after the written statement. The amendment was in six parts. He held that it was obvious that the Plaintiff was seeking to expanding the scope of the suit from one for a declaration and a money claim to include specific performance of the MoU. Though the Plaintiff had written letters claiming its readiness and willingness, it chose not to seek specific performance. That omission to sue for specific performance, the learned single Judge held, was deliberate. A suit for specific performance would now be time barred, and given the enormous delay, the amendment sought was impermissible. The court also held that the amendment would change the character of the case. The amendment application was allowed only to a limited extent (of change of name, etc).

10. The Plaintiff appealed. Before the Division Bench, it again canvassed the argument that there was an admission by the Defendant. The appellate order of 30th November 2015 must be reproduced. This is what it says:

"1. The grievance of the Appellant/Original Plaintiff is that in view of the specific averment made in the written statement that the Defendant was ready and willing to perform the agreement and is still ready and willing to perform the agreement, the Plaintiff is only seeking a consequential amendment in the plaint and also seeking an amendment in the reliefs claimed by the Plaintiff.

2. In our view, it is not necessary to amend the plaint for that purpose and it is always open for the Plaintiff to take out an appropriate application, seeking a decree on admission at the trial in view of the said pleadings made in the written statement. Reserving the right of the Plaintiff to

do so, the appeal is disposed of. It is clarified that the contentions raised by both the parties are kept open."

(Emphasis added)

11. Mr Sancheti submits that the appellate order makes it clear that the amendment was unnecessary and that the Plaintiff is entitled instead to simply seek a decree on admission. I do not think that is a correct reading of the appellate order at all. The submission overlooks the first paragraph of the appellate order which sets out the grievance of the Plaintiff. The Plaintiff contended before the Appellate Court that it was only seeking a "consequential amendment" in the Plaint. But consequential to what? It could not be consequential to a claim for specific performance, because there was none. It was said to be 'consequential' to a defence, but that is no reason to allow any amendment. Indeed, the Plaintiff was doing nothing of the kind. It was clearly seeking to substitute a claim for refund and damages, an entirely monetary claim, with a wholly new claim for specific performance. This is what Shriram J refused to permit. Before the Appeal Court it seems the Plaintiff took a different line (asserting that its application was only 'consequential', a misnomer to begin with). It is in this context that the Appeal Court said that if indeed the Plaintiff believed that it was only seeking a 'consequential' amendment then the Plaintiff was at liberty to file an appropriate application for a decree on admission under Order XII Rule 6.

12. But what the Plaintiff now asks me to do is to decree the suit in terms of a prayer that was never made when the suit was

instituted. It asks that this be done specifically in terms of a prayer that it sought to introduce by an amendment that was refused.

13. Mr Sancheti submits this is something a Court can always do, although I note he wisely stops short of saying that this is something that a Court *must* always do. His reliance on the decision of the Supreme Court in *Firm Srinivas Ram Kumar v Mahabir Prasad & Ors*,⁶ an authority for very many propositions, is, unfortunately not an authority for the proposition that I must grant such a relief mindless of the trajectory of the litigation, the amendment application made by the Plaintiff and its rejection, and without any regard either to the Written Statement taken and read as a whole. Mr Sancheti submits that in *Firm Srinivas Ram Kumar* — a suit of specific performance — the plaintiff claimed to have paid the defendant some amount of money in part performance. The defendant denied the contract entirely. He however accepted that he had received some money but said this was not under any contract, but was simply a loan. Although there was no prayer for anything but specific performance, the Supreme Court held the court could pass a decree for recovery of the loan even if the plaintiff had failed to plead and claim relief on this alternative case. That is at quite a remove from where we find ourselves in this particular situation. There is not only the question of the Plaintiff's failure to plead a case for specific performance and seek damages in the alternative. The Plaintiff actually attempted to introduce precisely such a case. The Plaintiff failed in that attempt. Having suffered that failure, I do not see how it is open to the Plaintiff to now get indirectly that which it completely failed to get by a frontal application squarely

6 1951 SCR 277 : AIR 1951 SC 177.

placing a case for amendment to include a prayer for specific performance. In any case, I do not see how any decree for specific performance can be passed on some sort of implicit or implied averment. The law in that regard is clear. A claim for specific performance is a distinct cause of action and it requires to be pleaded and proved in a specific manner. It cannot be assumed to exist as a cause of action buried somewhere in the pleadings, or arrived at by a process of necessary implication. The Supreme Court's decision in *Firm Srinivas Ram Kumar* was obviously a finding in the interest of justice. After all the defendant there did have the plaintiff's money and agreed that he did. He just said that he had the money in a quite different character (as a borrower), and not under any agreement capable of specific performance. This could not and did not tie the hands of a civil court in directing the repayment by the Defendant of the sum that he held.

14. The decision of a Division Bench of the Madhya Pradesh High Court in *Shikharchand & Ors v Mst Bari Bai*⁷ will also not assist the present Plaintiff. In this case, the plaintiff sought a decree on admission in the context of a lease. The Division Bench held that while it is true that ordinarily a plaintiff is confined to the relief sought on the basis of the cause of action made out in his plaint, it is open to the Court in a suitable case to afford a relief on the basis of the case set up by the defendant. In such a case, there could be no prejudice to the defendant because the relief legitimately springs from the case set up by him. I think it would be stretching things a little too far in the case before me to say that the MTDC must now be not just held but actually *confined* to these three words in

7 1973 SCC OnLine MP 46 : AIR 1974 MP 75.

paragraph 2 of its Written Statement to compel an execution of the lease, even though the Plaintiff himself has never sought this; and even though the Plaintiff today still does not seek it; and even though the Plaintiff's application for amendment to introduce this prayer was rejected. This would also require that I completely overlook that, in paragraph after paragraph of the Written Statement, the Defendant stands by its termination of that MoU. The submission by the Plaintiff amounts to nothing more than this: that these few words in paragraph 2 operate to completely obliterate everything else said in the Written Statement. No pleading can be read like this.

15. There is also an Affidavit in Reply to the present Notice of Motion and of course the inevitable rejoinder (without which it seems no judge of this Court can ever decide any matter). The reply itself reasserts that there is indeed no admission. It says in terms this at paragraph 8:

"8. I say that since the Plaintiff who failed to discharge their obligation, under the MoU, resulting into termination of the said MoU by the Defendant, alleged that the termination was wrong, arbitrary and illegal, the Defendant averred in the Written Statement about their readiness and willingness of their part under the MoU in order to justify and substantiate the ground for termination and Defendant would have performed their part of obligation as per MoU if the Plaintiff would have performed their part of the obligation avoiding termination."

(Emphasis added)

16. Is this explanation good? Is it bad? This is not the time to determine those questions. At some point in the trial, the Defendant's witness will be confronted with this. But it does emerge from this extract, apart from the portions of the Written Statement that have been set out above, that the so-called admission in paragraph 2 of the Written Statement on which the Plaintiff places such emphasis is certainly not of the kind that would justify a decree under Order XII Rule 6 of the CPC. It is no admission at all.

17. I conclude this by referring to a decision cited by Mr Sancheti which, alas, is more against him than in his favour. This is the decision of the Supreme Court in *Charanjit Lal Mehra & Ors v Kamal Saroj Mahajan & Anr.*⁸ In paragraph 8, quoting from the decision in *Uttam Singh Duggal & Co Ltd v United Bank of India*,⁹ the Supreme Court said:

"In the objects and reasons set out while amending Rule 6 of Order 12 CPC 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.**'"

(*Emphasis added*)

18. The words emphasized above are important. The Defendant, MTDC, does not agree that the Plaintiff is entitled to specific

8 (2005) 11 SCC 279.

9 (2000) 7 SCC 120.

performance. It says in terms that the Plaintiff is *not* entitled to specific performance. It has always said so. What the Plaintiff is doing is to substitute pleading and proof of *its own readiness and willingness* by relying on the Defendant's assertion that the *Defendant was always ready and willing*. This is what is lost in translation. What MTDC is really saying is no admission at all. It is saying that *although MTDC was always ready and willing to perform its obligations, the Plaintiff was not*, and hence the termination. This is the averment in full. The law is settled, too, that an pleading (and an admission) must be read in full. There can be no admission of a case not pleaded. On any reading of the Written Statement as a whole, it cannot be said that the Defendant's case is that the Plaintiff is now entitled to the relief of specific performance. The Defendant has, at quite extensive length, disputed this altogether, and set out the circumstances in which that perhaps infelicitously worded averment came to be made in paragraph 2 — and that is all that it is.

19. The Notice of Motion is dismissed. I will, as an exceptional case, resist the temptation to make an order of costs.

(G. S. PATEL, J)