OCD-1

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
[Commercial Division]

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE UDAY KUMAR

APO/16/2023
WITH
CS/59/2021

SIDDHA REAL ESTATE DEVELOPMENT PVT. LTD.
Versus
COLLIERS INTERNATIONAL (INDIA) PROPERTY SERVICES PVT. LTD.

For the Appellant	: Mr. Debnath Ghosh, Adv. Mr. Arik Banerjee, Adv. Mr. Ramendu Agarwal, Adv. Ms. Rishika Goyel, Adv.
For the Respondnet	:Mr. Kumarjit Banerjee, Adv. Ms. Sanchari Chakroborty, Adv. Mr. Sourajit Dasgupta, Adv. Ms. Akansha Chowdhury, Adv. Ms. Tanishka Khandelwal, Adv.
Order dated	: 28th June, 2023

Soumen Sen, J.(Oral)

1. The appellant is the respondent in the suit. The appellant is aggrieved by the order passed by the learned Single Judge on 14th November, 2022 in an application for judgment upon admission.

2. The dispute has arisen out of non-payment of facility management services. The respondent was appointed by the appellant for rendering facility services in respect of the project "Siddha Town". The respondent was providing the facility services to the several flat owners. The flat owners have since formed an Association but the Association formally took over management in August, 2019. The facility management contract expired on 31st July, 2019. Close to the expiry of the contract period, the facility management raised an invoice of Rs.92 lakhs and agreed to receive Rs.60 lakhs on an ad hoc basis till the final accounts are settled. The respondent/plaintiff approached the learned Trial Court on the basis of few e-mails which, *inter alia,* include an e-mail of 29th September, 2019 where the appellant had agreed to pay a sum of Rs.20 lakhs pending settlement of the accounts. This was accepted by the respondent in its e-mail dated 1st October, 2019 as an ad hoc payment. However, in between, it appears that disputes arose between the parties with regard to the exact amount payable for the services rendered. The principal defence to the claim of the appellant appears to be an allegation of misappropriation by one of its officers, Nilanjan Ghosh, alleged to have collected the CAM charges on behalf of the plaintiff and issued rent receipts. The appellant alleged that Nilanjan Ghosh had no authority express or implied to collect CAM charges on behalf of the facility management company as it was beyond the purview of the agreement between the plaintiff and the defendant and accordingly, any unauthorised collection made by Nilanjan Ghosh during the course of his employment could not bind the plaintiff. The plaintiff, accordingly,

proceeded on its earlier demand and claimed an ad hoc sum of Rs.60 lakhs. The learned Single Judge on the basis of the e-mails exchanged and considering the nature of the controversy involved was of the opinion that it is not a fit case for judgment upon admission as there was no unequivocal admission of any specific amount and had relied upon three electronic mails reliance upon which were made by the plaintiff to arrive at a finding that these e-mails do not constitute admission. However, the learned Single Judge has proceeded to allow the prayer for security following the decision of the Hon'ble Supreme Court in *Rahul S. Shah vs. Jitendra Kumar Gandhi & Ors.,* reported in *2021 (6) SCC 418.* The basis of the finding is stated under:

> *"At the same time there is no dispute as of now that the plaintiff did not supply any staff, technician or facilities staff in terms of the contract. It is also not in dispute that the contract did not provide for collection of CAM charges by the plaintiff. Any collection said to have been made by Nilanjan Ghosh a staff deployed by the plaintiff in terms of the contract cannot, prima facie, be said to be collection of CAM charges by the plaintiff in terms of the contract when there is no specific term in respect thereof in the contract. The defendant on the basis of the complaint lodged by the association towards alleged misappropriation of the fund have in turn alleged misappropriation. There is, at this stage, no prima facie evidence to substantiate that there has been misappropriation of fund or as to its quantum except the report prepared by the auditors engaged by the defendant. The police complaint said to have been made by the defendant regarding misappropriation against Nilanjan Ghosh a staff of the plaintiff has also not reached a logical conclusion to demonstrate that a staff of the plaintiff misappropriated the funds. There is also no clear cut, prima*

facie evidence to demonstrate on the otherhand the defendant has utilized the services and has not paid except Rs. 20 lakhs the amount that the defendant was to collect from the Residents Association or had collected and misappropriated. There is also no denial by the Residents Association to pay the plaintiff available on record owing to misappropriation of fund. It is therefore evident that on one hand the plaintiff had engaged facilities staff and technician as per the contract and has not received any payment in excess of Rs. 20,00,000/- though the aggregating invoice is Rs. 93,02,638/-.

Considering all these aspect and the fact that the contract no where speaks of paying the plaintiff only after collection from the residents association or payment by the said association and further that the suit being a money suit instituted in the commercial division of this Court and in the light of the judgment reported in 2021 (6) SCC 418 [Rahul S. Shah-Vs-Jitendra Kumar Gandhi & Ors.] I am inclined to direct the defendant to secure a sum of Rs. 40,00,000/- to the credit of this suit by 14th December, 2022 failing which there will be an automatic decree of Rs. 40,00,000/- in favour of the plaintiff as against the defendant." (emphasis supplied)

3. This order is now under challenge.

4. Mr. Debnath Ghosh, learned counsel representing the appellant submits that there is no pleading in the plaint or in the application justifying attachment before judgment as contemplated under Order 38 Rule 5 of the CPC. Mr. Saha has relied upon the Division Bench judgment in *Sunil Kakrania vs. Saltee Infrastructure* reported in *AIR 2009 Cal 260* to argue that in absence of any pleading justifying furnishing of security, the order passed by the learned Single Judge is without jurisdiction. It is submitted that the order rejecting the prayer for judgment upon admission

would clearly show that the plaintiff has no, prima facie, case and once a triable issue has been raised, the learned Trial Court could not have applied the principle laid down in *Rahul S. Shah* (supra) and direct furnishing of security in the instant case.

5. Mr. Ghosh has further submitted that the appellant had in the meantime filed a written statement with a counter-claim and having regard to the nature of the dispute and lack of any pleading justifying furnishing of security, the impugned order is required to be set aside.

6. In reply, the learned counsel for the plaintiff has submitted that the learned Single Judge has not proceeded on the basis of Order 38 Rule 5 but had invoked the jurisdiction under Section 151 of the Code of Civil Procedure following the ratio of the Hon'ble Supreme Court in *Rahul S. Shah* (supra) sub-paragraph 42.7 and such order was passed under inherent jurisdiction.

7. Learned counsel has further submitted that on 29th September, 2019, the respondent had already agreed to pay the ad hoc sum and had acted upon it by remitting a sum of Rs.20 lakhs on an ad hoc basis which clearly shows that the appellant may not have any defence to the real claim of the plaintiff. It is submitted that although the plaintiff may have failed to have a judgment written for admission but the same set of facts may be relevant and taken into consideration for the purpose of invoking Section 151 of the Code of Civil Procedure directing security following the ratio of the decision of the Hon'ble Supreme Court in *Rahul S. Shah* (supra), paragraph 42.7.

8. We have heard the learned counsel for the parties.

9. The order refusing judgment upon admission is not under challenge. The learned Single Judge has categorically stated that the plaintiff is not entitled to judgment upon admission. The order also does not proceed on the basis of Order 38 Rule 5. Having regard to the fact that there was no pleading in the plaint or even in the petition disclosing the essential ingredients of Order 38 Rule 5 of the Code of Civil Procedure, the question arises whether the Court would apply its inherent jurisdiction under Section 151 of the Code of Civil Procedure in directing security to be furnished at this stage. There cannot be any doubt that the agreement does not cast any duty upon facility management company to collect the CAM charges. We could not find any plausible explanation from the appellant permitting Nilanjan to collect such amount for the last several years using the letterhead of the said company. It has not been alleged that the letterheads were forged. The counter claim was filed belatedly presumably to dislodge the claim made by the plaintiff. The appellant did not allege any deficiency in service. Although it appears to be extremely doubtful at this stage that Nilanjan could continue to exercise his authority to collect CAM charges under the nose of the appellant and without the knowledge of the appellant, the auditor has filed a report and it cannot be said that triable issues have not been raised for the purpose of determining liability of the claim of the plaintiff. Since the argument is made essentially on paragraph 42.7 of *Rahul S. Shah* (supra), it is necessary to refer to the said sub-paragraph:

> "***42.7.*** *In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree."* (emphasis supplied)

10. In our respectful reading of the said sub-paragraph, it does not show that in every suit for payment of money, the Court would direct furnishing of security. The Hon'ble Supreme Court has used a phrase "in appropriate cases during the pendency of the suit" meaning thereby that if the Court is of the view that the case although may not come within the purview of Order 38 and still there is a strong possibility of the plaintiff succeeding in the suit and execution of the decree could be an impediment as there is every possibility of the defendant removing his assets or his creditworthiness appears to be untrustworthy, the Court may direct furnishing of security."

11. The law is required to be interpreted and applied in a manner so that no injustice is caused to the rightful claimant. The law cannot be a lame duck. The situation in the 1950s and the situation in 2019 are completely different. The commercial world has changed. Recent developments all over the world have shown that commercial morality has remained merely as a concept. It is "more honoured in breach than in observance" (***Hamlet, Shakespeare***). The modus operandi to make a decree otiose and illusory by an unscrupulous litigant apprehending that a

decree is imminent by adopting devious and clandestine means are well known and law courts are every now and then facing such situations. Should a court faced with an unimpeachable claim wait for an unscrupulous litigant to deliver its defence and the luxury of a trial by which time the chance of recovery would be lost forever?

12. In ***Abheya Relators Private Limited vs. SSOPL Retail Limited & Anr.*** reported in ***2010 (2) CHN (CAL) 203*** it is stated:

> *"24. Two aspects need to be seriously considered. At the time that the Civil Procedure Code came to be made suits would not take years or decades to be brought to trial as is usually the case these days. The strength of the principle that an apparently good claim would not justify an order for attachment to be made before final judgment is rendered, needs to be seen with reference to the time and place in which such principle was born. The second aspect is that even without a defendant attempting to defraud its creditors or the plaintiff, the vicissitudes of the commercial market may leave the defendant with little to offer as judgment-debtor upon the decree being made. The sheer passage of time between the institution of an action and the trial thereof that has now come to be accepted as par for the course may make the claim irrelevant or even the claimant disinterested. That would result in an erosion of the confidence in the system and lead suitors to undesirable quarters for more effective results. But this may not be the ideal action for such considerations to have a bearing."*

13. In ***Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*** reported at ***AIR 1962 SC 527*** it was observed: *"that courts have inherent jurisdictions to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC... It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the*

legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them ... The court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so." Even prior thereto in two Calcutta decisions namely ***Bhagat Singh Bugga vs. Dewan Jagbir Sawhney*** reported at ***AIR 1941 Cal 670*** and ***Chinese Tannery Owners' Association and Ors. v. Makhan Lal and Ors.,*** reported at ***AIR 1952 Cal 560***, the said principles have been clearly stated. In ***Bhagat Singh Bugga*** (supra), the High Court held that the law cannot make express provisions against all inconveniences and the court, therefore, had inherent power to act *ex debito justitiae* where the circumstances of the case required. (See. ***Harleen Jairth vs. Prabha Surana & Anr.,*** reported in **2019 SCC Online 2372; 2019 (4) CHN 412; 2020 (1) CalLT 631** and ***TATA Chemicals Ltd. vs. Kshitish Bardhan Chunilal Nath*** reported in **2022 SCC Online Cal 3343).** As observed by Krishna Iyre, J. in ***Sushil Kumar Sen vs. State of Bihar*** reported **1975(1) SCC 774** "justice in the goal of jurisprudence". Ex debito justitiae is inbuilt in the inherent power of the court.

14. It is a trite law that the inherent power can only be applied when there is no specific provision in the Code to deal with the situation. If the Code provides a remedy and lays down specific conditions upon fulfilment of which a litigant is entitled to an order prayed for, the Court would not ordinarily be exercised it inherent power. However, as the word 'inherent power' itself connotes in a given situation where the principles of any of the provisions of the Code may not be clearly applicable, the Court may in

appropriate cases exercise such powers ex debito justitiae and pass appropriate order. The court exists to do real, complete and substantial justice. In paragraph 42 of the judgment in ***Rahul S. Shah*** (supra), the Hon'ble Supreme Court had observed that all Courts dealing with suits or execution proceedings shall mandatorily follow the directions which, inter alia, include paragraph 42.7.

15. At this stage, having regard to the nature of the dispute that a counter-claim has now been filed it may not be proper to direct payment of cash security. However, we direct the appellant to file an affidavit of assets on oath with the Registrar, High Court, Original Side, within two weeks from date upon prior service to the plaintiff and if it appears at any stage of trial or even before the commencement of trial that there is a possibility of the appellant being either referred to IBC or in an impecunious or precarious financial condition, it would be open for the plaintiff to file an application during the pendency of the suit for furnishing security to ensure satisfaction of the decree that may be likely to be passed, regard being had to the nature of the agreement and the obligations cast upon the parties with regard to fulfillment of their obligations under the facility. In the event an affidavit of assets with the latest balance-sheet and annual accounts for the last three years since 2019 till date is filed within a period of two weeks from date, the order directing furnishing cash security for Rs.40 lakhs shall stand set aside and the Registrar, Original Side shall prematurely encash the fixed deposit created pursuant to the order dated 13th December, 2022

and remit the proceeds thereof to the designated bank account of the appellant upon due notice to the plaintiff.

16. The appellant shall continue to furnish balance-sheet with auditor's report for every year till the disposal of the suit.

17. The appeal is allowed in part.

18. APOT 16 of 2023 is disposed of, however, there shall be no order as to costs.

I agree (SOUMEN SEN, J.)

(UDAY KUMAR, J.)

sg.