

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

**CS 186 of 2018
With
IA No. GA 8 of 2024**

Primarc Srijan Projects LLP & Ors.

Versus

Howrah Mills Company Ltd.

Mr. Ratnanko Banerjee, Sr. Adv.

Mr. Sabyasachi Choudhury

Mr. Saubhik Chowdhury

Mr. Paritosh Sinha

Mr. Shounak Mukhopadhyay

Mr. Tithankar Das

... For the plaintiffs.

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Sarvapriya Mukherjee

Mr. Satadeep Bhattacharyya

Mr. Bikash Shaw

Mr. Sumanta Biswas

Mr. Yashvardhan Kochar

... For the defendant.

Hearing Concluded On : 24.01.2024

Judgment on : 01.02.2024

Krishna Rao, J.:

1. The defendant has filed the present application being G.A No. 8 of 2024 for rejection of the plaint or in the alternative to dismiss the suit.

2. The plaintiffs have filed the suit praying for following reliefs:

“a) A decree in the sum of Rs. 11,58,74,242/- (Rupees Eleven Crores Fifty Eight Lakhs Seventy Four Thousand Two Hundred and Forty Two) along with interest at the rate of 15 % (Fifteen percent) per annum from the date of institution of the suit against the Defendant, as more fully pleaded in paragraph 20 above;

b) Decree for interest upon judgment at the rate of 15 % (Fifteen percent) per annum against the Defendant, as morefully pleaded in paragraph 21 above from 1st June 2018 onwards;

c) Pendente lite interest and interest upon judgment;

d) Perpetual injunction restraining the Defendant and its men, servants or agents to construct or undertake any development on the said land being the demarcated and earmarked portion of 194 Cottahs of land out of the larger premises no. 493/C/A Grand Trunk Road (S), Howrah – 711102 without first making payments of the dues of the plaintiffs.”

3. The defendant is contesting the suit by filing written statement along with counter claim praying for following reliefs:

“(a) A decree of specific performance directing the plaintiff Nos. 2 & 3 to act in terms of the MOU dated 27th August, 2015;

(b) In the event specific performance cannot be granted then, a decree for damage to the tune of Rs. 130 crore as more fully pleaded in paragraph 9(e) of the Written Statement;

(c) In the alternative enquiry into damage and decree for such sum which may be found due and payable upon enquiry;

(d) Decree for interest upon judgment @18% per annum as pleaded in paragraph 9(g)."

4. By an order dated 22nd December, 2022 following issues are framed:

1. *Whether the plaintiffs are entitled to a decree for Rs.11,58,74,242/- along with interest @ 15% per annum from the date of institution of the suit?*
2. *Whether plaintiffs are entitled for interest upon judgment @ 15% per annum against the defendant from 1st June, 2018 onwards?*
3. *Whether the plaintiffs are entitled to pendente lite as prayed for?*
4. *Whether the plaintiffs are entitled to an order of perpetual injunction restraining the defendant and its men, servants or agents to construct or undertake any development on the demarcated and earmarked portion of 194 Cottah of land out of the larger premises no. 493/C/A, Grand Trunk Road(s), Howrah 711102?*
5. *Whether the defendant failed to perform their obligations under the agreement dated August 27, 2015?*
6. *Whether the Agreement recorded in form of Minutes in a Meeting held on May 9, 2017 is binding upon the parties to the suit?*
7. *Whether the defendants have committed breach of their obligations under the Agreement dated May 09, 2017?*

8. *Whether the defendant has suffered any loss or damage on account of loss of profit, business opportunity and goodwill due to delay committed by the plaintiff?*
9. *Whether the defendant is entitled to a decree for damages against the plaintiff to the tune of Rs.130 crores along with interest upon decree @ 18% per annum?*
10. *Whether the defendant is entitled to a decree of specific performance against the plaintiff no.2 and 3 to act in terms of the Agreement dated August 27, 2015?*

5. This Court had fixed the matter for witness action of the plaintiff but the Learned Counsel for the plaintiff informed this Court that the plaintiff will not adduce any witness and will argue the matter on merit on the basis of the documents relied upon by the parties. The Counsel for the plaintiff has concluded his argument. The Counsel for the defendant has also argued the matter on merit. During the argument, the defendant has raised the point of admissibility of the document i.e. the agreement dated 27th August, 2015, on the basis of which the plaintiff has filed the suit as the said agreement is not properly stamped.

6. By an order dated 29th March, 2023, this Court has referred the agreement dated 27th August, 2015 to the Collector for proper valuation under the Indian Stamp Act, 1899 and accordingly, the agreement was properly stamped. Subsequently, the defendant has filed two applications being G.A. No. 6 of 2023 and G.A. No. 7 of 2023. The

defendant has not pressed the application being G.A. 6 of 2023 and the Counsel for the defendant has argued the matter with regard to the application being G.A. No. 7 of 2023 wherein the defendant has raised objection of admissibility of the document i.e. Minutes of the meeting dated 9th May, 2017 appearing at page No. 41 and 42 of the plaint as the same is also not properly stamped.

7. The objection raised by the defendant with regard to the admissibility of the document appearing at page nos. 41 and 42 of the plaint was decided by this Court by an order dated 22nd September, 2023 holding that the document is not required to be stamped. Being aggrieved with the said order, the defendant has preferred an appeal being APOT No. 387 of 2023 and the said appeal was disposed of by an order dated 17th November, 2023 by setting aside the order dated 22nd September, 2023 and directed this Court to decide the issue de novo on the basis of the observation made by the Appellate Court.
8. After the order passed by the Appellate Court, the plaintiffs submits before this Court that the plaintiffs do not want to go to any controversy whether the document is required to be stamped or not, the plaintiffs voluntarily prayed for sending the document to the Collector for stamp. As per the submissions made by the Learned Counsel for the plaintiffs, this Court has referred the Minutes of the Meeting dated 9th May, 2017 to the Collector for valuation for the purpose of getting the document properly stamped. On 21st December, 2023, the Collector of Stamp Revenue, Kolkata has properly stamped the said document.

After the stamp of the documents, the plaintiffs prayed for passing appropriate order on merit of the suit but in the meantime, the defendant has filed the present application.

9. Now the defendant raised an objection that the Minutes of the Meeting dated 9th May, 2017 which the plaintiffs have relied upon expressly creates a “lien over the Premises No. 439/C/A, G.T. Road (South), Howrah – 711 102” and thus the said document is required to be registered and without the registration, the said document cannot be admitted in evidence or relied upon.
10. Mr. Abhrajit Mitra, Learned Senior Advocate referred Section 59 and Section 100 of the Transfer of Property Act, 1882 and submitted that by acts of parties, the Minutes of the Meeting is a security for the payment of money which has been created over the immovable property and the same does not amount to mortgage, it is a charge within the meaning of Section 100 of the Transfer of property Act, 1882 and the principal money secured under the said document is more than one hundred rupees, as per Section 59, the same requires registration.
11. Mr. Mitra submits that the Minutes of the Meeting is an unregistered document and thus the same is in-admissible in evidence under Section 49 of the Registration Act, 1908.
12. Mr. Mitra relied upon the judgment reported in **2019 SCC Online Mad 21145 (Narayana Naicker and Others –vs- Kannusamy Naicker**

and Others) and submitted that proviso to Section 49 of the Registration Act makes that document admissible in evidence only in respect of collateral transaction, which is not required to be registered. The collateral transaction is not a transaction affecting the immovable property, but it is independent from the main transaction. Therefore, merely the payment of deficit stamp duty, in respect of an unregistered document, it cannot be stated that it can be used for any collateral purpose. The above unregistered document sought to be used in respect of immovable property is inadmissible, in view of the clear bar under Section 49 of the Registration Act.

13. Mr. Mitra submitted that the suit is based on the Minutes of Meeting dated 9th May, 2017 as appearing at paragraph 17 of the plaint and the said Minutes of the Meeting cannot be looked into even for the collateral purposes and thus the plaint is liable to be rejected. Mr. Mitra relied upon the judgment reported in **2013 SCC OnLine Cal 7062 (Suresh Tulshan & Ors. -Vs- Development Consultants Pvt. Ltd.)** and submitted that where a plaint based on an unregistered document the same even cannot be looked into for the collateral purpose and the plaint is to be rejected.
14. Mr. Ratnanko Banerjee, Learned Senior Advocate representing the plaintiff submits that initially on 27th August, 2015, a Basic Understanding on Joint Venture Development for a portion of the Premises No. 493/C/A, G.T. Road (South), Howrah was entered between the plaintiff and the defendant for development. The property

is still mortgaged with the SBI and the land has not yet converted to “Baastu” land. Without clearing the mortgage and without obtaining No Objection Certificate from the SBI, no conversion can be made to “Baastu” land.

- 15.** The plaintiff has paid an aggregate sum of Rs. 7,00,00,000/- (Rupees Seven Crores Only) to the defendant in terms of the memorandum of understanding and the defendant has acknowledged the receipt of the same.
- 16.** Subsequent to the Memorandum of Understanding, a Minutes of the Meeting was recorded on 9th May, 2017 wherein it is recorded that in case the Memorandum of Understanding is cancelled, the defendant shall return the amount of Rs. 7,00,00,000/- along with expenses upto Rs. 1,00,00,000/- along with interest @ 15% within 90 working days from the date of cancelation or termination of the Memorandum of Understanding. In the said Minutes, it is also recorded that the plaintiffs shall have lien over the said premises and no one will be allowed to construct on the said premises without first making payment to the plaintiffs.
- 17.** The defendant in its written statement admitted with regard to the acknowledgement of Rs. 7,00,00,000/- and it is also admitted that the defendant has not obtained No Objection Certificate from the SBI nor the land is converted to Baastu. The defendant had failed to obtain no objection from SBI in terms of the Memorandum of Understanding and

Minutes of the Meeting, the plaintiff by a letter dated 18th May, 2018, had cancelled the Memorandum of Understanding and called for the defendant for return of the amount with interest but the defendant failed to return the amount with interest and expenses, therefore, the plaintiff has filed the suit.

- 18.** Initially the defendant has raised objection that the Memorandum of Understanding is not properly stamped and in terms of the order passed by this Court, the plaintiffs have taken appropriate steps and got the said document properly stamped. Thereafter, the defendant has filed an application that the Minutes of the Meeting dated 9th May, 2017 also not properly stamped, this Court has rejected the contention of the defendant and the defendant has carried the said order in appeal and the Appellate Court has set aside the order of this Court and remanded the matter to decide the issue de novo. Before deciding the matter by this Court, the plaintiffs of their own have got the said Minutes of the Meeting properly stamped.

- 19.** Minutes of the Meeting dated 9th May, 2017 reads as follows:

“It has been agreed by both the Howrah Mills Co. Ltd. (hereinafter referred to as HMCL) and Primac Srijan LLP (hereinafter referred Srijan) on the development of 194 cottachs of land at premises 493C/A, G.T. Road South, Howrah – 711 102 that Primac Srijan LLP will only develop the aforesaid premises and sign the formal development agreement on the basis of the MOU dated 27th August, 2015 if the State Bank of India and/or its assignee permits to sanction housing loan for the flat purchasers as well as allow to construct on the aforesaid land.

Primarc Srijan LLP will keep deposited two cheques aggregated Rs. 9 crores that is Rs. 5.50 crores for sanction of plan by Howrah Municipal Corporation; Rs.3.50 crores for permission of housing loan for customers/SBI NOC with Mr. Utpal Majumdar, Advocate for a period of 30 days as a security. On obtaining permission for Housing Loan/SBI NOC the sum of Rs.3.50 crores shall be paid by Mr. Majumdar to HMCL and the balance amount of Rs.5.50 Crores shall be released by Mr. Majumdar only upon the successful completion of both the events ie. Housing Loan NOC and Sanction of Plan.

Primarc Srijan LLP has categorically stated in case HMCL fail to bring the permission for housing loan as well as sanction plan for the said premises within 30 days from the date hereof then the Memorandum of Understanding shall automatically stand cancelled without any further negotiation.

In case of such happening of cancellation and/or determination of MOU, HMCL will return Srijan Rs.7 crores plus expenses upto the tune of Rs.1 crore; incurred by Primarc Srijan LLP in this project till date along with interest @15% p.a. within 90 working days from the cancellation and/or termination as stated hereinabove and till such payment is made by HMCL to Srijan. Srijan shall have lien over the aforesaid permises and no one will be allowed to construct on the said premises without first making payment to Srijan. Srijan shall have no other claim whatsoever and cheques of Rs.9 crores deposited with Sri Utpal Majumdar, Advocate will be returned”

- 20.** Similar question came before the Hon’ble Supreme Court in the case of ***Haryana Financial Corporation –vs- Gurcharan Singh and Another*** reported in **(2014) 16 SCC 722** and the Hon’ble Supreme Court held that:

“8. This Court in *J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd.* [*J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd.*, AIR 1970 SC 1041 : (1969) 2

SCR 866] explained the difference between the charge and the mortgage as follows :

“33. ... While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti.”

9. Section 100 of the Transfer of Property Act, 1882 defines “charge” as follows:

“100. Charges.—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

The abovementioned section clearly indicates the following types of charges:

- (1) Charges created by act of parties; and
- (2) Charges arising by operation of law.

10. An ordinary charge created under the Transfer of Property Act is compulsorily registrable. The first portion of Section 100 of the TP Act lays

down that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The words “which apply to a simple mortgage shall, so far as may be, apply to such charge” in this section were substituted by Section 53 of the Transfer of Property (Amendment) Act, 1929, for the words “as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge”. Evidently, the effect of the amendment was that all the provisions of the TP Act which apply to simple mortgages were made applicable to charges.

11. Section 59 of the Transfer of Property Act refers to the mode of transfer which reads as follows:

“59.Mortgage when to be by assurance.—Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.”

12. A conjoint reading of Section 100 with Section 59 of the TP Act makes it clear that if by act of parties, any immovable property is made security for the payment of money to another and it does not amount to mortgage, then all the provisions which apply to a simple mortgage, as far as may be, apply to such charge. Consequently, in view of Section 59 of the TP Act when there is a mortgage other than a mortgage by deposit of the title deeds, it can be effected only by a registered instrument.

14. In *K. Muthuswami Gounder [K. Muthuswami Gounder v. N. Palaniappa Gounder, (1998) 7 SCC 327]* this Court was dealing with the legal validity of a security bond by which parties undertook that they would not alienate the properties till the decree was discharged. Referring the said document, this Court held as follows :

“17. The document, Ext. A-6, security bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document, we cannot say that a charge as such has been created in respect of the suit property for money to be decreed in the suit. All that it states is that in the event of a decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agree with the finding of the High Court that the document at Ext. A-6 is not a charge. If that is so, the suit filed by the appellant has got to be dismissed.”

The Court held that the decree obtained in that suit was a simple money decree and not a decree on a charge or mortgage with the result that the appellant who purchased the property in execution of that decree did not acquire the rights under the security bond.

15. In *Bank of India [Bank of India v. Abhay D. Narottam, (2005) 11 SCC 520]* this Court was examining the scope of undertaking made for creating an equitable charge over a flat in favour of the Bank. This Court held that without a transfer of interest, there is no question of there being a mortgage and that mere undertaking is not sufficient to create a charge. The ratio laid down by the abovementioned judgment applies to the present case. In our view, the mere undertaking that the party will not dispose of the properties mentioned in an undertaking, during the currency of the loan, will not create any charge over those properties, unless charge is created by deposit of title deeds or through a registered document.”

- 21.** As far as the present case is concerned, initially on 27th August, 2015, a Memorandum of Understanding was entered between the plaintiffs and the defendant and in terms of the said Memorandum, the plaintiffs have paid Rs. 7,00,00,000/- to the defendant. The defendant failed to carryout out its obligation by not obtaining pollution/fire clearance certificate, No Objection Certificate from the State Bank of India and approval from the State Bank of India for project loan and accordingly a meeting was held between the parties on 9th May, 2017 wherein the plaintiffs have agreed to keep two cheques amounting to Rs. 9 crores that is Rs. 5.50 crores for sanction of plan by Howrah Municipal Corporation and Rs. 3.50 Crore for permission of loan for customers with No Objection from State Bank of India with Mr. Utpal Mazumdar for a period of 30 days as security. On obtaining permission of housing loan and No Objection from the State Bank of India, the sum of Rs. 3.50 Crores will be paid by Mr. Mazumdar to the defendant and balance amount of Rs. 5.50 Crores shall be released by Mr. Mazumdar only upon the successful completion of both the events. It is also mentioned that the defendant failed to bring permission for housing loan as well as sanction plan within 30 days, the MOU shall stand cancelled without any further negotiation and the defendant will return the amount of Rs. 7,00,00,000/- plus expenses along with interest within 90 working days from the date of cancellation and till such payment is made by the defendant to the plaintiff, the plaintiff shall have lien over the premises and no one will be allowed to construct on the said premises without first making payment to the plaintiff.

- 22.** In view of the case of *Haryana Financial Corporation (Supra)*, mere undertaking that no one will be allowed to construct on the said premises without first making payment to the plaintiff, will not create any charge over the property. The defendant has not created any charge by depositing the title deed or any registered documents in favour of the plaintiffs except the undertaking.
- 23.** As regard to the merit of the suit, the defendant has admitted with regard to the execution of the Memorandum of Understanding dated 27th August, 2015, receipt of an amount of Rs. 7,00,00,000/- and the execution of the Minutes of the Meeting dated 9th May, 2017. Initially the defendant has raised objection that the Memorandum of Understanding and Minutes of the Meeting were not properly stamped but in terms of the order passed by this Court, the Memorandum of Understanding was duly stamped and subsequently the plaintiff of its own after the order passed by the Hon'ble Division Bench, got the Minutes of the Meeting properly stamped.
- 24.** The defendant has filed written statement along with counter claim for Specific Performance of Memorandum of Understanding. The defendant has not produced any documents to prove that the defendant has complied with its obligation in terms of the MOU but on the other hand by signing in the Minutes of the Meeting dated 9th May, 2017 has admitted that the defendant has not obtained all the required documents in terms of the Memorandum of Understanding.

- 25.** Considering the above facts and circumstances, this Court finds that the plaintiff has proved the case and is entitled to get Decree in terms of prayers (a), (b), (c) and (d) of the plaint.
- 26.** The defendant failed to prove the case in terms of the prayers of the counter claim as the defendant has not complied with the terms and conditions of the Memorandum of Understanding and Minutes of the Meeting. Accordingly, the counter claim filed by the defendant is dismissed.
- 27.** In view of the above, the application filed by the defendant being **G.A. No. 8 of 2024** is thus **dismissed**. **C.S. No. 186 of 2018** is thus **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J)

Later:

Counsel for the defendant prays for stay of the operation of the order. Counsel for the plaintiffs raised objection. Considered the submissions made by the Counsel for the respective parties. Prayer is refused.

(Krishna Rao, J)