

2025 SCC OnLine Cal 531

In the High Court of Calcutta

(BEFORE KRISHNA RAO, J.)

Umang Goenka

Versus

A.B. Nirvan Builders Private Limited and Others

GA No. 1 of 2023 In CS No. 124 of 2023

Decided on January 15, 2025, [Hearing Concluded On :
11.12.2024]

Advocates who appeared in this case :

Mr. Jishnu Chowdhury, Sr. Adv. Mr. Rahul Das Mr. Tanay Agarwal Mr. Chitresh Saraogi ... For the plaintiff.

Mr. Krishnaraj Thaker, Sr. Adv. Mr. Suddhasatva Banerjee Mr. Saumabho Ghose Mr. Souvik Majumdar Mrs. Anyapurba Banerjee ... For the defendants.

The Judgment of the Court was delivered by

KRISHNA RAO, J.:— The plaintiff has filed the present application being GA No. 1 of 2023 in CS 124 of 2023 under Order 12 Rule 6 of the Civil Procedure Code, 1908 praying for judgment and decree on admission for a sum of Rs. 2,78,00,000/- along with interest @ 18% per annum totaling in Rs. 30,86,30,569/- or in alternative for an order of injunction restraining the defendants from dealing with or disposing of or alienating or transferring or encumbering their assets and properties and from withdrawing any amounts from their bank accounts.

2. The defendant nos. 2 and 3 approached the plaintiff for a loan of Rs. 2,78,00,000/- and in view of the relationship between the plaintiff and the defendants, the plaintiff agreed to makeover a loan to the defendants. The terms and conditions of the loan were discussed between the parties and it was agreed between the parties that the plaintiff would lend and advance a sum of Rs. 2,78,00,000/- to the defendants with the interest @ 18% per annum. The defendant no. 1 would be received the said amount on behalf of the other defendants and is re-payable on demand. It was further agreed between the parties at the end of each financial year, the defendants would execute necessary balance confirmation certificate confirming the principal amount due to the plaintiff for the purpose of tax.

3. The plaintiff has paid a total sum of Rs. 2,78,00,000/- to the defendants through the defendant no. 1 on eleven tranches i.e. on and

from 9th December, 2006 to 6th April, 2010 amounting of Rs. 10,00,000/-, Rs. 40,00,000/-, Rs. 25,00,000/-, Rs. 75,00,000/-, Rs. 15,00,000/-, Rs. 50,00,000/-, Rs. 6,00,000/-, Rs. 12,00,000/-, Rs. 10,00,000/-, Rs. 18,00,000/-, Rs. 17,00,000/- respectively. At the end of each financial year, the defendants executed and made over balance confirmation certificates to the plaintiff upto 31st March, 2021. From the end of year 2021 and for the financial year ending 31st March, 2022, the defendants failed and neglected to issue balance confirmation to the plaintiff. The plaintiff by an email dated 16th October, 2022 and a letter dated 14th June, 2023 called upon the defendants for repayment of the loan amount of Rs. 2,78,00,000/- along with interest accrued therein. The defendants failed to pay the principal amount as well as interest as demanded by the plaintiff, the plaintiff has filed the present suit.

4. Mr. Jishnu Chowdhury, Learned Senior Advocate representing the plaintiff submits that the defendants have admitted and acknowledged the debts in the balance confirmations executed by the defendants for the financial years 2006-2007, upto 26th September, 2007, 2010-2011, 2011-2012, 2012-2013, 2014-2015, 2016-2017, 2017-2018, 2019-2020 and 2020-2021.

5. Mr. Chowdhury submits that the defendants have not denied with respect to the receipt an amount of Rs. 2,78,00,000/- from the plaintiff which was duly transferred from the accounts of the plaintiff to the accounts of the defendants on and from 9th December, 2006 to 6th April, 2010. He submits that the defendants have also not denied with regard to the balance confirmations showing the total amount of Rs. 2,78,00,000/-.

6. Mr. Chowdhury further submits that the plaintiff came to know that the defendant nos. 2 and 3 are involved circumstances and have numerous creditors in the market. He submits that the defendant nos. 2 and 3 were the real estate developers and have developed several projects in past but at present, the defendant nos. 2 and 3 do not have any project which is upcoming. He submits that the involvement of the defendants at present is as lenders in many projects which have been taken over by other persons. He submits that the defendant nos. 2 and 3 and their concerns are at the stage of insolvency. Mr. Chowdhury further submits that the plaintiff and her family members and concerns have filed several suits against the defendant nos. 2 and 3 and their family concerns claiming total amount of Rs. 114 Crores.

7. *Per contra*, Mr. Krishnaraj Thaker, Learned Senior Advocate representing the defendant no. 1 submits that the plaintiff has filed the present application for judgment upon admission relying upon the

balance confirmations. He submits that the plaintiff has alleged that the balance confirmation had been issued by the defendants but the same was issued only by the defendant no. 1, thus there is no admission on behalf of the defendant nos. 2 and 3 in any manner whatsoever. He submits that the defendant nos. 2 and 3 have not received any amount from the plaintiff. He submits that in the application, there is no document to show that the plaintiff is entitled to get any interim relief against the defendant nos. 2 and 3.

8. Mr. Thaker submits that it is settled law that a contract entered into by a company must be in writing. He submits that the alleged oral contract as relied upon by the plaintiff with a company is null and void. He submits that there exist written contracts which the plaintiff has suppressed in order to make out the case of oral agreement. He submits that for the alleged similar transaction with Mr. Manoj Kumar Bhagat, the plaintiff has instituted similar suits being CS No. 122 of 2023, CS No. 123 of 2023 and CS No. 125 of 2023.

9. Mr. Thaker submits that the moneys were advanced in December, 2006 to April, 2010 but there is not a single instance of payment of any amount of interest as claimed by the plaintiff @ 18% per annum. He submits that there is not a single instance of deposit of tax deducted at source by the defendant no. 1 company on account of interest. He further submits that other than the notice dated 14th June, 2023 which was sent just a month before for filing of the suit, the plaintiff has not demanded for payment of interest from the defendant no. 1, though the alleged transaction was in December, 2006 to April, 2010.

10. Mr. Thaker submits that in the email dated 16th October, 2022, the husband of the plaintiff not even alleged that the plaintiff or her husband had provided any funds as loan to the defendant no. 1 or other companies of the Bhagat Group and Companies. On the contrary, the contention in the said email is that moneys were advanced towards buildings, plots and projects. He submits that as per the allegation made by the plaintiff, the defendants have executed and made over balance confirmation certificates to the plaintiff uptill 31st March, 2021 but none of the documents were signed by the defendant nos. 2 and 3. He submits that the said documents only records the fact that an aggregate amount of Rs. 2,78,00,000/- has been paid by the plaintiff to the defendant no. 1 and there is no mention of the alleged interest @ 18% per annum.

11. Mr. Thaker submits that the defendant nos. 2 and 3 received a notice under Section 41A of the Cr. P.C. from the Bidhannagar Police Station and from the said notice only, the defendants came to know for the first time that the husband of the plaintiff had filed a criminal complaint against the defendant nos. 2 and 3 for the offence under

Sections 420/406/34 of the IPC. He submits that the defendant nos. 2 and 3 obtained certified copy of complaint, FIR dated 1st July, 2022 in which the husband of the plaintiff has correctly stated that the real transaction between the parties is the real estate ventures of the Bhagat Group of Companies on a revenue sharing model. He submits that in the complaint dated 1st July, 2022, the husband of the plaintiff has also provided several indentures, agreements, allotment letters and various Memorandum of Understanding (MOU) to the police authorities and from the said documents, it reveal the true transactions between the parties which the plaintiff has suppressed before this Court.

12. Heard the Learned Counsel for the respective parties, perused the materials on record and the judgments relied by the parties. The plaintiff has filed the suit praying for a decree for a sum of Rs. 30,86,30,569/- along with interim interest and interest upon judgment @ 18% per annum. In the present application, the plaintiff has prayed for judgment and decree upon admission. The plaintiff has mainly relied upon the confirmation of accounts from 1st April, 2006 to 31st March, 2021 total amounting to Rs. 2,78,00,000/-. As per the case of the plaintiff, the balance confirmations are necessary for tax purposes and are issued confirming loans and on the basis of the balance confirmations, decree be passed on admission. In this context, the plaintiff has relied upon the judgment in the case of *Ajay Kumar Agarwal v. Green Concretex Global Limited*, 2020 SCC OnLine Cal 2123 and submitted that wherein the Coordinate Bench of this Court held that:

"33. The defence sought to be raised in the present proceeding, in my opinion, is incongruous, vague, nebulous and convoluted. The defence is moon shine. In my opinion, no triable issue has been raised by the respondent to the extent of the amount covered by the cheques furnished by the respondent to the petitioner which were dishonoured. It will be a travesty of justice to relegate such claim of the petitioner to trial. The object of Order XII Rule 6 of the Code of Civil Procedure is to enable a party to obtain a speedy judgment at least to the extent of the admission made by the other party. The admission may be in the pleading or otherwise. A pre-suit admission would also suffice. In the present case, I have no reason to believe that the balance confirmations were procured by the petitioner dishonestly. The confirmation statements clearly amount to admission. The cheques furnished by the respondent to the petitioner also amount to admission of liability to the extent of the aggregate amount of the cheques."

13. The plaintiff has also relied upon the judgment in the case of *Rishabh Bengani v. Jaideep Halwasiya*, 2020 SCC OnLine Cal 382 and

submitted that in the said case also there was a balance confirmation of the defendant and the defendant has acted upon the balance confirmation, the defendant deposited Tax Deducted at Source on 31st March, 2019 for a sum of Rs. 99,452/-. The Coordinate Bench of this Court has accepted the said balance confirmations and passed judgment upon admission with regard to the principal amount and relegated the suit for trial with respect to interest.

This Court has considered both the judgments relied by the plaintiff and finds that in the case of *Ajay Kumar Agarwal* (supra), this Court has not only considered the balance confirmation but has also considered that the defendant had issued eleven postdated cheques in favour of the plaintiff for a total sum of Rs. 87,46,313/-, though the claim of the plaintiff was Rs. 1,11,51,507/- and accordingly, the Coordinate Bench of this Court has allowed judgment upon admission only for a sum of Rs. 87,46,313/-, thus the said judgment is distinguishable from the facts of the present case.

In the case of *Rishabh Bengani* (supra), the Coordinate Bench of this Court has considered the balance confirmation of the defendant upto the March 31, 2018 as well as Tax Deducted at Source on 31st March, 2019 for a sum of Rs. 99,452/-. In the present case, the plaintiff has relied upon the balance confirmation but has not produced any document with respect to the Tax Deduction at Source and it is the specific defence of the defendants in the present case that the plaintiff has not shown any document to prove the Tax Deduction at Source, thus the said judgment is also distinguishable from the facts of the present case.

14. The plaintiff says that the defendants unable to explain the admission about the balance confirmations and thus the plaintiff is entitled to get judgment and decree upon admission. In this context, the plaintiff has relied upon the judgment in the case of *Uttam Singh Duggal & Co. Ltd. v. United Bank of India*, (2000) 7 SCC 120 wherein the Hon'ble Supreme Court held that:

"12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, 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". We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain

admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed."

15. The plaintiff has further relied upon the judgment in the case of *Karam Kapahi v. Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 wherein the Hon'ble Supreme Court held that the phrase "approbate and reprobate" is borrowed from Scots law where it is used to express the common law principles of election, namely, that no party can accept and reject the same instrument.

16. The plaintiff has further relied upon the judgment in the case of *Adhunik Ispat Limited v. Triveni Infrastructure Development Co. Ltd.*, (2011) 2 CHN 527 wherein the Coordinate Bench of this Court held that there are two elements as to judgment on admission : the first is the factum and then there is the inference drawn from the fact and the liability consequent thereupon. If the factum is established, the maker of the admission is afforded an opportunity to explain it away or dispute the liability that is the corollary to the admission. If the factum is not proved, the matter ends.

In the present case, the plaintiff has relied upon the confirmation of accounts. The defendants have denied with regard to the same, firstly on the ground, the defendant nos. 2 and 3 have not issued the said balance confirmations, secondly, no Tax Deduction at Source shown by the plaintiff with respect to the said balance confirmations thirdly, the defendants have taken specific defence that the said amount is not of loan and is with regard to the investment in the real estate project and the plaintiff has suppressed the agreement entered between the parties, subsequently, the defendants have brought the said document on record by way of supplementary affidavit when the defendants came to know about the criminal case initiated by the plaintiff against the defendants in which the plaintiff has disclosed the agreements, thus the said judgments are distinguishable from the facts of the present case.

17. The defendants have relied upon the supplementary affidavit, wherein the defendants have disclosed the documents i.e. the FIR initiated by the husband of the plaintiff against the defendant nos. 2 and 3, written complaint, Memorandum of Understanding dated 30th December, 2006, Memorandum of Understanding dated 2nd March, 2015 and the Memorandum of Understanding dated NIL. In the complaint dated 1st July, 2022 of the husband of the plaintiff made complaint against the defendant nos. 2 and 3 to the Inspector-in-charge, Bidhannagar Police Station alleging that:

"From around 2000 onwards, the abovenamed accused persons Piyush Kumar Bhagat and Raj Kishore Modi frequently came

regularly to my office at the abovementioned address in Sector-5, Salt Lake and asked me to give money for their business and joint projects such as Club Town, Space Town, Vedic Village etc.

In 2001, I purchased a plot of 250 cottahs of land at the site of Raj Kishore Modi and Piyush Kumar Bhagat's upcoming "Vedic Village" project. Once the project was becoming successful, in 2007 Raj Kishore Modi negotiated with me in my office to enter into a joint venture in which he would construct many bungalows on my plot of land as part of the project (by this time Mr. Modi and Mr. Bhagat had separated from their joint business and Mr. Modi had taken over Vedic Village project). In exchange for the rights to do so, I was allotted 12 (twelve) bungalows out of the new constructions. However, I was never handed over possession of said 12 bungalows even though the construction was completed. Instead, Mr. Modi and his team have sold my bungalows without my express permission or knowledge, to other persons who are now in possession of said property, Mr. Modi has paid me a sum of Rs. 3.30 Crore, without any clarification as to what the payment is for. Despite multiple reminders and requests to give a complete account and pay for the full value of my 12 bungalows (fair market value is around Rs. 25 Crore), Mr. Modi has refused to do so, indicating that the vast majority of the proceeds from the sale of my bungalows have been laundered away by showing the sale price of bungalows at much lower than market value and receiving payment from buyers in cash.

Further, from around 2004, Piyush Kumar Bhagat took money in the account of a number of his companies, his personal accounts and also to the account of his brother namely Mr. Manoj Kumar Bhagat. As and when possible, I transferred a hefty sum of amount several times, which totaled an amount of Rs. 15.5 crore via cheques/NEFT/RTGS bank transactions issued from my Sector-5 Salt Lake office (details enclosed). In exchange of the abovementioned transaction, the accused persons namely Piyush Kumar Bhagat, Manoj Kumar Bhagat, and their abovenamed companies/concerns promised me and agreed to sell and transfer flats, land plots, villas etc. in his various projects to my name vide Indentures, agreements, allotment letters and various Memorandums of Understanding (MOU).

However, till date, the said person did not fulfill any of his aforementioned promises and failed to transfer flats, land plots, villas etc. in his various projects to my name vide Indentures, agreements, allotment letters and various Memorandum of Understanding (MOU) as promised to my name, despite repeated requests by me over a long span of time. I have also made repeated requests to provide an account of money transferred to them by me

and how the funds are being used but they have failed to provide me the same. As per my knowledge, I believe that the funds have been funneled and laundered by them and their men and agents with nefarious purposes. They have also refused to pay back my money with accrued interest, despite repeated requests."

18. The defendants have also relied upon the Memorandum of Understanding dated 30th December, 2006 entered between the defendant no. 2 and the husband of the plaintiff wherein the husband of the plaintiff agreed to jointly developed the Residential Project in the proposed location wherein the responsibility of the defendant no. 2 is to drive the entire process of land acquisition, construction including marketing and selling of flats and the responsibility of the husband of the plaintiff is restricted to provide necessary financial assistance for completion of project. It is also agreed between the parties that both would be entitled to equal share of revenue from the sale of the project in terms of the building plan approval.

There are two other Memorandum of Understandings dated 2nd

March, 2015 and another is undated and in both the Memorandum of Understandings only signature of one party is available and another party is not available. The said agreements/Memorandum of Understandings relied by the husband of the plaintiff in the complaint made to the police of Bidhannagar police station on the basis of which an FIR has been initiated against the defendant nos. 2 and 3. In the said complaint, the said documents are mentioned as follows:

"Details of money given along with supporting bank statements and agreements."

In the supplementary affidavit, the defendant no. 2 has categorically stated that only after receipt of the notice under Section 41A of the Criminal Procedure Code, 1973, the defendant no. 2 came to know about the said documents and had obtained the same.

With regard to the aforesaid document, the plaintiff has taken the defence that the Memorandum of Understanding dated 30th December, 2006 is not properly stamped due to which the plaintiff has not disclosed the same in the plaint and in the present application and the same cannot be relied upon. As regard to two Memorandum of Understandings, it is stated by the Learned Counsel for the plaintiff that the same has not been executed by both the parties. It is further case of the plaintiff that the case initiated before the police and the Memorandum of Understandings are connected with the Vedic project and not with regard to the loan amount of Rs. 2,78,00,000/- and as such the said documents cannot be taken into consideration in the present case. The Learned Counsel for the defendants submits that the plaintiff has suppressed the material facts by not disclosing the criminal

case initiated against the defendant nos. 2 and 3 as well as agreements/Memorandum of Understandings which the plaintiff has relied upon in the criminal complaint. The defendants have relied upon the judgment in the case of *Bhaskar Laxman Jadhav v. Karamveer Kakasaheb Wagh Education Society*, (2013) 11 SCC 531 wherein the Hon'ble Supreme held that it is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of the case and leave the decision-making to the court.

In the present case, the husband of the plaintiff made a written complaint against the defendant nos. 2 and 3 on 1st July, 2022 by disclosing details of money, bank statements and agreements. The wife of the plaintiff has presented the plaint on 27th June, 2023 and the same was admitted on the same date but in the plaint, the plaintiff has not disclosed the complaint and the documents relied by her husband in the said police complaint.

19. The defendants have relied upon the judgment in the case of *Balraj Taneja v. Sunil Madan*, (1999) 8 SCC 396 wherein the Hon'ble Supreme Court held that under Order 12 Rule 6 of the Civil Procedure Code, 1908, the court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But before the court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive. In the said case, the Hon'ble Supreme Court had relied upon the judgment in the case of *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 SC 886 wherein the Hon'ble Supreme Court held that Order 12 Rule 6 has to be read along with the proviso to Rule 5 of Order 8. That is to say, notwithstanding the admission made by the defendant in his pleading, the Court may still require the plaintiff to prove the fact pleaded by him in the plaint.

In the present case, the plaintiff has relied upon the confirmation of accounts as admitted document and prayed for judgment and decree upon admission. The defendants have taken a specific defence that the said confirmation of accounts are not signed by the defendant nos. 2 and 3 and there is not a single instance of deposit of Tax Deducted at Source by the defendants and thus the same cannot taken as confirmation of accounts. The defendants have a specific defence that the said amount is invested in the project but the plaintiff has stated that the said investment is with regard to Vedic Project which is no way connected with the present case.

Considering the above, this Court finds that there is no unequivocal admission on the part of the defendant nos. 2 and 3 and the defence taken by the defendant nos. 2 and 3 is to be decided during the trial

whether the amount is in connected with investment in any project or the agreement is admissible in evidence or not.

20. The plaintiff has also prayed for an injunction restraining the defendants from dealing with their property and the bank accounts connected with PAN No. AAECA2585R, PAN No. AGYPB3619C and PAN No. ADJPB3555F. As per the case of the plaintiff, the defendant nos. 2 and 3 are involved in circumstances and have numerous creditors in the market and the defendant nos. 2 and 3 were real estate developers and have developed several projects but have not any projects which is upcoming. The plaintiff has also stated that the defendant nos. 2 and 3 and their concerns are at the stage of insolvency. The plaintiff has relied upon the judgment in the case of *Tata Chemicals Limited v. Kshitish Bardhan Chunilal Nath*, (2022) 1 HCC (Cal) 275 wherein the Hon'ble Division Bench of this Court held that there cannot be an absolute proposition that in a money claim no order of injunction or attachment or receiver could be made. Order 38 to Order 40 of the Civil Procedure Code, 1908 does not restrict the power of the court to pass any order that a court is empowered to pass just because it is a money claim. We have already discussed the circumstances when the court can exercise any of such power.

The plaintiff has relied upon the judgment in the case of *Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689 wherein the Hon'ble Supreme Court held that it is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted.

In the present case, the plaintiff has only made an averment that the defendant nos. 2 and 3 are not having any project which is upcoming. The defendant nos. 2 and 3 and their concerns are at the stage of insolvency and borrowed about over Rs. 1,000 crores from market but other than the said statement, there is no document to prove the contentions of the plaintiff. There is no prima facie case and balance of convenience is made out by the plaintiff for grant of interim order for security deposit.

21. Considering the above, this Court did not find any merit in the

application either to pass judgment and decree on admission or to pass injunction for security deposit as prayed for by the plaintiff.

22. In view of the above, GA No. 1 of 2023 in CS No. 124 of 2023 is dismissed.

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