

Durga Builders (P) Ltd Vs. Motor and General Finance Ltd. and anr.

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Court : Delhi

Decided On : Dec-20-2013

Judge : S.Ravindra Bhat

Appellant : Durga Builders (P) Ltd

Respondent : Motor and General Finance Ltd. and anr.

Advocate for Def. : Dr. Sarbjit Sharma, Ms. Swati Yadav

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

18. 12.2013 Pronounced on:20.12.2013 + REV. PET. 293/2012, C.M. APPL. 8373/2012 (for stay) & C.M. APPL. 8374/2012 IN RFA (OS) 88/2007 DURGA BUILDERS (P) LTD. Appellant Through: Sh. Mohit Chaudhary and Sh. A. Das, Advocates, for Review Petitioner. versus MOTOR AND GENERAL FINANCE LTD. AND ANR. Respondents Through: Dr. Sarbjit Sharma and Ms. Swati Yadav, Advocates. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE S.P. GARG MR. JUSTICE S. RAVINDRA BHAT % C.M. APPL. 8374/2012 (for exemption) IN REV. PET. 293/2012 Allowed, subject to all just exceptions. REV. PET. 293/2012, C.M. APPL. 8373/2012 (for stay) 1. This is a review petition against the order and judgment of this Court in RFA(OS) 88/2007, dated 10.04.2012. Originally, Durga Builders Pvt. Ltd. (hereafter Durga Builders) was aggrieved by the judgment and order of a learned Single Judge dated

06.11.2007 in CS(OS) 612/2001, in which an application preferred by Motor & General Finance Ltd. (the plaintiff in the suit, and hereafter MGF) REV. PET.293/12 IN RFA (OS) 88/07 Page 1 under Order VII Rule 6, Code of Civil Procedure, 1908 (hereafter CPC) for a decree on admission was allowed.

2. The facts of the underlying dispute are provided in the judgment disposing off the appeal, and are not repeated here in their entirety. However, for the purposes of the present review, the following factual matrix is important, as elaborated upon in the judgment sought to be reviewed:

The brief facts are that MGF filed a suit for recovery of ` 3,56,82,220/- under Order XXXIV of the Code of Civil Procedure, 1908. MGF, in its plaint claimed that it had given three Inter Corporate Deposits (hereinafter referred as ICDs) to Durga Builders for a sum of ` 1 Crore, ` 1 Crore, and ` 50 Lakhs respectively on various dates i.e., (29.06.1996 (at 30% per annum), 07.02.1997 (at 27% per annum) and 13.05.1997 (at 22% per annum)). The plaintiff further alleged that Durga Builders and one M/s Sonal Developers Pvt. Ltd. created on the dates of grant of ICDs i.e., 29.06.1996, 07.02.1996 and 13.05.1997 equitable mortgages in its favor (MGF) for repayment of the amounts underlying the ICDs. These pertained to a total 32 kanal land in various parts of village Islampur District, Faridabad, Haryana, and Plot No.12 Ring Road, Lajpat Nagar, New Delhi. MGF claimed that all the ICDs were issued in New Delhi and were repayable within the jurisdiction of the Delhi Courts. The amount claimed in respect of first ICD account was ` 1,84,59,220/-, for the second ICD account it was ` 84,71,329/- and for the third it was REV. PET.293/12 IN RFA (OS) 88/07 Page 2 ` 87,51,616/-. These included the interest component which according to MGF were payable by Durga Builders.

3. In response to these claims, Durga Builders stated that no equitable mortgage was ever created over the Lajpat Nagar property. Further, in its written statement, Durga Builders stated that the ICDs had been created in its favour on 11.09.1995 and 10.01.1996. As regards the ICD of 11.09.1995, Durga Builders admitted that it created a mortgage in respect of two properties in Faridabad, but specifically stated that no mortgage in respect of the Lajpat Nagar property was created, and no documentary proof in respect of that mortgage was provided by MGF.

Moreover, Durga Builders claimed that it had fully paid back the amount of ` 2 crores due under the ICDs of 11.09.1995 and 10.01.1996, and accordingly, MGF was under an obligation to return the title deeds but had not done so. Crucially, Durga Builders denied the existence of any of the ICDs of 29.06.1996, 07.02.1997 and 13.05.1997 as alleged by MGF. Further, Durga Builders stated that although ` 1 crore that been extended to it by MGF on 06.05.1996, this was a simple loan transaction, rather than an ICD. Setting up its own case, Durga Builders claimed that the suit was a result of collusion between MGF and one Mr. Arun Mehra, an ex-director of Durga Builders. To that end, Durga Builders contended that a company named M/s. Hindustan Commercial Investment Trust Ltd., which belonged to Mr. Arun Mehra, had purchased 50 plots of 502.32 square yards in Edenburg City, Faridabad for a consideration of ` 2.5 REV. PET.293/12 IN RFA (OS) 88/07 Page 3 crores which was paid under the cover letter dated 28.06.1996, and crucially, one of the cheques used to purchase these properties was by MGF, thus indicating, if not proving, the factum of collusion. Moreover, it was claimed that in the absence of any written document evidencing the mortgage transaction or interest created by Durga Builders in favour of MGF, no right accrued in MGF.

4. Pending trial, and after the framing of issues on 29.09.2005, MGF filed an application, I.A. No.12439/2006, under Order XII Rule 6 CPC, claiming a decree on admission. In its application, MGF alleged that in its balance sheet for the year ending 31.03.2004, Durga Builders admitted liability of ` 1,93,00,000/- to MGF. This balance sheet, MGF argued, was signed on behalf of Durga Builders and submitted to the Income Tax authorities as well, and thus, forms a proper basis for a decree on admission since the outstanding liability has been recognized by Durga Builders itself. Schedule C of the balance Sheet, relating to Unsecured Loans, did indeed, as the impugned judgment notes in this case, record a loan amount of ` 1,93,00,000/- from M/s. Motor & General Finance Ltd.

, i.e. MGF. In its reply to the application, however, Durga Builder did not deny the fact of the existence of the balance sheet, but stated that there was never any mortgage liability, i.e. MGF had never advanced any amount as against a mortgage. Rather, it was claimed that the balance sheet was a result of the collusion of Mr. Arun Mehra with MGF, as is clear from the reply to I.A.

12439/2006, which states:

6.....The present case is nothing but a misrepresentation of facts on behalf of REV. PET.293/12 IN RFA (OS) 88/07 Page 4 the plaintiffs. The balance sheet annexed is the reflection of fraud by one Shri Arun Mehra who has totally acted against the interest of the defendant No.1 company. The contents of amended written statement of defendant No.1 may be read as a part and parcel to this reply and the same is not repeated here for the sake of brevity.

5. Given that MGFs plea for a decree on admission was based squarely on the admission of liability in the balance sheet, the learned Single Judge directed the statement of Mr. R.K. Nanda, the Managing Director of Durga Builders to be recorded, which was done on 09.10.1997. The relevant part of his statement extracted below:

.....The balance sheet has been signed by me. (). My wife has also signed the balance sheet. My attention has been drawn to Schedule `C of the balance sheet, which is a list of unsecured loans in which at serial No.1, the name of the plaintiff is shown and an amount of Rs.1.93 Crore has been stated as the loan availed from M/s Motor & General Finance Limited. I, however, state that this amount was advanced against the booking of plots in Okhla Enclave Project. There were certain documents executed in respect of the booking including the agreement to sell. The documents have not been filed. The agreement was only with Mr. Arun Mehra and MGF Limited did not have anything to do with the agreement. It was Mr. Arun Mehra, who brought all the documents. MGF Limited never applied for refund and thus we never repaid them back. M/s. Durga Builders Private Limited is willing to pay the amount back to MGF Limited. I now state that the money received from MGF was through Mr. Arun Mehra towards booking.....

REV. PET.293/12 IN RFA (OS) 88/07 Page 5 6. Based on the alleged admission in the balance sheet, and the statement of Mr. Nanda, the learned Single Judge allowed the I.A. under Order XII Rule 6 CPC and decreed the suit to the extent of ` 1.93 crores, reasoning that:

17. The object of Order XII Rule 6 of the said Code must be kept in mind as set out in Uttam Singh Dugal & Co. Ltds case (supra) that to the extent there is such unambiguous admission, the plaintiff must succeed at least to that extent 18. It is no doubt true that defendant No.1 has shown the amount of Rs.1.93 Crores as unsecured loan while the plaintiff claims that the same is secured by the mortgage of the suit properties. Whether the mortgage has so been created or not is a matter to be decided in trial. This would not amount to taking a piecemeal admission since the admission is in respect of the quantum of liability and the aspect of mortgage is only qua the aspect of security for such liability.

19. I am, thus, of the considered view that the plaintiff is entitled to a decree to the extent of Rs.1.93 Crores against defendant No.1 on the basis of the admissions contained in the balance-sheet as also corroborated by the statement of the Managing Director of Defendant no.1, Mr. Nanda.

7. On appeal, this judgment and order were reversed, and the parties were directed to return to the learned Single Judge for the trial to proceed on its merits. The judgment considered the effect of the admission not through a selective reading of the documents before the Court, or the pleadings, but rather, through an overall reading of the material to determine whether the admission was clear and unequivocal, as opposed to leaving certain issues undecided or in REV. PET.293/12 IN RFA (OS) 88/07 Page 6 doubt. On this basis, the judgment held as follows:

20. In this case, Durga Builders consistent stand in the written statement as well as in the reply to the application under Order 12 Rule 6 CPC was denial of the entire mortgage transaction; it also claimed that it was the victim of a fraud played by Shri Arun Mehra. Moreover the first issue framed by the Court, in the suit, was maintainability of the suit and the second aspect was limitation. If one were to keep all these aspects in the backdrop, the circumstance that Durga Builders showed (under the head of liabilities to unsecured creditors) in its balance sheet for the year 2004, and its Managing Director conceded that the sum of ` 1.93 could be paid back if demanded by MGF, should not, in our view with respect to the impugned judgment, have been the exclusive basis for holding that the plaintiff

was entitled to a decree on admissions. Looked at differently, the impugned judgment assumes Durga Builders liability in respect of the suit amount (even though the question of existence of mortgage and consequently limitation still exists and is hotly contested). Such reasoning in this Courts opinion is inconsistent. If in the ultimate analysis, Durga Builders plea with regard to limitation and enforceability of the alleged mortgage security is upheld, the suit is liable to be dismissed. This will be in complete conflict- (with the assumption in the impugned judgment)- that some amount is payable by the Durga Builders to MGF. That issue, as to whether lawfully any amount is due, and whether MGFs suit is maintainable, is the subject matter of the pending lis. Another aspect is that the reasoning in the impugned judgment proceeds to reject Durga Builders explanation, why the amount was shown in its balance sheet, as payable to MGF; the entirety of Shri Nandas statement has not been taken into consideration. The investigation under Order 12 Rule 6 CPC, cannot extend to consider the merits of an averment, unless it is plainly opposed to law. Doing so would result in anomalous and startling results, because the Court would then not have the benefit of the evidence and REV. PET.293/12 IN RFA (OS) 88/07 Page 7 other materials that would get on to the record, at a later stage, during the trial. This court, therefore, is of opinion that Durga Builders pleadings and statements made on its behalf under Order X cannot be considered as unequivocal or unqualified admissions, necessitating a decree on admissions.

8. In the present review, learned counsel for MGF contends that this judgment fell into a grave error in law, and did not appreciate the correct legal precedent on the issue of admission in balance sheets. Before the merits, however, learned counsel for MGF argues that the judgment was obtained on the strength of fraud played upon the Court by Durga Builders, in that the affidavit accompanying the Regular First Appeal, and even the vakalatnama in favour of Mr. Sharad. K. Agrawal, Advocate, is not signed by anyone. It was argued that the appeal was filed on the basis of a printout taken after the scanning the signatures of Mr. R.K. Nanda, which is visible from the naked eye, and thus, clearly an act of forgery. Accordingly, it was argued that in the absence of signatures on the appeal, affidavit and vakalatnama, technically, there is no appeal and hence the same was liable to be dismissed on this ground. For this, reliance was placed upon the

decision of the Supreme Court in Dalip Singh v. State of Uttar Pradesh and Others, 2010 2 SCC114 as also the decisions in S.P. Chengalvaraya Naidu (Dead) by L.Rs v. Jagannath (dead) by LRs and Others, JT1993(6) SC331 and Prestige Lights Ltd. v. State Bank of India, 2007 (8) SCC449 9. On merits, it was argued that the judgment is erroneous on the face of the record, as the reasoning in paragraph 20 that if REV. PET.293/12 IN RFA (OS) 88/07 Page 8 Durga Builders plea with regard to limitation and enforceability of the alleged mortgage security is upheld, the suit is liable to be dismissed is contrary to Section 18 of the Limitation Act, 1963. Here, learned counsel placed reliance on the decision of the Supreme Court in Food Corporation of India v. Assam State Cooperative Marketing and Consumer Federation Limited and Ors., 2004 (12) SCC360 to argue that the present suit was filed in the year 2001, and the balance sheet was reflecting the loan outstanding amount in favour of MGF in 2003, i.e. three years after the institution of the suit, and that this constitutes acknowledgement of debt under Section 18. Accordingly, it was argued that there cannot be any argument on limitation with regard to the admission amount, as the limitation period would run afresh. Further, learned counsel relied upon the decision of this Court in Rishi Pal Gupta v. S.J.

Knitting and Finishing Mills Pvt. Ltd., 1998 (73) DLT593 and specifically the following holding of the Court:

14. The respondent in its balance sheet for the year ending 31.3.1990 has admitted that the petitioner is one of the sundry creditors of the respondent company and its name is shown in the list of sundry creditors in the said balance sheet. The respondent has also admitted its liability in its reply dated 22.11.1991 whereunder it has transmitted the said balance sheet to the Registrar of Companies. The Division Bench of this court has also in its order dated 29.11.1995 recorded that there is an admission of liability by the respondent to the extent of Rs. 6,89,870.76 and that the said liability was acknowledged by the respondent in its reply dated 22.11.1991. In view of the aforesaid acknowledgement of debt in the balance sheet as also in the reply sent by the respondent through one of its Directors REV. PET.293/12 IN RFA (OS) 88/07 Page 9 Constituting acknowledgement in writing within the meaning of Section 18

of the Limitation Act, the petition presented by the petitioner on 14.5.1992 to enforce a liability of the company acknowledged in the balance sheet for the year ending 31.3.1990 is indisputably within time.....

10. Learned counsel argued that the Single Judge had correctly considered the effect of Mr. Nandas statement as to the explanation for recording a ` 1.93 crore debt to MGF, and that such findings did not mandate the interference of this Court. Finally, learned counsel contradicts the argument that some fraud was played by Mr. Arun Mehra as factually incorrect, and urges that, on the contrary, there are three cases of cheating and fraud pending against Mr. R.S. Nanda and his lawyer (being FIR No.24/2009, 246/2009 and 140/2009) registered at the Tilak Marg Police Station, New Delhi on the instructions of this Court and that the same are pending trial before the Court of ACMM, Patiala House, New Delhi. Given that these cases of forgery and cheating are pending against Mr. Nanda, learned counsel argues that the allegations that fraud was played upon Durga Builders by MGF and Mr. Arun Mehra are unbelievable. Rather, learned counsel urges, these are only attempts to delay repayment of an established debt.

11. The Court has considered the submissions advanced to review its judgment and order of 10.04.2012. On the question of forgery of the vakalatnama and the affidavit accompanying the appeal, which in the Petitioners argument renders the appeal itself non est, the Court notices the following facts which are clear from the record. First, a REV. PET.293/12 IN RFA (OS) 88/07 Page 10 duly stamped vakalatnama is on the record, from Durga Builders Pvt. Ltd. through its Managing Director Mr. R.K. Nanda, in favour of Mr. Sharad. K. Agrawal, Smt. Purnima Agrawal, Smt. Sangeeta Grover and Mr. J.S. Bakshi, to represent them in the appeal proceedings, dated 05.12.2007. This document also bears the stamp and signature of Mr. Nanda, in his capacity as the Managing Director. Subsequently, it is apparent that Durga Builders engaged different counsel. This is verified by a No Objection Certificate issued by Mr. Sharad. K. Agrawal, and a new vakalatnama filed by Dr. Sarbjit Sharma, dated 06.10.2009, to represent them in the appeal proceedings, which is also signed in original by Mr. Nanda, in his capacity as the Managing Director, and Mr. Sharma as well. Equally, the application of early hearing on behalf of Durga Builders under Section 151, CPC, dated 23.11.2010,

and the accompanying affidavit, clearly bears the signature of Mr. Nanda, and was filed during the pendency of the appeal. Given these facts, and the fact that Mr. Nandas signature and stamp also appear on the affidavit accompanying the appeal, this Court finds no merit in the contention that the appeal is non est on account of the failure to correctly present the appeal or the vakalatnama.

12. In this review, MGF argues that the Courts judgment was erroneous on two grounds: first, that the question of limitation considered by the Court in paragraph 20 of its judgment is foreclosed, as Section 18 of the Limitation Act, and the various judgment relied upon by learned counsel, clearly establish that an acknowledgment, such as that found in the balance sheet, extends the period of REV. PET.293/12 IN RFA (OS) 88/07 Page 11 limitation, and secondly, on the ground that the admission made in the balance sheet was categorical and does not leave any room for explanation, as was decided by the learned Single Judge.

13. On the first ground, even if the question of limitation is decided against Durga Builders, on a reading of Section 18 of the Limitation Act, 1963, though the Court need not consider that question, the questions of whether the mortgage can be established in the absence of written proof and is enforceable, whether the loan was a mere loan or an ICD, whether the amount admitted under the balance sheet was a result of fraud by Mr. Mehra, given the possible relationship between him and MGF still remain to be decided, and indeed, if decided against MGF, could bar any right of recovery that MGF may have in the suit. In fact, it is important to note that the learned Single Judge, by an order dated 29.09.2005, framed various issues in the course of the trial, and several of those issues, extracted below, may lead to a dismissal of the suit even at this stage, i.e. the fact of an unsecured loan on Durga Builders balance sheet does not decide or obviate the need to decide these issues:

4. Whether an equitable mortgage by deposit of title deeds was created with respect to property No.Plot No.12, Ring Road, Lajpat Nagar-IV, New Delhi?. If so, to what effect. XXXXXX XXXXXX XXXXXX7 Whether the plaintiff has fraudulently procured the title deeds with respect to property No.12, Ring Road, Lajpat Nagar-IV, New Delhi in collusion with Shri Arun Mehra, the then Director of defendant

No.1 company at the relevant time?. REV. PET.293/12 IN RFA (OS) 88/07 Page 12 8. Whether the defendant No.1 has redeemed the mortgage in relation to immovable properties bearing Nos. : (i) 16 Kanal land comprising in Khewat No.1 Khatauni No.9, M.No.16 and Killa No.16/3 (6-19), 24/3 (0-5), 25 (80), M.No.17 Killa No.11 (8-0), 20/2 (5-7), 21/1 (5-7), M.No.19 Killa No.1 (7-13), M.No.20 Killa No.5 (8-0) situated in village Islampur, District Faridabad, Haryana. (ii) 16 Kanal of land comprised in Khewat No.1 Khatauni No.9, M.No.16 and Killa No.16/3 (6-19), 24/3 (05) 25 (8-0), M.No.17 Killa No.11 (8-0), 20/2 (5-7), 21/1 (57), M.No.19 Killa No.1 (7-13), M.No.22 Killa No.5 (8-0) situated in village Islampur, District Faridabad, Haryana.

9. Whether there is any collusion between the plaintiff and Shri Arun Mehra and on account of the same?. Whether the claim of the plaintiff is vitiated by fraud?. OPD.

10. Whether an equitable mortgage by deposit of title deeds was not created with respect to property Plot No.12, Ring Road, Lajpat Nagar-IV, New Delhi ?. If so, to what effect?. OPD

14. Furthermore, the judgments relied upon by the learned counsel under Section 18 of the Limitation Act, 1963, are authorities for the proposition that a balance sheet may extend the period of limitation, and not whether the balance sheet, if contested, as in this case, is, by its very fact, unimpeachable evidence. In Food Corporation of India (supra), for example, the Supreme Court first considered the question of whether the document on the basis of which the debt was sought to be established was proven, i.e. whether the liability itself was REV. PET.293/12 IN RFA (OS) 88/07 Page 13 undisputed, and then subsequently considered the issue of whether that admission of liability could lead to an extension of the limitation period under Section 18, which is precisely the case in the present facts as well. In that case, the Supreme Court considered the issues as follows:

7. The issue as to limitation centers around two letters respectively dated 29/03/1977 and 30/07/1977 marked as Exhibits 8 and 9 (Annexures P4 and P5). According to the plaintiff these two letters written by the Federation amount to acknowledgement of liability within the meaning of Section 18 of the Limitation Act, 1963 and have the effect of extending the period of limitation. The trial court has

found the letters not proved and also not amounting to such acknowledgement of liability as may attract the applicability of Section 18 of the Limitation Act.

8. The first question which arises for consideration is whether the two letters have been proved..... XXXXXX XXXXXX XXXXXX¹¹ The Court further held that once the document has been marked as exhibit without any objection from a party then such party cannot object to the admissibility of document and once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.

12. The documents having been tendered in evidence without any demur by the defendants, the same coming from proper custody and forming part of official record of the appellant-Corporation and being part of the chain of correspondence can be said to have been proved by P.W.1 more so when his deposition to the effect that the two letters were received from the Federation was not disputed by the REV. PET.293/12 IN RFA (OS) 88/07 Page 14 defendant-Federation either by directing any cross-examination on that part of the statement or by making any suggestion to the contrary indicating the defendant's case as regards the said two letters. In our opinion, the documents were proved and their contents can be read in evidence. Needless to say, there is no rebuttal of the letters on the part of the defendants by way of evidence adduced in the case.

13. Once it is held that the two letters are proved then the next question which arises is as to their effect on limitation.

14. According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well-settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication.

15. As the Court recognized in its judgment, the admission must be clear, unequivocal and categorical, whereas in this case, various questions still require consideration and the alleged admission of liability in the balance sheet can be explained away, and accordingly, these issues must be put to trial. The issue here is not whether Durga Builders has an unimpeachable case, but rather, whether there is some room to doubt that the liability is established. Since Durga Builders, in its written statement, reply to the application under Order XII, and in its reply to the present review petition, has contested the existence of REV. PET.293/12 IN RFA (OS) 88/07 Page 15 the ICDs, and MGFs case is based on a debt arising from the ICDs, this Court does not find merit in the argument that debt is established, while only the nature of the security is dispute. Neither is Mr. Nandas alleged admission categorical, in that he specifically avers wrongdoing on behalf of Mr. Mehra, a fact which, whether ultimately true or not, deserves to be tested during the ordinary course of trial. The fact that Mr. Nanda and his lawyers have allegations of forgery pending against them in unrelated trials, or that FIRs have been registered against them, does not allow this Court to reach the conclusion that its findings based on well-established jurisprudence surrounding decree on admissions are to be reviewed or set aside. Crucially, this Court, neither in its judgment of 10.04.2012 nor in the present review expresses any opinion on the merits of the claims advanced by either party, but only reiterates that these claims must be tested at trial.

16. Accordingly, for the above reasons, the Court finds no errors apparent or sufficient cause to recall its judgment and order dated 10.04.2012. Accordingly, this review petition is dismissed along with pending application, but with no order as to costs. S. RAVINDRA BHAT (JUDGE) S.P. GARG (JUDGE) DECEMBER20 2013 REV. PET.293/12 IN RFA (OS) 88/07 Page 16

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