

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

Present:

The Hon'ble Justice Krishna Rao

I.A. No. G.A. 3 of 2023

With

G.A. (Com) No. 4 of 2024

In

C.S. (Com) No. 412 of 2024

[Old No. CS 182 of 2022]

Maadhawa Realpro Private Limited

Versus

Sushila Jain & Ors.

Mr. Kuldip Mallick

Mr. Arun Kumar Upadhyay

Mr. Dyutimoy Paul

Mr. Shantanu Mishra

... for the plaintiff.

Mr. Sarosij Dasgupta

Mr. Javed K. Sanwarwala

Ms. Madhurima Halder

Mr. S. A. Sanwarwala

Ms. S. Afrin

... for the defendant no.1.

Hearing Concluded On : 10.06.2025

Judgment on : 25.06.2025

Krishna Rao, J.:

1. The plaintiff has filed an application being G.A. No. 3 of 2023, under Order XII, Rule 6 of the Code of Civil Procedure, 1908, praying for judgment upon admission. The defendant no.1 has filed an application being G.A. (Com) No. 4 of 2024, under Order VII, Rule 11 of the Code of Civil Procedure, 1908 for rejection of plaint and dismissal of suit.
2. Mr. Kuldip Mallick, Learned Advocate representing the plaintiff submits that the plaintiff has filed an application for grant of injunction being G.A. No. 1 of 2022. In the said application, the defendants have filed affidavit-in-opposition and affirmed it on 3rd April, 2023, which was served upon the Learned Advocate-on-record of the plaintiff on 4th April, 2023, and in the affidavit-in-opposition at paragraph no.5, the defendants have admitted the entire case of the plaintiff.
3. Mr. Mallick submits that the defendants have specifically and unequivocally admitted the case made out in the plaint and thus the defendants have no plausible defence and prayed for judgment upon admission.
4. Mr. Mallick submits that subsequent to service of affidavit-in-opposition in connection with G.A. No. 1 of 2022 dated 4th April, 2023, the defendants have prayed for withdrawal of the said affidavit on the ground that the said affidavit was only a draft and not a final one. He

submits that such statement was belatedly made by the defendants after the unequivocal statement was made in the said affidavit.

5. Mr. Mallick submits that the affidavit was not only affirmed but also served to the plaintiff on 4th April, 2023, thus the defendants cannot say that the said affidavit was draft.
6. Mr. Sarosij Dasgupta representing the defendant no.1 in his application being G.A. (Com) No. 4 of 2024 submitted that there is no privity of contract between the plaintiff and the defendants. He submits that there is no contractual relationship between the plaintiff and the defendants. He submits that the defendants have never entered into contract of any nature with the plaintiff.
7. Mr. Dasgupta submits that the alleged unregistered Deed of Mortgage dated 17th February, 2016, unregistered Supplementary Agreement dated 2nd March, 2016 and the alleged 2nd registered Deed of Mortgage dated 17th March, 2016, the name of the entity with which the defendants have entered into the Deed of Mortgage was “Madhva Real Estate Company Private Limited” but in the instant case, in the cause title, the name of the plaintiff is “Maadhawa Realpro Private Limited”.
8. Mr. Dasgupta submits that all the cheques were made in favour of “Madhva Real Estate Company Private Limited” and not in the name of the plaintiff, namely, “Maadhawa Realpro Private Limited”. The plaintiff has presented the cheques for encashment but the said cheques were dishonoured with the reasons “Payee name deferred”. He submits that

it is also not the case of the plaintiff that the plaintiff has filed the present suit as agent or representative of the plaintiff (Maadhawa Realpro Private Limited).

9. Mr. Dasgupta submits that there is no cause of action arose against the defendants and there is no privity of contract between the plaintiff and defendants. In support of his submissions, Mr. Dasgupta relied upon the judgment in the case of ***M/s. Tinna Overseas Limited Vs. Food Corporation of India and Anr.*** reported in ***2012 SCC OnLine Del 5325*** and in the case of ***Babu Ram and Others Vs. Dhan Singh and Others*** reported in ***1956 SCC OnLine Punj 139***.
10. Mr. Dasgupta submits that the suit filed by the plaintiff is barred by limitation. He submits that as per Clause-3 of the Deed of Mortgage dated 17th February, 2016, the defendants ought to have been repaid the amount within two years from the date of execution i.e. by 17th February, 2018 and cause of action was till 17th February, 2021 but the suit is filed in the month of July, 2022 without any explanation.
11. Mr. Dasgupta further submits that the 2nd Deed of Mortgage is dated 17th March, 2016 and the term of mortgage was only two years i.e. upto 17th March, 2018 and the suit ought to have been filed by 17th March, 2021 but suit was filed in the month of July, 2022. He submits that despite being the power given to the lender to liquidate the assets of the defendants, the plaintiff did not exercise such power and such right had been exercised only on 23rd May, 2022, much after the expiry period of

limitation. He submits that though the plaintiff has argued that the limitation of the plaintiff is covered by the order passed by the Hon'ble Supreme Court during pandemic Covid-19 but no such explanation or averment have been made in the plaint.

- 12.** Mr. Dasgupta submits that the suit for mortgage is dealt with, under Order XXXIV of the Code of Civil Procedure, 1908 and such provisions provides for three kinds of suits relating to immovable property. He submits that Form Nos- 45 and 46 of the Code of Civil Procedure, 1908 which provides for forms of prayers in suits for foreclosure, sale and redemption but the plaintiff has not prayed for any foreclosure or injunction. He submits that the plaintiff has also not prayed for any redemption of the immovable properties said to have been mortgaged with it.
- 13.** Mr. Dasgupta submits the suit filed by the plaintiff is not a commercial suit as per Section 2(1)(c) of the Commercial Courts Act, 2015. He submits that the plaintiff has not complied with the provisions of Section 12A of the Commercial Courts Act, 2015 and the suit is not covered under any of the Clauses of Section 2(1)(c) of the Commercial Courts Act, 2015.
- 14.** Mr. Dasgupta submits that the plaintiff has relied upon the fabricated share certificates. He submits that as per Section 46 of the Companies Act, 2013, every share certificate to be mandatorily signed by two

directors and to bear the seal of the company but the same is missing in the present case.

- 15.** Mr. Dasgupta submits that inadvertently, the erstwhile Learned Advocate-on-record of the defendants had served the unsettled copy of an affidavit-in-opposition which was never filed in Court nor intended to be filed and the same is not in the Court record. He submits that upon realising such mistake, the erstwhile Advocate-on-record of the defendants, has sent an e-mail to the plaintiff intimating that the defendants are withdrawing the same and assured to send final copy of the affidavit-in-opposition. The plaintiff instead of returning the same has served the copy of affidavit in reply to the said affidavit-in-opposition. Subsequently, the defendants have served final copy of the affidavit-in-opposition to the plaintiff. He submits that taking advantage, the service of unsettled copy of affidavit-in-opposition, the plaintiff has filed an application being G.A. No. 3 of 2023 for judgment upon admission.
- 16.** Mr. Dasgupta submits that there is no unequivocal admission on the part of the defendants. The plaintiff has filed the application only on the basis of the unsettled affidavit-in-opposition which was never filed in the Court.
- 17.** Mr. Kuldip Mallick, Learned Advocate representing the plaintiff submits that defendants entered into an agreement with the plaintiff “Maadhawa Realpro Private Limited”. He submits that in the registered

Deed of Mortgage dated 17th March, 2016, one Shri Suresh Kumar Agarwalla, Director, being the Principal Officer of the Plaintiff Company has executed the said deed on behalf of the Plaintiff Company. He submits that the consideration of Rs. 2.50 Crores has been paid by the Plaintiff Company to the defendant no.1 and the defendant no.1 has received the consideration without any demure.

18. Mr. Mallick submits that the Deed of Mortgage dated 17th March, 2016, has the PAN number of the Plaintiff Company being "AAGCM9123R". He submits that the registered Deed of Mortgage also contains the photocopy of the PAN Card of the Plaintiff Company. He submits that the defendant no.1 also handed over original share certificates of equity shares held by the defendant no. 1 and in the defendant no.3 Company to the plaintiff as security for the consideration amount of Rs. 2.50 Crores. He submits that the defendant no.1 has also handed over signed share transfer forms of equity shares held by the defendant no.1 in the defendant no.3 Company to the plaintiff as security for the consideration amount of Rs. 2.50 crores.

19. Mr. Mallick submits that in the contract where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of such error and cannot be allowed to enforce it. In support of his submissions, he has relied upon the judgment in the case of **W.C. Binns Vs. W. & T. Avery Ltd.** reported in **1934 ILR Vol LXI Cal 548.**

20. The case of the plaintiff is mainly based on 1st unregistered Deed of Mortgage dated 17th February, 2016, Supplementary Agreement dated 2nd March, 2016 and registered Deed of Mortgage dated 17th March, 2016, entered between the parties and the cheques issued by the defendants in favour of the plaintiff. The plaintiff has filed the suit in the name of “Maadhawa Realpro Private Limited” and the deeds were executed in the name of “Madhva Real Estate Company Private Limited”. The defendants have also issued cheques in the name of “Madhva Real Estate Company Private Limited” and on presentation of the cheques, the cheques were dishonoured with the reasons “Payee name differs”. The case made out by the plaintiff that though the name of the plaintiff differs in the plaint and in the mortgage deeds but all the deeds have been executed by one Shri Suresh Kumar Agarwalla and his Election Identity Card and PAN Card are attached with the mortgage deeds and the Plaintiff Company PAN Card is also attached with the deed which reflects the name of the company as “Maadhawa Realpro Private Limited”, the plaintiff herein. The plaintiff also says that the defendants have had the knowledge of the deeds but has never objected the same. It is submitted that inadvertently the name of the plaintiff’s company is mentioned as “Madhva Real Estate Company Private Limited” in the Deed but the correct name of the plaintiff company is “Maadhawa Realpro Private Limited”. The plaintiff has relied upon the judgement in the case of **W.C. BINNS (supra)** wherein the Hon’ble Court held that where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time

that there is an error acts fraudulently and if he seeks to take advantage of that error and cannot be allowed to enforce it. The Hon'ble Court held that the defence was that the agreement set up by plaintiff was obtained fraudulently which was always a legal defence. In this case also the defence which the defendants have taken that the deeds entered between the parties is "Madhva Real Estate Company Private Limited" and the name of the plaintiff in the plaint is "Maadhawa Realpro Private Limited". The defendant has denied that the Plaintiff Company and "Madhva Real Estate Company Private Limited" are one and the same. The documents which the plaintiff has relied upon to establish that the Director is the same and PAN Card is also same in matter of trial.

- 21.** The plaintiff has filed the present application for judgment upon admission on the pretext that the defendants have filed an affidavit in opposition in connection with G.A. No. 1 of 2022 which was served upon the plaintiff on 4th April, 2023 and in the affidavit-in-opposition, the defendant no.1 has made unequivocal admission with respect to the claim of the plaintiff. The plaintiff particularly relied upon para 5(a) to (f) of the said affidavit-in-opposition which reads as follows:

"5. I shall now proceed to categorically state the actual facts and circumstances of the events that occurred.

a. The Answering Respondent has filed a Vacating Application (being G.A. No. 2 of 2022) wherein the facts and circumstances of the instant case have been enumerated. The Answering Respondent craves leave of

this Hon'ble Court to refer to and rely upon a copy of the aforementioned application at the time of hearing, if necessary.

- b.** *The Answering Respondent for the purpose of availing a loan of Rs.2,50,00,000/- (Rupees Two Crore Fifty Lakhs) had executed a Deed of Mortgage dated 17th February, 2016 in favour of the Plaintiff Company herein who was represented by one Suresh Kumar Agarwal. The said loan was agreed to be a online credit/loan facility agreed to be advanced given for cordial relationship between the Petitioner's management and the Respondents. It becomes pertinent to mention that the Respondent No.2 stood as the guarantor and the Respondent No.3 was the confirming party in such Deed of Mortgage. The Answering Respondent No.1 craves leave of this Hon'ble Court to refer to and rely upon the relevant clauses of the said Deed at the time of hearing of the instant Petition.*

- c.** *Thereafter a Supplementary Agreement was entered into between the self-same parties wherein it was agreed that Answering Respondent shall pay 9% of Rs.2,25,000/- (Rupees Two Lakhs Twenty Five Thousand) the total finance charges interest for a year.*

- d.** *The relevant clauses of the supplementary affidavit are set herein below for ease of reference of this Hon'ble Court:*
 - 1.** *It is agreed by and between the parties hereto that finance charges/interest on Rs.2,50,00,000/- (Rupees Two Crore Fifty Lacs Only) shall be paid by the Mortgagor to the Mortgagee at the rate of*

four percent per month in the following manner;

- a. The mortgagor shall pay 9% of Rs.2,25,000/- (Two Lacs twenty five thousand) the total finance charges/interest for a year i.e. 12 months by account payee cheque/ demand draft/pay order drawn in favour of Mortgagee;*
- b. The mortgagor shall pay the Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand) per month balance of Rs.5,25,000/- (Five Lacs Twenty Five Thousand) of the total finance charges/interest after 12 month by cash;*
- 2. All other terms and conditions including the liability of the Mortgagor to pay interest/finance charges to the Mortgagee as contained in the Mortgage Deed dated 17/02/2016 shall remain unchanged;*
- 3. This supplementary agreement shall be treated as a part and parcel of the mortgage deed.*
- e.*** *Subsequently as per legal advice, the parties collated all the terms and conditions as contained in the Deed of Mortgage dated 17th February, 2016 and the Supplementary Agreement dated 2nd March, 2016 and executed a registered Deed of Mortgage dated 17th March, 2016.*
- f.*** *The said Answering Respondent No.1 handed over Cheques vide letter dated 1st July, 2016 .”*

22. The defendant no.1 has made out a case that inadvertently the erstwhile Advocate-on-record of the defendant no.1 has served the copy of the unsettled copy of affidavit-in-opposition to the plaintiff but when it realised, on 12th April, 2023, the erstwhile Advocate-on -record of the defendant no.1 had sent an e-mail to the plaintiff withdrawing the said written statement and assured that they will served another copy of affidavit-in-opposition. The plaintiff has also filed affidavit-in-reply to the affidavit-in-opposition dated 4th April, 2023. The defendant no.1 has served the another copy of affidavit-in-opposition to the plaintiff on 19th April, 2023. The matter with regard to service of copy of affidavit-in-opposition was brought to the notice of this Court and this Court by an order dated 24th April, 2023, passed the following order:

“The Court :- There is an utter confusion in this matter created by the defendant no.1 while filing affidavit in opposition to this application. Initially an affidavit affirmed on 3rd April, 2023 was served on the plaintiff. On the basis thereof the plaintiff obtained a direction to file a reply thereto. The affidavit in reply was affirmed on 12th April, 2023. On the same very day the plaintiff/petitioner received an electronic mail from the defendant no.1 saying that the affidavit in opposition affirmed on 3rd April, 2023 and served on the plaintiff/petitioner was by mistake it should be discarded. The defendant no.1 has now affirmed another affidavit on 19th April, 2023. The said affidavit filed in Court today is taken on record.

Without prejudice to the rights and contentions of the plaintiff/petitioner, if any, in respect of any admission said to have made in the first affidavit affirmed on 3rd April, 2023, the plaintiff/petitioner shall be at liberty to use an affidavit in reply to the affidavit in opposition affirmed on 19th April, 2023. Let such affidavit in reply be filed by 10th May, 2023.

Let this matter appear on 15th May, 2023.

The interim order already passed is extended till 30th June, 2023 or until further orders whichever is earlier.”

- 23.** The affidavit-in-opposition which was served upon the plaintiff on 4th April, 2023, was not filed in Court. The affidavit-in-opposition affirmed on 19th April, 2023, was taken on record by an order dated 24th April, 2023 and directed the plaintiff to file affidavit-in-reply without prejudice to the rights and contentions of the plaintiff with respect to any admission have been made in the first affidavit served on 4th April, 2023.
- 24.** The opposition which he has received on 4th April, 2023, subsequently, the defendants have filed another affidavit and this Court has taken the same on record. The first affidavit is not on record. The defendant no.1 has taken the stand that the said affidavit is unsettled one and the same was informed to the plaintiff. In view of the above, this Court finds that the same cannot be treated as unequivocal admission. The matter is to be taken into consideration during trial whether the affidavit which the defendant no.1 has served to the plaintiff was unsettled one and can be relied upon as admission.
- 25.** The defendants have also taken a stand that the suit is not a commercial suit and is a suit for mortgage dealt under Order XXXIV of the Code of Civil Procedure, 1908. The plaintiff has filed the suit for recovery and money and for perpetual injunction. The plaintiff has

relied upon mortgage deeds. The defendants state that the name appearing in the deeds and the name of the plaintiff is different. It is upon the plaintiff to prove that the name appearing in the deed and in the plaint is of the same entity. If the plaintiff able to prove the same, the case of the plaintiff would cover under Section 2(1)(c) of the Commercial Courts Act, 2015 and thus it is the matter of trial and the issue raised by the defendants cannot be decided in the present application.

- 26.** The defendants have also taken the ground of limitation. The plaintiff is taking the benefit of the Order passed by the Hon'ble Supreme Court in *Suo Moto* case wherein the Hon'ble Supreme Court has extended the period of limitation during the period of Pandemic Covid-19. As per the case of the defendants that the cause of action for filing the suit arose on 17th February, 2021 and 17th March, 2021 but the plaintiff has filed the suit in the month of July, 2022.

In the case of **SUO MOTU WRIT PETITION (C) NO. 3 OF 2020** dated **10th January, 2022**, the Hon'ble Supreme Court has passed the following order:

“5.III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

In the case of ***Prakash Corporates vs. Dee Vee Projects Limited*** reported in **(2022) 5 SCC 112**, the Hon'ble Supreme Court has considered the order passed in **SMWP No. 3 of 2020** and held that:

“15. The major deal of arguments in the present case has revolved around the orders passed by this Court in Suo Motu Writ Petition (Civil) No. 3 of 2020 and the effect thereof on the prayer of the appellant for another opportunity to file its written statement. Having regard to the questions involved, it shall be apposite to take note of all the relevant orders passed by this Court.

15.1. The said suo motu petition was taken up by this Court in rather peculiar and extraordinary circumstances in the wake of the outbreak of Covid-19 Pandemic, where the normal functioning of almost all the institutions got disrupted due to serious illness of a large populace and due to various containment measures taken by the administrative authorities, including lockdowns. The functioning of courts and other juridical institutions also suffered setbacks and, in fact, with regular spike in Covid-19 cases, when the Governments announced lockdowns in the interest of public safety and health, it was obvious to this Court that the litigants and their authorised agents would be facing serious hardships and difficulties in relation to their litigations and more particularly, in relation to the period of limitation when it would be well-nigh impossible for them to file the proceedings within the prescribed period of limitation, if the same was expiring during the period of such health emergencies and enforcement of the measures of containment.

28. As regards the operation and effect of the orders passed by this Court in SMWP No. 3 of 2020, noticeable it is that even though in the initial order dated 23-3-2020, this Court provided that the period of limitation in all the proceedings, irrespective of that prescribed under general or

special laws, whether condonable or not, shall stand extended w.e.f. 15-3-2020 but, while concluding the matter on 23-9-2021, this Court specifically provided for exclusion of the period from 15-3-2020 till 2-10-2021. A look at the scheme of the Limitation Act, 1963 makes it clear that while extension of prescribed period in relation to an appeal or certain applications has been envisaged under Section 5, the exclusion of time has been provided in the provisions like Sections 12 to 15 thereof. When a particular period is to be excluded in relation to any suit or proceeding, essentially the reason is that such a period is accepted by law to be the one not referable to any indolence on the part of the litigant, but being relatable to either the force of circumstances or other requirements of law (like that of mandatory two months' notice for a suit against the Government. The excluded period, as a necessary consequence, results in enlargement of time, over and above the period prescribed."

In the case of **M/s Arif Azim Co. Ltd. vs. M/s Aptech Ltd.** reported in **(2024) 3 SCR 73**, the Hon'ble three Judges Bench of the Supreme Court further considered the order passed in **SMWP No. 3 of 2020** and the order passed in **Prakash Corporates (supra)** and held that:

"84. *The effect of the above-referred order of this Court in the facts of the present case is that the balance limitation left on 15.03.2020 would become available w.e.f. 01.03.2022. The balance period of limitation remaining on 15.03.2020 can be calculated by computing the number of days between 15.03.2020 and 27.03.2021, which is the day when the limitation period would have come to an end under ordinary circumstances. The balance period thus comes to 1 year 13 days. This period of 1 year 13 days becomes available to the petitioner from 01.03.2022, thereby meaning that the limitation period available to the petitioner for*

invoking arbitration proceedings would have come to an end on 13.03.2023.”

The defendants admitted that the cause of action for filing of the suit arose on 17th February, 2021 and 17th March, 2021 but during the said period, the total world was affected by Pandemic Covid-19. The period of limitation from 17th February, 2021 to 28th February, 2022 is to be excluded. Taking into consideration of the said period and the judgment passed by the Hon'ble Supreme Court, this Court finds that the plaintiff has filed the suit within the period of limitation.

- 27.** Considering the above, this Court did not find any merit in both the applications filed by the plaintiff as well as the defendants, thus, **G.A. No. 3 of 2023** and **G.A. (Com) No. 4 of 2024** are accordingly **dismissed.**

(Krishna Rao, J.)