

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved On 10.02.2012

Decided on : 10.04.2012

+ **RFA (OS) NO. 88/2007**

DURGA BUILDERS P.LTD

..... Appellant

Through : Dr.Sarbjit Sharma, Advocate with Mr.Sumit
Sharma and Ms.Arjita Bhalla, Advocates.

versus

MOTOR and GENERAL FINANCE LTD. and ANR

..... Respondents

Through : Mr.Mohit Chaudhary, Advocate with Mr.A.Das,
Mr.Dheeraj Gupta and Ms.Rashi Bansal, Advocates.

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The appellant (hereinafter referred to variously as “Durga Builders” or “the defendant”) is aggrieved by the judgment and order of a learned Single Judge dated 06.11.2007 in CS(OS) No.612/2001 by which an application preferred by the plaintiff (hereinafter referred as “MGF” or “the respondent”) was allowed.

2. 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 ₹ 87,51,616/-. These included the interest component which according to MGF were payable by Durga Builders.

3. Durga Builders, in its written statement denied that its Managing Director Mr. R.K. Nanda had approached MGF to issue the ICDs or had ever subsequently created equitable mortgage in respect of the Lajpat Nagar property. It was also alleged that no written documents in relation to the claim had been given to the plaintiff nor were any title deeds or documents deposited. According to Durga Builders, the ICDs had been created in its favour on 11.09.1995 and 10.01.1996. In respect of the first ICD, the Durga Builders (according to its written statement) had created the mortgage of the two properties in Faridabad. It emphasized that no mortgage in respect of the property at Lajpat Nagar had been created and further claimed that it had fully paid back the amount of ₹2 Crores (i.e., the value of the two earlier ICDs of 11.09.1995 and 10.01.1996). According to Durga Builders, the second ICD for Rs.1 crore, dated 10.01.1996 was also paid back to MGF on 10.05. 1996. Durga Builders averred that MGF was under an obligation to return the original title deeds but had not done so. It however, denied the existence of

three ICDs, which according to MGF were created later and formed the subject matter of the suit.

4. According to Durga Builders, the transaction towards the amount of ₹ 1 Crore received by it on 06.05.1996, was not an ICD but a simple loan which had been repaid. Durga Builders denied the existence of the ICDs (the second dated 09.09.1996 as well as the 3rd ICD for ₹ 1 Crore dated 29.06.1996 which formed the subject matter of the suit).

5. Durga Builders alleged that the suit was result of the collusion between MGF and one Arun Mehra who was earlier its Director and had unauthorizedly passed on some of its documents to the plaintiff (MGF). It specifically claimed that the suit was time barred in the absence of any written document evidencing any mortgage or the intention to create a mortgage. Durga Builders contended that one Hindustan Commercial Investment Trust Limited, which belonged to Arun Mehra had purchased 50 plots of 502.32 square yards in Edenburg City Faridabad for a consideration of ₹2.5 Crores which was paid under the cover of letter dated 28.06.1996. One of the cheques was received was of MGF Limited. Durga Builders denied the creation of ICDs (which are subject matter of the present suit); it importantly claimed that the suit was time barred in view of its complete denial with regard to creation of mortgage security.

6. By an order dated 29.09.2005 the learned Single Judge of this Court had framed issues. The first one pertained to limitation; Issue Nos. 4 to 10 go to the root of the plaintiff's claim; they read as follows :

“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.

5. *If the issue No.4 is answered in **alternative**, whether the said mortgage is in violation of the mandatory provisions of the Companies Act?*

6. *If issue No.4 is decided in affirmative, whether such mortgage is in violation of the mandatory clauses of the lease deed dated 21.01.1960?*

7. *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?*

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 (8-0), 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 (0-5) 25 (8-0), 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.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*

11. *Whether the plaintiff is entitled to recovery any amounts from the defendants and even by sale of mortgaged properties as mentioned in the suit? OPD.”*

7. When the suit was pending trial, the plaintiff-MGF filed an application IA No.12438/1996 claiming a decree on admission. The application under Order 12

Rule 6, CPC, alleged that Durga Builders has filed its balance sheet for the year ending 31.03.2004 which admitted its liability to the extent of ₹1,93,00,000/- as payable to MGF. It was stated that the balance sheet was filed before the Income Tax Authorities and signed on behalf of Durga Builders. The relevant schedule, i.e., Schedule 'C' pertaining to Unsecured Loans was produced along with the application. It is extracted below for the sake of convenience :

“DURGA BUILDERS PRIVATE LIMITED

SCHEDULE FORMING PART OF THE BALANCE SHEET AS ON 31ST MARCH 2004

SCHEDULE – C OF “UNSECURED LOANS”

<i>Particulars</i>	<i>Current Year Ended 31-3-2004</i>	<i>Previous year ended 31-3-2003</i>
1. <i>From M/S Motor & General Finance Ltd.</i>	<i>1,93,00,000</i>	<i>1,93,00,000</i>
2. <i>From M/s Hindustan Commercial Investment Trust Ltd.</i>	<i>1,59,30,000</i>	<i>1,59,30,000</i>
3. <i>From M/s Class Sales Pvt. Ltd.</i>	<i>73,60,000</i>	<i>73,60,000”</i>

8. In its reply, Durga Builders (the same being supported by its Director's affidavit), denied the contentions in the application for decree on admissions. Durga Builders alleged that there was no mortgage liability and that MGF had never advanced any loan against mortgage of the properties. It sought to rely upon letters placed on record, allegedly written on behalf of Hindustan Commercial Investment Trust Limited by Shri Arun Mehra. It was contended that the plots had not been taken and therefore the amount was shifted to the balance sheet of Durga Builders by Shri Arun Mehra . Durga Builders further stated that an application was filed (by it) to implead Shri Arun Mehra and was pending before the Court. The averment in para 6 of its reply further stated that:

“ The present case is nothing but a misrepresentation of facts on behalf of the plaintiffs. The balance sheet annexed is the reflection of fraud by one Shri Arun Kumar 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.”

9. In view of the controversies, the learned Single Judge directed the statement of Shri R.K. Nanda, Durga Builders' Managing Director to be recorded which was done in Court on 09.10.1997. Shri Nanda admitted that Durga Builders used to file regular balance sheets and both he and his wife had signed them. The Court noticed that when shown the certified copy of the balance sheet of 2004, he admitted his signatures; he also identified signatures of his wife. When shown the entry in the balance sheet reflecting the sum of ₹1.93 Crores, as payable to MGF, he explained that the amount was advanced towards booking of plots in the Okhla Enclave Project and that certain documents including agreement to sell had been executed. The relevant part of Mr. R.K. Nanda's statement reads as follows :

“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.”

10. The learned Single Judge by the impugned judgment was of the opinion that the legal position with regard to judgments on admission was fairly well settled. The impugned judgment reasoned that Shri Nanda’s statement clearly revealed that Durga Builders continued to show MGF as its creditor in its balance sheet from 1996-1997 till 2004 even after the presentation of the suit. The impugned judgment held that:

“the explanation given by learned counsel for defendant No1 that the same is towards booking of the plots cannot be accepted for the reasons that in the balance sheet the plaintiff has been shown as unsecured creditor. If the amount was towards any booking, then it would have been shown in the balance sheet as such.”

11. The impugned judgment further held that Shri Nanda had in fact even volunteered that the plaintiff had not paid back amounts since the latter had not demanded it. The impugned judgment held 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. Ltd’s 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.”

12. On the basis of the above reasoning the MGF's application for judgment on admission was allowed and a decree to the extent of ₹1.93 cores was directed to be drawn.

13. Durga Builders contends that the impugned judgment is in error of law because the pleadings and the entire material have to be taken as a whole to see whether there is an unambiguous admission justifying a decree under Order XII Rule 6 CPC. It was submitted that when the basis for the suit, i.e., mortgage transactions was in dispute and issues had been framed, which in turn were intrinsically linked with the question of limitation, the Court should not have directed a decree to be drawn on the basis of admission. Counsel for Durga Builders emphasized that the Court should not have resorted to a selective reading of the statement of Shri Nanda recorded after the application was filed since it was always open to Durga Builders to give an explanation during the trial. Counsel submitted that even an averment which seemingly appears to prejudice a party, can be explained during the trial if an opportunity is afforded and there is a subsisting issue.

14. Learned counsel relied upon the ruling of the Supreme Court in *Jeevan Diesel & Electricals Limited Vs. Jasbir Singh Chadha & Another*, (2010) 6 SCC 601 and submitted that for the grant of a decree on admissions under Order XII Rule 6 CPC, the admission would have to be unequivocal or unambiguous, and not one which is qualified. Elaborating on this the Counsel pointed out that in the initial pleadings, where the existence of the mortgage had been disputed by the parties, even the maintainability of the suit had been challenged by the Durga Builders and issues had been framed, in that regard.

15. Thus, this issue, according to Durga Builders' counsel, has two levels i.e., (i) the nature of transaction and (ii) the question of limitation. If in fact the plaintiff could prove the subsisting mortgages on the date of the filing of the suit, the claim could proceed. However, if at the threshold the issue could not be proved the suit was liable to fail. In these circumstances it was inexpedient for the learned Single Judge to infer an admission and proceed to act on it by directing a decree to be drawn.

16.. Counsel for the MGF submitted that the appeal is devoid of merit and has to be dismissed. He relied upon the reasoning in the impugned judgment and contended that Shri Nanda's admission with regard to willingness to repay the amount to MGF was sufficient for the Court to draw a decree. So far as the other arguments are concerned, learned counsel submitted that once the balance sheet stood admitted – indeed Shri Nanda not denied his signatures and admitted signature of his wife, a Director on the balance sheet, there was no legal impediment for the course adopted by the impugned judgment on decreeing the suit to the extent the plaintiff's sought relief i.e., ₹1.93 Crores. The Court can therefore proceed on the other aspects i.e., as to the MGF's entitlement for the balance amount on the basis of the mortgage security and the interest claimed by it. Learned counsel submitted that the decision in *Uttam Singh Duggal & Co. Vs. United Bank of India & Ors* 2000 (7) SCC 120 as well as the judgment of the Supreme Court in *Jeevan Diesel (supra)* clothes the Civil Court with sufficient power to make such orders on the basis of an admission, whether on pleadings or otherwise, to the extent the ends of justice warrant. Having regard to this position in law, the approach adopted by the impugned judgment could not be faulted.

17. The above analysis would reveal that MGF based its suit on the existence of three mortgage securities. The suit was concededly filed in 2001. Durga Builders

denied that it owed any amount on the basis of ICDs; it also denied having created any mortgage securities in respect of three ICDs. The record also reveals that a large number of issues were struck by the Court; 7 of them pertained to the subsistence and extent of enforceability of mortgage transactions in respect of three properties. While the matters stood thus MGF moved an application seeking decree on admission relying upon balance sheet filed by Durga Builders as on 31.03.2004 to the Income Tax Authorities. Undoubtedly certified balance sheet reflects a sum of ₹1.93 Crores as payable to MGF as a unsecured creditor. In its reply Durga Builders denied liability and also put forward an explanation that balance sheet was a result of fraud played by one Shri Arun Mehra. It was also stated that an application to implead Shri Arun Kumar was filed and is pending. For clarifying the facts the Court in exercise of its power under Order 10 CPC, recorded the statement of Shri Nanda, Managing Director of Durga Builders. In the course of that statement, Shri Nanda admitted that an entry in favour of MGF had been shown in the balance sheet for the year ending 2004, for a sum of ₹1.93 crores in favour of MGF. He, however, had an explanation for that; he also added that the amount could be paid back to MGF if the latter demanded it.

18. The question is whether the pleadings taken as a whole point to an unambiguous and clear admission of the kind contemplated by law. The relevant standard spelt out in *Uttam Singh and Jeevan Diesel (supra)* that the Courts have to adopt, while considering pleadings and seeing if a decree on admission is to be drawn, is whether there is a “*clear and unequivocal admission of the case*” of the party defending the application. It is also not in dispute that there is no golden rule about what constitute as “clear and unequivocal admission”, the Court has to proceed on a case specific approach having due regard to the overall effect of the pleadings and documents. This is discernible from the decision in *Gilbert Vs.*

Smith, 1875-76 (2) Ch 686, which was relied upon by the Supreme Court in *Jeevan Diesel case (supra)*. The question was amplified in *Western Coalfields Ltd. Vs. M/s Swati Industries*, AIR 2003 Bombay 369. In *Jeevan Diesel's Case (supra)*, it was held that :

“whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision on this question depends on the facts of the case. This question, namely whether there is a clear admission or not cannot be decided on the basis of a judicial precedent.”

19. It is therefore evident that the Court cannot base its decision to decree (or not to grant a decree) in a suit in terms of Order XII Rule 6 CPC only on the basis of a particular pleading or admission; the overall effect of the pleadings and documents of the concerned parties is to be judicially weighed. In other words, the Court has to keep in mind the fact that what seems plainly an admission could well be explained by the litigant making it, during the course of the trial. Moreover, the controlling expression under Order 12 Rule 6 is that “*Court may*”. It is important to analyze this aspect because admissions either in the pleadings or in a document or in the course of the statement, cannot be viewed in isolation.

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 Court's 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 MGF's 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. Nanda's 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 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.

21. For the above reasons, we are of the opinion that the impugned judgment cannot be sustained; it is accordingly set aside. The appeal is allowed in the above terms.

22. The parties are directed to be present before the learned Single Judge as per the Roster for further directions on 20th April, 2012.

**S. RAVINDRA BHAT
(JUDGE)**

April 10, 2012

**S.P. GARG
(JUDGE)**