

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

% **Date of decision: 8th August, 2019.**

+ **CS(OS) 89/2018 & IA No.2805/2018 (u/O XXXIX R-1&2 CPC)**

RAKESH JAIN

..... Plaintiff

Through: Mr. Divakar Kumar and Mr. A.K. Bajpai, Advs.

Versus

ATUL BANSAL & ORS

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff, Rakesh Jain has instituted this suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.6,75,06,667/- with *pendente lite* and future interest and costs, jointly and severally from (i) Atul Bansal, (ii) ABW Infrastructure Limited, (iii) Ved Prakash Saxena, (iv) Ravi Shanker and (v) Aditya Buildwell Pvt. Ltd.

2. The suit came up first before this Court on 27th February, 2018 when summons thereof ordered to be issued and the defendant No.2 ABW Infrastructure Limited directed to maintain *status-quo* with respect to possession and title of land admeasuring 62 Kanals and 13 Marlas in Village Nangli Umarpur, Gurgaon, Haryana.

3. The order dated 18th April, 2018 records that the defendants No.1,2&5 Atul Bansal, ABW Infrastructure Limited and Aditya Buildwell Pvt. Ltd. had been served and the defendant No.3 Ved Prakash Saxena was reported to have died. The counsel for defendants No.1,2&4 appeared on 18th April, 2018 and also informed that the name of Aditya Buildwell Pvt. Ltd. has

been changed to ABW Infrastructure Limited and thus defendants No.2&5 were one and the same entity. The order dated 8th August, 2018 records that winding up order had already been “passed” against defendant No.2. The plaintiff applied for issuance of summons for judgment and which vide order dated 26th November, 2018 were ordered to be issued. The order dated 18th February, 2019, for reasons stated therein, records that the suit did not qualify under Order XXXVII of the CPC and had been wrongly treated as under Order XXXVII of the CPC and ordered the suit to be converted into an ordinary suit and gave opportunity to the defendants No.1&4 to file written statement. Yesterday i.e. 7th August, 2019, when the suit came up before this Court, it was found, (a) that the plaintiff, inspite of repeated opportunities had not taken any step to substitute the heirs of defendant No.3 Ved Prakash Saxena; and, (b) that the plaintiff, inspite of opportunity had not taken any steps for obtaining permission from the Company Court to proceed with the suit against the defendant No.2 ABW Infrastructure Limited which was under liquidation. Thus, the suit, insofar as against the defendant No.3 Ved Prakash Saxena was found to have abated and insofar as against the defendants No.2&5 ABW Infrastructure Limited and/or Aditya Buildwell Pvt. Ltd., which are the same entity, was dismissed for non-prosecution and the suit was kept for today to consider, whether the plaintiff is entitled to a decree forthwith against defendants No.1&4 and the effect of abatement of the suit qua defendant No.3.

4. The plaintiff has instituted this suit pleading, (i) that the defendant No.1, a Director in defendants No.2&5, is known to the plaintiff since long and there were financial dealings between the plaintiff and the defendant No.1; (ii) that initially the plaintiff agreed to provide loan of

Rs.1,76,58,750/- to defendant No.1 through cheques, against which the defendant No.1 issued 40,000 equity shares in the name of the plaintiff of the face value of Rs.10/- each out of the total paid up capital of 5,00,000 equity shares of Rs.10/- each of defendant No.5 Aditya Buildwell Pvt. Ltd., as security; (iii) that as on 1st November, 2015, a sum of Rs.5,63,52,426/- was due to the plaintiff; (iv) that a written agreement was executed by the plaintiff and the defendant No.1 acting for himself and on behalf of his companies, admitting a loan of Rs.5,63,52,426/-; (v) that the defendants failed to make payment of the said amount till 31st May, 2016 as agreed and an additional agreement dated 5th July, 2016 was executed whereunder the defendant No.1, for himself and on behalf of the other defendants admitted liability in the sum of Rs.6,75,06,667/- and also issued seven post dated cheques for the said amount; (vi) that the defendant No.1 also handed over photocopies of documents showing ownership of land aforesaid of the defendant No.2; (vii) that all the aforesaid cheques were dishonoured on presentment; (viii) that all the seven cheques were issued by the defendant No.2; (ix) that all the defendants are liable to pay Rs.6,75,06,667/- to the plaintiff; (x) that as per the additional agreement dated 5th July, 2016, not only defendant No.2 ABW Infrastructure Limited but its other directors defendants No.3&4 are also liable to pay the amount in question; and, (xi) that the plaintiff has initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 against defendant No.2 ABW Infrastructure Limited.

5. A perusal of the photocopy of the agreement dated 1st November, 2015 shows the same to be signed by the plaintiff and the defendant No.1 only. The same is the position of the additional agreement dated 5th July,

2016. Without the defendant No.4, who besides the defendant No.1 is the only surviving defendant, being a signatory to the documents on the basis of which the suit is filed, the plaintiff cannot have any claim against the defendant No.4 Ravi Shanker. Thus, the need to relegate the plaintiff to lead evidence at least qua defendant No.4 is not felt and the suit, insofar as against defendant No.4, is liable to be dismissed.

6. That leaves the claim of the plaintiff against the defendant No.1 only.

7. The counsel for the plaintiff states that though originals of the agreements dated 1st November, 2015 and 5th July, 2016 have not been produced but the plaintiff is in possession thereof and the same can be produced, if required.

8. On the pleadings of the plaintiff himself, of the liability of defendant No.1 being along with the other defendants, on dismissal as abated of the suit against defendant No.3 Ved Prakash Saxena, the suit claim against the defendant No.1 is also liable to be dismissed on this ground alone. However, the deceased defendant No.3 Ved Prakash Saxena also admittedly was not a signatory to the agreements on the basis of which the suit is filed, and taking into consideration the said aspect, the aspect of liability, if any of the defendant No.1 has been considered, *de hors* the same.

9. The plaintiff, in the plaint, besides pleading payment of Rs.1,76,58,750/-, has not pleaded any other payments to the defendant No.1 or to anyone else and in re-payment whereof Rs.5,63,52,426/- would be due as on 1st November, 2015. The only inference is that the amount of Rs.5,63,52,426/- has been derived, computing interest on Rs.1,76,58,750/- from 2003 till 2015 i.e. for a period of nearly 12 years.

10. However to secure re-payment of Rs.1,76,58,750/-, the defendant No.1, according to the plaintiff also, had transferred 40,000 equity shares of defendant No.2 in the name of the plaintiff. From the language used in paragraph 5 of the plaint, it appears that the money was paid to defendant No.2 ABW Infrastructure Limited and which had issued shares in the name of the plaintiff. The plaintiff however has not filed any document also in this regard and it appears the amount of Rs.1,76,58,750/- was paid towards share application money and not by way of loan.

11. Be that as it may, I have enquired from the counsel for the plaintiff, that if the defendant No.1 was in default, why did the plaintiff not realise dues by liquidating the security. Significantly, while instituting the suit also, no credit has been given of the value of the security which the plaintiff, according to his own averments is holding.

12. The counsel for the plaintiff, on enquiry, has no idea and is unable to answer any of the questions, save for saying that he will have to take instructions.

13. Such appearance in Court is “as good as no appearance” and rather wastes the time of the Court.

14. In terms of the agreement dated 1st November, 2015 also, the plaintiff was to return the shares. The counsel for the plaintiff does not even know, whether the shares are still with the plaintiff.

15. As has become the norm, Mr. Divakar Kumar, Advocate appearing for the plaintiff seeks adjournment.

16. The plaintiff to appear in person tomorrow.

17. The plaintiff to also deposit costs of Rs.25,000/- for today's adjournment with the Delhi High Court Advocates Welfare Trust, before he appears tomorrow.

18. List tomorrow i.e. 9th August, 2019.

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19. The counsel for the plaintiff has mentioned the matter just before lunch and states that the plaintiff withdraws the suit.

20. The suit is dismissed as withdrawn.

21. The date of 9th August, 2019 is cancelled.

RAJIV SAHAI ENDLAW, J.

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