IN THE HIGH COURT AT CALCUTTA

ORIGINAL SIDE

COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

C.S. (Com) No. 408 of 2024

(Old No. C.S. 178 of 2022)

With

GA No. 1 of 2022

Fox & Mandal

Vs.

Somabrata Mandal & Ors.

Mr. S. N. Mookherjee, Sr. Adv.

Mr. Paritosh Sinha, Adv.

Mr. Soumya Roy Chowdhury, Adv.

Mr. Deepan Kumar Sarkar, Adv.

Ms. Deepti Priya, Adv.

Mr. Susrea Mitra, Adv.

...for the plaintiff

Mr. Krishnaraj Thaker, Sr. Adv.

Mr. Indranil Munshi, Adv.

Ms. Anushka Sarkhel, Adv.

...for the defendant No.1

Hearing Concluded On : 17.07.2025

Judgment On : 28.07.2025

Krishna Rao, J.:

1. The plaintiff has filed the present suit praying for the following reliefs:

> a) *Declaration that the defendant No. 1 is entitled to a sum of Rs. 1,07,03,773/- in the particulars given in paragraph 22 above being his share in the amount payable to the erstwhile senior partner of the plaintiff, Late Dinabandhu Mandal in terms of clause 17 of the Partnership Deed dated 27th October, 2014 and to no other amount;*
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> b) *Declaration that the defendant No. 1 is only entitled to claim in terms of clause 17 of the Partnership Deed dated 27th October, 2014;*
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> c) *Decree of perpetual injunction restraining the defendant No. 1 from claiming any amount of money against the share of Late Dinabandhu Mandal other than Rs. 1,07,03,773/- as pleaded in paragraph 22 above in terms of clause 17 of the Deed of Reconstitution dated 27th October, 2014;*
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> d) *Decree of perpetual injunction restraining the defendant No. 1 from claiming any sum from the plaintiff other than in accordance with clause 17 of the Deed of Reconstitution dated 27th October, 2014;*
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> e) *Decree of perpetual injunction restraining the defendant No. 1 from issuing any email or notice or letter or communication containing the allegations similar to those contained in the notices/emails dated 21st March, 2022 and 14th May, 2022 annexed hereto and marked with the letters "M" and "P" respectively;*
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> f) *Receiver;*
> g) *Injunction;*

h) Attachment;
i) Costs;
j) Such further and/or other relief or reliefs.

2. The defendant no.1 has filed an application being G.A. No. 4 of 2023 praying for extension of time to file written statement but the same was dismissed on 14th June, 2024. After dismissal of the application, the plaintiff prays for arguing the matter on merit for grant of decree in terms of Order VIII, Rule 10 of the Code of Civil Procedure, 1908.

3. The plaintiff is a registered partnership firm carrying on business as Solicitors and Advocates. The plaintiff firm was established in the year 1896 with two partners, namely, Mr. J.K. Fox and Mr. G.C. Mandal. The last reconstitution of the plaintiff firm took place on 30th March, 2022 by way of Deed of Reconstitution. One of the erstwhile partner, Late Dinabandhu Mandal died intestate on 30th June, 2020, leaving behind his wife Kabita Mandal and three sons, namely, Shuvabrata Mandal, Shouryabrata Mandal and the defendant no.1. Kabita Mandal also expired on 5th March, 2022.

4. As per Clause 17 of the Deed of Reconstitution, the plaintiff firm offered the defendant no.1 his share i.e. 1/4th share as one of the legal heirs of Late Dinabandhu Mandal being a sum of Rs. 1,07,03,773/-. As regard to the share of Late Kabita Mandal, it was informed to the legal heirs that the same would be made over to the person who succeeds to her estate. The other two sons of Dinabandhu Mandal, namely, Shuvabrata Mandal and Shouryabrata Mandal have accepted their respective shares but the defendant no.1 refused to accept the share of Rs. 1,07,03,773/-.

5. The plaintiff has also filed an application being G.A. No. 1 of 2022 praying for allowing the plaintiff to deposit the sum of Rs. 1,07,03,773/- with this Court being the share of the defendant no.1 or in the alternative to appoint a Special Officer to deposit the said amount with the Special Officer. The said application is still pending for adjudication. In the said application, the defendant no. 1 has filed Affidavit-in-Opposition.

6. The defendant no.1 failed to file written statement even within the outer period of 120 days. The application filed by the defendant no.1 for extension of time to file written statement was dismissed and the case is proceeded as “undefended suit” against the defendant no.1.

7. Mr. S. N. Mookherjee, Learned Senior Advocate representing the plaintiff submits that in the present suit no question of facts is involved. The entire scope of adjudication is interpretation of Clause 17 of the Deed of Reconstitution dated 27th October, 2014. Mr. Mookherjee submits that as per the provisions of Order VIII, Rule 3A of the Code of Civil Procedure, 1908, as amended under the Commercial Courts Act, 2015, denial shall be in the manner provided under sub-rules (2), (3), (4) and (5) of the said Rule but in the present case the defendant no.1 has not filed any written statement.

8. Mr. Mookherjee submits that Order VIII, Rule 4 of the Code of Civil Procedure, 1908, as amended under the Commercial Courts Act, 2015 provided evasive denial and specific denial but the defendant has not filed written statement, thus question of evasive denial or specific denial does not arise. He submits that where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against the person under the disability, but the Court may, in its discretion, require any such fact to be proved.

9. Mr. Mookherjee submits that all statements in the plaint stand admitted in the light of the provisions of Order VIII, Rule 3A read with Rule 5(1) and (2) of the Code of Civil Procedure, 1908, as amended under the Commercial Courts Act, 2015.

10. Mr. Mookherjee submits that the contractual dues of the defendant no.1 in terms of Clause 17 of the Deed has been duly quantified and the plaintiff has offered the defendant no.1 to pay the quantified amount but the defendant no.1 refused to accept the same. The other legal heirs of Late Dinabandhu Mandal have accepted their respective shares.

11. Mr. Mookherjee submits that the sole contention of the defendant no.1 is that the defendant no.1 in addition to the aforesaid amount is also entitled to an additional sum on account of goodwill, which was contractually payable in terms of Clause-17 of the Deed, but the defendant no.1 has not made any case as to what amount is payable to him on account of goodwill.

12. Mr. Mookherjee submits that no question of fact is required to be decided in the present case. The Court has to interpret Clause 17 of the Deed dated 27th October, 2014. In support of his submissions, he has relied upon the judgment in the case of ***SK. Bhikan Vs. Mehamoodabee and Others*** reported in ***(2017) 5 SCC 127*** and submitted that when the Court is called upon to interpret the documents and examine its effects, it involves question of law and it is obligatory upon the Court to decide such question on merit.

13. Mr. Krishna Raj Thaker, Learned Senior Advocate representing the defendant no.1 submits that this Court also to determine whether the particulars given in paragraph 22 of the plaint determining the share of the defendant no.1 and share actually works out to Rs. 1,07,03,773/-. He submits that the plaintiff voluntarily has not chosen to adduce any evidence and there is no evidence to settle the moot issue, how the plaintiff has arrived at the sum of Rs. 1,07,03,773/-.

14. Mr. Thaker submits that the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not filed by the defendant. In support of his submissions, Mr. Thaker relied upon the judgment in the case of ***Balraj Taneja & Anr. vs. Sunil Madan & Anr.*** reported in ***(1999) 8***

SCC 396. He submits that provisions of Order VIII, Rule 10 of the CPC is discretionary power of the Court. The plaintiff failed to satisfy this Court as to how the plaintiff has calculated the amount of Rs. 1,07,03,773/-.

15. Mr. Thaker submits that declaration claim under Section 42 of the Specific Relief Act, 1963, lies entirely judicial discretion of the Court and is to be exercised with caution according to the exigencies of a particular case. He submits that a party cannot as of right, claim such a declaration because such a relief is more in the nature of an equitable relief than legal remedy. He has relied upon the judgment in the case of ***Bhairabendra Narayan Bhup Vs. State of Assam*** reported in ***MANU/GH/0072/1953***.

16. Mr. Thaker submits that while exercising its discretionary powers the Court must keep in mind the well settled principles of justice and fair play and should exercise the discretion only if the ends of justice require it, for justice is not an object which can be administered in vacuum. He relied upon the judgment in the case of ***Executive Committee of Vaish Degree College, Shamli and Others vs. Lakshmi Narain & Ors.*** reported in ***(1976) 2 SCC 58***.

17. Mr. Thaker submits that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have provided their case or not. In support of his submissions, he has relied upon the judgment in the case of ***Union of India and Others vs. Vasavi Cooperative Housing Society Ltd. & Ors.*** reported in ***(2014) 2 SCC 269***.

18. Mr. Thaker submits that pleading is not an evidence, far less proof. Issues are raised on the basis of the pleadings. The suit will fail if both parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and its rest, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side. He relied upon the judgment in the case of ***Anil Rishi vs. Gurbaksh Singh*** reported in ***(2006) 5 SCC 558***.

19. Mr. Thaker submits that Section 42 of the Specific Relief Act doesn't contemplate declarations about the pecuniary liability of persons as the same cannot be considered to be declarations about the legal character or any right to property. He relied upon the judgment in the case of ***Mahabir Jute Mills vs. Firm Kedar Nath Ram Bharose*** reported in ***1959 SCC OnLine All 94***.

20. Mr. Thaker submits that the plaintiff cannot be permitted to seek relief in a suit which would frustrate the defendants from initiating a prosecution against the plaintiff or seeking any remedy available in law. In support of his submission, he relied upon the judgments in the case of ***Cotton Corporation of India Ltd. Vs. United Industrial Bank Limited and Others*** reported in ***(1983) 4 SCC 625*** and ***Frost International Ltd. Vs. Milan Developers and Builders Private Limited and Anr.*** reported in ***(2022) 8 SCC 633***.

21. Mr. Thaker submits that even if the defendant failed to file written statement and, in that matter, even if forfeiture of the right to file written statement has occasioned it would not disentitle the defendant from participating in the further proceedings, without filing a written statement and in such circumstances, the defendant would also be having the right to cross-examine the witnesses, if any, of the plaintiff. He relied upon the judgment in the case of ***Kaushik Narsinhbhai Patel & Ors. Vs. S.J.R. Prime Corporation Private Limited & Ors.*** reported in ***(2024) 9 SCC 462***.

22. Mr. Thaker submits that the plaintiff is to prove his pleaded case by adducing evidence. Order VIII, Rule 10 CPC, in fact, has to be read together with Order VIII, Rule 5 and the position seems to be clear that a trial Court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission. He relied upon the judgment in the case of ***Asma Lateef and Anr. Vs. Shabbir Ahmad & Ors.*** reported in ***(2024) 4 SCC 696***.

23. The issue in the present case is whether a judgment and decree can be passed under Order VIII, Rule 10 of the Code of Civil Procedure, 1908.

24. Clause 17 of the Deed dated 27th October, 2014, reads as follows:

> *"**17.** The death or retirement of a partner shall not dissolve the partnership but the partnership shall be carried on by the surviving partners. The partnership accounts shall be made up after two years from the date of death/retirement of a partner but within three years from the said date. The share of the deceased or retiring partner in the outstanding bills upto the date of his death/retirement which have been realized within a period of two years from his death/ retirement less the cost of realization assessed at 30% of the amount realized on these bills shall be paid to the retiring partner or the legal representative of the deceased partner on account of his share of the profit and goodwill of the firm. The amount payable for the share of profit and goodwill of the deceased/ retiring partner to be calculated in the manner aforesaid shall be determined and paid in the manner decided by Dinabandhu Mandal in his absolute discretion and the heirs of the deceased partner or the retiring partner shall not be entitled to raise any question or objection thereto."*

25. The father of the plaintiff, namely, Dinabandhu Mandal was one of the partners of the plaintiff firm who died intestate on 30th June, 2020, leaving behind his wife Kabita Mandal, three sons, namely Shuvabrata Mandal, Shouryabrata Mandal and Somabrata Mandal, the defendant no.1 herein. In the meantime, Kabita Mandal also expired on 5th March, 2022. After the death of Dinabandhu Mandal as per Clause-17 of the Deed of Reconstitution dated 27th October, 2014, the plaintiff firm offered the defendant no.1 his 1/4th share amounting to Rs. 1,07,03,773/-. The other two brothers of the defendant no.1 have accepted the said amount. The plaintiff firm also clarified that with respect to share of the wife of Dinabandhu Mandal, the same would be made over to the person who succeeds to her estate. The defendant no.1 refused to accept the amount offered by the plaintiff firm.

26. As the defendant no.1 refused to accept the amount calculated by the plaintiff firm as per Clause-17 of the Deed, the plaintiff has filed the present suit praying for the relief stated in paragraph 1 above. In the suit, the plaintiff has also filed an application being G.A. No. 1 of 2022 praying for the following reliefs:

> ***a)*** *Leave be granted to your petitioner No. 1 to deposit a sum of Rs.1,07,03,773/- (Rupees One Crore Seven Lakhs Three Thousand Seven Hundred and Seventy Three only) with this Hon'ble Court being the share of the respondent No. 1 in the amount payable to the erstwhile senior partner of the petitioner No.1, Late Dinabandhu Mandal in terms of clause 17 of the Deed of Reconstitution dated 27th October, 2014 pending disposal of the instant suit;*
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> ***b)*** *Alternatively, a Special Officer/Receiver be appointed and the petitioner No. 1 be granted liberty to deposit the said sum of Rs.1,07,03,773/- (Rupees One Crore Seven Lakhs Three Thousand Seven Hundred and Seventy Three only) being the share of respondent No. 1 in the amount payable to the erstwhile senior partner of the petitioner No.1, Late Dinabandhu Mandal in terms of clause 17 of the Deed of Reconstitution dated 27th October, 2014 with Special Officer/Receiver so appointed pending disposal of the instant suit;*
>
> ***c)*** *Ad interim orders in terms of prayers above;*
>
> ***d)*** *Such further and/or other order or orders be passed, direction or directions be given as Your Lordships may deem fit and proper."*

27. In the said application, the defendant no.1 has filed affidavit-in-opposition. Relevant paragraphs of the said affidavit reads as follows:

> *"**6) b.** At all material times my father, namely Dinabandhu Mondal (since deceased) was a partner of the plaintiff No. 1 firm. The said plaintiff No. 1 firm is a registered partnership firm has been*

carrying on the business as Solicitor and Advocate since 1896. During the lifetime of the said Dinabandhu Mondal, the plaintiff No. 1 firm was lastly reconstituted on 27th October, 2014 and as such the rights of the said Dinabandhu Mondal (since deceased) and legal heirs, in his absence, will be determined only in terms of the said Deed on reconstitution deed dated 27th October, 2014.

e. *As such, in terms of clause 17 of the Partnership Deed dated October 27, 2014 the legal heirs of the said Dinabandhu Mondal are entitled to the followings:*

(i) Money lying in the capital account of Dinabandhu Mondal (since deceased) as on June 30, 2020;

(ii) The share of Dinabandhu Mondal in respect of the outstanding dues upto June 30, 2020 which has been realized on or before June 30, 2022 less the cost of realization assessed at 30% of the amount realized;

(iii) Shares in goodwill;

g. *I say that the documents annexed to the said petition would show that I always tried to settle the accounts relating to the share of my deceased father who was a partner of the plaintiff firm in terms of clause 17 of the Deed of Reconstitution. The following correspondences were exchanged between the parties:*

(i) Letter dated November 11, 2020 by me to the partners of the plaintiff No.1;

(ii) Letter dated March 21, 2022 addressed by my advocate to the partners of the plaintiff No.1;

(iii) Letter dated April 16, 2022 exchanged between the Plaintiff No.1 and SRA Law chambers being my advocate;

(iv) Letter dated May 14, 2022 between my advocate of the petitioner and the plaintiff No.1;

(v) Letter dated May 23, 2022 exchanged between the advocate for the plaintiff No. 1 and my advocate;

h. *It would appear from a bare reading of the aforesaid communications that the partners of the plaintiff firm did not adhere to such request made by me.*

9. *With reference to paragraphs 20 and 21 of the said petition save what have been stated herein, save what are matter of records and save what may be substantiated therefrom, all allegations contrary thereto and/or inconsistent therewith are denied and/or disputed. I repeat that subject to the share receivable by my mother in the estate of Dinabandhu Mandal, I am entitled to 25% of share of the said estate. Although the plaintiffs have correctly admitted such however they are categorically refuting to make payment of the share of goodwill receivable by my deceased father and eventually I am deprived of the same to the extent of 25% thereof. Further, the plaintiff firm and its partners have not yet disclosed the accounts of the Firm for the financial years 2019-20, 2020-21 and 2021-22. I hereby call the plaintiffs upon to disclose the accounts of the Firm for the financial years 2019-20, 2020-21 and 2021-22 and reserve my rights to make further submissions and claims after perusal thereof. It would appear from the contents of the plaint and the said petition that the plaintiffs have admitted their liability to me at least to the extent of Rs. 1,07,03,773/-. I say that the alleged statement of calculation is a document (being annexure R to the said petition) purportedly prepared by the plaintiff firm and/or its partners unilaterally and the basis thereof has never been disclosed to me; I do not admit or accept the existence of the said documents and/or the contents thereof.*

10. *With reference to paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the said petition it is denied and/or disputed that I am only entitled to Rs. 89,89,272/- or Rs. 17,14,501/- as it has been untruly alleged or at all. It is incorrect to allege that I am invading and/or threatening to invade the rights of the plaintiffs. It is incorrect to allege that by issuing any communication to the plaintiff or its* *partners (and not to any third party) I could invade and/or threaten to invade the rights of the plaintiffs. It is absolutely false that I ever made any claim, receivable by me from the estate of my deceased father, beyond the scope of clause 17 of the said Partnership Deed; on the contrary I have been seeking to get the same absolutely in terms of clause 17 of the said Deed. It is denied and/or disputed that any decree of perpetual injunction needs to be passed. It is utterly misconceived assertion that I had interfered with the business of the plaintiff firm by issuing any communication. In view of the aforesaid the subject suit is liable to be dismissed."*

28. The plaintiff has disclosed the statement of calculation in the plaint as well as in the application being G.A. No. 1 of 2022, which reads as follows:

*"**Fees realised on bills raised prior to 01.07.2020 during the period 01.07.2020 to 30.06.2022***

Month	***Fox & Mandal***
Jul-20	*55,40,677*
Aug-20	*67,07,203*
Sep-20	*51,10,757*
Oct-20	*27,49,887*
Nov-20	*19,14,082*
Dec-20	*32,59,809*
Jan-21	*13,30,208*
Feb-21	*23,08,061*
Mar-21	*37,28,503*
Apr-21	*2,23,784*
May-21	*94,116*
Jun-21	*3,03,600*
Jul-21	*4,26,101*
Aug-21	*7,07,593*
Sep-21	*4,81,999*
Oct-21	*2,86,337*
Nov-21	*45,048*
Dec-21	*5,51,400*
Jan-22	*16,04,363*
Feb-22	*1,32,350*
Mar-22	*1,45,636*

Apr-22	*9,34,381*
May-22	*20,700*
Jun-22	*5,82,003*
Total (X)	***3,91,88,599***
Agreed cost of realization as per clause 17 Y = (30% of X)	***1,17,56,580***
Balance : Z = X – Y	***2,74,32,019***
Payable to Estate of Late Dinabandhu Mandal (A)	***68,58,005***

Note:
1. ***A = 25% of Z (17.50% of X)***
2. ***The share of the deceased partner in the profits of the Firm was lastly 25%."***

The defendant no.1 has not filed written statement in the suit but has filed affidavit-in-opposition in G.A. No.1 of 2022. The defendant has dealt with the said document in para 9 of the affidavit-in-opposition which is quoted at paragraph 27 above. The defendant no.1 has only stated that statement is prepared by the plaintiff unilaterally and the basis thereof were not disclosed to him. The defendant no.1 has not disclosed his calculation and what is the quantum of amount the defendant no.1 is liable to get other than the amount calculated by the plaintiff.

29. Mr. Thaker relied upon the case of ***Balraj Taneja (supra)*** wherein the Hon'ble Supreme Court held that:

> *"**29.** As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC.*

Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy, Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

In the present case, the defendant has not filed written statement. The suit filed by the plaintiff is a commercial suit. Order VIII, Rules 1, 3, 5 and 10 are amended under the Commercial Courts Act, 2015 which reads as follows:

"(i) In Rule 1, for the proviso, the following proviso shall be substituted, namely:-

"Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.";

(ii) After Rule 3, the following Rule shall be inserted, namely:-

"3A. Denial by the defendant in suits before the Commercial Division of the High Court or the Commercial Court.-

(1) Denial shall be in the manner provided in sub-rules (2), (3), (4) and (5) of this Rule.

(2) The defendant in his written statement shall state which of the allegations in the particulars of plaint he denies, which allegations he is unable to admit or deny, but which he requires the plaintiff to prove, and which allegations he admits.

(3) Where the defendant denies an allegation of fact in a plaint, he must state his reasons for doing so and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version.

(4) If the defendant disputes the jurisdiction of the Court he must state the reasons for doing so, and if he is able, give his own statement as to which Court ought to have jurisdiction.

(5) If the defendant disputes the plaintiffs valuation of the suit, he must state his reasons for doing so, and if he is able, give his own statement of the value of the suit.";

(iii) In Rule 5, in sub-rule (1), after the first proviso, the following proviso shall be inserted, namely:-

"Provided further that every allegation of fact in the plaint, if not denied in the manner provided under Rule 3-A of this Order, shall be taken to be admitted except as against a person under disability.";

(iv) In Rule 10, [***] the following proviso shall be inserted, namely:-

"[Provided that] no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.";”

The defendant has not filed written statement even within the outer period of 120 days as prescribed under Order VIII, Rule 1 of the CPC as amended under the Commercial Courts Act, 2015 and the application filed by the defendant no.1 was dismissed by this Court by an order dated 14th June, 2024 in G.A. No. 4 of 2023. The defendant no. 1 has not filed written statement, thus there is no denial. The defendant no.1 has filed affidavit-in-opposition in G.A. No.1 of 2022. In the said affidavit also, the defendant no.1 has not come forward with different version of events from that given by the plaintiff. The defendant no.1 has not stated which calculation is wrong and what is the further amount the defendant no.1 is entitled. Simply the defendant no.1 has stated that it was prepared unilaterally and the defendant no.1 does not accept the said calculation.

30. Mr. Thaker has further relied upon the judgment in the case of ***Anil Rishi (supra)*** wherein the Hon'ble Supreme Court held that:

> *"**10.** Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side."*

In the said case issues are raised on the basis of pleadings, which reveal that the defendant filed written statement and not admitted the fiduciary relationship between the parties and the relationship between the parties was an issue. In the present case no written statement is filed. The defendant no.1 has not raised any issue by denying the averments made in the plaint as per Rule 3A of the Code of Civil Procedure, 1908 as amended under the Commercial Courts Act, 2015. In the affidavit-in-opposition also the defendant no.1 has not come up with specific claim.

31. Mr. Thaker relied upon the case of ***Sudir Engineering Company Vs. Nitco Roadways Ltd.*** Reported in ***1995 (34) DRJ,*** wherein the Delhi High Court held that:

> *"**6.** Any document filed by either party passes through three stages before it is held proved or disproved. These are:*
>
> *First stage; when the documents are filed by either party in the Court; these documents though on file, do not become part of the judicial record;*
>
> *Second stage: when the documents are tendered or produced in evidence by a party and the Court admits the documents in evidence. A document admitted in evidence becomes a part of the judicial record of the case and constitutes evidence;*
>
> *Third stage: the documents which are held 'proved, not proved or disproved when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Usually this stage arrives at the final hearing of the suit or proceeding."*

In the said case, the Delhi High Court has explained about admission of document in evidence, and how it is to be proved and disproved. In the present case the plaintiff is not relying upon the document for judgment under Order VIII, Rule 10 of the CPC. The plaintiff in paragraphs 21 and 22 of the plaint has described how the defendant no.1 is entitled to get an amount of Rs. 1,07,03,773/-. The defendant has not denied with regard to the said amount. The claim of the defendant that the defendant is entitled to further amount than the amount calculated by the plaintiff. The defendant has not disclosed any calculation by which the defendant no.1 is entitled to get further amount. The only claim of the defendant no.1 is that no amount of goodwill has been offered to him and other legal heirs but the defendant no.1 has not made any calculation as to what would be the amount of goodwill. On the other hand, the other two brothers of the defendant no.1 have accepted the amount calculated by the plaintiff.

32. The contention of the defendant no.1 that the plaintiff has relied upon the Deed dated 27th October, 2014 and the calculation being Annexure – "R" of the plaint but the said documents are not the evidence. As regard to the Deed, the defendant is also relying upon and admitted Clause 17 of the Deed. It is the specific case of the defendant no.1 that the manner in which the accounts of a deceased partner is to be settled, is governed by Clause 17 of the Deed dated 27th October, 2014. Once the defendant has admitted the Deed of Reconstitution, the plaintiff is not required to prove the said document further. As regard to the calculation sheet is concerned, the defendant no.1 is not denying with the amount of Rs. 1,07,03,773/- which the plaintiff is ready to pay to the defendant no.1. The defendant no.1 is not accepting the said amount only with the reason that the break up does not provide for any valuation for goodwill. The main issue raised by the defendant no.1 with regard to the valuation of goodwill but the defendant no.1 has not stated anywhere that as per his calculation what would be the valuation of the goodwill.

33. The first part of Clause 17 is that the death or retirement of partner shall not dissolve the partnership but the partnership shall be carried on by the surviving partners. The defendant has not raised any dispute to the same. The second part is that the partnership accounts shall be made up after two years from the date of death/ retirement of a partner but within three years from the said date. The said part is also not in dispute as the plaintiff has initiated process for disbursement of shares of Dinabandhu Mandal but the defendant no.1 has started sending notices and e-mails requesting not to distribute the assets of Dinabandhu Mandal and in the meantime the wife of Dinabandhu Mandal expired and thereafter the other two brothers have received the amount.

The third part is that the share of the deceased or retiring partner in the outstanding bills upto the date of his death /retirement which have been realized within a period of two years from his death/ retirement less the cost of realization assessed at 30% of the amount realized on these bills shall be paid to the retiring partner or the legal representative of the deceased partner on account of his share of the profit and goodwill of the firm.

34. "Goodwill", as Lord MacNaghten described is "a thing very easy to describe, very difficult to define", in ***IRC v. Muller & Co. (All ER p. 416 G)***.

35. The term "goodwill" signifies the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than a mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits. "Goodwill" may be the whole advantage belonging to the firm, its reputation as also connection thereof. It, thus, means that every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business whether connected with the premises of business or its name or style, everything connected with or carrying the benefit of the business.

36. In ***Halsbury's Laws of England*, 4th Edn., Vol. 35, at pp. 114-15**, the law is stated in the following terms:

> *"201. Goodwill generally; right to use name; sale to a partner.—The goodwill of the business carried on by a partnership forms part of the assets to be realised on distribution. If the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners*

> *as still being partners with him. If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the firm name; and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned. On dissolution, a partner may advertise that he is no longer connected with a periodical that the firm publishes.*
>
> *Where the goodwill becomes on dissolution the property of one of the partners (either by purchase in the ordinary way or pursuant to a provision in the articles), the outgoing partner or partners may not carry on a similar business in the name of the old firm, and may not solicit old customers."*

37. The goodwill is generally considered to be an asset of the partnership. In the aforementioned volume of ***Halsbury's Laws of England*, at p. 116**, it is further stated:

> *"204. When goodwill is to be treated as an asset.—Although, generally, the goodwill should be included where, under the partnership articles, a general account and valuation is to be taken on the death of a partner, the value of the goodwill should not, in the absence of contrary agreement, be included in the firm's periodical balance sheets; and, therefore, where the value of the share of a deceased partner is, by agreement, governed by the balance sheet, his estate is not entitled to treat the goodwill as an asset.*
>
> *Where a surviving partner sells the partnership business, the estate of his deceased partner is entitled to a share of the purchase money representing the value, if any, of the goodwill; but, having regard to the rights of the surviving partners to carry on a similar business, this value may be infinitesimal.*

38. The plaintiff has calculated the entitlement of the shares of the legal heirs of Dinabandhu Mandal as per the balance sheet as Rs. 3,59,57,086/- and all the said total amount is divided in four equal shares which come to Rs. 89,89,272/-. The plaintiff has taken the calculated of total fees realized in terms of Clause 17 of the Deed is Rs. 3,91,88,599/-. As per Clause 17, agreed cost of realisation @ 30% has been taken into consideration which comes to Rs. 1,17,56,580/- and accordingly, the total balance would come to Rs.2,74,32,019/-. 25% of share of Dinabandhu Mandal is come to Rs. 68,58,005/-, accordingly, the 1/4th share of the defendant no. 1 would come to Rs. 17,14,501/-, thus the total share of the defendant no. 1 in the estate of the Dinabandhu Mandal comes to Rs. 1,07,03,773/-.

This Court finds that the plaintiff has considered the share of Dinabandhu Mandal including profits of the plaintiff firm, goodwill and benefits of the other assets and properties and books of account and papers thereof. The defendant no. 1 has not raised any specific claim with regard to the goodwill.

39. The 4th part of Clause 17 of the Deed of Partnership provides that the amount payable for the share of the profit and goodwill of the deceased/ retiring partner to be calculated in the manner aforesaid shall be determined and paid in the manner decided by Dinabandhu Mandal in his absolute discretion and the heirs of the deceased partner or the retiring partner shall not be entitled to raise any question or objection thereto. In this regard, this Court finds that after the death of

Dinabandhu Mandal, the plaintiff firm has considered the share of the Dinabandhu Mandal and divided into four shares including the wife of Dinabandhu Mandal but after the death of the wife, the plaintiff firm has duly informed the legal heirs that the share of the wife of Dinabandhu Mandal shall be released/paid on production of Succession Certificate or Letters of Administration or probate or equally to all the legal heirs. Two of the sons of Dinabandhu Mandal have already accepted their shares as calculated by the plaintiff but only the defendant no. 1, one or the other reasons has not accepted the shares calculated by the plaintiff firm even the defendant no. 1 has not raised any specific claim before the plaintiff or in the present suit.

40. Considering the above, this Court finds that the plaintiff firm has calculated the shares of the deceased Dinabandhu Mandal in accordance with the Clause 17 of the Deed of Reconstitution and the defendant no. 1 has not come with any further calculation to disbelieve the calculation made by the plaintiff.

41. As regard to the issue raised by the defendant that the suit filed by the plaintiff is barred by Section 41(b) of the Specific Relief Act, 1963, this Court finds that the plaintiff has prayed for perpetual injunction against the defendant no. 1 at prayers (c), (d), & (e) of the plaint.

42. In the case of ***Cotton Corporation of India Limited vs. United Industrial Bank Limited & Ors.*** reported in ***(1983) 4 SCC 625,*** the Hon'ble Supreme Court held that the bank seeks to restrain the corporation by an injunction of the Court from instituting a proceeding for winding up of the bank. There is a clear bar in Section 41(b) against granting these reliefs. The Hon'ble Supreme Court further held that the Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, temporarily relief cannot be granted in the same terms.

43. In the present case, the plaintiff has prayed for decree for perpetual injunction restraining the defendant no. 1 from claiming any amount of money against the shares of Dinabandhu Mandal other than Rs. 1,07,03,773/- in terms of Clause 17 of the Deed of Reconstitution and restraining the defendant no. 1 from issuing any email or notices or communication against the plaintiff. The prayers (c), (d) and (e) of the plaint are barred under Section 41(b) of the Specific Relief Act, 1963 and thus the plaintiff is not entitled to get any relief in terms of the prayers (c), (d) and (e) of the plaint.

44. Considering the above, the defendant no. 1 is directed to receive the amount of Rs. 1,07,03,773/- being his 1/4th share from the plaintiff within a period of 30 days from the date of this judgment failing which the plaintiff is directed to deposit the said amount with the Registrar, Original Side of this Court within two weeks thereafter. If the plaintiff deposits the said amount with the Registrar, the Registrar shall invest the said amount in the interest bearing fixed deposit receipt with any of the Nationalized bank and to keep the same in safe custody till the defendant no. 1 receive the said amount.

45. **C.S. (Com) No. 408 of 2024 (Old No. CS 178 of 2022)** is **disposed of**. Decree be drawn accordingly. In view of the above, **GA No. 1 of 2022** is also **disposed of**.

(Krishna Rao, J.)