

(2011) 04 CAL CK 0087

Calcutta High Court

Case No: GA No's. 547, 3188 and 3407 of 2010 and CS No. 35 of 2010

Dipak Saha

APPELLANT

Vs

MA Kreeng Construction Private  
Ltd.RESPONDENT

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**Date of Decision:** April 4, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 401, 482

**Citation:** (2011) 2 CHN 862**Hon'ble Judges:** Sanjib Banerjee, J**Bench:** Single Bench**Advocate:** Abhrajit Mitra and M.S. Tiwari, for the Appellant; Chama Mukherjee, Anupam Mukherjee, A. Chakraborty and Sikha Chowdhury, for the Respondent

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### Judgement

Sanjib Banerjee, J.

The Court: The first of the applications in the suit, GA No. 547 of 2010, is for orders in the nature of attachment before judgment in a purely money claim. GA No. 3188 of 2010 has been made under Chapter XIII A of the rules on the Original Side of this Court and it is not in dispute that such application is maintainable. GA No. 3407 of 2010 is the Defendants' application for extension of time to file their written statements.

2. The Plaintiffs say that on May 25, 2006 the Plaintiffs entered into an agreement in writing with the Defendants for purchase of an immovable property at 118, Raja Dinendra Street, Calcutta 700 004. A copy of an agreement prepared on a non-judicial stamp paper of Rs. 10/- has been appended to the Plaintiffs' second application. At paragraph 7 of the second application the Plaintiffs have averred that the acknowledgement of the receipt of payments recorded in the agreement of May 25, 2006 was in the hand of one Suresh Pandey. The memorandum of consideration that appears at page 7 of the document is handwritten. The first two amounts

reflect payments by cheque. The next three sums indicated in the memorandum of consideration are of Rs. 20 lakh, Rs. 20 lakh and Rs. 11 lakh and are clearly stated to be in cash. There is a signature at the foot of the memorandum of consideration with the date of May 25, 2006 scribbled there under.

3. The Plaintiffs' version of things is that the agreement of May 25, 2006 could not be worked out between the parties and the Defendants let out the space of approximately 2550 sq. ft to a third party. The Plaintiffs claim that on May 19, 2009 the parties entered into another agreement by which the Defendants agreed to refund a sum of Rs. 1.10 crore to the Plaintiffs in lieu of the payment of Rs. 68 lakh received from the Plaintiffs in the year 2006.

4. The Defendants have altogether denied the transaction reflected in the document executed on May 19, 2009. They say that some known miscreants entered their office on the relevant date and coerced the Defendants into signing the document of May 19, 2006. As to the six post-dated cheques that the Defendants issued in terms of the document dated May 19, 2009, they say that such cheques were also obtained under coercion.

5. The Defendants claim to have lodged a written complaint with the local police station on the same day. A copy of the complaint of May 19, 2009 has been relied upon and appears as Annexure "B" to the Defendants' affidavit in GA No. 3188 of 2010. The complaint appears to be very collected in that it details the names of three persons who had apparently visited the office. The complaint also refers to an agreement that provided for refund and alleges that the Defendants were forced to execute six post-dated cheques of various denominations. The letter signs off by claiming that the complainant would "proceed before the learned Court for justice.

6. To continue with the Defendants' version of things, the Defendants have claimed that there was a subsequent attempt on October 22, 2010 by the Plaintiffs to browbeat the Defendants into submission whereupon the same complainant (Suresh Pandey, the husband of one of the two individual Defendants) again ran to the police and in a rather cryptic written complaint named the first Plaintiff but did not name any other. According to such complaint, the first Plaintiff came into the Defendants' office at 8.30 a.m. along with "an unidentified person used strong abusive languages and threatened me with dire consequences.

7. The Defendants say that upon the police authorities usual failure to act upon the Defendants' complaints, they filed a petition of complaint u/s 156(3) of the Criminal Procedure Code, 1973 which the relevant Magistrate was pleased to reject on the ground that the disputes appeared to be civil in nature. The Defendants thereafter carried an application u/s 401 read with Section 482 of the Code of Criminal Procedure before this Court.

8. The Defendants suggest that there were divers transactions between the parties wherein they have assisted each other in the matter of other properties, particularly,

an Uluberia property for setting up a petrol pump thereat. The affidavits filed by the Defendants in GA No. 547 of 2010 and GA No. 3118 of 2010 set out instances of other transactions, several of them in cash reflecting heavy sums.

9. For assessing the Defendants' stand, since it is, prima facie, found to be false and incredible, what has been said by them at various stages need to be seen. Before the Magistrate in the petition of complaint, they said that subsequent to the execution of the agreement of May 25, 2006, the Plaintiffs expressed their inability to perform their part of the agreement ("That is to say pay the sum of Rs. 51,00,000/- by cash or in any manner whatsoever"). Paragraph 6 of such complaint proceeded to record that the Petitioner therein (Suresh Pandey) "tried his best to return the amount received by cheque on 25th May, 2006. There is nothing else said in the petition of complaint as to whether the money was subsequently returned. Such petition was filed well after October 22, 2009.

10. In the petition under Sections 401/482 of the Code of Criminal Procedure carried to this Court, the Petitioner therein repeated, at paragraph 7 of the petition, that he "tried his best to return the amount received by cheque on 25th May, 2006. At paragraph 3 of the same petition, the Petitioner therein admitted execution of the agreement of May 25, 2006; at paragraph 4 thereof the Petitioner therein indicated that the net consideration fixed was Rs. 68 lakh of which Rs. 17 lakh was received by cheques. At paragraph 5 of such petition Suresh Pandey claimed that "a sum of Rs. 51,00,000/- though reflected as having been paid in cash, was to be paid by cash at the time of execution i.e. registration of the said agreement. However, the private Respondents (the Plaintiffs herein) did not and/or could not arrange for the balance and hence the said amount was never paid to the Petitioner.

11. In the first affidavit that the Defendants used in the present suit, one affirmed again by Suresh Pandey on April 12, 2010, the execution of the agreement of May 25, 2006 is admitted, but it is said that "a sum of Rs. 17,000,00/- (sic) was paid in cheque and a memo of consideration was drawn up for payment of the balance through cash. However, the balance cash payment was never made by the Petitioners or accepted by the Respondents herein." There is thus a clear admission of the memorandum of consideration which was made out at the foot of the agreement of May 25, 2006, but a denial of a part of the contents thereof.

12. At paragraph 5(h) of the said first affidavit of the Defendants in the present suit, the following has been said:

That the 1st cheque caused to be signed on 19.05.09 was cheque No. 092401 dated. 20.05.09 on Indian Overseas Bank, the cheque was not presented before any bank. On 22nd October 2009 the Petitioners along with some antisocial elements once again forcefully entered the office of the deponent. They resorted to using abusive language and threats of dire consequences demanding payment of consideration money for Rs. 10 lacs by cash and immediately. The deponent had no cash the

Petitioners along with his group left the office premises. The deponent was once again constrained to file further complaint with the local P.S. Burtolla on 22nd October, 2009.

13. There is no mention in the first affidavit of the Defendants in the present suit that the sum of Rs. 17 lakh that was admittedly received by the Defendants was either refunded or attempted to be refunded to the Plaintiffs. Upon the receipt of the application under Chapter XIII A of the rules on the original side of this Court, the Defendants claimed at paragraph 2(m) of the affidavit of Suresh Pandey affirmed on December 21, 2010 that "the sum of Rs. 17,000,00/- received by cheque at the time of signing of the agreement of sale was refunded in cash by the Respondents to the Petitioner. Leave is craved to produce books of accounts if necessary.

14. The primary argument on behalf of the Defendants is that there was no claim by the Plaintiffs between the execution of the original agreement of May 25, 2006 and the date of execution of the second agreement on May 19, 2009 for either performance by the Defendants of the original agreement or refund of the payment there under. Counsel on behalf of the Defendants repeats that there was no attempt by the Plaintiffs to demonstrate that the payment of Rs. 51 lakh had, indeed, been made at the time of or simultaneously with the execution of the original agreement of May 25, 2006. It is suggested on behalf of the Defendants that it is inconceivable, given the nature of the relationship between the parties and the several transactions entered into between them, that the Plaintiffs would not remind the Defendants of the sum of Rs. 68 lakh if such money had been paid without any consideration against the same being received.

15. The Defendants say that even as late as in May, 2009 the Plaintiff had attempted to make available a sum of Rs. 17 lakh to the Defendants in two tranches of Rs. 8.5 lakh each. Paragraph 2(n) of Suresh Pandey's second affidavit in this suit claims that the Defendants did not want to retain such money and apparently returned the same, though one of the cheques for refund of such amount was originally not cleared but was subsequently cleared on June 2, 2009.

16. There are several gaps in the Defendants' story that would preclude any reasonable person from accepting the same. To begin with, the rhetoric that the Plaintiffs should have either sought performance of the original agreement or demanded refund of the money, is utterly meaningless in the context of stand taken in both affidavits filed on behalf of the Defendants. The parties enjoyed the most cordial of relationships and had several business transactions. It is evident from the Defendants' complaints, petitions and affidavits that the first note of discord was struck around May 19, 2009 when the first Plaintiff is alleged to have coerced the Defendants or their representative into executing an agreement for refund of the money and into signing six post-dated cheques for a total sum of Rs. 1.10 crore. There could have been no occasion, therefore, to make a written demand for payment of the original agreement or for refund of the money prior to May, 2009.

17. For a moment, it may be presumed that the Defendants' version is right and that the first Plaintiff, indeed, coerced the Defendants' representative into executing the document and signing the post-dated cheques. Yet, there appears to be nothing of note done by the Defendants between May 19, 2009 and October 22, 2009. It is true that there is a letter of complaint dated May 19, 2009 which is said to have been deposited with the local police station, but it is not unusual in this country that a rubber stamp of the police station (and even much higher authorities) is obtained on a subsequent date. The complaint of May 19, 2009, if there was one at all, promised that the complainant would take the matter to Court; but there was no action taken till the second complaint of October 22, 2009. It is difficult to believe that a person claimed that he had been coerced into executing a document by hired henchman of the first Plaintiff and that such person remained silent even as to the matter of issuing instructions to the bankers for stopping payment of the six post-dated cheques that had been signed on May 19, 2009. Further, the alleged first complaint bears no stamp as to date and time of receipt thereof; the second complaint does.

18. It is evident that it was only on or after October 22, 2009 that the Defendants began a flurry of activities. First, there was the complaint to the police station followed by the petition of complaint before the Magistrate. Then came the petition under Sections 401/482 of the Code of Criminal Procedure before this Court and later instructions to the Defendants' bankers to stop payment of one or more of the cheques despite one or more of the cheques having already been previously dishonored for want of sufficient funds in the relevant account.

19. The statement made at paragraph 2(m) of the second affidavit filed by Suresh Pandey in these proceedings is unsubstantiated. There is no date which has been given in support of the allegation that the sum of Rs. 17 lakh admittedly received at the time of execution of the agreement of May 25, 2006 was returned to the Plaintiffs. The books of accounts have not been produced despite the promise in the relevant paragraph.

20. On behalf of the Defendants it is argued that it is impossible that a cash amount of Rs. 51 lakh would be tendered by any party or be received by another. Reference is made to the general rule that a payment for more than Rs. 20,000/-cannot be made by cash. However, in the Defendants claiming to have repaid Rs. 17 lakh by cash, there was apparent non-adherence to the same rule which is cited on behalf of the Defendants.

21. There is no denial of the execution of the original agreement dated May 26, 2006. Though there is a subsequent denial of receipt of the payment of Rs. 51 lakh by cash as recorded in the agreement of May 25, 2006, there is no basis to such allegation since the Defendants had admittedly executed the agreement and, for a period till May 19, 2009, there was no grievance that what was contained in the agreement of May 25, 2006 was, in fact, not what had actually transpired between

the parties. It was only upon the petition of complaint being filed that there was a denial of the receipt of the amount of Rs. 51 lakh in cash, contrary to what was accepted on behalf of the Defendants in their admitted execution of the agreement of May 25, 2006.

22. The defence is as unworthy as they come. The shifting stands of the Defendants do not inspire any confidence and the Plaintiff would be justified in demanding immediate payment.

23. However, since there may yet be some basis to the Defendants' assertion that the second agreement, that of May 19, 2009, may not have reflected the will of the Defendants, and there may have been complaints relating thereto, if not on the same day at least within five months thereof, the Plaintiff has to await the trial to receive any payment, including the Plaintiffs' demand of Rs. 1.10 crore under the second agreement. At the very least, however, the Defendants are liable to pay the Plaintiff the sum of Rs. 17 lakh which the Defendants admittedly received under the agreement of May 25, 2006 and which the Defendants are unable to show that they have refunded whether in cash or by cheque. The Defendants are also liable to the Plaintiff in the further sum of Rs. 51 lakh which they have claimed not to have ever received though the document of May 25, 2006 speaks otherwise. At this stage, the contents of the document should have primacy over the Defendants' unsubstantiated statement detracting there from.

24. The Defendants are granted leave to defend the suit, subject to the Defendants putting in the sum of Rs. 68 lakh together with interest thereon at the rate of 12 per cent per annum from May 25, 2006 till the date of deposit. Such deposit must be made within a period of a fortnight from date with the Registrar, Original Side, who will invest the same by way of a fixed deposit in any nationalized bank of his choice and make over copies of the fixed deposit receipt to the Plaintiffs and the Defendants.

25. In default of the deposit being made with the Registrar within the time permitted, there will be a decree in favour of the Plaintiffs and against the Defendants jointly and severally in the sum of Rs. 68 lakh together with interest thereon at the rate of 12 percent per annum from May 25, 2006 until realisation.

26. The balance claim of the Plaintiff will, in any event, stand to trial. The written statements will be filed within four weeks from date.

27. The order of injunction subsisting in favour of the Plaintiffs in GA No. 547 of 2010 will run till the date of the deposit by the Defendants, whereupon it will dissolve. In the event the deposit is not made and there is a decree in terms of this order, the injunction will continue till the realisation of the entire decretal sum by the Plaintiffs.

28. GA No. 547 of 2010, GA No. 3188 of 2010 and GA No. 3407 of 2010 are disposed of. The Plaintiff will be entitled to costs of these applications assessed at 5000 GM.

29. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.