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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No. 784/2018

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17th September, 2018

M/S SHEO PRASAD SHAMBHU RAM & ANR

..... Appellants

Through: Mr. B.S. Mathur and Mr. Rajat Mathur, Advocates (Mobile No. 9811556470).

versus

M/S PURAN CHAND & CO

..... Respondent

Through: Mr. Rajesh Mahindru, Advocate (Mobile No. 9810194135).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAVEAT No. 855/2018

1. Since counsel for the caveator(s) has entered appearance, the caveat stands discharged.

C.M. Appl. No. 37848/2018 (for exemption)

2. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA No. 784/2018 and C.M. Appl. No. 37847/2018 (for stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the Judgment of the Trial Court dated 01.06.2018 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff with respect to the suit property being shop and *chabutara* on the ground floor of property no. 396, Chandni Chowk, Delhi, measuring 230 sq. fts.

4. I need not narrate the facts in detail because the undisputed position which emerges is that this Court only has to consider the issue as to whether the appellants/defendants became tenants in the suit property prior to 1928 when mortgage was created of the suit property by predecessor-in-interest of the respondent/plaintiff or on 01.03.1931 in terms of the Lease Agreement Ex.PW1/30. Ex.PW1/30 is a Rent Note executed on 02.03.1931 by the appellants/defendants in favour of the mortgagees of the suit property. The admitted facts have been set out by the trial court in para 17 of its judgment and this para with its sub-paras (i) to (viii) read as under:-

“17. From perusal of pleadings of parties and evidence I found that there are certain undisputed facts. Before settling the dispute, it would be appropriate to record those facts to cut-short the controversy:-

(i) The property in question along with other properties were mortgaged by Sh. Ganga Ram and others in favour of the mortgagees Sh. Ram Chand, Sh. Bengali Mal, Sh. Shyam Lal and Sh. Chotte Lal on different occasions through different deeds in the year 1928.

(ii) The mortgaged amount was not paid by Sh. Ganga Ram, hence litigation started between the mortgagor and mortgagees and a compromise took place between them whereby mortgagees were given right to recover the rent from the tenants of the said property and it was also agreed that mortgagor will get execute the lease deed from the tenants on or before 01.03.1931.

(iii) The mortgagor failed to make payment of loan amount. Hence suit property was sold to plaintiff firm in auction purchase on 22.08.1972. A decree was passed in favour of the mortgagee and to execute the said decree, mortgagee filed an execution petition on 01.04.1952.

(iv) The plaintiff filed an I.A. No.2006/73 in execution petition no.28/69 for recovery of the suit property from the defendant along with other tenants on the ground that suit property was mortgaged by mortgagee. Hence the tenants are not entitled for protection under Delhi Rent Control Act, 1958.

(v) The litigation qua the same went up to the Supreme Court and ultimately it was held that since plaintiff is not the party in the original suit filed by the mortgagee, therefore, they are not entitled to possession and they were given liberty to file fresh suit for eviction.

(vi) The Hon'ble High Court full bench on the reference EFA (OS) No.3/77 vide judgment dated 11.09.1987 held that tenants inducted by a mortgagee in possession cannot claim the benefit of protection offered by the Delhi Rent Control legislation.

(vii) Hon'ble Supreme Court in civil appeal no.875/1988 vide order dated 27.09.1994 disposed off the SLP filed by the defendants along with other tenants with the direction to approach to the Division Bench to the petitioners (including defendants herein) and Division

Bench to dispose off appeal in the light of the judgment of full bench and thus judgment of full bench became final;

(vii) The division bench dismissed the appeal bearing EFA. No. (O.S.) 3 of 1977 of the plaintiff holding that plaintiff cannot seek the possession in the above said execution petition as he is not the party to the decree.

(viii) The plaintiff file civil appeal no.7250/2002 against division bench order but same was dismissed with liberty to file the separate suit.”

5. The issue which arose between the parties was on account of a Full Bench judgment of this Court reported as ***Puran Chand and Company v. Ganesh Lal Tara Chand and Ors., AIR 1988 Delhi 1***, and this judgment holds that if a mortgagee of a mortgaged property inducts a tenant then on the culmination of the mortgage the tenant has to vacate the suit property because a mortgagee cannot create a right, title and interest in a suit property beyond his own entitlement. In the present case, admittedly, the mortgage was created by the original owner/mortgagor-Sh. Ganga Ram in favour of Sh. Ram Chand, Sh. Bengali Mal, Sh. Shyam Lal and Sh. Chotte Lal. Since the owner/mortgagor-Sh. Ganga Ram failed to pay the dues under the mortgage, hence the owner/mortgagor-Sh. Ganga Ram allowed the mortgagees to induct tenants in the suit property and the rent being

recovered from the tenants by the mortgagees would be taken by the mortgagees towards appropriate satisfaction of payment of the loan amount. Mortgage was created in the year 1928 and in case the appellants/defendants are able to prove that they were tenants in the suit property in or prior to the year 1928, then they would be entitled to continue with their tenancies. However, in case the tenancies in favour of the appellants/defendants/tenants were created after the year 1928 and by the mortgagees of the suit property, then the tenancies would come to an end on the mortgage coming to an end. I may note that respondent/plaintiff is an auction purchaser vide auction dated 25.09.1970 in legal proceedings which were initiated by the mortgagees for recovery of the amount of loan with interest, and on passing of the decree by the Civil Court against the owner/mortgagor-Sh. Ganga Ram, and in favour of the four mortgagees, the subject property was ordered to be sold in execution of the decree for recovery of the amounts payable by the mortgagor Sh. Ganga Ram to the mortgagees Sh. Ram Chand, Sh. Bengali Mal, Sh. Shyam Lal and Sh. Chotte Lal. Earlier there were proceedings in execution of the decree wherein a Division Bench of this Court as per its Judgment dated

21.11.2000 in **EFA (OS) 3/1977** held that since the respondent/plaintiff/auction purchaser is the third party to the proceedings in the suit, in case the respondent/plaintiff/auction purchaser has to recover possession from tenants who are illegally continuing possession after their tenancies have come to an end on account of mortgage coming to an end, appropriate civil suit had to be filed by the respondent/plaintiff, and consequently the subject suit has been filed by the respondent/plaintiff. The Division Bench in its Judgment dated 21.11.2000 made it abundantly clear that the legal and binding nature of the tenancies created by the mortgagees would be decided in the civil suit and the Division Bench further clarified that they were not making any adjudication as to legality and validity of the tenancies as per their judgment in **EFA (OS) 3/1977**. The relevant paras of the judgment of the Division Bench in this regard read as under:-

“In the instant proceedings, the appellant-auction purchaser being an outsider and not a party to the Suit Nos.109/30 and 144/33, which resulted in a compromise, preliminary decree and final decree in execution of which the property was put to sale, will not be entitled to recover physical possession from the respondents in view of the provisions contained in Order 21 Rule 95. They will be entitled only to symbolic possession in terms of provisions of Order 21 Rule 96 of the Code and in that view of the matter, it will not be proper for us to make any adjudication on the question of the legal and binding

nature of the tenancies created by the mortgagees pursuant to the compromise. We are also not considering the question raised by learned counsel for the appellant about the respondents liability, if any, to pay mesne profits.

By the impugned order learned Single Judge had ordered symbolic possession to be given to the auction purchaser as prescribed under Order 21 Rule 96 C.P.C. while maintaining that part of the order, present appeal is dismissed with no order as to costs making it clear that we are not making any adjudication on the legality and validity of the tenancies since the said question, if raised in any appropriate proceedings, will have to be decided, therein, in accordance with law and for that reason alone, we further make it clear that findings recorded thereon by learned Single Judge in the impugned Judgement on the legality and validity of the tenancies of the surviving respondents will neither come in the way nor cause any prejudice to the appellant or the respondents in those proceedings. In view of this position, there is no need for us to make any adjudication on the questions raised in the cross-objections, which also stand disposed of along with this appeal.”

6. Therefore, the issue to be squarely decided is as to whether the appellants/defendants were tenants of the mortgagees or were tenants before the mortgage was created by the owner-Sh. Ganga Ram in favour of the four mortgagees stated above.

7. Trial court has held this issue, and in my opinion rightly, in favour of the respondent/plaintiff because admittedly there exists a document of tenancy being the Rent Note Ex.PW1/30 dated 02.03.1931. Trial court has referred to the language of the Rent Note and which shows that the landlords for creation of the tenancies in favour of appellants/defendants were the mortgagees and it is to the

mortgagees that the rent was payable for the tenancies created. As per the Rent Note, on the tenancies coming to an end, possession was to be handed over by the tenants to the mortgagees and not the mortgagors. Accordingly, the trial court as per its paras 27 to 32 held that the Rent Note Ex.PW1/30 will prevail and once that is so, the tenancies having come into existence in favour of the appellants/defendants on 01.03.1931, and mortgage being of the year 1928, consequently, appellants/defendants are tenants of the mortgagees and not of the mortgagor. These paras 27 to 32 read as under:-

27. Now I shall proceed to decide the issue when the tenancy of defendant came into existence. In order to prove that defendant was inducted as tenant on 01.03.1931 the plaintiff has relied upon the Rent note Ex.PW1/30 which is in Urdu and also having its English translation which was filed in Execution No.28/69. On perusal of said rent note it is evident that same has been executed on 02.03.1931 on behalf of firm M/s Shiv Prasad Shambhu Ram Gotewala with respect to one shop having one door pacca built situate in Delhi Chandni Chowk. It is not disputed by defendant that said rent note was not with respect to suit property. To understand the character of the rent note, it would be appropriate to reproduce the same:-

“ Translation

Firm Shiv Pershad Shambhu Ram Gotewala in Kucha Brij Nath, Bazar Chandni Chowk, through I Ram Rajpal, Son of Ghasi Ram, Caste Vaish, Trade in Gota of Delhi Bazar, Chandni Chowk, previously of Rohtak, am the partner of the above firm.

Whereas one shop having one door pacca built situate in Delhi Chandni Chowk, Near Kucha Brij Nath has been taken at an exclusive rent of Rs.61/14/- per month by me on 1st March, 1931 from Lala Ram Chand Sahib, son of Lala Lachhman Dass and Lala Bengali Lal, Son of Lala Ram Chand Sahib, Proprietor firm Lala Lachhman Dass Ram Chand and Lala Sham Lal and Lala Chuni Lal, sons of Lala Dhoom Sen, proprietors of firm Dhoom Sen Sham Lal, Caste Vaish, doing business of blacksmith in Bazar Chawri, mortgagees decreeholders of the said property. It is hereby agreed that the rent as settled will be paid for each English Calender month as per receipt. In default of payment of rent, then the mortgagees will be entitled to recover the rent from me and the firm mentioned above according to law and I will have no objection to the same. Whenever the mortgagees want to get the shop vacated, I will have no objection to vacate the same within one month from the date of such information; otherwise the mortgagees will be entitled to increase the rent and get shop vacated. In case I wish to vacate the shop, then in that case, I will inform the mortgagees before one month. I will not damage the shop in any way, nor I will give the same on rent to some body else. I have written this rent deed at the rate of Rs.61/44/- per month on this the 2nd day of March, 1931 on Tuesday.

Sd/- in English of Ganga Ram.

Executant.

Sd/- Shiv Pershad Shambu Ram Signed in Mundi.

Executant.

True translation from urdu.

28. Thus from the language of the rent note ExPW1/30 it is evident that the defendant firm has taken the said shop on rent on 01.03.1931 from Lala Ram Chand Sahib, Lala Bengali Lal, Lala Sham Lal and Lala Chuni Lal the mortgagee.

29. The defendant has objected the exhibition of all the documents on the ground of mode of proof at the time of exhibition of documents. The objection has not been decided by my Ld. Predecessor at that

time, hence said objection is to be decided now. The said rent deed is certified copy taken from the High Court file bearing Ex.No.28/69. The defendant has not denied the said fact. The public record can be proved by filing its certified copy and there is no need to call the witness from the public office until authenticity of certified copy is disputed.

30. The defendant no.2 in his affidavit Ex.DW1/A has admitted that the said rent note Ex.PW1/30 was executed by the defendant firm. Hence in my view there is no illegality in exhibiting the same hence I disallow the objection. Thus from the rent note, it is proved that the property in question was taken on rent by the defendant firm on 01.03.1931 on rent of Rs. 61/14 per month from Lala Ram Chand Sahib, Lala Bengal Lala Sham Lal and Lala Chunni Lal the mortgagee/deed holder of the property. Further in the rent note it is mentioned that whenever mortgagee want to vacate the premises they will vacate the same. It does not mentioned that said rent note was executed at the instance of Mortgagor.

31. The language of the rent note is unambiguous that tenancy was taken from mortgagees otherwise there was no need to mention in the note that they will vacate the premises whenever mortgagee will ask for the same as there is no such condition in the compromise deed dt. 27.02.1931 EXPW1/11, of which English translation is PW1/13. Had tenancy was created by the Mortgagor the said fact would have been stated in the rent note by the defendant firm that they are already tenant of Mortgagor and in view of compromise decree in favour of mortgagee issuing the rent note accepting to pay rent to the mortgagee and certainly would not have agreed to vacate the premises on demand of mortgagee.

32. Even otherwise, It does not make any difference whether the defendant was in possession of the property in question prior to the said date i.e. since 1928 as alleged by them. In my view rent note exhibit PW1/30 establish that tenancy was created on 01.03.1931. No oral testimony can be given to proved that said rent note was executed for the payment of future rent to mortgagee by the defendant firm at the asking of mortgagor without surrendering the tenancy or creating fresh tenancy. Hence if I presume that defendant were in possession of

suit property prior to 01.03.1931 as tenant once the rent note exhibit PW1/30 was executed it amount to termination of their earlier tenancy under the mortgagor Ganga Ram and creation of new tenancy under the mortgagee.

8. In my opinion, there is an additional reasoning, and which this Court is giving under Order XLI Rule 24 CPC, that the appellants/defendants cannot question the finality of the Rent Note Ex.PW1/30 dated 02.03.1931. This is because of Sections 90 and 91 of the Indian Evidence Act, 1872 and which provide that once there is a written contract between the parties, then it is the contract which governs and not any other agreement which is sought to be relied upon as being the agreement between the parties. The contention of the appellants/defendants was that they are tenants not because of the Rent Note Ex.PW1/30 but because of a favorable tenancy granted to them by mortgagor in the year 1928, and such a plea is legally barred under Sections 90 and 91 of the Indian Evidence Act.

9. Even if the plea of the appellants/defendants is not barred by Sections 90 and 91 of the Indian Evidence Act, in my opinion, the appellants/defendants have failed to prove that they were tenants in the suit property on or prior to creation of the mortgage in 1928. Though

learned counsel for the appellants/defendants has placed reliance upon the letter Ex.PW1/D1 dated 05.05.1975 of Delhi Electric Supply Undertaking showing that the appellants/defendants/tenants had electricity connection from 08.04.1930, however, the fact of the matter is that even if the appellants/defendants were tenants from 8.4.1930, however, yet the year 1930 is after 1928 when admittedly the mortgage was created by Sh. Ganga Ram in favour of the aforesaid four persons. Therefore, in my opinion as per the evidence relied upon by the appellants/defendants, it cannot be held that tenancies in their favour came into existence on or prior to creation of the mortgage in the year 1928.

10. The mortgage in the present case came to an end when the respondent/plaintiff purchased the suit property in an auction sale proceeding in the Court on 25.09.1970. Today we are in the year 2018. Appellants/defendants have therefore illegally held on to possession of the most valuable property of the respondent/plaintiff since the year 1970 i.e. for about 48 years. The possession of appellants/defendants is illegal at least since the year 1988 when the Full Bench of this court held that tenants of mortgagees, such as the

appellants/defendants, cannot continue as tenants often the mortgage coming to an end. Though this was a fit case wherein in the opinion of this Court costs of Rs. 1,00,000/- per year should be imposed upon the dishonest persons such as the appellants/defendants, however, this appeal is only dismissed with costs of Rs. 5,00,000/-. Costs of Rs. 2,50,000/- out of the total sum of Rs.5,00,000/- will be deposited by the appellants/defendants with the Chief Minister Distress Relief Fund of State of Kerala and the balance of Rs. 2,50,000/- as costs will be paid by the appellants/defendants to the respondent/plaintiff within a period of six weeks from today.

11. The appeal is accordingly dismissed with the aforesaid observations.

SEPTEMBER 17, 2018

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VALMIKI J. MEHTA, J