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

Date of Decision: 05.10.2015

\+ CS(OS) 1290/2012

SUMAN LATA ..... Plaintiff

Through: Mr. Prabhjit Jauhar with Ms Rosemary Raju & Ms. Aakriti Dawar, Advs.

versus

BANK OF INDIA & ANR ..... Defendants

Through: Ms. Al Moohmina Muzzammil, Adv. for D-1/SBI

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.(Open Court)

1. This suit has been filed seeking permanent injunction, recovery of Rs.25 lacs along with pendente lite and future interest and decree of declaration that the equitable mortgage of the property being the entire first and the second floor along with roof and terrace rights with common rights and facilities and with the proportionate right of the underneath the freehold property bearing No.48, Bhera Enclave, Paschim Vihar, New Delhi-110087 admeasuring 248.20 sq yds effected by the defendant No.2 in favour of the defendant No.1 bank vide Hypothecation cum Loan Agreement dated 13.1.2009 is null and void and unenforceable.

2. It is the plaintiff's case that they are owners of the suit property by way of a sale deed dated 22.8.2008 (Ex.PW1/1). The right of the defendant No.1 to file written statement was closed on 6.12.2012.

Defendant No.2 was proceeded ex parte on 6.11.2013. He has not represented by any counsel. On 3.11.2014, this Court had noted that in view of the fact that the right to file WS has been closed, there is no necessity for framing of issues. The defendant's witnesses could not have led any evidence therefore the plaintiff's case is entirely unrebutted.

3. The learned counsel for the plaintiff would submit that insofar as defendant No.2 has no right in the property, he could not convey a better title than what he had. He relies upon the dicta of the Hon'ble Supreme Court in ***Subudinikar & Ors. vs. Sabiti Rani Deb*, 2012 (4) GLT 338**, para 19 of which reads as under:

> *"19.When similar rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This rule, however, applies only to cases where the conflicting equities are otherwise equal. Section 48 of the Transfer of Property Act 1882 is founded upon the important principle that no man can convey a title than what he has. If a person has already effect a transfer, he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. Section 48 is an absolute in its terms and does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the prior transfer."*

4. According to the registered sale deed, the property stands transferred in the name of the plaintiff, he has been in possession of the same since the year 2008, this position is unrebutted. Therefore, claim of the plaintiff has to be accepted. There is nothing on record to the contrary as to why it should not be accepted. Insofar as the hypothecation-cum-loan agreement dated 13.1.2009 has been created between the defendants apropos

the suit property of which the plaintiff is the absolute owner, the said agreement would be of no consequence. The said Hypothecation-cum-Loan Agreement would be null and void. It is so decreed. Decree sheet be drawn up accordingly.

5. Ms. Al Moohnina Muzzammil, the learned counsel for defendant No.1 would submit, upon instructions, that an internal enquiry has been initiated pertaining to the grant of loan to defendant No.2 against the mortgage of the suit property. Subsequent to the attachment of the property in SARFAESI proceedings, an amount of Rs.25 lacs which was deposited by the plaintiff would be returned to the plaintiff along with such interests as may have accrued thereon within a period of three weeks from today by way of a demand draft in the name of the plaintiff.

6. The suit is disposed off in the above terms.

NAJMI WAZIRI, J

OCTOBER 05, 2015/ak