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

+ CS(OS) 1115/2015 & I.As. 8406-8408/2015

ROHIT TYAGI ..... Plaintiff
Through Mr. Manish Pratap Singh, Advocate.

versus

LATE SHRI BRIJESH SOOD AND ORS. ..... Defendants
Through Mr. Atulay Nehra, Advocate with
Mr. Neeraj Sharma, Advocates

% Date of Decision : 20th May, 2015

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present suit has been filed for specific performance, damages as well as mandatory and permanent injunction. The admitted position is that defendant nos. 1 to 3 are the joint owners of second and third floors of M-16, Greater Kailash, Part-I, New Delhi-110048 (hereinafter referred to as 'suit property').

2. It is alleged in the plaint that the plaintiff entered into a lease agreement dated 21st August, 2009 with defendant nos. 1 and 3 with regard to suit property for a period of nine years, w.e.f. 15th December, 2009 at a monthly rent of Rs. 1,50,000/- for first three months and thereafter for three years at a monthly rent of Rs.1,80,000/- and subsequently the rent was to be increased by 15% every three years.

3. It is alleged in the plaint that defendant nos. 1 and 2 kept taking petty loans from the plaintiff without refunding the same. It is stated that in December, 2009 the defendants approached the plaintiff for financial help in form of a secured loan by mortgaging suit property. It is the case of the plaintiff that on 10th December, 2009 the defendant no. 1 entered into a Loan Agreement and Promissory Note with defendant no. 11 wherein defendant no. 11 gave a secured loan of Rs. 72,00,000/- against the mortgage of the suit property to defendant no. 1 for a tenure of four years on interest at the rate of 1.2% per month. Learned counsel for the plaintiff states that defendant no. 1 handed over three cheques in favour of defendant no. 11 for a total sum of Rs.72,00,000/- as a security and the plaintiff with bonafide intent stood as a sole guarantor to the transaction and also gave an undated cheque amounting to Rs. 72,00,000/- to the defendant no. 11 as a security. He points out that in case of failure to repay the aforesaid secured loan along with interest, defendant no. 11 was at liberty to recover the same by selling the suit property.

4. It is also stated in the plaint that after two days of signing of the aforesaid Loan Agreement and Promissory Note, defendant nos. 1 and 2 approached the plaintiff for another secured loan of Rs. 30,00,000/- by mortgage of their suit property. It is also averred that defendant nos. 1 and 2 as well as defendant no. 11 entered into an Agreement for Sale on 14th December, 2009 acknowledging receipt of Rs. 30,00,000/- as secured loan from defendant no. 11, which was to be repaid after four years along with monthly interest of 1.5%. Learned counsel for the plaintiff emphasis that the Agreement for Sale clearly records that in case the defendant nos. 1 and 2 failed to repay the loan or interest, the defendant no. 1 shall pay Rs. 13,00,000/- in addition to whatever he has already paid as principal loan amount and get the suit property registered and mutated in his favour.

5. It is the case of the plaintiff that he regularly paid part of the rent against the suit property as interest against the loan amount totalling Rs. 1,02,00,000/- to defendant no. 11 and the balance amount of rent was paid to defendant nos. 1 and 2.

6. In the plaint, it is averred that as the defendant defaulted in payment of their loans, defendant no. 11 deposited the cheques given by defendant nos. 1 and 2 which was dishonoured. Learned counsel for the plaintiff states that as even the cheque given by the plaintiff was dishonoured due to insufficient funds, defendant no. 11 initiated proceedings against him and defendant nos. 1 and 2 under Section 138 of Negotiable Instruments Act. He states that in the said proceedings, the plaintiff paid Rs. 1,02,00,000/- to the defendant no. 11 and entered into a Memorandum of Understanding dated 17th October, 2014 whereby defendant no. 11 relinquished all rights/ title/interest in the mortgaged property and the plaintiff was given the right to specifically enforce the loan agreements. He states that as a consequence, the plaintiff has taken all rights which accrued to defendant no. 11 under the Loan Agreement and Promissory Note dated 10th December, 2009 as well as Agreement for Sale dated 14th December, 2009.

7. Learned counsel for all the defendants, except defendant no. 11, states that all the documents filed by the plaintiff including the Loan Agreement and Promissory Note dated 10th December, 2009 as well as Agreement for Sale dated 14th December, 2009 except the lease deed and order sheets are forged and fabricated.

8. Learned counsel for all the defendants, except defendant no. 11, points out that defendant no. 1 had expired on 29th December, 2013 and, therefore, the cheques which are alleged to have been dishonoured on 10th February, 2014, 27th January, 2014 and 3rd February, 2014 could not have been issued by him.

He points out that the cheques which are alleged to have been dishonoured in 2014 do not find mention either in the Loan Agreement or in the Agreement for Sale. He states that in the Loan Agreement as well as Agreement for Sale it has not been mentioned as to how the loan had been advanced to the defendant nos. 1 and 2 by defendant no. 11.

9. After hearing the parties on 14th May, 2015 this Court had dictated an order in open court only disposing I.A. 8406/2015 and referring the matter to Economic Offences Wing, Delhi Police for investigation.

10. However, before signing the order sheet, this Court on re-examination of the file was of the view that present suit in the present form was not maintainable. Consequently, matter was listed for direction.

11. Today, Mr. Manish Pratap Singh, Advocate enters appearance on behalf of the plaintiff. He not only reiterates the arguments advanced by the previous counsel for the plaintiff but re-emphasises that the plaintiff is seeking specific performance of Agreement to Sell dated 14th December, 2009.

12. Having heard learned counsel for parties, this Court is of the view that specific performance claimed in the suit is of a Loan Agreement and a Promissory Note dated 10th December, 2009 and Agreement for Sale dated 14th December, 2009.

13. The Loan Agreement and Promissory Note dated 10th December, 2009 of which a photocopy is filed, is executed on a Rs.100/- stamp paper. The same is not valued as a Promissory Note. Under the said document the defendant No.11 described as a thirty party, was entitled to recover the loan and interest thereon by selling the property of the defendants No.1 to 10. The plaintiff in the plaint has labelled the said transaction as mortgage of the property by the defendants No.1 to 10. However, a mortgage of immovable property can be created by a registered document or by deposit of title deeds.

The document dated 10th December, 2009 is admittedly not registered. The same could not thus have affected any mortgage on the property. The plaintiff thus, even as an assignee of the defendant No.11 cannot possibly have any right as mortgagee of the said property. It may also be added that even if it were a mortgage, no suit for specific performance of a mortgage lies and the right, if any of a mortgagee is to foreclose the mortgage. The suit as filed is not for foreclosure.

14. The other document dated 14th December, 2009 though labelled as an Agreement for Sale, does not contain any Agreement to Sell. The same only provides that the defendants No.1 to 10/ their predecessor had received a sum of Rs.1,02,00,000/- (One crores two lakhs) for a period of four years @ 1.5% from the defendant No.11 and that if the defendants No.1 to 10 fail to pay the received amount within the said time, they " will be bound to get the said transaction to complete through the Court of Law under the specific performance and execute a Sale Deed in favour of the defendant No.11". However, nowhere in the document, the transaction is described. There is nothing in the document to suggest that the defendants No.1 to 10 or their predecessor thereunder had agreed to sell the property to the defendant No.11. Moreover, the said document itself refers to the Agreement dated 10th December, 2009 of loan and the plaintiff in the plaint has described the entire transaction again as a mortgage. The relief claimed of specific performance is thus totally misconceived.

15. The suit also seeks a direction to the defendants to transfer the title of the suit property to the plaintiff. However, since the plaintiff claims as a mortgagee, the question of a mortgagee calling upon the mortgagor to transfer the title, does not arise. The relief of foreclosure had to be claimed and which has not been claimed. No relief of recovery of money also has been claimed.

16. The suit as framed itself does not disclose any cause of action for the reliefs claimed and the plaint is accordingly rejected.

MANMOHAN, J

MAY 20, 2015
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