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

+ **FAO 295/2015**

ICICI BANK LTD

..... Appellant

Through: Mr. Punit K. Bhalla and Ms. Chetna
Bhalla, Advocates

versus

SUNIL KUMAR

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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15.09.2015

CM No.19480/2015 (Exemption)

1. Allowed subject to just exceptions.

FAO 295/2015

2. This is an appeal directed against order dated 18.08.2015 whereby the learned Additional District Judge (Central), Tis Hazari, has declined to grant the prayer sought for appointment of a receiver, at the ex parte stage.

2.1 The learned ADJ was of the view that the ex parte appointment of a receiver was dependent on the facts and circumstances obtaining in each case.

2.2 Having said so, the learned ADJ did not elaborate as to what was those facts, which persuaded her to not appoint a receiver, at the ex parte stage, as was prayed for by the appellant.

2.3 In this particular case, the appellant has averred that, a loan in the sum

of Rs.9,50,000/- was sanctioned in favour of the respondent. It is further averred that in pursuance of the same, an amount equivalent to Rs.9,45,350/- was disbursed to a dealer, by the name of M/s. Avia Auto Services Pvt. Ltd. (in short the dealer).

2.4 It is also stated that in this behalf a loan agreement dated 22.09.2012 was executed between the appellant and the respondent. In pursuance of the aforementioned loan agreement, a sum equivalent to Rs.9,45,350/- was disbursed on 22.09.2012. The said sum was paid to the aforementioned dealer for the benefit of the respondent.

2.5 It is stated that pursuant to the loan extended to the respondent via the dealer, the respondent purchased and, consequently, was delivered a vehicle described as DUSTER/SISEL RXZ; bearing registration no. HR 26BU 0073 (hereafter referred to as the subject vehicle).

2.6 The said loan was required to be paid by the respondent in 36 Equated Monthly Instalments (EMIs) equivalent to Rs.31,445/- each. The loan facility, apparently, carries a penal interest of 24% p.a. The said loan, according to the appellant is secured by a deed of hypothecation and an irrevocable power of attorney. The latter document i.e. the irrevocable power of attorney, apparently, authorises the appellant to take possession of the subject vehicle and sell the same, in case, of commission of default in the repayment of dues by the respondent.

2.7 According to the appellant, the respondent failed to adhere to the terms of the loan agreement, and thus, committed defaults in payment of the EMIs. The total sum due and payable against the outstanding instalments, according to the appellant, is an amount of Rs.94,335/-. This amount is, in addition, to the instalments falling due in future; which is, an amount

equivalent to a sum of Rs.3,14,450/-, as on 27.12.2014.

2.8 In view of the aforesaid, the appellant appears to have issued a recall notice dated 16.12.2014.

2.9 It is the appellant's case that the respondent neither replied to the notice nor repaid the amount, which was due and payable under the loan agreement.

3. By virtue of the aforesaid notice, the respondent was also called upon to hand over the possession of the subject vehicle.

3.1 The appellant having failed in its endeavour, to receive the defaulted amount and / or the possession of the subject vehicle, proceeded to institute an action for this purpose in the court below. The said suit was moved on 10.03.2015. As indicated above, a prayer was made for appointment of a receiver, at that stage itself. The trial court, however, declined the request for appointment of a receiver at the ex parte stage.

4. It is, in these circumstances, that the appellant has filed the instant appeal.

5. Having heard Mr. Bhalla and perused the record, I am of the view that the appellant has set up a prima facie case for appointment of a receiver. The balance of convenience also appears to be in favour of the respondent. There is in the given circumstances every possibility of harm being carried to the interest of the appellant if, the respondent were to create third party interest in the subject vehicle in the interregnum.

5.1 Accordingly, the prayer made by the appellant for appointment of a receiver ought to have been granted by the trial court. As indicated at the very outset, if the trial court had reasons to decline the request for appointment of the receiver, the same ought to have been articulated in the

order itself. The trial court has done neither; except for, directing issuance of summons in the suit.

5.2 In my view, the order being bereft of reasons and given the fact that a good prima facie case has been set up by the appellant, I am inclined to both appoint a receiver and set aside the impugned order. It is directed accordingly. Mr. Rahul Nadir, a representative of the appellant is appointed as a receiver. He will take possession of the subject vehicle. In case the respondent were to pay the outstanding amount, the subject vehicle will be released to him, albeit on superdari. The receiver will also, in such an eventuality, issue a receipt to the respondent evidencing the payment of dues by the respondent.

5.3 In case police assistance is required, the concerned SHO, on being approached, by the receiver will render the necessary assistance. The receiver will, however, ensure that while taking possession of the subject vehicle every courtesy is extended to the respondent and / or the person who may be in seisin of the subject vehicle, at the time the receiver seeks to take possession of the same. The receiver while taking possession, will bear in mind the place and time when the possession of the subject vehicle is sought to be taken so as to ensure that no inconvenience is caused to the respondent or the person who, at the relevant point in time, may be in seisin of the subject vehicle.

6. The directions passed by me hereinabove for appointment of the receiver will continue to operate till the trial court hears and disposes of the application filed by the appellant in the suit for the very same purpose.

6.1 The Trial court will have liberty, upon hearing the respondent i.e. the original defendant to modify, vary or even vacate the order if, the

circumstances impel it to do so.

7. Before concluding, I may only point out that there is an illuminating discussion in the judgement of the Madras High Court in the case of *T. Krishnaswamy Chetty vs C. Thangavelu Chetty & Ors. AIR 1955 Mad 430*, wherein the court after adverting to various authorities, set down the five core principles, which a court should ordinarily keep in mind while appointing a receiver. These are briefly paraphrased as follows:

- (i) The appointment of a receiver is a matter within the discretion of the court. The discretion is neither arbitrary nor absolute. It is required to be exercised to effectuate the ends of justice and to protect the interest of all parties who are interested in the controversy.
- (ii) While appointing a receiver, the court should satisfy itself that the plaintiff has set up a prima facie case and has a good chance of succeeding in the suit.
- (iii) The plaintiff must be able to demonstrate emergent danger or loss if immediate action is not taken.
- (iv) Ordinarily an order for appointment of a receiver, which results in depriving the defendant of de facto possession, is not granted where it may cause irreparable wrong.
- (v) The last factor that a court has to bear in mind while appointing a receiver, is to look to the conduct of the party who makes an application for appointment of a receiver. The applicant should approach the court with clean hands and should not have disabled himself from seeking, what is, an equitable relief by virtue of the laches and delay and/or acquiescence.

7.1 Insofar as principle no. (iv) is concerned, I may add that it has to be applied bearing in mind the assets qua which a receiver is appointed. If it is

an immovable property, the said principle may apply, whereas in a case of a movable or perishable property, the court may or may not apply this principle. Even in the case of an immovable property the defendant can always be directed to continue in possession as an agent of the court. In other words, defendant will act as a receiver and his possession will be custodia legis.

7.2 Furthermore, in so far as this principle is concerned, it has to been seen in the light of the law which has evolved via-a-vis claims of banks and financial institutions. A Full-Bench of the Bombay High Court exhorted courts to adopt a practical approach in exercising the power vested with them for appointment of a receiver, having regard to their outstanding claims. [See *State Bank of India vs Trade Aid Paper and Allied Products (India) Pvt. Ltd. & Ors.* AIR 1995 Bom 268].

7.3 I may also indicated herein that the Full Bench judgement of the Bombay High Court in *State Bank of India* case was taken up in appeal to the Supreme Court only on one issue which was qua the embargo put in place by the Full Bench on the aspect of sale of the property by the receiver prior to a decree being passed in the suit. The Supreme Court over-ruled the Full Bench judgement on this aspect and stated, in no uncertain terms, in its judgement in the case of *ICICI Ltd. & Ors. vs Karnataka Ball Bearings Corpn. Ltd. & Ors.* (1999) 7 SCC 488, that no such fetter is contemplated on the powers of the receiver appointed under the provisions of Order 40 Rule 1 of the CPC. In other words, the Supreme Court went as far as to observe that a receiver, pursuant to the directions issued by the court in that behalf, is empowered to sell the property even before a decree is passed in the suit. This, according to the Supreme Court, is discernable on a plain

reading of provisions of Order 40 Rule 1 of the CPC. The only caveat that the court entered was that while directing sale of the property before passing of a decree, it will apply sound judicial discretion in the matter. In this regard some of the instances, in which sale could be directed, which were articulated by the Supreme Court were as follows. These instances were cited by the Supreme Court only by way of illustration.

- (a) Where the court feels if the property is not sold, the initiator of the action would be subjected to a great fraud
- (b) Where there could be diminution in value of assets if immediate order is not passed.
- (c) Where there is apprehension of wastage or even where wrongful entrants or trespassers may attempt to make an in-roads in the property for permanent settlement.

8. With the aforesaid directions in place, the appeal is disposed of.

RAJIV SHAKDHER, J

SEPTEMBER 15, 2015

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