

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **01.11.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.20 of 2007

M/s. Eссор Hotels Private Limited, Madras
Rep. by its Managing Director
Padinjare Vazhiyil Anupkumar,
1089, Poonamallee High Road,
Chennai - 600 084.

.. Appellant

Vs.

1. Grindlays Bank
Now known as Standard Chartered Bank,
Rep. by its Manager,
19, Rajaji Salai,
Chennai - 600 001.

2. Shri.P.Ramaswami
Ex-Advocate Receiver,
M/s. Eссор Hotels Pvt. Ltd.,
87, Law Chambers, High Court,
Chennai - 600 029.

3. Shri.M.Keshav Bhatt
No.349, Poonamallee High Road,
Aminjikarai, Chennai - 600 029.

..Respondents

(Name of the appellant substituted
vide order of the Court, dated 02.09.2016
made in C.M.P.No.14000 of 2016)

Original Side Appeal filed under Clause 15 of the Letters
Patent read with Order XXXVI Rule 1 of Original Side Rules against
the Judgment and Decree, dated 09.05.2006 made in C.S.No.150
of 1987.

For appellant : Mr.K.Mani

For respondents : Mr.N.V.Srinivasan for
M/s. N.V.S.Associates for R1

R2 - Official Receiver (Died)

No Appearance for R3

JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the Judgment and Decree of the learned single Judge, dated 09.05.2006 passed in C.S.No.150 of 1987 dismissing the suit.

2. The plaint averments are as follows :

(i) The plaintiff company was registered as a Private Limited Company under the Companies Act, 1956 on 01.07.1971. In pursuance of the objects, the plaintiff set up a hotel business under the name and style of Hotel Gokula at Poonamallee High Road, Madras. The said Hotel consisted of 73 rooms with various other amenities like conference hall, bar, restaurants and others. For the purpose of raising necessary funds for running the hotel, the plaintiff company approached the first defendant Bank for

various loan facilities. The plaintiff was sanctioned (a) Term loan of Rs.20 lakhs; (b) Over draft - Rs.2 lakhs; and (c) Deferred Payment Guarantee - Rs.6.3 lakhs. The entire amount received by the plaintiff by way of loan was invested in the business of the company including the construction of the project. Under the agreement, the plaintiff has to repay the term loan in instalments commencing from 03.09.1974. The Company was not in a position to repay the loan as agreed due to reasons beyond its control and therefore, it requested the first defendant for capitalisation of the loan and the interest thereon. But the first defendant filed a suit against the plaintiff in C.S.No.151 of 1978 for recovery of Rs.47,59,950/- including the interest.

(ii) In the said suit, the first defendant filed an application for appointment of a Receiver. This Court appointed the second defendant as the Receiver for the management of the Hotel owned by the plaintiff, by order, dated 27.11.1978. The previous management of the plaintiff company had closed the Hotel on 30.11.1978. The second defendant as the Receiver appointed by the Court filed an application seeking direction to lease out the hotel property to the third defendant and this Court by its order, dated 04.12.1978 permitted the second defendant to lease out the

hotel property to the third defendant. The lease was for a period of 5 years, i.e., from 01.12.1978 to 01.12.1983, subject to the orders of this Court. The monthly rent was fixed at Rs.20,000/- and the lessee was also directed to furnish a security deposit of Rs.2 lakhs. The lease commenced from 01.12.1978. The registered lease deed was entered into between the second and third defendant and the third defendant took possession and commenced the business from 01.12.1978. A separate amenities deed was also executed between second and third defendants. Under the said deed, the third defendant undertook to hand over the articles and equipments entrusted to him to the second defendant in good and usable condition, failing which the second defendant was entitled for compensation for the loss and damage to such amenities as may be determined by the Court, according to the prevailing market value.

(iii) In the meantime, this Court passed a decree on 18.07.1979 in C.S.No.151 of 1978 in favour of first defendant for a sum of Rs.47,59,841/-. It was also declared that the first defendant is entitled to equitable mortgage by the deposit of title deeds in respect of the hotel property belonging to the plaintiff and that the plaintiff was to pay into the Court on or before

18.01.1980, a sum of Rs.63,35,902.61/-. In default of the payment, the mortgaged property or sufficient part thereof was directed to be sold and the sale proceeds paid into the Court in satisfaction of the sum due to the first defendant. On disposal of the above suit, the third defendant was directed to vacate the premises to enable the second defendant to bring the property for sale.

(iv) This Court directed the third defendant to surrender the possession of the hotel property to the Receiver appointed by the Court, i.e., the second defendant herein. The third defendant preferred an appeal before the Division Bench in O.S.A.No.194 of 1981. The said appeal was dismissed on 21.10.1982. Against the said order, SLP was preferred by the third defendant. The Hon'ble Supreme Court while declining to grant the leave, by its order, dated 07.12.1982, directed the third defendant to hand over the vacant and peaceful possession of the premises on or before 31.12.1982 to the second defendant / Receiver, without raising any contention either directly or indirectly himself or through anyone else. The second defendant was directed to return the security deposit and in addition to pay the third defendant a sum of Rs.1 lakh in cash, on the third defendant handing over the possession of

the premises. The third defendant was also directed to obtain a receipt from the second defendant when he actually handed over the possession of the above property. In pursuance of the order of the Supreme Court, the third defendant handed over the possession of the premises to the first defendant on 31.12.1982. The second defendant filed a report before this Court on 24.03.1983 confirming the same. The first defendant after taking over possession continued to be in possession of the premises until it was handed over to the purchaser on 31.07.1984.

(v) The report of the Advocate-Receiver narrated the conditions of the article of the hotel that beds, cots and other articles were getting spoiled in the rooms and amenities such as Central Air-conditioning plants, lifts, pumpsets and pipelines were also getting rusted. Therefore, the defendants are jointly and severally liable for the hotel building, fixtures etc., which were available at the time when the premises was leased out to the third defendant and the third defendant was bound to return to the first and second defendants all the assets and the first and second defendants are liable for proper upkeep and return of the same to the plaintiff. In the meantime, the shares of previous shareholders were purchased by the present shareholders on 10.06.1984. The

second defendant filed an application for his discharge as the Receiver in the above suit in C.S.No.151 of 1978. This Court, by order, dated 06.07.1984 directed the defendants 1 and 2 to hand over the possession of the entire property to the new management and to take complete inventory of all articles and assets delivered by the first and second defendants to the purchaser. Accordingly, an inventory was taken with the help of technical experts and the Receiver filed his report before this Court and this Court by its order, dated 06.03.1985 which became final dealt with the objections raised by the plaintiff, in regard to the missing articles and found that several articles belonged to the plaintiff, which were in the possession of the first defendant and which the second defendant leased out to the third defendant were damaged and missing when the subsequent inventory was taken. Thus, the defendants 1 and 2 are jointly and severally responsible for the replacement of missing articles as well as for the damages of many articles, which were in their possession, custody and control.

(vi) The plaintiff issued lawyers notice to the defendants, for which a reply was sent by the first defendant on 10.10.1985, admitting their taking possession of the hotel and the second defendant sent a reply stating that the entire property was taken

over by the Bank and the third defendant sent a reply, dated 30.08.1985, thereby making a false counter claim for a sum of Rs.15 lakhs, for allegedly replacing and repairing the articles. During the period from January 1983 to July 1984 when the property was in possession of the first defendant, the first defendant used or caused to use water and electricity and also telephone in the premises resulting in a demand of Rs.87,782/- towards electricity charges; Rs.84,963/- towards telephone charges; Rs.66,930/- towards water and demurrage taxes and Rs.54,369/- being water charges for the said property, totalling a sum of Rs.2,94,044/-. The possession of the premises by the first defendant was wholly unauthorised. Due to non-payment, the water connection was disconnected, which caused considerable embarrassment, in addition to loss of reputation of the plaintiff.

(vii) The first defendant took possession of the premises on 31.12.1982. The substantial portion of the property has been kept under lock and key by the first defendant from 31.12.1982 to 31.07.1984. For the unauthorised possession of the premises for the above said period, the first defendant is liable to pay compensation to the plaintiff at Rs.3/- per sq.ft for 30,000 sq.ft for AC area and at Rs.1.50/- per sq.ft for 35,000 sq.ft for Non-AC

area, totally to a sum of Rs.27,74,000/-. The second defendant colluded with the first defendant, allowed the first defendant to unauthorisedly use and occupy the said premises and therefore, the defendants 1 and 2 are jointly and severally liable to the plaintiff for the above said sum. Hence, present suit claiming the value of missing articles, electricity charges, telephone charges, water and sewerage tax and water charges for the period from January 1983 to July 1984 and compensation with interest and costs.

3. The averments of the written statement filed by the first defendant are as follows :

(i) All the allegations made in the plaint are denied except the fact of availing loans and advances and also taking possession of the property by the first defendant by virtue of the Judgment in C.S.No.151 of 1978. The articles and equipments covered by the Amenities Agreement, dated 01.12.1978 were intended, for use in a running hotel and were subject to enormous wear and tear and breakage on account of delay use and the nature of the use. There was no question of the second defendant being liable to compensation on account of breakage to the articles, occurring in the normal course and / or due to natural

cause and normal wear and tear. Normally in a hotel, kitchen-ware and gadgets, vessels, furniture and other articles and equipments have very limited span of life and require frequent replacements. Articles and equipments hired for use in December 1978 could not be expected to last for more than a year.

(ii) As per the order of the Hon'ble Supreme Court, the first defendant took possession of the premise, viz., 72 rooms, the bar, the restaurant, the lounge and the reception on 31.12.1982 with an inventory of the articles, which were then existing in the said rooms. The second defendant, the Advocate-Receiver continued retention of one room in the premises. The security guards were appointed to prevent any theft or pilferage in the premises. The articles inside the said rooms were taken along with the rooms in an "as is where is condition". Articles in hotels and hotel lodging rooms are subject to speedy decay, soiling, wear and tear and destruction by continuous use. No articles other than those which were in the said rooms were handed over to this defendant by the third defendant. The report submitted by the second defendant bears ample testimony to the fact that the third defendant had not delivered to this defendant possession of the articles included in schedule 2 to 6 of the Amenities Agreement.

The first defendant has no responsibility in respect of any of the said goods. The first defendant had a mortgage charge over the hotel premises only. It had no charge over the movable assets and no charge over the said assets was claimed in C.S.No.151 of 1978. The return of the articles entrusted to the third defendant was a matter between the second defendant and the third defendant.

(iii) The first defendant was in possession only of the premises and the articles in the 72 rooms therein and the same were handed over to the plaintiff in the same condition as they were at the time when the first defendant took possession of the premises on 31.12.1982. The possession of the premises was taken by the first defendant on 31.12.1982. Most of the articles which were in existence in the hotel in early 1980 must under any circumstances, have become useless on account of ordinary wear and tear due to use. After this defendant took possession of the premises, it took another 1 year 7 months for the plaintiff to claim delivery of possession. Even during the said period, the articles which were in the rooms would have got damaged by normal wear and tear and non-use. The claim of the plaintiff for the alleged missing and damaged articles is not founded on any fair or reasonable basis, but it is a baseless and imaginary claim.

(iv) The first defendant is in no way liable to pay any compensation for use and occupation of the premises consisting of 72 rooms, the restaurant, the kitchen and the bar. The said premises was not put in use by the first defendant. It ventured to take possession of the premises only on the directions of the Hon'ble Supreme Court and the Supreme Court has not given any direction that the first defendant should use the premises to third parties. No tortuous act was committed by the first defendant and no loss was occasioned to the plaintiff by any act or omission by the defendant. The claim of loss is wholly false and preposterous. The first defendant had not used any water or electricity or telephone ever since it took possession of the premises and therefore, it is not liable to pay any charges. The first defendant is not in any way responsible for the disconnection of water supply as alleged. The first defendant refutes the claim with its liability to pay compensation to the plaintiff for the period from 31.12.1982 to 31.07.1984. Therefore, the suit is to be dismissed as against the first defendant.

4. The averments made in the written statement of third defendant are as follows :

(i) By order of this Court, dated 04.12.1978 the third defendant became a lessee of the hotel on a monthly rent of Rs.20,000/- and with a deposit of Rs.2 lakhs. The lease took effect from 01.12.1978. The defendant took possession of the leased out portions and gave a new life to the hotel. The hotel premises, which were Centrally Air Conditioned did not function as an air conditioned hotel, due to the failure of the Air Condition plant prior to 30.11.1978 itself. Besides, there were huge arrears due as these were paid by the third defendant at a huge expenditure and brought the hotel to a good running condition with a higher rate of occupancy.

(ii) In October 1981, the plaintiff filed an application for directing the third defendant to deliver vacant possession of the hotel portion of the premises to it in order to facilitate payment of the decree amount as agreed between the company and the Bank. The third defendant resisted the application. This Court directed the defendant to surrender possession to the Receiver who would in turn place the plaintiff in possession of the property. The appeal filed by the third defendant was also dismissed by the Division Bench. Hence, he moved the Supreme Court by way of SLP. The

Hon'ble Supreme Court directed the third defendant to surrender possession to the Bank on or before 31.12.1982 on receipt of the security deposit of Rs.2 lakhs and further sum of Rs.1 lakh. Accordingly, the third defendant had promptly surrendered on 31.12.1982 to the first defendant in the presence of second defendant after preparing inventory of items delivered. Nothing was due from the third defendant afterwards when once he had surrendered possession. His entire liability as a lessee of the hotel premises came to an end on 31.12.1982. Neither the plaintiff company nor the first defendant Bank, nor the Advocate-Receiver reserved any claim to be made on the third defendant after 31.12.1982. The handing over of the possession by the third defendant on 31.12.1982 was in full and final settlement of all his claims and rights as a lessee of the hotel premises. After 31.12.1982, it is only the first defendant and the second defendant that could be made responsible for the hotel buildings or its materials. In fact the third defendant had spent huge sums of money extending to Rs.15 lakhs towards resorting to the Air-Conditioning plant, lifts, electricity and telephone and to give a face lift to the hotel premises. The third defendant spent even this amount in the hope that he would be allowed to continue for the full term of the lease, i.e., for 5 years. The Hon'ble Supreme Court,

taking into account all these factors directed the third defendant to surrender possession on or before 31.12.1982 and directed the Bank to return the security deposit besides a further sum of Rs.1 lakh towards compensation. Therefore, the plaintiff cannot fasten any liability on the third defendant.

(iii) For the notice issued by the plaintiff, the third defendant sent a suitable reply on 30.08.1985 setting out the correct particulars. Thereafter nearly for 2 years, the plaintiff kept quite and then came up with the present suit. The plaintiff has no cause of action and the suit is hopelessly barred by limitation and therefore, the suit is to be dismissed.

5. The second defendant had not filed any written statement. The second defendant Advocate-Receiver also passed away during the pendency of the suit.

6. The learned single Judge framed necessary issues and after analysing both the oral and documentary evidence, dismissed the suit with costs of the first defendant. Aggrieved by the Judgment, the plaintiff has preferred this Original Side Appeal.

7. The learned counsel appearing for the appellant / plaintiff contended that having accepted under the instance of the Bank, the High Court has ordered the leasing the hotel business and lodging house and it is the duty of the Bank to make good the loss; that the first defendant Bank took possession of the premises without verifying the inventory of the articles mentioned in the lease-cum-amenities deed, it is liable to make good the loss to the plaintiff company; that the subsequent purchaser / the present plaintiff was not aware of the earlier proceedings and took over the management only on 31.07.1984 by an order of this Court and therefore, the Bank is liable for the loss during the period of appointment of Receiver at the instance of the Bank; that the entire premises was under the control of the Bank and therefore, the plaintiff company is entitled to the loss and damages for non-using the lodging and the hotel premises for the period from January 1983 to 31.07.1984 and that it is the duty of the mortgagee to preserve the property in good condition and if any damage or loss is caused, the mortgagee should compensate to the mortgagor under Sections 71, 72 and 73 of Transfer of Property Act.

8. The learned counsel appearing for the first respondent per

contra contends that as per the orders of the Hon'ble Supreme Court, the first defendant Bank took possession of the lodging premises from the third defendant and has been in possession of the property as custodian. The learned single Judge after analysing the evidence of both sides has rightly dismissed the suit and it does not warrant any interference.

9. The admitted facts are that the appellant / plaintiff company registered under the Companies Act, 1956, availed loan facilities from the first defendant Bank. For the loan, the hotel property was mortgaged as security by depositing of title deeds. The nature of mortgage was equitable mortgage and the possession was with the mortgagor. Therefore, it is a mortgage without possession. Since repayment was not made as per the terms, the Bank filed suit in C.S.No.151 of 1978, claiming Rs.47,59,950/- together with further interest on the said amount. As the then management of the appellant / plaintiff wanted to close down the business from 30.11.1978, the first defendant / Bank filed an application for appointment of a Receiver to protect the security and also to have a solid income. This Court appointed the second defendant (now deceased) as the joint Receiver along with Mr.Bora Lingaiah, the then Managing Director of the appellant

/ plaintiff. The Receiver reported on 04.12.1978 about the closure of the business by the then management on 30.11.1978 and the availability of 73 rooms and the bar for being leased out. This Court permitted the Receiver to lease out the Restaurant, 73 rooms and the Bar to the third defendant for a period of 5 years on a monthly rent of Rs.20,000/- subject to the condition that the period of lease is subject to the result of the suit and the winding up proceedings then pending against the company. The lessee was also directed to deposit Rs.2 lakhs with the Receiver. Preliminary Decree was passed in C.S.No.151 of 1978 on 18.07.1979. The Judgment Debtor, viz., Mr.Bora Lingaiah, who was the then Managing Director filed an application on 21.10.1982 for termination of lease and for delivery of vacant possession, as there were offer from third party for the purchase of hotel building. This Court terminated the lease and the lessee preferred appeal in O.S.A.No.194 of 1981 before the Division Bench and the same was also dismissed on 01.10.1982.

10. The third defendant / lessee preferred SLP before the Supreme Court in S.L.P.No.10113 of 1982. The Hon'ble Supreme Court while dismissing the SLP, by an order, dated 07.12.1982 directed the lessee to hand over peaceful and vacant possession of

the premises on or before 31.12.1982 and the Bank was directed to return the security deposit of Rs.2 lakhs and Rs.1 lakh was also ordered to be paid as compensation to the third defendant herein and further not to recover rent for October, November and December 1982. As per the direction of the Hon'ble Supreme Court, the third defendant handed over possession to the first defendant Bank on 31.12.1982 by receiving Rs.3,20,000/-. The intending purchaser, Mr.Kutty Menon was directed to deposit Rs.1,56,000/- with certain conditions on 14.09.1983. He filed applications on 07.04.1984 seeking extension of time to pay the balance by accepting Rs.70 lakhs. The order was modified in O.S.A.No.95 of 1984 by order dated 25.04.1984 by allowing to deposit Rs.70 lakhs and purchase the property. As per the order of this Court, dated 06.07.1984, the Receiver shall take inventory in respect of the premises. On 06.07.1984, this Court permitted a payment of Rs.62,13,430.89/- made on behalf of the purchaser towards part satisfaction of the Decree obtained by the Bank. Mr.Kutty Menon, the purchaser took possession of the premises on 31.07.1984. As per the order of this Court, dated 06.03.1985, the Receiver was discharged.

11. In this suit, the plaintiff claims :

(a) The value of missing and damaged articles described in the plaint;

(b) Compensation for the use and occupation of the premises from 01.01.1983 to 31.07.1984; and

(c) Electricity charges, Telephone charges, water and sewerage charges for the period from 01.01.1983 to 31.07.1984.

12. Mr.Kutty Menon, the purchaser, who was the then Managing Director of the appellant / plaintiff company filed applications in A.Nos.2378, 2379, 2471 and 2472 of 1984, seeking (i) to deliver the vacant possession of the property under the decree; (ii) to discharge the Receiver of the suit property . All the applications were heard together and common order was passed on 14.07.1984. In this common order, while discharging the Receiver and directing to hand over the possession, it is ordered as follows :

"On the other hand, Mr.Dullip Singh represents that delivery is to be effected to "as is, where is" condition to the purchaser. But, in this case, the Receiver while leasing out the property to the tenant and made out a list of

articles available in the premises and the tenants are liable to restore the same. Now an inventory of the articles in the premises will be useful to ascertain what are the articles missing so that liability with reference to the same can be decided later on. The lessee is also responsible to restore the premises in the same condition as set out in the lease deed. But at the same time, nobody can be held responsible for the natural wear and tear of the articles and furnitures. Hence, the Receiver while delivering possession will make an inventory of the articles with particular reference to the missing articles and apparatus. Relating to the condition of the articles and apparatus where it is working or not, the Receiver may make a note of the same with the assistance of the person and already installed the articles and apparatus. The Receiver shall submit a report soon after the inventory is over. The parties are directed to hand over possession as early as possible."

13. The Advocate-Receiver took inventory and submitted his report. The main contention of the third defendant is that he resisted the termination of the lease projecting his investment for repairing and bringing the hotel to a functional one and the

Hon'ble Supreme Court after considering all aspects, while directing to deliver vacant possession also directed the Bank to refund the deposit amount of Rs.2 lakhs and also to pay Rs.1 lakh to the third defendant, apart from dispensing with the rent for three months. The order, dated 07.12.1982 of the Hon'ble Supreme Court, reads thus :

"The petitioner shall, without raising any contention either directly or indirectly himself or through any one else, hand over vacant and peaceful possession of the premises involved in the dispute on or before December 31, 1982 to Respondent No.2, Grindlays Bank Ltd. Receiver Grindlays Bank, Respondent No.2 shall return the security deposit of Rs.2 lakhs and in addition pay rupees one lakh in cash on the petitioner's handing over the possession of the premises as herein indicated. The compensation for the use and occupation of the premises for the months of October, November and December 1982 shall not be payable by the petitioner and shall not be recovered by Respondent No.2 and if recovered shall be refunded along with the security deposit and cash of Rs.one lakh on the specific understanding that the petitioner vacates and hands over possession by the date herein specified."

14. Thus, as per the order of the Hon'ble Supreme Court, the third defendant was awarded Rs.1 lakh in addition to the security deposit, apart from dispensation of three months rent. Thus, the Hon'ble Supreme Court gave a finality for any claim from or by the third defendant.

15. As already pointed out, the learned single Judge, while ordering discharge of the Receiver and handing over possession of the property to the purchaser, made a passing remark to make an inventory of the movables in the premises for the purpose of future adjudication. The purchaser knowing fully well, about the lis on the property, the fact that it was leased out to a third party and then possession was taken through order of the Hon'ble Supreme Court purchased the property.

16. It is also pertinent to note that P.W.1 says in his evidence that he had purchased the property with all liabilities. P.W.1 also admits in his evidence that he made inspection before purchasing the property. The purchaser also filed applications before the Court and purchased the property. Having participated in the proceedings, he had knowledge about the entire lis including the order of the Supreme Court, wherein the third defendant was

directed to deliver vacant possession on receipt of Rs.1 lakh, apart from security deposit. In the light of the order of the Hon'ble Supreme Court and the fact that the purchaser purchased the property by approaching the Court with full knowledge about the property, the claim for missing and damaged articles is not sustainable. Even assuming for a moment that the plaintiff is entitled to such a claim, he has to establish the value of the missing articles with depreciation and the particulars and value regarding damages. But the plaintiff has not put forth any material to establish the same. Therefore, the plaintiff is not entitled to the claim of Rs.31,39,604/- towards the value of missing and damaged articles.

17. The first defendant Bank took possession of the premises on 31.12.1982 from the third defendant lessee, as per the orders of the Hon'ble Supreme Court. As per the orders of this Court, the Bank handed over the possession to the purchaser / plaintiff on 31.07.1984. The Bank was in possession of the property from 01.01.1983 to 31.07.1984. As already pointed out, there is no dispute that the then Managing Director of the plaintiff company filed an application before this Court in A.No.3699 of 1981 for termination of lease and deliver of vacant possession, as

there was an offer from third party for the purchase of the hotel building. The lease was terminated and the lessee was directed to hand over the possession by 31.12.1982, as per the orders of the Hon'ble Supreme Court. Thus, at the instance of the then Managing Director of the appellant / plaintiff, lease was terminated, so as to keep the premises vacant for the purpose of sale. As per the direction of the Hon'ble Supreme Court, the first defendant Bank took possession on 31.12.1982 for the safe custody and handed over possession to the purchaser as per the orders of this Court. During that period, the Bank had not used the premises. There is absolutely no material on the side of the plaintiff to show that the premises was utilised or occupied by the first defendant.

18. The second defendant being Advocate-Receiver appointed by the Court is the officer of the Court. Being Agent of the Court, he should ensure safe custody and management of the property during the period of litigation. For such management of a big premises, it is stated that he occupied one room in the premises. Apart from that, Bank also deployed security to protect the premises and the movables therein.

19. The learned counsel appearing for the first

respondent cited the Hon'ble Supreme Court Judgment in **Kanhaiyalal v. Dr.D.R.Banaji**, reported in **AIR 1958 SC 725**. In this Judgment, it has been held as follows :

"A receiver appointed under O.40 of the Code of Civil Procedure, unlike a Receiver appointed under the Insolvency Act, does not own the property or hold any interest therein by virtue of a title. He is only the agent of the Court for the safe custody and management of the property during the time that the Court exercises jurisdiction over the litigation in respect of the property."

20. As already pointed out, the first defendant also took all precautions by deploying security personnel, apart from providing a room to the Receiver to manage the property. During the period when the first defendant was in possession of the property, i.e., between 01.01.1983 to 31.07.1984, the property was not put in use and it was kept vacant for the purpose of sale at the instance of the then Managing Director of the plaintiff and therefore, the plaintiff is not entitled to any compensation for the use and occupation of the premises during the above said period. During January 1983 to July 1984 since the entire premises was kept unused as aforesaid, the Electricity charges, Telephone

charges, water and sewerage charges are to be borne only by the plaintiff and it cannot be claimed from the defendants.

21. The nature of mortgage in this case is equitable mortgage. The Bank has no right to be in possession of the property. The Bank took possession of the property on 31.12.1982 for the safe custody, only as per the orders of the Hon'ble Supreme Court.

22. The Mortgagee is bound to manage the property under Section 76 of the Transfer of Property Act, if he is in possession of the mortgaged property. Here in this case, the Bank took possession of the property to protect the same and not as a mortgagee. Therefore, the liability under Section 76 of the Transfer of Property Act will not aid the appellant in this case.

23. There is no privity of contract between the parties to claim damages. Thus, the learned single Judge has rightly dismissed the suit and this Court does not find any reason to interfere with the well reasoned Judgment of the learned single Judge and accordingly, this Original Side Appeal is liable to be dismissed.

In fine, this **Original Side Appeal is dismissed with the**

costs of the first defendant, confirming the Judgment and Decree of the learned single Judge, dated 09.05.2006 made in C.S.No.150 of 1987.

(A.S.,J.) (P.K.,J)
01-11-2016

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tsvn

A.SELVAM,J.
AND
P.KALAIYARASAN,J.

tsvn

Judgment
in O.S.A.No.20 of 2007

01-11-2016