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

Decided on: 21.07.2017

\+ **RFA (OS)(COMM) 10/2017**

SUNIL ..... Appellant

Through : Sh. Sandeep Sethi, Sr. Advocate with Sh. Rajeev Saxena and Sh. Raman Sahaney, Advocates.

versus

M/S. LOK SEWAK AUTO MOBILES PVT. LTD...... Respondents

Through : Sh. Rajesh Harnal with Sh. Ajay Kumar Tandon, Sh. Lalit Gupta, Ms. Suman. N. Rawat, Ms. Nikita Madan and Sh. VinayPandey, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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Caveat No.651/2017

Learned counsel for the caveator has put in appearance. Caveat stands discharged.

C.M. APPL.25338/2017

Allowed, subject to just exceptions.

RFA (OS)(COMM) 10/2017, C.M. APPL.25337/2017

1. Issue notice. Sh. Rajesh Harnal, Advocate accepts notice on behalf of the respondent. With consent of counsel for the parties, the appeal was heard finally. Since the record of the learned Single Judge is part of the appeal, parties agreed that the matter may be heard finally.

2. The appellant/plaintiff challenges an order of the learned Single Judge, rejecting his Commercial Suit – CS (Comm) 1376/2016, seeking specific

performance of an agreement to sell dated 10.10.2014 as modified by the documents dated 03.07.2015 and agreement to sell dated 18.01.2016. All these documents pertained to the property known as "Hotel Kutir Darpan Palace", XV/7923, Ara Kashan Road, Pahar Ganj, New Delhi [hereafter referred to as "the hotel" or "suit premises"].

3. The plaintiff claims to manage and control the hotel in the suit premises, which according to him, was purchased from one Bharat Bhushan Batra, i.e. the second respondent and Director of the first respondent (i.e. the first defendant, hereafter referred to as "Lok Sewak Auto Mobiles"]. It is alleged that prior to the agreement to sell, Lok Sewak Auto Mobiles had entered into a registered rent agreement of 19.09.2014 with the plaintiff/appellant's brother, Sunny, in respect of the suit property, to be in force for nine years, covering the ground, first, second and third floor. The monthly rent reserved under that agreement was ₹1,60,000/-, besides payment of refundable security of ₹50 lakhs. It is also alleged that the plaintiff entered into an agreement to sell to purchase the property just 20 days after the rent agreement; the plaintiff claims to have paid ₹50,000/- as earnest money. Other allegations, such as surrender of the premises to the second respondent by Sunny (the plaintiff's brother), towards the performance of the agreement to sell etc. were made. The suit further alleged that the defendant/respondent had received over ₹2,20,50,000/- for the execution of the sale deed. It was contended in the suit that the defendants deliberately avoided executing the sale deed.

4. The defendant/respondent entered appearance and refuted the allegations in the suit; the written statement pointed out that the suit property was subject matter of a previous suit for ejectment, i.e. Suit No.1/16 *[Lok Sewak Automobiles Pvt. Ltd. v. Sunny],* which was decreed on 04.06.2016.

The appeal against that decree, i.e. RFA 491/2016 was filed by the defendant in the suit, i.e. Sunny. The written statement further averred that the plaintiff had earlier filed a suit for specific performance, i.e. Suit No.149/2016 [*Sunil Kumar v. Bharat Bhushan Batra*] before the Additional District Judge, Delhi that was pending till the date of institution of the present suit. Since no *ad interim* injunction was granted, the plaintiff in the present suit (who is also plaintiff in Suit No.149/2016) withdrew it under Order XXIII Rule 1, CPC.

5. The written statement importantly alleged that the suit was a blatant attempt to thwart execution of decree for possession which the defendant had secured against Sunny. In addition, it was stated that the suit premises were mortgaged in favour of a bank and could not be the subject matter of a suit for specific performance.

6. In the course of the hearing, on 06.07.2017, the defendant further alleged that the property in question was mortgaged to Indraprastha Sehkari Bank Ltd., Faiz Road, Karol Bagh. The learned Single Judge proceeded to make the impugned order based entirely upon the following reasoning:

> *"While learned counsel for the plaintiff states that the entire consideration has been paid in cash in various instalments, learned counsel for the defendants states that all the agreements to sell relied upon by the plaintiff are forged and fabricated. He points out the discrepancies in the agreements to sell and the documents produced by the plaintiff themselves as well as the contemporaneous applications filed by the plaintiff in other proceedings. He also places strong reliance upon the order dated 28th April, 2017 in Civil Suit No. 1731/2016 passed by ShriAmit Kumar, Additional District Judge, Central, Tis Hazari Courts, Delhi*
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> *The Agreements to Sell executed between the parties and relied upon by learned counsel for the plaintiff reveal that the property in question to the knowledge of the parties was mortgaged to IndraprasthaSehkari Bank Ltd., Faiz Road, Karol*

Bagh, New Delhi. There is no averment in the pleadings that the equitable mortgage created in favour of the aforesaid Bank has been discharged. Learned counsel for the defendants states that the loan of the bank in question has not been discharged.

Consequently, in the opinion of this Court, the suit for specific performance is not maintainable.

At this stage, learned counsel for the plaintiff wishes to implead the bank in question as a defendant to the present proceedings. However, he refuses to give an undertaking that plaintiff will pay whatever dues are payable to the bank in question to get the property papers discharged.

This Court may mention that learned counsel for the plaintiff was given an offer to convert the present suit to suit for recovery of money, if any, paid to the defendants. However, the same is not accepted by learned counsel for the plaintiff.

Consequently, as the suit property is mortgaged to IndraprasthaSehkari Bank Ltd., Faiz Road, Karol Bagh, New Delhi, this Court is of the view that no relief of specific performance can be granted in the present suit. Accordingly, the suit and pending application are dismissed. The injunction order dated 3rd October, 2016 stands vacated."

7. It is argued that the only reason given by the impugned order to reject the suit is that the subject matter is a mortgaged property. Learned counsel submitted that this by itself did not constitute a bar for the maintainability of the suit. It was argued that so far as the question of maintainability of suit either on the ground that the bar was attracted on account of withdrawal of previous suit or on account of other allegations leveled in the written statement are concerned, learned Single Judge could not have entered into the merits or demerits of such arguments. This was because in order to dismiss the suit, the contentions of the parties had to be decided in the course

of trial in accordance with the procedure prescribed by the Civil Procedure Code. If it was the defendant's argument that the suit was barred for some reason and the plaint had to be rejected, the question of looking into any averments in the written statement did not arise.

8. Learned counsel for the defendant denied the submissions of the plaintiff. He endeavored to argue that the written statement had laid bare the false claims of the plaintiff who had repeatedly sought to abuse the process of the Court in order to thwart the lawful execution of the decree obtained against his brother. Furthermore, it was urged that there was no averment indicative of the encumbrance of the suit property which itself entitled the plaintiff to relief because suppression of such material facts as well as others such as pendency of other suits, existence of a decree against the suit property etc. barred its maintainability.

9. The Court is of the opinion that there is nothing indicative in the impugned order that any bar exists with respect to the sale of a property on the ground that it is encumbered by way of equitable mortgage. That there is no such bar, is now settled law, in view of the decisions in *Raghunath Vs. J.P. Sharma* AIR 1999 Del 383 and *R. Velammal Vs. R. Daya Siga Mani* AIR 1993 Mad 100. In such circumstances, the rights of the mortgagee - being the prior transferee under Section 48 of the Transfer of Property Act, 1882, cannot be curtailed. In other words, the encumbrance of a third party mortgagee over the property and its rights both in law and equity to enforce the mortgage cannot be defeated by the sale of mortgaged property, consequent to a decree for specific performance. The mortgage's right to claim a decree for sale is not prejudiced or precluded.

10. At this stage, learned counsel for the defendant/respondent submitted that the suit may be remitted for proper consideration in accordance with law

and that all rights of the parties, including the right of the defendant to file application either for rejection of the plaint or decree on admissions, be preserved.

11. Learned counsel for the plaintiff/appellant expressed that he has no objection to this course of action. In view of the above statements, the Court hereby sets aside the impugned order and remits the matter for further proceedings to the learned Single Judge. It is open to the defendant to file either applications for rejection of the plaint, or any other application seeking decree on admissions, (including decree of dismissal of the suit) as are admissible in law.

12. Nothing stated in the present order shall be construed as an expression on the merits of the *inter se* disputes between the parties; their rights and contentions are hereby reserved. The parties are directed to appear before the learned Single Judge on 16.08.2017.

13. The appeal is allowed in the above terms. Order *dasti* to the parties.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 21, 2017