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

\+ **RFA No. 117/2018**

% **7th February, 2018**

G. SHANTHI ..... Appellant

Through: Mr. Raj Shekhar Rao and Mr. Yogesh Raavi, Advocates.

versus

DEEPAK CHAUDHARI & ORS. ..... Respondents

Through: Mr. Amitabh Chaturvedi, Adv. for R-1 and 2.
Mr. Prashant Singh, Adv. for R-3 and 4.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

Caveat No. 102/2018

Counsel appears for the caveator. Caveat accordingly stands discharged.

CM No. 4689-91/2018(Exemptions)

Exemptions allowed subject to just exceptions.

CMs stand disposed of.

RFA No. 117/2018 & CM No. 4688/2018 (stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.3 in

the suit impugning the judgment of the trial court dated 11.12.2017 by which the trial court has decreed the suit filed by the respondent nos. 1 and 2/plaintiffs thereby subrogating the respondent nos. 1 and 2/plaintiffs in place of the creditor/respondent nos. 3 and 4/defendant nos. 1 and 2/Vijaya Bank, and consequently on account of subrogation the respondent nos. 1 and 2/plaintiffs being given the benefit of stepping into the shoes of the mortgagee of the property mortgaged by the appellant/defendant no.3 with the respondent nos. 3 and 4/defendant nos. 1 and 2/Vijaya Bank. The mortgaged property in dispute is Flat No. 105, D Type , Laasya Block, Poojitha Estates situated as Bahtookhanguda, near ESI Hospital, Hyderabad (hereinafter referred to as 'the Hyderabad property') with respect to which the respondent nos. 1 and 2/plaintiffs have been held to be subrogees in view of Sections 140 and 141 of the Indian Contract Act, 1872 inasmuch as the respondent nos. 1 and 2/plaintiffs have been substituted in place of the mortgagee/Vijaya Bank *qua* this Hyderabad property (and respondent nos. 1 and 2/plaintiffs are effectively now the mortgagees of this Hyderabad property including the right to possession of the mortgaged property at Hyderabad) on account of respondent nos. 1 and 2/plaintiffs paying the dues of the creditor/Vijaya Bank/mortgagee.

2. The facts of the case are that admittedly the respondent no.5/defendant no.4/company was sanctioned financial limits by the respondent nos. 3 and 4/defendant nos. 1 and 2/Vijaya Bank. Respondent no.5/defendant no.4/company was in the business of trading of pesticides and fungicides and for its buniess took a loan of Rs.1crore on 13.10.2007 from the respondent nos. 3 and 4/Vijaya Bank. Loan was taken from the Hyderabad Branch of the Vijaya Bank and which is the respondent no.4/defendant no.2. Appellant/defendant no.3 was one of the guarantors and who had mortgaged the aforesaid Hyderabad property to Vijaya Bank. Vijaya Bank initiated SARFEASI proceedings against the mortgaged property and took over symbolic possession of the Hyderabad property on 25.5.2010 and actual physical possession on 3.7.2010. To complete the narration I must state that Vijaya Bank was also a mortgagee with respect to the same loan account of the respondent no.5/defendant no.4/company with respect to a property at Delhi, and with which property we are not concerned, and which belongs to the

respondent nos. 1 and 2/plaintiffs, inasmuch as the respondent nos. 1 and 2/plaintiffs whereby were the mortgagers and as stated below the dues of the Vijaya Bank were cleared by the respondent nos. 1 and 2/plaintiffs whereby the Delhi property no longer stands charged/mortgaged to Vijaya Bank. As regards the Delhi property it may be noted that pursuant to the proceedings initiated by the Vijaya Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (also known as the SARFAESI Act) legal proceedings took place before the DRT, DRAT and finally before this Court. An agreement was arrived at between the respondent nos. 1 and 2/plaintiffs and the Vijaya Bank whereby the respondent nos. 1 and 2/plaintiffs made a total payment of Rs.127.50 lacs on 19.12.2011 to the Vijaya Bank. This payment was made in terms of the orders dated 21.9.2011 and 16.12.2011 passed by this Court in the proceedings pending in this Court. Once the loan account of the respondent no.5/defendant no.4/company was cleared, and with respect to which mortgagees were created of the Delhi property and the Hyderabad property, the respondent nos. 1 and 2/plaintiffs asked the Vijaya Bank to hand over title deeds of both the properties at Delhi and Hyderabad to the respondent nos. 1 and 2/plaintiffs. Vijaya Bank had no difficulty for giving the title deeds of the Delhi property as also possession thereof to the respondent nos.1 and 2/plaintiffs, however since disputes were raised by the appellant/defendant no.3 with respect to the Hyderabad property of which the appellant/defendant no.3 was the mortgagor, Vijaya Bank hence did not return the title deeds of the Hyderabad property to the respondent nos.1 and 2/plaintiffs and Vijaya Bank also did not hand over possession of the same to the respondent nos.1 and 2/plaintiffs. Consequently the subject suit was filed by the respondent nos.1 and 2/plaintiffs for declaration, mandatory and perpetual injunction seeking the rights of a subrogee in terms of Sections 140 and 141 of the Indian Contract Act with respect to the Hyderabad property with further directions being sought for handing over of the title deeds as also possession of the Hyderabad property (which the Vijaya Bank had) to the respondent nos.1 and 2/plaintiffs. It is in these proceedings that the impugned judgment has been passed. I may note that no oral evidence was led in the suit as parties agree that the issues in question in the suit had to be decided as per the admitted facts and documents appearing on record.

3. Trial court after pleadings were complete framed the following issues:-

> "1. Whether the plaintiffs are entitled to the surety's rights as provided under Section 141 of the Contract Act/OPP.
> 2. Whether this Court has territorial jurisdiction to entertain and try this suit? OPP
> 3. Relief."

4. As regards the issue no.1 there is no dispute raised on behalf of the appellant/defendant no.3 that the respondent nos.1 and 2/plaintiffs do not stand subrogated to the rights of the creditor/Vijaya Bank with respect to Hyderabad property. However, the disputes are/were raised before the trial court and also arguments urged before this Court, with respect to lack of territorial jurisdiction of the Courts at Delhi. I may also clarify that it is agreed by the counsels for the parties that liability of guarantors will be proportionate for the dues payable to the Vijaya Bank and that it is further agreed that there are a total of five guarantors with respect to the financial limits which were sanctioned by the Vijaya Bank to the respondent no.5/defendant no.4/company. Of the five guarantors, the appellant/defendant no.3 is

one of the guarantors, and would have proportionate liability for the loan facility i.e the appellant/defendant no.3 will not be liable to repay the entire amount whether to Vijaya Bank or to the respondent nos.1 and 2/plaintiffs and the liability of the appellant/defendant no.3 to the respondent nos. 1 and 2/plaintiffs will proportionate to being one of the five guarantors. I may also note that one of the guarantor with respect to the financial limits sanctioned by the Vijaya Bank and which have been repaid, was the respondent no.1/plaintiff no.1.

5. The only issue therefore which is required to be decided by this Court is with respect to whether the Courts at Delhi had territorial jurisdiction so as to firstly hold that respondent nos. 1 & 2/plaintiffs would be the subrogees and secondly as to whether possession of the mortgaged property at Hyderabad which was with the Vijaya Bank can be handed over to the respondent nos. 1 and 2/plaintiffs in the subject proceedings of the subject suit at Delhi. Issue no. 2 as to territorial jurisdiction has been decided by the trial court by making the following observations:-

> "24. It is argued by Ld counsel for defendant no.1 and 2 and also by Ld counsel for defendant no.3 that loan was taken by defendant no.4 from defendant no.2 at Hyderabad. Business of defendant no.4 was at Hyderabad and office of defendantno.4 is also at Hyderabad. Further,

plaintiff has claimed relief against immovable property situated at Hyderabad. Hence this Court does not have territorial jurisdiction.

25. Moreover, it is argued by ld. counsel for defendant no.3 that by way of present suit, Plaintiff no.2 is claiming relief that in addition with other reliefs, property documents be handed over to her along with actual physical possession. The immovable property being at Hyderabad, plaintiff cannot seek possession of the property which is situated at Hyderabad.

26. On the other hand, it is argued by Ld counsel for plaintiff no.2 that plaintiff no.2 made payment to defendant no.1 at Delhi, though he might have accepted it on behalf of defendant no.2. Hence the cause of action in the present case arose when payment was made in Delhi in order to save her property from defendant no.1 and 2. Hence cause of action for filing the present suit in favour of Plaintiff no.2 arose on the date on which she made payment to defendant no.1 and 2 in Delhi.

27. However, in the present case the relief sought can be obtained by way of personal obedience of defendant no.2. The relief of seeking handing over of title deeds of the Hyderabad property is relief which has to be performed on papers by defendant no.2. Moreover, the actual physical possession of the Hyderabad property is with the bank. The bank has to hand over the possession of the property on papers along with handing over the key to Plaintiff no.2. This also being a relief which in the present case can be attained by way of personal obedience of the parties i.e defendant no.2 , hence the present Court has territorial jurisdiction with regard to this relief also. Moreover by way of present suit, Plaintiff no.2 is only seeking a relief of handing over of documents of the Hyderabad property along with actual physical possession and also a declaration that he has stepped into the shoes of the bank, and is not seeking redemption of the mortgage at present, this being a limited relief is within the purview of territorial jurisdiction of this Court.

28. A suit for a right to enforce a mortgage is not a suit for land/immovable property. Plaintiff No.2 hereby claims a charge over mortgage of defendant no.3,plaintiff being entitled to do so under Section 140 & 141 of Contract Act. Plaintiff is not seeking redemption of mortgage, but a mere declaration of a right to enforce mortgage. The said right accrued to him when he made payment of debt on behalf of himself and defendant no.3 in Delhi. Plaintiff is seeking a right in personam to recover a debt. That being so, the present Court has territorial jurisdiction.

29. It was held in case titled **Pralhad Madhoba Ruikar Vs. Aboobajar Abdul Rehman Hon'ble Supreme Court of India** observed

> *"....... This appeal raises a short question of jurisdiction. The plaintiffs are entitled to a mortgage created by defendants Nos.1 to 5. The mortgage is on property situate outside British India, and defendants Nos.1 to 5 reside outside British India. But the mortgage was executed in Bombay. Under the decision of this Court in Hatimbhai Hassanally v. Framroz Eduljee, by which*

we are bound, a suit to enforce a mortgage is not a suit for land within the meaning of clause 12 of the Letters Patent, and if that is so, it is clear that the plaintiffs are entitled to bring their suit against defendants Nos.1 to 5, the cause of action having arisen in Bombay. Defendant no.6 who is the present appellant, claims a charge on the property, that charge arising under a decree of a Court outside British India."

"....... It seems to me that the true view is that where a person procures a charge on a property which is mortgaged and that mortgage is capable of being enforced in this Court, the person taking that charge necessarily confers on the mortgages a right of action against him, and as that right of action arises on a mortgage made within the jurisdiction of this Court, the cause of action must be taken to arise within the jurisdiction of this Court."

"....... The question raised in this appeal is not free from difficulty. Upon the whole, however, I have reached the conclusion that the judgment appealed from must be affirmed. This is a suit to enforce a mortgage which, under the ruling in Hatimbhai's case which is binding on this Court, is not a suit for land, but a suit in personam to recover a debt. The appellant does not reside or carry on business in Bombay, and that being so, the only question is whether a part of the cause of action has arisen within jurisdiction. Now the plaintiffs' case is that the mortgage was executed in Bombay....... The plaintiffs say in their plaint that the appellant claims to have a charge on the property, and they pray that a declaration to establish their mortgage against all the defendants should be granted. On these facts it is difficult to see how a part of the cause of action hjas not arisen within the jurisdiction of this Court."

30. Hence this issue is also answered in favour of plaintiffs and against defendants.

<u>Reliefs-</u>

1. In view of above, it is hereby declared that plaintiff has stepped into the shoes of defendant no.2 and has all the rights which are available to the Bank against the Hyderabad property of defendant no.3 bearing No. Flat No.105, D Type, Laasya Block, Poojitha Estates situated at Bahlookhanguda, near EST Hospital, Hyderabad.
2. Defendant no.2 is hereby directed to hand over title documents of the Hyderabad property of defendant no.3 to the plaintiff after complying with all the necessary formalities required on behalf of the Bank.
3. The defendant no.2 Bank is hereby directed to hand over actual physical possession along with key to the plaintiff within 45 days from the date of this order after complying with all the necessary formalities/documents required on behalf of Bank.
4. No other relief is made out.

Parties to bear their own costs." (underlining added)

6. I may also, to complete the narration, note that during the pendency of the suit the appellant/defendant no.3 by an interim order

was given the benefit of possession of the mortgaged Hyderabad property and simultaneous to passing of the impugned judgment, it has been further held in paras 31 to 35 of the impugned judgment that the appellant/defendant no.3 must hand over possession to the Vijaya Bank and that Vijaya Bank will thereafter handover possession of the Hyderabad Property to the respondent nos. 1 and 2/plaintiffs. These paras 31 to 35 read as under:-

> **<u>"Disposal of application under Section 151 CPC</u>**
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> 31. In the present case, during the pendency of suit, an application was moved by defendant no.3 thereby submitting that she may be handed over possession of the Hyderabad property belonging to her as her ailing father is required to reside therein for his treatment. It was further the case of defendant no.3 that she is residing at Nelore while her father has to stay in Hyderabad for treatment purposes. Hence, her application was allowed and actual physical possession along with key was handed over to her till further orders.
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> 32. On 15.02.2017 an application was moved by plaintiff thereby submitting that father of defendant no.3 has unfortunately expired and now defendant no.3 may be directed to hand over the possession back to the Bank.
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> 33. I have heard both the sides and gone through the reply as well as other documents on record.
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> 34. It is the argument of ld. counsel for defendant no.3 that the said property is required by mother of defendant no.3 as she is an old aged lady for her residence. However, on being questioned by the Court whether defendant no.3 does not have any other relative or any other son or daughter living at Hyderabad, it is admitted by ld. counsel for defendant no.3 that brother of defendant no.3 resides at Hyderabad.
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> 35. Moreover, the possession was temporarily handed over to defendant no.3 for a limited purpose. Now unfortunately the father of defendant no.3 is no more and also her brother is residing at Hyderabad. Moreover, I have decreed the suit in favour of the plaintiffs. Hence, for the efficacious disposal of the further proceedings which may arise consequent to the present suit and the purpose for which possession was granted to her is already over, I hereby deem it fit that possession of the Hyderabad property be taken back from defendant no.3. In the

circumstances, defendant no.3 is directed to hand over actual physical possession along with key to defendant no.2 within 30 days from today."

7. A reading of the aforesaid paras of the impugned judgment shows that trial court has held that rights of subrogation are in law declaration only of rights to enforce the right to the mortgaged property and which are the same/equal to actual enforcement of the right of actual redemption by sale of the mortgaged property and to declare rights as a subrogee it is not necessary to file the suit where the mortgaged property is situated. Trial court by reference to Sections 140 and 141 of the Indian Contract Act, held that for determination of rights of subrogees as per Sections 140 and 141 of the Indian Contract Act, it is not necessary that the judicial proceedings have to be initiated at the place whether the immovable property is situated. For the sake of convenience Sections 140 and 141 of the Indian Contract Act are reproduced below:-

"**140. Rights of surety on payment or performance.**—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. Surety's right to benefit of creditor's securities.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

8. On behalf of the appellant/defendant no.3 there is no dispute to this proposition that the courts at Delhi can exercise jurisdiction for determining the rights of the respondent nos. 1 & 2/plaintiffs as subrogees in terms of Sections 140 and 141 of the Indian Contract Act and what is only contended is that since issue arises of handing over possession of the mortgaged property at Hyderabad, therefore a suit relating to rights in an immovable property could only have been adjudicated, in view of Section 16 CPC, at the competent court at Hyderabad. I however cannot agree with this argument made on behalf of the appellant/defendant no.3 inasmuch the trial court has rightly held that the issue really is with respect to obtaining possession by a personal act of obedience by the Vijaya Bank, Hyderabad Branch and which can also be done at Delhi. It has already been stated above that possession of the mortgaged property at Hyderabad is with the Vijaya Bank Hyderabad Branch pursuant to proceedings initiated by the Vijaya Bank, Hyderabad Branch under the SARFAESI Act. Therefore, in my opinion since handing over of possession can be enforced through a personal act of obedience and

which is in the nature of handing over possession of the keys of the mortgaged property situated at Hyderabad by giving keys for possession at New Delhi, in my opinion such a suit filed at Delhi cannot be said to be hit by Section 16 CPC. This aspect has been sufficiently expounded upon by the trial court in paras 27 and 28 of the impugned judgment and which paras have already been reproduced above.

9. Learned counsel for the appellant/defendant no.3 placed reliance upon a Division Bench judgment of the Madras High Court in the case of ***Pyramid Saimira Theatre Ltd. Having Office at No. 672, 2nd Floor, Temple Towers Anna Salai, Nandanam, Chennai 600 035 Vs. S. Murugan & 15 Others*** OSA No. 44/2008 decided on 31.10.2008 ***(2009) 1 LW 866*** to argue that in view of the ratio of this judgment of the Division Bench of the Madras High Court it should be held that the courts at Delhi do not have territorial jurisdiction. I however cannot agree with this argument urged on behalf of the appellant/defendant no.3 by placing reliance upon the judgment in the case of ***Pyramid Saimira Theatre (supra)*** inasmuch as the said judgment pertains to facts and interpretation of the provisions of the

SARFAESI Act. There is no interpretation or any ratio laid down in the judgment in the case of ***Pyramid Saimira Theatre (supra)*** with respect to whether handing over of possession pursuant to rights created under Sections 140 and 141 of the Indian Contract Act cannot be by means of personal obedience. Therefore, the ratio in the case of ***Pyramid Saimira Theatre (supra)*** will not apply in the facts of the present case where facts are totally different because proceedings in the present case are not proceedings under the SARFAESI Act or any issue of interpretation of the provisions of the SARFAESI Act but issue is of rights of subrogees of a mortgaged property in view of Sections 140 and 141 of the Indian Contract Act read with Section 16 CPC.

10. I may note that at the conclusion of argument, this Court as per the submission of the counsel for the respondent nos. 1 and 2/plaintiffs has put a suggestion as to whether the appellant/defendant no.3 wanted some time to handover possession of the suit property at Hyderabad to the Vijaya Bank and consequently to the respondent nos. 1 and 2/plaintiffs, however, learned counsel for the

appellant/defendant no.3 states that he has been instructed to invite a judgment from this Court.

11. In view of the above discussion, I do not find any merit in the appeal. Dismissed.

FEBRUARY 07, 2018 **VALMIKI J. MEHTA, J**
ib/godara/Ne