$~5 & 6

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

% *Date of Decision: 12th February, 2018*

\+ **FAO(OS) 72/2017**

M/S D B P LIMITED ..... Appellant
Through: Mr. Davinder Singh with Mr. Ashish Mittal, Advs.

versus

M/S D H A F P LIMITED & ORS ..... Respondent
Through: Mr. Saurabh Kirpal with Mr. Pallav Pandey and Mr. Sarthak Sachdev, Advs. for respondent no.6.

\+ **FAO(OS) 147/2017 & CM No.18056/2017**

M/S PREM ENTERPRISES ..... Appellant
Through: Mr. Saurabh Kirpal with Mr. Pallav Pandey and Mr. Sarthak Sachdev, Advs.

versus

M/S D.B.P LIMITED & ORS ..... Respondent
Through: Mr. Davinder Singh with Mr. Ashish Mittal, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM No.18056/2017 (*delay of 49 days*) in **FAO(OS) No.147/2017**

For the reasons stated in the application, delay in filing the appeal is condoned.

This application stands disposed of.

<u>FAO(OS) No.72/2017</u>
<u>FAO (OS) No.147/2017</u>

1. These two appeals relate to the property bearing No.11, Ring Road, Lajpat Nagar, Part – IV, New Delhi (hereinafter referred to as "*the suit property*") which is the subject matter of CS(OS) No.484/2016 titled <u>*M/s DBP Limited vs. M/s DHAFP Limited & Ors*</u>.

2. In this suit, on 14th February, 2017, arguments were heard on two applications and while the ld. Single Judge has rejected I.A. No.11750/2016 (*under Order XXXIX Rule 1 & 2 of CPC filed by the plaintiff-M/s D.B.P. Limited)*, however, no orders stand passed on I.A. No.12871/2016 (*under Order VII Rule 11 of the CPC filed by the defendant no.6-M/s. Prem Enterprises*).

3. The facts necessary for adjudication of these appeals to the extent necessary are noted hereafter. For expediency, we are referring to the parties by the nomenclature as assigned to them in CS(OS) No.484/2016.

4. We may also hasten to add that inasmuch as we have been called upon to consider the application under Order VII Rule 11 of the Code of Civil Procedure, we are referring to the facts as brought on record only in the plaint in CS(OS)No.484/2016 as well as the documents filed by the plaintiff (*appellant in FAO(OS) No.72/2017 herein*) in that suit before the ld. Single Judge.

5. M/s DHAFP Limited (defendant no.1) had purchased the said suit property in a court auction (*conducted pursuant to an*

order passed in Suit No.585/1974 on 21st November, 1990), for an amount of Rs.65,77,379/-. It is the case of the plaintiff that the amount of sale consideration was advanced by it to DHAFP Limited (*defendant no.1*) and that the defendant no.1 had created an equitable mortgage by depositing the original title deeds and handing over the possession of the said property in favour of the plaintiff.

6. So far as the need to file the suit is concerned, in para 2 the plaint contends the following:

> *"2. Immediate <u>need to file the present suit has arisen</u> in view of the fact that on <u>08.09.2016,</u> Defendant Nos.1 to 6 without any information and notice to the plaintiff and for no rhyme started <u>breaking the building by use of Bulldozers, JCB machines</u> and deployed huge man power to remove debris by use of dumper trucks. Effect of which is that the property in possession of the plaintiff is partially broken resulting into dispossession and due to the broken construction material/debris in the property, which has fallen all over the access to the basement floor is also impossible. All the records/files papers/furniture/store items belonging to the plaintiff have been illegally removed or are dumped inside the debris. Instantaneously police complaint was made and thereafter this Hon'ble Court is being approached to protect the property and the security of the plaintiff. "*
>
> *(Emphasis supplied)*

7. It is essential to refer to some further portions of the plaint. In paras 25 & 26, averments stand made as regarding the accrual of the cause of action for filing of the suit in question and reads as follows:

*"25. Apart from the protection and recovery of possession of plaintiff at the two floors namely 2nd floor and basement of the suit property being Plot no.11 at Ring Road, Lajpat Nagar, New Delhi – 24, plaintiff is entitled to the **possession of complete security**, namely the **complete suit property** and **for recovery of the mortgage money by recovery of the principal amount and interest thereupon** at the rate of 24% per annum apart from the cost charges and expenses incurred by the plaintiff. Plaintiff is also entitled to get cancellation of the documents illegally and fraudulently executed by the Defendants so as to defraud the Plaintiff.*

*As on date of filing the present Suit, the **amount due from** the **mortgage of the suit property** being Plot no.11 at Ring Road, Lajpat Nagar, New Delhi – 24, **is a total of Rs.65,00,000/-** (Rupees Sixty Five Lacs) alongwith interest at 24% per annum from 19.5.1997 till the date of realization. The beneficiaries/Defendants (but for Defendant No.7) are jointly and severally liable to pay.*

*26. That the CAUSE OF ACTION for filing of the present suit arose on **08.09.2016**, when the **Defendants started breaking the suit property** and after which present management of the Company became aware of the fraud played upon by the Defendants as detailed in Para 3 above. Prior to this vide order dated 11.03.2014, present management of the company took over after a long drawn litigation, when the Company Law Board passed a judgment in the case of Arun Mehra & Anr versus Durga Builders (P) Limited & Ors in C.P. No.112 (N.D.) of 2013, wherein the validity of the agreement dated 19.05.1997 was upheld and Mr Arun Mehra and his wife Mrs Seema Mehra were recognized as the shareholders. The cause of action is continuing one."*

(Emphasis supplied)

8. Mr. Davinder Singh, ld. counsel for the plaintiff has

vehemently contended that the plaintiff is a victim of fraud at the hands of Mr. R.K. Nanda as well as the defendant nos.2 to 4. It is submitted that pursuant to an agreement dated 19th May, 1997, 100% shares of the erstwhile Directors in M/s Durga Builders (P) Limited were purchased by Mr. Arun Mehra and his wife Mrs. Seema Mehra. However, despite this agreement and the transaction having been completed, Mr. R.K. Nanda continued to exercise control over the company necessitating the proceedings before the Company Law Board. Mr. Singh has contended that it was on the 11th March, 2014, that the Company Law Board had declared that Mr. Arun Mehra and his wife Mrs. Seema Mehra were shareholders in the company and directed to hold a meeting of the new Board which meeting was conducted on the 24th March, 2014.

9. In the plaint, the plaintiff has also made reference to a complaint made by M/s Class Sales Pvt. Ltd. to the Economic Offences Wing in the year 2016. It is submitted by Mr. Saurabh Kirpal, ld. counsel for the defendant no.6 that Mr. Arun Mehra is one of the Directors of M/s. Class Sales Pvt. Ltd. This fact is not disputed by the ld. counsel for the plaintiff.

10. So far as the claim against the defendants is concerned, the plaintiff refers to the sale of the suit property at approximately Rs.70 lakhs by Mr. R.K. Nanda acting on behalf of the defendant no.1 – DHAFP Limited to the defendant nos.2 & 3 purportedly in the year 1998. There is a reference in para 15 of the plaint that there are two Agreements to Sell, one dated 2nd January, 1999 and

the subsequent Conveyance Deed dated 24th January, 2000.

11. So far as defendant no.6 is concerned, we find that without making any averments in the plaint regarding further transfer by the defendant nos.2 to 4 in favour of the defendant no.6, in the prayer clause, the plaintiff has sought decree of declaration declaring the alienation dated 16.07.2011 through registered sale deed of the suit property in favour of the defendant no.6 – M/s Prem Enterprises as null and void.

12. It is submitted by Mr. Davinder Singh, ld. counsel for the plaintiff, that the transfer of the suit property in favour of the defendant nos.2 to 4 and the defendant no.6 were collusive and fraudulent. The plaint makes an averment that the sale consideration allegedly paid by the defendant nos.2 to 4 did not even come into the accounts of the company and, further, that it was sold at an extremely low price lending support to the plaintiff's case that it was fraudulent.

13. The basic challenge on behalf of the plaintiff to the transactions, rests on the contention that the conveyance deeds were illegal, null & void and of no effect in the eyes of law resulting in the deprivation the right of the plaintiff over the suit property.

14. Premised on these assertions, the plaintiff filed CS(OS) No.484/2016 on 20th September, 2016 seeking the following prayers:

> *"(a) Pass a decree for the* ***recovery of the mortgage money*** *and* ***direct Defendant Nos.1 to 6 to pay the***

__principal amount and interest in__ terms of the calculation made at Para No.25 of the suit plaint alongwith pendent lite interest at 24% per annum till actual payment; and/or

*(b) Pass an order **injuncting Defendant Nos.2, 3 and 6 from interfering with the possession of the Plaintiff** in **the 2nd floor** and **basement of the suit property** being Plot No.11, Ring Road, Lajpat Nagar – IV, New Delhi – 110024 and **restoring the possession of the part of the suit property already interfered with, and/or***

*(c) Pass a **decree of declaration thereby declaring that both Agreements to sell each dated __02.01.1999__** in respect of property being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024 are **illegal, null and void** and **cancel the same**; and/or*

*(d) Pass a **decree of declaration** thereby declaring that the **Conveyance Deed dated 24.01.2000** executed by **Defendant No.7 in favour of Defendant Nos.2 and 3** in respect of property being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024 is null and void and of no effect and cancel the same; and/or*

*(e) Pass a **declaration** thereby declaring that the **gift deed dated 10.09.2008** in relation to the suit property **in favour of Defendant No.2** in respect of property being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024 is illegal, null and void and of no effect and cancel the same; and/or*

*(f) Pass a decree of **declaration** thereby declaring that the **alienation in favour of M/s Prem Enterprises (Defendant No.6)** on **16.7.2011** through **registered sale deed** of property being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024 is null and void and of no effect and cancel the same; and /or*

(g) Pass a decree in favour of Plaintiff and against the

*Defendants for **restoration of possession thereby directing Defendant Nos.2, 3 and 6 or their assignees, representatives, agents** or any person, whosoever is found in possession of the property being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024, **to hand over the said property to the Plaintiff** Company forthwith; and/or*

*(h) Pass a decree of **permanent injunction** in favour of the Plaintiff and against the Defendants thereby **restraining Defendant Nos.2, 3 and 6 or their assignees, representatives, agents or any other person from in any manner selling, transferring, alienating or parting with possession of property** being Plot No.11, Ring Road, Lajpat Nagar-IV, New Delhi – 110024 in any manner whatsoever to any person, except the Plaintiff; and/or*

*(i) Pass **a decree granting damages/compensation to the Plaintiff** for the illegal acts on the part of Defendant Nos.1 to 6 for which an enquiry should be ordered and upon enquiry whatever damages compensation is found to be reasonable, the Plaintiff hereby agrees and undertake to pay the actual court fee on the amount of damages which may be awarded in favour of the Plaintiff at the time of passing the decree; and/or*

(j) Cost of the suit be allowed to the Plaintiff;

(k) Any other relief which this Hon'ble Court deems fit in the circumstances of the case may be granted to the Plaintiff and against defendants."

(Emphasis by us)

15. Along with the plaint, M/s DBP Ltd. (the plaintiff) filed I.A.no.11750/2016 under Order XXXIX Rules 1 and 2 of the CPC praying for grant of interim injunctions against the defendants in respect of the said property. On this application, when the suit

came up for hearing for the first time on 22nd September, 2016 *ex parte ad interim* injunction was granted. The defendants contested this application.

16. The ld. Single Judge examined the prayers for interim injunction made by the plaintiff by way of I.A. No.11750/2016 which was then rejected by the order dated 14th February, 2017.

17. So far as the prayer for grant of interim injunction prohibiting transfer and alienation of the suit property, in the impugned order dated 14th February, 2017, the ld. Single Judge was of the opinion that in view of Section 68 of the Transfer of Property Act, the right to sue for mortgaged money arises in favour of the mortgagee in cases enumerated in Clauses 1(a) to 1(d) thereof and that the only right given to a mortgagee under the mortgage is to ensure the payment of the money. It was observed that till this is done, the mortgagee can seek the continuation/retention of the security. The ld. Single Judge has also clearly noted that the very factum of there being a mortgage of 19th May, 1997 was itself a contentious issue. Ld. Single Judge has also observed that the property may have been demolished in the year 1997; that this fact was within the knowledge of the plaintiff and that despite the fact that the plaintiff lost possession of its security in the year 1997, it kept silent till 2016 when the suit was filed. The court has also found that the knowledge of the plaintiff of the subsequent transfers of the property to the various purchasers was a contentious issue.

18. In this background, the ld. Single Judge accepted the

willingness expressed by the defendants without prejudice to their rights, to deposit the amount claimed by the plaintiff in Court, observing that since the plaintiff has no right, title and interest in the suit property other than part of it allegedly being handed over to it as a security against the alleged mortgage amount, there was no *prima facie* case in favour of the plaintiff to prohibit the defendants from raising construction over the suit property.

19. The Court was also of the view that the defendants claimed to be *bona fide* purchasers of the property and have a right in the property and that they would be put to inconvenience when they had undertaken to deposit the mortgaged money in the Court and that it was the defendants who would suffer irreparable loss and injury if the stay was granted.

20. In this background, by the order dated 14th February, 2017, the ld. Single Judge dismissed I.A. No.11750/2016 filed under Order XXXIX Rule 1 and 2 by the plaintiff, subject to the defendants depositing an amount of Rs.65 lakhs with the Registrar General of this Court within seven days from the order with information to the plaintiff of such deposit.

21. It is noteworthy that by the order dated 14th February, 2017, the ld. Single Judge has passed no specific order on I.A. No.12871/2016 which was filed under Order VII Rule 11 by the defendant no.6. Instead, it has however been directed that the issue framed relating to limitation shall be treated as a preliminary issue.

22. Aggrieved by the order dated 14th February, 2017, the plaintiff has assailed the said order dismissing the I.A.

No.11750/2016 by way of FAO(OS)No.72/2017 while the defendant no.6 has filed FAO(OS) No.147/2017 assailing the order dated 14th February, 2017 on I.A. No.12871/2016. We have heard ld. counsels at length on these appeals who have carefully taken us through the necessary record of suit.

23. On the 23rd May, 2017, in FAO(OS)No.72/2017, we had recorded the following order:

> *"1. In the present case, the appellant claims to be the mortgagee in respect of a loan of Rs.65 lakhs payable by the respondent no.1-M/s DHAFP Ltd. to it. On the last date of hearing, a doubt was raised with regard to the payment of the said amount by the appellant to the respondent no.1. It is submitted by Mr. Harish Malhotra, learned senior counsel for the appellant that five documents have been filed on record which include copy of the balance sheet as on 31st March, 1997 of BDPL; copy of the order dated 10th October, 2012, true copy of balance sheet of 1996-1997 of the payment on 31st March, 1996 of M/s DHAFP Ltd.; copy of possession letter and copy of the advertisement dated 15th December, 1999 in Times of India have been filed on record.*
>
> *2. It may be observed that no document evidencing transfer of Rs.65 lakhs in the year 1996 by the appellant to the respondent no.1 has been placed on record.*
>
> *3. Let the record of CS(OS) 484/2016 be called for before the next date of hearing.*
>
> *4. List on 30th October, 2017."*

24. Let us first examine the prayer for injunction made by M/s DBP Ltd. in I.A.No.11750/2016 and the order passed by the Ld. Single Judge thereon.

25. Before considering the rival contentions, additional important circumstances deserve to be considered. One aspect is of the alleged payment of the amount by M/s DBP Limited (*plaintiff*) to M/s DHAFP Limited (*defendant no.1*) against the creation of the equitable mortgage. Another aspect is the claim of possession of part of the property (second floor)and basement) by the plaintiff and dispossession by M/s DBP Ltd. We shall also consider the aspect of proceedings conducted before the Economic Offences Wing on a complaint *inter alia* against Mr. R.K. Nanda and his wife Mrs. Promila Nanda.

26. So far as the claim of payments made by M/s DBP Ltd. to the defendant no.1-DHAFP Ltd. is concerned, we have noted above the averments in the plaint that the mortgage was created for "*<u>almost</u> the same value*" as the purchase price of the suit property which was Rs.65, 77, 379/-.

27. We note that in para 3 of the plaint, reference is made to the report dated 29th March, 2016 of the Economic Offences Wing referring to the statement attributed to Mrs. Promila Nanda wherein she has allegedly referred to "*dues of Rs.65 Lacs*".

28. To support the payment which formed the basis of the creation of the alleged equitable mortgage, the plaintiff has placed five documents in FAO(OS) No.72/2017 before us. Amongst these documents are the two copies of the balance sheets as on 31st March 1995 of M/s Durga Housing & General Finance Pvt. Ltd.- a sister concern of defendant no.1. This balance sheet contains amongst the other, the following entries: (pg.544)

"Durga Housing & General Finance Pvt. Ltd.
Balance Sheet as on 31st March, 1996.

Previous Year Ended 31-03-95	*Liabilities*	*Current Year Ended 31-03-95*
61,97,016.20	*M/s Durga Builders Pvt. Ltd.*	*65,03,339.20"*

Thus according to this Balance Sheet, the plaintiff - M/s Durga Builders Pvt. Ltd. had a liability of Rs.61,97,016.20 on the year ending 31st March, 1995 which has gone up to Rs.65,03,339.20 at the year ending 31st March, 1996. This document was never placed before the ld. Single Judge. However, even if we could take the same into consideration, the document does not support the case set up in the plaint which is to the effect that around Rs.65 lakhs were was advanced by the plaintiff to the defendant no.1 on 19th May, 1997 when the equitable mortgage was created.

29. Ld. counsel for the plaintiff has drawn our attention to an undated letter captioned as "*Possession Letter*" (at pg.337 of the record). This letter makes a reference to the "*amount of Rs.65 lacs*". This possession letter is referred to in para 8(i) of the plaint.

30. Despite a close scrutiny of the entire record, we are unable to find a definite disclosure of either the exact amount of the loan against which the defendant no.1 had allegedly created an equitable mortgage in favour of the plaintiff in the plaint or the exact date on which this was done.

31. We now examine the plaintiff's claim of possession having

been handed over to it and subsequent dispossession. To support its pleadings on this aspect, the plaintiff has placed on record copy of a possession letter which was executed by Mr. R.K. Nanda on 19th May, 1997, which reads as follows:

"*Possession Letter*

In consideration for an amount of Rs.65.00 lacs due to M/s. DURGA BUILDER PVT. LTD., we confirm having handed over possession of property No.11, Lajpat Nagar-4, Ring Road, New Delhi along with necessary titles deed.

The complete, vacant space of over five thousand sq.ft., unencumbered peaceful possession and keys of the ***Basement*** *and* ***second floor*** *is hereby handed over to Mr. Arun Mehra at New Delhi, today.*

HANDED OVER
Sd/-
Mr. R.K. Nanda
for Durga Housing & General Finance (P) Ltd.

TAKEN OVER
Sd/-
ARUN MEHRA

Witnesses:
Dr. Bhasin
Mr. Gauba. "

32. It is noteworthy that the above letter makes no reference to the creation of a mortgage. The same is also undated. It refers to no specific portions of the property

33. Mr. Davinder Singh, ld. counsel for the plaintiff would contend that the date is mentioned on the backside of the document. A perusal thereof shows that on the back of the

document, only the date of the purchase of stamp paper is mentioned. The ld. Single Judge has noted this date as '*19.05.1997*'.

34. So far as the creation of the mortgage is concerned, in the plaint, which was filed on 20th September, 2016, we find the following contradictory averments made by the plaintiff:

> *"1. ...... **Plaintiff is a mortgagee by deposit of original title deed(s) as against the value of the entire sale consideration** mentioned in the title deed(s) of property in question i.e. Property No.11, Ring Road, Lajpat Nagar-IV (hereinafter referred to as the 'suit property'), New Delhi. **Suit property was purchased on <u>08.11.1990</u> for a value of Rs.65,77,379/-** (Rupees Sixty Five Lacs Seventy Seven Thousand Three Hundred Seventy Nine Only) i.e. almost the same value for which mortgage was created. It is pertinent to note that **Defendant No.1 on <u>19.05.1997</u> created a mortgage** as indicated above and in order to further secure the **plaintiff handed over possession of two floors in the property** (mortgage security), by executing a separate possession letter. In effect, plaintiff holds both the original title deeds as well as the possession along with the possession letter towards the mortgage security of the amount so paid by it as a mortgagee.*
>
> *xxx xxx xxx*
>
> *8(b)...... It was thereafter that suit property was permitted to be **purchased on <u>21.11.1990</u>** by **M/s Durga Housing & General Finance Private Limited.** That a **mortgage by deposit of original title deeds and by giving possession of two floors (2nd floor and basement) was created by the Defendant No.1 in favour of Plaintiff Company**."*

(Emphasis supplied)

This date does not tally with the dates of payment.

35. It is trite that consideration of an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure rests on three basic principles. The Court would require an examination as to whether the plaintiff had made out a *prima facie* case in its favour; whether the plaintiff would suffer irreparable loss and damage in case injunction was not granted; and whether the balance of convenience was in favour of the plaintiff.

In the present case, the plaintiff hopelessly fails to satisfy any of the three basic requirements entitling grant of injunction. So far as the plea of equitable mortgage is concerned, we have found no disclosure at all of even the amount which was advanced by the plaintiff to the defendant no.1, the date on which the same was paid or when became due and payable.

36. The plaintiff is unable even to give the date on which the equitable mortgage was created, let alone the specific terms thereof. It is important to note that none of the terms of creation of the mortgage has been disclosed anywhere in the plaint. The plaint also does not make a statement as to when the money which was allegedly advanced to the defendant no.1 became due and payable by it. There is a reference in para 25 of the plaint that as on the date of filing of the suit, the amount due from the mortgage of the suit property is a total of Rs.65 lakhs along with interest @ 24% per annum till the date of realization.

37. Our attention stands drawn to the proceedings before the

Economic Offence Wing, the plaintiff refers to a report dated 29th March, 2016 of the Economic Office Wing. The plaintiff has placed a copy of this report on the suit record as well as before us. This report makes a reference to a "*previous final report*". This report has unfortunately not been placed on record by the plaintiff. However, a copy thereof appears to have been filed on the suit record by the defendant no.6 as an annexure to the I.A. No.12871/2016 (*under Order VII Rule 11 of CPC*) filed by it, which is dated 16th May, 2013.

38. Being a document filed by a defendant, while we would stand precluded from considering it for the purposes of examining the prayer in I.A.No.1287/2016 under Order VII Rule 11 C.P.C., we can certainly consider this report for examination of the plaintiff's prayer for injunction by way of I.A.No.11750/2016. This report was premised on investigation conducted by the Economic Offence Wing on the complaint made by DBP Ltd. (plaintiff). Statements made in this report are relevant so far as the plea regarding possession is concerned. It has been stated as follows :

> "*..... However, on our further and persistent follow up, they started avoiding us. Recently in* ***the month of <u>September 2009</u>****, when we* ***visited the said <u>Property No.11</u>****, Lajpat Nagar-4, Ring Road, New Delhi for* ***inspection*** *to our shock & surprise, we found the* ***signboard of one M/s Global School of Management Science displayed over there****. On making enquiries, we came to know that M/s Global School of Management Science have taken the property on lease from M/s Sonal Developers Pvt. Ltd., who had taken/purchased the said*

property from M/s Durga Housing & Finance Ltd. On further inquiry from own sources we came to know that Mr. R.K. Nanda & Mrs. Promila Nanda have ***illegally handed over/sold/transferred the aforesaid property to M/s Sonal Developers Pvt. Ltd.*** *Thus the agreement/arraignment entered into with us was violated.* ***Mr. S.K. Modi, the Accused No.4*** *is the Director and key person of M/s Sonal Developers Pvt. Ltd. and is the architect of the said illegal deal/transaction between Mr. R.K. Nanda & Mrs. Promila Nanda and M/s Sonal Developers Pvt. Ltd. and all the accused persons were working in collision & conspiracy and in active connivance with each other....."*

(Emphasis supplied)

39. At page 24 of the above report of the Economic Offence Wing, reference is contained to certain disputes between M/s Class Sales Pvt. Ltd. and the plaintiff in the following terms:

"Several documents and ***reply in response to the allegations*** *made in the complaint* ***have also been obtained from the alleged persons****. It has been informed by the alleged R.K. Nanda (F/A) that he did not sign any agreement with* ***M/s Class Sales Pvt. Ltd. He has further informed that Mr. Arun Mehra, Director of M/s Class Sales P. Ltd. has been claiming that he had advanced some loan against some of the plots*** *and the plots were kept as security for the said loan. This fact was admitted hy him in* ***WS filed by him being director Class Sales P. Ltd. in suit No.961/2004****. He has also claimed that* ***no payments were received by M/s Durga Builders P. Ltd. from M/s Class Sales P. Ltd.*** *against sale of the plots in question.* ***It has also been claimed that no documents were ever executed by M/s Durga Housing & Finance P. Ltd. in favour of M/s Class Sales P. Ltd. in respect of property No.11, Lajpat Nagar-IV, Delhi and that the said property was sold sometimes in the year 1999-2000****."*

(Emphasis supplied)

40. So far as the suit property is concerned, the Economic Offences Wing has stated thus:

> *"Regarding Claim Property No.11*
>
> *The **property bearing No.11, Ring Road, Lajpat Nagar-IV, New Delhi was owned by M/s Durga Housing and General Finance Pvt. Ltd**. The said company did not have any concern with Mr. Arun Mehra or any of his companies, including Class Sales Pvt. Ltd. and Hindustan Commercial Investment Trust Limited. In fact the **said property alongwith property bearing No.12,** Ring Road, **comprised of a huge commercial complex, comprising of a number of shops**, which were built and sold to the shopkeepers during 1992-93. **The <u>Municipal Corporation of Delhi while taking demolition action on 10.11.1997 and 11.11.1997 demolished the entire commercial complex</u>.** The same finds mentioned in the MCD, house Tax Assessment Order, the copy of which is annexed herewith. **The said complex** comprising of various shops was **sold to the Shopkeepers, much prior to Mr. Mehra's entering into the agreement with me, R.K. Nanda, in the year 1997** (copy of the agreement enclosed). **When all the shops and structure were demolished by MCD, the shopkeepers** wanted the refund of their money. They **identified a new buyer, with my consent and the property was sold to M/s Sonal Developers Pvt. Ltd. by executing a Sale deed**, as the said M/s Sonal Developers Pvt. Ltd. had refunded the entire money to the shopkeepers whose shops were demolished and the shopkeepers surrendered all their claims in favour of M/s Sonal Developers Pvt. Ltd."*
>
> *(Emphasis by us)*

41. The proceedings and reports of the Economic Offence Wing

are significant. Though the plaintiff has extracted portion of the report dated 26th March, 2016 in the plaint itself, the plaintiff has consciously skipped the previous report dated 16th May, 2013 filed by the Economic Offence Wing which has been placed by the defendant no.6 before the ld. Single Judge. In this report, the Investigating Officer has reported to the effect that the suit property was demolished in its entirety by the Municipal Corporation of Delhi while taking demolition action on the 10th and 11th November, 1997. It is further reiterated that this fact stands mentioned in the MCD House Tax Assessment order which was also annexed with the report.

42. According to the investigation conducted by the Economic Offence Wing, <u>the entire suit property was demolished in the year 1997</u>. Thus, the property of which the plaintiff claims to have received possession from M/s DHAFB Ltd. appears to have been demolished. The plaintiff (or its Directors), who claim to have been in possession of the property, would have been aware of the demolition of the suit property in the year 1997 if they actually had an equitable mortgage in its favour of the suit property, which formed security therefrom or were ever in actual possession of any potion thereof.

43. The above report of the Economic Offences Wing would show that the plaintiff became aware of the sale of the suit property in the year 1999.

44. No action stands taken either with regard to title or possession or demolition of the suit property.

45. We are informed by Mr. Saurabh Kirpal, ld. counsel for the defendant no.6 that the suit property in question was let out to one M/s Global School of Management Science at the time of the first demolition in 1997 by the MCD and that in June, 2016, the suit property in question was being demolished for the second time, at the instance of the defendant no.6.

46. Clearly, the plaintiff had failed to make out a *prima facie* case for grant of an injunction.

47. Defendant no.6 has staunchly opposed not only the grant of injunction, but also the maintainability of the suit on the ground of limitation.

48. It has been contended at length by Mr. Saurabh Kirpal that even if the glaring false information in the plaint was believed, the pleas in the plaint and the documents relied upon by the plaintiff, clearly manifest that the suit has been filed hopelessly beyond the period of 12 years as envisaged under Article 62 of the Schedule II of the Limitation Act, 1963 and is therefore, barred by limitation.

49. Article 62 of Schedule II of the Limitation Act, 1963 which prescribes the limitation to enforce a money claim premised on a mortgage or charge reads as follows:

*"**Article 62***

Description of suit	*Period of limitation*	*Time from which period begins in run*

To enforce ***payment of money secured by a mortgage*** *or otherwise charged upon immovable property.*	***Twelve years***	***When the money sued for becomes due***.*"*

(Emphasis supplied)

50. A bare reading of the plaint would show that according to the plaintiff, 19th May, 1997 was the date on which equitable mortgage was actually created in favour of the plaintiff.

51. Clearly, in terms of the above, it was open for the plaintiff to file the suit for recovery of the amount of the mortgage within 12 years of the date when the money became due and payable to it. The plaint is hopelessly silent on the specific date when the amount became due and payable.

52. As set out above, no dates are disclosed in the plaint. Only in para 25 of the plaint wherein the plaintiff has quantified the liability of the defendant no.1, we find that a reference is made that the interest became payable from 19th May, 1997 till the date of realization. If this could be treated as the date wherefrom the amount became due and payable by the defendant no.1, it was open for the plaintiff to file a suit within limitation only within 12 years of 19th May 1997, which is on or before 18th May, 2009. In the present case, the suit has been filed thereafter on the 20th September, 2016, i.e. more than seven years after the expiry of the prescribed period of limitation.

53. It appears that in order to extend the period of limitation, the

plaintiff has attempted to refer to an alleged demolition of the suit property on 8th September, 2016. So far as demolition is concerned, we have noted above the report dated 16th May, 2016 of the Economic Offence Wing which refers to demolition of the entire properties having been taken place on 10th and 11th November, 1997 by the MCD. The demolition was of property, allegedly mortgaged would then have to be treated as destruction of claimed security. This demolition, therefore, would also be accrual of the cause of action to a mortgagee to bring a suit for securing the mortgaged property. The suit filed on 20th September, 2016 has been filed almost 19 years after accrual of the cause of action.

54. It is also well-settled that injunction shall not be granted if the same is barred in law. The suit itself thus was barred by the law of limitation. In view thereof, the plaintiff was additionally disentitled to the relief of injunction for this reason.

55. FAO(OS)No.147/2017 has been filed by Prem Enterprises complaining against the failure to grant relief to the defendant no.6 by the impugned order dated 14th February, 2017. As noted above, the consideration of the application being I.A.No.12871/2016 under Order VII Rule 11 of the CPC for rejection of the plaint which had been filed by M/s Prem Enterprises (defendant no.6) has to be confined to the averments of the plaint and that the defence in the written statement as well as documents filed by the defendants cannot be considered.

56. We find that even the ld. Single Judge has directed that the issue of limitation be treated as a preliminary issue. No order has

been recorded on the prayer for rejection of the plaint.

57. This being the position and the above discussion as well as our findings that the suit itself was barred by limitation, there was no option for the Court but to reject the same in view of the provisions or Order VII Rule 11 (d) of the CPC.

58. It is directed as follows :

(i) The challenge in FAO(OS) No.72/2017 to the impugned order dated 14th February, 2017 assailing on I.A. No.11750/2016 in CS(OS) No.484/2016 filed under Order 39 Rule 1 and 2 of CPC by the plaintiff is hereby dismissed.

(ii) FAO(OS) No.147/2017 assailing the impugned order dated 14th February, 2017 on I.A. No.12871/2016 in CS(OS) No.484/2016 filed under Order VII Rule 11 of CPC filed by the defendant no.6 is hereby allowed, and consequently I.A. No.12871/2016 shall stand allowed.

(iii) As a consequence, it is directed that the plaint in CS(OS) No.484/2016 shall stand rejected.

(iv) In view of the above order, the Registry is directed to refund the amounts of Rs.65 lakhs deposited by the defendant no.6 along with accruals, if any, thereon through the counsel.

Both these appeals are disposed of in the above terms.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 12, 2018/pmc