

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 233 OF 2019
IN
NOTICE OF MOTION (L) NO. 162 OF 2019
IN
SUIT NO. 1011 OF 2014

WITH
NOTICE OF MOTION (L) NO. 500 OF 2019
IN
APPEAL (L) NO. 233 OF 2019

Dukh Singh s/o Dharam Singhji	}	
Chouhan	}	Appellant
versus		
Haji Israr Alam Mohd. Nazir	}	
Siddiqui and Ors.	}	Respondents

Mr. R.R.Mishra i/b. Mr.Shishir S. Pandey
for the appellant.

Mr.Nusrat Shah with Mr.Kevin Gala i/b.
Mr.Kevin Gala for respondent no.1.

Ms.Pervin Contractor with Ms.Ema
Almedia and Ms.Samaa Shah i/b.
Ms.Samaa Shah for respondent nos. 2, 4,
6 and 7.

Mr.Vivek B. Pandey i/b. Mr.Vikas B.
Pandey for respondent no. 5.

CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.

DATED :- JUNE 25, 2019

P.C. :-

1. This is an appeal by original defendant no.8. Suit No.1011 of
2014, in which an application, styled as Notice of Motion (L)

No.162 of 2019, was moved before the learned Single Judge resulting in an order dated 10th April, 2019. It is this order which is challenged before us. The applicant in that notice of motion is the original plaintiff. He was seeking a direction to defendant no.7 to handover to him commercial premises more particularly described in the order. The further relief sought is a direction to release the sum deposited in this court with accrued interest.

2. Pertinently, defendant no. 7 is not dissatisfied with this order, but it is defendant no.8. Defendant no. 8 alleges that this order prejudices his claim and that is of a mortgage. He says that respondent nos. 5 and 7 to this appeal had approached him for a finance/ commercial loan for the purpose of taking admission of respondent no. 7 in a medical college. Since they were on friendly terms that there is a property or a security for the loan, firstly, the amount was secured by offering the property known as Al-Madina Hotel and Restaurant. There was a mortgage executed and now, by the present suit, the appointment of Receiver of the immovable property and the impugned order, the right to enforce the mortgage is completely lost. More so, when in the impugned order, there are serious observations and conclusive in nature made about the legality and validity of the mortgage.

3. We have heard Mr.Mishra at some length. We have also perused the order under challenge. We have perused the other materials placed on record. We are of the view that the original defendant no.8 cannot raise the issue of the mortgage and seek to enforce it in a suit not instituted by him, but by the plaintiff, who has been deprived of the fruits of an agreement styled as permanent alternate accommodation agreement. That is an agreement dated 30th December, 2011. That having not been enforced in its entirety and the accommodation being not made available, though constructed, he was forced to institute this suit. In that suit, as a defence, the issue of mortgage was raised.

4. We do not think that any conclusive or binding observations have been made by the learned Single Judge which preclude the present appellant from raising the issue relating to the mortgage or seeking to enforce it. That can be done by him in an independent proceeding as well. By clarifying that all observations in the impugned order are tentative and *prima facie* and shall not influence the court while trying the very suit or any other action in relation to the mortgage, we dismiss this appeal. We do not think that the order under challenge puts an end to any of the rights allegedly claimed in the alleged mortgage. All the more, therefore, we are disinclined to interfere with the

discretion of the learned Single Judge, which is neither exercised capriciously nor arbitrarily. The exercise of discretion is judicious and not vitiated by any error of law apparent on the face of the record. The appeal is devoid of merits and it is dismissed. There would be no order as to costs.

5. At this stage, Mr.Mishra says that the order passed on this appeal on the earlier occasion shall be continued for a period of two weeks. We do not think that by continuing the ad-interim order, any purpose will be served. More so, when the Court Receiver has already been directed to put the plaintiff in possession. Defendant no. 7 has deposited the amount in this court. That defendant has no objection for the plaintiff taking away the money. For all these reasons, the request for continuing the ad-interim relief is entirely misconceived. The request is refused.

(G.S.PATEL, J.)

(S.C.DHARMADHIKARI, J.)