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

+ RFA(OS) 83/2016 and CM APPL. 37745/2016

RELIGARE FINVEST LIMITED

..... Appellant

Through: Mr. Sanjeev Singh, Mr. Satish Kumar and
Ms. Amisha Agarwal, Advocates

versus

MERLION COMMERCIAL & TRADING PRIVATE LIMITED &
ORS

..... Respondents

Through: Mr. Anoop George Chaudhari, Senior
Advocate with Mr. Ashish Mohan and
Mr. Shashwat Panda, Advocates for R-1.
Ms. Rachna Agarwal, Advocate for R-3.
None for R-2, R-4 to R-8.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE VINOD GOEL

ORDER

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07.05.2019

1. The present appeal has been filed by the appellant company/defendant no.5 assailing a common judgment and order dated 26.08.2016 passed by the learned Single Judge in CS (OS) 1455/2013 and CS (OS) 231/2015. The relief in the present appeal is confined to CS (OS) 231/2015.
2. The brief facts of the case necessary to decide the present appeal are that the respondent no.1 (plaintiff) had instituted a suit for declaration against the respondent no.2 (D-1), respondent no.3 (D-2), respondent no.4 (D-3), respondent no.5 (D-4), the appellant company (D-5), respondent no.6 (D-6), respondent no.7 (D-7) and respondent no.8 (D-8) praying *inter alia*

for the following reliefs: -

“A. Pass a decree of declaration declaring the equitable mortgage allegedly created by the Defendant no.1, 6 & 7 in favour of the Defendant no.5 as null and void and not binding upon the Plaintiff herein;

B. Pass a decree of declaration declaring the Award dated 28.01.2014 passed by the Defendant no.8, Shri Nitin Chaddha, Arbitrator as null and void and not binding upon the Plaintiff;

(b) PASS such other or further orders as may deem fit and proper in the interest of justice.”

3. The stand of the appellant Company (D-5) is that the respondent no.2, 6 and 7 and two other Private Limited Companies had approached him in March, 2010 for extension of financial facilities to purchase premises no.A-331, Defence Colony, New Delhi, for a total sale consideration of Rs.20 crores. The appellant company approved the loan for a sum of Rs.10 crores in favour of the above parties for purchasing the aforesaid premises owned by the Respondent No. 2 (D-1) comprising of a basement, ground floor, first floor, second floor and third floor. Respondent no.2, 6 and 7 and the two Private Limited Companies in turn executed documents in favour of the appellant and created an equitable mortgage in respect of the said property. On 09.04.2010, two Sale Deeds, one in respect of the basement, ground floor, first floor and second floor and the other in respect of the third floor and the terrace rights were executed by one Mr.Kashmiri Lal Khanna and his wife, Mrs.Meena Khanna in favour of the respondent no.2.

4. On 07.02.2011, the second floor of the suit premises was sold by the

respondent no.2 to a third party. Similarly, he sold the first floor, basement and ground floor of the suit premises to third parties on 09.06.2011, 21.06.2011 and 21.07.2011 respectively. Thus, between 07.02.2011 to 21.07.2011, respondent no.2 sold different floors of the suit premises to different parties. On 30.08.2011, the third floor with terrace rights was sold by the respondent no.2 to the respondent no.3. On 18.09.2012, the respondent no.3 in turn sold the said portion to the respondent no.1/plaintiff, who remained in possession and occupation of the third floor and terrace from the date of the execution of the Sale Deed i.e. w.e.f. 18.09.2012.

5. In its written statement, the appellant company pleaded that when a Loan Recall Notice dated 13.03.2013 was issued by it to the respondent no.2, 6 & 7 and the two Private Limited Companies calling upon them to repay the entire loan amount which by then had mounted to a sum of Rs.9,28,53,563.48 and no steps were taken by them to comply with the demand made, it had filed a claim before the EOW against the respondent No.2 and the other borrowers on 28.05.2013. Simultaneously, the appellant company also invoked the arbitration clause governing the parties. It is stated by learned counsel for the appellant company that the contesting respondents mentioned above did not participate in the arbitration proceedings that resulted in passing of an *ex-parte* Award on 28.01.2014.

6. At this stage, learned counsel for respondent No.1 states that prior to passing of the *ex-parte* Award, the appellant had filed a petition under Section 9 of the Arbitration and Conciliation Act on the Original Side of this court praying *inter alia* for interim relief. The respondent No.1 had appeared in the said proceedings and raised an objection as to the maintainability of the said petition whereafter the appellant had immediately withdrawn the

said petition. Thereafter, on 29.08.2014 , the appellant filed an Execution petition bearing No.310/2014 in the High Court for execution of the Award dated 28.01.2014. It was during the pendency of the said proceedings that the impugned judgment came to be passed.

7. It is noteworthy that in January, 2015, respondent No.1 (plaintiff) had instituted a suit registered as CS (OS) 231/2015 praying *inter alia* for a decree of declaration declaring the Award dated 28.01.2014 as null and void and not binding on it and for declaring the equitable mortgage created in favour of the appellant (D-5) as null and void. Summons were issued in the suit on 30.01.2015. The appellant (D-5) entered appearance on 20.07.2015. All the defendants were directed to file their written statements within the prescribed timeline and the matter was directed to be placed before the court on 01.12.2015, for framing of issues.

8. After entering appearance in the suit, the appellant company failed to file its written statement. As a result, vide order dated 18.11.2018, the learned Joint Registrar closed its right to file the written statement. Admittedly, the appellant did not take any steps to file a chamber appeal against the said order which attained finality. Similarly, the right of the other defendants in the suit i.e. defendants No.1, 3, 4, 6 and 7 to file the written statement was also closed by the Ld. Joint Registrar by an earlier order dated 08.09.2015. Subsequently, the impugned judgment and order dated 26.08.2016 came to be passed, wherein it was noted that no steps were taken by the appellant and the respondents No.1, 3, 4, 5 and 6 to file their written statement and nor were the orders dated 08.09.2015 and 18.11.2015 passed by the learned Joint Registrar challenged by any of them. Holding that there was no opposition to the prayer made in the suit, the same was

decreed under Order VIII Rule 10 of the Code of Civil Procedure. It is the said order that has been assailed in the present appeal.

9. Mr. Sanjeev Singh, learned counsel for the appellant states that it is the duty of the court to act with caution before passing a judgment under Order VIII Rule 10 CPC. The court ought to satisfy itself that the plaintiff has proved the facts pleaded in the plaint. The court is also required to examine as to whether a plaint is maintainable in accordance with law and the plaintiff is entitled to the relief that is being prayed for. He argued that in the instant case, merely because none of the defendants had filed their written statements, could alone not be a ground to accept the plaintiff's version as the gospel truth and proceed on the said basis without first satisfying itself that the averments made in the plaint are proved and the facts stated in the plaint can be accepted as correct. In support of his submissions, learned counsel for the appellant has cited the following decisions:-

- (i) C.N.Ramappa Gowda vs. C.C. Chandre Gowda & Anr., (2012) 5 SCC 265. The relevant paragraphs are reproduced below:

“25. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who

has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial.”

(ii) Shanti Lal Gulab Chand Mutha vs. TATA Engineering and Locomotive Company Limited & Anr., (2013) 4 SCC 396.
The relevant paragraphs are reproduced below:

6. The Court in *Balraj Taneja case [(1999) 8 SCC 396 : AIR 1999 SC 3381]* further held that “judgment” as defined in Section 2(9) CPC means the statement given by the Judge of the grounds for a decree or order. Therefore, the judgment should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.

8. In *Bogidhola Tea & Trading Co. Ltd. v. Hira Lal Somani [(2007) 14 SCC 606 : AIR 2008 SC 911]* this Court while reiterating a similar view observed that a decree under Order 8 Rule 10 CPC should not be passed unless the averments made in the plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved.

9. *In view of the above, it appears to be a settled legal proposition that the relief under Order 8 Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed.”*

(iii) Venkata Raju & Ors. vs. Vidyane Doureradjaperumal (D) Thr. L.Rs. and Ors (2014) 14 SCC 502. The relevant paragraph is reproduced below:

17. Being aggrieved, the parties filed Cross-Appeal Suit Nos. 198/83, 21/88 and 43/88. All the aforesaid appeal suits were disposed by a common judgment of the first appellate court, and the said court held, that Vedavalliamalle was not residing in the suit property as she was residing somewhere, and had rented the house to three different tenants, with a total strength of about 26 members. Therefore, Defendant 1 was not in possession of the suit property even as early as 1969, and therefore, Defendant 10 also did not have possession of the suit property. In view of the fact that the tenants could have been evicted subsequently by the appellant-plaintiff, resorting to the provisions of the 1980 Act, which had been extended up to 31-3-1990, the suit was maintainable, and the trial court ought not to have dismissed the said suit on the ground that the appellant-plaintiff had not sought consequential relief of recovery of possession.”

10. Learned counsel for the respondent No.1/plaintiff opposes the present appeal on the ground that the appellant had failed to file its written statement

after an opportunity was granted to it. After its right to file the written statement was closed, the appellant did not take any steps to challenge the said order in accordance with law. Therefore, the prayer now made for remanding the suit back to the learned Single Judge for disposal on merits and for permission to file the written statement, is untenable. He argues that if at all this court is inclined to remand the suit for fresh disposal, then the clock be set back to 11.08.2018, the date on which the appellant was proceeded against *ex-parte*.

11. Learned counsel for the appellant/respondent submits that he does not wish to press prayer clause (ii) whereby the appellant seeks permission to file the written statement in the suit. Instead, he requests that the suit may be remanded to the learned Single Judge for disposal in accordance with law and the proceedings may commence from the date when his client was proceeded against *ex-parte*. He, however, states that in the event the court directs the respondent No.1/plaintiff to lead any evidence to prove the averments made in the plaint, then the appellant/respondent No.1 would be entitled to cross-examine their witnesses, as permissible in law. Further, the appellant would be entitled to take all the objections available in law as to the maintainability of the suit as filed.

12. We find substance in the submission made by learned counsel for the appellant that simply because the defendants in the suit had failed to file the written statement, would not be a ground for the court to act in a mechanical manner and proceed to pronounce a judgment under Order VIII Rule 10 CPC, without first examining the pleadings in the plaint and the questions of facts and law involved therein. Failure to adopt the said procedure would be a travesty of justice and also result in multiplicity of proceedings by way of

appeals etc. In such circumstances, it would be necessary for the plaintiff to establish the averments made in the plaint and only after the court is satisfied on all aspects including the maintainability of the suit, should a reasoned decision follow.

13. For the reasons stated above, the impugned judgment and decree in respect of CS(OS) 231/2015 is quashed and set aside. The suit is remanded back to the Original Side for being taken further from the date when the appellant was proceeded against *ex-parte*. The parties shall ensure their presence before the learned Single Judge on 15.07.2019.

14. In view of the orders passed above, the interim protection granted to the respondent No.1/plaintiff in the suit vide order dated 30.01.2015, shall continue to operate in its favour till the disposal of the suit unless and until the same is vacated/modified or altered on an appropriate application being moved in this regard.

15. The appeal is disposed of on the above terms along with the pending applications with costs quantified at Rs.20,000/-, payable to the respondent No.1/plaintiff.

HIMA KOHLI, J.

VINOD GOEL, J.

MAY 07, 2019

Shailendra/rkb