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

Judgment Reserved on: 16.08.2021

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Judgment Pronounced on: 15.09.2021

+ CS(COMM) 189/2020

ALOK KUMAR LODHA

..... Plaintiff

Through: Mr.Avishkar Singhvi and Mr.Nipun
Katyal, Advs.

Versus

ASIAN HOTELS (NORTH) LTD.

..... Defendant

Through: Mr.Vikram Nankani, Sr.Adv. with
Mr.Sidhant Kumar, Mr.Sanjay
Aggarwal, Dr.Joginder Singh,
Ms.Aakanksha Kaul and Ms.Manyaa
Chandok, Advs. for the defendants.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA Nos.5173/2021 & 5174/2021

1. IA No.5173/2021 is filed by the plaintiff under Order 1 Rule 10 CPC seeking impleadment of necessary and proper parties as defendants. IA No.5174/2021 is filed by the plaintiff under Order 6 Rule 17 CPC for amendment of the plaint.

2. The present suit is filed by the plaintiff seeking a decree of declaration that the licence in favour of the plaintiff in respect of the shop/premises bearing No.L-83, Hotel Hayatt Regency Delhi, Bhikaji Cama Place, New Delhi is irrevocable and perpetual and the purported revocation of the license by the defendant is illegal, void and bad in the eyes of law. A decree

is also sought for declaration declaring that the plaintiff has unfettered right to occupy and use the said premises/shop under the irrevocable license till the documents of transfer/conveyance are executed by the defendant. Other connected reliefs are also sought.

3. It is the case of the plaintiff that as part of the Asian Games, the Hyatt Hotel was launched subsequent to allotment of land under a lease deed dated 22.07.1982 by DDA. It was a part of an initiative to create 5-star iconic property with high end hospitality. It is the case of the plaintiff that the plaintiff through the original allottee paid a total sum of Rs.8.47 lakhs to the defendant in 1991 which was received as security deposit for the said shop/premises L-83. It is stated that the said amount was substantially higher than the then prevailing value of the shop. On 02.09.1991, a license agreement was executed by the plaintiff and the defendant company that regulated the terms of occupation of the plaintiff for the shop in question situated in the defendant hotel. The agreement was to be renewed periodically every five years. It is the case of the plaintiff that under the agreement valuable consideration was transferred being Rs.8.47 lakhs which was paid for the subject shop. There was no further additional payment or premium payable by the plaintiff. It is stated that the interest in the property was perpetual, permanent and irrevocable in law.

4. On 29.05.2020, it is the case of the plaintiff that to the utter shock and surprise of the plaintiff a revocation of license notice was served during the ongoing pandemic and amidst the lockdown. Several other licensees who have occupied the shops for almost 40 years were also served such notices. These notices are unrelated to any alleged breach. The plaintiff impugns the said communication stating the same to be illegal and wholly contrary to the

agreed terms. The defendant have also blocked free ingress and egress of the plaintiff to the arcade/access to the shop. Hence, the present suit.

5. To complete the narration of facts, I may mention that when the present matter came up for hearing before the court after filing, the defendant entered appearance on receipt of an advance copy of the paperbook. The defendant raised an objection that the suit is not maintainable in view of section 8 of the Arbitration and Conciliation Act. With the consent of the parties, the Co-ordinate Bench heard learned counsel for parties on the issue of maintainability of the suit as also the interim injunction application. This court vide judgment dated 21.07.2020 returned a *prima facie* finding that the plaintiffs have a right in their favour and interest in land which is more than that of a lessee or at least that of an irrevocable license. The court also held that the suit and the application are liable to be dismissed with liberty to the parties to avail the remedy of arbitration in view of the arbitration clause in the license agreement.

6. Both sides filed an appeal before the Division Bench. The Division Bench by judgment dated 24.12.2020 *set aside* the judgment of the Co-ordinate Bench of this court dated 21.07.2020 stating that the order of dismissal of the suit on a verbal plea of section 8 of the Arbitration and Conciliation Act, is not an order referring the parties to arbitration. The Division Bench *set aside* the said judgment in its entirety including *prima facie* findings of interest or rights of the parties. The matter was remanded back. Liberty was granted to the defendant Hotel if it so desires to on or before 15.01.2021 prefer an application under section 8 of the Arbitration and Conciliation Act, which will be considered and decided in accordance with law. The defendants have filed the said application under section 8 of

the Arbitration and Conciliation Act. The same is pending adjudication.

7. The plaintiff has now filed IA No.5174/2021 under Order 6 Rule 17 CPC seeking amendment of the plaint. It is the case of the plaintiff that pursuant to a reply filed by the defendant hotel in these proceedings, the plaintiff to its utter shock learnt for the first time about the mortgage carried out by the defendant of the entire hotel to certain banks. It is stated that the said mortgage carried out by the defendant was not revealed by the defendant earlier. The mortgaging of the property is for the purposes other than construction of the hotel which was admittedly completed in year 1984. It is stated that the defendant have surreptitiously created several mortgages over the present premises without properly disclosing to the banks/financial institutions that a considerable portion of the hotel was conveyed/transferred for extraordinary premium received in lieu thereof in the years 1981-2005. It is stated that the said mortgages have been created by the defendant without disclosure to the plaintiff despite the plaintiff having substantial rights in law under the terms of license and contemporaneous documents. Hence, it is pleaded that the mortgages created by the defendant in favour of the financial institutions/ banks are illegal and void *ab-initio* to the extent it encumbers the interest held by the plaintiff in the subject premises from 02.09.1991. Hence, consequential amendments are sought to be made in the plaint pertaining to the rights of the plaintiff. The prayer clause is also sought to be amended seeking a decree of declaration against the defendant that the mortgages including the mortgage deeds which have been executed in favour of the banks is void and illegal to the extent that it encumbers any right, title and interest of the plaintiff in the subject premises.

8. Another application filed by the plaintiff is IA No.5173/2021 which is

under Order 1 Rule 10 CPC which seeks to implead the banks and the financial institutions as defendants No.2 to 7.

9. I have heard learned counsel for the plaintiff and learned senior counsel for the defendant.

10. The learned counsel for the plaintiff has vehemently urged that the mortgages carried out by the defendant in favour of financial institutions i.e. the proposed defendants No.2 to 7 came to the knowledge of the plaintiff only after filing of the present suit. It is pleaded that in terms of the license agreement, the defendant had no right to mortgage the interest of the plaintiff. It is further stated that under the license agreement the defendant could only have mortgaged the property for construction purposes at best and not for any other purpose. The construction however of the building was completed in 1980's and no such mortgage could be carried out thereafter. Hence, it is urged that consequential reliefs have to be sought in the present suit and hence the present application. Reliance is placed on the judgments of the Supreme Court ***Kasturi v. Iyyamperumal & Ors., 2005 (6) SCC 733***; and ***Ma Shwe Mya v. Maung Po Hnaung, AIR 1922 PC 249***.

11. Learned senior counsel appearing for the defendants have pointed out as follows:

(i) The mortgage in question was carried out in 1980's. There is no challenge to the said mortgage in the present suit. The same cannot be permitted now.

(ii) It is further stated that the plaintiff has no right against the banks and financial institutions. Hence, the present amendment application does not lie. It is further stated that in any case the prayer of the plaintiff for declaration of relief and rights in the suit property have to first be adjudicated, before

any relief can be claimed against the proposed defendants No.2 to 7. It is only after the plaintiff is successful in claiming any rights in the property that the issue of adjudication of the rights of the third parties would arise.

(iii) It is further urged that there is an arbitration clause in the agreement between the parties and hence this suit is liable to be stayed. An appropriate application has been filed by the defendant. Reliance is placed on the judgment of Supreme Court in the case of *Deccan Paper Mills Company Ltd. v. Regency Mahavir Properties & Ors., 2021 (4) SCC 786*.

12. In rejoinder, learned counsel for the plaintiff has pointed out that the mortgages were carried out sometime in the year 2012. In fact, defendants have failed to provide full details of the mortgage. The same does not pertain to 1980's when construction took place. No details are given by the defendant.

IA No.5174/2021

13. I will first deal with the above IA under Order 6 Rule 17 CPC.

14. I may note that the suit is presently at the initial stages. The defendants have opposed the present suit and have filed an application under Section 8 of the Arbitration and Conciliation Act seeking stay/dismissal of the present proceedings.

15. It is the case of the plaintiff that subsequent to the filing of the suit they have learnt about the creation of the mortgages by the defendant of the property claimed by the plaintiff with proposed defendants No. 2 to 7. The plaintiff claims that the mortgages carried out by the defendants are illegal and void to the extent that they affect the alleged rights of the plaintiff in the suit property. Defendants deny the said contention of the plaintiffs stating that under the terms of the agreement between the parties they have a right to

create the mortgage. It is further stated that the mortgages were carried out long back and plaintiff has failed to carry out any challenge to the said mortgages. Other pleas are also raised.

16. It is settled law that at the time of carrying out amendments to the pleadings the merits and demerits of the proposed amendments are not to be gone into.

17. Reference in this context may be had to the judgement of the Supreme Court in ***Rajesh Kumar Aggarwal and Ors. vs. K.K. Modi and Ors.***, AIR 2006 SC 1647, where the court held as follows:

“19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.”

18. Hence, at this stage, it is not for this court to go into the correctness and falsity of the case as is sought to be made out in the amendments.

19. In this context reference may also be had to the judgment of the Supreme Court in the case of ***Revajeetu Builders and Developers vs. Narayanaswamy and Sons & Ors.*** (2009) 10 SCC 84. The Supreme Court held as follows:-

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) Whether the amendment sought is imperative for

proper and effective adjudication of the case;

- (2) Whether the application for amendment is bona fide or mala fide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.”

In my opinion, the proposed amendments are *bona fide*. The proposed amendments are necessary and proper for complete adjudication of the dispute between the parties. In the absence of such additions to the plaint the plaintiff would not be in a position to get full relief as is being sought. Merely getting relief from the court as presently sought may not constitute sufficient relief for the plaintiff. If the plaintiff were to succeed this court would pass appropriate declaration declaring that the plaintiffs have rights in the property/have an irrevocable license in their favour. However, if any such relief is granted by this court, it would be otiose in view of the fact that

the property already stands mortgaged to the proposed defendants No.2 to 7.

20. In view of the above, the present application is allowed.

IA. No.5173/2021

21. As noted above this application is filed under Order 1 Rule 10 CPC seeking to implead the proposed defendants No.2 to 7 to the plaint.

22. It is the case of the plaintiff that the defendant has subsequent to the filing of the suit mortgaged the entire property including the rights claimed by the plaintiff in the present suit to banks/financial institutions being proposed defendants No.2 to 7. Hence, the present application to implead defendants No.2 to 7.

23. In this context reference may be had to the judgment of the Supreme Court in the case of *Kasturi v. Iyyamperumal & Ors., (Supra)*. On the issue of addition of party, the Supreme Court held as follows:

“13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.”

24. It is clear from the facts of the above case that the proposed defendants No.2 to 7 are necessary and proper parties. Their presence is necessary to completely adjudicate upon and settle all questions involved in the suit.

25. I also cannot help noticing that when the matter was originally heard by a Co-ordinate Bench of this court based on which a judgment was passed

on 21.07.2020, it was vehemently pleaded by the defendant that there exists mortgages on the suit land and that no right of ownership, lease or license in perpetuity can be created in favour of the third parties/licensees unless the mortgagees are impleaded as parties. It was further pleaded that suit is bad for non-joinder of the necessary and proper parties. This court in its judgment dated 21.07.2020 had noted the said pleas of the defendant. Relevant portion of the said judgment dated 21.07.2020, reads as follows:

“87.At this stage, it will also be appropriate to note the objection of the defendant that since there exists mortgages on the suit land no right of ownership, lease or license in perpetuity can be created in favour of the third parties/licensees unless the mortgagees are not impleaded as parties. Therefore, the suit is bad for non-joinder of the necessary parties.”.

26. Clearly, in view of the pleas taken by the defendant in court, it does not now lie for them to plead that the proposed defendants No.2 to 7 are not necessary or proper parties. They cannot be permitted to resile from the submissions made before the Co-ordinate Bench of this court when the same matter was argued in the first round.

27. Accordingly, the present application is allowed. Defendants No.2 to 7 are impleaded to the present suit.

CS(COMM) 189/2020

Amended plaint if not filed, be filed within ten days. Thereafter, issue notice to the newly impleaded defendants No. 2 to 7, returnable for 29.09.2021.

JAYANT NATH, J.

SEPTEMBER 15, 2021/v