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

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Decision delivered on: 19.09.2024

+ **FAO(OS) 32/2023, CM Nos.10470-71/2023 & 20834/2023**

M/S ANIL SHARMA AND SONS

.....Appellant

Through: Ms Nivedita Sharma, Ms Suruchi Mittal, Mr Tarranjit Singh Sawhney and Ms Jasmeet Kaur, Advs.

versus

M/S NATIONAL SMALL INDUSTRIES
CORPORATION LTD & ORS.

.....Respondents

Through: Mr Sanjay Sharma Darmora, Mr Nitin Darmora and Mr Yoginder P. Uniyal, Advs.

+ **FAO(OS) 43/2023 & CM No.13904/2023**

NATIONAL SMALL INDUSTRIES
CORPORATION LTD

.....Appellant

Through: Mr Sanjay Sharma Darmora, Mr Nitin Darmora and Mr Yoginder P. Uniyal, Advs.

versus

M/S ANIL SHARMA AND SONS (HUE) THOUGH
ITS KARTA SH. ANIL SHARMA

.....Respondent

Through: Ms Nivedita Sharma, Ms Suruchi Mittal, Mr Tarranjit Singh Sawhney and Ms Jasmeet Kaur, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]



RAJIV SHAKDHER, J. (ORAL):

1. These are cross-appeals filed by the disputants against a common order dated 08.12.2022 passed by the learned Single Judge. The disputants are at cross-appeals with regard to the issues that were reframed *via* the impugned judgment and order.

2. To be noted, what was on record prior to reframing of issues *via* the impugned judgment and order were the issues which were framed *via* the order dated 07.05.2015 by the learned Single Judge.

3. The reframed issues, which have been culled out in paragraph 47 of the impugned judgment and order, read as follows:

“(i) *Whether defendant No.4 is liable to pay the due amount having stood as a guarantor for the loan taken by defendant No.1? If yes, then what amount? OPP*

(ii) *Whether Clause 6(h) of the Agreement dated 20th September, 1994 [Sic : 23.08.2012] is not binding on the defendants? OPD*

(iii) *Whether there is no cause of action against defendant No.4? OPD*

(iv) *Whether there is any privity of contract between the plaintiff and defendants No.5 to 8? OPP*

(v) *Whether defendants No.5 to 8 are liable to pay any amount to the plaintiff? If so, then what amount? OPP*

(vi) *Relief.”*

4. A perusal of the prayers made in the plaint and the way the suit has been filed by the National Small Industries Corporation Ltd. [NSIC], i.e. the plaintiff, is clearly indicative of the fact that the action is not a mortgage suit. For greater clarity, the prayers made in the plaint are set forth hereafter:

“(i) *pass a decree in favour of the Plaintiff and against Defendants No.1 to 8 jointly and severally as under:*

a. *for a sum of Rs 9,84,07,792.39 (Rupees Nine Crore Eighty Four Lacs Seven Thousand Seven Hundred Ninty Two & Paise Thirty Nine only) against Defendants 1 to 4;*

b. *for a sum of Rs.3,52,62,754.08 (Rupees Three Crores Fifty Two Lakhs Sixty Two Thousand Seven Fifty Four & Paise Eight only) against Defendant No. 5;*



- c. for a sum of Rs.1,38,46,777.54 (Rupees One Crore Thirty Eight Lakhs Forty Six Thousand Seven Hundred Seventy Seven & Paise Fifty Four only) against Defendant No.6;
- d. for a sum of Rs.54,50,938/-(Rupees Fifty Four Lakhs Fifty Thousand Nine Hundred Thirty Eight only) against Defendant No.7;
- e. for a sum of Rs.41,56,450/- (Rupees Forty One Lakhs Fifty Six Thousand Four Hundred Fifty only) against Defendant No.8...”

5. We may note that the record does indicate that NSIC and defendant nos.1 to 3 had entered into a settlement agreement dated 23.08.2012.

5.1 Under the said settlement agreement, the aforementioned defendants i.e., defendant nos. 1 to 3 were required to pay to NSIC Rs.8.55 crores.

5.2 There is no dispute that NSIC received Rs.6.50 crores. There is also no dispute that the balance amount, i.e., Rs.2.05 crores, which was agreed to be paid on or before 31.12.2012, was not paid, which resulted in a default.

6. We may note that the appellant in before us in FAO(OS) 32/2023 i.e., an entity called Anil Sharma and Sons [hereinafter referred to as the “entity”] has been arrayed as defendant no.4 in the suit action.

7. Ms Nivedita Sharma, learned counsel, who appears on behalf of the entity (i.e., defendant no.4 in the suit action), says that since the suit filed by NSIC is not a mortgage suit, NSIC’s insistence that issue no.1, as framed on 07.05.2015, should have been retained is completely erroneous.

7.1 In other words, it is Ms Nivedita’s contention that the learned Single Judge *via* the impugned judgment and order rightly deleted issue no.1 which was framed, *albeit* ex-parte, on 07.05.2015.

8. The entity/defendant no.4 had carried the order dated 07.05.2015 in appeal. The coordinate bench, *via* the judgment dated 17.04.2017, set aside the order whereby the entity/defendant no.4 was proceeded *ex-parte*.

8.1 However, the other part of the order dated 07.05.2015, which



concerned framing of issues, was not disturbed.

9. That said, as indicated above, since the matter was carried to the division bench and the division bench, *via* the order dated 17.04.2017 gave an opportunity to the entity/defendant no.4 to agitate reframing of issues, in particular, the issue concerning alleged creation of equitable mortgage, the matter was remanded and the learned Single Judge passed the impugned judgment and order, *qua* which the disputants preferred the above-captioned appeals.

10. The backdrop of the argument of Ms Nivedita is that the suit action was not a mortgage suit claiming foreclosure of the subject property.

10.1 Furthermore, Ms Nivedita says that since the entity/defendant no.4 did not furnish any guarantee, issue no.1 framed by the learned Single Judge *via* the impugned judgment and order shall also be deleted.

10.2 Besides this, Ms Nivedita says that issue no.2 framed by the learned Single Judge *via* the impugned judgment and order should also be deleted as the entity/defendant no.4 was not a party to the settlement agreement and the consent decree which followed.

11. On the other hand, Mr Sanjay Sharma Darmora, learned counsel, who appears on behalf of NSIC i.e., the appellant in FAO(OS) 43/2023, does concede unhesitantly that the suit action is not a mortgage suit.

12. It is Mr Sharma's contention that the suit action, as framed, is only a recovery suit.

13. Therefore, according to Mr Sharma, although an appeal has been filed against the impugned judgment and order dated 08.12.2022, including issue no.1 which resulted creation of equitable mortgage concerning subject property *via* the order dated 07.05.2015, he says, on instructions, that he



does not wish to press the said aspect of the matter.

14. It is also conceded by Mr Sharma that the entity /defendant no.4 did not stand as a guarantor and, therefore, issue no.1 framed *via* the judgment and order dated 08.12.2022 was erroneous.

15. It is, however, Mr Sharma's contention that the learned Single Judge has erred in making observations in paragraph 31, which conflicted with framing of issue no.4, i.e., "*Whether there is any privity of contract between the plaintiff and defendants No.5 to 8? OPP.*" For convenience, we would like to set forth the observations made by the learned Single Judge in paragraph 31 of the impugned judgment and order:

"31. In this context it may also be observed that plaintiff itself has stated that the privity of contract was between defendant No.1 and defendant No.5 to 8 respectively and the plaintiff only had to receive the money which it had given to defendant No.1 by way of loan to secure its contracts with defendant No.5 to 8. There is no privity of contract as per the averments of the plaintiff between it and defendant No.5 to 8 and the amounts due and payable, if any, by defendant No.5 to 8 were in fact to defendant No.1, who in turn was liable to make the payments to the plaintiff. In so far as defendant No.5 to 8 are concerned, there is no privity of contract and no independent cause of action disclosed against defendant No.5 to 8."

16. In our opinion, there is a clear dissonance between the observations made in paragraph 31 of and the aforementioned issue i.e., issue no.4 framed by the learned Single Judge.

17. According to us, the said observations cannot stand. We may also note that in the backdrop set forth above, issue no.1 which was framed *via* the impugned judgment and order dated 08.12.2022, needs to be deleted.

17.1 Likewise, issue no.2 framed *via* impugned judgment and order dated 08.12.2022 should also be deleted.

18. The reason that we want to order deletion of issue nos.1 and 2 is,



briefly, the following:

(i) Insofar as the entity/defendant no.4 is concerned, it is not even a case of NSIC that it stood as a guarantor.

(ii) As regards issue no.2, admittedly, the entity/defendant no.4 was not a party to the said settlement agreement dated 23.08.2012, which morphed into a consent decree dated 04.09.2012.

19. However, as indicated above, the position which is not disputed under the settlement agreement dated 23.08.2012 is that NSIC did not receive the entire agreed amount.

19.1 The result of the same would be that, in our opinion, NSIC should be able to continue with its suit against defendant nos.4 to 8. This aspect is covered, in our view, in the reframed issue no.3, which reads as follows:

“(iv) Whether there is no cause of action against defendant No.4? OPD”

19.2 This issue has been framed, as it appears, by the learned Single Judge as one of the contentions advanced on behalf of the entity/defendant no.4 is that once the settlement was arrived and it is morphed into a consent decree, no cause of action survives for recovery of money against entity/defendant no.4.

19.3 This is an issue which the learned Single Judge will adjudicate as per law.

20. Therefore, the impugned judgment and order dated 08.12.2022 is varied to the following extent. In other words, the issues *qua* which adjudication will take place in the suit action will be the following:

“(i) Whether there is no cause of action against defendant No.4? OPD

(ii) Whether there is any privity of contract between the plaintiff and defendants No.5 to 8? OPP

(iii) Whether defendants No.5 to 8 are liable to pay any amount to the plaintiff? If so, then what amount? OPP



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(iv) *Relief.*”

21. The appeals are disposed of in the aforesaid terms.
22. Consequently, the pending applications shall stand closed.
23. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

AMIT BANSAL, J

SEPTEMBER 19, 2024

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