(2005) 02 DEL CK 0107

In the Delhi High Court

Case No : IA No''s. 6274 and 8265/04 in CS (OS) No. 1510 of 1996

Can Fin Homes Limited APPELLANT

Vs

Mitre Specialised Services (India) Pvt. Ltd. RESPONDENT

Date of Decision : 11-02-2005

Acts Referred:

Citation : (2005) 117 DLT 639 : (2005) 80 DRJ 739

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Peeyoosh Kalra and Sonal Sehgal, for the Appellant; Jagjit Singh, for Defendant No. 2 and Asit Kumar Roy, for Defendant Nos. 1, 3 and 4, for the Respondent

Judgement

Pradeep Nandrajog, J.—By and under is NO. 6274/2004 defendant No. 2 seeks to amend written statement filed, by incorporating paras 4 and 5 to the existing paras 1 to 3 of the preliminary submissions and to amend paras 6 and 10 of the existing written statement as proposed in paras 3 and 4 of the application.

2. By and under is No. 8265/2004, plaintiff prays for a decree on admission purported to be made in the written statement by defendant No. 2.

3. Suit under Order 34 CPC is for sale of the mortgaged property bearing No. 878, East Park Road Karol Bagh, New Delhi for recovery of Rs. 95,63,550/- being the amount due as per the plaintiff as on the date of the suit. Case of the plaintiff is that defendant No. 1 is the borrower. Defendant No. 2 is the owner of the property in question. Defendants 3 to 5 are stated to be guaranteers. As per the plaintiff, defendants 1 and 2 entered into a memorandum of understanding on 1.7.1988 whereunder property of defendant No. 2 was to be developed by defendant No. 1 on the terms and conditions contained in the memorandum of understanding. As funds were required, defendants 1 to 3 approached the plaintiff and requested for financial assistance for purposes of development of the property. Defendant No. 2 agreed to mortgage the property in favor of the plaintiff to secure repayment of the loan. plaintiff sanctioned a loan of Rs. 48 lacs

to defendant No. 1 for development of the property and disbursed a sum of Rs. 40 lacs. As per the plaintiff, a loan agreement dated 23.1.1989 was executed.

4. As per the plaintiff there is default in repayment of the loan and hence the suit.

5. In the written statement filed by defendant No. 2, in response to the averments made in para 6 of the plaint, defendant No. 2 has pleaded as under:-

"6. That para No. 6 of the reply as stated is not correct. It is denied that the Defendant No. 2 had made any request for any loan. In fact, from the document filed by the plaintiff itself it is clear that the loan was sanctioned only on the request of the Defendant No. 1 and the answering Defendant had never requested for any loan and the document filed by the plaintiff would also show that all the document including the guarantee document has been signed by the Defendants. Therefore, the answering Defendant has got no liability towards the plaintiff. In fact, the loan has been sanctioned in the name of the Defendant No. 1 Therefore the answering Defendant had got no liability to make any payment."

6. In response to para 10 of the plaint, in para 10 of the written statement, defendant No. 2 has stated as under:-

"10. That para No. 10 of the reply is admitted to the extent that the answering Defendant had deposited a title deed with the plaintiff. It is however submitted that some papers were got signed by the Defendant No. 4 only to expedite the loan and in any event as the loan has been sanctioned in the name of the Defendant No. 1 Therefore the answering Defendant is not liable to make any payment to the plaintiff.

7. In respect of the memorandum of understanding dated 1.7.1988 between defendant No. 2 and defendant No. 1 and the loan taken by defendant No. 1 from the plaintiff and certain documents being signed by defendant No. 2, in para 3 of the written statement, defendant No. 2 has pleaded as under:-

"That the answering Defendant has unnecessarily been made party to the present suit as answering Defendant has got no liability towards the plaintiff. In fact, even if any loan has been sanctioned the same has been sanctioned in the name of the Defendant No. 1 and as per the averments contained in the Suit also. It is clear that defendant No. 1 had executed the loan documents. It is the Defendant No. 1 who is liable to make the payment to the plaintiff if any, and the answering Defendant is not at all liable to make any payment."

8. Proposed amendments by the defendant No. 2 seek to incorporate paras 4 and 5 in the preliminary objections as under:-

"4. It is denied that answering Defendant ever created any mortgage of property bearing No. 878, East park Road, Karol Bagh, New Delhi. There is no privity of contract between plaintiff and Defendant No. 2. Defendant No. 2 did not take any loan. Defendant No. 2 did not execute or sign any Deed of Guarantee. Resultantly, suit as against Defendant No. 2 is incompetent in law. Presuming for sake of arguments, though not admitting that there is any mortgage of property as alleged, yet said alleged mortgage is illegal because:

a) Defendant No. 2 did not execute any Deed of Mortgage qua said property. In the absence of any deed of mortgage or a registered document, there can be no mortgage.

b) Alternatively, even if it is pleaded by plaintiff that there was any oral contract of mortgage, and/or any deposit of title deeds, same is absolutely incorrect because Defendant No. 2 had never gone in to deposit title deeds of property as alleged and/or to create any oral transaction of mortgage as alleged. Further more, plaintiff is not authorized in law to accept or to create any oral mortgage by deposit of title deeds.

c) In any of the eventuality, there is no lawful or valid or enforceable mortgage as alleged by plaintiff. Resultantly, the property carries no charge. Resultantly plaintiff is duty bound to return original documents of title of the said property unto the answering Defendant.

5. Answering Defendant is not liable to pay suit amount either towards principal or interest. Plaint does not disclose the correct factual status for the principal amount and/or towards interest accrued thereupon. plaintiff cannot act both way. Once the plaintiff has chosen to file a suit under order 34 CPC, it is bound to disclose the amount of interest, accrued/fallen due, mode of calculation of interest, rate of interest etc. etc. In any case, it is submitted that plaintiff''s figures disclosed after allegedly computing interest are patently wrong and denied. plaintiff is not entitled to charge interest @ 16.5% per annum compounded on monthly basis. Same is illegal and/or otherwise is forbidden by law and/or otherwise is not permissible as per directives Reserve Bank of India. The Hon''ble Court shall observe that plaintiff itself has admitted in Plaint in one paragraph stating that rate of interest is 16.5% per annum compounded monthly basis. Charging and claiming of interest on monthly compounding basis is otherwise also opposed to public policy and hence is illegal. Even otherwise, it is settled proposition of law that in case of mortgage suit, interest livable or chargeable cannot exceed 6% per annum. Order 34 CPC is a complete Code in itself. Neither Sec. 34 CPC nor Interest Act is applicable to a suit under Order 34 CPC. Therefore, Claim of interest made by plaintiff in its suit is bad in law. In any case, it is submitted that claim of the suit is not tenable. Present suit for mortgage is wholly incompetent both on facts and law and as such merits dismissal."

9. Further amendment proposed is to make the following the additions in existing para 6 of the written statement:-

"In fact no mortgage was ever created by answering defendant in favor of plaintiff."

10. Further proposed amendment seeks to insert the word ''not'' in the first line

of para 10 of the written statement so that the same reads as under:-

"That para No. 10 of the reply is not admitted to the extent......."

11. Learned counsel for the plaintiff Mr. Peeyoosh Kalra opposed the proposed amendment on the ground that the same seeks to withdraw an admission made by defendant No. 2 in the written statement.

12. A perusal of the existing written statement filed by defendant No. 2 would show that defendant No. 2 has denied having joined in any request made by defendant No. 1 to the plaintiff for the loan. Defendant No. 2 has specifically pleaded with clarity that the loan document filed by the plaintiff evidences that the loan was sanctioned only at the request of defendant No. 1. He has categorically pleaded that the loan was sanctioned only in the name of defendant No. 1. Further defendant No. 2 has categorically pleaded that he had no concern with the loan agreement dated 23.1.1999.

13. It is further pleaded in the written statement that the plaintiff cannot take action against the property of defendant No. 2 because of default by defendant No. 1.

14. A perusal of the existing para 10 of the written statement would reveal that the second sentence commencing from ""It is further submitted...." is obviously intended to clarify the preceding sentence. Preceding sentence of para 10 of the written statement is to the effect that the defendant admits having deposited the title deed of the property with the plaintiff. Learned counsel for defendant No. 2 urged that inadvertently, the word ''not'' was omitted before the word ''admitted'' in the first sentence of para 10. Counsel stated that if defendant No. 2 was to admit having deposited the title deed of his property with the plaintiff, there was not need of the second sentence, which clarifies the first sentence in para 10 of the written statement.

15. A perusal of the existing written statement filed by defendant No. 2 shows that the said defendant was joining issues with the plaintiff on the score that he had no concern with the loan.

16. As held by this court in the decision Mohd. Shamim Farooqi and Another Vs. Delhi Wakf Board, , amendment can be allowed notwithstanding that it withdraws an admission made by a party. As clarified by their Lordships of the Supreme Court, in the decision B.K.N. Narayana Pillai Vs. P. Pillai and Another, , amendments which are in consistent and contrary to the admissions made and are mutually destructive of the facts alleged cannot be allowed to be incorporated by means of amendment to the pleadings. As further explained in the decision P.A. Ahammed Ibrahim Vs. The Food Corporation of India, , an amendment which seeks to completely substituted and set up and entirely new case cannot be permitted.

17. Amendments proposed to be incorporated by defendant No. 2 do not fall within the prohibitions as noted above.

18. Proposed amendments are in harmony with tenor of the written statement filed. In the specific context of para 10 of the existing written statement as noted above, there appears to be a typographic omission of the word ''not'' before the word ''admitted'' in the first sentence of para 10 of the written statement.

19. is No. 6274/2004 is accordingly allowed, subject to cost in sum of Rs. 10,000/- to be paid to the plaintiff. Amended written statement filed along with the application is taken on record.

20. Since is No. 8265/2004 sought to take benefit of existing para 10 of the original written statement, and since defendant''s application for amendment has been allowed, considering the amended written statement, there is no question of their being any admission.

21. is No. 8265/2004 is accordingly dismissed.