(1991) 05 DEL CK 0025

In the Delhi High Court

Case No : I.A. No. 2526 of 1990 in Suit No. 945 of 1990

Union Bank of India APPELLANT

Vs

M/s. Logic Systems Pvt. Ltd. and others RESPONDENT

Date of Decision : 31-05-1991

Acts Referred:

Citation : AIR 1992 Delhi 153

Hon'ble Judges : M.L. Verma, J

Bench : Single Bench

Advocate : Pramod Aggarwal with Mrs. Vasudha Indurkar and Sunil Goel, for the Appellant; Swatantra Kumar with Ms. Geeta Mittal and H.L. Dassi, for the Respondent

Judgement

1. This is an application by the plaintiff under 0. 2, R. 2 of the CPC (for short''CPC), seeking leave to omit the relief for enforcement of its mortgage rights in respect of Flat No. 3, Datta Apartments Khar, Bombay (for short the mortgaged property) from the instant suit and to institute appropriate proceedings in the Court of competent jurisdiction to enforce its said rights in respect of the said property. It has also been prayed in this application that necessary leave be granted to the plaintiff to omit including in this suit, the claim of the plaintiff under the various bank guarantees issued by the plaintiff for and on behalf of defendant No. I in favor of various parties, and to institute a suit for recovery of its dues if and when necessary, in the event of the bank guarantees being invoked and the payment of amount claimed therein.

2. It is stated in this application that defendant No. I had equitably mortgaged the said property with intent to create security for the dues of defendant No. I and that this charge was got registered in the office of the Registrar of Companies of Delhi and Haryana, New Delhi. It is alleged that since the mortgaged property is situated in Bombay, Therefore, the plaintiff cannot claim the relief under the mortgage against the said defendant in the suit in this Court as this Court does not have the jurisdiction to grant such a relief. It is also

alleged that, that can only be done by filing appropriate proceedings in the Court of competent jurisdiction in Bombay where the said mortgaged property is situated and that the plaintiff intended to do so.

3. In the application it is also stated that the plaintiff had issued various bank guarantees for and on behalf of defendant No. I in favor of various parties; some of which are still alive; and the plaintiff bank has not received any demand till date invoking them. In the event of such guarantees being invoked, the plaintiff would have to make payment under the same. Consequently, the plaintiff bank will also become entitled to recover those amounts from the defendants. It is, however, pointed out that the cause of action in respect of the bank guarantees had not accrued till the filing of the application and, Therefore, no claim in respect thereof was includible in this Suit.

4. The plaintiff has categorically stated in his application that it was not intentionally giving up its rights under the mortgage and the claims under the bank guarantee. In effect, the plaintiff/ applicant is seeking leave under 0. 2, R. 2, sub-rule (3), CPC to enforce its rights under the mortgage and its entitlement to the relief as a mortgagee.

5. At this stage a few facts material for the disposal of this application may be noticed. The plaintiff filed the above suit on 6-3-90 for the recovery of Rs. 1,17,90,025.86 p. One of the prayers in the plaint is that leave under 0. 2, R. 2 of C.P.C. may also be granted to institute a suit or such other proceedings in appropriate Court having jurisdiction over the mortgaged property. On 26-3-90 this application under 0. 2, R. 2, C.P.C. was filed. The suit as well as this and other applications came up for hearing for the first time on 29-3-90. It may also be noticed that in paragraph 34 of the plaint it has been stated that the mortgaged property was equitably mortgaged by deposit of title deeds and that the rights under the mortgage were not being claimed because this Court did not have jurisdiction to grant the relief under the said mortgage. The plaintiff also reserved its rights to move the Court having jurisdiction over the mortgaged property, to enforce their rights under the mortgage. The plaintiff has also undertaken to give due credit to the defendants of the amounts realised by them from the said property.

6. Mr. Pramod Aggarwal, learned counsel for the plaintiff/ applicant, argued in support of this application. He urged that although the instant suit had to be filed in Delhi; the relief in respect of the mortgaged property could not be included in this suit, in view of the provisions of S. 16(d), C.P.C. He submitted that a separate mortgage suit under 0. 34, C. P.C. will have to be filed in Bombay. He urged that this Court did not have jurisdiction to grant the relief based on the rights of the plaintiff bank as a mortgagee in respect of the mortgaged property in Bombay. Mr. Aggarwal urged that the relief claimed in this Suit was against the defendants in person for a money decree and for enforcement of hypothecation and pledged rights. Another relief could be claimed by the bank against the mortgaged property. Mr. Aggarwal fairly conceded that in view of the Explanation

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to 0. 2, R. 2, C.P.C., the cause of action was the same for this suit as well as for the mortgage suit that the plaintiff may file. He, however, urged that the relief in this suit is distinct and different from the relief to be sought in the mortgage suit. He submitted that he could not seek the relief in respect of the mortgaged property from this Court and, Therefore, there was no question of seeking the said relief in the instant suit.

7. Mr. Aggarwal relied upon the judgment of Allahabad High Court in the case of Smt. Aziz Fatima Vs. Munshi Khan, , in support of his contention that another suit would not be barred under 0. 2, R. 2 if the Court in which an earlier suit was filed did not have jurisdiction to try the suit and grant the relief sought in the second suit. He also cited the judgment of the Supreme Court in the case of Sidramappa Vs. Rajashetty and Others, , in support of his contention that if in an earlier suit the plaintiff could not have claimed the relief which is sought in the subsequent suit then the subsequent suit is not barred by 0. 2, R. 2, C.P.C. Mr. Aggarwal relied upon another judgment of the Supreme Court in the case of The State of Madhya Pradesh Vs. The State of Maharashtra and Others, in support of his contention that since the right to sue on the basis of bank guarantee had not accrued, there was no question of seeking any such relief in the instant suit. Besides, he submitted that the cause of action under the bank guarantees is quite different from the one in the instant suit.

8. Mr. Aggarwal submitted that to recover its debts from the defendants, one way for the plaintiff was to obtain a decree in this suit, sell the hypothecated and pledged goods and realise the debt from the defendants personally. The other way for Realizing the debt was by enforcing its rights under the mortgage and the security. Mr. Aggarwal submitted that the claim in the suit was for a decree for the amounts due, outstanding and payable to the bank from the defendants and the relief for achieving the object of recovering the amounts could be through this suit and through the mortgage suit against the mortgaged property. He submitted that two suits on the same cause of action for the same amount were maintainable; one seeking a money decree, another seeking a mortgage decree. In this connection he referred to the judgment of this Court in the case of Citibank N.A. Vs. Juggilal Kamlapat Jute Mills Co. Ltd., .

9. Mr. Swatantra Kumar, learned counsel for the non-applicant, opposed this application. His opposition is broadly as follows:

(i) That the'' application in question is barred under 0. 2, R. 2, C.P.C. because at the time of filing of the suit no leave was sought or granted. Consequently the leave sought cannot be granted now under the said provision and the application ought to be dismissed as not maintainable.

(ii) That even though under S. 16(d), C.P.C., a mortgage suit would not normally be maintainable in a Court in Delhi and the Court where the Immovable property is situate would have the jurisdiction to entertain such a suit but this was subject to the proviso to S. 16, C.P.C.

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(iii) That the relief to be sought in respect of the Immovable property by the plaintiff bank as the mortgagee can be entirely obtained through the personal obedience of mortgagor/ defendant No. 1, because if the mortgagor fails to pay the decretal amount under the preliminary decree within the time allowed then the sale of the mortgaged property can be registered in Delhi like in the ''Presidency Towns''.

(iv) That admittedly the mortgagor/defendant No. I actually and voluntarily resides and carries on business in Delhi, Therefore , this Court has jurisdiction to grant the relief under the mortgage also.

(v) That the relief under the mortgage could and should have been sought in the instant suit and since the plaintiff has omitted to do so, Therefore, it has abandoned the same and cannot now seek liberty to institute another suit in another Court in respect of the mortgaged property on the ground that the said property is not situated within the local limits of the jurisdiction of this Court.

10. Mr. Swatantra Kumar submitted that the cause of action based on the mortgage of the Immovable property is also included in this suit, although no relief has been claimed on the basis of the mortgage. In this connection a reference was invited to paragraph 34 of the plaint. He urged that if the mortgage suit is to be filed on a different cause of action then there is no question of seeking any leave under 0. 2, R. 2, C.P.C. And if it was based on the same cause of action then for the aforesaid reasons, according to Mr. Swatantra Kumar, the application deserved to be dismissed. A reference was invited to the contents of paragraphs 3 and 5 of this application in this connection.

11. Mr. Swatantra Kumar fairly conceded that but for his argument, noticed in subpara 9(i) above if the proviso to S. 16, C.P.C. is not applicable to the case then this Court would not have jurisdiction to try the suit seeking relief based on the mortgage of the property. In that event the plaintiff would be entitled to the leave sought.

12. Mr. Swatantra Kumar referred to the judgment of the Supreme Court in the case of Kewal Singh Vs. Smt. Lajwanti, . He submitted that in paragraph -six of the judgment, the Supreme Court had noticed with approval the principle summarised by the Privy Council in the case of AIR 1949 78 (Privy Council) with regard to the correct test in cases falling under 0. 2, R. 2 and the meaning of the words ''cause of action''. He pointed out that it had been noticed there that if the claim in the new suit was founded on a cause of action distinct from that which was the foundation of the former suit then it would not be a case falling under 0. 2, R. 2. Mr. Swatantra Kumar also relied upon the judgment of the Rajasthan High Court in the case of the The State of Rajasthan and Others Vs. Rao Dhir Singh and Others, , wherein it was held that cause of action for recovery of amount in a later suit was covered by the cause of action in the previous suit for injunction and, Therefore, the claim for the recovery of the amount was barred under 0. 2, R. 2.

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13. With reference to the judgment in Kewal Singh Vs. Smt. Lajwanti, and in the case of Citibank N.A. Vs. Juggilal Kamlapat Jute Mills Co. Ltd., Mr. Swatantra Kumar submitted that in case the proposed mortgage suit or any suit based on any bank guarantee was founded on a separate cause of action, no permission was required to be taken under 0. 2, R. 2, C.P.C. According to Mr. Swatantra Kumar, in this view, the application was misconceived. Learned counsel also referred to the judgment of the High Court of Andhra Pradesh in the case of Arikatla Venkata Swami (died) and Others Vs. Mavillapalli Veeraiah and Others, , and submitted that Order Rule 2(3), C.P.C. gets attracted only where separate reliefs could be claimed in one suit and is inapplicable to a suit where a single relief could be granted in regard to one claim. This is so in view of the provisions of Order 2, Rule 2(I) whereunder it is forbidden to spilt up one claim.

14. Mr. Swatantra Kumar also cited a judgment of Calcutta High Court in the case of Bimal Kumari Vs. Asoke Mitra and Another, whereunder the vendor covenanted to execute and register a deed of conveyance and simultaneously deliver possession to the purchaser. In this case the purchaser instituted a suit for specific performance of the agreement for sale and omitted to sue for possession. Leave was sought under 0. 2, R. 2 to sue for possession. This was rejected by holding that the cause of action for possession and for the specific performance was the same and on those very averments as made in the plaint, the plaintiff/ purchaser would be entitled to ask for possession also, as he need not allege anything more nor prove anything else.

15. Two more judgments were relied upon by Mr. Swatantra Kumar; one in the case of The Central Bank of India Ltd. Vs. Nusserwanji H. Bharucha, ; and another in the case of AIR 1926 313 (Nagpur) . In Central Bank''s case (supra) an equitable mortgage was created in Bombay by persons residing in Bombay, although in respect of property in Baroda. It was held that the Bombay High Court could entertain the suit in respect of this property and enforce the equitable mortgage of the property. It was also held that the Bombay High Court could pass an order of the sale of property in the event of the mortgagor failing to pay the mortgage amount within the time provided in the decree. In this case it was held that such a relief was a relief in personam. This judgment was based on the English Law. In Narainadin''s case (supra) the facts were peculiar. However, it was held that a suit seeking that the defendant should execute and register a deed of surrender of occupancy holding, or pay back to the plaintiff the consideration for the said purpose, was triable in the Court within whose jurisdiction the defendant resides though the property is situate outside its jurisdiction.

16. With reference to these two judgments Mr. Swatantra Kumar submitted that this Court has jurisdiction to entertain the suit and grant relief relating to the equitable mortgage. He submitted that in view of the proviso to S. 16, C.P.C., the decree, if any, passed and the relief on the basis of the equitable mortgage can be entirely obtained through the personal obedience of the defendant No. 1.

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Relying upon the judgment of the Calcutta High Court in the case of Bimal Kumari Vs. Asoke Mitra and Another, Mr. Swatantra Kumar urged that since at the time of the filing of the suit no liberty was sought or granted so the application was barred by Order 2, Rule 2.

17. In reply Mr. Aggarwal submitted that the argument, that the application was barred was untenable both on facts and in law. He submitted that a plain reading of 0. 2, R. 2 made clear that an application seeking leave of the Court need not be filed on the same date when the plaint is filed and the suit instituted. He further submitted that in any case the plaint and the application were heard on the same date even though the application was not filed on the same date as the plaint. He pointedly referred to the plaint to submit that leave of the Court had been sought in the plaint itself and, Therefore, it was not factually correct to contend that the plaintiff had abandoned its right to claim the relief under the mortgage. He submitted that the contention; that the leave should have been sought simultaneously with the institution of the suit otherwise 0. 2, R. 2(3) cannot be invoked; was not tenable. For this he relied upon the judgment of the Lucknow Bench of the Allahabad High Court in the case of Sardar Balbir Singh Vs. Atma Ram Srivastava, . In this case it was held that Sub-rule (3) of 0. 2, R. 2 did not specify the stage when the leave of the Court should be sought. It is noticed in this judgment that in S. 43 of the CPC of 1882 the words used were "with the leave of the Court obtained before the first hearing". These words have been omitted in the CPC of 1908. Therefore, leave may now be sought and granted at any stage of the suit.

18. With regard to the argument that this Court has jurisdiction to grant the relief under the mortgage, Mr. Aggarwal submitted that the proviso to S. 16, C.P.C. was not applicable to this case. He submitted that the relief to be sought on the basis of the equitable mortgage could not be obtained entirely through the personal obedience of the mortgagor/defendant No. 1. He submitted that if the relief was obtainable partly by the personal obedience of the defendant then the proviso to S. 16, C.P.C. would not apply. He urged that even if the sale deed in respect of the mortgaged property could be executed and registered in Delhi that would not satisfy the requirement of the said proviso. Mr. Aggarwal pointed out that local laws applicable to Bombay, where the mortgaged property is situate, had to be complied with before the sale deed was executed. This can only be done in Bombay. He pointed out that permission may be required under the Urban Land (Ceiling and Regulation) Act 1976 (for short ULCA) for which steps will have to be taken before the Competent Authority under ULCA in Bombay. He reiterated that even though the cause of action may be the same, the leave was being sought under 0. 2, R. 2, sub-rule (3), C.P.C. on the basis of a separate and distinct relief to which the plaintiff was entitled because of the equitable mortgage in respect of mortgaged property. He urged that a suit based on a mortgage under 0. 34, C.P.C. is not covered by the proviso to S. 16, C.P.C. He reiterated that it is only the Court having jurisdiction over the place where the immovable property is situate that will have the jurisdiction to entertain the

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mortgage suit u/s 16(d) and Order 34, C.P.C. and grant the relief based on the rights under the mortgage.

19. Mr. Aggarwal vehemently argued that the relief sought must be entirely obtainable through the personal obedience of the defendant without the defendant having to go outside the jurisdiction of the Court granting the relief and that such a relief should be available entirely through the personal obedience of the defendant without the defendant having to go outside the jurisdiction of the Court. In this case he submitted that it is not possible that the relief to be sought under the mortgage was entirely obtainable through the personal obedience of the defendant without the defendant or its nominee having to go to Bombay.

20. 1 am of the opinion that the argument of Mr. Swatantra Kumar as noticed in paragraph 9(i) above that the application is barred under 0. 2, R. 2 because no leave was sought simultaneously with the filing of the suit or obtained at the first hearing of the suit does not have merit. I am in respectful agreement with the view expressed in Sardar Balbir Singh Vs. Atma Ram Srivastava, . The argument that the plaintiff had abandoned its right to relief under the mortgage is also without merit and is rejected. I hold that the application is maintainable. The judgment of the Supreme Court in the case of Kewal Singh Vs. Smt. Lajwanti, is of no help to the non-applicants because there is no dispute that the mortgage suit would also be based on the same cause of action. The judgment of the Andhra Pradesh High Court in the case of Arikatla Venkata Swami (died) and Others Vs. Mavillapalli Veeraiah and Others, actually supports the case of the applicants instead of being helpful to the defendants because leave has been sought to institute the mortgage suit for a separate and distinct relief to which the plaintiff is entitled as mortgagee of the mortgaged property. I am also of the opinion that the other three judgments cited on behalf of the defendants as noticed in paragraphs 14 and 15 above also do not help the defendants.

21. There appears to be merit in the arguments of Mr. Aggarwal that the proviso to S. 16, C.P.C. would become applicable only if the relief sought was entirely obtainable through the personal obedience of a defendant without the defendant having to go out of the jurisdiction of the Court for the said purpose. Obedience must be such as the defendant could render without going beyond the jurisdiction of the Court where he resides or works for gain or carries on business. This is because the said proviso provides for residence, business or work as well as obedience of the defendant for obtaining the relief within the Jurisdiction of the same Court. In this case, it may or may not be necessary for seeking any permission from the local authorities or under ULCA in Bombay but even after the execution of the sale deed, possession of the mortgaged property would have to be handed over to the purchaser by going to Bombay. Therefore, I am of the opinion that proviso to Section 16, CPC is not attracted on the facts of this case. The result is that this Court does not have the jurisdiction to grant relief based on the mortgaged property for which the plaintiff has to be granted

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leave to institute proceedings in Bombay.

22. The arguments of Mr. Aggarwal that a suit based on mortgage under Order 34, CPC is not covered by the proviso to Section 16, CPC is difficult to accept as being a correct proposition of law. However, a perusal of Order 34, Rule 14 makes it clear that where a mortgagee has obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgage property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and that he may institute such a suit notwithstanding anything contained in Order 2, Rule 2, CPC. It is obvious, Therefore, that even if the plaintiff obtains a money decree in this suit, it will not be able to sell the mortgaged property in view of the embargo under Order 34, Rule 14. For doing that it will have to institute a suit for the sale of the mortgaged property subsequent to the money decree, if any, that may be passed in its favor; and such a suit can be filed as per Order 34, Rule 14 notwithstanding the provisions of Order 2, Rule 2.

23. The above view finds support in the judgment of a Division Bench of the Patna High Court in the case of Bank of Bihar Ltd. Vs. Omitave Chattarji and Another, wherein it has been held that by reasons of Rule 14, of Order 34, the provisions of Rule 15 apply to charges created by deposit of title deeds. The Patna High Court held in that case that a charges may bring a suit to recover money charged on an immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of the decree. It was also held in that case that Rules 14 and 15 of Order 34 are exceptions to the general rule laid down in Order 2, Rule 2. 1 am in respectful agreement with the decision of the Patna High Court. Therefore, also the plaintiff would be entitled to institute a separate suit for which leave is being sought.

24. Lastly, as regards the leave sought in respect of the bank guarantees it is the case of the plaintiff itself that firstly, the cause of action in respect thereof has not accrued and secondly, that it would be a separate cause of action. Consequently, the provisions of Order 2, Rule 2 do not apply and there is no need for any leave to be granted in respect of the bank guarantees. It is, however, made clear that the plaintiff would be entitled to institute such proceedings as may be permissible in law in the event of the plaintiff having to make payment on the basis of the bank guarantees given by it to various parties at the instance of defendant No. 1.

25. With the above observations the present application is partly allowed. The plaintiff is granted leave to omit from this suit, the relief based on the mortgaged property. No leave need be granted qua the bank guarantees for the reasons noticed above. This 1. A. stands disposed of with no orders as to costs.

26. Application partly allowed.

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