2022 INSC 713

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3703-3750 OF 2022

ASIAN HOTELS (NORTH) LTD. ...APPELLANT(S)

VERSUS

ALOK KUMAR LODHA & ORS. ...RESPONDENT(S)

J U D G M E N T

M.R. SHAH, J.

1.0. As common question of law and facts arise in this group of appeals and as such arise out of the impugned common judgment and order passed by the High Court, all these appeals are decided and disposed of together by this common judgment and order.

2.0. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 15.09.2021 passed by the High Court of Delhi in respective applications in respective Commercial Suits under Order 1 Rule 10 and Order 6 Rule 17 of the Code of Civil Procedure, by which, all the aforesaid applications submitted on behalf of the original plaintiff, the High Court has allowed the said applications and has permitted the original plaintiff to amend the respective suits and has also ordered impleadment of mortgagees (Banks), original defendant no.1 - Asian Hotels (North) Limited has preferred the present appeals.

3.0. For the sake of convenience, the impugned order passed by the High Court in IA No.5173-5174 of 2021 in Civil Suit (Commercial) No.189 of 2020 shall be treated as the lead matter. Therefore, for the sake of convenience and to avoid any repetition, facts arising out of Civil Suit (Commercial) No.189 of 2020 leading to the present appeals are narrated, which are as under:

3.1. That the appellant herein granted licenses for individual

shops at the premises from 1983 onwards to various shopkeepers including the respondent herein – original plaintiff. On 29.5.2020 the original plaintiff as a licensor served a revocation of license notice. Similar notices were also served on other licensees. Therefore, the respective licensees had instituted the respective suits before the Delhi High Court against the appellant – licensor – Asian Hotels (North) Limited seeking a decree of declaration that the license in favour of the plaintiff in respect of shop/ premises 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 a 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.

3.2. That the appellant – defendant appeared before the High Court. The defendant raised verbal objection that the suit is not maintainable in view of Section 8 of the Arbitration and Conciliation Act, 1996. The High Court

vide order dated 21.07.2020 dismissed the suits with liberty to the parties to avail remedy of arbitration in view of the arbitration clause in the license agreement on the verbal plea. The order passed by the High Court dismissing the suits with the above liberty was a subject matter of appeal before the Division Bench. The Division Bench allowed the said appeal and remanded the matter. Liberty was granted to the defendant to prefer an application under Section 8 of the Arbitration and Conciliation Act, 1996. It is reported that such an application is filed by the defendant and is pending adjudication.

3.3. During the pendency of the aforesaid suit, the plaintiff filed present IA No. 5174 of 2021 under Order 6 Rule 17 of the Code of Civil Procedure seeking amendment of the plaint, by which, the plaintiff proposed to amend the suit challenging various mortgages created by the defendant hotel, in favour of certain banks. In the said application, it is the case on behalf of the plaintiff 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 said premises from 2.9.1991. Therefore, consequential amendments were sought to be made pertaining to the rights of the plaintiff. By the said application, 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 it encumbers any right, title and interest of the plaintiff in the subject premises.

3.4. Another application, being IA No.5173 of 2021 was also filed by the plaintiff under Order 1 Rule 10 of the Code of Civil Procedure seeking to implead the Banks and the Financial Institutions as defendant nos. 2 to 7.

3.5. Both the aforesaid applications were opposed by the defendant on the ground that (i) the mortgage in question was in 1980's; there is no challenge to the said mortgage in the present suit and therefore, the same cannot be permitted now; (ii) the plaintiff has no right

against the banks and financial institutions and therefore, amendment application does not lie; (iii) that the prayer of the plaintiff for the relief of declaration 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 and it is only after the plaintiff is successful in claiming any right in the property that the issue of adjudication of the rights of the third parties would arise; (iv) that in view of the arbitration clause in the agreement between the parties, the suit is liable to be stayed for which an appropriate application has been filed by the defendant, which is pending adjudication.

3.6. By the impugned common judgment and order and mainly relying upon the decision of this Court in the case of **Kasturi v. Iyyamperumal & Ors reported in (2005) 6 SCC 733** and in the case of **Revajeetu Builders and Developers vs. Narayanaswamy and Sons & Ors reported in (2009) 10 SCC 85**, the High Court has allowed both the applications i.e. application under Order 6 Rule 17 of the Code of Civil Procedure

and application under Order 1 Rule 10 of the Code of Civil Procedure.

3.7. Feeling aggrieved and dissatisfied with the impugned common order passed by the High Court allowing applications under Order 6 Rule 17 of the Code of Civil Procedure and under Order 1 Rule 10 of the Code of Civil Procedure, original defendant no.1- licensor has preferred present appeals.

4.0. Shri Mukul Rohatgi, learned Senior Advocate has appeared on behalf of the appellant- original defendant and Shri Avishkar Singhvi, learned counsel and Shri Rahul Gupta, learned counsel have appeared on behalf of the respective respondents.

5.0. Shri Rohatgi, learned Senior Advocate appearing on behalf of the appellant – original defendant has vehemently submitted that in the facts and circumstances of the case High Court has committed a serious error in allowing the applications under Order 6 Rule 17 of Code of Civil Procedure and Order 1 Rule 10

of the Code of Civil Procedure permitting the respondents to amend their respective plaints to declare *void ab initio* all mortgages / charges on the entire premises and implead the mortgagee banks / financial institutions.

5.1. It is vehemently submitted by Shri Rohatgi, learned Senior Advocate that appellant granted license for individual shops at the premises from 1983 onwards to various shopkeepers including the respondents herein. That prior thereto, on 23.09.1982 appellant created mortgages in favour of financial institutions /banks. The said mortgages were rolled over, refinanced and replaced from time to time for ensuring the continuous development of the Hotel Projects / premises which requires consistent upkeep, renovations, upgradation from time to time. It is contended that clause 13 of the License Agreement recognizes and preserves the power of the appellant (lessor) to create and continue mortgages. It is submitted that clause 13 has been retained in every renewal (every five years) and as such respondents who

are licensees have continuously ratified all mortgages from 1982 onwards by signing the License Agreement and subsequent renewals. It is submitted that licenses have been revoked on 29.5.2020 by the appellant. It is urged that at this belated stage it is not open for the respondents who are only licensees and whose licenses have been revoked to challenge the mortgages created by the appellant created in favour of various banks/ financial institutions which have been continued since 1982 onwards.

5.2. It is further submitted by Shri Rohatgi, learned Senior Advocate that as such in view of the arbitration clause in the license agreement, suits are not maintainable in view of Section 8 of the Arbitration and Conciliation Act. That application filed by the appellant – original plaintiff to stay the suits are pending adjudication. Therefore, as such the said application/s under Section 8 of the Arbitration and Conciliation Act are to be decided first. It is further submitted that while pleadings were completed and Section 8 application was part-heard, respondents

filed the present applications in April 2020 to implead the Banks holding mortgage over the premises and amend their plaints seeking to challenge such mortgages. It is submitted that the learned Single Judge as such, without issuing any notice or granting an opportunity to file reply, heard arguments and reserved the judgment which has been pronounced on 15.09.2021.

5.3. Shri Rohatgi, learned Senior Advocate appearing for the appellant – original defendant has assailed the impugned judgment and order passed by the High Court mainly on the following grounds:

I. Impugned judgment has resulted in mis-joinder of causes of action and of parties;

II. Respondents do not have the *locus* or right to challenge the mortgages / charges;

III. Challenge to mortgage/ charges is barred by limitation, delay and laches;

IV. The impleadment and amendment applications are *mala fide* filed only to circumvent adjudication pending

Section 8 of the Act;

V. Impugned judgment has been passed in violation of principles of natural justice;

5.4. It is vehemently submitted by Shri Rohatgi, learned Senior Advocate for the appellant that when the first License Agreement was executed in 1983, the premises were already mortgaged and the respondents were aware of the said fact, as is evident from Clause 13 of the License Agreement. It is submitted that thus, the respondent's rights, even as a licensee, are subject to the pre-existing charge perfected thereon with which the respondents have no concern.

5.5. It is submitted that the respondents – original plaintiffs are strangers to the mortgage on the premises created by and between the appellant and its lenders. Respondents – original plaintiffs have no privity with the mortgagee banks/ financial institutions. The suits themselves are based on the License Agreement executed with the appellant and the rights contained thereunder.

5.6. It is further submitted that the suits originally sought declarations that the respondents are irrevocable licenses or alternatively owners. Thus, the suits preferred by the plaintiffs only concern the inter-se rights between the appellant and the respondent, with which the banks/ financial institutions impleaded by the impugned judgment have no concern. But the impugned judgment has resulted in mis-joinder of parties and causes of action which is incorrect in law.

5.7. It is further submitted by Shri Rohatgi, learned Senior Advocate that the respondents have no semblance of right to sue the banks/ financial institutions in the present case or challenge the mortgage.

5.8. It is further submitted that mortgage over the premises has been created by and between the appellant and its lenders. Respondents- original plaintiffs are not parties to said transaction. There is admittedly no privity of contract between the respondents and original plaintiffs and its lenders. Therefore, the plaintiffs have no right to sue the lenders of the appellant against whom reliefs are

now sought by way of amendment of the plaint.

5.9. It is further submitted that, even otherwise, respondents are ascertaining their status as irrevocable licensees of the concerned shops. Therefore, plaintiffs have not locus or cause to challenge mortgages / charges, which have been created by the appellant from time to time for ensuring continuing development of hotel project / premises.

5.10. It is further submitted by Shri Rohatgi, learned Senior Advocate that challenge to mortgage / charges now is barred by limitation, delay and laches. This is because the first mortgage was created on the premises on 23.09.1982. By the amendment applications, the principal relief sought to be added by the respondents is to assail any and all charges / mortgages on the premises created since 1982 in favour of any person. It is submitted that first mortgage on the premises was registered on 23.09.1982 with the RoC as per Section 125 of the Companies Act, 1956. Subsequent charges /

mortgages were also registered with the RoC. It is submitted that as per Section 126 of the Companies Act, 1956 and Section 80 of the 2013 Act, the respondents are deemed to have knowledge and constructive notice of the said mortgage / charges and there exists a presumption in law that the respondents had knowledge of the aforesaid charges.

5.11. It is submitted that clause 13 of the License Agreements expressly records the knowledge of the respondents of the existing charges on the premises and also authorizes creation of further charges in the future. It is submitted that this understanding has been renewed and reaffirmed by the parties in the subsequent Renewal Agreements. Therefore, the respondents have knowledge of the mortgages in view of statutory presumption and express stipulation in Clause 13 of the License Agreement since 1982, which negates the assertion that respondents acquired knowledge by pleadings filed in the proceedings before the High Court. It is further submitted that considering Article 58, Schedule I of the

Limitation Act, the prayer to challenge mortgages / charges would be clearly barred by law of limitation and therefore, liable to be rejected. In support of the above submission, reliance is placed on the decision of this Court in the case of **Ashutosh Chaturvedi v. Prano Devi (2008) 15 SCC 610, T.N. Alloy Foundry Co. Ltd vs. T.N. Electricity Board and Ors (2004) 3 SCC 392 and L.J.Leach & Co Ltd vs. M/s. Jardine Skinner & Co. AIR 1957 SC 357.** Making above submissions, it is prayed to allow the present appeals.

6.0. While opposing the present appeals and supporting the impugned order passed by the High Court, allowing the applications under Order 6 Rule 17 of the Code of Civil Procedure and Order 1 Rule 10 of the Code of Civil Procedure, learned counsel for the respondents have vehemently submitted that in the facts and circumstances of the case. The impugned order is just and proper. It is contended that it is necessary to implead banks which are mortgagees of the suit property, while plaintiffs are claiming ownership interest

and that the trial has not yet commenced and the suit is at preliminary stage where the defendant has even not filed its written statement therefore, no prejudice can be said to be caused to the defendant if the application for amendment as well as impleadment applications are allowed. That no error has been committed by the High Court in the peculiar facts and circumstances of the case.

6.1. It is vehemently submitted by the learned counsel for the respondents that as such the plaintiff is the *dominus litus* in the suit. That in view of the position in law, when the applications submitted by the original plaintiffs under Order 1 Rule 10 of the Code of Civil Procedure have been allowed, the same may not be interfered with by this Court. Reliance is placed on the decision of this Court in the case of **Kasturi v. Iyyamperumal & Ors** reported in **(2005) 6 SCC 733**.

6.2. It is further submitted by learned counsel for the respondents -original plaintiffs that cogent reasons have

been given by the High Court while allowing the applications under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure, which in a nutshell are as under:

I. that it is necessary to implead the banks who are mortgagees of the suit property wherein the Plaintiffs are claiming ownership interest;

II. the trial has not yet commenced and the suit is at the preliminary stage where the Petitioner has not even filed its written statement;

III. no prejudice can be said to be caused to the Petitioner if the abovesaid applications are allowed;

IV. that the plaintiff is the *dominus litus* in the suit;

VI. the fact that the Petitioner themselves had pleaded before the learned Single Judge of the Hon'ble High Court that the suit was bad for non-joinder of parties without the banks being parties;

VII. at the stage of allowing the amendment the Court should not be concerned with the merits and demerits of such amendments;

VIII. it is imperative that the Hon'ble Courts are liberal in their view of amendment of pleadings especially when the parties are necessary and required to be present to protect the subject matter of the relief;

6.3. Relying upon the decisions of this Court in the case of **Rajesh Kumar Aggarwal & Ors vs. K.K.Modi & Ors AIR 2006 SC 1647** and in the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and Sons & Ors (2009) 10 SCC 84**, it is vehemently submitted by the learned counsel for the respondents – original plaintiffs that as observed and held by this Court while considering whether an application for amendment should or should not be allowed, Court should not go into the correctness or falsity of the case in the amendment. It is further observed and held that likewise, it should not record a finding on the merits of the amendment and the merits thereof sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

6.4. Learned counsel for the respondent no.1 has further submitted that the amendments did not seek any direct injunctions against the banks for creation of the mortgage but has only sought reliefs against the defendant hotel whose property is mortgaged to the banks. That the mortgage has not been challenged by the respondents but only the undeniable interest of the respondent is sought to be protected by having mortgagees as a party to the suit. It is submitted that idea is to see that in the event banks enforce the mortgage then they will step into the shoes of the appellant.

6.5. It is further submitted by the learned counsel for the plaintiffs that in the suit original plaintiffs are seeking perpetual ownership rights in the premises of the appellant hotel. Therefore, if the mortgages with respect to the very property are not challenged, in that case, in future they may affect the rights of the plaintiffs and therefore, to protect their rights, the impleadment of the mortgagee banks / financial institutions and the

amendments are very much necessary. That as such, Banks / Financial Institutions (mortgagees) can be said to be necessary and proper parties for giving the ultimate effective relief in favour of plaintiffs. That respondents – original plaintiffs after final adjudication of the suit may be held to be owners as they are the perpetual lessee who hold irrevocable licenses executed in their favour to operate their respective shops. It is submitted that the plaintiffs have paid the premium at the time of execution of the License Agreement and hence this is not a case of mere license but it is a case of irrevocable and perpetual license. Therefore, no error has been committed by the High Court while passing the impugned orders and allowing the applications under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure.

7.0. We have heard learned Senior Advocate appearing on behalf of the appellant and learned counsel appearing on behalf of the respective respondents - original plaintiffs at length.

7.1. By the impugned orders, the High Court has allowed the

applications filed by the original plaintiffs under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure permitting the original plaintiffs to amend their respective plaints so as to declare void ab-initio all the mortgages / charges on the entire premises in question and also implead mortgagee banks / financial institutions for that purpose.

7.2. At the outset, it is required to be noted that mortgages have been created in favour of different mortgage banks/ financial institutions since 1982 onwards which have been extended and / or rolled over, refinanced and replaced from time to time. The mortgages are created not only with respect to the shops / premises occupied by the original plaintiffs, but with respect to the entire premises / Hyatt Residency Hotel. The respective original plaintiffs are granted licenses for individual shops which are part of entire premises. According to the appellant, first mortgage was created in the year 1982. At that time, none of the original plaintiffs were license holders. They have been granted license for individual shops at the

premises from 1983 onwards to various shopkeepers including respondents- original plaintiffs. The appellant, being owner – licensor, has terminated the respective licenses granted in favour of respective license holders – original plaintiffs. The revocation of the license is subject matter of respective suits. Therefore, the only controversy / issue in the respective suits is with respect to revocation of the respective licenses. By way of an amendment of the plaint the plaintiffs now want to challenge the mortgages / charges on the entire premises created by the appellant. As such, the original plaintiffs are not at all concerned with the mortgages created by the appellant which is required for the continuous development of the hotel. By the purported amendment, the original plaintiffs have now prayed to declare that all the mortgages / charges created on the premises as void ab-initio. Even such a prayer can be said to be too vague. How the original plaintiffs can now can be permitted to challenge various mortgages / charges created from time to time. At this stage, it is required to be noted that even under the License

Agreement (clause 13) the Licensor shall have the right to create charges / mortgages as and by way of first charge on its land, premises and the buildings (including shops) constructed and to be constructed, in favour of financial institutions and banks as security for their terms loan advanced / to be advanced to the licensor for the completion of its hotel project. Therefore, in fact original plaintiffs being the licensee are aware that there shall be charges / mortgages on the entire premises and the buildings including the shops. In that view of the matter, now after a number of years, plaintiffs cannot be permitted to challenge the mortgages / charges created on the entire premises including shops.

8.0. The High Court while allowing the amendment application in exercise of powers under Order 6 Rule 17 of the Code of Civil Procedure has not properly appreciated the fact and / or considered the fact that as such, by granting such an amendment and permitting plaintiffs to amend the plaints incorporating the prayer clause to declare the respective charges / mortgages void

ab-initio, the nature of the suits will be changed. As per the settled proposition of law, if, by permitting plaintiffs to amend the plaint including a prayer clause nature of the suit is likely to be changed, in that case, the Court would not be justified in allowing the amendment. It would also result in misjoinder of causes of action.

9.0. From the impugned order passed by the High Court, it appears that what has weighed with the High Court is that plaintiffs, is the *dominus litus* and heavy reliance is placed in the case of Kasturi (supra). However, the principle that the plaintiffs is the *dominus litus* shall be applicable only in a case where parties sought to be added as defendants are necessary and / or proper parties. Plaintiffs cannot be permitted to join any party as a defendant who may not be necessary and / or proper parties at all on the ground that the plaintiffs is the *dominus litus*.

9.1. Even otherwise, High Court has materially erred in relying upon the decision in the case of **Kasturi (supra**).

In the case of **Kasturi (supra)** before this Court the suit was for specific performance of the agreement to sell and the subsequent purchasers purchased the very property for which decree for specific performance was sought. Therefore, on facts said decision is not applicable to the facts of the case on hand.

10. In view of the above and for the reasons stated above, High Court has committed serious error in allowing the application under Order 6 Rule 17 and under Order 1 Rule 10 of the Code of Civil Procedure by permitting original plaintiffs to amend the plaint including prayer clause by which, the plaintiffs have now prayed to declare the charges / mortgages on the entire premises as void-ab initio and permitting the original plaintiffs to join / implead the respective banks / financial institutions as party defendant. The alleged rights of the plaintiffs as perpetual license holders are yet to be adjudicated upon. The licenses of the original plaintiffs have been revoked. Therefore, in a suit challenging revocation of the respective licenses, the plaintiffs cannot

be permitted to challenge the respective mortgages / charges created on the entire premises as void ab-initio. It is the case on behalf of the appellant that apart from the fact that first charge was created in the year 1982, thereafter said mortgages have been rolled over, refinanced and replaced from time to time for ensuring the continuous development of the Hotel Project / premises which requires consistent upkeep, renovation and upgradation from time to time. Under the circumstances, the impugned orders passed by the High Court allowing the application under Order 6 Rule 17 and under Order 1 Rule 10 of the Code of Civil Procedure are unsustainable, both on facts as well as on law.

11. In view of above and for the reasons stated above, all these appeals succeed. The impugned orders passed by the High Court allowing the application under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure in respective suits preferred by the respondents herein original plaintiffs are hereby quashed and set aside. Present appeals are allowed accordingly,

However, there shall be no order as to costs.

.....J.
[M.R. SHAH]

.....J.
[B.V. NAGARATHNA]

NEW DELHI;
JULY 12, 2022