

(2008) 2 ILR Delhi 1321

Delhi High Court

Case No: Regular First Appeal No. 93 of 2004

Jasbir Singh Chadha

APPELLANT

Vs

U.P. Financial
CorporationRESPONDENT

Date of Decision: July 25, 2008**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10, Order 7 Rule 11, 20, 21
- Evidence Act, 1872 - Section 68
- Specific Relief Act, 1963 - Section 38
- State Financial Corporations Act, 1951 - Section 29
- Transfer of Property Act, 1882 - Section 100, 54, 58, 96

Citation: (2008) 2 ILR Delhi 1321**Hon'ble Judges:** Aruna Suresh, J; A.K. Sikri, J**Bench:** Division Bench**Advocate:** Ravinder Agarwal, for the Appellant; A.K. Singh and Vinod Dubey, for the Respondent

Judgement

Aruna Suresh, J.

Under challenge in this appeal is the judgment and decree of the learned Additional District Judge dated 1.11.2003 whereby the suit of the appellant for permanent injunction was dismissed. Harjit Singh, Parminder Singh, Bhupinder Singh all sons of appellant Jasbir Singh filed suit for permanent injunction against M/s. U.P. Financial Corporation and M/s. Amar House Builders. M/s. Amar House Builders was subsequently dropped from the array of defendants and the suit as filed continued against M/s. U.P. Financial Corporation (Respondent herein). The plaintiffs sold the flat on rear portion of the second floor of the building bearing No. E-544, Greater Kailash, Part-II, New Delhi in favour of Jasbir Singh, their father on 28.04.1999 by way of registered Sale Deed. Consequently, Jasbsir Singh filed an application under Order 22 Rule 10 CPC (CPC) before the trial

court which was allowed and he was substituted in the array of plaintiffs and the name of Harjit Singh, Parminder Singh and Bhupinder Singh were deleted.

2. In brief, the facts are: In 1981 M/s. Amar House Builders purchased an old single storeyed building bearing No. E-544, Greater Kailash, Part-II, built on a plot measuring area 562 Sq.Yds., for a consideration of Rs. 14,50,000/- vide Sale Deed dated 22.06.1981 from Shri Mehta Ram Atmaram and his wife Smt. Sundri Mirchandani. The said builders/developers M/s. Amar House Builders constructed eight flats with requisite sanction from the Municipal Corporation of Delhi and out of these eight flats one of the flat on the rear portion of the second floor of the building was sold by M/s. Amar House Builders to Shri Apar Singh for a total consideration of Rs. 3,40,000/- by way of Registered Sale Deed dated 19.04.1985. Apar Singh was handed over vacant possession of the said flat on the same day. Builders however, retained original Sale Deed executed in their favour with them because they had retained residuary interest in the property by way of terrace rights and pro rate interest in the plot/common areas and also because the original Sale Deed could not have been handed over to different purchasers of eight different flats. Shri Apar Singh bequeathed the said property in favour of Harjit Singh, etc. (the initial plaintiffs) by virtue of a Will dated 2.10.1985. Shri Apar Singh died on 2.12.1985 at Nairobi, Kenya and after his death Harjit Singh, etc. sons of the plaintiff Jasbir Singh (appellant herein) became the owners of the said flat by virtue of the said Will and they remained in peaceful physical possession of the said flat as owners.

3. In 1996 a company by the name of M/s. Shivlok Investment Holding (Pvt.) Ltd., New Delhi, sister concern of Regency Towers Pvt. Ltd. got a loan (lease finance) of Rs. 50,00,000/- sanctioned to them from the respondent Corporation vide Lease Agreement dated 15.05.1996. Subsequently, on 23.08.1996 respondent Corporation entered into another Lease Agreement with Regency Towers India Pvt. Ltd. for granting lease assistance to the said company for a sum of Rs. 110,00,000/- Smt. Prakashvati Aggarwal, B.B. Aggarwal, Seema Jain and Alka Thakur, partners of M/s. Amar House Builders executed a guarantee in respect of the loans of M/s. Shivlok Investment Holding Pvt. Ltd. being partners of M/s. Amar House Builders. Smt. Prakashwati Aggarwal and B.B. Aggarwal, partners of M/s. Amar House Builders also executed a guarantee in respect of loan granted to M/s. Regency Towers India Pvt. Ltd. and created an equitable mortgage of the property bearing No. E-544, Greater Kailash Part-II, New Delhi twice on 15.05.1996 and 23.08.1996 respectively.

4. On 9.02.1999 a notice was published by the respondent corporation in Hindustan Times alleging that since M/s. Shivlok Investment Holding (Pvt.) Ltd. and M/s. Regency Tower India (Pvt.) Ltd. have failed to repay the dues of the corporation, the respondent was invoking the collateral security offered against the loan and published that property No. E-544, Greater Kailash Part-II, New Delhi (impugned property) was available for immediate sale $\frac{1}{2}$ as is where is basis $\frac{1}{2}$. On reading this notice, Harjit Singh, etc. the sons of the appellant fearing threat to the title and possession of the flat owned by them,

served a Legal Notice dated 9.02.1999 on the respondent corporation through their Counsel and asked the corporation to furnish entire documents with regard to the alleged transaction along with further request not to take any further action in respect of the flat in question. Despite service of this notice, the respondent corporation did not send any response to the same. Hence, Harjit Singh, etc. filed a suit for permanent injunction against the defendants seeking the following relief:

Prayer

It is, therefore, most respectfully prayed that this Hon"ble Court may be pleased to pass a decree of permanent injunction in favour of the plaintiffs and against the defendants, thereby restraining the defendants more particularly the defendant No. 1, its officials, agents, employees, associates, workers, officers/officials and the persons working on its behalf from taking any action on the basis of the notice dated 9.2.1999 published in daily Hindustan Times, regarding the sale of flat on the second floor of property bearing No. E-544, Greater Kailash, Part-II, New Delhi belonging to plaintiffs herein, in collusion and connivance with Defendant No. 2 or in any other manner whatsoever, in the interest of justice.

Costs of the suit/proceedings be also awarded in favour of the plaintiffs and against the defendants.

5. During the pendency of the suit learned trial court granted ad interim injunction and ordered that status quo with respect to the property in suit be maintained by the parties. In the original plaint, plaintiffs initially impleaded M/s. Amar House Builders as defendant No. 2, but the same was dropped from the list of parties vide order dated 27.05.1999, as the plaintiffs were unable to serve effective notice on defendant No. 2 despite repeated attempts and no relief was claimed against them.

6. Respondent-corporation contested the suit of the plaintiff on various grounds contending inter alia that M/s. Regency Tower India (Pvt.) Ltd. availed lease assistance from the defendant corporation for a sum of Rs. 110,00,000/-. To secure the said financial assistance from the defendant corporation, the said company ie. M/s. Regency Tower India (Pvt.) Ltd. executed various documents including Loan Agreement, Hypothecation, etc. on 23.08.1996 and the said company got first charge registered with the concerned Registrar of Company. M/s. Shivlok Investment Holding (Pvt.) Ltd. engaged in the business of construction of houses, flats, apartments, buildings or civil works of every description in India and abroad, the sister concern of M/s. Regency Tower India (Pvt.) Ltd. also approached the defendant corporation for a term loan of Rs. 50,00,000/- and to secure the said financial assistance by the defendant corporation, M/s. Shivlok Investment Holding (Pvt.) Ltd. executed various documents including the Loan Agreement, Hypothecation, etc. on 15.05.1996 and got the first charge registered with the concerned Registrar of Company in favour of the respondent company, besides borrower company gave a collateral security of immovable property and Smt. Prakash Wati

Aggarwal, B.B. Aggarwal, Seema Jain and Alka Thakur executed deed of guarantee in respect of loans and the guarantors created equitable mortgage of property bearing Plot No. E-544, measuring 562 Sq.Yds., situated at Greater Kailash, Part-II, New Delhi. The guarantors also submitted a Non-Encumbrance Certificate dated 23.08.1996 issued by Sh. B.S. Tanwar, Advocate. The said two companies did not adhere to the terms and conditions of the respective Loan Agreements and committed default in payment of the dues to the respondent corporation. The corporation invoked the personal guarantees of guarantors and mortgage and issued an advertisement to this effect in the newspaper.

7. It is also alleged in the written statement that the suit is without any cause of action in favour of the plaintiff and liable to be dismissed under Order 7 Rule 11 CPC and that there is no privity of contract between the plaintiff and defendant as the property was purchased by the grandfather of the plaintiffs and as such no right and title over the property had passed on to them as the alleged Will was not got probated and that action has also not been initiated on part of the plaintiffs against M/s. Amar House Builders. Hence, plaintiff has no right or title in the property and the suit is liable to be dismissed. The maintainability of the suit is also challenged on the ground that the suit is bad for non-joinder of necessary parties as no action is initiated by the plaintiff against the alleged seller M/s. Amar House Builders and has dropped the said company from the array of defendants. The territorial jurisdiction of Court at Delhi is also challenged by the defendant as it is a financial corporation created under the SFC Act for the State of U.P. and the entire transaction of mortgage took place in U.P. Therefore the suit filed in Delhi Court is barred u/s 20 and 21 of the CPC. The defendant corporation is entitled to sell the property mortgaged to it in view of the powers vested by Section 29 of the SFC Act.

8. In the replication plaintiff refuted the claim of defendant No. 1 and reasserted his claim as made in the Plaint.

9. The trial court framed following issues on 9.01.2001.

- (1) Whether the plaintiff is entitled to the decree of injunction as alleged? OPP.
- (2) Whether the plaintiff has no cause of action to file the suit? OPD.
- (3) Whether there is privity of contract between the parties as alleged, it so to what effect? OPD.
- (4) Whether the suit is bad for non joinder of parties? OPD.
- (5) Whether this court has no territorial jurisdiction to try the suit? OPD.
- (6) Relief.

10. Mr. Ravinder Agarwal, learned Counsel for the appellant while arguing on Issue No. 1 and 6 has urged that the trial court ought to have looked into the question as to whether

the mortgage created by M/s. Amar House Builders in favour of U.P.F.C. was legal as mortgage necessarily involved transfer of mortgagor's interest in the immovable property. He has referred to Section 58(a) of the Transfer of Property Act which defines mortgage. In support of his contention he has relied on Bank of India v. Abhay D. Narottam (2005) 11 SCC 520.

11. It is further submitted by the learned Counsel for the appellant that M/s. Amar House Builders had sold all its rights in respect of the impugned flat to Shri Apar Singh vide Sale Deed dated 19.04.1985 and therefore mortgagor M/s. Amar House Builders did not have any interest in respect of the said flat and could not have mortgaged the said flat in favour of the respondent corporation and thus, UPFC could not have had any charge over non-existent interest.

12. It is also submitted that M/s. Amar House Builders had retained only terrace rights subject to usage rights in favour of Shri Apar Singh and therefore the mortgage if legal could operate only against the said terrace rights only.

13. He has assailed the judgment of the trial court and urged that trial court erred in holding that the Sale Deed executed in favour of the plaintiff by his sons in 1991 was not registered and therefore did not create any title in the suit flat in favour of plaintiff whereas the said Sale Deed was duly registered at No. 673, Addl. Book No. 1, Volume 1563 at pages 17 to 26 with the Sub Registrar.

14. It has been argued by the learned Counsel for the appellant that the possession by the plaintiff and his sons of the flat in question has never been disputed and they are in possession of the property for almost 22 years. Therefore, the court did not adopt proper approach while declining the relief to the appellant on the basis of Will executed by Mr. Apar Singh during his life time in favour of Sh. Harjit Singh, etc.

15. It is further pointed out that the suit for injunction can be filed on the basis of proprietary rights as well as possessory rights and the court can grant relief of injunction on the basis of possession if the rights of the plaintiff are better than that of the defendant. UPFC had no right in respect of the flat in question compared to the rights of the plaintiff. Even if plaintiff failed to prove his title but was in possession of the flat in question nevertheless the appellant/plaintiff was entitled to the relief of injunction as prayed his right being better than that of UPFC. According to him, the court failed to appreciate that the first mortgage was created only in May, 1996, after about 11 years of the flat having been sold by M/s. Amar House Builders in favour of Mr. Apar Singh and therefore no charge could have been made over the said flat by the builders as they had no right to transfer which they no longer had with them. He has referred to [M. Kallappa Setty Vs. M.V. Lakshminarayana Rao](#) .

16. Mr. A.K. Singh, learned Counsel for the respondent has urged that the plaintiff claimed his title through his sons Harjit Singh, etc. the initial plaintiffs who allegedly sold

this property to him vide Sale Deed dated 28.04.1999 after the filing of the suit and that the said Sale Deed is not a registered document and therefore did not pass any valid title in favour of the plaintiff Jasbir Singh.

17. It is further submitted that the title of Harjit Singh, Parminder Singh and Bhupinder Singh, original plaintiffs has not been proved on record by the plaintiff as the Will by virtue of which the said flat was bequeathed to Harjit Singh, etc. by Mr. Apar Singh has not been proved in evidence as no attesting witness has been examined as per the provision of Section 68 of the Indian Evidence Act and therefore Harjit Singh, etc. had no title in the property which they could transfer in the name of Jasbir Singh/plaintiff by way of Sale Deed and since plaintiff has no title in the property in suit, he has no locus standi to file the present suit for injunction.

18. It is alleged that the particulars of the Sale Deed vide which Apar Singh had purchased the flat in question are different from the particulars given in the Sale deed dated 2.10.1985 and the Sale Deed only contained the name and father's name of the purchaser and did not mention any particulars or any other identification of the purchaser and therefore after taking the names from the Sale Deed the Will was fabricated later on to create a right in the flat.

19. It is further submitted that existence of an obligation as contemplated u/s 38 of the Specific Relief Act is lacking in the present case and the suit therefore has been rightly dismissed by the learned ADJ.

20. Learned Counsel for the respondent has highlighted that there was concealment of material facts by the plaintiff as plaintiff had purchased the property on 28.04.1999 but he became party to the proceedings only on 26.02.2001. Even at the time when plaintiff had filed an application for restoration of the suit as representative of Harjit Singh, etc. it was not disclosed that he had purchased the property from the initial plaintiffs in the suit.

21. It is also argued that M/s. Amar House Builders who was impleaded as defendant No. 1 was subsequently dropped on 27.05.1999 by the plaintiff with a mala fide intention to conceal the truth from the court.

22. It is argued that respondent is entitled to take action against the property mortgaged as per the provision of Section 29 of the State Financial Corporation Act (SFC Act) and other allied provisions of law and since the plaintiff has not been able to prove his title in respect of the flat in question, he cannot be allowed to claim discretionary relief of injunction on the basis of possessory rights especially when he has not said anything about his possessory rights in the plaint. Therefore, according to him, the appeal is liable to be dismissed. He has referred to:

(1) [Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another,](#)

(2) Ram Kanwar (deceased) Thrn"s L.R."s v. Kotu Ram and Anr. 1972 RLR 260;

(3) Kanwal Swarup v. Sneha Lata 1975 RLR 101;

(4) [Naresh Chandra Bose Vs. State of West Bengal and Others,](#)

(5) [M/s. Seemax Construction \(P\) Ltd. Vs. State Bank of India and another,](#)

23. It is common ground of the parties that M/s. Amar House Builders through their General Power of Attorney Mr. B.B. Aggarwal sold premises (flat) consisting of three bedrooms, attached baths, drawing cum-dinning, one kitchen and store on the rear side of the second floor of plot bearing No. E-544, Greater Kailash, Part-II, New Delhi vide a registered Sale Deed Ex.PW1/1 dated 19.04.1985 for a total consideration of Rs. 3,40,000/- in favour of Apar Singh. Relevant Clauses of the Sale Deed read as follows:

...and the Vendors do hereby sell convey transfer and assign by way of absolute sale the above said premises with all rights, titles interest or concern in upon or with the property hereby conveys in any manner whatsoever.

That the vendors hereby declare and assure the Vendee that the rights hereby transferred to vendee subsists and the vendors have full rights, power and authority to transfer the same and the same is free from all sorts of charges, liens, claims, demands liability, injunctions, legal disputes, flaws, mortgage, gifts and sales, etc.

24. Thus it is clear that at the time when Apar Singh purchased the impugned flat it was free from all encumbrances including the mortgage or any other claims, liabilities, etc.

25. After about 11 years of this Sale M/s. Shivlok Investment Holding (Pvt.) Ltd., company entered into Lease Agreement dated 15.05.1996 Ex.RW1/2 with the respondent corporation for financing the equipments for industrial use and respondent corporation sanctioned a sum of Rs. 50,00,000/- as loan to M/s. Shivlok Investment Holding (Pvt.) Ltd. This Lease Agreement was signed by five persons including B.B. Aggarwal, Parkash Wati, Seema Jain, Alka Thakur, who also happen to be the partners of M/s. Amar House Builders. Seema Jain, Parkash Wati, Alka Thakur, B.B. Aggarwal and one Uma Aggarwal stood as guarantors for M/s. Shivlok Investment Holding (Pvt.) Ltd., and created an equitable mortgage in respect of the property No. E-544, measuring 562 Sq.Yds., Greater Kailash, Part-II, New Delhi in favour of the respondent corporation. To that effect an Affidavit Ex.RW1/3 was executed by the above said persons and they also created a charge on the said property in favour of the respondent corporation in the prescribed form being Form Nos. 8 and 13 Ex.RW1/5 and RW1/6 respectively.

26. After about three months from the execution of the Lease Agreement dated 15.05.1996 Ex.RW1/2, M/s. Regency Tower India (Pvt.) Ltd. a sister concern of M/s. Shivlok Investment Holding (Pvt.) Ltd., having B.B. Aggarwal and Smt. Prakash Wati as its Directors entered into a Lease Agreement Ex.RW1/1 with the respondent corporation on 23.08.1996 and took a loan of Rs. 110,00,000/-. This Lease Agreement does find mention of M/s. Shivlok Investment Holding (Pvt.) Ltd. having obtained a lease assistance

of Rs. 50,00,000/- and for the said purpose Shri B.B. Aggarwal and Smt. Uma Aggarwal had already created equitable mortgage of premises No. E-544, Greater Kailash, Part-II, New Delhi as a guarantors/mortgagor which still subsisted and the said mortgagors requested the respondent corporation to extend said equitable mortgage in favour of the U.P.F.C. to secure the lease assistance of Rs. 110,00,000/- in favour of M/s. Regency Tower India (Pvt.) Ltd. This Agreement was signed by Mr. B.B. Aggarwal and Prakash Wati Aggarwal as Directors of M/s. Regency Tower India (Pvt.) Ltd.

27. Thus, it is clear that M/s. Shivlok Investment Holding (Pvt.) Ltd., and M/s. Regency Tower India (Pvt.) Ltd. created equitable mortgage in respect of the entire property No. E-544, Greater Kailash, Part-II, New Delhi in favour of the respondent against two separate loans for Rs. 50,00,000/- and Rs. 110,00,000/- in the year 1996. At the time when two separate Lease Agreements were executed between the said two companies and the respondent, M/s. Amar House Builders, the purchaser of the property was left with no interest in the said property on which it had constructed eight flats and sold them to different purchasers except for the right on the terrace. Shri B.B. Aggarwal and Prakash Wati Aggarwal and other partners of M/s. Amar House Builders had no right, title or interest in the suit property when they created equitable mortgage in respect of the suit property in favour of the respondent corporation. At the best they could have mortgaged their terrace rights which they held in the suit property. The relevant Clause of the Sale Deed reads as below:

That the terrace at the top of the building shall always remain the property of the Vendors and for its use before or after the execution of the transfer deed and the Vendors can use the same in any manner at its decision. The Vendors will, however have the right to use the external portion of the building or terrace of the building for publicity or such other purpose as may be deemed fit and proper by the Vendors and will have the right to raise further floors any time desired by the Vendors.

28. Mortgage is defined in Section 58 of The Transfer of Property Act (hereinafter referred to as "T.P. Act"). Section 58 so far is relevant to the facts and circumstances of this case reads as under:

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined. ½ (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage ½ Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and

agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

29. By virtue of Section 96 of the T.P. Act the provisions applicable to a simple mortgage also apply to a mortgage by deposit of title deeds.

30. The requisites of a simple mortgage or mortgage by deposit of title deeds are (1) debt, (2) a deposit of title deeds and (3) an intention that the Deeds shall be security for the debt.

31. The characteristic feature of mortgages is that right in the property created by the transfer is accessory to the right to recover debt. The debt subsists in a mortgage, while a transaction by which a debt is extinguished is not a mortgage but a sale.

32. The simple mortgage consists of a personal obligation, express or implied to pay and the transfer of a right in the Immovable property to cause the mortgaged property to be sold in case the debt is not repaid and the right so transferred to the mortgagee in the property is not transfer of ownership. The mortgagor binds himself personally to pay the debt which may be either expressed or implied for a promise to pay arising out of the acceptance of a loan. In other words, the loan prima facie involves a personal liability and such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest and also the nature and terms of the security may negate any personal liability on part of the borrower. It is a matter of construction whether the security is a simple mortgage, there may be a personal covenant either express or implied and in the absence of such a covenant, the security is generally though not necessarily a charge on the property. In a simple mortgage the possession of the property is not given to the mortgagee. The primary consideration in a suit for sale of the mortgaged property is the money borrowed and the mortgage is only by way of security in favour of the mortgagee and therefore there is no legal hurdle in recovering the amount of debt by a simple money decree. The right to sale the mortgage property can be exercised only with the intervention of the court which is clear from the words used in Section 58 Clause B of the T.P. Act "cause the property to be sold". Accordingly, in a simple mortgage the security for the debt is two folds i.e. the personal obligation and the property. The title deed must relate to the property as well as show prima facie or apparent title of the depositor. If the documents deposited do not indicate any kind of title, no mortgage is created.

33. A person cannot by transfer or otherwise confer a better title on another than he himself has in the property and a mortgagor cannot therefore create an interest in the mortgaged property in favour of another person as a security which would ensure beyond the termination of his interest as mortgagee. In other words, the mortgagor cannot mortgage the property in favour of another person in which he had no title at the time

when he created the mortgage to ensure repayment of the loan taken by him. In these circumstances, the mortgagee cannot create any charge on the mortgaged property.

34. In *Bank of India v. Abhay D. Narottam and Ors.* (2005) 11 SCC 520, where respondent No. 2 had availed of certain overdraft facilities from the appellant bank and for consideration for the grant of such facility he undertook to create an equitable charge of the flat in favour of the appellant Bank. As undisputedly at that point of time respondent No. 2 was not the owner of the flat and all it had was the agreement executed by the owner to sell the flat to respondent No. 2 and this agreement was deposited with the appellant Bank and it was observed, that a contract for sale of immovable property does not of itself create any interest in or charge over such property, as per the Section 54 of the Transfer of the Property Act. Since the agreement to sell therefore creates no interest in favour of respondent No. 2 which he could have transferred by way of security to the Bank and the Bank therefore had no charge over such non-existence interest. Mortgage as defined in Section 58 of the Transfer of Property Act was incorporated as follows:

..."Mortgage" has been defined in Section 58(a) of the Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge u/s 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.

35. Learned Counsel for respondent has submitted that non-encumbrance certificate dated 23.08.1996 was obtained from the borrowers which indicated that the property was free from all encumbrances except that it was mortgaged with U.P. Financial Corporation, Lucknow, U.P. for Rs. 50,00,000/- during the month of June, 1996 and therefore the partners of M/s. Amar House Builders, New Delhi held a clear and marketable title through their partner Smt. Uma Aggarwal who was the real owner of the property and also that the property was free from all sorts of impediments. It was on the basis of this certificate that the respondent had accepted guarantor's security of the impugned property having a charge on it as a mortgagee. Mr. B.S. Tanwar Verma, Advocate who submitted his Search Report Ex.RW1/7 was not examined by the respondent corporation as its witness. DW1 Shri K.S. Sonkar, Manager Law, of the respondent corporation in his cross examination has deposed that there was no provision at the time of sanction to physically verify the property which was mortgaged for loan and in the instant case the applicants i.e. M/s. Shivlok Investment Holding (Pvt.) Ltd. and M/s. Regency Tower India (Pvt.) Ltd. had submitted the house tax assessment record from the MCD at the time of mortgaging the property for loan. He had not brought the original file regarding sanction of loan and therefore he did not know if his corporation had initiated any action against the borrowers. He also admitted that he had no knowledge if the borrowers who applied for loan in the year 1996 had already sold the said plot after construction of eight flats to

different persons and that the plaintiff was one of the bona fide purchasers of the said flat which he purchased on 19.04.1985. He further admitted in the cross examination that besides assessment record from the MCD, the borrowers had also submitted the non-encumbrance certificate issued by Shri B.S. Tanwar Verma Advocate and while relying upon the said two documents, the respondent corporation had sanctioned the loan without any physical verification. He also deposed that Ramesh Chand, Technical officer of the corporation had physically verified the property in question and submitted his report to the department which was also taken into consideration by the defendant corporation for sanction of the loan to the borrowers. Admittedly, the report of Mr. Ramesh Chand was not filed on the court record till then.

36. DW2 Shri Ramesh Chand, produced and filed his valuation report Ex.DW2/1 on record which he had prepared after inspection of the suit property. However, in his cross-examination he admitted that he did not remember as to how many flats were built at the time of his inspection. When suggested he admitted that there were eight flats. He also admitted that those flats were occupied. He further admitted that he did not make any inquiries from the residents of those flats as to in what capacity they were residing there, as he was only to evaluate the property. According to him one Ashish Aggarwal representative of Mr. B.B. Aggarwal borrower was also with him at that time. But his name does not find mention in his report nor he has been examined as a witness.

37. The evidence adduced on the record by the defendant corporation clearly indicate that the defendant corporation did not get the Title Deeds of the property in question from the Office of the Sub-Registrar searched independently. The borrowers who needed loan could easily submit non-encumbrance report prepared by their Advocate to ensure the sanction of loan in their favour. Defendant corporation should have held independent inquiry if the impugned property was not sold by M/s. Amar House Builders in favour of other persons especially when DW2 Ramesh Chand on visit did find eight flats constructed on the plot and occupied by various persons, but he did not care to find the status of the occupiers of the said flats.

38. Sale Deed Ex.RW1/1 executed by M/s. Amar House Builders in favour of Shri Apar Singh in respect of rear flat on second floor of the impugned property is not disputed. He was given possession of the flat at the time of execution of the Sale Deed is also not in question before this court. Hence, partners of M/s. Amar House Builders who were also the partners of M/s. Shivlok Investment Holding (Pvt.) Ltd. had no valid title in their favour in the suit property which they could mortgage as a security in favour of the defendant corporation. In fact, the respondent company did not even insist upon the production of Title Deeds of the impugned property nor they cared to see them before sanction of the loan. The House Tax Assessment Receipts of the MCD and non-encumbrance certificate in no manner can be considered as Title Deeds of the impugned property. Therefore, the defendant corporation had no valid legal right to issue a notice for sale of the impugned property when borrowers failed to pay the loan amount or did not adhere to terms and conditions of the Lease Agreements Ex. RW1/1 and RW1/2. Even if it is deemed that the

property mortgaged by the borrowers was free from all encumbrances, the proper forum to be adopted by the defendant corporation for recovery of loan amount was through the court/process of law.

39. The action taken by the defendant corporation of putting the property to auction by way of notice dated 09.02.1999 was therefore illegal and against the provisions contained in Section 58 of the Transfer of Property Act. The defendant was not remediless, it could have filed a suit for recovery of money with a prayer to auction the property if the money was not recoverable from the borrowers.

40. The title of the present plaintiff in respect of the impugned flat is also under challenge. According to the defendant corporation plaintiff has no locus standi to file the suit nor has any cause of action to file the present suit against the defendant as he has failed to prove that he became the owner of the impugned flat by virtue of a Sale Deed Ex.PW1/2 executed in his favour by the initial plaintiffs, his sons, on 28.04.1999. It is also argued that the Sale Deed is not a registered document and therefore by virtue of Section 54 of the Transfer of Property Act, no right or title is vested or conferred on the plaintiff in respect of the said flat. The validity of the Sale Deed is also disputed as the original plaintiffs could not prove the Will dated 2.10.1985 allegedly executed by Shri Apar Singh in their favour.

41. True that the said Will executed by Shri Apar Singh on 2.10.1985 has not been proved in evidence by the plaintiff but the Sale Deed executed by the original plaintiffs, namely, Harjit Singh, Parminder Singh and Bhupinder Singh in favour of their father Shri Jasbir Singh is a proved document as Ex.PW1/2. It is a registered document as is clear from the records of this court. This document is registered as No. 673, Addl. Book No. 1, Volume 1563 at pages 17 to 26 with the Sub Registrar. Therefore, this Sale Deed has been proved on the record.

42. Even if, the title of the plaintiff in respect of the flat in question is defective, undisputedly he is in possession of the said flat. plaintiff being in possession of the flat has better rights in the same than that of the defendant and has therefore a locus standi to file the present suit against the defendant. The defendant corporation had put a notice of auction of the property and if the property was sold, the rights of the plaintiff even if possessory were likely to be affected. Hence, he had a cause of action in his favour and against the defendant corporation to file the present suit. It is pertinent to mention here that original plaintiffs had served a notice upon the respondent corporation on reading the said notice of sale in daily newspaper Hindustan Times which Notice Ex.PW1/4 was never replied by the defendant corporation. As pointed out above, the first mortgage was created in favour of the respondent by the borrowers on 23.08.1996 after about eleven years of the flat having been sold away by M/s. Amar House Builders in favour of Shri Apar Singh. Therefore, at the time when the mortgage was created, M/s. Amar House Builders had no right in the property to create any charge on it in favour of the respondent. The possession of the plaintiff in the suit property after its sale by way of a

Sale Deed is an important and relevant circumstance to be considered and protected by the court. In [M. Kallappa Setty Vs. M.V. Lakshminarayana Rao](#), it was observed:

So far as the question of possession is concerned, as mentioned earlier, both the trial court and the first appellate court have accepted the plaintiff's case that he was in possession of the suit site ever since he purchased the same in 1947. This is essentially a finding of fact. That finding is based on evidence. The High Court, in our opinion, erred in coming to the conclusion that the possession of the plaintiff after the sale deed in his favour is not a relevant circumstance. We are of the opinion that it is an extremely important circumstance. The plaintiff can on the strength of his possession resist interference from persons who have on better title than himself to the suit property. Once it is accepted, as the trial court and the first appellate court have done, that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against interference by someone who is not proved to have a better title than himself to the suit property. On the findings arrived at the fact finding courts as regards possession, the plaintiff was entitled to the second relief asked for by him even if he had failed to prove his title satisfactorily. Therefore, in our opinion, the High Court was not right in interfering with the judgment of the trial court as affirmed by the first appellate court regarding relief No. 2.

(Relief No. 2 in the said case related to grant of permanent injunction restraining the defendant from unlawfully entering upon the appellant's suit site.)

43. The trial court while holding that the mortgage was made in the year 1996 and the property was allegedly purchased by Sh. Apar Singh in the year 1985, the only portion which was sold to Sh. Apar Singh could not have been mortgaged by said M/s. Amar House Builders, went wrong when it further observed that perusal of the document would show that the suit property was also mortgaged even prior to 1996 as per Loan Agreement Ex.RW1/1 as the earlier date was not mentioned in the agreement and that date could only be disclosed by the plaintiff or M/s. Amar House Builders.

44. It is already observed that the reference of mortgage of the property in lease agreement dated 23.08.1996 Ex.RW1/1 is in reference of the earlier mortgage dated 15.05.1996 Ex.RW1/2 and not to any other agreement of the property prior to 1996. The trial court failed to appreciate the contents of the Sale Deed dated 19.04.1985 Ex.PW1/1 and the Lease Agreements Ex.RW1/1 and RW1/2 created in the year 1996 to correlate and come to a proper conclusion as to when the property was first mortgaged.

45. The trial court has not rightly appreciated the facts and circumstances of this case while declining grant of equitable relief of injunction as prayed and dismissed the suit. The court was incorrect when it held that since title of Harjit Singh etc. had not been proved by the plaintiff and during the pendency of the suit and even before filing of the replication, plaintiff Harjit Singh, Parminder Singh and Bhupinder Singh had sold their property to their father Jasbir Singh, i.e. the present plaintiff vide Sale Deed Ex.PW1/2, which fact

was concealed in the replication and assuming that the Sale Deed being registered document passed title in favour of Jasbir Singh, the plaintiff would not be entitled for relief of injunction as the title of Harjit Singh, etc. in the property in suit was not proved which they claimed by virtue of a Will executed by Apar Singh in their favour and the said Will was not proved in evidence and that therefore no title could pass to the plaintiff.

46. The court failed to take into consideration the possessory rights of the plaintiff in the impugned flat even if his title in the said flat was found defective for the reasons that the Will executed by Mr. Apar Singh, the original owner of the property in favour of Harjit Singh, etc. was not proved in evidence. plaintiff happened to be the father of the original plaintiffs. The plaintiff being in possession has better rights than that of the defendant corporation in the said flat. Therefore, in our view, he is entitled to equitable relief of injunction as prayed.

47. Learned Counsel for the respondent has urged that plaintiff is not entitled to the equitable relief as he himself has not done equity and has concealed relevant facts from the court. The suit was filed on 15.02.1999, the plaintiff allegedly purchased the impugned flat from his sons, the original plaintiffs, on 28.04.1999. The suit was dismissed in default on 6.03.2000 and was restored by the court on 4.09.2000. It is pointed out that replication was signed by Mr. Jasbir Singh, plaintiff whereas application under Order 22 Rule 10 CPC was filed on 26.02.2001 which was contested by the defendant and this application was allowed on 24.08.2001. For 2½ years the plaintiffs concealed this fact of sale of the property in favour of Jasbir Singh and therefore, the plaintiff is not entitled to the discretionary relief. From the date of the dismissal of the suit in default on 6.03.2000 till the date it was restored on 4.09.2000, the plaintiff having moved an application for restoration within a period of limitation, could not have moved any application for being impleaded as plaintiff in place of the original plaintiffs. It seems that after the written statement was filed, the replication was filed by the plaintiff under his signatures. But immediately thereafter an application under Order 22 Rule 10 CPC was filed which was allowed after about six months of the filing of the application.

48. Under these circumstances, it cannot be said that plaintiff concealed the material facts from the court. The irregularity committed in filing the replication by the plaintiff and signing the application stood rectified after he was impleaded in the array of plaintiff. Also otherwise replication is not treated as part of the pleadings and any defects in the same would not disentitle the plaintiff from claiming discretionary relief of injunction as prayed.

49. Perusal of the record indicates that M/s. Amar House Builders was made co-defendant in this case because Mr. Apar Singh had purchased the impugned flat from them in the year 1985. But no relief has been claimed by the plaintiff against M/s. Amar House Builders. Therefore, to say that plaintiff dropped M/s. Amar House Builders from the array of defendants with the mala fide intention to avoid the truth coming before the court is incorrect. The partners of M/s. Amar House Builders who also happen to be the borrowers and guarantors to the property in suit could have been summoned as

witnesses by the defendant so as to bring the truth before the court. Therefore, deletion of M/s. Amar House Builders from the record does not in any manner prejudice the case of the plaintiff nor can it be treated as a factor which dis-entitles the plaintiff from claiming the relief of injunction as prayed. plaintiff cannot be denied the relief of injunction his being in possession of the said flat though he claimed himself to be the owner of the said flat by purchase, which he failed to prove. The court has to consider the case of the parties in totality and not on a particular plea. Once the possessory rights of the plaintiff are not in dispute and the defendant corporation cannot claim better title of the property being a mortgagee of the suit property, having already been sold to various persons, the plaintiff can pray for discretionary relief of injunction on the basis of possessory rights.

50. In [M/s. Seemax Construction \(P\) Ltd. Vs. State Bank of India and another](#), wherein facts of filing of earlier suits in other courts and withdrawal after filing of the said suit were concealed or suppressed from the court, it was held that the facts not disclosed amount to suppression of material facts and therefore the plaintiff was not entitled to the discretionary relief of injunction as prayed and the suit was dismissed without going into the merits of the case. This judgment in no manner helps the case of the defendant corporation under the circumstances of this case as discussed above.

51. The alleged concealment or suppression of material facts pertains to changed circumstances after filing of the suit. It is not the case of the defendant that plaintiff has concealed material facts at the time of filing of the suit, with a view to avoid the truth coming before the court and which would have gone against him. The alleged concealment or suppression of facts therefore, in no manner disentitles the plaintiff to claim equity from the court.

52. The findings of this Court on the issues framed by the trial court are summed up as below:

Issue No. 5:

The Trial Court rightly held that Courts at Delhi have jurisdiction to entertain the suit. Findings of the trial court on this issue have not been challenged before us in the present appeal. Therefore, this issue stood decided in favour of the plaintiff and against the defendants.

Issue No. 4:

Since no relief was claimed by the plaintiff against M/s. Amar House Builders though it was initially impleaded as defendant No. 2 in the case but dropped later on and the presence of M/s Amar House Builders was neither necessary nor proper for final adjudication of the case on merits, the findings of the trial court on this issue are reversed. This issue is accordingly decided in favour of the plaintiff and against the defendants.

Issues No. 2 & 3:

Since plaintiff had sought relief of permanent injunction on the basis of his possessory rights in the impugned flat and the defendant had issued a publication for open sale of the property in question, the plaintiff had a cause of action to file the suit as his rights in the property were under cloud in view of the said notification. In a suit for injunction it is not necessary that there should be a privity of contract between the parties as it is a discretionary relief. An affected person is entitled to claim this relief if his rights are adversely affected by an action of the other party. This right is not based on any contract. Therefore, even if there was no privity of contract between the parties, plaintiff had the right to file the suit for permanent injunction claiming the relief as prayed in the suit. The findings of the trial court on these issues have not been accepted by us being based on improper assessment of the evidence of the parties. The findings of the trial court on these issues are hereby set aside. Hence these issues are accordingly decided in favour of the plaintiff and against the defendant.

Issues No. 1 & 6:

These two issues have been dealt with by the trial court together. We have reversed the findings of the trial court on these two issues and has held that plaintiff is entitled to the decree of injunction as prayed.

53. Under these circumstances, we hold that the trial court did not adopt correct approach in appreciating the facts and circumstances of the case and dismissing the suit of the plaintiff only on the basis of plaintiff having failed to prove title of ownership in the suit property and therefore, the judgment and decree dated 1.11.2003 is hereby set aside.

54. The defendant corporation, its official, agents, employees, associates, workers, officers/officials and the persons working on its behalf are hereby restrained by way of permanent injunction from taking action on the basis of the notice dated 9.02.1999 published in the daily newspaper Hindustan Times regarding the sale of flat on the second floor of property bearing No. E-544, Greater Kailash, Part-II, New Delhi in possession of the plaintiff herein in any manner whatsoever. The suit is accordingly decreed with costs.