

SUPREME COURT OF INDIA

Bank of India

Vs.

Abhay D. Narottam & Ors.

(Ruma Pal and C.K. Thakker, JJ.)

C.A.No.2156 of 1996

03.05.2005

ORDER

Ruma Pal, J.

1. The issue in this appeal is whether the appellant Bank had a prior charge in respect of properties claimed to belong to Respondent 2 Company. , There are two properties in question. The first property is Flat No. B-2, Neelkanth Complex, Sahar Road, Vile Parle (E), Bombay (hereinafter referred to as “the flat”). The second property is certain land at Anjaneri (hereinafter referred to as “the land”).

2. Respondent 2 had been granted certain overdraft facilities by the appellant Bank in 1989. In consideration for the grant of such facility, Respondent 2 undertook to create an equitable charge of the flat in favour of the appellant Bank. Undisputedly at that point of time Respondent 2 was not the owner of the flat. All it had in its possession was an agreement executed by the owner to sell the flat to Respondent 2. This agreement was deposited with the appellant Bank by way of security by Respondent 2.

3. Respondent 2 also took a loan from the appellant Bank of about Rs 35 lakhs and undertook to create a mortgage by deposit of title deeds of the said land. Pursuant to this undertaking, no mortgage was in fact executed by Respondent 2.

4. Defaults were committed by Respondent 2 in repayment of moneys under both the accounts. Two separate suits were filed by the appellant Bank for recovery of the amounts from Respondent 2. While the suits were pending, Respondent 1 was declared a notified party under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. Respondent 1 filed suit before the Special Court for recovery of an amount of approximately Rs 23 crores from Respondent 2. While Respondent 1’s suit a was pending, pursuant to an interim application moved by Respondent 1, a Court Receiver was appointed over the assets of Respondent 2, including the flat and the land. The appellant Bank sought to

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intervene in the proceedings before the Special Court. However, the application for intervention was rejected. The notice of motion taken out by Respondent 1 was ultimately disposed of by appointing a Court Receiver as prayed for therein.

5. The appellant Bank then filed an independent application before the Special Court for discharge of the Receiver appointed over the properties and/or for a directive to the Receiver to sell these properties and to hand over the net sale proceeds to the appellant Bank. While the application was pending, the suit filed by Respondent 1 against Respondent 2 was compromised and a consent decree was passed by which Respondent 1 became entitled to recover from Respondent 2 a sum of Rs 12,44,59,207 as principal together with interest thereon.

6. After the consent decree was passed the appellant Bank withdrew its earlier notice of motion and filed a fresh notice of motion reiterating its earlier prayer. That application was dismissed by the impugned order. The Court held that so far as the flat was concerned there was no prior charge created in favour of the appellant Bank as there had been no registration of the charge under Section 125 of the Companies Act, 1956. As far as the land was concerned it was held that since there was only an undertaking to create a mortgage by Respondent 2, there was no question of the land being a security created in favour of the appellant Bank by Respondent 2.

7. Aggrieved, the appellant Bank has preferred this appeal. The argument is that Section 125 of the Companies Act did not at all apply as it provides that a non-registered charge would be void against the liquidator or any creditor of a company when the company itself was in liquidation. Since Respondent 2 Company was not in liquidation Section 125 would not operate.

8. It is also contended on the basis of the decisions in *K.L.C.T. f Chidambaram Chettyar v. Aziz Meah*¹ and in *Amulya Gopal Majumdar v. United Industrial Bank Ltd*². that mere agreement for sale could create a valid charge by deposit of such agreement.

9. It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. "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 under Section 100 of the Transfer of Property Act. *Section Vadodara Distt. Coop. Sugarcane Producers' Union Ltd. V. 523 Chandrakantbhaithakorebhai Patel* 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.

10. As far as the land is concerned, we agree with the learned Judge that a mere undertaking to create a mortgage is not sufficient to create any interest in any immovable property.

11. As far as the flat is concerned, it needs no authority to say that a contract for sale of immovable property does not of itself create any interest in or charge over such property. This is provided in Section 54 of the Act and is well-settled law. In this case, the agreement for sale which was deposited by Respondent 2 with the appellant Bank was not an agreement by which Respondent 2 agreed to sell the property to a third party, but an agreement to sell the flat to Respondent 2. No interest was created in favour of Respondent 2 by virtue of this agreement for sale which could have been transferred by way of security to the appellant Bank. There is as such no question of the appellant Bank having any charge over such non-existent interest.

12. In the circumstances, the appeal is dismissed albeit for reasons which are somewhat different from those expressed in the impugned order.

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13. In view of the decision in Civil Appeal No. 2156 of 1996 titled Bank of India v. Abhay D. Narottam this appeal is also dismissed.

Cases Referred.

¹*AIR 1938 Rang. 149(FB.)*

²*AIR 1981 CM 0404*