

SUPREME COURT OF INDIA

Hill Properties Ltd.

Vs.

Union Bank of India

C.A.No.7939 of 2013

(K.S. Radhakrishnan and A.K. Sikri JJ.)

11.09.2013

JUDGMENT

K.S. RADHAKRISHNAN, J.

1. Leave granted.

2. We are in this case concerned with the saleability of Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, Malabar Hill, Mumbai – 400 006, which is under attachment in the execution proceedings before the Debt Recovery Tribunal (DRT), Mumbai.

3. Union Bank of India, Respondent No.1 herein, had advanced some financial assistance to the second respondent sometimes in the year 1992. Respondent Nos.3 and 4 stood as personal guarantors for repayment of the dues of Respondent No.2. Respondent No.5, being an associate company of Respondent No.2, mortgaged the aforementioned flat in favour of the Union Bank of India to secure repayment of the dues of Respondent No.2. For realization of the payment of the amount, proceedings were initiated under the Securitization Act before the DRT, Mumbai, and the flat in question was attached under the warrant of attachment on 23rd August, 2005.

4. The Hill Properties Ltd., Appellant herein, preferred Suit No.1627 of 2007 before the High Court of Judicature at Bombay (Ordinary Original Jurisdiction), to release the flat in question from attachment. Notice of Motion was taken out for injunction restraining the Bank and others from taking any steps in furtherance of

warrant of attachment or transferring the suit property to third parties. Learned Single Judge rejected the Appellant's Notice of Motion seeking to release the flat from attachment by its order dated 25th January, 2012, giving liberty to the Appellant to make its offer to purchase the suit flat at a price determined by the Valuer or the price determined by the Auditor of the Company, whichever is higher. Aggrieved by the order, the Appellant preferred Appeal (L) No.185 of 2012 before the Division Bench of the Bombay High Court contending that Respondent No.5, being only a shareholder of the Company, has only a right to occupy the flat and has no right to mortgage the same to the Bank without permission of the Company. Further, it was pointed out that Respondent No.5 is only holding "A" equity share (bearing Share Certificate No.45) in the Appellant Company. By virtue of Articles of Association of the Company, Respondent No.5 was only permitted to use and occupy the flat owned by the Appellant Company and, therefore, the same is not liable to be attached and sold.

5. The Application was resisted by Respondent No.9 contending that the right to occupy the suit flat is the valuable right and value in the share of the Company is nothing but the value of the flat and the same could be transferred for consideration. The flat was, therefore, rightly mortgaged to the Bank and the learned Single Judge was justified in rejecting the claim of the Appellant.

6. The Division Bench of the Bombay High Court found no illegality in the order passed by the learned Single Judge and dismissed the Appeal, so also the Notice of Motion. Various safeguards incorporated by the learned Single Judge were reiterated. Aggrieved of the said order, this appeal has been preferred.

7. Shri Shyam Divan, learned senior counsel appearing for the Appellant, submitted that Respondent No.5 is only a shareholder of the Appellant Company and hence only permitted to use and occupy one of the flats owned by the Company and all the rights, title and interest in respect of the flat in question exclusively vest in the Company. Learned senior counsel submitted that Respondent No.5 could not have mortgaged the suit flat without the permission of the Company which is in violation of the provisions of the Articles of Association of the Company. Learned senior counsel referred to the Articles of Association of the Company and submitted that Respondent No.5 being a shareholder, is bound by the provisions of Articles of Association of the Company. Learned senior counsel placed reliance on the judgments of this Court in *Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay*, (1955) 1 SCR 876, and *Vodafone International Holdings B.V. Vs. Union of India & Anr.*, (2012) 6 SCC

613, Learned senior counsel also submitted that the ratio laid down by this Court in *Ramesh Himatlal Shah Vs. Harsukh Jadhavji Joshi*, (1975) 2 SCC 105, is not applicable to the case on hand, since in that case this Court was dealing with the interest of a member in an immovable property of a Cooperative Society governed by the provisions of the Maharashtra Cooperative Societies Act, 1960, which is inapplicable in the case of right of a shareholder in a limited liability company registered under the Indian Companies Act, 1956.

8. Shri U.U. Lalit, learned senior counsel appearing for the Respondents, on the other hand, submitted that the principle laid down in *Ramesh Himatlal Shah's* case (supra), will clearly apply to the facts of this case. Learned senior counsel submitted that the question as to whether the flat belongs to a member of a Cooperative Society or a shareholder of a Company makes no difference, since the right, title and interest and the right to occupy is the species of property, which has the stamp of transferability. Learned senior counsel submitted that in the absence of any clear and unambiguous legal provisions to the contrary, such species of rights can always be transferred and there is no illegality in mortgaging the property to the Bank, as security for the loan transaction. Learned senior counsel submitted that the High Court has rightly rejected the suit as well as the Notice of Motion and the same calls for no interference by this Court.

DISCUSSION

9. The Appellant claims to be the owner of the property known as Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, Malabar Hill, Mumbai – 400 006. Respondent No.5 is the shareholder of the Appellant Company holding one “A” equity share. Flat No.23 was allotted to Respondent No.5 who was holding the Share Certificate No.45. Respondent No.5 created an equitable mortgage to secure dues of Respondent No.2 to the Union Bank of India by depositing Share Certificate No.45. Union Bank of India filed Suit No.1079 of 1993 for recovery of the dues and also for enforcement of the security. The suit was later transferred to the DRT, Mumbai, and was numbered as OA No.245 of 2001. The DRT, Mumbai, later passed an order of attachment in respect of the flat in question. The question arose as to whether the property which was mortgaged to the Bank and the right of Respondent No.5 upon it could be attached and sold in execution of a decree.

10. We are of the view that the right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative

Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act as well as the Cooperative Societies registered under the Registration of Cooperative Societies Act, etc. Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners' right to dispose of its flat is also well recognized, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well.

11. Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat.

12. In Ramesh Himatlal Shah's case (supra), this Court has clearly delineated the legal principle which is as follows:-

“20. Multi-storeyed ownership flats on cooperative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are: ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon

fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. We have failed to find one.”

13. Reference may also be made to another judgment of this Court in DLF Qutub Enclave Complex Educational Charitable Trust Vs. State of Haryana, (2003) 5 SCC 622, wherein this Court held that the right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. In our view, the Articles of Association of a Company have no force of a Statute and that the right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association.

14. We find that neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners’ benefit. A legal bar on the saleability or transferability of such a species of interest, in our view, will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently we find no error with the warrant of attachment issued by the DRT on the flat in question.

15. We may reiterate that the appellant will certainly have the right of pre-emption, but not at any value lesser than the market value of the suit flat at the time of the sale. Various directions already given by the High Court, therefore, will stand.

16. The appeal is, therefore, dismissed and the amount, if any, deposited by the Appellant be refunded to him. There will, however, be no order as to costs.