SUPREME COURT OF INDIA

Haryana Financial Corporation

Vs.

Gurcharan Singh

C.A.No.11028 of 2013

(K.S.Radhakrishnan and C.Nagappan, JJ.)

13.12.2013

JUDGMENT

K.S.Radhakrishnan, J.

1. Leave granted.

2. M/s Amrit Steel Industries, Jagadhari, a proprietorship concern of which the first respondent is the sole proprietor, had obtained a loan of Rs.5,05,750/- on 15.9.1994 from the Appellant, Haryana Financial Corporation, by entering into hypothecation of machinery, fixture, as well as, personal guarantee bond dated 15.9.1994. The first respondent also gave a written undertaking dated 5.3.1994 that he would not dispose of his properties during the currency of the loan. The first respondent failed to repay the loan. Consequently, the Corporation took over the hypothecated property and sold the same and appropriated the amount. In the meantime, the second respondent, the wife of the first respondent filed Civil Suit No.767 of 1995 against the first respondent before the Court of Civil Judge (Jr. Divn.), Jagadhari, seeking a declaration that she is the absolute owner and in possession of the properties mentioned in the undertaking dated 5.3.1994. The suit was decreed on 3.2.1996 as against the first respondent.

3. The Corporation then filed Civil Suit No.167 of 2003 in the Court of Additional Civil Judge (Senior Division), Jagadhari, against the Respondents seeking a declaration that the decree dated 3.2.1996 was null and void. The Corporation also submitted that the decree was obtained by fraud to defeat the personal undertaking executed by the first respondent on 5.3.1994 in favour of the Corporation. The Court decreed the suit holding that the

decree passed in Civil Suit No.767 of 1995 is a collusive one obtained to defeat the undertaking created by the first respondent on 5.3.1994 in favour of the Corporation. The second respondent filed Civil Appeal No.34 of 2005 in the Court of Additional District Judge, Yamunanagar. The Additional District Judge, however, allowed the Appeal vide judgment dated 30.8.2005 holding that the loan taken by the first respondent was not subject to charge over the property covered by the decree in Civil Suit No.767 of 1995 and that the Appellant had no locus standi to challenge the decree suffered by the first respondent in favour of the second respondent. The Corporation aggrieved by the aforesaid judgment filed RSA No.44 of 2006 before the Punjab and Haryana High Court, which was dismissed by the High Court on 9.1.2006. Aggrieved by the same, the Corporation has filed the present Appeal.

4. Shri Amit Dayal, learned counsel appearing for the Corporation, submitted that the High Court has committed an error in sustaining the order passed by the Additional District Judge after having found that the decree obtained by the second respondent against the first respondent in Civil Suit No.167 of 2003 was a collusive one. Learned counsel submitted that apparently such a decree was obtained without any contest by the first respondent, only to defeat the undertaking given to the Corporation on 5.3.1994. Learned counsel also placed reliance on the judgments of this Court in *S.P. Cheranalvaraya Naidu (dead) by LRs. vs. Jagannath (dead) by LRs and others*[1], *and Badami (deceased) by her LR vs. Bhali*[2] and submitted that the Court cannot grant relief to a party who has obtained a fraudulent decree and who has come to the Court with unclean hands. Learned counsel also placed reliance on the judgment of this Court in *M.L. Abdul Jabbar Sahib vs. M.V. Venkata Sastri & Sons & Ors*[3], and submitted that even if the undertaking dated 5.3.1994 was not registered, still the first respondent is bound by the undertaking and the Corporation can always proceed against the properties referred to in the said undertaking.

5. Shri Gagan Gupta, learned Advocate appearing for the Respondents, submitted that the High Court has rightly affirmed the judgment of the lower Appellate Court after having noticed that the undertaking dated 5.3.1994 has not created any charge over the properties mentioned therein. Consequently, the Corporation cannot proceed against the properties mentioned in the undertaking. Learned counsel submitted that without transfer of interest in the properties in question by a registered document, no charge could be created in those properties and hence the Corporation cannot proceed against those properties on the basis of mere undertaking dated 5.3.1994. In support of this contention, reliance was placed on the judgments of this Court in *K. Muthuswami Gounder vs. N. Palaniappa Gounder*[4] and *Bank of India vs. Abhay D. Narottam and others*[5].

6. We may, for the purpose of this case, extract the undertaking given by the first respondent in favour of the Corporation on 5.3.1994, which reads as follows :-

> "That the proprietor of the concern have the following means :-

Name of the Proprietor/ Partner/Director	Immovable & Moveable Property Assets & Liabilities	Personal Liabilities	Net Worth
Gurcharan Singh			
	Capital with Amrit Steel Industries	1,20,760.00	
	Land & Building of Amrit Steel Industries	8,14,000.00	
	Jewellery	1,00,000.00	
	Cash & Bank Balance	1,00,000.00	
	Deposit with Malhotra	50,000.00	
	Timber		
		11,84,760.00	

LIABILITIES NIL
NET WORTH 11,84,760.00

Sd/-

DEPONENT

VERIFICATION

I, Gurcharan Singh, the above named deponent do hereby verify contents of the above paras as true and correct to the best of my knowledge and belief and nothing has been concealed from.

Further confirm that the means as indicated above in the name shall not be disposed off during the currency of the loan.

Sd/-

DEPONENT PLACE: Yamuna Nagar Dated : 05/03/94"

7. The above-mentioned undertaking dated 5.3.1994 was submitted by the first respondent on a duly attested Stamp Paper, but was not registered under the Registration Act. The above-mentioned undertaking was given before the loan was sanctioned to the first respondent on 15.9.1994. We also fully endorse the view taken by the Courts below that the decree in Civil Suit No.767 of 1995 was obtained by the second respondent as against the first respondent collusively to defeat the undertaking given by the first respondent on

5.3.1994 in favour of the Corporation. Still the question is whether the undertaking dated 5.3.1994 has created any charge over the properties mentioned therein in favour of the Corporation. This Court in *J.K. (Bombay) Private Limited vs. New Kaiser-I-Hind Spinning & Weaving Co. Ltd. & Others*[6] explained the difference between the charge and the mortgage as follows :-

> "While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesnti."

8. Section 100 of the Transfer of Property Act, 1882 defines "charge" as follows:-

> "100. Charges.- Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust- property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge." The above-mentioned Section clearly indicates the following types of charges:
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> 1) Charges created by act of parties; and
>
> 2) Charges arising by operation of law."

9. An ordinary charge created under the Transfer of Property Act is compulsorily register able. The first portion of Section 100 of the TP Act lays down that where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The words "which apply to a simple mortgage shall, so far as may be, apply to such charge" in this Section were substituted by Section 53 of the Transfer of Property (Amendment) Act, 1929, for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of

Sections 81 and 82 shall, so far as may be, apply to the persons having such charge." Evidently, the effect of the amendment was that all the provisions of the TP Act which apply to simple mortgages were made applicable to charges.

10. Section 59 of the Transfer of Property Act refers to the mode of transfer which reads as follows:-

> "59. Mortgage when to be by assurance.- Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title- deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be affected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

11. A conjoint reading of Section 100 with Section 59 of the TP Act makes it clear that if by act of parties, any immovable property is made security for the payment of money to another and it does not amount to mortgage, then all the provisions which apply to a simple mortgage, as far as may be, apply to such charge. Consequently, in view of Section 59 of the TP Act when there is a mortgage other than a mortgage by deposit of the title deeds, it can be affected only by a registered instrument. So far as the present case is concerned, no registered mortgage deed was executed by the first respondent and no title deed of the property was handed over by the first respondent to the Corporation. The mere undertaking that a person would not dispose of the properties mentioned, during the currency of the loan, would not confer any charge on the immovable properties mentioned therein. In other words, a mere undertaking to create a mortgage is not sufficient to create an interest in any immovable property. This legal position has been settled by various judgments of this Court. In K. *Muthuswami Gounder* (supra), this Court was dealing with the legal validity of a security bond by which parties undertook that they would not alienate the properties till the decree was discharged. Referring the said document, this Court held as follows:

> "17. The document, Exhibit A-6, security bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document, we cannot say that a charge as such has been created in respect of the suit property for money to be decreed in the suit. All that it states is that in the event of a decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agree with the finding of the High Court that the document at Exhibit A-6 is not a charge. If that is so, the suit filed by the appellant has got to be dismissed."

12. The Court held that the decree obtained in that suit was a simple money decree and not a decree on a charge or mortgage with the result that the appellant who purchased the property in execution of that decree did not acquire the rights under the Security Bond.

13. In Bank of India (supra), this Court was examining the scope of undertaking made for creating an equitable charge over a flat in favour of the Bank. This Court held that without

a transfer of interest, there is no question of there being a mortgage and that mere undertaking is not sufficient to create a charge. The ratio laid down by the above-mentioned judgment applies to the present case. In our view, the mere undertaking that the party will not dispose of the properties mentioned in an undertaking, during the currency of the loan, will not create any charge over those properties, unless charge is created by deposit of title deeds or through a registered document. We also hold that even if the purpose of the decree obtained in Civil Suit No.767 of 1995 between the respondents was fraudulent and collusive one so to defeat the undertaking made on 5.3.1994 that would not confer any charge over the properties, unless the undertaking is registered. We, therefore, find no error in the judgment of the lower Appellate Court which was affirmed by the High Court.

14. In the result, the appeal fails and is accordingly dismissed. There will be no order as to costs.

Judgment referred

[1]*1994 (1) SCC 0001*

[2]*2012 (11) SCC 0574*

[3]*1969 (1) SCC 0573*

[4]*1998 (7) SCC 327*

[5]*2005 (11) SCC 0520*

[6]*1969 (2) SCR 0866*