

Dispute between two banks regarding first charge over mortgaged property: DRAT KOLKATA

State Bank of India

...Appellant

United Bank of India

...Respondent

Case No: Appeal No. 51 of 2014

Date of Judgement: 12.10.2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. P.K.Roy, Mr. S. Bandopadhyay, Advocates.

For Respondent: Mr. N.K. Rakshit, Ms. Laboni Rakshit, Advocates.

Facts:

Appellant SBI sanctioned a housing loan of Rs.6.90 lakhs to Respondent No.2, Partha Pratim Ghosh on 03.10.2007. Respondent no.2 executed security documents on 03.12.2007 and deposited the original title deed (Deed No. 1544 of 2008) on 30.03.2009, thereby creating an equitable mortgage. Loan account became NPA due to irregular payment. Notice u/s 13(2) was served on 23.06.2010 demanding Rs. 8.14 lakhs. Symbolic possession was taken on 12.01.2013. When SBI was planning to sell the secured asset, it found an e-auction notice dated 10.11.2013 published by Respondent No.1 United Bank of India for the same property. SBI filed an application to restrain the sale, stating that the property is already mortgaged with it. Respondent No.1 refuted the claim and stated that it had sanctioned a loan of Rs.6.50 lakhs to one Babul

Dutta on 16.11.2006 for purchasing the same property, which was mortgaged on 29.01.2008 by depositing the title deed (Deed No. 1371 of 2007). The account became NPA and symbolic possession was taken on 02.02.2011.

Court's Opinion:

Court observed that both banks were negligent in disbursing loans without proper title verification. For an equitable mortgage, three essentials are required as per Section 58 of TPA – (1) a debt, (2) deposit of title deeds and (3) intention that the deposit is security for debt. Equitable mortgage for SBI was created on 30.03.2009 when the title deed was deposited with intention to secure the debt. For United Bank of India, equitable mortgage was created on 29.01.2008 when Babul Dutta deposited the title deed. The deed deposited with SBI on 30.03.2009 is subsequent to the deed deposited with UBI on 29.01.2008. Hence, SBI's mortgage is subsequent to UBI's mortgage. The court did not find merit in SBI's argument regarding a letter dated 19.01.2008 showing merely a specimen acknowledgement letter without date. The letter dated 29.01.2008 clearly shows deposit of title deed. As per the agreement with SBI dated 03.12.2007, the original title deeds were not deposited by the borrower before 30.03.2009. Hence, UBI has the first charge over the equitable mortgage.

Arguments:

Appellant SBI:

Equitable mortgage was created on 30.03.2009 by deposit of title deed no. 1544 of 2008. Their mortgage is first charge over the property. Letter dated 19.01.2008 shows mere specimen without date, hence a fabricated document.

Respondent No.1 UBI:

They have first charge as equitable mortgage was created on 29.01.2008 by Babul Dutta depositing title deed no. 1371 of 2007. SBI's mortgage dated 30.03.2009 is subsequent to their mortgage. Letter dated 29.01.2008 clearly shows deposit of title deed on that date.

Sections:

Section 13(2) of SARFAESI Act – Notice to borrower classifying account

as NPA

Section 58 of Transfer of Property Act – Defines essentials of equitable mortgage by deposit of title deeds

Case Laws Referred:

Syndicate Bank Vs. Estate Officer & Manager, A.P.I.I.C. Ltd. & Ors (2007) 8 SCC 361 – Essentials for an equitable mortgage are (1) a debt, (2) deposit of title deeds and (3) intention to secure the debt.

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Full Text of Judgment:

1. Instant appeal has arisen against the judgement and order dated 04.03.2014 passed by learned DRT-II Kolkata in S.A. No. 1373 of 2013 whereby S.A. was dismissed. Feeling aggrieved the appellant preferred the appeal.

2. As per pleadings of the parties, respondent no.2 Partha Pratim Ghosh requested the appellant bank on 03.10.2007 for sanction of loan. Accordingly, appellant bank sanctioned housing loan of Rs.6.90 lakhs in favour of respondent no.2 vide sanction letter dated 03.10.2007. Respondent no.2 executed security documents on 03.12.2007. Original title deed being Deed No. 1544 of 2008 was deposited with the appellant bank thereby equitable mortgage of the said property i.e. Flat No. 4A, 4th floor, Monalisa Apartment was created. A confirmation letter confirming deposit of such deed was also executed on 30.03.2009. Due to irregular payment of loan instalments, loan account was classified as NPA and notice u/s 13(2) of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act') dated 23.06.2010 was served upon the respondent no.2 demanding Rs.8.14 lakhs with further interest. Symbolic possession was taken by issuing notice dated 09.01.2013 which was affixed on the secured asset and published in two newspapers on 12.01.2013.

3. When the appellant bank was contemplating to sale the secured asset they came across an E-auction sale notice dated 10.11.2013 published by respondent no.1 bank in 'The Telegraph' and 'The Ananda Bazar

Patrika' newspaper for sale of the aforesaid property. Hence, S.A. was filed praying for restraining respondent no.1 bank to put the property on e-auction sale as the property is already mortgaged with the appellant bank.

4. Respondent no.1 bank refuted the claim of the appellant bank and submitted that housing loan of Rs.6.50 lakhs was sanctioned on 16.11.2006 in favour of Shri Babul Dutta for purchase of Flat No. 4A, 4th floor, Moalisha Apartment on the condition that said flat would be mortgaged in favour of the respondent no.1 bank as security. Borrower attended Bank on 29.01.2008 and deposited the original title deed thereby creating equitable mortgage. Since repayment of loan became irregular, loan account was classified as NPA on 13.09.2009. Notice u/s 13(2) of the Act dated 28.09.2010 was issued. Symbolic possession was taken by the authorized officer of the bank on 02.02.2011 by affixing notice on the secured asset and also published in the newspapers. The property was put to auction sale by issuing sale notice dated 09.11.2013. Valuation report was also obtained. Sale was fixed on 03.02.2014. 30 days' notice was given to the borrower. It is further submitted that Smt. Radharani Kumar and Sri Debabrata Kumar through their constituted attorney registered title deed in favour of the borrower on 30.04.2007.

5. Appellant bank is claiming mortgage on 30.03.2009 while the mortgage with the respondent no.1 bank was created on 29.01.2008. Accordingly, respondent no.1 bank is holding prior charge of the equitable mortgage of the property.

6. It is a peculiar case wherein two nationalized banks are contesting their claim against each other. Both of them sanctioned loan to different persons on the basis of two different sale deeds of the same property. Both are claiming that the mortgagor created equitable mortgage by depositing title deed.

7. At the very outset, I would like to observe that both the bank were negligent enough at the time of disbursing of loan. They did not take care of obtaining non-encumbrance certificate or made enquiry about the title of the mortgagor. It is also observed by the learned DRT in

its judgement and order.

8. Equitable mortgage by depositing title deed is defined u/s 58F of the Transfer of Property Act, which reads as under : "Mortgage by deposit of title-deeds. – Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other town which the 8[State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds." A bare perusal of the provision would show that mortgage by depositing title deed would be created on delivery by the mortgagor the document of title of immovable property with the intention to create a security thereon.

9. Hon'ble Supreme Court in the case of Syndicate Bank Vs. Estate Officer & Manager, A.P.I.I.C. Ltd. & Ors [(2007) 8 SCC 361] has held that Section 58 of the Transfer of Property Act inter alia provides that where a person in any of the towns mentioned therein delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. It would be seen from this provision that three essentials are required for an equitable mortgage, namely, (1) a debt, (2) deposit of title deeds and (3) the intention that the delivery should be security for the debt.

10. Now it is to be seen as to whether equitable mortgage was created in favour of the appellant bank prior to the creation of mortgage in favour of respondent no.1 bank, who is holding first charge over the property? Appellant bank has submitted that respondent no.2 Partha Pratim Ghosh had executed the deed of undertaking-cum-indemnity and deposited with the bank on 30.03.2009 the original title deed i.e. the deed of conveyance dated 04.12.2007 which was registered as Deed No. 1544 of 2008. It means that equitable mortgage was created in favour of the appellant bank on 30.03.2009 when the original title deed was deposited by respondent no.2 in favour of the appellant.

11. Per contra, respondent no.1 bank claims that one Shri Babul Dutta

had created equitable mortgage of the property on 29.01.2008 by depositing original title deed dated 23.04.2007 which was registered as Deed No. 1371 of 2007. A letter of deposit of title deed was also executed on 29.01.2008. It is not the case of either party that sale deed deposited with them are forged but at the same time both the bank did not make any effort to verify the genuineness of the sale deed. Further, it is not on record that whether any non-encumbrance certificate was obtained over the property or not?

12. As far as first charge is concerned a bare perusal of the sale deed deposited with the parties will show that the original sale deed was deposited with the appellant bank on 30.03.2009 while the original sale deed executed in favour of the Babul Dutta was executed on 29.01.2008. Accordingly, sale deed deposited with the appellant bank is later in time than the sale deed deposited with the respondent no.1 bank. It means that equitable mortgage created in favour of the appellant bank was later in time than the equitable mortgage in favour of respondent no.1. Accordingly, the mortgage created in favour of the appellant bank shall be subject to existing charge/mortgage of respondent no.1 bank.

13. Learned counsel for the appellant bank made an attempt to challenge the mortgage in favour of the respondent no.1 bank on the basis of letter dated 19.01.2008 written by the United Bank of India, Sheoraphully Branch to the Senior Manager, United Bank of India, Serampore Branch wherein specimen of acknowledgement letter relating to deposit of title deeds by the borrower was attached, which was signed by Babul Dutta, but it is undated. Learned counsel submits that since this letter is undated, it is a concocted document. I do not find any force in the submission. Letter dated 29.01.2008 written by the Sheoraphully Branch of United Bank of India to the Senior Manager, United Bank of India clearly indicate that the original title deed was annexed with the letter for creation of equitable mortgage. Endorsement was also made by the Senior Manager, United Bank of India, Sheoraphully Branch to the effect that equitable mortgage was created on 29.01.2008 at page no. 126. This document could not be disbelieved. At the same time, equitable mortgage was created in favour of the

appellant bank by Partha Pratim Ghosh by depositing original title deed on 30.03.2009. Earlier agreement was signed by Pratha Pratim Ghosh wherein in the Column of "Security" it is mentioned as under :
"Flat No. 4A measuring 750 Sft. on the 4th floor of the building known as "Monalisha Apartment" consisting 2 bedrooms, 2 toilets, Kitchen, dining space and balcony, on the plot of land R.S.Dag No. 3997, RS Kh.No. 1312, Mouza- Sheoraphully at 6, Nonadanga Road, under Baidyabati Municipality. Equitable mortgage of flat/property/land with original set of documents. Further, it is also mentioned in Column "11-Documents:" as under : The following documents will be executed by you before disbursement: Term Loan agreement for Home Loan – Documents, Affidavits and Confirmation Letter in respect of Equitable Mortgage – Annexure I in respect of Disclosure to CIBIL – Letter in respect of SBI Life – Affidavit.

14. It means that the original title deed was not deposited by Partha Pratim Ghosh with the appellant bank prior to 30.03.2009. In the deed of undertaking dated 03.12.2007 it is also stated that "Whereas, the mortgagor has entered into an agreement to sale with Banerjee Land Developers & Construction, Chandannagar and thereby agreed to purchase flat no. 4A, admeasuring 750 Sft on 4th floor of the building being constructed at Plot No. 3997, Survey No. 1312 at Mouza Sheoraphully. The said agreement is registered in the office of Sub-Registrar And Whereas the bank has sanctioned a Home Loan of Rs.6.90 lakhs to the mortgagor for the purpose of purchase of flat. The mortgagor has agreed to repay the said loan in 209 equal monthly instalments of Rs.7204/- each with interest @ 10.50% per annum with monthly rests." Hence, it is clear that equitable mortgage was created only on 30.03.2009 when the original title deed was deposited by Partha Pratim Ghosh in favour of the appellant bank. It is later in time to the equitable mortgage created in favour of the respondent no.1 bank.

15. Learned DRT has recorded a finding that property was sold for Rs.8.83 lakhs but no argument was raised by the appellant on this issue.

16. On the basis of the discussion made above, I am of the view that learned DRT has arrived at a logical finding. There is no illegality

or irregularity in the impugned order. Hence, the appeal is liable to be dismissed.

17. Appeal is dismissed. Impugned order dated 04.03.2014 passed by learned DRT-II Kolkata in S.A. No. 1373 of 2013 is confirmed. No order as to costs. File be consigned to record room. Copy of the order be supplied to the appellant and the respondent and a copy be also forwarded to the concerned DRT. Copy of the judgement/Final Order be uploaded in the Tribunal's website. Order dictated, signed and pronounced by me in the open Court on this the 12 day of October, 2023.

Syndicate Bank Vs. Estate Officer & Manager, A.P.I.I.C. Ltd. & Ors
Section 58 of the Transfer of Property Act inter alia provides that where a person in any of the towns mentioned therein delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. It would be seen from this provision that three essentials are required for an equitable mortgage, namely, (1) a debt, (2) deposit of title deeds and (3) the intention that the delivery should be security for the debt.