

Priority of equitable mortgages created by two banks on the same property: DRAT KOLKATA

State Bank of India

...Appellant

United Bank of India

...Respondent

Case No: Appeal No. 53 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:

Respondent No. 2 Debabrata Halder requested appellant State Bank of India (SBI) for a housing loan on 09.02.2008. SBI sanctioned a loan of Rs. 5.17 lakhs on 25.03.2008. Halder executed security documents on 08.04.2008 and deposited the original title deed (Deed No. 1542 of 2008) thereby creating an equitable mortgage of Flat No. 4C, 4th floor, Monalisa Apartment. Due to irregular loan repayments, the account was classified as NPA. SBI issued notice u/s 13(2) of SARFAESI Act on 23.06.2010 demanding Rs. 5.46 lakhs. Symbolic possession was taken on 12.01.2013. When SBI was preparing to sell the secured asset, it found an e-auction notice dated 10.11.2013 published by respondent No. 1 United Bank of India (UBI) for sale of the same property. Hence SBI filed an application to restrain the sale. UBI

refuted SBI's claim stating that it had sanctioned a housing loan of Rs. 6.50 lakhs to one Srimanta Mukherjee on 23.11.2006 for purchase of the flat, subject to mortgage of the flat. Mukherjee created an equitable mortgage by depositing the title deed on 29.01.2008. As the account became NPA, UBI issued notice u/s 13(2) on 14.11.2011 and took symbolic possession on 19.09.2012. The sale notice was issued on 09.11.2013.

Elaborate Opinions:

SBI is claiming mortgage on 02.04.2009 while UBI's mortgage was created earlier on 29.01.2008. Thus, UBI has prior charge on equitable mortgage of the property. The case involves two nationalized banks contesting claim against each other, with both sanctioning loans against two sale deeds of the same property and claiming equitable mortgages. Both banks were negligent in disbursing loans without obtaining non-encumbrance certificates or enquiring into title. This was also observed by the DRT. Section 58F of Transfer of Property Act provides that equitable mortgage is created by deposit of title deeds with intention to create security. Three essentials are required – a debt, deposit of title deeds and intention to secure the debt. As per Supreme Court in *Syndicate Bank v. APIIC*, the intention must be to create security for the debt. Equitable mortgage for SBI was created on 02.04.2009 when Halder deposited the title deed. For UBI, it was created on 29.01.2008 when Mukherjee deposited the title deed. Thus, UBI's mortgage has priority. Both mortgages are on the basis of genuine sale deeds. It is not on record if non-encumbrance certificates were obtained. The deed deposited with SBI on 02.04.2009 is later than UBI's deed on 29.01.2008. Thus, SBI's mortgage is subject to UBI's prior mortgage.

Arguments:

SBI challenged UBI's mortgage based on an undated acknowledgement letter. However, UBI's letter dated 29.01.2008 clearly showed deposit of title deed and creation of equitable mortgage. Documents show SBI did not obtain deposit of title deeds from Halder prior to 29.01.2008 when UBI obtained deposit. Equitable mortgage for SBI was created only on 02.04.2009. No arguments were raised regarding property being sold

for higher price of Rs. 8.30 lakhs.

Sections:

Section 13(2) of SARFAESI Act: Power of secured creditor to take possession of secured asset

Section 58F of Transfer of Property Act: Mortgage by deposit of title deeds

Cases Referred:

Syndicate Bank Vs. Estate Officer & Manager, A.P.I.I.C. Ltd. & Ors [(2007) 8 SCC 361]

Conclusion:

The DRT arrived at the logical finding that UBI's equitable mortgage has priority over SBI's mortgage. The impugned order does not suffer from any illegality or irregularity. The appeal was accordingly dismissed.

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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. 1375 of 2013 whereby S.A. was dismissed. Feeling aggrieved the appellant preferred the appeal.

2. As per pleadings of the parties, respondent no.2 Debabrata Halder requested the appellant bank on 09.02.2008 for sanction of loan. Accordingly, appellant bank sanctioned housing loan of Rs.5.17 lakhs in favour of respondent no.2 vide sanction letter dated 25.03.2008. Respondent no.2 executed security documents on 08.04.2008. Original title deed being Deed No. 1542 of 2008 was deposited with the appellant bank thereby equitable mortgage of the said property i.e. Flat No. 4C, 4th floor, Monalisa Apartment was created. A confirmation letter confirming deposit of such deed was also executed on 02.04.2009. 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.5.46 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 23.11.2006 in favour of Shri Srimanta Mukherjee for purchase of Flat No. 4C, 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 12.09.2009. Notice u/s 13(2) of the Act dated 14.11.2011 was issued. Symbolic possession was taken by the authorized officer of the bank on 19.09.2012 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 fixing reserve price at Rs.7.00 lakh. Sale was fixed on 03.02.2014. 30 days' notice was given to the borrower.

5. Appellant bank is claiming mortgage on 02.04.2009 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 Debabrata

Halder had executed the deed of undertaking-cum-indemnity and deposited with the bank on 02.04.2009 the original title deed i.e. the deed of conveyance which was registered as Deed No. 1542 of 2008. It means that equitable mortgage was created in favour of the appellant bank on 02.04.2009 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 Srimanta Mukherjee had created equitable mortgage of the property on 29.01.2008 by depositing original title deed dated 19.04.2007 which was registered as Deed No. 394 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 02.04.2009 while the original sale deed executed by Srimanta Mukherjee 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 29.01.2008 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 Srimanta Mukherjee, 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 original title deed was received. This document could not be disbelieved. At the same time, equitable mortgage was created in favour of the appellant bank by Debabrata Halder by depositing original title deed on 02.04.2009. Earlier agreement was signed by Debabrata Halder wherein in the Column of "Security" it is mentioned as under :

"All that on complete residential flat super builtup area 700 sft. On 4th floor being Flat No. 4C at "Monalisha Apartment" along with proportionate share of land underneath with all common facilities standing upon that land measuring 4 cottah, 3 chattack, 11 Sft. comprised R.S.Dag No. 3997, LR Plot 6938 RS Kh.No. 4821, Mouza-Sheoraphully at J.L. No. 6, under Baidyabati Municipality, Serampore Dist. Hooghly. 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 Debabrata Halder with the appellant bank prior to 29.01.2008. In the deed of undertaking dated 08.04.2008 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. 4C, admeasuring 700 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 02.04.2009 when the original title deed was deposited by Debabrata Halder 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.8.30 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. 1375 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, 2023.1.