

Validity of agreement of sale vis-à-vis banks rights as a secured creditor: DRAT KOLKATA

Smt. Anshu Gupta

...Appellant

Reliance Asset Reconstruction Company Limited

...Respondent

Case No: Appeal No. 11 of 2023

Date of Judgement: 12th October, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Nemani Srinivas, Advocate.

For Respondent: Mr. A. Satyanarayana, Mr. Pankaj Kumar Mukherjee, Advocates.

Facts:

Appellant Smt. Anshu Gupta entered into an agreement of sale dated 6th December, 2010 with Respondents No. 2 (Sri Rajesh Kumar Gupta) and 3 (Smt Sangeeta Gupta) for purchase of a flat. The agreement was on a plain paper for Rs. 25 lakhs of which Rs. 15 lakhs were paid in cash. Respondents 2 and 3 had taken a loan from Laxmi Vilas Bank and created an equitable mortgage on the flat in favor of the bank by deposit of title deeds on 14th August 2012. The bank filed an Original Application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which is pending. The bank's debt was assigned to Respondent 1 (Reliance Asset Reconstruction Company Limited) in 2015. Respondent 1 issued notice under Section 13(2) of

the SARFAESI Act on 1st April 2022 and took possession on 21st July 2022. Meanwhile, Appellant had filed a civil suit for specific performance of agreement which was decreed ex-parte on 22nd September 2021. Appellant filed an application under Section 17 of SARFAESI Act to set aside Respondent 1's possession which was dismissed. Appellant has appealed against the said order.

Arguments by Appellant:

Appellant has an agreement of sale, consideration has been paid, suit for specific performance has been decreed in her favor. She has a right to protect her interest in the property. Relying on Supreme Court decision in Anita International, Appellant argued that Respondent 1's possession is in violation of the decree in her favor and hence illegal.

Arguments by Respondent 1:

The impugned order is valid. The agreement relied upon by Appellant being unregistered does not confer any title rights as per decision in Suraj Lamp case. Appellant has not taken steps to execute the decree or get sale deed registered even after 1 year. Transactions are sham and collusive as parties are relatives. Bank and Respondent 1 have valid mortgage over the property and have exercised their rights under the SARFAESI Act. Sale has also taken place after due process. Hence Appellant has no rights.

Court's Decision:

Agreements of sale do not create any rights or interest in property unless followed by execution and registration of sale deed. Hence, Appellant's agreement does not confer any legal rights [Refer – Section 54 and 55 of Transfer of Property Act; Suraj Lamp case]. Although the agreement has culminated into a decree of specific performance, Appellant has not taken any steps to execute the decree for over a year. This shows transactions are collusive. On the other hand, the bank and its assignee (Respondent 1) have valid mortgage rights which they have exercised by taking possession under SARFAESI Act. Property has already been sold to a 3rd party. Appellant thus has no prima facie case or balance of convenience in her favor. No case for grant of stay against actions of Respondent 1. Impugned order

valid.

Sections:

Section 54, 55 of Transfer of Property Act

Section 13(2), 14 and 17 of SARFAESI Act

Section 19 of Recovery of Debts Due to Banks and Financial Institutions Act

Cases Referred/Relied Upon:

Suraj Lamp and Industries Pvt. Ltd. Vs State of Haryana (2012) 1 SCC 656

Anita International Vs Tungabhadra Sugar Works Mazdoor Sangh (2011) 6 SCC 42

Conclusion:

The Appellant had an unregistered agreement of sale. In light of Supreme Court decisions, such an agreement does not confer any rights or interest. The bank/Respondent 1 have valid mortgage rights which they have exercised validly as per law. The appeal was therefore dismissed upholding the Trial Court's order.

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Court

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Full Text of Judgment:

1. Feeling aggrieved by the order dated 2nd January, 2023 passed by Learned DRT-II, Hyderabad in I.A. 1783 of 2022 in S.A. 240 of 2022 Appellant preferred the appeal.

2. As per the pleadings of the parties, Appellant preferred a SARFAESI Application, being S.A. 240 of 2022, for declaration of the Possession Notice dated 20th July, 2022 under Rule 8 (1) of the Security Interest (Enforcement) Rules, 2002 null and void and with consequential reliefs. Appellant is a third party to the SARFAESI proceedings initiated by the Respondent No. 1. Appellant entered into an agreement of sale dated 6th December, 2010 with Respondents No. 2 and 3 for purchase of the schedule property, i.e. Flat No. G-2, Ground Floor, Durga Nivas, having built-up area on 1200 Sft on Plot No. B-7/Part in

Sy No. 64, 66,67/A, 68, 69 and 70 admeasuring 300 Sqyds situated at Manikonda Jagir Village Rajendra Nagar Mandal RR District.

3. Respondent No. 1 is the assignee of the Bank. Respondents No. 2 and 3 were not executing the sale deed in favour of the Appellant. Accordingly, a civil suit, being Civil Suit No. 32 of 2021, was filed by the Appellant against the Respondents 2 and 3 in the Court of Junior Civil Judge, Rajender Nagar for 'Specific Performance of the Contract', which was decreed on 22nd September, 2021.

4. Respondent No. 1 affixed the Possession Notice dated on 21st July, 2022 on the schedule property whereby he came to know about the equitable mortgage created by Respondents No. 2 and 3 in favour of Respondent No. 1 by depositing title deeds of the disputed property. Appellant preferred S.A. 240 of 2022 wherein I.A. 1783 of 2022 was filed seeking stay of the proceedings and setting aside the order under Section 14 of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act) which was dismissed by the Learned DRT. I have heard the Learned Counsel for the parties and perused the record.

5. Appellant is putting her claim on the basis of an agreement of sale wherein Item No. 5 of the Possession Notice was allegedly agreed to be purchased by the Appellant from Respondents No. 1 and 2. Original Suit No. 32 of 2021 for specific performance of contract was decreed ex parte against Respondents No.1 and 2 on 22nd September, 2021. Demand Notice under Section 13 (2) of the Act was issued upon Respondents No. 1 and 2 on 1st April, 2022 while the Possession Notice was issued on 21st July, 2022. Equitable mortgage was created on 14th August, 2012 by the Respondents No. 2 and 3 in favour of Respondent No. 1.

6. Learned Counsel for Appellant argued that an agreement to sale exists in favour of the Appellant. Civil suit was filed for 'Specific Performance of the Contract' which was decreed. Accordingly, now Appellant has the right to protect her rights. Reliance is placed upon a judgment of the Hon'ble Apex Court in Civil Appeal No. 6042 – 6048 of 2011 (Anita International -vs- Tungabhadra Sugar Works Mazdoor Sangh & Others) wherein in paragraph 45 it was held that party to the lis or to any third party who considers an order passed by a Court as

void or non est must approach a Court of a competent jurisdiction to have the said order set aside on such grounds as may be available in law. However, till the order passed by the Court is set aside, the same would have the force of law and any act/action carried out in violation thereof would be liable to be set aside.

7. Per contra, Learned Counsel for Respondent submits that the secured assets have already been sold and sale certificate is issued and registered. It is submitted that the proceedings of Original Suit No. 32 of 2021 was collusive in nature as the Respondents No. 2, 3 and the Appellant are close relatives. Agreement of sale is on a plain paper; all the transactions were made in cash which could not be a valid proof for passing of consideration. No steps for registration of the sale deed after passing of the decree have been taken. Bank filed the Original Application, under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993, in 2014. Notices were issued and assignment was made in favour of Respondent No. 1 in 2015. Reliance is placed upon a judgment of the Hon'ble Apex Court in Suraj Lamp And Industries Private Limited -vs- State of Haryana & Another (2012 (1) SCC 656) wherein it was held that any contract of sale which is not a registered deed of conveyance would fall short of Sections 54 and 55 of the Transfer of Property Act and will not confer any title nor transfer any interest in an immoveable property.

8. As far as the facts of the case are concerned, admittedly, the Appellant is not a party to the SARFAESI proceedings. Appellant is putting her claim on the basis of an unregistered agreement of sale which was executed between Appellant and Respondents No. 2 and 3. As far as admissibility of the agreement of sale is concerned, no doubt, a Civil Suit No. 32 of 2021 is filed for 'Specific Performance of Contract' which was decreed ex parte on 22nd September, 2021 against Respondents No. 2 and 3 but no steps were taken by the Appellant for execution of the decree. It appears that neither the sale deed was executed nor the earnest money, allegedly paid by the Appellant to the Respondents No. 2 and 3, was refunded. Respondent No. 1 is an assignee of the Bank. Loan was taken. Laxmi Vilas Bank is the original creditor and Durga Jewellers and Gems Private Limited, who is a Private Limited

Company, is the Borrower of the Bank. Sanjay Kumar Gupta, Rajesh Kumar Gupta, Shiva Kumar Gupta, Purushotham Das Gupta, Durgesh Gupta, Subhash Chand Gupta, Aila Chandrakala and Sangeeta Gupta are the Guarantor/Mortgagors of the loan facilities. Guarantor/Mortgagor, namely, Rajesh Kumar Gupta, and Smt. Sangeeta Gupta Gupta, Respondents No. 2 and 3, created equitable mortgage in favour of the Bank on 14th August, 2012. It is also not in dispute that Respondent No. 1 is an Assignee of the Bank.

9. O.A. 771 of 2014, filed by the Bank under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993, is pending. Agreement to sale culminated into a decree which was passed ex parte against Respondents No. 2 and 3. It is also not in dispute that the Respondents No. 2, 3 and the Appellant are close relatives. No steps have been taken for execution of the decree. No doubt, an order of a competent Court, till it is set aside by a competent Court, is binding upon the parties as has been held by the Hon'ble Apex Court in Suraj Lamp (supra) that : "Scope of an agreement of sale 16. Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam [(1977) 3 SCC 247] observed: (SCC pp. 254-55, paras 32-33 & 37) "32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra³.) The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

33. In India, the word 'transfer' is defined with reference to the word 'convey'. The word 'conveys' in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

37. ... that only on execution of conveyance, ownership passes from one party to another..."

17. In *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra* [(2004) 8 SCC 614] this Court held: (SCC p. 619, para 10)

"10. Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party."

18. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed a of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter." Further it was held by the Hon'ble Apex Court that immoveable property can be legally purchased only by a registered deed of conveyance.

10. Learned DRT recorded a finding that no prima facie case is made out in favour of the Appellant on the basis of an unregistered agreement of sale although it culminated into a decree. I do not find any illegality in the impugned order. Accordingly, I am of the

considered opinion that the Appellant herein has no prima facie case and there is neither any balance of convenience in her favour nor irreparable loss would be caused to her.

11. Accordingly, I do not find any force in the appeal and is liable to be dismissed.

Appeal is dismissed. The impugned order dated 2nd January, 2023 passed by Learned DRT-II, Hyderabad in I.A. 1783 of 2022 in S.A. 240 of 2022, is affirmed.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

File be consigned to Record room.

Order dictated, signed and pronounced in open Court.

Copy of the Judgment/Final Order be uploaded in the Tribunal's Website.