

Validity of equitable mortgage created by deposit of title deed copies instead of originals: DRAT KOLKATA

Central Bank of India

...Appellant

Uday Chand Das

...Respondent

Case No: Appeal No. 115 of 2023

Date of Judgement: 12th October, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Debasish Chakrabarty with Ms. Sharmistha Pal, Advocates.

For Respondent: Mr. Debasish Karmakar with Mr. Arya Nandi, Mr. Emon Bhattacharya and Ms. Pooja Sah, Advocates .

Facts:

Respondent No. 2 Dipankar Saha enjoyed a term loan of Rs. 40,000 from Appellant Central Bank of India's Burdwan Branch. Dipankar's father Parimal Saha (now deceased) stood guarantor and offered his property as security. The property was leased to Parimal's father Panchanan Saha in 1949. Panchanan died intestate in 1978 leaving behind wife, two sons (Parimal and Shankar), and three daughters (Jyotsna, Nilima and Shibani). A partition deed was executed between Parimal and Shankar in 2004 regarding the property. Parimal then created an equitable mortgage on the property by depositing certified copies of the 1949 lease deed and 2004 partition deed with the Bank. He also

gave letters of confirmation affirming the mortgage in 2002, 2005, 2006 and 2008. When the loan became irregular, the Bank issued notice under Section 13(2) of the SARFAESI Act in 2014. Notices were received by Respondent No.2 Dipankar but no representation was made. Possession notice was also published in 2015. Respondent No. 1 Uday Chand Das challenged the bank's action by filing an application under Section 17 before the Debt Recovery Tribunal (DRT). The DRT allowed the application vide impugned order dated 28.07.2022.

Court's Opinion:

The partition deed between Parimal and Shankar is legally invalid as the three sisters were not made parties to it. Merely mentioning their consent in the subsequent 2009 sale deed does not cure this defect. The Bank failed in its duty to ensure a valid security. It had knowledge about the surviving daughters but did not obtain any surrender/waiver document from them. Relying merely on oral consent was wrong. No original title deeds were deposited with the Bank. Depositing only copies does not create a valid mortgage under Section 58(f) of the Transfer of Property Act. The contradictory stands taken by the Bank about deposit of originals lacks credibility. Thus, no legally enforceable mortgage was created by Parimal. The DRT has rightly set aside the Bank's action under SARFAESI Act.

Appellant Bank's Arguments:

The partition deed allotted separate shares to Parimal and Shankar. It was duly registered and mutated. The sale deed mentions that the partition was done with consent of the three sisters who also joined as vendors. So their consent can be inferred. The Bank's mortgage register shows that equitable mortgage was properly created by deposit of title deeds. This was reaffirmed multiple times by Parimal. The Bank holds the original lease and partition deeds. Hence valid security interest exists. The DRT failed to consider this aspect.

Respondent's Arguments:

The partition deed excluded the daughters, hence it did not transfer title in favour of Parimal and Shankar. Consent cannot be oral or subsequent. The sisters were not made parties to the partition deed. The sale deed recital about their consent is contradictory and

doubtful. Certified copies were deposited by Parimal, not original deeds. Equitable mortgage requires deposit of original documents of title. The Bank's contradictory stands at different places shows that originals were never deposited. Reliance on photocopies makes the mortgage invalid.

Sections:

Section 13(2) of SARFAESI Act: Issuance of Demand Notice

Section 17 of SARFAESI Act: Filing application before DRT challenging bank's action

Section 58(f) of Transfer of Property Act: Mortgage created by deposit of title deeds

Cases Referred:

Aloka Bose v. Parmatma Devi (2008): Oral agreement to sell is valid

Central Bank of India v. CELIR LLP (2023): Bank also bound to follow due process of law

Laws Discussed:

Requirement of depositing original title deeds for creating equitable mortgage

Need for consent of all legal heirs in partition deed

Conclusion:

No valid equitable mortgage was created in favour of the Bank. The impugned DRT order setting aside the bank's action under SARFAESI Act does not call for interference.

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Court

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Full Text of Judgment:

1. Feeling aggrieved by the judgment and order dated 28.07.2022 passed by the Learned DRT-2 Kolkata allowing the S.A. No. 06 of 2016, secured creditor i.e. Central Bank of India preferred the Appeal.

2. As per the pleadings of the parties, Respondent No. 2 namely Sri Dipankar Saha was enjoying a term loan facility of Rs.40,000/- from

the Appellant i.e. Central Bank of India Burdwan Branch. Parimal Saha (since deceased) father of Sri Dipankar Saha stood as guarantor and also offered his property as security.

3. As per the pleadings, Late Panchanan Saha was the owner of the property by virtue of Lease Deed being No. 8236 of 1949 executed between Sri Dinabandhu Sadhu S/o. of Late Brajendra Sadhu and Panchanan Saha, S/o. Late Ramlal Saha in respect of property situated at RS Khatian No. 592, Dag No. 976 J.L No. 35 Touzi No. 681 Mouza Panidanga, P.O & District Bardhaman. Panchanan Saha died intestate leaving behind his wife Shakuntala Saha (since deceased) and the two sons namely Parimal Saha and Shankar Saha and three daughters namely Jyotsna Saha, Nilima Saha and Sibani Saha.

4. Parimal Saha along with his brother Sri Shankar Saha executed a Partition Deed on 14.01.2004 which was registered on 06.02.2004 before ADSR, Burdwan as Deed No. 600 of 2004. Mutation was also carried out.

5. Sri Parimal Saha in security of the loan in favour of Sri Dipankar Saha created equitable mortgage of the property in favour of the Bank by deposit of certified copy of the main Lease Deed No. 8236 of 1949 and Partition Deed No. 600 of 2004. Letter of Confirmation was also given by Sri Parimal Saha on 26.02.2004. Loan was enhanced upto Rs.8.00 lacs and for the enhanced amount Parimal Saha stood as guarantor. Parimal Saha renewed and reaffirmed the fact of creation of equitable mortgage on 03.06.2005, 23.08.2006 and 20.03.2008. When the loan repayment was irregular, it was classified as NPA. Notice under Section 13(2) of the SARFAESI Act (hereinafter referred to as the Act) was issued on 27.10.2014. Notices were duly received by Respondent No.2. No representation was submitted. Notice under Section 13(4) of SARFAESI Act was also issued on 23.11.2015 which was duly affixed on the conspicuous place of the secured assets. Possession Notice was also published in two newspapers in "Business Standard" and "Bartaman" on 28.11.2015.

6. Feeling aggrieved by the possession notice, Respondent No. 1, Uday Chand Das preferred an application under Section 17 of the SARFAESI Act challenging the SARFAESI action initiated by the Bank. On 29.01.2016, an application under Section 14 of the SARFAESI Act, 2002

was made by the Appellant which was allowed on 21.07.2016. Physical possession was taken on 28.01.2017 which was also challenged by the SARFAESI Applicant. Auction sale notice was published on 22.03.2017 which was also challenged by filing I.A. No. 125 of 2017. Consequently, SARFAESI Application was allowed by the Learned DRT by impugned order.

7. Feeling aggrieved, Appellant secured creditor preferred the Appeal.

8. I have heard the Learned Counsel for the Appellant as well as Respondent No. 1 and perused the record.

9. Learned Counsel for the Appellant submits that the Learned DRT has erred in recording a finding that notice under Section 13(2) of the SARFAESI Act was not served upon Parimal Saha. No original Title Deeds were lying with the Bank. Accordingly, no security interest was created in favour of the secured creditor. It is further submitted that the Learned DRT has erred in not placing upon the assertions made in the Sale Deed in favour of the SARFAESI Applicant wherein recital of consent by the daughters of Panchanan Saha for partition was recorded. It is further submitted that the Learned DRT erred in recording the finding that the mortgage was never created in favour of the Bank. Accordingly, all the actions undertaken by the Bank are null and void.

10. Per contra, Learned Counsel for the Respondent would submit that the Learned DRT has rightly recorded the finding that the Partition Deed between Parimal Saha and Shankar Saha did not transfer the Title in their favour as the daughters of Panchanan Saha were not the party to it. Their consent was not recorded. Original deed was not deposited with the Bank. Hence, no equitable mortgage was created in favour of the Bank. It is further submitted that despite notice, Bank could not deposit the Title Deeds with the DRT. Equitable mortgage could not be created by depositing the certified copies of the Title Deed.

11. There are certain admitted facts in this case. Property in dispute was leased in favour of Panchanan Saha from one Dinabandhu Sadhu on 30th December, 1949. Panchanan Saha died on 08.08.1978 leaving behind

his sons Parimal Saha and Shankar Saha and three daughters Jyotsna Saha, Nilima Saha and Sibani Saha. A loan of Rs. 40,000/- was sanctioned by the Central Bank of India in favour of Dipankar Saha wherein Parimal Saha and Bandana Saha stood guarantor. Loan amount was enhanced subsequently to Rs. 50 lac. A Partition Deed of the property under Bardhaman Municipality Mouza Balidanga, R.S. Plot No. 976, under R.S. Khatian No. 592, L.R. Plot No. 976/ 2128 was executed between Parimal Saha, son of Panchanan Saha and Shankar Saha for the property received by their father Panchanan Saha by virtue of indenture of lease No. 8236 which was registered in Burdwan District sub Registry in the year 1949. In the schedule of property which is received by Parimal Saha details were Mouza Balidanga J.L. No. 35 R.S. Khatian No. 592 L.R. Khatian No. 1487 Dag No. 976 area 1699.57 sq. ft together with single storeyed house standing thereon. The area of land is 386 sq.ft. and the schedule in favour of Shankar Saha Mouza Balidanga J.L. No. 35 R.S. Khatian No. 592, L.R. Khatian No. 1487, R.S. Dag No. 976 L.R. Dag No. 976/2128 area 2257.53 sq.ft. The area of land is 386 sq.ft.

12. On 17.12.2009 a Sale Deed was executed by Parimal Saha, Shankar Saha, Nilima Saha and Jyotsna Saha in faovur of Uday Chand Das, Respondent No. 1 herein regarding a property at Bardhaman Municipality Mouza Balidanga JL No. 35 R.S. Khatian No. 592, L.R. Khatian No. 1487, R.S. Dag No. 976 L.R. Dag No. 976/2128 measuring 1699.57 sq.ft. constructed portion ground floor 1135 sqft., first floor 1135 sqft.

13. A notice under Section 13(2) of the SARFAESI Act was issued by the Appellant Bank on 27.10.2014 against Parimal Saha being guarantor of 'Nandita Dresses' demanding an amount of Rs. 18,68,524/- regarding property situated at Mouza Balidanga, R.S. Plot No. 976, LR Plot No. 976/2128 JL No. 35, RS Khatian No. 592, LR Khatian No. 1487 under Burdwan Municipality vide Partition Deed dated 06.02.2004. Notice under Section 13(4) was issued on 23.11.2015 which is challenged by the Respondent No. 1 before the Learned DRT by filing an application under Section 17 of the SARFAESI Act with the relief to set aside the possession notice dated 23.11.2015 with consequential reliefs.

14. Main controversy revolves on the issue as to whether any security

interest was created by Parimal Saha in favour of the Appellant Bank regarding the secured assets as mentioned in the notice under Section 13(2) of the SARFAESI Act?

15. Parimal Saha died in 2013. As far as title of Panchanan Saha is concerned, it was created on 30th December, 1949. Hence, there cannot be any dispute regarding the title of Panchanan Saha. It is also not in dispute that Panchanan Saha left behind his two sons and three daughters. It is alleged that a Partition Deed was executed in between Parimal Saha and Shankar Saha on 14.01.2004. On the basis of this partition Deed, Bank is claiming the security interest in the property in dispute. On the date of execution of Partition Deed, three daughters of Panchanan Saha were alive, but there is no recital in the Partition Deed to this effect that the three sisters of Parimal Saha and Shankar Saha have either surrendered their property rights in their favour or waived their rights. When the three daughters of Panchanan Saha were alive, a

partition by two sons of Panchanan Saha cannot be made. It is argued that the Sale Deed was executed by Shankar Saha, Parimal Saha and the three daughters of Panchanan Saha in favour of Respondent No. 1 wherein there is a recital that Parimal Saha and Shankar Saha executed the Partition Deed with the consent of Jyotsna Saha, Nilima Saha and Sibani Saha who are their sisters. But they were not made party to the Partition Deed. So, in order to avoid any complicity of law, they have become vendors of the Sale Deed. Recital of the Sale Deed itself are very doubtful. In the column of vendors following names are entered

- (1) Parimal Saha, son of Panchanan Saha
- (2) Shankar Saha son of Panchanan Saha
- (3) Jyotsna Saha
- (4) Nilima Saha
- (5) Sibani Saha.

Relevant paragraphs of Sale Deed regarding consent are reproduced below:

"Be it known that we vendor No. 1 and 2 of this Deed by executing a Deed of partition being No. 600 of 2004 with the consent of the vendors No. 3, 4 and 5 having partitioned the property mentioned in the schedule below has been allotted to you the vendor No. 1 and till

now you have been in enjoyment and possession of the same without other's connection and without any dispute and other co sharers that is vendor No. 2, 3, 4 and 5 has given consent to the same. However although vendor Nos. 2, 3, 4 5 has consented to the said Deed of partition as they have not been included as party to the Deed of partition so in order to avoid the complicity of law and to refute all kinds of objection we vendor No. 3, 4 and 5 and the second party to this Deed of partition that is vendor No. 2 of this Deed together became the vendors in this Deed.

Now after taking the consent consent of vendor No. 2, 3, 4, 5, vendor No. 1 having declared to sell the property mentioned in the scheduled below and you the vendee in this deed of sale having wanted to purchase the same the value of the same fixed at Rs. 13,50,000/- Thirteen lakh fifty thousand Rupees."

16. A perusal of the recital as quoted above will show that the vendor Nos. 2, 3, 4 and 5 have given consent for the partition. They were also not made party to the Partition Deed and their consent is taken by the vendor No. 1 to sell the property. If it was so, then it means that the vendor No. 2 i.e. Shankar Saha was not a signatory to the Partition Deed. Otherwise, why it is mentioned in the Sale Deed that he has consented for the Partition Deed and he was not included as party in Partition Deed while the Partition deed would show that it was executed between Shankar Saha and Parimal Saha. It creates a doubt about the veracity of Partition Deed. Further, no consent of daughters of Panchanan Saha was obtained at the time of execution of Partition Deed. A subsequent recital in the Sale Deed does not fill up the lacuna which was created in the Partition Deed. Parimal Saha stood guarantor for Nandita Dresses on 27.10.2014 on the basis of Partition Deed while the Sale Deed was executed in favour of Respondent No. 1 by the legal heirs of Panchanan Saha on 17.12.2009. It means that the legal heirs of Panchanan Saha including Parimal Saha had already sold the property in favour of Respondent No. 1, Uday Chand Das. Accordingly, any security interest created in the property subsequently on 27.10.2014 is illegal.

17. Security interest was created in favour of the Bank. It is stated

in para 'g' of affidavit in opposition before the Learned DRT that it was reported to the Bank that the three sisters and mother of Parimal Saha have waived their right in the said property and they have no objection if the property is inherited and divided between the two brothers. Accordingly, Partition Deed was executed between Parimal Saha and Shankar Saha. This admission of the Bank shows that on the date of creation of the security interest, this fact was well within the knowledge of the Bank. But no document of surrender or waiver of rights was taken by the Bank which would have been executed by the sisters and mother of Parimal Saha. Merely on the basis of oral statement, security interest was created on the basis of a Partition Deed which was not executed between the legal heirs of the owner i.e. Panchanan Saha. Hence, the creation of security interest itself was not legally acceptable.

18. It is the duty of the Bank to ensure that the loan is disbursed on the basis of a valid security. Bank is the custodian of public money. Authorised officer is under obligation to watch the interest of public money. In a recent judgment of the Hon'ble Apex Court in Civil Appeal No. 5542- 5543 of 2023 CELIR LLP Vs. Bafna Motors (Mumbai) Pvt. Ltd. & others in paragraph No. 100 it was held by the Hon'ble Apex court that-

"Bank is duty bound to follow the provisions of the law as any other litigant. It is to be noted that the Bank i.e., the secured creditor acts under the SARFAESI act through the authorized officer who is appointed under Section 13(2). Thus, the authorized officer and the Bank cannot act in a manner so as to keep the sword hanging on the neck of the auction purchaser. The law treats everyone equally and that includes the Bank and its officers. The said enactments were enacted for speedy recovery and for benefitting the public at large and does not give any license to the Bank officers to act de hors the scheme of the law or the binding verdicts."

19. Before disbursing the loan, a report is obtained by the Branch Manager Central Bank of India Bardhaman from Baidyanath Roy Advocate. Even in the said report there is no mention of existence of three daughters of Panchanan Saha. Such a report of non-incumbrance over the

secured assets is nothing but a waste paper keeping in view the fact that it was within the knowledge of the Bank that three sisters of Parimal Saha were alive at the time of partition. Without their consent if any partition is made between the two brothers, it has no legal consequence. Even if any consent is recorded in the Sale deed in favour of the Respondent No.1, it cannot be made effective retrospectively because Parimal Saha stood as guarantor on the strength of the Partition Deed which was not and should not be treated as a legal document. Further, the consent of sisters of Parimal Saha cannot be an oral consent. Reliance is placed by the Learned Counsel for the Appellant upon a judgment of the Hon'ble Apex Court in Aloka Bose versus Parmatma Devi and others (2009) 2 SCC 582: 2008 SCC OnLine SC 1904 wherein the provisions of Section 10 of the Contract Act were discussed wherein it was held that even an oral Agreement to sale is valid. But in the present case as far as consent of the sisters of Parimal Saha is concerned, there is no mention in the Partition Deed that they have given oral consent for the partition. Hence, no benefit could be extended in favour of the Appellants.

20. Security interest was created on the basis of Partition Deed, that too was not deposited in original. Rather, certified copy was submitted. Contradictory stand has been taken by the Appellant Bank. At one place it is submitted that original was submitted by Parimal Saha but at another place it is stated that certified copy is submitted. In the note dated 23.05.2002 executed by Parimal Saha in favour of the Bank it is recorded that the certified true copy of the Lease Deed No. 8236 of 1949 was deposited for creating equitable mortgage. Further, re-affirmation of equitable mortgage dated 23.08.2006, same documents are mentioned. On 20th March, 2008, also same documents are mentioned. In the affidavit filed before the DRT it is stated in Para 3 (m) that –

“The answering defendant has duly recorded the creation of equitable mortgage in respect of the said immovable property in its Mortgage Register by making entry on 23.05.2002, which fact was again re-affirmed by the said Parimal Saha by calling on the Branch Officer time to time on 18.11.2002, 03.06.2005, 23.08.2006 and 20.03.2008 and confirmed and re-affirmed the fact of creation of equitable mortgage

by deposit of said original title documents, which was recorded by the answering defendant in their Mortgage Register by making re-entry accordingly. The Photocopies of the pages of Mortgage Register dated 23.05.2002, 18.11.2002, 03.06.2005 and 23.08.2006 are annexed hereto and collectively marked with Letter –“G”. Again in Para “O” and “P” it is stated that – “(o) Further, the Defendant Bank states that they are holding the said original Lease Deed No. 8236 and Partition Deed No. 600 dated 06.02.2004. The answering defendant is having first paramount and absolute charge over and in respect of the property being the subject matter of the said application. (p) It is very much pertinent to put on record that answering defendant is holding the said original Lease Deed No. 8236 since 2002 and the said Partition Deed since 2004 and none of the legal heirs of Late Panchanan Sadhu & Saha has raised any objection till date for said equitable mortgage of the said property by depositing the said original Lease Deed and said Partition Deed.”

21. It shows that Bank is taking different stands at different places. Original Title Deed was never deposited with the Bank but in the written opposition filed before DRT a plea is taken that the original Lease Deed and Partition Deed were deposited while the record filed by the Bank does not show that any original documents were ever deposited for creation of the Title Deed. Section 58 (f) of Transfer of Property Act defines “ 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 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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.”

22. Bare perusal shows that the mortgage can only be created by all the documents of title of immovable property with intent to create a security thereon which means that the documents of title have to be deposited in original, if Photostat copies or certified copies are permitted to be taken, then it may result in fraudulent transaction which is not permitted under the law.

23. Accordingly, the equitable mortgage created by Parimal Saha in favour of the Bank was not in accordance with law.

24. On the basis of discussion made above, I am of the considered opinion that no equitable mortgage was created by Parimal Saha in favour of the Appellant Bank. Learned DRT has rightly arrived at the conclusion in the impugned judgment which did not call for any interference. Accordingly, Appeal lacks merit and is liable to be dismissed.

Appeal is dismissed. Judgment and order dated 28.07.2022 passed by the Learned DRT-2 Kolkata in S.A.

No. 06 of 2016 is confirmed.

No order as to costs.

File be consigned to Record Room.

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

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

Order signed and pronounced by me in the open Court on this the 12th day of October, 2023.1.