

IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA
Appeal No. 23 of 2019

(Arising out of Application No. 28 of 2018 DRT- Guwahati)

THE HON'BLE MR. JUSTICE ANIL KUMAR SRIVASTAVA
CHAIRPERSON

15.09.2023

1. Sri Lakhendar Singh residing at Flat No. 3A, Chatribari, Beelpar Road, PO Rehabari, PS Paltan Bazar, Guwahati 781008, Dist. Kamrup(M).
2. Sri Rajiv Kumar Choudhary, residing at Flat No. 3A, Chatribari, Beelpar Road, PO Rehabari, PS Paltan Bazar, Guwahati 781008, Dist. Kamrup(M).

... Appellants

-Vs-

1. Oriental Bank of Commerce, having office at RRL Cluster, Guwahati, OPP MMC Hospital, Hem Baruah Road, Panbazar, Guwahati - 781001, Assam.
2. The Branch Manager, Oriental Bank of Commerce, having office at Pan Bazar Branch, RRL Cluster, Guwahati, OPP MMC Hospital, Hem Baruah Road, Panbazar, Guwahati - 781001, Assam.
3. The Athorised Officer, Oriental Bank of Commerce, having office at RRL Cluster, Guwahati, OPP MMC Hospital, Hem Baruah Road, Panbazar, Guwahati - 781001, Assam.
4. M/s. D Modern Medicos, Guwahati Club, Guwahati - 781003, Dist. Mamrup(M), Assam, place of business Gr. Floor, Bipul Bharali Complex, Maligaon Chariali, Guwahati - 781012, Assam.
5. M/s. New D Modern Medicos, having office at Guwahati Club, Guwahati - 781003, Dist. Mamrup(M), Assam, place of business Gr. Floor, Bipul Bharali Complex, Maligaon Chariali, Guwahati - 781012, Assam.
6. Sri Nayan Kamal Nath, residing at Chariali, Guwahati - 781012, Assam.

... Respondents

For the appellants : Mr. Prasenjit Pal, Id. Advocate

For the respondents: Mr. Pankaj Kr. Mukherjee, Id. Adv.- Resp.no.1,2&3.

THE APPELLATE TRIBUNAL

Feeling aggrieved by the judgement and order dated 14.02.2019 passed by learned DRT Guwahati dismissing the S.A. No. 28 of 2018 being devoid of merits, the appellant preferred the appeal.

2. As per pleadings of the parties, appellant Sri Lakhendar Singh and Sri Rajiv Kumar Choudhary allegedly the bona fide purchaser of the flat marked as 3A and 3B measuring super built area 1445 Sq.ft. each, situated on the third floor of the building known as "Brook Heaven" standing over the plot of land covered by Dag No. 1121 of KP Patta No. 645 of Village Sahar, Guwahati, Part-II, Mouza Guwahati in the Dist. of Kamrup(M), Assam with undivided proportionate share of land measuring 26 Are and one car parking space on the ground floor of the building. Respondent no.6, namely Sri Nayan Kamal Nath, was the absolute owner of the plot of land measuring 01 Katha 14-1/2 Lechas covered by Dag No. 1121 of KP Patta No. 645 of Village Sahar, Guwahati Part-II, Mouza Guwahati in the Dist. Of Kamrup(M) Assam.

3. In the year 2010 respondent no.6 applied for no-objection certificate for construction of building over the scheduled land from Guwahati Municipal Corporation, Guwahati which was duly accorded. Respondent no.6 constructed multistorey building over the plot of land. Appellant no. 1 and 2 entered into a registered agreement for sale with the respondent no.6 in two separate conveyances as described above on 05.03.2013 and 08.03.2013

respectively. Consequent thereto they were also paid the consideration amount on different dates. Sale deed was also executed in their favour on 07.07.2017. Possession was also delivered. Mutation was done in the municipal record.

4. On 14.02.2018 possession notice dated 08.02.2018 was pasted by the respondent on the building and was also handed over to the appellant. They came to know that respondent no.4 namely M/s. D Modern Medicos has taken term loan of Rs.51,59,819.00 and respondent no.5 M/s New D Modern Medicos has taken term loan of Rs.25,15,856/-. Building was not mortgaged by respondent no.6 to the respondent no.1 bank while the mortgage deed simply shows that the land was mortgaged. Appellants were bona fide purchaser for value without notice, they had no knowledge of the alleged loan having been taken by respondent no.6. Further, it is stated that there are violation of mandatory provision of Rule 8(6), 9(1), 8(1) and 8(2) of the Security Interest (Enforcement) Rules, 2002. Accordingly, application u/s 17 of the SARFAESI Act (hereinafter referred to as 'the Act') was filed by the appellants challenging the SARFAESI action initiated by respondent bank.

5. Respondent no.1 filed their objection alleging that respondent no.6 mortgaged a plot of land measuring 01 Katha 14-1/2 Lechas covered by Dag No. 1121 of KP Patta No. 645 of Village Sahar, Guwahati Part-II, Mouza Guwahati in the Dist. Of Kamrup(M) Assam along with multistorey building exist thereon

and availed a cash credit facility of Rs.25.00 lakhs in the name of M/s. New D Modern Medicos on 31.08.2016 wherein respondent no.6 was a partner along with his wife Smt. Darshana Nath and cash credit facility of Rs.50.00 lakhs in the name of M/s. D. Modern Medicos on 12.12.2016 and another term loan of Rs.70.00 lakhs in his own name on 24.05.2017. Necessary documents were executed for creating equitable mortgage by depositing title deed. Respondent bank has first charge over the property. Appellants have no claim over the property as the charge was created by respondent no.6 Nayak Kamal Nath by creating equitable mortgage. Hence, first charge over the property lies with the bank.

6. After hearing learned counsel for the parties, learned DRT dismissed the SARFAESI application holding that respondent no.6 Nayan Kamal Nath had mortgaged the land as well as building thereon as equitable mortgage which was created in favour of the bank on 23.05.2017. Appellants had purchased the property by sale deed dated 07.07.2017. The property was already under mortgage. Agreement for sale does not confer any title of ownership in favour of the appellants.

7. I have heard learned counsel for the parties and perused the records.

8. Appellants preferred the application u/s 17 of the Act on the ground that they entered into an agreement for sale with respondent no.6 by executing registered agreement for sale.

Agreement for sale was executed prior to the mortgage dated 23.05.2017. It is also not in dispute that sale deed was executed in favour of the appellants on 07.07.2017. Accordingly, on the date of execution of the sale deed already respondent no. 6 Nayak Kamal Nath had mortgaged the property in favour of the respondent bank. This fact could not be disputed by the appellants.

9. Learned counsel for appellants vehemently argued that there are violation of the mandatory provisions of the Act and Rules of 2002. Hence, the SARFAESI action initiated by the bank is liable to be set aside.

10. Per contra, respondent bank submits that the appellants have no locus standi to challenge the SARFAESI action initiated by the bank. Bank initiated all the actions on the basis of equitable mortgage created by respondent no.6 in favour of them. Respondent no.6, the borrower, or any of the guarantors have not challenged the SARFAESI action initiated by the bank.

11. As far as challenge against the SARFAESI action initiated by the bank is concerned, firstly appellants have to establish their right over the property. No doubt a registered agreement for sale was executed in favour of the appellants by the respondent no.6. Thereafter respondent no.6 created mortgage of the plot of land construction of the building standing over it by creating equitable mortgage. Now it is to be seen as to whether any legal

right exists in favour of the appellants vis-à-vis the respondent bank?

12. Learned counsel for the appellants has placed reliance on Section 53A of the Transfer of Property Act. Now it is to be looked into as to whether any security interest was created by respondent no.6 in favour of respondent no.1 bank as far as land in dispute is concerned?

13. 'Security agreement' is defined under Section 2 (zb) of SARFAESI Act, 2002 while 'security interest' is defined under Section 2 (zf) of the SARFAESI Act, 2002, which reads as under:

"(zb) "Security Agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor";

"(zf) "Security interest" means right, title or interest of any right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes –

(i) Any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any tangible asset or assignment or licence of such tangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset."

14. Section 54 of the Transfer of Property Act, reads as under:

"Sale" defined – "Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made – Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, the possession of the property.

Contract for Sale – A contract for sale of an immovable property is a contract; that the sale of such property shall take place on the terms settled between the parties.

It does not, or itself, create any interest in or charge on such property.”

15. Thus, as per Section 54 of the Transfer of Property Act, contract for sale of an immovable property is a contract; that the sale of such property shall take place on the terms settled between the parties. But the agreement to sale does not confer any right, title or interest on such property.

16. In **Sunil Kumar Jain -vs- Kishan & Others** [(1995) 4 SCC 147] Hon'ble Supreme Court held that the agreement of sale does not confer title. In **Namdeo -vs- Collector, East Neemar, Khandwa & Others** [AIR 1996 SC 973] it was held by Hon'ble Supreme Court that an agreement of sale does not convey any right, title or interest, it would create only an enforceable right before a Court of law and parties could act thereon. In **Crest Hotel Limited & Another -vs- The Assistant Superintendent of Police** [AIR 1994 Bom 208] wherein same principle was laid down that agreement of sale of immovable property does not create any interest or charge on such property.

17. No doubt an agreement for sale was executed in favour of the appellants coupled with possession, but that agreement to sale in any manner cannot override the provision of law as far as Section 54 of the Transfer of Property Act is concerned. It was held in **Bajarang Shyamsunder Agarwal vs Central Bank of**

India [(2019) 9 SCC 94] that SARFAESI Act will override the provisions of Transfer of Property Act.

18. Hence, appellants cannot make any claim over the secured asset on the strength of agreement to sale.

19. Now another question arises as to whether appellants are 'person aggrieved' or not. An application u/s 17 of the Act can be filed by any person including borrower aggrieved by any of the measure referred to in Section 13(4) of the Act taken by the secured creditor. As far as status of the appellants is concerned, as has been held earlier, they have an agreement to sale in their favour which did not confer any right against the secured asset as far as respondents are concerned. Appellants should have to prove that they are aggrieved person by the action of the respondent bank. Action taken by the respondent bank under the Act was against the mortgagor's property who were respondent no. 4 to 6, but they have not filed any application u/s 17 of the Act. In such circumstances, the appellants are neither borrower nor 'person aggrieved' who may file an application u/s 17 of the Act. It is further relevant to note that in the written statement filed by the respondent no. 4 to 6 before the learned DRT, it was specifically admitted in Para 16 that SARFAESI applicants, appellants herein, have specific knowledge regarding taking of loan by the answering defendants. It is further stated that respondent no. 4 to 6 constructed a multi storey building after obtaining necessary permission from the concerned authorities.

Appellants purchased flats from respondent no. 4 to 6 after due verification and completion of all the requirements and formalities. It is further mentioned that loan was sanctioned by the respondent bank after completing all the formalities. Presently, all the disputes between the Bank and respondent no. 4 to 6 have been settled down. Respondents are paying instalments regularly as per instruction of the bank. It is clearly proved that appellants have full knowledge of the loan taken by respondent no. 4 to 6 from the respondent no.1 bank. Admittedly, mortgage was created in favour of respondent no.1 bank by the respondent no. 4 to 6 on 23.05.2017 while the appellants purchased the flats from respondent no.4 to 6 on 07.07.2017. Hence, it is abundantly clear that appellants purchased the flats wherein first charge lies with the respondent bank.

19. LTR 21 was executed by the respondent no.6 in favour of respondent no.1 bank. This document was not denied by respondent no.6, rather it is admitted in the written statement before the learned DRT that loan was taken by him by executing equitable mortgage in favour of the bank. This fact is well within the knowledge of the appellants. In the LTR 21 dated 24.05.2017 respondent no.6 has confirmed in respect of account nos. 20167015001347; 20164015000109 and 20164015000245 in the following manner :

"I/we write to confirm that I/we Nayak Kumar Nath called on you in your office on 23.05.2017 (date) and as agreed

deposited with your bank the original title deed specified in schedule A hereinunder concerning the property belonging to me/us free from encumbrances with intent to create security by way of equitable mortgage in respect of land/property, morefully described in schedule B together with all buildings, superstructure, plant and machinery constructed and/or to be constructed installed and/or to be installed and all accretions thereto to secure the repayment of all liabilities/ advances already made or which may hereinafter be made by the bank at my / ours request to M/s Nayan Kumar Nath (name of the borrower) under / in respect of any of the following limits and interest, costs and other charges payable in terms of loaning documents executed by the borrower.”

20. In Schedule-A details of the property are, Original Gift deed, three numbers of original litigation pending certificate, certified copy of Jamabandhi, Original NEC, copy of Land Revenue Payment receipt, and in Schedule – B details of land measuring 01 Katha 14-1/2 Lechas covered by Dag No. 1121 of KP Patta No. 645 of Village Sahar, Guwahati Part-II, Mouza Guwahati in the Dist. Of Kamrup(M) Assam. Non-encumbrances certificate was also submitted by respondent no.6 which was obtained from the office of the senior sub-Registrar, Kamrup (M). Thereafter, loan was sanctioned in favour of respondent no.6. Learned counsel for the appellants submitted that there was registered agreement to sale between the appellants and respondent no.6, hence, loan could not have been sanctioned to respondent no.6. There was an encumbrance certificate over the property. I am unable to accept the submission made by the learned advocate. As has been held earlier agreement to sale does not confer any title over the property. Further, an agreement to sale binds the seller as well as the purchaser but it cannot be imposed against the bank

or the financial institution. In such circumstances, appellants cannot take any advantage of the agreement to sale in their favour.

21. Appellants have no locus standi to challenge the SARFAESI action initiated by the respondent no.1 bank. As far as any dispute between the appellants and respondent no.6 is concerned appellants can avail the legal remedy available to them under the law, but the action of the respondent no.1 bank taken under the Act cannot be challenged by the appellants as they are not the 'person aggrieved' who can file an application u/s 17 of the Act.

22. On the basis of the discussion made above, I am of the view that learned DRT has rightly recorded a finding that respondent no.1 bank has charge over the whole property, i.e. the plot of land as well as buildings constructed thereon as the mortgage is prior to the sale deed. Accordingly, respondent no.1 bank is having prior charge over the property and sale deed executed by respondent no.6 in favour of the appellants is subject to mortgage. I found the appeal devoid of any merit which is liable to be dismissed.

ORDER

23. Appeal is dismissed. Impugned judgement and order dated 14.02.2019 is confirmed. No costs.

File be consigned to record room.

Copy of the order be supplied to the appellant and the respondents 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 15th day of September , 2023.

(Anil Kumar Srivastava, J)
Chairperson

Dated : 15.09.2023
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