IN THE DEBTS RECOVERY APPELLATE TRIBUNAL AT KOLKATA

(Appeal No. 131 of 2017)
(Arising out of T.S.A. 291 of 2014 in DRT-3, Kolkata)

THE HON'BLE MR. JUSTICE ANIL KUMAR SRIVASTAVA
CHAIRPERSON

Biswajit Sharma, 181, Purba Sinthee Bye Lane, P.S. Dum Dum, Kolkata – 700 030.

… Appellant

-Versus-

1. ICICI Bank Limited, "Landmark Building", 4th Floor, 228A, A.J.C. Bose Road, Kolkata – 700 020;

2. Authorised Officer, ICICI Bank Limited, "Landmark Building", 4th Floor, 228A, A.J.C. Bose Road, Kolkata – 700 020;

3. Sri Sudipta Mitra, 24/1, Lock Gate Road, P.S. Cossipore, Kolkata - 700 002.

Counsel for the Appellant	…	Mr. Prabhat Sil
Counsel for Respondent Bank	…	Mr. Abhishek Guha with Ms. Kasturi Dasgupta
Counsel for Respondent No. 3	…	None

JUDGMENT : 5.07.2022

THE APPELLATE TRIBUNAL :

This Appeal is preferred against the judgment and order dated 30th December, 2016 passed by Learned Debts Recovery Tribunal-3, Kolkata in T.S.A. 291 of 2014 (arising out of S.A. 4431 of 2014 in DRT-2, Kolkata) in the matter of Biswajit Sharma -vs- ICICI Bank Limited & Others whereby the learned Tribunal has dismissed the SARFAESI petition.

2. Brief facts of the case are that the Appellant is a Developer who is engaged in the business of promoting and selling the flats. Sri Ram Naresh Pandey was the absolute owner of a property; measuring 2 cottahs 39 sq. feet situate at Mouza Purba Sinthee under P.S. Dum Dum, Kolkata – 700 030. Sri Ram Naresh Pandey executed

a power of attorney in favour of the Appellant for development and construction upon the said land. After the death of Ram Naresh Pandey, his only son, Kalipada Guha (Pandey) inherited the property whose name was mutated in the municipal records. Kalipada Guha (Pandey) executed a Development Agreement, dated 6th October, 1997, for construction of flats on the said property. There was another property measuring about 1 cottah 13 chittacks and 27 sq. feet situate in Mouza Purba Sinthee, P.S. Dum Dum, Kolkata – 700 030 in the names of Smt. Shanti Roy and Smt. Manti Roy who executed the Development Agreement for construction of G + 4 storey building in favour of the Appellant on 23rd September, 1996.

3. On the basis of two separate power of attorneys, dated 23rd September, 1996 and 4th October, 1997, the Appellant developed and constructed G+ 4 storeys building on the aforesaid properties.

4. It appears that the Appellant agreed to sale of a flat on the 3rd floor of the premises, measuring 977 sq. feet, through a registered Agreement of Sale in favour of Sri Sudipta Mitra, Respondent No. 3, for a consideration of Rs.24.00 lac from Respondent No. 1 and loan agreement was executed. The flat in question was mortgaged to the Respondent No.1/Bank in order to secure re-payment of the loan. Respondent No. 3 mortgaged a residential unit, being Flat No. B, 3rd floor at Premises No. 181, Purba Sinthee Bye Lane, ad-measuring about 977 sq. feet, Mouza Purba Sinthee, J.L. No. 22, RS No. 811, Touzi No. 1298/2833,1298, RS Dag No. 92(P), R.S. Khatian No. 1189, 1190, P.S. Dum Dum, Ward No. 12, District – 24 Parganas (North), Kolkata – 700 030 (hereinafter referred to as the Scheduled property) for securing the loan amount. The loan agreement was executed on the 20th of August, 2004 by and between Respondent No. 1, ICICI Bank Limited, and Respondent No. 3, Sudipta Mitra. Respondent No. 3 and Appellant entered into a registered Agreement for Sale on the 20th of August, 2004. Subsequently, Respondent No. 3, Sudipta Mitra,

handed over the original IGR to the Respondent Bank along with the copy of the Sale Agreement. An amount of Rs.10,00 lac was disbursed in favour of the Appellant, being Developer. Some instalments were paid but subsequently, after 15th of March, 2007 no further instalments were paid. As per the law, Demand Notice for Rs.21,10,575.00, calculated as on 9th January, 2012, was issued by Respondent No. 1 to Respondent No. 3. Notice under Section 13 (2) of the SARFAESI Act, 2002 was sent to Respondent No. 3. After expiry of the statutory period, proceedings under Section 13 (4) of the SARFAESI Act, 2002 were initiated by the Respondent Bank. Symbolic possession of the Scheduled property was taken by Respondent Bank on 24th February, 2014.

5. Appellant filed an application under Section 17 of the SARFAESI Act, 2002 before the Learned Debt Recovery Tribunal-3, Kolkata which was dismissed by the impugned order.

I have heard Learned Counsel for both the Appellant as well as Respondents No. 1 and 2 and have also gone through the records. Respondent No. 3, despite service, did not appear.

6. Learned Counsel for the Appellant submits that Learned Tribunal below has passed an illegal order. Learned Tribunal failed to appreciate that no document of title was handed over to the Bank; there was no privity of contract between the Bank and the Appellant. It is further submitted that the Agreement to Sale does not create any right, title or interest with the purchaser. Learned Tribunal below acted without jurisdiction in making a declaration regarding loan amount. Scheduled property is still in possession of the Appellant.

7. Learned Counsel further submits that as per the provisions of Section 54 of the Transfer of Property Act, sale was not conducted. It is further submitted that no mortgage can be created by depositing of title deeds without transfer of the title. There was no concluded contract between the Bank and the Appellant, as such, there is no

liability of the Appellant and no liability, whatsoever, can be thrust upon.

8. Learned Counsel for the Appellant has placed reliance upon the following judgments:

(i) (1995) 4 SCC 147 Sunil Kumar Jain -vs- Kishan & Others.

(ii) AIR 1996 SC 973 Namdeo -vs- Collector, East Neemar, Khandwa & Others

(iii) AIR 1994 Bom 208 Crest Hotel Limited & Another -vs- The Assistant Superintendent of Police

9. Per contra, learned Counsel for the Respondents submits that there is no doubt on the legal proposition that agreement for sale does not confer title. Learned Counsel submits that in order to arrive at a conclusion as to whether mortgage was effective or not, intention of the parties is to be looked into. In order to establish his submission, learned Counsel has placed reliance upon the following judgments:

(i) Civil Appeal No. 7824 7828 of 2004 Syndicate Bank -vs- Estate Officer And Manager (Recoveries) & Others dated 30th August, 2007;

(ii) (1977) ILR 2 Cal 385 Usha Rice Mill Company Limited -vs- United Bank of India;

(iii) AIR 1981 Cal 404 Amulya Gopal Majumdar -vs- United Industrial Bank Limited & Others;

10. Learned Counsel would further submit that Learned Tribunal below has rightly held that the loan amount was not Rs.24.00 lac rather it was Rs.10.00 lac which was directly transferred to the Appellant. The Borrower had an intention to create mortgage in favour of the Bank. Appellant himself had given permission to the Borrower to create mortgage in favour of the Bank. The security interest over the property was acquired by the Bank.

11. The transferable right in the property was acquired by the Borrower which was mortgaged by him to the Respondent Bank.

Reliance is also placed upon a judgment of a larger Bench of the Hon'ble Supreme Court dated 20th February, 2019 passed in Civil Appeal No. 7824 7828 of 2004 in the matter of Syndicate Bank -vs- Estate Officer And Manager (Recoveries) & Others.

12. As per the pleadings of the parties and the record, it is apparent that Respondent No. 3, Sudipta Mitra, is the borrower who took the loan from the Respondent No. 1 to a tune of Rs.10.00 lac. It is also not in dispute that the Appellant is the Developer of the flat in question in which an agreement to sale was entered into and the same was executed between the Appellant and Respondent No. 3. Pursuant to the Agreement to Sale, Respondent No. 3 had taken a loan of Rs.10.00 lac from Respondent No. 1. This amount was directly transferred to the Appellant. It is also not in dispute that Respondent No. 3 or the Appellant failed to repay the loan. Accordingly, Respondent No. 1/Bank had initiated proceedings under the SARFAESI Act, 2002. Appellant moved an application; being T.S.A. 291 of 2014, before the Learned Debts Recovery Tribunal-3, Kolkata under Section 17 of the SARFAESI Act, 2002 which was decided by the Learned Tribunal below on the 30th of December, 2016. and following order was passed:

"5. In view of the above, I pass the following order:

(i) The claim/objections raised by the Applicant are not supported by proper evidence and documents. There is no document filed to show that agreed sale consideration was Rs.24.00 lakhs (Rupees twenty four lac). Applicant's possession or claim on the flat in question is unlawful/unauthorized.

(ii) Respondent Bank has paid the sale consideration of the flat directly to the Applicant (Developer). Respondent Bank's claim having security on the flat is correct and proved.

(iii) The T.S.A., being T.S.A. 292 of 2014, is liable to be dismissed, hence dismissed.

No order as to cost."

13. Now, the moot questions that need to be decided are:

(i) Whether any right, title and interest can be transferred by executing an agreement of sale?

(ii) How a valid mortgage was created?

(iii) Whether any secured debt exists in favour of the Bank against the Appellant and if so, whether the Bank has the right to enforce the security interest?

(iv) Whether any privity of contract exists between the Appellant and Respondent No. 1?

14. To decide all these questions, it would be relevant to first decide the sale consideration for the flat in question. According to the Appellant, Respondent No. 3, agreed to purchase the flat for Rs.24.00 lac; while according to Respondent Bank the agreed rate to purchase the flat was Rs.10.00 lac and the whole consideration amount was transferred to the Appellant on the basis of application of the borrower.

15. According to agreement to sale, the sale consideration was Rs.9,28,150.00, as mentioned in para 4 of the agreement to sale. According to Schedule I of the loan agreement dated 28th August, 2004, Respondent No. 3 and his wife applied for a loan of Rs.10.00 lac before the Respondent No.1/Bank for purchase of a property; being Flat No. B, 3rd floor at Premises No. 181, Purba Sinthee Bye Lane, ad-measuring about 977 sq. feet, Mouza Purba Sinthee, J.L. No. 22, RS No. 811, Touzi No. 1298/2833,1298, RS Dag No. 92(P), R.S. Khatian No. 1189, 1190, P.S. Dum Dum, Ward No. 12, District – 24 Parganas (North), Kolkata – 700 030. Receipt was given by the Appellant, which reads as under:

"Received on this 25th day of 2004 from the withinnamed ICICI Home Finance Company Limited duly constituted attorneys for and on behalf of ICICI Bank the sum of Rs.9,98,849.00 (Rupees nine lakh ninety eight thousand eight hundred forty nine only by cheque no. ……. dated 25.8.04 drawn to ICICI Bank Limited favouring Biswajit Sharma being net amount disbursed out of total disbursed amount of

Rs.10,00,000/- pursuant to deduction of Rs…….Towards Processing/Administrative Fees and Rs..… towards Pre-Equated

Monthly Installment interest and Rs….. towards……

I received
Sd/- Sima Mitra"

In this receipt also Rs.10.00 lac is mentioned as the sale consideration; which was directly transferred in favour of the Appellant. Subsequent thereto, Appellant, by a letter dated 20th August, 2004, addressed to ICICI Home Finance Company Limited, Mumbai, gave permission to mortgage etc., in favour of Respondent No. 3. The letter, dated 20th August, 2004, is reproduced hereunder:

"Dear Sir,

This is to inform you that we have agreed to sell the Flat No. "B" in Apartment admeasuring 977 sq ft. approx. together with the fixtures and fittings thereon existing and future on the 3rd floor situated at within plot No. 181 of P.S. Bye Lane together with the undivided proportionate share of land to Mr. Sudipta Mitra son of Sunil Kumar Mitra for a total consideration of Rs.11,77,150 (Rupees eleven lac Seventy seven thousand one hundred fifty only) under an agreement dated 20.8.2004 hereby assure you that the flat as well as the said building situate within plot No. 181 of P.S. Bye Lane and the land appurtenant hereto are not subject to any encumbrances, charge or liabilities of any kind whatsoever and that the entire property is free and marketable.

We further confirm that we have a clear legal and marketable title to the said property and every part thereof.

We also undertake and confirm that we shall not raise any loan from any Bank, Institution, Firm, Corporate Body or anywhere and create any charge/encumbrances on the said property without your written consent.

We further undertake and confirm that we shall not allow the Purchaser/s to transfer, exchange or cancel the said flat without your written consent.

We have "No Objection" to ICICI Group Enterprise giving a loan to Mr. Sudipta Mitra, purchaser of the said flat together with the undivided proportionate share of plot of land referred to in paragraph 1 of this letter and his/her/their mortgaging the same with you/the security trustee nominated by you by way of security for repayment of the loan notwithstanding anything to the contrary contained in our Arrangement dated 20.8.2004 executed with the Purchaser/s.

We also undertake to inform you/the security trustee and give proper notice to the Co-operative Society Apartment Owners Association, as and when formed, about the flat being so mortgaged."

16. Thus, relying on the aforesaid documents, it can safely be concluded that sale consideration for the flat in question was Rs.9.28 lac; which was directly transferred to the Appellant, being the Developer of the property in question and not Rs.24.00 lac, as alleged or claimed by Appellant.

17. Now the question arises as to whether any security agreement was executed or not? Whether any security interest was created or not?

18. '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."

19. 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 immoveable 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 immoveable 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."

20. Thus, as per Section 54 of the Transfer of Property Act, contract for sale of an immoveable 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.

21. The fact that the sale deed was not executed in favour of Respondent No. 3 by the Appellant, is agreed and not disputed by the parties. It is also not in dispute that the title deeds were not deposited with the Respondent No. 1 to create a mortgage. The only document regarding creation of mortgage is the letter of the Appellant, dated 20th August, 2004, in favour of the Bank seeking permission to mortgage. It is also not in dispute that the amount was transferred in favour of the Appellant.

22. Learned Counsel for Appellant has placed reliance upon a judgment reported in *(1995) 4 SCC 147 in the matter of Sunil Kumar Jain -vs- Kishan & Others* wherein it was held that the agreement of sale does not confer title.

23. Reliance is also placed on the judgment reported in *AIR 1996 SC 973 in the matter of Namdeo -vs- Collector, East Neemar, Khandwa & Others* wherein it was held 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.

24. Reliance is also placed on the judgment reported in *AIR 1994 Bom 208 in the matter of Crest Hotel Limited & Another -vs- The Assistant Superintendent of Police* wherein same principle was laid down that agreement of sale of immoveable property does not create any interest or charge on such property.

25. Learned Counsel for Respondents has placed reliance upon a judgment of the Hon'ble Apex Court in the matter of *Syndicate Bank -vs- Estate Officer And Manager (Recoveries) & Others, passed in Civil*

Appeal No. 7824 7828 of 2004, decided on 30th August, 2007, wherein the matter was referred to the Larger Bench, wherein the Hon'ble Apex Court held as under :

"There cannot be any dispute, whatsoever, that in absence of a registered deed of sale, the title to the land does not pass, but then what would not be conveyed is the title of the estate and not the allotment and possession itself."

In the concluding paragraph, the Hon'ble Apex Court held as under:

"In a case of this nature where valuable right is created which may or may not confer as assignable right, the question requires clear determination having regard to the equitable principle in mind, and would have far reaching consequences, as a large number of banks and financial institution advance a huge amount only on the basis of allotment letters are to be totally ignored, the same may deter the banks in making advances which would in effect and substance create a state of instability."

26. The Larger Bench decided the matter on the 20th of February, 2019; wherein the Hon'ble Apex Court in the first paragraph held as under:

"These appeals are before this Bench because two Judges Bench of this Court felt that there is no clear cut authority on the question as to whether property can be equitably mortgaged by depositing documents which may not be title deeds or registered documents of title. In view of the decision which we propose to take, it is not necessary to answer this question in the present cases."

At page 5 of the judgment, the Hon'ble Apex Court held as under:

"We are of the opinion that the Reference need not be answered in the peculiar facts and circumstances of the case since in our opinion, the State of Andhra Pradesh and its Successor viz., the APIIC

and the Telangana Industrial Infrastructure Limited are estopped from challenging the validity of the mortgage".

27. In the judgment dated 30th August, 2007 of the Hon'ble Apex Court in the Syndicate Bank case (supra), held as under:

"The requisites of an equitable mortgage are: (i) a debt; (ii) a deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage. The principal question, which, therefore, requires consideration is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document."

28. Further reliance was placed in the matter of Amulya Gopal Majumdar -vs- United Industrial Bank Limited & Others, reported in AIR 1981 Cal 404, wherein it was held that :

"Therefore, at the time when the disputed transaction was entered into the mortgagor Eagle Plywood Industries Private Limited had entered into lawful possession of the Behala property on the basis of an agreement for sale dated July, 18, 1950. Such possessory title could very well in law be furnished as security for the mortgage. On this point we are in respectful l agreement with the view taken by M.M. Dutt and R.K. Sharma,JJ in the case of Usha Rice Mills Company Limited v. United Bank of India (1978) 82 Cal WN 92, since the view taken by their Lordships is based on high authorities."

29. In Usha Rice Mill Company Limited -vs- Union Bank of India , reported in (1977) ILR 2 Cal 385, Division Bench of the Hon'ble High Court at Calcutta placed reliance upon judgment of Privy Council in Pir

Baksh -vs- Mohomed Tahar L.R. 61 Ind Ap 388 wherein it was held that transfer by sale could only be made by a registered instrument and the contract by itself could not create any interest in or charge on the property. It is, thus, well settled that no interest in the property passes to the purchaser under a contract for sale.

30. Hon'ble High Court has further delved into the question as to whether or not, by virtue of its possession, Defendant no. 1 (in that case) had acquired the transferable interest in the disputed property? It was observed that the possession of a material object is a title to the ownership of it. The thing, of which possession is taken, may already be the property of someone else. In para 8 it was held as under:

"8. In view of the principles of law laid down in the above decisions, it is difficult to accept the contention of the Defendants that the Defendant No. 1 had no interest in the disputed property which could be transferred by way of mortgage. It is true that the agreement for sale did not create any interest in the property agreed to be sold, but at the same time the possession of the Defendant No. 1 cannot be ignored. The possession of the Defendant No. 1 of the disputed property has conferred on it an interest thereon or possessory title which is valid against all except the true owner. It is well known that possession is one of the most important elements which constitute ownership and such possession, except that of a licensee, would undoubtedly create an interest in the property in favour of the possessor."

31. In Krushna Chandra Sahoo -vs- Bank of India, reported in AIR 2009 Ori 35, Division Bench of the Hon'ble High Court at Orissa held as under:

"8. A Constitution Bench of the Hon'ble Supreme Court in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, AIR 1975 SC 1331 held that the statutory authorities cannot deviate from the statutory provisions and any deviation, if so made, s required to be

enforced by legal sanction of declaration by the Courts invalidating such actions in violation of the statutory Rules and Regulations. A similar view had been reiterated by the Apex Court in Ambika Quarry Works etc. v. State of Gujarat, AIR 1987 SC 1073; Purushottam v. Chairman, Maharashtra State Electricity Board, 1999) 6 SCC 49: 1999 AIR SCW 4747 and Sultan Sadik v. Sanjay Raj Subba, AIR 2004 SC 1377.

9. Therefore, it is evident that when the action of the instrumentalities of the State is not as per the Rules and Regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act illegal and invalid. It becomes the duty of the Court to ensure compliance of such Rules and Regulations for the reason that they are binding on the authorities. Any order or action done by the authority in violation of the statutory provisions is constitutionally illegal and this cannot claim any sanctity in law. There can be no obligation on the part of the Court to sanctify such illegal act.

10. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hither to uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius", meaning thereby that if a statute provides for a thing to be done in a particular, then it has to be done in that manner and in no other manner and following other course is not permissible, Vide State of Bihar v. J.A.C. Saldanna, AIR 1980 SC 3276; Haresh Dayaram Thakur v. State of Maharashtra, (2000) 6 SCC 179: AIR 2000 SC 2281; Prabha Shankar Dubey v. State of Madhya Pradesh, AIR 2004 SC 486, and Indian Banks' Association --vs- Devkala Consultancy Service, AIR 2004 SC 2615."

32. Learned Counsel for Respondents No.1 and 2/Bank has placed reliance upon a judgment of the Hon'ble High Court at Calcutta in Amulya Gopal Majumdar (supra) wherein it was held as under:

"23. Mr. Banerji, appearing in support of this appeal, raised two points. In the first place it was contended by him that transactions entered into with the plaintiff Bank not amounting to an equitable or any other form of mortgage, the plaintiff does not stand in the position of a pulsne mortgagee. This point, however, stands overruled in view of our findings recorded in the other appeal, viz., F.A. 481 of 1972. We have therein found that at least one of the transactions with the plaintiff Bank constituted an equitable mortgage. The second point raised by Mr. Banerji is that when the appellant has purchased the equity of redemption in his mortgage sale, he has got a preferential right of redemption as against the plaintiff. We, however, find little substance in the contention of Mr. Banerji. In law as the purchaser of an equity of redemption, he might have a preferential right of redemption but when at no stage did he exert that right of redemption, he cannot simply plead that right to defeat the right of the present plaintiff. The appellant was added as a party defendant in the earlier suit as early as on 22.7.1969. He contested the said suit throughout, suffered a decree therein and yet he took no steps to enforce his preferential right of redemption as against the plaintiff Bank who instituted the present suit on 26.5.1973. Moreover, this objection of Mr. Banerji is more academic than real because the appellant can in effect redeem the mortgage in favour of the plaintiff Bank by paying the amount decreed against the original mortgagor and the appellant in the earlier mortgage suit of the plaintiff Bank. In this view we overrule both the points raised in support of this appeal. The appeal, therefore, fails and is dismissed. We affirm the preliminary decree as passed by the trial Court subject, however, to this direction, viz., if on the accounts taken in the earlier suit it be adjudged that nothing stands outstanding towards the mortgage dues to the plaintiff

Bank on the mortgage of Behala property or if plaintiff be paid off his mortgage dues on that account in terms of the preliminary decree of that suit, then in that event the plaintiff's claim in this suit would stand dismissed at the stage of drawing up the final decree."

33. The aforesaid judgment cannot be of any aid to the submission made by the Learned Counsel for Respondents as it is abundantly clear that possession of the property in dispute was not delivered to the Bank; even title deeds were not deposited with the Bank; rather, only a letter dated 20th August, 2004, was written by the Appellant wherein the Appellant has given 'No Objection' if ICICI Group Enterprise gives a loan to Sri Sudipta Mitra, the purchaser of the said flat. This letter itself cannot be treated as a security agreement as, neither any rights were created or any deposit of title deeds coupled with the possession was handed over to the Bank. In such circumstances, it cannot be accepted that any equitable mortgage was created by the Appellant in favour of the Bank wherein any liability can be raised against the Appellant.

34. In Namdeo -vs- Collector, East Neemar, Khandwa & Others, reported in AIR 1996 SC 973, the Hon'ble Apex Court held as under:

"Appellant Bank agreement of sale does not convey any right, title or interest. It would create only an enforceable right in a court of la and parties could act thereon. The right, title and interest in the land of Devi Prasad stood extinguished only on execution and registration of the sale deed and admittedly it was done in 1974. Therefore, the sale deeds are within the prohibited period."

35. The Hon'ble Apex Court in the matter of Syndicate Bank -vs- Estate Officer And Manager (Recoveries) & Others, passed in Civil Appeal No. 7824 7828 of 2004, decided on 30th August, 2007, held as under :

"Even if the mortgagor derives some interest which can be subject-matter of mortgage, a mortgage by deposit of title deeds can be created. It is not in dispute that whereas a deposit of title deeds by

itself does not require a document in writing, but in the in event a mortgage is created thereby, it will require registration. It is furthermore not in dispute that complete title over a property can be acquired by a vendee only when a deed of sale is executed and registered by the vendor in terms of Section 54 of the Transfer of Property Act."

"The requisites of an equitable mortgage are: (1) a debt; (ii) a deposit of title deeds; and (ii) intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage. The principal question, which, therefore, requires consideration is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document."

"In Mulla's Transfer of Property Act, a large number of cases have been noticed where even a patta of land has been considered to be a document of title depending of course on the circumstances under which it had been given.

Moreover, if insistence on the original document of title is laid, it may give rise to the conclusion that once the document of title is lost, no mortgage of deposit of title deed can be created at all.

It is, however, one thing to say that a person cannot convey any title, which he himself does not possess; but it is another thing to say that no mortgage can be created unless he obtains a title by reason of a registered conveyance."

"ln Amulya Gopal Majumdar v. United Industrial Bank Ltd, and Others [AIR 1981 Calcutta 404], a Division Bench of the Calcutta High

Court held that possessory title itself can be a subject-matter of mortgage, opining:

Therefore, at the time when the disputed transaction was entered into the mortgagor Eagle Plywood Industries Private Limited had entered into lawful possession of the Behala property on the basis of an agreement for sale dated July 18, 1950. Such possessory title could very well in law be furnished as security for the mortgage. On this point we are in respectful agreement with the view taken by M.M. Dutt and R.K. Sharma, JJ. in the case of Usha Rice Mills Company Limited v. United Bank of India (1978) 82 Cal WN 92, since the view taken by their Lordships is based on high authorities."

36. No doubt, three requisites for an equitable mortgage are, (1) debt (2) deposit of title deeds and (3) an intention that the deeds shall be security for the debt. A debt was created by the Bank but as far as remaining two conditions are concerned, they could not be proved. A simple letter was written by the Appellant acknowledging the debt, could not be treated as deposit of title deed in their favour though the Appellant had deposited the same with the Respondents. Further, even the intention could not be gathered from the letter as the was an undertaking to clear off the debt but at the same time it has to pass the test of law. The letter cannot be treated as a substitute for the title deeds. Further even the possession of the property in question was not delivered at the time of executing the agreement for sale. In such circumstances, it could not be inferred that any equitable mortgage was created in favour of the Bank.

Accordingly, I am of the view that the Learned Debts Recovery Tribunal-3, Kolkata has wrongly dismissed the petition, thus appeal is liable to be allowed.

O R D E R

The appeal, being Appeal No. 131 of 2017, is allowed. The judgment and order dated 30th December, 2016, passed by Learned

Debts Recovery Tribunal-3, Kolkata is hereby set aside. The SARFAESI Application filed under Section 17 of the SARFAESI Act 2002 by the Appellant is allowed. Notice under Section 13(4) of the Act dated 28th February, 2013 is quashed. Bank shall be at liberty to recover the loan amount in accordance with law.

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 pronounced by me in the open Court on this the 5th day of July, 2022.

(Anil Kumar Srivastava,J)
Chairperson

Dated: 5th July, 2022
ac