

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Ex. F.A. No.13/2013 and C.M. No.16029/2014 (condonation of delay)**

% **23rd September, 2014**

M/S MONEYLINE CREDIT LTD. Appellant
Through: Mr. Sachin Sangwan, Advocate.

VERSUS

SH. SANJEEV KUMAR AND ORS. Respondents
Through: Mr. Pradeep Trehan, Advocate for
respondent No.3.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this execution first appeal is to the impugned order of the trial court dated 22.1.2013. Trial court by the impugned judgment has dismissed the execution proceedings by holding that there were no rights of a mortgagee created in favour of the appellant inasmuch as and in fact the objectors being the respondent nos.1 and 2 herein, and who are not the judgment debtors, were the owners of the suit property by means of the purchase under a sale deed dated 20.1.2009 from

the legal heirs of the original owner and that subsequently this property was mortgaged to the respondent no.3-bank herein i.e M/s. Central Bank of India at Greater Kailash-II Branch, New Delhi.

2. The judgment of the executing court is a very thorough and exhaustive judgment. I would therefore seek to reproduce two important paragraphs of the judgment which refer to the fact that what was handed over to the appellant by the judgment debtor were not the title deeds but only an allotment letter and a possession letter with respect to the property which was allegedly mortgaged i.e L-17C, DDA, Janta Flats, Near Green Fields School, Saket, New Delhi, and, mortgage cannot be created in the absence of deposit of the original title deeds. These paras are paras 4.2 and 6.4 and which read as under:-

“4.2 During the course of arguments on behalf of all the objectors, Ld. Counsel Sh. R.B. Trivedi, Advocate requests for setting aside of attachment of the property and auction proceedings, that all original title documents in proper chain have been deposited with the Central Bank of India by the other objectors when they took loan and mortgaged the property, this mortgage has been created as per provisions of the Transfer of Property Act. Therefore, the property mortgaged with Central Bank of India cannot be attached and auctioned under the proceedings of execution petition based on award dated 05.11.2011, which was against judgment debtors. The law on the point of mortgage is vivid, the objectors have complied the statutory provisions and principles of practice of mortgage of property. On the other side, the decree holder or decree holder's record does not establish that the property was mortgaged with decree holder by the judgment debtors as per law and practice of mortgage of immovable property. In the year 2007, it was a lease property and judgment debtors were not owner thereof, how it could have been mortgaged by the judgment debtors nor the handing over of allotment letter amounts to mortgage of immovable property,

since allotment letter is not a title document. Further, the requirement of law is that there should be debt, deposit of title deed to be mortgaged and intention of giving the mortgagee a security and in banking practice a register is maintained that whenever mortgage is created, entries are made in such register. As appears, the judgment debtors had no intention to create mortgage, that is why neither there is any title document nor it was deposited with the decree holder by them. Whereas, what the objectors have done, it satisfies all these requirements, but decree holder's record does not satisfy such practice, procedure and law. The objectors further contentions are based on the reasons given in case law, which are as follows:-

1. State Bank of India vs Kerala Financial Corporation (Kerala High Court decided on 17.11.1982): On the point of Section 78 of the Transfer of Property Act it is held that Court held that the subsequent mortgage must prove that he was directly and not remotely induced by reason of the gross neglect on the part of the prior mortgagee to advance money on the security of the mortgaged property. "Gross neglect" in Section 78 means and involves the absence of care that was requisite under the circumstances on the part of the prior mortgagee and it being a relative term depends upon the facts of each case.
2. Lloyds Bank Ltd. vs P.E. Guzdar And Co. AIR 1930 Cal. 22: On the request of mortgagor, the mortgagee returned title document and, the same title documents were utilized for creating another mortgage, the defendant bank was held guilty of gross neglect and the mortgage of the defendant bank must be postponed to the plaintiff bank.
3. Indian Bank vs M/s Punjab National Bank (Madras High Court decided on 22.07.2009) held the requirement of law is to deposit of original title document and it amounts to gross negligence by accepting creation of equitable mortgage on the basis of certified copies of original title deeds.
4. Syndicate Bank vs Estate Officer & Manager (Appeal (civil) No.7824-7828 of 2004) : Allotment letter, agreement and consent letter are not title documents within the meaning of Section 58 (f) of the Transfer of Property Act and mere deposit of such letter or agreement did not create any charge in favour of the mortgagee. Each case has to be considered on its own facts and circumstances.
5. K.J. Nathan vs S.V. Maruty Reddy & Ors 1965 AIR 430 SCR (6) 727: Intention of a party to create a mortgage coupled with delivery of title deed are the requirements for creating equitable mortgage.
6. C. Assiamma Vs. State Bank of Mysore 1990 – 3 BC 342 (Mad.): "By documents of title, we mean the legal instrument which prove the right of a person in a particular property. Evidence supplied by documents may in some cases be conclusive while in other cases it may be insufficient in proving the title or the right claimed".

It is concluded that the objectors have taken all necessary precautions as well as steps to ensure compliance of law before creating equitable mortgage and the seller was asked about allotment letter and allied documents, since as per information received under RTI Act, the allottee was issued the allotment letter, possession letter etc. The seller had lodged NCR with regard to document letter, mutation, possession letter, demand letter etc. on 12.08.2008 with police station Malviya Nagar by registering NCR No.2312/2008. The objectors have interest in the property, but decree holder failed to establish it, therefore, Objectors' property cannot be attached and auctioned in satisfaction of award against the judgment debtors. The attachment is required to be set aside.

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6.4 By reading contentions of both sides and by analysis of record, it is undisputed fact that the property was allotted by Delhi Development Authority in the year 1997 to Sh. S. Appale Swami. The judgment debtor applied for loan to decree holder by mortgage application in December 2007. The decree holder has placed on record photocopy of first sheet of conveyance deed dated 18.08.1982 but the first page of conveyance deed reflects name of original allottee Sh. S. Appale Swami and not in the name of the judgment debtors. In the memorandum of deposit of title deed or in schedule I and schedule II accompanying the application form, no description of property has been mentioned nor there is any record to the effect that permission was given by Delhi Development Authority on application to create mortgage on the property. It also reflects that permission was warranted to create mortgage, as it was not a freehold property and permission of principal lessor was required but there is no record by the decree holder that Delhi Development Authority had given the permission to create mortgage in respect of the property, which was belonging to the principal lessor. On the other side the objectors have record, now in possession of Central Bank of India, of special power of attorney dated 29.06.2008 for mutation, conveyance deed dated 01.12.2008 in favour of T. Shankar Rao and Sh. T. Sunder Rao, sale deed dated 12.12.2008 (in favour of Smt. T. Mallina Rao) and sale deed dated 20.04.2009 in favour of two objectors, after agreement to sell dated 15.12.2008. So far allotment letter is concerned, neither it is a titled document since conveyance deed dated 18.08.1982 is the title document it was in favour of original allottee, therefore, the judgment debtors name was not mentioned in the conveyance deed dated 18.08.1982, whereas, for creating a mortgage or equitable mortgage there should have been title document, as per the requirement of section 58 of Transfer of Property Act. The decree holder would have taken the record from the judgment debtors at the time of creating mortgage in respect of the property but neither those documents

have been mentioned in the application form or mortgage agreement nor in the schedule of such record nor the allotment letter is a title document as held in precedent Syndicate Bank vs Estate Officer (supra). In the search report dated 24.02.2009 it was opined and advised to the Central Bank of India to take necessary precautions or additional documents, which also comprises allotment letter and decree holder contends that Central Bank of India had not taken care of it and it is negligent. Whereas, the seller/judgment debtor T. Sunder Rao had applied to Delhi Development Authority under RTI for copies of allotment letter record since it was misplaced and he had also lodged NCR No. 2312/12/08/2008, which is prior in time to search report dated 24.02.2009. Therefore, it can be plainly held that the decree holder had obtained some of the documents from the judgment debtor to create equitable mortgage but documents collected by the decree holder are not title document to make the requirement of section 58 of Transfer of Property Act complete for equitable mortgage, whereas on the other side the objector Central Bank of India has all chain of documents, inclusive of conveyance deed in favour of sellers vis a vis sale deed in favour of one of the seller and then sale deed in favour of both the objectors, which are the title documents and it had created equitable mortgage by deposit of such title documents in respect of suit property. Therefore, the property in question is the mortgaged property under equitable mortgage with Central Bank of India by deposit of title deed by other objectors Sh. Sajeew Kumar and Ms. Archana Thakur pursuant to agreement to sell and sale transaction by the sellers/two judgment debtors and Central Bank has right and interest in the property, the decree holder cannot be permitted to get it attached and auctioned in respect of Award/decreed against the judgment debtor in satisfaction of decretal amount by selling the property of objectors. Therefore, objections of Sh. Sanjeev Kumar and of Ms. Archana Thakur and also objections of Central Bank of India are allowed. The attachment of the property L-17C, DDA, Janta Flats, Near Green Fields School, Saket, New Delhi is withdrawn and it is released from the execution of proceedings of petition No. Ex. 2/12. Accordingly, both the objections stand disposed of.”

(underlining added)

3. Learned counsel for the respondents/objectors refer to the recent judgment of the Supreme Court in the case of ***R. Janakiraman Vs. State represented by Inspector of Police, CBI, SPE, Madras (2006) 1 SCC 697*** in which Supreme Court has said that equitable mortgage cannot be

created without depositing the original title deeds and because original title deeds had not been deposited in the present case, consequently there is no valid mortgage as is claimed by the appellant.

4. In my opinion, in this case the provision of Section 41 of the Transfer of Property Act, 1882 will also go against the appellant because respondent nos.1 and 2 can be said to be *bonafide* purchasers for value by paying consideration because the appellant at no point of time took steps to inform the DDA not to execute the conveyance deed in favour of the predecessor-in-interest of the respondent nos.1 and 2/subsequent purchasers i.e the conveyance deed in favour the legal heirs of the original allottee Sh. S. Appale Swami. The case of the respondents/objectors before me is that if the appellant had informed the DDA that a 'mortgage' has been created in its favour, assuming that mortgage could be created only by giving/depositing possession of the allotment letter and possession letter, then, the position would not have come to the present stage whereby a conveyance deed would have been executed in favour of the legal heirs of Sh. S. Appale Swami and who thereafter on the basis of that conveyance deed sold the suit property to the respondent nos.1 and 2 herein by means of the sale deed dated 20.1.2009, and consequently which resulted in the respondent nos.1 and

2/objectors becoming *bonafide* purchasers for value without notice of any rights existing in favour of the appellant herein.

5. In the peculiar facts of the present case, and taking into account that there is no mortgage by deposit of the original title deed in favour of the appellant and that respondent nos.1 and 2 are *bonafide* purchasers and respondent no.3 thereafter has by taking mortgage of the property advanced loan to the respondent nos.1 and 2, the trial court was justified in holding that no mortgage was created in favour of the appellant.

6. Dismissed.

VALMIKI J. MEHTA, J

SEPTEMBER 23, 2014

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