In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 6947 of 2016 (O&M)

Date of Decision: 28.07.2022
Reserved On : 22.07.2022

Baldev Singh and Another

... Appellant(s)

Versus

Mohan Singh and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Vijay Lath, Advocate
for the appellant(s).

Mr. Sandeep Jain, Advocate
for the respondent No.2.

Anil Kshetarpal, J.

1. The plaintiffs assail the correctness of the findings arrived at by the learned First Appellate Court, which has accepted their appeal, however, with a rider that the lien of defendant No.2 (State Bank of Patiala, Mukandpur Branch, District Shaheed Bhagat Singh Nagar) would remain a first charge on the suit property and the defendant No.2-Bank, if the situation so arises, would be able to enforce all its rights against the suit property even if its ownership changes hands.

2. In these circumstances, the question which arises for consideration is "if a prior agreement to sell is proved, then whether subsequent mortgage of the property in favour of bank shall not affect the rights of the agreement holder in a case where the suit for specific performance of the agreement to sell has been decreed?"

3. Some peculiar facts are required to be noticed. Sh.Mohan Singh

was the owner of the land measuring 13 kanals and 7 marlas. He, through his attorneys, is stated to have entered into an agreement to sell of the aforesaid property with the plaintiffs for 01.03.2009 for a total sale consideration of ₹20,00,000/-. A sum of ₹10,00,000/- was paid as earnest money. The sale deed was agreed to be executed and registered on 02.05.2009 which was extended twice, upto 15.01.2010. The respondent-Bank claims that Sh.Mohan Singh mortgaged the property in its favour against a term loan of ₹20,00,000/- and a cash credit limit to the tune of ₹3,75,000/- borrowed by Sh.Jaswinder Singh (his son) and executed a registered mortgage deed dated 17.04.2009.

4. The trial Court refused to grant the relief of specific performance as it was found that the suit has been instituted after an unexplained delay of 2½ years, whereas, the First Appellate Court has decreed the suit for specific performance with a rider giving precedence to the rights of the bank. It is relevant to note that though the defendant No.2 (Sh.Mohan Singh) filed a written statement, but never appeared in evidence. Only the bank (defendant No.2) contested the suit.

5. Heard the learned counsel representing the parties and with their able assistance, perused the paper-book.

6. The learned counsel representing the appellant contends that the plaintiffs (appellants) have prior contract in their favour and such contract may not create right in the property, but nonetheless it creates an obligation attached to the ownership of the property. He contends that subsequent charge created on account of mortgage cannot override the rights of the plaintiffs. In support of his arguments, he relies upon the judgments passed by the Supreme Court in ***Vannarakkal Kallalathil Sreedharan v.***

Chandramaath Balakrishnan (1990)3 SCC 291, ***Rajender Singh v. Ramdhar Singh and Others (2001)6 SCC 213*** and ***Jagroop Singh and Others v. Boria Khan (Dead) through LRs and others 2009(1) RCR (Civil) 697***.

7. On the other hand, the learned counsel representing the Bank contends that the agreement to sell between the plaintiffs and defendant No.1 (Sh.Mohan Singh) in an antedated agreement, which is fabricated in order to defeat the rights of the bank.

8. Keeping in view the facts of the case, it becomes important to examine the difference between the charge and the mortgage. The charge is defined under Section 100 of the Transfer of Property Act, 1882 (hereinafter referred to as "the 1882 Act"), whereas, mortgage is defined in Section 58 of the 1882 Act, which are extracted as under:-

> *"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined**.—(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
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> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being arc called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
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> ***(b) Simple mortgage**.—Where, without delivering possession*

of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to payaccording to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

***(c) Mortgage by conditional sale**.—Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment bein g made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:*

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

***(d) Usufructuary mortgage**.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits* *accruing from the property or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.*

(e) English mortgage*.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.*

(f) 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 immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*

(g) Anomalous mortgage*.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage".*

> ***59 to 99*** *XXXX XXXX XXXX XXXX*
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> ***100. Charges****.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.*
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> *Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge".*

9. It is evident that charge does not create an interest in the specific immovable property. Rather it only creates a right of payment out of the specified property. On the other hand, a mortgage effectuates the transfer of a specific interest in the property mortgaged. Section 58(a) of the 1882 Act provides that a mortgage is a transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan or payment of an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

10. The transfer of property is defined under Section 5 of the 1882

Act, whereas what can be transferred and exceptions thereof are provided under Section 6 of the 1882 Act. Section 5 and 6 of the 1882 Act are extracted as under:-

> *"**5. "Transfer of property" defined**.—In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or it himself and one or more other living persons; and "to transfer property" is to perform such act.*
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> *In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.*
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> ***6. What may be transferred**.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:*
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> *(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other merepossibility of a like nature, cannot be transferred.*
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> *(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.*
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> *(c) An easement cannot be transferred apart from the*

dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it opposed to the nature of the interest affected thereby, or (2) an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3)to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a court of Wards, to assign his interest as such tenant, farmer or lessee".

11. Under Section 5 of the 1882 Act, it is provided that the transfer of property means an act by which a living person conveys property, in

present or in future, to one or more living persons. Section 6 of the 1882 Act provides that the property of any kind may be transferred, except as otherwise provided in this Act. On a careful reading of the properties which are specifically transferable and its exceptions, the chance of an heir-apparent succeeding to an estate and certain other things cannot be transferred. The section is exhaustive and enumerates the rights which cannot be transferred. However, mortgage is explicitly recognized to be transferable under the 1882 Act. In ***J. K. (Bombay) Private Ltd. V. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. and Others AIR 1970 Supreme Court 1041***, the Supreme Court noticed the distinction between a charge and a mortgage. Thus, the terms "charge" and "mortgage" are not synonyms. Mortgage transfers/creates an interest in the immovable property, whereas, charge does not transfer/create any such interest but only gives a right to payment out of the property so charged. The judgments relied upon by the learned counsel representing the appellants in ***Vannarakkal Kallalathil Sreedharan v. Chandramaath's case*** *(supra)* and ***Rajender Singh's case*** *(supra)* are with respect to the property which was charged and not mortgaged. Hence, the aforesaid judgments are not applicable.

12. Now, in these circumstances, the question is "whether the plaintiffs (appellants) have a superior right over the right of the mortgagee or not?" The mortgage is in favour of a nationalized bank. It was executed by a registered mortgage deed on 17.04.2009 by Sh.Mohan Singh stood as a guarantor for the amount borrowed by his son (Sh.Jaswinder Singh). It is also important to note that though Sh.Mohan Singh has taken a stand that the agreement to sell is a result of misrepresentation and fraud and infact, there

was no agreement, however, he has admitted that he did sign certain blank papers on account of good relationship between his sons and the plaintiffs. It is claimed that the plaintiffs and the defendant No.1 are residents of the adjoining village. The agreement to sell has been thumb marked by the Sh.Mohan Singh, his son's Attorney and not Sh.Mohan Singh.

13. It would be noted here that Section 19(b) of the Specific Relief Act, 1963 (hereinafter referred to as "the 1963 Act") protects a transferee for value who has paid his money in good faith and without notice of the original contract. Section 19(b) of the 1963 Act is extracted as under:-

> *"**19. Relief against parties and persons claiming under them by subsequent title**.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—*
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> *(a) XXXX XXXX XXXX XXXX XXX*
>
> *(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract".*

14. In common parlance, it is understood that bonafide transferee of the property for a valuable consideration without notice of the original contract, is saved from a decree of specific performance with respect to a prior agreement to sell. It is important to note that the agreement for sale or agreement to sell itself does not create any interest in/or charge on such property. It only creates an obligation attached to the ownership of the property. In other words, the intention of the statute is to save the transferee for value who has paid his money in good faith and without notice of the

original contract. In this case, no evidence has been led by the plaintiffs to prove that the bank had the notice of the agreement to sell between the plaintiffs and the defendant No.1. The expression "transferee" in Section 19 of the 1963 Act read with Section 5 and 6 of the 1882 Act does not necessarily mean absolute transfer of the property. Creation of a mortgage also falls within the expression "transfer of the property or creation of an interest". The transfer of property need not be, in all the cases, an absolute transfer. In lease and mortgage, only a specific interest in the property is transferred while the ownership remains with the transferor. The mortgage is a kind of transfer of interest in a specific immovable property for the purpose of securing payment of loan etc. and it does not result in transfer of complete ownership *per se*. Nonetheless, it, still, is a transfer of the property under Section 5 read with Section 58 of the 1882 Act. Thus, this interest of a nationalized bank is saved by virtue of Section 19(b) of the 1963 Act.

15. Furthermore, it is observed that there is no explanation either in the plaint or in the replication or in the evidence led by the plaintiffs which caused the delay of 2½ years in filing the suit. It would be noted here that since the defendant No.1, except for filing of the written statement ,did not contest the suit, hence, the bank was prejudiced and was not in a position to defend the suit properly. In fact, defendant No.1, while filing the written statement, has admitted the signatures of his two sons on the agreement to sell, though, has stated that these were taken on account of their close relationship with the plaintiffs. Hence, the genuineness of the agreement to sell also comes under the cloud of suspicion.

16. Keeping in view the aforesaid facts, the learned First Appellate Court has correctly held that the suit for specific performance of the

agreement to sell, filed by the plaintiffs, shall stand decreed subject to the rights of the bank created by the mortgage. Consequently, finding no merit, the appeal is dismissed.

17. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

July 28, 2022
"DK"

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No