

(1946) 02 AHC CK 0003
In the Allahabad High Court
Case No : First Appeal No. 40 of 1945

Benares Bank Ltd.

APPELLANT

Vs

Bank of Bihar Ltd. and others

RESPONDENT

Date of Decision : 19-02-1946

Acts Referred:

Citation : (1946) 02 AHC CK 0003

Final Decision : Allowed

Judgement

Braund, J.—This is a first appeal from the decision of the learned Additional Civil Judge of Benares in a suit which relates to the transactions of the Benares Bank Limited, now in liquidation. The facts are relatively simple and, we venture to think, when understood, themselves go a long way towards providing the solution of the difficulties which have occurred.

2. On 3-12-1936 the Benares Bank Limited (hereinafter called "the Benares Bank") in the course of its business took a mortgage by deposit of title deeds from a certain Rai Sahib Harkrishna Das and others to secure a principal sum of Rs. 2,10,000 then outstanding against the mortgagors on a running account with the Bank. The title deeds deposited with the Benarea Bank radated to certain lands and buildings more particularly described in the sch. 2, to the instrument of mortgage. The terms of the instrument of deposit are not very material, but it may be observed that the security was for the principal sum together with interest thereon at the rate of seven and a half per cent per annum and that, following the customary form, the mortgagors (whom, to save confusion, we shall hereinafter refer to as the "principal mortgagors") undertook at the request of the Benares Bank at any time to execute a mortgage over the properties in the English form. The date for the repayment of the debt was expressed to be 31-12-1938.

3. On 24-4-1939 the Benares Bank, being itself then in need of money, either borrowed from, or were then themselves indebted to, the Bank of Behar Limited (hereinafter called the "Behar Bank") in a sum of forty thousand rupees, for

which on that date a promissory note was executed by the Benares Bank in favour of the Behar Bank. At the same time, as a security for the payment of this sum of forty thousand rupees by the Benares Bank to the Behar Bank the former executed what is described as a "deed of assignment", which is set out at p. 35 of our paper book. This instrument of 24.4-1939, which we shall hereinafter refer to as the "sub-mortgage", was, so far as material, in the following terms:

We hereby assign to the Bank of Behar Limited the following debts as security for an advance of Rs. 40,000 (rupees forty thousand) taken from them under a promote executed by us of date. The debts are unencumbered and nothing out of it has been realised. Any payment made to us in future towards the same will be handed over to the Bank of Behar Limited immediately.....Details of debts. Equitable mortgage, dated 3-12-1936, from Rai Sahib Harkisshen Das and others to Benares Bank Limited.

Then followed a list of the title deeds in the custody of the Benares Bank as principal mortgagees which were handed over to the Behar Bank as sub-mortgagees.

4. It should be noticed that between the date of the principal mortgage in 1936 and the date of the sub-mortgage in 1939 very substantial payments had been made by the principal mortgagors in reduction of their running account with the Benares Bank with the result that at the latter date there was only outstanding on the security of the principal mortgage a sum of Rs. 47,112.

5. On 1st February 1940, the Behar Bank launched the suit out of which this appeal arises. It is, we think, material for us to pay some attention to the exact form which this suit took in the first place. The first eight defendants to it were the then principal mortgagors. Defendant 9 was the Benares Bank, which was, of course, the principal mortgagee and the mortgagor in respect of the sub-mortgage to the Behar Bank. A 10th defendant who was a certain Mr. Dalmia, was also added. His concern with the matter was that he had prior to the date of the suit entered into a contract for the purchase of the mortgaged properties which consisted of collieries. The plaint started by setting out the fact that the Behar Bank had become the assignee of the principal mortgage by virtue of the sub-mortgage of 24th April 1939. It went on to admit that only a sum of Rs. 47,112, was then outstanding on the principal mortgage and it then set out the particulars of the sub-mortgage of April 1939. In the form in which it was originally drafted, it concluded with prayers, first, for a mortgage decree under O. 34, R. 4 of sch. 1, Civil P.C., against the principal mortgagors and, secondly, for liberty to apply, in the event of there being a deficiency after sale, for the usual personal decree against the original mortgagors. It is to be noted that these two prayer which are numbered (a) and (b) in the plaint are based upon the footing that the, plaintiffs were seeking to enforce their security constituted by the sub-mortgage against the properties comprised in and charged by the original mortgage. The third item of relief which the plaintiffs claimed was that "if for any reason the plaintiff be not deemed entitled to the reliefs claimed above"-

meaning relief on the footing of the sub-mortgage-"then a decree for Rs. 40,000 as principal and Rs. 1,559-11-9 interest. . . ." This obviously was a claim on the personal covenant to pay, but the plaint omitted to state against whom the claim was made.

6. The next material event which occurred was that on 1st March 1940, a compulsory winding up order was made in this Court against the Benares Bank. On the making of the winding up order, it was obvious that the suit, so far as it was a suit against the Benares Bank, could not proceed without the leave of the winding up Court under 3. 171, Indian Companies Act. This accordingly was applied for by the plaintiffs in April 1940, and, as was obviously proper, leave was given by the winding up Court to the Behar Bank to proceed with the suit. Thereafter in July 1940, and September 1941, further amendments were made in the third part of the relief claimed by the plaint which made it evident that what the plaintiffs were claiming was a personal decree against the mortgagors in favour of the plaintiffs "as assignee of the debt due to defendant 9", that is to say the Benares Bank. It follows, therefore, that what the plaintiffs were really claiming by the third part of the relief sought by them was a decree in their favour as sub-mortgagees against the original mortgagors. In other words they were claiming to stand in the shoes of the Benares Bank.

7. We do not think that we need deal with any of the written statements except possibly that of the Benares Bank. The liquidator of the Benares Bank by the Bank's written statement of May 1940 admitted that the outstanding balance of the account between the Behar Bank and the Benares Bank was then Rs. 41,559-11-9 in favour of the former. It went on, however, to take two substantive points in opposition to the sub-mortgage. First it contended that the sub-mortgage had never been registered under the Registration Act and that, therefore, "the rights under the said equitable mortgage"-meaning the principal mortgage-"did not pass to the plaintiff and, secondly, the plaintiff has no right or locus standi to sue on the basis of the equitable mortgage." The second point taken by the Liquidator was that the sub-mortgage had never been registered with the Registrar of Joint Stock Companies under, S. 109, Companies Act, and accordingly that it was void as a security as against the Liquidator and the creditors of the Benares Bank. This last mentioned contention on the part of the liquidator involves certain further facts relating to the registration of the sub-mortgage with the Registrar of Joint Stock Companies, which are not, we think, in dispute, which it will be convenient here to set out.

8. The sub-mortgage was executed, as we have already said, on 24th April 1939. Particulars of the charge created by it were sent by the Benares Bank to the Registrar on 4th May 1939, but they were not sent on the prescribed form and were not accompanied by the prescribed fee. On 8th May another form was substituted by the Benares Bank, but this too, was rejected by the Registrar on the ground that the form was obsolete. On 11th May one of the Directors of the Benares Bank went and saw the Registrar at Lucknow and on that day lodged the

particulars with him on the correct form. The Registrar actually examined the original of the instrument of charge and, having stamped it, returned it to the Director of the Bank. That, it is to be observed, was well within the period of 21 days from the date of the execution of the charge. It seems that the prescribed fee had still not been paid and, on the 15th May, a sum of Rs. 10 was sent to the Registrar, but, after a delay of six weeks, the Registrar pointed out that this was not enough and that a further sum of Rs. 20 was necessary. This led to a wrangle between the Bank and the Registrar after which the whole matter went to sleep until 24th September 1941 when, as a result of renewed proceedings, the charge was actually registered by the Registrar. Finally, the Registrar issued a certificate of the registration of the sub-mortgage, the actual date of which is immaterial, under S. 114, Companies Act.

9. Those are the material facts. But before seeing how the matter was dealt with when it came before the learned Judge of Benares for hearing, there is one further relevant matter to be mentioned. In July 1941 during the pendency of the suit, a compromise was arrived at between the defendants inter se. This is set out at p. 14 of our paper book. It was a very simple arrangement. It will be remembered that Mr. Dalmia had become the purchaser of the property under a contract. What was agreed between the defendants was that this contract should be proceeded with notwithstanding the suit and that Mr. Dalmia should pay into Court in the suit a sum of Rs. 50,000 to answer the claim of the Behar Bank or the Benares Bank, as the case might be according to the result of the proceedings. It is an open question whether the Behar Bank as the plaintiffs might have objected to this course; but the fact is that they did not and they do not now object. It is very material, therefore, to observe that, as a result of this compromise, which was recorded and sanctioned by the Court, the dispute has now shifted from the rights of the plaintiffs as against the property comprised in the security to their rights as against the sum of Rs. 50,000 now lying in Court to the credit of the suit. In other words, all question of the realization of the mortgage securities over the actual properties has now disappeared, and the issue is now the very simple one as between the Behar Bank and the Liquidator of the Benares Bank whether the sum in Court should be first applied in satisfaction of the debt due to the Behar Bank or whether such sum should form part of the assets of the Liquidator against which the Behar Bank will have a right to prove merely as a creditor. It would appear almost that at that point the first eight defendants might have disappeared from the suit.

10. We are now in a position to see how this matter was dealt with by the learned Judge in the Court below. We regret to say that it left something to be desired, although we bear in mind that the matter was possibly an unusual one. After setting out seven issues, on which we have no comment to make, the learned Judge proceeded with a paragraph which has caused a good deal of difficulty. He said:

Though the plaintiff bank originally prayed for a mortgage decree under Order

31, R. 4 of the Civil P.C. but it subsequently made a prayer for a simple money decree in the event of a mortgage decree not being granted. During the course of arguments, the learned counsel of the plaintiff did not press for a mortgage decree and did not argue that he was entitled to one. On the other hand, he argued that the mortgage deed be regarded as a simple money bond for the purpose of his claim. The question of admissibility of the assignment in evidence, therefore, does not arise. The plaintiff was assigned only the debt and not the security by the assignment. Such an assignment does not require registration and can be admitted in evidence, Gopi Nath Vs. Mt. Bekali and Others, Gopinath v. Mt. Bekali at page 838). The transfer was legal. The issues are decided according to this finding in favour of the plaintiff,

11. It would certainly appear from this that at the trial the plaintiffs abandoned their claim under the security and relied entirely on their claim to have a decree on the debt. Again, it is not clear from the language the learned Judge has used whether what they were claiming was a simple money decree against the Benares Bank or against the original mortgagors. We point this out because a good deal of confusion has been introduced into this case by what appears to have been an abandonment by the plaintiffs of their claim as secured creditors of the Bank. However that may be, the learned Judge then went on to decide that the sub-mortgage had been duly registered with the Registrar of Joint Stock Companies, which, as we shall point out presently, was not quite the correct way of putting it; he then decided that the plaintiffs were not precluded from getting a simple money decree by virtue of S. 171 of the Indian Companies Act; and he concluded his judgment by another passage which has caused a good deal of difficulty. He said:

The Benares Bank was made only a pro forma defendant by the plaintiff. No relief was sought against it during arguments also. The official liquidator contested the suit on the ground that the Benares Bank was entitled to recover the money from the defendants of the first party as the assignment was invalid, but it was held above that the assignment was valid and the plaintiff had a right to Sue.

The defendants of the first party appear to have transferred the mortgaged property to Mr. Dalmia, who deposited Rs. 50,000 in Court to be given to the successful party. The plaintiff is entitled to recover the amount of his claim with costs and pending and future interest at Rs. 3 per cent, per annum out of this amount subject to delivery of the title deeds to Mr. Dalmia, but I shall make no order in this respect. The issue is decided according to the above findings.

ORDER.

The suit is decreed with costs and pending and future interest at Rs. 3 per cent, per annum against the defendants of the second party. The defendants of the second party who are pro forma defendants will bear their own costs.

12. When it came to the actual decree, it was drawn up, as we have so often had occasion to complain, in a manner which only served to produce fresh confusion.

There was a decree that "the plaintiff's claim.....be decreed against the defendants second party"-that is the Benares Bank; and that "the defendants second party do pay us. 47,112" with interest to the plaintiff. We are at a loss to understand what this really means and, indeed, it is impossible, apart from anything else, to find any support for the figure of Rs. 47,112. That is the condition with which we are faced in, this appeal.

13. In our judgment the matter is not quite so complicated as it seems; and we propose to try to clear the ground by taking the questions which have been canvassed point by point. There is no dispute but that the so called assignment of 24th April 1939 was executed by the Benares Bank in favour of the Behar Bank. And there is no dispute but that a sum of Rs, 41,559-11-9 was due from the Benares Bank to the Behar Bank at the date of the commencement of the suit. The first thing that is said on behalf of the Benares Bank, who are the only appellants in this case, is that, by virtue of the provisions of S. 17, Registration Act, the Behar Bank cannot rely on the security of the sub-mortgage at all because it was not registered. It is admitted that it never has been registered and the only question is what is the effect of that. We entirely agree with the view of the Liquidator that as a security over the land comprised in the deposited title deeds this objection is fatal to the sub-mortgage of 24th April 1939. Nor do we think that Dr. Kailash Nath Katju on behalf of the Behar Bank seriously contends otherwise. But what Dr. Katju does say is that, notwithstanding that the security may have failed as a security over the properties charged, it did not fail on account of non-registration as a charge over the debt due by the mortgagors to the Benares Bank. The debt due at the date of the said mortgage by the mortgagors to the Benares Bank was a debt due to the Bank in the course of its business and it is quite clear from the language of the sub-mortgage at page thirty-five of our paper book that what was assigned to the Behar Bank was the debt. The learned Judge was right when he said that the plaintiff was assigned the debt and we agree that it may be an open question whether there was any assignment of the security at all. The one thing that is certain in our view is that the instrument on 24th April 1939 constituted an assignment in favour of the Behar Bank of the debt, although it was to be held as security.

14. Dr. Katju relies on AIR 1931 245 (Privy Council) in which the Privy Council decided an almost exactly similar question. In that case a Bank to which debts were owing which debts were secured by the deposit of title deeds, had created a floating charge over all its assets. The floating charge was not registered under the Indian Registration Act, 1908, and it was held-indeed, it was not contended otherwise before the Privy Council-that the floating charge failed as a security over the properties comprised in the several deposits of title deeds by the customers. The question remained, however, whether the floating charge, notwithstanding its non-registration, remained effective as against the debts, qua unsecured debts, of the several customers of the Bank. Their Lordships held that it did and they took the view that those debts were charged independently of the properties to which the title deeds related. They held moreover that it was too

narrow a view of the construction of S. 130, Transfer of Property Act, 1882, to suppose that the debt was not an actionable claim which could not be transferred independently of the security. They said that there appeared to be no difficulty in a transfer of a debt without a security, which the original debtor could always redeem and, in the result, they held that, while the Imperial Bank, in whose favour the floating charge existed, had no right or interest in the immovable property of the Bengal National Bank, including the immovable property over which it held security, the Imperial Bank had a charge over the debts due to the Bengal National Bank, whether secured or not, and were entitled to the benefit of all sums received in reduction of those debts, whether from the realization of securities or otherwise.

15. We think, therefore, that, if one thing is more clear than another in this case, it is that the security of the plaintiffs, the Behar Bank, over the principal debt was not affected by the non-registration, and consequent failure of the charge over the security constituted by the immovable property. As we have already pointed out, in the events which occurred, no question arose at the hearing as to how those debts should be realised in favour of the Behar Bank, since, as a result of the compromise, they had then come to be represented by the single sum of fifty thousand rupees standing in Court to the credit of the suit. The whole matter had thereby become very much simplified. We accordingly hold that the result of the non-registration of the sub-mortgage of 24-4-1939 was not to destroy the security of the Behar Bank over the debt due to the Benares Bank and the proceeds of such debt when realized, as it since has been.

16. That disposes of the first point. We then meet the second point which is the point relating to the alleged failure of the Benares Bank to register the security with the Registrar of Joint Stock Companies under S. 109, Companies Act. It has to be noticed that if this objection to the security is a valid one, it is fatal to the whole claim of the plaintiffs, so far as its security is concerned, since the section avoids the security altogether as against the Liquidator and the creditors; But, in our judgment, on a proper consideration of the facts and in the events which have happened, we do not think that the effect of S. 109 was to destroy the security. It has to be observed, as was pointed out by Lord Justice Stratton in (1924) 1 K.B. 431 : 93 L.J.K.B. 241 : 130 L.T. 465, *National Provincial Union Bank of England v. Charnley* at p. 447, that what avoids the charge is not lack of registration but the neglect to send in the particulars. It is important to notice that distinction. On the facts of the present case, which facts are not in dispute, particulars of the charge were sent in to the Registrar. They were sent in on 11-5-1939, well within the twenty-one day period. It is true that there was an outstanding dispute as to the fee; but, nevertheless, the particulars were sent to the Registrar. It is true also that actual registration was not effected for over two years, but as we have pointed out, the validity of the charge is not made to depend by S. 109 on the date on which the Registrar chooses to make the necessary entry in the register. Unfortunately we cannot pretend to think, so far as the facts are available on the material before us, that the proceedings of the

Registrar have been satisfactory in this case. We think on the contrary that it would be in the interests of the public if some explanation were called for from him as to how it came about that registration of this charge was neglected for a period of two and a half years. The provisions of S. 109 are designed as a protection to the public and we feel that, unless there is some explanation which is unknown to us, some explanation is due from the Registrar as to the apparent neglect by him of his duties in this case under this section of the Indian Companies Act. However that may be, we are inclined to agree with Dr. Katju when he says that the Benares Bank had complied with the condition of the section when it finally sent in the particulars of the charge on nth May. There is the further subsidiary point made by Dr. Katju that the Registrar did actually, though later, issue a certificate under S. 114. While it may be a matter of grave doubt whether such a certificate could ever render valid something that had already been declared void by S. 109, we think, at least, that in face of the certificate it is no longer open to the Benares Bank to challenge any of the mechanical steps of registration, including the delivery of particulars and the payment of the prescribed fee (1908) 1 Ch. D. 152 : 77 L.J. Ch. 43 : 97 L.T. 824, In re Yolland at p. 159 and (1924) 1 K.B. 431 : 93 L.J.K.B. 241 : 130 L.T. 465, National Provincial Union Bank of England v. Charnley.

17. As a result of these findings, we are compelled to hold that the security of the sub-mortgage dated 24-4-1939 in favour of the Behar Bank, so far as it was a security over the debt was at. The date of the winding up order a valid and subsisting security. We think that subject to one or two subsidiary points, this disposes of the appeal.

18. We still have to deal with that curious passage in the judgment of the learned Judge on which we have already commented from which it would appear that the plaintiffs at the trial abandoned their case and were content to rely on obtaining a simple money decree against either the Benares Bank or the mortgagors. We are told by Dr. Katju that this was never the intention of the plaintiffs and that the whole matter was misunderstood by the learned Judge. It may possibly be the result of the intermediate payment into Court as a result of the compromise, from which the learned Judge may have been led to think that the question had resolved itself merely into one of the payment of money. We are inclined to think that this probably is the true explanation. However that may be, it is, we think obvious from the concluding passage of the judgment that the plaintiffs had not abandoned their interest as sub-mortgagees, The learned Judge himself says, in the passage which we have already quoted, that:

. . . . The plaintiff is entitled to recover the amount of his claim with costs and pending and future interest at Rs. 3 percent, per annum out of this amount subject to delivery of the title deeds to Mr. Dalmia.....

19. It is clear from this that they were still relying on their security. Otherwise the words "out of this amount" would be meaningless. What really has happened is that the learned Judge thought that the mere fact that the whole dispute had

then become centred on the sum in Court, destroyed the character of the suit as a mortgage suit. This, of course, was not so, although it is true that thereby he was probably absolved from making a formal mortgage decree and the matter had been simplified for him by enabling him merely to make a decree as to how the sum standing in Court should be distributed. As a result of this view of the matter we do not think we could justly allow this appeal to succeed on the ground that the plaintiffs had abandoned their claim under the security so far as the debt was concerned.

20. We feel it right to say, although it will not now be necessary for us to discuss it at any length, that, had we taken the view that the Behar Bank had abandoned its security over the debt, we should have felt a considerable difficulty in upholding a simple money decree either as against the mortgagors and still more so against the Benares Bank. The question whether the plaintiffs had ever been given leave under S. 171, Companies Act to prosecute a simple money claim against the Benares Bank would have constituted a formidable difficulty. In the view we have taken, however, these questions do not arise.

21. In the result, therefore, we think that this suit succeeds to the extent at any rate that the decree must be varied. For the reasons we have expressed above we think that the decree of the learned Judge should be set aside and the following decree should be passed:

1. There will be a declaration that the plaintiffs, the Bank of Behar Limited, are entitled to a valid and subsisting charge by virtue of the instrument of 24-4-1939 over the debt of 47,112-0-0 mentioned in paragraph 5 of the plaint and over the proceeds thereof in the hands of the Benares Bank Limited (in Liquidation), which said debt and proceeds are now represented by the sum of fifty thousand rupees standing in Court to the credit of this suit.

2. A decree for the payment out of Court to the plaintiffs out of the said sum of fifty thousand rupees of the sum of Rs. 41,559-11-9 together with interest thereon at the rate of three per cent, per annum from 5-2-1940 up to the date of payment and together also with the costs hereinafter mentioned.

3. An order that the parties do bear their own costs of the suit in the Court below and that the respondents, the Bank of Behar Limited, do pay to the appellants, the Benares Bank Limited {in Liquidation}, such proportion of the cost of this appeal as the sum of Rs. 5,553 bears to Rs. 47,112.

22. We feel that there should be no costs in the Court below because the plaintiffs by their pleadings made a considerable contribution to the confusion which occurred which gave rise to the necessity for this appeal. On the other hand in this Court the appellants have succeeded to a limited extent. We have only to add that we view with considerable alarm a state of affairs in which such a mortgage as the present could have remained unregistered in the circumstances of this case for a period of two and a half years without any proceedings having been taken under S. 122, Companies Act.