(1991) 05 CAL CK 0042

In the Calcutta High Court

Case No : F.A. 16 of 1981

Bhabani Prosad Ghosh and others — APPELLANT

Vs

Central Bank of India — RESPONDENT

Date of Decision : 17-05-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(1), Order 34 Rule 14(1), 10

Citation : AIR 1992 Cal 76 : (1993) 76 CompCas 349

Hon'ble Judges : Siba Prasad Rajkhowa, J;Shamsuddin Ahmed, J

Bench : Division Bench

Advocate : Mr. Partha Sarathi Bose, for the Appellant; Mr. Abhijit Banerjee and Mr. Manisa Bhowmick, for the Respondent

Judgement

S.P. Rajkhowa, J.

1.This appeal arises out of judgment and decree dated 20th February, 1980 passed by the learned subordinate Judge, 7th Court, Alipore in Title Suit No. 18 of 1970.

2. The plaintiff bank filed the Title Suit No. 18 of 1970 claiming (a) a decree for Rs. 4,43,734.95 p. (b) a declaration that premises No. 12/2B, Circular Garden Reach Road, Calcutta and 1A, Harisabha Street, Calcutta are charged with a first and paramount charge in favour of the plaintiff for repayment of plaintiffs dues: (c) a decree for sale of the immovable properties mentioned in prayer (b) above with liberty to the plaintiff to appropriate the sale proceedings in protanto satisfaction of its claim in the suit and for interest and other reliefs.

3. Plaintiffs case in short is that defendants 1, 2 and 3 were Directors of the Bango Steel Furniture Co. Private Limited carrying on business at No. 57, Diamond Harbour Road, Calcutta, for short the Company. The Company was a customer of the plaintiff Bank and had a current deposit account and the Company had overdraft facilities and other arrangements for financial

accommodation with the Bank. The Company had a Block Account, a Supply Bills Account No. 2 and Goods Account No. 3 with the Bank. The advances to the Company in the accounts aforesaid were made against the security inter alia of hypothecation or all raw materials, stock-in-trade of finished goods and work progress and also all sorts of machineries, tools, furnitures, fixtures, motor car etc. The respective limits of the said Block Account, Supply Bills Account No. 2 and Goods Account No. 3 were Rs. 2,45,000/-and Rs. 2,00,000/- and Rs. 3,60,000/- in or about June 16, 1966. In respect of the accounts Nos. 2 and 3 all the 3 defendants and the Company duly executed from time to time diverse sets of documents, each set consisting of the following -- (a) letter of hypothecation, hypothecating all raw material, stock-in-trade of finished goods and works in progress at No. 57, Diamond Harbour Road, Calcutta : (b) letter of continuity. In addition, all the 3 defendants and the company executed from time to time demand promissory notes for the cash credit/overdraft limit then existing in respect of account Nos. 2 and 3 and also executed letters of co-obligation. Pursuant to and in terms of the agreement between the plaintiff and the defendants and the Company, account Nos. 2 and 3 were duly operated upon by the Company and the plaintiff duly maintained mutual, open, current and continuous accounts of the dealings and transactions according to the English Calendar year. The Block Account was declared by hypothecation of all tangible movable properties such as products, stocks-in-trade and goods of the defendants'' Company also comprising of all sorts of machinery, tools, furnitures etc. In consideration of the Bank making advances and/or giving facilities to the Company, defendants 1 and 2. On or about June 17, 1966 deposited with the Bank the following documents of title:-- (1) a security deed dated June 19, 1931 between Ratneswar Ghosh since deceased (the father of the Improvement Trust); (2) a deed of partition dated May 3, 1942 between Ratneswar Ghosh and Sm. Anupama Ghosh, Sukumar Ghosh and Sudhir Ghosh (the last two being minors represented by their mother Sm. Anupama Ghosh) whereunder the southern portion of plot No. 25, Scheme-XVI was given to Ratneswar Ghosh and northern portion was given to the other parties; (3) a deed of gift dated March 5, 1965 whereby the Donor Ratneswar Ghosh made a gift of the premises No. 12/2B, Circular Garden Reach Road, Calcutta and 1A, Harisabha Street, Calcutta to his sons defendants Nos. 1 and 2 in consideration of natural love and affection; (4)a deed of reconveyance dated April 19, 1966 between Gobordhan Das and defendant No. 1; and (5) Municipal Rate Bills evidencing payment of Municipal Bills. Thereafter defendants 1 and 2 deposited with the plaintiff and/or its agents duly authorised in that behalf deed of re-conveyance from one C. C. Saha and another deed of re-conveyance from one A. C. Koondu. On/or about December31, 1968 there became due and owing by the Company to the Bank a total sum of Rs. 3,99,005.95 p. inclusive of interest up to December 31, 1968. This amount was arrived at after giving credit to the Company for all sums paid by the Company and/or on its behalf and after appropriating the items of credit to the items of debit in order of time in the said account Nos. 2 and 3. But the Company failed and neglected to pay the dues of the Bank and so the Bank in/ or about the year 1969 filed a suit being Suit No. 1469 --the Central Bank of India Ltd. v. Bango Steel Furniture Co. Private Limited -- in the Calcutta High Court in its original side. Upon an application made in the said suit, the High Court made an interim order whereby the Company was restrained by an injunction from selling any machinery except upon notice to the Bank. By the said interim order the Official Receiver of the High Court, Calcutta was also appointed Receiver over all the hypothecated movable properties of the Company including book debts and Bills. The said immovable properties were held by the Bank as security which was in addition to the securities furnished by the defendants 1 and 2 by the delivery of documents of title as mentioned above. The Receiver is still in possession of the hypothecated movable properties. On 24th May 1974 a decree was passed by the High Court in its original side in the aforesaid suit No. 1469 of 1969. The said decree is still unsatisfied. No payment was made by the Company to the plaintiff after filing of the said suit in the High Court and also after passing of the decree in the* aforesaid suit. Nothing has been received by the Receiver out of the hypothecated movable properties. The total sum due by the Company to the plaintiff stood at Rs. 4,43,734.95 inclusive of interest up to 24th March 1970. Hence the plaintiff prayed for a decree for the aforesaid sum against the defendants including other reliefs already set forth at the outset.

4. During the pendency of the suit defendant No. 3 having died his heirs and legal representatives were substituted.

5. Defendants contested the suit by filing written statement contending inter alia that the plaintiffs claims, if any, lie on Bango Steel Furniture Pvt. Limited, against whom, for similar causes and amounts the plaintiff filed Suit No. 1469 of 1969 at the High Court at Calcutta, claiming securities other than the ancestral home of the defendants : that none of the defendants had ever mortgaged, pledged or hypothecated any personal assets, movable or immovable, nor has the plaintiff advanced any evidence in support of such allegation/claim on the ancestral home of defendants 1 and 2; that they did not deposit the title deed by way of equitable mortgage on 17th June 1966 but that the deeds were deposited in June 1966 and the deeds were given in connection with loan for raising building construction; that the defendants are not mortgagors nor have they singly or jointly mortgaged any personal property or movable or immovable assets. They also contested plaintiffs assertion that the necessity for equitable mortgage by deposit of title deeds was not there when the agreement for overdraft facility and other financial accommodation was entered into between the plaintiff Bank on the one side and the Company represented by its Directors on the other side, but the alleged equitable mortgage became necessary to secure alleged ultimate balance.

6. The parties went to the trial to answer the following issues.

Issues

1) Is the suit maintainable in its present form and in law?

2) Has the plaintiff any cause of action for the present suit?

3) Is the suit bad for non-joinder and mis-joinder of parties?

4) Is the plaintiff entitled to the decree prayed for?

5) To what other reliefs, if any, is the plaintiff entitled?

6) Is the suit barred under O.2, R. 2, C.P.C.?

7) Was there any equitable mortgage as alleged?

8) Are the defendants liable to the plaintiff as guarantor and co-obligants?

The learned Judge decided all the issues in favour of the plaintiffs and held that the defendants as guarantors were liable to pay the sum claimed by the plaintiff and decreed the suit in full in preliminary form on contest with interest at the rate of Rs. 6% from 25th March 1970 till realisation against defendants 1 and 2 and ex parte against the rest. The securities were charged for payment of the decretal dues. No cost was awarded.

7. The points for consideration before us are (1) whether the suit is barred under Order 2, Rule 2, C.P.C. and (2) whether there was any equitable mortgage by deposit of title deeds.

8. At the outset we put the law straight by quoting the relevant rules and orders of the C.P.C. Order-II, Rule 2(1) says, every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court; (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished; (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

9. Order XXXIV, Rule 14(1) says, where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O. II, R. 2.

10. Mr. Bose, learned counsel for the appellant has submitted that the cause of action and the parties to the litigation being same in both the suits, one filed in the High Court in its original side (Suit No. 1469 of 1969) and the other filed before the court of sub-Judge, at Alipore, Calcutta (Title Suit No. 18 of 1970), the latter suit is not maintainable in view of the bar enjoined in O. II, R. 2, C.P.C. The learned counsel then referred us to the prayer made by the plaintiff in High Court Suit No. 1469 of 1969 and the decree passed by the High Court therein. From the plaint (Ext. 44) of the High Court suit we find that the plaintiff inter alia

prayed for a declaration that the whole of the stock of goods, tangible, movable assets, stock of iron and steel materials, machines and other goods mentioned in Annexures ''M'', ''N'' and ''O'' and bills mentioned in Annexure ''P'' thereto remained pledged and/or charged to the plaintiff by way of first and paramount charge as security for the payments by the defendant Company of the plaintiffs claims and a decree for the sale of the said stock of goods etc. by private treaty or by public auction, and to appoint a Receiver. The suit was decreed accordingly as seen from the decree (Ext. 42). The official Receiver appointed in that suit was directed to sell forthwith the stock of goods, produce merchandise etc. with a view to satisfy the claim of the plaintiff. But we find that the prayers of the plaintiff in the suit filed at the Alipore Court are quite distinct from the prayers in the suit filed before the High Court. In the High Court suit the subject matter of the charge prayed for was movable goods and assets whereas in the suit at Alipore Court the prayer was for a declaration that suit premises No. 12/2B, Circular Garden Reach Road, Calcutta and 1A, Harisabha Street, Calcutta be charged with a first and paramount charge in favour of the plaintiff for repayment of the plaintiffs dues and for sale of the aforesaid immovable properties. Thus we find that although both the suits were filed for satisfaction of the outstanding dues by the defendants and their Company yet the High Court suit was in respect of movable goods and the Alipore Court suit is in respect of immovable properties. As such in our considered opinion both the suits are distinct and separate from each other. This is also to be noted that the plaintiff specifically prayed in their plaint filed in the High Court suit for leave under O. 2, R. 2, C.P.C. to file separate suit for enforcement of the equitable mortgage.

11. This brings us to the question whether any equitable mortgage by deposit of title deeds has been created in favour of the plaintiff by the defendants. It is not clear that the plaintiff has brought the present suit for recovery of the decretal dues of the High Court suit that remained unsatisfied, on the grounds of equitable mortgage in respect of the immovable properties, against the Directors of the Company in their personal capacity. It is alleged by the plaintiff that the defendants 1 and 2 on or about 17th June 1976 deposited with the plaintiff Bank and/or its agent duly authorised in that behalf at 33, N. S. Road, Calcutta, the documents of title in respect of the premises No. 12/2B, Circular Garden Reach Road, Calcutta and 1 A, Harisabha Street, Calcutta with intention to create security for repayment of the ultimate balance dues in the account. This is denied by the defendants and the learned counsel for the appellant forcefully contends that there was no such creation of equitable mortgage by deposit of title deeds. From the evidence of PW 1, Sri S. B. Pardiwalla who was serving in the plaintiff Bank at N. S. Road, Calcutta during the period from 1960 to 1971 it is seen that defendants Nos. 1 and 2 who are Directors of Bango Steel Furniture Pvt. Ltd. came to his office at 33, N. S. Road, Calcutta with the title deeds and the mortgage in respect of the aforesaid immovable properties was effected in June 1966. As par banking practice, plaintiff maintained a register in which entries were made in respect of the borrowers who called at the Bank to deposit

title deeds to create equitable mortgage and this register was maintained in usual course of business. Ext. 1(a) is said to be that entry in respect of the deposit of title deeds by the defendants. This entry was written by PW3, P. Moitra. During hearing we asked for the original register and it was produced before us. We are satisfied that this register was maintained in usual course of business. There cannot be any doubt as to the genuineness of the register. The Bankers'' Books Evidence Act has defined ''Bank'' as any company or corporation carrying on the business of Banking and ''Bankers'' Books'' include ledgers, day-books, cash "books, account books and all other books used in the ordinary business of a bank As such Ext. 1(a) is admissible in evidence and we have found it to be reliable. PW 1 has made it clear that initially the documents of title were handed over by the parties for investigation for supplying loan but thereafter the documents were taken back by Dhananjay Ghosh (defendant-2) and to that effect a receipt dated 4-5-66 was obtained which was produced in Court and marked Ext. 3. Thereafter the deeds were again deposited to create an equitable mortgage on 17-6-66. Therefore, the learned counsel for the appellant has hotly contested the statements of PW 1. He has referred to a letter Ext. A(1) dt. 9th June 1966. It is written by defendants 1 and 2 to the plaintiff Bank. From this letter it would appear that some documents of title were forwarded to the Bank as enclosures to this letter. Learned counsel for the appellant contends that if the title deeds were submitted to the plaintiff Bank on 9-6-66 then the question of depositing the same again on 17-6-66 does not arise at all. Learned counsel for the respondent has countered this submission of the learned counsel for the appellant by submitting that there was no question of returning the title deeds before 17-6-66 inasmuch as these documents were not sent or deposited with the plaintiff Bank on or before 9-6-66, if Ext. A(1) were to be relied on. On scrutiny of Ext. A(1) it is seen that the alleged documents were sought to be deposited with the plaintiff Bank as security for obtaining construction loan and the defendants requested the plaintiff to acknowledge receipt of that letter and the enclosures. But defendants have not produced any receipt showing acknowledgement by the Bank on account of receipt of this letter along with enclosures. There is nothing to show that in spite of demands to that effect, plaintiff was not acknowledging the same. On the other hand, PW 1 stated before the Court on the date of his deposition that for the first time he saw the letter dt. 9-6-66. It appears that he is not conversant with the contents of this letter. The learned counsel for the respondent has also drawn our attention to Ext. 3 which is a receipt dated 4th May 1966 issued by the defendants. This receipt shows that the defendants got back the original gift deed from the plaintiff Bank. Learned counsel submits that had there been any deposit of title deeds on 9-6-66, the plaintiff Bank would have surely issued a receipt to the defendants. Something remains unexplained about this letter and both sides have not set the records straight about this. Under the circumstances, it is difficult to come to any definite conclusion about this letter. However, PW 1 has stated that subsequent to the creation of equitable mortgage on 17-6-66, defendant 1 approached the plaintiff for return of the gift deed for mutation. They instructed their solicitor with whom this deed was kept to give this deed of gift to the defendant''s solicitor on accountable receipts. The plaintiffs solicitor complied with the instructions. For sometime this deed of gift was not returned to the plaintiff on the ground that this was given for construction loan. So the plaintiff instructed their solicitor to insist for the accountable receipt and ultimately the deed of gift was returned to the plaintiff by letter dt. 9-2-70 Ext. A(6) is a letter dt. 28th November 1966 written by the defendants to the plaintiff requesting them to return the original deed of gift in respect of Kidderpore properties for the purpose of effecting mutation. The plaintiff was assured that the same would be returned within a fortnight. This request of the defendants was complied with and the defendants'' solicitors B. K. Sen and Company acknowledged receipt of the original deed of gift received from plaintiffs solicitor B. N. Basu and Co. vide letter dt. 7-12-66, Ext. A(I5). The evidence on record clearly shows that the defendants had created an equitable mortgage by deposit of title deeds in respect of the suit properties and that the intention of depositing the title deeds was to create such an equitable mortgage. The learned counsel for the appellant has referred to Saradindu Mukherjee Vs. Amiya Kumar Basu, Saradindu Mukherjee v. Amiya Kr. Basu, wherein it was held that mere deposit of title deeds with the creditor by the debtor would not constitute equitable mortgage unless intention of creating mortgage is proved by creditor. It is true that there must be the intention to create such an equitable mortgage by depositing title deeds and we have already observed that in the instant suit the intention was to create such an equitable mortgage.

12. The learned counsel for the appellant has sought to raise the question of res judicata and has referred to Order No. 58 dt. 6-4-73 passed by the learned trial Judge in dealing with an application under S. 10, C.P.C. filed by the defendant/ appellant. While dealing with that application the learned trial Judge had observed that "the finding given by the Calcutta High Court in the earlier suit would certainly operate as res judicata" and allowed the application and stayed the disposal of the suit till the disposal of the High Court Suit No. 1469 of 1969. The learned counsel for the appellant has submitted that the findings would constitute res judicata. The learned counsel for the respondent has vehemently opposed this submission of the learned counsel for the appellant on the ground that the question of res judicata has never been pleaded and this cannot be raised now. We agree with the learned counsel for the respondent that this question cannot be raised now.

13. We conclude by observing that the appellants as guarantors are liable to pay the dues of the company Bango Steel Furniture Co. Pvt. Ltd. of which they were the Directors.

14. The result is that the appeal fails and the same is dismissed. The judgment and decree appealed against are hereby affirmed. If any money was received by the Official Receiver and was paid to the plaintiff, it shall be adjusted to the decretal amount. Under the facts and circumstances of the case no cost is

allowed.

S. Ahmed, J.

15.I agree.

16. Appeal dismissed.

