

(1993) 07 KAR CK 0008

In the Karnataka High Court

Case No : Company Application No. 139 of 1993 in Company Petns. No"s. 43 to 94 of 1992

Company Bank, Bangalore

APPELLANT

Vs

Lalitha H. Holla and Others

RESPONDENT

Date of Decision : 08-07-1993

Acts Referred:

Transfer of Property Act, 1882 — Section 96

Citation : AIR 1994 Kar 133 : (1993) ILR (Kar) 3260 : (1993) 3 KarLJ 372

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : Udaya Holla, for the Appellant; A.G. Holla for Hari Krishna Holla, G.Vedavyasachar, M/s. King and Patridge and K.G. Raghavan, for the Respondent

Judgement

1. Respondents 1 to 52 herein filed a petition for winding up against respondent No. 53 (hereinafter referred to as the Company") in Company Petition Nos. 43 to 94 of 1992 (later clubbed into Co. P. No. 43 of 1992). The said petitions were admitted on 28-8-1992. The Company is the owner of Premises No. 48, Church Street, Bangalore. An order has been made by this Court on 22-9-1992 in C. A. No. 988/1992 directing the tenants of the Company to deposit the rents from September 1992 and onwards into Court, to preserve the assets of the Company and proper management thereof, so that the interests of the large body of unsecured creditors can also be protected.

2. The applicant Bank (hereinafter also referred to as "the Bank") claims to be a secured creditor of the Company. According to the applicant a sum of Rs. 98 lakhs was advanced by the Bank to the Company and in that behalf the company had executed an on demand promissory note, an agreement for term loan and other documents on 30-9-1986, copies of which are produced as Exs. B to I to the application; and premises bearing No. 48, Church St. Bangalore, belonging to the Company was equitably mortgaged in favour of the applicant Bank confirmed by Memorandum dated 30-9-1986 (Annexure-G); and a Power of Attorney was

executed by the Company on 30-9-1986 irrevocably authorising the applicant to demand and receive from State Bank of India or any other person in possession of the portion of Premises No. 48, Church Street, Bangalore, measuring 45460 sq. ft. described in the Schedule to the said power of Attorney; and in view of the said documents, the applicant claims that there is an equitable assignment of the rents in favour of the Bank and therefore the Bank is entitled to receive the monthly rent of Rs. 1,36,380/- for the said portion from State Bank of India and as there is an equitable assignment of the said rent in favour of the Bank, only the Bank is entitled to receive the rent for the said portion and not the Company; and the order of 22-9-1992 directing all the tenants to pay the rents into court requires to be modified and the Bank should be permitted to receive rents in regard to the portion in the occupation of State Bank of India; and that on the date of filing of the application, a sum of Rs. 1,11,77,879.45 was due to the Bank and now as on date about Rs. 125 lakhs is due to the Bank.

3. The respondents have opposed the said application. Respondents 1 to 52 in their objections have contended that the Power of Attorney executed in favour of the Bank does not amount to an equitable assignment of the rent and if the Power of Attorney is to be held as having effected equitably assigning the rent, the power of Attorney itself is void for want of registration.

4. On these rival contentions, the question that arises for consideration is whether the execution of the Power of Attorney dated 30-9-1986 or the other documents by the Company in favour of the Bank, created an equitable assignment of the rents payable in regard to a portion of Premises No. 48, Church Street, Bangalore in favour of the Bank to be appropriated by the Bank, towards the amounts due by the Company and whether it entitled the Bank to receive the same, to the exclusion of the Company.

5. An act which did not amount to a regular assignment, or which was not recognised as an assignment in common law, but nevertheless giving assignee, a right enforceable in equity was termed as equitable assignment. In an equitable assignment of a debt, even though there may be no regular assignment, the debtor is notified or made to understand that the debt has been made over by the creditor to some third person. Thus in *Rodick v. Gandell* (1852) 1 G&G 763, extracted with approval in *Palmer v. Carey* 1926 AC 703 the law as to equitable assignment is slated thus :

"The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

Thus the several documents executed by the Company in favour of the Bank will

have to be examined to find out whether there is any basis for the Bank's contention that there is an equitable assignment of the rents payable by State Bank of India in its favour and that the Bank is entitled to receive the rents, to the exclusion of others, till its amounts are recovered.

6. It is admitted by the Applicant that property No. 48, Church Street, Bangalore is secured in favour of the Bank by way of equitable mortgage (mortgage by deposit of title deeds) and not by way of usufructuary mortgage or mortgage with possession. The possession of the mortgaged property is not delivered to the Bank in lieu of interest or otherwise, by way of an usufructuary mortgage or mortgage with possession. By virtue of such mortgage, the Bank is only entitled to such rights which a simple mortgagee will have in regard to the mortgaged property vide Sec. 96 of Transfer of Property Act). That is the mortgagee is not entitled to the possession of the mortgaged property. In the event of the mortgagor failing to pay the amounts due according to the contract, the mortgagee has the right to cause the mortgaged property to be sold and apply the proceeds towards discharge of the mortgage money. Thus the property itself is the security and the mortgagee does not have any right over the rents or income from the mortgaged property. The letter of 30-9-1986 from the Company to the Bank (Exhibit G) confirming the deposit of title deeds is proof of the equitable mortgage and nothing more. The equitable mortgage, as such, does not help the Bank to claim a charge or equitable assignment in regard to the rents.

7. The other loans documents executed by the Company in favour of the Bank (Exhibits B to F, H, J and K) are the loan application. On demand Promissory Note, Agreement for Term Loan, Letters of guarantee and acknowledgments of debt. None of these documents refer to the rents receivable in regard to the portion in the occupation of State Bank of India, let alone create an assignment or charge or security over the rents in question. The last document to be considered is the Power of Attorney dated 30-9-1986, executed by the Company in favour of the Bank. It is necessary to extract the entire power of Attorney to understand its scope and purport :

"By virtue of the lease deed dated 13th day of June One Thousand Nine Hundred Eighty Three entered between Karnataka Finance Corporation and State Bank of India, a part of the building erected thereon with an area of 55460 sq. ft belonging to M/s. Karnataka Finance Corporation (Regd.) at No. 48, Church St. Bangalore-1 which is more fully described in the schedule below, was leased to the State Bank of India constituted under the State Bank of India Act, 1955, for carrying on their business for a term of 5 years from 15th day of July One Thousand Nine Hundred Eighty Three on a monthly rent of Rs. 1,36,380/- and the tenancy month being 5th of one month to the 4th of succeeding month commencing from 5th day of August One Thousand Nine Hundred Eighty Three.

Whereas M/s. Karnataka Finance Corporation was dissolved by their deed of dissolution dated 14-2-86 and their business has been taken over by us i.e.,

Karnataka Leasing and Commercial Corporation Ltd. and have become lessors in respect of the property referred above and more fully described in the schedule below and we have been collecting the said rent from our tenants, viz., State Bank of India as per the lease Deed dated 13th Day of June One Thousand Nine Hundred Eighty Three.

Now (by) this Irrevocable Power of Attorney, we do hereby nominate, constitute and appoint Corporation Bank, Malleswaram Branch to do the following acts on our behalf, viz.,

(i) To ask or demand and receive from State Bank of India or any other persons to be in possession of the building more fully described in the schedule below, the respective rent of Rs. 1,36,380/- only from time to time;

(ii) To collect, receive and realise all such rents or arrears of rent due and payable by State Bank of India thereafter fully or partially lump sum or by instalments or otherwise and to give and execute all necessary receipts and discharge for the same with Power to accept security and grant time for payment;

(iii) To institute suits or other legal proceedings authorised by law for recovery of all or any of such arrears of rent payable by the lessee and to sign any complaint, petition or other pleadings, vakalatnama, warrant of attorney, to execute any decree or order;

(iv) To compromise or withdraw any such suit or plaint or other proceedings, to refer to arbitration any dispute;

(v) Generally to do all such acts, deeds and things as the bank shall think fit and appropriate as fully and effectually as the company could do by itself notwithstanding any express power of authority in that behalf as herein provided and

(vi) We, the Karnataka Leasing and Commercial Corporation Ltd., do hereby agree to ratify and confirm all and whatever our said attorney shall do, execute or perform or cause to be done or perform in exercise of the power of authority hereunder conferred upon or otherwise expressed or intended."

8. Mr. Udaya Holla, learned counsel for the Bank contended that the power of attorney and all other documents executed by the company have to be considered together to find out whether there is an equitable assignment. It is seen that the only document that refers to the rent and is therefore relevant to find out whether there is an equitable assignment of rents or not, is the Power of Attorney. In support of his contention that the said Power of Attorney created an equitable assignment in favour of the Bank in regard to rents, he relied on two decisions of the Supreme Court in *Bharat Nidhi Ltd. Vs. Takhatmal* (Decd. by his Legal Representatives) and *Another, and Seth Loon Karan Sethiya Vs. Ivan E. John and Others*,

9. In *Bharat Nidhi Ltd. Vs. Takhatmal* (Decd. by his Legal Representatives) and

Another, the question that arose for consideration was whether the Bharat Bank Ltd. which was holding a power of Attorney to collect bills due to one M. R. Malhotra and appropriate the amounts towards its dues was entitled to an equitable assignment of the funds by way of a security. In that case, the power of attorney contains the following recital (at p. 314) :

"Whereas we are working as contractors to the Government in its various departments and have entered into certain contracts and will in future enter into other contracts and whereas an agreement dated 13th July 1946 has been made between us and the Bharat Bank Ltd., in pursuance of which the attorney have agreed to finance contracts and to advance us sums of money, against supply bills for payment to be received by us under the contracts issued by the Government in various departments on conditions mentioned therein; and whereas we, for the purpose of carrying out the terms of the said agreement more effectively and to secure the interest of the attorneys are desirous of appointing the Bharat Bank Ltd., as our lawful attorneys in all matters relating to the receipt of all payments under the contracts made or to be made hereafter."

and the Power of Attorney empowered Bharat Bank Ltd.:

"to present and submit supply bills regarding our contracts to the proper officers and/or authority of the Government Departments concerned; to obtain cheques for sums payable to us under the contracts directly in their own name or in our names in payment of such bills or other amounts and to cash and to receive the amount thereof and appropriate such receipts towards and in repayment of the advances made or to be made hereafter and all other monies due from us to the attorney in any account whatsoever."

The Supreme Court held that the question whether a document amounts to an equitable assignment or not, was primarily one of construction. The court after referring to the terms of the power of attorney observed as follows (at p. 315) :

"In construing the power of attorney it is necessary to bear in mind that the relationship of the two parties, Malhotra and the Bank was that of borrower and lender and that the document was brought into existence in connection with a proposed transaction of financing of Malhotra's contracts. The loans were to be advanced by the Bank against Malhotra's bills for the supplies under the contracts. The obvious intention of the parties was to provide protection for the lender and to secure repayment of the loans. With that object in view, the lender was authorised to receive payment of the bills and to appropriate the receipts towards repayment of the loans. As the lender had an interest in the funds the power of attorney was expressed to be irrevocable. On a proper construction of the document the conclusion is irresistible that there was an agreement between the lender and the borrower that the debt owing to the lender would be paid out of a specific fund of the borrower in the hands of the Government authorities. The power of attorney coupled with the endorsement on the bill dated July 19, 1948 was a clear engagement by Malhotra to pay the appellant Bank out of the

monies receivable under the bill and amounted to an equitable assignment of the fund by way of security."

10. It would be seen from the portions extracted above, that the Power of Attorney which was considered by the Supreme Court, specifically recited the advance of loan by the Bank to the Company and the contract between the Bank and company under which the Bank was authorised to receive the amount due in regard to supply of bills and appropriated the same towards the amounts due to the Bank. Having regard to the express terms of the Power of Attorney which authorised the Bank to receive the Bill amounts and appropriate the amounts towards repayment of advances made by the bank, the Supreme Court on a proper construction thereof held that equitable assignment was created in favour of the Bank.

11. In Seth Loon Karan Sethiya Vs. Ivan E. John and Others, the Supreme Court was concerned with a Power of Attorney under which State Bank of Jaipur was authorised to execute a decree obtained by one Seth Loon Karan, its debtor (Decree-Holder under the decree) against a third person and credit the realisation to the debtor's account. State Bank of Jaipur levied execution of the decree and the Bank's Debtor (Decree-holder in the decree) objected to such execution. In that context, the Supreme Court examined whether the Power of Attorney executed in favour of the said Bank constituted an equitable assignment of the amount due under the decree or so much of that amount as was necessary for discharging the debt due to it. The relevant portion of the Power of Attorney executed by the Bank's debtor in favour of the Bank read as follows: --

"And Whereas I am very heavily indebted to the Bank of Jaipur Limited, Agra Branch and my liability is partly secured by the pledge of my goods and partly by the equitable mortgage of my and my mother's immovable properties with the said Bank; And Whereas major part of my said liability is unsecured; And Whereas I have agreed to appoint the Bank of Jaipur Ltd. to be my true and lawful attorney to execute the said decree in Suit No. 76 of 1949 which may ultimately be passed in my said appeal and to do the following acts, deeds, matters and things for me, on my behalf and in my name and to credit to my account the sum or sums which may be realised in execution of or under the said decree."

The Supreme Court on examination of the tenor and terms of the Power of Attorney executed by Seth Loon Karan in favour of State Bank of Jaipur concluded that the said Power of Attorney was a power coupled with interest and cannot be terminated to the prejudice of such interest. Thereafter the Supreme Court observed Seth Loon Karan Sethiya Vs. Ivan E. John and Others,

"This takes us to the question whether the power given to the Bank amounts in equity to an assignment of the decree or any portion thereof, to the Bank. From the power of attorney it is clear that the amount under the decree was specifically ear-marked for discharge of the debts due to the Bank. It was

constituted as a special fund for the said purpose. The power to realise that fund was made over to the Bank with the further authority to set off the amount realised towards the debts due to it. In other words, the power of attorney is an engagement to pay out of the particular fund the debt due to the Bank and hence the same constitutes an equitable assignment of the amount due under the decree or so much of that amount as is necessary for discharging the debts due to it."

The decision in Seth Loon Karan's case also depended on the terms of the power of attorney which specifically authorised the State Bank of Jaipur to recover the decretal amount and appropriate the same towards the amount due to it.

12. The powers of Attorney considered by the Supreme Court in Bharat Nidhi Ltd. Vs. Takhatmal (Decd. by his Legal Representatives) and Another, and Seth Loon Karan Sethiya Vs. Ivan E. John and Others, were construed as equitable assignments, on the basis of the specific terms of the Powers of Attorney which referred to the loans advanced and empowered the Banks to recover the amounts due and appropriate the same towards the debts due to them. It has to be seen whether the principles laid down in these two cases are applicable in this case to the power of attorney executed by the Company in favour of the applicant. The Power of Attorney dated 30-9-1986 is significantly different from the Powers of Attorney which were held by the Supreme Court, as constituting an equitable assignment in the following respects.

(a) it did not refer at all to the loan advanced by the Bank in favour of the Company;

(b) It did not authorise the Bank to appropriate the rents received by using the Power of Attorney, towards the amount due by the Company to the Bank;

(c) It did not refer to any arrangement between the bank and the company under which, the company had agreed for the amounts realised to be appropriated towards the loan.

In short the several ingredients which persuaded the Supreme Court to hold that the powers of Attorney created an equitable assignment in Bharat Nidhi Ltd. Vs. Takhatmal (Decd. by his Legal Representatives) and Another, and Seth Loon Karan Sethiya Vs. Ivan E. John and Others, are absent in the power of attorney that is executed by the Company in favour of the Bank. The Power of Attorney merely authorises the Bank to demand and receive the rent from State Bank of India and do acts connected with such collection of rent on behalf of the Company. There is no reference to any agreement or obligation undertaken by the Company to the Bank for repayment of the debt or authorisation to the Bank as Agent to adjust and appropriate the rents towards the amounts due by the Company. The Power of Attorney dated 30-9-1986 is a power of Attorney *Simpliciter* executed by a Principal in favour of an Agent authorising them to execute the acts mentioned therein. It does not create any equitable assignment in favour of the Bank.

13. Sri Udaya Holla next contended that the use of the word "Irrevocable" with reference to the power of Attorney implied an equitable assignment of the rents in favour of the Bank and entitled the Bank to receive the rents to the exclusion of others. Mere use of the word "irrevocable" in a Power of Attorney will not make the Power of Attorney "irrevocable" unless the terms thereof, disclose that it created or recognised an agency coupled with interest in favour of the Agent. For example, a Power of Attorney simpliciter, which merely authorises an Agent, to do certain acts, in the name of or on behalf of the executant can be revoked or cancelled by the executant at any time, in spite of the instrument stating that the Power of Attorney is irrevocable. On the other hand, a Power of Attorney executed in favour of an Agent, recording or recognising an interest of the Agent/ Attorney, in the property which is the subject matter of the Agency, cannot be revoked or terminated, even if the instrument does not state specifically that it is irrevocable, as then, it would be a power coupled with an interest (See S. 202 of the Contract Act, 1872). In this context, reference may be made to the following passage from the decision of the Andhra Pradesh High Court, in M. John Kotaiah Vs. A. Divakar and Others,

"From the passages quoted above, it is clear . that if on a construction of the power of attorney and in the light of the facts and circumstances obtaining in the case, the document does not prima facie satisfy the requirements for the creation of a power coupled with interest, then merely because the document itself describes the agency to be an irrevocable one, it does not become an irrevocable agency. The Indian Contract Act " also provides that in cases where the period of agency is prescribed and the agency is not, in law irrevocable, then the agent may have a cause of action against the principal for other remedies ies, in case the agency is revoked within the period. But that does not mean that an agency described as being irrevocable is to be treated as an irrevocable (one) if, in law, it does not satisfy the requirements of an irrevocable power of attorney".

14. Bowstead on Agency (14th Edition) at pages 423 succinctly states when an authority given to an Agent is irrevocable. The relevant portion reads thus:--

(1) Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. But it is not irrevocable merely because the agent has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter of it, the authority not being given expressly for the purpose of securing such interest or advances.

(2) Where a power of attorney, whenever created, is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power, or the performance of an obligation owed to the donee, then, so long as the donee has that interest, or the obligation remains undischarged, the power if irrevocable."

"The mere fact that a power is declared in the instrument granting it to be irrevocable does not make it so; irrevocability requires something further -- to be irrevocable, the authority must be conferred at protection of the agent's interest".

15. Sri Udaya Holla, next contended that the Power of Attorney executed by the company should be read in the context of the loan advanced by the company and the equitable mortgage created by the Company and the execution of other loan documents on the same day. He relied on the decision in *S. Chattanatha Karayalar Vs. The Central Bank of India and Others*, where it has been held that where a transaction between the parties is contained in more than one document, they must be read and interpreted together and they have the same legal effect for all purposes, as if they are one document. On that principle he contended that all the loan documents executed by the borrower should be read together and if so done, an equitable assignment in regard to the rents receivable from State Bank of India in respect of the portion of the property described in the schedule to the power of Attorney, will become evident. It is to be reiterated that the power of attorney does not refer to the grant of loan by the Bank to the Company or to any agreement or arrangement between the Bank and the Company whereby the Bank is entitled to receive the rents by using the power of Attorney and appropriate the same towards the debt due by the Company. Nor do the other documents dated 30-9-1986 said to have been executed by the Company (copies of which have been produced by the Bank) refer to any such arrangement or agreement. Further, it is doubtful whether reference to any such agreement in any document, other than the power of Attorney, will help the Bank to plead an equitable assignment, as an equitable assignment of a fund without notice to the person who is liable to pay the fund, is of no assistance to the person claiming assignment.

16. If the term loan agreement or other documents executed by the Company in favour of the Bank had stipulated that towards repayment of the loan, Bank was authorised to recover the rents in regard to the property and appropriate the same towards the loan and if the Power of Attorney had also contained a recital referring to the grant of loan and the agreement for repayment thereof by the company and stipulating that the Bank was authorised to adjust the amount received by way of rents towards the loan, then it might have been possible to state that a combined reading of the documents would imply on equitable assignment, leaving aside the question whether such an equitable assignment in regard to rents can be created otherwise than through a registered instrument. But if none of the documents executed by the Company in favour of the Bank refers to any such arrangement for recovery of loan advanced by them, then the position is different. Merely because the loan is advanced by the Bank and a power of attorney is executed by the debtor in favour of the creditor (Bank) to receive the rent, the two acts, without anything more, cannot be read together to draw an inference that there was an equitable assignment in regard to the rents. To illustrate, assume a case where a person creates an equitable mortgage

in regard to a property; and on the same day, he also executes a power of attorney in favour of the mortgagee authorising him to manage the property and receive the rents from the property; the two acts cannot be read together to convert the equitable mortgage into an usufructuary mortgage. Such an interpretation or reading, if done, will violate the provisions of the Transfer of Property Act, Stamp and Registration laws.

17. It is well settled that an instrument which creates a right or interest in the rents, profits, benefits and income from an immovable property, is a document which is compulsorily registrable (See the decision of Privy Council in AIR 1936 230 (Privy Council) and the decision of the Supreme Court in *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, Thus a document creating an assignment of a debt will not require registration, but a document assigning rents will require registration. If the Power of Attorney in question is to be treated as creating an equitable assignment of rents, it will require registration and if not registered will be void and unenforceable. The power of Attorney in question as already held does not create or recognise any right in or relating to any immovable property or benefit arising therefrom in favour of the Bank. It merely authorises the Bank to act as the Company's Agent to perform the acts stated therein. That is not an equitable assignment.

18. For the aforesaid reasons, the contentions of the Bank that the rents payable in regard to the portion 45460 sq. ft. of Premises No. 48, Church Street, Bangalore, presently in the occupation of State Bank of India, have been equitably assigned to the Bank, till the Bank's dues are cleared and consequently the said tenant -- State Bank of India, cannot be directed to deposit the rents into Court, are without any basis and they are hereby rejected. Consequently, the application, C.A. 139 of 1993, is rejected.

19. Application dismissed.