

(2009) 07 MAD CK 0008
In the Madras High Court
Case No : Writ Petition No. 25502 of 2007

Indian Bank

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 22-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 58, 78

Citation : AIR 2010 Mad 84 : (2010) 2 BC 186 : (2010) 1 MLJ 346 : (2010) 7 RCR(Civil) 767

Hon'ble Judges : R. Subbiah, J;P.K. Misra, J

Bench : Division Bench

Advocate : Jayish Dolia, for Aiyar and Dolia, for the Appellant; R. Umasuthan, for Respondent-1, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—This writ petition is a fight between two Nationalised Banks, namely Indian Bank and Punjab National Bank, in the matter

relating to applicability of Section 78 of the Transfer of Property Act.

2. The secured property in question was mortgaged by the undisputed owner with the Indian Bank on 10.5.1989, the petitioner in the present writ

petition, by depositing certified copies of the title deeds. The very same owner of the property subsequently created another equitable mortgage

over the very same property by depositing the original title deeds with Punjab National Bank, on 10.6.1989. Two banks had separately filed

independent suits, which were transferred to the Debt Recovery Tribunals as per The Recovery of Debts Due to Banks and Financial Institutions

Act, 1993, and two separate orders were passed in their favour. When the Punjab National Bank took steps to put the property for sale,

objection was raised by Indian Bank. The Debt Recovery Officer faced with the conundrum directed that the matter should be placed before the

Presiding Officer of the Debt Recovery Tribunal. The contention of the Indian Bank before the Tribunal was to the effect that it was admittedly the

prior mortgagee and, since at the time of creation of the equitable mortgage the owner had informed that the original title deeds such as sale deed

and the Will were lost and untraceable, the certified copies of the sale deed and the Will were deposited and subsequently the Bank also obtained

an affidavit from the owner on 28.7.1989, wherein it had been indicated that the original title deeds were lost.

3. The contention of the Punjab National Bank was to the effect that the Indian Bank had acted negligently in accepting the certified copies of the

sale deed and the Will for creation of the equitable mortgage without proper verification and because of such negligence, the owner of the

property, who was in possession of the original sale deed and the original Will, created another equitable mortgage subsequently by deposit of

such original documents.

4. The Debt Recovery Tribunal by referring to Section 58(f) of the Transfer of Property Act concluded that in law there was no bar in creating

equitable mortgage by deposit of certified copy of the title deeds. The Tribunal by referring to the decisions of the Calcutta High Court reported in

Bisseswar Poddar Vs. Nabadwip Chandra Poddar and Another, and Kerala High Court reported in 1983 Ker 38 (State Bank of India v. Kerala

Financial Corporation) further observed that Punjab National Bank had not proved that Indian Bank was in gross neglect while creating equitable

mortgage and further Indian Bank had shown due diligence by obtaining sworn affidavit from the owner that the title deeds have been lost.

Accordingly, it observed that from out of the sale proceeds of the mortgaged property, the debt in favour of the Indian Bank has to be met and

thereafter the surplus can be applied towards the debt in favour of Punjab National Bank. This decision of the DRT was the subject matter of

challenge in Appeal No. 8 of 2002 filed before the Debt Recovery Appellate Tribunal (DRAT) by the Punjab National Bank.

5. The DRAT, while reversing the judgment of the DRT, observed that Indian Bank had not taken proper care and caution while accepting the

certified copies of the sale deed and the Will for creation of the equitable mortgage. By applying the principle of Section 78 of the Transfer of

Property Act, DRAT has concluded that since Indian Bank was not diligent in getting proper documents from the borrower and the original owner

took advantage by producing the original deeds before Punjab National Bank for obtaining subsequent loan by deposit of original title deeds, the

Punjab National Bank was entitled to have priority as contemplated in Section 78 of the Act.

6. Learned Counsel appearing for the Indian Bank/appellant submitted that since creation of equitable mortgage by deposit of certified copies of

the documents of title is permissible, it cannot be said that there was any negligence far less gross negligence on the part of the Indian Bank in

creation of the mortgage and, therefore, the order passed by the Appellate Tribunal is not sustainable.

7. Learned Counsel appearing for Punjab National Bank, on the other hand, submitted that DRAT has considered the relevant facts and

circumstances and come to the proper conclusion by applying the principle enshrined in Section 78 of the Transfer of Property Act and, therefore,

there is no error of law in such order, justifying interference by the High Court while exercising jurisdiction under Article 226 of the Constitution.

8. Though initially there was some difference of opinion expressed by various High Courts in India relating to validity of creation of equitable

mortgage on deposit of certified copies of the original title deeds, it can be now taken to be well settled that there is no legal embargo for creation

of the equitable mortgage by deposit of certified copies of original title deeds. At least this position appears to be well accepted so far as Madras

High Court is concerned as apparent from several decisions such as 1993(1) LW 456 (M.A.V.R. Nataraja Nadar & Sons and 2 Ors. v. State

Bank of India) and 1995(1) LW 516 (Raju Pillai and 4 Ors. v. V.P. Paramasivam and 7 Ors.). The only question, therefore, is notwithstanding the

fact that a valid equitable mortgage had been created in favour of Indian Bank in anterior point of time, whether it can be postponed in favour of

the subsequent mortgagee, namely, Punjab National Bank, by applying the principle of Section 78 of the Act.

9. Section 78 of the Transfer of Property Act is to the following effect:

78. Postponement of prior mortgagee.- Where, through the fraud, misrepresentation or gross neglect of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

10. In the present case, there is no question of fraud or misrepresentation. The only requirement is whether it can be said that because of any gross neglect of the prior mortgagee, namely, the Indian Bank, Punjab National Bank had been induced to advance money on the security of the very same mortgaged property.

11. Learned Counsel for the Indian Bank has contended that it cannot be said that Indian bank by its action has induced Punjab National Bank to advance money on the security of the very same mortgaged property. In our considered opinion, this submission, however, is not acceptable, as there is no requirement that the subsequent mortgagee should have been induced by the prior mortgagee. On the other hand, it is apparent that because the original title deeds were all along with the owner, such owner was able to induce Punjab National Bank to advance money on the security of the very same mortgaged property. The basic question therefore remains is whether the Indian Bank can be said to have acted in a grossly negligent manner by accepting creation of equitable mortgage on the basis of certified copies of the original title deeds.

12. In the present case, there is no dispute that the owner claims title by virtue of a sale deed of the year 1935 and a subsequent registered Will.

However, at the time of creation of the equitable mortgage, dated 10.5.1989, the Indian Bank does not appear to have acted in a manner

expected of a man of ordinary prudence. It is no doubt true that about two months after creation of such equitable mortgage, the Indian Bank had

obtained an affidavit from the original owner that the original title deeds were lost. This, however, instead of fortifying the case of the Indian Bank

on the question of negligence, in our opinion, it would only be a circumstance to prove that at the time of creation of equitable mortgage, the Indian

Bank had not acted prudently as would have been expected from a nationalised bank.

13. If the original owner had stated at the beginning that original title deeds were lost, in normal circumstances, a bank would be expected to make

certain verification or even require the intending borrower to publish adequate notice. Moreover, the fact that the affidavit was taken two months after would only indicate that at the initial stage no query was made regarding the absence of original title deeds. Otherwise, under such normal circumstances, one would have expected that the Bank would obtain an affidavit on the date of transaction itself. From the facts and circumstances of the case, it is apparent that the Indian Bank in its apparent hurry to enter into the transaction, had omitted to take minimum precaution and because of such negligence on the part of the Indian Bank, the owner of the property was subsequently able to induce Punjab National Bank to advance loan by creating equitable mortgage by deposit of original title deeds. This is precisely the conclusion of the Appellate Tribunal. Whether there was gross negligence on the part of the Indian Bank was essentially a mixed question of fact and law. It cannot be said that the Appellate Tribunal has misapplied the law. If the Appellate Tribunal, on the basis of the facts and circumstances of the case, has come to a factual conclusion can it be said that there was an error of law apparent on the face of record requiring interference by the High Court in exercise of jurisdiction under Article 226/227 of the Constitution of India.

14. Counsel for the Indian Bank vehemently contended that the burden was on the Punjab National Bank to plead and prove that there was gross

neglect on the part of the Indian Bank. Can it be said that the facts and circumstances were not sufficient to prove gross negligence?

15. From the facts and circumstances, which have been noticed by the Recovery Officer and subsequently by DRT as well as DRAT, the

following undisputed circumstances emerge:

(1) The Indian Bank had accepted the certified copies of the original title deeds i.e., sale deed and the registered Will at the time of creation of the equitable mortgage.

(2) There is nothing to indicate that Indian Bank had taken any care at the time of creation of mortgage to investigate as to why the original title deeds were not produced.

(3) Affidavit to the effect that the original title deeds were lost was given by the owner after about two months.

16. From these circumstances, which are not in dispute at all, the reasonable

inference as has been drawn by the Appellate Tribunal is that the Indian Bank had not taken proper care at the threshold.

17. For the aforesaid reasons, we are unable to interfere with the order passed by the Debts Recovery Appellate Tribunal. Accordingly, the writ petition is dismissed. No costs.