
(1943) 04 CAL CK 0015
In the Calcutta High Court

K. Roy and Bros.	Vs	APPELLANT
Ramanath Das and Others		RESPONDENT

Date of Decision : 13-04-1943

Acts Referred:

Companies Act, 1956 — Section 109
Registration Act, 1908 — Section 17, 17(1)

Citation : AIR 1945 Cal 37

Hon'ble Judges : Derbyshire, C.J.;Roxburgh, J;Lodge, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal from an order made by McNair J. on 13th January 1943. The order was in terms of prayer (a) of the summons which was to this effect:

That the Official Liquidator may be directed to pay to the applicant in pari passu with other debenture holders but in priority to other creditors whether secured or unsecured out of the sale proceeds in his hands as well as out of money realised for uncalled capital of the company and other realisations the sum of Rs. 99875-3-9 with further interest at 5 per cent, up to the date of payment being the sum due on the 151 debentures issued by the company in his favour.

2. The legal question in the case is whether debentures issued by a company charged on the whole of its property which includes immovable property must be registered under the Registration Act or whether registration under the provisions relating to the registration of debentures of companies is sufficient. The facts which led up to this application are shortly these. The East Bengal Sugar Mills Limited was a company formed to build, equip and operate a Sugar Mill at Dacca in East Bengal. The Appellants, K. Roy and Brothers are building contractors and they built the Mill for the company. They were not paid, for their work and the materials with the result that they eventually went to arbitration and secured an award for their debt. Whilst the Mill was being built the company in order to equip it arranged to buy machinery from abroad and to pay for the machinery

borrowed money on debentures issued to various persons. The applicant, Ramanath Das, was a director and one of the managing agents of the company. He took up 151 of these debentures, each of them for Rs. 500 and paid for them. With the money realised from the issue of these debentures the company paid for the machinery it had installed. The debentures were duly registered u/s 109, Companies Act, but they were never registered under the provisions of the Registration Act (Act 16) of 1908. The company after working for a time got into financial difficulties and a winding up order was made by this Court. The debenture-holders did not appoint a receiver under their debentures. The Official Liquidator appointed by the Court has taken possession of the land, buildings, plant, machinery and utensils of the company and sold them to a purchaser who has transferred the undertaking to another company known as the Kaligunge Sugar Mills Limited.

3. The debenture-holders claim that they are entitled to a first charge on the whole of the money received from the sale of the old -company's undertakings. The liquidator has informed them that he considers that as their debentures were not registered under the Registration Act, it does not affect the immovable property of the company and that the debenture-holders are only entitled to be paid their debt out of the moveable assets of the company. McNair J. decided that the debentures did not need to be registered under the Registration Act and that therefore there was a good charge upon the whole of the company's assets and the proceeds thereof and he made an order in terms of prayer (a) as referred to above. Messrs K. Roy and Brothers have appealed against that and they claim that the debentures ought to have been registered under the Registration Act. As they have not been registered the debenture-holders are only entitled to what may be obtained from the sale of the moveables and that they as creditors will be entitled to a share in the immovables and their proceeds. The debentures themselves are in the form which was at one time common in England. (See *Palmer's Company Precedents*, Part, Debentures, 15th Edn. at pp. 272 to 274.) Clause 3 of the debenture which is headed "Mortgage Debenture" provides as follows:

The company doth hereby as beneficial owner, charge with such payments (that is principal and interest at 61/2 per cent.) its undertaking and all its property whatsoever or wheresoever both present and future including its uncalled capital for the time being.

4. Clause 4 reads:

This debenture is issued upon and subject to the conditions indorsed hereon which shall be and be read as part of this debenture and which the company covenants to observe and perform in every respect.

5. The conditions referred to are seventeen in number; I refer only to the following:

1. This debenture is one of a series of 200 debentures of Rs. 500 each numbered

1 to 200 inclusive of the company issued or about to be issued by the company for an aggregate amount of Rs. 100,000. The company shall be at liberty to issue further debentures of a like nature to rank *pari passu* with the debentures of these series.

2. The debentures of the said series whether original or not are all to rank *pari passu* as a first charge on the property hereby charged without any preference or priority one over another and such charge shall until the money is hereby secured shall become payable, be a floating security and the company shall not create any mortgage or charge in priority to the said debentures.

3. The principal money hereby secured shall immediately become payable if the company make default for a period of three calendar months in the payment of any interest hereby secured and the registered. holder thereof for the time being before such interest is paid by notice in writing to the company calls in such principal money or if a distress or execution is levied upon or against any of the property and the assets of the company and is not paid out or withdrawn within ten days or if a Receiver of any property and assets of the company is appointed by any Court of competent jurisdiction or if an order is made or an effective resolution is passed for winding up of the company.

16. A Receiver or Receivers so appointed shall have power (a) to take possession of the property charged by the debenture and (b) to sell or concur in selling any of the property charged by the debentures.

6. No Receiver was appointed, and as I have said an order was made by this Court for the winding-up of the company and the Official Liquidator was appointed liquidator. Now that debenture and its series were duly registered under the provisions Section 109 Companies Act (Act 7 of 1913 as amended by Act 22 of 1936). They were registered with the Registrar of Joint Stock Companies in Calcutta. It may be mentioned in passing that there is a Registrar of Joint Stock companies appointed in each of the large provinces; there is one in Calcutta, there is one for Assam, there is one for Bombay and so on. By the provisions of Section 109, proviso (4) it is enacted:

The holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

7. Sub-section (2) which was added by Section 60 of Act 22 of 1936 provides,

Where any mortgage or charge on any property of a Company required to be registered under this section has been so registered any person acquiring such property or any part thereof or any share or interest therein shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

8. Section 109A deals with some of the requirements of registration and Section 110 deals with the particulars that are required in case of registration. Particular (c) is as follows : "A general description of the property charged" (i. e., what is required to be registered under the provisions of the Companies Act). I must

mention here that there was no debenture trust deed accompanying the issue of these debentures. In the debenture deed itself the only reference to the property charged is its undertaking for all, its property whatsoever, and wheresoever present and future. That description apparently satisfies the requirements of Section 110, Companies Act, and nothing more is required as far as the Companies Act is concerned. It is said that the effect of Section 109(2), Companies Act, is to give anybody who deals with the property notice that it has been made subject to a floating charge. It must be pointed out at once that as Section 110(c) indicates that only a general description of the property is required and there is nothing making it compulsory to give any further details of property, so that there is nothing in the registration under the Companies Act of these debentures which would inform any person exactly what the immovable property was that was charged. It should be remembered that under the provisions of Section 109 a company is required to keep a register of its mortgages and charges specifically affecting property of the company and all floating charges on the undertakings or on any property of the company. That register would be kept, of course, at the company's head office.

9. The purpose of the registration of debentures, charges, and mortgages under the Companies Act is to give notice to persons dealing with the company that there are certain encumbrances on its property. Those encumbrances can be discovered by a search of the registry of the place where the company is registered and by a search or an application made at the company's head office. Of course it does not follow that a company is registered or has its head office at the place or even in the province where the immovable property that may be charged is situate. Those who deal with the company in the ordinary way of business can have searches made and they can discover the general nature and the financial extent of the charges, but they cannot discover what particular pieces of land or immovable property have been charged. The Registration Act of 1908 is the successor of two previous Acts requiring registration of certain kinds of documents. It is like the Companies Act, an all India Act. Section 17(1), Registration Act, provides:

The following documents shall be registered if the property to which they relate is situate in a District in which, and if they have been executed on or after the date on which, Act No. 16 of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely: (a) instruments of gift of immovable property:

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

10. It will be noted that the registration is a local registration in the district in which the property is situate. Section 21 provides:

(1) No non-testamentary document relating to Immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.

(2) Houses in towns shall be described as situate on the north or other side of the street or road (which should be specified) to which they front and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered.

(3) Other houses and lands shall be described by their names, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies and also, whenever it is practicable, by reference to Government map or survey.

11. Section 28 provides that save as otherwise provided in part 5

every document mentioned in Section 17, Sub-section (1), Clauses (a) and (b), in so far as such document affects immovable property, shall be presented for registration at the sub-registry within whose sub-district the whole or some portion of the property to which such document relates, is situate.

12. Section 49 provides:

No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered, shall (a) affect any immovable property comprised therein unless it has been registered.

13. The purpose of the Registration Act as disclosed in its provisions is to provide information to people who may deal with property as to nature and extent of the rights which persons may have affecting that property, in other words, to enable people to find out whether any particular piece of property with which they may be concerned has been made subject to some particular legal obligation. There are other purposes of the Registration Act. One is to give solemnity of form and legal importance to certain classes of documents by directing that they shall be registered. For some purposes a document which is directed to be registered creates similar rights and obligations to the documents "under Seal in England. Another purpose is to perpetuate documents which may afterwards be of legal importance and the general purpose is to put on record somewhere, where people may see the record and enquire what the particulars are and as far as land is concerned what obligations exist with regard to them. The purpose of this is to prevent fraud. I ought to have mentioned that in Section 17(2) (iii) there is this provision:

Nothing in Clauses (b) and (e) of Sub-section (1) applies to any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder of the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the

whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures.

14. That provision is designed to exempt from registration debentures issued, may be in a series under a trust deed, or debentures which of course, may include both moveable and immovable property. The trust deed itself might have to be registered, but the separate debentures issued under the trust deed would not require registration. The debentures we are concerned with were not issued under a debenture trust deed and the question is whether they should be registered u/s 17(1) (b). Now it has been pointed out that in Section 109 proviso (4), Companies Act, it is provided that the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property. It is contended that these debentures do not create an interest in immovable property and therefore do not require registration. It is not, however, merely an interest in property that is mentioned in Section 17(1) (b), (but something more) a non-testamentary instrument (like the present debentures) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property must be registered. The present document does purport on the face of it to limit the right of the company to its property. It creates from the moment it was executed a floating charge over the whole of the company's property immovable and moveable. That floating charge may become fixed on the happening of one of the events mentioned in condition 3 endorsed on the debentures, so that at the moment of issue there was a limitation of the right of the company to its immovable property contingent upon the happening of one of the events specified in the condition. A charge on the property is defined by Section 100, T. P. Act:

Where immovable property of one person is by act of parties or by 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.

15. Clearly there was a charge on the property here limiting the right of the company to that property and in my opinion, for that reason this document comes within the meaning of Section 17(1) (b), Registration Act, and ought, therefore, to be registered as regards the immovable property covered by it in the appropriate local registry under the Registration Act (Act 16 of 1908). It is said: "Oh, but that is impossible, because the debenture itself contains no reference to any specific piece of property. It simply charges all its property whatsoever and wheresoever present and future. That being so, we cannot register in this particular registry or that particular registry." In my opinion that is beside the question. If the debenture creates a charge over the company's property it must be registered in the proper registry. Of course there is no difficulty where there is a trust deed. The difficulty arises in this particular form

of debenture which as I said previously is a common form in England. It may be a suitable form of debenture in England because England is a country where, except for two counties, Middlesex and Yorkshire, there is no system of land registration and this form may be well adapted for that purpose, but it may be ill adapted for countries where such a form of land registration is compulsory. In Section 79 of the English Companies Act of 1929, which deals with the registration of charges with the Registrar of Companies it is clearly contemplated that there may have to be double registration, namely, registration with the Registrar of Companies under the provisions of the Companies Act and registration of land or immovable property belonging to the company in the country where such land or immovable property is situate and is required to be registered. For instance, Section 79(4) provides:

Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the charge may be sent for registration under this section notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

16. Sub-section (5) provides:

Where a charge comprises property situate in Scotland or Northern Ireland and registration in the country where the property is situate is necessary to make the charge valid or effectual according to the law of that country the delivery to and receipt by the Registrar of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced, together with a certificate in the prescribed form stating that the charge was presented for registration in Scotland or Northern Ireland, as the case may be, on the date on which it was so presented shall for the purposes of this section, have the same effect as the delivery and receipt of the instrument itself.

17. There is no corresponding provision in the Indian Companies Act. India is a very much bigger country than Great Britain and Ireland and the distances of places apart may be so great as to make virtually ineffective the provisions for safety and warning which the Companies Act gives. I put one illustration to Mr. Roy in course of argument and it was this. Suppose that a company is registered in Bombay and has its head office in Bombay and that it is engaged in carrying on business throughout India. One of its places of business is in town far away say Madras or Calcutta or some other town in which mortgage of land by deposit of title deeds is made legal now or in the future by the Provincial Government u/s 58, T. P. Act. The company is in difficulties and issues debentures by floating charge over the whole of its property in the form in which it has been done in this case. Those debentures will be registered with the Registrar of Companies in Bombay and a record of them will be kept in the registered office of the Company in Bombay and any one who wishes to know to what extent the company is embarrassed or has created encumbrances over its property can find that out by searching the office of the Registrar of Companies in Bombay or at the office of

the company in Bombay. But all that that search reveals is the extent of the indebtedness of the company and the extent to which its property generally has been charged, but it does not show what particular items of its property has been charged. Whilst the company is embarrassed, the manager of this distant branch finds difficulty in meeting the wage bills there and he asks a local person to lend money--say a thousand rupees--to meet the monthly wages. He has with him in safe custody the documents of title to some land which the company owns locally. The person to whom he applies for money may be willing to lend one thousand rupees provided he has proper security and he is offered the documents of title relating to that land. He would, if he were an ordinary prudent person, enquire at the local Registry whether there were any charges created on the land. If registration under the Companies Act of debentures of floating charges is in Bombay and is sufficient he would find nothing in the local Registry under the Registration Act. He might, therefore, on searching and finding nothing lend the money only to discover later before the money had been repaid that some one who had a floating charge had taken steps to crystallise it and that the security on which he had lent the money was valueless to him. Neither Mr. Roy nor the Advocate-General was able to say that there was anything either improbable or fallacious in that argument and it seems to point to the necessity for observing the law strictly as it is laid down in the Registration Act. The Registration Act is intended to afford warning to people in the district in which the land is situate as regards charges affecting that land so that they may not suffer through lack of knowledge. If we are to say that registration under the Companies Act was sufficient then it means that the security which the Registration Act has provided for local man goes and he is left at the mercy of the debenture-holder who is elsewhere.

18. In my opinion for the reasons I have given it is necessary that a debenture creating a charge whether floating or fixed over any immovable property should be registered according to the provisions of law laid down in Section 17, Registration Act, in addition to the provisions of the Companies Act. The provisions of the Companies Act are intended to protect people who have business dealings with companies and to warn them to the extent to which the companies have created obligations over their property. The provisions of the Registration Act are intended to protect all who may have dealings with land so that those persons, particularly those local persons, may have knowledge of the obligations which have been created over and in respect of the land.

19. There is one other matter. A question arose in the Court below as to whether the machinery of the sugar mill was fixed to the soil of the buildings so as to be immovable property. The learned Judge did not find it necessary to decide that question owing to the view he took on the question whether the debentures should be registered or not. But he expressed the view that whether the machinery was immovable property or whether it was not, was a question of fact. I agree that it is a question of fact and it is for the learned Judge to determine whether a particular piece of machinery is immovable property or

whether it is not. For these reasons this appeal must be allowed. The applicant Ramanath Das has a first charge on the moveable properties and uncalled capital of the company pari passu with other debenture-holders. There will be an enquiry by the trial Court to ascertain: (a) what the moveable properties of the company and their value at the time of the sale were; (b) whether the machinery and plant, etc., or any part thereof is moveable or immovable property; and (c) how much of the money paid by the purchasers to the liquidator for the assets of the company, namely, Rs. 1,61,000 represents the sale proceeds of (i) moveable and (ii) immovable property. The respondent Ramanath Das will pay the costs of the appellants, K. Roy and Brothers both in the appeal Court and in the trial Court. Costs will be as of a hearing. Certified for two counsel. The liquidator is entitled to the costs here and below to be reimbursed out of the assets of the moveable properties which come to his hands. Ramanath Das repeats the undertaking that he will return the sum of Rs. 25,000 by 13th May 1943.

Lodge, J.

20. I agree.