

(1961) 03 AHC CK 0023
In the Allahabad High Court
Case No : Special Appeal No. 429 of 1958

Krishna Deva Bhargava and Others

APPELLANT

Vs

Official Liquidator U.P. Oil Industries Ltd.

RESPONDENT

Date of Decision : 13-03-1961

Acts Referred:

Companies Act, 1913 — Section 109
Companies Act, 1956 — Section 125
Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 100, 4, 59

Citation : AIR 1962 All 101 : (1962) 32 CompCas 925

Hon'ble Judges : N.U. Beg, J; A.P. Srivastava, J

Bench : Division Bench

Advocate : Brij Lal Gupta, for the Appellant; J. Swarup, for the Respondent

Final Decision : Partly Allowed

Judgement

Beg, J.—This is an appeal arising out of an application given by the Official Liquidator of the U.P. Oil Industries Limited hereinafter called "the Company" The company went into liquidation, and was ordered to be wound up on the 11th of May, 1956. An investigation into the assets and liabilities of the Company by the Liquidator revealed that it had three series of debentures. The first series of debentures were allotted on the 8th of April, 1947, for a total sum of Rs. 1,50,000/-. A debenture Trust Deed in respect of this series was executed and registered with the Registrar Joint Stock Companies, Lucknow, and also in the office of the Sub-Registrar, Lucknow under the Indian Registration Act. The second series of debentures were issued on the 23rd of June, 1950, for a sum of Rs. 1,00,000/-. For this series also a debenture Trust Deed was executed, and it was registered with the Registrar, Joint Stock Companies, Lucknow, as well as in the office of the Sub-Registrar, Lucknow under the Indian Registration Act. By a resolution dated the 23rd March, 1952, the Board of Directors authorised Sri B.P. Agarwal who was managing the affairs of the Company to issue a third series of debentures for Rs. 4,50,000/-, and a Committee was appointed to allot these

debentures.

In pursuance of the above resolution, on the 7th April, 1952, the Committee allotted debentures bonds Nos. 1 to 4 for Rs. 2,000/- to Rai Sahib. Pandit Sri Krishna Deva Bhargava of Khatauli and four bonds Nos. 5 to 8 for Rs. 3,000/- to Smt. Rajeshwari Devi of Karol Bhagh Delhi. In respect of this series of debentures no Trust Deed was executed nor was any registration effected in the office of the Sub-Registrar as required under the Indian Registration Act. The Company, however, registered with the Registrar, Joint Stock Companies, the particulars of this series of debentures on the 18th of April, 1952, u/s 109 of the Indian Companies Act. In view of this situation the liquidator moved an application in the High Court before the Company Judge praying for a relief to the effect that a declaration be made that the holders of the third series of debentures are not secured creditors but ordinary unsecured creditors. The Company Judge before whom the matter came up for determination allowed this application and made the declaration prayed for. Dissatisfied with the said order of the learned Judge, the appellants, who were holders of the third series of debentures, filed the present appeal.

2. On behalf of the appellants learned counsel advanced two arguments before us. The first argument was that the third series of debentures, having been registered u/s 109 of the Indian Companies Act 1913, were not required to be further registered under the Indian Registration Act. The second argument advanced by him was that, in any case, the declaration prayed for should not have been given in respect of the moveable properties of the Company. So far as the first argument is concerned, it involves a discussion of the following two questions:

1st. Is a charge compulsorily registrable under the Indian Registration Act?

2nd. How far is a floating charge created by the third series of debentures in the present case compulsorily registrable under the said Act?

3. We have no doubt in our mind that an ordinary charge created under the Transfer of Property Act is compulsorily registrable. Such a charge is created u/s 100 of the Transfer of Property Act (Act 4 of 1882). The first portion of Section 100 lays down that where Immovable property of one person is by act of parties or 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; and all the provisions therein made applicable to a simple mortgage shall, so far as may be, apply to such a charge. It may be noted in this connection that the words "which apply to a simple mortgage shall, so far as may be, apply to such charge" in this section were substituted by section 53 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929) for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the persons having such charge". The effect of the amendment was that all the

provisions of the Transfer of Property Act which apply to simple mortgages were, so far as possible, made applicable to charges.

4. Section 59 of the Transfer of Property Act makes all simple mortgages in which the principal money secured is one hundred rupees or upwards compulsorily registrable. Section 4 of the Transfer of Property Act (Act 4 of 1882) as amended by Act 3 of 1885 lays down that Sections 54 paras 2 and 3 59 107 and 123 of the Transfer of Property Act shall be read as supplemental to the Indian Registration Act (Act 16 of 1908). The combined effect of sections 4 59 and 100 of the Transfer of Property Act is, therefore, to make all charges in respect of immovable properties compulsorily registrable under the Registration Act provided that the amount secured exceeds Rs. 100/-. The cases reported in AIR 1929 141 (Privy Council) and Tanneti Viswanadham Vs. M.S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company Limited and Another, support the same conclusion.

5. A floating charge is, however, a special charge which is recognized by the Indian Companies Act. In the present case, we are concerned with the Indian Companies Act (Act VII of 1913) which was the Act in force at the relevant date. A floating charge is created by making the assets or the undertaking of the Company a security for the payment of debts into which a company enters. Such a charge might cover properties which may be specified or unspecified in the document creating the charge. The description may be a general one. A peculiar feature of this transaction, however, is that it is not possible to predicate the exact property on which the charge would operate until the happening of a future event. This future event may be the appointment of a receiver at the instance of the creditors of a company for the realization of their debts or the winding up of the Company itself. Till such a future event happens, the charge is of an ambulatory or roaming character. It remains in this hovering condition until the contemplated future event takes place. Once, however, this future event occurs the charge settles down, and attaches itself to a fixed property. The right created under it is no doubt a right in present. The security in respect of which the right is created, however, becomes crystallized only when the future event takes place. It may, therefore, be said that until the time that such further event occurs the right created thereby is a dormant right. The moment such future event takes place, this dormant right assumes, a dynamic form, and becomes capable, of enforcement against certain specified property or properties which answer the description of the property given in the debenture.

Section 109 (1) (f) of the Indian Companies Act of 1913 lays down that every mortgage or charge created by a company after the commencement of the said Act which is a floating charge on the undertaking or property of a company shall, in respect of such security, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument (if any) by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the registrar for

registration in the manner, required by the Act within twenty-one days after the date of its creation. Section 110 of the Indian Companies Act specifies the particulars which are to be filed with the registrar when a registration as contemplated by Section 109 of the said Act is sought to be effected. The provisions of Clause (c) of Section 110 would indicate that, in the case of such a registration, a general description of the property charged is quite enough.

6. In the present case it is the admitted case of the parties that the third series of debentures were registered as required by Sections 109 and 110 of the Companies Act (Act VII of 1913). On behalf of the appellants it is argued that a floating charge is a statutory charge under the Companies Act. A registration of the same, therefore, under the aforesaid sections is quite sufficient. On the other hand, on behalf of the respondents the learned counsel has argued that the fact that under the Companies Act such debentures are made compulsorily registrable in a certain manner with the Registrar of the Joint Stock Companies does not absolve the parties from the necessity of having the said documents registered under the Registration Act where such documents are compulsorily registrable under the latter Act also. In the present case it is argued that debentures of the third series would be compulsorily registrable u/s 17 of the Indian Registration Act (Act 16 of 1908) if they are to be treated as valid and effective documents creating a charge on Immovable property. Both the parties have advanced detailed arguments before us in, support of their respective contentions. We are, however, of opinion that the answer to this question would depend on the particular circumstances of each case. It is, therefore, necessary to look at the terms of the particular debentures by which the charge in question in the present case is sought to be created bearing in mind the specific property in respect of which the dispute has arisen. In the present case we have looked at a copy of the debentures in question. Condition No. 3 of the printed form of this series of debentures is relevant in this connection. It specified the property which was sought to be made the subject-matter of the floating charge. It runs as follows:

"3. The company hereby charges with such payments its undertaking and all its property, present and future."

The above description shows that the debentures in question related to two types of properties. Firstly, they covered all the present property of the Company--both movable as well as immovable. Secondly, they covered all the future property of the Company both movable as well as immovable. So far as the movable property is concerned, it is conceded by both the parties that the charge would not be compulsorily registrable under the Indian Registration Act. So far, however, as the immovable property is concerned, it has been argued on behalf of the appellants that the floating charge is not registrable even though it might embrace within its ambit immovable property. By the present immovable property is meant the property which was in the ownership of the Company at the date when the charge was created. On the other hand, by the future

immovable property is meant the property which was not in the ownership of the company at the date of the creation of the charge but came into its ownership at a subsequent date. In the present case it is admitted that the land to which the mill in question it attached was in the ownership of the Company at the date of the creation of the charge. The mill, therefore, constitutes a mere accretion to the land which was already owned by the Company at the relevant date. This land is admittedly covered by the property described as present immovable property in the debenture. We, therefore, want to make it clear that the conclusion arrived at by us in the instant case applies only to a case where the dispute relates to such property as was in the ownership of the Company on the date of the creation of the charge or its accretion, and the observations made by us in this judgment would be confined to such a case only. So far as the future immovable property is concerned, we do not wish to express any opinion in this case. We must confess that the question appears, to bristle with difficulties at every stage, and it is not easy to reconcile the conflicting considerations that arise in such a case.

7. In our opinion, Section 17 of the Indian Registration Act (Act XVI of 1908) would be attracted in a case where the dispute relates to a charge sought to be created by a debenture on immovable property which was existent at the date of the creation of the charge and was in the ownership of the Company at that date. The relevant provision of law in this regard is Section 17(1)(b) of the Indian Registration Act. u/s 17(1)(b) of the Indian Registration Act the documents made compulsorily registrable are described as follows :-

"17. (1) (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;"

8. In the present case the debentures in question are admittedly non-testamentary instruments of the type indicated by Section 17(1)(b) above and are of a value above one hundred rupees. Further, they purport to create a charge on immovable property which was in the ownership of the Company at the date of the creation of the charge. In this connection we have already held above that the right created by such a debenture is a right in praesent although it is dormant at that stage. It can, therefore, be said that the document in question does operate to create a right.

9. Further, the debenture in question also purports to declare that on the happening of a certain contingency in future it would be open to the creditor to enforce the realization of the debt owed to him by taking steps in that regard against immovable property of the Company, provided of course that on that future date the said property happened to be in the ownership of the Company. The fact that a charge has been created by a debenture, no doubt, does not prevent the Company from alienating the property or creating mortgages on the same. If the Company alienates property prior to the happening of the future

event, the alienee takes the property immune from such a charge. Further, the said rights of the charge-holder might be subject to the prior rights of a mortgage. The fact that a charge-holder is entitled to take steps against the Company only on the happening of a future event does not, however, affect the matter. The declaration itself may relate to a future contingency and may be of a conditional nature. The section does not restrict the operation of its provisions to a declaration of an absolute or unqualified nature.

10. It can also be said that the verb "limit" in Section 17(1)(b) would also cover a transaction of this nature, As observed by us, the happening of the future event does have the effect of limiting the rights of the Company to a certain extent. Whereas before the happening of the future event the Company did possess an unlimited power to dispose of absolutely the property which was sought to be made the subject-matter of the charge, after the happening of the said event the charge fastens itself on the specified property thereby altering the situation. The crystallization of the security in this manner does to a certain, extend limit the right of the Company, for if can be said that thereafter the property which is the subject-matter of charge having been specified and fixed becomes subject to the charge created by the debenture and the fetters which the law imposes on charged property begin to attach to such a property. The unrestricted right of the Company to deal with the said property can thus be said to have been limited.

11. It may also be noticed that Clause (b) of Section 17(1) of the Registration Act is worded in a very wide form. Every portion of this section bears the imprint of its extensive character and seems to be designed to emphasise the same. Clauses (a) and (b) of Section 17(1) together cover all kinds of non-testamentary instruments relating to immovable property. Section 17(1)(b) embraces not only rights which become operative in immediate present but also in future. This is borne out by the clause "whether in present or in future" in the said provision of law. It is also significant to note that this clause covers not only titles and interests in Immovable property but also rights in them. Further, the section uses both the words "to" as well as the word "in" when describing such rights, titles or interests. Its ambit is further extended by the inclusion within it not only of vested but also of contingent rights, titles, or interests. A floating charge cannot, therefore, escape the clutches of this section merely because although it may come into existence in present, its actual operation is postponed to a future date. A floating charge can be said to be a contingent right in the sense that the charge attaches itself to the property on the happening of a future event. The wide character of the section is further emphasised by the use of the words "purport", as well as "operate" both of which precede a multiplicity of verbs comprised in the expression "to create, declare, assign, limit or extinguish", The profusion of these verbs shows that the intention of the Legislature was to include within the ambit of this section a large variety of legal transactions, and their collection in this clause indicates that the Legislature intended to include within the wide sweep of this provision of law every type of document that may affect any right, title or interest in or to immovable property.

The section appears to be so designed as to make it exhaustive of the entire category of such transactions.

12. The conclusion reached by us is fortified by a reference to Clauses (ii), (iii) of Sub-section (2) of Section 17 of the Indian Registration Act. This clause would indicate that while enacting Section 17 of the Indian Registration Act the Legislature had in view the provisions of the Company Law also. Clause (ii) of Sub-section (2) of Section 17 lays down that any instrument relating to shares in a Joint Stock Company would be exempt from the operation of Clauses (b) and (c) of Sub-section (1) of Section 17, notwithstanding that the assets of such Company consist in whole or in part of immovable property. Clause (iii) of Sub-section (2) of Section 17 is, however, more relevant in the present case. This provision of law carves out an exception to the application of Clauses (b) and (c) of Sub-section (1) of Section 17 of the Indian Registration Act in the case of a debenture issued by a Joint Stock Company only if it does not declare, assign, limit or extinguish any right, title or interest, to or in immovable property. It would, therefore, necessarily follow from it that a debenture which does seek to create, declare or limit any right, title or interest to or in immovable property would be covered by Clause (b) of Sub-section (1) of section 17 of the Indian Registration Act.

13. It is also noteworthy that there is no specific provision in the Indian Companies Act itself exempting debentures creating charges in immovable properties from the mandatory provisions of the Indian Registration Act. On the other hand, one does find that while enacting Section 17 of the Registration Act, the Legislature did have in view debentures which are the creations of the Company law, and did not intend to exempt from, its operation debentures affecting immovable property. It also appears that the purpose of registration under the Companies Act is quite different from the purpose of registration under the Registration Act. In the case of registration u/s 109 of the Companies Act (1913), as Section 110 (c) of the same Act shows, a general description of the property is quite enough. On the other hand description under the Registration Act has got to be specific and definite (vide section 21, Registration Act). The purpose of registration under the Companies' Act, therefore, appears to be to give a general idea of the financial condition and status of the Company to persons who want to deal with it. On the other hand, the provisions of the Registration Act are framed for the purpose of giving full and detailed information of a reliable type to persons wanting to have dealings in respect of specific immovable properties of a Company by a search of the local registry where such information would be available. Reference in this connection may be made to Sections 64 and 65 of the Registration Act which are designed to effectuate this purpose.

14. It may also be noted in this connection that Section 109 of the Indian Companies Act (1913) applies equally to both charges as well as mortgages. The result is that if its provisions are interpreted as engrafting an exception on

Section 17 of the Registration Act, then it can be argued that even a mortgage of immovable property created by a Company would be exempt from registration under the Registration Act, This would not only make a serious inroad on the provisions of the Registration Act, but would also have the effect of creating a good deal of confusion and uncertainty in transactions relating to immovable properties. The Registration Act has placed transactions relating to immovable properties on a special pedestal, and has, for that reason, attached certain formality and solemnity to such transactions. The purpose of making registration compulsory under the Registration Act in respect of transactions relating to immovable properties above a certain value is not only to provide a permanent repository of such transactions, but also to create certainty in them and thereby facilitate dealings therewith. Registration of such documents not only serves to provide unimpeachable evidence of dealings affecting immovable properties, but also lends assurance to persons entering into them regarding their legal rights and obligations,

A contrary view is likely not only to result in practical difficulties" and serious inconveniences but also in the preparation of fraud and deception. in the long run it is likely to have repercussion on the day-to-day business of the companies themselves. If persons dealing with, Companies cannot be sure of their position, they would be reluctant to have dealings with them. The Companies might, therefore, find it difficult to borrow monies from creditors to enable them to sustain and to advance their business. Such a view would, therefore, be prejudicial not only to the interests of the creditors but also to that of Companies themselves. We would, therefore, require something more to be able to hold that such salutary and imperative provisions of the Registration Act as are embodied in section 17 are completely swept away by the Companies Act, Unless, therefore, we find ourselves constrained by considerations of a strong, clear and compelling nature, we would be reluctant to endorse the arguments so vehemently advanced before us by the learned counsel for the appellants. The view taken by us above would also find support from the line of reasoning adopted in the *Imperial Bank of India Vs. Bengal National Bank Ltd.*, , *K. Roy and Bros. Vs. Ramanath Das and Others*, and *State of Madras Vs. Madras Electric Tramways (1904) Ltd. and Another*, . It may be noted that the first case was reversed by the Privy Council in AIR 1931 245 (Privy Council) but not so far as this particular point was concerned.

15. Learned counsel for the appellant also relies on proviso (iv) to Section 109 (1) of the Companies Act (1913) which states 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."

This argument seems to ignore the width of the provisions of Section 17(1)(b) of the Registration Act which make it applicable not only to "an interest in immovable property" but also to a right ""to or in immovable property". Further, as observed in *State of Madras Vs. Madras Electric Tramways (1904) Ltd. and*

Another, cited above

"....the fourth proviso to section 109 of the Companies Act will only exempt the debenture from being, registered, and not the immovable properties given as security to the debenture holders. Otherwise, the mortgage on the immovable properties in favor of the debenture holders need not be registered under the Registration Act."

16. Learned counsel for the appellant also cited before us a large number of English authorities in support of his submission that the English doctrines of equity would be applicable to such a case. We do not think it necessary to deal with the English cases cited by him, as in our opinion, the English doctrines of equity cannot be invoked for the purpose of modifying or nullifying the clear provisions of Indian Statutory Law, vide AIR 1931 79 (Privy Council) and AIR 1939 14 (Privy Council)

17. On behalf of the appellant the learned counsel has drawn our attention to the provisions of Sub-section (1) of Section 21 of the Indian Registration Act which lays down that 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. In this connection the learned counsel argued that it was not possible for the parties to give a description of the property sought to be charged because immovable property sought to be charged might not be in the ownership of the Company when the charge was created. This criticism cannot, however, apply to the present case, because the property in question was in the possession and ownership of the Company at the date of creation of the charge. This aspect of the matter might, however, present a real difficulty in the case of registration of a debenture in so far as future immovable property is concerned. As we have already observed above, we do not propose to express any opinion of this aspect of the matter, because this question does not specifically arise in the case before us.

18. In this connection, the learned counsel for the appellant also argued that the factory which was installed on the land was future property as it was affixed to the land subsequent to the creation of the charge. That, however, would not make any difference. The fact that the machinery was affixed to the land subsequent to the date of the creation of the charge has the effect of making the machinery in question a part and parcel of the immovable property. In other words, the machinery which is embedded in the land should be considered to be appurtenant to it or rather, an accretion to it. The situation in such a case would be analogous to that of a house which is subsequently constructed or a tree which is subsequently planted on a land which is already mortgaged. Reference in this connection might be made to the following cases:-

Reynolds v. Ashby and Son (1904) AC 466, R. M. P. M. Chettiar Firm v. Siemens (India) Ltd. AIR 1933 Ran 195, Mohammed Ibrahim Vs. Northern Circars Fibre Trading Co., .

The basis of accretion in the present case being admittedly in existence and in the ownership of the Company at the date of execution of the deed, specification of immovable property could be given and registration cannot be said to be impossible on that score. Learned counsel concedes that, apart from the land on which the Mill stands, there is no other independent immovable property which can be said to be after-acquired or future and to which the charge in the present case can be said to have attached itself.

19. For the above reasons We would hold that so far as the charge in question in the present case is concerned, the debenture of the third series required registration u/s 17(1)(b) of the Registration Act.

20. Section 49 of the Indian Registration Act provides for the consequences of non-registration of documents which are compulsorily registrable u/s 17 of the said Act or under the provisions of the Transfer of Property Act. According to it no document which is required to be registered by Section 17 of the Registration Act or under the Transfer of Property Act, which is not so registered shall affect any immovable property comprised therein, nor shall it be received as evidence of any transaction affecting such property. The combined effect of Sections 17 and 49 of the Indian Registration Act, therefore, in our opinion is to make debentures of the third series ineffective so far as they seek to create a charge on immovable property of the Company.

21. In the end the learned counsel argued that, in any case, the appellants should be declared to be secured creditors so far as moveable property is concerned. In this connection he wanted to take us into the report of the Commissioner and to argue with respect to every specific item as to whether it should be considered to be movable or immovable property. Whether a property which is affixed to the earth should be treated as movable or immovable is a matter depending on the question as to how and in what manner it is affixed to the earth and what was the real intention, of such affixation. If the property was affixed in such a manner as to indicate that the intention of such affixation was to use the machinery in such a way as to make a permanent part and parcel of the land in which it is embedded in our opinion it should be deemed to be a immovable property. On the other hand, if it consists of tools or other items which are not intended to be used thus and are not attached to the earth in such manner and with this intent, such articles should be deemed to be movable properties. On behalf of the respondent the learned counsel has stated that the question as to whether any particular property is movable or immovable should be left open to be determined by the learned Company Judge when the case goes back to Mm. Learned counsel for the appellant agrees to this procedure. We have, already pointed out the broad lines of distinction between movable and immovable property, and when the question does arise before the learned Company Judge, we have no doubt that, as agreed by the parties before us, he would go into the matter again and re-determine the question with reference to the specific items in connection with which it is raised. In this view of the matter,

the declaration made by the learned Company Judge will have to be modified.

22. This appeal is, therefore, partly allowed and the holders of the third series of debentures are hereby declared to be secured creditors in respect of the movable properties but not in respect of the immovable properties in the ownership of the Company at the date of the execution of the debentures or subsequent accretions to the said immovable properties.

23. In the circumstances of the case, we make no order as to costs.