

(2007) 09 AP CK 0061

In the Andhra Pradesh High Court

Case No : Writ Petition No. 11891 of 2007

M.K. Ramesh Kumar

APPELLANT

Vs

Asset. Reconstruction Company (India) Limited and Others

RESPONDENT

Date of Decision : 28-09-2007

Acts Referred:

Companies Act, 1956 — Section 94, 94(1)
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 163
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17(1), 18
Transfer of Property Act, 1882 — Section 108, 4, 43, 58, 6

Citation : AIR 2008 AP 45 : (2008) 3 BC 258

Hon'ble Judges : G.S. Singhvi, C.J

Bench : Single Bench

Advocate : C.V. Mohan Reddy, sisted by P. Jagadish Chandra Prasad, for the Appellant; S.R. Ashok, assisted by P. Sriharsha Reddy, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Singhvi, C.J.—Whether conveyance deed dated 11.6.1996 executed by the Government of Andhra Pradesh in favour of Smt. Krishna Balachander in respect of plot bearing No. 240/A admeasuring 4622 square feet situated at Marredpalli, Secunderabad could be treated as an accession to mortgage executed by her in favour of the State Bank of India (for short "the Bank") within the meaning of Section 70 of the Transfer of Property Act, 1882 (for short, "the 1882 Act") and whether respondent No. 1 - Asset Reconstruction Company (India) Ltd. with whom the Bank entered into Assignment Agreement dated 31.3.2005 and transferred all the loan incidents can recover its dues by disposing of the plot and the building constructed over it, are the questions which arise for determination in this petition filed under Article 226 of the Constitution of India by Shri M.K. Ramesh Kumar through his General Power of Attorney M. Kartikeyan for quashing order dated 30.4.2007 passed by the Debts Recovery Appellate Tribunal at

Chennai (for short, "the Appellate Tribunal") in SARFAESI - 105/2007 confirming order dated 13.2.2007 passed by the Debts Recovery Tribunal, Hyderabad (for short, "the Tribunal") in S.A. No. 125 of 2006.

2. The Government of Andhra Pradesh owned the plot in question. The same was leased out to Uppalanchi Venkateswara Rao and Uppalanchi Bala Rajaiah for a period of 30 years commencing from 3.6.1970. After the plot changed three hands, Shri Indraprakash sold leasehold rights in favour of Smt. Krishna Balachander by registered deed dated 13.8.1975. She created an equitable mortgage in favour of the Bank on 24.7.1979 by depositing the sale deed as a security for the credit facilities provided by the Bank to M/s. Abilash Rubber Products and India Rubber Products. On 28.1.1998, Smt. Krishna Balachander extended the equitable mortgage for securing further credit facilities in favour of M/s. India Rubber Products, of which her husband was a Director. While doing so, she unequivocally stated that the property is in her sole occupation and there is neither any subsisting agreement for the sale of the property nor there is any prospect of any intending purchaser taking possession of it or part thereof.

3. After four years of extending the term of equitable mortgage executed in favour of the Bank, Smt. Krishna Balachander is said to have sold the property, which bears number MCH 10-2-240/A (new number 10-2-347/1) to the petitioner by registered sale deed dated 9.12.2002 by representing that she has purchased the land from the government vide registered conveyance deed dated 10.6.1996 and there was no encumbrance over it.

4. On account of failure of the borrower to repay the amount due, the Bank filed an application u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, "the 1993 Act") for recovery of Rs. 5,26,20,679/- with future interest and term loan of Rs. 1,14,603.00. The same was registered as O.A. No. 457 of 2000.

5. During the pendency of the O.A., the Bank entered into Assignment Agreement dated 30.5.2005 with respondent No. 1 whereunder the latter became true and legal beneficial owner of all incidents of loan including the credit facilities extended to M/s. India Rubber Products. After sometime, respondent No. 1 issued notice dated 12.1.2006 to the borrower u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the 2002 Act") requiring it to pay Rs. 13,46,20,198/-. Similar notice was issued to Smt. Krishna Balachander on 2.2.2006. Neither of them replied to the notice nor paid the dues. However, the petitioner, who claims to have purchased the property from Smt. Krishna Balachander, sent communication dated 26.7.2006 through his advocate to contest the action initiated by respondent No. 1. After some correspondence with the petitioner's advocate, the Authorised Officer of respondent No. 1 issued communication dated 10.11.2006 to Smt. Krishna Balachander intimating her that symbolic possession of the secured assets i.e. house bearing No. 10-2-240/A has been taken. A copy of possession notice was also annexed with

communication dated 10.11.2006. This was followed by eviction notice dated 23.2.2007 sent by the Authorised Officer to the petitioner and Smt. Krishna Balachander. At that stage, the petitioner filed an application u/s 17(1) of the 2002 Act for issue of a direction to respondent No. 1 to redeliver possession of the property by contending that he had purchased the house property by registered sale deed and the mortgage deed dated 28.1.1998 executed by Smt. Krishna Balachander in favour of the Bank is not binding on him. The same was registered as S.A. No. 125 of 2006. Respondent No. 1 contested the application and claimed that the sale deed executed by Smt. Krishna Balachander in favour of the petitioner is not binding on it.

6. By an order dated 13.2.2007, the Presiding Officer of the Tribunal dismissed the application. The relevant portions of that order are extracted below:

The next argument advanced by the learned Counsel for the respondent is that the conversion of the leasehold rights into absolute ownership rights is an accession to the property and, therefore, it comes within the purview of the Transfer of Property Act. According to Section 70 of Transfer of Property Act "if, after the date of a mortgage any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession." Whether the word "Accession" to the property will include conversion of leasehold rights into ownership rights is the point for consideration before this Tribunal. If the accession of the property referred in Section 70 of Transfer of Property Act only deals with the physical accession, then the respondent bank will not be entitled to exercise the rights of mortgage in respect of the ownership rights. The meaning of the word "accession" according to the Oxford Dictionary is "the attachment of a position of rank; the formal acceptance of a treaty or joining of an association; a new item added to a collection of books or artifacts. Even seeing the definition it is an attainment of a position or a rank and now the leasehold rights of the property in question have become the absolute rights and the owner thereto i.e. Mrs. K.K. Balachander has attained the position of an owner from the position of a lessee and whatever that accrued to the benefit of the mortgagor will also accrue to the benefit of the mortgagee and in these circumstances, I am of clear conclusion that the leasehold rights which were converted into ownership rights will accrue to the benefit of the mortgagee and, therefore, this question is answered accordingly. It can also be seen that the extension of mortgage was done subsequent to the attainment of ownership rights by Smt. K. K. Balachander and, therefore, there is a clear intention on the part of Mrs. K.K. Balachander to mortgage the property in favour of the respondent and in these circumstances, I hold that the respondent is entitled to proceed against the mortgaged properties belonging to Mrs. K.K. Balachander and whatever the rights accrued to the present applicant will be subject to the mortgage and, therefore, the respondent bank is entitled to proceed against the property and in these circumstances, I have no hesitation in dismissing the S.A. but in the circumstances without costs.

7. The petitioner challenged the order of the Tribunal by filing an appeal u/s 18 of the 2002 Act, which was dismissed by the Appellate Tribunal vide order dated 30.4.2007. The Appellate Tribunal held that in terms of Section 70 of the Transfer of Property Act, the accession made to the mortgage property after the date of mortgage will form part of the mortgage and, therefore, the sale made in favour of the appellant will be subject to the right of the Bank to recover its due in accordance with law.

8. The petitioner has prayed for quashing order dated 30.4.2007 by contending that the Tribunal and the Appellate Tribunal have not considered the points raised in S.A. No. 125 of 2006 and SARFAESI No. 105/2007 including the one that respondent No. 1 cannot dispose of the property in question by invoking Section 13(4) of the 2002 Act because Smt. Krishna Balachander did not deposit the title deed for securing repayment of the credit facilities extended to M/s. India Rubber Products Ltd. According to the petitioner, conveyance deed dated 11.6.1996 executed by the government in favour of Smt. Krishna Balachander did not become part of the equitable mortgage executed by her in favour of the Bank and, therefore, respondent No. 1 cannot take recourse to the provisions of the 2002 Act for recovery of the dues by disposing of the plot and the building constructed over it.

9. Shri C.V. Mohan Reddy, learned Senior Counsel appearing for the petitioner extensively referred to documents annexed with the writ petition including extension deed dated 28.1.1998 executed by Smt. Krishna Balachander in favour of the Bank to show that she had given security only of leasehold rights and not the title acquired on the basis of conveyance deed dated 11.6.1996 and argued that respondent No. 1 cannot recover its dues by disposing of the house property, which was purchased by the petitioner through registered sale deed dated 9.12.2002. He relied on the judgments of the Supreme Court in *Shrimant Appasaheb Tuljaram Desai and Others Vs. Bhalchandra Vithalrao Thube*, *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, and *K.J. Nathan Vs. S.V. Maruty Reddy and Others*, and of Allahabad High Court in *Baljit Singh (deceased by L.R's) Vs. J.I. Cunningham and Others*, and argued that mortgage of the leasehold right cannot be treated as a mortgage of the title acquired by Smt. Krishna Balachander on the basis of conveyance deed executed in her favour by the State Government on 11.6.1996. Learned Senior Counsel emphasised that while executing equitable mortgage on 28.1.1998, Smt. Krishna Balachander did not make a mention of the purchase of property by her vide conveyance deed dated 11.6.1996 and, therefore, the title of the property cannot be treated to have been mortgaged in favour of the Bank entitling respondent No. 1 to take possession of the property.

10. Shri S.R. Ashok, learned Senior Counsel appearing for respondent No. 1 relied on the judgment of the Privy Council in *Moti Lal v. Bai Mani* AIR 1925 PC 86 and two Full Bench judgments of Patna High Court in *Mahanth Sukhdeo Das and Another Vs. Kashi Prasad Tiwari and Others*, and *Sidheshwar Prasad Singh*

and Others Vs. Ram Saroop Singh and Others, and argued that the title acquired by Smt. Krishna Balachander during the currency of the equitable mortgage of leasehold rights will automatically accrue the mortgagee i.e. the Bank and being an assignee of the loan advanced by the Bank to M/s. India Rubber Products, respondent No. 1 is entitled to take action under Sections 13(2) and 13(4) qua the mortgaged property for recovery of the dues. Learned Senior Counsel referred to Clauses 2 and 8 of sale deed dated 9.12.2002 executed by Smt. Krishna Balachander in favour of the petitioner and argued that if the latter feels that he has been defrauded by the vendor, then he can avail appropriate legal remedy for recovery of the sale consideration with interest and also claim damages.

11. We have considered the respective submissions and scrutinised the records. Section 70 of the 1882 Act reads as under:

70. Accession to mortgaged property. - If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

12. The word "accession" used in the above reproduced provision has not been defined in the 1882 Act. Therefore, it will be useful to notice the dictionary meaning of the word. In Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edition), the author has extracted the meaning of the word "accession" from some of the judgments. The same read as under:

Accession is a mode of acquiring property as an addition to existing property by natural growth or by application of human labour. (See Cent. Dict.). In its broadest sense it may be defined to be the means by which title to the increments to one's property movable or immovable is acquired, whether by natural or artificial means (as) accession of a province to an empire. In the restricted sense, in which it is generally used in law, it applies to the acquisition of generally used in law, it applies to the acquisition of title to the increments to one's movable property, brought about by artificial means, such as labour or the addition of material other than the intermixture of goods or things of the same kind.

13. As per Black's Law Dictionary (7th Edition), the word "accession" means:

1. The act of acceding or agreeing (the family's accession to the kidnapper's demands).
2. A coming into possession of a right or office (as promised, the state's budget was balanced within two years after the governor's accession).
3. (International Law) The process by which a nation becomes a party to a treaty that has already been agreed on by other nations (Italy became a party to the nuclear-arms treaty by accession). - Also termed adherence; adhesion.

4. The acquisition of title to personal property by bestowing labour on a raw material to convert it to another thing (the owner's accession to the lumber produced from his land). - Also termed (in Roman law) accession.

5. A property owner's right to all that is added to the land, naturally or by labour, including land left by floods and improvements made by others (the newly poured concrete driveway became the homeowner's property by accession).

14. In *Motilal v. Bai Mani* (supra), the Privy Council held that where after shares, in a company, were pledged, the company issued fresh shares and allotted them to the old shareholders taking the call money from the yearly dividend payable on the old shares, on which they had resolved to pay a fixed interest of 6 per centum per annum, the new shares were "increase or profit" and the pledgee must return them to the pledgor along with the old shares. These additional shares were, in the opinion of their Lordships of Privy Council, accessions to the shares expressly pledged or hypothecated, and the pledgor was entitled to recover them.

15. The ratio of the above noted judgment was applied by the Supreme Court in *Standard Chartered Bank and Another Vs. The Custodian and Another*, . In that case, the Supreme Court considered the question whether bonus shares, dividend and interest accrued on the pledged shares and debentures were accretions to the pledged stocks and formed part of the pledged property, which is to be returned by the pledgee only when the pledged goods are to be returned and answered the same in affirmative.

16. Their Lordships distinguished two earlier judgments in *Commissioner of Income Tax, Bihar Vs. Dalmia Investment Co. Ltd.*, and *Hunsur Plywood Works Ltd. Vs. Commissioner of Income Tax*,) and held:

In our opinion the Court rightly came to the conclusion that bonus share is an accretion. A bonus share is issued when the company capitalises its profits by transferring an amount equal to the face value of the share from its reserve to the nominal capital. In other words the undistributed profit of the company is retained by the company under the head of capital against the issue of further shares to its shareholders. Bonus shares have, therefore, been described as a distribution of capitalised undivided profit. Section 94 of the Companies Act refers to the power of a limited company to alter its share capital. u/s 94(1)(a) it has power to increase its capital share while under Clause (d) it can sub-divide its share into shares of smaller amount. Whereas in a case of sub-division an existing share is simply divided or split and it may be argued that no new share or capital is created, but there can be little doubt that in the case of issue of bonus share there is an increase in the capital of the company by transferring of an amount from its reserve to the capital account and thereby resulting in additional shares being issued to the shareholders. A bonus share is a property which comes into existence with an identity and value of its own and capable of

being bought and sold as such. Neither in Dalmia Investment nor in Hunsur Plywood case was this Court concerned with a question whether the bonus share could be regarded as an accretion or not. This Court in those cases was only concerned with a question relating to the valuation of the bonus share for tax purposes.

17. On the other hand the Privy Council in *Motilal Hirabhai v. Bai Mani* had to consider as to whether the pledgee was required to return to the pledgor, on redemption, bonus shares which had been issued. The plea taken by the pledgee in that case was that the pledgee was only required to return the original shares which were pledged and not the bonus shares which were received. Rejecting this contention it was held that the bonus shares were received as arising out of and appertaining to the original shares and that it was impossible to contend that the right to these shares could be differentiated from the right to the original shares. Referring to Section 163 of the Contract Act the Privy Council held that:

These shares (bonus shares) are clearly accessions to the shares expressly pledged or hypothecated, and the pledgor or his representative, the present plaintiff, is entitled to recover the same.

Applying the same logic it must follow that the dividend and interest which was received by the plaintiffs and which was relatable to the pledged stocks must also be regarded as accretions thereto.

18. In *Pratap Chand Vs. Ram Narayan and Another*, , the Supreme Court considered the question whether the "Sir" land, which came into possession of the appellant on the extinction of the ex-proprietary tenancy of the landholder, can be regarded as accession to the mortgage and the mortgagee is entitled to half share of the lands. The facts of that case were that one Ramchandar Jat originally owned Annas - 10/8 share in Mauza Tamalawadi, while the rest belonged to others.

19. Ramchandar executed a simple mortgage deed on July 27, 1920 in favour of Seth Ram Jiwan and two minors Ram Narain and Radhey Sham. On August 27, 1926, the appellant purchased Annas -5/4 share belonging to the other shareholders in the village. Thereafter, he brought a suit against Ramchandar for profits. The same was decreed. In execution of the decree, the appellant purchased the entire Annas -10/8 share of Ramchandar in the village. Thus, he became the owner of the entire village subject be the mortgage of the respondents on Annas -5/4 share therein. On July 27, 1932, the respondents sued Ramchandar on the basis of the mortgage deed. The appellant was a party to the suit. A preliminary decree for sale was passed in March, 1937. This was followed by a final decree.

20. Thereafter, the property was put to sale and purchased by the respondents. The sale was confirmed on April 12, 1940. Ramchandar Jat held "Sir" land in certain khasras with a total area of 252.49 acres. On the sale of Ramchandar's share to the appellant, Ramchandar became an ex-proprietary tenant of his "Sir"

land. Thereafter Ramchandar was ejected from his ex-proprietary tenancy sometime in 1936 and the lands came into possession of the appellant. There were certain other lands which were nominally recorded as Muafi Khairati in the name of Ramchandar's mother but were actually in the possession of Ramchandar. It appears that Ramchandar was ejected from these lands also and they came into the possession of the appellant. Further the appellant as a lambardar came into possession of certain other lands by surrender or otherwise. In 1942, the respondents filed a suit for partition and claimed half share in the lands of Ramchandar and others, which came into the possession of the appellant. Their case was that these lands were accession to the mortgage in their favour. The Sub-Divisional Officer rejected the plea of the respondents. Thereupon, the respondents filed a suit for declaration in the civil court. The trial court partly decreed the suit. Consequently, the respondents went up in appeal to the High Court, which was allowed to the extent of the respondents' claim to one-half share in the "Sir" lands held by Ramchandar. On appeal, the Supreme Court noted that the mortgage covered "Sir" plots and held:

...We have already pointed out that the mortgage covered the sir plots also so far as the proprietary rights in them were concerned. Therefore, when Ramchandar's ex-proprietary rights came to an end and the land came into the possession of the appellant and became khudkashat, the mortgage would cover this khudkashat land to the extent of the mortgagees' share therein. It is true that if Ramchandar's ex-proprietary tenancy had continued, the mortgagee would have no right to ask for half share in it; but when the ex-proprietary tenancy was extinguished and this land came in the possession of the lambardar (mortgagor) it was an accession to the mortgage u/s 70 of the Transfer of Property Act and the mortgagees could claim a share in it. It was however urged that accession to be available to the mortgage must be a legal accession. We however see no illegality in the accession which took place. There is also no doubt that the accession took place when the mortgage was still subsisting. Therefore, we agree with the High Court that on the ex-proprietary tenancy being extinguished, the sir land which would otherwise have remained in the exclusive possession of Ramchandar as an ex-proprietary tenant became an accession to the mortgaged property and the respondents would be entitled to half of it on their purchasing the - 1/5/4 share in execution of the decree on the mortgage. The fact that the rent of an ex-proprietary tenant is due to the person whose ex-proprietary tenant he becomes by virtue of the sale or mortgage with possession would make no difference after ex-proprietary tenancy is extinguished, for on such extinction the land would go to the entire proprietary body and would thus in this case be an accession to the mortgage to the extent of the share mortgaged.

21. In Chapsibhai Dhanjibhai Danad Vs. Purushottam, , the Supreme Court interpreted Section 108(d) of the 1882 Act and held:

...if any accession is made to the leased property during the continuance of a

lease, such accession is deemed to be comprised in the lease. If the accession is by encroachment by the lessee, and the lessee acquires title thereto by prescription, he must surrender such accession together with the leased land to the lessor at the expiry of the term. The presumption is that the land so encroached upon is added to the tenure and forms part thereof for the benefit of the tenant so long as the lease continues and afterwards for the benefit of the landlord.

22. In *Sidheshwar Prasad v. Ram Saroop* (supra), the Full Bench of Patna High Court interpreted Section 70 of the 1882 Act and held that there is no reason to restrict the word "accession" to physical additions to the mortgaged property and exclude incorporeal accession i.e. acquisition of an interest in the property. Some of the observations made in that judgment, which are useful for deciding the issue raised by the petitioner, are extracted below:

...Accretion to the mortgaged property and improvements upon it by construction of building or electric installations are obvious cases of accession. Property, however, is a bundle of rights, and enlargement or diminution of some of the rights which constitute property will be tantamount to accession within the meaning of Section 70 or, for the matter of that, Section 63. Whatever tends to increase the value of the security, either by additions made to the mortgaged property or by enlargement of the right in it, would constitute accession. On the same principle, if after the mortgage the mortgaged property is lost to the mortgagor by operation of law or otherwise and the mortgagor thereafter acquires some interest therein, though not the whole interest he owned at the time of mortgage, it is, in my opinion, an accession to the mortgaged property, so as to be available to the mortgagee. I do not see any principle or logic to deprive the mortgagee of his right to recover the mortgage debt by sale of the limited right of the mortgagor in such bakasht lands....

Identity of interest in the mortgaged property and the accreted lands is not the foundation of the principle of accession. Wherever there is an alteration in the interests of the mortgaged property, the mortgagee will be entitled to the interest left with the mortgagor, be it an enhanced interest or diminished interest.

23. The ratio of the above noted judgments is that whatever tends to increase the value of the security either by addition made to the mortgaged property or by enlargement of the right in it, the same would constitute accession. Therefore, even though while executing deed dated 28.1.1998 for extension of the equitable mortgage of the plot, Smt. Krishna Balachander did not make a mention of conveyance deed dated 11.6.1996, the title acquired by her in the property would constitute accession within the meaning of Section 70 of the 1882 Act, and respondent No. 1 cannot be prevented from disposing of the house property for realisation of its dues by taking recourse to the provisions of the 2002 Act.

24. We may now advert to the judgments on which reliance has been placed by

Sri C.V. Mohan Reddy. In Appasaheb v. Balachandra (supra), the Supreme Court interpreted the Bombay Hereditary Offices Act, 1874 and held that where grantee of inam lands, which constitute watan properties within the meaning of Section 4 of the Act, constructed a wada and the wada was not subject of the grant, the same could not be treated as accession to the watan properties. Paragraphs 5 and 6 of the judgment, which contained discussion on the subject, read thus:

5. What has to be decided is, do the attributes of "Watan Property" accrue to the Wada which was constructed after the grant on land which was admittedly "Watan Property"" as defined by the Bombay Hereditary Offices Act, 1874 (Bombay Act No. III of 1874), hereinafter referred to as the Act. In appeal No. 760 of 1942, Chagla, J. took the view that the house in that case was an accession to the side on which it stood. Accordingly, it must partake of the character of the land on which it stood. The learned Judge stated that the question which he had to determine was whether the house was immovable property held for the performance of the duty appertaining to an hereditary office within the meaning of Section 4 of the Act. Having regard to the definition of "immovable property" in the Bombay General Clauses Act he was of the opinion that the house certainly formed part of the Immovable property which was held for the performance of the duty appertaining to the hereditary office of the Watan and that the only answer to the question "what is the Immovable property which is held for the performance of the duty u/s 4?" can be both the land and the house. If the house forms part of the Immovable property it is not possible to sever the two and to say that it is only the land which is Watan property and not the house which is permanently fastened to it. Shah, J. relied upon the decision of Chagla, J. and held that the land on which the Wada in the present case stood, being Watan property, the Wada must also be deemed to have acquired that character. The Division Bench which heard the appeal against the decision of Shah, J. was of the opinion that although a house built on land must be regarded as Immovable property it did not follow that like the land on which it was built the house became Watan property. The fact that a house subsequently built became Immovable property would have no material bearing on the question whether it was Watan property or not. In order that the house may be regarded as Watan property it must satisfy the test laid down by the definition of the word "Watan Property"" in Section 4 of the Act and that if the word "held"" was construed in the way in which the learned Judges of the Division Bench thought it should be, it would be difficult to accept the view that a house subsequently built by a watandar on a part of the Watan land could be said to be held by him for the performance of his duties of a hereditary office. The learned Judges of the Division Bench accordingly were of the opinion that Mr. Justice Shah erred in so holding.

5A. "Watan property"" has been defined in the Act to mean:

The moveable or Immovable property held, acquired, or assigned for providing

remuneration for the performance of the duty appertaining to an hereditary office. It included a right to levy customary fees or perquisites, in money or in kind, whether at fixed times or otherwise. It includes cash payments in addition to the original watan property made voluntarily by the State Government and subject periodically to modification or withdrawal. The inam lands of Nandi were undoubtedly held as remuneration for the performance of the duty appertaining to an hereditary office and therefore were Watan properties. On the findings of the courts below the Wada in question was not the subject of the grant. In our opinion, therefore, at no time was it held for providing remuneration for the performance of the duty appertaining to a hereditary office. Nor could it be said to have been acquired for performance of any such duty. It had been constructed some time subsequent to the grant either by the grantee or his descendants and there is no indication on the record that it was constructed for the purpose of providing remuneration for the performance of the duty appertaining to a hereditary office. To that extent at least it appears to be clear that the Wada in question does not come within the definition of Watan property as defined in the Act. The only question is whether having been constructed on land which is Watan property and being immovable property within the meaning of the Bombay General Clauses Act, does it partake of the character of the land on which it stood? On behalf of the appellants it was argued that the Wada is an accession to the Watan property, namely, the land of village Nandi. It seems to us however, that construction of a Wada on land which is Watan property is not an accession to it, as accession to the land would suggest that over a course of years imperceptible accretion to the land has taken place and it was impossible to distinguish the original land from the accreted land. In such a case the accreted land may possibly partake of the character of the original land. Adjacent lands to the original land which have been acquired and can be distinguished cannot partake of the character of the original land.

6. On behalf of the appellants it was argued that the right, title and interest of the grantor had to be looked at first in construing a grant and if it appeared from the terms thereof that it did not contain any reservation or exception then all the rights, title and interest of the grantor which he was capable of granting would pass to the grantee. The grantor in this case was the Government which could have built a construction on the land granted or dug tube wells on it. The grantee, therefore, could also build a house or any other structure on the land. On the other hand, it was contended on behalf of the respondent that the position of a watandar was not that of an absolute owner of the land. He held the land on certain conditions. The land was liable to forfeiture if he was guilty of certain acts mentioned in Section 60 and Schedule II of the Act. We will assume, there being nothing to the contrary in the Sanad, that the grantee was not restricted from constructing a building on the land. From that, however, it does not necessarily follow that the building so constructed became Watan property within the meaning of the Act. If the Government could have built a construction on the land it could also have dismantled it and removed the material with which

it was made. Similarly, the grantee could do so, there being no restriction in that regard in the terms of the Sanad. It seems to us that on a proper construction of the Sanad there was no impediment in the way of the grantee from dismantling the house which he had built and removing the materials with which it had been constructed and selling the same. Indeed, unless it is held that a house constructed on the land partakes of the character of the land, it is difficult to see how the grantee is prevented from selling or mortgaging it but not the land on which it stood. It seems to us, therefore, that the Wada in the present case although immovable property did not partake of the character of the land on which it was constructed because it was severable from the land and was capable of being dismantled and the materials of which could be removed and sold without violating any of the provisions of the Act. In our opinion, the decision of the Division Bench of the High Court that the Wada was not Watan property appears to be correct.

25. In *Jumma Masjid v. Kodimaniandra Deviah* (supra), the Supreme Court interpreted Sections 6(a) and 43 of the 1882 Act and held:

Section 43 embodies a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. For the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it. Where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail u/s 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in Section 43, however fraudulent the act of the transferor might have been.

26. In *K.J. Nathan v. S.V. Maruthi Rao* (supra), the Supreme Court interpreted Section 58(f) and highlighted the distinction between equitable mortgage as under in English law and mortgage by deposit of title deeds recognized under the Transfer of Property Act in India and held:

In England an equitable mortgage can be created either (1) by actual deposit of title-deeds, in which case parol evidence is admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title-deeds, then by a memorandum in writing, purporting to create a security for money advanced. In either case it does not operate as an actual conveyance though it is enforceable in equity; whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee.

27. In *Baljit Singh v. Cunningham* (supra), a learned Single Judge of Allahabad High Court noted that the land, which belonged to the State Government and was managed by the Cantonment Board, was not subject matter of mortgage and held that mortgage of the building does not necessarily include mortgage of the site even though the mortgagor was the lessee.

28. In our opinion, the ratio of none of above noted judgments has bearing on the issue raised in this petition because in neither of the cases, the Supreme Court and the learned Single Judge of Allahabad High Court considered the issue of accession of rights and interest to the mortgaged property.

29. At this stage, it will be useful to notice some features of deed dated 28.1.1998 executed by Smt. Krishna Balachander in favour of the bank and Clauses 2 and 8 of sale deed dated 9.12.2002. The same read as under:

Deed Dated 28.1.1998

1. I/We am/are writing this to confirm that I/We have deposited with the Bank on 24-7-1979 the documents of title relating to my/our property situated at Marradpally, Seunderabad Village _____ Taluk _____ District described below (hereinafter referred to as the "said property") with the intention of creating an equitable mortgage over the said property by way of security for the amount due to the Bank from me/us the concern of M/s. India Rubber Products under the following credit facilities extended to me/us the concern of M/s. India Rubber Products by the Bank.

Nature of facility Limit a) Cash credit (MT) 7-00 lacs b) Cash credit 11-00 c) Cash credit 4-00 d) MTL 1-50 _____ Total 25-30 lacs _____ and also as security for all other liabilities and indebtedness past present and future to the Bank....

3. This is to confirm that consequent upon the additional credit facilities as stated above and for the purpose of having the additional limits of the credit facilities covered by the security of the property, I/We called on you on 27-1-98 and admitted and declared in the presence of yourself and Shri S. Papayya Raju that the benefit to the Bank of the mortgage by deposit of title deeds relating to the said property created, as stated above on 24-7-79 shall also apply for stand extended to and cover the enhanced aggregate limits of Rs. 6,35,00,000/- granted to me/us the concern of M/s. India Rubber Ltd., M/s. Abhilash Rubber Products, India Rubber Products by the Bank besides the said property being security for all the liabilities and indebtedness.

4. The said property is under my/our sole occupation.

5. There is no subsisting agreement for the sale of the said property nor has any prospective of any intending purchaser taken possession of it or part of it. The said property is free from encumbrances save mortgage already created in favour of the Bank.

Sale deed dated 9.12.2002

2. The vendor do hereby assures that the scheduled property has not been alienated or encumbered in any manner whatsoever and the vendor hereby declares that the scheduled property hereby sold is free from all encumbrances, charges, prior sales, gifts, mortgages, liens, statutory liabilities, disputes or Court attachments etc.

8. Vendor hereby asserts and confesses that all the assertions made above are true and correct and if any defect is found in the title of the vendor or any lacunae in obtaining any statutory clearance and due to which if the vendee is deprived of the possession and enjoyment of the scheduled property conveyed hereunder, either wholly or any part thereof the vendor shall be responsible and liable to compensate the same to the vendee at his own costs. The vendor hereby indemnifies and agreed to keep always indemnified the vendee against any loss or expenses caused to him for reasons of any defect in vendor's title or his capacity to sell the scheduled property.

30. A careful reading of the deed dated 28.1.1998 makes it clear that while executing the same Smt. Krishna Balachander was conscious of the existing mortgage and, therefore, it was mentioned that she had deposited with the Bank on 24.7.1979 the document of title relating to the property with the intention to create an equitable mortgage by way of security for the amount due to the Bank. She then declared that the existing mortgage shall stand extended and cover the enhanced aggregate limit of Rs. 6,35,00,000/- besides the said property being the security for all the liabilities and indebtedness. Therefore, even though no mention was made of the conveyance dated 11.6.1996 executed by the Government in her favour, the corporeal right acquired by her in the property by virtue of that deed will be deemed to have become part of the mortgage deed executed in favour of the Bank.

31. It appears to us that Smt. Krishna Balachander fraudulently entered into sale transaction dated 9.12.2002 with the petitioner by concealing the fact that the house property was already mortgaged with the Bank. Therefore, the only remedy available to the petitioner is to sue Smt. Krishna Balachander for recovery of the price with interest and damages.

32. On the basis of the above discussion, we hold that the petitioner has failed to make out a case for interference with the impugned order and the writ petition is liable to be dismissed. Ordered accordingly.

33. As a sequel to dismissal of the writ petition, WPMP. No. 14766 of 2007 filed by the petitioner for interim relief is also dismissed.