

(2017) 03 BOM CK 0225
In the Bombay High Court
Case No : 9804 of 2014

Mr. Mukesh Kothari

APPELLANT

Vs

State Bank of India, & Ors.

RESPONDENT

Date of Decision : 10-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 22 Rule 10](#), [Order 39 Rule 1](#) -
[Transfer of Property Act, 1882](#), [Section 58\(f\)](#) -
"Mortgage"

Citation : (2017) 03 BOM CK 0225

Hon'ble Judges : R. M. Borde, A. S. Gadkari

Bench : DIVISION BENCH

Advocate : Aashish Kamat, Nikhil Rajani, V. Deshpande, Raj Patel, Prakash Panjabi

Final Decision : Dismissed

Judgement

1. Heard.

2. Rule. With the consent of the parties, Petition is taken up for final disposal at the admission stage.

3. The Petitioner is objecting to the decision rendered by the Debts Recovery Appellate Tribunal at Mumbai in Appeal No. 117 of 2009 decided on 16th June 2014 confirming the decision rendered by the Debts Recovery Tribunal - III at Mumbai in S. A. No. 35 of 2007 decided on 16th April 2009. The Petitioner herein is purchaser of Flat No. 101, First Floor, Rajendra Kripa Cooperative Housing Society Ltd; Manish Darshan, Bidkanti Nagar, near Jain Temple, J. B. Nagar, Andheri (East), Mumbai - 59. The flat was purchased by Petitioner from Respondent No. 2 through a Saledeed dated 18th November 2006 for a sale consideration of Rs. 22.00 Lacs. According to Petitioner, the Sale Agreement was duly registered on 18th November 2006. The property has been purchased by Petitioner by obtaining housing loan from Respondent No. 3 - Allahabad Bank, in

whose favour Petitioner is stated to have created Equitable mortgage in respect of the said flat. The Petitioner claims that Respondent No. 1 - State Bank of India has taken steps under Section 13(4) of the SARFAESI Act and issued a possession notice on 12th April 2007 on the Petitioner. The Petitioner claims that he is neither a Borrower nor a Guarantor in respect of the loan availed by Respondent No. 2 from Respondent No. 1 - Bank.

4. There are two contentions raised by the Petitioner for resisting the proposed action under Section 13(4) of the SARFAESI Act at the instance of Respondent No.1 - (i) The Equitable mortgage created by Respondent No. 2 in favour of Respondent No. 1 - Bank is not a legal, valid and that the Respondent No. 1 - Bank has no right to proceed against the property in possession of Petitioner under the SARFAESI Act. The Petitioner prays for declaration of the possession notice dated 12th April 2007 as null and void; and (ii) it also contends that the Petitioner is bonafide purchaser for value, without notice of the Equitable Mortgage allegedly created in favour of the Respondent No. 1 - Bank. The Petitioner also contends that he did not have any knowledge in respect of initiation of proceedings under RDDB & FI Act by Respondent No. 1 and issuance of interim order of injunction by the Debts Recovery Tribunal at Bangalore. It is further contended that even otherwise the transaction of sale between Petitioner and Respondent No. 2 remains unaffected and that Respondent No. 1 - Bank does not have any entitlement to proceed against the Petitioner.

5. It is contended on behalf of Respondent No. 1 - Bank that the property in dispute has been mortgaged with Respondent No. 1 - Bank. The Respondent No. 2 has created the Equitable mortgage by deposit of original Title Deeds and the mortgage is prior in time and subsisting. The Petitioner does not have any right to create a mortgage in favour of Respondent No. 3 - Allahabad Bank in respect of the property in dispute and the mortgage created in favour of Respondent No. 1 - Bank being prior in time, shall have precedence over the mortgage allegedly created in favour of Respondent No. 3 - Allahabad Bank by Petitioner. It is also contended that the transaction of sale effected during operation of the order of injunction is illegal and as such sale does not have any binding effect on the Respondent No. 1 - Bank and further that the prior claim of Respondent No. 1 - Bank on the basis of the mortgage created by Respondent No. 2 - original owner of the property remains unaffected. The Petitioner does not have any right or entitlement to question the Equitable mortgage created by Respondent No. 2 in favour of Respondent No. 1 - Bank and more specifically when Respondent No.2 has not raised any question and has accepted the factum of creation of mortgage by his conduct of not raising any question in that behalf.

6. The Respondent No. 1 - Bank presented Original Application No. 47 of 2001 before the Debts Recovery Tribunal Karnataka at Bangalore for recovery of amount. During the pendency of Original Application No. 47 of 2001, Respondent No. 1 - Bank claimed an order of injunction which came to be issued by the Debts Recovery Tribunal as requested by Respondent No. 1 - Bank on 12th

February 2001 restraining Respondent No. 2 from transferring, alienating or otherwise dealing with the property in question. During the pendency of Original Application and operation of order of injunction, a transaction has been effected between Respondent No. 2 and Petitioner herein. The Petitioner, as stated above, questioned the action initiated by Respondent No. 1 - Bank under Section 13 (4) of the SARFAESI Act by presenting S. A. No. 35 of 2007 to the Debts Recovery Tribunal III at Mumbai. On consideration of contentions raised before the Tribunal, the Tribunal recorded finding that the transaction of mortgage entered into between Respondent No. 1 - Bank and Respondent No. 2 cannot be stated to have been proved. It is observed by the Tribunal that Respondent No. 1 - Bank has not produced the notification issued by the Government of Karnataka under Section 58 (f) of the Transfer of Property Act to demonstrate that Belgaum is the City notified by the State Government permitting execution of Equitable mortgage. In view of the failure of Respondent No. 1 - Bank to produce notification issued by the Government of Karnataka under Section 58 (f) of the Transfer of Property Act, the creation of mortgage by Respondent No. 1 - Bank by deposit of Title Deeds cannot be recognised. The Tribunal, however, considered the issue of transaction of sale effected by Respondent No. 2 in favour of Petitioner during the operation of order of injunction issued by the Debts Recovery Tribunal Karnataka at Bangalore and recorded the finding that such transaction being illegal one, Petitioner cannot claim any relief. The Appeal presented by Petitioner came to be dismissed by the Debts Recovery Tribunal - III at Mumbai.

7. Being aggrieved by the order passed by the Debts Recovery Tribunal III at Mumbai, Petitioner approached to the Debts Recovery Appellate Tribunal by presenting Appeal No. 117 of 2009 which came to be decided by the Appellate Forum on 16th June 2014. The Appellate Court apart from confirming the findings in respect of illegality of the sale between Petitioner and Respondent No. 2, has observed that Belgaum City is notified by Government of Karnataka under Section 58 (f) of the Transfer of Property Act and as such the transaction of Equitable mortgage created in favour of Respondent No. 1 - Bank is valid and subsisting and Respondent No. 1 - Bank can surely recover the amount by adopting measures as provided under Section 13 (4) of SARFAESI Act.

8. It is vehemently contended by the Counsel appearing for Petitioner that the transaction of sale between Respondent No. 2 and Petitioner is legal and valid, though entered into during the operation of order of injunction against Respondent No. 2. It is contended that Petitioner is neither a Borrower nor a Guarantor in respect of the loan secured by Respondent No. 2 from Respondent No. 1 - Bank. The Petitioner did not have any knowledge of creation of Equitable mortgage by Respondent No. 2 in favour of Respondent No. 1 - Bank. Even if it is assumed that the Equitable mortgage is created, since it is not in conformity with Section 58 (f) of the Transfer of Property Act, the Respondent No. 1 - Bank does not have any entitlement to recover the amount on the basis of such Equitable mortgage. It is contended that since the transaction between Petitioner and

Respondent No. 2 is legal and valid, Respondent No. 1 - Bank shall not be permitted to take measures by resorting to provisions of Section 13 (4) of the SARFAESI Act.

9. It is not a matter of doubt that Respondent No. 1 - Bank presented proceedings before the Debts Recovery Tribunal Karnataka at Bangalore under the provisions of RDDB & FI Act and the order of injunction restraining Respondent No. 2 from transferring, alienating or dealing with the disputed property has been issued on 16th April 2001 and the said order of injunction is subsisting. It is also not a matter of doubt that Respondent No. 2 was aware of the issuance of order of injunction and in breach of the restraining order he has entered into sale transaction with Petitioner. It is also worthwhile to note that Respondent No. 2 has not come forward to deny creation of Equitable mortgage concerning the disputed property with Respondent No. 1 - Bank. The transaction of mortgage entered into between Respondent No. 1 - Bank and Respondent No. 2 is disputable by the parties to the transaction and since Respondent No. 2 has preferred not to question the transaction, it would be a matter of serious doubt as to whether the Petitioner who has purchased property during operation of prohibitory order of injunction issued against Respondent No. 2 is entitled to question the same. In our view, the Petitioner prima facie does not have entitlement to question the validity of the Equitable mortgage created in favour of Respondent no. 1 - Bank by Respondent No. 2 especially when Respondent No. 2 who is a party to the transaction has preferred not to question the same and accepted it.

10. The alienation made by Respondent No. 1 - Bank in favour of Petitioner in defiance of the restraint order passed by the Debts Recovery Tribunal Karnataka at Bangalore has to be treated as having not taken place at all for its purposes. In this context, reliance can be placed on the judgment in the matter of Surjit Singh and others V/s Harbans Singh and others, reported in AIR 1996 SC 135. It is observed by the Apex Court in para No. 4 of the said judgment as below :

"If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes."

11. An identical question arose in the matter of Keshrimal Jivji Shah and another V/s Bank of Maharashtra and others, reported in 2004(3) Mh.L.J. 893. The question was - whether the transfer of immovable property in contravention of prohibitory direction or injunction order of a court is illegal or void. While dealing with the issue, the Division Bench of this Court has observed in paragraph 26 to 28 of the said judgment as quoted below :

" 26. We cannot accept Shri Naphade's contention that observations of the

Supreme Court in the case of Surjit Singh should be read as restricted to proceedings under Order 22 Rule 10 of Civil Procedure Code and the same cannot be extended to defiance of injunction order issued under Order 39 Rule 1 of Civil Procedure Code. Once the issue is placed on the pedestal of public policy and the very faith of litigants in Rule of law and administration of justice, then it is not possible to make the distinction or bifurcation suggested by Shri Naphade. It would mean that consequences of nullifying such transaction not being provided by the Statute, it would not lose its legal efficacy even if it is in utter disregard to or in violation of or breach of prohibitory order or order of injunction issued by a Court of law. It would mean that parties can breach and violate Court orders openly and with impunity and neither they nor the beneficiaries suffer any consequences. It is time that we recognise the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by Court of law, confers no right, title or interest in the transferee, as it is no transfer at all. The transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not party to the proceedings in which order of injunction or other prohibitory direction or restraint came to be issued. It is enough that the transferor is a party and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this course is not adopted then the tendency to flout orders of Courts which is increasing day by day can never be curbed. The Court exercises its powers on the foundation of respect and regard for its authority by litigating public. People would lose faith and respect completely if the Court does not curb and prevent this tendency. The note of caution of the Supreme Court must be consistently at the back of everybody's mind. Therefore, Shri Naphade is not right in distinction which he is trying to make.

27. Equally untenable is the contention of Shri Naphade that an order of injunction will bind only the transferor in this case. It is his submission that the said order does not bind the world at large. He submits that ownership rights are neither taken away nor restricted in any manner by order of injunction or other preventive directions. He submits that the transfer in favour of his client was thus neither invalid nor illegal, leave alone null and void. For the reasons already recorded above, we find it difficult to accept this contention of Shri Naphade. Decision of the Supreme Court in the case of Krishan Kumar Narula Vs. State of Jammu and Kashmir, reported in AIR 1967 SC 1386 has no application. There, the Supreme Court was distinguishing an order of stay from an order of injunction. The distinction was made in the context of consequences upon breach and violation of such orders. It is in that context that the Supreme Court observed that the order of stay is qua a Court, whereas an order of injunction reaches and touches a party to the lis. These observations cannot be applied when it is noticed that during the pendency of an order of injunction, immovable property, which is subject matter of restraint or injunction, is transferred. When this course is admittedly adopted, then there is no choice but to declare the transaction as illegal. There is no question of then deciding the nature and effect

of the order of injunction.

28. Mr. Naphade"s submissions overlook the effect of an order of injunction. An order issuing interlocutory injunction is issued with a view to preserve and protect status quo during the pendency of the suit or litigation. The true effect of such an order is, therefore, preservation of status quo prevailing as on the date of issuance of the order. Any alteration in the status quo as prevailing and directed to be maintained by the Court of law is not permissible except with leave or sanction of Court. It is well settled that if Courts are not to honour and implement their own orders and encourage party litigants, be they public authorities, to invent methods of their own to short circuit and give a go by to the obligations and liabilities incurred by them under orders of Courts, the rule of law will become casualty in the process - a consequence to be jealously averred by all and at any rate by the highest Courts in the State. (see AIR 2001 SC 2790 at P. 2792)."

12. In the light of the decision in the matter of Surjit Singh (cited supra) as well as considering the conclusion arrived at in the matter of Keshrimal Shah (cited supra), the transaction which is recorded in defiance of the prohibitory order shall have to be branded as illegal, if not void. In the matter of Ghanshyam Sarda V/s Shashikant Jha, Director, M/s. J. K. Jute Mills Company Limited and Others, reported in (2017) 1 SCC 599, the Supreme Court has considered the question of effect of transfer or alienation in violation of the prohibitory order and has observed that :

"legal consequences of what has been done in breach of or in violation of the order of stay or injunction can be undone and the parties could be put back to the same position as they stood immediately prior to such order of stay or injunction."

The Counsel appearing for Petitioners relying upon certain observations in para No. 25 of the aforesaid judgment contends that; the transaction of sale between Petitioner and Respondent No. 2 shall have to be deemed valid. The observations recorded in para No. 25 are as recorded below :

"If by disobedience the persons enjoined claim that they have validly effected some charge in the rights and liabilities of others, although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. As has been recorded in the aforesaid judgment."

13. As has been recorded in the aforesaid judgment as well as in the matter of Keshrimal Shah that the transaction may bind the parties but such transaction may not override the entitlement or right of any other party in whose favour the prohibitory order came to be issued. The transaction of sale entered into between Respondent No. 2 and Petitioner during operation of the prohibitory order may bind the parties but the said transaction will not have any effect on the prior claim of Respondent No. 1 - Bank as against Respondent No. 2 on the basis of creation of a prior mortgage in favour of Respondent No. 1 - Bank by

Respondent No. 2. The illegal transaction entered into between Respondent No. 2 and Petitioner will not bind or affect the entitlement of Respondent No. 1 - Bank.

14. The Petitioner has made reference to the judgment in the matter of Thomson Press (India) Limited V/s Nanak Builders and Investors Private Limited and Others, reported in (2013) 5 SCC 397. In paragraph no. 53 of the said judgment, the Apex Court has observed thus :

" 53. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor."

15. The preposition laid down in the judgment that the party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor is not at all disputable. The transaction entered into between Respondent No. 2 and Petitioner binds the parties, however, such illegal transaction does not have any precedence over the prior claim of Respondent No. 1 - Bank based upon the Equitable mortgage entered into between Respondent No. 1 - Bank and Respondent No. 2. The Petitioner has vehemently contended that Respondent No. 1 - Bank has failed to prove the prior claim on the basis of Equitable mortgage entered into between Respondent No. 1 - Bank and Respondent No. 2. It is contended that Belgaum is not the town notified by the Government of Karnataka for purposes of recording Equitable mortgage under Section 58 (f) of the Transfer of Property Act and as such the transaction of mortgage cannot be recognized.

16. It must be noted that the parties to the transaction i.e. Respondent No. 2 and more particularly Respondent No. 2 shall be deemed to have accepted the same since he had not questioned the transaction. The Petitioner who is purchaser of the property during operation of the prohibitory order of injunction is not entitled to question the transaction when the Respondent No. 2 who is the author of the said mortgage transaction does not dispute the same and moreover in the circumstance when the subsequent transaction of sale between Petitioner and Respondent No. 2 is illegal. Even otherwise, there does not appear to be any room for doubt that Belgaum was the District headquarter before reorganisation of the states and in view of Mysore Gazette dated 24th July 1969 the provisions of Section 58 (f) of the Transfer of Property Act are made applicable to all the

district headquarters in Mysore State.

17. The Counsel appearing for Respondent No. 1 - Bank has referred to certain notifications issued by the State of Karnataka. The extract of the list of notified places for deposit of Title Deeds in the State of Karnataka is downloaded from the Website of the State of Karnataka and there is a reference to district Belgaum in the list which has been brought to our notice. The Appellate Court has also referred to the Commentary of "Transfer of Property Act" by Mulla & Mulla and has recorded the finding that Belgaum is the town prescribed under Section 58(f) of the Transfer of Property Act, where Equitable Mortgage can be created. Merely because the original gazette has not been placed before the Court, will not lead to a conclusion that no Equitable mortgage can be created at Belgaum.

18. As has been recorded above, since Respondent No. 2 who has created equitable mortgage has not questioned the same, the transaction which is otherwise validly entered into cannot be nullified on the technical plea raised by the Petitioner who himself is staking claim on the basis of an illegal transaction. There are three requirements of the Mortgage Deed by deposit of Title Deed (i) Debt, (ii) Deposit of Title Deeds; and (iii) an intention that the Deeds shall be the security for the debt [K. J. Nathan V/s S.V.Maruthi Rao, AIR 1965 SC 430]. All the ingredients of the valid mortgage transaction do find place in the instant matter.

19. In our considered opinion, there is a valid mortgage in favour of Respondent No. 1 - Bank created by Respondent No. 2 and that such transaction is not at all been questioned by Respondent No. 2 - creator of the mortgage and as such Respondent No. 1 - Bank has entitlement to proceed under Section 13 (4) of the SARFAESI Act. As has been observed above, the transaction entered into by the Petitioner with Respondent No. 2 being illegal one, cannot be recognised and Petitioner does not have any right to question the measures taken by Respondent No. 1 Bank under the SARFAESI Act. It would be open for Petitioner to proceed against Respondent No. 2 for redressal of his grievance.

20. For the reasons recorded above, the Writ Petition does not deserve favourable consideration and as such dismissed.

21. Rule is discharged.

22. There shall be no order as to costs.