
(1987) 07 KL CK 0032
In the High Court Of Kerala
Case No : E.F.A. No. 9 of 1986

State Bank of India

APPELLANT

Vs

Viswaniriyat (P.) Limited and Another

RESPONDENT

Date of Decision : 09-07-1987

Acts Referred:

Companies Act, 1956 — Section 124, 125, 130, 132

Citation : (1989) 65 CompCas 795 : (1988) 1 ILR (Ker) 172

Hon'ble Judges : P.K. Shamsuddin, J;P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : C.K.S. Panicker, K.P. Balasubramonian, K.K. Ravindranath and P.C. Sasidharan, for the Appellant; S. Easwara Iyer, E. Subramoni and T.K. Chandrasekhar Das, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Menon, J.—The principal question for decision in this appeal concerns the interpretation of Section 125 of the Companies Act, 1956. The appellant is the State Bank of India, Willingdon Island and the appeal is against the order of the court below rejecting the appellant's claim under Order XXI, Rule 58, CPC against the attachment of properties of the defendant before judgment. The suit is by an unsecured creditor of the defendant company for recovery of money due to the plaintiff. Pending the suit, some of the items of immovable properties belonging to the defendant company were attached on 7th July, 1982, under Order 38, Rule 3 Criminal Procedure Code. The appellant-State Bank of India filed a claim against the attachment contending that the properties attached are subject to an equitable mortgage in favour of the bank and no attachment can be effected ignoring the mortgage. The suit was decreed on 4th August, 1984, and in EP 227 of 1984, the decreeholder brought items 1 and 2 of the attachment schedule to sale. The execution court ordered sale subject to the rights of the claimant bank to be adjudicated in proceedings initiated under Order 21, Rule 58 Criminal Procedure Code, Items 1 and 2 were sold on 11th October, 1985, and

the decreeholder himself purchased the same for Rs. 2,30,000. The claim was rejected by the impugned order of the court below dated 3rd April, 1986, and the claimant has come up in appeal.

2. The defendant company was allowed what is called an "Export Packing Credit Accommodation" by the claimant originally up to a limit of Rs. 50 lakhs, later increased to Rs. 100 lakhs. Exhibit A-4 dated 31st March, 1977, is a certificate issued by the Registrar of Companies to show that a pledge for Rs. 50 lakhs is registered under Sections 125 - 130 of the Companies Act. Exhibit A-5 shows that the pledge was increased from Rs. 50 lakhs to Rs. 100 lakhs with effect from 27th June, 1977. Exhibit A-1 series are the documents of title deposited by the defendant with the claimant bank as per exhibit A-2 letter dated 14th June, 1977. Exhibit A-2 reads :

" In compliance with the conditions of the Tripartite agreement entered into within ourselves, the State Trading Corporation of India Ltd. and the State Bank of India, we are pleased to forward herewith the following title deeds for depositing with you."

3. There is no dispute that the title deeds deposited as per exhibit A-2 take in also the title deeds of items 1 and 2 in the attachment schedule sold in E.P. No. 227 of 1984. The court below has found that the letter exhibit A-2 does not disclose an intention to create a mortgage by deposit of title deeds and it cannot therefore be said that the claimant-bank has a charge on the properties sold. We are unable to agree with this finding of the lower court. The defendant company admits that the claimant bank had granted credit accommodation up to a limit of Rs. 100 lakhs. This is also clear from exhibits A-4 and A-5 referred to above. Exhibit A-3, certified extract of the accounts of the bank, shows that the defendant's liability to the bank exceeds Rs. 11 lakhs. Exhibit A-2 evidences the deposit of title deeds by the defendant company with the claimant-bank in compliance with the conditions of the tripartite agreement among the defendant company, the State Trading Corporation and the claimant bank. The evidence in the case clearly shows that the credit accommodation was granted to the defendant company in pursuance of the agreement referred to in exhibit A-2. The title deeds, exhibit A-1 series, relating to the properties of the defendant company, were deposited with the claimant bank to create a security for the credit accommodation granted to the company. The intention to create a mortgage by deposit of title deeds is clear from these documents. The defendant company itself has no case that the deposit of title deeds does not create a charge on the properties. We, therefore, hold that the claimant bank has an equitable mortgage over the properties sold in execution of the decree in the suit.

4. The lower court has rejected the claim also on the ground that the charge, if any, in favour of the claimant bank is void against the plaintiff for want of registration u/s 125 of the Companies Act, Section 124 of the Act defines "charge" to include also a mortgage and Section 135(1) enacts that every charge created on or after the 1st day of April, 1914, by a company shall so far as any

security on the company's property or undertaking is conferred thereby "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 this Act within thirty days after the date of its creation". The proviso to sub-section (1) authorises the Registrar to extend the time by seven days in the circumstances mentioned therein. Sub-section (2) enacts that nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge. When a charge becomes void u/s 125(1), the money secured thereby shall immediately become payable (vide sub-section (3)). Section 130 provides for registration of charges and Section 132 empowers the Registrar to issue certificates of registration.

5. Exhibits A-4 and A-5 certificates issued by the Registrar of Companies do not show that a charge on the security of the properties attached and sold has been registered in accordance with Section 130 of the Companies Act. We are, therefore, willing to assume that the charge created by deposit of title deeds as per exhibit A-2 is not registered. The question still remains whether the non-registration of the charge would render the charge invalid to enable the purchaser at a sale in execution of a simple money decree to claim that his purchase was free of the encumbrance. Section 125 itself gives the indication that the debt itself is not obliterated. Sub-section (2) provides that nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge, and as per sub-section (3) when a charge becomes void under the section, the money secured thereby becomes payable immediately. With reference to the corresponding provisions in Section 93 of the Companies (Consolidation) Act, 1908, Lord Cozens-Hardy M.R. considering the effect of non-registration in *Monolithic Building Co., Tacon v. The Company* [1915] 1 Ch 643, stated at page 662 :

" This Section says that so far as any security under the property comprised in the unregistered mortgage is concerned, it is to be void against the liquidator, and any creditor of the company unless registered within this period. What does that mean ? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of winding up, but that is a contingency which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing an opinion. "

6. The Master of the Rolls further stated at page 667 :

" Of course the deed is not void to all intents and purposes. "It is a perfectly good deed against the company so long as it is a going concern ". "

7. To the same effect is the following observation of Phillimore L.J. at page 667 :

" We have to construe Section 93 of the statute. It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator and against any creditor, and it leaves the security to stand as against the company while it is a going concern. "

8. Considering Section 109 of the Indian Companies Act, 1913, Bachawat J. stated In the matter of Chandbali Steamer Service Co. Ltd. 60 CWN 278 of 26 Comp Cas:

" In spite of the generality of the expression " any creditor ", an ordinary unsecured creditor of the company cannot avoid the mortgage, for he has no enforceable right either against the mortgagee or either against the property comprised in the mortgage. Only a creditor of the company who has acquired a right against the property may intervene and avoid the mortgage, e.g., where he has a charge over the property or where the company is in liquidation and he has acquired a right to the rateable distribution of the assets of the company; Re. Ehrmann brothers Ltd. [1906] 2 Ch 697, 708-9. "

9. The same view is expressed by a Division Bench of the Assam High Court with reference to Section 109 of the Companies Act in Bhramar Lal v. Promode Ranjan AIR 1963 GAU 56. Mehrotra C.J. stated at page 58 :

"To our mind on a plain reading of Section 109, it cannot be said that the failure to register the mortgage renders the mortgage invalid and a nullity. The effect of the Section is that if the mortgage is not registered, the liquidator is not to take notice of it as a mortgage. The debt will survive and it will be treated on par with other debts. The property which is the subject-matter of the security will be available as the assets of the company to the liquidator for payment to the creditors. The creditors in liquidation will not be affected by the mortgage. This Section does not take away the right of the company to deal with its property. If the company can validly deal with its property, any transfer made by the company will be binding on the company. If the company mortgages certain property, any person who subsequently purchases the property from the company will take it subject to the mortgage and Section 109 is no bar to the mortgagee enforcing his mortgage as against the transfer of the company simply because it has not been registered u/s 109."

10. Following the above decisions, a Division Bench of the Andhra Pradesh High Court in Maturi Umamheswara Rao and Others Vs. Pendyala Venkatrayudu and Others, held that the failure to have the mortgage registered u/s 125 of the Companies Act does not in any way invalidate it as against the company when it is a going concern, and its only effect is that the security created by the mortgage is rendered void against the liquidator and the creditor in winding up proceedings. Referring to the decision of the Assam High Court in Bhramar Lal's case AIR 1963 GAU 56, the Andhra Pradesh High Court stated at page 230 (page

759 of 40 Comp Cas) :

"This case is an authority for the position that even though the mortgage is not registered under the Companies Act, a person claiming to have purchased the mortgaged property in execution of a money decree, cannot contend that his purchase is free from the mortgage, nor is Section 109 a bar to the mortgagee enforcing Ms mortgage, as against the transferee of the company. We follow this decision and hold that in the case before us, the mortgaged property having been purchased by the first defendant subject to the mortgage, it is not open to him to contend that the mortgage is a nullity, or that the properties purchased by him are not subject to the rights of the mortgagee. In this view, this contention also has to be rejected."

11. What the decree-holder has purchased in execution of the decree is only the rights of the company in the properties sold. The equitable mortgage created by deposit of title deeds is binding on the company as a going concern. Section 125 of the Companies Act does not in any way invalidate the mortgage and the charge on the company's properties subsists subject to the restriction that, in the event of winding up of the company, the holder of an unregistered charge cannot stand outside the winding up and claim a preferential right to the security. In the event of winding up, he can rank only as an ordinary creditor entitled to rateable distribution of the assets of the company. In the present case, the company is a going concern and the decree-holder-purchaser in court auction had no prior interest in the properties sold. The court auction sale and purchase by the decree-holder can convey only the judgment debtor-company's title in the property to the decree-holder-auction purchaser. The company's rights in the properties are subject to the mortgage in favour of the claimant-bank created by deposit of title deeds.

12. For the aforesaid reasons, we set aside the impugned order of the court below and declare that the title obtained by the decree-holder-auction purchaser in the properties sold on October 11, 1985 in execution of the decree of the court below in O. S. No. 165 of 1982 is subject to the mortgage in favour of the claimant-bank created by the judgment debtor-company by deposit of title deeds as per exhibit A-2.

13. The appeal is allowed as stated above. There will be no order as to costs.