

(1981) 02 DEL CK 0034

In the Delhi High Court

Case No : Company Application No. 97 of 1978

Sushil Prasad

APPELLANT

Vs

Vinod Motors (Pr.) Ltd.

RESPONDENT

Date of Decision : 20-02-1981

Acts Referred:

Citation : (1984) 55 CompCas 52 : (1981) 20 DLT 85

Hon'ble Judges : B.N. Kirpal, J

Bench : Single Bench

Advocate : B.N. Nayar and S. Jain, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The short question which comes up for consideration in this case is as to whether the petitioner is a secured creditor or not.

(2) The Company in liquidation belonged to the family of the petitioner. It ran into financial difficulties. Large sums of money were owed by the Company to the Central Bank of India.

(3) The case of the petitioner is that he, along with his father and brother, was the owner of the property known as Swiss Hotel, Delhi. In order to see that the dues of the Central Bank of India from the Company in liquidation were cleared, the petitioner and his father and brother agreed to sell the said Swiss Hotel, Delhi to M/s. Oberoi Hotels (India) Pvt Ltd. The money which was to be realised from that was to be utilised for paying off the Central Bank of India for and on behalf of the said Company. According to the petitioner the Company had agreed that the money which is so paid would result in a mortgage or a charge being created by the Company of its property at Indore in favor of the petitioner and his father and brother. According to the petitioner, with a view to give effect to the aforesaid scheme, the petitioner and his father and brother issued a power of attorney dated 18th April, 1966 in favor of the Central Bank of India. By this power of attorney the Central Bank of India were, inter alia, entitled to realise

from M/s. Oberoi Hotels (India) Pvt. Ltd., the intending Purchasers of Swiss Hotel, the balance amount of sale price payable by them. The Central Bank was further authorised that out of the sale proceeds so received by them the debt due to the Bank from the Company would first be liquidated. The balance amount was to be placed to the credit of the joint account of the petitioner and his father and brother. On that very day i.e. on 18th April, 1966 a letter was also written to Oberoi Hotels (India) Pvt. Ltd. to the effect that the balance amount of sale price payable by them should be paid to Central Bank of India. On 19th April, 1966 the Board of Directors of the Company passed a resolution in which it was, inter alia, stated as follows :-

"Shri RadhaKishan informed the house that the agreement between himself and with lots of persuasion Shri Sushil Parshad and Shri Satish Parshad the shareholders of the company who have also agreed to sign the agreement with the bank that they shall give the balance of the sale proceeds of their property Swiss Hotel to the Central Bank to clear the debts of the Company, has been signed yesterday.

"Mr. Satish Parshad and Mr. Sushil Parshad have after great persuasion agreed to this and have only agreed if the Company mortgages the assets of the company with them.

It was unanimously decided that the mortgage as agreed to be made and any of the directors was authorised to sign the agreement with Shri Sushil Parshad and Shri Satish Parshad and do the needful to fulfill the requirements of mortgage and register same with the Registrar of Companies.

(4) It is an admitted case that thereafter the property Swiss Hotel was sold and the balance amount of the sale proceeds realised by the Bank and the said Bank appropriated to itself the amount which was due from the said Company. The effect of this was that the petitioner, in place of the Bank, became a creditor of the Company. On 19th December, 1967 an agreement was entered into between the Company and the petitioner. In the said agreement it was recited that the petitioner had agreed to give loan to the Company on the condition that the Company would create a charge of its assets and properties in favor of the petitioner and in consideration of such advances. It was further stated that, whereas loans had been advanced, the Company had not carried out its obligation as a regular charge had not been created. The said document purported, thereafter, to create a charge in favor of the petitioner of the Company's immovable property known as House No. 20/2, Manorama Ganj, Indore. The said charge was in respect of a sum of Rs. 1,75,000.00 which was stated at that time to be due to the petitioner. On 6th February, 1968 a winding up petition was filed in this Court by the petitioner. By an order dated 18th November, 1968 the Company was ordered to be wound up.

(5) The Official Liquidator invited claims from various debtors of the Company. By order dated 9th September, 1976 the Official Liquidator admitted the claim of

the petitioner amounting to Rs. 1,48,045.46 but informed the petitioner that the same be regarded as an ordinary claim against the Company as the charge was not registered under the Indian Registration Act and was within one year preceding the date of the winding up. Thereupon the petitioner filed an appeal under Rule 164 of the Companies (Court) Rules, 1959. By order dated 5th January, 1978 it was held by this Court that it was not a suitable case where power should be exercised under Rule 164 and the question involved could be decided by an application u/s 446(2) of the Act. By the same order it was also held that the Official Liquidator could only determine the quantum due to a debtor but could not determine the nature of the debt. By the said order leave was also granted to the petitioner to move an application u/s 446(2) of the Act. It is in pursuance to the grant of the said leave that the present application u/s 446 has been filed.

(6) In the present application the above mentioned facts have been reiterated by the petitioner. It has been specifically stated that in pursuance of the agreement dated 19th December, 1967 the Company "by a resolution dated 19th December, 1967 created a second charge in favor of the petitioner....." It is further mentioned that the charge so created was registered with the Registrar of Companies under sections 125 to 130 of the Companies Act. This registration was effected on 30th January, 1968. Copy of the certificate of registration has also been placed on record.

(7) It will be seen that the Official Liquidator vide his letter dated 9th September, 1976 had accepted the claim of the petitioner that he was a creditor to the tune of Rs. 1,48,045.46. It was further stated in the said letter that "as the charge was not registered under the Indian Registration Act and was within one year preceding the date of winding up order, Therefore the claim cannot be treated as secured." The reply of the Official Liquidator to the present application u/s 446 is also to the same effect. The defense put forth by the Official Liquidator is the same, namely, that the instrument creating the charge was not registered and secondly the charge was void on account of fraudulent efforts.

(8) The first question which arises for consideration is whether a charge is compulsorily registerable or not. Previously the view of some of the High Courts was that a valid charge cannot be created, under the provisions of the Transfer of Property Act itself, orally and the charge could be created only by instrument which was duly registered. This was so held by Madras High Court in Pandit Shiva Rao and Another Vs. D.A. Shanmugasundaraswami (Official Liquidator) and Others, . In arriving at this conclusion reference was made by the Madras High Court to sections 59 and 100 of the Transfer of Property Act and it was held that though charge was not the same thing as mortgage but nevertheless in view of the provisions of section 100, which, inter alia, stated that all the provisions regarding simple mortgage would apply to a charge, the provisions of section 59 became applicable and a charge could be effected only by a registered instrument executed in the manner provided by section 59. The Supreme Court,

however, in a decision reported as *M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others*, came to the conclusion that a charge is not compulsorily registerable under the Registration Act. The Supreme Court held that the provisions of section 59 were not attracted in the creation of the charge. It was observed by the Supreme Court that a charge could be created orally. It was, however, stated that if a charge was created by a written document then the provisions of the Registration Act would have to be complied with and the document registered.

(9) In the present case what was registered under sections 125 to 130 : of the Companies Act as a charge was the charge which was sought to be created on 19th December, 1967. On that date the abovementioned document was executed which purported to create the charge. The question which arises for consideration is whether this creation of charge was valid or; not because of non-registration of the said document. It is also the contention of Shri Nayar that the charge was validly created and that, in any event, even if that document is ignored the Company had orally agreed to . and had in fact created a charge of its property.

(10) What is the effect of a document creating a charge not being. registered ? Section 49 of the Registration Act, inter alia, provides that no document which is required by section 17 or by provisions of Transfer of Property Act to be registered shall "affect any immovable property comprised therein" unless it is registered. To my mind the plain meaning of these words can be only one and that is that if a document is required to be registered the character of that property would not change if the document is not registered. Or, to put it differently, that document will not affect the said property. The non-registration of the document, whether under the provisions of section 17 of the Registration Act or under the provisions of the Transfer of Property Act, has been placed at par by section 49. Just as a sale of immovable property is not complete and effective unless there is a registered sale-deed, because that is the requirement of Transfer of Property Act, similarly I must hold that a charge if sought to be created by a document , and which would require registration u/s 17 of the Registration Act, cannot be said to come into existence. The contention of Shri Nayar, however, is, while relying upon *Govindan Nayar and Another Vs. Koipunthil Ammed and Others*, , *Gurdas Mal and another v. Baij Nath and others*, Air 1928 Lah 662 and *Munshi Ram v. Baisakhi Ram and others*, Air 1947 Lah 35, that the document itself is not invalid and if the execution, of such an unregistered document is admitted then relief can be granted on the basis thereof. By also referring to *Ganpatrao Shivaram v. Anant Ramchand*, Air 1954 M 26 it is contended that if the existence of a particular state of affairs is admitted, namely, that a charge was created by a document, though unregistered, then it is not necessary to bring that document into evidence. The valid creation of a charge by the document cannot, it is argued, be adversely affected by non-registration of the document or inadmissibility of the same. This argument, however, loses sight of the fact that if a document itself purports to affect any

immovable property then the provisions of clause (a) of section 49 come into operation. It is sub-clause (e) of section 49 which deals with the question of document being received in evidence or not. The effect of section 49(a) is that any charge which is sought to be brought about in respect of a property would be ineffective if the document which seeks to bring about the charge and requires registration is not registered. With respect I am unable to agree with the contrary views which have been expressed in the aforesaid cases. If the law says that only a registered document can affect an immovable property, I fail to see how the Court can accept that a property has been affected by a document, which is not registered, merely because the two parties, in the pleadings, admit that such an unregistered document were executed. The ratio of the decisions in the aforesaid cases, appears to me to be contrary to the provisions of section 49(a) of the Registration Act. I might also usefully refer to a decision of this Court reported as *Lakshmi Chand v. Iqbal Singh*, 1975 RLR 67. In that case it was held that notwithstanding sections 17 and 49 of the Registration Act a partition deed which created or extinguished right to immovable property of more than Rs. 100.00 was inadmissible in evidence under sections 91 and 92 of the Evidence Act. This, to my mind, is the correct position in law.

(11) It will be seen that a charge, as held by the Supreme Court can be created orally as well as by written document. The written document in the present case dated 19th December, 1967 is clearly inadmissible in evidence. Does it mean that, on the facts and circumstances of the present case, no charge at all was created? Document dated 19th December, 1967 cannot be relied upon by the petitioner for the purposes of showing that a charge came into existence, but a charge can be created orally also. The conduct of the parties can be such which would show that de hors a written document a charge was created. (See *M.C. Chacko Vs. The State Bank of Travancore, Trivandrum*, and *J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others*, . In the present case there is a resolution of 19th April, 1966. The entire transaction more or less begins with the passing of the said resolution. In the said resolution the Company had undertaken that its properties would be mortgaged in favor of the petitioner and his father and brother on the debt due to the Central Bank of India being liquidated with the sale proceeds of Swiss Hotel, Delhi. This debt was liquidated. The petitioner and his father and brother carried out their part of the agreement. On 19th December, 1967 a Director of the Company executed the said deed on behalf of the Company. On 20th Dec., 1967 the Board of Directors passed a resolution to the following effect :-

"Mr.Vinod Parshad informed that the agreement between the Company and the shareholders Shri Sushil Parshad and Satish Parshad has been signed on the 19th December and steps to create the charges are initiated and as soon as the charge is registered the same will be informed."

Even if the document dated 19th December, 1967 is ignored the two resolutions dated 19th April, 1966 and 20th December, 1967 along with the registration of

the charge under sections 125 to 130 on 30th January, 1968 with the Registrar of Companies clearly show that a charge was created. This charge was created, not by the document dated 19th December, 1967 but de hors that document when on 19th December, 1967 there must have been a verbal agreement to the creation of charge, pursuant to which the written agreement was executed. Even if this written document is ignored the prior verbal agreement must be held to have resulted in the creation of a valid charge. The charge, in the alternative, can also be said to have been created when on 20th December, 1967 the aforesaid resolution of the Board was passed and, further, when charge was sought to be registered with the Registrar of Companies.

(12) The second contention on behalf of the official Liquidator was that the transaction was hit because of fraudulent preference. Firstly reliance was sought to be placed on section 531A of the Companies Act. Section 531A applies, inter alia, in the case of transfer of properties. It has now been held by the Supreme Court in *New Kaiser-I-Hind's* case (supra) that creation of a charge does not amount to any transfer of interest in the property. In this case it was further held that in the case of a charge there was no transfer of property or any interest therein but a charge only created a right of payment out of the specified property. Reference was then made by Mrs. Jain to the provision 531. It was contended that within six months before the presentation of the winding up petition the charge was effected in Dec., 1967. In order to see whether the creation of charge is hit by section 531 or V not reference has to be made to section 53 of the Provincial Insolvency Act, 1920. The said provision reads as under :-

"53.Avoidance of voluntary transfer.-Any transfer of property not being a transfer made before and in consideration of marriage or made in favor of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

It is contended on behalf of the petitioner that in the present case the charge was created in December, 1967 in good faith and for consideration. This contention is well founded. It will be seen that as far back as on 19th April, 1966 the Board of Directors of the Company had agreed to mortgage its properties in favor of the petitioner and his father and brother if they liquidated the debt of the Company towards the Central Bank. The creation of the charge in the present case was in the implementation of that agreement. The payment of the money to the Bank and the creation of the charge are two parts of the same transaction. I do not find that the charge which was created in the present case was not in good faith or not for valuable consideration. This being the case even though the charge was created within six months before the filing of the winding up petition) nevertheless the charge is not in contravention of section 531 of the Companies Act and the same is not void.

(13) Mrs. Jain also referred to Krishna Deva Bhargava and Others Vs. Official Liquidator U.P. Oil Industries Ltd., . In that case it was held that a charge could be created on an immovable property only by registered document. In my opinion this proposition of law is no longer good law, in view of the later pronouncements of the Supreme Court in Abdul Jabbar's case (supra) and M.C. Chacko's case (supra). Reference to Rana Vidya Bhushan Singh v. Rati Ram, C.A. 460 of 1966 decided by the Supreme Court on 28th January, 1969 can also be of no assistance to the respondent because that case was concerned with section 49 of the Registration Act. In the present case the document need not be referred to at all for coming to the conclusion that there was a creation of charge by the Company. The charge can be created orally. It is not compulsory for the creation of a charge that there should be a document in writing duly registered.

(14) For the aforesaid reasons I allow the application and hold that the petitioner is a secured creditor and has a charge in respect of the property No. 20/2 Manorama Ganj, Indore. Parties to bear their own costs.