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C.A.No. 2156 OF 1996

ITEM No.105

Court No.4

SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 2156 OF 1996.

BANK OF INDIA

Appellant (s)

VERSUS

ABHAY D.NAROTTAM & ORS.

Respondent (s)

[With Ias 2&3 for substitution of deceased respondentNo.2 and c/delay
in filing the application for substitution]

WITH

CA No.2157/1996 (With office report)

Date : 03/05/2005 This matter was called on for hearing today.

CORAM :

HON'BLE MRS.JUSTICE RUMA PAL

HON'BLE MR. JUSTICE C.K. THAKKER

For Appellant (s)M/s Ramesh Singh,Pratap Venugopal,
PS Sudheer,Amit Singh,Advs.for
KJ John & Co.

For Respondent (s)Mr.S. Balakrishnan,Sr.Adv.
M/s S.Prasad,Sree Narain Jha,Advs.

M/s Sushma Suri,Sunita Sharma,Advs.

UPON hearing counsel the Court made the following

O R D E R

No orders on IA Nos.2 & 3.

The appeals are dismissed in terms of the signed order.

[Naresh Kumar]

[Madhu Saxena]

Court Master

Court Master

[Signed order is placed on the file.]

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2156 OF 1996

BANK OF INDIA... Appellant

Vs.

ABHAY D.NAROTTAM & ORS.... Respondents

WITH
CIVIL APPEAL NO.2157/1996

O_R_D_E_R

C.A.No.2156/1996.

The issue in this appeal is whether the Appellant-Bank had a prior charge in respect of properties claimed to belong to Respondent No.2-Company. There are two properties in question. The first property is Flat No.B-2, Neelkanth Complex, Sahar Raod, Vile Parle (E), Bombay (herein after referred to as the 'Flat'). The second property is certain land at Anjaneri (hereinafter referred to as the 'Land').

Respondent No.2 had been granted certain overdraft facilities by the Appellant-Bank in 1989. In consideration for the grant of such facility, respondent no.2 undertook to create an equitable charge of the Flat in favour of the Appellant-Bank. Undisputedly at that point of time the respondent no.2 was not the owner of the Flat. All it had in its possession was an agreement executed by the owner to sell the Flat to the respondent No.2. This agreement was deposited with the Appellant-Bank by way of security by respondent no.2.

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Respondent no.2 also took a loan from the Appellant-Bank of about Rs.35 lacs and undertook to create a mortgage by deposit of title deeds of the said Land. Pursuant to this undertaking no mortgage was in fact executed by respondent no.2.

Defaults were committed by respondent no.2 in repayment of moneys under both the accounts. Two separate suits were filed by the Appellant-Bank for recovery of the amounts from respondent no.2. While the suits were pending, respondent no.1 was declared a notified party under The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. Respondent no.1 filed suit before the Special Court for recovery of an amount of approximately Rs.23 crores from the respondent No.2. While respondent no.1's suit was pending, pursuant to an interim application moved by respondent no.1, a Court Receiver was appointed over the assets of respondent no.2, including the Flat and the Land. The Appellant-Bank sought to intervene in the proceedings before the Special Court. However, the application for intervention was rejected.

The Notice of Motion taken out by respondent no.1 was ultimately disposed of by appointing a Court Receiver as prayed for therein.

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The Appellant-Bank then filed an independent application before the Special Court for discharge of the Receiver appointed over the properties and/or for a directive on this Receiver to sell these properties and to hand over the net sale proceeds to the Appellant-Bank. While the application was pending, the suit filed by respondent no.1 against respondent no.2 was compromised and a consent decree was passed by which respondent no.1 became entitled to recover from respondent no.2 a sum of Rs.12,44,59,207/- as principal together with interest thereon.

After the consent decree was passed the Appellant-Bank withdrew its earlier Notice of Motion a

nd filed a fresh Notice of Motion reiterating its earlier prayer. That application was dismissed by the impugned order. The Court held that so far as the Flat was concerned there was no prior charge created in favour of the Appellant-Bank as there had been no registration of the charge under Section 125 of the Companies Act, 1956. As far as the Land was concerned it was held that since there was only an undertaking to create a mortgage by respondent no.2, there was no question of the Land being a security created in favour of the Appellant-Bank by respondent no.2.

Aggrieved, the Appellant-Bank has preferred this appeal. The argument is that Section 125 of the Companies Act did not

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at all apply as it provides that a non registration charge would be void against the liquidator or any creditor of a Company when the Company itself was in liquidation. Since respondent no.2-Company was not in liquidation Section 125 would not operate.

It is also contended on the basis of the decisions in K.L.C.T. Chidambaram Chettyar v. Aziz Meah & Ors. reported in AIR 1938 Rangoon 149 and in Amulya Gopal Majumdar v. United Industrial Bank Ltd. & Ors. reported in AIR 1981 Calcutta 404 that mere agreement for sale could create a valid charge by deposit of such agreement.

It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. 'Mortgage' has been defined in Section 58(a) of The Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge under Section 100 of The Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.

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As far as the Land is concerned, we agree with the learned Judge that a mere undertaking to create a mortgage is not sufficient to create any interest in any immovable property.

As far as the flat is concerned, it needs no authority to say that a contract for sale of immovable property does not of itself create any interest in or charge of such property. This is provided in Section 54 of the Act and is well settled law. In this case, the agreement for sale which was deposited by respondent no.2 with the Appellant-Bank was not an agreement by which respondent no.2 agreed to sell the property to a third party, but an agreement to sell the Flat to respondent no.2. No interest was created in favour of respondent no.2 by virtue of this agreement for sale which could have been transferred by way of security to the Appellant-Bank. There is as such no question of the Appellant-Bank having any charge over such non-existent interest.

In the circumstances, the appeal is dismissed albeit for reasons which are somewhat different from those expressed in the impugned order.

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C.A.No.2157/1996.

In view of the decision in Civil Appeal No.2156/1996 titled Bank of India v. Abhay D. Narottam & Ors., this appeal is also dismissed.

.....J.

(RUMA PAL)

.....J.

(C.K. THAKKER)
New Delhi,
3rd May, 2005.