

[2013] 10 S.C.R. 89

HILL PROPERTIES LTD.

v.

UNION BANK OF INDIA AND OTHERS  
(Civil Appeal No. 7939 of 2013)

SEPTEMBER 11, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

*Transfer of Property – Multi-storeyed flats – Flats purchased by members of Cooperative Society or shareholders of Company – Right, title, interest over such flat – Nature of – Held: It is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society – It cannot be said that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company – The right of transfer of land is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute – The Articles of Association of a Company have no force of a Statute and consequently on facts, right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association – Neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit – A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion – The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently no error with the warrant of attachment issued by the DRT on the flat in question.*

**The Appellant-company claims to be the owner of the flat in question. Respondent No.5 is a shareholder of appellant-Company holding one "A" equity share. The**

A flat was allotted to Respondent No.5 which was holding the Share Certificate. Respondent No.5, being an associate of Respondent no.2, created an equitable mortgage to secure dues of Respondent No.2 to Respondent no.1-bank by depositing the Share Certificate. Respondent no.1- Bank filed suit for recovery of the dues and also for enforcement of the security. The Debt Recovery Tribunal (DRT) passed an order of attachment in respect of the flat in question.

The question arose as to whether the property which was mortgaged to the Bank and the right of Respondent No.5 upon it could be attached and sold in execution of a decree.

On behalf of the appellant, it was submitted that Respondent No.5 was only a shareholder of appellant-Company and hence only permitted to use and occupy one of the flats owned by the Company and all the rights, title and interest in respect of the flat in question exclusively vested in the Company; and that Respondent No.5 being a shareholder, was bound by the provisions of Articles of Association of the appellant-Company and could not have mortgaged the suit flat without the permission of appellant-Company.

Dismissing the appeals, the Court

HELD: 1.1. The right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act as well as the Cooperative Societies registered under the

Registration of Cooperative Societies Act, etc. Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners' right to dispose of its flat is also well recognized, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well. [Para 10] [96-E-H]

1.2. Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat. [Para 11] [97-A-D]

1.3. The right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. The Articles of Association of a Company have no force

A of a Statute and the right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association. [Para 13] [98-B-C]

B 1.4. Neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently there is no error with the warrant of attachment issued by the DRT on the flat in question. [Para 14] [98-D-E]

D *Ramesh Himatlal shah Vs. Harsukh Jadhavji Joshi* (1975) 2 SCC 105; 1975 (0) Suppl. SCR 270 and *DLF Qutub Enclave Complex Educational Charitable Trus Vs. State of Haryana* (2003) 5 SCC 622; 2003 (2) SCR 1 – relied on.

E *Banch F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay* (1955) 1 SCR 876; *Vodafone International Holdings B.V.Vs. Union of India & Anr.* (2012) 6 SCC 613; 2012 (1) SCR 573 – cited.

**Case Law Reference:**

F	(1955) 1 SCR 876	cited	Para 7
	2012 (1) SCR 573	cited	Para 7
	1975 (0) Suppl. SCR 270	relied on	Para 7
	2003 (2) SCR 1	relied on	Para 13

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7939 of 2013.

H From the Judgment and Order dated 20.03.2012 of the High Court of Bombay in AL No. 185 of 2012.

Shyam Divan, Pratap Venugopal, Avishka Singhvi, Deepa A  
Mani (for K.J. John & Co.) for the Appellant.

U.U. Lalit, Sushmita Banerjee, Rabin Mazumdar, Shiv  
Kumar Suri for the Respondents.

The Judgment of the Court was delivered by B

**K.S. RADHAKRISHNAN, J.** 1. Leave granted.

2. We are in this case concerned with the saleability of  
Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, C  
Malabar Hill, Mumbai – 400 006, which is under attachment in  
the execution proceedings before the Debt Recovery Tribunal  
(DRT), Mumbai.

3. Union Bank of India, Respondent No.1 herein, had  
advanced some financial assistance to the second respondent D  
sometimes in the year 1992. Respondent Nos.3 and 4 stood  
as personal guarantors for repayment of the dues of  
Respondent No.2. Respondent No.5, being an associate  
company of Respondent No.2, mortgaged the aforementioned E  
flat in favour of the Union Bank of India to secure repayment of  
the dues of Respondent No.2. For realization of the payment  
of the amount, proceedings were initiated under the  
Securitization Act before the DRT, Mumbai, and the flat in  
question was attached under the warrant of attachment on 23rd  
August, 2005. F

4. The Hill Properties Ltd., Appellant herein, preferred Suit  
No.1627 of 2007 before the High Court of Judicature at  
Bombay (Ordinary Original Jurisdiction), to release the flat in  
question from attachment. Notice of Motion was taken out for  
injunction restraining the Bank and others from taking any steps  
in furtherance of warrant of attachment or transferring the suit  
property to third parties. Learned Single Judge rejected the  
Appellant's Notice of Motion seeking to release the flat from  
attachment by its order dated 25th January, 2012, giving liberty G

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A to the Appellant to make its offer to purchase the suit flat at a  
price determined by the Valuer or the price determined by the  
Auditor of the Company, whichever is higher. Aggrieved by the  
order, the Appellant preferred Appeal (L) No.185 of 2012  
before the Division Bench of the Bombay High Court  
B contending that Respondent No.5, being only a shareholder of  
the Company, has only a right to occupy the flat and has no right  
to mortgage the same to the Bank without permission of the  
Company. Further, it was pointed out that Respondent No.5 is  
only holding "A" equity share (bearing Share Certificate No.45)  
C in the Appellant Company. By virtue of Articles of Association  
of the Company, Respondent No.5 was only permitted to use  
and occupy the flat owned by the Appellant Company and,  
therefore, the same is not liable to be attached and sold.

D 5. The Application was resisted by Respondent No.9  
contending that the right to occupy the suit flat is the valuable  
right and value in the share of the Company is nothing but the  
value of the flat and the same could be transferred for  
consideration. The flat was, therefore, rightly mortgaged to the  
Bank and the learned Single Judge was justified in rejecting  
E the claim of the Appellant.

F 6. The Division Bench of the Bombay High Court found no  
illegality in the order passed by the learned Single Judge and  
dismissed the Appeal, so also the Notice of Motion. Various  
safeguards incorporated by the learned Single Judge were  
reiterated. Aggrieved of the said order, this appeal has been  
preferred.

G 7. Shri Shyam Divan, learned senior counsel appearing for  
the Appellant, submitted that Respondent No.5 is only a  
shareholder of the Appellant Company and hence only  
permitted to use and occupy one of the flats owned by the  
Company and all the rights, title and interest in respect of the  
flat in question exclusively vest in the Company. Learned senior  
counsel submitted that Respondent No.5 could not have  
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mortgaged the suit flat without the permission of the Company which is in violation of the provisions of the Articles of Association of the Company. Learned senior counsel referred to the Articles of Association of the Company and submitted that Respondent No.5 being a shareholder, is bound by the provisions of Articles of Association of the Company. Learned senior counsel placed reliance on the judgments of this Court in *Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay*, (1955) 1 SCR 876, and *Vodafone International Holdings B.V. Vs. Union of India & Anr.*, (2012) 6 SCC 613, Learned senior counsel also submitted that the ratio laid down by this Court in *Ramesh Himatlal Shah Vs. Harsukh Jadhavji Joshi*, (1975) 2 SCC 105, is not applicable to the case on hand, since in that case this Court was dealing with the interest of a member in an immovable property of a Cooperative Society governed by the provisions of the Maharashtra Cooperative Societies Act, 1960, which is inapplicable in the case of right of a shareholder in a limited liability company registered under the Indian Companies Act, 1956.

8. Shri U.U. Lalit, learned senior counsel appearing for the Respondents, on the other hand, submitted that the principle laid down in *Ramesh Himatlal Shah's* case (supra), will clearly apply to the facts of this case. Learned senior counsel submitted that the question as to whether the flat belongs to a member of a Cooperative Society or a shareholder of a Company makes no difference, since the right, title and interest and the right to occupy is the species of property, which has the stamp of transferability. Learned senior counsel submitted that in the absence of any clear and unambiguous legal provisions to the contrary, such species of rights can always be transferred and there is no illegality in mortgaging the property to the Bank, as security for the loan transaction. Learned senior counsel submitted that the High Court has rightly rejected the suit as well as the Notice of Motion and the same calls for no interference by this Court.

A DISCUSSION

9. The Appellant claims to be the owner of the property known as Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, Malabar Hill, Mumbai – 400 006. Respondent No.5 is the shareholder of the Appellant Company holding one “A” equity share. Flat No.23 was allotted to Respondent No.5 who was holding the Share Certificate No.45. Respondent No.5 created an equitable mortgage to secure dues of Respondent No.2 to the Union Bank of India by depositing Share Certificate No.45. Union Bank of India filed Suit No.1079 of 1993 for recovery of the dues and also for enforcement of the security. The suit was later transferred to the DRT, Mumbai, and was numbered as OA No.245 of 2001. The DRT, Mumbai, later passed an order of attachment in respect of the flat in question. The question arose as to whether the property which was mortgaged to the Bank and the right of Respondent No.5 upon it could be attached and sold in execution of a decree.

10. We are of the view that the right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act as well as the Cooperative Societies registered under the Registration of Cooperative Societies Act, etc. Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners’ right to dispose of its flat is also well recognized, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well.

11. Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat.

12. In *Ramesh Himatlal Shah's* case (*supra*), this Court has clearly delineated the legal principle which is as follows :-

"20. Multi-storeyed ownership flats on cooperative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are: ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats

A by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. We have failed to find one.”

B 13. Reference may also be made to another judgment of this Court in *DLF Qutub Enclave Complex Educational Charitable Trust Vs. State of Haryana*, (2003) 5 SCC 622, wherein this Court held that the right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. C In our view, the Articles of Association of a Company have no force of a Statute and that the right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association.

D 14. We find that neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest, in our view, will create chaos and confusion. The right or interest to occupy any such flat is a E species of property and hence has a stamp of transferability and consequently we find no error with the warrant of attachment issued by the DRT on the flat in question.

F 15. We may reiterate that the appellant will certainly have the right of pre-emption, but not at any value lesser than the market value of the suit flat at the time of the sale. Various directions already given by the High Court, therefore, will stand.

G 16. The appeal is, therefore, dismissed and the amount, if any, deposited by the Appellant be refunded to him. There will, however, be no order as to costs.

B.B.B.

Appeal dismissed.