

A HARYANA FINANCIAL CORPORATION

v.

GURCHARAN SINGH & ANR.
(Civil Appeal No. 11028 of 2013)

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DECEMBER 13, 2013

[K.S. RADHAKRISHNAN AND C. NAGAPPAN, JJ.]

Transfer of Property Act, 1882:

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s.100 r/w s.59 – Charges – Undertaking given against loan that properties mentioned therein shall not be disposed of during the currency of the loan – Documents not registered – Held: A conjoint reading of s.100 with s.59 makes it clear that if by act of parties, any immovable property is made security for the payment of money to another and it does not amount to mortgage, then all the provisions which apply to a simple mortgage, as far as may be, apply to such charge — Consequently, in view of s.59, when there is a mortgage other than a mortgage by deposit of title deeds, it can be effected only by a registered instrument — The mere undertaking that the party will not dispose of the properties mentioned in the said undertaking, during the currency of the loan, will not create any charge over those properties, unless charge is created by deposit of title deeds or through a registered document – A mere undertaking to create a mortgage is not sufficient to create an interest in an immovable property — In the instant case, no registered mortgage deed was executed by the first respondent and no title deed of the property was handed over by him to Corporation – Therefore, there is no error in the judgment of first appellate court as affirmed by High Court that the loan taken by first respondent was not subject to charge over the property covered by the decree in favour of second respondent.

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Respondent no. 1 gave a written undertaking dated

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5.3.1994, as security against a loan obtained from the appellant-Corporation, that he would not dispose of his properties enumerated therein during the currency of the loan. On his failure to repay the loan, the appellant took over the hypothecated properties, sold the same and appropriated the amount. Respondent no. 2, the wife of respondent no. 1, filed Civil Suit no. 767 of 1995 seeking a declaration that she was the absolute owner and in possession of the properties mentioned in the undertaking dated 5.3.1994. The suit was decreed against respondent no. 1 on 3.2.1996. The appellant-Corporation filed a suit seeking a declaration that the decree dated 3.2.1996 was null and void. The trial court held that the decree in the suit filed by respondent no. 2 was a collusive one obtained to defeat the undertaking dated 5.3.1994. However, the first appellant court allowed the appeal of respondent no. 2 holding that the loan taken by respondent no. 1 was not subject to charge over the property covered by the decree in favour of respondent no. 2. The High Court dismissed the appeal of the Corporation.

Dismissing the appeal, the Court

HELD: 1.1. Section 100 of Transfer of Property Act, 1872 clearly indicates the following types of charges : (i) Charges created by act of parties; and (ii) Charges arising by operation of law. An ordinary charge created under the Transfer of Property Act is compulsorily registerable. The first portion of s.100 lays down that where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. [para 9] [840-H; 841-A-C]

A 1.2. A conjoint reading of s.100 with s.59 of the TP
 B Act makes it clear that if by act of parties, any immovable
 C property is made security for the payment of money to
 D another and it does not amount to mortgage, then all the
 provisions which apply to a simple mortgage, as far as
 may be, apply to such charge. Consequently, in view of
 s.59 of the TP Act, when there is a mortgage other than
 a mortgage by deposit of the title deeds, it can be effected
 only by a registered instrument. So far as the instant case
 is concerned, no registered mortgage deed was executed
 by the first respondent and no title deed of the property
 was handed over by him to the Corporation. A mere
 undertaking to create a mortgage is not sufficient to
 create an interest in any immovable property. In *Bank of
 India*, this Court has held that without a transfer of
 interest, there is no question of there being a mortgage
 and that mere undertaking is not sufficient to create a
 charge. [para 11 and 13] [841-G-H; 842-A-C, H; 843-A-B]

Bank of India v. Abhay D. Narottam and others (2005)
 11 SCC 520; and *K. Muthuswami Gounder v. N. Palaniappa
 Gounder* 1998 (1) Suppl. SCR 206 = (1998) 7 SCC 327 –
 E relied on.

*J.K. (Bombay) Private Limited v. New Kaiser-I-Hind
 Spinning & Weaving Co. Ltd. & Others* (1969) 2 SCR 866 –
 F referred to.

1.3. This Court, therefore, holds that the mere
 undertaking that the party will not dispose of the
 properties mentioned in the said undertaking, during the
 currency of the loan, will not create any charge over those
 G properties, unless charge is created by deposit of title
 deeds or through a registered document. Even if the
 purpose of the decree obtained in Civil Suit No.767 of
 1995 between the respondents was fraudulent and
 collusive one so as to defeat the undertaking made on
 H 5.3.1994, that would not confer any charge over the

properties, unless the undertaking is registered. Therefore, there is no error in the judgment of the lower appellate court which was affirmed by the High Court, that the loan taken by the first respondent was not subject to change over the property covered by the decree in favour of second respondent. [para 3 and 13] [836-G-H; 837-A; 843-B-D]

S.P. Cheranalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs and others 1993 (3) Suppl. SCR 422 = (1994) 1 SCC 1 and *Badami (deceased) by her LR v. Bhali* (2012) 11 SCC 574; *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons & Ors.* 1969 (3) SCR 513 = (1969) 1 SCC 573 – cited.

Case Law Reference:

1993 (3) Suppl. SCR 422	cited	para 4
(2012) 11 SCC 574	cited	para 4
1969 (3) SCR 513	cited	para 4
1998 (1) Suppl. SCR 206	relied on	para 5
(2005) 11 SCC 520	relied on	para 5
(1969) 2 SCR 866	referred to	para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11028 of 2013.

From the Judgment and Order dated 09.01.2006 of the High Court of Punjab and Haryana at Chandigarh in R.S.A. No. 44 of 2006.

Amit Dayal for the Appellant.

Gagan Gupta for the Respondents.

The Judgment of the Court was delivered by

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

A 2. M/s Amrit Steel Industries, Jagadhari, a proprietorship
 concern of which the first respondent is the sole proprietor, had
 obtained a loan of Rs.5,05,750/- on 15.9.1994 from the
 Appellant, Haryana Financial Corporation, by entering into
 hypothecation of machinery, fixture, as well as, personal
 B guarantee bond dated 15.9.1994. The first respondent also
 gave a written undertaking dated 5.3.1994 that he would not
 dispose of his properties during the currency of the loan. The
 first respondent failed to repay the loan. Consequently, the
 Corporation took over the hypothecated property and sold the
 C same and appropriated the amount. In the meantime, the
 second respondent, the wife of the first respondent filed Civil
 Suit No.767 of 1995 against the first respondent before the
 Court of Civil Judge (Jr. Divn.), Jagadhari, seeking a
 declaration that she is the absolute owner and in possession
 D of the properties mentioned in the undertaking dated 5.3.1994.
 The suit was decreed on 3.2.1996 as against the first
 respondent.

E 3. The Corporation then filed Civil Suit No.167 of 2003 in
 the Court of Additional Civil Judge (Senior Division), Jagadhari,
 against the Respondents seeking a declaration that the decree
 dated 3.2.1996 was null and void. The Corporation also
 submitted that the decree was obtained by fraud to defeat the
 personal undertaking executed by the first respondent on
 F 5.3.1994 in favour of the Corporation. The Court decreed the
 suit holding that the decree passed in Civil Suit No 767 of 1995
 is a collusive one obtained to defeat the undertaking created
 by the first respondent on 5.3.1994 in favour of the Corporation.
 The second respondent filed Civil Appeal No.34 of 2005 in the
 G Court of Additional District Judge, Yamunanagar. The Additional
 District Judge, however, allowed the Appeal vide judgment
 dated 30.8.2005 holding that the loan taken by the first
 respondent was not subject to charge over the property covered
 by the decree in Civil Suit No.767 of 1995 and that the
 H Appellant had no *locus standi* to challenge the decree suffered

by the first respondent in favour of the second respondent. The Corporation aggrieved by the aforesaid judgment filed RSA No.44 of 2006 before the Punjab and Haryana High Court, which was dismissed by the High Court on 9.1.2006. Aggrieved by the same, the Corporation has filed the present Appeal.

4. Shri Amit Dayal, learned counsel appearing for the Corporation, submitted that the High Court has committed an error in sustaining the order passed by the Additional District Judge after having found that the decree obtained by the second respondent against the first respondent in Civil Suit No.167 of 2003 was a collusive one. Learned counsel submitted that apparently such a decree was obtained without any contest by the first respondent, only to defeat the undertaking given to the Corporation on 5.3.1994. Learned counsel also placed reliance on the judgments of this Court in *S.P. Cheranalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs and others* [(1994) 1 SCC 1] and *Badami (deceased) by her LR v. Bhali* [(2012) 11 SCC 574] and submitted that the Court cannot grant relief to a party who has obtained a fraudulent decree and who has come to the Court with unclean hands. Learned counsel also placed reliance on the judgment of this Court in *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons & Ors.* [(1969) 1 SCC 573] and submitted that even if the undertaking dated 5.3.1994 was not registered, still the first respondent is bound by the undertaking and the Corporation can always proceed against the properties referred to in the said undertaking.

5. Shri Gagan Gupta, learned Advocate appearing for the Respondents, submitted that the High Court has rightly affirmed the judgment of the lower Appellate Court after having noticed that the undertaking dated 5.3.1994 has not created any charge over the properties mentioned therein. Consequently, the Corporation cannot proceed against the properties mentioned in the undertaking. Learned counsel submitted that without transfer of interest in the properties in question by a registered

A document, no charge could be created in those properties and hence the Corporation cannot proceed against those properties on the basis of mere undertaking dated 5.3.1994. In support of this contention, reliance was placed on the judgments of this Court in *K. Muthuswami Gounder v. N. Palaniappa Gounder* [(1998) 7 SCC 327] and *Bank of India v. Abhay D. Narottam and others* [(2005) 11 SCC 520].

6. We may, for the purpose of this case, extract the undertaking given by the first respondent in favour of the Corporation on 5.3.1994, which reads as follows :-

“That the proprietor of the concern have the following means :-

D	Name of the Proprietor/ Partner/ Director	Immovable & Moveable Property	Personal Liabilities	Net Worth
E	Gurcharan Singh	<u>Assets & Liabilities</u> Capital with Amrit Steel Industries		1,20,760.00
		Land & Building of Amrit Steel Industries		8,14,000.00
F		Jewellery		1,00,000.00
		Cash & Bank Balance		1,00,000.00
		Deposit with Malhotra Timber		50,000.00
G				11,84,760.00

LIABILITIES NIL

NET WORTH 11,84,760.00

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Sd/- A
DEPONENT

VERIFICATION

I, Gurcharan Singh, the above named deponent do hereby
verify contents of the above paras as true and correct to
the best of my knowledge and belief and nothing has been
concealed from. B

Further confirm that the means as indicated above in the
name shall not be disposed off during the currency of the
loan. C

Sd/-
DEPONENT

PLACE : Yamuna Nagar D
Dated : 05/03/94"

7. The above-mentioned undertaking dated 5.3.1994 was
submitted by the first respondent on a duly attested Stamp
Paper, but was not registered under the Registration Act. The
above-mentioned undertaking was given before the loan was
sanctioned to the first respondent on 15.9.1994. We also fully
endorse the view taken by the Courts below that the decree in
Civil Suit No.767 of 1995 was obtained by the second
respondent as against the first respondent collusively to defeat
the undertaking given by the first respondent on 5.3.1994 in
favour of the Corporation. Still the question is whether the
undertaking dated 5.3.1994 has created any charge over the
properties mentioned therein in favour of the Corporation. This
Court in *J.K. (Bombay) Private Limited v. New Kaiser-I-Hind
Spinning & Weaving Co. Ltd. & Others* [(1969) 2 SCR 866],
explained the difference between the charge and the mortgage
as follows :-

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A “While in the case of a charge there is no transfer of
 property or any interest therein, but only the creation of a
 right of payment out of the specified property, a mortgage
 effectuates transfer of property or an interest therein. No
 B particular form of words is necessary to create a charge
 and all that is necessary is that there must be a clear
 intention to make a property security for payment of money
in praesenti.”

8. Section 100 of the Transfer of Property Act, 1882
 C defines “charge” as follows :-

“**100. Charges.**- Where immoveable property of one
 person is by act of parties or operation of law made
 security for the payment of money to another, and the
 transaction does not amount to a mortgage, the latter
 D person is said to have a charge on the property; and all
 the provisions hereinbefore contained which apply to a
 simple mortgage shall, so far as may be, apply to such
 charge. Nothing in this section applies to the charge of a
 trustee on the trust-property for expenses properly incurred
 E in the execution of his trust, and, save as otherwise
 expressly provided by any law for the time being in force,
 no charge shall be enforced against any property in the
 hands of a person to whom such property has been
 transferred for consideration and without notice of the
 F charge.”

The above-mentioned Section clearly indicates the
 following types of charges :

- (1) Charges created by act of parties; and
 G (2) Charges arising by operation of law.

9. An ordinary charge created under the Transfer of
 Property Act is compulsorily registerable. The first portion of
 Section 100 of the TP Act lays down that where immoveable
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property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The words "which apply to a simple mortgage shall, so far as may be, apply to such charge" in this Section were substituted by Section 53 of the Transfer of Property (Amendment) Act, 1929, for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the persons having such charge." Evidently, the effect of the amendment was that all the provisions of the TP Act which apply to simple mortgages were made applicable to charges.

10. Section 59 of the Transfer of Property Act refers to the mode of transfer which reads as follows :-

"59. Mortgage when to be by assurance.- Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title- deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

11. A conjoint reading of Section 100 with Section 59 of the TP Act makes it clear that if by act of parties, any immovable property is made security for the payment of money to another and it does not amount to mortgage, then all the provisions which apply to a simple mortgage, as far as may be, apply to such charge. Consequently, in view of Section 59 of the TP Act when there is a mortgage other than a mortgage by deposit of

- A the title deeds, it can be effected only by a registered instrument. So far as the present case is concerned, no registered mortgage deed was executed by the first respondent and no title deed of the property was handed over by the first respondent to the Corporation. The mere undertaking that a
- B person would not dispose of the properties mentioned, during the currency of the loan, would not confer any charge on the immovable properties mentioned therein. In other words, a mere undertaking to create a mortgage is not sufficient to create an interest in any immovable property. This legal position
- C has been settled by various judgments of this Court. In *K. Muthuswami Gounder* (supra), this Court was dealing with the legal validity of a security bond by which parties undertook that they would not alienate the properties till the decree was discharged. Referring the said document, this Court held as
- D follows :

E “17. The document, Exhibit A-6, security bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document, we cannot say that a charge as such has been created in respect of the suit property for money to be decreed in the suit. All that it states is that in the event of a decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agree with the finding of the High

F Court that the document at Exhibit A-6 is not a charge. If that is so, the suit filed by the appellant has got to be dismissed.”

G 12. The Court held that the decree obtained in that suit was a simple money decree and not a decree on a charge or mortgage with the result that the appellant who purchased the property in execution of that decree did not acquire the rights under the Security Bond.

H 13. In *Bank of India* (supra), this Court was examining the

scope of undertaking made for creating an equitable charge over a flat in favour of the Bank. This Court held that without a transfer of interest, there is no question of there being a mortgage and that mere undertaking is not sufficient to create a charge. The ratio laid down by the above-mentioned judgment applies to the present case. In our view, the mere undertaking that the party will not dispose of the properties mentioned in an undertaking, during the currency of the loan, will not create any charge over those properties, unless charge is created by deposit of title deeds or through a registered document. We also hold that even if the purpose of the decree obtained in Civil Suit No.767 of 1995 between the respondents was fraudulent and collusive one so to defeat the undertaking made on 5.3.1994, that would not confer any charge over the properties, unless the undertaking is registered. We, therefore, find no error in the judgment of the lower Appellate Court which was affirmed by the High Court.

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14. In the result, the appeal fails and is accordingly dismissed. There will be no order as to costs.

R.P.

Appeal dismissed.

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