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STATE BANK OF BIKANER AND JAIPUR

v.

NATIONAL IRON AND STEEL ROLLING CORPORATION AND ORS.

DECEMBER 14, 1994

B

[S.C. AGRAWAL, FAIZAN UDDIN AND SUJATA V. MANOHAR, JJ.]

C

Rajasthan Sales Tax Act, 1954: Section 11-AAAA—Dealer—Liability to pay tax—Creation of first charge on the property of dealer—Effect on existing mortgage of dealer's property—Held charge operates on the entire property of dealer including interest of mortgage therein—Charge will have precedence over existing mortgage.

Transfer of Property Act, 1882: Sections 58 and 100—'Charge'. 'Mortgage'—What is—Distinction between 'charge' and 'mortgage' discussed.

D

The respondent-Corporation mortgaged its factory and pledged the plant and machinery installed in the factory premises with the appellant-Bank as a security measure for repayment of the amounts advanced to it under the cash credit facilities given by the appellant-Bank. In a suit filed by the appellant-Bank against the respondent-Corporation for recovery of a sum of Rs. 3,79,672 the mortgaged property was sold by auction under the orders of the Court for a sum of Rs. 4,02,000. Since there were sales tax dues also to be paid by the respondent-Corporation, the Commercial Tax Officer claimed priority for the recovery of sales tax from the sale proceeds of the mortgaged property under Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 which provides that the amount of sales tax or any other sum due and payable by a dealer or any other person under the Act should be the first charge on the property of the dealer or of such person. The Trial Court accepted the claim of the Commercial Tax Officer. Revision preferred by the appellant-Bank was dismissed by the High Court.

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In appeal to this court, it was contended on behalf of the appellant-Bank that (i) since the mortgage in their favour was prior in point of time, its claim will have precedence over the claim of the Sales Tax authorities; and (ii) There was an existing mortgage at the time of coming into force of the first statutory charge, therefore, the only property which was possessed by the dealer was equity of redemption

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in respect of that property. Consequently, the first charge would operate only on the equity of redemption. A

Dismissing the appeal, this Court

HELD: 1. Where a mortgage is created in respect of any property undoubtedly, an interest in the property is carved out in favour of the mortgagee. The mortgagor is entitled to redeem his property on payment of the mortgage dues. This does not, however, mean that the property ceases to be the property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer the property subjected to the first charge is the entire property of the dealer. The interest of the mortgagee is not excluded from the first charge. The first charge, therefore, which is created under Section 11-AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption. [570 E to F] B C

2. Section 11-AAAA creates a first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. The submission, therefore, that the statutory first charge created by Section 11-AAAA of the Rajasthan Sales Tax Act can operate only over the equity of redemption, cannot be accepted. The charge operates on the entire property of the dealer including the interest of the mortgagee therein. [571 D] D E

3. The statute has created a first charge on the property of the dealer. A charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage. [571 E] F

Dattatreya Shanker Mote and Ors. v. Anand Chintaman Datar and Ors., [1974] 2 SCC 799 and *Westminster City Council v. Haymarket Publishing Ltd.*, [1981] 2 All. E.R. 555, referred to.

Fisher and Lightwood's Law of Mortgage 10th Edn. page 33; referred to. G

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9161 of 1994.

From the Judgment and Order dated 2.9.93 of the Rajasthan High Court in R.P. No.630 of 1990. H

A V.M. Tarkunde, Anil Kr. Sangal and K.K. Gogna for the Appellant.

V.R. Reddy, Additional Solicitor General, A.P. Dhamija, Sushil Kr. Jain and S. Attreya for the Respondents.

The Judgment of the Court was delivered by

B **SUJATA V. MANOHAR, J.** Leave granted.

C The appellant, namely, the State Bank of Bikaner and Jaipur had given cash credit facilities to respondent No. 1 National Iron and Steel Rolling Corporation. Respondents 2 to 5 are the partners of respondent No.1. As a security for repayment of the amounts advanced to respondent No.1 by the appellant-bank, respondent No.1 created a mortgage of their factory premises situated at Industrial Area, Bharatpur by a Deed of Mortgage dated 18.10.1977. They have also, by a letter of Promise dated 10.6.81, pledged the plant and machinery installed in the said premises to the bank as a security for the said advances. There is also an agreement for the pledge of movables dated 7.1.80 executed by the first respondent in favour of the appellant-bank.

E The appellant-bank filed Civil Suit No. 5/86 in the court of the Additional District Judge II, Bharatpur against the respondents for the recovery of a sum of Rs. 3,79,672 due and payable under the above cash credit facility and future interest @ 16.25% p.a. with quarterly rests. In this suit the appellant-bank also asked for the realization of the mortgage security under Order 34, Rule 4 of the Code of Civil Procedure.

F While the suit was pending, the Commercial Taxes Officer, Bharatpur got himself impleaded in the suit on 18.5.90 on the ground that he had a prior claim for the recovery of a sum of Rs.1,19,122 as sales tax dues from respondent No. 1 and was entitled to realize it by sale of the mortgaged property.

G The property which is the subject-matter of the mortgage has been sold by auction under the orders of the court for a sum of Rs. 4,02,000 to one Smt. Kamlesh Goel. Under the orders of the court the sale proceeds have been deposited in court. It was contended by the Commercial Taxes Officer, Bharatpur that the sales tax dues of the first-respondent were liable to be paid first out of the sale proceeds. The claim of the appellant-bank could be satisfied only out of the balance amount. The trial court by its judgment and order dated 18.5.90 accepted this claim of the Commercial

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Taxes Officer. The Revision Petition of the appellant-bank was dismissed by the High Court by the impugned judgment and order. Hence this appeal by special leave. A

The claim of the Commercial Taxes Officer, Bharatpur rests on the provisions of Section 11-AAAA of the Rajasthan Sales Tax Act, 1954. Section 11-AAAA has been introduced in the Rajasthan Sales Tax Act, 1954 by way of an amendment in 1989. Section 11-AAAA is as follows:— B

“11-AAAA. *Liability under this Act to be the first charge notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, penalty, interest and any other sum, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.*” C

Under this Section the amount of sales tax or any other sum due and payable by a dealer or any other person under the Rajasthan Sales Tax Act, 1954, is a first charge on the property of the dealer or of such person. It is on account of the provisions of this Section that the Commercial Taxes Officer claimed priority for the recovery of the sales tax dues from the sale proceeds of the mortgaged property. The appellant, however, contended that since the mortgage in their favour is prior in point of time, their claim will have precedence over the claim of the Sales Tax authorities. D

It is, therefore, necessary to consider the effect of Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 on an existing mortgage in respect of the property of the dealer or the person liable to pay sales tax or other sums under the Rajasthan Sales Tax Act, 1954. Section 100 of the Transfer of Property Act deals with Charges on an immovable property which can be created either by an act of parties or by operation of law. It provides that where immovable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, a charge is created on the property and all the provisions in the Transfer of Property Act which apply to a simple mortgage shall, so far may be, apply to such charge. A mortgage on the other hand, is defined under Section 58 of the Transfer of Property Act as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a mortgage and a charge was considered by this Court in the case of *Dattatreya Shanker Mote and Others v. Anand Chintaman Datar and Others*, [1974] 2 SCC 799. The Court has observed (at pages 806-807) that E F G H

- A a charge is a wider term as it includes also a mortgage, in that, every mortgage is a charge, but every charge is not a mortgage. The court has then considered the application of the second part of Section 100 of the Transfer of Property Act which *inter alia* deals with a charge not being enforceable against a *bona fide* transferee of the property for value without notice of the charge. It has held that the phrase "transferee of property"
- B refers to the transferee of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage.

- In the present case we have to consider whether the statutory first charge which is created under Section 11-AAAA of the Rajasthan Sales Tax Act over the property of the dealer or a person liable to pay sales tax and/or other dues under the Rajasthan Sales Tax Act, is created in respect of the entire interest in the property or only the mortgagor's interest in the property when the dealer has created a mortgage on the property. In other words, will the statutory first charge have priority over an earlier mortgage. It was urged by Mr. Tarkunde, learned counsel for the appellant-bank that
- D at the time when the statutory first charge came into existence, there was already a mortgage in respect of the same property. Therefore, the only property which was possessed by the dealer and/or person liable to pay tax or other dues under the Rajasthan Sales Tax Act, was equity of redemption in respect of that property. The first charge would operate, therefore, only on the equity of redemption. The argument though ingenious, will have to
- E be rejected. Where a mortgage is created in respect of any property, undoubtedly, an interest in the property is carved out in favour of the mortgagee. The mortgagor is entitled to redeem his property on payment of the mortgage dues. This does not, however, mean that the property ceases to be the property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the
- F property of the dealer, the property subjected to the first charge is the entire property of the dealer. The interest of the mortgagee is not excluded from the first charge. The first charge, therefore, which is created under Section 11-AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption as urged by Mr. Tarkunde.

- G We find support for this conclusion in the observations made in Fisher And Lightwood's Law of Mortgage, 10th Edn. at page 33 where the statutory charges are discussed. In dealing with a statutory charge in favour of rating authorities in respect of rating surcharges for unused commercial buildings under the General Rate Act, 1967, it is stated that "a statutory charge has priority to the interest of the mortgagee under a mortgage existing
- H when the charge arose". In the case of *Westminster City Council v.*

Haymarket Publishing Ltd., [1981] 2 AER 555, the English Court of Appeals was required to consider whether a statutory charge on the property under the General Rate Act would have priority over a legal mortgage on the property existing when the charge came into being. It was argued that the charge would be only on the mortgagor-owner's interest in the property i.e. on the equity of redemption. The court negatived this contention. It held that "charge on the land" imposed for an unpaid surcharge was not confined to a charge on the owner's interest in the premises when the charge arose, but extended to a charge on all the estates and interests in the premises existing when the charge arose. The rating authority's charge would have priority over the bank's interest as a mortgagee.

In the present case, the section creates a first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. The submission, therefore, that the statutory first charge created by Section 11-AAAA of the Rajasthan Sales Tax Act can operate only over the equity of redemption, cannot be accepted. The charge operates on the entire property of the dealer including the interest of the mortgagee therein.

Looked at a little differently, the statute has created a first charge on the property of the dealer. What is meant by a "first charge"? Does it have precedence over an earlier mortgage? Now, as set out in *Dattatreya Shanker Mote's case* (supra), a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage.

No other contention has been urged before us. We, therefore, agree with the conclusion arrived at by the High Court. The appeal is, therefore, dismissed. In the circumstances, however, there will be no order as to costs.

T.N.A.

Appeal dismissed.