A.P.O.No.132 of 2012

C.P.13 of 2009

ICICI Bank Limited…appellant
Vs.
Dunlop India Limited…respondent

This appeal has been preferred with the leave of the Court against the same judgment and order of the learned Company Judge dated 20.1.2012 passed in the aforesaid company application. The above appellant was not a party to the proceedings and they have been able to satisfy prima facie at the time of admission of appeal that it is affected by strong observation and direction given by the learned Trial Judge without hearing it. The appellant is a banking company carrying on its business in India as well as in Singapore having its branch office thereat.

The case of the appellant is shortly put hereunder:-

In or about May 2008 one Wealthsea Pte. Limited approached ICICI Bank Limited, Singapore for availing of foreign currency term loan facility (in short FCTL) with an overall limit of USD 125 million. After negotiation and discussion the appellant at its Singapore branch sanctioned aforesaid facility in the shape of back to back Stand By Letter of Credit Facility (hereinafter in short SBLCF) of USD 125 million. Hence in India, the appellant issued the said letter of credit facilities in favour of the branch of the appellant at Singapore at the behest of Shalini Properties and Developers Pvt. Limited and SPR Resorts Limited for guaranteeing FCTL of ICICI Bank, Singapore. The two properties namely 132A, Dr. Annie Besant Road, Worli, Mumbai belonged to the Bhartiya Hotels Limited and another property at Ambattur, Chennai belonged to Dunlop Properties Private Limited were mortgaged with the petitioner to secure the SBLC facility. The said two companies also stood as corporate guarantors in respect of the same facility.

It is claimed that said credit facility was duly granted, however the loanee failed and neglected to make payment of the outstanding dues of Rs.2,234,296,346.43 which comprised of the invoked Letter of Credit amount of Rs.2,200,271,866.33 and outstanding SBLC commission of Rs.34,024,480.10. No payment was made either by the borrower nor by the corporate guarantor. Thus for recovery of the alleged outstanding dues the appellant seeks to enforce the said security namely two mortgaged properties. According to the appellant it is unable to do so, in view of observation and direction given by the impugned judgment and order which affects the right of the appellant.

Mr. Jayanta Mitra, learned Senior Advocate with Mr. Bimal Chatterjee, Senior Advocate, for the appellant contends that the decisive observation made and direction given by the learned Trial Judge by the same impugned judgment and order has seriously affected his client's right as mortgagee. This decision has been rendered without hearing his client. According to them their client is bona fide mortgagee for value without any notice. There has been no transaction with the Dunlop India Limited respondent company herein and this Bank. The mortgages were created by the separate companies which have got different and distinct entities, to secure amount of loan advanced to the aforesaid companies.

According to them there was no warrant to make any comment or observation with regard to legality, validity and enforceability of the mortgage property vis-à-vis title of the mortgagor. The direction given upon the official liquidator to take legal steps to recover amongst other mortgaged properties has really sealed the fate of the bank's claim as a mortgagee. In effect the learned Trial Judge has declared the said mortgage being invalid and illegal. This exercise undertaken by the learned Trial Judge so to say is without jurisdiction as far as transaction of granting loan between the appellant and said borrower as well as the guarantors are concerned. The Company Court has no jurisdiction to examine legality and validity of the same before final winding up order is passed. Therefore this direction and observation made therein should be expunged immediately so that their client can approach the appropriate forum for enforcement of the mortgage or to take legal step as permissible under the law without being affected by the order and judgment of the learned Trial Judge.

Mr. Pratap Chatterjee, learned Senior Advocate appearing for the Madura, respondent No.2 herein submits on fact in this case that admittedly the present management of Dunlop India Limited in violation of the order of restriction under Section 22A of SICA sold and transferred four immovable properties of the company leaving company's creditors, employees and workmen in the lurch. Sale of all these four properties of the company were void ab initio, non est in the eye of law and nullity. The suspicious circumstances surrounding the transaction which prompted the appellant to advance money in respect of two of those immovable properties display total lack of bona fides and want of jurisdiction. His legal submission is that the instant appeal is liable to be dismissed as the appellant has no locus standi to file the same. The appellant is not the mortgagee in respect of Mumbai and Chennai property. One 3i Infotech Trusteeship Services is the mortgagee in respect of the said properties. The appellant has deliberately not disclosed the copies of the title deeds of the suit properties in question. In any event the appellant had no reason to be aggrieved. The appellant should have moved the application before the learned Trial Judge. Since the sale of the said properties by the company were void ab initio, non est in the eye of law and nullity as such the title has not passed at all to the company.

On behalf of the appellant/Dunlop Company no argument was advanced.

We have considered the respective contention of the learned counsel for the parties and carefully gone through the materials placed before us. We notice when the application for interim relief was made there was no document to show that the appellant was the mortgagee nor it was a lender to any company for which any security has been furnished. However, on granting leave this appellant filed supplementary affidavit annexing certain documents. It appears from these documents that the appellant as rightly contended by Mr. Chatterjee that appellant is not mortgagee and rather one M/s. 3i Infotech Trusteeship Services Limited is mortgagee and one M/s. Bhartiya Hotel is the mortgagor by indenture of the mortgage dated September 26, 2008 in respect of property at 132A, Dr. Annie Besant Road, Worli, Mumbai intending to furnish collateral security for SBLCF. Similar way by an indenture dated 26th September 2008 Dunlop Property Private Limited mortgaged in favour of the said 3i Infotech Trusteeship Services Limited mortgagee in respect of immovable property at Ambattur, Chennai in the State of Tamil Nadu collateral security for stand by letter of credit facilities. We have read these two documents annexed to the supplementary affidavit it appears that recorded mortgagee is purporting to act as a security trustee and acting on behalf of the ICICI Bank Limited. We are of the view that whatever may be the status of the said recorded mortgagee vis-à-vis the appellant the said recorded mortgagee is the separate juristic entity. It is difficult to conclude in this appeal whether the appellant before us can derive any title on the strength of the aforesaid document apparently executed in favour of 3i Infotech Trusteeship Services Limited. Thus on prima facie reading we cannot say that appellant is aggrieved rather the said recorded mortgagee might be aggrieved who has not approached us.

Under those circumstances we think that the direction given by the learned Trial Judge at the instance of the appellant cannot be deleted. However reading the judgment and order of the learned Trial Judge we feel that it will be great injustice if observation recorded and direction given by the learned Trial Judge are allowed remain in the impugned judgment and order. Admittedly the parties who might be affected were not heard nor any notice was given. We therefore clarify those observation and direction will not be binding factor on any person at the moment simply, the learned Trial Judge at this stage has no jurisdiction. In the event the aforesaid two alleged mortgages are sought to be enforced by any person interested prior notice therefor should be given upon the Special Officer appointed by this Court who on receipt of the same will be entitled to approach the learned Company Judge to seek leave to take appropriate legal measure as may be advised and as may be directed. Therefore, we do not find any reason to grant any relief on this appeal. We make it clear that it would be open for the appellant to take steps in accordance with law; obviously notice of such action shall be given to the Special Officer in the event aforesaid transferred properties are sought to be roped in. Thus this appeal is disposed of with above observation and finding and direction.

There will be no order as to costs.

(K. J. Sengupta, J.)

I agree.

(Asim Kumar Mondal, J.)