

(1977) 09 CAL CK 0030
Calcutta High Court
Case No: First Appeal No. 202 of 1973

Usha Rice Mill
Company Ltd.

APPELLANT

Vs

United Bank of India
(UOI)

RESPONDENT

Date of Decision: Sept. 13, 1977

Acts Referred:

- Specific Relief Act, 1877 - Section 9
- Transfer of Property Act, 1882 - Section 54

Citation: 82 CWN 92 : (1977) 2 ILR (Cal) 385

Hon'ble Judges: Sharma, J; M.M. Dutt, J

Bench: Division Bench

Advocate: P.N. Mitter, A.N. Mitra and B.N. Mitra, for the Appellant; Ranjit Kumar Banerjee and N.R. Das Gupta, for the Respondent

Final Decision: Dismissed

Judgement

M.M. Dutt, J.

This appeal is at the instance of the Defendants and it arises out of a suit for the enforcement of a mortgage and recovery of a sum of Rs. 1,93,465-4-3.

2. The case of the Plaintiff was that the Defendant No. 1 Usha Rice Mill Company Ltd., which carried on a rice milling business had an account with the Comilla Banking Corporation Ltd. By a registered mourashi mokurari patta dated July 15, 1935, the land comprised in the factory of the Defendant No. 1 was acquired by Sm. Usha Rani Ghosh, wife of the Defendant No. 2 Charu Kumar Ghosh. Certain structures were raised on the said land. On April 1, 1945, the said Usha Rani Ghosh entered into an agreement for sale I with the Defendant No. 1 in respect of the said land with all structures, plants, tools, machineries etc. She received the entire consideration money and made over possession of the disputed property to the

Defendant company, but no sale deed was executed by her. In December 1945, the said Comilla Banking Corporation Ltd. allowed the Defendant No. 1 cash credit overdraft facilities up to a limit of Rs. 2,00,000 at an interest of 4½% per annum with monthly rests and as security for the said overdraft the Defendant No. 1, by a registered deed of hypothecation dated December 29, 1945, charged and hypothecated to the said Bank its business and goodwill and all outstanding debts, profits and monies due and all its machineries, plants, tools, implements, fixtures, stocks-in-trade etc. The Defendant No. 1 also mortgaged the land and buildings as described in Schedule "B" to the plaint by deposit of title deeds with the Bank at its office at Clive Ghat Street, Calcutta. The Defendant No. 2 Charu Kumar Ghosh also guaranteed payment of the sum that might be due from the Defendant No. 1 upto the limit of Rs. 2,00,000. The rate of interest was increased to 5% from June 1948 and to 6% from March, 1951. The Defendant No. 2 executed some pro-notes as security for the balance. The Comilla Banking Corporation Ltd. amalgamated with the Plaintiff Bank. The balance in the overdraft account of the Defendant No. 1 as on June 3, 1945, amounted to Rs. 1,93,465-4-3. It was the Plaintiff's case that both the Defendants were bound and liable to pay the said sum. But as the Defendants had failed to pay the same in spite of demands, the said suit was instituted by the Plaintiff.

3. The Defendants Nos. 1 and 2 contested the suit by separate written statements. Their defence was, inter alia, that the Defendant No. 1 had no title to the property on which the factory of the Defendant No. 1 was situate. It was denied by the Defendant No. 1 that there was any mortgage by deposit of title deeds. It was alleged that certain documents were produced by the Defendant No. 1 at the Hazra Road Branch of the Bank as the Bank had required production of the same for audit purposes. The Defendant No. 1 was compelled to execute various documents under undue influence and coercion and he was discharged from his liability as the guarantor as there was variation in the rate of interest. Further, their case was that no charge was created by the hypothecation bond and the Plaintiff was not entitled to realise any money on the basis of the said bond. The Defendant No. 2 appointed the Plaintiff Bank as his agent under two irrevocable powers-of-attorney and by virtue of those powers-of-attorney the Bank had realised the dues of the Defendants without giving credit of the same to the Defendants it was alleged that on a proper accounting it would be found that the Plaintiff Bank was not entitled to any amount from the attendants. It was contended that the suit was barred by limitation and it was also bad for defect of parties.

4. The learned Subordinate judge, second Court, Alipore, came to the finding that the properties sought to be charged under the hypothecation bond consisted of both movable and immovable properties and as such, it was compulsorily registerable. He held that for want of registration the hypothecation bond failed and the Plaintiff was not entitled to enforce the same. As to the mortgage by deposit of title deeds it was held by the learned Subordinate Judge that the Defendant No. 1

had an interest in the disputed property as mentioned in Schedule "B" to the plaint and there was a valid mortgage of the same by the deposit of title deeds. He found that there was no variation with respect to the mode of calculation of interest and that the Plaintiff was entitled to get the increased rate of interest as claimed in the plaint. It was held by him that the Plaintiff had cause of action against both the Defendants. The Defendant No. 2 was found personally liable as guarantor for the dues of the Defendant No. 1 to the Bank. He overruled the contention of the Defendants that the suit was bad for non-joinder of the said Usha Rani Ghosh. He found that the suit was not barred by limitation. Upon the said findings, he decreed the suit in a preliminary form. He granted a decree against the Defendants for Rs. 1,93,465-4-3 with further interest at the rate of 6% per annum from the date of the institution of the suit till realisation. The Defendants were allowed six months time to pay the decretal amount; in default, it was directed that the Plaintiff would be entitled to get a final decree for sale of Schedule "B" property of the plaint under Order 34 of the Code of Civil Procedure. Further, it was directed that if the sale proceeds would fall short of the decretal amount, the Plaintiff would get a personal decree for the balance, if any, when applied for. The liability of the Defendant No. 2 was fixed to the extent of Rs. 2,00,000 only. Hence, this appeal by the Defendants.

5. The last point that has been urged by Mr. P.N. Mitter, learned Advocate, appearing on behalf of the Defendants Appellants, is that the Defendant No. 1 had no interest in the disputed property and so it was not entitled to create any mortgage in respect of that property. It was contended by him that the Defendant No. 1 did not acquire any interest in the disputed property by virtue of the agreement for sale and the alleged mortgage by deposit of title deeds had no legal existence. This contention of the Defendants requires some consideration. u/s 54 of the Transfer of Property Act "sale" is a transfer of property in exchange for a price paid or promised or part-paid and part-promised. The transfer of ownership by sale can only be made by a registered instrument in the case of property valued at Rs. 100 or more. The last clause of Section 54 provides that a contract for sale of immovable property does not, of itself, create any interest in or charge on such property. It has abolished the English doctrine that a contract for sale transfers an equitable estate to the purchaser. The Privy Council in *Pir Bakhsh v. Mohamed Tahar* L.R. 61 IndAp 388 held that a transfer by sale could only be made by a registered instrument and the contract by itself could not create any interest in or charge on the property. It is thus well-settled that no interest in the property passes to the purchaser under a contract for sale. The contention of the Defendants in that regard is quite correct and is consistent with the principles of law as embodied in the last clause of Section 54. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the Plaintiff Bank, submits that he does not dispute the proposition that a contract for sale simpliciter does not create any interest in immovable property. It is, however, contended by him that the Plaintiff does not rely merely on the contract for sale but on other facts and circumstances which are payment of the full amount

of consideration by the Defendant No. 1 to its vendor and delivery of possession of the disputed property by the vendor to the purchaser. It is strenuously urged by him that possession of the disputed property by the Defendant No. 1 had conferred on it a possessory title which it was entitled to transfer by mortgage.

6. There is therefore no dispute that the agreement for sale did not create any interest in the disputed property. The question, however, is whether or not by virtue of its possession the Defendant No. 1 had acquired a transferable interest in the disputed property. It has been observed by Prof. Salmond that the possession of a material object is a title to the ownership of it. The thing of which possession is taken may already be the property of some one else. In this case, the title acquired by possession is good, indeed, against all third persons but is of no validity at all against the true owner. Possession, even when consciously wrongful, is allowed as a title of right against all persons who cannot show a better, because (sic) a prior, title in themselves : Salmond on Jurisprudence (12th ed., pp. 434-435). Possession even without ownership may have the utmost practical importance. Possession may create ownership either by occupation (the taking control of a res nullius) or by the expiration of a period of acquisitive prescription. Moreover, possession is prima facie evidence of ownership and he who would disturb a possessor must show either title or a better possessory right : Paton's Text Book of Jurisprudence (4th ed., p. 554). In the case of *Mussammat Sundar v. Mussammat Parbati* L.R. 16 IndAp 186 admittedly the two widows of one Baldeo Sahai had no title to the estate left by their deceased husband. The lawful owners were either the heirs of Praisukh or of Baldeo Sahai. Praisukh was the adopted son of Baldeo Sahai. In a suit for partition of the estate of the deceased husband at the instance of one widow against the other, it was contended that the Plaintiff had no title to the estate and it could not be partitioned at her instance. Lord Watson of the Judicial Committee observed as follows:

Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except heirs of Praisukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstances that they may have ascribed their possession to one or more other titles which do not belong to them.

It is clear from the above observation that although the widows had no title to the property, they had, according to their Lordships of the Privy Council, an estate or interest in respect of their possession. In other words, they acquired an interest in the property by virtue of their possession which entitled them to make a division of the property by partition. In a later decision of the Privy Council in *Ismail Ariff v.*

Mahomed Ghouse L.R. 20 IndAp 99 Sir Richard Couch observed as follows:

It appears to their Lordships that there is here a misapprehension of the nature of the Plaintiffs case upon the facts stated in the judgment. The possession of the Plaintiff was sufficient evidence of title as owner against the Defendant. By Section 9 of the Specific Relief Act (Act I of 1877), if the Plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of dispossession, have recovered possession, notwithstanding any other, title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner and an injunction to restrain the wrong-doer from interfering with his possession.

By the above observation, the Privy Council clearly recognised the right of a person to found an action on title against another other than the lawful owner.

7. A Division Bench of the Patna High Court in [Govind Dutta Vs. Jagnarain Dutta and Others](#), has relied on the principles of law laid down in the above Privy Council decisions and has held that possession is good title against all but the true owner and a person in peaceable possession of land has, as against everyone but the true owner, an interest capable of being inherited, devised or conveyed.

In [Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others](#), the Supreme Court reviewed all the decisions on the question of possessory title. Hidayatulla J., who delivered the judgment of the Court, considered the following observation of the Judicial Committee in *Perry v. Clissold* 1907 A.C. 73 as declaratory of the law in India:

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished and the possessory owner acquires an absolute title.

8. In view of the principles of law laid down in the above decisions, it is difficult to accept the contention of the Defendants that the Defendant No. 1 had no interest in the disputed property which could be transferred by way of mortgage. It is true that the agreement for sale did not create any interest in the property agreed to be sold, but at the same time the possession of the Defendant No. 1 cannot be ignored. The possession of the Defendant No. 1 of the disputed property has conferred on it an interest therein or possessory title which is valid against all except the true owner. It is well-known that possession is one of the most important elements which constitute ownership and such possession except that of a licensee would undoubtedly create an interest in the property in favour of the possessor. It is,

however, argued on behalf of the Defendants that under the statement of law made by the Judicial Committee in *Perry v. Clissold* 1907 A.C. 73 two conditions have to be fulfilled, namely, that the possession must be in the assumed character of owner and that the person in possession exercises the ordinary rights of ownership. In our opinion, the materials on record show that both these conditions are fulfilled. The agreement for sale was executed on April 1, 1935. Exhibit 1 is a letter dated March 22, 1945 written by the Defendant No. 2 as the director of the Defendant No. 1 to the Agent of the Comilla Banking Corporation Ltd. In this letter, it has been asserted on behalf of the Defendant No. 1 that the mill and machinery stand on its own land. There is also evidence that the Defendant No. 1 had constructed some structures on the disputed property. In this connection, it may be observed that when a purchaser pays the full consideration money and obtains delivery of possession of the property agreed to be sold, he enters into the possession of the property in the assumed character of the owner thereof even though no formal deed of sale is executed before such delivery of possession. We, therefore, hold that the Defendant No. 1 has been in possession of the disputed property in the assumed character of owner and has been exercising peaceably the ordinary rights of ownership.

9. More than forty years have passed since the date of the execution of the agreement for sale by Sm. Usha Rani Ghosh in favour of the Defendant No. 1. The Defendant No. 1 has been possessing the disputed property as the owner thereof and exercising peaceably and without interruption the ordinary rights of ownership to the knowledge of its vendor, the said Usha Rani Ghosh, who is none else than the wife of the Defendant No. 2, the director of the Defendant No. 1. During this long period Usha Rani Ghosh did not enter the field and claim recovery of possession from the Defendant No. 1. In our view, her right stands extinguished and the Defendant No. 1 has acquired an absolute title. In these circumstances, we overrule the contention of the Defendants that the Defendant No. 1 had no interest in the disputed property and so there was no valid mortgage of the same by deposit of title deeds in favour of the Plaintiff Bank.

10. Next, it is contended on behalf of the Defendants that in fact there was no mortgage of the disputed property by deposit of title deeds. Much reliance was placed on behalf of the Defendants on Ex. A which is a letter dated December 16, 1948, written by the Agent of the Comilla Banking Corporation Ltd. to the Defendant No. 1. By that letter the Bank requested the Defendant No. 1 to send the title deed of the mill and the renewed fire policy covering all the machineries and other assets of the mill as the same would be required for audit purpose. As required by the Bank, the Defendant No. 1 sent two documents to the Bank, namely, (i) the original registered *mourashi mokurari* deed in favour of Usha Rani Ghosh and (ii) the original agreement for sale, under a covering letter dated December 20, 1958, Ex. A(1), of its director Charu Kumar Ghose. The Bank received those two documents which would appear from the receipt (Ex. B) granted by it to the Defendant No. 1 on the same day. In his evidence, the Defendant No. 2 Charu Kumar Ghosh stated that

as the documents were required by the Bank for the audit purpose, they were sent accordingly. He denied that the said documents were deposited with the Bank at its Head Office for the purpose of creating an equitable mortgage. There can be no doubt that in order to create an equitable mortgage mere deposit of title deeds will not be enough unless such deposit is made with an intention to create a security for repayment of money taken by way of loan. In the absence of any further evidence beyond the deposit of title deeds by the Defendant No. 1 with the Plaintiff Bank for audit purpose only, it must be held that no mortgage was created by such deposit. We have now to see whether there is any further evidence in this regard. Before we proceed to consider the same, it may be stated that it is not necessary that the documents of title should show a good title in the depositor. It is sufficient if the deeds deposited bona fide relating to the property are material evidence of title and are shown to have been deposited with the intention of creating a charge : [Surendra Mohan Rai Choudhury Vs. Mohendra Nath Banerjee and Others](#), . In *Angu Pillai and Ors. v. M.S.M. Kasiviswanathan Chettiar* AIR 1924 Mad. 16, it has been held that where a person deposited with his creditor a tax receipt issued in his name in respect of the property and also an agreement by the previous owner of the property to convey the property to him, the condition of deposit of title deeds was satisfied. In the instant case, it has been already stated that the Defendant No. 1 deposited with the Bank the original mourashi mokurari deed and the agreement for sale. These two documents though did not show complete title of the Defendant No. 1 in the disputed property, yet they related to the property and are undoubtedly some material evidence of title.

11. The question, however, is whether there is evidence of intention to effect a mortgage by the deposit of the said title deeds. The Plaintiff Bank examined one of its officers Tarit Kumar Sen gupta (D.W. 1), who was at the relevant time in the Hazra Road Branch of the Comilla Banking Corporation Ltd. In his examination-in-chief he stated that Charu Babu deposited the title deeds of the Defendant No. 1 in the Bank. He received those papers at the Hazra Road Branch and thereafter he, accompanied by Charu Babu and one Biren Das Gupta, since deceased, who was the Agent of the Hazra Road Branch, went to the Head Office where Charu Babu deposited the title deeds for creating an equitable mortgage. In his cross-examination he said that the Defendant No. 1 sent those documents through a messenger to the Hazra Road Branch of the Bank by a forwarding letter and a receipt was granted by him (D.W. 1). The documents were deposited in the Head Office on another date in the month of December. The Agent of the Bank asked the Defendant No. 1 to send Charu Babu. Then he said that he, Charu Babu and the Agent went to the Security Department of the Head Office with the documents which were handed over to Charu Babu and met Santosh Bose, the officer-in-charge of that department, at about noon. Santosh Babu kept those papers. Santosh Babu was not alive on the date of deposition. Much criticism has been made on behalf of the Defendants about the evidence of D.W. 1, Tarit Kumar Sengupta. It is true that there is some discrepancy in his

evidence, but considering that he deposed about 28 years after the alleged deposit, such discrepancy is very likely to occur. The learned Subordinate Judge has believed the evidence of D.W. 1 and we do not find any reason why we should not also believe him. By the lapse of time, it is not possible for the Bank to give better evidence about the creation of an equitable mortgage and in such circumstances we think that we should also look into the surrounding circumstances at about the time of the alleged creation of the equitable mortgage. In [K.J. Nathan Vs. S.V. Maruty Reddy and Others](#), the Supreme Court observed that the fact, whether there was an intention that the deeds would be security for the debt, would have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. It is an admitted fact that the Defendant had never asked for the return of the documents which they allege to have been given to the Bank for its audit purpose. Even assuming that the Defendant No. 1 delivered its documents of title to the Bank for the audit purpose of the latter, it is not at all comprehensible why the Defendant No. 1 would allow the documents to lie in the custody of the Bank for years to come and would not even ask for the return of the same. The conduct of the Defendant No. 1 suggests that the documents were not delivered by it to the Bank only for the audit purpose but for some other purpose which, as the Plaintiff's case is, was for the purpose of creating an equitable mortgage. Exhibit 12 is the resolution of the Board of Directors of the Defendant No. 1 : company dated March 17, 1945 by which the Defendant No. 2 Charu Kumar Ghosh was authorised to execute hypothecation deeds, promissory notes and other documents on behalf of the company in respect of the cash credit account with a limit of Rs. 2,00,000 with the Comilla Banking Corporation Ltd., South Calcutta Branch, at an interest of 4% per annum. Exhibit 8 is a letter dated December 29, 1951, written to the Agent of the Plaintiff Bank wherein the Defendant No. 2 Charu Kumar Ghosh made a clear admission that the company had taken an overdraft of Rs. 1,89,506-8-0 on the security of pledge, hypothecation and mortgage of all its assets including mills, machinery, stocks, lands etc. The above circumstances including the admission made in Ex. 8 justify an inference that the mortgage by deposit of title deeds was effected by the Defendant No. 1 in respect of the loan taken by it from the Bank from the overdraft account. Further, we may point out a significant fact. In para. 6 of the plaint, the Plaintiff stated about the creation of the equitable mortgage by deposit of title deeds at its office situate in the Clive Ghat Street, Calcutta. Although the Defendant No. 1 in his written statement has denied the allegations made in para. 6 of the plaint, the Defendant No. 2 in para. 14 of his written statement has not specifically denied the fact stated in para. 6. In para. 14, it has been, inter alia, stated by him that he does not admit the statements in paras. 5 and 6 of the plaint as correct. The Defendant No. 2 who was running the company and negotiated all its transactions with the Bank was alone, in our view, competent to say whether the deposit of title deeds was made by the Defendant No. 1 with a view to creating an equitable mortgage. His statement was more important than the statement of the Defendant No. 1 made through one of its officers. As there is no denial by the

Defendant No. 2 of the fact of deposit of title deeds with intent to create a security, the said fact stands admitted so far as the Defendant No. 2 is concerned. Be that as it may, we have also referred to other circumstances and considering the same with the evidence of D.W. 1, the conclusion is irresistible that the documents of title were deposited by the Defendant No. 1 with an intention to create an equitable mortgage. We agree with the finding of the learned Subordinate Judge in this regard.

12. Lastly, it is argued on behalf of the Defendants that the granting of the personal decree against the Defendants in addition to a decree for mortgage was illegal. No reason has been given in support of the said contention and in our view, we do not find any legal bar to the passing of such a decree. This contention of the Defendants, therefore, fails. Before we part with this appeal, it may be recorded that the other findings of the learned Subordinate Judge including his finding on" the question of limitation has not been challenged before us on behalf of the Defendants.

13. For the reasons given above, the judgment and decree of the learned Subordinate Judge are hereby affirmed and this appeal is dismissed; but, in view of the facts and circumstances of the case, we do not make any order as to costs in this appeal.

Sharma, J.

14. I agree.