

(1931) 05 BOM CK 0001**Bombay High Court****Case No:** None

Imperial Bank of India

APPELLANT

Vs

Bengal National Bank, Limited

RESPONDENT

Date of Decision: May 21, 1931**Acts Referred:**

- Transfer of Property Act, 1882 - Section 6

Citation: (1931) 33 BOMLR 1338**Hon'ble Judges:** George Lowndes, J; Blanesburgh, J; Atkin, J**Bench:** Full Bench**Final Decision:** Allowed

Judgement

Atkin, J.

This is an appeal from an order of the High Court of Judicature in Bengal affirming an order of the Court made in its original civil jurisdiction on an application for directions made by the liquidators of the Bengal National Bank, Ltd., the respondents in this appeal. The respondent bank was incorporated in 1907 and registered under the Indian Companies Act, 1882. On or before May 4, 1923, the respondent bank had borrowed from the Imperial Bank of India, the appellant, hereinafter called the Imperial Bank, the sum of ten lacs with interest, and on May 4, executed and delivered to the Imperial Bank a debenture creating a floating charge on the whole undertaking, properties, assets and interests present and future of the respondent bank as security for the loan. On August 1, 1923, a similar debenture was executed and delivered to the Imperial Bank, creating a similar floating charge as security for a further loan of ten lacs with interest. Both documents were duly registered pursuant to Section 109 of the Indian Companies Act, 1913. Neither document was registered under the Indian Registration Act, 1908. In both documents the charge was to become fixed, amongst other events, on the respondent bank suspending payment. On April 28, 1927, that event happened. On the same date the Imperial Bank, exercising a power given them by the debenture

of August 1, 1923, appointed three gentlemen as receivers under the debenture. On May 20, 1927, a petition was presented for winding up the respondent bank, and on August 2, a winding up order was made. On May 26, the Imperial Bank commenced a debenture holders' action, and on June 1, the three receivers appointed by them were appointed receivers by the Court. On August 9, two of the receivers, together with a third gentleman, were appointed official liquidators. On February 10, 1928, the official liquidators presented a petition to the Court asking for directions on various matters. The question which is the subject matter of this appeal involves a considerable sum of money and is of great importance to persons lending money to companies, and especially to banks. It appears that the respondent bank in the ordinary course of its business lent money to customers on overdraft account on the security of title deeds deposited by the customers, in respect of which loans at the date of the suspension of payment sums remained due to the bank, who continued to hold the security. The question is whether the two debentures held by the Imperial Bank give them any and what interest in the amounts due to the respondent bank from such customers and in the property comprised in the title deeds. The Imperial Bank set up the express charge over the whole of the assets of the respondent bank. The liquidators contend that the debentures, so far as they seek to charge the debts secured on deposit of title deeds, come within Section 17 of the Indian Registration Act, which requires registration of all non-testamentary instruments which "purport or operate to create, declare, assign, limit or extinguish, whether in the present or in the future, any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in any Immovable property"; and not being registered are covered by Section 49 of the same Act, which provides that no document required by Section 17 to be registered and, in-fact, unregistered shall affect any Immovable property comprised therein or be received as evidence of any transaction affecting such property. The result of non-registration is, as they contend, not only to deprive the Imperial Bank of any right to the property comprised in the title deeds, but also of any right over the sums so secured. This view has found favour with the High Court on appeal, and it is this decision which their Lordships have now to consider. It is desirable to mention two incidental matters. In the course of its business the respondent bank had in some cases sued its customers on the overdrafts, obtained money decrees against them, procured the property comprised in the deposited title deeds to be sold in execution, and had itself bought the property in the execution sale. Such property obviously became part of the Immovable property of the respondent bank. In some other cases the respondent bank had re-deposited some of the title deeds with the Imperial Bank as security for loans. No question arises as to these, as it was eventually conceded by the liquidators that such transactions were protected by Section 59 of the Transfer of Property Act, 1882.

2. The question raised by this application for directions as to the rights of the Imperial Bank came, in the first instance, on March 9, 1928, before Costello J., who

directed it to stand over until after the determination of the debentureholders' action above referred to. On March 26, 1928, the debentureholders' action came on for decision before Costello J., who, on admission made on behalf of the Imperial Bank, made a decree which, so far as is material, is as follows: "The plaintiff bank, by its advocate admitting that by reason of the fact that the two debentures in the plaint in this suit mentioned have not been registered in accordance with the provisions of the Indian Registration Act, 1908, such debentures do not operate to affect any Immovable property of the defendant bank, it is declared that the said debentures constitute charges upon all the undertaking, property and assets (including uncalled capital) of the defendant bank other than the Immovable property of the defendant bank." This decree, from which no appeal has been brought, operates, in the opinion of their Lordships, to restrict considerably the points that remained open for argument by the Imperial Bank. Counsel desired to address to the Board arguments to the effect that the Indian Registration Act did not apply to a floating charge for various reasons, as, for example, that it was impossible to comply with the provisions requiring particulars of the specific property: they also were prepared to contend that provisions in the Indian Companies Act for the registration of charges took the place of the provisions in the Indian Registration Act so far as they affected dispositions by companies. Their Lordships, in the course of the hearing, felt bound to intimate that in their view, in this case, such contentions were no longer open. The decree is inconsistent with any such arguments: and in their Lordships' view any right, title or interest in the properties comprised in the title deeds in question which the Imperial Bank claim by their debentures must be covered by the phrase "immovable property" used in the admission and the decree.

3. As a result, it follows that the Imperial Bank, by their debentures, acquired no right, title or interest in the Immovable property comprised in the title deeds. In other words, the title deeds are not available to them as security for any of the debts which the deeds were deposited to secure. They cannot, therefore, control such securities, or the disposition of them, or take steps to enforce them either in their own name or in the name of the respondent bank.

4. Are they, however, left without any right or interest in the debts which the title deeds secure? The High Court on appeal has answered this question in the affirmative. Their Lordships are of opinion that this decision does not give effect to the rights of the parties and cannot be supported. The debentures were intended to create a charge over the whole of the assets of the respondent bank; a floating charge until the occurrence of the stipulated events; a fixed charge when any of these events occurred. It is unnecessary to discuss how such a floating charge obtains legal validity in India. It is sufficient in this case to say that its validity over assets other than Immovable property is not disputed, and has been expressly established by the decree in the debenture-holders' action referred to above. Inquiry, therefore, has to be made as to what were the assets of the respondent

bank other than Immovable property at the time when the charge became fixed. It seems to their Lordships obvious and beyond question that the principal assets of this bank, as of any bank, are the debts due to the bank from customers either for advances, whether on overdraft or loan account, or for any other consideration, such as guarantee, etc. The debts may be secured either on Immovable property or on merchandise: they may be wholly secured or partly secured: the security may have been given when the debt was created or later; but in any case, the debts exist as moveable property and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security. There would, therefore, appear to be no reason in principle why a creditor should not be able to charge his moveable assets, the debts due to him, even if he be unsuccessful by reason of statutory restrictions in transferring the security. The difficulty felt by Rankin C. J., which led him, contrary to his own wishes, to decide against the charge on the debts, was created by the terms of the Transfer of Property Act, 1882, as amended by the Act of 1900. By the amending Act, an actionable claim was defined as "a claim to any debt other than a debt secured by mortgage of Immovable property or by hypothecation or pledge of moveable property," and sections were substituted for corresponding sections in the Act of 1882 dealing with the transfer of actionable claims. It appeared to the Chief Justice that inasmuch as a secured debt is not within the definition of actionable claim, the debt without the security could not be made the subject of transfer at all. But this seems to be creating disabilities which are not expressed in the Act, and, indeed, are inconsistent with it, for by Section 6 of the Act of 1882, "Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force." It appears to have escaped notice that the definition in "actionable claim" also excludes debts secured by hypothecation or pledge of moveable property; and it would appear very remarkable if in India merchants are unable to secure credit by disposing of their available book debts unless at the same time they re-hypothecate or replete the merchandise which they may happen to hold. The effect of the amendment is to restrict the statutory rights on transfer such as the right to sue in the transferees' name, etc., to such transfers as are transfers of actionable claims as defined. There appears to be no difficulty in a transfer of a debt without the security: the original debtor can always redeem: the relations between him and his original creditor are not altered: indeed, in the present case it would appear that the Imperial Bank can only enforce the debt in the name of the respondent bank which, no doubt, the latter bank must permit. The transferee takes no further interest than the transferor was able to give him. The rights of the parties are further declared by the amended Section 134 of the Transfer of Property Act, which would appear to apply to their case. The result is that while the Imperial Bank have no right or interest in the Immovable property of the respondent bank including the Immovable property over which the respondent bank hold security, the Imperial

Bank have a charge over the debts due to the respondent bank, whether secured or not, and are entitled to the benefit of all sums received in reduction of the debts, whether from the realisation of securities or otherwise. Their Lordship are, therefore, of opinion that the appeal should be allowed, and the order of the appellate Court, dated March 18, 1930, be set aside. The order of Mr. Justice Buck-land, dated August 26, 1929, should be varied by adding before the first" It is ordered "the following declaration:◆" It is ordered and declared that by virtue of its debentures the Imperial Bank of India is entitled to all sums received or to be received subsequently to April 28, 1927, by the receivers or liquidators of the Bengal National Bank, Limited, in or towards satisfaction of debts owing to that bank upon the security of property moveable or immovable, and any interest on such debts, whether such sums were or shall be received by way of repayment by the customer or payment by a guarantor or out of proceeds of sale of the security or otherwise; and, subject thereto."

5. The costs of the parties in the appeal below should be costs in the application. The costs of both parties of the appeal to His Majesty in Council should be taxed; the costs of the Imperial Bank as so taxed being added to its security: the costs as so taxed of the respondent bank being included in the costs, charges and expenses of its liquidation.

6. Their Lordships will humbly advise His Majesty accordingly.