2025 INSC 243

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1565 of 2025

(@SPECIAL LEAVE PETITION (C) NO. 11557/2019)

THE COSMOS CO. OPERATIVE BANK LTD. …

APPELLANT(S)

VERSUS

CENTRAL BANK OF INDIA & ORS. …
RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX

1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Judicature at Bombay (Civil Appellate Jurisdiction) dated 12.12.2018 in Writ Petition No.11324 of 2015, by which the writ petition filed by the appellant herein seeking to challenge the order passed by the (Debt Recovery Appellate Tribunal) (for short, the "**DRAT**") dated 28.08.2015 in Appeal No. 41 of 2007 came to be rejected thereby affirming the order passed by the DRAT.

A. FACTUAL MATRIX

3. The facts giving rise to this appeal may be summarised as under: -

(a) We take notice of the fact that the respondent nos. 2, 3 and 4 respectively, are the original borrowers. However, the respondent No.4 has passed away and therefore his name came to be deleted from the array of parties vide order dated 4.12.2020.

(b) The original borrowers on the strength of one unregistered agreement of sale availed loan facility from the Central Bank of India i.e. the respondent No. 1 to the tune of Rs.30,00,000/- approximately. What was offered by way of security was a flat which the original borrowers proposed to purchase from the developer and all that they had on the day and date when they went before the bank to avail the loan was an unregistered agreement of sale.

(c) It is not in dispute that the Central Bank on the strength of an unregistered agreement of sale sanctioned the loan creating a charge over the flat.

(d) Since the borrowers defaulted in the repayment of the loan, the Central Bank initiated proceedings for the recovery of the requisite amount before the Debt Recovery Tribunal-I, Mumbai (in short "the DRT"). The DRT Mumbai adjudicated the Original Application No. 74 of 2002 and held the borrowers jointly and severally liable to pay an amount of ₹43,15,405.56 paisa with interest thereon @15% per annum from the date of filing of the O.A. till its payment.

(e) The relevant observations made by the DRT, Mumbai in Para 8 reads thus: -

> *"8. In application affidavit of the applicant state that the Defendant No. 2 with intention to create mortgage deposited title deeds of her flat No. C-28, Sahyadari Apartment, L.T. Road, Borivali West, Bombay-400092 as security of the loan. sanctioned to Defendant No. l. To prove this fact the Applicant's side rely on Exh. 53, which is an unregistered memorandum. It being unregistered document itself is not sufficient to create the mortgage. The applicants state further on 04.02.1993, the Defendant No. 2 again attended Applicants office and re-deposited the title deeds of her flat on the enhanced, revised loan. The applicant's case about mortgage is based on the title deeds, the documents produced by Defendants to create the mortgage. That was primary evidence. It was not produced. Memorandum, Exh. 53 affidavit and pleading of applicant cannot take place. The applicant do not state or explain why that primary, basic evidence is not brought before the Tribunal. Unless these documents are on record, it cannot be assessed/ascertained whether those documents were sufficient to create mortgage or not. In all the circumstances, I hold the applicant failed in proving the Defendant No. 2 mortgaged her flat as a security of the loan given by the Applicants."*

(f) The operative part of the order passed by the DRT reads thus: -

"A) The Defendant No. 2 and 3 shall jointly and severally pay the amount of Rs. 43,15,405.56 ps (Rupees Forty Three Lacs Fifteen Thousand Four Hundred Five and Paise Fifty Six only) to the Applicant with interest thereon @ 15% p.a. from the date of filing of this application till the payment.
B) The defendant No. 2 shall pay the Applicant, the amount of Rs. 5,70,787.21 ps. (Rupees Five Lacs Seventy Thousand Seven Hundred Eight Seven and Paise Twenty One Only) as dues of Overdraft Accounts, Rs. 4,08,157.25 ps. (Rupees Four Lacs Eight Hundred One Hundred Fifty Seven and Paise Twenty Five only) as due of Short Term Loan Account, Rs. 2,25,498.45 ps. (Rupees Two Lacs Twenty Five Thousand Four Hundred Ninety Eight and Paise Forty Five only) as dues of Working Capital Loan with interest thereon @ 15% p.a.
C) The Applicant will be entitled to recover this amount from the hypothecation created by the defendants as mentioned in the application of the defendants fail to pay the above amount."

D) The defendants No. 2 & 3 shall pay cost of this Application to the applicant and to bear their own costs".

(g) The Central Bank of India had to file an appeal before the DRAT because of the observations made by the DRT in its order as contained in para 8 referred to above.

(h) The order passed by the DRAT, allowing the appeal filed by the Central Bank reads thus: -

"1. This appeal has been filed by the plaintiffs /appellant herein being aggrieved by the order dated 30/11/2006 passed by the learned Presiding Officer, DRT-I, Mumbai in O.A. No. 74 of 2002, whereby the learned Presiding Officer directed the defendant nos. 2 and 3 to jointly and severally pay the amount of Rs.43,15,405.56 ps. to the applicant with interest thereon @15% p.a. from the date of filing of the application till its payment. Further directed the defendant No. 2 to pay the amount of Rs.5,70,787.21 ps. as dues of Overdraft Accounts, Rs. 4,08,157.25 ps. as dues of Short Term Loan Account and Rs.2,25,498.45 ps. as dues of Working Capital Loan with interest thereon @15% p.a.

2. The ld. counsel for the appellant raised two grounds namely the description made by the defendant no.1 is not correct one and second ground is that the original title deeds have not been produced before this court. Hence he prayed that the appeal has to be allowed against the defendant no.1 alone. The suit has been dismissed against the defendant no.1. Anyhow the suit against the defendant nos. 2 and 3 has been decreed.

3. The contention of the ld. counsel for the appellant is that the defendant no.1 is real borrower and is sued in his personal capacity as proprietor of M/s. Ajanta Industries which is evident from Para No. 2. Hence he prayed that the appeal has to be allowed.

4. The contention of the respondent is that the mortgage has not been proved before the DRT. Hence the suit has been rightly dismissed. Thereafter respondent no. 4 has advanced the loan to the respondent no. 1 and thereafter the property is sold to the third person. Hence he prayed that the appeal has to be dismissed.

5. From the perusal it is seen that it has been mentioned that the respondent no.1 was sued in his personal and individual capacity as proprietor of M/s. Ajanta Industries as clearly set out in Para No.2. Hence as per Order 30 Rule 10 he has been properly described, hence the finding in this regard given by the DRT has to be set aside and in turn is set aside.

6. The next contention is that the original documents have not been produced before the trial court is not in dispute. Now it has been produced before this court which pertains to the mortgaged property and original agreement are now brought on record and is taken on record. It is pertinent to note that the original title deeds are with the appellants and mortgage is not denied by the guarantor. It is also clear that respondent no.4 do not have title deeds pertaining to the property and their alleged mortgage is very much subsequent to the mortgage of appellants. Hence, I am of the view that it can be accepted that the appellant bank has valid and subsisting mortgage in its favour and in turn mortgage is admitted and finding given by the DRT in this regard has to be set aside and the O.A. against the defendant no.1 also decreed and allowed as all parties are properly sued and joined.

7. The appeal is allowed.

8. Subsequent to sale by respondent no. 4 in favor of third party and amount of deposit is concerned, this point is left open to agitate before the appropriate forum."

(i) While the proceedings before the DRAT were pending in the form of appeal filed by the Central Bank of India, the appellant bank herein had to intervene, and they were also heard on the question as to which bank had the first charge over the security interest created by the original borrowers.

(j) The appellant bank herein being dissatisfied with the order passed by the DRAT referred to above challenged the same by filing a writ petition before the High Court. The High court proceeded on the footing that the DRAT was right in recording a finding that the mortgage of the flat in question created in favour of the appellant bank herein was subsequent in point of time and besides the same, the appellant bank had no valid title deeds with them at the time of sanctioning the loan in favour of the original borrowers.

(k) In short, the finding of fact recorded by the High Court in its impugned judgment is that the flat was mortgaged with the Central Bank of India on 31.10.1989, whereas the mortgage claimed by the appellant Bank herein was of October, 1998.

(l) The High Court observing as aforesaid, rejected the writ petition filed by the appellant herein. The relevant observations made by the High Court in its impugned judgment read thus: -

> *"6. By the impugned order, therefore, the DRAT had arrived at a clear finding of fact that the mortgage of the said flat to the Petitioner-Cosmos Bank is 'subsequent' to the mortgage of the Respondent-Central Bank apart from the fact that the Petitioner-Cosmos Bank did not have title deeds pertaining to the said flat. This finding was arrived at by DRAT as the said flat was mortgaged to the Respondent-Central Bank on 31-10-1989, whereas the mortgage claimed by the Petitioner-Cosmos Bank was of October 1998.*
>
> *7. It is brought out in the Affidavit-in-Reply of the Respondent-Central Bank that the Respondent-Central Bank had Initially filed a suit against the borrower/guarantors (Respondents Nos.2 to 4 herein) in this Court on 5 September 1994. By an interim order dated 20-10-1994, this Court had appointed a Court Receiver in respect of the said flat.*

8. It would thus be evident that at the time of sanction and grant of the Loan by the Petitioner-Cosmos Bank i.e. sometime in November 1998, the said flat was in custodia legis as the Court Receiver was appointed in the year 1994. In these circumstances, there appears to be substance in this submission of the learned Counsel for the Respondent-Central. Bank that the validity of the mortgage of the said flat in favour of the Petitioner-Cosmos Bank was even otherwise questionable. The suit which was filed in this Court was ultimately transferred to DRT only in the year 2002 and numbered as O.A.No. 74 of 2002. Before this Court, the Petitioner-Cosmos Bank have essentially relied upon the Share Certificate which was as a matter of fact issued by the Society only in the year 1989 (as the Society itself was formed in the year 1986-87) and Agreement for Sale dated 7-12-1978 (which is subsequent to Agreement for Sale dated 09-11-1978 relied upon by the Respondent-Central Bank). Both the Agreements are unregistered. It Is not even pleaded by the Petitioner-Cosmos Bank in the present Petition that the documents of title deeds relied upon by the Respondent-Central Bank were not credible or that the mortgage of the said flat in favour of the Respondent-Central Bank was not valid. In any event, it can be hardly disputed that the mortgage in favour of the Respondent- Central Bank was prior in point of time. In the circumstances, in our view, the DRAT rightly held in the impugned order that the alleged mortgage of the Petitioner-Cosmos Bank was subsequent in point of time to the mortgage of the Respondent-Central Bank.

9. In view of the aforesaid discussion, we are unable to find fault with the impugned order of the DRAT. The Petition is, accordingly, dismissed. The Recovery Officer, DRT may now pass appropriate orders as regards the distribution of the sale proceeds of the said flat which has been deposited in the DRT."

4. In such circumstances referred to above, the appellant bank is here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. <u>Submissions on behalf of the appellant Cosmos Co. Operative Bank</u>.

5. The learned counsel appearing for the appellant bank vehemently submitted that the High Court committed an egregious error in rejecting the writ petition filed by his client and thereby affirming an equally egregious order passed by the DRAT.

6. He would submit that indisputably the first mortgage was created in favour of the Central Bank of India, but the said mortgage was invalid or rather having no force in law. According to him any bank, while sanctioning the loan would ensure that what is being offered by way of security is something valid. In such circumstances, when an unregistered agreement of sale was offered as a title deed, it was of no value as it is a settled law that agreement of sale does not confer any right title or interest. Far from being a registered agreement of sale, in the case on hand, what was offered by way of security to the Central Bank was an unregistered agreement of sale.

7. In the aforesaid context, the learned counsel first invited the attention of this Court to Section 54 of the Transfer of Property Act, 1884 (for short, the "**Act, 1884**") which defines the terms sale. Thereafter he invited the attention of this Court to Section 58 of the Act, 1884 which defines the term "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed".

8. He laid much emphasis on sub-section (a) of Section 58, which explains what is mortgage. Thereafter, he invited the attention of the Court to Section 100 of the Act, 1884 which explains what is “charge”.

9. The learned counsel thereafter invited the attention of this Court to certain provisions of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short the "**Act 1963**") more particularly Section(s) 4, 4A and 11 therein, respectively.

10. He thereafter invited the attention of this Court to few provisions of the Maharashtra Apartment Ownership Act 1970 (for short the “**Act, 1970**”) more particularly the preamble to the Act and Sections 2, 4 and 5 respectively.

11. To fortify his submissions more particularly the principal contention that the respondent no. 1 Bank cannot be said to have the first charge over the mortgaged property, he relied on few decisions of this Court, which are as under: -

i. ***Suraj Lamp & Industries (P) Ltd. (2) through Director v. State of*** **Haryana and Another** reported in **(2012) 1 SCC 656** more particularly paras 16 and 19 respectively therein.

ii. **Bank of India v. Abhay D. Narottam and Others** reported in **(2005) 11 SCC 520** more particularly the observations made in paras 9 and 11 respectively therein.

iii. ***Anita Enterprises and Anr. v. Belfer Coop. Housing Society Ltd. and Ors.*** reported in **(2008) 1 SCC 285** more particularly the observations made in para 41 therein.

iv. **Dattatreya Shanker Mote and Ors. v. Anand Chintaman Datar and Ors.** reported in **(1974) 2 SCC 799** more particularly the observations made in para 67 therein."

12. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal, the same may be allowed and the impugned order passed by the High Court may be set aside.

ii. <u>Submissions on behalf of the respondent no.1; Central Bank of India</u>.

13. On the other hand, the learned counsel appearing for the Central Bank of India submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order. He would submit that indisputably the first charge over the mortgaged property is that of the Central Bank.

14. At this stage, we must record that the learned counsel wanted to place few additional documents on record to make good his case that the view taken by the High Court is correct. However, considering the fact that this litigation is pending past almost 10 years, we declined such request.

15. We requested the learned counsel to proceed on the basis of the material on record and make good his case that the impugned order passed by the High Court needs no interference.

16. He would submit that there are concurrent findings recorded by the DRAT and by the High Court in so far as the validity of the mortgage is concerned and also which bank has the first charge over the mortgaged property.

17. In such circumstances, referred to above, the learned counsel would submit that there being no merit in this appeal, the same may be dismissed.

C. ISSUE FOR CONSIDERATION

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

D. ANALYSIS

i. Relevant Provisions

19. Before adverting to the rival submissions canvassed on either side, we must look into the few provisions of the law relevant for the purpose of deciding the present appeal which are as follows: -

SECTION(S) 58 AND 100 OF THE ACT, 1884.

> ***"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—***
> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being arc called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage.— Where, without delivering possession of the*

mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.— Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage.— Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage -money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.— Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds.— Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

*"**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 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 in the execution of his trust, 5 [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 charge."

SECTIONS 4, 4A AND 11 RESPECTIVELY OF THE ACT, 1963

"***4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered. –***

(1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent. of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act") and such agreement shall be in the prescribed form."

(lA) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b),-

(a) particulars,-

(i) if the building is to be constructed, the liability of the

promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of limited common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities, if any;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use of which the flat is intended and restriction of its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents,-

(i) the certificate by an Attorney at law or Advocate under clause (a) of sub-section (2) of section 3;

(ii) Property Card or extract of village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.

(2) Any agreement for sale entered into under sub-section (1) shall be presented by the promoter or by any other person competent to do so under section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under sections 23 to 26 (both inclusive) to the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in sections 34 and 35 of the said Act also within the time aforesaid:

Provided that, where any agreement for sale is entered into, or is purported to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983, and such agreement was not presented for registration or was presented for registration but its execution was not admitted before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration, and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for registration, and register it under the Registration Act, as if it were presented, and its execution was admitted, within the time laid down in the Registration Act:

Provided further that, on presenting a document for registration as aforesaid if the person executing such document or his representative, assign or agent does not appear before the registering officer and admit the execution of the document, the registering officer shall cause a summons to be issued under section 36 of the Registration Act requiring the executant to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons. If the executant fails to appear in compliance with the summons, the execution on the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard, if satisfied that the document has been executed by him, proceed to register the document accordingly.

4A. Effect of non-registration of agreement required to be registered under section 4.-

Where an agreement for sale entered into under sub-section (1) of section 4, whether entered into before or after the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, Management and transfer) (Amendment and Validating Provisions) Act, 1983, remains unregistered for any reason, then notwithstanding anything contained in any law for the time being in force, or in any judgement, decree or order of any Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

xxx xxx xxx

11.Promoter to convey title, etc., and execute documents, according to agreement-

(1) A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid or to an association of flat takers or apartment owners, his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

(2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under sub-section (1).

(3) If the promoter fails to execute the conveyance in favour of the Cooperative society formed under section 10 or, as the case may be, the Company or the association of apartment owners, as provided by sub-section (1), within the prescribed period, the members of such Co-operative society or, as the case may be, the Company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the Company or the association, who have purchased the

flats and all other relevant documents (including the occupation certificate, if any), for issuing a certificate that such society, or as the case may be, Company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

(4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution, of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance.

(5) On submission by such society or as the case may be, the Company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued by the Competent Authority alongwith the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate registration Officer shall, notwithstanding anything contained in the Registration Act, 1908, issue summons to the promoter to show cause why, such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may on being satisfied that it was fit case for unilateral conveyance, register that instrument as, 'deemed conveyance'."

SECTIONS 2, 4 AND 5 RESPECTIVELY OF THE ACT, 1970

*"**2. Application of the Act. -***
This Act applies only to property, the sole owner or all of the owners of which submit the same to the provisions of this Act by duly executing and registering a Declaration as hereinafter provided : Provided that, no property shall be submitted to the provisions of this Act, unless it is used or proposed to be used for residence, office, practice of any profession or for carrying on any occupation, trade or business or for any other type of independent use :

xxx *xxx* *xxx*

4. Status of apartments. –
Subject to the provisions of the second proviso to section 2 of this Act, each apartment, together with its undivided interest in the common areas and facilities, appurtenant to such apartment, shall for all purposes constitute heritable and transferable immoveable property within the meaning of any law for the time being in force in the State;

and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other manner whatsoever in the same manner, to the same extent and subject to the same rights, privileges, obligations, liabilities, investigations, legal proceedings, remedies and to penalty, forfeiture and punishment as any other immoveable property, or make a bequest of the same under the laws applicable to the transfer and succession of immoveable property.

5. Ownership of apartments. –
(1) Each apartment owner shall be entitled to the exclusive ownership and possession of his apartment in accordance with the Declaration executed and registered as required by section 2 of this Act.

(2) Each apartment owner shall execute a Deed of Apartment in relation to his apartment in the manner prescribed for the purpose."

20. Without any doubt in our mind, we say that the High Court fell in error more particularly, in view of, what has been observed in para 8 of the impugned order. The law is very well settled as explained by this Court in ***Suraj Lamp*** (supra) that a contract of sale i.e. an agreement of sale does not itself create any interest in or charge on any property. This is evident on

plain reading of Section 54 of the Act, 1884 which we have referred to above.

21. In the aforesaid context, the decision of this Court in ***Abhay D. Narottam*** (supra) is also relevant more particularly the observations made in para 11 therein. Paras 9 and 11 read thus: -

> *"9. It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. "Mortgage" has been defined in Section 58(a) of the Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge under Section 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.*
>
> *xxx xxx xxx*
>
> *11. As far as the flat is concerned, it needs no authority to say that a contract for sale of immovable property does not of itself create any interest in or charge over such property. This is provided in Section 54 of the Act and is well-settled law. In this case, the agreement for sale which was deposited by Respondent 2 with the appellant Bank was not an agreement by which Respondent 2 agreed to sell the property to a third party, but an agreement to sell the flat to Respondent 2. No interest was created in favour of Respondent 2 by virtue of this agreement for sale which could have been transferred by way of security to the appellant Bank. There is as such no question of the appellant Bank having any charge over such non-existent interest."*
>
> (Emphasis supplied)

22. The observations referred to above are directly applicable to the facts of the present case.

23. The observations made by this Court in ***Dattatreya Shanker Mote*** (supra), more particularly, in para 67 also assumes significance. Para 67 reads thus: -

> *"67. The contention was that, although a charge may not be described as "a transfer", yet, the result of Section 100 of the Act was to equate it with a simple mortgage which is a transfer because Section 100 says: "all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge". I think that, apart from the qualifying words, "so far as may be", used by Section 100 of the Act, a condition essential to the applicability of Section 48 of the Act is that there must be an actual transfer of property. Furthermore, another condition for invoking Section 48 of the Act is that the previous and the subsequently created rights "cannot all exist or be exercised to their full extent together". In the case before us, this does not appear from facts found. In any case, the prior right of the charge-holders could only obtain priority provided other things are not unequal. This follows from words used indicating that each of the two or more transactions must at least be a "transfer". Furthermore, the conditions of priority as between the holder of a previous charge and a subsequent simple mortgage are completely covered by Section 100 of the Act. The principle underlying Section 48 is one expressed in the maxim of Equity: "Qui prior est tempore potior est jure" (first in time is stronger in right). This principle, applied to ranking between rival equitable claims, is applied by Section 48 to contending claims of otherwise equal legal validity. The effect of Section 100 is that while a charge, which is not a "transfer" of property, gets recognition as a legally enforceable claim, that enforceability is subjected by the proviso to the requirements of a prior notice in order to give it precedence over a legally valid transfer of property. The rights of the appellants charge-holders could only be exercised, on facts found, subject to the priority obtained by the respondent mortgagee's rights. This clear result of the law, as contained in Section 100 of the Act, cannot be defeated by invoking either the terms of or the principles underlying Section 48 of the Act read with the first part only of Section 100 of the Act. If the respondent simple mortgagee Oswal could not have claimed the benefit of the proviso to*

Section 100, the first part of Section 100, read with Section 48 of the Act, could have come to the aid of the appellants. But, on the view adopted by me, this line of reasoning does not help the unfortunate charge-holders at all."

(Emphasis supplied)

24. The observations made by this Court in ***Anita Enterprises*** (supra) in para 41 are also relevant. The para 41 reads thus: -

"41. It appears to us that the status of a member in a tenant co-partnership housing society is very peculiar. The ownership of the land and building both vests in the society and the member has, for all practical purposes, right of occupation in perpetuity after the full value of the land and building and interest accrued thereon have been paid by him. Although de jure he is not owner of the flat allotted to him, but, in fact, he enjoys almost all the rights which an owner enjoys, which includes right to transfer in case he fulfils the two preconditions, namely, he occupies the property for a period of one year and the transfer is made in favour of a person who is already a member or a person whose application for membership has been accepted by the society or whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub-section (1-A) of Section 23 of the Societies Act. In case any of these two conditions is not fulfilled, a member cannot be said to have any right of transfer. Thus, we reiterate the law laid down by this Court in Sanwarmal [(1990) 2 SCC 288] that a member has more than a mere right to occupy the flat, meaning thereby higher than tenant, which is not so in the case of a tenant within the meaning of Section 5(11) of the Rent Act. This being the position, we have no difficulty in coming to the conclusion that the status of a member in the case of tenant co-partnership housing society cannot be said to be that of a tenant within the meaning of Section 5(11) of the Rent Act, as such there was no relationship of landlord and tenant between the Society and the member."

(Emphasis supplied)

25. The observations made by this Court in ***Suraj Lamp*** (supra) in paras 16 and 19 are also relevant. The paras 16 and 19 respectively read thus: -

"Scope of an agreement of sale

16. Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas

Karsondas v. S.A. Kamtam [(1977) 3 SCC 247] observed: (SCC pp. 254-55, paras 32-33 & 37)

> *"32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra [AIR 1967 SC 744 : (1967) 1 SCR 293] .) The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.*
>
> *33. In India, the word 'transfer' is defined with reference to the word 'convey'. … The word 'conveys' in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.*
>
> ***
>
> *37. … that only on execution of conveyance, ownership passes from one party to another…."*
>
> *xxx xxx xxx*

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter."

(Emphasis supplied)

26.*Suraj Lamp* (supra) later came to be referred to and relied upon by this Court in ***Shakeel Ahmed v. Syed Akhlaq Hussain*** reported in **2023 SCC OnLine SC 1526** wherein the Court after referring to its earlier judgment held that the person relying upon the customary documents cannot claim to be the owner of the immovable property and consequently not maintain any claims against a third-party. The relevant paras read as under: -

> *"10. Having considered the submissions at the outset, it is to be emphasized that irrespective of what was decided in the case of Suraj Lamps and Industries (supra) the fact remains that no title could be transferred with respect to immovable properties on the basis of an unregistered Agreement to Sell or on the basis of an unregistered General Power of Attorney. The Registration Act, 1908 clearly provides that a document which requires compulsory registration under the Act, would not confer any right, much less a legally enforceable right to approach a Court of Law on its basis. Even if these documents i.e. the Agreement to Sell and the Power of Attorney were registered, still it could not be said that the respondent would have acquired title over the property in question. At best, on the basis of the registered agreement to sell, he could have claimed relief of specific performance in appropriate proceedings. In this regard, reference may be made to sections 17 and 49 of the Registration Act and section 54 of the Transfer of Property Act, 1882.*
>
> *11. Law is well settled that no right, title or interest in immovable property can be conferred without a registered document. Even the judgment of this Court in the case of Suraj Lamps & Industries (supra) lays down the same proposition. Reference may also be made to the following judgments of this Court:*
>
> *(i). Ameer Minhaj v. Deirdre Elizabeth (Wright) Issar (2018) 7 SCC 639*
>
> *(ii). Balram Singh v. Kelo Devi Civil Appeal No. 6733 of 2022*
>
> *(iii). Paul Rubber Industries Private Limited v. Amit Chand Mitra SLP(C) No. 15774 of 2022.*
>
> *12. The embargo put on registration of documents would not override the statutory provision so as to confer title on the basis of unregistered documents with respect to immovable property. Once this is the settled position, the respondent could not have maintained the suit for possession and mesne profits against the appellant, who was admittedly*

in possession of the property in question whether as an owner or a licensee.

13. The argument advanced on behalf of the respondent that the judgment in Suraj Lamps & Industries (supra) would be prospective is also misplaced. The requirement of compulsory registration and effect on non-registration emanates from the statutes, in particular the Registration Act and the Transfer of Property Act. The ratio in Suraj Lamps & Industries (supra) only approves the provisions in the two enactments. Earlier judgments of this Court have taken the same view."

iii. Concept of Equitable Mortgage.

27. The question whether Central Bank of India i.e., the respondent no. 1 herein had a valid mortgage or not can be looked at from one another angle. It is an undisputed fact that the original borrowers herein whilst availing the loan facility from the respondent no. 1 bank herein had offered the said flat in question as a security, and pursuant to the same had willingly deposited the agreement of sale in respect of the same with the respondent no. 1 bank.

28. Although, indisputably as discussed in the foregoing paragraphs the said agreement to sale can by no means be treated as title deeds to the said flat and as such would not constitute a mortgage in terms of Section 58 of the Act, 1884, yet could it be said that there was no charge created on the said flat at all by the original borrowers? Could it be argued that the failure to deposit the share certificate to the said flat at the time of availing the loan for whatsoever reasons by a necessary implication nullifies the charge that was intended or sought to be created over the said flat in favour of the appellant bank herein, merely because the agreement to sale in itself does not

purport any title even though the intention of the parties was to create a charge over the flat? The answer to the same has to be an emphatic “No”.

29. Before we proceed to explain the aforesaid, it would be apposite for us to understand the concept of “Equitable Mortgage”. Under the English Law, broadly there are two kinds of mortgages; **(i)** a legal mortgage and **(ii)** an equitable mortgage. A ‘legal mortgage’ entails creation of a charge by way of conveyance of a proprietary interest over the property or security in favour of the lender in accordance with the formalities set out under the Law of Property Act, 1925. This is typically effectuated through execution of a deed of charge or a mortgage deed simpliciter. While such conveyance need not involve transfer of the title or ownership in itself nor is the conveyance required to be physical or actual and may be symbolic in nature where the borrower or mortgagor continues to retain possession or even title of the mortgaged property; however, the *de jure* effect of such conveyance must be in the nature of vesting the lender with an enforceable right to take possession, to foreclose or to sell the property in the event of default. Thus, the legal effect of the deed of charge or mortgage must convey certain enforceable rights in favour of the lender or mortgagor over the mortgaged property even though the title or ownership may not be transferred.

30. However, there may be instances where the parties agree to mortgage a property as security, but no formal charge or conveyance of any proprietary interest in the said property has taken place, still the same may be recog-

nized as a mortgage. This is popularly understood as an 'equitable mortgage' where although under the law the formalities required for creating a legal charge or mortgage over a property are patently absent, yet the said property would be in equity deemed to have been mortgaged and as such may be apportioned or appropriated by the lender on the strength of mere intention of the parties to create a mortgage. In other words, where under the law no mortgage or charge is said to have been created over a property i.e., no conveyance of a right or interest over the subject property has been effected, yet if the intention of parties to create a mortgage is clear, equity would demand that such intention is not only respected but given some effect to and the said property be deemed to have been mortgaged so as to enable the lender to assert its rights over the same, it is known as an 'equitable mortgage'.

31. The concept or doctrine of 'equitable mortgage' owes its origin to the English case of ***Russel v. Russel*** reported in **[1783] 28 E.R. 1121** wherein the High Court of Chancery speaking through Lord Thurlow held that where there is delivery of title by the borrower to the lender for the purpose of availing a loan, although such deposit may not constitute a valid mortgage, but the courts in granting specific performance to the lender to create a security or lien over the property would effectively be "*supplying the legal formalities necessary to create nothing but a mortgage though one in equity*". He explained that the court in permitting the lender to create a se-

curity over the property on the strength of the title deeds lying with it is not per se performance of a contract but rather its execution and hence for all purposes would be a mortgage inter se the borrower and the lender in equity. He lastly elaborated that the further grant of relief to execute such a contract which is not a valid mortgage but nevertheless being converted into one is grounded on it being already being a contract part performed. [See; J.B. White & Tudor in Equitable Mortgage and Leading Cases in Equity, 9th Ed. (Sweet & Maxwell (1928)]

32. Thus, the underlying distinction between a legal mortgage and an equitable mortgage under the English Law is that in the former, there is conveyance or transfer of some proprietary interest in the mortgaged property in accordance with the statute or law whereas in the latter the formalities required for a legal mortgage are not fully satisfied, but the parties' intentions to create a mortgage are clear as result of which it is deemed as a mortgage.

33. The rationale behind the existence of the concept of an ‘equitable mortgage’ was elaborated upon by Sir William Holdsworth in *A History of English Law.* He explained that the evolution of equitable mortgage is based on the principle that a mortgage at its core is essentially nothing more than a ‘security’. It is not intended as a mechanism of transferring either ownership or any vested interest in the strict sense but rather only a means for providing a security. He elaborated how ‘equitable mortgages’ of today’s time is a reflection of the practicalities of the then mercantile system of the time where

due to the commercial exigencies and need for quick financial arrangements led the community to resort to the informal practice of extending loans and creating security by mere deposit of titles or a promissory note to repay solely on a ‘mutual understanding’ between the parties, without any actual agreement or memorandum and without following the cumbersome formalities of any transfer of conveyance of proprietary rights as required under a traditional or legal mortgage.

34. The aforesaid may be better understood through the well-known maxim of ‘*Quod fieri debuit pro facto censetur*’ which means that ‘*what ought to have been done is considered as done*’. Edward Henry Turner Snell in his book on *The Principles of Equity* explained that the role of equity in law is only one i.e. to rectify the injustice arising out of the rigidities of the law, to intervene and ensure that substantive justice prevails over mere formalities or hyper technicalities, even when strict legal requirements have not been met. Snell articulated that equity operates as a "court of conscience" tempering the harshness of the law and fulfilling its enduring mission to deliver fairness and justice where the rigid application of legal rules would otherwise result in inequity. In the context of mortgages, take a situation where there is no express document or deed to evince that a charge was created over the subject property and the parties at the time of availing the loan merely agreed that they would create a mortgage in the event of default. In the eyes of law, it would be said that no mortgage has been created whatsoever, yet

the understanding between the parties to later create a mortgage at the time whilst advancing the loan shows the *ab initio* intention to create a charge and treat the subject property as a security or a collateral for the sum so advanced. Under the general principle of law, the recourse that would ordinarily be available to the lender in the aforesaid situation would be to seek specific performance of the said agreement (oral or written) to create a mortgage on the strength that there has been part performance of the agreement i.e., loan has been advanced and thus, charge should now be permitted to be created, and thereafter proceed to exercise its rights after the said mortgage is created. But a "court of conscience" would instead of subjecting the lender to the rigmarole of the law, will directly give effect to the true sum and substance of the intention of the parties and thereby give to the very agreement itself the effect of creating a mortgage in 'equity' and enable the lender to exercise its rights as he would be entitled to if the agreement had been performed.

35. Thus, where a borrower willingly parts away with any title deed or a document or a promissory note or an undertaking in respect of a property by depositing it with the lender for the purpose of availing any credit facility and upon such deposit, the loan is so advanced by the lender, fairness, good conscience and justice or in other words 'equity' would demand that some meaningful significance be given to such act or conduct of the parties, as generally such act of depositing documents against loans is more often than

not for no other purpose but to create a mortgage. Thus, a "court of conscience" would give effect to the intention of the parties in the form of an 'equitable mortgage' even if there is no formal agreement or a shred of document expressly providing that such deposit is for the purpose of creating a charge **OR** if the documents so deposited do not necessarily have the effect of transferring or conveyancing any title or interest in the subject property to the lender.

iv. Nature of an Equitable Mortgage.

36. Having understood the concept of 'equitable mortgage', it would now be apposite to understand the ways in which an equitable mortgage may be created and its nature. Under the English Law, the two primary ways for creating an 'equitable mortgage' is either **(i) by deposit of the original title deeds to the subject property with the lender** or where the original title deeds are retained by the borrower then **(ii) by way of a memorandum of understanding or an agreement simpliciter recording the intention of the parties to create a charge over the subject property**.

37. In the case on hand, the original borrowers had availed loan facilities from both, the appellant bank and the respondent no. 1 bank herein by deposit of certain documents in respect of the said Flat. For availing the loan facility from the respondent no. 1 bank, the original borrowers deposited two unregistered agreement to sale dated 15.10.1973 and 09.11.1978 respectively in

relation to the said Flat all the way back in 1989. Whereas, whilst availing the loan facility from the appellant bank herein in the year 1998 the original borrowers deposited one another unregistered agreement to sale dated 07.12.1978 in respect of the said flat which is subsequent in time along with a share certificate of ownership of the said Flat dated 14.09.1989 that was issued by the concerned cooperative housing society.

38. Indisputably, when the loan was granted to the original borrowers, the share certificate of ownership being the sole document for conveyance of title had not been issued by the concerned housing society. In such a scenario, could it be said that in order to create a mortgage by deposit of title deeds, the respondent no. 1 bank was required to take or collect all documents and deeds of title to the said Flat in its possession, more particularly when the title deed or share certificate of ownership was not in existence at that time?

39. The High Court of Chancery in ***Robberts v. Croft*** reported in **44 E.R. 887** and a catena of other decisions have emphatically answered the aforesaid question in a negative. It has been held that *"[...] It is not necessary, to create an equitable mortgage, that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds deposited are material evidence of title."*

40. In fact, the English Courts have gone to the extent of saying that the title deeds are not the only documents a deposit of which may create an equitable charge upon the subject property, and that even a promissory note or an

agreement for purchase of the subject property can create an equitable mortgage. [See; ***Ex parte Warner***, reported in **[1812] 19 Ves Jr 202**; ***Lacon v. Allen*** reported in **[1856] 3 Drew. 579**]. Samuel Miller in *The Law of Equitable Mortgages* explained the aforesaid with a illustration that take a case where the owner has lost an important deed or where the deeds which have been deposited while purporting title to the property contain no reference to any other material deeds, or a situation where there exists no possible way for the lender to ascertain whether any other deeds or documents are actually outstanding, should the lender be deprived of the benefit of the deposit of the other documents even if the intention of parties to create a mortgage is clear? In his opinion, the principle underlying the doctrine of 'equitable mortgages' is premised to mitigate these very hardships or technicalities that often emerge in transactions of such nature from coming in the way of creation and enforcement of mortgages. He added, to hold otherwise, would be nothing but an unfaithful dilution of the doctrine of equitable mortgages and by extension the concept of 'equity' based justice. This is because for deciding a question of an equitable mortgage, the court is not required to look for deposit of a valid legal title, because no passing or transfer of title is involved in the first place in equitable mortgage unlike a legal mortgage, rather what the courts look for is a transaction in the nature of a contract whereby the interests of the borrower embraced in the subject property may be later subjected and made liable for the debt.

41. Even though, the High Court of Chancery speaking through Lord Eldon in the case of ***In Re: Rice*** reported in **[1819] 36 E.R. 632** argued against the idea of extending the doctrine of 'equitable mortgage' to instances of deposit of 'part-deeds' to discourage the act of scrupulous borrowers of obtaining loans from multiple creditors by dividing and depositing different deeds with each of them, the position under the English Law has continued to remain the same i.e., part deposits of title would be sufficient to create an equitable mortgage and that there is neither any requirement that the mortgagee or the lender should be required to acquire every title deed, nor is there any requirement that the documents so deposited show a good title to the vested property. [See; ***Robberts*** (supra). What is required is that the deeds or documents so deposited materially evinces the intention of the parties to create a charge over the subject property and the mortgagor assures itself that he has acquired all available titles or documents.

42. The Court of Chancery speaking through Lord Eldon in ***Knight v. Knight*** reported in **(1840) 3 Beav 148** held that "*equity looks to the intent rather than the form*". Thus, even if the document that was deposited with the lender falls short, it would still be enforceable in equity provided the intention of the parties to do so is as clear as a noon day. In the case at hand, even though what was deposited with the respondent no. 1 bank herein was nothing but an unregistered agreement to sale having no legal effect of con-

veyance or transfer of the said flat or any right therein in favour of the bank, the undisputed factum that the said agreement to sale was deposited by the original borrowers herein so as to offer the said flat as security would tantamount to an equitable mortgage. Moreover, since at the time of availing the loan, the share certificate of ownership to the said Flat was yet to be issued, it could be said that the respondent no. 1 bank had all the documents to the said Flat that it could have at that time possibly taken in possession, and we even proceed on the footing that the respondent no. 1 bank might have undertaken all the necessary steps to assure itself that there were no other material documents to be taken possession of at the time of extending the loan.

43. Thus, where 'equitable mortgages' have been created based on deposit of part-deeds or documents purporting title or evincing intention of parties to create an interest, all such deposits will be a valid mortgage in equity and the charge that might have been created prior in time will assume priority over any subsequent charges or mortgagors. However, since such a mortgage is an 'equitable mortgage' any rights flowing from such mortgages are only of personal character and only rights *in personam* and as such will not operate against any strangers or subsequent incumbrancers unaware of such equitable mortgage. This stems from the rule that equity acts only *in personam*. The very basis for creation of an 'equitable mortgage' is the intention of parties alone, and as such any action or remedy can be directed only

against the parties so involved. This is because, unlike a legal mortgage where a 'charge' is created directly on the property itself and the title or any proprietary interest therein is transferred to the lender thereby becoming a right enforceable in rem in respect to the property, in case of an 'equitable mortgage' no such charge is said to have been formally created on the property nor any transfer or conveyance of interest has said to occur. Rather on the contrary, the *de jure* title or ownership continues to vest with the original borrower and only the documents thereof is ordinarily retained by the lender and as such the right of the lender in such a situation is being enforced through the party having title over the said property alone i.e., the borrower and thus is only a right in *personam*. Edgar N. Durfee in *The Lien or Equitable Theory of the Mortgage* explaining the aforesaid stated that, in cases of equitable mortgage in the absence of any 'conveyance' or creation of 'charge', the money so advanced against the subject property is only in the form of a personal debt and hence a right in *personam* at best and the right of the lender to apportion or appropriate the subject property for repayment of loan only a right to take such an action rather than a right in the property itself.

44. 'Equitable Mortgage' being a right in *personam* will not affect successive incumbrances and will not be enforceable against successive mortgagees if the creation of such equitable charge was no disclosed to them. This is particularly because, 'equitable mortgages' are construed as 'incomplete mort-

gages' (as no actual charge is created nor any conveyance of title has taken place) and thus no person can be permitted to derive any advantage from any incomplete title who has on his own volition not done everything requisite to complete its title. If a first mortgagee voluntarily either leaves the title deeds with the mortgagor, or voluntarily accepts part-deeds and fails to either secure the rest or assure himself of any outstanding deeds or documents, then the charge of such first mortgagee must be postponed to any and all subsequent mortgagees, without notice of the charge of first mortgagee, because he due to his own gross negligence enabled the subsequent incumbrances. Thus, even if multiple equitable mortgages are created, the first charge will have priority, unless in case of fraud or gross negligence, or a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee in either **(i)** retaining the remaining deeds or **(ii)** failure to take steps in putting everyone to notice, more particularly the subsequent incumbrancers about the first equitable mortgage. Where the first mortgagor has made *bond fide* inquiry for them and received a reasonable excuse for their non-delivery, he shall not be postponed to a subsequent equitable mortgage that may be created.

45. In India, the aforesaid has been recognized in Section 78 of the Act, 1882 which provides that where on account of any fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee

shall be postponed to the subsequent mortgagee. The said provision reads as under: -

> ***78. Postponement of prior mortgagee. —***
> *Where, through the fraud, misrepresentation or gross neglect of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.*

46. It is in this very context, this Court in ***Suraj Lamps*** (supra) emphasized on the need for registration of documents so as to give publicity and public exposure to various transactions in respect of immovable properties and enable people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. The relevant observation reads as under: -

> *Advantages of Registration*
> *10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference: -*
>
> > *"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.*
> >
> > *Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether*

vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

Section 49 al the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

(Emphasis supplied)

47. In the present case, it appears from the materials on record, that when the loan was being advanced by the respondent no. 1 bank, a Memorandum of Equitable Mortgage recording transfer / deposit of the agreement to sale in respect of the said Flat was sought to be created, although the same has not

been placed on record. There are no correspondences or communications between the respondent no. 1 bank or the original borrowers where the share certificate of ownership was demanded, even though the Bank was well aware that the conveyance of title where the subject Flat is situated only takes place through such certificate and not by the agreement of sale in terms of Section 11 of the Act, 1963 read with Section 4 of the Act, 1970. Moreover, it appears that no steps were taken by the respondent no. 1 bank to issue a public notice of equitable charge that was created in its favour, as discernible from the fact that when the appellant bank upon inquiry was informed by the concerned cooperative housing society that the said flat was not subject to any prior encumbrances or charge. In such a scenario, the equitable charge of the respondent no. 1 bank herein is liable to be postponed to the charge created in favour of the appellant bank herein in terms of Section 78 of the Act, 1882, and the impugned order of the High Court is liable to be set-aside on this ground alone.

v. <u>Distinction between Mortgage by Deposit of Title Deeds under the English Law and under the Transfer Of Property Act, 1882</u>.

48. At this stage we must also address ourselves on one another important aspect where the High Court grossly erred whilst passing the impugned judgment and order. As discussed in the foregoing paragraphs of this judgment, the original borrower whilst availing the loan facility from the respondent

no. 1 and appellant, had deposited with them two unregistered agreement to sale, and another unregistered agreement to sale along with the share certificate of ownership, respectively. Although both of the aforesaid transactions seek to create mortgage by deposit of documents or title, yet there lies a very fine but pertinent distinction between the two transactions. In respect of the loan advanced by the respondent no. 1 bank, only two unregistered agreements to sale were deposited which as discussed earlier do not purport any title as held in ***Suraj Lamps*** (supra) while with the appellant bank herein apart from one unregistered agreement to sale the share certificate of ownership had also been deposited which has the effect of conveyance of title.

49. Under the English Law, whether the documents so deposited actually purport or transfer any title is immaterial for the purpose of creating an 'equitable mortgage' as long as the intention to do so is clearly discernible. The position in India however is quite different. This is because under the English Law, a mortgage created by deposit of title or documents is not construed as a legal mortgage and is only treated as an equitable mortgage. Whereas in India under the Act, 1882, more particularly under Section 58 sub-section (f) a statutory recognition has been given to the mode of creation of mortgage by deposit of title deeds. Such a mortgage by deposit of title deeds is for all purposes a 'legal mortgage' and not an equitable mort-

gage. At the cost of repetition, the said provision is once again reproduced hereunder: -

> *"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—***
> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being arc called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage.— Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
>
> *(c) Mortgage by conditional sale.— Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:*
>
> *Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.*
>
> *(d) Usufructuary mortgage.— Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the*

mortgage -money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.— Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds.— Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

50. Section 58 sub-section (a) stipulates the general rule that mortgage is "*the transfer of an interest in specific immoveable*" or as understood under the English Law as a "legal mortgage". Section 58 sub-section(s) (b) to (g) further explains the different modes to create a mortgage under the Act, 1882. What is particularly important to note is the fact that, the subsequent sub-section(s) do not either expressly or impliedly stipulate that no transfer of interest is taking place where mortgage is created in terms of the other modes provided therein. There is also nothing in the entire Act, 1882 that mortgage created by one particular mode under Section 58 would be subservient to another. In such a scenario, any mortgage that happens to be created

in terms of the Act, 1882 more particularly Section 58 would for all purposes be equal except in the consideration of priority of charge. Thus, while mortgage by deposit of title deeds under the English Law is an equitable mortgage and subservient to a legal mortgage, in India mortgage created by such deposit is not subservient to an equitable mortgage as such mortgage is in itself a legal mortgage.

51. Deposit of title deeds is one of the many forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. The three requisites for a valid mortgage are, (i) debt; (ii) deposit of title deed; and (iii) an intention that the deed shall operate as security for the debt. In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 of the Act, 1882 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. Whether there is an intention that the deed shall be security for the debt is a question of fact to be decided in each case on its own merits. The said fact will have to be decided just like any other fact

based on legal presumptions, oral, documentary and/or circumstantial evidence. Normally, title deeds are delivered to the bank along with a covering letter indicating therein an intention of delivering title deed i.e. to create security for the present or future liability. In turn, bank gives a letter to the person delivering title deeds indicating acceptance of the documents and/or title deeds by way of security either for the outstanding dues or for the loan to be advanced. The banks, normally, maintain register of securities called Equitable Mortgage Register; wherein the entry of title deeds is taken in the form of memorandum signed by the Branch Manager alone, as a person accepting delivery of the documents as security. **These formalities are done to establish three essential requisites of equitable mortgage, viz. (1) debit, (2) deposit of title deed and (iii) the intention that deed shall operate as security for the present or future debt.** But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage.

52. Thus, when the original borrowers deposited with the appellant bank herein, the share certificate of ownership to the said Flat, on that very day and date, a legal charge is said to have been created on the flat in favour of the appellant bank, whereas, when it comes to the respondent no. 1 bank no such charge on the flat was created, rather what was created was only an equit-

able mortgage, though prior in time. This distinction is particularly important, because even if the agreements to sale deposited with the respondent no. 1 bank were registered and thereby, giving public notice of their existence, still the appellant bank by virtue of possession of the actual title deeds to the said Flat in the form of the share certificate of ownership would be accorded priority in charge for the sole reason that the charge created by it is a legal mortgage in terms of Section 58 of the Act, 1882. At this stage, we may clarify that deposit of part-deeds of title would not constitute a mortgage in terms of Section 58 sub-section (e) of the Act, 1882 unlike English Law, because under the latter such deposit is only an equitable mortgage and thus, the strict rigidities may not be imposed or insisted upon whereas in India mortgage by deposit of title deeds is a legal mortgage which in effect would defeat any equitable mortgage, and thus, the requirement to deposit all title deeds would have to mandatorily be required except those deeds which despite best of efforts of the mortgagee could not have been deposited or known to be outstanding.

53. The underlying reason behind why an equitable mortgage would be subservient to a legal mortgage, even where proper notice was effectuated may be understood in many different ways, we have already discussed one of them in the foregoing paragraphs, particularly that the former does not create any *de jure* charge or right in the subject property and rather is only a right in *personam*, however, the short answer to the above is that equity cannot sup-

plant the law and can only supplement it. Thus, where the law is unambiguous and clear, equity will always yield to the law. However, when it comes to equitable mortgages, we may rephrase the above to only say that equity will yield to the law only to the extent provided by the law. Thus, although the legal mortgage would have assumed priority in charge, yet an equitable mortgage may still be enforceable as secondary charge, provided the other considerations such as notice of such mortgage is fulfilled.

54. This Court in ***K.J. Nathan v. S.V. Maruthi Rao*** reported in **AIR 1965 SC 430** has explained the fine distinction between an equitable mortgage as understood in the English law and the mortgage by deposit of title deed. K. Suba Rao J. (as His Lordship then was) speaking for Court observed as under: -

> *"Under this definition (referring to section 58(f) of the Transfer of Property Act) the essential requisites of mortgage by deposit of title deeds are, (i) debt), (deposit of title-deeds, and (iii) an intention that the deeds shall be security for the debt. Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English Law and the mortgage by deposit of title deeds recognized under the Transfer of Property Act in India. In England an equitable mortgage can be created either, (1) by actual deposit of title deeds, in which case collateral evidence is admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title deeds, then by a memorandum in writing, purporting to create a security for money advanced; See White and Tudor's Leading Case in Equity, 9th Edition, Vol. II, at p. 77. In either case it does not operate as an actual conveyance though it is enforceable in equity; whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This*

distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed. […]"

(Emphasis supplied)

55. However, in order to obviate any confusion, we may clarify that the aforesaid observations in ***K.J. Nathan*** (supra) must not be understood to mean that equitable mortgage has no valid basis or is not recognized *in toto* in India. Any act of the parties that evinces a clear intention of the parties to create a mortgage though the same might not have been created in terms of Section 58 of the Act, 1882, may still be a valid charge in terms of Section 100 of the Act, 1882. The said provision reads as under: -

*"**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 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 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 charge."

56. Section 100 of the Act, 1882 provides that where a transaction does not amount to a mortgage i.e., not a mortgage in terms of Section 58 of the said Act, the person to whom the immovable property is offered as a security

would still nevertheless be said to have a "charge" in terms of the said provision, and that all provisions under the Act, 1882 as applicable to simple mortgage envisaged under Section 58 sub-section (b) of the said Act shall apply to such "charge" insofar as possible. The key distinction is that any mortgage which is not created in terms of Section 58 of the Act, 1882 i.e., all equitable mortgages are still nevertheless a "charge" to such property. The expression "*and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge*" assumes significance as it is not suggestive that such charge would be deemed a simple mortgage, rather it only goes so far as to provide that the provisions that apply to simple mortgage will also apply to such "charges" so far as possible but by no means does it provide that such "charge" is to be treated as a simple mortgage in terms of Section 58 of the Act, 1882 i.e., as a legal mortgage. The last part of Section 100 of the Act, 1882 further statutorily recognizes the *in personam* nature of such "charge" and provides that they shall not be enforced against any person to whom such property or interest therein has been transferred i.e., to whom it has been mortgaged in terms of Section 58 of the said Act or any other *bona-fide* transferee who does not have notice of the said charge. Thus, what may be discerned is that, 'equitable mortgages' are very much recognized in India under the nomenclature of "charge" in terms of Section 100 of the Act, 1882, and the same will be

enforceable as far as possible in terms of the procedure and provisions applicable to a simple mortgage except those without notice of such charge.

57. We are conscious of the decision of this Court in ***J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd.*** reported in **1968 SCC OnLine SC 32** which held that an agreement to create a mortgage only gives rise to perform such an agreement and does not amount to either a mortgage or a charge and the decision in ***Haryana Financial Corpn. v. Gurcharan Singh*** reported in **(2014) 16 SCC 722** wherein it was held that since all provisions applicable to a simple mortgage shall, as far as possible, also apply to a charge, Section 59 of the Act, 1882 which requires a simple mortgage to be compulsorily be registered would also be applicable and as such the creation of a charge under Section 100 of the Act, 1882 must be compulsorily registered. However, a close reading of the decision in ***J.K. (Bombay) (P) Ltd.*** (supra) will reveal that this Court never held that any agreement to mortgage will be incapable of creating a charge in terms of Section 100 of the Act, 1882, rather what was held is that only those agreement to mortgage where the intention to create a charge in *praesenti* is absent will be incapable of creating either a mortgage or a charge, but where such intention of parties is there, the same will definitely tantamount to a 'charge' under Section 100 of the Act, 1882 as held in ***ONGC Ltd. v. Official Liquidator*** reported in **(2015) 5 SCC 300**. Similarly, the decision of ***Haryana Financial Corpn*** (supra) holding that registration in terms of Section 59 of the

Act, 1882 is mandatory in order to create a charge *prima facie* appears to be incorrect in view of an earlier decision of a larger bench of this Court in ***M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons*** reported in **(1969) 1 SCC 573** which in clear terms held that the second part of Section 100 of the Act, 1882 does not attract the provisions of Section 59 of the said Act and that a charge may be made without any writing and there is no provision of law which require that such an instrument must be attested or registered. We are also in agreement with the decision of ***M.L. Abdul Jabbar Sahib*** (supra) as to hold otherwise would result in absurd consequences which could not have been intended by the legislature. We say so because, if a charge can be made only by a registered instrument in accordance with Section 59 of the Act, 1882, then the subsequent transferee will always have notice of the said charge in view of Section 3 Explanation I which stipulates that "*where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration [...]*". This would effectively render the second part of Section 100 of the Act, 1882 which mandates requirement of notice to all subsequent transferees before the enforcement of a 'charge' as otiose and redundant, as the moment when such instrument is registered, notice is deemed to have been made. The very idea behind stipulating the requirement of notice under

Section 100 of the Act, 1882 seems to be to save even those transactions which are not registered and do not amount to a mortgage yet in equity may still be enforceable provided the subsequent transferee has notice of such charge. We do not intend to dwell any further on the decisions of this Court in ***J.K. (Bombay) (P) Ltd.*** (supra) and ***Haryana Financial Corpn*** (supra) as the present case does not require examining whether the respondent no. 1 bank could be said to have an enforceable charge against the appellant bank, and even otherwise if an 'equitable mortgage' cannot be construed as a 'charge' in terms of Section 100 of the Act, 1882, the former may still be permitted to be enforceable in the extant of equity in the peculiar facts of each case. This is because the enforcement of an 'equitable mortgage' being a by-product of the doctrine of equity is purely a matter of discretion that a court of conscience may grant keeping in mind the principles of fair-play, good conscience and justice. Where any 'equitable mortgage' is found to be unenforceable, the same though neither a 'legal mortgage' nor a 'charge' may still nevertheless entitle a lender to seek other reliefs such as specific performance of the contract or a suit for recovery on the strength of the *ab inito* intention of the parties to create a security evident from such 'equitable mortgage'.

58. We are conscious of the decision of this Court in ***Kedar Lal v. Hari Lal*** reported in **AIR 1952 SC 47** wherein it was held that the whole of law of mortgage in India, including the law of contribution arising out of a transac-

tion of mortgage, is now statutory and is embodied in the Act, 1882 read with the Civil Procedure Code, 1908 and that the courts cannot travel beyond these provisions. The relevant observations read as under: -

> *"27. So far as Section 43 is concerned, I am not prepared to apply it unless Sections 82 and 92 can be excluded. Both Sections 43 and 82 deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that Section 82 must exclude Section 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general. In my opinion, the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code. I am clear we cannot travel beyond these statutory provisions."*

59. However, a close reading of the aforesaid paragraph of ***Kedar Lal*** (supra) would reveal that the observations were made in light of the question whether Section 43 of the Indian Contract Act, 1882 which deals with right to contribution would be applicable to such a right which is arising out of a mortgage to the exclusion of Section 82 of the Act, 1882 which deals with mortgages. It was in this context this Court held that when it comes to mortgages it will not be permissible to travel beyond the scheme of Act, 1882 and venture into the provisions contained in other laws.

60. However, this by no stretch means that the concept of equitable mortgage has no place in the Indian jurisprudence. The concept of equitable mortgage is purely a creation and by-product of the doctrine of equity, and thus, the

absence of any specific provision under the Act, 1882 providing for such a mortgage will not run to the detriment of something which is essentially designed to ensure that principles of fair-play, good conscience and justice endure. There is no decision which either specifically excludes or outrightly rejects the application of this doctrine. Rather, the subsequent decision of this Court in ***K.J. Nathan*** (supra) it was specifically stated that although the concept of equitable mortgage as evolved under the English Law cannot be considered to be a rule of law, which as also discussed by us in the foregoing paragraphs is by-product of doctrine of equity and not the law of the land, yet they may serve as a guide. The relevant observations read as under: -

> *10. The foregoing discussion may be summarized thus : Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt, (ii) deposit of title deed; and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an infer-*

ence as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the titledeeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction."

(Emphasis supplied)

61. Thus, in such a situation where a transaction does not amount to a mortgage but nevertheless can be construed as a preliminary step towards the preparation of a mortgage which will be security thereafter with nothing else done for conveyance or transfer of title or interest, there three recourses may be available to the lender: -

(i) He may simply claim that the transaction amounts to an equitable mortgage as it was for the purpose of creating a present or immediate security which a court of equity ought to consider; or

(ii) He may claim that there has been a sufficient part performance of the contract, with attending circumstances which a court ought to relieve by permitting the lender to 'perfect its mortgage' i.e., to take further

steps for the transfer of conveyance of title or interest in order to create a mortgage; or

(iii) He may bring a suit for recovery of money and base his claim simply on the *ab initio* intention of the parties to create a security in the first place and the resultant part-performance of the contract insofar as the loan was extended based on such promise or consideration of security.

62. Before we close this judgment, we must look into the observations made by the High Court in para 8 of its impugned order. In para 8 the High Court has recorded that at the time of sanction and grant of the loan by the appellant-bank herein i.e. sometime in November, 1998 the flat in question was in *custodia legis* of the court receiver appointed in the year 1994. What weighed with the High Court was the submission canvassed on behalf of the Central Bank that the validity of the mortgaged flat in question in favour of the appellant bank was also questionable. The reason why the High Court said so is because both the agreements are unregistered. According to the learned counsel appearing for the Central Bank, the agreement which appellant bank accepted was also unregistered. Then both the banks are sailing in the same boat. However, what seems to have been overlooked by the Central Bank is the fact that when the borrowers approached the appellant bank for loan they had a valid title deed i.e., the original share certificate issued by the society. The issuance of the original share certificate was also con-

firmed by the society vide letter dated 13.11.1998, which forms a part of the record.

63. The original share certificate which was produced before the appellant-bank as availed Title deed assumes significance in view of the provisions of Section 11 of the Act 1963, more particularly, sub-section (1) of Section 11 of Act which reads thus: -

> *"11. Promoter to convey title, etc., and execute documents, according to agreement.— (1) A promoter shall take all necessary steps to complete his title and convey, to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association flat-takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under Section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power."*
>
> (Emphasis supplied)

64. In para 8 of the impugned judgment, the High Court has recorded that the appellant bank herein had sought to rely upon the original share certificate issued by the Society as a valid piece of title deed. However, the High Court got carried away by the fact that the first charge was that of the Central Bank and not of the appellant bank, and failed to notice the distinction that exists between an ‘equitable mortgage’ and a ‘legal mortgage’.

65. The proposition of law is that though the transaction evidenced by the prior unregistered document is valid in itself, yet any title or interest created by it is liable to be defeated under the rule of priority by a valid later and legal

sale or mortgage evidenced by a duly registered document. The reason is, otherwise, no effect can be given to the rule which implies that the later registered title is intended to prevail against an earlier unregistered title. No weight can, therefore, be attached to the contention that by a valid unregistered agreement of sale, the vendor's title is exhausted, he has, afterwards, nothing to sell, and the later registered sale deed gives nothing to the predecessor. The fallacy in the contention lies in ignoring the reason of the rule, namely that as between the registered and unregistered transactions, the registered transaction creates the dominant right or title.

E. CONCLUSION

66. In view of the aforesaid, we have reached the conclusion that the impugned order passed by the High Court is not correct and it deserves to be set aside.

67. In the result the appeal succeeds and is hereby allowed. The impugned Order passed by the High Court is hereby set aside. Since, the respondent no. 1 had failed in bringing the factum of its ‘equitable mortgage’ to the notice of the appellant bank, the respondent no. 1 bank is not entitled to enforce the same qua the recovery proceeds of the appellant bank herein.

68. We are informed that an amount of Rs. 51 lakh is lying deposited with the DRT maintained in an escrow account. The same now be disbursed along with interest in favour of the appellant bank.

69. We direct the Registry to send one copy each of this judgment to all the High Courts with further request to each of the High Courts to forward the judgment to the DRTs and DRAT benches.

70. Pending application(s), if any, stand disposed of.

..... J.
(J.B. Pardiwala)

..... J.
(R. Mahadevan)

New Delhi;
04th February, 2025