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The Supreme Court of India explains the concept of equitable mortgage as applicable in India and the distinction between Indian law and English law vis-à-vis the mortgage by deposit of title deeds

The Supreme Court of India (“**Supreme Court**”) in its recent judgement in *The Cosmos Co. Operative Bank Ltd vs. Central Bank of India and Ors*¹, has held that (a) a mortgage by deposit of title deeds is a legal mortgage and the handing over of title deeds evidencing ownership, to the mortgagee is essential to create a valid mortgage; (b) equitable mortgages are legally recognised in India and are enforceable as a charge; and (c) a legal mortgage created subsequent to an equitable mortgage will prevail over the equitable mortgage unless it is established that the subsequent mortgagee had notice of the prior equitable mortgage.

Brief facts

The borrowers availed 2 (two) loans from Central Bank of India (“**Central Bank**”) and Cosmos Cooperative Bank Limited (“**Cosmos Bank**”) respectively in the years 1989 and 1998. To secure the loans, a flat (“**Flat**”) was mortgaged in favour of both the banks by depositing property related deeds. While the borrowers had deposited different agreements to sell with both the banks, the share certificate which evidenced the ownership of Flat was deposited with Cosmos Bank. The borrowers defaulted in servicing both the loans. Central Bank initiated recovery proceeding before the Bombay High Court (“**Bombay HC**”), which later got transferred to the Debts Recovery Tribunal-I, Mumbai (“**DRT**”); and Cosmos Bank took steps to sell the Flat by enforcing the security interest.

The DRT held that Central Bank did not have a valid mortgage in its favour. Central Bank’s appeal to the Debts Recovery Appellate Tribunal, Mumbai (“**DRAT**”), was held in its favour. The DRAT held that Central Bank had a valid and prior mortgage in its favour and that it will prevail over the mortgage created in favour of Cosmos Bank. Cosmos Bank was unsuccessful before the Bombay HC in its challenge to the order of the DRAT, and therefore preferred a civil appeal before the Supreme Court.

Issue

Whether an equitable mortgage will have a priority in enforcement over a legal mortgage?

¹ Judgement dated February 4, 2025, in C.A. No. 1565 of 2025. Neutral Citation 2025 INSC 243

Decision of the Supreme Court

The Supreme Court dealt with the nature of the mortgages created in favour of the 2 (two) banks in light of the applicable laws and judicial precedents, and held as under:

1. **Agreement to sell:** An agreement to sell does not by itself create any interest in a property; and it cannot be considered as a deed conferring title or ownership.
2. **Share certificate of a housing society:** The share certificate issued under the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 by the concerned housing society in which the Flat is located, is the ownership or title deed for the Flat.
3. **Legal mortgage vs. equitable mortgage:** A legal mortgage is created when proprietary interest in property is transferred by complying with the formalities prescribed under the applicable laws; and that equitable mortgage is created solely based on a clear intention of the parties to create mortgage.
4. **Priority of rights:** Considering the difference between the legal and equitable mortgages; and that the equitable mortgage creates only a right *in personam*, an equitable mortgage would have priority over subsequent charges or mortgages only if the subsequent charge holder or mortgagee was aware of the equitable mortgage. The Supreme Court also emphasised the steps required to be taken by an equitable mortgagee to retain the priority of such mortgage.
5. **Status of mortgage by deposit of title deeds in India:** under Indian law, mortgage by deposit of title deeds is statutorily recognised under section 58 of the Transfer of Property Act, 1882 (“**TP Act**”) and hence is a legal mortgage and not an equitable mortgage, in contrast to the position under English law.
6. **Central Bank’s mortgage and priority:** While there was clearly an intention to create mortgage in favour of Central Bank, considering that, the share certificate, which was the title deed for the Flat was not deposited by the borrower with the Central bank and the bank had also not taken steps to obtain the title deed from the borrowers; the mortgage in favour of Central Bank was only an equitable mortgage. By placing reliance on section 78 of the TP Act, the Court held that the mortgage in favour of Central Bank, will not have priority over the subsequent legal mortgage in favour of Cosmos Bank, since Central Bank had not issued any public notice regarding the mortgage in its favour and Cosmos Bank was unaware of the equitable mortgage in favour of Central bank. Accordingly, the Court held that Cosmos Bank will be entitled to appropriate the proceeds from the sale of the Flat.

Conclusion

The judgment is significant since it clarifies the position relating to mortgage by deposit of title deeds under the TP Act, and the difference between such a mortgage and equitable mortgage. The judgment further extensively deals with the concept of equitable mortgage as developed under English law and the differentiating aspects under Indian law. The decision emphasises the need to have proper documentation in place for a valid mortgage and due diligence required on the part of a mortgagee.

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During the course of our practice, we have also been involved in the drafting/ reviewing of (a) Agreements for Sale; (b) Conveyance Deeds; and (c) Lease Deeds.

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