



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMERCIAL APPEAL (L) NO. 7072 OF 2025
IN
INTERIM APPLICATION (L) NO. 18666 OF 2022
IN
COMMERCIAL SUIT (L) NO. 18229 OF 2022**

Omkara Asset Reconstruction Pvt. Ltd.

A company incorporated under the provisions
of the Companies Act, 2013

Having its registered office at:

No.9, M.P. Nagar First Street,
Kongu Nagar Extension,
Tirupur, Tamil Nadu, India – 641607.

And at:

47 Floor, Kohinoor Square, N.C. Kelkar Road,
Ram Ganesh Gadkari Chowk,
Opp. Shiv Sena Bhavan, Dadar West,
Mumbai – 400028

... Appellant

Versus

1. J.C. Flowers Asset Reconstruction Pvt. Ltd.

A company incorporated under the provisions
of the Companies Act, 2013

Unit No. 203-206, 2nd Floor,
Wing A Inspire BKC, Bandra East,
Maharashtra, India, 400051.

2. Sumer Radius Realty Private Limited

A company incorporated under the provisions
of the Companies Act, 1956,

Having its registered address at
220, Commerce House, 140 N.M.Nagindas Road,
Fort, Mumbai - 400 023.

3. Sumer Buildcorp Private Limited

A Company incorporated under the provisions

Of the Companies Act, 1956,
Having its registered office at

203, Peninsula Corporate Park, Tower No. 1,
2nd floor, G.K. Marg, Lower Parel,
Mumbai 400 013.

4. Piramal Capital and Housing Finance Limited
A company incorporated under the provisions
of the Companies Act, 1956
Having its registered office at 4th floor,
Piramal Towers, Ganpatrao Kadam Marg,
Lower Parel (West), Lower Parel,
Mumbai 400013.

... Respondents

**WITH
INTERIM APPLICATION (L) NO.7074 OF 2025
IN
COMMERCIAL APPEAL (L) NO. 7072 OF 2025**

Omkara Asset Reconstruction Pvt. Ltd.
A company incorporated under the provisions
of the Companies Act, 2013
Having its registered office at:
No.9, M.P. Nagar First Street,
Kongu Nagar Extension,
Tirupur, Tamil Nadu, India – 641607.
And at:
47 Floor, Kohinoor Square, N.C. Kelkar Road,
Ram Ganesh Gadkari Chowk,
Opp. Shiv Sena Bhavan, Dadar West,
Mumbai – 400028

... Applicant

IN THE MATTER BETWEEN :

Omkara Asset Reconstruction Pvt. Ltd.
A company incorporated under the provisions
of the Companies Act, 2013
Having its registered office at:
No.9, M.P. Nagar First Street,
Kongu Nagar Extension,
Tirupur, Tamil Nadu, India – 641607.
And at:
47 Floor, Kohinoor Square, N.C. Kelkar Road,
Ram Ganesh Gadkari Chowk,

Opp. Shiv Sena Bhavan, Dadar West,
Mumbai – 400028

... Appellant

Versus

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Piramal Towers, Ganpatrao Kadam Marg,
Lower Parel (West), Lower Parel,
Mumbai 400013.

... Respondents

Mr. Venkatesh Dhond, Senior Advocate a/w Mr. Karl Tamboly,
Mr. Ryan D'souza, Mr. Zaid Mansuri i/b. DSK Legal, for the
Applicant/original Appellant.

Mr. Pradeep Sancheti, Senior Advocate a/w Mr. Rohan Savant,
Mr. Vinod Kothari, Ms. Mitali Shahane, Mr. Kshitij Parekh
i/b. M/s. Apex Law Partners, for Respondent No.1.

Mr. Ankit Lohia a/w Mr. Viraj Bansod i/b. Mr. Tushar Goradia,
for Respondent No.3.

**CORAM : ALOK ARADHE, CJ &
M.S.KARNIK, J.**

RESERVED ON : 25th APRIL, 2025

PRONOUNCED ON : 6th MAY 2025

JUDGMENT (PER M.S.KARNIK, J.) :

1. The Respondent No.1-original Plaintiff - J.C. Flowers Asset Reconstruction Pvt. Ltd. ("J.C. Flowers" for short) filed a Commercial Suit in this Court for a declaration that J.C. Flowers is the exclusive charge holder/mortgagee with regard to the suit property. A further declaration is sought that the deeds of simple mortgage dated 30th July 2018 in favour of Appellant - Omkara Asset Reconstruction Pvt. Ltd. - original defendant No.5 are void and illegal and for taking all necessary steps to cancel the deeds of simple mortgage dated 30th July 2018. In the suit J.C. Flowers prayed for a direction to Respondent No.4 - Piramal Capital and Housing Finance Limited ("Piramal Capital" for short) – original defendant No.1 to deposit the mortgage deeds with the Trial Court. Further, a direction was sought to

Piramal Capital to disclose on oath, any rights created in favour of third parties in respect of the suit property. The directions were also sought from Respondent No.2 - Sumer Radius Realty Private Limited ("Sumer Radius" for short)- original defendant No.2 and Respondent No.3 - Sumer Buildcorp Private Limited ("Sumer Buildcorp" for short) - original defendant No.3 to disclose on oath third party rights created in the Suit property. An injunction is sought against Omkara Asset Reconstruction Pvt. Ltd. ("Omkara Asset" for short) and Piramal Capital from acting on or relying on the subject mortgage deeds. Further, directions to Respondent No.2 - Sumer Radius and Piramal Capital are sought to disclose on oath amounts received out of receivables from the Suit property.

2. The property comprises of land parcels at Santacruz and at Bandra village known as 'Ghia Compound' described at Exhibit-A to the Suit.

3. The learned Single Judge by the impugned order dated 12th February 2025 granted the following interim reliefs :-

“(i) The Interim Application (L) No. 18666 of 2022 is allowed in terms of prayer clauses (a) and (d) which read thus, viz.

a) Pending the present Suit, this Hon'ble Court be pleased to order and direct Defendant No. 1 and Defendant No.5 to deposit Registered Deeds of simple Mortgage dated 30 July 2018 (Exhibits "B" and "C") in respect of Suit Properties with Prothonotary and Senior Master of this Honb'le Court:

d) Pending the present Suit, this Hon'ble Court be pleased to order and direct injunction on Defendant No. 1 and Defendant No.5 and their respective agents, servants, officers or any person or persons claiming by, through or under each or any one of them from in any manner acting on or relying upon the Deeds of Simple Mortgage dated 30th July 2018 (Exhibit B and C) in respect of Suit properties without obtaining consent of the Applicant;

(ii) It is made clear that this Order is passed only in facts of the present case and it shall be operative only against parties to the present Suit.

(iii) It is made clear that the observations made in this Order are *prima facie* and shall not affect the parties while dealing with the captioned Suit.”

4. Aggrieved by the interim order passed by the learned Single Judge, this Appeal is filed by Omkara Asset. Assailing the findings on the basis of which the interim order was made, Mr. Dhond, learned Senior Advocate placed the following facts for our consideration which need to be stated

to appreciate the controversy. It is the case of J.C. Flowers in the plaint that Sumer Radius approached Yes Bank Limited ("Yes Bank" for short), the predecessor of J.C. Flowers for a loan of Rs.350,00,00,000/- sometime in January 2016. By a sanction letter dated 28th January 2016 Yes Bank sanctioned a loan of Rs.350,00,00,000/- in favour of Sumer Radius. This was granted on the condition that a mortgage would be created in respect of the Suit property to secure the repayment. Yes Bank and Sumer Radius entered into a loan agreement for a facility of Rs.350,00,00,000/- [Term Loan ("TL1" for short)] on 29th January 2016. In order to secure the TL1, Sumer Radius as borrower, Sumer Buildcorp as mortgagor and Radius Estate Projects Pvt. Ltd. ("REPPL" for short) as confirming party executed a deed of mortgage with respect to their Santacruz property (forming part of the suit property).

5. Sumer Radius approached Yes Bank in March 2016 for a further loan of Rs.3,50,00,00,000/-. By a sanction letter dated 31st March 2016, two additional term loan facility of Rs.111,00,00,000/- ("TL2") and Rs.239,00,00,000/- ("TL3") aggregating to Rs.350,00,00,000/- were granted in favour of

Sumer Radius. In order to secure TL2 and TL3, Sumer Radius as a borrower, Sumer Buildcorp as mortgagor and REPPL as confirming party executed a deed of mortgage with respect to the Santacruz property in Yes Bank's favour. Clause 5 of this mortgage deed is identical to Clause 5 of the earlier mortgage deed.

6. Yes Bank granted a loan of Rs.205,00,00,000/- on 24th March 2017 to one Raghuleela Builders (Raghuleela was impleaded as defendant No.4 to the captioned Suit but subsequently dropped by J.C. Flowers). Sumer Radius, Sumer Buildcorp and REPPL executed supplemental deeds of mortgage on 6th February 2018 in favour of the trustee acting on behalf of Yes Bank and created a mortgage over the 'Ghia Compound' property. Thus, as on 6th February 2018, the entire Suit property was mortgaged in favour of J.C. Flowers.

7. One of the promoter groups of Sumer Radius viz. the Radius Group, sent email to Yes Bank on 27th July 2018 stating that Sumer Radius wished to close the loan facilities with Yes Bank and requested for a conditional NOC in respect

of all the loan facilities. Piramal Capital (which was then known as Dewan Housing Finance Corporation Limited) issued sanction letters in respect of two loans on 27th July 2018 viz. (i) Loan of Rs.1100 Cr. to REPPL, (ii) Loan of Rs.900 Cr. to Sumer Radius. On 30th July 2018 Piramal Capital entered into two loan agreements with the borrowers therein i.e. REPPL and Sumer Radius in respect of the aforesaid sanctioned loans. To secure the loans advanced by Piramal Capital to Sumer Radius and REPPL respectively, the following mortgage deeds were executed :

(i) Mortgage deed by REPPL, Sumer Radius, Sumer Buildcorp (all as mortgagors) in favour of Piramal Capital creating a mortgage over the Suit property on 30th July 2018.

(ii) On 30th July 2018 a second mortgage deed in favour of Piramal Capital in respect of the loan of Rs. 900 Crs. creating a mortgage over the Suit property.

8. On 31st July 2018 Yes Bank issued a conditional NOC to Sumer Radius and Raghuleela for release of charge over the Suit property subject to receipt of its outstanding dues on or before 10th August 2018. This NOC was issued on a

conditional basis subject to receipt of all amounts due to Yes Bank. The NOC also stated that in the case the conditions in the NOC are not complied with on or before 10th August 2018, the NOC shall stand revoked. Piramal Capital disbursed an amount of Rs.1100 Cr. to REPPL on 31st July 2018. Piramal Capital disbursed an amount of Rs.439.25 Cr. to Sumer Radius between 30th July 2018 to 1st July 2019 over 7 tranches.

9. According to J.C. Flowers, Sumer Radius defaulted in making payments of the outstanding dues to Yes Bank. Owing to such non-payment, Yes Bank issued a loan recall notice in respect of TL1, TL 2 and TL3 on 24th July 2019. Yes Bank issued a notice under Section 13(2) of the SARFAESI Act on 29th July 2019 in respect of the property. Yes bank withdrew the NOC dated 31st July 2018 on 2nd August 2019. The National Company Law Tribunal, Mumbai ("NCLT") passed an order on 6th September 2021 admitting REPPL into corporate insolvency resolution process. Yes Bank addressed a letter to the Ministry of Corporate Affairs on 18th February 2022 requesting it to cancel Piramal Capital's charge on the Suit property. Yes Bank filed an Interlocutory Application

dated 17th May 2022 being Interim Application No.1367 of 2022 before the NCLT, Mumbai in the CIRP of REPPL seeking similar relief as in the Interim Application filed by J.C. Flowers.

10. On 7th June 2022 Yes Bank filed the present Suit. By an Assignment Agreement dated 16th December 2022, the loans advanced by Yes Bank to Sumer Radius were assigned in favour of J.C. Flowers-the plaintiff. By and under an Assignment Agreement dated 30th June 2023, the loans advanced by Piramal Capital to REPPL and Sumer Radius, along with all corresponding security (including the rights of Piramal Capital under the deeds of simple mortgage) were assigned in favour of the Appellant - Omkara Asset. By an order dated 20th February 2024, this Court permitted Yes Bank to be substituted by J.C. Flowers. By the same order Omkara Asset was added as a party to the Suit.

11. The NCLT passed an order dated 7th August 2024 dismissing Interim Application No.1367 of 2022 filed by Yes Bank. J.C. Flowers filed Appeal No.1804 of 2024 before the NCLAT challenging the aforesaid order dated 7th August 2024.

12. Mr. Dhond, learned Senior Advocate for the Appellant - Omkara Asset submits that the relief prayed for cancellation of the mortgage deeds dated 31st July 2018 was dropped pursuant to an amendment made in the Plaint. Learned Senior Advocate relying on Section 31 of the Specific Relief Act, 1963 submitted that it is only when the twin conditions of Section 31 is satisfied, that the Court may, in its discretion order for it to be cancelled. In his submission, the relief seeking cancellation of a written instrument is a discretionary relief and not a mandatory one. Learned Senior Advocate submitted that the aforesaid twin conditions are not met and neither has J.C. Flowers made out a case for exercise of the discretion.

13. Learned Senior Advocate then placed reliance on Section 34 of the Specific Relief Act, 1963 to submit that the grant of a declaratory relief in the nature as sought in the captioned Suit is also a discretionary relief. As the twin test under Section 31 is not met, therefore, it is the submission of learned Senior Advocate that for an agreement to be considered as a void agreement, it should qualify as an

agreement which is not enforceable by law. According to learned Senior Advocate, the learned Single Judge committed an error in holding that the mortgage deeds were voidable at the instance of J.C. Flowers as the said mortgaged deeds are not agreements and hence cannot be enforceable by law.

14. Learned Senior Advocate submitted that the entire basis for J.C. Flowers case is in the teeth of Clause 5 of the two mortgage deeds executed in favour of Yes Bank. He submits that Clause 5 stipulates that no mortgage deed can be executed by the mortgagors without the prior written consent of Yes Bank and that any mortgage entered into "in violation of this deed, shall be subject to the present mortgage/charge created in favour of the mortgagee under this deed, and the mortgage/charge created in terms of this deed shall in all circumstances rank superior." Learned Senior Advocate submitted that from Clause 5 it is clear that the two mortgage deeds in Yes Bank's favour provides for the consequence of a subsequent mortgage created without obtaining Yes Bank's NOC, namely such mortgage will rank inferior to that of the Respondent No.1. This per force means that the subsequent mortgage is in existence and in force for

it to rank inferior to J.C. Flowers mortgage. The emphasis of learned Senior Advocate's contention is that if the mortgage deed is to be treated as void/legally unenforceable then the language of the last part of Clause 5 quoted above would be rendered superfluous. The submission is that an interpretation which renders some words/a phrase of the contract otiose is legally impermissible. According to learned Senior Advocate, the learned Single Judge erred in holding that the mortgage deeds were voidable at the instance of Respondent No.1, as such a finding would be completed contrary to the terms of Clause 5 of the Yes Bank's mortgage deeds and would therefore amount to rewriting the contract which is wholly impermissible. In fact a proper reading of Clause 5 makes it clear that the mortgage deeds dated 30th July 2018 in favour of Piramal Capital are enforceable. Learned Senior Advocate then placed reliance on Section 48 of the Transfer of Property Act, 1882 which provides for priority of rights created by transfer. According to him the provisions of Section 48 makes it clear that not only the mortgage is enforceable under law, but there is a specific recognition of such subsequent rights and a manner provided for the way such rights are to be

exercised. It is therefore submitted that the first condition of Section 31 of the Specific Relief Act, 1963 itself is not satisfied and hence Section 31 is not attracted.

15. Learned Senior Advocate relied upon the decision in **Deccan Paper Mills Company Limited vs. Regency Mahavir Properties and others**¹ in paragraph 19 which sets out the test to be applied for cancellation of the document. It is further submitted that the decision relied upon by J.C. Flowers in **Bikram Chatterji and others vs. Union of India and others**² is distinguishable on facts. Learned Senior Advocate placed reliance on the decision of the Allahabad High Court in **Mata Din Kasodhan vs. Kazim Husain and another**³, wherein a Full Bench held that the transfer by a mortgagor in breach of a condition against alienation is valid, except in so far as it does not encroach upon the right of the mortgagee to realise the security. Mr. Dhond therefore submits that J.C. Flowers cannot be aggrieved by the fact that the mortgage in favour Omkara Asset will be treated subservient to that of J.C. Flowers. It is further submitted that J.C. Flowers has not dealt with the jurisdictional

1 (2021) 4 SCC 786

2 (2019) 19 SCC 161

3 ILR (1891) 13 ALL 432 (FB)

arguments on exclusive jurisdiction to decide the question of priorities vesting solely with the NCLT. J.C. Flowers entire case proceeds on the basis that the injury caused to them will ensue after Sumer Radius and Sumer Buildcorp are admitted into CIRP and according to learned Senior Advocate this is all the more reason why the jurisdictional interdiction under Section 60(5)(c) of the Insolvency and Bankruptcy Code will wholly apply. Learned Senior Advocate submitted that in fact, J.C. Flowers has taken this very position in its own Appeal filed before the NCLT and therefore also the learned Single Judge ought not to have granted interim reliefs in favour of J.C. Flowers. Mr. Dhond also relied upon the decision of **Kanti Ram and others vs. Kutubuddin Mahomed and others**⁴.

16. Mr. Sancheti, learned Senior Advocate for J.C. Flowers, on the other hand invited our attention to the findings of learned Single Judge, in support of his submissions. Our attention is invited to the relevant pleadings in the Plaint, relevant documents and the findings in the impugned order to submit that the discretion exercised by the learned Single Judge in granting the interim reliefs is not

⁴ (1895) ILR 22 CAL 33

arbitrary, capricious or perverse to warrant an intervention in the appellate jurisdiction of this Court.

17. We have heard learned Senior Advocate for the parties at length. Let us first notice the relevant observations of the learned Single Judge. According to the learned Single Judge, the deeds of simple mortgage were executed prior to the conditional NOC issued by Yes Bank and for a subsequent mortgage to have come into existence, NOC from Yes Bank was a mandatory requirement. Section 48 of the Transfer of Property Act, 1882 did not apply as it pre-supposes that a mortgage created subsequently is a validly created mortgage. The deeds of simple mortgage were created in violation of Yes Bank's mortgage deed and therefore voidable at the instance of J.C. Flowers.

18. The subsequent mortgage created in favour of Omkara Asset is not subservient to that of J.C. Flowers but voidable at the instance of J.C. Flowers as that would be directly contrary to Clause 13(d) and 10(B) of the Schedule-I of J.C. Flowers mortgage deed. The deeds of simple mortgage itself state that the mortgage properties were free from any prior charge.

19. The learned Single Judge rejected the contention of Omkara Asset that by virtue of Clause 5 of J.C. Flowers mortgage, any subsequent mortgage without J.C. Flowers NOC would not be void but merely be subservient to J.C. Flowers mortgage.

20. The learned Single Judge observed that J.C. Flowers mortgage unequivocally sets out that it is the first and exclusive charge holder in respect of the Suit properties. The learned Single Judge held that J.C. Flowers has demonstrated how its rights as exclusive charge holder under the provisions of SARFAESI Act and IBC would be entirely lost/defeated if Piramal Capital and/or Omkara Asset were to be considered as second charge holders. The learned Single Judge was of the opinion that the impugned mortgages had been created contrary to J.C. Flowers mortgage and are thus invalid in the eyes of law. The learned Single Judge was of the opinion that permitting Piramal Capital or Omkara Asset to assert any right under the impugned mortgages which would in any manner impinge upon J.C. Flowers exclusive first charge would amount to putting a premium on dishonesty.

21. The learned Single Judge has held the contention of Omkara Asset that “the plaintiff have conceded/accepted that it would be the NCLT which would have jurisdiction to decide the issue of priority and validity of the impugned mortgages in view of Section 60(5) of the IBC, since J.C. Flowers has filed an Appeal from Order dated 7th August 2024 passed in Interim Application No.1367 of 2022 in Company Petition No.380 of 2021 in which J.C. Flowers has inter alia stated that NCLT has jurisdiction under Section 60(5) of IBC to adjudicate upon the issue of validity and legality of the charge” is misconceived. The reasoning of the learned Single Judge is that as on the date of the passing of the order there was no IBC proceedings admitted against the defendant No.2 – Sumer Radius and defendant No.3 – Sumer Buildcorp. Learned Single Judge then held that the issue in the present Suit is to the very legality of the impugned mortgages and also a declaration that the same are void and illegal. Learned Single Judge further observed that any application under Section 60(5) of the IBC would deal with the priority of charge and not the very legality of the impugned mortgage itself. It is in these circumstances the learned Single Judge held that

these reliefs would squarely fall within the purview of the jurisdiction of this Court.

22. Before proceeding to test the order of the learned Single Judge, we must bear in mind the well settled principles laid down regarding the scope of an Appeal under Section 13 of the Commercial Courts Act against an order granting injunction. The scope of an appeal from an order has already been delineated by the Supreme Court in **Wander Limited vs. Antox India Pvt. Ltd.**⁵, **Shyam Sel and Power Limited and another vs. Shyam Steel Industries Limited**⁶ and **Ramakant Ambalal Choksi vs. Harish Ambalal Choksi and others**⁷. We may also refer to a Full Bench decision in *UTO Nederland B. V. & Anr. vs. Tilaknagar Industries Ltd.* of this Court dated 28th April 2025 in Appeal No.66 of 2012. In view of the enunciation of law by Supreme Court, the Appellate Court will not interfere with exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had

5 1990 (supp) SCC 727

6 (2023) 1 SCC 634

7 2024 SCC OnLine SC 3538

ignored the settled principles of law regulating grant or refusal of interlocutory injunctions.

23. It is thus seen that J.C. Flowers issued conditional NOC on 31st July 2018 to release the mortgage properties subject to the repayment of outstanding loans. The NOC was valid upto 10th August 2018 and it was further provided that it would stand revoked if the conditions mentioned therein were not complied with. Without waiting for the NOC and without repaying the outstanding loans due to J.C. Flowers, a day prior to the conditional NOC, on 30th July 2018 deeds of mortgage were executed by Sumer Radius and Sumer Buildcorp in favour of Piramal Capital (predecessors of Omkara Asset). The mortgage deed contains clauses to the effect that the mortgagee was the sole and exclusive charge holder of the subject properties. This mortgage document was not disclosed to J.C. Flowers by Sumer Radius and Sumer Buildcorp. As Sumer Radius and Sumer Buildcorp committed defaults, J.C. Flowers issued a recall notice dated 24th July 2019 and also issued notices under Section 13(2) of the SARFAESI Act. Sometime in August 2019, upon taking search

of ROC records, J.C. Flowers came across the impugned deeds of simple mortgage dated 30th July 2018 for financial facilities of Rs.2000 Crores approximately. The impugned mortgage deeds of the Suit property are in violation of the terms of the prior mortgage in favour of J.C. Flowers. It is the submission of learned Senior Advocate Mr. Dhond that Clause 5 of the mortgage deed be interpreted in a manner whereby Omkara Asset should be treated as second charge holder having regard to the last sentence of Clause 5. Clause 5 of the mortgage deed reads thus :-

"5. DEALINGS WITH RESPECT TO THE MORTGAGED PROPERTIES :

The Mortgaged Properties shall be specifically appropriated in the charge and mortgage and lien created under this Deed and the Mortgagor shall not sell, transfer, lease out, assign, dispose of or otherwise part with the Mortgaged Properties or any part thereof, or deal with the same or create or suffer any mortgage, charge, lien or other encumbrance on the Mortgaged Properties, without the prior written consent of the Mortgagee. Any mortgage/ charge created hereafter by the Mortgagor on the Mortgaged Properties, in violation of this Deed, shall be subject to the present mortgage/charge created in favour of the Mortgagee under this Deed, and the mortgage/ charge created in terms of this Deed shall in all circumstances rank superior."

(emphasis supplied)

24. It is well settled that the mortgage document must be read as a whole and must be construed in a manner so as

not to render any part thereof nugatory or otiose. The decision in **Life Insurance Corporation of India and another vs. Dharam Vir Anand⁸** and **Radha Sundar Dutta vs. Mohd. Jahadur Rahim and others⁹** is in support of the proposition. We agree with learned Senior Advocate Mr. Sancheti appearing for J.C. Flowers that the earlier part of Clause 5 ought to be given effect to, as a disposition once made cannot be taken away by a later clause/part. In the present case the mortgage deed needs to be interpreted against Sumer Radius and Sumer Buildcorp and in favour of J.C. Flowers. It is pertinent to note that the sanction letter and loan agreement mandated that Sumer Radius and Sumer Buildcorp were not to create any mortgage or charge without consent of J.C. Flowers. Clause 13(d) of the deed of mortgage stipulates "not to create any mortgage or encumbrance over the mortgage property in favour of any person except as permitted under the financing documents."

25. We find force in the submission of learned Senior Advocate Mr. Sancheti that the mortgage in favour of Omkara

⁸ (1998) 7 SCC 348

⁹ AIR 1959 SC 24

Asset violates Section 6(h) of the Transfer of Property Act read with Section 23 of the Indian Contract Act. J.C. Flowers has filed a Suit invoking the provisions of Section 31 of the Specific Relief Act on the ground that the subsequent mortgage is void/voidable and that it has reasonable apprehension that such instrument may cause it serious injury. The apprehension of injury to J.C. Flowers is clearly demonstrated by the fact that under the IB proceedings all the financial creditors who claim to be secured financial creditors are treated at par, i.e. no priority is accorded on the basis of first and second charge in terms of entitlement under Resolution Plan approved by CoC/NCLT. Moreover, NCLT in IB proceedings may not be in a position to adjudge the invalidity of the subsequent mortgage and hence we find force in the submission of Mr. Sancheti that in such circumstances the position of J.C. Flowers as sole and exclusive charge holder would clearly be compromised.

26. The impugned mortgage in favour of Omkara Asset is clearly contrary to the terms of the prior mortgage inasmuch as it purports to grant exclusive first charge in favour of Omkara Asset as mentioned in Clause 2 and Clause

3 of the impugned deed of mortgage. In the facts of the present case J.C. Flowers has prima facie made out a case that the essential condition about the instrument being void or voidable against J.C. Flowers and that J.C. Flowers reasonably apprehends serious injury by the instrument being left outstanding are met.

27. Let us briefly refer to the relevant clauses from the financing documents. The sanction letter dated 28th January 2016 provides that so long as the facilities or any sum thereunder are outstanding, Sumer Radius and Sumer Buildcorp shall not create or allow to exist any encumbrance or security over assets specifically charged to J.C. Flowers without its prior written consent. The loan agreement dated 29th January 2016 stipulates the following representations and warranties :-

"3. REPRESENTATIONS AND WARRANTIES

(a) Special Terms and Conditions: The Borrower agrees that the Facilities hereby granted shall also be subject to the Borrower providing the special representations and warranties and agreeing/complying with the conditions as specified in the Facility Letter and other Transaction Documents.

(i) Good Title:

(i) The Borrower possesses or shall possess valid, right and marketable title and interest over the Assets

and revenues of the Borrower on which it grants or purports to grant security interests) pursuant to the Security Documents, in each case free and clear of any security interest (other than those permitted by the Bank) and further confirms that the security interest(s) created or expressed to be created by the Security Documents is and shall be valid and enforceable. Further, the Borrower shall not, hereafter, encumber any of its Assets or part thereof (including uncalled share capital or any part thereof) without the prior written consent of the Bank nor do or allow anything to be done that may prejudice the Security created in favour of the Bank/Person acting on behalf of the Bank."

28. The Recital B in the deed of mortgage dated 9th February 2018 reads thus :-

"(B) One of the conditions of the Term Loan Agreement is that the Facilities together with all interest, Additional Interest, Default Interest, commission, costs, charges, expenses and all other monies including any increase as a result of revaluation/devaluation/fluctuation or otherwise in the rates of exchange of foreign currencies. if any, involved, whatsoever stipulated in or due and payable by the Mortgagor under the Term Loan Agreement and/or the other Financing documents shall be secured, inter alia, by a charge on the Mortgaged Properties in terms of the provisions act out in Schedule I hereto."

29. Then the clause regarding the dealings with respect to the mortgaged properties provides that "The Mortgaged Properties shall be specifically appropriated in the charge and Mortgage and lien created under this Deed and the Mortgagor shall not sell, transfer, lease out, assign, dispose of or otherwise part with the Mortgaged Properties or any part thereof, or deal with the same or create or suffer any

mortgage, charge, lien or other encumbrance on the Mortgaged Properties, without the prior written consent of the Mortgagee. Any mortgage/ charge created hereafter by the Mortgagor on the Mortgaged Properties, in violation of this Deed, shall be subject to the present mortgage/charge created in favour of the Mortgagee under this Deed, and the mortgage/ charge created in terms of this Deed shall in all circumstances rank superior."

30. It is also material to refer to the provisions relating to floating charge which reads thus :-

"10(B). PROVISIONS RELATING TO FLOATING CHARGE

(iii) FURTHER THAT, the Mortgagor shall not create or suffer any lien on the Mortgaged Properties set out in paragraph 10(A)(iv) of this Schedule I or any part thereof except with the specific written approval of the Mortgagee. Any subsequent fixed or floating charge created by the Mortgagor, in violation of this Deed, shall under no circumstances rank superior to the charge created by the Mortgagor in favour of the Mortgagee under this Deed. Further, upon creation of any charge in violation of this Deed, the charge created under this Deed shall crystallize and shall have priority over any and all other charges created in violation of this Deed.

31. It is also relevant to note that the mortgagor had undertaken as under :-

"13. UNDERTAKINGS

(d) not create any mortgages, charges and encumbrances over the Mortgaged Properties in favour of any person except which are expressly permitted to

be created under the Financing Documents and as are disclosed to the Secured Parties in writing.”

32. It would also be significant to notice the relevant clause in the sanction letter dated 27th July 2018 issued by DLFH i.e. the predecessor of the Omkara Asset. The following clauses relevant which read as under :-

“2. The borrower has to arrange-for the conditional NOC for creation of exclusive charge in favour of DHFL w.r.t the facilities availed against the security of Avenue 54 from the respective lenders;

4. The borrower w.r.t the existing facilities proposed to be taken over by DHFL has to comply with the following conditions-

a) Procure and submit Original No Dues Certificate from the respective Lenders within 2 working days from date of closure of the respective facilities;

b) Release of charge of the existing lenders within 2 working days from the date of closure of the loan availed;

c) deposit the Original Title deeds with DHFL within 7 working days from the date of closure of respective loan accounts.

5. The Borrower within 7 working days from the date of closure of all the facilities availed from YES Bank Ltd against the Avenue 54, has to execute the conveyance deed for plot #1 with SBPL for acquisition of 100% land and rights on the project Avenue 54.”

33. Now let us briefly refer to the decision relied upon by the learned counsel. In *Bikram Chatterji and others* (supra) Their Lordships observed in paragraph 85 that “In order to create a mortgage, it was necessary to obtain clear NOC in

order to create effective mortgage deed. As that has not been done so far, no mortgage in the eye of the law has been created in favour of the bank. It was not open to the bankers to mortgage the land in view of the conditional permission to create mortgage, the mortgage created in violation of condition cannot be said to be effective in accordance with law as the land was owned by the authorities concerned and the lessees had right to mortgage only subject to fulfilment of conditions imposed by the lessor/authorities." In *Radha Sundar Dutta* (supra) the Supreme Court held that if two constructions of a document are admissible, one which would give effect to all the clauses therein would be adopted as opposed to the construction which would render one or more of the clauses nugatory. In **Sahebzada Mohammad Kamgarh Shah vs. Jagdish Chandra Deo Dhabal Deb and others**¹⁰ it was held that in the event, two clauses or two parts of the same clause are irreconcilable, the earlier clause will prevail, i.e. the earlier clause will not be allowed to be cut down by a later clause. In the case of ambiguity, the document has to be interpreted strictly against the grantor and in favour of the grantee. *Deccan Paper Mills Company*

¹⁰ AIR 1960 SC 953

Limited (supra) is relied upon for the proposition as to the declaration that a document is void or voidable and its cancellation can be sought if the document can be a source of potential mischief. The jurisdiction under section 31 is a protective or a preventive one and the principle of the relief is the same as in quia timet actions. In **Zarina Siddiqui vs. A. Ramalingam**¹¹ the Supreme Court held that the Court would exercise discretion judiciously and in accordance with sound and reasonable judicial principles and not in an arbitrary manner. The conduct of the respondent is a relevant factor.

34. The arguments of Mr. Dhond that having regard to the last sentence in Clause 5, Omkara Asset is entitled to a second charge, undoubtedly is attractive. However, we cannot overlook the facts of the present case and the conduct of Sumer as well the conduct on the part of Omkara Asset in seeking the deeds of mortgage executed even prior to the issuance of conditional NOC of Yes Bank. The huge loans of Yes Bank were not repaid. The loan account was not closed. The NOC of Yes Bank was a conditional one. It appears that mortgage deeds were executed by Omkara Asset hurriedly.

¹¹ (2015) 1 SCC 705

In the light of the various clauses referred to hereinbefore, it is obvious that the impugned mortgage deeds without a clear NOC from Yes Bank cannot be a mortgage in the eye of law. It was not open for Sumer to create a mortgage in favour of Omkara Asset. The conduct of Sumer is dishonest. The claim of J. C. Flowers cannot be defeated in such a manner. The provisions of law cannot be read in the given facts which would virtually amount to putting a premium on a dishonest transaction by holding that Omkara Asset still is entitled to a second charge.

35. We are, therefore, satisfied with the manner in which the discretion is exercised by the learned Single Judge in the facts of the present case which cannot be said to arbitrary, capricious or perverse to warrant interference in the Appeal.

36. We therefore do not find any merit in this Appeal. The Appeal is dismissed. Interim Application (L) No.7074 of 2025 is disposed of.

(M.S.KARNIK, J.)

(CHIEF JUSTICE)