

State Bank of Mysore Vs. Devakar Silk Weaving Factory and

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Court : DRAT Madras

Decided On : Aug-03-2006

Reported in : IV(2006)BC215

Judge : K Gnanaprakasam

Appellant : State Bank of Mysore

Respondent : Devakar Silk Weaving Factory and

Judgement :

The appellant is the applicant in OA-41/1999 on the file of DRT, Bangalore. OA was filed for the recovery of the amount from the defendants, holding them personally liable to pay the amount, and also for the sale of Schedule I hypothecated stocks, Schedule II pledged machineries, Schedules III and V mortgaged properties, for the realisation of the debt. The Tribunal by its Order dated 15.10.2004, allowed the OA, holding that the defendants 1 to 5 personally liable to pay the amount and sale of Schedules I and II hypothecated properties alone, and the reliefs sought for the sale of Schedules III and V immovable properties, was disallowed, Aggrieved by the same, the applicant Bank has preferred this appeal.

I have heard the learned Advocates for the appellant Bank and the respondents.

1. The learned Advocate for the appellant Bank would submit that the execution of the mortgage by deposit of title deeds by the defendants in respect of Schedules

III and V immovable properties was accepted by the Tribunal, but it took a view that the appellant Bank has not produced any document relating to the mortgage of Schedules III and V properties even though the documents were mentioned in Schedules IV and VI to the OA, and dismissed the claim of the appellant Bank to bring those immovable properties for sale. It is pointed out that it is in evidence that the mortgagors have confirmed the mortgages created by deposit of title deeds by their letter dated 19.6.1991 and though the defendants denied the mortgage, they could not substantiate the same, in view of the clinching documentary evidence filed on behalf of the appellant Bank. It is further submitted that the documents relating to these properties shown in Schedules IV and VI were kept in the safe custody of the appellant Bank in J.C. Road Branch, as they are all originals. As the Bank mainly relied upon the confirmation of the mortgage executed by the respondents, they have not filed the original documents. It is further submitted that it is a usual practice that original title deeds were not filed for two reasons, (1) that they are not insisted upon and (2) for fear of being misplaced or lost. It is further submitted that filing of the original title deeds even before the execution of the order is not a legal requirement, as contemplated under Order 34 of the Code of Civil Procedure and the said provision is also applicable with necessary changes, for the proceedings before the DRT. It is further submitted that in order to obviate the obsession created, the appellant had taken out an application (IA-354/2006) before this Tribunal for reception of the original documents in the form of additional evidence, which were not filed before the DRT in the circumstances explained above.

2. On the contrary, the learned Advocate for the respondents would contend that the reasons given by the appellant for not having filed the original documents before the DRT are not convincing and it is not the case of the appellant Bank that they could not produce the documents before the Tribunal in spite of exercise of due diligence, and therefore, the application filed by them to produce those documents as additional evidence, before this Tribunal is not sustainable. That in the absence of the original title deeds, the Tribunal was right in dismissing the claim of the appellant in respect of the immovable properties set out in Schedules III and V. Now, let us consider whether the non-production of original documents in respect of the mortgaged properties, would disentitle the Bank from getting a

decree.

3. Order 34 of Code of Civil Procedure deals with suits relating to mortgage of immovable property. It may be stated that Code of Civil Procedure is not applicable to the proceedings before the DRT. Section 22(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 states that The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 to 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely, (a) summoning and enforcing the attendance of any person and examining him on oath, etc....

Therefore, the application of Code of Civil Procedure, in the absence of specific rule, or regulations under the RDDB & FI Act, is not prohibited.

4. The learned Advocate for the appellant submitted that in a suit on a mortgage, the production of original documents before the Court, at the time of filing the suit is not necessary. In support of the above said submission, the appellant relied upon Rule 3 of Order 34, which speaks about passing of final decree in a foreclosure suit, states Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree (a) Ordering the plaintiff to deliver up the documents referred to in the preliminary decree....

Relying upon this Rule, appellant states that the filing of the documents would arise only when the defendants make payment to Court of all the amounts due from them before passing of the final decree. Then, the Court shall, that too on the

application made by the defendants, order the plaintiff to deliver up the documents. It shows that the original documents will continue to be in the hand of the plaintiff and there was no legal compulsion that it should be filed in the Court itself. Incidentally, Rule 5 of Order 34 is also relied upon by the appellant, wherein also, it is stated that after passing of final decree and before confirmation of the sale, if the defendant makes payment to the Court, the Court shall, that too on the application of the defendant, order the plaintiff to deliver up the documents referred to in the preliminary decree. That even in a suit for redemption, Rule 8 of Order 34 states that, where, before the final decree is passed, debarring the plaintiff to exercise the right of redemption, if the plaintiff makes the payment into the Court of all amounts due from him, then the Court, that too on the application made by the plaintiff, pass an order directing the defendant to deliver up the documents' referred to in the preliminary decree. By relying upon all these Rules in Order 34 Code of Civil Procedure, the appellant contends that there was no necessity to produce the original documents of title deeds along with the plaint or OA claim, and therefore, the order passed by the DRT disallowing the appellant's claim to bring the immovable properties set out in Schedules III and V for sale, for non-filing of the original title deeds, is not proper.

5. The learned Advocate for the appellant further submits that the nature of deposit made/created by the defendants in the OA is an equitable mortgage by deposit of title deeds and the requisites for such a deposit is covered under Section 58(f) of the Transfer of Property Act, 1882, which states 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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.

The requisites of an equitable mortgage are (1) a debt, (2) deposit of title deeds and (3) an intention that the deed shall be security for the debt. Mere, the respondents have deposited the title deeds with an intention to create a mortgage and that was also recited in the OA, and the list of documents were also set out in Schedule IV in respect of the immovable property in Schedule III and in Schedule

VI in respect of the immovable property in Schedule V. But, the appellant has not filed the document of Title Deeds. Only on the ground of non-filing of the Title Deeds, relating to immovable properties set out in Schedules III and V, the DRT disallowed the claim of the appellant, which according to the appellant, is not proper. The appellant submits that the requisites of a valid equitable mortgage has been made out and mere non-production of the documents in the OA, would not deprive the appellant from getting a decree to bring those immovable properties for sale, for the realisation of the amount due by the defendants. As it has been commented by the DRT, that the appellant has not produced the documents of title deeds, the appellant filed an application for reception of those documents as additional evidence, which also shows that the relevant documents were in the custody of the appellant, and those documents were delivered by the defendants to the appellant at the time, when the mortgage was created.

6. Per contra, the learned Advocate for the respondents would submit that the appellant has not given any valid reason for the non-production of the title deeds along with the OA and the present application filed by the appellant seeking the permission of this Tribunal to file those documents as additional evidence, is not permissible. It is not the case of the appellant that they could not produce the document before the Tribunal in spite of exercise of due diligence, but on the contrary, the appellant contends that there was no need to produce those documents and the said contention is not sustainable. Section 58(f) of the Transfer of Property Act clearly states that, mortgage by deposit of title deeds could be created only by delivery of documents of title of immovable property to a creditor or to his agent, and therefore, it is incumbent upon the appellant, that they should have produced those documents at the time of filing of the OA. As the appellants have not filed the documents, they are not entitled to get a decree based on mortgage.

The question that falls for consideration is, whether the non-filing of the document of Title Deeds relating to the mortgage created by deposit of title deeds along with the OA, would deprive the appellant from getting a decree for sale of immovable properties? 7. A careful analysis of the case would reveal that delivery of documents of Title Deeds to immovable property to a creditor or to his agent at the

time of creating the deposit of title deeds is one thing and filing of the documents along with the suit or original application filed in a Court/Tribunal for the recovery of the amount due under the mortgage is another thing. It is not the case of the respondents/defendants that they have not delivered the documents of title to immovable property to the appellant Bank at the time when the mortgage was created. But, on the other hand, it is their case that, those documents of title deeds were not filed along with the OA. In fact, the appellant had shown all these documents in the Schedules IV and VI in the OA. but they have not chosen to produce those documents for one reason or the other.

8. Appellants have made a categorical statement in the OA that the loan amount advanced by them was secured by the equitable mortgage of the property owned by the respondent No. 4 and also the property standing in the name of the deceased Akkaiyamma and the properties were also set out in Schedules III and V and they were given as security by deposit of title deeds shown in Schedules IV and VI respectively. The appellants have also filed the letter of confirmation for having created equitable mortgage by deposit of title deeds relating to the properties with an intention to create equitable mortgage over those properties by way of security for the amounts due to the Bank, and they were marked as Ex. A22 and A23. These documents do reveal the execution of the mortgage by deposit of title deeds, creating a charge in respect of those properties and the connected documents alone we're not filed by the appellants, which made the DRT to come to the conclusion that they are not entitled to get a decree on mortgage and bring the immovable properties for sale. I am of the view that the respondents have validly created equitable mortgage by deposit of title deeds, as required under Section 58(f) of the Transfer of Property Act, 1882 and the OA is also based upon the mortgage. There is nothing to indicate that the related documents, for having created a mortgage by deposit of title deeds, were necessarily to be filed along with the suit/OA. I am of the view that the DRT is not correct in having come to such a conclusion. Mere non-filing of the documents of title in respect of validly created equitable mortgage would not definitely disentitle the appellant from getting a decree based upon the mortgage.

9. Now, to prove that those documents were in the custody of the appellant and they have not felt that production of those documents were necessary in the OA proceedings, and that the Tribunal had taken a view that the appellants are not entitled to get a decree on mortgage, for non-production of those documents in the OA proceedings, the appellants have filed an application before this Tribunal for reception of those documents. As such, the application (IA-354/2006) filed by the appellants for reception of the documents as additional evidence, has got to be allowed, and accordingly, it is allowed.

10. The appellants, by filing of the documents Ex. A22 and A23, have proved that there is a valid equitable mortgage by deposit of title deeds and the appellants are entitled to get a decree based upon the mortgage and to bring the immovable properties for sale, in accordance with law, as prayed in the OA.11. In the result, the Appeal RA-20/2006 and IA-354/2006 are allowed.

The Order of the DRT, Bangalore passed on 15.10.2004, disallowing the appellant's claim for bringing to sale the immovable properties set out in Schedules III and V to the OA, is set aside. No costs.

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