

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.4719 of 2013

ORDER :

This Revision is filed challenging the order dt.04.10.2013 in I.A.No.05 of 2013 in O.S.No.172 of 2012 on the file of Judge, Family Court-cum-VII Additional District and Sessions Judge, Medak at Sangareddy.

- 2.** The petitioners herein are defendants in the suit.
- 3.** The respondent/plaintiff filed the above suit for recovery of money from petitioners and also for creation of a charge on the amounts due from petitioners on the plaint schedule properties belonging to them. Although in the plaint it is alleged that there were mortgages by deposit of title deeds of properties belonging to petitioners made as guarantee for repayment as of a pre-existing liability of 1st petitioner, the suit is not filed on the basis of the said mortgages.
- 4.** Written statement was filed by petitioner nos.2 and 3 disputing the fact that they have created any mortgages by deposit of title deeds. They also contended that from the manner in which the suit is framed, it appears that the respondent/plaintiff had abandoned the mortgage.
- 5.** The petitioners filed I.A.No.5 of 2013 under Section 68 of the Transfer of Property Act, 1882 (for short,

‘the Act’) to direct the respondent to forthwith return all the title deeds in respect of plaint schedule properties to them, and, in default, to stay the suit in terms of Sub-section (2) in terms of Section 68 of the Transfer of Property Act, 1882.

6. In the said application, they contended that the respondent had obtained the title deeds of properties belonging to them from a financial institution clandestinely, and that they had never given these title deeds as security as alleged in the plaint. They contended that unless the respondent exhausts all available remedies against the properties which he claims to be mortgaged, the suit O.S.No.172 of 2012 shall be stayed, or else, unless he should abandon the mortgage; they contend that the suit cannot be allowed to proceed and while abandoning the mortgage, he shall be directed to deliver the title deeds of the properties of petitioners to the petitioners.

7. This application was opposed by respondent. He contended that the financial institution had not acted unauthorisedly or in collusion with respondent. He denied that petitioners had not given the title deeds as security as alleged in the plaint. He also contended that the petitioners are not entitled to the relief of stay of the suit and stated that the respondent has not abandoned the securities and the petitioners cannot claim the relief of

return of the title deeds. It was reiterated that petitioners had agreed to mortgage the title deeds of the property as a guarantee for the repayment of a debt which was anterior to the alleged mortgage.

8. By order dt.04.10.2013, the court below dismissed the said application. It referred to the following issues framed by it :

“3. Whether D1 to D3 mortgaged the plaintiff A to C schedule properties belonging to them respectively by depositing their title deeds in respect of those properties with the plaintiff as security for repayment of the alleged debt of Rs.1 crore ?

.....

5. Whether the plaintiff abandoned the mortgage security and if so he is liable to return the title deeds to the defendants ?”

9. It held that the above issues can be decided only after oral and documentary evidence was adduced by the parties. It held that the question ‘whether the plaintiff has not exhausted all his remedies against the mortgage property and if so he abandoned the security’ can be decided conclusively only after considering the oral and documentary evidence adduced by both sides and the claim for return of the title deeds by invoking Section 68 of the Act, is premature. It further held that the respondent cannot be directed to return the title deeds which are in its possession to petitioners and the suit proceedings therefore cannot be stayed.

10. Challenging the same, the present Revision is filed.

11. Heard Sri V.L.N.G.K. Murthy, counsel for petitioners. None appears for respondent even though notice to respondent was served on 23.04.2014 itself.

12. The counsel for petitioners would contend that this approach of the court below is unsustainable and when an application under Section 68 (2) of the Act is filed, it is the duty of the court to decide it and it cannot put off a decision therein stating that it would decide the application under Section 68 (2) only after oral and documentary evidence is adduced by both parties.

13. Section 68 of the Act states :

"68. Right to sue for mortgage-money :- (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :-

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor or reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that, in the case referred to in clause (a), a

transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property."

14. A reading of the plaint shows that in paras.8 to 12 and 15, there is a specific pleading about the creation of a mortgage by deposit of title deeds by petitioners in respect of an anterior debt/pre-existing liability by petitioners. The prayer in the suit indicates that the suit is not based on the mortgage but is a simple suit for recovery of money with a prayer to create charge for the amounts due on the plaint schedule properties belonging to petitioners. No explanation is given in the plaint as to why, having security in the form of a mortgage by deposit of title deeds, the respondent/plaintiff has not chosen to seek relief on that basis.

15. In this view of the matter, the petitioners cannot be found fault with for insisting that the respondent/plaintiff makes it's stand clear on the issue of mortgage and have rightly filed the petition under Section 68 (2). It may be that the court below has framed issue Nos.3 and 5 on the issue of existence of mortgage as well as abandonment thereof, but these issues, in my considered opinion, need to be gone into also while deciding an application under Section 68 (2). If the respondent insists that the mortgage

exists then the suit might have to be stayed until he has exhausted all his remedies against the mortgage properties. If he abandons the mortgage then he may have to be compelled to deliver the title deeds or re-transfer the mortgage property, as a condition precedent for the suit to proceed. The prayer for return of the title deeds made by petitioners cannot be said to be premature since it comes within the last part of Clause (2) of Section 68.

16. In this view of the matter, the order dt.04.10.2013 in I.A.No.05 of 2013 in O.S.No.172 of 2012 on the file of Judge, Family Court-cum-VII Additional District and Sessions Judge, Medak at Sangareddy is set aside, and the said I.A. is remanded back to the Trial Court to consider the application again; and while deciding it, the Trial Court shall go into the issue not only about the existence of the mortgage but also about its abandonment, if it is found that such a mortgage exists by taking oral and documentary evidence on these two issues, if necessary. The Civil Revision Petition is disposed of with the above directions. No order as to costs.

17. This exercise shall be completed within a period of three (03) months from the date of receipt of a copy of this order.

18. As a sequel, miscellaneous petitions pending, if any, in this Revision shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 31-07-2015

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