

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.02.2009

CORAM

THE HONOURABLE MR.JUSTICE D.MURUGESAN

AND

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

O.S.A.Nos.343 to 345, 390 to 392 of 2007 & 130 to 132 of 2008

The Committee representing

RBF Nidhi Limited

New No.15 (Old No.8) West Cott Road

Appellant in O.S.A.

Royapettah, Chennai 600 014

.. Nos.343 to 345 of 2007

Federation of Investors Association

rep.by its Secretary D.Ramamoorthy

No.23, Lake View Road

Appellant in O.S.A.

West Mambalam, Chennai 600 033

.. Nos.390 to 392 of 2007

Vipanchi Investments Pvt.Ltd.,

8C/1510-G Trichy Road

Coimbatore 641 018

Appellant in O.S.A.

rep.by its Director Mr.S.R.Eshwaran .. No.130 of 2008

Electrotherm Furnace Private Limited

32-B II Phase Peenya Industrial Area Appellant in O.S.A.

Bangalore 560 058 .. No.131 of 2008

Superline Engineering Ltd.,

8C/1510-G Trichy Road

Coimbatore 641 018 Appellant in O.S.A.

rep.by its Director Mr.S.R.Eshwaran .. No.132 of 2008

-vs-

Vipanchi Investments Pvt.Ltd.,

8C/1510-G Trichy Road 1st & 3rd respondents in

Coimbatore 641 018 O.S.A.Nos.343 & 390

rep.by its Director Mr.S.R.Eshwaran .. of 2007

Electrotherm Furnace Private Limited 1st & 3rd respondents

32-B II Phase Peenya Industrial Area in O.S.A.Nos.344 & 391

Bangalore 560 058 .. of 2007

Superline Engineering Ltd.,

8C/1510-G Trichy Road

1st & 3rd respondents in

Mr.P.Giridharan for
Mr.K.Moorthy
in O.S.A.Nos.390 to 392 of 2007

Mr.Sriram Panchu
Senior Counsel for
Mr.T.Mohan in
O.S.A.Nos.130 to 132 of 2008

For Respondent :: Mr.M.Ravindran
Additional Solicitor General
of India assisted by
Mrs.K.Latha Parimala Vadhana
Asst. Official Liquidator

JUDGMENT

D.MURUGESAN, J.

As the issues raised for consideration in all the appeals are common, they are taken up together and disposed of by this order. For convenience, we refer to the facts as put forth by the appellants in O.S.A.Nos.130 to 132 of 2008 in their Company Applications.

2. In a pending Company Petition No.230 of 2004, the appellants in O.S.A.Nos.130 to 132 of 2008 filed three Company Applications in C.A.Nos.1191 to 1193 of 2007 seeking for return of the title deeds morefully described and pertaining to the schedule properties owned by the appellants to an extent of 16.97 acres, 7.14 acres and 20.42 acres respectively in various Survey Numbers in Begapalli Villge, Hosur Taluk,

Dharmapuri District and lying within the limits of Begapalli Panchayat and Hosur Panchayat Union, which were pledged by one Mr.Jamsheed M.Panday, Chairman of Zen Global Finance Limited and who happened to be the friend of Mr.S.R.Eshwaran, the Director of the appellants-companies.

3. On 25.3.98, by separate Board Resolutions, the said Jamsheed M.Panday was authorised and we refer to one such resolution passed by the Board of M/s Vipanchi Investments Private Limited in respect of the property to an extent of 16.97 acres, which reads as follows:

"Resolved that Sri Jamsheed M.Panday, Chairman of M/s Zen Global Finance Limited be and is hereby authorised to pledge the documents of 16.97 Acres of the landed property of the company situated at Begapalli Village, Hosur as collateral security in favour of M/s R.B.F.Nidhi Ltd., in connection with raising of funds for M/s Zen Global Finance Limited and to sign necessary documents for the above purpose of pledge."

Similar resolutions were passed in respect of the properties of the other two companies as well. The said Panday deposited the title deeds in respect of the properties with R.B.F. Nidhi Limited on 15.4.98 for the loan already availed by him. When the appellants were following up the said Panday for return of the title deeds, they were informed that the title deeds were with the R.B.F. Nidhi Limited. Later on, the said Panday was adjudged as insolvent, thereby disabled himself from transacting any business or settling his liabilities.

4. On the ground that the said Panday was authorised to pledge the title deeds only as collateral security in favour of M/s R.B.F. Nidhi Limited and that too in connection with the raising of funds for M/s Zen Global Finance Limited, contrary to the authorisation, the said Panday had mortgaged the title deeds in connection with his personal borrowings of Rs.2.50 Crores with R.B.F. Nidhi Limited, the appellants approached this Court seeking for return of the above title deeds. The said applications were ordered on 26.10.2007 and the learned Judge had directed the appellants to pay a sum of Rs.4,72,24,139/- along with further interest

upto the date of payment to the Official Liquidator to redeem the properties.

5. Questioning the said order in directing the payment of the above sum for return of the title deeds, the companies have filed O.S.A.Nos.130 to 132 of 2008. Questioning the very same order in directing the return of the title deeds, the Committee representing RBF Nidhi Limited and the Federation of Investors Association have filed O.S.A.Nos.343 to 345 & 390 to 392 of 2007 respectively.

6. We have heard Mr.Sriram Panchu, learned Senior Counsel for Mr.T.Mohan, Advocate for the appellants in O.S.A.Nos.130 to 132 of 2008, Mr.Arvind P.Datar, learned Senior Counsel for Mr.B.S.Jhothiraman, Advocate for the appellant in O.S.A.Nos.343 to 345 of 2007, Mr.P.Giridharan, Advocate for Mr.K.Moorthy, Advocate for the appellant in O.S.A.Nos.390 to 392 of 2007 and Mr.M.Ravindran, learned Additional Solicitor General of India assisted by Mrs.K.Latha Parimala Vadana, Assistant Official Liquidator for Provisional Liquidator.

7. At the outset, we would like to point out that the Committee constituted to manage the affairs of M/s R.B.F. Nidhi Limited had been superseded, as it is under the control of the Provisional Liquidator of this Court. An objection was also raised by Mr.M.Ravindran, learned Additional Solicitor General of India that the Federation of Investors Association cannot be heard. Though O.S.A.Nos.343 to 345 of 2007 cannot be prosecuted by the Committee which is not in existence as on today, as the very same common order is put in issue before this Court in the other appeals and they were parties to the applications before the Court below, and also for an effective adjudication of the issue, we are of the opinion that the learned counsel for the erstwhile Committee should also be heard. Therefore, we permit Mr.Arvind P.Datar, learned Senior Counsel representing the erstwhile Committee to present his case. So far as the appellant in O.S.A.Nos.390 to 392 of 2007 is concerned, they being the Federation of Investors Association, we permit Mr.P.Girirajan, learned counsel to assist the Court for the very same

reason namely, they have also questioned the common order put in issue before this Court and in case any order adversely affecting their rights are passed, they would also be aggrieved. Moreover, they were allowed to come on record to appeal by orders of this Court. Further, as the disposal of the O.S.A.Nos.130 to 132 of 2008 will also govern the issue raised by the Committee and the Federation of Investors Association, the objection raised cannot be accepted and accordingly, we proceed to consider the submissions made by the respective learned counsels in all the appeals.

8. The short question arises for consideration is as to whether the appellants in O.S.A.Nos.130 to 132 of 2008 could seek for return of the title deeds from M/s R.B.F. Nidhi Limited solely on the ground that Jamsheed M.Panday had deposited the title deeds contrary to the power of attorney given to him by way of the resolutions. It appears that even before such resolutions were passed, the said Panday had a huge amount due to M/s R.B.F. Nidhi Limited in a sum of Rs.86,73,82,285/- as on 31.12.99 for the House Mortgage Loans (shortly known as "HML") which he had availed. After a period of nearly three years from the date of the first loan, it appears that he had approached the three appellants-companies for assistance. Accordingly, by three separate Board Resolutions, he was authorised to give the properties in question as collateral security in favour of M/s R.B.F. Nidhi Limited in connection with the raising of funds for M/s Zen Global Finance Limited, as he was the Chairman of the said company.

9. It is argued that by the resolutions, the authorisation was only to furnish the title deeds as collateral security in favour of M/s R.B.F. Nidhi Limited and that too in connection with the raising of funds in favour of the company and not for individual loan or loans. It is further argued that by the resolutions, the said Panday was authorised to raise funds in future and not to give the title deeds as collateral security for the existing loans. It is further argued that in any case, the title deeds were deposited in respect of the loans taken by Mr.Panday on 12.7.95 and that too as "HML" and if at all the R.B.F. Nidhi Limited could retain the title deeds, it could be only for the loan covered under 'HML-736'

together with interest and not for any other loans taken by the said Panday. It is finally argued that in any case the appellants are entitled to redeem the title deeds in view of the provisions of Section 91 of the Transfer of Property Act.

10. A careful reading of the resolutions does not indicate that the title deeds could be given as collateral security only in respect of the loan availed by Mr.Panday in HML-736 on 12.7.95. The report of the Official Liquidator filed during July, 2007 would show that the said Panday had availed several loans from M/s R.B.F. Nidhi Limited only in the capacity of Chairman of M/s Zen Global Finance Limited, thereby meaning that the loans were availed only for the benefit of the company and such loans cannot be considered to be the personal loans of Panday. Therefore, the contention of the learned Senior Counsel for the appellants-companies that the said Panday had deposited the title deeds contrary to the authorisation cannot be accepted. Whether Mr.Panday had contravened the authorisation or not is a matter between the appellants-companies and the said Panday to be resolved. There is no privity of contract between the appellants-companies and M/s R.B.F. Nidhi Limited.

11. It could be further seen that even on the date when the title deeds were deposited on 15.4.98, the said Panday had availed ten loans and had a huge outstanding amount of nearly Rs.36 Crores towards the loan amount and the interest accrued thereon. We are at loss to understand that when the said Panday had availed ten different loans from 6.4.95 till 16.9.95, he could deposit all the title deeds of the properties covering a total extent of approximately 44 acres for one loan of Rs.2.50 Crores alone. In the report filed by the Official Liquidator during July, 2007, it is stated that even as on 31.12.99, he was due in a sum of Rs.86,73,82,285/-. However, strangely and surprisingly, the Official Liquidator has taken a stand that the title deeds in question were deposited only in respect of one loan namely, HML-736 dated 12.7.95. In this context, the counter affidavit of Thiru K.R.Rajagopal, the then Chief Executive Officer of M/s R.B.F. Nidhi Limited filed during July, 2007 is referable, where it is stated that the deposit of title deeds were given on

15.4.98 when there were ten loans availed by Mr.Panday and therefore, M/s R.B.F. Nidhi Limited was entitled to have a general lien over the properties offered as security to cover all the loans availed by the said Panday. It is also specifically averred that the offer of security cannot be confined to a particular loan alone, and when the recovery of amount from the borrower is to be realised by way of sale of properties, R.B.F. Nidhi Limited has a right to utilise the surplus amount, if available, towards the other loans as well.

12. It is also averred that M/s R.B.F. Nidhi Limited is not concerned with the internal matters between Panday and the three appellants-companies. It is also averred that though the title deeds were deposited as early as on 15.4.98, the applications for return of the title deeds were filed only in the year 2007 after nine years. In our opinion, the stand taken by the Official Liquidator is not only contrary to the records but also not in the interest of the company facing liquidation. The trust and confidence embedded on him by this Court, while he was appointed as Provisional Liquidator, was not kept in his mind. For the said reason, the report of the Official Liquidator has to be ignored.

13. As far as the mortgage by deposit of title deeds is concerned, Section 58(f) of the Transfer of Property Act is referable and the said Section reads as under:-

"58(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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds."

14. Though there is no presumption of law that the mere deposit of title deeds by itself would constitute a mortgage, but the Court may presume under Section 114 of the Evidence Act that under certain circumstances,

loan and the deposit of title deeds constitute a mortgage. In the given facts and circumstances of this case, inasmuch as the loans were already availed and the promissory notes were executed in respect of a huge sum of Rs.37 Crores without there being any security, it could be reasonably presumed that the deposit of title deeds in question cannot be restricted only for one loan, but it shall be in respect of all the loans and thereby, M/s R.B.F. Nidhi Limited would be entitled to oppose the redemption restricting the consideration only in respect of one loan. In our opinion, the deposit of title deeds cannot be confined to one loan and it is in respect of all transactions between the parties.

15. The duties of the Company Court are to (i) protect the assets of the company in liquidation; (ii) safeguard the company's records and (iii) investigating the company's affairs to discover, protect and recover the assets. In a proceeding for winding up of a company in liquidation, the Court acts as a custodian for the interest of the company and the creditors/investors. The term 'creditors and investors' shall also include the depositors. The assets of the company become custodia legis. Therefore, the Court is charged with the responsibility of protecting the assets of the company facing liquidation. In that context, a Provisional Liquidator is appointed pending winding up petition due to the concern as well that the assets of the company are not at risk. By such appointment, the assets and the potential creditors are protected until the petition for winding up is heard and disposed. The liquidator, therefore, holds an important position of responsibility and trust. One of the paramount consideration in appointing a Provisional Liquidator is to ensure a fair distribution of the assets of the company and for the said purpose, the company should realise the maximum amount due to the company not only for a fair and equitable distribution, but also to the maximum possible. Under these circumstances, in our considered opinion, it would not be in the interest of not only the company which is facing liquidation, but also the investors to allow the appellants to take back the title deeds on payment of the sum as directed by the learned single Judge.

16. 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 either advanced or to be advanced by way of loan. The three requisites for such mortgage are (i) debt; (ii) deposit of title deed; and (iii) an intention that the deed shall be security for the debt.

17. In the judgment in K.J.Nathan v. S.V.Maruthi Reddy and others, AIR 1965 SC 430, the Apex Court while considering the aspect of intention, had observed as follows:-

"10.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 S.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 inference 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....."

18. This Court is competent to consider the circumstances under which the deposit of title deeds was made. Even when the title deeds were deposited, the said Panday had availed ten loans from R.B.F. Nidhi Limited. Another circumstance is that there is absolutely no indication as to why the deposit of title deeds should be restricted only in respect of one loan when there were no deposit of title deeds in respect of at least seven other loans. The further circumstance is that what prompted Mr.Panday to deposit the title deeds in respect of more than 44 acres of valuable land for a loan of Rs.2.50 Crores at the time when he had already availed a loan of nearly Rs.36 Crores. One of the further

circumstance is that he had availed loans by executing promissory notes in the capacity as the Chairman of M/s Zen Global Finance Limited and he would not have intended to restrict the deposit of title deeds only in respect of one loan. These are all certain circumstances which prompt us to infer the intention of the said Panday in depositing the title deeds in respect of all loans, though in record the deposit of title deeds was made in respect of one loan.

19. Mr.Sriram Panchu, learned senior counsel appearing for the appellants had submitted that in terms of Section 91 of the Transfer of Property Act, besides the mortgagor, any person who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same, is entitled to redeem the mortgaged property. There cannot be any dispute over the said submission as the provision is very clear. In the capacity as owners of the properties, the appellants, in the absence of any action taken at the instance of the mortgagor, namely, Panday, could make an application for redemption of the properties. The question, however, is whether such application could be entertained on the facts of this case. As we have already observed, the deposit of title deeds was made by Mr.Panday in respect of one loan at the time when he had nine other loans and, at least for seven other loans, there were no securities furnished to R.B.F. Nidhi Limited. The claim of the appellants-companies that Panday had contravened the authorisation cannot be put against M/s R.B.F. Nidhi Limited. Such dispute could be resolved between the appellants and Panday.

20. There is one more aspect in this regard. As against the right of redemption of the appellants-companies, the right of R.B.F. Nidhi Limited to claim a general lien over the properties in respect of the other loans as well in terms of Section 171 of the Contract Act should also be considered. Section 171 of the Contract Act reads as under:-

"171. General lien of bankers, factors, wharfingers, attorneys and policy brokers.--Bankes, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them;

but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

21. In *Syndicate Bank v. Vijay Kumar and others*, AIR 1992 SC 1066, while considering the scope of 'general lien', the Apex Court quoted the Halsbury's Laws of England as follows:

"Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract."

The Apex Court has also quoted 'Chalmers on Bills of Exchange' as to the meaning of 'Banker's lien', which reads as follows:-

"A banker's lien on negotiable securities has been judicially defined as 'an implied pledge.' A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer."

The Apex Court has also quoted 'Chitty on Contract' as to the general lien, which reads as follows:-

"By mercantile custom the banker has a general lien over all forms of commercial paper deposited by or on behalf of a customer in the ordinary course of banking business. The custom does not extend to valuables lodged for the purpose of safe custody and may in any event be displaced by either an express contract or circumstances which show an implied agreement inconsistent with the lien.... The lien is applicable to negotiable instruments which are remitted to the banker from the customer for the purpose of collection. When collection has been made the proceeds may be used by the banker in reduction of the customer's debit balance unless otherwise earmarked."

22. In *Brando v. Barnett* (1846) 12 Cl., it is stated as follows:-

"Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien."

Having quoted the above judgments, the Apex Court ultimately held as follows:-

"The above passages go to show that by mercantile system the bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is also applicable to negotiable instruments including FDRs which are remitted to the Bank by the customer for the purpose of collection. There is no gainsaying that such a lien extends to FDRs also which are deposited by the customer."

On the given facts of the case, we are of the considered opinion that M/s R.B.F. Nidhi Limited is entitled to invoke the provisions of Section 171 relating to general lien and the claim of the appellants-companies seeking for redemption in terms of Section 91 of the Transfer of Property Act must yield to such right and consequently the right to claim redemption cannot be accepted.

23. For the foregoing reasons, the order of the learned single Judge dated 26.10.2007 passed in Company Application Nos.1191 to 1193 of 2007 in Company Petition No.230 of 2004 in directing the return of the title deeds to the appellants in O.S.A.Nos.130 to 132 of 2008 is set aside and consequently, the said appeals are dismissed. In view of the said

finding, O.S.A.Nos.390 to 392 of 2007 are allowed and for the same reason, O.S.A.Nos.343 to 345 of 2007 are closed. Consequently, all the connected miscellaneous petitions are also closed. There shall be no order as to costs.

Index : yes (D.M.J.,) (M.S.N.,J.)

Internet: yes

To

The Sub Assistant Registrar (O.S.)

High Court, Madras

D.MURUGESAN, j.

AND

M.SATHYANARAYANAN, J.

Judgment in

O.S.A.Nos.343 to 345 of 2007 etc.

03.02.2009