
(2004) 04 OHC CK 0018
In the Orissa High Court
Case No : Writ Petition (C) No. 12790 of 2003

Alekha Sahoo

APPELLANT

Vs

Puri Urban Co-operative Bank Ltd. and Others

RESPONDENT

Date of Decision : 29-04-2004

Acts Referred:

Contract Act, 1872 — Section 171

Citation : AIR 2004 Ori 142 : (2005) 1 BC 58 : (2004) 97 CLT 769 : (2004) 1 OLR 677

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Judgement

M.M. Das, J.—Petitioner has filed this writ application for quashing the letter under Annexure-3, by which the Opp. Party, i.e. Puri Urban Cooperative Bank Ltd. (hereinafter referred to as "Bank") has marked a lien on the gold ornaments of the petitioner, now lying with the Bank and for issue of a writ of mandamus directing the Opp. Party-Bank to release the said gold ornaments in favour of the petitioner.

2. Bereft of the details, the facts giving rise to the present writ application are as follows :

The petitioner availed two gold loans of Rs. 12,000/- each on 20.8.2001 from the Opp. Party-Bank on pledge of gold ornaments and has cleared up the said gold loans on 22.7.2003. As the Bank did not return the ornaments so pledged for availing the gold loans to the petitioner, but issued the letter under Annexure- 3 dated 30.7.2003 to the petitioner, stating that the Bank has marked a "lien" on the said gold ornaments, the petitioner issued a notice/ demand letter vide Annexure- 4 through his lawyer, demanding return of the gold ornaments. Failing in such attempt, the petitioner has filed this writ application.

3. The Opp. Party-Bank in Its counter has stated that before availing the gold loans the petitioner stood as a guarantor for the cash credit loan advanced to M/

s Bimala Bhandar for a limit of Rs. 4,50,000/- on 25.6.2001 and the outstanding amount in the said cash credit account has gone upto Rs. 5,33,846.75 as on 31.12.2003. It is further averred that though admittedly the outstanding amount for the two gold loan accounts have been repaid by the petitioner, but as he is not free from liability as a guarantor to the cash credit loan advanced to M/s Bimala Bhandar and is jointly and severally liable for the said outstanding amount, he cannot object to the action of the Bank in marking a lien on the gold ornaments pledged by him for availing the gold loans and there is no contract to the contrary prohibiting the Bank from exercising its right of banker's lien under the Mercantile Law as well as u/s 171 of the Contract Act.

4. Mr. Patnaik, learned counsel for the petitioner contended that, in the facts of the present case the Bank has no right to exercise Banker's lien on the gold ornaments of the petitioner which were pledged to the Bank under the pledge letters and gold loan bond under Annexure-R/I series and that the gold ornaments having been pledged to the Bank on separate and specific contracts executed for the gold loans, the said contracts are impliedly contrary to the right of the Bank u/s 171 of the Contract Act. It was further submitted by him that none of the requirements of Section 171 of the Contract Act are fulfilled so as to permit the Bank to exercise its right of general lien as envisaged therein and the Bank was under an obligation to return the pledged ornaments under the provisions of Section 174 of the Contract Act. He relied on decisions reported in Sri Ramakrishna Sharma Vs. State Bank of India, ; Vijay Kumar Vs. Jullundur Body Builders and others, , Gurbax Rai and Others Vs. Punjab National Bank, New Delhi, and Krishna Kishore Kar Vs. United Commercial Bank and Another, Mr. Patnaik further submitted that in this case no notice has been served on the petitioner as the guarantor to pay the dues of the principal debtor M/s. Bimala Bhandar and therefore the Bank acted arbitrarily in exercising its right of lien over the gold of the petitioner. He cited the decision of the Calcutta High Court reported in Satyanarayan Kamal Kumar Vs. Birendra Pr. Singh and Another, for the proposition that the liability of the guarantor is conditional upon the default committed by the principal debtor.

5. Mr. Kanungo, learned counsel for the opp. party-Bank, on the other hand, submitted that law is well settled that the liability of guarantor is coextensive with that of the principal debtor. He cited the decision of the Supreme Court in Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, for the proposition that the liability of the surety u/s 128 of the Contract Act is very strict. He argued that the Bank therefore could exercise the lien over the pledged gold ornaments of the petitioner for adjustment of the balance in the loan account of M/s. Bimala Bhandar for which the petitioner was a surety/guarantor, Mr. Kanungo submitted that the decision of this Court in Sri Ram Krishna Sharma v. State Bank of India (supra) cited by Mr. Patnaik, learned counsel for the petitioner, was no more good law in view of the decision of the Apex Court in The Board of Trustees of The Port of Bombay and Others Vs. M/s Sriyanesh Knitters, in which it has been held that the general lien

contemplated by Section 171 of the Contract Act can be exercised by wharfinger on consignments for wharfage and demurrage charges due in respect of an earlier consignment, in reply to the , submission of Mr. Patnaik, learned counsel for the petitioner, that the petitioner was not given any legal notice before exercising lien over the pledged gold ornaments for the dues of M/s. Bimala Bhandar, Mr. Kanungo submitted that the .petitioner was given the notice dated 30.7.2003 after 8 days of settlement of the gold loan. Mr. Kanungo cited the decision of the Supreme Court in Syndicate Bank Vs. Vijay Kumar and others, the decision of the Karnataka High Court in S. Vasupalaiah v. The Vysya Bank, Kudagenahalli Branch, Voi. 50 All IBLJ 513, and the decision of the Madras High Court in The City Union Bank Limited Vs. C. Thangarajan, in support of his submission that the Bank can exercise such lien over the properties of the guarantor/surety/co-promisor.

6. The impugned notice dated 30.7.2003 of the Secretary, Puri Urban Co-operative Bank Ltd., Puri to the petitioner is extracted herein below :

"THE PURI URBAN CO-OPERATIVE BANK, LTD., PURI - 752001

Ref 324 Date 30.7.2003

From

The Secretary, Puri Puri Urban Co-operative Bank Ltd. Dt. 30.7.2003 PURI.
(Registered with A.D.)

To

1. Sri Alekh Sahoo S/o. Dhadi Sahoo
2. Sri Manmohan Sahoo, Proprietor, M/s. Bimala Bhandar
3. Sri Dhadi Sahoo, S/o. Bhagaban Sahoo

Sub : Exercise of power of Banker's General lien over Gold ornaments of Alekh Sahoo towards loan availed by Manmohan Sahoo, prop. M/s. Bimala Bhandar.

Sir,

I am to intimate you all above named persons that Manmohan Sahoo, proprietor M/s. Bimala Bhandar has availed a Cash Credit Loan limit of Rs. 4,50,000/- from this Bank being No. C. 214. You Sri Dhadi Sahoo and Sri Alekh Sahoo are guarantors for the said loan.

Due to non-payment of dues in time, the aforesaid loan has become irregular. The present outstanding is Rs. 4,50,000/- towards principal and Rs. 1,38,121/- towards interest in total it come to Rs. 5,88,121/- which has become Non-performing Assets. Though the original sanctioned limit of Rs. 4,50,000/- was backed by mortgage of immovable property by Sri Dhadi Sahoo, yet the rest amount which has exceeded the sanction limit is not yet covered by any security. It is the settled position of law that the liability of the guarantors are co-

extensive with that of the borrower till the loan is fully liquidated.

That you Sri Alekh Sahoo had availed two loans from this Bank on pledge of Gold ornaments which are G.L.H. No. 2568 and G.L.H. No. 2569. You have paid back both the above loans in the mean time and the pledged ornaments are in custody of this Bank.

That this Bank under provision of Bye law of Puri Urban Co-operative Bank Ltd. and in exercise of powers of Bankers General lien under provision of Indian Contract Act do hereby retain your ornaments mentioned below as Additional Security for the loan granted to Manmohan Sahoo, Proprietor, M/s. Bimala Bhandar where you are a guarantor.

You are therefore hereby informed that you all are liable to refund the aforesaid loan dues of principal Rs. 4,50,000/- and interest of Rs. 1,38,121/- along with further interest till the date of payment along with other costs if any within 15 days from receipt of this notice. After repayment of above loan, you Sri Alekh Sahoo are at liberty to take back the gold ornaments mentioned below over which Bankers general lien has been exercised.

For and on behalf of The Puri Urban Co-operative Bank Ltd. Yours faithfully,
Sd/- Illegible. 30.7.2003

List of Gold Ornaments

1. GLH 2568 - Sunakacha - 3 pieces
2. GLH 2569 - Paraskata Kangan - 2 pieces

Chain Locket - 1 piece"

It will be clear from the impugned notice dated 30.7.2003 of the Secretary, Puri Urban Co-operative Bank Ltd., Puri that the Bank has relied upon the provisions of the bye-laws of the Puri Urban Co-operative Bank Ltd. and the provisions of the Indian Contract Act relating to Banker's general lien for retaining the gold ornaments of the petitioner as additional security for the loan granted to Manmohan Sahoo, Proprietor M/s. Bimala Bhandar for whom the petitioner was the guarantor and for this reason has not returned the gold ornaments of the petitioner.

7. The first question, therefore, which has to be decided in this writ petition is whether the Bank could under the provisions of its bye-laws retain the gold ornaments of the petitioner as additional security for the loan granted to Manmohan Sahoo, Proprietor M/s. Bimala Bhandar for whom the petitioner was a guarantor. Along with its counter-affidavit, the Bank has annexed the documents which the petitioner has signed at the time of taking the gold loans as Annexure - R/I series. The relevant portions of the documents in which the petitioner has undertaken to accept the bye-laws of the Bank as binding on him are quoted herein below :

"I have and have been explained the relevant Bye-laws and rule of the Bank in this connection and I accept the same as binding on rule also undertake to abide by the decision of the Bank authorities as to the extend of loan to be granted on the security of these goods after its due appraisalment and valuation made by the Bank and I authorize to break or melt any part or whole of these goods for purpose of proper testing at my risk and expense."

"The 2nd party also authorized to take any action at any time with regards to the pledged goods according to there Bye-laws and rules which can be questioned and challenged by the first or his/their representative at any time."

In the aforesaid portions of the documents signed by the petitioner at the time of taking the gold loans, the petitioner has stated that the byelaws and the rule of the Bank have been explained to him and he has accepted the same as binding on him and has further stated that he will not question the said bye-laws and rule. But the particular bye-law and rule of the Bank to the effect that the Bank can retain the gold ornaments of the petitioner for the loan account of the principal debtor for whom he is a guarantor has not been placed by the Bank before the Court. In the absence of any bye-law or rule of the Bank to the effect that the gold ornaments of the petitioner pledged for the gold loans could be retained by the Bank as additional security for loan granted to M/s. Bimala Bhandar for whom the petitioner was a guarantor, the Bank could not retain the gold ornaments of the petitioner after repayment of the gold loans by the petitioner under the bye-laws of the Bank.

8. The next question to be decided in this writ petition is whether the Bank could in exercise of its right of general lien u/s 171 of the Indian Contract Act retain the gold ornaments of the petitioner as additional security for the loans granted to Manmohan Sahoo, Proprietor M/s. Bimala Bhandar for whom the petitioner was a guarantor. Section 171 of the Indian Contract Act is quoted herein below :

"771. General lien of bankers, factors, wharfingers, attorneys and policy-brokers : Bankers, 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."

The aforesaid Section states that bankers 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. The said Section 171 does not extensively deal with the cases in which a banker can retain as security for a general balance of account any goods bailed to it. Section 171 of the Contract Act, however, is a recognition of the right of general lien of bankers under English Mercantile Law and therefore the decision of Court in England as to in which cases such lien can be exercised by bankers and in which cases such lien cannot be exercised by bankers will, equally apply to exercise of lien u/s 171 of the Contract Act.

9. In *Wolstenholm v. Sheffield Union Banking Co. Ltd.* (1886) 54 L.T. 746, the question that arose for decision was as to whether the Bank can retain a property belonging to a partner to satisfy the general account of his firm and Lord Esher, M. R. held that the Bank cannot exercise such lien over the private property of a partner for satisfying the general balance of account of his firm. To quote Lord Esher, M. R. :

"The bank said, "we shall not account to Wing's trustees for the surplus, although the lease was his private property, because we have a right to keep it to satisfy the general account of his firm". That was tantamount to saying, "we are now claiming your surplus to pay the debt of somebody else." The claim in effect was that, in virtue of the bank's general lien, they were entitled to retain the property of one man to pay the debt of another. That claim was based, not upon agreement, but on a supposed custom that bankers should in such a case have a general lien. There never was or could be a custom, however, by which you could take the property of one man to pay the debt of another. No such proposition was put forward in the cases cited, and no such proposition has ever been laid down in any of the cases respecting a banker's lien."

In *Cuthbert v. Roberts, Lubbock & Co* (1909) 2 Ch. 226, C.A., the bankers applied to claim the plaintiffs' shares or the proceeds thereof to the liquidation of the debit balance of Chancellor's Current Account and Joyce J. held that the bankers were not entitled to do so. Joyce J. in particular held :

"... It is true that the bankers have a general lien on the securities of any customer deposited by him with them otherwise than for a particular purpose, to secure any sum in which the customer may be indebted to the bankers. This, however, is a lien upon the securities of the customer and not upon those of other persons, and the general lien of a banker does not attach even upon money or securities of the customer known to the bankers to be affected by a trust. ..."

This view taken by Joyce J. that the lien of the Bank is upon the security of the customers and not upon those of other persons was upheld by Buckley L.J. and Kennedy L.J. and the appeal against the decision of Joyce J. was dismissed. It is thus clear from the aforesaid decision of the Courts of England that under the English Mercantile Law relating to Banker's General Lien the Bank can retain as security for general balance of an account of a customer, goods bailed to them by that customer and not goods bailed to them by some other customer.

10. The contention of Mr. Kanungo is that the petitioner is a guarantor for the loan account of M/s. Bimala Bhandar and is therefore liable for the outstanding balance of M/s. Bimala Bhandar by virtue of the provisions of Section 128 of the Contract Act which provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. But there is no provision in the Contract Act to the effect that the properties of the surety can be retained by the creditor as security for the debts due from the

principal debtor to the creditor. On the other hand, Courts have taken a view that Bank in exercise of its general lien cannot retain the private property of a partner to satisfy the outstanding balance in the general account of his firm notwithstanding the settled position of law that the partners are jointly and severally liable for the debts of a firm of which they are the partners. The aforesaid decision in *Wolstenholm v. Sheffield Union Banking Co. Ltd.* (supra) has been followed by a Division Bench of the Punjab High Court in *Punjab National Bank Ltd. v. Arura Mal Durga Das and Anr.* AIR 1960 P & H 632 for coming to the conclusion that :

"a bank has no lien on a partner's private account for an overdraft on partnership account or vice versa for want of reciprocity."

Similarly, in *Gurbax Rai and Ors. v. Punjab National Bank* (supra) cited by Mr. Patnaik, learned counsel for the petitioner, the Supreme Court has held that goods which are offered by the firm as security for the cash credit facility could not be utilized for adjusting the liability of the partners to the Bank. The relevant portion of the said judgment of the Supreme Court in *Gurbax Rai and Ors. v. Punjab National Bank* (supra) is quoted herein below :

"The question is : Is it open to the Bank which held pledged goods against the cash credit facility to adjust the amount recovered from the pledged goods for wiping out separate dues of the individual partners ? The goods were of the firm. They were not the goods of the partners. The goods were not offered as security for the individual debt of the partners. The goods were pledged against cash credit facility of the firm. Therefore, when the amount on account of the destruction of the pledged goods of the firm was recovered from the insurer, it must be given credit only in the cash credit account and to that extent the liability in the cash credit account would be reduced."

11. In *Syndicate Bank v. Vijay Kumar and Ors.* (supra) cited by Mr. Kanungo, the judgment-debtor who owned two Fixed Deposits executed two letters on 17.9.1980 creating a lien in favour of the Bank over the two Fixed Deposit Receipts and on these facts the Supreme Court held that the two letters executed by the judgment-debtor on 17.9.1980 created a lien in favour of the Bank over the two Fixed Deposit Receipts, this is thus a case where the owner of the Fixed Deposit Receipts had expressly agreed that the Bank would have lien over the Fixed Deposit Receipts. In this case, the Supreme Court has not laid down any law that the Bank can exercise its general lien u/s 171 of the Contract Act over the properties of the surety for the liabilities of the principal debtor to the Bank, In *S. Vasupataiah v. The Vysya Bank, Kudagenahalli Branch* (supra) and in *City Union Bank Ltd. v. C. Thangarajan* (supra) cited by Mr. Kanungo, the learned single Judges of the Karnataka High Court and the Madras High Court respectively have referred to the aforesaid decision of the Supreme Court in *Syndicate Bank v. Vijay Kumar and Ors.* (supra) and have held that the Bank can exercise lien over the properties of a guarantor or a co-promisor for recovery of the outstanding dues of the principal debtor or the promisor to the Bank. But as

we have discussed above, Courts in England and in India have held that the Bank can exercise general lien over the properties of a customer for the general balance in such customer's account and not for the general balance of some other customer's account. Unless therefore a customer has expressly agreed that his properties can be retained as security for the outstanding balance in the account of some other customer, a Bank cannot exercise lien over the properties of such customer u/s 171 of the Contract Act. In the guarantee agreement executed by the petitioner for the cash credit account of M/s. Bimala Bhandar, a copy of which has been annexed to the counter-affidavit as Annexure-R/2, there is no such provision that the Bank can retain the properties of the petitioner as security for the outstanding balance in the loan account of M/s. Bimala Bhandar. In fact, the Bank has also not relied on any such provision in the guarantee agreement and instead has relied on the bye-laws of the Bank and the general lien of the Bank as provided in Section 171 of the Contract Act. As we have seen, the Bank has no such right under the bye-laws or Section 171 of the Contract Act to retain the gold ornaments of the petitioner as security for the outstanding balance in the loan account of M/s. Bimala Bhandar.

12. Since we have found that the Bank has no right whatsoever either under its bye-laws or u/s 171 of the Contract Act to retain the gold ornaments of the petitioner after the petitioner had cleared the outstanding balance in the two gold loan accounts for which the gold ornaments were pledged as security, the retention of the gold ornaments of the petitioner by the Bank was without any authority of law and is arbitrary and the impugned notice dated 30.7.2003 is liable to be quashed.

13. For the aforesaid reasons, we quash the impugned noticed dated 30.7.2003 of the Secretary, Puri Urban Co-operative Bank Ltd., Puri to the petitioner and direct the opposite parties so forthwith return the gold ornaments to the petitioner. Considering the facts and circumstances, parties shall bear their own costs.

A. K. PATNAIK, J.

14 .I agree.