
(1987) 12 KAR CK 0007

In the Karnataka High Court

Case No : Regular Second Appeal No. 458 of 1978

Mangalore Catholic Co-operative Bank Ltd.

APPELLANT

Vs

M. Sundara Shetty

RESPONDENT

Date of Decision : 10-12-1987

Acts Referred:

Contract Act, 1872 — Section 15, 171, 70

Citation : (1988) ILR (Kar) 970 : (1987) 3 KarLJ 21

Hon'ble Judges : Hiremath, J

Bench : Single Bench

Advocate : V. Tarakaram, for the Appellant; Ashok Haranahalli, for B.V. Acharya, for the Respondent

Final Decision : Dismissed

Judgement

Hiremath, J.—Respondent - Sundara Shetty had filed O.S. No. 104/68 before the Court of the Civil Judge, Mangalore against one Ronald Lobo and B.L. Ignato for the amounts due to him on a hire purchase agreement and obtained an attachment before judgment of the Immovable properties of B.L. Ignato. The suit came to be decreed on 16-12-1968 and on the execution petition filed by the plaintiff in Execution Case No. 44/70 before the same Court, the attached property was sold in Court auction and the plaintiff - respondent himself purchased the same in Court sale and the sale was confirmed on 17-4-71. Even he was delivered possession of the property. Defendant present appellant-bank had encumbrance over this property by way of mortgage in its favour dated 28-3-67 and the sale in favour of the plaintiff was subject to this mortgage. The plaintiff was not aware of any other encumbrance over this property.

2. After he took delivery of possession of the property sold to him, the plaintiff in order to discharge the encumbrances of the defendant addressed to it a letter in the month of August, 1971 to inform him the total amounts due under the mortgage over the mortgage of the schedule property and the bank intimated him that the mortgagor B.L. Ignato was also a surety to His wife for a sum of Rs.

2957-77 paise and therefore the said mortgagor was due to pay that surety loan also to the bank. When the plaintiff intimated the bank denying his liability to pay the surety loan the bank claimed that he was liable to pay that loan amount as well. Even the amount tendered by the plaintiff due under the mortgage dated 28-3-67 was refused by the bank. The plaintiff intended to sell away the property purchased by him and therefore was in need of the title deeds of this property and therefore he was constrained to make payment of all the amounts due to the bank namely the mortgage debt of B.L. Ignato of Rs. 3129-20 paise and the surety loan of Rs. 3580-77 paise. This payment was made on 29-8-72.

3. Having made payment as aforesaid he instituted the suit against the bank for refund of Rs. 3580-77 paise paid by him to the bank on surety loan of B.L. Ignato together with interest at 12% per annum from 29-8-1972 on the grounds to be stated hereafter: Firstly, he contended the surety loan advanced by the defendant to the same Ignato and his wife was on 7-1-1970 long after the schedule property was attached before judgment on 5-12-1968. Thus, the loan lent by the defendant subsequent to this attachment was void and there was no liability cast on the plaintiff to pay it back. Secondly, the plaintiff was made to pay this amount due under surety loan by coercion as the plaintiff was in need of title deeds of the schedule property. This amount was extracted from him with the threat of withholding the title deeds knowing fully well that the plaintiff could not secure any purchaser without the title deeds. He was not liable to pay the surety loan which was void.

4. The defendant - bank which is now the appellant in this appeal inter-alia contended that it was claiming charge on the later transaction also as B.L. Ignato had agreed with defendant to treat the title deeds handed over at the time of the first transaction as security for the second transaction as well. Secondly, there is a banker's lien of the appellant over the title deeds deposited with bank as security for the amounts due and this extended to the second transaction as well. Therefore, the title deeds were being withheld by the bank both lawfully and legally. It had never intended to coerce the plaintiff in making payment by withholding the title deeds. The plaintiff acted under independent legal advice and therefore coercion alleged by him is out of question. The bank even pleaded ignorance of attachment before judgment of the suit property in O.S. No. 104/68. It further pleaded that the position was altered when the parties agreed that the plaintiff was to pay all the dues of B.L. Ignato to the defendant and therefore there was a Novatio and the plaintiff being party thereto is bound by the altered agreement.

5. It even pleaded that when the plaintiff agreed to receive all title deeds by making payment of the amount due from B.L. Ignato there was a compromise or settlement of existing disputes and therefore the parties are bound by this settlement.

6. The trial Court dismissed the suit holding that the loan lent by the defendant to B.L. Ignato and his wife on 7-1-1970 was not void, that there was no coercion

on the part of the bank, but it was a voluntary payment by the plaintiff, that the suit is barred by estoppel. It found that advancement of surety loan cannot be said to be a private alienation or a transfer of any interest in the property attached. Therefore, Section 64 C.P.C. did not come into operation.

7. The first appellate Court on the appeal preferred by the plaintiff allowed it and found that the payment made by the plaintiff was not voluntary but under coercion as the plaintiff was in need of his title deeds for selling his property that the bank had no general lien over the securities in its possession and therefore Section 171 of the Contract Act was not applicable and lastly there is a bailment in respect of the second loan and therefore the transaction is hit u/s 64 C.P.C. It also pointed out that when the banker's lien started in the year 1970 there was already an attachment of the properties of B.L. Ignato. So holding the first appellate Court decreed the suit.

8. In this second appeal preferred by the bank, the following substantial questions of law have been formulated :-

1. Whether the 1st Appellate Court was correct in law in holding that the general lien of the defendant - Bank was excluded in the circumstances of the case?
2. Is the finding of the 1st Appellate Court on the 3rd issue (framed in the trial Court on the question of coercion) based on no evidence and therefore is vitiated ?

The material dates of these transactions are not disputed. Section 171 of the Contract Act relating to general lien of bankers reads as follows :-

"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."

A banker's lien when it is not excluded by special contract express or implied extends to all bills, cheques and money entrusted or paid to him and all securities deposited with it in his character as a banker, Strictly it is confined to securities and property in the custody of a banker. It is not necessary that the assignee should have given notice to the bank. There may however be circumstances in consistent with the general lien of a banker and the most frequent example of this is a deposit expressed to cover a specified advances. In that event the lien will not extend beyond the agreed advance may be a overdraft or the like. However, if the customer knowingly permits the banker to retain the security, a general lien may be implied and its protection may then be claimed in respect of other advances as well. The first appellate Court found that the title deeds were given to the bank in the year 1967 for a specific purpose because B.L. Ignato had mortgaged his property and it was in pursuance of that

mortgage he had handed over his title deeds. The contention of the plaintiff was that when the property was mortgaged the title deeds were not given as security for other transactions. It also pointed out that there was no bailment of the title deeds at the time of the first mortgage. They were only handed over. If at all it could be held that there was a bailment in respect of the second loan, the same is hit by Section 64 C.P.C. as the transaction was subsequent to this attachment taken out by the plaintiff of the property before judgment. This reasoning of the first appellate Court is now challenged as untenable. Reliance is placed by the learned Counsel for the appellant on a decision of the Punjab High Court in the case of Punjab National Bank Ltd. Vs. Satyapal Virmani, The learned Judges of the Division Bench of that High Court observed that where a banker has advanced, money to another, he has a Lien on all securities which come into his hands for the amount of his general balance, unless there is an express contract or circumstances to the contrary. Referring to various authorities cited before it the High Court said at para 12 of the Report that a review of these authorities shows that where a banker has advanced money to another, he has a lien on all securities which come into his hands for the amount of his general balance, unless there is an express contract or circumstances to the contrary. In that case, as in the present case, argument was raised that there was a specific contract which circumscribed the lien to the advance of call loan only. Although this allegation was made there is no evidence in support of it and therefore the High Court was unable to accept this special contract which was inconsistent with the general lien. In that case one V had with the bank at Lahore a call-loan account and by way of security he had deposited Government securities of the value of Rs. 5,00,000/-. On 31-12-1948 Rs. 4,86,148-1-0 was due to the bank on this account. With the consent of the debtor the securities were sold and after adjustment of the debt due from V a sum of Rs. 13,311-6-6 was a surplus amount in the hands of the bank. V called upon the bank to pay this surplus amount with interest but bank refused to pay the amount claiming a general banker's lien on that amount in respect of certain dues from another bank for whom V and another person had given a guarantee under which each one of them had taken an individual and personal liability to pay any amounts which were due to the bank. It was argued before that High Court that the bankers have no lien on the deposit of a partner on his separate account for a balance due to the bank from the firm referring to Grant's Law of Banking, Seventh Edition. Reliance was placed on the case of WATTS v. CHRISTIE (1949)11 Beav 546. In that case one Wingham had an account with the bank and later on he opened another account in the name of a firm of which he was a partner. The firm account was over-drawn to the extent of ? 500 for this temporary overdraft. Some time later the firm's account was closed and the leasehold was sold and the proceeds handed over to the bankers and Wingham was subsequently adjudicated bankrupt and the trustees in bankruptcy sued to remove the surplus of the proceeds of the sale after settlement of over-draft on Wingham's private account. The bank pleaded that the lease was deposited with them in order to secure advances made on both the accounts, i.e., of Wingham and of the

partnership and they claimed to retain the proceeds of the sale for the purpose of repaying both such advances. It was held that the lease was deposited by Wingh merely for the purpose of securing to the bankers the repayment of the particular overdraft of ₹ 500 and that the bankers had no general lien on the proceeds so as to entitle them to retain the surplus in respect of the firm's overdrawn account. Mathew J., who heard the case in the first instance, held that upon true construction of the documents the lease was deposited to secure the particular overdraft of ₹ 500, and the attempt of the bank's Counsel that there was a bargain by which the Lien was applicable to the entire account, was not sustained. The matter was taken in appeal and Lord Esher M.R. during the course of arguments observed that they have a general lien, but they have no right to take a security given for one purpose and apply it to another. Judgment of Mathew J. was affirmed by the Court of appeal observing that *prima facie* a separate debt cannot be set off against a joint debt either at law, in equity, or under the mutual credit clauses of the Bankruptcy Act. It was also observed that there is no authority for the bankers having a general lien in a case such as the one that was before them and he carefully pointed out that the correspondence made it clear that Wingh had deposited the lease to secure one particular advance and no more, and therefore that case was an authority for saying that security given for a particular advance excludes a general lien. Though reference was made to these decisions by the Punjab High Court in this case of *Satyapal* (*supra*) the learned Judges observed that in the case before them the securities had been sold and a general lien extended to the money which the bank held to the credit of the original applicant.

9. What class of securities may be the subject of lien is not very clearly defined. In *DEVIS v. BOWSHER* (1794) 5 Term Rep. 488 Lord Kenyon, C.J., uses first the words "all the securities", but afterwards says:

"...Whenever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance."

The class of securities covered by these definitions cannot, on the one hand, be limited to fully negotiable securities. Even Grose, J., uses the term paper securities. On the other hand, the general lien cannot be said to extend to all classes of documents, even though they might otherwise be utilised as security. In *WYLDE v. RADFORD* (1863) 33 L.J. Ch. 51 at 53 Kindersley, V.C., expressed the view that a conveyance of land was not subject to the general lien :

"The cases refer to a deposit of documents which are in their nature securities, but there is some ambiguity in the term "securities". Anything may of course be deposited, and deeds or plate, after they have been deposited, may be said to be a security; but what is intended is such securities as promissory notes, bills of exchange, exchequer bills, coupons, bonds of Foreign Governments, etc., and the Courts have held that if such securities are deposited by a customer with his banker, and there is nothing to show the intention of such deposit one way or the

other, the banker has, by custom, a lien thereon for the balance due from the customer."

The following observations of Page at on Law of Banking at page 500 of Eighth Edition are useful -

"The better view would, seem to be that in the admittedly rare cases in which a banker is entitled to refuse to re-deliver deeds until the depositor's debt to him is repaid, it is because an equitable charge over the deeds has arisen simultaneously and as a consequence of the implied change of character in which the deeds are held. Lien normally attaches to such securities as a banker ordinarily deals with for his customer, otherwise than for safe custody, when there is no question or contemplation of indebtedness on the part of the customer. Normally, deeds of property come into the banker's possession either when handed over as security or with the request that they be held for safe custody. Thus they cannot ordinarily be the subject of lien, In the second case, if the customer subsequently borrows from the bank the latter might properly retain the deeds until the debt is paid, as the result of a, new implied contract taking the deeds out of the category of safe custody and giving the banker a charge by deposit. This, however, is not strictly lien. An obvious example of possession inconsistent with lien is where bearer securities have to be deposited with an authorised depository, by virtue of Section 15 of the Exchange Control Act 1947 and are deposited for no other purpose.

Whether a particular security is in the banker's possession for the purpose of being dealt with by him in his capacity as banker is a question of fact, depending partly on the general usage of bankers, and partly on agreement or course of dealing between the banker and the particular customer who owns the security.

It must be assumed that the general lien extends only to the customer's own securities."

It all depends on the intention of the customer. If the owner of land gave to the bank an equitable mortgage by deposit of deeds to secure the then present and future general balance of his account, then certainly the banker would have a general lien over such deeds in respect of the future debt.

10. In the instant case it is noteworthy that there is no evidence to show that B.L. Ignato intended that the title deeds of the property attached should be the security for the subsequent debt as well. That indeed is not even the case of the appellant. The title deeds are not in the nature of the securities described by Kindersley, V.C., as extracted above. Therefore, when these title deeds were on account of equitable mortgage of the property for the loan that Ignato had taken, the bank cannot claim general lien over them for the subsequent surety loan of Ignato and his wife. The view taken by the first appellate Court in this behalf is quite consistent with the principles of banker's lien. Section 64 C.P.C. reads as follows :-

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

In the case of DASHARATHLAL AND ANOTHER v. ANANDKUMAR AND OTHERS AIR 1951 Nag 311 it was held that where the interest of the auction purchaser is prejudiced by a private transfer after the attachment of the property covered by the transfer, that transfer is wholly void u/s 64. The fact that in the meanwhile the vendee of the property concerned acquired the interest of the decree-holder would make no difference so far as the auction-purchaser is concerned as, by the sale of the property in execution, the claim enforceable under the attachment has been enforced. A person liable to satisfy a decree as a surety can obtain the benefit of Section 64 if he purchases the property of the judgment-debtor at the sale held in execution of the decree against the judgment-debtor alone. It is only claimed that there was a surety loan of Ignato and his wife subsequent to this attachment. There is nothing to show that there was a transfer of the interest in the property subsequent to the mortgage debt of 28-3-1967. Even the bank only pleaded that it was claiming a charge on the tatter transaction also because B.L. Ignato had agreed with the bank to treat the title deeds handed over to it at the time of the first transaction also as security for the second transaction. Practically there is no oral or documentary evidence in this behalf. Therefore, simply because a subsequent loan was taken by Ignato and his wife it does not follow there was a private alienation as contemplated u/s 64 C.P.C. In my view the first appellate Court was right in holding that the title deeds were deposited for a specific loan and there was no intention on the part of the customer to create a private charge on the property even for the subsequent loan. In such an event, in view of the nature of the security given, the bank cannot claim general lien on the title deeds deposited with it.

11. The next question is one of coercion alleged by the plaintiff. My attention was drawn to the notice issued to the bank on behalf of the plaintiff dated 28-9-1972 as per Ex.P-4. The relevant allegation in it is as follows :-

"When my client offered the amounts due to you under the said mortgage with a view to discharge the liability, but you have refused to accept the same without paying the a mounts due from said B.L. Ignato in respect of the surety loan alleged to have been executed by him. I am instructed to state that the said surety loan being subsequent to the attachment got effected by my client in the above suit, the surety loan alleged to have been advanced by you on the charge of the said property is nothing but void under law..... As my client was in need of the title deeds for selling the said property, he was constrained to pay the entire amount as directed by you. The said sum was extracted by you from my client taking advantage of the possession of the title deeds with you and my client was coerced to pay the same, inspite of the said claim by you was illegal..... You had exercised your undue influence on my client taking advantage of the

circumstances as stated supra."

My attention was drawn to the evidence in this behalf given by the Secretary of the defendant-bank as D.W.1. In his cross-examination he stated thus :-

"If the plaintiff had not paid the surety loan, we would not have returned the title-deeds. The plaintiff demanded for return of the title-deeds in writing by tendering the mortgage money. Plaintiff had come to me and I told him that unless all the amounts due by Ignato are paid by him, it was not possible for me to return the title-deeds. At the time of making the payment, plaintiff informed me that he was not liable to pay the surety loan, as he has purchased the property attached through Court. When the plaintiff made such statement, I told him that I was helpless and that I could not part with the documents unless he paid the surety loan."

Relying on this evidence it has been urged by the respondent - plaintiff that this is a clear case of coercion on the part of the bank as the plaintiff was badly in need of the title deeds to sell away the property purchased by him in the auction sale. Even the plaintiff gave evidence that he was in need for selling the property purchased by him in Court auction, of the documents of title of Ignato and the defendant insisted upon the payment of the surety loan also for returning the original documents of title. So he paid the surety loan also. It was only thereafter that he sold the property purchased in Court auction. He also added that he was willing to pay the mortgage loan of the vendor but not willing to pay his surety loan. While the trial Court very casually brushed aside this evidence as not amounting to coercion on the part of the bank as the plaintiff could as well have obtained certified copies of the deeds, the first appellate Court took it as an instance of coercion and observed that there was no voluntary payment on the part of the plaintiff of this subsequent surety loan so as to attract the provisions of Section 70 of the Contract Act. Section 70 reads thus :-

"Obligation of person enjoying benefit of non-gratuitous Act - Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

An instance of such voluntary payment came before this Court in the case of M.S. DEVARAJ v. S.V. KRISHNAMURTHY 1969(2) Mys.L.J. 580. The plaintiff in that case acting as power of attorney agent of the defendant entrusted certain building work to a contractor and paid the balance due to the contractor long after the power of attorney in his favour was cancelled, as the contractor threatened to sue him. The payment was made without any knowledge of the defendant. It was held that the payment to the contractor made by the defendant was not a lawful payment within the meaning of Section 70 of the Contract Act and plaintiff could not claim reimbursement from the defendant. That was a clear case of voluntary payment after he ceased to be power of

Attorney. It is the clear case of the plaintiff that the payment was not voluntary but under coercion. In the case of T.G.M. ASADI AND SONS v. THE COFFEE BOARD AND ANOTHER AIR 1969 Mys 230 a Division Bench of this Court observed that the word "coercion" occurring u/s 72 of the Contract Act should not be understood in the manner defined by Section 15 of the Act -and that word would be understood in its ordinary sense. Coercion to which that Section refers includes every kind of compulsion even if it does not measure up to "coercion" as defined u/s 15 of the Contract Act which incorporates a special definition of that word occurring in the preceding Section. That exclusive definition cannot assist the interpretation of Section 72 of the Act. The observations of Lord Moulton were quoted with approval :-

"It is impossible to contend that the coercion referred to in this section or in the above illustration is "with the intention of causing any person to enter into an agreement." The word "coercion" must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in Section 15."

In that case the Judicial Committee had before them a case in which the plaintiff alleged that he was the sole proprietor of certain cotton mills and their contents. The defendants who had a money decree against the limited company obtained thereunder an attachment against his said property, took possession and prevented him from working the mills. The plaintiff was in consequence compelled to pay to the defendants under protest the sum claimed by them and sought its recovery in the suit. The contention that there was no coercion within the meaning of Section 15 of the Contract Act was repelled on the ground that the word "coercion" occurring in Section 72 of the Contract Act was used in its general and ordinary sense and that its meaning was not controlled by the definition contained in Section 15. These observations were made from the decision in the case of SETH KANHAYA LAL v. NATIONAL BANK OF INDIA (1913)40 I.A. 56(PC). What creates liability to make restitution is the act of coercion which was itself wrongful. A person who pays money to another as the result of compulsion or duress exerted by that other or because it is exerted from him *colore officii*, can recover the money if it could not otherwise have been lawfully demanded from him. The compulsion or duress exerted upon the payer may fall short of the commission of an actual tort against him, but nevertheless still is sufficient for him to claim that the payment was not made voluntarily. The most usual form of compulsion consists in the seizure, or threatened seizure, of the plaintiff's property by way of distress or lien. (Anson's Law of Contract at pages 633 and 634 of Twenty Fourth Edition). In the case of TRIKAMDAS UDESHL v. BOMBAY MUNICIPAL CORPORATIONS the petitioner boarded a tram-car belonging to the BEST undertaking and got out at Bore Bunder without purchasing a ticket. He was thereupon called upon by the Traffic Supervisor to pay a sum of Rs.5/- as penalty. The petitioner paid the fine and obtained a receipt from the Supervisor. The receipt itself mentioned that the amount was paid to avoid proceedings in a Court of Law. His Lordship Justice Chagla (as he

then was) held that the petitioner had paid the same in order to avoid a prosecution. He knew perfectly well that if he did not pay this sum of Rs.5/- he would have been prosecuted before a Magistrate. It was impossible to suggest that both the parties were so situated that the petitioner could have refused to pay the amount if he so desired. Their situation was unequal. The Municipality could have dragged the petitioner to a criminal Court ; there would have been publicity about the prosecution; the petitioner would have been convicted and would have been compelled to pay a fine. It was to escape these consequences that the petitioner paid the amount. As that was the position, the petitioner could not be said to be in "pari delicto" with the Bombay Municipality in the question of the payment of Rs.5/-.

12. The learned Counsel for the appellant has contended that because the respondent had all along legal advice, he did not make any payment under coercion. The notice contents extracted above clearly go to show that the respondent was constrained to pay the amount as directed for the reason that he was badly in need of the title deeds. After the mortgage money was discharged the defendant-Bank had no reason or occasion to withhold title deeds. But it was compelling payment from the respondent on some other surety loan of which perhaps the respondent himself was not aware and there was no charge for this loan on the property. Therefore, this cannot be considered as a voluntary payment or gratuitous payment as contemplated u/s 70 of the Contract Act. The reasoning of the trial Court that he could have as well obtained certified copies of the title deeds does not commend to reason for the simple reason that a purchaser from the respondent of this property was very legitimately insisting on warrantee of title from the plaintiff. The fact that there was sale certificate in favour of the plaintiff is no ground to hold that there was no coercion because it all depends on how the mind of the plaintiff was working. When he wanted to sell the property, which he has done admittedly after receiving back the title deeds, he thought duty bound to deliver the title deeds to his purchaser. Whether the sale certificate alone could have been sufficient for the purpose is not the concern of the Court but what exactly the parties thought is a matter that should receive attention. The first appellate Court therefore was right in holding that there was coercion falling u/s 72 of the Contract Act to coerce the plaintiff to part with the surety loan money due from Ignato and his wife. In that view of the matter the first appellate Court was justified in decreeing the suit of the plaintiff and I do not find any reason to interfere with the judgment and decree of the first appellate Court. Consequently, the appeal must fail and the same is dismissed. Parties however, to bear their respective costs in this appeal.