

(2001) 09 KAR CK 0029

In the Karnataka High Court

Case No : Civil Revision Petition No. 779 of 1999

S. Vasupalaiah

APPELLANT

Vs

The Vysya Bank, Kodagenahalli Branch

RESPONDENT

Date of Decision : 19-09-2001

Acts Referred:

Contract Act, 1872 — Section 171

Citation : (2002) 1 CivCC 594 : (2002) 112 CompCas 394 : (2001) ILR (Kar) 5015 : (2002) 1 KarLJ 296 : (2001) 4 KCCR 436 SN : (2002) 2 RCR(Civil) 494

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : V.V. Gunjal, for V.S. Gunjal, for the Appellant; S. Shivananda, for Law Associates, for the Respondent

Final Decision : Dismissed

Judgement

The Court

1. The petitioner-plaintiff has preferred this revision petition against the judgment and decree dated 31-10-1998 passed in S.C. No. 22 of 1993 by the learned Principal Civil Judge (Junior Division), Madhugiri, dismissing the suit for recovery of a sum of Rs. 2,208.16.

2. The facts in brief are as hereunder.--

One Ramakrishna availed a loan of Rs. 4,000.00 in 1983 from the defendant-bank. The plaintiff stood as a surety for the aforesaid loan. The plaintiff had purchased a Janatha Cash Certificate on 3-9-1985 which was due for encashment on 3-3-1992 and the amount payable on maturity was Rs. 1,852.41. When the principal debtor Ramakrishna did not repay the loan the plaintiff was informed of the same and he was called upon to get the loan repaid by Ramakrishna and it was made clear to him that the amounts due in the Janatha Cash Certificate would be paid to him. Thereafter, when the plaintiff demanded the payment due under the said Certificate he was given an endorsement to the

effect that the said amount shall be attached to the crop loan of Sri Ramakrishna. It is thereafter the plaintiff has filed the above suit for recovering the said amount.

3. It is not in dispute that the bank has not filed any suit against the said Ramakrishna for the recovery of the amount. It is also not in dispute that the claim against Ramakrishna is barred by time. On the day the endorsement came to be issued the claim against Ramakrishna was time barred. However, the bank has adjusted the amount due under the Janatha Cash Certificate to the plaintiff towards the loan borrowed by Ramakrishna on the ground that the plaintiff being a guarantor his liability is co-extensive as that of the principal debtor. The suit of the plaintiff came to be dismissed by the Small Causes Court holding that the bank had the right to adjust the amounts due to the plaintiff under the aforesaid Fixed Deposit Receipt towards the loan amount of Ramakrishna as the plaintiff was a guarantor for the said loan. It is that finding which is challenged before this Court.

4. Sri Gunjal, learned Counsel for the petitioner-plaintiff submitted firstly that as the aforesaid Fixed Deposit was created subsequent to the loan transaction where the plaintiff stood as a guarantor the said amount could not have been adjusted towards the aforesaid loan. Secondly, it was contended the bank could not have adjusted the amounts due under the said Fixed Deposit Receipts towards discharge of a time barred debt. Thirdly, it was contended the banker's lien which is sought to be exercised by the bank would not apply to Fixed Deposit Receipts.

5. Per contra, Sri S. Shivananda, learned Counsel appearing for the respondent, submitted the bank has a right to adjust the amounts in their possession belonging to the debtor irrespective of the fact whether the said amount came into possession of the bank prior to the loan transaction or subsequent to the loan transaction. Further he submitted when a claim for money is said to be barred by law of limitation what is lost is only the remedy but not the right to the said amount and in that view of the matter it is settled law that if the creditor is in possession of money belonging to the debtor, the same could be adjusted even in respect of time barred debts. Lastly, he submitted the banker's lien applies even to the Fixed Deposit Receipts as in Jaw no distinction could be made regarding the amount belonging to the debtor whatever may be the nomenclature under which the said amount is lying with him.

6. Now the point for my consideration is as under:--

Whether the respondent-bank was justified in adjusting the amounts due by it to the petitioner under the Janatha Cash Certificate towards the loan borrowed by the principal debtor from the bank, which loan had become time barred and no suit had been filed against the principal debtor, when the aforesaid fixed deposit was created subsequent to the loan transaction.

7. In respect of the rival contentions the learned Counsels appearing for both

sides relied on several judgments of various High Courts including that of the Supreme Court. In view of the decision of the Supreme Court on the point, in my opinion it is unnecessary to refer to the decisions relied on by the learned Counsels of various High Courts.

8. The Supreme Court in the case of *Syndicate Bank Vs. Vijay Kumar and others*, , referred to some passages in the textbooks on the scope and meaning of the expression "banker's lien" which are extracted as hereunder

"6. In Halsbury's Laws of England, Vol. 20, 2nd Edn., p. 552, para 695, lien is defined as follows:

"Lien is 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".

In Chalmers on Bills of Exchange, Thirteenth Edition, page 91 the meaning of "banker's lien" is given 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".

In Chitty on Contract, Twenty-sixth Edition, page 389, paragraph 3032 the banker's lien is explained as under:

"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 process may be used by the banker in reduction of the customer's debit balance unless otherwise earmarked".

In Paget's Law of Banking, Eighth Edition, page 498 a passage reads as under:

"The Banker's Lien

Apart from any specific security, the banker can look to his general lien as a protection against loss on loan or overdraft or other credit facility. The general lien of bankers is part of law merchant and judicially recognised as such".

In *Brandao v Harriett*, it was stated as under:

"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" ".

9. After considering the aforesaid meaning given to the expression "banker's lien", the Supreme Court held as under.--

"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.

7. Applying these principles to the case before us we are of the view that undoubtedly the appellant-Bank has a lien over the two FDRs. In any event the two letters executed by the judgment-debtor on 17-9-1980 created a general lien in favour of the appellant-bank over the two FDRs. Even otherwise having regard to the mercantile custom as judicially recognised the banker has such a general lien over all forms of deposits or securities made by or on behalf of the customer in the ordinary course of banking business. The recital in the two letters clearly creates a general lien without giving any room whatsoever for any controversy".

10. In fact the banker's lien finds a statutory recognition u/s 171 of the Indian Contract Act which reads as under.--

"171, General lien of bankers, factors, wharfingers, Attorneys and policy-brokers.--Bankers, factors, wharfingersAttorneys 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".

11. In fact in the case of C.R. Narasimha Setty v Canara Bank and Another, this Court has held that the provisions of Section 171 apply only in the absence of an express contract to the contrary. An express contract between the parties creating a lien or security would exclude operation of the statutory general lien u/s 171 of the Contract Act.

12. Again the Supreme Court in the case of Punjab National Bank and others Vs. Surendra Prasad Sinha, , dealing with adjustment of fixed deposit receipts deposited by guarantor being adjusted towards debt barred by limitation has held as under.--

"4. Admittedly, as the principal debtor did not repay the debt, the bank as

creditor adjusted at maturity of the FDR, the outstanding debt due to the bank in terms of the contract and the balance sum was credited to the Savings Bank Account of the respondent. The rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act (36 of 1963), for short "the Act" only bars the remedy, but does not destroy the right which the remedy relates to. The right to the debt continues to exist notwithstanding the remedy is barred by the limitation. Only exception in which the remedy also becomes barred by limitation if the right is destroyed. For example u/s 27 of the Act a suit for possession of any property becoming barred by limitation, the right to property itself is destroyed. Except in such cases which are specially provided under the right to which remedy relates in other case the right subsists. Though the right to enforce the debt by judicial process is barred u/s 3 read with the relevant Article in the Schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What Section 3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody. Undoubtedly the respondent and his wife stood guarantors to the principal debtor, jointly executed the security bond and entrusted the FDR as security to adjust the outstanding debt from it at maturity. Therefore, though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists. In terms of the contract the bank is entitled to appropriate the debt due.....".

13. From the aforesaid decisions it is amply clear that though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists and the bank is entitled to appropriate the debt due from the amounts which are in its possession either belonging to the principal debtor or the surety, as it is settled law that the liability of the surety is co-extensive with that of the principal debtor. 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 to the banker judiciously recognised and in the absence of agreement to contrary by virtue of statutory provision u/s 171 of the Contract Act the banker has a general lien over such securities and amounts in its possession. He has the right to use the proceeds towards adjustment of the debt due to him from the customer. Such a lien is also applicable to negotiable instruments including FDRs of the customer which are lying with the bank. Merely because the said fixed deposit was created subsequent to the loan transaction it would not make any difference. The bank has a right to adjust all the amounts which are in their possession and which belong to the customer on the date they adjust the said amount

irrespective of the date on which the transaction which gave rise to the said claim took place.

14. Under these circumstances, I do not find any substance in any of the contentions raised by the plaintiff. The Trial Judge on a careful consideration of the rival contentions on the basis of the evidence on record and after noticing the law on the point has rightly held that the bank was justified in adjusting the amount due under the fixed deposit towards the loan amount of Ramakrishna for whom the petitioner has stood as guarantor. Accordingly, I do not find any merit in this petition. Hence, I pass the following order.--

15. Civil revision petition is dismissed. Parties to bear their own costs.