

(2001) 10 MP CK 0032
In the Madhya Pradesh High Court
Case No : Civil Revision No. 884 of 2001

State Bank of India

APPELLANT

Vs

Smt. Goutmi Devi Gupta and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 30
Contract Act, 1872 — Section 128, 171

Citation : AIR 2002 MP 81 : (2002) 1 MPHT 427 : (2002) 2 MPLJ 105

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Rajendra Tiwari, Rajesh Maindiratta and S. Paliwal, for the Appellant;
A.D. Deoras, Sharad Verma, Deepak Okhade and K.P. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Khare, J.

This is a revision by the decree-holder against the order by which the application of judgment-debtor No. 3 Rajesh Kumar Agarwal (hereinafter to be referred to as J.D.) raising two-fold objections has been allowed.

The decree-holder is State Bank of India. It has obtained money decree in Civil Suit No. 1-B of 1992 on 30-4-1997 against Smt. Goutmi Devi Gupta as Proprietor of Jyoti Dal Mill and also against the J.D. He was the surety of the principal borrower in the loan taken by her from this Bank. The liability of the judgment debtors under the decree is "joint and several". The principal amount payable under this decree is Rs. 1,95,314=00 and the interest payable thereon is 12 percent per annum from 16-12-1991. It is also stated in the decree that decree-holder would be free to sell the hypothecated goods and this decree would be the first charge on the hypothecated property. There is no direction that the decree holder would first proceed to recover the decretal amount from the hypothecated property and then against the properties of the J.D.

The J.D. had current account No. 1/169 in the plaintiff Bank in the name of "Classic Cables" of which he was the proprietor. On 29-3-1996 the J.D. had executed an agreement in favour of the Bank in Form-A and had pledged his two Fixed Deposit Receipts (FDRs) of Rs. 50,000/- each. On 17-8-1998 Arunima Agarwal daughter of the J.D. had executed an agreement in favour of the Bank in Form A-2 and had pledged two FDRs of the total amount of Rs. 3,51,041 =00. The language of both the agreements is almost identical. The relevant clause of the agreement executed by Arunima Agarwal is quoted in extenso as under:--

"In consideration of the State Bank of India (hereinafter called "the Bank") at my/our request granting certain banking facilities in the nature of overdraft accommodation or otherwise to (here state the name(s) of the borrower(s).

(hereinafter called "the Borrower(s)") at their office and/or elsewhere I/We agree to deposit with the Bank the securities/shares/life insurance policies mentioned in Schedule hereto (hereinafter referred to as the said policies/securities/shares) as security for the due performance by the Borrower(s) or any of them of the terms subject to which the aforesaid banking facilities may be granted and for repayment on demand to the Bank of all and every sum or sums of money which shall for the time being be owing to the Bank on any account from the Borrower(s) or any of them for loans cash credits advances, overdrafts or other banking accommodation or for any other money for which the Borrower(s) or any of them may be liable on any account to the Bank whatsoever with all interests, commission, discount and banking charges including legal charges occasioned by or incidental to the said indebtedness to the bank or by or to the enforcement of any security held by the bank I/We confirm and agree that such security shall also be available as a security for repayment to the Bank for any amount which shall for the time being be owing to the Bank on any account from the Borrower(s) or any of them jointly with any other person or, persons or firm or company, for loans, cash credits, advances, overdrafts or other banking accommodation or for any other money for which the Borrower(s) or any of them may be liable jointly with others as aforesaid on any account whatsoever with all interest commission discount and banking charges including legal charges occasioned by or incidental to the enforcement of any security held by the Bank."

The J.D. had one more account with the plaintiff Bank in the name of "J.S. Industries" of which he was a partner. By letter dated 12-7-2000 the Bank informed the J.D. of the appropriation and adjustment made by it. According to this letter the total amount payable under the four FDRs including interest was Rs. 5,93,440/-. The liability in respect of the account of Jyoti Dal Mill was Rs. 3,51,9897/-, the amount payable by the J.D. in the account of J.S. Industries was Rs. 2,30,978/- and the amount of Tax deducted at source was Rs. 10,473/-.

The first objection raised by the J.D. before the Executing Court was that the decree-holder should have proceeded to recover the decretal amount first against the hypothecated goods and thereafter against the J.D. The second objection was that the Bank had no authority to recover its dues either under the

decree or in the account of J.S. Industries from the FDRs which were pledged for the overdraft to be drawn from the current account in the name of "Classic Cables". The J.D. had written a letter to the Bank on 17-6-2000 to close this account and, therefore, the securities given in that account could not be adjusted towards other outstanding dues and especially in the absence of any order from the Court.

The reply of the Bank to the two objections referred to above is that under the terms of the decree and under the law it was not obliged to proceed first against the hypothecated goods and then against the other properties of the judgment debtors. It has the choice in that matter. It has been further pleaded that the Bank had "general lien" on the securities deposited by the J.D. with the Bank for realisation of its money on any account due from him. The Bank was further authorised under the terms of the two agreements referred above to adjust the proceeds of the four FDRs against the liabilities of the J.D. in two accounts.

The Executing Court by the impugned order held that the decree-holder should proceed first against the hypothecated goods. It has further held that the Bank has wrongfully and illegally adjusted the FDRs against the liabilities of the J.D. in different accounts. It has directed the Bank to return the four FDRs with interest to the J.D. and recover the decretal amount from the hypothecated goods.

The points for determination by this Court are : (a) whether the decree-holder should have first proceeded against the hypothecated goods and (b) whether the adjustment made by the Bank is not according to law. The learned counsel for both the sides have been heard at length on these points.

Point (a):

The decree directs payment of the decretal amount by all the defendants "jointly and severally". Then the decree proceeds that for recovery of the decretal amount the Bank can sell the hypothecated property and the decree will be first charge on hypothecated property.

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The proper construction of the decree is that the decree-holder has been empowered to sell the hypothecated goods for recovery of the money under the decree and this recovery will be first charge on hypothecated property. It cannot be interpreted to mean that the Bank should first proceed against the hypothecated property and then against the judgment debtors personally. The construction which the J.D. wants to place on the decree is not permissible looking to the language and the tenor of the decree.

The surety contracts : "Trust the borrower I undertake to be responsible" or "if he does not pay I will". This is the basic postulate or essence of the contract of guarantee. A surety in the eye of law is a favoured debtor. u/s 128 of the Contract Act, save as otherwise provided in the contract, the liability of the

surety is co-extensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate and simultaneous. It is not deferred until the creditor exhausts his remedies against the principal debtor either personally or against the property mortgaged or hypothecated by him. The creditor gets the right to recover the amount straightaway from the surety. The right of the creditor to proceed against the surety is not dependent or contingent upon his remedy being exhausted against the borrower. The creditor cannot be asked to pursue his remedies against the principal debtor either personally or against his mortgaged or hypothecated property in the first instance.

In *State Bank of India Vs. Messrs. Indexport Registered and others*, it has been laid down by the Supreme Court that the decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. There is nothing in law which provides such a composite decree to be first executed only against the property. The decree for money is a simple decree against the judgment debtor including the guarantor and in no way subject to the execution of the mortgage decree against judgment-debtor 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. The earlier decision of the Supreme Court in *Union Bank of India Vs. Manku Narayana*, has been overruled.

In view of the above legal position the decree-holder in the present case cannot be directed to proceed first against the hypothecated property and then against the surety.

Point(b):

J.D. and his daughter Arunima Agarwal had deposited four FDRs with the plaintiff bank in connection with the current account. That account was in the name of "Classic Cables". The J.D. was the proprietor of the business in the name of "Classic Cables". The agreements executed by the J.D. and his daughter are of wider amplitude. The use of the phrases : (a) "all sums of money owing to the bank on any account from the borrower", (b) "for any other money for which the borrower may be liable on any account to the bank" and (c) "for any other money for which the borrower may be liable jointly with others on any account whatsoever" in the agreement go to show the width and elasticity of the liability of the J.D. and his daughter. The documentation of the plaintiff bank is so perfect that it is difficult for the J.D. and his daughter to wriggle out of their liability.

Section 171 of the Contract Act gives statutory recognition to the concept of

"Banker's general lien". It provides that the 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. Money is a species of goods which may be the subject-matter of bailment and over which lien may be exercised. The general lien of bankers, as judicially recognised and dealt with in Section 171 of the Contract Act, attaches to all goods and securities deposited with them as bankers by a customer or by a third person on a customer's account, provided there is no contract, express or implied, inconsistent with such lien.

In Halsbury's Laws of England, 4th Edition (28) page 221 it is stated: "in its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied".

In *Devendra Kumar v. Gulab Singh*, AIR 1946 Nagpur 114, it has been held that in the absence of specific provision on the subject, when moneys are held by the Bank in one account and the payer in respect of these moneys owes the Bank on another account, the banker's lien gives the bank a charge on all the monies of the payer in its hands, so that they may be transferred to whatever account the bank chooses, to set off or liquidate the debt.

The Supreme Court in *Syndicate Bank Vs. Vijay Kumar and others*, , has laid down the law on "Banker's lien". It has been held after a detailed survey of various authorities on English law on the subject 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. In this case the words used in the letter accompanying the FDRs gave the authority to the Bank to retain the deposits "so long as any amount on any account" is due from the judgment-debtor. The Supreme Court held that the recital in the letter shows that a general lien is created in favour of the appellant-Bank in respect of those two FDRs. The Bank was given the authority to retain the FDRs so long as any amount on any account is due from the judgment-debtor. Thus, the appellant-Bank had a right to set off in respect of these FDRs if there was a liability of the judgment-debtor due to the Bank.

In the present case the language of the agreements referred to above under which the four FDRs were deposited with the Bank is much wider and stronger. The authority given to the Bank by these agreements authorised the Bank to

adjust and appropriate the FDRs against the dues of the Bank.

It has been argued on behalf of the J.D. that the FDRs were given in the account of "Classic Cables" and therefore any money due to the bank in that account alone could be adjusted. An attempt has been made to show that Classic Cables is different from the J.D. Such an argument appears to have found favour with the Executing Court. It has no substance. "Classic Cables" was the proprietorship concern of the J.D. That was an artificial or assumed name. It was not a separate legal entity or a juristic personality. The man who owned that business was the J.D. and therefore, the amount of the decree standing against him could be legally adjusted against the FDRs deposited by him and his daughter with the Bank under the agreements referred above.

The decision of this Court in *Balbir v. Indian Bank* 1996 MPLJ 853, relied upon by the Executing Court has dealt with the law relating to banker's lien but on the facts of that case it was found that there was variance in the contract between the creditor and the principal debtor without the consent of the surety and therefore the surety was held to have been discharged and the concept of banker's lien could not be invoked by the Bank.

The learned counsel for the respondents has cited the decision of *Union Bank of India Vs. K.V. Venugopalan and Others*, , where it has been held that the transaction evidenced by fixed deposit would not constitute bailment so as to attract Section 171 of the Contract Act and enable the bank to exercise banker's lien. That was a case in which the FDR was not pledged with the bank and it did not come in the hands of the bank in its regular course of business. The FDR was deposited by the holder in the Court in an attachment case and the Court directed the Bank as garnishee to pay the amount of the FDR. On these facts it was held that banker's lien was not available on FOR.

It has also been argued on behalf of the J.D. that he had closed his current account by sending his letter dated 17-6-2000 and therefore the FDRs deposited as security in that current account were to be returned to the depositors and these FDRs ceased to be with the Bank in regular course of business. This argument is not acceptable. The closure of the current account has no bearing for the exercise of the lien of the Bank in face of the terms and conditions in the agreements under which these FDRs came into the hands of the Bank. The bank had the authority on the basis of these agreements to appropriate the FDRs towards the liability of the J.D. under the decree.

As mentioned above the amount of Rs. 2,30,978/- has been adjusted by the Bank claiming that this amount was recoverable from the J.D. in his account in the name of "J.S. Industries" of which he was a partner. This is not the subject-matter of execution proceedings in Civil Suit No. 1-B of 1992 before the Executing Court. Therefore, the Executing Court could not deal with this matter. This Court also does not express any opinion whether that amount has been adjusted rightly or wrongly. In this case the decree-holder Bank was entitled to

adjust the amount of the decree (principal + interest + costs) and that alone could be the subject-matter of inquiry under Order 21 Rule 2, CPC and Section 47, CPC. In this case the adjustment or appropriation can be allowed only to the extent of the amount of the decree. The dispute relating to the remaining amount is outside the scope of the execution proceeding. The validity or legality of the adjustment of the remaining amount can be adjudicated in separate proceedings either at the instance of the Bank or the J.D. The Executing Court or this Court cannot direct the refund of the remaining amount to the J.D. as that would not be within the compass of the present execution proceedings.

In the result the impugned order is set aside. The application filed by the J.D. before the Executing Court raising the two objections mentioned above is rejected. The Executing Court is directed to examine whether the decree in question has been fully satisfied and if so it will record its satisfaction in the execution case.