

(1993) 06 KAR CK 0018
In the Karnataka High Court
Case No : Regular First Appeal No. 71 of 1993

Syndicate Bank

APPELLANT

Vs

Devendra Karkera

RESPONDENT

Date of Decision : 18-06-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58
Contract Act, 1872 — Section 171

Citation : AIR 1994 Kar 1 : (1993) 4 KarLJ 323

Hon'ble Judges : R.V. Vasantha Kumar, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : Sri B.R. Aswatharam, for the Appellant; Sri B.L. Acharya, for the Respondent

Judgement

Shivashankar Bhat, J.—The decree-holder is the appellant. The respondent is the claimant under O. 21, R. 58 of the Code of Civil Procedure.

2. The appellant-Bank had obtained a decree against Krishna Karkera and others in O.S. No. 121/82. The decree was not satisfied and in the process of executing the said decree the appellant attached the boat in question asserting that the boat belongs to Krishna Karkera.

3. There is no dispute that the boat in question originally belonged to Krishna Karkera. It was hypothecated in favour of appellant-Bank's Ashok Nagar Branch at Mangalore. In the year 1988, Krishna Karkera sold the boat to one Madhava Shriyan and in the year 1989 said Madhava Shriyan sold the boat to Devendra Karkera as per Ex. P. 1. The said sale transaction was completed by payment of balance in the year 1991 as per F.x. P.3. After the purchase Devendra Karkera was administering the loan account of Krishna Karkera in the banks branch at Ashok Nagar and ultimately the said loan obtained from the said branch was cleared in January, 1992.

4. The appellant-Bank contends that Krishna Karkera had obtained another loan

from the same Bank from Mission Street Branch and in respect of this loan the suit in question was filed as per O.S.No. 121/1982 and decree was obtained. Since this decree was not satisfied the boat in possession of Devendra Karkera was attached.

5. Devendra Karkera contends that he was not bound to clear the loan raised by Krishna Karkera from the Mission Street Branch and that the earlier hypothecation of the boat in favour of Ashok Nagar branch was the only liability which he was bound to satisfy. The claimant further contends that he was not aware of the loan obtained by Krishna Karkera from Mission Street Branch and that he is the bona fides purchaser for value of the boat in question and therefore the appellant cannot proceed to attach the boat belonging to the claimant, by assuming that the boat still belongs to Krishna Karkera or on the assumption that the sale in favour of the claimant and the earlier sale in favour of Madhava Shriyan were not bona fide transactions and were entered into by Krishna Karkera to defeat the claim of the appellant. Several documents were filed by the claimant in support of his claim that he is the bona fide purchaser of the boat without knowledge of Krishna Karkera's liability to the appellant-branch at Mission Street. Before proceeding it is also necessary to note that the boat in question was not hypothecated in favour of (he Mission Street Branch. But Mr. B. R. Aswatharam, learned counsel for the appellant contended before us that the earlier hypothecation in favour of Ashok Nagar Branch itself created a lien in favour of the appellant-Bank regarding all the claims of the appellant-Bank against Krishna Karkera. This proposition is. based on the further contention that the hypothecation agreement between the appellant-Bank at Ashok Nagar Branch and Krishna Karkera is in reality an agreement between the appellant-Bank and therefore the benefit of that hypothecation and the lien that would result from the said hypothecation would extended to ail the claims of the Bank irrespective of the branch from which Krishna Karkera borrowed any loan.

6. The first question for consideration is whether the claimant is a bona fide purchaser of the boat without knowledge of Krishna Karkera's liability to the Mission Street Branch of the appellant-Bank and whether the sale transactions in favour of Madhava Shriyan and the claimant were bona fide transactions.

7. The trial Court has given a definite finding that the transactions were bona fide and there is nothing to indicate that Devendra Karkera was aware of Krishna Karkera's liability towards Mission Street Branch of the Bank. On an earlier occasion this matter had come up before this Court in R. F. A. No. 216/92. This Court had remanded the matter on 3-8-1992 giving an opportunity to the parties to lead further evidence in support of the respective contention's of the parties.

8. After the remand further evidence was adduced by the parties.

9. Ex. P. 2 is the agreement of sale executed by Krishna Karkera in favour of Madhava Shriyan who was the partner of M/s. Jalraj Enterprises. The agreement does not give the date and it was executed in April 1988. The stamp paper was

purchased on 19-4-1988. The boat was sold by Krishna Karkera to Madhava Shriyan for a sum of Rs. 1,55,000/-. On the date of the agreement a sum of Rs. 40,000/- was paid by the purchaser to the vendor in cash and a sum of Rs. 75,000/- was due to Ashok Nagar branch of the Appellant-Bank, which was to be discharged by the Purchaser-Madhava Shriyan.

On 17th March 1989, Madhava Shriyan sold the boat to the claimant Devendra Karkera (present respondent), as per Ex. P 1. The sale consideration was Rs. 1,60,000/-; at the time of the agreement a sum of Rs. 70,000/- was stated as having been paid by the claimant to the vendor; a sum of Rs. 34,500/- was payable by the end" of September 1980 and a sum of Rs. 55,000/- was payable to Ashok Nagar Branch of Appellant-Bank by the claimant. Ex. P3, another agreement entered into between the same parties dated 18th April 1991 which says that the consideration has been paid in full to Madhava Shriyan. However, some amount was still due to Syndicate Bank, Ashok Nagar Branch. This agreement enables the purchaser (claimant) to clear the loan dues to the said Bank. Ex. P 4 is the certificate of Registration whereby the boat was registered in the name of claimant. Ex. P5 dated 25-1-1992 is the certificate issued by the South Kanara District Co-operative Fish Marketing Federation Limited certifying that the claimant was surrendering regular catches (fish) to the said Federation since three years and that all the correspondence of diesel subsidy and Central Excise duty subsidy was being claimed in the office of the Federation in the name of the claimant. This certificate also refers to the boat in question. The claimant has also produced Ex. P 10 to Ex. P31 to establish that the amount due to Ashok Nagar Branch of Syndicate Bank was cleared by payments on several dates, the last date being 6-1-1992.

10. In spite of these two sales Krishna Karkera's name continued to be shown as the owner in the Insurance policies and when (he boat met with an accident the insurance amount received was paid to the Bank since insurance premiums were being paid by Ashok Nagar Branch of the appellant-Bank.

11. The boat was attached on 22-1-1992 and the present claim petition was filed on 27-1-1992.

12. Ex. D 1 is a letter dated 14-12-1989 written by the claimant to the Divisional Manager of the appellant-Bank. The letter refers to the loan account of Krishna Karkera at Ashok Nagar Branch of the Bank and the letter states that the fishing boat was sought to be seized by the Ashok Nagar Branch on an earlier occasion and the claimant approached the Regional Office of the Bank for permission to purchase the boat and it was agreed to by the Deputy Divisional Manager and the Regional Manager and that the claimant remitted a sum of Rs. 10,664- and took possession of the boat from Krishna Karkera and the letter also states that Krishna Karkera was then out of Mangalore and that claimant was responsible for the boat. The claimant requested to transfer the loan account standing in the name of Krishna Karkera to the name of claimant as he was in charge of the boat and was managing it. This document had been produced by the Bank before the

lower Court and was marked as Ex. D. 1. There is no material on record to indicate as to what was the response of the Bank to this letter. In these circumstances, we have to proceed on the assumption that the Bank did not deny the assertions made in the letter. In other words, the Bank was made aware of the fact that claimant had taken possession of the boat and the claimant was managing the boat and had undertaken to discharge the loan due to Ashok Nagar Branch.

13. Mr. B. R. Aswalha Ram. pointed out that there is no reference in Ex. D 1 to the sale transaction between Krishna Karkera and Madhava Shriyan in Ex. D, 1 and the further sale effected by Madhava Shrivani in favour of the claimant. No doubt this is one of the circumstances in favour of the contention of the appellant bank which cast doubt about the genuineness of the sale transaction.

14. The documentary evidence is further supplemented by the oral evidence on record. In the light of the oral evidence especially of the statutory authorities the trial Court has come to the conclusion that these sale transactions were genuine transactions.

15. P.W. I is the claimant. He speaks to this agreement. He denies knowledge of the loan obtained by Krishna Karkera from Mission Street Branch which is the subject matter of the present litigation. He denies the suggestion that he was managing the boat when Krishna Karkera was away in Gulf countries. He also denied the suggestion that these sale transactions were got up documents to defeat the claim of the Bank. Though Ex. D I was shown to P.W. he was not asked as to why Ex. D 1 does not refer to any of these transactions and in the absence of such a question it is not possible to infer the probable explanation that would have been offered by P.W. 1, While remanding the matter on the earlier occasion this Court had pointed out that evidence on record is insufficient to decide the case. The order of this Court quoted Ex. D 1 in its entirety and there is an observation that the parties have not placed full material on the question involved and no definite finding could be given on the existing material. There is also an observation in the earlier order that no adverse inference could be straightway drawn by relying on Ex. D 1 without reference to other circumstances. It is the definite case of claimant that he paid Rs, 70,000/- on the date of the agreement --Ex, P. 1 and the balance was payable subsequently. This case is made out by producing Ex. P1. If the said document was not a genuine document and was got up, P.W. I should have been cross-examined as to the source for the consideration paid by him and as to how he paid the sum. We do not find any such cross-examination of P.W. 1. He was also not questioned about Ex. D 1 with reference to its contents to enable drawing of adverse inference against P.W. 1 from the contents of Ex. D1.

16. Madhava Shriyan was examined as P.W. 2. He speaks to the purchase made by him from Krishna Karkera and the sale effected by him subsequently in favour of the claimant. He asserted that he paid Rs.40,000/- to Krishna Karkera. He also asserted that the second agreement Ex. P3 between the claimant and P.W. 2 was

executed after the entire consideration was received by P.W. 2. No suggestion made by him that he did not receive the sum of Rs. 70,000/- from the claimant on the date Ex. P. 1. It is not necessary to refer to other statements in this evidence.

17. P.W. 3 was Port Conservator in Mangalore Port Office, he speaks to Ex. P. 34 and Ex. P. 35 and the registration of the boat in question in the name of the claimant. Ex. P. 34 was in the hand writing of this witness. The registration was done in the year 1991 according to this witness. P.W. 4 is the Attestor to the agreement Ex. P. 2. He speaks to the sale in favour of the claimant. He also attested the agreement Ex. P. 1. He was also an Attestor to the agreement -- Ex. P. 3. He speaks to the payment of Rs. 70,000/- by the claimant to Madhava Shriyan at the time of Ex. P. 1. He also states that on the date of Ex. P. 3 a sum of Rs. 34,500; - was paid to Madhava Shriyan by the claimant.

18. P.W. 6 is the Recovery Officer employed in Dakshina Kannada District Fish Marketing Federation. He speaks to the membership of the claimant and the supply of fish caught by the claimant by using the boat in question.

19. R.W. 1 was a Clerk at Ashok Nagar Branch of the appellant-Bank. He speaks to Ex. D1. Nothing useful to the case of the appellant could be inferred from this evidence. R. W. 2 is the clerk of the appellant-Bank at Ashok Nagar Branch. He speaks to the agreement-Ex. D 13 under which Krishna Karkera obtained the loan by hypothecating the boat. There is absolutely no evidence suggesting that the transactions of sale of the boat were not genuine and they were got up documents to defeat the claim of the appellant-Bank. On the other hand the evidence of the Attestors as well as the statutory authorities indicate that the boat was purchased by the claimant and he was supplying the fish to the Co-operative Society. We are of the view that there is no reason as to why we should come to a different conclusion from that of the trial Court on this question. There is no evidence to show that the claimant was aware of Krishna Karkera's liability to Mission Street Branch. Just because the claimant and Krishna Karkera are relatives, it cannot be inferred that the claimant would be aware of all the debts incurred by Krishna Karkera.

20. Evidence of R. W. 1 discloses that the witness knew Madhava Shriyan and the latter also used to come to the Bank in connection with this business (obviously reference is to the loan transaction of Krishna Karkera with Ashok Nagar Branch); the witness came to know Madhava Shriyan at the time of the business connected with the boat in question. However he denies knowledge of the purchase of loan by Madhava Shriyan. Entire loan account is cleared, is an admitted fact as per this witness; he also states that several persons used to pay money towards this loan account. The evidence of R. W. 1 also indicates that Krishna Karkera stood surety to one Ishwara Soliyan at Mission Street branch and since the said amount was not fully paid, Ashok Nagar Branch refused to give a discharge certificate. Therefore, the decree obtained by Mission Street branch against Krishna Karkera, obviously, was a decree occasioned by the

failure to pay dues by the surety, of the loan advanced to Ishwara Soliyan when the boat met with an accident, it was Devendra Karkera (claimant) who informed the bank. R. W. 2, another clerk of Ashok Nagar Branch of the Bank admitted that the loan obtained by Krishna Karkera from Ashok Nagar Branch was fully repaid before January 1992 and Krishna Karkera had the liberty to sell the boat after repaying the loan amount.

21. It is thus clear that in January 1992, after the loan account with Ashok Nagar Branch was cleared, the Bank had no hold over the boat, even according to the Appellant's witness, R. W. 2. By the time the boat was attached, the said loan had been cleared.

22. Mr. Ashwatharam contended that the hypothecation, Ex. D 13, was not merely in favour of Ashok Nagar Branch of the Bank, but, in favour of the Bank itself and therefore, benefit of the hypothecation was available to the Bank regarding all liabilities of Krishna Karkera towards the Bank. The learned counsel contended that hypothecation was nothing but the extended idea of pledge and results in a general lien in favour of the Bank.

23. In (In the matter of SreeYellamma CottonMills Co. Ltd.) Bank of Maharashtra Ltd., Poona v. Official Liquidator, High Court Buildings AIR 1969 Mys. 280 Narayana Pai, J. (as he then was) observed at page 287:

"In the case of hypothecation or pledges of movable goods, there is no doubt about the creditor's right to take possession, to retain possession and to sell the goods directly without the intervention of Court for the purpose of recovering his dues. The position in the case of regular pledge completed by possession is undoubted and set out in the relevant sections of the Contract Act. Hypothecation is only extended idea of a pledge, the creditor permitting the debtor to retain possession either on behalf of or in trust for himself (the creditor)".

24. It was a case of bankruptcy of the debtor; the relevant clause in the hypothecation deed clearly provided for the creditor to take possession of the hypothecated goods in the case of debtor's insolvency. Further the hypothecation covered all further borrowings; therefore the seizure of the goods by the creditor was in respect of the very debt for which goods were hypothecated. The hypothecation continued to operate on all the debts of the debtor: the creditor therefore could seize those goods and sell them in the exercise of creditor's power of sale given to the creditor under the hypothecation deed.

25. The present case is different. On the date of the attachment of the boat, the hypothecation did not exist, because, the loan account for which the boat was hypothecated, had been fully cleared. Therefore the Bank had no right to seize the boat on its own. The attachment of the boat in execution of the decree is on the assumption that the boat belonged to the judgment-debtor and like any other property of the judgment-debtor, it can be attached; attachment was not

on the ground that the boat was hypothecated to the bank. There was no decree against the boat, in the sense of a decree being made for the sale of a pledged or hypothecated goods.

26. Mr. Ashwatharam is not right in extending the principle of Section 171 of the Contract Act to the boat in question to cover other liabilities of Krishna Karkera. Section 171 is a statutory provision, which could govern the cases clearly covered by the provision. The constructive bailment in favour of the bank regarding the boat occasioned by the hypothecation Ex. D13, ceased to exist by the time the bank sought to attach the boat by executing the decree.

27. The learned counsel for the Bank relied on clause 14 of the hypothecation deed Ex. D 13; it reads :

"That in the event of being surplus available for the net proceeds of such sale after payment in full of the balance due to the Bank, it shall be lawful for the Bank to retain and apply the said surplus together with any other money or moneys belonging to the Borrowers or any one or more of them for the time being in the hands of the Bank in or under whatever account as for the same shall extend against or towards payment or liquidation of any and all other moneys which shall be or become due from the borrowers or any one or more of them whether solely or jointly with any other person or persons, firms or company to the Bank by way of loans, discounted bills, letter of credit, guarantees, charges and other obligations current though not then due payable or other demands legal or equitable which the Bank may have against the Borrowers or any one or more of them or which the law of set off or mutual credit would in any case admit and whether the Borrowers or any one or more of them shall become or be adjudicated Bankrupt or insolvent or be in the liquidation or otherwise and interest thereon from the date on which any and all advance/s in respect thereof shall have been made at the rate or respective rates at which the same shall have been advanced."

28. Above clause is attracted only when the boat is sold by the bank for failure of the debtor to repay the loan for which the hypothecation was effected; in such a case, the boat is seized and sold; the excess sale proceeds would be with the bank which can be appropriated towards any other liability of the debtor to the Bank. This clause cannot override the earlier clause No. 8 which reads:

"In consideration of the above premises the borrower/s hereby hypothecates/ hypothecate the machinery/implements/ Vehicles/ tractors/power tillers and other accessories listed in the Third Schedule hereto and also other machineries / Vehicles / Power tillers/ tractors/implements accessories proposed to be purchased as detailed in Annexure I hereto and/ or any such machineries and vehicles etc. acquired and possessed by Borrower/s in future other than mentioned herein as security for the due payments by the Borrower/s to the Bank until the closing of the above said advance in full with interest."

29. in other words, the security created by Ex. D 13 existed only till the

particular loan account was not closed; when admittedly the loan and interest in their entirety were paid, necessarily the said account would stand closed. If so, the security created by clause 8 would not survive.

30. In *Syndicate Bank Vs. Vijay Kumar and others*, Fixed Deposit Receipts were offered as security. However there was a clear statement in the letters of the judgment debtors that the deposits and renewals shall remain with the Bank so long as any amount on any account is due to the Bank, which certainly created a general lien. The concept of lien as stated in Halsbury's Laws of England, Vol.20 (2nd edition, page 552) was quoted by the Supreme Court, at page 1068 :

"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".

After a few references, the Supreme Court proceeded to observe :

".....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."

31. Primarily there should be a right to possession, because, Lien is a right in one man to retain that which is in his possession belonging to another. Lien enables the retention of the property belonging to another. Possession of the goods by the person claiming right of lien, is anterior to the exercise of the said right. If the said person is not in possession (actual or constructive), then exercise of the right of lien is not possible.

32. In the instant case, the hypothecation did not exist when the Bank sought attachment of the boat; therefore, it was not a case of taking of "actual possession" of the boat by a person who was in "constructive possession" of the boat.

33. In *The Bank of Bihar Vs. The State of Bihar and Others*, the pledge of articles was to secure the cash-credit loan. The pledge covered all advances and therefore it was held that the Bank had priority to recover the amounts due to it under the cash-credit loan account by possessing and selling the goods and the seizure of the goods by the Government for the amounts due to it by the debtor

was not binding on the Bank and that out of the sale proceeds of the goods, the Bank's dues were to be paid, before the Government appropriated any sum towards its claim.

34. This decision in no way advances the appellant's case before us.

35. Therefore, we have no hesitation in rejecting the contention of the Bank that it has a general lien over the boat in question and its attachment in execution of the decree should be recognised as the exercise of this right of lien.

36. The Appeal is accordingly dismissed. No order as to costs.

37. Appeal dismissed.