

(2003) 02 KAR CK 0028

In the Karnataka High Court

Case No : W.A. No's. 7537 of 2000 and 32 of 2001

Syndicate Bank

APPELLANT

Vs

Wilfred D'Souza

RESPONDENT

Date of Decision : 18-02-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Contract Act, 1872 — Section 171

Citation : AIR 2003 Kar 337 : (2003) 2 KCCR 97 SN

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : Tukaram S. Pai, M.S. Pai, K.R. Prabhu and Deepak Dave, for the Appellant; P.R. Srinivasan, S. Kashinath, S.R. Suresh, B.S. Ranganath, K. Parmodkumar Rai and Kishore Shetty, for the Respondent

Final Decision : Allowed

Judgement

Nayak, J.—Both the writ appeals are directed against the same order of the learned single Judge dated 8-11-2000 in W.P. No. 5234 of 1998. The appellant in Writ Appeal No. 7537/00 is the Syndicate Bank, whereas in Writ Appeal No. 32/01, the appellant is one Wilfred D'Souza. Sri Wilfred D'Souza was the petitioner and the Syndicate Bank was the respondent in the writ petition. By the order impugned in these writ petitions, the learned single Judge has allowed the writ petition and quashed the impugned communication of the Syndicate Bank dated 7-1-1998.

2. The background facts leading to filing of these writ appeals be noted briefly as under :--

3. The writ petitioner is the Managing Director of the Company called M/s. Souza and Lewis Fisheries India (Pvt.) Ltd., having its registered office at Hampanakatta, Mangalore. The said company borrowed huge amounts from the Consortium Bank comprising of Syndicate Bank, Canara Bank and Vijaya Bank. The Syndicate Bank is a member of the consortium Bank and lead Bank. The writ

petitioner has furnished the bank guarantee to an extent of Rs. 170 lakhs along with the interest by Deed of Guarantee dated 12-4-1988 the true copy of which is produced and marked as Annexure "1" in the writ petition. The Syndicate Bank as a Lead Bank with a view to recover the amounts due to the consortium of Banks got issued legal notice dated 25-10-1997 to the petitioner and others calling upon them to repay the amounts. In the said notice issued to the writ petitioner, it has been clearly averred that the petitioner is liable to the Bank pursuant to the individual guarantee furnished by him. The true copy of the legal notice sent to the petitioner is produced Annexure "3" in the writ petition. According to the Bank, since the writ petitioner did not comply with the demand contained in the legal notice, the Consortium of Bank under the leadership of the Syndicate Bank, filed an application u/s 19 of the Central Act 51 of 1993 which is pending on the file of the Debt Recovery Tribunal, Bangalore. In the meanwhile according to the Syndicate Bank, since the writ petitioner did not make any attempt to repay the debts in terms of personal guarantee sought by him and instead, indulged in correspondences raising untenable pleas, in order to safeguard the interest of the Bank, it exercised its right of set off as also the right of exercise of general lien over the amounts belonging to the petitioner in his S.B. Account No. 47724. It appears that on 30-1-1997, the writ petitioner opened the above S.B. Account and a sum of Rs. 3,01,508,69 was laying in the account on the date the Bank exercised its right of set off as well as the right of general lien. This was done by the Bank in the month of January, 1998 and the same was communicated to the writ petitioner vide letter dated 7-1-1998. The writ petitioner wrote a letter to the Bank vide Annexure C protesting against the said action of the Bank. On receipt of the said letter dated 15-1-1998, the Bank replied to the same as per reply dated 15-2-1998 refusing to accede to the request of the writ petitioner. When the matter stood thus, the writ petition was filed seeking to quash the communication bearing Ref: 44/0408/LIC 485/RF dated 7-1-1998.

3. In the writ petition it was contended that (i) the action of the Bank in exercising the general lien on the amount standing to the credit of the petitioner in S.B. A/C No. 47724 with the respondent-Bank is illegal and arbitrary; (ii) that the freezing of the amount and exercising general Hen on the amounts belonging to the petitioner even before determination of its liability by the Debt Recovery Tribunal by passing appropriate decree in favour of the respondent-Bank, is bad in law; (iii) that the liability of the petitioner could be enforced only after the decree is passed by the Debt Recovery Tribunal in favour of the Bank and, therefore, the impugned action is one without authority of law.

4. The writ petition was opposed by the Syndicate Bank by filing a detailed statement of objections. In the Statement of Objections, it was contended by the Bank (i) that writ petition is not maintainable inasmuch as the petitioner is seeking for enforcement of contractual obligations, (ii) that since the writ petitioner has furnished individual bank guarantee to an extent of Rs. 1,70,00,000/- by executing a deed of guarantee dated 12-4-1998, the Bank had

legal right to set off the amount available with it belonging to the writ petitioner in respect of the debts due from the company; (iii) that the Bank has had also the right to exercise the right of general lien over the amount belonging to the petitioner in terms of Section 171 of the Indian Contract Act; (iv) that the exercise of right of set off and right of general lien by the Bank does not depend upon the determination of the liability by the Debt Recovery Tribunal and that right is an independent right flowing from the provisions of Section 171 of the Indian Contract Act as well as the deed of guarantee dated 12-4-1998 executed by the writ petitioner in favour of the Bank; (v) that the impugned action was taken by the Bank's management to safeguard the interest of the Bank and in the public interest and, therefore, the exercise of power was bona fide and not mala fide.

5. The learned single Judge in view of the pleadings of the parties and the contentions canvassed before him, framed the following two points for consideration and decision :--

. i) Whether the writ petition is maintainable under Art. 226 ?

ii) Whether the respondent-Bank could have exercised its rights u/s 171 of the Contract Act to adjust the amount in the writ petitioner's S.B. Account No. 47724 in respect of the dues of the Bank.

6. The learned single Judge dealing with point No. 1 held that the writ petition is maintainable. On point No. 2 the learned Judge has held that the right of set off and right of lien are available to the Bank. Dealing with the express terms of the guarantee executed by the writ petitioner, learned Judge has held that the writ petitioner as a guarantor is obliged to pay and satisfy the demands of the Bank towards the loan borrowed by the company. Learned single Judge also held that the power of lien reserved by the Bank under the deed of guarantee can be exercised at any time. However, learned single Judge found flaw in the impugned action of the Bank on the procedural front and has opined that before exercising the right of set off and right of general lien, the Bank ought to have raised a demand and since no demand was made prior to the adjustment of the money lying in S.B. Account No. 47724, the impugned action cannot be sustained for violation of principles of natural justice and fairness in action. In the result, learned single Judge allowed the writ petition. The operative portion of the judgment reads as follows:--

"In the result, the petition deserves to be allowed. Accordingly it is allowed. The impugned communication of the respondent-Bank dated 7-1-1998 is set aside. The respondent-Bank is directed to credit a sum of Rs. 3,01,508.69 ps. to the petitioner's savings bank account with interest within four weeks from the date of receipt of certified copy of this Court's order. Insofar as the application filed by the bank before the Debt Recovery Tribunal against the petitioner as guarantor to M/s. Souza and Lewis Fisheries India (Pvt) Ltd., is concerned, I do not intend to express any opinion on the same. There is no order as to costs.

Ordered accordingly."

7. Hence these two writ appeals are filed by the petitioner as well as by the respondent.

8. The appellant in W.A. No. 32 of 2001 has contended that learned single Judge having allowed the writ petition, should have quantified the rate of interest due and payable to the appellant while granting interest on the deposits made by him and since learned single Judge has not quantified the rate of interest, the appellant would be put to enormous financial loss and inconvenience.

9. In Writ Appeal No. 7537/00 preferred by the Bank, the same contentions which were advanced before learned single Judge were reiterated.

10. We have heard Sri K. Radesh Prabhu, learned Advocate for the appellant in W.A. No. 7537 of 2000 and Sri Kasinath, learned counsel for the appellant in W.A. No. 32/ 2000.

11. Sri Radesh Prabhu at the threshold maintained that the writ petition filed by the respondent under Articles 226 and 227 of the Constitution of India is not maintainable inasmuch as the grievance brought before the Court by the respondent pertains to private law and not public law and, therefore, learned single Judge ought to have refused to entertain the writ petition and directed the writ petitioner-respondent herein to work out his remedy, if any, before the competent Civil Court. Learned counsel nextly contended that learned single Judge has seriously committed a factual error in opining that Section 171 of the Indian Contract Act has no application to the facts of this case. Learned counsel also contended that the observation of learned single Judge that the Bank has admitted in its Statement of Objections that no demand was made prior to the alleged adjustment is nothing but misreading of a fact and in fact, the legal notice issued by the Bank on 25-10-1997 which is produced at pages 51 to 55 of the material papers, would clearly go to show that a demand was raised specifically against the writ petitioner not only on the basis that he is the Managing Director of the Bank but also on the count that he and two more directors of the company have furnished individual guarantees, guaranteeing the liability of the company M/s. Souza and Lewis Fisheries India (Pvt.) Ltd. Sri Radesh Prabhu alternatively contended that before exercising the right of set off or the right of general lien, the provisions of Section 171 do not contemplate any prior notice or demand. Sri Prabhu would conclude by maintaining that the impugned action was absolutely legal and justified and was intended to safeguard the interest of the Nationalised Banks.

12. On the other hand, Sri S. Kashinath, learned counsel for the writ petitioner supported the Judgment of the learned single Judge.

13. In view of the rival contentions canvassed before us, the only question that arises for our consideration and decision is whether the view taken by the learned single Judge with regard to maintainability of the writ petition as well as

with regard to prior notice before exercising the right of set off and right of lien requires to be corrected. It is true that the postulates of Article 14; reasonableness, fairness in action and non-arbitrariness would strike at State actions and actions of instrumentalities of the State whenever the State authorities or the instrumentalities of the State act affecting civil rights of persons/citizens in breach of those postulates. The doctrine of fairness in action as held by the Courts include the right to be heard before an adverse action is taken. If the Court finds that adverse action is taken against a person/citizen by State authorities in breach of principles of natural justice, this Court, in appropriate cases where alternative remedies are unsuited and inadequate or time consuming, would be justified in stepping in and correcting the wrongs committed by the State Authorities.

14. However, it needs to be noticed that generally speaking the extraordinary power of High Court under Article 226 cannot be permitted to be invoked by a litigant where the right infringed is a "personal right" of contract or not amount to interference with the right to carry on profession or business or trade or avocation under Article 19(1)(g) of the Constitution. It is also fairly well settled that the power of the High Court under Article 226 can be invoked by an aggrieved citizen at the stage of making contract and not to enforce rights and obligations flowing from a concluded contract. Similarly Article 226 power cannot be permitted to be used by a litigant for avoiding his burden arising out of an ordinary contract. In the instant case, as already pointed out supra, the obligation of the writ petitioner flows from an ordinary contract i.e., the deed of guarantee executed by him in favour of the Bank and the said Bank Guarantee is not a statutory contract. The relationship between the writ petitioner and the respondent is that of a Banker and a customer. In exercising the right of set off and general lien, the Bank has acted as a prudent banker and in the normal course to safeguard its own financial interest. In that view of the matter, we find force in the contention of the learned standing counsel for the Bank that the learned single Judge ought not to have entertained the writ petition in which the writ petitioner sought to enforce the alleged obligations arising out of a deed of guarantee executed by him in favour of the respondent-Bank.

15. The question whether the writ petition is maintainable or not has to be determined with regard to the facts and circumstances of each case. In the instant case, the obligations of the writ petitioner flows from the deed of guarantee executed by him. The obligation does not flow from any statutory contract. In terms of the stipulations contained in the deed of guarantee, the Bank has exercised the right of set off and right of general lien and that right could be exercised by the Bank whenever the monies advanced to the company become overdue. It is trite that this right is an independent right available to the Bank's management. Therefore, we do not find any merit in the contention of the learned counsel for the writ petitioner that the right of lien should have been exercised only after the liability of the petitioner is determined by the Debt Recovery Tribunal, after necessary adjudication. The Courts, including the Apex

Court, by any large, refused to enforce the contractual obligations. We do not find any public law element in the controversy brought before the Court for adjudication in this case. In the instant case, the facts are not in dispute. It is admitted position that the petitioner has executed the deed of guarantee and in terms of that document, the Bank has acquired the right to set off and the right of general lien and the said document does not contain any stipulation that the said right of the Bank should be exercised only after the liability of the petitioner is determined by the competent Civil Court or a judicial forum like the Debt Recovery Tribunal.

16. We do not find any merit in the contention of the writ petitioner that the impugned action of the Bank in exercising the right of set off and the right of general lien, the Bank acted arbitrarily and unfairly. As noticed from the records, the Bank before exercising the right of set off and the right of lien, had to issue notices to all the Directors including the petitioner reminding him of his obligation to pay the overdue to the Bank on account of the company's failure to repay the loan amount in terms of the schedule of repayment by issuing the legal notice on 25-10-1997 and since the writ petitioner without complying with the demand raised in the said notice, raised several frivolous objections and that forced the Bank to exercised the right of lien reserved by it not only under the deed of guarantee executed by the writ petitioner himself but also the power statutorily conferred upon the Bank u/s 171 of the Indian Contract Act. The said action taken by the Bank with an intention to protect the financial interest of the Bank could not be condemned as arbitrary or irrational and violative of Article 14 of the Constitution of India. Secondly, we could hardly find any public law element in the transaction in respect of which the writ petitioner has complained in the writ petition. Strictly speaking, the transaction between the parties squarely fell in the field of private law.

17. It is trite that the right of banker to set off the amount available with it belonging to the customer in respect of the deeds due from the said customer is a well recognised right. If such a right is reserved by the Banker in a deed of guarantee executed by the customer, the banker has also right to exercise the right of general lien over the amount belonging to the customer u/s 171 of the Contract Act. Section 171 of the Indian Contract Act, 1872 reads as follows:--"171. General lien of bankers, factors, wharfingers, attorneys 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 failed to them, unless there is an express contract to that effect."

18. It is quite clear from the provisions of Section 171 that section will not have any application in a case where there exists a contract to the contrary to the provisions of Section 171. That is not the position in the instant case. The learned Judge has observed that-

"In the present case, the petitioner and the Bank had an express contract by way

of counter guarantee providing the method of reimbursement."

We find from the documents, it is an individual guarantee furnished by the writ petitioner in a sum of Rs. 170 lakhs. The guarantee itself made it clear that the guarantee furnished therein, should be in addition thereto and not in derogation of any security that may be held thereafter by the Bank. The said document being of the year 1998, could not be provided for a contract to the contrary for exercise of general lien or right of set off in respect of the S.B. Account No. 47724 opened on 30-1-1997. We also do not find any counter guarantee in the document nor do we find any stipulation or provision in the deed of guarantee which could be regarded as the one contrary to the provisions of Section 171 of the Act. Since the provisions of Section 171 of the Contract Act being a general enactment available to all the bankers, we do not find any flaw or error on the part of the respondent-Bank in exercising the right of set off and the right of general lien in regard to monies of the writ petitioner lying in S.B. A/c No. 47724. The right of the banker to exercise the right of general lien over the amount belonging to the customer u/s 171 of the Indian Contract Act has been recognised by the Courts in number of cases. The Supreme Court in the case of *Syndicate Bank Vs. Vijay Kumar and others*, having referred to Halsbury's Laws of England Vol. 20, 2nd Edn. p. 552 para 659; Chalmers on Bills of Exchange Thirteenth Edition page 91; Chitty on Contract, Twenty Sixth Edition page 389, paragraph 3032 and Paget's Law of Banking, Eight Edition, page 498 stated the principle succinctly in para 7 thus-

"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.

19. The words "even otherwise" occurring in para 7 of the judgment are quite significant and these words make it abundantly clear that even in the absence any agreement between a banker and its customer, the banker has a general Hen over all forms of deposits or securities made on behalf of the customer.

20. In *United Commercial Bank Vs. Bank of India and Others*, , the Supreme Court referred to a passage from *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank* (1977) 2 All ER 862 with approval. It reads :--

"It was only in exceptional cases that the Courts would interfere with the machinery of irrevocable obligations assumed by banks. They were the life blood of international commerce. The machinery and commitments of banks were on a different level. They must be allowed to be honoured, free from interference by

the Courts. Otherwise trust in internal commerce could be irreparably damaged."

21. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , the Supreme Court has referred to the following passage in the Headnote of the judgment handed down in R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank (1977) 2 All ER 862 with approval which runs as under :--

"(I) Only in exceptional cases would the Courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers."

22. From the above discussion, it can be gathered that the bank guarantees are placed on different level and they must be allowed to be honoured free from interference by the Courts.

23. In conclusion, with respect, we cannot sustain the order of the learned single Judge impugned in this writ appeal. In the result, we allow Writ Appeal No. 7537/00 filed by the Syndicate Bank and set aside the order passed by the learned single Judge in W.P. No. 5234 of 1998 and dismiss Writ Petition No. 5234 of 1998. Since we have dismissed Writ Petition No. 5234 of 1998, Writ Appeal No. 32/2001 is also liable to be dismissed and accordingly we dismiss it. In the facts and circumstances of the case, both the parties are directed to bear their own costs in both the writ appeals.