

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 28th January, 2016.**

+ **W.P.(C) 9828/2015**

KOTAK MAHINDRA BANK LTD. Petitioner

Through: Mr. Sumit Bansal, Mr. Ateev Mathur,
Ms. Richa Oberoi and Mr. A.P.S.
Sehgal, Advs.

Versus

BANK OF BARODA AND ANR Respondents

Through: Ms. Priyadarshini Verma, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition seeks a mandamus to the respondent No.1 Bank of Baroda (BOB) to release the title documents of property bearing No.KU-62, Pitampura, Delhi in favour of the petitioner Kotak Mahindra Bank Ltd.

2. Though the petition was listed on three earlier occasions before this Court and the counsel for the respondent No.1 BOB appeared on advance notice but was adjourned from time to time on the request of the counsel for the petitioner Bank and last on the request that the petitioner Bank desires to move some application. However no application has been filed and the counsel for the petitioner Bank and the counsel for the respondent No.1 BOB have been heard.

3. It is the case of the petitioner Bank:

(i) that one M/s Chhavi Textiles of which the respondent No.2 Sh. Rajat Gulati was / is the sole proprietor was enjoying credit limit from the respondent No.1 BOB and to secure which had created equitable mortgage by deposit of title deeds of property No.KU-62, Pitampura, Delhi;

(ii) that the respondent No.2 Sh. Rajat Gulati approached the petitioner Bank for an overdraft limit to satisfy the dues of the respondent No.1 BOB and the petitioner Bank agreed thereto on the respondent No.2 Sh. Rajat Gulati agreeing to secure the advances of the petitioner Bank by creating equitable mortgage of his aforesaid property and the petitioner Bank paid the entire outstanding of the respondent No.1 BOB from the said M/s Chhavi Textiles / Sh. Rajat Gulati;

(iii) however, the respondent No.1 BOB notwithstanding having so closed the credit account of M/s Chhavi Textiles / Sh. Rajat Gulati, has not released the title documents of the property aforesaid in favour of the petitioner Bank and which as per the agreement of the petitioner Bank with the respondent No.2 Sh. Rajat Gulati are to be deposited

with the petitioner Bank to secure the dues of the petitioner Bank;

(iv) that the respondent No.1 BOB has refused to so release the title documents (a) on the ground that it has advanced certain monies to one M/s R.R. Enterprises also and for security of which the respondent No.2 Sh. Rajat Gulati has given his personal guarantee and since the said M/s R.R. Enterprises and the respondent No.2 Sh. Rajat Gulati did not pay the dues of the respondent No.1 BOB, the respondent No.1 BOB approached the Debt Recovery Tribunal (DRT) which has issued a Recovery Certificate against the respondent No.2 Sh. Rajat Gulati also; and, (b) claiming a general lien over the subject property for realisation of the dues crystallised by the DRT.

4. It is the contention of the petitioner Bank that the respondent No.1 BOB has no general lien over the property aforesaid.

5. I have at the outset enquired from the counsel for the petitioner Bank as to how a writ petition under Article 226 of the Constitution of India is maintainable for the relief claimed and whether not the dispute if any of the petitioner Bank with the respondent No.1 BOB is a private *lis* with no public law character and for which the appropriate remedy is either by way of approaching the Banking Ombudsman or by way of a suit or arbitration as

may be applicable.

6. The counsel for the petitioner Bank, post passover sought to cite case law, has drawn attention to paras 21 and 22 of ***Kumari Shrilekha Vidyarthi Vs. State of U.P.*** (1991) 1 SCC 212 to contend that since the respondent No.1 BOB is a State within the meaning of Article 12 of the Constitution of India and its action, of notwithstanding the monies to secure which the title deeds were kept with it having been repaid not releasing the said title deeds, is unfair and arbitrary, a writ petition is maintainable.

7. I am unable to accept the proposition that for resolution / adjudication of all disputes with the State or with an entity which qualifies as a State within the meaning of Article 12 of the Constitution of India, a petition under Article 226 is the remedy. The jurisdiction of the High Court under Article 226 of the Constitution of India is an extraordinary remedy, to be not invoked or allowed to be invoked ordinarily, as is found being done increasingly, leaving very little time for the High Courts to deal under Article 226 with issues really deserving consideration thereunder. Supreme Court, as far back as in ***Rashid Ahmed Vs. Municipal Board, Kairana*** AIR 1950 SC 163 and ***Nain Sukh Das Vs. The State of Uttar Pradesh*** AIR 1953 SC 384 held that prerogative writs are extraordinary remedies intended to be

applied in exceptional cases in which the ordinary legal remedies are not adequate but in the last over half century the said principle appears to have been forgotten, with the writ remedy being considered as a cure for all ordinary ailments also and for which the ordinary legal remedies under the civil law are adequate. The same has resulted in the High Courts being inundated with writ petitions, the disposal whereof axiomatically is found to be taking, in most cases, as much time as the disposal of an ordinary civil *lis*, and which has resulted in the High Courts facing difficulty in providing immediate relief even in deserving cases in writ jurisdiction and / or being left with little time to ponder over the important constitutional issues coming before it in the writ jurisdiction. In my humble view, a time has thus come for the High Courts to send out a clear message of the writ remedy being an extraordinary remedy not available as an alternative to the remedy already available under the civil and general laws.

8. Supreme Court in *Godavari Sugar Mills Ltd. Vs. The State of Maharashtra* (2011) 2 SCC 439, on a conspectus of the earlier dicta in this regard reiterated, i) normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants;

the aggrieved party will have to agitate the question in a civil suit; but an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers; ii) only if a fundamental right or a statutory right has been infringed and the aggrieved party comes to the Court for enforcement of the right, the writ Court while declaring the existence of such right or infringement thereof has the power to give consequential reliefs by ordering payment of money realized by the Government without the authority of law; iii) a petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right; the aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of power under Article 226 for payment of money; iv) there is a distinction between cases where a claimant approaches the High Court seeking a relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc.; while a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the

assessment was without a jurisdiction and the taxes collected were without authority of law, the High Court has the power to direct refund in a writ petition; v) it is one thing to say that the High Court has no power under Article 226 to issue a writ of mandamus for making refund of money illegally collected and yet another thing to say that such power can be exercised sparingly depending on the facts and circumstances of the cases; vi) where the lis has a public law character or involves a question arising out of the public law functions, access to justice by way of a public law remedy under Article 226 will not be denied.

9. Supreme Court recently in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728, on a consideration of the earlier case law on the subject including ***Kumari Shrilekha Vidyarthi*** supra has held that the writ petition under Article 226 of the Constitution of India would be maintainable only in the following situations:

“69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

- (i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.*

- (ii) *State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.*
- (iii) *Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings Under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.*
- (iv) ***Writ jurisdiction of High Court Under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.***
- (v) *Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the*

license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court Under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law

*element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. **Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions Under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.***

- (x) *Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and*

this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes”.

(emphasis added)

10. The counsel for the respondent No.1 BOB appearing on advance notice has also contended that the petitioner Bank, on the same grounds as urged before this Court had filed I.A. No.741/2015 for impleadment before DRT-III before which O.A. No.206/2012 filed by the respondent No.1 BOB with respect to the dues of M/s R.R. Enterprises was pending, but had after some hearing withdrawn the said application with a liberty to file a separate O.A. before the DRT. She, for this reason also contends that the writ remedy is not available to the petitioner Bank.

11. The counsel for the petitioner Bank rejoins that though the application aforesaid was withdrawn with liberty to file O.A. but no O.A. lies before the DRT for the claim, as is made in this petition. He has further contended that

though it was the claim of the respondent No.1 BOB in O.A. No.206/2012 that it is entitled to recover its dues by sale of the subject property also but in the final order dated 2nd June, 2015 therein the said contention has not been accepted and the respondent No.1 BOB has been permitted to recover its dues from sale of the properties mortgaged to secure those dues and which do not include the subject property. He has also contended that the respondent No.2 Sh. Rajat Gulati does not appear to have given a personal guarantee for the dues of M/s R.R. Enterprises and had only mortgaged two of his other properties.

12. The counsel for the respondent No.1 BOB controverts that the respondent No.2 Sh. Rajat Gulati had not given the personal guarantee.

13. I tend to agree with the contention of the counsel for the respondent No.1 BOB; unless the respondent No.2 Sh. Rajat Gulati had given his personal guarantee for the dues of M/s R.R. Enterprises, the DRT would not have issued Recovery Certificate against the respondent No.2 Sh. Rajat Gulati also, as is shown to have been issued in the order aforesaid of the DRT. Once the Recovery Certificate has been issued against the respondent No.2 Sh. Rajat Gulati, the respondent No.1 BOB would in law be entitled to recover the monies from sale also of his property not mortgaged with the

respondent No.1 BOB.

14. The counsel for the petitioner Bank has also drawn attention to the letter dated 22nd February, 2013 issued by the respondent No.1 BOB to M/s Chhavi Textiles / Sh. Rajat Gulati confirming that the documents of title of the subject property were lying deposited with it by way of equitable mortgage for availing of CC limits for the said M/s Chhavi Textiles / Sh. Rajat Gulati. Therefrom, it is contended that the respondent No.1 BOB at that stage did not claim a general lien over the said documents / property as is now being claimed for the dues of M/s R.R. Enterprises.

15. However the said letter dated 22nd February, 2013 is shown to have been written in response to the letter dated 22nd February, 2013 of M/s Chhavi Textiles / Sh. Rajat Gulati and which letter is not available. It is quite probable that M/s Chhavi Textiles / Sh. Rajat Gulati vide their letter of 22nd February, 2013, on the spot requested the respondent No.1 BOB to confirm that the said documents were lying deposited with it and the language used in the subject letter was in pursuance thereto. In any case, from the said letter it is not evident that the respondent No.1 BOB is precluded for claiming any other right with respect to the documents lying deposited with it.

16. The counsel for the petitioner Bank has also drawn attention to the letter dated 25th February, 2013 of M/s Chhavi Textiles / Sh. Rajat Gulati to the respondent No.1 BOB intimating that they had availed of overdraft facility from the petitioner Bank and the petitioner Bank would be clearing the dues of the respondent No.1 BOB. It is contended that the respondent No.1 BOB at that time also did not say that it would not be releasing the title documents even inspite of payment of all the dues of M/s Chhavi Textiles.

17. The counsel for the respondent No.1 BOB has on the contrary contended that the petitioner Bank did not approach the respondent No.1 BOB at any point of time or before releasing monies, asking for a 'No Objection Certificate' of the respondent No.1 BOB and if had so approached, would have been informed of the general lien claimed by the respondent No.1 BOB over the property aforesaid.

18. I have tested the maintainability of the writ petition in the light of aforesaid principles and contentions.

19. The counsel for petitioner Bank inspite of asking has not shown any duty or obligation owed by respondent No.1 BOB to, in the facts aforesaid, release the title documents in favour of petitioner. No Circular / Guideline of Reserve Bank of India in this regard is shown.

20. It is also not the case of the petitioner Bank that it has any privity of contract with the respondent No.1 BOB or that the respondent No.1 BOB had made any representation or promise to the petitioner Bank on which the petitioner Bank acted.

21. In this scenario, the right if any of petitioner Bank against the respondent No.1 BOB or the cause of action, essential for filing writ petition also, is highly doubtful. The right if any to get back the title documents from respondent No.1 BOB is of respondent No.2 Sh. Rajat Gulati, who evidently has not exercised the same, perhaps finding himself not entitled thereto.

22. The reason given by respondent No.1 BOB for not releasing the title deeds, of having a general lien thereover, is not such which can be called as totally unfair or *mala fide* or preposterous or arbitrary or not expected of a public sector bank as respondent No.1 BOB is. Supreme Court in ***Syndicate Bank Vs. Vijay Kumar*** (1992) 2 SCC 331 held that by mercantile system a 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. The respondent No.1 BOB, as a custodian of public monies, is found to be fully justified in claiming general lien over a property of the respondent No.2 Sh. Rajat Gulati against whom it holds a Recovery Certificate.

23. Rather, it is found that the petitioner Bank did not take due care for securing the advance made by it to the respondent No.2 Sh. Rajat Gulati and acted in haste in lending monies to him by payment of his dues to the respondent No.1 BOB without even making any enquiry from the respondent No.1 BOB, whether on such re-payment, the respondent No.1 BOB was willing to deliver title deed lying deposited with it to the petitioner Bank. The petitioner Bank is found to be now asserting its claim thereto, as made in this petition, to get over its default. The petitioner Bank having voluntarily incurred such liability cannot be permitted to redeem itself at the cost and to the detriment of the respondent No.1 BOB.

24. In any case, the claim even if any of the petitioner Bank against the respondent No.1 BOB is not such which is free of factual disputes and for which reason also the writ remedy invoked is not the appropriate remedy.

Also, the petitioner Bank has utterly failed to show any public law character in the dispute, to be able to maintain a writ petition under Article 226 of the Constitution of India for adjudication thereof. As aforesaid, the situation in which the petitioner Bank is, is of its own creation and at best in the nature of a private dispute between the two Banks, not calling for any adjudication under the public law remedy mechanism.

25. I say so also because the adjudication may also entail that if both the Banks are at fault, which of them should suffer. The rule of equity formulated in this regard in *Lickbarrow Vs. Mason* (1787) 102 E.R. 1192 and recognized by the Supreme Court in *The New Marine Coal Co. (Bengal) Private Ltd. Vs. Union of India* AIR 1964 SC 152 and *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co.* AIR 1966 SC 543 is that whenever one of two innocent parties must suffer by the act of third, he who has enabled such person to occasion the loss must sustain it. Another guiding mechanism in this regard is, in *pari delicto potior est conditio* defendants i.e. where both the parties are equally at fault, the position of the defendant is stronger.

26. I therefore find the petition to be not maintainable.

27. Dismissed.

28. It is however clarified that any of the observations herein would not come in the way of the Suit Court or any other appropriate authority which may be approached by the petitioner Bank, on going through all the documents and material and evidence, returning an independent finding.

29. It is further clarified that this order shall also not come in the way of the petitioner Bank taking its remedy against the order dated 15th May, 2015 supra of the DRT rejecting its application for impleadment in O.A. No.206/2012 or availing of appeal against the final order dated 2nd June, 2015 supra of the DRT.

30. It is yet further clarified that the petitioner Bank shall be entitled to, before the Debt Recovery Appellate Tribunal (DRAT), seek exclusion of the time expended in this petition.

No costs.

RAJIV SAHAI ENDLAW, J.

JANUARY 28, 2016
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