



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 02.09.2016
DELIVERED ON : 09.08.2017

CORAM

THE HONOURABLE MR.JUSTICE NOOTY. RAMAMOHANA RAO
AND
THE HONOURABLE MR.JUSTICE S.S.SUNDAR

W.P.(MD)No.12613 of 2016

M.Shanthi

... Petitioner

Vs.

Bank of Baroda,
Represented by its Chief Manager,
Namakkal Branch,
Namakkal.

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue of a Writ of Mandamus, to direct the respondent to return the documents in respect of the property belonging to the petitioner situated at Namakkal, given as security in respect of the transaction covered by sanctioning letter dated 04.04.2013 upon payment of Rs.41,65,904/- towards the entire dues without claiming to exercise any general lien.

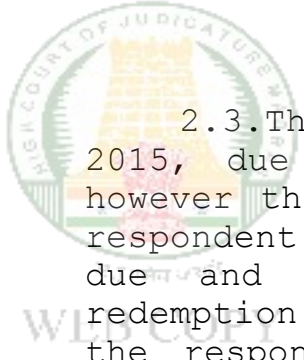
For Petitioner	: Mr.S.R.Rajagopal
	for Mr.R.M.Renganath
For Respondent	: Mr.Pala Ramasamy

ORDER

The writ petition has been filed for issuance a Writ of Mandamus, directing the respondent to return the documents in respect of the properties belonging to the petitioner and given as security in respect of the loan borrowed by the petitioner by sanction letter dated 04.04.2013, upon payment of the entire dues without claiming to exercise any general lien.

2.1. The case of the petitioner as brought out from the affidavit filed in support of the writ petition are as follows.

2.2. The petitioner borrowed a sum of Rs.47 lakhs from the respondent bank on 04.04.2013 on the basis of equitable mortgage by deposit of title deeds. On 04.04.2013, the petitioner executed a memorandum of agreement of mortgage by deposit of title deeds in favour of the respondent, in respect of six plots of land belonged to the petitioner in all measuring an extent of 24,955 sq.ft. described in Annexure-II of the memorandum.



2.3. Though the petitioner serviced her account regularly till 2015, due to temporary financial crunch, there was some dues, however things were improved later. The petitioner approached the respondent bank and expressed her intention to settle the entire due and to redeem the mortgaged properties. However, the redemption of mortgage upon full payment of the debt was denied by the respondent bank. When the petitioner sent a representation dated 23.02.2016, to the respondent, the respondent by letter dated 29.02.2016, replied that the bank will be in a position to close the loan account and on such closure of account, no interest shall be payable. However, the respondent further stated that bank has right of general lien under Section 171 of the Indian Contracts Act to proceed against mortgaged properties of the petitioner for the outstanding due of loan account of one "M/s CMS Educational Trust", to which the petitioner is also liable as a guarantor.

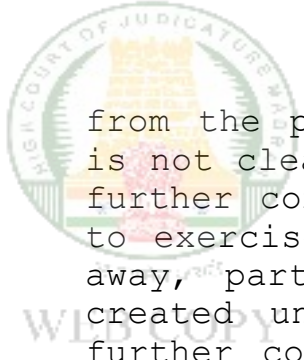
2.4. The loan transaction referred to in the letter dated 29.02.2016, is an independent loan transaction and though the petitioner stands as guarantor, the property of the petitioner was not secured and hence cannot be proceeded with. Though several properties are named in the title documents, only the listed properties measuring an extent of about 24,995 sq.ft worth about Rs.2.5 Crore was given as security for the loan borrowed by the petitioner. Hence, the documents cannot be retained by the respondent bank. The act of the respondent threatening to exercise general lien is in violation of the legal principles, reiterated in several judgments of the Honourable Supreme Court.

2.5. No law for time being in force, permits the bank to retain the title deeds alleging dues in respect of any other transaction, under section 171 of the Indian Contract Act. Bank is bound to receive the balance and issue a No Due Certificate in respect of the loan and return all the documents deposited by the petitioner.

2.6. The mortgage was created for a specific loan transaction. Upon repayment of said loan under no stretch of imagination, the bank would claim general lien and retain the documents. Title deeds deposited as security is not a form of security in respect of which Section 171 of the Contract Act can be applied.

3. It is on the basis of the reply given by the respondent on 29.02.2016, the petitioner has filed the above writ petition for issuing a direction to the respondent to return the documents without claiming any right of general lien upon receipt of the entire money due under the loan transaction.

4. The respondent bank filed a counter affidavit raising several contentions. It is contended by the respondent bank that the writ petition itself is not maintainable, since the amount due



from the petitioner as per the sanction letter dated 04.04.2013, is not cleared till date and the mortgage is not redeemed. It was further contended by the respondent bank that the statutory right to exercise lien is a valuable right and that it cannot be taken away, particularly when it is the statutory right of the bank created under Section 171 of the Indian Contract Act. It was further contended that as on 31.07.2013, a sum of Rs.44,39,703/- was due from the petitioner, out of the demand loan sanctioned in favour of the petitioner. The petitioner is also a guarantor in respect of the loan of one "M/s. CMS Educational Trust". Since, the amount due from the account of M/s. CMS Educational Trust is around 33 crores as on 06.01.2016, the bank has got a statutory right to retain the documents even if the petitioner's demand loan is cleared and fully discharged.

5.It is also the contention of the respondent bank that it has laid O.A.No.244 of 16, before the Debt Recovery Tribunal, Madurai, for recovery of a sum of Rs.32.85 crores, from CMS Educational Trust,. Thereafter, SARFAESI proceedings were also initiated against the petitioner. The legal contention was mainly by referring to Section 171 of Indian Contract Act. It is the argument of respondent that the right available to the mortgagee is an implied right and so long as the same is not expressively excluded, the petitioner cannot claim redemption ignoring the general lien.

6.Having regard to the stand taken by the respondent, it can be seen that there is no factual issues as the respondent has not denied the facts which led to the above Writ Petition. The only question is about the scope and object of Section 171 of Indian Contract Act. In other words, the short question arises for consideration in this writ petition is whether the bank can exercise the right of general lien in respect of the properties of the guarantor, who has also given her properties as security by way of deposit of title deeds in respect of and in connection with a demand loan obtained by the guarantor independently from the bank. Since the whole issue revolves on the scope and applicability of Section 171 of Indian Contract Act, same is extracted below:

"171. General lien of bankers, factors, wharfingers, attorneys and policy brokers

Bankers, factor, wharfingers, attorneys 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 which no lien is created by law, goods, bailed to them, unless there is an express contract to that effect.



7. The learned counsel appearing for the respondent bank, after referring to the documents, made the following submissions:

(a) The Writ Petition is not maintainable, as the issue purely involves on the contractual obligation on the basis of disputed facts.

(b) The Madurai Bench of Madras High Court has no jurisdiction to entertain this Writ Petition as the cause of action arose at Namakkal, the place which comes under the territorial jurisdiction of the Principal Seat.

(c) Since No Due Certificate is not issued by the Bank, the relationship of bank and customer has not come to an end, and that therefore, there cannot be impediment for the bank to exercise its general lien under Section 171 of Indian Contract Act. The Bank's lien cannot be ignored in this case, as there is no express contract at the time of creating equitable mortgage to exclude the application of Section 171 of Contract Act.

8. The learned counsel for the petitioner relied upon a judgment of a Division Bench of this Court in the case of State Bank of India & Anr. v. Mrs. Jayanthi & Ors. reported in AIR 2011 Madras 179, wherein it has been held that mortgage created by the guarantor for a different loan can be treated as a contract to contrary to disable the Bank to exercise the general lien as per Section 171 of Contract Act to retain the security for the loan for which the mortgagor was a guarantor. Paragraphs 9 to 16 of the judgment deals with the point and hence, they are extracted as follows:

"9. After having decided the above question in favour of the appellant Bank, we now move on to consider the more important question in this appeal, viz., as to whether the appellant Bank shall be entitled to retain the documents of title in respect of the property which has been inherited by the respondents claiming a right of general lien under section 171 of the Indian Contract Act. Before we delve into the factual and legal aspect, it would be necessary to look into section 171 of the Indian Contract Act, 1872 and for easy reference the same is extracted as herein below.

"171. General lien of bankers, factors, wharfingers, attorneys and policy brokers

Bankers, factor, wharfingers, attorneys 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 which balance, goods, bailed to them, unless there is an express contract to that effect.

10. The case of the appellant Bank is that they have a right to retain the title deeds of the property



delivered to them in the normal course of business transaction by exercising general lien under Section 171 of the Act and therefore, they are not bound to return the same till the liability in the other account where the mortgagor (husband of the 1st respondent herein, since deceased), was a guarantor, is discharged.

11.The learned Senior Counsel appearing for the appellant Bank mainly placed reliance on a decision of the Hon'ble Supreme Court in Syndicate Bank v. Vijaya Kumar and others, reported in 1992 (2) SCC 331.

12.As noticed above, Section 171 of the Act states that the bankers like the appellant Bank, in the absence of a contract to the contrary, retain as security for a general balance account, any goods bailed to them. Therefore, what is required to be seen in the instant case is whether there is any contract to the contrary, which prevents the bank from exercising their general lien and as to whether any goods have been bailed to them. It cannot be disputed that the property in question was not bailed to the appellant Bank by the deceased borrower at any point of time. Further, it is an undisputed fact that the property in question was offered by (late) N.P.S.Mahendran to cover his liability in respect of the loans, which he had borrowed in the accounts of M/s.Sanjay Bala Tea Plantation and M/s.Aarthi Bala Tea Plantation and his self acquired properties were mortgaged to secure this specific loan transactions. No document has been placed before us to show that the borrower had given any authorisation to the Bank to hold the documents of the mortgaged property, given to secure the loan transaction for M/s.Sanjay Bala Tea Plantation and M/s.Aarthi Bala Tea Plantation, for the purpose of any other loan availed in any other branch by M/s.Somerset Tea Plantation in which (late) N.P.S.Mahendran, stood as a guarantor. Thus, the issue boils down to the question as to whether there is any contract to the contrary, which prevents the appellant Bank from exercising its general lien under Section 171 of the Act.

13. In Chitty on Contracts, 29th Edition (2004) - Volume-II, Page 496 on Bankers' Lien, it is stated as follows:

"... The most frequent example of circumstances inconsistent with the general lien is in the case of a deposit expressed to cover an advance for a specified purpose. However, once the original purpose has been fulfilled by repayment of the specified advance, if a



customer knowingly permits the banker to retain the security, a general lien may ultimately be implied and its protection then claimed in respect of other advances"

14. In the instant case, the borrower, (late) N.P.S. Mahendran, has admittedly deposited the title deeds of the property to secure a loan transaction availed in respect of two Plantation Companies. This fact has not disputed by the appellant Bank. Therefore, we have no hesitation to hold that this contract / mortgage, had been created by the deceased borrower for a specific purpose and for a specific loan and the contract was self contained and the terms and conditions were binding upon both the borrower as well as the bank. In other words, the deposit of title deeds by which the mortgage was created by the deceased borrower was for a specific purpose to cover an advance for a specific loan. When such is the situation, the borrower having deposited the documents in order to secure a specific transaction, the bank cannot contend that they could hold the documents for a balance due in a different loan account where the said N.P.S. Mahendran is not a borrower. Further, the language of Section 171 of the Act, is explicit to the fact that the bankers are entitled to retain as a security for a 'general balance account'. Admittedly, it is not the case of the appellant Bank that the amount, which is now said to be due on account of the borrowings of M/s. Somerset Tea Plantation, is a general balance account of the deceased borrower N.P.S. Mahendran.

15. In the case of Syndicate Bank v. Vijaya Kumar, referred supra and relied on by the learned senior counsel for the appellant Bank, it is to be noted that the borrower therein issued a letter in favour of the bank stating that the bank is at liberty to adjust from the Fixed Deposit receipts without any reference to the loan and he agreed that the Fixed Deposit receipts shall remain in the bank so long as any amount on any account is due to the bank from them either singly or jointly or with others. Thus, the Hon'ble Supreme Court, while interpreting such a letter covering the transaction executed by the borrower therein, rendered a finding that the bank is entitled to general lien over the Fixed Deposit receipts given by the borrower therein.

16. As noticed above, the facts of the present case are couched differently. There was a specific contract / agreement between the deceased borrower and the bank, by which the borrower the borrower offered the property in question to secure only a particular transaction. Therefore, this agreement / mortgage has to be construed as a "Contract to the Contrary" and therefore, we have no



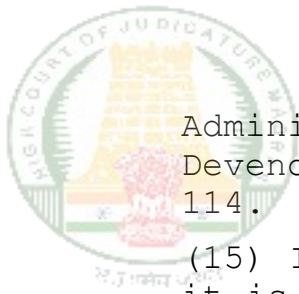
hesitation to hold that the bank cannot claim these documents by invoking the power of general lien under Section 171 of the Indian Contract Act, 1872."

9. The above judgment was also followed by a learned Single Judge of this Court in the case of Sri Ginning Industries Private Limited vs. Tamil Nadu Mercantile Bank, reported in 2015 (3) CTC 831. The learned Single Judge after referring to the judgment of the Division Bench and Section 171 of the Indian Contract Act, observed further that the title deeds which were offered as a security, cannot be deemed as goods bailed, so as to attract Section 171 of the Indian Contract Act.

10. The learned counsel for the petitioner then relied upon the judgment of learned Single Judge of Karnataka High Court, in the case of Mangalore Catholic Coopeative Bank Limited Vs. M.Sundaran Shetty, reported in ILR Karnataka 970, wherein similar issue was considered. It was observed that if the owner of the land give the bank title deeds, by way of equitable mortgage to secure, the then, present and future general balance of accounts, the bank, will have a general lien for such deeds in respect of future debt. However it was specifically held that if the title deeds are deposited for a specific loan and there was no intention on the part of the customer to create a private charge on the property, even for the subsequent loan, the bank cannot claim general lien on the title deed deposited with the bank. In this case also, the learned Single Judge of the Karnataka High Court, has observed that Section 171 of Indian Contract Act, is not applicable to the title deeds, which are deposited to secure the loan by stating that this form of security is not the one, which attracts Section 171 of the Indian Contract Act.

11. It has been held by a Division Bench of Punjab High Court in the case of Punjab National Bank Ltd., v. Aruna Mal Durga Das and Another reported in AIR 1960 Punjab 632, that in order to exercise the Banker's lien or right to set off, the demands must be mutual and between same parties. It was further held that the Bank has no lien on a partner's private account for an overdraft on partnership account or vice versa for want of reciprocity. Para 14 to 17 of the judgment are extracted below:

"(14) The rule of English law that the Bank has a lien or more appropriately, a right to set off against all monies of his customers in his hands has been accepted as the rule in India. According to this rule when monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set off or liquidate the debts: vide Llyods Bank Ltd. v.



Administrator General of Burma, AIR 1934 Rang 66 and Devendrakumar Lalchandji v. Gulabsingh, AIR 1946 Nag. 114.

(15) In order to create Banker's lien on several accounts it is necessary that they must belong to the payer in one and in the same capacity. Where the person has two accounts, one a trustee account and another private account at a Bank, deposits in the two accounts cannot be set off, the one against the other (see AIR 1934 Rang 66).

(16) Bankers have a right to combine one or more accounts of the same customer. But it cannot combine the account belonging to another or to himself alone with another account which is the joint account with another and third person, vide Radha Raman v. Chota Nagpur Banking Association Ltd., AIR 1944 Pat. 368 and Punjab National Bank Ltd. v. Satyapal Virmani, AIR 1956 Punj 118.

(17) Similarly, the Banks have no lien, on the deposit of a partner, on his separate account, for a balance due to the Bank from the firm. Therefore the banker is entitled to combine all accounts kept in the same right by the customer. It does not matter whether the accounts are current or deposit or whether they are in the same or different branches (Garnett v. Mckewan (1872), 8 Ex. 10). It is of essence to the validity of a banker's lien, that there should be a mutually of claim between the Bank and the depositor. In order that it should be permissible to set off one demand against another both must mutually exist between the same parties.

On this reasoning the joint and several accounts operated by two or more persons cannot be adjusted against the individual deposit of one of them. It is not open to the bank to claim the deposit of one partner made on his separate account in order to utilise other deposit against the debt due from the firm. In other words partnership deposits cannot be applied to the individual indebtedness of one of the partners (vide 7 A. M. Jur page 458). Courts in England do not allow a lien to the banker on the deposit of a partner on separate account for a balance due to the Bank from partnership firm (vide Watts v. Christie, 50 ER 928 (931). In Wolstenholm v. Sheffield Union Banking Co. Ltd. (1886) 54 LT 746 (748) Lindley L. J., said:

"Prima facie a separate debt cannot be set off against a joint debt either at law, in equity, or under the mutual credit clause of the Bankruptcy Act. There is no authority for the bankers having a general lien in such cases as the present."



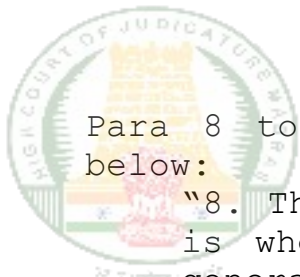
In the same case Lord Esher, M. R. observed:

"The bank said, 'we shall not account to Wing's trustees for the surplus, although the lease was his private property, because we have a right to keep it to satisfy the general account of his firm'. That was tantamount to saying 'we are now claiming your surplus to pay the debt of somebody else'. The claim in effect was that, in virtue of the bank's general lien, they were entitled to retain the property of one man to pay the debt of another. That claim was based, not upon agreement, but on a supposed custom that bankers should in such a case have a general line. There never was or could be a custom, however, by which you could take the property of one man to pay the debt of another. No such proposition was put forward in the cases cited, and no such proposition has ever been laid down in any of the cases respecting a banker's lien."

The proposition, therefore, admits of no doubt that a bank has no lien on a partner's private account for an overdraft on partnership account or vice versa for want of reciprocity.

(18) The Bank of course would be entitled to appropriate monies belonging to a firm constituted by a certain set of partners for payment of an overdraft to another firm provided that firm is constituted by the same set of partners, vide Firm Jaikishen Dass Jinda Ram v. Central Bank of India, (1959) 61 Pun LR 842: (AIR 1960 Punj 1). But this is not the case here there being no mutuality of obligation which is an essential element in the right to set-off."

12. A Division Bench of Orissa High Court in the case of Alekha Sahoo v. Puri Urban Co-operative Bank Ltd. and another, reported in AIR 2004 ORISSA 142 had occasion to deal with almost similar situation and held that the general lien of Bankers under Section 171 of Contract Act can be enforced on the security of principal debtor and not the guarantor. The petitioner before the High Court availed the gold loan of Rs.12,000/- each on 20.08.2001 from the respondent Bank on pledge of gold ornaments and cleared the gold loans on 22.07.2003. When the petitioner demanded return of gold ornaments, the respondent Bank stated that before availing the gold loans, the petitioner stood as guarantor for the cash credit loan advanced to a third party on 25.06.2001. Since the principal borrower and the guarantor are jointly and severally liable for the outstanding amount, the Bank took a stand that they have a general lien on the gold ornaments pledged by the petitioner under Section 171 of the Contract Act. It was held that the Bank can retain as security for general balance of an account of a customer, goods bailed to them by that customer and not goods bailed to them by the guarantor (some other customers).



Para 8 to 12 of the judgment are relevant and hence extracted below:

"8. The next question to be decided in this writ petition is whether the Bank could in exercise of its right of general lien under Section 171 of the Indian Contract Act retain the gold ornaments of the petitioner as additional security for the loans granted to Manmohan Sahoo, Proprietor M/s. Bimala Bhandar for whom the petitioner was a guarantor. Section 171 of the Indian Contract Act is quoted herein below :

"771. General lien of bankers, factors, wharfingers, attorneys and policy-brokers : Bankers, factors, wharfingers, attorneys 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."

The aforesaid Section states that 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. The said Section 171 does not extensively deal with the cases in which a banker can retain as security for a general balance of account any goods bailed to it. Section 171 of the Contract Act, however, is a recognition of the right of general lien of bankers under English Mercantile Law and therefore the decision of Court in England as to in which cases such lien can be exercised by bankers and in which cases such lien cannot be exercised by bankers will, equally apply to exercise of lien under Section 171 of the Contract Act.

9. In *Wolstenholm v. Sheffield Union Banking Co. Ltd.* (1886) 54 L.T. 746, the question that arose for decision was as to whether the Bank can retain a property belonging to a partner to satisfy the general account of his firm and Lord Esher, M. R. held that the Bank cannot exercise such lien over the private property of a partner for satisfying the general balance of account of his firm. To quote Lord Esher, M. R. :

"The bank said, 'we shall not account to Wing's trustees for the surplus, although the lease was his private property, because we have a right to keep it to satisfy the general account of his firm'. That was tantamount to saying, 'we are now claiming your surplus to pay the debt of somebody else.' The claim in effect was that, in virtue of the bank's general lien, they were entitled to retain the property of one man to pay the debt of another. That claim was based, not upon agreement, but on



a supposed custom that bankers should in such a case have a general lien. There never was or could be a custom, however, by which you could take the property of one man to pay the debt of another. No such proposition was put forward in the cases cited, and no such proposition has ever been laid down in any of the cases respecting a banker's lien."

In *Cuthbert v. Roberts, Lubbock & Co*, (1909) 2 Ch. 226, C.A., the bankers applied to claim the plaintiffs' shares or the proceeds thereof to the liquidation of the debit balance of Chancellor's Current Account and Joyce J. held that the bankers were not entitled to do so. Joyce J. in particular held :

"... It is true that the bankers have a general lien on the securities of any customer deposited by him with them otherwise than for a particular purpose, to secure any sum in which the customer may be indebted to the bankers. This, however, is a lien upon the securities of the customer and not upon those of other persons, and the general lien of a banker does not attach even upon money or securities of the customer known to the bankers to be affected by a trust. ..."

This view taken by Joyce J. that the lien of the Bank is upon the security of the customers and not upon those of other persons was upheld by Buckley L.J. and Kennedy L.J. and the appeal against the decision of Joyce J. was dismissed. It is thus clear from the aforesaid decision of the Courts of England that under the English Mercantile Law relating to Banker's General Lien the Bank can retain as security for general balance of an account of a customer, goods bailed to them by that customer and not goods bailed to them by some other customer.

10. The contention of Mr. Kanungo is that the petitioner is a guarantor for the loan account of M/s. Bimala Bhandar and is therefore liable for the outstanding balance of M/s. Bimala Bhandar by virtue of the provisions of Section 128 of the Contract Act which provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. But there is no provision in the Contract Act to the effect that the properties of the surety can be retained by the creditor as security for the debts due from the principal debtor to the creditor. On the other hand, Courts have taken a view that Bank in exercise of its general lien cannot retain the private property of a partner to satisfy the outstanding balance in the general account of his firm notwithstanding the settled position of law that the partners are jointly and severally liable for the debts of a firm of which they



are the partners. The aforesaid decision in Wolstenholm v. Sheffield Union Banking Co. Ltd. (supra) has been followed by a Division Bench of the Punjab High Court in Punjab National Bank Ltd. v. Arura Mal Durga Das and Anr., AIR 1960 Punjab 632, for coming to the conclusion that :

"a bank has no lien on a partner's private account for an overdraft on partnership account or vice versa for want of reciprocity."

Similarly, in Gurbax Rai and Ors. v. Punjab National Bank (supra) cited by Mr. Patnaik, learned counsel for the petitioner, the Supreme Court has held that goods which are offered by the firm as security for the cash credit facility could not be utilized for adjusting the liability of the partners to the Bank. The relevant portion of the said judgment of the Supreme Court in Gurbax Rai and Ors. v. Punjab National Bank (supra) is quoted herein below :

"The question is : Is it open to the Bank which held pledged goods against the cash credit facility to adjust the amount recovered from the pledged goods for wiping out separate dues of the individual partners ? The goods were of the firm. They were not the goods of the partners. The goods were not offered as security for the individual debt of the partners. The goods were pledged against cash credit facility of the firm. Therefore, when the amount on account of the destruction of the pledged goods of the firm was recovered from the insurer, it must be given credit only in the cash credit account and to that extent the liability in the cash credit account would be reduced."

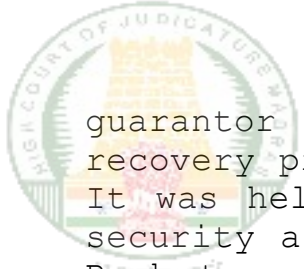
11. In Syndicate Bank v. Vijay Kumar and Ors. (supra) cited by Mr. Kanungo, the judgment-debtor who owned two Fixed Deposits executed two letters on 17.9.1980 creating a lien in favour of the Bank over the two Fixed Deposit Receipts and on these facts the Supreme Court held that the two letters executed by the judgment-debtor on 17.9.1980 created a lien in favour of the Bank over the two Fixed Deposit Receipts, this is thus a case where the owner of the Fixed Deposit Receipts had expressly agreed that the Bank would have lien over the Fixed Deposit Receipts. In this case, the Supreme Court has not laid down any law that the Bank can exercise its general lien under Section 171 of the Contract Act over the properties of the surety for the liabilities of the principal debtor to the Bank, In S. Vasupataiah v. The Vysya Bank, Kudagenahalli Branch (supra) and in City Union Bank Ltd. v. C. Thangarajan (supra) cited by Mr. Kanungo, the learned single Judges of the Karnataka High Court and the



Madras High Court respectively have referred to the aforesaid decision of the Supreme Court in Syndicate Bank v. Vijay Kumar and Ors. (supra) and have held that the Bank can exercise lien over the properties of a guarantor or a co-promisor for recovery of the outstanding dues of the principal debtor or the promisor to the Bank. But as we have discussed above, Courts in England and in India have held that the Bank can exercise general lien over the properties of a customer for the general balance in such customer's account and not for the general balance of some other customer's account. Unless therefore a customer has expressly agreed that his properties can be retained as security for the outstanding balance in the account of some other customer, a Bank cannot exercise lien over the properties of such customer under Section 171 of the Contract Act. In the guarantee agreement executed by the petitioner for the cash credit account of M/s. Bimala Bhandar, a copy of which has been annexed to the counter-affidavit as Annexure-R/2, there is no such provision that the Bank can retain the properties of the petitioner as security for the outstanding balance in the loan account of M/s. Bimala Bhandar. In fact, the Bank has also not relied on any such provision in the guarantee agreement and instead has relied on the bye-laws of the Bank and the general lien of the Bank as provided in Section 171 of the Contract Act. As we have seen, the Bank has no such right under the bye-laws or Section 171 of the Contract Act to retain the gold ornaments of the petitioner as security for the outstanding balance in the loan account of M/s. Bimala Bhandar.

12. Since we have found that the Bank has no right whatsoever either under its bye-laws or under Section 171 of the Contract Act to retain the gold ornaments of the petitioner after the petitioner had cleared the outstanding balance in the two gold loan accounts for which the gold ornaments were pledged as security, the retention of the gold ornaments of the petitioner by the Bank was without any authority of law and is arbitrary and the impugned notice dated 30.7.2003 is liable to be quashed."

13. A Division Bench of Karnataka High Court, in the case of Vijaya Bank and another v. Naveen Mechanised Construction (P) Ltd., and others reported in AIR 2004 KARNATAKA 199, has dealt with a situation where some securities were furnished by the petitioner's company for the purpose of issuing Bank guarantees and after all the bank guarantees were returned and cancelled due to completion of work by petitioner's company, the securities were retained by the Bank as the Director of the company was also the



guarantor for a transaction with another company against which recovery proceedings were initiated before Debt Recovery Tribunal. It was held that Bank was not at all justified in retaining the security as Section 171 of the Contract Act would only enable the Bank to retain the security for payment of debt borrowed by the same person. Para 12 and 13 of the judgment are relevant and extracted as follows:

"12. It is clear from the above said provision that the above said clause only relates to change in the constitution of the borrower or the Bank subsequent to the agreement, and would not absolve the liability of the parties but would bind the same despite the change in the constitution of the borrower or the Bank and does not specifically authorise the appellant-Bank to retain the security given for issuing Bank guarantee to be utilised for recovery of debt of any other Company or individual and wherefore the above said clause does not confer any specific lien on the appellant-Bank. As stated, the exercise of general lien under Section 171 of the Contract Act cannot also be exercised by the Bank in the present case as it is well-settled in view of the decision relied upon by the learned Counsel appearing for respondents 1 and 2 that lien 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 the present case, it is not disputed that the securities mentioned in First Schedule to the writ petition were furnished for the purpose of enabling the appellant-Bank to issue Bank guarantees and all the Bank guarantees have been returned and cancelled and the question is as to whether the Bank is justified in exercising its lien in refusing the return of the securities in exercise of lien over the said securities towards the discharge of debt of another Company MFEL on the ground that it has got banker's lien and is also authorised by the agreement.

13. The decision relied upon by the learned Counsel appearing for the appellant-Bank in Vijay Kumar case, supra, would not be helpful to him in the present case as in the said case the letters were executed in favour of the Bank specifically to enable the Bank to retain the securities with the Bank so long as any amount on any account is due to the Bank from the borrower. In the present case, it is not the case of the appellant-Bank that the petitioners have subsequently borrowed any amount and that the security is withheld for any amount due from the petitioners and wherefore in the absence of any specific authorisation or Hen conferred upon the appellant-Bank to retain the security towards the discharge of any debt in respect of other Companies, the



Bank is not at all justified in retaining the security as Section 171 of the Contract Act would only enable the Bank to retain the security for repayment of debt borrowed by the same person. In the present case as no amount is due to be paid by the petitioners, the contention that the Director of the first petitioner-Company as also the guarantor for the transaction is also a Director in MFEL against which recovery proceeding has been initiated in the Debt Recovery Tribunal. That would not be a justifiable ground to withhold securities in the absence of any express clause in the contract entered into by the petitioners and the Bank."

14. A learned Single Judge of Gujarat High Court in the case of Gaurangbhai Bipinbhai Pandya v. Bank of Baroda and others reported in AIR 2008 GUJARAT 141 has held as follows:

"22. If Section 35 of the Securitization Act is read with Section 37 of the Securitization Act, there cannot be any second view than that the Securitization Act, has the overriding effect over any other law for the time-being enforced, if anything is inconsistent with the Securitization Act. Therefore, if any rights are available other than under the Securitization Act, then they are saved. If the right arise under the Securitization Act itself, the Securitization Act, is to be given precedence, and such rights would prevail over the other rights. When it's a matter for enforcement of the rights under the Securitization Act, it would equally be a matter for discharging of the obligation under the Securitization Act, and the reason being that rights of the secured creditors under the Securitization Act, are not the rights in absolute, but by way of in-built mechanism under the Act, it also creates an obligation as conceived and expressly provided under the Act. In view of the observations and discussions, the right is conferred upon respondent-Bank, as the secured creditor to realise money by disposal of the property, over which the security interest has created, and obligation is also by virtues of later part of Section 13(7) to return the residue of the amount to the person concerned whose property is sold. Therefore, if the matter is covered for creation of the right and of obligation under the Securitization Act, the same would prevail over any other rights created under any other law for the time-being enforced.

23. Hence, so-called right of lien of the Bank under the Contract Act, for different loan transaction all together, cannot be read to dilute overriding effect of Section 35 of the Securitization Act, as provided under Section 35 of the Securitization Act. Therefore, on reconciliation provisions of Section 35 read with Section



37 of the Securitization Act, read with the observations made by this Court for obligation created with the secured creditor to return the money under Section 13(7) of the Act, the contention of learned Counsel for the respondent Bank cannot be accepted for maintaining right of lien under the Contract Act, as against the provisions for obligation created under the Securitization Act."

15. Petitioner in the case above referred to has obtained a mortgage loan. When the respondent Bank initiated proceedings under SARFAESI Act, the entire mortgage loan was settled by sale of the property to the buyer introduced by the petitioner leaving also a balance of more than Rs.16 Lakhs. When the petitioner sought for return of the balance, it was not considered on account of the fact that the petitioner as a guarantor of another loan to a third party is also liable to repay the amount of around Rs.5 Crores and recovery proceedings had been initiated before the Debt Recovery Tribunal. In view of a specific clause in the deed of guarantee, the Bank claimed that it is entitled to enforce the right of lien over the surplus amount lying to the credit of petitioner as aforesaid. The High Court directed the Bank to return the surplus amount and gave liberty to the petitioner to withdraw the amount which was directed to be deposited in Court.

16. In the case of Syndicate Bank v. Vijay Kumar and others reported in AIR 1992 SC 1066, the Honourable Supreme Court had occasion to consider the general lien of Bank to retain the fixed Deposit Receipts deposited with the Bank as security for the Bank guarantee. In this case, the Bank was given authority to retain the FDRs so long as any amount on any account is due from the person to whom the Bank guarantee was given and it was held that the Bank had a right to set off in respect of the FDRs as there was some amount due to the Bank in respect of other transactions between the Bank and the customer who had made the fixed deposits and given the FDRs as security for a Bank guarantee and for any amount on any account which due from the customer. This case has no bearing in this present case. The Banker's lien as explained in Brandao v. Barnett (1846) 12 CL & F in 787, in the following lines has been quoted with approval.

"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."

17. The Hon'ble Supreme Court had no occasion to deal with the issue relating to mortgage by deposit of title deeds and the right of general lien to retain the title deeds after the discharge of mortgage loan. The Honourable Supreme Court has further considered the scope of Banker's lien in the following passages:



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

(emphasis supplied) 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 lock 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. Barnett, (1846)12 Cl. and Fin.787 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.

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

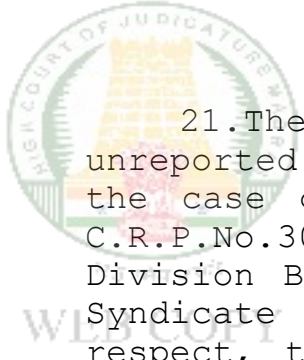


banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer 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".

18. The learned counsel appearing for the respondent bank relied upon a judgment of this Court in the case of Kunhan Mayan and others v. Vijay Kumar reported in (1986) I.L.R. (19) Madras 234. It is observed in the above judgment that Bankers have a general lien on things bailed with them unless there is a contract to the contrary. The question arose was whether the defendant bank has a lien on the jewels for the debts of the first plaintiff other than those for which they were pledged. The term "in the absence of a contract to the contrary" in Section 171 of Contract Act was considered and it was held that the burden of proving a contract to the contrary is on the plaintiff / debtor.

19. The learned counsel appearing for respondent Bank then relied upon another judgment of Andhra Pradesh High Court by a learned Single Judge in the case of K.Sita v. Corporation Bank in W.P.No.20178 of 1993, dated 09.04.1999. In this case, notice was issued to bank for return of Jewels pledged for the first loan. The Bank replied that the jewels can be returned only when second loan also is discharged. When Writ Petition was filed for release of gold ornaments, the Court dismissed on the ground that Banker's lien under Section 171 had overriding effect. This judgment has no application to the present case where the form of security is different.

20. The learned counsel for the Bank then relied upon another judgment of Andhra Pradesh High Court dated 22.11.2007 in W.P.No.16399 of 2006 in the case of Mohan Enterprises v. Andhra Bank, wherein it was held that the Bank has a general lien over the two FDRs which were furnished as security in respect of a different account and the Bank refused to return the FDRs despite settlement of the account in which the FDRs were furnished as security. The judgment of Hon'ble Supreme Court in Syndicate Bank v. Vijay Kumar reported in AIR 1992 SC 1066 and other judgments were followed ignoring the fact that the precedents relied upon are only cases where there was pledge of articles to hold that the Bank has got a right to retain in exercise of its general lien.



21. The learned counsel for respondent Bank also relied upon an unreported judgment of a Division Bench judgment of this Court in the case of State Bank of India v. Chokkalingam and others in C.R.P.No.3019 of 2007. In somewhat similar situation, the Hon'ble Division Bench followed the judgment of Hon'ble Supreme Court in Syndicate Bank case reported in AIR 1992 SC 1066. With great respect, the facts of the case before Hon'ble Supreme Court was not noticed by the Division Bench. The facts of the case before the Hon'ble Division Bench is stated in paragraph 2 of the judgment and the same is extracted as follows:

"2. The case of the petitioner-Bank is that respondents 1 to 3, who are the partners of the firm, M/s.Sree Vari Corporation, initially obtained crop loan on 14th Dec., 1996. Subsequently, the partnership firm, through respondents 1 to 3, on 23rd Jan., 1998, also obtained loan to the tune of Rs.70 lakhs, Rs.20 lakhs towards cash credit and Rs.50 lakhs towards term loan. While taking such loan, properties at survey No.678 and 679 of Thekkampatti village were mortgaged. The original documents were deposited with the bank. Pursuant to one time settlement in respect of loan amount of Rs.70 lakhs, the borrower, partnership firm, paid a sum of Rs.74,34,485/= in full and final settlement of the loan account. Thereafter, respondents 1 to 3, who are the guarantors, requested the bank to return the documents of title in their favour. The bank refused to return the documents on the ground that the crop loan taken on 14th Dec., 1996, which was renewed twice, on 23rd Oct., 1997 and 5th Feb., 1997, have not been returned by respondents 1 to 3. DRT, Coimbatore, after hearing the parties, by its order dated 17th Jan., 2007, directed the bank to return those original mortgaged documents, which was affirmed by DRAT by impugned order dated 10th Sept., 2007."

22. It was held that the bank has general lien over the securities and other instruments deposited by the respondents 1 to 3 in the ordinary course of banking. In our view, the Hon'ble Judges have not independently considered the legal implication of Section 60 of Transfer of Property Act and the scope of Section 171 and its applicability to securities by deposit of title deeds, with reference to specific legal submissions raised before us and other judgments referred to by us in this judgment.

23. The learned counsel for the Bank further relied upon another unreported judgment of a Division Bench of this Court dated 03.02.2009 in O.S.A.Nos.343 to 345, 390 to 392 of 2007 and 130 to 132 of 2008 in the case of the Committee representing R.B.F. Nidhi Ltd and others v. Vipanchi Investments Pvt. Ltd. Before the Division Bench the main issue was whether the



appellants in some of the appeals who were directed to make payments to discharge the loan for return of title deeds, could seek for return of title deeds from the mortgagee namely M/s. R.B.F. Nidhi Limited solely on the ground that the title deeds had been deposited by the authorised persons of the company, contrary to the power of attorney given to him by way of resolutions. It was contended that by resolutions, the authorisation was only to furnish the title deeds as collateral security in favour of M/s.R.B.F. Nidhi Limited in connection with raising of funds in favour of the company and not for individual loan or loans. Further, it was submitted that by the resolutions the individual was authorised to raise funds in future and not to give the title deeds for the existing loans availed by the individual. This contention was rejected by holding that the individual had availed the loans only in the capacity of Chairman of the company for the benefit of company and that the loans cannot be considered to be the personal loan of the individual. It was further noticed that the title deeds were given on 15.04.1998, when there were ten loans outstanding and that it should be presumed that the deposit of title deeds was in respect of all the loans. Finally, the Hon'ble Division Bench taking into consideration the interest of depositors of M/s.R.B.F. Nidhi Ltd., opined that it would be in the interest of not only the company which is facing liquidation, but also the investors to allow the appellants to take back the title deeds on payment of the sum as directed by the learned Single Judge. However, it was thereafter there was some discussion in the judgment about the contention of appellant that the security by deposit of title deed will not cover few other loans. Following the judgment of Hon'ble Supreme Court in Syndicate Bank case (AIR 1992 SC 1066) it was observed as follows:

"On the given facts of the case, we are of the considered opinion that M/s.R.B.F. Nidhi Limited is entitled to invoke the provisions of Section 171 relating to general lien and the claim of the appellant companies seeking for redemption in terms of Section 91 of the Transfer of Property Act must yield to such right and consequently the right to claim redemption cannot be accepted."

24. The Hon'ble Division Bench with respect has not considered the very important legal issue with reference to the nature of security, the Bank holds by deposit of title deeds. Having regard to the fact that specific legal issue is considered in the later judgment of Hon'ble Division Bench in the case of State Bank of India case reported in 2011 (2) CTC 465 we are not able to follow this judgment.

25. The learned counsel for the Bank relied upon yet another judgment of a learned Single Judge of this Court dated 16.03.2012 in W.P.No.19096 of 2011 in the case of C.Lalitha Raj vs. The Assistant General Manager, State Bank of India wherein the



mother of a borrower was holding an account with the Bank. The loan advanced to the borrower was also guaranteed by the mother as a guarantor. When the son committed default, the amount lying in the account of mother / guarantor was attached by the Bank in exercise of its general lien. The mother filed the Writ Petition and the same was dismissed by placing reliance on the judgment of Hon'ble Supreme Court in Syndicate Bank case. Strangely the judgment of Hon'ble Division Bench in State Bank of India vs. Jayanthi was relied upon though the said judgment has no application and the same was ignored by referring to the fact that the operation of the judgment was stayed by Hon'ble Supreme Court. This judgment is not on the point that arise for consideration in this case.

26. The learned counsel for Bank also relied upon another unreported judgment of a learned Single Judge of Calcutta High dated 14.10.2015 in W.P.No.2111 (W) of 2014 in the case of Nayabuddin vs. Union of India and others wherein equitable mortgage was created jointly by two brothers in connection with a house loan. One brother availed cash credit facility through a firm. The other brother filed a writ petition seeking a direction to the Bank to allow him to repay the entire home loan and to release the title deeds of the flat mortgaged in respect of such loan upon repayment. It was held that Bank has banker's lien over a security which has come in its possession in its usual course of business, namely, the title deeds of the immovable property pledged as security in respect of the home loan account. This judgment is also one following the judgment of Hon'ble Supreme Court in Syndicate bank case reported in AIR 1992 SC 1066. Similar view was also expressed by a learned Judge of Delhi High Court in a judgment dated 01.02.2016 in W.P.(C) 886 of 2014 in the case of Rajkumar and others v. Syndicate Bank placing reliance on the judgment of Hon'ble Supreme Court above referred to.

27. The learned counsel appearing for the Bank finally relied upon the judgment of Full Bench of this Court dated 04.07.2012 in W.P.No.5709 of 2011 in the case of B.Stalin vs. The Registrar, Supreme Court of India, on the maintainability of Writ Petition. The amended prayer in the Writ Petition is to issue a Writ of Mandamus directing the respondents 2 and 3 not to pass, number or list Writ Petitions, Writ Appeals etc. even if the respondents are from Delhi or Chennai falling within the Madurai Bench territorial jurisdiction / part of falling within Madurai jurisdiction / cause of action and when the petitioner's address is within Madurai Bench jurisdiction irrespective of the respondent's address. The Full Bench has referred to a Division Bench of this Court in E.Mary Oliviya vs. E.Jsohna Molton, reported in 2008 (7) MLJ 1012 wherein it has been held in paragraph 42 as follows:

<https://hcservices.ecourts.gov.in/cases> In the above discussion and analysis of various provisions and decisions of several Courts, including the Supreme Court, our conclusions are as follows:



(1) Establishment of a Permanent Bench has the effect of bifurcation of the State into two for the purpose of territorial jurisdiction of the Madras High Court between the Principal Bench at Chennai and the Permanent Bench at Madurai.

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(2) The District Courts and all other Courts inferior to that of the District Courts are subordinate to Madras High Court irrespective of its place of sitting.

(3) Appeal or Revision can be filed before the Principal Bench at Chennai or Permanent Bench at Madurai depending upon the situs of the Court against whose decision the Appeal or Revision is sought to be filed. An appeal or revision against the decision of a Court situate within the jurisdiction of the Principal Bench at Chennai has to be filed before the said, Principal Branch whereas the appeals and revisions arising from the orders of Courts coining within the districts earmarked for the permanent Bench at Madurai have to be filed at Madurai.

(4) Writ petitions can be filed before the Principal Bench at Madras or Permanent Bench at Madurai depending upon the place where the cause of action has arisen. If the cause of action has arisen wholly within the jurisdiction of the Principal Bench or the Permanent Bench, obviously such writ petition can be filed only at the seat of the Principal Bench or of the Permanent Bench as the case may be. On the other hand, if the cause of action arises either wholly or in part within the areas allotted to the Principal Bench at Chennai and the Permanent Bench at Madurai, the writ petition can be filed at any of the places.

(5) A proceeding for transfer under Sections 22 to 24 of the C.P.C., partakes the character of an original proceeding and can be filed before the Principal Bench or the Permanent Bench depending upon the "cause of action" or "the reason" for filing such transfer petition. In order to avoid any possible confusion in such matter relating to filing of transfer position, we make it clear that where a person seeks transfer of a case from a place to another place coming within the jurisdiction of one Bench, such transfer position has to be filed before the very same Bench. On the other hand, where



transfer is sought from a Court coming within the jurisdiction of the other Bench, such transfer petition can be filed before either Bench, obviously depending upon the cause of action for such transfer petition and the convenience of the petitioner.

(6) The Honourable the Chief Justice has discretion to direct that any writ filed or pending before the Principal Bench or the Permanent Bench can be taken up for disposal before the Permanent Bench or the Principal Bench, as the case may be."

The Full Bench has relied upon and approved the stand taken by Registry in Para 24 of the judgment, which is extracted below:

"24. Even otherwise as averred in the counter affidavit filed by the Registry, cases were examined by the Appeal Examiners. In case of any doubt, the matters are brought to the notice of the concerned Judge holding a particular portfolio or the Roster to decide the question of maintainability either in the Chamber or in the open court. If in any particular case, if the court had upheld the maintainability of the writ petition or entertained the case, then the jurisdictional issue could be raised only before the necessary appellate forum by the concerned aggrieved party as held by the Supreme Court in Rajasthan High Court Advocates' Association's case (cited supra). The aggrieved party in such a case is only the litigant before the court. Issue relating to want of jurisdiction can be raised only before the next appellate forum, (i.e., either before the division bench or before the Supreme Court as the case may be). Such orders cannot be attacked collaterally that too by third parties to the litigation."

Finally, the Writ Petition was dismissed and it is relevant to refer to para 31:

"31. Since the Chief Justice is the Master of Rolls and the jurisdiction of each High Court is well defined by the Presidential order and by a catena of decisions of the Supreme Court as well as this Court defining the scope of the Presidential order as well as the territorial jurisdiction of the High Court under Article 226 and also the territorial divisions between the two High Courts having benches in the same State at different places and also the question of cause of action both in civil and criminal cases have been well settled, a direction sought for by the petitioner cannot be countenanced by this Court. The issues raised before



this Full Bench are answered accordingly. The writ petition will stand dismissed. Miscellaneous petition will stand closed. No costs."

28. In the judgment of Division Bench of this Court, reported in 2011 (2) CTC 465, in the case of State of Bank of India vs. Jayanthi and others this Court has held that the mortgage deed has to be considered as "a contract to the contrary", referred to in Section 171 of Contract Act and that therefore the bank cannot claim the documents of title deed deposited to create equitable mortgage, invoking power of general lien under Section 171 of Indian Contract Act.

29. In this connection, it is also relevant to refer to Sections 58, 59 and 60 of Transfer of Property Act, dealing with the transaction relating to different forms of mortgage. The mortgage is defined as a transfer of interest, in specific immovable property for the purpose of securing the payment of money advanced by way of loan, existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. A person creates an equitable mortgage by deposit of title deeds, if he delivers to a creditor or his agent documents of title deeds in relation to immovable property, with intention to create a security thereon. Section 60 of the Transfer of Property Act, reads as follows:

60. Right of mortgagor to redeem

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

30. Section 60 of Transfer of Property Act, speaks about specific rights of mortgagor. It is clear that every mortgagor is entitled to collect the mortgage deeds and all other documents relating to the mortgaged properties, which are in the possession or power of mortgagee. This right of mortgagor is certainly a legal enforceable right. The mortgagee is under an obligation to

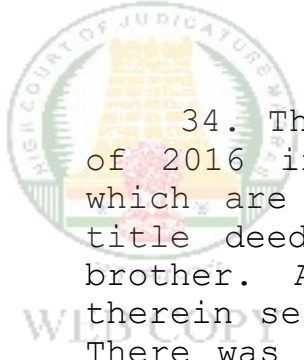


return the title deeds upon payment of the entire money due. This legal obligation gives an enforceable right in favour of the mortgagor in connection with the mortgage. This legal obligation of the mortgagee to return the title deed to the mortgagor upon discharge of mortgage loan for which the title deeds were secured, can be certainly treated as an implied contract contrary to Section 171 of the Indian Contract Act.

31. Hence this Court is of the firm view that the respondent bank cannot exercise right of lien to secure any other liabilities of the mortgagor by retaining the documents of the mortgagor or guarantor, which are deposited with an intention to secure a particular loan transaction. Lien is primarily considered as a right to retain security. It is doubtful, whether in exercise of such right to retain the title deeds the mortgagee can bring the property for sale for recovery of some debt which is due from the mortgagor, in connection with a different transaction, which is not covered by the mortgage.

32. Any agreement conferring a right upon anyone to bring the property which is offered as a security for a loan transaction, is considered to be a transaction creating a right in immovable property and such agreement namely mortgage can be executed by way of a registered instrument. The right of lien, under Section 171 of the Indian Contract Act, will be contrary to the provisions of Transfer of Properties Act, if Section 171 is also made applicable to the title deeds, which are offered as a security in relation to a particular transaction. Considering the scope of Section 60 of the Transfer of Property Act, and the scope and object of Section 171 of the Indian Contract Act, this Court is of the firm view that the respondent Bank cannot retain the title deeds or proceed with the properties which were offered as security in relation to an independent loan transaction, even after the borrower discharged the entire liability of borrower in connection with the loan which is secured by deposit of title deeds.

33. In the present case the bank is not willing to release the title deeds which were deposited in relation to the petitioner's demand loan, even if the petitioner discharge the entire loan and wipe out the mortgage debt. It is true that the amount is not settled by the petitioner to get back the documents as on today. However the petitioner's conduct in approaching this Court even before discharge of loan cannot be faulted, in view of the genuine grievance expressed by the petitioner in the wake of specific stand taken by the respondent bank that they will not return the documents and instead claimed that the stay are entitled to proceed against the security while initiating recovery proceedings against the principal borrower in respect of a different loan transaction in which the petitioner stood as guarantor.



34. This Writ Petition was moved along with W.P.(MD) No.12612 of 2016 in respect of other properties of the Writ Petitioner which are also the subject matter of a mortgage by deposit of title deeds in connection with a loan obtained by petitioner's brother. After entertaining the Writ Petition, the petitioner therein settled the entire dues pursuant to orders of this Court. There was no serious objection for entertaining the Writ Petition and on receipt of entire money, the Bank has filed a statement that they will not proceed further with the notice issued under Section 13(2) of Securitisation Act. The pendency of O.A.No.244 of 2016 filed by the Bank for recovery of money against M/s.CMS Educational Trust, before the Debt Recovery Tribunal, Madurai is also stated to be a fact as part of cause of action to file the Writ Petition before this Bench. In O.A.No.244 of 2016, the petitioner is also a party. Hence this Court relies upon Para 42 (4) of the judgment reported in 2008 (7) MLJ 1012 in the case of E.Mary Oliviya v. E.Jsohua Milton and para 24 in the judgment of Full Bench in W.P.5709 of 2011 dated 04.07.2012, in the case of B.Stalin's case to hold that the Writ Petition is maintainable and taking note of the fact that substantial amount has been deposited pursuant to the orders passed by this Court in the connected Writ Petition, this Court is not inclined to dismiss the Writ Petition for want of territorial jurisdiction.

35. It is to be noted that the bank has filed O.A.No.244 of 2016 before the Debts Recovery Tribunal, Madurai as against M/s.CMS Educational Trust. Petitioner is also impleaded as a party as a guarantor. Even in the said proceedings the respondent bank has not included the properties which are subject matter of the writ petition.

36.The bank never claimed any right of lien in respect of the properties of the petitioner which are given as security for the demand loan obtained by the petitioner. The petitioner is a party and has been impleaded only in her capacity as guarantor and not as a mortgagor of the properties.

37.In view of the findings as arrived at by this Court, the writ petition filed by the petitioner stands allowed and the respondent bank is directed to return the documents in respect of the properties belonging to the petitioner which were given as security by way of deposit of title deeds in respect of the transaction covered by sanctioning letter dated 4.4.2013 upon payment of the entire amount due. No costs.

Sd/-
Assistant Registrar



To

Bank of Baroda,
Represented by its Chief Manager,
Namakkal Branch,
Namakkal.

W.P. (MD) No.12613 of 2016

09.08.2017

cmr

JM/SV MMS/SAR 2/12.09.2017/27P/2C