

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

+ **RSA No. 240/2017**

% **10th October, 2017**

VIJAYA BANK Appellant

Through: Mr. Vaibhav Dang, Advocate.

versus

GAMBRO NEXIM (I) MEDICALS PVT. LTD. & ORS.

..... Respondents

Through: Ms. Anaunya Bhattacharya,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

Caveat No. 868/2017

Counsel for the caveator enters appearance.

Caveat stands discharged.

C.M. Appl. No. 36280/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

C.M. Appl. No. 36281/2017 (for delay)

This is an application seeking condonation of delay of 12 days
in filing the appeal.

For the reasons stated in the application the same is allowed and the delay of 12 days in filing the appeal is condoned.

C.M. stands disposed of.

RSA No. 240/2017 and C.M. Appl. No. 36279/2017 (for stay)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff/Vijaya Bank impugning the concurrent judgments of the courts below; of the trial court dated 21.3.2006 and the first appellate court dated 15.5.2017; by which the courts below have allowed the application under Section 144 CPC filed by the respondents/defendants. I may note that a decision on an application under Section 144 CPC is a decree as per the definition of decree contained in Section 2(2) CPC and hence a regular first appeal under Section 96 CPC was filed before the first appellate court (which has been decided by the impugned judgment dated 15.5.2017) and also this RSA under Section 100 CPC.

2. The admitted facts are that the appellant/plaintiff/Bank obtained in its favour an *ex-parte* money decree of Rs.1,18,059/- with costs and interest at the rate of 24% per annum against the respondents/defendants on 10.5.1994 from the court of the concerned

Additional District Judge at Delhi. After having obtained the judgment and decree dated 10.5.1994 appellant/plaintiff initiated execution proceedings. In terms of this execution petition for claiming the decretal amount of Rs.1,18,059/- the appellant/plaintiff adjusted two Fixed Deposit Receipts (FDRs) bearing nos. 190 and 191 of 1991 for amounts of Rs.49,158/- and Rs.49,148/- out of the decretal amount claimed of Rs.1,18,059. After further claiming certain amounts claimed towards bank guarantee commission, in the execution petition of the judgment and decree dated 10.5.1994 the appellant/plaintiff bank claimed a balance amount of Rs. 20,543/- along with interest at 24% per annum. Effectively, therefore it was only after adjusting the amount of the two FDRs that the balance decretal amount was claimed by means of Execution Petition No. 38/1996 which was filed on 31.5.1996.

3. The aforesaid two FDR nos. 190 and 191 of 1991 were admittedly given by the respondents/defendants as margin money for the appellant/plaintiff bank to issue bank guarantees in favour of the Sales Tax Department. The FDRs therefore were available with the appellant/plaintiff bank not as a general lien but as a specific lien i.e FDRs were specifically charged for amounts which the

appellant/plaintiff bank may have paid to the Sales Tax Department in case the Sales Tax Department would have sought invocation and encashment of the bank guarantees issued by the appellant/plaintiff bank in favour of the Sales Tax Department.

4. After the *ex-parte* judgment and decree dated 10.5.1994 was set aside on an application under Order IX Rule 13 CPC in terms of the order dated 4.7.2003, the subject application under Section 144 CPC came to be filed by the respondents/defendants seeking payments of the amount of the two FDRs along with same rate of interest of 24% per annum as was claimed by the appellant/plaintiff bank. It is this application which has been allowed by the concurrent judgments of the courts below and hence the appellant/plaintiff bank is in this second appeal.

5. Under Section 171 of the Indian Contract Act, 1872 a bank has a general lien with respect to monies available in its hands for the dues payable by the person whose monies are with the bank. This general lien under Section 171 of the Indian Contract Act is however subject to the contract to the contrary and meaning thereby that there may not be general lien of bank on certain deposits but the

general may only be a specific lien. Section 171 of the Indian Contract Act reads as under:-

“171. 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.”

6. Way back in the year 1981 a learned single Judge of this Court in the case of *Vijay Kumar Vs. Jullundur Body Builders and Others*, AIR 1981 Delhi 126 held that when FDRs were charged specifically for creating a bank guarantee then the FDRs have to be taken as a specific lien and thus taking away the rights of the bank for a claim of general lien on the FDRs in terms of Section 171 of the Contract Act. In *Vijay Kumar's* case (*supra*) the bank's case of general lien was rejected on account of the FDRs being specifically charged to specific bank guarantees.

7. In the present case no doubt the FDRs admittedly matured 12.5.1995, and the execution petition was filed on 31.5.1996, however, before the FDRs which could be adjusted it was necessary for the appellant/plaintiff bank to categorically and clearly demonstrate that the specific lien created for the FDRs, as security for

the bank guarantees issued in favour of the Sales Tax Department, have come to an end.

8. These bank guarantees could have come to an end if either the Sales Tax Department had issued the letter stating that Sales Tax Department has no longer any claim on the bank and whereupon the appellant/plaintiff bank could have accordingly intimated the respondents/defendants that the FDRs can be taken back by the respondents/defendants as the Sales Tax Department had given up their claims on the bank guarantees. Admittedly, this first situation and scenario never happened, and if this had happened way before 31.5.1996 when the execution petition was filed, the respondents/defendants could have well refused to convert the specific lien of FDRs into general lien and would have asked for return of the FDRs which were given for specific lien to cover the bank guarantee amounts.

9. In the second situation and scenario even if the Sales Tax Department would not have written any letter discharging the obligation under the bank guarantees issued to the Sales Tax Department, the appellant/plaintiff bank could have *suo moto* informed the respondents/defendants that the term of the bank

guarantees had expired on 11.5.1995 and consequently the respondents/defendants can either encash the FDRs or the bank can be given a general lien on the specific lien of the FDRs being cancelled, and thus FDRs being available for the other dues of the respondents/defendants towards the appellant/plaintiff bank in future. Even the second scenario did not take place and there is no letter issued by the appellant/plaintiff bank cancelling the specific lien and consent thereafter existing of the respondents/defendants of converting the specific lien FDRs into general deposits of the respondents/defendants with the appellant/plaintiff bank. Again therefore even since the second scenario did not occur the hence specific lien of the FDRs could not be converted into general lien by the appellant/plaintiff bank.

10. The third scenario would be if the respondents/defendants would have themselves and *suo moto* issued a letter to the appellant/plaintiff bank that the specific lien on the FDRs have come to an end and they no longer want to encash the FDRs but the appellant/plaintiff bank can keep with them the FDRs as normal FDRs and in which case the FDRs would be available as general lien for the appellant/plaintiff bank. Even this third scenario and situation never

occurred and no letter has been written by the respondents/defendants that the specific lien of the FDRs is cancelled and FDRs would now be available as general deposits to the appellant/plaintiff bank for the dues of respondents/defendants.

11. In view of the above discussion it is seen that the FDRs were given and charged as specific lien only for the claims of the appellant/plaintiff bank in case the Sales Tax Department would have invoked and encashed the bank guarantees which were given by the appellant/plaintiff bank. The specific lien so created was never cancelled and the FDRs were never available as general deposits for the appellant/plaintiff bank to claim general lien on the same. Once therefore no general lien could be claimed by the appellant/plaintiff bank in accordance with not only the language of Section 171 of the Contract Act, but also in accordance with the ratio in the case of ***Vijay Kumar (supra)***, the respondents/defendants were entitled to ask the bank to refund the FDRs as the bank did not have any general lien on the two subject FDRs.

12. It was lastly argued by the appellant/plaintiff bank that the courts below have wrongly granted a high rate of interest at 24% per annum, however, I note that it does not lie in the mouth of the

appellant/plaintiff bank to claim that rate of interest of 24% was high because when the *ex-parte* judgment and decree was passed in favour of the appellant/plaintiff bank it claimed and got interest at the rate of 24% per annum. Not only that, even in the execution proceedings the appellant/plaintiff bank continued to claim the same rate of interest at 24% per annum for the dues which it claimed under the *ex-parte* judgment and decree. Therefore if one principle is applied for the appellant/plaintiff bank the same therefore must apply even against the appellant/plaintiff bank and the appellant/plaintiff bank is therefore liable to pay the same rate of interest which it had claimed and got against the respondents/defendants in terms of the *ex-parte* judgment and decree. I therefore do not find any reason, in the peculiar facts of this case, to interfere with the rate of interest awarded by the courts below.

13. No substantial question of law arises. Dismissed.

OCTOBER 10, 2017

AK/godara

VALMIKI J. MEHTA, J