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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

Second Appeal No.94 of 2015
and M.P.No.1 of 2015

M/s.Bank of Baroda

Namakkal Branch

Represented by its Senior Branch Manager

Door No.39/30, Paramathy Road,

Namakkal Town.

... Appellant/Plaintiff

Vs.

P.Mohan

... Respondent/Defendant

Prayer:- Second Appeal has been filed under Section 100 of C.P.C to set aside the judgment and decree dated 31.07.2014 made in A.S.No.15 of 2008 on the file of the Principal District Judge, Namakkal, confirming the judgment and decree dated 26.11.2007 made in O.S.No.545 of 2001 on the file of the Subordinate Court, Namakkal.

For Appellant	: M/s.R.Umasuthan
For Respondent	: Mr.C.Jagadish

J U D G M E N T

This Second Appeal has been filed to set aside the judgment and decree dated 31.07.2014 made in A.S.No.15 of 2008 on the file of the Principal District Judge, Namakkal, confirming the judgment and decree dated 26.11.2007 made in O.S.No.545 of 2001 on the file of the Subordinate Court, Namakkal.

2.The appellant is the defendant and respondent is the plaintiff in O.S.No.545 of 2001 on the file of the Subordinate Court, Namakkal. The respondent filed the said suit for a declaration that set off made by the appellant in respect of FDR No.0541445 dated 18.06.1997 for Rs.1,30,000/- is null and void and for payment of Rs.1,90,909/- together with interest at 12% per annum. According to the respondent, he is the proprietor of SBM Tyres and SBM Transports. He is having accounts with appellant Bank at Namakkal and Salem branches in his name as



well as in the names of SBM Tyres and SBM Transports. He deposited a sum of Rs.1,30,000/- on 18.06.1997 in FDR No.0541445. In addition to that, he has also deposited various amounts in Fixed Deposits and term deposits as mentioned in the plaint. He has borrowed a sum of Rs.1,00,000/- in the appellant bank as overdraft loan for the business of SBM Transports. He gave FDR receipt Nos.0541445, 507731, 531805 and 507730 as security. The respondent repaid Rs.1,00,000/- borrowed on behalf of the SBM Transports. The appellant did not pay the amounts on maturity of the FDR and term deposits. The appellant issued notice dated 29.01.2000, stating that they are going to set off the amounts in FDRs for the amounts due in Salem branch by SBM Tyres. SBM Tyres borrowed a sum of Rs.1,60,000/- on 03.02.1994 in the account No.1385. In the circumstances, the respondent filed the said suit for declaration and mandatory injunction. He also filed two other suits in O.S.Nos.161 and 162 of 2000 for recovery of money covered under other FDRs and term deposit receipts.

3.The appellant filed written statement and contended that Rs.1,60,000/- was mistakenly credited twice in the account No.1385 of SBM Tyres, maintained at Salem branch. The respondent withdrew the said amounts. The appellant have right to collect the wrong credit as per Section 72 of the Indian Contract Act. The appellant also has right to set off the amount due to them as per the Bankers General Lien. The set off of Rs.1,30,000/- on 29.02.2000 is valid and prayed for dismissal of the suit.

4.Based on this pleadings, the learned Judge framed necessary issues. The respondent examined himself as P.W.1 and marked three documents as Exs.A1 to A3. The appellant examined one Mohan, Senior Manager of Namakkal Branch of the appellant bank as D.W.1 and marked three documents as Exs.B1 to B3.

5.The learned Trial Judge considering the pleadings, oral and documentary evidence, decreed the suit by the judgment and decree dated 26.11.2007. Against the said judgment and decree, the appellant has filed A.S.No.15 of 2008 on the file of the Principal District Court, Namakkal. The learned Principal District Judge, Namakkal framed necessary points for consideration. Considering the pleadings, oral and documentary evidence and judgment of the Trial Court, the learned Principal District Judge dismissed the Appeal, holding that the appellant has not proved that the second entry has been wrongly made in the account of SBM Tyres at Salem Branch and respondent withdrew the amount.

6.Against the said judgment and decree dated 31.07.2014, made in A.S.No.15 of 2008, the appellant has come out with the present Second Appeal.



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7. At the time of admission, this Court framed following Substantial Question of Law:

"1. Whether the Courts below were right in ignoring Section 72 of the Indian Contract Act, 1872 which gives right to the appellant to recover a sum of Rs.1,60,000/- which was paid to the respondent by mistake/inadvertence?

2. Whether the Courts below were right in decreeing the suit without properly appreciating the legal issue as to whether the appellant Bank has got lien over the fixed deposits of the respondent?"

8. The learned counsel for the appellant contended that the First Appellate Court failed to appreciate the materials on record and by incorrect application of law, rejected the claim of the appellant. The First Appellate Court failed to recognize the right of General Lien vested with appellant while dismissing the appeal. As per Section 72 of the Indian Contract Act, the appellant is entitled to recover the sum of Rs.1,60,000/- which was credited to the account of respondent twice by inadvertence. The First Appellate Court erred in holding that appellant does not have right to combine the two concurrent or similar accounts of the borrower and set off one against other.

8(a). The learned counsel for the appellant in support of his contentions, relied on the following judgments:

(i) 1993 3 SCC 631 (State Bank of India Vs. Yumnam Gouramani Singh):

"6. It is thus obvious that apart from the entries of the books of account there was ample evidence on the record to corroborate the said entries. Pws 5, 7 and 8 have in their detailed depositions corroborated the entries in the books of account. Even otherwise, issue Nos. 3, 4 and 7 were not contested by the respondent-defendant. In his written statement, he admitted that he took the alleged loans from the Manipur State Bank which merged in the State Bank of India."

(ii) 2012 SCC Online Mad 1072 (Lalitha Raj Vs. The Assistant General Manager, State Bank of India, Regional Business Officer, 22, 6th East Cross Street, Gandhi Nagar, Vellore and others):

"26. In support of right of lien of the respondent bank, learned counsel for the respondents placed reliance on the judgment of the Hon'ble Division Bench of this Court in the case of State Bank of India, Kotagiri Branch vs. Chokkalingam and others (C.R.P. (NPD) No. 3019 of 2007, decided on 10.01.2008, wherein it has been laid down as under:

"5. The question of bankers lien/general lien fell for consideration before the Supreme Court in Syndicate Bank Vs Vijay Kumar reported in AIR 1992 SC



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1066. The provision of Section 171 of the Indian Contract Act, 1872 was also noticed in the said case. Taking into consideration Halsbury's Laws of England and provisions of the Contract Act in respect of bankers lien, the following observation was made by the Supreme court :- "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 extent 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 process 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 look 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 & Fin 787 it was stated as under :

"Bankers most undoubtedly have a general lien on



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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 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."

6. In view of the finding of the Supreme Court, we are of the view that the bank has a general lien over the securities and other instruments deposited by respondents 1 to 3 in the ordinary course of banking and such general lien being valuable right of the banker, as per Supreme court decision, it cannot be ignored in absence of an agreement to the contrary."

(iii) 1989 4 SCC 1 (Mahabir Kishore and others Vs. State of Madhya Pradesh):

"13. Section 72 of the Indian Contract Act deals with liability of person to whom money is paid or thing delivered, by mistake or under coercion. It says:

"72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

"17. There is no doubt that the instant suit is for refund of money paid by mistake and refusal to refund may result in unjust enrichment depending on the facts and circumstances of the case. It may be said that this Court has referred to unjust enrichment in cases under Section 72 of the Contract Act. See M/s. Shiv Shanker Dal Mills V. State of Haryana reported in (1980) 2 SCC 437, UPSEB V. City Board, Mussoorie reported in (1985) 2 SCC 16 and State of



M.P V. Vyankatlal reported in (1985) 2 SCC 544."

(iv)1992 2 SCC 330 (Syndicate Bank Vs. Vijay Kumar and others):

"12. In the banking system it is understood that Bank guarantee has an dual aspect. In the case of a Bank guarantee the banker is the promisor. It is a contract between the Bank and the beneficiary of the guarantee and it is also a security given to the beneficiary by a third party. Now, it is a well-known business transaction in the World of commerce and it has become the backbone of the banking system. Now coming to its enforceability the same depends upon the terms under which the guarantor has bound himself. He cannot be made liable for more than what he has undertaken. Therefore the Bank guarantee, as already noticed, is in the nature of a special contract depending upon the happening of a specific event and when once it is discharged the guarantee comes to an end. It has to be borne in mind that the obligations arising under the Bank guarantee are independent of the obligations arising out of a specific contract between the parties. Therefore the endorsement of the words "Lien to BG 11/80" cannot have a bearing on the banker's lien on the two FDRs. Merely because on the basis of the security of the two FDRs the appellant Bank gave a guarantee it cannot be said that the banker had only a limited particular lien and not a general lien on the two FDRs. In our view this finding of the High Court is erroneous."

(v)2004 (4) Mh.L.J 788 (Central Bank of India Vs. Kesharao Narayanrao Patil):

"14.the defendant bank has also proved the extract of loan account of the plaintiff which would clearly reveal that the total outstanding amount of loan was to the tune of Rs.35974.36 and this loan amount was adjusted and accordingly the plaintiff was informed by the notice sent by registered post with acknowledgment due on 19.03.1987. There is an endorsement below the extract of account that, it is true copy of the entries and such entries contained in one of the ordinary Book of the Bank and was made in usual and ordinary course of business and that such book is still in the custody of the Bank and it is verified and certified also."

9.Per contra, the learned counsel for the respondent contended that the respondent did not withdraw the alleged second credit of Rs.1,60,000/-. The appellant has not produced



proper and full accounts to substantiate their claim that respondent has withdrawn the credits of Rs.1,60,000/- made twice by the appellant. Having failed to substantiate their claim that respondent withdrew both the amounts, the appellant is not entitled to exercise the General Lien and set off the amounts covered in the Fixed Deposits. The findings of the Courts rejecting the claim of the appellant is based on the facts. In view of the same, no question of law much less than the Substantial Question of Law arose and prayed for dismissal of the Second Appeal.

10.The following are the admitted facts:

(a).The respondent is having two concerns in the name and style SBM Transports and SBM Tyres.

(b).The respondent is having account in Namakkal and Salem branches of the appellant Bank in the name of his concerns as well as in his individual name.

(c).The respondent has deposited in Fixed Deposits and term deposits with the appellant Bank.

(d).The respondent availed overdraft facility of Rs.1,00,000/- for business of SBM Tyres. As security for repayment of said loan, he has given FDR 0541445 for Rs.1,30,000/- and FDR 507731 for Rs.12,500/-. The respondent repaid the said loan availed as overdraft.

11.The disputed facts are as follows:

The appellant claims that they have credited to the account No.1385 of SBM Tyres a sum of Rs.1,60,000/- twice by mistake and the respondent withdrew the said amounts. According to the respondent, the appellant did not give the credit twice and respondent did not withdraw the amounts twice. The respondent has deposited various amounts and has only withdrawn the same.

12.In view of denial by the respondent that he has not withdrawn Rs.1,60,000/- alleged to have been credited twice, it is for the appellant to prove that appellant has deposited the alleged amount twice and respondent withdrew the said amounts. According to the appellant, the amounts were credited in Salem Branch to the accounts of SBM Tyres. D.W.1, the Senior Manager of the Namakkal Branch of appellant was examined on behalf of the appellant. He is not an official from the Salem Branch. The appellant marked Exs.B1 and B2, the statement of accounts maintained at Namakkal and Salem Branches respectively. The Courts below considering Exs.B1 and B2 and the evidence of D.W.1, have held that appellant has not produced document relating to the wrong entry or excess withdrawal and D.W.1 did not depose that on what basis, the wrong entry was made and failed to prove whether Rs.1,60,000/- was disbursed towards cheque of SBM Tyres or whether it was directly taken by SBM Tyres and to whom the said amount was given.



13.Both the learned counsel for the appellant as well as the respondent referred to statement of accounts filed by the appellant as Exs.B1 and B2. The learned counsel for the appellant referred to two entries of Rs.1,60,000/- given credit to on 01.02.1994 and 03.02.1994. Based on these entries, the learned counsel for the appellant contended that the appellant has proved the wrong credit and therefore as per Section 72 of the Indian Contract Act, the appellant is entitled to recover said amounts from the respondent. The appellant, as General Lien of Bankers as per Section 171 of the Indian Contract Act has rightly set off the amounts covered by Fixed Deposits.

14.The learned counsel for the respondent referred to very same statement of account and pointed out that said statement of account does not show the withdrawal of Rs.1,60,000/- by the respondent twice. On the other hand, the learned counsel for the respondent pointed out the deposits made by the respondent and withdrawal of the said amounts. The learned counsel for the respondent vehemently contended that the appellant has not produced true statement of accounts to substantiate their case. This contention has considerable force. It is not in dispute that the appellant as Bankers has General Lien and is entitled to recover any wrong payment made by the constituents. In the present case, the appellant has failed to prove that Rs.1,60,000/- was withdrawn by the respondent or paid in respect of the cheques issued by the respondent. In view of said failure on the part of the appellant, the appellant is not entitled to exercise the Bankers General Lien to recover the wrong payment to the respondent. The Courts below have properly appreciated the facts and law and there is no error of law in the said judgments. In view of the above facts, the judgments relied on by the learned counsel for the appellant do not support the case of the appellant.

15.For the above reason, the Substantial Question of Law are answered against the appellant and Second Appeal is dismissed. The Judgment and Decree dated 31.07.2014 passed by the learned Principal District Judge, Namakkal, in A.S.No.15 of 2008 is confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS II)

//True copy//

Sub Assistant Registrar

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To

1.The Principal District Judge,
Namakkal.

2.The Subordinate Judge,
Namakkal.

3.The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.Umasuthan, Advocate SR.No.28391

+1cc to Mr.Jagadish, Advocate SR.No.28300

Second Appeal No.94 of 2015
and M.P.No.1 of 2015

MG(CO)
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