IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **17.10.2022**

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

W.P.No.21629 of 2016

S.Bhavani ... Petitioner

Vs.

The Branch Manager
Central Bank of India Main Branch
14/15, Variety Hall Road
Coimbatore-641 001 ... Respondent

PRAYER: Writ petition filed under Article 226 of the Constitution of India praying to issue a Writ of mandamus directing the respondent bank to release the sale deed dated 24.01.1992 registered as Document No.445 of 1992, on the file of SRO, Gandhipuram, coimbatgore Taluk, measuring an extent of 2380 sq.ft given as security of education loan under account no.3099407180, within a reasonable time.

For Petitioner : Mr.N.Anbazhagan
for
Mr.A.E.Ravichandran

For Respondents : Mr.F.B.Benjamin George, Standing Counsel

O R D E R

Writ Petition has been filed directing the respondent bank to release the sale deed dated 24.01.1992 registered as Document No.445 of 1992, on the file of SRO, Gandhipuram, Ccoimbatore Taluk, measuring an extent of 2380 sq.ft given as security of education loan under account no.3099407180, within a reasonable time.

2. It is the case of the Writ petitioner that she is the co-owner of the property situated at Plot No.73, along with one Geetha Sundaresh. The petitioners' daughter Sathya Srit has availed Rs.11.90,000/- education loan for the purpose of pursuing M.S.Degree in Health and Science management in the year 2010. At the time of availing the loan the petitioner stood as guarantor and executed a mortgage in respect of her property. Thereafter as there was some default in payment of loan SARFAESI proceedings has been initiated. Thereafter, the petitioner has paid the entire amount towards education loan and the loan account has been closed. After payment of the entire education loan while the petitioner sought for return of sale deed which is subject matter of the equitable mortgage, the bank has refused to return the same. It is also stated by the bank that property was not given for security for any other loan sanctioned to the petitioner. However, the bank

has failed to return the document. Hence, the Writ Petition.

3. In the counter, a stand has been taken by the bank admitting that at the time of availing the education loan for her daughter the petitioner furnished the property jointly held with one Geetha Sundaresh as security by way of mortgage by deposit of title deeds. As the borrower and guarantor failed to repay the loan and the accounts became NPA, proceedings were initiated under SARFAESI Act. However, dues under the said educational loan was settled and the account was closed. It is the stand of the bank that petitioner is the propreitrix of M/s. Bhavani Industries availed various credit facilities for her steel fabrication plant from the bank. The loans originally availed on 21.08.2008 were periodically renewed with enhancements and fresh limits. The loans were also restructured on 24.01.2014. However, the petitioner did not repay the dues to the tune of Rs.72,88,815/-. Therefore, the respondent filed O.A.No.354 of 2015 on the file of Debts Recovery Tribunal. Hence, it is the contention that as the petitioner has not cleared her loan account the bank exercised its general lien over the said property towards the dues in M/s. Bhavani Industries.

4. Learned counsel for the petitioner submits that petitioner is neither

a borrower in the educational loan she only stood as a guarantor as soon as the entire amount has been cleared, the bank cannot exercise general lien since the property has not been mortgaged in respect of her loan relating to the propreitrix concern. As a matter of right, the bank cannot exercise general lien further once the mortgage amount has been paid it is the duty of the mortgagee to return all the document as per the substantive provision of the Transfer of Property Act. Therefore, the bank cannot withhold the documents. Admittedly, the documents not only belong to the petitioner but also third party interest is involved. In support of his submissions, he also placed reliance in the judgment of the Madurai Bench of Madras High Court, ***2017-2-Writ.L.R 584,*** in the case of ***M.Shanthi vs. Bank of Baroda*** and the judgment of the Hon'ble Supreme Court in the case of ***Syndicate Bank vs. Vijaya Kumar, 1992 (2) SCC 331.***

5. It is the contention of the learned standing counsel for the bank as the petitioner has also availed loan for her propreitrix concern, as per Sec.171 of the Indian Contract Act, the bank can exercise general lien for the amounts not paid. Accordingly, the bank has rightly exercised the general lien and petitioner cannot seek return of documents. In support of her

submissions, she also relied upon the judgment of the Division Bench of this Court in ***C.R.Ramachary & Others vs.Indian Overseas Bank ,2018 SCC Online Mad 3298 and W.P.No.8986 of 2017.***

6. Learned counsel appearing for the petitioner submits that petitioner stood only as a guarantor for the education loan borrowed by her daughter. As long as the loan has been cleared and while availing the educational loan, the title deed stood in the name of the petitioner as well as her sister was mortgaged by way of deposit of title deeds. The loan amount has been admittedly repaid, which is not disputed by the bank. It is also not disputed that the property mortgaged by way of deposit of equitable mortgage is not belonging to the petitioner alone but also some third party. It is the main contention of the respondent that since the petitioner has availed various credit facilities in respect of her propreitrix concern from the year 2008 as the amount was not been paid they have a right to exercise general lien as per law. Therefore, they retained the document.

7. It is not disputed that the petitioner stood only a guarantor for the

education loan which was obtained in the year 2010. Now the bank contention is that the petitioner has availed a loan in the year 2008 for the proprietrix concern and there is a due and therefore they are entitled to invoke general lien as per Sec.171 of the Indian Contract Act.

8. It is relevant to note that the property which was mortgaged by deposit of title in favour of the bank pertaining to the educational loan alone. The title deed indicate that the petitioner along with other person is owner of the property. The above document is taken as a security for educational loan. It is not in dispute that educational loan is already paid the account has been settled. Now the point arises for consideration is whether under the premise of general lien the bank can exercise general lien to retain the document where third party right is also involved. It is relevant to extract Sec.171 of the Indian Contract Act:

> *"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."

9. On a careful perusal of the Sec.171 of the Indian Contract Act, to exercise general lien to retain the document as a security for a general balance of account one of the ingredients is that property must be bailed in favour of the bank.

10. Admittedly, in this case the property in question is not bailed to the bank towards the loan borrowed by the petitioner in the year 2008, whereas the the educational loan was obtained in the year 2010 and the petitioner was not a borrower and only stood as a guarantor. However, she has executed the memorandum of deposit of title documents in respect of the property not only belong to her but also some third party. As the amount has already been paid, now the bank cannot contend that they are entitled to exercise general lien as per Sec.171 of the Indian Contract Act. Admittedly, this property was never bailed to the bank towards the loan amount borrowed by the petitioner in the year 2008 much prior to the educational loan.

11. In this regard it is relevant to note that ***State Bank of India vs.***

Jayanthi and other, reported in ***2011 (2) CTC 465***, it is 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 Sec.171 of contract Act to retain the security for the loan for the which the mortgagor was a guarantor. Paragraphs 9 to 16 of the judgment reads as under:

> *" 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.*
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> *" 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.*
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> *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."

and held that 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, wherein the person is not a borrower.

12. Considering the above judgment, the Divison Bench of the Madurai Bench of Madras High Court in the case of ***M.Shanthi vs. Bank of Baroda***, reported in ***2017-2-Writ.L.R.584*** has also held that the bank cannot

exercise the general lien and the Court at para 30 of the judgment held as follows:

> *" 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."*

13. The Division Bench of this Court reported in ***2019 2 CTC 645***, in the case of ***C.R.Ramachary and another vs. Indian Overseas Bank and Ors***, wherein this Court held that in the absence of a contract to the contrary, bank has lien over the security for a general balance of account and the single Judge of this Court in W.P.No.8986 of 2017 has also took a similar view. The above two judgments the facts are entirely different. Whereas in

this case, while availing the educational loan, the petitioner stood only as a guarantor she is not a borrower and educational loan was availed in the year 2010, whereas the petitioner propreitrix concern availed loan in the year 2008. Further, as per Sec.60 of the Transfer of Property Act, it is substantiative provision which is governing the mortgagor and mortgagee, it is infact cast obligation on the bank to return the documents once the mortgage money is paid

14. This Court has already in the judgment already reported in AIR 2011 Madras 179, 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 Sec.171 of Contract Act. The same principle is squarely applicable to the present case also. Admittedly, there is a mortgage of the property belong to the guarantor as well as the third party. In such view of the matter when the mortgage itself is closed and the account has been closed. The Bank cannot exercise general lien under Sec. 171 of the Contract Act.

Accordingly, the Writ Petition is allowed. The respondent is directed to handover the title deed within a period of one month from the date of receipt of a copy of this order. No costs.

17.10.2022

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To

The Branch Manager
Central Bank of India Main Branch
14/15, Variety Hall Road
Coimbatore-641 001

N. SATHISH KUMAR, J.

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