IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-9136-2022 (O&M)
Reserved on: 20.12.2022
Date of Decision: 17.01.2023

Hari Chand Papneja . . . . Petitioner

Vs.

State Bank of India
. . . . Respondent

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CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MRS JUSTICE SUKHVINDER KAUR

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Present: - Mr.Aalok Jagga and Mr.Harkirat Singh Jagdev, Advocates, for the petitioners.

Mr.Rakesh Gupta, Advocate, for the respondent-Bank.

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M.S. RAMACHANDRA RAO, J.

The background facts

The petitioner, who is a partner of M/s Pupneja Rice Mill, had availed cash credit limit and warehouse receipt totaling Rs.18 crore from the respondent Bank (for short' Bank').

The loan account of the said firm became an NPA on 28.08.2016 and on 21.01.2017, notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short 'the Act'] was issued by the Bank claiming Rs.21,83,48,812/-.

Thereafter on 14.03.2017, the firm submitted objections under Section 13(3A) of the Act which were rejected on 05.04.2017.

The Bank then issued notice under Section 13(4) of the Act on 18.04.2017.

S.A-249-2017

Aggrieved by it, the petitioner approached the Debt Recovery Tribunal-I, Chandigarh by filing SA-249-2017.

On 02.10.2018, the mortgaged properties (which included the rice mill as well as the *subject* residential house located at Green Avenue, Near Thana Sadar, Ferozepur Road, Jalalabad) were put to sale on 05.10.2018 with a reserve price of Rs.1.03 crore by the Bank under the Act during the pendency of the SA.

On 23.10.2018, the petitioner filed IA-665-2018 challenging the said sale notice dt.02.10.2018 issued by the Bank proposing to put the properties for sale including the said residential house for 05.11.2018. In the said application, the following pleading was raised by the petitioner:

> *"That without prejudice to the above, the submission of the applicant is that the applicant has made earnest efforts and with the family members, one of the members of the family, has come forward to help the family of the applicant/ by offering Rs.75 lakhs to purchase the residential property which is at lot No.4 in the sale notice. Consequently, the applicant offered to deposit Rs.75 lakhs, as bid money from one of the relatives of the family, which may be deposited with the Bank in FDR in no lien account, being third party amount and bid/offer money to purchase the property at Rs.75 lakhs."*

Thus, the petitioner asserted that the family members were willing to buy the residential house for Rs.75 lakhs and was ready to deposit the said amount with the Bank to show genuineness of the offer.

In para 7 of the said application, it was further stated that his relative, who is offering Rs.75 lakh, will either match any bid more than Rs.75

lakh which will come to the Bank or else the petitioner would handover the physical possession of the residential house within 15 days.

The amount of Rs.75 lakh was thus being offered as bid money from the relatives of the petitioner, who intended to deposit the same with the Bank in the capacity of a prospective purchasers.

However, SA-249-2017 was itself dismissed on 06.12.2018.

THE LETTER DT.03.01.2019 GIVEN BY THE PETITIONER

The petitioner again approached the Bank vide Annexure P6 Letter dt.03.01.2019 offering Rs.75 lakh to be deposited by the prospective buyer/familymember so that the residential property could be sold to the purchaser as previous attempts by the Bank to sell it did not yield any fruitful results.

It was specifically stated there in that one of the petitioner's family members had arranged Rs.75 lakh by sale of some family property and all are willing to save the said residential house, and they are ready to deposit Rs.75 lakh with the Bank, and it should consider the petitioner's request for release of the house for Rs.75 lakh or alternatively put it to sale for Rs.75 lakh so as to see whether there is any other buyer for the said amount.

REPLY DT.8.1.2019 OF THE BANK

On 08.01.2019, vide Annexure P7, the Bank rejected the said request saying that the sale amount offered for the residential house is on the lower side and not acceptable to it, and if the petitioner wanted to get the house released, he should deposit Rs.1.03 crore, which was the reserve price fixed by the Bank or more against the sale of the house.

<u>CWP-2354-2019 FILED BY PETITIONER</u>

Challenging the order of the DRT-I, Chandigarh dt.06.12.2018 in SA-249-2017 and also the refusal dt.08.1.2019 by the Bank vide Annexure P7 to accept the request of the petitioner, petitioner filed CWP-2354-2019 in this Court.

The petitioner stated in paras 15, 18 & 20 of the said Writ Petition that members of his family, *as prospective purchasers*, were willing to deposit Rs.75 lakh to purchase the residential house of the petitioner; that the intention of the petitioner was to save the residential house; that the Bank should consider the said offer or the Bank may continue to put the property to sale, and in case a higher bid is received, either the petitioner will match the bid or else the petitioner would hand over the physical possession of the residential house within 15 days.

While referring to the offer dt.03.1.2019 made by the petitioner, it was stated that the sum of Rs.75 lakh is being offered by relatives of the petitioner for purchase of the residential property, and the Bank may accept the said offer and release the residential property or in alternative, it may put the residential to sale for the said amount.

It was also stated that if the Bank did not get a bidder for Rs.1.03 crore, fresh valuation report should be obtained and the property can be put to sale fresh. It was specifically stated that the petitioner would be ready to deposit Rs.75 lakh in the shape of FDRs.

A Writ of Mandamus was sought against the Bank to put the residential property of the petitioner to sale so as to enable the petitioner to claim the said residential property by way of release of Rs.75 lakh for which the petitioner had a ready buyer, since no bidder had come for Rs.1.03 crore fixed as reserve price by the Bank.

Events which happened during the pendency of CWP-2354-2019

Notice of motion was issued on 29.01.2019 in CWP-2354-2019.

CM-2239-2019 IN CWP-2354-2019 FILED BY PETITIONER

While the said petition was pending, the Bank tried to take physical possession of the residential house.

The petitioner then filed CM-2239-2019 in CWP-2354-2019 on 8.2.2019 and prayed for grant of stay of dispossession.

On 11.02.2019, this Court passed the following order:-

> "*Learned counsel for the applicant/petitioner states that a Draft of Rs.75 Lakhs shall be produced in the Court on the next date of hearing. Notice of this application to the non-applicant/respondent for 12.02.2019.*"

On 13.2.2019 the petitioner produced three demand drafts of Rs.25 lakh each amounting to Rs.75 lakh in this Court. This Court directed the petitioner to deposit the same with the Bank, which was directed to accept the same and encash them without prejudice to its rights in the Writ Petition; and *status quo* was directed to be maintained regarding the residential property. Matter was then adjourned to 21.02.2019.

On 21.2.2019, the petitioner's counsel reported to the Court that the deposit of Rs.75 Lakhs was made by petitioner, and the Court directed the interim order to continue and permitted the counsel for the Bank to file his reply and adjourned the matter to 20.3.2019.

SLP (CIVIL) DIARY NO.24466/2019 FILED BY THE BANK IN THE SUPREME COURT

The Bank then challenged the order dt.13.02.2019 in the Supreme Court of India by filing SLP (Civil) Diary No.24466/2019 and the Supreme Court on 13.9.2019 stayed the operation of the said order and permitted the Bank to proceed with the sale process in respect of the residential property. It was also observed that nothing more survives for consideration in the Writ Petition which is pending before the High Court and the parties are free to bring the order to the notice of the High Court so that no further order need be passed by it in the pending Writ petition until the Supreme Court so directs.

But the Supreme Court did not say anything in it's order as to what should happen to the deposit of Rs.75 lakhs made by the petitioner on behalf of his family members for purchase of the residential house during the pendency of the CWP-2354-2019.

THE FINAL ORDER DT.29.11.2019 IN CWP-2354-2019

In view of the said order, the Writ Petition was disposed of by this Court as withdrawn as it had become *infructuous* on 29.11.2019.

This Court also did not say anything *as to what should happen to the deposit of Rs.75 lakhs made by the petitioner on behalf of his family members during the pendency of the CWP-2354-2019.*

Possession of the residential house of petitioner was taken by the Bank in view of above orders.

The Bank however did not return the sum of Rs.75 lakhs to the petitioner.

Inter alia, it is qua return of this sum of Rs.75 lakhs that the instant Writ Petition came to be filed.

Other events

In the meantime, the Bank had again issued a sale notice, copy of which was allegedly not supplied to petitioner, fixing the reserve price for the residential house at Rs.85 lakhs.

Petitioner then gave a representation dt.26.12.2020 (P-20) to the Bank for reconsideration of the matter by it and even offered to pay an additional amount of Rs.10 lakhs in addition to Rs.75 lakh already paid by his family members through him earlier for purchase of the residential house.

The Bank replied vide letter dt.29.12.2020 that the matter was *subjudice* before the Supreme Court and so it cannot consider the application.

Order dt.4.3.2021 in SLP.No.24466 of 2019 of the Supreme Court

The SLP (Civil) No.24466 of 2019 filed by the Bank came to be listed before the Supreme Court on 4.3.2021.

The Supreme Court disposed of the said SLP noting that the Writ Petition CWP-2354-2019 had been disposed off by this Court as withdrawn on 29.11.2019, but it observed **that *qua* the amount of Rs.75 lakh deposited by the petitioner during the pendency of the Writ Petition, it is open to the petitioner to move this Court by way of appropriate application for directions in that regard**.

It did not express any opinion either way on the merits of that application and directed this Court to consider the same in accordance with law.

Pursuant to the liberty granted by the Supreme Court in its above order, the petitioner filed CM-8364-2021 in CWP No.2354 of 2019 for a direction to the respondent-Bank to refund Rs.75 Lakhs deposited with it contending that this deposit was done bonafidely for release of the mortgaged residential house and/or to adjust the same towards the sale consideration for the said house which was put to sale by the Bank by the sale notice dt. 09.02.2020 with reserve price of Rs.85 Lakhs.

The said CM was adjourned to 21.01.2022.

CM No.18051 of 2021 was filed seeking pre-ponement of the hearing of the CM-8364 of 2021 on the ground that the Debt Recovery Tribunal, Chandigarh had put the said residential property for sale on 02.12.2021 in RC No.1470 of 2019 in OA 206 of 2018 filed by the Bank against the firm M/s Pupneja Rice Mill, the petitioners and others.

But this Court held on 04.03.2022, that since CWP No.2354 of 2019 had itself been dismissed as withdrawn on 29.11.2019, these applications cannot be entertained in the said CWP and the petitioner was granted liberty to file fresh Writ Petition seeking refund of the amount of Rs.75lakhs deposited with the respondent-Bank on behalf of his family members during the pendency of the said CWP.

<u>The instant Writ Petition</u>

Therefore, petitioner has filed the instant Writ Petition with the following prayers:-

> *I) "Issue a writ in the nature of mandamus, directing the Respondent, to refund Rs.75 lakhs deposited by the petitioner in order to show bonafide as noticed in the order dated 13.02.2019 (ANNEXURE P-12) passed by this Hon'ble Court in the earlier round of litigation i.e. CWP No.2354 of 2019, offering prospective buyer for purchase of the residential house put to sale by the Bank under the provisions of the Securitization and Reconstruction of*

Financial Assets and Enforcement of Security Interest Act, 2002.

II) Alternatively, it is prayed that this Hon'ble Court may be pleased to direct the Respondent, to consider and adjust the aforesaid amount deposited to purchase the house in question towards the sale consideration of the residential house i.e. Green Avenue Colony, Ferozepur Road, Jalalabad West, Fazilka, during the sale proceedings.

III) It is still further prayed that this Hon'ble Court may be pleased to issue a writ in the nature of prohibition, restraining the Respondent Bank from proceeding against the aforesaid residential property.

IV) It is still further prayed that this Hon'ble Court may be pleased to issue any other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

Events during the pendency of this Writ Petition

During the course of the hearing of the Writ Petition, on 05.12.2022, petitioner was directed to place on record material to indicate that the amount of Rs.75 Lakhs which was deposited with the Bank during the pendency of CWP No.2354 of 2019 was in fact transferred from the Bank Accounts of petitioner's family members.

Petitioner thereafter filed CM No.19491 of 2022 to place on record annexure P-21 statements of savings Bank accounts of Mrs.Asha Rani, Mrs. Aparna Pupneja and Mrs. Shivani Pupneja in the Axis Bank which indicated that each of them (who had more than Rs.25 Lakhs in their respective Savings Bank Accounts) had taken FDRs for Rs.25 Lakhs. These Bank Account Statements further indicate that prior to the taking of their respective

FDR, each of them had obtained the said amount of Rs.25 Lakhs from certain 3rd parties.

The said application was allowed on 14.12.2022.

The respondent-Bank filed CM- 20183- 2022 to place on record statement of savings Bank account of Smt. Asha Rani and Smt. Shivani Pupneja in the State Bank of India to contend that the said persons did not have funds to procure the FDRs of Rs.25 Lakhs each.

This application was also allowed on 20.12.2022.

Contentions of the petitioner

The petitioner contends that:

(a) right from the stage of Debts Recovery Tribunal and the CWP-2354-2019, everywhere, Rs.75 lakhs was offered to be deposited by the prospective buyer/s. The Bank accepted the said amount after having examined the pleadings contained in the Writ petition as also pleadings before Debts Recovery Tribunal. Everywhere, the Bank was aware that this amount was being deposited by the prospective purchaser. The Bank never raised any objection. The Bank never contended that it will not accept the amount from prospective purchaser.

Even though, liberty was granted by this Hon'ble Court, the Bank never filed any application to raise a protest before this Hon'ble Court. The Bank never contended that the amount is being deposited by the petitioner. Consequently, the Bank accepted the amount with eyes wide open, coupled with the pleadings attached with the said deposit and accepted the amount from the prospective purchaser and therefore, cannot refuse to adjust the same in the sale or refund the said amount.

(b) That the order dated 13.02.2019, came to be passed in CM No.2239 of 2019. As per the said application, in Para No.3, the petitioner had submitted that buyer for Rs.75 lakhs is available and keeping in view the same, the order was passed. Therefore, the order dated 13.02.2019 is to be read along with the application and the pleadings contained therein.

(c) the prospective buyer, on asking of the petitioner, had deposited the said amount with the Bank, which is noticed in the order dated 13.02.2019. The act of Court is not to prejudice anybody. Therefore, if an amount is deposited in order to show bonafide, which is recorded in the order, the same cannot be treated to be against the interest of the petitioner.

(d) since the amount which is given to the Bank was for a particular purpose mentioned in the DRT SA, application and the CWP No.2354 of 2019 i.e. *offer for purchase of the residential house on behalf of the prospective buyer*, as per Section 148 of the Indian Contract Act, 1872, it can only be disposed of or appropriated as per the directions of the person delivering the same, and the Bank cannot contend that it will not refund the same when it is not agreeable to sell the residential house to the prospective purchaser.

(e) the prospective purchasers do not have any privity of contract with the Bank. The amount deposited by them is for a particular purpose to get the house. If the Bank is not in a position to adjust Rs.75 lakhs for the sale of the house, the Bank may return the same, as the prospective purchasers do not have any liability to deposit the said amount and therefore, the Bank cannot retain their amount.

(f) further, the Bank was fully aware that these FDRs were given by his family members and not him as copies of the FDRs were part of the writ petition.

Counsel for the petitioner also contended that though the persons who made available the sum of Rs.75 lakhs are spouses of petitioner and other guarantors, the said amounts cannot be treated as having been deposited to clear the loan dues of the firm in view of the fact that they had been provided for a specific purpose to persuade the Bank to sell the residential house of petitioner to them; that these amounts are their personal funds or stridhana; and their money cannot be said to belong to their spouses, who are guarantors of the loans granted by the Bank to the firm. He further relied upon the following decisions:-

a) **Lonankutty Antony @ T.L. Antony Vs. The Joint Registrar of Co-operative Socieites[1]**
b) **Axis Bank Vs. Sbs Organics Private Limited and Another[2]**
c) **M/s Sonell Clocks and Gifts Ltd. Vs. New India Assurance Co. Ltd.[3].**
d) **The Committee-GFIL Vs. Libra Buildtech Pvt. Ltd. And Others[4].**
e) **Siddeshwara Trading Company Vs. District Manager, Food Corporation of India, Karimnagar and others[5].**
f) **Delhi Development Authority Vs. Skipper Construction (P) Ltd. And another[6].**

[1] 2016 2 KLT 281 = 2017 5 (RCR) (Civil) 578 (Kerala High Court)
[2] AIR 2016 SC 2024 = 2016 12 SCC 18
[3] 2018 (9) SCC 784
[4] 2015 (16) SCC 31
[5] 2013 (3) ALT 432 = 2012 (25) RCR Civil 920

Stand of the Bank

The respondent-Bank contended that the Writ Petition is not maintainable as the issue which is being sought to be raised has already been settled.

It is next contended that the amount of Rs.75 Lakhs deposited was not deposited towards any OTS or towards any offer of sale; that the total amount payable by the firm to the Bank is Rs.48.56 Crores and the amount of Rs.75 Lakhs deposited by the petitioner is only towards the outstanding dues owed to the Bank by the borrower firm, and so he is not entitled to any relief. *It was denied that the said amount was deposited towards the sale of the residential house of the petitioner.*

It is contended that the petitioner himself had made the offer to deposit Rs.75 Lakhs on 11.02.2019 without there being any direction by the Court to him to make this payment and so he cannot claim the refund.

Reliance is also placed on Section 171 of the Contract Act, 1872 which deals with the general lien of Bankers.

It is contended that Mrs. Aparna Pupneja, Mrs. Shivani Pupneja and Mrs. Asha Rani, in whose names the 3 fixed deposits each of Rs.25 Lakhs were given to the Bank and were encashed by it, are none other than the wives of the guarantors/partners of the firm; therefore, they are not third parties intending to purchase the residential house, that they are only the family members of borrowers/guarantors, and so the deposits cannot be termed to be amounts from prospective buyers.

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[6] 1996 (4) SCC 622

It is contended that the petitioner never deposited Rs.75 Lakhs towards the cost of the property but had deposited the same towards the outstanding dues of the Bank and to get an interim order from this Court.

According to the Bank, since the petitioner did not get any order of refund from the Supreme Court, or in the application filed in CWP No.2354 of 2019, this Writ Petition cannot be filed by him; the request of the petitioner to release the house for Rs.75 Lakhs was specifically declined by it as its value was more than Rs.1.03 Crores; since the house property is being put to sale in terms of the order dt.30.09.2019 passed by the Supreme Court, the petitioner can always bring in customers who are interested in purchasing his property through a competitive bidding.

It is contended that the FDRs placed on record by the petitioner show that the amounts have come from the borrower and not from any third party.

Counsel for the Bank reiterated the said contentions and relied on the following decisions: -

(i) ***The Punjab National bank Ltd. Delhi Vs. Shri Satya Pal Virmani***[7]

(ii) ***State Bank of Patiala Vs. North Land Sugar Complex Ltd.***[8]

(iii) ***Syndicate Bank Vs. Vijay Kumar***[9]

(iv) ***F.Jaikishan Dass Jinda Ram Vs. The Central bank of India Ltd.***[10]

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[7] 1956 AIR (Punjab) 118
[8] 2004(55) SCL 92
[9] 1992(2) SCC 330
[10] 1960 AIR (Punjab) 1

Consideration by the Court

The plea of the Bank that this Writ Petition is not maintainable as the issue being sought to be raised herein was already settled cannot be accepted for the reason that in the earlier CWP-2354-2019, there was no adjudication on the said aspect and it came to be disposed of as infructuous on 29.11.2019 taking note of the order dt.30.09.2019 passed by the Supreme Court in SLP (Civil) Diary No.24466 of 2019. When the said SLP was finally disposed of on 04.03.2021, it was brought to the notice of the Supreme Court that fate of Rs.75 lakh deposited during the pendency of CWP-2354-2019 had not been decided, and the Supreme Court permitted the petitioner to move this Court by way an appropriate application for direction in that regard without expressing any opinion on the merits of that application and directed this Court to decide it in accordance with law. Thereafter, petitioner filed CM-8364-2021 in CWP-2354-2019, but this Court declined to entertain it since the CWP itself was not pending and granted him liberty to file a fresh Writ Petition seeking refund of the said amount.

Therefore, the issue about the refund of Rs.75 lakh was not settled in CWP-2354-2019 and is required to be adjudicated in this Writ Petition.

We may point out that the said sum of Rs.75 lakh was not deposited for adjustment towards the dues of the Bank as is being alleged by the Bank. This can be seen from the following circumstances:

(a) Pleading of the firm dt.23.10.2018 in IA-665-2018 in SA 249 of 2017 (in para 4) that members of the family of the petitioner had come forward to help the petitioner by offering Rs.75 lakh to purchase the residential property of the petitioner and that the offer of deposit of the same is *as bid money* to purchase the residential property of the petitioner;

(b) Annexure P6 letter dt.03.01.2019 given by the petitioner to the Bank specifically mentioned that he and his family members are ready to deposit Rs.75 lakh for release of the residential property of the petitioner only;

(c) Pleading at Paras 15, 18, 19 & 20 in CWP-2354-2019 of the petitioner that the deposit of Rs.75 lakh is by prospective purchasers who are members of his family with an intention to save the residential house of the petitioner.

These circumstances categorically establish that the deposit of Rs.75 lakh was offered on behalf of members of the petitioner's family for purchase of the residential property mortgaged by the petitioner to the Bank only and not for payment of dues of the Bank.

The contents of the orders dt.11.02.2019 and 13.02.2019 in CWP-2354-2019 cannot be construed by the Bank to imply that the deposit was made towards the dues of the Bank ignoring the above circumstances. The said orders do not give any such indication of the petitioner intending such deposit to be made towards the dues of the Bank. The fact that the Court allowed the Bank to encash the three FDRs of Rs.25 lakh each taken by the family members of the petitioner as prospective purchasers cannot also be construed as a decision by the Court accepting the interpretation placed by the Bank since no such reason is contained therein.

The Bank also cannot say that since it was the petitioner who came forward with the offer of deposit of the said amount of Rs.75 lakh, he is supposed to have intended such deposit to be adjusted towards the dues of the Bank since the specific stand of the petitioner as can be seen from above circumstances is that the said amount belongs to his family members who wish to purchase the residential house of the petitioner.

The Bank has admitted in para No.5 of its written statement that the three FDRs each of Rs.25 lakh are in the name of Mrs. Aparna Pupneja, Mrs.Shivani Pupneja and Mrs.Asha Rani. It was these FDRs which were encashed by it. Since they were given with an intention to persuade the Bank to sell petitioner's residential house to them, once the Bank declines to sell it to them for the said amount, the said amount is bound to be refunded by the Bank and it cannot retain it and adjust it to the borrower's dues.

Merely because the said persons are the wives of the guarantors of the Firm M/s Pupneja Rice Mills, it cannot be said that the amount deposited was drawn from funds of the petitioner or other guarantors. This is because in India wife and husband are two independent legal entities capable of contracting on their own; one does not bind the other vis a vis a transaction involving a third party; the law treats both of them as capable of independently acquiring and holding property in their own names and capable of contracting with third persons independently of each other. Neither of them is liable for liability incurred under a contract by the other with a third party. There is no presumption that wife is a name lender of her husband. **(Lonankutty Antony @ T.L. Antony** (1 Supra) and **Siddeshwara Trading Company** (5 Supra)).

Moreover, Annexure P-27 Bank Statements of the Savings Bank Accounts of Mrs. Aparna Pupneja, Mrs.Shivani Pupneja and Mrs.Asha Rani in Axis Bank filed by petitioner clearly point out that each of them had obtained a sum of Rs.25 lakh from third parties and then took an FDR for the said sum and gave it to the petitioner to deposit in the Court.

Therefore, there is clear evidence that these amounts belong to them individually and they had not been transferred to them by their respective spouses who are guarantors of the Firm.

Mrs. Aparna Pupneja, Mrs.Shivani Pupneja and Mrs.Asha Rani are thus third parties to the loan transaction or to the guarantee transaction and the Bank cannot contend that the relationship of these persons with the guarantors of the Firm makes their wealth, the wealth of their husbands.

The reliance by the Bank on Section 171 of the Contract Act, which provides for general lien of a banker to retain a security without an express contract, is totally misplaced because the sum of Rs.75 lakh does not belong to the petitioner or to the Firm. So no such general lien can be exercised in respect of the said amount by the Bank.

It is a settled law that unless a person is a party to a loan transaction in whichever capacity, there is no question of the Bank exercising general lien on his/her property, even if he/she is the spouse of the contracting party. (**Lonankutty Antony @ T.L. Antony** (1 Supra)).

The decisions cited by the counsel for the respondents thus have no application to the facts of the instant case.

Also where a deposit is made before a Tribunal or a Court for a particular purpose, such deposit cannot be treated as a secured asset as no security interest is created by the person making the deposit in the said deposit and consequently Bank has no lien on such deposit entitling it to retain it after the proceeding is disposed of against the person making the deposit.

The Axis Bank (2 supra) case

In **Axis Bank** (2 Supra), a borrower had approached the Debt Recovery Tribunal, Ahmedabad and filed a Securitization Application. Initially interim relief was granted but the same was later vacated.

It then filed an appeal under Section 18 of the SARFAESI Act, 2002 before the Debt Recovery Appellate Tribunal, Mumbai. In terms of proviso under Section 18, it deposited Rs.50 lakhs.

During the pendency of the said appeal before the Debt Recovery Appellate Tribunal, the Securitization Application came to be disposed of finally by the Debt Recovery Tribunal setting aside the sale.

Realising that the appeal did not survive thereafter, the borrower sought to withdraw the same and also sought refund of the deposit of Rs.50 lakhs. Permission was granted, however, making it subject to the disposal of the appeal.

As the appeal itself was being withdrawn, the borrower moved the High Court of Gujarat aggrieved by the observation that the withdrawal would be subject to the result of the appeal.

A learned Single Judge disposed of the said Writ Petition by setting aside the said condition and permitting the borrower to withdraw the same unconditionally. This was also confirmed by a Division Bench.

The Bank challenged it in the Supreme Court contending that borrower had no right to get back the deposit made by it as a pre-condition for entertaining the appeal and that the said amount has to be set off against the dues of the borrower. It was further contended that recovery of the dues had been permitted under Section 13 of the Act and so the deposit is liable to be appropriated by the Bank.

The Supreme Court rejected the said contention and held that the partial deposit before the Debt Recovery Appellate Tribunal is only a pre condition for considering the appeal on merits in terms of Section 18 of the Act and that it is not a secured asset or a secured debt; on disposal of the appeal either on merits or on withdrawal or on being rendered infructuous, in case the appellant makes a prayer for refund of the pre-deposit, the same has to be allowed and the pre-deposit has to be returned to the appellant unless with the consent of the depositor, on the request of the secured creditor permitted appropriation of the same towards the dues. It was held that the Bank has no lien on the pre-deposit and that the pre-deposit is a deposit not with the Bank but with the Tribunal, and is not a bailment with the Bank.

In the instant case also the deposit of Rs.75 lakh made by the spouses of the guarantors of the Firm was permitted to be encashed by the Court in its order dt.13.02.2019 in CWP-2354-2019, but the Court did not allow to be appropriated towards the dues of the borrower/guarantors.

The deposit was intended to be made as consideration for purchase of the residential house of the petitioner, and since the said sale was not agreed to by the Bank, it would be a travesty of justice, to allow the Bank to retain it and not refund it to the petitioner. The principle of restitution would come into play.

In **State of W.B. v. B.K. Mondal and Sons[11],** the Supreme Court held that where something is given lawfully to another non-gratuitously, and

[11] 1962 Supp (1) SCR 876 : AIR 1962 SC 779

such person enjoys the benefit thereof, he has to restore the thing delivered. It held:

> ***"13.*** *Section 70 reads thus:*
>
> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*
>
> ***14.*** *It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

So if the Bank intends to retain the money , it must transfer/sell the residential house of the petitioner to Mrs. Aparna Pupneja, Mrs.Shivani Pupneja and Mrs.Asha Rani . Otherwise it has to refund the same to them.

For the aforesaid reasons, the Writ Petition is allowed and the respondent/Bank is directed to refund Rs.75 lakh encashed by it to the family members of the petitioner i.e. Mrs.Asha Rani, Mrs. Aparna Pupneja and Mrs. Shivani Pupneja pursuant to the order dt.13.02.2019 passed in CWP-2354-2019 within *four weeks* with interest @ 7% p.a. from the date of such encashment of FDRs by the respondent till the actual date of refund. No costs.

Pending application(s), if any, shall stands disposed of.

(M.S. RAMACHANDRA RAO)
JUDGE

17.01.2023 **(SUKHVINDER KAUR)**
Vivek **JUDGE**

1. Whether speaking/reasoned? ***Yes***
2. Whether reportable? ***Yes***