

Harsh Wood Products Pvt. Ltd. (M/s.) Vs M/s. Shabd Pratap Investment Pvt. Ltd. and Others

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: May 17, 2013

Citation: (2013) 3 JLJ 301

Hon'ble Judges: Anil Sharma, J

Bench: Single Bench

Advocate: S.K. Shrivastava, for the Appellant; Harish Dixit, for the Respondent

Final Decision: Allowed

Judgement

Anil Sharma, J.

Appellant-defendant has filed this appeal u/s 96 of CPC against the judgment and decree dated 28.2.2004 passed in Civil

Suit No. 19-B/2001 by learned 12th Additional District Judge (Fast Track Court) Gwalior; whereby, suit filed by the respondent No. 3-plaintiff

has been decreed and counter claim filed by the defendants has been dismissed. The brief facts of the case are that the respondent No. 3-plaintiff

filed a suit for recovery of amount of Rs. 2,33,683/- against the appellant as principal borrower and respondent No. 1-Guarantor. The appellant-

defendant has entered into a contract with State of Madhya Pradesh for purchasing 90 thousands trees of Khair per annum from the forest

department for a period of 12 years. During the contract period, the dispute arose between the defendant No. 1 and State of Madhya Pradesh in

respect of price of the trees. A Civil Suit No. 65-A/85 was filed to decide the said dispute in the Court of the District Judge, Gwalior and the

District Judge on the ad hoc basis fixed the price of tree at Rs. 29/- per tree and injunction order was issued to supply trees against the State on

15.10.1985. The State Government filed a M.A. No. 141/1985 in which price of trees were to be maintained at the rate of Rs. 29/- per tree vide

order dated 11.4.1986. The High Court has directed the defendant to furnish bank guarantee for Rs. 5.83 per tree out of Rs. 29/-. To have a

bank guarantee, defendant No. 1 may contact plaintiff-bank for issuing bank guarantee in the name of State of Madhya Pradesh. The plaintiff-bank

issued various guarantees. On 21.4.1987 the bank issued bank guarantee for Rs. 1,05,000/- and guarantee letter was executed on 21.4.1987 for

bank guarantee No. 5/87. On that basis, the bank gave an undertaking upto Rs. 1,05,000/-. The period of guarantee remained for 3 months.

Afterwards, various other bank guarantees were also issued extending the period of guarantee and this was extended from 17.2.1989 to upto

20.11.1996. Defendant No. 2 stood as guarantor for respondent No. 1 being society/company of the defendant No. 1 upto amount of Rs.

8,88,888/- and for that security, it placed SBI Magnums of Rs. 8,90,000/- in favour of the bank. The bank could recover from this magnums only

Rs. 7,45,275/- and accordingly plaintiff has to recover an amount of Rs. 1,43,513/- as received less by selling magnums, therefore, plaintiff filed a

suit to recover the said amount along with interest at the rate of 20.25% per annum calculated on quarterly basis. The defendants have not paid

said amount, therefore, notice was given on 21.8.1996.

2. The defendant No. 1 contested the suit by pleading that plaintiff bank has incorrectly encashed the bank guarantee. Bank has unauthorizedly

encashed the FDRs of Rs. 3,36,000/- kept for letter of credit without giving prior intimation. Said FDRs were lying with the bank since year 1990-

91; whereas, encashment of bank guarantee has taken place on 6.11.1995. The bank guarantee was furnished in compliance of order of Hon"ble

apex Court dated 23.2.1987 and it was to be paid only after decision in the civil suit and before that it could not be encashed. The payment has

been made illegally, arbitrarily and contrary to the terms and conditions of the bank guarantee on 6.11.1995 because the suit was decided on

30.5.1997.

3. The defendant No. 2 in the separate written statement has made counter-claim for Rs. 10 lacs by saying that SBI Magnums cannot be encashed

without any order of the Court and various other objections were also taken.

4. Learned trial Court by impugned judgment and decree decreed the suit filed by the plaintiff for Rs. 2,33,686/- and dismissed the counterclaim

submitted by the defendant.

5. Aggrieved by the impugned judgment and decree passed by learned trial Court, appellant-defendant No. 1 has filed this appeal on the ground

that learned trial Court is not justified in passing the impugned judgment and decree against the appellant overlooking the fact that Hon"ble apex

Court vide order dated 23.3.1987 directed that the bank guarantee to be kept alive till disposal of the suit but the bank guarantee has been

encashed against the directions of Hon"ble apex Court.

6. The only point for consideration in this case is whether learned trial Court is justified in passing the impugned judgment and decree and whether

the bank was having knowledge about the direction given by Hon"ble apex Court for keeping alive the bank guarantee till disposal of the civil suit

because it is not disputed that the civil suit was decided after the bank guarantee has been encashed on 6.11.1995.

7. Learned counsel for the bank has submitted that bank was not party in the civil suit pending between the Government and the appellant,

therefore, direction/condition issued/imposed by Hon"ble apex Court was not binding on the bank. Learned counsel for the respondent-bank has

also submitted that bank guarantee was encashed in compliance of the letter No. Letter/Revenue/56/41 dated 6.11.1995 written by Divisional

Forest Officer, Morena and bank has to make the payment of Rs. 8,88,888/- to the Divisional Forest Officer, Morena and after said payment, the

bank has become entitled for receiving the balance amount from the defendants No. 1 and 2.

8. So far as, knowledge of condition imposed by Hon"ble apex Court is concerned, the document of guarantee Ex.P-3 shows that guarantee has

been granted in compliance of order of High Court of M.P., Gwalior dated 11.4.1986, which shows that bank was having knowledge that bank

guarantee has been furnished in compliance of order of the Court. It is important to note that the letter of Divisional Forest Officer dated

6.11.1995, on the basis of which, bank guarantee has been encashed, has not been produced in evidence by the bank. Since the bank guarantee

has been granted in compliance of the order of High Court, even if any letter is written by Divisional Forest Officer, the bank was duty bound to

either demand order of High Court for encashment or to issue notice to the appellant.

9. Learned counsel for the appellant has drawn attention of this Court towards the provisions of section 171 of the Contract Act which is

reproduced herein below:

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.

10. Learned counsel for the appellant has submitted that where the plaintiff and the bank had express a contract by way of counter guarantee

providing the method of reimbursement, this contract would exclude application of section 171 of the Contract Act. In support of his argument he

has cited judgment of Hon"ble Calcutta High Court in the matter of Krishna Kishore Kar Vs. United Commercial Bank and Another, .

11. Learned counsel for the appellant has also cited the judgment of Hon"ble Nagpur High Court in the matter of AIR 1946 114 (Nagpur) , in

which it has been held that there is a distinction between bailment and deposit. Money paid into a bank to be credited in the current account of the

person making the payment does not constitute a case of bailment.

12. Learned counsel for the appellant has also cited the judgment of Hon"ble Gauhati High Court in the matter of Tilendra Nath Mahanta Vs.

United Bank of India and Others, , in which it has been held that u/s 171 of the Contract Act, banker"s lien cannot be exercised over fixed

deposits. It can arise only over thing belonging to customer and held as security by bank. Such fixed deposits are basically loan in hands of bank,

therefore, it has no connection with loans in a different account. Amount in other account cannot be, adjusted against claim in any suit.

13. Learned counsel for the appellant has further cited judgment of this Court in the matter of State Bank of India Vs. Madhya Pradesh Iron and

Steel Works Pvt. Ltd., Raipur and Others, , in which has been held that section 171 of the Contract Act in terms did not apply to cases of deposit

of money. In case of deposit no relationship of bailor and bailee is established in accordance with section 148 of the Contract Act. The items of

money deposited with a bank do not retain their identity unless they are set apart or earmarked under special terms of contract. The bank cannot

claim lien on money deposited with it.

14. Learned counsel for the appellant on the basis of above mentioned judgment has submitted that the bank was not entitled to encash fixed

deposits submitted towards bank guarantee in the absence of any contract to this effect.

15. Learned counsel for the respondent-bank on the other has cited the judgment of Hon"ble apex Court in the matter of Syndicate Bank Vs.

Vijay Kumar and others, , in which it has been held that u/s 171 of the Contract Act insurance of bank guarantee on Court"s direction on basis of

deposit of duly discharged fixed deposit receipts in the recital in letters executed along with that deposits and renewals shall remain with bank so

long as any amount is due to bank. General lien is created in favour of bank. Bank guarantee discharged by Court, attachment of FDRs,

permissible only to extent or balance remaining after adjustment of its dues of bank. The judgment is not applicable to the present case because

there is no agreement that FDR will be encashed for payment made in respect of bank guarantee.

16. Learned counsel for the respondent No. 1 has also cited the judgment of this Court in the matter of Bank of India Vs. Binod Steel Ltd. and

Another, , which relates to rights of pawnee which has no application to the present case.

17. Learned counsel for the respondent No. 1 has also cited the judgment of this Court in the matter of Kamla Prasad Jadawal Vs. Punjab

National Bank, New Delhi and Others, , which relates to transaction with nationalised bank which cannot be reopened u/s 3 Usurious Loans Act,

1918 which is not the situation in the present case, therefore, not applicable.

18. Learned counsel for the respondent has also cited the judgment of Hon"ble apex Court in the matter of National Thermal Power Corporation

Ltd. Vs. M/s. Flowmore Private Ltd. and another, , in which it has been held that u/s 126 of Contract Act while considering the question that when

bank guarantee can be invoked, it has been held that bank guarantee is payable on demand which implies that bank is liable to pay as and when

demand is made by beneficiary. Bank is not concerned with inter se disputes between parties. But in the present case bank was having knowledge

that bank guarantee has been furnished in compliance of order passed by High Court, before which Divisional Forest Officer was a party,

therefore, bank was duty bound either to verify from the concerned Forest Officer whether civil suit has been decided or to issue notices to the

appellant-defendant before invoking bank guarantee, therefore, this judgment is also not applicable to the present case.

19. Learned counsel for the respondent No. 1 has also cited the judgment of this Court in the matter of State Bank of India Vs. Mukesh Rawat, ,

which relates to provisions of section 171 of the Contract Act with regard to orders passed by trial Court u/s 372 of the Succession Act,

therefore, this judgment is also not application to the present case because in the present matter there was a direction to keep the bank guarantee

alive and the order of Hon"ble apex Court in binding on the defendant in the suit in which bank guarantee was furnished and since the bank was

knowing that bank guarantee has been furnished in same litigation, even if the nature of the case was not known to the bank it was having

knowledge that there is a dispute between petitioner and the Government and bank guarantee has been furnished as per the direction of the Court.

20. Learned counsel for the appellant has cited judgment of Lahore High Court in the matter of AIR 1927 408 (Lahore) , in which it has been held

that the distinction between general lien of a bailee (whether he be a banker or not) and the right of a creditor who advances money to

accommodate his customers to buy goods and deposit them with him on what is called the ""godown system"" is important. The former merely

confers on the lien-holder the right to retain the goods until payment and does not carry with it the right of sale to secure the debt or indemnity, but

the latter conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In one case a mere right

of retention or retainer is given, and in the other a special property in the chattel bailed is created in favour of the pledge.

21. Learned counsel for the appellant has submitted that the amount kept in fixed deposit could not have been encashed by the bank directly for

realization of money of bank guarantee. He has cited the judgment of Hon"ble Kerala High Court in the matter of Union Bank of India Vs. K.V.

Venugopalan and Others, , in which it has been held that money put in fixed deposit constitutes a debt in the hands of the banker and a debt cannot

be a suitable subject for a lien, because a lien is a right recognised in a creditor to retain another man"s property until the debt is paid. A "lien"

postulates property of the debtor in the possession or under the control of the creditor. A creditor enjoying the "lien" however has no right to sell

the thing or dispose it of. In other words he is only entitled to retain possession. The bank has not produced the letter written by Divisional Forest

Officer on the basis of which bank guarantee has been encashed. Further, in spite of knowledge of furnishing of bank guarantee in litigation by

order of High Court, the bank authorities have encashed the bank guarantee without taking any permission from the Court and without inquiring

from the Court whether said amount can be paid and even without giving any notice to the appellant, who was going to be deprived of benefits

under shares and deposits in magnums plan. On such notice, the appellant might have obtain appropriate orders from the Court or might have

manage to deposit the amount thereby securing the future benefits under magnums and FDRs, therefore, the bank is duty bound to restore the

losses sustain by the appellant. Learned trial Court is not justified in rejecting the counterclaim of the appellant, therefore, appeal is allowed, the

judgment passed by learned trial Court is dismissed and the suit filed by the bank for recovery of remaining amount under the bank guarantee is

also dismissed. The bank has wrongly encashed the FDRs, therefore, the amount under the FDRs with interest @ 12% per annum be paid to the

appellant by the bank. The appellant is also entitled to recover the interest payable on magnums and shares at the rate which was payable on

monthly basis from the bank as her was put to loss by the bank illegally. However, the bank may recover the aforesaid amount from the forest

department/officer on whose letter, the amount of bank guarantee has been encashed as the officer was duty bound by the direction given by

Hon"ble apex Court regarding furnishing of bank guarantee and its continuation till disposal of the suit. The respondent bank shall pay its own cost

of appeal as well as of appellant. Counsel fee be calculated as per schedule, if pre-certified. Decree be prepared accordingly.