HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Spl. Appl. Writ No. 813/2024

Canara Bank, Sirohi through its Authorized Officer, Bhanwar Lal Mali S/o Shri Magna Ram, Aged About 34 Years, R/o Sadar Bazar, Laxmi Bhawan, Sirohi.

----Appellant

Versus

1. M/s. Gopal Industries, through its Proprietor Chhagan Lal S/o Shri Sava Ram, Plot No. 114-115-120-121, Opposite Nehru Nagar, Sheoganj Main Highway, Mahaveer Nagar Colony, Sirohi.
2. Chhagan Lal S/o Shri Sava Ram, Resident of Meghwalvas Chudwal, Kalandri, Sirohi.
3. Ramesh Kumar S/o Shri Lumba Ram, Resident of 602, Meghwalvas, Naya Sanwara, Pindwara, District Sirohi.
4. Mala Ram, S/o Shri Naga Ram, Aged About 64 Years, R/o 28/29, Housing Board, Sirohi, through his Legal Representatives

    4/1. Smt Bhagwati Devi, W/o Late Shri Mala Ram, Aged About 57 Years,

    4/2. Pravin Kumar, Aged About 31 Years, S/o Late Shri Mala Ram, Aged About 31 Years,

    4/3. Vipul Kumar, Aged About 22 Years, S/o Late Shri Mala Ram, Aged About 22 Years,

    4/4. Divyanshu, Aged About 21 Years, S/o Late Shri Mala Ram, Aged About 21 Years,

    4/5. Khushwanti Chouhan, Aged About 34 Years, D/o Late Shri Mala Ram, Aged About 34 Years,

    4/6. Nirma Chouhan, Aged About 26 Years, D/o Late Shri Mala Ram, Aged About 26 Years,

    All resident of 2/B/29, Housing Board Colony, Ward No.1, Sirohi.

----Respondents

For Appellant(s)	:	Mr. Pradeep Singh Khinchi, Adv.
For Respondent(s)	:	Mr.Narendra Thanvi, Adv. with Mr.Mahendra Thanvi, Adv.

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI
HON'BLE MR. JUSTICE MUNNURI LAXMAN

Judgment

Judgment Reserved on : 28.11.2024

Judgment Pronounced on : 05.12.2024

[Per Hon'ble Mr. Justice Munnuri Laxman] :

1) The present special appeal arises out of order dated 10.07.2024 passed by the learned Single of this Court in S.B.Civil Writ Petition No.12144/2023, whereby the prayer for refund of the balance amount of Rs.3.23 lacs left after adjusting the loan amount from the price fetched in the auction of the writ-petitioner's property was allowed and such amount was ordered to be returned to the writ-petitioner with interest @ 9% per annum within three weeks and if not paid within stipulated period, the petitioner is entitled for enhanced interest @ 18% per annum.

2) The present appeal has been filed by Canara Bank, who is the first respondent in the writ petition.

3) The case of the writ-petitioner is that he was the guarantor for the loan agreement of the second respondent-Firm for credit facilities availed with the first respondent-Canara Bank. Subsequently, the credit facility account of the second respondent was classified as a Non-Performing Assets (NPA). The outstanding amount standing to the credit of the second respondent's credit facility account was unpaid. The first respondent-Bank proceeded for recovery of unpaid amount by invoking the provisions of SARFAESI Act by auctioning the property of the writ-petitioner, who was the guarantor for the said loan. The amount of outstanding loan was Rs.19,53,608/-. The value fetched in the

auction was Rs.23,00,000/-. After adjusting the outstanding loan amount, the balance of Rs.3,23,000/-, which ought to have been returned to the writ-petitioner was not refunded or paid. In such circumstances, the writ petition was filed seeking direction to the Bank to refund the balance amount of Rs.3,23,000/- with interest.

4) The initial stand of the respondent before the Writ Court is that the Bank did not dispute the fact that Rs.3,23,000/- were balance amount after adjusting the loan amount of the second respondent and such balance amount was adjusted towards outstanding amount of the second respondent towards additional Guaranteed Emergency Credit Line (GECL). Upon the direction of the learned Single Judge, the respondent-Bank come up with knew plea that the writ-petitioner was a guarantor for another loan account of one Bhagirath Nirmal and the said account was also classified as NPA. The balance amount which was available after adjusting the loan amount of the second respondent, was credited to the writ-petitioner's account and the same was adjusted towards the part of loan of Bhagirath Nirmal, to which the writ-petitioner was also guarantor.

5) The learned Single Judge after seeing the two different stands of the bank, did not agree with the existence of the second loan of Bhagirath Nirmal and consequently, directed the respondent-Bank to pay the amount with interest. Aggrieved by the same, the present Special Appeal has been filed.

6) Heard learned counsel for both the sides and perused the impugned order as well as material available on record.

7) The learned counsel appearing for the respondent No.1-Bank has contended that the learned Single Judge failed to

consider the existence of the second loan of Bhagirath Nirmal, which was also declared NPA and the writ petitioner was guarantor for the said loan transaction also. The balance amount remained after adjusting with the second respondent's loan agreement, was adjusted towards the loan account of Bhagirath Nirmal to which the writ-petitioner was also guarantor. He also contended that such adjustment was done by the Bank exercising the right of general lien on all securities and all forms of commercial papers deposited by or on behalf of the customers in ordinary course of banking business.

8) The learned counsel for the Bank also contented that though the property was given on security for the loan amount of the second respondent, such a security can also be made use for the purpose of adjustment of another loan by exercising its power of general lien over such property unless contract is otherwise. According to learned counsel, there is no specific terms in the agreement, which disentitles the bank to exercise its right of general lien over the property mortgaged in respect of other loan of the said bank. In support of his contention, the learned counsel has relied upon the decisions of the Apex Court rendered in the cases of (i) **C.Lalitha Raj Vs. The Assistant General Manager, State Bank of India**, reported in 2012 SCC Online Mad. 1072, (ii) **Sanjay Kumar Singh Vs. The State of Jharkhand,** reported in (2022) 7 SCC 247 and (iii) **Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala**, reported in (2009) 9 Supreme Court Cases 478.

9) It is also the contention of the learned counsel for the Bank that the learned Single Judge ought not to have entertain

writ petitioner against proceedings of SARFAESI Act. To support his contention, he has relied upon the decision of the Apex Court rendered in the case of **M/s. South Indian Bank Ltd. & Ors. Vs. Naveen Mathew Philip & Anr.**, reported in (2023) 4 SCR 18.

10) The learned counsel appearing for the writ-petitioner vehemently opposed the contentions raised by the counsel for the Bank. His submission is that the learned Single Judge has taken note of two different stands taken by the Bank to justify the illegal retainment of balance amount fetched in the auction after adjustment of loan. He submitted that the writ-petitioner is not aware of the other loan to which he was said to be the guarantor. According to him, subsequent loan considered by the Bank required to be rejected in the light of the initial stand taken by the Bank that the adjustment of the balance was made in respect of additional GECL availed by the second respondent. Such stand was rightly rejected on account of the recitals in the acceptance letter dated. 5.5.2023 whereunder the outstanding amount was mentioned as Rs.19,38,000/-, which includes additional GECL of Rs.3,23,000/-.

11) The learned counsel for the writ-petitioner has also submitted that the security, which was given to the loan account of the second respondent is a particular lien and such a security cannot be invoked by the Bank exercising its general lien to make adjustment in respect of other loan transaction of the bank. He further submitted that the writ petition was filed without challenging any proceedings of SARFAESI Act. However, the direction was sought in respect of the balance amount remained after adjustment of loan transaction, for which the property was

auctioned. Therefore, the decision relied upon by the Bank is not applicable in the facts and circumstances of the present case. He seeks dismissal of the Special Appeal.

12) Before adverting to the factual matrix of the case, it is apt to refer to the very concept of 'general lien' and 'particular lien' in the banking business. The Apex Court had an occasion to deal with similar kind of issue in the case of **Syndicate Bank Vs. Vijay Kumar & Ors.,** reported in (1992) 2 Supreme Court Cases 330, wherein it was held as follows:-

> "6. In Halsbury's Laws of England, 2nd Edn., Vol. 20. P.552 para 695, lien is defined as follows: [Ed.: In 4th Edn. See Vol. 28, para 502]
>
> > "Lien 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."
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> In Chalmers on Bill of Exchange, 13th Edn., p.91 the meaning of "Banker's lien" is given as follows:
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> > "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, 26th Edn., p. 389, para 3032 the Banker's lien is explained as under:
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> > "Extent of lien- 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 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 proceeds 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, 8th Edn., p.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 recognized as such."

In Brandao V. Barnett (1843-60) All ER 719 : (1846) 12 Cl & Fin 787 : 8 ER 1622), it was stated as under: (All ER p.722-H)

> "Bankers, most undoubtedly, have a general lien on 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 passage go to show that by mercantile system the Bank has a general lien over all forms securities or negotiable instrument deposited by or on behalf of customer in the ordinary course of banking business and that the general lien is valuable right of the banker judicially recognized 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 instrument including FDRs which are remitted to 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."

13) A reading of the above decision, it is clear that it is judicially recognized the valuable right of banks i.e. general lien over all forms of security or negotiable instrument deposited by or on behalf of the customer in the ordinary course of banking business. It has right to use proceeds in absence of any balance

i.e. may be due from the customer by way of deduction of customers debt balance. However, such a general lien is not available, if any agreement is contrary to such right. In view of the above ratio laid down by the Apex Court, the judgment relied upon by the learned counsel for the respondent No.1-Bank are not required to be dealt with.

14) The grievance of the writ-petitioner in the present case is that he was a guarantor for the loan facility availed by the second respondent; his property was mortgaged for such a loan; the second respondent credit account was declared as NPA; the outstanding loan was 19,53,608/- and the bank auctioned such a property for Rs.23 lacs. After the adjustment, the balance amount was of Rs.3,23,000/- and he filed the writ petition seeking direction to release such an amount. Though the Bank's initial stand was that such amount adjusted towards Additional GECL due of Rs.3,23,000/- of the second respondent. However, subsequent stand was that such amount was adjusted towards the loan of Bhagirath Nirmal to which the writ-petitioner was a guarantor and the said loan account was also declared NPA. According to him, such change of stand is not acceptable.

15) The pleadings of the petitioner is not clear whether the second claim set up by the Bank was correct or incorrect and when a stand is taken that there is another loan to which the writ-petitioner was a guarantor, such a fact required to be adjudicated in the regular civil proceedings and not in the writ proceedings. The established principle, which is judicially recognized is that the Bank has a general lien over all securities and all forms of commercial papers submitted on behalf of the customers in the

ordinary course of banking business. Such a lien is also extended for adjustment of customers' due to the bank by way of reduction of customer debt balance.

16) One of the contention of the learned counsel for the writ-petitioner was that unless the proceedings under the SARFAESI Act were drawn for the second loan default, the bank has no right to adjust that balance amount of other loan account has no legs to stand. The reason is that the Bank has such a lien over all forms of security and adjust such an amount in order to reduce the debt balance of customer. The right of the Bank to have general lien over all the securities has not properly been brought to the notice of the learned Single Judge resulting the impugned order. Therefore, the impugned order is liable to be set aside.

17) In the result, the Special Appeal is allowed. The order dated 10.07.2024 passed by the learned Single Judge is set aside. However, a liberty is given to the writ-petitioner to seek an adjudication before a proper civil court, if he has any grievance with regard to the second loan transaction.

18) Pending interlocutory applications, if any, shall stand disposed of.

(MUNNURI LAXMAN),J **(DR. PUSHPENDRA SINGH BHATI),J**

NK/-