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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.375 of 2017

(Arising out of order dated 25-3-2017 passed by the 9th Additional District Judge, Bilaspur in Execution Case No.03-B/2008)

Order reserved on: 10-7-2017

Order delivered on: 22-8-2017

Dr. Achinto Chakraborty, S/o Abni Chakraborty, Age 48 years, Through Power of Attorney Holder Smt. Polly Chakraborty, Aged 40 years, R/o F-6, B-2, 3rd Floor, Shriram Towers, Vyapar Vihar, Bilaspur, PS Civil Line, Bilaspur, District Bilaspur (C.G.)

(Judgement Debtor)

---- Petitioner

Versus

1. Chairman & Managing Director, State Bank of India, Registered Office State Bank Bhawan, 14th Floor, Madame Cama Road, Nariman Point, Mumbai

2. Regional Manager, State Bank of India, RBO State Bank, 3rd Floor, Vikas Bhawan, Nehru Chowk, Bilaspur (C.G.) 495001

3. Madhwan Kutty, Assistant General Manager, Retail Asset & Small and Medium Enterprises, State Bank of India, City Credit Centre & SARC, 2nd Floor, Galaxy Heights, Vyapar Vihar, Bilaspur (C.G.) Pin 495 001

4. Prabash Kumar, Branch Manager, State Bank of India, Main Branch, Bilaspur (C.G.) 495 001

5. Sunil Mehta, Manager Recovery, State Bank of India, Retail Asset & Small and Medium Enterprises, City Credit Centre & SARC, 2nd Floor, Galaxy Heights, Vyapar Vihar, Bilaspur (C.G.) Pin 495 001

(Decree Holder)

---- Respondents

For Petitioner: Mr. Saleem Kazi, Advocate.

For Respondents No.1 and 2: Mr. P.R. Patankar, Advocate.

Amicus Curiae: Mr. Saurabh Dangi and Mr. Amrito Das, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The absorbing question that emanates for consideration in this writ petition is, whether the State Bank of India, the respondent herein, is justified in exercising the right to set off in the facts and circumstances of the case appropriating an amount of ₹ 1,20,000/- from the savings bank account of the petitioner without noticing him.

2. For determining the *lis* between the parties, following facts are necessarily required to be noticed: -

2.1) The petitioner took a loan of ₹ 4 lakhs from the respondent Bank on 30-11-2003 which he could not repay right in time compelling the respondent Bank to institute a civil suit on 1-5-2006 being C.S.No.3-B/2008 for recovery of ₹ 4,07,400/- which ultimately came to be settled before the Lok Adalat, Bilaspur on 2-11-2008 requiring the petitioner to pay a sum of ₹ 3,62,566/- by 19-4-2009. Accordingly, the decree was also drawn.

2.2) The petitioner this time also failed to comply with the terms of the decree leading the respondent Bank to levy execution for recovery of ₹ 3,62,566/- with interest of ₹ 14,874/-, in sum ₹ 3,77,440/- in all. The correctness of the said amount was disputed by the petitioner herein stating inter alia that he had already paid the said amount and that was being examined by the executing court. Meanwhile, on 13-5-2016, the respondent Bank issued a letter to the petitioner threatening legal action against him

notwithstanding the pendency of execution proceeding. Finally, the respondent Bank debited an amount of ₹ 1,20,000/- from the savings bank account of the petitioner exercising the right to set off / lien under Section 171 of the Indian Contract Act, 1872.

2.3) Resisting the above-stated course of action adopted by the Bank, the petitioner filed an application for initiating contempt proceeding as well as for return of ₹ 1,20,000/- to the petitioner stating inter alia that the impugned action of the Bank is totally contrary to law and unknown to standard banking practice prevalent in banking system. The said application was replied by the Bank and it has been claimed that the Bank has exercised its right to set off / lien and accordingly, adjusted the sum of ₹ 1,20,000/- on 15-9-2016 which is strictly in accordance with law and such a right to set off / lien is totally permissible as per the Banking laws and therefore the application deserves to be rejected.

2.4) The executing Court by its impugned order rejected the application leading to filing of the instant writ petition by the petitioner / judgment debtor contending inter alia that the action of the Bank is not only arbitrary, but against the well settled banking practice prevalent in the bank and even the right to set off has been exercised without notice to the petitioner, therefore, the impugned order deserves to be set aside.

3. Mr. Saleem Kazi, learned counsel for the petitioner, would submit that the respondent Bank has already levied an execution in which the petitioner has already raised claim that the entire amount has

already been deposited which the executing court was examining and in the meanwhile, from the savings bank account of the petitioner, an amount of ₹ 1,20,000/- has been appropriated exercising the alleged right to set off / lien under Section 171 of the Indian Contract Act, 1872, that too without notice to the petitioner ignoring the fact that the matter is sub judice before the court and the plea of the petitioner that he had already deposited the sum due to the respondent, is being examined, therefore, the impugned order deserves to be set aside.

4. Mr. P.R. Patankar, learned counsel appearing for the State Bank of India/respondents No.1 and 2, opposing the writ petition would submit that the petitioner has failed to pay the loan despite time having been granted by the Lok Adalat up to 19-4-2009 which led the respondent Bank to lay an execution and the petitioner even though having requisite amount in his savings bank account was not paying the amount which necessitated to exercise the right to set off / lien under Section 171 of the Indian Contract Act, 1872 which is strictly in accordance with standard banking practice. Therefore, the learned executing court has rightly rejected the petitioner's application as such, the writ petition deserves to be dismissed.

5. Mr. Amrito Das, learned counsel appearing as *amicus curiae,* would submit that under Section 171 of the Indian Contract Act, 1872, banker's lien cannot be exercised to money deposited by the petitioner.

6. Mr. Saurabh Dangi, learned counsel also appearing as *amicus curiae*, would submit that the scope of judicial interference in standard banking practice is extremely limited and it can be interfered with only in exceptional cases as the Bank plays a very vital role in the functioning of the economy of the country.

7. I have heard learned counsel for the parties as well as the *amicus curiae* and considered their rival submissions and also gone through the record with utmost satisfaction.

8. In order to resolve the dispute, it would be necessary, at the outset, to consider first as to whether the Bank has exercised the right to lien / right to set off as prevalent in the banking system. The right of banker's lien is provided under Section 171 of the Indian Contract Act, 1872 which states as under: -

> "**171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers**.—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."

9. The word 'bailment' has been defined under Section 148 of the Indian Contract Act, 1872 and it refers to delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned.

10. The word 'banker' has been defined by the Black's Law Dictionary as 'a person who engages in the business of banking'. 'Retain' has been defined as continue to hold and keep possession of

something. 'Any goods' means that the article has to be a tangible movable article. The Sale of Goods Act, 1930 defines 'goods' under Section 2 (7) to mean any kind of movable property other than actionable claims and money. Thus, for the operation of Section 171 of the Indian Contract Act, 1872, the deposits made in the bank accounts cannot be treated as goods and the right of the banker as lien over the deposit is not applicable. This would demonstrate that the principle of bailment shall not apply in a case where a customer has deposited his money in the account to a bank and the bank promises to pay back the same upon demand with interest or under any term as it may exist.

11. In the matter of **Devendrakumar Lalchandji v. Gulabsingh Nekhesingh**[1], the Nagpur High Court has clearly 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. Therefore, Section 171 of the Indian Contract Act, 1872 does not apply to a case where the bank intends to balance an account by making deductions from the account of a customer.

12. In the matter of **Punjab National Bank Ltd. v. Arura Mal Durga Das and another**[2], bankers lien has been defined by the Punjab High Court as under: -

> "The statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits, …
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> Strictly speaking the use of the word 'lien in relation to

1 AIR 1946 Nagpur 114
2 AIR 1960 Punjab 632

money – though frequently used, is not correct. It is confined to securities and property in Bank's custody. A distinction is drawn between a Banker's lien, on its clients, paper, goods and security etc. and the Bank's right to set off deposits against debts due to it from its depositors. It may arise from the contract, or from mercantile usage or by operation of law. …

The rule of English law that the Bank has a lien or more appropriately, a right to set off against all monies of his customers in his hands has been accepted as the rule in India. According to this rule, when monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set off or liquidate the debts. …

It has to be remembered that bank's right to apply a deposit to an indebtedness due from the depositor, results from the right of set off obtaining between persons occupying creditor and debitor relationship with mutual demand existing between them."

13. In the matter of **Syndicate Bank v. Vijay Kumar and others**[3], the issue of Banker's lien has been considered by the Supreme Court and it has been held as under: -

"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."

The above passage goes 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

3 (1992) 2 SCC 330

> 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.
>
> Applying these principles to the case before us we are of the view that undoubtedly the appellant-Bank has a lien over the two FDRs. In any event the two letters executed by the judgment-debtor on 17-9-80 created a general lien in favour of the appellant-Bank over the two FDRs. Even otherwise having regard to the mercantile custom as judicially recognised the Banker has such a general lien over all forms of deposits or securities made by or on behalf of the customer in the ordinary course of banking business. ...”

14. Therefore, it is quite vivid that the money deposited by a person to the bank does not constitute a case of bailment and Section 171 of the Indian Contract Act, 1872 would not be applicable and as such, the banker's right of lien would not be applicable in the case of deposit of money by the customer with the Bank.

15. Now, right to set off would come into play. Right to set off is a right judicially recognised which arises from the principle of equity and it is an equitable right. Right to set off is not a contractual right but follows from the custom and usages of the mercantile law on the principle of equity and justice. The principles of banker's right of set off are followed in India in the same lines as has been followed by English law. The Indian Contract Act, 1872 is not a complete code in itself and Section 1 of the Act itself saved any usage or custom of trade. {See **Arura Mal Durga Das's** case (supra).}

16. What is right of set off has precisely been explained by the High Court of Punjab in **Arura Mal Durga Das's** case (supra) as under:-

> “The generally accepted rule respecting a bank's right of set off was stated in 3 Ruling Case Law, 591 in the following words: -

> "The right of a Bank to apply a deposit to an indebtedness due from the depositor, results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exist mutual demands, and it is familiar law that mutuality is essential to the validity of a set off, and that, in order that one demand may be set-off against another, both must mutually exist between the same parties.""

17. In order to exercise the right of set off there is no requirement that there should be an agreement between the Bank and the customer to exercise that right of set off. In the matter of **Krishna Kishore Kar v. United Commercial Bank and another**[4], the Calcutta High Court held as under: -

> "22. … There was no express contract between the plaintiff and the defendant Bank regarding the manner of adjustment of this outstanding balance in the cash credit account. All the proceeds of the fixed deposits had been duly credited in this account. Therefore the Bank could exercise its general lien under S. 171 of the Contract Act for making up the loss caused by the plaintiff and the Bank had rightly adjusted this claim against Rs. 93,500/- set free by order dated 1-7-1963."

18. The above mandate of the Calcutta High Court in **Krishna Kishore Kar** (supra) has been followed by the Gujarat High Court in the matter of **Shivam Construction Co., Ahmedabad and others v. Vijaya Bank, Ahmedabad and others**[5].

19. In the matter of **Indian Bank, Rasipuram v. Sri Annapoorna Finance, Rasipuram**[6], the Madras High Court has held that for exercising the right of set off there should exist mutual demand between the Bank and the customer and in paragraph 11, it has been observed as under: -

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4 AIR 1982 Cal 62
5 AIR 1997 Guj 24
6 AIR 2002 Mad 180

> "11. … It is true that the bank can exercise its right to set-off in the money balance of a customer, provided there should exist mutual demands and in order that one demand might be set-off against another, both must exist mutually between the parties. ..."

20. In the matter of **Anumati v. Punjab National Bank**[7] wherein the bank exercised the right of set off against the monies kept in joint holder of customer, Their Lordships of the Supreme Court in paragraphs 11 and 16 held as under: -

> "11. Parties to a joint account are not automatically authorised to pledge each other's credit. According to Sheldon and Fidler : Practice and Law of Banking[8], a banker should not lend money to the parties to a joint account, either by means by an overdraft or in any other way, without obtaining from each of the parties an undertaking to be severally as well as jointly liable to pay the loan. The banker has no right to set off the credit balance in the joint account except in respect of another joint account of the same parties (*ibid*). The difference between the joint fixed deposit account and a joint savings, current or other account, is that there is no right in the depositors to operate such account and withdraw the moneys except upon maturity.
>
> 16. In our view, these decisions correctly set out the law. In the present case the contract in respect of the joint account was between the respondent Bank and the husband and wife. The fixed deposit was not a debt due by the Bank to Mam Chand alone which could be set off by the Bank against any claim that the Bank may have had against Mam Chand. Besides the right of Mam Chand was to receive the money deposited only after it matured, if he survived. Supposing Mam Chand had died before the fixed deposit matured, the only person entitled to get the money would be the appellant. This right of the appellant could not have been taken away without her consent."

21. Thus, there is a marked difference between banker's right to lien and banker's right to set off which has been noticed by the Punjab High Court in **Arura Mal Durga Das's** case (supra) and in

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7 (2004) 8 SCC 498
8 11th Edn., p. 71.

particular, the banker's right to lien is a right to retain in one's possession over belongings of another until certain demands of the person in possession are satisfied, for the repayment of debt, whereas, the right of set off means right of combination of several accounts, when a customer maintains more than one type of account in the bank, when the creditor has defaulted in making payment. Likewise, in its scope banker's lien is in relation to securities and properties in the bank's custody, whereas set off is confined to money (liquidated) and may arise from a contract or from the mercantile usage or by operation of law. Right to lien flows from Section 171 of the Indian Contract Act whereas, right to set off flows from the custom and usage of mercantile law and has been legally recognised by the Courts of India.

22. Now, the question would be, what should be the mode and manner of exercising the right to set off.

23. It is clear from the above discussion that the right of set off is available to the banker when there is debt due and when there is a mutual demand between the banker and the customer. It is further clear that the banker's right of set off does not flow from any statute or Act, but is based on the principle of equity. In this regard, reference may be made to an English decision in the matter of **Halesowen Presswork & Assemblies Ltd. v. Westminster Bank Ltd.**[9] in which Lord Denning M.R. held as under: -

> "Seeing that the banker's lien is no true lien, in order to avoid confusion, I think we should discard the use of the word "lien" in this context and speak simply of a banker's

9 (1970) 3 WLR 625

> "right to combine accounts": or a right to "set off" one account against the other.
>
> Using this phraseology, the question in this case is: suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts so that he can set off the debit against the credit, and be liable only for the balance?
>
> The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and to set off one against the other, unless he has made some agreement, express or implied, to keep them separate. This principle was stated and applied in two cases decided on the same day—November 8, 1872. One was In re European Bank. Agra Bank Claim (1872) L.R. 8 Ch.App. 41 in the Court of Appeal in Chancery. The other was Garnett v. M'Kewan (1872) L.R. 8 Ex. 10 in the Court of Exchequer. It has been applied several times since, such as T. & H. Greenwood Teale v. William Williams, Brown & Co. (1894) 11 T.L.R. 56 and In re Keever (A Bankrupt) [1967] Ch. 182. Conversely, the customer has a right to call on the banker to combine the two-accounts, and to set off one against the other unless there is some agreement, express or implied, to the contrary: see Mutton v. Peat [1900] 2 Ch. 79."

24. The aforesaid decision has been followed by the M.P. High Court in the matter of **State Bank of India v. Madhya Pradesh Iron & Steel Works Pvt. Ltd., Raipur and others**[10].

25. Queen's Bench Division in **Halesowen Presswork & Assemblies Ltd.** (supra) speaking through Roskill J, held as under: -

> "It must be remembered, however, that the plaintiff might have ordered a transfer of his assets from the one branch to the other and the defendants' bank, on the other hand, must have a corresponding right. In general it might be proper or considerate to give a notice to that effect, but there is no legal obligation on the bankers to do so, arising either from express contract or the course of dealing between the parties."

26. The Bombay High Court in the matter of **State Bank of India v. Javed Akhtar Hussain and another**[11] considered the question of

10 AIR 1998 MP 93
11 1992 Mh.L.J. 1080

Bank exercising lien over customer's account unilaterally and without giving notice to the customer and it has been held that the action of the Bank in keeping lien over both these accounts was unilateral and high handed and observed as under in paragraph 12:-

> "12. The action of keeping lien was a sort of suo motu act exercised by the Bank/applicant in the present case, even without giving notice to the non-applicant No.2 and his wife. Even though the applicant had filed Special Darkhast No. 200 of 91, it could have moved the court for passing orders in respect of the amounts invested in TDR and RD accounts. However, the action of the applicant in keeping lien over both these accounts was unilateral and high-handed and even it is not befitting the authorities of the State Bank of India to do so. If such thing would continue, perhaps in future the customer would lose his confidence in the Bank and I am afraid that the days are not far off."

27. If the facts of the case are examined in light of the principles noticed herein-above, it is quite apparent that the matter is pending consideration before the executing court and before the executing court, the petitioner had already raised claim that he has deposited almost all the amount which was being examined by the executing court, but, in between, without notice to the petitioner, unilaterally, the Bank has exercised the right to set off ignoring the court proceeding which is clearly arbitrary and unsustainable in law. Once the matter is pending before the executing court, the said court seizes of the matter and the respondent Bank in all fairness could have made an application before that court for adjustment of said amount, if any, and could have also simultaneously made application for attachment of that amount, if any, but exercise of said right without notice and without making any application for

attaching and appropriating is clearly arbitrary apart from being whimsical. I respectfully agree with the view of the Bombay High Court as held in **Javed Akhtar Hussain's** case (supra) that if a Bank like State Bank of India would proceed in such a high-handed and arbitrary manner to misappropriate the deposit of its customer, definitely the customer/depositor will lose faith and confidence in the Bank as those days have come closer.

28. It must be mentioned at this stage that this Court is not un-oblivious of the scope of interference in banking machinery highlighted by the Supreme Court in the matter of **United Commercial Bank v. Bank of India and others**[12] in which Their Lordships referred to a passage from **R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.**[13] with approval which states as under: -

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."
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> (emphasis supplied)

29. As a fallout and consequence of aforesaid discussion, the

12 (1981) 2 SCC 766
13 (1977) 3 WLR 752

impugned order is quashed and the State Bank of India is directed to deposit the entire amount along with interest in the savings bank account of the petitioner within two weeks from the date of order along with 8% interest per annum from the date of withdrawal of that amount till the date of deposit. The respondent Bank is saddled with cost of ₹ 10,000/- for its arbitrary action.

30. The writ petition is allowed to the extent indicated herein-above.

31. Before parting with the record, this Court appreciates the assistance rendered by Mr. Amrito Das and Mr. Saurabh Dangi, learned *amicus curiae*, as in short notice, they have not only appeared and assisted the court but also submitted excellent written note.

Sd/-
(Sanjay K. Agrawal)
Judge

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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.375 of 2017

Dr. Achinto Chakraborty

Versus

Chairman & Managing Director, State Bank of India and others

Head Note

Distinction between banker's lien and right to set-off pointed out.

शीर्ष टिप्पण

बैंककार के धारणाधिकार तथा मुजराई के अधिकार के मध्य भिन्नता इंगित की गई।