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Kerala High Court

Justice Dama Seshadri Naidu

### **Lonankutty Antony v. Joint Registrar Of Co-Operative Societies**

WP(C).No. 2527 of 2015 (M)

08.03.2016

**Contract Act, S. 171 - Lien - Unless a person is a party to a loan transaction in whichever capacity, the question of the Bank's exercising the general lien vis-à-vis the property of that person—even if he or she were the spouse of the contracting party—does not arise. Put differently, it falls foul of the contractual obligations of the banker and customer - Question of the husband's implicitly incurring a liability on the contract entered into by his wife with a third party, in the absence the husband's express or implied consent thereto, does not arise - Had it been a case of contract between wife and husband, given the statutory obligation of spousal maintenance, the parameters, of course, would have differed - Evidently the wife contracted, as the record reveals, the loan having provided the sureties, who do not include her husband - The husband, in fact, contracted the loan subsequently - Bank's plea that it bona fide believed that the petitioner could offer his property as security is to be discounted - For by the time the wife took the loan, the husband was not at all in the picture—his loan was subservient. [Para 26, 27, 28]**

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**Dama Seshadri Naidu, J.:**— The petitioner, a member of the third respondent Co-operative Bank, availed himself of a loan after mortgaging a piece of property and later cleared it. When he sought the return of the title deeds of the property after clearing the loan, the respondent Bank refused. The refusal seems to be on the premise that the petitioner's wife also secured a loan, and the petitioner's title deeds are deemed to have been kept as security for the realisation of the said debt, too. In other words, the third respondent Bank has exercised its general lien. Aggrieved, the petitioner has filed the present writ petition.

2. The learned counsel for the petitioner has submitted that the petitioner has nothing to do with the loan obtained by his wife. He has further submitted that the petitioner is not a guarantor to the loan. Nor has he offered his property as security.

3. The learned counsel for the respondent Bank has, on the other hand, strenuously contended that the petitioner has all along known about the loan obtained by his wife. He has, in fact, contended that it is the petitioner that is instrumental in his wife's securing the loan.

4. In elaboration of his submissions, the learned counsel has also contended that the Bank has bona fide believed that the husband's property could be used for securing his wife's loan.

5. The learned counsel has also drawn my attention to Ext.R3(g) issued by the Assistant Registrar allowing the respondent Bank to retain the petitioner's title deeds until his wife's loan is cleared.

6. Heard the learned counsel for the petitioner and the learned counsel for the respondent Bank, apart from perusing the record.

7. To a specific query whether the petitioner and his wife are living together, the learned counsel for the petitioner did submit that they had been living together, though he added apologetically that they had a strained relationship. I must acknowledge that the answer to my question, either way, has no impact on the issue.

8. To begin with, this Court is aware that it cannot indulge in any moral adjudication. The liability of the party, be it husband or wife, is required to be determined strictly in statutory terms—in terms of either the contract they have entered into or the law governing the issue.

9. In the first place, the learned counsel for the respondent Bank could not bring to the notice of this Court any provision under which the Assistant Registrar issued Ext.R3(g) allowing the respondent Bank to retain the petitioner's documents for the loan contracted by his wife. It is indeed an extra-legal order with no enforceability. And it is required to be ignored as devoid of any force. It is thus disregarded.

#### Securities-Lien:

10. In *Transcore v. Union of India* 2008 1 SCC 125,, the Apex Court has delineated on the securities that could be offered. Broadly, there are three types of security over an asset. First is where the creditor obtains an interest in the asset concerned (mortgage). Second is the security in which the rights of the creditor depend on possession of the asset (pledge/lien). The third is the charge where the creditor gets neither ownership nor possession of the asset, but the asset is appropriated to satisfy the debt or obligation in question. The dichotomy, which is important, is that more than one obligation could arise from the same transaction, namely, to repay the debt or to discharge other obligation.

11. Focusing on the contractual concept of the term, we may examine 'lien'. Black's Law Dictionary<sup>2</sup> defines lien as a legal right or interest that a creditor has in another's property, usually lasting until a debt or duty it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained. Of the banker's lien,

the same lexicon defines it to be the right of a bank to satisfy a customer's matured debt by seizing the customer's money or property in the bank's possession.

12. In West's Encyclopedia of American Law, lien is defined as a right given to another by the owner of property to secure a debt, or one created by law in favour of certain creditors. A lien is an encumbrance on one person's property to secure a debt the property owner owes to another person. The statement that someone's property is "tied up" describes the effect of lien on both real and personal property. Lien is a French word meaning "knot or binding" that was brought to Britain during the Norman Conquest in 1066.

13. The Hon'ble Supreme Court in *Syndicate Bank v. Vijay Kumar* 1992 2 SCC 330, has examined the numerous definitional dynamics of the expression 'the Banker's Lien.' In Halsbury's Laws of England<sup>5</sup>, the lien is defined to mean 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. As per this primary sense, it is given by law and not by contract. A banker's lien on negotiable securities, according to Chalmers on Bills of Exchange<sup>6</sup>, is 'an implied pledge'. A banker has, in the absence of an agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business regarding any balance that may be due from such customer.

14. In Paget's Law of Banking<sup>7</sup>, it is observed that 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 recognised. In *Chitty on Contract*<sup>8</sup>, the Banker's lien is explained as under:

*"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 contract 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 original as in Vijaya Kumar)*

15. Putting the issue in perspective, we may say that a lien is the creditor's right to retain the debtor's asset, movable or immovable, until the debt is repaid. If the asset is retained till the debt for which the asset is offered as security is repaid, it is a particular lien. On the other hand, if the asset is retained till any other unconnected debt is repaid, it is a general lien. As the general lien is mostly exercised by the bankers, it is also called the banker's lien. With either a particular lien or a general one, there shall be no contract, express or implied, to the contrary. Even with general lien, the owner of the asset has to be contractually connected to the debt in the capacity of either a borrower or a guarantor.

16. In fact, Section 171 of the Indian Contract Act gives statutory shape to the general lien of bankers, factors, etc. The provision reads to the effect that bankers, factors, wharfingers,

attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as security for a general balance of account, any goods bailed to them. But no other persons have a right to retain, as security for such balance, goods bailed to them, unless there is an express contract to that effect. It serves well to remember, however, that lien in service jurisprudence differs from that under the contract act or even common law.

17. As is well known, a statute of limitation bars or runs against the remedy, but does not discharge the debt or extinguish or impair the right, obligation, or cause of action. Keeping this in view, let us proceed further.

18. In Anson's Law of Contract ( 19th Edn. p. 383, as quoted in Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay ), it is opined that at Common Law lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract or from its terms, it be limited in point of duration. According to the Anson's, though the contractual right is of permanent character, the remedies arising from its violation are withdrawn after a certain lapse of time. The remedies are barred, though the right is not extinguished.

19. Quoting the above, in Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay 1958 SCR 1122, a Constitution Bench of the Apex Court has held that when a creditor has a lien over goods by way of security for a loan, he can enforce the lien for satisfying the debt, even though an action thereon would be time barred.

20. There is, in this case, no privity of contract; nor any legal obligation even by implication, however.

### **Coverture:**

21. The archaic and now obsolete common law concept of spousal unity is a matter of coverture. Black's Law Dictionary defines coverture as the condition of being a married woman. Under common law, a woman under coverture could sue only through the personality of her husband. The lexicon further amplifies thus:

*"Coverture, is a French word signifying any thing that covereth, as apparell, a coverlet.... It is particularly applied in our common lawe, to the estate and condition of a married woman, who by the lawes of our realme, is in (potestate viri) and therefore disabled to contract with any, to the preiudice of her selfe or her husband, without his consent and privity; or at the least, without his allowance and confirmation." John Cowell, The Interpreter (1607).*

*"Coverture is by law applied to the state and condition of a married woman, who is sub potestati viri, (under the power of her husband) and therefore unable to contract with any to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof. When a woman is married, she is called a Femme couverte, and whatever is done concerning her during marriage is said to be done during coverture." The Pocket Lawyer and Family Conveyancer 96 (3d ed. 1833)*

22. To rid the phrases of their French flavour, we may say femme sole is a single woman,

and femme covert, literally, a covered woman. In Chapter XV of the Commentaries on the Laws of England, William Blackstone explains the concept of coverture. The legendary legal commentator describes the legal consequences of making and dissolving a marriage by observing thus:

*“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.”*

23. Under the English Common Law, wife and husband are regarded as one person and are presumed to have but one will. Courts have gone to the extent of saying that they cannot be accused of conspiracy for one person cannot conspire with oneself. This common law concept has, however, largely confined to testimonial privileges. It is based on the premise that once wife and husband are treated as but one, one testifying against another, as a matter of legal fiction, amounts to self-incrimination. On the converse, one testifying for another is nothing but a reaffirmation of one’s own testimony: it cannot even be corroborative—just repetitive. Undeniably there are myriad exceptions to this rule. Indian Law has, however, refused to recognise this spousal immunity of biblical origin. Section 120 of the Evidence Act makes it clear.

24. Further, at page 725 of Commentaries on the Laws of England, Blackstone observes that in the civil law, the husband and wife are regarded as two distinct persons; and may have separate estates, contracts, debts, and injuries. And the learned author thus concludes that a woman may sue and be sued without her husband.

25. At any rate, in the first place, the coverture covers, rather subsumes the proprietary rights of a wife under those of her husband. The converse cannot be said. Second, in India, from either perspective, wife and husband are two independent legal entities capable of contracting on their own. One does not bind the other, especially by implication, vis-à-vis a transaction involving a third party. In India, law has been consistent when dealing with the property rights of, or contracts involving, either of the spouses. The law equates the wife with the husband; it puts them on the same pedestal. Both of them can independently acquire and hold the property in their own names. One can, therefore, contract with third persons independently of the other.

26. In conclusion it may be held that the question of the husband’s implicitly incurring a

liability on the contract entered into by his wife with a third party, in the absence the husband's express or implied consent thereto, does not arise. Had it been a case of contract between wife and husband, given the statutory obligation of spousal maintenance, the parameters, of course, would have differed.

27. Veering back to the facts of the case, I may observe that evidently the wife contracted, as the record reveals, the loan having provided the sureties, who do not include her husband. The husband, in fact, contracted the loan subsequently. In my considered view, the Bank's plea that it bona fide believed that the petitioner could offer his property as security is to be discounted. For by the time the wife took the loan, the husband was not at all in the picture—his loan was subservient.

28. Unless a person is a party to a loan transaction in whichever capacity, the question of the Bank's exercising the general lien vis-à-vis the property of that person—even if he or she were the spouse of the contracting party—does not arise. Put differently, it falls foul of the contractual obligations of the banker and customer.

29. In these circumstances, I am of the considered view that the respondent Bank's action of retaining or withholding the petitioner's title deeds even after his clearing the loan is per se illegal and arbitrary.

30. In the facts and circumstances, the Court allows the writ petition directing the respondent Bank to return to the petitioner the title deeds of the property, which he had earlier mortgaged for a loan. The debt admittedly stood discharged in due course.

31. Needless to observe that the respondent Bank should execute and register the 'gehan deed', as expeditiously as possible, at any rate, within one month from the date of receipt of a copy of this judgment.

32. If the officials of the Bank have lent the money to the petitioner's wife without ensuring sufficient security for its repayment, it is open for either the Management of the Bank or the Department to enquire into the issue and take remedial steps, which includes initiation of disciplinary proceedings against the negligent or conniving officials.

33. In the manner stated above, the writ petition is disposed of. No order as to costs.