IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MAQBOOL BAQAR

CIVIL APPEAL NO.167-Q OF 2005
(On appeal against the judgment dated 14.12.2004 of the High Court of Baluchistan, Quetta in RFA No.58 of 1999)

M/s Summit Bank Limited through its Manager, M.A.Jinnah Road Branch, Quetta ... Appellant

Versus

Muhammad Alam & another ... Respondents

For the appellant: Hadi Shakeel Ahmed, ASC.

For the respondents: Syed Ayaz Zahoor, ASC.

Date of hearing: 07.4.2015

JUDGMENT

MAQBOOL BAQAR, J.- Through the instant appeal, the appellant-bank has impugned judgment dated 14.12.2004 of a learned Single Judge of the High Court of Balochsitan, whereby the respondents' appeal was allowed and the judgment dated 25.9.1999, of the learned Additional District Judge-II, Quetta, dismissing the respondents' suit against the appellant-bank, was set-aside.

2. The relevant facts of the case, in brief, are that on 25.3.1992. Qasim Khan, the father of the respondents, opened an account, bearing No.251, with the appellant-bank in his name. However, in May 1992 he allowed respondent No.2 and thereafter also allowed respondent No.1 to operate the said account. Qasim

Khan passed away on 28.6.1996 whereafter at the request of the respondents the title of the account was changed to “M/s Qasim and Company”.

3. A contracting firm, namely, M/s Tameer-e-Nau Engineers and Contractors (hereinafter referred to as “Tameer-e-Nau”), owned by one Mir Afzal was awarded a civil contract by Lahore Development Authority (LDA). On 01.11.1994, the appellant-bank furnished a performance guarantee in respect of the said project on behalf of Tameer-e-Nau. The said performance guarantee was, sometime after 04.9.1995, enforced and encashed by LDA. For the purposes of said payment a Running Finance facility was granted in favour of Tameer-e-Nau and the amount was thus debited in the running finance account of Tameer-e-Nau. As per the relevant sanction advice *(page 105 of the paper book)*, the facility was secured by way of hypothecation of stock of construction material worth Rs.4.000 millions and also through equitable mortgage of a property bearing No.7-A, Model Town, Lahore, measuring 600 square yards, valuing Rs.5.215 millions. However, according to the appellant-bank, the re-payment of the facility was also guaranteed by Qasim Khan, the deceased father of the respondents, who according to the appellant-bank, executed a guarantee in that regard. According to the respondents, huge amounts were transacted by them through their afore-noted account bearing No.251. It was claimed that on 21.2.1998 an amount of Rs.55.50 millions was remitted by them through telegraphic transfer to the said account. However, subsequently some cheques including cheques dated 24.2.1998 and 17.3.1998 drawn by them against the said account were dis-honoured, and

upon inquiry they were informed by the appellant-bank that sufficient balance was not available in the respondents' account as an amount of Rs.38,88,721.65 has been deducted by the appellant-bank towards liquidation of the liability of Qasim Khan (late) therefrom under the aforesaid guarantee.

4. The plaintiffs/respondents through their counsel caused a legal notice to be served on the appellant-bank for refund of the amount but to no avail. The respondents, thus, filed the recovery suit.

5. Mr.Shakeel Ahmed, learned counsel for the appellant-bank submitted that in terms of section 7(4) of the Banking Companies (Recovery of Loans, Advances, Credit and Finances) Act XV of 1997 (hereinafter referred to as 'the Act'), read with section 9 of the Act, it was only the Banking Court constituted under the Act, which had the jurisdiction to entertain the respondents' suit and to proceed therewith, as the question involved therein was of the validity, extent, and encashment of the guarantee furnished by the late father of the respondents to secure re-payment of a finance facility within the meaning of section 9 of the Act and therefore, the learned High Court ought to have dismissed the respondents' appeal. He submitted that not only the account bearing No.251 was established and maintained by Qasim Khan (late) but even after his death, though the present respondents changed the title of the account but such fresh title being "M/s Qasim and Company" also contained the name of the deceased and therefore, the appellant-bank was fully justified in exercising its lawful right of lien over the said account as envisaged by section 171 of the Contract Act, and has thus rightly

appropriated the amount of the outstanding liability of the deceased from the said account.

6. On the other hand, Mr.Ayaz Zahoor, the learned counsel for the respondents submitted that after the death of Qasim Khan and at the request of the respondents, the title of the account was changed from “Qasim Khan” to “M/s Qasim and Company”. He submitted that such account was being maintained and operated exclusively by the respondents. He further submitted that undisputedly heavy amounts were transacted in and out of the said account since after the death of Qasim Khan in June 1996 and upto 18.3.1998, when an amount of Rs.38,88,721.65 was debited/ appropriated by the appellant-bank purportedly towards the alleged liability of the deceased. Mr. Zahoor further submitted that admittedly on 21.2.1998 a sum of Rs.55.50 millions was remitted by the respondents from Islamabad to the aforesaid account.

7. The learned counsel further submitted that neither the appellant-bank has had any lien over the amount lying in the aforesaid account nor could they exercise any such lien under section 171 of the Contract Act. He submitted that at the relevant time neither the account belonged to or was in the name of Qasim Khan (late), nor any amount lying in credit therein was deposited by Qasim Khan. However, the appellant-bank without any notice to the respondents, and without establishing their claim against the Tameer-e-Nau, the principal debtor and or even against the deceased, illegally and unlawfully mis-appropriated the amount from the respondents’ account under the grab of setting-off.

8. The learned counsel for the respondents further submitted that neither the respondents who hold and operate the said account are/were customers of the appellant-bank in relation to the alleged transaction relating to Tameer-e-Nau, nor have they executed any document in relation thereto and that no lien was ever marked over the subject account and thus, there was no question of the appellant-bank exercising its lien over the said account.

9. He further submitted that it is a settled principle of law that if any pecuniary obligation arises out of a contract by the deceased such would only bound the legal representatives to the extent of the estate left by the deceased and not otherwise. Mr. Zahoor further submitted that as can be seen from the sanction advice in relation to the Running finance facility in favour of Tameer-e-Nau, the said facility was secured by way of hypothecation and through equitable mortgage of a valuable property. However, neither the appellant-bank established its claim against Tameer-e-Nau nor have they sought enforcement of the such securities from the Court and instead found it convenient to surreptitiously mis-appropriate the respondents' money lying in trust with them under the garb of liquidation of the purported undetermined liability of their deceased father and, therefore, the respondents rightly invoked the jurisdiction of the Court.

10. The question that arose in this case was/is as to whether the deduction/withdrawal in dispute was lawful or not. The appellant-bank claims to have affected the deduction/ withdrawal by exercising its lien/right to set-off the liability of the

deceased towards the appellant-bank. The concept of banker's lien/right to set-off as embodied under section 171 of the Contract Act has been aptly explained in the case of **Punjab National Bank Ltd. v. Arura Mal Durga Das** (AIR 1960 Punjab 632) as under:-

> "(14). 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 the 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 hardly need any emphasis to understand that a banker can exercise his right of lien or his right to set-off the liability of his customer against the securities and monies in his hand of that customer only and not of any body else.

11. To elaborate the above mutuality, the judgment proceeds as follows:-

> "15. In order to create Banker's lien on several accounts it is necessary that they must belong to the payer in one and in the same capacity. Where the person has two accounts, one a trustee account and another private account at a bank, deposits in the two accounts cannot be set-off, the one against the other....
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> 16. Bankers have a right to combine one or more accounts of the same customer. But it cannot combine the account belonging to another or to himself along with another account which is the joint account with another.....
>
> 17. Similarly, the Banks have no lien on the deposit of a partner, on his separate account, for a balance due to the Bank from the firm. Therefore, the banker is

> entitled to combine all accounts kept in the same right by the customer. It does not matter whether the accounts are current or deposit or whether they are in the same or different branches. ---- It is essence to the validity of a banker's lien, that there should be a mutuality of claim between the Bank and the depositor. In order that it should be permissible to set-off one demand against another both must mutually exist between the same parties."

12. Furthermore, as rightly commented by Sheldon and Fidler's in their book on Practice and Law of Banking (Eleventh Edition, page 31) "*The banker may exercise the right of set-off only when the money owned to him is a sum certain, which is due".*

13. Here it may be relevant to note that even under the law which provides for recovery through coercive process such as land revenue, determination of the amount due is an essential pre-requisite. The bank cannot be conferred with the judicial powers for determination of the amount due against its customer/borrower. The right/power to set-off would be available only where the amount claimed was due and is certain and determined by a competent judicial forum.

14. However, in the present case, although the subject account was established by Qasim Khan in his name, however, undisputedly, he authorized the respondents to operate the account. After the death of Qasim Khan on 28.6.1996, the title of the account was, at the request of the respondents, changed to "M/s Qasim and Company". Since after the death of Qasim Khan and upto 18.3.1998, when the appropriation/adjustment in question was made by the appellant-bank, heavy amounts were transacted in and out of the said account. Admittedly, on

21.2.1998 an amount of Rs.55.50 millions was remitted by the respondents from Islamabad to the said account. The learned counsel for the appellant has not shown to us that any amount lying in the subject account, in fact belonged to the deceased and thus the very first pre-requisite for creation of a right to set-off did not exist in the present case.

15. Even otherwise, neither the purported liability of the deceased has been proved nor has the same been quantified. The appellant-bank has not even filed any recovery suit, either against Tameer-e-Nau, or even against the deceased. Although the finance was primarily secured by way of mortgage over a valuable property and through hypothecation of stock valuing Rs.4 Millions, but no suit for enforcement of the securities was filed by the appellant-bank. In the circumstances no right to set-off was available to the appellant-bank.

16. It is a well settled principle of law that a pecuniary obligation undertaken by a deceased promisor would be binding on his legal representatives to the extent of the estate of the deceased promisor in their hand. This principle has been statutorily recognized in section 50 of the Civil Procedure Code which lays down the extent to which a decree passed against a judgment-debtor who dies before the decree has been fully satisfied, against his legal representative. Whereas, in the present case, as noted, neither has there been any adjudication of appellant's claim against Tameer-e-Nau and/or Mir Afzal, the principle debtor, or against the deceased, nor has it been judicially determined as to whether the respondents h ave inherited any property from the deceased, there was/is thus no question of the

appellant seeking to right-off the alleged liability and/or seeking any recovery from the respondents without adjudication of the above referred aspects of the matter.

17. As regards the appellant's contention that only the Banking Court, established under the Act had jurisdiction in the matter, it may be noted that, as is now clear from the above discussion, neither there was any question pertaining to "finance" as defined by Section 9 of the Act, nor the question as to whether the respondents were "customers" in the context of the Act involved in the matter and no documents were executed by the respondent securing re-payment of the alleged liability. The suit for recovery was filed by the respondents for the amount that was deducted out of their monies lying in their account illegally and unauthorizedly and thus the Banking Court had no jurisdiction in the matter as the same was constituted to adjudicate upon the matter pertaining to "finance" between bank and its customer, we therefore, did not find any jurisdictional error in the matter.

18. It was in view of the foregoing that we dismissed the above appeal.

Judge

Judge

Judge

Islamabad the
7th April 2015
(Aamir Sh.)

'NOT APPROVED FOR REPORTING'