

(1983) 08 MP CK 0014

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 164 of 1982

Balkrishna Agrawal and Another

APPELLANT

Vs

Central Bank of India and Another

RESPONDENT

Date of Decision : 17-08-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 39 Rule 10

Citation : AIR 1984 MP 74 : (1984) ILR (MP) 50 : (1984) JLJ 90

Hon'ble Judges : B.C. Varma, J

Bench : Single Bench

Advocate : N.S. Kale, for the Appellant; K.P. Munshi, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Varma, J.—The order in this appeal shall also govern the disposal of Miscellaneous Appeals Nos. 165 and 166 both of 1982.

2. The decision of these three appeals shall turn upon the determination of true scope of Rule 10 of Order 39 of the Civil P. C.

3. The appellants in these three appeals are defendants in three suits filed by the respondent Bank for recovery of huge amounts. In all the three cases, the appellants are said to have executed hypothecation bonds in respect of certain properties, including articles of trade. After the institution of the suit, the respondent Bank in its anxiety to enforce speedy recovery of the amount claimed, applied before the lower Court under Rule 10 of Order 39 of the Code for a direction to hand over the articles hypothecated to it. Detailed replies in answer to these applications were filed, The alleged agreement of hypothecation of goods in favour of respondent/plaintiff has been specifically denied. In the suit giving rise to Miscellaneous Appeal number 164 of 1982, the hypothecation is said to be only imaginary and it is asserted that "the relevant time, the appellants were not even possessed of the articles said to be hypothecated. It is asserted that at the time of granting the loan, the employees of the Bank

obtained signatures of the appellants on various forms which were never read out to them and, therefore, their contents were never explained to the signatories. The terms of those documents are said to be not binding. In the other two cases also, the alleged hypothecations have been likewise denied. In spite of this and in spite of the fact that in Civil Suits Nos. 8-B and 9-B (giving rise to Miscellaneous Appeals 165 & 164 respectively) specific issues are framed if the properties were hypothecated as alleged by the plaintiff the lower Court on the strength of the documents filed by the respondent/plaintiff, has directed that the properties shown in the alleged hypothecation bond be handed over to Shri N. K. Tiwari, Station House Officer, Police Station Gunj, who shall be at liberty to take possession of all those properties, shall prepare an inventory of the properties so taken in possession and shall report to the Court for taking steps for effecting sale of the properties under the terms to be determined by the Court at his request later on.

4. Shri N. S. Kale, learned counsel for the appellants in all the three appeals, seriously questioned the propriety of this order principally on the ground that the alleged hypothecations are not only not admitted but are specifically denied and hotly contested. The contention is that unless the hypothecation is admitted, Rule 10 of Order 39 of the Code cannot be brought into play. In my opinion, this contention has force and must be accepted.

5. Order 39, Rule 10 of the Civil P. C. is as follows :

"Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court."

This provision is attracted when the subject-matter of the suit is money or some other thing capable of delivery. The further requirement is that it should be admitted by a party that the money or the thing which is the subject-matter of the suit, is held by it as a trustee for another party or it belongs or is due to another party. Unless both these conditions are satisfied, no order in terms of Rule 10 can be passed. In the instant case, the first condition is undoubtedly satisfied because the subject-matter of the suit is money advanced by the respondent/plaintiff to the appellants. It has to be seen whether the second requirement is also satisfied. The respondent/plaintiff claims that certain goods were hypothecated against the advance of money. Hypothecation is only an extended idea of pledge. In case of a pledge, which is nothing but bailment of goods as security of payment of debt or for performance of contract (Section 172 of the Contract Act), the possession of the article is transferred to the creditor. This delivery may be either actual or constructive and may even not be simultaneously with the money advanced. In a pledge what passes as special property is the right to retain the goods pledged in possession by the pledgee till

payment of debt and in default of payment to sell the things pledged and allow the property to pass to the purchaser. In case of hypothecation of goods or chattels, the intention is the same as in case of a pledge to create security for the money advanced but the actual possession of the movable property does not pass to the creditor. The possession of the property is retained by the owner. Such hypothecation not accompanied by possession nevertheless confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it. It was held in *Nanhuji v. Chimna* (1911) 7 Nag LR 72, that in the absence of fraud, there is no inherent illegality, immorality, or opposition to public policy in the non-possessory hypothecation of movable, and, therefore, a contract for such a hypothecation is a valid contract. It is a transaction which is customary throughout the country and is suited to the circumstances and business intercourse of the people. The possession of the bailor in case of hypothecation of the goods hypothecated is really in trust for the creditor who has a right to exercise his right of private sale to satisfy the loan advanced. The creditor can recall the goods and recover his debt by private sale. In such a case, the creditor effecting the sale of hypothecated goods shall be bound to give credit for the sale proceeds and can maintain a suit only for balance. A Division Bench of this Court in *Bank of India Vs. Binod Steel Ltd. and Another*, held that a hypothecation is only a form of pledge, the creditor permitting the debtor to retain possession on behalf of and in trust for him. Subsequent creditor cannot attach and sell the goods for recovery of his debt without satisfying the pledge. Thus, that being the nature of hypothecation of movables in law, a creditor has always the assistance of the Court to secure possession of the articles hypothecated, and this can very well be done by a direction in terms of Rule 10 of Order 39 of the Civil P. C. in a suit filed by the creditor for recovery of loan, (*Jagdish Lal Sidana v. United Commercial Bank, Bhopal* M. A. No. 194 of 1977, decided on 17-1-1978). The power under Rule 10 of Order 39, however can be exercised only when the hypothecation is admitted. The admission of hypothecation would mean that the defendant/debtor holds the thing or article hypothecated as a trustee for the plaintiff/creditor. When this trust is admitted and the subject-matter of suit is money, it will be competent for a Court to issue a direction for deposit of that thing in the Court or to be delivered to the creditor subject to further direction of the Court. In my opinion, therefore, what is essential is the admission of the hypothecation, i. e., possession of the articles, as trustee for the creditor. In absence of such admission, it will not be competent for the Court to issue such a direction. This admission may be in the pleadings or may be solicited in the manner prescribed in Order 12 of the Code. Notice may be given of the fact of hypothecation. Notice may also be given to admit the document containing the contract of hypothecation. If the opposite party in answer to these notices or in the written statement filed in answer to the claim, admits the fact of hypothecation, the Court will be competent to act and issue direction in terms of Rule 10 of Order 39, C.P.C. The admission so solicited should, however, be of the kind which should be akin to the admission of a claim entitling the Court to pronounce

judgment in terms of Rule 6 of Order 12, C. P. C. The mere fact that the plaintiff alleges that the defendant executed a hypothecation bond and the defendant while admitting the signature upon that document pleads that the document was obtained by fraud and signatures were obtained on blank forms without communicating to him the import of that document, will not be sufficient to warrant an order in terms of Rule 10 of Order 39 because that, in my opinion, will not tantamount to say that the defendant admits the hypothecation i.e., that he holds the property in trust for the plaintiff/creditor. Such an admission would not be sufficient to allow a Court to pass a decree under Order 12, Rule 6 C. P. C. That admission would also be insufficient to warrant a direction under Rule 10 of Order 39 C. P. C. It was rightly stated in *Devsri Narain Patel v. Hassanand* AIR 1927 Sind 25, that the admission in order to entitle a party to a judgment under Order 12, Rule 6 must not be ambiguous but should be clear that the sum of money was due to the plaintiff and an admission which was insufficient for an order under Order 12, Rule 6 is also Insufficient for an order under Order 39, Rule 10 of the Civil P. C. The scope of Order 39, Rule 10 is admittedly narrower than that of Order 12, Rule 6. I am, therefore, of the opinion that the admission for the purpose of Rule 10 of Order 39 should be clear, unambiguous unqualified and certain. In the present case, far from being an admission, the pleading and the replies to the application filed by the appellants only indicate that the alleged hypothecations have been specifically denied. That being so, the lower Court was not right in acting upon the alleged hypothecation bonds only because they bear the signatures of the appellants/defendants. The order of the lower Court in all the three appeals, therefore, cannot be allowed to stand.

6. The appeals are allowed, all the three orders under appeals are set aside and the applications filed by the respondent/plaintiff under Order 39, Rule 10 of the Civil P. C., are hereby dismissed. There shall be no order as to costs.