

(2013) 09 GAU CK 0025
In the Gauhati High Court
Case No : Regular First Appeal No. 46 of 2006

Kalinath Roy

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 11-09-2013

Acts Referred:

Citation : (2013) 5 GLT 7

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : S. Sarma, Ms. N. Deka and Mr. G. Sharma, for the Appellant; P.C. Goswami and Mr. A.J. Das, SC, CBI, for the Respondent

Judgement

Brojendra Prasad Katakey, J.—This appeal by the plaintiff is directed against the judgment and decree dated 28th November, 2005 passed by the learned Civil Judge (Senior Division) No. 3, Kamrup at Guwahati in Title Suit No. 346/2003, dismissing the suit of the plaintiff/appellant. The appellant as plaintiff instituted the said suit for a declaration that he is entitled to receive the pledged articles kept in Bank locker No. 23 of the erstwhile Purbanchal Bank, alongwith Rs. 10,000/- deposited for the purpose of compromise of the Money Suit No. 65/1982, and that the defendant is liable to return the said pledged articles and also for a decree for realization of the value of the property, if the defendant fails to return the pledged articles alongwith Rs. 10,000/-, apart from a decree for Rs. 2,00,000/- as damages for the wrongful detention of the plaintiffs property kept in locker No. 23, alongwith interest @ 18% per annum on the entire sum from the date of filing of the suit and @ 6% per annum from the date of the decree till realization, basically contending inter alia that since the Money Suit No. 65/1982 filed by the present respondent as plaintiff for realization of the amount against the cash credit facilities made available to the appellant and also for enforcement of the pledged articles, namely, gold ornaments and jewellery weighing about 38 Tolas, has been dismissed, the respondent Bank cannot retain the said property. It has also been contended that an amount of Rs. 10,000/- deposited by the

present appellant during pendency of Money Suit No. 65/1982 also needs to be returned, in view of the dismissal of the said suit.

2. The claim of the plaintiff has been resisted by the respondent Bank by filing written statement contending inter alia that the erstwhile Purbanchal Bank was amalgamated with the Central Bank of India, that the suit is hit by the constructive res-judicata and that since the aforesaid gold and the gold ornaments were pledged for due payment of the amount against the cash credit facilities made available to the plaintiff, the plaintiff is not entitled to get the said articles without payment of the amount due in the cash credit account, despite dismissal of Money Suit No. 65/1982 instituted by the present respondent/defendant.

3. Based on the pleadings of the parties, the trial Court framed the following issues for determination:-

1. Whether the suit is barred under principle of Res-judicata?
2. Whether the defendant agreed to advance to the plaintiff an amount of Rs. 1,00,000/-?
3. Whether the plaintiff has admitted his liability to the cash credit loan granted by the defendant bank and inability to pay the total claim of the bank and prayed for exemption of interest?
4. Whether the defendant was know to amicable settlement of the defendant's claim in M/s. 65/82?
5. Whether the plaintiff is entitled to receive back the pledged goods kept in the bank's locker along with Rs. 10,000/- being part payment made by hem towards liquidation of the loan without being his loan discharged?
6. Whether the plaintiff is entitled to any relief as prayed for?
7. To what any other relief or reliefs the parties are entitled?

4. During trial, both the plaintiff and the defendant examined 1(one) witness each and proved a number of documents. The trial Court upon appreciation of the evidence on record, both oral and documentary, dismissed the suit by holding that since the gold and the gold ornaments have been pledged with the Bank for repayment of the dues under the cash credit account, no decree can be passed for return of those articles, unless and until the amount due and payable against the said cash credit account is paid by the plaintiff, in view of Section 176 of the Indian Contract Act, 1872 (in short, "1872 Act"). Hence, the present appeal.

5. I have heard Ms. S. Sarma, learned counsel for the appellant/plaintiff and Mr. P.C. Goswami, learned counsel appearing for the respondent/defendant.

6. Ms. Sarma, learned counsel appearing for the appellant/plaintiff, referring to the provision of Section 176 of the 1872 Act has submitted that since two options were available to the respondent Bank to realize the amount due and

payable under the cash credit account, i.e. by filing a suit against the present appellant, upon the debt or promise, and retain the goods placed as a collateral security or sale of the things pledged, on giving the appellant/plaintiff reasonable notice of the sale, the respondent Bank having taken to the first recourse, i.e. filing of the suit upon the debts or promise and retaining the goods as a collateral security, cannot subsequently retain the pledged articles, when the suit instituted by the respondent Bank has been dismissed. The learned counsel further submits that an amount of Rs. 10,000/-, which the present appellant was made to deposit, during pendency of the Money Suit No. 65/1982, is also required to be refunded, when the suit has been dismissed.

7. Per contra, Mr. Goswami, learned counsel appearing for the respondent Bank referring to the provision of Section 176 of the 1872 Act has submitted that as the Pawnee (respondent Bank in this case) has 2(two) concurrent recourses available to it for realization of the amount due and payable by the Pawnor (in this case, the appellant/plaintiff), dismissal of the suit being Money Suit No. 65/1982 instituted by the respondent Bank would not debar the Bank for enforcing the pledged articles for payment of the loan amount payable by the appellant/plaintiff.

8. Having regard to the pleadings of the parties and the judgment and decree passed by the trial Court as well as the argument advanced by the learned counsel for the parties, the following point for determination arises in this appeal:-

Whether on dismissal of the suit filed by the Pawnee against the pawnor upon the debt and sale of pledged goods for satisfaction of the decretal amount, the pawnee can withhold return of the pledged good, in other words sell the things pledged u/s 176 of the 1872 Act?

9. From the evidence of the witnesses adduced by the parties, the following undisputed fact emerges-that the plaintiff in order to avail the cash credit facilities from the respondent Bank (erstwhile Purbanchal Bank) pledged gold and gold ornaments kept in the respondent Bank's locker No. 23 and that the respondent Bank for realization of the debts in the said cash credit account instituted Money Suit No. 65/1982 with the following prayer:-

(i) A decree for Rs. 28,955/- in favour of the plaintiff and against the Defendant be passed.

(ii) A declaration to the effect that the hypothecated goods shown in schedule "A" below stands hypothecated and charged to the plaintiff by way of first and permanent charge.

(iii) A decree for sale of the hypothecated goods towards satisfaction of the decretal amount.

(iv) A decree for sale of the pledged goods towards satisfaction of the decretal amount.

(v) Full cost of the suit.

(vi) Any other relief or reliefs to which the plaintiff may be entitled under the law and equity may also be granted and decreed.

10. The hypothecated goods and the pledged goods are mentioned in Schedules-A and B to the plaint filed in Money Suit No. 65/1982, which are reproduced below:-

Schedule "A"

The whole stock of the Defendant's good consisting of lime, Lime stone, Tins, coal, barrels etc. kept and stored in the premises/godown of the Defendant's firm "Assam Bengal Lime Co." at K.C. Sen Road, Paltanbazar, Guwahati-8.

Schedule "B"

Gold, gold ornaments measuring 38 tolas kept by the Defendant in the Plaintiff Bank's Locker No. 23.

11. The said suit was dismissed by the trial Court vide judgment and decree dated 5th March, 1999, against which though Money Appeal No. 3/1999 was filed, the same was also dismissed. The review petition seeking review of the judgment and decree filed was also subsequently dismissed. The respondent Bank did not challenge the said judgment and decree in the higher forum and hence, the same attained finality.

12. Section 176 of the 1872 Act provides that if the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. It also provides that if the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance and if the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor. A pawnee, therefore, can bring a suit against the pawnor upon the debt or promise and retain the goods pledged as a collateral security or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

13. Once the pawnee brings a suit against the pawnor upon the debt or promise and for realization of the amount due as well as for sell of the pledged goods towards satisfaction of the amount to be decreed, he, however, cannot thereafter, take recourse to the second remedy of selling things pledged, upon giving the pawnor reasonable notice for sale, if the suit is dismissed, as the pawnee has instituted the suit for enforcement and sale of the pledged good, which has been denied by the Civil Court. If, however, the pawnee institutes a simple money suit and not for sale of the pledged articles, the situation may be different and in that case, he may, even after dismissal of the suit, be entitled to

sell the things pledged upon giving reasonable notice of sale to the pawnee, which question, however, having not arisen for decision in this case, has not been gone into.

14. In the instant case, as discussed above, it is evident from the plaint filed in Money Suit No. 65/1982 that the respondent Bank claimed the decree for realization of Rs. 28,955/- against the present appellant as defendant in respect of the cash credit account and also for sale of the pledged goods towards satisfaction of the amount to be decreed. The suit of the respondent Bank having been dismissed, the respondent Bank cannot retain the pledged articles, namely, gold and the gold ornaments.

15. That being the position, the plaintiff is entitled to a decree for return of the gold and the gold ornaments weighing about 38 Tolas. The plaintiff, however, would not be entitled for a decree of Rs. 10,000/-, as he has paid the said amount in the Bank during pendency of Money Suit No. 65/1982, without any compulsion but of his own volition. The plaintiff is also not entitled to any compensation, in the absence of any evidence on record relating to the damage caused to the plaintiff.

16. In view of what has been discussed above, the suit of the plaintiff with regard to return of the gold and the gold ornaments is decreed. No costs. The Registry is directed to send down the lower Court records.