
(2012) 02 P&H CK 0321
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 9507 of 2010

Kams Leatherware Ltd.

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Contract Act, 1872 — Section 148, 150, 151, 152, 161

Citation : (2012) 4 BC 75

Hon'ble Judges : M.M. Kumar, J;Alok Singh, J

Bench : Division Bench

Advocate : H.C. Arora, for the Appellant; Ravinder Singh, Advocate, for the Respondent No. 1, Mr. G.S. Gill, Advocate, for the Respondent No. 4 and Mr. B.S. Walia, Advocate, for the Respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

Alok Singh, J.—By way of present petition, petitioner is assailing order dated 7.6.1999 passed by Debts Recovery Tribunal, Jaipur (hereinafter referred to as "DRT"), as well as order dated 22.2.2010 passed by Debts Recovery Appellate Tribunal, New Delhi (hereinafter referred to as "DRAT"). Facts of the present case inter alia are that petitioner (borrower) had availed cash credit hypothecation limit of Rs. 33 lacs; as per stock statement, duly verified by the Bank (Annexure P-1) on 30.9.1994, hypothecated goods of Rs. 54,78,036/- were kept under the lock and key of the Bank. As per statement of account Rs. 41,82,760/- were outstanding against the borrower on 19.10.1994. Undisputedly, Bank got the stock insured for Rs. 55,00,000/- in the month of October, 1994. Undisputedly, respondent No. 5 took over the land and factory in its possession on 17.10.1994 and put its lock and key on the premises. Undisputedly, borrower sent registered notice (Annexure P-2) dated 19.10.1994 to the Bank requesting the Bank either to sell the goods or to permit the petitioner to sell the hypothecated goods. Undisputedly, respondent No. 5 vide letter dated 28.11.1994 (Annexure P-3) has assured the Bank to provide full cooperation in disposing of the hypothecated

goods, which were kept under the lock and key of the Bank in the premises. Undisputedly, goods in stock in the lock and key of the Bank were perishable goods and were completely destroyed in due course and now as per the latest valuation report called by the DRT, maximum price which could be fetched would be around Rs. 25,000/- only.

2. Initially a suit was instituted by the Bank/respondent No. 1 before the Civil Judge, Kharar for recovery of Rs. 60,47,053/- on 8.9.1995, which stood transferred to DRT,

3. Learned DRT vide impugned judgment dated 7.6.1999 has directed the petitioner to pay Rs. 41,82,760/- to the Bank with cost, however, in the impugned judgment has held that since hypothecated goods of perishable nature were under the lock and key of the Bank and even on the request of the borrower, Bank failed either to sell the goods or to grant permission to the borrower to sell the goods, therefore, Bank is not entitled for any interest on the outstanding amount of Rs. 41,82,760/- after 30.9.1994

4. Feeling aggrieved, two appeals were filed before the DRAT by the borrower as well as by the Bank. Learned DRAT vide impugned judgment dated 22.2.2010 dismissed the appeal filed by the borrower/petitioner, however, has allowed the appeal filed by the Bank having observed that Bank was not in exclusive possession of the premises in dispute; borrowers were negligent in not selling the goods hypothecated to the Bank, therefore, Bank can charge enhanced rate of interest on the outstanding amount against the borrower. Feeling aggrieved, petitioner has approached this Court.

5. We have heard learned Counsel for the parties and have carefully perused the record.

6. Mr. H.C. Arora, learned Counsel appearing for the petitioner/borrower has vehemently argued that as per the revised statement of account submitted before the DRT, on 19.10.1994 only Rs. 41,82,760/- were outstanding against the petitioner while on 19.10.1994 hypothecated goods of Rs. 54,78,036/- were under the lock and key of the Bank, which were got insured by the Bank in the month of October, 1994 itself for Rs. 55,00,000/-; despite the legal notice/registered request letter dated 19.10.1994 (Annexure P-2) either to sell the hypothecated goods or to permit the petitioner/borrower to sell the same, Bank has neither sold the hypothecated goods nor has permitted the petitioner to sell the goods. Not only this, even after taking possession of the unit by the Punjab Financial Corporation/Punjab State Industrial Development Corporation Limited, respondent No. 5 vide letter dated 28.11.1994 has informed the Bank that Corporation is willing to extend any cooperation to the Bank to sell the hypothecated goods; despite of the assurance given by respondent No. 5, Bank neither sold the goods nor permitted the petitioner to sell the goods. All the goods under the lock and key of the Bank were perishable in nature and have lost their utility and cost by the lapse of time, therefore, Bank is not entitled for

recovery of any amount from the petitioner rather is duty-bound to compensate the petitioner for the damages caused to the hypothecated goods due to the negligence of the Bank.

7. Mr. Ravinder Singh, learned Counsel appearing for the Bank/respondent No. 1, has vehemently argued that possession of entire premises of the petitioner was taken by respondent Nos. 4 and 5 on 17.10.1994, therefore, Bank was unable to sell the goods stored in the godown under the lock and key of the Bank; borrower should have applied either to the Court or to respondent Nos. 4 and 5 to sell the goods, therefore, borrower himself was negligent, hence judgment passed by DRAT does not require any interference.

8. Mr. B.S. Walia, learned Counsel appearing for respondent No. 5, while referring to Annexure P-3 to the writ petition, has vehemently argued that Corporation has offered cooperation to the Bank to sell the goods stored in the godown situated in the premises taken into possession by the Corporation in the month of October, 1994.

9. Hon"ble Apex Court in the case of Lallan Prasad Vs. Rahmat Ali and Another, has held as under:

... Under the Common Law a pawn or a pledge is a bailment of personal property as a security for some debt or engagement. A pawner is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfillment of his liability. The two ingredients of a pawn or a pledge are : (1) that is essential to the contract of pawn at the property pledged should be actually or constructively delivered to the pawnee, and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn, therefore, is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. In this sense a pawn or pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed. (See *Halliday v. Holygate*, (1868) 3 Ex 299). A contract to pawn a chattel even though money is advanced on the faith of it is not sufficient in itself to pass special property in the chattel to the pawnee. Delivery of the chattel pawned is a necessary element in the making of a pawn. But delivery and advance need not be simultaneous and a pledge may be perfected by delivery after the advance is made. Satisfaction of the debt or engagement extinguishes the pawn and the pawnee on such satisfaction is bound to redeliver the property. The pawner has an absolute right to redeem the property pledged upon tender of the amount advanced but that right would be lost if the pawnee has in the meantime lawfully sold the property pledged. A contract of pawn thus carries with it an implication that the security is available to satisfy the debt and under this implication the pawnee has the power of sale on default in payment where time is fixed for payment and where there is no such stipulated time on demand for payment and on notice of his intention to sell

after default. The pawner however has a right to redeem the property pledged until the sale. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawner's debt, for, the sale proceeds are the pawner's monies to be so applied and the pawnee must pay to the pawner any surplus after satisfying the debt. The pawnee's right of sale is derived from an implied authority from the pawner and such a sale is for the benefit of both the parties. He has a right of action for his debt notwithstanding possession by him of the goods pledged. But if the pawner tenders payment of the debt the pawnee has to return the property pledged. If by his default the pawnee is unable to return the security against payment of the debt, the pawner has a good defence to the action. This being the position under the common law, it was observed In *Trustees of the Property of Ellis and Co. v. Dixon Johnson*, 1925 AC 489, that if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand over the security, and that if, having improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt.

17. There is no difference between the common law of England and the law with regard to pledge as codified in Sections 172 to 176 of the Contract Act. u/s 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and u/s 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right u/s 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, howsoever, the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows, therefore, that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree, If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract of pledge. The pawnee, therefore, can sue on the debt retaining the pledged goods as collateral security. If the debt is paid he has to return the goods with or without the assistance of the Court and appropriate the sale proceed towards the debt. But if he sues on the debt denting the pledge, and it is found that he was given possession of the goods pledged and had retained the same, the pawner has the

right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment towards the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledgee denies, the pledgee is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance.

10. Judgment of the Hon'ble Apex Court in the case of Lallan (supra) was further relied upon by two different Hon'ble three Judges' Benches of the Hon'ble Supreme Court in the case of The State Bank of Saurashtra v. Chitranjan Rangnath Raja and Another, AIR 1980 SC 1528 and in the case of Maharashtra State Co-operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner,

11. Learned Single Judge of the Kerala High Court in the case of The Dhanalakshmi Bank Ltd. Vs. K.K. Jose alias Jose Mohan and Others, while placing reliance on the judgment of the Hon'ble Apex Court in the case of Lallan Prasad (supra), has held as under:

15. The next aspect that falls for consideration is whether the principle enunciated, above can be applied to the facts of the present case where the goods pledged are available, but not in the condition in which they were at the time of pledge. Pledge is a bailment of goods as security for payment of a debt or performance of a promise. Bailment as defined in Section 148 of the Contract Act is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The purpose in this case is the security for payment of the debt due from defendant. When the purpose is accomplished, viz. the discharge of the debt the bailee is bound to return the goods pledged to the bailor. Section 150 of the Act stipulates that the bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee, directly from such faults. Section 151 enjoins a duty on the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same build, quality and the value as the goods bailed. The loss or damage of goods entrusted to the bailee is prima facie proof of evidence of his negligence. The burden to prove absence of negligence is on the bailee. Section 152 of the Act stipulates that in the absence of any special contract, the bailee is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care it is described in Section 151. The bailee is, therefore, bound to take care of the goods as an ordinary prudent man would take care of his own goods. The standard of diligence required is that of an ordinary prudent man. A bailee can escape from liability for lost goods if it is shown that he has taken as much care

an ordinary man would take of his own goods. In case the goods are not returned, delivered or tendered at the proper time on account of the default of the bailee he will be responsible to the bailor for any such loss, destruction or deterioration of the goods from that time, vide Section 161 of the Act.

... From the Commissioner's report it is evident that the machines have become worthless and can be sold only as scrap. Considerable damage has therefore been caused to the goods. The pawnee is not thus in a position to redeliver the washing machines pledged under Ext. A2 and what is available is only the machines without their valuable parts. The pawner will not be in a position to get back the same articles pledged by him on tendering the amount due. Under such circumstances the pawnee has no right to sue on the debt. The Supreme Court has held that if the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Since plaintiff is not in a position to return the goods to the pawnee in the same condition in which they were entrusted to them at the time of pledge they have no right to sue on the debt whereas they can only retain the goods or whatever left of them. The result is that defendant is absolved of all liabilities under Ext. A1 and the claim of plaintiff for return of the money has only to be negated.

12. Division Bench of Madhya Pradesh High Court in the case of Central Bank of India, Tirodi Branch Vs. Abdul Mujeeb Khan and Others, , has held as under:

11. Hypothecation is an extended form of pledge which has not been expressly dealt within the law of contract. The distinction between hypothecation of goods and pledge of goods is well known. In case of pledged goods, the goods are stored in the godown under the lock and key of the Bank under the Bank's supervision. Thus, the pledged goods remain under the physical possession of the Bank and no withdrawals or additions of the stocks in the godown are permissible without the Bank's permission. The position with regard to the hypothecation of goods is, however, different because these goods are, strictly speaking not under the lock and key of the Bank as such but are supposed to be under the constructive possession of the Bank by virtue of deed of hypothecation under which the borrower is obliged to submit regular returns to the Bank indicating the increase and decrease of the value of the said goods to enable the Bank from time-to-time to determine the drawing of the borrower with regard to it. In law, however, there is no difference with regard to the legal possession of the Bank. In both the cases, the goods are under the constructive possession of the Bank, while in the case of pledge they are also in the actual physical possession of the Bank, but in the case of hypothecated goods they are in actual possession of the borrower subject to the restriction mentioned above. It is, therefore, said that hypothecation is only as extended idea of pledge, the creditor permitting the debtor to retain possession either on behalf of or in trust for himself. See the decision of Orissa High Court in case of B.S. Patra (supra).

12. In Black's Law Dictionary, Sixth Edn. at page 742 the word "hypothecate" has been given meaning as under: "To pledge property as security or collateral

for a debt. Generally, there is no physical transfer of the pledge property to the lender, nor is the lender given title to the property, though he has the right to sell the pledged property upon default.

13. In Webster's Encyclopedic Unabridged Dictionary of the English Language, 1989 Edn, at page 702, the meaning of the word "hypothecate" is given that, "to pledge to a creditor as security without delivering over.

14. In Corpus Juris Secundum, Vol. XIII, page 370 the word "hypothecation" is defined thus:

A term borrowed from the Civil law, and, insofar as it is naturalised in English and American law, it means a contract of mortgage or pledge in which the subject matter is not delivered into the possession of the pledgee or pawnee, or, conversely, a right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold in order to be paid as claim out of the proceeds.

15. From the above, it is clear that truck being hypothecated and therefore, in terms of three clauses of loan agreement, the plaintiff after taking possession of the truck on 20.4.1982, the plaintiff-Bank could have disposed of the truck in the manner prescribed in Clause 15 and would have adjusted the sale proceeds, but, that was not done as found proved.

13. Learned Single Judge of Jammu and Kashmir High Court in the case of State Bank of India Vs. Standard Engineering and Trading Corpn. and Others, , while placing reliance on the judgments of the Hon"ble Apex Court in the case of Lallan Prasad (supra), Madhya Pradesh High Court in the case of Central Bank of India (supra) and Kerala High Court in the case of The Dhanalakshmi Bank (supra), has taken the same view that having improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt.

14. From the undisputed facts that goods, which were perishable in nature, were kept under the lock and key of the Bank and Bank got them insured for Rs. 55,00,000/- in the month of October, 1994 and after taking over possession of the premises by the Corporation, Bank has put its extra lock over the godown having stock and despite of the notice dated 19.10.1994 (Annexure P-2) by the petitioner/ borrower and assurance by respondent No. 5 vide letter dated 28.11.1994 (Annexure P-3), failed to sell the goods in its possession and further failed to permit the petitioner/borrower to sell the same to discharge the liability of debt; therefore, Bank cannot get any decree of debt because by the efflux of time entire hypothecated goods, under the lock and key of the Bank, stood destroyed and valuation of the goods, which was assessed at Rs. 55,00,000/-, by the insurance company in 1994, came down to Rs. 25,000/-. Therefore, judgment impugned herein cannot be sustained in the eyes of law.

15. As far as counter-claim of the petitioner/borrower is concerned, petitioner/borrower has not quantified the damages nor has paid any Court fee thereon,

therefore, counter-claim is vague and ambiguous and cannot be granted. Consequently, petition is allowed. Impugned judgments are set aside and claim of the Bank stands dismissed. However, in the peculiar facts and circumstances of the case, no order as to costs.