

(2003) 04 KAR CK 0009

In the Karnataka High Court

Case No : Regular Second Appeal No. 613 of 1998

P.N. Melinamutt (deceased) by L.Rs.

APPELLANT

Vs

Canara Bank, Malamaddi Branch and Another

RESPONDENT

Date of Decision : 03-04-2003

Acts Referred:

Contract Act, 1872 — Section 151, 152, 167, 172, 176

Citation : (2003) 3 KCCR 2091

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : S.W. Arbatti, for the Appellant; C.S. Ramadas, for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

K. Sreedhar Rao, J.—This appeal arises out of the Judgment and Decree passed in RA No. 174 of 1989 on the file of the Principal District Judge, Dharwad, arising out of the Judgment and Decree passed by the Principal Civil Judge, Senior Division, Dharwad, in O.S. No. 127 of 1978.

2. The Appellants herein are the L.Rs. of the Defendant in the suit. The Respondent/Plaintiff-Bank filed a suit for recovery of a sum of Rs. 21,574/- with costs and interest. The Defendant availed over draft facility for a limit of Rs. 10,000/- by executing the pronote and also hypothecated the machinery and the stock-in-trade including the finished products. The Defendant claims to be the sole proprietor of Rajpal Fruit Products manufacturing fruit bars and jams. The manufacturing activity was being done in the residence of the Defendant and the godown was also situate in the residence of the Defendant. It was the contention of the Defendant before the trial Court that the finished products were in the godown situate in the premises of the Defendant under the lock and key in the control of the Bank. The officials of the Bank did not permit the sale of the finished products to the customers with oblique motives nor made any efforts to sell securities to realise the loan. Therefore contends that on account of the

dishonest conduct of the Bank, he had to suffer a huge loss of Rs. 60,000/- being the value of the finished products kept in the godown. Therefore, disclaims the suit liability.

3. The trial Court formulated as many as six issues. The issue No. 4 is formulated in the following manner:

4(a): Whether Defendant No. 1 proves that he sustained loss of Rs. 1,75,000/- regarding the suit transaction due to the conduct of the Manager and officials of the Plaintiff-bank?

The said issue came to be deleted by order dated 10.6.1981. Nonetheless, the Defendant has let in evidence relating to the conduct of the Plaintiff-Bank in not sanctioning further loans as and when needed for the purpose of business and has stated that the Bank has also prevented the sale of finished products to the customers and that the Bank was in control of the lock and key of the godown where the finished products were stored. The trial Court has rejected the contention of the Defendant and decreed the suit. The Appeal Court also confirmed the decree. Aggrieved by the said Judgments and Decrees, the present Appeal is filed.

4. The following point of law is formulated for consideration in this appeal:

a)Whether the Judgment and decree of the lower appellate Court is sustainable, holding that, suit is maintainable, which is contrary to Sections 172 to 176 of the Contract Act, as enunciated in Lallan Prasad Vs. Rahmat Ali and Another,

5. The undisputed facts disclose that the fruit jam bars were the finished products. According to Plaintiff, it was valued at Rs. 35,000/- and according to Defendant, it was valued at Rs. 60,000/-. It is the contention of the Defendant that the Plaintiff was conscious of the fact that the security offered under hypothecation was a perishable commodity, yet the Bank did not co-operate with the Defendant in selling the products to the proposed customers. Therefore, on account of the dishonest and negligent conduct of the Bank, the properties came to be perished and as such, the Defendant is not liable to pay the suit loan.

6. The Counsel for the Appellant relied on the provisions of Sections 172 to 176 of the Contract Act and the ruling of the Supreme Court reported in Lallan Prasad Vs. Rahmat Ali and Another, to contend that when the possession of the pledged goods are with the pledgee, the pledgee cannot maintain a suit for recovery of the debt without returning the pledge or accounting the pledge property. In the said decision, some aeronautical scrap material was the subject-matter of pledge. The custody of the pledged property was with the pledgee. In the suit, the theory of pledge was denied. As a fact it was established and found that the aeronautical scrap valued at Rs. 35,000/- was pledged with the pledgee. The pledgee was not in a position to return the pledged articles. Therefore it is held that the pledgee is not entitled to sue for recovery of the debt atleast to the extent of value of the pledged articles.

7. The decision of Allahabad High Court in Punjab National Bank Vs. Lakshmi Industrial and Trading Co. (P.) Ltd. and others, Citing under para No. 15, the following observations are made:

15 Sri K.L. Grover, learned Counsel for the Appellant, submitted that some of the goods pledged with the Bank were damaged or destroyed due to natural decay. It was for the Bank to prove this fact. It was to lead specific evidence as to how they were damaged and destroyed and further to indicate the quantify and quality of such goods. The Appellant produced nine witnesses but none of them specified the quantity and quality of the goods which were destroyed during the period it remained under the custody of the Bank.

8. In the cited case it was contended by the Bank that the properties were destroyed due to natural decay but the nature, quantity and quality of the goods were not established and no evidence was placed to show that the destruction or damage was on account of the natural decay. In view of the lack of evidence, the claim of the Bank to the extent of value of the goods was rejected. The Court also turned down the contention of the Bank that the pledged articles were misappropriated by the Receiver. In this regard, the following observations are made in para-17:

Lastly it is urged that if any goods have been lost or destroyed on account of any negligence by the receiver, the Bank shall not be held responsible for the damage and loss of such goods. It is urged that the receiver is an officer of the Court and for any fault of the receiver the party should not be made liable to suffer. Admittedly the receiver was appointed at the instance of the Appellant. If a receiver is appointed by the Court on an application of a party and it is found that the receiver is mismanaging the property or is guilty of any misappropriation, it is the duty of the applicant who gets the receiver appointed to file an application before the Court to take action against the receiver. The receiver appeared as witness in the case and the Bank never suggested to him in cross-examination that he mismanaged or misappropriated the goods which was pledged with the Bank. The Court below was, in these circumstances, justified to hold that the Bank should be entitled to recover the amount of loan from the Defendants but after adjusting the amount of goods which were pledged with it.

9. The decision of the Madhya Pradesh High Court in Central Bank of India Vs. Grains and Gunny Agencies and Others, is relied on. In the said case, the loan was granted on key loan account. The Bank retained possession of the pledged stocks. In respect of the dishonoured documentary bills, the suit was filed. It was found that on account of the negligence of the Bank the goods were damaged and the Bank was incapable of returning the pledged goods. Therefore, the suit for recovery of money came to be dismissed. At appellate level it was for the first time argued that the Bank had exempted itself from the liability of negligence by its servants and thus damage or loss caused on account of the negligence is not a ground to fasten liability on the Bank. However, the Court found that clause-9 in the agreement relied on by the Bank does not exempt the Bank from the

liability of negligence by its servants in the manner contended and held that there is no contract between the parties contracting out of the provisions in Sections 151 and 152 of the Contract Act. Relying on the said decision it is argued that in the instant case on account of negligence of the Officer of the Bank the goods were perished and therefore, the Defendant is not entitled to pay the suit claim.

9. Per contra, the Counsel for the Respondent relied on the ruling of the Kerala High Court reported in 1993 (2) KLT 105. In paras-21 and 25 it is held thus:

21. In regard to the general words exempting the liability like "whatsoever", "howsoever" and "any account whatsoever", we shall advert to certain passages from Chitty on Contracts, 25th Edition. In para 878, it is said that the liability for negligence may be effectively excluded if words are used which indicate that all damages, however caused, is to be comprehended within the exemption, or which throw the risk upon the Plaintiff. If the Defendant merely says "any loss", he is directing attention to the kinds of losses, and not to their cause or origin, so liability for negligence will not necessarily be excluded. But if he says "however caused", "from whatever other cause arising, howsoever arising", "arising from any cause whatsoever", relieves from all responsibility for any injury, delay, loss or damage, however caused", have been held to be effective. Further it is stated that any words in fact, which clearly indicate an intention to exclude all liability without exception, for example, "no liability whatever" or "under any circumstances", will be considered sufficient.

25. Now, our only task is to construe or interpret the clause. In Clause 17 of Ext A 19, it is very clearly and plainly stated, "Bank shall not be may suffer or sustain on any account whatsoever while the same are in possession of the Bank during the continuance of this Agreement nor shall the bank be responsible for any shortage resulting from theft or pilferage or otherwise notwithstanding that the goods may be in the possession of or under the control of the Bank". This clause, according to us, on the basis of the passages from Chitty on contracts we have already referred, makes it clear that the bailee is not responsible even for the negligence of the bailee.

In the said case, Clause 17 of the contract exempted the liability of the bank for any shortage resulting from theft or pilferage or otherwise and the obligations of bailee under Sections 151 and 152 was specifically contracted out by the terms of the said clause. In the present case the relevant Clause 13 does not stipulate contracting out the obligation under Sections 151 and 152 of Contract Act. Therefore, the view taken by Appellate Court is incorrect and the ratio laid down in 1993 (2) KLT has no application to the facts of the case.

10. In the instant case, an issue was indeed framed in 4(a) and 4(b) causing burden on the Defendant to prove that he has sustained loss on account of the conduct of the Bank officials and that he is not liable to pay the suit claim. This issue was formulated in view of the pleadings of the Defendant that the goods

pledged with the Bank were perishable in nature and that the Bank neither sold the goods nor permitted the Defendant to sell the goods to the proposed customers before the expiry date as such the goods were perished and they were rendered un-edible. The issue came to be deleted by the consent of the parties. Nonetheless, evidence has been let in by the Defendant by documentary material at Exs. D1 to D8, the copies of the correspondence made with some parties proposing the sale of product and in alternative proposing the sale of unit ex facie Exs. D1 to D8 lack credibility about its genuineness and its correctness. The concerned parties are not examined. The correspondence in the said letters was only at the stage of offer.

11. When the articles pledged are perishable commodities and subject of natural decay, if it is shown by the pledgee that the goods pledged have been perished on account of natural decay and in the absence of any negligence on the part of pledgee, no counter liability could be fastened on the pledgee to account for the value or to seek a set off to that extent by the pledger. However, the fact that the properties pledged are subjected to natural decay and absence of negligence on the part of pledger is essentially a matter of fact and an evidence. In the instant case, a careful perusal of the hypothecation agreement at Ex.P3 discloses that the stock-in-trade was never a subject-matter for pledge and there is no evidence placed to show that the stock in trade was offered as a pledge and that they were in the custody of the Bank. Ex.P3 discloses that only the machinery and the accessories of the machinery along with the office furniture, land and building was hypothecated to the Bank. Therefore, the entire theory of the defence that the stock in trade was offered as a pledge is not evident from the terms of the hypothecation agreement and no other evidence is placed by the Defendant to prove the pledge of the finished products with the Bank and being in the custody of the Bank any time. This material aspect has been overlooked by the Courts below.

12. In view of the evidence on record and reasons and discussions made above, I find that the order of the Courts below is to be upheld although not for the reasons stated by them but for the reasons narrated above. In the absence of proof of pledge of the articles, the provisions of Sections 167 and 176 of the Contract Act would not apply and the point formulated in this appeal is answered in the negative. Accordingly, the appeal is dismissed.