

(1928) 01 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 387 of 1925

Shankar Tukaram Kakade	Vs	APPELLANT
Lakshmibai Shankarrao Ghadge		RESPONDENT

Date of Decision : 06-01-1928

Acts Referred:

Contract Act, 1872 — Section 178

Citation : AIR 1928 Bom 225 : (1928) 30 BOMLR 470

Hon'ble Judges : Patkar, J; Baker, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Patkar, J.—In this case, the plaintiff employed one Baburao and two others as her agents authorizing them to look after the Immovable property and to collect rents, lease out lands and file assistance suits in connection only with the Immovable property by a power of attorney, Exhibit 35, executed on July 25, 1919. Baburao, who was in. physical possession of some of the ornaments of Laxmibai, pawned them to the father of defendants Nos. 2 to 4. The plaintiff having learnt of the pawn filed the present suit for a declaration that the pawn was not binding on her, and sued to recover possession of the pawned articles from defendants Nos. 2 to 4. the learned Assistant Judge who heard the suit held that the plaint pawn did not bind the plaintiff as Baburao was not in juridical possession of the ornaments within the meaning of Section 178 of the Indian Contract Act, and ordered defendants Nos. 2 to 4 to restore the articles pawned with them or their value Rs. 1,500. On appeal, the learned District Judge confirmed the decree of the Assistant Judge except for the figure of Rs. 1,500 which was a mistake for Rs. 1,388. The learned District Judge, probably acting under Order XLI, Rule 33, ordered Baburao, defendant No. 1, to pay defendants Nos. 2 to 4 the amount of Rs. 700 plus interest at seven and a half per cent, to the date of suit and future interest at the same rate till payment.

2. Defendants Nos. 2 to 4. have appealed to this Court and it is contended on

their behalf that the pawn made by Baburao was binding on the plaintiff, and that the possession of Baburao was not merely physical possession, and reliance is placed on the power of attorney, Exhibit 35. The power of attorney empowers Baburao and two others to manage the Immovable property, and they have been prohibited from pledging or mortgaging even the Immovable property. The power of attorney does not give the agents any power to deal with moveable property. In *Jonmenjoy Coondoo v. Watson* I.L.R (1884) Cal. 901, a person holding a power of attorney for certain purposes including the power of negotiating and disposal was held not entitled to make a valid pledge of the Government Promissory Notes deposited with him for safe custody by endorsing the same. The power of attorney must be strictly construed and it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in, express terms or by necessary implication. See *Bank of Bengal v. Ramanathan Chetty* (1915) 18 Bom. L.R. 387. On the proper onstruction of the power of attorney Baburao had no right to deal with the ornaments. which were in his physical possession.

3. The next question is whether the defendants Nos. 2 to 4 can claim a valid pledge of such ornaments u/s 178 of the Indian Contract Act. Three conditions are necessary u/s 178: firstly, that the pawner must be in possession of the goods; secondly, that the pawnee acts in good faith; and thirdly, that the goods have not been obtained by means of an offence or fraud. The first question, therefore, is whether the pawner, Baburao in this case, was in possession of the goods. It has been held in several cases that possession connotes juridical possession as distinguished from bare custody. The word "possession" in the first part of the section is distinguished from the word "custody" in the second proviso to the section. It was held in *Biddomoye Dabee Dabee v. Sittaram* ILR (1878) Cal. 497 and in *Shankar Murlidhar v. Mohanlal Jaduram* ILR (1887) Bom. 704. that a servant entrusted by his master with the custody of goods during his absence was not in juridical possession of the goods which would enable him to make a valid pledge u/s 178 of the Indian Contract Act. In *Seager v. Hukma Kessa* ILR (1900) Bom. 458& 2 Bom. L.R. 403 the wife in charge of her husband's articles of jewellery as custodian on his behalf was held incapable of making a valid pledge of the ornaments in her physical possession. In *Naganada Davay v. Bappu Chettiar* ILR (1903) Mad. 424 a person who hired a jewel for four days was held incompetent to make a valid pledge of it. But in *Seshapjner v. Subramaniii Chettar* ILR (1916) Mad. 678 a commission agent employed to sell a jewel was held competent to make a valid pledge on the ground that the possession of the agent was juridical possession as distinguished -from merely physical possession or custody. Reliance is placed by the learned pleader on behalf of the appellant on the decision in the case of *Bank of Bombay v. Nandla* (1912) 15 Bom. L.R. 1 which went up to the Privy Council from the decision in *Nandlal Thakersey Vs. The Bank of Bombay*, , but their Lordships of the Privy Council declined to express any opinion on the proper construction of Section 178 of the Indian Contract Act, and held that the Bank of Bombay having

returned the goods to the warehouseman by whom they were deposited without any notice of any claim by any other person was not liable on account of any want of duty on its part towards the plaintiff. It, therefore, follows from these cases that the question in each case would be whether the pledgor had juridical possession as distinguished from physical possession or Custody.

4. In the present case it is clear that Baburao was not empowered by the power of attorney to deal with the moveable property. His possession was merely the possession of a servant, and could not be said to be juridical possession within the meaning of Section 178 of the Indian Contract Act. The pledge, therefore, effected by Baburao in favour of the father of defendants Nos. 2 to 4 was not binding on the plaintiff".

5. We think, therefore, that the view of the lower Court is correct and the appeal must be dismissed with costs.

6. The respondent has filed cross-objections on the question of costs. The Assistant Judge ordered that the costs of the suit should be paid by defendant No. 1, but no cross-objections were filed in the lower appellate Court on the question of costs. The decree of the first Court as to costs is, therefore, final. It is not shown that the conduct of defendants Nos. 2 to 4 was otherwise than bona fide, and even on the merits, we do not think that the order with regard to the costs in the lower Courts is incorrect. We, therefore, dismiss the cross-objections with costs.