(1988) 10 MAD CK 0027

In the Madras High Court

State Bank of India APPELLANT

Vs

N. Sathiah and Others RESPONDENT

Date of Decision : 07-10-1988

Acts Referred:

Citation : (1989) 1 LW 329 : (1989) 1 MLJ 338

Hon'ble Judges : Sathiadev, J

Bench : Division Bench

Judgement

Sathiadev, J.—These appeals are preferred by State Bank of India, Arantangi branch, against the judgments in O.S.Nos.9, 10, 12, and 11

of 1978 on the file of the Sub-Court, Pudukottai. The said suits were filed for recovery of amounts due and payable by the respondents-

defendants based on amounts borrowed by them by executing promissory notes and pledging their jewels on different dates agreeing to pay

interest at 2 per cent above State Bank of India advance rate with minimum of 12 per cent per annum with quarterly rests. The loans were payable

on demand. As Head Office of the plaintiff bank at Madras entertained suspicion on a large number of loans taken by one Sathiah in July, 1976,

on a detailed verification of ornaments pledged by him, his relatives and associates of whom the defendants happened to be some, it was found

that spurious jewels have been deposited and therefore, complaints were lodged with Arantangi police, who investigated the matter and the same is

pending. The jewels were seized by the Police along with the original notes. Without prejudice to the rights of plaintiff to proceed by way of sale of

pledged articles as and when they are returned to the plaintiff by the Criminal Court, the suits were filed, based on promissory notes, because inspite of reminders, no amount had been paid so far by defendants.

3. The defence taken was that, plaintiff has no right in law to base the cause of action on the promissory notes executed by way of security since

the original cause of action was on pledge of gold jewels, and the relationship between the parties was based on contracts of pledge. Defendants

are entitled to the return in specie i.e., with weight and description of jewels conforming to the details noted and accepted by the plaintiff bank on

various dates of pledges. Defendants have an obligation to pay the loan with interest, and in turn have a right to get back the jewels after satisfying

the accepted description at the time of the contract. Plaintiffs agent and other officers noted down the quality of the jewels, the weight of the jewels

etc., in pencil in the respective demand promissory notes. Only genuine jewels have been pledged, and to cover up misdeeds committed by the

officers of the Bank, one of them gave a designedly false complaint to the police. Defendants are prepared to pay the principal and interest upto

date, only provided the plaintiff returns the items of jewels. If a decree is to be passed against the amounts covered by the suit items, it should be

provided in the decree that the plaintiff is entitled to recover that amount, only on returning the jewels covered by the suit items. The defendants

reserve their right to file separate suits after proving in the criminal case that they pledged only genuine jewels.

4. The trial Court while taking note of the fact that the defendants are prepared to pay the principal and interest upto date and also to avoid

multiplicity of proceedings, decreed the suit as prayed for, on condition that the plaintiff should deposit the gold ornaments into court within three

months as per the description, weight etc., mentioned in the Gold Loan demand register available with it, and that after satisfying the decree, the

respective defendants are entitled to get back the pledged gold jewels from the court, on payment of necessary court-fees.

5. On appeal, in A.S.Nos.198 to 201 of 1979, to this Court, the Judge held as follows:

... As there is dispute regarding the nature of the jewels pledged, the proper course would be to pass a decree in favour of the appellant in all the

four suits for the amounts claimed in the plaint with the condition that the amounts under the decrees can be realised by the plaintiff only after the question regarding the nature of pledged jewels is decided by the Court, either by appellant filing a suit for declaration that jewels now in his

possession are the jewels pledged by the respondent and they are spurious jewels or the respondents filing suits for redemption by establishing that

the jewels pledged by them are not spurious jewels and they are as per the description, weight, etc., mentioned in the Gold Loan demand register

available with the plaintiff. The decrees passed by the trial court in all these suits are modified accordingly....

6. Mr. T.R. Mani, learned Counsel for the appellant-plaintiff/Bank, submits that, neither of the directives issued by the trial Court, as well as by the

learned Judge of this Court, is in accordance with the provisions of Section 176 of the Indian Contract Act, and that once a pawnee is held to be

entitled to file the suits based on promissory note reserving the right to proceed against the pledged articles if circumstances warrant, the suits ought

to have been decreed as prayed for, without imposing any condition whatsoever.

7. As to what are the rights of the pawnee are exemplified in the following decisions cited by the learned Counsel for the appellant.

(i) A Full Bench of this Court in Mahalinga Nadar v. Ganabathisubbhaiah 13 M.LJ. 445 : ILR (1904) Mad. 528, held that a pawnee is entitled to

sue for the sale of the property pledged to him notwithstanding that he was also entitled u/s 176 of the Contract Act, to sell the property without

reference to court. This conclusion was arrived at on the basis that in a case where both rights exist, they are concurrent rights and the rights to

proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally.

(ii) In Gulatn Hussain v. Clare D''zoza 53 Bom.819, a learned Judge of Bombay High Court held that in a case of pledge or hypothecation or

mortgage of movable property, the creditor has two remedies and they are concurrent i.e., (i) he can proceed against the debtor personally and (ii)

he can proceed against the property pledged. The learned Judge further held....

It is clear under the law applicable to cases of a pledge that the creditor has two rights which are concurrent, and the right to proceed against the

property pledged is not merely accessory to the right to proceed against the debtor personally. For the pledged may have a right to sue for sale of

the property even in the absence of a right to sue for a personal decree.

The same principles would apply to the case of hypothecation or mortgages of movable property.

(iii) A Division Bench of this Court in Ramaswami v. Palaniappa AIR 1930 Mad. 365, in construing Section 176, held that a pledger cannot

compel the pledgee to exercise the power of sale as a means of discharging or satisfying the decree, because he has only three rights, they being...

(i) ''In case the pledgee exercises the power, to insist that it should be honestly and properly done and the sale proceeds applied to the debt; (2) in

case the pledgee does not exercise the power, to redeem the pledge on payment to the debtor so much of it as remains otherwise unpaid (3) in

case the sale is improperly exercised to get damages caused thereby.

(iv) A Division Bench of the Calcutta High Court in Haridas Mundra Vs. National and Grindlays Bank Ltd., , held that the right of the pawnee to

sue upon the debt or promise does not exclude or destroy his right to sell the pawn. It was further held....

In construing this section too much importance should not be given to the semicolon in the first paragraph. In case where the pawnor makes

default, the pawnee has three rights... (i) he may bring a suit against the pawner upon the debt or promise and (ii) he may retain the pawn as a

collateral security, or (iii) he may sell it on giving the pawner reasonable notice of the sale. The rights to retain the pawn and the right to sell it are

alternative and not concurrent rights. While the pawnee retains, he does not sell; and when he sells he does not retain, but the pawnee has the right

to sue on the debt or the promise concurrently with his right to retain the pawn or to sell it. The retention of the pawn does not exclude this right of

suit, since the pawn is a collateral security only. Nor does the sale of the pawn destroy this right; the pawnor is still liable on the original promise to

pay the balance due....

(v) By reference to the common law of England and the law with regard to pledge as condified in Sections 172 to 176 of the Contract Act, in

Lallan Prasad Vs. Rahmat Ali and Another, , it has been held as follows....

...Under Section 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

person to retain the goods pledged as a 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 (i) 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 pawnor. So long, however, the sale does not take place, the pawnor 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 proceeds

towards the debt. But if he sues on the debt denying 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 pledged by payment of the debt. 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. 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 pledge or is otherwise not in a position to return the pledged goods he has to give

credit for the value of goods and would be entitled to recover only balance.

(vi) After referring to pages 211,218,219 and 222 in volume 29 of Halsbury''s Laws of England, 3rd Edition dealing with that point, it was held in

The Bank of Bihar Vs. The State of Bihar and Others, , that it has not been shown how the law in India is in any way different from the English law relating to the right of the pawnee vis-a-vis other unsecured creditors of the pawness.

(vii) Following the decision in Lallan Prasad Vs. Rahmat Ali and Another, , a Division Bench in State Bank of India Vs. Quality Bread Factory and

Others, , held that a pawnee can file a suit for recovery of loan without first selling the goods. The view expressed in Lallan Prasad Vs. Rahmat Ali

and Another, referred to above, was reiterated in Balkrishan Gupta and Others Vs. Swadeshi Polytex Ltd. and Another, .

8. Section 176 of the Indian Contract Act reads as follows:

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 pawner upon the debt or promise, and retain the goods pledged as a collateral security; or may

sell the things pledged, on giving the pawner reasonable notice of the sale.

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. If the

proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

9. This section recognizes three rights in a pawnee in case of default by a pawnor. They are: (1) he may bring a suit upon the debt; (ii) he may

retain the goods pawned as collateral security; (iii) he may sell it giving the pawnor reasonable notice of sale. The rights of a pawnee having been

thus clearly spelt out, the pre-condition imposed preventing the plaintiff/Bank from recovering the amounts due to it based on the promissory note

is certainly against the rights of the pawnee recognised u/s 176 of the Contract Act. Having held that the suits as filed are maintainable in view of

Section 176, and that the spuriousness or the genuineness of the gold jewels is alien to the scope of the suits, the restraint put on the plaintiff that

only after the question regarding the nature of the pledged jewels is decided by the Court, the decrees could be executed, is destructive of the

rights of the pawnee, as recognised u/s 176 of the Act.

10. Mr. Surendranath, learned Counsel for the defendants would repeatedly point out that the criminal case was foisted upon the defendants, that

the Bank officials, who had been responsible for misdeeds committed to cheat both the Bank and the customers, have manoeuvred to get out of the criminal case and innocent third parties are subjected to appear both in civil court as well as in criminal court; that the criminal revision petitions

filed by them are pending disposal, and that once with the help of appraisers, the jewels having been certified to be genuine, and necessary

particulars having been entered in the register about the quality of the jewels; the Bank is bound to return the jewels of the description as found in

its registers, and unless and until the jewels pledged by them are returned, no amount could be recovered from the defendants, and therefore, to

avoid multiplicity of proceedings, the directives given, if not made available to them, it would result in considerable loss to the defendants. He refers

to the decision in Kothandarama Gupta v. Venkatakrishna (1974) T.L.N.J. 68, which dealt with a suit filed on the pledge even though the plaintiff

was not possessed of the pawned goods, and therefore, following the decision in Lallan Prasad Vs. Rahmat Ali and Another, , it was held that

when the pawned goods could not be delivered by the Pawnee, the suit was not maintainable. Hence, this decision has no relevance to the instant

case.

11. These contentions as could be seen are contrary to the intendant of Section 176, and the right of the pawnee to maintain the suits based on

promissory notes cannot be defeated by imposing any condition in the nature as done. As to whether the jewels at the time pledge were genuine or

spurious, is certainly outside the scope of the suits filed, based on the promissory notes. The pawnee is bound to return the jewels as soon as the

amounts covered by the decrees are paid. As stated above, defendants have already stated in their written statements that ''defendant is prepared

to pay principal and interest upto date only provided, the plaintiff returns those items'' and therefore, this stand taken by them by itself entitled the

plaintiff to secure the decree as prayed for. It is not the stand of the plaintiff/ Bank that it would not return the jewels in specie, if the amounts

claimed by it are paid by respective defendants. It is only when the jewels are returned defendants would be in a position to decide whether the

jewels as pledged by them are the same or otherwise. It is not open to them at this stage to claim that unless the jewels, as described in the

registers of the Bank are returned, decrees cannot be executed against them. This is an aspect, which is clearly foreign to the nature of the suits, and it is left to be considered in appropriate proceedings, which would be dependent upon what would transpire when the jewels are returned to

them in specie are not the jewels pledged by them or their description and quality is different from what they have pledged or that they do not

satisfy the descriptions as found in the registers maintained by the Bank, it is then for the respective defendants to thereafter take appropriate

proceedings against the Bank on the ground that the security furnished by them had not been returned in the same condition in which they had

pledged them. How far the claims inter se between them relating to nature of pledged articles are true or not would be gone into in the proceedings

which they choose to institute, if circumstances warrant. Certainly, this right is available to them, and therefore, there is no need to impose any

condition as done either by the trial court or by the learned Judge. When the respective defendants deposit the amounts based on the plaint claims,

plaintiff/bank is obliged to return the jewels in specie in whatever condition they are found and which will have to be done with as much precision

as required relating to gold jewels, so that if the defendants are aggrieved that the Bank officials have cheated them, it will help them to seek for

appropriate remedies.

12. Hence, all these Letters Patent Appeals are allowed, deleting the modified condition imposed upon the plaintiff, and resulting in the suits being

decreed as prayed for with costs. There will be no order as to costs in these appeals.