
(1971) 10 SC CK 0041
In the Supreme Court Of India
Case No : Civil Appeal No. 190 of 1967

The Central Bank of India Ltd.	Vs	APPELLANT
Hari Prasad Jalan and Others		RESPONDENT

Date of Decision : 22-10-1971

Acts Referred:

Contract Act, 1872 — Section 151, 152

Citation : AIR 1972 SC 1274

Hon'ble Judges : K.S. Hegde, J;H.R. Khanna, J;A.N. Grover, J

Bench : Full Bench

Advocate : Bishan Narain, B.P. Maheshwari and R.K. Maheshwari, for the Appellant; A.B.N. Sinha K.K. Sinha, B.P. Rajgarhia and S.K. Sinha, for the Respondent

Final Decision : Allowed

Judgement

A.N. Grover, J.—This is an appeal by certificate from a judgment and decree of the Patna High Court in a mortgage suit.

2. The facts may be stated: On August 1, 1953 the Defendants, who are Respondents herein, entered into an agreement (Exh. P-9) with the Plaintiff Bank by which a cash credit account was opened, the limit being Rupees 3.50.000/-. The Defendants hypothecated in favour of the Bank the goods described in general terms in the Schedule attached to the agreement. The arrangement was that the Defendants were to be at liberty to sell and dispose of the goods which had been hypothecated in the ordinary course of their business but they were bound to replace the goods disposed of by new goods of equal value. According to Clause 5 of the agreement the hypothecated goods were to be stored or kept at the risk of the Defendants and at their expense in good condition. The interest was payable at a certain percentage over the Bank rate the minimum being 5%. The agreement was to operate as a continuing security for the balance from time to time due to Bank and also for the ultimate balance which would become due in the cash credit account. It may be mentioned that we have referred only to

the terms of the agreement which are material for the purpose of the present case. The goods which were hypothecated were stored in the godowns which, as admitted in the evidence of one of the Defendants himself, were situated within the premises of the mills belonging to the Defendants. The key or the keys of the godowns, however, remained in the custody of the Bank Official i.e. the godown keeper. On July 27, 1954 there was an unexpected and unprecedented flood in the town of Raxaul where the premises of the mills were situated and which got inundated with flood waters. The Defendants addressed a letter dated July 27, 1954 to the Bank Manager saying that due to unprecedented floods "a great damage has been done to the goods pledged with you and we are helpless which is already known to you and to your staff when you troubled to come in our factory at the time when the flood was in full swing. The goods which have been damaged by the flood require different sorts of handling to save from further deterioration. We are therefore going to pile loose weight goods to dry them and so there may be variation in counting of the goods which please note."

3. On September 29, 1954 the Defendants addressed a letter (Exh. I-b) to the Bank the material portion of which is reproduced below:

In the event of your handing over to us delivery of the under mentioned stocks pledged with you and damaged by the recent flood for processing and sale at best available market rate we, hereby undertake to hold the said stocks so delivered to us as trustees for and on behalf of your Bank holding them strictly under lien (?) to you and we hereby undertake not to make any other disposition whatsoever of the said goods without your written instructions.

We have no right, title or interest nor any claim over the said goods held by us as trustees on your behalf and undertake at any time to hand over to you on demand the goods so long as the same continue to be in our custody.

We hereby agree to hand over to you all the sale proceeds of the goods as and when sold by us.

.....

We hereby guarantee and promise at all times hereafter to keep you indemnified against all losses, costs, damages and expenses of whatever nature you may sustain or which you may have to incur by reason of any act of embezzlement, neglect, misfeasance, nonfeasance in respect of clearance and sale of the goods at best available market rates and we shall always remain liable and responsible for all the acts of omission of our servants, employees representatives or any other person acting on our behalf.

A Schedule of stocks was given in the letter (Exh 1-b) the total book value of which was shown as Rupees 1,04,840/-. On the same date the Defendants executed a receipt (Exh. 4) to the effect that the stocks mentioned therein which were the same as given in the Schedule to the letter (Exh. 1-b) were being held by them in trust in terms of the "trust receipt agreement" which meant the letter

(Exh. 1-b). According to the Plaintiff's case the Defendants owed to the Bank on December 29, 1954 a sum of Rupees 1.64,884/14/3 in excess of the value of the pledged commodities and on December 30, 1954 the Defendants executed a mortgage bond in favour of the Bank giving in mortgage two houses at Raxaul described in Schedule A of the plaint. It was stipulated that interest at 1½% over the Bank rate would be paid the minimum rate being 5%. The mortgage bond was registered on April 20, 1955. By means of a letter Exh. 5(c) dated January 1, 1955 the correctness of the stocks hypothecated as per stock report dated December 31, 1954 submitted by the Bank was confirmed and it was further confirmed by the Defendants that the balance due from the Defendants on that date stood at Rupees 1,69,859-9-3. On November 9, 1955 whatever goods out of the hypothecated goods remained in the godowns of the Defendant's mills but under the lock and key of the Bank were stated to have been delivered to the Defendants. The finding of the Courts below is also to the same effect on the same date a notice was sent by the Bank to the Defendants for payment of the amount due on the mortgage. This notice has not been included in the printed record but the reply Exh. 1-d, dated January 14, 1956 sent by the Defendants has been got printed-In this reply there was no mention whatsoever about the goods which were damaged by the floods not having been delivered to the Defendants. This fact assumes material importance because one of the main questions on which the High Court has given its decision against the Bank is that the damaged goods mentioned in the schedule to Exh. 1-b were never delivered by the Bank to the Defendants. On August 11, 1956 another notice Exh. 6 was sent by the advocate of the Plaintiff Bank to the Defendants. It is a short letter and may be reproduced:

Under instructions from my clients, The Central Bank of India Ltd, Muzaffarpur. I beg to give you notice as follows:

- (1) That you had cash credit account with my clients at its pay office at Raxaul and a large amount to the extent of Rs. 1,64,848. 14. 3 was due from you on 29th December, 1954 and in security thereof you executed a Deed of Mortgage dated 20-12-1954.
- (2) That on this account after payments and adjustment of interest a sum of Rupees 1,08,383.7-9 (Rupees one lac eight thousand three hundred eighty three annas seven pies nine) only is due as on 31 7-56 besides interest thereafter as stipulated in the bond.
- (3) That the due date of payment on the Mortgage Bond was 30-12-55 which has expired.
- (4) That still a heavy debit balance as stated before is payable by you and as you have not seen your way to pay up the same, this is to inform you that unless the amount is paid within a month from night hereof, the matter will be placed in Court without any further reference to you.

The Defendants sent a reply dated September 27, 1956 saying that the

Defendants were facing severe repercussions in trade due to labour and other troubles which stood in the way of meeting the demands of the Bank. The Bank was requested to give due consideration to the predicament of the Defendants and to consider giving the following facilities and accommodation:

(1) That we are prepared to pay Rupees 5,000 (rupees five thousand) immediately the cash credit facilities are restored and to pay another Rupees 5,000 within three months towards liquidation of the dues in our account.

(2) That we will continue to pay to you Rupees 16000 (illeg) yearly from January 1957, towards liquidation of the dues in our account besides payment of interest accrued in the account every month. It may be noted that if our business improves we may pay you more than the stipulated yearly payment of Rupees 10,000.

(3) That a cash credit limit of Rupees 1.50,000 and Docy. (?) Mills Limit of Rupees 50,000 and Clean Bill limit of Rupees 5,000 may be sanctioned to us forthwith to enable us to fulfil the stipulation enumerated above.

(4) That in the event of our failure to pay to you in terms of our above stipulations you may enforce the action contemplated (?) in the Paragraph (4) of the notice referred to above.

The Bank finally filed a suit for recovery of Rupees 1,16,309.37 inclusive of principal, compound interest, interest and. incidental charges up to November 15, 1957 besides interest pendente lite etc. on the foot of the mortgage after serving a notice dated January 30, 1957.

4. The plaint was a simple and short document and referred to the agreement of mortgage executed on December 30, 1954 for the unsecured advance i.e. for advance in excess of the value of pledged commodities under the cash credit account for a sum of Rupees 1,70,000 or such amounts not exceeding Rupees 1,70,000 as might fall due after disposal of the commodities which had been pledged in the cash credit account standing in the name of Pashupati Nath Rice and Oil Mills. It was asserted in Para 4 of the plaint that the Defendants had acknowledged and admitted that in pursuance of the mortgage agreement and in consideration of a sum of Rupees 1,64,848/14/3 due by the mortgagor to the Plaintiff Bank on December 29, 1954 the Defendants had mortgaged and hypothecated the properties in Schedule A as security for the advances. In the written statement which was filed by the Defendants a number of preliminary matters were raised. On the merits as regards the allegations in Para 4 of the plaint it was pleaded: "These Defendants did never enter into agreement to mortgage nor did they execute the alleged mortgage bond dated 20-4-55 under their free will and consent, as will appear from the subsequent paragraphs of this written statement." In Para 10 it was stated that the Defendants had taken advances against sufficient security of commodities which were under the lock and key of the Bank and were also under its custody. Apart from the security of commodities the Defendants used to get advances on the security of bills,

hundies etc. It was further stated, "the Plaintiffs having thus brought these Defendants under their confidence often used to obtain signatures on certain printed forms without explaining the accounts or without giving any opportunity to verify the accounts". In Para 11 it was claimed that commodities like linseed, M. Seed Oil, Oil cakes, Rice, Paddy, barley and other grains worth about Rupees 4 lacs were hypothecated as security for the advances with the Plaintiff Bank. During the time of floods the Bank did not take prompt action to preserve these commodities from damage. It was asserted that the agent of the Bank insisted on a mortgage bond being executed and the Defendants in their anxiety to keep their mills in a running condition agreed to execute the bond. However, the Manager of the Bank did not explain the accounts and simply got the documents prepared according to his own choice and got the same signed by the Defendants without informing them of the contents thereof. The Defendants were "not so conversant with the English language; the content of the document, mortgage bond in suit was not explained to these Defendants." The Bank did not advance a single pie on the basis of the bond and there was nothing due against them on December 29, 1954-The mortgage bond was tainted with fraud and misrepresentation and was without consideration. The material parts of Paragraphs 12 and 13 may also be set out:

...The allegations regarding the delivery of commodities to these Defendants on 9-11-55 are incorrect. The said delivery did not relate to the commodities which were in the custody of the Plaintiff prior to the mortgage bond in suit but to other commodities which were pledged after the bond. If the Plaintiff produces any such paper to show the delivery of the commodities pledged before the bond in suit that paper would certainly be a forged and fabricated paper.

...There is nothing due against these Defendants payable to the Plaintiff, rather the Plaintiff owe heavy amount to these Defendants for the non-delivery of goods worth about Rupees 4 lacs which had been pledged and placed under the custody of the Plaintiff before the bond in suit.

5. On the pleadings of the parties the trial Court framed a number of issues but the only issues which need be mentioned are the following:

4. Has the mortgage bond In suit been properly and duly executed, or was any undue influence practiced in its execution?

5. Is the mortgage bond in suit for consideration?

6. Was the liability caused by flood on the Plaintiff or On Defendants?

8. Is the Plaintiff entitled to a mortgage decree?

The above issues are mentioned In the judgment of the trial Court although at an earlier stage the issues framed were somewhat different. On issues Nos. 4, 5 and 6 it was found by the trial Court (a) that the mortgage bond was properly executed but it had been executed under undue influence and was not valid for that reason, (b) The mortgage bond was not for the entire consideration shown

therein "though it could be relied upon for the dues within the limitation", (c) The liability caused by floods with respect to linseed Oil and Oilcakes was on the Defendants and with respect to other articles on the Plaintiff.

6. On issue No. 8 it was held that the Plaintiff was not entitled to a mortgage decree and should be granted only a money decree and that also not for the entire amount. A sum of Rupees 83,896/- which represented the liability for the loss caused by the flood and for which the Plaintiff was held liable was subtracted from the amount which was ascertained as due to the Plaintiff from the Defendants and a simple money decree was granted accordingly. The trial Court, however noted that the goods which had not been damaged by the floods had been delivered to the Defendants by the Plaintiff on November 9, 1955.

7. The Plaintiff filed an appeal to the High Court. The High Court reversed the finding of the trial Court on issue No. 4 and held that the Defendants had failed to establish exercise of undue influence in the matter of execution of mortgage bond. It was further held that the mortgage bond was executed as an over-all security for the shortfall between the level of debt in the cash credit account and that of the security of the goods. Therefore the consideration for the mortgage was to be the difference between the two as standing in the books of the Bank or as might be determined after disposal of the pledged goods. Unfortunately the High Court went into the matter on which there was no plea whatsoever in the written statement and in respect of which no issue was framed. That matter related to the delivery of the goods worth Rupees 1,04,840/- to the Defendants out of the hypothecated goods on September 29, 1954. Relying largely on oral evidence and considering that the burden was on the Plaintiff in spite of the numerous documents which have already been referred and to which reference will be made once again and other facts and circumstances of material consequence the High Court came to the conclusion that the Plaintiff had failed to prove that the goods mentioned in Exts. 1-b and 4 had either been destroyed by the floods or had been delivered to the Defendants. The High Court also dealt with the question of the liability of the Plaintiff under Sections 151 and 152 of the Contract Act. After discussing the evidence and the case law it was observed that the Appellant had failed to show what quantity of goods which were kept as security had been actually destroyed or damaged and what their value was. It was also held that the parties could not contract out of their obligations enjoined by Section 151 of the Contract Act. After deducting a sum of Rs. 1,04,840/- from the amount of Rs. 1,16,309.37 a mortgage decree for Rs. 11,469.37 with interest pendente lite proportionate costs in the trial court and with future interest at 6% per annum was granted.

8. We are unable to comprehend how the High Court, in the absence of any plea or issue, examined the question whether the goods of the value of Rs. 1,04,840/- which are stated to have been damaged by floods remained with the Bank and were not delivered to the Defendants. We have referred in detail to the documents which fully establish that the Defendants had taken delivery of the

goods. In this connection the receipt exh. 4 read with the letter exh. 1-b of September, 29, 1954 constituted unimpeachable evidence of the Defendants having taken delivery of the goods in question. It is significant that in the mortgage bond the Defendants admitted the amount which was in excess of the value of the pledged commodities. It is common ground and has not been disputed before us that the value of the goods covered by the receipt exh. 4 was not deducted from the amount of Rs. 1,64.88414.3 shown to be in excess of the value of the pledged goods on December 29, 1954. If the delivery of the damaged goods had not been taken by the Defendants the mortgage bond would have contained a figure after taking into account the value of the aforesaid goods. Moreover the correctness of the stocks hypothecated as per stock report dated December 31, 1954 was also confirmed together with the balance due by means of the letter exh. 5(c) on January 1, 1955. The Plaintiff sent two notices to the Defendants to which reply was sent by them. Even in these replies the Defendants never took up the position that the Bank was liable to account for the value of the damaged goods since their delivery had not been taken by the Defendants. The most striking feature about the whole matter is that at no stage the Defendants either wrote or protested against the non-delivery of the aforesaid goods. There is nothing even in the pleadings in the written statement which have been extensively referred to by us at an earlier stage from which a case could be made out that goods of the value of Rs. 1,04,840/-were not delivered to the Defendants although they had executed a receipt and admitted that they had been delivered. We are completely at a loss to understand how in these circumstances any oral evidence could be looked at for determining whether the admissions contained in all the aforesaid documents about the delivery of goods to the Defendants were wrong. In our judgment in such circumstances oral evidence would be worthless and would be of no value even if it could be considered in spite of the serious infirmity in the whole case of the Defendants on the point there being complete absence of pleadings and issues. Moreover the High Court appears to have proceeded on several assumptions which were not justified. For instance it has been assumed that the letter exh. 1-b was not voluntarily written by the Defendants. We have not been shown any material from which such an inference could be legitimately drawn. The High Court attached importance to the fact that the peon of the Bank who was on duty at the material time was not examined by the Bank to prove that the Defendants had taken delivery of the goods. This illustrates the error into which the High Court fell inasmuch as it proceeded to consider the evidence on the footing that it was for the Plaintiff to prove the delivery of the goods. In the presence of so much documentary evidence and other facts and circumstances which fully establish the delivery of the goods to the Defendants the burden could not have been placed on the Plaintiff Bank to prove the same. It was for the Defendants to plead and prove that they never got delivery of the disputed goods. This, in our opinion, they entirely failed to do. It cannot be forgotten that admittedly the goods were lying in the godowns which were in the premises of the mills of the Defendants. The Bank had only the key or the keys of the godowns. The process

of delivering the goods was quite simple as their physical delivery was not necessary. In the above view no question of the applicability of Section 151 of the Contract Act could arise. Nor was the question of negligence of the Plaintiff as a bailee even raised at any time before the suit despite the previous correspondence and the notices sent by the Plaintiff. The Defendants would, in normal course, have long before the suit informed the Plaintiff that on account of its negligence the pledged goods had got damaged and therefore, it was liable for all the consequences. Not one word was said about it at all material stages and it was only when the suit was filed that such a plea was put forward.

9. Learned Counsel for the Defendants-Respondents has contended that the goods had been completely destroyed by the floods and therefore they could not have been possibly delivered to the Defendants. The High Court, however, came to the conclusion that on the evidence on record it could not be held that any portion of the goods mentioned in exhs. 1-b and 4 had been destroyed by the floods. This finding is a complete answer to the contention raised on behalf of the Defendants. In spite of our repeated questions counsel for the Defendants could furnish no explanation for the Defendants having never demanded the return of the goods which had been damaged during the floods or the adjustment of their value against the dues of the Bank if the case which was sought to be made out before the High Court had any substance.

10. In the High Court it was not disputed that the amount of Rupees 1,16,309-37 due to the Bank had been correctly calculated. The High Court, however, deducted a sum of Rupees 1,04,840/- from that amount on the ground that the damaged goods had not been delivered to the Defendants. As according to our decision those goods had been delivered to the Defendants this amount cannot be deducted from the sum of Rs. 1,16,309.37. The appeal is consequently allowed and a mortgage decree is granted in that amount with interest pendente lite and future interest at 6% per annum from the date of the decree of the trial court to the date of realisation. A period of three months is allowed to the Defendants to make the payment of the decretal amount. The Plaintiff Bank shall be entitled to its costs in this Court.