

(1955) 10 MAD CK 0027

In the Madras High Court

Case No : O.P. No. 96 of 1952, (Applns. No's. 3617 and 4436 of 1954)

V. Ramamurthi, Official Liquidator

APPELLANT

Vs

Indian Bank Ltd. and others

RESPONDENT

Date of Decision : 07-10-1955

Acts Referred:

Companies Act, 1956 — Section 109, 109(1), 109(1)(c), 109(1)(e)

Contract Act, 1872 — Section 171, 178

Sales of Goods Act, 1930 — Section 30

Citation : (1955) 10 MAD CK 0027

Hon'ble Judges : Balakrishna Ayyar, J

Bench : Single Bench

Advocate : K. Ramamurthy, for the Appellant; Alladi Subramanian, K.S. Sankara Iyer, Jacob and Ratan and K.S. Sundaram, for the Respondent

Judgement

Balakrishna Ayyar, J.—Dinasari Ltd., now under liquidation, was started as a private limited company in 1944. It was publishing two papers called "Dinasari" and "Kandipam". Its memorandum of association permitted it, among other things, "to carry on the business of... dealers in printing machinery, furniture, type, ink, paper etc."

In an affidavit filed by the Official Liquidator and dated 29-7-1954, it is stated that the company was importing large quantities of news-reel and printing ink which it was using not merely for purposes of the papers it was publishing but also for sale on profit.

In fact, but for the said profits the paper could not have been kept going for these years. The accounts of Dinasari from the beginning would show that large quantities of news reels etc. were being imported from foreign places and sold to local customers for profit and that the purchases and sales were part of its regular business.

By an order made in O. P. No. 96 of 1952 the company was ordered to be wound up.

2. The Indian Bank Ltd. claimed that various quantities of newsprint had been pledged to it by the company and on various dates in April 1952, and later, this newsprint was sold for a sum of Rs. 92,277-2-0. The Indo-Commercial Bank Ltd., made a similar claim in respect of other quantities of news reel and these were sold on 11-12-1952 for a sum of Rs. 8606-6-6.

3. Two petitions have been filed in relation to the moneys thus realised. Appln. No. 4436 of 1954 is one by Narayana Rao, and, his case is this. In January 1951, in association with four of his friends he formed a syndicate for the purchase and sale of paper. In January 1951, they purchased various quantities from "Dinasari Ltd."

A further two lots were purchased in February 1951. Yet more lots were purchased on 31-3-1951, 4-4-1951, 10-4-1951, 23-5-1951, 18-10-1951 and 28-12-1951. In his affidavit he stated:

In respect of the above purchases on 31-3-1951, 4-4-1951 and 10-4-1951, 32 reels of newsprint of 17933 pounds were delivered by the company on account of D. Govindarajulu and Mohana-krishnan under invoice No. 1041, dated 31-3-1951. On 23-5-1951 the company under invoice No. 1031 in my favour delivered 6952 kilos or 15322 pounds of newsprint.

Even so the company under invoices dated 18-10-1951 and 28-12-1951 bearing Nos. 1134 and 1158 respectively delivered to the five reels of 3209 pounds and one reel of 617 pounds.

I may state here that during the arguments I specifically asked counsel when these deliveries were made and he told me that the delivery was on 2-4-1951. There is no mistake about this date because I made a note of it at the time. From time to time Narayana Rao paid to the company large sums of money aggregating to Rs. 81,000. He also insured the goods with the Union Insurance Society of Canton Ltd.

In his affidavit Narayana Rao further stated that though the purchases were made in the name of several members of the syndicate ultimately all the rest agreed with him that he should become solely entitled to receive delivery of the newsprint. Though he could have directly removed the reels to any godown of his own, he could not do so owing to the difficulty of obtaining godown accommodation and so the company agreed to keep for him newsprint amounting to 240 reels.

On 1-11-1951 the company wrote that they were holding the reels with them and would deliver them whenever he required. The company had no right to deal with these goods and the Indian Bank Ltd. did not act "bona fide" in putting its lock on the godown in which these goods were stored. The money fetched by the sale of 240 reels belonged to him, and, he prayed for a direction that the Indian Bank Ltd., be asked to pay him that money.

4. Appln. No. 3617 of 1954 is by the Official Liquidator for a direction asking the

Indian Bank Ltd., and the Indo-Commercial Bank Ltd., to bring back into court the moneys realised by the sale of the paper at their instance. In para 7 of his affidavit the Official Liquidator stated, "After, examining the accounts and other material records I find that the charges created by the company in favour of the Indian Bank Ltd., and Indo-Commercial Bank Ltd. are not Valid and binding upon the Official Liquidators or any of the creditors under the provisions of S. 109(1) (e), Companies Act.

I would submit that (1) the transaction is a charge or mortgage of moveable property and not a pledge as the legal possession of the goods was always with the company on the facts stated above, (2) Even assuming the transaction amounts to a pledge of moveables, the property pledged is the stock in trade of the company as mentioned above.

Hence the transactions required to be registered under S. 109 of the Act before the Registrar of Joint Stock Companies and as they were not so registered, they are void against the Official Liquidator or the creditors. Thus the amount realised by the sale of the said stock is liable to be refunded to the Official Liquidator as assets available for distribution."

5. The case of the Indian Bank Ltd. is that there had been a valid pledge of the goods sold at its instance, that it is a secured creditor in respect of the amounts due to it, and, that it is perfectly entitled to appropriate the amount realised by the sale of the pledged goods towards the money due to it. The contention of the liquidator that the goods formed the stock-in-trade of the Dinasari Ltd. is not sound. The affidavit filed on behalf of the Bank states:

It (the company) imported these goods for the purpose of utilising them in its business for printing and publishing. The mere fact that it might have sold these goods on some occasions clandestinely without proper licence or permit cannot convert its business to one of buying and selling newsprint or inks etc.

In the circumstances, the newsprint, ink etc., which form the subject matter of the pledge were not the stock in trade of Dinasari Ltd....

Even assuming without admitting that the goods are stock in trade, this respondent states that on a proper construction of S. 109(1)(c), Companies Act, the transaction does not require to be registered. The contention therefore that the transaction is void on account of its not being registered under S. 109(1) (c), Companies Act is untenable.

6. The case of the Indo Commercial Bank Ltd. is substantially the same as that of the Indian Bank Ltd. By way of abundant caution however the Indian Bank Ltd., has filed O. P. No. 62 of 1955 praying that the delay in registering the pledges may be excused.

7. The claim of Narayana Rao may be first considered. Before he can succeed in his application he must show that the reels eventually disposed of in auction on the motion of the Indian Bank Ltd., had been actually sold to him. Beyond the

bare averments in his affidavit there is no proof whatsoever of this fact. Narayana Rao did not even go into the box to say that he actually got possession of any paper at any time.

Mr. Tyagarajan, his learned counsel argued that Narayana Rao had paid for the goods and that he had also insured the stock which was being kept in Subhadrabai mansions. But, these two circumstances are not sufficient to show that Narayana Rao actually received the goods, much less that the goods were the same as those subsequently disposed of by the Indian Bank Ltd.

The goods supposedly sold and delivered by Dinasari Ltd., to Narayana Rao were stored in Subhadrabai Mansions. But all the goods sold at the instance of the Indian Bank Ltd., excepting item 16 in the notice of sale, were stored in other places, that is to say, either at No. 13, Rundalls Road, Vepery or at No. 228, Poonamallee High Road or in compartment No. 1, Springhaven Shed, South Quay.

To these properties Narayana Rao, whose goods were stored according to him in Subhadrabai Mansions, can lay no claim. One circumstance will show that even in respect of item 16 in the notice of sale Narayana Rao's claim must fail. As I stated at the outset, in answer to a question put to him, counsel for Narayana Rao stated that the goods were delivered to him on 2-4-1951 by Chockalingam. Now Ex. I. B. 16(a) will show that the goods which formed item 16 in the sale notice were cleared from the harbour only on 10-4-1951.

It follows that they could not have been delivered to Narayana Rao on 2-4-1951. Besides, even on 2-4-1951 the goods had been pledged with the Indian Bank Ltd. Vide Ex. 1. B. 16.

8. Mr. Thyagarajan made an attempt to show that some at least of the paper sold in auction, viz., items 5 and 6 in the sale notice must have been those previously sold and delivered to Narayana Rao. An examination of the relevant exhibits, however indicates that what happened was this: out of the goods pledged with the Indian Bank 110 double reels, that is to say, 220 reels, were at the instance of Dinasari Ltd., sent to the Express Newspapers, the understanding being that the Express Newspapers would replace these reels by 136 other reels.

Accordingly, the Express Newspapers sent 136 reels in two lots, one of 104 reels and the other of 32 reels. The 104 reels were accepted and stored in Rundalls Road. Out of the second lot of 32 reels 14 were rejected by the godown keeper on the ground that they were damaged. The remaining 18 were stored in Subhadrabai Mansions. Subsequently a certain quantity was transferred to No. 13. Rundalls Road.

Now, these goods could not possibly have been those alleged to have been delivered to Narayana Rao because the original goods which were handed over to the Express Newspaper were received only in September 1951. Moreover, they are of a different description from those sold to Narayana Rao. Nor could the paper sent over by Express Newspaper have been delivered to Narayana Rao for

two or three reasons: one is that it was the Indian Bank which took delivery of the replaced paper and naturally it would not have delivered it to Narayana Rao.

Secondly, an examination of the documents filed by Narayana Rao shows that there were only two sales to him subsequent to September 1951. One was in October and the other was in December. The description of the goods sold on both these occasions differs from that of the goods which formed items 5 and 6 of the list in the notice of sale. It will also be recalled that the statement of counsel was that the goods had been delivered on 2-4-1951 and it follows that the goods which came in subsequently could not have been those delivered to him on 2-4-1951.

It is unnecessary to pursue this matter further since to dispose of Narayana Rao's claim it is enough to repeat that no evidence has been produced to show that the goods he paid for and claims to have taken delivery of were those sold by the bank. Application No. 4436 of 1954 is dismissed with costs.

9. The case of the Official Liquidator is that the Indian Bank Ltd. and the Indo-Commercial Bank Ltd., are not entitled to retain the money realised by the sale of the newsprint, firstly on the ground that the goods had not been pledged, and, secondly, on the further ground that even assuming that there had been a pledge it is void because it had not been registered under S. 109(1), Indian Companies Act.

Now, an examination of the documents filed by the Indian Bank Ltd., and the Indo Commercial Bank Ltd. shows that in every case the goods were in the first instance pledged to the bank. In every case possession of the goods was also constructively delivered to the banks by the relevant shipping and other documents of title being handed over. The ownership of the goods remained with Dinasari Ltd.

Delivery of the documents of title to the goods was effected in order that the goods might be security for the moneys advanced by the bank. The transactions were therefore pledges in the proper sense of the word. In some instances, - this applies only to the Indian Bank - however, the goods actually pledged were released and other goods substituted as security in that place.

In one or two instances - this too applies only to the Indian Bank Ltd. - the amount due on the pledge had been paid, but, the bank still kept the goods as security for its over all account. This the Indian Bank Ltd. was expressly allowed to do under one of the clauses of the instrument pledging the goods. Now none of these pledges was registered under S. 109(1), Indian Companies Act. The question, therefore, is whether the pledges are valid, or void on this ground.

10. So far as is now material, S. 109, Indian Companies Act runs as follows:

Every mortgage or charge created after the commencement of this Act by a company and being either-

(c) a mortgage or charge on any immovable property wherever situate, or any interest therein; or

(e) a mortgage or a charge, not being a pledge on any moveable property of the company except stock-in-trade...

shall so far as any security on the company's property or undertaking is thereby concerned be void against the liquidator and any creditor of the company unless the prescribed particulars of the mortgage or charge... are filed with the Registrar....

If there had been a comma after the word "pledge" in clause (e) there would have been no difficulty whatsoever about its meaning. In that case the clause would have meant that a mortgage or a charge on any moveable property except stock-in-trade would have to be registered, but, if it were a pledge it would not have to be registered.

Now, when I read the section before the decisions bearing on it were placed before me that is how I was inclined to read it; and, after an examination of the decisions I have come back to the same conclusion.

11. of the four cases that were read before me the earliest in this court is T. Radhakrishnan Chettiar Vs. The Official Liquidator, Madras Peoples' Bank, Limited (In Liquidation), a Bench decision. The facts there were these. On 5-2-1938 Radha-krishnan Chettiar the appellant placed with the Madras Peoples Bank Ltd., a sum of Rs. 3000 on fixed deposit for the period of one year. The bank did not repay the money when it fell due and it was agreed that the money should be re-deposited but that the amount should be split up into four sums of Rs. 500 each and a fifth sum of Rs. 1000 repayable on different dates in April, May and June 1939.

The bank was unable to repay any of these sums on the due dates but offered to endorse five promissory notes to the appellant as security for its indebtedness to him. The appellant agreed and the terms of the arrangement were embodied in a document which was duly executed, but it was not registered with the Registrar of Joint Stock Companies. In November 1939 the court passed an order for the compulsory winding up of the bank.

The promissory notes endorsed to the appellant had been executed by debtors of the bank as security for the money they owed to it. It was common ground that after endorsement the promissory notes were delivered to the appellant who instituted suits against the makers of the promissory notes and realised in all Rs. 1173-3-9.

In February 1941 the Official Liquidator took out a judge's summons calling upon the appellant to show cause why the agreement between the bank and the appellant should not be declared void and why he should not be required to pay over the money he had realised. The case of the Official liquidator was that the agreement between the appellant and the bank required registration under S.

109, Companies Act and as that had not been done the agreement was void, against him.

Gentle J. found for the Official liquidator. From that order there was an appeal. The Bench held that the transaction of 29-6-1939 amounted to a bailment of the promissory notes and a bailment as security for the payment of the debt due to the appellant by the bank. Therefore, all the requirements of the Contract Act for a valid pledge had been fulfilled.

The court held: "The transaction now in question may amount to a mortgage, but, as there are here all the requirements for a valid pledge it is also a pledge, and being a pledge did not require registration." This case is therefore a direct authority for the position that a pledge does not require to be registered.

12. Now, it is possible to say in respect of this case that promissory notes are not stock in trade, that the decision will therefore properly apply only to moveable property which is not stock in trade, that the reels of paper dealt with by Dinasari Ltd., was stock in trade and that in consequence the decision does not apply. But even if that be so the observations in this case are entitled to as much weight as the observations in a later case by a Bench of this Court to which I shall refer presently.

I may add that the decision proceeds expressly on the basis that a pledge of moveable property need not be registered. I would further observe that on an analysis of the language of the section and the facts I am not prepared to hold that this case is properly distinguishable.

13. The next case is reported in *In Re: East Africa Hardware Company, in Liquidation*, There Tendolkar J. held that if the moveable property was stock in trade it would not require registration. The learned Judge was of the opinion that cl. (e) must be read as though there were a comma after the word "pledge" in order to understand its meaning properly.

Reading the clause that way the result would be that a pledge would not require registration though a mortgage or a charge on moveable property would require registration unless it was stock in trade. According to the learned Judge no pledge need be registered. A charge or mortgage too would not need registration if it related to stock in trade; but a charge or mortgage in respect of other moveable property must be registered.

It will be noted that a charge or mortgage of immoveable property is already provided for by cl. (c). If I may say so with respect this is exactly the way I am also inclined to read the clause.

14. The third case is reported in - *Tansukhrai M. Karundia Vs. The Official Liquidator, Andhra Paper Mills Co. Ltd., (In liqn.),)*. But in that however there was no decision by the court on this question. The following passage appears on p. 68:

The learned advocate for the applicant conceded that a pledge on stock in trade would require registration, but he submitted that he was willing to give up his claim for security over stock in trade and was content with a declaration that he is entitled to have his security over all the properties covered by the document, Ex. P. 3 other than stock in trade.

No doubt on p. 597 the learned Judge did say that a pledge of moveable properties other than stock-in-trade does not require registration under cl. (e). But, in view of the concession which counsel for the applicant had made earlier I doubt whether this case can be regarded as containing any judicial decision on the question now before me.

15. The last case I have to examine is reported in- *Rajah of Vizianagaram Vs. The Official Liquidator, Vizianagaram Mining Company Limited, Vizagapatam*, , where a consolidated judgment in six appeals was delivered. One of the appeals was C. M. A. No. 103 of 1950. The facts there, were as follows:

A company called the Vizianagaram Mining Co., Ltd. went into liquidation. A foreign company called S. A. Belgi Miners E. Commercial claimed a sum of ₹. 9500 principal and also interest thereon.

It further claimed that it was entitled to a charge on the mineral ore quarried by the company. The District Judge disallowed the claim for interest as also the claim for a charge on the ground that the charge had not been registered under S. 109, Companies Act. The argument in appeal was, that according to para. 8 of the agreement between the foreign company and the company under liquidation, the foreign company was entitled to a lien on the ore not disposed of at the time of the liquidation proceedings. This contention was found against by this court. It was observed:

We do not think that a true interpretation of these documents can show that there is any such charge as claimed. For one thing the charge under Ex. P. 12 is if at all only against stocks of ore ready for shipment and awaiting despatch. It is not suggested that at the time of liquidation there was any quantity of ore ready for shipment and awaiting despatch... That itself would be sufficient to disallow the claim for a charge. Moreover, even if there is a charge, it can only be a floating charge and in view of S. 109 of the Act we have to hold that the floating charge has to be registered.

If on this point the judgment had stopped there, counsel for the liquidators could have derived no help from the case. However it proceeds:

In our opinion, where stock-in-trade is made the subject of a mortgage or charge it should be registered, otherwise the result would be incongruous that a company can create a mortgage or a charge over its stock-in-trade without registration and registration will be necessary if it has to create a charge over other moveables.

Now, it may be said at once that these observations were obiter. The learned

Judges did not find that there had been a pledge of the manganese ore which was the stock-in-trade involved; on the other, as I have already stated, it was distinctly found that a charge had not been created, much less a pledge. The attention of the court does not appear to have been drawn to the earlier decision in *T. Radhakrishnan Chettiar Vs. The Official Liquidator, Madras Peoples' Bank, Limited (In Liquidation)*, which also is a Bench decision.

One may also be excused for thinking that there is a good deal to be said for the view of Tendolkar J. To get the results reached by Govinda Menon and Chandra Reddi JJ. clause (e) would have to be read - so it seems to me - as though the words.

"not being a pledge on any moveable property of the company except stock-in-trade" constituted an exception to the "charge or mortgage" mentioned earlier in that clause. Now I cannot help feeling that this would be unusually involved language even for a legislative draftsman. The preposition "on" occurring immediately after the word "pledge" appears to my mind to be decisive. We speak of a pledge of good faith, pledge of honour, pledge of loyalty, pledge of fealty, pledge of secrecy, pledge of affection, pledge of goods, pledge of documents of title and not of a pledge on good faith, pledge on honour, pledge on loyalty, pledge on fealty, pledge on secrecy, pledge on affection, pledge on goods, pledge on documents of title.

I am free to say that I have not seen any instance where any reputable writer uses the preposition "on" in association with the words "pledge" immediately after it. Glancing through the law reports I find in - AIR 1938 52 (Privy Council) a decision of the Privy Council, that Lord Wright uses the preposition "on" and not "of" after the word pledge. See page 54.

16. Section 178, Indian Contract Act, (since repealed) says:

A person who is in possession of any goods,...may make a valid pledge of such goods or documents;....

See also S. 30, Sale of Goods Act where the words used are "pledge thereof" and not "pledge thereon".

17. I spent some time trying to discover whether in any English statute the preposition "on." is used after the word "pledge", and, I am free to say that I have not been able to find any. Section 3, Factors Act, 1889, in Volume I of Halsbury on Statutes, at p. 39 runs: "Effect of pledges of documents of title". "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

18. One other consideration mentioned by Mr. Sankara Aiyar is pertinent. He asked if the view expressed in *Rajah of Vizianagaram Vs. The Official Liquidator, Vizianagaram Mining Company Limited, Vizagapatam*, were right; what would be the property referred to in cl. (e) over which the mortgage or charge mentioned in it would operate.

19. Mr. Thyagarajan referred me to the commentary on the Indian Companies Act by Sircar, 1937 Edn., page 322, where the learned writer says, "Sub-cl. (e) has been introduced by the Amending Act of 1936, and makes a mortgage or charge of moveable property generally registrable. The only exception is a pledge of moveable property other than the stock-in-trade." But at the same time, on p. 323 the writer seems to contradict himself when he says:

A pledge has been exempted from registration, possibly on the ground that it contemplates a transfer of possession while the other cases do not, as of necessity, contemplate such a transfer. It is not clear why the stock-in-trade has been specially exempted. The only possible explanation seems to be because of the ambulatory nature of stocks-in-trade.

I find myself in agreement with the view of Tendolkar J. It is also in accordance with the decision in T. Radhakrishnan Chettiar Vs. The Official Liquidator, Madras Peoples" Bank, Limited (In Liquidation), which I am bound to follow. The contention of the Official Liquidator that the pledges must be registered does not appear to me to be correct.

20. His claim must fail on another ground also. Under S. 171, Indian Contract Act:

Bankers,... may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them....

In the present case, not only is there no contract to the contrary but on the other hand, there is an express contract emphasising and recording this right. In the result, application No. 3617 of 1954 is also dismissed with costs payable out of the estate. The Official Liquidator may take his costs from the assets in his hands. Advocate's fees, (two sets), Rs. 250/-.