

(1992) 01 GAU CK 0010

Gauhati High Court

Case No: First Appeal No. 27 of 1987

United Bank of India

APPELLANT

Vs

Sri Debendra Nath Roy
Choudhury

RESPONDENT

Date of Decision: Jan. 27, 1992

Acts Referred:

- Contract Act, 1872 - Section 176

Citation: AIR 1992 Guw 88 : (1995) 84 CompCas 791

Hon'ble Judges: Manisana, J; J. Sangma, J

Bench: Division Bench

Advocate: B.K. Goswami and R.I. Yadav, for the Appellant; B.K. Das and N. Islam, for the Respondent

Final Decision: Dismissed

Judgement

Manisana, J.

This is an appeal by the plaintiff, United Bank of India, against the defendant respondent from the judgment and decree dated 18-12-86 passed in TS 20 of 1982 by the Assistant District Judge (1) at Silchar dismissing the suit for sale in default of payment of mortgage-money of Rs. 53,556.24.

2. The case of the plaintiff, in brief, was thus. The plaintiff-bank allowed the defendant the benefit of a cash credit account with a limit of Rs. 20,000/-, i.e. there was an arrangement of cash credit account, by which the plaintiff-bank allowed the defendant to borrow money up to the limit of Rs. 20,000/- . The payment of money advanced or to be advanced by way of loan, or performance of an engagement, was secured by (1) a mortgage by deposit of title-deeds, (2) a demand promissory note of Rs. 20,000/- and (3) an agreement to pledge goods. But the defendant failed to pay the amount due. The defendant contested the suit. The case of the defendant was, inter alia, that he took the loan of Rs. 20,000/-, but at the time of granting the

loan the plaintiff demanded deposit of goods stocked in the go down and, therefore, goods worth about Rs. 38,245.00 were pledged to the plaintiff-bank and the plaintiff-bank was in possession of goods as well as the keys of the godown where the goods were kept. Out of the goods pledged, the defendant took delivery of goods worth Rs. 2311.00 by depositing the amount in the plaintiff-bank, and as such, the plaintiff-bank retained the goods worth Rs. 35,934.00. Therefore, the suit was not maintainable. The defendant also raised the plea of limitation. The trial Court dismissed the suit holding that the suit was barred by limitation. Hence this appeal.

3. Upon hearing the learned counsel for the parties, the points for determination in this appeal are :--

- 1) Whether the suit was maintainable in view of Section 176 of the Contract Act?
- 2) Whether the suit was barred by law of limitation?

4. Let us now deal with the factual position of the case. It is not disputed that the defendant took the loan of Rs. 20,000/-. Relying on the evidence of the plaintiffs witness, the trial Court has held that goods worth Rs. 38,294.00 was pledged to the plaintiff-bank and the plaintiff was in possession of the goods pledged. The evidence of the defendant himself (DW-1) shows that the plaintiff-bank retained the goods worth more than Rs. 35,000/- after taking delivery of the goods worth about Rs. 2300/- out of the goods pledged the evidence of PW-2, the Deputy Manager of the bank, indicates that a discussion was made between him and the defendant with regard to the goods pledged. Therefore, it is held that the defendant took loan of Rs. 20,000/- and the goods worth Rs. 38,294/- were pledged and those goods pledged were in possession of the plaintiff-bank, and that the value of the goods so retained by the bank at the relevant time was about Rs. 35,000/-. But, in the plaint, it has not been mentioned about the retention of the goods pledged by the bank although it has been stated therein that there was an agreement of deposit of goods as a security. No notice of sale of the goods pledged was given. The suit is one for gale based on mortgage by deposit of title-deeds without stating what it had happened to the goods pledged. The consequence is that the plaintiff-bank sued the defendant denying the pledge by implication, but it was found that goods were pledged. Non-explanation of the plaintiff-bank about the goods pledged goes against the plaintiff. On the facts and in the circumstances of the case, it is held that the plaintiff was not in a position to return the goods.

5. With regard to the right of pawnee where the pawnor makes default, Section 176 of the Contract Act runs in the following terms:

"Pawnee's right where pawnor makes default-- 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 pawnor upon the debt or promise, and retain the goods pledged as a collateral

security; or he may sell the thing pledged on giving the pawnor 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."

A reading of Section 176 indicates that the right of a pawnee is that, in case of default by the pawnor, the pawnee has the right to sue upon the debt and retain the goods as a collateral security, or, to sell goods after reasonable notice of the intended sale to the pawnor. If the proceeds of sale is less than the amount due, the pawnor is still liable to pay the balance, and if the proceeds of sale is greater than the amount so due, the pawnee shall pay the surplus to the pawnor.

6. In the context of Section 176, the Supreme Court in *Lalan Prasad v. Rahmat Ali AIR 4967 SC 1322* has held (at pages 1325 & 1326):

".....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 pawnor 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..... 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 the goods and would be entitled then to recover only the balance."

7. In *Balkrishan Gupta and Others Vs. Swadeshi Polytex Ltd. and Another*, the Supreme Court has observed:

"Under Section 176 of the Indian Contract Act, 1872 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 pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. In the case of a pledge, however, the legal title to the goods pledged would not vest in the pawnee. The pawnor has only a special property. A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title can not exceed what is specifically granted by law. In this sense a pledge differs from a mort gage".

8. The law laid down by the Supreme Court may now be summarised as follows. A pledge differs from a mortgage. A pawnee has the right to sue upon the debt and retain the goods pledged as a collateral security: But, if pawnee denies the pledge or is otherwise not in a position to return goods pledged and if the value of the goods is more than the debt, the pawnee is not entitled to a decree, and if the value of the pledged property is less than the debt, the pawnee will be entitled to sue the pawnor for the balance only after giving credit for the value of the goods.

9. In the present case, goods were pledged to the plaintiff-bank as security for the debt and those goods pledged were in possession of the plaintiff-bank. Therefore, the plaintiff was bound to return the goods on payment of the debt. The loan was also secured by giving immovable property on mortgage by deposit of title-deeds. The suit is one for sale of mortgaged property in default of payment of amount due. The plaintiff sued the defendant denying the pledge, but, it was found that the goods were pledged and the plaintiff-bank was not in a position to return the goods pledged. A pledge differs from a mortgage. In these circumstances, if the plaintiff-bank succeeds in the suit, it would recover the amount claimed by it by sale of the mortgaged property or otherwise free from its liability to return the goods pledged. Liability is in the sense that the plaintiff-bank was not in a position to return the goods pledged even after the payment of the debt. This being the position, it would be against the justice and good conscience. The Courts in India are primarily the Courts of equity, justice and good conscience. If any authority is required we may refer to the decision of the Supreme Court in Indira Bai Vs. Nand Kishore, Therefore, keeping in view the principles laid down by the Supreme Court in the cases cited above, we are inclined to examine as to whether the value of the goods pledged was lesser or greater than the amount due in respect of the debt for we are of the view that, if the value of the goods pledged is less than the amount so due, the plaintiff can follow the mortgaged property for the balance in the suit for sale. Otherwise, the plaintiff cannot obtain a decree.

10. In the suit, the plaintiff has claimed that the amount due in respect of the loan of Rs. 20,000/- was Rs. 53,556.24. According to the plaintiff, the defendant acknowledged or confirmed an amount of Rs. 27,891.23 to the defendant's debit as on 12-11-75 under his letter dated 12-11-75 (Ext.-16), and the defendant further acknowledged or confirmed an amount of Rs. 34,469.71 to his debit as on 30-6-79 under his letter dated 3-7-79 (Ext-15). With regard to the last letter, Ext-15, there is a dispute that confirmation or acknowledgement was made after the law of limitation. Be that as it may, it has already been concluded that the plaintiff-bank was not in a position to return the pledged goods Worth about Rs. 35,000/-. If the said sum of about Rs. 35,000/- was credited to the account of the defendant there would be surplus. In that view of the matter, the plaintiff cannot obtain the decree as prayed for. Accordingly, the suit was not maintainable.

11. With regard to the question of law of limitation, which is a mixed question of law and fact in the present case, we decline to deal with the question in view of the above conclusion.

12. In the result, the appeal is dismissed. No costs.

13. I agree.