

Bennet Coleman and Co. Ltd. Vs Shaw Wallace and Co.Ltd.

Court: Calcutta High Court

Date of Decision: June 20, 1997

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 12 Rule 6

Companies Act, 1956 â€” Section 187C

Contract Act, 1872 â€” Section 172, 181

Negotiable Instruments Act, 1881 (NI) â€” Section 138

Citation: (1999) 1 ILR (Cal) 545

Hon'ble Judges: Ruma Pal, J; Devendra Kumar Jain, J

Bench: Division Bench

Judgement

Ruma Pal, J.

These appeals have been preferred from two orders both dated January 7, 1997 passed in two virtually identical suits disallowing the Appellants prayer for judgment upon admission and for sale of pledged shares.

2. The claims in both the suits relate to the return of loans made by the Appellants to the Respondent and the sale of shares pledged by the

Respondent with the Appellant by way of security. The first suit arises out of a loan of Rs. 4.00 Crores given by the Appellant to the Respondent

under an agreement dated June 22, 1994 (hereafter referred to as the first loan). The agreement was initially for a period of six months. The

agreement records that the Respondent had pledged and deposited with the Appellant 19,500 equity shares of Rs. 10.00 each fully paid up in

M/s. Tide Water Oil Co. (India) Ltd. (hereinafter referred to as the company) by way of securing repayment of the loan and interest thereon on

due dates and due performance of all the terms and conditions and covenants on the part of the Defendant under the agreement.

3. The relevant clauses of the agreement are set out in which the "borrower" is the Respondent and the "Lending Company" is the Appellant:

2. That the borrower has pledged and deposited with the lending company 19,500.00 (nineteen thousand and five hundred only) equity shares of

Rs. 10.00 each fully paid up in M/s. Tide Water Oil Co. (India) Ltd., (which have been sent for registration) by way of security for the due

repayment of the loan on maturity and of interest thereon on due dates and due performance of all the terms and covenants on the part of the

borrower under this agreement. The details of the said shares have been given in the schedule annexed to and forming part of this agreement.

3. The Lending Company shall be entitled to have the said shares registered in its name subject to the condition that the Lending Company shall be

entitled to beneficial interest in the said shares to the extent of its security and, in that event, the Borrower as well as the Lending Company agree to

make, execute, submit and file relevant declaration forms u/s 187C of the Companies Act, 1956 read with Companies (Declaration of Beneficial

Interest in Shares) Rules, 1975.

4. It is represented by the Borrower to the Lending Company that the said 19,500 (nineteen thousand and five hundred only) equity shares in M/s.

Tide Water Oil Co. (India) Ltd., are free from all charges, encumbrances, liens, attachments or any litigation.

5. That any dividend/bonus/rights declared and/or paid by the said Tide Water Oil Co. (India) Ltd., on the said 19,500 equity shares pledged by

the Borrower with the Lending Company shall belong to the Borrower. However, the security and/or pledge of the Lending Company shall also

extent to all the Bonus Shares and the Right shares and the borrower shall deposit share certificates with blank transfer deeds with the lending

company within 10 days from the date of receipt of all such share certificates.

6. That the borrower shall arrange for issue of transfer deeds duly signed by the registered holders of the said shares if and when so desired by the

Lending Company.

7. That the Borrower undertakes to pay to the Lending Company interest on the said loan at the rate of 21% (twenty one percent) p.a. for a

period of six months or until full repayment of the said loan as the case may be and that such interest shall be paid on quarterly rests basis by way

of post dated cheques issued by the borrower in favour of the Lending Company and deposited with it in advance. The Borrower guarantees that

on presentation on due dates of its Bankers, the said cheques shall be duly honored and paid.

10. That the Borrower hereby irrevocably and unconditionally undertakes and agrees not to violate any of the terms of this agreement. However, in

the event the Borrower fails to honour its commitments or causes a breach of this agreement in any manner whatsoever, then in that event the

Lending Company has the unfettered authority and is hereby empowered specifically to deal with/dispose of the said 19,500 equity shares of Tide

Water Oil Co. (India) Ltd., pledged with the Lending Company as per Clause 2 herein above in the manner as it shall deem fit and proper in its

exclusive discretion without having to refer the matter to the Borrower, including sale of such shares to any party at the saleable price prevailing in

the market without prejudice to the rights and contentions of the Lending Company under this agreement and apply the proceeds thereof towards

its dues on account of principal and interest from the Borrower which action and/or prices shall not be questioned by the Borrower in any manner

on any account or for any reason.

11. That in the event of any of the post dated cheques, whether for payment of interest or for repayment of loan amount of Rs. 4,00,00,000/-

(Rupees four crores only), being dishonoured and returned unpaid by the Borrower's bank, the Lending Company shall have the right to proceed

against the Borrower in such manner as they may be legally entitled to including criminal prosecution on account of such dishonourment, and to

take such other action or actions as they may be advised including enforcement of the Promissory note. The Borrower further undertakes that it

shall not be entitled to question in any proceedings, legal or otherwise, the date of signing of the post dated cheques issued by it in favour of the

Lending Company.

12. The Borrower hereby agrees and undertakes that in case there is any default in the payment of any interest on due date, the entire loan amount

of Rs. 4,00,00,000.00 (Rupees Four Crores only) together with interest due thereon would stand recalled by the Lending Company in one lump

sum immediately on the occurrence of such default and would be repaid by it accordingly.

13. The Borrower hereby agrees and undertakes to repay the Loan of Rs. 4,00,00,000.00 (Rupees Four Crores only) on due date without

production of the Promissory Note. Further, in case of default on the part of the Borrower to repay the entire loan amount of Rs. 4,00,00,000.00

(Rupees Four Crores only) on due date, the Borrower shall pay to the Lending Company a further compound interest @ 7% p.a. in addition to the

agreed rate of interest of 21% p.a. for the delayed period. It is agreed that stipulation of such further interest is proper and reasonable and is in

accordance with the market practice, custom and usage. In case of such default, the Borrower also undertakes to reimburse to the Lending

Company, all costs, expenses, damages, losses etc. whatsoever arising out of such default."

4. Pursuant to Clause 7 the agreement the Respondent deposited post dated cheques with the Appellant in respect of the principal and interest as

well as the scrips and transfer deeds in respect of the pledged shares.

5. The Respondent did not repay the amount within the period of six months and on December 21, 1994 requested for renewal of the loan. On

December 24, 1994, a fresh agreement was entered into on terms materially identical with the earlier agreement.

6. On January 20, 1995, a second loan of Rs. 4 Crores was made by the Appellant to the Respondent on similar terms and conditions as the first.

A separate but substantially identical agreement was executed between the parties on January 20, 1995. The only difference in this case was in the

number of shares pledged namely 25,000 equity shares of the company. In this case also post dated cheques were given for repayment of the

principal and interest dues. In terms of the agreement dated January 20, 1995 the loan was due for repayment on July 29, 1994. On June 19,

1995, according to the Appellant, the Respondent acknowledged its liability to pay the amount of Rs. 4 Crores in respect of the first loan along

with the interest then amounting to Rs. 15.95 lakhs but requested the Appellant to renew the deposit for a further period of six months on the same

terms and conditions. In July, 1995 the Respondent pledged another 5,000 shares of the company with the Appellant as security for repayment of

the first loan of Rs. 4 Crores. Thus the total number of shares so pledged with the Appellant in respect of the two loans of Rs. 4 Crores each was

49,500.

7. The post dated cheques deposited by the Respondents in respect of both loans were presented for payment by the Appellant. All the cheques

were dishonoured by non-payment.

8. Between July and November, 1995 the Appellant was registered as a share holder in respect of the pledged shares by the company. On

September 20, 1995 the company paid a gross dividend of Rs. 1,67,000 to the Appellant in respect of the pledged shares. The Appellant

adjusted the amount of dividend towards its claim against the Respondent.

9. The Respondent sent fresh post dated cheques for repayment of the principal amount and interest in respect of the second loan on January 2,

1996. These were also dishonoured.

10. By letters dated April 23, 1996 and May 3/8, 1996 the Appellant informed the Respondents that in view of the default of the Respondent in

repaying the loans it was entitled to sell the pledged shares and to adjust the sale proceeds in protanto satisfaction of its claim.

11. On April 24, 1996 the Appellant informed the Respondent in writing that the shares pledged in respect of the two agreements had been

registered in the name of the Appellant and called upon the Respondent to reimburse the Appellant for the stamp duty paid in this connection.

12. The Respondent replied to the Appellants giving notice of sale on May 13, 1996. It said:

Kindly refer to your letter dated 23rd April 1996 on the subject of sale of 24,500 shares of Tide Water Oil Co. (I) Ltd., which has been pledged

for intercorporate deposit amount of Rs. 4 Crores.

We would earnestly request you to kindly hold on to the shares since we have an attractive proposal to dispose of these shares, which details we

would personally discuss with you on 14th May 1996 when the undersigned along with our Executive Director, Mr. Pradip Mathur would call

upon you at 2.30 p.m.

We would give you a definite commitment as to the interest payment, during the course of our personal meeting.

13. No such proposal, however, was forthcoming from the Respondent. On June 17, 1996 the Appellant filed two declarations in Forms No. 1

Section 187C of the Act with the Company.

14. Criminal proceedings were initiated by the Appellants against the Company u/s 138 of the Negotiable Instruments Act in respect of the

dishonoured cheques and on October 1, 1996 the two separate suits were filed by the Appellant against the Respondent for recovery of the first

and second loans in terms of the two agreements and for sale of the shares pledged under the each agreement. In the first suit a decree of Rs.

5,53,66,570.00 was prayed. In the second suit a decree for Rs. 5,41,20,380.00 was prayed.

15. Applications under Order 12 Rule 6 of the CPC for judgment upon admission were filed by the Appellant in both the suits. Except for the

amounts claimed and the number of shares the prayers are identical. In addition a prayer was made for interest. Prayers (c) and (d) refer to the

money claimed and for securing the same under the Order 12 Rule 6 of the Code of Civil Procedure. Prayer (e) was for appointment of the

Receiver over the shares and sale of the same by public auction or by private treaty and for making over of the sales proceeds thereof after taking

the costs and charges, towards protanto satisfaction of the Appellants "claims". Prayers (f) and (g) read:

(f) An order of injunction restraining the Defendant, its servants, agents and assigns from remitting, removing or investing any funds, assests or

properties of the Defendant out of India or from making any investment in Shaw Wallace Gulf Limited or from entering into any foreign

collaboration involving payment of money to any Foreign company or concern;

(g) An order of injunction restraining the Defendant from selling and/or disposing of the shares of any of its subsidiaries or otherwise delinking any

subsidiary company;

16. Prayer (h) and (i) both related to injunction to restrain the Respondent from assigning or selling its unit or undertaking or immovable properties

except by auction to the highest bidder and to restrain it from making payment of any demand without making payment to the Appellant.

17. By an order dated October 4, 1996 an Advocate of the Court was appointed in terms of prayer (e) of the petition. The Receiver was directed

to give notice to the Respondent with the regard to the sale intimating the price at which she was likely to sell the shares. Such notice was required

to be given at least 24 hours before effecting the sale. The Respondent was given the option of purchasing the shares. The Receiver was given the

option to sell the shares in such lots as would fetch the maximum price. Orders in terms of prayers (f) and (g) were also granted. This order was

passed ex parte.

18. On October 14, 1996 another order was passed in the presence of both parties. Apart from giving directions for filing of affidavits the Court

directed:

Let the Receiver appointed herein take expeditious steps to sell the shares of Tide Water Oil Company (India) Ltd.

Mr. S.B. Mukherjee appearing on behalf of the Defendant, has submitted that his client has a subsidiary, which subsidiary in turn controls Calcutta

Chemical and Detergents (India) Ltd., Mr. Mukherjee has submitted that the shares so held by the said subsidiary of the Defendant in Calcutta

Chemical and Detergents (India) Ltd. is likely to be sold on October 16, 1996. Mr. Mukherjee has further submitted that in view of order passed

in terms of prayer (g) of the petition, the said sale cannot be effected and in such event if the sale fizzles out there is possibility of the said subsidiary

of the Defendant suffering prejudice. Mr. Mukherjee has, however, submitted that the sale proceeds of such shares may be kept with the

Registrar, Original Side of this Court, for further securing the claims of the Plaintiff in this suit.

The defendant is directed to give offer for sale of the said shares to the Plaintiff at the same price in course of tomorrow (i.e., 15.10.96). Such offer

would be given to the Advocate-on-Record of the Plaintiff by 12.00 noon tomorrow. In the event the Plaintiff is desirous of buying the said shares

at the offered price, intimation in regard thereto should be given to the Advocate-on-Record of the Defendant by 4.00 p.m. tomorrow and the deal

should be concluded within October 16, 1996. The entire sale proceeds shall be deposited by the Defendant in an account to be opened with the

United Bank of India, High Court Branch, Calcutta. The Defendant and/or its officers shall not be entitled to withdraw the said sum from the Bank

Account to be opened.

In the event, however, the Defendant refused to purchase those shares at the offered price or fails to communicate to the Advocate-on-record of

the Plaintiff by 4.00 p.m. tomorrow in regard to giving of assent to such offer, the Defendant shall be free to sell the subject shares at the offered

price as may be offered to the Plaintiff in terms of the order and in that event the entire said proceeds thereof shall be deposited in the same manner

with the United Bank of India, High Court Branch, Calcutta. Such deposit shall remain free from lien and subject to further orders of this Court."

19. No appeal was preferred from this order but for whatever reason the Receiver has not sold the shares nor were the shares of the

Respondent's subsidiary sold pursuant to the leave granted.

20. The applications in both the suits came up for final hearing before the Learned Single Judge and were disposed of on January 7, 1997. The

order reads:

Service of the writ of summons is waived. Written statement is to be filed within three weeks from date. Discovery of documents within fortnight

thereafter, inspection forthwith thereafter and the suit will appear in the appropriate list for expeditious hearing. The earlier order is varied to this

extent only that there will be an order of status quo with regard to the subject shares until disposal of the suit.

No order as to costs.

The application is disposed of.

21. Two appeals were thereafter preferred and the stay applications filed. We are of the view that the disposal of the stay application would in

effect decide the issues raised in the appeal. It is nobody's case that any document which was before the Trial Court has not been included in the

pleadings before us. The facts as narrated above have been admitted by the Respondent. In defence to the Appellants claims, the Respondent has

raised four issues all of which are questions of law which do not require any evidence to be led. We therefore, dispose of the appeal itself on the

basis of the papers filed before this Court.

22. The first defence seeks to raise a preliminary issue, it is said that the suit were not suits for money decree alone as relief was also claimed in

respect of the pledged shares. It is said that the shares, to the knowledge of the Appellant, did not belong to the Respondent but to Companies

which were the registered holders of the shares. As none of these owners of the shares had been made parties to the suits, it is therefore submitted

that no decree could be passed in their absence.

23. The Respondent's second submission is that the Appellant had committed breach of the agreements and had registered the shares in its name

with the company without notice to the Respondent. It is said that this was an out and out transfer and that the title to the shares had passed to the

Appellant. It is submitted that the Appellant had therefore, lost its right to claim any money or any declaration as its entire claim had stood satisfied

by reason of such transfer.

24. The third submission of the Respondent is that the Appellant had initiated criminal proceedings u/s 138 of the Negotiable Instruments Act

1881. It is stated that the Respondent would be seriously prejudiced if the trial of the suits were allowed to proceed and therefore, the suit should

be stayed during the pendency of the criminal proceedings.

25. Finally it is submitted that a judgment on admission was not a matter of right but a matter of discretion of the Court. It is also submitted that the

Appellate Court should not readily interfere with the exercise of the Single Judge's discretion unless it could be shown that the discretion had been

exercised on wrong principles. According to the Respondents the defences raised by it were not "moonshine" and it was entitled to unconditional

leave to defend the suits as had been granted in this case. Several decisions have been cited in this context which will be considered at an

appropriate stage in this judgment.

26. The preliminary objection raised by the Respondent as to the maintainability of the suit by reason of the absence of the erstwhile registered

holders of the pledged shares had not been raised by the Respondent in either of its affidavits in opposition to the application for judgment upon

admission in the Court below nor indeed in the stay application before us.

27. In any event the submission is without substance. The prayers for sale of shares are only consequential to the money claim in respect of which

the decree has been claimed under Order 12 Rule 6 of the Code of Civil Procedure. Besides both the agreements which are the basis of the two

suits and which have been relied on by both the parties proceed on the basis that the shares are in effect the Respondent's or at least are shares

over which the Respondent could exercise the power of disposal. The clause of the agreements quoted earlier evidence this. The agreements also

record that it was the Respondent itself which pledged the shares in question with the Appellant. Whether the decree would bind the companies

whose shares had been pledged by the Respondent is therefore, not an objection which can be raised by the Respondent and it is possible for this

Court to pass a decree which will bind the parties to the suit and determine the rights of the parties inter se (See Order 1 Rule 9 of Code of Civil

Procedure). None of the concerned companies have protested against the registration of the shares in the Appellant's name. It is also significant

that the only defence on merits is that the loans which the Respondent had admittedly taken from the Appellant had been satisfied by the transfer of

these very shares.

28. The facts in the case of *Ontario Jockey Ltd. v. Samuel Mc Bride* 1928 P.C. 291 cited by the Respondent are wholly distinguishable from the

facts of this case. That was a case where A had executed transfer of shares in a company in favour of B.B applied to the company for registration

of the shares in his name. The company refused. B then sued the Company. On the merits their Lordships found against B and observed and that

they "would have found it difficult in affirming an order for rectification made in an action to which the transferor was not a party". Apart from being

obiter dictum, in this case no objection has been taken by the company at all and the shares were registered in the name of the Appellant much

prior to the filing of the two suits.

29. The submission of the Respondent on merits viz. that the Appellant had committed breach of the agreement between the parties is based

primarily on Clause 3 of the agreement and Section 187C of the Companies Act. The breach, according to the Respondent, consists in-

(a) in not filing the declaration u/s 187C within the statutory period;

(b) obtaining registration of the shares without notice to the Respondent or the registered share-holders; and

(c) acting in a manner inconsistent with the ownership rights of the registered-holders or the Respondent by having an out and out transfer of the

shares in the Appellant's favour.

30. It is also said that that by virtue of the last action, the Appellant's claim for recovery of the loan was fully satisfied. The submissions are

unacceptable.

31. Clause 3 of the agreement permits the Appellant to have the shares registered in its name subject to the condition that the Appellant would be

entitled to the beneficial interest in the shares to the extent of its security. It was agreed that in the event the shares were so registered both the

Appellant as well as the Respondent would make, execute, submit and file the relevant declaration forms u/s 187C of the Companies Act 1956

read with the Companies (Declaration of Beneficial Interest in Shares) Rules, 1975.

32. Section 187C of the Companies Act 1956 casts an obligation on a person whose name is entered in the register of members of a company as

the holder of a share in that company but who does not hold the beneficial interest in such share to make a declaration to the company specifying

the name and other particulars of the person who holds the beneficial interest in such share within such time and in such form as may be prescribed.

A similar obligation is cast on the person who holds a beneficial interest in a share to make a declaration to the company specifying the nature of his

interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be

prescribed within thirty days after his becoming such beneficial owner. The company on its part is required to make a note of such declaration in its

register of members and is required to file within thirty days from the date of receipt of the declaration by it, a return in the prescribed form with the

Registrar of Companies with regard to such declaration. Any default on the part of either the ostensible holder or the beneficial owner or the

company with their respective obligations is punishable by payment of penalty during the period of default.

33. It is therefore, clear that the failure to discharge the obligations imposed by Section 187C can be regularised by subsequent compliance and

payment of the penalty. The only other consequence of such failure to declare is that any charge, promissory note or any other collateral

agreement, created, executed or entered into in relation to the share by the ostensible owner or any hypothecation by the ostensible owner of any

share, cannot be enforced by the beneficial owner or any person claiming through him during the period of default.

34. In this case the Appellant had admittedly filed the declaration u/s 187C with the company much prior to the institution of the suit. The

agreement does not envisage the giving of notice of registration by the Appellant to the Respondent. It appears from the copies of the transfer

deeds annexed that they had been executed by the Appellant as transferee on July 17, 1995. The company approved the transfers on different

dates between July and November 1995. The declarations u/s 187C were filed by the Appellant with the company on June 17, 1996. No penal

action has been taken against the Appellant by reason of such delay till date. The penalty by reason of the delayed declaration by the Appellant if

and when Imposed will not fall upon the Respondent. The Respondent on the other hand does not appear to have filed the relevant declaration

forms u/s 187C in terms of Clause 3 of the agreement although admittedly the Respondent knew about the registration of the shares in the

Appellants name at least in April 1996. It is noteworthy that no protest to the registration of the shares was made. It is also nobody's case that the

Appellant had created any charge or executed any promissory note or entered into any other collateral agreement in relation to the shares pledged

nor has it hypothecated any of the pledged shares as such ostensible owner.

35. The actions of the Appellant cannot be said to be inconsistent with the agreements which admittedly were loan transactions secured by a

pledged. There was no "out and out transfer of the shares" as claimed by the Respondent. The right of the Appellant as pledgee of the shares is

more than a mere right of detention. It has a special property and indefeasible interest in the shares [See: Lallan Prasad Vs. Rahmat Ali and

Another, and the The Bank of Bihar Vs. The State of Bihar and Others, which it can secure by registration of the shares in its name so that in the

event of default by the Respondent the pledged shares could be sold by the Appellant for recovery of its dues. This is what the law the agreements

provide.

36. This is also clear from the conduct of the parties. The Appellant had never claimed nor did the Respondent even treat the Appellant as the

absolute owner of the shares. If it were otherwise there would have been no question of the Appellant giving the Respondent notice of sale of the

pledged shares nor of the Respondent requesting the Appellant not to sell the shares as it did by its letter dated May 13, 1996. The stand now

taken by the Respondent that the Appellant's claim had been met by the transfer of shares had not only not been taken, but the liability of the

Respondent to pay the Appellants its dues on account of loans despite registration of the shares was admitted.

37. The decision of *Neikram Dobay v. Bank of Bengal* (1891) XIX IA 60 by the Respondent runs contrary to its submission. In that case the

Plaintiff had pledged securities against advances made by the bank. The pledgee bank then purchased some of the pledged securities and credited

the pledgor's account with the market value of the securities. Subsequently the pledgor repaid the bank the monies advanced seeking to redeem all

its securities. The bank however, resold the securities to third parties. The Plaintiff claimed damages from the bank. The Privy Council affirmed the

decision of the Court below that the sales by the bank to itself were null and void against the pledgor and "did not put an end to the contract of

pledge so as to entitle the Plaintiff (pledgor) to have back the government notes without payment of the loans for which they were security".

However, since several of the notes had been resold by the bank to third parties after the pledgor had made payment of his dues in the belief that

he would be redeeming the whole of his securities, their Lordships held:

It would be inequitable to allow the bank, after this transaction, to treat the securities which it had sold to itself, and then had in its hands, as still

subject to the pledge. In their Lordships' opinion, the bank should be held to be no longer a pledgee of these notes, and to have converted them to

its own use, and to be liable in damages for the value of them including the interest thereon. But if the bank is so liable, the Plaintiff cannot have

credit in, the loan account for the proceeds of these notes. He cannot both affirm and disaffirm the sales to the bank.

38. No such equitable consideration arises in this case as the Appellant has not sold the shares to anyone. Therefore, even if the registration of the

shares were treated as an out and out transfer to the Appellant, it must be held following this decision, that the transfer was null and void, that it did

not put an end to the contract of pledge and that the Respondent is still liable to make payment of the loan to the Appellant.

39. The law relating to pledge statutorily provided in Sections 172 to 181 of the Contract Act, 1872 defines a pledge to mean the bailment of

goods as security for payment of debt or performance of a promise. The bailor is called the "pawnor" and the bailee is called the "pawnee".

Section 176 is in the following terms:

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 the giving the pawnor reasonable notice of the sale.

Thus whether under the agreements or under statute the Appellant as pledgee of the shares has the right to sell the goods pledged and the right to

the property pledged vests in the pledgee so far as is necessary to secure the debt.

40. Clause 10 of the agreement also provides this. It gives the unfettered authority to the Appellant in the event of any failure whatsoever by the

Respondent to honour its commitments under the agreements to dispose of the shares pledged in the manner as it shall deem fit and proper in its

exclusive discretion without having to refer the matter to the Respondent, including sale of such shares in the market "without prejudice to the rights

and contentions" of the Appellant under the agreement and to apply the proceeds thereof towards its due on account of principal and interest

which shall not be questioned by the Borrower (Respondent) in any manner or on any account or for any reason".

41. The admitted facts show that the Respondent has failed to honour its commitments under the agreement. The loan was not repaid, nor were the

cheques honoured on presentation. The Appellant is thus clearly entitled to enforce its security by sale of the pledged shares as had indeed been

initially ordered by the Trial Court.

42. The third submission of the Respondent that the suit could not be preceded with pending disposal of the criminal proceeding initiated u/s 138 of

the Negotiable Instruments Act, 1881 is unsustainable and is rejected for the following reasons:

(1) The agreements between the parties specifically allow the Appellant not only to initiate criminal proceedings in respect of the dishonoured

cheques but also to take civil action for the recovery of the Appellants dues.

(2) The applications filed by the Appellant under Order 12 Rule 6 in both the suits contained the entire case in the plaint. This has been dealt with

by the Defendants in their affidavit filed in opposition to the applications without protest and the defence of the Respondent has in fact been

disclosed.

(3) No prayer had been made by the Respondent before the Learned Single Judge for stay of the suit by reason of the pendency of the criminal

proceeding.

(4) The law must be taken to have been concluded against the Respondent's submission by the recent decision of the Supreme Court in State of

Rajasthan Vs. Kalyan Sundaram Cement Industries Ltd. and Others, The facts in that case cannot be distinguished with the present case before us.

Civil suits had been filed for recovery of monies. Proceedings had also been initiated u/s 138 of the Negotiable Instruments Act. The suits had been

stayed by an order of the High Court on the ground of pendency of the criminal proceedings. In disposing of the matter the Supreme Court set

aside the decision of the High Court and said:

It is settled law that pendency of the criminal matters would not be an impediment to proceed with the civil suits. The criminal Court would deal

with offence punishable under the Act. On the other hand, the Courts rarely stay the criminal cases and only when the compelling circumstances

require the exercise of power. We have never come across stay of any civil suits by the Courts so far ... The High Court proceeded on wrong

premise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit. It is

not a correct principle of law. Even otherwise it longer subsists, since many of them have filed their defences in the civil suit. On principle of law,

we hold that the approach adopted by the High Court is not correct. But since the defence has already been filed nothing survives in this matter.

See also the unreported judgment of this Court in Apeejay Private Limited v. Raghabchari Narasinghan and Ors. : Appeal No. 297 of 1992;

judgment dated June 19, 1996 and E.A.P. Industries v. Narendra Kumar Bapna : Suit No. 315 of 1993.

43. The fourth and final submission of the Respondents states the law correctly but the principles enunciated do not assist the Respondent. While it

is true that a judgment on admission is a matter of discretion and although the Court of appeal should be slow to interfere with an exercise of

discretion unless there has been manifest and unfair prejudice, but as held in Prem Suk v. Udairam AIR 1918 Cal. 467: the discretion is a judicial

one and an erroneous exercise thereof is open to correction by the Court of appeal.

44. In the case of Prem Suk v. Udairam (Supra) the Division Bench of this Court indicated that the Court may refuse to pass a decree under Order

12 Rule 6 if a case involves questions which cannot be conveniently disposed of on a motion. There is no such finding by the Learned Single Judge.

Indeed, the Learned Single Judge has not disclosed the reasons which persuaded him to reject the case made out by the Appellant under Order 12

Rule 6 outright. It does not also appear that the Learned Judge even considered imposing any condition on the Respondent by way of security or

otherwise in respect of the claim of the Appellant. We are of the view that the Learned Judge erred in rejecting the Appellant's case judgment

upon admission in the circumstances of this case.

45. The defence of the Respondent on merits is of confession and avoidance. There is a clear and unambiguous admission by the Respondent of

the loans made and the fact that they were not repaid. The liability to repay has been sought to be avoided on the basis of certain legal

consequences which the Respondent claims to have arisen from the admitted facts. These are issues which could have been decided on the

affidavits as filed. The injustice and prejudice to the Appellant is manifest by having to unnecessarily prolong and delay the recovery of the dues, a

postponement which would have been justified only if there were any disputed or future fact which was required to be resolved by a trial. This is

not such a case.

46. The decisions in *M/s. Mechalec Engineers and Manufacturers v. Basic Equipment Corporation* AIR 1917 S.C. 577 and *Kalipada Deo*

Pandey v. Vasu Dev Sankar Sukla 1985 (2) C.H.N. 222: cited by the Respondent were both cases which related to leave to defend being

granted in summary proceedings initiated under Order 37 Rule 3 in the first decision and under Chapter XIII A of the Original Side Rules in the

second. In both the cases the Courts emphasised that leave to defend will be given even though a clear answer to the Plaintiff's case may not have

been made out if the defence raised "shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a

defence to the Plaintiff's claim". Paraphrased it means that there should be a question which remains to be proved at the trial. If no further fact

remains to be established for determining the defence no purpose would be served and it would be meaningless exercise to relegate the matter to

trial.

47. The last decision cited by the Respondent is *Dunlop India Limited v. Anamika Udyog* 1994 (1) C.H.N. 409. The decision dealt with the

defence to a claim of winding up petition. The case has no bearing on the facts before us. The Division Bench in that case followed the principles

enunciated in *Mechalec Engineers and Manufacturers v. Basic Equipment Corporation* (Supra) and applied the same principles to winding up

applications.

48. The principle underlying the various tests laid down by the noted decisions relating to judgment on summary proceedings is the one clearly

enunciated in *Prem Suk v. Udairam* (Supra) namely, whether the matter can be conveniently disposed of on the basis of affidavits or does it require

further evidence be taken at a fully fledged trial? The defence in this case does not pass this test. We are not persuaded that any fact remained to

be disclosed which warranted the exercise of the Learned Single Judge's discretion against the Appellant. We have already found that the

defences raised by the Respondent are not at all acceptable and we are satisfied that the Appellant is entitled to the final decree as claimed by it on

the basis of the Respondent's admissions.

49. In the circumstances of the case we allow the appeals and application. It is declared that the 49500 equity shares of M/s. Tide Water Oil

Company (India) Limited are pledged in favour of the Appellant for repayment of its dues. The orders under appeal are set aside. There will be

judgments in favour of the Appellant and a decree for Rs. 5,41,20,331.00 in the first suit and a decree for Rs. 5,31,66,370.00 in the second

together with interim interest and interest on judgment in both suits on the sums decreed therein @ 14% per annum. The Receiver appointed by the

Trial Court in respect of the pledged shares is directed to sell the pledged shares in any stock exchange through a registered broker and make over

the net sale proceeds thereof after deducting the cost, charges and expenses of such sale to the Appellant in pro tanto satisfaction of the

Appellant's claim. Any excess amount shall be refunded to the Respondent. The Appellant is allowed the costs of both appeals.

50. The appeal being disposed of, all undertakings are discharged.

Devendra Kumar Jain, J.

I agree.