(1936) 02 BOM CK 0017

Bombay High Court

Case No: O.C.J. Suit No. 171 of 1927

Cooverji Umersey		APPELLANT
	Vs	
Mawji Vaghji		RESPONDENT

Date of Decision: Feb. 13, 1936

Acts Referred:

- Contract Act, 1872 - Section 176

Citation: AIR 1937 Bom 26 : (1936) 38 BOMLR 982 : 166 Ind. Cas. 565

Hon'ble Judges: B.J. Wadia, J

Bench: Single Bench

Judgement

B.J. Wadia, J.
[The judgment after dealing with points not connected with the report proceeded.]

2. It is contended that no proper notice of the sale was given by the pawnee to the pawnor u/s 176 of the Indian Contract Act. It must be remembered that the 922 bales were hypothecated to Cooverji Umersey & Co. on September 30, 1925, by defendant No. l''s firm of Damodar Mawji Vaghji. On January 13, 1927, Cooverji Umersey & Co. wrote to Damodar Mawji Vaghji that they did not want to keep their moneys invested on the security of the bales, that Damodar Mawji Vaghji should give an order within four days for sale or pay Rs. 60,000, and in default they would ask their Kobe agent to sell off the goods. This letter was received by Damodar Mawji Vaghji on January 17. On that date Cooverji Umersey & Co. gave notice through their solicitors to defendants Nos. 1 and 2, demanding Rs. 1,20,000''. with the interest due thereon, and in default of payment they threatened to realise their mortgage security. On the same date Cooverji Umersey & Co. wrote through their attorneys that their security for the loan was the equitable mortgage, and the bales were given merely as further security. On January 20, defendants Nos. 1 and 2 through their solicitors replied that the bales were primarily security for repayment of the loan, and that the equitable mortgage was given only by way of further security, that the firm was amply secured, and there was no need to sell the bales.

The question is whether the notice of January 13 is a proper notice for the sale of the goods pledged'' to secure repayment of the loan of Rs. 1,20,000. It was argued that no notice was given to defendant No. 2. But strictly speaking no notice to her was necessary, as she was not the pawnor of those goods. The '' moneys'' referred to in the notice, however, are not the Rs. 1,20,000, but the moneys due under the joint ventures account, and that is made clear from para. 4 of the firm''s reply to the counterclaim. A pawnee has a right to sell the pledged goods; that right is perfected with the giving of the notice of sale, and it is open C to the pawnee to sell at any date thereafter. The power of sale is expressly conferred upon him for his benefit according to his discretion and for the realisation of the debt due to him. It has also been held that he is not-bound to give full details about the date, time and the place of sale: see Kunj Behari Lal v. The Bkargava Commercial Bank, Jubbulpore ILR (1918) All. 522. It must, however, be a reasonable notice, reasonable, presumably having regard to the circumstances of each case, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. It was argued that the four days'' notice was not sufficient when the goods were lying at Kobe, but apart from that, though in fact the goods were not sold within four days, there was no demand of the debt of Rs. 1,20,000 for which the pledged goods were to be sold, and the notice was based on the assumption that the bales were security only or primarily for the amount due under the joint ventures account. In my opinion, therefore, the notice is not a proper notice as contemplated by Section 176.

3. The result is that, the pawnee having sold before he was entitled to sell, the sale is wrongful, and the pawnor''s remedy is to sue the pawnee for having converted the pawnor''s goods to his own use. It has, however, been held that the wrongful act of the pawnee does not annihilate the contract between the parties: see Johnson v. Stear (1863) 15 C.B. 330. In that case there was a sale of the pledged goods, but it was wrongful because the sale was premature. The pawnee, becomes liable in damages for conversion to the pawnor, but I do not think that the sale is thereby avoided and must be set aside. It is not so provided by Section 176 of the Indian Contract Act. u/s 69 (3) of the Transfer of Property Act the remedy of a mortgagor for an improper sale of the mortgaged property is in damages. The statute protects the innocent purchaser and confines the remedy of the mortgagor to a suit for damages. I think that by analogy the same result should follow when there is an improper sale by a pawnee of the goods pledged to him. The important question which still remains is, what is the measure of the damages to the pawnor ? It is laid down in Halsbury, Vol. XXII, p. 243, Article 503, that the correct measure is the loss which the pawnor has actually sustained, taking into account the pawnee''s interest in the goods at the time of the conversion. What is the loss sustained by the pawnor here ? There must be evidence of that loss, for the Court has to determine what amount should be credited to defendants Nos. 1 and 2 in respect of the 546 bales. It was argued on behalf of defendant No. 2 that the proper measure of damages was

the difference between the sale price of the goods and the market rates prevailing on the date of sale. If so, it was for defendant No. 2 to have led evidence to show how the sale has prejudicially affected her. The firm have put in the account-sales which they received later, and of which inspection was given to defendants Nos. 1 and 2. It has been held in Hodgson v. Rupchand Hazarimal (1869)6 B.H.C.R.39 that account-sales are prima facie evidence of the amount realised by the sale of the goods in foreign markets, unless some foundation is laid for stating that the account-sales are incorrect; a mere objection that they are not correct is not enough. This case was followed in Mayen v. Alston ILR (1893) Mad. 238 and Barlow v. Chuni Lall Neoghi ILR (1901) Cal. 209 Defendants Nos. 1 and 2 have annexed certain particulars of damage to the written statement, but the figures arc obviously incorrect when compared with the rates given in the account-sales. The only witness whom they called was Rashid Fatehali. He gave no evidence of sales or purchases of similar goods in Japan at the date of sale, but deposed to two offers made by his firm in respect of Chalisgaon cotton which is Khandesh cotton. It has been pointed out in Government of Bombay Vs. Merwanji Muncherji Cama, S that too much importance ought not to be attached to offers, for "an offer does not come within the category of sales and purchases ", and amounts merely to an expression of opinion on the part of the offerer. The offers made by Rashid are not conclusive as to the rates, though I accept the statement that an offer, provided it is bona fide, is prima facie evidence of the fact that there is a buyer of these goods at that rate at the time. There is also another method of calculating damages, namely, by taking the Bombay prices of similar goods and adding to them the cost of shipping charges to Japan, freight, insurance, etc.; but whether such a method is always satisfactory it is difficult to say. The sale must, however, be considered wrongful for want of proper notice. I am not prepared to say that this is a case merely for nominal damages, as there is some evidence of an intention to redeem before the goods were actually sold, and the difference between the prices realised and the alleged market prices is not small,, There has been considerable delay in the realisation of the plaintiff''s claim, but I think that I should, though reluctantly, give defendant No. 2 one more opportunity to prove the actual damage sustained by her. There will, therefore, be a reference to the Commissioner to ascertain the damages sustained by defendant No. 2 by reason of the sale of the 546 bales on or about January 29, 1927. The Commissioner will first ascertain the amount of the loan and interest thereon at nine per cent, per annum from September 30, 1925, till the date of his report, and tack on to that amount the rents payable up to the date of the report in terms of the order of July 23, 1935. The sale-proceeds of the 130 bales together with interest thereon at nine per cent, per annum from the date of their realisation till the date of the report, and the price of the 546 bales which, as defendant No. 2 might prove, should have teen realised, with interest thereon similarly calculated, will be set off against the amount due under the loan with the interest and the rents added thereto. I direct the Commissioner to expedite the reference, and complete the same within four months from this date, so that his report may be available

soon after the Court reopens in June next. If there is any application made on behalf of defendant No. 2 for the issue of a commission to Japan, the Chamher Judge will no doubt take the delay that has already occurred into consideration before making his order. I order defendant No. 2 to pay seven-eighths of the plaintiff''s costs of this hearing from the date of remand, such costs to be tacked on to the mortgage claim. No order as to the remaining one-eighth of such costs.