Syndicate Bank vs C.H.Muhammed on 6 April, 2010

Author: P.Bhavadasan

Bench: P.Bhavadasan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

SA.No. 674 of 1996()

1. SYNDICATE BANK ,PALLIKARA
... Petitioner

Vs

1. C.H.MUHAMMED
... Respondent

For Petitioner :SRI.K.V.SOHAN

For Respondent :SRI.D.KRISHNA PRASAD

The Hon'ble MR. Justice P.BHAVADASAN

Dated :06/04/2010

O R D E R

P. BHAVADASAN, J.

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S.A. No. 674 of 1996

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Dated this the 6th day of April, 2010.

JUDGMENT

The defendant in O.S. No.219 of 1989, who suffered a decree at the hands of the first appellate court is the appellant. The parties and facts are hereinafter referred to as they were available before the trial court.

2. The plaintiff alleged that he had pledged gold ornaments of five sovereigns on 11.11.1981 with the defendant Bank and borrowed a sum of Rs.2500/- on the security of those gold ornaments. The

plaintiff paid Rs.1918.70 on 8.4.1985 towards the loan amount. The Bank issued a notice dated 4.2.1986 to the plaintiff recalling the loan and informing him that if he failed to discharge the debt, the ornaments would be sold in auction on 27.2.1986. The plaintiff claimed to have paid Rs.500/- in response to the notice and thereafter he expressed his willingness to discharge the balance amount. But the gold ornaments were not returned to him. A notice was issued by the plaintiff, which caused the defendant to send a reply containing false allegations. The defendant claimed to had sold the jewels. The plaintiff claims that it was unauthorised, illegal and contrary to law. Being an unauthorised sale, it is also stated that the Bank is not entitled to adjust the balance amount due from the sale proceeds. Claiming that he is entitled to return of the ornaments, he laid the suit, or in the alternative claiming Rs.12,000/-.

3. The defendant resisted the suit. The pledge was admitted. The defendant disputed that 5 sovereigns of gold were pledged and contended that 30.700 grams which was equal to three and three fourth sovereigns were pledged by the plaintiff. The valuation of jewellery was estimated at Rs.4500/- and a sum of Rs.2500/- was given as loan to the plaintiff on execution of a pronote also. The plaintiff was bound to discharge the debt within three years. He did not do so. In case the debt was not paid, the Bank was entitled to cause sale of the ornaments after notice to the plaintiff in compliance with the statutory requirements. The defendant issued notice dated 4.2.1986 informing the plaintiff to wipe off the debt as in case of default the ornaments pledged would be sold. After receiving notice, the plaintiff paid a sum of Rs.500/-. Thereafter he did not respond. Sale was published in Malayala Monorama daily dated 20.7.1986 and the ornaments were sold in public auction. There is no merit in the allegation that the sale was unauthorised and illegal. It was in accordance with law. The plaintiff was fully aware of the auction. They contended that the plaintiff is not entitled to any reliefs and the suit would be dismissed.

4. The trial court raised necessary issues. The plaintiff examined P.W.1 and had Exts.A1 and A2 marked. The defendant had examined D.W.1 and Exts. B1 to B9 marked. On a consideration of the materials before it, the trial court came to the conclusion that the sale was in accordance with law and the plaintiff is not entitled to any reliefs. Accordingly the suit was dismissed.

5. The plaintiff carried the matter in appeal as A.S. 17 of 1991 before the Sub Court, Hosdurg. The appellate court felt that the notice sent by the Bank which stipulated that the sale will be held on 27.2.1986 in case the plaintiff failed to discharge the debt, was bound to conduct the sale on the same day. Having not done so, the Bank was bound to issue another notice before the sale was effected. Holding so, the lower appellate court reversed the finding of the trial court and decreed the suit as follows:

> "In the result, the appeal is allowed, the judgment and decree of the lower court are set aside; and the suit is decreed for a sum of Rs.6,844/- (Rupees Six Thousand Eight Hundred and Forty Four only) with costs throughout. Time for payment is one month. The plaintiff/appellant is also entitled to get future interest from the date of plaint till realisation at the rate of 6% p.a.."

The said judgment and decree are assailed in this appeal.

6. The following substantial questions of law are raised in this Second Appeal for consideration:

> "i) A pawnor who gives notice of sale of pledged articles stipulating a date and the pawnee pays a portion of the debt without redeeming the pledge whether the pownee entitled to a subsequent notice of intended sale in case the pawner sells the pledged articles on a subsequent date?
>
> ii) Is not the notice of intended sale dt: 4.2.86 given to the plaintiff by the defendant valid notice under Section 176 of the Indian Contract Act?
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> iii) Is not a publication of intended sale in local daily sufficient reasonable notice contemplated under section 176 of Indian Contract Act?"

7. The facts are almost admitted. There is no dispute regarding the fact that gold ornaments were pledged with the Bank and the plaintiff had availed a loan of Rs.2500/-. He had also executed a pronote. It is also not in dispute that a notice dated 4.2.1986 was issued by the Bank calling upon the pledger to discharge the debt and in case he failed to do so, the ornaments would be sold by the pledgee on 27.2.1986. It seems that the plaintiff paid a sum Rs.500/- and did not pay the balance amount due to the Bank. The Bank after publication in the Malayala Manorama daily sold the gold ornaments. The case of the plaintiff is that later when he went to the Bank and expressed his readiness to discharge the loan, and sought return of the ornaments, the Bank was not able to do so.

8. The main issue is regarding the notice issued by the Bank. While the trial court held that the notice issued and which is admitted to have been received by the plaintiff is sufficient in law, the appellate court thought otherwise. According to the appellate court, in the notice issued by the Bank they had indicated that if the loan is not discharged, the sale would be conducted on 27.2.1986. Admittedly no sale was conducted on 27.2.1986. It is also on record that a sum of Rs.500/- was paid by the plaintiff. The appellate court held that before conducting sale a fresh notice had to be issued to the plaintiff as the case on hand constitutes an exceptional circumstance as envisaged in law. The question is whether the view of the appellate court is correct.

9. It may be useful to refer to the relevant statutory provisions. Sections 176 and 177 of the Indian Contract Act reads as follows:

> "176. Pawnee's right where pawnor makes default.- If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the pawnee may bring a suit against the pawnor upon the debtor 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.

> 177. Defaulting pawnor's right to redeem.- If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must, in that case, pay, in addition, any expenses which have arisen from his default."

In case of possession of goods pledged with the pownee, Section 176 recognizes three rights in case of default by the pawnor. They are (i) he may bring upon a suit, (ii) he may retain it as a collateral security and (iii) he may sell it by giving the pawnor a reasonable notice of the sale. The right of the pawnor to have a reasonable notice is well recognized in law. If the pawnor commits default in payment of the debt within the stipulated period in respect of which the goods were pledged, the pawnee can either file a suit or to resort to sale of pledged goods by giving reasonable notice. Indian Contract Act does not prescribe any particular form of notice or any particulars the notice should contain. What is stated is only that the pawnor should be given a reasonable notice of the sale.

10. It was contended on behalf of the appellant that it is not necessary that the pledgee in his notice should specify the time, date and place of sale. All that is required by the section is that the pledger should be informed that if he does not wipe off the debt, the pledgee would be entitled to sell the articles. Even assuming a date is specified in the notice for the sale of the property and even if the sale is not conducted on that day, it does not mean that if sale is conducted later a fresh notice has to be issued. All that section 176 requires is that the plegee should exercise his option informing the pledger about the same.

11. Learned counsel appearing for the respondent on the other hand pointed out that having specified the date and having received Rs.500/- from the pledger, if the pledgee wanted to conduct the sale on a later date, they were bound to issue fresh notice. The pledger has a right to redeem the property and he could do so before the actual sale is effected. So it is absolutely necessary that the pledger is informed about the entire details regarding the sale. It was therefore contended that not only the pledgee should inform about his option, but he should also inform the time, date and place of sale.

12. It is well settled that the contract of pawn or pledge contains five classes of bailment. Pawn has been described as a security where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pawnee so far as is necessary to secure the debt.

13. In Halsbury's Laws of England, Fourth Edition at page 77 it was held as follows:

> "128. Power of sale. The contract of pawn carries with it an implication that the security may be made available to satisfy the obligation. Under this implication a pawnee has a power of sale on default of payment if the time for payment has been fixed. If there is no stipulated time for payment, the pawnee may demand payment, and in default of payment may sell, on notice to the pawnor of his intention to do so. The pawnor retains his right to redeem at any moment up to sale, that is at any

> moment up to the time of the exercise by the pawnee of his power of sale by entering into a valid contract of sale."

At page 73 Note 120 reads as follows:

> "120. The right to redeem. A pawnor has an absolute common law right to redeem the thing pawned upon tender of the amount advanced, since the general property in it remains in him. In the absence of any agreement as to time for payment he may redeem at any time during his life, and upon the pawnee's death this right continues against the pawnee's personal representatives. The right to redeem necessarily depends upon tender of the debt by the pawnor to the pawnee, and it is lost if the pawnee has lawfully sold the subject of the pawn. The right to redeem a pawn is not barred by any statute of limitation during the pawnor's lifetime."

14. Chitty on Contracts vole II, 29th Edition, at page 244 notes 33-128 mentions as follows:

> "Power of sale at common law. If the pledger makes default in payment at the stipulated time, the pledgee has the power at common law to sell the pledge, even although there is no express agreement to that effect; or he may sue the pledgor for his debt, retaining the pledge as a security. But if a time for payment has not been agreed upon, or if the time agreed upon has been extended indefinitely, the pledgee cannot sell the pledge until after demand for payment and notice of his intention to sell. the pledgee must take care that it is a provident sale. At common law, he sells by virtue of an implied authority from the pledgor and for the benefit of both parties; hence he must, after deducting his debt, account to the pledgor for any surplus of the proceeds of the sale. If, however, the proceeds of the sale do not satisfy the debt, the pledgor is still personally liable for the deficit."

The author also refers to the statutory rights of sale. The aspects regarding issuance of the notice and the contents of the notice have come up for consideration in a number of decisions. As far as this case is concerned, the matter is covered by Sections 176 and 177 of the Indian Contract Act. While Section 176 confers right of sale on the pledgee after issuing reasonable notice, Section 177 confers a power to the pledgee the right to redeem before the actual sale. In the decision reported in Santi Sahu v. Sheogulam Sahu (AIR 1958 Patna 174), it was held as follows:

> "(7) In my view, however, the court below was also right in relying upon the provisions of S.176 of the Contract Act for coming to the conclusion that, after reasonable notice had been given to the defendants, the plaintiffs as pawnees of the goods were entitled to sell the goods.

Section 176 reads as follows:

> "If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the

> pawnee may bring a suit against the pawnor upon the debtor 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."

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Mr. Sinha, on behalf of the appellants, contended that there was no question in this case of the application of the provisions of S.176 of the Contract Act inasmuch as the position of the plaintiffs was not the position of pawnees. Section 148 of the Contract Act is relevant in this connection, and the provisions of that section are as follows:

> "A bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they ae delivered is called the 'bailee'.
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> Explanation.- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment".

Section 172 of the Contract Act says-

> "The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnor'. The bailee is called the 'pawnee' . In the present case, the Tisi belonged to the plaintiffs. The defendants bought the Tisi from the plaintiffs. The defendants bought the Tisi from the plaintiffs, and the price of it was advanced by the plaintiffs, and the price of it was advanced by the plaintiffs. The defendants, in their turn, by agreement with the plaintiffs arranged that the goods would remain with the plaintiffs, who were to be paid interest on the money advanced as also the arhat charges for keeping the goods of the defendants in the plaintiffs' arhat."

In this view of the arrangement between the parties, which is admitted it must be held that there was bailment within the definition of the words in S.148 of the Contract Act, and in the circumstances the law must presume that there was delivery of the goods by the defendants to the plaintiffs after the defendants had bought the goods from the plaintiffs; and, upon the defendants'

own case,the goods were kept in the godown of the plaintiffs as security for payment of the debt advanced by the plaintiffs. In that view of the matter also, in my opinion, the plaintiffs, having given reasonable notice to the defendants, were entitled to sell the goods under S.176 of the Contract Act."

It was also observed in the above decision that Section 176 of the Indian Contract Act is the same as English law on the subject and refers to a decision to that effect in paragraph 8 of the judgment.

15. In the decision reported in Official Assignee v. Madholal Sindhu (AIR (34) 1947 Bombay 217) it was held as follows:

> "39. The terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale, are inconsistent with the provisions of S.176, Contract Act, and, therefore, by virtue of S. of that Act, must give place to the express provisions of the Act.
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> 42. In my judgment, a notice must be given in all cases of pledge, even when the instrument of pledge itself contains an unconditional power of sale. This opinion is held by the three distinguished editors (Sir Federick Pollock, Sir Dinshah Mulla and Sir Maurice Gwyer) of Mulla's Indian Contract Act, Edn.7. It follows that even if it is possible to regard the contract of 23rd, 24th October,1941, as a sale by the bank as pledgee of Mr. Nissim, that sale is invalid as being in breach of S.176, unless it could be shown that before his insolvency Mr. Nizzim effectively waived the giving of notice so as to bind the Official Assignee.
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> ..... There is no such saving clause in S.176, and in my opinion its provisions are mandatory, and it is not open to parties to contract themselves out of those provisions. The notice that is to be given to the pledger of the intended sale by the pledgee is a special protection which the statute has given to the pledger, and parties cannot agree that in the case of any pledge the pledgee may sell the pledged articles without notice to the pledger.
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> The real point for determination in this case is whether the right of redemption given to the pledger by S.177, Contract Act has been put an end to by the sale to the plaintiff by defendant 2 bank. This right to redeem can be exercised right upto the time when the "actual sale" of the goods pledged takes place. The actual sale referred to in S.177 must be a sale in conformity with the provisions of S.176 which gives the pledgee the right to sell; and if the sale is not in conformity with those provisions, then the equity of redemption in the pledger is not extinguished."

16. In the decision reported in Narasayyamma v. Andhra Bank (AIR 1960 Andhra Pradesh 272), it was held as follows:

> "The term 'pledge' is defined in Sec. 172 of the Indian Contract Act as ' the bailment of goods as security for payment f a debt or performance of a promise'. The bailer is

called the pawnor, and the bailee is called the pawnee.

Section 176 of the Act deals with the right of the pawnee or the pledgee in the case of default by the pledgor. The Section is in these terms:

"If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the pawnee may bring a suit against the pawnor upon the debtor 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."

On a plain reading of the section it seems to us that before exercising the power of sale the pawnee should give to the pledger reasonable notice of the sale. The contention of the Advocate for the respondent, however, is that in Ext.B1 the pawnor had waived the right to receive such a notice and this found favour with the trial court. The learned counsel for the appellants has assailed the correctness of that finding on various grounds.

There is considerable judicial authority in support of the above contention. In co-operative Hindustan Bank Ltd. v, Surendra Nath Dey, AIR 1932 Cal 524 at p.532, a Bench of the Calcutta High Court has held that Sec. 176 of the Contract Act unlike some other sections such as, 163, 171, 172 does not contain a saving clause in respect of the special contracts contrary to its express terms, and that in as much as Sec. 177 gives to the pawnor a right to redeem even after the stipulated time for payment but before the sale, in order that that provision should not be made nugatory the proper interpretation to put on Sec. 176 is tohold notwithstanding any contract to the contrary notice has to be given. In AIR 1947 Bom 217 at p.288 a Bench of the Bombay High Court consisting of Stone C.J. and Chagla J. took substantially the same view. The learned Chief Justice observed as follows:

"In my judgment, a notice must be given in all cases of pledge, even when the instrument of pledge itself contains an unconditional power of sale. This opinion is held by the three distinguished editors (Sir Federick Pollock, Sir Dinshah Mulla and Sir Maurice Gwyer) of Mulla's Indian Contract Act, Edn.7. It follows that even if it is possible to regard the contract of 23rd, 24th October,1941, as a sale by the bank as pledgee of Mr. Nissim, that sale is invalid as being in breach of S.176, unless it could be shown that before his insolvency Mr. Nizzim effectively waived the giving of notice so as to bind the Official Assignee."

In Bharat Bank Ltd. v. Sheoji Prasad, AIR 1955 Pat 288, a Bench of the Patna High Court has held that Sec. 176 is mandatory and the required notice has to be given for the right to exercise redemption, and under Sec. 176 it would be rendered illusory if such notice is not given."

17. In the decision reported in Grison Knitting Works v. Laxmi Commercial Bank Ltd. (AIR 1960 Punjab

98) the specific contention was taken that the notice must be specific, ie., the date, time and place of sale must be specified going by the words used in Section 176 of the Contract Act. In this case also there was a postponement of sale and two other contentions were also raised, that notice was waived and also that the delay in sale should lead to the conclusion that the notice had been withdrawn. All these contentions were repealed and it was held as follows:

> "But when reference is made to the next S.177 of the Indian Contract Act which provides for the right of the pawnor to redeem the goods pledged at any time before the actual of them, it becomes clear that the words used in Sec.176 are "the sale", and those used in Sec. 177 are "the actual sale:; and this makes it clear that while Sec.177 refers to the actual sale taking place on a definite date and at definite time and place, no such expression having been used in Sec. 176, the expression "the sale" in that Section can only be read as 'intention to sell'. This to my mind is conclusive and over-weighs the two arguments that have been urged by the learned counsel for the defendants in this behalf.
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> It is a practical impossibly to give a notice of an actual sale of its date, time and place in the case of a notice under Sec. 176 for the simple reason that in certain cases that may definitely lead to a loss mot only to the pawnee but also to the pawnor as was pointed out in the case of sale of securities on the Share Market in AIR 1958 Cal
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> 644. The conclusion that is reached then is that the words "he may sell the thing pledged, on giving the pawnor reasonable notice of the sale:, refer to his intention to sell and do not refer to actual sale of which notice of the actual date, time and place is to be given. This argument on behalf of the defendants fails.
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> The last objection to the notice is that, in the circumstances of the case, it may be taken to have been withdrawn because, (i) the plaintiff Bank did not reply to the defendant's proposal to delay the sale of the pledged goods, (ii) the sale did not take place until about 7 months after the date of the notice and (iii) the parties agreed to sell jointly, which was a new agreement. The plaintiffs did not reply immediately to the letter Ext.P19 of the defendants seeking delay of the sale; this in itself is no evidence that the plaintiff Bank had withdrawn the notice to sell or gave up its right to sell.
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> It has to be kept in mind that the plaintiff Bank was not bound to sell immediately or even to reply to the defendants' suggestion for delaying the sale, for the simple reason that on a proper and valid notice having been given under Sec. 176 of the Indian Contract Act, its right to sell the pledged goods had accrued, and it could be exercised after its accrual. it is true that the sale took place on 12.6.1948, something about 7 months after the date of the notice, but a pledgee is not compelled by law to sell the

> pledged goods, in regard to which his right of sale has accrued under the law, within any particular time."

It is true that one of the Judges in the above decision has taken a view that the notice should specify the time, date and place. But the learned Judge does not rely on any particular decision, but relies on American decisions and Ancient Indian Law.

18. The issue had come up for consideration in the decision reported in Sankaranarayana Iyer v. Kottayam Bank (AIR (37) 1950 Travancore-Cochin 66), wherein it was held as follows:

> "In dealing with the first point, it may be mentioned that in the court below it was even contended that the Bank cannot effect the sale of the securities pledged eith them without the consent or permission of defendant 1. In the appeal no such point was urged and if we may say so rightly. Section 176, Contract Act (S.129, Travancore Contract Act) defines the rights a pawnor has with respect to his securities and the said section reads thus:
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> "If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the pawnee may bring a suit against the pawnor upon the debtor 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.
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> 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."

The contention that the pawnee should give the date, time and place of intended sale was also considered in the above decision. It was held as follows:

> "To this we need only observe that a similar contention was raised in the two cases mentioned and what is pointed out in them that the expression 'he may sell the thing pledged on giving reasonable notice of the sale' in S.176 only means an intimation of the intention to sell and not that a sale should be arranged beforehand and due notice of all details given to the pawnor finds abundant support is earlier as well as in later decided cases."

After referring to the English decisions, it was held that it is not necessary to specify the date, time and place of sale. The decision takes note of the fact that the provisions of the statute relevant for the present purpose have never been understood to be any the different from the English common law rules relating to pledges and the notice in the said case was considered as sufficient enough and the contention that the notice should specify the time, date and place of sale was repelled. The decision went on to hold that what is required is the intention of the pledgee to sell the articles and the

pledger had notice of the same. It is not necessary for the pledgee to conduct the sale within a particular time or within a reasonable time. The choice date of sale is left to the pledgee. One more aspect, which was considered in the above decision is what is required is only the expression of the intention of the pledgee that if the pledgor does not wipe off the debt, the pledgee will exercise his right of sale.

19. The matter might be different in a case where after notice is received, the pledgor approaches the pledgee and pays certain amount and gets an assurance from the pledgee that sale will not be conducted except after fresh notice to the pledgor. True in the case on hand also there is a payment of Rs.500/- after the notice. But there is no case that there is any assurance of postponement of sale resulting in a new agreement. The decision in Sankaranarayana Iyer's case exhaustively deal with almost all the aspects of this issue.

20. In the decision reported in Lord Krishna Bank v. Asst. Commissioner (1999 (114) STC 333) it was held as follows:

> "So far as pledge is concerned, the right to sale is contained in Section 176 of the Indian Contract Act, 1872. It is as follows:
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> "If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the pawnee may bring a suit against the pawnor upon the debtor 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.
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> 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."

Pollock & Mulla on Indian Contract Act and Specific Relief Acts, Tenth Edition at page 812 states as follows:

> "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only to sell on default in payment and after notice to the pledgor) although the pledgor may redeem at any moment up to sale. Once the pawnee, after reasonable notice to the pawnor of his intention to sell the goods pawned, sells them under Section 176 of the Contract Act, the pawnor's right of redelivery is extinguished, but his right to redeem continues up to the sale....."

At page 813, the learned author says as follows:

> "the power conferred on the plegee under this section to sell the property without reference to the court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him."

Thus, from a review of the above principles, one can come to the conclusion that the pawnee is not the owner of the property. But he exercises his right to sell the debtor's property for realisation of the debts. He is only a bailee. he is not selling the goods either as an owner or as an agent or any other capacity representing the owner. He is exercising the power because of the right given under the Indian Contract Act." This issue was considered in the decision reported in Standard Chartered Bank v. Custodian (AIR 2000 SC 1488) and it was observed as follows:

> "Section 172 of the Contract Act provides that the bailment of goods as security or payment of a debt or performance of a promise is called pledge. Bailor being the pawnor and pawnee being the bailee. What is bailment is defined by Section 48 which, inter alia, provides that bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor and the person to whom the goods are delivered is called the bailee. Section 160 provides that the goods bailed are to be returned by the bailee on expiration of time or accomplishment of purpose. Reading Section 172 with Sections 148 and 160 of Contract Act, it would appear that when goods are bailed for securing payment of debt or the performance of a promise the bailor would get a right for the return of the said goods when the purpose is accomplished, namely, the debt is returned or the promise is performed. At the same time Section 176 provides for pawnee's right when pawnor makes default. This Section reads as follows:
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> "Pawnee's right where pawnor makes default :- If the pawnor makes default in payment of the debt, or performance ; at the stipulated time or the promise, in respect of which the good were pledged, the pawnee may bring a suit against the pawnor upon the debtor 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."

This section only only gives the pawnee the right to retain the goods pledged as collateral security but also entitles the pawnee to sell the pledged goods after giving pawnor reasonable notice of the same. If the proceeds of the sale are less than the amount due, the pawnor continues liable to pay the balance. On the other hand if the proceeds realised on the sale being made are greater than the amount due the pawnee is under obligation to pay over the surplus to the pawnor."

21. In the decision reported in Sunderlal Saraf v. Subhas Chand Jain (AIR 2006 Madhya Pradesh 35) it was held as follows:

"Since this Section does not speak about sending the notice of intending sale on a particular date, time and place are not mentioned in notice Ext.D14, would not render the said notice ineffective or in contravention to Section 176 of the Act. According to me, since the pawnee (defendant) who had given a reasonable notice under Section 176 of the Sale (Ext.D14), was competent to sell the pawned articles at anytime after sending the notice. Merely because 7 days notice was given by pawnee (defendnat) would not ipso facto gets the notice invalid. Since no particular time has been prescribed in Section 176 of the Contract Act."

22. In the decision reported in Central Bank of India v. Siriguppa Sugars and Chemicals Ltd. (AIR 2007 SC 2804) it was held as follows:

"The right of the lender, or pledgee, is to retain the chattle until a proper tender of the amount due is made. (See The Law of Mortgages by Edward F. Cousins) Under Section 173 of the Contract Act, a pawnee has the right to retain the goods pledged for payment of the debt including interest on the debt and all necessary expenses incurred by the pawnee in respect of the possession or for the preservation of the goods pledged. The rights of the pawnee were summed up by this Court in LallanPrasad v. Rahmat Ali and another(1967 (2) SCR 233 at 239) thus:

"There is no difference between the common law of England and the law with regard to pledge as codified in Sections 172 to 176 of the Contract Act. Under Section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and under Section 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of the pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under Section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner.

....

In Karnataka Pawnbrother's Association and others v. Stateof Karnataka and others (1998(7) SCC 707) this Court summed up the position as under:

"It cannot be and it is not disputed that the pawnbroker has special property rights in the goods pledged, a right higher than a mere right of detention of goods by a right lesser than general property right in the goods. To put it differently, the pawnor at the time of the pledge not only transfers to the pawnee, the special right in the pledge but also passes on his right to transfer the general property right in the goods. To put

> it differently, the pawnor at the time of the pledge not only transfers to the pawnee, the special right in the pledge but also passes on his right to transfer the general property right in the pledge in the event of the pledge remaining unredeemed resulting in the sale of the pledge by public auction through an approved auctioneer. The position being what is stated above, the natural consequence will be that it is the pawnee who holds not only the absolute special property right in the pledge but also the conditional general property interest in the pledge, the condition being that he can pass on that general property only in the event of the pledge being brought to sale by public auction in accordance with the Act and the Rules framed thereunder."

Thus, going by the principles governing the matter, propounded by this Court there cannot be any doubt that the rights of the appellant-bank over the pawned sugar had precedence over the claims of the cane Commissioner and that of the workmen. The High Court was, therefore, in error in passing an interim order to pay parts of the proceeds to the Cane Commissioner and to the Labour Commissioner for disbursal to the cane growers and to the employees. There is no dispute that the sugar was pledged with the appellant-bank for securing a loan of the first respondent and the loan had not been repaid. The goods were forcibly taken possession of at the instance of the revenue recovery authority from the custody of the pawnee, the appellant- bank. In view of the fact that the goods were validly pawned to the appellant-bank, the rights of the appellant-bank as pawnee cannot be affected by the orders of the Cane Commissioner or the demands made by him or the demands made on behalf of the workmen. Both the Cane Commissioner and the workmen in the absence of a liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of the goods."

23. The view consistently taken by the courts is that all that is necessary is that the pledgee should inform the pledgor about the intention to enforce the right of sale and it is not necessary that the notice should specify the time, date and place of sale. It can also be seen from the above decisions that even if the pledger makes payment subsequent to the receipt of notice unless there is clear evidence or materials to show that there has been a waiver or postponement of sale from the side of the pledgee, it could not be said that the pledgee could not effect sale at the time of his choice. In the case on hand, there is absolutely no material to show that on receipt of notice and on payment of Rs.500/-, the pledgee had assured or undertaken to postpone the sale. The views expressed by the courts appear to be that once notice is issued, thereafter the pledgee can effect the sale at the time of his choice and volition. The only right available to the pledgor is that till the sale is effected, he has a right to redeem going by Section 177 of the Indian Contract Act.

24. From the above decisions, it can be seen that in order to exercise the right under Section 176, the pledgee will have to issue a notice to the pledgor expressing his intention to sell the property. Notice is mandatory. As to the form of notice, there is no particular form or words to be used. The absence of notice makes the sale void in law and it is not a mere irregularity and the courts have gone to the extent of saying that the transferee may not get right to the property. The consequence of an invalid sale would be that the pledge subsists and the pledgor retains the right of redemption.

25. Applying the principles in the decisions cited above, in the case on hand the notice issued by the Bank is sufficient in law and therefore there is no merit in saying that since the sale was not conducted on 27.2.1986 and since Rs.500/- was received from the pledgor, a new notice was necessary before the sale is effected. At the risk of repetition, one may notice that after receiving notice, the pledger has paid Rs.500/-. But there is no act by the pledgee to show that the right of sale was either waived or the pledgee had undertaken to issue fresh notice before the sale is effected. The pledgor was aware of the fact that debt still continues. The appellate court was not justified in coming to the conclusion that because the date of sale is mentioned in the notice, it is an exceptional circumstance and that necessitated a fresh notice. The view of the appellate court does not appear to have any support in law.

26. There is yet another aspect. Even according to the plaintiff, amounts were due under the transaction. The case of the plaintiff was that when he went to clear off the debt and demanded that the ornaments be returned to him, the Bank was unable to do so because it has already sold the ornaments.

27. One may now notice the prayer in the plaint. It is for return of gold ornaments or its value. The appellant has no case that he had discharged the debt and the Bank was unable to return the ornaments. In a case where the debt is still outstanding, the remedy available to the appellant is two fold. Assuming that the Bank has illegally sold the property, the remedies available are (i) to sue for redemption (ii) to sue for damages for conversion. In Halsbury's Laws of England, Fourth Edition at page 74 it is mentioned as follows:

> "122. Actions for recovery by pawnor. A pawnor cannot maintain an action for conversion against a pawnee for the pledge unless the pawnor has a right to its immediate possession, consequently until tender or payment of the debt the pawnor cannot generally maintain an action for conversion of the pledge. A pawnor may sue a pawnee who refuses to restore the pledge after tender of the debt, but if the ownership of the pledge is in doubt the refusal, if made reasonably and to obtain a reasonable time for the purposes of investigation, will not ground such an action. In similar circumstances, the assignee of a pawnor may bring an action for conversion, and may recover damages for non-delivery.
>
> If the pawnee unlawfully deals with the pledge, as by sale, transfer or repledge, the contract of pawn is not thereby determined and the pawnor may not recover in conversion unless he has a right to immediate possession by redeeming the pledge. However, if the pawnee deals with the pledge in a manner other than that which the law allows, and, for example by purporting to dispose of a greater interest than he has in the pledge, makes it difficult for the pawnor to redeem it, then, if any real damage has been caused to the pawnor, the pawnee has committed a legal wrong against him."

In Chitty on Contracts Volume II at page 245 Note 33-132 deals with unlawful dealing by the pledgee. This aspect was considered in the decision reported in Narasayyamma v. Andhra Bank

(AIR 1960 AP 272), wherein it was held as follows:

> "In case of an unauthorised sale by a pledgee the relief that the pledgor can seek is to file a suit for redemption by depositing the money, treating the sale as if it had never taken place, or where the suit for redemption is not filed, to ask for damages on the foot of conversion. A mere suit for declaration that the sale of certain sharers is contrary to law and did not affect the right of the pledgor to redeem the pledge of the shares with an ancillary relief for injunction restraining the company from registering the shares in the name of the purchaser is not maintainable."

In Official Assignee v. Madholal Sindhu (AIR 1947 Bombay 217), it was held as follows:

> "The sale without notice is not a mere irregularity but is void and the vendee without notice of the pledge takes only the right and interest of the pledgee in the goods. The pledger without suing the pledgee for damages for conversion, can maintain an action for redemption against against the vendee. Analogy of S.69(3), T.P.Act, cannot be applied."

In The Law of Contract by P.C. Markanda Vol.2 2nd Edition at page 1545 it is stated as follows:

> "i) In case of unauthorised sale by a pledgee the relief that the pledgor can seek is to file a suit of redemption by depositing the money, treating the sale as if it had never taken place, or where the suit for redemption is not filed, to ask for damages on the foot of conversion.
>
> ii) The pledgee has on default right to sell the pledge if the payment is to be made on a certain day; otherwise not; but a sale before default would be a conversion; yet the sale, whether wrongful or not, passed the title to the vendee as against the pledgor.

In Official Assignee v. Madholal Sindhu, it was held:

> (i) that although the pledgee may sell the goods unauthorisedly or unlawfully, the contract of pledge is not put to an end and the pledgor does not become entitled to the possession of the goods pledged without tendering the amount due on the pledge; or, in other words, without seeking to redeem the pledge; and
>
> (ii) that without a proper tender of the amount due on the pledge, the only right of the pledgor in respect of an unlawful or unauthorised sale is in tort for damages actually sustained by him."

28. It is true that this aspect has not been considered by both the courts below. But this issue does arise for consideration. The suit is not one for redemption or damages for conversion. It is for return of the articles pledged, which per se is not maintainable.

29. In the circumstances, this court is unable to accept the judgment and decree of the first appellate court and it needs to be interfered with.

This appeal is allowed and the judgment and decree of the first appellate court is set aside and the judgment and decree of the trial court is restored. There will be no order as to costs.

P. BHAVADASAN, JUDGE sb.