

Amit Jain vs Canara Bank & Ors. on 10 November, 2022

Author: Amit Bansal

Bench: Amit Bansal

2022/DHC/004734

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : 1st November, 2022
Judgment Delivered on : 10th November, 2022

+ CS(COMM) 667/2022 and I.A. 16541/2022 (O-VII R-11 of CPC)

AMIT JAIN Plaintiff

Through: Mr.Manik Dogra, Ms.Shankari
Mishra and Mr.Dhruv Pande,
Advocates.

versus

CANARA BANK & ORS. Defendants

Through: Mr. Deepak Jain and Mr.Tanpreet
Gulati, Advocates for D-1.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

I.A. 15745/2022 (O-XXXIX R-1 & 2 of CPC) and I.A. 16168/2022 (of the defendant no.1 u/O-XXXIX R-4 of CPC)

1. Brief facts relevant for deciding the present applications are set out below:

1.1 The plaintiff is the promoter and managing director of the defendant no.2 company.

1.2 The defendant bank extended a cash credit facility to the defendant no.2 company, for which the plaintiff pledged 30% promoters' holding in the defendant no.2 company with the defendant bank, and CS(COMM) 667/2022 Signature Page 1 Not of 13 Verified Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 also assigned LIC policies bearing No.115836269 and

115836270 in the name of the plaintiff to the defendant bank. A share pledge agreement dated 7th July, 2021 was executed by the plaintiff in favour of the defendant bank pledging 19,79,549 equity shares of the defendant no.2 company with the defendant bank.

1.3 Business of the defendant no.2 company was hit during COVID-19 Pandemic and meetings were held with the defendant bank for restructuring of the cash credit facility. The cash credit facility of the defendant no.2 company was declared as a non-performing asset (NPA) by the defendant bank on 18th October, 2021, and on 20th October, 2021, the defendant bank sent a loan recall notice to the plaintiff and the defendant no.2 company.

1.4 On 27th October, 2021, a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was sent by the defendant bank to the defendant no.2 company and the plaintiff. On 19th January, 2022, the defendant bank issued another notice under Section 13(2) of the SARFAESI Act. Further, the defendant bank sent another notice on 3rd September, 2022 to the plaintiff expressing its intention to surrender the two LIC policies assigned in favour of defendant bank to recover the outstanding amount under the cash credit facility.

1.5 On 6th September, 2022, the defendant bank invoked the pledge in respect of the 19,79,549 shares i.e. 30% promoters' shares in the defendant no.2 company and hence, the aforesaid shares were CS(COMM) 667/2022 Signature Page 2 Not of 13 Verified Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 transferred from the demat account of the plaintiff to the demat account of the defendant bank.

1.6 Writ petition, being W.P.(C) 13448/2022, was filed on behalf of the plaintiff before this Court against invocation of the pledged shares of the defendant no.2 company by the defendant bank.

1.7 On 15th September, 2022, the defendant bank sent a 7 days' notice to the plaintiff for sale of the pledged shares.

2. Hence, the present suit was filed seeking the following reliefs:

(i) Pass a decree a Permanent and mandatory Injunction restraining the Defendant No.1 Bank from selling the pledged 30% of promoters' shares which have been Pledged vide Share Pledge Agreement Dated 07.07.2021 in the open market; and

(ii) Pass a decree a Permanent and mandatory Injunction restraining the Defendant No. 1 Bank from surrendering the LIC policies 115836269 and 115836270 which have been assigned in favour of the Defendant No. 1 Bank by the Plaintiff;

(iii) Pass a decree of declaration thereby declaring that the Notice of Sale dated 15.09.2022 issued by the Defendant No. 1 without letter of invocation is bad in law;

(iv) Pass a decree of declaration thereby declaring that the Notice dated 03.09.2022 issued by the Defendant No. 1 for surrender LIC policies 115836269 and 115836270 without letter of invocation is bad in law;

(v) Pass a decree of permanent injunction against the Defendant No.1, by itself or through its servants, agents, representatives, assignees and/ or officers, from invoking the Share Pledge Agreement dated 07.07.2021"

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3. On 23rd September, 2022, summons were issued in the present suit and an ex parte ad interim order was passed by this Court restraining the defendant bank from selling the pledged shares or surrendering the aforesaid LIC policies assigned by the plaintiff in favour of the defendant bank.

4. The defendant bank filed I.A.16168/2022 under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (CPC) seeking vacation of the aforesaid ex parte interim order as also I.A.16541/2022 under Order VII Rule 11 of the CPC. Notices were issued in the aforesaid applications and replies have been filed on behalf of the plaintiff.

5. Counsel appearing on behalf of the plaintiff has made the following submissions:

I. At the time when the plaintiff signed the said share pledge agreement, Schedules-I and II to the said agreement were kept blank. Subsequently, the defendant bank filled the date and time of execution in Schedule I of the said agreement, and the defendant bank filled in 48,08,237 shares in Schedule-II of the said agreement.

II. The defendant bank has failed to give sufficient notice to the plaintiff in terms of Section 176 of the Indian Contracts Act, 1872, for sale of the pledged shares.

III. Two LIC policies were not assigned by the plaintiff in favour of the defendant bank, only a lien was created. Reliance is placed on the Sanction letter dated 13th October, 2020 and the Schedule thereto.

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6. Counsel for the defendant has made the following submissions:

I. The plaintiff has wrongly averred in the plaint that the defendant bank was seeking to sell 48,08,237 shares of the defendant no.2 company. Only 19,79,549 shares were pledged by the plaintiff with the defendant bank and therefore, the defendant bank could not sell any further shares.

II. The allegations of forgery made in the plaint are completely baseless. The share pledge agreement along with the aforesaid Schedules was executed by the plaintiff on 7th July, 2021 and the same was duly signed by the plaintiff in his own right and as an authorized signatory of the defendant no.2 company.

III. No notice was required to be given by the defendant bank to the plaintiff for invocation of the pledged shares. Reliance in this regard is placed on the judgment of the Supreme Court in PTC India Financial Services Limited v. Venkateswarlu Kari and Anr., 2022 SCC OnLine SC 608.

IV. The plaintiff was duly intimated of the invocation of the pledged shares on 6th September, 2022, which also amounted to notice of the intention of the defendant bank to sell the pledged shares. Therefore, it cannot be said that reasonable notice under Section 176 of the Indian Contracts Act, 1872 was not given by the defendant bank to the plaintiff.

V. Insofar as two LIC policies are concerned, the same were duly assigned by the plaintiff to the defendant bank and the same were CS(COMM) 667/2022 Signature Page 5 Not of 13 Verified Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 subject matter of the notice issued under Section 13(2) of the SARFAESI Act. Therefore, the said LIC Policies cannot be the subject matter of the present suit. Reliance in this regard is placed on the notice dated 3rd September, 2022 sent by the defendant bank to the plaintiff, filed at page no. 111 of the documents filed along with the plaint.

7. I have heard the counsels for the parties and perused the record of the present suit.

8. As noted above, the plaintiff had filed W.P.(C) 13448/2022 before this Court impugning the invocation of the pledged shares by the defendant bank. During the pendency of the said writ petition, the notice dated 15th September, 2022 was issued

by the defendant bank to sell the pledged shares upon failure of the plaintiff to pay the outstanding amounts within 7 days. The said writ petition was listed before the writ court on 23rd September, 2022, when the plaintiff without apprising the writ court about the filing of the present suit withdrew the said writ petition.

9. It is pertinent to note that the present suit was listed before this Court on the same date and none appeared on behalf of the defendant bank, since the defendant bank was not aware of the plaintiff filing the present suit. A perusal of the proof of service filed with the plaint shows that the service was effected by way of an email addressed to "pradeep@radnpartners.com". It appears to be the email of one of the advocates of the firm representing the defendant bank in the writ petition filed by the plaintiff. However, the plaintiff ought to have informed the filing of the present suit to the writ court as well as the counsel appearing CS(COMM) 667/2022 Signature Page 6 Not of 13 Verified Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 on behalf of the defendant bank before the writ court. Clearly, this was a dishonest attempt on part of the plaintiff to obtain an ex parte order behind the back of the defendant bank. Therefore, the interim order passed by this Court on 23rd September, 2022 is liable to be vacated on the said ground alone.

10. The defendant bank along with the application filed under Order XXXIX Rule 4 of the CPC has placed on record the share pledge agreement dated 7th July, 2021. The Schedule I to the said agreement mentions the date of the agreement as 7th July, 2021, and Schedule II of the said agreement clearly mentions that 19,79,549 shares of the defendant no.2 company have been pledged by the plaintiff with the defendant bank.

The said schedule bears the signatures of plaintiff in his own right and as an authorized signatory of the defendant no.2 company.

11. It is the plaintiff's own case that 19,79,549 shares of the defendant no.2 company have been pledged by the plaintiff with the defendant bank. Therefore, I do not find any merit in the submission of the plaintiff that the defendant bank has forged the aforesaid pledge agreement, so as to increase the number of pledged shares from 19,79,549 to 48,08,237.

12. Next, it has been contended on behalf of the plaintiff that the defendant bank has failed to give reasonable notice to the plaintiff for the sale of the pledged shares, as required under Section 176 of the Indian Contracts Act, 1872. There is no denying the fact that in terms of Section 176 of the Indian Contracts Act, 1872, a pawnee is required to give reasonable notice of sale to the pawnor before selling the pledged goods.

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13. The Supreme Court in its recent judgment in PTC India (supra) has reiterated that under Section 176 of the Indian Contracts Act, 1872, a reasonable notice is required to be given by the pawnee to the pawnor of sale of the pledged goods, even though no period for the notice has been prescribed. The object of the said notice is to make the pawnor aware of the pawnee's intent to sell the pawn and give him an opportunity to exercise his statutory right of redemption available to a pawnor under Section 177 of the Indian Contracts Act, 1872. It was further observed that whether the period of notice was reasonable or not would depend on the facts and circumstances of the case. The Supreme Court went on to observe that in respect of the dematerialized securities sold by the pawnee in accordance with the provisions of the Depositories Act, by-laws and rules, the pawnor would not have a right of redemption against third parties on the ground of not being given reasonable notice under Section 176 of the Indian Contracts Act, 1872. The relevant observations of the Supreme Court in paragraphs 85 and 93 are set out below:

"85. We, however, accept that the Depositories Act, by-laws and rules relating to sale of dematerialised securities would be gravely undermined in case the pawnor is entitled to redeem the dematerialised shares from the third party on the ground that reasonable notice, as postulated under Section 176 of the Contract Act, was not given to the pawnor. To this extent, we would accept that there is a conflict between the Depositories Act and the interpretation given in Madholal Sindhu (supra), which has been followed in other cases, including the judgment of the Delhi High Court in Nabha Investment (supra). If this principle is applied to dematerialised securities that have been transferred to the third parties in accordance with the provisions of the Depositories Act, by-laws and rules, it would materially impact certitude in the transaction in listed dematerialised securities CS(COMM) 667/2022 Signature Page 8 Not of 13 Verified Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 which would become vulnerable to challenge even when the arm's length purchasers are innocent third-party buyers for valuable considerations. Open market operations would be affected. To this extent, therefore, we do hold that the dictum in Madholal Sindhu (supra) and Nabha Investment (supra), that the pawnor has a right to redemption against third parties when the pawnee does not give reasonable notice under Section 176 of the Contract Act, would not apply to listed dematerialised securities which are sold by the pawnee in accordance with the provisions of the Depositories Act, by-laws and rules. In fact, the stipulations in Section 12 of the Depositories Act and Regulation 58 of the 1996 Regulations have in built provisions in terms of which the pawnor and the pawnee are informed about the change of status with the pawnee making a request and being accorded a status of the „beneficial owner . The pawnee cannot make the sale of dematerialised securities without being registered as a „beneficial owner , which is a

step that a pawnee must take before he proceeds to sell the pledged dematerialised securities.

...

93. Our attention was also drawn to a Single Judge Bench judgment of the Delhi High Court in Tendril Financial Services Pvt. Ltd. v. Namedi Leasing & Finance Ltd.⁸⁰, which supports the MHPL's case. However, a careful reading of the judgment would show that it was passed in peculiar facts therein as there was an ad interim order which had remained in force for twelve years, consequent to which the pawnee was unable to sell the shares. We agree that normally a court would not grant interim injunction on the prayer of the pawnor alleging non-compliance of Section 176 of the Contract Act. The object and purpose requiring the pawnee to issue notice to the pawnor before selling the pawn is to give an opportunity to the pawnor to redeem the pledged goods before the 'actual sale'. The requirement of issue of reasonable notice under Section 176 would be satisfied once the pawnor is made aware and has knowledge of the pawnee's desire/intent to sell. Continuation of interim orders predicated on the ground of lack of reasonable CS(COMM) 667/2022 Signature Page 9 Not of 13 Verified Digitally Signed By: AMIT BANSAL Signing Date: 10.11.2022 14:50:55 2022/DHC/004734 notice under Section 176 would not be a justification when the pawnee in his written statement clarifies and takes a clear position. The written statement itself can be treated as reasonable notice. We have made these observations as we have come across cases where such injunctions have been granted and confirmed even after the pawnee has entered appearance."

14. At this stage, a reference may be made to the relevant clause of the share pledge agreement dated 7th July, 2021, which is set out below:

"9. The Pledgor/s hereby irrevocably agrees that the Bank shall be entitled to invoke pledge at its absolute discretion at any point of time without giving prior intimation to the Pledgor/s (as pledgee's right specified, in clause 58(8) of the SEBI (DEPOSITORIES AND PARTICIPANTS) REGULATIONS 1996 as amended from time to time or by any other provisions of law or by contract and Bank is also entitled to all rights/privileges as a pledgee provided under the provisions of Indian Contract Act, and that the decision of the Bank in this respect shall be final and conclusive."

15. A perusal of the aforesaid clause shows that the defendant bank was entitled to invoke the pledge at its own discretion without giving prior intimation to the plaintiff. Under Regulation 58(8) of the SEBI (Depositories And Participants) Regulations, 1996, a pledgee is entitled to invoke the pledge in terms of the provisions of the pledge document. Further, upon invocation, the depository would register the pledgee as the beneficial owner of the said securities.

16. In the present case, the pledge in respect of 19,79,549 shares was invoked by the defendant bank on 6th September, 2022, and the plaintiff was duly informed of the same by way of a text message

dated 6th September, 2022 received from NSDL, a screenshot of which is filed at CS(COMM) 667/2022 Signature Page 10 Not Verified of 13 Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 page no.112 of the plaintiff's documents. Subsequently, a notice was issued by the defendant bank on 15th September, 2022 calling upon the plaintiff to clear the outstanding liabilities within seven days, failing which the defendant bank shall sell the pledged shares. Counsel for the plaintiff contends that the aforesaid notice does not amount to reasonable notice as envisaged under Section 176 of the Indian Contracts Act, 1872.

17. As observed by the Supreme Court in PTC India (supra), whether the period of notice was reasonable or not would depend upon the facts and circumstances of the case. It was further observed that requirement of notice under Section 176 of the Indian Contracts Act, 1872 is to make the pawnor aware of the intention of the pawnee to sell. In the present case, the intent of the defendant bank to sell the pledged shares was made clear to the plaintiff when the pledged shares were invoked by the defendant bank on 6th September, 2022. The intimation of invocation was duly received by the plaintiff by way of a text message on 6th September, 2022 and this was, in fact challenged by the plaintiff by way of a writ petition. It was only thereafter that the notice dated 15th September, 2022 was issued by the defendant bank giving seven days to the plaintiff to clear the outstanding dues, failing which the defendant bank would sell the pledged shares. Therefore, the notice dated 15th September, 2022 would have to be read along with the intimation of invocation sent on 6th September, 2022 and in my view, this would constitute reasonable notice under Section 176 of the Indian Contracts Act, 1872.

18. There is no merit in the submission of the plaintiff that the defendant bank did not include the pledged shares in the notice issued CS(COMM) 667/2022 Signature Page 11 Not Verified of 13 Digitally Signed By:AMIT BANSAL Signing Date:10.11.2022 14:50:55 2022/DHC/004734 under Section 13(2) of the SARFAESI Act. Since the pledged shares had already been pledged with the defendant bank, no notice in respect of Section 13(2) of the SARFAESI Act was required to be given in respect of the said pledged shares.

19. A perusal of the notices dated 3rd September, 2022 and 12th September, 2022 sent by the defendant bank to the plaintiff clearly shows that the aforesaid two LIC policies were assigned by the plaintiff to the defendant bank, and the defendant bank was entitled to encash the aforesaid two LIC policies without issuing any notice to the plaintiff. Therefore, I do not find any merit in the submission of the plaintiff that merely a lien in respect of the aforesaid two LIC policies was created in favour of the defendant bank, and the defendant bank could not have surrendered the said policies. In any case, the aforesaid two LIC policies were the subject matter of the notice dated 19th January, 2022 issued by the defendant bank under Section 13(2) of the SARFAESI Act and in view of Section 34 of the SARFAESI Act, the same cannot be made subject matter of the present suit.

20. There is another aspect of the matter. The ex parte injunction order against sale of the pledged shares was passed by this Court on 23rd September, 2022. Thereafter, the matter was listed before the Court on 28th September, 2022, 12th October, 2022, 20th October, 2022 and 1st November, 2022. The submission of the counsel for the plaintiff is noted in the order dated 20th October, 2022 that the plaintiff is taking steps towards the settlement in respect of the aforesaid LIC policies and

the pledged shares, and the matter was adjourned to 1st November, 2022.

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However, it appears that no such steps were taken by the plaintiff and even on 1st November, 2022, the plaintiff was not in a position to clear the outstanding dues of the defendant bank. Counsel for the plaintiff submitted that the plaintiff could not clear the outstanding dues on account of insolvency proceedings having been initiated against the plaintiff before the National Company Law Tribunal (NCLT). The effect of insolvency proceedings being initiated against the plaintiff cannot come to the rescue of the plaintiff, as the present suit has been filed by the plaintiff, whereas the interim moratorium under Section 96 of the Insolvency and Bankruptcy Code, 2016 (IBC) would be in respect of the suits/legal proceedings filed against the plaintiff.

21. In view of the above discussion, the plaintiff has failed to establish a prima facie case in his favour. The balance of convenience is in favour of the defendant bank. Accordingly, the interim order dated 23rd September, 2022 passed by this Court is vacated. Resultantly, I.A. 15745/2022 is dismissed and I.A. 16168/2022 is allowed. Further, taking into account the conduct of the plaintiff in obtaining ex parte interim order behind the back of the defendant bank, the plaintiff is burdened with the costs of Rs.1,00,000/- to be paid to the defendant bank.

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22. List before Joint Registrar for further proceedings on 11th January, 2023.

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