Manav Investment And Trading Co. Ltd vs Dbs Bank India Ltd on 16 February, 2022

Author: Shekhar B. Saraf

Bench: Shekhar B. Saraf

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
(Commercial Division)

Present:

The Hon'ble Justice Shekhar B. Saraf

I.A. G.A. NO. 1 of 2021
in
C.S. NO. 138 of 2021
MANAV INVESTMENT AND TRADING CO. LTD.
Versus
DBS BANK INDIA LTD.

And

I.A. G.A. NO. 2 of 2021
In
C.S. No. 138 of 2021
MANAV INVESTMENT AND TRADING CO. LTD.
Versus
DBS BANK INDIA LTD.

For the Plaintiff/Petitioner : Mr. Anirban Ray, Advocate
Mr. Rajarshi Dutta, Advocate
Mr. Pankaj Agarwal, Advocate
Ms. Paramita Maity, Advocate

For the Defendant/Respondent : Mr. Jishnu Saha, Senior Advocate
Mr. Sakabda Roy, Advocate
Ms. Trisha Mukherjee, Advocate

Heard on : December 07, 2021, December 14, 2021, January 19, 2022, February 07, 2022, February 09, 2022 and February 11, 2022

Judgment on : February 16, 2022

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Shekhar B. Saraf, J.:

1. The present application being I.A. G.A. No. 1 of 2021 in C.S. No. 138 of 2021 has been preferred by the petitioner for seeking an order of injunction to restrain the respondent from dealing with or selling the securities pledged by the petitioner for securing certain financial facilities. After hearing the above application, an ad-interim ex-parte order dated August 3, 2021 was passed by this Hon'ble Court restraining the respondent from selling the pledged securities. Thereafter, a vacating application being I.A. G.A. No. 2 of 2021 in C.S. No 138 of 2021 has been preferred by the respondent in terms of the liberty granted in the order dated August 3, 2021. Both the applications were accordingly heard together.

2. The relevant facts to decide the present interlocutory applications are delineated as follows:

a) The petitioner, Manav Investment & Trading Company Limited, is a common promoter of the companies, namely Birla Tyres Limited (hereinafter referred as "BTL") and Kesoram Industries Limited (hereinafter referred as "KIL"). The erstwhile Laxmi Vilas Bank (hereinafter referred as "LVB") had extended a Term Loan facility (hereinafter referred to as "TL facility") and a Working Capital Facility (hereinafter referred to as "WC facility") to KIL. Later on, the business of KIL was demerged into a new entity namely BTL after a Scheme of Arrangement sanctioned by the National Company Law Tribunal, Kolkata Bench on 8th November, 2019 and the erstwhile LVB amalgamated with the respondent, DBS Bank India Ltd.

(hereinafter referred to as "DBIL").

b) Pursuant to the demerger, the TL facility and the WC facility availed by KIL were bifurcated and partly transferred to BTL. A Facility Agreement governing the said transferred "TL facility" was executed on February 11, 2021 between BTL as the borrower and the banks and financial institutions (including DBIL) as the lenders, a total 31,75,000 BTL equity shares were pledged for the purpose of such transferred "TL facility". Thereafter, the petitioner/plaintiff as the promoter executed a Promoter Undertaking on February 15, 2021 wherein the pledged shares of KIL towards Working Capital Facility were released by DBIL and the petitioner as a common promoter of KIL and BTL pledged a further 31,75,000 equity shares of BTL (New BTL Pledged shares) in favour of DBIL. The petitioner/plaintiff as a Security Owner also executed an Agreement of Pledge of Shares and other securities held in dematerialized form in favour of DBIL on April 16, 2021.

c) According to the Pledge Agreement, there are two sets of pledge shares for the facilities availed by BTL from DBIL. The first set of the BTL pledged shares (hereinafter referred to as "Old BTL pledged shares") were pledged by the petitioner in favour of DBIL to secure the Term Loan which is governed by the terms of the Pledge Agreement and the Facility Agreement dated February 11, 2021 entered into between BTL and DBIL. The second set of the BTL pledged shares (hereinafter referred to as "New BTL pledged shares") were pledged by the plaintiff in favour of DBIL to secure the "WC Facility". The New BTL pledged shares are governed by the Pledged Agreement read with the

Promoter Undertaking.

d) Since BTL defaulted in repaying the facilities granted by DBIL, on July 17, 2021, DBIL issued a notice of event of default and recall of the "TL Facility" to BTL. The outstanding amount claimed under this notice was INR 37,99,07,537/- (Thirty-Seven Crores Ninety Nine Lakhs Seven Thousand Five Hundred thirty seven only). On the same day, that is, July 17, 2021 another notice of event of default and recall of the "WC Facility" was issued by DBIL to BTL and an outstanding amount of INR 28,19,35,329/- (Twenty-Eight Crores Nineteen Lakhs Thirty-Five Thousand Three Hundred Twenty-Nine only) was claimed towards repayment of this loan. The two notices of recalling and event of default addressed to BTL provided for a time period of 2 days (i.e. from July 17, 2021 to July 20, 2021) for repayment of the outstanding dues. Simultaneously, two separate notices were issued on 17th July, 2021 addressed to the petitioner/plaintiff for invocation and sale of the two sets of pledged shares. For the shares pledged against the Working Capital Facility, the petitioner was granted time till 6th August, 2021 for repayment of the outstanding amount (INR 28,19,35,329/-) under the "WC Facility". Subsequently, on the same date, another notice was issued for invocation and sale of the pledged shares towards repayment of the outstanding amount (INR 66,18,42,866/-) under the "WC Facility" as well as the "TL Facility", where the petitioner was granted time till July 20, 2021 to discharge its obligations. Thereafter, on July 30, 2021, the defendant sold 3,76,063 shares out of the 31,75,000 old BTL pledged shares in the open market. The balance shares are in Respondent's Depository Participant Account presently.

e) For challenging such action of the respondent, the petitioner instituted the present suit and filed the application being G.A. No. 1 of 2021 seeking appropriate orders of injunction as stated therein. Upon hearing the same an order dated 3rd August, 2021 was passed by this Hon'ble Court restraining the respondent from giving further effect to the letters dated July 17, 2021 issued for the purpose of invoking or selling the pledged shares. Hence, the vacating application being G.A. No. 2 of 2021 has been filed under Order XXXIX Rule 4 read with Section 151 of Code of Civil Procedure, 1908 by the defendant/respondent praying for setting aside the ex-parte ad-interim order dated August 3, 2021 passed by this Hon'ble Court in G.A. No. 1 of 2021 in C.S. No. 138 of 2021. Arguments:

3. Counsel for the petitioner/plaintiff argues that in terms of Section 176 of the Indian Contract Act, 1872, the petitioner was provided time till August 6, 2021 to cure the default and the respondent reserved its right of sale of the pledged shares that was to be invoked only subsequent to August 6, 2021. In breach of such clear understanding and the mandate under Section 176 of the Indian Contract Act, 1872 (hereinafter referred as "the Act"), the respondent sold 3,76,063 shares out of the 31,75,000 pledged shares in the open market on 30th July, 2021. He places reliance upon The Cooperative Hindusthan Bank Ltd. -v- Surendranath De reported in AIR 1932 Cal 524 wherein the Hon'ble Calcutta High Court has found that any statement/communication in the nature that stipulates sale of hypothecated stock on the failure of payment by certain date is not a notice under Section 176 of the Act but only intimation. Hence, such sale will be bereft of any notice under Section 176 of the Act.

4. The petitioner further submits that Clause 8 of the Promoter Undertaking dated February 15, 2021 provides that all monies that may become payable by the Promoter to the respondent pursuant to such undertaking shall, without any delay, demur or protest, be paid to the respondent within 15 days of a written notice in such regard being issued by the respondent. He submits that the notice dated 17th July, 2021 was received by the petitioner on that date and before the expiry of the 15 days period as contemplated in Clause 8 of the Promoter Undertaking, a part of the pledged shares (i.e. 3,76,063 shares) was already sold by the respondent in open market.

5. Furthermore, the petitioner avers that the notice dated July 17, 2021 is a combined notice of invocation and sale. The notice under Section 176 of the Act stipulates entitlement to a reasonable notice before exercising the right available to the respondent/defendant for carrying on sale of the pledged shares. Hence, the notice dated July 17, 2021 is outside the ambit of Section 176 of the Act. The above submissions were made with respect to the Working Capital Facility.

6. With regard to the Term Loan Facility, the counsel for the petitioner submits that the basis of the notice of invocation and sale of pledged shares is default in payment. Such alleged default in payment is a curable defect and is capable of being remedied. The facility agreement read with the Promoter Undertaking required the respondent to give a 15 days' notice to the petitioner to remedy the default. The respondent could not have exercised the right of invocation in respect of the pledged shares prior to giving a reasonable time to the petitioner to remedy the default. The petitioner invokes Clause 7.1 of the facility agreement dated 11th February, 2021 that provides for events of default and remedies there under. It provides a cure period of Thirty days that shall be applicable from the date of the occurrence of such event of default.

7. Counsel for the respondent/defendant argues that on account of default of repayment obligations by Birla Tyres Limited, the respondent/defendant is entitled to recall the entire principal amount of Working Capital Facility along with accrued interest in accordance with Clause 1 of Article IV and Clause 1 of Article V of Working Capital Consortium Agreement dated January 19, 2018. The defendant/respondent states that it is entitled to recall the entire principal amount of Term Loan Facility along with accrued interest in the circumstances stated therein in accordance with Clauses 7.1 (a) and 7.1 (b) and Clause 7.2 of the Facility Agreement dated February 11, 2021.

8. Furthermore, it is submitted by the defendant/respondent that Clauses 6 (c) and Clause 8 of the Promoter Undertaking dated February 15, 2021 reflect that in the event an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 is filed, the Defendant Bank shall, on an immediate basis, have a right to invoke the New BTL Pledged Shares and the Promoter i.e. the Petitioner herein, shall be liable to pay all outstanding dues within fifteen business days of Respondent's written notice. According to the petitioner an Event of Default in terms of Clause 6 (c) of the Promoter Undertaking was triggered on or about July 7, 2021, as an application for initiation of corporate insolvency resolution process under Section 7 of IBC (C.P. (IB) No. 200/KB/2021) was filed by ICICI Bank Limited as a Financial Creditor against Birla Tyres Limited before National Company Law Tribunal, Kolkata Bench.

9. Counsel for the defendant bank avers that Clauses 17 and 18 of the Pledge Agreement dated April 16, 2021 establish that the defendant/respondent was entitled to invoke the New BTL Pledged Shares "on an immediate basis" under the Pledge Agreement read with the Promoter Undertaking. Finally, the defendant/respondent submits that neither the Promoter undertaking nor the Pledge Agreement specify any "cure period" in relation to the events of default contemplated there under. Hence, the plaintiff/petitioner is not entitled to any interim relief.

10. Mr. Saha has further argued that the two notices issued to the petitioner are in keeping with the mandatory requirement under Section 176 of the Act. He has submitted that the very fact that the petitioner filed a suit seeking injunction of the two notices indicates that the intention of the bank to sell the shares was patently clear in the above two notices. He further submitted that the difference in the time given of fifteen days in one notice and three days in another notice is based on the agreements between the parties and is accordingly proper and reasonable notice of sale under Section 176 of the Act. Analysis:

> 11. Upon analysing the arguments put forward by both the parties, I am of the view that the following issues are required to be addressed by me to resolve the dispute between the parties:
>
> a) Did the defendant bank act as per the terms of the agreements that have been entered between the parties?
>
> b) Were the two notices dated July 17, 2021 under section 176 of the Indian Contract Act, 1872 a clear, proper and valid notice of sale?
>
> c) If the answer to b) is in affirmative, then did the notices provide a reasonable time as required under section 176 of the Indian Contract Act, 1872?

12. In order to tackle the first issue, that is, whether the defendant bank acted as per the terms of the agreements that have been entered between the parties, relevant clauses of the agreements governing the obligations and rights of both the parties need to be examined. The document which was entered into between the parties for securing both the facilities granted to BTL is the Pledge Agreement. It governs the rights and obligation of the parties in relation to the two sets of pledged BTL equity shares. Clause 17 and Clause 18 of the Pledge Agreement deal with the right to recall the facilities and the right to invoke the securities respectively, and the same are extracted below:

> "17. The "Security Owner" agrees that the bank shall have the right to recall the advance/credit facilities at any time at its discretion and/or violation of any of the terms of the agreement and/or any other conditions stipulated from time to time or even without assigning any specific reason thereof. It is also agreed that the bank may at its absolute discretion discontinue the facility granted with or without assigning any reason whatsoever and the bank shall not be liable for any loss or damage that may cause or incur to the borrower(s)/ "Security Owner"

thereof.

18. The "Security Owner" agree that in the event of any default on his/her/their part, in discharging its obligation hereunder or payment of dues, or on the account becoming irregular, or on violation of any of the terms and conditions of this agreement, or at any point of time during the currency of loan/credit facilities at the discretion of the Bank, the Bank shall be entitled to invoke the pledge as provided under SEBI (Depository and Participants) Regulations 1996 and exercise any right as a pledgee as per the provisions of Indian Contract Act and thereby sell, transfer in its own name as beneficial owner or otherwise dispose of the said securities or such part as the Bank may desire, and appropriate the sale proceeds first in payment of the cost, secondly towards repayment of the balance amount due with interest and cost in any of the loan accounts of the borrower(s). The shortfall left, if any, in any of the loan accounts of the borrower(s) after such appropriation shall be made good by the borrower(s) on demand by the Bank."

13. The relevant clauses of the Facility Agreement that governs terms and conditions for the grant of "TL Facility" to BTL and defines "Event of Default" are extracted below:

> "7.1 EVENTS OF DEFAULTS For the purpose of this Agreement, each of the following shall constitute an Event of default
>
> (a) Default in Repayment of Principal Sums of the Loan Default has occurred in the payment of principal sums of the Loans on the Due Dates.
>
> (b) Default in Payment of Interest etc. Default has been committed by the Borrower in payment of any instalment of interest and/or payment of any amount payable in terms or under or pursuant to any Finance Document on respective Due Dates.

[....] Upon the occurrence of any of the above Events of Default save and except the Event of Default as mentioned in Section 7.1 (a) and (b), that is capable of remedy, a cure period of Thirty (30) days shall be applicable from the date of the occurrence of such event."

Based on a reading of the Clauses 7.1 (a) and 7.1 (b) along with a reading of the subsequent exception clause it is apparent that the default committed by the petitioner is not curable in nature. The same falls within the ambit of Clause 7.1 (a) and (b) which does not contemplate any cure period of 30 days. Hence, the contention of the plaintiff/petitioner that a cure period of thirty days as mentioned in the exception clause of the Facility Agreement should have been given by the defendant bank does not hold water. The notice dated July 17, 2021 (Page 163 of G.A. No. 2 of 2021) for immediate recalling of the term loan facility and demanding payment is correct and it is in sync with both the Facility Agreement as well as the Pledge Agreement.

14. The Promoter Undertaking governs the rights and obligations of both the parties with regard to the "WC Facility". Relevant clauses that contemplate events of default and notice for repayment of the money are Clauses 6 (c) and 8 respectively, and the same are delineated below:

"6. Unconditional and Irrevocable Undertaking: MITCL hereby irrevocably unconditionally undertakes the following obligations:

(c) Without prejudice to the above, if prior to the expiry of 12 (twelve) months from the Effective Date, an insolvency application under Sections 7 or 10 of the Insolvency and Bankruptcy Code, 2016 ("Code") is filed, or an insolvency application under Section 9 of the Code is admitted in respect of BTL or any new Event of Default occurs in relation to the BTL Facility, DBIL shall, on an immediate basis, have a right to invoke the New BTL Pledged Shares and / or seek recovery of the Release Amount from the Promoter in its entirety and upon such recovery, the dues of BTL shall stand reduced to that extent. Such right shall be in addition to all other rights of DBIL in relation to the BTL Facility, including but not limited to the security interest over the Old BTL Pledged Shares and other security interests.

8. All monies that may become payable by the Promoter to DBIL pursuant to this Undertaking shall, without any delay, demur or protest, be paid to DBIL within 15 (fifteen) business days of a written notice in this regard being issued by DBIL ("Notice"). MITCL hereby agrees that the Notice in this regard may be sent vide an email to either of bbmanav@gmail.com, and / or bbmanavcs@gmail.com which shall be effective upon delivery, provided that there is no failure delivery notification and it is received within business hours in India. Any Notice received post business hours will be effective on the next business day. The payment shall be made in the manner specified in the Notice, preferably by Real Time Gross Settlement System (RTGS), by National Electronics Funds Transfer (NEFT) or by cheque or by bank draft drawn in favour of DBIL on a scheduled bank at Mumbai or such other place or to such other account as may be notified by DBIL."

After a reading of the above two clauses it can be inferred that the respondent bank granted a time period of 15 days as provided in the first notice (Pg. 161 of G.A. No. 2 of 2021) for repayment of the outstanding amount based on Clause 8 of the Promoter Undertaking. The wording of the relevant clauses of the Promoter Undertaking is unambiguous and it unequivocally states that the defendant bank shall have a right to invoke the new BTL pledged shares and / or seek recovery of the release amount from the promoter in its entirety. The immediate and concurrent release of the notice for recalling of the facilities and notice for payment has been done rightfully as per the terms of the agreement entered into between the parties. In my view, a time period of 15 days is also reasonable for making repayment of the due amount and it is in consonance to the Promoter Undertaking.

15. To answer the second issue with regard to the notices issued upon the petitioner, one will have to examine the very concept of pledge. A pledge is a bailment of goods as security for payment of debt or performance of a promise. The pawnee has the right to retain the pawn as security and the scope and ambit of this right of retainer is defined by sections 173 and 174 of the Act. Section 176 defines the pawnee's rights where the pawner makes default. Section 177 gives the defaulting pawner a right to redeem the pawn at any time before the actual sale of it. Sections 176 and 177 read thus:--

> "176. Pawnee's right where pawnor makes default - If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.
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> 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 them1, but he must, in that case, pay, in addition, any expenses which have arisen from his default."

16. In construing Section 176 too much importance should not be given to the semicolon in the first paragraph. In a case where the pawner makes default, the pawnee has three rights: (i) he may bring a suit against the pawner upon the debt or promise, and (ii) he may retain the pawn as a collateral security, or (iii) he may sell it on giving the pawner reasonable notice of the sale. But the pawnee has the right to sue on the debt or the promise concurrently with his right to retain the pawn or to sell it. The retention of the pawn does not exclude this right of suit, since the pawn is a collateral security only.

17. In the case of Haridas Mundra -v- National and Grind-Lays Bank Ltd. reported in AIR 1963 Cal 132 it was held by this Hon'ble Court that there is some difference between a notice giving mere intention to sell and a notice of the intended sale. The court held that a mere intention with giving specific particulars will not be enough and such notice will be unreasonable. Relevant paragraph of the judgment is extracted below:

> "9. Mr. Deb contended secondly that the notice dated February 6, 1960 was not a reasonable notice of the sale within the meaning of section 176 because (a) the notice does not refer to the actual sale which is going to be held and (b) because it does not give the place, date and time of the sale. On the first branch of his contention, Mr. Deb argued that the notice dated February 6, 1960 was a notice of an intention to sell and that such notice is not enough. I am unable to accept this contention. The notice stated that in default of payment of the debt due to the defendant on or before the 18th February, 1960. "The undernoted shares, or such of them as the Bank may decide to sell will be sold by the Bank in exercise of its rights and powers as pledgee and the net proceeds applied in reduction of your indebtedness." The notice gave a reasonable time to the plaintiff to pay the debt and redeem the pawn and definitely and clearly, stated that in default of payment within the time mentioned the defendant would sell the shares or such of them as the defendant might decide to sell.

> The word "sale" in section 176 means intended sale as opposed to the expression "actual sale" in section 177. Section 176 requires notice of the intended sale. Such notice was sufficiently given by the, letter dated February 6, 1960. Mr. Deb relied upon the decision in Co-operative Hindusthan Bank Ltd. v. Surendra-nath De, (3) I.L.R. 59 Cal. 667 and (8) the unreported decision in an appeal from Original decree No. 12 of 1953 (Agarchand Chunilal v. Gorakh-ram Sadhuram, p. 40, decided on January 17, 1957). Both these cases are distinguishable. In the first case, the notice could not reach the pawner before the sale. Consequently the sale was not a sale on reasonable notice of it. Besides the notice there stated that failing payment by named date, the pawnee would arrange for the sale of hypothecated stock and on this ground this case was distinguished by Lahiri, J., in (12) Hulas Kunwar v. Allahabad Bank, A.I.R. 1958 Cal. 644 where the court upheld the validity of a notice which stated that the pawnee would arrange to effect sale of the securities as and when opportunity offered. I must say however that 1 see no essential distinction between the notices in the two cases and speaking for myself, I am not prepared to say that the wording of the notice in the case of the Co-operative Hindusthan Bank Ltd. v. Surendranath De (3) I.L.R. 59 Cal. 667 was in any way defective. In the unreported case decided by S.R. Das Gupta, J. and myself, the pawnee had not given any notice of the sale at all. In that case the pawnee gave a notice in writing dated April 10, 1946 calling upon the pawner to make immediate payment of the debt and take back the goods and stating that in default of compliance with the requisition within two weeks the pawnee would take further steps for the recovery of his dues and hold the pawner liable for costs. The notice was not a notice of intended sale at all; it did not state that in default of payment the pawnee would proceed to sell the goods. In that case there was also evidence to show that the pledged goods were re-conditioned at the pawner's request for the sole purpose of enabling the pawnee to sell them: the pawner had therefore knowledge of the pawnee's intention to sell; never-less it could not be said that the pawner had received reasonable notice of the sale or any notice giving him reason able time to redeem the pledged goods and stating that in default of payment the pawnee would proceed to sell the goods."

18. In the case of Prabhat Bank Ltd. and Another -v- Babu Ram reported in AIR 1966 All 134 it was held by the Court that a notice of the character contemplated by Sec. 176 cannot be implied. Such notice has to be clear and specific in language indicating the intention of the pawnee to dispose of the security. Relevant paragraphs of the judgement are extracted below:

> "5. Two contentions were raised by the learned counsel before me. First, that the term in the agreement empowering the Bank to sell the securities for realising the debt due from the respondent being unqualified, it was not necessary to comply with the provisions of Sec. 176 of the Contract Act. Secondly, it was urged that the letter sent by the bank on 5-8-1948 asking the respondent to pay up the money due to the appellant, and the reply of the defendant dated 13-8-1948 asking for time up to the 15th September, 1948 and requesting the postponement of the sale of securities clearly indicated that the respondent had notice of the intended sale of the securities,

pledged with the Bank. Consequently, so it was urged, the sale of the securities by the appellant Bank was legal and the suit for recovery of the balance was maintainable.

6. Sec. 176 of the Contract Act provides that if the pawner makes a default in payment of the debt in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt, or he may sell the thing pledged on giving the pawner reasonable notice of the same. The contention that notice of the contemplated sale to the pawner should be inferred from his letter dated 13-8-1948, cannot hold water inasmuch as the said letter does not disclose that a reasonable notice had been given by the pawnee to the pawner to sell the securities. A notice of the character contemplated by Sec. 176 cannot be implied. Such notice has to be clear and specific in language indicating the intention of the pawnee to dispose of the security. No such intention was disclosed by the Bank in any letter to the respondent.
....

....

8. I am, therefore, clearly of the opinion that the sale of the securities by the appellant Bank without reasonable notice to the respondent was bad and was not binding on him. What is contemplated by Sec. 176 is not merely a notice but a 'reasonable' notice, meaning thereby a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay up the amount within the time mentioned in the notice. No such notice was ever given by the appellant to the respondent. There can thus be no escape from the conclusion that the sale of the securities by the appellant was against law and not binding on the respondent. The conclusion reached by the lower appellate court was, therefore, legally sound."

19. In the case of GTL Limited -v- IFCI Ltd. & Ors. reported in (2011) 182 DLT 696 it was held by the Court that the provisions of Section 176 Contract Act are mandatory and the applicability and sweep of Section 176 unlike several other provisions on the same subject is not eclipsed by the phrase "in the absence of a contract to the contrary". Relevant paragraph of the judgment are extracted below:

"66. From the above observations two things immediately become clear first, that there are exceptions to the general rule that the suit for the redemption of the pledge is maintainable without offering to deposit the money in certain exceptional cases. Secondly, the wordings of the section 176 are not eclipsed by the qualification "In the absence of the contract to the contrary" which means that the notice under section 176 is mandatory and must be given effect to in all circumstances before the power to sale can be exercised."

20. In the case of Co-operative Hindustan Bank Ltd. -v- Surendra Nath Dey reported in AIR 1932 Cal 524 it was held by the Court that a mere intimation that arrangements will be made for a sale is not a notice under Section 176. The Court held that reasonable notice of the sale would require more

definite particulars. Relevant paragraph of the judgment is extracted below:

> "These being the facts, we have to consider, in the first place, whether notice was necessary and, if so, whether the notice, that was issued, was sufficient. Section 176 of the Contract Act, unlike some other sections, e.g., sections 163, 171 and 174, does not contain a saving clause in respect of special contracts contrary to its express terms. The section gives the pawnee the right to sell only as an alternative to the right to have his remedy by suit. Besides, section 177 gives the pawner a right to redeem even after the stipulated time for payment and before the sale. In our opinion, in view of the wording of section 176 as compared with the wordings of the other sections of the Act, to which we have referred, and also, in view of the right which section 177 gives to the pawner, and, in order that the provision of that section may not be made nugatory, the proper interpretation to put on section 176 is to hold that, notwithstanding any contract to the contrary, notice has to be given. We are also of opinion that the notice, that is to be given, should, in the words of the section, be a "reasonable notice of the sale". The notice in the present case satisfies none of the requirements of this expression. It says,--"Failing which (i.e., the payment by the 7th) we shall arrange for sale of the hypothecated stock". This is merely intimation that arrangements will be made for a sale but it is not a notice of the sale that is to be held: such a notice would require more definite particulars. What such particulars should be must depend upon the peculiar facts of each case. And once a proper notice is given, it is not necessary that a fresh notice is to be given if the contemplated sale is adjourned to a future date. "

21. Upon careful perusal of the judgement cited by the parties the following principles emerge:

> a) The provisions of Section 176 of the Act are mandatory. The applicability and sweep of Section 176 unlike several other provisions on the same subject is not eclipsed by the phrase "in the absence of a contract to the contrary." The notice that is to be given to the pledgor of the intended sale by the pledgee is a special protection which statute has given to the pledgor and, parties cannot agree that in the case of any pledge, the pledgee may sale the pledged articles without notice to the pledgor.
>
> b) Right to redeem under Section 177 can be exercised right up to the time the actual sale of the goods pledged takes place. The actual sale referred to in Section 177 must be a sale in conformity with the provisions of Section 176 which gives the pledgee the right to sale; and if the sale is not in conformity with those provisions, then the equity of redemption in the pledgor is not extinguished.
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> c) A notice of the character contemplated by Sec. 176 cannot be implied. Such notice has to be clear and specific in language indicating the intention of the pawnee to dispose of the security.

> d) What is contemplated by Sec. 176 is not merely a notice but a 'reasonable' notice, meaning thereby a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay up the amount within the time mentioned in the notice.
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> e) Section 176 only requires an intimation of the intention to sell and not that, a sale should be arranged beforehand and due notice of all details of the time, date and place of sale be given to the pawnor.

22. Coming to the present facts, it is clear that the defendant issued two notices on BTL one for recalling of the "TL Facility" for a sum of Rs. 38 Crore approx and the other for recalling of the "WC Facility" for a sum of Rs. 28 Crore approx. In both these notices, the defendant called upon BTL to make the outstanding payments within a period of two days from the date of notice. On the same day, that is, July 17, 2021, two notices were also issued upon the petitioner herein with regard to the Notice of Invocation and Sale of the pledged equity shares of BTL. The first notice (Pg. 161 of G.A. No. 2 of 2021) was with reference to the New BTL shares that were covered under the pledge agreement and the promoter undertaking. The relevant clauses in relation to the intended sale are Clauses 3 and 4 of the said notice and are delineated below:

> "3. DBIL hereby notifies you that pursuant to this Notice of Invocation and Sale, in the event that you fail to fulfil your obligation to us in accordance with the terms of the Promoter Undertaking, DBIL shall have the right to enforce the pledge by transferring the New BTL Pledge shares into DBIL's depository participant account and/or selling the New BTL Pledged Shares.
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> 4. In accordance with Section 176 of the Indian Contract Act, 1872, we hereby request you to pay us INR 15,87,50,000 (Rupees Fifteen Crore Eighty Seven Lakhs and Fifty Thousand) in its entirety in the manner specified under Clause 8 of the Promoter Undertaking by 5:00 pm on August 06, 2021, post which DBIL shall have the right of sale as specified in 3 above. Needless to add, all economic risks in relation to the value of the shares and price fluctuations, if any, shall continue to vest with you as the pledgor till such time that DBIL exercises its right of sale and utilises such proceeds towards settlement of outstanding amounts."

In this particular notice it is to be noted that a time frame of 15 days was given to the petitioner/plaintiff to pay a particular sum of money post which the defendant would have the right of sale. In the second notice, the same was with reference to the Old BTL pledged shares which was governed by the Facility Agreement and the Pledge Agreement. The relevant paragraphs in the said notice dated July 17, 2021 (Page 163 of G.A. No. 2 of 2021) therein are paragraph 5 and 6 wherein time was granted till July 20, 2021 (3 days) to make payment of the outstanding amounts in failure of which the respondent bank would have the right of sale. The contents of this notice with reference to Section 176 and right of sale are similar to the first notice.

23. Upon a reading of the relevant clauses in the above notices issued to the petitioner it appears that on failure of the petitioner to make payment of the outstanding dues the defendant would have a right of sale. This right of sale is further specified in the preceding paragraph of the notice which says that the defendant shall have the right to enforce the pledge by transferring the New BTL Pledge Shares into the respondent bank's depository account and/or selling the New BTL Pledged Shares. It is noticeable that in both of the clauses, the respondent bank states that they shall have the right to enforce the pledge. However, I don't find an unequivocal statement stating that the shares shall be sold. In my view, there is a clear distinction between having a right of sale and intention to sell. The very philosophy of Section 176 and 177 is that a protection is given to the pawnor with regard to having an opportunity to redeem the shares upon a proper and reasonable notice being given to him. A positive assertion has to be made that in default sale shall take place. The statement used in the notices is ambiguous, fraught with too many technical words and creates a cloud over what exactly is the intention of the pawnee. A Right of sale is not a Notice for Sale. It has to be kept in mind that Section 176 is not subject to the contract between the parties and is an independent section that has to be applied without being tied down by the contract between the parties. For example, if the contract between the parties states that no notice is required to be given under Section 176 of the Contract Act, such part of the agreement would be void ab initio and the pawnee would be required to give notice under Section 176.

24. Furthermore, the notice is required to be a reasonable notice. Admittedly, the notice of sale need not specify the date, time and place of the sale but the notice must specify unambiguously that the pawnee intends to carry out the sale. By merely stating that the pawnee shall have the right of sale is not enough. In my opinion, Section 176 is mandatory and the required notice must be given to the parties before sale of the pledged security by the pawnee. The requirement cannot be waived at the time of making the contract of pledge, and supersedes any contract to the contrary. In the case of Prabhat Bank (supra), similar findings were made by the Court and it was further observed that an agreement authorising the pawnee to the sell the goods pawned, without notice, is void under the Indian Contract Act, 1872. The above findings are applicable to the case at hand as well. However, it may be noted in the present case, the Pledge Agreement is not contrary to the Indian Contract Act, 1872. In fact, Clause 18 of the pledge agreement provides for adherence to Section 176 of the Act.

25. In the case of Surendranath De (supra) the Division Bench of the Calcutta High Court held that the statement "Failing which (that is, the payment by the 7th) we shall arrange for sale of the hypothecated stock"

> was held to be a mere intimation that arrangements will be made for a sale but not a notice of the same. On a reading of the clauses in the case at hand, I find that the words "shall have the right to enforce the pledge"

is far from a notice of sale. Indicating to the pawnor that the pawnee shall have the right of sale does not amount to a notice of sale of the pledged goods. One may argue that the distinction being drawn between the words "right of sale" and "shares would be sold" is just a play on words and mere semantic in nature. At first blush, one would agree with the above contention. However, it has to be kept in mind that Section 176 has to be read along with Section 177 that provides for a right of

redemption to the pawnor. Such right of redemption would become otiose if a crystal clear and unambiguous reasonable notice of sale is not given to the pawnor.

26. Another argument may be made that since the words "in accordance with Section 176 of the Indian Contract Act, 1872" were used at the start of the clause the intent behind the entire clause is crystal clear that in the event of default sale would take place. In my view, merely referring to Section 176 is not enough - the ingredients and requirements of the Section have to be mandatorily complied and a reasonable notice of the sale should be evident from the words used in the notice. As pointed out above, the words used in the notices dated July 17, 2021 do not communicate a clear intention of sale. The argument that the notices were clearly understood by the petitioner as a notice under Section 176 as the petitioner immediately filed a suit seeking injunction of the notices is also rejected by me for the reason that the actions of the petitioner cannot be faulted on the ground that the petitioner was vigilant of his rights and apprehending an illegal action by the defendant bank, petitioner took steps to prevent the same. Furthermore, it may be pointed out that the conduct of the petitioner in approaching the Court cannot and does not have any impact on the wording of the notices that were sent by the defendant bank. The judgment in Surendranath De (supra) and Haridas Mundra (supra) cited above also support the view being taken by me presently. I, therefore, conclude that the two notices issued were not proper notices under Section 176 of the Indian Contract Act, 1872 as they did not contain the essential ingredients of a notice of sale.

27. As pointed out in the preceding paragraph, the notices issued by the defendant respondent were not sufficient notices under Section 176 and therefore, one need not go into the arena of whether the notice was a reasonable notice, that is, whether reasonable time was given to the pawnor. However, I may note here that one of the notices provides for fifteen days whereas the other one provides for 2 days. Mr. Shah arguing on behalf of the defendant has submitted that the same is due to the reason that the agreements that have to be read along with the pledge agreement provide for a longer period in the case of Promoter Undertaking while that is not the case in the case of the Facility Agreement. As pointed out above, Section 176 is not dependent on the contract between the parties and the reasonableness of the notice has to be construed independently of the specific contract of the parties. It is not the case of the pawnee that the goods that were pledged in this particular case were perishable in nature, and accordingly, required to be sold by giving a very short period of notice. In fact, in the present case, the pledge goods are shares and the rationale for giving a longer period of time in one notice in contradistinction to giving a shorter period in another notice for shares of the same company that are pledged with the defendant does not stand to reason and is accordingly rejected by me. In my view, having given notice for 15 days (which is a reasonable period) in one notice, the defendant should have also given a period of 15 days in the other notice. In conclusion, notice under Section 176 was not proper and valid and neither was the time provided therein reasonable.

28. Having answered the above questions, I am inclined to grant permanent injunction on the two notices dated July 17, 2021 in relation to the portion dealing with the sale of the pledged shares. I hasten to add over here that the defendant shall be at liberty to issue fresh notices complying with the provisions of Section 176 and proceed in accordance with law.

29. I make it clear that the present injunction is specifically with reference to the two notices dated July 17, 2021 and actions emanating from the two notices for sale of the pledged goods.

30. Hence, I.A. G.A. No. 1 of 2021 in C.S. No 138 of 2021 is allowed and I.A. G.A. No. 2 of 2021 in C.S. No 138 of 2021 is dismissed.

31. With the above directions I.A. G.A. No. 1 of 2021 and I.A. G.A. No. 2 of 2021 in C.S. No 138 of 2021 are disposed of.

32. I would go amiss if I do not state my sincere appreciation for the dexterous and assiduous efforts of Counsel appearing on behalf of both sides.

33. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)