Grison Knitting Works vs Laxmi Commercial Bank Ltd. And Ors. on 28 April, 1959

Equivalent citations: AIR1960P&H98, AIR 1960 PUNJAB 98, ILR (1959) PUNJ 1990

JUDGMENT

Mehar Singh, J.

(1) This judgment will dispose of two cross-appeals No. 291 of 1951 by the defendants and No. 38 of 1952 by the plaintiff Bank from the judgment and decree dated 29-11-1951, of the Subordinate Judge, 1st Class of Ludhiana.

(2) The plaintiff Bank brought a suit to recover an amount of Rs. 29,785-4-3 from the seven defendants, of whom the first is firm Girson Knitting Works, Ludhiana, 2nd, 3rd, 4th and 5th, namely, Mangat Ram, Babu Ram, Jai Pal and Raj Pal, are sons of the 6th defendant. Labhu Ram, and the 7th defendant Poni Devi is the wife of defendant No. 6 and mother of defendants Nos. 2 to 5. The circumstances out of which the claim of the plaintiff the Laxmi Commercial Bank Ltd., has arisen are these.

(3) The plaintiff Bank has a branch at Ludhiana. Defendant No. 1 is a firm which carries on hosiery and cloth manufacture business at Ludhiana. The plaintiff has alleged that defendants Nos. 2 to 6 are the partners of defendant No. 1. On 18-1-1946, the firm defendant No. 1 of defendants No. 2 to 6 made an application to the plaintiff Bank for a cash credit account to the tune of rupees one lac. The application was allowed to the extent of Rs. 50,000/-, but, on a subsequent approach by the partners of the defendant firm, on 1-11-1946, the cash credit limit of the loan was enhanced to rupees on lac.

On 18-1-1946, defendants Nos. 2 to 5 gave the promissory note Exhibit P. 2 for the amount of rupees one lac to the plaintiff Bank on behalf of defendant No. 1 as security for the cash credit account. It was accompanied by the letter, of even date, Exhibit P. 5 also signed by the same defendants. On the same date as security for the same loan a pledge of goods lying in the godown of the Imperial bank at Tuticorin port in Madras Presidency along with other property, was given, signed by defendants Nos. 2 to 5, to the plaintiff Bank. The plaintiff Bank averred in para No. 4 of the plaint that the value of the pledged goods was stated to be Rs. 60,000/-. On 17-6-1947, defendant No. 7 deposited, with the plaintiff Bank, title deeds of the land, of which description is given in para No. 5 of the plaint, as an additional security for repayment of the debt due to the plaintiff Bank from defendant No. 1 and its partners.

On the same date under letter Exhibit P. 8 the defendant firm pledged with the plaintiff five thousand shares of the value of Rs. 25,000/- in Girson Cloth Mills authorising the plaintiff Bank, in the even of non-payment of the debt, to recoup the loan by the sale of the shares. In the agreement Exhibit P. 3 of 18-1-1946, it was further agreed by the defendants with the plaintiff Bank that the latter would have power to sell the pledged goods without giving any notice of sale to the defendants.

(4) In para No. 7 of the plaint the plaintiff Bank says that demand letters were addressed to the defendants on April 23, June 2 and July 10, 1947, but the defendants did not clear the cash credit account and the amount of loan outstanding against their name in cash credit account. In the written statement by defendants Nos. 1 to 4 in reply to para No. 7 of the plaint there is no specific denial of those demands by these four defendants and in the written statement of defendants Nos. 5, to 7 all that is stated is that the allegations set forth in para No. 7 of the plaint were not known. It is clear that the defendants have not denied that the plaintiff Bank made demands for payment of the outstanding loan from the defendants.

On the record there is one of these demand letters of 2-6-1947, which is Exhibit C-91. Defendants Nos. 1 to 6 having failed to repay the loan in consequence of demands made by the plaintiff Bank, the latter was then obliged to give formal notice Exhibit P. C. 1 on 18-11-1947, after referring to two items, one of Rs. 45,174/8/3 secured against the stocks lying at Tuticorin port and the other of Rs. 16,206/3/3 for which a security had been given for payment, that being a debt of Messrs. Jai Pal-Raj Pal, of its intention to sell the pledged goods lying at Tuticorin. The notice is in these terms.

> "We regret to note, that in spite of our repeated demands you have paid no attention for the disposal of stock lying at Tuticorin (Madras), nor you have cared to adjust the above accounts by cash payment. Under the circumstances, we hereby finally request you to adjust these accounts by payment before 25th instant, otherwise we shall send our representative to Tuticorin at your expense, for the sale of stock at the available market price either at Tuticorin or any other place, and shall file suit against you for the balance if the proceeds of stock do not cover the loan due by you in both the accounts."

The notice is signed by the Secretary of the plaintiff Bank. To this notice defendant No. 1 replied by a letter Exhibit P. 19 of 22-11-1947, pointing out the unfasten and difficulties of travelling to Tuticorin and saying that "if goods are not sold up to the end of this year, we will proceed to Tutricorin to dispose of the goods in January, 1948. So you are requested to wait up till the end of the year". But no payment was made to the plaintiff Bank y the defendants in consequence of the notice.

The defendants not having cleared the account, the plaintiff Bank proceeded to dispose of the goods and sold them on 12-61948, for Rs. 17,750/- through auctioneers, Murray and Company of Madras. After giving credit for that amount to the defendants, the plaintiff Bank sued the defendant firm and its partners and also defendant No. 7 to recover the amount of the suit, as stated, with interest, found due to it from the first six defendants personally as also by the sale of the shares pledged by them and by enforcement of the equitable mortgage effect by defendant No.7 in its favour.

(5) One written statement has been filed by defendants Nos. 1 to 4 and another written statement has been filed by defendants Nos. 5 to 7. The reason for the two written statements is that none of the defendants admit that defendants Nos. 5 and 6 are partners of defendant No. 1. Their position is that defendants Nos. 5 to 7 have no concern with defendant No. 1 and are not liable for the claim of the plaintiff Bank. The position taken on behalf of defendant No. 7 is that she is not liable to the plaintiff Bank because she has created no equitable mortgage of her property in favour of the plaintiff Bank nor was such a mortgage a legal mortgage.

In so far as defendants Nos. 1 to 4 are concerned they admit the execution of the promissory note as also the various agreements with the plaintiff Bank where under they opened the cash credit account in the name of defendant No. 1 with it. They deny that any other property or goods have been pledged with the plaintiff Bank except the goods that were lying at Tuticorin. They say that they never gave in writing to the plaintiff Bank to recover the debt by the sale of those goods without any notice. The sale is questioned on the ground of want of notice for some reasonable period. They deny knowledge of the equitable mortgage made by their mother defendant No. 7.

It is admitted by them that defendant No. 3 did pledge the shares to the plaintiff Bank but curiously enough it is stated that the other proprietors of the firm have not participated in the pledge. The notice Exhibit P. C. 1, was according to them, received on 21-11-1947, and it is said that it is invalid and against law and reasonable time was not given to the defendants in respect of selling the pledged goods by auction. It is further explained that in view of the communal disturbances in the months of November and December, 1947, travel to Tuticorin was difficult and unsafe and thus notice given by the plaintiff Bank was verity short and unreasonable. The position taken specifically in para No. 8 of the written statement is that the plaintiff Bank taking undue advantage of such a critical time at the instigation of and in collusion with some enemies of defendant No. 1 gave a short period notice to the defendants with a view to misappropriate the pledged goods of defendant No. 1 of the value of Rs. 90,853/12/- or to sell the same at a very low price.

With regard to the sale the position taken by them is that they do not admit that the goods were in reality sold by auction and the alleged sale is claimed by them to be absolutely fictitious. In the end they say that not only is the plaintiff Bank not entitled to the amount claimed but that in fact the plaintiff Bank is liable to them to pay the value of the goods as stated and on that account they said that they were going to file a separate suit making a claim against the plaintiff Bank.

(6) Statements of Babu Ram defendant No. 3, Labhu Ram defendant No. 6, and Poni Devi defendant No. 7 were taken before the settlement of the issues and then the following issues were settled in the suit by the learned trial Judge:

1. Are defendants Nos. 5, 6 partners of firm defendant No. 1?

2. If issue No. 1 is not proved, is not defendant No. 5 liable for the debt in suit?

3. If issue No. 1 be not proved, did defendant No. 6 undertake the liability by executing any document in favour of the plaintiff?

4. Did defendant No. 7 effect any mortgage in favour of the plaintiff? If so, what are the terms thereof?

5. Is the hypothec regarding shares ineffective against defendants Nos. 1, 2 and 4 and what is its effect?

6. Was any notice to the defendants before disposal of goods necessary in face of the agreement P. 3?

7. If0 issue No. 6 be proved did the plaintiff serve a proper and reasonable notice before disposing of the goods?

8. If issue No. 7 be not proved then what deduction are the defendants entitled to on account of the price of those goods?

8A. Have the pledged goods been sold and for what price?

8B. Is the plaintiff Bank not competent to sue without the previous permission of the High Court?

9. are the defendants liable to pay interest at 5 per cent per annum?

10. Are the defendants entitled to any credit on account of Insurance commission? If so how much?

11. Whether the plaint has been properly signed, verified and presented by Shri Bhagwan Dass?

12. Relief.

At the time of the arguments before the learned trial Judge the learned counsel for the defendants addressed no arguments on issues Nos. 1 to 5, 8B and 9 to 11. But the learned counsel was not prepared to take the stand that it should be taken as conceded on behalf of the defendants that the subject-matter of those issues was accepted by them as a finding against them. He left the learned trial Judge to give his own finding on those issues. He only confined his arguments to issues Nos. 6, 7, 8 and 8A. the learned trial Judge found on issues Nos. 1 to 3 that defendants Nos. 5 and 6 are partners of defendants Nos. 1 and that they are liable for the debt of the plaintiff Bank.

In regard to issue No. 4 his finding is that defendant No. 7 did create an equitable mortgage of her land in favour of the plaintiff Bank as a security for the debt owing from defendants Nos. 1 to 6 to the plaintiff Bank. On issue No. 5 the finding is that the shares were pledged for and on behalf of defendant No. 1 and its partners and the pledge is binding on the partnership, and all partners of the partnership. As no provision of law was shown how the plaintiff Bank was required to obtain previous permission of the High Court to bring the suit so issue No. 8B was found against the defendants. On issue No. 9 the finding is that the defendants are liable to pay interest at the rate of 6 per cent per annum except for the period for which the plaintiff Bank itself charged them a lower rate of 5 per cent per annum.

The defendants failed to show how they were entitled to any insurance commission and that the plaint was not properly signed and verified and presented by a properly authorised person. So issues Nos. 10 and 11 was found against the defendants. These findings of the learned trial Judge have not been questioned in these appeals. No reference has been made to the subject-matter of any of these issues at the time of the arguments. The learned counsel on both sides have confined themselves to issues Nos. 6 to 8 and 8A.

(7) On issue No. 6 the finding of the learned trial Judge is that in the fact of the provision in Section 176 of the Indian Contract Act, a contract to the contrary dispensing with notice before sale is not good and in spite of such contract notice is necessary under that Section. In regard to issue No. 7 the learned trial Judge has come to the conclusion that the notice Exhibit P. C. 1 is not a valid notice under the said Section. On issue No. 8A the finding is that in fact there has been no proper sale binding on the defendants and on issue No. 8 the learned trial Judge has concluded that the value of the pledged goods in the beginning was a little over Rs. 90,000/- but the defendants themselves later assessed the value at Rs. 60,000/- (in fact Rs. 65,000/-).

In view of all these findings the learned trial Judge has granted a preliminary decree for accounts between the parties so that the value of the pledged goods of the defendants that the plaintiff Bank says it has sold be determined and then account taken between them to see whether anything is due to the plaintiff Bank from the defendants. The decree of the learned trial Judge is dated 29-11-1951.

(8) In this appeal the plaintiff Bank claims a decree for the amount claimed by it against the defendants and in the terms of its prayers in the plaint. In their appeal the defendants claim the dismissal of the suit of the plaintiff Bank. As already stated, in these appeals controversy between the parties on both side has been confined to issues Nos. 6 to 8 and 8A. In fact the subject-matter of issue No. 6 is not a matter of dispute because it is conceded on both side that the parties could not contract out of the provisions of Section 176 of the Indian Contract Act and the plaintiff Bank could not sell the pledged goods without notice according to that section.

So that the controversy between the parties concerns only issues Nos. 7, 8 and 8A. It has two broad aspects. One is that the notice of sale in this case was not valid according to Section 176 of the Indian Contract Act or in any case the circumstances are such that fresh notice under that Section was necessary. The second aspect is that with regard to the sale of the pledged goods. The defendants claim that in substance there was no sale although there has been a show of a fictitious sale.

(8a) The terms of the notice Exhibit P. C. I have already been reproduced above. To that notice four objections have been taken here, as before the learned trial Judge, and those four objections are, (a) that it refers to the demand of two debts against one of which the goods were not pledged and so it was not a proper notice for the sale of goods on failure of the demand for payment of the loan against which the goods were pledged, (b) that it was not a notice of an actual sale but only informed the defendants of arrangements that were going to be made by the plaintiff Bank for the sale of the goods, (c) that it was a short notice and sufficient time was not given to the defendants to pay up the amount due from them and so on this account it was unreasonable, and (d) that it must be taken to have been withdrawn because (i) when the defendants made a proposal for delay in the disposal of

the goods, the plaintiff Bank did not reply for a long time, (ii) the goods were in fact not sold until some 7 months after the date of the notice, and (iii) the parties agreed to sell the pledged goods jointly. Of these four objections the other three prevailed with the learned trial Judge except objection (b) as above.

(9) It is true that the notice Exhibit P. C. 1 refers to two debts and makes a demand for the payment of both and says that if the same are not paid the plaintiff Bank would sell the pledged goods. The first amount mentioned in this notice is the amount that has been secured against the goods lying at Tuticorin and the second amount is a debt of Messrs. Jai Pal-Raj Pal (defendants Nos. 4 and 5), an independent firm of those defendants, for which defendant, No. 1 had stood surety. In this case no period for payment of the loan was fixed.

Under Section 176 of the Indian Contract Act the plaintiff Bank had right either to have the pledged goods sold through Court or it could sell the same after notice of sale according to that section. It chose to pursue the second alternative. The section refers to the payment of the debt and the right of the pawnee to sell the goods after reasonable notice of sale. What the learned counsel for the defendants contends is that if the notice contains anything more than that has reference to the provisions of the Section 176 of the Indian Contract Act, then the form of the notice must be taken as defective and notice as not valid according to the section.

In this particular case the learned counsel says that threat of sale was held out against the defendants not only to force payment of the amount against which the goods were pledged, but also of another amount against which the goods were in fact not pledged. One thing is quite clear from the notice and that is that the amount against which the goods were pledged has been clearly stated and it is further stated that if that amount is not paid then the plaintiff Bank was selling the goods by the date stated in the notice. This is in accordance with the provisions of Section 176 of the Indian Contract Act.

To my mind the fact that a second item of debt due from another firm, through of that firm two of the defendants were partners and though that debt has been secured by defendant No. 1, has also been referred in the notice and its payment demanded that does not render the notice vague in so far as it makes a demand for payment of the amount for which the goods were pledged and in default informed the defendants that the plaintiff Bank was selling the goods. The two parts of the notice are clear enough and can be seen quite separately and independently. In these circumstances the additional matter in the notice does not render it a notice illegal because of its not being confined only to the rights of the plaintiff Bank according to Section 176 of the Indian Contract Act.

It is a clear notice under that section of the demand made for the amount against the pledged goods. The additional matter stated in it does not render it invalid. No case has been cited taking a view inconsistent to this view but reference has been made to cooverji Umersey v. Mawji Vaghji AIR 1937 Bom. 26, in which B. J. Wadia J. held a notice under Section 176 to be an improper notice because it did not refer to the debt for which the goods had been pledged and for which those goods wee to be sold. But here in the notice there is reference to the debt for which the pledged goods were to be sold by the plaintiff Bank. Reference to the additional amount of another debt, as stated, does not render

the notice improper and invalid. This objection on behalf of the defendants cannot be accepted.

(10) It has then been said that there was no notice of actual sale but only intimation of an arrangement to sell. In this respect reliance is placed on Co-operative Hindusthan Bank Ltd., v. Surendra Nath Dey, AIR 1932 Cal. 524, but in that case the words used were "failing which (i.e., the payment by the 7th) we shall arrange for sale of the hypothecated stock." In the present case the words used are "we shall send our representative to Tuticorin at your expense, for the sale of stock at the available market price either at Tuticorin or any other place."

It is clear that the language of the notice in that case has nothing parallel with the language used in the present case. Here the plaintiff Bank did not say that it was going to make arrangement for the sale of goods. It said definitely and categorically that in case of default it was going to send its representative to Tuticorin to sell this stock at market price. This was a clear statement that in default the goods were going to be made with regard to their sale. In Hulas Kunwar v. Allahabad Bank Ltd., AIR 1958 Call 644, the words used in the notice were.

> "It (Bank) would arrange to effect sale of the securities as and when opportunity offers."

It was contended with reference to AIR 1932 Cal 524, that the words meant only an intimation of an arrangement to sell and not a notice to sell, but the learned Judges refused to accept such reading of the form of the notice, and this was in spite of which had been stated in the earlier case in the same High Court. The words used in the notice in the present case are even more clear than the words used in the notice in AIR 1958 Cal 644. So that this approach to the notice in this case on behalf of the defendants is untenable and cannot be accepted. In this connection another aspect of the case that has been argued is that the notice is bad under Section 176 of the Indian Contract Act because it does not give any intimation of the date, time and place of the intended sale, and thus it is not a notice of sale under that Section. In Kunj Behari Lal v. Bhargava Commercial Bank, ILR 40 All 522: (AIR 1918 All 363 (2)) such an argument was advanced before the learned Judges but was repelled and the learned Judges held that the words-

> "He may sell the things pledged, on giving the pawnor reasonable notice of the sale"

mean an intention to sell, and they do not necessarily mean that a sale should be arranged before-hand and that due notice of all the details should be given to the pawnor. Even since that decision no subsequent decision has taken a contrary view. The learned counsel for the defendants had to concede that there is not reported case which has taken a view in support of what has been contended by him. Every time the argument has been raised it has been rejected by the learned Judges. In that case the learned Judges with reference to Section 107 of the Indian Contract Act, which has now been repealed and forms part of the Indian Sale of Goods Act, observed that the right of the pawnee to sell is analogous to the seller's right of re-selling granted under S. 107 of the Indian Contract Act, and they thought that the two rights must be exercised in more or less the same method. The learned counsel for the defendants says that this approach of the learned Judges, on comparison of the language of Section 176 and the previous Section 107 of the Indian Contract Act,

is not correct, and in fact when the two Sections are considered together, they support rather his argument. It has already been pointed out that the words used in Section 176 are-

> "he may sell the thing pledged, on giving the pawnor reasonable notice of the sale."

In the former Section 107 the words used were-

> "the seller..... may, after giving notice to the buyer of his intention to do so, re-sell them,.." This Section clearly referred to a notice by the seller of this intention to sell and then his power of resale. On the other hand Section 176 merely refers to "notice of the sale"; it dew not refer to notice of intention to sell and sale thereafter. On comparison of the language of the two Sections I am considerably inclined to agree with the learned counsel for the defendants that the wording of Section 107 rather goes to support the interpretation tat he puts on the wording in Section 176. But this was not the only reason upon which the decision of the learned Judges was based.
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> The learned counsel for the defendants then says that the sue of the article "the" in the expression 'reasonable notice of the sale' indicates that the notice must be of the sale that will be actually held, which of course means notice must be of the actual date, time and place of the intended sale. This is the very argument that was advanced in AIR 1958 Cal 644 and rejected by the learned Judges as is clear from page 649 of the report. Even in regard to this contention of the learned counsel fi the matter was only confined to consideration of Section 176, I would have been prepared to give serious consideration to it.
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> 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 sale of them, it becomes clear that the words used in Section 176 are "the sale", and those used in S. 177 are "the actual sale", and this makes it clear that while Section 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 Section 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 practical impossibility to give a notice of an actual sale of its date, time and place in the case of a notice under Section 176 for the simple reason that in certain cases that may definitely lead to a loss not 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 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.

> (11) It is then contended in the third place that the notice was of a short duration. The notice was given on 18-11-1947, and it demanded payment before 25-11-1947. It was, from its date, a notice of 7 days for payment. In para No. 7 of the written statement of defendants Nos. 1 to 4 it is stated that it was received by them on 21-11-1947. The Branch of the plaintiff Bank at Ludhiana gave the notice, and the Head Office of defendant No. 1 is also at Ludhiana. It is quite unreasonable to accept that it took 4 days for delivery of the notice, through post, in the same town. The learned trial Judge remarks that "presumably it must have been delivered to the defendants on or about 19th or 20th of November, 1947". It is clear that the defendants are deliberately making effort to show that they had not enough time to meet the demand made for payment in the notice.

The notice gave them clear if not seven, about 6 days for payment. This has to be seen in the light of the previous letters of the plaintiff Bank to the defendants making similar demands on the defendants on April 23, and June 2 and 10, 1947. The defendants must necessarily have known that the plaintiff Bank was pressing for clearance of their cash credit account with it. In the circumstances the time given in the notice for payment is unreasonable neither in itself nor because of the knowledge of the defendants that the plaintiff Bank was pressing for payment. At no stage have the defendants ever attempted to make the payment and clear off that account.

Their conduct shows that they had absolutely no intention of making the payment. Not only did they ask for the postponement of the sale in their letter Exhibit P. 19 of November 22, 1947 but they proceeded to file a suit against the plaintiff Bank to obtain injunction against it prohibiting it from selling the pledged goods. The sale did not actually take place till 12-6-1948. The defendants never made any effort to redeem the pledged goods before the actual sale. It will be shown hereafter that they were straining every effort to prevent the sale.

In ILR 40 All 522 at p. 525: (AIR 1918 All 363 (2) at p. 364) the learned Judges have stated that "It is quite clear that all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed." Similarly Tek Chand J. in Alliance Bank of Simla v. Ghamandi Lal Jain Lal, ILR 8 Lah 373, at P. 379: (AIR 1927 Lah 408 at p. 410) points out that the object of the notice by the pawnee to enforce his right of sale is "a notice of sale giving reasonable time to the defendants to pay." In view of the past demands of the plaintiff Bank, and even ignoring that aspect of the case, taking the time for payment as given in the notice itself, there was sufficient time for the defendants to redeem the pledge.

In their reply in Exhibit P. 19 they were not interested in redeeming the pledge but all that they were interested in was the deferring of the sale. It is, therefore, not correct that the time given in the notice for redemption of the pledge, in the circumstances of the case, was not a reasonable time. In that letter the defendants did not even say that the time given for redemption was unreasonable because of its shortness. The parties were at Ludhiana and for redemption of the pledge the payment was to be made at Ludhiana. The learned trial Judge seems to have been impressed by the fact that the pledged goods were lying at Tuticorin, but that is not a relevant circumstance in

considering the sufficiency of the time for the defendants to redeem the pledge. This objection also fails.

(12) The last objection to the notice is that, in the circumstances of the case, it must 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 plaintiff's did not reply immediately to the letter Exhibit P. 19 of the defendants seeking delay of the sale; this in itself is not evidence that the plaintiff Bank had withdrawn the notice to sell or gave up its right to sell.

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 Section 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.

So that no inference from this factor is available as urged on behalf of the defendants that the notice should be taken to have been withdrawn. Somewhat similar view has been taken in the Bharat Bank Ltd., v. Bodh Raj (1956) 58 Pun LR 494: (AIR 1956 Punj 155). In their letter Exhibit P. 19 of 22-11-1947, the defendants, after requesting the plaintiff Bank not to sell the pledged goods till the end of 1947 and saying that they will thereafter proceed to dispose of the goods in January, 1948, they said that the plaintiff Bank could send its representative with them then for the sale. But they also said that they objected to the plaintiff Bank's representative alone going to Tuticorin to dispose of the pledged goods. In the letter Exhibit C. 157, dated 14-4-1948, the plaintiff Bank informed defendant No. 1 that the defendant's representative should accompany its representative to Tuticorin for the sale of the pledged goods.

This letter refers to a promise given by the defendants to the Secretary of the plaintiff Bank at Delhi that their representative would go to Tuticorin with the plaintiff Bank's representative to sell the pledged goods. Letter Exhibit C. 158 of 16-4-1948, is from the Delhi office of the plaintiff Bank to defendant No. 3 as proprietor of defendant No. 1 in which the plaintiff Bank has informed the defendants to the same effect as in the previous letter saying that the defendants' representative should go to Tuticorin to sell the pledged goods and with the consent of their Manager Sardar Santokh Singh.

It will be shown later when dealing with the subject of the sale in this case that Babu Ram defendant No. 3 had left for Tuticorin without informing the plaintiff Bank and without taking its representative with him and from there he sent a telegram to the plaintiff Bank saying that he had sold the goods and asking the plaintiff Bank to send its representative by the first train. To that the plaintiff Bank gave reply in letter Exhibit C. 160 of 19-4-1948, expressing its surprise that Babu Ram defendant No. 3 had left for Tuticorin without informing the plaintiff Bank or without taking its representative Sardar Santokh Singh with him.

It is upon these letters that reliance is placed on behalf of the defendants that the plaintiff Bank agreed to sell the pledged goods, lying at Tuticorin port, jointly with the defendants, and as it sold the goods, without the defendants, the sale is not according to law because there was a subsequent agreement between the parties to sell the pledged goods jointly. If ever there was an argument that was stretched to a limit on a complete mispresentation of the contents of any document, it is this argument on behalf of the defendants. The defendants had themselves requested the plaintiff Bank to defer the sale and for their own benefit. The right had accrued to the plaintiff Bank to sell.

It had given proper notice of its intention to sell to the defendants. It was not bound to sell according to the wishes of the defendants. All the same it provided an opportunity as a matter of accommodation and facility to the defendants to be present at the time of the sale. It will be shown that in spite of this the defendants had no mind to be present for they had no mind to co-operate with the plaintiff Bank in the mater of the sale of the pledged goods. Their whole object which is clear from their conduct is that they intended to place the plaintiff Bank in such circumstances so as to be able to fight out the suit for recovery of the debt as they have actually done now.

So that, in my opinion, this accommodation and facility which the plaintiff Bank though it proper to give to the defendants so that in their presence the pledged goods may be sold is not being turned upon the plaintiff Bank and put froth as a fresh agreement to sell the pledged goods jointly. In their letter Exhibit P. 19, giving reply to the notice as has already been pointed out, all that the defendants asked for was the deferring of the sale. They never proposed that the sale should be jointly made.

The conduct of the defendants is a negation of this argument of their behalf. Babu Ram defendant No. 3 went alone to Tuticorin, without informing the plaintiff Bank or taking its representative with him. From there he sent the telegram Exhibit P. 20 saying that he had sold the goods. Defendant No. 1 confirmed this from Ludhiana as is clear from the letter Exhibit P. 21 of 19-4-1948. It is not explained that if there was a fresh agreement to sell jointly why the defendants proceeds to take steps to send defendant No. 3 alone to Tuticorin and there to attempt to sell the pledged goods. The conduct of the defendants provides a complete answer to this argument. Thus this contention on behalf of the defendants is discarded.

(13) The notice Exhibit P. C. 1 was from every consideration a valid and a proper notice under Section 176 of the Indian Contract Act. But the learned counsel for the plaintiff Bank has contended that in this case in fact defendants Nos. 1 to 6 did not object to the sale but rather agreed and consented to it and all that they asked, in their letter Exhibit P. 19 of 22-11-1947, was that the plaintiff Bank should wait for the sale till the end of the year 1947. This is apparent from that letter. In the letters of the plaintiff Bank Exhibits C. 157 and 158 respectively of April 14 and 16, 1948, there is reference on behalf of the plaintiff Bank to the promise made by the defendants to send their representative to Tuticorin at the time of the sale of the pledged goods.

The defendants having only asked for the deferring of the sale till the end of 1947 took no exception to the sale and in fact agreed to the sale but, as is clear from the contents of the letter Exhibit P. 19, they wanted that the sale should not take place immediately. It has been held in Madholal Sindhu v. Official Assignee of Bombay, AIR 1950 FC 21, that where a pledgee, before the sale of the pledged

property, had consulted the pledgor who was agreeable to the transfer of the shares by the pledge, the question of notice under Section 176 of the Indian Contract Act does not arise, as the pledgor's consent to the proposed transfer is already obtained. On this consideration also the argument pressed on behalf of the defendants against the validity of the notice Exhibit P. C. 1 must be rejected.

(His Lordship considered other objections raised on behalf of the appellant and dealing with them after consideration of the evidence his Lordship proceeded:) (14-30) The result is that the notice Exhibit P. C. 1 was a valid and a proper notice according to Section 176 of the Indian Contract Act and the sale of the pledged goods by the plaintiff Bank by auction was a proper and a genuine sale in the circumstances of the case. The discussion on these aspects of the case has been confined to issues Nos. 7, 8 and 8-A. In view of the conclusions that the learned trial Judge reached he ordered account between the parties. The conclusions of the learned trial Judge have been found to be erroneous and so the decree cannot be maintained.

The appeal of the defendants thus fails and is dismissed with costs, but the appeal of the plaintiff Bank succeeds and, reversing the decree of the trial Court, it is granted a decree with costs for Rs. 29,785/4/3 with interest at the rate of 6 per cent per annum from the date of the institution of the suit to the date of this decree against defendants Nos. 1 to 6 and a preliminary decree is granted to the plaintiff Bank against defendants Nos. 1 to 6 that the amount of the decree is recoverable under the pledge of the shares by defendants Nos. 1 to 6 and also from the mortgage of the land by defendant No. 7 with plaintiff Bank.

The defendants are given six months from the date of this decree to pay the amount and if they do so then procedure referred to in Order 34, Rule 4 of the Code of Civil Procedure will apply with regard to the discharge of the pledge and the mortgage but if they do not pay the amount within the time stated, the plaintiff Bank will then proceed to apply for a final decree for the sale of the pledged shares of defendants Nos. 1 to 6 and mortgaged property of defendant No. 7, and the preliminary decree in this behalf is according to the terms of Rule 4 Order 34.

If after the sale of the pledged shares and the mortgaged land, there still is left outstanding any decretal amount then it is stated as a matter of precaution that defendants Nos. 1 to 6 shall be personally liable for that amount. This is stated as a matter of precaution only because it is clear from what is stated above that a money decree is first passed against defendants Nos. 1 to 6 and then it is followed by preliminary decree for the sale of the pledged shares and the mortgaged land. However, this has been stated to avoid any misunderstanding about the nature of the decree.

Tek Chand, J.

(31) I have read the judgment written by my brother Mehar Singh J. and I concur in his conclusion that the appeal of the defendant should be dismissed with costs, and that the appeal of the plaintiff Bank should succeed and a decree with costs should be passed in favour of the plaintiff Bank for Rs. 29,787/4/3 with interest at the rate of six per cent per annum from the date of the institution of the suit to the date of this decree against defendants Nos. 1 to 6, and also that a preliminary decree be granted to the plaintiff Bank against defendants Nos. 1 to 6 that the amount of the decree is

recoverable under the pledge of the shares by defendants Nos. 1 to 6 and also from the mortgage of the land by defendant nos. 7 with plaintiff Bank.

But I regret that I cannot persuade myself to agree with my learned brother on issue No. 7, as in my opinion the notice, Exhibit P. C. 1, served by the plaintiff Bank was not in accordance with the provisions of section 176 of the Indian Contract Act. But the invalidity of the notice does not in any way affect the decision of this case as the defendants did not at any state, raise any objection to the sale being vitiated on the ground that the notice was defective either for the reason that it was vague, or not reasonable because no date, time or place of the sale was mentioned, or that it was too short. The defendants had merely asked for the deferring of the sale till the end of 1947, which request of theirs was conceded by the Bank and the sale actually took place on 12th of June, 1948, about seven months after service of notice, Exhibit P. C. 1. In AIR 1950 F. C. 21, Mahajan J. at page 38 said-

> "It was contended that if the bank held these shares as pledgee no notice of the sale was given to Nissim under S. 176 and therefore sale was void abinition. This contention overlooks the fact that the pledgee before disposal of the shares had consulted the pledgor who was agreeable to the transfer of these shares by the bank. His consent having been obtained for the disposal of the shares, the question of notice under S. 176 does not arise. Moreover, he was subsequently informed about it and throughout he ratified the transaction about it and throughout he ratified the transaction and acquiesced in it. As already pointed out, not only did he acquiesce in the transaction, but the Official Assignee after full investigation also acquiesced in it."

(32) The notice, Exhibit P. C. 1, dated 18th of November, 1947, is in the following words:--

> "We regret to note, that in spite of our repeated demands you have paid no attention for the disposal of stock lying at Tuticorin (Madras), nor you have cared to adjust the above accounts by cash payment. Under the circumstances, we hereby finally request you to adjust these accounts by payment before 25th instant, otherwise we shall send our representatives to Tuticorin at your expense, for the sale of stock at the available market price either at Tuticorin or any other place, and shall file suit against you for the balance if the proceeds of stock do not cover the loan due by you in both the accounts."

(33) In reply, Exhibit P. 19, dated 22nd of November, 1947, the Girson Knitting Works desired the Bank to defer the sale on several grounds. In their last paragraph, they said-

> " * * * If goods are not sold up to the end of these year, we will proceed to Tuticorin to dispose of the goods in January, 1948. So you are requested to wait up till the end of the year. You may send one of your representatives with us. We shall do our level best to dispose of the goods at as high a price as possible. We certainly object to some of your representatives alone going to Tuticorin to dispose of our goods and we are not prepared to pay the expenses for this purpose. We hope the above proposal will be approved by you."

(34) Mr. Faqir Chand Mital, learned counsel for the defendant appellant, raised several objections to the validity of the notice which have been noticed by my learned brother. The only objection, which, according to me, merits scrutiny, is that the notice, Exhibit P. C. 1, was not a "reasonable notice of the sale" under section 176 of the Indian Contract Act in so far as the time and place of the sale were not mentioned. The notice has stated that in case payment was not made before 25th of November, 1947, the Bank would send its representatives to Tuticorin for the sale of stock either at Tuticorin or any other place. This notice obviously did not disclose the date, the time or the place at which the sale of the pledged goods would be effected.

(35) The authorities which have been cited at the Bar and which have been examined by my learned brother, no doubt support the contention of the Bank and Mr. Faqir Chand Mital was not able to cite any decision of any High Court in India to the contrary laying down, that a notice under section 176 of the Contract Act, must refer to time and place of the sale. The leading authority in support of the proposition contended for by the Bank is a decision of the Allahabad High Court in ILR 40 All. 522: (AIR 1918 All 363 (2)). The learned Judges who formed the Division Bench, observed:

> "In our opinion section 176 does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The words are:--
>
> 'He may sell the thing pledged on giving the pawnor reasonable notice of the sale.' This, in our opinion, means in intention to sell, and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. For instance it would be open to the pawnee to put up the property to auction sale and to sell it to the highest bidder. It would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser.
>
> It is quite clear that all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act, and we take it that the two rights must be exercised in more or less the same method. The seller's right to re-sell under section 107 may be exercised after giving notice to the buyer of the intention to re-sell after the lapse of a time. The language of the two sections is slightly different, but their meaning is practically the same."

(36) I am constrained to think that while making the above observations due weight was not given to the arguments urged at the Bar on behalf of the pawnor. The force of the contention that the notice should contain information f the actual date, time and place of the sale, is not whittled down by saying that notice of all the details cannot be given to the pawnor, and that it would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser. the pawnor did not ask for such an information nor did he insist on being given all the details other than the actual date, time and place of the sale.

In that case, as appears from the report, it was contended for the pawnor, that under section 177, the pawnor had a right of redemption up to the moment of the actual sale of the goods pledged, and the provision would become nugatory if it were open to the pawnee to sell the goods whenever he liked, provided he had given a reasonable notice of his intention to sell. It was also maintained that the power of private sale was such as was liable to be gravely abused to the serious injury of the pledgor. It was also contended, that the language of the section suggested that notice was to be of "the sale" and not of "the intention to sell".

It was then submitted that if the legislature had intended otherwise, it could have adopted the language of section 107 of the Act which was different from that of section 176. It was also urged that the presumption was that to convey the same meaning the legislature would use the same language throughout the same statute. The above arguments, which to my mind were very weighty, were hardly referred to, much less refuted in the judgment. The other judgments, which had been cited at the Bar, had likewise not examined the above arguments.

(37) The next ruling referred to by the learned counsel for the Bank is AIR 1937 Bom. 26. In that case Wadia J. merely remarked that in Kunj Behari Lal's case, ILR 40 All 522: (AIR 1918 All 363(2)), it had been held that the pawnee was not bound to give full details about the date, time and place of the sale and has not discussed the matter further.

(38) The next case cited before us was AIR 1932 Cal 524. In that case the notice which was given by the pledgee to the pledgor ran as under:--

> "Failing which (i.e., the payment by the 7th) we shall arrange for sale of the hypothecated stock." This was said to be merely an admission that arrangements would be made for a sale but was not a notice of the sale that was to be held as such a notice would require more definite particulars. It was also remarked that what such particulars should be must depend upon the peculiar should be must depend upon the peculiar facts of each case. This case is really an authority for the proposition that once a proper notice is given it is not necessary that a fresh notice was to be given if the contemplated sale was adjourned to a future date. The notice given in this case was not considered reasonable. This decision does not throw any light on the moot point in this case.
>
> (39) In AIR 1958 Cal 644, the contention, that notice was bad because it did not give any intimation of the date, time and place of the intended sale, was examined and rejected principally on the authority of Kunj Behari Lal's case, ILR 40 All 522 (AIR 1918 All 363 (2)). In that case a deed of hypothecation had been executed in favour of the Allahabad Bank Limited in respect of certain shares as security for advances to be made by the Bank on the plaintiff's overdraft account. In the notice sent to the plaintiff the Bank said that it would "arrange to effect sale of the securities as and when opportunity offers".

One of the reasons for repelling the objection of the counsel for the appellant to the notice was that having regard to the nature of the securities hypothecated by the appellant it was impossible for the Bank to mention the exact date and time of the sale, as the price of tea shares which constituted the subject-matter of the sale, varied from day to day and the Bank had every right to sell the shares at the best available price of which no previous notice could be given.

It was held, that the Bank was within its rights in telling the appellant, that it would sell the shares "as and when opportunity offers". Which meant as and when market conditions were most favorable. But the same considerations cannot hold good where the goods pledged are moveable chattels and not "stocks". The value of stocks is subject to quick fluctuation which is not ordinarily the case with goods of a non-perishable character, like cloth, Lahiri J. also observed:

> "The law does not require that the pawnee should arrange for the sale beforehand and then give the pawnor a notice of the date, time and place of that sale. All that is necessary is that a notice should be given of the pawnee's intention to sell in default of payment by the pawnee within a specified date. This was the view taken by the Allahabad High Court in the case of ILR 40 All 522: (AIR 1918 All 363 (2)).
>
> Mr. Meyer, however, pressed us to dissent from this view by relying upon the language of S. 176. According to him the use of the article 'the' in the expression "reasonable notice of the sale' indicates that notice must be given of the sale that will be actually held; or in other words the pawnee must first arrange for a sale and then give a reasonable notice thereof. I cannot, however, accept this argument as correct.
>
> "The sale' in S. 176 means the intended sale and not the sale that has been actually arranged by the pawnee. If the pawnee is required to give notice to the pawnor after entering into a binding agreement for the sale of the pledged goods, he will be liable for damages for breach of that agreement to the intending buyer in case the pawnor chooses to redeem the pledged goods before the actual sale, under S. 177. For these reasons I agree with the view taken by the Allahabad High Court in Kunj Behari Lal's case ILR 40 All 522: (AIR 1918 All 363 (2)) and hold that the reasonable notice of the sale does not require specification of the date, time and place of the sale."

(40) It is nowhere the contention of the pawnor that the pawnee should give notice after entering into a binding agreement for the sale of the pledged goods. All that is claimed on behalf of the pawnor is that the date, time and place of the proposed sale should be indicated in the notice. I find it difficult to agree that the article "the" in the expression "reasonable notice of the sale" in section 176 is not of any significance and it merely refers to an intention on the part of the pledgee to sell the goods at some future but unspecified date.

(41) The word "the" is a definitive and has been used before the noun "sale" which is specific. "The" particularises the notified sale. It has the effect of specifying or individualising that sale. Tilghman, C. J., said-

> "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object."

See Black's Law Dictionary, page 1168.

(42) To my mind the word "the" in the expression "on giving the pawnor reasonable notice of the sale" is a pointer to the particular sale where the thing pledged shall be sold.

(43) The next judgment that was cited was the case of ILR 8 Lah. 373: (AIR 1927 Lah 408). In that case, Tek Chand J. Said "In order, therefore, to enforce the right of sale under section 176, it was necessary for the Bank to prove.

(a) a demand for the amount due;

(b) a default by the defendants;

(c) a notice of sale giving reasonable time to the defendants to pay;

(d) an actual sale"

> (44) In that case it was held that the plaintiff had not succeed in proving that such a demand had been made. It was not further specified as to what the notice of sale should contain.
>
> (45) At this stage I may also refer to the language of section 107 of the Indian Contract Act. In runs as under:--
>
> "Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss but is not entitled to any profit, which may occur on such resale."

(46) The notice contemplated under section 107 is of the seller's intention to resell the goods after the lapse of reasonable time. Under section 107 seller is merely required to notify to the buyer that on account of the failure on the part of the buyer to perform his part of the contract, the seller proposes to re-sell the goods. The contrast with the language of section 176 "on giving the pawnor reasonable notice of the sale" is clear and cannot be overlooked. When the legislature in its wisdom thought it proper to use different expressions in the two sections of the same statute, the presumption is that it intended to give distinct meanings, otherwise it would have used identical words.

> "It has been a general rule," said Blackhurn J., in Hadley v. Perks, (1866) LR 1 QB 444 (457), "for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of acts of Parliament would bear in mind that that is the real principle of construction."

(47) In Casement v. Fulton (1845) 5 Moore P. C. 130 (141), the Judicial Committee of the Privy Council said "It is certainly to be wished, that, in framing statutes, the same words should always be employed in the same sense."

(48) There are, however, cases where the legislature departs from the language previously used without intending to depart from the meaning, the prima facie rule of construction is that where draftsman uses different words he presumably intended a different meaning. It is however, not an invariable rule that from variation of language variation of intention must necessarily be inferred. Sometimes without there being any change of intention, legislative draftsmen use different language, and in the words of Blackburn, J., in (1866) LR 1 QB 444 (457), with a view "to improve the graces of the style, and to avoid using the same words over and over again."

Ordinarily, however, change of language suggests change of intention, though this presumption by itself is by no means a safe guide for all contingencies. In this case, however, I feel that the variation in the language between section 107 and section 176 was deliberate, the object being to convey different intentions, and not with a view to avoid repetition or "improve the graces of the style."

(49) Furthermore, section 177 of the Indian Contract Act enable the pawnor to redeem the goods pledged at any time before the actual sale. If under section 176 of the Act a pawnee need not disclose to the pawnor the date, time and place of the sale, the benefit of section 177 will only be illusory. If section 176 is to be construed in the light of the observations made in Kunj Behari Lal's case, ILR 40 All 522: (AIR 1918 All 363 (2)), then the pawnee can almost, always, arrange the sale of the pledged goods, in such a manner, so as to keep the pawnor in the dark as to the actual sale, and thereby, effectively deprive him of the benefit of the succeeding section.

In my view, the words referred to above occurring in section 176 call for a beneficial interpretation in favour of the pawnor, with a view to protect his interests in the property, of which he is the legal owner, and which, has been made over to the creditor, as a security, before it is completely lost to him by the sale. A power of sale without the intervention of the Court, but after notice to the pledgor which merely discloses intention to sell and does not mention, time or place of the sale, can be exercised in an oppressive manner. Such a power is liable to be abused, and is prone to work mischievously, to the detriment of the pawnor.

On the other hand, an honest pledgee does not suffer in any way by notifying date, time and place to the pawnor, as with his co-operation, there is greater likelihood of the security fetching a better value. The underlying object of giving the pawnor reasonable notice of the time and place of the sale, is, that he should know when his opportunity to redeem will terminate and he may procure persons

to attend the sale and bid thereat. This ratio for the requirement of such a notice, is certainly strengthened, and in no case weakened by the provisions of section 177.

If the sale as notified in the notice under section 176 is not held for any fortuitous circumstances on the date on which it was intended to be held and it is, therefore, postponed, it is always open to the pawnor under section 177 to redeem his security at any time up to the actual sale. The difference in the language of sections 176 and 177 suggests that the pawnor's right to redeem the goods pledged is not forfeited by the expiration of the time fixed for holding the sale. If for any reason sale is postponed, the right to redeem does not come to an end but continues till such time as the pledged goods are not actually sold.

(50) The expression "reasonable notice of the sale" is compendious so as to ensure that there is not resort to any kind of tactics in the nature of sharp practice or unfair play. The right of the pawnee to sell valuable security of the pawnor without adequate safeguards can freely be exercised in an unjust and inequitable manner. Notice of date, time and place of the sale will ensure effective protection to a vigilant pawnor. Even if such a person cannot, before the actual sale, arrange for the redemption of the debt he can at least try and protect his interests by getting bidders at the place of the sale in sufficiently large numbers, and see, that his goods are sold after proper publicity and fetch a fair price. Any other interpretation of the provision will expose the pawnor to grave and unjust hazards.

(51) In my view, in a case like this, a notice merely of an intention to sell at some future date, without specifying the date, time or place of the sale, cannot be deemed "a reasonable notice". A pawnee's notice to the pawnor of his intention to sell is in the nature of a notice of his intention to sell is in the nature of a notice to redeem. The pawnor is merely put on his guard by the notice that the pawnee has terminated all indulgence, and that he should repay the loan. But the words "notice of the sale" are more definitive. The intention of the legislature appears to be that the pawnor should be told that as the pledge has not been redeemed, all indulgence shown to him has terminated and the goods pledged by him as security would be sold on a specified date at a particular time and place, so that the pawnor, who is vitally interested in them as the owner, might take suitable steps to see that the best price obtainable is secured at the sale.

(52) There may, however be exceptional cases where either because the pawnor's whereabouts are not known or the goods are of a perishable nature or on account of fluctuating value of the chattels or because the subject-matter of pawn consists of stocks and shares or of choses in action, or on account of some other extraordinary circumstances it may not be possible to notify the time and place of the sale. It is why the legislature has advisedly used the expression "reasonable notice of the sale."

(53) A useful parallel is furnished by Order 21, rule 66, Civil Procedure Code, which requires that where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made; and such proclamation, which shall be draw up after notice to the decree-holder and the judgment-debtor, shall state the time and place of sale etc. The object of the requirements of this provision is that the property of the judgment-debtor should be sold at a public auction so that it might fetch best value.

These are precautionary measures designed by law for ensuring sale at a fair value. The requirements of a reasonable notice under section 176 should envisage the giving of information of time and place of sale to the pledgor, not only for the purpose mentioned above but also in order to enable the pledgor to redeem his goods up to the last minute under section 177, which he can only do if the time and place of the sale is notified to him.

(54) We have not been referred to any other authority of any Indian High Court where the nature of the notice under section 176 might have been examined from this point of view. As the law relating to securing repayment of debt by pledging goods is both ancient and universal, I think it will not be inappropriate to seek light from other allied systems.

(55) The Contract Act of 1872 applies to all contracts in India and with regard to pawns and pledges it is a codification of the English common law, vide official Assignee, Bombay, v. Madholal Sindhu, AIR 1947 Bom 217 (227). In his Commentaries on the Law of Bailments, Ninth Edition, Judge Story said-

> "Another right resulting, by the common law, from the contract of pledge is, the right to sell the pledge, when there has been a default in the pledgor in complying with his engagement. Such a right does not divest the general property of the pawnor, but still leaves in him (as we shall presently see) a right of redemption. But if the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is a security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity.
>
> If there is no stipulated time of the payment of the debt, but the pledge is for a n indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfillment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold." (Vide para 308 page 275).
>
> He then proceeded on to say:
>
> " * * But the law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawnor for a forcelosure and sale; or, he may proceed to sell ex mero motu, upon giving the notice of his intention to the pledgor **".

(Vide para 310 page 276).

There is a footnote at page 277 which runs as under:

> "Formal notice of the time and place of sale is not requisite, if the pledgor has actual knowledge, and the pledgee's procedure is fair and reasonable. Alexandria R. R. Co. v. Burke, 22 Gratt. 254."

(56) Judge Story in his Treatise on the Law of Contracts, Fifth Edition, Volume 2, para. 875, page 33, made similar observations-

> "If, however the time at which the debt is to be paid, or the engagement to be fulfilled, be indefinite, the pledgee may, after the lapse of a reasonable time, either demand payment, and upon neglect or refusal thereof by the pledgor, may, after giving proper notice, proceed to sell the plege; or he may file a bill in equity against the pledgor, for a foreclosure and sale."

(57) The same learned author in his Commentaries on Equity Jurisprudence, Third Edition, para. 1033, page 428, said-

> "It has been also said, that the pledgee may, after the time for redemption has passed, upon due notice given tot he pledgor, sell the pledge without a judicial decree of sale."

(58) Goodeve in his Modern Law of Personal Properly, Ninth Edition, page 63, wrote-

> "The pawnee has a right to sell, the goods on non-payment of the debt when a day is fixed for payment, but only after notice if no day is fixed."

(59) In Ex parte Hubbard, In re: Hardwick, (1886) 17 QBD 690 (698), BowenL. J., observed-

> "A special property in the goods passes to the pledgee in order that he may be able--if his right to sell arises-to sell them. In all such cases there is at Common Law an authority to the pledgee to sell the goods on the default of the pledgor to repay, the money, either at the time originally appointed, or after notice by the pledgee."

(60) See also similar observation of Fry J. in France v. Clark, (1883) 22 Ch. D. 830; Pigot v. Gubley, (1864) 143 E. R. 960; Halsbury's Laws of England, Second Edition, volume 25, para 34, pages 14 and 15; and 'Bailments in the Common Law" by Paton, 1952 Edition, page 367.

(61) As the principles of Common Law have been adopted in the United States of America and have also been embodied in the Indian Contract Act, it will be of some assistance to examine how the principles underlying section 176 of the Indian Contract Act have been interpreted there.

(62) The law as to enforcement of a pledge so far as it is relevant for purposes of this case as stated in the 'Restatement of the Law of Security by the American Law Institute'at page 137,para,48, is as under:--

> "Methods of Enforcement.
>
> Upon default, the pledgee, in addition to his rights in respect of the enforcement of the claim secured by the pledge, can

(a) after giving reasonable notice of the time and place of sale to the pledgor and also to the third person where the pledgor has been authorized by a third person to pledge the latter's chattels, sell the pledged chattels at a public sale where they are goods or instruments which have a market, or

(b) * * * * * ,or

(c) * * * * * ,or

(d) maintain an action in a Court of equity for foreclosure and sale of the pledged chattels * *."

(63) In Ruling Case Law, Volume 21, para. 50, page 690, the law as to necessity for notice of sale has been stated in the following words:--

"While it has been held that if the pledge was made without any particular term, the creditor may demand his debt at any time, it is the well settled general rule that it is essential to a valid sale of the pledge without judicial process that reasonable notice to redeem shall be given to the pledgor. Notice to the pledgor of the pledgee's intention to sell and of the time and place of sale is also necessary, unless waived by agreement of the parties." As to the manner of sale, it is said-

"It is well settled that in the absence of any controlling agreement to the contrary, where a pledgee elects to sell the pledged property without resort to judicial proceedings he must sell at public auction, and this is expressly required by statute in some states. In making the sale the pledgee must exercise reasonable skill and diligence in order to get the value of the property and this includes the fixing of a reasonable time and place of sale, and while there are few decisions with respect to the giving of notice to the general public, it would seem that the sale should be preceded by such public notice as is ordinarily given for auction sales of like property in the same locality.

Without some such notice it is clear that the property must ordinarily be sacrificed for want of bidders; for to bring out bidders persons interested in the class of property to be sold must in some way have their attention called to the sale. A pledgor of stock having notice of the time and place of sale fixed by his pledgee, and making no objection thereto, and taking no notice thereof, by his silence will be held to have waived any objection existing as to such place, and the fact that a pledgee's sale of stock was attended by but one bidder only does not render it invalid."

(Vide para 52, pages 691 and 692).

(64) To identical effect is the statement of the law in American Jurisprudence, Volume 41, pages 643 to 645.

'If, after a demand and notice to redeem, the pledgor continues in default the pledgee, as a general rule, cannot make a valid sale of the collateral without first giving to the pledgor reasonable notice of the time and place of sale,* * * unless the giving of such notice is waived by the pledgor or is dispensed with by statute,"

(Vide 72 C. J. S. page 117).

"The notice must inform the pledgor, or his agent or personal representative, that a sale is to be made of the pledged property, and generally must inform him of the time and place of sale, and must be given a reasonable time before sale so that the pledgor may have an opportunity to protect his interests."

(Vide 72 C. J. S. page 119) (65) In the under noted American cases it has been held that giving of notice by the pledgee to the pledgor of the time and place of the sale of the pledged goods is necessary and in the absence of such a notice the sale is invalid:--

Griggs v. Day, (1892) 32 ASR 704 (730) (Note); Plucker v. Teller, (1896) 52 ASR 825 (827) (Note); McDowell v. Cjicago Steel Works, (1888) 7 ASR 381; Robinson v. Hurley, 17 Am. Dec. 497 (501) (Note); National Bank of Illinois v. Baker, (1889) 4 LRA 586 (587) (Note); Moses v. Gringer, (1900) 53 LRA 857 (862) (Note); Steam v. Marsh, (1847) 47 Am. Dec. 248 (252); Dykers v. Allen, 42 Am. Dec. 93 (See notes at page 750); Baker v. Drake, (1876) 23 Am. Rep. 80 (84); Wilson v. Little, (1849) 51 Am. Dec. 307 (314) (See notes at page 878); Guinzberg v. Downs, 43 N. E. R. 195; and Allen v. Bagley, 133 SWR 2d. 1027 (1029).

(66) The above are only a few out of a very large number of cases decided in different States,. The Courts, in America where the common law rule relating to pledges holds the field have contoured "a reasonable notice of the sale' to be one where time and place of the proposed sale are notified.

(67) I have taken the liberty of expressing my doubts, as to the correctness of the statement of law, as expressed in ILR 40 All 522: (AIR 1918 All 363 (2)), and other cases which have followed it and I have preferred the interpretation of the pharase "reasonable notice of the sale" occurring in section 176, Indian Contract Act, which is in accord with the view expressed by American Judges on analogous law. It is true that the English and the American authorities referred to above were not cited at the Bar and, therefore, I have not had the advantage of hearing the comments of the learned counsel appearing in the case. I have ventured to strike a discordant note with the assistance of other systems of law.

(68) I may now briefly advert to two ancient legal systems. The tendency of the ancient, as also of the modern law, has been, to put fetters on absolute powers of pledgees, to sell the vadium, or the pledge. The rights of the pledgee over the goods peledged are in the nature of jura in re aliena. The ancient law givers were unwilling

> to deprive the debtor of his res, without his being given the opportunity of redeeming it, before the security was lost to him beyond retrieval.

As an absolute power of alienation without effectual safeguards has all the potentialities of lending itself of serious abuse, the modern legislatures, and equally, the ancient law givers evinced solicitude for the pledgor, by imposing restrictions on pledgees unfettered powers of sale, where it was effected without the intervention of the Court or the Sovereign. As an illustration of such a protection in the modern systems, reference may be made to section 169(2) of the Transfer of Property Act and sections 103 and 196 of Law of Property Act, 1925, (15 Geo. 5. Ch. 20).

(69) The Code Napoleon prohibited the power of sale by a mortgage which could not be exercised otherwise then through the Court, and declared such a power to be null and void, vide Articles 2078 and 2090. The other continental systems which follow the civil law, have also adopted the rule of requiring a judicial sale, vide Story on the Law of Bailments, Ninth Edition, para 309.

(70) According to Roman Law, a creditor could sell the security only if the debt and interest remained unpaid on the due date and only after due notice to the debtor, vide Roman Private Law by Roby, Volume II, page 109. If there was a previous agreement as to the manner and time of the exercise of the power of sale, the creditor must observe such agreement; otherwise the creditor must follow the procedure prescribed by law, giving formal notice of his intention to sell and waiting for the necessary period of time.

In the Ante-Justinian Law the creditor must notify the debtor three times of his intention to sell the security because of non-payment of the debt (Paul, Sent. 2, 5 1; Dig. 13, 7, 4-5). But by a statute of Justinian only a single notice was required, and the creditor must wait for two years from this notice before he could sell (vide Code, 8 33 (34), 3, 1). See Roman Law in the Modern World by Sherman, Volumen Second, Third Edition, pages 190 and 191).

(71) In ancient India the legal concept of pledge was well understood and there were elaborate procedural details as to the manner of redemption and sale of pledge.

(72) Where no time for redemption had been stipulated the pledgee could neither transfer to another person nor sell the pledge (Manu 8. 143).

(73) A pledge (adhi) became forfeited in those cases only where time limit had been stipulated and the due date had passed (yajna 2, 58).

(74) When the debtor repays the debt and asks for the return of the pledge, it must be restored to him (Brihaspathi 11. 20).

(75) As to sale the law required that if the debtor was absent the creditor might sell the pledge, but he must do so, in the presence of witnesses (Yajna 2. 63).

(76) According to Brihaspati, in Parshara Madhav p. 181 after the principal has become double, if the debtor dies or is not heard of for a long time, the creditor should sell the pledge in the presence of witnesses and after having kept the sale money with the community for ten days, he should realize his dues and set aside the balance. The balance was to be handed over to the debtor's relatives, failing them, to the King.

(77) According to Katyayana, Virmitrodaya, p. 311. If the debtor or his heirs cannot be traced (and the principal has become double) the creditor shall put up the pledge before the King; thereupon the pledge shall be publicly sold; out of the sale proceeds, the creditor shall take his principal with interest and surrender the balance to the King.

(78) The above examination of the different systems of law, both ancient and modern, relating to the sale of pledge convincingly indicates that the law zealously protects the interests of the debtor regarding the extra-judicial sale of security at the will of the creditor. Though the safeguards devised were different, their objective appears to be the same, namely, to avoid abuse of the power by a surreptitious sale by the creditor behind the back of the debtor.

Section 176 and 177 of the Indian Contract Act were designed to serve the same purpose. In order that the pawnor may effectually take advantage of the provisions of section 177 for redeeming the goods pledged at any time before the actual sale of them, the giving to the pawnor of a "reasonable notice of the sale" must ordinarily indicate date, time and place of the sale, unless for exceptional reasons, which it is not possible to enumerate, such a notice cannot be given.

(79) For the above reasons, I respectfully differ from the view taken by my learned brother regarding isue No. 7 and this issues should be decided against the Bank, though so far as the result of the case is concerned, that would not really matter.

(80) As already stated, I agree with the conclusions of Mehar Singh J., that the appeal of the plaintiff-Bank should be allowed and the suit decreed as proposed by him.

(81) Order accordingly.