Lallan Prasad

Vs

Rahmat Ali & Anr

Civil Appeal No. 776 of 1964

(R. S. Bachawat, J. M. Shelat JJ)

13.12.1966

JUDGMENT

SHELAT, J. –

This appeal by certificate is directed against the judgment and decree passed by the High Court of Allahabad reversing the judgment and decree passed by the Civil Judge, Allahabad, directing the respondents to pay to the appellant Rs. 18,142/- and costs.

Two questions arise in this appeal : viz., (1) whether the first respondent pledged certain quantity of aeroscraps purchased by him from military authorities at Bamrauli Depot, Allahabad and delivered possession thereof to the appellant under an agreement of pledge entered into between them and (2) whether the appellant was entitled to any relief when his case was that the first respondent never delivered to him the said goods and the said agreement never ripened into a pledge.

On January 10, 1946 the appellant advanced Rs. 20,000/- to the first respondent against a promissory note and a receipt. The first respondent also executed an agreement whereby he agreed to pledge as security for the debt the said aeroscraps and to deliver them at the appellant's house and keep them there in his custody. The appellant's case, however, was that the first respondent failed to deliver the said goods to him, stored them in a plot adjacent to the aerodrome at Allahabad and therefore the said agreement did not ripen into a pledge. Consequently, he was entitled to recover the amount advanced by him in the suit based on the said promissory note and the said receipt. In his written statement the first respondent admitted the said loan but alleged that in pursuance of the said agreement he delivered 147 tons of aeroscraps of the value of Rs. 35,000/- to the appellant. He claimed that the appellant was not entitled to obtain a decree unless he was ready and willing to redeliver the said goods pledged with him.

In the Trial Court the appellant besides examining himself also led the evidence of other witnesses. The respondents in their turn led both documentary and oral evidence and relied in particular on certain notices served upon them by the appellant as also certain receipts issued by the appellant in respect of payments made to the appellant against sales by him of part of the said goods.

The Trial Judge, however, rejected the respondent's case and held that there was no completed contract of pledge as the first respondent had failed to deliver the said goods, that the second respondent had agreed to become a surety for repayment of the said loan and that thereupon the appellant did not insist on possession of the said goods being given to him and that therefore he was entitled to maintain the suit and recover the said monies. On an appeal by the respondents, the High Court disagreed with the said findings and set aside the said decree. The High Court held that the

said goods were delivered to the appellant, that the said agreement did not rest at a mere agreement to pledge but ripened into a pledge and that the appellant was not entitled to any relief in view of his stand that the said goods were never pledged with him and were therefore not in his possession. In the result, the High Court dismissed the appellant's suit with costs.

Mr. Rana, for the appellant, challenged both the findings of the High Court and contended (1) that the High Court was not justified in finding that the first respondent had delivered the said goods to the appellant and the said goods therefore remained in his custody and (2) that even if the goods were delivered to the appellant the appellant could under section 176 of the Contract Act still maintain his suit on the said promissory note and recover the amount due thereunder.

As the High Court's judgment is one of reversal Mr. Rana took us through the relevant portions of the evidence and submitted that on the evidence the findings of the High Court cannot be sustained.

The first question is whether the first respondent after obtaining the aeroscraps from the military authorities delivered them to the appellant. Before however we proceed to consider this question we may first set out certain undisputed facts. There is no dispute that the appellant advanced Rs. 20,000/- to the first respondent. There is also no dispute that the first respondent executed the said agreement agreeing to pledge the said goods. There is further no dispute that the said goods were stored in a plot near the aerodrome. The dispute between the parties lies therefore within a short compass, viz., whether the custody of the said goods after they were stored at the aforesaid place was with the appellant or with the first respondent.

The first broad fact that inevitably strikes one is that though the first respondent had agreed to hand over the said goods to the appellant and though he failed to do so, the appellant did not at any time protest or call upon him to deliver the goods. Since he had advanced a fairly large amount it would be somewhat unusual, if the said goods were not placed in his possession, not to call upon the first respondent to forthwith deliver the goods. Since a large amount was advanced by him the appellant also would not ordinarily be content merely with a promissory note from the first respondent. The appellant's case, however, was that since he had obtained a guarantee from the second respondent, the father of the first respondent, he did not worry even if the said transaction remained at the stage of an agreement to pledge. But the letter under which the 2nd respondent agreed to be the surety was obtained under different circumstances. Under the said agreement the appellant was to permit the first respondent to remove and sell part of the said goods provided he paid to the appellant 3/4th of the sale proceeds. This by itself would presuppose that the goods were under the control and custody of the appellant, for otherwise no question of any permission from the appellant would arise. The letter of surety from the second respondent itself states that the goods were pledged with the appellant, that the appellant was not allowing the first respondent to remove them for sale and that with a view to assure the appellant that his monies were not in danger the second respondent agreed to make himself responsible for payment of the said loan. This again presupposes that the goods were under the control of the appellant.

Apart from these broad facts there were also other facts on record on the strength of which the High Court arrived at its a foresaid findings.

Since as a pledgee the appellant was entitled to recover from the first respondent such expenses as might be incurred by him for the preservation and safety of the said goods he had appointed certain watchmen whose salaries he claimed in the suit. According to the appellant, he had employed these watchmen in the hope that the goods would be placed in his custody and would require to be

watched for their safety. His case further was that as the first respondent did not deliver them and stored them near the Aerodrome, he placed, on a request by the respondents, the services of the watchmen at their disposal. But he could not explain as to why he continued to pay the salaries of the watchmen, though their services were no longer required by him. The explanation given by him in this regard did not impress the High Court and in our view rightly. If the goods were not delivered to the appellant and were never in his custody there was no reason why he should continue to pay the watchmen's salaries. Even assuming that he had engaged the watchmen in the first instance in the hope that the goods would be placed in his possession, he would have discharged them on the first respondent failing to hand over the goods to him. The only explanation that appears to be acceptable in these circumstances is that he continued to employ those watchmen as the goods were in his possession and required to be safely kept as security.

The evidence shows that on or about August 18, 1946 the first respondent removed part of the said goods but he did so after paying to the appellant Rs. 1,000/- towards the principal and Rs. 200/- towards interest. The removal of these goods and the said payment were simultaneously made. That fact would indicate that the first respondent had removed the said goods with the appellant's consent which again envisages that the goods were at that time in the appellant's charge. In November 1947, 100 maunds of the said aeroscraps were sold to one Amrit Lal for Rs. 1,400/-. It is significant that Amrit Lal paid Rs. 200/- by cheque out of the said Rs. 1,400/- directly to the appellant. The receipt Ex.D in respect of this amount indicates that the appellant was concerned with the sale. If the goods were not in his possession and they were sold by the first respondent without the appellant being concerned with the sale, Amrit Lal would not have directly given the cheque to the appellant. That the appellant was concerned with the said sale becomes also apparent from the fact that in the notice Ex.P given by him to the first respondent he had intimated that he intended to sell 100 maunds out of the goods.

Two notices given by the appellant to the first respondent dated August 4, 1947 and September 11, 1947 furnish clear indications that the appellant was in possession of the said goods. In the first notice he reminded the first respondent that "the aeroscraps purchased from the Bamrauli Depot were pawned in lieu of the amount due", that the first respondent had continued to remove part of the said goods and dispose them of contrary to the said agreement, that "accordingly my client engaged servants there for safety of the goods and you are liable for payment of their salaries also in accordance with the terms of the agreement." By this notice the appellant intimated to the first respondent that unless the latter made up the account and paid the remaining balance including interest and the salaries of the said watchmen within a week from the date of the service of the notice he would dispose of "the entire goods pawned and realise his entire dues on account of principal, and interest" etc. The second notice was in the same vein again informing the first respondent that the appellant would settle with some customer and dispose of the said aeroscraps, that he had arranged a customer for 100 maunds, that the said 100 maunds would be sold on the 12th of September 1947 and that the first respondent could remain present at the time of the sale if he so desired. These two notices were followed by a telegram Ex.C which also gave a similar intimation to the first respondent. It cannot be disputed that through these notices the appellant was informing the first respondent that he intended to exercise his right to sell the said goods pledged with him. These notices are clearly inconsistent with the position adopted by him that the goods were never delivered to him or that they were not pledged with him or that the transaction of pawn had not materialised. His explanation that these notices were sent at the instance of the first respondent to compel the second respondent to pay up the said debt is without any foundation and was rightly rejected by the High Court.

Apart from this documentary evidence which satisfactorily established that the said goods were in his possession, there was also oral evidence, which if accepted, would prove that the said goods were handed over to the appellant and remained in his control. The most important part of the oral evidence was that of Manmohan Banerjee, the Commissioner appointed by the Court in a suit filed by the Calcutta National Bank against the respondents. In that suit the Court had passed an order of attachment before judgment of the goods belonging to the first respondent. The evidence of Banerjee was that when he went to attach the aeroscraps belonging to the first respondent he was informed that part of the said goods were in possession of the appellant and that thereupon he refrained from attaching those goods. This evidence shows that at that time it was a well known fact that the aeroscraps in question were in possession of the appellant.

There were two items of evidence, however, on which the appellant relied to establish that the goods were never in his possession. The first was the evidence of Kedar Nath, the owner of the plot where the said goods were stored. His evidence was that the first respondent had taken the said plot on rent from him in October 1946 and that he was paying the rent therefor. The evidence of Kedar Nath, was, however, rejected by the High Court on the ground that he was not in a position to give the exact date on which the said plot was leased to the first respondent and also on the ground that his evidence was not satisfactory to show that the said goods were not stored before October 1946. The second fact relied on by the appellant was that the suit filed by the Calcutta National Bank ultimately failed, that the goods attached by the Bank were thereafter released and some of the goods were thereafter removed by the respondents and the rest by some other persons. It was therefore alleged that the respondents could not have removed those goods if in fact they had been pledged with the appellant. But there was no satisfactory evidence to show that the goods attached by the said Bank were the very goods which had been pledged with the appellant. The evidence of Banerjee on the other hand shows the contrary. The fact therefore that the goods attached by the Bank were subsequently released and removed by the respondents would not assist the appellant. In view of these facts we are of the view that the High Court was right in its findings that the said goods were delivered to the appellant, that he was a pledgee thereof and that the said agreement did not rest at the stage of a mere agreement to pledge.

The second question would then be whether the appellant was entitled to recover the balance of the said loan in view of his denial of the pledge and his failure to offer to redeliver the goods. Under the Common Law a pawn or a pledge is a bailment of personal property as a security for some debt or engagement. A pawner is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfilment of his liability. The two ingredients of a pawn or a pledge are : (1) that it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. In this sense a pawn or pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed. (See Halliday v. Holygate ([1968] L.R. 3 Ex. 299.)). A contract to pawn a chattel even though money is advanced on the faith of it is not sufficient in itself to pass special property in the chattel to the pawnee. Delivery of the chattel pawned is a necessary element in the making of a pawn. But delivery and advance need not be simultaneous and a pledge may be perfected by delivery after the advance is made. Satisfaction of the debt or engagement extinguishes the pawn and the pawnee on such satisfaction is bound to redeliver the property. The pawner has an absolute right to redeem the property pledged upon tender of the amount advanced but that right would be lost if the pawnee has in the meantime

lawfully sold the property pledged. A contract of pawn thus carries with it an implication that the security is available to satisfy the debt and under this implication the pawnee has the power of sale on default in payment where time is fixed for payment and where there is no such stipulated time on demand for payment and on notice of his intention to sell after default. The pawner however has a right to redeem the property pledged until the sale. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawner's debt, for, the sale proceeds are the pawner's monies to be so applied and the pawnee must pay to the pawner any surplus after satisfying the debt. The pawnee's right of sale is derived from an implied authority from the pawner and such a sale is for the benefit of both the parties. He has a right of action for his debt notwithstanding possession by him of the goods pledged. But if the pawner tenders payment of the debt the pawnee has to return the property pledged. If by his default the pawnee is unable to return the security against payment of the debt, the pawner has a good defence to the action. (Halsbury's Laws of England, 3rd ed. Vol. 29 page 221.) This being the position under the common law, it was observed in Trustees of the Property of Ellis & Co. v. Dixon-Johnson ([1925] A.C. 489.) that if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand over the security, and that if, having improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt.

There is no difference between the common law of England and the law with regard to pledge as codified in sections 172 to 176 of the Contract Act. Under section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and under section 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, however, as the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows therefore that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract of pledge. The pawnee therefore can sue on the debt retaining the pledged goods as collateral security. If the debt is ordered to be paid he has to return the goods or if the goods are sold with or without the assistance of the court appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge, and it is found that he was given possession of the goods pledged and had retained the same, the pawner has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledge denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance. That being the position the appellant would not be entitled to a decree against the said promissory note and also retain the said goods found to have been delivered to him and therefore in his custody. For, if it were otherwise the first

respondent as the pawner would be compelled not only to pay the amount due under the promissory note but lose the pledged goods as well. That certainly is not the effect of section 176. The contentions urged by Mr. Rana therefore must be rejected.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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