IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION NO. 260 of 2010

In COMPANY PETITION NO. 207 of 2001

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PRAMODBHAI KANJIBHAI PATEL....Applicant(s)
Versus
OFFICIAL LIQUIDATOR OF M/S MINAL OIL & AGRO INDUSTRIES & 1....Respondent(s)

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Appearance:
MR CHINMAY M GANDHI, ADVOCATE for the Applicant(s) No. 1
MR MB GANDHI, ADVOCATE for the Applicant(s) No. 1
MS AMEE YAJNIK, ADVOCATE for the Respondent(s) No. 1
MR NANDISH CHUDGAR, ADVOCATE FOR NANAVATI ASSOCIATES, ADVOCATE for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

Date : 30/10/2015
CAV JUDGMENT

1. The applicant has taken out this Judge's Summons, wherein, he has prayed for the following relief/s:

"(a) That this Hon'ble Court be pleased to

hold and declare that the company in liquidation had created pledge/ hypothecated the goods, machineries and book-debts as securities at the time when loan of Rs.2,50,00,000/- was taken with 40% margin and thereafter additional security was provided by deposit of title deeds by immovable properties as per the agreement dated 15.10.2001 and that the respondent bank has failed to take care of their securities and by not lodging the claim on property, the gods and machineries having been sold off, the respondent Bank has lost the securities and therefore, the personal properties of the present petitioner cannot be made liable for the payment of the debt and therefore, the Hon'ble Court be pleased to hold and declare that the immovable properties namely, Survey/Block Nos. 167/1, 171, 170, 340, 340/2, 340/3, 169/1, 167/2, 168/2 and 169/2 of Mouje Nandasan, Taluka: Kadi, District Mehsana are the private properties of the petitioner and therefore, the said properties be declared and discharged as securities of respondent Bank.

(b) That the Hon'ble Court be pleased to direct the respondents herein to handover the original documents and the titles/sale deeds of the aforesaid Survey Nos. to the present petitioner."

2. Heard learned advocate Mr. M.B.Gandhi with learned advocate Mr. Chinmay M. Gandhi for the applicant, learned advocate Ms. Amee Yajnik for respondent No.1 – Official Liquidator and learned advocate Mr. Nandish Chudgar for Nanavati Associates, for respondent No.2.

3. Learned advocate Mr. Gandhi appearing for the applicant submitted that applicant has filed this application in his individual capacity. Applicant was also Director of M/s. Minal Oil and Agro Industries Pvt. Ltd. The said company i.e. M/s. Minal Oil and Agro Industries Pvt. Ltd. was ordered to be wound up by an order of this Court passed on 04.12.2001. The Official Liquidator attached to this Court has been appointed as Liquidator of the said company with a direction to take the possession of the assets and properties of the said company. Accordingly, the Official Liquidator had taken over the possession of assets and properties of the company in liquidation. It is submitted that before the company went in liquidation, the company wanted to have the financial assistance and therefore, loan of Rs.2,50,00,000/- was taken and agreement of hypothecation of goods and book-debts of the company was executed on 06.02.2001 with the respondent No.2 Bank. The respondent No.2 bank is in possession of the said hypothecation agreement. It is submitted that the company, which is taking the loan is required to register the hypothecation of the charge created by the company as per the provisions of Sections 130, 135, 137 and 138 of the Companies Act, 1956. That form No.13 is required to be filled in and sent to the company. Learned advocate Mr. Gandhi

further submitted that respondent No.2 had written a letter for providing additional securities to the company in liquidation. However, the present applicant, who was also the Managing Director of the company in liquidation was not having other properties for providing as additional securities. As a result of that the personal properties of the present applicant bearing Block Nos. 167/1, 167/2, 168/1, 168/2, 169/1, 170, 171, 340/3, 340/2 and 340/1 in all admeasuring 23,873 sq. mtrs. were mortgaged by creating equitable mortgage.

4. Learned advocate Mr. Gandhi further submitted that over and above several parcels of land admeasuring 23,873 sq. mtrs., the applicant is also an owner of one office premises admeasuring 2100 sq. mtrs. situated on 8th floor of Popular House built on Final Plot No.137 of T.P. Scheme No.3 of Mouje Shaikhpur-Khanpur. That office premises is also of the personal ownership of the applicant along with the aforesaid different parcels of land, the said office was also mortgaged. Learned advocate Mr. Gandhi further submitted that the applicant also filed two different applications being Company Application No.167 of 2010 as well as Company Application No.164 of 2010 for getting back the possession of the personal properties of the applicant i.e.

office premises as well as the agricultural lands situated at Nandasan village. He further submitted that respondent No.2 herein is also made a party in Company Application No.164 of 2010.

5. Learned advocate Mr. Gandhi further submitted that the company in liquidation had originally mortgaged several parcels of land together with hypothecated machineries to the Export – Import Bank ('EXIM Bank' for short) and since the monies could not be repaid, the said bank and one M/s. Kanak Castor Products Private Ltd., had entered into an agreement and the property was auctioned by this Court and the Official Liquidator had executed a registered sale deed showing Exim Bank as confirming party and the whole property was sold off for a sum of Rs.23.80 crores.

6. Learned advocate Mr. Gandhi further submitted that at the time when the said sale was effected, all the plants, machineries, goods which were hypothecated to respondent No.2 bank were also sold off. It is further submitted that since the present respondent No.2 was in possession of the hypothecation agreement, when the company's properties were sold, respondent No.2 bank must have come forward to the Official Liquidator for their claim because the properties were secured

with them and they ought to have made first claim for the securities and if it is not done, then it means that inspite of the debt being secured, the respondent No.2 bank did not take care to save the property or to put up the claim before the Official Liquidator. However, after long time of the said sale, a letter was written by respondent No.2 bank to the Official Liquidator of the company in liquidation in which it is stated that total Rs.5,86,97,662.78 (principal plus interest) is outstanding against the company in liquidation. Learned advocate Mr. Gandhi further submitted that the respondent No.2 bank has written letter to the Official Liquidator that the properties were ordered to be sold by the Hon’ble High Court and according to them the properties have been purchased by M/s. Kanak Castor Products Private Ltd. for Rs.23.80 crores and in the said letter it was also informed that according to the agreement in favour of respondent No.2 Bank, the salt purification plant is in possession of the respondent No.2 bank and the value of which is about Rs.2.83 crores and therefore from the amount realized by the EXIM Bank, respondent No.2 bank is entitled to get Rs. Rs.2.83 crores.

7. Learned counsel Mr. Gandhi thereafter submitted that respondent bank has got a charge over the machineries, inspite of that the

respondent bank did not pursue the matter further with the EXIM Bank and therefore EXIM Bank has adjusted the amount realized from the sale of the assets of the company in liquidation towards its dues. Thus, the respondent Bank has lost the security and once the pledgee or mortgagee lose the security and does not take proper care then in that case the the debtor i.e. the mortgagor is not responsible to pay that amount. The creditor has to take care of such properties which are provided as security. In short, it is submitted that the debtor cannot be saddled with the responsibility twice for single transaction. In the present case, the company has gone in liquidation. The machineries of the salt purification plant were hypothecated to the respondent bank and that was a security and the respondent bank, according to the agreement of hypothecation, ought to have taken proper steps for the purpose of saving the same or opposing the advertisement for sale of the property by the Official Liquidator in the year 2004 itself when the orders were passed for sale of the properties and when the sale was confirmed by this Court. Learned counsel therefore submitted that the respondent bank has lost the security which was provided by the company in liquidation. It is contended that the applicant had mortgaged his personal properties by way of equitable mortgage

to the respondent bank for the financial assistance taken by the company in liquidation. Such additional securities were provided as the bank has insisted for giving further securities.

8. Learned advocate Mr. Gandhi thereafter contended that the respondent bank has lent Rs.2.50 crore to the company in liquidation. As against this, a sum of Rs.2.83 crore was realized from the sale of machineries of salt purification plant and other machineries and therefore if the respondent bank has taken the care and lodged the claim in time when the auction had taken place then the respondent bank could have got the appropriate amount. Now the security is lost and therefore the other personal properties which are provided as additional security to the respondent bank cannot be dealt with by the respondent bank. Therefore, this application is filed.

9. Learned advocate Mr. Gandhi for the applicant thereafter submitted that the respondent bank had filed Lavad Suit No.1886 of 2002 in which decree came to be passed on 30.06.2003. Entry of the said decree is also effected in the record of rights. However, though the respondent bank is having decree in its favour, respondent has not enforced and executed the said decree and therefore now the respondent bank be directed to

handover all the original documents i.e. the sale deeds of different survey numbers, the details of which are given in prayer made in the Judges' Summons.

10. Learned advocate Mr. Gandhi has relied upon the decision rendered by the Hon'ble Supreme Court in the case of ***Lallan Prasad v. Rahmat Ali and another***, reported in ***AIR 1967 SC 1322,*** and more particularly, the observations made in para 9, 11, 14, 16 and 17 of the said decision, which read as under:

> "9. 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 34th 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.

11. 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, lie placed, on a request by the respondents, the services of the watchmen at their disposal. But he could not explain as to why lie 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.

14. 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 238 of Banerjee was that when he went to attach the aeroscrapes 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 aeroscrapes in question were in possession of the appellant.

16. 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 : (I) 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 239 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.(1) 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.(2) This being the position under the common law, it was observed in Trustees of the Property of Ellis & Co. v. Dixon-Johnson(3) 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.

Halsbury's Law of England, 3rd Ed. Vol.29,p. 221.

17. There is no difference between the common law of England) and the law with

regard to pledge as codified in section 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 pledgee 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 other wise 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."

11. Learned advocate Mr. Gandhi thereafter has placed reliance upon the decision of Delhi High Court rendered in the case of ***Syndicate Bank v. Official Liquidator, Prashant Engg. Company***

Private Ltd., reported in ***AIR 1985 Del 256*** and more particularly the observations made in para 7 and 8, which are as under:

> "7. The winding -up order was made on September 26, 1980. Pursuant to the winding-up order, the official liquidator took possession of the entire assets of the company. The suit was filed by the bank on March 18, 1981, without impleading the official liquidator although the winding-up order had already been made apparently because the bank was not aware of the fact that the company was in winding - up. in the suit, the bank sought a simple money decree even though the factum of hypothecation agreement was mentioned in para. 8 of the plaint. For reasons which are not clear, no relief was sought in the suit with regard to the security. The bank, no doubt, sought the appointment of a commissioner to visit the factory and submit a report "as to whether the factory was lying closed and, if so, since when and whether it was in charge of any person or was actually running". The commissioner submitted his report on March 24, 1981, and this report mentions that the factory was closed and there were locks on the shutter and "was under seal", but there is no mention that the property was in the possession of the official liquidator. The bank apparently came to know of the winding-up order in 1982 because by its application, C.A. No.3 of 1982, it sought form this court leave under section 446 of the Companies Act to continue the suit, which was allowed on February 11, 1982.
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> 8. Unlike a mortgage, a pledge or hypothecation does not have the effect of

transferring any " interest" in the property in favor of the pledge or the hypothecated. The pledge and hypothecation, however create a special property in the goods in favor of the pledge or the hypothecate. In the case of pledge, the special property is to keep possession of the pledged goods and to dispose them of for the realisation of the debt for which it is held as security. In the case of hypothecation, possessions remains with the hypothecator but the hypothecate has the right to take possession of the hypothecated property ad to sell it for the realisation of the debt secured by hypothecation. It was open to the bank to take possession of the debt secured by hypothecation. It was open to the bank to take possession of the hypothecated property on its own or though the court, but it failed to do so. It was also open to the bank to enforce the security by the suit that it filed but there again the bank chose to seek a simple money decree. Mere mention of hypothecation in the suit was sufficient. The bank would, therefore, be deemed to have waived its right as hypothecate and was satisfied with a simple money decree. The bank having filed a suit for the recovery of money and having failed to make a claim on the security, any claim on the security or the sale proceeds thereof would now be barred under Order2, rule2, of the Civil Procedure code, 1908, with the result that the bank has no subsisting claim on the machinery or any part of the sale proceeds thereof and must rank as an unsecured creditor along with the other creditor along with the other creditors of the company, an prove its claim before the official liquidator at the appropriate time. See Official Assignee of Bombay v. Chimniram Motilal and Official Assignee of Bombay v.

> Abdul Hayee, AIR 1933 Bom 437. The bank is itself to blame for the course that it chose to adopt."

12. On the other hand, learned advocate Mr. Nandish Chudgar appearing for respondent No.2 – Kalupur Commercial Co.op Bank Ltd. has submitted that admittedly the property in question was never the property of the company in liquidation and the same was personal property of the applicant which has been mortgaged by him in favour of the respondent bank to secure repayment of the dues of the borrower company. Thus, when the property in question did not belong to the company in liquidation, the Company Court has no jurisdiction to entertain any proceedings relating to such properties and pass orders qua the said properties. He further submitted that the Official Liquidator has taken the possession of the properties in question in a mistaken belief that the said properties belong to the company in liquidation and therefore the Official Liquidator be directed to handover the peaceful and vacant possession of the property in question to respondent No.2 so that the bank can deal with that property for recovery of its dues in accordance with law since the respondent bank is the sole secured creditor qua the said property.

13. Learned advocate Mr. Chudgar thereafter

submitted that the company in liquidation had taken financial facilities from the respondent bank. The applicant had remained one of the guarantors and had also mortgaged his personal property, the description of which is given in the prayer made in the Judges' Summons. The said property has been mortgaged with the respondent bank by way of mortgage by deposit of title deeds. The company in liquidation has not repaid the outstanding dues to the respondent bank and therfore the respondent bank initiated recovery proceedings against the borrower and the guarantors by filing Arbitration Suit No.1886 of 2002 before the Board of Nominees. The award and order dated 30.06.2003 is passed by the said Board of Nominees.

14. I have considered the arguments advanced by learned advocates for the parties. I have also gone through the material produced before this Court and considered the decisions relied upon by the learned advocate for the applicant.

15. From the record, it appears that the property in question is the personal property of the applicant which has been given by way of additional security by the applicant as a guarantor. In fact the company in liquidation had borrowed money from the respondent bank. The

applicant stood as guarantor and mortgaged his personal properties by way of additional security. The properties, which are in possession of the Official Liquidator being land bearing survey/block Nos. 167/1, 167/2, 168/1, 169/1, 169/2, 170, 171, 340/2 and 340/3, situated at village Nandasan, Taluka: Kadi, District Mehsana as well as office premises No.802 situated on 8th floor, Popular House, Ashram Road, Ahmedabad, are private and personal properties of the applicant, whereas, the original documents of title deeds are with the respondent bank. In view of this, this Court is of the opinion that the Company Court is not having jurisdiction to deal with the private properties of the applicant. Moreover, in another application filed by the applicant which is decided today, this Court has already given the direction to the Official Liquidator to handover the possession of some of the properties in question to the applicant. However, the properties in question in the present case are not the properties of the company in liquidation and therefore Company Court does not have jurisdiction to give direction to the respondent bank to handover the original documents and title deeds/sale deeds of the property in question to the applicant. For the said relief/s, the applicant has to approach before the appropriate forum/Court by filing appropriate proceedings.

Thus, this application is required to be dismissed only on this limited ground of maintainability of the present application before the Company Court. It is open for the present applicant to agitate his grievance by filing appropriate proceedings before appropriate forum and as and when such proceedings are filed, it is open for the concerned Court/forum to decide the same in accordance with law without being influenced by any observations made by this Court in this order. It is clarified that this Court has not gone into the merits of the submissions canvassed by learned advocates appearing for both the parties.

16. In view of the aforesaid discussion, this application is dismissed. Notice discharged.

(VIPUL M. PANCHOLI, J.)

Jani