IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.22 OF 2001

Ahmedali Gulamhussein Kathawala & Ors. ….Plaintiffs

V/s.

The Development Credit Bank Ltd. ....Defendant

Mr.Vivek Kantawala a/w Mr.Amey Patil i/by M/s.Vivek Kantawala & Co. for plaintiffs.

Mr.M.P.Rao, Senior Advocate a/w Mr.A.S.Daver and Ms.Radha Bhandari i/by M/s.M.V.Kini & Co. for the defendant.

CORAM : K.R.SHRIRAM,J
DATE : 14.12.2016

P.C.:-

1 The plaintiffs are individuals who were the directors of the company by name Union Quality Plastics Limited (the company). The company was the constituent of the defendant, which is a bank. The plaintiff/company was in the business of manufacturing of plastics.

It is the case of the plaintiffs that prior to 1990 the plaintiff had imported certain goods from a party in Hungary and the payment for the said import was to be made on documents against acceptance. As certain disputes arose between the party in Hungary and the company, the company did not make any payment to the said party but collected the documents from the defendant and cleared the goods. But that is a separate matter. Though no payment was made by the defendant nor any claim or demand was made, the defendant in order to secure themselves of the contingent liability to the party in Hungary called upon the company to deposit with the defendant a sum of Rs.5,23,000/- in fixed deposit which was to earn interest. It is stated in the plaint that the company after expiry of considerable time, by a letter dated 20.6.1995 (Exh.P2) called upon the defendant to release the fixed deposit amount. It was also the case of the plaintiffs that the amount under the documents sent by the party in Hungary will not have to be paid. This was followed by another letter dated 18.10.1995 (Exh.P3) to the defendant from the company in which it is stated that the company has settled with the party in Hungary and as more than 5 years from the date of transaction has lapsed, amounts under the fixed deposit be returned to the company. After this letter of 18.10.1995 there is no document on record to show that the company called upon the defendant to return the fixed deposit.

From the documents, however, it appears, and it is also admitted by the parties that the fixed deposit was returned to the company and it was substituted by plaintiffs who pledged shares of reputed companies having market value in excess of Rs.10,00,000/- that they held personally to secure the company's liability. It is the case of the plaintiffs that pledge of shares was restricted only to secure the defendant against the contingent liability to the party in

Hungary, whereas it is the case of the defendant that the pledge of shares were in addition to the other collateral security that the plaintiffs had given to the defendant against various facilities extended by the defendant to the plaintiffs.

2 The parties relied upon Exh.P-4, Exh.P-5 & Exh.P-7 which are the sanction letters. They also relied on Exh.P-6 which is a pledge document with which I shall deal later. In Exh.P-4, the clause relating to collateral security reads as under :-

> *"Collateral Security :*
>
> *(1) Extension of charge on prime securities for Term Loans to be extended by negative lien letter for covering other limits.*
>
> *(2) Pledge of shares of reputed companies having market value of over Rs.10.00 lacs to secure the company's liability for payment of long outstanding collection bill dated 17.07.1990 for US$ 29025 in consideration of which margin held of Rs.7.42 lacs [FDRs] is released."*

3 In the sanction letter at Exh.P-5 & P-7, clause no.1 of the collateral security is changed but clause no.2 remains identical. It is the case of the plaintiffs that clause no.2 expressly mentions that the pledge of shares was restricted to the payment of long outstanding collection of bills dated 17.7.1990, otherwise, there is no need to describe in that clause "........to secure the company's liability for payment of long outstanding........ is released."

4 The plaintiffs also submitted that Exh.P-6 which is the pledge document has a typed portion on the top which is marked `A' for identification and the same reads as under :-

> *“SECURITY OF SHARES FOR LIABILITY OF UNION QUALITY PLASTICS LTD. TOWARDS FOREIGN BILL FOR US$ 29,025/- DRAWN BY CHEMOLIMPEX, BUDAPEST”*

Relying on this, plaintiffs submitted that this also shows that the pledge of shares was restricted to the contingent liability towards the party in Hungary. According to the plaintiffs, the shares were sold on 22.2.2000 and the value of the shares on that date was Rs.7,65,62,200/- which the defendant has to pay to the plaintiffs.

The counsel for the plaintiffs also submitted that under provisions of Section 174 read with section 176 of the Contract Act, 1872, even if the company owed money to the defendant, the defendant had an obligation to give notice to the plaintiffs to pay the amount outstanding and give a chance to the plaintiffs to make the payment and redeem these shares. Such a notice has not been given and hence, the defendant was liable to make good the loss which is value of those shares as on 22.2.2000.

5 The defendant in their written statement have denied all the allegations and it is the stand of the defendant that the shares pledged were not just restricted to the transaction to the party in

Hungary but the shares pledged were part of the overall collateral security given for all the facilities given by the defendant to the company.

6 On 25.8.2014 this court was pleased to settle the issues and for ease of reference the issues are reproduced at the end in paragraph no.19.

7 The plaintiffs led evidence of the plaintiff no.2 since he was the managing director of the company at the relevant time and defendant led evidence of one Abraham Jacob D'mello, who had signed and verified the written statement. Further examination-in-chief of the plaintiffs' witness and cross-examination of both witnesses-the plaintiffs' witness and the defendant's witness, was held before the Commissioner appointed by this Court. Commissioner's report, the documents received in evidence as well as evidence are also placed on record.

8 At the outset, the counsel for the plaintiffs stated that he does not intend to argue anything on the first issue that was settled and he was going on directly to the merits of the matter.

9 It is to be noted that the transaction, which the plaintiffs

had entered into with the party in Hungary was sometime on or about 17.7.1990. The plaintiffs on or about 4.10.1990 deposited in fixed deposit a sum of Rs.5,23,000/- to secure any claim that would be made by the foreign party for the defendant having accepted and released the documents to the company. The fixed deposit continued for about 5 years and the plaintiffs for the first time by letter dated 28.6.1995 (Exh.P-2) informed the defendant that the amount does not have to be paid to the party in Hungary and requested the defendant to release the fixed deposit. Almost 4 months later, by letter dated 18.10.1995 (Exh.P-3) the plaintiffs once again called upon the defendant to return the fixed deposit. The last two paragraphs of Exh.P-3 will be useful to be reproduced and it reads as under :-

> *"The last communication received from Magyar Hital Bank was on 30.3.92. Subsequently this amount has been settled with the party concerned directly to us since we had received lot of quality claims and finally we have agreed with the amount has not to be paid.*
>
> *In view of this time lapse of nearly 5 years from the date of the transaction and also with fact that the country would saving foreign exchange, we are requesting you to kindly give us permission to close this file and release the deposit lying with you. We need these fund very urgently that our day to day operation and your early response in this matter would be greatly appreciated. In this regard if any letters or undertaking is required to be given, we shall be pleased to furnish the same in order to facilitate the closing of this file."*
>
> *(emphasis supplied)*

Therefore, it appears that sometime in March-1992 itself the plaintiffs have settled the claim of the party in Hungary. If that was the case, I fail to understand as to why the company of which the plaintiffs are directors waited till 28.6.1995 (P-2) to write to the bank for return of fixed deposit and why should the plaintiffs even give as pledge shares of reputed companies valued in excess of Rs.10,00,000/-. The only conclusion one can come to is the shares were given as collateral security for all facilities extended to the company. Though both the parties have not produced any evidence to show when these shares were actually given [certainly it was not given when Exh.P-6 was signed by the plaintiffs but earlier] the 1st reference to the pledged shares can be found in Exh.P-4, the sanction letter dated 26.11.1996 as issued by the defendant to the plaintiffs. If according to the plaintiffs the matter with the party in Hungary was already settled, the plaintiffs would have insisted for return of those pledged shares if the pledge was restricted only to the said Hungary transaction. On the contrary, after the letter dated 18.10.1995 (Exh.P-3) when according to the plaintiffs the matter was already settled in 1992 with the party in Hungary, the plaintiffs still went ahead and pledged their personal shares. After November-1996 (Exh.P-4), the defendant has written another sanction letter dated 6.10.1997 (Exh.P-5) and further sanction letter dated 23.3.1998 where these shares are mentioned as collateral securities. If I have to accept the plaintiffs' contention that these were restricted to Hungary transaction, plaintiffs would not have agreed for the pledge of these shares as mentioned in the sanction letter. The sanction letters also start with the following wording “We are pleased to inform you that we have sanctioned you financial assistance on the following terms and conditions”. The limits of sanction are also mentioned and the pledge of shares are mentioned in the column `collateral security'. Curiously the plaintiffs have asked for return of these shares only in their advocate's letter dated 11.2.2000 (Exh.P-8), more than 4 years after the first sanction letter Exh.P-4 was written by defendant. Therefore, in my view, reading the entire document and the conduct of the parties, paragraph no.2 in the column of collateral security only amounts to identifying the shares which have been pledged and cannot be read as restricted only to the Hungary transaction.

10 Coming to Exhibit P-6 which is the pledge document, the document does not contain a date but from the rubber stamp on the document shows the date on which the document was franked as 23.5.97. Therefore, this document also would have been signed after 23.5.1997. If according to the plaintiffs they have settled the Hungary issue sometime in March-1992 or even if we take the letter's date of Exh.P-2 as 28.6.1995, there was no need to mention these shares in the pledge document. Moreover, the pledge document provides that the signatory thereto agreed that all goods, documents of title of goods and securities of every descriptions which may from time to

time be deposited with the bank by way of pledge or which may come into the possession of the bank in the account of Union Quality Plastics Ltd. shall be deemed to have been deposited with and shall be held by the bank upon and subject to the terms and conditions mentioned therein. The pledge document also states that the pledged securities shall be a security to the bank for the payment and discharge to the bank on demand of all the moneys mentioned therein. Admittedly, the company owed money to the bank and the bank had later sold debt of the company to a 3rd party.

11 Shri Kantawala appearing for the plaintiffs relied upon the typed portion of security of shares for liability of Union Plastics Ltd. that was marked `A' in Exh.P-6 to buttress his submission that the understanding of the parties was pledge of shares was restricted only to secure the contingent liability. I am afraid, I cannot agree with this submission because of the reasons mentioned earlier with reference to Exh.P-4, Exh.P-5 & Exh.P-7 which squarely apply.

12 Even for a moment we accept that the plaintiffs had actually pledged the shares and they were to be given notice as submitted by Shri Kantawala and the pledge of shares were restricted only to the Hungary transaction, let us see whether the plaintiffs prove the amount that they had claimed in the suit.

13 In every case the plaintiffs will have to not only establish that the defendant has a liability but should also prove the quantum.

In the affidavit in examination in chief the plaintiffs have listed the shares in paragraph-17 and have also stated "I hereby produce the table evidencing the price of the shares which on my personal knowledge were prevalent at the stock market in the first quarter of 2000". Even the table of value of each of the shares pledged has the heading "MARKET RATE OF SHARES LODGED WITH THE BANK AS ON 22nd FEBRUARY, 2000". Therefore, the value of the shares which the plaintiffs are claiming is the value as on 22.2.2000.

First of all price of shares can never be static for an entire quarter.

Further, in the notice addressed by the plaintiffs' advocate to the defendant dated 11.2.2000 (Exh.P-8) in paragraph-6 it is stated as under :-

> *"We are further instructed to state that to our Clients' great surprise and dismay <u>our Clients are recently given to understand</u> that notwithstanding the facts as above stated, the Bank has without the knowledge or consent of our Clients fraudulently sold some of the shares........."*

(emphasis supplied)

14 Therefore, when the plaintiffs state that recently they were

given to understand that the shares have been sold, their knowledge has to be before 11.2.2000, the date on the notice (Exh.P-8). If that is the case, certainly the plaintiffs cannot claim the value of shares as on 22.2.2000. There is a lot more to be said on this valuation of loss.

Though in the affidavit in lieu of examination in chief PW-1 has stated that the price of the shares mentioned in the table were to his personal knowledge, in cross-examination to question nos.34, 35, 36, 37 & 38 the witness has answered as under :-

“Q.34 : Has this document been prepared by you ?

Ans. : It has been prepared by my lawyer.

(Witness is shown page 17 of the Affidavit of Evidence)

Q.35. : Is it correct for me to say that the table at page 17 of your evidence is the replica/identical to Exhibit-N of the plaint ?

Ans. : Yes.

Q.36. : I put it to you that the contents of Exhibit-N to the Plaint and the table at page-17 of your evidence are false ?

Ans. : No.

Q.37. : I put it to you that the contents of Exhibit-N to the plaint and the table contained at page 17 of your evidence are unsubstantiated ?

Ans. : No.

Q.38. : I put it to you that you have deliberately selected the 22nd February, 2000 as the date contained in Exhibit-N to the plaint and table contained at page 17 only with a view to inflate your unsubstantiated claim ?

Ans. : No not at all."

15 PW-1 has agreed that Exhibit N is same as the table at page-17 of the evidence. He also states that the statement was prepared by his lawyer. The witness has also not produced a shred of evidence to substantiate the amount which according to him was prevalent on 22.2.2000. In my view, the plaintiffs were bound, particularly when the defendant has denied in the written statement the value of the shares or the amount as claimed, to produce evidence to substantiate the amount claimed in the suit. The burden of proof in this suit to prove the amount was on the plaintiffs in which they have failed.

16 Shri Kantawala submitted that the plaintiffs have in evidence of PW-1 stated that PW-1 was personally aware and that was the amount which was prevalent on 22.2.2000 and it was for the defendant to cross-examine the witness on the value. I do not agree with Shri Kantawala. In any event, the defendant has cross-examined the witness and when the witness in answer to question nos.34 & 35, has stated that the statement was prepared by his lawyer, there is nothing much that is required to be asked. And no

further evidence has been led by the plaintiffs. The defendant has also put their case to the plaintiffs that the contents of Exh.N and the table at page-17 of PW-1's evidence are false.

17 Therefore, in the circumstances, I am unable to gather myself to accept that the plaintiffs have suffered loss in the sum of Rs.7,65,62,200/-.

18 In view of the above, I do not see any reason why I should even go into the submissions of the plaintiffs that they were not given notice before the pledged shares were sold and under Sections 174 and 176 of the Contract Act, 1872, they should have been given a chance to redeem those shares by making the payment. Therefore, the issues are answered as under :-

No.	Issues	Findings
1	Whether the plaint discloses any cause of action?	Does not arise in view of para-8.
2	Whether the plaintiffs prove that the pledge of the suit shares in favour of the defendant was only to secure the contingent liability of Union Quality Plastics Limited in respect of only the DA Bill dated 17.07.1990 drawn by Chemolipex, Budapest for US$ 29,025/- ?	No
3	Whether the plaintiffs prove that the defendant should not have and could not have sold the suit shares ?	No
4	Whether the defendant proves that the suit shares were sold after valid notice to the plaintiffs ?	Does not arise

5	Whether the plaintiffs prove that the defendant is bound and liable to return letter of pledge dated 19.07.1990 duly cancelled ?	No
6	Whether the plaintiffs prove that they are entitled to a decree in the sum of Rs.7,65,62,200/- together with interest at 24% per annum from the date of the suit until payment/realization ?	No
7	What decree ? What order ?	Suit dismissed with cost in the sum of Rs.1,00,000/-

(K.R.SHRIRAM,J)