

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2018

CORAM :
THE HONOURABLE MR. JUSTICE.S.VAIDYANATHAN

W.P.No.4828 of 2011

Mahesh Bharathan

.. Petitioner

Vs.

1. Bank of Baroda
rep. by its Chief Manager,
Errabalu Chetty Street Branch,
5, Errabalu Chetty Street,
Chennai 600 001.
2. The Regional Manager (South Zone),
Bank of Baroda,
No.90, C.P.Ramasamy Road,
I Floor, Alwarpet,
Chennai 600 018.
3. The Assistant General Manager,
Bank of Baroda,
Assets Recovery Branch,
Triplicane,
Chennai 600 005.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India
praying for the issuance of a writ of mandamus, directing the Respondents
to return the Schedule Mentioned Shares to the Petitioner.

Petitioner : Mr.J.Sivanandaraaj
For Respondents : Mr.K.S.V.Prasad

* * * * *

ORDER

The Petitioner has come up with the present Writ Petition seeking a direction to the Respondents to return the Schedule Mentioned Shares to him.

2. According to the Petitioner, who is the Proprietor of M/s.C.R.Bharathan & Co., he availed Overdraft facilities from the Respondent/Bank in the year 1996 for the purpose of business operations of the Proprietary concern and for the facility availed by him, he had executed necessary documents as security and by Letters dated 28.06.1998 and 12.02.1999, he had pledged several collateral securities with the Respondent/Bank, including 200 shares of Reliance Industries. The Respondent/Bank has accepted and acknowledged the same.

3. While so, as a result of Stock scam in the year 2000, the Petitioner suffered huge loss in the business and he was unable to clear the outstanding dues on the said account. Consequently, the Respondent/Bank initiated recovery proceedings in O.A.No.2410 of 2001 under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short 'RDDDB & FI Act) before the Debts Recovery Tribunal, for a total sum of Rs.96,33,180.63 with future interest @ 17% per annum. The Debts Recovery

Tribunal, by an order dated 25.05.2007 allowed the above Original Application and the same was confirmed on appeal filed by persons arrayed as Guarantor in the proceedings. In the meantime, the Petitioner entered into discussions with the 3rd Respondent/Assets Recovery Branch of Bank of Baroda and had suggested One Time Settlement of the entire dues. The Petitioner and the Respondent/Bank agreed to One Time Settlement of the outstanding amount of Rs.49 lakhs and the Petitioner paid the entire amount in instalments.

4. The Petitioner approached the Officials of the Respondent/Bank for release of shares. As time was running out, the Petitioner eventually paid the entire outstanding amount and obtained "No Dues" Certificate on 24.10.2009. The Bank released the original title deeds of the immovable property belonging to C.L.Rajalakshmi, however, they did not release the Share Certificates pledged by the Petitioner, for reasons best known to them. The Officials of the Respondent/Bank merely stated that the shares were in some other Office and they need to be retrieved. Based on the assurance given by the Officials of the Respondent/Bank, the Petitioner agreed to collect the Share Certificates after retrieval of the same. As no development took place, the Petitioner wrote several letters to the Respondent/Bank seeking release of the pledged shares. On 26.07.2010, the 1st Respondent sent a reply that they had a 'few' shares and that they

'cannot trace' the remaining shares which were already pledged with the Respondent/Bank.

5. It is the case of the Petitioner that he had paid the entire outstanding amount to the Respondent/Bank and "No Dues" Certificate has also been obtained and that the Respondent/Bank has no right whatsoever to retain possession of his shares. It is his grievance that he had borrowed huge money at high rate of interest and that the Respondent/Bank deliberately did not release the shares at the time of negotiation of One Time Settlement and even after the dues were settled. According to the Petitioner, though different shares have been entrusted with the Bank, he is concerned only about SSL shares and 200 shares given by Reliance Industries Limited.

6. The Respondent/Bank has filed counter affidavit stating that the Petitioner is well aware that on account of default in repayment of the dues in the credit facilities enjoyed by him with the 1st Respondent/Bank, O.A.No.2410 of 2001 was filed by the Respondent/Bank before the Debts Recovery Tribunal II, Chennai and by an order dated 25.05.2007, the Debts Recovery Tribunal-II, Chennai, had upheld the claim of the 1st Respondent/Bank and directed issuance of Recovery Certificate against the Defendants therein for recovery of Rs.96,36,180.63 with further interest at

17% per annum, from the date of application till the date of realization, in full.

7. It is further stated in the counter that in the said Original Application, the Respondent/Bank had sought for relief against the three Schedules of property which were mortgaged/hypothecated/pledged with them. Schedule B of the said Original Application relates to the shares pledged by the Petitioner, standing in the name of Reliance Industries and SSL Finance Limited, as security by way of Letter of Pledge, dated 23.03.1996 at the time of execution of loan documents. According to the Respondent/Bank, the Petitioner never raised any issue of other shares alleged to have been pledged by him with the 1st Respondent after being put on notice of the claim of the 1st Respondent/Bank in the Original Application, based on the pledge.

8. It is the case of the Respondent/Bank that the Petitioner is seeking to put forth a false case, as if he had pledged shares with the Bank. According to the Respondent/Bank, the Petitioner was carrying on business as a share broker and it is totally incorrect to state that the Petitioner had pledged the alleged shares with the Respondent/Bank. On the other hand, it is their case that 100 shares of Reliance Industries and 2800 shares of SSL Finance Limited alone were pledged with them and based on the final

orders passed by the Debts Recovery Tribunal, a sum of Rs.239.07 lakhs was payable by the Petitioner in instalments, and it is totally incorrect to state that the Respondent/Bank pressurized the Petitioner to pay OTS amount. When the Petitioner approached the Bank with regard to the release of shares, the Officials of the 1st Respondent categorically reported to him that the Petitioner was also aware that 100 shares of Reliance Industries were in fact converted into Demat form on 25.08.2003 and the same were sold on 18.02.2004 at the rate of Rs.605.65 per share and the total sale proceeds, less the charges were credited to the account of the Petitioner. The settlement was arrived at only for the balance amount, after the sale of 100 Reliance shares.

9. The Respondent/Bank adds that the shares were transferred to the Bank's name and settlement was arrived at only for the balance amount, and what was left with the Bank was 2800 shares of SSL Finance Limited in physical form, which were given to the Petitioner. According to the Respondent/Bank, the Petitioner did not evince any interest in receiving the said Share Certificates of SSL Finance Limited, as they were no more being listed at the Stock Exchange and it is incorrect to state that the Petitioner was made to run from pillar to post to get the shares from the Respondent/Bank.

10. It is the contention of the Respondent/Bank that the Petitioner had discharged the Bank's liability pursuant to the acceptance of OTS and the Bank had accordingly issued a 'No Due Certificate' on paying the OTS amount. Further, the compromise/OTS dated 31.03.2009 was signed by the Petitioner, wherein, one of the terms and conditions of sanction was to release the mortgaged properties only, but not, release of the shares. Accordingly, the mortgaged properties were released on the discharge of liability and the share certificates of SSL Finance Limited numbering 2800, in the physical form, are available with the Respondent/Bank, as they could not be sold. The pledge of the shares of Reliance Industries with the Respondent/Bank was duly invoked, converting into Demat form, sold by the Bank and given credit to the account of the Petitioner on the basis of the Letter of Pledge, dated 22.03.1996. According to the Respondent/Bank, at no point of time, they committed an unlawful act. As part of contractual obligations, the Petitioner, while pledging the shares, had authorized the Respondent/Bank to invoke the Pledge and sell the shares without any notice on the Account becoming irregular and NPA and that the Bank had acted within their rights and proceeded against the shares to realize the legitimate dues. Thus, according to the Respondent/Bank, the Petitioner is not entitled to any relief, much less the one sought in the Writ Petition.

11. The Petitioner has filed a Reply to the counter affidavit of the Respondents and reiterated his stand.

12. Learned counsel for the Petitioner submitted that 200 shares of Reliance Industries apart from 2800 shares of SSL Finance Limited were deposited with the Respondent/Bank as security, which is described in Schedule-B. He further submitted that when the Petitioner had paid the entire dues to the Respondent/Bank as OTS, it is the duty cast upon the Respondent/Bank to return the Shares pledged by him. It is his contention that no notice was served to the Petitioner and any condition that may be entered contrary to the provisions of the Indian Contract Act, more particularly, Section 176 is bad and that under Section 176 of the Indian Contract Act, the Petitioner may be given a chance to redeem the shares and hence, he should have been put on notice before disposing of the shares.

13. According to the Learned Counsel, without issuing a reasonable notice, the Respondent/Bank ought not have acted in disposing of the shares and if they had disposed of the shares, they are at risk and they cannot shirk their responsibility in returning 200 shares of Reliance Industries Limited, belonging to the Petitioner. Even assuming that the

Respondent/Bank was justified in doing so, *de hors* Section 176 of the Indian Contract Act, out of 200 Reliance Industries shares, only 100 shares have been sold and the Petitioner is entitled to the remaining 100 shares. Hence, he prayed that the relief sought by the Petitioner may be granted by this Court.

14. In support of his case, Learned Counsel for the Petitioner has relied on the following decisions:

(i) **M/s.Gemini Communications Ltd. Vs. Karvy Financial Services Limited, CDJ 2012 MHC 6372**

“18. The case before the Kerala High Court was that the plaintiff pledged 5 sovereigns of gold ornaments with the defendant bank and availed loan of Rs.2,500/-The bank recalled the loan and called upon the plaintiff to discharge debt, failing which, informed that the ornaments would be sold in auction on 27.2.1986. The plaintiff paid Rs. 500/- in response to the notice and expressed his willingness to discharge the balance amount, but the defendant bank claimed to have sold the jewels, which was, according to the plaintiff, unauthorized, illegal and contrary to law and the plaintiff hence filed suit for return of the ornaments. The suit was dismissed on the ground that the sale was in accordance with law. Whereas, the lower appellate court reversed the finding of the trial court on the basis of the conclusion that the bank ought to have issued another notice before the sale was effected. When the judgment of the lower appellate court was challenged by way of second appeal. The High court of Kerala, though set aside judgment of the lower appellate court and restored the judgment of the trial court, held that without proper tender of the amount due on the pledge, the only right of the pledger in respect of an unlawful or

unauthorized sale is in tort for damages actually sustained by him and the suit is not one for redemption or damage for conversion and it is for return of the articles pledged, which per se is not maintainable. While doing so, High court of Kerala has dealt with the main issue as to whether notice issued by the bank is sufficient or not and arrived at conclusion that the right of the pawnor to have a reasonable notice is well recognized in law and any default in payment of debt within the stipulated period, the right available to the pawnee is either file a suit or to resort to sale of pledged goods by sending reasonable notice."

(ii) **Prabhat Bank Ltd. vs. Babu Ram, AIR 1966 All 134**

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

(iii) **Syndicate Bank vs. C.H.Mohammed, 2010 SCC Online Kerala**

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"33. One may now notice the prayer in the plaint. It is for return of gold ornaments or its value. The appellant has no case that he had discharged the debt and the Bank was unable to return the

ornaments. In a case where the debt is still outstanding, the remedy available to the appellant is two fold. Assuming that the Bank has illegally sold the property, the remedies available are (i) to sue for redemption (ii) to sue for damages for conversion. In Halsbury's Laws of England, Fourth Edition at page 74 it is mentioned as follows:

"122. Actions for recovery by pawnor. A pawnor cannot maintain an action for conversion against a pawnee for the pledge unless the pawnor has a right to its immediate possession, consequently until tender or payment of the debt the pawnor cannot generally maintain an action for conversion of the pledge. A pawnor may sue a pawnee who refuses to restore the pledge after tender of the debt, but if the ownership of the pledge is in doubt the refusal, if made reasonably and to obtain a reasonable time for the purposes of investigation, will not ground such an action. In similar circumstances, the assignee of a pawnor may bring an action for conversion, and may recover damages for non-delivery.

If the pawnee unlawfully deals with the pledge, as by sale, transfer or repledge, the contract of pawn is not thereby determined and the pawnor may not recover in conversion unless he has a right to immediate possession by redeeming the pledge. However, if the pawnee deals with the pledge in a manner other than that which the law allows, and, for example by purporting to dispose of a greater interest than he has in the pledge, makes it difficult for the pawnor to redeem it, then, if any real damage has been caused to the pawnor, the pawnee has committed a legal wrong against him."

(iv) Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others, (2010) 11 SCC 186

“20. In the case on hand, the respondent- Company has demonstrated that based on the advise of the appellant-Bank, they shifted their accounts to another Nationalized Bank and through an arrangement with the State Bank of India, a cheque of Rs.15 crores was deposited by their Bank and in token of the same, by statement of accounts dated 14.05.2009 the appellant- Bank clearly mentioned that there is no due or nil balance from the respondent-Company (Emphasis supplied). In such circumstances, when the relief sought for does not relate to interpretation of any terms of contract, the Bank being a Nationalized Bank, a Writ Court can issue appropriate direction in certain circumstances as mentioned above. In such a factual matrix, the reliance placed on these two decisions is not helpful to the appellant-Bank.

15. Per contra, the Learned Counsel appearing for the Respondent/Bank submitted that as per the pledge, the Petitioner is entitled to sell the shares. Even though in the pleadings, it has been referred to as 200 shares of Reliance Industries, it has been categorically mentioned in Schedule-B that there are only 100 shares. That apart, in the Letter dated 12.02.1999 addressed to the Respondent/Bank, the Petitioner has given a list of shares in writing, wherein, it has been mentioned that the Petitioner has given only 100 shares of Reliance Industries to the

Respondent/Bank. He further submitted that no permission is required from the Debts Recovery Tribunal to sell those shares for adjustment of loan that has been given to the Petitioner.

16. According to the Learned Counsel appearing for the Respondent/Bank, Section 176 of the Indian Contract Act may not be applicable to the facts of this case, as the Petitioner being a borrower cannot step into the shoes of the Respondent/Bank, which is a Guarantor. He further submitted that the entire proceedings for recovery of the outstanding amount is based on the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and in view of the overriding provisions under Section 34 of the said Act, there is no need to put the Petitioner on notice before the shares have been demated and adjusted towards the loan.

17. It is further stated by the Learned Counsel that there is no compulsion for the Petitioner to accept the OTS. In fact, the total amount due from the Petitioner was nearly 240 lakhs and that the Petitioner, having accepted the OTS, has paid less than Rs.50 lakhs. The Petitioner, as a beneficiary, having accepted OTS and enjoyed its benefits, cannot approbate and reprobate. It has been made very clear that the Petitioner was asked to pay OTS only on the balance amount outstanding and no

assurance was given that Reliance Industries shares could not be adjusted. At no point of time, 200 shares of Reliance Industries were given by the Petitioner and that the available shares numbering 100 have been adjusted towards the non-payment of amount by the Petitioner, as he had availed Overdraft facility.

18. Learned Counsel appearing for the Respondent/Bank goes on to state that OTS is a supplant to the original contract and having accepted the OTS, the Petitioner has no right much less the legal right to contend that Section 176 of the Indian Contract Act will be applicable to the facts of this case. According to him, once the terms of OTS have been fulfilled and acted upon by the parties, neither party can go back to the original contract.

19. To substantiate his stand, Learned Counsel appearing for the Respondent/Bank has relied on the following decisions:

(i) **Infrastructure Leasing & Financial Services Limited vs. B.P.L. Limited**, CDJ 2015 SC 022

“41. ... 176. Pawnee's right where pawnor makes default. - If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. Defaulting pawnor's right to redeem - If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must, in that case, pay, in addition, any expenses which have arisen from his default."

42. The aforesaid two provisions when read in a conjoint manner clearly establish that a pledge does not get extinguished and, in fact, continues even when the pawnee has sued and recovered a part of the debt without enforcement of the pledge or the security. As per Section 176, when the pawnor makes default in making the payment, the pawnee may bring a suit upon the debt or promise and retain the good(s) pledged as a collateral security. A pawnee has both collateral and concurrent rights and can institute a suit for the purpose of realization of the said debt or promise while retaining the goods as a collateral security. Section 176 also makes it clear that it is the discretion of the pawnee and it gives an option to him and merely because pawnee has filed a suit for recovery, that would not affect or destroy the charge or the right of the pawnee in respect of a pledged goods or the collateral security. Thus, it is within the domain of discretion of pawnee to file a suit for recovery of a debt and yet retain the collateral security or pledged goods. It would not bar or prohibit a pawnee from subsequently selling the pledged goods or the collateral security. It is pertinent to mention here that there is a difference between a hypothecation and a pledge. In the case of a pledge, the security is in possession of the pledge, but in the case of hypothecation, the possession remains with the owner i.e. the pawnor.

Though such a distinction exists, yet it is an accepted legal principle that hypothecation is treated as a sub-species of pledge and virtually has the same legal effect. In this context, reference to a passage from Lallan Prasad V. Rahmat Ali and another[34], would be seemly.”

(ii) **State Bank of India vs. N.Sathiah, AIR 1989 Madras 279**

“9. This section recognises three rights in a pawnee in case of default by a pawner. They are : (i) he may bring a suit upon the debt; (ii) he may retain the goods pawned as collateral security; (in) he may sell it giving the pawner reasonable notice of sale. The lights of a pawnee having been thus clearly spelt out, the pre-condition imposed preventing the plaintiff Bank from recovering he amounts due to it based on the promissory notes is certainly against the rights of the pawnee recognised under Section 176 of Contract Act. Having held that the suits as filed maintainable in view of Section 176, and that the spuriousness or the genuineness of the gold jewels is alien to the scope of the suits, the restraint put on the plaintiff that only after the question regarding the nature of the pledged jewels is decided by the Court, the decrees could be executed, is destructive of the rights of the pawnee, as recognised under Section 176 of the Act.”

(iii) **Haridas Mundra vs. National & Grindlays Bank Ltd., CDJ 1962**

Cal. HC 107

“5. In construing this section too much importance should not be given to the semicolon in the first paragraph. In a case where the pawnor makes default, the pawnee has three rights: (i) he may bring a suit against the pawnor upon the debt or promise, and (ii) he may retain the pawn as a collateral security, or (iii) he may sell it on giving the pawnor reasonable notice of the sale. The right to retain the pawn and the right to sell it are alternative and not concurrent rights. While the pawnee retains, he does not sell; and when

he sells he does not retain. But the pawnee has the right to sue on the debt or the promise concurrently with his right to retain the pawn or to sell it. The retention of the pawn does not exclude this right of suit, since the pawn is a collateral security only. Nor does the sale of the pawn destroy this right; the pawnor is still liable on the original promise to pay the balance due. The sale does not give a fresh starting point of limitation for a suit to recover the balance. See ILR 24 All 251 and Yellappa v. Desayappa, ILR 30 Bom 218. Similarly, the institution of a suit upon the debt or promise does not reduce the pledge to a passive lien and destroy the pawnee's right to sell the pawn. The right of sale is necessary to make the security effectual for the discharge of the pawnor's obligation and the right continues in spite of the institution of the suit. The point in issue arose directly for decision in Suit No. 860 of 1945, Gorakhram Sadharam v. Agarchand Chunilal, decided by Sarkar J. on August 5, 1952. In that case Sarkar J. observed :

"I have already said that some of the sales took place after the suit had been filed. I did not understand learned counsel for the defendant to make any special point of this. Nor do I myself find that this makes any difference. The pledgee has admittedly the right to sell. I do not see that he loses this right by filing a suit."

It is to be observed that this opinion was not challenged on appeal though some of the other findings of Sarkar J. were set aside in A.F.O.D. No. 12 of 1953, Agarchand Chunilal v. Gorakhram Sadharam, decided on January 17, 1957.

6. The above conclusion sufficiently disposes of the first contention raised by Mr. Deb. I may add however that even if it be assumed that the right of sale out of Court is alternative to the right to institute a suit on the debt or promise, I am by no means satisfied that the two alternatives are mutually exclusive and that the

exercise of one alternative right destroys all future recourse to the other alternative. ..."

(iv) **Srinivasulu Naidu (died) and others vs. Gajaraj Mehta and Sons, 1990 (1) MLJ 188**

"5. It is next argued by the learned Counsel that first a separate notice ought to have been given intimating the plaintiff the amount due from him and that the defendant proposed to have the sale. But Section 176 is not to that effect at all. To repeat, what all the section says is that a reasonable notice of sale must be given to the pawner. In this connection the learned Counsel reads out three decisions viz., (1) Sri Rama Finance Corporation, Bobbili, Sri Kakulam District A Partnership Firm By Their Managing Partner Sri. C.V. Seetharamaswamy v. Chatla Yellaiah Reddi and two others (1976) 1 A.W.R.107; (2) Prabhat Bank Ltd. and Anr. v. Baby Ram ; and (3) Sri Raja Kakral puni Venkata Sudarsana Sundara Narasayamma Gam (Died By Lrs. v. The Andhra Bank Ltd. Vijayawada and Ors. (1960) 1 A.W.R.234. But I do not see any one of there decisions in support of the contention of the learned Counsel. In the first case, viz., Sri. Rama Finance Corporation Bobbeli v. Chajla Yellaiah Reddi (1976) 1 An.W.R.107, it is held that:

A pledgee is entitled to pray for sale of goods through Court, though he is entitled under Section 176 of the Contract Act to sell them himself without reference to the Court, but before he proposes to sell, the pledgee should give notice to the pledger about the intended sale.

In the second case viz. Prabhat Bank Ltd. v. Baby Ram , it is laid down that, A notice of the character contemplated by Section 176 cannot be implied. Such notice must be clear and specific in its language and must indicate the intention of the pawner to dispose of the security.

In the third case viz., Sri. Raja Kakral Puni Venkatasudarsana Sundara Narasayamma Gam v. The Andhra Ltd. (1960) 1 An.W.R. 234, it is ruled that, On a plain reading of Section 176 of the Contract Act, it is clear that before exercising the power of sale the pawner should give to the pledger reasonable notice of the sale (of the pledged thing) Section 176 is mandatory and even if there is a term in the contract of pledge to waive notice, still, the pledge is not relieved of his obligation to give notice before the sale of pledged articles.

Now, there is no doubt that a notice of sale is mandatory, but in this case a notice in fact has been sent. The above decisions cited by the learned Counsel only emphasise that a reasonable notice must be given. That is the very language of the section to which we have referred above.”

(v) **Madholal Sindhu vs. The Official Assignee of Bombay, AIR 1950 FC 21**

“43. It was contended that if the Bank held these shares as pledgee, no notice of the sale was given to Nissim under Section 176 and therefore the sale was void ab initio. 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 Section 176 does not arise. Moreover, he was subsequently informed 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.”

(vi) **GET Power Ltd. vs. State Bank of India, IV (2016) BC 294**

(Mad.)

"12. It is well settled proposition of law that this Court, in exercise of powers conferred under Article 226 of The Constitution of India cannot conduct a roving enquiry into the disputed facts projected on behalf of both sides. In such an event, the remedy under Article 226 of The Constitution of India is not a proper remedy. It is for the respondents, who have granted loan in favour of the petitioner company have to either accept or reject the proposal submitted by the petitioner company for re-structuring the loan account in which this Court has no jurisdiction to either direct the respondents to accept the proposal or grant an opportunity to the petitioner to settle the loan amount in a manner convenient to them. In this context, useful reference can be made to the decision of the Division Bench of this Court, relied on by the learned counsel for the respondents 1, 5, 6 and 9 in (Tamil Nadu Industrial Investment Corporation Limited vs. Millenium Business Solutions Pvt Ltd.,) reported in 2004 (5) CTC 689 wherein it was held as follows:

"16. A loan granted in terms of the contract, and grant of one time settlement or re-scheduling of the loan amount is really a modification of the contract, which can only be done by mutual consent of the parties, vide Section 62 of The Contract Act, 1872. The Court cannot alter the terms of the contract.

17. For the reasons stated above, this writ appeal is allowed and the impugned order passed in WP No. 14013 of 2004 is set aside. Consequently, connected miscellaneous petitions are closed.

18. Before parting with the case we would like to mention that recovery of tens of thousands of crore rupees of loans of banks and financial institutions has been held up by Court orders under Article 226 proceedings which were really unwarranted. However, much sympathy a

Court may have for a party, a writ Court must exercise its jurisdiction on well settled principles, and not on mere sympathy or compassion. No doubt, there may be hardship to a party, but unless violation of law is shown, the Court cannot interfere. Holding up recoveries of loans by unwarranted Court orders is causing incalculable harm to our economy, since unless the loan is recovered a fresh loan cannot be granted to needy persons. The courts must keep these considerations in mind."

(vii) **Y.V.Sekar vs. A.Parimala Kanthi**, CDJ 2017 MHC 5695

13.

In this context, the learned counsel for the first defendant/appellant relied on the decision of the Apex Court in ([Babulal Badriprasad Verma vs. Surat Municipal Corporation and others](#)) reported in AIR 2008 Supreme Court 2919 (1) wherein it has been held as follows:-

34. Significantly, a similar conclusion was reached in the case of [Krishna Bahadur vs. Purna Theater](#)(2004) 8 SCC 229), though the principle was stated for more precisely, in the following terms:-

9. The principle of waiver although is akin to the principle of estoppel, the difference between the two, however, is that whereas estoppel is not a cause of action, it is a rule of evidence, waiver is contractual and may constitute a cause of action, it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no

public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

20. In reply, while reiterating the contentions, Learned Counsel for the Petitioner submitted that a notice in writing is mandatory and having failed to issue the same, the act of the Respondent/Bank in disposing of the shares that are pledged, is contrary to Section 176 of the Indian Contract Act. According to him, the Respondent/Bank ought to have retained the pledged shares as collateral security and sell them at a later point of time, after giving a reasonable notice of Sale to the Petitioner. The reason is that if there is excess, the balance amount on account of the sale has to be refunded to the person, who has availed the loan and if it is less, the Bank, which has granted loan, can demand the balance amount from the borrower. In the case on hand, the action of the Respondent/Bank is contrary to the provisions of the Statute, more particularly under the Indian Contract Act, 1872.

21. Heard the learned counsel on either side and perused the material documents available on record.

22. It is not in dispute that the Petitioner had availed loan from the Respondent/Bank. The claim for recovery of money for the loan granted by the Respondent/Bank was accepted by the Debts Recovery Tribunal and an order was passed on 25.05.2007. Pursuant thereto, the Petitioner had discussions with the Respondent/Bank and agreed to One Time Settlement of Rs.49 lakhs. It is seen that the Petitioner specifically requested release of the pledged shares immediately on payment of the first instalment of the OTS amount. Subsequent to the payment of the entire outstanding OTS amount by the Petitioner on 24.10.2009, the Respondent/Bank issued a 'No Dues' Certificate on the same day. Despite receiving the 'No Dues' Certificate, the Petitioner has approached this Court in the pretext that the Share Certificates pledged by him with the Respondent/Bank have not been returned.

23. Now, the issue addressed before this Court is with regard to 200 shares of Reliance Industries Limited and 2800 shares of SSL Finance Limited.

24. When this Court directed the Respondent/Bank to ascertain the present status as to the number of shares pledged by the Petitioner, the Bank has filed an additional counter affidavit. For better appreciation of

the case, relevant portion of the same is extracted hereunder:

"8. The fact that we had shares of only two Companies, (a) Reliance Industries and (b) SSL Finance Ltd., was mentioned in the Schedule-B of our Application in O.A.No.2410 of 2001 filed in DRT, on or about 24.12.2001. It shows that the shares of other Companies mentioned in the Writ Petition were not available with us even as on 24.12.2001, the date of OA Application, 10 years prior to the filing of this Writ Petition. The disputed shares of other Companies were either sold or returned, the documents to confirm which are not available now, for the reasons stated supra.

The defendants 1 and 2 (the Petitioner herein) in OA filed in DRT, Chennai did not dispute our averment in para 7 of our application that we had at that time, shares of only 2 Companies and that the process of their sale would take some time.

9. During the years 2001 to 2002, if it had been disputed, our Officers, who have since retired (long back), would have managed to produce the documents relating to their return to the petitioner or sale. The statement of account filed in DRT with the OA Application shows very many deposits, the reason being that the said EC street Branch being the Bank authorized by Share brokers and Madras Stock Exchange Ltd., to receive and pay out the proceeds of sale of shares of the customer of the Share brokers. At this point of time, after 23 years, we are not able to point out the relevant entry, as the entry of sale proceeds of some of the pledged shares, claimed in this Writ Petition.

10. So far as Reliance shares are concerned, as averred in para 7 of the OA Application filed in DRT, the process of sale was continued, they were sold on or about 18.02.2004 and we received from our Bombay Branch, the sum of Rs.1,08,554/-. It was given credit to by the Hon'ble DRT-II, Chennai, in its Recovery Certificate when it calculated the interest due on the principal ordered by it.

11. It is pertinent to point out here that the Petitioner was aware of the sale as well as the appropriation of this sale proceeds of the shares of Reliance Company as well as the other Companies and so he had not raised the issue of return of all these shares of different Companies at any time, earlier, i.e. (a) in his Written Statement in DRT (b) in his Compromise Letter dated 23.02.2009 offering OTS and (c) while accepting the Bank's offer of OTS, dated 31.03.2009, wherein the Bank agreed to receive only the sum of Rs.49.00 lakhs instead of a contractual or decreed dues of "Rs.239.07 lakhs plus interest and costs" and agreed that "Document/Title deeds will be released" after obtaining the order from DRT. Even the order dated 09.09.2009 of DRT, recording the Memo of Full Compromise, does not mention the shares of their return."

25. The Respondent/Bank has agreed to return the SSL shares available with them and it is their case that the Petitioner is not willing to take the same. As regards the number of shares pledged by the Petitioner with the Respondent/Bank, from the material documents produced before this Court, it is seen that the total number of Reliance shares pledged by the Petitioner with the Respondent/Bank is 100 and not 200, as averred by the Petitioner. Though, it has been mentioned in the pleadings, that there are 200 Reliance Industries shares, the Petitioner has categorically mentioned as 100 Reliance Industries shares in the Letter dated 12.02.1999 addressed by him to the Respondent/Bank and at no point of time, the Petitioner had objected to it before the Tribunal or at the time of accepting the One Time Settlement.

26. Though, the entire OTS is based on the negotiation between the parties for the amount payable by the Petitioner to the Respondent/Bank on the date of OTS, from the records, it is clear that on the date of OTS, 100 Reliance Industries shares have been demated and the Petitioner's Account has been adjusted. Thus, the reliance placed by the Learned Counsel for the Petitioner to Section 176 of the Indian Contract Act, 1872, may not be applicable to the facts and circumstances of this case, as the conditions in OTS have supplanted the original contract.

27. That being the case, on the date of OTS, no Reliance Industries shares were pledged by the Petitioner with the Respondent/Bank and hence, there is no need to issue a notice under Section 176 of the Indian Contract Act, 1872, more particularly in the light of Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Even assuming that the same is required to be done, the Petitioner having waived his rights before the Debts Recovery Tribunal and accepted the Schedule of property, viz. Schedule - B, is estopped from raising a plea that there are 200 Reliance Industries shares with the Respondent/Bank and that the Bank is bound to return the same. And, even assuming that only 100 shares have been pledged by the Petitioner with the Respondent/Bank, 100 shares alone have been demated by the Bank.

28. As OTS is contractual in nature and that the parties are bound to perform the contract in terms of the said OTS as approved by the Debts Recovery Tribunal, and that OTS has replaced all the Agreements/Contracts including the contents in the Original contract, based on the old Loan Agreement, which has been supplanted by OTS, the Respondent/Bank is bound to return only the Share Certificates that are available with them, viz. SSL shares and that the 100 Reliance Industries shares handed over by the Petitioner have been demated and adjusted towards the loan amount prior to OTS and there is no evidence to show in the pleadings that 200 shares of Reliance Industries were pledged by the Petitioner with the Respondent/Bank.

29. This Court cannot conduct a roving enquiry on this issue. Based on the pleadings before this Court and taking note of the submissions of the Petitioner, this Court is of the view that 100 shares of Reliance Industries were pledged by the Petitioner with the Respondent/Bank and at a later point of time, the same have been demated and adjusted towards the Petitioner's loan account and for the balance amount, OTS has been entered. In view of the above, this Court finds no reason to grant the relief sought by the Petitioner.

Accordingly, this Writ Petition fails and stands dismissed. No costs.

Consequently, connected M.P.No.1 of 2011 is closed.

23.01.2018

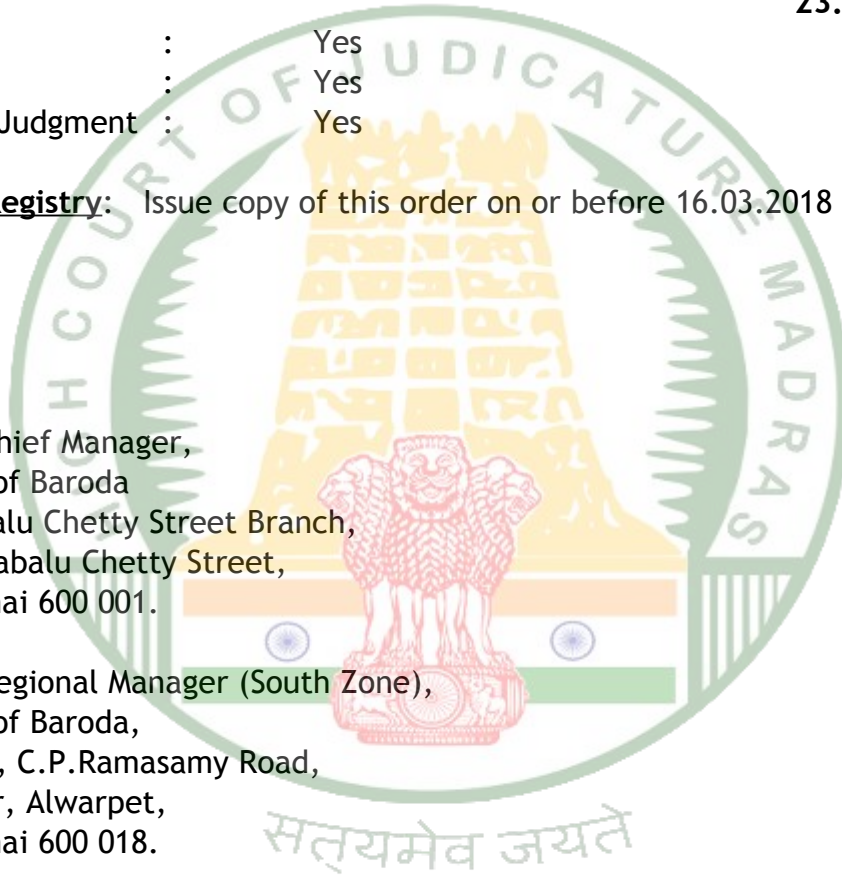
Index : Yes
Internet : Yes
Speaking Judgment : Yes

Note to Registry: Issue copy of this order on or before 16.03.2018

(aeb)

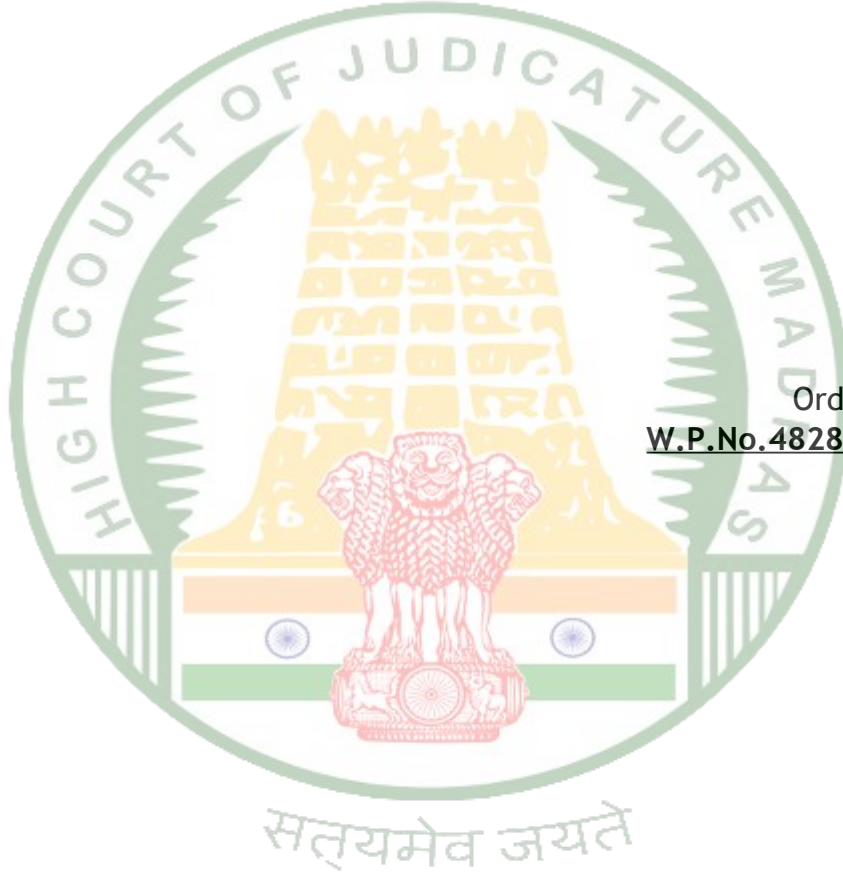
To:

1. The Chief Manager,
Bank of Baroda
Errabalu Chetty Street Branch,
5, Errabalu Chetty Street,
Chennai 600 001.
2. The Regional Manager (South Zone),
Bank of Baroda,
No.90, C.P.Ramasamy Road,
I Floor, Alwarpet,
Chennai 600 018.
3. The Assistant General Manager,
Bank of Baroda,
Assets Recovery Branch,
Triplicane,
Chennai 600 005.



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S.VAIDYANATHAN, J.
(aeb)



Order in
W.P.No.4828 of 2011

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