IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.04.2018

PRONOUNCED ON : 13.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.939 of 2004 &
CMP.NO.6914 OF 2004

M/s.M.G.International
rep. by its proprietor M.G.Sekar,
185, Royapettah High Road,
Chennai - 600 004. ... Appellant/Defendant in O.S

Vs.

Syndicate Bank,
Perambur Branch,
Chennai - 600 011. ... Respondent/Plaintiff in O.S

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.12.2002 made in A.S.No.29 of 2000 on the file of the Court of the VII Additional City Civil Court, Chennai, reversing the judgment and decree dated 25.09.1998 made in O.S. No.9093 of 1996 on the file of the Court of the XVII Assistant City Civil Court, Chennai.

For Appellant : Ms.M.Meenakshi
for Mr.P.Anbarasan

For Respondent : Mr.R.Ravendran

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JUDGMENT

This second appeal is directed against the judgment and decree dated 20.12.2002, passed in A.S.No.29 of 2000, on the file of the VII Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 25.09.1998, passed in O.S. No.9093 of 1996, on the file of the XVII Assistant Judge, City Civil Court, Chennai.

2. Parties are referred to as per their rankings in the trial Court.

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3. Suit for recovery of money.

4. The case of the plaintiff, in brief, is that the defendant during the course of its business transaction approached the plaintiff bank for the grant of loan of Rs.1,25,000/- towards the export of 53 cartons (4624 pieces) of ready made garments (ladies blouses in cotton power looms) for export to U.S.A. and the defendant agreed to repay the said loan within 90 days and accordingly, the loan was sanctioned to the defendant on 19.7.1985 and for the loan granted, the defendant executed a promissory note in favour of the plaintiff agreeing to repay the borrowed sum as agreed to and also issued a take delivery letter dated 19.07.1985 in favour of the plaintiff and in case of default, agreed to pay overdue interest or at such rate as may be charged from time to time and the defendant also executed a export credit agreement in favour of the plaintiff in connection with the loan availed and also executed a letter of security duly securing the letter of credit and the materials supplied and due security for the repayment of the loan and the plaintiff reserves their right to proceed against the hypotheca and after availing the loan facilities, the defendant was very irregular in the matter of repayment and failed to repay the loan within the agreed period as promised and hence, the plaintiff sent a reminder calling upon the defendant to settle the due amounts and as no payment is forthcoming, the plaintiff issued a legal notice dated 27.10.1986, to the defendant, which has been duly acknowledged by the defendant and despite the same, the defendant failed to settle the amount and hence, the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts and the defendant admits that it has applied for a key loan and the same was sanctioned and the necessary documents had been executed by the defendant and as per the formalities of the plaintiff's bank, the goods of garments to be exported were deposited with the plaintiff's bank and as per the practice, the plaintiff's bank is liable to handover the goods deposited with them to the defendant, when the defendant repays the loan amount and in this case, while the defendant demanded the goods to be returned, the plaintiff's bank informed that the goods were handed over to the guarantor, namely, Jaykay Sports and the plaintiff's bank had no authority to handover the deposited goods to anyone, except the defendant and the plaintiff replied to the enquiry of the defendant that the goods were returned to the guarantor, who was doing the business for the plaintiff and the plaintiff's bank having failed to return the goods deposited has no right of demanding the loan amount and in this connection, the defendant wrote several letters to the plaintiff's bank and the plaintiff's bank has also responded to the same and the letters sent by the plaintiff's bank as well as

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the copy of the letters sent by the defendant were all seized by the Income Tax Authorities while conducting a raid in the business premises of the defendant on 13.09.1996 and could not be filed by the defendant and inasmuch as the defendant obtained the key loan on depositing the goods worth more than the loan amount and the plaintiff failed to return the goods to the defendant, the plaintiff has no right to claim the repayment with interest as putforth and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case PW1 was examined, Exs.A1 to A9 were marked. On the side of the defendant DW1 was examined, no document has been marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit laid by the plaintiff. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and resultantly, granted the decree in favour of the plaintiff as prayed for. Impugning the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether the lower appellate Court is correct in giving a finding that in the key loan obtained by the appellant pursuant to hypothecation agreement, only the papers relating to 53 boxes of textile goods were hypothecated and not the goods?

2. Whether the lower appellate Court has overlooked the evidence of PW1 who had categorically admitted in his evidence that the respondent bank was in the custody of the goods hypothecated by the appellant?

3. Whether the lower appellate Court has misread Ex.A-6 which clearly shows that the appellant had deposited the goods worth about Rs.4 lakhs with the respondent bank which had lien to sell the goods?

4. Whether the lower appellate Court has

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ignored the evidence available on record such as various documents furnished by the appellant as security, enabling the respondent to sell the goods and appropriate the amount towards the loan amount?

5. Whether the lower appellate Court is correct in awarding interest at 12% from the date of suit till the date of realization especially when the respondent bank has failed to sell the goods and appropriate the loan amount from the sale proceeds?

9. The availment of the subject loan by the defendant from the plaintiff's bank is not in dispute. Materials placed on record would go to show that the security had been offered by the defendant for the loan availed by way of depositing the 53 carton of ready made goods and it is found that the said security goods had been handed over by the defendant only to his clearing agent M/s.Lemuir Air Express, Chennai and it is thus found that for the loan availed, the defendant has created the hypothecation of the abovesaid goods and the same had been kept only in the custody of the defendant's clearing agent and it is thus found that the goods were not entrusted in the physical custody of the plaintiff's bank at the time of the availment of the loan. This could be evidenced from the document Ex.A1, the application for advance against merchandise and as rightly putforth by the plaintiff's bank, it is seen that the security had been kept only under the custody of the warehouse described in the document and not left with the custody of the plaintiff's bank as such. That apart, it is also found that the plaintiff, on seeing the failure of the defendant in not honouring the repayment of the loan amount as promised, sent a legal notice dated 21.10.86 to the defendant and to the said notice a reply has been sent by the defendant, dated 17.11.86, which has been marked as Ex.A9. On a perusal of Ex.A9, it is found clearly that the security goods concerned are kept only with the custody of the clearing agent and the same is not left with the physical custody of the plaintiff's bank as such and therefore, it is seen that as rightly putforth by the plaintiff's counsel, the goods offered as the security for the loan transaction, being left only with the custody of the clearing agent in the nature of the hypotheca with the plaintiff's bank, the defendant would be entitled to deal with the goods as such for exporting the same to the overseas buyer, for which purpose, the loan had been availed by the defendant.

10. On a perusal of Ex.A9, it is found that the defendant had availed the loan for exporting the goods concerned to the overseas buyer in U.S.A. and it is further noted that on account

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of the failure of the overseas buyer to open the LC in the foreign bank to enable the shipment in time, for one reason or the other the shipment of the goods concerned could not be effected and it is thus found that accordingly the defendant had responded by way of Ex.A9 that they would be clearing the loan concerned at the earliest point of time, at least, by shipping the goods to the alternative buyer in case of the failure of the original buyer to effect the shipment of the goods and it is thus found that the hypotheca had been kept only in the custody of the clearing agent and not with the plaintiff's bank.

11. Such being the factual position, as rightly putforth by the plaintiff's counsel, the plaintiff having laid the suit for a simple money decree against the defendant as regards the loan involved and when it is found that the defendant has failed to repay the loan amount as promised, the defendant cannot now disclaim the payment on the footing that the hypotheca had been entrusted in the custody of the plaintiff's bank and the option of the plaintiff is to proceed against the hypotheca and not seek the decree against the defendant as prayed for. However, when it is seen that the loan had been availed by offering the security only in the nature of hypothecation, as rightly putforth in the light of the decision rendered in AIR1995 AP 134 (State Bank of India Vs. S.B.Shah Ali (died) and others), when it is found that the hypothecation is understood in mercantile world as creation of charge on movables in favour of the hypothecatee by hypothecator, where possession of the goods will remain with the hypothecator and the hypothecator can be in the possession of the goods hypothecated and enjoy the same without causing any damage to the rights of the hypothecatee and further, when it is found that in case of hypothecation, unlike pledge, hypothecatee can enjoy the goods hypothecated and further, when it is seen from the decision of the Gujarat High Court, reported in AIR 1987 Gujarat 1 (Bank of Baroda, Ahmedabad Vs. Rabari Bachubhai Hirabhai and others), when a property is hypothecated with a creditor, it is given as security or collateral for a debt without physical transfer thereof to the creditor and the title of the property does not pass to the creditor but the creditor has merely the right to sell the property on default and the hypothecation differs from pledge and accordingly, when it is further seen that the bank would be entitled to obtain the simple money decree against the debtor without proceeding vis-a-vis the hypothecation agreement as per the decision reported in AIR 1985 Delhi 256 (Syndicate Bank Vs. Official Liquidator, M/s. Prashant Engg.Co.(P) Ltd.), on an analysis of the principles of law outlined in the above said decisions, it is found that as rightly putforth by the plaintiff's bank, the trial Court, without appreciating the materials placed on record in the right perspective, had erred in holding that the hypotheca involved in the matter had been left in the custody of the plaintiff's bank physically and on

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the other hand, the materials go to disclose that the hypothecated goods are only in the hands of the clearing agent and under the control of the defendant ready for shipment and once the LC is created by the foreign buyer and in such view of the matter, when even as per the case of the defendant, the shipment of the goods could not be effected due to the failure of the opening of the LC by the foreign buyer, the argument now putforth by the defendant's counsel that the plaintiff's bank is entitled only to proceed against the hypotheca and not entitled to seek the money decree against the defendant, as such, cannot be accepted.

12. In the light of the abovesaid decisions relied upon by the plaintiff's counsel, considering the nature of the hypotheca and particularly, when it is made out that the hypotheca are only with the possession of the defendant's clearing agent, it is found that the first appellate Court is justified in holding that the plaintiff is entitled to obtain the money decree against the defendant as prayed for, particularly, noting that the defendant has failed to honour its promises in repaying the borrowed sum made at the time of the availment of the loan.

13. The principles of law outlined in the above said decisions relied upon by the defendant's counsel reported in AIR 1996 Madhya pradesh 32 (Punjab and Sind Bank Vs. M/s. Nagrath Industries Pvt. Ltd and others) and AIR 1967 SC 1322 (Lallan Prasad Vs. Rahmat Ali and another) are taken into consideration and followed as applicable to the case at hand.

14. In the light of the above discussions, I do not find any reasons to interfere with the well considered judgment and decree of the first appellate Court and in such view of the matter, in my considered opinion, the defendant cannot insist the bank to proceed only against the hypotheca and not claim the money decree against the defendant and in such view of the matter, accordingly the substantial questions of law formulated in this second appeal are answered against the defendant and in favour of the plaintiff's bank.

15. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-
Assistant Registrar(CS V)

//True copy//

Sub Assistant Registrar

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To

1. The VII Additional City Civil Court, Chennai.

2. The XVII Assistant City Civil Court, Chennai.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.R.Raveendran, Advocate SR.No.27455
+1cc to Mr.P.Anbarasan, Advocate SR.No.28297

S.A.No.939 of 2004

SKV(CO)
GN(10/05/2018)

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