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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

COMMERCIAL APPEAL FROM ORDER NO. 9 OF 2024

IN

NOTICE OF MOTION NO. 764 OF 2024

IN

BOMBAY CITY CIVIL COMMERCIAL SUIT NO. 48 OF 2024

ALONGWITH

INTERIM APPLICATION NO. 9812 OF 2024

IN

COMMERCIAL APPEAL FROM ORDER NO. 9 OF 2024

Inditrade Business Consultants Ltd.

**..... Appellant/
Applicant**

VERSUS

Kotak Mahindra Bank & Ors.

..... Respondents

Mr. Vishal Pattabiraman a/w. Mr. Anuj Jhaveri, Ms. Ritisha Choudhary
i/b. Mr. Anuj Jhaveri for the Appellant/Applicant.

Mr. Zal Andhyarujina, Senior Advocate a/w. Mr. Abhishek Gupta, Mr.
Chirag Naik, Ms. Poornima Eapen, Ms. Akansha Agarwal i/b. MZM
Legal LLP for the Respondent no.1.

Coram : A.S. Chandurkar & Rajesh S. Patil, JJ.

Date on which the arguments were heard : 19th DECEMBER 2024

Date on which the judgment is pronounced : 25th MARCH 2025

JUDGMENT (PER - RAJESH S.PATIL, J.) :

1. This Commercial Appeal from Order is filed by the appellant
(original plaintiff) under Section 13 of the Commercial Courts Act,

2015 challenging the order dated 11th June 2024 passed in Notice of Motion No. 100764 of 2024 filed in Commercial Suit No. 100048 of 2024.

2. The appellants are original plaintiffs who had obtained financial facilities being a short term loan against agricultural commodities from the respondent no.1/defendant no.1 (Kotak Mahindra Bank) being pledged and stored within the warehouse of respondent no.2. The said agricultural commodities (cotton bales) were insured with the respondent no.3 - Insurance Company.

For sake of convenience, the parties are referred to, as per their nomenclature before the Trial Court/Bombay City Civil Court.

3. It is the case of the plaintiff that the agricultural commodities (cotton bales) were worth Rs. 8,92,46,684/- against which the credit facility loan worth of Rs.6,20,08,634/- was disbursed out of the sanction limit from the defendant no.1 - Bank. The goods were stored in the warehouse as per the terms and conditions on the sanction letter being building preapproved warehouse. The plaintiff had handed over security cheques in favour of the defendant no.1 Bank for an amount of Rs.20 crores each. As per the sanction letter, the insurance of the said commodities had to be taken wherein the

beneficiary of the said insurance was to be the defendant no.1 Bank, and the premiums were to be paid by the plaintiff. The insurance policy was valid from 8th September 2022 to 7th September 2023. The defendant no.1 had also executed a Pledge Agreement (for short “PA”) and a Master Facility Agreement (for short “MFA”) with the plaintiff.

4. According to the plaintiff, the General Manager of the defendant no.2 informed the plaintiff that on 14th May 2023 a fire had broken out in the warehouse where the plaintiff’s goods were stored, which destroyed the entire stock of the plaintiff’s agricultural goods (cotton bales) which were pledged with the defendant no.1 Bank and stored in the said warehouse, in furtherance of which the police complaint was lodged with the Panvel Police Station. Thereafter the Insurance Company appointed a Surveyor to ascertain the claim and the incident. As the Insurance Company was processing the file of the plaintiff, the defendant no.1 Bank raised the margin cost to the plaintiff and also demanded to serve the margin call of Rs.49,94,528/-.

5. In the meanwhile, the defendant no.1 Bank adjusted the bank account of the plaintiff to the tune of Rs.1,20,00,000/- on 20th November 2023 as maintained and operated by the defendant no.1

Bank and placed the said account under debit freeze. The plaintiff hence wrote an E-mail on 20th November 2023 to the defendant no.1 Bank requesting to reverse the said adjustment. However, the defendant no.1 Bank reverted with the denial. The defendant no.1 Bank thereafter communicated to the plaintiff that the plaintiff should pay the overdue loan account and also threatened that the plaintiff's account would be declared as Non-Performing Asset (NPA) if the said payments were not cleared. Hence, the plaintiff filed a suit before the City Civil Court and claimed relief of mandatory and permanent injunction against the defendant no.1 from depositing the security cheque issued by the plaintiff in favour of the defendant no.1 Bank. Further a decree of mandatory and permanent injunction against the defendant no.1 from invoking corporate guarantee issued against the guarantor in favour of the defendant no.1 Bank and mandatory and permanent injunction against the defendant no.1 Bank from declaring the plaintiff's account as NPA and also from the decree of mandatory injunction to re-frame from harassing the plaintiff by making undue claim against it. The plaintiff also filed an Interim Application in the form of Notice of Motion seeking *ad-interim* relief against the defendants.

6. To the Notice of Motion, the defendants filed their reply and after hearing the learned counsel for all the parties, the learned Judge of the City Civil Court by his order dated 11th June 2024 partly allowed the Notice of Motion, thereby directing the defendant no. 1 Bank not to take any coercive action against the plaintiff except by following due procedure of law. Being dissatisfied with the impugned order passed on 11th June 2024 by the Judge of City Civil Court, the plaintiff has filed the present Commercial Appeal From Order.

7. Mr. Vishal Pattabiraman, learned counsel appeared on behalf of the original plaintiff and made his submissions as under:-

7(i) The appellant (Original Plaintiff) had filed the present suit seeking recovery of damages for the destruction of 489.22 MT of Cotton Bales, valued at approximately Rs. 8,80,88,000/- which were pledged with the respondent no. 1 and destroyed in a fire incident on 14th May 2023 during the insured period. It is undisputed that the relationship between the plaintiff and respondent no. 1 is one of Pledger and Pledgee. Under Sections 151, 152, and 161 of the Indian Contract Act, 1872, the Pledgee is obligated to take due care of the pledged goods. The destruction of the goods was caused by the negligence of respondent nos. 1 and 2, and as a result, both

respondents are jointly and severally liable for the damage caused.

7(ii) It is undisputed that the commodities were under the lock and key of the Bank and stored with the pre-approved warehouse (CMA) of the bank. It is also undisputed that the CMA is the insured entity, and the beneficiary is the Bank wherein the premiums are paid by the present plaintiff. The clause mentioned in the sanction letters of 2018 and 2022 clearly depicts that in order to avail credit facilities, the borrower has to store the commodities in the pre-approved warehouse of the bank which shall be within the requisite radius of the Agri RM location. Further, only after the CMA from the pre-approved list of Banks and empanelled with the Bank is approved, the credit facilities are sanctioned.

7(iii) The Supreme Court in the case of *Taj Mahal Hotel vs. United India Insurance Co. Ltd. (2020) 2 SCC 224* observed that a party can contract out from liability was in context of common carrier at sea. The Apex Court has observed that in the case of common carrier, the conditions at sea are unpredictable and therefore such carriers should have the liberty to contract out of liability for their servants' negligence. It is also observed that the liability in context of common carrier as bailees is governed by Carriers Act of 1865 and not

by Sections 151 & 152 of the Indian Contract Act. The Apex Court has clarified that the terms "in absence of any special contract" in Section 152 mean that the Bailee can opt for a higher standard of care than Section 151 and not otherwise.

7(iv) Even otherwise, plaintiff respectfully submits that there is no such clause in the agreement which states that respondent no. 1 and/or its servants and/ or agents will not be liable for the negligence of its agents or servants. It is incorrect to state that the clause which merely reads that the pledger was responsible for taking care of goods would not mean the bank and/or its agents are exonerated from negligence.

7(v) CMA is the Agent of respondent no.1 – Bank. The respondent no. 1 Bank has itself admitted that the warehouse/ CMA has to be chosen by the pre-approved list provided by the bank. Thus, the plaintiff's had no choice but to choose the respondent no. 2 CMA. Further, the provisions of the sanction letters clearly depict that the CMA should be within requisite radius of Agri RM locations. There was only one pre-approved warehouse within such limitations placed by the defendant no.1 and therefore, it is abundantly clear that there was no choice given to the plaintiff. Furthermore, the CMA charges

are decided by the Bank depending on the credit loan facility availed.

7(vi) A bare perusal of the provisions of the sanction letters shows that respondent no. 2 is an agent of respondent no. 1 Bank to hold the goods pledged with the Bank on behalf of the Bank and therefore there was no iota of doubt that there is a clear relationship of principal and agent, between the respondent no.1 Bank (being the principal) and CMA i.e., respondent no.2 (being agent of respondent no.1).

The plaintiff placed reliance on the judgment of the Apex court in *LIC v. Rajiv Kumar Bhasker, (2005) 6 SCC 188*.

7(vii) Further, even Section 233 of the Indian Contract Act, 1872 where it is permissible for a third party while dealing with agent to hold the agent as also its principal liable. Thus, in view of the said case, CMA is acting on the directions of the Bank and therefore there is presence of an ostensible authority which is present between the two bodies and therefore there is a presence of a contract of agency.

7(viii) CMA, the agent of defendant no.1, has been negligent in its duties. The emails with respect to the insurance claims have clearly stated there have been traces of arson (email dated 24th August 2024 tendered separately which have been detected at the warehouse

and therefore the respondent no. 3 viz. Insurance had rejected the claim. Furthermore, the report submitted by the Fire Fighter Authority records that the fire was caught due to over storage. Therefore, it is abundantly established that the CMA has been negligent in storing the cotton bales at its facility. Even otherwise the plaintiff has sufficiently in Para No. 8, 9, 14 & 19 of the Plaint has pleaded that the loss of goods is attributable to the respondent no. 1 & 2 and therefore the same are jointly and severally liable.

7(ix) Further, it is submitted that vide email dated 13th November 2024 (email dated 24th August 2024 tendered separately) respondent no. 2 informed that the insurance claim has been reopened. Therefore, it is abundantly clear that if the insurance company grants insurance, the money shall be obtained by the respondent no.1 Bank, it being the beneficiary and if the claim is rejected by respondent no.3 insurance company, it would clearly establish and solidify the argument of the plaintiff that respondent no. 1 & 2 were negligent. Thus, holding them jointly and severally liable.

7(x) The defendant no.1 cannot recover its dues when it is not in a position to return the goods bailed.

7(xi) The plaintiff respectfully submits when a Pawnee initiates

a suit for the recovery of a debt, he retains the right to hold the pledged goods as security. However, he is obligated to return these goods upon payment of the debt. The right to sue for the recovery of the debt is premised on the Pawnee's ability to redeliver the goods upon satisfaction of the debt. If the Pawnee places himself in a position where he cannot redeliver the pledged goods, he cannot claim a decree in his favor.

7(xii) The plaintiff in support of the above has placed reliance on the case of *Lallan Prasad v. Rahmat Ali*, 1966 SCC OnLine SC 266, wherein the Apex Court *inter alia* has held that if a Pawnee seeks to recover its dues, then it should be in a position to re-deliver the goods.

7(xiii) The plaintiff asserts that respondent no. 1 has been repeatedly issuing margin calls against the plaintiff. It is important to highlight that the very concept of margin calls necessitates that the quantity of commodities pledged must be commensurate with the credit facilities utilized. However, it is crucial to emphasize that the pledged commodities were rendered completely non-existent or valueless as a result of the fire incident, which effectively destroyed the collateral goods. This fact is not only pertinent but central to the matter at hand, and any demand for margin calls under such

circumstances is unfounded and legally unsustainable.

7(xiv) The argument put forth by respondent no. 1 Bank, suggesting that the plaintiff must settle the credit loan facility before being entitled to the insurance money, is without merit. The fire occurred in respondent no.2's warehouse while the goods were under the custody and control of the bank, secured by the pledge. As the goods were pledged and the insurance policy listed the commodities as insured, the bank is the beneficiary of the policy. The provision in the insurance policy must be interpreted in the context of the pledge, not independently. Since the credit facility was obtained after the goods were pledged, and the fire occurred during the existence of the credit facility, the appellant should not be required to pay the alleged dues unless the respondent no. 1 Bank is in position to handover the goods simultaneously with recovering the dues.

7(xv) The plaintiff has not waived off its claim for the negligent acts of respondent no.1 and respondent no.2, that has caused damage to the goods under sanction letter dated 14th September 2023.

7(xvi) The plaintiff categorically denies the alleged case of the respondents that the plaintiff has waived its rights to claim negligence or claims for the damage suffered due to the destruction of goods

caused by fire.

7(xvii) It is further submitted that respondent no.1 Bank is using the sanction letter in a malafide manner as no fresh disbursement would take place until the issue of the fire incident is resolved under the said sanction. Further, it is shocking to fathom that the Bank has itself renewed the sanction letter despite being aware that no commodities are being pledged. Thus, the purported sanction letter dated 14th September 2023 came to be renewed upon insistence of the respondent no. 1 Bank vide email dated 14th September 2024. Pertinently, no amount was disbursed by the respondent no. 1 Bank, nor any amounts were obtained by the appellant under the new sanctioned letter.

7(xviii) The plaintiff has nowhere accepted the liability of the fire and has time and again objected to the margin calls raised by defendant no. 1. The plaintiff's case has always imposed liability on the bank as the cotton bales were in lock and key of the bank and fire incident broke out whilst the commodities were pledged with the Bank and in possession of the CMA, the agent of the Bank.

7(xix) As set out hereinabove, the plaintiff humbly submits that defendant no. 1 Bank cannot now shy away from its obligations when

defendant no.1 Bank and its agents has failed to take reasonable due care as per Section 151 of the Indian Contract Act, 1872. Furthermore, defendant no.1 Bank cannot recover when it is not in a position to deliver the goods back, being the bailee/ Pledgee. Mr. Pattabiraman, learned counsel also relied upon following judgments:-

(a) The judgment of Supreme Court in case of **Bank of Rajasthan Limited vs. VCK Shares & Stock Broking Services Limited, (2023)1 SCC 1**

(b) The judgment of Madhya Pradesh in case of ***Central Bank of India, Raigarh vs. M/s. Grains and Gunny Agencies & Ors. 1988 M.PL.J. 453.***

8. Mr. Zal Andhyarujina, learned Senior Advocate appeared on behalf of the defendant no.1 Bank and made his submissions as under :-

8(i) He submitted that the defendant no.1/Bank has expressly contracted out of the responsibility of preservation of the subject goods in bailment/pledge.

8(ii) As per Clauses 3 (VIII), (X) and (XII) in the Pledge Agreement dated 18 December 2018 at page 188 - 189 of appellant's (original plaintiff) COD Part - 1, the plaintiff was solely responsible for any loss or damage to the goods and that the Bank shall not be held liable.

8(iii) Service Agreement dated 7 February 2023 executed between the CMA and the plaintiff was undisclosed by the plaintiff before the Trial Court.

8(iv) The defendant no.1/Bank has the right as a pledgee to contract out of its obligations to preserve the subject goods.

9. The defendant no.2 is not the agent of the Bank and therefore, the Bank cannot be held liable for negligence (if any) of the defendant no.2. The Sanction Letter dated 14th September 2023 states that the borrower/plaintiff shall clear pending margin calls before renewal of limits. The outstanding dues underlying the loan granted against the pledged goods are to be repaid by the plaintiff before their respective maturity date and that no extension or rollovers therein would be allowed.

10. The said Sanction Letter, executed pursuant to the fire incident and pursuant to the Bank issuing margin calls upon the plaintiff, records the plaintiff's categorical admission of the existence of an outstanding debt and the plaintiff's liability to meet the margin calls without making any claim for set-off against a purported claim for damages for loss of pledged goods.

11. Further, the plaintiffs/appellant's email dated 25 July 2023 to

defendant no.1/Bank categorically admits that the fire incident was an "unforeseen event"; and does not claim negligence as against the Bank and/or make any claim to set off damages against the repayment of the outstanding dues.

12. The Insurance Company had appointed a surveyor and the claim was re-opened. The claim value booked is Rs.8.29 Crore towards a loss of 489.22 Mt taken with bank. The loan outstanding along with interest against the credit facility on 14th May 2023 was Rs. 6.20 Crore therefore the loss incurred by the Plaintiff is Rs. 2.09 Crore will also be processed through said Insurance Company under the complete claim.

13. Reliefs sought by the plaintiff were hit by Section 41 of the Specific Relief Act, 1963.

14. Without prejudice to the above, the Bank had taken reasonable care of the pledged goods as per Section 151 of the Contract Act.

15. In fact, though the choice of warehouse rested with the plaintiff, the Bank also ensured that warehouse where the goods were to be stored was required to be approved by the Bank and Collateral Manager after due inspections.

16. That being the case, in terms of Section 152 of the Contract Act,

the loss of these goods i.e. the cotton bales would then not make the Bank responsible for the same. Section 152 of the Contract Act, absolves the bailee from being held responsible for the loss, destruction of the bailed goods if the amount of care taken was that as described in Section 151 of the Contract Act.

17. Mr. Andhyarujina, learned Senior Advocate relied upon following judgments :-

1. The judgment of Punjab & Haryana High Court in case of *State Bank of India vs. M/s. Quality Bread Factory, Jullundur Road, Batala & Anr. (1983) 2 I.L.R. 406*
2. The judgment of this Court in case of *Bombay Steam Navigation Company Limited vs. Vasudeo Baburao Kamat, 1927 SCC OnLine Bom 34*
3. The judgment of Madras High Court in case of *Sheik Mahamad Ravuther vs. British India Steam Navigation Co. & Ors., 1908 SCC OnLine Mad 151*
4. The judgment of this Court in case of *Balkrishan R. Dayma vs. Bank of Jaipur Ltd. & Anr., 1970 SCC OnLine Bom 8.*

18. We have heard the learned counsel for both the sides and with their assistance, have gone through the documents on record.

19. The present Appeal from Order challenges an order passed by the Judge of the City Civil Court thereby refusing to grant relief in favour of the plaintiffs.

19.1 The plaintiff/present appellant had sought in the Notice of Motion, the following prayers :-

- a) Pass ad-interim Ex-parte injunction orders, thereby restraining the defendants, their agents, representatives, employees etc. from harassing the plaintiff on account recovery outstanding amount.
- b) Pass ad-interim Ex-parte injunction orders, thereby restraining the defendant No. 1 from depositing the Security Cheques issued by the Plaintiff.
- c) Pass ad-interim Ex-parte injunction orders, thereby restraining the defendant No. 1 invoking corporate guarantee issued against the guarantors.
- d) Pass ad-interim Ex-parte injunction orders, thereby restraining the defendant No. 1 from declaring the Plaintiff's account as a Non-Performing Asset /and reporting the account of plaintiff as defaulter to external agencies.

19.2 While, the City Civil Judge by its order dated 11th June 2024 did not grant these prayers, but directed the defendant Bank not to take any coercive action against plaintiff, except by following due

procedure of law. The plaintiff has challenged this order dated 11th June 2024 in Appeal From Order.

19.3 The plaintiff's case in the suit is that the plaintiff had purchased goods (cotton bales) worth Rs. 8,92,46,684/- The said goods were pledged by the plaintiff with defendant no.1 Bank in order to get the credit facilities of Rs.6,20,08,634/-.

19.4 Goods were stored in warehouse of defendant no.2, and there was a valid insurance policy with defendant no.3, on the date when the entire goods worth Rs.8,80,88,000/- were destroyed by fire on 14th May 2023. As pledged goods were destroyed the defendant no.1 – Bank started making margin call and demanded amounts from plaintiff.

19.5 The defendant no.1 – Bank by its email dated 20th November 2023, informed the plaintiff that they have adjusted Rs.1,20,00,000/- from plaintiff's bank account and also placed the account under debit freeze. And further that the plaintiff's account will be turning into N.P.A. The issue before us is whether the bank can be directed not to take action of recovery of its dues from borrowers who have defaulted in payment of outstanding loan amount.

19.6 At the time of granting loan the defendant no.1 – Bank

had issued letter dated 4th November 2022 to the plaintiff- borrower, which **contained standard and common conditions** (applicable to all finance facilities). Certain important conditions needs to be looked into for deciding the present proceeding :

Insurance – Borrower to provide copy of the master insurance car marking bank as beneficiary to the extent of the value of stocks lying in their warehouse. Insurance should cover for theft, burglary, fire, floods and other standard perils. Insurance policy to be taken and marked in favour of bank.

Designated Warehouse – Warehouse where the goods are to be stored will require to be approved by the bank and collateral Manager after due inspections.

Margin Call - Prices will be marked to market on weekly basis. When the available margin fall by 5%, the bank shall intimate the company to top up the margins either by providing additional stocks under pledge or by reducing the outstanding exposure for maintaining stipulated margin. Delay in servicing margin call will attract penal interest @ 2% per month on the entire balance outstanding in the account.

19.7 So also, pledge agreement was entered into between

plaintiff and defendant no.1 – Bank. The clause 3(x) reads as under:-

Clause 3(x) - “ The Pledger (s) agrees that the pledgee shall not be held liable for any loss, damage or depreciation (s) which the said pledged goods/securities undergo while in possession nor shall the pledgee be held liable in case of theft, burglary, loss by fire, floods, earthquake, enemy, warfare, civil commotion and riots and the like and the authority herein contained in favour of the pledgee to enable them to seel and transfer the said pledged goods / securities is hereby declared to be irrevocable during the currency hereof, and the pledgor (s) hereby consents that the terms and conditions herein before stipulated shall apply so long as any amounts remain due and payable by the Borrower (s) to the pledgee. ”

19.8 In our view, there cannot be any legal bar on the Bank from taking any steps to recover its money. Monies which the Bank had offered as loan was ultimately public money. If the Bank is prohibited from recovery of its outstanding amount, it will have repercussion on its banking business.

19.9 The Apex Court in ***Bank of Rajasthan Ltd. v. VCK Shares & Stock Broking Services Ltd.(2023) 1 SCC*** has settled that while a borrower may have the right to institute a parallel suit for damages against the Bank, there can be no question of a stay on the Bank's recovery proceedings under the RDB Act.

19.10 ***Bombay Steam Navigation Company Limited*** (supra) the

Division Bench, Bombay High Court was dealing with facts when the plaintiff's agent at Bombay shipped some packages to the plaintiff at Honawar by a vessel belonging to the defendant company. One of the conditions of the bill of lading, was that the defendant company was not liable for loss from the negligence of its servants. Whilst the shipment was being unloaded in the Honawar harbour, one of the packages got loose from a sling, fell into the sea and was lost. The plaintiff sued to recover the value of the lost package.

The Court concurred with the decision in *Sheik Mahamad Ravuthers vs. The British India Steam Navigation Co. Ltd., (1908) 32 Mad. 95* in which the majority decision held that a shipowner is competent to protect himself by express contract from the liability for the negligence of his servants.

19.11 *Quality Bread Factory* (supra) the Punjab and Haryana High Court follows the judgment passed in *Lakhaji Dollaji & Co. v Boorugu Mahadeo Rajanna*.

19.12 *Lakhaji Dollaji & Co. v Boorugu Mahadeo Rajanna*, Division Bench, Bombay High Court, were dealing with fact where the plaintiffs instructed the defendants, who carry on business as commission agents in bullion in Bombay, to purchase silver bars on

their account and to keep them. The defendants purchased the bars and kept them, where three of the bars were lost. Per the contractual understanding between the parties, the defendants agreed to keep the bars at the plaintiff's risk. The plaintiffs sued for damages for the lost bars.

It was held that it was open to the bailee to contract himself out of the obligations imposed by Section 151 of the Indian Contract Act and that the Act does not expressly prohibit contracting out of Section 151. It follows the judgments passed in *Bombay Steam Navigation Co. Ltd. vs. Vasudev Baburao and Sheik Mohamad Ravuther vs. British India Steam Navigation Co. Ltd.*

19.13 *Balkrishan R. Dayma. Bank of Jaipur, Ltd. & Anr., 1970 SCC OnLine Bom 8* the Division Bench of the Bombay High Court were dealing with the facts. In this case the plaintiff/borrower availed a cash credit account facility from the defendant-bank, pledging goods stored in the plaintiff's godown, with the keys and control handed to the defendant-bank. Clause 7 of the pledge agreement stipulated that the borrower would bear all losses, damages, or deterioration caused by theft, fire, natural disasters, or other causes, irrespective of whether the goods were under the bank's possession or control.

This Court rejected the contention that Clause 7 did not apply where the defendant-Bank or its servants were negligent. The Court held that the clause was not limited to instances without negligence and that excluding negligence would import words of limitation into the agreement. Further, the Court reasoned that a Bank is not an insurer of goods under Section 152 of the Indian Contract Act, 1872, unless expressly stated, and liability is generally limited to negligence unless otherwise contracted. The Court also noted that words like “any loss however caused” or “under any circumstances” provide a sufficient warning to the bailor that the bailee is exempt from liability for negligence.

19.14 In the judgment of *Lallan Prasad* (supra) of the Supreme Court relied upon by the plaintiff, the appellant had advanced Rs.20,000/- to the respondent against the promissory note. The respondent executed an agreement whereby he agreed to pledge as security aero-scrap and to deliver them at appellant’s house and keep them there in his custody. The appellant’s case was the respondent failed to deliver the goods and stored them in a plot adjacent to the aerodrome. When the suit was filed to recover the amount advanced, the respondent in the written statement admitted the said loan, but

alleged that they had delivered aero-scrap to the appellant. Therefore, though appellant was entitled to obtain a decree but he should willingly redeliver the goods pledged. In such a situation, the Supreme Court held that pawnee has to return the property pledged. If by his default, the pawnee is unable to return the security against the payment of debt, the pawner as a good defence to the action. In our view, the ratio will not be applicable to the present proceeding, as in the present proceeding as per pledge agreement, the goods were in the warehouse and as per the terms if there was a fire, the Bank could not be held liable.

19.15 In case of *Chairman, LIC vs. Rajiv Kumar* (supra), Supreme Court, was dealing with the issue of principal and agent, regarding life insurance policy floated for employees. In the present proceeding, there is no question of agency. It is a case of borrower and lender.

20. The Insurance Company initially has rejected amount to be paid under the insurance policy. However, on the request being made by the plaintiff, they are again considering the claim in the policy.

21.1 Mr. Andhyarujina, learned Senior Advocate appearing on behalf of the defendant no.1 Bank on instructions submitted that if the

insurance claim is granted by the defendant no.2 - Insurance Company to the defendant no.1 Bank. The said amount would be adjusted by the defendant no.1 Bank and only for the balance amount, they will proceed further against the plaintiff.

21.2 The statement made by the learned counsel appearing for the defendant no.1 Bank is accepted by this Court as an undertaking given to this Court.

21.3 The credit facility that exist between the plaintiff and the defendant no.1 Bank is in the nature of contract between the parties. Hence, both of them are bound by the terms of the contract.

21.4 The plaintiff has availed credit facility and is duty bound to repay the said amount as per the terms agreed between the plaintiff and the defendant no.1 Bank.

21.5 If the Insurance Company pays the entire amount as claimed by the plaintiff, the said amount is to be adjusted by the defendant no.1 Bank against its claim and for the balance amount (if any) the defendant no.1 is free to take such steps by following the due procedure of law.

22. The learned Judge of the City Civil Court has considered all relevant aspects and has come to the finding that the defendant no.1

Bank is at liberty to take recourse in accordance with the due procedure of law. We do not find any reason whatsoever to interfere with the impugned interlocutory order.

23. We find no merit in this Commercial Appeal From Order and hence the same is dismissed. No costs. In view of disposal of the Commercial Appeal From Order, pending Interim Application is also disposed of. It is however observed that any observations made by the trial Court in the impugned order or in the present order shall not come in the way of either party and all contentions are kept open for being raised before the trial Court.

[RAJESH S. PATIL, J.]

[A.S. CHANDURKAR, J.]

24. At this stage, the learned counsel for the appellant seeks extension of the impugned relief granted earlier.

25. Ms. Poornima Eapen, the learned counsel appearing for the respondent no.1 strongly opposes the request made by the appellant. We find that there is no reason to extend the interim relief. The request made by the learned counsel for the appellant is rejected.

[RAJESH S. PATIL, J.]

[A.S. CHANDURKAR, J.]