habitation that also would give the landlord a right to eject the tenant was not seriously pressed before us even by the learned counsel for the petitioner. Neither principle nor precedent could be cited in support of such a proposition. There is thus no option but to reject the same.

18. To conclude the answer to the question posed in para 2 above is rendered in the affirmative and it is held that if the substantial part of the integrated larger building has become unsafe and unfit for human habitation the tenant can be ejected from the demised premises forming part thereof, under section 13(3)(a)(iii) of the Act despite the fact that the particular portion in his occupation may not be so.

19. The answer to the legal question referred having been rendered in the terms above, the revision would now go back before a learned Single Judge for a decision on merits in accordance therewith.

N.K.S.

Before R. N. Mittal, J.

STATE BANK OF INDIA,—*Appellant.*

versus

M/S. QUALITY BREAD FACTORY, JULLUNDUR ROAD, BATALA and another,—*Respondents.*

Regular Second Appeal No. 2040 of 1981.

December 8, 1982.

Contract Act (IX of 1872)—Sections 141, 151, 152 and 176—Loan by a Bank—Key loan system and open credit system—Distinction between the two concepts—Goods hypothecated under the open credit system—Debtor furnishing a surety as well for repayment of the loan—Pledged goods lost due to the negligence of the Bank—Surety—Whether stands discharged—Section 141—Whether applicable to open credit system.—Pawnee—Whether entitled to file a suit for recovery of the debt without first selling the

State Bank of India *v.* M/s. Quality Bread Factory, Jullundur Road Batala and another (R. N. Mittal, J.)

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goods—Bailment—Bailee—Whether could contract himself out of obligations imposed by section 151.

Held, that the loans are advanced by a Bank to its customers either on key loan system or on open credit system. In the key loan system, the goods pledged are under the lock of the pledges and the pledgor has no access to them whereas in the open credit system the goods pledged are in actual possession of the pledgor and the pledgee has constructive possession over them. In the former system, the pledgor cannot deal with the goods unless the pledgee gives their possession to him, whereas in the latter system, he has freedom to deal with them. In the open credit system, however, the formal character of pledge is maintained. The loan advanced on the basis of key loan system is also called loan by pledge of goods and the loan advanced on open credit system is also called factory type loan or loan on the basis of hypothecation. In the case of pledged goods, the goods are stored in the godown under the lock and key of the bank under the supervision of the bank's godown-keeper and the goods are undoubtedly in the possession, physical and otherwise, of the bank and no withdrawals or additions of the stocks are permissible without their permission. The position with regard to hypothecated goods is, however, different because these goods are strictly speaking not under the lock and key of the bank but are allowed to be kept at the factory or the premises of the borrower without any lock and key of the bank as such, but are supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation which obliges the borrower to submit a regular return to the bank indicating the increase and decrease in the value of the said goods to enable the bank from time to time to determine the drawing of the borrower with regard to it. In law, however, there is no difference with regard to the legal possession of the bank. In both the cases, the goods are under the constructive possession of the bank while in the case of pledge they are also in the actual physical possession of the bank but in the case of hypothecated goods, they are in the actual physical possession of the borrower but subject to the restriction mentioned above. In a sense, the borrower in the case of hypothecated goods has actual physical possession of the goods as an agent, as it were, of the bank and in the limited sense the hypothecated goods are also not only constructively but actually in the possession of the bank. (Paras 7 and 8).

Held, that if the loan has been advanced on the basis of security, the surety stands discharged to the extent of the value of the security, if the creditor loses or parts with the security without the consent of surety. It has not been laid down in the Contract Act, 1872 that this principle applies only to pledges and not to the hypothecations. The law regarding discharge of surety as laid down in section 141 of the Act applies equally to open credit system. It is true that in the key loan system the creditor has more effective control than that of the open credit system, but that does not mean that different principles of law are applicable to these two systems. In the open credit system, the debtor is required to furnish a statement of stocks, manufactured goods, machinery etc. hypothecated at regular intervals and the creditor is entitled to examine and take them into

possession at any time. It is, therefore, expected from the creditor that he should keep requisite vigilance on the debtor in order to protect himself and the surety against the illegal actions of the debtor. Any negligence or in-action on his part by which he loses the security absolves the surety from his liability. The question of discharge of the surety has to be determined by taking into consideration the facts and circumstances of each case. (Para 12)

Held, that from a reading of section 176 of the Act, it is evident that if the pawnor makes default in payment of any debt, the pawnee is entitled to file a suit for the recovery of the debt and retain the pledged goods as a collateral security. In the alternative, he is entitled to sell the pledged goods and adjust the proceeds towards the debt. If the proceeds are less, the pawnee is entitled to recover the balance from the pawner. Thus the pawnee in spite of the pledge of the goods is entitled to bring a suit without selling the goods. (Para 17).

The Karnataka Bank Ltd. *vs.* Gajanan Shankararao Kulkarni and another, A.I.R. 1977 Karnataka 14.

Jayant T. Shah *vs.* The Andhra Bank Ltd. and others, (1977) 11 An. W. R. 129.

Vasireddi Seetharamaiah *vs.* Srirama Motor Finance Corporation, Kakinada and another A.I.R. 1977 Andhra Pradesh 164. *DISSENTED FROM.*

Held, that the words in the absence of any special contract in section 152 of the Act go to show that the bailee can contract himself out of the obligations imposed by section 151 of the Contract Act. (Para 19).

Regular Second Appeal from the decree of the Court of the 2nd *Additional District Judge, Gurdaspur, dated the* 21st *day of May,* 1981, *affirming that of the Sub-Judge* 1st *Class, Batala, dated the* 23rd *February,* 1980, *dismissing the suit of the plaintiff and leaving the parties to bear their* own *costs.*

R. K. Chhibber, Advocate, *for the Appellant.*

R. L. Sarin, Advocate, *for the Respondent.*

Rajendra Nath Mittal, J.—

(1) This second appeal has been filed by the State Bank of India, Batala, plaintiff, against the judgment and decree of the IInd Additional District Judge, Gurdaspur (Smt. Bimla Gautam).

(2) Briefly, the case of the plaintiff is that Avtar Singh, defendant No. 2, was the sole proprietor of M/s Quality Bread

Factory, at Batala, defendant No. 1. He approached the Branch Manager of the plaintiff Bank for the grant of cash credit facility to the tune of Rs. 5,000, on 16th May, 1975. The Bank agreed to grant that facility to defendants Nos. 1 and 2, who agreed to pay interest at the rate of 4 per cent per annum below the State Bank advance rate with minimum rate of 10 per cent per annum in respect of the monies advanced. It is alleged that defendants Nos. 1 and 2 also agreed to pledge the machinery, namely, mixer, moulder, slicer and sealer, which were lying in the factory premises situated at Jullundur Road, Batala, Accordingly, defendants Nos. 1 and 2 executed in favour of the plaintiff an agreement for cash credit facility on security of mixer, moulder, slicer, sealer, produce and mercandise on the same day and pledged the said things. They also executed a demand promisory note in the sum of Rs. 5,000 in favour of Gurbachan Singh, defendant No. 3, and he delivered the same, duly endorsed in favour of the plaintiff, as security for the said amount. It was agreed that defendants Nos. 1 and 2 would pay the amount due from them with interest to the plaintiff on demand and in case of default the plaintiff could recover the same by public auction or private sale of the pledged goods, produce, merchandise, etc.

(3) The case of the plaintiff further is that defendant No. 3 in consideration of the plaintiff having agreed to advance to defendants Nos. 1 and 2 the cash credit facility guaranteed the repayment of the loan advanced to them from time to time together with interest thereon.

(4) Defendants Nos. 1 and 2 started operating their cash credit account and withdrew various amounts for their business on various dates and an amount of Rs. 3,275.20 was outstanding against them. Consequently, the plaintiff filed a suit for recovery of the said amount with future interest from the defendants by sale of the pledged goods and other properties of the defendants.

(5) Defendants Nos. 1 and 2 did not contest the case and were proceeded against *ex parte*. Defendant No. 3 controverted the allegations of the plaintiff. He *inter alia* pleaded that subsequently another agreement was executed between the plaintiff and defendant No. 3 on 26th May, 1975, by virtue of which he paid Rs. 2,500 to the Bank and agreed to pay the balance amount of Rs. 2,500 in

case the Bank handed over the pledged goods lying in the premises of defendant No. 1 worth about Rs. 30,000 to him. He averred that the key of the factory was with the Bank, which had not been handed over the same to him. It is also pleaded by him that he mortgaged his land by equitable mortgage with the Bank but the guarantee came to an end with the execution of fresh agreement, dated 26th May, 1975. He, therefore, pleaded that he was not liable to pay any amount to the Bank.

(6) The learned trial Court held that it was not clear as to how the plaintiff dealt with the articles pledged with it and that the plaintiff had failed to show that the amount of Rs. 3,275.20 was payable by the defendants. It further held that no oral compromise, dated 26th May, 1975, was proved and, therefore, the property of defendant No. 3 remained mortgaged with the Bank. In view of the aforesaid findings, the suit of the plaintiff was dismissed. On appeal, the Additional District Judge held that the plaintiff had proved that the amount of Rs. 3,275.20 was payable by the defendants. He further held that the plaintiff had not cared to recover the loan from the goods pledged with it and that it failed to prove that these were insufficient for recovery of the amount. He concluded that the plaintiff could recover the amount by putting the pledged articles to auction and that if the sale proceeds were insufficient for meeting the loan, it could bring further action against the defendants for recovery of the amount. In view of the aforesaid findings, he dismissed the appeal. The Bank has come up in second appeal to this Court.

(7) The first question that arises for determination is as to whether the cash credit facility was given by the plaintiff to defendants Nos. 1 and 2 on open credit system and, if so, its effect. The loans are advanced by the Bank to its customers either on key loan system or on open credit system. In the key loan system, the goods pledged are under the lock of the pledgee and the pledgor has no access to them whereas in the open credit system the goods pledged are in actual possession of the pledgor and the pledgee has constructive possession over them. In the former system, the pledgor cannot deal with the goods unless the pledgee gives their possession to him, whereas in the latter system, he has freedom to deal with them. In the open credit system, however, the formal character of pledge is maintained. The loan advanced on the basis of key loan system is also called loan by pledge of goods and the

loan advanced on open credit system is also called factory type loan or loan on the basis of hypothecation. In the above view, I am fortified by the observations of the Madras High Court in *Nadar Bank Ltd., Madurai* v. *Canara Bank Ltd. and others,* (1), which are as follows:—

> ".....We might here conveniently state that, under the 'key loan' system, to the contrary, the advance is secured by the pledge of goods in the godowns through the simple and effective expedient of putting a lock or seal of the creditor bank on the godowns, the key or keys thereof being retained by that bank. But, naturally, this latter system has the profound disadvantages that it immobilises trade or credit. It is no longer possible for the borrower to deal with the goods, even for a restricted purpose, unless he takes possession of the key from the creditor bank and thus operates upon his stock.....*We would here emphasise that, in such a matter, the form of the juridical relationship is very important, and that it cannot be divorced from the substance, merely because, in mercantile practice, there is a certain flexibility and freedom for the borrower under the 'open credit' system. On the contrary, the system seems to have been devised for this very reason : in effect, it secures for the borrower a certain freedom to deal with the goods, provided a stipulated margin above the value of the advance is maintained, though the formal character of the pledge is throughout preserved,.....The law is not that the character of the pledge is lost, unless the pledgee retains manual possession of the goods offered as security.* On the contrary, firstly, as stated by Erle C.J., in *Martin* v. *Reed* (1862) 142 ER 982, in order to constitute a valid pledge, what is essential is that there must be a delivery of the article, either actual or constructive, to the pawnee.
>
> *'Possession is an equivocal term; it may mean either mere manual possession, or the mere right to possession'.* Also see Chitty on Contracts, Vol. II, 21st Edn. para 180 at page 73. *Constructive delivery will be adequate to*

(1) AIR 1961, Madras 326.

constitute a pledge and it applies to all those cases where the pledgor remains in possession of the goods under this specific authority of the pledgee, or for limited purposes.....

Reeves v. *Capper* (1838) 132 ER 1057 *is a case of moveable property (Chronometer) left with the pledgor for use, and it was held that notwithstanding this fact, the possession was still that of the pledgee.* In *North-Western Bank Ltd.* v. *Jovn Poynter and Son Macdonalds,* 1895 AC 56, it was explicitly recognised that a pledgee may redeliver goods to the pledgor for a limited purpose, without thereby losing his rights under the contract of pledge. Finally, reference may be made to *Ex-parte,* Hubbard, 1886—17 QBD 690, *which laid down that the general property in the goods pledged may remain with the pledgor, but that a special property vested in the pledgee, namely, a right of sale of which he might avail when the occasion arises."*

(8) The above view was followed by a Division Bench of Andhra Pradesh High Court in *Konakalla Venkata Satyanarayana and others* v. *State Bank of India and others,* (2). Similar view was also taken in *M/s Gopal Singh Hira Singh* v. *Punjab National Bank and another,* (3), wherein it has been observed that in the case of pledged goods, the goods are stored in the godown under the lock and key of the bank under the supervision of the bank's godown-keeper and the goods are undoubtedly in the possession, physical and otherwise, of the bank and no withdrawals or additions of the stocks are permissible without their permission. The position with regard to hypothecated goods is, however, different because these goods are strictly speaking not under the lock and key of the bank but are allowed to be kept at the factory or the premises of the borrower without any lock and key of the bank as such, but are supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation which obliges the borrower to submit a regular return to the bank indicating the increase and decrease in the value of the said goods to enable the bank from time to time to determine the drawing of the borrower with regard to it. In law, however, there is no difference with regard to the

(2) AIR 1975 Andhra Pradesh 113.

(3) AIR 1976 Delhi 115.

legal possession of the bank. In both the cases, the goods are under the constructive possession of the bank while in the case of pledge they are also in the actual physical possession of the bank but in case of hypothecated goods, they are in the actual physical possession of the borrower but subject to the restriction mentioned above. It has also been observed that in a sense, the borrower in the case of hypothecated goods has actual physical possession of the goods as an agent, as it were, of the bank and in that limited sense the hypothecated goods are also not only constructively but actually in the possession of the bank.

(9) Now, adverting to the facts of the present case, the loan was advanced by the Bank to respondents Nos. 1 and 2 on the security of goods, produce and merchandise. The details of these goods have been given in Annexure P. 5, as follows:—

Maida	... 4 bags.
Sugar	... 1 bag.
Ghee	... 1 tin.
Firewood	... 5 qtls. (approximately).
Breads	... 350 (no.)

In addition, the Bank had taken the security of the machinery, namely, mixer, moulder, slicer and sealer of defendants Nos. 1 and 2, as per letter of pledge, Exhibit P.6. The said defendants also gave a letter to the plaintiff, Exhibit P.1, wherein the cash credit facility extended by the Bank to them has been shown as factory type. All the above-said documents are of 16th May, 1975. From the said documents, it is evident that the cash credit facility was given to defendants on open credit system.

(10) Now, it is to be seen that if in open credit system, the goods hypothecated are lost by the negligence of the pledgee, whether the surety stands discharged. The Indian Contract Act deals with pledge of goods and not with hypothecation of goods. However, the principles contained therein apply to both types of securities. Section 151 of the Contract Act deals with the care to be taken by the bailee of the goods. It says that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to

him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 says that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151. Thus, it is evident from a reading of the above-sections that the duty enjoined upon the bailee of goods is to take that much care of the goods which, as a man of ordinary prudence, he would take of his own goods and if still the goods are lost, he would not be responsible for the loss.

(11) Section 141 deals with surety's rights to benefit of creditor's securities. The section reads as follows :—

> "A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract for suretyship is entered into whether the surety knows of the existence of such security, or not, and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

This section was interpreted by the Supreme Court in *State of Madhya Pradesh* v. *Kaluram* (4). Shah, J., speaking for the Court, observed as follows :—

> ".....The expression 'security' in Section 141 is not used in any technical sense, it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefits of the rights of the creditors against the principal debtor which arise out of the transaction which gives rise to the right of liability: he is, therefore, on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. *If the creditor has lost or has parted with the security without the consent of the surety, the latter is, by the express provision contained in section* 141, *discharged to the extent of the value of the security lost or parted with.*"

(4) AIR 1967 S.C. 1105.

While making the above observations, the learned Judge took into consideration the following dictum in *Wulff and Billing* v. *Jay*, (5):—

> "I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiff; and he was entitled, therefore, to the benefit of that real and substantial security 'in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the creditors have put it out of their power to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Rees* v. *Barrington*—2 White & Tudor's L.C. 4th Edn. at page 1002—'As a surety, on payment of the debt is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. *A surety, moreover, will be released if the creditor by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands.*"

(12) Following the above, view, V. Ramaswami, J., speaking for the Court, in *Amrit Lal Goverdhan Lalan* v. *State Bank of Travancore and others*, (6), observed that section 141 of the Indian Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him. Again, the section was interpreted by that Court in *The State Bank of Saurashtra* v. *Chitranjan Rangnath Raja and another*, (7). The relevant observations are reproduced below :—

> "In order to attract section 141, it must be shown that the creditor had taken more than one security from the

(5) (1872) 7 Q.B. 756.

(6) AIR 1968 S.C. 1432.

(7) AIR 1980 S.C. 1528.

principal debtor at the time when the contract of guarantee was entered into and irrespective of the fact whether the surety knew of such other security offered by the principal debtor, if the creditor loses or without the consent of the surety parts with the other security the surety would be discharged to the extent of the value of the security.....

Section 141 comprehends a situation where the debtor has offered more than one security, one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet *once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of sections* 139 *and* 141 *of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by section* 141."

It is evident from the above observations, that if the loan has been advanced on the basis of security the surety stands discharged to the extent of the value of the security, if the creditor, loses or parts with the security without the consent of surety. It has not been laid down in the Contract Act that this principle applies only to the pledges and not to the hypothecations. Therefore, I am of the opinion that the law regarding discharge of surety as laid down in section 141 applies equally to open credit system. It is true that in the key loan system the creditor has more effective control than that in the open credit system, but that does not mean that different principles of law are applicable to these two systems.

In the open credit system, the debtor is required to furnish statements of stocks, manufactured goods, machinery, etc. hypothecated at regular intervals and the creditor is entitled to examine and take them into possession at any time. It is, therefore, expected from the creditor that he should keep requisite vigilance on the debtor in order to protect himself and the surety against the illegal actions of the debtor. Any negligence or inaction on his part by which he loses the security absolves the surety from his liability The question of discharge of the surety has to be determined by taking into consideration the facts and circumstances of each case,

(13) The learned counsel for the appelant has submitted that in the case of loan advanced on open credit system, the possession of goods remains with the debtor and in case he misappropriates the goods, the creditor cannot be held responsible for that. In support of his contention, he refers to *the Karnataka Bank Ltd.* v. *Gajanan Shankararao Kulkarni and another* (7a). *Jayant T. Shah* v. *The Andhra Bank Ltd. and others* (8), *and Vasireddi Seetharamaiah* v. *Srirama Motor Finance Corporation, Kakinada and another* (9), the cases are distinguishable on facts. It may also be pointed out that the observations in those cases are not in consonance with those made by the Supreme Court in the cases referred to above and especially in *Chitranjan Rangnath Raja's case* (supra). In the circumstances, with great respect to the learned Judges, I regret my inability to follow the view expressed by them. Mr. Chhibbar, therefore, cannot derive any benefit from the said cases.

(14) It is to be seen now whether in the present case, the securities have been lost on account of the negligence or inaction of the Bank. The cash credit account, as already stated, was opened by defendants Nos. 1 and 2 on 16th May, 1975, and all the documents between the parties were executed on that date. Defendants Nos. 1 and 2 withdrew the amounts of Rs. 1,000 and Rs. 3,900 on 16th and 23rd of May, 1975, respectively. Thereafter, there was no withdrawal of the amount by them. However, the interest was debited by the Bank to their account. They also did not repay any amount to the Bank except two paltry amounts of Rs. 100 and Rs. 85 in September and December, 1975, respectively. It was respondent No. 3 who deposited Rs. 2,500 on 26th May, 1976, that is, more than one year after the withdrawal of the amouts by defendants Nos. 1 and 2. The said defendants also did not file the returns as undertaken by them and the Bank took no action against them for non-filing of the returns. No evidence has been led by the Bank to the effect that anybody on its behalf inspected the hypothecated machinery, etc., or tried to take possession thereof as agreed.

(15) The case set up by the Bank appears to be that the goods were in existence up to the date of institution of the suit. In this

(7a) AIR 1977 Karnataka 14.

(8) (1977) 11 An.W.R. 129.

(9) AIR 1977 A.P. 164.

regard, reference may be made to the notice, dated 19th February, 1977, and the plaint, which was filed on 12th May, 1978. The notice was served by Mr. Rajinder Kumar Sarup, Advocate, Batala, on behalf of the Bank, wherein he asked defendants Nos. 1 and 2 to make payment of the balance amount, otherwise it would proceed to sell the machinery, merchandise, raw material, etc., by public auction or private negotiations. In the plaint also, the Bank requested the Court that a Receiver be appointed to take into possession the hypothecated goods. It also requested that the defendant be restrained from dealing with, disposing of or parting with the possession of the hypothecated goods. If the hypothecated goods did not exist on the aforesaid dates, there was no idea of making the said prayers. However, the Bank did not make any separate application for the aforesaid purpose and did not press the matter before the Court. If appropriate action had been taken by the Bank at that stage, the possession of the goods could have been obtained by it after institution of the suit. Gurbachan Singh, defendant, when appeared as his own witness, deposed that if the hypothecated goods were given to him by the Bank, he was ready to pay the balance amount. There is also no evidence that the hypothecated machinery was got insured. If the Bank had been vigilant about the securities, at least the hypothecated machinery which was worth about Rs. 30,000, would not have been lost. The stand of the respondent, at the time of the arguments before me was the same, however, the learned counsel for the appellant candidly admitted that the goods were no longer available. After taking into consideration all the above-said circumstances, I am of the opinion that the securities have been lost on account of negligence or inaction of the Bank.

(16) It has already been observed above that if the security is lost on account of negligence or inaction on the part of the creditor, the surety stands absolved of his liability to the extent of price of the security. In the present case, the amount claimed by the plaintiff is Rs. 3,275.20. The amount is about one-ninth of the price of the pledged machinery. In the circumstances, in my view, the surety stands discharged from his liability to pay the balance amount.

(17) The second question that requires determination is that even if the goods are deemed to be in physical possession of the plaintiff, whether it can file a suit for recovery of the loan without

first selling the goods. The learned Appellate Court has observed that as the plaintiff has not cared to recover the loan from the hypothecated machinery, etc., and there is no evidence that the price of the machinery, etc., was not sufficient for recovery of the loan, it is not entitled to recover any amount by suit from the defendants. It also observed that the plaintiff could recover the amount by putting the pledged machinery, etc., to auction and in case that was insufficient to satisfy the amount of loan, it could bring further action against the defendants. Section 176 of the Indian Contract Act, 1872, relates to the pawnee's right where pawner makes default in payment. It reads as follows :—

> "If the pawner makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise and retain the goods pledged as a collateral security or he may sell the thing pledged on giving the pawner 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 pawner 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 pawner."

From a reading of the section, it is evident that if the pawner makes default in payment of any debt, the pawnee is entitled to file a suit for recovery of the debt and retain the pledged goods as a collateral security. In the alternative, he is entitled to sell the pledged goods and adjust the sale proceeds towards the debt. If the proceeds are less, the pawnee is entitled to recover the balance from the pawner. Thus, the pawnee in spite of the pledge of the goods is entitled to bring a suit without selling the goods. In the above view, I am fortified by the observations of the Supreme Court in *Lallan Prasad* v. *Rahmat Ali and another,* (10). J. M. Shelat, J., speaking for the Court, observed that the pawnee has a right of action for his debt notwithstanding possession by him of

(10) AIR 1967 S.C. 1322.

the goods pledged. While interpreting section 176 *ibid* the learned Judge observed as follows :—

> "Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner."

Therefore, I am of the opinion that if the goods are deemed to be in physical possession of the plaintiff still it can file a suit for recovery of the loan without first selling the goods.

(18) It appears that the provisions of section 176 were not brought to the notice of the learned Appellate Court. In view of the aforesaid discussion, I am of the view that the observations of the learned Appellate Court that the plaintiff was not entitled to institute the suit cannot be sustained.

(19) The third question that requires determination is that if the goods are lost because of creditor's negligence, whether the debtor is liable to pay the amount if there is a special contract between the creditor and the debtor by which the former contracted himself out of the obligations imposed by section 151 of the Contract Act. I have already dealt with section 151 which relates to the care to be taken by the bailee. Section 152 deals with the question as to when the bailee is not liable for loss of the goods bailed. It reads as follows :—

> "The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151."

The words "in the absence of any special contract" go to show that the bailee can contract himself out of the obligations imposed by section 151 of the Contract Act. In the above view, I got support from the following observations of Beaumont, C.J., in *Lakbail Dollaji & Co.*, v. *Boorugu Mahadeo*, (11):—

> "This Court in *Bombay Steam Navigation Co. Ltd.*, v *Vagudev Baburao*, (12), held that it was open to a bailee

(11) 41 Bombay Law Reporter 6.
(12) (1927) ILR 52, Bombay 37.

> to contract himself out of the obligations imposed by section 151, and I feel no doubt whatever that that view is correct. The Act does not expressly prohibit contracting out of Section 151 and it would be a startling thing to say that persons *sui juris* are not at liberty to enter into such a contract of bailment as they may think fit. Contracts of bailment are very common, although they are not always called by their technical name. I can see no reason why a man should not be at liberty to agree to keep property belonging to a frined on the terms that such property is to be entirely at the risk of the owner and that the man who keeps it is to be under no liability for the negligence of his servants in failing to look after it."

The above case was followed by a Division Bench of the Gujarat High Court in *M/s Chhitarmal Anandilal* v. *The Punjab National Bank Ltd.*, (13). The learned Bench observed that though a bailee is required to take ordinary care of the goods bailed, it is open to him to contract himself out of the obligations imposed by section 151 of the Contract Act. With great respect to the learned Judges, I am in agreement with them.

(20) Now, the question to be seen is whether there is any special agreement by which the Bank contracted himself out of the obligations imposed on it by section 151 of the Contract it. The learned counsel for the appellant made a reference to clause 15 in the agreement for cash credit (Exhibit P.4). The clause reads as follows :—

> "That no responsibility will lie with the Bank in respect of the quantity quality or condition on final outturn of the goods produce and merchandise now pledged or hereafter to be pledged to the Bank under this Agreement."

(21) Exhibit P.4 relates to hypothecation of the goods, produce and merchandise and not the machinery. From the language of the clause as well, it is evident that it applies only to the goods, produce and merchandise and not to the machinery. The document which relates to the hypothecation of the machinery is Exhibit P.6. No

(13) (1969) ILR 10 Gujarat 480.

clause has been brought to my notice in that document from which it can be inferred that the Bank contracted itself out of the obligation imposed by section 151 regarding the machinery, I hold accordingly.

(22) The fourth question that has been raised is that the plaintiff is entitled to a decree against defendant No. 3 on the basis of equitable mortgage. This question, in view of the finding that defendant No. 3 stands discharged from his liability to pay the balance amount, does not arise and, therefore, it is not necessary to deal with it.

(23) The last question is whether the plaintiff is entitled to the interest from the defendants from the date of institution of the suit till the date of realisation. It is provided in section 34 of the Code of Civil Procedure that where a decree is for payment of money arising out of the commercial transaction, the Court can grant interest from the date of the suit till the date of realisation of the decretal amount at the rate of interest not exceeding the contractual rate of interest between the parties. In view of the aforesaid section, I am of the view that the plaintiff is entitled to recover the interest from defendants Nos. 1 and 2 at the contractual rate of interest from the date of institution of the suit till the date of realisation of the decretal amount.

(24) For the aforesaid reasons, I partly accept the appeal and decree the suit of the plaintiff-appellant for the recovery of Rs. 3,275.20 with costs throughout and interest at the contractual rate from the date of institution of the suit till the date of realisation against defendants Nos. 1 and 2, and dismiss the suit against defendant No. 3 with no order as to costs.

N. K. S.

Before S. S. Sandhawalia, C.J. & D. S. Tewatia, J.

CHANAN SINGH,—*Petitioner.*

versus

JANGIR KAUR,—*Respondent.*

Criminal Revision No. 134 of 1980.

December 17, 1982.

Code of Criminal Procedure (II of 1974)—Section 125—Punjab High Court Rules and Orders Volume III, Chapter 7-A, Rule 1—Proceedings