Privy Council Appeal No. 44 of 1933.

The Official Assignee of Madras - - - - - *Appellant*

v.

The Mercantile Bank of India, Limited - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER 1934.

Present at the Hearing:

LORD ATKIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WRIGHT.]

The appellant is the Official Assignee of Madras in whom the property vested on insolvency of C. K. Narayana Ayyar & Sons (who will be referred to hereafter as the insolvents); the question in the appeal is whether the appellant or the respondents are entitled to the proceeds of certain consignments of ground nuts; the primary issue is whether the respondents who had advanced monies on the security of the railway receipts in respect of these ground nuts obtained a valid pledge of the goods. Certain further or alternative questions will be dealt with subsequently.

The appellant succeeded before Waller J.; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate Jurisdiction; the appellant now appeals to His Majesty in Council.

There is little dispute about the facts. The insolvents did a large business in ground nuts, which they purchased from the up-country growers; the nuts were then despatched by rail arrived in Madras by one or other of two railways, the Madras & Southern

Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the insolvents, but there was on it a signboard bearing the name of the respondents. For many years the respondents had financed the consignments of nuts purchased and consigned by the insolvents; their method was to grant loans against particular consignments. The general course of business was for the insolvents to obtain from the railway companies in respect of each consignment or wagon load a railway receipt which will later be more particularly described; sometimes, however, the up-country seller appeared as consignor and consignee, in which event the receipt was endorsed and delivered to the insolvents; sometimes the seller was named on the receipt as consignor, while the insolvents were consignees; in other cases the insolvents were named on the receipt both as consignors and consignees. Each receipt gave full particulars relating to the goods, the wagon number, the marks of the bags, the number, and so forth. It contained the following condition:—

> "That the railway receipt given by the N.G.S. Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the railway company or the railway may refuse to deliver and the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

The condition recognises a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading, whereby delivery is made on an indemnity if bills of lading are not forthcoming. As in general the insolvents wanted loans against consignments their practice was to bring or send to the respondents the railway receipts, duly endorsed by them in blank, with a letter of hypothecation and a promissory note, and, if the values were satisfactory and the transaction was in order, the loan was granted, the insolvents executing a promissory note for the amount and the letter of hypothecation, which was duly completed with full particulars of the security. The railway companies were, no doubt, aware of this general course of business, but were not notified that it had been followed in respect of any particular transaction. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts; these the respondents had retained, but in order to enable them to obtain delivery the practice was to hand

them to the representative of the insolvents, who paid freight and unloaded the goods from the wagons into the X warehouse, where they came into the actual possession of the respondents.

The insolvents were adjudicated bankrupt on the 11th February, 1929, the date of the insolvency being the 7th February, 1929. At that latter date the goods, which are the subject of this appeal, consisted of 7,993 bags of ground nuts, represented by 46 railway receipts; all the goods were at the time either in transit on the railway or in the transit sheds or godowns of the Port Trust. Of the 46 receipts, 14 representing 2,975 bags, had been presented on the 7th February, 1929, to the Port Trust by the insolvents, who had received them from the respondents, in accordance with the method and for the purpose described above, but the Port Trust refused to give delivery and unloaded these bags into its own sheds or godowns because payment of the freight was not forthcoming; the remaining 32 receipts were presented by the respondents after the insolvency; in view, however, of the dispute which culminated in the present suit, delivery was refused by the Port Trust, and all the goods were eventually sold under orders of the Court, the proceeds being held by the respondents to abide the result of these proceedings.

The main question (putting aside for the moment any consideration of the letter of hypothecation) is whether the pledging of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents, that is, what has been called a pledge of the *ipsa corpora* of the documents. The solution of the question depends on the true effect of section 178 of the Indian Contract Act, 1872, as then in force; that section which has since been repealed by the Indian Contract (Amendment) Act, 1930, and replaced by a new section 178, was in the following terms:—

> *A person who is in possession of any goods or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate or warrant or order for delivery or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:*
>
> *Provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them by means of an offence or fraud.*

By section 172 a pledge is defined as "a bailment of goods as security for payment of a debt or performance of a promise."

The first matter to be decided is whether a railway receipt such as those in question is a document of title to the goods within the section. Their Lordships are of opinion that it is. In *Ramdas* v. *Amerchand & Co.*, 43 I.A. 164, this Board held that a

railway receipt was an " instrument of title " within section 103 of the Contract Act ; the Board said in that case that no distinction could be drawn between the term " document of title" and the term " instrument of title " ; and accordingly also held that the railway receipts were documents of title to goods within section 178. Their Lordships likewise in the present case see no reason for giving a different meaning to the term in section 178 from that given to the terms in sections 102 and 103 ; in addition a railway receipt is specifically included in the definition of " mercantile document of title to goods " by section 137 of the Transfer of Property Act, 1882, which, in virtue of section 4 of the Act, is to be taken as part of the Contract Act as being a section relating to contracts. A railway receipt is now included in the definition of documents of title to goods in section 2 (4) of the Indian Sale of Goods Act, 1930.

The two questions which next arise on section 178 are (1) Whether the words " a person who is in possession of any goods or of any bill of lading," etc., include the owner, and (2) whether a pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered ; both depend on the words of the section read in connection with the rest of the Act.

But the arguments advanced on behalf of the appellant have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarised. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery ; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him ; there was thus a change of possession and a constructive delivery : the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained

on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realized. So things have remained in the English law: a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the *ipsa corpora* of them; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in *Spear* v. *Travers*, 4 Camp. 251. The common law rule was stated by the House of Lords in *McEwan v. Smith*, 2 H.L.C. 309. The position of the English law has been fully explained also more recently in *Inglis* v. *Robertson* [1898], A.C. 616, and in *Dublin City Distillery* v. *Doherty* [1914], A.C. 823. But there also grew up that legislation which is compendiously described as the Factors Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus entrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties *bona fide* and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Section 3 of the Factors Act, 1889, provides that " a pledge of document of title to goods shall be deemed to be a pledge of the goods." It has been held that this section only applies to transactions within the Factors Act (*Inglis* v. *Robertson*, *supra*).

Thus the curious and anomalous position was established that a mercantile agent acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodier and

obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the appellant that section 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on section 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in section 3 of the English Act of 1899.

But section 178 of the Contract Act, 1872, has omitted the word " agent," and has without express qualification made the section apply to " a person who is in possession of any goods or of any bill of lading, etc." The Appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out by this Board in *Ramdas's* case (*supra*) that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian Legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended to pledge the goods and not merely the railway receipts and the respondents have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England in the like case is no argument against their Lordships' conclusion, nor is it an argument

that section 178 as subsequently amended in 1930 and now in force has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian Legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that " any person, etc.," includes owner; the decisions appear to have turned on the meaning of the word " possession," and on such distinctions as that between mere custody and juridical possession. An examination of sections 103 and 108 of the Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

The other question arising under section 178, viz., whether under its terms a pledge of the documents amounts to a pledge of the goods should also, in their Lordships' judgment, be answered, as it was by the Appellate Court, in favour of the respondents. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained; the actual words of section 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of section 178 is abbreviated; but " a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by " bill of lading," the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the pledging of a bill of lading. This was the view adopted in regard to railway receipts in *Ramdas's* case (*supra*). In that case it was held that the pledging of a railway receipt had the same effect on the right of stoppage *in transitu* under section 103 as a pledging of the goods; the railway receipt *quoad* this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under section 178 to a pledge of the documents, especially as the Board held in *Ramdas's* case (*supra*) that documents and instruments of title had the same meaning in both sections. A " pledge " is defined as stated above to be a bailment of goods as security (section 172), hence it seems that section 178, the marginal note to which is " pledge by the possessor of goods or

of documentary title to goods," can only be dealing with pledges of goods, though the section uses the words "pledge of such goods or documents." In other words it is describing a pledge of goods, either by pledging the goods *eo nomine* or by pledging the relative documents.

On this construction of section 178 the respondents were, on the facts of the case, entitled to their security in the ground nuts represented by the 46 railway receipts as being validly pledged to them.

It was contended that even on this view the goods represented by the 14 railway receipts presented on the 7th February, 1929, were in a different position, because, it was said, the respondents had parted with their pledge on these goods by giving back possession of the railway receipts to the insolvents. In their Lordships' judgment this contention is based on a misuse of the word "possession." The respondents did not part with the possession of the goods or receipts in the juridical sense of that word; they merely parted with the custody, by entrusting the receipts to the insolvents as their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and unloading them from the railway wagons or transit sheds and putting them into the X godown warehouse on behalf of the respondents. Such action does not involve a parting with possession and accordingly it does not in any way affect rights of pledge; the redelivery by the pledgee to the pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by *North Western Bank* v. *Poynter* [1895], A.C. 56, and the more recent case in *re David Allester, Ltd.* [1922], 2 Ch. 211. In both these cases the limited purpose was in order that the goods should be realized by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the respondents who were bankers, but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient for the conduct of the business in question. This point also fails the appellant.

The above conclusions are sufficient to dispose of the appeal, but a further point taken on behalf of the respondents would in itself, in the opinion of the Board, be sufficient to decide the appeal in their favour. Reference has already been made to the letter of hypothecation, which, in the case of each advance, was completed by the insolvents. The finding of the Trial Judge on this point is that "in order to finance the transaction the insolvents took the railway receipts to the bank with promissory notes and letters of hypothecation." The letter of hypothecation was in terms an acknowledgment by the insolvents that they had deposited the property documents and securities thereunder-mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter,

in their Lordships' judgment constitutes a good equitable charge which is binding between the insolvents and the respondents, and is equally binding on the appellant who, for this purpose, merely stands in the insolvents' shoes, and has as against the respondents no higher or better right than the insolvents had at the date of the insolvency. An analogous case was considered in *ex parte North Western Bank, in re Slee*, L.R., 15 Eq. 69, where a letter of lien over wools of the bankrupt which were in his warehouse, was held to create a good equitable charge in favour of bankers who had made advances; no delivery of the warrant for wools had been made; but it was held that the bankers had a good title against the trustee in bankruptcy. This authority was followed and approved *in re Hamilton Young & Co. ex p. Carter* [1905] 2 K.B. 772. In that case the traders who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. The Court of Appeal rejected the argument that the letters of lien were void under the Bills of Sale Act: such matters are not here material because in India there is no legislation corresponding to the Bills of Sale Acts. Apart from that question Vaughan Williams L.J., thus summed up the general position at p. 784 :—

> "The result of the practice detailed seems to be that in respect of the matter and preparation and shipment of the goods, the management and direction of these goods for the purposes of bleaching, dyeing and shipping, until the bills of lading were handed over, rested entirely with [the debtors], and that no property other than by way of a lien or charge would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining [the debtors] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank."

There was in that case notice by the bank of their lien to the bleachers shortly before the insolvency, but the statement of the bankers' rights in equity as against the debtors, and consequently as against the trustee in bankruptcy, is not made with reference to any question of notice. The rights between the immediate parties do not depend on notice, just as in the case of an equitable assignment of a debt notice is not necessary to complete the equitable right as between assignor and assignee. Thus in *Brandts* v. *Dunlop Rubber Company* [1905], A.C. 454, it is clear that there was a good equitable assignment as between the merchants as assignors and the financiers as assignees, though the assignment was not completed in the sense that the debtors to the merchants were bound by it or bound to pay the assignees, without receiving notice of it. Thus at p. 462 Lord Macnaghten says: "As between Kramrisch & Co. [the merchants] and Brandts' [the bankers] the assignment was perfect without them" (sc. the documents giving notice to the debtors). In the same way in the present case, though it is true that no third party holding the

goods or dealing with them without notice of the respondents' lien, would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the respondents and the insolvents. In this case nobody's rights are concerned except the rights as between these immediate parties : the appellant merely stands in the insolvents' shoes.

A similar course of reasoning has been applied in India, for instance, in the case of *In re Ambrose Summers*, I.L.R. 23 Cal., 592.

Some objection was raised on the hearing of the appeal that the question of the effect of the letters of hypothecation had not been an issue in the Courts below, and indeed that the letters of hypothecation had not been proved except in general terms. But both in the first Court and in the Appellate Court this issue is referred to, and the Trial Judge finds the facts. Before this Board the point was argued as an alternative, and in view of the conclusions stated above as to the application of section 178 of the Contract Act, it may be regarded as not calling for decision. But this point by itself would be enough to decide the case against the appellant even if he were right in the construction of section 178, for which he has contended.

A still further point was raised on behalf of the respondents ; it was argued that if under section 178 the respondents did not get a good pledge at law by the delivery of the railway receipts, still that delivery considered on all the facts of the case, was evidence of a good equitable charge as least as between the immediate parties even ignoring the accompanying letters of hypothecation. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts. If so, the appellant must be subject to the same equity.

There still remains for consideration a final point raised on behalf of the appellant, which is that on any view of the case the consignments of nuts in question constitute property divisible among the creditors in virtue of section 52 (2) c, of the Presidency Towns Insolvency Act, 1909, which corresponds with the similar clause in the English Bankruptcy Act, as " goods being at the commencement of the insolvency in the possession order and disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof." This point can be shortly here disposed of. If the goods in question were validly pledged under section 178 as their Lordships have held, they were not in the possession of the insolvents, because the railway company held

the goods as bailees of the respondents, the possession by the respondents of the documents of title being equivalent to the possession of the goods : hence these goods were not within the possession order and disposition of the insolvents at all ; it is the respondents who were entitled to obtain delivery of the ground nuts from the railway company. A similar conclusion was arrived at on analogous facts in *Fakeerappa* v. *Thippanna*, I.L.R., 38 Mad. 664. It was argued that a distinction must be drawn in this connection in regard to goods represented by the 14 railway receipts that were handed over to the insolvents' representative for the special purpose explained above, of unloading the goods into the X warehouse. Their Lordships, however, do not think that these goods are in any different position from the remainder for this purpose. The pledge was not affected by the handing over of the railway receipts for the limited purpose ; it was only for that purpose that the insolvents had the temporary possession, or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession order and disposition of the insolvents, still less that they were so with the consent of the true owners, that is the respondents, as pledgees. Nor could it be said either as to the consignments as a whole or as to the 14 consignments that the circumstances were such as to make the insolvents the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know " those facts which are capable of being generally known to those who make enquiry on the subject," in the sense explained by Lord Selborne in *ex. p. Watkins*, L.R. 8 Ch. 520, at p. 528 : the general course of business and the relationship of the interested parties to the consignments and in particular the purpose for which the insolvents had custody of the 14 receipts were inconsistent with any reputation of ownership in that sense. Reference may be made in this connection to the English cases of *ex p. North Western Bank* (*supra*), and *in re Hamilton Young & Co.* (*supra*). The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also.

In the result the appeal should, in their Lordships' opinion, be dismissed with costs.

They will humbly so advise His Majesty.

In the Privy Council.

THE OFFICIAL ASSIGNEE OF MADRAS

v.

THE MERCANTILE BANK OF INDIA, LIMITED.

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