APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

Mar. 5.

U PAW TUN AUNG & Co. (APPELLANTS)

v.

ABDUL RAZAK (RESPONDENT).*

Pledge of jewellery for loan—Ss. 176 and 177, Contract Act—Whether stipulation that pledge would become irredeemable, valid—Sale by pledgee without notice to the pledgor, conversion—Measure of damages—Value at the date of the conversion—Accrual of Interest (War-Time Adjustment) Act—Whether applies to settled transactions.

Held : The rights of pledgor and pledgee are governed by ss. 176 and 177 of the Contract Act. Pledgee has no right to foreclose, and his remedy is either to sell the pledged article or to file a suit and retain pledged article as collateral security. The stipulation in the contract of pledge that if the pledgor does not redeem by a particular date the pledge will be irredeemable is void, and the right of pledgee to redeem the pledged article subsists.

If the pledgee sells the pledged articles without notice as provided under ss. 176 and 177 of the Act it amounts to conversion even though there was a contract that after a particular date the pledge will become irredeemable.

The Co-operative Hindusthan Bank, Limited v. *Surendranath De*, 59 Cal. 667, followed.

Dwarika v. *Bagawati*, A.I.R. (1939) Ran. 413, dissented from.

The general measure of damages in case of conversion is in general the value of the goods at the time of conversion.

Ratanlal's Law of Torts (10 Edn.), p 305 ; Iyer's Law of Torts (1932 Edn.), p. 140 ; *Cooverji Umersey* v. *Mowji Vaghji and another*, A.I.R. (1937) Bom. 26, followed.

Ma Me Shin v. *R.M.R.M.N. Chettyar Firm*, A.I.R. (1933) Ran. 76 at p. 79, distinguished.

The Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act XI of 1947), applies only to outstanding debts and not to settled transactions that are settled before the Act came into force.

P. K. Basu for the appellants.

Tun Sein for the respondent.

U THAUNG SEIN, J.—On the 17th January 1941 the respondent Abdul Razak borrowed a sum of Rs. 950

* Civil 2nd Appeal No. 129 of 1947 against the decree of the District Court of Akyab in Civil Appeal No. 20 of 1947.

from the appellants U Paw Tun Aung & Co., bearing interest at ten annas per cent per mensem, and deposited a certain quantity of gold jewellery as security for the loan. This transaction took place at Akyab. However, with the declaration of war by Japan on the 8th December 1941 there was general unrest all over Burma and the respondent evacuated from Akyab and did not return to that town till 1944. He then sought to redeem his pledged jewellery but the appellants were unable to produce the same as it had been sold away in or about September 1942. The respondent therefore sued the appellants in Civil Regular Suit No. 19 of 1947 of the 2nd Assistant Judge, Akyab, for the return of the pledged articles or their value after deducting all moneys due in respect of the previous loan.

The appellants contested the suit on two main grounds, *viz.* that at the time of the loan the respondent had executed a document (filed as Exhibit A in C.R. Suit No. 19 of 1947) by which he had promised to redeem the jewellery by about April 1941 and failing which the ownership in the properties was to pass to the appellants. It was further contended that if the transaction between the parties was found to be a pledge of gold jewellery, then all that the respondent could claim was for payment of the surplus sale proceeds of the articles after deducting the amount due on the loan.

The learned 2nd Assistant Judge, Akyab, held that the transaction in question was a pledge and that the appellants had sold away the articles and thus rendered redemption impossible. He accordingly decreed that the respondent be allowed to redeem his gold jewellery or else be paid a sum of Rs. 2,747-5 being the price of the gold ornaments on the date of suit, *minus* the sum due in respect of the loan. The appellants

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appealed to the District Court of Akyab against this decree but without success and they have now come to this Court to have the judgment and decrees of both the lower Courts set aside.

There is little or no dispute as to the facts, and the main grounds advanced in the present appeal are as follows.

The appellants insist that the transaction between the parties was one of conditional sale and not a pledge. In the grounds of appeal, however, it was contended that the transaction was a mortgage. The learned counsel for the appellants in his argument stated that he did not intend to press this ground and relied mainly on his contention that it was a conditional sale.

The question whether the transaction was a pledge or a conditional sale depends mainly on the construction to be put on Exhibit A. At the outset I would say that this document is very vaguely worded and reads as follows: " If the goods are not redeemed by *Tagu* (April) 1302 B.E. U Paw Tun Aung & Co. will take the same. There will be no right to object to anything." The document does not read as if it were a sale deed, and as far as I can see from the evidence on record the parties did not regard it as anything more than a document of pledge.

The question is : Whether the undertaking by the respondent-pledgor in Exhibit A to forfeit his title to the goods and also his right of redemption on his failure to redeem it by a certain date is valid ? The rights and duties of pledgor and a pledgee are set out clearly in sections 176 and 177 of the Contract Act and I agree with the learned District Judge, Akyab, that the parties cannot contract themselves out of these statutory rights and liabilities. If it were possible to defeat the statutory provisions of any Act, then there

could be no object in having such Acts as the Limitation Act or the Transfer of Property Act. For instance, parties may agree by mutual consent to transfer orally immovable property worth more than Rs. 100. This would certainly be an invalid transaction even though the parties may have mutually agreed on it as there are statutory provisions in the Transfer of Property Act which lay down that transfers of immovable property of Rs. 100 or more must be evidenced by a registered deed. I note with surprise, however, that there is a ruling by Mackney J. in *Dwarika* v. *Bagawati* (1)— where it was laid down that an agreement that the pledge should become irredeemable on failure to redeem within a limited period is not necessarily invalid. This case is reported in an unofficial law report and with all due respects I do not consider that it correctly interprets sections 176 and 177 of the Contract Act. These sections were designed to prevent any clogs in the way of redemption and parties cannot override these statutory provisions by mutual agreement. In my opinion, the document, Exhibit A, did in fact create a pledge and nothing else even though the wording in it may be vague.

The transaction between the parties being one of pledge, the rights and liabilities between them must be decided by reference to sections 176 and 177, Contract Act. The learned counsel has sought to distinguish between these two sections in the following manner.

According to him, where no date is fixed for the redemption of the articles then under section 176, Contract Act, the pledgee is required to serve a notice on the pledgor before the pledged articles are sold. Where a date is stipulated or fixed for the redemption of the articles then under section 177, Contract Act,

(1) A.I.R. (1939) Ran. 413.

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the pledgee is entitled to sell the property without notice to the pledgor. The answer to this argument is by reference to the two sections which read as follows :

" 176. If the pawnor 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 pawnor upon the debt or promise, and retain the goods pledged as a collateral security ; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

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

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

I have italicized the words " *at the stipulated time of the promise* " in section 176 to indicate that where a date has been fixed for the redemption reasonable notice must be given to the pledgor before the properties are sold. It is evident that whether a time has been stipulated or not for the redemption of the pledged articles reasonable notice must be given to the pledgor before the sale in accordance with section 176, Contract Act. In this connection, I would refer to the ruling in *The Co-operative Hindusthan Bank, Limited* v. *Surendranath De* (1). The following extract from the head-note of that case will be of great assistance in the case under consideration by me :

" Section 176 of the Contract Act, unlike some other sections, *e.g.* sections 163, 171 and 174, does not contain a saving clause

(1) 59 Cal. 667 (668).

in respect of special contracts contrary to its express terms. The section gives the pawnee the right to sell only as an alternative to the right to have his remedy by suit. Besides, section 177 gives the pawnor a right to redeem even after the stipulated time for payment and before the sale.

In view of the wording of section 176 as compared with the wordings of the other sections of the Contract Act referred to and also in view of the right, which section 177 gives to the pawnor, and in order that the provisions of that section may not be made nugatory, the proper interpretation to put on section 176 is that notwithstanding any contract to the contrary notice has to be given, which, in the words of the section should be 'a reasonable notice of the sale.' "

This ruling goes so far as to say that notice of sale must be given to the pledgor even if there were a contract between the parties to dispense with this notice.

The above sections of the Contract Act outline the rights and liabilities of the pledgor and the pledgee. To put it briefly the rights of a pledgee are to sue for the moneys due while retaining the pledged articles as collateral security or to sell the articles after due notice to the pledgor. A pledgee has no right of foreclosure and cannot sell the articles till the expiration of reasonable notice to the pledgor. Applying these principles to the present case I am in agreement with the findings of the lower Courts that the transaction between the parties was one of the pledgor and pledgee and hence under section 176, Contract Act, notice of the sale should have been served on the respondent before the jewellery were actually sold.

There is no dispute that the respondent had evacuated from Akyab in 1942 and that no notice was served on him. In all probability, the appellants, who were labouring under the impression that according to the document, Exhibit A, they became the owners of

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the pledged properties from April 1941, sold them away as their own properties. This act of the appellants is what is known in law as " conversion " and the real bone of contention between the parties is as to the compensation which is payable to the respondent-pledgor for the wrongful conversion. Both the lower Courts have held that for the purpose of assessing the damages payable the value to be fixed for the pledged articles is their value at the date of suit. The appellants, on the other hand, assert that this value must be the value at the time of the conversion. I have referred to two treatises on the Law of Torts and find the following annotations as regards the measure of damages in cases of wrongful conversion of pledged properties. At page 305 of Ratanlal's Law of Torts (10th Edition) there is the following note under the heading " Damages " :

> " The measure of damages is in general the value of the goods at the time of the conversion, where no special damage has been sustained, and the goods have not been tendered and received back after action. This would be the market value of the goods at the time of conversion."

The same principles are also set out at page 140 of the Law of Torts (1932 Edition) by S. R. Iyer :

> " *Method of Ascertainment.*—The value of the chattel is ascertained generally as at the time and place of conversion. But this rule is not a rigid one and must be interpreted in the light of the circumstances of each case. . . . . Where the article is wrongfully detained by the defendant and not produced for assessment of value, the Court will make every presumption against him and put the highest value on it."

The general rule as to the value to be put on the goods which have been the subject of conversion

has also been laid down in *Cooverji Umersey* v. *Mawji Vaghji and another* (1). In this case there is the following passage in the head-note :

" The correct measure of damages is the loss which the pawnor has actually sustained, taking into account the pawnee's interest in the goods at the time of the conversion."

The learned District Judge, Akyab, refused to rely on the principle laid down in this ruling on the ground that the goods referred to therein were merchandise whereas in the case before him the property pledged was gold jewellery. I am unable to appreciate how any distinction can be drawn between these articles both of which are easy to dispose of in the open market.

My attention has however been drawn by learned counsel for the respondent to the case of *Ma Me Shin* v. *R.M.R.M.N. Chettyar Firm* (2) as authority for the principle that the value to be put on the pledged articles in a case of conversion is the price at the date of suit. I have read this ruling carefully and note that there is no general discussion in the body of the judgment as to the principles by which damages are to be ascertained in cases of wrongful conversion. There is, however, the following passage :

" I understand that it is agreed by the parties that that being so, the respondents are entitled to claim the amount due on the promissory notes after deducting what is a reasonable value for the jewellery deposited. The value must be taken as the value at the date of suit, that is 20th June 1930."

As far as I can see, the value of the goods was fixed by mutual consent in that case as their value on the date of suit. This case cannot, in my opinion, be cited as authority for the rule urged by the learned counsel for the respondent, that the price to be fixed for goods

(1) A.I.R. (1937) Bom. 26. (2) A.I.R. (1933) Ran. 76 at p. 79.

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which have been the subject of conversion is their value on the date of suit

In the present case, the sale of the pledged jewellery in September 1942 was probably under the *bona fide* belief that the ownership in them had passed to the appellants. Under these circumstances, I am of opinion that in assessing the damages payable by the appellants the value to be put on the pledged articles should be in accordance with the general rule, namely, their value at the date of conversion. Had the appellants been guilty of fraudulent retention of the properties, then I would have held that a departure from the general rule would be justified and fixed the value at the price on the date of suit. Both the lower Courts thus erred in the calculation of damages. The amount which would be payable by the appellants to the respondent may be worked out as follows :

Amount due by respondent to appellants :

	Rs.	A.
(1) Amount of original loan	950	0
(2) Interest at As. 10 per cent per mensem from 17th January 1941 to 14th September 1942 ..	118	12
(3) Extra charges for preservation of the gold jewellery (the 2nd Assistant Judge, Akyab, has already held that this sum is payable) ...	47	6
Total ...	1,116	2

Value of the jewellery at the date of conversion, *i.e.* on 14th September 1942, for 23 ticals 12 annas and 4 ratis of gold at Rs. 60 per tical (rate decided by 2nd Assistant Judge, Akyab) 1,425 0

It will be noticed that I have allowed interest on the loan up to the 14th September 1942. The Accrual of Interest (War-Time Adjustment) Act, 1947 (Burma Act No. XI of 1947), applies only to outstanding debts and not to settled transactions, *i.e.* transactions settled before the Act came into force. The amount payable by the appellants to the respondent for the wrongful

conversion of the pledged jewellery was therefore Rs. 1,425 *minus* Rs. 1,116-2, *i.e.* Rs. 308-14 (Rupees three hundred and eight and annas fourteen only).

The appeal will accordingly be allowed in this sense, that the decree of the learned 2nd Assistant Judge, Akyab, will be modified and the appellants U Paw Tun Aung & Co. shall pay to the respondent Abdul Razak the sum of Rs. 308-14. As the appellants have only been partially successful in this appeal no costs will be allowed in this Court ; they shall, however, pay proportionate costs in both the lower Courts.