OD 58

IA NO: GA/1/2022
IN CS/67/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

MANAV INVESTMENT AND TRADING COMPANY LIMITED
Vs
DBS BANK INDIA LIMITED

BEFORE:
The Hon'ble JUSTICE SHEKHAR B. SARAF
Date : 4th April, 2022.

Appearance:
Mr. Dhruba Ghosh Sr. Adv.
Mr. Anirban Ray, Adv.
Mr. Rajarshi Dutta, Adv.
Mr. V.V.V. Sastry, Adv.
Mr. Pankaj Agarwal, Adv.
Mr. Debjyoti Saha, Adv.
. . .for the petitioner.

Mr. Jishnu Saha Sr. Adv.
Mr. Sakabda Roy, Adv.
Ms. Trisha Mukherjee, Adv.
. . .for the respondent.

Order Dictated in Open Court:

1. This is an interlocutory application seeking injunction restraining the respondent and its men, agent and servants from giving any effect or further effect to the letters dated 23rd February, 2022, being Annexures "P" and "Q" of this petition. Both these notices are for the purpose of invoking the pledge and transferring the pledged shares in favour of the respondent.

2. It is to be noted that in an earlier suit being C. S. No. 138 of 2021 filed by the petitioners herein, an interim order was passed on 3rd August, 2021 restraining the respondents from proceeding with sale of the pledged shares. Subsequently, a vacating application was filed by the respondent which was taken as the affidavit in opposition to the main application and the matter was heard out. Upon hearing both the parties, this Court had passed an order on February 16, 2022 holding that the notices dated July 17, 2021 for immediately recalling of the term loan facility and working capital facility were in tune with the agreements entered into between the parties. However, the Court held that the notices were not in terms of Section 176 of the Indian Contract Act, 1872. After having examined the judgment cited by the parties, the Court had laid down the following principles to be kept in mind in cases of Section 176 notice. The same is delineated below:

> "21. Upon careful perusal of the judgment cited by the parties the following principles emerge:
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> a) The provisions of Section 176 of the Act are mandatory. The applicability and sweep of Section 176 unlike several other provisions on the same subject is not eclipsed by the phrase "in the absence of a contract to the contrary." The notice that is to be given to the pledgor of the intended sale by the pledgee is a special protection which statute has given to the pledgor and, parties cannot agree that in the case of any pledge, the pledge may sale the pledged articles without notice to that pledgor.
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> b) Right to redeem under Section 177 can be exercised right up to the time the actual sale of the goods pledged takes place. The actual sale referred to in Section 177 must be a sale in conformity with the provisions of Section 176 which gives the pledgee the right to sale; and if the sale is not in conformity with those provisions, then the equity of redemption in the pledgor is not extinguished.

c) A notice of the character contemplated by Sec. 176 cannot be implied. Such notice has to be clear and specific in language indicating the intention of the pawnee to dispose of the security.

d) What is contemplated by Sec. 176 is not merely a notice but a 'reasonable' notice, meaning thereby a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay up the amount within the time mentioned in the notice.

e) Section 175 only requires an intimation of the intention to sell and not that, a sale should be arranged beforehand and due notice of all details of the time, date and place of sale be given to the pawnor."

3. Based on the above principles, this court was of the view that the notices that had been issued on July 17, 2021 did not provide the petitioner with a clear intent of sale as is required under Section 176. In fact, the words used therein were "right of sale" which the Court found to not being the same as an intention to sale. Accordingly, the notices were permanently injuncted. The relevant paragraphs are delineated below:-

> "23. Upon a reading of the relevant clauses in the above notices issued to the petitioner it appears that on failure of the petitioner to make payment of the outstanding dues the defendant would have a right of sale. This right of sale is further specified in the preceding paragraph of the notice which says that the defendant **shall have the right to enforce the pledge** by transferring the New BTL Pledge Shares into the respondent bank's depository account and/or selling the New BTL Pledged Shares. It is noticeable that in both of the clauses, the respondent bank states that they shall have the right to enforce the pledge. However, I don't find an unequivocal statement stating that the shares shall be sold. In my view, there is a clear distinction between having a right of sale and intention to sell. The very philosophy of Section 176 and 177 is that a protection is given to the pawnor with regard to having an opportunity to redeem the shares upon a proper and reasonable notice being given to him. A positive assertion has to be made that in default sale shall take place. The statement used in the notices is ambiguous, fraught with too many technical words and creates a cloud over what exactly is the intention of the pawnee. A Right of sale is not a Notice for Sale. It has to be kept in mind that Section 176 is not subject to the contract between the parties and is an independent section that has to be applied without being tied down by the contract between the parties. For example, if the contract between the parties states that no notice is

> required to be given under Section 176 of the Contract Act, such part of the agreement would be void ab initio and the pawnee would be required to give notice under Section 176.
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> 24. Furthermore, the notice is required to be a reasonable notice. Admittedly, the notice of sale need not specify the date, time and place of the sale but the notice must specify unambiguously that the pawnee intends to carry out the sale. By merely stating that the pawnee shall have the right of sale is not enough. In my opinion, Section 176 is mandatory and the required notice must be given to the parties before sale of the pledged security by the pawnee. The requirement cannot be waived at the time of making the contract of pledge, and supersedes any contract to the contrary. In the case of ***Prabhat Bank (supra)***, similar findings were made by the Court and it was further observed that an agreement authorising the pawnee to the sell the goods pawned, without notice, is void under the Indian Contract Act, 1872. The above findings are applicable to the case at hand as well. However, it may be noted in the present case, the Pledge Agreement is not contrary to the Indian Contract Act, 1872. In fact, Clause 18 of the pledge agreement provides for adherence to Section 176 of the Act.
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> 28. Having answered the above question, I am inclined to grant permanent injunction on the two notices dated July 17, 2021 in relation to the portion dealing with the sale of the pledged shares. I hasten to add over here that the defendant shall be at liberty to issue fresh notices complying with the provisions of Section 176 and proceed in accordance with law."

4. Mr. Dhruba Ghosh, Senior Advocate, counsel appearing on behalf of the petitioner has placed the fresh notices under Section 176 dated 23rd February, 2022 and indicated the relevant paragraphs therein. The relevant paragraph in the first notice (second notice being similar) is provided below for a clear understanding of the issues.

> *"In accordance with Section 176 of the Indian Contract Act, 1872, and in view of the observations made in the order dated February 16, 2022 passed by the Hon'ble High Court of Calcutta in G.A. Nos.1 and 2 of 2021 in C.S. No.138 of 2021, we hereby call upon you to pay us INR 15,87,50,000 (Rupees Fifteen Crore Eight Seven Lakh and Fifty*

Thousand) in its entirety in the manner specified under Clause 8 of the Promoter Undertaking by 12:00 p.m. IST on 16-March-2022, post which DBIL shall, at its discretion, sell the New Pledged Shares as specified hereinabove. Needless to add, all economic risks in relation to the value of the shares and price fluctuations, if any, shall continue to vest with you as the pledgor till such time that DBIL undertakes the sale and utilises such proceeds towards the settlement of outstanding amounts."

5. Mr. Ghosh has submitted that this notice once again hopelessly fails the test under Section 176 of the Indian Contract Act, 1872. He submits that the notice is once again not clear in its intent and does not comply with the principles laid down by this court at paragraphs 21 (c) and (d) of the judgment passed by me earlier. He submits that no time frame has been given to his client to redeem the goods and accordingly the notice is not correct. He submits that a time should have been granted post 16th March, 2022 in which the petitioner would have a right to redeem the goods. He further submits that the fact that the words "at its discretion" are used in the notice, the same leads to ambiguity and cannot be treated to be a notice under Section 176.

6. Mr. Saha, Senior Advocate, counsel appearing on behalf of the respondent bank submits that this court had earlier upheld the invocation of the debt by the notices dated July 17, 2021. He submits that the fresh notices were issued post the judgment given by me and were clearly in terms of Section 176. He submits that the language is clear as the words used are "sell the new pledged shares" and not "shall have the right to sale". He

further submits that a clear date has been given by which the payment is required to be made by the petitioner, and accordingly, the right to redeem is clearly present in the said notice till that date. He further submits that as has been held in several Supreme Court judgments and the judgment passed by me, it is not necessary to give the date, time and place of the sale but only an unequivocal intention to sell the same.

7. Upon hearing the parties and upon carefully perusing the judgments that had been relied upon earlier by the petitioners and the judgment dated February 16, 2022 passed by me in the earlier suit, I am of the view that the petitioners have failed to show a prima facie case in their favour. I am unable to concur with the argument placed by Mr. Ghosh that a further date was required to be given by the respondent bank for making payment or rather for sale of the pledge shares. In my view, the words used in the new notices is that payment is required to be made by 12 pm IST on March 16, 2022 post which DBIL shall sell the new pledge shares. The words “at its discretion” doesn't create any ambiguity at all and only leaves the date, time and place to be decided by the respondent bank at its discretion. As is clearly seen, the notice that has been given is for a period of approximately 18 days, and is therefore, reasonable notice. The clause dealing with Section 176 of the Indian Contract Act, 1872 in both the notices is unequivocal with regard to the factum of sale to take place after the prescribed time of March 16, 2022. In the event the petitioner seeks to redeem the goods under Section 177, he has the option to do so by March 16, 2022. As is clear from the present notices, the recall of the

loan had taken place by the earlier notices and the present notice is specifically a notice under Section 176 of the Indian Contract Act, 1872. The present notices, in my view, is without any ambiguity, is precise in its words, provides the time as contemplated under Sections 176 and 177 for the purpose of redemption, and accordingly, does not require any interference whatsoever. The undisputed fact in the present case is that the petitioners have failed to pay back the amounts due to the respondent bank and is now thwarting each and every step being taken by the bank to obtain its legitimate outstanding dues. In my view, the attempts being made by the petitioner by nitpicking on the notices being issued by the respondent bank is only a ploy to avoid the harsh reality that loans are required to be paid back. The resultant consequences of failure to pay will have to necessarily follow and this court should not be used, rather abused, to prevent the loan giver from exercising his rightful legal claims against the borrower. The balance of convenience and inconvenience is also in favour of the respondent bank, and accordingly, I do not find this to be a fit case to interfere in any manner whatsoever.

8. Accordingly, the order of temporary injunction sought for at the ad interim stage is refused.

9. Since this has been a hot contested matter, it would be fair on my part to stay the operation of this order for a period of seven days to grant time to

the petitioner to file an appeal. Accordingly, the operation of this order is stayed for a period of seven days.

10. Let affidavit-in-opposition be filed by the respondents within two weeks from date, reply, if any, be filed two weeks thereafter. Liberty is granted to mention for inclusion in the list after completion of affidavits.

11. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SHEKHAR B. SARAF, J.)

sp/b.pal