

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Best.*

1895.  
October 15,  
25.

KUNHAN MAYAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THE BANK OF MADRAS (DEFENDANT), RESPONDENT.\*

*Indian Contract Act—Act IX of 1872, s. 171—Banker's lien.*

The plaintiff deposited certain jewels with the defendant bank to secure certain debts. Afterwards, he paid the secured debts and demanded the return of the jewels being then otherwise indebted to the bank :

*Held*, that the plaintiff was not entitled to recover the jewels without discharging the other debts unless he proved that the defendant had agreed to give up its general lien.

APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of North Malabar, in original suit No. 58 of 1893.

Suit for the return of certain jewels pledged by the first plaintiff on different dates with the defendant as security for loans made to him or their value. The first plaintiff alleged that at the date of the said pledges and loans the defendant was informed that the jewels pledged did not belong to the first plaintiff, but belonged to plaintiffs Nos. 2 and 3, and further that it was agreed that whenever first plaintiff tendered the principal and interest due on the respective loans the jewels pledged therewith were to be returned to him. The plaintiffs alleged that the first plaintiff, on 30th June 1893, tendered the amount due on the loans and demanded the return of the jewels pledged, but that defendant refused to return the jewels alleging that the jewels will not be delivered until the first plaintiff discharges his other liabilities to the bank. The defendant by its agent admitted the loans and pledges of the jewels in question, but denied that at the time the pledges were made, the defendant was informed that the jewels did not belong to the first plaintiff, and the defendant denied that it was agreed that whenever plaintiffs tendered the principal and interest due on the said loans the jewels were to be returned. The defendant further denied the tender and the defendant further set up that in addition to the amounts for which the jewels were pledged to the defendant the first plaintiff was indebted to the said defendant in a large sum of money and that the

\* Appeal No. 206 of 1894.

defendant has the right to retain any property belonging to the first plaintiff and in defendant's possession, in exercise of his general right of lien on such property for the amount due. The Subordinate Judge by his decree directed that, on payment of the loans by the plaintiffs with interest thereon within one month together with defendant's costs, the defendant should return the jewels pledged.

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The plaintiffs appealed and the defendant filed a memorandum of objections on the ground that the Lower Court erred in law in finding that the defendant was not entitled to a general lien on the jewels, the subject of the suit for all money due to it, and that it should have found that the defendant was entitled to hold the said jewels until all moneys due to it from the plaintiffs on any account whatever were paid.

Mr. *C. Krishnan* for appellants.

Mr. *J. H. M. Ryan* for respondent.

SHEPARD, J.—The real question to be decided in this appeal is whether, under the circumstances, the defendant had a general lien on the jewels and was at liberty to retain them until the other debt owing by the plaintiff Kunhan Mayan was paid off. I see no reason to differ from the Subordinate Judge in his opinion on the evidence given with reference to the second issue, but the alleged fact of notice having been given to the agent that the jewels belonged to other persons, is not, in my opinion, material, for it is not said that Kunhan Mayan was acting otherwise than with their consent in pledging the jewels. Indeed the evidence in the case of one pledge is to the effect that the real owner was actually present and took part in the transaction; in another case, the husband of the alleged owner is said to have been present. Under these circumstances and seeing that the bank agent was, as the discharged cash-keeper admits, careful to deal with the plaintiff Kunhan Mayan only, I do not think the right of the bank in respect of the pledge would be in any way prejudiced by the agent's knowledge, if it had existed. The question as to the bank's general lien is important, because, by his letter of the 22nd August 1893, the agent declined to give up the jewels until the other liabilities of the plaintiff were discharged. In this letter, referring to the plaintiff's letter of the previous day, the agent in effect told the plaintiff that he would not take the money offered

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on the terms indicated in the plaintiff's letter. If, therefore, the plaintiff was right in insisting on those terms, he was entitled to say that there was, on the part of the bank, a waiver of his actual tender of the money. The rule of law with regard to general liens is clearly laid down in the 171st section of the Contract Act. Bankers have such a lien on things bailed with them unless there is a contract to the contrary. It was for the plaintiff in this case to prove the existence of such a contract. It was argued that the plaintiff had discharged that burden of proof by showing that a fresh deposit of jewels was made as each loan was advanced. Each loan, with the pledge of jewels accompanying it, must, it was said, be taken as a separate transaction so that the bank could not retain the jewels pledged to secure one of the loans as security for any other of the three loans. The evidence before us as to the relations between the plaintiff and the bank is meagre. All we know is that besides these three loans there were other loans by the bank to the plaintiff, a list of which with interest was made up to the 31st May 1893. On the 28th June, a deed of hypothecation was given as security. The bank books were not produced, but perhaps it may be inferred that the loans on jewels and the other loans were not entered in one account. This circumstance, however, is not inconsistent with the bank's claim to a general lien. The evidence of the cash-keeper, which is extremely brief, shows that he at least thought there was nothing special about the plaintiff's loans and that therefore the jewels might be retained until all debts were paid off. It being incumbent on the plaintiff to show that the bank had agreed to give up the general lien to which by law a bank is *prima facie* entitled, I must say that in my opinion the plaintiff has failed in his proof. There was, it may be observed, no proper issue on the question, and no attempt made to prove a special contract except by the evidence of the witnesses which was discredited by the Judge. Holding that the bank was entitled to retain the jewels until the other debts owed by the plaintiff were paid off, I think the suit ought to have been dismissed. I would accordingly reverse the decree and dismiss the suit with all costs.

BEST, J.—Plaintiff appeal against so much of the decree as directs payment of (1) interest subsequent to 21st August 1893, (date of the letter D) and (2) defendant's costs of the suit, while defendant has taken objection under section 561 of the Code of

Civil Procedure to the disallowance of his claim to a general lien on the jewels pledged.

Plaintiffs' case is that the amount due on the pledge of the plaint jewels was first tendered on 30th June 1893 and again the tender was repeated in writing on 21st August following, by letter D, to which was received the reply E from the defendant bank's agent, saying that the jewels could not be given up "until full value for same has been received, unless you first discharge your other liabilities to the bank."

The question, therefore, is, had the defendant a lien on the jewels for debts of the first plaintiff other than those for which they were pledged?

The law on the point is contained in section 171 of the Contract Act, which says that bankers may "in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them." The burden of proving "a contract to the contrary" is, in the present case, clearly on the plaintiffs, who allege that at the times of deposit of the jewels the then agent was informed that the jewels belonged to second and third plaintiffs and should be returned to them on their paying the moneys due on the particular pledge. The Subordinate Judge's finding as to this special agreement, which is against the plaintiffs, is in accordance with the evidence. Mr. Black, the then agent, denies that there was any such agreement, or that he was informed that the jewels belonged to the second and third plaintiffs. The only witnesses who give evidence to the contrary are the first plaintiff and his first witness Achuden, a dismissed cash-keeper of the bank, who, however, admits that it was "against the rules of the bank" to advance money on the pledge of jewels known not to belong the pledger.

Agreeing with the Subordinate Judge in his findings as to the facts, I would dismiss the appeal. But on these same findings the conditional decree in favour of plaintiffs cannot be supported. The suit should have been dismissed in its entirety.

The respondent's objection must, therefore, be allowed and the suit dismissed with costs throughout.

Messrs. *Barelay, Morgan & Orr*, attorneys for the respondents.

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