APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903.
August 13.
September 8.

NAGANADA DAVAY AND OTHERS (THIRD DEFENDANT'S REPRESENTATIVES), APPELLANTS,

v.

BAPPU CHETTIAR (PLAINTIFF), RESPONDENT.*

*Contract Act—Act IX of 1872, s. 178—Jewel lent on hire—Pledge by hirer to third party—*Bonâ fide *advance of money by third party—Suit by owner for recovery—Liability of third party.*

The owner of a jewel lent it on hire to first defendant, who pledged it with third defendant—the latter acting in good faith. In a suit by the owner against the hirer and the pledgee to recover the jewel:

Held, that the pledgee was liable to pay the owner the value of the jewel.

Per SUBRAHMANIA AYYAR, J.—Sections 178 and 179 of the Indian Contract contemplate mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. Section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods independently of any interest of his therein, though, as one invested with the symbol of property, he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances. Though the pawnor had possession, it was traceable to, and was an incident of, his right as the hirer of the jewel. It was not such possession as is contemplated by section 178.

SUIT to recover a jewel or its value. Plaintiff alleged in his plaint that first defendant had, in 1895, obtained a neck ornament called kasumalai from plaintiff on hire for four days, stipulating to pay 8 annas per diem; that as first defendant failed to return the jewel, plaintiff had prosecuted him, though unsuccessfully; that first defendant had dishonestly and illegally pledged the jewel with third defendant. Plaintiff now sued to recover the jewel or its value, Rs. 600, from first and third defendants, joining the son of first defendant as second defendant. Defendants Nos. 1 and 2 remained *ex parte*. Third defendant defended the suit, and contended that he believed first defendant to be the owner of the jewel and had *bonâ fide* lent him Rs. 350 on the pledge of the jewel. He said that, with first defendant's consent, he had sold the jewel,

* Second Appeal No. 1531 of 1901, presented against the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 580 of 1900, presented against the decree of S. Runganadha Mudaliyar, District Munsif of Tanjore, in Original Suit No. 523 of 1898.

and from the proceeds of sale had repaid himself the sum advanced with interest, and that the jewel was only worth Rs. 425. He contended that at any rate plaintiff was not entitled to claim the jewel from him without redeeming it by paying him the amount he had advanced. The District Munsif found that plaintiff was the owner of the jewel, that the pledge to third defendant was not shown to have been otherwise than *bonâ fide*, and that the jewel was worth Rs. 536. He gave a decree against all the defendants for that sum and interest. Third defendant appealed to the Subordinate Judge, who held that third defendant, though he had acted in good faith, was not protected from liability to a claim by the real owner under section 178 of the Contract Act; inasmuch as the first defendant's possession was merely that of a hirer. He upheld the Munsif's finding that plaintiff was the owner of the jewel, and decreed in his favour, reducing the amount to Rs. 460 with interest.

Third defendant preferred this second appeal.

P. S. Sivaswami Ayyar for appellants.

Mr. *C. Krishnan* for respondent.

BODDAM, J.—I think that the protection given to pledgees by section 178 of the Contract Act is similar to that given to buyers under exception 1 to section 108 of the same Act, and that the possession intended is the same in both sections. In interpreting the section the English cases are of no assistance. The meaning of the section must be determined by a consideration of the statute and of the words of the section itself. The word "possession" in the section is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledger, because the "possession" in the first part of the section is distinguished from the "custody" of them in the last paragraph of the same section. It has therefore been held that goods in the custody of a servant, though they are in his physical possession, cannot be pledged under the section (*Biddomoye Dabee Dabee* v. *Sittaram*(1) and *Shankar Murlidhar* v. *Mohanlal Jaduram*(2) and the same has been held to apply to jewels in the custody of a wife (*Seager* v. *Hukma Kessa*(3)). Moreover the possession intended is not the possession of a person who has a limited interest, because that case is specially provided or in section 179. The word "possession" is also used in section

(1) I.L.R., 4 Calc., 497. (2) I.L.R., 11 Bom., 704.
(3) I.L.R., 24 Bom., 458.

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108, exception 1, and though the words in that section are not identical with the words in section 178, they are very similar and I think that the possession intended is the same. Section 108 contains the words "notwithstanding any instructions of the owner to the contrary" which are not in section 178, and it has been held continuously ever since 1873, when *Greenwood* v. *Holquette*(1) was decided that the existence of these words in the section indicate that the possession meant in that section is a possession which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it. The section was therefore held not to apply to a person in possession of a piano under a hire-purchase agreement, but the possession intended must be similar to that of a factor or agent. The possession must be such a possession as an owner has, not a qualified possession such as the hirer of goods has or where the possession is for a specific purpose.

As the word "possession" in both sections is intended to be restricted and as the wording of both the sections is so similar, I think the word as used in section 178 of the Contract Act is intended to have the same meaning as in section 108, though the words "notwithstanding any instructions of the owner to the contrary" are not repeated in the former section. In these circumstances the pledgee of a jewel hired is not in my opinion protected.

I think, therefore, that the decree of the Subordinate Judge is right and would dismiss this appeal with costs.

SUBRAHMANIA AYYAR, J.—I agree. Sections 179 and 178 of the Indian Contract Act, which are the only sections bearing on the question under consideration, respectively, contemplate mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. On the other hand, section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods unconnected with, and independent of, any interest of his therein, though as one invested with the symbol or indicia of property he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances.

(1) 12 B.L.R., 42.

In the present case the pawnor had, no doubt, possession, but as that possession was traceable to, and was an incident of, his right as the hirer of the jewel for four days, it was not such possession as is contemplated by section 178. In the course of the argument Mr. Sivaswami Ayyar referred to the case of a pledge by a factor in possession, who has made an advance thereon so as to make his agency one coupled with an interest, in favour of a pawnee acting in good faith and without any reason to believe that the pawnor was making the pledge improperly as an instance inconsistent with this view.

This argument however reverses the true relation of things and assumes that the possession of the factor in the case supposed is the consequence of his interest, while the fact is the possession is directly attributable to his character as agent, in other words, it is attributable to the agency irrespective of whether it is one coupled with an interest or not.

As to section 179 the language thereof assumes and necessarily implies that the limited interest contemplated therein is such as to make a pledge valid to some extent and not altogether invalid. That, however, is not the case here, for, though the pawnor had a right to retain and use the jewel for the very limited period of four days, yet such right, even if it were not merely personal, had terminated at the date of the pledge, which was consequently a wholly tortious act, a conversion for which the owner may maintain an action against the hirer as well as the person taking delivery from him (see Beal on 'Bailments,' pages 226 and 231). Section 179 also could not therefore apply.

As neither of the provisions of the Contract Act that could be relied on in support of the pledge in question applies, the second appeal fails and must be dismissed with costs.