APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Tek Chand.

ALLIANCE BANK OF SIMLA IN LIQUIDATION (PLAINTIFF) Appellant

versus

GHAMANDI LAL-JAINI LAL (DEFENDANTS) Respondents.

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Feb. 14.

Civil Appeal No. 357 of 1925.

Indian Contract Act, IX of 1872, sections 171, 172, 176 —Money advanced by Bank—on deposit of goods—effect of—Section 176—Sale by Bank—implied right of—formalities and conditions precedent to—Wrongful conversion—Damages—measure of—Section 171—Lien of bailee—distinction—pointed out.

The defendant, having entered into contracts with third parties to buy goods, arranged with the plaintiff Bank that the sellers should draw on the defendant and send the drafts accompanied by invoices or shipping documents to the Bank and that the latter should pay the drafts and receive and store the goods until the defendant took delivery against payment, not on any fixed date, but in accordance with the requirements of his business.

Held, that in such cases the goods so stored must be taken to have been bailed with the plaintiff Bank as collateral security for repayment of the money advanced by it for the purchase of such goods, and, therefore, the possession of the Bank was that of a pledgee as defined in section 172 of the Contract Act and consequently it had the power, on failure of the defendant to make payment on demand, to sell the goods in accordance with the provisions of section 176 of the Act.

Held also that the rights of such a creditor, who accommodates his customers by storing goods for the purchase of which he had advanced money, are higher than those of an ordinary bailee who has a *general* lien under section 171 of the Act, in so far that in the former case there is an implication that the security shall, if necessary, be made effectual

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to discharge the obligation, whereas in the latter, the lienholder has merely the right to *retain* the goods until payment and does not possess the right of sale to secure the debt or indemnity.

Held further, that as in the present case no period had been fixed for repayment by the defendant, it was necessary for the plaintiff Bank, before being entitled to enforce its right of sale under section 176, to prove (*a*) a demand for the amount due; (*b*) default by the defendant; (*c*) a notice of sale giving reasonable time to the defendant to pay; and (*d*) an actual sale.

And, in the absence of proof of a demand and default or of the defendant's knowledge of the plaintiff's intention to sell the goods, he was not bound by a sale improperly conducted without notice to him and without proper advertisement in the market.

Held also that as the case was clearly one of wrongful conversion, the measure of damages was the market value of the goods at the date of such conversion.

Henderson v. *Williams* (1), and *Ebrahim Ahmad* v. *Samuel Balthazar* (2), followed.

First appeal from the preliminary decree of Sayad *Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated the 23rd December 1924, declaring that the plaintiffs are not entitled to include in the accounts sued upon any items on account of the defendants' goods they have illegally sold to third parties, etc.*

O'CONNOR, for appellants.

SARDHA RAM and MEHR CHAND MAHAJAN, for Respondents.

JUDGMENT.

TEK CHAND J.

TEK CHAND J.—On the 30th January 1923, the Alliance Bank of Simla, Limited, instituted a suit against the firm of Messrs. Ghamandi Lal-Narain

(1) (1895) 1 Q. B. 521. (2) (1916) 34 I. C. 297.

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Das, piece-goods merchants, Delhi, for recovery of Rs. 7,160, alleged to be due on foot of an account, which began under an oral agreement between the parties, according to which the Bank was to advance moneys on the security of piece-goods purchased by the defendants, the goods were to be kept in the Bank's godowns and in case of failure of the defendants to repay on demand the amount due, the Bank was authorised to sell the goods and apply the sale-proceeds towards reduction of the account. It was alleged that the defendants had, after demand, failed to pay the amount due and the plaintiff Bank had been compelled to sell a part of the goods hypothecated, and after giving credit for the price realized, Rs. 7,160 was still due, for which sum a decree was claimed.

The defendants denied the alleged oral agreement and pleaded that they had an ordinary cash credit account with the Bank in which money was found due sometimes to the defendants and sometimes to the Bank, that this account had nothing to do with the goods, which had been stored in the Bank's godowns on payment of rent and not as security for the advances, that the Bank had no authority to sell the goods, that, in fact, no demand was ever made, nor did any sales actually take place, and in any case, the alleged sales were not properly advertised or conducted and were not binding on the defendants.

Before the issues were framed the plaintiff's pleader put forward an alternative claim, to the effect that irrespective of the agreement alleged in the plaint, the plaintiff Bank had the power to sell the goods " under the bankers' lien both under law and usage ". On the 27th April 1923 the Bank went into

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liquidation and the suit was continued by the liquidators.

The Subordinate Judge held that the Bank had a general bankers' lien on the goods bailed with it, as described in section 171 of the Contract Act, which entitled it merely to *retain* the goods as security for their general balance of account, that its position was not that of a pledgee and consequently section 176 being inapplicable the goods could not be legally sold. On the factum and validity of the sale, the learned Judge found that even if section 176 applied there was no proof of any demand having been made by the plaintiff or default in payment committed by the defendants, and the sales not having been properly advertised were not binding on the defendants. On these findings, he thought that "the only way to do justice to the parties was to square the amount originally paid by the plaintiff on behalf of the defendants in relation to the goods sold, against that realised on account of the sale" thereof and to wipe off the two items from the account. He accordingly passed a preliminary decree declaring that the plaintiff was not entitled to include in the account sued upon any item on account of the defendants' goods which it had illegally sold to third parties and directing that accounts be taken as to the amount due to the plaintiff from the defendants in accordance with the above decision.

The plaintiff Bank has appealed and the first point urged on its behalf by Mr. O'Connor is that the suit should be treated as one on a mere overdraft and a decree passed in favour of the plaintiff for the amount due to it irrespective of the sale of the goods in dispute, the defendants being left to seek relief in

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a separate suit for damages, if the goods be held to have been wrongfully sold by the Bank. After fully considering the arguments of the learned Counsel, I am unable to accept this contention and hold that he cannot be allowed to set up an entirely new case at this stage. In the plaint the plaintiff definitely alleged that the goods had been pledged with it as security for the advances made; that the Bank, exercising its rights as a pledgee, had sold them and given credit to the defendants for the proceeds thereof. In the statement of the plaintiff's pleader the only alternative claim put forward was on the basis of the "banker's lien" under which the goods could legally be sold. In the course of the trial in the Court below, there was no suggestion whatever that the plaintiff had sued on an ordinary overdraft account, nor did the grounds of appeal to this Court make mention of any such claim. The appellant must, therefore, be limited to the allegations in the plaint as amplified by its Counsel before issues in the Court below.

As to the course of business between the parties I am of opinion that the learned Subordinate Judge has in the opening paragraph of his judgment correctly summarised the position and this is fully borne out by Ex. P. 1 which is a detailed copy of the defendants' account with the Bank, and by other documents on the file (Ex. P. 2 to Ex. P. 5, Ex. P. 9 and Ex. P. 10). These documents disclose that the defendants having entered into contracts for purchase of goods with third parties, arranged with them that they should draw on the defendants and send the drafts accompanied by the shipping documents or invoices to the Bank. The latter paid off the drafts and received the goods and stored them in its godowns. The defendants subsequently took delivery from the

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Bank against payments in accordance with the requirements of their business. Mr. Sardha Ram for the respondents made a faint-hearted attempt to contest this position and to argue that the Bank was merely a godown keeper or warehouseman for the defendants and that the goods were not kept with it as security for the advances. He was, however, unable to support his contention by any materials on the record.

He further urged that the plaintiff in the plaint had alleged a specific oral contract, which had not been proved and that the suit should be dismissed on this ground alone. It is no doubt true that there are no materials on the record to prove the alleged oral contract, but as already indicated the plaintiff's counsel before issues had claimed the right of sale under the law by making the security available for repayment of its debt, and I shall examine the case now in this light.

It seems to me that while the learned Subordinate Judge has correctly described the course of business between the parties, he has failed to appreciate the legal consequences following therefrom. It is obvious that section 171 of the Contract Act has no applicability at all to the plaintiff's claim as disclosed by the course of dealings between the parties. That section refers to the lien of a banker, factor, or a wharfinger to retain as security for a *general balance of account* any goods bailed to him. In other words, if a certain sum is due to a Bank in one account, it may, under certain circumstances, make available other moneys or moveables that come into its hands in another account and thus reimburse itself in the former account. In the present case it is clear that the goods in question had been bailed with the Bank as collate-

ral security for repayment of the moneys that had been advanced by it for purchasing these very goods. The case is, therefore, clearly one of a pledge as defined in section 172 of the Indian Contract Act and consequently under section 176 the Bank had the power, if default was made in payment on demand, to sell the goods, on giving defendants reasonable notice of the sale. The distinction between the general lien of a bailee (whether he be a banker or not) and the right of a creditor who advances moneys to accommodate his customers to buy goods and deposit them with him on what is called the "Godown System" is important and must be carefully kept in view. The former merely confers on the lien-holder the right to *retain* the goods until payment and does not carry with it the right of sale to secure the debt or indemnity, but the latter conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In one case a mere right of detention or retainer is given and in the other a special property in the chattel bailed is created in favour of the pledgee.

It now remains to see whether the Bank in this case, possessing as it did, the right of sale exercised it in accordance with law. It is clear that no period was fixed for the repayment of the loan or the redemption of the pledge. The plaint itself states that the amount was payable on demand. In order, therefore, to enforce the right of sale under section 176, it was necessary for the Bank to prove

(*a*) a demand for the amount due;

(*b*) a default by the defendants;

(*c*) a notice of sale giving reasonable time to the defendants to pay; and

(*d*) an actual sale.

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The plaintiff has not produced any documentary evidence to prove demand for repayment of the loan, but it is alleged that oral demands were made. The only witness to prove these is P. W. 2., Jagan Nath, Accountant of the Bank. His evidence on the point is, however, extremely vague and cannot in the absence of further corroboration be accepted. The plaintiff must, therefore, be held to have failed to establish the first necessary ingredient.

Assuming, however, that a demand was made and default committed, it was still incumbent on the plaintiff to give the defendants reasonable notice of its intention to sell. There is no documentary evidence on this point either, and here again we have only the vague statement of P. W. 2, Jagan Nath, who merely states that one or more notices were served on the defendants before the goods were sold. He gives no particulars as to the time or nature of these notices nor is it indicated whether in the alleged notices reasonable time was given before the sale.

Lastly, as to the sale itself, the plaintiff seeks to establish that it was conducted privately through the firm of Harmukh Rai-Munna Lal, cloth merchants, Delhi, and that the following articles were sold :—

(1) One bale of *Kashmira* No. 370 sold on the 21st November 1922 to the defendants on payment of Rs. 1,490 into the Bank.

(2) One bale of *Kashmira* No. 371 sold on the 8th January 1923 to Gopal Chand-Sham Lal at Re. 1-14-0 *per yard* for Rs. 597-3-0.

(3) 12 bales of waterproof sold on 16th January 1923 to Suraj Bhan-Shibban Lal at Re. 1-4-0 per yard for Rs. 4,341-4-0.

(4) 2 bales of mulls No. 1932 and 1934 on 16th January 1923 at Rs. 13-10-0 per piece to Chaman Lal-Posti Mal for Rs. 2,711-6-0.

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In the first place it is to be noted that P. W. Panna Lal of the firm Harmukh Rai-Munna Lal has not produced any account books showing these alleged sales. Indeed he definitely stated that his books did not contain any entry relating to these sales. It was alleged that the sales had been made through brokers, but Panna Lal could not give the names of the brokers nor give the amount of brokerage paid to them. He failed to produce any correspondence with the Bank relating to these sales. As noted above, sales (3) and (4) are alleged to have been made to Messrs. Suraj Bhan-Shibban Lal and Chaman Lal-Posti Mal, respectively, but D. W 5, Mithan Lal and D. W. 7, Chaman Lal, who are the representatives of these firms definitely stated that they never bought these goods. These sales must, therefore, be held to be unproved. D. W. 6, Kirpa Ram, the representative of the firm Gopal Chand-Sham Lal, to whom the sale is alleged to have been made, deposed to having bought bale No. 371 of *Kashmira* cloth, but the rate at which he bought as given in his books is much higher than that for which Panna Lal represents the sale to have taken place. As to the transaction relating to bale No. 370, it is no doubt entered in the Bank's books that the defendant took delivery of this bale on payment of Rs. 1,490 and that a sum of Rs. 30 is shown there as representing the commission paid to Harmukh Rai-Munna Lal. But in the absence of any documentary evidence on the point and having regard to the unsatisfactory nature of the evidence of Panna Lal it cannot be held with any degree of certainty that

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the defendants had knowledge of the intention of the plaintiff to sell the goods. It is also to be borne in mind that the sales, if they were effected at all, were conducted in a hole and corner manner and were not made in the open market after proper advertisement. The Bank, therefore, cannot be held to have exercised its right of sale properly and I hold that the defendants are not bound by the alleged sales, even if they did actually take place.

It remains now to see whether the learned Subordinate Judge was justified in directing that the amount which was paid by the plaintiff originally on behalf of the defendants in relation to the goods sold, as also the amount realised on the alleged sales, should be wiped off altogether from the account as has been done by the learned Subordinate Judge. After fully considering the matter, I see no justification either in law or in equity for the course adopted. On the finding that the alleged sales are illegal and not binding on the defendants, they are legally entitled to be reimbursed for the value of the goods, wrongfully sold. The case is clearly one of wrongful conversion and it is well settled that in cases of this kind, the measure of damages is ordinarily the value of the goods on the date of such conversion. See *Henderson* v. *Williams* (1), and *Ebrahim Ahmad* v. *Samuel Balthazar* (2). There was, therefore, no justification for omitting from the account both the credit and debit entries relating to the goods in question, but the proper order to pass was to let the debit entry stand and to allow the defendants credit for the price of these goods, as determined by the market rate prevailing on the dates of the alleged sales.

(1) (1895) 1 Q. B. 521. (2) (1916) 34 I. C. 297.

For the foregoing reasons the appeal is accepted to this extent that in lieu of the lower Court's decree a preliminary decree be passed declaring (*a*) that the Bank is not entitled to deduct Rs. 30 as commission fee in respect of the transaction relating to bale No. 370 of *Kashmira;* (*b*) that the defendants are not bound by the alleged sales of bale No. 371 of *Kashmira* dated the 8th January 1923, 12 bales of waterproof dated the 16th January 1923, and 2 bales of Mulls Nos. 1932 and 1934, dated the 16th January 1923; and (*c*) that the defendants are entitled to a credit for the price of these goods calculated according to the market rate prevailing on the dates of the alleged sales. The accounts will be gone into on the above basis and the lower Court will proceed to pass a final decree in accordance therewith. The order of the lower Court as to costs will stand but parties will bear their own costs in this Court.

CAMPBELL J.—I agree.

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N. F. E.

Appeal accepted in part.

Case remanded.