Case No. 9

AIR 1995 KARNATAKA 185

N. D. V. BHAT.J.

Hindustan Machine Tools Ltd., Appellant

Vs

The Nedungadi Bank Ltd., and another, Respondents

Hypothecation - possession not transferred and no creation of title - yet hypothecation provides a security by creation of charge - Hypothecatee entitled to exercise right of private sale

Cases Referred : Chronological	Paras
AIR 1978 J & K 76	20A
(1974) 2 SCC 799	15,16
(1974) 1 Kant LJ Short Note 180 Page 49	16,17
AIR 1969 Mys 280	20,21
AIR 1966 Cal 405	20A
AIR 1964 Andh Pra 201	20A
AIR 1939 Lah 398	20A
AIR 1938 Lah 509: 177 IC 332	15,16
AIR 1932 Cal 524 : 32 Cri LJ 853	20A
AIR 1924 Cal 990 : 80 IC 20	20A
AIR 1916 Bom 77	20A

S. G. Bhagwan for Appellant ; S.K. V. Chalapathy (for NO. 1) for Respondents.

JUDGMENT: - This appeal is preferred against the judgment and decree dated 27-2-1982 passed by the XII Additional City Civil Judge, Bangalore. By the said judgment, the lower Court decreed the suit of the plaintiff, declaring that the plaintiff – Bank has the first charge in the machinery described in schedule to the plaint. The lower Court further ordered that defendant-2 is entitled to realise the amount due to it by defendant –1 in pursuance of the decree in O.S. No.6/1972 by sale of the said machinery, but subject to the first charge of the plaintiff. Being aggrieved by the same, defendant –2 – Hindustan Machine Tools Limited has preferred this appeal.

2. The facts relevant for the disposal of this appeal briefly stated are as under:

Defendant 2 (appellant) had filed original suit No. 6/1972 against Fix Well Industries of which M.V. Vasudevan (defendant – 1 in the present suit) was the proprietor. The said suit was filed by the defendant –2 – Hindustan Machine Tools for the recovery of Rs. 85,621-50. The said suit was decreed by the judgment dated 16-11-1972 of the Court of the Civil Judge, Civil Station, Bangalore. By the said judgment, the Civil Judge decreed the suit of the plaintiff. It was further ordered that the defendant will pay the decretal amount in six equal half yearly instalments and if he fails to pay the instalment, the plaintiff would be entitled to recover the entire amount in one lump sum. There, was also a direction by the Court that the defendant shall not create charge or transfer the machinery. In furtherance of the said Judgment, which is produced at Ex. P1, the decree was drawn up, a copy of which is marked at Ex D2.

3. The said decree was sought to be executed by Hindustan Machine Tools in execution case No. 40/1973. In the said execution, the property that is to say, the machineries described in the suit schedule, were attached. Consequent upon such attachment, respondent-1 Bank (Nedungadi Bank – hereinafter referred to as the Bank) filed Miscellaneous Case No. 99/1974) under Order 21, Rule 58, CPC praying for raising the attachment on the ground that the property was hypothecated in its favour. However, the said application was dismissed on 7-11-1975. It is under these circumstances, the plaintiff-Bank has filed the present suit praying for the reliefs referred to hereinabove. In substance, the allegation made in the plaint is that the machineries were hypothecated to the Bank by defendant–1 – Vasudevan on 12-5-1973, when he took a loan of Rs. 1,75,000/- from the Bank. The Bank therefore, asserted that it had the first charge in respect of the machinery, which was hypothecated to it. It has also made the other allegations collateral to the same, which are summarised by the Court below in Para No. 11 of its judgment.

4. Defendant 1 – Vasudevan remained exparte. It was defendant-2 (appellant) who contested the suit. Defendant –2 denied that plaintiff – Bank had any preferential right or charge over the machinery described in the plaint schedule. It took up a contention that defendant-2 is not aware of the plaintiff granting credit facilities to defendant –1 and obtained deed of hypothecation dated 2-5-1973 from defen-

dant –1. It was further contended by defendent-2 that the deed of hypothecation is not registered and that therefore no property could be claimed by it. It was asserted that the legal possession of the suit machinery was with the plaintiff. Defendant 2 also took up a contention that in view of the undertaking given by defendant –1, in the earlier suit, which was incorporated in the decree. It was not permissible for the bank to advance the amount on the hypthecation of the machineries to defendant-1 – Vasudevan – Defendant-2 – Hindustan Machine Tools have given the calendar of events in the course of its written statement and asserted that plaintiff cannot be said to have had first charge at all in respect of the machineries in question. It prayed for the dismissal of the suit.

5. On the basis of these pleadings, the following issues and additional issue were framed:

(1) Whether plaintiff Bank had the 1st charge on the plaint schedule machineries under hypothecation deed dated 12-5-1973?
(2) Whether 2nd defendant is an unpaid vendor in respect of suit machineries and whether he has a lien on the suit machineries?
(3) Whether plaintiff is entitled to declaration prayed for?
(4) To what decree?

Additional Issue

Whether this court has no pecuniary jurisdiction to entertain this suit?

6. Before the court below, PW 1 – T.K. Gopalkrishnan the Manager of the Bank was examined. Ex. P1 to P3 were marked for the plaintiff. None is examined for the defendants. However, Ex. D 1 to D3 were marked for the defendants presumably by consent.

7. On the basis of the evidence on record and for the reasons recorded in the judgment, the learned Judge answered Issue No. 1 in the affirmative, No. 2 in the negative, No. 3 by holding that plaintiff is entitled to decree sought for. The Additional issue was heard by way of a preliminary issue and was answered in favour of the plaintiff,

8. Having regard to the findings given on the issues raised, the lower court decreed the suit of the plaintiff in terms referred to earlier. Hence, the instant appeal by defendant-2- HMT

9. I have heard the arguments of Sri S.G.Bhagwan, learned Counsel for the

appellant and Sri S.K.V. Chalapathi, learned Counsel for the respondent.

10. In the light of the submissions made at the Bar the following points arise for consideratoion.

(1) Whether the decree passed in O.S. No.6/ 1972 has created a charge relating to suit schedule machineries in favour of plaintiff-respondent-1?
(2) Whether the hypothecation in favour of the Bank by defendant-1 Vasudevan (respondent-2) would amount to the creation of a charge in respect of the suit machineries?
(3) What order?

POINTS NOS. 1 and 2

11. Since these two points are inextricably mixed up with each other they are taken up together for discussion. Infact, it is not disputed by Sri S. G. Bhagawan, learned counsel for the appellant that the suit machineries were hypothecated in favour of the Bank by defendant –1 – M.V. Vasudevan towards the loan of Rs.1,75,000/- on 12-5-1973.I may point out here at this stage that the hypothecation deed which is at Ex. P1 marked as such before the Court below is shown to have been taken back after the suit was disposed of. However, Sri Bhagwan submitted that the fact that the suit machineries were hypothecatd in favour of the Bank on 12-05-1973 is not disputed. In fact, the lower Court also in its judgment at para III has stated among other things, as under:

"it is further undisputed fact that defendant - 1 had hypothecated suit scheduld machineries under Ex. P.1 hypothecation deed dated 12-5-1973".

12. In this view of the matter, the learned Counsel on either side submitted that they have no objection to proceed on that basis and not to insist upon the re-production of the said document lest the same may further protract the hearing of the appeal.

13. In this view of the matter, it is clear that by a deed of hypothecation the suit machineries were hypothecated in favour of the Bank on 12-05-1973. It is also not in dispute at this stage that the instant appellant – HMT had obtained a decree against defendant-1 (present repondent-2) for the recovery of Rs. 85,621.58 ps. and the suit was decreed in the sum of Rs. 85,621-58 ps. together with interest etc. It would be indeed in fitness of things to refer to the terms of the decree with

a view to appreciate the submissions made at the Bar from a proper perspective. The copy of the decree in O.S. No. 6/72 which is marked at Ex. D2 reads as under:

"Suit filed on 13-01-1972 for the recovery of Rs. 53,060/- being the balance against supply of g.131 machine on 31-03-1972 including freight charges of Rs. 60/- , Rs. 27,000/- being the balance against the supply of LBM Machine on 28-04-1971, Rs. 3,823.52 ps. interest on I.S.C. Item from 31-03-1972 and Rs. 1,738.06 interest in 2nd item from 28-04-1971 due by the defendant to the plaintiff towards the supply of above machine together with costs and current interest.

This suit coming on for final disposal before Sri G.S. Kalaskar, B.A., LL.B., Civil Judge, in the presence of Sri P.P. Bopanna, Advocate for the plaintiff and Sri G.M. Rego, Advocate for the defendant.

It is ordered and decreed that the defendant do pay to the plaintiff a sum of Rs. 85,621-58 ps. together with cost and current interest at 6% per annum on the principal amount of Rs.80,060/-. The defendant is directed to pay the decretal amount of Rs. 85,621.58 ps. in six equal half yearly instalments. If he fails to pay one instalment, the plaintiff would be entitled to recover the entire amount in lump sum. The first instalment shall be paid on or before 15th December, 1972/ Amended.

Sd/- xxx 21 / 10 / 1975
Civil Judge

The defendant shall not create any charge or transfer the interest in the Machine more stated is the I.A.I any manner.

And it is further ordered and decreed that the defendant to pay to the plaintiff the sum of Rs.7,291-75 ps. being the amount of costs incurred in this suit, as by memorandum annexed.

Given under may hand and the seal of the court this 16th day of Nov. 1972

Sd/- G.S. Kalasakar,
1-12-1972
Civil Judge,
Civil Station, Bangalore"

14. It is in the context of the aforesaid facts which do not appear to be in

dispute at any rate, at this stage that this Court is required to answer the two points raised for consideration. In the first place, this court is required to see as to whether the decree in O.S. No. 6/72 has, in substance, created a charge relating to suit machineries. Secondly, this Court is required to see as to whether the hypothecation in favour of the Bank would amount to a charge relating to suit machineries.

15. Sri Bhagawan, learned counsel for the appellant submitted that the terms of the decree if read between the lines would unmistakably go to show that the machineries in question were intended to be incorporated in the decree by way of security. That is the only irresistible inference which the court has to draw, as otherwise the said clause in the decree which is in the nature of direction by the court will not have any meaning. In this connection, the learned Counsel Sri Bhagawan invites the attention of this court to two decisions in particular. In the first place, reliance is placed on the decision in *Thirath Ram v. official Receiver, Ferozepore* (AIR 1938 Lah 509). Secondly, reliance is placed on the decision in *Dattarreya Shankar Mote v. Anand chintaman Datar* (1974 (2) SCC 799). In Thirath Ram's case, the High Court of Lahore has, among other things, taken the view that mere attachment of property, whether before or after judgment, does not create a charge on the property in favour of the attaching creditors. It is further held therein that where by a compromise deed not only the attachment of the property was continued, but it was specifically stated that until the payment of the entire decretal amount the judgment-debtor shall not transfer the attached property by mortgage, sale or otherwise to any other person and that in default of payment of the instalments fixed the decree-holder would be entitled to realize the entire decretal amount from this land, a charge upon the land is clearly created in favour of the decree-holder.

16. Sri Bhagawan is right only in part. He is right in contending that the transaction need not contain as specific recital that a charge is created. It certainly opens to decide as to whether a charge is created or not by the totality of the circumstance and terms reflected in the transaction. However, I do not agree with Sri Bhagwan in his submission that the ratio of the decision in Thirath Ram's case (AIR 1938. Lah 509 would apply to the facts of this case also. It is significant to notice here that in Thirath Ram's case, the compromise decree clearly indicated that in default of payment of the amount agreed to be paid, the same can be recovered by the sale of property, in respect of which an undertaking was given. Further the property was also attached. Such however, is not the situation here. In the instant case, the decree does stipulate that the defendant shall not create a charge etc., in respect of the machineries. However, there is no stipulation in the decree that the

amount decreed can be realised by the sale of the property is respect of which the undertaking is reflected in the decree. Under these circumstance, it is clear that the ratio of the decision in Thirath Ram's case, does not apply to the facts of this case. On the other hand, there is a direct decision of this Court in *Gangubai v. Shiviji Gangaram Tupane* (1974 (1) Kant LJSh. note Item No. 180 SNP 49). In the said case, among other things, it is pointed out that if a party to a suit violates the undertaking given to the Court that he will not dispose of the suit property in any manner till the decision of that suit, he may be liable for contempt of court, but the transfer effected by him in contravention of such an undertaking would not be invalid or null or void. A careful perusal of the said decision would clearly go to show that the undertaking not to transfer the property specified would not by itself create ac charge. Sri Bhagwan, learned Counsel, however, as pointed out earlier, has tried to gain support from the decision of the Supreme Court in Dattatreya Shankar Mote case (1974 (2) SCC 799). The learned counsel put his finger to the passage at page 810 para 14 therein. At para therein, the Apex Court has held as under:

"A charge on the other hand under Section 100 of the Act is neither a sale nor a mortgage because it creates no interest in or over a specific immoveable property but is only a security for the payment of money".

17. The thrust of the submission made by Sri Bhagawan, learned counsel for the appellant with reference to the said decision is with reference to the observation therein that a charge does not create any interest in the property. There cannot be any quarrel over the said proposition. Sri Bhagawan is right in that behalf. However, what is required to be decided in this case is not as to whether the charge creates an interest in immoveable property but what is required to be seen in this case is as to whether the decretal terms in Ex. D.2 in favour of the defendant-2 and the hyothecation of the machineries in favour of the plaintiff-Bank by defendant-1 would create a charge. As pointed out earlier, the decision of the Lahore High Court alluded to earlier does not advance the case of the appellant further. Further observations of the Supreme Court pressed into service by Sri Bhagawan is also not relevant in the context of the controversy.

At his juncture, it is necessary to have a clear idea with reference to the concept of 'charge'. The word 'charge' is described in S.100 of the Transfer of Property Act. I hasten to add here that the charge referred to in S.100 of the T.P. Act

relates to immoveable property. However, the definition of the word 'charge' given in S.100 of the T.P. Act will give an inkling as regards as to what exactly is meant by charge. Charge can be created in respect of immoveable property and charge can be created also in respect of moveable. A charge is nothing but a devise to create security which is enforceable in a court of law. In order to create a charge in respect of immoveable property, it is necessary that the same is required to be embodied in document. However, in order to create a charge relating to moveables it need not be in writing. Further in order to create a charge, it is not necessary to employ any technical or any particular form of expression. All that is required is that there should be a clear intention to make a particular property as security for the payment of money. In other words, creation of enforceable security is the essence of charge either in respect of immoveable hereinabove, this Court is required to see as to whether charge was created in favour of defendant-2 (appellant) by the decree Ex. D2 and /or whether charge was created in favour of the Bank by virtue of the hypthecation of the machineries. In so far as the first aspect is concerned, having regard to the wordings reflected in the decree it becomes difficult to say that a charge was created in favour of the plaintiff in the said suit, that is to say, defendant 2 in the present suit, viz, HMT. Though the decree stipulates that the defendant in the said suit at O.S. No. 6/72 should not create a charge (in favour of third party) relating to machineries the decree does not say that a charge is cretated in favour of the plaintiff in the said suit with reference to the machineries in question. Further, the decree also does not stipulate that the decretal amount should be realized by the sale of the said machineries also, as was the case in the facts reflected in decision of the Lahore High Court cited by Sri Bhawagan and alluded to earlier. Further as poined out by this Court in Gangubai's case (1974 (1) Kant LJ Sh. Note Item 180 p 49) the violation of the undertaking given by party to the Court will not make the transfer invalid. Under these circumstances, it becomes difficult to say that a charge was created in favour of the present defendant-2 (appellant), that is to say, the plaintiff in O.S. No. 6/72.

18. If that be so, the next question for the Consideration of the Court is as to whether the hypothecation of the machineries in favour of the Bank by defendant-1 – Vasudevan, would by itself create a charge in respect of the machineries. Shri Bhagawan, learned counsel for the appellant contended that a hypothecation cannot be placed on par with either a mortgage or a pledge. Dilating on this aspect, the learned Counsel Sri Bhagawan argued that the position of pledgee is distinct and different. It is conteded that a pledgee comes into possession of the moveables and as such the moveable property would serve as a security for the recovery of the

amount in respect of which the moveables are pledged. According to Shri Bhagawan, the same cannot be said in respect of hypothecation. As far as the hypothecation is concerned, the person in whose favour deed of hypothecation is executed or hypothecation is effected does not come into possession of the properties at the either actual or constructive. According to Shri Bhagawan he may be having some sort of right but that right cannot be equated with the right of a holder of charge or a pledge. Summing up his submissions on these lines, the learned Counsel contended that the hypothecation deed in favour of the Bank does not ipso facto create a charge.

19. I have given my anxious consideration to the submissions made by Sri Bhagawan, learned counsel for the appellant.

20. The learned Counsel is right in contending that the hypothecation and pledge do not mean the same thing. One is distinct from the other. If I can say so, Hypothecation is a species of pledge. In this connection, the decision of this Court in In the Matter of Sree Yellamma Cotton, Woollen and Silk Mills Co., Ltd., — *Bank of Maharashtra Ltd. Poona v. Official Liquidator* (AIR 1969 Mys 280), can be looked into with advantage. In the said at paras 36 and 37 this court has held as under :

"36. In the case of hypothecation or pledges of movable goods, there is no doubt about the creditor a right to take possession, to retain possession and to sell the goods directly without the intervention of Court for the purpose of recovering his dues. The position in the case of regular pledge completed by possession is undoubted and set out in the relevant sections of the Contract Act. Hypothecation is only extended idea of a pledge, the creditor permitting the debtor to retain possession either on behalf of or in trust for himself (the creditor).

37. Hence, so far as the moveable actually covered by the hypothecation deeds are concerned, there can be no doubt that the Bank is entitled to retain possession and also to exercise the right of private sale."

20A. The observation of this Court culled out hereinabove is self-explanatory and it is not necessary to elaborate on the same. Then again, in the decision Md. Sultan v. Firm of Ram Pratap Kannyalal (AIR 1964 AP 201), the High Court of Andhra Pradesh at para 7 therein has held as under:—

"Now according to Section 58 of the Transfer of Property Act various types of

mortgages are defined but all of such mortgages relate to immovable property, and it is clear that, that Section has no application to a mortgage of a moveable property. Thus as far as the Indian Law is concerned it can be said that only two types of hypothecations have been statutorily recognized. One is the pledge as defined in Section 172 of the Contract Act and the other is mortgage of immoveable property as defined in Section 58 of the Transfer of Property Act. Perhaps a charge under Section 100 of the Transfer of Property Act may be another recognized form. Nevertheless it is now fairly settled that various other forms of hypothecation are recognized although there, may not be statutory recognition for the same. In the Words of Beaman, J., In Tehilram v. D'Mello, 18 Bom LR 587 at p 600 : (AIR 1916 Bom 77 at p 80).

"In the statute law of India it would be difficult to find anything making it imperative upon Courts to acknowledge any such doctrine. In the 3rd section of the Transfer of Property Act, amongst other definitions, the definition of a chose in action mentions the hypothecation of moveables as though that were an accepted part of the law of this country, and, again, in the Stamp Act S. 2, Clause 7, the like words are to be found elsewhere I do not believe that it would be easy to discover in the sufficiently volumnous statute law of this country any warrant for the assertion that the courts of India are bound to recognise a mortgage of movables. Nor after having considered the case law, both of this country and England which has gone to establish that doctrine, very carefully and critically for many years, am I able to discover any authority, in reason or equity, adequate to establish it, If however, it is to be taken as a part of the law of India, and in the existing state of the case law, I suppose it must be, then it is very necessary to examine the essential ingredients of the mortgage of movables and so arrive at a clear understanding not only of the nature of the legal notion but of all its legal consequences in relation to others who may have dealings with or rights in the movables so mortgaged."

The learned Judge came to the conclusion:

"We may take it on authority of all the text book writers that a mortgage of moveables can be as validly effected by parole as by a writing, and that the immediate effect of such a mortgage is to pass the property in the chattels mortgaged from the mortgagor to the mortgagee. It is altogether unnecessary that actual possession of the chattel should be given."

It is evident that apart from the pledge and mortgage of immovable property, mortgage of movable property is also a recognised form of hypothecation. Similarly

another form which is called hypothecation is also recognized on the same footing in India. The following decisions speak of such hypothecation. Such hypothecation not accompanied by possession confers a good title upon the person in whose favour it is made the law recognizes the transaction as security and equally gives effect to it.

Jatindra Chandra v. Rangpur Tobacco Co. Ltd., AIR 1924 Cal 990, Co-operative Hindusthan Bank Ltd. V. Surendra Nath, AIR 1932 Cal 524, Peoples Bank v. Forbes, Forbe Campbell and Co. Ltd., AIR 1939 Lah 398."

Then again in the decision in Pramatha Nath Talukdar v. Maharaja Probirendra M. Taere (AIR 1966 Cal 405), the High Court Calcutta at para 16 therein has held as under.

"The reason why the learned counsel for the plaintiff sought to rely on the above proposition is, that the subject matter in the instant case being 'goods' and not 'documents of title of goods'. Mundra the hypothecatee cannot claim protection because there has been no delivery of the goods. The contention of the defence is that the word 'transfer' in the section not merely refers to 'documents of title' but to 'goods' as well. To get the protection of the section it is not imperative that the seller in possession must make a delivery of the goods to the subsequent disponee, in the instant case the hypothecatee. Transfer of an interest in the goods by hypothecation is also permissible and such bona fide transfer of interest would be protected by the section. The fallacy of the defence argument is that by hypothecation no interest or property is transferred to the hypothecatee. Hypothecatee has nothing more than an equitable charge to have his claim realised by the sale of goods hypothecated. By a charge no interest in the property is transferred. The only right acquired by the charge-holder is the right to be paid out of the property charged. The hypothecatee having nothing more than equitable charge acquires no property in the goods charged. Section 30(1) would come into play only when property right is transferred to the disponee. If the subsequent hypothecatee of the seller in possession acquires no property right, what protection he can get under Section 30(1) of the Sale of Goods Act? It is not to be forgotten that the hypothecatee has not only no interest in the goods hypothecated, he has not even the right to get possession of the goods. Having no right of property not even right to possession, I apprehend that a hypothecatee is not entitled to any protection under Section 30(1) of the Sale of Goods Act. In the view, I have taken, it is impossible to hold that 'other disposition' in Section 30(1) covers hypothecation as well. It is strenuously contended that 'other disposition' should be given a generous interpretation to cover 'hypothecation' as well. It is

argued that the only difference between 'pledge' and 'hypothecation' is that whereas the pledgee has possession while the hypothecatee has not. Otherwise the two are the same. But the fact of possession gives the pledgee a property in the goods and this makes the difference between pledge and hypothecation to be vital for the purpose of Section 30(1) of the Sale of Goods Act. Transfer by way of 'sale, pledge or other disposition' referred to in Section 30(1) has reference to property right in the goods. In as much as hypothecation does not give any property right in the goods hypothecated, 'other disposition cannot include hypothecation. In law there can be mortgage of movables and mortgage gives property right to the mortgagee. 'Other disposition' in Section 30(1) may cover a case of mortgage along with sale or pledge. In my view it does not include hypothecation. Mr. Banarjee is right in his submission that the words 'other disposition' must be construed *ejusdem generis* that is of the same generis as sale or pledge i.e., transfer of property or right to property for consideration. In any event 'transfer' contemplated by the section must include some property right in the movables, and hypothecatee gets no such property right in the movables. Even if the word 'transfer' is construed to be referable to goods and not the documents of title in goods, Section 30(1) is not applicable to hypothecation of goods by the seller in possession, for reasons stated above."

Reference can also be had to the decision in *State Bank of India v. M/s. Victory Export and Import Syndicate* (AIR 1978 J. & K. 76).

21. The sum total of these decisions would clearly go to show that hyothecation though not necessarily accompanied by possession of the property and though it may not create a title as such would indeed provide a security. This Court in In Re. S.Y.C.W. & S. Mills' case (AIR 1969 Mys 280) has stated that the Bank is entitled to even retain possession and sale and also to exercise the right of private sale in respect of property hypothecated. One thing is clear from the sum total of the decision viz., that hypothecation does create a charge. As pointed out earlier, the learned Counsel Sri Bhagawan has not disputed the fact that the machineries have been hypothecated in favour of the Bank. If that be so, it is obvious that the said hypothecation did create a charge in favour of the Bank relating to the machineries described in the suit and which were undisputedly the subject matter of the deed of hypothecation.

22. From what is stated hereinabove, it becomes clear that the undertaking reflected in the decree does not create a charge in favour of defendant-2 (appellant) and that the same also does not render invalid the charge created in favour of the Bank. Further, the hypothecation in favour of the Bank does create a charge. Under these circumstances, it is clear that the Bank has got a charge in respect of the

properties whereas defendant-2 did not have any preferential right over the Bank relating to the sale of machineries for the realisation of the amoun decreed in O.S. No.6/1972, Looked at from that point of view, it becomes difficult to find fault with the decree passed by the Court below.

For the reasons stated hereinabove, point No.1 is answered by holding that the decree passed in O.S. No.6/1972 has not created any charge or for that matter a priority to realize the decretal terms in favour of defendant-2 HMT. It is further held that the hypothecation in favour of the plaintiff – Bank by defendant-1 Vasudevan did create a charge in reapect of the machineries in question.

23. Hence, the appeal is liable to be dismissed. Accordingly, the appeal is dismissed. In the facts and circumstances of the case. I make no order as to costs.

Appeal dismissed.