CHAPTER II

HYPOTHECATION

Case No. 7

AIR 1995 ANDHRA PRADESH 134

Y.BHASKAR RAO AND J. ESWARA PRASAD, JJ.

State Bank of India — Appellant

Vs

S.B. Shah Ali (died) and others — Respondents

L.P.A. No. 130 of 1988, Dated 9-3-1994.

Hypothecation - creation of charge on movables in favour of the financier - possession remains with the borrower - rights of the financier depends on the terms of the hypothecation - private repossesesession without court's intervention permissible depending on the contractual terms.

Cases Referred: Chronological	Paras
AIR 1988 Andh Pra 18	31
AIR 1985 Delhi 256	30
(1978) 48 Com Cas 640:(1977) 2 Mad LJ 499	32
(1977) 2 Andh WR (HC) 129	28,48
AIR 1976 Delhi 115	29
AIR 1969 Mysore 280	27,28,31
AIR 1965 SC 1061	
AIR 1961 Madras 326	26
AIR 1960 Punjab 42	25
AIR 1940 Madras 929	25
AIR 1932 Bombay 613	33, 48
AIR 1932 Cal 524: 32 Cri LJ 853	23
AIR 1932 Nagpur 613	5
AIR 1918 Cal 165	21
AIR 1916 Bombay 77	31
(1911) 10 Ind Cas 869: 7 Nag LR 72	22
(1902) 1 Ch 579 : 71 LJ Ch 328 : 86 LT 269 (CA), Deverges v. Sandeman, Clark & Co.	33
(1887) 18 QBD 386 : 56LJQB 200 : 56 LT 177 (CA), Watkins v. Evans	38

(1886) 18 QBD 222 : 56 LJQB 139 : 56 LT 42 (CA), Ex. Parte Official Receiver v. In Re Morritt 39
(1878) 10 Ch D 408 :40 LT 237 : 27 WR 498, Ex. Parte National Guardian Assurance Co. In Re Francis 41

C. Trivikrama Rao, for Appellant;
A Bal Reddy, for Respondents.

Y.BHASKAR RAO, J.:- This letters Patent Appeal has been preferred by the appellant - bank against the judgement of a learned single judge of this court in CCCA No. 98 of 1980 dated 26-8-1987.

2. This facts of the case, briefly stated, are as follows: The appellant-Bank filed a suit, O.S. No.530 of 1973 on the file of the IV Additional Judge, City Civil Court, Hyderabad for recovery of Rs.46,987-62 ps and for interest at 11% per annum to the foot of a mortgage by deposit of title deeds, created by the defendants in favour of the appellant-Bank. The 1st defendant disputed the nature of the loan advanced to him and mainly raised the contention that the appellant-bank has highhandedly seized his lorry bearing registration No. ADT 1520 which was hypothecated to the appellant-Bank and thus caused damage and loss to him and for that purpose he made a counter-claim for damages in the suit. This 1st defendant filed a suit earlier to the suit filed by the appellant-Bank in O.S. No. 2449 of 1973 before the II Assistant Judge, City Civil Court, Hyderabad for a declaration that the seizure of the lorry is illegal and for an injunction restraining the appellant-Bank from selling the lorry. That suit was transferred and tried along with the suit filed by the appellant-Bank and numbered as O.S. No.315 of 1976. The issues in both the suits are almost common. The main controversy is whether the seizure of the lorry by the appellant-Bank is legal, and if not whether the appellant-Bank is liable to pay compensation for the illegal seizure and for the damage caused to the 1st defendant, On that controversy, the learned IV Additional Judge, City Civil Court, Hyderabad held that in the absence of the 1st defendant the vehicle was taken by the appellant-Bank clandestinely and the 1st defendant suffered loss due to this forcible seizure and that Clause 10 of the agreement is invalid and that the appellant-Bank is liable to pay compensation at the rate of Rs.100/- per day and awarded a sum of Rs.15,300/- from 27-6-1973 to 27-11-1973 and decreed the suit filed by the 1st defendant restraining the appellant-Bank from selling the vehicle and also decreed the suit filed by the appellant-bank deducting Rs.15,300/- towards the damages sustained by the 1st defendant and

passed a decree for the balance of Rs. 31,687-62ps. Assailing the correctness of the said finding of the learned IV Additional Judge, City Civil Court, Hyderabad, the appellant-Bank filed CCCA No.98 of 1980 in this Court.

3. The learned single Judge after perusing Clauses 6 and 10 of the agreement for medium term loan observed that there is no assignment of interest in the property (vehicle) and no possession was given to the Bank, but, however it was described that the vehicle was hypothecated to the Bank. With regard to the legal consequence of hypothecating the vehicle, the learned single Judge observed that the hypothecation of goods may connote an idea that the goods are pledged or mortgaged, that hypothecation is a pledge when there is bailment of goods for the security of debt, that there must be delivery of possession of the goods either actual or constructive, that the title in the goods remains with the pledger or the pawnor as described under the Indian Contract Act, that that is why under common law it is stated that the general property in goods remains with the pledger but special property alone is transferred and hence the pledgee has no right of foreclosure since he has only a special property in goods, that the hypothecation is a mortgage when there is assignment of title or what is called general property in goods is transferred, that the transfer of possession of goods is not necessary for a mortgage of moveable, that hypothecation of moveable which is neither pledge, nor mortgage, operates only as a charge creating equitable interest in the goods hypothecated, and that the description of a transaction as hypothecation is not decisive and the Court must examine whether under the hypothecation a pledge, mortgage or a charge is created in respect of such movables. Ultimately the learned single Judge dismissed the appeal filed by the appellant-bank by holding that the decree in favour of the 1st defendant towards damages caused by illegal seizure is clearly sustainable.

4. With regard to the question whether the right of seizure and sale of the vehicle can be exercised without the intervention of the Court when the hypothecation creates only a charge, the learned single Judge observed that the expression "hypothecation " is used to denote either a mortgage of movables or a pledge, and that the Court must see whether the document in question created a mortgage or pledge or merely a charge.

5. With regard to the right to seize and sell the property by the creditor when the goods are hypothecated, the learned single Judge observed as under:

"If the hypothecation constitutes pledge, or pawn, the said right is specifically given under Section 176 of the Contract Act. Further, if the hypothecation consti-

tutes a mortgage, Courts have recognised the right of such mortgage if he is in possession to sell the property without the intervention of the Court. (Vide AIR 1932 Bom 613). But when the hypothecation creates only a charge, it is only a right in respect of the property and such a covenant in the contract can only be enforced through Court. The reason being that in the absence of de jure or de facto possession or transfer of title, a person cannot take the law into his own hands and take possession of the goods forcibly when the debtor obstructs taking of possession. The Clause in the Deed providing seizure and sale only enables the creditor to enforce through a Court of law as it operates in equitable charge in favour of the creditor.

Applying this test to the case in question, clauses 6 and 10 together do not give the Bank a right to seize the goods forcibly, without the intervention of the Court."

6. The learned counsel for the appellant-Bank argued that clause 10 of the hypothecation agreement empowers the appellant-Bank to take possession and sell the vehicle if there was any default, that under the said clause, the appellant-Bank has also the right as Attorney for the owner of the vehicle to take possession of the vehicle, that the said clause clearly and specifically empowers the appellant-Bank to take possession and sell the vehicle, if there was a default both as a hypothecate and as an Attorney of the 1st respondent-borrower and owner of the vehicle and that it is in exercise of the contractual right, the appellant-Bank had taken possession of the vehicle.

7. The learned counsel for the appellant-Bank further argued that the hypothecatee had a special right to recover its dues in the event of default by the borrower, if needed by the sale of the vehicle and that the said right can be exercised without intervention of the Court. If a right requires intervention of Court for its enjoyment, it is no right at all. If intervention of Courts is much compulsory for enjoyment of a right, it amounts to denial of a right. Intervention of Court arises only if there is any infringement of right. When there is no infringement, there is no lis and no suit lies.

8. The learned counsel for the respondents on the other hand contended that there are no merits in the appeal as damages to a tune of Rs. 15,300/- sustained by the 1st respondent were rightly deducted from the decretal amount granted to the appellant-Bank in that suit. The learned counsel for the respondent further contended that the agreement has given a right to the hypothecate to realise the amount by enforcing the security through Court and that, therefore, there are no grounds to interfere in appeal. Therefore, the trial Court as well as the learned single Judge are

correct in partly allowing the counter-claim.

9. To appreciate the rival contentions of the learned counsel for both parties, it is relevant to refer to clauses 6 and 10 of the hypothecation deed, Ex. A-2.

10. Clause 6 states that, as security for the said loan and also for payment of any other charges, costs and expenses payable to or incurred by the bank in relation thereto, the borrower hereby charges and hypothecates to the Bank of the said vehicle specified and described in the Schedule which will at any time during the continuance of this security normally be garaged in or about Hyderabad or elsewhere in India. Clause 10, no doubt, empowers the Bank to take possession and sell the vehicle if there is default.

Clause 10 is as follows:

"10. The Bank its Agents and Nominees shall be entitled at all times, without notice to the borrower but at the borrower's risk and expense and if so required as attorney for and in the name of the borrower to enter any place where the said vehicle may be and inspect value insure superintendent disposal and/or take particulars of all or any part of the said vehicle and check any statements accounts reports and information and also on any default of the borrower in payment of any money hereby secured or the performance of any obligation of the borrower to the Bank or if any statement representation or warranty made by the borrower in its, their or his loan application or in any support in financial statement shall be found to be false or inaccurate in any material respect or on the occurrence of any circumstances in the opinion of the Bank endangering this security to take possession or recover receive appoint receivers or remove and/or sell by public auction or private contract despatch for realization or otherwise dispose of or deal with all or any part of the said vehicle and to enforce realize settle compromise and deal with any rights or claims relating thereto without being bound to exercise any of these powers or being liable for any loss in the exercise thereof and without prejudice to the Bank's rights and remedies of suit or otherwise and notwithstanding there may be any pending suit or other proceedings the borrower undertaking to give immediate possession to the Bank on demand of the said vehicle and to transfer and deliver to the Bank all relative bills contracts securities and documents and agreeing to accept the Bank's accounts of sales and realizations as sufficient proof of amounts realised and relative expenses and to pay any shortfall or deficiency thereby shown provided that the Bank shall be entitled at all times to apply any other money or moneys in its hand standing to the credit of or

belonging to the borrower in or toward payment of any amount for the time being payable to the Bank and to recover at any time from the borrower by suit or otherwise the balance remaining payable to the Bank under this agreement or otherwise not withstanding that all or any of the securities may not have been realised."

11. A perusal of clauses 6 and 10 of the hypothecation deed, Ex. A-2, discloses that the hypothecate has got a right to take possession of the hypothecated moveable property and also right to appoint a receiver to manage the properties and to sell the same by public auction or private contract for realisation of the amount advanced. The appellant Bank is, thus, clothed with the power to take possession of thee hypothecated property and to appoint a receiver and to sell the same whenever there is default.

12. Now, the question to be considered is: whether the hypothecate-Bank has set a right to take possession of the hypothecated goods and sell the same without intervention of the Court or not.

13. Now let us notice the distinction between 'Mortgage', 'Pledge' and 'Hypothecation'.

14. Section 58 of the Transfer of Property Act, 1982, defines 'Mortgage' as under:

"58. 'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed' defined-(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any), by which the transfer is effected is called a mortgage-deed.

15. Thus it can be seen that Section 58 of the transfer of Property Act not only defines the mortgage but also provides for mortgage of immoveable property, besides different kinds of mortgages viz., simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgage. The mortgage as per Section 58 of the Transfer of Prop-

erty Act deals with transfer of interest in immoveable property as security for the loan advanced, or to be advanced.

16. Section 172 of the Contract Act defines pledge as under:

"172. "Pledge", "Pawnor" and "Pawnee" defined-

The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called "pawner". The bailee is called the "pawnee".

In the case of pledge, the possession of pledged goods will be passed on to the pawnee from the pawnor, and the possession of moveables will be transferred to the pawnee and he will be in possession and the pawnor will not be able to enjoy the same as the possession has already been parted with the goods. So, pledge deals with transfer of possession of moveable property to the creditor as security to the loan advanced.

18. Hypothecation is not a statutory creation but it is in usage in mercantile field since times immemorial. The hypothecation is neither governed by any statute nor there is any law governing the same directly or indirectly. Therefore, Courts have to consider hypothecated cases purely on general conditions of the contract as per the terms of the hypothecation agreement. As there is no provision in the Contract Act regarding hypothecation nor in the Sale of Goods Act, we have to find out, what the meaning of hypothecation is. It is also relevant to know what is the difference between 'pledge' and 'hypothecation'.

19. Hypothecation is understood in mercantile world as creation of charge on movables in favour of hypothecatee by hypothecator where possession of goods will remain with the hypothecator. Thus, the hypothecator can be in possession of goods hypothecated and enjoy the same without causing any damage to the rights of the hypothecatee.

20. Thus, to sum up, the distinction between pledge and hypothecation is, that in case of hypothecation the hypothecator can be in possession of the goods hypothecated and enjoy the same without causing any damage to the rights of the hypothecatee whereas in the case of pledge the possession of movables will be transferred to the pawnee and he will be possession and the pawner will not be able to

enjoy the same as the possession has already been parted with.

21. In this context it is relevant to refer to the decisions.

In Haripada v. Anatha Nath, AIR 1918 Cal 165, it was held by a Division Bench of the Calcutta High Court as under:

"The method provided by Sec. 172, by the hypothecation of loose chattels is not only the method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it."

22. Thus, it can be seen that apart from the pledge, security can be created on the loose chattels.

While considering the question whether a non-possessor hypothecation of movables is a valid contract or not, the Nagpur Judicial Commissioner's Court in Nanhuji v. Chimna, (1911) 10 Ind Cas 869, held as under:

"Neither the Transfer of Property Act nor the Indian Contract Act recognise the non-possessory hypothecation of movables. The rights and remedies of the parties to such a transaction must be regulated by the Courts according to general law of contract, subject to those principles of justice, equity and good conscience, governing Courts in this country under the authority of the highest tribunal. A non-possessory hypothecation of movables is a valid contract and should be recongised and enforced by the Courts. The rights of the hypothecatee are entirely regulated by the terms of the contract between the parties. On default in payment of the debt, he can compel delivery of the property or obtain a decree for sale of the property, if so stipulated in the contract. If the property is simply hypothecated without any stipulation as to the manner in which it is to be dealt with, the only remedy open to the creditor is to obtain a money-decree declaring his lien on the property and his right to sell."

23. In Co-operative Hindusthan bank v. Surendra Nath, AIR 192 Cal 524, it was held that a hypothecation of movables, though not accompanied by delivery of possession, is valid.

24. Creation of a charge on future crop to be produced, which is a moveable property, was recognised as permissible under the Indian Law.

25. In Venkatachalam v. Venkatrami, AIR 1940 Mad 929, a Division Bench of the Madras High Court held as follows:

"Under the Indian Law there can be a valid mortgage of moveable property. Under Section 3, T.P. Act, immoveable property does not include growing crops. Therefore a deed of mortgage of immoveable property and also of the produce realized therefrom every year operates in respect of the produce on the land as a mortgage of moveable property. The moment the crop comes into existence the mortgagee gets title to the crop."

In Simla Banking Etc. Co. v. M/s. Pritams, AIR 1960 Punj 42, while making a distinction between pledge and hypothecation, a Division Bench of the Punjab High Court held as follows (at p.4 of AIR):

"The civil law recognises to kinds of pledges, viz, the "pignus" (pawn) in which the possession of the thing is actually delivered to the person for whose benefit the pledge was made, and "hypotheca " (hypothecation) in which the possession of the think pledged remained with the debtor, the obligation resting in mere contract without delivery. In one case possession was actually delivered to the creditor or pawnee, in the other it remained with the debtor. Hypothecation has been defined as a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claims out of the proceeds. It is an act of pledging a thing as security for a debt or demand without parting with the possession. In follows as a consequence that although the property remains in the possession of the debtor, it cannot be transferred to a third party without the express consent or permission of the creditor."-

26. In Nadar Bank Ltd. v. Canara Bank Ltd., AIR 1961 Mad 326 a Division Bench of Madras High Court held as follows:

"In order to constitute a valid pledge, what is essential is that there must be a delivery of the article, either actual or constructive, to the pawnee. Possession is an equivocal term ; it may mean either mere manual possession, or the mere right to possession. Constructive delivery is adequate to constitute a pledge and it applies to all those cases where the pledger remains in possession of the goods under the specific authority of the pledgee. There cannot be any rigid delimitation of the purpose for which the pledgor is permitted to retain possession of the goods. The essential test is not the purpose, but whether the dominion over the goods of the

pledgee is retained, and the physical possession or handling of the goods by the pledgor is under the delegated authority of the pledgee, or is independent, (English case law referred). The borrower delivered goods to the bank as security for the payment of loan. Under the agreement the borrower was, with the previous consent of the bank, at liberty from time to time to withdraw any goods pledged to the bank provided the advance value of the said goods was paid or a margin of 40 per cent on the value of the goods was maintained. The borrower was to furnish statements and returns to the bank of the current market value and other particulars of the goods left with him as the bank might require from time to time. The goods were also insured by the borrower in favour of the Bank.

Held that this was a case of pledge of goods to the bank and not a mere hypothecation of movables. The form of the juridical relationship was very important, and it could not be divorced from the substance, merely because in mercantile practice, there was a certain flexibility and freedom for the borrower under the "open credit" system. The term of condition that even for dealing with the goods, the prior consent of the creditor bank was necessary insured the constructive possession as well as the character of pledge."

27. Dealing with the question whether a creditor is entitled to retain possession and can exercise right of private sale without intervention of Court, the High Court of Mysore in Re, S.Y.C.W. and S. Mills, AIR 1969 Mys 280, held as follows:

" In the case of hypothecation or pledge of moveable goods, there is no doubt about the creditor's 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. 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). Hence so far as the moveables 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. "

28. While approving the aforesaid decision of the High Court of Mysore (AIR 1969 Mys 280) (supra), this Court in Jayant T. Shah v. Andhra Bank Ltd., (1977) 2 Andh WB (HC) 129 observed as under:
" There is a distinction between " Hypothecation" and "Pledge". In the Indian Contract Act (9th edition) by Pollock and Mulla at page 688, the difference between " Hypothecation" and "Pledge" is neatly stated:

' In hypothecation the possession of the property is retrained by the owner and certain rights in that movable property are transferred to the person in whose favour the property is hypothecated. But in a pledge the possession of goods also passes to the pledgee by way of security though the possession may be constructive. The true distinction from hypothecation is that the constructive possession of the goods in the case of pledge is specifically secured by the terms of the contract and is continued unabated throughout.'

It is not disputed that in the case of hypothecation, the creditor has the right to take possession of the goods and to sell it without the intervention of the Court. But, the question is whether it is a security within the meaning of Sec 141 of the Contract Act, so that if the creditor were to lose or part with the goods given in security, to that extent the surety is discharged."

29. In M/s. Gopal Singh v. Punjab National Bank, AIR 1976 Delhi 115 a distinction between pledge and hypothecation of goods with the Bank has been made. While construing that the hypothecated goods are not only constructive but actually in the possession of the Bank and the borrower has actual physical possession of the goods, the Delhi High Court observed as under (at p. 120 of AIR):

"A reference to Ex. D1/7 leaves no manner of doubt as to the terms and conditions incorporated in it. This agreement partakes the character of the usual document drawn between the bank and the borrower during the material period and, inter alia, provides for the pledge of goods by way of security for the amount to be advanced by the bank from time to time, the margin that must be maintained between the value of the goods and the mount of drawing, the manner in which the goods must remain under the lock and key of the bank through the godown-keeper, the liability of the borrower to submit reports with regard to the additions and withdrawals from the stocks pledged with the bank to enable the bank to verify through its godown-keeper. It must, however, be pointed out that in case of pledged goods, the goods are stored in the godown under the lock and key of the bank under the supervision of the bank's godown-keeper and the goods are undoubtedly in the possession, physical and otherwise, of the bank and no withdrawals or additions of the stocks are permissible without their permission. The position with regard to hypothecated goods is, however, different because these goods are strictly speaking not under the lock and key of the bank but are allowed to be kept at the factory or the premises of the borrower without any lock and key of the bank as such, but are

supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation which obliges the borrower to submit a regular return to the bank indicating the increase and decrease in the value of the said goods to enable the bank from time to time to determine the drawing of the borrower with regard to it. In law, however, there is no difference with regard to the legal possession of the bank. In both the cases, the goods are under the constructive possession of the bank while in the case of pledge they are also in the actual physical possession of the bank but in the case of hypothecated goods, they are in the actual physical possession of the borrower but subject to the restriction mentioned above. In a sense, the borrower in the case of hypothecated goods has actual physical possession of the goods as an agent, as it were, of the bank and in the limited sense the hypothecated goods are also not only constructive but actually in the possession of the bank."

30. While holding that in the case of hypothecation possession remains with the hypothecator but the hypothecatee has a right to take possession of the hypothecated property and to sell it for realization of the debt secured by it, in the decision in Syndicate Bank v. Official Liquidator, AIR 1985 Delhi 256, it was held as follows (at p. 257 of AIR):

"Unlike a mortgage, a pledge or hypothecation does not have the effect of transferring any interest" in the property in favour of the pledgee or the hypothecatee. The pledge and hypothecation, however, create a special property in the goods in favour of the pledgee or the hypothecatee. In the case of pledge, the special property is to keep possession of the pledged goods and to dispose them of for the realization of the debts for which it is held as security. In the case of hypothecation, possession remains with the hypothecator but the hypothecatee has the right to take possession of the hypothecated property and to sell it for the realisation of the debt secured by hypothecation. It was open to the Bank to take possession of the hypothecated property on its own or through the Court, but it failed to do so. It was also open to the Bank to enforce the security by the suit that it filed but there again the Bank chose to seek a simple money decree. Mere mention of hypothecation in the suit was not sufficient. The Bank would, therefore, be deemed to have waived its right as hypothecatee and was satisfied with a simple money decree. The Bank having filed a suit for the recovery of money and having failed to make a claim on the security, any claim on the security or the sale proceeds thereof would now be barred under Order 2, Rule 2 of the Code with the result that the Bank has no subsisting claim on the machinery or any part of the sale proceeds thereof and must rank as an unsecured creditor along with the other creditors of the Company, and prove its claim

before the official liquidator at the appropriate time. The Bank is itself to blame for the course that it chose to adopt." (Emphasis supplied).

31. While dealing with the question whether hypothecation amounts to constructive possession or not, while approving the decision of the High Court of Mysore, (AIR 1969 Mysore 280) (supra), a Division Bench of this Court in State v. Andhra Bank Ltd., AIR 1988 Andhra Pra 18 observed as under (at p. 22 of AIR):

"The next aspect that is to be considered is whether such a transaction viz., a hypothecation can be recognised as valid as to conferring rights though not provided for in the statutes. The rules of common law relating to substantive rights have been recognised and adopted and enforced by judicial decisions and treated to bee 'law in force' in the country within the meaning of Art. 72(1) of the Constitution of India. In Builders Supply Corporation v. Union of India, AIR 1965 SC 1061 their Lordships considered the concept of 'law in force' as contained in Art. 372(1) of the Constitution and laid down this principle.

It is fairly well settled that there was various forms of mortgage recognised by courts thought there may not be statuary recognition. In Teehilram v. D'Mello, AIR 1916 Bom 77 at page 80 it is held thus:

'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 Transfer of Property Act, amongst other definitions, the definition of a chose in action mentions the hypothecation of movables as though that were an accepted part of the law of this country, and again, in the Stamp Act Section 2, Cl. 7, the like words are to be found. Elsewhere I do not believe that it would be easy to discover in the sufficiently voluminous 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. "

The Division Bench further held as under:

"Where a suit was filed by the Bank against a Sugar Mill for recovery of case credit amount advanced on hypothecation of stock of sugar in the godown of the mill, but before a decree could be passed the stock of sugar was attached on behalf of State for recovery of sugarcane purchase tax, it was held that the transaction being a hypothecation, the hypothecatee, viz., the Bank had a lien on the goods which were held by way of security and the bank had a preferential claim as a secured creditor even against the Government's demand of taxes. It is true the hypothecation as such is not defined in the Contract Act and there is no provision dealing with such a transaction. But the difference between "Hypothecation" and "Pledge" is that in hypothecation the possession of the property is retained by the owner and certain rights in that moveable property are transferred to the person in whose favour of the property is hypothecated. But in a pledge the possession of goods also passes to the pledges by way of security though the possession may be constructive. The true distinction between pledge and hypothecation is that the constructive possession of the goods in the case of pledge is specifically secured by the terms of the contract and is continued unabated throughout.

The hypothecation of moveable property is also a recognised from of mortgage. Hence, it has to be recognised although such hypothecation or mortgage of movables are not specifically dealt with in the Contract Act, but these transactions have long been recognised as valid in law and they have to be given effect to. In the absence of specific rules, the recognised principles in the Civil Courts is that courts should decide according to justice, equity and goods conscience which is underlying recognised principle of common law court. "

32. In Union of India v. CT. Shentilanathan (1978) 48 Com Cas 640 a Division Bench of Madras High Court held:

"Hypothecation of goods is a concept which is not expressly provided for in the law of contracts, but is accepted in the law merchant by long usage and practice. Hypothecation is not a pledge and there is no transfer of interest or property in the goods by the hypothecator to the hypothecatee. In only creates a notional and an equitable charge in favour of the hypothecate and the right of the hypothecatee, as already stated, is only to sue on the debt and proceed in execution against the hypothecated goods, if they are available. As delivery of possession is not a since qua non for the creation of a notional charge under a deed of hypothecation and as possession of the hypothecated goods is always with the hypothecator, a wide door is

open to the owner to deal with be goods without reference to the hypothecatee. If, however, the hypothecator, contrary to the stipulation under the hypothecation bond, deals with the property, the breach on his part would certainly be noticed by the hypothecatee and he would be dealt with independently by him. It is in this context that the rights of a bona fide transferee for value of such goods are protected in law, for, the hypothecatee who fails to bequester the goods and reduced them into his custody, takes the risk of such clandestine dealings of the hypothecator. If the hypothecatee expressly or constructively notifies the equitable charge, matters would be different; even so, when the hypothecatee has constructive possession of the goods, though not physical possession of the same. In the absence of such a constructive notice or express notice to the public at large, the right of the hypothecatee is that of bare private money-creditor with the ancillary right to proceed against the goods hypothecated after obtaining a decree in a court of law. Thus, a hypothecation is a right in creditor over a thing belonging to another and which consists in the power in him to cause the goods to be sold in order that his debt might be paid to him from the sale proceeds and this right is distinguishable from a mortgage of chattels. "

33. The learned counsel for the appellant-Bank submits that the rights of a mortgatgee of moveable property are not in any way inferior to the rights of a pledgee because the mortgagee has the general estate in the property which is mortgaged to him. He invited our attention to the decision in In Ahmed Ali Mohomed Khoja, in re AIR 1932 Bom 613 wherein Kania, J. of the Bombay High Court relying on the judgment in Deverges v. Sandeman, Clark & Co. (1902) I Ch 579, held:

"Where the mortgagee is in fact in possession of the mortgaged property, without any objection from the mortgagors, the mortgagee has on the mortgagor's insolvency a right to sell the property without the intervention of the Court. The rights of a mortgagee of moveable property are not in any way inferior to the rights of a pledgee because the mortgagee has the general estate in the property which is mortgaged to him. Besides, he has the right to sell the property without the intervention of the Court if the mortgagor, after a proper notice is given to him to repay the money, fails to do so. "

34. From the aforesaid decisions it is clear that pledge and hypothecation are two different transactions - in the former possession of goods is parted with by the owner in favour of the creditor whereas in the latter possession of goods is retained by the borrower.

The next point that can be deduced from the principle laid down by the aforesaid decisions is that where there is a mere charge in hypothecation agreement, the hypothecatee has to approach the Court and seek intervention of the Court for obtaining money decree and for bringing the hypothecated goods for sale through the Court. When there is any specific clause in the hypothecation agreement empowering the hypothecatee to take possession of the goods and sell the same, in the event of default in payment, as per the said terms the hypothecatee can proceed ahead without intervention of the Court.

35. From the aforesaid decisions, the following points will also emerge:

1) So far as the moveables 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 as 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).

2) According to the deed of hypothecation the borrower is in actual physical possession whereas the constructive possession is still with the hypothecator.

3) In the case of pledge, the special feature property is to keep possession of the pledged goods with the pledgee and to dispose them of for the realisation of the debt for which it is held as security. In the case of hypothecation, possession remains with the hypotehcator but the hypothecatee has the right to take possession of the hypothecated property and to sell it for the realization of the debt secured by hypothecation. It is open to the Bank to take possession of the hypothecated property on its own or through the court as per the terms of hypothecation.

36. Now, it is relevant to refer to some of the rulings and judgments of the foreign Courts.

37. In England earlier to 1982 hypothecation and pledge were on the same lines as in India, to say the practice prevailing in England earlier to 1982 was followed in India and the judgments were also followed. The hypothecated property was brought to sale through a Court or where there was a right to take possession as per the clauses of the agreement, possession of the same was taken from the hypothecator and was sold for realization of the borrowed amounts. Therefore, there arose a necessity to lay down the norms as to when the property can be taken. Therefore, the Bills of

Sale Act, 1878 was enacted and it was further amended in the year 1882 by providing Section 7 which is as under:

"Section 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:-

"(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security:

(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4) If the grantor shall not without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes;

(5) If execution shall have been levied against the goods of the grantor under any judgment at law;

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above mentioned causes, apply to the High Court or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists may restrain the grantee from removing or selling the said chattels, or may make such other order as may deem just."

Thus the conditions, under which the personal chattels assigned under the bill can be seized or taken possession under certain specified contingencies. Thus, the right to take possession or seize the goods hypothecated to hypothecator in the event of default in payment of the amount due as per the agreement, was well recognised in England.

38. In Watkins v. Evans (1887) IS QBD 386 a Bill of Sale given as security for money, was in the form setforth in the schedule to the Bills of Sale Act, 1882, except that,

the mortgage debt (instead of being made payable by instalments) was made payable, with interest, in one sum, a month after the date of the deed, and there was a covenant by the grantor, in case the principle money should not be then paid to pay interest half-yearly on the principal money remaining unpaid. There was also a covenant by the grantor to insure the chattels comprised in the deed, and to produce the receipts for premium to the grantee. Therein it was held as follows:

"The bill of sale was valid, and that, interest being in arrear for more than two months, the grantee had power to seize the chattels, and to sell them after the expiration of five days from the seizure. Per Bowen and Fry. L. JJ. The power of sale was conferred by S. 19 of the Conveyancing Act, 1881, subject to the restrictions imposed by S. 20 of that Act and by S. 13 of the Bills Sale Act of 1882.

Per Lord Esher, M.R. The Conveyancing Act did not apply, but there was an implied power to seize and sell under the Act of 1882.

A bill of sale given as security for money, by which the mortgage debt is made payable in one entire sum, is "in accordance with" the statutory form".

39. In Ex Parte offical Receiver v. In Re Morritt (1886) 18 BBD 222 a Bill of Sale of personal chattels, given as security for money lent, contained a provision "that the power of sale conferred on the mortgages by the Conveyancing Act, 1881, shall be exercisable by them in every respect as if the 20th Section of the said Act had not been enacted."

40. Effect of the Clause 'for possession till default' as incorporated in the mortgage deed has been analysed in Coote's Law of Mortgages. VIII Edition, Volume I at page 182 and is to operate as a redemise by the mortgagee, who cannot sue for the chattels until default has been made or the expiration of the time for payment; and the mortgagor may maintain an action if his possession is interfered within the interval. But the mortgagor is only entitled to the use of the chattels; if he or his trustee in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees can sue for the conversion.

41. The proviso for the mortgagor to retain possession until default is not in consistent with a proviso for taking possession on the happening of a certain event. {Re Francis (1878) 10 Ch D 408 CA}

42. It is however, now settled that the right of seizure and of sale are derived not from the general law but exclusively from the Bills of Sale Act, 1882. (Vide the Law of Mortgages by C.H.M. Waldock at page 101).

43. The mortgagee of personal chattels, if they are in his possession, and in any case the mortgagee of stocks and shares has a power of sale implied at common law. When the mortgage is by deed the common law power is displaced by the power given by Section 101 of the L.P.A., but the implied power is still serviceable when there is no deed. If the mortgage fixed a day for payment, the implied power is exercisable immediately after default on that date. (Vide The Law of Mortgages by C.H.M. Waldock, Second Edition, page 259).

44. A creditor will some times have a right to seize his debtor's chattels, usually with the added power to sell the chattels for the satisfaction of his debt. (Vide The Law of Mortgages by C.H.M. Waldock, Second Edition, page 12).

45. In England the powers of seizure and sale of hypothecated chattels are governed by the provisions of the Bills of Sale Act, 1882, whereas, in India, the same is governed by the terms and conditions of the contract entered into between the parties, as was in vogue in England in common law earlier to enactment of Bills of Sale Act, 1882.

46. Thus, from the foregoing decisions and the principles laid down therein, it is clear that the Intervention of the Court is not necessary and compulsory for enjoyment of a right, and the intervention of Court arises only when there is an infringement of right, and when there is no infringement, there is no lis and suit. In the hypothecation agreement, the rights of the hypothecatee are governed by the terms of the agreement. Where the agreement provides for taking of possession of the goods hypothecated, the hypothecatee can take possession of the said goods without intervention of the Court. Where the goods are hypothecated only by creating a charge, then the hypothecatee has to take action to enforce the said charge according to law. Therefore, it cannot be said that the hypothecatee has to approach the Court even though the deed provides for taking of possession in case of default of the hypothecator. In there is any violation of the terms of the deed it will not, however, bar the hypothecator to approach the Court and seek proper relief.

47. Clause 10 of the hypothecation deed, Ex, A2, empowers the appellant-Bank to take possession and appoint a Receiver and sell the goods by public auction or by a private contract. Thus, the seizure of the lorry by the appellant-Bank is not unlawful

nor does it amount to any breach of terms of the contract. Further, Clause 10 of the agreement is not opposed to public policy.

48. A mortgage is not less than a pledge. Hypothecation is not defined in any statute. It has been in vogue in mercantile field. The same has been interpreted by the Courts in India as well as in foreign countries as referred to supra. Thus, a distinction has also been brought out between pledge and hypothecation. In the circumstances, the decisions, relied upon by the learned single Judge in Jayant T. Shah v. The Andhra Bank Limited (1977 (2) Andh WR (HC) 129) (supra) and Ahmed Ali Mohomed Khoja, in Re (AIR 1932 Bombay 613) (supra) have not been properly analysed and inasmuch as the Maritime laws are totally different from other laws all over the world, reliance placed by the learned single Judge on paragraph 635 of Volume 43 Halsbury's Laws of England(4th Edition) is of no consequence.

49. The learned counsel for the respondents argued that a notice as contemplated under Section 176 of the Contract Act, 1872 has to be issued by the appellant-Bank before the sale of the lorry. He invited our attention to the decision in Prabhat Bank v. babu Ram (sic) AIR 1960 AP 273 wherein it was held:

"An agreement under which the pawnee bank has been authorised to sell the securities pledged with it without notice to the pawner in case the credit balance of the pawner fell below the margin, cannot avail the pawnee in acting contrary to law. Such an agreement would be inconsistent with the provisions of the Contract Act and therefore, would be wholly void and unenforceable. Consequently, the sale of the securities by the pawnee bank without giving reasonable notice to the pawner is bad and not binding on him. What Section 176 contemplates is not merely a notice but a reasonable 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."

We are not for a moment able to accede to the contention advanced by the learned counsel for the respondents. In the case on hand, seizure of the lorry has been made on 27-6-1973. Till 27-11-1973 the lorry was in the custody of the appellant-Bank. The respondents obtained an order of injunction against auctioning the lorry by the appellant-Bank. The appellant-Bank published a notice in the newspaper, Deccan Chronicle, on 6-12-197. On 13-12-1973 the 1st respondent filed O.S. NO. 2449 OF 1973 before the II Assistant Judge, City Civil Court, Hyderabad for a declaration that the seizure of the lorry is illegal and sought for an injunction restraining the

Bank from selling the lorry. For these reasons it cannot be said that no notice has been issued by the appellant-Bank to the respondents.

50. In the result, the appeal is allowed and the order of the learned single Judge and the trial court are set aside. The counter-claim of the 1st defendant in the suit i.e., the 1st respondent in this appeal is, negatived. The suit for recovery of Rs.46,987-62 ps. With interest at 11% p.a. by the appellant-bank is decreed in its entirety. A preliminary decree is passed in the suit. Time for redemption: six months.

51. We, however, make no order as to costs.

Appeal allowed.