Case No. 12

2000 (I) CTC 314

IN THE HIGH COURT OF MADRAS

R. Balasubramanian, J.
A.S.No. 146 of 1986
14.10.1999

M.Bernardsingh — Appellant

Vs

Syndicate Bank, Nagercoil Branch by it's Manager and 3 other — Respondents

Hypothecation - a specie of pledge - creats charge not covered by Contract Act -controversy arising out of agreement to be decided based on the terms contained in the deed of hypothecation.

CASES REFERRED

AIR 1995 AP 134	(11,13,21)	AIR 1969 Mys. 280	(11)
AIR 1995 Kar. 185	(11,13)	AIR 1967 SC 1322	(11)
AIR 1976 Del. 115	(11)	AIR 1960 Pun. 42	(11)
AIR 1976 AP 273	(11,13)	AIR 1958 All. 864	(11)

Mr.G. Subramaniam, Senior Coundel, Advocate for Appellant.
Mr. Srivatsamani, Advocate for Respondent No. 1. Mr. J. James, Advocate for Respondents No 2 and 3.
A.S. DISMISSED

ORDER

1. The first defendant O.S.No. 58 of 1992 on the file of the Sub-Court at Nagercoil is the appellant in this appeal. The plaintiff in that suit and defendants 2 to 4 therein are respondent No. 1 and respondents No. 2 to 4 respectively in this appeal. In this judgment the parties to the appeal would hereinafter be referred to as the plaintiff and the defendants. The plaintiff filed the above suit against the defendants praying for a composite decree for a sum of Rs. 1,51,424.45 together with interest thereon; a preliminary decree for the sale of the hypotheca described in the schedule to the plaint and a personal decree against defendants 1 to 3 in case the entire decree amount is not realised on the sale of the hypotheca. On contest, the learned

trail judge decreed the suit against the 4th defendant. The first defendant is therefore before this court in this appeal. Heard Mr.G. Subramaniam, learned senior counsel appearing for the appellant; Mr.N. Srivatsamani, learned counsel appearing for the first respondent/decree holder as well as MR.J. James, learned counsel appearing for respondents 2 and 3. As far as respondent No.4 is concerned a Division Bench of this Court passed on order 19.10.1999 dismissing the appeal as against him for non-prosecution.

2.The plaintiff sought for the relief referred to above alleging the following facts:

> "The first defendant availed a loan of Rs. 65,000 on 25.9.1976 for purchasing a second hand mechanised fishing boat. The boat was purchased with the loan amount advanced by the plaintiff bank. At the request of the first defendant, the loan amount was paid to one H.D. Simon of Ganesapuram at Nagercoil. Defendants 2 and 3 stood as sureties for the repayment of the loan amount due to the plaintiff. Defendants 1 to 3 have executed a memorandum of agreement on 25.9.1976. Defendants 1 to 3 also promised to re-pay the loan amount in monthly instalments spread over the period commencing from 25.10.1976 and ending with 25.10.1980. The contract also provided for payment of interest not less than 7-1/2 % p.a. above the Reserve Bank of India rate subject to the minimum of 16-1/2 % p.a as no 31st March; 30th June; 30th September and 31st December of each year. The contract provided for payment of over-due interest at the rate of 2-1/2 % p.a., if the defendants commit default in payment of the amount as scheduled. The first defendant also executed a receipt acknowledging the receipt of the loan amount on 25.9.1976. The first defendant also executed a letter of declaration dated 25.9.1976 that he will not borrow on the boat till the loan in favour of the plaintiff is fully discharged. The first defendants also executed a memorandum of agreement hypothecating the property mentioned in the schedule thereto in favour of the plaintiff as on 25.9.1976 as security for the due repayment of the loan amount. The boat had been insured with the Insurance Company. The plaintiff has been paying the premium regularly and debiting the same in the name of the first defendant. As the policy is to kept alive, the plaintiff Bank may be permitted to pay the future premium and to recover the same from the defendants. The first defendant agreed to accept their liability towards the plaintiff on the basis of the statement of account to be sent by the plaintiff Bank. A sum

of Rs 1,51,424.45 is due to the plaintiff as on 20.7.1982 certified true extract copy of the statement of the loan account is filed. On 21.5.1977 the plaintiff issued a notice to the defendants to repay the loan amount. Defendant 1 and 2 received the notice. The notice sent to the third defendant was returned unserved. On 15.2.1978 the plaintiff issued another notice to the defendants. The notice addressed to defendants 1& 3 were returned unserved. The second defendant received the said notice and sent a reply dated 27.2.1978. The first defendant acknowledge the debt by signing the acknowledgment of liability dated 20.7.1979 in respect of the loan amount concerned in the suit. Therefore the suit is not barred by limitation. As 20.7.1982 was a local holiday, the suit filed on the next working day namely, 21.7.1982 is in time. The defendants are not entitled to the benefits of any of the Tamil Nadu Debt Relief Laws. Hence the suit for the reliefs already referred to above."

3. The first and the third defendants have filed a common written statement contending as follows:

"The borrowal of money is admitted. The boat was purchased for a sum of Rs 93,000 with the loan amount sanctioned by the plaintiff Bank.The rate of interest claimed in the plaint is hit by Usurious Loan Act and therefore the plaintiff cannot claim interest as stated in paragraph 6 of the plaint. The statement of account referred to in paragraph 14 of the plaint is denied. No amount is due to the plaintiff from the defendants. While the first defendant was remitting the amounts due to the plaintiff Bank towards the loan account his father fell ill and therefore he was not able to remit the instalment amounts regularly. In that context, the first defendant approached the then Manager Thiru K.K. Krishnan Nair of the plaintiff Bank and explained to him about his difficulties. The Manager promised to help him in the matter and directed the first defendant to hand over the boat to a party at Keezhakarai, Ramnad District. The boat was at Cochin. Thiru. K. Krishnan Nair, the then Manager and Thiru. Krishnandoss, the former Manager of the Bank seized the boat at Cochin in the presence of Thiru. Dhas Manager of M.S.M Press at Nagercoil and the same was entrusted to one Mariadhasan of Keezhakarai on 12.5.1978 as per the approval of the Head Office at Manipal. Mariadhasan had already deposited a sum of Rs.8,000 with the plaintiff's Bank in his account No.SD 471 for the purchase of the said boat. A sum of Rs.7,995 was withdrawn from that account and it was credited in the account of the first defendant for the purchase of the boat. On seizure of the boat, the liability of the defendants to the Bank stood discharged and therefore the defendants are not liable to pay any amount to the plaintiff.

Mariadhasan used to make remittances whenever the Bank Manager went for spot collection and the amounts received from him were properly accounted for in the bank account. Since Mariadhasan did not come to Nagercoil as promised, to execute a fresh document, the Bank Authorities were unable to get a fresh document at the time. The first defendant after receiving the summons issued in this case from the Court approached the present Manager and appraised him of the true facts as to the seizure of the boat from him and entrustment of the same by the Bank authorties to Mariadhasan. The Manager wanted the first defendant to bring Krishnadoss, their former Manager and Mariadhasan. Accordingly the first defendant took them to the Manager on 6.9.1982. The Manager promised to lettle the matter outside Court. Mariadhasan tendered Rs.3,000 to the Manager and wanted him to credit that amount in the account. The Manager insisted for more payment and since he was not in a position to remit any more payment on that day, the Manager asked the first defendant to file Vakalat in Court since the hearing in the suit was fixed for 7.9.1982. The Manager promised to withdraw the suit as not pressed. Again in the evening of 7.9.1982 the first defendant went with Mariadhasan to the Manager and he promised to settle the matter. But as promised he had not withdrawn the suit as against these defendants. The first defendant brought to the notice of the Assistant General Manager Thiru. K.T. Kuduva as to what happened by a letter dated 13.11.1982. The third defendant also informed him about the same by his letter dated 26.11.1982. Mariadhasan had returned a letter dated 8.9.92 to the Manager expressing his willingness to remit the amount along with the pay order dated 8.9.1982 to the Manager expressing his willingness to remit the amount along with the pay order dated 08.09.1982. The first defendant had not acknowledged the debit as alleged in the plaint. On 12.5.1978 namely, the date of seizure and entrustment of the boat, the first defendant was asked by the Bank Authorities present there including the Assistant Manager to sign in to blank papers and printed forms not duly filled up and they made the first defendant to believe that papers are wanted for seizure of the boat and for entrustment of the same to Mariadhasan. The Bank Authorities might have used one such paper. The first defendant had not acknowledged the debt on 20.7.1979; it is a fabricated one and as such it cannot be accepted in evidence. The third defendant had not acknowledged the debt within the period of limitation and so the claim as against the third defendant is barred by limitation. Mariadhasan is a necessary party to the suit and hence the suit is liable to be dismissed for non-joinder of necessary parties."

4. The second defendant filed a separate written statement contending follows:

"The defendant stood only as a surety for the loan transaction dated 25.9.1976 This defendant is not primarily liable for the claim and his liability only secondary in nature. The suit is barred by limitation as more than three years had expired from 25.9.1976. This defendant had not acknowledged the liability and there is no valid and legal acknowledgement made by the first defendant. Even if there is any acknowledgement liability by the first defendant, yet it is not binding on the second defendant and it cannot be used against this defendant to make him and his assets liable for the suit claim. The amount claimed in excessive. The claim of the plaintiff is hit by Usurious Loans Act. The rate of interest is excessive. This defendant send a reply notice on 25.2.1978. If at all the plaintiff Bank can succeed, they can be proceed only against the first defendant and not against this defendant. This defendant is not liable is not liable for costs."

5. The first defendant filed I.A.No. 300 of 1983 under Order 1 Rule (2) of the C.P.C to implead Mariadhasan as the 4th defendant in the suit. That petition was allowed on 25.9.1993. Thus the 4th defendant came to be impleaded as a party to the suit. The 4th defendant filed a written statement contending as follows:

"This defendant never stood as a surety for the due repayment of the loan due to the plaintiff. This defendant is not a party to the loan transaction referred to in the plaint. This defendant is not aware of the allegations contained in paragraph 8 to 11 of the plaint; he is not concerned with the alleged statements and it will not bind him since there is no privity of contract between the plaintiff and this defendant. The plaintiff is not entitled to recover any money from this defendant. The boat was entrusted with this defendant by the then Manager of the plaintiff's Bank Thiru. Krishnan Nair with an understanding that this defendant should remit a sum of Rs.25,000 in the account of the first defendant and that the boat will be transferred in the name of this defendant. This defendants and paid a total amount of Rs.27,495 on different dates. The plaintiff was not willing to transfer the boat in the name of this defendant and returned the bank draft sent by this defendant for a sum of Rs. 3,000. There is no privity of contract between the plaintiff and this defendant and likewise there is no privity of contract between the 4th defendant and the other defendants. This defendant is put to hardships and financial loss due to the non-compliance of the assurance given by the then Branch Manager, Krishnan Nair of the plaintiff's Bank. This defendant is entitled to get from the plaintiff Bank a sum of Rs. 27,495 with interest paid by him in the account

of the first defendant as per the instructions of the plaintiff Bank's then Manager. This defendant reserves his right to realise the said amount from the plaintiff Bank by appropriate proceedings. If the plaintiff Bank repays the said amount to this defendant they can take back their boat. The plaintiff is entitled to claim interest as stated in the plaint. The suit is barred by limitation. This defendant is entitled to the benefits of the Debt Relief Laws."

6. The plaintiff filed a reply statement contending as follows:

"The plaintiff never entrusted the boat with the 4th defendant and he had not paid any amount in the Bank on the alleged understanding stated in paragraph 7 of his written statement. If the 4th defendant is in possession of the boat, he shall be in possession as the agent of the first defendant only, who might have unlawfully transferred the same to the 4th defendant. The amount of RS. 3,000 sent by the 4th defendant was returned by the Bank as the 4th defendant has nothing to do with the Bank or the boat. The allegation that the plaintiff Bank is liable to pay the sum of Rs.27,495 with interest is denied as false and the 4th defendant is a total stranger as far as the suit transaction is concerned. Defendants 1 to 3 are liable to pay the amount due to the Bank. The plaintiff is entitled to get a decree against the boat, as the boat is hypothecated in favour of the Bank under the loan granted to defendants 1 to 3."

7. On the side of the plaintiff one witness was examined as P.W.1 and on the side of the defendants the first defendant alone gave evidence as D.W.1. As many as 13 exhibits were marked on the side of the plaintiff namely, Exs.A.1 to A13 and on the side of the defendants Exs.B.1 to B.5 were marked. On the above pleadings the learned trial Judge framed the following issues:

(a) Whether the defendants are liable to pay the plaintiff the amount claimed in the plaint?
(b) Whether the 4th defendant has any right in the hypothecated property and whether he is a necessary party?
(c) Whether the interest claimed by the plaintiff is excessive?
(d) Whether the suit is barred by limitation?
(e) To what relief the plaintiff is entitled to?

In as much as the 4th defendant was added as a party to the suit by an order of

the lower Court on an application filed by the first defendant, the learned trial Judge found that the decision on Issue No.2 really does not arise and therefore he did not render any finding in regard thereto. The learned Trial Judge took up all the other issues namely Issues Nos. 1,3, and 4 together. Issue Nos. 3 and 4 were answered in the affirmative in favour of the plaintiff. In the result he suit against the 4th defendant was dismissed without costs and a decree as prayed for was passed against defendants 1 to 3. It is the correctness of this Judgement that is being questioned in this appeal by the first defendant.

8. Mr.G. Subramaniam, learned senior counsel for the appellant made the following submissions:

It may be true that the first defendant borrowed money on the hypothecation of his mechanised boat. In this case it remains established that on and with effect from 12.5.1978 the boat in the custody of the first defendant was seized by the plaintiff Bank, probably in exercise of their power as the hypothecated boat and handed over the same to the 4th defendant. On the happening of such an event it must be held in the eye of law that the liability of the first defendant as the principal debtor of the Bank for the amount claimed in the plaint, come to an end. If at all the plaintiff can have any remedy to recover the money, advanced in respect of the purchase of the boat they must, only look to the 4th defendant, at whose intervention in the manner referred to above, the liability of the first defendant was transferred to the 4th defendant. In other words the argument of the learned senior counsel for the appellant is that, there is an agreement between the plaintiff, the first defendant and the 4th defendant in vogue and by which a new contract between the plaintiff and the 4th defendant came into existence in substitution of the contract entered into earlier between the plaintiff and the first defendant and therefore on the principle of novation of contract, the earlier contract between the plaintiff and the first defendant need not be performed. It is the further argument of the learned senior counsel that plaintiff had not established that the first defendant had ever acknowledged liability as stated under Ex.A.12 and therefore Ex.A.12 cannot be relied upon for any purpose at all in favour of the plaintiff. The plaintiff Bank had asked for only a money decree in the suit; no relief is asked for with reference to the hypothecated boat and therefore this act on the part of the plaintiff Bank would amount to waiving their rights in respect of the hypothecated boat. In any event the trial Court also granted only a money decree. If that is so, then the suit would be a simple suit for recovery of money and therefore to enforce that claim the suit should have been filed within three years from 25.9.1976, on which date the loan was advanced to the first defen-

dant. If Ex.A.12 is not taken into account, then the suit filed in the year 1982 in respect of the cause of action that arose in the year 1976, is definitely barred by limitation. The learned senior counsel further contended that the transaction in the case on hand is more or less like a "pledge" as defined under section 172 of the Contract Act. If it is so, the learned senior counsel would contend that the plaintiff being in the position of a "pawnee" had acted in violation of section 176 of the Contract Act, in that he had not given any notice to the first defendant before exercising the right of sale over the hypothecated boat. Therefore on this ground also the plaintiff should be non-suited. The learned senior counsel would further add that on account of the facts referred to above namely, seizure of the boat and entrustment of the same to the 4th defendant novation of contract between the plaintiff and the first defendant by the subsequent contact between the plaintiff, the first defendant and the 4th defendant and the plaintiff acting in violation of section 176 of the Contract Act, it must be held that the principal debtor namely the first defendant as discharged from his obligation towards the plaintiff and if so, consequently defendants 2 and 3 also should be discharged as per section 134 of the Contract Act. The learned senior counsel also contended that the factum of seizure of the boat from the first defendant; entrustment of the same to the 4th defendant and the 4th defendant paying the money due, are all evidenced by Ex.A.13 and therefore the court ought to have held that there is novation of the contract already entered into between the plaintiff and the first defendant. The learned senior counsel would also contend that the non-examination of the former officials of the plaintiff's Bank, especially in the context of Ex.B.1. assumes importance in this case and therefore the Court should draw as adverse inference against the plaintiff for withholding the best available evidence before Court.

9. Contending contra, Mr.N.Srivatsamani, learned counsel appearing for the first respondent/decree holder would contend that there is no evidence at all about the contract between the first defendant and the plaintiff having been rescinded and in substitution thereof, a new contract between the plaintiff and the 4th defendant having come into existence. The learned counsel would also contend that at no point of time, the hypothecated boat was seized from the custody of the first defendant and therefore there is no question of handing over of the same to the 4th defendant. According to the learned counsel for the first respondent/decree holder the first defendant continued to be in possession of the hypothecated boat and if at all it is found in possession of the 4th defendant, it must be only in his capacity as the agent of the first defendant or it must be held that the first defendant had unlawfully transferred the same to the 4th defendant. Any payment made by the 4th defendant,

if established should be held as payments made by the 4th defendant for and on behalf of the first defendant only and not in his separate capacity pursuant to any agreement between him and the plaintiff. The learned counsel would also contend that there is no privity of contract between the plaintiff and the 4th defendant and therefore there is no question of the plaintiff claiming any relief against the 4th defendant nor there is any scope for the Court to give the relief to the plaintiff against the 4th defendant. Mr. J. James learned counsel appearing for the second and the 3rd respondents would state that he is adopting the arguments of the learned senior counsel appearing for the appellants.

10. On the pleadings available in this case and in the light of the arguments advanced by the learned senior counsel for the appellant as well as the learned counsels appearing for the respondents, the following issues alone arise for consideration in this appeal:

(a) Has not the plaintiff seized the boat from the first defendant and handed over custody of the same to the 4th defendant and if so, on and from that date is not the liability of the first defendant towards the plaintiff under the suit transaction has come to an end?

(b) On account of the seizure of the boat from the first defendant: handing over of the same to the 4th defendant by the plaintiff and the 4th defendant was put an end to and in novation thereof a new contract between the plaintiff and the 4th defendant had come into existence?

(c) On account of novation of contract as stated above, is not the principal debtor namely, the first defendant stands discharged from performing his obligations towards the plaintiff and if yes are not defendants 2 and 3 also discharged from performing their obligations towards the plaintiff?

(d) In what capacity the 4th defendant is in possession and custody of the boat belonging to the first defendant and hypothecated by him to the plaintiff originally?

(e) To what relief the plaintiff is entitled to?

11. Since there is likely to be a repetition of discussion if each issue is then up separately and decided, I am inclined to take up all the issues together and dispose of the same accordingly. Before analysing the facts available in this case, I want to make myself clear on the legal aspects namely, “pledge” and “hypothecation”. Under section 172 of the Contract Act, the bailment of goods as security for payment of a

debt is called "pledge". The "bailor is called the pawnor". The "bailee" is called the "pawnee". The legal rights and liabilities of the "pawnor" and "pawnee" are found in sections 173 to 179 of the Contract Act. In the 4th Edition of Indian Contract Act by Singhal & Subrahmanyan's revised by a former learned Judge of this Court, it is stated page 1913 as follows:

> "In the case of a "pledgee" the thing pledged passes into the possession of the "pledgee". But in the case of "hypothecation", it remains in the possession of the owner. On hypothecation the creditor has a right over the goods belonging to another, which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds of sale. Although the property remains in the possession of the debtor, it cannot be transferred to a third person without the express consent or permission of the creditor."

For this statement of law the learned authors referred to Simla Banking Etc. Co., M/s. Pritams, A.I.R, 1960 Pun. 42 and State Bank of India v. S.B. Shah Ali, A.I.R.1995 A.P. 134. In the case reported in Simla Banking Etc. Co., v. M/s. Pirams, A.I.R. 1960 Pun .42, a Division Bench of that Court has held as follows:

> "The civil law recognises two 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 thing 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 of demand without parting with the possession. It follows as a consequences 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".

In a case reported in State Bank of India v.S.B.Shah Ali, A.I.R. 1995 A.P 134 a Division Bench of that Court has held as follows:

> "Hypothecation is not a statutory creation but it is in usage in mercantile filed times immemorial. The hypothecation is neither governed by any state

nor there is any law governing the same directly or indirectly. Therefore Court have to consider hypothecated cases purely on general conditions of the contract as per the terms of the hypothecation agreement. Hypothecation a understood in mercantile world as creation of charge on moveables in favour of hypothecatee by hypothecator where possession of goods will remain with the hypothecated and enjoy the same without causing any damage to the rights of the hypothecatee."

"The distinction between pledge and hypothecation is that, in case of hypothecation the hypothecatee 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 moveables will be transferred to the pawnee and he will be in possession and the pawner will not be able to enjoy the same as the possession has already been parted with."

"Where there is a mere charge in hypothecation agreement the hypothecate 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."

"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 thought the deed provides for taking of possession in case of case of default of the hypothecator. If 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."

The learned authors also referred to the case in Dharam Deo v. State ,A.I.R. 1958 All 864 in their book to state that "in an hypothecation, the possession over the property is retained by the owner and it is only certain rights in the moveable property that are

transferred to the creditor." No doubt that Judgment of Allahabad High Court is on the issue regarding the payment of stamp duty under the Stamp Act on a instrument, which was the subject matter of that appeal. The learned Judges in that case while deciding the question about the stamp duty payable on an instrument before it namely, whether it was a "pledge" or a "deed of hypothecation", has stated so.

In a case reported in M./s. Gopal Singh v. Punjab National Bank, A.I.P. 1976 Del. 115 a learned Single Judge of that Court had an occasions to consider a "pledge" and a "hypothecation" and the differences between the two. In that context it was held by the learned Judge of that Court in that case as follows:

> "There is distinction between hypothecation of goods and pledge of goods in that the hypothecated goods need not be in the physical possession of the bank but may remain under the actual physical possession of the borrower with a view to enable the borrower to use the same either as raw material or in the process of fabrication of goods or an finished goods. In such cases, the borrower is in actual physical possession but the constructive possession is still of the bank because according to the deed of hypothecation, the borrower holds the actual physical possession not in his own right as an owner of the goods but as the agent of the bank."

In a case reported in Shatzadi Begum v. Girdharila, A.I.P. 1976 A.P. 273 two learned Judges of that court has held as follows:

> "Although the hypothecation and mortgage of moveables are not specifically mentioned in the Contract Act, but that Act not being exhaustive law on the subject and as the above said transactions have long been recognised as valid in India these transactions will have to be given effect to. In the absence of specific rules applicable to any matter, the principle recognised in the various Civil Court Act is that the courts should decide according to justice, equity and good conscience which is considered to be equivalent to the English law whenever such law is applicable to Indian conditions. It is only under this principle that the hypothecation or mortgage of moveable property, although not specifically provided in the Contract Act are valid and a decree can be passed in enforcement of such transactions."

The learned authors in their commentary on the Indian Contract Act, had quoted the last referred to two judgments also in that. In a case reported in Hindustan Machine

Tools Ltd. v. Nedungadi Bank Ltd. A.I.R. 1995 Kar. 185 it has been held as follows:

> "Hypothecation is a specie of pledge. Hypothecation though not necessarily accompanied by possession of the property and through it may not create a title as such would indeed provide a security. Hypothecation does create a charge."

This judgment refers to an earlier judgment of that Court reported in Sree Yellamma Cotton Wo llen and Silk Mils Co. Ltd. & Bank of Maharashtra Poona v. Official Liquidator A.I.R. 1969 Mys. 280 wherein it has been held as follows:

> " 36. 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. 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, in the creditor permitting the debtor to retain possession either on behalf of or in trust for himself (the creditor).
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> 37. Hence, so far as the moveable actually covered by the hypothecation deed are concerned there can be no doubt that the Bank is entitled to retain possession and also to exercise the right of private sale."

In a case reported in Lallan Prasad v. Rahmat Ali, A.I.R. 1967 S.C. 1322 brought to my notice by the learned senior counsel for the appellant it has been held as follows:

"(17) There is no difference between the common law of England and the law with regard to pledge as codified in sections 172 to 176 of the Contract Act. Under section 172 (a pledge is a bailment of the goods a security for payment of a debt or performance of a promise. Section 173 entitles a pawnor to retain the goods pledged as security for payment of a debt and under section 175 he is entitled to receive from the pawnor any extraordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a Pawnee and provides that in case of default by the pawnor the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security and (2) to sell the goods after reasonable notice of the intended sale to the pawnor. Once the pawnee by virtue of his right under section 176 sells the goods the right of the pawnor to redeem them is of course

extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus if any to the pawnor. So long, however, the sale does not take place the pawnor is entitled to redeem the goods on payment of the debt. It follows therefore, that where a pawnee files a suit for recovery of debt though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise the result would be that he would recover the debt and also retain the goods pledged and the pawnor in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract of pledge. The pawnee, therefore, can sue on the debt retaining the pledged goods as collateral security. If the debt is paid he has to return the goods with or without the assistance of the Court and appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge and it is found that he was given possession of the goods pledged and had retained the same, the pawnor has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledgee denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance. That being the position the appellant would not be entitled to a decree against the said promissory note and also retain the said goods found to have been delivered to him and therefore in his custody. For, if it were otherwise the first respondent as the pawnor would be compelled not only to pay the amount due under the promissory note but lose the pledged goods as well. That certainly is not the effect of section 176."

12. In the light of the law laid down by various Courts in the judgments referred to above, I applied my mind to Ex.A.1 to find out what are the terms and conditions on which the memorandum of hypothecation was created by the first defendant in favour of the plaintiff Bank. To Ex.A.1, the first defendant is a party as the first part; defendants 2 and 3 are parties to the same as the second part and plaintiff is a party to it as the bank. Under Clause 6 of the said agreement the Bank is given the power to call for the entire money immediately and also enforce the security or recover the money in any other manner which the Bank thinks fit. The 3rd schedule to the document gives the description of the boat hypothecated to the Bank. Clause 9(a) of this document states that the hypothecated boat shall be held as Bank's

exclusive property and the borrower will not create charge mortgage or lien of encumbrance affecting the same or any part thereof nor do anything which would prejudice to security. Clause 10 of this agreement empowers the Bank to take possession of the hypothecated boat. Clause 12 of the said agreement specifically states that " in the event of default in terms of the agreement by the borrower, *the Bank at it's option is entitled to take possession of the hypothecated boat at the risk of the borrower and sell the same by public action or private contract or otherwise.* The net proceeds after deducting the expenses and other losses incurred in exercise there of should be applied towards liquidation of the balance due to the Bank without prejudice to the Bank's rights and remedies of suits against the borrower; the borrower agreed to Bank's account of sales of realisation and pay any shortfall or deficiency therein shown and appear to be due by the borrower." Under Clause 17 of this document the borrower shall not without previous permission of the Bank in writing, sell or otherwise part with the hypothecated goods and if with the permission of the Bank goods are sold, the value of the goods shall be paid to the Bank.

13. The rights and obligations of the plaintiff and the first defendant leaving out of Ex.A.1 are clear and certain. As held by the Andhra Pradesh High Court in the judgment reported in 1995 A.P. 134 since the transaction of hypothecation is neither governed by any Statute nor there is any law governing the same directly or indirectly, the Court have to consider such cases purely on general conditions of the contract as per the terms of the hypothecation agreement. In Shatzadi Begum v. Girdharilal, A.I.R. 1976 A.P.273, the learned Judges after noticing that the transaction of hypothecation is not specifically mentioned in the Contract Act and that Act not being exhaustive law on the subject and such transactions having been recognised from time immemorial held that the Court should decide in the absence of specific rules applicable to such matter according to justice, equity and good conscience. Therefore I have no doubt in my mind that the claim of the plaintiff has to be decided with reference to the terms contained in Ex.A.1 and on the basis of justice, equity and good conscience.

14. Let me now go into the facts of this case. The 4th defendant was not originally impleaded in the plaint by the plaintiff. The first defendant took certain defence on the basis of which he pleaded that the 4th defendant is a necessary party to the suit. Even then the plaintiff had not taken steps to implead the 4th defendant. Thereafter, the first defendant filed an application and on that on order came to be passed to implead the 4th defendant. The 4th defendant had also filed a separate written statement admitting the possession of the hypothecated boat with him as

one having been entrusted to him by the Bank directly. He also claimed certain reliefs against the Bank. The Bank in it's counter affidavit filed to the application filed by the first defendant to implead the 4th defendant as a party to the suit, had stated that even if the proposed party had paid some money yet he had paid the same only as an agent of the first defendant towards the loan secured by the first defendant. It is stated in the said counter affidavit by the Bank that there was no seizure of the boat from the first defendant and if there was any such seizure then it should have followed proper documentation from the proper and necessary parties. The plaintiff Bank filed an amended plaint showing the proposed party as the 4th defendant later on. Even then, they have not asked for any relief against the 4th defendant and the amendment made in the prayer column of the plaint makes it abundantly clear that the relief asked for was confined only to defendants 1 to 3. Ex.A.13 is the statement of account maintained by the plaintiff with reference to the loan transaction availed by the first defendant and the reference number in O.S.L.No. 37 of 1976. The starting debit entry in this account is for Rs. 65,000 on 25.9.1976. There is a debit entry for a sum of Rs.1,423.80 on 14.9.1977 and the endorsement is "To seize boat charges". Ex.B.3 is the Pass Book for Savings Deposit Account No/SD 471 in the name of the 4th defendant maintained in the plaintiff's Bank. There are only three entries in this Pass Book and the first entry is the credit entry dated 27.1.1978 for a sum of Rs.8,000. The second entry is a debit entry dated 29.5.1978 for a sum of Rs. 7,995 and this debit entry is shown to be "To OSL". On the same day there is a credit entry in Ex.A.13 for a sum of Rs. 7,995 and the credit entry is shown to be "By SB 471". The Pass Book for SB471 is marked as Ex.B.3 in this case and it is in the name of the 4th defendant. P.W.1 would admit in his evidence in cross done on behalf of defendant 1 and 3 that in Ex.B.13 there is a debit entry on 14.9.1977 towards seizure of boat and the boat was not seized from the first defendant. He would further admit that in the month of May, 1983 when he went for inspection of he boat he came to know that it is in the custody of a person at Keezhakarai. It may be noticed here that defendants 1 to 3 are in a Village at Kanyakumari District whereas defendant No.4 is a resident of Keezhakarai at Ramnad District. This witness would that he was unable to locate the boat there. He would further admit about the existence of Ex.B.3 account in the name of Mariadhas of Keezhakarai (defendant No.4) and the credit entry dated 29.5.1978 in Ex.A.13 may relate to the account of Mariadhas. He would also admit that there was a debit entry on that date in Ex.B.3. and there was also a corresponding credit entry on the same day in Ex.A.13. He would further admit that the credit entry dated 18.7.1978. for a sum of Rs.3,000 in Ex.A.13 represents the amount paid by Mariadhas). However he would state that he does not know whether the subsequent credit entries dated 8.8.1978 for a sum of Rs.2,000; on 12.9.1978

for a sum of Rs.2,000; on 21.10.1978 for a sum of Rs.2,000; on 16.3.1978 for a sum of Rs.3,000; on 12.4.1979 for a sum of Rs.1,500; and on 8.6.1979 for a sum of Rs.2,000 represent payment made by Mariadhas. He would also admit that there are credit entries in Ex.A.13 relating to the first defendant. In the cross examination done on behalf of the 4th defendant this witness would admit that the debit entry dated 29.5.1978 in Ex.B.3 may refer to the boat loan. Admittedly on the day when the said debit entry was made in Ex.B.3, there was no pre-existing loan arrangement between the plaintiff and the 4th defendant. This witness would also admit that on 8.9.1982 the 4th defendant sent a sum of Rs.3,000 by way of a demand draft towards boat account and since there was no boat loan account in the name of the 4th defendant the said sum was returned. It is no doubt true that the 4th defendant had not given evidence in support of his pleading about he being given the boat with the specific understanding of the then Manager of the plaintiff's Bank namely, Krishnan Nair that on he paying a sum of Rs.25, 000 the boat would be transferred in his name. However a total sum of Rs. 27,495 had been credited in Ex.A.13 commencing from 29.05.78 and ending with 10.7.1980. It is not the case of the plaintiff that the first defendant made these payments. The first defendant in his oral evidence as D.W.1 would state that his liability came to an end on and with effect from 12.5.1978, on which date the boat was seized from him and handed over to the 4th defendant. It is not even suggested to him in his cross examination that the payments referred to above commencing from 29.5.1978 and ending with 10.7.1980 were paid only by him. Therefore I have no hesitation to hold that the credit entries made in Ex.A.13 commencing from 29.5.1978 and ending with 10.7.1980 are payments made by the 4th defendant. Many of the credit entries during the period referred to above appear to be by cheque payments. The Bank could have easily established as to the drawer of the cheque and they are bound to explain that fact in view of the controversy in the suit. However they have conveniently omitted to establish the same for reasons within their control.

15. P.W.I. would admit that he assumed office in the present Branch of the Bank only in July 1982. Much water had flown under the bridge by the time P.W.I assumed office in the plaintiff's Bank Branch. He is the Branch Manager and he would admit that his immediate predecessor was one Rajaraman and before him was one Krishnan Nair. Therefore it is clear that he does not know anything personally on the controversy between the parties. *He would admit in his cross examination done on behalf of defendants 1 and 3 that he did not know whether Krishnan Nair, the Ex- Manager seized the boat on 12.5.1978 from the first defendant and handed over the same to the 4th defendant.* Therefore, it is clear that his evidence is worth nothing as far as

the events that had taken place in May 1978, to which the plaintiff Bank, the first defendant and the 4th defendant are parties, are concerned. His evidence would further show beyond any pale of doubt that during 1983 the hypothecated boat was stated to be in the custody of a person at Keezhakarai and he was unable to locate it. The 4th defendant is shown to be from Keezhakarai. In the cross examination done on behalf of the 4th defendant he would admit that Ex.B.2 contains the signature of Krishnadhas, one of the previous Managers, since retired. This letter is dated 28.4.1978 and was written from Ernakulam. It is addressed to the sub- Inspector of Police Kanyakumari Police Station and the letter reads that a boat is being sent with Mariadhas (the name of the 4th defendant is mariadhas) for keeping it under police custody. The written statement at paragraph 8 is that the boat was at Cochin when it was seized. The evidence of the first defendant at paragraph 8 is that the boat was at Cochin when it was seized. the evidence of th first defendant as D.W.1. is that when the boat was at Cochin, it was seized by Krishnan Nair. Ex.B.2 therefore corroborates the oral evidence of D.W.1 supported by his pleadings that the seizure of the boat was at Cochin. P.W.1in his oral evidence also admits that Ex.B.1 contains the signature of Krishnan Nair. This letter was sent by Krishnan Nair to the Assistant General Manager of the Syndicate Bank. D.W.1 has produced it. His evidence is that in connection with the dispute between the parties in the suit when he met Krishnan Nair, he gave that letter to him to be posted and he had taken a Xerox copy of the same before posting it. The said Xerox copy is marked as Ex.B.1 in this case. Ex.B.1 is produced from the custody of D.W.1. P.W.1 admits the signature found therein as that of the Ex-Manager of the plaintiff's Bank Branch at Nagercoil. This letter shows the seizure of the boat and entrustment of the same another with the approval of the head office at Manipal. This letter also records the payments made by the subsequent person. No doubt the name of the subsequent person is not mentioned. D.W.1 had laid the foundation for receiving this document as secondary evidence. His evidence in this regard is that he met Krishnan Nair and he told him to meet the General Manager of the plaintiff's Bank at Madras and explain. He also gave a letter in his context and asked him to post. However before posting the said letter he had taken a Xerox copy of the same and the said Xerox copy is marked as Ex.B.1 in this case.

16. Under these circumstances, though the first defendant had not given any notice to the plaintiff to produce the original of Ex.B.1, yet I am inclined to rely upon the same for the limited extent of finding that the boat was seized. There is also a reference in the written statement of the first defendant to a letter dated 13.11.1982 sent to the Assistant General Manager by name Thiru.K.J. Khuduva. Obviously this letter referred to in the written statement of the first defendant, must refer only to

Ex.B.1. Therefore in my considered opinion the first defendant had established that the boat, which was in his possession was seized at Cochin by the officials of the plaintiff Bank; the same was entrusted later on to the 4th defendant and there cannot be any escape from the conclusion which I have reached on this factual aspect. The plaint is totally silent about this and it proceeds on the basis as though nothing of this sort had happened. After the written statement had come on record, the plaintiff filed the reply statement denying the seizure of the boat and the entrustment of the same to the 4th defendant. The case of the 4th defendant about the understanding and payment are also denied and it was stated therein that the possession of the boat with the 4th defendant is only in his capacity as the agent of the first defendant. Even in his oral evidence in chief, P.W.1 is totally silent about this aspect, except stating in his oral evidence would speak about the circumstances under which the boat came to be seized from him and handed over to the 4th defendant. No cross examination worth mentioning of this witness has been made except making a suggestion that Ex.B.1 is not true; he himself gave the boat to the 4th defendant; the Bank had no role to play in that and this suggestion was denied by him. If really the case of the plaintiff is true then nothing prevented them from taking any action against the first defendant for having violated the terms of Ex.A.1. I have already noticed that under the terms of Ex.A.1 the first defendant has no right to transfer or deal with the hypothecated boat in any manner prejudicial to the interest of the plaintiff without their written consent. I have also noticed that P.W.1 in his evidence in cross would state that when he went for inspection he came to know that the boat was in the custody of a person at Keezhakarai. Therefore it is clear that the plaintiff had knowledge that the boat was not with the first defendant. As already stated, if really the plaintiff is not responsible for transferring the custody of the boat from the first defendant to the fourth defendant and the first defendant in violation of the terms for Ex.A.1 had transferred the same on his own to the fourth defendant, then the plaintiff as a prudent creditor should not have kept silent. The plaintiff is not an individual creditor, but it is a nationalized bank. Therefore the omission on the part of the plaintiff to take any action on the lines indicated above make me disbelieve their case that they have no role to play in transferring the custody of the boat from the first defendant to the fourth defendant. Under these circumstances as already stated, I am of the firm opinion that the plaintiff in purported exercise of their power to take possession under Ex.A.1. had taken possession of the boat from the first defendant and the custody of the same and been handed over by them to the 4th defendant.

17. The question that follows from this stage is, in what capacity the 4th defen-

dant is in possession of the boat, whether as a buyer or as an agent of the first defendant or in any other capacity? The burden to prove this fact is definitely on the plaintiff since it is they, who have taken possession of the boat from the first defendant and Ex.B.2 establishes beyond any doubt that the boat was sent to the police at Kanyakumari by the Bank through one S. Mariadhas for keeping it under the police custody. The said letter further records that the boat must be returned back to the Bank on demand. The boat is neither shown to be in the custody of the police nor is shown to be in the custody of the first defendant. The evidence of P.W.1, as already referred to shows that he came to know that the boat is in the custody of a person at and no where he has stated that the boat is in the custody of the first defendant. I have already noticed that the 4th defendant is a resident of Keezhakarai at Ramnad District and defendants 1 to 3 are residents of another District. The plaintiff had not placed any other material to show on what terms and conditions the hypothecated boat was given to the custody of the 4th defendant. The evidence of P.W.1 does not throw any light at all on this aspect. The 4th defendant had neither examined himself nor examined anybody else on his side. However his written statement is that he was given custody of the boat on the understanding that if he pays a sum of Rs.25,000, the boat will be transferred in his name and though he had paid a total sum of Rs.27,495 (evidenced by the credit in Ex.A.13), yet the boat has not been transferred to him. It appears as though he it claiming it as a buyer. Except the pleading there is neither oral nor documentary evidence at all. It is needless to state that pleading is not evidence and any amount of evidence without pleading cannot be looked into. In this case though there is a pleading by the 4th defendant about the manner and circumstances under which the custody of given custody of the boat yet there is no oral evidence in support of the same. I find from Ex.B.1 some details regarding the terms on which the custody of the boat was stated to have been given to another person. The terms as reflected in Ex.B.1 is not spoken to either by P.W.1 or admitted by the 4th defendant. It is only the first defendant as D.W.1 who speaks about it. It is only the first defendant as D.W.1, who speaks about it. In other words the terms of Ex.B.1; the pleading of the first defendant and his evidence as D.W.1, would project a novation of contract. It is needless to state that if there is novation of contract under section 62 of the Indian Contract Act, then the assent of all parties is necessary. No new debtor can be bound without his assent and no old debtor can be discharged without the creditor's consent. Everything depends upon the character of the right or obligation or of both on which novation is sought. It is not the case of the first defendant that there is a written instrument evidencing the terms of the new contract between the plaintiff and the fourth defendant which came into existence in novation of his contract with the plaintiff. The pleading of the fourth defendant also

does not establish any concluded written contract and everything appears to be only oral assurances by the bank. The plaintiff totally denies any such arrangement. It is no doubt true Law recognizes novation of contract. However if novation of contract has to be accepted, then the parties pleading novation must establish beyond doubt as to what are the terms of the subsequent contract, which had displaced the original contract. At least if the party to the subsequent, contract admits the terms of the new contract which went in substitution of the old contract then one can understand. As already stated in this case, the fourth defendant does not admit of having entered into any new contract in taking over the liability of the first defendant towards the bank. His specific case in the written statement is that he was orally informed when he was entrusted with the custody of the boat that on his paying a sum of Rs. 25,000 the boat would be transferred to him. Ex.B.1 would show that the subsequent person is shown to have agreed to enter into a new contract. The subsequent person is stated to be the 4th defendant in the suit. He denies his liability to pay anything in excess of Rs. 25,000. As on 12.5.1978 the liability of the first defendant in the statement of account of the Bank namely, Ex.A.13 is in the region of Rs. 75,000 and therefore when the 4th defendant pleaded that he is not liable to pay anything in excess of Rs. 25,000 which he had already paid, it only means that he had not agreed to take the loan liability of the first defendant.

18. Under these circumstances, I am inclined to hold that the first defendant had not established that there was a novation of his contract with the plaintiff substituted by the contract of the plaintiff with the 4th defendant. But unfortunately in this case the plaintiff had not asked for any relief against the 4th defendant though it is shown that the 4th defendant is in possession of the boat. The appeal as against the 4th defendant is also dismissed by this Court as referred to earlier for non-prosecution. The first defendant is deprived of his boat by the conduct of the plaintiff. But however, it appears that whatever money the 4th defendant had paid, had been given credit in the account of the first defendant towards his loan account. This shows fairness on the part of the plaintiff Bank. However the character and nature of possession of the boat with the 4th defendant is not established to be that of a buyer on an out right sale or a buyer with any conditions attached to the sale. The materials available on record do not establish that the first defendant had on his own transferred the boat to the fourth defendant. The materials available on record do show that the fourth defendant had made payments to the extent of Rs. 27,495 on various dates commencing from 29.5.1978, as reflected in Ex.A.13. From Ex.B.2 it could be seen that the plaintiff wanted the police at Kanyakumari to have the boat in their custoday for and on behalf of the plaintiff, since in Ex.B.2 it is clearly stated that the police

should return the boat to the plaintiff when demanded. Therefore it is clear from Ex.B.2 that the plaintiff did not want to have the custody of the boat with themselves, but wanted somebody else to have the custody of the boat on their behalf. The probabilities are, if the boat is kept in the custody of the police, it is likely to be idle and therefore, the plaintiff would have transferred the custody of the boat to the fourth defendant. On the broad probabilities available in this case, it appears to me that the plaintiff should have taken custody of the boat from the police and handed over the same to the fourth defendant. Therefore, I am of the opinion that the fourth defendant should be held to be in custody of the boat only for and on behalf of the plaintiff, since the materials on record do not establish any concluded contract between the plaintiff and the fourth defendant, which would amount to selling the boat on an outright basis to the fourth defendant.

19. The rights of the plaintiff Bank as a "hypothecatee" is more or less similar to the rights of a "pawnee" as provided for under section 173 to 179 of the Indian Contract Act, the only difference is the "pawnee" being given possession of the goods pledged at the time of the transaction and the "hypothecator" not being given posssession of the goods at the time of the transaction and he having allowed the same in the custody of the "hypothecator". However the fact remains in this case that, at least at a particular point of time the plaintiff bank, as a creditor, got possession of the hypothecated boat. Ex.B.2 shows the date as 28.4.1978. The Bank parted with the boat in favour of the 4th defendant. It is not established in this case that the boat was sold to the 4th defendant the plaintiff's right under Ex.A.1 to sell the property through public auction or private contract, is recognized. However in this case there are no materials available at all on record placed either by the plaintiff or by the defendants, had the boat was sold on an out right sale basis to the 4th defendant.

20. The deed of hypothecation creates a charge over the hypothecated material. In order to create a charge over the moveable properties, as held in the judgment reported in Hindustan Machine Tools V. Nedungadi Bank Ltd., A.I.R. 1995 Kar 185, "law does not require it to be in writing and 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 a security for the payment of money. Creation of enforceable security is the essence of charge either in respect of immovable property or in respect of movables. Hypothecation is a specie of pledge and it does create a charge. "Therefore if a charge is created over the hypothecated property then the plaintiff will be well in

order to pursue his remedy against the property over which charge is created. In the case on hand the terms of Ex.A.1 clearly creates a charge over the boat. The case of the plaintiff throughout was that they have no privity of contract with the 4th defendant which does not appear to be correct. But however it is clear that whenever a charge is created over any property then whoever is in possession of that property they have custody over the same only subject to such charge. If really there was a novation of contract as pleaded by the first defendant then one would expect him to have that fact established. The first defendant is not an illiterate and he is holding a post graduate degree in teaching. He was also shown to be working as a Physical Training Teacher in a college at Tuticorin. Therefore he is a man who know things and what his rights are. He would categorically admit that he did not take any steps to have his loan transaction put an end to on the seizure of the boat and handing over custody of the same to the 4th defendant. I have already held that the first defendant had not established the novation of his contract with the plaintiff. The terms of the contract which went in substitution of the original contract is not established in a manner known to law and to the satisfaction of the Court. Therefore the learned Trial Judge was justified in not accepting the case of the first defendant on his aspect.

21. On these facts, I am of the opinion that it does not lie in the mouth of the first defendant now to contend that his contract with the plaintiff was substituted by another contract entered into between the plaintiff and the 4th defendant. As I have already stated the first defendant had not established that there was an out right sale of the hypothecated boat by the plaintiff in favour of the 4th defendant though he had established the plaintiff taking possession of the said boat. Only in the event of the plaintiff intending to sell the boat as provided for under Ex.A.1, principles of natural justice equity fair play and good conscience require that the plaintiff must get the best price for the boat. Only under such circumstances fair play requires him to give a notice to the first defendant. Inasmuch as the first defendant had not established the factum of sale of the hypothecated boat by the plaintiff to the 4th defendant I am of the firm opinion that no occasion had arisen for the plaintiff to give any notice or opportunity to the first defendant. As held by the Andhra Pradesh High Court in the judgment reported in A.I.R. 1995 A.P. 134, I am bound to consider the controversy between the parties only on the general conditions of equity and good conscience also guided me in solving the issue involved in this appeal. Though it is clear that the first defendant is deprived of the use of his boat, yet it is available for being proceeded with at the instance of the plaintiff. The learned senior counsel for

the appellant is not correct in contending that the learned trial Judge had granted only a money decree. But on the other hand the decree provides for the payment of the money quantified within the time schedule failing which the decree provides for the sale of the hypothecated boat and if the sale proceeds is found insufficient to proceed against defendants 1 to 3 personally.

22. The argument of the learned senior counsel for the appellant that Ex.A.12 cannot be relied upon as an acknowledgment of liability signed by the first defendant since the plaintiff had not established that the first defendant had signed it knowing it to be an acknowledgment of liability, loses it's importance in view of the submission of the learned senior counsel himself that only if it is a suit for money claim simplicitor, this question would arise and not otherwise. Inasmuch as I have found that the relief prayed for in the suit is based on the deed of hypothecation, I am of the firm opinion that the arguments advanced by the learned senior counsel on the truth or otherwise of Ex.A.12, does not really arise for consideration.

23. In the event of the decree being sustained of course one other difficulty may arise in the dispute between the parties and it is as follows:

In case the decree debt is satisfied by defendants 1 to 3 without the hypothecated boat being sold then the first defendant would be entitled to have the custody of the boat as it's owner. But the plaintiff by his conduct as noted above in this judgment had put the boat beyond the reach of the first defendant and therefore it is for the plaintiff to take appropriate steps in law to get the boat back and deliver it to the first defendant in the event of he satisfying the decree debt without any recourse to the sale of the boat under the decree. The suit against the 4th defendant was dismissed by the trial Court. The appeal before this Court stands dismissed as against the 4th defendant for non-prosecution. Therefore in the absence of the 4th defendant this Court is at a handicap to decide the right of the plaintiff as against the 4th defendant in the context of his having possession of the boat and he having paid nearly Rs. 28,000. The fact also remains that he is having use of the boat for almost 20 years. The following emerged from my foregoing discussions.

a. The plaintiff established the borrowal by the first defendant and defendants 2 and 3 standing as guarantors;
b. Ex.A.1 creates a charge over the boat in favour of the plaintiff;
c. The first defendant committing default in payment of instalment amounts;

d. Ex.A.1 empowers the plaintiff to take possession of the boat in the event of the borrower committing breach of the terms Ex.A.1;
e. In purported exercise of such power the plaintiff seized the boat and took possession of the same from the first defendant;
f. The plaintiff entrusted the boat to the 4th defendant and the terms of such entrustment are not established to the satisfaction of the Court;
g. The 4th defendant is in possession of the boat;
h. The 4th defendant had paid in all a sum of Rs. 27,495;
i. The said sum of Rs.27,495 had been given credit to in the loan account of the first defendant;
j. The contract evidencing the loan transaction between the plaintiff and defendants 1 to 3 continues continues to be in force and in novation of the same no new contract between the plaintiff and the 4th defendant had come into existence;
k. Inasmuch as a charge is created over the boat, the plaintiff is entitled to pursue his remedy against the security;
l. In case the decree debt is satisfied by the judgment –debtors without sale of the security, then the first defendant is entitled to be given custody of the boat by the plaintiff and the documents relating to the loan transaction should be cancelled; and
m. The plaintiff is at liberty to take any action in accordance with law to get back the boat from the 4th defendant in the event of the decree debt being satisfied without the sale of the boat. Accordingly I find no merits in this appeal and it is dismissed with costs.