WRIGHT AND THREE OTHERS

v.

PEOPLE'S BANK

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND MOONEMALLE, J.
C. A. 424/74 (F) – D. C. COLOMBO 11387/MB.
May 21, 27, 28, 30, 31 AND JUNE 3 AND 4, 1985.

Pledge – Authority to pledge client's goods – Broker – Mercantile Agent – Contract – Essentials of pledge – Delivery – Constructive delivery – Applicability of English Law – Section 3 of the Civil Law Ordinance – Factors Act of 1889 of England (sections 1(1), 1(2), 1(5) and 2(1)) – Auctioneers and Brokers Ordinance – Section 17 of the Registration of Documents Ordinance – Tea Control Act. No. 51 of 1957 (section 15 (1)) and Rubber Control Act (Cap. 436) (section 10).

The People's Bank (plaintiff) sued Quentin Nicholas Wright and three others (defendants) who were carrying on business in partnership under the name, style and firm of "Muller Wright and de Mel" for the recovery of Rs. 437,500 and interest being the total of loans given to the defendants for which they had pledged with the *plaintiff-bank the goods consisting of Ceylon produce including the goods referred to* in the Schedule to the plaint. Among the questions that arose were the following : Whether English law applied, whether the defendants were brokers or mercantile agents and/or agents for sale with authority to pledge their clients' produce, whether there was a valid pledge created, whether the plaintiff-bank could lawfully take possession of tea and rubber as it had no dealer's licence under the Tea Control Act and Rubber Control Act.

The plaintiff-bank had padlocked the stores holding the goods pledged to them and the defendants complaining of loss and damage as a result claimed Rs. 1.2 million in reconvention.

Held –

(1) English law applied because under s. 3 of the Civil Law Ordinance suits in respect of principals and agents had to be decided according to the English law applicable to a like cause at the corresponding period. The English Factors Act of 1889 applied.

(2) In the terms of the contract of loan they had entered into, the defendants had authority as mercantile agents and/or agents for sale in the customary course of their business to sell the goods of their clients and /or to raise money on the security of the said goods.

(3) On the evidence the defendants had validly pledged the goods in the stores to the plaintiff-bank as the requirements of a valid pledge had been complied with :

(a) The defendants as mercantile agents and/or agents for sale had authority to pledge the goods.

(b) There was constructive delivery of the goods to the plaintiff. It was not necessary that the delivery and advance of the money be contemporaneous. It was sufficient if the goods were delivered in pursuance of a contract to deliver the goods.

(c) the plaintiff was in actual, ostensible and bona fide possession of the goods in the relevant stores.

(d) Failure to register the documents of pledge and obtain a dealer's licence under the provisions of the Tea Control Act and Rubber Control Act read with s. 17 of the Registration of Documents Ordinance does not taint the pledge with illegality because the plaintiff never held itself out as a dealer in tea or rubber and it is possession of the tea or rubber qua dealer without a licence that is prohibited. The possession of tea and rubber by the bank was incidental to the contract of pledge.

Cases referred to :

(1) *Usman v. Rahim (1930) 32 NLR 259.*

(2) *Hilton v. Tucker 39 Ch. Div. 669.*

(3) *St. John Shipping Corporation v. Joseph Rank Ltd. [1956] 3 All E.R. 683.*

APPEAL from a judgment of the District Court of Colombo.

G. F. Sethukavalar, P.C. with *Mark Fernando, P.C., S. Mitrakrishnan* and *Shemil Perera* for defendant-appellants.

H. L. de Silva, P.C. with *S. J. Jayasundera* and *E. D. Wickremanayake* for plaintiff-respondent.

Cur. adv. vult.

September 6, 1985.

G. P. S. DE SILVA, J.

The People's Bank instituted this action against the defendants who were carrying on business in partnership under the name, style and firm of "Muller Wright and de Mel" for the recovery of a sum of Rs. 437,500 and interest due on three writings marked P 23, P 25 and P 31. It is the case for the Bank that in pursuance of these writings the defendants pledged with the Bank goods consisting of Ceylon produce including the goods referred to in the Schedule to the plaint. The plaintiff-bank averred inter alia in its plaint :–

(i) that the defendants carried on in partnership the business of mercantile agents and/or agents for sale having in the customary course of their business as such agents authority to sell Ceylon produce ;

(ii) that the defendants acting in the course of their business, in pursuance of the said writings (P23, P25 and P31) pledged goods consisting of Ceylon produce to the plaintiff and actually delivered the said goods into the possession and custody of the plaintiff in order to secure the repayment of the loans advanced by the plaintiff to the defendants on a Cash Credit Account ;

(iii) that in pursuance of the said agreements the defendants from time to time delivered to and pledged goods including the goods referred to in the Schedule to the plaint and the plaintiff received and accepted the said goods as security for the repayment of the loans granted to the defendants by the plaintiff ;

(iv) that the said goods have been at all times material, actually, ostensibly and bona fide in the possession and custody of the plaintiff and held as security for the said loans ;

(v) that on or about the 22nd of March 1968 the plaintiff discovered that some of the goods delivered and pledged by the defendants to the plaintiff were of a nature inferior to that which was agreed upon and that the plaintiff thereupon refused permission to the defendants to withdraw the goods and the goods now continue to remain pledged to the plaintiff and under the possession, custody and control of the plaintiff.

The plaintiff sought to recover the said sum of Rs. 437,500 and prayed for a hypothecary decree declaring the said goods to be bound and executable for the recovery of the said sum of money on the footing of the said pledge.

The defendants in their answer pleaded –

(*a*) that they were brokers of Ceylon produce and denied that they were mercantile agents and/or agents for sale ;

(*b*) that the writings P23, P25 and P31 did not in law create or constitute a valid pledge of the goods referred to in the plaint or any other goods ;

(*c*) that the defendants have at no time actually delivered any goods into the exclusive custody and possession of the plaintiff and that the plaintiff had at no time taken delivery of any such goods into their exclusive possession or custody and therefore the said writings do not constitute a valid pledge of the goods ;

(*d*) that in any event the said agreements were not intended to be acted upon and in fact the parties never acted on the basis of the said agreements ;

(*e*) that the goods referred to in the plaint at all times belonged to the owners of the said goods and the defendants had no authority to pledge the said goods for any purpose whatsoever ;

(*f*) that the defendants carried on business of brokers of Ceylon produce without let or hindrance or any control by the plaintiff till 20th March 1968 ;

(*g*) that the plaintiff was not at any time in actual ostensible and bona fide possession and custody of any goods whatsoever in the stores of the defendants ;

(*h*) that the plaintiff on or about the 20th of March 1968 unlawfully, wrongfully and without just cause locked up the stores of the defendants and thereby prevented the defendants from carrying on their business to the defendants' loss and damage estimated at 1.5 million rupees.

The defendants prayed for a dismissal of the action and for judgment against the plaintiff in the said sum of 1.5 million rupees.

Issues Nos. 1 to 5 raised on behalf of the plaintiff-bank relate to the authority of the defendants as mercantile agents and/or agents for sale in the customary course of their business to sell the goods and/or to raise money on the security of the said goods. The other material issues raised on behalf of the plaintiff-bank were :–

6.(*a*) Were the goods described in the Schedule to the plaint pledged by the defendants to the plaintiff ?

(*b*) Was such pledge made to secure the loans advanced by the plaintiff to the defendants on a Cash Credit Account ?

7.(*a*) Were the said goods actually delivered to the plaintiff by the defendants ?

(*b*) Were the said goods so delivered into the possession and custody of the plaintiff ?

(*c*) Did the said goods at all times material to this action continue to remain actually and ostensibly and bona fide in the possession and custody of the plaintiff ?

16.(*a*) On or about the 22nd of March 1968 did the plaintiff discover that some goods delivered and pledged by the defendants were of a nature and quality inferior to that which was agreed upon by the plaintiff and the defendants ?

(*b*) Did the plaintiff thereupon refuse, as it lawfully may, to grant permission to the defendants to withdraw the said goods ?

(*c*) Did the said goods continue to remain mortgaged and pledged to the plaintiff and under the possession and custody and control of the plaintiff ?

On behalf of the defendants the following among other issues were raised :

Did the plaintiff on or about the 22nd March wrongfully and unlawfully lock up the stores and prevent the defendants from having access to their stores and carrying on their normal business at the said stores ?

The District Judge, after trial, answered the issues in favour of the plaintiff-bank and entered judgment as prayed for in the plaint. The defendants have now appealed against this judgment and decree.

The first submission of Mr. Sethukavalar, Counsel for the defendants-appellants, was that the parties did not intend to create a pledge by the documents P 23, P 25 and P 31. On a reading of P 23, P 25 and P 31, however, it seems clear that the Bank agreed to grant the defendants credit facilities on security of goods pledged to the Bank. All three documents are in very similar terms. Each of the documents has the heading "Agreement to secure a cash credit *on goods deposited*". In the introductory part it is stated "The People's Bank having at request of Messrs. Muller Wright and de Mel (hereinafter called the borrower) opened or agreed to open in the books of the Bank . . . . a Cash Credit Account to the extent of Rs. . . . with the borrowers . . . . . and *to be secured by goods to be pledged with the Bank*. The material part of clause (1) provides "that the goods described in general terms in the schedule hereto which have been already delivered to and the goods which shall be hereafter delivered to the Bank under this agreement . . . . *are hereby pledged to the Bank* or are to be deemed to be so pledged as security with the Bank for the payment by the borrowers of the balance due to the Bank at any time or ultimately on the closing of the said Cash Credit Account . . . . .". Clause 4 provides "that the borrowers shall with the previous consent of the Bank be at liberty from time to time to withdraw from the Bank any of the goods for the time being pledged to the Bank and forming part of the securities the subject of this agreement provided the advanced value of the said goods is paid into the said Account or goods of similar nature to those mentioned in the schedule hereto or any of the same or at least equal value are substituted for the goods so withdrawn . . . . . ". Clause 18 states that "the Bank shall not be in any way liable or responsible for any damage or depreciation the goods for the time being pledged to the Bank and forming part of the security the subject of this agreement . . . . . may suffer or sustain on any account whatsoever *while same are in possession of the Bank* during the continuance of this agreement or thereafter . . . . . ". At the end of each agreement there is a schedule of securities.

P 24 is the application made by the defendants to the Bank for the loan which was subsequently granted on P 23. The opening paragraph in P 24 reads thus :–

> "We shall be grateful if you would grant us further over-draft facilities of a sum of Rs. 3 Lakhs *on the securities of the produce lying in our stores*".

P 26 is the application made by the defendants for the loan which was thereafter granted on P 25. Once again the opening paragraph is significant, "We would be grateful if you would grant us over-draft facilities for a sum of Rs. 10 Lakhs in the *securities of produce lying in our stores*. The produce in question is mainly tea and rubber. We have in our stores at any one time produce to the value of approximately two million rupees. The value of the immovable security and the value of goods in our stores at any one time making a total far in excess of the present facilities, viz., *pledge loan of Rs. 275,000 on stocks under the Bank's physical control* . . . . " Another letter in almost the same terms as P 26 is the document D 27. Both in P 26 and in D 27 the transaction in P 23 is referred to as "*a pledge loan* of Rs. 275,000 on stocks under *Bank's physical control*" and the request is for additional credit facilities "on security of goods lying in the stores". By P 22 dated 22nd July, 1965, the defendants sought further credit facilities in a sum of Rs. 250,000. In P 22 the defendants have referred to the credit facilities in a sum of Rs. 475,000 granted on P 23 and P 25 " as *pledge loan* against the produce of the stores". It is significant that the defendants in their correspondence have used such expressions as "on the security of the produce lying in our stores" and "pledge loans against produce in stores". Moreover, none of the signatories to these agreements have chosen to give evidence and contradict the plain meaning of the words used in the agreements and the correspondence. The finding of the District Judge that when the defendants signed P 23, P 25 and P 31, they knew they were signing documents for the purpose of securing a cash credit on the security of the produce in their stores, is clearly supported not only by the express terms in the agreements themselves but also by the correspondence with the Bank. The expression "pledge loan" could refer only to the loan granted on the security of the goods in the stores. I therefore find myself unable to accept the first submission made by Mr. Sethukavalar.

The next submission of Mr. Sethukavalar was that no valid pledge of the produce in the stores of the defendants was created by P 23, P 25 and P 31 inasmuch as –

(i) the defendants had no authority from their clients, the producers of the goods, to pledge the goods to the Bank ;

(ii) there was no delivery of the pledged goods to the Bank as required by section 17 (*a*) of the Registration of Documents Ordinance (Chap. 117) ;

(iii) that the Bank had no capacity in law to enter into a contract of pledge in respect of tea and rubber for the reason that the Bank did not hold the required dealer's licence in terms of the Tea Control Act and the Rubber Control Act.

The defendants admittedly were not the owners of the goods. Mr. Sethukavālar submitted that the defendants were only brokers and were not mercantile agents and/or agents for sale. They had authority to sell the goods of their clients, but certainly no authority to pledge the goods, for they were never the owners of the goods. Counsel urged that the defendants were not authorised to pledge the goods belonging to their clients in order to secure loans taken from the Bank to run the defendants' own business. As brokers they merely carried on business on the authority of the licences issued to them under the Auctioneers and Brokers Ordinance (Chap. 109). Their right to carry on business was derived from these licences and they had neither express nor implied authority to pledge goods belonging to their clients. Mr. Sethukavalar emphasised the fact that there is no evidence to show that the defendants pledge goods in the ordinary and customary course of their business. Counsel therefore maintained that the District Judge was in error when he answered issues 1 to 5 in the plaintiff's favour, for the defendants were neither mercantile agents nor agents for sale.

On a consideration of the submissions made by Mr. Sethukavalar, it would appear that the question of an agent's authority to bind his principal arises for consideration. The law relating to principal and agent governs the question whether the defendants had the authority to pledge goods of their clients. The provisions of the Civil Law Ordinance (Chap. 79) would therefore be very relevant. The material part of section 3 of that Ordinance reads thus :

"In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of . . . . . principals and agents. . . . . the law to be administered shall be same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted. . . . . "

Having regard to the wide language used, namely "the law to be administered shall be the same as would be administered in England in the like case, in the corresponding period, if such question or issue

had arisen or had to be decided in England", it is not only the English Common Law but also the statute law of England that is made applicable. As observed by Dalton, J. in *Usman v. Rahim* (1) :

> "Ordinance No. 5 of 1852 directs that in maritime matters the law to be administered in Ceylon shall be the same as that administered in England 'in the like case at the corresponding period'. . . . . Ordinance No. 22 of 1866 provides that in certain commercial matters set out the law to be administered shall be same as would be administered in England 'at the corresponding period' if the question or issue arising had arisen or had to be decided in England. . . . . All these cases show the Legislature has provided in express terms for the application in Ceylon of English Law that may only come to be enacted in England after the local enactment was passed."

Thus what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute.

Mr. H. L. de Silva, on behalf of the plaintiff-bank, contended that the defendants were "mercantile agents" within the meaning of the Factors Act of England (52 and 53 Vic 45) and therefore had the authority to pledge the goods of their clients. Thus it is necessary to consider the provisions of the Factors Act of 1989 :

"(1) For the purposes of this Act–

(1) the expression 'mercantile agents' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods ;

(2) a person shall be deemed to be in possession of goods or of the documents of title to the goods, where the goods or the documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf. . . . .

(5) The expression pledge shall include any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability."

It seems to me that the defendants fall within the definition in section 1 inasmuch as in the customary course of their business they have the authority to sell the goods. As regards section 1 (2) it is not in dispute that the defendants were in possession of the goods.

The other sections of the Factors Act which are relevant are sections 2 (1) and 2 (4).

"2 (1) Where a mercantile agent is, with the consent of the owner, in possession of goods. . . . . any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not the authority to make the same.

2 (4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary."

It is to be noted that section 2 (1) contains a deeming provision – "pledge. . . . . made by him when acting in the ordinary course of business of a mercantile agent shall. . . . . be as valid as if he were expressly authorised by the owner of the goods. . . . . ". The evidence clearly shows that the defendants were in possession of the goods with the consent of the owner. Witness Samaranayake called by the defendants spoke to the need for credit facilities from the Bank :

"Q. Why does your firm require credit facilities from the Bank ?

A. To give advances to the clients.

Q. It is the practice for all broker firms to give advances to their clients against the produce which the clients entrust to the firm to sell ?

A. Yes, and the loans as well.

Q. You are aware that other firms also give advances and loans to their clients ?

A. Yes.

Q. Does your firm give loans and advances to your clients ?

A. Yes.

Q. That is to ensure that they will sell the produce to you ?

A. Yes.

Q. That is the practice that has been prevailing among brokers as long as you know ?

A. Yes.

Q. Do you say that every cent that had been borrowed from the Bank was utilised for the purpose of making advances to your customers ?

A. Yes."

Diandas, the Accountant, who examined the books was questioned thus :–

"Q. The business of the defendants is entirely dependant on the credit facilities available to them from the Bank ?

A. Yes, during this period it appears to be so."

Thus the evidence reveals that the defendants needed the loans from the Bank to make advances to their clients – a normal incident of the business of a broker. In P 36 dated 17.1.1968 the defendants have stated that they "advance money on tea as well as on stocks of rubber and all other produce received by them." Again, the defendants in P 34 dated 12th September, 1966 have stated that they "have large stocks of tea in their stores and for every pound of tea we have advanced money. In some cases our advances have been at a low rate of 25 cents per pound, since our clients are unable to carry on unless we help them with these advances". In P 26 of 28th April, 1964 the defendants have stated that the reason for their asking an extension of credit facilities is that their firm handles mostly bought leaf factory teas and that their clients "are mostly of the small producer class who are in need of regular advances against the produce sent to our stores."

On a consideration of the provisions of sections 1 (1), 1 (2), 1 (5) and 2 (1) of the Factors Act, the oral and documentary evidence, I am of the view that the defendants had the requisite legal capacity and authority to enter into the agreements P 23, P 25 and P 31. The finding of the District Judge that "the plaintiff had in entering into these transactions acted bona fide and on the basis that the defendants did have authority to pledge the goods of their clients" is amply supported by the evidence. I might add that the correctness of the statement in the judgment that "the Factors Consolidated Act of 1889 is part of our law" was not challenged by Mr. Sethukavalar.

Mr. Sethukavalar further contended that the only authority the defendant had was the authority conferred on them by the licences issued under the Auctioneers and Brokers Ordinance (Chap. 109) and therefore they had no authority to pledge goods which do not belong to them. But on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute as submitted by Mr. de Silva.

I now turn to the question whether there was delivery of the pledged goods to the Bank as required by the provisions of section 17 of the Registration of Documents Ordinance. At one stage of the argument Mr. H. L. de Silva strongly urged that "delivery" of the pledged goods was not essential to constitute a valid pledge as between the debtor (defendants) and the creditor (the Bank). The submission was that the agreement between the parties is sufficient without "delivery" of the goods to the Bank and the question of a valid delivery would have arisen only if the Bank sought to exercise its statutory right to sell the goods without recourse to court under the provisions of the Mortgage Act. Mr. de Silva referred us to the following passage in Mortgage and Pledge in South Africa by Wille, 1920 Ed. page 95 :

> "As between the parties, a movable article may be pledged by mere agreement without delivery of the articles or any other formality and the pledge will be valid to this extent that it is binding on the debtor".

However, on his attention being drawn by us to the provisions of section 17 of the Registration of Documents Ordinance Mr. de Silva conceded that delivery of the goods is essential to constitute a valid pledge under our law since it is common ground that P 23, P 25 and P 31 have not been registered in terms of the Ordinance. The true position under our law therefore would be that although P 23, P 25 and P 31 show that there was an agreement to create a pledge, this alone will not suffice to create a valid pledge, unless the agreement is accompanied by the delivery of the goods as well. Admittedly the Bank locked up the stores on 20th March, 1968 and denied the defendants access to the goods in the stores. The Bank could have lawfully acted in this way only if there was delivery, actual or constructive, of the goods themselves to the Bank.

The crucial question then is whether there was "delivery" of the produce in the stores to the Bank. The goods in question were placed in the stores marked "A" and "B" in plan P 27. Mr. Sethukavalar strongly contended that the evidence in the case was totally insufficient to establish actual or constructive delivery of the goods in the stores to the Bank. Counsel submitted that the only evidence relied on by the plaintiff was the fact that a padlock was placed by the Bank on the door on each of the stores "A" and "B" and the boards with the words "People's Bank stores" were put up inside the stores. On the other hand, counsel urged that it was the defendants who had taken on lease the premises in which the goods were stored ; that the keys of the padlock of the main gate which provided access to the premises were with the defendants ; that the defendants had their own padlock on stores "A" and "B" ; that it was the defendants' store-keepers and clerks who maintained a record of the inflow and outflow of goods ; that it was the defendants' watcher who looked after the premises. In short counsel maintained that the Bank never had exclusive possession of the goods and that the plaintiff's case at its best was that the Bank had "some degree of control over some of the goods" (to use counsel's own words). Mr. Mark Fernando for the defendants-appellants stressed that section 17 of the Registration of Documents Ordinance requires that the Bank must establish actual physical custody of the goods and the evidence at most established "joint possession" which is in law totally insufficient.

It seems to me that on the question of the degree of control exercised by the Bank over the produce in the stores A and B, the correspondence is revealing. The defendants in their letter to the Bank

dated 28.4.64 (P26) referred to the loan obtained on P23 as a "pledge loan of Rs. 275,000 on the stocks under the Bank's physical control" In P28 of 22.12.65 addressed by the Bank to the defendants the security for the pledge loan is referred to as "goods under Bank's control". The defendants in their letter of 1.2.68 (P40) addressed to the Bank refer to the daily stocks in the stores being "from the inception under your control". Since January 1968 the Bank had doubts as to whether the stocks in stores A and B were sufficient to cover the loans and also complained that some of the produce covered by the pledge was not stored in stores A and B. The Bank therefore wrote P35 of 10.1.68 and in the course of that letter referred to stores A and B as "stores under our control" and also as "the Bank's stores". It is significant that in P36 dated 17.1.68 which is a reply to P35 the defendants did not dispute the assertion of the Bank that stores A and B are the Bank's stores. On the other hand in P36 the defendants state :

> "As mentioned in paragraph 4 of the letter under reference total stock as at date (10.1.68) was 550,000 lbs. approximately *under your direct control* . . . . . We have already explained in earlier correspondence that we not only advance money on tea but do so also on stocks of rubber and all other produce too. We would earnestly appeal to you to consider *taking even the keys of the entire stores, so that all our produce will be in the control of the Bank*"

The reference to the "entire stores" would be to stores C and D since A and B were already in the control of the Bank. The point to be noted is that the defendants understood and acted on the basis that the handing over of the keys to the Bank meant the giving of control to the Bank.

The penultimate paragraph of P37 of 27.168 addressed to the defendants by the Bank reads thus :

> "Kindly note that we are issuing instructions to our representative not to release any teas without our prior permission with effect from 3rd February 1968. Thereafter, releases will be permitted by us only of such stocks as may be in excess of our security requirements."

The evidence of Goonetilleke, the Assistant General Manager of the Bank is that the defendants at no time questioned the right asserted by

the Bank not to release the tea. The reply to P 37 is by P 40 dated 1.2.68 which contains significant admissions :

> we have now taken adequate steps to keep within your requirements. We are deeply concerned at your penultimate paragraph of the letter under acknowledgement and in this connection we have to most respectfully ask for more time to enable us to rectify the errors caused by us unknowingly . . . . . In conclusion, as stated in our letter of the 17th ultimo, we once again appeal to you to kindly consider *taking over the keys of the entire stores so that all our produce will be under your control* . . .

In P43 of 11.2.68 sent by the defendants to the Bank there is an admission that the Bank had the right to stop issues and receipts of goods into the stores – vide paragraph 1. In paragraph 4 of the same letter the loan is described as a "pledge loan". As rightly observed by the trial Judge, the claim that the Bank did not have sole control but only joint control along with the defendants was made for the first time only after the closure of the stores by the Bank.

Wille in Mortage and Pledge in South Africa (1920 Ed.) page 99 discusses the nature of "delivery" required to constitute a valid pledge :

> "The delivery that is necessary to perfect a pledge is the placing of another person in legal possession of the thing so that he may deal with it as his own ; by possession is meant, not actual bodily contact with the thing, but the physical power of dealing with it immediately and of excluding any foreign agency over it. (Savigay, Possession, p. 142-148). In other words, delivery is the ceding or giving to another the power over a thing in such a way that the physical control thereof is united with the legal right of disposing of it. Delivery takes either of two main forms :
>
> (1) real delivery, where the natural possession is handed over, or
>
> (2) constructive delivery, where a handing over, which does not actually take place, is understood to have been effected (Voet, 41 : 1 : 34)."

The case for the Bank was that there has been constructive delivery of the goods. On a close analysis of the evidence, the District Judge found that "there had been no delivery of possession of the goods pledged at or about the time the pledge was created as the plaintiff allowed the defendants to bring in and take out goods from stores A

and B without placing any restrictions on them." However, having regard to the conduct of the parties in particular as evidenced by the documents P35, P36, P37, P39, P40, P43, P44, P45 and P47 and the testimony of the Bank's witnesses Goonetilleke and Saheed, the District Judge arrived at the conclusion that as from 10.1.68 the plaintiff "not only had paramount control over the right of entry and egress into stores A and B, but also exercised full control over the contents of these rooms. This control the plaintiff exercised up to the date of the closure of the stores. These facts to my mind indicate that as from 10.1.68 there was 'delivery' of possession to the plaintiff of the goods pledged with them by the defendants". These findings were assailed by Mr. Sethukavalar as being unwarranted on the evidence but in my view they are fair and reasonable findings rooted firmly on the contemporary documents and the oral testimony of the witnesses for the Bank. For cogent reasons given by the trial Judge, the evidence of the principal witness for the defence, Samaranayake, has been rejected.

The question now arises whether delivery of possession of the goods must be at the same time as the advances of the money and the agreement to pledge or whether it would suffice if delivery of the goods takes place at a subsequent point of time. It was contended for the defendants that if the delivery of the goods is not contemporaneous with the agreement there can be no valid pledge. However, it is very important to note that each of the agreements specifically provided for the removal of the goods from the stores and the substitution of other goods in their place. Moreover, the very nature of the business carried on by the defendants would not permit the goods which were in the stores on the date of the agreements to remain in the stores throughout the period the agreements were in force. The Bank's rights, as pledges, attached to the particular goods in the stores on given date and time if such goods were in the Bank's possession. The correspondence show that from January 1968 the steps taken by the Bank were directed to the implementation of clause 4 of the agreements. In my view, the dicta of Kekewich, J. in *Hilton v. Tucker*, (2) support the contention of the Bank that delivery of the goods need not be contemporaneous with the agreement to pledge. Said Kekewich, J. –

> "I have pointed out that until delivery is made there is nothing but a contract and the contract does not pass the property without such incidents as I have already mentioned. But I am not aware of any

authority which goes so far as to say that the delivery must be contemporaneous so long as it is in honest fulfilment of the contract. . . . . I am at a loss to understand why delivery should be actually contemporaneous with the advance. . . . . My view of the law certainly is that if money is advanced, as here, on a contract that goods shall be delivered and that then those goods are delivered in pursuance of that contract, the same legal results follow as if the money was handed over with one hand and the goods received with the other".

No decision to the contrary was cited before us.

It was only in March 1968 that the Bank sought to exercise its rights as pledgee by closing the stores. The evidence establishes the fact that at that point of time there was actual delivery of the goods into the possession and custody of the Bank. The goods being a moving stock, the absence of exclusive possession prior to January 1968 is not relevant. The District Judge has also accepted the position of the Bank that there were 2 boards inside stores A and B which bore the name "People's Bank Stores". This is relevant on the requirement of "ostensible possession". I accordingly hold that the contention of the defendants that there was no valid delivery of the goods in the stores A and B to the Bank is not well founded.

Finally, Mr. Sethukavalar submitted that inasmuch as the Bank did not hold a dealer's licence under the Tea Control Act No. 51 of 1957 and the Rubber Control Act (Chap. 436) the Bank could not have been in lawful possession of the tea and rubber alleged to have been pledged. The Bank's possession of the goods being unlawful, it was argued that the contract of pledge was tainted with illegality. Although no such plea appears to have been taken in the answer and no issue raised on that basis, yet I shall proceed to consider this submission since it raises a pure question of law.

Section 15 (1) of the Tea Control Act provides that no person other than a licensed dealer in made tea or a registered manufacturer or a person acting on behalf of such dealer or manufacturer shall have in his possession tea in excess of the prescribed quantity. A similar provision is found in section 10 of the Rubber Control Act in respect of rubber. On a reading of all the provisions contained in Part IV of the Tea Control Act and Part III of the Rubber Control Act it would appear, as submitted by Mr. H. L. de Silva, that these provisions were intended to regulate the purchase and sale of tea and rubber. In considering the question of the illegality of the contract of pledge it is

relevant to have regard to the object and scope of the Act. It is possession which is incidental to contracts of sale and purchase which falls within the prohibition contained in the statute. In the instant case, possession of tea and rubber by the Bank was incidental to the contract of pledge which was to secure the loan to the defendants. The mere fact that the goods pledged are tea and rubber cannot taint the contract of pledge with illegality. The Bank never held itself out to be a dealer in tea and rubber. It is possession *qua dealer* in tea or rubber that is prohibited under the statute.

In support of his submission that the absence of a dealer's licence did not render the contract of pledge illegal, Mr. de Silva cited the leading case of *St. John Shipping Corporation v. Joseph Rank Ltd.* (3) This was a case where the plaintiffs carried a cargo of wheat from America to UK in their ship which, when bunkered with fuel for the voyage, submerged the load line contrary to the provisions of the Merchant Shipping (Safety and Load Line Conventions) Act of 1932. The master was fined £ 1200 for the offence in UK. The defendants to whom the ownership of a portion of the goods had passed withheld part of the freight on the ground that the plaintiffs could not enforce a contract which they had performed in an illegal manner. Devlin, J. rejected that contention, for the illegal loading was merely an incident in the course of performance that did not affect the substance of the contract. In the course of his judgment Devlin, J. stated .

> "Whether it is the terms of the contract or the performance of it that is called in question, the test is just the same : is the contract, as made or as performed, a contract that is prohibited by the statute ? . . . . . the question always is whether the statute meant to prohibit the contract which is sued on . . . . . Counsel for the plaintiffs is right in his submission that the determining factor is the true effect and meaning of the statute . . . . . In the statutes to which the principle has been applied what was prohibited was a contract which had at its centre – indeed often filling the whole space within its circumference – the prohibited act . . . . . "

On a fair reading of the Tea Control Act and the Rubber Control Act, I hold that contracts of pledge in the instant case are not within the ambit of the statutes. The submission that the contracts of pledge are tainted with illegality therefore fails.

In a comprehensive and well-reasoned judgment, the District Judge had found for the plaintiff-Bank on all material issues. We see no reason to disturb the findings of the trial Judge, based as they are on a very careful and proper evaluation of the evidence, both oral and documentary. It is difficult to resist the conclusion that the contemporary documents, while strongly supporting the plaintiff's case, tell heavily against the case for the defendants. We accordingly affirm the judgment and dismiss the appeal with costs.

MOONEMALLE, J. – I agree.

Appeal dismissed.