HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

FIRST APPEAL NO.144/2007

M/s Vijay & Sons, Mungavali

Versus

Shivpuri Guna Kshetriya Gramin Bank & Anr.

Shri D.D.Bansal, learned counsel for the appellant.
Shri D.S.Chauhan, learned counsel for the respondent No.1.
None for the respondent No.2, though served.

FIRST APPEAL NO.444/2006

M/s Saksham Traders & Anr.

Versus

Shivpuri Guna Kshetriya Gramin Bank & Anr.

Shri D.D.Bansal, learned counsel for the appellant.
Shri D.S.Chauhan, learned counsel for the respondent No.1.
None for the respondent No.2, though served.

FIRST APPEAL NO.166/2006

Shivpuri Guna Kshetriya Gramin Bank & Anr.

Versus

M/s Saksham Traders & Anr.

Shri D.S.Chauhan, learned counsel for the appellant.
None for the respondents, though served.

AND

FIRST APPEAL NO.167/2006

Shivpuri Guna Kshetriya Gramin Bank & Anr.

Versus

M/s Vijay & Sons, Mungavali & Ors.

Shri D.S.Chauhan, learned counsel for the appellant.
None for the respondents, though served.

Present : Hon. Mr. Justice Alok Aradhe
Hon. Mr. Justice Vivek Agarwal

J U D G M E N T
(21 .04.2016)

Per Alok Aradhe, J.

In this bunch of appeals, since common question of law and facts arise for consideration, they are heard analogously and are being decided by the common judgment and decree. First Appeal No. 144/2007 as well as First Appeal No. 444/2006 have been filed by defendant No.1 being aggrieved by the judgment and decree passed in Civil Suit No. 3B/2002 and judgment and decree passed in Civil Suit No. 4B/2002 respectively, by which the claim of the plaintiff-Bank has been decreed. First Appeal No. 166/2006 and First Appeal No.167/2006 have been filed by the plaintiff-Bank against the judgment and decree passed in the aforesaid Civil Suits, by which the defendant No.2 has been exonerated from 1+1/5 liability. In order to appreciate the challenge of the parties to the impugned judgments and decrees, relevant facts need mention which are stated infra.

2. The respondent No.1, namely Shivpuri Guna Kshetriya Gramin Bank, is a Bank incorporated under the Kshetriya Bank Adhiniyam, 1976 and has its branch at Mungaoli, District Guna. The plaintiff-Bank filed a suit, namely, Civil Suit No.3-B/2002 for recovery of an amount to the tune of Rs. 4,85,159/- against the defendants inter alia on the ground that defendant No. 1(a) and defendant No. 1(b) submitted an application on 26.11.1998 for sanction of the loan to the tune of Rs. 1,07,000/- and

pledged the receipt No.42505 in respect of food grains stored in the warehouse of defendant No.2. The defendant No.1 also agreed that in case of non-payment of the loan, the Bank shall have the authority to sell the food grains stored in the warehouse and to recover the amount of loan. The in-charge of the godown of defendant No.2, namely Mr. Ram Govind Sharma also endorsed the lien notes on the receipt. It was also averred that respondent No.1 again applied for a loan of Rs.99,000/- on 26.11.1998 and executed necessary documents and pledged the receipt bearing No. 43531 in respect of food grains stored in the warehouse of defendant No.2 and empowered the Bank that in case of default by the defendant No.1, in respect of repayment of the amount of loan, the Bank can sell the food grains stored in the warehouse and can recover the same. It was further pleaded that defendant No.1 again on 30.3.1999 applied for a loan of Rs. 1,35,000/- and executed necessary documents and pledged the receipt No.42588 in respect of the food grains which were stored in the warehouse of defendant No.2. The godown in-charge endorsed the lien note on the receipt and the Bank was given the authority to sell the food grains in case of default in repayment of loan by defendant No.1. It is the case of the plaintiff that the aforesaid amounts by way of was extended to defendant No.1 by way of cash credit facility subject to payment of interest at the rate of 20% per annum with quarterly rests.

3. The defendant No.1 did not repay the aforesaid amount within the prescribed time and, therefore, a notice dated 24.2.2000 was sent to the defendant to repay the amount of loan. On receipt of the notice, the defendant No.1 made part payment of the amount of loan

but could not repay the entire amount. Accordingly, the civil suit No. 3B/2002 seeking recovery of amount to the tune of Rs.4,85,159/- along with interest was filed. Similarly, the plaintiff-Bank on the same set of averments filed another suit, namely Civil Suit No. 4B/2002 for recovery of the amount of Rs.6,82,668/- along with interest.

4. The defendant No.1 filed written statement in Civil Suit No. 3B/02 in which inter alia it was admitted that the sum of Rs.3,44,383/- was given to him by way of cash credit facility by the Bank. However, it was denied that he had executed any agreement in respect of rate of interest. It was also pleaded that the defendant No.1 had pledged the receipt of food grains stored in the warehouse of defendant No.2. It was also pleaded that the defendant No.1 had informed in writing to the Bank that in case the amount of loan is not repaid, the Bank can sell the food grains stored in the warehouse of defendant No.2. It was further pleaded that since financial condition of defendant No.1 was not good, therefore, he could not repay the amount of loan and despite being aware about the financial condition of defendant No.1, the plaintiff-Bank did not take any steps to sell the food grains. Therefore, the defendant No.1 is not liable to pay interest from 28.2.2000. It was also averred that the market value of the food grains stored in the warehouse of defendant No.2 was 6,45,405/-, whereas the amount of loan was only Rs.3,44,383/-, therefore, the same could have been easily adjusted. It was further pleaded that the liability, if any, is of defendant No.2 as well.

5. The defendant No.2 also filed the written statement in which the claim of the plaintiff was denied. It was also

denied that defendant No.2 had pledged the receipt of warehouse with the plaintiff-Bank. It was pleaded that the in-charge of the godown, namely, Mr. Govind Sharma had prepared forged receipts in connivance with the defendant No.1. It was averred that the in-charge of the godown was not authorized to execute the lien note. It was further pleaded that on physical verification of the godown, it was found that the forged receipts were prepared without keeping the material in the warehouse. Therefore, the First Information Report was lodged in Police Station, Mungaoli and thereupon offences under Sections 467,468 and 420 of the Indian Penal Code were registered. Similar defence was taken by defendants No. 1 & 2 in Civil Suit No. 4B/02 as well.

6. The trial Court vide judgment and decree dated 15.12.2005 inter alia held that defendant No.1 had availed of the cash credit facilities from plaintiff-Bank and had pledged the receipts, under Section 176 of the Contract Act, 1872 the plaintiff-Bank had the authority to sue for the debt, while retaining the pawn as collateral security. On the basis of pro-notes executed by defendant No.1 it was held that rate of interest was 20% with quarterly rests. It was further held that Bank merely sent notices to defendant No.2 and did not send the receipts to defendant No.2, therefore in view of Section 17 of Madhya Pradesh Agriculture Warehouse Act, 1947, the defendant No.2 could not have handed over the food grains to the plaintiff-bank . It was also held that the Bank did not physically verify the fact whether food grains were stored with defendant No.2 and on mere completion of formalities on paper, loan was sanctioned to defendant No.1. On the basis of evidence of Farhat Ali (DW.2), it was held that Ram Govind Sharma, the

erstwhile godown in-charge prepared the forged receipts and criminal case is pending against him for offences under Sections 467, 468 and 420 of the Indian Penal Code and, therefore, defendant No.2 is not liable to make payment of the decretal amount. The trial Court also recorded a finding that though plaintiff-Bank is entitled to receive food grains but no food grains are stored in the warehouse of defendant No.2. Accordingly, the suits, namely, Civil Suits Number 3B/2002 and 4B/2002 were decreed along with interest at the rate for a sum of Rs.4,85,169/- and Rs.6,82,668/- respectively along with 20% interest with quarterly rest from the date of institution of suits till realization of the amount in question.

7. Learned counsel for the appellant in First Appeal No. 144/2007 and First Appeal No.444/2006 has invited the attention of this Court to Section 176 of the Contract Act (hereinafter referred to as 'the Act') and has submitted that the defendant No.1 had authorised the bank to sell the food grains pledged with it, in the case of default being made by the defendant No.1 and, therefore, the bank could have filed the suit for recovery of the amount in question, only after it had sold the food grains. It is also argued that there is no averment in the plaint regarding cheating by the defendant No.2 and no counter claim has been filed by the defendant No.2. Alternatively, it was submitted that the suit, should have been decreed against the defendant No.2 as well, and

both the defendants should have been held jointly and severally liable for payment of the amount. It was submitted that there was no contract with regard to payment of interest and, therefore, the grant of interest by the trial court at the rate of 20% along with quarterly rest is arbitrary and is excessive. It is further submitted that the suit filed by the plaintiff is not maintainable and no amount of evidence can be looked into in the absence of pleadings. In support of aforesaid submissions, learned counsel for the appellant has placed reliance on the decisions of Supreme Court in **Lallan Prasad v. Rahmat Ali and another (AIR 1967 SC 1322); Hasmat Rai and another vs. Raghunath Prasad (AIR 1981 SC 1711); Central Bank of India vs. M/s Grains and Gunny Agencies and others (1988 JLJ 618); Punjab and Sind Bank Gwalior vs. Nagrath Industries (Pvt) Ltd. and others (1995 MPLJ 1004).**

8. On the other hand, learned counsel for the plaintiff-bank in First Appeal No. 166/2006 and First Appeal No. 167/2006 has adopted the submissions made by learned counsel for the appellant in First Appeal No.144/2007 and First Appeal No.444/2006 and has submitted that the trial Court has grossly erred in exonerating the defendant No.2 from 1+1/5 liability to make payment of

the decretal amount and defendant No.2 should have been held jointly and severally liable along with defendant No.1 to make payment of the loan. It is further submitted that after filing of the written statement by the defendant No.2, it came to the knowledge of the plaintiff that the food grains are not in existence in the warehouse of defendant No.2. It was also pleaded that the food grains which were stored in the godown were lateron removed at the time of filing of the suit and, therefore, the bank was left with no option but to file the suit for recovery of the amount in question. While referring to Section 176 of the Act, it is contended that the plaintiff has two options, namely, to file a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security or to sell the goods pledged by giving the pawnor reasonable notice of sale. In support of aforesaid submissions, reference has been made to decisions in the cases of **Kamla Prasad Jadawal vs. Punjab National Bank, New Delhi & others (AIR 1992 MP 45); State Bank of India vs. Smt. Neela Ashok Naik and another (AIR 2000 BOMBAY 151); Bank of Maharashtra vs. M/s Racmann Auto (P) Ltd. (AIR 1991 DELHI 278).**

9. We have considered the submissions made by

learned counsel for parties. At this stage, we may advert to the pleadings of the parties and the evidence led by them. The plaintiff in the plaints filed in Civil Suit No.3B/2002 and Civil Suit No.4B/2002, in unequivocal terms has admitted that amount of loan was sanctioned in favour of the defendant No.1 after pledging the warehouse receipts in respect of the food grains kept in the warehouse of defendant No.2. This fact is evident from the averments made in paragraphs 2,3,6,7 and 10 to 21 and 26 of the plaint in Civil Suit No.3B/2002. Similar averments have been made in paras 2,4,6,7,8 and 10 to 21 in Civil Suit No. 4B/2002.

10. Vishnu Kumar Parashar, Branch Manager of the bank, who has been examined as PW.1 in Civil Suit No.3B/2002, in paragraph 32 of the cross- examination, has admitted that the fact that the food grains have been stored in the godown was verified by the Incharge of the godown and the plaintiff-bank had got an authority letter executed from the defendant No.1 that in case of default, the plaintiff-bank will have the authority to sell the food grains. Similarly, in paragraph 34 of the cross-examination, the aforesaid witness has admitted that the food grains stored in the godown were not sold. In paragraph 36 of the cross-examination, it has been admitted by the aforesaid witness that in view

of receipts, namely, Exhibits P/3, P/14 and P/25, the loan has been advanced to defendant No.1, and the document of title in respect of food grains stored in the warehouse were with the plaintiff-bank. In paragraph 38 of his cross-examination, it has further been admitted that he along with other officers had visited godown and godown incharge had renewed the receipts pledged in favour of the bank. Another witness, namely, Anand Kumar, Branch Manager of the Bank, has been examined as PW.2 in Civil Suit No.3B/2002, who in paragraphs 23 and 24 of his cross-examination has admitted that the food grains of which reference was made in the receipts, namely, Exhibits P/3, P/14 and P/25, were kept in the godown of defendant No.2 and the receipts were pledged with the bank. It has further been admitted that bank was given the authority to sell the food grains in case of default being made by the defendant No.1 in repayment of the amount of loan.

11. Anil Kumar, who has been examined as DW.1 in Civil Suit No. 3B/2002 has admitted in his examination in chief that on pledging the receipts of food grains stored in the warehouse of defendant No.2, he had obtained the loan from the plaintiff-bank, and subsequently the receipts were renewed by Godown Incharge and that he had made request to the bank to sell the food grains

stored in the warehouse of defendant No.2. In para 31 of his cross-examination aforesaid witness has not denied signature of Sunil Kumar on Ex.P/35. Sayyed Farhat Ali (DW.2) in Civil Suit No.3B/2002 in paragraph 5 of his cross-examination has admitted that Ramgovind Sharma was Incharge of the godown. In paragraph 14 of his cross-examination, he has stated that he has no knowledge whether the officers of the bank have physically verified the stock kept in the ware house.

12. In Civil Suit No. 4B/2002, Vishnu Kumar, PW.1, in para 33 of his cross-examination has admitted that prior to sanction of loan, Exhibits P/7, P/14, P/23 and P/24 were verified and signatures of godown incharge were verified by higher officers of the Bank. It is further admitted by him that the aforesaid receipts were renewed. In para 34 of his cross-examination, it is admitted by him that food grains pledged vide receipts in question were stored in the godown of defendant No.2 and the plaintiff-bank had authority to sell the same. It is also admitted by him that defendant No.1 had given notice that since his financial condition is not good, the food grains should be auctioned. In para 35 of his cross-examination, it is admitted by him that godown incharge while renewing the receipts had certified the fact that food grains are properly and safely stored. Anand Kumar

(PW.2) has stated in para 24 of his cross-examination that Bank had the authority to sell the food grains. Rakesh Kumar, who has been examined as DW. 1 in Civil Suit Number 4-B/ 2002, has admitted in his examination in chief that by pledging the receipts in respect of food grains in the warehouse of defendant No.2, he had obtained loan from the plaintiff-bank and the godown receipts were renewed by godown incharge and that he had made request to the bank to sell the food grains stored in the warehouse of plaintiff-bank. In para 19 of his cross-examination, aforesaid witness has admitted his signature on Exhibits P/23 to P/29, Exhibits P/36 to P/42 and Exhibit P/35. DW.2 Farhat Ali has stated in his evidence that Ram Govind Sharma was Incharge of the godown at the relevant time and documents, i.e., receipts Exhibits P/3, P/23 and P/24 bear his signature and the person in whose favour receipts are issued is entitled to lift the food grains from warehouse of defendant No.2.

13. Section 176 of the Contract Act, which is relevant for the purpose of controversy involved in these appeals, is reproduced below for the facility of reference:-

> *"176. Pawnee's right where pawnor makes default.-- If the pawnor makes default in payment of the debt, or performance; at the stipulated time of the promise, in*

> *respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.*
>
> *If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."*

From perusal of Section 176 of the Contract Act, it is evident that a pawnee has three rights in cases of default by a pawnor, namely, he may bring a suit upon the debt, and he may retain the pawn as a collateral security, or he may sell it giving the pawnor reasonable notice of sale. The pawnee cannot have payment of debt and cannot retain the goods also.

14. At this stage, it is apposite to notice the well settled legal principles with regard to pawnee's right where pawnor makes default. The Supreme Court in the case of **Lallan Prasad (supra)**, while dealing with the question whether appellant in that case was entitled to any relief, when his case was that respondent never delivered to him the goods and said agreement never ripened into a pledge in para 17 held, the relevant extract of which reads as under:-

> *"There is no difference between the common law of England and the law with regard to pledge as codified in Ss 171 to 176 of the Contract Act. Under S. 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise,*

> *Section 173, entitles a pawnee to retain the goods pledged as security for payment of a debt and under section 175 he is entitled to receive from the pawner 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 pawner 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 pawner. Once the pawnee by virtue of his right under S. 176 sells the goods the right of the pawner 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 pawner. So long, however, the sale does not take place the pawner 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 pawner 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."*

Thus, it is evident that 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 debt. The right to sue for debt assumes that he is in position to redeliver the goods on payment of the debt and, therefore, if has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If

the debt is paid, the goods have to be delivered. The aforesaid decision was referred to with the approval by the Supreme Court in the case of **Balkrishan Gupta and others vs. Swadeshi Polytex Ltd. and another (AIR 1985 SC 520)** and in the case of **Central Bank of India vs. Siriguppa Sugars and Chemicals Ltd. and others (AIR 2007 SC 2804)**. The Division Bench of this Court in **Central Bank of India (supra)** has held that under an agreement to pledge a party can contract out of its liability in respect of acts of God but not from the liability arising out of negligence of its servants. In the case of **Punjab and Sind Bank Gwalior (supra),** the debtor had handed over possession of factory premises to the bank, as it was unable to pay its due. The trial court decreed the suit, however the trial court did not grant interest in respect of the property which was handed over to the bank. The bank, therefore, filed the suit. In this context, an observation was made in concluding paragraph that since goods were kept at the disposal of the bank, it should have proceeded to sell the same and realise the proceeds.

15. The Supreme Court in the case of **Infrastructure Leasing and Financial Services Ltd. Vs. B.P.L. Ltd., (2015)**

3 SCC 363, has held that as per Section 176 of the Act when the pawnor makes default in making the payment, the pawnee may bring a suit upon the debt or promise and retain the good(s) pledged as a collateral security. A pawnee has both collateral and concurrent rights and can institute a suit for the purpose of realization of the said debt or promise while retaining the goods as a collateral security. Section 176 also makes it clear that it is the discretion of the pawnee and it gives an option to him and merely because pawnee has filed a suit for recovery, that would not affect or destroy the charge or the right of the pawnee in respect of the pledged goods or the collateral security. Thus, it is within the domain of discretion of pawneee to file a suit for recovery of a debt and yet retain the collateral security or pledged goods.

16. In the backdrop of aforesaid well settled legal position, the issues which arise for consideration in these appeals are twofold, namely, whether in view of law laid down by the Supreme Court in the case of **Lallan Prasad (supra),** the plaintiff could have filed the suit while retaining the pawn and whether the defendant Number 2 can also be held jointly and severally liable to repay the decretal amount.

17. From perusal of plaint in Civil Suit No. 3-B/2002 it is evident that on 26.11.1998 and 30.3.1999 sums of Rs.

1,07,000/-, Rs.99,000/- and Rs.1,35,000/- with 20% quarterly rest were sanctioned to defendant No.1. In para 22 of the plaint, it is averred that on 24.2.2000 accounts were closed and notice dated 24.2.2000 was sent and the defendant No.1 executed the receipt (Exhibit P-35). The DW.1, namely, Anil Kumar in para 31 of his cross-examination has not denied the signature of Sunil Kumar in Exhibit P-35. In the aforesaid document, defendant No.1 has acknowledged the liability of Rs.3,44,383/-. In para 26 of the plaint, it is stated that defendant No.1, in reply to notice, acknowledged the liability and asked the plaintiff-bank to take delivery of food grains from defendant No.2. It is pertinent to mention that it is not the case set up in the plaint that plaintiff bank approached defendant No.2 for obtaining delivery of food grains and no suggestion has been made in cross-examination to defendant No.2 that plaintiff bank approached the defendant No.2 to take delivery of food grains and same was denied. The plaintiff's witnesses have also stated that foodgrains were stored in the godown of defendant No.2.

18. Similarly from perusal of plaint in Civil Suit No. 4-B/2002, it is evident that on 12.11.1998, 26.11.1998 and 30.3.1999 sums of Rs.93,000/-, Rs.1,28,000/- and Rs. 1,68,000/- along with 20% quarterly rests were

sanctioned to defendant No.1. In para 22 of the plaint, it is averred that defendant No.1 by executing receipt (Exhibit P-36) acknowledged the liability to the tune of Rs.4,78,115/- as on 24.2.2000. In para 27 of the plaint, it is averred that in reply to notice while acknowledging liability the defendant No.1 requested the plaintiff bank to sell the food grains. The DW.1, namely, Rakesh Kumar in para 19 of his cross-examination has admitted his signature on Exhibit P-36 and other documents executed in favour of the bank. It is noteworthy that it is not the case of the plaintiff in the plaint that plaintiff bank approached the defendant No.2 for obtaining delivery of food grains and no suggestion has been made in cross-examination to defendant No.2 that plaintiff bank approached the defendant No.2 to take delivery of food grains and same was denied. The plaintiff's witnesses have also stated that goods were stored in the godown of defendant No.2.

19. The details of the receipts, the value of food grains, the date on which amount of loan was transferred in the account of defendants No.1 in Civil Suits No.3-B/2002 and 4-B/2002 are reproduced for the facility of reference in the form of chart :-

Civil Suit No.3-B/2002

Date of Receipt	Value of food grains	Date on which amount of loan was credited to the account of defendant No.1	Principal amount of loan
10/11/98	1,95,000	26.11.1998	1,07,000
23.11.1998	1,80,405	26.11.1998	99,000
30.03.1999	2,70,000	30.3.1999	1,35,000
Total	**6,45,405**		**3,41,000**

Civil Suit No.4-B/2002

Date of Receipt	Value of food grains	Date on which amount of loan was credited to the account of defendant No.1	Principal amount of loan
10.11.1998	1,68,750	12.11.1998	93,000
23.11.1998 23.11.1998	1,80,405 1,80,405	26.11.1998 } 26.11.1998 }	1,98,000
30.03.1999	3,30,500	30.3.1999	1,68,000
Total	**8,60,060**		**4,59,000**

20. From the evidence on record referred to in the preceding paragraphs, following facts are axiomatic :-

(i) The factum of taking of the amount of loan by the defendants No.1 in both the civil suits by pledging the receipts in respect of food grains stored in the warehouse of defendant No.2 is not in dispute.

(ii) Anil Kumar, who has been examined as DW.1 in Civil Suit No.3-B/2002, in para 31 of his cross-examination has not denied the execution of the receipt (Exhibit P-35) and has acknowledged his liability as on 24.2.2000 to pay a sum of Rs.3,44,383/-.

Similarly, Ramesh Kumar, who has been examined as DW.1 in Civil Suit No.4-B/2002 in paragraph 19 of his cross-examination has admitted his signature on Exhibit P-36, and has acknowledged his liability as on 24.2.2000 to pay the amount to the tune of Rs.4,78,115/-.

(iii) From perusal of paragraph 26 of the plaint in Civil Suit No.3-B/2002, it is evident that the defendant No.1 in reply to notice dated 24.2.2000 had asked the plaintiff-bank to take delivery of the food grains from the defendant No.2 and to sell the same. Similarly, in paragraph 27 of the plaint in Civil Suit No.4-B/2002, it is averred by the plaintiff that the defendant No.1 while sending reply to notice dated 24.2.2000 had requested the plaintiff to sell the food grains.

(iv) From close scrutiny of the plaints in Civil Suits No.3-B/2002 and 4-B/2002, it is evident that it is neither the case of the plaintiff-bank that it approached the defendant No.2 for obtaining delivery of food grains nor any suggestion has been made to the witness of the defendant No.2, namely, Farhat Ali that the plaintiff-bank had approached the defendant No.2 to take delivery of the food grains and the same was denied to them.

(v) The plaintiff’s witnesses in both the civil suits, namely, Civil Suit No.3-B/2002 and Civil Suit No.4-B/2002, namely Vishnu

Prasad (PW.1) in paragraphs 32 and 34 of his cross-examination, respectively has admitted that the bank had authority to lift the food grains and to sell the same in view of the receipts Exhibits P/3, P/14, P/25 and Exhibits P/3, P/14, P/23 and P/24, respectively. Similarly, the aforesaid witness in paragraph 35 of the cross-examination recorded in Civil Suit No.3-B/2002 has stated that Godown Incharge had informed him that pesticides were sprinkled on the food grains on 21.9.1999 whereas in Civil Suit No. 4-B/2002 in paragraph 38 of the cross-examination, the aforesaid witness has stated that while renewing the receipts on 21.9.1999 the Godown Incharge had informed him that the food grains are in proper condition.

(vi) Admittedly, when the plaintiff-bank had the authority to sell the pledged food grains, yet on receipt of the reply to the notice dated 24.2.2000, the plaintiff-bank did not take any steps for selling the food grains. Instead of taking action for selling the food grains the plaintiff-bank chose to file Civil Suit No. 3-B/2002 on 24.11.2001 whereas Civil Suit No. 4-B/2002 was filed on 19.11.2001.

21. Thus, even though the plaintiff-bank had the authority to sell the pledged goods, despite receipt of request by the defendant No.1 in reply to the notice dated 24.2.2000, the plaintiff bank did not take any

action to sell the food grains. There is neither any pleading nor any evidence on record to suggest that the plaintiff-bank had approached the defendant No.2 along with the receipts and requested it to deliver the food grains pledged to the plaintiff-bank. In view of the principle ingrained in Section 176 of the Contract Act as interpreted by the Supreme Court in the case of **Lallan Prasad (supra)** and **Infrastructure Leasing (supra),** the bank after filing of the suits for recovery of the debt, though was entitled to retain the goods yet it was bound to return the same on payment of the debt. The right to sue on the debt assumes that the plaintiff-bank was in a position to redeliver the goods on payment of the debt. In the instant case, from the material available on record, it is evident that on the date of filing of the suit the plaintiff-bank was in a position to redeliver the goods. The plaintiff-bank cannot be permitted to recover the debt as well as to retain the pledged goods. The plaintiff bank after recovery of the amount of debt at this point of time is not in a position to deliver the food grains which is a perishable commodity. In peculiar fact situation of the cases in hand if the plaintiff bank is permitted to recover the amount in its entirety, the same is impermissible in law as plaintiff bank is not in a position to deliver the food grains to plaintiff No.1.

Besides that, it would tantamount to putting premium on the default committed by the plaintiff bank as it failed to sell the food grains despite specific requests made by defendants No.1 in both the suits in replies to notices dated 24.2.2000. Therefore, in view of the preceding analysis, the plaintiff bank is entitled to recover the amount of loan which was admittedly sanctioned to the defendants No.1 in both the suits, namely, Civil Suit No.3-B/2002 and Civil Suit No.4-B/2002 along with 20% quarterly rest from the date on which the amount was credited in the account of defendant No.1 till 24.2.2000.

22. The contention raised by learned counsel for the appellant that the suits filed by the plaintiff-bank were not maintainable, as it did not sell the pledged food grains and the suits could have been filed only after the pledged food grains were sold, is misconceived as the same is made on misinterpretation of Section 176 of the Contract Act, as has been held by the Supreme Court in the case of **Lallan Prasad (supra)** and **Infrastructure Leasing and Financial Services Ltd. (supra)**. Similarly, the contention that defendant No.2 ought to have been held jointly and severally liable to make payment of the decretal amount also does not deserve acceptance, in the absence of any material on record that the plaintiff-bank made any attempt to obtain the pledged goods

from the defendant No.2 or had requested it to deliver the same to the plaintiff-bank. The contention that there is no agreement with regard to rate of interest also deserves to be negatived in view of the overwhelming documentary evidence on record, namely, the documents executed by the defendants No.1 in both the suits in favour of the plaintiff-bank while sanctioning the amount of loan which mention the rate of interest.

23. In the peculiar fact situation of the case, as the plaintiff bank failed to sell the food grains which were perishable in nature despite request by the defendant and taking into account the fact that plaintiff-bank is not in a position to deliver the food grains at this point of time, we deem it appropriate to direct that the plaintiff bank shall be entitled to recover the amount of debt along with 20% quarterly rest from the date on which the amount was credited in the accounts of defendants No.1 in both the suits till 24.2.2000 after adjustment of the value of the food grains, which were pledged with the plaintiff-bank as on 24.2.2000, which in Civil Suit No.3-B/2002 is Rs.6,45,405/- whereas the same in Civil Suit No.4-B/2002 is Rs.8,60,060/-. The plaintiff-bank shall adjust the value of the food grains in both the Civil Suits as on 24.2.2000 from the amounts which are due to it on 24.2.2000. The plaintiff-bank shall be entitled to

recover remainder amounts of the adjustment due to it as on 24.2.2000 from the defendants No.1 both the civil suits with 20% quarterly rest till realization of the amount.

24. In the result, First Appeal No.166/2006 and First Appeal No.167/2006 are dismissed whereas the judgments and decrees passed in Civil Suits No.3-B/2002 and 4-B/2002 are modified to the extent mentioned above. In the result, First Appeal No.144/2007 and First Appeal No.444/2006 are disposed of.

(Alok Aradhe)
Judge.

(Vivek Agarwal)
Judge.

(yogesh)