

VIMAL CHANDRA GROVER

A

v.

BANK OF INDIA

APRIL 26, 2000

[S. SAGHIR AHMAD AND D.P. WADHWA, JJ.]

B

Consumer Protection Act, 1986—S. 2(1)(o), 2(1)(g) & 2(2)(d)—Bank—Deficiency in service—Overdraft facility availed by a customer by pledging his shares—Request for selling in a part of shares pledged—Delay on the part of the Bank in disposing the shares—Meanwhile share prices falling down—Customer incurring loss—Claim for compensation—Dismissed on the ground that there was no deficiency in service—Validity of—Held, grant of overdraft facility to a customer by charging interest amounts to ‘service’ by Bank—Delay in disposing the shares resulting in loss to the customer amounts to ‘deficiency’ in service—Customer entitled to claim compensation along with interest—Banking Regulation Act, 1949—S. 6—Indian Contract Act, 1972—Ss. 172 to 177.

C

D

Pleadings—New plea—Raising of—No foundation laid either in the pleadings or in the evidence before the court below—Held, cannot be allowed to be raised.

E

Words & Phrases :

“Service”—Meaning and scope of in the context of S. 2(1)(o) of the Consumer Protection Act, 1986.

“Customer”—Meaning of in the context of S. 2(2)(d) of the Consumer Protection Act, 1986.

F

“Deficiency”—Meaning and scope of in the context of S. 2(1)(g) of the Consumer Protection Act, 1986.

Appellant availed an overdraft facility from the respondent-Bank by pledging his shares. In order to clear his overdraft account, appellant requested the Bank to sell part of his shares. However, the Bank sold the shares after a delay of several months, by which time prices of shares fell down resulting in monetary loss to the appellant. Consequently, appellant filed a claim before the National Consumer Disputes Redressal Commis-

G

H

A sion, and it was dismissed on the ground that there was no deficiency in service in disposing the shares. Hence the present appeal.

Allowing the appeal, the Court

B HELD : 1.1. National Consumer Disputes Redressal Commission was not justified in holding that there was no negligence on the part of the Bank or that the Bank was not bound to dispose of the shares. Appellant is entitled to claim compensation for the loss incurred along with interest. [605-E; 606-B-C]

C 1.2. Grant of overdraft facilities to its customers by a Bank amounts to providing 'service' within the meaning of S. 2(1)(o) of the Consumer Protection Act, 1986. Bank is rendering service by providing overdraft facilities to a customer which is not without consideration. Bank is charging interest and other charges as well in providing said service. Request for sale of part of the pledged shares for clearing overdraft facilities and which is agreed to by the Bank is certainly part of the service connected with the grant of overdraft facilities. Appellant as a consumer was hiring service of the Bank for consideration by way of payment of interest for the overdraft facilities received by him by pledging the shares of different companies. Thus, it cannot be accepted that appellant is not a consumer or that the Bank is not providing any service to the appellant. [594-G-H; 596-B-D]

E 1.3. There was 'deficiency' in service on account of negligent conduct of the Bank in disposing the shares. If action has been taken by the Bank promptly or within a reasonable time, appellant would have been able to clear him overdraft account. Thus, it cannot be disputed that appellant suffered loss because of the delay in not disposing of his shares. It is true that the Bank is not expected to process the request of its customers at once but within reasonable time and certainly promptness and deligence is required which was lacking in the instant case. Once the Bank agreed to sell the part of the shares, on request by the appellant and without pre-conditions, it cannot fall back on other alleged defaults of the appellant in his dealing with the Bank. [605-A-E]

G 2. The plea of respondent-Bank that the provisions of Ss. 172 to 177 of the Contract Act, 1972 were applicable to the parties and thus the Bank was not under a legal obligation to follow a customer's instructions to sell the pledged shares or the plea regarding jurisdiction of National Commission cannot be permitted to be raised since no foundation was laid either in the H

pleadings or evidence before the National Commission.

[599-G-H; 604--B-C]

Management of Northern Railway Co-operative Society Ltd. v. Industrial Tribunal, Rajasthan, Jaipur & Anr., [1967] 2 SCR 476; *Chinta Lingam & Ors. v. Government of India & Ors.*, [1970] 3 SCC 768; *S.L. Ramaswamy Chetty & Anr. v. M.S.A.P.L. Palanlappa Chettiar*, AIR (1930) Madras 364 (DB); *Bank of Maharashtra v. M/s. Racmann Auto (P) Ltd.*, AIR (1991) Delhi 278; *Bharat Bank Ltd. v. Bodhraj*, AIR (1956) Punjab 155 (DB); *Surajmal v. Fulchand*, AIR (1951) Nag. 264, referred to.

Halliday v. Holgate, (1868) LR Exchequer 299 and *China and South Sea Bank Ltd. v. Tan*, (1989) 3 ALL E.R. 839; *Warehousing & Forwarding Company of East Africa Ltd. v. Jafferli & Sons Ltd.*, (1963) 3 All.E.R. 571, referred to.

Chitty on Contract (Twenty-Seventh Edition), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 15701 of 1996.

From the Judgment and Order dated 21.6.96 of the National Consumer Disputes Redressal Commission, New Delhi, in D.O.P. No. 163 of 1994.

U.U. Lalit for the Appellant.

Krishnan Venugopal, Ms. Tania Bery, Ms. Nina Gupta, Vineet Kumar and Ms. Namita Sood for the Respondent.

The Judgment of the Court was delivered by

D.P. WADHWA, J. This appeal is directed against the order dated June 21, 1996 of the National Consumer Disputes Redressal Commission (National Commission) holding that there was no negligence on the part of the respondent Bank in dealing with its security of pledged shares of the appellant or its release in part to him and that the Bank could also not be faulted on its practice not to dispose of shares through brokers not on the approved list of the Bank and lastly that it could not be said that there was any deficiency in service by the Bank as defined in Section 2(1)(g) of the Consumer Protection Act, 1986 ('Act' for short). Leave was granted limited to the claim of the appellant to his shares of Castrol Limited pledged with the Bank.

A On the request of the appellant, Bank sanctioned to him on September 20, 1990 an overdraft limit of Rs. 5,00,000 against pledge of shares of various companies, value of all the shares being Rs. 10,60,900 at the relevant time. Out of these number of shares of the Castrol Limited were 1400 @ Rs. 200 per share of the total value of Rs. 2,80,000. It is not disputed that as per the guidelines issued by the Reserve Bank of India, banks are allowed to make advance against pledge of shares retaining 50% margin. As per the terms of sanction of the overdraft limit shares were got transferred in the name of the Bank. In due course of time Bank received bonus shares numbering 2,224 of Castrol Limited. It is stated that value of shares also increased manifold. Appellant also paid an instalment of Rs. 1,45,600 to the Bank against the overdraft limit. Overdraft amount was to be adjusted in three equal instalments. In order to clear the overdraft account the appellant, apart from shares of other companies, requested the Bank to arrange sale of 500 shares of Castrol Limited. This he did by letter dated 23, 1992.

D The Chief Manager,
Bank of India,
Kingsway,
Nagpur.

April 23, 1992

Dear Sir,

E I have advised my share broker, Mr. Janakbhai Dalal of M/s. Jayant Amorchand Kalidas, Bombay to sell 500 shares of Castrol Limited, at an indicative price of Rs. 2400 to Rs. 2500 per share, out of the lot of the same company pledged with you. These shares are lying with your Head Office at Bombay.

The shares are to be delivered to the above named broker in payment. Mr. Janakbhai Dalal of M/s. Jayant Amorchand Kalidas has suggested two options in respect of payment of sale proceeds as under:-

- (1) The shares may be delivered to the Bombay Stock Exchange claiming House. The payment will be made on the pay out day.
- F (2) To accept a post dated cheque from M/s. Jayant Amorchand Kalidas for the date of the pay out notified by the Stock Exchange. However, Mr. Janakbhai Dalal of M/s. Jayant Amorchand Kalidas is authorised by me to discuss the mode of payment in respect of the sale of the said shares with your Bombay Office. Mr. Janakbhai Dalal of M/s. Jayant Amorchand Kalidas is a client of your Bombay Office and also is a recognised broker of your Bank.

G This letter is issued, in triplicate so that you can send a copy of this letter to your H.O. share department to discuss this matter with Mr. Janakbhai Dalal, when he calls on them. He is fully authorised to discuss and settle suitable mode of payment, protecting your full interest, on my behalf.

The sale proceeds when received by your H.O. may be transferred to the credit of my OD Account No. 15098 with you at Nagpur

Thanking you,

Yours faithfully,

(V.C. GROVER)"

H

After 12 days of the receipt of this letter the Bank at Nagpur, where the Overdraft Account of the appellant was maintained, sent a letter dated May 5, 1992² to its Head Office at Bombay (copy of this letter was endorsed to the appellant) agreeing to the terms of the appellant set out in his letter of April 23, 1992. Nagpur Branch received a letter of June, 19, 1992 from its Head Office stating that it did not receive the letter dated April 23, 1992 of the appellant and further that the shares were not in the Head Office. By letter dated July 29, 1992³ Nagpur Branch of the Bank informed the appellant that Head Office was not holding the shares. It was, however, found that the shares were lying with the Nagpur Branch itself. By this time it appeared that the price of the share fell and the shares could not be sold at the price indicated by the appellant. He therefore, filed a claim with the National Commission for Rs. 5,09,037.53 in respect of shares of Castrol Limited as under :

BANK OF INDIA

INTER OFFICE MEMORANDUM

from : The Chief Manager Nagpur (Main) Branch Nagpur.	To : The Chief Manager Bombay (Main) Branch Sales Purchase Department
---	--

Ref. No. : NGP/C & IC : VBP : 92-93/83

Date: 5.5.92

Our Overdraft account
 Shri V.C. Grover,
 against pledge of shares
 Sanctioned Limit : Rs. 5 lacs
 Sanctioning Authority &
 Date - H.O. Committee dated 28.8.89

Our Constituent, Shri Grover vide his letter dated 23.4.92 (copy enclosed) has advised us that some shares of M/s. Castrol India Limited are lying with you for selling the same in the market. Out of these shares, he desires to sell 500 shares (of M/s. Castrol India limited) through his broker, M/s. Janakbhai Dalal at the price of Rs. 2400 to Rs. 2500 per share. The instructions for sale are mentioned in the aforesaid letter which may be followed.

2. Please discuss this matter with the above referred share broker. Please send the proceeds by Credit Note for the credit of overdraft account of Shri V.C. Grover with us and advise us if any clarification is required.

Encl. : a/a.

CHIEF MANAGER

hs/

CC : Shri V.C. Grover,
 4th Floor, National Insurance Bldg.
 Kingsway, Nagpur.

A "Loss on account of non-sale of 500 shares of Castrol Limited.

a. Estimated sale price of 500
shares @ Rs. 2400 Per share Rs. 12,00,000.00

B Deduct price prevailing on
23.7.92 @ 700 per Share Rs. 3,50,000.00

Rs. 8,50,000.00

Deduct amount of effective
debit balance in O/D on 30.6.92 Rs. 3,40,962.53

C Rs. 5,09,037.53"

He also filed other claims against the Bank with which we are not concerned in this appeal.

D There cannot be any doubt if action had been taken by the Bank promptly or within a reasonable time appellant would have been able to clear his overdraft account. About the prevalent price of the share as claimed by the appellant there cannot be any dispute.

Bank of India

E H.O. : Express Towers, Nariman Point, Bombay - 21

Telex : Stringent
Phone : 531404/531405/531406
Nagpur Main Branch,
Post Box No. 9
S.V. Patel Road,
Nagpur-1

F Ref. No. : NGP : C & IC : VBP 92-93/345 Date : 29.7.1992

Shri V.C. Grover
National Insurance Building
4th Floor, Kingsway
Nagpur - 400001.

Dear Sir,

G Reg. : Your Overdraft Account with us.

Kindly refer to your letter No. Nil dated 23.4.92.

2. As requested by you we have advised our Bombay Office to sell 500 shares of Castrol India Limited. However, we understand from that they are not holding such shares with them. This is for your information.

Thanking you,

H

Yours faithfully,

CHIEF MANAGER

Bank has submitted before us that relationship between the parties is governed by Sections 172 to 177⁴ of the Contract Act, 1972 and Bank was within its right to choose the time and place as to when it would like to dispose of the pledged goods and that the only requirement is that before that notice is to given to pawnor, appellant in the present case. In support of its submissions reference was made to a Division Bench decision of the Punjab High Court in *Bharat Bank v. Bodhraj*, AIR (1956) Pun. 155. We were also referred to "Chitty on Contracts". Twenty-Seventh Edition, and other decisions to which we will presently refer.

Prima facie it does appear to us that Bank has failed to honour its commitment resulting in loss to the appellant. The question still, however, arises if the alleged default on the part of the Bank could be termed as deficiency in service. "Service" has been defined in clause (o) of sub-section (1) of Section 2 of the Act and "deficiency" in clause (g) thereof. These are as under :

4 172. "Pledge", "Pawnor" and "pawnee" defined. — The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

173. *Pawnee's right of retainer.* — The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. *Pawnee not to retain for debt or promise other than that for which goods pledged : Presumption in case of subsequent advances.* — The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. *Pawnee's right where pawnor makes default.* — It the pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

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.

177. *Defaulting pawnor's right to redeem* — If a time is stipulated to the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

A “(g) “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.”

B “(o) “service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;”

C
D In the arguments it was submitted that the appellant is not a consumer within the meaning of sub-clause (2) of clause (d) of Section 2 of the Act. This sub-clause is as under :

“2(d) “consumer” means any person who

(i) ...

E (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and party promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

F
H Explanation — ...

G We think that the argument that the appellant is not a consumer or that the Bank is not rendering service is an argument in desperation. No such plea was raised before the National Commission. Overdraft limit prescribed by the Bank was not without consideration. Bank is rendering service by providing overdraft facilities to a customer which is not without consideration. Bank is charging interest and other charges as well in providing the service. Provision for overdraft facility is certainly a part of the banking and its service within the meaning of clause (o) of Section 2 of the Act. In ordinary

parlance "banking" is a business transactions of a bank (The Concise Oxford Dictionary). "Banking" is defined in the Black's Law Dictionary. It is as under :

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national and municipal and other corporations. *Mercantile Bank v. New York*, 121 U.S. 138, 156, 7 S.Ct. 826, 30 L.Ed 895; In re Produce Co., D.C.N.Y., 10 F. Supp. 33, 36."

The Reserve Bank of India under the Reserve Bank of India Act, 1934 controls various activities of the banks in india. Under Section 22 of that Act, Reserve Bank of India has the sole right to issue bank notes in India. Bank in the present case is governed by the Banking Regulation Act, 1949. Under clause (b) of Section 5 "banking" means the accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise. Under clause (c) "banking company" means any company which transacts the business of banking in India. Under clause (cc) "branch" or "branch office", in relation to a banking company, means any branch or branch office, whether called a pay office or sub-pay office or by any other name, at which deposits are received, cheques cashed or moneys lent, and for the purposes of Section 35 includes any place of business where any other form of business referred to in sub-section (i) of Section 6 is transacted. Section 6⁵ of this Act describes the forms of business which can be conducted by

5. *Forms of business in which banking companies may engage.* - (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely :

- (a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, draft, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations securities and investments of all kinds, the purchasing and selling of bonds,

A a banking company in addition to the business of banking. When Bank is engaged in different types of business as mentioned in Section 6, it is apparent that when bank is granting overdraft facilities to its client which is a customer, it is providing service to him. The Act itself does not define the term "banking" and as to what services a bank can provide, we can usefully refer to Section 6 of the Banking Regulation Act, 1949.

B Request for sale of part of the pledged shares for getting overdraft facilities and which is agreed to by the Bank is certainly part of the service connected with the grant of overdraft facilities. Appellant as a consumer was hiring service of the Bank for consideration by way of payment of interest for the overdraft facilities received by him by pledging the shares of different companies. We reject the argument that the appellant is not a consumer or that the Bank is not providing any service to the appellant. The only question that requires consideration is if there was any deficiency in service in the present case.

D Bank has denied that there was any deficiency in service on its part and the conduct of the Bank in dealing with the alleged securities was not negligent. It was stated that facts on record clearly established that it was the appellant who was solely responsible for causing the confusion and misleading

-
- E scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances, the receiving of all kinds of bonds, scrips or valuables on deposits or for safe custody or otherwise, the providing of safe deposit vaults : the collecting and transmitting of money and securities;
- (b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing the forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent or secretary and treasurer of a company;
- F (c) contracting for public private loans and negotiating and issuing the same;
- (d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;
- G (e) carrying on and transacting every kind of guarantee and indemnity business;
- (f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;
- (g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;
- H (h) undertaking and executing trusts;

the Bank to locate the shares with Bombay Office. It was, thus, contended that the alleged delay which was caused could not be attributed to the negligence of the Bank as it was the appellant himself who misled the Bank. It was rather explained that it was the assertion of the appellant which led to the time consuming process of checking and again rechecking whether the said shares were indeed in the Bombay Office. It was thus denied that "there was any negligence or deficiency in service on the part of the respondent Bank who carried out its duty with due diligence and care and was hampered by the misleading information given by the appellant himself". It was then contended that the Bank had lien over certain shares which the appellant had pledged as security for the overdraft facility of Rs. 5,00,000 provided by the Bank. It was stated that the Bank, in fact, acceded to the request of the appellant and sanctioned the overdraft facility after imposing certain terms and conditions. It was also submitted that prior to the agreement for grant of overdraft facility of Rs. 5,00,000 appellant had executed a letter of lien and set of dated August 9, 1989 which entitled the Bank to retain all the shares, which were in its possession or which may come into the possession of the Bank at any future date, as collateral security for all the outstanding dues of the appellant apart from any specific facility provided to him. Then the Bank said that it was well-settled principle of law that the Banker's lien

-
- (i) undertaking the administration of estates as executor, trustee or otherwise;
 - (j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object.
 - (k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;
 - (l) selling improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;
 - (m) acquiring and undertaking the whole or any part of the business of any person or company; when such business is of a nature enumerated or described in this sub-section;
 - (n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;
 - (o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.
 - (2) No banking company shall engage in any form of business other than those referred to in sub-section (1).

A extended to all securities deposited it in its character as a banker. It was, therefore, contended that it was undisputed that the Bank had every right to exercise lien over the pledge shares. Then it was submitted that though the appellant had requested the Bank to sell the shares through his broker who was not on the approved list of the Bank and that it was the Standard Practice followed by the banks that they dealt with the pledged shares only through brokers whose names featured in the approved list of the Bank. According to the Bank appellant should have discharged his contractual obligations by settling the overdraft account in three equal installments as agreed and secured the release of the pledged shares but instead he sought release of some of the pledged shares. Bank, in pursuance to the request and directions given by the appellant, carried out a thorough search in the Bombay Office but the Castrol shares were not traceable there. It was then denied by the Bank that the appellant suffered any monetary loss. This is how the Bank advanced its plea :

D “It is submitted that the appellant received some bonus shares of Castrol India Ltd., which were allotted in the ratio of 3.5 on 23.6.1992. Subsequently the appellant obtained some more bonus shares whose total market value inclusive of the original No. of shares pledged with the answering respondents, at a time when market price of the said shares allegedly dipped was higher than the alleged previous value of the Castrol shares pledged by the appellant with the answering respondent. Hence the averments made by the Appellant about the loss suffered by him is wholly unsustainable and illogical.”

F It was then submitted by the Bank that the appellant was a regular defaulter and time and again had failed to liquidate his dues and discharge his obligations. The Bank was under no obligation whatsoever to release the shares which were in its possession and could not be compelled in law to sell any of the pledged shares. Then the Bank said that delay was caused to process the request of the appellant to sell the shares held by the Bank as security as his request needed to be carefully examined especially in view of the fact that he had several irregular accounts and was a habitual defaulter. The Bank which is a custodian of public funds could hardly be rushed into making its commercial/business decision, so the Bank lamented. Lastly, it was submitted by the Bank that it could not be blamed for any fluctuations of the market price of the shares and by merely fluctuating the market price of the shares on the days when the value of the shares are particularly high,

one cannot calculate the gain or loss suffered and that in any case fluctuations is the value of the shares could also be worked out the other way, i.e., to the prejudice of the Bank. That is all to the case set up by the Bank.

We have been referred to various decisions by Mr. Krishna Venugopal, who appeared for the Bank. He submitted that he could certainly raise issues such as the law of pledge or the jurisdiction of the National Commission in this appeal for sustaining the decision of the National Commission. In support of his submission, he referred to a decision of this Court in *Management of Northern Railway Co-operative Society Ltd. v. Industrial Tribunal, Rajasthan, Jaipur & Anr.*, [1967] 2 SCR 476. But as held by this Court in *Chinta Lingam & Ors. v. Government of India & Ors.*, [1970] 3 SCC 768 when there is no foundation laid in the pleadings before the National Commission argument of such pleading could not be allowed to be raised in this Court. However, if it is a pure question of law going to the root of the case, this plea may be allowed to be raised with the permission of the Court. We may in this connection refer to Order 41 Rule 22 of the Code of Civil Procedure which provides that though the respondent may not have appealed from any part to the decree, he may not only support the decree but may also state that finding against him in the court below in respect of any issue ought to have been in his favour. For this, however there has to be pleadings and evidence on that. In *Warehousing & Forwarding Company of East Africa Ltd. v. Jafferli & Sons Ltd.*, (1963) 3 All.E.R. 571 on the question when a new point is raised in appeal, which was not raised in the court below, whether that new point should have been allowed to be taken the Privy Council observed :

“The question of ratification never having been investigated and the outcome of such an investigation not being clear, it was not possible to hold that the result would have been the same whatever such investigations would have revealed; in such circumstances the respondents ought out to have been allowed to argue the new point before the Court of Appeal.”

Mr. Krishna Venugopal, it appears, made this point in answering to objection by the appellant that the Bank did not raise any issue regarding law of pledge or the jurisdiction of the National Commission before the National Commission. We heard Mr. Venugopal on the applicability of the law of pledge as contained in Sections 172 to 177 of the Contract Act on a plea that there was to deficiency in service because the Bank was not under a legal obligation to follow a customer's instructions to sell the pledged shares. He

A said the statute not only imposes no obligation on the pledgee to sell pledged shares on the request of the pledgor it grants a positive option to pledge to either retain or sell the pledged shares which would be nullified by creating an obligation on his part to sell on the request of the pledgor. We may refer to some of the decisions cited by Mr. Venugopal at the Bar on this aspect.

B In *Halilday v. Holgate*, (1868) LR Exchequer 299 the facts (as appeared from the Head Note) a holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He afterwards became bankrupt, and the defendant, without demand and without notice, sold ten of the fifteen shares to repay himself his debt. The creditors' assignee, without making any tender of the amount of the debt, brought an action of trover against the defendant to recover the value of the shares. It was held that even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale
C D
revested in the plaintiff, and that he could not, therefore, maintain trover, either for the whole value of the shares or for, nominal damages.

In *S.L. Ramaswamy Chetty & Anr. v. M.S.A.P.L. Palanlappa Chettiar*, AIR (1930) Madras 364 (DB) the Court said :

E "The respondent (a pledgor) could not compel the appellants to exercise the power of sale as a means of discharging or satisfying the decree. His only rights were (1) in case the appellants (a pawnee) exercised the power, to insist that it should be honestly and properly done and the sale proceeds applied to the debt (2) in case the
F appellants did not exercise the power, to redeem the pledges on payment of the debt or so much of it as remained otherwise unpaid and (3) in case the sale was improperly exercised, to get damages caused thereby."

G A single Judge of the Delhi High Court in *Bank of Maharashtra v. M/s. Racmann Auto (P) Ltd.*, AIR (1991) Delhi 278 on examining the provisions of Sections 176-177 said :

H "In view of the provisions of Section 178 of the Contract Act, there remains no doubt about the legal proposition that it is in the discretion of the plaintiff bank to have filed the suit for recovery of the debt and

retain the pledged goods as collateral security or in the alternative could resort to selling the pledged goods after giving reasonable notice of sale to the defendant. Plaintiff bank had in its wisdom exercised the first option of filing the suit and retained the pledged goods as collateral security. So, even if the value of the goods had deteriorated due to passage of time, no relief can be obtained by the defendant against the plaintiff as the defendant was legally bound to clear the debt and obtain the possession of the pledged goods from the plaintiff bank before the pledged goods were sold during the pendency of the suit. That is clearly provided in S. 177 of the Contract Act.”

In *China and South Sea Bank Ltd. v. Tan*, (1989) 3 All.E.R. 839, the Privy Council laid the following principle :

“The creditor is not obliged to do anything No creditor could carry on the business of lending if he could become liable to a mortgagee (sic : mortgagor) and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline.”

In *Bharat Bank Ltd. v. Bodhraj*, AIR (1956) Punjab 155 (DB) the appellant gave notice to the respondent. The appellant was defendant in a suit by the respondent-plaintiff. The plaintiff had cash credit account with the Bharat Bank Ltd. at Rawalpindi (now in Pakistan) prior to the year 1947. He had pledged as security 988 shares of a company. The defendant gave notice to the plaintiff demanding payment of the debt due from the plaintiff by 18.8.1947 and if the amount was not paid the shares would be sold without any reference to the debtor and at his risk and responsibility. The plaintiff did not send any reply to this letter of demand by the defendant. On 28.8.1948 the shares were sold at Rs. 10 per share. Plaintiff on 31.1.1949 gave a notice to the defendant claiming Rs. 9,000 on account of surplus which would have accrued had the shares been sold by the middle of September 1947 when the price was Rs. 19-12-0 per share. The defendant replied on 8.2.1949 saying that it was not bound to sell the shares in September 1947 and could sell them at any time after the expiration of the period of notice sent by it in August 1947. The material plea of the defendant was that the Bank could not function after August 1947 due to disturbances that the Bank could not bring its records to India due to restrictions imposed by the Pakistan Government and that before the shares could be sold the Bank had to get the sanction of the

- A Custodian of Evacuee Property. Suit of the plaintiff was decreed on appeal by the defendant to the High Court. Reference was made to Section 176 of the Control Act which requires a reasonable notice of the sale. It was submitted by the defendant that the sale should take place within a reasonable time of the notice but the High Court negatived this plea. High Court referred
- B to an earlier decision in *Surajmal v. Fulchand*, AIR (1951) Nag. 264 where it was held a pawnee who have given a reasonable notice of sale under Section 176, Contract Act can sell at any time and is not bound to sell within a reasonable time after the expiry of the period mentioned in the notice. Section 176 of the Contract Act talks of reasonable notice of sale. The pawnor is warned by notice that if he does not discharge the debt within a reasonable
- C time the pledged goods would be put to sale. This will mean that if there is default by the pawnor the goods would be put to sale after expiry of reasonable period from the date of the notice. However, it does not mean that after reasonable period has expired from the date of notice, the pawnor is debarred from all time to redeem his pledged goods. Any time before the
- D pledged goods are put to sale, he can redeem them after discharging the debt.

In *Agencia Commercial International Limited and Others v. Custodian of the Branches of Banco Nacional Ultramarino*, [1982] 2 SCC 482 this Court held that branch of the bank in which account is maintained by customer is a separate and distinct entity from the head office. This is how this Court said :

- E
14. Now it is indisputable as a general proposition that a body corporate and its branches are not distinct and separate entities from each other, that the branches constitute mere components through which the corporate entity expresses itself and that all transactions entered into ostensibly with the branches are in legal reality transactions with the corporate body, and it is with the corporate body that a person must deal directly. But it is also now generally agreed that in the case of a Bank which operates through its Branches, the Branches are regarded for many purposes as separate and distinct entities from the Head Office and from each other. This Court observed in *Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh*, [1995] 2 SCR 402 :
- F
- G

- H In banking transactions the following rules are now settled : (1) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account

and the bank can rightly refuse to cash a cheque at any other branch : *Rex v. Lovitt*, (1912) AC 212, *State Aided Bank of Travancore v. Dhrit Ram*, AIR (1942) PC 6 and *New York Life Insurance Co. v. Public Trustee*, (1924) 2 CH. 101; (2) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank; *Joachimson v. Swiss Bank Corporation*, (1921) 3 KB 110 quoted with approval by Lord Reid in *Arab Bank Ltd. v. Barclays Bank*, (1954) SC 495. The rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account; the Privy Council case was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need to pay, and for these reasons the English courts hold that the situs of the debts is at the place where the current account is kept and where the demand must be made.

It was explained further that if the bank wrongly refused to pay when a demand was made at the proper place and time then it could be sued at its head office as well as at its branch office, but the reason was that "the action is then, not on the debt, but on the breach of the contract to pay at the place specified in the agreement", and reference was made to Warrington, L.J. at page 116 and Atkin, L.J. at page 121 of *New York Life Insurance Co. v. Public Trustee*. That is the position in regard to banking law and practice, and it is apparently in that light that the Regulation has been framed."

Chitty on Contract (Twenty-Seventh Edition) dealt with unlawful dealing by the pledgee. It said, "if the pledgee deals with the thing pledged in an unlawful manner, such as by sale before the time fixed for repayment of the debt, or by wrongfully claiming to be absolute owner of the thing, the contract of pledge is not determined and the pledgor cannot, without payment or tender of the debt, sue the pledgee for conversion. But if the pledgee "deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor by any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor." (paras 32-100)

A It is difficult to accept the contention of the Bank that the correspondence that was exchange between the appellant, the Nagpur Branch of the Bank and its head office did not constitute an agreement between the parties under which the Bank is agreed to sell the 500 shares of Castrol Limited pledged with it by the appellant. This agreement can be clearly spelt out from
B the correspondence exchanged between the parties. Mr. Venugopal sought reference to the provisions of Securities Contracts (Regulation) Act, 1956 under which stock exchanges in the country function. We cannot permit him to raise such a plea which has no foundation either in the pleading or in the evidence before the National Commission.

C We do not think it is necessary for us to go into all these legal niceties in view of the clear provisions of law and in this mass of judicial pronouncements referred to above we should not forget the real issue. We have held that the appellant is a consumer and Bank is provider of the service. Appellant's case is simple. He did not want his shares back. He only wanted
D part of the shares to be sold and for the bank to keep the money to liquidate part of his overdraft account. Bank agreed. Each branch of the bank is independent. The Bank has taken two principal pleas : (1) it was not obliged to sell the shares as under law Bank is not bound to follow the instructions in view of the provisions regarding pledges as contained in Sections 172 to 177 of the Indian Contract Act; and (2) It was the appellant who misled the
E Bank by saying that the shares were lying in the head office of the Bank at Bombay. That the Bank has a right under the law to retain the pledged goods is not in dispute. But once the Bank having agreed to sell part of the pledged goods, it could not fall back on those very provisions to raise a plea of its right under the law to retain the pledged goods. Bank says it was misled by
F the appellant that the shares were lying in Bombay when in fact these were lying in the Nagpur branch itself where the appellant had the overdraft account. Could not the Bank verify as to where the pledged shares were kept when on the basis of those very shares as security overdraft facility was granted? We think that the Bank is just firing a shot from the shoulders of the appellant to hide its own defaults, nay negligence. As far as the appellant
G is concerned, he has clearly stated, which has not been denied, that the pledged shares were to be transferred in the name of the Bank and sufficient number of blank transfer forms duly signed by him were submitted to the Bank and further that the Share Department of the Bombay Head Office of the Bank was centralised for handling all matters concerning shares and that
H bonus shares in this very case were received by the Bombay Head Office of

the Bank. Bank also advance a plea that the appellant was guilty of contributor negligence by which the Bank tacitly admitted its own negligence on its part as well. That the appellant suffered loss because of the delay in not disposing of his shares as agreed to by the Bank cannot be disputed. In these days of revolution in information technology Bank is merrily going on corresponding with its customer, the appellant, and also its own Head Office. It was not difficult for the Bank to find out on receipt of the letter dated April 23, 1992 of the appellant where the pledged shares were lying. It took 12 days to transmit the request of the appellant to its Head Office. When the Nagpur Branch received letter dated June 19, 1992 from the Head Office that the shares were not lying there, it took another 40 days to inform the appellant of this fact by its letter of July 29, 1992. Then the Nagpur Branch finds that the shares are lying with it and then it is too late. It is true that the Bank is not expected to process the request of its customer at once but within reasonable time and certainly promptness and diligence is required which we find lacking in the present case. Whatever may be the fault of the appellant being not regular in his account with the Bank, all these pleas raised by the Bank are merely afterthoughts in order to hide its own default and inefficiency. Once the Bank agreed to sell the part of the shares on request by the appellant and without any pre-conditions, it cannot fall back on other alleged defaults of the appellant in his dealing with the Bank. The plea of the Bank that it could dispose of the shares only through its own broker is without substance as it never apprised the appellant this fact. We, therefore, find ourselves unable to agree with the view of the National Commission that there was no negligence on the part of the Bank or that the Bank was not bound to dispose of the shares.

The appellant made a claim of Rs. 29,56,264.76 before the National Commission. He further claimed interest at the rate of 21% per annum till the final decision of the National Commission and realisation of the decreed amount. We think the claim made is highly inflated and there does not appear to be any basis for the same. The indicative price at which the appellant requested the Bank to sell the shares of Castrol Ltd. was Rs. 2,400 to Rs 2,500 per share. As to what is the price of share on any day is known to the Bank and for that matter to any person interested in knowing value of the share. On July 29, 1992 the price of the share of Castrol Ltd. had fallen to Rs. 700 per share, though it was more than the value of the share at the time these shares were pledged with the Bank. The appellant has arrived at the figure of Rs. 8,50,000 as the loss occasioned to him. On June 30, 1992 his overdraft

A

B

C

D

E

F

G

H

A account showed debit balance of Rs. 3,40,962.53 with the Bank. The appellant, therefore, said that he suffered a loss of Rs. 5,09,037.47 after deducting the debit balance, which he thus claimed with interest and other charges like damage for loss of long standing business due to non-renewal of letter of credit; for non-releasing of securities; undue and unjust harassment thus making a total of Rs. 29,56,264.76. On the face of it apart from the claim of damages for loss in selling of shares other claims are too much overblown to be considered at all. The appellant would, thus, be entitled to the award of Rs. 5,09,037.47 with interest at the rate of 11% per annum from August 1, 1992. The bank is granted four weeks time to make the payment. In case of default, the appellant shall be entitled to further interest at the rate of 18% per annum on the amount of Rs. 5,09,037.47 from the date of the award till payment. We are not concerned in this appeal with the working of the overdraft account, which the appellant had with the Bank in respect of which shares of Castrol India Ltd. were pledged. If any amount is due to the Bank in any of the accounts of the appellant or of any of his firms where he is a partner or otherwise, the Bank shall be entitled to adjust the amount awarded by this judgment Bank shall, however, not claim any interest or other charges on amount of Rs. 3,40,962.53 in the relevant overdraft account of the appellant from the date of filing of complaint before the National Commission.

E The appeal is, therefore, allowed, impugned judgment of the National Commission is set aside and the complaint of the appellant is allowed. There shall be award of Rs. 5,09,037.47 with interest at the rate of 11% from August 1, 1992 in favour of the appellant and against the respondent Bank of India. Bank is granted four weeks time to make the payment of the amount so awarded. In case of default the appellant shall be entitled to further interest at the rate of 18% on Rs. 5,09,037.47 from the date of this judgment till payment. Bank shall be entitled to adjust the amount of award against any sum due to it from the appellant in any of his accounts with the Banks or any other account in which he has interest as a partner or otherwise. Parties shall bear their own costs.

G S.V.K.

Appeal allowed.

H