* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 3rd April, 2018**

\+ **IA No.13721/2006 (of plaintiffs under Order XXXIX Rules 1 &2 CPC), IA No.14158/2006 (of defendant no.7 under order XXXIX Rule 4 CPC) and IA No.291/2007 (of defendants no.1 to 4 under Order XXXIX Rule 4 CPC) in CS (OS) No.2281/2006.**

TENDRIL FINANCIAL SERVICES PVT. LTD. & ORS. **.... Plaintiffs**

Through: Mr. Ashwini Kumar Mata, Sr. Adv. with Mr. Rahul Srivastava, Adv.

Versus

NAMEDI LEASING & FINANCE LTD. & ORS. **...Defendants**

Through: Mr. Abhishek Puri, Adv. for D-1 to 4.
Mr. Harish Malhotra, Sr. Adv. with Mr. Tarun Single, Adv. for D-7.
Mr. Lokesh Chopra, Adv. for D-8.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The six plaintiffs viz. (i) Tendril Financial Services Pvt. Ltd., (ii) Niketan Traders Pvt. Ltd., (iii) Ebony Traders Pvt. Ltd., (iv) Becker Traders Pvt. Ltd., (v) Cross Trading Pvt. Ltd., and, (vi) Petunia Financial Services Pvt. Ltd., instituted this suit against the nine defendants viz. (a) Namedi Leasing & Finance Ltd., (b) Northern Projects Ltd., (c) Praveen Electricals Pvt. Ltd., (d) Morgan Venture Ltd., (e) Indo Rama Synthetics (India) Ltd., (f) RNM Finstocks Pvt. Ltd., (g) Morgan Securities and Credits Pvt. Ltd., (h) Blue Coast

Hotels & Resorts Ltd., and, (i) Morepen Laboratories Ltd., for the reliefs of declaration, permanent and mandatory injunction.

2. It is the case of the plaintiffs in the plaint:

(a) that on the request of the defendant no.9 Morepen Laboratories Ltd. (Morepen), the plaintiffs, who are investment companies, vide letter dated 7th February, 2003, pledged 15,00,000 equity shares of defendant no.8 Blue Coast Hotels & Resorts Ltd. (Blue Coast) owned by them in favour of defendant no.7 Morgan Securities and Credits Pvt. Ltd. (Morgan) as security for the financial facility availed of by the defendant no.9 Morepen from the defendant no.7 Morgan;

(b) that the defendants no.1 to 4 companies, though distinct legal entities, have a discernible inter-relationship with each other, with the pivotal control in the hands of the Directors of defendant no.7 Morgan;

(c) that the defendant no.8 Blue Coast is the owner of a prestigious five star hotel in the name and style of 'Park Hyatt Goa Resort & Spa' at Goa;

(d) that defendant no.9 Morepen is the holding company of Dr. Morepen Ltd. which is the owner of popular medicinal brands 'Burnol' and 'Lemolate';

(e) that disputes arose between the parties as to the amount remaining unpaid under the aforesaid financial facility and which disputes were referred for adjudication to the Sole Arbitrator; during the course of arbitration, the parties settled their inter se disputes and entered into a Settlement Agreement dated 27th May, 2003 which set out the agreed amount due towards principal and interest and mode and manner of its repayment; under the Settlement Agreement, the plaintiffs reiterated the pledge of all their right, title and interest in 15,00,000 equity shares in defendant no.8 Blue Coast, in favour of defendant no.7 Morgan; the Arbitrator published the Award dated 28th June, 2003 in terms of the said Settlement Agreement;

(f) that the defendant no.9 Morepen could not discharge its repayment liability within the time stipulated in the Award;

(g) that the defendant no.7 Morgan, on 4th January, 2004 and 9th January, 2004 filed Execution Petitions No.6/2004 and 13/2004, for execution of the arbitral Award and which along with EFA No.19-21/2006, arising from Execution Petition No.13/2004, were also pending consideration; thus from the date of pendency of Execution Petition No.13/2004, the repayment of liability of defendant no.9 Morepen as principal borrower was in dispute and subject

matter of adjudication and securities in the form of pledged shares could not have been invoked by defendant no.7 Morgan pending such adjudication; the plaintiffs are however not parties to the said Execution Petition;

(h) that the defendant no.9 Morepen has during the pendency of the Execution Petition aforesaid been intermittently discharging its liability to the defendant no.7 Morgan;

(i) that the parties, in Clause 5 of the Letters of Pledge, agreed and understood that simple invocation of pledge by defendant no.7 Morgan would not amount to sale of shares to defendant no.7 Morgan; thus invocation could not extinguish the property rights of the plaintiffs in those shares which, if necessary, had to be sold in open market, after giving notice of such sale, for realization of dues if any of defendant no.7 Morgan from defendant no.9 Morepen; Clause 8(iii) of the Pledge Agreement also casts an unequivocal and mandatory obligation on defendant no.7 Morgan to give a prior notice to the plaintiffs, of intention to sell the shares; thus no sale of pledged shares could take place without the plaintiffs being put to a prior notice of such sale;

(j) that the defendant no.7 Morgan purports to have sold the pledged shares in contravention of the terms of the pledge and in breach of statutory provisions including Section 176 of the Indian Contract Act, 1872, requiring

mandatory prior legal notice preceding such sale and in breach of fiduciary duty of a pledgee to act honestly and fairly; the shares are purported to have been sold at manipulated/artificial price to defendants no.1 to 4; thus the said sales are void and non est.

(k) that though the alleged sale is purported to have taken place from 16th December, 2003 to 25th March, 2004 but was concealed from the Executing Court and no prior permission from the Executing Court was taken for the purported sale after the date of filing of Execution Petitions; on the contrary, defendant no.7 Morgan obtained orders from the Executing Court to the effect that the defendant no.8 Blue Coast shall not increase its equity share capital so as to dilute the value of the pledged shares held by the defendant no.7 Morgan as security, demonstrating that the defendant no.7 Morgan itself till then believed that it continued to hold the said shares when it claims to have completed the sale prior thereto; the sale was disclosed for the first time on 14th August, 2005; and,

(l) that the aforesaid 15,00,000 shares constitute 22.89% of the total paid up equity share capital of defendant no.8 Blue Coast.

3. On the aforesaid pleas, the plaintiffs have claimed the reliefs of i) declaration that the sale / transfer of the said 15,00,000 shares is

illegal, void and of no effect; ii) declaration that no rights have accrued in the defendants no.1 to 4 in respect of the said 15,00,000 shares; iii) declaration that the plaintiffs are entitled to return and redemption of the said 15,00,000 shares subject to determination of liability of the defendant no.9 Morepen to defendant no.7 Morgan; and, iv) permanent injunction directing the defendants no.1 to 4 and 7 to re-transfer the said 15,00,000 shares.

4. The suit came up before this Court first on 11th December, 2006 when senior counsel for the defendant no.7 Morgan appeared. Vide ad-interim order on IA No.13721/2006 of the plaintiffs under Order XXXIX Rules 1&2 CPC, the defendants no.1 to 4 were restrained from transferring, alienating, encumbering or otherwise dealing with or parting with possession of the 15,00,000 shares aforesaid. Vide subsequent order dated 18th December, 2006, it was clarified that neither party shall use the *ex parte* order dated 11th December, 2006 in any criminal proceedings with respect to the said shares.

5. The aforesaid ad-interim order continued, with repeated adjournments on some ground or the other. FAO(OS) No.350/2008 was preferred by defendant no.1 *inter alia* against *ex parte* order dated 11th December, 2006 but it was disposed of on 14th August, 2008 since the injunction application being IA No.13721/2006 was still pending before the Single Judge.

6. The process of adjournments and various other applications being filed from time to time, continued.

7. Finally on 3rd May, 2012, issues were framed in the suit and the suit set down for trial and a date also given for hearing of the application for interim relief being IA No.13721/2006 and other pending applications.

8. On 12th July, 2016, finding that inspite of issues framed as far back as on 3rd May, 2012, no affidavit by way of examination in chief had been filed by the plaintiffs till then, the suit was dismissed for non-prosecution and the interim order in force, vacated.

9. The plaintiffs preferred RFA(OS) No.66/2016 against order dated 12th July, 2016 and which was allowed vide judgment dated 21st September, 2016 and suit along with all pending applications, restored.

10. The senior counsel for the plaintiffs, the counsel for defendants no.1 to 4 and the senior counsel for the defendant no.7 Morgan were heard on (a) IA No.13721/2006 of the plaintiffs under Order XXXIX Rules 1 and 2, (b) IA No.14158/2006 of defendant no.7 Morgan and (c) IA No.291/2007 of the defendants no.1 to 4, both under Order XXXIX Rule 4 of the CPC, on 18th November, 2016, 22nd November, 2016, 14th December, 2016, 28th April, 2017 and 9th May, 2017 and orders reserved with liberty to the counsels to also submit in bullet points their respective contentions.

11. The counsels during the hearing, also submitted Convenience Volumes to save the time in rummaging through the voluminous records.

12. During the hearing, i) it was informed that defendant no.8 Blue Coast had approached Securities and Exchange Board of India (SEBI) with a complaint with respect to the sale of 15,00,000 shares aforesaid and of violation of the Takeover Code; ii) that SEBI held in favour of defendant no.8 Blue Coast but the Securities Appellate Tribunal (SAT) in appeal, reversed the order of SEBI and the appeal preferred to the Supreme Court by defendant no.8 Blue Coast had been dismissed; iii) the senior counsel for the plaintiffs agreed that in the event of any inconsistency qua the mechanism provided of sale of shares by the defendant no.7 Morgan in the pledged documents and in the Memorandum of Settlement in terms whereof Arbitral Award was published, the Memorandum of Settlement shall prevail; iv) the senior counsel for the plaintiffs was asked to explain whether the Civil Court can go into the questions which had already been decided by a specialized adjudicatory body i.e. SAT; v) the counsels were asked to address on whether challenge to sale of shares pursuant to a debt, which has been subject matter of execution proceedings, can be made by way of an independent suit or the said questions should have to be raised only in the execution proceedings; (vi) it was informed that defendant no.7 Morgan invoked the pledge on 28th April, 2003 and in pursuance to which invocation, the aforesaid 15,00,000 shares were transferred from the Demat Account of the plaintiff to the Demat Account of the defendant no.7 Morgan; however on Memorandum of Settlement incorporated in the Arbitral Award being executed and further time being granted to defendant no.8 Blue Coast and defendant no.9 Morepen to repay the dues of defendant no.7 Morgan, the shares

were transferred back from the Demat Account of defendant no.7 Morgan to the Demat Account of the plaintiffs; that the defendant no.7 Morgan again invoked the pledge on 6th / 9th December, 2003 and the said 15,00,000 shares were again, from 15th December, 2003 onwards, transferred from the Demat Account of the plaintiffs to the Demat Account of defendant no.7 Morgan; that the shares were actually sold by defendant no.7 Morgan to defendants no.1 to 4 from 16th December, 2003 till 25th March, 2004, through the Stock Exchange; vii) it was informed that Execution Petition No.13/2004 had since been disposed of as satisfied but at the time of disposal of the Execution Petition, the question whether the sale of shares is valid or not was left open to be adjudicated in this suit; viii) it was the contention of the senior counsel for the plaintiffs that the Pledge Agreement contemplated two stages – one of invocation of pledge but which did not divest the plaintiffs of title in the shares and the second, of actual sale of shares only on happening whereof the plaintiffs were to stand divested of the title to shares; ix) it was enquired from the senior counsel for the plaintiffs as to what difference it made, whether the plaintiffs were divested of the title in the shares on 6th / 9th December, 2003 or on 25th March, 2004 inasmuch as unless the plaintiffs had redeemed the pledge within the meaning of Section 177 of the Contract Act till then, the sale would still be valid; x) the senior counsel for the plaintiffs contended that no notice of sale in accordance with Section 176 of the Contract Act was given and the sale of shares was thus bad; xi) it was the contention of the senior counsel for the plaintiffs that till 25th March, 2004, a sum of

approximately Rs.37.5 lacs out of over Rs.6 crores due had been repaid; and, xii) it was the contention of the senior counsel for the plaintiffs that the plaintiffs learnt of the sale only in the year 2005; till then, the defendant no.7 Morgan, in the execution proceedings, by obtaining injunction against defendant no.8 Blue Coast enhancing its share capital, kept the plaintiffs under the belief that the shares were still held by the defendant no.7 Morgan inasmuch as if the shares had been transferred, there would have been no need to obtain such protection.

13. Before proceeding further, the following may be noticed:

A. The relevant clauses of the Letter of Pledge executed by each of the plaintiffs in favour of defendant no.7 Morgan and to which attention was drawn during the hearing are as under:

> "5. The pledgee may invoke the pledge at any time in the event of default or otherwise for as many number of shares as the Pledgee/lender deems fit in its sole discretion. However, such invocation of pledge will not amount to sale of shares to the lender and the borrower will not be entitled to any credit / adjustment on such invocation / transfer of shares to the lender's account on that date. The amount which may be realized against as and when actual sale is effected by the lender in the market and in that circumstances only the borrower will be entitled to adjustment of the sale proceeds so realised against the ICD dues. Pledger agrees that it has understood the concept and shall not create any dispute on the same.

8 ii) In the event of borrower not duly paying amount of ICD Facility being extended together with all interest and charges or in case they at any time fail to maintain the margin of security, stipulated as above. We hereby authorise you to sell and dispose off whole of the said securities or any part of the same by publication, auction or otherwise or you may get these transferred in your name or in the name of any other person as and when you may in your absolute discretion deem fit and to apply the net proceeds of such sale in satisfaction so far as the same extend towards liquidation of the amount due for principal and interest in respect of the said ICD facility together with interest overdue interest and all charges and expenses incurred by you.

v) In order to enable you to sell and dispose off the said securities under the circumstances mentioned above, We hereby give you the authority to undertake all deeds and acts to dispose off the said shares to adjust the outstanding amount. We hereby confirm that we will not question whether you have got the best price for the securities. We will not dispute or claim any loss on account of price at which securities are sold by the lender to himself, its group companies or to any outsider.

9 (ii) The pledgor/s shall pledge the dematerialised securities in favour of the Lender in accordance with the provisions of the Depositories Act, 1996, the regulations made pursuant thereto and the Regulations and Bye-laws of the concerned depository.

(viii) Notwithstanding what is stated above, if so permitted by the Bye-laws and Regulations of the concerned

depository, the Lender may sell, realize and / or dispose-off the dematerialised Pledged Securities or any of them without having the same first transferred or registered in the name of the Lender.

10. That you shall have Irrevocable right to sell, dispose off or realize the said securities on such terms and for such price as you may think fit and shall apply the net proceed towards satisfaction of the total outstanding against the borrower. If the net sum realized by such a sale should be insufficient to cover the full amount due in respect of the said ICD facility together with interest, over due interest and other charges and expenses as per your claim. We agree to pay you forthwith a delivery of the said amount and any balance due to you on the footing thereof. If the net sum realized by such a sale shall be in excess of the amount due in respect of the said ICD Facility, the excess will be made over by you to us forthwith."

(emphasis added)

B. The relevant Clauses of the Memorandum of Settlement dated 27th May, 2003 incorporated in the Arbitral Award and to which attention was drawn by the counsels during the hearing, are as under:

"4. RIGHTS OF LENDER IN CASE OF DEFAULTS

(i) On the occurrence of any of the event of default, without prejudice to any other remedy which the Lender may have, the pledge will become enforceable forthwith which includes the right of sale of shares pledged.

(iii) It is also specifically agreed that in the event the number of unpaid instalments (whole or in part) become three, then there shall be an acceleration and the entire DEBT DUE AND PAYABLE as mentioned in Annexure "A" shall become due and payable forthwith without requirement of any notice and further without prejudice to the executability of the Award in terms hereof.

6. GUARANTEE AND PLEDGE

(ii) The Pledgers Guarantee due repayment by Borrower / Guarantors / Surety of the DEBT DUE AND PAYABLE and by way of security have pledged all their rights, title and interest in and to the shares in favour of the Lender. The details of the Pledgers and the security pledged and the number of shares pledged are enumerated hereinbelow:-

Name of the Pledger	Security Name	Type of Security	No. of shares Pledged
Tendril Financial Services Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	3,17,000
Niketan Traders Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	3,10,000
Ebony Traders Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	22,000
Becker Traders Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	2,92,000
Cross Trading Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	2,89,000
Petunia Financial Services Pvt. Ltd.	Blue Coast Hotels & Resorts Ltd.	Equity Share	2,70,000
	Total		**15,00,000**

7. FURTHER ASSURANCES

(i) It is understood and agreed by and between the parties that since the share market remains highly volatile and the prices of the scrips keep on fluctuating quite a lot, which factum is known to all the parties of this Settlement. The Borrower, Guarantors and Surety and Pledgers fully agree and undertake that they shall not raise any objection on the said decision of the Lender and shall accept the statement containing the share sale transactions carried out by the Lender in relation thereto; without any protest or objection.

(ii) It is also agreed by the Borrower and Pledgers that in case they failed to make the payment in terms of this Memorandum of Settlement or the price of equity shares pledged falls below the price mentioned in para 3(iii) above, the Lender shall be at liberty to sell / dispose off the whole or the part of the said shares at its sole discretion as it may deem fit at any point of time at the price available in the market for which the Borrower / Pledgers shall have no objection whatsoever. The proceeds on account of the sale of said shares will be credited accordingly to the Borrower's account and adjusted against the overdue amount.

(iii) In case of default the Lender shall have absolute right, title and interest to appropriate the security and sell the security at fetchable market price. However, the Lender undertakes that prior to the default he will keep the security as pledge and will not create any third party right.

We, the Pledgers undertake, agree and abide by the terms and conditions of this Memorandum of Settlement and have signed hereof in token of our acceptance of the terms contained in the Memorandum of Settlement hereinabove. We the Pledgers also agree and confirm that this Memorandum of Settlement shall not affect the rights of the Lender under the Letters of Pledge and Irrevocable Power of Attorney(s) dated 07.02.2003 or affect the validity of the said Letters of Pledge and Irrevocable Power of Attorney(s)."

(emphasis added)

C. Sections 176 and 177 of the Contract Act are as under:

"**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 pledge 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 for 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"

14. The senior counsel for the plaintiffs informed / argued (a) that the defendant no.9 Morepen is the promoter of defendant no.8 Blue Coast; (b) that 15,00,000 shares were pledged to secure the borrowings of defendant no.8 Blue Coast and defendant no.9 Morepen from defendant no.7 Morgan; (c) that in terms of the Memorandum of Settlement, three arbitral awards with respect to three inter-corporate deposits were made; (d) that Execution Petitions No.6/2004 and 13/2004 were filed by defendant no.7 Morgan for recovery of dues from defendant no.9 Morepen and Execution Petition No.18/2004 was filed by defendant no.7 Morgan for recovery of dues from defendant no.8 Blue Coast; (e) that the defendant no.7 Morgan claimed to be entitled to Rs.18 crores and sold the 15,00,000 shares to defendants no.1 to 4 for Rs.1.57 crores; (f) that Execution Petitions No.18/2004 and 6/2004 have been disposed of as satisfied; (g) that in the said Execution Petitions, no credit of the amounts realized by the defendant no.7 Morgan from sale of the 15,00,000 shares was given; (h) that the legal question for adjudication is whether the plaintiffs lose right and title in the shares merely on invocation of the pledge or on sale of the shares; if it is held that the plaintiffs lose right / title on invocation of the pledge, no challenge to the sale can be made; (i) that it is however the contention of the plaintiffs that on mere invocation of pledge, the

plaintiffs as pledgors did not lose right or title in the shares; this is evident from the shares at the time of first invocation though having been transferred from the Demat Account of the plaintiffs to the Demat Account of defendant no.7 Morgan, having been returned to the Demat Account of the plaintiffs on Memorandum of Statement incorporated in the Arbitral Award being drawn up; (j) that the defendant no.7 Morgan relies upon a notice dated 6th September, 2003 and which is disputed by the plaintiffs and the said question is a subject matter of evidence; (k) that till the filing of the Execution Petition on 9th January, 2004, the defendant no.7 Morgan was treating the pledge to be continuing; this is clear from the amounts realized from sale if any of the shares being not mentioned in the Execution Petition and application for restraining the defendant no.8 from enhancing the share capital being filed; and, (l) that the proceedings before the SEBI were concerned with the aspect of Takeover Code and not with the aspect of pledge.

15. Per contra, the senior counsel for the defendant no.7 Morgan informed / argued (a) that since the shares were not in physical form but in fungible form, the provisions of the Contract Act relating to pledge are not relevant and the provisions of the Depositories Act, 1996 apply thereto; (b) that Regulation 58 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 is as under:

> "**Manner of creating pledge or hypothecation.**

58(1) If a beneficial owner intends to create a pledge on a security owned by him, he shall make an application to the depository through the participant who has his account in respect of such securities.

(2) The participant after satisfaction that the securities are available for pledge shall make a note in its records of the notice of pledge and forward the application to the depository.

(3) The depository after confirmation from the pledgee that the securities are available for pledge with the pledgor shall within fifteen days of the receipt of the application create and record the pledge and send an intimation of the same to the participants of the pledgor and the pledgees.

(4) On receipt of the intimation under sub-regulation (3) the participants of both the pledgor and the pledgee shall inform the pledgor and the pledgee respectively of the entry of creation of the pledge.

(5) If the depository does not create the pledge, it shall send along with the reasons an intimation to the participants of the pledgor and the pledgee.

(6) The entry of pledge made under sub-regulation (3) may be cancelled by the depository if the pledgor or the pledgee makes an application to the depository through its participant:

Provided that no entry of pledge shall be cancelled by the depository with the prior concurrence of the pledgee.

(7) The depository on the cancellation of the entry of pledge shall inform the participant of the pledgor.

(8) Subject to the provisions of the plegde document, the pledgee may invoke the pledge and on such invocation, the depository shall register the pledgee as beneficial owner of such securities and amend its records accordingly.

(9) After amending its records under sub-regulation (8) the depository shall immediately inform the participants of the pledgor and pledgee of the change who in turn shall make the necessary changes in their records and inform the pledgor and pledgee respectively.

(10)(a) If a beneficial owner intends to create a hypothecation on a security owned by him he may do so in accordance with the provisions of sub-regulations (1) to (9).

(b) The provisions of sub–regulations (1) to (9) shall mutatis mutandis apply in such cases of hypothecation:

Provided that the depository before registering the hypothecate as a beneficial owner shall obtain the prior concurrence of the hypothecator.

(11) No transfer of security in respect of which a notice or entry of pledge or hypothecation is in force shall be effected by a participant without the concurrence of the pledgee or the hypothecate, as the case may be.";

(c) that under the aforesaid Regulation, the beneficial ownership in the shares changes on invocation and it is only the adjustment which takes

place on sale; (d) that the plaintiffs in the plaint have not disputed that the defendant no.7 Morgan sold the shares through the market; (e) that at the time of sale, Execution Petition No.13/2004 was already pending and due adjustment has been given therein of the price received on sale of shares; (f) that it was a term of the loan that till the loan is re-paid, the defendant no.8 Blue Coast will not change its shareholding; that the defendant no.7 Morgan, by seeking an order in the execution to the said effect was merely enforcing the said term and applying for and obtaining the said injunction order does not indicate that the shares continued to be pledged; (g) that the price fetched by the shares was low compared to the earlier prevailing price, owing to a large number of shares having come in the market; (h) that in fact, the said sale was effected after obtaining permission of SEBI because the said shares were under the 5% Circuit Breaker limit; (i) that the repayment of the loan by the defendant no.8 Blue Coast and defendant no. 9 Morepen started much later; (j) that on the complaint of the plaintiffs of the offence of breach of trust, an FIR was also registered but which has been quashed and the challenge thereto before the Supreme Court has been dismissed; (k) that therefore there is no question of breach of trust now; (l) that the order of SAT is final; (m) that this case now only concerns the applicability of Section 176 of the Contract Act;

(n) that Section 23E of the Depositories Act as under:

> **"23E. Civil Court not to have jurisdiction.**

> No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction can be granted by any court or other authority in respect of any action taken or to be taken. In pursuance of any power conferred by or under this Act."

bars the jurisdiction of the Civil Court; (o) that Section 15Y of the Securities and Exchange Board of India Act, 1992 as under:

> "**15Y. <u>Civil Court not to have jurisdiction.</u>** – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

also bar the jurisdiction of the Civil Court; and, (p) that the plaintiffs in the present case are admittedly investment companies of the borrowers viz. defendant no.8 Blue Coast and defendant no.9 Morepen, of the defendant no.7 Morgan.

16. The counsel for the defendants no.1 to 4 informed/argued, (a) that the defendants no.1 to 4 purchased the shares from the market; (b) that the defendant no.8 Blue Coast, while disclosing its shareholding pattern as on 1st January, 2004, disclosed the shares held by the defendant no.5 who sold the same to the defendant no.1 on 9th July, 2004 and the shares held by defendant no.2; (c) the defendant no.8 Blue Coast thus had knowledge as on that date, of the sale of the pledged shares and the plaintiffs who are acting in concert with

defendant no.8 Blue Coast thus also had knowledge; (d) that public announcement dated 27th February, 2004 was made by defendant no.8 Blue Coast of defendant no.7 Morgan having become beneficial owner of the shares in accordance with Regulation 58 supra; (e) that defendant no.6 bought 4.58% of the shares from the market and sold the same to the defendant no.1 on 9th July, 2004; (f) that defendant no.5 sold the shares acquired by it from the market to the defendants no.1 to 3 on 16th July, 2004; (g) that in such transactions through depositories, it is not known who is buying and who is selling; (h) that defendants no.1 to 4 are *bona fide* purchasers of the said shares; (i) that the plea of the plaintiffs, of the defendants no.1 to 4 having acted in concert with defendants no.5 to 7 has already been rejected by quashing of the FIR for the offence of breach of trust and the *ex parte* order is liable to be vacated on the said ground alone; (j) that the defendants no.1 to 4 are not concerned with Section 176 of the Contract Act;(k) that all the aforesaid dates of transfer of shares have been accepted as correct in the order of the SAT; and, (l) that the SAT in its order has also returned a finding of purchase of shares by the defendants no.1 to 4 through the market mechanism and that when trades are executed through market mechanism, there can never be prior meeting of minds between buyer and seller; if there has to be prior meeting of minds, the trades have to be manipulative and cannot be through market mechanism and which was not the allegation before it; it was further recorded in the said order that the trading system of Stock Exchange is anonymous and does not permit the buyer to know who the seller is and vice-versa.

17. The senior counsel for the plaintiffs, in rejoinder referred to Section 28 of the Depositories Act as under:

> **"28. Application of other laws not barred**
>
> The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force relating to the holding and transfer of securities.

to contend that the same is in addition to the provisions of the Contract Act and thus the jurisdiction of the Civil Court is not barred and notice under Section 176 of the Contract Act would still be required. It was further contended that the notice claimed to have been given has been given to defendant no.9 Morepen and not to the plaintiffs as pledgors. It is further informed that the plaintiffs filed a petition under Section 570 of the Companies Act, but had subsequently withdrawn the same. It was yet further argued that the balance of convenience is in favour of the plaintiffs, particularly as the trial is underway.

18. The counsel for the plaintiffs along with his written submissions has filed copies of following judgments though all of them were not cited at the time of hearing:

(i) ***Neikram Dobay Vs. Bank of Bengal*** 1891 LR 60;

(ii) ***Ramdeyal Prasad Vs. Sayed Hasan*** AIR (31) 1944 Patna 135;

(iii) ***The Official Assignee Vs. Madholal Sindhu*** (1946) 48 BOMLR 828;

(iv) ***Nabha Investment Pvt. Ltd. Vs. Harmishan Dass Lukhmi Dass*** 1995 (33) DRJ 496;

(v) ***Hulas Kunwar Vs. Allahabad Bank Ltd.*** AIR 1958 Cal 644;

(vi) ***Balkrishan Gupta Vs. Swadeshi Polytex Ltd.*** (1985) 2 SCC 167;

(vii) Order dated 14th August, 2008 in FAO(OS) No.350/2008 titled ***Namedi Leasing & Finance Company Ltd. Vs. Tendril Financial Services Pvt. Ltd.***;

(viii) ***Hamza Haji Vs. State of Kerala*** (2006) 7 SCC 416;

(ix) ***Poysha Power Generation Pvt. Ltd. Vs. Doctor Morepen Ltd.*** 2006 SCC OnLine Del 1665;

(x) ***Dalpat Kumar Vs. Prahlad Singh*** (1992) 1 SCC 719;

(xi) ***Bina Murlidhar Hemdev Vs. Kanhaiyalal Lokram Hemdev*** (1999) 5 SCC 222;

(xii) ***Anand Prasad Agarwalla Vs. Tarkeshwar Prasad*** (2001) 5 SCC 568;

(xiii) ***Hindustan Petroleum Corpn. Ltd. Vs. Sriman Narayan*** (2002) 5 SCC 760; and,

(xiv) ***Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass*** (2004) 8 SCC 488.

19. The counsel for the defendant no.7 Morgan along with his synopsis of submissions has filed following judgments though at the time of hearing only first two judgments were cited:

(i) ***JRY Investments Pvt. Ltd. Vs. Deccan Leafine Services Ltd.*** 2003 SCC OnLine Bom 1134;

(ii) ***Pushpanjali Tie Up Pvt. Ltd. Vs. Renudevi Choudhary*** IV (2014) BC 565 (DB) (Bom.);

(iii) ***Maharashtra State Cooperative Bank Ltd. Vs. Assistant Provident Fund Commissioner*** (2009) 10 SCC 123;

(iv) ***Infrastructure Leasing & Financial Services Ltd. Vs. B.P.L. Ltd.*** 2015 (1) SCALE 186;

(v) ***Bharat Bank Ltd. Vs. Bodh Raj*** AIR 1956 P&H 155;

(vi) ***Sankaranarayana Iyer Saraswathy Amal Vs. The Kottayam Bank Ltd.*** AIR 1950 Ker 66 (FB);

(vii) ***Cooverji Umersey Vs. Mawji Vaghji*** AIR 1937 Bombay 26; and,

(viii) ***S.L. Ramaswamy Chetty Vs. M.S.A.P.L. Palaniappa Chettiar*** AIR 1930 Madras 364.

20. The counsel for the defendants no.1 to 4 has also filed synopsis of his submissions.

21. I have considered the controversy and for the reasons following, am of the view that the plaintiffs are not entitled to the continuation of the ad interim order which has remained in force for the last 12 years:

A. As far as the argument of the senior counsel for the plaintiffs of the balance of convenience being in favour of the plaintiffs, especially now when the trial is underway, is concerned, a) without the plaintiffs having a *prima facie* case in their favour, merely by urging the criteria of balance of convenience, they cannot be entitled to interim relief; b) it cannot be lost sight of that inspite of the issues having been framed as far back as on 3rd May, 2012, no affidavit by way of examination-in-chief even was filed by the plaintiffs till 12th July, 2016 when the suit was dismissed for non-prosecution on that account; c) though in appeal, the suit was restored but not by finding the plaintiffs to have been diligent but for the reason of an application pending

consideration; d) even after the order of restoration of the suit, the plaintiffs are found to have tendered the affidavit by way of examination-in-chief of their first witness on 4th July, 2017 and whose examination-in-chief itself was deferred on the request of the counsel for the plaintiffs that certain judicial files summoned had not been received; thereafter on 24th August, 2017 and 13th December, 2017 again, the witness of the plaintiffs was found to have not appeared and adjournment was sought; it is thus quite evident that the trial of the suit is unlikely to be near conclusion.

B. The High Court of Bombay, in ***JRY Investments Private Limited*** supra is found to have, held i) that the shares in dematerialized form cannot be pledged in accordance with the provisions of the Contract Act which requires delivery of the goods pledged; ii) it is obvious from the provisions of the Contract Act, that for a valid pledge, there must be a delivery of goods i.e. a physical possession of the goods; it would however be impossible to hold that such goods in a dematerialized form are capable of delivery i.e. by handing over de facto possession; since goods are invisible and intangible, it would be impossible and in any case difficult to fix the fact of time and place of delivery; dematerialized shares cannot be delivered physically nor can physical possession of such dematerialized shares be handed over; iii) provisions have been enacted in the Depositories Act for the purpose of recording accurately the transfers and pledges of shares including those in a dematerialized form; iv) the transactions in such shares are directly governed by the

Depositories Act which contemplates the existence of a depository; the shares are held by the depository in the name of the beneficial owner of the shares; the depository is entitled to act as a registered owner for the purpose of effecting transfer of ownership of security on behalf of a beneficial owner vide Section 10 of the Depositories Act which begins with a non-obstante clause and therefore ownership and transfer of shares governed by the Act must be in accordance with the provisions of the Depositories Act; v) Section 12 of the Depositories Act provides for pledge or hypothecation of the security and Section 20 thereof renders anyone who acts in contravention of the Act or any regulations or bye-laws, punishable with imprisonment; vi) SEBI in exercise of the powers under Section 25 of the Depositories Act has made the Regulations aforesaid which require the depository to maintain records of all approvals, notices, entries and cancellation of pledge; vii) the Depositories Act and the Regulations aforesaid contain a whole and self-contained procedure for the creation of pledges; viii) in any case, since it is not possible to physically deliver demated shares and therefore pledge them in accordance with the Contract Act, it must be held that a pledge of such shares can only be validly created in accordance with the provisions of the Depositories Act; ix) though in the facts of the case, pledge was not created by the plaintiff in the suit and the title in the shares was conveyed to the defendant no.1 in the suit but even if it were to be assumed that the plaintiff did not convey title in the shares to defendant no.1, still, it could not be said that the other defendants who purchased the shares from the defendant no.1 would not get any title in the share; and, x) the shares stood in the

name of defendant no.1 as beneficial owner and the circumstances of the shares standing in the name of defendant No.1 as beneficial owner of the shares in the records of the depository participant was clearly attributable to the plaintiff and the plaintiff was estopped from asserting its title against bona fide purchasers for value without notice of any defect in the title.

C. No merit is found in the contention of the senior counsel for the plaintiffs of aforesaid judgment being on a finding of *bona fide* purchase and which is not so in the present case; sale of shares in the present case is admittedly through market transactions and the finding of the SAT, being a specialized Tribunal, in this regard and which has attained finality, would bind the parties. What was held by a Single Judge of the Bombay High Court in ***JRY Investments Private Limited*** supra qua the pledge of dematerialized shares being not possible under the provisions of the Contract Act and being governed solely by the Depositories Act and the Regulations made thereunder was concurred with by the Division Bench of the same High Court in ***Pushpanjali Tie Up Pvt. Ltd.*** supra. The Division Bench further added that a) a party is entitled to assume and proceed on the basis that the pledge, if any, would be created in the manner prescribed by the Depositories Act and the Regulations made thereunder; b) the provisions of the Depositories Act, particularly Section 12, and the Regulations, particularly Regulation 58, are salutary as they introduce transparency and certainty in the securities market; there is no other discernible reason for the legislature having introduced these provisions; if a

pledge could be created in any other manner, there was no reason for the legislature to have provided for a particular manner alone for creating a pledge of shares in a dematerialized form; c) the Contract Act does not prescribe the manner in which a pledge is to be created; it does not stipulate that a pledge can be created only in a particular manner; the Depositories Act however prescribes the manner in which a pledge must be created; thus even if owing to Section 28 of the Depositories Act, it were to be held that the provisions of the Contract Act are not excluded, provision in the Depositories Act and the Regulations thereunder of the manner of creation of pledge in dematerialized shares is not in derogation of the provisions of the Contract Act but in addition thereto; d) even assuming that Section 176 of the Contract Act applies to pledges created under the Depositories Act and the pledgee fails to exercise its right in accordance with the provisions of Section 176 of the Contract Act, it would make no difference as far as the purchaser of the dematerialized shares from the pledgee is concerned; and, e) if injunctions are granted in such cases, it would adversely affect the functioning and sentiments of the securities market – it would derail the entire system of maintaining the margin by utilizing securities.

D. I have no reason to take a view different from that taken by the High Court of Bombay in ***JRY Investments Private Limited*** supra and in ***Pushpanjali Tie Up Pvt. Ltd.*** supra and respectfully concur with the same and am for the same reasons unable to find the plaintiffs entitled to any interim relief as they have enjoyed for the last 12 years.

E. I may however add, that a notice under Section 176 of Contract Act is in derogation of Regulation 58 supra. While Section 176 entitles the pledgee/pawnee to, on default by the pledgor/pawnor, sell the thing pledged, "on giving the pawnor reasonable notice of the sale", Regulation 58(8) entitles the pledgee to, "subject to the provisions of the pledge document" , "invoke the pledge" and mandates the depository to "on such invocation" i.e. by the pledgee, "register the pledgee as beneficial owner of such securities" i.e. the securities pledged and further mandates the depository to "amend its records accordingly". There is no place for a prior notice under Section 176, in the scheme of Regulation 58(8). On the contrary, Regulation 58(9) requires the depository to, after so amending its records under Regulation 58(8), inform the participants of the pledgor and the pledgee of the same and mandates the said participants to inform the pledgor and the pledgee. Thus, (a) while Section 176 provides for a notice to pledgor prior to effecting sale, Regulation 58 provides for notice post invocation and on which invocation beneficial ownership of pledged shares changes from that of the pledgor to that of the pledgee and which is equivalent to sale under Section 176. To hold that a prior notice under Section 176 of Contract Act is also required in the case of pledge of dematerialised shares would interfere with transparency and certainty in the securities market, rendering fatal blow to the Depositories Act and Regulations and the object of enactment thereof.

F. The distinction sought to be drawn by the senior counsel for the plaintiffs between "invocation" and "sale" is also not in consonance with Regulation 58. I may notice that there is no such distinction in Contract Act either. While Section 176 of Contract Act entitles pledgee to, on default of pledgor, sell the pledged thing i.e. transfer title and possession thereof to purchaser, Regulation 58 entitles the pledgee to, on default on pledgor, invoke the pledge by intimating to the depository and mandates the depository to in its records record the pledgee in place of the pledgor as the beneficial owner of pledged shares, thereby transferring title as beneficial owner, from the pledgor to pledgee. The only condition imposed on invocation of pledge by the pledgee, under Regulation 58 (8) is of the same being required to be "subject to the provisions of the pledge documents" i.e. of creation of pledge in the manner provided in Regulation 58(1) to 58(6) - of which the participant of the pledgee and the depository have been made aware and with which they are thereby required to comply with. It is not the case of plaintiffs that there was any condition of prior notice in the pledge documents. Though it is not the plea that the Letters of Pledge and Arbitral Award were intimated to the participant or the depository but even they do not provide for prior notice. On the contrary, they provide otherwise. The distinction drawn in the Letters of Pledge aforequoted between invocation of pledge, whereupon the beneficial ownership in pledged shares, under Regulation 58, was to stand transferred from that of pledgor to that of pledgee, and sale of said shares by pledgee, to realize its dues, is only for the purpose of determining the amount which was to be offset from the debt to secure

which the pledge was made. However such agreement cannot be interpreted as the pledgor continuing to have title in the shares. The only title in dematerialised shares, under the Depositories Act, is as beneficial owner in the records of the participant and the depository and which beneficial ownership changes on invocation of pledge in terms of Regulation 58. Even otherwise, a plea of a pledgor, of the pledgee, though after notice under Section 176, having sold the pledged thing for less than optimum price cannot be a ground for invalidating the sale. The mere fact that the parties, in terms of Arbitral Award reversed the earlier invocation also cannot change the said position. Such agreement is also not found to be inconsistent with Regulation 58. The quantum of consideration does not affect the transfer of title as beneficial owner.

G. There is another aspect of the matter. According to the senior counsel for the plaintiffs also, after the first invocation by defendant no.7 Morgan, there were disputes between the parties which were subject matter of arbitration resulting in an Arbitral Award and which under the Arbitration & Conciliation Act, 1996 has the force of a decree. Under the said Arbitral Award, having the force of decree, the defendant no.7 Morgan was entitled to sell the shares, without any notice and the plaintiffs had agreed not to raise disputes. The invocation/sale of pledged shares thereafter is in terms of Arbitral Award having force of decree and the pleas as sought to be taken are not available to the plaintiffs.

H. Supreme Court in ***Vimal Chandra Grover Vs. Bank of India*** (2000) 5 SCC 122, did not accept the defence of Sections 172 – 177 of the Contract Act in the context of a claim under the Consumer Protection Act, 1986 and further reasoned that the Bank as pledgee in that case having agreed to the request of pledgor for sale of pledged shares, could not take the plea of being entitled under Section 176 of the Contract Act to retain the pledged shares and sue for recovery of its dues.

I. There is another aspect. Provision of notice under Section 176, even if were to be held to be required to be given, is for the benefit of the pledgor and has no element of public law or public interest. A provision, even in law, for personal benefit, if not in public interest, can always be waived by that person. The plaintiffs, in the Letters of Pledge and in the Arbitral Award, are found to have waived such notice.

J. I may further add that even if Section 176 of the Contract Act were to be held to apply and to have been not complied with by the defendant no.7 Morgan, the same does not wipe away the debt to secure which the pledge was made. It is not as if the plaintiffs, prior to the sale by the defendant no.7 Morgan, had repaid the said debt. The principal borrower at whose instance the plaintiffs had pledged their shares, admittedly remains in default and Execution Petition No.13/2004 is still stated to be pending. Though this suit has been pending for 12 years, but the debt has not been repaid. Even if reasonable notice under Section 176 was not given, the plaintiffs

during pendency of suit have had sufficient notice. Supreme Court, in ***Nopany Investments (P) Ltd. Vs. Santok Singh (HUF)*** (2008) 2 SCC 728, in the context of notice under Section 106 of the Transfer of Property Act, 1882, held that after such long pendency of suit, the non giving of notice prior to institution of suit is of no significance. The balance of convenience, in the circumstances, is in favour of defendants no.1 to 4 rather than in favour of the plaintiffs.

K. I am thus unable to interpret Section 176 of the Contract Act as entitling the plaintiffs to seek restraint against dealing with shares or return of the shares, as the plaintiffs have sought in this suit, even if the notice under Section 176 of the Contract Act was held to be required to be given and having not been given.

L. This Court in ***Nabha Investment Pvt. Ltd.*** supra, ofcourse dismissed an application under Order VII Rule 11 of the CPC in a suit by pawnor, only for declaration as bad of further pledge by the pledgee of pledged shares without suing for redemption and held the suit to be maintainable but in that case the pawnor had prior to the pledgee further pledging the shares, requested the pledgee to return the pledged shares against payment of loan amount. Also, the suit was held to be maintainable because the pledgee in that case was found to be not in a position to return the pledged shares even if the pawnor had sued for redemption. This judgment however is of prior to the Depositories Act and does not relate to dematerialised shares. Though this judgment is found to have been followed, after the coming into force of Depositories Act, in ***GTL Limited Vs. IFCI Ltd.*** 182 (2011)

DLT 696, but without considering the Depositories Act. The same thus do not bind me.

M. I may also notice that even if the sale of pledged shares in the present case, by defendant no.7 Morgan, ultimately to defendants no.1 to 4, were to be bad for non service of notice under Section 176, the same would still vest in defendants no.1 to 4, rights as a pledgee, which the defendant no.7 Morgan admittedly had/has and it cannot thus be said that it was/is not possible for plaintiffs to also sue for redemption of pledged shares, if not from defendant no.7 Morgan, from defendants no.1 to 4. The plaintiffs have not done so. The plaintiffs as pledgors cannot on the one hand restrain the defendant no.7 Morgan and defendants no.1 to 4 as assignees from defendant no.7 Morgan, from dealing with pledged shares and at the same time neither redeem nor offer to redeem the pledged shares, thereby defeating the pledge. For this reason also, no interim relief sought can be granted.

N. The counsel for the plaintiffs, in written submissions, has relied upon ***Neikram Dobay*** supra and ***Ramdeyal Prasad*** supra to contend that sale to oneself is void.

O. However in ***Neikram Dobay*** supra also, after holding the sale by the pledgee to himself to be bad, it was held that liability of such a pledgee would also be for damages only; similarly, in ***Ramdeyal Prasad*** supra, it was held that such an Act of the pledgee does not put an end to the pledge so as to entitle the pledgor to recover the pledged

goods without payment of the amount thereby secured and the pledgor is bound by the re-sales duly effected by the pledgee to third persons.

P. Reference in this context may also be made of ***Dhani Ram & Sons Vs. The Frontier Bank Ltd.*** ILR [XV-(1)] 1961 Punj 79. It was held, relying on ***Neikram Dobay*** supra, that the sale of the pledged things by the pledgee to itself, though unauthorised, cannot be said to be void. Finding it to be not the pledgor's case that the value credited to its account is below the market value, it was held that no interim injunction could be granted. Similarly in the present case there is no whisper of the prevalent price on date of sale or of damage if any caused to plaintiffs.

22. Resultantly, IA No.13721/2006 of the plaintiffs under Order XXXIX Rules 1 and 2 is dismissed and IA No.14158/2006 of defendant no.7 Morgan and IA No.291/2007 of the defendants no.1 to 4, both under Order XXXIX Rule 4 of the CPC, are allowed. Resultantly, the ad interim order dated 11th December, 2006 is vacated.

CS (OS) No.2281/2006, CCP(O) No.57/2007 & IA No.1922/2007 (of the plaintiffs under Order XI Rules 12&14 CPC)

23. Though I am of the opinion that in view of the aforesaid, the suit itself is liable to be dismissed but since the counsels have not been heard on the said aspect, it is deemed appropriate to hear the parties concerned.

24. List for the said purpose on 21st May, 2018. Recording of evidence to go on in the meanwhile.

RAJIV SAHAI ENDLAW, J.

APRIL 3, 2018
'gsr'..

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