* **HIGH COURT OF DELHI : NEW DELHI**

\+ **IA No.11586/2011 in CS (OS) No.1771/2011**

% Judgment decided on: 29.08. 2011

GTL Limited .....Plaintiff

Through: Dr. Abhishek Manu Singhvi , Sr. Adv., Mr. Rajiv Nayar, Sr. Adv., Mr. N.K.Kaul, Sr. Advocate with Mr. Farid Karachiwala, Ms. Fariyal Tahseem, Mr. Rishi Agrawala, Mr. Akshay Ringe & Mr. Nikhil Rohatgi, Advs.

Versus

IFCI Ltd. & Ors. .....Defendants

Through: Mr. Maninder Singh, Sr. Advocate with Mr. Pawanjit S. Bindra, Mr. Vishrov Mukherjee & Mr. Nitin Kaushal, Advs. for D-1 & D-2. Mr. Amit Sethi, Adv. for D-3.

Coram:

**HON'BLE MR. JUSTICE MANMOHAN SINGH**

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

**MANMOHAN SINGH, J.**

1. By this order I propose to decide the interim application

being IA No.11586/2011 under Order 39 R 1 and 2 CPC seeking inter alia various reliefs including restraining the defendants No.1 and 2 and their agents and servants in any manner dealing with, disposing of, selling, alienating for sale or creating any third party rights and parting with shares of the suit property by passing the injunction orders.

2. The plaintiff has also filed another application under Order 2 Rule 2 CPC seeking relief to grant leave to the plaintiff to file suit for damages against the defendants.

3. The brief facts of the case are that on 12th July, 2010, Facility Agreement was entered into between defendant No.1 and defendant No.3 whereby defendant No.1 advanced a loan of Rs.250 crores against various securities to the defendant No.3. One of the securities is a pledge of shares of the plaintiff which were to be kept in non-disposal escrow account. The other securities are hypothecation of movable properties, mortgage of immovable properties, corporate guarantees etc given by the defendant No.3. The plaintiff is not a party to this Facility Agreement, even though, plaintiff is group company of defendants No.3 and 4.

4. Defendant No.3 was required to maintain a security cover of two times of the Facility Amount (Rs.250 crores) by escrow of such

number of shares in the Escrow Account in accordance with Non-Disposal and Escrow Agreement in form and manner satisfactory to the defendant No.1. As per the terms of Facility Agreement the said amount was to be repaid by defendant No. 3 at the end of 36 months from the date of disbursement of the loan i.e. from July, 2010.

5. On 12th July, 2010, a Non-Disposal and Escrow Agreement was also executed between the five parties i.e. plaintiff, i.e. GTL Limited, IFCI Financial Services Limited (defendant No.2), AXIS Bank Limited, IFCI Limited (defendant No.1) and Chennai Network Infrastructure Ltd. (defendant No.3). Under the said agreement, the shares of the GTL Infrastructure Ltd./defendant No.4 held by the plaintiff as share holders were placed in an escrow arrangement and the payment account was established for deposit of proceed of such shares in the event of sale and for recovery of outstanding amount in case of default.

6. As per Clause 3.1 of the Non-Disposal and Escrow Agreement (hereinafter referred to as NDE), it is agreed by the parties to the said agreement that the plaintiff shall not deal with the shares during the currency of the said agreement. Clause 4 sets out the escrow arrangement under which the defendant No.2 was appointed as

an escrow agent who is the group company of defendant No.1 and in its favour power of attorney was executed by the plaintiff on the same date, inter alia, to pledge, mortgage, charge, transfer, assign and/or otherwise dispose of all or part of Escrowed shares to any person including defendant No.1 as the attorney.

7. As per the NDE, the plaintiff escrowed approximately 17,63,68,219 crores number of shares of defendant No.4. It is specifically provided in the NDE that the escrow would stand converted into a pledge on the occurrence of event of default defined under the Facility Agreement and the NDE.

8. From the aforesaid facts, it is clear that the defendant No.3 had taken a loan facility from the defendant No.1 which was secured by pledging shares of the defendant No.4 held by the plaintiff in an escrow account which was managed by the defendant No.2 who was appointed escrow agent.

9. Since the value of the share fell to Rs.32.70 paise per share, i.e. 28.29% lower than the initial share price (Rs.45) at the time of first drawn-down and the security cover had fallen to 1.80 times as against the stipulated cover of 2 times. Defendant No.1 by notice dated 02.06.2011 requested the defendant No.3 to provide cash margin, the

security cover in terms of the agreement. The share of the defendant No.4 further fell to Rs.16.95 paise per share against Rs.45 per share, by notice dated 20.06.2011, the defendant No.1 brought the said fact to the notice of defendant No.3.

10. Admittedly, the security cover further had fallen to 1.05 times against the stipulated cover of 2 times and the value of the share was 47.25% against the stipulated cover and defendant No.1 requested defendant No.3 to provide cash margin of Rs.118.129 crores to restore the collateral value to 2 times of the loan outstanding.

11. By another notice dated 21.06.2011, the defendant No.1 asked defendant No.3 to urgently provide cash margin to restore the collateral value to 2 times of the loan outstanding.

12. On 22.06.2011 it topped up the security cover by pledging 11,81,29,000 shares, increasing the total number of escrowed shares to 27,37,29,000 shares to escrow account, i.e. 28.59% share capital of defendant No.4 and security cover improved to 1.68 times, but still, it was below the prescribed cover.

13. As the same was below the stipulated cover, the defendant No.1, by notice dated 27.06.2011 asked defendant No.3 and the plaintiff to provide the necessary cash margin to restore security cover

of 2 times within 3 days, failing which the defendant No.1 would take necessary action as per financial documents.

14. Defendant No.3 on 28.06.2011 replied to the above letter and tried to explain the position about the sudden drop in the price. But the defendant No.1 again on 29.06.2011 asked the defendant No.3 to restore security cover as per the contract.

15. Admittedly, the security cover was not raised to 2 times of the facility amount within stipulated time. The defendant No.1 by exercising its option available under Clause 2 of the Power of Attorney dated 12.07.2010 executed by the plaintiff of default (sub-clause (v) & (w) of Clause 13.1 of the Facility Agreement read with Clause 4.2 of the Non-Disposal and Escrow Agreement) on 27,37,29000 created a pledge of the shares on 13.07.2011 which were kept in Escrow Account.

16. Thereupon, the CDR proposal was given to defendant No.1 on 16.07.2011 by Board of Directors of defendant No.4 as it was a signatory to the Inter Creditor Agreement. However, the defendant No.1 on 18.07.2011 informed defendant No.3 that since defendant No.3 failed to restore the security cover up to the level of 2 times, it has sold 1,00,000 shares on 18.07.2011 and the proceeds amounting to

about Rs.15,00,000/- has been appropriated to itself. Similar sale of further 1,00,000 shares by the defendant No.1 worth about Rs.14,80,000/- were appropriated on 19.07.2011.

17. The present suit was filed on 21.07.2011 by the plaintiff inter-alia alleging that despite the defendants No.3 & 4 were considering re-structuring its debt and were referring the matter to CDR Cell, it was stated, sale of shares by the defendant No.1 is illegal, and such sale is in violation of Section 176 of the Contact Act, 1872 as no notice was given prior to the said sale.

18. It appears from the record that defendant No.1 issued a letter on 20.07.2011 addressed to defendant No.3 intimating that the defendant No.1 has invoked the pledge of 17,63,68,219 shares and appropriated the proceeds amounting to Rs.251 crores to itself in order to adjust the amount on closing price of Rs. 14.25 on NSE as on 20.07.2011 against the dues of loan and also issued a "No Dues Certificate" on 22.07.2011.

19. The plaintiff's contention is that it was only on 28.07.2011 a copy of the No Dues Certificate ante dated to 22.07.2011 in favour of defendant No.3 was produced by defendant No.1 for the first time along with its reply to the interim application. The said No dues

Certificate did not show the fate of remaining other securities including about 9.71 crores shares which were required to be released by the defendant No.1 in case the defendant No.1 is to be believed. By letter dated 04.08.2011 issued by the defendant No.1 to plaintiff and Global Holding Corporation Pvt. Ltd., it was informed that the defendant No.1 shall be retaining 9.71 crores shares (approx.), i.e., remaining shares which formed a part of security for erstwhile loan to defendant No.3 till the time debt is paid by the defendant No.3.

20. It is also alleged by the plaintiff that even during the hearing of interim application, the defendant No.1 sold 1,77,926 and 1,27,500 shares without notice on 03.08.2011 and 04.08.2011 respectively in violation of the mandatory provision of Section 176 of the Contract Act, 1872. Therefore, the entire action of the defendant is void ab initio being contrary to law. Thus, the entire security deserves to be reverted back to the plaintiff.

21. It is also submitted that a pawnee/defendant No.1 cannot invoke the pledge and appropriate the security to itself, since, as a pledgee/pawnee it only has a special right in the pledged goods whereas the general ownership remains with the owner. The second part of Section 176 of the Contract Act, 1872 mandates that the

Pledged security cannot be appropriated and a pawnee has no right to foreclosure since he never possesses the absolute ownership at law of the pledged goods. The plaintiff has referred to various decisions, i.e., ***Balkrishan Gupta & Ors. vs. Swadeshi Polytex & Anr., (1985) 2 SCC 167; Harrold vs. Plenty, (1901) 2 Chancery Division 314; Dwarika vs. Bagawati, (1939) AIR Rang 413.***

22. It is argued by the plaintiff that the requirement of giving a notice under Section 176 of the Contract Act, 1872 is mandatory and the requirement cannot be waived off at the time of making the contract of a Pledge. An agreement authorizing the pawnee to sell the goods pawnor, without notice is void under Section 23 of the Contract Act, 1872. The alleged waiver relied by the defendant No.1 under Clause 14.1 of the Facility Agreement cannot be pressed into service against the plaintiff as the same is against law.

23. The plaintiff has referred to the decisions i.e. ***Nabha Investment Pvt. Ltd. vs. Harmishan Dass Lukhmi Dass, 58(1995) DLT 285; M/s. A.E.C. Enterprises Ltd. & Ors. vs. M/s. Peacock Chemicals Pvt. Ltd. 7 Ors., 75(1998) DLT 484; Official Assignee vs. Madholal Sindhu, AIR 1947 Bom 217.***

24. The case of the plaintiff is that after becoming owner of the

share, the sale of the same to third parties is illegal, as defendant No.1 could not claim ownership of shares without providing accounts, since the invocation of pledge qua the plaintiff is only arising out of the Guarantee provided by it in the capacity of a surety and not as a debtor.

25. The defendant No.1 in answer submits that submission of the plaintiff that it is entitled to a notice under Section 176 of the Contract Act, 1872 is without any substance as the right of redemption vests solely with the defendant No.3 (Clause 6 of the Facility Agreement) thus the defendant No.3 is a pawnor and not the plaintiff. As far as defendant No.3 is concerned, the defendant No.1 has been sending the notices from time to time. Since the pawnor/defendant no.3 had made a default in performance of the stipulated time, the defendant no.1 who is a pawnee is entitled to sell the shares pledged. He referred to the case of ***Lallan Prasad vs. Rahmat Ali;*** **AIR (1967) SC 1322** – para 16 & 17.

26. As per defendant No.1, a suit for redemption or pledge can be filed only by a party on deposit of money as held in the case of ***Nabha Investment Pvt. Ltd.*** (supra). As the suit has not been filed by defendant No.3, thus, the suit filed by the plaintiff is not maintainable.

27. It is alleged by the defendant No.1 that the plaintiff is guilty of Suppressio Veri and Suggestio Falsi in as much as it has concealed the material facts and withheld the vital documents at the time of filing the suit, i.e. the defendant No.1's letters dated 02.06.2011, 20.06.2011 and 21.06.2011 whereby the defendant No.1 requested the defendant No.3 to make up the cash margin security cover in terms of the agreement executed between the parties were not filed with the present suit.

It is also stated alleged that the plaintiff has annexed with the list of documents filed the plaint a draft of non-disposable and escrow agreement. The original agreement executed between the parties bearing the signatures of the parties has deliberately not been filed. Significantly, the last para of clause 4.2 (c) is missing in the agreement filed by the plaintiff. The said clause is reproduced herein below for the sake of convenience:-

> "It is clarified that the failure of the Borrower and/or the share holder to meet the Top Up requirement and to pay the Cash Top Up within the stipulated time, shall constitute an Event of Default."

The said documents were filed by the defendant No.1 along with its reply to the stay application.

28. Learned Senior counsel Dr. Abhishek Manu Singhvi, Mr. Rajiv Nayar and Mr. Neeraj Kishan Kaul appearing on behalf of the plaintiff have made their submissions which can be outlined in the following terms:

a) Firstly, it is submitted that the present case relates to the facility arrangement wherein the debt is secured by way of pledging the shares of defendant No. 4 company of which plaintiff company is the shareholder. The defendant No. 3 with the aid of the plaintiff has pledged the shares of the plaintiff (as it is the group company of the plaintiff) with the defendant No. 1 against the sum of Rs. 250 Crores.

It is submitted that the plaintiff steps in the shoes of the defendant No.3, therefore, the plaintiff is directly interested and affected as a pawnor as it is the property of the plaintiff which is secured as debt.

b) Secondly, learned Senior counsel submitted that the defendant No. 1 may be right when it says that there is an event of default in not keeping the security cover of 200% as has been agreed in the agreement by the parties which entitles the defendant No. 1 to put the shares from escrow account to pledge and invoke the

pledge, but the said invocation of the pledge by the defendant No. 1 has to be in accordance with the law and principles envisaged under the Indian Contract Act, 1872.

It is submitted that the illegal invocation of the pledge and consequently unilateral sale to itself tantamount to forfeiture which impermissible under the law and the same is contrary to the principles governing the law of pledge.

c) It is also argued that the pawnee under the pledge has a special property wherein it has a right of retention of the property or the goods to the exclusion of other till the time of realization of the debt. The right to enjoyment of the property or fruit arising therefrom is specifically excluded from its purview that too without notice which leads to forfeiture of the property. This as per learned Senior counsel for the plaintiff distinguishes the pledge from the mortgage.

The reliance has been placed on the decision of ***Balkrishan Gupta vs. Swadeshi Polytex Limited*** **(supra)** the Hon'ble Court observed :

> "33. The fact that 3,50.000 shares have been pledged in favour of the Government of Uttar Pradesh also would not make any difference. Sections 172 to 178-A of the

Indian Contract Act, 1872 deal with the contract of pledge. A pawn is not exactly a mortgage As observed by this Court in Lallan Prasad v. Rahmat Ali the two ingredients of a pawn are: "

> (1) that it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt.... The pawner however has a right to redeem the property pledged until the sale. (emphasis supplied)

In Bank of Bihar v. State Bank of Bihar also this Court has reiterated the above legal position and held that the pawnee had a special property which was not of ordinary nature on the goods pledged and so long as his claim was not satisfied no other creditor of the pawner had any right to take away the goods or its price. Beyond this no other 'right was recognised in a pawnee in the above decision. Under Section 176 of the Indian Contract Act, 1872 <u>if the pawner makes default in payment of the debt, or performance</u>, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawner reasonable notice of the sale. In the case of a pledge, however, the legal title to the goods pledged would not vest in the pawnee. The pawner has only a

special property. A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense a pledge differs from a mortgage in view of the foregoing the pawnee in the instant case i.e. the Government of Uttar Pradesh could not be treated as the holder of the shares pledged in its favour. The Cotton Mills Company continued to be the member of the Polytex Company in respect of the said shares and could exercise its rights under Section 169 of the Act.

d) Learned senior counsel for the plaintiff submitted that defendant has illegally in contravention to the mandate of section 176 of the Indian Contract Act, 1872 has sold the shares of the plaintiff to himself and misappropriated the same. It is argued that the notice to the pawnor is essential in the case of the pledge as per the requirement of Section 176 of the Act. The said notice is mandatory in nature and without notice, the said transaction of sale becomes void as it is vitiated by the notice.

Learned Senior Counsel for the plaintiff has relied upon the following judgments passed by the courts from time to time to highlight the mandatory nature of the notice under Section 176 of the Act:

(i) ***Nabha Investment Pvt. Ltd. Vs. Harmishan Dass Lukhmi Dass*** (supra).

(ii) ***Prabhat Bank Ltd. & Anr. vs. Babu Ram; AIR 1966 All 134***. Relevant paras 6 and 7 are reproduced as under :

> "6. Section 176 of the Contract Act provides that if the pawnor makes a default in payment of the debt in respect of which the goods were pledged, the pawnor may bring a suit against the pawnor upon the debt, or he may sell the thing pledged on giving the pawnor reasonable notice or the same. The contention that notice of the contemplated sale to the pawnor should be inferred from his letter dated 13.8.1948, cannot hold water inasmuch as the said letter does not disclose that a reasonable notice had been given by the pawnee to the pawnor to sell the securities. A notice of the character contemplated by Section 176 cannot be implied. Such notice has to be clear and specific in language indicating the intention of the pawnee to dispose of the security. No such intention was disclosed by the Bank in any letter to the respondent.
>
> 7. As regards the terms of agreement dated 31.12.1946 under which the pawnee had been authorized to sell the securities in case the credit balance of the debtor fell below the margin, it could not avail the Bank in acting contrary to law. An agreement of this character would be inconsistent with the provisions of the Contact Act and, as such, would be wholly void and unenforceable."

(iii) ***Co-operative Hindustan Bank Ltd. vs. Surendra Nath Dey and Ors; AIR 1932 Calcutta 524***. The relevant para is reproduced as under :

> "These being the facts, we have to consider in the first place whether notice was necessary and, if so, whether

> the notice that was issued was sufficient. Section 176, Contract Act, unlike some other sections, e.g., Sections 163, 171 and 174 does not contain a saving clause in respect of special contracts contrary to its express terms. The section gives the pawnor the right to sell only as an alternative to the right to have his remedy by suit. Besides Section 177 gives the pawnor a right to redeem even after the stipulated time for payment and before the sale. In our opinion in view of the wording of Section 176 as compared with the wording of the other sections of the Act, to which we have referred and also in view of the right which Section 177 gives to the pawnor and in order that the provision of that section may not be made nugatory, the proper interpretation to put on Section 176 is to hold that notwithstanding any contract to the contrary notice has to be given. We are also of opinion that the notice, that is to be given should, in the words of the section, be a " reasonable notice of the sale."

He has also referred some more decisions on the said proposition. It is not necessary to refer all. Thus, it is submitted by the learned Senior counsel that the transaction of sales effected by the defendant No.1 and intimation after the sale is violative of the provision of the section 176 of the Indian Contract Act, 1872. The defendant No. 1 has to be restrained from effecting such illegal sales of the shares without notice to the pawnor/plaintiff.

e) As regard the repayment of the loan or suit for redemption is concerned, it is stated that the debt has to be paid after the expiry of period of 36 months by the defendant No.3 as prescribed in the agreement. Therefore, the defendant No.1 cannot ask the repayment of the loan prematurely. Even after invocation of the pledge by the defendant, it is incorrect on the part of the defendant No.1 to say that the plaintiff cannot seek injunction against the said illegal sales without the compliance of the provision of Section 176 of the Indian Contract Act, 1872 as the plaintiff is not the proper party to file the suit. It is submitted that the defendant No.1's grievance was and is always non maintenance of security cover. Even if there is a stipulation in the contract that the defendant No. 1 can make the unqualified sale of the shares without notice. The said part of stipulation is an agreement which is beyond the law and the parties by agreeing otherwise cannot waive the mandatory provisions of the law. Thus, the said stipulation agreeing beyond section 176 of the Indian Contract Act, 1872 is against law and public policy.

29. Learned Senior Counsel for the plaintiff submitted that in

order to secure interest of the plaintiff in the said shares, the defendant No. 1 should be restrained by way of interim order of this court from illegally appropriating the shares of the plaintiff without issuing notice and the Court should also declare that the transaction already undertaken by the defendant no. 1 as null and void.

30. Per contra, Mr. Maninder Singh, learned Senior Counsel for the defendant No.1 has resisted the injunction application by making the submissions which can be enunciated as under:

1) Mr. Singh, learned Senior Counsel for the defendant No.1 submitted that the plaintiff has no locus to file the suit as the plaintiff is not privy to the contract and as such the plaintiff is not pawnor and the pawnor is actually defendant No. 3 who is not before the court and the present suit filed by the plaintiff is thus liable to be dismissed and the plaintiff cannot press for violation of Section 176 of the Contract Act, 1872. It is argued that the plaintiff is a stranger to the contract and does not have any say in the agreement.
2) Mr. Singh, learned senior counsel submitted that the plaintiff is not the pawnor, the pawnor as per Mr. Singh is the person who has the right of redemption. Learned senior counsel relied upon

the judgment passed by Apex Court in the case of ***Lallan Prasad v. Rahmat Ali (supra)***.

In the present case, the defendant No. 3 is the pawnor who by way of repayment of the loan can get the shares redeemed from the security and thus the plaintiff is not the required noticee under section 176 of the Indian Contract Act. Thus, the challenge laid by the plaintiff to the actions of the defendant No. 1 is not correct and the said actions of defendant cannot be faulted with.

3) Mr. Singh, learned Senior Counsel for the defendant argued that the plaintiff cannot compel the defendant not to sell the shares as it would be blocking the realization of the debt after making the default in the payment. It was argued that the plaintiff has filed the present suit so that the defendant is not able to reap the money which is the subject matter of debt by way of selling the shares when all the other securities and avenues are shut as the other securities are incapable of satisfying the debt amount.

4) Mr. Singh, learned Senior Counsel argued that assuming that even if there is a violation of section 176 of the Indian Contract Act, 1872 the plaintiff is no person to challenge the same.

5) Mr. Singh, learned senior counsel submitted that the plaintiff was aware that the suit for the redemption of the pledge can be be filed only by depositing the debt amount and the pawnor can maintain the suit by depositing the said amount. This is the reason why the actual pawnor who is defendant No. 3 has not maintained the action and the suit was preferred by the plaintiff who is neither the party to the agreement nor the pawnor.

6) Mr. Singh argued that the plaintiff has concealed certain facts from this court and withheld the vital documents at the time of filing the suit. The said facts are:

   a) The defendant No. 1's letters dated 2.6.2011, 20.6.2011 and 21.6.2011 whereby the defendant No. 1 requested the defendant No. 3 to make the security cover in terms of the agreement executed between the parties were not filed by the plaintiff.

   b) The agreement which NDPE has not filed which has been actually signed by the parties where in clause 4.2 (c) is missing which reads:

      "It is clarified that the failure of the borrower and/ or the share holder to meet the Top up requirement and to pay the

cash Top up within the stipulated time shall constitue an event of default"

Thus, by concealing the said facts, the plaintiff is guilty of unequitable conduct and is thus not entitled for the interim injunction.

Mr. Singh, learned Senior Counsel concluded that the court in view of the above submissions advanced should dismiss the injunction application and the suit of the plaintiff.

31. Before examining the rival submissions of the parties, I deem it appropriate to first discuss the law on subject and some facts. In the present case, so far, none of the defendant has filed the written statement. The defendants No.3 and 4 have not addressed their submissions nor have they filed reply to the interim injunction. In the memo of parties they are mentioned as proforma defendants.

32. Apart from the other points raised by the parties, I am of the view that the following issues are necessary to be considered at this stage :

(i) Whether the defendant No.3 and plaintiff are the defaulters by not raising two times the facility amount in the stipulated time within the meaning of default under Clause 13.1 sub-clause (v) and (w) of the

Facility Agreement read with Clause 4.2 of the NDEA.

(ii) Whether the plaintiff has any locus to file the present suit in view of the objections raised by the defendant No.1.

(iii) Whether the defendant No.1 who is pawnee/pledgee entitled to invoke the pledge and appropriate the security cover to itself without issuance of notice to the plaintiff which is provided in Section 176 of the Contract Act, 1872.

33. I shall first deal with the issue (i) that in the event of default committed by not raising security cover as per contract by the plaintiff and defendant No.3, then what rights the defendant No.1 possesses.

34. Clause 13 of the Facility Agreement sets out events of default. Sub-clause (a) thereof provides that failure to comply with any or all the conditions mentioned therein shall be an event of default. Sub-clause (v) provides that failure to Top Up in the manner described in the Non Disposal and Escrow Agreement shall be an event of default. Sub-clause (w) provided that failure to Cash Top Up in the manner described in the Non Disposal and Escrow Agreement shall also be an event of default. Sub-clause (hh) further provides that any corporate action, legal proceedings or other procedure or step taken in relation to suspension of payments, a moratorium of any indebtedness,

winding-up, dissolution, administration, provisional supervision or reorganization of the borrower or composition, assignment or arrangement with any creditor of borrower or the company (defendant No.4) or appointment of liquidator, receiver, administrator etc. shall also be an event of default.

35. Clause 4.2 provides that if on any date, the escrow value of the shares falls by 10% of the required escrow share value (i.e. below 1.8 times of the amount loaned), then, the defendant No.1 shall issue a Top Up Notice and within 3 working days of receipt of notice shall ensure that escrow value is maintained at the required level.

36. Clause 4.2 (c) provides that if on any date after first drawn-down date, the Escrow Value falls below by 25% from the Required Escrow Value shares, then defendant No.1 shall issue a Cash Top Up Notice to the defendant No.3 who within 3 working days would pre-pay the obligations in accordance with the Facility Agreement to the extent that upon such payment, the Escrow share value is equal to or greater than the Required Escrow Value-Shares.

37. The agreement further provides that failure of the borrower (defendant No.3) or share-holder (plaintiff) to meet the Top Up requirement and to pay the Cash Top Up within the stipulated time

shall constitute as an event of default. Clause 5 of the agreement deals with sale or disposal of escrow shares under which the defendant No.2 has been appointed an attorney by the plaintiff to sell/pledge/invoke or otherwise dispose the shares.

38. Admittedly, the security cover was not raised two times of the facility amount within the stipulated time despite of the various notices issued to the defendant No.3 and within the knowledge of the plaintiff as admitted in the plaint. It is clear that defendant No.3 and plaintiff did not top up requirement and to pay cash top up within the stipulated time, thus, it constitutes an event of default within the meaning of "default" under Clause 13.1 (v) & (w) of the Facility Agreement read with Clause 4.2 of NDEA.

As per clause 14.1 the lender can call upon the borrower to forthwith repay all loans and interest accrued thereof. In the present case, the defendant No.1 had actually called upon the defendant No.3 in this regard while issuing various notices. Thus, the pledgors are guilty of default with the terms of two agreements. At the same time, the pawnor has a right to redeem the property pledged upon tendering of the amount of debt and upon tendering of money by the pawnor and return of pledged property as mutual reciprocal and simultaneous, see

(see ***Nabha Investment Pvt. Ltd.*** (supra)) but the right would be lit if the pawnee has in the meanwhile sold the property lawfully. Therefore, the issue (i) is decided accordingly.

39. Now I shall take up the issue No.(ii), as to whether the plaintiff has any locus to file the present suit in view of the objections raised by defendant No.1. Admittedly, the plaintiff is the shareholder of the shares of defendant No.4 within the meaning of Clause 1.1 (hhh) of the Facility Agreement dated 12.07.2010 executed between defendant No.1 and defendant No.3 which provides, "shareholder" means GTL Limited. The Facility Agreement did make a reference to the plaintiff and its obligation under the Non Disposal Escrow Agreement dated which was executed on the same day. The plaintiff is one of the parties to the said agreement. In terms of NDE agreement, the plaintiff has also topped up the security cover on 22.06.2011 by further pledging 11,81,29,000 shares by increasing to 27,37,29,000 shares to escrow account due to fall down of shares value. NDE agreement is linked to the Facility Agreement. The obligations and performance have been placed on the plaintiff to provide the shares on pledge under the Facility Agreement. Clause 5.3 of the NDEA stipulates that any action which is taken by defendant

No.1 is to be informed to the plaintiff. Further as per plaintiff, the objection about the locus of the plaintiff is not taken by defendant No.1 in its reply. Reliance was also placed on the decision of the Supreme Court in the case of ***State Bank of India & others Vs. S.N. Goyal, 2008(8) SCC 92*** where it has been held that the party cannot take the position that is not present in its pleadings.

40. Section 172 of the Indian Contract Act, 1872 wherein the "Bailment" is defined, the same is reproduced here under:-

> "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 'pawnee'."

41. On reading, it becomes clear that the delivery of the possession of the goods as security for the payment of the debt and/ or performance of the promise is a pledge. The person who delivers the goods is a bailor or pawner and the person to whom goods are delivered is pawnee.

42. The delivery of the said possession of the goods can be actual or constructive. The courts have held that delivery of the title deeds or railway receipts is delivering the goods itself and thus the same can also lead to valid pledge.

43. A reading of section 178 onwards would reveal that the pawnor must have some interest in the goods pledged which will determine the valid pledge. This is due to the reason that the person making the pledge must be either the owner or in the possession of the goods with the consent of the owner or in the possession of the goods under the voidable contract not yet avoided or must have some interest in the goods pledged in order to make a valid pledge. There are statutory indicators to this effect which are enacted in the form of section 178 and section 178 A and section 179. The said sections are reproduced hereinafter:

> "178. **Pledge by Mercantile agent** – Where a mercantile agent is, with the consent of the owner, in possession of goods or the document of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.
>
> 178A. **Pledge by person in possession under voidable contract** – When the pawnor has obtained possession of the goods pledged by him under a contact voidable under Section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

> 179. **Pledge where pawnor has only a limited interest** – Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest."

44. Thus from the above, It becomes clear that the pawner must have some interest in the goods either ownership or possession or a title with a consent from owner or any other interest in order to pass special property or right of retention to the pledgee. Another thing which is relevant to note is that the merchantile agent or a person with the consent and authorization of the owner can make a valid pledge.

45. A necessary corollary which follows is that a person cannot put another person's goods into pledge unless the former is expressly authorized by the owner to do so and the pawnee has no notice of the pawner having no authority at the time of pledge. If the pawnee is aware of the pawnors defect in title at the time of entering into the pledge, the pawnee is risking its money by entering into such pledge as the person who is bona fide and without notice is protected under section 178 of the Indian Contract Act, 1872.

46. To come within the parameters of section 178 of the Act, the pawnee must be the one who acts bonafide and without notice of the fact that the pawner has no authority to pledge, only then the said

section would be applicable to make it a valid pledge.

47. The significance and scope of section 178 of the Act has been discussed by the Court in ***Firm Poonamchand Shankarlal and Co. Bombay vs. Firm Deepchand Sireymal, Ujjain & Others, AIR 1972 MP 40***, wherein Division Bench has observed thus:

> "8. When a pledge is made in the ordinary course of business by a merchantile agent who is known to be carrying on business as such and who is in the possession of the goods pledged, the pledge is protected if subsequently if it is discovered that the goods pledged really belonged to third person and the pledgor had no authority to pledge them. In such a case, the pledge will be as valid as if pledgor had been specifically authorized by the owner to pledge them. Section 178 of the Contract Act enacts as follows:
>
> **This section provides an exception to a fundamental rule of the law of transfer of property that no man can give better title than he himself possess, the latin maxim being "Nemo Dat Quod Non Habet". As a corollary of this fundamental rule, no one can pledge goods unless he is the owner or lawfully represents the owner. Consequently, if a person obtains a pledge of goods from another who has no valid title to make a pledge, the former acquires no security over them….."**
>
> (Emphasis Supplied)

48. Thus, section 178 provides a mode whereby the valid pledge can be made by way of authorization and the pledgee who is without notice can be protected to that extent. But the situation prescribed under section 178 of the Act is also not completely fulfilled

as in the present case all the parties including the pledgee which is defendant no. 1 while entering into the contract was aware that the said shares are those belonging to the plaintiff as shareholder. The agreement itself defines the shareholder. Therefore, although the transaction in the present case seems akin to section 178 but is not strictly falling under the same.

49. It is, however, to be looked into as to what shall be the position of the owner in those circumstances in the event the owner or the possessor of the goods continues with the said pledge by not rescinding the said pledge and rather proceeds to give it legal shape, The said owner and person giving such pledge under the authority of the owner or holder can then become joint promissors after putting into the notice of the pledgee about the correctness in the title. After all it is the owner or possessor who has by way of authorization bailed his goods as security for the purposes of debt secured by other person who promised to pay or redeem on behalf of the owner. The owner or holder or possessor in those circumstances will become joint promisor and will have equal right of redemption by way of paying of the money and getting the goods released from the pawnee. Thus, the role of such owner or person having authority to assign or possessor or holder

cannot be completely obviated from the transaction where the pledge is made under authorization of the said owner/ possessor and the said owner has its promise to perform in the agreement.

50. In the present case too, the situation akin to what has been discussed above has arisen wherein the defendant No. 3 has pledged the shares of defendant No.4 of whose holder/ shareholder was plaintiff in the facility agreement dated 12.7.2010 which was entered into between the defendant No. 1 and the defendant No. 3. The defendant No. 4 and the plaintiff are stated to be belonging to one group to justify such transaction. The relevant clauses of the agreement are reproduced herein after along with the definition clauses:

> "1(h) Company means GTL infrastructure Limited, a company incorporated under the Act with the corporate identity no. U74210MH2004PLC144367 and having its registered office at Maestros House MIDC, Building no. 2, Sector 2, Millenium Business Park, Mahape, Navi Mumbai - 400710
>
> 1(hhh) "Share holder" means GTL Limited more particularly described in the Non Disposal and Escrow Agreement and or any other person or entity who shall be escrowing the shares in pursuance to section 12.1 of this Agreement.
>
> 8 Security
>
> The Facility Amount together with all interest, liquidated damages, prepayment costs, other costs, charges,

expenses and other monies whatsoever stipulated in or payable under Finance documents shall be secured by the following as continuing seciurity fot the obligations:

a)……

b)…..

c)…..

d) Escrow of such number of shares of the company so as to maintain a security cover of two times of the facilty amount in accordance with the non disposal and escrow agreement in a form and manner satisfactory to the lender.

13 Events of the Default

13.1 The occurrence of any of the following events shall constitute event of default.

a) ……

b)…..

c) failure to top up in the manner described in the non disposal and escrow agreement.

14 Remedies on an event of default
14. 1

14.2 In addition to the above, the lender shall also have a right to

(a)…

(b)….

(c) to pledge and or sell and or transfer and/ or assign the

escrowed shares.

(e) Invoke the pledge and/ or transfer or register in its name or in the name of any of its nominees or any other person as it shall deem fit, all or any of the collateral of the company as per the discretion of the lender at the cost of the shareholder in accordance with the terms of the non disposal and escrow agreement without any notice to shareholder."

51. On reading of the aforesaid clauses of the agreement, it is clear that the defendant No. 1 had the knowledge of the fact that the shares which are secured in the debt belongs to the defendant No. 4 or for that matter shareholder who is plaintiff at the time of signing the agreement as the same is clearly spelt out in the clauses of the agreement. It is further becomes clear that the event for default is defined in the facility agreement as failure to top up the security and also the remedies are provided which is pledge. In some of the remedies like the pledge, there is a reference to the shareholder who is involved in the part of the transaction.

The said transaction was completed by entering into the further escrow agreement which was entered between all the parties namely, plaintiff as shareholder, wherein the plaintiffs authority or the assent, was taken towards entering into such transaction by calling upon the plaintiff to execute irrevocable power of attorney in favour of

defendant No. 2 to execute such arrangement and escrow the shares of the plaintiffs in the escrow account. Further, the plaintiff was also made bound by calling upon him not to deal with such shares and put the shares into escrow account due to the facility arrangement. All these events and actions undertaken by the plaintiffs in the subsequent agreement itself shows that it is the plaintiff who has sanctioned or approved the pledge in order to make it complete.

52. The escrow agreement which was entered into between all the parties wherein the plaintiff is the party performs the said future consideration by putting the shares into escrow account. Further, the said escrow agreement again talks about the right to transfer, sell, pledge etc of the defendant No. 1 which has already been agreed between defendant No. 1 and defendant No. 3 in the facility agreement. However, this time in the escrow agreement, the parties agree for the same rights and the wordings used in the said clauses are "Share holder/ Borrower" interchangeably and their obligations are reaffirmed.

53. The said clauses of the escrow agreement are reproduced hereinafter:

> "5. Sale or disposal of Escrow Shares

5.1 The share holder confirms that in consideration of lender advancing the facility to the borrower, the shareholder has agreed inter alia to appoint the escrow agent as its constituted attorney by executing an irrecovable

5.2 The Share Holder/Borrower acknowledges and agree that the Escrow Agent, as its Attorney, is irrevocably authorized upon the occurrence of an Event of Default to promptly sell, pledge, transfer, invoke, assign and/or otherwise dispose of for monetary consideration, the Escrowed Shares and deposit the proceeds of such sale of the Escrowed Shares in the Payment Account.

5.3 The Share Holder/Borrower undertakes and agrees that upon any of the Share Holder Obligations becoming due and the Share Holder being unable to make such payment, the Attorney shall, upon becoming aware of the Share Holder's default or being notified of same by the Lender, be authorized (as the Share Holder's constituted attorney) to sell, transfer, assign and/or otherwise dispose of the Escrowed Shares, including through pledge, charge or other Encumbrance on the Escrowed Shares in favour of the Lender/Escrow Agent (or any other person nominated by the Lender/Escrow Agent to hold such Encumbrance) for the benefit of the Lenders, as security for or for the purpose of paying-off or discharging any and all amounts, which may from time to time be or become outstanding under any of the Transaction Documents.

5.4 The Share Holder/Borrower agrees that any sale, transfer, assignment and/or disposition (including creation of any Encumbrance by the Attorney as its agent can be on such terms as the Attorney in its discretion deems fit or as may be advised by the Lender and at such costs and prices as may be decided by the Attorney without the Attorney being held responsible for any losses (whether direct or indirect in relation to any future or present profit) or expenses that the Share Holder may suffer or incur.

> 5.5 The Parties acknowledge and agree that the actions set out in Clauses 5.3 and 5.4 above may be initiated and undertaken by the attorney at any point in time after the receipt of a notice from the Lender, informing the attorney of the borrower's and share holder's default in meeting the loan obligations and/or the occurrence of any event of default as per the facility agreement."

From the use of the wordings shareholder/ borrower interchangeably makes few things clear. Firstly, that the transaction of the pledge could not be complete without the sanctioning and authority of the plaintiff who is a shareholder of the shares and being the owner can authorize for the right to sell or to invoke the pledge etc. Secondly, it shows the intent of the parties wherein the shareholder and borrower/ defendant No. 3 being group companies together offer the shares for bailment/ pledge as security and both act as joint promissors. Thirdly, the plaintiff is not the stranger to the contract, actually it is the plaintiff from whose hands the consideration is moving wherein the shares are being put to escrow account through the escrow agent pursuant to the facility agreement. Fourthly, the plaintiff becomes the part of the main contract by entering into the same very covenant in the escrow agreement although with an attempt to provide an authority to the attorney to sell, transfer or pledge the shares at the

instance of the defendant No.1/ lender but simultaneously agreeing to allow the use of its shares for selling, pledging etc in the event of his default or the default of the defendant No. 3.

54. Further clause 5.5 itself makes it clear that the parties acknowledge that the actions stated in 5.3, 5.4 may be initiated which included the pledge by the attorney at any point after the receipt of a notice from the lender/ defendant No. 1 informing the attorney o f the borrower's and shareholder's default in meeting the loan obligations and the occurrence of the event of the default. This means that the by this covenant the parties including the plaintiff and defendant no. 1 and defendant No. 3 recognizes by referring to the facility agreement, the plaintiffs obligations in the pledge and its non performance as the event of the default( which leads to pledge) as it talks about both borrowers as well as share holder's default. This is a clear indicator of the fact that the plaintiff is a joint promissor and not the stranger to the contract.

55. Therefore, the completeness of pledge when the facility agreement dated 12.7.2010 was entered into between the defendant No. 3 and defendant No. 1 becomes questionable one as at that time the ingredients of the valid pledge are not fulfilled either under section

172 or under section 178 of the Act and the consideration in the said agreement remains executory in nature which is the shares belonging to the plaintiff being the share holder. It is only when the plaintiff provides its assent and approval to such transaction by entering into the covenants with the parties in the Non disposal Escrow agreement, the shares of the shareholder/ plaintiff gets actually secured against the loan and the said transaction attains legal sanctity. The aspect of pledge or invocation of the pledge still remains a future event when the defendant No.1 can create a pledge in the event of the default.

56. There is one more thing which indicates and persuades this court to take the view that the plaintiff is acting as joint promissor is the clause 4 (c) of the escrow agreement which has been relied by the defendant no. 1 itself which is reproduced:

> "It is clarified that the failure of the borrower and/ or the share holder to meet the Top up requirement and to pay the cash Top up within the stipulated time shall constitute an event of default"

57. From the above also, it is clear that the promise of the plaintiff to Top up or to provide security cover has been given full weightage and the failure to do the same either by him or by the defendant no. 3 is considered as an event of default which ultimately

can create a pledge. Any event can be considered as an event of default by the actions or inactions of the party to the agreement only when it has a role or promise to perform and not when it is stranger to the contract.

58. If the said event of not providing a security cover can lead to invocation of pledge, then certainly, the said performance of promise is secured against the security and in the event of non performance, the pledge can be invoked and consequences of sale and other remedies can follow.

59. For the all these reasons, it cannot be said that the plaintiff has no role to play. Rather, the present case relates to a pledge wherein the owner/ shareholder of the shares of defendant No. 4 has authorized the defendant No. 3 to enter into such pledge acting as joint promissor. This can be prima facie inference which can be drawn by looking into the events which are turning up as stated above. This situation is more akin to the authorized pawn as defined under section 178 with the exception that in this case, the defendant no. 1 was aware and so as the defendant No. 3 and they have legitimized the transaction by making the plaintiff a party.

60. Now I shall proceed to discuss the law relating to notice

under section 176 of the Contract Act, 1872.

It is now well settled that the right to redemption of the pledge exists with the pawner till the time sale of the goods is made by the pawnee in the event of the default by the pawnor. The pawnee has only the right to retention of the goods till the time of realization of debt and not the right to enjoying the same or forfeiture. In order qualify the sale of the goods, the provision of notice under section 176 is made to safeguard the pawned goods and give the pawner a chance to make good the debt or promise which is subject matter of the pledge.

61. Pawnee's right where pawnor makes a default is defined in Section 176 of the Act which reads 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 or 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.

62. The special property or interest, if exists, the pawnee can compel payment of the debt or can sell the goods when the right to sell the goods arises. A pawnee's special property in the pledge may be

assigned to a third party by an assignment of the pawnee's interest or even by way of a sub-pledge made by him.

63. The Supreme Court in the case of ***Lallan Prasad v. Rahmat Ali (supra)*** has dealt with the similar question in great detail, the relevant para reads as under:

> "16. The second question would then be whether the appellant was entitled to recover the balance of the said loan in view of his denial of the pledge and his failure to offer to redeliver the goods. Under the Common Law a pawn or a pledge is a bailment of personal property as a security for some debt or engagement. A pawner is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfilment of his liability. The two ingredients of a pawn or a pledge are : (1) that it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. In this sense a pawn or pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed. (See Halliday v. Holygate). A contract to pawn a chattel even though money is advanced on the faith of it is not sufficient in itself to pass special property in the chattel to the pawnee. Delivery of the chattel pawned is a necessary

element in the making of a pawn. But delivery and advance need not be simultaneous and a pledge may be perfected by delivery after the advance is made. Satisfaction of the debt or engagement extinguishes the pawn and the pawnee on such satisfaction is bound to redeliver the property. The pawner has an absolute right to redeem the property pledged upon tender of the amount advanced but that right would be lost if the pawnee has in the meantime lawfully sold the property pledged. A contract of pawn thus carries with it an implication that the security is available to satisfy the debt and under this implication the pawnee has the power of sale on default in payment where time is fixed for payment and where there is no such stipulated time on demand for payment and on notice of his intention to sell after default. The pawner however has a right to redeem the property pledged until the sale. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawner's debt, for, the sale proceeds are the pawner's monies to be so applied and the pawnee must pay to the pawner any surplus after satisfying the debt. The pawnee's right of sale is derived from an implied authority from the pawner and such a sale is for the benefit of both the parties. He has a right of action for his debt notwithstanding possession by him of the goods pledged. But if the pawner tenders payment of the debt the pawnee has to return the property pledged. If by his default the pawnee is unable to return the security against payment of the debt, the pawner has a good defence to the action. This being the position under the common law, it was observed in Trustees of the Property of Ellis & Co. v. Dixon-Johnson that if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand over the security, and that if, having improperly made away with the security he is

unable to return it to the debtor he cannot have judgment for the debt."

64. The judicial opinion in the field is well settled that the notice under section 176 of the contract act is mandatory in nature and any sale affected without giving notice to the pawnor is vitiated and hence is void. In ***Nabha Investment Pvt Ltd*** (supra), this court had an occasion to examine two aspect, first is the maintainability of the suit and another is the effect of the notice under Section 176 wherein Hon'ble Justice R.C. Lahoti (as his Lordship then was) has observed thus:

> "22.6 It is important to note that the question whether a suit for redemption of pledge could be filed without tendering or depositing the pledge money did not arise for decision in the case before Chagla, J. The dismissal of claim for redemption was upheld for reasons different than the non-tender or non-deposit of the pledge money by the pledgor. Thus, the twin principle which have been deduced by Chagla, J. in *Madho Lal Sindu*'s case (supra) and reproduced in para 68 by the Division Bench of Andhra Pradesh do not bind me as precedent.
>
> 22.7 I may make it clear that if the Bombay and Andhra Pradesh decisions go on to the extent of holding that a suit for redemption of a pledge cannot be filed unless preceded by a tender or accompanied by a deposit of the pledge money then I express my respectful disagreement with the view so taken. No provision in any statute and no principle of law has been brought to my notice which may persuade me

taking a view in line with the view taken by the Andhra Pradesh High Court.

22.8.Here I may utilise this opportunity for extracting other principles of law laid down by Chagla,J. in his illuminating judgment which are based on several authorities. They are :-

(i) The provisions of Section 176 Contract Act are mandatory. The applicability and sweep of Section 176 unlike several other provisions on the same subject is not eclipsed by the phrase- "in the absence of a contract to the contrary." The notice that is to be given to the pledgor of the intended sale by the pledgee is a special protection which statute has given to the pledgor and parties cannot agree that in the case of any pledge, the pledgee may sale the pledged articles without notice to the pledgor (para 55)

(ii) If a sale is held of the shares under authority of the pledgor then it could convey to the purchaser full title in the shares; sale under Section 27 of Sale of Goods Act title conveyed to the purchaser would not be a title better than that of the seller. (Para 56).

(iii) Notice under Section 176 of Contract Act must be given before the power of sale can be exercised. If the notice is essential, the purchaser, however innocent cannot acquire a title better than his vendor has (Para 56).

(iv)Right to redeem under Section 177 can be exercised right up to time the actual sale of the goods pledged takes place. The actual sale referred to in Section 177 must be a sale in conformity with the provisions of Section 176 which gives the pledgee the right to sale; and if the sale is not in confirmity with those

provisions, then the equity of redemption in the pledgor is not extinguished (para 57).

(v) The pledgor has a right to call upon the pledgee to redeem the shares or payment of the debt. If the pledgee has transferred the shares, he is entitled to call upon the transferee for the same because the transferee does not acquire anything more than the right, title and interest of the pledgee which is to retain the goods as a pledge till the debt is paid off. If the pledgor may not be in a position to redeem, he may contend himself with merely suing the pledgee for conversation if any damage has resulted by reason of the goods being sold without proper notice (para 59).

(vi) There is no analogy between Section 69 (3) of T.P. Act and Section 176 Contract Act; there is a marked contrast between the two. Former protects the innocent purchaser, the latter does not do so. In the absence of any provision in Section 176 of the Contract Act in favor of the innocent purchaser, to import such protection from the provisions of another statute is with respect wholly fallacious and unjustifiable. It is always dangerous to draw analogy between one statute and another

(23) Division Bench decision of Madras High Court in *S.L. Ramaswamy Chetty* v. *Msapl Palaniappa*, AIR 1930 Madras 364, was relied on by both the parties and has been referred to by the Andhra Pradesh High Court too in the above-referred to decision. It will be useful to extract and reproduce the following statement of law therefrom:-

> "It was suggested that the non-maintainability of the suit was due to the respondent's not having tendered or his not having been ready and

> willing to pay the amount due before the suit, which it seems is an essential condition of bringing a suit for redemption. This is a misapprehension. If a pledgor brings a suit for redemption without first tendering the money to the pledge and it turns out that the suit was unnecessary because the pledge was always ready and willing to deliver up the property pledged without suit if the debt has been paid, the plaintiff will no doubt be made to pay the costs of the defendant but his suit cannot be dismissed. But if it turns out that in the circumstances which preceded the suit, it would have been perfectly useless to tender the money to the pledge as for instance, where the pledge declares in advance his inability to return the pledged property, in such a case if the pledgee was at fault in putting it beyond his power to return the goods the pledgor cannot be defeated on account of his not going through a useless ceremony of tender. Sec.51, Contract Act makes the matter clear when it declares that neither party to reciprocal promises need perform his promise unless the other party is ready and willing to perform his promise."

(24) To my mind the correct position of law appears to be this. Tender of money by the pawnor and return of pledged property by the pawnee are mutual reciprocal and simultaneous obligations of the two parties. Ordinarily, the pawnor must tender the money and hand it over the same to the pawnee if the latter is returning the pledged property to the pawnee. But there can be exceptions. The pawnee might have in advance declared his inability to return the pledged property. The pledged property might have been lost or destroyed and the fact is known to the pawnor. The pledged property might have earned yield or benefits which according to the contract is liable to be adjusted

> in payment of the loan amount in which case an account has to be taken and the liability of the pawnor might have stood discharged already. If any such circumstance has not preceded the institution of the suit still if the pawnor brings a suit for redemption without first tendering the money to the pledgee and it turns out that the suit was unnecessary because the pawnee was always ready and willing to give back the pledged property the plaintiff will be saddled with the defendant's costs. If the suit is filed without tendering the money and it is found that the pledged property cannot be returned to the pawnor, then the pawnor may have a decree in damages. In either case his suit cannot be dismissed."

65. The same view has been taken in ***The Official Assignee vs. Madholal Sindhu (supra)*** and also in ***Prabhat Bank Ltd. & Anr. (supra)***, wherein Allahabad High Court went further to state that the sale without notice under Section 176 is void.

66. From the above observations two things immediately become clear first, that there are exceptions to the general rule that the suit for the redemption of the pledge is maintainable without offering to deposit the money in certain exceptional cases. Secondly, the wordings of the section 176 are not eclipsed by the qualification "In the absence of the contract to the contrary" which means that the notice under section 176 is mandatory and must be given effect to in all circumstances before the power to sale can be exercised.

67. I find the present case falls within the exceptions wherein the plaintiff's role as a joint promissor is only confined to keeping security cover of 200 % which the plaintiff is still offering to do at the time of asking for injunction. In the present case, as stated above the goods/ shares of the plaintiff are secured against the performance of the promise of topping up and the said goods/ shares are simultaneously secured against the debt of the defendant No. 3. The event of default in the present case is the inability of the plaintiff and defendant No. 3 to provide the top up or security cover. That is the same promise which the defendant No. 1 is finding faulty (as the plaintiff has not done the same earlier) and invoking the pledge. In these circumstances, qualifying the right of the plaintiff to come before this court with a deposit of the equivalent sum which is the part of the defendant No. 3's obligation may not be appropriate. Therefore, I find that the suit against the defendant is maintainable as such to the extent it seeks to prohibit illegal forfeiture or sale of the pledged goods without notice.

68. The complaint of the plaintiff is precisely that the defendant No. 1 should not sell the shares without issuing notice to him and not that the shares must be released to him.

There are three steps in the present case in relation to the pledge which needs examination after the occurrence of the event for default:

a) Creation of pledge – Wherein the defendant no. 2 is authorized through defendant no. 1 to create a pledge from the escrow account.

b) Forfeiture or sale to defendant no. 1 itself and appropriation – After creation of the pledge, the defendant no. 1 can effect the sale to himself which has been done in the present case.

c) Sale of the said pledged shares- The defendant no. 1 can also sell the said shares in his possession as pledged to outside market in order to realize the debt sum.

69. In order to analyse the satisfaction of the legal requirement of section 176, it becomes incumbent to test the same at the three steps in the transaction so as to properly gauge its applicability.

70. So far as the step (a) is concerned, it is clear that on occurrence of the event of default as per Clause 13.1 (v) & (w) of the Facility Agreement read with Clause 4.2 of NDEA, the consequence of the same by way pledge of shares can follow and for the same, there is no notice requirement neither under the law nor under the contract for the purposes of forming a valid pledge.

In relation (b) which is proceeding to sell the shares to the

pledge itself and appropriating the proceedings thereof, essentially the said action would mean forfeiture or selling to itself, the said sale to oneself or forfeiture cannot be effected until the notice requirement under section 176 of the Act is completed. Further, the said right is otherwise also not available in view of absence of ownership and right which is available is right to sell to the extent of the realization of debt.

Consequently, even in relation to step (c), clearly due to operation of section 176 of the Act, the pledgee cannot sell the goods/ shares pledged to outsider or to third party without issuing notice to the pledgor. This is due to the reason that the right to sell is a qualified right which enures to the pledgee (whether to sell to himself or to others) only after giving reasonable notice of sale to the pawnor.

71. Thus, in the present case, so far as creation of pledge is concerned, there is no requirement of notice under section 176. Further in the present case, the defendant No.1 also issued No Dues Certificate dated to 22.07.2011 after filing the suit before this Court on 21.07.2011. The case of the plaintiff is that the said No Dues Certificate came to the knowledge of the plaintiff only on 28.07.2011. During the pendency of the interim application, the defendant No.1

had also sold 1,77,926 and 1,27,500 shares on 03.08.2011 and 04.08.2011 respectively.

72. At this stage, it becomes necessary to examine the submission advanced by the learned counsel for the defendant No. 1 that letters dated 27th June 2011 and 13th July 2011 wherein it calls upon the defendant No. 3 to comply the security cover failing which shall lead to invocation of pledge should be construed as notice. I am of the opinion that the said letters cannot be treated as notice under section 176 of the Act. It is due to two fold reasons, first being that it is the intimation or letter written by the defendant No. 1 to the defendant No. 3 for creation of pledge or invoking the pledge on the occurance of default which is separate and distinct from the act of the sale which happens after the creation of pledge. In the present case, the happening of default leads to both the events creation of pledge as well as it entitles the defendant No. 1 to effect the sales. Thus, the requirement under section 176 comes into play when the defendant No. 1 proceeds to sell the securities in the event of the default and not on the action of invocation of the pledge. Thus, if the said letters would have clearly spelt out that the defendant No. 1 is proceeding to sell particular amount of shares from the security, the same would have

been construed as notice of sale. Secondly, there must be reasonable notice, ordinarily the pledgee issues the notice of sale for a reasonable time of sale in the event of the default by the pledgor. But in the present case, the defendant No. 1 attains the status of the pledgee only when he has invoked the pledge. Thus, thereafter, if the said pledgee or the defendant No.1 faces a default, he can issue notice to the defendant No.3 and plaintiff as they are co-pawners. Thus, the contention of the learned counsel for the defendant No. 1 cannot be acceded to.

73. It is also noticeable that the defendants have already appropriated 17,63,68,219 shares which are equivalent to the sum of Rs.251 crores which is equivalent to the debt amount. The said shares are sold by the defendant to himself on 20.07.2011 and intimated to defendant No. 3. The said transaction or act of sale is clearly violative of rights of the pledgee. This is due to the reason that the fine distinction between the pledge and mortgage must be realized while taking recourse to sale. The pledge gives the right to retention to the pledgee till the time of realization of debt and the right of sale with notice as per section 176 of the Act. The right to retention does not include right to enjoy benefits or the fruits of the property or benefits

arising out the same. The forfeiture of the goods/ shares in the present case without notice is not permissible under the law of pledge which distinguishes the same from mortgage. (Kindly see ***Balkrishan Gupta vs. Swadeshi Polytex (supra***))

Thus, the said act of the defendant No. 1 whereby on 20.07.2011 the defendant No.1 appropriates the proceeds of the 17,63,68,219 shares to himself is bad as it amounts to forfeiture which is impermissible under the law.

74. Now I shall deal with the submissions advanced by the parties:

A. Firstly, the submission of Mr. Singh, learned senior counsel for the defendant No. 1 that the pawner is actually the defendant No. 3 stood answered in view of my discussion above that the present case relates to pledging by way of authorization wherein the plaintiff and defendant No. 3 are acting as joint promissors which is prima facie view taken by me considering the role of the plaintiff. Thus, the plaintiff has the locus to maintain the suit and is one of the required noticee under section 176 of the Indian Contract Act.

B. Secondly, the submission of Mr. Singh that the plaintiff is not privy to the contract is also answered as the plaintiff is intrinsic part of the agreement. It is to be noted that the escrow agreement is not the separate agreement from that of the facility agreement. Rather, the escrow agreement brings into the existence of the future/ executory consideration as stated in the facility agreement. Further, the escrow agreement refers to the facility agreement and rather the plaintiff confirms and affirms the same covenants relating to sales and transfers and pledging of shares as done by the defendant No. 3 in the facility agreement. The escrow agreement is thus the extension of the facility agreement itself and rather executes the obligations stated in the main agreement. Thus, the plaintiff is the part of the agreement and hence cannot be held to be a stranger to the agreement.

C. It is correct when Mr. Singh, learned senior counsel states that the defendant No. 1 must realize the debt amount and there should not be any hinderance when the pawner is himself at default. However, the said realization has to be legal whether done with or without the intervention of the court. This court is

not against the realization of sum through the sale which is the right of the defendant but the reluctance of the defendant No. 1 to issue notice is a matter of concern. Once the statute itself mandates that the pawnee must give the reasonable notice to the pawner so that the pawner must get a chance to fulfil or satisfy the debt and redeem the security. There is no justification under the law for the pawnee to first forfeit the shares to its advantage and then informing the pawner. In any event, nothing can be done in relation to shares which has already been encashed or appropriated by the defendant as the separate remedies lies for the plaintiff to proceed against illegal appropriation. But the court can certainly monitor that the mandate of the law must be respected for future transactions.

D. I am in a way also convinced with the submission of the Learned counsel for the defendant that it is for the defendant No. 3 to come forward and maintain such action wherein the court may ask to him to fulfil his part of obligation by depositing the amount before the court. But this is the way the plaintiff and defendant No. 3 are distinct in agreement which has been itself signed by the defendant No. 1 wherein the promises of both the

plaintiff and defendant No. 3 are divided. Whereas the defendant No. 3 is under the facility agreement is bound to repay the loan and secure the same. The plaintiff has promised to maintain the security cover and has also given his shares as security. In these circumstances, any one of them or both jointly can maintain the action.

E. So far as concealment is concerned, The plaintiff has clarified the same by filing the affidavit wherein it has stated that the plaintiff has not got the copy of the signed agreement and has made the efforts to obtain the same. There is no advantage which occurred by filing such agreement or the complete one by any of the parties. The said aspect is thus irrelevant.

F. Lastly, I also agree with Mr. Singh, learned Senior counsel that the debt money of the defendant No.1 cannot be blocked but the same has to be realized legally within the permissible forcorners of the law. If the pledgees are given the unilateral right to forfeiture without the notice, then it would shake the confidence and balance in the business transactions as whenever there is a default, the pledgee without waiting for the pledgor to make good the loss immediately proceed to part with the goods. The

same cannot be allowed more so in view of the clear mandate of Section 176. Thus, this court deems it fit for the defendant No. 1 to issue notice in relation to shares which the defendant shall sell in future.

75. In support of his submissions, Mr Maninder Singh, learned Senior Counsel, has referred to various clauses of the Facility Agreement as well as Non-Disposal and Escrow Agreement which are as under:

Clause 14 of the Facility Agreement sets out remedies in event of default. Relevant portions thereof are reproduced herein below for the convenience of this court.

> *"Section 14 – Remedies of an Event of Default*
>
> *14.1 Upon the occurrence of any Event of Default, the Lender shall have the right, but not the obligation, to inter alia, cancel the Facility and call upon the Borrower to forthwith repay all loans, interest, accrued thereon and all other amounts under the Finance Documents without any further notice of default, presentment or demand for payment or other notice or demand of any kind or nature whatsoever such notice, presentment or demand being hereby irrevocably waived by the Borrower) whereupon all the Loans and interest accrued therein and other amounts shall become immediately payable by the Borrower notwithstanding anything to the contrary therein contained, and the Security shall become enforceable.*

*14.2 In addition to the above, the Lender shall also have a right to:*

*(a) to enforce the mortgage and sell the property;*

*(b) to sell the hypothecated assets;*

*(c) to pledge any/or sell any/or transfer and/or assign the escrowed times*

*(d) to exercise al or any of the rights conferred in terms of the Non Disposal and Escrow Agreement and the Power of attorney;*

*(e) invoke the pledge and/or register in its name or in the name of any of its nominees or any other person, as it shall deem fit, all or any of the Collateral of the Company as per the discretion of the Lender at the cost of the Share Holder, in accordance with the terms of the Non Disposal and Escrow Agreement without any notice to the Share Holder, and/or*

*(f) exercise all the rights and remedies available to it under the Finance documents including the right to sell the Escrowed shares pursuant to the Finance documents in such manner as the Lender may deem fit without intervention of the Court and without any consent of the Obligors and/or any person granting any Security pursuant to the terms of the Finance Documents."*

Clause 5 of the Non-Disposal Escrow Agreement deals with sale of disposal of escrow shares under which the Defendant No.2 has been appointed an attorney by the Plaintiff to sell/pledge/invoke or otherwise dispose the shares. The relevant clauses whereof are reproduced herein below for the convenience of this court:-

"5.2 The Share Holder/Borrower acknowledges and agree that the Escrow Agent, as its Attorney, is irrevocably authorized upon the occurrence of an Event of Default to promptly sell, pledge, transfer, invoke, assign and/or otherwise dispose of for monetary consideration, the Escrowed Shares and deposit the proceeds of such sale of the Escrowed Shares in the Payment Account.

5.3 The Share Holder/Borrower undertakes and agrees that upon any of the Share Holder Obligations becoming due and the Share Holder being unable to make such payment, the Attorney shall, upon becoming aware of the Share Holder's default or being notified of same by the Lender, be authorized (as the Share Holder's constituted attorney) to sell, transfer, assign and/or otherwise dispose of the Escrowed Shares, including through pledge, charge or other Encumbrance on the Escrowed Shares in favour of the Lender/Escrow Agent (or any other person nominated by the Lender/Escrow Agent to hold such Encumbrance) for the benefit of the Lenders, as security for or for the purpose of paying-off or discharging any and all amounts, which may from time to time be or become outstanding under any of the Transaction Documents.

5.4 The Share Holder/Borrower agrees that any sale, transfer, assignment and/or disposition (including creation of any Encumbrance by the Attorney as its agent can be on such terms as the Attorney in its discretion deems fit or as may be advised by the Lender and at such costs and prices as may be decided by the Attorney without the Attorney being held responsible for any losses (whether direct or indirect in relation to any future or present profit) or expenses that the Share Holder may suffer or incur.

5.5 The Parties acknowledge and agree that the actions set out in Clauses 5.3 and 5.4 above may be initiated and undertaken by the attorney at any point in time after the receipt of a notice from the Lender, informing the attorney of the borrower's and share holder's default in meeting

the loan obligations and/or the occurrence of any event of default as per the facility agreement."

Clause 4.2 (c)(i) of the Non-Disposal and Escrow Agreement provides that it is clarified that failure of the borrower and/or the share holder to meet the top up requirement and to pay the cash top up within the stipulated time, shall constituted an event of default. Clause 5.2 provides, which is agreed by all the parties, that in the event of default, the escrow agent, i.e., the defendant No.2, who is a group company of defendant No.1, to promptly sell, pledge, transfer, invoke, assign and/or otherwise dispose of for monetary consideration, the escrowed shares and in case of default, the attorney of the borrower and shareholder shall proceed in accordance with Facility Agreement. The duty of the escrow agent is provided in Clause 7.1 of the Non-Disposal and Escrow Agreement. Right of the escrow agent upon event of default is provided in Clause 7.3 of the agreement. Clause 7.3(a) of the Non-Disposal and Escrow Agreement reads as under:

"7.3(a) Upon the occurrence of an Event of Default under the Facility Agreement, the Escrow Agent shall, immediately upon the instructions of the Lender/Attorney be entitled to sell, pledge, invoke (or otherwise Encumber) in favour of the Lender, transfer or otherwise dispose of the Escrowed Shares (or any part thereof)

> without the intervention of any court and without any consent of or notice to the Share Holder/Borrower, at public or private sale or on any securities exchange for cash, upon credit or for future delivery or transfer or procure registration in the name of the Escrow Agent/Lender, or any of its nominees at the cost of the Share Holder, as the Lender/the Escrow Agent may deem commercially reasonable."

76. At this stage, it becomes relevant to discuss that the defendant No. 1 has already sold 2 lac shares on 18.07.2011 and 19.07.2011 and 1,77,926 shares and 1,27,500 shares on 03.08.2011 and 04.08.2011 in the market which I have found is violative under Section 176 of the Act. As the defendant has already illegally realized the proceeds of the sale of the said shares in terms of money, the only remedy lies to the plaintiff under the law of torts. This is due to the reason that even if the said sale is bad in view of the notice requirement, the same cannot be reversed and whatever illegal gains the defendant no.1 has attained in view of the said sale is liable to recovered on the foot of tort of conversion. (Kindly see the view taken in ***Nabha Investment Pvt. Ltd.*** (supra)).

77. The same view was also expressed by Chagla J in ***Official Assignee vs. Madho Lal Sindhu*** (supra) in the following words:

> "59 The pledgor has right to call upon the pledge to redeem the shares on payment of the debt. If the pledge

> has transferred the shares, he is entitled to call upon the transferee for the same because the transferee does not acquire anything more than the right, title and interest of the pledge which is to retain the goods as a pledge till the debt is paid off. **If the pledgor may not be in the position to redeem, he may contend himself with merely suing the pledge for conversion if any damage has resulted by reason of the goods being sold without the proper notice."**

78. In the present case too, number of shares to the tune of 17,63,68,219 have already been invoked into pledge and the proceeds to the same have been appropriated by the defendants of the sum of Rs. 251 crore. In the said shares, the pledgee/ defendant No. 1 has assigned the same to himself without notice attempting to appropriate the proceeds which amounts to foreclosure which is impermissible under the law. The Hon'ble Supreme Court in similar situation has declared such foreclosure as invalid in ***Balakrishna Gupta vs. Swadeshi Ploytex*** (**supra**) by observing thus:

> " In Bank of Bihar versus State of Bihar also, this court has reiterated the above legal position and held that the pawnee had a special property which was not of ordinary nature on the goods pledged and so long as his claim was not satisfied no other creditor of the pawnor had any right to take away the goods or its price. Beyond this no other right was recognized in a pawnee in the above decision. Under section 176 of Indian Contract Act, 1872, if the pawnor makes the 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 as a collateral security, or he may sell the thing pledged on giving the pawnor reasonable notice of the sale. **In the case of a pledge, however, the legal title to the goods pledged would not vest in the pawnee. The pawnor has only a special property. A pawnee has no right of foreclosure since he never had the absolute ownership at the law and his equitable title cannot exceed what is specifically granted by the law. In this sense, pledge differs from mortgage. In view of the foregoing, the pawnee in the instant case, i.e. the Government of Uttar Pradesh could not be treated as the holder of shares pledged in its favour**.
(Emphasis Supplied)"

79. Accordingly, the defendant No.1 while selling the said 17,63,68,219 shares to himself and appropriating the proceeds of the same cannot be allowed to do so and the said transaction, intimation dated 20.7.2011 and all other acts pursuant to the same are illegal and inconsequential. Accordingly, the defendant No. 1's status towards the said 17,63,68,219 shares along with the remaining 10 crore shares is still of a pledgee and the said shares are in totality open to redemption, sale and all other consequential remedies under the law of pledge. I do not agree with the contention of the plaintiff that the question of repayment of loan or suit for redemption does not arise as the debt has to be paid after the expiry of 36 months as stipulated in the agreement. The said argument has no force because of the reason that there are also various stipulated clauses in both the agreements wherein the

parties have agreed by themselves that in the event of failure what action the defendant No.1 can take. Therefore, the defendant No.1 after the default could proceed as per the said terms and without waiting for expiry period of 36 months.

80. In view of above discussion, the conclusions which can be discerned are outlined as under:

a) The plaintiff's role in the agreement cannot be obviated as it acts as co pawnor or joint promissor wherein his promise to the extent of the top up or to provide security cover is secured against the security of share along with the promise to repay the loan by the defendant No. 3. Both are entitled to redemption and more so when they are group companies of each other.

b) The notice under section 176 of the Indian Contract Act, 1872 is mandatory so as to give ample and reasonable chance to the pledgor to make the redemption prior to the sale. Rather, the right to sale accrues only when the notice for sale is given although the remedies of pledge to file suit and other remedies prescribed under Section 176 are available without notice.

c) In the present case, the notice requirement comes into play only at the time of sale and not at the time of invocation of pledge.

Thus, when the defendant has sold 5,00,426 shares in the market, the defendant No.1 ought to have given the notice under section 176 of the Act. Nevertheless, now as the sale has been effected, the only remedy lies to the plaintiff or defendant No.3 is under the law of torts.

d) The foreclosed shares or 17,63,68,219 shares appropriated by the defendant to itself is done in contravention to the law of pledge as no such right to foreclosure is available to the pledge. His equitable title cannot exceed what has been permissible under the law. Accordingly, the defendant no. 1 is still a pledgee of the said appropriated shares.

e) The stipulation in agreement giving absolute right to sell after the invocation of pledge is contrary to the law and thus prima facie illegal and cannot come in the way of effecting the valid pledge.

f) Normally, the suit for redemption can be filed when there is a reciprocal act of paying at one hand and giving back the security at the other. As there is illegality in the sales and the plaintiff and defendant No. 3 although are group companies but have separate performances to perform, such kind of arrangement is

entered into and this court has only passed this order to legitimize the relations so as to facilitate the immediate redemption legally.

g) The defendant No.1 is accordingly the pledgee of 27,37,29,000 equity shares in totality which it can treat them as per the law in view of the remedies available under Section 176 of the Act along with the remedies available under the contract. The said shares are open to redemption by either by the plaintiff and defendant No.3.

h) The event of default has accrued on account of non maintenance of topping up of security cover which is stipulated in clause v under the head of event of default and the redemption of shares is open on account of the occurrence of event of default and consequent invocation of pledge by the defendant No. 1.

i) In case, the defendant No. 1 exercises the right to sale, it shall do so as per the law and to the extent of the debt secured and the amount due and is not entitled to make any further adjustments.

81. In view of the conclusions set out above, the plaintiff is unable to prove any prima facie case in his favour as the defendant is

still a valid pledgee of more than 27 crore shares which are still open to redemption in view of my finding that the status of the defendant No. 1 is still of pledgee. The plaintiff has also expressed its reservation by not depositing or offering the debt amount of Rs. 250 crores by saying that its obligation is confined to topping up the security cover and if any redemption is available it is for the defendant No. 3 only after 36 months have elapsed although my finding is that the plaintiff is co promisor or co pawnor, the plaintiff has equal right of redemption as the property belongs to that of the plaintiff, the said fact tilts the balance of convenience in favour of the defendants as the defendant will be more inconvenienced in case the defendant is not allowed to proceed further legitimately in the transaction. The irreparable loss will also ensue to the defendant in case any embargo is put on the legitimate rights of the defendant No.1 as a pledgee of the shares as the event of default has already occurred.

82. Accordingly, the relief mentioned in IA no.11586/ 2011 cannot be granted in the terms prayed by the plaintiff except by disposing of the same in the following terms:

a) The acts of the defendant No.1 by appropriation of 17,63,68,219 shares to himself without notice are not correct

and all other consequential acts in relation to the said shares were inconsequential as no such right of foreclosure subsists under the law and the defendant No. 1 is still the pledgee of said 27,37,29000 equity shares. In fact, all the actions taken by the defendant No.1 after pledge on 13.07.2011 are inconsequential.

b) However, the defendant No.1, now being the pledgee, is therefore, entitled to sell and dispose of the same after issuance of valid notice required under Section 176 of the Act and the plaintiff or the defendant No.3 would be entitled to redeem the same. In case they fail to redeem the same within the time granted by the defendant No.1, it would be entitled to sell/transfer or assign the same in the manner provided in two agreements and after adjustment of its debt, the remaining amount shall be returned to the co-owners.

c) In so far as 500426 shares sold by the defendant No.1 on 18th and 19th July, 2011 and on 03.08.2011 and 04.08.2011 are concerned, the pawnor is entitled to take appropriate action under the law of tort and conversion.

83. For the reasons stated above, no further orders are called for nor the plaintiff is entitled to any relief. In view of the

circumstances explained IA No. 11586/2011 is disposed of with the aforesaid terms. The findings given by this order are tentative which shall have no bearing at the final stage of the suit.

**CS (OS) No.1771/2011**

Let the written statement be filed within four weeks. Replication be filed within four weeks thereafter. Original documents be filed by the parties within six weeks. List the matter before the Joint Registrar on 02.12.2011 for directions.

**MANMOHAN SINGH, J.**

**AUGUST 29, 2011**
ka