

The Doctrine of Pledge Under the Pakistani Legal System: A Case Law Appraisal

Amr ibn Munir

Department of Law, International Islamic University, Islamabad
amribnmunir2000@gmail.com

Abstract

This paper discusses what is a pledge, the parties to a pledge, the rights and liabilities of the parties. The main findings of this paper are that can conclude that a pledge is a bailment of goods as security for repayment of debt or the performance of a promise. In this case, the bailor is called the pawnor while the bailee is referred to as the pawnee. The rights and liabilities of the pawnee exceed those of the pawnor. A pledge is a sub-species of bailment and the purposes for the delivery of goods by way of bailment. Thus, a pledge is a kind of bailment and security. The methodology of this paper is doctrinal.

Keywords: Pledge, Pawnor, Pledgor, Pawnee, Pledgee, Mercantile Agent, Bailment

© 2023 The Authors. This is an Open Access article distributed under the terms of the Creative Commons Attribution Non-Commercial License.

1. Introduction

This paper discusses what is a pledge; who are the parties to a pledge; what are the rights and liabilities of the pawnee; does the pawnor have any rights and liabilities; what are the different types of pledges; how are they different; what is the difference between a pledge and a bailment; is pledge a type of bailment; The methodology of this paper is doctrinal.

1.1. Pledge

A pledge is a bailment of goods as security for repayment of debt or the performance of a promise. (*Habib Bank Limited v. Messrs Medina Rice and Ice Mills*, 2015 CLC 1808 [Lahore], 2015 CLD 829 [Lahore], at para 12; *Messrs Ibrahim Oil Mills v. MCB Bank Limited*, 2015 CLD 802 [Lahore], at para 7; *Vital Chemicals Corporation v. Silk Chemical Limited*, 2022 CLD 320 [Lahore (Multan Bench)], at para 19.) In this case, the bailor is called the pawnor while the bailee is referred to as the pawnee. Under American jurisprudence, it is referred to as “pawn” (West, 2005, p. 411). It means “to deliver personal property to another as a pledge or as security for a debt. A deposit of goods with a creditor as security for a sum of money borrowed” (West, 2005, p. 411). “It denotes a deposit of personal property with a pawnbroker as security for a loan.” (West, 2005, p. 411). Under our law, it is incorporated within Section 172 of the Contract Act, 1872 (hereinafter referred to as the “Act”) which provides that “the bailment of goods as security for payment of a debt or performance of a promise is called “pledge”. The bailor is in this case called the “pawnor”. The

bailee is called the “pawnee”.” It should be noted however that the Courts have referred to the pawnor and pawnee as pledger and pledgee respectively as well. For our purposes, to avoid any confusion, we shall stick only to the terms, pawnor and pawnee as provided by the provision itself. Thus, there are three essential ingredients of the pledge (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p.1497). The first is that there must be a bailment of goods, that is to say a delivery of goods under Section 148 of the Act (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p.1497). The second ingredient is that the bailment must be by the way of security (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p.1497) and lastly, the security must be for the payment of a debt or the performance of a promise (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p.1497). Hence, a pledge is the delivery of goods by the pledgor to the pledgee by way of security upon a contract that they shall when the debt, is paid or the promise is performed, be returned or otherwise disposed of according to the directions of the pledgor (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p.1497).

2. The Rights and Liabilities of the Pawnee

The pawnee has the right to retain the pledged goods, not only for the payment of a debt or for the performance of a promise, but also for any interest in the debt and for all expenses incurred by him in regards to the possession and preservation of the pledged goods. (*Lallan Prasad v. Rahmat Ali*, 1967 AIR 1322, 1967 SCR (2) 233, pp. 239-240.) Section 173 of the Act provides that

“The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.”

The pawnee also cannot retain the goods for any debt or promise other than the debt or promise for which they are pledged, provided that there is no contract to the contrary. However, should there be any subsequent advances by the pawnee, then such a contract shall be presumed, provided that there is no contract to the contrary. Section 174 of the Act provides that

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

Thus, it raises a statutory presumption as to the continuing security in favour of the pawnee who advances or lends money subsequent to the creation of pledge of goods against any particular liability, debit or promise (*Mst. Talat Nasreen v. United Bank Ltd.*, 2003 CLD 94 [Karachi], p. 98.) Or we can say that Section 174 stipulates in clear and unambiguous language, that a pledged security can be kept by the pledgee only as security for the obligations for which it was pledged (*Mian Nisar Elahi v. Lahore Stock Exchange (G) Limited*, 2007 CLD 376 [Lahore], at para 65). The pawnee's right to be compensated for any extraordinary expenses incurred by him for the preservation of the pledged goods is also incorporated within Section 175 of the Act (*Lallan Prasad v. Rahmat Ali*, 1967 AIR 1322, 1967 SCR (2) 233, p. 240) which provides that "*the pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.*"

In case of default by the pawnor to, the pawnee has the right to either sue upon the debt and to retain the goods as collateral security and also to sell the goods after reasonable notice of the intended sale to the pawnor (*Lallan Prasad v. Rahmat Ali*, 1967 AIR 1322, 1967 SCR (2) 233, p. 240). Once the pawnee sells the goods, the right of the pawnor to redeem them is of course extinguished. Although pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawnor (*Lallan Prasad v. Rahmat Ali*, 1967 AIR 1322, 1967 SCR (2) 233, p. 240). This finds force in Section 176 of the Act which provides that

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

Of course, should the pawnor pay his debt or perform his promise, then the pawnee has to return the pledged goods to him (*Messrs Ali Traders Rice Dealer, Gujranwala v. National Bank of Pakistan*, 2015 CLD 1 [Lahore], at para 8). He cannot maintain a suit for recovery of debt as well as retain the pledged property *Messrs Ali Traders Rice Dealer, Gujranwala v. National Bank of Pakistan*, 2015 CLD 1 [Lahore], at para 8). Thus, a pawnee does not have the right of ownership though he has the rights of a pledge which include only the right of possession but not the right of

enjoyment (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p. 1497). A pledgee has the right of disposition which is limited to disposition of the pledgee rights only and of a sale only and that too only after notice and subject to certain limitations (*National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi], p. 1497). The sending of a notice merely requires that the notice should contain an intimation of the pawnor's intention to sell these goods if the debt was not paid within a reasonable time (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 8).

It does not require that the amount due from the pawnor should be specifically stated in the notice (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 8). It is enough if the notice contains material from which the debtor can infer as to what debts he has to pay to the pawnee (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 8). It is also not necessary that the notice should contain the date or place of sale or that the pawnee should first arrange the sale of the pledged goods, and then communicate his decision to the pawnor (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 8).

However, even in such a case, where the pawnor has defaulted his payment of the debt or the performance of the promise at the stipulated time, the pawnor still has the right to redeem himself at any subsequent time before the goods are sold (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 13; *Prudential Commercial Bank Ltd. v. Hydari Ghees Industries Ltd.*, 1999 MLD 1694 [Karachi], p. 1699).

He must also pay for any extra expenses that have incurred for the pawnee due to his default (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556, at para 13; *Prudential Commercial Bank Ltd. v. Hydari Ghees Industries Ltd.*, 1999 MLD 1694 [Karachi], p. 1699). This finds force in Section 177 of the Act which provides that

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

This right of the pawnor however is subject to a bank's right of retaining the goods under Section 171 of the Act (*Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.)

Karachi 556, at para 13; *Prudential Commercial Bank Ltd. v. Hydari Ghees Industries Ltd.*, 1999 MLD 1694 [Karachi], p. 1699).

Where the pawnor only has a limited interest in the pledged goods, the pledge is only valid to the extent of that interest. This is incorporated within Section 179 of the Act which provides that “where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest”. In a case, where a pawnee further pledges the goods, the pledge will be valid only to the extent of his interest and his interest is the amount for which the goods have been given to him as a security. If he pledges for a larger amount, the original pledger will still be entitled to his goods on paying the amount for which he himself pledged the goods (*Firm Thakur Das v. Mathura Prasad*, AIR 1958 All 66). Where, on the other hand, an effective pledge in favour of the pledgee has not taken place, any repledge made by him will be equally ineffective (Singh, 2017, p. 734, *Jaswantraai Manilal Akhaney v State of Bombay*, AIR 1956 SC 575, 1956 SCR 483).

3. Pledge by Mercantile Agent

Where a mercantile agent is in possession of the goods or the documents of the title of the goods with the owner’s consent, any pledge made by him when acting in the ordinary course of business of a mercantile agent, it shall be valid as if he were expressly authorized by the owner to do so, provided that pawnee acts in good faith and at the time the pledge is made does not notice that the pawnor does not actually have to authority to pledge (*Muhammad Nawaz v. Muhammad Safdar*, 2009 CLD 632 [Lahore], at para 5). Section 178 is as follows:

“Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents 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. Explanation. In this section, the expressions ‘mercantile agent’ and ‘documents of title’ shall have the meanings assigned to them in the Sale of Goods Act, 1930”

Thus, there are four essential conditions that have to be fulfilled for the application of this provision (Singh, 2017, p. 730). The first is that there should be a mercantile agent, which has the same meaning attached to it as the meaning provided by Section 2(9) of the Sale of Goods Act 1930 (Singh, 2017, p. 730). It provides that

“mercantile agent” means a mercantile agent having in the customary course of business, as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods”.

The second essential condition is that the mercantile agent should be in possession of the goods with the owner’s consent (Singh, 2017, p. 730). Consent in this case means the consent as per Section 13 of the Act. If the consent is real, it is immaterial that it was obtained by fraud or misrepresentation or with dishonest intention. All these things may make the person receiving possession liable for some offence, but the consent of the owner actually given is not annulled thereby (Singh, 2017, p. 730). Where a goldsmith obtained possession of a certain piece of jewellery under the pretense that he had a customer, and instead pledged the jewellery, the pledgee was held to have obtained a good title (*U. Sulaiman v Ma Ywet*, AIR 1934 Rang 198, (1934) 151 IC413; *Ah San v. Maung BaThi* (1937) 169 IC 221). Possession in this case refers to juridical possession as distinguished from mere physical possession or bare custody (*Sharadin v Gokulchand*, AIR 1931 Lahore 526). The third condition is that it must be done in the course of business, that is to say, the goods should have been entrusted to the agent in his capacity as a mercantile agent and he should be in possession in that capacity, (Singh, 2017, p. 730). If the goods are entrusted to him in a different capacity, it is not open to a third party who takes a pledge from him to say that they were in his possession as a mercantile agent and therefore, he had the power to create a pledge (*Staffs Motor Guarantee Ltd. v British Wagon Co Ltd*, (1934) 2 KB 305). The last condition is that the pawnee should act in good faith and should not notice that the pawnor had no authority to pledge the goods at the time the pledge was made (Singh, 2017, p. 731). In this case, the definition of good faith as provided under Section 20 of The General Clauses Act 1897 shall be applicable (Singh, 2017, p. 731). It provides that *“a thing shall be deemed to be done in “good faith” where it is in fact done honestly, whether it is done negligently or not”.*

4. Pledge by Person in Possession of Goods under a Voidable Contract

Section 178A of the Act provides that

“When the pawnor has obtained possession of the goods pledged by him under a contract 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.]”

Hence, where the pawnor has obtained possession of the goods obtained that are pledged by him under a voidable contract as per Sections 19 and 19A of the Act and the contract has not yet been rescinded at the time of the pledge, the pawnee then acquires a good title to the goods, provided that he acts in good and without noticing the pawnor's defect of title. Thus, in this case, there are four conditions that have to be fulfilled in order for this provision to be applied. The first is that the pawnor has obtained possession of the goods. The second is that he has obtained the possession of the goods under a voidable contract as per Sections 19 and 19A of the Act. The third is that the contract has not yet been rescinded at the time the pledge is made and lastly, the pawnee must act in good faith and without noticing the pawnor's defect of title to the goods, similar to the conditions imposed under Section 178 of the Act as discussed hereinabove.

5. Pledge and Bailment Distinguished

A pledge is a sub-species of bailment and the purposes for the delivery of goods by way of bailment as envisaged by section 148 of the Act is the security for payment as has been mentioned in section 172 of the Act (*Faisal Bank v. Messrs Zimindara Rice Mills*, 2007 CLD 1164 [Lahore], at para 18). Thus, the rights inter se the parties are primarily governed by Chapter 9 of the Contract Act i.e., from sections 148 to 181 thereof (*Faisal Bank v. Messrs Zimindara Rice Mills*, 2007 CLD 1164 [Lahore], at para 18). Hence, the slight difference between bailment and pledge is that in the case of bailment the deposit of goods is for a certain purpose, to be returned after the purpose is accomplished but in the case of pledge, the goods are deposited as a security to be kept till the payment of debt is affected or a promise for which the goods were pledged is performed (*Vital Chemicals Corporation v. Silk Chemical Limited*, 2022 CLD 320 [Lahore (Multan Bench)], at para 20). Or in simpler terms, we can say that a pledge is a kind of bailment and security (*Vital Chemicals Corporation v. Silk Chemical Limited*, 2022 CLD 320 [Lahore (Multan Bench)], at para 20).

6. Conclusion

From the discussion hereinabove, we can conclude that a pledge is a bailment of goods as security for repayment of debt or the performance of a promise. In this case, the bailor is called the pawnor while the bailee is referred to as the pawnee. The pawnee has the right to retain the pledged goods, not only for the payment of a debt or for the performance of a promise, but also for any interest in the debt and for all expenses incurred by him in regards to the possession and preservation of the pledged goods. The pawnee also cannot retain the goods for any debt or promise other than the

debt or promise for which they are pledged, provided that there is no contract to the contrary. However, should there be any subsequent advances by the pawnee, then such a contract shall be presumed, provided that there is no contract to the contrary. In case of default by the pawner to, the pawnee has the right to either sue upon the debt and to retain the goods as collateral security and also to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee sells the goods, the right of the pawner to redeem them is of course extinguished. Although pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. However, even in such a case, where the pawnor has defaulted his payment of the debt or the performance of the promise at the stipulated time, the pawnor still has the right to redeem himself at any subsequent time before the goods are sold. He must also pay for any extra expenses that have incurred for the pawnee due to his default. Where the pawnor only has a limited interest in the pledged goods, the pledge is only valid to the extent of that interest. Where a mercantile agent is in possession of the goods or the documents of the title of the goods with the owner's consent, any pledge made by him when acting in the ordinary course of business of a mercantile agent, it shall be valid as if he were expressly authorized by the owner to do so, provided that pawnee acts in good faith and at the time the pledge is made does not notice that the pawnor does not actually have to authority to pledge. Where the pawnor has obtained possession of the goods obtained that are pledged by him under a voidable contract as per Sections 19 and 19A of the Act and the contract has not yet been rescinded at the time of the pledge, the pawnee then acquires a good title to the goods, provided that he acts in good and without noticing the pawnor's defect of title. A pledge is a sub-species of bailment and the purposes for the delivery of goods by way of bailment. The slight difference between bailment and pledge is that in the case of bailment the deposit of goods is for a certain purpose, to be returned after the purpose is accomplished but in the case of pledge, the goods are deposited as a security to be kept till the payment of debt is affected or a promise for which the goods were pledged is performed. Or in simpler terms, we can say that a pledge is a kind of bailment and security.

References:

Ah San v. Maung BaThi (1937) 169 IC 221.

Eastern Book Company, 12th ed.

Faisal Bank v. Messrs Zimindara Rice Mills, 2007 CLD 1164 [Lahore].

Firm Thakur Das v. Mathura Prasad, AIR 1958 All 66.

- Habib Bank Limited v. Messrs Medina Rice and Ice Mills*, 2015 CLC 1808 [Lahore], 2015 CLD 829 [Lahore].
- Jaswantrai Manilal Akhaney v State of Bombay*, AIR 1956 SC 575, 1956 SCR 483.
- Lallan Prasad v. Rahmat Ali*, 1967 AIR 1322, 1967 SCR (2) 233.
- Messrs Ali Traders Rice Dealer, Gujranwala v. National Bank of Pakistan*, 2015 CLD 1 [Lahore].
- Messrs Continental Syndicate of Trade v. Llyods Bank Ltd.*, PLD 1966 (W. P.) Karachi 556.
- Messrs Ibrahim Oil Mills v. MCB Bank Limited*, 2015 CLD 802 [Lahore].
- Mian Nisar Elahi v. Lahore Stock Exchange (G) Limited*, 2007 CLD 376 [Lahore].
- Mst. Talat Nasreen v. United Bank Ltd.*, 2003 CLD 94 [Karachi].
- Muhammad Nawaz v. Muhammad Safdar*, 2009 CLD 632 [Lahore].
- National Bank of Pakistan v. Emirates Bank International Ltd.*, 2004 CLD 1490 [Karachi].
- Prudential Commercial Bank Ltd. v. Hydari Ghees Industries Ltd.*, 1999 MLD 1694 [Karachi].
- Rana, A. A. (2019). Formation of international contracts and formation of contract in Pakistan: A comparison. *SSRN Electronic Journal*. doi:10.2139/ssrn.3918467
- Rana, A. A., & Siddique, H. M. (2022). The Transgender Persons (Protection of Rights) Act 2018: A Shariah appraisal of self-perceived gender identity and right of inheritance of the transgender. *SSRN Electronic Journal*. doi:10.2139/ssrn.4145921
- Sharadin v Gokulchand*, AIR 1931 Lahore 526.
- Singh, Avtar (2017), “*Law of Contract, A Study of the Contract Act 1872 and Specific Relief*”, *Staffs Motor Guarantee Ltd. v British Wagon Co Ltd*, (1934) 2 KB 305.
- U. Sulaiman v Ma Ywet*, AIR 1934 Rang 198, (1934) 151 IC413.
- Vital Chemicals Corporation v. Silk Chemical Limited*, 2022 CLD 320 [Lahore (Multan Bench)].
- West’s Encyclopedia of American Law, (Thomson Gale, 2nd ed., Vol. 7., 2005).