IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Ms. Justice Aynun Nahar Siddiqua

First Appeal No. 38 of 2020.

Agrani Bank Limited (now PLC)

... Appellant.

-Versus-

M/S Yanbar Agro Products Industries, Dhaka

....Respondent.

First Appeal No. 73 of 2020.

Agrani Bank Limited (now PLC)

...Appellant.

-Versus-

M/S A. Hashem Dewan & Co. Limited

....Respondent.

Mr. Shamim Khaled Ahmed, Senior Advocate with
Mr. Mohammad Sakhawat Hossain, Advocates
… For the appellant

Mr. Kamruzzaman Bhuiyan, Advocate with
Mr. Monirujjaman, Advocate with
Mr. Md. Asraful Alam, Advocate with
Mr. Md. Zakir Hossain, Advocates
… For the respondent.

Heard on: 13.07.2026, 21.07.2026, 30.07.2026, 11.08.2026, 18.08.2026, 25.08.2026 & 30.08.2026.

Judgment on: 03.09.2026.

Md. Badruzzaman, J:

Since the plaintiff-respondents in both the suits are sister concerns, the defendant-appellant is the same bank and the facts as well as the questions of law involved in both the appeals are substantially similar, both the appeals have been heard simultaneously and are being disposed of by this common judgment.

First Appeal No. 38 of 2020

This appeal is directed against the judgment and decree dated 19.09.2019 (decree signed on 22.09.2019), passed by the learned Special Joint District Judge and Judge, Environment Court, Dhaka in Money Suit No. 60 of 2018, whereby the suit was decreed in part and the defendant-bank was directed to pay Tk. 14,00,00,000/- to the plaintiff-respondent as compensation.

The respondent as plaintiff instituted Money Suit No. 35 of 2005, subsequently renumbered as Money Suit No. 60 of 2018, on 08.06.2005 before the learned Joint District Judge, 5th Court, Dhaka, against the defendant-bank for recovery of Tk. 50,86,83,671/-, including Tk. 10,86,83,671/- as compensation for alleged deterioration of the pledged goods, Tk. 10,00,00,000/- for mental agony and Tk. 30,00,00,000/- for alleged loss of reputation and goodwill contending, inter alia that for the purpose of importing M.S. plates from Japan, it opened an account with the defendant-bank and obtained a loan facility of US$ 540,500/- against two Letters of Credit dated 02.12.1984. Pursuant thereto, it imported 2,800 metric tons of M.S. plates from Japan for manufacturing 1,44,000 running feet of M.S. housing pipes for supply to the Bangladesh Agricultural Development Corporation (BADC). The imported goods were furnished as security in favour of the bank and were kept in the plaintiff's godown under the supervision of security guards employed by the bank, whose salaries were paid from the plaintiff's loan account.

The plaintiff subsequently manufactured 82,320 running feet of M.S. housing pipes and, upon depositing Tk. 3,08,58,337/- with the bank, obtained delivery of the corresponding M.S. plates. It further stated that M.S. plates corresponding to 3,232 running feet of M.S. housing pipes manufactured from an earlier consignment were also lying in the bank's godown. Thus, after delivery of the plates corresponding to 82,320 running feet, M.S. plates corresponding to the remaining 64,912 running feet continued to remain as security.

Thereafter, the plaintiff sought remission of interest and repayment of the outstanding loan by instalments. Pursuant thereto, a reciprocal agreement was entered into between the parties on 06.07.1994, under which the plaintiff made a down payment of Tk. 60,00,000/-. According to the plaintiff, notwithstanding the said agreement and repeated requests, the bank failed to realise the outstanding dues by selling the pledged goods through auction and instead instituted Money Suit No. 188 of 1991 for recovery of its dues.

Ultimately, on 13.01.2004, the plaintiff purchased the remaining M.S. plates corresponding to 64,912 running feet of M.S. housing pipes for Tk. 35,00,000/-. According to the plaintiff, by that time goods valued at Tk. 2,92,10,400/- had deteriorated and become scrap. It alleged that such deterioration and destruction resulted from the bank's negligence in delaying the sale of the goods by auction and its failure to comply with the reciprocal agreement dated 06.07.1995. The plaintiff demanded compensation from the bank, but the bank did not respond favourably, whereupon the suit was instituted.

The defendant-bank contested the suit by filing a written statement. Its case, in substance, is that despite repeated demands and opportunities, including waiver of a substantial portion of the interest, the plaintiff failed to discharge its outstanding loan liability. The bank stated that the goods were kept in the plaintiff's own godown at Ferry Ghat, Muktarpur, where they remained under the direct possession and control of the plaintiff, although the godown was supervised by the bank's guards and manager. According to the bank, the plaintiff was responsible for taking delivery of and properly preserving the goods.

The bank further contended that it had taken steps to sell the goods, but no buyer came forward and the sale could not be effected. According to the bank, because of the plaintiff's failure to take delivery of and properly preserve the goods, the remaining 64,912 running feet of M.S. plates remained exposed to the elements for about twenty years and consequently deteriorated and became scrap. The plaintiff eventually purchased the goods on 13.01.2004 for Tk. 35,00,000/-.

The defendant-bank denied negligence and asserted that it had exercised due care as a prudent banker. It further contended that under the special contract embodied in the pledge agreement, the plaintiff had undertaken the risk of damage, loss and deterioration of the goods from any cause whatsoever. On these grounds, the bank denied liability and prayed for dismissal of the suit.

At the trial, the plaintiff examined one witness and the defendant-bank examined one witness. Both parties adduced documentary evidence, which were duly marked as exhibits. Upon consideration of the oral and documentary evidence and the materials on record, the learned trial Court decreed the suit in part and directed the defendant-bank to pay Tk. 14,00,00,000/- to the plaintiff. Being aggrieved by the said judgment and decree, the defendant-bank preferred First Appeal No. 38 of 2020.

First Appeal No. 73 of 2020

This appeal is directed against the judgment and decree dated 19.09.2019 (decree signed on 22.09.2019), passed by the learned Special Joint District Judge and Judge, Environment Court, Dhaka in Money Suit No. 90 of 2018, whereby the suit was decreed in part and the defendant-bank was directed to pay Tk. 1,53,23,543/- to the plaintiff-respondent as compensation, with applicable bank interest from the date of judgment until realization.

The plaintiff-respondent instituted Money Suit No. 80 of 2001, subsequently renumbered as Money Suit No. 90 of 2018, on 01.12.2001 before the learned Joint District Judge, 5th Court, Dhaka, against the defendant-bank for recovery of Tk. 5,92,41,250/- as compensation for alleged deterioration of the pledged goods along with interest.

The plaintiff's case is that it was engaged in the manufacture of steel pipes and ship-breaking business. On 24.08.1985, the Ministry of Industries awarded it an order for carrying out ship-breaking work and granted permission to import old vessels for that purpose. For importing the vessels, the plaintiff obtained a loan of Tk. 4,51,98,736.58 from the defendant-bank and, against the said loan facility, opened letters of credit. Pursuant thereto, two vessels were imported. The vessels were brought to Chattogram Port and kept at Tulatuli Ship-Breaking Yard and, about a year thereafter, were released therefrom and stored in the warehouse of the defendant establishment.

The plaintiff thereafter broke the vessels and produced 8,183 metric tons of scrap. According to the plaintiff, responsibility for supervision, custody and maintenance of the warehouse and the scrap stored therein lay with the defendant-bank. Under the terms of the loan facility, upon payment by the plaintiff of a specified amount, the bank was required to release a proportionate quantity of the scrap. Accordingly, the plaintiff deposited Tk. 2,17,52,607.43 with the bank and obtained release of 4,200 metric tons of scrap. The remaining 3,983 metric tons continued to remain in storage.

After the aforesaid partial repayment, Tk. 2,21,45,655/- remained due and payable by the plaintiff to the defendant-bank. According to the plaintiff, the remaining 3,983 metric tons of scrap were valued at Tk. 5,92,41,250/-, calculated at the rate of Tk. 15,000/- per metric ton.

The plaintiff further contended that it could not take delivery of the remaining 3,983 metric tons of T.T. Siemens materials pledged with the bank because the price fixed by the bank was higher than the prevailing market price. According to the plaintiff, as it was unable to obtain delivery upon payment of the price demanded by the bank, the bank ought to have sold the goods and adjusted the sale proceeds against the outstanding loan liability. The bank, however, failed to do so and the loan liability consequently continued to remain outstanding.

The plaintiff further alleged that although Bangladesh Bank had fixed the rate of interest at 14.50% during the relevant period, the defendant-bank charged interest at the rate of 18%. According to the plaintiff, owing to the bank's failure to sell the pledged goods and adjust the sale proceeds against the loan account, coupled with the alleged excessive interest, it suffered financial loss.

It was further stated that, instead of selling the pledged goods and adjusting the proceeds towards the outstanding loan, the defendant-bank instituted Artha Rin Suit No. 225 of 1991 before the Artha Rin Adalat claiming Tk. 7,16,24,979/- and obtained an ex parte decree therein. Thereafter, the bank instituted Execution Case No. 21 of 1993 for realization of the decretal amount and sought to sell by auction the plaintiff's properties situated at 3/18, Iqbal Road, as well as other properties.

At that stage, the plaintiff applied to the bank for remission of interest. In response, the Manager of the bank's Dalpatti Branch issued a letter offering remission of interest subject to certain conditions. According to the plaintiff, the bank agreed to remit 75% of the ordinary interest and 100% of the penal interest, and in compliance with the conditions the plaintiff made a down payment of Tk. 60,00,000/-.

The plaintiff further contended that, pursuant to the bank's decision, the remaining scrap stored at Tulatuli, Chattogram, was to be sold and the sale proceeds adjusted against the outstanding loan liability. The bank, however, did not sell the remaining scrap. The plaintiff again requested the bank by letter dated 20.07.1994 to sell the remaining pledged goods. According to the plaintiff, despite the said request, the bank left the goods exposed in the open air, resulting in their deterioration. The plaintiff also alleged that dishonest officers and employees of the bank had sold a portion of the goods and misappropriated the sale proceeds. On these allegations, the plaintiff instituted the suit claiming compensation.

The defendant-bank contested the suit by filing a written statement, denying the material allegations and the factual and legal basis of the claim. The bank contended that the plaintiff had obtained the loan facility but failed to repay the outstanding amount or obtain release of the pledged goods upon making the requisite payment. It was further contended that the plaintiff failed to comply with the terms and conditions of the waiver of interest dated 06.07.1995, particularly by failing to make the stipulated down payment within the prescribed time.

The bank stated that it had requested the plaintiff on several occasions to liquidate the outstanding loan liability, but the plaintiff failed to pay the dues. Having found no other alternative, the bank served a legal notice dated 17.09.1989 demanding repayment and subsequently instituted Artha Rin Suit No. 225 of 1991 before Artha Rin Adalat No. 1, Dhaka, on 17.07.1991 for recovery of Tk. 7,16,24,979/-. The suit was decreed on 16.07.1992. Thereafter, the bank instituted Execution Case No. 21 of 1993 on 30.06.1993 for realization of Tk. 9,75,68,798/-.

The bank further contended that, following the alleged misappropriation of some of the pledged goods by miscreants, it lodged Sitakunda Police Station Case No. 3 under section 379 of the

Penal Code and Sitakunda Police Station Case No. 33 under sections 143, 447, 448, 352 and 379 of the Penal Code.

It was also contended that the plaintiff had neither stated nor specified in the plaint any particular act of negligence or omission on the part of the bank from which liability for the alleged loss could be imputed to it. The plaintiff had also failed to explain the basis upon which the alleged loss was assessed and had not produced any assessment or valuation report to establish the extent of the damage or the compensation claimed.

At the trial, both parties adduced one witness each and produced documentary evidence, which were duly marked as exhibits. Upon consideration of the oral and documentary evidence and the materials on record, the learned trial Court decreed the suit as stated above. Being aggrieved by the said judgment and decree, the defendant-bank preferred First Appeal No. 73 of 2020.

Submissions

Mr. Shamim Khalid Ahmed, learned Advocate appearing for the appellant in both the appeals, referring to sections 151, 152 and 172 of the Contract Act, 1872, submits that the learned trial Court committed an error of law in fastening liability upon the defendant-bank without properly appreciating the legal relationship between the parties and the statutory duties of a pawnee or bailee. He submits that the liability of the bank, if any, must be determined in accordance with the Contract Act and the terms of the security documents and cannot be founded merely upon a general notion of tortious liability.

He further submits that the goods admittedly remained in the respective plaintiff's own godown or shipyard under the supervision of security guards and that the bank neither had physical possession nor exclusive custody thereof so as to attract the obligations of a bailee under sections 151 and 152 of the Act.

He further submits that under section 176 of the Contract Act the bank was not legally bound to sell the pledged goods before instituting proceedings for recovery of its outstanding dues. According to him, the bank was entitled to sue upon the debt and retain the security, and its failure to sell the goods immediately could not, without more, constitute negligence or breach of duty.

Referring to clause 8 of the Pledge of Goods, marked as Exhibit-A5 in Money Suit No. 60 of 2018 and Exhibit-A in Money Suit No. 90 of 2018, learned Advocate submits that the plaintiff expressly undertook responsibility for loss, damage or deterioration of the securities caused by theft, fire, rain or any other cause whatsoever. He contends that in view of the said contractual stipulation and the plaintiff's continued custody and control of the goods, their deterioration cannot be attributed to the bank in the absence of cogent evidence of negligence or breach of duty on its part.

He further submits that the plaintiffs failed to establish any actionable wrong on the part of the bank and instituted the suits only to avoid their liability to repay the money due to the bank.

In support of his submissions, learned Advocate has referred to *Messrs. World Trans Logistics and others Vs. Silk Bank Limited and others*, 2016 SCMR 800; *The Lahore Central Cooperative Bank Limited*

Vs. Messrs. Haji Allah Dad Fida Hussain, Merchants and Commission Agents and others, 1987 L.C.L. 1435; *Bank of Maharashtra Vs. Messrs. Racmann Auto (P) Limited*, AIR 1991 Delhi 278; and *Reliable Jute Traders and another Vs. Sonali Bank and others*, 7 BLC 16.

Mr. Kamruzzaman Bhuiyan, learned Advocate appearing for the plaintiff-respondents in both the appeals, on the other hand, submits that under the reciprocal agreement dated 06.07.1994 (Exhibit-5 in Money Suit No. 60 of 2018), the defendant-bank in Money Suit No. 60 of 2018 was required to realize the outstanding loan by selling the secured goods, but failed to do so despite repeated requests. He therefore submits that the bank is liable to make good the loss sustained by the plaintiffs on account of the loss and destruction of the pledged goods occasioned by the bank's laches and negligence.

Drawing our attention to the auction notice published by the bank (Exhibits A19-A21 in Money Suit No. 90 of 2018), learned Advocate submits that the bank itself specifically stated therein that the pledged goods were in its custody. He therefore contends that the bank cannot subsequently resile from its own representation or shift the burden by taking the plea that the pledged goods remained under the exclusive possession and control of the plaintiffs.

Learned Advocate further submits that clauses 7 and 8 of the pledge agreements, whereby the plaintiffs assumed responsibility for loss, damage or deterioration of the goods, are inconsistent with sections 151 and 152 of the Contract Act and are therefore void under section 23 thereof. He further submits that the offending portions of the agreement are severable by applying the Blue Pencil Rule and that the plaintiffs are entitled to compensation under section 73 of the Contract Act read with section 34 of the Code of Civil Procedure.

In support of his submissions, learned Advocate has referred to *Nimai Chandra Biswas v. Sonali Bank, Dhaka and another*, 22 BLC (AD) 195, and *Archana Proshad Nandi v. Miss Chilia Randolph and others*, 34 DLR (AD) 106.

Points for determination

In view of the rival submissions, the following questions arise for determination:

(i) Whether the goods in question were delivered into the possession or custody of the defendant-bank so as to attract the legal incidents and statutory duties arising from a pledge and/or bailment under the Contract Act, 1872;

(ii) Whether the defendant-bank was legally bound to sell the secured goods before instituting proceedings for recovery of its outstanding dues;

(iii) Whether the deterioration, destruction or loss of the goods was attributable to any breach of contract, negligence or other actionable omission on the part of the defendant-bank so as to entitle the plaintiffs to compensation;

(iv) Whether clauses 7 and 8 of the Pledge Agreements are unlawful or void under section 23 of the Contract Act merely because they allocate responsibility for loss, damage or deterioration of the goods to the plaintiffs, having regard to sections 151 and 152 of the Act; and

(v) Whether the plaintiffs established the necessary causal connection and quantum of loss so as to sustain the decrees for compensation.

Discussion and findings

We have heard the learned Advocates for the parties, perused the memorandums of appeal, the impugned judgments and decrees and the materials on record. There is no dispute that the plaintiff-respondents obtained financial accommodation from the defendant-bank and that the goods in question were furnished as security for repayment of the respective loans. The central controversy, however, is not merely whether the documents described the goods as “pledged”, but whether, in the factual arrangement between the parties, possession or custody of the goods was delivered to and retained by the bank.

Nature of pledge and requirement of possession

Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another for some purpose upon a contract that, when the purpose is accomplished, the goods shall be returned or otherwise dealt with according to the directions of the person delivering them. Section 172 provides that the bailment of goods as security for payment of a debt or performance of a promise is called a pledge, the bailor being called the pawnor and the bailee the pawnee.

Thus, delivery and possession are fundamental elements in the ordinary legal conception of a pledge.

It is necessary, however, to emphasize that delivery need not invariably be proved by a physical handing over of each item of goods. Depending upon the circumstances, delivery may be actual or constructive. What is material is whether the transaction, viewed in substance, transferred possession or control of the goods to the pawnee, so that the pawnee assumed the legal position contemplated by the law of pledge.

This distinction is important because a security arrangement cannot be converted into a conventional pledge merely by attaching the label “pledge” to the documents. Where the borrower retains actual possession and control of the goods at its own premises and the lender merely obtains a security interest over those goods, the Court must examine the substance of the transaction and the actual arrangement between the parties.

In *Eastern Bank Ltd. and another Vs. Sufia Re-Rolling Mills and Steel Ltd. and others*, 56 DLR (2004) 530, the distinction between pledge and hypothecation was considered with reference to possession of the goods. The decision recognizes the significance of actual custody and control in determining the nature of the security arrangement.

In the present cases, the evidence, as discussed by the trial Court and available on record, does not satisfactorily establish that the defendant-bank obtained exclusive physical possession of the goods. The goods remained at the plaintiffs' own godown or shipyard and continued to remain physically accessible to and under the control of the plaintiffs. The fact that security guards were posted by the bank for protection of the goods does not, by itself, establish that possession was transferred to the bank. The further fact that the expenses of the guards were borne from the plaintiffs' loan account also does not alter the essential character of the arrangement.

The bank's supervision of the goods must therefore be distinguished from possession of the goods in the legal sense. Supervision for the purpose of protecting security does not necessarily amount to delivery of possession, particularly where the borrower remains in physical occupation of the premises and continues to exercise control over the goods. The description of the goods as "pledged" in the security documents is undoubtedly a relevant circumstance, but it is not conclusive of the factual question of possession. The Court must determine the legal character of the transaction from the entire arrangement and the evidence relating to custody and control.

The plaintiffs have placed particular reliance upon the auction notice in which the bank described the goods as being in its custody. Such description is a circumstance to be considered, but it cannot, standing alone, override the evidence regarding actual possession. An expression used in an auction notice cannot by itself establish delivery of possession where the surrounding evidence demonstrates that the goods physically remained at the plaintiffs' premises and under their control.

We therefore find, on the facts of these cases, that the plaintiffs have failed to establish that the defendant-bank obtained actual or constructive possession of the goods in such a manner as to make it the custodian or bailee responsible for their physical preservation.

It follows that the statutory duties ordinarily arising from the relationship of bailor and bailee under sections 151 and 152 of the Contract Act cannot be imposed upon the defendant-bank merely because it held a security interest over the goods or posted security guards at the premises.

Ratio 1: *Where goods described as pledged remain throughout in the borrower's physical possession and control and the lender does not obtain possession or custody of the goods in fact or in law, the mere description of the transaction as a pledge or the lender's supervision or posting of security guards does not, by itself, make the lender a bailee liable under sections 151 and 152 of the Contract Act. The Court must determine the existence of possession from the substance of the transaction and the actual arrangement between the parties.*

Whether the bank was bound to sell the goods before instituting recovery proceedings

The next question is whether, assuming the arrangement constituted a pledge, the defendant-bank was under an absolute legal obligation to sell the pledged goods before instituting proceedings for recovery of the outstanding debt.

Section 176 of the Contract Act provides that where the pawnor makes default in payment of the debt or performance of the promise, the pawnee may bring a suit against the pawnor upon the debt and retain the goods pledged as collateral security; or he may sell the thing pledged upon giving the pawnor reasonable notice of the sale. The statute further provides for recovery of the balance where the sale proceeds are insufficient and payment of the surplus to the pawnor where the proceeds exceed the amount due.

The language of section 176 is significant. It does not make sale of the pledged goods a condition precedent to a suit for recovery of the debt. The pawnee is expressly authorized to sue upon the debt while retaining the pledged goods as collateral security. Alternatively, the pawnee may exercise the power of sale upon reasonable notice.

The Appellate Division in *Islamic Bank Bangladesh Ltd. v. Sub-Judge & Additional Artha Rin Adalat and others*, 55 DLR (AD) 121, has been relied upon in this connection, and the principle reflected therein is that the law does not require the pawnee to sell the pledged goods first and thereafter institute a suit for recovery of the balance. The statutory scheme of section 176 itself makes this position clear.

Accordingly, the plaintiffs' contention that the bank was under an absolute statutory obligation to auction the pledged goods before instituting proceedings for recovery of the debt is misconceived.

At the same time, this does not mean that a pawnee can, in every circumstance, disregard an independent contractual undertaking or any duty which may arise from its actual possession of the security. Section 176 does not confer immunity from liability for an independently established breach of contract or other legal duty. The question of liability must therefore be examined separately upon the facts of each case.

In the present case, however, the plaintiffs have failed to establish any independent legal or contractual duty on the part of the defendant-bank requiring it to sell the goods within any particular period, apart from their contention that such duty arose by virtue of section 176 of the Contract Act. The mere fact that the goods remained unsold for a considerable period, by itself, cannot give rise to a claim for compensation unless the plaintiffs establish a breach of an enforceable contractual or legal obligation and further establish that such breach caused the loss claimed by them.

In view of the foregoing discussion, we find no substance in the submission of the learned Advocate for the respondent that, under the Reciprocal Agreement dated 06.07.1994, the defendant-bank was under an obligation to realize the outstanding loan by selling the secured assets within any particular period.

Ratio 2: *Section 176 of the Contract Act does not impose upon a pawnee an absolute obligation to sell the pledged goods before instituting a suit for recovery of the secured debt. Upon default, the pawnee may sue upon the debt and retain the security as collateral, or may sell the pledged goods after giving reasonable notice. Mere failure to sell the security before or immediately after instituting recovery proceedings does not, by itself, constitute breach of section 176 or create a liability for consequential loss.*

Liability for deterioration, destruction or loss

The principal grievance of the plaintiffs is that the bank's failure to sell the goods resulted in their deterioration and destruction.

A claim for compensation cannot succeed merely by proving that the goods deteriorated while the loan remained outstanding. The plaintiffs were required to establish, first, the existence of a legal or contractual duty on the part of the bank; secondly, breach of that duty; thirdly, a causal connection between the breach and the alleged loss; and, fourthly, the loss in a manner recognized by law.

Sections 151 and 152 of the Contract Act operate in the context of bailment. Section 151 prescribes the degree of care required of a bailee in respect of goods entrusted to him, while section 152 deals with the circumstances in which the bailee is liable or not liable for loss, destruction or deterioration. These provisions cannot be invoked in isolation from the foundational requirement that the goods were entrusted to and remained in the possession or custody of the alleged bailee.

As we have already found, the plaintiffs retained physical custody and control of the goods. The goods remained at their own premises. Therefore, the mere fact that the goods subsequently deteriorated after remaining exposed for a prolonged period does not establish a breach of the bank's duty. There must be evidence identifying the particular act or omission of the bank which caused or materially contributed to the deterioration. No such specific act or omission has been satisfactorily established.

The plaintiffs have also failed to establish that the bank assumed possession of the goods at any subsequent stage in such a manner as to transform the legal relationship between the parties. Mere supervision by bank personnel, without transfer of possession, does not suffice.

The decision in *Nimai Chandra Biswas v. Sonali Bank, Dhaka and another*, 22 BLC (AD) 195, relied upon by the learned Advocate for the plaintiffs, is distinguishable on facts. The reported principle concerns pledged goods remaining in the custody and control of the bank. The present cases stand on a materially different factual footing because the plaintiffs continued to retain physical possession and control of the goods. The Appellate Division authority therefore does not assist the plaintiffs on the issue of liability in the present factual circumstances. The reported authority is also recognized as dealing with pledged goods remaining under the custody/control of the lending bank.

It is therefore necessary to maintain the distinction between two situations: where pledged goods are actually delivered to and retained by the pawnee, the pawnee may incur statutory and contractual responsibilities concerning their preservation; but where the borrower retains possession and control, deterioration of the goods cannot automatically be attributed to the lender.

Ratio 3: *Deterioration or destruction of secured goods does not, by itself, establish negligence or breach of duty by the lender. A claimant seeking compensation must prove the specific legal or contractual duty owed by the lender, the particular breach thereof, the direct causal connection between that breach and the loss, and the legally recoverable quantum of such loss. Where the borrower retained physical possession and control of the goods, sections 151 and 152 cannot be invoked merely because the lender held a security interest over them.*

Effect of the contractual clauses

The plaintiffs have challenged clauses 7 and 8 of the Pledge Agreements on the ground that those clauses are inconsistent with sections 151 and 152 of the Contract Act and therefore void under section 23 of the same Act.

It has, inter alia, been stipulated in clause 7 of the Pledge Agreements that the borrowers shall remain responsible for the quantity and quality of the goods pledged with the bank, as well as for the accuracy of the statements and returns furnished by them to the bank from time to time, as referred to in clause 6 above. Clause 8, inter alia, stipulates that, during the continuance of the agreement, the borrowers shall remain responsible for all loss, damage or deterioration of the securities caused by theft, fire, rain or any other cause whatsoever.

Section 151 prescribes the degree of care required from a bailee. Section 152, however, expressly refers to the position “in the absence of any special contract”. Thus, the statutory scheme itself recognizes that the parties may, subject to the law, make special contractual arrangements concerning the allocation of risk and responsibility. Section 23 renders an agreement unlawful where its consideration or object is forbidden by law, defeats the provisions of law, is fraudulent, involves or implies injury to the person or property of another, or is otherwise regarded by the Court as immoral or opposed to public policy.

In the present case, clauses 7 and 8 cannot be held to be void merely because they allocate certain responsibilities and risks to the plaintiffs. Clause 7 makes the plaintiffs responsible for the quantity and quality of the goods pledged with the bank and for the accuracy of the statements and returns furnished by them from time to time, whereas clause 8 places upon them the risk of loss, damage or deterioration of the pledged goods. Such contractual allocation of responsibility and risk, by itself, does not render the said clauses void or unenforceable. In the first place, the plaintiffs themselves retained physical possession and control of the goods. Secondly, there is nothing on record to show that such contractual allocation of responsibility and risk was prohibited by any provision of law. Thirdly, the plaintiffs have failed to establish that the said clauses were intended to relieve or protect the bank from liability arising from its own established breach of any mandatory statutory or legal duty. In the absence of any such prohibition or established breach, the contractual allocation of responsibility and risk contained in clauses 7 and 8 cannot, by itself, be treated as invalid or unenforceable.

It is therefore unnecessary to invoke section 23 to invalidate the clauses. At the same time, we make it clear that a contractual clause cannot, merely by its wording, authorize a party to act in breach of a mandatory statutory duty or confer immunity from liability which the law does not permit the parties to exclude. Whether a particular contractual clause is enforceable must always depend upon the nature of the statutory duty, the factual relationship between the parties and the terms and object of the contract. No such overriding statutory duty has been established here.

The plea of the **Blue Pencil Rule** also does not assist the plaintiffs. The doctrine of severability may permit an invalid or unenforceable part of a contractual provision to be severed where the remaining portion is capable of independent operation without rewriting the bargain. It does not empower the Court to reconstruct the parties' agreement or create a contractual obligation which the parties did not undertake.

The decision in *Archana Proshad Nandi v. Miss Chilia Randolph and others*, 34 DLR (AD) 106, relied upon by the plaintiffs, arose in a materially different factual and legal setting concerning severability of a divisible contractual obligation. That principle cannot be mechanically applied to the present case.

Here, there is no distinct unlawful portion of clauses 7 and 8 which can be severed while preserving the remainder in a manner necessary for the plaintiffs' claim. More importantly, application of the Blue Pencil Rule cannot establish possession, prove negligence or create the missing causal link between the alleged omission of the bank and the deterioration of the goods.

Ratio 4: *A contractual allocation of risk concerning loss, damage or deterioration of secured goods is not rendered void under section 23 of the Contract Act merely because it operates to the disadvantage of the borrower, particularly where the borrower retained possession of the goods. Section 152 itself recognizes the relevance of a special contract. However, no contractual term can override a mandatory statutory duty or immunize a party from an otherwise established breach of such duty. The Blue Pencil Rule is a doctrine of severability and cannot be employed to rewrite the parties' contract or create a duty which the contract and law do not otherwise impose.*

Causation and compensation under section 73 of the Contract Act.

Section 73 of the Contract Act provides the measure of compensation for loss or damage caused by breach of contract. The statutory remedy presupposes the existence of a breach. Therefore, proof of loss alone is insufficient; the claimant must first establish a breach attributable to the defendant and then demonstrate that the claimed loss was caused by such breach and is legally recoverable.

In the present cases, the plaintiffs have failed to establish any specific breach by the bank which caused the deterioration of the goods. The goods remained under the plaintiffs' physical custody for a prolonged period. The deterioration is therefore equally consistent with, and on the evidence attributable to, their continued exposure while in the plaintiffs' possession. Furthermore, the plaintiffs have not satisfactorily established the basis upon which the amounts claimed as compensation were assessed. In particular, there is no sufficient evidence establishing that the alleged deterioration or destruction, and the precise quantum of financial loss claimed, were the direct and proximate consequences of any actionable omission of the bank.

The trial Court, while awarding substantial compensation, was required to identify the precise legal duty breached by the bank and the evidence establishing the causal connection between that breach and the loss. In the absence of such findings supported by evidence, the decree for compensation cannot be sustained.

Ratio 5: *No decree for compensation under section 73 of the Contract Act can be sustained merely upon proof of deterioration or financial loss. The claimant must establish an actionable breach attributable to the defendant and a direct causal nexus between such* *breach and the loss claimed, together with sufficient evidence of the quantum of recoverable damage.*

Subsequent payment of the bank's dues

It has been argued by the learned Advocate for the respondents that, pursuant to the direction of the Hon’ble Appellate Division made in its judgment dated 17.01.2016 passed in Civil Petition for Leave to Appeal Nos. 982–984 of 2011, the plaintiffs paid a total sum of Tk. 7,02,00,000/- to the defendant-bank and, upon such payment, obtained the charged documents. It is further submitted that, since the outstanding dues of the bank were thereby recovered from the plaintiffs, the defendant-bank was under an obligation to take appropriate legal steps for sale of the goods, but failed to do so. Consequently, according to the learned Advocate, the defendant-bank is liable to compensate the plaintiffs for the deterioration of the goods.

We are unable to accept the said submission. The subsequent discharge of the outstanding dues of the bank by the plaintiffs pursuant to the direction of the Hon’ble Appellate Division does not, by itself, establish any liability on the part of the bank for the deterioration or destruction of the goods. The plaintiffs’ obligation to discharge the debt and the bank’s alleged liability for the deterioration or destruction of the security are legally distinct matters. Payment of the debt neither constitutes an admission by the bank of liability for the condition of the security nor, by itself, establishes negligence, breach of any legal or contractual duty, or a causal connection between any act or omission of the bank and the loss alleged by the plaintiffs.

Accordingly, the subsequent payment of the bank's dues cannot, by itself, be treated as sufficient evidence to establish the plaintiffs' claim for compensation.

Alleged tortious liability

On perusal of the impugned judgments, it appears that the trial Court, without first determining the respective contractual obligations and liabilities of the parties, proceeded to fasten liability upon the defendant-bank on a tortious basis and assessed the alleged loss accordingly. In doing so, the learned Judge of the trial Court failed to properly appreciate the contractual relationship between the parties and the allocation of risks and responsibilities under the relevant agreements.

The relationship between the parties arose principally out of the loan and security transactions. The alleged liability of the bank, therefore, ought to have been examined with reference to the applicable provisions of the Contract Act, the terms of the security documents, and the evidence establishing the respective obligations of the parties. Mere characterization of the bank's conduct as "negligence" or "tortious liability" cannot dispense with the requirement of establishing a legally enforceable duty, its breach, a causal connection between such breach and the alleged loss, and the damage thereby suffered. A finding of liability must be founded upon a legally recognizable duty and cogent evidence establishing its breach and the resulting loss.

The plaintiffs have failed to establish any actionable breach of contractual or legal duty on the part of the defendant-bank.

Consequently, the liability fastened upon the bank by the trial Court, on the basis of alleged tortious liability, cannot be sustained in law.

Interest under section 34 of the Code of Civil Procedure

Section 34 of the Code of Civil Procedure confers upon the Court the power to award interest in a decree for payment of money in accordance with law. Such power presupposes a sustainable money decree.

Since the plaintiffs have failed to establish their entitlement to the principal amounts claimed as compensation and the decrees for compensation cannot be sustained, the consequential award of interest also cannot survive.

Overall Finding

Upon consideration of the pleadings, evidence on record, submissions of the learned Advocates for the parties and the applicable provisions of law, we find that the trial Court proceeded on an erroneous premise in fastening liability upon the defendant-bank on a tortious basis without first determining the nature and extent of the parties' respective contractual obligations and, in particular, whether possession or custody of the pledged goods had in fact been delivered to, or assumed by, the bank. The trial Court also failed to identify any specific contractual or legal duty of the bank which had been breached and which gave rise to the alleged liability.

The evidence on record establishes that the goods remained in the physical possession and control of the respective plaintiffs. The mere posting of security guards by the bank, in the circumstances of these cases, did not amount to a transfer of possession or an assumption by the bank of exclusive custody or control of the goods.

We further find that section 176 of the Contract Act did not impose upon the bank an absolute or mandatory obligation to sell the pledged goods before instituting proceedings for recovery of its dues. Upon default, the pawnee is entitled, subject to the terms of the contract and the provisions of law, to exercise the remedies available to it under section 176, including suing upon the debt while retaining the security. Therefore, the mere failure of the bank to sell the pledged goods cannot, in the absence of a specific contractual or legal obligation requiring such sale within a particular period, constitute a breach giving rise to liability for the subsequent deterioration or destruction of the goods.

The plaintiffs have also failed to establish any specific act or omission on the part of the bank which caused, or materially contributed to, the deterioration or destruction of the goods. Mere lapse of time, or deterioration of goods which remained in the physical possession and control of the plaintiffs, cannot, in the absence of proof of an actionable breach and a causal connection between such breach and the loss claimed, give rise to liability on the part of the bank.

The challenge to clauses 7 and 8 of the respective Pledge Agreements under section 23 of the Contract Act is likewise without substance in the facts and circumstances of these cases. The said clauses merely allocate certain responsibilities and risks between the contracting parties. No provision of law has been shown which renders such allocation unlawful. The Blue Pencil Rule cannot be invoked either to rewrite the contractual arrangement agreed between the parties or to introduce a legal duty which is not otherwise founded upon the contract or law.

Furthermore, the plaintiffs have failed to establish the necessary causal connection between any actionable breach on the part of the bank and the loss claimed by them. They have also failed to adduce sufficient and reliable evidence to substantiate the quantum of compensation awarded by the trial Court.

For all the foregoing reasons, we find that the plaintiffs have failed to establish any contractual, statutory or otherwise actionable liability on the part of the defendant-bank for the alleged deterioration or destruction of the pledged goods. The trial Court, in decreeing the suits against the defendant-bank, misappreciated the legal relationship between the parties and the evidence on record and, without identifying any specific legal or contractual duty owed by the bank or establishing any breach thereof and the requisite causal connection between such breach and the alleged loss, erroneously fastened tortious liability upon the bank. The findings and decrees of the learned trial Court, having thus been founded upon an erroneous view of law and misappreciation of the evidence, cannot be sustained in law.

In view of the discussion made above, we find no merit in these appeals.

Order

In the result, the appeals are allowed, without any order as to costs. The impugned judgments and decrees dated 19.09.2019, decrees whereof were signed on 22.09.2019, passed by the learned Special Joint District Judge and Judge, Environment Court, Dhaka in Money Suit No. 60 of 2018 and Money Suit No. 90 of 2018 are hereby set aside. Consequently, the aforesaid suits stand dismissed.

Let a copy of this judgment along with the lower Court records be communicated to the Court concerned forthwith.

(Justice Md. Badruzzaman)

I agree.

(Justice Aynun Nahar Siddiqua)