
(1949) 05 BOM CK 0006
In the Bombay High Court
Case No : Civil Appeal No. 34 of 1948

Madholal Sindhu	Vs	APPELLANT
The Official Assignee of Bombay		RESPONDENT

Date of Decision : 06-05-1949

Acts Referred:

Contract Act, 1872 — Section 176

Citation : (1949) 51 BOMLR 906

Hon'ble Judges : Mukherjea, J;Mahajan, J;Harilal Kania, J;Fazl Ali, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Harilal Kania, Kt., C.J.—This is an appeal from a judgment of a division bench of the High Court at Bombay setting aside a decree of a single Judge of that Court. The material facts are these :-

2. By January 1940 Mr. Meyer Nissim (hereafter referred to as Nissim), defendant No. 4, had borrowed from defendant No. 2 bank Rs. 75,000 on the security of 26,000 shares of the first defendant company and passed two letters of hypothecation in the same terms in favour of the bank. The letter of hypothecation provided that all securities which may from time to time be held by the bank of Nissim's account shall be security for repayment of the outstanding general balance of all and every loan or account of his with the bank, including interest. It further provided as follows :-" With power to you (the bank) at your discretion to sell or a sufficient portion of such securities in the event of my not maintaining a margin of 40 per cent, on the market value of the securities for the time being or on my failing to repay the amount of any loan made by you to me on the due date of such loan," On these shares the company claimed a lien for Rs. 1,10,000. When Nissim pledged the shares with the bank, he had signed five transfer forms (Ex. A-S) in blank and had given them to the bank. Barring Nissim's signature as transferor, which was witnessed, the forms were blank. The name of the company, viz. the Assian Assurance Company Ltd.

was however filled in.

3. Nissim was also a debtor to the bank in other accounts. He had underwritten the issue of new shares of the bank and Rs. 95,000 were due to the bank by Nissim on that account. The bank claimed a lien on those shares. Nissim had further guaranteed repayment to the bank of loans standing to the debit of Kuberdas Raghavji and Issac Mera.

4. Mr. Jamnadas Mehta (defendant No. 3) was the Chairman of the Board of Directors of the company and also of the bank. He and Nissim were great friends and they had also money dealings. It appears that there arose a disagreement between Jamnadas and Nissim and on March 1, 1940, Nissim filed suit No. 396 of 1940 in the High Court of Bombay against Jamnadas claiming Rs. 93,248 or accounts. Nissim alleged in his plaint that several loans that were taken from the bank in his name were to accommodate Jamnadas and they were really the debts of Jamnadas. Evidently, when this became known to Jamnadas, he got a resolution passed by the bank recalling the loans paid to Nissim against the company's shares "as they were repayable by March 1940." In pursuance of this resolution a notice was sent by the bank to Nissim on April 12, 1940, requiring him to repay the loan. There is no document to show that there was an agreement or understanding under which Nissim had to repay the loan by the end of March 1940. In the last para of the bank's letter it is stated that the loan may be repaid, if possible, fully or at least some partial repayment of Rs. 25,000 or Rs. 30,000 at least may be made. Nissim did not repay anything and the bank did nothing thereafter.

5. The evidence shows that Jamnadas had the complete controlling voice in the management of the bank and the managing director was practically under his thumb. Late in June 1940, when Nissim's very involved financial condition became known, it appears that there was some talk between Jamnadas representing himself, Jamnadas and some officers of the bank representing the bank, and Nissim, and it was then suggested that Jamnadas should take over, so far as the bank was concerned, all the liabilities and securities of Nissim. On July 6, 1940, Jamnadas wrote to Deshpande, the managing director of the bank, a letter in the following terms:- "With reference to our conversation last week about the disposal of Mr. Nissim's share in the Asian Assurance Company, Ltd., I shall be glad to buy them myself for Rs. 73,000 only. Please place this offer of mine before our next Committee meeting." There is no evidence to show that this letter was written with the knowledge or consent of Nissim. On July 10, 1940, Jamnadas wrote another letter to Deshpande in the following terms:- "I have consulted Dr. T.N. Kajiji and he has agreed to allow his name as the purchaser of Mr. Nissim's shares. In case of any difficulty arising you may take my assurance that I shall remain ultimately responsible, as already personally stated to you." The shares there referred to were the shares of the bank itself. Later in the day, on July 10, 1940, a meeting of the executive committee of the bank was held at which Mr. Jamnadas presided. Resolution No. 7 was in these terms :-" Resolved

that the offer of Mr. J.M. Mehta for buying the shares numbering 26,000 in all of the Asian Assurance Company Ltd. standing in the name of Meyer Nissim for a sum of Rs. 73,000 or thereabouts, as contained in his letter of the 6th instant, be and is hereby accepted and Mr. J.M. Mehta's account be debited with the purchase price." Another resolution in respect of the bank shares was passed at the same meeting and was in these terms:-""Resolved that the transfer of the following shares as stated in a separate statement signed by the Chairman be and is hereby sanctioned.

(ii) Transfer from underwriter Mr. Meyer Nissim 4373 shares...transferee Dr. T. M, Kajiji, Bar-at Law.

and it is further resolved that Dr. T.M. Kajiji should be debited with the purchase price of the shares at par." On the same day Jamnadas executed in favour of the a bank pro-note for Rs. 75,000 and also a letter of hypothecation in terms similar to those passed by Nissim. Deshpande made the following endorsement in red pencil on the overdraft account of Nissim with the bank :

1. Ledger clerk to note.

6. Mr. Meyer Nissim's O/D a/c is to be closed as Mr. Jamnadas Mehta has agreed to buy the 22,000 shares of the Asian Assurance Company pledged with the bank by Mr. Nissim. The Ex-Company approved the transaction as per resolution No. 7 of July 10, 1940. Mr. J.M. Mehta's a/c is to be debited with the purchase price, but for final closing of the account and the adjustments the account be kept formally open the date of the balance sheet for the ratification of the transaction by the full Board." According to that account, Rs. 76,194-13-0 were due by Nissim to the bank on that day. Deshpande drew two horizontal lines in red pencil below that debit balance, put down his initials and date July 10, 1940. Although Jamnadas had an account with the bank, no amount was debited to Jamnadas at all. In the security register an entry appears under date July 10, 1940, reciting that the shares were purchased by Jamnadas and pledged with the bank. It cannot be stated when that entry was made. In the remarks column against that entry it is stated "The amount to the debit of Mr. Meyer Nissim actually transferred to Mr. Jamnadas N. Mehta's account on 31-2-41 on being ratified by the Board. Sd/ M.C. Pranjpe." In spite of Deshpande drawing lines in red pencil in the overdraft account of Nissim, on July 18, 1940, Rs. 2,132 were credited to that account by a transfer from Nissim's current account. On September 12, Rs. 165 were debited in that overdraft account by a transfer from Nissim's current account. The account was continued in Nissim's name and quarterly interest was debited therein on October 25 and December 31, 1940, and March 26, 1941. The account was closed as on March 31, 1941, in pursuance of a resolution of the directors passed at their meeting held on April 15, 1941, by crediting Rs. 76,986-5 to Nissim and debiting the same to Jamnadas's overdraft account. The evidence further shows that the debit entry in the name of Jamnadas was made in the suspense account and remained in that way in the bank's books till 1944.

7. On July 12-13, 1940, Deshpande wrote to Nissim in these terms :-" With reference to our conversation on the phone we have to inform you that we have disposed of the shares of the Asian Assurance Company Ltd. and of our bank standing in your name and the sale proceeds are being adjusted to your loan accounts. You are therefore no longer a debtor of this bank." Considerable evidence was led to challenge the genuineness of this letter. The Appeal Court considered it unreliable. According to Deshpande's evidence (which is the only evidence on the point), this letter was first handed over by Deshpande to Nissim on July 15. Nissim was adjudicated insolvent on July 16. In his statement of assets and liabilities filed with the Official Assignee on that day he showed these shares as held by the bank as security against his account. He sent the letter dated July 12 to the Official Assignee with his letter of September 6, 1940, and asked for permission to amend his schedule.

8. On November 1, 1940, the bank wrote to the company intimating that the board had decided to get the 26,000 shares transferred to the name of another party who had accepted the liability for the amount advanced to the previous party. On November 4, 1940, at a meeting of the directors of the company it was resolved to inform the bank that the shares were subject to a lien. The company's, solicitors accordingly wrote to the bank that they claimed a lien on the shares. Nissim had given a power-of-attorney to vote at the general meeting of the company, as directed by Jamnadas. On May 6, 1941, Nissim obtained his discharge by consenting to a decree being passed against him in favour of the Official Assignee for Rs. 50,000.

9. On July 14, 1941, Nissim revoked the power-of-attorney and proxy. Jamnadas, and another thereupon filed suit No. 921 of 1941 claiming that the revocation was invalid and Nissim should be directed to vote as directed by Jamnadas. On July 30, 1941, the bank and Jamnadas filed suit No. 1001 of 1941 against the company, Nissim and the Official Assignee as assignee of the estate of Nissim, In that plaint, paras. 9, 10 and 11 were in these terms :-

9. On or about July 10, 1940, it was agreed between the first plaintiff bank, the 2nd plaintiff and the 2nd defendant that the 2nd plaintiff should take over all the liability of the 2nd defendant to the 1st plaintiff bank and be entitled to the interest of the 2nd defendant in all securities given by the 2nd defendant to the 1st plaintiff bank. The 2nd defendant was at that time indebted to the 1st plaintiff bank in a sum exceeding Rs. 1,15,000/-.

10. On or about July 16, 1940, the 2nd defendant was adjudicated an insolvent and all his estate and effects became vested in the 3rd defendant as the Official Assignee of Bombay. The 1st plaintiff bank informed the 1st defendant Company that the interest of the 2nd defendant in the said shares had been transferred to another constituent of the bank meaning thereby the 2nd plaintiff. The 3rd defendant thereafter disclaimed the interest of the 2nd defendant in the said shares. Hereto annexed and marked "g" is a copy of a letter from the 3rd defendant to Messrs. Payne & Co.

11. The plaintiffs submit that by the agreement mentioned in paragraph 9 of the plaint, the 2nd defendant ceased to have any interest in the said shares. The plaintiffs further submit that in any event on the said disclaimer by the 3rd defendant all the interest of the 2nd defendant, if any, in the said shares ceased and came to an end. The plaintiffs further submit that even if the agreement mentioned in paragraph 9 above is not proved the rights of the 1st plaintiff bank as the pledgee of the said shares remain unaffected.

The prayers were for a declaration that the company had no lien on the shares, that in any event the lien, if any, was subject to the security created by Nissim in favour of the plaintiffs or in any event subject to the payment by the company to the plaintiff of Rs. 8 for each of the said 26,000 shares, for an injunction restraining the company from selling the shares in exercise of their alleged lien or in the alternative for damages for Rs. 1,30,000. The Official Assignee was informed that he was a formal party. A notice of motion praying for an interim injunction was taken out and in the affidavits various statements were made in respect of these shares.

10. When things stood in that way, the plaintiff on October 23, 1941, wrote a letter to the bank recording an agreement made by him with the bank and Jamnadas under which he purchased the 25,000 shares. The relevant portion of the letter is in these terms :-

Rs. 20,000 shares of the Asian Assurance Company Ltd. standing in the name of Mr. Meyer Nissim.

As the pledgee in possession of the above shares of the above Assurance Company Ltd. and with the consent of Mr. Jamnadas M. Mehta, the present holder of these shares, you have sold the said shares to me and I have purchased the same this day for a sum of Rs. 1,20,800/-....

I have agreed and undertaken to tender the amount of the lien, if any, claimed by the Asian Assurance Company on the said shares, if necessary.

You have delivered to me the relevant share certificates pledged with you together with 82 necessary transfer forms.... You should diligently and properly prosecute the suits filed by you against the said Meyer Nissim as also against Asian Assurance Company Ltd. being suits Nos. 921 of 1941 and 1001 of 1941 as I direct....

There were further provisions for indemnity for the costs of the suits. A special and urgent meeting of the executive committee of the bank was held on October 24, 1941, to consider the offer of the plaintiff for buying 26,000 shares of the company. Jamnadas was present at the meeting. Jamnadas was asked whether he would give his consent to the acceptance of the plaintiff's offer and he replied that he would give his consent to the transaction if the bank would declare him fully exonerated from all and any liabilities to the bank in respect of loans given to or guaranteed by Nissim, Kuberdas Raghavji & Co. and Isaac Ezra, and that

the bank would release him from liability, if any, for the alleged lien in respect of 26,000 shares claimed by the Company. The Committee agreed provided Jamnadas did not claim any exoneration or indemnity so far as the lien of the bank was concerned against the bank shares. Jamnadas agreed to that. On October 24 Jamnadas, as Chairman of the bank, wrote to the plaintiff in these terms :-

We duly received your letter of the 23rd instant and the same was placed before the executive Committee of the bank at their meeting held on October 24, 1941. The bank accepts your offer contained in your letter on the understanding that the bank and Mr. Jamnadas Mehta are selling to you all their respective rights, title and interest in the said shares and that you take them subject to the contentions of the parties to the pending suits Nos. 921 of 1941 and 1001 of 1941 in the Bombay High Court referred to by you in your letter under reference.

11. Suit No. 921 of 1941 ended on August 30, 1943, in a consent decree under which Nissim admitted that he was a bare trustee for Jamnadas. In suit No. 1001 of 1941 the written statement was filed on November 4, 1941, and the hearing was concluded in September 1943, but judgment was reserved. On October 12, 1943, the plaintiff filed the suit from which the present appeal has arisen. The company, the bank, Jamnadas Mehta, Nissim and the Official Assignee were made party defendants. The plaint recites that on January 23, 1940, the bank held the shares as pledgee or mortgagee for the total advance of Rs. 75,000 made by the bank to Nissim and for all other debts and liabilities of Nissim to the bank. It was next stated that Nissim was adjudicated insolvent on his own petition on July 16, 1940. In para. 7 of the plaint, the plaintiff's letter to the bank to purchase the shares and the bank's reply dated October 24 were referred to. Paragraph 8 of the plaint is in these terms :?

8. The said letter of the plaintiff mentions the fact of such sale having been made with the consent of the 3rd defendant. The occasion for such consent arose and it was given by reason of the fact that before the 4th defendant was adjudicated an insolvent which was on or about July 10, 1940, the 3rd defendant had become the owner of the said shares and had pledged them with the 2nd defendant Company, the 3rd defendant having taken over the liabilities of the 4th defendant and all the security, therefor, and that the 2nd defendant company had disposed of the said shares to the 3rd defendant.

The plaintiff alleged that on the sale of the said shares to him by the bank he became the owner and Jamnadas had no further interest therein. It was pleaded that in suit No. 1001 of 1941 the fact that Nissim and the Official Assignee had no interest left in the said shares was asserted and not denied by either of them. In para. 10 of the plaint it was pleaded that Nissim in the insolvency proceedings had admitted that the bank had disposed of his interest in the said shares and no interest was left in him. Various further facts and circumstances were pleaded to create an estoppel against any claim to the shares being made by the Official Assignee. The prayers were for a declaration that the Company had no lien on

the shares, that if in suit 1001/41 it was held that there was a lien, the amount of it may be ascertained and that out of the money brought by the plaintiff in Court the same may be satisfied. The fifth defendant (the Official Assignee) filed his written statement and counter-claim in which he claimed that the bank continued to hold the shares as pledgee from Nissim and all the intermediate transactions were not binding on the Official Assignee. The counter-claim was to redeem the shares on payment of the amount due by Nissim. against the same. The plaintiff filed a reply to the counter-claim denying that the Official Assignee had any interest left in the shares. The suit was heard by Mr. Justice Bhagwati, and in a detailed judgment the learned Judge upheld the plaintiff's claim. On appeal that decision was reversed and a decree was passed in favour of the Official Assignee on the counter-claim. As the record of this appeal had not been sent to the Judicial Committee of the Privy Council before February 1, 1948, the appeal is heard by this Court under its extended jurisdiction.

12. In the trial Court several issues were raised on the counter-claim of the Official Assignee. The learned Judge, inter alia, came to the following conclusion (1) That the official Assignee was not estopped from disputing the sale of the shares in favour of the plaintiff. (2) That the issues about the fact and validity of sale in favour of Jamnadas was not res judicata by reason of the proceedings in suits Nos. 1001/41 and 896/40. (3) That the Official Assignee was entitled to go behind his admission and withdraw the admission, if any, about disclaiming his interest in the shares and was not estopped from claiming an interest in the shares. (4) That on the adjudication of Nissim no interest in the shares vested in the Official Assignee because the shares had passed on to Jamnadas, and that the sale to Jamnadas was not bad for want of notice. (5) That the allegations and statements characterised as false and fraudulent in para. 25 of the written statement of the Official Assignee were not proved. On appeal, the findings in favour of the Official Assignee were confirmed. The Appeal Court, however, differing from the trial Judge, held that there was no sale of the shares to Jamnadas and that as no notice u/s 176 of the Indian Contract Act had been given by the bank, the bank had no right to sell the shares and therefore no title as owner passed to Jamnadas or to the plaintiff. Before us it was strenuously contended on behalf of the appellant that he was a bona fide purchaser for value without notice and therefore his title cannot be attacked even if Jamnadas had a defective title. It may be noticed that no issue on this point was raised in the trial Court and therefore there is no finding of the trial Court on that point. On the question whether Nissim had waived the notice of the sale, if any such notice was required by Section 176 of the Indian Contract Act, the learned trial Judge considered it unnecessary to record any finding. During the hearing of the suit in the trial Court, counsel for the plaintiff intimated that he abided by decision in Suit No. 1001. of 1941 that the tripartite agreement between Nissim, Jamnadas and the bank was not established and he did not want to re-agitate the same question here. The appeal therefore remains to be decided on that footing.

13. The first point urged before us was that even though the tripartite agreement

might not be proved, if the 26,000 shares were sold by the bank to Jamnadas on July 10, 1940, the plaintiff was entitled to prove that and support his title on that ground. In this connection it may be noticed that in suit No. 1001/41, where the bank and Jamnadas were plaintiffs, they did not even allege that apart from the tripartite agreement there was a sale of these shares by the bank to Jamnadas, much less a sale of the shares with the consent of Nissim. In the present suit also, in para. 3 of the plaint it is not stated specifically how Jamnadas became the owner of the shares. There it is only recited that Jamnadas had become the owner of the said shares before Nissim's insolvency and had pledged them with the bank, "Jamnadas having, taken over the liabilities of Nissim and all the security therefor." Read as a whole, this paragraph only affirms that Jamnadas's title to the shares arose because of this carrying out the tripartite agreement. It is true that during the hearing of the case witnesses have made statements showing that there was a sale of the shares by the bank to Jamnadas, but on the pleadings it seems to me clear that the case of a sale of these shares independently of the tripartite agreement was not envisaged. The tripartite agreement having been given up by the appellant, cannot rely on it.

14. The question therefore is whether irrespective of such an agreement, the sale of the shares to Jamnadas is proved. On this point the evidence consists of documents and the oral evidence of Deshpande. The evidence of Pranjpe, the other bank official, has no bearing on this question. He made entries and only carried out the directions afterwards given by Deshpande and/or Jamnadas. Jamnadas has not been called as a witness to prove any such sale. As regards the oral evidence of Deshpande and Pranjpe, the learned trial Judge in his judgment observed as follows-"I may go so far as to observe that if Deshpande and Pranjpe had not been corroborated by any documents which are contemporaneous and even proved to be such, I would not have relied merely on the oral testimony of Deshpande and Pranjpe." Having regard to this observation, the right approach to the question is to keep away at first from the oral evidence and to look at the documents. A sale according to the Sale of Goods Act (and in India goods include shares of joint stock companies) takes place when the property passes from the seller to the buyer. To bring about that transaction, a price has to be agreed and either paid or credit to be given for the same. The Advocate General contended that there was such a sale because by his letter dated July 6, 1940, Jamnadas made an offer to buy and the bank accepted the offer by its resolution of July 10. Jamnadas then gave a promissory note for Rs. 75,000 and also passed a letter of hypothecation in favour of the bank. It was argued that this constituted a complete transaction. I am unable to accept this contention. The price offered by Jamnadas was Rs. 73,000 and the bank passed the resolution of selling the shares for Rs. 73,000 "or thereabouts". The passing of the promissory note for Rs. 75,000 does not tally either with the offer or the acceptance. The passing of the letter of hypothecation does not help in deciding whether there was a completed sale or not. It was argued that "thereabouts" meant the balance due at the foot of the overdraft account of Nissim. There is no

evidence to support this argument. If the expression was ambiguous, some witness should have been asked to clear the ambiguity and state the correct meaning. Deshpande was the only witness called on this point by the plaintiff and he was not even asked what "thereabouts" meant. When oral evidence is given and no such question is asked, I do not think it is proper for the Court to draw an inference from the documents, particularly when they are not clear. In the whole of his evidence Deshpande has nowhere stated that for the sale of the 26,000 shares the consideration was the liability of Nissim at the foot of his overdraft account. He has given the figures of Rs. 74,000, 75,000 or 76,000 as the amount of consideration. He has talked throughout his evidence about the transfer of the securities and the balance of this and other accounts of Nissira to Jamnadas as a part of carrying out of the tripartite agreement by the bank and not independently of it. The entry in red pencil made by Deshpande in the overdraft account of Nissim, in my opinion, supports the case only of a tripartite agreement. If this was a normal transaction of sale of shares by the bank, as pledgee from a customer, no sanction of the board of directors was necessary under the articles of association of the bank. The note made by Deshpande clearly shows that even after the resolution of the executive committee the sanction of the board was considered necessary for taking the transfer entries. That also explains why in fact no entry closing the account of Nissim and debiting the balance to Jamnadas was made till the board sanctioned the transaction in April 1941. If one client's securities and liabilities en Hoc are taken over by another client, it will not be an ordinary normal transaction to be entered into by a bank, and therefore it will not be within the powers of the executive committee to sanction the same. Again, if the consideration was the balance due at the foot of the overdraft account on July 10, 1940, there should have been no credit or debit entries in the account after that day. The transfer of Rs. 2,132 on July 18, 1940, to the credit of this account from Nissim's current account is inexplicable if the consideration for the transfer of the shares was the balance due at the foot of the overdraft account on July 10, 1940. In his evidence, Deshpande said that he considered that the bank was entitled to take this credit because Jamnadas had taken over all assets of Nissim and therefore the bank was entitled to reduce the liability of Nissim in the overdraft account by this sum. This does not support an independent sale but only the tripartite agreement. Again, if the liability of Jamnadas was for the balance due at the foot of the account on July 10, 1940, how can the bank debit Rs. 165 to this account on September 19? Furthermore, there would be no occasion to debit interest in this overdraft account as if Nissim continued to be liable for the balance of the account. All this clearly shows that on July 10 there was no concluded sale of 26,000 shares of the company by the bank to Jamnadas. The entries are explicable on the theory of there being a tripartite agreement, but not otherwise. If such an agreement existed, all these entries will be consistent with it, because whether Nissim was liable to the bank on one account or another was immaterial, as all the liabilities and securities of Nissim were to be treated as of Jamnadas thereafter. It is very significant that throughout all these manipulations there is not a single document or paper

signed by Nissim showing how he wanted his securities or liabilities to be dealt with. Except the letter dated July 12, 1940, of which the date of origin is open to grave doubts, there is also no communication from the bank to Nissim intimating how these matters were dealt with by the bank.

15. Some reliance was placed by the appellant on two transfer deeds (ex. W. and A-47) produced by Deshpande in his evidence. Exhibit W. is a transfer form in blank, i.e. without the name of the company, the number of shares, the distinctive number of shares, the consideration or the date filled in. It is signed by Nissim as transferor and by Jamnadas as transferee. Exhibit A-47 is a transfer form with similar blanks but signed only by Jamnadas as the transferor. It was stated that on July 10, Jamnadas signed exhibit W. and also signed exhibit A-47 to show that he had purchased the shares from Nissim and re-pledged them with the bank on his own account. The existence of these two documents was urged to be conclusive on the question of sale on July 10. In my opinion, these documents are entirely unreliable. When Nissim pledged these shares as security, he had signed (ex. A-3) five transfer forms in each of which the name of the company was carefully filled in. If on July 10 the intention was that Jamnadas was to be the owner of these shares, if at all, one of those transfer forms should have been signed by Jamnadas as the transferee. It would be surprising if while these transfer forms with the name of the Company filled in, existed, another form, without the name of the Company, should have been utilised for showing that Jamnadas had become the owner of these 26,000 shares of the Company. Similarly, if there was a conscious effort to record that these 26,000 shares of the Company were pledged by Jamnadas to the bank on July 10, 1940, the name of the Company would have been filled in the transfer form (ex. A-47) signed by Jamnadas. Moreover, if these documents formed part of the security and the transfer thereof, they should have been handed over by the bank to the plaintiff in October 1941. Deshpande's evidence in this connection is very instructive. When ex. W. (the blank transfer form signed by Nissim and Jamnadas) was shown to him, he said that on July 10 he had in his possession about five or seven blank transfer forms signed by Nissim "in this manner" which had been given by Nissim when the money was paid to him against the shares of the company. One form was used in this manner and the rest continued to be in "his possession. He had put all these forms in an envelope in his safe. He admitted that none of these transfer forms was produced or mentioned by him throughout the trial of suit No. 1001 of 1041 or at any time before he gave evidence in this suit, as he had forgotten their existence. In the end he admitted that besides the two transfer forms, there might be one or two more such transfer forms still in the bank. This evidence shows clearly that these transfer forms had nothing to do with the 26,000 shares of the Company. It appears that Nissim had signed and left with the bank some blank transfer forms, irrespective of the same being related to any particular company, and these transfer forms (ex. W. and A-47) are produced only to support the case now sought to be made out in this suit. The evidence of Fauzdar in this connection is still more clear. He said that he was

present when the sale of these 26,000 shares was completed and the share certificates and the transfer (ex. A-8) were handed over in the office of solicitors. He then added as follows :?"There were no transfer forms signed by Jamnadas. I did not ask for any transfer forms signed by Jamnadas in respect of these shares as I understood that the blank transfer forms signed by Nissim as transferor were quite enough for the purpose. I did not hear of any transfer forms signed by Nissim as the transferor and Jamnadas as the transferee of the shares". It is therefore clear that the transfer forms (ex. W. and A-47) were not considered as relating to these shares at all and were not dealt with as such by the plaintiff or his agent or the bank. I am therefore unable to attach any importance to these documents. In my opinion, therefore, the evidence does not show that there was a concluded sale of these shares for any ascertained sum, apart from the tripartite agreement.

16. Even if a different view is taken and on July 10, 1940, the bank purported to sell the shares to Jamnadas, in my opinion", the appellant cannot succeed. Jamnadas was the Chairman of the board of directors of the bank and knew that the bank was a pledgee of the shares and as such had only a limited title thereto. u/s 176 of the Indian Contract Act it is clear that before a pledgee can exercise the power of sale, when a fixed time for repayment is provided, a notice of the intention to sell must be given. When no period is fixed for repayment of the loan, the pledgee has the right either to have the share sold through the Court or he can sell the shares after notice of sale is given to the pawner. In either case, therefore, the power to sell is conditional on the notice of sale being given to the pawner. The question whether the pawner can contract to give up this right does not arise here as the letter of hypothecation signed by Nissim does not amount to such a contract. The demand for payment contained in the bank's letter of April 10, 1940, is not a notice to sell. It is, therefore, clear that no notice to sell was given by the bank to Nissim, as required in law. In the trial Court it was suggested that Nissim had waived such a notice. The trial Court did not record any finding on this issue, as it considered unnecessary to do so. The appellate Court held that there was no waiver on the part of Nissim. In my opinion, on the evidence on i-eeord, that conclusion is correct. While Nissini may have agreed to the bank transferring all his securities to Jamnadas against Jamnadas taking over all his liabilities to the bank, it is an entirely different proposition to say that Nissim had agreed to the transfer of the one set of securities against Jamnadas taking over only one of his overdraft accounts with the bank. For a man in involved circumstances it is one thing to get clear of one creditor completely; it is an entirely different thing, even as regards the money value, to say that such a person agreed to the transfer of one specified security against the transferee taking over only one specific liability. Jamnadas was not examined on the point and Deshpande had not deposed to any such consent or waiver on the part of Nissim. The plaintiff has not even pleaded that the sale was with the consent of Nissim at any time. Some reliance was placed on the letter of July 12 by the bank to Nissim in which there was a reference to a telephone

conversation. Apart from the doubtful genuineness of this letter, Deshpande's evidence shows that the telephone conversation was either on July 11 or 12, and in that conversation he told Nissim how the bank had acted in respect of the tripartite agreement. The conversation being after July 10, it is clear that this letter cannot support the case of Nissim's having given consent to the sale of 26,000 shares against any particular amount on July 10. Absence of immediate protest, which Nissim was not obliged to make in law, does not amount to a waiver of notice. Therefore, the sale by the bank to Jamnadas, who knew all the facts, did not give Jamnadas a better title than the pledgee. In my opinion, even after such alleged sale if Nissim or the official assignee had claimed to redeem the shares, they would have been entitled to do so from Jamnadas.

17. Section 27 of the Sale of Goods Act provides that a seller, cannot give a better title to a purchaser than he himself has, except when a mercantile agent sells to a bona fide purchaser for value without notice. In *Earl of Sheffield v. London Joint Stock Bank* (1888) 13 App. Cas. 333 the facts were these. S. gave to E. certificates of railway stock with transfers thereof executed by him in blank and bonds of foreign companies for the purpose of raising ₹26,000. E. gave these securities to N., a money dealer, to secure ₹26,000 advanced by N. to E. N. deposited the transfers and securities together with other securities of his customers with various banks as security for the loan accounts running between him and them, the blanks in the transfer of stock being filled up with the nominees of the banks. In so dealing the banks either actually knew or had reason to believe that the securities did or might belong not to N., but to his customers. N. became bankrupt. The bank sold some of S's securities and claimed to hold the proceeds and the unsold remainder as security for all the debt due from N. to them. It was held that though the bank had the legal title to the securities they were not purchasers for value without notice, but ought to have enquired into the extent of N.'s authority; and that upon payment to the banks of the money advanced by N. to E., S. was entitled to the value of such of the securities as had been sold by the banks, and to redeem the remainder. The order of redemption was limited to certain securities only, because in respect of the securities sold the legal title was ostensibly in the bank and the purchaser had no notice of any defect in the bank's title to the securities. It was noticed that to complete the pledge, the execution by S. of blank transfer forms was an incident of the transaction. It was held that the banks had the legal estate and they were purchasers for value. The whole question resolved itself into a question of fact: "had the banks notice of the infirmity of N.'s title to pledge the securities of his customers for the whole of his indebtedness?" It was held that the character of the transactions between the respondents and M. was, of itself, sufficient to notify to them that N.'s interest was limited. It was noticed by Lord Macnaghten that the banks knew that in most cases, if not in all, the securities which were deposited with them were not N's own absolute property. He further observed as follows (p. 348) :-

The banks knew that the person who dealt with them as owner was not acting by

right, of ownership. They took for granted that he had authority, but for some reason or other they did not choose to inquire what that authority was. They relied either on some assumed custom or general usage of bankers or on Mozley's representations.... If they relied on Mozley's representations it turns out now that in this case his representations were not well founded, and as loss has occurred the loss must fall on those who trusted without inquiry to the representations which H made.

18. Summarising the position in law he stated as follows (p. 348) :-

It is obvious that in every case where a person deals as owner with property which is not his to the knowledge of the person who deals with him there must be a simultaneous and concurrent representation of authority honestly believed in or else there must be actual fraud "and dishonesty.

19. Again, in *Cook v. Eshelby* (1887) 12 App. Cas. 271 an agent sold goods in his name for an undisclosed principal and the principal sued the buyer for the price. The buyer sought to set off a debt due from the agent. It was held that he could not do so unless in making the contract he was induced by the conduct of the principal to believe and did, in fact, believe that the agent was selling on his own account. When a person thus is in possession of goods to sell which he had either absolute or limited authority, the question would be one of fact. It was observed by Lord Halsbury as follows (p. 276) :-

The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce nor did in fact induce that belief.

20. The Earl of Sheffield's case shows that when a person advances money on the security of shares which stand in someone else's name, it is his duty to enquire whether the person tendering the security had authority to do so. Section 87 of the Sale of Goods Act is applicable to the relationship of pawner and pledgee also. In the present case, therefore, as no notice of the bank's intention to sell the shares was given to Nissim, the bank had no authority to sell the same and Jamna-das must be held aware of this want of authority.

21. The next question is in respect of the sale to the plaintiff in October 1941. The plaintiff negotiated the whole transaction through his friend, Fouzdar. Fouzdar admitted that he had gone to the bank, looked into the papers "and discussed the whole position about the shares with Deshpande." Fouzdar was keen on the shares remaining under the control of somebody he knew. He had not suggested that anything was kept back from him. He stated "he did not see the necessity of telling the plaintiff anything more with regard to the history of these shares or whatever else he knew about the same. The plaintiff did not want to know anything further from me." The knowledge of Fouzdar is the knowledge of the plaintiff. Knowing the full history of these shares and being in

charge of the transaction on behalf of the plaintiff, Fouzdar must have been also aware of the resolutions passed by the committee of the bank on October 24, 1941. The resolutions are very significant. In addition to the sale of those shares it was resolved that all the securities, documents, papers, etc. belonging to Nissim, Kuberdas Raghavji and Issac Ezra now in the bank be and are hereby transferred to Mr. M. Sindhu in consideration of the agreement now arrived at between the bank and Mr. M. Sindhu as recorded in his letter of October 23, 1941, and the bank's resolution and reply of October 24, 1941. I am unable to treat this as pure imagination of the bank. The transaction was, therefore, a new tripartite agreement with the plaintiff of the same type as before. In my opinion, Fouzdar was fully aware of the nature of the transaction, and on the principle of Earl of Sheffield's case Fouzdar and, the plaintiff had knowledge of the want of full title in Jamnadas to these shares,, The plea of estoppel against the Official Assignee has been rejected by both the lower Courts and the appellant did not rely upon the same in this Court. The plaintiff cannot, therefore, claim a better title to the shares than Jamnadas or the bank, and the Official Assignee, in my opinion, is entitled to redeem the shares on payment of what was due by Nissim to the bank. If there was no sale of the shares by the bank to Jamnadas, the alternative claim made by the appellant of being a bona fide purchaser for value from the bank which sold the shares to him as Nissim's pledgee, also cannot succeed. For the reasons mentioned above, to complete the plaintiff's title, the bank must give notice to Nissim of its intention to sell. No such notice was given. Moreover, as the plaintiff is a party who had notice of the true position in respect of these shares, he cannot acquire a better title to the shares than the bank which had the title of only a pledgee. In my opinion, therefore, the appeal should be dismissed with costs,

Mahajan, J.

22. This case comes before us on an appeal against a decree of a division bench of the Bombay High Court setting aside a decree of a single Judge of that Court.

23. We have, therefore, before us two judgments expressing divergent opinions on a vital question of fact. It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies, and like other tribunals he may go wrong on questions of fact, but on such matters if the evidence as a whole "an reasonably be regarded as justifying the conclusion arrived at, the Appeal Court should not lightly interfere with the judgment. Looking at the evidence as a whole, in my opinion, the appellate Court in this case was not justified in reversing the decision of the trial Judge and that decision should be restored.

24. The question to decide in the case is whether the 26,000 new shares of the Asian Assurance Co., Ltd., standing in the name of one Nissim had been lawfully transferred to Jamnadas Mehta and then to the plaintiff or whether the Official Assignee of Bombay on the insolvency of Nissim acquired the ownership of the shares subject to the pledge of the New Citizen Bank of India, Limited. The facts

material for purposes of this appeal lie within a narrow compass and there is not much difficulty in arriving at the decision.

25. Shortly stated, the facts are these : in June 1939 the Asian Assurance Company, Limited, issued 59,000 new shares valued at Rs. 25 each and Nissim entered into an under-writing agreement with it in respect of 30,000 out of these shares. 26,000 out of these are the subject-matter of this litigation. Nissim was a director of this company and was considered at that time to be a man of substance. He was also a director of the New Citizen Bank of India, Limited. The chairman of both these companies was Jamnadas Madhavji Mehta. Nissim owned Rs. 1,10,000 on the under-writing agreement to the company. He also owed some other amounts to it on the basis of other accounts. On September 1, 1939, Nissim borrowed from the New Citizen Bank of India, Ltd., Rs. 25,000 on a promissory note on pledge of the shares above mentioned. As the share scrips had not been issued at that time, the pledge took the form of a deposit of the letters of allotment together with blank transfer forms signed by the pledgor. The Bank was authorized under the pledge agreement to sell these shares at its discretion, in case a margin of 40 per cent, on the market value of the security was not maintained, or in case the loan could not be repaid on the due date. Information of this pledge agreement was given to the company and it was directed to send the share scrips when ready to the Bank. On October 6, 1939, Nissim borrowed another sum of Rs. 50,000 from the Bank on the pledge of the same shares and executed similar documents in its favour. Nissim was also a debtor to the Bank in other accounts as well. He had underwritten the issue of new shares of the Bank itself and a sum of Rs. 92,500 was owed by him to the Bank on this account. He had also guaranteed repayment to the Bank of certain loans of one Messrs. Kuberdas Raghavdas & Co. and of another person named Issac Ezra. On January 22, 1940, the 26 share scrips in respect of the 26,000 shares were sent by the company to the Bank as desired by its letter dated January 17, 1940. In March 1940 Nissim sued Mehta for Rs. 93,248 and in the alternative for accounts in suit No. 396 of 1940. It appears that some misunderstanding arose between them and Nissim rushed to Court rather too suddenly. He did not pursue the litigation seriously and it remained in a state of suspended animation till August 1941, when the Official Assignee tried to revive it, but eventually gave up the attempt.

26. The financial position of Nissim had become unstable by the beginning of 1940 and the Board of Directors of the Bank resolved to recall the loans advanced to him. A letter of demand was accordingly issued to him by the Bank on April 12, 1940. Nissim had no money to meet the demand. He seems to have made up with the Chairman of the Bank, Jamnadas Mehta, and ways and means were being devised to adjust the loans. Nothing matured till the beginning of July 1940.

27. It is said that on July 5, 1940, an agreement was reached between Nissim, the Bank, and Mehta, under which Mehta agreed to take over all the liabilities of

Nissim to the Bank as well as the securities pledged by him. Under this arrangement Mehta was to become debtor to the Bank for the whole of the indebtedness of Nissim and he was also to become the owner of all the securities that Nissim had pledged to the Bank. On the following day Mehta wrote a letter to Deshpande, the managing director of the Bank, offering a sum of Rs. 78,000 for the purchase of 26,000 shares of the Asian Assurance Company that had been pledged by Nissim to the Bank. Mehta, Deshpande and Nissim, it appears, were having conversations on these matters and it is not unlikely that this offer was made to the knowledge of Nissim, who was also a director of the Bank. On July 10, 1940, the executive committee of the Bank accepted this offer, though not in identical terms in which it had been made. The variation was in respect of the price offered. Instead of saying that the amount offered as price was Rs. 73,000 in the resolution it was said that the price offered was Rs. 73,000 or thereabouts. It was resolved that the account of Mehta must be debited with the purchase price. The resolution was passed with Mehta in the chair and therefore it must be taken that his offer stood modified in terms of the resolution of the executive committee. It is alleged that a contract was thus arrived at between the Bank and Mehta regarding the sale of the 26,000 shares in its favour on July 10, 1940, for a sum of Rs. 73,000 or thereabouts. This expression, it is said, was understood by both the parties as meaning the amount due on the overdraft account on the two promissory notes totalling Rs. 75,000, for which the shares had been pledged. On the same day Jamnadas Mehta executed in favour of the Bank a promissory note in the sum of Rs. 75,000 and a letter of pledge in respect of the 26,000 shares. One of the blank transfer forms was also signed by him as transferee and two other forms he signed as transferor. The shares and the blank transfer forms remained with the Bank as before, though now pledged by Mehta, whereas formerly they had been pledged by Nissim. Though all these documents were executed on July 10, 1940, the resolution of the executive committee of the Bank was not given effect to by debiting the balance in the overdraft account of Mehta, which account continued nearly till the end of the financial year. In Nissim's account an entry was made with a red pencil mentioning the transaction of sale and a week later the security register also mentioned the fact of this transaction. Nissim was also given information orally on the telephone on July 11 or 12, and in writing by July 15, that the sale of the shares had been completed. In this letter it was expressly stated that in pursuance of this conversation on the telephone with Deshpande, the shares had been sold and that the sale proceeds would be adjusted in his account and that he was no longer a debtor to the Bank.

28. Nissim filed a petition for his adjudication as an insolvent on July 16, 1940. He mentioned the amount due to the Bank in the preliminary schedule of debts. It is possible that this schedule had been prepared by him before July 11 or 12, 1940. He corrected this matter when he filed his first schedule on September 6, 1940. In his letter of September 6, 1940, Nissim told the Official Assignee that the shares had been sold and did not belong to him. A copy of the Bank's letter

dated July 12, 1940, received by him on July 15, 1940, was also sent to the Official Assignee. The Official Assignee accepted the position as disclosed by Nissim to him in his letter of September 6, 1940, and never questioned the sale transaction or the statement of Nissim in the letter of September 6, 1940. In his letter of June 2, 1941, the Official Assignee asked the Bank to furnish to him an explanatory statement showing the indebtedness of Nissim to the Bank, the rate or rates at which the 26,000 shares were sold by it and whether there was any surplus or deficit in the said account. The Bank replied on June 5, 1941, that the shares had been disposed of for a sum of Rs. 75,000 and that there was a small deficit which the sale proceeds had not covered. It, however, stated that there was no surplus available which could be placed at the disposal of the Official Assignee. The Official Assignee on June 10, 1941, again inquired about the date of sale, and the reply given on June 24 was to the effect that the shares were sold on July 10, 1940. Till March 1942, when several litigations began, no further correspondence passed between the Official Assignee and the Bank. Both Nissim and the Official Assignee had thus the fullest information about the sale transaction of July 10, 1940.

29. On November 1, 1940, the Bank wrote to the Company requesting that the shares be transferred in the name of another party who had accepted liability for the amount advanced to Nissim. They also requested that the dividend be paid to the Bank on the shares. The Company's reply dated November 12, 1940, was to the effect that they had no notice at all that the shares were held by the Bank as security on behalf of Nissim. It further said that these shares were subject to a lien for a loan of one lac of rupees advanced to Nissim, and until the amount was paid, the company was not prepared to agree to the transfer of the said shares from the name of Nissim to the name of the other party mentioned by the Bank. On the like ground the Company refused to pay any dividend to the Bank.

30. The 15th meeting of the Board of Directors of the Bank was held on April 15, 1941, and the executive committee's resolution accepting the offer of Jamnadas Mehta on July 10, 1940, regarding the sale of 26,000 shares on his taking the liability of Nissim to the Bank amounting to Rs. 74,062-13-0 was ratified and confirmed, and the loan account of Nissim was adjusted. On May 6, 1941, Nissim gave a power-of-attorney in favour of one Ramrao Ganpatrao Vijayakar, the nominee of Mehta, authorizing the latter to vote at the general meeting of the Company as directed by him and a proxy was also given in his favour. The proxy, however, was revoked by Nissim on July 14, 1941.

31. On July 15, 1941, Jamnadas and Vijayakar filed a suit for a declaration that the revocation of the power-of-attorney and the proxy were invalid and that by the issue of an injunction Nissim shall be directed to vote at the meeting as desired by Jamnadas. This suit was numbered as 921 of 1941 and remained pending till August 1943 when it ended with a consent decree. Nissim admitted that he had no interest in the shares and that he held them as trustee for Jamnadas.

32. As the Company was claiming a lien on these shares, on July 30, 1941, the Bank and Jamnadas jointly filed a suit, being suit No. 1001 of 1941, against the Company, Nissim and the Official Assignee, for a declaration that the Company had no lien on these shares. The Official Assignee was informed that he was merely a pro forma party and he took no interest in the litigation. The suit was fought out between the Bank and Jamnadas on one side and the Company on the other. The Company challenged the locus standi of both the plaintiffs to maintain the suit. Whether Jamnadas had a locus standi to maintain the suit or not, the Bank as pledgee obviously was competent to maintain it. In order to establish his locus standi, it was contended by Jamnadas that by reason of a tripartite agreement arrived at between the Bank, himself and Nissim on July 16, 1940, and given effect to on July 10, 1940, he had become the owner of these shares and was thus entitled to maintain the suit. The Company denied the existence of the arrangement. The matter was put into issue and a decision was reached that the existence of this agreement was not proved. At the same time it was held that Jamnadas had locus standi to maintain the suit. On no other hypothesis than that Jamnadas was a purchaser of the shares he could be said to have a locus standi to join as a plaintiff in the suit. The suit was, however, dismissed on November 1, 1943, on the ground that the Company had a lien on the 26,000 shares pledged with the Bank for the amount due to it under the underwriting agreement of Nissim. An appeal from this decision failed in November 1944.

33. The net result of the three litigations fought out between Jamnadas Mehta and the Bank on one side and the Company, Nissim and the Official Assignee on the other was that the Company's lien was established on 26,000 shares to the extent of the underwriting agreement, Jamnadas's ownership of the shares was acquiesced in and was accepted and nothing was found due from Mehta to Nissim. The Official Assignee's attitude regarding the 26,000 shares of Nissim claimed by Mehta as owner was that of a person who had acquiesced in the ownership and who considered that the matter having been concluded required no further scrutiny or investigation. He was not claiming the shares or any right of redemption in them. So far as Nissim was concerned, his attitude can be explained only on the hypothesis of his acceptance of the fact that they had been sold with his full knowledge and consent. Mehta, of course, was asserting his ownership to these shares and the Bank recognised it. The account of Nissim was adjusted by crediting the sale price in it and the account of Mehta was debited with it. The Bank did not claim from the Official Assignee any amount on account of this indebtedness. Enquiries were made by the Official Assignee about any surplus and he was told that instead of a surplus there was a small deficit. Had matters stood as they then did and nothing further happened, there is no question that the ownership of these shares could be taken to have rested in Jamnadas Mehta and the Bank was a pledgee of these shares on his account.

34. On October 28, 1941, the Bank as pledgee and Mehta as owner sold these shares to Madholal Sindhu, the plaintiff in the suit out of which this appeal arises, for a sum of Rs. 1,20,000. The sale was subject to the contentions of the parties

in the two pending suits, viz. suits Nos. 921 of 1941 and 1001 of 1941. Suit No. 921 of 1941, as already indicated, was for a declaration that Nissim was bound to vote at the meetings of the Company as desired by Jamnadas. That suit ended in favour of Jamnadas. The other suit concerned the lien of the Asian Assurance Company on the shares. The lien was held established to the extent of the balance of the overdraft account. There is no question that this sale was a genuine one, Madholal Sindhu had no connection or concern with the Bank or the Company. He was a bonafide outside purchaser and paid full value for the shares. The amount was paid by cheque and was credited in the books of the Bank to Jamnadas Mehta's account. The share scrips and blank transfer forms were handed over to the purchaser.

35. As already indicated, suit No. 921 of 1941 was decided in August 1943 and suit No. 1001 of 1941 was not decided till November 1, 1943. While it was still pending, on October 12, 1948, the present suit was filed by the plaintiff, Madholal Sindhu, for a declaration against the Asian Assurance Company that it had no lien on the 26,000 shares for the sum of Rs. 1,45,000 due to it on the other account of Nissim. The plaintiff deposited in Court simultaneously with the plaint a sum of Rs. 1,07,500 to meet the Company's lien in suit No. 1001 of 1941. The suit was necessitated by reason of the Company's threat regarding the sale of the shares to recover the amounts due from Nissim on other accounts except those covered by suit No. 1001 of 1941. The plaintiff impleaded as defendants in this suit the Company, the Bank, Jamnadas Mehta, Nissim and the Official Assignee of Bombay. On February 15, 1944, the Company filed a written statement and denied that the Bank was a pledgee in possession of their shares. It also denied the factum and validity of the transaction of sale of the shares to the plaintiff, Jamnadas's ownership of the shares was also disputed. The Company claimed a lien not only in respect of Rs. 1,10,000, but also in respect of Rs. 1,45,000 and certain costs. The Bank and Jamnadas did not file any written statement. They supported the plaintiff's allegations. Nissim did not appear in the case. On March 16, 1944, the Official Assignee contested the claim of the plaintiff and filed a counter-claim alleging that before Nissim's adjudication as insolvent Jamnadas had not become the owner of the shares and therefore the equity of redemption in these shares remained vested in him and they could not be sold by the Bank without notice to him and he had thus a right to redeem the pledge. He also raised a plea of res judicata by reason of the decision in suit No. 1001 of 1941. More than four years after the sale, the Official Assignee seems to have become suddenly alive to the necessity of claiming ownership or the equity of redemption in the shares. But for the litigation between the Company and the plaintiff, the dispute regarding the ownership of these shares had ended long before. That litigation, however, furnished an opportunity to the Official Assignee to put forward a somewhat belated claim for exercise of the right of redemption in the 26,000 shares. In all probability he was prompted in this litigation by some group of speculators who wanted to have control over the company by purchasing these shares. There could be no other motive behind it as the amount

due one the pledge would be considerably in excess of the real value of the shares. Thus, the claim of the Official Assignee is on the face of it of a very speculative character.

36. The trial Judge, Mr, Justice Bhagwati, decreed the plaintiff's claim against the Company and dismissed the counter-claim of the Official Assignee. He upheld the plaintiff's contention that Jamnadas Mehta had become the owner of these shares by the sale transaction of July 10, 1940, and that it had been effected with the full knowledge and concurrence of Nissim before the date of his insolvency. The learned Judge pronounced the sale in favour of the plaintiff as a bona fide one and held that even if Jamnadas Mehta had not become the owner of these shares on July 10, 1940, the Bank as pledgee of these shares had every right to put them to sale and that the failure on his part to give notice to the Official Assignee as required by Section 176 of the Indian Contract Act was a mere irregularity which did not affect the title of the purchaser. The Company accepted his decision, but the Official Assignee appealed against it. A division bench of the High Court consisting of the Chief Justice and Mr. Justice Chagla heard the appeal and wrote separate judgments and on somewhat different reasoning reached the same conclusion. It was held that the alleged sale of July 10, 1940, in favour of Jamnadas was not an independent transaction but was another aspect of the so-called tripartite agreement pleaded in suit No. 1001 of 1941; in other words, the alleged sale was the tripartite agreement of July 5, 1940, in disguise, and as that agreement had not been proved in the former case and was not pleaded in this case, the sale could not be held proved. The learned Chief Justice reiterated the opinion expressed by him in suit No. 1001 of 1941 that the documents executed on the 10th did not evidence a real transaction, while Mr. Justice Chagla thought that those documents were executed with a view to keep the transaction in a nebulous state. It was, however, held that the Bank as pledgee of the shares from Nissim could have sold them after notice to the Official Assignee, but as no notice was given, the sale was wrongful, and all that the plaintiff acquired under it was the right, title and interest of the pledgee in the shares and the Official Assignee was therefore entitled to redeem them. The plaintiff was given leave to appeal to His Majesty in Council against this decision, and in view of the enlarged jurisdiction of this Court the appeal was heard by us.

37. As I have observed at the outset, this appeal should be allowed. The trial Judge, after considering the documentary evidence about the genuineness of which he was satisfied by the oral testimony heard by him, reached the conclusion that a concluded sale between Jamnadas and the Bank with the concurrence of Nissim regarding these shares had been proved and that the title in these shares after July 10, 1940, vested in Jamnadas Mehta and he was competent to sell them to the plaintiff. Unless very cogent grounds existed for reversing this decision on a pure question of fact, the appellate Court's decision cannot be sustained. I have no hesitation in saying that there was no good justification in this case for reversing the decision of the trial Court. In my view,

the learned Judges of the division bench failed to look at this question in its proper perspective. They were obsessed with their own respective decisions in suit No. 1001 of 1941 (though those decisions were not *res judicata* and were not otherwise relevant) about the tripartite agreement and could not dissociate their minds from them. It was thought that the tripartite agreement pleaded in the former case was still the subject-matter of the present suit and that it had only been given a new form. I am satisfied that this line of approach was not justified. Whether the sale transaction of July 10, 1940, was in pursuance of the previous arrangement or was an independent transaction by itself is not relevant to decide this dispute. Assuming that there was no tripartite agreement made between Jamnadas Mehta, the Bank and Nissim on July 5 or 10, 1940, under which Mehta took over all the assets and liabilities of Nissira, it does not follow that what took place subsequently is automatically wiped out. If a concluded contract of sale is evidenced by the documents and it is not a sham transaction, it must pass title in the shares to Mehta, no matter what negotiations preceded the sale, and no matter whether the sale was made to give effect to a part of the agreement or was agreed upon independently of it. The Chief Justice, Sir Leonard Stone, considered that what took place on the 5th and 10th was a mere camouflage and that the whole transaction was a sham; that Jamnadas Mehta, the Chairman of the Bank, Nissim and officers of the bank conspired together in executing the documents without any intent on their part of giving effect to them, and the conspiracy was hatched in view of the unsteady market caused by the fall of Fiance. This is what the learned Chief Justice said in the concluding part of his judgment (48 Bom. L.R. 828, at p. 847):-

At the conclusion of my judgment in this Court in suit No. 1001 of 1941 I said :

In the face of the letter to the shareholders sent by Mr. Mehta as the Chairman of the bank and the balance-sheet annexed to it, Mr. Mehta cannot be heard to say that there was an agreement under which [the] debt was his. Far from the documents supporting the tripartite agreement, they are, in my judgment, at variance with the existence of any such agreement.

In my opinion there can be no doubt that no concluded or enforceable agreement was ever come to in July, 1940, whereby Mr. Jamnadas Mehta was to take over all Mr. Nissim's liabilities and all his securities therefor. The evidence and the documents point in my judgment to a discreditable attempt on behalf of Mr. Jamnadas Mehta and the bank to make entries in the bank's books and to bring some documents into existence, so that the position could be held in suspense, until it could be seen what emerged from the crisis of July 1940, But apart from these reasons I think the learned Judge was wrong in deciding this ease as he did because he ought to have held himself bound by the decision of Chagla J. and of this Court in suit No. 1001 of 1941, He had no new oral evidence before him and all the documents were precisely the same.

In my opinion Mr. Jamnadas Mehta never had any estate or interest in these 26,000 Asian shares.

With the greatest respect to the learned Chief Justice, it has to be pointed out that once it was held that the decision in suit No. 1001 of 1941 had not the effect of res judicata and did not bar the trial of the issue in this suit, it had absolutely no relevancy and the observations of the learned Chief Justice cited above are open to serious objection. They afford no justification for setting aside the judgment of the single Judge who had arrived at his own conclusion on the evidence about the genuine execution of the documents that came into existence on July 10, 1940. It is difficult to appreciate an appellate judgment which sets aside the judgment of the trial Judge simply because the Judges constituting the appellate Court had previously expressed different opinions from those expressed by the trial Judge and expresses surprise as to why that Judge had not followed their opinions. Such a disposal of the appeal cannot receive the approval of this Court. Mr. Justice Chagla arrived at the same conclusion on a different reasoning. He observed as follows(48 Bom. L.R. 828, at pp. 860, 862) :-

If the matter is left to be determined on these two documents alone, I should have no hesitation in holding that the plaintiff has established that these shares were sold by the bank to Jamnadas Mehta, As I have already pointed out, the bank was holding these shares as a pledgee of Meyer Nissim and the sale would then be by the pledgee in possession in exercise of his power of sale. But these documents have got to be considered in their proper context. But the most curious thing is that the amount of the price is not credited in the overdraft account of Meyer Jvissim nor is the amount debited in the account of Jamnadas Mehta,....

In my opinion, the bank deliberately left the transaction in a vague and nebulous stati". While it obtained a letter from Jamnadas Mehta on July 6, 1940, for the sale of these shares and accepted that offer on July 10, 1940, it made no relevant entries either in the account of Meyer Nissim or in the account of Jamnadas Mehta. Although it wrote a letter to Meyer Nissim stating that it had disposed of his shares, it was written in a manner which made it possible for the Bank if occasion arose either to disown it or to adopt it. The bank apparently was waiting upon events. After the insolvency of Meyer Nissim, it wanted to be in a position to put forward such transaction as circumstances might justify.

With great respect again, this finding seems to me to be based on somewhat conjectural grounds. I have not been able to find anything in the letter written to Nissim which made it possible for the Bank to disown the transaction of sale. The Bank was under no necessity to wait for future developments which are merely vaguely mentioned but not specified. It was quite clear to the Bank that Nissim was not able to pay his debts and was likely to seek the aid of the insolvency Court. The conduct of the Bank in making entries in its books cannot affect the title of Jamnadas Mehta in the shares if the title had become indefeasible on July 10, 1940. I have not been able to appreciate the remark that the transaction was left in a vague and nebulous state. So far as I can see, there is nothing vague in the transaction and it cannot be said to be in any nebulous state. Either the

transaction was completed or it was not completed. That was the sole question to decide. Once the learned Judge reached the decision that these two letters brought about a concluded sale, all the further discussion in the judgment, in my opinion, was foreign to the decision of this issue, unless the learned Judge was thinking that the transaction, though concluded, was not a real one. For that finding he had no materials whatsoever.

38. In the result, in my opinion, both the learned Judges reversed the decision of the trial Judge on surmises and conjectures and their decision has no foundation in the evidence of either of the parties. There is no evidence whatsoever on the record to suggest that any valid grounds exist for the suggestion that the Bank, Mehta and Nissim entered into a conspiracy and the documents executed on the 10th were the result of the conspiracy and were not intended to be given effect to.

39. The broad facts in the case are that the Bank was a pledgee of the shares and was entitled to sell them, when Nissim failed to meet the notice of demand admittedly issued to him in April 1940. Having committed this default, he had no option but to agree to the sale of these shares to the Bank. He had no means whatsoever to meet the Bank's demands. There is ample evidence on the record to prove that he was meeting the Chairman of the Bank, Mehta, and its manager, Deshpande. One fact stands firmly established that on July 5, 1940, all these gentlemen met and discussed the agreement under which Mehta was willing to take over all the liabilities of Nissim along with his securities. Nissim was quite willing to pass on his liability to Mehta along with the securities as apparently the securities were not sufficient to meet them. Mehta was willing to take over these liabilities and securities because it was at his instance that the Bank had advanced the loan to Nissim. It was on July 6 that Mehta sent his offer to the Bank about these shares and on the 10th this offer was accepted by the Bank. The next day Deshpande informed Nissim on the telephone about this conversation and later on wrote to him a letter on the 12th giving him full information about the disposal of the shares. It is, therefore, quite clear that before July 10 Nissim was agreeable to the sale and subsequent to that fully accepted it. He was informed that in the other account in which he had underwritten the Bank's shares his liability had also ceased because Mehta had got those shares transferred in the name of one Kajiji and that in both those accounts he was no longer a debtor to the Bank. Not only was he informed about the sale but the Official Assignee was also put in full possession of the facts later on. Jamnadas Mehta not only executed a promissory note in favour of the Bank and gave a letter of pledge, but he also signed one of the blank transfer forms as transferee and two other forms as transferor. These documents he would not have executed had he not become the owner of these shares on July 10, 1940. On no other hypothesis is the execution of these documents by Mehta in favour of the Bank explicable, particularly the transfer forms. If the thing was not intended to be acted upon, I cannot conceive that Mehta would have been allowed to sign one of the blank transfer forms as transferee. The security

register a week later recorded the sale transaction and a note of sale was also made in Nissim's overdraft account on the basis of his promissory note of Rs. 75,000. Mehta's account later on was debited with the full amount that was owed to the Bank by Nissim. In these circumstances it is difficult to imagine that all these things happened as a result of conspiracy. The rights of parties cannot be decided on mere suspicions or conjectures and the law presumes in favour of honest dealing. The documents proved in the case clearly evidence a concluded sale of the shares in favour of Mehta and they cannot be explained away on hypothetical grounds. If Nissim had not accepted the sale transaction, it is inconceivable that he would have executed irrevocable power-of-attorney and proxy in favour of Mehta's nominee to vote at the general meeting of the Company. In my opinion, Mr. Justice Bhagwati was right in the remark that Jamnadas having persuaded the Bank to advance a loan to Nissim felt himself morally bound to recoup the Bank when Nissim was not able to pay it and safeguarded himself by the sale of the shares, and it may be that he agreed to take over all the assets and liabilities of Nissim and that the whole of the arrangement was not carried through or that it could not be satisfactorily proved. It does not follow, however, that what actually took place cannot be given effect to. The decision that there was sale of these shares in favour of Mehta on July 10, 1940, does not in any way run counter to the decision in the earlier suit about the tripartite agreement not being proved. On the other hand, it is consistent with that; decision. It was therein observed that the sale may have taken place though no tripartite agreement was proved. As a matter of fact, Mr. Justice Chagla held in the former case that Jamnadas Mehta had locus standi to maintain that suit by reason of the sale. Be that as it may, the decision in the former suit does not operate as res judicata in this case and the findings in that case are therefore not relevant here and should not be allowed to influence the decision in the present case.

40. Mr. K.M. Munshi, the learned Counsel for the Official Assignee, attempted to support the decision of the appellate Court on the ground that, the documents relied on by the plaintiff to prove his case did not, standing by themselves, prove a concluded contract of sale of the shares between the Bank and Mehta with the consent of Nissim. It was contended that these documents may conceivably be evidence of a tripartite agreement but they do not prove an independent contract of sale dissociated from it for which a separate and severable consideration had been agreed upon, and that as the tripartite agreement had been abandoned in this case, the sale in favour of Mehta, aliunde could not be held proved. It was also said that such a transaction had not even been pleaded as such. It was argued that in law no concluded contract for sale came into existence by the offer of the 6th for purchase of shares for Rs. 73,000 as the acceptance was not in the terms of the offer, the offer being for purchase of shares for a price of Rs. 73,009, while the acceptance was for a price of Rs. 73,000 or thereabouts. Further, it was said that by the use of the expression "thereabouts" even if Mehta agreed to the counter offer, the price was not ascertained or fixed and the

contract did not satisfy the requirements of Section 9 of the Sale of Goods Act. According to Mr. Munshi, it had nowhere been said by any one that the sale of 26,000 shares was for the balance of the amount due to the Bank on the overdraft account of Nissim, on July 10, 1940, and that there was no evidence in support of such a contention. Attention was drawn to the history of events and the conduct of the Bank in the subsequent treatment by it of Nissim's account and to the conflicting statements about the amount of the price for which the shares were sold. Sometimes it was said that the price was Rs. 74,000; on another occasion it was made out as Rs. 75,000 and later it was stated to be Rs. 76,000. It was said that no sale in law could be held valid when the Bank itself did not know what the price was. The learned Counsel contended that the true position was that the evidence disclosed some kind of an arrangement between Mehta, the Bank and Nissim, under which Mehta was to take over all the liabilities and assets of Nissim, and as the whole arrangement was not carried out, a part could not be given effect to even if carried out as there was no separate consideration for it and either the whole had to stand or it had to go in its entirety and the effort to represent this sale as an independent transaction was somewhat belated. Without positively asserting that what is evidenced by the documents of the 10th was a sham transaction, the learned Counsel asked us to look at all of them with suspicion.

41. In my opinion, the contentions of Mr. Munshi, though plausible, are devoid of force. It is no doubt true that the offer by the purchase of these shares was for one definite price of Rs. 73,000 and the acceptance by the Bank was for a price of Rs. 73,000 or thereabouts. It is also true that Deshpande made somewhat different statements at different stages as to the price. In express terms it was not deposed to by him that the sale of these shares was for the amount due from Nissim on the overdraft account of Rs. 75,000. But the whole transaction has to be judged in the light of the attendant circumstances. There is strong circumstantial evidence that unerringly fixes the meaning of the expression "73,000 or thereabouts" and there is no reason not to accept that evidence in preference to any of the oral statements made by Deshpande. As already stated, Jamnadas Mehta presided over the meeting of the executive committee which considered his offer for the purchase of the shares. In his presence the resolution of the executive committee was passed. It must, therefore, be presumed that when in the resolution his offer was described as one for Rs. 73,000 or thereabouts, he accepted that description and that he and the Bank were in agreement so far as the price was concerned. The contention of Mr. Munshi that stating the price in those terms does not bring the case u/s 9 of the Sale of Goods Act again cannot be sustained for the simple reason that both the Bank and Mehta fully knew what the meaning of this expression "73,000 or thereabouts" was. On July 10, 1940, the amount of Rs. 73,698 was due from Nissim in this overdraft account and it was for this reason that the price was fixed by saying "73,000, or thereabouts"; in other words, the price was stated to be Rs. 73,000 odd. The exact sum was not mentioned as possibly the exact

figure disclosed by the accounts was not then before the meeting, but there can be no manner of doubt that both the purchaser and the seller understood the meaning of that expression. This view is fully supported by the following further facts. The Bank took a promissory note for the purchase price from Mehta in the sum of Rs. 75,000. The promissory note was not taken for a sum of Rs. 73,000 or Rs. 73,000 odd for the simple reason that the overdraft account of Nissim was on the foot of the promissory note for Rs. 75,000. Instead of Nissim, Mehta was substituted in the promissory note account. Secondly, on the account itself an endorsement was made that the securities pledged under that account had been transferred to Mehta along with the liability but that the account would be closed at a later date. Mehta was the chairman of the Bank and for purposes of the balance sheet the directors did not like to show that he was a debtor in a very large sum to the Bank. Further by a process of elimination the words "73,000 or thereabouts" could only refer to this overdraft account and to nothing else. So far as the other accounts were concerned, on the same day one of them was transferred to the name of Kajiji, while for the two other accounts Mehta had executed separate guarantee letters. There can therefore be no question that so far as the sale of 26,000 shares of the Asian Assurance Company is concerned, the sale was made for the amount due on the overdraft account of Nissim and it could relate to no other account. The contention of Mr. Munshi that subsequently the Bank continued this account and even credited it with further amounts cannot in any way affect the case because what the Bank officials did later on would not in any way deprive the purchaser of the ownership of the shares transferred to him on July 10, 1940. Once it is held that the expression "73,000 or thereabouts" was used to specify the overdraft account of Nissim and that both the parties understood this expression in that sense, then the contention that the sale was not for a fixed price cannot hold water. As regards the fact that the sale of shares by the Bank with the consent of Nissim in favour of Mehta was not expressly pleaded, the reply to it has been sufficiently given by Mr. Justice Chagla in the following terms 48 Bom. L.R. 828 :-

Although both the pleadings and the issues raised are far from satisfactory for a trial of the question of sale by the Bank to Jamnadas Mehta, all the parties and the learned Judge himself went on with the trial on the basis of the plaintiff having alleged a sale by the Bank to Jamnadas Mehta.

42. The next contention of Mr. Munshi that even if this sale took place, the consideration for it was a part of the consideration for the whole of the tripartite agreement under which all the liabilities of Nissim were to be taken over by Mehta along with his securities, and that as the rest of the agreement was not acted upon and was repudiated by the Bank, a part of it for a part of the consideration cannot stand not being severable, is also fallacious. It is no doubt true that the original arrangement between the parties was that Mehta would take over all liabilities of Nissim along with the securities, but that arrangement had to be given effect to by sale of the securities in favour of Mehta for the sum due on different accounts. These securities were pledged in different accounts for

different sums of money and these accounts had to be dealt with separately and this is what actually happened on July 10. One of the accounts was agreed to be adjusted by the sale of the 26,000 shares, the other account was adjusted by the sale of the Bank's shares in favour of Kajiji and the third and fourth accounts were adjusted by the letters of guarantee. Different documents were taken from Mehta by the Bank for the different accounts. Therefore, it is not a case where there was one whole consideration for a particular sale. The arrangement had to be given effect to by entering into four different kinds of transactions, and if the Bank repudiated two or three out of these transactions, it does not follow that the one which went through cannot also be given effect to.

43. It was contended that if the Bank held these shares as pledgee, no notice of the sale was given to Nissim u/s 176 and therefore the sale was void ab initio. This contention overlooks the fact that the pledgee before disposal of the shares had consulted the pledgor who was agreeable to the transfer of these shares by the Bank. His consent having been obtained for the disposal of the shares, the question of notice u/s 176 does not arise. Moreover, he was subsequently informed about it and throughout he ratified the transaction and acquiesced in it. As already pointed out, not only did he acquiesce in the transaction but the Official Assignee after full investigation also acquiesced in it.

44. For the reasons given I am of the opinion that none of the contentions raised by Mr. Munshi have any force. The reasons given by the learned Judges of the division bench who reversed the decision of the trial Court cannot be justified in law. The result, therefore, is that the appeal is allowed with costs, the decision of the division bench set aside and that of the single Judge dismissing the counter-claim restored.

45. Several other questions were argued in the case, namely, whether a pledgor can enter into a contract to the contrary against the provisions of Section 176 of the Indian Contract Act and can waive notice, or whether a sale by a pledgee of pledged shares without notice to the pledgor is a mere irregularity and cannot affect the title of a bona fide purchaser for value. None of these contentions require consideration in the view of the case that I have taken. "

Fazl ALi, J.

46. I agree with Mahajan J.

Mukherjea, J.

47. I concur in the judgment delivered just now by my learned brother Mahajan J. and I hold on the reasons given by him that this appeal should be allowed with costs.

48. Per Curiam. In accordance with the opinion of the majority, the appeal is allowed with costs, and the case is remitted to the High Court with a declaration that in place of the judgment and decree of the division bench passed in the appeal made to it the judgment and decree of the trial Judge be substituted.