Official Receiver, Jhansi vs Jugal Kishore Lachhi Ram Jaina, ... on 20 September, 1962

Equivalent citations: AIR1963ALL459, AIR 1963 ALLAHABAD 459, 1963 ALL. L. J. 152 ILR (1961) 1 ALL 382, ILR (1961) 1 ALL 382

Author: S.N. Dwivedi

Bench: S.N. Dwivedi

JUDGMENT

Mukerji, J.

1. Although my learned brothers Jagdish Sahai and Dwivedi are agreed as to the result of this appeal, yet they have differed in regard to the reasons sustaining their respective conclusions on which they agree to a dismissal of the appeal.

2 I have had the advantage of reading the opinions of both and I find myself in agreement with the line of reasoning adopted by my learned brothel Jagdish Sahai. I also find that I have little to add to what has already been said, except pointing out that by adopting the line of reasoning followed by my learned brother Jagdish Sahai equity was not being deployed to override law. There was, in my view, nothing in either the Contract Act or the Sale of Goods Act which compelled a Court to uphold the fraud practised in the instant case.

3. I agree with the opinion of my learned brother Jagdish Sahai.

Jagdish Sahai, J.

4. I have read the opinion of my brother pwivedi and agree with his conclusion that the appeal should be dismissed with costs. Inasmuch as my approach to the case is basically different from that of my brother Dwivedi, I have thought it necessary to embody my views in a separate judgment.

5. The facts of the case are as follows: One Sri Chand was the proprietor of the firm Panna Lal Balmukund of Jhansi. Professing to carry on the business of selling and purchasing grain he introduced himself to a registered firm at Jalna in Hyderabad known as firm Jugal Kishore Lachhi Ram (hereinafter referred to as the plaintiffs), of which Lachhi Ram is the managing partner, and offered to send goods to be sold through the agency of the latter to which the plaintiffs agreed. In pursuance of that general arrangement Sri Chand sent two railway receipts by post and simultaneously a Hundi for Rs. 20,000 through the Central Bank of India Limited to the plaintiffs.

The plaintiffs, on presentation of the Hundi, declined to pay that much amount on the ground that the goods purporting to be covered by the railway receipts could not be worth more than Rs. 15,000/-. The Central Bank communicated this fact to Sri Chand who directed the Bank to accept Rs. 15,000/- which, on demand, the plaintiffs paid to the Jalna Branch of the Bank. The Jalna Branch transferred that amount to the Jhansi Branch, where it was credited to Sri Chand's account. In the meantime the plaintiffs discovered that the railway receipts did not cover any goods and directed to Jalna Branch of the Bank to have the payment of Rs. I5,000/- paid by it to be withheld. Thereafter there was some telegraphic communication between the Jalna Office and the Jhansi Office of the Bank and the Jhansi Office withheld the amount of Rs. 15,000/- with itself. On 27th July, 1950, the Insolvency Judge of Jhansi, in connection with application presented by certain creditors for adjudging Sri Chand as insolvent, directed the Central Bank, not to pay that sum to any one and to withhold the same. Thereafter on 7-8-1950 the plaintiffs filed the suit giving rise to this appeal for a declaration that the lawful title to the sum of Rs. 15,000/- lying at the Jhansi Branch of the Bank and given by the plaintiffs under the Hundi drawn by Sri Chand vested in the plaintiffs and that Sri Chand or his firm had no title to the same. During the pendency of the suit Sri Chand was adjudged insolvent on 30-9-1950 and the Official Receiver was also impleaded as a defendant in the suit. Two written statements were riled in the suit one by the Bank and the other by the Official Receiver. The Bank did not claim any rights in the sum of Rs. 15,000/-and expressed its willingness to pay the sum to whomsoever the Court held entitled to receive. The Official Receiver alleged that the sum belonged to the estate of Sri Chand and consequently claimed it in order to discharge the debts of Sri Chand. It was also pleaded that it was open to the plaintiffs to file a claim in the Insolvency proceedings and receive pro rata sum. The learned Civil Judge decreed the plaintiffs suit on 13-3-1951. This appeal is directed against that decree.

6. The question requiring determination is whether the plaintiffs have a valid title to the sum of Rs. 15,000/-. The appeal came up before our brother Srivastava and myself. We referred the case to a Full Bench in view of the conflict of decisions in this Court. In similar circumstances, Agarwala and Mulla, JJ. in Rameshwar Swarup v. Surajmal Shyam Sundar, AIR 1955 All 676 held that the Receiver was not entitled to the money which belonged to the person who paid it. In V. A. F. O. No. 157 of 1952, Shree Om Sharan Sahaney v. Narotam Das Prem Chand and Brother, decided by Desai, J. (as he then was) and Takru, J., on 10-9-1957, a contrary view was taken. In Sahney's case Desai, J. who delivered the judgment of the Bench took the view that to the facts of that case Section 86 of the Indian Trusts Act did not apply--firstly because the contract of transferring the property was not induced by fraud or mistake and transferring the property was not induced by fraud or mistake and secondly no notice to that effect had been given to the transferee by the transferor. I will advert to these decisions a little later.

7. Admittedly the railway receipts sent by Sri Chand to the plaintiffs did not cover any goods and were forged documents. There is a clear finding of the trial Court to that effect and my brother Dwivedi is also in agreement with that finding Had it been a criminal case there would have been no difficulty in holding Sri Chand guilty ot the offence punishable under Section 420, I. P. C. and the Court trying that criminal case would have had jurisdiction, under Section 517, Cri. P. C. to hand over the money to the plaintiffs.

8. My brother Dwivedi has taken the view that inasmuch as the contract was not expressly Rescinded on or before 27th July, 1950, the interest in the sum of Rs. 15,000/- passed to Sri Chand. He is of the opinion that since Section 19 of the Indian Contract Act makes an agreement obtained by fraud only voidable and not void, Sri Chand could rest his title on that contract. My difficulty is that I am unable to subscribe to this view, both with regard to the question of fact that the "contract was not rescinded on or before July 27, 1950" as also with regard to the legal question relating to the interpretation of Section 19 of the Contract Act. I am reproducing below the telegrams that were exchanged between the Jalna Branch of the Bank and the Jhansi Branch between the 12th and 19th of June, 1950.

9. The telegram of the Jalna Office of the bank dated 12th of June, 1950 to its Jhansi Branch reads as follows:

> "Seven one one. Your Bici 542 drawees complain that drawers sent bogus R. R. Drawees request withhold payment. Drawees coming Jhansi. Wire."

The Jhansi Branch the same day sent back the following reply:

> "Yours twelfth our Bici five four two withold our Jalna Office telegram dated 17-6-1950 to Jhansi Office."

On 17th June, 1950 the Jalna Office sent to the Jhansi Office of the Bank the following telegram:

> "Seven four-three Yours twelfth. Wire whether we may refund rupees fifteen thousand to Jugal Kishore Lachhi Ram debiting your account."

On 19th June, 1950, the Jhansi Office replied to the Jalana Office telegraphically as follows:

> "Yours seventeenth. Do not debit our account. Letter follows".

On 20th June, 1950 the Jalna Office sent the following telegram to the Jhansi Office:

> "Seven eight zero. Yours twelfth debited fifteen thousand our entry tenth reversed".

On the same day, the Jhansi Office sent a telegram to the Jalna Office in the following terms:

> "Yours twentieth. Refer qur wire nineteenth also oar letter one six two nineteenth. Do not debit our account."

A perusal of the telegrams reproduced above shows that on the 12th of June, 1950 the plaintiffs had taken the positive stand that they had been defrauded and on the 17th June, 1950 they definitely wanted their money back on the ground that they had been defrauded. From the statement of Lachhi Ram it is clear that on 13th June, 1950, he was informed by the Jhansi Branch of the Central Bank that payment to Sri Chand had been withheld. Section 19 of the Contract Act does not require

that an agreement shall be rescinded in a particular form and all that Section 66 provides for is that the rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal. Section 4 of the Contract Act provides that the communication of a revocation is complete as against the person who makes it when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it and as against the person to whom it is made, when it comes to his knowledge. In my judgment, the Central Bank was the agent of Sri Chand. The reasons why I have come to that conclusion are set out in a later part of this judgment while dealing with the question of notice under Section 86 of the Indian Trusts Act. Inasmuch as the Central Bank was the Agent of Sri Chand and the former had been informed by the plaintiffs that they had been defrauded and the sum of Rs. 15,000/- should not only be withheld from Sri Chand but should be paid back to them, they had in effect informed the Agent of Sri Chand about rescission of the contract on the 12th, 13th and 17th June, 1950. Consequently, I am unable to hold that the contract had not been rescinded by the plaintiffs before July 27, 1950.

10. Again, on the question of law, I am of the opinion that when Section 19 speaks of an agreement obtained by fraud to be voidable, it only means that the agreement is void at the option of the deceived party. That section does not sive any support to the defrauding party to build a titld in respect of the property or the money obtained by fraud. In this connection it would be relevant to Reproduce Section 19 of the Contract Act in extenso:

> "When consent to an agreement is caused by coercion ... ... fraud or misrepresentation, the agreement is a contract 'voidable at the option of the party whose consent was so caused'.
>
> A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit 'insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true'.
>
> Exception : If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.
>
> Explanation; A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised or to whom such misrepresentation was made, does not render a contract voidable."

(Underlined (here in ' ') by me). As I read the section, it gave the plaintiffs the right either to treat the contract as void or to affirm it if they thought fit to do so. It would be noticed that under this section no rights have been conferred on the person who practises fraud. The rights that have been conferred are upon the person who has been cheated or deceived. All that the 'legislature intended to provide for was that whereas the person defrauding would have no rights under the agreement if rescinded, the person defrauded could either treat the agreement as void or affirm it. An agreement

can be affirmed either by the positive act of declaring it as such or by the passive act of not declaring it void and by purporting to act under it. In other words "Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void". (See Pollock and Mulla: Indian Contract Act, Edn. 6, p. 365).

In the case of Muralidhar Chatterjee v. International Film Co. Ltd., AIR 1943 PC 34, the Judicial Committee took this statement of law given by Pollock and Mulla as correct. The reason why under Section 19 an agreement obtained by fraud has been kept voidable at the option of the person-defrauded and not wholly void is obvious. The idea was to put the person defrauded in a better position than he would have been if the agreement was void. It is clear that if an agreement is void the person defrauded cannot insist upon the fraudulent party to perform his part of the contract and the contract would be void both for the fraudulent party as also the defrauded party. I have found nothing in Section 19 on the basis of which it can be contended that even though the defrauded party may choose the option of rescinding the contract the defrauded party would have any right in the agreement. The present transaction consisted of Sri Chand giving the Railway receipts purporting to cover goods on the one hand and the plaintiffs paying him Rs. 15,000/- on the other. Inasmuch as there were no goods once that fact was known to the plaintiffs there was nothing for them to affirm and for Sri Chand to do even if the agreement was recognized by the plaintiffs. The present is not a case where the parties were required to do something in future. By the very nature of the agreement there was no scope for its being affirmed.

11. There is nothing in Central National Bank Ltd. v. United Industrial Bank Ltd., 1954 SCR 391: (AIR 1954 SC 181), also to suggest that Sri Chand or the Official Receiver would have any title to the money in dispute. What had happened was that one Bhuiya owned a large number of shares. There was an agreement between Bhuiyan and one Mukerji , for sale of those shares to the latter for the price of Rs. 38,562-8-0. Bhuiya delivered the share scripts to the United Industrial Bank Ltd. (hereinafter referred to as the United Bank). The United Bank gave the share scripts to one of its employees Paul with directions that he should go to Mukerji in his chambers and deliver the share scripts aftef receiving the sum of Rs. 38,562-8-0 from him. Paul went to the chambers of Mukerji and the latter started looking into the scripts. Paul objected saying that until the price had been paid, Mukerji should not take the scripts. Mukerji, however, assured Paul that he was just going out to get the pay order and would be returning forthwith. In this manner, Mukerji took away the share scripts without paying the price. He went straight to the Central National Bank Ltd. (hereinafter referred to as the Central Bank) where he had already opened a current account by giving a cheque for Rs. 100/- and had obtained facilities for over drafts. Against the security of the share scripts, Mukerji after executing a promissory note, obtained an over draft of Rs. 29,000/- from the Central Bank. Paul having waited for Mukerji for some time returned to the United Bank and informed his superior officers as to what had happened. Mukerji was not seen any longer thereafter. Treating one Shaw as an accomplice of Mukerji, the Calcutta police prosecuted him but the case ended in an acquittal. The United Bank paid to Bhuiya the entire sum of. Rs. 38,562-8-0. The dispute arose between the two banks. The Central Bank instituted a suit on the original side of the Calcutta High Court for a declaration that it had acquired the rights of a pledgee in respect of the two blocks of shares in two companies. The claim was for recovery of possession of shares and also for damages alleged to have been suffered by the plaintiff Bank by reason of wrongful denial of its title by the

United Bank.

It is noteworthy that at no stage during the litigation right from the Court of the learned Single Judge to the Supreme Court was it ever disputed "that Mukerji did not acquire any legal title to the shares". The position of Mukerji was similar to that of Sri Chand in our case. With regard to his rights the Supreme Court took pains to emphasise that admittedly he had no rights. The dispute was between the two Banks. It was contended by the plaintiff Bank that it had received the shares by way of pledge in good faith and without notice of the defect in the title of Mukerji who had agreed to purchase those shares from Bhuiya and had actual possession of the same with the consent of the seller with the result that the pledge would be effective under the provisions of Section 30(2) of the Indian Sale of Goods Act in the same way as the right of the original seller did not exist. The case of the defendant Bank on the other hand was that Mukherji was not in possession of the shares nor was the plaintiff Bank a bona fide pledgee without notice of the title.

The Trial Court (the Single Judge of the Calcutta High Court) who decided the case in favour of the plaintiff held that Mukerji had obtained possession of the shares with the consent of the agent of Bhuiya, i.e. Paul Within the meaning of Section 30(2) of the Indian Sale of Goods Act and it was immaterial as to whether or not Paul's consent had been obtained by fraud. On appeal a Division Bench of the Calcutta High Court reversed the judgment of the learned Single Judge on the finding that Paul never consented to Mukerji's obtaining possession of the shares as buger and that there was no intention to give delivery at all. The matter was then taken up to the Supreme. Court. Their Lordships of the Supreme Court affirmed the decision of the Bench of the Calcutta High Court and held that Mukerji had not the consent of Paul to take away the share scripts and dismissed the appeal.

This decision is not on Section 19 of the Indian Contract Act but on Section 30(2) of the Indian Sale of Goods Act, the language of the latter being completely different from that of the former. Neither Section 30(2) nor the Supreme Court decision mentioned above protect a cheat but only an innocent transferee, under specified circumstances. Section 30(2) of the Indian Sale of Goods Act has been enacted to protect an innocent purchaser who has received, the property in good faith and, without notice of lien or other right of the original seller in respect of the goods, which admittedly is not the position of Sri Chand. This provision is obviously based upon considerations of public policy and the larger interests of society. In civilised countries, where transactions of buying and selling are every minute occurrence, such a provision was needed in the interest of free flow of commerce and in order to protect persons who buy goods in good faith without knowledge of the rights of the real owner in the same. It is the counterpart in the Indian Sale of Goods Act, which deals with movable property, of S. 41 of the Transfer of property Act, which deals with immovable property. The considerations which led to the enactment of Section 30(2) of the Indian Sale of Goods Act are wholly different from those which led to the enactment of Section 19 of the Indian Contract Act. No considerations of public policy are involved in the enactment of the latter section. As I read Section 19 of the Indian Contract Act, I believe it to mean that the fraudulent party cannot build any rights an a contract obtained by fraud though it is open to the deceived party either to insist that the contract shall be performed or to declare it void. It is only when the deceived party insists on the performance of the contract by the defrauding party that the latter can insist on its rights in the

contract and not otherwise. Immediately a contract is rescinded by the defrauded party on the ground of fraud, it is rendered void ab initio, i.e., right from the inception.

In AIR 1943 PC 34, the Judicial Committee while considering the scope of Section 19 of the Contract Act observed as follows :

> "This is certainly so in any case under Section 19; it is enforceable at the option of the party only in the sense that that party may elect to treat it as not binding upon any party. The voidable contract in a case of undue influence is either going to be good or wholly void. After rescission it will not be enforceable at all."

What is true of undue influence is also true of fraud. In a case of fraud the right of the defrauding party would not stand extinguished from the date on which the defrauded party declares the contract void but that party would in the eye of law be treated never to have had any right. This is clear from the provisions of S. 64 of the Contract Act as well which requires the restoration of those benefits also which have accrued under the contract even before the date of rescission of the same. It is for these reasons that I respectfully disagree with my brother Dwivedi.

12. I would take the approach of Dwivedi, J. to the case only in the alternative.

13. I now proceed to give my reasons for the conclusion that the appeal should be dismissed. The agreement was declared void and the contract rescinded by the plaintiffs on 12-6-1950 and they are entitled to receive back the money paid by them. With the rescission of the contract Sri Chand lost all rights to the money. Except the contract there was nothing else to support his chum to Rs. 15,000/-. Besides in view of the circumstances of the present case, the amount would also be treated to have been paid under a mistake within the meaning of Section 72 of the Indian Contract Act. There is good authority for the proposition that money paid under mistake induced by fraud may be recovered under this section. (See Shugan Chand v. Government, North Western Provinces JLR 1 All 79, Anrudh Kumar v. Lachmi Chand, AIR 1928 All 500, Raghavachariar v. Thiruvenkatsami Iyengar, 17 Mad LJ 82 and Khimji Chaturbhuj v. Sir Charles Forbes Baronet, 8 Bom HCR OC 102. The word "mistake" in Section 72 of the Indian Contract Act has been used without qualification or limitation (See Shiba Prasad Singh v. Srish Chandra Nandi, AIR 1949 PC 297). There is good authority that "there is no warrant for ascribing any limited meaning to the word 'mistake' ..... It is wide enough to cover not only a mistake of fact but also a mistake of law ..... The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same. No distinction can therefore, be made in respect of tax liability and any other liability on a plain reading of Section 72 of the Indian Contract Act even though such a distinction has been made in America." (See Sales Tax Officer v. Kanhaiya Lal, AIR 1959 SC 135 at pp. 141 and 142).

That was a case where an amount had been paid to the State as tax in the belief that it was due but ultimately it was held that the tax was illegal and the person who had paid the amount wanted its recovery under Section 72 of the Indian Contract Act.

14. Another line of reasoning also supports the plaintiffs' case. Section 10 of the Indian Contract Act reads as follows :

> "10. All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

An agreement can be a contract only if it is made with the free consent of the parties competent to contract and for a consideration. It is elementary that an agreement without consideration is not a contract. It is true that a promise to pay or to supply goods in future can also be a consideration under certain circumstances. However, in the present case the alleged consideration was not a promise to deliver some goods in future but the supposed goods purporting to be covered by the forged railway receipt, and inasmuch as there were no goods it must be held that there was no consideration for the contract. There being no consideration for the receipt of Rs. 15,000/- which Sri Chand obtained by fraud, it must be adjudged to be a case of constructive trust. A constructive trust is imposed in order to prevent unjust enrichment. "It is frequently said that a constructive trust is imposed as a remedy for fraud" (see. Scott on Trusts, Vol. III, p. 2313, Art. 462. 1939 Ed.). In McCormick v. Grogan, (1869) 4 HL 82 at p. 97, Lord Westbury speaking of the jurisdiction to enforce a constructive trust said :

> "It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud."

I will deal with the question whether or not Section 86 of the Trusts Act applies to the facts of this case at a later stage but even assuming that neither that section nor any other section of that Act applies, the position of Sri Chand cannot be any other than that of a constructive trustee; so far as I can see this alternative approach is not affected by the principle "that to the extent that the Indian Contract Act deals with a particular subject it is exhaustive upon the same" laid down in Ganga Saran v. Firm Ram Charan Ram Gopal, 1952 SCR 36: (AIR 1952 SC 9) and reiterated in AIR 1959 SC 135 (Supra) because once it is held that the contract was not formed the provisions of the Indian Contract Act would not be applicable.

15. There is yet another way of looking at the case and reaching the same conclusion. It is well established that where a contract is fraudulent no property delivered under it passes from the owner and he continues to be entitled to it. See Allahabad Bank Delhi v. Firm of Madan Mohan Kishen Lal. 39 Ind Cas 169: (AIR 1917 Lab 431), Dursun Lal Panday v. Indur Chunder Baboo, 6 Suth WR 81, Small v. Attwood, (1832) 159 ER '1051 (1103) and Bellamy v. Sabine (1847) 41 ER 1007 (1013).

In the present case Sri Chand has got possession of the sum of Rs. 15,000/- by committing a criminal offence (Section 420, I. P. C.). No person can confer on himself a legal right to something

by acting in a wrongful manner. It is true that no one can take advantage of his own fraud (nul prendra advantage de son tort demesne). Thus no title passed to Sri Chand in respect of this sum of Rs. 15,000/-. It is also elementary that the Receiver would have no title in the money superior to that of Sri Chand. On this ground also the plaintiffs are entitled to the amount in dispute. In following this line of reasoning, I am not cutting across the provisions of Section 37(2) of the Bengal, Agra and Assam Civil Courts Act and am not invoking equity at the cost of law. It is not the scheme of our law to protect a cheat or to recognise his rights in property which he has received fraudulently by committing a cri-'minal offence. I have already said in an earlier part of this judgment that if Sri Chand had been convicted by a criminal Court that Court would have had ample jurisdiction to direct the Bank to pay the sum of Rs. 15,000/- to the plaintiffs and not to Sri Chand or the Receiver under the provisions of Section 517 Crj P. C. Besides, it is well known that the principles of English law and of equity have, in the absence of specific provisions in the Indian statutes, been applied by Indian Courts even in connection with cases of contract. As an instance may be mentioned the Hindu Law of Contract known as Damdupat which prevents interest exceeding the amount of principal being recovered at a time. This rule is still in force in the Bombay Presidency and in the Presidency towns of Calcutta.

16. I will now deal with the submission made by learned counsel i'or the defendant-appellant on the basis of Section 86 of the Indian Trusts Act. That section reads as follows:

> "86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake the transferee must, on receiving notice to that effect hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid."

Section 86 of the Indian Trusts Act requires two things. In the first place the property must be transferred in pursuance of a contract liable to rescission, and secondly the transferee must be given notice to that effect by the transferor. It is contended that inasmuch as the contract was obtained by fraud it was voidable at the option of the plaintiffs-respondents under Section 19 of the Indian Contract Act and thus the first condition of Section 86 of the Indian Trusts Act is fulfilled. It is then submitted that the Bank which had collected the sum of Rs. 15,000/- from the plaintiffs-respondents was in the position of an agent of Sri Chand and inasmuch as the plaintiffs-respondents had informed the Bank that it had been defrauded and a request was made to withhold the payment,' the second condition of Section 86 of the Indian Contract Act was also fulfilled and a notice contemplated by that section would be deemed to have been given by the transferee to She transferor. On behalf of the appellant Official Receiver reliance is placed upon the following passage in the judgment of Desai, J. in Sahaney's case, F. A. F. O. No. 157 of 1952 (All) for the proposition that the contract was not induced by fraud:

> "So far as the contracts are concerned they are of the supplying of certain quantities at a certain price on the one side and for the buying of that quantity of wheat at that price on the other. The terms are plain and simple and there is nothing in the contracts which can be said to make them liable to rescission on any ground. The respondent's case is that the fraud which Sri Chand practised on them was to induce

> them to part with their moneys on contracts which he never had any intention of fulfilling himself and that their contracts were therefore liable to rescission..... The fraud which according to him has been perpetrated on the respondents is something outside and subsequent to the contracts themselves."

Sahney's case, F. A. F. O. No. 157 of 1952 is based on its own facts. Whether or not a contract has been induced by fraud or mistake is always a question of fact depending upon the facts of that particular case. That being so, I take the observations made by Desai, J. in Sahney's case as confined to the facts of that case. The trial Court has recorded a categorical finding with which both myself and my learned brother are in agreement, that the railway receipts did not cover any goods and Sri Chand had obtained the sum of Rs. 15,000/- from the plaintiffs by practising fraud. That being so, it must be held that the first condition of Section 86 of the Trusts Act has been fulfilled in the present case.

17. With regard to the second condition, the matter is a little more difficult. I have already mentioned that the Hundi had been sent by Sri Chand through the Jhansi Branch of the Central Bank to the Jalna Branch and the latter Branch Collected Rs. 15,000/- from the plaintiffs and remitted it to the Jhansi Branch. In addition, there is the uncontroverted statement of Lachhi Ram plaintiff that the plaintiffs had received a telegram from Sri Chand asking them to pay Rs. 15,000/-to the Jalna Branch of the Central Bank. The two Branches were of the same Bank. Consequently, there can be no escape from the conclusion that the Central Bank was the agent of Sri Chand. It is clear from the telegrams and the statement of Lachhi Ram that the information given to the Bank amounted to the rescission of the contract.

18. It has been contended on behalf of the respondents that under the provisions of Section 229 of the Indian Contract Act, notice to the agent is notice to the principal, if given in the course of the business transacted by the agent. There cannot be the least doubt that the Central Bank would continue to be the agent of Sri Chand until the sum of Rs. 15,000/- was credited to his account. There is, however, no evidence 011 the record that the amount has been transferred in the account of Sri Chand. Even in the written statement filed by the Bank, all that is mentioned is that "the answering defendant, by wire, informed the Jalna Branch that the payment had been withheld and the said sum paid by the plaintiffs is now lying at the Jhansi Branch of the answering defendant". The plaintiffs' express case was that "the said amount paid by the plaintiffs is now lying at the, Jhansi Branch of the defendant No. 2". The 'Official Receiver in his written statement never alleged that the amount has been transferred in the account of Sri Cband. Para 16 of his written Btatement is as follows:

> "That, the amount that is in deposit in the Central Bank Jhansi is deposited in the name of Panna Lal Balmakund Proprietor Sri Chand and was deposited to the extent of over Rs. 38,000/-and as such there was no particular amount chalked out, for which a declaration of title could be sought. Pannalal Balmakund (Prop. Sri Chand) had interest in all the money that was deposited in the Central Bank (in whatever manner that money was deposited) and that interest now vests in the contesting defendant. Suit for declaration is not legally maintainable."

There is no evidence on the record to show that the amount of Rs. 15,000/- realised from the plaintiffs by the Bank was even transferred in the account of Sri Chand. The Official Receiver has rot produced any evidence and Lachhi Ram, who is the solitary witness in the case, has not deposed anything about it. The copies of telegrams which have been filed in the case by the Central Bank also do not prove this fact. Consequently, there is no material on the basis of which it can be held that the amount of Rs. 15,000/- is not lying in the Jhansi Branch of the Central Bank unaccounted for but has been credited to the account of Sri Chand. Till the amount is not actually credited to the account of Sri Chand by the bank, the latter remains the agent of the former. The agency will terminate only after the amount has been credited in the account of Sri Chand for which, as already staled, there is no evidence. The Central Bank would therefore, be deemed to have been the agent of Sri Chand acting in the course of transacting business for him when it received information about rescission of the contract from the plaintiffs. That being so, it must be held that Sri Chand had notice of the rescission of the Contract within the meaning of Section 36 of tho Trusts Act and its second condition is also fulfilled.

19. Even if it be assumed -- though there is no material tor that assumption -- that the amount was transferred in the account of Sri Chand, the fact will still remain that there is neither any evidence nor averment that it was transferred in the account of Sri Chand before June 17, 1950 by which time the plaintiffs had, as already said above, rescinded the contract and given notice. Even in that view of the matter, the second condition of Section 86 of the Trusts Act would stand fulfilled and the position of Sri Chand would be that of a constructive trustee.

20. In AIR 1955 All 676 (Supra), Agarwala and Mulla, JJ. in a case similar to ours, applying the principle of Section 86 of the Indian Trusts Act, decreed the suit but the learned Judges did not consider the question of notice and proceeded chiefly on equitable considerations. That case, therefore, cannot provide a precedent for us though the conclusion to which I have arrived is the same to which the learned Judges in that case had arrived. In Clarkson v. Davies, (1922) 32 Mad LT 196 at P- 204 (PC), it was held that the amounts improperly paid to the Director of a company can fee recovered by the liquidator on the basis of constructive trust. A similar view was taken in -Peoples Bank of Northern India, Ltd. v. Har Kishen Lal, AIR 1916 Lah 408. Even if it be assumed that the amount of Rs. 15,000/- had been credited to the account of Sri Chand on the date of the filing of the suit inasmuch, as it can be traced out, it can be followed up in the hands of whomsoever is in possession. (See AIR 1955 All 676 (supra), Subramanian Chettiar v. Rajah Rajeshwari Dorai, ILR 32 Mad 490 and Kushdan Khan Kabuli v. Official Assignee, Madras, AIR 1936 Mad 21. In the last case a Kabuli had deposited a certain amount of money for safe custody with a person who later on became insolvent. The question arose whether the amount deposited by the Kabuli could be treated to be a debt. The Madras High Court held that the money had got to be returned to the depositor and was not divisible among the creditors of the insolvent and the claim of the Offical Assignee that Kabuli could only file a claim and get a pro rata sum was rejected.

21. The only other, question that requires our attention is whether the provisions of Section 28 of the Provincial Inscolvency Act (hereinafter referred to as the Insolvency Act) are fatal to this suit. I have already given dates showing that the suit had already been commenced before the adjudication order was passed by the Insolvency Judge. Section 28(2) had no reference to suits or other

proceedings actually pending at the date of the order of adjudication. It is settled that adjudication order does not affect suits already filed. (See Re Wray, (1887) 36 Ch. D. 138 at p 143 and Re Berry. (1896) 1 Ch 939 at p. 946). It is also well established that if a suit was validly filed and the Court had jurisdiction to entertain it on the date of the institution subsequent events would not lead to the defeat of the suit unless expressly provided to that effect by a legislative enactment. (See Venugopala Reddiar v. Krishnaswami Reddiar, AIR 1943 FC 24).

In that case a suit had been filed in a British India Court at a time when Burma had not separated from India. During the pendency of the suit Burma became an independent country and the question arose whether the Indian Court would have jurisdiction to adjudicate in respect of the property situated in Burma in view of the wellknown principle embodied in municipal law of all civilised states that a Court would have no jurisdiction to entertain an action for the determination of the title or right to possession of property situate in a foreign land. The learned Judges of the Federal Court observed as follows;

> "The true position as we have already stated as not whether there is an express provision permitting the continuance of pending proceedings, but whether there is any clear indication against the continuance of pending proceedings to their normal termination."

Another ground why Section 28 of the Insolvency Act did not bar this suit is that the sum of Rs. 15,000/- does not belong to Sri Chand the insolvent. Even if it is assumed that the money was shown in the Bank account of Sri Chand, that would not alter the position because I have already shown above that he had not even a semblance of a title to it and the title to it always remained with the plaintiff. No one can give to another a better title than he has and the Official Receiver is no exception to this general rule. The Insolvency Act is a Special enactment. Its provisions can exclude the jurisdiction of a competent civil Court only to the extent to which they expressly bar it.

A suit for a declaration as claimed in the present case is maintainable under Section 9, C. P. C., 39 Ind Case 169: (AIR 1917 Lah 421) is an authority for the proposition that unless the money belongs to the insolvent it cannot be seized by the Official Receiver. Again, it is difficult to hold that this sum of Rs. 15,000/- is a debt. If it is not a debt it can be proved in Insolvency proceedings. In view of my finding that the money was obtained by fraud by Sri Chand and as such his position was that of a trustee and not of a debtor, the sum of Rs. 15,000/- cannot be treated to be a debt. Generally speaking debt is defined as a liquidated sum payable either immediately or at some future time. The question however is whether in, the absence of the relationship of a debtor and a creditor the element of debt can exist. In other words, whether an author of a trust and trustee can be relegated to the position of a creditor and a debtor. As at present advised, I would find it difficult to hold that the amount of Rs. 15,000/- which, according to my finding, is held in trust can be treated to be a debt. However, it is not necessary to express any final opinion on this question because on the grounds already mentioned above, the suit of the plaintiff was, in my opinion, rightly decreed. In my judgment, the appeal is liable to be dismissed.

22. I would, therefore, dismiss the appeal with costs.

Dwivedi, J.

23. The essential facts of the case are;

Sri Chand. the second defendant, was seemingly in the wholesale business of selling foodgrains under the name and style of Pannalal Balmukund nt Jhansi. He offered to supply foodgrains to the plaintiff firm at Jalna in Hyderabad. Sometime in June 1950 he sent by post two forged railway receipts to the plaintiff and simultaneously also sent a hundi for Rs. 20,000/- through the Central Bank of India Ltd., Jhansi branch, for collection from the plaintiff. The plaintiff declined to pay that much amount, which was then reduced to Rs. 15,000/- by him. The plaintiff paid the reduced sum to the Jalna branch of the Central Bank of India Ltd. on June 10, 1950. The Jalna branch transmitted the amount to the Jhansi branch. On receiving railway receipts the plaintiff discovered that they referred to some bundles of Jaggery shown to have been booked from the Datia railway station to Jalna on June 2, 1950. On June 12, 1950 the plaintiff, suspecting fraud, instructed the Jalna branch of the Central Bank of India Ltd., to stop payment of Rs. 15,000/- to Sri Chand. On that very date the Jalna branch telegraphically asked the Jhansi branch to withhold payment. The amount could not therefore be withdrawn by Sri Chand. On July 27, 1950, a certain person applied to the insolvency Court at Jhansi for ad-judging Sri Chand an insolvent. The Court directed the bank to retain the amount. On August 7, 1950 the plaintiff filed a suit against Sri Chand and the bank for a declaration that the amount in deposit with the bank belonged to it and not to Sri Chand. On September 30, 1950 Sri Chand was adjudged insolvent, and the Court appointed a Receiver of his property. The plaintiff then impleaded the Receiver to the suit. The Receiver, in his Written statement claimed that Sri Chand was the owner of the money-deposit and that the plaintiff should prefer a claim in the Insolvency Court, prove it and share with other creditors the divisible dividends. Sri Chand did not appear.

24. The trial Court has found that the railway receipts were bogus and forged and did not cover any goods. It has also found that "the intention of Sri Chand never was to send any goods for the amount paid but only to defraud the plaintiff. "These findings are not challenged, but it is strongly pressed that Sri Chand and through him the Receiver -- is the owner of the deposited sum. AIR 1955 All 676 is against the Receiver. In similar circumstances Agarwala and Mulla, JJ. upheld the claim of the transferor to the money against the Receiver in insolvency of the property of the defrauding transferee on equitable considerations, Agarwala, J. speaking for the Court, said, "Equity protects a person who has been defrauded and therefore declares that if the amount paid by him can be traced in the hands of the person who has received it, the Receiver is charged with a trust for the benefit of the person defrauded."

The judgment refers to, but does not decide on the basis of, Section 86, Trusts Act, which makes the transferee of property a constructive trustee for the benefit of the transfer or in certain circumstances and conditions.

25. The Receiver says that in India the matter is regulated by Section 86 of the Trusts Act and equity cannot override law. It is said that the plaintiff did not give any notice to Sri Chand that the contract was induced by fraud. He points out that a Division Bench of the Court has dissented from the

opinion in Rameshwar Swarup's Case, AIR 1955 All 676. That decision is not reported (F. A. F. O. No. 157 of 1953 decided by Desai and Takru, JJ. on 10-9-1957).

In that case Desai, J. said that Section 86 would apply only on the fulfilment of two conditions firstly, that the property should have been trans ferred in pursuance of a contract which is liable to rescission or is induced by fraud or mistake, and, secondly, that the transferee must be given a notice to that effect. As regards the first condi tion he held that it was not proved that the trans feree had practised fraud on the transferor at the time of the formation of the contract; as regards the second condition he found that a notice noti fying fraud was not sent to the transferee by the transferor. It was therefore held that S. 86 did not help the transferor against the Receiver. He did not apply equity and dissented from the earlier decision.

26. Unlike Sahney's case, F. A. F. O. No. 157 of 1953 (All) the first condition is fulfilled here. There is here the unchallenged finding of the trial Court that Sri Chand never intended to send any goods and had from the very beginning conceived the design of defrauding the plaintiff. The finding is supported by evidence on recofd. As he never intended to send any goods, it should be Inferred that he had at the time of the formation of the contract made a promise without any intention of performing it. The plaintiff believed his fraudulent promise and agreed to pay. He thus parted with money in pursuance of a contract which was induced by fraud.

27. The second condition is, however, not satisfied, for there is no evidence to prove that the plaintff had given notice of the fraud of Sri Chand. Section 86 would not accordingly help the plaintiff.

27a. According to the trial Court Sri Chand 'never acquired any right' to the money, as the contract was induced by fraud, and he would be deemed to hold the money 'as agent' of the plaintiff. He has taken support for his view from 39 Ind Cas 169: (AIR 1917 Lah 421). That is a converse case of a vendee buying and taking delivery of goods with the preconceived intention of never paying the price. It was held that the contract was void for fraud and that the vendee held the goods not as owner but as agent of the vendor. 6 Suth W. R. 81 is relied upon as authority for the view taken. As for this case it is sufficient to say that it was decided before the passing of the Contract Act which would govern the present case. The former case although decided after the commencement of the Contract Act, make, no reference to its provisions.

28. The plaintiff came to Court with the case that Sri Chand made an epistolary offer to send foodgrains to the plaintiff who accepted the offer and' that 'in pursuance of the said offer' Sri Chand sent the hundi and the forged railway receipts to the plaintiff. (See paras 3 and 4 of the plaint). Lachchi Ram, the managing partner of the plaintiff firm, has admitted in his cross-examination that negotiations for sale and purchase of foodgrains were concluded at Jhansi.

He further admitted that although the negotiations did not touch upon the mode of payment but 'making payment through hundi is the business form of the present day.' The contract thus appears to have been concluded at Jhansi and the 'consideration on either side consisted of a promise to do an act -- a promise to deliver foodgrains by Sri Chand and a promise to pay through hundi by the plaintiff. On either side the consideration was executory.

29. Under Section 17 of the Contract Act fraud means and includes a promise made without any intention of performing it. Under Section 19 of that Act when consent to an agreement is caused by fraud, as here the agreement is a contract voidable at the option of the party whose consent was so caused. The contract between the plaintiff and Sri Chand was accordingly voidable and not void. Authority is all one way for the view that if a buyer purchases and obtains delivery of goods under pretence of a promise to pay but with a preconceived design of never paying for them, the contract for sale of goods is voidable and not void Ferguson v. Carrington, (1829) B and C 59; Load v. Green, (1846) 15 M. and W. 216;. Clough v. London and North Western Ry. Co., (1871) 7 Ex 26: Donaldson v. Farwell, (1876) 23 Law Ed 993, Tholasiram v. Duraji, 15 Mad LJ 375). And it cannot be otherwise when the victim of farud is the buyer. If a buyer pays some money in exchange of the promise of the seller to deliver goods which he has no intention to perform, the contract would be voidable only. Fraud voids a contract when the mind of the defrauding party and of the defrauded party cannot be said to have met as in a case of impersonation (Cundy v. Lindsay, (1878) 3 AC 459) but the case before us is not of that kind.

30. The trial Court seems to have thought that the agreement in the instant case was without consideration. But under Section 2(d) of the Contract Act the promise by Sri Chand to send food-grains would itself be consideration for the plaintiffs promise to pay. Serious intent to perform the promise is not necessary under the law. Corbin in his treatise on Contracts, (1950 Edn.) Vol. I, page 353, writes:

> "Practical jokers and intentional dcfrauders that they did not intend to perform, that they were not serious or honest in making, and that they did not believe to be enforceable."

31. The reason is that the chief purpose underlying the law of contract is not to carry out the will of the promisor but "the avoidance of disappointment arid loss to the promisee". The law seeks to fulfil his expectations. In Harrison v. Cage, (1698) 12 Mod Rep. 214, it was said that "A promise without consideration is void, but where there is a promise against a promise, one promise is consideration of the other because each may have his action against the other for non-performance."

Section 19 of the Contract Act gives to the party defrauded an option to enforce the performance of the promise made by the defrauding party or to claim damages for breach of contract.

31. Nor is the enforcement of morals the predominent object of the law of contract. The conduct of Sri Chand may amount to an offence under Section 420, I. P. C. but that alone would not void the contract. (See 1954 SCR 391: (AIR 1954 SC 181)). It is interesting to notice that Explanation 3 to Section 108 of the unamended Contract Act, which provided that a bona fide purchaser for value of goods from a person obtaining possession of the goods under a contract voidable at the option of the other contracting party shall not become the owner of the goods if the circumstances which render the contract voidable amounted to an offence committed by the person in possession, does not now find place either in the Act or in the corresponding Section 29 of the Sale of Goods Act, and now title in the goods would pass to a bona fide purchaser for value and without notice of fraud.

32. In my opinion the contract between Sri Chand and the plaintiff is not void but voidable. A voidable contract is binding and efficacious until avoided by the party defrauded either by repudiating it or by obtaining a judicial rescission of it. In view of Sections 66 and 4 of the Contract Act the repudiation to be effective must be communicated to the other party. In this case there is no evidence to show that the plaintiff had repudiated the contract to the knowledge of Sri Chand before July 27, 1950, on which date the application for adjudging him insolvent was made. The contract accordingly stood valid and operative on that date and would pass property in the money to Sri Chand subject of course to what is to be stated later. Oakes v. Turauand and Harding, (1867) 2 HL 325, Reese River Silver Mining Co. Ltd. v. Smith; (1869) 4 HL 64; United Shoe Machinery Co. of Canada v. Brunet, 1909 AC 330.

33. As the contract had not been rescinded, Section 72 of the Contract Act would not apply; nor would equity aid the plaintiff by imposing a constructive trust on Sri Chand. Courts in this State administer equity by virtue of Sub-section (2) of Section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887. Sub-section (2) provides that in cases not provided for by any other law for the time being in force the Court shall act according to justice, equity and good conscience. The Court cannot make Sri Chand a constructive trustee of the money by overriding the provisions of the Contract Act. When the Contract Act says that a contract induced by fraud is valid and binding until avoided, equity cannot declare that on July 27, 1950 Sri Chand was a constructive trustee of the money for the plaintiff. Equity cannot override the law.

In Ram Coomar Coondoo v. Chunder Canto Mookerjee, ILR 2 Cal 233 (PC), the Privy Council said, "When it is urged that the claim should be decided upon general principles of justice, equity and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases for which no specific rules may exist."

34. In Moheri Bibee v. Dharrnodas Ghosh, ILR 30 Cal 539 (PC), Dharrnodas executed a mortgage as security for a loan taken by him. Later he filed a suit through his mother for a declaration that he being a minor at the date of the execution of the mortgage it was void and should be delivered up to be cancelled. The Privy Council held that the mortgage was executed by a person not competent to contract and maintained the decree for cancellation of the mortgage. Disallowing refund of the mortgage money claimed by the mortgagee the Privy Council said that the Contract Act, 'so far as it goes, is exhaustive and imperative', and that the short answer to the argument founded on equity' is that a. Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person, the Legislature has declared to be void'. These statements of law have been approved by the Supreme Court in 1959 SCR 1350: (AIR 1959 SC 135).

35. Sri Jagdish Swarup, learned counsel for the plaintiff, has strongly relied on the opinion of Mr. Scott in his work on Trusts (1939 Edn.) Vol. III, at page 2313, 2320 and 2334 to the effect that it is frequently said that a constructive trust is imposed as a remedy for fraud. It is a general statement of law, and a general proposition would hardly decide this case. We do not know what the law of contract is in various States of the U. S. A., and without any knowledge of that law it would in my opinion not be proper to decide the case, which is primarily, and principally governed by the Contract Act, in the light of a generalised opinion of Mr. Scott. I can see no means of escape from the

logic of the Contract Act into the sanctuary of equity. If bankruptcy proceedings had not supervened, who knows the plaintiff might have elected to affirm the contract in spite of fraud and enforced! performance of it. After all under the law the plaintiff had the option to affirm or disaffirm the contract after notice of fraud, and until it was disaffirmed in accordance with law it was valid and binding on the parties. It would create a certain legal relation between the parties under the Contract Act, the equity cannot substitute for that relationship a constructive trust even though the plaintiff had not elected to rescind the contract of July 27, 1950.

36. We have not been referred to any case where a Court has imposed constructive trust on the party guilty of fraud even without rescission of the contract. (1869) 4 HL 82, is a case of a will alleged to have been obtained by fraud. In (1847) 41 ER 1007, a conveyance of sale was executed by Bellamy a man of weak mind and profligate in favour of his solicitor Sabine to whom he was heavily indebted, for a very low price. On his death his heir filed a bill for cancellation of the conveyance and recovery of property. Court cancelled the conveyance on the ground of fraud, and then said that Sabine was to be considered a trustee for Bellamy. In (1832) 159 ER 1051, a conveyance was cancelled on the ground of fraud. In neither case the Court was called upon to consider the impact of supervening insolvency of the defrauding partv on the contrary before its rescission. AIR 1936 Lah 408 and P. C. Teigumouth dark-son v. E. C. Davis, (1922) 32 MLT 196, are cases of fraud committed by directors on their companies. A director is in law in the position of a trustee or an agent of the company. When a director representing the company as trustee or agent, fraudulently transfers the property of the Company to himself or to another in whom he is interested, there arise entirely different considerations, one of them being that there are in law no two minds to conclude a bargain.

In 6 Suth WR 81 (supra), the seller offered to sell and deliver goods after the price had been paid. The buyer obtained possession without paying by fraud and pretence. It is plain that there was no concluded contract. In 39 Ind Cas 169: (AIR 1917 Lah 421) it was held that the contract was void on account of fraud. If the word Void' is used to denote void ab initio, then I respectfully disagree. I have already said that the learned Judges were not referred to the material provisions of the Contract Act.

In Rameshwar Swarup's case, AIR 1955 All 676 (supra), it does not appear whether the contract had been rescinded before the filing of the application for insolvency. If it had been rescinded to the knowledge of the insolvent, Section 86 of the Trusts Act would apply. If it had not been so rescinded, then, with great respect to Agarwala, J., I do not see how equity would help so long as the contract subsists.

37. As a result of the foregoing discussions 1 would hold that the contract, not having been rescinded on or before July 27, 1950, passed interest in the money to Sri Chand. Two questions would now arise: (1) what kind of interest passed under the contract of Sri Chand? (2) What vests in the Receiver?

38. The interest passing under the contract to Sri Chand was defeasible at the option of the plaintiff. He could obliterate the contract by electing to rescind it. Such election could be made either by repudiating the contract to the knowledge of Sri Chand (which was not done) or by filing a suit

repudiating the contract (which was done after July 27, 1950). It may be observed that it is neither pleaded nor proved by the receiver that the plaintiff had, by his conduct or otherwise, forfeited the option to rescind the contract after July 27, 1950. When the election to rescind has been exercised, the contract ceases to operate and the property revests in the transferor who is defrauded. It is in this sense that Sri Chand had only a defeasible interest to the money. And the Receiver took only his defeasible interest, for his interest could not be higher than Sri Chand's. Thus the interest that vested in the Receiver was defeasible and may be defeated by the result of the suit of the plaintiff. As we have found that the contract was induced by fraud, the plaintiff is entitled to a declaration that he is the owner of the money deposited in the Bank.

39. The view taken by me is supported by Sheobaran Singh v. Kuisum-un-nissa, ILR 49 All 367: (AIR 1927 PC 113); Tilley v. Bowman Ltd., (1910) 1 KB 745 and (1876) 23 Law Ed. 993-In the first case a zamindar was adjudged insolvent, and the Receiver sold his zamindari share to a stranger. Then a cosharer of the insolvent filed a suit for pre-emption. The auction-purchaser contended that the sale having been made by the Receiver was immune from pre-emption. The contention was accepted by this Court, but negatived by the Privy Council. The Privy Council said;

> "With deference to the learned Judges, it seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. In every system of law the term may vary, but in all there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens." The suit for pre-emption was decreed. In the second case a dispute arose between the vendor defrauded and the trustee in bankruptcy of the Vendee committing fraud whether ownership of the goods obtained by the vendee in pursuance of a contract induced by fraud would vest in the trustee, if the contact had not been rescinded at the date of the commisson of the act of bankruptcy. It was held that the trustee acquired the bankrupt's interest in the property subject to the vendor's right to disaffirm the contract. In the last case it was held that "the assignee has no higher interest in or better title to it than the bankrupt. Only the defeasible title of the latter to the goods in controversy vested in the assignee."

40. I would accordingly dismiss the appeal with costs.

By The Court

41. The appeal is hereby dismissed with costs.