# The Official Assignee vs Madholal Sindhu on 21 August, 1946

## Equivalent citations: (1946)48BOMLR828, AIR 1947 BOMBAY 217

JUDGMENT

Leonard Stone, Kt., C.J.

1. This is an appeal from the judgment of Mr. Justice Bhagwati dated September 17, 1945.

2. In the action the plaintiff, respondent No. 1 in this Court, sought a declaration and consequential relief with the object of establishing that certain alleged liens claimed by and in favour of the Asian Assurance Company, Ltd., (defendant No. 1 and respondent No. 2 to this appeal) upon 26,000 shares in that company do not attach to the shares. The Official Assignee (defendant No. 5 and the appellant in this Court) filed a counter-claim for redemption of the shares claiming that the equity of redemption was vested in him as trustee of the property of Mr. Meyer Nissim who was adjudicated an insolvent on July 16, 1940. In the Court below, the plaintiff was successful in his claim, and the learned Judge granted him certain relief against which there is no appeal, but the Official Assignee's counter-claim was dismissed with costs, and it is against that dismissal that this appeal has been brought.

3. The shares in question are of Rs, 25 each of which Rs. 5 only has been paid up and they still stand in the books of the Assurance Company registered in the name of Mr. Meyer Nissim, because by its articles the Assurance Company has an absolute right to refuse the transfer and consequential registration of any share in the company and in exercise of such right the Assurance Company has refused to transfer the shares, not, I think without good reason, since questions with regard to these 26,000 have been under litigation for over five years. The Official Assignee does not dispute that the plaintiff has some interest in the shares, but he alleges that the plaintiff is not the absolute owner thereof but the pledgee of them, by subrogation to the rights and interests of the New Citizen Bank of India, Ltd., (defendant No. 2 to this action, and respondent No. 3 to this appeal). Hence the counter-claim for redemption.

4. The transactions between the various parties to this action have already been the subject-matter of at least two suits in this High Court, one such suit being No, 921 of 1941, which ended in a compromise and consent decree, and another being suit No. 1001 of 1941 which has a vital bearing upon the questions we have to consider.

5. The relevant circumstances do not admit of any elaborate exposition. The 26,000 shares were registered in the name of Mr. Nissim in the books of the Asian Assurance Company on June 29, 1939, he was at that time and subsequently indebted to the Assurance Company in various amounts, and it is from this circumstance that claims of a lien upon the shares are advanced by the Assurance Company. By an agreement in writing dated September 1, 1939, Mr. Nissim pledged the shares to

the bank to secure all his indebtedness to the bank on whatever account and lodged with the bank the share certificates and blank transfers. The transfers are blank in every sense of the word for they do not even state the shares in respect of which they are given or the name of the company to which they refer.

6. On July 10, 1940, that is to say, six days before he was adjudicated an insolvent, Mr. Nissim's liabilities to the bank on one account, which I will refer to as "the Asian account", stood at Rs. 76,194-13-0, and on another account called his "Personal account" at Rs. 85,117-9-0, and he had also guaranteed the account of one Ezra which stood at an overdraft of Rs. 16,771-9-3 and of Raghavji which was overdrawn to the extent of about Rs. 24000, making his total 'liabilities to the bank upwards of Rs. 2,00,000. The bank held as security not only the 26,000 shares in the Assurance Company but also 787 five per cent, cumulative preference shares and 4089 ordinary shares in the bank itself. In the books of the bank the Asian shares are shown at the head of the Asian account and the bank shares at the head of personal account. But from the instruments of charge it is clear that both classes of shares stood as security for all Mr. Nissim's liabilities to the bank. The date July 10 is important, for it is on it that it is alleged that the bank in exercise of its powers of sale as pledgee of Mr. Nissim effectively disposed of all the shares to Mr. Jamnadas Mehta (defendant No. 3 to this action and respondent No. 4 to this appeal) who was a director of the bank and the chairman of its board in consideration of Mr, Jamnadas Mehta taking over the liabilities of Mr, Nissim to the bank. It is not suggested that any money passed, the whole of the alleged transaction taking place as it is said by entries in various books of the bank, and so it is alleged that the bank thereafter held the shares, no longer as pledgee of Mr. Nissim, but as pledgee for Mr. Jamnadas Mehta to cover the latter's indebtedness to the bank.

7. On July 30, 1941, the plaint in suit No. 1001 of 1941 was declared, that being an action launched by the bank and Mr. Jamnadas Mehta against the Assurance Company, Mr, Nissim and the Official Assignee, the principal object of which was no doubt to have the nature and the extent of the alleged liens in favour of the Assurance Company on these 26,000 shares determined, but for which purpose it was necessary for the bank and for Mr. Jamnadas Mehta to plead respectively their titles. I will presently refer to the pleadings in this action in greater detail, for the importance of an accurate assessment of the contentions which they contain is very great, because the plaintiff's claim to title as the present absolute owner of the 26,000 shares is derived by virtue of a contract which was made "subject to the contentions of the parties to the pending suits Nos. 921 of 1941 and 1001 of 1941 in the Bombay High Court." This contract which the plaintiff sets up as against the Official Assignee is contained in two letters dated respectively October 23 and 24, 1941.

8. The first letter is from the plaintiff to the bank and so far as is material is as follows:-

> Bombay, 23rd October 1941.
>
> Dear Sirs, Re. 26,000 shares of the Asian Assurance Co. Ltd., standing in the name of Mr. Meyer Nissim.

As the pledgee in possession of the above shares of the above Asian Assurance Co. 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 the sum of Rs. 1,20,800 which have been paid by a cheque No. A850298 of the American Express Company Inc. I have agreed and undertaken to tender the amount of the lien if any claimed by the Asian Assurance Co., Ltd., on the said shares, if necessary.

You have delivered to me the relative share certificates pledged with you together with the necessary transfer forms. You have undertaken to execute in my favour an irrevocable power of attorney to vote or to direct the votes in respect of the said shares, according to my directions and desire and to realise and receive the dividends in respect of the said shares either directly and/ or through Meyer Nissim and/or through yourselves and/or through Mr. Jamnadas M. Mehta and pay the same to me. You should diligently and properly prosecute the suits filed by you against the said Meyer Nissim, as also against Asian Assurance Co. Ltd., being suits Nos. 921 of 1941 and 1001 of 1941 as I direct and all instructions given by me in respect of the further prosecution of the said suit shall be followed by you and your legal advisers. The costs, charges and expenses of the said suits are to be borne by you except that I agree to contribute a sum not exceeding Rs. 5,000 towards such costs and expenses.

9. The second letter is from the bank to the plaintiff and is in these terms:--

Reference No. J/1617/41-42.

M. Sindhoo Esq. Bombay, 24th October 1941.

Dear Sir,

Re; 20,000 shares of the Asian Assurance Co. Ltd., registered in the name of Mr. Meyer Nissim.

We duly received your letter of the 28rd instant and the same was placed before the executive committee of the bank at their meeting held on the 24th October 1941. The bank accepts your offer contained in your letter on the understanding that the bank and Mr. Jamnadas M. 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.

Yours faithfully, (Sd.) Jamnapas M. Mehta, Chairman.

10. No attempt has been made to prove any oral contract apart from the letters. As I have already mentioned, suit No. 921 of 1941 was compromised and a consent decree was taken and all parties before us agree that so far as this action and appeal are concerned Suit No. 921 of 1941 has no materiality, indeed the pleadings in it have been neither included in the Appeal Paper Book nor have they been produced before us. We therefore proceed as if the stipulation in the letter of October 24, 1941, referred to contentions in Suit No. 1001 of 1941 only.

11. At the date of the contract the position with regard to suit No. 1001 of 1941 stood as follows. The plaint had been declared on July 30, 1941, and the first amendments to the plaint, viz. those shown in red ink had been made on September 1, 1941, and by paragraph 2 it is alleged that at all times relevant to that suit Mr. Nissim was the registered holder of the shares and by paragraph 4 that Mr. Nissim had agreed that the shares should be security to the bank for repayment of the outstanding general balance of every loan current, cash, credit, overdraft or other account and that the bank should have the power at their discretion to sell the shares or a sufficient part thereof if Mr. Nissim did not maintain a margin of 40 per cent, or failed to repay the amounts due by him, the instrument of charge was marked Ex. "B" and was annexed to the plaint. Then follow allegations and statements of fact relevant to the alleged lien of the Assurance Company, and in paragraph 9 it is alleged that on or about July 10, 1940, it was agreed between the bank and Mr. Jamnadas Mehta and Mr. Nissim that Mr. Jamnadas Mehta should take over all the liability of Mr. Nissim to the bank and be entitled to the interest of Mr. Nissim in all securities given by Mr. Nissim to the bank. Paragraph 10 states the fact that Mr. Nissim was adjudicated an insolvent on July 16, 1940, "and all his estate and effects became vested in defendant No. 3 as the Official Assignee of Bombay" and that the bank informed the Assurance Company that the interest of Mr. Nissim in the said shares " had been transferred to another constituent of the bank, meaning thereby Mr. Jamnadas Mehta. Defendant No. 3 (the Official Assignee) thereafter disclaimed the interest of defendant No. 2 (Mr. Nissim) in the said shares".

12. Paragraph 11 of the plaint is as follows :-

> The plaintiffs (the bank and Mr. Jamnadas Mehta) submit that by the agreement mentioned in paragraph 9 of the plaint the second defendant (Mr. Nissim) ceased to have any interest in the said shares. The plaintiffs (the bank and Mr. Jamnadas Mehta) further submit that in any event on the said disclaimer of the third defendant (the Official Assignee) all the interest of the second defendant (Mr. Nissim) 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 first plaintiff (the bank) as the pledgees of the said shares remain unaffected.

13. The other allegations in the plaint are not material to the issues we have to determine.

14. By letter dated July 29, 1941, the solicitors to the bank and Mr. Jamnadas Mehta wrote to the Official Assignee saying that he had only been added as formal party to suit No. 1001 of 1941 and that no relief was claimed against him. Accordingly the Official Assignee was not represented in suit No. 1001 of 1941 and took no part in it.

15. On November 4, 1941, the Assurance Company filed its written statement and by it denied that the alleged agreement of July 10, 1940, had been made. Paragraph 23 of the written statement which is in these terms deals with the allegation of disclaimer:-

> With reference to paragraph 11 of the plaint the defendant company does not admit the alleged disclaimer of the interests of the second defendant (Mr. Nissim) by the third defendant (the Official Assignee). This defendant company does not admit that the first plaintiff bank were at any time or are the pledgees of the said 26,000 shares. This defendant company denies; the validity of each and all the submissions made in the said paragraph.

16. Upon those allegations and denials issues were framed, and it is issues No. 2 and 3 which are material. Issue No. 2 is: Whether the first plaintiff bank were at any time or are the pledgees of the said 26,000 shares? And the answer of the learned Judge who tried suit No. 1001 of 1941 was in the affirmative. Issue No. 3 is:

> Whether the agreement between the first plaintiff Bank, the second plaintiff (Mr. Jamnadas Mehta) and the second defendant (Mr. Nissim) alleged in paragraph 9 of the plaint was arrived at ?

> And the answer of the learned trial Judge was in the negative. What the bank and Mr. Jamnadas Mehta set out to prove was that on or about July 5, 1940, there had been an oral tripartite agreement between the bank represented by Mr. Deshpande, its managing director, Mr, Jamnadas Mehta, and Mr. Nissim, whereby Mr. Jamnadas Mehta agreed to take over all the liabilities of Mr. Nissim to the bank in consideration of Mr. Jamnadas Mehta taking over all the securities of Mr. Nissim pledged to the bank, which Mr. Jamnadas Mehta was to re-pledge to the bank to secure his own indebtedness and an attempt was made to show that certain documents and entries in the bank's books for the most part dated July 10, 1940, gave effect to such an arrangement. By his judgment delivered on November 1, 1943, speaking of the alleged tripartite agreement the learned trial Judge said :-

> Having seen all these four witnesses in the witness-box (viz. Mr. Mehta, Mr. Deshpande, Mr. Paranjpe and Mr. Gorwane) I am not prepared to accept their testimony as to the tripartite agreement. None of them could give any really satisfactory explanation why the documents did not refer to the tripartite agreement, why it was not recorded in the books of the bank and why in fact the documents disclose a transaction quite different from the one pleaded by the plaintiff.

17. From that judgment the bank and Mr. Jamnadas Mehta appealed to this Court and such appeal was dismissed with costs. There has been no appeal to the Privy Council and the time for any such appeal has now long since, expired. 'It therefore follows that the contention of the bank and Mr. Jamnadas Mehta in suit No. 1001 of 1941 with regard to the alleged tripartite agreement involving the taking over of these shares by Mr. Jamnadas Mehta has been determined against Mr. Jamnadas

Mehta, nevertheless Sir Noshirwan Engineer on behalf of the plaintiff in this action has submitted in a learned argument that the plaintiff has become the absolute owner of the shares. His argument raises seven questions upon all of which we have thought it right to express our opinion since we are told that the matter will in any event go to the Privy Council, for we understand that the acquisition of these 26,000 shares can give control of the Assurance Company to one or other of rival combinations of shareholders.

18. The first question is whether the contract of October 23-24, 1941, was made subject to the result of suit No. 1001 of 1941, or, if it is not, whether it is obligatory upon the bank", if it could or can do so, to make title to the shares to the plaintiff in some other way than as pledgee of Mr. Jamnadas Mehta.

19. The second question is whether the whole dispute as to Mr. Jamnadas Mehta having purchased the shares immediately before the insolvency of Mr. Nissim can be re-opened and re-agitated or whether that question as between the plaintiff and the Official Assignee is res judicata by virtue of suit No. 1001 of 1941. . The third question is whether, if it is open to re-agitate the question of Mr. Jamnadas Mehta's alleged purchase of the shares, he did in fact purchase them.

20. The substratum of the fourth question is that the first part of question No. 1 has been answered in the negative and the latter part by saying that it is obligatory on the bank, if it can do so, to make title to the shares otherwise than as pledgee of Mr. Jamnadas Mehta. So that the question arises whether the bank can still make title as pledgee of Mr. Nissim.

21. The fifth question is subsidiary to question 4 and involves the allegation that Mr. Nissim waived any notice which it is incumbent upon the bank to give under Section 176 of the Indian Contract Act.

22. The sixth question is with reference to an allegation that the Official Assignee is estopped from disputing that the plaintiff is the absolute owner of the shares.

23. And the seventh question involves a plea of res judicata by the plaintiff against the Official Assignee by reason of a third previous action, viz. suit No. 396 of 1940.

24. Before embarking upon any detailed consideration of these questions it may be observed that a sale of shares backed by share certificates and blank transfers is in India a sale of goods and not as in England a sale of choses in action: see Maneckji Pestonji Bharucha v. Wadilal Sarahhai & Co. (1926) L.R. 53 I. A. 92 : s.c. 28 Bom. L.R. 777, in which case Viscount Dunedin, delivering the judgment of the Judicial Committee, said (p. 97) :

> It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Indian Contract Act, these choses in

action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of Choses in action, are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

25. With regard to the first question. This involves a determination of the true construction which has to be placed: upon the two letters which form the contract. In my opinion it is clear that what the plaintiff was setting out to purchase by his letter of October 23, 1941, were the 26,000 shares subject to the Assurance Company's lien, if any, and with notice of the pending actions to the prosecution of which by the bank and Mr. Jamnadas Mehta the plaintiff offered to contribute and on the basis that thenceforth the actions should be conducted as the plaintiff should direct. The letter of acceptance by the bank of October 24, 1941, contains certain new terms which must be regarded as being made as a counter offer and makes it plain that the sale was upon the understanding that the bank and Mr. Jaranadas Mehta were selling "all their respective rights, title and interests in the said shares and that you (the plaintiff) take them subject to the contentions of the parties to pending suits ...No. 1001 of 1941." That counter offer was accepted, for after it was made the share certificates were handed over, and also the six blank transfers, one of which was altered to show Mr. Jamnadas Mehta as transferee and the cheque for the purchase price was cashed on the day following - and the proceeds credited to Mr. Jamnadas Mehta's account at the bank. Are the words "subject to the contentions of the parties to pending suits... .No. 1001 of 1941" to be treated as implying that unless and until title in the vendors be established there is to be no contract, having a similar effect to the words "subject to contract", or are they to be read in the sense that the contract is complete but that the purchaser is to take all the respective rights, title and interests of the vendors, subject to all defects of title which might flow from a determination of the contentions of the parties in the suits mentioned? In my judgment the latter is the correct view. Freedom to prosecute the actions was no longer with the vendors, since the actions were to be prosecuted "as I (the purchaser) direct and all instructions given by me in respect of the further prosecution of the said suits shall be followed by you and your legal advisers." The purchaser was buying the shares subject to the result of suit No. 1001 of 1941, and I do not see how he can complain when as a result of the hearing of suit No. 1001 of 1941 Mr. Jamnadas Mehta was found to be empty of title, so that the bank, though retaining its position as pledgee of Mr. Nissim, was never pledgee of Mr. Jamnadas Mehta and could not sell as such. In my judgment on the true construction of the contract and in the events which have happened, all that passed to the plaintiff was all the right, title and interest of the bank in the shares, that is to say, as pledgee for Mr. Nissim to secure his liabilities to the bank at the date of the contract.

26. This question of construction does not appear to have been argued in the Court below and the judgment of the learned trial Judge, which certainly cannot be impeached on the ground of brevity, does not express any opinion upon the construction of the words "subject to the contentions of the parties to the pending suits No. 1001 of 1941."

27. Being of the opinion I have expressed on the first question, most of the other question do not arise. But, as I have already said, we think it right to express our opinion upon them as this matter may go further.

28. The second question arises from the Official Assignee's plea of res judicata and it does not in my opinion present any great difficulty. In India the doctrine of res judicata is codified and is to be found in Section 11 of the Code of Civil Procedure, which however is not exhaustive.

29. It is a fundamental principle of all Courts that there must be an end to litigation and regrettable though it be that substantially the same issue, viz. whether Mr. Jamnadas Mehta acquired inter alia these shares on or about July 10, 1940, from the bank, should again be the subject-matter of an elaborate trial at which the learned Judge should come to the opposite conclusion to that pronounced in the earlier trial; there is in my opinion a sound reason which makes the doctrine of res judicata no bar to the present suit, though in my opinion if an appropriate application had been made the learned Judge should, in the exercise of the Court's inherent jurisdiction, have struck out the defence to the counter claim as being frivolous and vexatious; see the judgment of Lord Justice Scrutton in Mackenzie-Kennedy v. Air Council [1927] 2 K. B. 517, 528. The question whether apart from the tripartite agreement alleged in suit No. 1001 of 1941, any agreement was come to on or about July 10, 1940, whereby Mr, Jamnadas Mehta purchased these shares might have been and should have been raised in that suit. But the judgment' in the former suit was a judgment inter partes and in order for the doctrine of res judicata to apply there must be reciprocity. There is no difficulty with regard to the position of the plaintiff, he claims title under the bank, who was one of the plaintiffs in suit No. 1001 of 1941, but the difficulty arises from the position of the Official Assignee. He was in fact made a defendant to that suit, but immediately before the plaint was declared the plaintiff's solicitors wrote to the Official Assignee the letter dated July 29, 1941,, with which they sent a copy of the proposed plaint and in which they said:

> We would mention that no relief will be claimed against you and that you are joined as ft formal party only.

30. In my opinion, in these circumstances, if the result of suit No. 1001 of 1941 had been the reverse to what it was and judgment had been delivered on the basis that the bank and Mr. Jamnadas Mehta were respectively pledgee and pledger of the shares, they would have been estopped from raising a plea of res judicata against the Official Assignee who, relying upon the representation made in the letter of July 29, 1941, filed no pleading and took no part at all in suit No. 1001 of 1941.

31. It appears from a number of cases in the Indian Courts to which we have been referred that there has been recognised the status of a "pro forma defendant", or "a formal defendant," as being something different from that of ordinary party and it is said that in the case of a pro forma defendant no plea of res judicata can be raised. In Mulla's Civil Procedure Code, 11th edition, p. 64 under the head of "pro forma defendant", it is stated:-

> A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the question involved; see Order I., Rule 10(2) and Section 82 of the Code of 1882. In such a case no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party, and cannot, therefore he res judicata against him.

32. With respect to the learned author and to the authorities which indicate that a pro forma defendant occupies some peculiar and privileged position different from that of an ordinary party, I am unable to agree. The supposed special status of a pro forma defendant appears to have arisen from nice distinctions which have been drawn between "a necessary party" and "a proper party": see notes to Order I, Rule 10(2), in Mulla's Civil Procedure Code at p. 519, and has flourished because in the Civil Procedure Code there is no equivalent to Order XXV, Rule 4, of the Rules of the Supreme Court in England as to striking out a party against whom no relief is sought. The status of a pro forma defendant has thus been raised up and sustained as an ornamental follower of the principal defendants without any risk of his tailing out a summons to encompass his own elimination and for the payment of his costs. The Privy Council have negatived the special status claimed for a pro forma defendant: see Munni Bibi v. Tirloki Nath (1931) L.R. 58 I. A. 158 : s.c. 33 Bom. L.R. 979, in which case Sir George Lowndes, delivering the judgment of the Board, said (p. 166) :-

> It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position.

33. However, having regard to the letter of July 29, 1941, written by the plaintiff's solicitors to the Official Assignee, it is my opinion for the reasons stated above that the doctrine of res judicata is no bar against the Official Assignee and therefore cannot operate against the plaintiff. But I desire to guard myself from bestowing any approval on a pro forma defendant or of recognising such an entity as in any way different from any other defendant.

34. The third question raises the principal point agitated in the Court below, viz. whether in July, 1940, Mr. Jamnadas Mehta by enforceable and binding contract acquired these 26,000 shares in the Assurance Company. Since in any attempt to establish his title to these shares as a purchaser from the bank the plaintiff has got to show not only that Mr. Jamnadas Mehta acquired the shares but that he re-pledged them to the bank, only in this way can the Official Assignee's claim to redeem the shares be defeated.

35. As pleaded in his plaint the plaintiff alleges:

> 3. Before the 4th defendant (Nissim) was adjudicated an insolvent which was on or about 16th July 1940, the 3rd defendant (Jamnadas Mehta) had become the owner of the said shares and had pledged them with the 2nd defendant company (the bank) the third defendant (Jamnadas Mehta) having taken over the liabilities of the 4th defendant (Nissim) and all the security therefor and that the 2nd defendant company (the bank) had disposed of the said shares to the third defendant (Jamnadas Mehta).

36. So we commence with the same allegations as were negatived in suit No. 1001 of 1941, that is to say, that the bargain was that Mr. Jamnadas Mehta was to take over " the liabilities of Mr. Nissim and all the security there for". The only difference between the allegations in suit No. 1001 of 1941

and paragraph 3 of the plaint in this suit appears to be that the label "tripartite" has now been dropped and no date of the alleged agreement is specified.

37. In suit No. 1001 of 1941 Mr, Jamnadas Mehta, Mr. Deshpande, the managing director of the bank,, Mr. Paranjpe, the secretary of the bank, and Mr. Gorwane, one of the bank's directors, gave evidence and were disbelieved. In this action Mr. Jamnadas Mehta and Mr. Gorwane have not ventured into the witness-box, but Mr. Deshpande and Mr. Paranjpe both gave evidence and in substance repeated what they said in the previous action. Mr. Deshpande is the plaintiff's principal witness and he was in the witness-box on five different days, during which time he tenaciously asserted that the arrangement of July, 1940, was that Mr. Jamnadas Mehta should take over all Mr, Nissim's liabilities to the bank and also all his securities therefor. In his; cross-examination he said:

> One complete arrangement had been arrived at between the parties orally.
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> And a little later he was asked:
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> Ques.: " The arrangement arrived on the 5-7-40 was that Jamnadas Mehta should take over from Nissim all his liabilities to the bank and all his assets ? " Ans. " Yes,"
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> And later he said:
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> This was the only arrangement which was arrived at between the parties before the 10-7-40. No other arrangement was arrived at between the parties till then. I drafted the minutes of the resolutions which were passed by the executive committee of the bank on the 10-7-40.
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> And then the question was put to him:
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> Q.: "I put it to you that at that meeting of the 10-7-40 the whole of the arrangement arrived at on the 5-7-40 was sanctioned by the Executive Committee t"
>
> A.: " It was not sanctioned."
>
> Later in his evidence he said:
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> The arrangement of the 5-7-40 was not that the bank should sell the shares to Jamnadas but that Jamnadas should take over the shares from Nissim together with the liabilities. He was to take over all the assets of Nissim including the shares from Nissim. What was recorded in the resolution of the executive committee on the 10-7-40 was in my opinion not different from what had been agreed upon. On the 5-7-40 the form in which the arrangement was to be carried out whether by a transfer from Nissim to Jamnadas or by a sale by the bank to Jamnadas was not discussed. The form in which the resolution came to be adopted by the executive committee was really the mode adopted by the committee for carrying out the part of the

arrangement which was the subject-matter of the resolution. In my opinion it was one and the same thing, whether one form was adopted or the other. The executive committee did not prefer but they did approve of the course which was ultimately adopted. I do not think that the terms which were agreed upon on the 5-7-40 were altered by what the Executive Committee did on 10-7-40. The intention was all throughout to give effect to the arrangement arrived at between the parties on the 5-7-40.

And finally:

On the 5-7-40 it was agreed between Nissim and Jamnadas in my presence that Jamnadas was to take over all the liabilities as also all the securities including these shares from Nissim. Even as the managing director of the bank I did not consider that this letter was written in order to put through a part of the arrangement of July 5, 1940.

Speaking of Mr. Nissim's bank shares Mr. Deshpande said:

I say that Jamnadas became the owner of these bank's shares on July 10, 1940, for all practical purposes for getting the loans of Nissim realised.

He was then asked:

Q : Jamnadas became the owner of these shares on the 10-7-40 by reason of the arrangement of the 5-7-40. Is it correct ?

A : Jamnadas became the virtual owner of these shares though Dr. Kajiji was the actual owner in terms of the resolution No. 11, part 2, passed by the executive committee on the 10-7-40.

38. With regard to Mr. Paranjpe it is sufficient to say that his evidence supports the story of Mr. Deshpande, though the role he played was a minor one and he is principally concerned with proving the documents to which I will later refer.

39. The result of this evidence is that there is once again set up the tripartite agreement of July 5, 1940, though it is no longer so designated, and that it is still asserted that the subsequent events and documents were the mode of carrying this agreement into effect.

40. The first document is a letter which Mr. Jamnadas Mehta addressed to the-bank and which is dated July 6, 1940. It is in the following terms:

Dear Sir, Deshpande, With reference to our conversation last week about the disposal of Mr. Nissim's shares in the Asian Assurance Co., Limited, I shall be glad to buy them myself for Rs. 73,000 (Rupees seventy-three thousand only). Please place this

offer of mine before our next committee meeting.

Yours sincerely, (Sd.) Jamnadas M. Mehta.

41. That letter was placed before the executive committee of the bank at their meeting held on July 10, and by resolution No. 7 of that day it was resolved:

> Resolved that the offer of Mr. J. M. Mehta for buying the shares numbering 26,000 in all, of the Asian Assurance Co, 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.
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> Mr. J. M. Mehta did not vote.
>
> The other documents relied upon are a promissory note executed on the same day by Mr. Jamnadas Mehta in favour of the bank for the sum of Its. 75.000 and a letter of pledge in the usual form in respect of an alleged advance of Rs. 75,000 and one of the six blank transfer forms signed by Mr. Nissim was filled up to the extent of inserting Mr. Jamnadas Mehta's name as transferee and this document he also signed, his signature being attested by Mr. Paranjpe. Mr. Jamnadas Mehta also signed a letter of guarantee, guaranteeing the liability of Ezra and Raghavji to the bank. There also appears in red pencil under the date July 10, 1940, in Mr. Deshpande '& handwriting the following note at the top of Mr. Nissim's Asian account in the books of the bank:
>
> Mr. Meyer Nissim's O/D/ A/C is to be closed as Mr. Jamnadas M. Mehta has agreed to buy the 26,000 shares of the Asian pledged with the Bank by Mr. Nissim. The Ex. Com. approves the transaction as per Resolution No. 7 of 10th July 1940, Mr. J. M. Mehta's a/c is to be debited with the purchase price, but for final closing of the a/c and the adjustments the a/c be kept formally open till the date of the balance sheet for the ratification of the transaction by the full Board.
>
> (Sd.) D. D. Deshpande, Mg. Director. 1-7-1940.

42. This note is of importance since it clearly shows that in Mr. Deshpande's opinion whatever the transactions which these documents and entries were thought to effectuate had to receive the ratification of the full board and it appears that there was good reason for this apprehension since the powers of the executive committee were limited to:

> Making allotments of shares, making investments from time to time, and to supervise the daily routine Banking business of the Company.

43. Mr. Jamnadas Mehta's account was not in fact debited with arty sum and Mr, Nissim's Asian account was in fact continued as such and was debited with sums in respect of interest on October 25, 1940, December 31, 1940, and March 2G, 1941. On March 31, 1941, a total debit balance of Rs.

76,986-5-0 was marked with the following entry:

> By Journal 46 Balance transferred to J. M. Mehta a/c in respect of having purchased the shares of Asian.

44. No endorsement was made on Mr. Nissim's personal- account -which continued in his name up to March 31, 1941, but in respect of this account which was primarily secured on Mr. Nissim's bank shares another letter was signed by Mr. Jamnadas Mehta on July 10, 1940:

> Dear Sir, Deshpande, I have consulted Dr. T. M. Kajiji and he has agreed to allow his name as the purchaser of Mr. Nissim's shares. In case of difficulty arising you may take my assuance that I shall remain ultimately responsible as already personally stated to you.
>
> Yours sincerely, (Sd.) Jamnadas Mehta.

45. The next document is one of particular significance. It is a letter of which three originals have been produced in this Court, though the bank is unable to produce any press copy from its regular records. The letter is dated July 412, 13, 3940, and is addressed to Mr. Nissim, is signed by Mr. Deshpande and is in these terms:

> To Ma. Meyer Nissim, M.A., J.P. 10, Outram Road, Fort, Bombay.
>
> Dear Sir, With reference to your conversation on the phone, we have to inform you that we have disposed [of] the shares of the Asian Assurance Company Limited and of our bank standing in your name and the sale proceeds have been adjusted to your loan account. You are therefore no longer a debtor of this bank.
>
> Yours faithfully, (Sd.) D. D. Deshpande, Managing Director.

46. This letter is strongly relied on by Sir Noshirwan Engineer on behalf of the plaintiff as showing the bona fides of the alleged transactions in July, 1940. The story of how more than one original of this letter came into existence is a remarkable one, and as told by Mr. Deshpande it is as follows: The first edition of the letter was prepared by him late on July 12 and could not be despatched on that day. This, Mr. Deshpande says, accounts for it being dated July 12, 13. It appears that it could not be delivered on the 13th as this was a Saturday or on the 14th which was Sunday. But on Monday the 15th, i.e. the day before he was adjudicated an insolvent, Mr. Nissim came to the office of the bank and saw Mr. Deshpande who handed him this original letter. Mr. Deshpande says that Mr. Nissim endorsed it at the foot in order to acknowledge that it had been received by him and then left the bank's office but immediately returned. Mr. Deshpande's evidence continues-:-

> I had certain conversation with him and as a result of that conversation I destroyed the office copy of that letter on which Nissim had made endorsement.

47. It appears that the letter was destroyed by being torn up, and that Mr. Deshpande then had the second edition of this letter prepared and also a form of receipt prepared on the bank's note-paper. These two documents were then formally sent round to Mr. Nissim's office and Mr. Nissim's clerk duly signed the prepared receipt. To make assurance doubly certain Mr. Deshpande retrieved the pieces of the torn up first edition of the letter and, as pieced together, they and the second edition and the receipt signed by the clerk are all exhibits in this action, as is also a third edition which is a carbon copy, but an examination of the typescript shows that it is not a carbon copy of either the first or the second editions. No explanation of the third edition is forthcoming.

48. What was the object of all this? July 1940 was the time of the fall of Prance, and it is common knowledge that the normal financial equilibrium of this city was considerably disturbed. Mr. Nissim, a Justice of the Peace, a director of the bank and a public figure, who had been Mayor of Bombay, was about to file his petition in insolvency.

49. The whole circumstances connected with this letter far from suggesting bona fides indicate in my opinion that the bank was attempting to provide itself with documentary evidence which could be furnished, if need be, to the Official Assignee as trustee of Mr, Nissim, an insolvent. This view of the matter is consistent with what subsequently occurred, since in September, 1940, Mr. Nissim sent this letter to the Official Assignee with a covering letter dated September 6, 1940, in which he stated:-

> I beg to forward you attached hereto a letter from the New Citizen Bank of India, Ltd., dated July 12/13, 1940, in which the Bank states that the shares of the Asian Assurance Co., Ltd., and the New Citizen Bank shares standing in my name against which I had taken loans from the Bank have been disposed of and the sale proceeds have been applied in liquidation of my loans. Although the letter is dated July 12/18, the information was not known to me at the time when I had prepared my preliminary schedule on July 16, 1940. I have to explain that it is for this reason that in my preliminary schedule, the bank appears as a creditor of Rs. 1,83,500, against which the bank was shown as holding the following shares standing in my name.
>
> And then follow particulars of the bank shares and the 26,000 Asian shares:
>
> In view of the letter stating that I was no longer a debtor of the Bank on July 16, 1940, I have omitted the above entries in the Schedule that I have filed today.

50. With very great respect to the learned trial Judge, I find it difficult from the labyrinthian industry of his judgment to discern the passages by which he has summed up his appreciation of the evidence and the documents and has come to some definite conclusion upon the transaction alleged. But I think that the following passages, which commence on the 74th page of the judgment, contain his conclusions on this part of the case:

> It is hardly fair or proper to label the transaction which took place on July 10, 1940, as under the heading of the alleged tripartite agreement or a particular

comprehensive arrangement alleged to have been arrived at between the parties. The events that took place on or about that date no doubt did take place under the impending shadow of the insolvency of Nissim. Whatever, however, was done, was done with a view to safeguard the interest of the bank in all possible manner consistent with the notions of Jamnadas as regards his position and prestige in the financial world. However reprehensible those notions of Jamnadas may be, so far as his idea of saving his own skin and not detracting from the high position which he thought he occupied in the eyes of the public was concerned, the fact remains that so far as the bank was concerned, all that was done was done with a view to safeguard its interests. Whatever was the definite arrangement arrived at between Deshpande, Jamnadas and Nissim and whether it was all embracing or embraced only the particular transaction with which we are concerned in this suit, viz. the transaction of the sale of the disposal or the sale of the 26,000 shares of the company by the bank to Jamnadas on July 10, 1940. I have got to consider here the transaction as put forward by the plaintiff divorced from all prejudice by reason of the plaintiff in suit No. 1001 of 1941 having failed to prove the alleged tripartite agreement which they put forward therein. I appreciate that on the basis of the alleged tripartite agreement which was not put forward in that suit and which has also been adhered to by the bank and Jamnadas in this suit in the written statement which they have filed here, the suggestions and criticisms of Mr. Coltman as regards the absence of transfer of the amount in respect of the indebtedness of Nissim to the bank in the said sum of Rs. 92,500 advanced on the security of the bank shares, from the account of Nissim to the account of Jamnadas and the claim which the bank put forward in the insolvency of Nissim by its affidavit of claim dated October 9, 1940, have very great force.

And later the learned Judge said:

The bank had put its oath to that alleged tripartite agreement and was evidently bound to support Jamnadas in the said title of his. The representatives of the bank, viz. Deshpande and Paranjpe, -were thus interested in supporting Jamnadas's title to the said 20,000 shares on the basis of the said alleged tripartite agreement of July 10, 1940. Jamnadas was, moreover, appearing at the hearing of that suit and whatever influence he had on Deshpande and Paranjpe was presumably continuing at the time when the latter gave evidence before Chagla J, in suit No. 1001 of 1941. The position, however, hi this suit is quite different. The bank had already sold the said 26,000 shares to the plaintiff as the pledgee in possession thereof and had made it clear in no uncertain terms in the letter dated October 24,1941, which is addressed to the plaintiff that the plaintiff was purchasing the said 86,000 shares with notice of the said suit No. 1001 of 1941. The bank was, therefore, no longer interested in sending its representatives Deshpande and Paranjpe to put forward and substantiate any case of sale by the bank to Jamnadas of the said 26,000 shares on July 10,1940, as alleged by the plaintiff, no such question having been mooted in suit No. 1001 of 1941 and no such representation having been ever made by the bank in the letter which is addressed to the plaintiff on October 24,1941. On the other hand, the bank in the

> event of the Court holding that there was a sale of these 26,000 shares by the bank to Jamnadas on July 10,1940, without notice to Nissim would lay itself open to a claim for damages at the instance of Nissim or the Official Assignee, which claim for damages could not be sustained only in the event of the Court holding that there was no sale of these 26,000 shares by the bank to Jamnadas on July 10, 1940, that Nissim continued to be the owner thereof up to the date of his insolvency and that the right, title and interest of Nissim therein had vested in the Official Assignee, as the assignee of the estate of Nissim. It was therefore not to the interest of the representatives of the bank, viz. Deshpande and Paranjpe, when they gave evidence in this suit to put forward a case which would involve the bank into any claim for damages at the instance of Nissim or the Official Assignee, Having regard to the above considerations I am inclined to hold that Deshpande and Paranjpe had no interest in this suit to give any false evidence as regards the case of the alleged sale of the 26,000 shares by the bank to Jamnadas on July 10, 1940, as alleged by the plaintiff. The evidence of Deshpande arid Paranjpe on this point, which is amply corroborated by the documents which I have discussed above, goes to establish that there was a transaction of sale of these 26,000 shares of the company by the bank to Jamnadas on July 10, 1940.

51. Again with respect to the learned Judge, I am unable to agree with this reasoning. Whatever the motives of Mr. Deshpande and Mr. Paranjpe to give true or false evidence may have been, the position was precisely the same when they gave evidence in September, 1943, in suit No. 1001 of 1941, to what it was in February, 1945, when they gave evidence in this action. In both cases the contract of October 23, 24, 1941, had been made and no circumstances intervened between the trial of the two actions which altered the position of the bank under its contract with the plaintiff. Further $\ am unable to agree that the evidence of Mr. Deshpande and Mr. Paranjpe is corroborated by the documents, or that the documents establish the transaction alleged. In my opinion the contrary is the case. By the pleadings and on the evidence the only transaction alleged is that Mr. Jamnadas Mehta should take over all Mr. Nissim's liabilities and the securities therefor. Yet the letter of Mr. Jaranadas Mehta of the July 6, 1940, negatives any previously concluded and comprehensive bargain. On the face of it, it is an offer to purchase the Asian shares only for Rs. 73,000. The curious letter of July 10, 1940, saying that Dr. Kajiji "has agreed to allow his name as the purchaser of Mr. Nissim's shares", which he in fact never did, is destructive of the alleged agreement. So also is the fact that both Mr. Nissim's Asian account and his personal account were kept open and that no proceeds of sale were debited to any account of Mr. Jamnadas Mehta. How can the promissory note for Rs. 75,000 be fitted in to the alleged agreement? If Mr. Jamnadas Mehta was to take over all Mr. Nissim's liabilities, the promissory note, even leaving out of account any liability for the two guaranteed accounts, should have been for Rs. 1,61,312-6-0, being the total indebtedness on the Asian account and the personal account. The statement in the remarkable letter of July 12, 13, 1940, that the sale proceeds "have been adjusted to your loan account" was untrue, and the curious expressions in Mr. Deshpande's evidence to the effect that Mr. Jamnadas Mehta had become the owner of the Asian shares "for all practical purposes" and that he had become "the virtual owner" of the bank shares are as ambiguous as they are deceptive in the mouth of the managing director of a bank giving evidence of vital transactions in which he, on behalf of his bank,

was dealing with the affairs of some one whom he knew was about to become an insolvent. Further, on October 9, 1940, the bank actually put in a proof in Mr. Nissim's insolvency to be a creditor for Rs. 23,925-6-0 in respect of Mr. Nissim's guarantee of Raghavji's overdraft account,

52. Mr. Deshpande in his evidence said that the question of the Board's ratification of the arrangements was not put on the agenda of any Board meeting before March, 1941, though he asserts that the matter was informally discussed. But by March, 1941, something had to be done by the bank to clear up the position, as the end of that month was the end of the bank's financial year, and the balance-sheet and profit and loss account had to be prepared and audited for presentation to the shareholders at the annual general meeting. As was pointed out by this Court in suit No. 1001 of 1941, if the alleged agreement of July 5, 1940, (therein referred to as the tripartite agreement) had in fact been come to, the third audited balance-sheet and the profit and loss account of the bank, which were sent out to shareholders by Mr. Jamnadas Mehta in May 1941, would have been in breach of Sections 132 and 133 of Form "F" of the Indian Companies Act, 1913, which requires that the debts of a director should be shown in the balance-sheet. In fact the debt of Mr. Nissim's personal account in respect of the sum of Rs. 85,117-9-0 is shown in the balance-sheet as a debt due from the ex-director, meaning thereby Mr. Nissim. 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 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.

53. In my opinion there can be no doubt that no concluded or enforceable agreement was ever come to in July, 1940, whereby Mir. 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 case 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. lie had no new oral evidence before him and all the documents were precisely the same.

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

55. The fourth question only arises if a view contrary to the one I have expressed upon the first question was to prevail, and is whether the bank did sell or can still make a title to the shares as pledgee of Mr. Nissim. The answer to this question must depend on the position with regard to the bank's power of sale.

56. The Indian Contract Act of 1872 applies to all contracts in India and with regard to a pawn is a codification of the English common law. Speaking of the common law right to sell Mr. Justice Story in his commentaries on the Law of Bailments, eighth edition, says at p. 262 ?-

Another right resulting, by the common law, from the contract of pledge, is the right to sell the pledge, where there has been a default in the pledgor in complying with his engagement, but a sale before default would be a conversion. Such a right does not divest the general property of the pawner, but still leave in him (as we shall presently see) a right of redemption.

And at p. 263 :-

> The common law of England, existing in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale or, he may proceed to sell ex mero motu, upon giving notice of his intention to the pledger.

57. The terms of an instrument of pledge, such as there is in this case, giving an unqualified power of sale, are inconsistent with the provisions of Section 176 of the Indian Contract Act, and, therefore,, by virtue of Section 1 of that Act must give place to the express provisions of the Act: see Chitguppi & Co, v. Vinayak Kashinath (1920) I.L.R. 45 Bom. 157 : s.c. 22 Bom. L.R. 659.

58. The group of sections in the Indian Contract Act dealing with bailment commence with Section 148, and it is to be observed that in Sections 152, 163, 171 and 174 the power is given to contract out of the Act. In the former section the words are "in the absence of any special contract" and in the three latter sections the expression used is "in the absence of any contract to the contrary". In my opinion, therefore, except in these four sections, the provisions of the Act with regard to bailment are mandatory: see The Co-operative Hindusthan Bank, Ltd. v. Surendranath De (1931) I.L.R. 59 Cal. 667.

59. Section 176 of the Contract Act is as follows :-

> If the pawner makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawner reasonable notice of the sale.
>
> The rest of the section deals with the application of the proceeds of sale and is not material.

60. In my judgment, a notice must be given in all cases of pledge, even when the instrument of pledge itself contains an unconditional power of sale. This opinion is held by the three distinguished editors (Sir Federick Pollock, Sir Diushah Mulla and Sir Maurice Gwyer) of Mulla's Indian Contract

Act, seventh edition (see p. 519). It follows that even if it is possible to regard the contract of October 23, 24, 1941, as a sale by the bank as pledgee of Mr. Nissim; that sale is invalid as being in breach of Section 176, unless it could be shown that before his insolvency Mr. Nissim effectively waived the giving of notice so as to bind the Official Assignee,

61. Until there is a lawful sale, the right to redeem remains. Even so, it has been submitted by Sir Noshirwan, that an innocent purchaser without notice, gets a good title, and he relies upon the eases of Halliday v. Holgate (1868) L.R. 8 Exch. 299 and Donald v. Suckling (1866) L.R. 1. Q. B. 585, as showing that the pledgee's right is to sue the pledger in conversion. But in neither of these cases was there any claim to redeem such as is advanced by the counter-claim in the case before us. Even under the law of mortgages-and a mortgagee has a far higher estate and interest in his security than has a pawnee-a purchaser with notice of the impropriety or irregularity in the exercise of the powers of sale is not protected from the right of redemption: see Selwyn v. Garfit (1888) 38 Ch. D. 278, In my opinion the plaintiff fails on this point and the Official Assignee's right to redeem is still subsisting.

62. The remaining questions do not present any great difficulty. The fifth question is whether Mr. Nissim waived the notice which it is incumbent upon the bank to give under Section 176 of the Indian Contract Act. The answer is that there is no evidence at all that he ever did so. It seems that in the trial Court an attempt was made to ask Mr. Deshpande a question with regard to a conversation he had with Mr. Nissim, but objection was taken to the question and the objection was upheld by the learned Judge.

63. The sixth question has reference to an allegation that the Official Assignee is estopped from disputing that the plaintiff is the absolute owner of the shares. The alleged estoppel, though not very strenuously pressed., is that the Official Assignee by his conduct led the plaintiff to believe that no interest was claimed in these shares by the Official Assignee, It is pointed out that in his original statement to the Court Mr. Nissim disclosed the 26,000 shares as being deposited with the bank and two letters dated respectively May 26, 194], and June 30, 1941, are relied upon. The former letter is written by a firm of solicitors "on behalf of a prospective purchaser of certain shares in the Asian Assurance Co., Ltd., which still stand in the books of the Company in the name of Mr. Meyer Nissim", and after setting out what the firm of solicitors believed to be the position with regard to these shares, the letter alleges that the question of the voting rights of these shares has now arisen and continues:-

> In order that no difficulty as to the validity of the voting may arise in future we request you to confirm in writing that you as the Official Assignee have disclaimed the insolvent's interest in these shares and such interest has not been dealt with by you and that you have no objection to the insolvent exercising his right of voting in respect of these shares in such manner as he may be advised.

64. The reply of the Official Assignee of June 30, is guarded in its terms, and is as follows:-

> With reference to your letter dated May 26, 1941, I have to state that I have since made inquiries of the New Citizen Bank of India, Ltd., regarding the 26,000 shares of the Asian Assurance Co. Ltd., in question. The bank states that the said shares were disposed of by the bank on July 10, 1940 (i.e. prior to the date of the order of adjudication herein).
>
> Under the circumstances, I cannot exercise any right of voting in respect of the said shares. It is open to the insolvent to act in the matter of exercising his right of voting if any as may be advised.

65. It must be borne in mind that by this date, i.e. June 1941, the Official Assignee had already received Mr. Nissim's letter of September 6, 1940, enclosing the bank's letter of July 12, 13, 1940, and must have been in some doubt as to what in fact was the true position. Even if the letter of June 30. 1941, had been written by the plaintiff and not, as it in fact was, by solicitors for some undisclosed prospective purchaser, it could not in my opinion raise any estoppel. There is nothing in this point.

66. The seventh and the last question is a plea of res judicata by the plaintiff against the Official Assignee by virtue of suit No. 396 of 1940. This was a suit filed by Mr. Nissim against Mr. Jamnadas Mehta in March, 1940, in an attempt to clear up the complicated financial transactions in which these two gentlemen had involved themselves.

67. On July 6, 1940, a very significant date, having regard to the allegations in this action, Mr. Nissim and Mr. Jamnadas Mehta came to what is described as an informal compromise of suit No. 396 of 1940, whereby Mr, Nissim agreed to allow his suit against Mr. Jamnadas Mehta to be dismissed or withdrawn and Mr. Jamnadas Mehta agreed to pay Mr, Nissim annually the sum of Rs. 6,000 out of his income from a certain managing agency. On September 8, 1941, the Official Assignee obtained an amendment of the plaint by bringing himself on the record and added a prayer to the plaint asking that it might be declared that the alleged compromise of July 6, 1940, was not binding upon him. Finally on June 23, 1943, a consent order was taken whereby the suit was dismissed with no order as to costs, and all allegations made against Mr. Jamnadas Mehta in that suit were withdrawn. The suit was--commenced before the alleged transactions of July, 1940, had taken place, and no mention of them is to be found either in the original plaint or in the plaint as amended after the Official Assignee had brought himself on the record. I agree with the learned Judge in the Court below that the contention of res judicata cannot be validly, urged. In my opinion any such suggestion is completely fallacious.

68. In the result the appeal must be allowed and an order for redemption of the 26,000 Asian shares passed in favour of the Official Assignee. There will have to be an inquiry as to the amount due and owing to the bank on October 24, 1941, under and by virtue of the instrument of pledge dated September 1, 1939, and signed by Mr. Nissim in favour of the bank. There will also have to be an account taken of the amount of principal, interest and costs due to the plaintiff, as subrogated to the bank's rights, from the footing of the amount found due in answer to the abovementioned inquiry, with all other consequential directions for redemption.

69. With regard to costs, we have heard arguments with regard to them and having taken all the circumstances into consideration, the order proposed is that the order with regard to costs made by the learned trial Judge should stand except that it should be varied by deleting from it the name of the Official Assignee as paying to the plaintiff one-third of his costs of the suit and counter-claim and that the plaintiff do pay to the Official Assignee his costs of the counter-claim.

70. The plaintiff is to pay the Official Assignee his costs of this appeal and there will be no order with regard to the costs of this appeal of any of the other parties.

Chagla, J.

71. In September-October, 1939, Meyer Nissim, defendant No. 4, borrowed from the 2nd defendant bank its, 75,000 against the security of 26,000 shares of the 1st defendant company. On July 16, 1940, defendant No. 4 was adjudicated insolvent. On October 23, 1941, the 2nd defendant bank sold these 26,000 shares to the plaintiff for the sum of Rs. 1,20,800. The 1st defendant company was claiming a lien on these shares in respect of various amounts. The plaintiff, while admitting the 1st defendant company's claim for a lien in respect of certain amounts, challenged its right to a Hen in respect of a sum of Rs. 1,45,000 and this suit was filed for a declaration that the 1st. defendant company had no lien upon the 26,000 shares for the sum of Rs. 1,45,000. The plaintiff also brought moneys into Court to be paid to the 1st defendant company in respect of the lien which he admitted and he wanted a declaration that after this amount had been paid to the 1st defendant company, the 26,000 shares were free from all liens and claims of the 1st defendant company. In this suit defendant No. 5, who is the Official Assignee, being the assignee of the estate and effects of defendant No. 4, filed a counterclaim for a declaration that the plaintiff had no interest in the 26,000 shares, that the 2nd defendant bank were the pledgees of these shares and that on his paying the amount due to the bank and also the lien of the 1st defendant company he was entitled to redeem the shares, and by the counter-claim he sought a redemption. Mr. Justice Bhagwati, who tried the suit, decreed the plaintiff's claim and held that the 1st defendant company was not entitled to a lien in respect of a sum of Rs. 1,45,000, With regard to defendant No. 5's counter-claim, he dismissed it. The 1st defendant company has not preferred any appeal from the decision of the learned Judge. But this appeal, is preferred by defendant No, 5 against the order of dismissal of his counterclaim.

72. The contention of the plaintiff is that he has purchased these 26,000 shares from the 2nd defendant bank who sold them to him as pledgees in possession and that he has full and complete title in these shares. It is necessary to consider the terms of the contract under which these shares were sold to the plaintiff by the 2nd defendant bank. I might state that it was the case both of the plaintiff and of the 2nd defendant bank that these shares were sold by the bank to Mr. Jamnadas Mehta, defendant No. 3, on July 10, 1940, and that Mr. Jamnadas Mehta in Ms turn pledged these shares with the bank and the bank sold these shares to the plaintiff as the pledgees in possession of Mr. Jamnadas Mehta. On October 23, 1941, the plaintiff wrote to the 2nd defendant bank and put on record that the bank as the pledgees in possession of the 26,000 shares of the 1st defendant company had, with the consent of Mr. Jamnadas Mehta, sold the shares to him for Rs. 1,20,800. In this letter the plaintiff also agreed and undertook to tender the amount of the lien if any claimed by

the 1st defendant company on these shares. On the next day the 2nd defendant bank treating this letter of the plaintiff as an offer accepted it on the understanding that the hank and Mr. Jamnadas M. Mehta are selling to you all their respective right title and interest in the said shares and that you take them subject to the contentions of the parties to the pending suits No. 921 of 1941 and No. 1001 of 1941 in the Bombay High Court, referred to by you in your letter under reference.

It is clear from these two letters that both the plaintiff and the 2nd defendant bank took up the attitude that the bank was not the pledgee of Meyer Nissim but of Mr. Jamnadas Mehta. The consent of Mr. Jamnadas Mehta was obtained because he was the pledger. It is not possible to accept the contention of Mr. M. P. Amin for the appellants that by these documents the 2nd defendant bank was merely assigning its debt and transferring its security to the plaintiff with the result that the plaintiff became subrogated to the bank as the pledgee of these shares. The language of the documents is clear and what was being conveyed to the plaintiff was the right title and interest not only of the pledgee but also of the pledger and, therefore, what the plaintiff purchased by this transaction was the full ownership of the shares. But these shares were purchased by the plaintiff subject to the contentions of the parties in suits No. 921 of 1941 and No. 1001 of 1941. Suit No. 921 of 1941 was concerned with the right of Meyer Nissim, defendant No. 4, to vote as the holder of these shares at the meetings of the 1st defendant company and the contentions in that suit are not relevant for the purpose of determining the plaintiff's title. Suit No. 1001 of 1941 was filed by the 2nd defendant bank and Mr. Jamnadas Mehta against the 1st defendant company, Meyer Nissim and the Official Assignee for a declaration that the 1st defendant company had no lien on the 26,000 shares which were pledged with the 2nd defendant bank and for an injunction restraining the 1st defendant company from exercising their lien on these shares. The contentions of the parties, therefore, in suit No. 1001 of 1941 related to the lien which the 1st defendant company was claiming, and by their letter of October 24, 1941, the 2nd defendant bank informed, the plaintiff that their title to the shares might be affected by the decision in suit No. 1001 of 1941 if the bank failed in their contention that the 1st defendant company had no lien on these shares; in other words, the plaintiff purchased these shares with notice that there was a claim for a lien put forward by the 1st defendant company on these shares. I do not agree that by this expression "subject to the contentions" the plaintiff agreed to be bound by every finding on every issue that was raised in that suit No. 1001 of 1941. He undoubtedly agreed to be bound by the decision in that suit and that decision could only be with regard to the lien claimed by the 1st defendant company.

73. The question of the sale by the 2nd defendant bank to Mr. Jamnadas Mehta on July 10, 1P40, has been a matter of acute controversy between the parties. But Sir Noshirwan Engineer for the plaintiff has argued that irrespective of that sale in any event the 2nd defendant bank on the admission of the Official Assignee himself was the pledgee of Meyer Nissim, and as such pledgee it was entitled to sell the shares and pass good title to the plaintiff. The debt due by Meyer Nisshim to the 2nd defendant bank is not disputed by the Official Assignee nor is the pledge of the shares disputed. It is also admitted that there was default in payment of the debt, but it is contended that no title passed to the plaintiff because notice under Section 176 of the Indian Contract Act was not given to Meyer Nissim or the Official Assignee. It cannot be denied that although the 2nd defendant bank was purporting to sell these shares to the plaintiff as the pledgee of Mr. Jamnadas Mehta if in fact it was the pledgee of Meyer Nissim and could exercise its power of sale as a pledgee, it could

undoubtedly transfer to the plaintiff the full title of the shares.

74. Section 176 of the Indian Contract Act requires that when the pledgee makes default in payment of the debt, the pledgee may sell the thing pledged on giving the pledger reasonable notice of the same. It is not suggested by the plaintiff that the 2nd defendant bank ever gave notice either to Meyer Nissim or to the Official Assignee. But it is urged that the want of a notice is merely an irregularity in the exercise of the power of sale and does not vitiate the sale or makes it void.,

75. In the first place, it is argued that the transaction of pledge between Meyer Nissim and the 2nd defendant bank was the subject of a contract entered into by them and it is that contract which regulates the rights of the parties and not Section 176 of the Indian Contract Act; under this contract the 2nd defendant bank was given the authority to sell the shares on the default of Meyer Nissim at its discretion, and, therefore, no question of giving notice to the pledger could arise under the terms of the contract. Therefore the question is whether the terms of Section 176 of the Indian Contract Act are mandatory and override the provisions of any contract to the contrary. The scheme of the Indian Contract Act is that it is competent to parties to incorporate into any contract any incident which is not contrary to or inconsistent with any provision contained in the Act. But they can only override a specific provision contained in the Act provided the particular section dealing with that provision contains a saving clause in respect of special contracts to the contrary. If one looks at the various sections of the Indian Contract Act, one finds that some of them specifically mention "in the absence of a contract to the contrary." There is no such saving clause in Section 176, and in my opinion its provisions are mandatory, and it is not open to parties to contract themselves out of those provisions. The notice that is to be given to the pledger of the intended sale by the pledgee is a special protection which the statute has given to the pledger, and parties cannot agree that in the case of any pledge the pledgee may sell the pledged articles without notice to the pledger. The Calcutta High Court (The Cooperative Mindusthan Bank, Ltd. v. Surendranath De (1931) I.L.R. 59 Cal. 667) has taken the same view of the section. In Chitguppi & Co. v. Vinayak Kashinath (1920) I.L.R. 45 Bom. 157 : s.c. 22 Bom. L.R. 659 our High Court held that under Section 133 of the Indian Contract Act any variation made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharged the surety as to transactions subject to the variation although the surety had agreed to such variation. It was held that such an agreement was inconsistent with the express provisions of Section 133 of the Indian Contract Act and Section 133 did not provide for any contract to the contrary.

76. It was then urged that even if notice was required under Section 176 of the Indian Contract Act, the absence of it is a mere irregularity and does not vitiate the sale or makes it void.

77. Now the sale by the 2nd defendant bank to the plaintiff was not by the owner of the shares, and under Section 27 of the Indian Sale of Goods Act the bank could not convey to the plaintiff a better title than it had; but if the bank sold the shares under the authority of the pledger, then it could "convey to the plaintiff full title in the shares. Now the bank can only obtain this authority to sell them provided the power of sale implicit in every pledge has arisen and be" come exercisable, and the question that falls to be determined is "When does the power of sale become exereisable ?" Section 176 of the Indian Contract Act gives two rights to the pledgee when the pledger makes

default in payment of a debt: one 'is to bring a suit against him upon the debt and retain the goods pledged as a collateral security; or, secondly, to sell the thing pledged; but the section specifically provides that the right to sell a thing pledged can only be exercised "on giving the pawnor reasonable notice of the sale". It is contended by Sir Noshirwan Engineer that even though notice is not given, the innocent purchaser is protected. If notice is essential, as in my opinion it is, before the power of sale can be exercised, the purchaser, however innocent he may be, cannot acquire a better title than his vendor had. Further it was open to the legislature, if it was so minded, to protect the innocent purchaser who buys at a sale held by the pledgee without giving the statutory notice to the pledger. For instance, Section 54, sub-cl.(3), of the Indian Sale of Goods Act, provides that where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer. Similarly, Section 69, Sub-clause (3), of the Transfer of Property Act, 1882, although Sub-clause (2) makes it imperative that a notice has to be given by the mortgagee to the mortgagor before he exercises his power of sale, protects the title of the purchaser although no such notice in fact has been given.

78. The real point for determination in this case is whether the right of redemption given to the pledger by Section 177 of the Indian Contract Act has been put an end to by the sale to the plaintiff by the 2nd defendant bank. This right to redeem can be exercised right up to the time when the " actual sale" of the goods pledged takes place. The actual sale referred to in Section 177 must be a sale in conformity with the provisions of Section 176 which gives the pledgee the right to sell; and if the sale is not in conformity with those provisions, then the equity of redemption in the pledger is not extinguished.

79. The statement of the law in Halsbury's Laws of England, Hailsham Edition, Vol. XXV, p. 12, is that the right to redeem is lost if the pawnee has lawfully sold the subject of the pledge. It is not enough that the pawnee should sell the subject of the pledge but he must sell it lawfully before the equity of redemption is extinguished. In this case by not giving the statutory notice he has not sold the subject of the pledge lawfully.

80. It is urged by Sir Noshirwan Engineer that the only right that accrues to the pledger when a sale is effected without notice being given to him is to sue the pledgee for conversion but he has no right to go against the purchaser for redemption. The Official Assignee's position in this case is that his right of redemption is not lost because there is no valid sale of the shares. He has a right to call upon the 2nd defendant bank to redeem the shares on payment of the debt. If the bank has transferred the shares, he is entitled to call upon the transferee for the same because the transferee does not acquire anything more than the right title and interest of the bank which is to retain the goods as a pledge till the debt is paid off. It may happen, as it very often happens, that the pledger may not be in a position to redeem, in which case he may con-lent himself with merely suing the bank for damages for conversion if any damage has resulted by reason of the goods being sold without proper notice.

81. I shall briefly deal with some of the cases that were cited at the Bar in support of the proposition that the Official Assignee can only sue the 2nd defendant bank for conversion but cannot claim to

redeem the shares from the plaintiff. Neikram Bobay v. Bank of Bengal (1891) L.R. 19 I. A. 60 laid down that a sale by a pledgee to himself of securities pledged is void; but that it does not put an end to the pledge, and that the pledger is bound by re-sales duly effected by the pledgee to third persons after such abortive sales to himself. It will be noticed that in this case the question of notice was not considered nor was the right of the pledger to claim redemption discussed. The Privy Council held that in respect of certain securities sold by the bank after a certain date there was conversion as the bank had erroneously represented to the pledger before such re-sales that these securities had been sold. It is true that in Cooverjee v. Mawji Mr. Justice B. J. Wadia expressed the opinion that the sale of the pledged goods without a proper notice did not render the sale void but made the pawnee liable in damages for conversion to the pownor. With respect to the learned Judge, this opinion was purely obiter. In this case the grievance of the pledger was that the goods had been sold by the pledgee without reasonable notice. The learned Judge accepted that contention and held that the pledger was entitled to damages. The pledger was not seeking redemption and no question of redemption arose. The learned Judge at page 985 says that the innocent purchaser is protected when there is an improper sale by the pawnee of the goods pledged to him, and he says so by applying the analogy of Section 69(1) of the Transfer of Property Act. With great respect, it is always dangerous to draw an analogy between one statute and another. Par from there being any analogy between Section 69(3) of the Transfer of Property Act and Section 176 of the Indian Contract Act, as I have already pointed out, there is a marked contrast between the two; while one protects the innocent purchaser, the other does not do so. In the absence of any provision in Section 176 of the Indian Contract Act in favour of the innocent purchaser, to import such protection from the provisions of another statute is, again, with respect, wholly fallacious and unjustifiable.

82. In Johnson v. Stear (1868) 15 C. B. (N.S.) 330 the date of repayment of the loan was on January 29. The plaintiff sold the goods pledged a day earlier, and it was held by the Court that that amounted to a conversion. It further held that the amount of damages for conversion was nominal as there was no intention on the part of the pledger to redeem the pledge by paying the loan. Halliday v. Holgate (1868) L.R. 3 Exch. 299 is a very instructive case. A holder of scrip certificates for shares borrowed from the defendant a sum of money on the security of his shares and deposited with him the share certificates. The plaintiff afterwards became bankrupt, and the defendant, without demand and without notice, sold a part of the shares to repay himself his debt. The creditors' assignee brought an action of trover against the defendant to recover the damage of the shares. The Court held that the plaintiff could not maintain an action of trover or of detinue as the immediate right to the possession of the shares was not by the sale revested in the plaintiff. It is important to note that the head-note of the case expressly states that the creditors' assignee filed the suit without making any tender of the amount of the debt. This decision followed the case of Donald v. Suckling (1866) L.R. 1 Q. B. 583. In this case A deposited debentures with B as a security for the payment of a bill endorsed by A and discounted by B. Before the maturity of the bill, B deposited the debentures with C to be kept by him as a security until the repayment of the loan from C to B larger than the amount of the bill. The bill was dishonoured, and while it still remained unpaid, A brought detinue against C for the-debentures. The Court held that the repledge by B to C did not put an end to the contract of pledge between A and B, and that A could not maintain detinue without having paid or tendered the amount of the bill. Mellor J.. in his judgment at p. 610 observed as follows;-

and I think that, although, he (pledgee) cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by. reason of the act of the pawnee in repledging the goods.

At p. 611 Blackburn J. says:

> In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

83. In my opinion these cases do not support the contention put forward by Sir Noshirwan Engineer that the pledger cannot sue for redemption against a third person to whom the goods pledged have been transferred under an unlawful or unauthorized sale. The principles which I deduce from these decisions are: (1) that although the pledgee may sell the goods unauthorisedly or unlawfully, the contract of pledge is not put an end to and the pledger does not become entitled to the possession of the goods pledged without tendering the amount due on the pledge; or, in other words, without seeking to redeem the pledge; and (2) that without a proper tender of the amount due on the pledge, the only right of the pledger in respect of an unlawful or unauthorised sale is in tort for damages actually sustained by him. In fact in none of these cases the pledger instituted an action for redemption, and, therefore, the question whether he had the right to redeem or not was in terms never decided. If anything, these decisions lead one to the inference, especially the ease of Donald v. Suckling, that if a proper redemption suit had been filed, there would have been no answer to such an action if the sale was not a lawful one.

84. The case where you have a redemption action is the one reported in France v. Clark (1883) 22 Ch. D. 830. In that case the plaintiff, who was the registered holder of ten fully paid-up shares in the Anglo-Egyptian Banking Company, deposited the certificates of the shares together with blank transfer forms with one Clark as security for a sum of £150 advanced by Clark to him. No time was fixed for the repayment of the loan. Clark deposited these certificates and the blank transfer forms with one W. G. Quihampton as security for the sum of £250, which Quiuampton had previously lent to Clark. Clark died insolvent, Quihampton then inserted his own name in the blank transfer form as transferee and sent the transfer to the company for registration and the company registered the same. The plaintiff then filed a suit against Clark's administratrix and Quihampton, claiming to have an account taken of what was due by the plaintiff to Clark's administratrix on the security of the certificates and that, upon payment of that amount to Quihampton, he might be ordered to deliver up the certificates and the transfer to the plaintiff and that, if necessary, the defendants or one of them might be ordered to retransfer the shares to the plaintiff. Mir. Justice Fry held that the pawnee

of chattels had no right to sell them unless a time was originally fixed for their redemption and that time had expired, or unless he had made a demand upon the pawner for the payment of what was due to him; and he, therefore, passed a redemption decree in favour of the plaintiff. This case went in appeal and it is reported in France v. Clark (1884) 26 Ch. D. 257. The judgment of Mr. Justice Fry was affirmed. The Earl of Selborne L. G. accepted the principle that the appellant's legal right could not be to anything more than that which Clark, as between himself and the plaintiff, could lawfully transfer; that Clark's legal right to the documents which be handed over to the appellant was at the most that of a bailee by way of pledge; and that nothing had occurred to justify in law a sale or alienation of the pledge to the prejudice of the plaintiff's right.

85. Reliance has been placed by the plaintiff on a statement of the law contained in Coote on Mortgages, Vol. II, ninth edition, p. 1472 ¦.

The pledgee has on default a right to sell the pledge if the payment is to be made on a certain day; otherwise not; but a sale before default would be a conversion; yet the sale, whether wrongful or not, passes the title to the vendee as against the pledgor.

Coote cites the cases of Donald v. Buckling and Halliday v. Holgate for the proposition that even a wrongful sale passes title to the vendee as against the pledger. I have already considered both these cases and with great respect to the learned author of that text book, those two cases do not bear out that particular proposition. As against this, in Story's well-known commentaries on the Law of Bailments, eighth edition, p. 272, it is stated:

> Thus, if a pledge is of a certificate of stock, which may pass by delivery, a bona fide purchaser, or subsequent pledgee, may hold the stock against the real owner.
>
> But in the foot-note the learned author says:
>
> But it has recently been held that a pledgee of stock has no legal right to sell the same without notice to the pledger, and such sale passes no title as against the pledger, even to a bona fide party.
>
> This recent decision is of the American Court, and it is not possible to secure a copy of it here and to ascertain the reasoning on which this decision was based. But Story considered this a very important case on. the subject and the statement of the law to which I have just referred has apparently been accepted by Story as a correct statement. If that be so, then clearly in this case the plaintiff, although he may be a bona fide party, acquires no title as against the pledger, the Official Assignee, and he can have no answer to a suit for redemption filed by the Official Assignee.

86. The question still remains whether the 2nd defendant bank sold the shares to the plaintiff not as the pledgee of Meyer Nissim but as the pledgee of Jamnadas Mehta; and for this purpose, the bank's ease is that on July 10, 1940, the bank sold as Meyer Nissim's pledgee the shares to Jamnadas Mehta and Jamnadas Mehta in his turn pledged his shares with the bank. The Official Assignee

contends that it is not open to the plaintiff to plead and prove the sale by the bank to Jamnadas Mehta as that issue is barred by res judicata as a result of the decision in suit No. 1001 of 1941. I have already referred in the earlier part of my judgment to this suit. In that suit three issues were raised which have a bearing on the question I am now considering, namely, (1) Whether the suit as framed is maintainable ?

(2) Whether the 1st Plaintiff bank were at any time or are the pledgees of the said 26,000 shares?; and (3) Whether the agreement between the 1st plaintiff bank, plaintiff No. 2 and defendant No. 2, alleged in paragraph 9 of the plaint, was arrived at ?

Issues Nos. (1) and (2) were found in the affirmative and issue No. (8) was found in the negative. The agreement which was pleaded in paragraph 9 of the plaint in that suit which is the subject-matter of issue No. (3) was a tripartite agreement, namely, that there was an agreement on July 10, 1940, between the 2nd defendant bank, Jamnadas Mehta and Meyer Nissim for Jamnadas Mehta to take over all the liabilities of Meyer Nissim to the bank and be entitled to the interest of Meyer Nissim in all securities given by Meyer Nissim to the bank. It may be stated that in paragraph 11 of the plaint the plaintiffs alleged that even if the agreement mentioned in paragraph 9 of the plaint (namely, the tripartite agreement) was not proved, the right of the 1st plaintiff bank as the pledgee of the said shares remained unaffected. The issue that is raised in this suit, namely, the sale by the 2nd defendant bank to Jamnadas Mehta, is not the same as the issue in the tripartite agreement raised in suit No. 1001 of 1941; but the principle on which the Official Asisignee is relying is the principle of constructive res judicata. It is urged that this agreement ought to have been made a ground of attack by the plaintiffs in that suit; and inasmuch as they did not do so, the plaintiff who is claiming under the plaintiffs in that suit or at least under the bank who were the 1st plaintiffs in that suit is barred from raising the issue of the sale.

87. In order that the principle of res judicata should apply, all the conditions laid down in Section 11 of the Civil Procedure Code must be satisfied. In the first place, can it be said that the issue with regard to the tripartite agreement was directly and substantially in issue in suit No. 100.1 of 1941 ? As I have pointed out, the only relief that the plaintiffs sought in that suit was for a declaration that the Asian Assurance Company, Limited, had no lien on the 26,000 shares and for an injunction restraining the company from exercising its alleged lien. The issue with regard to the tripartite agreement was only raised in order to establish the maintainability of the suit. And it is pertinent to note that although this issue with regard to the tripartite agreement was decided against the plaintiffs, still the Court held that the suit was maintainable. Therefore, in my opinion, it was not necessary to decide that issue in order to determine whether the suit was maintainable or not. The 1st plaintiff bank was in any event claiming to be the pledgees of the shares and as such it was entitled to maintain the suit. I may mention that the result of suit No. 1001 of 1941 was that the suit was dismissed with costs. There was an appeal from that decision, and the Court of Appeal confirmed the decision of the trial Court. It took the same view of the tripartite agreement as the trial Court had, namely, that the plaintiffs had failed to prove the agreement.

88. Now the principle is perfectly clear and it has been affirmed by several decisions of our Court and of other Courts that a matter can never be said to be directly and substantially in issue which

calls for a decision only collaterally or incidentally; and it cannot be said to be heard and finally decided if the finding on any particular issue is not necessary for the decision of the suit. In Daudbhai Allibhai v. Daya Rama (1918) I.L.R. 43 Bom. 568 : s.c. 21 Bom. L.R. 363 Mr. Justice Pratt observed (p. 571) :

> The question whether an issue was substantially raised and decided is a matter of fact to be decided upon the circumstances of each particular case. And although no rule of general application can be laid down, this proposition is well-established that when a decree of the Court is not based upon a finding but was made in spite of it, that finding cannot be res judicata.
>
> In Bai Nathi v. Narsi Dullabh (1919) I.L.R. 44 Bom. 821 : s.c. 22 Bom. L.R. 64 Sir Norman Macleod, Chief Justice, and Mr, Justice Heaton held that although the issue was heard and decided, it could not be said to be finally decided if it were not necessary for the decision which the Court gave. The same principle was enunciated in an earlier decision of our Court: Ghela Ichharam v. Sankalchand Jetha (1893) I.L.R. 18 Bom. 597. In my opinion, the issue with regard to the tripartite agreement was not substantially raised and decided in suit No. 1001 of 1941, because the decision of the Court was "ot based upon the finding on that issue but, on the contrary, it came to its decision in spite of the finding on that issue, and also for the purposes of the decision to which the Court came it was not necessary to decide that issue.

89. In suit No. 1001 of 1941 although both Meyer Nissim and the Official Assignee were impleaded as party defendants, no relief was sought against either of them; and in the letter that the plaintiff's attorneys wrote to the Official Assignee it was clearly stated that both he and Meyer Nissim had been joined as formal parties. The Official Assignee did not put in any appearance in that suit nor did he file any written statement. Now the question that arises is whether the issue with regard to the tripartite agreement could be said to have been decided as between the plaintiff and the Official Assignee who was merely a formal party. It is true that the mere fact that a party does not choose to put in an appearance and file his written statement does not make him a pro forma party if he is a necessary party or if any relief is claimed against him; but if lie is not a necessary party or no relief is claimed against him, it is open to him to take no part in the litigation. If he adopts that course, no issue decided in that suit could be res judicata as against him. In my opinion, if the issue with regard to the tripartite agreement had been decided against the Official Assignee, it could not have been pleaded as res judicata in any suit which the Official Assignee might have filed in which he wanted the same matter to be re-agitated. There must of necessity be mutuality with regard to the doctrine of res judicata. If the issue of the tripartite agreement cannot be pleaded as res judicata as against the Official Assignee, the Official Assignee himself cannot take the benefit of the decision on that issue against a party who was arrayed against him.

90. The principle of mutuality has been enunciated in Concha v. Concha (1886) 11 App. Cas. 541, see the judgment of Lord Herschell L. G. at p. 553. Mr. Justice Broomfield also in Shankar v. Prabhakardixit [1986) 38 Bom. L.R. 853, 858 says that the principle of res judicata is mutual.

91. Both the Lahore and the Patna High Courts have laid down that there can be no res judicata against a pro forma party-see Mohammad Din v. Hirda Ram [1935] A. I. R. Lah. 942 and Bhudeh Chandra v. Bhikshakar Pattanaik [1942] A. I. R. Pat. 120. The Calcutta. High Court in a recent decision in Hafiz Mohammad Fateh Nasib v. Swarup Chand Hukum Chand [1941] 2 Cal. 434 has laid down that principles of res judicata apply, to co-defendants if there is a conflict of interest between them and if it is necessary to decide the issue finally in order to give the plaintiff the relief he claims, and it is immaterial that one of the co-defendants is a pro forma defendant and no relief is claimed against him. But when one looks to the facts of the ease, with respect to the learned Judges who decided that case, it is difficult to understand how the particular defendant in that suit Abdul Alim Abed who is described as a pro forma defendant can possibly be described as such. The question that arose in that suit was relating to the validity of a wakf and Abdul Alim Abed was a prospective mutawalli of the wakf and interested in supporting the wakf; and Mr. Justice Edgley states at p. 453 that it was necessary to decide the question of the validity of the wakf in the presence of Abdul Alim Abed. Abdul Alim Abed actually filed a written statement and substantially supported the plaintiffs' case. Therefore the mere fact that no relief was claimed against him did not make him a pro forma defendant. In any event once he had put in his written statement and joined in the litigation, he took the risk of any issue decided in that case becoming binding against him. At p. 458 Mr. Justice Edgley observed as follows:

> We think that the law contemplates that even a pro forma defendant should ordinarily be bound by a decree which has been obtained in his presence.
>
> With respect, I agree with this view if it means that a pro forma, defendant who takes part in the litigation would be bound by the decision. The learned Judge then goes on to say that the Judicial Committee of the Privy Council have laid down that if a pro forma defendant is a proper party to a suit he has every right to be heard, and it would follow that, if he refrains from putting his case before the Court, he does so at his own risk and he cannot afterwards complain if his rights in connection with the subject-matter of the suit are placed in jeopardy by reason of his neglect. With great respect, I do not think that it is a correct statement of the law and it is not borne out by the decisions of the Privy Council which are relied upon for this purpose.

92. It is true that in Munni Bibi v. Tirloki Nath (1931) L.R. 58 I. A. 158 Sir George Lowndes, delivering the judgment of the Privy Council, stated (p. 166):

> It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it j but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she be desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position.
>
> But when one turns to the facts of the ease, there cannot be the slightest doubt that the appellant was a necessary party to the previous suit. The suit under appeal was filed by the appellant against the respondent claiming possession of a house, the title

> to which had long been in dispute. Some years previously a decree-holder against the appellant's father had sued for a declaration that he was entitled to execute the decree against the house. He joined as defendants the appellant and a Hindu female who then represented the estate which had since devolved upon the respondent. It was held in that suit that the decree could be executed against the house. It is clear that in the previously instituted suit the plaintiff could only succeed provided the issue that arose as to the title of the house as between the defendants in that suit, namely, the appellant and the respondents' predecessor-in-title, was decided in the plaintiff's favour. There was also a clear conflict of interest between the defendants in that suit and the plaintiff could only succeed if it was held that the house belonged to the father of the appellant. If it was held that the house belonged to the Hindu female, he must fail. I may point out that it was also found that in fact the appellant did support the plaintiff in the previous suit. Under these circumstances, in my opinion, it cannot be said that the appellant was a pro forma party in the previously instituted suit.

93. In Mating Sein Done v. Ma Pan Nyun (1932) L.R. 59 I. A. 247 : s.c. 34 Bom. L.R. 1040 the Burmese widow of a Chinaman died survived by two sons and two daughters. One of the daughters. Ma Sein, filed a suit against her sister and two brothers for the administration of the estate of her mother. The sister was described as a formal defendant. The Privy Council held that the decision in that suit bound the sister although she was described as a formal party. But it will be seen from the facts that the plaintiff's sister although she was described as a formal party was a very necessary party to the suit, the suit being an administration suit, and as it is so pointed out in the judgment itself at p. 255:

> The suit brought by Ma Sein was an administration suit, the purpose and object of which was to have the mother's estate divided among her four children as her heirs. To that suit all the alleged heirs were necessary and proper parties, for every one entitled to a share would be entitled to be heard upon the question whether or not an order for administration should be made.

94. In Kedar Nath Goenka v. Ram Narain Lal (1935) L.R. 62 I. A. 224 : s.c. 37 Bom. L.R. 794 the Subordinate Judge held that the issue as to the validity of the sale was not res judicata between the plaintiff who was defendant No. 1 and the Mahant who was defendant No. 2 in a previously instituted suit. The learned Subordinate Judge's reason for so holding was that no relief was sought as against the Mahant who was defendant No. 2. Their Lordships of the Privy Council dissented from this opinion. It is to be noted that the Mahant had actually entered an appearance and sided with the plaintiff in the previously instituted suit. It should also be noted that it was necessary to decide the issue as to the validity of the sale between the co-defendants in order that the plaintiff in the previously instituted suit should get his relief. It is difficult to see how a defendant can ever be a merely formal party where an issue as between him and another defendant has to be decided in order to give a plaintiff appropriate relief. In my opinion the Privy Council has not laid down that when you have a defendant against whom no relief is sought, who is not a necessary party to the suit and who does not take part in the litigation, he can still be bound by an issue decided in his absence. I agree, therefore, with the learned trial Judge below that the issue with regard to the sale by the

bank to Jamnadas Mehta on July 10, 1940, is not barred by res judicata.

95. Coming to the merits of the case, I agree with the learned Chief Justice that the plaintiff has failed to prove that on July 10, 1940, defendant No. 2 bank sold these 26,000 shares to Jamnadas Mehta. As this is a question of fact and as we are differing from the learned trial Judge, I should like to give my own reasons as to why I have come to this conclusion. The two most important documents relied upon by the plaintiff are the offer for the i>m-chase of these shares made by Jamnadas Mehta on July 6, 1940, and the acceptance by the executive committee on July 10, 1940. In his letter Jamnadas Mehta offers to buy these shares for Rs. 73,000 and the executive committee accepts this offer but the price is mentioned not as a definite sum of Rs. 73,000 but "Rs. 73,000 or thereabouts". The resolution further says that Jamnadas Mehta's account should be debited with the purchase price. Although in the acceptance the price mentioned is not the same as that mentioned in the offer, still this could constitute a valid and binding contract for sale, it being left to the parties to agree to the exact amount round about Rs. 73,000 as being the price of these shares. 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. On the same day Jamnadas Mehta executed a promissory note for Rs. 75,000 in favour of the bank and he also executed an instrument of pledge in respect of all securities pledged by Jamnadas Mehta with the bank. The suggestion is that as Jamnadas Mehta was not in a position to pay the purchase price, he executed this promissory note as collateral security and pledged the shares with the bank. But the most curious thing is that, the amount of the price is not credited in the overdraft account of Meyer Nissim nor is the amount debited in the account of Jamnadas Mehta. A note in red pencil appears on the top of Meyer Nissim's overdraft account signed by Deshpande who was and still is the managing director of the bank. This note states that Meyer Nissim's overdraft account is to be closed as Jamnadas Mehta has agreed to buy the 26,000 shares as per resolution of the executive committee and Jamnadas Mehta's account is to be debited with the purchase price, "but for final closing of the account and the adjustments the account be kept formally open till the date of the balance-sheet for the ratification of the transaction by the full board." The date under Deshpande's signature is July 10, 1940, and Deshpande has given evidence that he made this note on that day. It is difficult to understand why Deshpande took upon himself to make this note. There is nothing in the resolution of the executive committee which suggests that it is subject to the ratification of the full board of directors. On the contrary it is urged by Sir Noshirwan Engineer that the executive committee which is the committee of the board of directors was j>iven full authority to enter into this transaction and no ratification was necessary by the full board of directors. On March 26, 1941, more than eight months after the sale, interest is debited to this account, and it is only on March 31, 1941, that the balance at the foot of this account, namely, Us. 76,986-5-0, is transferred to the account of Jamnadas Mehta and the account of Meyer Nissim is closed. This entry, according to the evidence, is made pursuant to the resolution passed by the board of directors on April 15, 1941, confirming the resolution of the executive committee. But it is important to note that this resolution refers to the resolution of the executive committee as providing that Jamnadas Mehta was allowed to buy the 26,000 Asian Assurance Company's shares standing, in the name of Meyer Nissim and taking over the liability of

Meyer Nissim to the bank for advances made against these shares amounting to Rs. 74,062-13-0, The resolution of the executive committee, it will be remembered, did not make any mention of Jamnadas Mehta taking over the liability of Meyer Nissim to the bank. The only explanation given by Sir Noshirwan Engineer as to why proper entries were not made in the accounts of Meyer Nissim and Jamnadas Mehta on July 10, 1940, if these shares were in fact sold by the bank to Jamnadas Mehta, is that Jamnadas Mehta being the chairman of the board of directors of the bank, he did not want his name to appear as a debtor to the bank. But strangely enough, the evidence is that on the very day entries were made in the security register showing that these shares had been sold to Jamnadas Mehta and now stood as security for the indebtedness of Jamnadas Mehta and not Meyer Nissim. There is another document in this connection to which I must refer and that is the letter alleged to have been written by Deshpande to Meyer Nissim on July 12, 13, 1940. This letter states that the bank had disposed of the shares of Meyer Nissim and of other shares and that the sale-proceeds were being adjusted to Meyer Nissim's loan accounts, and Meyer Nissim was informed that he was no longer a debtor of the bank. A rather fantastic story was told in the witness-box as to how this letter came to be delivered to Meyer Nissim. I need not enter into all its entanglements and complexities. But the undisputed fact remains that this letter was in the possession of Meyer Nissim on September 6, 1940, and he handed it over to the Official Assignee on that day. But it has to be remembered that the letter is not numbered by a serial number which would give one a definite idea as to when it was written, and although the bank maintains a despatch book, it is not entered in the despatch book because it is alleged to have been delivered by hand, and although a receipt is produced which bears the date July 15, 1940, from Meyer Nissim's constituted attorney, there is nothing to connect this letter with the receipt.

96. It is important to note that the transaction on which the bank relied, as I have already pointed out, in suit No. 1001 of 1941, was a tripartite agreement between the bank, Jamnadas Mehta and Meyer Nissim. According to the bank and Jamnadas Mehta, the effect of this agreement was that Jamnadas Mehta took over all the liabilities of Meyer Nissim and also all his securities. Therefore, as far as these particular 26,000 shares were concerned, the result was a novatio whereby the bank agreed to substitute Jamnadas Mehta in place of Meyer Nissim as its debtor and Jamnadas Mehta took over the 26,000 shares of the Asian Assurance Company as its owner. The vital and fundamental distinction between that transaction and the transaction which the plaintiff now seeks to prove in this case can easily be appreciated. This transaction is a transaction of sale-a sale by the bank as pledgee in possession of Meyer Nissim's shares. The importance of this distinction would however be realized when one remembers that Meyer Nissim was in serious financial difficulties in the beginning of July 1940 and as a matter of fact was adjudicated insolvent on July 16, 1940. The difficulty of alleging one transaction at one time and alleging and trying to establish quite a different one at another time was clearly realized both by the bank and by the plaintiff. Strangely enough when one turns to the plaint in the suit this transaction of sale is not specifically alleged. The shades of the tripartite agreement are still haunting the plaintiff and his title to these shares is traced in the following words:-

> Defendant No. 3 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.

Even no specific issue was raised about the sale; and with respect to the learned Judge, although he found issue No. 1 raised by the 1st defendant company, namely, whether defendant No. 3 had before the adjudication of defendant No. 4 as insolvent become the owner of the 26,000 shares as alleged in paragraph 8 of the plaint, in the affirmative, he found issue No. 2, namely, whether defendant No. 3 had taken over the liabilities of defendant No. 4 and all the security therefor as alleged in paragraph 8 of the plaint, in the negative. The learned Judge obviously overlooked the fact that when one looks to paragraph 8 of the plaint, issues Nos. 1 and 2 really refer to one and the same allegation in paragraph 8 of the plaint. The bank in its reply to the Official Assignee's counter-claim still stoutly maintained that there was a tripartite agreement and rather naively alleged that the tripartite agreement was carried out inter alia by the sale by the bank to Jamnadas Mehta of the 20,000 shares. It is difficult to see how the tripartite agreement could be carried out by a sale by the bank as pledgee in possession to Jamnadas Mehta of the 26,000 shares when the very essence of the tripartite agreement was not the sale by the bank to Jamnadas Mehta but of Jamnadas Mehta taking over the liabilities of Meyer Nissim. 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.

97. Sir Noshirwan Engineer who was hard put to support the case of a sale was constrained to contend that the contract of sale was independent of the tripartite agreement and even if the tripartite agreement was not proved, there was nothing to prevent the plaintiff from establishing the case of a sale. But unfortunately for Sir Noshirwan his most important witness Deshpande, the managing director of the bank, refused to allow himself to be diverted from his loyalty to the bank and to the tripartite agreement. Although in his examination-in-chief Deshpande said that the 26,000 shares of the Asian Assurance Company were sold by the bank to Jamnadas Mehta on July 10, 1940, in his cross-examination he admitted that there was only one agreement -an oral one--which was arrived at on July 5, 1940, and which was the tripartite agreement; the form in which the resolution came to be adopted by the executive committee was really the mode- adopted by the committee for carrying out the part of the arrangement which was the subject-matter of the resolution. In other words, the resolution was merely the cloak and the outward appearance. The substance was the tripartite agreement. He was also emphatic that the terms which were agreed upon on July 5, 1940, were not altered by what the executive committee did on July 10, 1940. The intention was all throughout to give effect to the arrangement arrived at between the parties on July 5, 1940. He further made a rather startling admission that at the meeting of the executive committee Jamnadas Mehta stated to all its members that he had agreed to take over all the liabilities and all the securities of Meyer Nissim and the executive committee approved of that course of action and agreed that Jamnadas Mehta should take over all the liabilities and all the securities of Meyer Nissim. Thus it will be seen that on the evidence of Deshpande it is perfectly clear that only one transaction took place, namely, an oral agreement of July 5, 1940, given effect to by the resolution of

the executive committee on July 10, 1940.

98. In my opinion, the bank deliberately left the transaction in a vague and nebulous state. 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.

99. Considerable emphasis has been laid by Sir Noshirwan Engineer on the books of account of the bank. But in my opinion the books of account of the bank have been maintained in a manner which would be unworthy of even a petty trader, The only reason why a Court of law attaches importance to books of account kept in the ordinary course is because they are a contemporary record of events. If the bank chooses not to make the relevant entries on the due dates, it has got to thank itself if its books are disbelieved and discredited.

100. I should also like to say this; that to this transaction of sale, according- to the plaintiff, there were two parties, namely, the bank and Jamnadas Mehta. Jamnadas Mehta also at all relevant times was the chairman of the board of directors of the bank and by all accounts a dominating personality who guided and controlled the affairs of the bank. Although Jamnadas Mehta was available to the plaintiff, he was not called.

101. Under the circumstances I agree with the learned Chief Justice that the plaintiff has failed to prove that there was a sale by the bank to Jamnadas Mehta as pledgee in possession on July 10, 1940.

102. Sir Noshirwan Engineer has very wisely not pressed the issue of estoppel. He has however urged that the Official Assignee is precluded by the proceedings and consent decree in suit No. 396 of 1940 from contending that he had any right, title or interest in these shares. That suit was filed by Meyer Nissim before he was adjudicated insolvent in March, 1940, claiming a certain sum from Jamnadas Mehta. After Meyer Nissim was adjudicated an insolvent, the Official Assignee came on the record of the suit and he amended the plaint alleging that a compromise was arrived at between Meyer Nissim and Jamnadas Mehta which compromise was not binding on him. Jamnadas Mehta filed a written statement in that suit alleging that the compromise was binding on the Official Assignee and pointing out what the consideration for the compromise was, and one of the considerations was that Jamnadas Mehta had taken over the liabilities of Meyer Nissim to the bank in respect of the Joan of Rs. 75,000 which was secured by the 26,000 shares of the Asian Assurance Company. A consent decree was taken in this suit whereby the suit was dismissed.

103. Sir Noshirwan Engineer has argued that it is implicit in the consent decree that the compromise on which Jamnadas Mehta relied was upheld because, although the Official Assignee challenged the compromise, he ultimately agreed to the suit being dismissed whereby Meyer Nissim gave up his

claim in the suit; but there is nothing whatever to show in the terms of the consent decree that the basis of it was the upholding of the compromise. Various reasons might have led the parties to arrive at this conclusion; but even assuming that Sir Noshirwan's contention is correct, the consideration for the compromise merely dealt with the loan of Rs. 75,000 and no reference was made to the ownership of the Asian Assurance Company's shares. In my opinion there is nothing whatever in the contention of Sir Noshirwan Engineer that the consent decree in suit No. 396 of 1940 estops the Official Assignee from making a claim to these 26,000 shares.

104. In the result, therefore, I agree with the learned Chief Justice that the appeal succeeds and must be allowed.