CALCUTTA HIGH COURT

Unity Company Private Ltd

Vs.

Diamond Sugar Mills

Suit No. 1943 of 1957

(A.N. Sen, J.)

18.11.1968

JUDGMENT

A.N. Sen, J.

1. Unity Company Private Ltd., the plaintiff herein (hereinafter referred to as the plaintiff or the plaintiff company) was the owner and registered holder or 25,000 shares of Diamond Sugar Mills Ltd., the defendant No. 1 (hereinafter referred to as the defendant company). The said shares are fully paid up and, the shares are of the face value of Rs. 10/- per share. The defendant company claimed a lien over the said shares owned by the plaintiff company in respect of a debt of the plaintiff company to the defendant company and in exercise of the said lien the defendant company had sold the shares to other parties who happen to be and/or are represented by the other defendants in this suit. In this suit the plaintiff company challenges the validity of the sale of the plaintiff's said shares by the defendant company. The plaintiff had originally instituted this suit against the defendant company. By subsequent amendment of the plaint the other defendants who are the purchasers of the said 25,000 shares and the present registered holders thereof have been impleaded and brought on record in this suit. One of the original defendants Pannalal Beriwal who was the purchaser of 10,000 shares out of the said 25,000 shares died during the pendency of the suit and the defendant Nos. 2 to 10 are the heirs and legal representatives of the said Pannalal Beriwal. The defendant No. 3 Gopi Kissen Agarwal who is an heir and legal representative of Pannalal Beriwal is also himself a purchaser and the present registered holder of 5,000 shares out of the said 25,000 shares. The defendant No. 4 Sanwalram Agarwal, another heir and legal representative of Pannalal Beriwal is the purchaser and the present registered holder of another lot of 5,000 shares out of the said 25,000 shares and the defendant No. 5 Amarnath Agarwal who is also an heir and legal representative of Pannalal Beiriwal is the purchaser and registered holder of another lot of 5,000 shares out of the said 25,000 shares which form the subject-matter of dispute in the present suit.

2. The case of the plaintiff as made in the plaint may be stated. In paragraph 1 of the plaint, the plaintiff states that the plaintiff is and at all material time was the holder of 25,000 shares in the defendant company and the particulars of the said shares are given. In paragraph 2 of the plaint, the plaintiff alleges that the defendant company demanded payment from the plaintiff a sum of

Rs. 1,10,000/- alleged to be due to the defendant company by the plaintiff company on account of money lent and advanced by the defendant company to the plaintiff company in 1948 and in the said letter the defendant company claimed to exercise an alleged lien on the said shares belonging to the plaintiff if the said amount was not paid by the plaintiff to the defendant company. In paragraph 3 of the plaint, the plaintiff avers that no amount whatsoever was due by the plaintiff to the defendant company in June 27, 1956, all advances made by the defendant company to the plaintiff having been liquidated several years prior thereto and the plaintiff further states that in any event the alleged advances were barred by the law of limitation. In paragraph 4 of the plaint, it is stated that by letter dated 8th October, 1957 the defendant company informed the plaintiff that in exercise of the alleged power and lien as contained in the Articles of Association of the defendant company the said 25,000 shares standing in the plaintiff's name had been sold by the defendant company @ Rs. 5/- per share and a sum of Rupees 1,25,000/- had been realised by virtue of such alleged sale and it was further alleged in the said letter that after giving credit for the said amount to the plaintiff a sum of Rs. 42,940-1-0 still remained due and payable by the plaintiff to the defendant company. In paragraph 5 of the plaint the plaintiff makes the case that the plaintiff was and is not indebted to the defendant company in any sum whatsoever and the alleged sale of the said shares in exercise of the alleged lien contained in the Articles of Association of the defendant company is void, inoperative and not binding on the plaintiff. In paragraph 6, it is stated that no sale of the said shares in fact took place as alleged or at all and the purported sale of the said shares by the defendant company is mala fide and the sum of Rs. 5/- per share alleged to have been realized by the defendant company in respect thereof is grossly inadequate and is far below the market rate of the said shares. It is stated in paragraph 7, that the plaintiff is still the owner of the said shares. It is claimed in paragraphs 7(a), 7(b), 7(c), 7(d) and 7(e) which were introduced by amendment of the plaint, that the purported forfeiture of the said shares by the defendant company by its resolution dated 25th May, 1957 and allotment of the said shares to the al_ leged purchasers of the said shares and entering their names on the share-register of the defendant company and issuing fresh certificates in their favour and expunging the name of the plaintiff company from the share register of the defendant company are wrongful and illegal and not binding on the plaintiff company and that the share register of the defendant company should be rectified by deleting the names of the alleged purchasers there from and recording the name of the plaintiff as the lawful owner of the said shares. In para 8 the plaintiff alleges that the defendant are denying the plaintiff's title to the said 25,000 shares. In para 9 of the plaint, the plaintiff in the alternative claims damages from the defendant company in respect of the said shares for Rupees 12,50,000/- @ Rs. 50/- per share, being the value thereof on 18th October, 1957. On the basis of the aforesaid material averments the plaintiff has asked for the following principal reliefs :

(i) A declaration that the plaintiff continues to be the owner of the 25,000 shares in the defendant company.

(ii) A declaration, if necessary, that the purported sale of the said shares by the defendant company is void, inoperative and not binding on the plaintiff.

(iii) A declaration that the forfeiture of the said shares by the defendant company and the allotment of the same to the said Pannalal Beriwal since deceased and the defendants 3, 4 and 5 is void, inoperative and not binding on the plaintiff.

(iv) A declaration that the said resolution of the Board of Directors of the defendant company dated 25th May, 1957 is void, illegal and not effective and is not binding on the

plaintiff.

(v) Rectification of the share register of the defendant company by deleting the name of the said Pannalal Beriwal since deceased and of the defendants Nos. 3, 4 and 5 and by putting in the name of the plaintiff as the owner of the said shares.

(vi) If necessary, cancellation of the share certificates issued by the defendant company in favor of the said Pannalal Beriwal since deceased and the defendants 3, 4 and 5.

(vii) Alternatively, Rs. 12,50,000/- as damages or an enquiry into damages and a decree for such sum as may be found to be due on such enquiry.

3. The case of the defendants may now be noted. The defendant company in the written statement admits that prior to 21st May, 1957, the plaintiff company was the holder of 25,000 ordinary shares which form the subject-matter of the suit and makes the case that between January and July, 1948 the defendant company lent and advanced to the plaintiff company a sum of Rs. 1,40,000/-in 4 installments for the purpose of the business of the plaintiff company and at its request and in December 1949, the plaintiff company repaid a sum of Rs. 30,000/- in part payment of the said sum of Rupees 1,40,000/- leaving a balance of Rupees 1,10,000/-. The defendant company further makes the case that as the plaintiff company was unable to repay the said sum of Rs. 1,10,000/- immediately or in the near future, the plaintiff company through Babu Champalal Jathia appealed to the defendant company for sufficient time to repay the said balance sum of Rs. 1,10,000/- and also for facilities to repay the same in easy monthly installments and it was agreed by and between the plaintiff company and the defendant company as follows :-

(a) That the sum of Rs. 1,10,000/- would not become payable by the plaintiff company to the defendant company before 1st February, 1955.

(b) That the plaintiff company would repay the said sum to the defendant company with interest thereon @ 6% per annum by monthly installment of Rs. 5,000/-, the first of such installment to be paid on 1st February 1955 and all subsequent monthly installments on the first of each succeeding month.

(c) That payments were to be made at the plaintiff's registered office.

(d) That for the purpose of recovery of the said sum of Rs. 1,10,000/- and its interest thereon @ 6% per annum, the defendant company would be entitled to exercise all its rights provided under the Articles of Association in respect of the aforesaid 25,000 shares held by the plaintiff company in the defendant company.

4. It is the case of the defendant company that even after expiry of 1st February, 1955 and in spite of demands the plaintiff company failed and neglected to pay the said sum of Rs. 1,10,000/- or any part thereof or any interest thereon either by monthly installment of Rs. 5,000/- as agreed or at all and that it was resolved by the defendant company that the defendant company would enforce its lien on the said shares of the plaintiff as the plaintiff had failed and neglected to pay the sum of Rs. 1,10,000/- together with interest thereon or any part thereof by giving a notice to the plaintiff company in terms of the Articles of Association of the defendant company; and on or about 27th June, 1955, the defendant company called upon the plaintiff company to make payment of the said sum of Rupees 1,10,000/- with interest thereon @ 6% per annum within 7 days from the date of receipt of the said letter by the plaintiff company and also informed the

plaintiff company that in default of such payment the defendant company in exercise of its lien on the said 25,000 shares would forfeit, sell and allot the same in accordance with the provisions of the Articles of Association of the defendant company after the expiry of the said period and would apply the sale proceeds towards payment and discharge of the said sum of Rs. 1,10,000/- with interest @ 6% per annum. It is the further case of the defendant company that as inspite of the said notice the plaintiff company failed and neglected and/or refused to pay the said sum of Rs. 1,10,000/- with interest @ 6% per annum or any portion thereof within the aforesaid time or at all, the defendant company in exercise of its lien forfeited the said 25,000 shares of the plaintiff company and expunged the name of the plaintiff company from the register of members and the defendant company sold and allotted the said 25,000 shares @ Rs. 5/- per share to the following persons in the following manner, viz.,

1. Shri Pannalal Beriwal 10,000 shares
2. Shri Gopi Kissen Agarwal 5,000 shares
3. Shri Sanwalram Agarwal 5,000 shares and
4. Shri Amarnath Agarwal 5,000 shares

and the defendant company duly entered and/or registered the names of the said persons in the register of members of the defendant company. The defendant company states that the defendant company gave due notice to the plaintiff company of the said forfeiture and sale and allotment of the raid 25,000 shares and also called upon the plaintiff company to pay the defendant company a sum of Rs. 42,940/- and 1 anna which was still due and owing to the defendant company by the plaintiff company. The defendant company denies the allegations made in the plaint and denies in particular the case made by the plaintiff company that the plaintiff company had liquidated the debt several years earlier or that the loans advanced by the defendant company were barred by limitation. In substance the case of the defendant company is that the plaintiff company had failed and neglected to pay its debt to the defendant company of the said sum of Rs. 1,10,000/- with accrued interest and the said debt was justly payable by the plaintiff company to the defendant company and the defendant company in exercise of its lien has forfeited the said shares and has sold and allotted the said shares to purchasers of the said shares and the name of the defendant company has been expunged from the register of members of the defendant company and the names of the purchaser have been recorded therein. It may be noted that the defendant company has filed a suit against the plaintiff company for recovery of the said balance amount alleged to be still due and payable by the plaintiff company to the defendant company after giving credit to the plaintiff company for the sale proceeds realized in respect of the said 25,000 shares of the plaintiff company.

5. The other defendants (hereinafter referred to as the purchaser defendants) happen to be the heirs and legal representatives of the original defendant Pannalal Beriwal who had taken 10,000 shares and 3 of the other defendants namely, Gopikissen Agarwal, Sanwalram Agarwal and Amarnath Agarwal, the defendants Nos. 3, 4 and 5 herein are also purchasers of lots of the said 25,000 shares in their individual capacities. These defendants in their written statement deny the claim of the plaintiff and these defendants make the case that these defendants are in any event *bona fide* purchasers of the said shares for valuable consideration without any notice of any alleged claim of the plaintiff and the rights of these defendants in relation to the said shares cannot be affected by any alleged claim of the plaintiff company. The purchaser defendants further make the case that the plaintiff company with full knowledge that the defendant company

was threatening to and intended to sell the said shares stood by and took no steps to prevent such sale and thereby made it possible for the defendant company to sell the said shares and impliedly represented and/or permitted these defendants (the purchaser defendants) to believe that the defendant company was entitled to sell the said shares and/or acquiesced in the said sale; and that these defendants are *bona fide* purchasers for value of the said shares and have acted on the basis of the said inaction and/or representations of the plaintiff and/or said beliefs. It is the case of these defendants that the plaintiff is therefore estopped from challenging the title of these defendants to the said shares and these defendants make the further case that the plaintiffs are guilty of laches and/or delay and have and/or must be deemed to have lost and/or waived their rights, if any, in the said shares, which these defendants deny.

6. The following issues were raised :

1(a) Was there any agreement between the plaintiff and the defendant No. 1 as alleged in paragraph 1 (e) of the written statement of the defendant No. 1 ?
(b) Did the plaintiff liquidate all advances made by the defendant No. 1 (defendant company) to the plaintiff ?
(c) Was there any enforceable debt or liability by the plaintiff company to the defendant No. 1 at the time of alleged sale ?
2 (a) Did the defendant No. 1 have any lien on the 25,000 shares of the plaintiff in suit ?
(b) Did the defendant No. 1 duly enforce its right of lien on the said 25,000 shares ? Were those shares sold at the proper value ?
(c) Was the exercise of such right by the defendant No. 1 void, inoperative and not binding on the plaintiff company ?
3. Did the plaintiff company stand by and take no steps to prevent the sale of the said shares by the defendant No. 1 to the original defendant No. 2 and the defendants Nos. 3, 4 and 5 and thereby acquiesce in the said sale ?
4. Is the plaintiff estopped from challenging the sale of the said shares to the original defendant No. 2 and the defendants Nos. 3, 4 and 5 as alleged in paragraph 14 (a) of the written statement filed by the said defendants ?
5. (a) Are the original defendant No. 2 and the defendants Nos. 3, 4 and 5 *bona fide* purchasers for valuable consideration ?
(b) Were the said shares validly sold to and purchased by the original defendant No. 2 and the defendants Nos. 3, 4 and 5 for valuable consideration ?
6. Was the said sale mala fide or the price thereof grossly or at all inadequate or below the market price as alleged ?
7. Is the sale of the said 25,000 shares in favor of the original defendant No. 2 and the defendants Nos. 3, 4 and 5 by the defendant No. 1 binding on the plaintiff company ?
8. To what reliefs, if any, is the plaintiff entitled ?

7. It may be noted that issues Nos. 1 and 2 were raised on behalf of the defendant company, the defendant No. 1 herein and the issues Nos. 3 to 7 were raised on behalf of the purchaser-defendants, being the other defendants in this suit.

8. Evidence oral and documentary have been adduced on behalf of the parties. The documentary evidence consists mainly of entries in the books of accounts of the parties, other books, Balance Sheets, Memorandum and Articles of Association of the defendant company, the minutes and resolutions of the defendant company, the share certificates, receipts, certified copies of Bank Statements and correspondence. The plaintiff has called two witnesses (1) Kashi Nath Subramaniam and (2) Gopal Chandra Das. On behalf of the defendant company one Kedar Nath Dutta, who is the Chief Accountant of the defendant company has given evidence. Sri Jyotirmoy Mitra, solicitor for the defendant company, has also been called on behalf of the defendant company to prove that the entries and books exhibited by the plaintiff in the suit are not genuine. On behalf of the purchaser-defendants, Gopi Kissen Agarwal, the defendant No. 3 has given evidence.

9. In the facts of the instant case, it will be convenient, in my opinion, to discuss and consider the evidence in relation to the issues raised instead of discussing the evidence in general terms. I shall, however, record my impression of the evidence as and when I deal with the same. I, therefore, propose to take up the issues that have been raised and to discuss and consider the evidence which have been produced on behalf of the parties in relation to the said issues.

10. The first issue raised and which I now take up for consideration, is Issue No. 1 which is –

> 1 (a) Was there any agreement between the plaintiff and defendant No. 1 as alleged in para 1 (e) of the written statement by defendant No. 1 ?
> (b) Did the plaintiff liquidate all advances made by the defendant No. 1 to the plaintiff ?
> (c) Was there any enforceable debt or liability by the plaintiff to the defendant No. 1 at the time of the alleged sale ?

Plaintiff led evidence first to prove Issue No. 1 (b) and I shall take up the Issue No. 1 (b) first. Onus of proving this issue is on the plaintiff. (After considering the evidence His Lordship proceeded) :

16. I have, therefore, no hesitation in coming to the conclusion that the case of the plaintiff with regard to the repayment of the loan advanced by the defendant No. 1 is untrue and I hold that the plaintiff did not liquidate the advance made by the defendant company to the plaintiff company. (After discussing the evidence the judgment proceeded).

17. I now take up for consideration the question of the agreement between the plaintiffs and the defendant No. 1, alleged in para 1(e) of the written statement of the defendant No. 1, which is issue No. 1 (a). (After discussing the evidence, His Lordship concluded that a sum of Rs. 1,10,000/- remained due and payable by the plaintiff company to the defendant company and the same amount was payable with interest; but with regard to the rate of interest and with regard to the time for which interest was payable the judgment proceeded :).

21. I now take up Issue No. 1(c), which is really a consequential one and the answer to this issue has to follow from the answers to the issue No. 1 (a) (b). In view of my findings on issue No. 1 (a) and 1 (b), I must hold in answer to this issue 1 (c), that there was a debt or liability of Rs. 1,10,000/- with interest by the plaintiff company to the defendant company at the time of alleged

sale, but this debt or liability has become time barred and the defendant company could not enforce the said debt or liability by a suit in a Court of law.

22. I now take up Issue No. 2 for consideration and I shall take up Issue No. 2 (a) first. Article 35 of the Articles of Association of the defendant company provides as follows :-

> "The Company shall have first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) and upon the proceeds of sale thereof for his debts, liabilities and engagements, solely or jointly with any other person to or with the Company, whether the period for the payment, fulfillment or discharge thereof shall have actually arrived or not and no equitable interest in any share shall be created except upon the footing and condition that Article 13 hereof is to have full effect. and such lien shall extend to all dividends from time to time declared in respect of such shares. Unless otherwise agreed the registration of a transfer of shares shall operate as waiver of the Company's lien, if any, on such shares."

23. Article 13 referred to in the said Article 35 reads as follows :

> "Save as herein otherwise provided, the Company shall be entitled to treat the registered holder of any shares as the absolute owner thereof and accordingly shall not, except as ordered by a Court of competent jurisdiction, or as by statute required, be bound to recognize any equitable or other claim to or interest in such share on the part of any other person."

Article 36 of the Articles of Association of the company may also be set out -
Article 36 - For the purpose of enforcing such lien the Directors may sell the share subject thereto in such manner as they think fit, but no sale shall be made until such period as aforesaid shall have arrived and until notice in writing of the intention to sell shall have been served on such member, his Executor or Administrator or his committee, Curator bonis or other legal Curator and default shall have been made by him or them in payment, fulfillment or discharge of such debts, liabilities or engagement for 7 days after such notice." While setting out the above Articles, it will also be convenient to set out Article 38 which has also been relied on by the defendants and the said Article 38 is in the following terms –

> "Upon any sale after forfeiture or for enforcing a lien in purported exercise of the powers, hereinbefore given the Directors may cause the purchaser's name to be entered in the register in respect of the shares sold and the purchasers shall not be bound to see to the regularity of the proceedings, not the application of the purchase money and after his name has been entered in the register in respect of such shares the validity of the sale shall not be impeached by any person and the remedy for any person aggrieved by the sale shall be in damages only and against the Company exclusively."

24. The validity of the aforesaid Articles cannot be and has not been impeached or questioned.

The Articles of Association of the company on the basis of which any particular person becomes a member of the Company constitute a valid and binding contract between the company and the members of the company and also constitute a valid contract between the members of the Company inter se. Therefore, by virtue of the provisions contained in the aforesaid Articles and in Article 35 in particular, there cannot be any doubt, in my opinion, that the Company has a first and paramount lien on all the shares registered in the name of each member (whether solely or jointly with others) and upon the proceeds of sale thereof for his debts, liabilities and engagement, solely or jointly with any other person to or with the Company, whether the period for the payment, fulfillment or discharge thereof shall have actually arrived or not. I have already held that the case of the plaintiff company of repayment of the advances made by the defendant company to the plaintiff company is not true and there was a debt or liability of the plaintiff company to the defendant company for a sum of Rs. 1,10,000/- with interest thereon at the time when the plaintiff company was the registered holder of these 25,000 shares. As there was a debt or liability of the plaintiff company to the defendant company the defendant company by virtue of the provisions contained in the Articles of Association and particularly in Article 35 had a first and paramount lien on the said 25,000 shares on the plaintiff company in respect of the said debt or liability. I must, therefore, hold in answer to Issue No. 2 (a) that the defendant No. 1 did have a first and paramount lien on the said 25,000 shares of the plaintiff company in suit and I must answer this Issue in the affirmative. It is to be noted that in the letter of the 14th July, 1955 addressed by Messrs. T. Banerjee and Co., Solicitors for the plaintiff to the defendant company (P. D. No. 5 at page 6 of Ext. A) the lien of the defendant company was in fact admitted and it was contended that the lien would only be enforced, if there was a good and a valid claim. I have also to observe that it was not seriously disputed on behalf of the plaintiff that the defendant company did have a lien on the said 25,000 shares of the plaintiff for its debts and liabilities under the Articles of Association of the Company which bind the plaintiff and it has been mainly contended on behalf of the plaintiff that the defendant company had no right to enforce the said lien and had, in any event, lost the right to enforce the said lien, as the debt or liability in respect of which the lien arose had become barred and was not enforceable. I shall consider this aspect and deal with this contention when I take up Issue No. 2 (b) for consideration, as in my view this question really pertains to Issue No. 2 (b) and can be more conveniently decided, in dealing with the said Issue.

25. I now take up Issue No. 2 (b) for consideration. This Issue is : "Did the defendant No. 1 duly enforce its right of lien on the said 25,000 shares ? Were those shares sold at the proper value ?" It is to be seen that there are really two questions which have been included in this Issue No. 2 (b). The first question in this Issue is as to the due enforcement by the defendant company of the right of lien on the said 25,000 shares and the other question is as to whether the shares were sold at the proper value. I shall take up first the question as to whether the defendant company had duly enforced its right of lien on the said 25,000 shares of the plaintiff. It has been contended by the learned counsel on behalf of the plaintiff that this right of lien was not duly enforced by the defendant company, as the said lien could not be enforced in view of the claim of the defendant company against the plaintiff being barred by limitation. In other words, it is the contention of the plaintiff that the lien created on the shares under the Articles of Association ceased to become enforceable as soon as the debt in respect of which the lien was claimed, became barred by limitation.

26. It has next been contended that the said lien was not duly enforced and could not be enforced

as no proper notice as contemplated under the Articles has been served on the plaintiff company. It is the contention of the plaintiff company that the lien created by and under the Articles of Association can only be exercised provided due notice as contemplated in the Articles had been served on the plaintiff and the service of a proper notice as contemplated by the Articles is a condition precedent to the exercise of the right of lien by the defendant company. It is contended on behalf of the plaintiff that the notice served on the plaintiff company is defective and invalid as the amount to be paid by the plaintiff company is not specified in the said notice and in consequence of the notice being bad and defective there could not be any valid enforcement of the right of lien on the said 25,000 shares.

27. It has been finally contended on behalf of the plaintiff that in any event the defendant company had no right to forfeit the shares of the plaintiff for non-payment of the debt or liability and forfeiture of the said shares by the defendant company for enforcing the lien and effecting sale is unauthorized, unwarranted and illegal. The learned counsel for the plaintiff has contended that the right to forfeit the shares is there in the company only in case of non-payment of calls and the defendant company has no right to forfeit the shares to enforce its lien by sale of the shares and such forfeiture of the shares is not only not warranted or authorized under the Articles of Association of the company, but results clearly in the reduction of share capital of the company and trafficking by the company in its own shares.

28. It is broadly from these three aspects, this Issue as to due enforcement of the right of lien by the defendant company on the said 25,000 shares of the plaintiff has been argued and the sale in question has been attacked. The sale in question of the said shares by the defendant company, has also been impeached on the ground that there could be no valid sale of the said shares by the defendant company without a duly stamped instrument of transfer.

29. These contentions require very careful consideration and it will be convenient to note the arguments that have been advanced from the bar on behalf of the contending parties with regard to them.

30. The first contention, broadly stated, is whether the lien became unenforceable as the debt on which the lien was claimed, became barred by limitation. The learned counsel appearing on behalf of the defendant company has argued that the lien remains valid and enforceable even though the lien is claimed is barred by limitation. It is the argument of the learned counsel for the defendant company that when any debt becomes barred by the law of limitation, no suit can succeed or be entertained for recovery of such barred debt because of the statutory provisions contained in the Limitation Act, but the debt remains and is not extinguished. It is argued that the statute only bars the remedy of realizing the debt by a suit in a Court of Law, but does not extinguish the debt itself and the debt still remains; and it is open to any party to realise or recover the debt by any other method, if possible, without filing a suit in a Court of Law. It is the contention that as the debt is still there and is not entinguished and only the remedy to recover the same by suit in a Court of Law is barred, the lien continues to remain on the debt which is still there and there is nothing to prevent the defendant company from exercising the right of lien, if such right can be exercised without recourse to a suit. In support of this contention that the lien remains enforceable and the right of lien can be exercised in case of statute barred debts, reference has been made by the learned counsel on behalf of the defendant company to following decisions :

1. The case of *First National Bank Ltd. (In Liquidation) v. Seth Sant Lal, reported in*[1]
2. The case of *Musamut Janee Khanum v. Mussamut Amatool Fatima Khanum*[2],.
3. The case of *Nursing Doyal v. Hurryhur Saha, reported in*[3]
4. The case of *Narendra Lal Khan v. Tarubala Dassi, reported in*[4]
5. The case of *Ram Ratanlal v. Aditya Prasad, reported in*[5]
6. *Nakul Chandra Policy v. Kalipada Ghosal, reported in*[6]
7. The case of *Chotanagpur Banking Association Ltd. v. Rajib Nath Mukherjee reported in*[7]
8. The case of *Amar Nath v. Karnal Electric Supply Co Ltd., reported in*[8]

31. Reliance has also been placed on Articles 264 and 265 at page 144 in Halsbury's Laws of England, Third Edition, Vol. 24. The said Articles may be set out :-

> "Article 264 : Legal lien by contract - A lien whether general or particular may be created and defined by contract although a lien so arising will generally be more in the nature of a pledge. A general lien often arises by contract between a company and its member under the articles of association. An agreement which is void from the beginning for certain legal formalities cannot give rise to a right of lien, but an agreement to do something which is illegal, as for instance, to do certain work on Sunday, can give rise to a lien if the work is done."
>
> "Article 265 : Nature of legal lien - A legal lien is a right of defense, not a right of action and consequently can be claimed in respect of a statute barred debt. A lien does not, except in special circumstances, give any right to sell the things retained and if the thing is transferred without authority the lien does not pass with the possession of the property. Accordingly, a lien, being merely a personal right, which continues during possession of goods, cannot be taken in execution. In the case of a perishable article such as a horse, the party claiming the lien is bound to take reasonable care of such article, but, generally a person having a lien on a chattel, who keeps it for the purpose of enforcing its lien cannot make any claim against the owner for the cost of so keeping it."

32. The learned counsel for the plaintiff submitted that the lien becomes unenforceable

[1] AIR 1959 Punjab 328.
[2] reported in 8 Weekly Reporter page 51
[3] ILR 5 Cal 897
[4] AIR 1921 Cal 67
[5] AIR 1928 Oudh 273.
[6] AIR 1939 Cal 163
[7] AIR 1947 Pat 40
[8] AIR 1952 Pun 411

and is extinguished as soon as the debt in respect of which the lien is created under the Articles is barred. He has argued that the lien created by the Articles in the instant case is in the nature of an equitable charge on the shares of the members of the Company in respect of their debts and liabilities. He has referred to the decision in the case of *The Bradford Banking Co. Ltd.*

v. Henry Briggs, Son and Co., Ltd[9]*.,* and also to the decision in the case of *New London and Brazilian Bank v. Brocklebank*[10]*,* in support of his contention that the lien created by the Articles is in the nature of an equitable charge on the shares. The learned counsel for the plaintiff argues that the equitable charge is extinguished as soon as the debt or liability for which the same is created, becomes barred by limitation. The learned counsel refers to and relies on the following statement of law in Halsbury's Laws of England (Third Edition, Vol. 24) at page 155 :-

> "Article 285. Meaning of Equitable lien - An equitable lien may be defined as an equitable right, conferred by law upon one man, to a charge upon the real or personal property of another, until certain specific claims have been satisfied.
>
> It differs from an equitable charge inasmuch as the latter is normally a right founded on contract, whereas an equitable lien is founded on the principle of equity, that he who has obtained possession of property under a contract for payment of its value will not be allowed to keep it without payment; but so far as regards their effect and priorities there is no distinction between an equitable lien and an equitable charge, both are equitable interests and are not mere equities and both are liable to be defeated under the Limitation Act."

33. The learned counsel has also argued that the lien created under the Articles being in the nature of an equitable charge on the shares, really confers a right to property and the said right is extinguished and becomes unenforceable by virtue of the provisions contained in Section 28 of the Limitation Act of 1908 which was in force at the material time. Section 28 of the Limitation Act reads as follows :- "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

34. The learned counsel for the plaintiff has also referred to and relied on the decision in the case of *Rajibnath v. Chhotanagpur Banking Association Ltd*[11]*.,* and in citing this decision the learned counsel has pointed out that the decision in the same case of the single Judge reported in AIR 1947 Patna 40 referred to and relied on by the counsel for the defendant company has been overruled.

35. Before dealing with the respective contentions of the parties on this question it will be convenient to refer to and consider the decisions cited from the bar. In the case of *Mussamat Janee Khanum v. Mussamat Amatool Fatima Khanum*[12]*,* this Court observed at p. 54 as early as 1867 –

[9](1886) 12 AC 29 [11] ILR 27 Pat 108 : AIR 1948 Pat 443
[10] (1882) 21 Ch D 302 [12](1867) 8 Suth WR 51

> "The right of lien and the right to come to Court to pray to have the lien established, are causes of action which may be quite distinct from the right to sue for the original debt in respect of which the lien was created. It is no new doctrine that a lien may remain in full force, though any right of action in respect of the claim for which it was created has long been barred by limitation."

, delivering the judgment of a Division Bench of this Court in 1880 observed :

> "We are of the opinion that neither the Limitation Act 1871, nor that of 1877, extinguishes

> a debt. These Acts only bar or discharge the remedy. This we think is clear from the language of the Acts and particularly from Sections 12 and 29 of the Act of 1871 and Sections 11 and 28 of the Act of 1877.
>
> The difference between these Acts and the English Limitation Law is, that in India limitation need not be set up as a defense (Section 4 of the Act of 1871 and Section 4 of the Act of 1877), while in England the defendant must expressly claim the operation of the statute. Section 60 of the Contract Act which was passed after the Limitation Act of 1871, also shows that the debt is not extinguished, but may be insisted on for certain purposes; so likewise, if the Creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt the recovery of which was barred by the Limitation Act. and probably it would be held that an Executor would be allowed to retain out of a legacy a debt owing by the Legatee to the testator, though its recovery was barred by the Act."

These observations were made by a Division Bench of this Court while dealing with an application by a decree-holder for the execution of a decree and the main question was whether, assuming execution of the decree was barred by Article 167, Schedule II of the Act of 1871, the judgment creditor could take advantage of the more liberal provisions of Article 179 of Schedule II of the Act of 1877.

36-37. In the case of *Narendralal Khan v. Tarubala Dasi*[13], Rankin, J., observed at page 68 –

> "Now the law on the subject, so far as it is necessary to state it, stands thus. By Section 28 of the Limitation Act of 1908 it is provided that 'on the determination of the period hereby limited to any person for instituting a suit for possession of any property right to such property shall be extinguished :' but in the case of a personal action for a debt limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. Thus if the attorney has any form of lien upon the property in respect of his bills of costs, he can exercise that lien notwithstanding that by the terms of the Limitation Act, he could not bring a suit."

In this case the learned Judge was dealing with the question of costs of a Solicitor and his lien and the enforceability of the lien. The case of *Nakul Chandra Polley v. Kalipada Ghosal*[14], deals with the effect of Section 53 (a) of the Transfer of Property Act and lays

[13] AIR 1921 Cal 67

[14] AIR 1939 Cal 163

down that there is no bar of Limitation Act to any defense under Section 53 (a) of the Transfer of Property Act and Section 28 or Article 113 of the Limitation Act does not apply to the right of defense under Section 53 (a) of the Transfer of Property Act. This case, to my mind, has no application or bearing on the facts of the instant case or on the question involved. The decision in the case of *Chotanagpur Banking Association v. Rajib Nath Mukherjee*[15], is not of any assistance, as the said decision was subsequently overruled by the decision of the Division Bench in ILR 27 Pat 108 : AIR 1948 Patna 443.

38. In the case ILR 27 Pat 108 : AIR 1948 Patna 443 one Digendranath Mukherjee who held 48

fully paid shares of Chhotanagpur Banking Association had borrowed from the Bank a sum of Rs. 1,500/-on a handnote on the 20th of July, 1915. The Bank obtained the decree against the heirs of Digendra on the said handnote on the 15th May, 1923. In execution of the decree on the 3rd August 1935, the shares of Digendra were sold through the Court and purchased by the Bank itself as the shareholder. In view of the provisions contained in Section 55 (1) of the Companies Act of 1913 to the effect that no Company limited by shares shall have power to buy its own shares unless there was the consequent reduction of capital in the manner provided in the said Act, the Bank soon realised that a mistake had been made and the shares were allowed to stand in the name of Digendra and on 31st December, 1935, the Secretary of the Bank transferred 43 of the shares to one of the Directors and his wife in order to satisfy Digendra's debt. A suit was instituted by the heirs of Digendra challenging the said sale and contending that the original sale was a nullity and so also the second sale in 1935 as the Bank had no power to sell Digendra's shares. The Munsif had decreed the suit in the trial Court and the Subordinate Judge in the first appeal upheld that decision. Shearer, J., in second appeal, however, reversed the decision and dismissed the suit. This decision of Shearer, J., is reported in AIR 1947 Patna 40. The learned Judge had agreed with the lower Court's view that the purchase of its own shares by the Bank was a nullity. He, however, pointed out that under Article 30 of the Articles of Association of the Bank, to which the share-holders must be taken to have agreed when he purchased the shares, the Company had a paramount or prior lien on the shares of each member for all his debts and could absolutely sell and dispose of the shares registered in the books of the company, in the name of any such debtor and apply the proceeds towards the same to the extent in discharge and satisfaction of such debts and without any further or other consent of the holder of the shares, could transfer the same in the books of the company to a purchaser. Shearer, J., came to the conclusion, in view of this, that the sale by the Secretary of the Bank was a good sale and the plaintiff as Digendra's heir consequently had no title to the said shares. On a further appeal, the decision of Shearer, J., was reversed and a Bench of the Patna High Court consisting of Agarwala, C. J. and Meredith, J., held that when the Bank went to Court and took a decree on the handnote and sold the shares in execution without any mention of the lien or attempt to rely upon it, the lien must be taken to have been abandoned. The Bench further held that all rights upon the note having been merged in rights under the decree, the Bank had no other rights than those under the decree and consequently such rights as the Bank had, could only be exercised upon the decree, that is by execution and once execution became barred there remained no right which could be enforced in any other way; and the lien ceased with the right for there could be no lien once there were no longer any rights upon which it could be founded.

[15] AIR 1947 Pat 40

39. It is to be noted that this decision is of no particular assistance on the question involved in the facts of the instant case and there cannot be any doubt that if the right to which the lien is attached ceased to exist or is extinguished, the lien must necessarily cease to exist and be extinguished. In the case of *Amarnath v. Karnal Electric Supply Co. Ltd*[16]*.,* it was held that the lien that a company had did not attach to admitted liability only but also extended to liabilities which might be disputed.

40. The other case is the case of *First National Bank Ltd. v. Seth Santlal*[17]*,* The facts of the case may be briefly noted: The respondents were past share-holders of the First National Bank Ltd., which went into liquidation and whose respective shares of Rs. 100/- each were partly paid up to the extent of 75%. The Bank had submitted a scheme of arrangement which was sanctioned by Court on 19-4-1948. In accordance with the scheme a call of Rs. 12-8 per share was made on 15-

10-1948 and a notice of the call was sent to the respondents and the notice was followed by two reminders. A second call of Rs. 12-8 was made on 24-3-1953 and a notice of this call was sent to the respondents by registered post. On the above calls the respondents did not make any payment. On 22-9-1953, a notice was sent by registered post informing each respondent that his shares would be forfeited if the amount was not paid by 10-10-1953. On 24-3-1954 the Directors passed a resolution forfeiting the shares of the share-holders who had not paid the call money and they included the three respondents in these cases. Letters were sent to the respondents informing them that their shares had been forfeited by the Bank. The Bank was ordered to be wound up on 17-5-1957. The Bank had filed claims against the respondents. The Bank made a claim against the respondent Seth Santilal for Rs. 6603-4-9 pies on account of the two calls of Rs. 12-8 per share, for Rs. 5908/- in respect of the two calls against Shri Girdarilal and for Rs. 347-8-9 pies against Shri Kishorilal for the same calls. In the written statements the respondents contended that they were not liable as the claim was barred by limitation and the cases were mala fide and not justified. The two issues which were framed in all the cases were (1) whether the claim is within time and (2) whether the call is not justified. The second issue was abandoned and given up by the counsel for the respondents and the only question that was argued was with regard to the question of limitation. It was held that although the claims for calls might have been barred, a fresh cause of action had arisen after forfeiture of the shares and the learned Judge held at page 329 - "The liability of a contributory, to contribute to the assets of the company, to the extent of an amount sufficient for payment of its debts, the liabilities, costs etc., arises under Section 156. Article 112 of the Limitation Act does not apply to a claim for the amount forfeited, as such a claim cannot be said to be 'for a call by a Company registered under any statute or Act.' After forfeiture of the shares of quondam share-holders, the debt changes its character, giving rise to a fresh cause of action and a new liability is imposed in such a case on the share-holders." The learned Judge further observed at page 330 of the report –

> "It is well known that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the rights. It is only in the case of a suit for possession of any property that on the determination of the period of limitation not only the remedy, but the right also, is extinguished under Section 28 of the Limitation Act. But a debt does not cease to be due, because it cannot be

[16] AIR 1962 Pun 411

[17] AIR 1959 Pun 328

> recovered, after the expiration of the period of limitation provided for instituting a suit for its recovery. In all personal actions, the right subsists although the remedy is no longer available. If, therefore, a creditor, whose debt becomes statute barred, has any means of realizing and enforcing his claim by any method except by a suit, the Limitation Act does not prevent him from recovering his debt by such means. After a debt becomes barred, a person is still deemed to owe. In case he pays the amount after the expiration of the period of limitation, he cannot, after having paid his debt, claim to be entitled to recover it back on the ground, that the time barred debt was not 'money due' or 'owing.'"

41-42. The decision in the case of *Ram Ratan Lal v. Aditya Prasad*[18], lays down that although a separate claim by the creditor on the mortgage may be barred, yet the right of the creditor to the money due to him under the bond cannot be said to have been extinguished, so long as the lien

by possession lasts. It may be noted that the decision of the Oudh Court was upheld by the Privy Council and the decision of the Judicial Committee is AIR 1930 PC 176. The Limitation Act prescribes and fixes the time limit within which proceedings are to be instituted in a Court of law for enforcement of any right; and unless otherwise specifically provided, the Limitation Act has nothing to do with the creation of rights and obligations of parties or their extinction. Unless otherwise specifically provided, the Limitation Act bars the enforcement of any right in a court of law if not enforced within the time fixed and it merely bars the remedy, but does not affect the question of the right itself. The said Act provides that a suit has got to be instituted within a prescribed period for recovery of any debt and the said Act further provides that if the suit is not instituted within the prescribed period of limitation, the suit will not be entertained and will be dismissed. The provisions of the said Act, therefore, debar a person from recovering the debt or enforcing the claim in respect of the debt by any suit in a Court of law beyond the period prescribed by the said Act. In other words, when a debt becomes statute barred, no suit can be entertained for enforcement of the said debt and any suit filed for recovery of any such barred debt must necessarily be dismissed. The effect of the provisions of the Limitation Act, to my mind, appear to be clear. The provisions of the said Act debar and prevent a person from enforcing a debt or recovering a debt by a suit in a Court of law, beyond the prescribed period of limitation. Unless otherwise specifically provided in the said Act, the provisions of the Act only bar the remedy and do not affect the right. A debt which has become barred by limitation, cannot undoubtedly be recovered by suit in a Court of Law, but the debt continues to exist and continues to remain a debt. It is open to any and every debtor to pay a debt which has become barred by limitation and it is equally open to any and every creditor to accept such payment in satisfaction of the debt. The obligation to pay the debt and the right to accept the payment remains, although the said obligation and the right cannot be enforced by suit in a Court of law. The debt continues to exist, although the remedy to recover the same by suit may be barred. As the debt continues to exist and is not extinguished, not only the right to receive payment validly exists, but it also remains open to the creditor to realize or recover the debt by any other means, if available to him, than by way of suit. Only in those cases in which the right itself gets extinguished, because of lapse of time, the enforcement of the right by any means is also completely gone, as in that case there is no right to enforce. Such means are provided for in Section 28 of the Limitation Act of 1908. The said section has already been set out. In the instant case, the plaintiff company

[18] AIR 1928 Oudh 273

owed a debt to the defendant company. The debt of the plaintiff company does not cease to exist and does not get extinguished on the expiry of the prescribed period of limitation, although on the expiry of the said prescribed period the defendant company is barred and prevented from realizing the same by a suit. The debt, even after the prescribed period of limitation continues to exist and it is not only open to the defendant company to receive payment of the said debt, if payment is made beyond the prescribed period, but is also equally open to the defendant company to realize or recover the same by any means, if open to the defendant company, other than by bringing a suit in a Court of law for the recovery thereof. In the instant case, by the articles of association the lien has been created in favor of the defendant company on the shares of the plaintiff company and by the articles it has further been expressly provided that the defendant company will be entitled to enforce the lien by selling the shares of the plaintiff company. The lien in the instant case is the creature of the agreement between the parties, as contained in the articles of association of the defendant company. The effect of the said lien is undoubtedly to constitute a charge on the shares of the plaintiff company, but I do not think it will be right to equate the lien created by the Articles on the shares of the plaintiff to a mere

equitable charge only. The lien created as a result of the agreement contained in the Articles of Association remains a contractual lien which empowers the defendant company also to sell the said shares in enforcement of the lien in accordance with the provisions contained in the Articles of Association of the defendant company. The share of a member of a company represents the rights and obligations of the member as provided for in the statute and in the agreement contained in the Articles of Association of the company. The lien which is created on any share of a member of a company under the Articles, therefore, attaches to the various rights that the member may have in the company because of his holding the share in the company. Many of such rights remain vested in the company and under the control of the company and judged from that point of view the lien created in favour of the company on the shares of a member may be said to be in the nature of a possessory lien. The lien that the company has over the shares and the nature of such lien will mainly depend on the provisions of the articles of association of the company which constitute a binding agreement between the companies and its members and create the lien in favour of the company. In the instant case, in view of the provisions contained in the Articles of Association, the lien created by the said Articles undoubtedly constitutes a charge on the share of the member, but in my opinion, cannot be equated to an equitable charge only. In the light of the provisions contained in the Articles of Association of the defendant company in the instant case, the lien, to my mind, subsists so long as the debt is there and the lien does not get extinguished, because the debt becomes statute barred. The lien subsists and continues, so long as the debt is not extinguished and the debt and the lien can both be enforced, if such enforcement is possible or permissible by any other method than by filing a suit in a Court of Law. The authorities cited from the bar to which I have already referred, to my mind, support the view that I take.

43. Section 28 of the Limitation Act has, in my opinion, no application in the instant case. The said section applies only when the suit is one for possession of property by the plaintiff. The said section has to be strictly construed and in the instant case there is no question of recovery of possession of any property by the defendant company and the suit is also not by the defendant company. In the case of *Bhagwati Prasad v. Shiromani Sugar*

Mills Ltd[19]*.,* which has been referred to and relied on by the Punjab High Court in the case of First National Bank Ltd., AIR 1959 Punjab 328 a Division Bench of the Allahabad High Court held that it was open to the company to validly forfeit the shares and that it could exercise its powers in respect of the dues which were time barred. The Court further observed at page 197 -

> "Our reading of Section 28 Limitation Act (Act IX of 1908) is that in a case to which that section does not apply, on the determination of the period of limitation, the right itself is not extinguished. It may be urged and it is quite true, that the remedy is not enforceable in a Court of Law. That would not, however, extinguish the right or change the character of the debt. Our view is supported by two authorities which are to be found, in *Moheshlal v. Busunt Kumaree*[20]*,* and *Jokhu Bhunjja v. Sitla Baksh Singh*[21]*,* In Moheshlal's case, (1880) ILR 6 Cal 340 it was held that the Indian Law of Limitation merely bars the remedy, but does not extinguish the right. In Jokhu's case, AIR 1930 Allahabad 416, it was held that a secured creditor's remedy might be barred if he omitted to bring a suit within 12 years from the accrual of the cause of action but his right was not extinguished. It will be noted

that Section 28 applies only to cases in which the plaintiff sues for possession and a suit to recover the share money due from a co-sharer by a company is by no means a suit for possession. The conclusion at which we have arrived at after an examination of Section 28 and the two authorities mentioned above is that the remedy was barred but the right was not extinguished."

44. The decision in 1887-12 AC 29 and in (1882) 21 Ch D 302 referred to and relied on by the counsel for the plaintiff were concerned with the claims of priority and in deciding the said question of priority it was held in those cases that the lien created was in the nature of an equitable charge. The said decisions, to my mind, are of no great assistance in the facts of the instant case. The passage at page 155 in Article 285 in Halsbury's Laws of England, Third Edition, Vol. 24, relied on by the learned counsel for the plaintiff is, in my opinion, of no avail to the plaintiff in the instant case. The said statement of law is based on the provisions of the English Limitation Act and is applicable to a case of a mere equitable charge only. The nature and extent of any lien created by the Articles of Association of the company, will depend necessarily on the provisions contained therein. In cases it may constitute a mere equitable charge and in cases, it may partake of the nature of an equitable charge but may not constitute a mere equitable charge only. In the instant case, the lien created by the articles of the defendant company, cannot be equated to a mere equitable charge only and cannot be said to constitute an equitable charge only. The lien in the instant case is very much broader in its scope and effect. In Article 369 at page 205 of Halsbury's Laws of England, Third Edition, Vol. 24 under head - "Cases where remedy barred and not right", it is stated -

"Except in the cases previously mentioned, the Limitation Act 1939 only takes away the remedies by action or by set off; it leaves the right otherwise untouched, and, if a Creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set off, the Act does not prevent him from recovering by those means.

[19] AIR 1949 All 195 [21] AIR 1930 All 416

[20](1880) ILR 6 Cal 340

Thus, money paid to a creditor by the debtor without appropriation may be appropriated to the statute-barred debt, though the creditor cannot so appropriate money received on behalf of, but without the knowledge of, the debtor.

If a creditor has a legal lien for his debt, he may enforce his lien after the debt is barred. Thus, the lien of a Solicitor on documents in his hands for a statute-barred debt is not affected by the fact that the debt has become statute-barred; though no order can be made under the Solicitors' Act, making the Solicitors' costs in a proceeding a charge on the property recovered or preserved, if the right to recover payment of such costs is barred. A security may be enforceable even though given in respect of a statute-barred debt."

45-47. The following observations of Sir Rash Behari Ghose in course of his famous Tagore Law Lectures contained in the treatise 'The Law of Mortgage in India by Sir Rash Behari Ghosh' in Lecture IV at page 117, relied on by the learned counsel for the defendant company, may in this connection be aptly quoted :-

"It is necessary to notice, at the outset, that there is a remarkable want of precision in the

use of the word 'lien' by English lawyers. There seems to be an idea that a lien necessarily implies possession, but even at law, the word is applied to the right of a judgment-creditor which is very different in its nature from an ordinary common law lien on moveables. The confusion has been deepened by the language of equity lawyers by whom the word 'lien' is used not only in the common law sense of retainer, but also to denote equitable charges not depending upon possession and generally known under the name of non-possessory liens. The term is also applied, though inaccurately, to equitable mortgages and securities of a similar nature which rest simply upon contract."

48. On a true construction of the Articles, I am of the opinion that the lien which is created as a result of the contract contained in the said Articles, attaches to the debt and subsists so long as the debt is not extinguished and although the said lien cannot be enforced by an action in Court when the debt is barred by limitation, the said lien continues and may be enforced otherwise than by an action in Court, if such enforcement is otherwise possible or permissible. I am, therefore, of the opinion that the lien created on the shares under the Articles of Association of the defendant company did not cease to exist or become enforceable, as soon as the debt in respect of which the lien was created, became barred by limitation. The contention of the plaintiff on this aspect must therefore be negatived.

49. The next contention that has been raised on behalf of the plaintiff in this regard is that the lien was not duly enforced and could not be enforced as no proper notice as contemplated under the Articles had been served on the plaintiff company. The only grievance that is made in this connection is that in the notice the exact amount has not been indicated and the notice had made a claim of Rs. 1,10,000/- with interest on the said sum. In the facts of this case, this contention of the plaintiff, to my mind appears to be without any basis or foundation. Article 36 which provides for the necessary notice for the enforcement of such lien lays down that the notice in writing of the intention to sell the shares in enforcement of the lien must be given and there must be a default for 7 days after such notice has been given. The provision for notice for sale of the shares in enforcement of the lien as contained in Article 36 may be compared with the provision for notice for forfeiture of shares as contained in Article 27 of the Articles of Association. In Article 27 it is provided that in case of any forfeiture of share the notice should name a day (not being less than 14 days from the date of notice) and a place or places on and at which the call or installment and interest and expenses are to be paid. The Articles, to my mind, therefore, provide for notice in case of forfeiture of any share as to stating the exact amount to be paid and the date and places for payment and such a notice must necessarily be strictly construed. Whereas the notices, required to be given for enforcing the lien by the sale of the share, as contained in Article 36, contemplates that an unequivocal intention to sell the shares in enforcement of the lien has to be given. The basis and primary requirement of a notice for enforcement of the lien by the sale of shares is the expression of an unequivocal intention to sell the shares in enforcement of the lien. It is undoubtedly desirable that in such a notice also the exact amount should be stated; but in my opinion such a notice cannot be said to be bad or defective merely because of the fact that the exact amount has not been mentioned in the notice It may be noted that in the instant case the amount of Rs. 1,10,000/- with interest was demanded and no protest was made or objection taken that the exact amount which the plaintiff company was called upon to pay, had not been stated in the notice. There might have been some force in the contention, if the plaintiff had, in reply to the

said notice, raised any such objection or had wanted to know what was the exact amount that the plaintiff company was to pay. A debtor is expected to know the amount of his liability and if any debtor is in doubt as to the exact amount of his liability, it is only to be expected that an honest debtor who means to pay and thereby wants to stop the creditor from enforcing the lien would write in reply to any such notice wanting to know the exact amount to be paid by him. In the instant case the plaintiff company instead of raising any objection to the notice on any such ground completely denied the liability. The plaintiff company in the first instance had pleaded repayment of the loan and finally pleaded repayment or limitation In view of the attitude of the plaintiff company, the plaintiff company in the facts of the instant case did not or could not suffer any prejudice, as the exact amount bad not been stated in the notice. I am, therefore, of the opinion that this contention of the plaintiff fails. It may incidentally be observed that if there was even any defect in any such notice, a *bona fide* purchaser for value of the shares sold in enforcement of such lien without any notice or knowledge of such defect will not be prejudiced, in any way by reason of any such defect in the notice.

50. The next contention that has been raised on this aspect on behalf of the plaintiff is that the defendant company had no right to forfeit the shares of the plaintiff for non-payment of the debt or liability and forfeiture of the said shares of the defendant company for enforcing the lien and effecting the sale is unauthorized, unwarranted and illegal. The learned counsel for the plaintiff has argued that the defendant company had purported to forfeit the shares of the plaintiff in exercise of the said lien. The learned counsel has drawn my attention to the resolution of the defendant company dated 21st May, 1957, which is at page 63 of Ex. A and the material portion whereof reads as follows :

> "Resolved that in view of the fact that Messrs. Unity Co. Ltd., having not complied with the notices issued by the company on the 27th June, 1956, posted to them under registered letter - acknowledgment due, the 25,000 ordinary shares standing in their names being No.....of Rs. 10/- each be and are hereby forfeited together with accrued dividend and it is resolved that their names be expunged from the register of Members of the Company and the said shares having been applied for @ Rs. 5/- per share for fully paid up shares by the following persons for allotment be and are hereby allotted to them as per their applications and their names be entered in the Register of Members of the Company and fresh share certificates be issued in their favor."

Relying on the language issued in this resolution, the learned counsel for the plaintiff argues that the resolution of the Board, clearly establishes that the said shares of the plaintiff company were forfeited and were not being sold in any enforcement of the lien. The learned counsel has also drawn my attention to the share scripts which were issued to the purchasers on the basis of the aforesaid resolution and the learned counsel points out that on the reverse side of the said share scripts under the head "Memorandum of Transfer", everything is left blank and that indicates that fresh shares were being allotted on the basis of forfeiture of the plaintiff's shares and not that the plaintiff's shares were being sold to the said purchasers, in enforcement of the lien of the defendant company. It is the argument of the learned counsel that if the shares were being sold in enforcement of the lien and the defendant company was selling the shares of the plaintiff, in that event the columns under the head 'Memorandum of Transfer' would not have remained blank.

The learned counsel also draws my attention to the declarations of Sohanlal Murarka which are Exts. 21 (a) 22 (a), 23 (a) and 24 (a). The said declarations are all on the same lines and one of the said declarations may conveniently be set out –

> "Affidavit. - I, Sohanlal Murarka, a Director of Diamond Sugar Mills Ltd., Solemnly affirm and say as follows :-
> 1. I say that on the 21st day of May, 1957 the 25,000 shares bearing No..... standing in the name of Unity Co. Ltd., of the face value of Rs. 2,50,000/- were forfeited pursuant to the resolution dated 21st May, 1957 and notice of forfeiture dated 27th June, 1956, was served upon the said Unity Co. Ltd.
> 2. I further say that in place of the shares forfeited new share scripts in lieu thereof have been issued and the same have been sold and registered in the company's books in the name of the purchasers of the respective shares bearing their respective names in respective scripts.
> 3. That the statements contained in all the following paragraphs are true to my knowledge. Sohanlal Murarka."

Relying on this affidavit of Sohanlal Murarka, the learned counsel contends that the said affidavit clearly indicates that the shares of the plaintiff company were forfeited and after forfeiture new share scripts in lieu thereof have been issued and the same have been sold and registered in the company's books in the name of the purchasers and it is the contention of the learned counsel that this affidavit of Sohanlal Murarka clearly establishes that it was a case of forfeiture of the shares of the plaintiff by the defendant company. In this connection, the learned counsel for the plaintiff has also drawn my attention to Article 34 of the Articles of Association of the defendant company. The said Article reads as follows :

> "A duly verified declaration in writing that the declarant is a Director of the company and that certain shares in the company have been duly forfeited on a date stated in the declaration shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the shares and such declaration and the receipt of the company for the consideration, if any, given for the shares on the sale or dispossession thereof shall constitute a good title to such shares and the person to whom the shares are sold shall be registered as the holder of such shares and shall not be bound to see to the application of the purchase money, nor shall his title to such shares be affected by any irregularity or invalidity in the proceedings in reference to such forfeiture, sale or disposition."

It is contended that the said declarations of Sohanlal Murarka, a Director of the defendant company were in terms of the provisions contained in Article 34 and the act that such declaration had been made, establishes that the defendant company had chosen to forfeit the shares of the plaintiff company and had not enforced its lien by selling the shares of the plaintiff company. It is pointed out that in case of sale in enforcement of lien there is no scope for any such declaration and there is no provision in the Articles with regard to any declaration from a Director. My attention has also been drawn by the learned counsel to the written statement filed on behalf of the defendant company and to the statements made in sub-paras (g), (h) and (i) of paragraph 1. Relying on the said statements made in the written statement it has been contended that the

defendant company in the written statement has admitted that the defendant company forfeited the shares of the plaintiff in exercise of the lien. It is urged that in view of the said admission of the defendant company in the written statement of the defendant company, there cannot be any doubt or any question as to the fact that the defendant company had forfeited the shares of the plaintiff company in enforcement of the lien. The learned counsel further contends that in the oral evidence also the forfeiture is admitted and the learned counsel has drawn my particular attention to the evidence of Gopikissen Agarwal in question 31 where Gopikissen Agarwalla has stated "Diamond Sugar had to get some money from Unity Co. When Diamond Sugar did not get their money back, the shares belonging to Unity Co., issued by Diamond Sugar were forfeited by Diamond Sugar and were sold to us; so, we have been added as defendant." The learned counsel contends that the purchasers themselves had also knowledge of the fact that the shares had been forfeited. The learned counsel argues that on the basis of these facts there cannot be any question that the defendant company forfeited the shares of the plaintiff company in enforcement of the lien and the fact that the defendant company did forfeit the shares of the plaintiff company is beyond question. The learned counsel submits that the forfeiture of the shares of the plaintiff company by the defendant company in enforcement of the lien is clearly illegal and ultra vires the powers of the company and its Board of Directors.

51. The learned counsel has argued that there is no power in the defendant company under the Articles of forfeiture of any share in enforcement of any lien on such share. He has argued that there cannot be any such power in the company as forfeiture of any share in enforcement of any lien will be clearly illegal. It is his argument that forfeiture of any share in enforcement of lien will operate as a clog on the equity of redemption, will result in reduction of capital and will amount to trafficking in shares by the company. In support of his argument the learned counsel has relied on the decision in the case of *Hopkinson v. Mortiner, Harley and Co. Ltd*[22]*.,* and he has also referred to the decision in the case of *Naresh Chandra Sanyal v. Ramani Kanta Roy*[23]*,* as also to the decision of the Division Bench in the case of *Calcutta Stock Exchange Association Ltd. v. S. N. Nandy and Co*[24]*.,*

52. It has been contended on behalf of the defendant company that the defendant company has not forfeited the shares of the plaintiff company in enforcement of the lien and has merely sold the said shares in enforcement of the lien in exercise of the power conferred on the defendant company by the Articles of Association. The learned counsel for the defendant company has argued that although the words 'forfeit' and 'forfeiture' have been used, the said words have been used only in a very loose or popular sense and not in the technical sense in which the said words have been used in the Articles of the company. The learned counsel has referred to the meaning of the words 'forfeit' and 'forfeiture' as given in Shorter Oxford English Dictionary (Third Edition Vol. I at page 736). The word 'forfeit' has been described there to mean inter alia "To lose, lose the right to, to render oneself liable to be deprived of; also, to have to pay in consequence of a crime, offence, breach of duty or engagement." The word 'forfeiture' is described to mean - "The fact of losing or becoming liable to lose (an estate, goods, life and office, right etc.) in consequence of a crime, offence, or breach of engagement." He has also drawn my attention to the meaning and import of these words in Stroud's Judicial Dictionary (Third Edition, Vol. II at pages 1139-1140). The word 'forfeit' is there described at page 1139 to mean inter alia - "This word means not only an actual taking away of property on breach of a condition, but also the doing or suffering a thing which creates a liability to such a deprival." The word 'forfeiture' at pages 1140-1141 is described to mean inter alia as follows :-

(1) "The proper signification of 'forfeiture', as appears from Cowel's Interpreter and Ducange, is 'a mulct or fine, a punishment for an offence'; and it is quite clear that it is used in that sense in a charter where the justices are empowered to punish delinquents by 'fines, rensoms, amerciaments and forfeitures.' The term 'forfeit' is, indeed, ordinarily applied to the penalty of a bond with a condition, or to an estate held on condition; but the penalty of a bond when it is forfeited, or the estate itself, is never termed a 'forfeiture', even in common parlance; and it is, therefore, impossible to suppose that a recognizance with a condition broken could be intended to be described by such a term in a legal instrument. It is very true that in Fines and Forfeitures Act, 1670 (22 and 23 Car 2 c 22), 'forfeiture' is used in the title of the Act as a general term; but there, the context clearly explains the meaning. In the present case the context affords no such aid; and in its proper sense, especially in a grant from the Crown, it does not apply to a debt of record rendered indefeasible by non-compliance with the condition." e.g., an estreated recognizance (per Parke, B., *R. v. Dover*[25]*,)*\.(2) "Forfeiture" means "the loss of all interest" in the property spoken of."

53. The learned counsel for the defendant company has argued that the facts and circumstances of this case clearly establish that there has been no forfeiture of the shares of the plaintiff in this case in the sense contended for and complained of, but there has really been a sale of the said shares in enforcement of the lieu of the defendant company;

[22](1917) 1 Ch. 646 [24] ILR (1950) 1 Cal 235
[23] AIR 1949 Cal360 [25](1835) 4 LJ Ex 94

and the words 'forfeit' and 'forfeiture' have been used, though not very aptly and happily, to mean and indicate that the plaintiff company's rights in the said shares were being uprooted or extinguished as a necessary consequence of the enforcement of the lien by the defendant company by sale of the said shares. The learned counsel refers to the resolution of 21st June, 1956 (at page 1 of Ex. A) and contends that the said resolution which is the very foundation on the basis of which further steps have been taken and the subsequent developments have taken place, clearly establishes that the defendant company had decided to enforce its lien in terms of the provision contained in the Articles of Association. The learned counsel then draws my attention to the notice dated 27th June, 1956, given by the defendant company to the plaintiff company. This notice is at page 2 of Ex. A (Pd.21/D1 D6) and relying on this notice the learned counsel argues that this notice, in terms of the provisions in the Articles, conclusively establishes that the defendant company intended to exercise its lien on the shares by sale thereof in accordance with the provisions contained in the Articles. It is the argument of the learned counsel that the notice which is required to be given under the Articles before any steps can be taken for enforcement of the lien, unequivocally and in clear terms gives notice of the intention of the defendant company to enforce the lien by sale of the shares in accordance with the provisions in the Articles. The learned counsel refers to the correspondence which passed after the service of the notice dated 27th June, 1956. These Letters (at pages 3 to 8 of Ex. A) have been exhibited and relying on the correspondence, the learned counsel has argued that there cannot be any manner of doubt that the defendant company intended to enforce the lien by sale of the shares of the plaintiff company in accordance with the provisions of the Articles of Association and the plaintiff company clearly and perfectly understood the said intention of the defendant company.

The learned counsel points out that the evidence on record, namely, the oral testimony of Kedharnath Dutta and Gopikissen Agarwal and the agreement between the defendant company and the purchasers contained in the letters dated the 18th of May, 1957 and 19th of May 1957 which have been exhibited in this suit (being Exts. 13 and 14), clearly indicate that the defendant company was trying to enforce the lien by effecting a sale of the shares and had in fact entered into an agreement for sale of the shares to the purchasers. The learned counsel argues that the resolution of 21st May, 1957, (at page 63 of Ex. A) was passed to give effect to the said agreement for sale and to complete and perfect the sale; and the word 'forfeited' was used in the said resolution in the sense of uprooting or extinguishing the rights of the plaintiff company in the said shares and to transfer the same to the purchasers. The learned counsel has contended that the transaction clearly manifests the intention of the defendant company to enforce its lien by sale of the shares in exercise of the lien and not forfeit the shares of the plaintiff company.

54. In support of his contention the learned counsel has relied on the decision of the Supreme Court in the case of *Ramgopal v. Nandlal*[26], and has placed particular reliance on the following observations at p. 141 –

> "In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed."

[26] AIR 1951 SC 139

The learned counsel has also relied on the following observations of Mahajan, J., in the case of *Abdulla Ahmed v. Animendra Kissen Mitter*[27], at p. 21 –

> "Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument".

The learned counsel has also argued that the judgment of Eve, J., in the case of (1917) 1 Ch. 646, has lost a good deal of its force and it cannot now be said that forfeiture of shares otherwise than for non-payment of call is necessarily illegal and involves a reduction in the share capital. The learned counsel has referred to and relied on the decision of Das, J., in the case of AIR 1949 Calcutta 360 and also to the decision of the Division Bench of this Court in the case of ILR (1950) 1 Cal 235. He has also referred to the decision of the Supreme Court in the case of *Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd*[28].,

55. The main question to my mind which requires consideration on this aspect is whether there was any forfeiture of the shares of the plaintiff company by the defendant company or whether there was a sale of the shares by the defendant company in enforcement of the lien. There is no particular magic in the words 'forfeit' and 'forfeiture' which, as already noted, are used in different senses in different contexts. In the Articles of the defendant company these words have been used to convey a particular meaning and have a definite import and connotation. If the defendant company had purported to forfeit the shares of the plaintiff company in enforcement of the lien, such forfeiture would clearly and undoubtedly be illegal and bad. It will be bad and illegal as

there is no power in the defendant company to forfeit the shares in enforcement of its lien; and further any forfeiture of the shares in enforcement of the lien will be a clog on the equity of redemption. Forfeiture under the Articles of any company otherwise than for non-payment of calls, is not generally illegal or bad and may not necessarily involve a reduction in the share capital or trafficking in shares; but forfeiture in enforcement of a lien, whenever it amounts to a clog on the equity of redemption, is bad and illegal and will not be upheld. The position in law, to my mind, appears to be settled and is well established by the authorities which have been cited from the bar on this aspect; and I, therefore, do not consider that any useful purpose will be served by discussing the cases cited from the bar at any length on this aspect.

56. The real question for consideration, as I have already stated, is whether the defendant company forfeited the shares of the plaintiff company, as contended for on behalf of the plaintiff, or the defendant company had sold the said shares in enforcement of the lien, as argued on behalf of the defendant company. In the facts and circumstances of this case it is necessary, to my mind, to understand the real nature of the transaction for a proper appreciation of this question and for ascertaining the real intention. Undoubtedly, the words 'forfeit' and 'forfeiture' have been used in the resolution of the 21st May, 1957, (at page 63 of Ex. A) and the subsequent verified declaration of Sohanlal Murarka (Exts. 21 (A), 22 (A), 23 (A) and 24 (A)). But the question remains in what sense the words have

[27] AIR 1950 SC 15

[28] AIR 1964 SC 250

been used. As already noted, the words 'forfeit' and 'forfeiture' may be and are used in different senses and bear different meanings in different contexts. It is necessary in the instant case to find out the intended meaning of the said words used for ascertaining the real intention and appreciating the true nature of the transaction; and for that purpose extrinsic evidence in the instant case becomes permissible and it becomes necessary to consider the surrounding circumstances. It is to be noted that the Articles of the company contain provisions both as to forfeiture and lien. Articles 26 to 34 of the Articles of Association of the defendant company deal mainly with the question of forfeiture. These Articles provide as to under what circumstances there may be a forfeiture of shares, the steps that have to be taken for effecting such forfeiture and the effect and consequence of such forfeiture. Article 27 lays down the form of notice required to be given in the case of forfeiture. Article 30 provides that any share forfeited by the company shall be deemed to be a property of the company and the Directors may sell, re-allot and otherwise dispose of the same in such manner as they think fit. Article 32 provides that notwithstanding forfeiture, arrears and outstanding of the members will continue and will remain payable without any deduction or allowance for the value of the shares at the time of forfeiture. Article 35 provides for the company's lien on the shares. Article 36 provides for enforcement of the lien by sale of the shares by the Directors and also provides for notice required to be given to the member before effecting any sale in enforcement of the lien. Article 37 provides that nett proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities or engagements and the residue (if any) paid to such members, his heirs, Executors, Administrators, Committee, Curator, or other representatives. In the instant case the resolution which was passed by the company on the 21st June, 1956, clearly indicates that the company resolved to enforce the lien by sale of the shares of the plaintiff company. This resolution is the basis or foundation of the subsequent steps that have been taken in the matter. The notice dated 27th June, 1956 that was given by the defendant company to the plaintiff company is clearly a notice of the defendant's intention to enforce the lien by sale of the shares of the plaintiff company. The said

notice is certainly not a notice of forfeiture under Article 27 of the defendant company's Articles and is indeed a notice under Article 36, necessary for the enforcement of the lien by sale of the shares. The subsequent correspondence definitely indicate that the plaintiff company clearly understood the notice to be a notice of enforcement of the lien by sale of the shares. The subsequent conduct of the defendant company in trying to secure a purchaser for the said shares and in entering into the agreement for a sale with the purchasers, indicates, to my mind, that the defendant company was intending to sell the said shares in enforcement of the lien. It is to be noted that up to this stage the words 'forfeit' and 'forfeiture' have not been used and there is no manner of doubt that the defendant company was seeking to enforce its lien on the said shares of the plaintiff company by sale of the said shares and the defendant company had in fact entered into an agreement for sale of the said shares. The resolution of the 21st May, 1957, on which the plaintiff company greatly relies, came to be passed after the said agreement for sale of the said shares have been entered into. In this resolution the word 'forfeit' came to be used for the first time. It is also to be noted that by this very resolution the shares were allotted to the purchasers and this resolution itself also refers to the purchasers having applied for the said shares. By this resolution the name of the plaintiff company was directed to be expunged from the register of members of the defendant company and the names of the persons to whom the shares were transferred were entered in the Register of Members. In the background to which I have already referred, this resolution, to my mind, only seeks to give effect to the sale in enforcement of the lien which had already been agreed upon between the defendant company and the purchasers. The word 'forfeit' in this resolution, to my mind, was used in the sense of uprooting or extinguishing the rights of the plaintiff company in the said shares and depriving the plaintiff company of the said rights in the said shares for the purpose of transferring the same to the purchasers. It is significant to note that this resolution mentioned "the said shares having been applied for @ Rs. 5/- per share for fully paid up shares by the following persons for allotment" and this statement could only be possible in view of the earlier agreement for sale in enforcement of the lien and would not be possible if the said shares were going to be forfeited by that resolution as there could not be any arrangement for sale or allotment till the shares had been forfeited. The fact that by the very same resolution the name of the plaintiff company was being expunged and the names of the purchasers were being entered in the register of members of the defendant company, suggests, to my mind, that the sale of the said shares in enforcement of the lien which would result in the extinction of the rights of the plaintiff company in the said shares and would result in the purchasers acquiring the said rights as members of the defendant company, was being brought about and was being made effective. The fact that there was no forfeiture of the shares of the plaintiff company in enforcement of the lien, is, in my opinion, conclusively proved by the fact that the plaintiff company had been given full credit in respect of the sale proceeds realised as a result of the sale of the said shares. If it was a case of forfeiture of the shares of the plaintiff company under the Articles of Association, the plaintiff company would not be entitled to any credit for the sale proceeds and the liability of the plaintiff company would continue unabated. Under the provisions of the Articles (Articles 36 and 37) in case of sale in enforcement of lien, the nett proceeds have to be applied in satisfaction of the debt or liability. In the instant case the plaintiff company had been given entire credit for the sale proceeds and the debt of the plaintiff company to that extent had been satisfied. This fact along with other facts and circumstances to which I have already referred, clearly establishes, in my view, that there was no forfeiture of the shares of the plaintiff company by the defendant company and the defendant company sold the shares of the plaintiff company in enforcement of its lien. In my opinion the words 'forfeit' and 'forfeiture' whenever and wherever they have been

used, have been used not in the sense intended in the Articles and contended for by the plaintiff and the said words have been used to convey the sense of deprivation or losing of the rights of the plaintiff company in the shares or extinction of the plaintiff's rights therein by sale thereof. The plaintiff company necessarily loses its rights in the said shares and will be deprived of the same as soon as the said shares are sold by the defendant company in enforcement of its lien. Sale of the shares of the plaintiff by the defendant company in enforcement of its lien will have the effect of extinguishing the rights of the plaintiff therein and depriving the plaintiff of its rights in the said shares and conferring such rights in the shares on the purchasers. In the instant case, I am of the opinion that it is in this sense that the defendant company had used the words 'forfeit' and 'forfeiture', whenever the same had been used and I am also of the opinion that the transaction was not one of forfeiture of the shares of the plaintiff company within the meaning of the articles, but was really one of sale of the said shares by the defendant company in enforcement of the lien, as provided by its articles. The transaction itself in the instant case speaks more eloquently of its nature than the words used which are capable of different meanings. The contention of the plaintiff on this aspect that the defendant company had forfeited the shares of the plaintiff in endorsement of its lien, therefore, fails and must be negatived. The transaction itself proves best the nature of it and the declarations of Sohanlal Murarka in his affidavits cannot change or alter the character thereof and do not affect the real nature of the transaction.

57. I have to note that the learned counsel on behalf of the plaintiff company had suggested that the resolution of the 21st June, 1956 and the letters evidencing the agreements between the defendant company and the purchasers are not genuine documents and these documents have been fabricated for the purpose of this suit. I am unable to accept this contention and I am satisfied that these documents are genuine documents and they have not been fabricated for the purpose of this suit. The notice dated the 27th June, 1956 sent by the defendant company to the plaintiff company is an admitted document and the said notice appears to be quite consistent and in keeping with the resolution of the 21st June, 1956. Simply because the resolution appears to be at the very last page of the Minute Book, I cannot come to the conclusion that the said resolution had beers put in subsequently. There is no proper evidence which may lead to the conclusion that the said resolution is a fabricated one. The said resolution has been proved and the said resolution appears to be a very likely and a probable one and the admitted notice of the 27th June, 1956 indicates, to my mind, that the resolution must have been passed. With regard to the letters evidencing the agreement between the parties, I have no hesitation in accepting the testimony of Gopi Kissen Agarwal. Gopi Kissen Agarwal appeared to me to be a straightforward and truthful witness. His evidence is also corroborated by the testimony of Mr. Dutt and also by the documents.

58. I have also to note that the counsel for the plaintiff has also contended that the sale effected by the defendant company in enforcement of the lien is illegal and invalid as the sale had not been properly effected in accordance with law. It is the contention of the learned counsel that the sale is invalid and illegal as the defendant company had no power to sell without coming to Court for enforcement of the lien. It is also the contention that the sale without a proper deed or instrument of transfer duly executed is invalid and illegal and does not pass any property and the sale is also bad being in violation of Section 77 of the Companies Act as the defendant company had given financial assistance to the purchasers for purchasing the shares of the defendant company. These contentions in substance relate to the validity of the sale in enforcement of the

lien and it will be convenient to deal with these contentions in deciding Issue No. 5 (b) which covers the question of the validity of the sale. In answer to issue No. 2 (b) I, therefore, hold that the defendant company duly enforced its right of lien on the said 25,000 shares of the plaintiff by seeking to sell the said shares in enforcement of the lien and there was no forfeiture of the shares of the plaintiff company within the meaning of its Articles and the defendant company had not forfeited the shares in enforcement of the lien.

59. The next question in this issue is whether the shares of the plaintiff company were sold at the proper price. (After discussing the evidence the judgment proceeded :) I, therefore, have no hesitation in coming to the conclusion that the shares were sold at the proper value.

60. Issue No. 2 (c) is really a consequential issue, the answer to which depends on the findings of Issue Nos. 2 (a) and 2 (b). On these issues I have already held that the defendant company had a lien on the 25,000 shares of the plaintiff company and that the defendant company was competent to enforce the said lien, although the claim of the defendant company had become barred by limitation and that the defendant company duly sought to enforce the lien by sale of the said shares of the plaintiff. In view of my aforesaid findings, I have to hold in answer to this Issue No. 2 (c), that, subject to the question of validity of the sale which I shall consider when I discuss Issue No. 5, the exercise of the right of lien by the defendant company is valid and binding on the plaintiff company and is not void and inoperative.

61. It will be convenient at this stage to consider the question of the validity of the sale and I therefore propose to take up Issue No. 5 before considering the Issues Nos. 3 and 4. There are two issues in Issue No. 5, but as both the issues relate to the validity and binding nature of the sale and as practically the same arguments have been advanced with regard to the said issues, I propose to consider these issues together.

62. It has been contended on behalf of the plaintiff company that there has been no valid sale of the shares to the purchasers and the purchasers have really paid no consideration for the purchase of shares. It is further contended that as there has been no valid sale and as the purchasers have paid no real consideration for the purchase of the shares, the original defendant No. 2 and the defendants Nos. 3, 4 and 5 were not purchasers of the shares at all and in any event they did not act *bona fide* in the matter.

63. In support of the contention that there has been no valid sale of the shares in question, it has been argued that a valid sale could only have been effected through Court. It is the argument of the learned counsel for the plaintiff company that that lien in the instant case created merely an equitable charge which could be only enforced through Court. The learned counsel argues that in view of the provisions contained in the Articles, it was open to the defendants company to enter into an agreement for sale of the shares, but the defendant company was not competent to sell the said shares without having recourse to court. The learned counsel further argues that apart from the question that the lien in the instant case merely creates an equitable charge which only could be enforced by an action in court, no valid sale of the shares could be effected unless a proper instrument of transfer duly executed along with the share-scripts were made over and made available to the purchasers. The learned counsel has drawn my attention to Section 108 of the Companies Act 1956, the relevant portion of which reads as follows :

"108 (1). A Company shall not register a transfer of shares in, or debentures of. the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transfer and by or on behalf of the transferee and specifying name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures."

, in the case of *Albert Judah Judah v. Rampada Gupta*[29], and has placed particular reliance on the following observations at p. 745 (para 97). –

"It is next argued that on a true construction, the sale of shares by the company in enforcement of lien is excluded from the operation of Section 34 of the Act. The

[29] AIR 1959 Cal 715

section does not apply to cases of sale when the company itself is selling the shares. The company being itself the seller is bound to register the shares and if the company does not, the purchaser can compel the company to register the shares I agree that the section does not contemplate cases of transfer by the company of its own shares. Just as allotment by the company of its own share cannot be characterized as a transfer within the meaning of the section, similarly the sale of its own share by the company after forfeiture also cannot be characterized as a 'transfer' within the meaning of Section 34 of the Indian Companies Act. But shares belonging to other people which the company is selling in enforcement of lien or equitable charge cannot be treated on the same footing. They are not shares in which the company has property and the sale does not result in transfer of property from the company to the purchaser. The sale in enforcement of lien results in transfer of property from one registered owner to the purchaser and is no different from ordinary transfer from one share-holder to another. The fact that the company acts as the seller being authorised by the Article to sell, does not alter the character of the transaction. It is a case of transfer just like any other transfer and is covered by Section 34 of the Act. I do not think that sale of shares by the company in enforcement of lien is excluded from the operation of Section 34 of the Act." The learned counsel has also referred to Regulation 11 in Table A in Schedule I to the Companies Act. The said Regulation 11 is in the following terms :-

"11 (1). To give effect to any such sale, the board may authorize some persons to transfer the shares sold to the purchaser thereof.

(2) The purchaser shall be registered as the holder of the shares comprised in any such transfer.

(3) The purchaser shall not be bound to see to the application of the purchase money, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the sale."

64. The learned counsel has commented that in the instant case there is no provision in the Articles of the defendant company corresponding to Regulation 11 (1) and in the absence of any

provision to that effect, the defendant company could not transfer the shares, alleged to have been sold, to the purchasers. The learned counsel has argued that in any event the defendant company was not in a position to make over the share certificates to the purchasers, as the share certificates remained in the possession of the plaintiff company and there could not be any valid sale, unless the share certificates could be made over to the purchasers along with the proper instrument of transfer duly stamped and executed. In substance it is the argument of the learned counsel for the plaintiff company that the defendant company could not effect any sale of the shares of the plaintiff in enforcement of the lien, as the share certificates remained in the possession of the plaintiff company and there could not be any possible compliance with the requirements of Section 108 of the Companies Act. It has been contended that the provisions contained in Section 108 of the Companies Act are mandatory and in support of the contention reference has been made to the decision in the case of Coronation Tea Co. Ltd., AIR 1961 Calcutta 528 and also to the decision in the case of *Sm. Hemlata Saha v. Stadmed Pvt. Ltd*[30],. It has, therefore, been submitted that there has been no valid sale of the shares of the plaintiff company and no title to the shares of the plaintiff company

[30] AIR 1965 Cal 436

has passed to the purchasers.

65. It has next been contended by the learned counsel for the plaintiff company that there has been no valid sale of the shares on the plaintiff, as the purported sale is illegal being in violation of the provisions contained in Section 77 of the Companies Act, 1956. The relevant provisions of the said section on which reliance is placed may be set out :

> "77 (2). No public company and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company.
> (4) If a company acts in contravention of sub-sections (1) to (3), the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 1,000/- (Rupees one thousand)."

The learned counsel for the plaintiff has referred to the evidence of Gopikissen Agarwal and has argued that his evidence shows that the money with which the shares have been purchased, had been paid to them by the defendant company to enable the purchasers to purchase the shares. He argues that the evidence clearly indicates that the arrangement was that the defendant company would pay the sum of Rs. 1,25,000/- to the firm of Kashiram Kanhaiyalal in repayment of the liability of the defendant company to the said firm and also in payment of the dues of Bharat Agency Ltd., to the said firm to enable the purchasers to pay the said sum of Rs. 1,25,000/- to the defendant company in payment of the purchase price of the said shares; and it is the argument of the learned counsel that this payment of Rs. 1,25,000/- by the defendant company amounts to giving financial assistance by the defendant company for the purpose of, or in connection with, the purchase of the said shares of the defendant company. The learned counsel submits that the transaction comes within the mischief of Section 77 (2) of the Companies Act and is prohibited and it is the submission of the learned counsel that the sale is therefore illegal and void. Relying on the same evidence the learned counsel has further argued that there has been no valid sale, as

the purchasers have not paid any consideration money and the consideration money had in fact been paid by the defendant company itself and the alleged purchasers are not the purchasers at all.

66. It has next been contended by the learned counsel that as the alleged purchasers are not the purchasers at all, as they have not paid any consideration for the purchase, there cannot be any question of the purchasers being *bona fide* purchasers for valuable consideration. It is further argued that in any event the purchasers did not act *bona fide* in the matter. The learned counsel argues that the transaction was of an unusual nature and the purchasers were put on enquiry. The learned counsel submits that the evidence on record discloses only certain talks with Sohanlal Murarka and has not established any proper or reasonable enquiry or any enquiry at all on the part of the purchasers. He contends that no *bona fide* purchasers after having made reasonable enquiry would enter into the transaction. It is the contention of the learned counsel that a proper enquiry by any *bona fide* purchaser would satisfy him that there was no valid claim against the plaintiff company in respect of which the lien could be enforced and in any event the company was not in a position to sell the shares to pass any proper title to any purchaser in enforcement of the lien without coming to Court. The learned counsel argues that the purchasers are deemed to know the law and the provisions of Section 108 of the Companies Act and also must be deemed to have knowledge of the provisions contained in the Articles of the company and the purchasers must have known that forfeiture of the shares in enforcement of the lien was illegal and invalid and beyond the powers of the company. The learned counsel has further submitted that the nature of the transaction, the fact that the purchasers were put on the share register before any payment was made, the conduct of the parties and the financial assistance given by the defendant company to the purchasers for making the purchase, clearly indicates that the purchasers were not acting *bona fide* in the transaction and were not *bona fide* purchasers at all; and it is the submission of the learned counsel that the purchasers have really been set up by the defendant company to deprive the plaintiff company of its shares. The learned counsel has referred to and relied on the decision in the case of *Rama Corporation Ltd. v. Proved Tin and General Investments Ltd*[31]*.,* The learned counsel submits that as the alleged purchasers are not the purchasers at all and in any event not *bona fide* purchasers for any valuable consideration and as the sale is illegal and beyond the competence of the defendant company, Article 38 has no application in the instant case and the defendants are not entitled to invoke the said Article and to get any protection thereof.

67. It has been contended on behalf of the defendants that the sale is proper and valid and in any event, it is not open to the plaintiff company to impeach the validity of the sale in view of the provisions contained in the Articles and in Article 38 in particular. It has also been contended on behalf of the defendants that the plaintiff company cannot be heard to make any case of illegality of the sale as there is no case of any such illegality in the plaint.

68. The learned counsel for the defendant company has argued that the lien in the instant case is created by the agreement contained in the Articles of Association of the defendant company and the nature, extent and scope of the lien must be determined with reference to the Articles. It is his argument that the lien in the instant case cannot be said only to create an equitable charge and is much wider in scope and effect. He argues that the articles confer express power on the company to sell the shares in enforcement of the lien and in view of the particular provisions in the Articles, it is not necessary for the defendant company to come to Court to seek enforcement of

the lien and the defendant company was perfectly competent to effect the sale in exercise of the said powers in enforcement of the lien without coming to Court. He has submitted that the procedure with regard to the sale is also laid down and contained in the Articles which bind the plaintiff company; and it is his submission that the defendant company has effected the sale in compliance with the provisions of the Articles and the sale is perfectly valid and binding on the plaintiff company. The learned counsel has drawn my attention to the following passage at pages 443 and 444 in Palmer's Company Law (20th Edition) –

> "Cessor of membership. - A person may cease to be member of a Company -
> (1) By transferring his shares to another person. In such case the transferor ceases to be a member so soon as the transferee is registered, but not before. After registration the transferor is still liable to be placed on the B list of contributories

[31](1952) 1 All England Reporter 554

> as a past member, if the company is wound up within a year;
> (2) by his shares being forfeited;
> (3) by his shares being sold by the company under some provision in its articles (e.g., for enforcing a lien) and by the purchaser being registered as holder in his place;
> (4) by death; but in such a case the deceased member's estate remains liable until the registration of some person entitled under a transfer from his executors or administrators;
> (5) by a valid surrender;
> (6) by the trustee in bankruptcy of an insolvent member disclaiming his shares;
> (7) by rescission of the contract of membership on the ground of misrepresentation or mistake. This, however, does not apply to shares subscribed for in the memorandum of association."

69. The learned counsel has argued, relying on this passage, that in the instant case the shares of the plaintiff company have been sold by the defendant company under the provisions in its Articles for enforcing the lien and the purchasers have been registered as holders of the said shares in place of the plaintiff and the plaintiff has therefore ceased to be a member of the defendant company. The learned counsel submits that the sale therefore must be considered to be a valid one. The learned counsel argues that the sale of shares really means and implies the transfer of the right, title and interest of the holder and owner to the purchasers and such a sale becomes fully effective as soon as the name of the holder is expunged from the list of members and the name of the purchaser is registered in his place; and in view of the provisions contained in the Articles on the basis of which the sale is effected, the original holder is not competent to challenge the sale. The learned counsel submits that a sale of shares takes place as soon as the property in the share is transferred to buyer from the seller and the property in the share passes as soon as it is so intended to pass and a valid sale must take place even before the purchaser's name has been registered by the company. The learned counsel argues that because of the particular and peculiar nature of property a share in a company represents, provisions are made in the Articles of the company and have also been made in the Companies Act with regard to registration of such transfers by the company to enable the transferee to enjoy the full benefits of the transfer or sale; and it is the argument of the learned counsel that such provisions are

necessary as the sale or transfer of a share in a company, because of the nature of its property and interest, also concerns the company. The argument is that a sale of shares, like sale of any other goods or chattel, takes place as soon as the property in the share is transferred to the seller and the validity of the sale or transfer does not depend on the registration of the transfer by the company. It is argued that registration by the company is only a recognition of the transfer or sale and there must be a sale or transfer before there can be any question of registration of such transfer by the company; and it is further argued that there may be a perfectly valid sale, even if there be no registration of the transfer or even if the company refuses to recognise a transfer and to register the same. The learned counsel points out that in any such case of nonregistration of the transfer by the company, sale is not affected, although the purchaser may not be in a position to assert or exercise his rights as the share-holder of the company and although the seller may still be regarded by the company to be its member, such seller after the sale becomes the trustee for the purchaser in respect of all such rights. It is the submission of the learned counsel that a sale may be valid and may remain binding on the seller and the purchaser, notwithstanding that the transfer is not registered by the company and in such a case, because of the nature of the property of a share, the seller may continue to be a member of the company in so far as the company is concerned, but he becomes a trustee for the purchaser and is bound to exercise all his right as member, as the trustee for the purchaser and for his benefit in view of the sale of the shares to the purchaser. The learned counsel argues that Section 108 of the Companies Act deals with the question of registration of a transfer of share in a company by the company and the said section has nothing to do with sale or validity of sale. It is his argument that the said section lays down the requirements for the registration by the company of any transfer of its share and does not prescribe the mode of transfer or sale. He argues that usually a share is transferred by due execution of a transfer deed duly stamped and by delivery of the share certificate by the seller to the purchaser and this mode of transfer is usually and normally followed, when any registered holder sells or voluntarily transfers his share in the company to some other person, so that the transfer may also be registered in compliance with the requirements of Section 108 of the Companies Act by the company. According to the learned counsel, although this mode is the normal and usual mode by which any voluntary transfer of share is effected, this is not the only mode or method by which a share can be sold. The learned counsel has argued that Section 108 of the Companies Act has no application to the case of an involuntary transfer or to any sale of share effected by the company itself. It is the argument of the learned counsel that Section 108 has been enacted for the benefit and protection of the company and for the guidance of the company in the matter of registration of a transfer and these provisions do not have any application when the company itself sells the share, as in case of any sale by the company itself, the company is fully conversant with the fact of such sale. With regard to the decision of Mallick, J., in the case of Albert Judah Judah, AIR 1959 Calcutta 715 and his observations at p. 745 relied on by the learned counsel for the plaintiff and quoted earlier, the learned counsel for the defendant company has submitted that the said decision and the observations were made in the peculiar facts of that case and on the basis of the Articles of Association of that company and the said decision and observations are not of any assistance in the instant case. The learned counsel has further submitted that if the said observations of Mallick, J., are intended to lay down any general proposition of law, the same should not be followed. The learned counsel has argued that in the instant case the Articles are sufficiently wide to enable the company to make a valid sale of the shares in enforcement of the lien and the absence of any provision in the Articles similar to the provision in Regulation 11 (1) in Table A does not make any difference whatsoever. The learned counsel contends that in any event the power to sell in enforcement of the lien being

there in the company, any defect in the mode of sale will amount to an irregularity in the manner of exercise of such power and will not affect or vitiate the sale. The learned counsel has referred to and relied on the following passages at Farwell on Powers (Third Edition) at pages 379 and 385. The passage at p. 379 reads as follows :-

> "If the intention to pass the property subject to the power be clearly established, even although the intention to dispose of it under or by virtue of the power is not shown, still equity passed under the power.
> Where the intention to pass the property, the persons to be benefited and the amount of benefit are sufficiently indicated and there is good consideration, there is enough for the Court to act upon and it will rectify any mere informality in the mode of carrying out that intention; but it will not do so if any of these be wanting."

The passage as p. 385 is in the following terms :-

> "Equity aids the defective execution of a power in favor of (a) purchasers for value; (b) creditors; (c) charities; (d) persons for whom the appointer is under a natural or moral obligation to provide, unless he is under an equal obligation to provide for persons entitled in default of payment and they are unprovided for."

The learned counsel has referred to the following passages in Halsbury's Laws of England (Third Edition : Vol. 30) at pages 234 and 235 (Article 429) under the head 'No technical words required' –

> "No technical words or recital of the power are necessary for the execution of a power; all that is required is that an intention to exercise it should be clear. Thus powers have been held to be well exercised by informal statements in a bill, petition, answer, appointment of (ostensibly) only part of the fund, appointment of a new trustee, settlement, conveyance by lease and release, bond, transfer, gift inter vivos, recital, enumeration of parties to be benefited, memorandum, letter, declaration and statement of facts. A power will not be exercised, however, if a limited owner with a power of appointment in his own favour merely does acts of ownership, unless these acts are such as are prescribed by the power for vesting the property....."

Reliance has also been placed on Articles 518 and 519 at pages 272 and 273 of the same volume. The said Articles may be set out :

> "518. Defects not of the essence. Equity relieves only against defects which are not of the essence of the power; relief will not be granted so as to defeat anything material to the intention of the donor of the power. Thus mere defects in the mode of execution will be aided and so will an appointment by will made under a power to appoint only by deed. But no aid will be given to an appointment by irrevocable deed made under a power to appoint only by will, or to an appointment which would result in a fraud on the power or

aid a breach of trust. Moreover, no aid will be given to the exercise by will of a power of revocation by deed if it is clear that a deed is of the essence, as where the original power of appointment was by will or deed and on its exercise a power to revoke by deed only was reserved. Nor will the Court aid a lease containing unusual covenants granted under a power to lease with usual covenants, or a lease granted without consent under a power to lease with consent, or a sale of land reserving timber made under a power not authorizing such a reservation, or a sale of land reserving the minerals under a power not authorizing such a reservation.

519. Persons who may claim relief. Equity aids the defective execution of a power only in favor of persons who stand in a particular relationship to the donee (and not the creator) of the power. Relief is granted in the same cases as those in which the Court supplied a surrender in the case of defective dispositions of copyholds. The relationships between the donee and the following persons suffice for this purpose.

(1) Purchasers for value. A person is within this head only if there is consideration and an intention to purchase and a valid and binding contract, as, e.g., under a covenant on marriage to exercise a power to jointure. Purchasers pro tanto are included such as mortgagees and lessees. Thus where a power to lease arose only on the determination of an existing lease, an agreement to grant a lease entered into before the existing lease determined has been enforced by way of aiding defective execution; and trustees during a minority have power to grant a lease which the deceased tenant for life in his lifetime contracted to grant. Even where relief may otherwise be refused, it will be granted if after the death of a tenant for life who has granted a defective lease under a power the remaindermen lie by and allow the lessee to expend money on the premises; the lessee would have no claim against the estate of the lessor for granting a defective lease except on express covenants.

(2) Creditors .....

(3) Charities .....

(4) Persons for whom the appointer is under a natural or moral obligation to provide ....."

70. The learned counsel has referred to and relied on the following passage in Sir Rashbehary Ghose's 'Law of Mortgage in India' at page 294 –

> "An improper or irregular exercise of the power will not however, invalidate the sale, though it will subject the mortgagee to a claim for damages either at the instance of the mortgagor or of his assigns including puisne incumbrancers. But the law will not protect a purchaser who buys with notice of an irregularity in the sale, unless, perhaps, the irregularity is of such a description that the mortgagor could waive it and the purchaser has no notice that it has not been waived."

The learned Counsel further strongly relies on the following observations of Mudholkar, J., in the case of *Balwant Gopal v. The Ceramic Industries Ltd*[32]*.,* at p. 268 –

"I am, therefore, clear that the forfeiture of the appellant's shares was without proper basis and is consequently invalid. What, then, is the effect of this ? Can the appellant get back all his rights which the Board of Directors have purported to take away from him? I am referred to Article 35 of the Articles of Association which runs thus : "An entry in the Minute Book of the Directors of the Company of the forfeiture of any shares or that any shares have been sold to satisfy a lien of the Company shall be sufficient evidence as against all persons entitled to such shares were properly forfeited or sold and such entry and the receipt of the Company for the price of such shares shall constitute a good title to such shares. The Directors may cause the name of the purchaser to be entered in the register as a member of the Company in respect of the shares sold to the purchaser and the purchaser shall not be bound to see to the regularity of the proceedings or to the application of the purchase money. The remedy of the former holder of such shares and of any person claiming under or through him shall be against the

[32] AIR 1951 Nag 266

Company exclusively and in damages only.'

It is clear from this that if shares which have been even invalidly forfeited are sold by the Company, the only remedy of the former holder of such shares would be to claim damages from the Company."

71. The learned counsel has contended that it is not open to the plaintiff to raise any question as to non-compliance with the requirements laid down in Section 108 of the Companies Act in the absence of any averment in the pleadings. It is his contention that the requirements of Section 108 relate to questions of facts and unless there is proper pleading of the relevant facts in the plaint the question of non-compliance with the said requirements and any illegality in the transaction in consequence thereof, cannot be raised. The learned counsel has submitted that the transaction is a perfectly *bona fide* one and the purchasers were brought on the share register before receipt of payment of the purchase price, as the sale had in fact been finalized and the company had no doubt whatsoever about getting payment of the purchase price. It is the submission of his learned counsel that the company and the purchaser had been known to each other and the company had business dealings with the firm of Kashiram Kanhaiyalal and there was sufficient mutual confidence and trust between the parties and payment of the sum was assured as the payment was going to be made out of the money paid by the company in liquidation of the dues of the said firm.

72. The learned counsel for the defendant company has next argued that there has been no financial assistance by the defendant company to the purchasers for the purchase of the shares in question and there has not been any violation of the provisions contained in Section 77 of the Companies Act. He has argued that the sum of Rupees 1,25,000/- was paid by the defendant company to the firm of Kashiram Kanhaiyalal in repayment of the dues of the said firm from the defendant company and from Bharat Agency Ltd., a sister concern of the defendant company and it is his argument that payment of the legitimate dues of the said firm with whatever object and motive the payment might have been made, does not and cannot amount to giving any

financial assistance for the purpose or in connection with the purchase of any shares of the defendant company. It is argued that the evidence on record, the oral testimony of Gopikisen Agarwal and the Books of Account exhibited in the suit, clearly establish that the said sum of Rs. 1,25,000/- was paid by the defendant company to the said firm of Kashiram Kanhaiyalal and was received by the said firm in repayment of the legitimate dues of the said firm; and it is the argument that payment of the dues of the said firm can never be said to be giving any financial assistance within the meaning of Section 77 of the Companies Act. The learned counsel contends that the evidence on record clearly establishes due payment by the purchasers of the purchase price of the said shares and the fact that payment was made by the purchasers out of the money received from the defendant company in payment of the dues of the firm of Kashiram Kanhaiyalal, is of no consequence and does not establish that no consideration was paid by the purchasers of the said shares.

73. The learned counsel for the purchaser defendants has submitted that in view of the pleadings in the suit, it is not open to the plaintiff company to raise any question of illegality or invalidity of the sale. The learned counsel argues that the question of illegality and invalidity of the sale sought to be raised and argued on behalf of the plaintiff company on the basis of the provisions contained in Section 108 and Section 77 of the Companies Act, is not a pure question of law. It is his argument that the illegality contended for by the learned counsel on behalf of the plaintiff involves questions of fact and there cannot be any question of any violation of the provisions contained in the said Sections, unless the necessary facts are established. It is the submission that unless the necessary facts are pleaded in the plaint, it cannot be open to the plaintiff company to raise any such contention, relying on some portion of the evidence led for other purposes. The learned counsel relies on the provision contained in Order 6, Rules 6 and 8 of the Code of Civil Procedure in support of his contention that in the absence of proper pleadings with regard to the legality of the transaction, the question of illegality cannot be agitated; and the learned counsel has also referred to the following observations of the Supreme Court in the case of *Sri Venkataramana Devaru v. State of Mysore*[33] at pp. 262-263 :

> "Mr. M. K. Nambiar invited our attention to Ex. A-2 which is a copy of an award dated 28-11-1847, wherein it is recited that the temple was originally founded for the benefit of five families of Gowda Saraswata Brahmins. He also refers us to Ex. A-6, the decree in the scheme suit, O. S. No. 26 of 1915, wherein it was declared that the institution belonged to that community. He contended on the basis of these documents and of other evidence in the case that whether the temple was a private or public institution was purely a matter of legal inference to be drawn from the above materials and that, notwithstanding that the point was not taken in the pleadings, it could be allowed to be raised as a pure question of law. We are unable to agree with this contention. The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. and it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding of a matter which was not in issue and decide the rights of the parties on the basis of that finding. We have accordingly declined to entertain this contention."

The learned counsel has drawn my attention to the plaint filed in the suit and has pointed out that in the plaint no such case of alleged illegality for violation of the provisions contained in Section 108 and Section 77 of the Companies Act has been made and there is no averment of any of the necessary facts, the establishment of which, may give rise to any such case at the trial. The learned counsel comments that in the plaint the plaintiff originally made a definite case that there has been no sale of the shares in fact and alleged sale, if any, is mala fide and the price of Rs. 5/- per share is grossly inadequate; and at the time of the amendment of the plaint when the purchasers were impleaded and brought on record, the plaintiff made the only further case that forfeiture of the shares of the plaintiff company was illegal and ultra vires and as the forfeiture was illegal and ultra vires, the purchasers derived no title to the shares and such a sale is not binding on the plaintiff company. It is the contention of the learned counsel that in view of the allegation made in the plaint and the scope of the suit, the plaintiff company was illegal and ultra vires and as the forfeiture was illegal and ultra vires, the purchasers derived no title to the shares and such a sale is not binding on the plaintiff company. It is the contention of the learned

[33] AIR 1958 SC 255

counsel that in view of the allegation made in the plaint and the scope of the suit, the plaintiff company cannot raise the question of illegality of the transaction on the ground of violation of the provisions contained in Sections 108 and 77 of the Companies Act, particularly as serious question of facts are involved in the consideration of this question. The learned counsel further contends that even at the trial no such case of any violation of the provisions of Section 108 was made and no questions were asked as to whether there was any duly executed transfer-deed or not and no suggestion even of any such case was made to the witnesses called on behalf of the company or the purchasers. Adopting the arguments of the learned counsel for the defendant company, the learned counsel for the purchasers also argues that Section 108 of the Companies Act relates to the question of registration of any transfer by the company and has no application to the question of sale or mode of sale or transfer. The learned counsel has argued that Section 108 of the Companies Act deals with the question of registration of a transfer by the company and the said section has no application to any sale effected by the company in enforcement of its lien by virtue of the provisions contained in its articles. The learned counsel has referred to and relied on the provisions contained in Articles 18 and 38 of the Articles of Association of the defendant company and has submitted that by virtue of the aforesaid provisions in the articles, the shares have been duly registered in the name of the purchasers. The learned counsel has contended that there has been no violation of the provisions contained in its articles. The learned counsel has referred to and relied on the provisions contained in Articles 18 and 38 of the Articles of Association of the defendant company and has submitted that by virtue of the aforesaid provisions in the articles, the shares have been duly registered in the name of the purchasers. The learned counsel has contended that there has been no violation of the provisions contained in Section 77 of the Companies Act and the defendant company has not rendered any financial assistance to the purchasers for purchasing the said shares. The learned counsel has argued that the evidence shows that the defendant company and its sister concern, Bharat Agency Ltd. owed the firm of Kashiram Kanhaiyalal a large sum of money and the evidence further shows that at the time when the purchase of the shares had been agreed to at the price of Rs. 5/- per share, the firm of Kashiram Kanhaiyalal had insisted on payment of its dues and the purchasers were not willing to invest money on the shares, unless the firm of Kashiram Kanhaiyalal had received payment of its dues from the defendant company and its sister concern, Bharat Agency Ltd. It is the contention of the learned counsel that the evidence establishes that during the negotiations for sale of the shares, the arrangement was that the defendant company

would pay to the firm of Kashiram Kanhaiyalal the sum of Rs. 1,25,000/- in repayment of the dues of the said firm from the defendant company and its sister concern and the said shares would be purchased with the said sum of Rs. 1,25,000/- and the said arrangement was arrived at in the interest of both the parties to enable the defendant company to sell the shares @ Rs. 5/- per share and also to enable the said firm of Kashiram Kanhaiyalal to receive payment of its dues from the defendant company and its sister concern. The learned counsel further contends that the evidence on record, viz., the oral testimony of Gopikissen Agarwal and the Books of Account of the firm of Kashiram Kanhaiyalal, clearly establish that the sum of Rupees 1,25,000/- was paid by the defendant company and received by the said firm in repayment of its dues; and it is the contention of the learned counsel that the payment of the legitimate dues of the firm does not and cannot amount to any financial assistance within the meaning of Section 77 of the Companies Act. The learned counsel has also argued that even if there had been any financial assistance given by the said company to the purchasers for the purchase of the shares, the transaction would not become void or bad, but the company and its officers would be liable to punishment. In support of his contention that any purchase of shares in a company with financial assistance received from the company in contravention of the provision of Section 77 of the Companies Act is not vitiated or rendered void, the learned counsel has referred to the decision in the case of *Spink (Bourne Mouth) Ltd. v. Spink*[34], and also to the decision in the case of *Victor Battery Co. Ltd. v. Curry's Ltd*[35]., The learned counsel has next contended that it is clearly established that the purchasers have paid due consideration for the purchase of the shares. He referred to the oral testimony of Gopikissen Agarwal, Bank statements and the Books of Account exhibited in the suit and he has argued that the evidence proves beyond any doubt that the purchasers have duly paid the entire amount of consideration money of Rs. 1,25,000/-. He has submitted that there is really no dispute to the fact of payment of Rs. 1,25,000/- for the purchase of the shares by the purchasers. He submits that the defendant company does not dispute payment by the purchasers of the purchase price and in fact receipt of the entire consideration is admitted by the defendant company which sold the shares in enforcement of the lien; and it is his submission that the plaintiff is also not in a position to dispute the fact of payment and the contention of the plaintiff is that the money that was paid was not the purchaser's money but was really the money of the defendant company and no real consideration has been paid by the purchasers. He argues that there is no allegation of any benami transaction in the plaint and the purchasers have undoubtedly paid real consideration. It is his argument that the firm of Kashiram Kanhaiyalal received the sum of Rs. 1,25,000/- in payment of its legitimate dues from the defendant company and its sister concern and the claim of the said firm against the company was satisfied to that extent and although the consideration money for the purchase of the said shares was paid out of the said sum of Rs. 1,25,000/- received from the defendant company it was undoubtedly payment of real consideration and was paid out of the money lawfully belonging to the said firm of Kashiram Kanhaiyalal and it cannot be said to be a case of payment made by the defendant company. The learned counsel submits that there cannot be any question that the purchasers are purchasers for a valuable consideration and the learned counsel further submits that the purchasers are *bona fide* purchasers for a valuable consideration. The learned counsel has argued that Gopikissen Agarwal in his evidence has clearly explained as to why and under what circumstances they purchased the shares and has also stated in his evidence the discussions he had with Sohanlal Murarka and has also stated that the purchasers had no knowledge that the shares belonged to the plaintiff company. It is the argument of the learned counsel that the evidence of Gipikissen Agarwal clearly establishes that the purchasers acted *bona fide* and very properly. The learned counsel has submitted that the evidence of Gopikissen Agarwal should be

accepted. The learned counsel has commented that the main contention of the plaintiff has been that the transaction was of an unusual nature and the purchasers were put on enquiry and the purchasers have not made any enquiry. He has argued that sale by a company in enforcement of a lien is not an unusual transaction, as usually the articles of every company make provision for such lien and for enforcement of such lien by sale by the company. He has argued that the company and the firm of Kashiram Kanhaiyalal had been known to each other for a sufficiently long time and had business dealings together over a number of years and that the purchasers and Sohanlal Murarka, a director of the defendant company had sufficient confidence in

[34]1936 Ch. 544

[35](1946) 1 All England Reporter 519

each other and the discussions that had taken place between them show that all necessary enquiries had been made and there was no scope for any further enquiry and nothing more could have been ascertained by any further enquiry. It is argued that if on any further enquiry, which was not necessary, the purchasers did even come to know of the fact that the plaintiff company was disputing the liability for the debt, the knowledge of the fact of any such dispute would not have made any difference to the position, as the company is perfectly competent to enforce the lien by sale of the shares even in case of disputed liability. In support of his contention that a lien is enforceable even in case of a disputed liability, the learned counsel has referred to the decision in the case of AIR 1952 Punjab 411. The learned counsel has contended that the conduct of the company and of the purchasers complained of, does not show any lack of *bona fides* on the part of the purchasers and after the agreement for sale had been arrived at, the company was justified in effecting the sale and registering the names of the purchasers, in view of the mutual confidence and of the fact that the company was assured of payment of the purchase price which was to be paid out of the money to be received from the defendant company, before receipt of the actual consideration money from the purchasers. The learned counsel has contended that there is no allegation of fraud, collusion and conspiracy in the plaint and no such case has been or could be made. The learned counsel submits that in the facts of the case, it is well established that the purchasers are *bona fide* purchasers of a valuable consideration and the title of the purchasers to the shares cannot under any circumstances be affected.

74. The lien in the instant case has been created by the agreement contained in the Articles of Association of the defendant company. The nature, extent, scope and effect of the lien will, therefore, have to be determined with reference to the Articles of the Company. While discussing Issue No. 2, I have earlier held that the lien created by the Articles in the instant case, cannot be equated to a mere equitable charge and the lien is wider in its extent, scope and effect. Express and specific power has been conferred on the company by Article 36 to sell the shares in enforcement of the lien and by Article 37, to apply the sale proceeds in satisfaction of the debt. The Articles, to my mind, clearly and unequivocally express the intention that the company, by itself, is competent to enforce the lien by sale of the shares which are subject to such lien and to apply the sale proceeds in satisfaction of the debt or loan without recourse to an action in a Court of Law for enforcement of the lien. The other argument that the defendant company by itself was not competent to sell the shares in enforcement of the lien and could only enforce the lien through Court, as the defendant company was not in a position to comply with the provision contained in Section 108 of the Companies Act, 1956, is, in my opinion, not sound. Section 108 of the Companies Act deals only with the question of registration by the company of any transfer of share. The said section does not deal with the question as to how a sale or transfer of share is to be effected and only deals with the question as to under what circumstances a transfer of share

is to be recognized by a company by registering such transfer. Section 108 of the Companies Act, to my mind, lays down the conditions which have to be satisfied to enable a company to register any transfer of the company. The said section proceeds on the basis of a sale or transfer of share already effected and only lays down the conditions required to be fulfilled, to enable or compel a company to register such transfer. In view of the peculiar nature of property a share in a company represents, it is very necessary to have a sale or transfer of shares recognized and registered by a company to enable and entitle a purchaser to enjoy the benefits of the purchase in his own right as member of the company. Normally, shares are sold and transferred by due execution of a transfer deed and by making over the share certificates to the purchaser. This is undoubtedly so done to enable the purchaser to satisfy the requirements of Section 108 of the Companies Act and to have the transfer registered by the company in conformity with the provisions of the said section. In the case of every voluntary transfer or sale of any share by the registered holder, this is, undoubtedly, the normal and usual mode of transfer of any share by the registered share-holder. Section 108 of the Companies Act does not lay down or prescribe the mode of transfer and does not, in any event, lay down that the only mode by which a share can be sold or transferred is by execution of a duly stamped instrument of transfer and the delivery of share certificates. Shares are goods within the meaning of Indian Sale of Goods Act and the sale becomes complete as soon as property in the shares is intended to be transferred to the buyer. The intention to pass the property does not depend on any particular form or mode of transfer and has to be gathered from the facts of each particular case. It may be useful to illustrate the position by an example. Suppose, A, the registered holder of certain specified shares in a company, executes a document selling, transferring and conveying his entire right, title and interest in his said shares in the company for a good consideration in favor of B. The consideration and particulars of shares are all mentioned in the document and the intention is unequivocally and clearly expressed in the document, transferring the property in the said shares to the buyer for the consideration received. For some reason or other, the share certificates are made over to the purchaser and no other instrument of transfer is executed. In such case there cannot be any doubt, in my opinion, that a valid sale of the shares has taken place and the buyer has acquired a good title to the shares, although the buyer may not be in a position to have his name registered with the company as the holder of the said shares. It is well known that shares along with transfer deeds executed in blank by the registered holder pass freely from hand to hand in the market and many of the intermediary buyers who do not want to hold or retain the shares, do not even care to have the transfer registered. The fact that there has been no registration of the transfer of the shares by the company does not mean that there has been no valid sale or transfer of the shares. It is rightly contended, in my opinion, on behalf of the defendants that in such a case there is a lawful and valid sale or transfer of the shares, although the transfer is not recognized or registered by the company and the registered holder becomes a trustee for the purchaser in respect of all the rights and privileges relating to the shares sold and transferred but not registered by the company. I am, therefore, of the opinion that non-compliance with the requirements of Section 108 does not render the sale illegal and invalid and the factum of inability on the part of the defendant company to comply with the requirements of Section 108 of the Companies Act, 1956, does not imply that the defendant company was incompetent to effect the sale in enforcement of the lien of its own without recourse to an action in Court.

75. In the facts of the instant case and in view of the provisions contained in the Articles of Association of the defendant company, I am further of the opinion that Section 108 of the

Companies Act has no application in the present case. Section 108 of the Companies Act, to my mind, applies in the case of a voluntary transfer or sale of shares by the registered holder. The conditions that have been laid down in the said Section for registration of transfer of shares by the company are essentially for the guidance, benefit and protection of the company. Compliance with the requirements of Section 108 is essential to satisfy a company that there has been a genuine transfer which the company can recognize and register. Normally in the case of any transfer or sale of shares by the registered holder to some other person, the company does not have any knowledge of such transaction and the company may not know about the genuineness or reality of the transfer and may not recognize such transfer. Conditions are, therefore, laid down in Section 108 of the Companies Act and the said conditions are required to be fulfilled to enable a company to recognize and register the transfer, so that the transferee may become a member of the company and enjoy the full benefits of the transfer as member of the company. In the case of any involuntary or forced sale or transfer of share of any member, the provisions of the said Section 108 cannot be made applicable for the simple reason that the member whose shares are being dealt with perforce against his will, will not execute the deed of transfer and will not make over possession of the share certificates which will in the normal course remain in the custody and possession of the member. In the case of any forced sale through Court, such sales or transfers are effected in accordance with the decrees and orders of Court and such transfers are to be registered without any conformity or compliance with the requirements of Section 108 of the Companies Act. On this aspect reference be made to the decision of the Madras High Court in the case of *T. A. K. Mohideen Pichai Taraganar v. Tinnevelly Mills Co. Ltd*[36]*.,* and to the decision of a Division Bench of this Court in the case of *Mahadeo Lal Agarwala v. New Darjeeling Union Tea Co. Ltd*[37]*.,*

76. For involuntary or forced sale of any share of any member of a company provisions are usually made in the Articles of the company. A company may in proper case be entitled to forfeit the shares of a member of a company and may lawfully and validly forfeit the shares of any particular member; and the company may sell the shares so forfeited by the company. In the case of sale by a company of any forfeited shares, there is no compliance and there can be no question of any compliance with the requirements of Section 108 of the Companies Act. Articles of Association of the company usually make necessary provisions and the sales or transfers and registration of the transfers are affected in accordance with the provisions contained in the Articles. It is undoubtedly true that forfeited shares become the property of the company and the member loses his right, title and interest in the share on forfeiture; but such sale of forfeited share by a company to a party, does not amount to an allotment of any share of the company and no question of filing any return arises in such case (see the decision of the Supreme Court in the case of AIR 1964 Supreme Court 250). The effect of a valid forfeiture of the share of any particular member is to determine his membership and terminate the rights of the particular member and all that happens in case of such forfeiture is that the rights of the particular member disappear. A company is free to sell such forfeited shares and to register the name of the purchaser without complying with the requirements of Section 108 of the Companies Act, although the sale by the company of any forfeited shares does not amount to an allotment in respect of which any return has to be filed.

77. Sale by a company of any share of its member in enforcement of a lien on the basis of the provisions contained in the Articles of the Company, to my mind, cannot be said to be voluntary, as the sale or transfer is not effected by the member of his own accord or free will. Such a sale is

enforced by the company by virtue of the authority conferred on it by the Articles. As the articles of association of a company constitute a valid and binding

[36] AIR 1928 Mad 571

[37]55 Cal WN 408 : AIR 1952 Cal 58

agreement between the company and its members and also between the members inter se, the company, undoubtedly, derived such authority and power by virtue of the agreement contained in the Articles; but the exercise of the power and authority conferred on the company by the Articles does not depend on the will or consent of the member. As and when occasion arises, the company can exercise such powers conferred by the Articles in accordance with the provisions contained therein, whether any member is agreeable or not. The fact that the company derives the power and authority by virtue of the agreement contained in the Articles, does not, in my opinion, constitute the company an agent of the member in the matter of effecting the sale and the sale effected by the company in enforcement of the lien in accordance with the provisions in its Articles, does not depend on the consent and is not effected with any consent of the member concerned. A sale by the company in enforcement of its lien under the provisions contained in the Articles has to be effected and can be effected on the basis of the provisions contained in the Articles and in accordance therewith, irrespective of any question of the consent or readiness on the part of the member concerned. Such sales can be effected and in fact are mostly effected, in spite of protest and objections of the member. Section 108 of the Companies Act, 1956, in my opinion, is not intended to apply to any sale or transfer effected by a company in enforcement of its lien under the Articles and to the registration of such transfer. It is undoubtedly true that the effect of a sale of any share of a member of the company in enforcement of its lien under the Articles is to convey and transfer the right of ownership of the member in his share to the purchaser and to terminate his membership and all rights and privileges incidental to such membership by virtue of his ownership of the shares, but such transfer is not effected, in my opinion, by the company merely as an agent of the member. If it be considered to be a case of mere agency and the authority of an agent only, it may even be possible in that case for any member to terminate the agency and withdraw the authority. Whenever any person chooses to be a member of any company, he agrees to be bound and is bound by the Articles of the company. The Articles of Association of a company enjoy particular sanctity and cannot be changed or altered by any member at his will. The lien on the shares and the power to enforce a lien by sale of the shares are created by the Articles and the company enjoys such powers by virtue of its Articles and can exercise such powers in accordance with the provisions contained in the Articles, as and when occasion arises, irrespective of the question of likes or dislikes of the member concerned. It is not generally to be expected that any member whose share the company is selling in enforcement of its lien in accordance with the provisions contained in its Articles, will make over the share certificates which in the usual course is to remain with the member or will execute the necessary instrument of transfer which is being enforced by the company. To hold that the provisions of Section 108 of the Companies Act will apply to a case of sale or transfer by the company in enforcement of its lien will, therefore, have the effect of rendering the relevant Articles of the company containing the necessary provisions with regard to the lien, its enforcement by sale and the manner of transfer, nugatory and meaningless.

78. The provisions in the Articles of a company with regard to lien on the shares of any member and enforcement of such lien by sale by the company are incorporated in the Articles of Association of a Company in the interest of the company for better administration and

management of its affairs and for easier and speedier enforcement of the duties and obligations of its members. These provisions are not unreasonable and they do not, in my view, contravene any law. These provisions, to my mind, are very necessary and desirable for the smooth and effective functioning of any company and for this reason, these provisions are usually incorporated in the Articles of almost every company. Any person who becomes a member of a company, the Articles of which make such provisions, agree to be bound and are bound by the same. The company accepts any such person as member on the basis of the said provisions and is entitled to expect that all its members will comply with the same. In my opinion, it will not be just and proper to put any such construction on Section 108 of the Act, of 1956 which will have the effect of rendering any sale or transfer of any share of its member made by the company in enforcement of fits lien in accordance with the provisions contained in its Articles, illegal and void and thereby rendering such Articles completely ineffective and nugatory. The Court, in my opinion, should normally be inclined to uphold the validity of the Articles of any company and the Court should declare any particular Article to be invalid, only if the Court is satisfied that the particular Article infringes any statutory provision or is otherwise illegal. No authority has been cited before me to show that the provisions in the Articles of Association of any company relating to creation of such lien on the shares of its members or enforcement of such lien by sale of the shares by the company are illegal and invalid. The fact that such provisions with regard to creation of lien on the shares of the members of the company and with regard to enforcement of the lien by sale of the shares by the company are contained in Regulations 9, 10 and 11 in Table A, Schedule I to the Companies Act, 1956, clearly indicates, to my mind, that such provisions in the articles of any company are perfectly legal and valid. It may be noted that Regulation 11 (2) in Table A clearly provides that 'the purchaser shall be registered as the holder of the shares comprised in any such transfer,' and makes no mention of the provisions contained in Section 108 of the Companies Act. It may also be noted that similar provisions are to be found in the articles mentioned in Palmer's Company Precedents (17th Edn.) at page 431 and the learned author comments at the same page, "Where there is a lien, but no power of sale, it was considered necessary to bring an action to enforce a sale" (1882) 21 Ch D 302. When the articles, therefore, make provision for such power of sale by the company, the company is competent to exercise such power of its own in accordance with the provisions in its articles without any action in Court. The provisions contained in Section 108 of the Companies Act, in my view, therefore, do not apply to a sale by the company of the share of its own member in enforcement of its lien in accordance with the provisions contained in its articles. The said Section 108 should not be so construed, in my opinion, that its application will have the effect of defeating the legitimate and necessary provisions in the Articles of Association of any company; and the said section, in my view, should be construed to apply to voluntary sale or transfer of shares effected by the holder thereof of his own accord and free will and not to an enforced sale by the company. In this connection, the following observations of the Madras High Court in the case of AIR 1928 Madras 571 at p. 577 with which I respectfully agree, may be usefully quoted –

> "It seems to me that there is no obligation on a Court of Law so to construe a clause as would lead to a clear absurdity which could not possibly be regarded as contemplated by the legislating authority or agency. On the other hand, that construction alone should be adopted which is in consonance with common sense, which does not lead to absurd results or enormous practical difficulties."

The passage at page 443 of Palmer's Company Law (20th Edn.) to the effect that 'a person may cease to be a member of a company by his share being sold by the company under some provisions in its Articles (e. g. for enforcing a lien) and by the purchaser being registered as holder in his place,' relied on by the learned counsel for the defendant company, supports, to my mind, the view that I have taken. The observations of Mallick J. in the case of Albert Judah, AIR 1959 Calcutta 715 at p. 745 relied on by the learned counsel for the plaintiff company and quoted earlier by me in this judgment, appear to be not in accordance with the view taken by me. The said observations are to be read, in my opinion, in the light of the facts of that case and the particular provisions of the Articles of the company in that case. The said observations, to my mind, are not intended to lay down a general proposition of law. If the said observations are to be construed as laying down a general proposition of law relating to sales of shares of the members by any company in enforcement of lien in accordance with the provisions of the Articles of the company, irrespective of the question as to whatever may be the provisions of such Articles in this regard, I regret with very great respect to the learned Judge, my inability to agree. To construe the said observations as laying down a general proposition relating to sale of shares of the members of a company in enforcement of its lien in accordance with the provisions contained in the articles of association of a company, whatever be the nature of such provisions in this regard, will result in defeating and frustrating the legitimate and necessary provisions contained in the Articles and rendering all such Articles nugatory to the serious detriment to the interest and administration of a company. It may be noted that the facts in the case before Mallick, J. were completely different and the Articles of the company which had come up for consideration in that case were also different from the Articles in the instant case. The learned Judge had in fact come to the conclusion that the Directors who purported to act as Directors were not Directors of the company as they had vacated their office as Directors and the learned Judge had further held that the transaction was not a *bona fide* one and the alleged purchaser was not a *bona fide* purchaser. The decision of Mallick, J., in that case had really rested on the above findings and the said observations of the learned Judge relied on by the learned counsel for the plaintiff company appear to be in the nature of obiter. In the facts of the present case the Articles of Association of the company not only provide for the lien and its enforcement by sale by the company but the Articles, to my mind, further lay down the mode as to how such sale is to be effected. As already noted, Article 35 provides for the company's lien on the shares of its members and Article 36 provides the company with necessary power to sell the share in enforcement of the lien. Article 38 provides for entering the name of the purchaser in the register and Article 18 provides for issue of a new certificate to the purchaser in case of such sales. The sale of a share is brought about by and has the effect of extinguishing the right, title and interest of the member whose share is sold and transferring the same to the purchaser to whom the shares are sold. The right, title and interest of the member is extinguished by expunging his name from the register of the company and the said right, title and interest are conveyed and transferred to the purchaser by registering the transfer in his favour and by bringing his name on the register of the company and by issue of new share certificates in his favour. The company in the instant case has sold the share in enforcement of its lien in accordance with its Articles. The company has extinguished the right, title and interest of the plaintiff company in the said shares by expunging the name of the plaintiff company from the register and the company has conveyed and transferred the said interest to the purchaser by registering the transfer in their favour and by causing their names to be entered in the register of the company and the company has also issued new share certificates to the said purchasers. The company has also given full credit to the plaintiff for the entire sale-proceeds realised. The fact that the company expunged the name of the plaintiff company from

its register of members and entered the name of the purchaser in its register in place of the plaintiff company and issued new certificates to the said purchasers clearly indicates, to my mind, that the company had intended to transfer and had in fact transferred the property in the said shares to the purchasers and had sold the said shares to the said purchasers. I am, therefore, of the opinion that the company in the instant case has validly sold the shares of the plaintiff company in enforcement of the lien and am also of the opinion that the said transfer has been validly registered by the company in accordance with the provisions contained in its Articles. The fact that there is no provision in the company's Articles corresponding to the provisions contained in Rule 11 (1) in Table A, authorizing some person by the Board to transfer the shares sold to the purchaser to give effect to any such sale, is not of any material consequence. In the facts of the case the sale had in fact been effected by the Board itself at the meeting of the Board of Directors held on the 21st of May, 1957 by uprooting the right, title and interest of the plaintiff company in the said shares by expunging its name from the register of members of the company and by transferring and conveying the said shares to the purchasers and by bringing the names of the purchasers on the share register of the company. Any power which the board is competent to delegate to some other person for effecting the sale in enforcement of the lien can undoubtedly be exercised by the board itself.

79. Even if I had held that the power had not been properly exercised and the sale had not been properly effected, I would have held, accepting the contention of the learned counsel for the defendant company that in view of the specific power conferred on the company to sell the share in enforcement of the lien and the provisions contained in Article 38 of the defendant company's Articles of Association, that there would be only an irregularity in the proceeding and the validity of the sale could not be impeached and the plaintiff at the most would be entitled to damages only against the defendant company. It may be apt in this connection to refer to the following passage at page 432 of Palmer's Company Precedents (17th Edn.) –

> "Where the company threatens to sell without justification, the existence of this clause renders it expedient for the share-holder to apply for an injunction before the sale is effected; for after sale it will be difficult, if not impossible to recover the shares."

The observations of Mudholkar, J., in the case of AIR 1951 Nagpur 266 at p. 268 and quoted earlier, support, to my mind the view that I take.

80. In the facts of the present case I am satisfied that the purchasers acted *bona fide* and they are *bona fide* purchasers of the shares for valuable consideration. It is to be noted that there is no allegation of fraud, collusion, conspiracy or benami in the plaint Gopikissen Agarwal who has given evidence on behalf of the purchasers has stated in details as to why and under what circumstances, the purchasers agreed to purchase and purchased the shares in question. He has stated that the purchasers had no knowledge at the time of their purchase as to who were the owners of the shares and he has also stated how the entire consideration money was paid by the purchasers and it is also his evidence that the value they paid for the shares was more than adequate or the market value. I have no hesitation in accepting the evidence of Gopikissen Agarwal whose testimony on all important matters is supported by documentary evidence and is also corroborated by the testimony of Kedar Nath Dutt. I am satisfied that the documents relied on by the purchasers are all genuine documents and have not been subsequently prepared for the

suit. I have already observed that Gopikissen Agarwal created a very favorable impression on me from the witness box and he appeared to be a truthful witness. I am satisfied on the evidence on record that the sum of Rs. 1,25,000/-which the defendant company paid to the firm of Kashiram Kanhaiyalal was paid by the defendant company and received by the said firm in repayment of the legitimate dues of the said firm. In my opinion, payment of any sum to any person in repayment of its legitimate dues with whatever intention such payment may be made, cannot be construed to mean rendering of any financial assistance within the meaning of Section 77 of the Companies Act. I, therefore, hold that in the facts of the instant case there has been no violation of the provisions contained in Section 77 of the Companies Act. Even if I had held that the sum of Rs. 1,25,000/-was paid by the defendant company by way of financial assistance in breach or the provisions contained in Section 77 of the Companies Act, I would have held that the sale was not vitiated or rendered void in consequence thereof. In my opinion giving of any financial assistance by the company for the purchase of any shares in the company in violation of the provisions contained in Section 77 of the Companies Act, does not render the sale or the transaction void and it only entails a punishment for the company and its officers, as provided in Section 77 (4) of the said Act. To construe the said provisions in Section 77 (2) to imply that the transaction itself, if done in breach of the said provisions with financial assistance of the company, will be rendered illegal and void, will have the effect, in my opinion, of penalizing the share-holder to an unlimited extent, while the offending company and its officers in default will only be liable to a fine not exceeding Rs. 1,000/-. Such a construction may also have the very undesirable effect of putting premium on dishonesty and encouraging dishonest dealings on the part of unscrupulous directors and officers of any company, as it may enable any unscrupulous and dishonest director or officer to defraud the company by advancing large sums of money to its nominees by way of financial assistance which the company may not be able to recover because of the illegality of the transaction and the Director or officer concerned who swindles the company in the aforesaid manner gets away by paying the fine provided in Section 77 (4). The decision of the English Court in the cases of 1936 Ch 544 and (1946) 1 All England Reporter 519 on similar provisions in the English Companies Act relied on by the learned counsel for the defendant purchasers, clearly support, to my mind, the view that the transaction itself is not rendered invalid.

81. A sale by a company in enforcement of its lien should not be considered, in my opinion to be an unusual transaction in the sense that it puts the purchaser on any particular enquiry. Such a sale by a company is, undoubtedly, not a transaction of frequent occurrence; but every company in its own interest and in the interest of efficient administration and management of its affairs, usually possesses such power and authority by virtue of the provisions in its articles. In any event in the instant case the articles of the defendant company make provisions for lien of the company on the shares of its members and also for enforcement of the lien by sale of the shares by the company. I have already held that in the present case the company has sold the shares in enforcement of its lien in accordance with the provisions in its articles and in view of my above finding, the decision reported in the case of (1952) 1 All England Reporter 554 is not of any assistance in the instant case. It may be noted that the decision in the case of Rama Corporation Ltd., 1952-1 All England Reporter 554, came up for consideration in a later case, the case of *Freeman and Lockyer v. Bhokhurst Park Properties (Mangal) Ltd*[38]*.,* It is, however, not necessary to discuss in the instant case at any length these authorities which relate to the question of ostensible authority, as, in view of my finding that the sale had been effected on the basis of actual authority conferred by the articles and in accordance with the provisions thereof, no

question of any ostensible authority arises in the present case.

82. To my mind, there appears to be considerable force in the contention of the learned counsel for the defendant that the plaintiff is not entitled to raise and agitate this question of illegality of the transaction in the absence of any pleading. The illegalities complained of, on the basis of the provisions contained in Section 108 and Section 77 of the Companies Act, 1956, are not pure questions of law. The illegality depends essentially on certain facts being established and in my view, to raise this question of illegality the relevant facts should have been pleaded to enable the defendants to know the case of the plaintiff and to meet the same properly. In the facts of the case undoubtedly an issue has been raised as to the validity of the sale (Issue No. 5-b). But the said issue has been raised on the basis of the pleadings and must be considered with reference to the same and must be confined to the same. The invalidity of the sale is alleged in the plaint only on the basis of the illegality of the forfeiture of the shares in enforcement of lien and sale consequent on such forfeiture. There is no averment in the plaint of any violation of Section 108 and Section 77 of the Companies Act or of any of the relevant facts which give an indication of any such case. To allow the plaintiff to raise and agitate these questions of illegality for alleged non-compliance with the provisions of Section 108 and Section 77 of the Companies Act, 1956 without any pleading on the basis of some evidence adduced with regard to other matters in issue in the suit, will not be legal or just and will be prejudicial to a fair trial and the cause of justice. As, however, arguments have been addressed at length from the bar on these questions I have considered it fit and desirable to deal with all the contentions raised as to the illegality of the sale for alleged non-compliance with the provisions contained in Section 108 and Section 77 of the Companies Act, although I am of the opinion that the plaintiff company is not entitled to raise and agitate these questions at the trial for lack of necessary pleadings.

83. For the reasons indicated, I must therefore, hold that the purchasers are *bona fide* purchasers for a valuable consideration and that the shares were validly sold to and purchased by the purchasers for valuable consideration and I answer Issues Nos. 5 (a) and (b) accordingly.

84. So far as Issue No. 6 is concerned, I have already held while dealing with Issue No. 2 (b) that the shares have been sold at the proper value. In fact the evidence of Gopikissen Agarwal goes to show that for reasons of their own the purchasers were in fact persuaded to pay more than the adequate or market price of the said shares. As I have already stated, I accept the evidence of Gopikissen Agarwal and I have further to note that there is really no evidence to the contrary. The case of the sale being mala fide or the price thereof being

[38](1964) 1 All England Reporter 630

grossly or at all inadequate or below the market price is not at all established. I, therefore, answer Issue No. 6 in the negative. Issue No. 7 is really a consequential issue and in view of my findings on the other issues, I must answer this issue in the affirmative and I must hold that the sale of the said 25,000 shares in favour of the purchasers is binding on the plaintiff company.

85. The two other issues which remain to be considered are Issues Nos. 3 and 4. These two issues relate to questions of estoppel and acquiescence. In view of my findings on the other issues, the plaintiff company is not entitled to any relief in this suit against the defendants and in any event against the purchaser defendants. I do not consider it necessary to deal with these two issues and to discuss the various authorities which have been cited from the bar on this aspect.

86. On the question of relief it was very strenuously argued on behalf of the defendants that in view of the conduct of the plaintiff company, the plaintiff company should not in any event be entitled to any relief in this suit. It was argued that the reliefs that have been asked for are all in the nature of equitable relief and as the plaintiff who has come to Court with a false case and has fabricated documents in support of a false case, the plaintiff is not entitled to and should not be given any assistance by the Court. The learned counsel for the plaintiff company on the other hand has argued that although the case of the plaintiff with regard to repayment of loan might not have been established, the conduct of the plaintiff is not relevant in the instant case in the matter of granting relief, if the plaintiff is otherwise entitled to such relief. The learned Counsel for the plaintiff has referred to the decision in the case of *Young v. Ladies Imperial Club Ltd*[39]*.,* and also to the decision in the case of *Gray v. Allison*[40]*,* in support of his contention that the conduct of the plaintiff does not debar a plaintiff from the legal remedy that the plaintiff may be entitled to in any action.

87. As in view of my findings on the principal issues in this suit, the plaintiff is not entitled to any relief in the instant case, it is not necessary for me to consider the question whether the plaintiff would have been disentitled to any such relief to which the plaintiff might have been entitled because of its conduct and it is not necessary to discuss the authorities cited from the bar on this aspect. Even if I had held that there was any irregularity in the sale effected by the defendant company and the plaintiff was entitled to claim any damages from the defendant company in consequence thereof, I would have been unable to grant any relief to the plaintiff company, as there is no evidence as to any such damage which might have been suffered by the plaintiff.

88. In the result, the suit fails and is dismissed. As the defendant company has failed to prove the agreement alleged by it, I direct that the plaintiff will pay to the defendant company half of its taxed costs of the suit. The plaintiff will, however, pay to purchaser-defendants the taxed costs of the suit. Certified for two counsel.
Suit dismissed.

[39](1920) 2 KB 523

[40](1909) 25 TLR 531