

PATNA HIGH COURT

Arjun Prasad

Vs

Central Bank of India

Letters Patent Appeal No. 5 of 1954

(Das and Narayan, JJ.)

08.11.1954

JUDGMENT

Das, J.

1. This is an appeal from order No. 96 dated 22-1-1954 made by a learned single Judge of this Court in Companies Act Case No. 3 of 1951. The order was made on two petitions filed in the said case, one by Mr. Arjun Prasad and the other by his father Lala Gurusharan Lal, his mother Srimati Pankaj Devi, and his wife Srimati Madhurbhashmi Devi.

2. The aforesaid four persons held a large number of shares in the Gaya Sugar Mills, Limited. Sometime in 1947, four thousand seven hundred, and seventy-six shares of Rs. 100 each and thirty-three thousand one hundred and forty shares of Rs. 10 each of the Gaya Sugar Mills, Limited in the names of the aforesaid four persons were deposited by Lala Gurusharan Lal with the Central Bank of India as security for payment of a debt of Rs. 8,83,000/- and odd. At the time of the deposit, Messrs. Arjun Prasad and Lala Gurusharan Lal and the two ladies executed transfers in blank in favor of the Central Bank. On 16-5-1951 there was an application for winding up, and on, 14-11-51 was an order for winding up of the Gaya Sugar Milk, Limited. On 29-7-1952, the Central Bank of India, Limited, wrote to Lala Gurusharan Lal to the effect that the latter had an overdraft account amounting to Rs. 6,10,885/- up to 16-6-1952, and against the said overdraft account the Bank held as security a number of shares of various companies, the market value of which was not sufficient to cover the said overdraft; the Bank, therefore, called upon Lala Gurusharan Lal to liquidate the overdraft account, and added that if the overdraft amount together with interest up to date was not paid on or before 11-8-1952, the, Bank would proceed at their option to sell the shares held by them as security. Sometimes in July, 1902, Mr. Arjun Prasad made an application for the approval of a scheme of reconstruction of the Company. This application was heard on 6-10-1953 and an order was passed for calling meetings of the share-holders and of the creditors in accordance with Section 153, Companies Act and the

meetings were to be held on 9th and 10th November 1953.

Sometime before this, however, on 20-7-1953, the Central Bank of India sent to the Official Liquidator of the Gaya Sugar Mills, Limited, the share certificates in question together with the transfer deeds duly filled in, the transferee being the Central Bank of India, Limited and the date of transfer being the 2nd and 3rd February 1951. The Bank asked the Official Liquidator to get the shares registered in the name of the Bank. On 6-8-1953, the Official Liquidator submitted a report to the learned Judge hearing Companies Act cases. In this report, the Official Liquidator said :

"I have received from the Central Bank of India, Calcutta and Patna, seven applications for transfer of shares of the Gaya Sugar Mills Ltd., accompanied by the relevant share certificates and transfer deeds duly completed in all respects from the transferees. These transfer deeds are of a date prior to the petition for winding up. I have, examined them and they appear to be bone fide.... It is, therefore, prayed that your Lordships will be pleased to give me sanction to do all acts and things as may be necessary in respect of the said transfers and to permit me to affix the company's seal in relation to the said share certificates where required, or pass such other orders as may in the premises be deemed just and proper."

This report was considered by his Lordship Imam, J. (as he then was) on 7-8-1953. On that date the following order was passed :

"Read the report of the Official Liquidator under Section 227(2), Companies Act. It appears that the transfers in these cases took place before the order of winding up. The prayer of the Official Liquidator to the following effect is allowed. He is given sanction to do all acts and things as may be necessary in respect of the said transfers and is permitted to affix the Company's seal in relation to the said share certificates where required. These shares are to be transferred to the Central Bank of India."

On 5-11-1953, Lala Gurusharan Lal wrote to the Central Bank of India a letter in which he set out the advantages and disadvantages if the liquidation proceedings were allowed to continue, and the advantages of the scheme of reconstruction put forward by the creditors, in the end Lala Gurusharan Lal asked the Central Bank of India to allow him to act as a proxy for the Central Bank so that the scheme of reconstruction might be approved at the meeting of the share-holders to be held within a few days of the writing of the letter. The Central Bank of India did not appoint Lala Gurusharan Lal as their proxy. Then, on 9-11-1953 Mr. Arjun Prasad filed an application supported by an affidavit of that date and a supplementary affidavit dated 10-11-1953. In this application, Mr. Arjun Prasad said that the shares in question were merely pledged with the Central Bank of India and the Bank had no legal interest or right in the shares apart from their right as a pledgee, and the property in the shares still vested in him, his father, mother and wife; therefore, the Bank was not the owner of the shares in question and had no right to get

themselves registered in respect of the shares. Mr. Arjun Prasad substantially asked for the following reliefs :

(1) an order of injunction restraining the Central Bank from exercising any vote as a shareholder of the Gaya Sugar Mills, Limited on the strength of the shares in question; and

(2) Setting aside the order dated 7-8-1953 passed by his Lordship Imam, J. (as he then was). Subsequently, Lala Gurusharan Lal, his wife Srimati Pankaj Devi, and Srimati Madhurbhashim Devi, wife of Mr. Arjun Prasad, also filed an application in support of the application of Mr. Arjun Prasad in which they made the further prayers that the name of the Central Bank of India, Limited should be removed from the Register of members of the Gaya Sugar Mills. Limited, and the names of Lala Gurusharan Lal, Arjun Prasad, Srimati Pankaj Devi and Srimati Madhurbhashini Devi should be reinstated, or in the alternative, the Central Bank of India should be directed, to appoint Lala Gurusharan Lal or Iris nominee as a proxy for attending the meetings of the ordinary share-holders of the Company.

3. These petitions were heard by his Lordship Ramaswami, J. and on 22-1-1954 he dismissed both the applications. He reached the conclusion that the transaction between the petitioners and the Central Bank of India was not a pledge, but was in its true nature and effect a mortgage of the shares and the Bank had a valid legal title thereto. His Lordship said :

"Applying the principle of these authorities I have reached the conclusion that the petitioners in this case have by making a deposit of the share certificates and by executing blank transfer deeds mortgaged the shares in favor of the Bank who hold the legal title. I am further of opinion that the Bank was entitled to fill in the blank transfers and to apply before the Official Liquidator to have their names entered in the register in place of the petitioners for the shares in question.

With respect I hold that the order of Imam, J. (as he then was) dated 7-8-1953 is a correct order. I do not propose to go into the question whether I have any power to reconsider the order of Imam, J. Assuming in favor of the petitioners that I have such power, I do not think (for the reasons already given) that any case has been made out for modifying or vacating that order". The present appeal is from the aforesaid decision of Ramaswami, J.

4. The principal question which falls for determination in the present appeal is whether the transaction in question was a pledge or a mortgage in other words, was the Central Bank of India a mere pledgee or a mortgagee ? Mr. Sen who has argued before us on behalf of the appellants with considerable ingenuity has contended that the transaction was a mere pledge and the Central Bank had no legal title as a mortgagee in respect of the shares. He has contended that a mere execution of blank transfers and a deposit of the share certificates with the Central Bank of India,

Limited did not create a legal mortgage in favor of the Central Bank; he contended that in essence the transaction was a mere pledging of the shares as security, and at the highest it may amount to an equitable mortgage. He has also contended that the transfers were in blank when originally made and such blank transfers were ineffective to pass title he has submitted that a pledgee or mortgagee cannot perfect the imperfect transfer by filling in the blank trailers, unless specially unhorsted to do so by the pledger or mortgagor, though such authority may be conferred by subsequent ratification. He has further submitted that in the case of a bona lido transferee for value to whom and transfer had been intended from the very outset, the authority to fill in the blank transfers may be implied and he can fill in the blank transfers at any subsequent date to perfect the transfer; but in such a case, when the blank transfer is filled in, the transfer is operative only from the date it is filled in, as against the Company the transfer is inchoate till the transfer is registered.

5. I have tried to summarise above the main points of the submission made by Mr. Sen on the principal question for determination in the present appeal. I shall presently consider these points in detail. But before I do so, it is necessary to set the ground by referring to certain aspects of the problem regarding which there is no serious dispute between the parties.

6. Section 28, Companies Act lays down that the shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company. It is common ground that under the English law a share is regarded as a chose in action; but in India it is not so. Section 137, Transfer of Property Act excepts the applicability of the Chapter dealing with transfer of actionable claims to stocks and shares, and in Section 28, Companies Act as well as in Section 2(7), Sale of Goods Act shares have been defined as constituting moveable property and are "goods" within the meaning of the latter Act. Under Regulation XVIII of Table A, the instrument of transfer of any share in the Company shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain holder of the shares until the name of the transferee is entered in the Register of members in respect thereof. Article 37 of the Articles of Association of the Gaya Sugar Mills, Limited contains a similar provision. It may, therefore, be taken as settled law that shares are moveable property in India and they can be transferred in the manner provided by the articles of the Company. It is also common ground that there is a well recognized distinction in Law between a mortgage of personal chattels or goods and a pledge or pawn under which money is advanced upon the security of chattels. The distinction has been very clearly put in Halsbury's Laws of England, Hailsham Edition (Second Edition), para. 330 of page 226 of Vol. XXIII. The paragraph reads :

"A mortgage of personal chattels is essentially different from a pledge or pawn under which money is advanced upon the security of chattels delivered into the possession of the lender, such delivery of possession being an essential element of the transaction. A mortgage conveys the whole legal interest in the chattels; a pledge or pawn conveys only

a special property, leaving the general property in the pledger or pawnor; the, pledgee or pawnee never has the absolute ownership of the goods, but has a special property in them coupled with a power of selling and transferring them to a purchaser on default of payment at the stipulated time, if any, or at a reasonable time after demand and non-payment if no time for payment is agreed upon".

7. The question now is what is the true nature and effect of the transaction entered into by the petitioners through Lain Gurusharan Lal with the Central Bank of India, Limited. I have no doubt in my mind that in its true nature and effect the transaction was a mortgage. The position with regard to the commercial practice or mercantile usage in cases of this nature has been thus explained in Palmer's Company Law (Nineteenth Edition) at page 113 :

"Upon a sale or mortgage of shares, the transferor very commonly signs and hands over what is called a "blank transfer (i.e. a transfer signed by the transferor, but with a blank for the name of the transferee), the intention being that the purchaser or mortgagee shall be at liberty later on to fill up the blank and perfect his security by getting himself registered. If, however, the regulations require the transfer to be by deed, the transferee cannot effectively fill up the blank and deliver the deed unless authorized so to do by power of attorney under seal whereas, if the transfer may be under hand merely, the authority to fill up the blank may be oral and may be implied from the nature of the transaction".

In Buckley on the Companies Acts (Twelfth Edition), the position is similarly stated on p. 808 :

"Where the articles of association do not require a deed, but permit transfers to be made by 'instrument in writing', a transfer in blank carries to the person whose name is subsequently filled in as transferee, not only 'the equitable, but also the legal interest meaning, it is conceived, the legal right to call upon the company to register the transfer. For there is no legal title to the shares until registration of at any rate until all necessary conditions have been fulfilled to give the transferee as between himself and the company a present absolute and unconditional right to have the transfer registered".

Thus, where under the articles of the company a transfer of shares may be made by an instrument in writing, the share-holder may sign a blank transfer and hand it over to a purchaser or mortgagee with authority the holder of it for the time being to fill in the name of the transferee; and such a transfer when filled up can be sent in for registration, and no objection can be raised by the company to its validity.

8. Mr. Sen has argued that on the Bank's own admissions, the transaction was a pledge. He has referred to the statements made in the rejoinder of the Bank. In para. 2 of the said rejoinder, it was said that the Bank held the shares under the pledge given by Lala Gurusharan Lal against the loans advanced to him by the Bank; in para. 3 it was stated that in law and according to usage,

the right to the property vested in the pledgee so far as necessary to secure the debts, and it was further stated that the pledger had such a right in the shares pledged as he could convey to a third person but had an right to the goods without paying off the debt, and until the debt was paid off, the pledgee had the whole present interest. I do not say this to convey any disrespect to anybody, but it appears to me that some of the aforesaid statements in the rejoinder petition are statements culled from same English and Indian decisions, without perhaps appreciating very clearly the context in which they were made. I agree with my learned brother, Ramaswami, J., that the statements made in the rejoinder petition should not be read in isolation; rather the statements should be taken as a whole.

In some of the English decisions dealing with the question of a deposit of shares with blank transfers, the words 'pledge' and 'mortgage' have been used in the alternative; that may perhaps be accounted for by the circumstance that according to English law shares are choses in action, which cannot be pledged as goods but may be the subject of an equitable mortgage which creates a charge on the property but does not pass a legal estate; Fry, J. said, however, in - '*France v. Clark*¹', that he saw no reason why the principle which applies to a pledge of physical chattels should not equally apply to, a pledge of a chose in action. But as was pointed out by the Court of Appeal in - '*France v. Clark*²', the same conclusion is likely to be reached whether the transaction is treated as a pledge or is regarded in the light of an equitable mortgage of the shares. I shall presently advert to this question of an equitable mortgage. What appears to me to be quite clear on reading the rejoinder of the Bank as a whole is that the Bank was claiming the whole present interest in the shares and they stated in unequivocal terms, in para. 4 of the rejoinder, that the Bank had an indefeasible right to get the shares transferred in their name so that the Bank might dispose of the shares in order to realise their debts; therefore, the rejoinder taken as a whole does not go against the case of the Bank that the transaction in its true nature and effect was a transfer of the whole legal interest in the share to the Bank.

9. I shall now refer to some of the decisions on which Mr. Sen has relied in support of his contention. The first decision is the one to which I have already made a reference, namely (1884) 26 Ch. D. 257 (B). I do not think that that decision helps Mr. Sen. That was a case in which a registered holder of shares deposited the certificates with another person as security for a 150 and gave the latter a transfer with the consideration, the date, and the name of the transferee left in blank. This latter person in his turn deposited the certificates and the blank transfer with a third person as security for a larger amount of £, 230. The person with whom the certificates were first deposited died insolvent, and after his death the third person filled in his own name as transferee and sent in the transfer for registration. The principal question for decision in the case was what right this third person have vis a vis the registered holder of shares. It was held that the third person was not a purchaser for value without notice so as to acquire a greater right than the person from whom he himself received the instrument; it was further held that if a debtor delivered to his creditor a blank transfer by way of security, that did not enable the creditor to delegate to another person authority to fill it up for purposes foreign, to the original contract. What really fell for decision in that case was the right of a third party in the circumstances

mentioned, vis a vis the registered holder of shares. It was made quite clear in the judgment of the Court, that the right of the third person to stand in the shoes of the person in whose favor the share certificates were originally deposited as security for £ 150/- was never in dispute. The decision, therefore, does not lay down any such proposition that when a debtor delivers to his creditor a blank transfer by way of security, the original creditor must have a special or express authority, to enable him to fill up the blank in order to perfect his title. On the contrary, the decision accepts as correctly the proposition that the original creditor can perfect his title by filling up the blank.

10. Mr. Sen also replied on the decision in - *'The Colonial Bank v. Frederick Whinney'*³, (C). That was a case in which the Company was subject to the Companies Clauses Consolidation (Scotland) Act, 1845, Section 14 whereof required the transfer of any share to be 'by deed'. A registered holder of the Company deposited with his bank his share certificates together with a blank transfer executed by himself as security for advances the bank. Lord Blackburn said :

"The certificates of the shares were deposited with the Colonial Bank as a security for advances made to the firm by the bank. They were accompanied by what is commonly called a blank transfer, signed and sealed by W.F. Blakeway. That was inoperative as a transfer. It was, however, I think, evidence that the deposit of the certificates was intended to be a security".

Mr. Sen has relied on the observation of Lord Blackburn that the blank transfer was inoperative as a transfer. It is to be remembered, however, that Lord Blackburn was dealing with a case in which the transfer could only be made 'by deed' and the principal question for decision was whether the shares were in the possession, order, or disposition of the share-holder under such circumstances as to bring them within the meaning of Sub-Section (iii) of Section 44, Bankruptcy Act, 1883. It was held that the shares were "things in action" and, therefore, not goods within the meaning of the aforesaid sub-section. I have already pointed, out that the position in India is different where shares are goods. In any view of the matter, it is quite clear that Lord Blackburn's dictum that the blank transfer was inoperative as a transfer has to be considered in the light of the admitted fact in that case that under Section 14, Companies Clauses Consolidation (Scotland) Act, 1845 the 'transfer of any share of the Company had to be made by deed'. Mr. Sen has also referred to the decision in - *'Kvmhunni Elaya Nayar v. Krishna Pattar'*⁴, That was a case in which the question raised was whether there could be a valid pledge of shares by the deposit of the share certificates, when it was not accompanied by an instrument of transfer. It was held that in India shares were goods and, therefore, pledgeable. Leach, C.J. who delivered the judgment of the Court pointed out the distinction between a pledge, a simple lien and a mortgage; in the case of a lien there is no transfer of interest; in the case of a mortgage the property passes; in the case of a pledge a deposit of goods is made security for a debt and the right to the property vests in the pledgee so far as it is necessary to secure the debt. His Lordship

referred to Sections 148, 172, and 176, Contract Act and then observed :

"As shares are goods and therefore pledgeable, they can only be pledged by the deposit of the share certificate. It appears to us that by including shares in the definition of goods in the Sale of Goods Act the Legislature must have associated shares with the share certificate which is marketable. Otherwise, it is difficult to see how shares can be goods and the subject of pledge, the essence of which is delivery. To say that there can only be a pledge of shares when, the share certificate is accompanied by a deed of transfer is making the transaction something more than a pledge, as we have already pointed out.

We think that, when a person delivers a share certificate to another to be held by him as security, there is under the law of India a pledge which he can enforce, but unless the pledgee at the time of the deposit secures a deed of transfer which he can use in case of necessity or obtains one from his debtor at a later stage, he must have recourse to the Court when he wishes to enforce his security." I do not take this last observation of his Lordship as meaning that when at the time of the deposit a deed of transfer is also taken, the transaction must still be a pledge and the deed of transfer merely relieves the creditor from taking recourse to the Court when he wishes to enforce the security. Whether the deed of transfer creates a mortgage or not will depend on the intention of the parties and the circumstances of each case.

11. Two other decisions have been brought to our notice : - 'In re Tahiti Cotton Co., Ex parte Fargent', (1874) 17 Eq. C. 273 (E) and - '*The Colonial Bank v. Cady*⁵', (F). The first named decision supports the respondent Bank. One Mr. Fry borrowed £ 450 from Mr. Cannon, a share broker. He deposited with him as security the transfers of certain shares not quite filled up, that is, there was no date to them, and there was no name of the transferee; they were what are commonly called blank transfers. The deposits were made on two different occasions as a security. He handed to him' also certificates of shares. On these facts, Sir George Jessel, M.H. observed :

"I have no doubt that without express words Mr. Cannon was authorized, and was intended to be authorized, by Mr. Fry, if necessary, to fill up the blanks, and get the shares registered. The object and meaning of the whole transaction was, that if the money was not paid Mr. Cannon should do thisNow, in the first place, there can be no question that these transfers were not valid as deeds; but then no deed is required by the articles of association of the company. As I have already said, I hold there was authority to fill up the blanks over the signature of Mr. Fry, and therefore they were validly signed, and I think ought to have been registered".

The position of the Bank in the present case is the same. I have no doubt that without express words the Bank was authorized, and was intended to be authorised, by Lala Gurusharan Lal to

fill up the blanks if necessary. The Bank did fill up the blanks and had the right to get themselves registered in the books of the Company. It is necessary to refer in this connection to the letters which Mr. Arjun Prasad, his mother and his wife wrote to the Central Bank of India, Limited on 21-7-1953 which letters form part of the annexure to the supplementary affidavit made on behalf of the Bank and are printed at pp. 35 to 37 of the paper-book. In these letters, the aforesaid three persons said that they had no right, title, interest or claim of any sort over the shares in their names which they had handed over to Lala Gurusharan Lal with blank transfer deeds signed by them. Lala Gurusharan Lal also said in a letter to the Central Bank of India, Limited that the shares which he had made over to the Central Bank of India by way of security were his own property and no one else was interested directly or indirectly in them, even though some of the shares bore the names of third parties as transferee. If the blank transfer deeds were intended merely as a pledge, then Mr. Arjun Prasad, his mother and his wife would not have written the letters which they did to the Central Bank of India, Limited. In (1890) 15 A.C. 267 (F) certain certificates of shares in a New York company were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof; the indorsement was in the form of a transfer for value received, blank in the names of the transferor and transferee, with a power of attorney in blank to any out the transfer. On the death of the owner of the shares his executors obtained probate of his will, and in order that the shares might be registered in their own names

(Supra) signed as executors the transfers on the bank of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank which took them bona lido and without notice as security for advances. The bank retained the certificates and took as steps to obtain registration. The question was whether the transfers so signed by executors could be treated as being in order or could be received as sufficient security for advances unless duly authenticated. The executors brought an action against the bank to establish their title to the certificates. Amongst other points, one of the points decided was that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledges the shares or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against the bank, for the bank ought to have inquired into the broker's authority. As Lord Watson put it.

"the cases cited in the course of the argument which related to competition between equitable and legal rights to stock or shares had really no bearing"

in the case before their Lordships, and the sole question presented for decision before their Lordships was it the executors were estopped from saying that the broker had no authority to dispose of the certificates in question. The decision is also against the contention of Mr. Sen that special or express authority is needed to perfect 'the title of the person to whom the registered owner of shares makes over the share certificates with a transfer deed in blank. Both Lord Watson and Lord Herschell said that if the transfers had been executed by the registered owner himself and certificates made over by him, the position would have been different. Lord

Herschell said :

"The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are not the registered owners, there can be no such presumption. They may will have signed it merely to complete their title without the intention of ever parting with the shares".

Lord Watson observed :

"When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority, transmits his title to the shares both legal and equitable..... Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the Company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner".

These observations perhaps go a little further than what was laid down in (1884) 26 Ch. D. 257 (B); and in - '*Fox v. Martin*⁶', the interesting question was mooted if the decision of the House of Lords referred to above partly overruled '*prance v. Clark* (8)'. That is a question which need not detain us in the present case, it is clear, however, that all the decisions are really one way, namely that as between the parties to transaction and where the right of no third parties and involved, a registered share-holder by duly executing a transfer in blank and by handing over the share certificate to his creditor by way of security transmits his title to the shares both legal and equitable, and the transferee can fill up the blank and ask for the registration of his name in the books of the company without the risk of his right being defeated by the registered owner or by any other person deriving title from the registered owner. Another decision in which the principle of estoppel was the main question in issue is - '*Colonial Bank v. Hepworth*', (1887) 36 Ch. D. 36 (H). In that decision Chitty, J. referred to the normal mode of transfer as appeared from the document and the evidence before his Lordship and then observed :

"According to a practice which has extensively prevailed and has been recognised and acted upon by the Company, the transferor signs the transfer and power of attorney

without filling in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf

The plain legal effect of this recognised practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must of course be *bona fide* holders for value without notice". The case under our consideration is a much simpler case where the question that has arisen is between the registered owners of certain shares and the Bank to whom the shares were made over with blank transfers by the registered owners themselves as security for the money advanced. No question of *bona fide* holders for value without notice really arises in the present case.

12. In - '*Harrold v. Plenty*⁷', the question raised was whether a person with whom the certificate of shares in a limited company had been deposited by way of security was entitled to foreclosure or whether his only remedy was sale. Cozens-Hardy, J. said :

"Now, it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action. The certificate is merely evidence of title and whatever may be the result of the deposit of a bearer bond, such as that which Sir George Jessel dealt with in - '*Carter v. Wake*⁸', I think I cannot treat the plaintiff as a mere pledgee.

The deposit of the certificate by way of security for the debt, which is admitted, seems to me to amount to an equitable mortgage, or in other words, to an agreement to execute a transfer of the shares by way of mortgage". I have already observed that the position in India is somewhat different where shares are goods and therefore pledgeable. There can be a pledge of shares in India, and there can also be a mortgage of shares; whether it is one or the other will depend; on the intention of the parties and the circumstances' on each case. There is one more decision to which a reference is necessary, as it very clearly and forcefully puts the legal effect of a transaction of the kind which we are considering. In - '*Stubbs v. Stater*⁹', Cozens-Hardy, M.K. said at p. 638 :

"The plaintiff handed over to the brokers one certificate for the 390 shares together with a transfer executed by the plaintiff in blank, in which the numbers of the shares were specified but the name of the purchaser and the consideration were, of course, not specified. It was the ordinary well known transfer in blank.

Now what is the effect of that ? I am astonished that there should be any doubt about it. So long ago as 1899 Stirling, J. in - '*London and Midland Bank v. Mitchell*¹⁰', dealt with a case of precisely this nature and indicated what was the legal effect of it. That was a case in which certain shares together with a blank transfer had been deposited with a bank to secure a debt, and it was held that the bank had not lost their right against the shares although their simple contract remedy against the client was lost by reason on the Statute of Limitations. The Court there pointed out that the whole transaction was a mortgage as to which the bank were entitled to the ordinary remedy of foreclosure". His Lordship then referred to his own decision in '(1901) 2 Ch 314', which I have already cited before, and said that the transaction was a mortgage and not a pledge. His Lordship observed :

"It was a transaction of mortgage, in which there was no express power of sale given, but which by law involves and implies a right in the mortgagee to sell after giving reasonable notice."

13. There was some argument at one time before us whether there can be any mortgage of moveables in India. In Mulla's Transfer of Property Act (Third Edition, 1949), the following observations occur at pages 386-87 :

"The Transfer of Property Act refers to mortgages of immovable property and the Indian Contract Act refers to pledges of moveable property. But neither Act deals with mortgages of moveable property. A mortgagee of moveable property is entitled to a decree for sale just as much as a mortgagee of immovable property. A mortgagee of moveable property, if in possession, has a right to sell the property without the intervention of the Court, if after proper notice the mortgagor fails to repay the mortgage money No particular formality is necessary in India for the creation of a security on moveable property and a parole mortgage of goods is valid".

There are several decisions in support of the observations made above, and his Lordship Ramaswami, J. has referred to some of them in his judgment. Mr. Sen has not seriously contended before us that there can be no mortgage of moveables in India. It is, therefore, unnecessary to pursue the matter further except to state that the question has been dealt with in his usual erudite manner by the late Dr. Rashbehary Ghose in his Tagore Law Lectures on the Law of Mortgage in India, pages 112 to 114 and 342 to 344.

14. Having regard to all the circumstances in which Lala Gurusharan Lal made over the share certificates to the Central Bank of India, Limited with transfer deeds in blank and the subsequent conduct of the parties, I find that Lala Gumsharan Lal undoubtedly intended to transfer the shares to the Central Bank of India, Limited with authority to the Bank to fill up the blanks whenever

necessary. The object and meaning of the whole transaction was, to borrow the words of Sir George Jessel, that if the money was not paid, the Bank would be entitled to fill up the blanks and get themselves registered in the books of the company in respect of the shares in question.

15. I must now say a few words about the contention of Mr. Sen that the transaction was, at its highest, an equitable mortgage and if the transferee filled up the blanks to perfect his title after liquidation proceedings had begun, the transferee had no right to come on the books of the company unless he satisfied the Court. It is contended by Mr. Sen that the order of his Lordship Imam, J. (as he, then was) dated 7-8-1953, was made without notice to the registered holders and without investigating the facts, it is pointed out that the order proceeded on the wrong assumption that the transfers had taken place before the order of winding up. Mr. Sen has submitted to us that the order should have been recalled 'ex debito justitiae'.

16. It is doubtful if it is appropriate to use the expression "equitable mortgage" in India in connection with a transaction of the kind which we are considering; speaking broadly, the law of India knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Mortgages by deposit of title deeds are sometimes described as equitable mortgages. In Mulla's Transfer of Property Act (Third Edition, 1949), the learned commentator has made the following observations at page 375 in connection with a mortgage by deposit of title deeds :

"The term equitable mortgage is not appropriate in India for the law of India knows nothing of the distinction between legal and equitable estates....

..... . The phrase "equitable mortgage" might have been formerly justified in India on the ground that it was an inchoate mortgage perfected by equity. Equitable mortgages or mortgages by deposit of title deeds were accepted in India as equivalent to simple mortgages after the Privy Council decision in - '*Varden Seth v. Luckpaty*¹¹', and this is still the case in districts to which the Transfer of Property Act has not been extended

. The Act recognizes such mortgages as equivalent to simple mortgages - Section 96 - but restricts their operation to certain centres of commerce"

The Transfer of Property Act applies to immovable property. Assuming but without deciding, that a transaction of the kind which we have under consideration here is an equitable mortgage of moveable property at its inception, I do not think that the appellants stand on any better footing. The Bank had the right to perfect their title by filling up the blank transfers, and this they did before they asked for registration. They, therefore, had a completely valid legal title at the time when they asked for registration, and neither the registered owner of the shares nor any person deriving title from the registered owner, could defeat the right of the Bank. In view of our finding that the transaction was in its true character and legal effect a mortgage, it is unnecessary to consider if the appellants would stand on any better footing if the transaction were treated as a pledge and the Bank had the right to sell the thing pledged on giving the pawnor reasonable

notice of the sale. In the case under our consideration, the Bank did give notice to Lala Gurusharan Lal by their letter dated 29-7-1952. But be that as it may, it is, I think, clearly established that the transaction was really a mortgage of the shares in favor of the Central Bank of India, Limited.

17. Mr. Das who has argued the case on behalf of the respondent Bank has contended before is that the order of his Lordship Imam, J. (as he then was) dated 7-8-1953 is final and conclusive and cannot be recalled. He has also contended that under Section 54, Companies Act it was not necessary to give a notice to Lala Gurusharan Lal before the transfer of shares in favor of the Bank was registered in the books at the company. There has been some argument before us as to the true effect of Section 202, Companies Act and our attention has been drawn to me decision in - 'In the matter of East India - Cotton Mills Ltd.', AIR 1949 Calcutta 69. It was submitted that although Section 202, Companies Act, 1913 speaks both of rehearing and appeals from orders in winding up, the rehearing contemplated is not before the same Judge by way of review but before the Division Court by way of appeal. The further question that was mooted before us is if the appellants can be said to have been parties to the proceeding which culminated in the order of his Lordship Imam, J. and if they or any one of them, could prefer an appeal against the order of Imam, J., Ramaswami, J. rightly in my opinion, did not decide any of these questions. Assuming that we have the power to set aside the order of Imam, J. which was passed ex parte and without hearing any of the appellants, I think that it is clear that Section 227(2), Companies Act gave a complete discretion to the Court to do whatever it thought just in a matter of If we find, as we have found, that the order was correct and completely justified, it would certainly be improper to recall or vacate the order merely because it was passed ex parte on the report of the Official Liquidator. Mr. Sea has relied on the decision in - 'In re Onward Building Society', (1891) 2 QB 463 which lays down that in the case of a sale and transfer of shares in a company after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the Court; but the Court has power to order the rectification of the register of members by the insertion of such transferee's name and the exercise of that power is discretionary and such an order ought not to be made except on strong grounds. In '*Bir Chand v. John Bros*¹²' the argument that sub-section (2) at Section 227 means that every transfer of shares without the previous sanction of the Court is void was not accepted. His Lordship said

"I do not think that the section can bear this construction. If the Legislature had meant that a transfer of shares without previous sanction should be void, it was perfectly easy for the Legislature so to enact. In my opinion, the plain reading of the section means that it is within the jurisdiction of the Court at any time after the transfer of the shares to order that the transaction is a good transaction and shall stand".

We have held on an investigation of the facts and circumstances that the transaction in favor of the Bank was a good transaction. That being the position, no question of vacating or recalling the order of Imam, J. 'ex debito justitiae' or on the ground that it was made ex parte can arise,

whatever be our power to set aside an ex parte order on an appeal or rehearing preferred under Section 202, Companies Act.

18. In our opinion, the order of his Lordship Imam, J. (as he then was) dated 7-8-1953 was a good order and cannot be recalled or vacated.

19. For the reasons given above, the appeal fails and is dismissed with costs; we assess the hearing fee at Rs. 200/- only to be paid by the appellants to the respondent Bank.

Narayan, J.

20. I agree.

Appeal dismissed.

Cases Referred.

¹(1883) 22 Ch. D. 830 at P. 834

²(1884) 26 Ch. D. 257

³(1886) 11 A.C. 426

⁴ AIR 1943 Mad 74

⁵(1890) 15 A. C. 267

⁶(1895) 64 LJ Ch. 473

⁷(1901) 2 Ch. O. 314

⁸(1877) 4 Ch. D. 605

⁹(1910) 1 Ch. D. 632

¹⁰(1899) 2 Ch 161

¹¹ 9 Moo Ind App 303 (PC)

¹² AIR 1934 All 161