(1967) 11 CAL CK 0016

Calcutta High Court

Case No: F.A. 5 of 1956

Jitendra Singh Nahar		APPELLANT
	Vs	
Rakhahari Chatterjee		RESPONDENT

Date of Decision: Nov. 28, 1967

Acts Referred:

- Oudh Estates Act, 1869 - Section 13
- Transfer of Property Act, 1882 - Section 100, 41, 5, 56(6), 58

Citation: (1968) 2 ILR (Cal) 364

Hon'ble Judges: Laik, J; A.C. Sen, J

Bench: Division Bench

Advocate: P.N. Mitter and Jnanendra Nath Baksi, for the Appellant;Guruprosad Ghosh and Satyabrata Datta for Abinash Chandra Ghosh, Prasanta Kumar Ghosh and P.K. Hazra and Mukti Maitra, for Dy. Registrar, for the Respondent

Final Decision: Allowed

Judgement

Laik, J.

I may depart from the practice of making discussion and I desire to say that the judgment prepared by my learned brother seems to me sufficient to concur in the opinion expressed by him. It would be lamentable if the effect is not given to the plain language of Section 41 of the Transfer of Property Act in the facts of this case, as there is full scope for invoking the rule of estoppel contained therein.

2. Section 41, founded on the dictum of the judicial Committee in Ramcoomar Koondoo v. MacQueen (1872) L.R. IndAp Supp. 40 : 18 W.R. 166, followed by several decisions, noticed by my learned brother, is an exception to the general rule that a person cannot confer a better title than he has. The onus is on the transferee to show that the transferor was the ostensible owner of the property and that he had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good faith. In this appeal Rakhahari was put forward by his father

Akshay Kumar, the secret title holder, to be the ostensible owner of the property. The Appellants took reasonable care to ascertain that Rakhahari had power to make the transfer. The object, machinery and the conditions in Section 41 are fulfilled in this case. When the bona fide of Akshay Kumar is jealously scrutinized, one cannot but be in the borrowed language, notoriously partial to the Appellants. It must not be forgotten that these types of cases afford facilities for perpetration of fraud, and I think, Akshay should not be allowed to show his "hidden hand" to retain the property.

3. With the sanction of Section 41 and the principles laid down in the decision of Baidya Nath Dutt Vs. Alef Jan Bibi and Others, Gholam Siddique Khan v. Jogendra Nath Mitra (1926) 43 C.L.J. 452 : 31 C.W.N. 205, Macneil and Co. v. Saroda Sundari Debi (1928) 48 C.L.J. 374 : 33 C.W.N. 526, this appeal should succeed. In the following cases, viz., Ballu Mal and Another Vs. Ram Kishan, Kasturi Bai v. Baliram AIR 1923 Nag. 15, Sheogobind Ram Barai and Another Vs. Anwar Ali and Another, Shamsher Chand v. Bakshi Mehr Chand AIR 1947 Lah. 147 (F.B.), The Catholic Mission Presentation Convent and Another Vs. Subbanna Goundan and Others, Chandi Prosad Ganguly v. Gadadhar Singha Roy AIR 1949 Cal. 666, Sadiq Hussein v. Co-operative Central Bank AIR 1952 Nag. 106, the conditions of Section 41 are not satisfied and, as such, they do not support the Respondents. The following Supreme Court decisions, viz., Musammat Phool Kuer Vs. Musammat Pem Kuer and Another, , Ramrao Jankiram Kadam Vs. State of Bombay, Gurbaksh Singh Vs. Nikka Singh, Suraj Ratan Thirani and Others Vs. The Azamabad Tea Co. and Others, do not also go against the Appellants.

4. Accordingly, this appeal is allowed with costs. It is satisfactory that this conclusion corresponds with the justice of the matter.

A.C. Sen, J.

5. The Plaintiffs are the Appellants before us. The appeal arises out of a suit for the specific performance of a contract for sale or, in the alternative, for the realisation of monies paid by an enforcement of the mortgage charge on the property in suit.

6. The facts of the case are as follows. On or about March 16, 1946, the Defendant No. 1, Rakhahari Chatterjee, since deceased, claiming to be the absolute owner of the suit property, namely premises No. 1 Joy Narain Santra Lane at Howrah, agreed to sell the said premises to the Plaintiffs for Rs. 40,000. According to the Plaintiffs they paid to the Defendant No. 1 a sum of Rs. 22,500 by way of earnest in part payment of the price of the said premises.

7. On the same day, namely March 16, 1946, as instrument in writing was executed by the Defendant No. 1. The said instrument, inter alia, provided as follows:

(a) The vendor shall sell the premises subject to the title of the vendor being approved by Messrs. Nahar & Dutta, the Attorneys for the purchasers.

(b) The vendor shall make out title to the said premises to, the satisfaction of Messrs. Nahar & Dutta within 4 months.

(c) The purchasers shall pay to the vendor a sum of Rs. 22,500 by, way of earnest and the said sum would form a first charge on the premises. In case the consequence is not completed, the said sum with interest would become immediately due and payable and the purchasers shall be entitled to enforce the said charge.

The said instrument was duly registered.

8. On or about May 18, 1946, the Defendant No. 1 executed a deed of release in favour of the Defendant No. 2, Akshay Kumar Chatterjee, his father, declaring that the said Defendant No. 2 was the real owner of the said premises, agreed to be sold by the Defendant No. 1 to the Plaintiffs. According to the Plaintiffs, they came to learn on or about June 24, 1946, that the Defendant had executed the aforesaid release and thereupon called for an explanation through their Solicitors Messrs. Nahar and Dutta from the Defendant No. 1, who after repeated reminders admitted having executed and'' registered the aforesaid deed of release stating that he did all that under coercion and that he would take steps to set aside the document.

9. On or about July 2, 1946, the Defendant No. 2, Akshay Kumar Chatterjee, wrote a letter to the Plaintiff No. 1, Jitendra Singh Nahar, stating that he was the owner of the said premises and that the agreement for sale of the said premises by the Defendant No. 1 was unauthorised. Thereafter, the Defendant No. 2 executed on July 24, 1946, a deed of trust on the assertion that he had acquired the disputed property in the benami of the Defendant No. 1 and appointed the Defendants Nos. 4 to 7 as trustees thereunder.

10. It transpires that the Defendant No. 1 entered into a similar agreement to sell the disputed premises with the Defendant No. 8, Bijanbasini Debi, on or about February 5, 1946, that is to say, more than a month before his agreement with the Plaintiffs. Everything in connection with the said agreement of February 5, 1946, was done by Messrs. Ghosh, Hazra & Co., Solicitors. The Defendant No. 1 affirmed declaration as to the ownership of the disputed premises before a Magistrate on the same date before entering into the said agreement with the Defendant No. 8. Preliminary searches and inquiries as to the title of the Defendant No. 1 to the disputed premises were made by Messrs. Ghosh, Hazra and Co., Solicitors on behalf of the Defendant No. 8, Messrs. Nahar and Dutta, Solicitors for the Plaintiffs, were informed- by the Defendant No. 1 as well as by Messrs. Ghosh, Hazra and Co., Solicitors for the Defendant No. 8, that the Defendant No. 8 had consented to cancel her agreement and release the disputed property on receipt of her dues under her agreement of February 5, 1946.

11. Assuming but not conceding that the Defendant No. 1 was the ostensible and not the real owner of the disputed premises, the Plaintiffs stated as follows in para.

9 of the plaint on the question of good faith and proper enquiries.

The Plaintiff had acted in good faith after taking reasonable care to ascertain that the Defendant No. 1 had power...to sell the said premises and to create a mortgage and/or charge thereon. Enquiries were made inter alia of Messrs. Ghosh, Hazra & Co., Solicitors, Calcutta, to whom the Plaintiffs'' Attorneys Messrs. Nahar and Dutta of Calcutta were referred to by the Defendant No. 1 as having made searches and enquiries on behalf of their client. Sm. Bijanbasini Debi, Defendant No. 8....

12. According to the Plaintiffs, they are either entitled to have the contract to sell specifically enforced or to have the charge on the disputed premises for the money paid as earnest enforced.

13. The Plaintiffs claimed in the plaint for three reliefs in the alternative: (i) for a decree for the specific performance of the contract to sell; (ii) for a preliminary mortgage decree on account of the money paid as earnest on the security of the disputed premises; (iii) for a decree for Rs. 22,500 against the Defendant No. 1 with interest.

14. No written statement was filed by the Defendant No. 1. The Defendant No. 2, however, filed a written statement, and a separate written statement was also filed by the Defendants Nos. 3 to 7. The Defendant No. 8 filed a written statement mainly supporting the case of the Plaintiffs.

15. The written statement filed by the Defendant No. 2 is the foundation of the case for the contesting Defendants. The material facts are to be found in para. 17 of the said written statement. The relevant portions of the said paragraphs are as follows:

The disputed property comprising about 1 bigha 7 cottas of mokrari mourashi land with an old two-storied building, one-storied old stable and outhouse belonged to Sarbari Bhusan Ghosh and others.... They being in need of money mainly to satisfy a previous mortgage to one Bijoy Kumar Basu mortgaged the said property to this Defendant No. 1 for Rs. 20,000 on the 11th October, 1923, by a registered deed executed at Defendant 2''s request in the name of his eldest son Defendant No. 1 who was then a college student...entirely dependent upon Defendant No. 2.... The sum of Rs. 20,000...was raised by Defendant No. 2 by pledging valuable securities with the Imperial Bank, Calcutta, and Rs. 13,151 out of the said amount was paid to Bejoy Kumar Basu to satisfy the previous mortgage debt. On the 4th December, 1928, an adjustment of accounts was made and Rs. 36,164 was found to be due by the said Sarbari and others to Defendant No. 2. Sarbari Bhusan and others paid Rs. 3,000 in cash to Defendant No. 2, Rs. 3,164 was relinquished and they executed a fresh mortgage deed for Rs. 30,000.... This time also the mortgage was executed in the benam of Defendant 2''s eldest son Defendant No. 1, but the Defendant 2 as the real owner had to pay income tax on Rs. 10,000 as interest realised and on the 18th May, 1932, the said Sarbari Bhusan and others finding themselves unable to satisfy the said mortgage debt which by this time had amounted to Rs. 32,500 paid to the

Defendant No. 2, Rs. 4,000 in cash...and executed a hand-note for Rs. 1,500 and further executed and registered a sale hobala of the said mortgaged property for the balance of Rs. 27,000 in favour of Defendant No. 2 in the benam of Defendant No. 1.... Defendant No. 2 further spent large sums of money after his said purchase in improving the said property by adding to and altering the old existing buildings and by constructing a big three-storied building for accommodating the school...and has been since then in sole and undisputed possession of the said property by paying landlord''s rent and municipal tax in his own name and by realising rent from the tenants thereof. The Defendant No. 2...was a professor of the Ripon College, Calcutta. The late Sir Surendra Nath Banerjee founded the Howrah Ripon Collegiate School in this very building on the 1st June, 1889, by taking lease thereof. The school was subsequently shifted to a house in Taktaghat Road and then the proprietary right thereof was transferred to this Defendant No. 2 by the late Sir Surendra Nath on 18th August, 1903. This Defendant No. 2 has since then been managing the school as proprietor and head master, and since 1913 according to New University Regulations the management of the school was made over by Defendant No. 2 to a local managing committee.... In 1932 the school has been shifted to the disputed premises.... The Defendant No. 1...has no manner of connection...with the said premises or with the said school.... Defendant No. 1...without any pressure from anybody executed a Deed of Release on the 18th May, 1946, in respect of the disputed property.

16. The suit was dismissed by the trial Court in its entirety. According to the learned Subordinate Judge, there is no difficulty in holding having regard to the source of the purchase money and also from the exercise of possession that Akshay Babu (Defendant No. 2) is the real owner of the disputed property.

17. The trial Court considered the applicability of Section 41 of the Transfer of Property Act relied upon by the Plaintiff. On a construction of the agreement for sale dated March 16, 1946, the learned Subordinate Judge observed as follows:

It is clear that there was no transfer of interest under the said deed with the result that provisions of Section 41 of the Transfer of Property Act cannot be invoked.

18. The trial Court also considered the legal position on the hypothesis that the said agreement to sell created a mortgage by the ostensible owner, namely the defendent No. 1. The evidence on record was scrutinised in order to ascertain whether the Plaintiffs in taking the mortgage from the Defendant No. 1 made proper enquiries to ascertain that the Defendant No. 1 had the power to mortgage the disputed properties and whether they acted in good faith. In the opinion of the trial Court the enquiry that had been made by or on behalf of the Plaintiffs was not either sufficient or adequate. The materials on record, according to the trial Court,

clearly point to the conclusion that Rakhahari Babu acted in collusion with the Plaintiffs and their Solicitors.

Hence it was held that the Plaintiffs could not claim any benefit of the provisions of Section 41 of the Transfer of Property Act even on the assumption that the Defendant No. 1 as an ostensible owner mortgaged the disputed premises for the repayment of the amount paid as earnest.

19. In the present appeal by the Appellants the only point urged is that the Plaintiffs are entitled to get a preliminary decree for mortgage as against the Defendants Nos. 1 to 7 by invoking the principle laid down in Section 41 of the Transfer of Property Act.

20. Section 41 of the Transfer of Property Act provides as follows:

Where, with the. consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

21. The first question to be considered is whether any immovable property or interest in such property was transferred by Rakhahari, Defendant No. 1, to the Plaintiffs. If it is found that Rakhahari merely agreed to sell the disputed property and that no interest whatsoever in the disputed property was transferred to the Plaintiffs either by way of mortgage or otherwise, then there is no question of giving relief to the Plaintiffs u/s 41 of the Transfer of Property Act.

22. Mr. Mitter, the learned Advocate for the Plaintiffs, contends that Ex. 6A, registered agreement of sale executed between Rakhahari and the Plaintiffs, dated March 16, 1946, was not merely an agreement to sell the disputed property, it also created a simple mortgage on the disputed property for the repayment of Rs. 22,500 with interest at 10 % per annum in case the sale was not completed on any ground whatsoever. Clause 3 of Ex. 6A provides that the purchase shall be completed within 4 months from the date of the execution of. Ex. 6A subject to the approval of title, by Messrs. Nahar & Dutta, Solicitors for the Plaintiffs.

23. Our attention was drawn to Clause 5 of Ex. 6A. According to Mr. Mitter, a simple mortgage on the disputed property has been created by that Clause in order to secure the repayment of Rs. 22,500 paid as earnest together with interest at the rate of 10 % per annum. The material portion of Clause 5 runs thus:

The purchasers shall at or before the execution hereof pay to the vendor the sum of Rs. 22,500 by way of earnest...the said sum of Rs. 22,500 would, however, form a first charge on the said premises No. 1 Joy Narain Santra Lane, Howrah. The charge to be so created will upon the completion of the transaction merge in the conveyance in favour of the purchasers. In case the conveyance is not completed on any ground whatsoever, the said sum or Rs. 22,500 with interest thereon at the rate

aforesaid would immediately become due and payable and the purchasers shall be entitled to enforce thesaid charge immediately after 4 months and in case of the purchaser''s Solicitors expressing their disapproval of the title of the vendor immediately thereafter.

24. It may be noted that Ex. 6A was attested by two witnesses and registered under the Indian Registration Act. There is, however, no mention of the word ''mortgage'' in Clause 5. Mr. Mitter on behalf of the Plaintiffs argues that by Clause 5 an interest in the disputed property has been transferred to the Plaintiffs by the Defendant No. 1 by way of simple mortgage for the purpose of securing the payment of Rs. 22,500 paid as earnest together with interest at the rate of 10 % per annum. It has been stated therein that in case the conveyance is not completed on any ground whatsoever, the sum of Rs. 22,500 at the interest specified would immediately become due and payable. This shows that the vendor has not been given the right to forfeit the amount paid as earnest under any circumstances whatsoever and that the said amount shall become immediately due and payable in case the conveyance is not completed on any ground whatsoever. Due and payable by whom? Certainly by the vendor. Mr. Mitter suggests that by using the expression ''due and payable'' the vendor has bound himself personally to pay the mortgage money. In other words, according to Mr. Mitter, Clause 5 contains a personal covenant to pay the earnest with interest in case the conveyance is not completed on any ground whatsoever.

25. Clause 5 further provides that the purchasers shall be entitled to enforce the charge immediately after four months. The charge can be enforced by causing the property charged to be sold and by causing the proceeds of sale to be applied, so far as may be necessary, in payment of the amount due. Mr. Mitter, therefore, contends that the expression ''entitled to enforce the charge'' clearly indicates that the vendor has agreed, expressly or impliedly, that in the event of his failing to pay according to his contract, the purchasers shall have the right to cause the property charged to be sold and proceeds of sale to be applied, so far as may be necessary, in payment of the amount due. He, therefore, contends that all the requirement of a simple mortgage as contemplated by Section 58(b) of the Transfer of Property Act have been fulfilled by Clause 5 of Ex. 6A.

26. The learned Subordinate Judge thinks, and that is also the contention on behalf of the Defendants Nos. 1 to 7, that by Ex. 6A only a charge and not a mortgage has been created.

Now the examination of the agreement for sale, Ex. 6(a), says the learned Subordinate Judge, does not support the view that there was any transfer of interest in any specific immovable property.

It may be recalled in this connection that Section 58(a) of the Transfer of Property Act has defined mortgage as

the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

27. It is, therefore, necessary to ascertain whether any interest in specific immovable property has been transferred. By Ex. 6A specific immovable property, namely No. 1 Joy Narain Santra Lane, Howrah, fully described in the schedule to the document, has been given as security for the repayment of Rs. 22,500 with interest at the rate of 10 % per annum. Has any interest in this immovable property been transferred by way of security? The Plaintiffs have been given the right to enforce the charge, that is to say, the right to have the property sold. According to Mr. Mitter, the right to sell is an interest in the immovable property, and as the Plaintiffs have been given the right to sell, he contends, it must be taken that an interest in the immovable property, namely right to sell, has been transferred to the Plaintiffs.

28. Mr. Mitter further contends that Clause 5 of Ex. 6A cannot be construed as creating a mere charge and not a mortgage. Charge has been defined by Section 100 of the Transfer of Property Act, the material portion of which runs thus:

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provision hereinbefore, contained which apply to a simple mortgage shall, so far as may be, apply to such a charge.

It is settled law that in the case of a charge there is no transfer of the property of any right in the property.

29. The difficulty of distinguishing between a simple mortgage and a charge has been pointed out in a number of cases. It is also settled law, so far as our High Court is concerned, that mortgage which is invalid for want of attestation cannot take effect as a charge. Reference may be made to the case of Pran Nath Sarkar v. Jadu Nath Sarkar ILR (1905) Cal. 729. There a suit was instituted upon a bond which was held to be a simple mortgage by the Courts below as well as by the High Court. The mortgage bond was, however, not duly attested within the meaning of Section 5 of the Transfer of Property Act. It was, however, argued on behalf of the Plaintiff Appellant that even if the bond was not effective as a mortgage for want of attestation, it operated as an effective charge u/s 100 of the Transfer of Property Act. Meclean, C.J. gave the following reason for not accepting the argument:

The expression ''amount to a mortgage'' in Section 100 means such a mortgage as is defined by Section 58 of the Act. If we were to assent to the argument...that though coming within the definition of Section 58 it does not amount to a mortgage by reason of the fact that the requirements of Section 59 have not been complied with, we might as well strike the latter section out of the Act, for, if the transaction is bad

as a mortgage, because the document was not registered and attested...but is still good as a charge...the owner of that charge can afford to disregard Section 59 altogether, for he would be amply protected u/s 100. We do not think the Legislature would have intended this....

30. In Royzuddi Sheik v. Kali Nath Mookherjee ILR (1906) Cal. 985 one of the questions involved was whether the bond in suit was intended to be operative as a mortgage or a charge. The Defendant No. 2 accepted from the Plaintiff an under-tenure in the name of the Defendant No. 1, his son. The Defendant No. 1 executed a kistibandi for the payment of the rent in arrears. The under-tenure was made the security for the amount of the kistibandi. The lower Appellate Court held that the kistibandi was a mortgage, but that it was invalid as it was not properly attested. The suit was, accordingly, dismissed as against the Defendant No. 2. Before the High Court the Plaintiff as Appellant contended that the kistibandi was not a mortgage, but constituted a charge on the property. The relevant portion of the kistibandi was as follows:

If I neglect to pay off the money...then you, on instituting a suit...shall be able to recover the same by attachment and sale of the aforesaid property...shall not...transfer the said mahal...as long as this debt is not paid off.

31. Rampani, J. did not think it necessary to consider whether the kistibandi created a mortgage or a charge, because in his opinion in either view the Defendant No. 2 could not be made liable on bond executed by the Defendant No. 1. Mookerjee, J., however, entered into that question and held that the kistibandi created a charge and not a mortgage. Mookerjee, J. observed as follows:

There is considerable difficulty...in drawing a sharp line of demarcation between a mortgage and a charge; but there is this well-marked distinction between the two, that a mortgage does, whereas a charge does not involve a transfer of an interest in specific immovable property.... It is conceded that there are no express words in the document to indicate such a transfer. On the other hand, the clause, which entitles the creditor to recover his dues by attachment and sale of the property, lends support to the view that a mere charge was intended to be created, inasmuch as an attachment is wholly unnecessary...under a mortgage decree. Again, the clause which contains an undertaking by the debtor not to alienate the property, would be intelligible or meant for the necessary protection of the creditor, if a mere charge was intended to be created. Such a covenant...would be wholly needless for the protection of a mortgagee.... Taking, therefore, the instrument as a whole I am inclined to regard it as creating a charge....

It is needless to point out that in the instant case in Ex. 6A there is no Clause for recovery by attachment and sale, nor is there any clause against alienation by the debtor. Mookerjee, J. further observed:

If, however, it be treated as a mortgage security, I am unable to hold that it creates a valid charge because it is inoperative as a mortgage.

His Lordship overruled the contention that where an instrument which was intended to be a mortgage is invalid by reason of its not fulfilling the requirements of the law, it should be held to be operative as a charge with the following observation:

This view no doubt receives some support from the observations of the learned Judges of the Madras High Court.... The contrary view however has been uniformly maintained in this Court.... I am not prepared to dissent from this view which appeared to me to be based upon a reasonable construction of the words ''and the transaction does not amount to a mortgage'' in Section 100 of the Transfer of Property Act. These words...do not mean that, if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities prescribed by the law, the transaction is converted into a charge....

32. Mr. Mitter also referred us to the case of Govinda Chandra Pal v. Dwarka Nath Pal ILR (1908) Cal. 837 as that case, according to him, has laid down the principle for ascertaining whether a charge or a mortgage is created by a bond hypothecating immovable property for the repayment of a debt. In that case upon a suit for money a decree was made on compromise which provided, inter alia, that the immovable properties specified therein should be hypothecated for the realisation of the amount decreed and that the Defendant would not be able to create an incumbrance on the same. A part of the debt covered by the decree was realised by execution. For the balance a suit was instituted for the sale of the hypothecated properties. The Court had to consider whether the hypothecation Clause in the compromise decree operated as a mortgage or a charge. Their Lordships observed as follows on this point:

The distinction between a mortgage arid a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgage in the definitions given in Section 58 of the Transfer of Property Act has somewhat obliterated the distinction in India.... A charge which owes its existence to the operation of law, may be easily discovered.... A charge created for payment of a legacy or annuity or maintenance money by a will or trust-deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of liens created by other acts of parties, specially for payment of debts, must be solved in each case from the terms and expressions used...and the formalities actually observed in execution. If the instrument is expressly stated to be a mortgage and gives the power of realisation of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates

a charge.

33. Let us apply the test laid down in Govinda''s case Supra to Clause 5 of Ex. 6A in the instant case. The word ''mortgage'' has not been used in that clause. But in our opinion that is immaterial. We must look to the substance of the transaction contemplated by that clause. It is settled law that no particular form of words is necessary for the creation of a mortgage. In construing a deed

the form of expression, in literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.

Even if a deed is described as a mortgage its nature will be determined not by the description given by the parties, but by the jural relation constituted by it. A deed may be construed as a mortgage although the word mortgage does not occur in it.

34. It is clearly stated that the

sum of Rs. 22,500 would form a first charge on the said premises No. 1 Joy Narain Santra Lane, Howrah.

The Clause further provides that in case the conveyance is not completed on any ground whatsoever the purchasers shall be entitled to enforce the charge. The words ''enforce the charge'' imply that the. purchasers will be entitled to realise their dues by bringing the property to sell. By these words the right to sell the property has been expressly given, that is to say, transferred to the purchasers. The right to sell the property in suit is undoubtedly as interest in specific immovable property, and that interest'' has been transferred to the purchasers to secure the repayment of Rs. 22,500 with interest in case the conveyance is not completed. The sum of Rs. 22,500 was no doubt to be paid as earnest, but that would become a debt on the happening of a contingency, namely, non-completion of the conveyance. So it comes to this that by Clause 5 an interest in specific immovable property was transferred to the Plaintiffs, purchasers to secure the contingent liability that would accrue on the non-completion of the conveyance on any ground whatsoever. The contingent liability contemplated by Clause 5 is certainly a debt within the meaning of Section 58(a) of the Transfer of Property Act.

35. Looking at the substance and essence of the transaction there is scarcely any scope for doubt that the real intention of the parties was to transfer the right to sell as security for a debt. Clause 5, therefore, created a mortgage in favour of the Plaintiffs, but the mortgage was to accrue on the happening of a certain contingency. It is not disputed that that contingency has arisen; hence the purchasers are entitled to enforce the mortgage.

36. Clause 5 further provides that on the non-completion of the conveyance the sum of Rs. 22,500 with interest would become due and payable. The words ''due and payable'' imply due and payable by the vendors. In other words, the vendor bound himself personally to pay the mortgage money.

37. That the real intention was to create a mortgage will also be evident from the fact that the document was not only registered but it was duly attested. No attestation is required for creating a charge in writing. The document was attested, because the parties intended to create a mortgage. As has been pointed out in Govinda''s case Supra the formalities actually observed in executing a document give an indicaion as to the real intention of the parties.

38. If Clause 5 and 6 of Ex. 6A are read together it will be clear that Clause 5 contemplates a mortgage, whereas Clause 6 contemplates a charge. Clause 6 runs thus:

The vendor doth hereby charge the premises No. 1 Joy Narain Santra Lane, Howrah,...hereby agreed to be sold for the said sum of Rs. 22,500 with interest at 10% per annum and all costs of recovery thereof and of and incidental to this agreement and of investigation of vendor''s title to the premises as between attorney and client.

It is obvious that this Clause was inserted in lieu of the statutory charge contemplated by Section 56(6)(b) of the Transfer of Property Act: There would have been no necessity of inserting a separate Clause creating charge if Clause 5 too was meant to create a charge. The juxtaposition of these two Clauses makes it clear that the parties intended to create a mortgage by Clause 5 and a charge by Clause 6.

39. Reference may also be made to Clause 12 of Ex. 6A. The said Clause provides as follows:

If the purchasers'' Solicitors shall refuse the title or do not approve of the same the earnest money paid this day together with interest and costs as aforesaid shall at once become due and payable and the purchasers shall be entitled to sue for enforcing the charge hereby created.

This Clause clearly refers to the charge created by Clause 6, because not only interest but costs too shall become due and payable if the title is not approved by the Solicitors. In Clause 5 only interest shall become due and payable over and above the earnest money. Clause 5 enables the purchasers to ''enforce the said charge'', whereas Clause 12 enables the purchasers to ''sue for enforcing the charge''. It is, therefore, evident that Clause 5 has given the purchasers the right to sell whereas no such right has been given by Clause 12.

40. The foregoing discussion leads to the conclusion that Clause 5 of Ex. 6A created a simple mortgage in favour of the Plaintiffs in respect of the disputed property and we hold accordingly.

41. Mr. Ghose appearing on behalf of the contesting Respondents tried to convince us that Clause 5 of Ex. 6A merely created a charge and not a mortgage. He read out passages from the judgment of Bennett, J. in AIR 1943 338 (Oudh) to point out the distinction between a charge and a mortgage. In that case one Qualendar

relinquished his rights in an estate known as the Bhilwal estate in favour of Sarfaraj in consideration of an annual maintenance allowance of Rs. 400. This allowance was confirmed by Sarfaraj in a will and he made it a charge on the Bhilwal estate. The Plaintiffs as successors in the interest of Qualendar instituted a suit to recover arrears of maintenance against Hunter, who as liquidator of the Bank of Upper India purchased the Bhilwal estate at an auction sale. Hunter contended that the will of Sarfaraj did not operate to make the maintenance allowance a charge upon the estate as the will was not registered. u/s 13 of the Oudh Estates Act of 1869 prior to its amendment in 1910 no talukdar could bequeath his estate or any interest therein except by a gift or will registered within one month from the date of execution. The will of Sarfaraj was not registered. If the charge created by the will constituted an interest in the Bhilwal estate, the will would be invalid. The Full Bench was, therefore, asked to consider whether within the meaning of Section 13, Oudh Estates Act, a charge was an interest in property. The question was answered in the negative.

42. Bennett, J. in delivering the leading judgment considered the question at great length. His Lordship observed as follows:

There is first of all the difference in the definition of mortgage and charge, the omission in the case of charge to indicate any transfer. Secondly, there is the difference in effect, an indefeasible right to property accruing in the case of a mortgage and no such indefeasible right accruing in the case of a charge. That is to say, the right cannot be defeated in the one case by anything which the owner of the property may do; in the other it can. Thirdly, there are several other provisions in the Transfer of Property Act which indicate that the creation of a charge does not amount to the creation of an interest.

It may be noticed that the view expressed by Bennett, J. in the above passage is in consonance with the view expressed by the learned Judges of the Calcutta High Court in the cases cited above.

43. Mr. Ghose, however, drew our special attention to the following passage in the judgment of Bennett, J.:

I agree that when the stage arrives of putting a charge into effect there may be no distinction between a charge and a simple mortgage. But we have, I think, to consider the position not at that stage, but at the stage when the charge is created.

He suggests that the provision in Clause 5 of Ex. 6A for enforcing the charge, if the conveyance is not completed, relates to the stage of putting the charge into effect and not to the stage of the creation of the charge, hence, according to him this provision must be ignored in ascertaining whether a charge or mortgage has been created by Clause 5. His argument is that we must confine our attention solely to the words "Rs. 22,500 would, however, form a first charge on the said premises" totally disregarding the words "the purchasers shall be entitled to enforce the said charge"

in order to appreciate the true character of the transaction. If we do so, he proceeds, there is no escape from the conclusion that Clause 5 has created a mere charge and not a mortgage.

44. We are afraid that we cannot accept this argument. The right to enforce the charge has been given concomitantly with the creation of the charge, and the words "shall be entitled to enforce the charge" do not relate to the stage of putting the charge into effect. These words really give a clue to the nature of the transaction, and they leave no room for doubt that though the word ''mortgage'' has not been used the real intention was to create a moregage by transfering the right to enforce by selling the property.

45. Mr. Ghose also referred us to the case of Matlub Hasan and Others Vs. Mt. Kalawati and Others, There it has been laid down that when the intention of the parties is to create a liability in perpetuity the transaction cannot possibly be a mortgage, that a charge is not exactly identical with a mortgage, and that although a similar remedy is available a suit for the enforcement of a charge is not necessarily the same as a suit for the sale on the basis of a mortgage deed. This case, in our opinion, does not assist us in any way in construing Clause 5 of Ex. 6A. In a sense it goes against the Respondents. Enforcement of the charge in Clause 5 clearly refers to a suit for sale on the basis of the deed, whereas suit for the enforcement of the charge in Clause 12 contemplates a suit for the enforcement of the charge created by Clause 6.

46. Another case cited by Mr. Ghose, viz., Raja Sri Sri Shiva Prasad Singh Vs. Beni Madhab Chowdhury, in our opinion goes against the Respondents. In that case the following Clause in a deed had to be interpreted.

This settled coal land, mines, coal raised...tools, bungalow, edifices, coolie-shed...as well as other moveables and immoveables shall ever be regarded as a security for the payment of the rent and cesses due together with interest thereon due to you. I shall not be competent to transfer the said property...or remove the same, so long as the rents etc. due to you will remain unpaid.

This clause, it was held, operated as a mortgage and not a charge, though there was no express transfer of an interest. Das, J. quoted with approval the following observation of Chamier, J. in Dalip Singh v. Bahadur Ram ILR (1912) All. 446:

In a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred then the requirements (of a transfer of an interest in specific immoveable property) are satisfied.

His Lordship at another place observed:

There is very little difference, if any, between a charge and a simple mortgage...and (that) it becomes a question of some nicety to distinguish between a simple mortgage and a charge.

There was a provision against alienation, still the Clause was held to operate as a mortgage. In the instant case in Clause 5 of Ex. 6A there is no provision against alienation. If the Clause in the Patna case operates as a mortgage, Clause 5 in Ex. 6A operates, a fortiori, nor as a charge but as a mortgage.

47. Mr. Ghose read out to us a passage from Salmond''s Jurisprudence, (1948 ed., p. 440) to indicate the distinction between a charge and a mortgage. That passage does not help us much in construing Clause 5 of Ex. 6A. Again, as pointed out by Das, J. in the case just cited, the line of division in England between a charge and a mortgage is very clear one, but in this country the division is not so well marked. The same view has been expressed by our High Court in Govinda Chandra Pal v. Dwarka Nath Pal Supra, and the relevant passage has already been quoted above.

48. Mr. Ghose next urged that Clause 5 of Ex. 6A does not contain any right of redemption, nor is there any personal covenant to pay. We have already pointed out that the said Clause does contain a personal covenant to pay. As to the right of redemption it is a statutory right. It matters little whether that right is specifically given or not. If Clause 5 operates as a mortgage, and our view is that it does, the right of redemption can necessarily be claimed by the debtor. It may be pointed out that there is clear indication of due date of payment in Clause 5 from which the right of redemption can be deduced as a matter of law.

49. Let us now consider whether the other requirements of Section 41 of the Transfer of Property Act have been fulfilled or not. It is not disputed that Rakhahari, the Defendant No. 1, became the ostensible owner of the disputed property with the express consent of his father Akshay, the Defendant No. 2, sometime in 1932, if not earlier. Mr. Ghose says that Rakhahari ceased to be an ostensible owner with the consent of his father on and from February 18, 1946, when Akshay wrote to the Howrah Municipality for substituting his name for the name of Rakhahari; in the tax bills to be issued in future. We cannot accept this contention of Mr. Ghose. It cannot be said that Rakhahari ceased to be the ostensible owner with the permission of the real owner simply because he wrote a letter to the Howrah Municipality to have his name mutated in the rent bills. No step was taken by him to have the deed of sale in the name of Rakhahari set aside or to obtain a declaration from the Civil Court as to his real ownership. In T. Syed Fakruddin Saib and Others Vs. Katta Ramayya Setti and Others, the stranger mortgagee was given the protection of Section 41 of the Transfer of Property Act even though the real owner unsuccessfully asserted his title in certain criminal proceedings against the person in whose name the property was purchased prior to the stranger''s mortgage. The Madras High Court relies on the decision of the Calcutta High Court in Baidya Nath Dutt v. Alef Jan Bibi Supra, in which the claim of the stranger mortgagee was upheld. In that case the real owner

Karimannessa executed a conveyance of the disputed property in favour of her grand-daughters Asia and Sufia. The conveyance was found to be a paper transaction. Sufia was a minor and Asia was appointed her guardian by the District Judge. In 1900 Asia applied to the District Judge for permission to sell the half share of Sufia. Karimannessa filed a petition of objection stating that neither Sufia nor Asia has title to the property. The sale was sanctioned by the District Judge overruling the objection of Karimannessa. The entire interest of the two sisters was conveyed to one Muhammad. In 1909 Muhammad brought a suit for rent against a tenant in occupation of a portion of the house. Karimannessa was cited as a witness by the tenant who claimed to be her tenant. Karimannessa denied that she had conveyed the land and the house to anyone. The rent suit, however, was decreed. Muhammad executed in March 1910 a conveyance in favour of Abdul Kader who mortgaged the property to the Plaintiff in July 1910. In June 1911 Karimannessa instituted a suit against Abdul Kader for cancellation of the successive instruments of transfer, for establishment of title and for recovery of possession. The suit was decreed on a finding that the successive transfers were not genuine. In 1918 the Plaintiff instituted a suit to recover the property on declaration of title against Karimannessa, the two mortgagees from her and Abdul Kader. The suit was decreed on a finding that the Plaintiff was a bona fide mortgagee for value from an ostensible owner, namely Abdul Kader. Though there was clear repudiation of the title of Asia and Safia in 1900 and that of Muhammad in 1909 by Karimannessa, Abdul Kader was held to be an ostensible owner with the consent of the real owner when he mortgaged the property to the Plaintiff. If that be so, it cannot be said in the instant case that Rakhahari ceased to be an ostensible owner with the consent of Akshay as soon as Akshay wrote to the Municipality on February 28, 1946, to have his name mutated in the rent bills in place of Rakhahari.

50. The question as to whether or not a person is an ostensible owner with the consent of the real owner at the date of transfer is to be decided with reference to the third party transferee. If it is found that the third party transferee is absolutely in the dark as to assertion of title by the real owner repudiating that of the ostensible owner prior to the date of transfer, the transferor must be regarded as an ostensible owner with the consent of the real owner in relation to the innocent transferee. In the instant case, Rakhahari must be regarded as the ostensible owner at the date of the execution of Ex. 6A, that is to say, on March 16, 1946, inspite of the fact that Akshay wrote to the Municipality on February 18, 1946, for the mutation of his name in the rent bills, if it is found that the Plaintiffs Appellants acted in good faith after taking reasonable care to ascertain that Rakhahari had power to make the transfer by way of mortgage.

51. Hence, the next question for consideration is whether the Plaintiffs made reasonable enquiry and whether they acted in good faith and whether they paid proper consideration for the transfer.

52. In para. 9 of the plaint it has been stated that enquiries were made, inter alia, of Messrs. Ghosh, Hazra & Co., Solicitors, to whom the Plaintiffs'' Attorneys Messrs. Nahar and Dutta were referred to by Rakhahari, the Defendant No. 1. It is in evidence that the Defendant No. 1 entered into a prior agreement for the sale of the disputed property on or about February 5, 1946, with Bijanbasini Debi, the Defendant No. 8, on whose behalf searches and enquiries were made by Messrs. Ghosh, Hazra & Co.

53. Rabinra Chandra Hazra, proprietor of the Solicitors'' firm of Ghosh, Hazra & Co., deposed in the case as P.W. 3. Regarding enquiry he said as follows in his examination-in-chief:

I inspected the properties when the school was closed. Rakhahari Chatterjee represented that the school and some others were his tenants. More tenants were occupying the western block and referred to Rakhahari Babu who was accompanying me as their landlord.

His reply to questions put to him in cross-examination regarding the tenants was as follows:

I remember the name of one tenant Ripon Collegiate School. I did not try to ascertain the names of others as I was shown the counterfoil book. That book was not handed over to me as that was a current book. I saw some tenants on the western block but did not ask them to produce their rent receipts.... Ripon Collegiate School is the tenant. I did not see the head master nor looked into the books of accounts. All these were dispensed with as I was dealing with a high Government officer. I went to the school after 4 p.m. of one Saturday. The school was closed by that time. I went only one day.

54. Rakhahari represented to P.W. 3 that his documents had been mislaid when his family was shifted to Midnapore during the bombing period, that is to say, in or about 1942. On the day of the inspection of the disputed premises Rakhahari made over to the witness certain title deeds, namely, (i) a certified copy of a mortgage deed relating to the disputed property, (ii) a certified copy of the deed of sale in favour of Rakhahari and (iii) a letter addressed to Rakhahari by the assessor of the Howrah Municipality. A dakhila showing payment of rent to the superior landlord in respect of the disputed property was also shown to the witness on a subsequent date.

55. Even though Rakhahari told the witness (P.W. 3) that searches into his title deeds were not required, the witness insisted on searches. He, further, told Rakhahari that he would be required to make a declaration before a Magistrate to the effect that his original documents had been mislaid, and this was done by Rakhahari on February 5, 1946. The said declaration has been marked as Ex. 9. It is stated in para. 4 of the said declaration that Rakhahari obtained ten documents of title relating to the disputed property from his vendors. Paragraph 6 of the said declaration runs

thus:

The said ten prior title deeds and the said original Bengali instrument of sale dated the 18th May, 1932, got mislaid on the occasion of the removal of our family with belongings to Midnapore in 1942 for War emergency. I shall make vigorous searches in all necessary and possible quarters and shall make over all the said title deeds to the purchasers'' said Solicitors before the completion of the purchase.

Rakhahari also stated in para. 7 of the said declaration that the ten prior title deeds and the Bengali instrument of sale dated May 18, 1932, had not been deposited by him or any other person by way of collateral security or equitable mortgage.

56. P.W. 3 with the assistance of his clerk made searches in the Sadar and Joint Registry Office. Thereafter the agreement for sale with mortgage charge in favour of Bijanbasini, Defendant No. 8, and the declaration to be made before the Presidency Magistrate were duly engrossed. The declaration was sworn before the Presidency Magistrate on February 5, 1946, and the agreement for sale too appears to have been registered that very day. The appointment for the completion of the transaction was made only after the rent dakhila had been produced.

57. Rakhahari after the completion of the agreement for sale in favour of Bijanbasini requested. P.W. 3 to cancel the sale on his paying up Bijanbasini as he was arranging for money upon the disputed property through the firm of Nahar and Dutta. He requested P.W. 3 to give inspection of the title deeds, namely, the certified copies of the mortgage and sale deed, the letter from the assessor, the dakhila and the search notes to Nahar and Dutta. P.C. Dutta of Nahar & Dutta came over to the office of P.W. 3 and inspected the above title. P.C. Dutta asked P.W. 3 if he was satisfied about the title after searches, P.W. 3 replied in the affirmative.

58. In the foregoing paragraphs we have given the gist of the deposition of P.W. 3 His evidence leaves no room for doubt that he took care to ascertain that Rakhahari had power to sell or mortgage the disputed property. From the enquiries made by him he was satisfied as to the power of Rakhahari to make the transfer, and he said so to P.C. Dutta of Nahar & Dutta who acted on behalf of the Plaintiffs.

59. From the deposition of P.W, 4, Provat Kumar Hazra, son of P.W. 3, it appears that P.W. 4 made searches in the joint Registry Office on January 31, 1946. With Jiten searches were made in the index book for the period between 1931-46 and search notes were duly prepared. Applications were made only for searches into lease, but he tried to find out incumbrance of any kind. He also searched the register of Title Execution, Money Execution and Rent Execution case of the Munsif, 1st Court, and the Subordinate Judge, 3rd Court, Howrah. "He completed the searches on February 5, 1946.

60. P.W. 5, Ranjit Singh Nahar, one of the partners of Messrs. Nahar and Dutta, said something about enquiry in his deposition. P.C. Dutta, P.W. 5 and Krishna Babu, a

broker, went for the inspection of the disputed property. They found that a school known as Ripon Collegiate School was located thereon. They went round and found several persons on the back of the disputed premises, and on enquiry they were told by those persons that they were sub-tenants of the school. At their request the sub-tenants produced rent receipts granted by the school. Our special attention was drawn by Mr. Ghose on behalf of the Respondents to the following statements of P.W. 5 in his cross-examination:

R.K. Chatterjee was not present during inspection. We did not contract any neighbour of the locality. We left our office at 4-30 p.m. The school was closed on that date but cannot say why.... We did not enter the school premises.... A few subtenants were found in occupation of the back side.... The rent receipts were produced, but I kept no notes. I did not make any enquiry as to who were the owners of the school to whom the school was paying rent and at what rate. We did not contact anybody connected with the school. I relied upon the statement of R.K. Chatterjee. I did not go to the spot on any other occasion.

These statements, according to Mr. Ghose, clearly show that the enquiry made on behalf of the Plaintiff cannot be said to be reasonable. We. shall deal with this point subsequently.

61. From the deposition of P.W. 6, Sakshi Gopal Mitra, it appears that obtaining instructions from the firm of Nahar and Dutta he made searches in the Municipal office, the Registry office and the landlord''s office. The municipal records were searched between 1929-46. He informed P.C. Dutta of Messrs. Nahar and Dutta over the phone that the property was not in any way encumbered. He found that R.K. Chatterjee was the recorded owner in the municipal register. The landlords also gave him to understand that R.K. Chatterjee was their tenant and paying rent to them. Under fresh instruction from P.C. Dutta of Messrs. Nahar and Dutta he looked into the records of the Municipality and of the Registry office and discovered from the Registry office that R.K. Chatterjee had in the meantime executed a deed of release. He also found that the name of Akshay Babu appeared in place of Rakhahari in the assessment register of the first quarter of 1946-47.

62. P.W. 9 Pratul Chandra Dutta, one of the partners of Messrs. Nahar and Dutta, took the leading part in making enquiries as to the title of Rakhahari on behalf of the Plaintiffs. He along with P.W. 5 and Krishnalal went to the spot. The school was found closed. They found some persons in occupation of the back side, who represented themselves as the sub-tenants of the school. Rakhahari himself came to the office of Messrs. Nahar and Dutta. When asked for the documents, he said that the original had been lost and that certain documents were with Messrs. Ghosh and Hazra, who had also searched his title deed. He also handed over the certified copies of a deed of mortgage and a deed of sale. P.W. 9 went to inspect the search notes of Ghosh and Hazra on the same day as Rakhahari was pressing for money. P.W. 9 was given inspection of a letter from the Municipality, rent receipt and also

certified copies and search notes and the declaration made before the Presidency Magistrate. In this respect he fully corroborates P.W. 3 Rabindra Hazra.

63. It was P.W. 9 who engaged P.W. 6, Sakshi Gopal Mitra, to make searches in the Municipal office, Registry office and landlord''s office. Rakhahari showed hirn a rent receipt and counterfoil book in his name on March 14, 1948. A declaration on the line of the declaration made before the Magistrate was made by Rakhahari on March 16, 1946, and the said declaration was signed by Rakhahari in the presence of P.W. 9. The agreement for sale in favour of the Plaintiff together with the mortgage for the amount paid as earnest was also made that very day, but the said ''agreement was registered on June 20, 1946. As the registration was deferred from time to time and not done till June 20, 1946, P.W. 9 instructed P.W. 6 to make fresh searches, whereupon P.W. 6 informed him on further enquiry that Rakhahari had executed a deed of release in the meantime.

64. Mr. Ghose, the learned Advocate for the Defendants, submits that following statements made in cross-examination by P.W. 9 show that the enquiry made was not reasonable.

We believed him (Rakhahari) as he held responsible job though he was a needy man. I did not think it necessary to enquire into the source of the purchase money of the kobala from Sarbari Ghose. I knew that Rakhahari''s father was alive. I did not think it necessary to enquire as to how Rakhahari could get money during the time of mortgage and sale.... I did not make enquiries if Rakhahari lived separately or jointly with his father. I did not think it necessary to contact any witness of the mortgage deeds. I did not think it necessary to make enquiries of the neighbours of Rakhahari.... It appears that Rakhahari had no rate bill but that he had applied for getting duplicate. Municipal taxes, according to Rakhahari, were brone by the school. I made no enquiries to verify the statement. I did not think it necessary to enquire from the school as to where the rent was paid and at what rate.... I also did not enquire from the school if they were the tenants under R.K. Chatterjee.... I did not make any enquiry regarding the valuation of the premises or if it was worth Rs. 40,000. I made no enquiries who constructed the second floor. We shall presently show why the contention of the Respondents cannot be accepted.

65. The learned Subordinate Judge seems to think that there was no enquiry in the real sense of the term. The relevant portion of the judgment runs thus:

It is true that inspection was made on one day by the firm of Ghosh and Hazra and on another day by the firm of Nahar and Dutta. But those inspections were made on days when the school was closed. There is no evidence to show that the head master or any teacher of the school was contacted on the point. No enquiry was made of the original owners, viz., the Ghoses. It is also strange that the Solicitors did not think it worthwhile to make any enquiry either of the father of the proposed transferor or any of his relations. In my opinion, the enquiry that has been made in

this case was not either sufficient or adequate. On the other hand, this Court is of opinion that no reasonable or proper enquiries had been made.

66. That enquiries were made on behalf of the Plaintiffs are evident from what has been stated by the various witnesses for the Plaintiffs. The learned Subordinate Judge also does not say that no enquiries were made. P.W. 6 searched the Municipal office, Registration office and the landlord''s office. He also searched the record of the Munsif''s Court and the Subordinate Judge''s Court. These are the places where ordinarily searches are made in investigating the title or the power to transfer of the vendor. u/s 41 of the Transfer of Property Act the transferee is required to take reasonable care to ascertain that the transferor had power to make the transfer.

67. The duty of the transferee is to see whether the document of title stands in the name of the vendor, whether in the municipal record the name of the vendor has been recorded as the owner. Whether the record of the Registration office shows that the title of the vendor has in any way been impaired by subsequent transactions and whether any litigation is pending in respect of the property to be sold. When rent is payable to the superior landlord it is also the duty of the transferee to see whether the name of the vendor has been recorded as tenant in the landlord''s sherista. If these matters are properly investigated by the transferee before taking the transfer and if the result of such investigation is sufficient to satisfy a man of ordinary prudence as to the title of the transferor, it may be said that the transferee has taken reasonable care to ascertain that the transferor had power to make the transfer.

68. If the property to be sold is tenanted, ordinarily it is not the duty of the transferee to enquire to whom rent is paid by the tenant, because the possession of the tenant is not ordinarily notice of the title of the lessor. According to the learned Subordinate Judge, the head master or any teacher of the school should have been contacted. It is the common case that the school is in occupation as a tenant. A purchaser neglecting to enquire into the title of the occupier is not affected by any other equities than those which such occupier may insist on. If the purchaser is not affected by any other equities than those which the tenant may insist, it cannot be said that it is the duty of the purchaser to enquire to whom rent is paid. We, therefore, cannot agree with the learned Subordinate Judge that either the head master or any other teacher of the school should have been contacted to ascertain to whom rent was paid by the school. It is in evidence that the school never demanded, or got any rent receipt from Akshay Babu. So even if the head master or any other teacher had been contacted, he would not have been in a position to produce rent receipts showing payment of rent to Akshay Kumar Chatterjee. The entry in the cash book dated May 19, 1944, shows donation of Rs. 4,800 against arrear of rent for 2 years upto March 1944. This means that no rent was in fact paid for this period. The entry dated March 16, 1946, showing payment of Rs. 600 as rent to Akshay Babu by the school is very significant because the agreement for sale in

favour of the Plaintiffs was also effected on that very day. The inspection of the disputed properties by the two firms of Solicitors on two different dates appears to have been made prior to March 16, 1946. Therefore, on both the dates of inspection there was no entry in the cash book of the school showing payment of rent by the school to Akshay Kumar Chatterjee. Therefore, in our opinion, it is of no consequence that the Solicitors acting on behalf of the Plaintiffs, did not contact either the head master or any other teacher while inspecting the disputed property.

69. According to the learned Subordinate Judge,

it is also strange that the Solicitors did not think it worthwhile to make any enquiry either of the father of the proposed transferor or any of his relations.

We fail to understand why this omission on the part of the Solicitors should be regarded as strange. Rakhahari himself was a responsible Government officer. He was fairly advanced in age. The documents of title all stood in his name. Those documents do not give any indication whatsoever that his father is the real owner. A man of ordinary prudence is quite justified in thinking that the person in whose name the document of title stands is the real owner of the property covered by the document. It is no duty of the purchaser to make enquiries at random. The municipal record also mentions Rakhahari as the owner. That being the position, the Plaintiffs were not required to enquire of the father of the vendor. The question of making enquiry of any of the relations of the vendor cannot arise having regard to the facts and circumstances of the present case.

70. The learned Subordinate Judge further thinks that the enquiries should have been made of the original owners, viz., the Ghoses. In our opinion, no useful purpose would have been served by such enquiry, because in the deed of mortgage of October 1923 it is stated in equivocal language that the sum of Rs. 20,000 was received as loan by the Ghoses from Rakhahari. There is nothing in that document which should have put the Plaintiffs on some enquiry which might lead to some result.

71. Mr. Ghose, appearing on behalf of the Defendants Respondents, argued that on the recital in the deed of sale in favour of Rakhahari by Sarbari Bhusan Ghose and others it was the duty of the Plaintiffs to enquire of the father of Rakhahari as to who was the real owner.

72. In the deed of sale executed by Sarbari Ghose and others in favour of Rakhahari on May 18, 1932, marked as Ex. S, the various transactions culminating in the sale of 1932 have been recited. As stated above, Sarbari Ghose and others executed a deed of mortgage in respect of the disputed property in favour of Rakhahari on October 11, 1923, on receipt of Rs. 20,000 as loan. On December 14, 1928, an adjustment of account was made and Rs. 36,164 was found to be due, Rs. 3,164 was relinquished, Rs. 3,000 was paid in cash and a fresh mortgage for the balance of Rs. 30,000 was executed and that too in favour of Rakhahari. Thereafter on May 18, 1932, Sarbari

Ghose and others paid Rs. 4,000 in cash, executed a handnote for, Rs. 1,500 and executed a deed of sale in consideration of the balance of Rs. 27,000. Both the handnote and the deed of sale were executed in favour of Rakhahari. It appears that the sum of Rs. 20,000 advanced in October 1923 on the mortgage of the disputed property is the nucleus of the fund with which the disputed property was purchased in May 1932. It is in evidence that in 1923 Rakhahari, though not a minor, was merely a college student. Mr. Ghose argues that it was the duty of the purchasers to inquire how Rakhahari, a mere college student, could procure Rs. 20,000 as far back as 1923. We cannot accept this argument. First of all the age of Rakhahari has not been mentioned either in the mortgage deed of 1923 or in mortgage deed of 1923 or in the mortgage deed of 1928 or in the sale deed of 1932. Secondly, it is not possible for anyone to know on a plain reading of the deed of sale, Ex. S. That in 1923 Rakhahari was merely a college student without any independent source of income. When all the three documents extending over a period of nine years are in the name of Rakhahari, a man of ordinary prudence, is entitled to assume without any further enquiry that Rakhahari is the person who advanced the money in 1923 and purchased the property in 1932 in lieu of the money so advanced. As has been pointed out by the Judicial Commission in Ramcoomar v. Mac-Queen Supra it is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries, some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result. Neither the two mortgage deeds of 1923 and 1928, nor the sale deed of 1932 refer to any circumstance which might be the starting point of an enquiry which might be expected to lead to some result.

73. In Gholam Siddique v. Jogendra Nath Mitra Supra, p. 210, a Bench decision of our High Court. Suhrawardy, J. observed as follows:

It has been suggested in many cases that it is not the duty of every purchaser to doubt his vendor''s title when he finds it clear on the documents placed before him.

In the instant case the title of Rakhahari is clear on the documents pleaced before the Plaintiffs'' Solicitors. Therefore, it cannot be said that the Plaintiffs did not take reasonable care to ascertain that Rakhahari had the power to transfer simply because they relied on the documents of title without making any roving enquiries to ascertain who actually advanced the sum of Rs. 20,000 to the Ghoses in 1923.

74. It may be noted that the promissory note for Rs. 1,500 was executed by the Ghoses in favour of Rakhahari for the balance of the mortgage money. A suit has to be instituted for the recovery of the said amount due upon the said promissory note. Rakhahari figured as the Plaintiff in that suit. The plaint was signed by Rakhahari who got the decree in the suit. D.W. 11, Kalipada Sinha, a practising pleader of the Howrah Court; states in his examination-in-chief that the suit was filed upon instruction of Akshay Babu and that his fees and costs of the suit were borne by Akshay Babu. The suit was decreed on compromise and the

judgment-debtors were allowed to pay by instalments. D.W. 11 says that instalment dues were realised by Akshay Babu. Even assuming that the suit was filed upon the instruction of Akshay Babu, that the fees and costs were paid by Akshay Babu and that the instalments were realised by Akshay Babu, it does not necessarily follow that Akshay Babu was legally entitled to the money or that Akshay was the owner of the disputed property. It is remembered that Rakhahari is the son of Akshay, a man of ordinary prudence, would be justified in concluding inspite of the part played by Akshay in the said litigation that the decretal dues really belonged to Rakhahari and that Rakhahari was the real owner of the disputed property. It is not unusual for a father to look after and bear the expenses of litigation in which his son is involved. Moreover, in the instant case D.W. 11 admitted in his cross-examination that he did not remember it he had instructions from Rakhahari to make payment to his father. The learned Subordinate Judge seems to think that as D.W. 11 was a student of Akshay Babu, his evidence is all the more credible. We, however, are not of the same opinion. We are rather inclined to believe that he slightly twisted the fact in order to help his teacher.

75. Mr. Ghose argues that the Plaintiffs should have enquired who paid the municipal taxes. Such enquiry, according to him, would have revealed that the municipal taxes were brone by Akshay Babu. Even assuming that the municipal taxes were borne by Akshay Babu that fact does not in any way militate against the ownership of his son, Rakhahari. The payment of municipal tax by the father in respect of a house standing in the name of the son is not a circumstance which fixes the intending purchaser with the knowledge that the father is the real owner of the house. Inspite of such payment a man of ordinary prudence may reasonably infer that the son is the real owner especially when in the assessment register of the Municipality the son''s name has been recorded as the owner. Moreover in the instant case, Rakhahari at all material times was not only the recorded owner in the assessment register, the rent bills too were issued in the name of Rakhahari and receipts too were granted in the name of Rakhahari. The name of Rakhahari appears as the person liable to pay rates in Ex. 10 copy of the Demand Register in respect of the disputed premises.

76. The bills of the Howrah Municipality from the second quarter of 1936-37 to the fourth quarter of 1945-46 all mention Rakhahari as the owner or occupier of the disputed property. The name of Akshay appears for the first time in the first quarter of 1946-47. The agreement for sale, it should be remembered, was executed on March 16, 1946, prior to the first quarter of 1946-47. As the bills were issued in the name of Rakhahari, there was no duty cast upon the Plaintiffs as intending purchaser to enquire who actually paid the taxes. Therefore, no adverse inference can be drawn against the Plaintiffs for not enquiring who actually paid the taxes.

77. It has been noted above that Rakhahari could not produce the original title deeds including the deed of sale in his favour dated May 18, 1932. His explanation

was that they were mislaid on the occasion of the removal of the family to Midnapore in 1942. A declaration to that effect was sworn before the Presidency Magistrate on February 5, 1946. In that declaration it was stated that the documents of title ''got mislaid''. Another declaration was made in the office of Nahar and Dutta and not before any Magistrate on March 16, 1946, wherein it was stated that the said documents ''got mislaid and and/or lost''. According to Mr. Ghose, the explanation given in February 1946 was not the same as the explanation given in March 1946, in that in March Rakhahari went a step further by adding the expression ''and/or lost'', and that this discrepancy was a circumstance which should have put the Plaintiff on further enquiries to ascertain what actually happened to the said documents. Further enquiries, he says, were called for, because Rakhahari could not trace the documents even more than one month after the swearing of the first declaration. We cannot accept the contention of Mr. Ghose. First of all the discrepancy between the two declarations is almost nil and of no consequence. There is very little difference between mislaid and lost in the case of documents. Secondly, failure to trace the documents within a period of more than a month is not such a circumstance as should have put the Plaintiffs on further enquiries. A man of ordinary prudence would have been satisfied with the explanation given by Rakhahari, a responsible Government officer, as to why the original documents could not be produced, and on such explanation he would have been justified in not making further enquiries. Lastly, the certified copies of the documents of title did not contain any clue as to the custody of the original documents which could have been the starting point of further enquiry which might be expected to lead to some result. Hence, it cannot be said that the Plaintiffs did not take reasonable care to ascertain that Rakhahari had power to transfer simply because they, without further enquiry, remained satisfied with the explanation given by Rakhahari.

78. Mr. Ghose referred to another fact which according to him, disentitled the Plaintiffs from seeking the protection of Section 41 of the Transfer of Property Act. On or about November, 26, 1945, Rakhahari made an application to the Assessor, Howrah Municipality, for the supply of duplicate municipal rate bills for the disputed property so that they might be filed before the returning officer in connection with the ensuing elections. This shows, says Mr. Ghose, that Rakhahari was not even in possession of the municipal bills. Mr. Ghose argues that if the Plaintiffs demanded the Original rent bills from Rakhahari--and they should have done so--they would have known that Rakhahari was not the real owner. We are not in a position to accept this argument. Undoubtedly the rent bills were issued in the name of Rakhahari. It is immaterial whether or not he was in possession of the rent bills, so far as the question of Rakhahari''s power to transfer is concerned. In investigating the title of the transfer, a man of ordinary prudence may or may not ask for the production, it cannot be said that this fact alone is sufficient to establish that he did not take reasonable care to ascertain that the transferor had power to transfer. In the instant case the possession of the rent bills by Akshay, who is the father of

Rakhahari, does not in any way militate against the ownership of Rakhahari, nor is it the notice to the intending purchaser that Akshay, and not Rakhahari is the real owner.

79. There is nothing on record to show that Akshay dealt with the disputed property in a way which might be regarded as notice, actual or constructive, of the title of Akshay to a stranger purchaser. Payment of municipal taxes pursuant to the bills issued in the name of Rakhahari cannot certainly be regarded as such notice. On the other hand, Akshay took special care to conceal the fact that he was the real owner. All the three documents, ranging from 1923 to 1932, were taken in the name of Rakhahari. At all material times the name of Rakhahari appeared as the owner and occupier of the disputed premises. The promissory note for Rs. 1,500 was taken in the name of Rakhahari in 1932. In the suit for the recovery of the amount due on the promissory note Rakhahari''s name appeared as the Plaintiff. Mr. Ghose tells us that all these transactions took place at the instance of Akshay. If that be so, Akshay took meticulous care to keep himself in the background. There might be very good reason for doing so. Akshay took a loan of Rs. 20,000 upon a hand-note from the Imperial Bank and the said amount was advanced to the Ghoses in 1923 on the mortgage of the disputed property. This loan was advanced by the Imperial Bank on Akshay''s pledging cerain War Bonds as security. It is not denied by the Defendants that the War Bonds were really purchased upon withdrawing a sum of Rs. 20,000 from the Mercantile Bank. The evidence of D.W. 8, Abani Kanta Bose, who is a clerk attached to the Mercantile Bank, is that the account in the Mercantile Bank was that of the school and that it was not the personal account of Akshay Babu. The pass book stood in the name of Akshay described as the Head Master, Ripon Collegiate School, Howrah. The learned Subordinate Judge concludes from this
that the account with the Mercantile Bank of India stood in the name of Akshay Babu though he used to keep also the school fund in that account and that the War Bonds were purchased from the common account to enable Akshay Bafou to raise the loan under the promissory note.

It is, however, in evidence that this loan taken from the Imperial Bank was cleared by the sale of the War Bonds. The learned Judge also feels that the conduct of Akshay Babu is not above reproach.

Assuming that it (the disputed property) was purchased from the school fund,

says the learned Subordinate Judge,

Akshay Babu might have been called upon to account to the school for the same. He may have utilised the school fund in the way not expected of him and he might not have got any loan at all had he not been able to pledge those securities.

That being the position it is not difficult to understand why Akshay took particular precaution to create a smoke screen around the various transactions culminating in

the purchase of the disputed property in 1932.

80. The following passage from the judgment of the Privy Council in Ramcoomar v. MacQueen Supra may be quoted with profit to indicate the legal position where one man allows another to hold himself out as the owner of an estate and a third person purchase it:

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it.

81. u/s 41 of the Transfer of Property Act the transferee is no doubt required to show that he took reasonable care to ascertain that the transferor had power to make the transfer; but, according to the principle laid down in Ramcoomar''s case Supra, the real owner is also required to show either that the transferee had direct notice, or something which amounts to constructive notice of the real title; that there existed circumstances which ought to have put him upon an enquiry, that if prosecuted, would have led to a discovery of it. This principle has in no way been abrogated by Section 41 of the Transfer of Property Act, nor is it in any way inconsistent with that section.

82. As a matter of fact, Sir Dinshaw Fardunji Mulla, in his learned treaties on the Transfer of Property Act, has stated that the above principle laid down in Ramcoomar''s case Supra is the foundation of Section 41 of the Transfer of Property Act.

83. The Defendants were anxious to prove the source of the money with which the disputed property was purchased; scarcely any evidence worth the name was given, to show that the Plaintiffs had direct or constructive notice of the real title; or that there existed circumstances which ought to have put them upon an enquiry that, if prosecuted, would have led to a discovery of the real title.

84. Section 41 is in fact a statutory application of the doctrine of estoppel. Mr. Mitter appearing on behalf of the Plaintiffs Appellants referred to the well-known case of (1892) ILR 20 296 (Privy Council) wherein the Privy Council lucidly explained the doctrine of estoppel. There the Defendants were the Appellants before the Privy Council, the suit having been decreed in full by the lower Appellate Court and the High Court. The Defendants Appellants strongly relied on an earlier decision of the Privy Council in Luchman Chunder v. Kali Churn Singh (1893) 19 W.R. 292 in support of their claim, but the Privy Council distinguished it on facts. In Luchman Chunder''s

case the doctrine of estoppel was applied under circumstances similar to those in the instant case. The Defendants were the Appellants before the Privy Council in Luchman Chunder''s case. The suit was brought against them by Kali Churn Singh on behalf of himself and as guardian of his minor brother to recover certain property from the Defendants as heirs of one Ubotar Singh. The Defendants alleged that they had purchased the property from Ulpa, the widow of Ubotar, and that that property had been bought by Ulpa out of her own stridhan. The disputed property was purchased in the name of the wife Ulpa. The recitals in the deed left no room for doubt that the property was purchased by Ulpa out of her own stridhan. The purchase being of a darputnee the name of Ulpa was mutated in the serista of the putneedar as the owner of the property by purchase. The husband, Ubotar, during his life-time had in every way, both publicly and privately, whenever he was called upon to make any representation on the subject, always represented that this was his wife''s property. The suit was decreed in full by the trial Court, but the High Court on appeal varied the decree by allowing only the claim of the minor Plaintiff. The Privy Council, on further appeal, dismissed the suit in toto. The judgment was delivered by Sir Barnes Peacock. The relevant portion of the judgment is quoted below:

Now although the minor could not be bound by the representations made by his mother, if he really inherited the property from his father, still the question is whether he was not estopped by the representations of his father in his life-time from saying that this property was his father''s and, consequently, that it had descended to him.... If the property were purchased by him (father) and the Rs. 3,200 which were paid as the purchase-money were the property of the father, did he not represent and hold out to the world that the property was purchased out of the Rs. 3,200 which were the stridhan of his wife? That was a misrepresentation of the father by means of which the widow after his death was enabled to sell the property.... It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her stridhan, and in all his acts, both public and private, during his life-time, representing that the property was his wife''s. After that representation on the part of the father, his heirs were no more entitled to recover than the father would have been in his life-time.

85. In the instant case too, in all the three documents of the years 1923, 1928 and 1932, it was represented by Akshay that the money paid as consideration belonged to Rakhahari; and by having the name of Rakhahari recorded as the owner and occupier in the municipal assessment register, by paying the municipal taxes in the name of Rakhahari and by instituting the suit for the recovery of the amount due on the pro-note of 1932 in the name of Rakhahari. Akshay represented in all his acts, both public and private, that the property was Rakhahari''s. Akshay, therefore, cannot be allowed to resist the claim of the Plaintiffs if it is found that they are bona fide purchasers for valuable consideration.

86. As has been pointed out by Suhrawardy J. in Gholam Siddique''s case Supra, 212,

equity jealously scrutinises the bona fide of a secret title holder and is noto- riously partial to purchasers for value without notice,

and the reason, according to his Lordship, isuas follows:

It is possible that a person having a secret title divide with the ostensible owner the proceeds of the transfer, by the latter and then shows his hidden hand to recover that for which he has received good consideration.

87. We have demonstrated above that the Plaintiffs took reasonable care to ascertain that Rakhahari had the power to transfer and that they had no notice, either actual or constructive, of the title of Akshay. The only thing that remains to be considered is whether the Plaintiffs acted in good faith. In other words, can they be regarded as bona fide purchasers for valuable consideration?

88. As to the passing of consideration, the learned Subordinate Judge has not come to any definite finding. The. evidence on record clearly shows that the sum of Rs. 22,500 was actually paid to Rakhahari by way of ''earnest. The following letter of Rakhahari, Ex. 7Z, dated July 8, 1946, speaks for itself:

To Messrs Nahar and, Dutta, Solicitors

Re: Agreement for sale or charge...for Rs. 22,500

Dear Sirs,

I beg to request you to be good enough to allow me sometime to enable me to procure the amount in question...to pay you off as early as possible.... My father promised to pay off my debts and only because of that promise, I executed the release deed in his favour.

89. This letter is a clear admission on the part of Rakhahari that he received Rs. 22,500 from the Plaintiffs through Messrs, Nahar and Dutta. The entry dated March 16, 1946; in the cash book of Messrs. Nahar and Dutta, Ex. 12A, shows payment of Rs. 22,500 to Rakhahari. This entry was proved by Pratui Chandra Dutta, witness No. 9 for the Plaintiff. No suggestion was made to him in course of cross-examination that the cash book was not kept in the ordinary course of business, or that the said entry was spurious. We find no reason to disbelieve the said entry. Exhibit 12, entry in the cash book of Nahar and Dutta dated March 15, 1945, shows deposit of Rs. 22,500, Rs. 169-12-0 and Rs. 2. The sum of Rs. 22,500 has been shown against the following endorsement--

Receive from client on account of consideration money by cash.

The entry in the day book dated March 15, 1946, does not, however, show that the client made any deposit of Rs. 22,500. Gash book is the proper place for recording receipt or disbursement of cash, and not the day book. Therefore, absence of any

entry in the day book is no ground for inferring that the entry in the cash book is fabricated or spurious. On the evidence on record we are satisfied that Messrs. Nahar and Dutta received from the Plaintiffs a sum of Rs. 22,500 on March 15, 1946, and that the said amount was paid to Rakhahari as earnest on March 16, 1946.

90. The various reasons given by the learned Subordinate Judge for holding that the Plaintiffs did not act in good faith seems to be untenable. The identity of S.N. Das Gupta, one of the Plaintiffs, is in the opinion of the learned Subordinate Judge shrouded in mystery. This is one of the reasons why he thinks that the Plaintiffs did not act in good faith. Another reason given by the learned Subordinate Judge is that the sum of Rs. 5,000 that was to be paid to Bijanbasini to secure the release of the prior agreement for sale dated February 5, 1946, was not in fact paid as Messrs. Ghosh and Hazra demanded Rs. 500 as in pocket expense. The third reason given by the learned Subordinate Judge is that there is no explanation why the Solicitor firm, Nahar and Dutta, should come to Rakhahari''s rescue by advancing such a heavy sum of Rs. 22,500 and enter into an agreement for sale without in the first instance securing the release of the subsisting agreement for sale. The first reason is wholly untenable as in the written statements there is not the remotest suggestion doubting the identity of S.N. Das Gupta. As to the second reason, the contesting Defendants are not in the least concerned whether or not the sum of Rs. 5,000 is paid to Bijanbasini. That is a matter of adjustment between the Plaintiffs and the Defendant No. 8. As to the third reason, there is no question of Messrs. Nahar and Dutta coming to the rescue of Rakhahari by advancing Rs. 22,500; the said amount was paid primarily by way of earnest; only if the conveyance was not, completed the amount was to be returned with interest. Again the sum of. Rs. 22,500 was paid because Bijanbasini agreed through Messrs. Ghosh & Hazra to release the previous agreement for sale on receipt of Rs. 5,000. Therefore, it cannot be said that there was no explanation for such payment.

91. The learned Subordinate judge has mentioned two things which according to him

clearly point to the conclusion that Rakhahari Babu acted in collusion with the Plaintiffs and their Solicitors.

The first thing mentioned is:

The entry in the day book of the firm of Nahar and Dutta dated July 8, 1946, Ex.3/Z/23.

There are seyeral entries on that date under the heading ''Jitendra Singh Nahar''. The first entry runs thus:

Writing to Mr. Rakhahari Chatterjee informing about the execution of release in favour of Babu Akshay Kumar Chatterjee and requesting him to explain the position.

The date of writing that letter to Rakhahari is not mentioned. But it is in evidence that the said letter, Ex. 7Z(4), was written to Rakhahari by Messrs. Nahar and Dutta on June 24, 1946. The second entry runs thus:

Writing to Babu Rakhahari Chatterjee placing on record that he did not attend registration office to-day inspite of promises and appointing to-morrow for the purpose.

The date of this letter to Rakhahari has not been mentioned. But it is in evidence that this letter, Ex. 7Z(3), was written on June, 19, 1946 The exact language of that letter is as follows.

We regret that you did not attend the Registration office to-day inspite of your promise. As arranged with you on the phone we trust you will attend Registration office to-morrow at 11a.m. and finish registration. The second entry obviously gives a gist of this letter. These words ''to-day'' and ''to-morrow'' have without doubt been used with reference to the date of the letter, viz., June 19, 1946, and not with reference to the date of entry in the day book.

92. The learned Subordinate Judge seems to think that the second entry shows that the Solicitors asked Rakhahari Babu on July 8, 1946, to have the document registered even though it was registered on June 20, 1946. The learned Subordinate Judge is entirely mistaken on this point. This entry merely records that a letter was written to Rakhahari complaining that he did not attend registration office ''to-day'', that is to say, the day on which the letter was written and appointing ''tomorrow'', that is to say, the next day for the purpose. The clerk in making the precis made an obvious grammatical mistake. As the entry was made in the form of indirect narration he should have used the expressions ''that day'' and ''next day'' instead of using the expressions ''to-day'' and ''to-morrow''. The entry merely shows that such a letter was written; it does not say that the letter was written on the day the entry was made. As mentioned above, the said letter was written on June 19, 1946. That being the position, the following remarks of the learned Subordinate Judge regarding Ex. 3Z(23) are wholly unwarranted:

That entry on that date shows that the Solicitors gave a tagid to Rakhahari Chatterjee for having the document registered. This shows that the Solicitors knew in their heart of hearts that the transaction was unreal. For otherwise it is difficult to reconcile as to how the Solicitors could ask Rakhahari Babu on 8th July, 1946, to have the document registered though it had been registered on 20th June, 1946.

93. That the learned Subordinate Judge made a mistake in construing the second entry will be evident from the other two entries of that date. The third entry runs thus:

Writing to Rakhahari Chatterjee informing that the Registration of the agreement and charge has been extremely delayed and requesting him to attend Registration

office to-morrow.

The reference is obviously to the letter dated June 18, 1946, Ex. 7Z(2). That letter runs thus:

We regret that the registration of the Agreement and charge has been extremely delayed. However, we hope that you will nor fail to attend the Calcutta Registration office to-morrow at 12 noon and get the documents registered as arranged.

The word ''to-morrow'' in the day book has undoubtedly been borrowed verbatim from the letter itself. The use of ''to-morrow'' is obviously -a grammatical mistake for the word ''next day''.

94. The fourth entry of Ex. 3Z(23) runs thus:

Writing to Messrs. Ghosh and Hazra in reply to theirs of the 5 th instant explaining the reason for requirement of copies mentioned in the document.

This entry obviously refers to Ex. 7R the letter from Messrs. Nahar and Dutta to Messrs. Ghosh & Hazra, dated July 8, 1946, which runs thus:

With reference to your letter of the 5th instant our clients require the copies for the purpose of considering the step to be taken herein. Further it may be necessary to call for production of the said original documents in Court.

95. It follows that none of the entries in Ex. 3Z(23) refers to any letter written on the day the entry was made. The learned Subordinate Judge is obviously wrong in thinking that the Solicitors, Messrs. Nahar and Dutta, asked Rakhahari on July 8, 1946, to have the document, that is to say, the agreement for sale creating a charge dated March 16, 1946, registered.

96. Exhibit 3Z(23) was proved by Pratul Chandra Dutta, witness No. 9 for the Plaintiff. No question was put to him in cross-examination regarding any entry in this exhibit; in that case he could have explained the real import of the second entry in that exhibit.

97. The whole position will be clear if Ex. 3Z(23) is read along with Ex. 3Z(16) dated June, 20, 1946. Exhibit 3Z(16) is an entry in the day book dated June 20, 1946, and it runs thus:

Attending at Calcutta Registration office when Mr. Chatterjee got the document registered.

In the face of this entry it is absurd to suggest that the entry on July 8, 1946, shows that Rakhahari was asked to have the document registered on that day.

98. The second thing mentioned by the learned Subordinate Judge is the registration of the agreement for sale on June 20, 1946, by Rakhahari after having executed the deed of release on May 18, 1946. The learned Subordinate Judge has

made the following remark:

Further it is significant to note in this connection that the deed of release had been executed by Rakhahari Babu on 18th May, 1946. One fails to understand as to how Rakhahari Babu could be a party to the registration of the deed on 20th June, 1946.

The learned Subordinate Judge thinks that this fact too indicates conspiracy between Rakhahari on the one hand and the Plaintiffs and their Solicitors on the other. We cannot accept this conclusion of the learned Subordinate Judge. This fact may as well be taken as an evidence on conspiracy between Rakhahari and his father Akshay, when we remember that it is Akshay who at all material times extending from 1923 to 1946 held out Rakhahari as the owner and occupier of the disputed property. We are, however, expressing no opinion on this point save that this fact cannot be taken as evidence on conspiracy between Rakhahari and the Plaintiffs and their Solicitors.

99. The subsequent correspondence between Rakhahari and Messrs. Nahar and Dutta also militates against the theory of conspiracy beween Rakhahari and the Solicitors of the Plaintiffs. In reply to the letter written on June 24, 1946, by the Solicitors expressing surprise at the execution of the deed of release by Rakahaari in favour of Akshay, Rakhahari replied as follows on July 3, 1946:

...The document (release deed) executed by me in favour of my father is not a valid document because I did not get any consideration for the property which was mine and was purchased out of my own money.... I executed the release deed under coersion threat and disgust. I am taking necessary steps for setting aside the document in question....

It is quite clear that Rakhahari took part in the registration of the agreement for sale on June 20, 194G, as he thought that the deed of release executed by him on May 18, 1946, was void, inoperative and not binding. In any event, it is clear that the dubious part played by Rakhahari was made possible by Akshay holding him out as the owner of the disputed property; and certainly the Plaintiffs cannot be made to suffer for the misconduct, if any, on the part of Rakhahari.

100. We, therefore, are definitely of the opinion that both the facts mentioned by the learned Subordinate Judge as proving conspiracy between the Plaintiffs and Rakhahari do not support any such conclusion. The Plaintiffs in fact paid Rs. 22,500 in cash to Rakhahari as earnest, and there is nothing on record to show that the payment was not made in good faith. Our considered view is that the 5th Clause in the agreement for sale dated March 16, 1946 (Ex. 6) did create a mortgage in favour of the Plaintiffs, that in taking the said mortgage the Plaintiffs did take reasonable care to ascertain that the transferor, namely Rakhahari, had power to transfer, and that the Plaintiffs did act in good faith in taking transfer by way of mortgage. The Plaintiffs are, accordingly, entitled to get a preliminary mortgage decree for the recovery of the sum of Rs. 22,500 with interest at the rate of 10 per cent per annum

from March 16, 1946, until full realisation.

101. As to the application for additional evidence under Order 41, Rule 27, the evidence on record without any additional evidence is sufficient for the conclusion that the Plaintiffs are entitled to a preliminary decree for mortgage. The Plaintiffs feel the necessity for additional evidence because of certain remarks made by the learned Subordinate Judge in his judgment and those remarks have been quoted in para. 1 of the petition for additional evidence. We have dealt with those remarks in our judgment and we have shown that those remarks are quite unjustified. Additional evidence, therefore, strictly speaking is not called for. There is, however, no harm in admitting additional evidence as prayed for, as that will help in properly construing Ex. 3Z(23), the entry in the day book, dated July 8, 1946. The prayer for additional evidence is accordingly allowed. Let the press-copy book mentioned in the prayer portion of the application be admitted in the evidence and marked as Ex. 14.

102. In the result the appeal is allowed. The judgment and the decree of the trial Court are hereby set aside. We are sending the case back to the trial Court to pass a preliminary mortgage decree against the contesting Defendants for the recovery of the sum of Rs. 22,500 at an interest of 10% per annum from March 16, 1946, until full realisation and, if necessary, to pass a final decree on the basis of the preliminary decree. The Plaintiffs Appellants will get the costs of the Court as well as of the trial Court from the contesting Defendants, Respondents, excepting the minor Respondents.