(1977) 10 CAL CK 0006

Calcutta High Court

Case No: Appeal from Original Decree No. 51 of 1963

Sudhir Kumar Banerjee	APPELLANT
Vs	
Tukvar Company Ltd.	RESPONDENT

Date of Decision: Oct. 7, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 1, Order 41 Rule 2
- Companies Act, 1956 - Section 134, 175, 293
- Limitation Act, 1908 - Article 151, 12, 12(2)
- Limitation Act, 1963 - Section 12(2)
- Transfer of Property Act, 1882 - Section 58

Citation: (1978) 2 ILR (Cal) 96

Hon'ble Judges: R.M. Datta, J; Hazra, J

Bench: Division Bench

Advocate: Dipankar Ghosh, for the Appellant;B.N. Sen, for the Respondent

Judgement

R.M. Datta, J.
When the hearing of this heavy appeal went on for about 6 days, a point was sought to be raised on behalf of the Respondent company herein that the memorandum of appeal was not filed within the period of limitation and accordingly, the appeal should be dismissed in limine.

2. The point ought to have been taken at a much earlier stage or, at any rate, on the first day of the hearing of the appeal. We refused a prayer for the adjournment of the hearing of the appeal on this ground and allowed the Appellant to file a petition stating the facts so that this point could be decided on the basis thereof and of the affidavits filed by the respective parties in answer thereto. A petition has been filed in pursuance thereof for the determination of the said point of limitation with a prayer that in the special facts and circumstances of this case, if necessary, the delay, if any, be condoned. An affidavit-in-opposition and a reply thereto have also

been filed for the decision of this point. We shall first decide this point of limitation and thereafter the merits of this appeal.

3. The decree herein was passed on March 22, 1963. Thereafter, the following steps were taken to prefer the present appeal:

1.	28.3.63
2.	25.3.63
3.	28.3.63
4.	26.6.63
5.	2.7.63
6.	9.8.63
7.	22.3.63
8.	20.11.63
9.	5.7.66
10.	8.7.66
11.	12.7.66
12.	22.7.66

As mentioned hereinabove, within a week from the date of the decree, the memorandum of appeal herein was ordered to be filed with the leave of the Court without the certified ropy of the said decree being annexed thereto on condition that the Appellant would file a certified copy of the said decree within the period of limitation; that he would cause this order to be drawn up and would include the same in the Paper Book; and that he would cause a list of all dates relevant to the question of limitation to be prepared and would include the same also in the said Paper Book. By the same order the Appellant also obtained an ad interim order for stay of the operation of the decree with a direction upon the Official Receiver of this Court to retain possession of the title-deeds mentioned in the petition till the dispossal of the said application. The above order was obtained ex parte on behalf of the Appellant. It follows, therefore, that pursusant to the liberty of the Court the Appellant filed the memorandum of appeal and the Appellant also became obliged to file the certified copy of the decree after obtaining the same from the department of this Court. Obviously, in the normal course it would take some time for the department to draw up and complete the said order and thereafter, to issue the certified copy of the decree so that as and when such a certiled copy of the decree would be obtained, the same would be filed in accordance with the said order and the Appellant thereby would be in a position to comply with the said order dated March 28, 1963, passed herein. By so doing, the Appellant would also be complying with the provision of Order XLI Rule 1 of the CPC which requires, inter alia, that
the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is

founded.

4. This is a case where the provision of the old Limitation Act, 1908, would be applicable. Under Article 151 of the Schedule to the said Act, the time as mentioned in the third column thereof is to run from the date of the decree or order. The second column thereof under the said provision provides for 20 days'' time. That would mean 20 days from the date of pronouncement of the decree or order. u/s 12 of the said Act of 1908 the Appellant would be entitled to the exclusion of the ''time requisite'' for obtaining a copy of the decree. Sub-section (2) of Section 12 of the Limitation Act, 1908, provides as follows:

12(2). In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

The language used by the Legislature which is relevant for our purpose and which is sought to be excluded, is "the time requisite for obtaining a copy of the decree" appealed from.

5. this Court for its Original Side has framed rules for filing of appeals from judgment of first instance at the Original Side. Chapter XXXI Rule 2 of the said Rules provide:

2. Every memorandum of appeal from the Original Side shall be in Form No. 1 and shall be drawn up in the manner prescribed by Order XLI, Rule 1 of the Code and shall be presented to the Registrar, accompanied by a copy of the Decree or Order appealed from.

Sub-rule (b) of Rule 29 of the same chapter provides:

29(b). The Appellate Court, or the Judge as aforesaid may also upon application and upon sufficient grounds verified by affidavits, except the parties or any of them from the operation of the whole or any part of these rules and may make such special order as shall appear desirable with regard to any matter with which these rules are concerned.

It would seem that acting under the above provision of the rules of this Court the Appeal Court gives leave to file the appeal without the certified copy of the judgment or decree appealed from so that upon the memorandum of appeal being filed the question of granting the ad interim orders in respect of the decree appealed from might be considered by the Appeal Court. Accordingly, such leave is granted to file the memorandum of appeal subject to certain conditions, as to filing within the period of limitation, the certified copy of the decree or order appealed from, the order of the Appeal Court, a copy of the certified copy and a list of all relevant dates relevant to the question of limitation in the Paper Book which is

prepared for the appeal.

6. In respect of the said provision of Section 12, as set out hereinabove, it, would appear that all that has been provided therein is that the ''time requisite'' for obtaining the certified copy of the decree appealed from shall be excluded. By this provision the period of limitation as provided by the Schedule to the Act is sought to be extended or enhanced so that the requirement of the Court as provided under Order XLI Rule 1 of the Code might be complied with. Here in this case the Appeal Court has already allowed the memorandum of appeal to be filed without the certified copy of the decree being filed along with it upon condition that when the same would be obtained from the department of this Court the same would be filed by the Appellant within the period of limitation.

7. It has been sought to be argued on behalf of the Respondent with reference to the above list of dates set out hereinabove, that in so far as this Court was concerned the Court made the decree ready for filing on August 22, 1963, but nothing was done by the Appellant until November 20, 1963, when the decree was actually filed. Accordingly, the Appellant would not be entitled to the said period to be excluded from the period of limitation and if that period would not be excluded, then the appeal would become barred by limitation.

8. In my opinion, to appreciate the position fully, the list of dates, as set out hereinabove, should be carefully considered in relation to the rules and practice of this Court. It is to be noticed that a day after the passing the decree i.e. on March 23, 1963, the requisition for drawing up of the decree as provided in chap. XVI of the Rules was put in by the Solicitors for the decree-holder. Chapter XVI Rule 27 of the Original Side Rules of this Court provides:

27. Except as otherwise provided in the Rules, or unless otherwise ordered, application shall be made for the drawing up of every decree and order, other than an order directing a person to furnish security, by requisition to the Registrar in writing by the party in whose favour the decree or order was made within three days from the date of the decree or the order, or, in default of his applying within such time, by any party within seven days from the date of the decree or order....

9. From the above relevant portion of the said Rules it would appear that the application for the drawing up of the decree would be made by a requisition to the Registrar in writing by the party in whose favour the decree was made within three days from the date of the decree. Accordingly, during that period, only the decree-holder would be entitled to give such requisition for the same and if within the period of three days he would not do so, then only the other party to the decree could do it within the period of seven days from the date of the decree. It necessarily follows that if the requisition for drawing up of the decree would be given on behalf of the decree-holder, then the Respondent could not have the carriage of the proceedings in the matter of such drawing up of the decree although

he might seek to prefer an appeal from the said decree. Even if the Respondent under such circumstances would have given the requisition for drawing up of the decree, the same would have been redundant inasmuch as the decree-holder had already got the carriage of the proceedings in the matter of drawing up of the decree.

10. In Sambhu Nath Bandapadhya v. Gopi Lal Seal ILR Cal. 709 (710) the decree was pronounced on May 16, 1928 and on the next day, the Plaintiff decree-holder filed a requisition for the drawing up of the decree, so that the Appellant Defendant did not become entitled to exercise the right of putting in another requisition for drawing up of the decree. There the Defendant filed a requisition for obtaining an office copy of the decree on June 5, 1928, i.e. alter exhausting the whole period of 20 days to which the Defendant was entitled. The Defendant Appellant filed the memorandum of appeal on the very day, the office copy of the decree was ready for delivery. Under those circumstances, Rankin C.J. in the above Division Bench case observed:

The only way, therefore, in which the Defendant can be out of time, would be in respect of the period between the 19th June when the decree was sent to be ledgered and the 9th July when the decree was flied by the Plaintiff. The Plaintiff certainly did take unnecessary time, but the question is whether that can be charged against the Defendant, whether he is not entitled to say that, as the requisition for drawing up the decree was flied by the Plaintiff, the Defendant was not called upon to interfere in the process of the drawing up of the decree. It cannot be doubted that, if the Defendant had insisted upon the decree being filed, it might have been filed sooner than it was. At the same time, I see no negligence on the part of the Defendant. Indeed, I am satisfied that the Defendant was keeping watch and making enquiry at the office diligently. I have some doubt whether by making any usual enquiry at the office he would be able to ascertain what the cause of the delay was. I am, therefore, of opinion that no part of the time occupied by the Plaintiff in getting the decree drawn up can be charged to the Defendant for the present purpose.

11. On the basis of the aforesaid observation the Bench concluded that the Defendant was not out of time and even if he was so, it was not on account of his negligence. It was observed that the time under such circumstances should be extended, if necessary. On that basis, the memorandum of appeal which was rejected by the office on the ground that it was filed out of time was accepted and registered.

12. It is true that there is no provision in the Rules of this Court as to who should file the decree, but the various decisions of this Court would seem to suggest that a party who has the carriage of proceedings and who has given the requisition has to file the decree and in case he would fail to file the same, then the order party might take steps after obtaining leave of the Court to file the same.

13. In the case of Union of India v. Assam Iron and Steel Company ILR (1966) Cal. 477 (479) another Division Bench of this Court consisting of Sinha and A.C. Sen JJ. considered the point in an application for leave to appeal to the Supreme Court as to whether the Respondent could take the plea of limitation in filing the certified copy of the decree after the period of limitation, due to the laches on the part of the Respondent and take advantage of his own laches or negligence. Sinha J. delivered the judgment of the Court after considering the Privy Council decision in Jijibhoy N. Surty v. T.S. Chettyer AIR 1928 P.C. 103 and observed:

In my opinion, the correct method would be to decide each case upon its own facts. In this case, the requisition was put in by the Respondent and it is stated that, although a watch was being kept and enquiry was made, the decree was not filed by the Respondent, whereupon the Solicitor of the Appellant started correspondence and requested the other side to file the decree and in the meanwhile made the application, presumably in order to save limitation. In my opinion, the Appellant has not contravened the law.

The said Bench also observed Supra:

Under the practice and procedure of this Court no certified copy of the decree can be obtained unless the decree is filed by the party who has given requisition for drawing up of the decree.

14. In view of the above observations in the said two Division Bench decisions I think it can safely be concluded that in the matter of the filing of the decree it was the Plaintiff Respondent, who gave requisition for the drawing up of the decree, who has to file the same in the department after putting in the requisite stamps thereon. There may not be any direct provision in the Rules of this Court as to who should file the same, but in view of the above decisions and in view of the provision for giving requisition for drawing up of the decree, the person responsible for doing so is under a legal obligation to put in the stamps and to file the decree. It is only when he fails to do it, the person applying for a certified copy may put in such stamps and file the decree after obtaining leave of the Court. But the Defendant Appellant, under such circumstances, cannot be said to have contravened any law nor can have any legal obligation or can he said to be negligent in not taking prompt action in the matter of the filing thereof. It is the Plaintiff decree-holder who has the carriage of the proceedings and as such when the decree would be ready for filing, the intimation thereof would be given to the Plaintiff decree-holder alone, under such circumstances and not to the Defendant Appellant and as such, it would not come within the knowledge of the Defendant Appellant. If under such circumstances, the period of limitation is allowed to expire due to the laches on the part of the Plaintiff decree-holder, then the Plaintiff decree-holder cannot be allowed to urge this point of limitation on this ground against the Defendant Appellant and take advantage of his own wrong. It is only after the decree would be filed, then the same would be ledgered in the ledger section and according to the current practice in the ledger

section, it is then received by the current record department. In that current record department certain formalities have to be gone through. There, on the basis of the requisition for getting a certified copy, the folios of the decree or order are assessed and then the stamps are put in for such certified copy and thereupon the current record department transmits the same to the copyist department for preparation of the certified copy and for delivery thereof to the party concerned. The party concerned thereupon takes delivery of the certified copy from the copyist department.

15. That being the position, there could not be any duty cast upon the Appellant or its Solicitor in the usual course to get the decree filed. The duty was cast upon the Respondent in this case or on its Solicitors M/s T. Banerjee and Company and in the normal course M/s T. Banerjee and Company had put in the necessary stamps and had filed the decree. If there was any laches in filing the decree it was on the part of the Respondent or its Solicitors M/s T. Banerjee and Company If they were guilty of inaction that could not go against the Appellant. No question of negligence on the part of the Appellant or its Solicitors could come in because there was no duty or legal obligation cast upon the Appellant to file the said decree. The Appellant was to wait for getting his certified copy until the Respondent would file the decree as per its requisition.

16. That being so, upto that date, viz., November 28, 1963, when the decree was filed, it could not be said that there was any laches on the part of the Appellant and accordingly, the Appellant would be entitled to the exclusion of time upto the said period.

17. We shall now consider the next period, viz. from November 28, 1963, till July 15, 1966, when the folios for the certified copy were assessed by the department. That indeed is a long gap and would require serious consideration. The question is whether the Appellant or on its behalf the person concerned has any legal duty cast upon him or any legal obligation provided by any law whereby he was obliged to pursue the matter with the department and if not, whether he would be entitled to the exclusion of time for such period. On this point there is divergence of opinion. Chakravartti C.J. sitting with Lahiri J. in the case of Sm. Prativa Bala Mitra v. Gourlal ILR 1968 (2) Cal. 554 recorded a practice of this Court as follows:

It is stated by the office that no certified copy of any order or decree can be supplied till the decree or order has been filed and the copying department cannot possibly become aware whether a decree or order has or has not been field unless it is informed. There has accordingly grown up a practice and it is now a practice of very long-standing that immediately after a decree or order is filed, a party who has put in a requisition for a certified copy informs the copying department of the fact and then the copying department proceeds to mark the folios.

It is necessary to examine under what circumstances the above observation was made by Chakravartti C.J. From the judgment it would appear that the point was not at all involved in that case-before that Bench, but in course of the hearing of the appeal the matter arose in the following way:

In course of the hearing of that appeal an objection was taken on behalf of the Respondent therein that the identical points involved therein had been decided in another matter between the same parties on the same date when the judgment and order appealed from was passed. Chakravartti C.J. thought it to be very strange that although the appeal before him was at a hearing stage, yet in respect of the said other matter, how could it be that the time for preferring the appeal had not till then expired. The learned Chief Justice was told that the department concerned of the Court took exceptionally long time to issue the certified copy of the order. Although the requisition therefor had been put in as soon as the order had been passed, the folios necessary for furnishing the certified copy had not been assessed by the department concerned. That led the learned Chief Justice to call for a report from the department and upon that the copyist department, obviously for its own protection, gave a note setting up the said practice and on the basis thereof Chakravartti C.J. referred to the said practice as set oat above in his judgment.

18. We have had the opportunity to look into the records of that matter and the report of the said department which was produced before us. The point was neither involved nor canvassed in the said appeal. The Bench was later on informed that the Appellant had by that time succeeded in presenting the appeal from the said other order as well and accordingly, Chakravartti C.J. observed in his judgment as follows:

Whether or not that appeal will be treated as one filed in time is a question which is bound to arise and another question undoubtedly will be whether even if the appeal be ultimately admitted, the bar of res judicata can be avoided by the filing of an appeal in the circumstances I have already recited. These are not matters which can be gone into at the present stage, because before it can be held that the Respondent''s plea of res judicata has been met by the filing of the other appeal, assuming it can be met by such an appeal in law, it will have first to be decided whether that appeal has been properly filed and filed in time. That question is not before us at all and accordingly, we find that we cannot proceed with the present appeal any further.

19. In view of the fact that, no question of limitation was decided and further, since it is not possible to gather from the said judgment as to who gave requisition for the drawing up of the decree, I do not think that the above practice, as set out in the said judgment, could apply to the facts of the case before us. The said practice, although referred to in the judgment of Taker Brothers v. Binani Properties judgment delivered on April 18, 1969 (unreported), an unreported decision of this Court by Ray J. (as he then was) sitting with S.K. Mukherjea J., was not relied on. That Bench relied on the Supreme Court decision in the case of State of Uttar Pradesh Vs.

Maharaj Narain and Others, where the Supreme Court held that Section 12(2) of the Limitation Act laid down no obligation on the Appellant to be prompt in his application for obtaining the copy of the order and that there was no justification for restricting the scope of that provisions.

20. In yet another Division Bench decision of this Court in Union of India (UOI) Vs. Kamal Kumar Goswami and Others, the very same point was considered, but the Bench took a different view of the matter. That Bench also decided the point after considering the aforesaid Supreme Court decision reported in State of Uttar Pradesh Vs. Maharaj Narain and Others, .

21. A similar point arose before that Bench also and it was contended that the appeal was time-barred. In that case the decree was passed on June 29, 1967 and on the same day the Solicitors for the Respondents Nos. 2 and 3 put in the requisition for drawing tip of the decree and simultaneously on that day the Appellant''s Solicitors also put in the requisition for the certified copy of the judgment and decree. It was filed on November 30, 1967. The department sent folios to the Appellant''s Solicitors on March 26, 1968 and on the same day the Appellant''s Solicitors furnished stamps for its certified copy. The draft decree was settled on August 8, 1968 and it was signed by the trial Judge on September 18, 1968 and then it was filed on January 2, 1969. The department furnished folios on March 26, 1969, to the Appellant''s Solicitors and on the same day the Appellant''s Solicitors furnished the stamps and the certified copy of the judgment and decree were delivered to him on May 2, 1969 and then the appeal was filed on May 28, 1969. There two arguments were advanced on the basis of the decision of the Judicial Committee in the case of Pramatha Nath Roy v. Lee L.R. 49 IndAp 307 and the cases in Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others, and State of U.P. v. Maharaja Narain Supra. The said Bench thereafter observed:
The law laid down by the Supreme Court in these two decisions is that the time stops running the moment the requisition for drawing up of the decree and for the certified copies are put in. Further, the Solicitors have no duty to go to the department for making tadbirs for the Rules of the Original Side of this Court do not cast any such duty on them. Hence, we overrule his contention and hold that this appeal is not time-barred.

It is, therefore, necessary to consider the above Supreme Court decision (6). The Supreme Court observed:

If the appellate Courts are required to find out in every appeal filed before them the minimum time required for obtaining a copy of the order appealed from, it would be unworkable. In that event, every time an appeal is filed, the Court not only will have to see whether the appeal is in time on the basis of the information available from the copy of the order filed along with the memorandum of appeal, but it must go further and hold an enquiry whether any other copy had been made available to

the Appellant and if so, what was the time taken by the Court to make available that copy. This would lead to a great deal of confusion and enquiries into the alleged laches or dilatoriness in respect not of copies produced with the memorandum of appeal but about other copies which he might have got and used for other purpose with which the Court has nothing to do.

22. In the above Supreme Court case the scope and effect of Section 12(2) of the Limitation Act in the matter of filing an appeal was directly considered. The previous decision of the Lahore High Court in AIR 1935 682 (Lahore) was overruled. It was observed that what was deductible u/s 12(2) was not the minimum time within which a copy of the order appealed against could have been obtained. It was observed in State of U.P. v. Maharaja Narain Supra:

That section permits the Appellant to deduct from the time taken for filing the appeal, the time required for obtaining the copy of the order appealed from and not any lesser period which might have been occupied if the application for copy had been filed at some other date. That section lays no obligation in the Appellant to be prompt in his application for a copy of the order. A plaint reading of Section 12(2) shows that in computing the period of limitation prescribed for an appeal, the day on which the judgment or order complained of was pronounced and the time taken by the Court to make available the copy applied for, have to be excluded. There is no justification for restricting the scope of that provision.

23. The Supreme Court wanted to avoid such confusion which was likely to be created if it was to be construed as meaning the minimum time required for obtaining the copy. It negatived the idea that the expression ''time requisite'' would mean simply time required by the Appellant to obtain the copy of the decree assuming that he acted with reasonable promptitude and diligence. It considered the decisions of the Judicial Committee in Pramatha Nath Roy''s case Supra and in the case of Jijibhoy N. Surty v. T.S. Chettyer Supra. Referring to Jijibhoy''s case the Supreme Court had observed Supra (961):

In other words, what their Lordships said was that any delay due to the default of the pleader of the Appellant cannot be deducted. There can be no question of any default if the steps taken by the Appellant are in accordance with law. Hence, the above quoted observations of the Judicial Committee can have no application to the point under consideration.

24. It follows, therefore, that there must be a legal obligation in steps and the failure to take the same would amount to a default on the part of the Appellant. It is contended that in the case before us there could be no such legal obligation to inform the copyist department that the decree had since been filed because the filing thereof was to be made not by the Appellant but by the Respondent who gave requisition to draw up the decree.

25. Mr. Sen, on the other hand, relies on chap. XL Rule 3 of the Original Side Rules of this Court and contends that the practice of this Court as set out in the judgment of Chakravartti C.J. still remaining in force, becomes a legal obligation on the part of the Appellant to inform the copyist department immediately after the decree was filed by T. Banerjee and Company That rule of chap. XL provided as follows:

Where no other provision is made by the Code or by these Rules the present procedure and practice shall remain in force.

26. Mr. Sen relied on another recent Bench decision of this Court is the case of Santimoy Dey Vs. Suriya Properties Private Ltd. and Others, where the Bench consisting of Mitra C.J. and S.K. Datta J, in deciding a matter u/s 12(2) of the Limitation Act, 1963, relied on the said practice as mentioned in Prativa Bala''s case Supra relating to the practice of this Court. It appears that the aforesaid Supreme Court decision was not cited. On the extreme facts of that case the Bench observed that the time taken by the Appellant in obtaining the certified copy of the order was not time requisite or the time properly required and accordingly, the appeal was dismissed. Nobody raised any objection as to the practice mentioned in the decision in Prativa Bala''s case and no arguments were advanced on that as has been done in the instant case.

27. Mr. Ghose, Learned Counsel appearing on behalf of the Appellant, contends that the facts herein are a little different from the facts of the other cases relied on by Mr. Sen. Here there is no default on the part of the Appellant or by S.K. Banerjee who have the undertaking before the Appeal Court in filing the certified copy of the decree appealed from within the period of limitation. The memorandum of appeal was filed with the leave of the Court immediately after the decree was passed. Therefore, the appeal was within the time, but in filing the certified copy thereof the undertaking given by S.K. Banerjee could not be complied with because of the delay caused by the department concerned and because of the death of S.K. Banerjee and the warrant of Attorney having stood discharged thereby. The death of S.K. Banerjee made the situation complicated, because at that point of time there was nobody who could carry out the order of the Appeal Court in the matter of the filing the certified copy of the decree. It took quite some time to get the present Appellant substituted in the place and stead of the said S.K. Banerjee. Steps were to be taken in the testamentary proceedings to get the administrator ad litem appointed and thereafter to get him substituted in the proceedings herein. This is a case where delay has been explained by stating the facts in connection therewith in the petition and in the affidavit-in-reply filed by the administrator ad litem who is the present Appellant in this appeal. In the petition it has been stated that according to the Original Side of this Court the duty of filing the decree is on the party who gives the requisition for the drawing up of the decree. In the present case, the Plaintiff Respondent had filed a requisition on March 23, 1963, for the drawing up of the decree and it was therefore the duty of the Plaintiff Respondent and not of the

Appellant to file the decree after the same had been ready for filing. Actually the decree was filed in the department by or on behalf of the Plaintiff Respondent. In the circumstances, the delay, if any, in filing the decree is not attributable to the Appellant nor is it due to any laches on his part.

28. I have already noted that although there is no, provision in the Rules of this Court on the question as to who should file the decree the decisions cited above are unanimous on the point that it is filed by the party who gives the requisition for the drawing up of the decree. Mr. Ghose contends and to my mind, he rightly does so, that in laying down the practice of this Court this point was lost sight of and was not considered in Prativa Bala''s case Supra. Of course, that was a case where the learned Chief Justice enquired of the department concerned to explain the delay why the certified copy was not issued and to that query the department sent a note and in the judgment the same was quoted as the practice of this Court. The point was neither argued nor required to be decided in Prativa Bala''s case.

29. Mr. Ghose next contends that when the order of the Appeal Court dated January 28, 1964, was made herein the Appellant''s Solicitors were M/s Fox and Mondal and in the petition it has been stated that the Appellant who was not a lawyer had no personal knowledge as to what steps were required to be taken to make the appeal ready for hearing and he relied on his the then Solicitors to take all necessary steps in that behalf. So far as the Appellant is aware M/s Fox and Mondal did diligently take steps in the appeal subsequent to the order dated January 20, 1964. The Appellant was informed by the said Solicitors that as early as on February 6, 1964, the said Solicitors had written to the Registrar requesting him that the certified copy as applied for earlier be made available. This instruction and/or request in writing will be confirmed by the Bills of Costs submitted to the Appellant by the said Solicitors.

30. As stated above, S.K. Banerjee duly applied for a certified copy, but thereafter he died and the department made it available on July 22, 1966 and immediately thereafter the same was filed.

31. As against the aforesaid averments in the affidavit-in-opposition it has been stated as follows:

Moreover, the inordinate and inexplicable delay from the date of the filing of the decree on 20th November, 1963 and the information received by the Appellant from the department as to folios assessed on 16th July, 1966, unmistakably and unequivocally suggest that the Appellant did not take any steps to inform the copying (copyist) department as to the filing of the said decree.

In answer to that the Appellant stated in the affidavit-in-reply that he came to know upon enquiry from M/s. Fox and Mondal that all necessary steps had been taken for getting the appeal ready. It has been denied therein that no information was conveyed to the copyist department, as wrongly alleged. The deponent also came to

know upon enquiry from the department made by the present Solicitors that the department did not maintain any record of information given to the copyist department. The then court clerk of M/s Fox and Mondal was no longer in the employment of the said Solicitors and his whereabouts were not known.

32. On the basis of the aforesaid averments Mr. Ghose contends that the Appellant''s case should be believed that due information had actually been given to the department concerned, but in spite thereof the department made it available only on July 22, 1966, on which date the same was filed in the appeal section. It is contended that even on this basis, the provision of Section 12(2) of the Limitation Act was complied with and such time taken for obtaining the certified copy should be held to be the time requisite in the peculiar and special facts and circumstances of this case.

33. Mr. Ghose next contends that in the order of the Appeal Court three undertakings were recorded, one was relating to the filing of the certified copy within the period of limitation, the second was that the Appellant was to have the order of the Appeal Court drawn up and to include the same in the Paper Book and the third was to include the list of dates relating to limitation in the said Paper Book. It is urged that the death of Suren Banerjee and the substitution proceedings are not relevant for the purpose of limitation. These are matters which do not involve any default or inaction or laches on the part of the Appellant and accordingly, it was not necessary for the Appellant to put in all such dates in the list of dates set out in the Paper Book. These are matters which arose due to the peculiar facts and circumstances herein arising out of the death of Suren Banerjee, the original Appellant who gave the undertaking before the Appeal Court. Those are matters which are required to be explained to the Court for the purpose of satisfying the Court that there had not been any breach of the undertaking given to it. These are matters in which the Court had granted a conditional order which conditions are required to be fulfilled by the Appellant and if there is any inordinate delay in doing so, the same are required to be explained. The delay, under such circumstances, if properly explained, can be condoned by the Court. Had it been a case where even though the folios had been assessed by the department, yet the stamps had not been furnished on behalf of the Appellant, then the delay caused thereby would be a matter of consideration in so far as the exclusion of time as provided in Section 12(2) of the Limitation Act is concerned. Such a case of delay might also arise when the certified copy of the decree is made ready for delivery, but still the same is not taken delivery of by or on behalf of the Appellant and delay is caused in filing certified copy of the decree. In such event, there would be a default on the part of the Appellant or his lawyers in obtaining the certified copy and it would be a case of breach of duty or default on the part of the Appellant to obtain such certified copy. It would then be a case of negligence for which the Appellant could not take the benefit of Section 12 of the Limitation Act.

34. In my opinion, the various dates connected with the substitution proceedings since the death of S.K. Banerjee are matters of record and the Court can always look into it. In the facts and circumstances of this case it was not necessary on the part of the Appellant to include all those dates in the list of dates filed with the Paper Book. Such relating to the date of death, substitution and the change of Attorney are not relevant to the question of limitation because during such period there was no default or negligence or breach of any legal duty in obtaining the certified copy as provided by the rules of this Court. The undertaking given to Court was to file the certified copy of the decree within the period of limitation. The time to obtain the certified copy thereof stopped running since the same had been applied for. All that has to be looked into is whether the Appellant had committed any default in obtaining such certified copy and if it is found that by reason of such default unnecessary time had been taken, then only the Appellant would not be entitled to the benefit of the exclusion of time u/s 12(2) of the Limitation Act.

35. Mr. Sen has relied on the decision is Ramsey v. Broughton ILR 10 Cal. 652 to show that even during the late last century the same practice prevailed, namely, that when the decree was ready it was the Appellant''s business to go to the office and get the copy and it was not the duty of the office or of the Respondent to give the Appellant any notice that the decree was ready. According to the Division Bench decision

he was bound himself to ascertain at the office when the decree was ready and bespeak a copy.

I have already held that factually there was no default on the part of the court clerk of M/s Fox and Mondal, the then Attorneys for the Appellant, to enquire into the department concerned and to ascertain whether the same was ready or not, We have ascertained that there is no practice in the current record department to record any particulars or as to the date when the party informs that a decree for which the certified copy had been applied for, had been filed in Court. It is to be noted that in the above case Supra the point involved therein was not regarding the filing of the decree. There the decree was lying ready with the department and even so the same was not collected. In that case the period of 20 days had already expired. It was argued that an additional period of 10 days, in the facts of that case, should have been considered as the time requisite for obtaining the certified copy. In that case, there was clear evidence of negligence on the part of the Appellant in allowing the period of limitation to expire without even applying for a certified copy. Under those circumstances, in my opinion, that decision has no application to the facts of the case before us. In the present case, there is nothing on record to show that the department concerned was not guilty of the delay or that they made everything available to the party and that it was due to the default on the part of the Appellant that the certified copy of the decree was not made over.

36. In my opinion, so far as the filing of the decree is concerned, that is a matter for the party on whose behalf the requisition has been put in for drawing up the decree. Therefore, if for some reason there is some delay, that cannot be counted against the Appellant when the requisition has been given on behalf of the Respondent decree-holder.

37. For the period between 1963 and 1966, in my opinion, there was no adequate material before the Court on the basis whereof the Court could come to the finding that there was default on the part of the Appellant. Mere allegation that there has been default on the part of the Appellant would not be enough.

38. On behalf of the Appellant it has been asserted that the department concerned kept no record as to when and by whom they were informed about the filing of the decree. It has further been stated that the man who could make the affidavit has since retired. In Binani''s case Supra the Court considered the question but came to the conclusion that there was no default. There also mere allegation was considered to be insufficient. Here in this case the certified copy was applied for within three days from the date of the decree and immediately the same was made ready by the Court, the Appellant obtained it and filed it. Hence, there could be no default unless it was shown to the Court on the basis of some materials that the Appellant had a duty which he failed to perform or that he had a duty cast upon him in the matter of obtaining the certified copy, but he failed to perform such obligation and as such, he was not entitled to the exclusion of time u/s 12(2) of the Limitation Act. In my opinion, Chakravartti CJ. did not have the occasion to consider the facts in the context of Section 12. It is a matter of 14 years from now and there is no material before this Court whereby it could be said that the copyist department was not informed on behalf of the Appellant. With utmost respect to the learned Chief Justice, I am constrained to hold that the practice laid down in the said judgment is not the correct practice which is followed in this Court. We have since been informed by the Registrar of this Court that the person who gave requisition for drawing up of the decree files it after obtaining the same and then informs the current record department that the decree has been filed. Thereafter the current record department assesses the folios and the person asking for certified copy and who has already given lequisition for getting the certified copy of the decree would then furnish the stamps on the folios and thereafter, the folios are assessed by the current record department and the same would be transmitted to the copyist department and then it would be made available to the party who has applied for and paid for the stamps.

39. That being the position I hold that Mr. Sen''s point is bound to fail and accordingly, the same is rejected.

40. Having disposed of the preliminary point as to limitation in favour of the Appellant I now proceed to deal with the merits of the appeal. This appeal arises out of the judgment and decree of A.N. Ray J. (as he then was).

41. The suit was for the return of the title-deeds by the Defendant Surendra Kumar Banerjee. Surendra Kumar Banerjee was the Chairman of the Board of Directors of Tukvar Company Ltd. The Plaintiff''s case was that the title-deeds belonged to Tukvar Company Ltd. (hereinafter called the said company). The Defendant Surendra Kumar Banerjee, as such Chairman of the company, was in possession of the said title-deeds. At a meeting of the Board of Directors held on February 1, 1962, the said Surendra Kumar Banerjee (hereinafter called S.K. Banerjee) tendered his resignation and the company duly accepted the same. The company''s case was that S.K. Banerjee ceased to be the Chairman of the Board of Directors and also ceased to have any right or authority to retain the said title-deeds in his possession or custody and became liable to return the same to the company. At the very same meeting one Maturam Singh Agarwalla was co-opted as Director of the company and the said Maturam Singh Agarwalla was authorised to take delivery of the title-deeds from S.K. Banerjee and to keep the same in his safe custody for and on behalf of the company. The company has also pleaded in the plaint that the said S.K. Banerjee expressly and/or impliedly agreed to return the said title-deeds to the company as decided at the said meeting, but he failed and neglected to do so. S.K. Banerjee wrongfully detained the same without any right, title or authority and the company was entitled to the return thereof from S.K. Banerjee. The company claimed damages, but that part of the claim was not pursued at the trial.

42. S.K. Banerjee''s defence in the written statement was that he from time to time lent and advanced to the Plaintiff various sums of money to the extent of Rs. 8 lakhs. As security for such advances and the interest thereon the company charged, mortgaged and/or hypothecated in favour of S.K. Banerjee all the crops, export quota rights, production rights and all such other rights of the company that were granted or to be granted to the company. On or about February 5, 1960, an agreement was entered into bv and between the company and S.K. Banerjee in writing. The said agreement recorded, inter alia, the following clause:

The company (the Plaintiff) also undertakes to create a mortgage by deposit of title-deeds of its landed properties at Darjeeling by depositing the same with the financier (the Defendant) as soon as the title-deeds are received from the National and Grindlays Bank Ltd.

S.K. Banerjee''s case was that the company deposited the said title-deeds with S.K. Banerjee at Calcutta with the intent to create a mortgage for due repayment of the said sum due from the company to S.K. Banerjee. As a result of such deposit an equitable mortgage in respect of the properties of the company covered by the said title-deeds was duly created in favour of S.K. Banerjee. Thereafter, the other two agreements dated respectively November 29, 1961 and February 1, 1962, were entered into by and between the company and the said S.K. Banerjee varying the rate of interest. S.K. Banerjee''s further defence is that, at all material time he was in possession of the said title-deeds as mortgages and not as the Chairman of the

Board of Directors of the company. S.K. Banerjee''s defence was that the said equitable mortgage was still subsisting and the Receiver was holding the said title-deeds subject to the said equitable mortgage. Since 1959 S.K. Banerjee had been ailing and was practically confined to bed. On or about February 1, 1962, T. Banerjee, the Solicitor and Director of this company together with Maturam Singh Agarwalla and Prem Singh Agarwalla came to the residence of S.K. Banerjee and held certain discussions. In course of such discussions Maturam Singh Agarwalla made certain proposals for creating registered mortgages in respect of the properties covered by the said title-deeds. S.K. Banerjee declined to agree to any such proposal. S.K. Banerjee did not accept such proposal nor did he agree to the terms suggested by the said Maturam Singh Agarwalla. Maturam Singh Agarwalla, who was leaving Calcutta for Jalpaiguri, handed over to S.K. Banerjee an undated letter (Ex. ''K'') whereby S.K. Banerjee was asked to deliver the title-deeds of Tukvar Company Ltd. to M/s T. Banerjee and Company who would receive the same on behalf of Maturam Singh Agarwalla. In the body of the said undated letter S.K. Banerjee wrote as follows:

Received the original letter.

S.K. Banerjee

43. It appears from the evidence adduced herein that the full amount was not paid by Maturam Singh Agarwalla and all the shares were not delivered to him by S.K. Banerjee. Thereafter on February 17, 1962, S.K. Banerjee delivered the remaining shares lying with him and the balance price of the shares were paid by Maturam Singh Agarwalla to S.K. Banerjee. It further transpires that on this date viz. on February 17, 1962, S.K. Banerjee was a ked to deliver the title-deeds, but he flatly refused to do so. On that date both T. Banerjee and Maturam Singh Agarwalla came to the residence of S.K. Banerjee for the aforesaid purpose. Thereafter, some correspondence was exchanged between the parties. On February 24, 1962, the company''s Secretary Shyamal K. Banerjee wrote to S.K. Banerjee by registered post with acknowledgment due receipt recording the meeting of the Board of Directors held on February 1, 1962 and further, recording that on that date S.K. Banerjee had resigned and also executed an agreement regarding repayment of the loan. It was further recorded that by the said agreement S.K. Banerjee released the charge created in his favour. At the said meeting it was also resolved that Maturam Singh Agarwalla be authorised to take delivery of the title-deeds from S.K. Banerjee on behalf of the company. On that basis Maturam Singh Agarwalla requested S.K. Banerjee to deliver the title-deeds when S.K. Banerjee told Maturam Singh Agarwalla that the title-deed were lying with the bankers of S.K. Banerjee and he would arrange to bring the same and deliver to Maturam Singh Agarwalla immediately after the same would be obtained from the bankers. It, was also recorded therein that S.K. Banerjee agreed with Maturam Singh Agarwalla that as Maturam Singh Agarwalla was leaving Calcutta for Jalpaiguri, the title-deeds would be delivered to

M/s. T. Banerjee and Company who would receive the same on behalf of Maturam Singh Agarwalla. That agreement was arrived at the suggestion of S.K. Banerjee. Accordingly, a letter was then and there written out and was signed by Maturam Singh Agarwalla and handed over to S.K. Banerjee at his request (Ex. ''K''). It was further recorded that M/s. T. Banerjee and Company had telephonic conversation with S.K. Banerjee in course of which S.K. Banerjee informed that he had kept the title-deeds ready with a list but he would prefer to deliver the same to Maturam Singh Agarwalla when he would call at the residence of S.K. Banerjee for taking deliver) of the rest of the shares purchased by him from S.K. Banerjee. It was, further, recorded that on February 17, 1962, both Maturam Singh Agarwalla and T. Banerjee went to the residence of S.K. Banerjee and took delivery of the rest of the shares against payment of the value in cash. The letter then proceeds:

Thereafter you were requested to deliver the title-deeds to him in accordance with the arrangement, hereinbefore referred to, but without assigning any reasons whatsoever, you flatly declined to deliver the title-deeds.

In this connection, we have to point out to you that you have no right whatsoever to retain the title-deeds which were in your custody as the ex-Chairman of the Board of Directors of the company.

Moreover, by the memorandum dated the 1st February, 1962, duly executed by you in consideration of two of the new Directors of the company having given a general guarantee for the repayment of your loan, you released all charges in your favour created by the company by the deed of hypothecation dated the 5th February, 1960, or otherwise and your loan is now only an unsecured debt of the company payable in instalments in the said deed.

By reason of your wrongfully withholding the title-deeds of the property of the company, we are suffering heavy loss and damage and unless the said title-deeds are forthwith returned to us, we may suffer loss and damage and for this you alone will be responsible.

Immediately on receipt of the said letter on March 3, 1962, S.K. Banerjee wrote to the company as follows:

To

Messrs Tukvar Company Ltd.

10/2, Syed Sally Lane,

Calcutta-7.

Dear Sirs,

Your letter dated the 24th February, 1962, received today and in the contracts there is no agreement that I shall hive to return the documents, first of all you must pay

me the 10 lacs of rupees 10,00,000 and then you can have the document. You can make out the case either criminally or civil and those courts are to decide, which please note.

Yours faithfully,

Sd. S.K. Banerjee

It would appear from the aforesaid letter of S.K. Banerjee that he asserted his right to retain the documents. Then S.K. Banerjee serves a Solicitor''s letter dated March 31, 1962, which states as follows:

Ref. No. 1415.

Tukvar Company Ltd.

10/2, Syed Sally Lane,

Calcutta-7.

Dear Sirs,

Under instructions from Shri Surendra Kumar Banerjee of 11/2, Ultadanga Road, Calcutta-4, we address you as follows:

A few days back a notice purporting to be a notice from your company intending to hold an Extra-Ordinary General Meeting of the share-holders of the company on Monday, the 2nd April next has been received by our said client.

Our client has been very much surprised to read the con tents of your said purported notice.

Since our client released the charge in respect of the crop and quota rights by an agreement dated 1st February, 1962, you have been contending that the title-deeds of the immovable properties of the company have not been lying with our client as a mortgagee. On the basis of this contention of yours you have demanded in the past for delivery of the title-deeds contending also at the same time that our client''s advances to you amounting to over rupees 9,70,000 carrying 4% interest have become an unsecured loan by reason of the said release dated the 1st February, 1962. Our client has stoutly denied and disputed your contention. He has also written to you saying in clear terms that you are not entitled to the return of the title-deeds. You have even threatened our said client with legal proceedings. Fortunately, good sense prevailed with you and you seem to have been correctly advised not to take such steps.

You are aware that under the terms of the first agreement dated the 5th February, 1960, you understood to create a mortgage by deposit of title-deeds of its landed properties at Darjeeling by depositing same with our said client as soon as the said title-deeds are received from the National and Grindlays Bank Ltd. You were also

aware that on the security of the title-deeds and also of the crop and quota rights of the company the said bankers advanced to your company a large sum which were in fact repaid with our client''s moneys on the terms and conditions mentioned in the agreement dated 5th February, 1960. You were also aware that pursuant to the said undertaking given by you, you caused the said title-deeds on their return from the said bankers to be deposited with our said client at Calcutta with the intent to create a mortgage in favour of our client in respect of its immovable landed properties. The said agreement dated 1st February, 1962, is a release in respect of the hypothecation of crop and quota rights and the same had nothing to do with the mortgage of the company''s immovable properties in favour of our client created pursuant to the said undertaking.

Our client is further surprised to find, that you have deiiberately omitted to mention about this mortgage in our client s favour in the contents of your said purported notice to hold extra-ordinary general meeting on 2nd April next. Our client states that the said notice is misleading, bad in law, not valid and not binding on the share-holders and/or our said client.

Please note that if you do not withdraw the said statements in the purported notice and/or state in the meeting, lf held in spite of this letter and without prejudice to our client''s rights and contention hereinabove, the facts as to the existing mortgage in out client''s favour, or in case, any resolution is passed contrary IO or inconsistent with our client''s right herein mentioned, then our client shall have no other alternative but to lake such steps against your company as he may be advised in the premises without further reference to you in that behalf.

This letter is being sent to you in triplicate, one under registered post, the second under certificate of posting and the third by a messenger.

Yours faithfully,

B.L. Mukherjee and Company

The company gave a reply by its letter dated April 5, 1962, addressed to Messrs D.L. Mukherjee and Company as follows:

The Tukvar Company Limited.

10/2, Syed Salley Lane, Calcutta-7

Dated 5th April, 1962.

Ref. No. 288/111/62.

(Registered with AD.)

Messrs D.L. Mukherjee and Company

10 Old Post Office St.,

Calcutta-1.

Dear Sirs,

We are in receipt of your letter No. 1415 of the 31st March. 1962.

It is now apparent from your letter under reply that your client is bent upon creating mischief and is inviting upon himself the consequences of his illegal and wrongful action.

In view of your client''s old age and also in view of the tact that he was until lately connected with the company as the Chairman of its Board of Directors, we had refrained from taking action against your client but it now seems inevitable that action shall have to be taken.

Your client has nothing to do with the extra ordinary general meeting of the share-holders as he is no longer a share holder of the company. The notice was sent to him as a matter of courtesy. There was nothing in the notice to cause your client any surprise. A resolution is to be passed in the usual course of the management of the company.

It is amusing to note that for the first time in your letter under reply (that is, after your client has consulted a lawyer) that your client has come up with the story that bv the agreement dated the 1st February, 1962, your client released the charge in respect of crop and quota rights only.

A reference to the agreement will clearly show that your client released all the charges in his favour created by the company under the said deed of hypothecation dated the 5th February, 1960, or otherwise.

Moreover, by the memorandum of agreement dated the 5th February, 1960, no charge was or could be created by deposit of title deeds on the landed properties at Darjeeling. The documents of title were never deposited with your client for creating any equitable mortgage and the documents were all along held by the company. Your client''s actual custody of the documents was as the Chairman of the Board of Directors as will be clearly borne out from all papers resolutions and documents.

Your client will perhaps remember that the documents were deposited with Messrs J. Thomas and Company Private Ltd. and such deposit was made by the company namely Messrs Tukvar Company Ltd. as will appear from the original receipt of the said Messrs J. Thomas and Company Private Ltd. which is on the files of the company.

Moreover, at the meeting of the Board of Directors held on the 1st day of February, 1962, at your client''s house and in his presence, the resolution authorising Maturam Singh Agarwalla, the new Director of the company, to take delivery of the title deeds from your client who was holding the same as the Chairman of the company, was passed and your client signified his acceptance of the said resolution

by signing his name on the true copy of the letter whereby he was authorised to deliver the title-deeds to Messrs T. Banerjee and Company, who were empowered to receive the same on his behalf by Sri Maturam Singh Agarwalla.

Sri Maturam Singh Agarwalla and Sri Prem Singh Agarwalla personally guaranteed your client''s loan to the company in consideration of his releasing all claims for charge against the assets of the company, if any and it is astounding to note your client''s claim to retain the title-deeds which he does not possess either in fact or in law. It is false to allege that your client has ever denied or disputed our contentions.

A reference to your client''s previous letter will how that beyond n dogmatic assertion, namely that there was no agreement that he will have to return the documents and asking us "to make out the case either criminally or civilly and those Courts are to decide", he made no other claim to the documents as he could not possibly have.

Your client who was the Chairman of the Board of Directors is fully aware that there has been, at no time whatsoever, any resolution of the Board of Directors whereby an equitable mortgage was authorised to be created in your client''s favour. Your client is also fully aware that the Board could not create any equitable mortgage without such a resolution. Further, your client is aware that unless the title-deeds are formally deposited with the intention of creating an equitable mortgage, there cannot be any equitable mortgage. Admittedly this was never done.

We were advised to take steps against your client, but steps were not so far taken for the reasons stated in the previous portion of the letter. It seems that the indulgence given to your client is being misconstrued and he is compelling us to take steps.

Your client is fully aware that the title-deeds were never deposited with him as and by way of equitable mortgage as it would not have been done in the absence of any resolution of the Board of Directors.

As your client has or had no charge on the landed properties whatsoever in his favour he cannot expect us to mention a non-existent fact. It is denied that, the notice issued by the company is misleading, bad in law, not valid and binding on your client. For your information it may be stated that at the meeting of the share-holders which was duly on the 2nd April, 1962, the resolution has been unanimously passed. Your client who was the Chairman of the Board of Directors at all relevant times up to the date of his resignation namely 1st February. 1962, is fully aware that no particulars of any alleged mortgage in favour of your client on the properties at Darjeeling have been registered with the Registrar of Company nor has any document creating any such alleged mortgage has been executed and/or registered by the company. Your client is therefore fully aware that he cannot have, as in fact he has not, any charge on the properties of the company and/or the title-deeds of the said properties. As it appears that good sense has not prevailed

upon your client, we have no other option but to hand over the papers to the lawyer for taking necessary action which we are proceeding to do.

By reasons of your client''s wrongful and illegal detention of the title-deeds we have suffered and are daily suffering heavy loss and damage.

Needless to add that we will look at your client for recovery of all such loss and damages.

Yours faithfully,

For The Tukvar Company Ltd.

Sd. R.N. Singh

Director.

44. Before the learned trial Judge the only question which came up for decision was whether the Plaintiff company created an equitable mortgage of its title-deeds in favour of the Defendant as alleged in para. 1 of the written statement. The other question which was raised in the issue, framed by the Court below, as to damages, alleged to have been sufferred by the Plaintiff, was not pressed,

45. As the Defendant S.K. Banerjee was a very old man and was suffering from illness of a serious nature, he was examined on commission and as such, gave his evidence first.

46. On behalf of the Plaintiff one Dr. Jyotish Chandra Chatterjee was called as a witness. He was called as a witness because S.K. Banerjee said in his evidence that he did not know about the Extra-ordinary General Meeting of the company which was held on February 19, 1958 and the resolution passed therein sanctioning and permitting the Board of Directors to take a loan from S.K. Banerjee to the extent of Rs. 5 lakhs upon terms and conditions written in the resolution. S.K. Banerjee further said that he was not present in such meeting. S.K. Banerjee said that he did not remember anything about the Extra-ordinary General Meeting held on February 19, 1958.

47. As against the above evidence Jyotish Chandra Chatterjee when asked about the said meeting, said that he was present in the said meeting and he identified his signature on the minute book in respect of the said meeting. He also said that S.K. Banerjee was also present. He was also an old man of 79 years of age. He said that his eye-sight was not enough. He was asked whether the other gentlemen whose names and signatures appeared there did put their signatures in his presence. He said that he could not say. But ultimately he said that after he signed his name he went away, thereafter the other persons could have signed their names. By reading the said minute he said that the contents were true. He further said that the name of S.K. Banerjee was written there as the Chairman of that meeting. He could not recognise the signature of S.K. Banerjee, but he said that he knew him very well. In

cross-examination he could not answer any question properly regarding the writing out of the minutes of the meeting and his evidence was that immediately after the meeting he left and he did not remain there and he did not know what happened thereafter. Referring to S.K. Banerjee''s signature in the said minute he said that he had not seen the signature himself. Regarding the other names and signatures appearing therein he said that those were not written in his presence.

48. On the basis of the aforesaid evidence the learned Judge has come to his finding that S.K. Banerjee was present in the meeting because he was unable to accept the oral evidence of the Defendant. This documentary evidence which was relied on by and on behalf of the Plaintiff to show that the company by its said resolution only authorised the raising of the loan on a promissory note or on any other document and from that it could not be said that there was any resolution authorising the company 10 create any equitable mortgage in favour of the Defendant.

49. As stated above, pursuant to this resolution the company executed a deed of hypothecation in favour of the Defendant, but the same was misled Accordingly, in the Board meeting it was decided that another deed of hypothecation was to be executed and pursuant thereto on February 5, 1960, a deed of hypothecation was executed. This is an important document. In Clause 3 it was stated that the company undertook to create a mortgage by deposit of title-deeds of its landed properties at Darjeeling with the financier as soon as the title-deeds were received from National and Grindlays Bank Ltd. From the said deed of hypothecation also it would appear that there was a previous litigation going on by and between the company and National and Grindlays Bank Ltd. which advanced the money S.K. Banerjee repaid that money in full and thus a mortgage by deposit of title-deeds was redeemed.

50. In my opinion, the learned Judge was not right in appreciating the arguments advanced on behalf of the respective parties in respect of the said Clause 3 of the deed of hypothecation. The learned Judge failed to appreciate the recital in the deed and failed to take note of it in his judgment that the predecessor National and Grindlays Bank Ltd. had advanced money on the security of some of the properties of the company including the security of the title-deeds of the company''s tea estate and further, that the financier S.K. Banerjee agreed to advance such accommodation loan on the terms and conditions contained in the said deed dated February 5, 1960, which provided the said Clause 3 whereby the company undertook to create a mortgage by deposit of title-deeds as soon as the said deeds would be received from the said Bank. The said deed further recited that the terms and conditions contained therein including Clause 3 thereof were duly approved by the company at a general meeting of the shareholders of the company held on February 19, 19.58. It has been specifically stated in the said deed that the previous deed dated April 16, 1959, which was lost, contained the aforesaid terms and conditions including Clause thereof. Accordingly, it was contended on behalf of the Appellant that the validity of Clause 3 could not be challenged on behalf of the company by

saying that such a provision was not sanctioned by any resolution of the Extra-ordinary General Meeting of the company held on February 19, 1958. Accordingly, it must be held that by the said resolution the parties thereto intended to execute document in terms of the said Clause 3.

51. There were two resolutions passed at the said Extra-ordinary General Meeting held on February 19, 1958 and the same were as follows:

Resolved unanimously that the sanction of taking loan by the Board of Directors in their meeting held on 30th November, 1957, to the extent of Rs. 5,00,000 (five lacs) only from Mr. S.K. Banerjee, Chairman of the Board of Directors, on a promissory note or any other valid documents to the satisfaction of Mr. Banerjee at an interest of 6% six per cent per annum with monthly rests with the right of Mr. Banerjee to call for mortgage of crops by hypothecation at any time when he wishes be confirmed and Mr. S.K. Banerjee be and is hereby authorised to honour the said promissory note or any other valid documents executed by Directors on behalf of the company for the purpose of the loan taken by the company.

* * * *

Resolved unanimously that the limit of the loan from Mr. S.K. Banerjee be increased to Rs. 12,00,000 twelve lacs and Directors be authorised to execute necessary documents or behalf of the company in favour of Mr. S.K. Banerjee on the said terms and conditions and Mr. Banerjee be authorised to honour the documents executed by the Directors on behalf of the company for the purpose of the loan.

52. Accordingly, it must be held that the said resolutions contemplated that a valid mortgage by deposit of title-deeds to the satisfaction of Mr. S.K. Banerjee could be created within the meaning of the expression "any other valid document to the satisfaction of Mr. S.K. Banerjee" and within the meaning of the expression "necessary document on behalf of the company in favour of Mr. S.K. Banerjee". It must be held that the company is now estopped from challenging the validity of the existing Clause 3 of the deed of hypothecation dated February 5, 1960, on the ground that the same was not sanctioned by the company at a general meeting.

53. Mr. B.N. Sen, Learned Counsel for the Respondent, submits that Clause 3 is neither covered by the Extra-ordinary General Meeting of the company held on February 19, 1958, nor by the resolution passed at the Board of Directors'' meeting held on January 14, 1960. It is submitted that the resolutions referred to in the said meetings merely authorised the execution of a deed of hypothecation and do not in any way authorises the creation of a mortgage by deposit of title-deeds in respect of its landed properties by depositing the same with Mr. S.K. Banerjee. It would seem that on behalf of the Respondent too much emphasis was laid on the Extra-ordinary General Meeting held on February 19, 1958 and the resolution passed therein. It is sought to be canvassed that pursuant to that resolution of February 19, 1958, only the agreement dated February 5, 1960, was executed.

54. In my opinion, the real recital in the said agreement dated February 5, 1960, was lost sight of. It was recorded in such recital and the fact remained that the then National Bank of India Ltd. (later on National and Grindlays Bank Ltd.) advanced moneys to the company on the security of some of the properties including the security of the title-deeds of the company''s tea estate and their dues were paid off by the company by moneys advanced by Mr. S.K. Banerjee and on that basis the company agreed to create similar mortgage in favour of S.K. Banerjee as expressed by Clause 3 thereof. It was further lost sight of that the recital also recited about the suit filed by the said bank against the company and in the said suit the said bank made an application for the appointment of a Receiver and obtained an order for payment by instalments. Under such circumstances, the company applied for such loan to Mr. S.K. Banerjee. S.K. Banerjee in his turn came to the rescue of the company and agreed on the said basis. Now if the company seeks to challenge the authority of creating a mortgage by deposit of title-deeds by contending that such authority was not given by the company in its General Meeting the company should have produced the resolution whereby such a mortgage was created in favour of the said bank. Furthermore, it appears from the said agreement itself that the Directors signing the said agreement were duly authorised by the resolution of the Board of Directors of the company passed on the very same day i.e., on February 5, 1960, authorising them to use the company''s seal to enter into the said agreement. The said resolution, however, has not been produced in evidence. In any event, in my opinion, the company is now estopped from challenging the authority to give an undertaking or to create a mortgage as provided in Clause 3 of the said agreement.

55. The learned Judge of the Court below proceeded on the basis that the mortgage could not have been created by Clause 3 of the said agreement. The learned Judge, in my opinion, failed to appreciate that it was nobody''s case that the mortgage was so created by Clause 3. Clause 3 merely recorded an undertaking of the company to create a mortgage by deposit of title-deeds by depositing the same with Mr. S.K. Banerjee since the said title-deeds would be received at a subsequent date from the National and Grindlays Bank Ltd. By the said agreement of February 5, 1960, SK. Banerjee agreed to advance money on the basis of the said Clause 3 and all concerned appreciated on that date that it would take some time to get back the documents from the said bank. If the documents were available on that date with the company then there could be nothing which would have stood in the way of the company depositing the title-deeds with Mr. S.K. Banerjee then and there, but certain formalities were then to be observed in the matter of getting back those title-deeds and as such, the same undertaking had to be recorded as Clause 3.

56. Mr. Sen argued that the powers of the Board of Directors were restricted in the matter of creating the mortgage as pro vided u/s 293 of the Companies Act, 1956. In my opinion, it is too late in the day for Mr. Sen to urge such points and to contend that the authority to create the mortgage by the company in favour of Mr. S.K. Banerjee was lacking.

57. I shall now go into the more fundamental question as to whether there was intent to create security by mortgaging the company''s assets by depositing the title-deeds. Such a type of mortgage is provided u/s 58(f) of the Transfer of Property Act. 1882. There are three elements of such a mortgage. First, then-must be a debt due to the mortgagee and about which there is no dispute in this case; secondly, the title-deeds must be delivered to the mortgagee. The fact of delivery which took place at the office'' of Messrs T. Banerjee and Company at 6 Old Post Office Street, Calcutta on July 12, 1960, is undisputed also. But what is disputed is whether die mortgage was created by such delivery, Thirdly, the element of intent to create the mortgage must be there to create a valid mortgage by deposit or title-deeds. This is the real question which has to be determined. The question of intent to create mortgage is a matter of inference and such intent has to be gathered from tile facts and surrounding circumstances. It is contended that this task has become much simplified because of the existence of an express clause whereby the intent of the company has been clearly expressed. Obviously, what is being referred to is Clause 3 of the agreement dated February 5, 1900. The company has undertaken to create such mortgage as soon as the same were received from the bank. It is an obligation on the basis whereof Mr. S.K. Banerjee agreed to advance money and he actually advanced the money. It has crystalised into a contractual obligation. The documents were to be collected and delivered to S.K. Banerjee. If the agreement dated February 5, 1960, remained valid, the contractual obligation recorded therein also remained enforceable. In the absence of anything else to the contrary in the normal course the title-deeds were to be delivered to S.K. Banerjee in pursuance of the said Clause 3 and nothing could stand in the way of such delivery coupled with the said intent as expressed therein. The transaction would be completed in the same manner as it stood when the title-deeds were deposited with the bank. In this case at no point of time the validity of Clause 3 having been challenged, in effect S.K. Banerjee in the normal course was to step into the shoes of the bank. The probabilities of the case also are overwhelmingly in favour of Mr. S.K. Banerjee because (a) huge money to the extent of more than 8 lakhs had been lent and advanced by Mr. S.K. Banerjee to the company; (b) it was inconceivable that such a large sum would be lent without the security of mortgage and (c) the presumption of fact arises in favour of S.K. Banerjee because (i) there is a debt and (ii) Mr. S.K. Banerjee came to be in possession of the title-deeds all throughout except for the period to be mentioned hereinafter.

58. On behalf of the company it is contended that the documents being the title-deeds were received by T. Banerjee and Company Solicitors, on May 24, 1960, from National and Grindlays Bank Ltd., but before the same were delivered on July 12, 1960, a resolution of the Board of Directors was passed on July 7, 1960, whereby it was resolved that a bank would be approached to borrow money against the said title-deeds and that would go to show that the company did not intend to create the mortgage in favour of Mr. S.K. Banerjee. It is argued that even assuming that Clause

3 of the said agreement dated February 5, 1960, remained valid, the passing of the said resolution dated July 7, 1960, would go to suggest that the company had by that time given a go-bye to the intention to create a mortgage by deposit of title-deeds in favour of Mr. S.K. Banerjee. In answer to Q. 45, T. Banerjee on behalf of the company in his evidence said:

After the meeting of the Board of Director held on the 7th July, 1960, Mr. S.K. Banerjee came to my office and (sic) me that he would take the title-deeds as it would have to be offered to a bank for arranging a finance and accordingly, I asked one of my assistants to hand over the title-deeds to Mr. S.K. Banerjee; then this endorsement Received from Messrs T. Banerjee and Company, Solicitors, the above-mentioned documents that was written out and thereafter Mr. S.K. Banerjee granted a receipt for the documents saying that he had received the 27 deeds and signed it as S.K. Banerjee for Tukvar and Company Ltd.

59. In cross-examination in answer to Q. 217, I. Banerjee gave an explanation as to why the documents were handed over to S.R. Banerjee by saying:

Because he was the Chairman of the Board of Directors and he was negotiating with the Bank for obtaining a loan against security of the title-deeds.

If this was the case made by the company in defence, why was it that it was not put to S.K. Banerjee when he was cross-examined on behalf of the company? If for the avowed purpose of approaching the bank for finance against the said title-deeds the same were handed over to S.K. Banerjee, why could not such a case be put to S.K. Banerjee? The only case made out in the plaint was that the title-deeds remained with S.K. Banerjee because he was the Chairman of the Board of Directors of the company and when he resigned from the said post he ceased to have any right or authority to retain the same and became liable to return the title-deeds to the Plaintiff. It is surprising that such a case had not been mentioned in a single letter written by the company. Furthermore, there is no evidence before us that pursuant to the said resolution any such bank was ever approached for any loan cither by S.K. Banerjee or by anybody on behalf of the company. T. Banerjee, in course of his evidence, has admitted that there was no mortgage by deposit of title-deeds with any bank in pursuance of the said resolution. He tried to suggest that in pursuance of the said resolution dated July 7, 1960, the same were deposited with J. Thomas and Company, but ultimately he did not succeed. He had to confess that he had little knowledge about such transaction. There is no explanation as to how there could be such resolution on July 7, 1960, if the company undertook to deposit the said title-deeds with S.K. Banerjee as shown in the agreement dated February 5, 1960, entered into by the company with S.K. Banerjee and not by the Board of Directors.

60. The next question relates to the receipt granted by Mr. S.K. Banerjee by obtaining delivery of the title-deeds on July 12, 1960.

61. According to the evidence of S.K. Banerjee the documents were received from Sandersons and Morgans by M/s. T. Banerjee and Company Thereupon the witness demanded the documents and the same were sent to him. Delivery took place at the office of T. Banerjee and Company He further said that he had repaid the loan to National and Grindlays Bank. He said that the arrangement was that all the documents would remain with him and that the quota rights, documents and production would all belong to him. According to S.K. Banerjee, he lent to the company Rs. 8 lakhs and he obtained 27 documents against the said amount. This he said in answer to Q. 33. In answer to Q. 34 also he said that he got those documents because he advanced Rs. 8 lakhs and so he had them in his possession. He also said that they were his properties. It is to be noticed at this stage that the witness stated that he was feeling unwell and the meeting was adjourned till the day after the next day, i.e. till February 28, 1963. Thereafter on the adjourned day the witness was asked as to why he got those documents and his answer was:

I got these documents because I advanced money by keeping mortgage, on the security of the title-deeds. I wanted to keep them so long as my indebtedness was not cleared.

62. In answer to Q. 39 the witness said that he received those documents for himself and not for anybody else and in answer to Q. 40 he denied any possible suggestion by the Plaintiff that he received those documents as Chairman of Tukvar Company. He said he gave the money and he got the documents. He said that he did not give any receipt when he received those 27 documents, but on some documents it was written that the witness had received 27 documents and he signed such a document and that was all. That meant he had received 27 documents and signed his name as S.K. Banerjee. He said, he counted them and found that the documents were 27 in number and he put his signature. That he signed on his behalf personally.

63. It appears that the clean answer given by S.K. Banerjee in answer to Q. 35, as set out above, was considered by the learned trial Judge to be tutored evidence. When on that date, as appeals from the deposition, the witness was not in a position to answer the question properly and asked for adjournment, the learned Judge thought that he was feigning that he was unwell and got the hearing of the commission adjourned till the next day so that he could answer the questions properly after ascertaining the correct position. The learned Judge on that basis disbelieved the witness. The learned Judge in his judgment observed:

The oral evidence of the Defendant at the first sitting of the commission was that he got 27 documents against the advance of Rs. 8,00,000. In question 34 he was asked by counsel examining him--"Mr. Banerjee, why have you got these documents, for what reasons?" He answered, "because those are my properties. I advanced Rs. 8,00,000, so I had them in my possession." The witness then felt unwell and the sitting was adjourned. At the next sitting question 35 which was the first question put to Mr. Banerjee was as follows: "Mr. Banerjee, you said you got 27 documents,

why did you get those documents?" Then he answered as follows: "I got those documents because I advanced money by keeping mortgage on the security of the title-deeds. I wanted to keep them so long as my indebtedness was not cleared." Counsel for the Plaintiff is, in my view, right in his contention that the identical question, which was not answered on the previous occasion, was put to the witness and the answer which was elicited should not be believed. There is a good deal of substance in that contention. It is true that the witness was old, but I do not see any reason as to why the witness did not answer the question at the first sitting in the same manner that he answered on the, following day. The fact that time elapsed and the same question was put to the witness shows, in my opinion, that the answer is not reliable. I am unable to rely on the word of, mouth of the Defendant Banerjee.

64. I am unable to agree with the above finding of the learned that Judge, the learned Judge had no opportunity to look (sic) the demeanour of the witness as lie was examined on commission. In my opinion, the fact that the witness was not even denied by T. Banerjee when he was asked in cross-examination about the same. It the learned judge had minutely looked into tile proceedings of the commission evidence he would have noticed that the sitting of the commission was being adjourned every clay when the witness was feeling unwell. S.K. Banerjee from time to time said that he was feeling unwell and even then his evidence had been continued. In answer to Qs. 428 to 432, T. Banerjee admitted that by the end of 1962 or in the beginning of 1963, S.K. Banerjee had been to the hospital. ''He was suffering from cancer of the prostrate glands. The learned Judge failed to appreciate that S.K. Banerjee admittedly lent and advanced to the company Rs. 8,00,000 and his dues at the date of the suit was more than Rs. 10 lakhs after calculating interest on the principal amount. The learned Judge failed to appreciate that the whole case in the written statement was that there was a mortgage by deposit of title-deeds in favour of S.K. Banerjee and that the only issue which was being tried before the learned Judge was as to whether such a mortgage, had been created or not. Under such circumstances, in examination-in-chief, if the witness had said on the very next day and in answer to the first question that he got those 27 documents because lie advanced money keeping mortgage on, the security of the title-deeds, could he be said to give such answer after coming prepared with such answer? Under such circumstances, if such an answer, would be given, could that be held to be not reliable and should the witness be disbelieved on that score? We have been told that shortly alter he gave his evidence on commission, S.K. Banerjee died of the ailments he was suffering from. In fact, his examination on commission was held on February 20 and 28, 1963 and on March 1, 2 and 3, 1963. The judgment herein was delivered on March 22, 1963 and S.K. Banerjee died on April 14, 1963. If S.K. Banerjee said in answer to Q. 34 that the reason why he got those documents was because these were his properties, he must have meant that not only had he the major share-holding in the company but he was helping the company by lending moneys to the tune of Rs. 8,00,000. Accordingly, a feeling like that in him was quite normal.

The learned Judge failed to appreciate that even before he gave the answer to Q. 35 he, in substance said the very same thing in answer to Qs. 28 and 33. The same are set out as follows:

Q. 28. So far as Tukvar Company was concerned, was there any arrangement between you and Tukvar Company regarding these matters?

A. yes, it was pointed out that all the documents would remain with me and that quota rights, documents and production would all belong to me.

Q. 33. In respect of this advance of Rs. 8,00,000 by you to the company was any document executed, Mr. Banerjee?

A. I have got 27 documents against this amount, nothing more.

65. Then again, the learned Judge failed to appreciate that S.K. Banerjee in his evidence said that he received those documents'' for himself and not'' for the company. He personally paid money and he got the documents. He received 27 documents and he signed S.K. Banerjee'' and that was all. In answer to Q. 44 he said as follows:

Q. 44. Did you sign on your behalf personally or on behalf of Tukvar Company?

A. On my behalf personally. I got them against the money that I advanced. He remembered this much that, he received ''the documents and then he signed his name ''S.K. Banerjee''. He repeated the same thing in answer to Q.44 as follows:

Q. 60. Mr. Banerjee, you said that you received 27 documents and you signed ''S.K. Banerjee'' that is all?

A. Yes, I received 27 documents that I signed my name S.K. Banerjee''.

In answer to Q. 61 counsel for S.K. Banerjee put a leading question to which objection was taken on, behalf of the company and the same is recorded as follows:

Q. 61. I am showing a receipt. After your signature ''S.K. Banerjee'' you find ''for Tukvar Company Ltd.'' Do you know if this was there when you signed?

A. (Mr. Mitter makes objection as it is a leading question and the witness understand English as the witness is answering in English) (Witness looks at the receipt) Received 27 documents, S.K. Banerjee, that is all. I cannot decipher what is written after that. (Shown P.D. 2).

To appreciate the position further the subsequent two questions may also be set out hereunder to show that S.K. Banerjee, said in substance that he merely wrote his name.

Q. 62. Mr. Banerjee, so far as you recollect what did you write?.

A. I have already said that.

Q. 63. And nothing else?

A. That is so. Having received those 27 documents I signed my name. I have already told you just now what I wrote.

66. It is surprising that there was no cross-examination to S.K. Banerjee in, respect of the above evidence given by S.K. Banerjee in examination-in-chief. The learned Judge has disbelieved S.K. Banerjee on this point and has observed in his judgment as follows:

The oral evidence of the Defendant Banerjee is that when he received the documents at 6 Old Post office Street, he did not give any receipt, but on some document it was written that he had received 27 documents and he signed S.K. Banerjee. The Defendant Banerjee''s answer was as follows: "I signed S.K. Banerjee, that is all". In Q. 42 counsel examining the Defendant Banerjee asked, "you signed S.K. Banerjee, what do you mean by ''that is all''? The Defendant Banerjee answered. "That is all means that I had received 27 documents and sighed, by name S.K Banerjee". In Q. 61 at the same sitting the Defendant Banerjee was asked by his counsel, "I am showing you a receipt. After your signature S.K. Banerjee'' you find ''for Tukvar and Company Ltd.'' Do you if this was there when you signed?" The Defendant Banerjee was examined on commission and counsel for the Plaintiff objected to the question as a leading question. ''In my opinion, the objection taken by counsel for the Plaintiff is valid and pertinent. The question undoubtedly is leading. The Defendant however answered as follows: ''Received 27 documents--S.K. Banerjee'', that is all. I cannot decipher what is written after that. On this evidence counsel for the Plaintiff, in my view, rightly contended that at the same sitting the Defendant Banerjee, who could see his signature and speak about it, failed to decipher anything with regard to the words ''for Tukvar Company Ltd.'' Furthermore counsel for the Plaintiff is, in my view, right in his contention that there is no specific statement by the Defendant Banerjee that he did not write the words ''Tukvar and Company Ltd.''

67. S.K. Banerjee could read the writing ''Received 27 documents'' and then his signature ''S.K. Banerjee'', but something more. He said that he could not decipher what was written after that. Indeed when the original is looked into (Ex. ''C'') a lot of legitimate comments could be made. This is a highly suspicious document and it is difficult to appreciate how in the normal course such a writing could be there. It is unnatural in many respects, S.K. Banerjee''s evidence was that he merely put his signature. He did ii in the marginal portion. Underneath the writings ''Received from T. Banerjee and Company Solicitors the above-mentioned documents, curiously enough, no signature has been put by S.K. Banerjee. On the top of the signature of S.K. Banerjee is written ''Recd.'' 27 deeds. That portion appears to be not in the same handwriting as that of S.K. Banerjee. The date, viz., July 12, 1960 and the words for Tukvar Company'' have been squeezed ill and has overlapped the typewritten portion of the document. The figure ''7'' in the date, i.e. ''12.7.60'' and the figure ''7''

in the figure ''27'' of ''Recd. 27 deeds'' are significantly different in style. Perhaps, it was not noticed at the time of the cross-examination of T. Banerjee that the word ''my'' appeared before the word ''Solicitors'' in the receipted portion, set out as above to give the meaning that the documents were received from T. Banerjee and Company who was S.K. Banerjee''s Solicitors, The word ''my'' has been struck out but is quite legible in the original. It shows at least that at first such a situation did crop up in the mind of the parties, may be even unconsciously.

68. As against the above, the learned Judge has laid down, much emphasis on the evidence o&#65533; T. Banerjee who happened to be a senior Solicitor of this Court and the suggestion of any interpolation in Ex. ''C'' appeared to the learned Judge to be of a very serious nature. In my opinion, T. Banerjee was an interested witness. He was a Director, a share-holder and was playing a very vital role in respect of the affairs of the company. Sometime he was trying to say something about which he could not have any personal knowledge, but ultimately in cross-examination be failed miserably, I shall particularly discuss his evidence in relation to his answers regarding J. Thomas and Company He could not have any personal knowledge about this transaction, but still he wanted to assert that pursuant to the resolution dated July 7, 1960, there was a transaction with J. Thomas and Company in which the documents of title had been deposited. This he said for the purpose of creating an impression on the Court that on July 12, 1960, there could not have been any intention for creating a mortgage on behalf of the company by deposit of title-deeds. Ultimately, he succumbed when he had to admit that he had no knowledge about the said dealing arid transaction.

69. Be that as it may, it has to be borne in mind that the Court is not called upon to come to the finding whether or not there was interpolation or forgery in respect of Ex. ''C''. The main question is which of the two versions is to be believed. Mr. Sen, appearing on behalf of the company, submits that, no case of interpolation or forgery was made out either by pleading or in the correspondence. In the examination-in-chief of S.K. Banerjee, it was staged by S.K. Banerjee categorically that the writings ''For, Tukvar. Company Ltd.'' were not his own handwriting. He said that he could not decipher what was written there after, his signature. It is true that previous to the said answer he said that he only signed his name and that was all. When pressed further he said that he did not remember what he wrote at that time. In his own answer to Q.45 he said this:

It happened so long ago, I do not remember all that. If you please let me see it, then I shall be able to tell you how I signed. I know this much that I receded 27 documents and then I signed my name S.K. Banerjee.

70. It is further argued by Mr. Sen that as against this evidence T. Banerjee has categorically stated that in his presence S.K. Banerjee wrote out the entire thing. On the strength of the said evidence Mr. Sen argues that the case of interpolation or forgery cannot stand.

71. In my opinion, the matter, if properly understood, is not one where forgery or interpolation has to be proved in order to succeed in the case. It is the case of belief or disbelief of the case made out by either side. Even without actually proving as to who made the interpolation or at what point of time it was so done, if at all and so on, it is perfectly legitimate to contend that in the normal course such a document in such form would not be executed in the manner it has been done and in any event, it must have been executed under highly suspicious circumstances and little reliance should be put thereon. In any event, in my opinion, it is immaterial whether the words ''for Tukvar Co Ltd.'' were there or not at the time S.K. Banerjee received the said document. It is obvious that T. Banerjee was acting in the dual capacity As Solicitor of the company he received the title-deeds from M/s Sander sons and Morgans. He could legitimately insist on a receipt from the company and on behalf of the company so as to get valid discharge in respect of delivering the title-deeds to the company. As such, it would not have been lawful on his part to pan with the said title-deeds by delivering the same to S.K. Banerjee personally. In the second place. T. Banerjee was also acting in his capacity as a Director of Tukvar Company Ltd '' As such Director the title-deeds were liable to be delivered to S.K. Banerjee in pursuance of Clause 3 of the company agreement dated February 5, 1960 and T. Banerjee had full knowledge thereof as the draftsman of the said agreement. Furthermore, assuming that T. ''Banerjee''s evidence was true that S.K. Banerjee made a representation to T. Banerjee in his office on July 12, 1960, that he would take delivery of the title-deeds'' as the same would have to be offered to a bank for arranging for finance and that the documents Were so delivered even then the position would have remained the same in so far as the performance of the pre-existing Obligation in terms of Clause 3 was concerned. In Other words, Clause 3 remaining effective and the obligation to perform the undertaking contained therein still remaining valid on July 12, 1960, the delivery to S.K. Banerjee by T. Banerjee constituted delivery in pursuance of the intention to create a mortgage by deposit of title-deeds. There is no escape from avoiding the situation so long as Clause 3 would remain alive. Under those circumstances, whether S.K. Banerjee received the title-deeds for himself or for Tukvar Company Ltd. makes little difference. It is to be looked into more as a matter of substance than of form. The fact that it was delivered to S.K. Banerjee and to none else clinches the issue.

72. It is contended, it would be improbable that knowing full well of the contents of the resolution of the Board of Directors passed on July 7, 1960. T. Banerjee should have delivered the said title-deeds except for the purposes as indicated in the said resolution and as such, there could not be any delivery of the said title-deeds in performance of the undertaking mentioned in Clause 3.

73. From the totality of the evidence on record I can well visualise the position by connecting the chain of, events and it is hardly difficult to arrive at the conclusion that the delivery on July 12, 1960, of the title-deeds to S.K. Banerjee constituted delivery thereof with the intent to create a security, of mortgage by deposit of the

title-deeds.

74. As observed hereinabove, Clause 3 was alive and the obligation to deliver the title-deeds was a pre-existing one. It readied me stage of culmination on July 12, 1960. S.K. Banerjee had already paid to the company huge sums to enable the company to pay up the dues of the previous mortgages to M/s National and Grindlays Bank. It might be that the company was in need of more money. The company might have thought it necessary to borrow again. S.K. Banerjee, admittedly, had the controlling interest (in, the company. Accordingly, it was the interest of S.K. Banerjee that, further money was to be borrowed. If under such circumstances, the resolution of July 7, 1960, contemplated further borrowings from bank that could only be possible with the, concurrence of S.K. Banerjee. The idea of a second mortgage by deposit of title-deeds with the concurrence of the first mortgagee S.K. Banerjee cannot be totally excluded. Furthermore, it could not have affected S.K. Banerjee''s rights as the first mortgagee by deposit of title-deeds in my opinion, when the documents were delivered to S.K. Banerjee the same must have been delivered in discharge of the pending'' obligation as provided in Clause 3 and thereafter, to enable S.K. Banerjee to negotiate with the bank for further money on a second mortgage by depositing the said title-deeds and thereafter, if such negotiations would materialise to have a proper resolution passed by the company as provided by the resolution dated July 7, 1960.

75. Strictly speaking the resolution of July 7, 1960, should not be allowed to be raised on behalf of the company since that case was made out for the first time in the witness-box by T. Banerjee in his evidence in answer to Q. 45. Curiously enough, the case had not been made out anywhere at any stage. If that was put, S.K. Banerjee might have explained the position. Then again, this resolution had not been mentioned in any of the correspondence disclosed herein and lastly, the case made out in the plaint is entirely on a different basis which is not consistent with the case made out in the witness-box. Accordingly, the possibility, as indicated above, could not be totally ruled out.

76. In support of July 7, 1960, resolution, it was argued that it was only when this resolution was passed that the documents were parted with from the possession and custody of T. Banerjee in favour of S.K. Banerjee. If such title-deeds were to be delivered to S.K. Banerjee in pursuance of Clause 3 then there was no point in keeping the title-deeds with T. Banerjee and Company from May 24, 1960, till July 12, 1960, but this case also had not been put to S.K. Banerjee in cross-examination. The point was raised for the first time in appeal and S.K. Banerjee was not given any opportunity to explain the position.

77. I shall now discuss the transaction the company had with J. Thomas and Company in 1961 It is contended that from February 27, 1961, till October 30. I''961, the title-deeds were being dealt with by the company quite freely for the loan transaction. Hence, that would go to suggest that there was no mortgage by the

deposit of the title-deeds in favour of S.K. Banerjee. A receipt given by T Thomas and Company Ltd. has been disclosed and tendered in evidence as Ex. ''D''. Nobody has been called from J. Thomas and Company to prove the contents or to explain under what circumstances the 27 title-deeds, mentioned therein, were received from Tukvar Company Ltd. by the said J. Thomas and Company T. Banerjee in his evidence at first suggested that he knew that Tukvar Company Ltd. took a loan from J. Thomas and Company on the security by hypothecation of crops and the title-deeds were also sent to J. Thomas and Company T. Banerjee solemnly proved the said receipt being Ex. ''D''. He tried to maintain in examination-in-chief that pursuant to the resolution dated July 7, 1960, J. Thomas and Company was approached for a loan and they gave a loan against the said 27 title-deeds. He, further, said that the said loan was repaid and J. Thomas and Company returned the 27 title deeds to Tukvar Company Ltd. Referring to October 30, 1961, letter, T. Banerjee said that he had seen that letter. The letter dated October 30, 1961, was marked for identification in examination-in-chief. He first said that although there was no mortgage by deposit of the title-deeds with any bank but a loan was taken from J. Thomas and Company and the title-deeds were deposited with them. In support of his answer he referred to the said receipt (Ex. ''D''). When further questioned as to whether he had the knowledge that the title-deeds were deposited with J. Thomas and Company to create a security, he said that was his impression. Ultimately, he admitted in his evidence that money was taken from J. Thomas and Co and that was said by him on the basis of what he heard. Even at the stage he tried to contend that as a Director of the company he had some know ledge of the parties from whom loan was being taken, but regarding J. Thomas and Company he categorically admitted that what he said was on the basis of what he heard. In Q. 233 he said:
That is so but is not hearsay. If I may respectfully submit to you in that sense because as Director of this company I had some knowledge as to the parties from whom loans were being taken. I had heard that loans had been taken from J. Thomas and Company

He was thereafter, cross-examined on the letter of October 30 1961. Referring to the said letter T. Banerjee said that J. Thomas and Company returned the said title-deeds because their loan was repaid and that was his submission. By reading the letter dated October 30, 1961, he said in answer to Q. 242:

That is not correct. Because the loan was advanced in February 1961 and the loan was repaid by October 1961 and these title-deeds and all other papers including the deeds and other things were returned along with this letter. It is quite clear from this letter.

Then in answer to Q. 244 he tried to connect the resolution dated. July 7, 1961, with the transaction entered into by and between the company and J., Thomas and Company, even though he knew it fully well that the said resolution related to authority to approach a bank. In answer to Q. 246 he admitted that as a Director of

the company he had no knowledge of any discussion about any mortgage of the title-deeds with J. Thomas and Company

78. In my opinion, the transaction with J. Thomas and Company is not authorised by any resolution either by the Board of Directors or by the company in its General Meeting and accordingly, no mortgage should be presumed there. Even assuming that there was a mortgage in favour of J. Thomas and Company by the deposit of the title deeds with the intent to create security thereon that by itself could not militate against the creation of the mortgage in favour of S.K. Banerjee on July 12, 1960, in furtherance of the intention as expressed in Clause 3. As observed above, S.K. Banerjee, having the controlling interest in the company, could very well be interested in raising further money on behalf of the company from Tea brokers like J. Thomas and Company for temporary accommodation of loan either by creating second mortgage or by postponing his rights under the said mortgage in favour of J. Thomas and Company It is significant to note that if T. Banerjee''s evidence is to be accepted that there was actually a mortgage by deposit of title-deeds with J. Thomas and Company Ltd. although there be no resolution of the company in its General Meeting there could hardly be any reason as to why in the course of his argument Mr. Sen should insist on S.K. Banerjee''s proving such a resolution to support a mortgage in pursuance of Clause 3 of the agreement dated February 5, 1960. In any event, on the basis of the evidence of T. Banerjee on this point it is difficult to affirm the finding of the learned trial Judge that the title-deeds'' were deposited with J. Thomas and Company with the intent to create mortgage by deposit of title-deeds. Such a fir ding is only against the evidence on record. It is true that the letter dated October 30, 1960, was, tendered in evidence inasmuch as several questions were put in cross-examination, to Mr. T. Banerjee, vet many things remained unexplained in so far as the documents were concerned. It was quite easy for the company to call somebody from J. Thomas and Company to prove the mortgage, if any, or to produce even the company''s books and documents by calling competent witness on behalf of the company to prove the existence of any mortgage, but no attempt was made to prove any, such mortgage by such direct evidence. That being the position, the finding of the learned trial Judge on this point cannot be upheld. Under those circumstances, the evidence given by S. K. Banerjee that the said title-deeds were sent to J. Thomas and Company for the purpose of their inspection appears to be acceptable.

79. The matter can be looked into from yet another point of view. In the case of Briggs v. Jones 1870 L.R. 10 Eq. 92 the question of creating such a mortgage by deposit of title-deeds, as discussed above, was held to be possible. It could be done by the mortgagor himself after obtaining the delivery of title-deeds from the mortgagee and getting his consent. By either such process the mortgage created in favour of the first mortgagee from whom the documents are sought to be taken could not be destroyed. It might at, best amount to postponment of the payment in his favour if the mortgagor obtains further loan against the said documents from

the second mortgagee without intimating the second mortgagee about a prior mortgage created in favour of the first mortgagee. In my opinion, the principles enunciated therein are applicable to the facts of the case before us on the assumption that a mortgage was created by the company in favour of J. Thomas and Company in between the period of February 27, 1961 and October 30, 1961. It really amounts to a question of competing priorities. But vis-a-vis the mortgagor and the mortgagee the rights would remain intact. The mortgagee''s right is not lost by his parting with the documents in favour of the mortgagor so as to enable him to create a second mortgage with the notice of the first mortgage. As and when the documents come back from the first mortgagee he can enforce his right as against the mortgagor, as in this case, admittedly the documents were lying with S.K. Banerjee in between the period of July 12, 1960 and February 27, 1961 and thereafter, from November 30, 1961, till the date of the suit.

80. The next important event in point of time was the execution of the agreement of November 29, 1961. It is submitted that if there was any mortgage by deposit of title-deeds in favour of S.K. Banerjee, then the same would have found place in that agreement and in the absence of any mention of such mortgage it should be held that there was in fact no mortgage in favour of S.K. Banerjee at any time prior to the date of the said agreement. But, it is to noticed that the said agreement dated November 29, 1961, was executed for the purpose of raising the existing rate of interest from 6 6% to 7�%. There is yet another significant fact which may be noticed from this agreement that a further sum of Rs. 74,000 was lent and advanced by S.K. Banerjee in favour of the company during this period. It may also be noticed in this decument that it mentions that in spite of some variations made in the rate of interest all other terms and conditions which were contained in the agreement dated February 5, 1960, were to remain unaltered. That would also go to suggest that the intention to create mortgage as expressed in Clause 3 all throughout existed and the company never disowned that liability.

81. We now come to the time when the controlling interest in the company, which was so long held by S.K. Banerjee, was being sought to be transferred in favour of Mathuram Singh Agarwalla as would appear from the several incidents and documents of February 1, 1962. It is to be remembered that the company''s case is that there was a meeting on this date. In course of evidence T. Banerjee was asked in examination-in-chief as to whether the personally received any intimation of that meeting of February 1, 1962. After he answered in the affirmative he was asked whether he had brought the notice with him and in answer produced the notice containing the agenda (Qs. 74, 75 and 76). This document was never a disclosed document. The copy thereof ought to have been in the custody of the company. Moreover T. Banerjee came 10 give evidence on behalf of the company as a Director and as such, such a notice ought to have been disclosed before. First, it is to be noted that nothing was asked to S.K. Banerjee about this notice. Secondly the agenda in the notice does not say anything about any agenda relating to the making

over of the title-deeds. If it is a genuine document then it must be that the parties knew about the change-over of the management at least on this date, but that was not the case. Lastly, if this notice had been served on S.K. Banerjee, then how could he have sent a demand letter for recovery of his loan on January 29, 1962? For all these reasons, to my mind, the reliability of this notice is open to doubt. In any event, there is no evidence that this notice was served on S.K. Banerjee. If this notice was a genuine notice then the agreement to sell the shares in favour of Mathuram Singh Agarwalla and for repayment of the loan to S.K. Banerjee must have been completed on or before this date. It must have, been agreed then that S.K. Banerjee would retire on February 1, 1962 and Mathuram Singh Agarwalla would be appointed as a Director, T. Banerjee in his evidence has said that the stamp paper for the agreement was purchased by him on January 31, 1962, or on February 1, 1962. The draft was completed and approved on February 1 and at 12 noon he went to S.K. Banerjee s house along with the agreement. If the demand letter was sent by S.K. Banerjee on January 29, 1962, then the same must have been talked about and discussed and thereafter, the date of February 1, 1962, must have been fixed for the purchase of shares by Mathuram Singh Agarwalla. As observed above, the most important thing, viz. the execution of the formal agreement surely would have been mentioned in the agenda if the notice was a genuine one. Mr. Ghose comments that this notice was brought into existence in this surreptitious way only to show that the meeting was actually held on February 1, 1962, in the normal course and that in such meeting the fact of delivery of the title-deeds was duly recorded.

82. I trunk, Mr. Ghosh was justified in making the said comment. It appears to me to be a doubtful document and the way it was pushed into form a part of the records herein enhances the doubt in my mind. I, accordingly, do not place much reliance on this document. It is true that when the document was tendered, no objection was recorded, but we are not considering, the question of the admissibility thereof but as to what evidence should be placed thereon.

83. On February 1, 1962, it would appear from the evidence on record that the entire shares were not purchased or delivered, but all the same S.K. Banerjee resigned and Mathuram Singh Agarwalla was appointed as a Director. It is agreed by the execution of the formal agreement that the loan was to be repaid by instalments and a personal guarantee was recorded. On that very day an undated letter was executed and the same was made over to S.K. Banerjee (Ex. 1). S.K. Banerjee has admitted that he received the original thereof both in his written statement as also in his evidence. According to S.K. Banerjee as pleaded in his written statement--

the said Mathuram Singh Agarwalla, who was leaving Calcutta, handed over to the Defendant an undated letter the receipt whereof the Defendant acknowledged on a copy thereof. The said Mathuram Singh Agarwalla stated that if the Defendant changed his mind he could hand over the title-deeds to Messrs T. Banerjee and Company for the aforesaid purpose, on the strength of the said letter.

In very same paragraph on behalf of S.K. Banerjee it was pleaded that on February 1, 1962, certain proposars were made for treating registered mortgages in respect of the properties covered by the said title-deeds, but S.K. Banerjee defined to agree to any such proposal. According to T. Banerjee, however, S.K. Banerjee on that date agreed to return the said title-deeds and since the same were not with him at that time it was agreed that the same would be made over to T. Banerjee on behalf of Mathuram Singh Agarwalla.

84. The question is, if that is acceptable or not. When the formal agreement was executed on that date--was it conceivable that such an agreement to make over the title-deeds, if true, would not find place in such agreement? Would such an agreement be recorded in such an undated letter without even an endorsement from S.K. Banerjee that he agreed to deliver the same in accordance with the said letter? Why was not such an agreement recorded therein? The signature and the endorsement ''received the original letter'' would go to show merely that he had received the original of that letter and nothing more. If the agreement was entered into on that date as alleged, then S.K. Banerjee surely, in the normal course, would have written the Word ''agreed'' and then he would have put his signature.

85. It is to be remembered that on February 1, 1962, S.K. Banerjee was lying ill and while he was lying in bed in his bedroom the transaction took place. He has categorically denied (Q. 269) that he ever agreed to make over the title-deeds to the company on February 1, 1962. In the next place, the events of what had happened on February 17, 1962, when S.K. Banerjee flatly denied to return the title-deeds would go to show that there was never any agreement on February 1, 1962, to return the title-deeds. In any event, had there been any such agreement it would surely have been put in some writing. The drama, if I may call it, then reached a stage when both the parties were supposed to be acting most cautiously and in fact, they were so moving, Further more, when on February 24, 1962, by its letter the company threatened to take action against him if she did not return the title-deeds, S.K. Banerjee immediately reacted to say that he was first to be paid his money back and then only the title-deeds would be returned. That, would also go to show that there could apt have been any agreement to return the title-deeds on February 1, 1962. It such a large, gum of money was to be returned on instalments it is difficult, to appreciate why he should agree to return the title-deeds so as to loss his security for the due payment of the said loan The whole thing is not improbable that it should outright be rejected. It is quite normal to give up the hypothecation of the tea crop when his entire interest was being put an end to in respect of the ownership of the shares in the tea garden; but is it at all conceivable that S.K. Banerjee, under such, a situation, should rely only on the personal guarantee of the Agarwallas and return even the title-deeds? How in the normal course such a transaction could take place specially when there was already a criminal case earlier with the Agarwallas is difficult to think of? It is to be noticed that the learned Judge in the Court below did not consider this point at all nor did he arrive at any finding.

86. In the next place, it is to be noticed that even the minute of the meeting held on that date did not record any such agreement. All that was resolved was:

Resolved that Sri Mathuram Singh Agarwalla be authorised to take delivery of the title-deeds from S.K. Banerjee and keep the same in his safe custody for and on behalf of the company.

It appears, further, from the said minutes that on that day Agarwalla had advanced to the company the sum of Rs. 43,424-92 to enable the company to pay the said amount to S.K. Banerjee as part payment of his loan. Can it be suggested therefrom that S.K. Banerjee agreed to deliver the title-deeds to the company?

87. I shall now discuss the formal agreement entered into on that day, viz. on February 1, 1962. It is most significant that the expression ''or otherwise'' should have been stated therein if there was no existing mortgage by deposit of ''title-deeds'' in favour of S.K. Banerjee. T. Banerjee in his evidence had admitted that the said expression or otherwise was the product of his draftsmanship (Qs. 308, 312, 345 to 353). He could not give could not give any satisfactory answer as to why the expression or otherwise was used and he suggested that it might be that S.K. Banerjee might claim the said title deeds to have been deposited with him in terms of the agreement dated February 5, 1960.

88. To my mind, this expression must have been introduced consciously so that, if needed, the same might be utilised to include any possible claim for mortgage by deposit of title-deeds. It is obvious that by that time it was known to all concerned that S.K. Banerjee would not part with the said title-deeds unless his entire money would be paid back. Having known such attitude of S.K. Banerjee it must be that all efforts were being made to make him agree, in whichever way it was possible and if not, then to bind him by these expressions which would have far reaching consequences and which would appear to be innocuous even in the careful mind of S.K. Banerjee.

89. The explanation given by T. Banerjee in his evidence as to way the purchase of the entire shares was not compreted on February 1, 1962, is hardly acceptable. He then tried to suggest that some of the shares were in the nick-name of a S.K. Banerjee, but it that was so, why was it not put to S.K. Banerjee when he was cross-examined ?

90. It is difficult to appreciate why only T. Banerjee was called to the witness-box and why Mathuram Singh Agarwalla was not. It is improbable in the facts and circumstances of this case that the Board meeting was held in the bed-room of S.K. Banerjee and not somewhere else in the said premises, as suggested by S.K. Banerjee. I am inclined to accept the evidence of S.K. Banerjee and to reject the evidence of T. Banerjee on this point. There was undoubtedly a definite and an unholy motive which was playing in the mind of Agarwalla and of T. Banerjee to somehow get back the title-deeds from this ailing Director who was selling away his

controlling interest in the company yet trying his best to remain in control of the documents of title until his several lakhs loan money was repaid by the company.

91. The Plaintiff Respondent herein, viz. the company made out a very simple case in the plaint, viz., that in his capacity as Chairman of the company S.K. Banerjee held the, title-deeds. Thereafter, when he ceased to, be the Chairman by reason of his resignation, he was liabile to make over the title-deeds to the company but he failed to do so. Alternatively, he agreed to deliver the title-deeds to the company. The main case had been abandoned at the trial until it transpired that the Defendant''s case that there was a mortgage by deposit of title-deeds was substantially made out. It was only T. Banerjee who in his evidence had faintly made an attempt to suggest that S.K. Banerjee as Chairman used to retain possession of all the documents of the company, but no such suggestion was ever made or put to S.K. Banerjee when he was cross-examined. The case, to my mind, was abandoned because it could not be sustained on behalf of the company. Such a case could be made on the basis of some articles of association of the company or on the basis of any resolution of the Board of Directors of the company. What was the position of the Chairman of this company had not been established in evidence. T. Banerjee in cross-examination has agreed that it is normally a secretary who would be responsible for the company''s documents said papers. There is no reason why the company should not keep the important title-deeds with its bankers in a locker. Mr. Ghose has referred to Section 175 of the Companies Act, 1956, which provides for the function of the Chairman in a company''s meeting, but the same would not suggest any such permanent position of a Chairman of a company nor would it suggest that such a Chairman would be entitled to retain custody and possession of the documents and papers of the company. The evidence adduced before us has categorically shown that there was a previous mortgage by deposit of title-deeds with M/s National and Grindlays Bank and the amount due to them to the extent of more than ten lakhs was repaid on behalf of the company by S.K. Banerjee and for that purpose the agreement of February 5, 1960, provided expressly as agreed to by the company that, as and when the title-deeds would be obtained from the said bank, the company would create a mortgage in favour of S.K. Banerjee. If the documents were always to be kept in the safe custody and possession of S.K. Banerjee in his capacity as Chairman, why should such documents remain with M/s T. Banerjee and Company for such a long time, viz., from May 24, 1960, till July 12, 1960 ? That would also prove that the Plaintiff case, as made out in the plaint, has no merit and should be rejected.

92. In my opinion, some of the most important factors have not been properly taken into consideration in deciding this case. Firstly, admittedly the loan was repaid by the company with the help of the moneys advanced by S.K. Banerjee. Secondly, there was a valid mortgage created by the company by deposit of title-deeds in favour of National and Grindlays Bank. Thirdly, it was necessary to pay up the National and Grindlays Bank because the bank tiled the suit and got an order for the

appointment of the Receiver. Fourthly, the company admittedly executed the agreement dated February 5, 1960, which remained unassailed. Accordingly, no challenge could be thrown as to the authority of the company to give the undertaking to create the mortgage as provided in Clause 3 thereof without challenging the entire agreement itself. Fifthly, S.K. Banerjee had the controlling interest over this company and accordingly, it was in his own interest that he should, in the normal course, try to raise further money if necessity would so arise, to protect the company in time of difficulty and for that purpose it might only be a normal behaviour on his part to allow the documents to be used, for whatever purposes it might be, so that further moneys might be raised as was raised in this case from J. Thomas and Company Sixthly, it could not be that the documents remained with him by virtue of his position as Chairman--a case as was made out in the plaint, because that would be inconsistent with the pleading in para. 2 of the plaint that S.K. Banerjee

expressly and/or, impliedly agreed to return the said title-deeds to the Plaintiff as decided at the said meeting.

Seventhly, the evidence discloses that round about the time when S.K. Banerjee decided to self off his controlling shares and/or the entire interest in the said company in favour of Mathuram Singh Agarwalla, it was made clear by him that he would not part with the documents of title unless and until the entire amount lent and advanced by him was paid up. Both T. Banerjee and Mathuram Singh Agarwalla were conscious of the position and they were making every effort to get the documents from S.K. Banerjee taking advantage of his ill health and also taking advantage of the fact that his sons and relations had not been behaving normally with him. Shyamal was definitely under the influence of T. Banerjee. His sons-in-law were also acting against his interest and hence, finding that S.K. Banerjee was so adamant in parting with the documents of title, the company and/or its Directors and Secretary excluding S.K. Banerjee had to adopt ways and means in such a manner that it would be difficult for S.K. Banerjee to appreciate the legal implication of the document which, if legally construed, might amount to such an agreement on his part so as to make him part with the title-deeds. Such a document was couched in such language which was not understandable to S.K. Banerjee, because if there would be an express clause to part with the title-deeds then S.K. Banerjee would refuse to sign such a document.

93. In my opinion, the behaviour of T. Banerjee in this regard was not that of a lawyer acting On behalf of the company in the usual manner but that of an interested Director of the company, consciously trying to get back the documents from S.K. Banerjee by employing his legal acumen and experience in such a manner so that the claim for mortgage of S.K. Banerjee might not be sustained in future. The learned trial Judge did not find any fault with regard to the behaviour and action of T. Banerjee and judged him as a senior lawyer of this Court but, in the facts and

circumstances of this case, I am unable to agree with him there and I have no doubt in my mind that T. Banerjee himself was an interested party and wanted to help Mathuram Singh Agarwalla in respect of this deal. That was the reason why he alone volunteered to come to the witness-box and did not allow any other, person to come and depose on behalf of the company. He became a Director only in March 1962 and accordingly, he was not in a position to say anything about or on behalf of the company as to what had happened relating to the period, prior to that from his personal knowledge. According to S.K. Banerjee he was brought in by S.K. Banerjee as a Director and ever since he became the Director T. Banerjee was all in all in the sense that everything would proceed on the basis of his advice.

94. As against that, it is evident that the ailing Director S.K. Banerjee, who was suffering from cancer in the prostate gland, was so helpless both in family matters and in business matters that he thought of selling off his interest the company. He could sell of his shares, but he could not find put ways to get back the amount lent and advanced to the company immediately. Agarwalla agreed to pay him by instalments. It was a huge amount to the extent of Rs. 12 lakhs and odd. He had to give up his, rights of hypothecation of the tea crops and of the selling tight. His only protections were in those circumstances, would it not be, the normal behaviour for a person like S.K. Banerjee to protect his fights in respect of the mortgage in his favour created by the company by deposit of the title-deeds? The probability of the case is undoubtedly and overwhelmingly in favour of S.K. Banerjee and against the company. Were the then circumstances not such, that he could realise that his huge claim on account of loan would never be realised if his mortgage would be given up?

95. It is true that a very legitimate comment has been made on behalf of the company as to why the letter dated February 9, 1962, did not mention about the mortgage by deposit of the deeds when D.L. Mukherjee gave a notice u/s 134 of the Companies Act. But even then, to my mind, the inference to be drawn therefrom is a weak one in favour of the company s case that there was no mortgage, By that notice a definite pressure was sought to be put on the company to pay up the loan to S.K. Banerjee and that must be the reason why any mortgage was not mentioned. If the mortgage was mentioned, perhaps the notice for winding up would have been weaker and that must have promted D.L. Mukherjee acting under the advice of S.K. Banerjee not to mention about the deposit of the title-deeds in such notice.

96. There is still another factor which was commented upon on behalf of the company that no particulars of the equitable mortgage, if any, were furnished by S.K. Banerjee to the Registrar or Joint Stock Company. That step is normally to be taken by the company under the Companies Act so that, in case the company goes into liquidation, the Liquidator would not be in a portion to treat the transaction as a void one. In the absence of such particulars being furnished the same would be void as against the Liquidator and the mortgagee would lose his priority. It is also true that in the correspondence prior to March 3, 1962, there is no mention of this

equitable mortgage, but the admitted position which has come out in the evidence was that on February 17, 1962, when T. Banerjee and Agarwalla went (sic) S.K. Banerjee at his residence and Agarwalla purchased the remaining shares and got delivery thereof, S.K. Banerjee flatly refused to part with the documents of title and thereby asserted his right over the same as a mortgage. This was also repeated in the same way by the letter dated March 3, 1962. These are matters which had not been discussed or considered by the learned Judge at all. The learned Judge also failed to take note of the fact that the case in the plaint was completely given a go-bye and that the agreement, as pleaded in para. 2, was inconsistent with the main case made out in the plaint. The case of wrongful detention of the documents of title because S.K. Banerjee ceased to be the Chairman was not pursued and was abandoned. Then again, it was not correct to say, as pleaded in the plaint, that all throughout the title-deeds remained with S.K. Banerjee. These were delivered to S.K. Banerjee only on July 12, 1960 and prior to that they were in a bank and thereafter with T. Banerjee and Company No document was disclosed to prove the powers of the Chairman. No resolution was tendered. T. Banerjee was not the proper person to speak about any resolution of the company prior to his appointment as the Director of the company. There was no suggestion to S.K. Banerjee that as the Chairman he was to hold the documents on behalf of the company so long he remained a Chairman. It was true that the only and main issue was relating to the mortgage in respect whereof the onus lay heavily on the Defendant S.K. Banerjee but, on the evidence as discussed above, such onus was primarily discharged and had shifted on to the company to disprove the same and in doing so, it was surely relevant to consider the Plaintiffs case as is made out in the plaint.

97. The learned Judge also failed to consider that a different case was made out on behalf of the company only in course of evidence of T. Banerjee, viz. the purpose why the title-deeds. were made over to S.K. Banerjee on July 12, 1960, This, story was a departure from the plaint. This related to, the resolution of the Board of Directors dated July 7, 1960. The same was never put to S.K. Banerjee. Such a resolution did not find place in any of the correspondence or documents. I have already discussed the said resolution in details and the implications thereof. The admitted position was that no bank was ever approached and the documents ever since remained in the possession of S.K. Banerjee until at least February 27, 1961. Such a resolution was not an effective resolution. It was a resolution to pass a further resolution after negotiation with a bank. It was a resolution to get further money for the company. It was a resolution of the Board and not of the company, but Clause 3 was provided in an agreement entered into by and on behalf of the company. The learned Judge failed to appreciate that even assuming that there was a mortgage by deposit of title-deeds in favour of J. Thomas and Company that could not go to disprove the mortgage or the intention to create mortgage in favour of S.K. Banerjee in respect of the loan advanced by him to the company. Such a dealing with J. Thomas and Company was not inconsistent with the prior mortgage with S.K.

Banerjee. If the title-deeds were so mortgaged then the same was so done with the consent and approval of S.K. Banerjee. The documents dated November 29, 1961, recited that a further sum of Rs. 74,000 was advanced by S.K. Banerjee and the evidence shows that thereafter the documents again came back to S.K. Banerjee. It was a simple thing for the company to produce its books of accounts and to prove by competent witness that a mortgage by deposit of title-deeds was actually created in favour of J. Thomas and Company, but the company did not choose to do so. Even then, taking the worst as against S.K. Banerjee. I have already observed that such a mortgage could not have been inconsistent with or could not have destroyed the prior mortgage in favour of S.K. Banerjee. Lastly if no papers and documents were executed on February 1, 1962 and if the parties applied their conscious mind over the matter what was the difficulty in inserting a clause in the formal agreement that S.K. Banerjee agreed to return the title-deeds to the company?

98. By taking into consideration all these facts and the entire surrounding circumstances of this case. I have no doubt in my mind that there can be but one conclusion that the mortgage by deposit of title-deeds was created on July 12, 1960, as stated in the written statement and in the particulars furnished to the Defendant''s Solicitor. The case made out by the Defendant in the written statement relating to mortgage and issue no. 1 as framed was fully proved. The learned judge clearly went wrong in appreciating the evidence before him and in weighing the same properly and correctly. Issue no. 2 was not pressed before him.

99. The result, therefore, is that the appeal is allowed with costs including costs of the commission evidence which is to be paid by the Plaintiff Respondent to the Appellant. The judgment and decree of the learned trial Judge is set aside and the suit is dismissed with costs Certified for two counsel.

100. It appears that by an order of the Court dated November 19, 1963, the Official Receiver was directed to hand over the title-deeds to the Plaintiff Respondent upon the undertaking on the part of the said company and one of its Directors Raghu Nath Singh Agarwalla given through the learned Advocate then appearing that the Respondent company and the said Raghu Nath Singh would return forthwith the title-deeds being the subject-matter of the said suit to the Official Receiver of this Court as Receiver herein free from all encumbrances, if any, created after this date by the said Respondent company and/or the said Raghu Nath Singh Agarwalla if the Appellant would succeed in the appeal. On the basis thereof, we direct that the Plaintiff Respondent do forthwith make over the said title-deeds, which were so delivered in pursuance of the said order, to the Appellant through his Advocate on record. All parties to act on a signed copy of the minute of this order upon the Appellant''s Advocate''s undertaking to draw up, file and complete the decree and order passed herein. Let the decree and order be drawn up expeditiously. Stay is refused.

Hazra, J.

101. I agree.