

(1962) 12 GAU CK 0007

In the Gauhati High Court

Case No : Letters Patent Appeal No. 8 of 1961

Bhramar Lal Baxi and Another

APPELLANT

Vs

Promode Ranjan Chaudhury and Others

RESPONDENT

Date of Decision : 06-12-1962

Acts Referred:

Companies (Consolidation) Act, 1908 — Section 93
Companies Act, 1900 — Section 13(1), 15, 80, 86, 87
Companies Act, 1913 — Section 109
Companies Act, 1956 — Section 120, 125

Citation : (1962) 12 GAU CK 0007

Hon'ble Judges : G. Mehrotra, C.J.;C.S. Nayudu, J

Bench : Division Bench

Advocate : S.M. Lahiri and K.P. Bhattacharjee, for the Appellant; S.K. Ghose and P. Choudhuri, for the Respondent

Final Decision : Dismissed

Judgement

G. Mehrotra, C.J.—Sri Promode Ranjan Chowdhury, Respondent before us and hereinafter called the Plaintiff brought a suit in the court of the Subordinate Judge, Cachar, Silchar for recovery of Rs. 7,380/- as damages for trespass upon the land claimed by Plaintiff and for wrongful occupation of the first floor of the building at a monthly rate of Rs. 205/-for three years from 1st April 1950 to the 31st March 1953 against Defendant No. 1. He further claimed an Injunction restraining the Defendant from taking the money deposited in and now lying in Karimganj Treasury as monthly rent of Rs. 40 for the four back rooms of the first floor by the Land Customs Department in Requisition Case No. 4 of 1948-49 until the decision of this case.

2. The Plaintiff's case is that he had a money decree against the Standard Bank Limited, in execution of the said decree he purchased the two-storeyed building and the land upon which it stood. The description of the property is given in the schedule attached to the plaint. The building Is a double storeyed one consisting of seven rooms situate on a land measuring 55 x 55 ft. The property was

attached In August 1948 and the auction sale took place on the 10th November, 1948. The sale was confirmed on the 19th February 1949 and the Plaintiff claimed to have taken delivery of possession through court on the 18th September 1949. On the 4th December 1948 Eklmur Raja Chowdhury who has been imp leaded as Defendant No. 4 in the court of the Additional Subordinate Judge, granted a lease for six years to Defendant No. 1.

The Standard Bank executed a mortgage in favour of Defendant . No. 4 on the 12th August 194/. The mortgagee Defendant No. 4 gave the portion of the building in question to Defendant No. 1 on lease. Four rooms of the first floor were in the actual occupation of the Land Customs Department on being requisitioned by the Deputy Commissioner. Possession was taken by the Land Customs Department on the 1st February 1949 and thereafter the Plaintiff under the purchase claimed rent from the Deputy Commissioner, Cachar as according to him the rooms belonged to him. As to the three other rooms of the first floor the case of the Plaintiff is that they are illegally in occupation of the Defendant No. 1 and he has claimed damages for such illegal occupation. The mortgage executed by the Standard Bank in favour of Defendant No. 4 is challenged. It is further urged that the lease is invalid. The trial court dismissed the suit. On appeal to this Court the single Judge has set aside the order of the Subordinate Judge and has decreed the suit. It is against this decision that the present appeal has come up before this bench.

3. The main contention of the Plaintiff-Respondent before the courts below was that the mortgage executed by" the Standard Bank (hereinafter called "the Co.") was void In view of the provisions of Section 109 of the Indian Companies Act of 1913 and as such the lessee has no right to remain in possession of the rooms. From the date of the sale of the property in favour of the Plaintiff the Plaintiff acquired title to this property and the possession of the Defendant became illegal. In effect the argument is that the possession under the mortgage of the Defendant No. 4 - the leesor of Defendant No. 1 - became illegal and the Plaintiff was entitled to get possession over the property after the auction sale. The occupation of the Defendant No, 4 over the disputed building by leasing it out to the Defendant No. 1 is illegal.

4. Section 109 of the Indian Companies Act 1913 which corresponds to Section 125 of the Indian Companies Act, 1956, is as follows:

109 (1) Every mortgage or charge created after the commencement of this Act by a company and being either-(sic)

(f) a floating charge on the undertaking or property of the Co.

shall, in so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the Instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the

registrar for registration in manner required by this Act within twenty-one days after the date of Its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

Provided that:

(1) in the case of a mortgage or charge created out of the Provinces comprising solely property situate outside the Provinces, twenty-one days after the date on which the instrument or copy could, in due course of post, and it dispatched with due diligence, have been received in the Provinces shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar.(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

Only the relevant provisions of the section have been quoted above. Section 120 provides as follows:

120(1). The Court, on being satisfied that the omission to register a mortgage or charge within the time required by Section 109, or that the omission or misstatement of any particular with respect to any such mortgage or charge or omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors, or share-holders of the Co., or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified,, and may make such order as to the costs of the application as it thinks fit.

(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.

5. Mr. Lahiri who appears for the Appellants, contends that the effect of non-registration of the mortgage u/s 109 is not to render the mortgage a nullity. The section only means that if the charge or the mortgage has not been registered it will be void against the liquidator and any creditor of the company. It only means that the liquidator is not bound by that mortgage and the assets of the company which have been mortgaged will be available to the liquidator for distribution among the various creditors. It will not be open to a mortgagee to say that he

will" stand out of the winding up proceedings as he holds a charge over the property of the Co. The words "and any creditor in Section 109 only relates to the creditor who has not an interest in the property and not a simple money creditor and further the clause only means that if a mortgage has not been registered, the mortgagee will have no priority over other creditors in liquidation proceedings.

It is urged that the mortgage will be a valid mortgage and binding on the company as a going concern. The liquidator in winding up proceedings is not entitled to ignore the mortgage as the representative of the Co. but only in his own right as the liquidator of the Co. as well as on behalf of the creditors. When a mortgage or a charge becomes void under this section, the money secured thereby shall immediately be payable. This clause also shows that the mortgage is not a nullity. Section 120 which gives power to the court under certain circumstances to extend the time for registration, expressly lays down that the extension of time will not prejudice any rights acquired in respect of the property concerned. When Section 109 is read along with Section 120 it is contended that the failure to register is to affect only the right of the creditors who have some interest in the property and not simple money creditors.

To our mind on the plain reading of Section 109 it cannot be said that the failure to register the mortgage renders the mortgage invalid and a nullity. The effect of the section is that if the mortgage is not registered, the liquidator is not to take notice of it as a mortgage. The debt will survive and it will be treated on a par with other debts. The property which is the subject-matter of the security will be available as the assets of the company to the liquidator for payment to the creditors. The creditors in liquidation will not be affected by the mortgage. This section does not take away the right of the company to deal with its property. If the company can validly deal with its property, any transfer made by the company will be binding on the company. If the company mortgages certain property, any person who subsequently purchases the property from the company will take it subject to the mortgage and Section 109 is no bar to the mortgagee enforcing his mortgage as against the transfer of the company simply because it has not been registered u/s 109.

In the present case there is no evidence to show that the company has gone in liquidation. It is not the liquidator who in the course of the liquidation proceeding is contending that the mortgage is not binding on him. It is the creditor of the company who in execution of his decree has purchased the property and is contending that his purchase is free from the mortgage. Section 109 does not warrant such an interpretation.

6. There is no prohibition u/s 109 to the company to transfer its property. If a mortgage created by the company is not registered, it is only void against a liquidator and a creditor. This section only means that such a mortgage can be avoided by a liquidator and a creditor. The question of the liquidator's avoiding it would only arise if the company has gone into liquidation. So far as the creditor

is. concerned, the right to avoid would also arise In liquidation. The purpose of Section 109 in calling upon a company to register the charge or mortgage is for the benefit of the liquidator and the creditors in liquidation. A creditor who has no Interest in the property cannot put any restraint on the powers of the company to mortgage Its property. Neither the language of Section 109 nor the purpose behind it can justify such an interpretation. In effect the contention of the Plaintiff is that from the date of the auction purchase he became the owner of the property free from encumbrance. The possession of the mortgagee or his lessee became illegal. What he purchased was the property and not only the right of redemption.

7. In order to find out as to what was actually purchased by the Plaintiff it will be necessary to refer to the sale certificate and the proceedings in execution of the decree. On the 7th June 1948 the application filed by the Plaintiff for execution of his decree against the Standard Bank Limited was taken up and an order was passed for attachment of the property. On the 5th July, 1948, notices under Order 21 Rule 66, Civil Procedure. Code were directed to be issued. An application .was filed" by the Plaintiff decree-holder in the execution case No. 1& of 1948 in which it was stated that the decree-holder become to know that the judgment-debtor"s property which had been attached by the decree-holder in execution of the decree has been mortgaged by the judgment dabor to Mlvi. Eklmur Raja Chowdhury of Sylhet Town by a registered mortgage deed on 13th August 1947 after taklnft a loan of Rs. 55,000 from him before the attachment of the said property. The principal and interest of the said mortgage have become Rs. 58,710-15-6.

It was prayed that the sale proclamation should be issued after declaration that the said property has been encumbered by way of mortgage. As the property has already been mortgaged the decree-holder further prayed? that it should be added in the sale proclamation that the value of the property is Rs. 2,000/- only. The sale certificate which is marked Ext. 1" states that the decrees-holder has purchased the interest of the judgment-debtor la respect of the property given in the schedule for a of Rs. 2,500 in execution of his decree. The sale was confirmed on the 19th February 1949. In the sale certificate there is a note to the effect that as the land and toe-house were mortgaged by a registered mortgage dated executed on the 13th August 1947 for a sum of Rs. 58,710-15-0 including the principal and interest to Janata Eklmur Raja Chaudhury of Sylhet Town, the same went sold in auction after declaration of the said, mortgage.... This clearly shows that what the Plaintiff purchased was the right and interest of the judgment-debtor, that is, the bank. subject to the mortgage. In view of the clear statement the sale certificate it is not open, to the Plaintiff to sap that what the Plaintiff purchased under the sale certificate was the property and that the interest which he purchased was larger than the Interest of his Judgment-debtor in the property.

It cannot be disputed that If the mortgage in favour of the Defendant is not an

invalid document the mortgagee under the terms of the mortgage was entitled to remain in possession. The contention of the counsel for the Respondent is that on the proper Interpretation of Section 109 the only remedy of the mortgagee is to bring a suit for the recovery of the amount and not to retain possession as against the Plaintiff. As I have already shown, on the proper interpretation of Section 109 it cannot be said that the mortgage is invalid and a nullity. The mortgage will not affect the right of the liquidator to bring in the property for distribution among the creditors and also a creditor in liquidation is entitled in view of Section 109 to say that a secured creditor will have no priority against him. It should also be noted that the Plaintiff obtained a decree on his debt. His debt thus merged into the decree. After the execution of the decree he claims to be the owner of the property and what he is trying to enforce by means of the present suit is not his right as a creditor but as the purchaser of the property. As the purchaser of the property u/s 109 he cannot claim that the mortgage is void.

8. The contention of the Respondent is that the word "void" used in Section 109 should be given its ordinary meaning. The word "void" may be sometimes construed as avoidable" and where the provision is introduced for the benefit of the parties only, such a construction may be right. If however it is introduced for public purposes, and to protect those who are incapable of protecting themselves it should receive its full force and effect Bayley J. in the case of *R. v. Hips well*, (1828) 8 B & C 466. If the language that has been employed does not plainly and conclusively indicate the intention of the Legislature that the contract should be void for all purposes, it would seem that if the inhibition is merely for the benefit of a particular person or persons the Court will lean to the construction that the contract is voidable at the election of the person or persons for whose benefit the inhibitory Act was enacted. In the present case there is nothing in Section 109 which goes to show that the contract was declared to be void for all purposes.

9. It would be convenient at this state to examine some of the authorities cited at the bar.

10. The first case referred to is *re Monolithic Building Co., Tacon v. The Co.* reported in (1915) 1 Ch. 643. The provision of a statute which came for interpretation was Section 93 of the Companies (Consolidation) Act, 1908, which was in similar terms as Section 109 in question. The facts were that the Defendant company acquired some property and executed a mortgage on March 3, 1913 in favour of the Plaintiff. That mortgage was not registered under the Companies Act. it was subsequently registered but not within the period allowed by the Act. There was a first mortgage debenture subsequent to that which was registered. This was granted to the Plaintiff and there was a second mortgage debenture which was also registered. Before the action was brought the period for registration of the mortgage of the Plaintiff was extended up to April 17, 1914. This order was made without prejudice to the rights of the parties prior to the time when the mortgage was actually registered. The main point which was

urged there was that as the subsequent debenture mortgage was subsequent to the original mortgage and the first mortgage was registered later, still as the second mortgagee knew of the first mortgage, the first mortgage must be given priority. Dealing with the language of Section 93 Lord Cozens-Hardy M. R. observed (at page 662) as follows:

This was a mortgage on land executed by a Co., and Section 93 says: (The Master of the Rolls read the section and continued:) Mr. Jenkins, of course, was creditor of the company in respect of his registered debenture. That is quite plain. This section says that so far as any security under the property comprised in the unregistered mortgage is concerned it is to be void against the liquidator, and any creditor of the company unless registered within this period. What does that mean? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of winding up, but that is a contingency which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing an opinion.

Phillimore, L.J. said.

We have to construe Section 93 of the statute. It makes void a security; not the debt, not the cause, of action, but the security, and not as against everybody, not as against the company grantor, but against the, liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company. There are three ways in which documents, or three degrees to which instruments, may be void. They may be void altogether, like a bill of sale under 301. under the Bills of Sale Act, 1882; they may be void as to the security and good as to the obligation, and they may be void against certain parties only; but in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying "to all intents and purposes or any phrase of that kind.

In this case the facts were no doubt different. The question was not between the purchaser under simple money decree and a mortgagee of the property. The question there was of priority between a mortgagee whose mortgage had not been registered under the Companies Act and another mortgagee whose mortgage had been registered. Undoubtedly if the purpose of Section 109 is that it does not make the mortgage void in toto, it only states that it will not have an effect as against a creditor who has got his mortgage registered, the "creditor" in the section must necessarily mean a creditor who has got a charge over the property or a mortgage. In the case of a simple creditor the question of registration u/s 109 will not arise at all.

11. The next case is "In the matter of Chandball Steamer Service Co. Ltd." reported in 60 Cal WN 278. The facts of that case no doubt are different. The matter arose out of an application by the Union of India for extension of time of the registration of the mortgages dated 5th January 1953 and 2nd March 1953 and the collateral instruments dated the 9th January 1953 and the 5th June 1953. In 1952 an application for winding up of the company was presented and on the 7th January 1953 an application for sanction of a scheme was presented. On the 31st January 1955 a provisional liquidator of the Co. was appointed and on the 9th March 1955 the Co. was ordered to be wound up. The application for registration of the mortgage was opposed by the liquidator of the company and also by some unsecured creditors of the company. The application was rejected and it was observed that this will be without prejudice to the question whether or not the several mortgages, charges and instruments referred to in the petition at all required registration u/s 109 of the Indian Companies Act. The court was satisfied that the omission to register the mortgages, and charges or instruments was due to Inadvertence. The Calcutta High Court was further satisfied that the order extending time should not be made" In this case as the winding up had already been made and the liquidator had been appointed. The relevant observations relied upon by the counsel for the Appellants (at page 281) read as follows:

The section makes void a security comprised in certain unregistered mortgages and charges against certain persons. This section makes the security void "not as against everybody, not as against the company grantor, but as against the liquidator, and against any creditor, and it leaves the security to stand as against the Co. while it is a going concern. It does not make the security binding on the liquidator as successor of the Co....

In Spite of the generality of the expression any creditor an ordinary unsecured creditor of the Company cannot avoid the mortgage, for he has no enforceable right either against the mortgagee or against the property comprised in the mortgage. Only a creditor of the Company who has acquired a right against the property may intervene and avoid the mortgage, e.g., where he has a charge over the property or where the Company is in liquidation and he has acquired a right to the ratable distribution of the assets of the Co.

12. The next case is Aung Ban Zeya v. C. R. M. A. Chettiar Firm reported in AIR 1927 Rang 288. There the mortgagee brought a suit for the enforcement of his mortgage against the Co. - the mortgagor. One of the points taken by the company was that as the mortgage is not registered it was void. It was held that the mortgage though unregistered could not be repudiated by the Co. itself while it is a going concern.

13. The next case is "In re Ehrmann Bros. Ltd., Albert v. Ehrmann Bros. Ltd., reported in (1906) 2 Ch. 697. In this case it was held that where debentures are inadvertently omitted to be registered within the twenty-one days prescribed by the Companies Act, 1900, and are subsequently registered under an order

extending the time for registration, and the order contains the usual proviso that it is to be without prejudice to the rights which may have been or may be acquired against the holders of the debentures in question prior to the time when they shall be actually registered, an ordinary unsecured creditor of the company at the date when the debentures are registered .is not entitled to rank paripassu with such debenture-holders unless he has taken steps to enforce his debt, or un-, less a winding-up has intervened. It is true that the matter involved there was the interpretation of the section corresponding to Section 120 of the Act of 1913 and further of the order under which the time for registration was extended, still the principle laid down in this case was that the unregistered mortgage will have priority as against a simple creditor unless the creditor comes to winding up or has enforced his debt. At pages 705-706 of the judgment of Vaughan Williams L. J. it was stated.

I think that the intention of the Legislature, as appears by the statute itself, was, in a case where the omission to register was accidental and the extension of time was a just thing to grant, to place the debenture-holders in the same position as they would have been in if they had registered in due time. But of course the legislature had to make provision for the rights of those who had obtained rights which existed at the time when the order for the extension of time was made. I do not think that the Legislature meant by that that an unsecured creditor, merely because he was an unsecured creditor at the time when the extension order was made, should be allowed to say, "So far as I am concerned, that debenture which was not registered in due time, but which was registered under the order for extension, is a void debenture." In fact, It is not really contended that he can say so. Counsel for the Respondents admitted most frankly that in a case, at all events where debentures are registered under the extension order before a winding-up occurs it is impossible to say that the debenture is void. They only say, "Although It is not void this extension order stops the person registering under It from saying, as against an unsecured creditor, that this debenture is not void, but is an effective security which still continues as against him." I think that is not the right view, and, therefore, I think that this order of Joyce J. must be amended.

14. No authority has been cited before us which will show that a mortgage though validly executed by the company will be void ab initio unless it is registered. In our opinion what Section 109 provides is that the mortgage will be void as against the liquidator and the creditors. It only means that in the liquidation proceedings the liquidator can say that the mortgage is not binding on him and the property mortgaged will be available to him for distribution to the creditors. It may be open to a creditor though a simple money creditor in liquidation to say that the mortgagee cannot claim priority in respect of his debt. Nor can the mortgagee keep away the property mortgaged to him from being treated as an asset of the company so as to be distributed to the creditors ratably. Unless the matter goes to a winding up, only the creditor who has got his mortgage registered can claim that the unregistered mortgage is void as against

him. This necessarily means that so long as the liquidation proceedings do not start the creditor who can claim the unregistered mortgage void as against him is a creditor who has got a charge over the property or has obtained a mortgage. A simple money creditor cannot avoid the mortgage simply on the ground that it has not been registered.

15. The learned single Judge has considered the question as to whether the principles of waiver and estoppel are attracted in the present case. It cannot be disputed that there can be no estoppel against the statute. It also cannot be disputed that waiver is also a form of estoppel. But in the present case on the interpretation of Section 109 by us it cannot be said that there is any statutory prohibition contained in Section 109. If a statute prohibits that a particular property cannot be mortgaged or the mortgage will be void, no amount of estoppel can deprive even the party to the contract to say that the contract is a nullity. The contention of the Appellants in effect is that Section 109 does not give any power to the purchaser to avoid the mortgage. Nor does it render a mortgage void ab initio. This plea cannot be said to be pleading estoppel against the statute. Dealing with the question the learned single Judge has observed as follows:

It is true that waiver is only the abandonment of a right which one is at liberty to waive. It signifies intention not to insist upon a right. But in the instant case, a mortgage not registered u/s 109 of the Act has been made void as against a creditor or the liquidator. Any agreement to waive a void instrument will itself be void. Section 109 does not make a mortgage, not registered under that section, merely avoidable.

This observation of the learned single Judge is based on his interpretation of Section 109. If we hold that Section 109 is a complete prohibition to the Co. transferring a property, undoubtedly it is not open to any party to waive the prohibition. If a right is created in favour of a party under certain statutory provision, such a right can be waived even though the provisions of the statute may be mandatory. But if the statute does not create any right or is not enacted for the benefit of an individual, the question of waiver would not arise. The act is prohibited. There is an inhibition contained in the statute for such a contract and under those circumstances the question of waiver would not arise.

16. The real question is the effect of Section 109 on the mortgages which are not registered. It is not necessary to examine in detail the various authorities cited by the counsel for the Respondents and referred to by the learned single Judge for the proposition that a right acquired under a void contract cannot be waived or an absolute prohibition contained in a statute cannot be waived. It will be sufficient to refer to the case of *Vellayan Chettiar v. Govt., of the Province of Madras*, reported in AIR 1947 19 and the case of *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, The first case was referred to by the counsel for the Appellants and the second was strongly relied upon by the counsel for the Respondents and by the single Judge.

17. In the case reported in AIR 1947 PC 197 the question which arose for consideration was whether the notice required to be given u/s 80 of the CPC could be waived. At page 199 it was observed as follows:

Upon the first issue the decision of this Board in AIR 1927 176 (Privy Council) appears to be decisive. It was there, said that Section 80 is express, explicit and mandatory, and admits of no implications or exceptions. The question there was whether a suit in which an injunction was claimed, was a "suit" within the section. This Board decided for the reason above briefly stated that it was. In the present case the question is whether, a notice having been given on behalf of one Plaintiff stating his cause of action, his name, description and place of residence and the relief which he claims, a suit can then be instituted by him and another. It is clear to their Lordships that it cannot. The section according to its plain meaning requires that there should be in the language of the High Court of Madras "identity of the person who issues the notice with the person who brings the suit:

The notice then being defective, the Appellants urge that the Respondents have "waived their right to a proper notice of the suit" or alternatively are "estopped from contending that no proper notice was given". There appear to be two questions here involved, (1) whether it is competent for the Defendant in a suit, to which Section 80 applies to waive his right to a proper notice and (2) whether, upon the assumption that it is so competent, the Respondents in this case waived their right. there is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided.

Dealing with the case of AIR 1938 165 (Privy Council) their Lordships said:

There the sections of the Code under consideration Were Sections 86 and 87, which in effect make the consent to the Governor-General in Council a condition of a suit being brought against a Sovereign Prince, and it was held that that condition could not be waived by the Sovereign Prince. But their Lordships would observe that this decision, which related to a consent by a third party, who was not a party to the suit, is not a governing authority where the only person concerned is himself a party to the suit. The condition to which Sections 86 and 87 relate is created not, or not merely, for the benefit of the Sovereign Prince, but to serve an important public purpose. It is for that reason that the consent of the Governor-General in Council is required, and for that reason that there can be no waiver of his consent by a Sovereign Prince. On the other hand, there appears to their Lordships to be no reason why the notice required to be given u/s 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required: if in the particular case he does not require that protection and says so, he can lawfully waive his right.

18. In the case of Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., the question of waiver was raised in connection with the Bombay Rents, Hotel, and

Lodging House Rates Control Act. The Appellant before the Supreme Court in that case was a tenant of certain premises which were purchased by the Respondent. After the purchase the Respondent gave notice to the Appellant to vacate, as he wanted to construct a new building on the site of the old building. The Appellant agreed to vacate and the Respondent let to him a portion of his new building which was not far from the old one. The Appellant had four sub-tenants, three of them also shifted to the new premises which were let to the Appellant by the Respondent.

On January, 3, 1949 the Respondent gave notice to the Defendant to vacate the premises on the grounds of non-payment of rent and sub-letting which it was alleged had resulted in the termination of the tenancy. Thereafter the suit was brought for ejectment on the ground of nonpayment of rent and sub-letting of the premises. The contention was that the sub-letting was prohibited u/s 13(1) (e) and thus the Defendant was liable to ejectment as he had sub-let the premises. One of the points taken before the Supreme Court in appeal which was never raised before, on behalf of the tenant, was that the landlord Respondent had waived his right in respect to the prohibition against sub-tenants and the provision against subletting u/s 13(1)(e) was for the protection of his right which he was entitled to waive. This contention was not accepted. The following observation at page 693 was relied upon by the counsel for the Respondent:

Assuming that to be so and proceeding on the facts found in this case the plea of waiver cannot be raised because as a result of giving effect to that plea the Court would be enforcing an illegal agreement and thus contravene the statutory provisions of Section 15 based on public policy and produce the very result which the statute prohibits and makes illegal. In *Surajmull Nagoremull v. Triton Insurance Co. Ltd.*, Lord Sumner said:

No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset The enactment is prohibitory. It is not confined to affording a party a protection of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible.

The enunciation of law by Lord Sumner has been quoted with approval by their Lordships of the Supreme Court. But in circumstances of the case in question their Lordships observed as follows:

In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the Appellant in enforcing a term of the agreement which Section 15 of the Act declares to be illegal. By enforcing the contract the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot

be condoned by any conduct or agreement of parties.

The question therefore, rests on the interpretation of Section 109. If Section 109 contains a prohibition, it the effect of enforcing the mortgage will be to perpetuate an illegality or doing something which the legislature has expressly prohibited, it undoubtedly cannot be allowed. That will be defeating the very purpose of the enactment. But if the provisions requiring registration of a mortgage are for the benefit of the liquidator and the creditor and with the sole object of making the property available for distribution among the creditors, the creditors can certainly waive such a right. Section 109 does not prohibit, as we have already said, the execution of a mortgage. This case thus is distinguishable.

19. One more case which may be dealt with Is Tinsukia Municipal . Board v. Harikissen Lohia reported in AIR 1957 Gau 10. The following passage at page 18 has been strongly relied upon by the counsel for the Respondent:

It has been also suggested that the Defendants, having ratified the terms of the document and having acted upon it; In other words, they having continued to pay to the Plaintiffs half the income derived up to March 1943, were not stopped from pleading that the document was not enforceable as a valid contract.

The rule of estoppel cannot be invoked in a case where the claim is founded upon a document which Is not enforceable under the statute. So long as the parties had not to come to Court, it may be that the Defendants continued to pay the income, and the Plaintiffs enjoyed the same; but when the document has been repudiated, it is now for the Court to consider whether or not it can be acted upon, and the principle of estoppels cannot therefore, be invoked to defeat the plain provisions of a statute.

In this case the document was held to be unenforceable as it was not registered. The Plaintiff was claiming under an unregistered document and the Defendant pleaded in court that such a document was unenforceable and gave no right to the Plaintiff to get the money from the Defendant. The Plaintiff pleaded that as the Defendant has been giving money all along, he cannot now say that he has not to pay It because the document is a nullity or Is unenforceable. Under these circumstances this Court held that the payment will not stop the Defendant from pleading that the document on which the claim is based is unenforceable and the court cannot compel the Defendant to carry out the terms of that contract In future simply on the ground that at best the Defendant has been paying the money. It was not a case where any right was created In favour of the Defendant under the contract which It was alleged that he had waived. Giving effect to the principle of estoppel would have resulted in enforcing an illegal and a void document.

20. In our opinion, therefore, on the proper construction of Section 109, the mortgage was not abilities a void document. The Plaintiff having purchased the property subject to the mortgage, cannot, now enlarge the interest which he purchased in the property and treat the mortgage in favour of the Defendant as

a nullity. The Defendant's possession thus cannot be said to be that of a trespasser. In the result therefore, we allow this appeal, set aside the order of the learned single Judge and maintain the order of the Subordinate Judge. The suit of the Plaintiff stands dismissed with costs.

C.S. Nayudu, J.

21. I agree.