
(1966) 08 CAL CK 0016
In the Calcutta High Court
Case No : O.O.C.J. 2 of 1951

Calcutta National Bank Ltd. APPELLANT
Vs
Rangaroon Tea Co. Ltd. and Another RESPONDENT

Date of Decision : 17-08-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 8, Order 8 Rule 5
Companies Act, 1913 — Section 109, 109(1), 109A, 120
Companies Act, 1956 — Section 125, 127, 141
Contract Act, 1872 — Section 23
Defence of India Rules, 1939 — Rule 94A, 95
Evidence Act, 1872 — Section 17, 58

Citation : AIR 1967 Cal 294

Hon'ble Judges : S.P. Mitra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.P. Mitra, J.—The plaintiff is a Bank in liquidation. In the plaint it is alleged that on the 30th August, 1944, the plaintiff lent and advanced Rs. 2,75,000 to Ranjit Bose, the Original Defendant No. 2 with interest at 6 per cent per annum with half yearly rests. This rate of interest was subsequently increased to 7 per cent with effect from the 1st January, 1947. Ranjit Bose deposited with the plaintiff, to secure the repayment of the loan, documents of title belonging to the Rangaroon Tea Estate, in Darjee-ling. A registered memorandum of agreement was also entered into between the plaintiff and Ranjit Bose on the 30th August, 1944, evidencing the deposit of Title Deeds.

2. The plaintiff then alleges that as further security for the advance Ranjit Bose on the 30th August 1944, charged and hypothecated by way of first charge in favour of the plaintiff certain plants, machinery, furniture and other movables appertaining to the Rangaroon Tea Estate. Ranjit Bose on the 30th August, 1944, executed also a deed of hypothecation of Tea crops to secure a cash credit account not exceeding Rs. 20,000 in the aggregate with interest at 8 per cent

per annum with half yearly rest.

3. I may now quote paragraph 6 of the plaint (as it originally stood), which would be relevant for our consideration at a later stage. The paragraph runs thus: --

"On the 30th December, 1944 by a Deed of Transfer executed by the defendant No. 2, (that is Ranjit Bose) in favour of the Defendant No. 1 (that is the Rangaroon Tea Company Ltd.) to which the plaintiff was a party, the defendant No. 2 relinquished all right, title and interest in the said Rangaroon Tea Estate in favour of the defendant No. 1 and assigned the said Rangaroon Tea Estate, the movable properties lying therein and the Tea crops to the Rangaroon Tea Co., Ltd. subject to the said mortgage by deposit of title deeds, and hypothecation of movables and tea crops in favour of the plaintiff by the defendant No. 1. The defendant No. 1 by the said document admitted the said loan and covenanted to pay the amounts due under the said memorandum of deposit of title deeds, deed of hypothecation of movables and deed or hypothecation of tea crops to the plaintiff."

4. The plaintiff has claimed in this suit Rs. 1,70,365-12-0 including interest up to the 30th January, 1950 and the usual preliminary mortgage decree in Form No. 5A.

5. The case of the defendant No. 1 (Rangaroon Tea Co, Ltd. which is also in liquidation) inter alia, is that on 30th August, 1944, it purchased the property in suit in the benami of Ranjit Bose with express notice to the plaintiff and under the advice or instruction of the plaintiff. The mortgage and the deeds of hypothecation referred to in the plaint, according to this defendant, are void by reason of the provisions of the Defence of India Rules.

6. Ranjit Bose is now dead, His legal heirs and representatives are on record. Before he died, however, he filed a written statement claiming, inter alia, that he purchased the Tea Estate and the movables and machinery therein in his own and absolute right by a conveyance dated the 30th August, 1944. The defendant No. 1 did not acquire any title to or interest in the said properties by virtue of the purported indenture dated the 30th December, 1944.

7. Learned counsel appearing for the heirs and the legal representatives of Ranjit Bose has not supported this stand. He relies on an alternative plea in paragraph 10 of Rose's written statement in which it is alleged that the deeds of mortgage and hypothecation dated the 30th December, 1944, were parts of the same transaction and were obtained by the plaintiff and the defendant No. 1 fraudulently and without any valid consideration and in collusion or -conspiracy with each other with a view to contravening the provisions of Rules 94A and 95 of the Defence of India Rules, then in force. The relevant deeds therefore are void and unenforceable. It is also alleged in paragraph 11 of this written statement that the particulars regarding the alleged mortgage or hypothecation had not been filed within the time or in the manner required u/s 109 or 109A of the Indian Companies Act 1918. The plea of limitation has also been taken.

8. The following issues were raised :

1(a) Was there a mortgage of the Tea Estate by Ranjit Bose, since deceased, in favour of the plaintiff, as alleged in paragraph 3 of the plaint?

(b) Was there a relinquishment of right and title to and interest in the Tea Estate by Ranjit Bose, since deceased, in favour of the 1st defendant, as alleged in paragraph 6 of the plaint?

2(a) Was the property in suit purchased by Rangaroon Tea Company Limited in the benami of Ranjit Bose, since deceased?

(b) Did the Rangaroon Tea Company Limited create a mortgage on the said properties in favour of the plaintiff or did it acquire the said properties subject to mortgage in favour of the plaintiff created by Ranjit Bose?

(c) Was the object or consideration of the documents dated the 30th August, 1944 and the 30th December, 1944 forbidden by law or to defeat the provisions of the Defence of India Rules?

(d) Was the mortgage void or illegal by reason of the provisions of the Defence of India Rules?

3. Is the mortgage void by reason of nonregistration under the provisions of Section 109 of the Indian Companies Act, 1913?

4. Was there any agreement as to increase of interest from 6 per cent to 7 per cent?

5. Is any part of the cause of action in suit barred by Limitation?

6. What is the amount due on the account?

7. To what relief, if any, is the plaintiff entitled?

9. Issues Nos. 1(a), 1(b), 2(a) and 2(b). The facts as they emerged from the documents tendered are that on the 30th January, 1944, Ranjit Bose agreed to purchase the Rangaroon Tea Estate from Treanor for Rupees 4,00,000. Ranjit Bose on the 1st February, 1944, paid to Treanor Rs. 20,001. In March-April, 1944, there was an agreement between Ranjit and the plaintiff bank whereby the bank agreed to lend and advance to Ranjit Rs. 2,75,000 repayable with interest at the rate of 6 per cent per annum and Ranjit agreed to secure the repayment by an equitable mortgage of the Rangaroon Tea Estate. On the 18th May, 1944, the Rangaroon Tea Company Limited was incorporated.

10. On these facts learned counsel for the plaintiff argues that in January, 1944, when Ranjit entered into an agreement for purchase of the Tea Estate and advanced Rs. 20,000 to Treanor by way of earnest the Rangaroon Tea Company Limited was not in existence. It came into existence in May, 1944. Therefore, the case made in the written statements namely, that Ranjit acted as the Company's benamdar cannot be accepted. At any rate it cannot be said that Ranjit acted so

far as the agreement to purchase and the making of the earnest were concerned as the Company's trustee or benamdar. There cannot be a trustee of a non-existent beneficiary or the benamdar of a non-existent real owner.

11. Learned counsel for the plaintiff then said that it is possible to establish primarily from the documentary evidence in this suit that the bank when it advanced the money did not know that Ranjit Bose was a trustee or benamdar of the Company. He first showed to me Ext. B-2 which is the indenture of conveyance dated the 30th August 1944, by Treanor to Ranjit. In this conveyance, it is recited that, Ranjit had paid to Treanor Rs. 20,000 by way of deposit and part payment of the consideration and Treanor had already put Ranjit in possession of the garden. It is further stated that possession of all movable properties belonging to Treanor in the Rangaroon Tea Estate had already been made over to Ranjit. On these recitals, learned counsel submitted that, immediately after payment of the advance Ranjit went into possession. (There appears, however to be no clear evidence on this point except what is contained in these recitals to the deed of conveyance). Learned Counsel has urged that on the 30th January, 1944, it could not be contemplated that Ranjit was purchasing the property as a benamdar.

12. The plaintiff's Counsel then came to Ext. D which contained the two receipts dated the 30th August, 1944, Treanor had granted to Ranjit Bose (and not to the company) for the sum of Rs. 32,282/2/6 being the price of stock of tea and expendable stores and the sum of Rs. 2,30,000 being the price of machinery, furniture etc.

13. The next two documents of relevance are the documents in Ext. "C" to the plaint namely, the agreement dated the 30th August, 1944, in which the bank agreed to advance Rs. 2,75,000 and another agreement of the same date for hypothecation of tea crops. In both of these documents Ranjit Bose (and not the Rangaroon Tea Company Limited) has been described as the borrower. The next document of relevance is a letter of the 3rd August, 1944 (Ext. "3") addressed by Messrs Dutt and Sen, solicitors of this court to the Directors of Rangaroon Tea Company. This letter requires very careful consideration and it ought to be set out in full at this stage of my judgment. The letter runs thus :

"Dear Sirs, Re: Completion of purchase and mortgage of Hangaroon Tea Estate.

As explained to your Mr. Bose we have pointed out the difficulties which would arise if the conveyance is taken straight off in the name of the company and then a mortgage is created by the company. In our view, a mortgage to be effected by the company would require the previous sanction of the examiner of capital issues and that would take some time which we understand you do not want to spend at present.

In the circumstances, we have suggested that the conveyance may be taken in the name of Mr. Bose for the present and that Mr. Bose should execute a

mortgage in favour of the Calcutta National Bank. After the mortgage and the Conveyance are completed, the estate, subject to mortgage may be transferred from Mr. Bose as the trustee of the company to the company itself. This would entail you in an additional stamp duty of only Rs. 18 but at the same will avoid the delay which would otherwise be caused as explained above.

You should, therefore, place this matter before the Directors and obtain their sanction to the course suggested being adopted.

For your reference, we enclose herewith a draft of the Minutes as they should be recorded.

Yours faithfully, Sd/- Dutt and Sen."

14. I now intend to quote the resolution which was passed at the second meeting of the Board of Directors of the Rangaroon Tea Company Limited on the 3rd August, 1944. The letter of M/s Dutt and Sen already set out and this resolution of August 3, 1944 would have to be commented upon at length in order to appreciate the nature of the transactions in suit. The relevant portions of the minutes of this second meeting of the Board of Directors (vide Ext. "13") are as follows :

"The second meeting of the Board of Directors of Rangaroon Tea Co., Ltd. was held at the registered office (Clive Buildings Block E3, Calcutta) on Thursday, the 3rd August 1944 at 4 p. m. and the following members of the Board were present:--

1. Sudhanya Kumar Roy.
2. Syama Kanta Das
3. P.R. Sarkar
4. S.N. Sur
5. J.N. Bose
6. S.C. Datta

A letter received from Messrs Datta and Sen, Solicitors Calcutta for the Calcutta National Bank Ltd. on the subject of the conveyance and Mortgage of the Rangaroon Tea Estate is placed on the table.

Resolved, after discussions that in order to save time the suggestion of Messrs Dutta and Sen, as to the completion of the Conveyance and the Mortgage be accepted and Mr. R. Bose is to act as the trustee of the Company.

Proposed from chair. Carried unanimously. Confirmed.

Sd/- S.N. Sur Chairman, 6-12-44. Sd/- S. N. Sur, Chairman 3-8-44

15. Learned counsel for the plaintiff, says that, the bank cannot be fixed with

notice of the device Messrs Dutta and Sen had advised the Rangaroon Tea Company Limited to adopt. The letter of Messrs Dutt and Sen was not addressed to the bank. In any event, in this letter advice has been given on mortgage of the Tea Estate but nothing is stated regarding the hypothecation of movables and tea crops. In spite of the advice and the resolution Ranjit had executed deeds of hypothecation in favour of the bank describing himself as the owner. In the deed of mortgage also he has described himself as the owner. The existence, therefore, of these documents namely Exts. 3 and 13 does not prove that the bank knew that Ranjit was to be a trustee only. In his written statement filed in this suit also Ranjit asserts his ownership over the properties (vide paragraphs 4, 8 and 7 of the written statement of the original defendant No. 2). I would make my comments on the other submissions of the plaintiff's counsel in this respect later on. But at the moment I only wish to say that Ranjit's written statement or the allegations made therein cannot be treated as evidence in this suit; particularly against the Rangaroon Tea Co. Ltd.

16. Learned counsel then referred to some portions of the evidence of Nirmal Kumar Pal, who was the Secretary of the Rangaroon Tea Co., Ltd., since June, 1944. This witness has stated that Ranjit Bose took possession of the tea garden on the 31st August, 1944 (Questions 61 to 72, 79 to 81, 107 to 120 and 199 to 208). This evidence of Nirmal is inconsistent with the statement in Ext. "B" i.e. the conveyance dated the 30th August, 1944 that the vendor had already put the purchaser in possession of the Tea garden, lands and premises called or known as the Rangaroon Tea Estate. Indeed Nirmal has stated in answer to question No. 209 that, though it is so written in the document, possession had not been made over and actual possession was given on the 31st August, 1944. Learned counsel for the plaintiff comments that assuming that Ranjit Bose was the Company's trustee this evidence of Nirmal Pal is inadmissible in view of Section 92 of the Evidence Act.

17. The plaintiff's counsel next showed to me questions 150 to 159 and 202 in the Evidence of Kanak Nath Bhattacharjee an employee of the Court Liquidator who worked as an Assistant in the Security Department of the plaintiff bank from 1937. He has said that he did not know anything about the advice which messrs Dutt and Sen gave to the Rangaroon Tea Co. Ltd. He knew that Ranjit Bose was taking the loan. The letter of Messrs Dutt and Sen, according to him was written to the Directors of Rangaroon Tea Co. Ltd. and the bank had no knowledge of it. He admits that at the material time Sachin Bhattacharjee was the Bank's Managing Director and Ramesh Chandra Sircar was the General Manager. He says that if any of these persons had known of Dutt and Sen's advice there would be records in the bank. He cannot say whether they or any of them had any Verbal knowledge". Till the deed of transfer reached the bank he asserts "we did not know anything about Rangaroon Tea Co. Ltd."

18. It is obvious that this evidence of Kanak Bhattacharjee is not very strong. But the plaintiff's counsel invited me to take it into consideration as one of the

pieces of evidence which tends to establish that the bank was not aware that Ranjit was the Company's trustee at the time the loan was advanced.

19. My attention was next invited to Exts. 5, 6 and 11. Ext. 5 is the bank's letter to the Rangaroon Tea Co. Ltd. dated the 13th January, 1948 "Re. Your loan account dated 30-8-44 for Rs. 2,75,000." Ext. 11 is a similar letter dated the 18th November, 1948 "Re. Loan against deposit of Title Deeds of Rangaroon T. E. and hypothecation deed of movable assets of the Company" Ext. 6 is the bank's letter to the Company dated March 30, 1949, calling upon the Company to repay "your liabilities to the bank" The bank proposed to exercise its lien on the credit balance of your account with us."

20. These letters were shown to Kanak Bhattacharjee when he was on the box: vide questions 79 to 81, 268, 276, 290 to 293, 299 to 302, 324 to 329 and 338 to 354. He has said that when Raniit Bose executed a registered deed of transfer in the name of Rangaroon Tea Co. Ltd. and the deed was sent to the bank, the bank in its own books struck out the name of Ranjit Bose and substituted the name of the Rangaroon Tea Co. Ltd. He could not say whether the bank was releasing Ranjit Bose from all liability". He was instructed to make the substitution. The deed of transfer was taken to the bank towards the end of December, 1944, tor getting the bank's signature. The bank did not sign because it contained incorrect statements. After the document was registered it was again taken to the bank. He does not remember the date on which the Company's name was substituted, but it was done after the 30th December, 1944. So far as Ext. 5 that is the letter dated the 13th January, 1948 is concerned his explanation is that this was written after the transfer and since the transfer had taken place the account was described in the letter to the Company as "your loan account dated 30th August, 1944." He admits that the current account of the Rangaroon Tea Co. Ltd. on which the bank proposed to exercise its lien in its letter of March 30, 1949 (Ext. 6) has not been disclosed in this, suit, but he says that it is there and it will require some time to produce it. The letter of the 18th November. 1948, was also addressed to the Company after the transfer and he has the same explanation for the statements made in this letter.

21. Learned counsel for the plaintiff has stated that these documents namely Exts. 5, 6 and 11 far from contradicting the plaintiff's case lends support to it particularly in view of Kanak Bhattacharjee's explanation.

22. Learned counsel for the plaintiff thereafter proceeded to make strong comments on the books of account and other documents of the Rangaroon Tea Co. Ltd. disclosed in this suit. Nirmal Kumar Pal the Company's Secretary at the relevant time said that he did not know from whose custody Cash Book No. 1 of the Company had come (question 130). His attention was drawn to the erasures at page 52 of this book with respect to entries dated the 6th October, 1944 (Exts. J1 and J2). In fact there are other erasures in various other parts of the book as well. His explanation is that the entries were recorded under a wrong account and that is why they were corrected. The Company's auditors found the

mistake and pointed them out to the Company. Some of the corrected writings are of Ranjit Bose and some of the Part-time accountant whose name he could not remember (questions 181 to 198). Learned counsel submits that no reliance can be placed on entries made in such a book. He showed to me the affidavit of documents affirmed by the Official Liquidator in May, 1954. In this affidavit there is no mention or entries in the Company's books. With regard to the voucher for Ranjit's travelling allowances to go to the Tea Garden dated 9th October, 1944 (Ext. 14) learned counsel invites me to compare this vouchee with Ext. 15a which is an entry in the Cash Book relating to the same expense. According to this entry the sum of Rs. 239-11-6 was paid to Ranjit on the 9th October, 1944 "for travelling expenses for visiting garden as per voucher. "The voucher says" for expenses incurred for visiting the garden on the 31st August, 1944 with Messrs M. Biswas and N. Bose for taking formal delivery of possession of the properties." Questions were put to Nirmal Pal about this entry and the voucher. His evidence is that Ext. 15a is in the handwriting of Ranjit Bose (question 80). The Rangaroon Tea Co. Ltd. had a system of maintaining vouchers but it did not put Serial Numbers on them. He says that entries were made in the Cash Book on the basis of these vouchers. The plaintiffs counsel asked roe in this connection to look into the evidence of Kanak Bhattacharjee who had said that in March or April, 1944, Ranjit informed the bank that he had got possession of the Tea garden (questions 5 and 330). The conveyance dated the 30th August, 1944, also recites that the vendor had already put the purchaser in possession (Ext "B"). The memorandum of deposit of title deeds annexed to the plaint dated the 30th August, 1944, says that, the mortgagor is in possession (Ext. "A"). In this state of the evidence, learned counsel submits, the voucher (Ext. 14) which shows that Ranjit went to take formal possession on or about the 9th October, 1944, has to be disbelieved.

23. Having made all the above points learned counsel for the plaintiff urged that in any event there is no pleading that the bank had knowledge of the transactions or a device was adopted to defeat the provisions of law. I do not think it is correct to say that there is no such pleading. Paragraph 10 of Ranjit Bose's written statement is enough for this purpose.

24. Then it was urged that assuming that the document of the 30th December, 1944 (Ext. "E") in which Ranjit is described as the Transferor and the Rangaroon Tea Co. Ltd. is described as the Transferee is bad in law, the result is that the Tea Estate has not been transferred to the Company at all. Ranjit continued to be the owner of the Tea Estate which had been mortgaged to the plaintiff bank. Ext. "A" annexed to the plaint which is the deed of mortgage does not describe Ranjit as a Trustee although the Company had come into existence on the date of the mortgage that is the 30th August, 1944. Up to this date no trustee, or benamdar was on the scene. This position would also be in conformity, according to the plaintiffs counsel, with Ranjit's purchase in his individual capacity. The position would be further borne out by the Deed of Conveyance dated the 30th August, 1944 which Treanor had executed describing Ranjit Bose as the purchaser and

Ext. "C" annexed to the plaint which is the deed of hypothecation dated the 30th August, 1944 of plant machinery etc. in which Ranjit is described as the borrower and several other documents.

25. Learned counsel for the plaintiff then made his submissions on Ext. "E" namely the Indenture whereby Bose transferred the Tea Estate to the Rangaroon Tea Co. Ltd, subject to the mortgage and hypothecation in favour of the Calcutta National Bank. The bank was mentioned as a party to the agreement but it did not execute the document. On behalf of the plaintiff it was urged that the recitals contained palpable misstatements. Firstly, it is said that the Transferee Company (that is the Rangaroon Tea Co. Ltd.) agreed with Treanor to purchase the Tea Garden. The recital is false because in January, 1944 the Company was not in existence. Secondly, it is said in these recitals that by a resolution dated the 3rd August, 1944, the Company proposed the raising of a loan of Rs. 20,000 on the hypothecation of Tea crops. The resolution says nothing about hypothecation. Thirdly, it is stated that the Transferor (i. e. Ranjit) acted as the trustee for and on behalf of the transferee and that all documents so far executed in favour of the bank were executed by the transferor in his capacity as a trustee of the transferee Company. All these statements contradict the legal mortgage and the deed of hypothecation.

26. Against this back ground, the plaintiffs counsel submits, the Court should accept Kanak Bhattacharjee's evidence that the bank refused to sign in view of the incorrect statements in this document. (Questions 36, 341 to 354). As the bank was not a party to this document the recitals incorporating the resolutions do not bind the bank, nor does the declaration of Ranjit bind the bank. A recital will not act as an estoppel against a stranger to a deed. Secondly, a recital will act as an estoppel only against any party to the deed who is bound by it and also against any one claiming by, through, under or in trust for him. Thirdly, a recital need not act as an estoppel against all parties to the deed but will operate only against the parties who by construction are deemed to have made the statement contained in the recital. This is a question of construction of a deed as a whole. In this connection reference may be made to Odgers on "The Construction of Deeds and Statutes". 4th Edition, pages 110 to 111. There is also the principle referred to in the said pages of Odgers' Book that the exceptions to these rules are the cases where a deed is fraudulent or illegal.

27. Learned counsel says that as the bank is not the signatory to this document nor does it claim under or through Ranjit or the Company no statement made in it can affect the bank's claim. Alternatively, the deed is fraudulent or illegal and the rule of estoppel cannot be invoked at all. The plaintiffs counsel then relied on paragraphs 6, 8, 9 and 10 of Ranjit Bose's written statement wherein he asserts his ownership of the properties and finally submits that if no decree can be passed against the Company a mortgage decree ought to be passed in this suit against Ranjit Bose. He also relied on the judgment of the Supreme Court in Srinivas Ram Kumar Vs. Mahabir Prasad and Others, for the proposition that a

decree can be passed upon the case which the defendant himself makes.

28. I have in the foregoing paragraphs exhaustively dealt with the arguments advanced before me on behalf of the plaintiff to convince me that the bank had no knowledge of the fact that the Rangaroon Tea Co. Ltd. had purchased the Tea Estate in the name of Ranjit Bose, when the mortgage was executed. After giving this matter by anxious consideration I am finding it difficult to believe that the persons responsible for conducting the affairs of the bank at the material time were innocent or were ignorant of the device which was adopted to evade the provisions of the Defence of India Rules which would be discussed later in this judgment. I now propose to give the reasons for my inability to accept the point of view on the part of the plaintiff. I would begin with Ext "E" which is the deed of relinquishment dated the 30th December, 1944. This deed recites unequivocally that the transferee company which is the defendant No. 1 in this suit agreed with Treanor for purchase of the Tea gardens known as Rangaroon Tea Estate. There is evidence that the initial sum of Rs. 20,000/- which was paid to Treanor was paid by Hindustan Planters of which Ranjit was a partner. On or about the 20th June, 1944, the defendant No. 1 allotted shares of its own to Hindustan Planters in lieu of the said sum of Rs. 20,000/-. Ext. 4b in this suit is an entry in the peon book of the defendant No. 1 dated the 20th June, 1944, recording the despatch of the document of allotment and the receipt for Rs. 20,000/- to Hindustan Planters. According to this entry Ranjit himself had received these documents on behalf of Hindustan Planters. Nirmal Pal has proved Ext. 4b and has described as far as he could remember what the transaction was in questions 148 to 152 and 214 to 225.

29. The next entry in this peon Book is Ext. 4a which shows that the draft conveyance which was finally executed on the 30th August, 1944 was sent to the Calcutta National Bank Ltd. on the 22nd August, 1944. I intend to quote in this connection the evidence of Kanak Bhattacharjee in questions 283 to 287. These questions and answers are as follows:

"Q. 283: You will find from the peon Book that this is a peon Book of Rangaroon Tea Co. Ltd.? Only a paper and the name of Rangaroon Tea Company is there.

284. Do you find stamp of Rangaroon Tea Company Ltd., inside? /Yes.

285. Kindly look at the entry of the 22nd August, 1944, Ext. 4a. Do you find from that entry that what was being sent to the Calcutta National Bank was the draft conveyance? /Yes.

286. Can you suggest any reason why the Rangaroon Tea Co. Ltd. are sending the draft conveyance to the Bank? /No.

287. But it was the natural thing to do if it was the Company's transaction? / I cannot say anything about that",

30. The draft conveyance I find was duly received by the Calcutta National Bank Ltd. If the bank was not aware of the transaction at all whereby Ranjit was to

purchase as a trustee or benamdar of the Company if the bank was not interested in that transaction I find no explanation for the Company's sending the draft conveyance to the Bank. In any event, Kanak Bhattacharjee has failed to explain the position.

31. Let us now take the resolution of the 3rd August, 1944 (Ext. 13). It is recorded that a letter from the bank's solicitors Messrs. Dutt and Sen has been received "on the subject of the conveyance and mortgage of the Rangaroon Tea Estate". The resolution which the Company adopted on this letter was to accept the suggestion of Messrs Dutt and Sen that the conveyance could be taken in the name of Ranjit and Ranjit will execute the mortgage as the Company's trustee: On this point certain questions were put to Kanak Bhattacharjee. He admits that M/s. Dutt and Sen were the bank's solicitors (question 144). He admits that Sudhangsu Sekhar Banerjee who was the witness to the signatures of Ranjit Bose as the partner incharge of Hindusthan Planters, the Managing Agents of Rangaroon Tea Co. Ltd., on the deed of relinquishment of the 30th December, 1944, was an assistant to Messrs Dutt and Sen, solicitors (questions 310 and 311). The back sheet of this document contains the name of Messrs Dutt and Sen; but Kanak Bhattacharjee says that he does not know if Messrs Dutt and Sen had prepared the document (question 312). He admits however in the next question that "Messrs Dutt and Sen were working in this matter" (question 313). He admits in question 314 that in these transactions Messrs Dutt and Sen were the bank's solicitors. In question 341 he says that the bank did not sign the document as it contained incorrect statements but this evidence of his is not borne out by the bank's pleadings. In paragraph 6 of the plaint the bank has stated: "On the 30th December, 1944, by a Deed of Transfer executed by the said Ranjit Bose in favour of the defendant No. 1 in which the plaintiff (i. e. the Bank) was a party the said Ranjit Bose relinquished all right title and interest in the said Rangaroon Tea Estate in favour of the defendant No. 1 and transferred, assigned the said Rangaroon Tea Estate the movable properties lying therein and the Tea Crops to the Rangaroon Tea Co. Ltd. subject to the said mortgage by deposit of Title Deeds hypothecation of movables and of tea crops in favour of the plaintiff to the defendant No. 1. The defendant No. 1 by this document admitted the said loans and covenanted to pay the amount due under the said Memorandum of Deposit of Title Deeds, Deed of Hypothecation of movables and Deed of Hypothecation of tea crops to the plaintiff. I repeatedly asked learned counsel to explain why the document of the 30th December, 1944, was pleaded in this form. The only answer that he could give me was that this was a Muffasil pleading and the implications were not fully appreciated. To my mind the evidence that I have discussed in this paragraph puts the controversy in question beyond doubt. Learned counsel for the defendant No. 1 made certain submissions on this document based on Sections 19 and 32(3) of the Evidence Act. I think it is unnecessary to deal with these points in view of the averments in paragraph 6 of the plaint.

32. I would now come to Ext. 16. This is a statement of account certified by

Bimal Majumdar, the Manager of the Bank which was filed in the Subordinate Judge's Court at Darjeeling. The original account, it appears, stood in the name of "Messrs Rangaroon Tea Co. Ltd., 285/F. Bowbazar Street, Calcutta". By an order of this Court made on the 3rd February, 1956 the heading was amended. It now reads as follows ;

"A/C Mr. Ranjit Bose

Particulars:- Loan against mortgage Ran-garooji Tea Estate and hypothecation of movables Loan No. 1619 Address C/o Messrs Rangaroon Tea Company Limited, Block E3 Clive Building, 8, Clive Street, Calcutta."

33. The order of amendment was made without prejudice to the rights and contentions of the parties. I am told that in the original account the name of the company was mentioned as the debtor by mistake. But nobody has come to tell me how the mistake had occurred, and who was responsible for the mistake. It is necessary for the Court to know from which book of the bank this statement of account was copied inasmuch as it has been certified by the bank's Manager. But the book has not been shown to me. The weakness of the plaintiff's case in this regard need not be dilated any further. It is reasonable to infer in these circumstances that the bank knew from the very beginning that this was the Company's transaction and it started its account with the Company as the debtor. I was not at all satisfied with the evidence that Kanak Bhattacharjee gave on this point in questions 170 to 194.

34. Counsel for the defendant No. 1 then made certain submissions on the manner in which the bank's books used to be kept. He has even gone to the extent of suggesting that all the relevant books have not been produced before the Court. I was not impressed with this charge against the Court Liquidator and in this judgment I wish to ignore the charge altogether. I would discuss however the books and entries tendered in evidence. Let me first take up the Loan Register from January 1941 in which there are three Exhibits which require my attention at present. I mean Exts. 2a, F1 and F2. In all these entries I find clumsy alterations and scorings out of writings which destroy the evidentiary value of this Register to a large extent. In the page of "Contents" dealing with "R" I find that the original item No. 11 was the name of the Rangaroon Tea Co. Ltd. Deliberate attempts have been made, which must have taken some time, to obliterate the name of the Company. In fact, the scoring out has become ugly and it is by some efforts that next line Item No. 11 has been repeated and we get the name of Mr. Ranjit Bose whose account is at page 127 of this book. The entry at page 127 is Ext. F1. The date namely the 30th August, 1944 is an altered date. The entry reads thus : "deposit of Title deeds of the Rangaroon Tea Estate by memorandum and deed of hypothecation for all movables of the Company. The next date namely June 30, 1945, is also an altered date for writing up interest up to February, 1945. When I look at Exts. 2a and F1 I get the feeling that originally the account was meant to be the account of the Rangaroon Tea Company Limited which started on the 30th August, 1944. Thereafter

intentional alterations were made to change it into the account of Ranjit Bose. But even then the intention was not fully served as in the entry itself the words "of the Company" are still there. It is obvious that "Ranjit Bose", in whose name the account was to be, was not a Company nor did he", if the Bank's present story is to be accepted, deposit any title deeds or execute any deed of hypothecation of movables of "the Company".

35. I will now turn to the Cash Book of the defendant No. 1. It is the cash book for 1944-45. On the 28th/30th August, 1944, various entries have been made relating to the transactions in Suit "vide Ex. 15b. It is recorded that on these dates the Rangaroon Tea Company Limited received various sums of money from the Calcutta National Bank Ltd. by transfer or otherwise and have utilised these sums for payment to Treanor through Messrs Dutt and Sen solicitors in respect of the purchase price of the Rangaroon Tea Estate as also to Messrs Dutt and Sen for their costs and charges in connection with the conveyance of the said Tea estate. All these entries are in the handwriting of Ranjit Bose (Vide Question 85 of Nirmal Kumar Pal). There is another entry in this Cash Book dated the 9th October, 1944. This is also an entry (marked Ext. 15a) in the handwriting of Ranjit Bose (Question 80 of Nirmal Kumar Pal). It is an entry for the sum of Rs. 239-11-6 "paid to Mr. R. Bose for travelling expenses for visiting garden as per voucher". The Voucher is Ex. 14. This voucher is also in the handwriting of Ranjit Bose (Question 67 of Nirmal Kumar Pal). According to this voucher the sum of Rs. 239-11-8 was "Paid to Mr. R. Bosa for expenses incurred for visiting the garden on 31-8-44 with Messrs M. Biswas and N. Bose for taking formal delivery of possession of the properties".

36. It appears therefore from this Cash Book that the loan which the Calcutta National Bank advanced was received not by Ranjit but by the Rangaroon Tea Co. Ltd. and it is the Company which paid for the purchase of the Tea Estate, the solicitor's costs for the conveyance and the expenses for taking formal possession. In other words, it is the Company which purchased the Tea Estate and not Ranjit Bose.

37. There is another point which should be disposed of in this connection. Ranjit Bose in his written statement has firmly asserted that he was the owner of the Tea Estate and not the Company. Of course at the trial his heirs and legal representatives did not defend this position. If they had done so they would have been confronted with these entries in the Cash Book and in the voucher containing statements which he had made against his pecuniary or proprietary interest which would have been admitted u/s 32(3) of the Evidence Act.

38. I intend now to make a few comments on the books of the Calcutta National Bank Ltd. I have already referred to Ex. F1 which is an entry, inter alia, dated the 30th August, 1944 in the Bank's Loan Register of 1944. This entry shows that the original account was of "Mr. Ranjit Bose". While giving the particulars of this account the writer that is Kanak Bhattacharjee (vide his deposition Question 205) first wrote that this was a "Loan against mortgage of Rangaroon Tea Company

Ltd. "He has then struck out the words "Co. Ltd." and has put down "Estate" The entry now reads" "Loan against mortgage Rangaroon Tea Estate and Hypothecation of all movables". This is in the heading but as I have already pointed out in the body of the entry we find the expression "deposit of Title deeds of the Rangaroon Tea Estate by memorandum and deed of the hypothecation for all movables of the Company". Since the company was not then in existence Kanak Bhattacharjee was cross-examined on these entries. I would merely quote question 208 and its answer which are as follows :

"Question 208--On the very first day the account was being opened, you did not know anything about the Limited Company and you wrote that by mistake?

They had a discussion of floating a Limited Company. Either for that or for what impression I wrote it, I do not remember."

39. To my mind, this is a piece of strong evidence against the contentions of the Calcutta National Bank. This is a classic example of how a transaction is entered into in the commercial world before a company is floated. One of the promoters of the company was Ranjit Bose. He knew that he could not purchase the Tea garden and it was necessary to have a Limited Company. All the documents prior to the 30th August, 1944 were also in his name and at the earliest possible opportunity on the 30th December, 1944, he transferred the Tea Estate to the Company by a formal document (Ex. "E") declaring that he was the Company's trustee and the property was purchased in his name by the Company.

40. Then again, Kanak Bhattacharjee admits that Messrs Dutt and Sen were the solicitors of the Calcutta National Bank Ltd. in 1944. All the documents of the 30th August, 1944, were prepared by Messrs Dutt and Sen as the bank's solicitors, (questions 145 and 146). He admits, as I have already said, that Sudhangsu Sekhar Banerjee an Assistant of Messrs Dutt and Sen has put his signature on Ex. "E" namely the document of the 30th December, 1944. In the face of this evidence it would be legitimate for me to observe that apart from anything else Messrs Dutt and Sen knew that this was the Company's transaction and as a matter of pure law I can say that Dutt and Sen's knowledge was the bank's knowledge.

41. Nirmal Kumar Pal in his evidence says that he went with Ranjit Bose to one or two banks to negotiate with them for raising a loan. Ranjit was then a Director of the defendant No. 1. They first went to the Bengal Central Bank Ltd. Thereafter they went to the Calcutta National Bank Ltd. in or about July, 1944. There was a discussion between Ranjit Bose and Sachin Bhattacharyya of the Calcutta National Bank. The bank said that there were certain difficulties and they would be consulting their solicitors Messrs Dutt and Sen. He then went with Ranjit Bose to the firm of Messrs Dutt and Sen and met Mr. Sushil Sen there. Mr. Sen advised Ranjit that he was preparing the Draft Resolution and if the resolution was adopted by the Board of Directors of the defendant company the loan would be sanctioned. Nirmal Kumar Pal has identified Dutt and Sen's letter

of the 3rd August," 1944 which he had received at the office of the defendant No. 1 (Questions 18 to 34). In cross-examination this witness has said that he did not go with Ranjit every time Ranjit went to the Calcutta National Bank. He cannot give the exact date in July, 1944 on which he went to the bank. That was the solitary occasion he had to accompany Ranjit (questions 95 to 103). He does not remember the precise nature of the difficulties the bank had raised. He has no recollection of the conversation between Ranjit and the bank's agent except that Messrs Dutt and Sen had sent a letter (questions 153 to 158).

42. Learned counsel for the plaintiff asked me to disbelieve Nirmal Pal. I do not say that his evidence on this point is fully convincing, or that this can be decided on his evidence alone. But when I analyse his answers to the said questions in the light of the documentary evidence and other evidence on record I am inclined to accept his oral testimony.

43. I wish to conclude my observations on these issues after referring to one other Exhibit. It is Ex. G1 which contains entries in the Loan Ledger of the bank for 1944 at page 102 thereof. The loan account in this suit has been commenced on this page. Looking at the entry the impression that I get is that on the 30th August, 1944, the account was started as the account of the Rangaroon Tea Co. Ltd. Ranjit Bose's name was written above that of the Rangaroon Tea Co. Ltd. His name has now been struck out. My point is that if it is the personal account of Ranjit Bose writing against the printed word "Account" should have mentioned Ranjit's name and not the name of the Company. There is no point in putting down Ranjit's name above the Company's name. Looking at this entry in the context of the facts and circumstances of this case one is led to the conclusion that originally the bank thought that it would be the Company's account. Later on the changes were made. This is another piece of evidence to be borne in mind in determining the issues under consideration.

44. Lastly, I want to point out another fact in the pleadings. I have already dealt with the admissions made in paragraph 6 of the plaint that the bank was a party to the Deed of Transfer dated the 30th December, 1944. In the original cause Title of the plaint also (which was amended under order of this Court dated the 8th July, 1953 presumably after Ranjit's death) Ranjit Bose was the defendant No. 2 "for self and as a Trustee under a Deed dated the 30th December, 1944....." To my mind, this is another admission by the plaintiff bank of the correctness of the statements made in the document of transfer dated the 30th December, 1944.

45. For all the reasons aforesaid I hold that the property in suit was purchased by the Rangaroon Tea Co. Ltd. in the benami of Ranjit Bose since deceased. I hold that the mortgage was created by the said Company in the name of Ranjit Bose and the plaintiff bank was all along aware of how the transaction was effected. These would be my answers to Issues Nos. 1 (a), 1(b), 2(a) and 2(b) raised in this suit. Issues Nos. 2(c) and 2(d).

46. Before I discuss the, respective arguments of the parties on these issues it would be appropriate to set out the relevant provisions of the Defence of India Rules and the Order of exemption relied on in this case. In the Defence of India Rules the material provisions are as follows :--

Rule 94A. Control of Capital Issues--(i) For the purpose of this Rule--

(a) Securities shall mean the following instruments issued or to be issued by or for the benefit of a Company namely (i) shares stocks and bonds, (ii) debentures, (iii) other instruments creating a charge or lien on the assets of the Company, and (IV) instruments acknowledging loan to or indebtedness of the Company and guaranteed by a third party or entered into jointly with a third party.

(b) a person shall be deemed to make an issue of capital who issues any securities whether for cash or otherwise.

2(a)--Subject to exemptions as may be granted by Order of the Central Government, no Company, whether incorporated in British India or not, shall except with the consent of the Central Government--

(i) make an issue of capital in British India;

Sub-rule (6)--The Central Government may by order condone a contravention of sub-rule (2), and on the making of such order the provisions of this rule shall have effect as if an exemption had been granted under this rule from the operation of Sub-rule (2), in favour of the thing done in contravention of such sub-rule.

(7) No person shall accept or give any consideration for any security in respect of an issue of capital made or proposed to be made in British India or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital.

(8) No person shall sell, purchase, transfer or accept transfer of any securities issued by a Company in respect of any issue of capital made after the 17th May, 1943, in British India or elsewhere unless such issue has been made with the consent or recognition of the Central Government.

(9) The Central Government may, by special or general order grant exemption from all or any of the provisions of this rule.

(10) If any person contravenes the provisions of this rule he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both.

47. In the Gazette of India Extraordinary dated the 9th June, 1944 the Office of the Examiner of Capital Issues (Finance Department) Government of India published an Exemption Order the relevant portions whereof are as follows :--

"No. D. 4114--E.C.I/44--In exercise of the power conferred by Sub-rule (9) of

Rule 94-A of the Defence of India Rules, the Central Government is pleased to exempt.

(a) from the provisions of Sub-rules 2(a)(i), (4) and (7) of the said rule.

(i) - ..

(ii) Issue of securities (other than debentures) by persons in the ordinary course of their normal business and strictly and solely for the purpose of that business to a person carrying on the business of banking or his nominee in respect of advances made or to be made or overdraft granted or to be granted by that person from time to time."

48. In the light of these provisions we have to adjudge in this suit whether the object or consideration of the documents dated the 30th August, 1944, and the 30th December, 1944 was forbidden by law and, as such, whether the mortgage was void or illegal.

49. Learned counsel for the plaintiff in his arguments have taken the preliminary point that having regard to the pleadings herein these issues cannot be gone into. In paragraph 16 of the written statement of the defendant No. 1 there is a vague alternative averment that the mortgage and the hypothecation are void by reason of the provisions of the Defence of India Rules. In paragraph 10 of the written statement of the defendant No. 2 also it is merely alleged (as an alternative case) that the deeds of mortgage and hypothecation dated the 30th August, 1944, and the deed of transfer dated the 30th December, 1944, were purported to be obtained, inter alia, with a view to contravening or frustrating the imperative provisions of Rules 94-A and 95 of the Defence of India Rules then in force. It is vaguely alleged further that the object or consideration of the said documents was forbidden by law or to defeat the provisions of law and, as such, these were void, unenforceable and of no effect.

50. These averments, says counsel for the plaintiff, do not comply with the provisions of Order 8, Rule 2 of the CPC which require, inter alia, that facts showing illegality must be pleaded. Reliance was placed on the observations of Lord Davey in *Bullivant v. Attorney General for Victoria* (1901) AC 196 that if a man in his pleading merely sets out a sentence from a statute which is capable of two meanings without saying which he means the one being consistent with the absolute innocence of the transaction and the other involving a charge of either fraud or illegality, he must say which he means, and if he intends to charge illegality, he must state facts for the purpose of showing what the illegality is. My attention was also invited to the view of Ghulam Hasan, J. speaking for the Supreme Court in *Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another*, that the provisions of Order 8, Rule 2 leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract. According to learned counsel for the plaintiff in the Written Statements it should have been pleaded (1) that

the Rangaroon Tea Co. Ltd. had made an issue of capital is envisaged by Rule 94-A (2) without the consent of the Central Government and (ii) that there is no special or general order granting exemption in such a case. In the absence of express pleadings of these facts, learned counsel submits the Court should refuse to discuss issues Nos. 2(c) and 2(d).

51. To my mind, the pleading in paragraph 10 of the Written Statement of the defendant No. 2 appears to be, specific. In any event, Issues have been raised without the plaintiffs objection and it is too late for the plaintiff to contend that these issues cannot be discussed. In AIR 1930 205 (Privy Council) , a suit was based on a certain agreement. Its subsequent variance was not mentioned in the plaint, but was put in issue and contested and proved. The Judicial Committee has been pleased to observe at page 208 that notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed and ought upon that footing to be determined. In the case before me also issues were raised. Evidence was adduced and elaborate arguments were advanced on these issues by counsel for the defendant No. 1. In the premises, I shall be justified in going into the merits of these contentions and I propose to do so now.

52. On the merits, learned counsel for the plaintiffs firstly contended that, the provisions of Rule 94-A were not mandatory. He referred to a passage in Sutherland's Statutory Construction, 3rd Edition, Volume III at page 77 in Article 5802. It is stated that the difference between mandatory and directory statutes is one of effect only: the question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to, statutory directions; this determination involves a decision of whether or not the violation or omission is such as to render invalid acts or proceedings pursuant to the statute, or rights powers, privileges or immunities claimed thereunder; and if the violation or omission is invalidating, the statute is mandatory; if not, it is directory.

53. Learned counsel argues that it does not appear from Rule 94-A that the violation of the rule has an invalidating effect. Clause 10 of the Rule does not render the transaction void; only the consequence is provided for. The consequence is not invalidation of the transaction but punishment for its breach. The object of Rule 94-A is not prohibition but "control" of capital issues. The rule itself provides for granting exemption in Sub-rule (9). These factors the Court will take into consideration in coming to the conclusion whether the statute is directory or mandatory. In the case of Sm. Arunima Das Vs. Secretary, Board of Secondary Education, West Bengal and Others, , Bose, J. (as he then was) observed that the question as to whether a statute is mandatory or directory, depended upon the intent of the legislature and not upon the language in which the intent was clothed. The learned Judge said that the meaning and intention of the legislature must govern and these were to be ascertained not only from the phraseology of the provision but also by considering the nature, and the design

of the Statute and the consequences which would follow from construing it one way or the other. Learned counsel placed strong reliance on "consequences" as indicated in this judgment of Bose, J. and submitted that since the consequence is punishment the rule is directory.

54. I do not think there can be any dispute as to the proposition that the Court in each case must look to the nature and design of a statute and the consequences flowing from violation to determine whether it is mandatory or directory. Not only the language used but the object or purpose of the legislation has to be determined. In the instant case Sub-rule (2) (a) (i) prohibits a company from making without the Central Government's consent an issue of capital. Sub-rule (7) imposes a similar prohibition on the other party to the transaction as well. A marginal note has nothing to do with interpretation of statutes. The marginal note may speak of "control" of capital issues. But what the statute provides is not merely "control" but absolute prohibition unless the transaction is covered by an order of exemption under Sub-rule (9). In other words, subject to exemption, if any, the prohibition is absolute. This view is confirmed by the introduction of Sub-rule (10) which makes both the making of an issue of capital (Sub-rule 2(a) (i)) and the giving of consideration (Sub-rule (7)) punishable with imprisonment. It is true that Rule 94-A does not expressly provide that the transaction itself would be invalidated but the Defence of India Rules have nothing to do with transactions. It merely prohibits transactions. It says that if you violate a particular provision you would be punished. Now, Section 23 of the Contract Act provides that every agreement of which the object or consideration is unlawful is void As observed in Mulla's Contract Act, 8th Edition, page 159, it is possible for a statute to attach a penalty to make a particular kind of agreement, and at the same time to provide that such an agreement, if made, shall not be, therefore, void. We do not know of more than one such case in England or of any in India. Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to English law. The principles may be stated thus; "when conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in course of such business or profession are void if it appears by the context that the object of the legislature in imposing ; the condition was the maintenance of public order or safety or the protection of persons dealing with those on whom the condition is imposed : (but they) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of revenue. It is also observed in Mulla's Contract Act, 8th Edition, at page 158 that, an act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable under the Penal Code or of acts prohibited by special legislation or by regulations or orders made under authority derived from the legislature. Parties are not, as a rule, so foolish as to commit themselves to

agreements to do anything obviously illegal, or at any rate bring them into Court; so the kind of question which arises in practice under this Act is whether an act, or some part of a series of acts, agreed upon between the parties, does not contravene some legislative enactment or regulation made by lawful authority. Broadly speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it; but an act which is in itself harmless does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted. There was a time when the English Courts almost regarded it as meritorious to evade statutory regulations, and encouraged evasions of them, by fine distinctions; but that attitude is long out of date, and an example of it cannot now be taken as precedent.

55. Now, let us apply the above principles to Rule 94-A of the Defence of India Rules. Sub-rule (10) of this Rule prescribes that if any person contravenes its provisions he shall be punished but the rule nowhere says that an agreement made in violation of the Rule shall not be void. Secondly, the Defence of India Act, 1939, under which these rules were framed was enacted "to provide for special measures to ensure the public safety and interest and the Defence of British India and the trial of certain offences" inasmuch as an emergency had arisen which rendered it necessary to provide for such measures. It is clear therefore that the object of the legislature in introducing the provisions, of the Act was the maintenance of public order or safety. Any agreement therefore made contrary to its provisions for the conduct of any punished but the rule nowhere says that an attached to transactions contemplated by R. 94-A and it is obvious that the conditions laid down in this rule were not imposed for merely administrative purposes. Thirdly, an act which has been forbidden in public interest cannot be made lawful by paying the penalty for it.

56. For all the reasons aforesaid I am of opinion that Rule 94-A is mandatory. The crucial question in this suit is whether it was Ranjit Bose's transaction or it was a subterfuge to get round the provisions of Rule 94-A. Since I have held that it was the Company's transaction in the name of Ranjit Bose I have also to infer that this was a case of subterfuge. The company came to the bank and asked for a loan. The loan was given to Ranjit Bose to evade the provisions of Rule 94-A and all these things according to me had happened with the bank's knowledge. I am confirmed in this view by reason of Rule 95 of the Defence of India Rules which laid down:

"Before making any payment or transfer of funds at the request of any person, the bank shall require any declarations and information which may be reasonably necessary to satisfy it that the payment or transfer will not involve and is not with a view to the contravention of any of the provisions of these Rules by that or any other person."

57. The next point that learned counsel for the plaintiff argued was that assuming that Rule 94-A was mandatory the transaction was covered by the

order of exemption dated June 9, 1944. This order was published on the said date in the Gazette of India Extraordinary. The Central Government made the order in the exercise of the power conferred by Sub-rule (9) of Rule 94-A. The Central Government exempted from the provisions of Sub-rules (2) (a)(i) and (7) "the issues of securities (other than debentures) by persons in the ordinary course of their normal business and strictly and solely for the purposes of that business to a person carrying on the business of banking or his nominee in respect of advances made or to be made or over-drafts granted or to be granted by that person from time to time." The plaintiff's counsel says that the defendant No. 1 had created the mortgage in the ordinary course of its normal business and strictly and solely for the purposes of that business. In support of this contention he relied on Clauses (3) and (18) of the Company's Memorandum of Association. These clauses are as follows:

"(3) to sell, let, lease, exchange, part with, transfer, deliver charge, mortgage or otherwise dispose of or deal with the undertaking lands and real and personal estate or property and assets of any kind of the Company or part thereof.

(18) to borrow or raise money or to receive money on deposit at interest or otherwise in such manner as the Company may think fit and in particular by the issue of debenture stocks convertible into shares of this Company or perpetual annuities; and in security of any such money so borrowed, raised or received to mortgage pledge or charge the whole or any part of the property, assets or revenue of the Company present or futural including its uncalled capital by special assignments or otherwise or to transfer, convey the same absolutely or in trust and to give the tenders power of sale and other powers as may seem expedient, and to purchase, redeem, or pay off any such securities."

58. Learned counsel submits that in view of the above clauses in the memorandum the transaction in suit should be considered to be a transaction entered into in the ordinary course of normal business of the defendant company. He then showed to me questions 6 to 8 and their answers of Nirmal Kumar Pal. The witness has said that the company was incorporated for doing tea business by purchasing the Rangaroon Tea Estate at Darjeeling. The plaintiff's counsel submits on this evidence that purchasing the Tea Estate was within the company's ordinary course of business. Reliance was placed on the judgment of the Bombay High Court in Paper Sales Ltd. v. Chokhani Brothers, AIR 1946 Bom 429. At page 434 it is observed that the law presumes against an illegality, and the burden of proving that an illegality has taken place rests on the party who asserts. Learned Counsel states that the defendants in the present suit have failed to discharge this onus- In question 27 Nirmal Kumar Pal says that when he went with Ranjit to Sachin Bhattacharjee of the plaintiff bank there was a discussion between Ranjit and Bhattacharjee. They (i. e, the bank) said that a loan could not be advanced at that stage. There were certain difficulties and they (i. e. the bank) would be consulting their solicitor M/S Dutt and Sen and if they (i. e. the bank) were so advised they would do something. In question 154

Nirmal says that he did not correctly remember what difficulty the bank had raised, but perhaps they (i. e. the bank) said; "We are in difficulty. You would perhaps consult our solicitor M/S Dutt and Sen." Learned counsel has urged that there is no evidence of what this difficulty was. The illegality, if any, has not been clearly stated either in the oral evidence or in the documents the defendant No. 1 has disclosed except that Dutt and Sen's letter of 3rd August, 1944 is there and a resolution was passed thereon. This letter M/s. Dutt and Sen had addressed to the defendant No. 1 when the order of exemption was already there. The letter was addressed under a misconception of law.

59. I am unable to accept these contentions raised on behalf of the plaintiff. The onus is on the plaintiff to show that the transaction is covered by the "Exemption Order" of the 9th June, 1944. Whether or not the Company had made the agreement in the ordinary course of its normal business is very much a question of fact. The order of exemption has not been pleaded. No specific issue based on the order was raised and no evidence was adduced in this regard except that the Company's Memorandum of Association was relied on. Secondly, the relevant clause in the Order itself has been couched in language requiring the strictest interpretation. The Court has to see that the transaction in suit was entered into in the ordinary course of business. Not only must it be in the ordinary course but it must relate also to the normal business of the Company. The Court has to see that the transaction was (i) strictly and (ii) solely for the purpose of this normal business. What, we may ask, is the normal business of a Tea Company? What kind of transaction does a Tea Company undertake in the ordinary course of business? These are the questions which the Court has to answer in dealing with this issue. To my mind the normal business of a Tea Company is cultivation and manufacture of tea and selling of tea. Hypothecation of tea crops for carrying on this business may come within the scope of normal business. But the mortgage of a Tea Estate to purchase the property itself before the Company commences business cannot be said to have been done in the ordinary course of normal business. The memorandum of association which learned counsel for the plaintiff showed to me was not exhibited in the suit. In any event, a memorandum only reveals with what power a company has been incorporated. The memorandum does not indicate what the Company is actually doing. The Tea Estate was being acquired to enable the company to start a business and mortgaging was not--it could not have been--the Company's normal business. In the premises, it appears that the object or consideration of the documents dated the 30th August, 1944 and the 30th December, 1944 was forbidden by law; and these documents were executed to defeat the provisions of the Defence of India Rules.

60. I have referred already to Section 23 of the Contract Act. It says, inter alia, that every agreement of which the object or consideration is unlawful is void. Section 6(h) of the Transfer of Property Act, 1882 provides, inter alia, that no transfer can be made for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872. In English law the effect of illegality was laid down by Lord Mansfield as early as 1775. In *Holman v. Johnson*

(1775) 1 Cowp 341 His Lordship says: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country then the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring its action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendendis*."

61. The principle, therefore, is that, no suit may be brought to embrace an illegal contract, nor will the Courts recognise any cause of action founded upon it; Anson on Contracts, 21st Edition, page 313. There is also the principle that what you cannot do directly you cannot do indirectly (See Saleh Abraham Vs. Manekji Cowasji, .

62. In these circumstances, I have to declare that the mortgage in the instant case was void or illegal by reason of the provision of the Defence of India Rules.

63. Before I leave these issues however I wish to say that learned counsel for the parties had raised Issues Nos. 1 and 2, had led evidence on these issues and advanced lengthy arguments on them. That is why I have dealt with these issues in details. But the short point in this case is to determine whose transaction is it that the Court is considering? By the document of the 30th December, 1944 (Ex "E") Ranjit Bose is admitting that he was only the agent of the defendant No 1. He recites the resolution of the 3rd August, 1944 which was passed pursuant to the letter of Dutt and Sen of the said date; he disclaims and relinquishes all right in and title to the properties in favour of the defendant company. The stamp used on the document is a stamp for release. In these premises, it is obvious that the Company had entered into this transaction in the name of Ranjit and this transaction was illegal, and therefore void for reasons advanced aforesaid. Consequently, whether or not the bank had knowledge of these Facts was immaterial. The illegality does not depend on the bank's knowledge. Rule 94-A of the Defence of India Rules imposes an absolute prohibition on these transactions and the Court cannot assist the plaintiff to obtain a decree. (I asked the learned counsel for the plaintiff if he had any answer to this point; but he did not choose to deal with it).

64. Learned counsel for the plaintiff also placed before me certain passages from Craies on "Statute Law", 3rd Edition, at pages 71 and 75. The propositions relied on are that a person may go to a solicitor and ask him how to keep out of an Act

of Parliament--how to do something which does not bring him within the scope of it. That is evading in one sense. But there is nothing illegal in it. The other is when a man goes to his solicitor and says, "tell me how to escape from the consequences of the Act of Parliament although I am brought within it" That is an act of quite a different character. Secondly, an Act evaded is not Act infringed.

65. I have held that the provisions of Rule 94-A are mandatory--the prohibitions imposed therein were absolute. The short answer to this contention of the plaintiff is the sentence I had referred to in Mulla's Contract Act at pages 158 to 159 namely that there was a lime when the English Courts almost regarded it as meritorious to evade statutory regulations and encouraged evasions of them by fine distinctions; but that attitude's long out of dale, and examples of it cannot now be taken as precedents. Moreover, one must always bear in mind the distinction between evasion and infringement. That distinction was pointed out in the very passages which the plaintiff's counsel had cited. Indeed, the first proposition above is preceded at page 74 of Craie on Statute Law. 3rd Edition by the sentence: "the word "evade" is ambiguous and has ordinarily two meanings one suggesting underhand dealing, the other intentional avoidance of something disagreeable." The instant case is not a case of mere evasion but a case of infringement. The Court always examines the real nature of a transaction for which it is sought to evade an Act (Craies on "Statute Law" 3rd Edition, page 76). Here the nature of transaction suggests infringement and not evasion, particularly having regard to the object and the language of Rule 94-A.

ISSUE No. 3.

66. This issue involves consideration of certain portions of Sections 109, 109A and 120 of the Indian Companies Act, 1913. S. 109 inter alia, provides that every mortgage or charge created after the commencement of the Act by a company and being a mortgage or charge on any immovable property wherever situate, or any interest therein shall, so far as any security on the Company's property 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 the manner required by the Act within 21 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.

67. Section 109A, inter alia provides that where after the commencement or the Indian Companies (Amendment) Act, 1936, a Company registered in India acquires any property which is subject to a charge of any such kind as would, if it had been created by the Company after the acquisition of the property, have been required to be registered under this Part, the Company shall cause the prescribed particulars of the charge, together with a copy (certified in the

prescribed manner to be a correct copy) of the instrument if any by which the charge was created or is evidenced, to be delivered to the registrar for registration in the manner required by the Act within 21 days after the date on which the acquisition is completed. If default is made in complying with this Section, the Company and every officer of the Company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.

68. Then we come to Section 120 which provides, inter alia, that the Court, on being satisfied that the omission to register a mortgage or charge within the time required by Section 109, 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 shareholders of the Company, 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 may seem to the Court just and expedient, order that the time for registration be extended.

69. It is to be observed that section 120 conferred on the Court the right to extend time for registration of a mortgage or charge u/s 109 only. There was no such provision for extension of time for registration of charges on properties acquired subject to charge u/s 109A.

70. In the instant case, if it was a mortgage executed by the defendant Company it was not registered at all u/s 109 of the Indian Companies Act, 1913. On the 4th April 1949. the Calcutta National Bank Limited obtained an order from S. B. Sinha, J. that the time for registration and for filing of particulars of the charge created under the memorandum of deposit of Title deeds and the Deed of Hypothecation dated the 30th August, 1944, subject to which the properties were acquired by the defendant Company under the conveyance dated 30th December, 1944, in the office of the Registrar be extended by a month from the said date; (Ex. 7). Obviously this order was for extension of time for registration of a charge on properties acquired subject to charge u/s 109A. The registration was effected within the time allowed by this order: (Ex.8).

71. This order of S.B. Sinha, J. and the subsequent registration were challenged in a proceeding before this Court. The matter went up to the Appellate Court and the judgment of that Court is reported in Calcutta National Bank (in Liquidation) Vs. Abhoy Singh Sahela and Another, . Before the Appeal Court it was urged that this Court was not competent to grant extension of time for registration of a mortgage or charge u/s 120 of the Act of 1913 in a case which falls u/s 109A. The Appellate Court held in favour of this contention. Naturally another question arose, namely, whether the Order of S. B. Sinha, J. on the 4th April, 1949, was a nullity which could be revoked even at the instance of a person (In the present case Abhoy Singh Sahela who was a creditor of the Rangaroon Tea Company Ltd.) who had no interest in the subject matter of the dispute. The Appellate Court was of the view that S. B. Sinha, J. as the Company Judge had jurisdiction u/s 3 of the Indian Companies Act over the subject matter of the dispute and that he had territorial as well as pecuniary jurisdiction in respect of the said

subject matter. Consequently, according to the Court of appeal, the conclusion was irresistible that the decision which S.B. Sinha J. gave was a decision given in the regular exercise of that jurisdiction. The Court of Appeal held that the order extending the time was not void but merely voidable and it could be revoked only at the instance of a litigant who had an interest in the subject matter of that proceeding.

72. In the instant suit learned counsel for the plaintiff admits that the mortgage was not registered u/s 109. But no issue has been raised challenging the order of S. B. Sinha J. and the subsequent registration pursuant to that order despite the observations of the Court of Appeal. So far as the documents go, the Rangaroon Tea Company Ltd. was acquiring property subject to mortgage. Section 109A. therefore, was the proper Section that applied to this transaction. And the acquisition has been duly registered under the Act after obtaining the order of S.B. Sinha, J. Until that order was set aside by a competent Court on the application of a competent party the registration effected under that Order, according to learned counsel, could not be touched.

73. The plaintiffs counsel also argued that Section 109 has no application to the present case. It is attracted only when a Company creates a charge. It is A statutory provision; it either applies or it does not apply. A mortgage created by an individual who does not even describe himself as a trustee or benamdar of the Company cannot possibly come within the purview of Section 109.

74. The issue in this suit is whether the mortgage created by Ranjit Bose in favour of the bank was void by reason of non-registration under the provisions of Section 109 of the Indian Companies Act, 1913. I have held that this mortgage was in fact the mortgage of the defendant Company. I have also held that in the matter of this mortgage Ranjit Bose was a mere benamdar of the Company. Now, a benami transaction (which is recognised in Indian law) is benami for all purposes. If it was the Company's transaction in the name of Ranjit it should have been registered. I can visualise that there could be initial difficulties in effecting registration but there is no evidence that the Company requested the Registrar to register the mortgage on the ground that it was a benami transaction. There is no evidence that the Registrar had refused registration in view of that disclosure or that attempts were made for obtaining orders from appropriate authorities directing the Registrar to effect registration. On the premises, I have to hold that the mortgage is void against the liquidator of the Rangaroon Tea Company Ltd, for want of registration u/s 109 of the Indian Companies Act, 1913.

ISSUE NO. 1.

75. In view of the conclusions I have already reached it is unnecessary to answer this issue. But I would merely point out that there is no direct evidence that there was an agreement for increase in interest from 6 per cent to 7 per cent per annum. Kanak Bhattacharjee merely states that the rate of interest was

increased from 6 per cent to 7 per cent (in Question 38). He does not, remember when that was done but it was done with notice "to the party" (question 38). He has only identified a writing on the top of the bank's Loan Ledger at page 47 marked Ex. II 2, which says "Int. 7 per cent half yearly rest from 1-1-47 as per letter No. 7/46 dated 16-12-46". His evidence is that this is the hand writing of one Arun Kumar Dutt. No copy of the letter of the 16th December, 1946, has been disclosed in this suit. There is no evidence that by mutual agreement the rate of interest was increased. The answer to this Issue therefore must be in the negative.

ISSUE NO. 5.

76. This issue was not pressed.

ISSUES NOS. 6 and 7

77. Learned counsel for the plain till has urged that if no decree could be passed against the defendant Company because of the illegality of the transaction (vide sub-rule (7) of Rule 94A of the Defence of India Rules) particularly decree should be passed against Ranjit Bose in view of the admissions he has made in his written statement. I must say at once that there is no such claim in this suit. The Supreme Court in *Trojan and Co. Ltd. Vs. M. N. Nagappa Chettiar*, has observed that the decision of a case cannot be based on grounds outside the pleading of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for.

78. In any event, let us see what the admission of Ranjit Bose is. In his written statement he claims to be the sole and absolute owner of the Rangaroon Tea Estate and all movables and machinery therein (paragraph 6). In paragraph 7 he denies not the factum but the validity or legality of the alleged mortgage by deposit of Title Deeds and the alleged Deed of Hypothecation both dated 30-8-1944. The question is whether on these admissions a decree can be passed against him. It seems to me that these admissions cannot be brought within the scope of the principle the Supreme Court laid down in *Srinivas Ram Kumar Vs. Mahabir Prasad and Others*, . There in a suit for specific performance of a contract the plaintiff alleged that he paid some money to the defendant in part performance of the contract. The defendant denied the contract and pleaded that the money was taken by him as a loan. The Supreme Court was of the view that a decree could be passed for the recovery of the plaintiff on his failure to prove the contract, even though, the plaintiff had failed to plead and claim relief on this alternative case. The reason why these principles cannot be applied to the present case is that in paragraph 2 of the written Statement Ranjit Bose "does not admit the alleged loan of Rs. 2,75,000/-and/or the validity or legality of the said loan."

79. Assuming therefore that there is some admission with regard to the factum of mortgage, reading the written statement of the defendant No. 2 as a whole

the admission appears to be conditional. A piece of admission cannot be disjuncted from the other portions of the pleading. This proposition was clearly enunciated by Chukravartti, C. J., (sitting with Lahiri J. (as he then was) in *Fateh Chand Murlidhar v. Juggilal Kamlatpat* AIR 1955 Cal 405. The learned Chief justice in paragraph 18 of the judgment at page 468 says that, while a Court of law is entitled to accept a part of the evidence of a witness and to reject another part a pleading cannot be so dissected but must be taken either as a whole or left alone altogether. In other words, continues the Chief Justice, if a written statement contains an admission of certain facts which are favourable to the plaintiff but contains a denial of other facts favourable to the defendant or an assertion of other facts which are unfavourable to the plaintiff, the plaintiff must, if he wants to avail himself of the admission, take not only the first set of facts as truly stated but also the second set of facts.

80. In the instant case, if the plaintiff wants to rely on the admission of Ranjit Bose in his written statement the plaintiff must also accept his other averments I have referred to and also those in paragraph 10 of the written statement, viz., that the transactions in this suit were entered into with a view to contravening or frustrating the imperative provisions of Rules 94A and 95 of the Defence of India Rules and the object or consideration of the alleged Mortgage, Hypothecation and Transfer Deeds was forbidden by law.

81. The moment the plaintiff accepts particularly the latter position, the plaintiff would be faced (apart from the impediments I have already pointed out) with another overwhelming difficulty. No relief can be given when a case is based on illegality. In Mulla's Contract Act, 8th Edition, at pages 198 and 199, has been quoted an observation of Justice Field of the Supreme Court of the United States in *Oscanyan v. Winchester Repeating Arms Co.* (1870) 103 U. S. 261 which runs thus:

"Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys."

82. Our Supreme Court also took a similar view in *Immani Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Others*, .

83. The latest decision on the subject appears to be that of the Andhra Pradesh High Court in *Dasari Satyanarayana*, being minor represented by guardian A. Venkataramaiah Vs. *Kanchupatla Appa Rao and Others*, . In this judgment the decision of that Court's Division Bench in *Peddi Virayya Vs. Doppalapudi Subba Rao and Another*, has been followed. The decision is that when a contract is entered into for making purchases prohibited by statute for the purpose of an illegal partnership no party can invoke the aid of a Court to have such a contract carried into effect its law would not tolerate any party to violate any moral or legal duties. As a corollary to this principle, the Andhra Pradesh High Court is of

opinion that, if money is advanced for a purpose which is either opposed to morals or law or in furtherance of an illegal transaction such advance is not recoverable having regard to the maxim *ex turpi causa non oritur actio*. But this is subject to an exception. The law allows *locus paenitentiae*. So before a fraud or an illegal purpose is carried out, the money may be recovered from the person to whom it was advanced. But the Court will not render any assistance in the recovery of the money if there is even a part performance of the illegal contract.

84. In our case we are not concerned with any violation of moral duties. But it is clear that the contract in suit was illegal and performance of that illegal contract was complete. The Court in the circumstances cannot render any assistance to the plaintiff for recovery of the money advanced under the contract.

85. For all the reasons aforesaid, although I see that the plaintiff bank had advanced large sums of money (on the quantum whereof I give no decision) I am unable to pass a decree either against the defendant Company or the heirs and legal representatives of Ranjit Bose.

86. In the result, this suit is dismissed with costs. Certified for two counsel. The Court Liquidator will be at liberty to retain his costs out of the plaintiff's assets as between Attorney and Client.