

(1968) 06 CAL CK 0001

In the Calcutta High Court

Case No : Extra Ord. Suit No. 2 of 1951 and A.F.O.D. No. 222 of 1966

Calcutta National Bank Ltd. (In Liquidation)

APPELLANT

Vs

Rangaroon Tea Co. Ltd. and Others

RESPONDENT

Date of Decision : 13-06-1968

Acts Referred:

Companies Act, 1913 — Section 100

Defence of India Rules, 1939 — Rule 94A(1), 94A(10), 94A(2), 94A(7), 94A(9)

Transfer of Property Act, 1882 — Section 100, 58

Citation : AIR 1969 Cal 578

Hon'ble Judges : S.K. Mukherjea, J;A.N. Ray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.N. Ray, J.—This appeal is from the judgment of S.P. Mitra J. dated 17th August, 1966.

2. The plaintiff is the appellant. The plaintiff instituted this suit against the respondent company Raugaroon Tea Company Ltd. and Ranjit Bose. During the pendency of the suit Ranjit Bose died and his widow and minor son were impleaded as parties to the suit.

3. The plaintiff's case in short is that on 30th August 1944 the plaintiff lent and advanced to Ranjit Bose a sum of Rs. 2,75,000 with interest thereon at the rate 6 per cent per annum which was subsequently increased to 6 per cent (sic) per annum with effect from 1947. To secure the repayment of the said loan the plaintiff alleged that the said Ranjit Bose deposited with the plaintiff the documents of title relating to the properties known as Rangaroon Tea Estate belonging to Ranjit Bose and situated in the district of Darjeeling. In paragraph 3 of the plaint it was alleged that on 30th August 1944 a registered memorandum of agreement was entered into between the plaintiff and Ranjit Bose at Calcutta evidencing the deposit of title deeds. As further security for the said advance Ranjit Bose charged and hypothecated by way of first charge in favour of the

plaintiff the plants, machinery, furniture and other movable assets appertaining to the said Rangaroon Tea Estate. On 30th August 1944 Ranjit Bose it is alleged, executed in favour of the plaintiff a deed of hypothecation on tea crops of Rangaroon Tea Estate to secure a cash credit account not exceeding Rs. 20,000. In para. 6 of the plaint it is alleged that on 20th December 1944 by a deed of transfer executed by Ranjit Bose in favour of Rangaroon Tea Estate to which the plaintiff was a party Ranjit Bose relinquished all right, title and interest in Rangaroon Tea Estate in favour of Rangaroon Tea Company Ltd. and transferred and assigned the Rangaroon Tea Estate, the movable properties and tea crops to Rangaroon Tea Company Ltd. subject to the aforesaid mortgage by deposit of title deeds, hypothecation of movables and tea crops in favour of the plaintiff. The plaintiff alleged that a sum of Rs. 1,70,365/12/- was due up to 30th January 1950. The plaintiff claimed preliminary mortgage decree in form 5-A of appendix D of the CPC and other relief's. In the schedule of the plaint the description of the property in respect of which the preliminary mortgage decree was asked for was set out.

4. Written statements were filed by Rangaroon Tea Company Ltd. and Ranjit Bose. Additional written statement was filed by the heirs of Ranjit Bose.

5. The issues raised at the trial will indicate the defences broadly stated. The defences were whether there was a mortgage of the tea estate by Ranjit Bose in favour of the plaintiff and whether there was relinquishment of right, title and interest of the tea estate by Ranjit Bose. Another question was whether the property in suit was purchased by Rangaroon Tea Company Ltd. in the name of Ranjit Bose. The third question was whether Rangaroon Tea Company Ltd. created a mortgage on the properties in favour of the plaintiff or Rangaroon Tea Company Ltd. acquired the properties subject to mortgage in favour of the plaintiff created by Ranjit Bose. The fourth question was whether the object or consideration of the documents dated 30th August 1944 and 30th December 1944 was forbidden by law. Another question was whether the mortgage was void or illegal by reason of the provisions of the Defence of India Rules, There was a question as to whether the mortgage was void by reason of non-registration under the provisions of section 109 of the Indian Companies Act.

6. The learned Judge came to the following conclusions: First, the property in suit was purchased by Rangaroon Tea Company Ltd. in the name of Ranjit Bose and further that the mortgage was created by Rangaroon Tea Company Ltd. in the name of Ranjit Bose and the plaintiff bank was all along aware of the transactions effected. Secondly, Rule 94A of the Defence of India Rules was mandatory and the mortgage in the present case was void or illegal by reason of the provisions of the Defence of India Rules. Thirdly, the plaintiff could not enforce the illegal contract and the Court would not recognize any cause of action founded upon it. Fourthly the plaintiff's plea that the transaction was covered by the exemption order under the Defence of India Rules was not sustainable. Fifthly the mortgage was void by reason of want of registration u/s 109 of the

Companies Act. The learned Judge was pleased to dismiss the suit with costs.

7. I shall first deal with the question as to whether the mortgage transaction was of Ranjit Bose or of Rangaroon Tea Company Ltd. This question is covered by issues Nos. 1A and B and 2A and B. Counsel on behalf of the appellant contended that the transaction was of Ranjit Bose for six reasons. First, that the conveyance exhibit B (page 203), secondly, the receipts, exhibit D (pages 227-228). thirdly, the hypothecation agreement, exhibit C (pages 12, 20), fourthly, the certificate of incorporation, exhibit I (page 253), fifthly the memorandum of deposit, exhibit A (page 6) and sixthly, the oral evidence of Kanak Nath Bhattacharjee and in particular questions 5, 150. 159. 202 and 330 would indicate "hat the transaction was of Ranjit Bose. Exhibit B is the conveyance dated 30th August 1944 between Robert Stanley Seymour Treanor and Ranjit Bose. The receipts, Exhibit D are signed by R. S. Treanor and are both dated 30th August 1944. One of the receipts acknowledges the receipt of Rs. 32,282-2-6 from Ranjit Bose and the other receipt is for the sum of Rs. 2,50,000 received from Ranjit Bose. It may be stated here that both the sums were paid by cheques drawn by M/s. Dutt and Sen in favour of Treanor. The hypothecation agreement, exhibit C is dated 30th August 1944 and made between Ranjit Bose described as a borrower and the appellant described as a bank. The certificate of incorporation is dated 18th May 1944. The reason why reliance was placed on the certificate of incorporation was that the conveyance referred to the agreement dated 30th January 1944 between Treanor on the one hand and Ranjit Bose on the other for purchase of Rangaroon Tea Estate and it was said that in view of the incorporation of the company in the month of May 1944 there could not be an agreement between the company and Treanor for purchase of the Tea Estate prior to its incorporation. The memorandum of deposit, Ex. A was relied on to show that it was a memorandum between Ranjit Bose described as the mortgagor on the one hand and the appellant Calcutta National Bank Ltd. described as the mortgagee on the other. The oral evidence of Kanak Nath Bhattacharjee was that M/s. Dutt and Sen were the solicitors of Calcutta National Bank and the loan was taken by Ranjit Bose.

8. It appears that the total price that was paid for Rangaroon Tea Estate was the sum of Rs. 4,32,282-2as-Gp. It is an admitted feature that the appellant Calcutta National Bank advanced Rs. 2,75,000. Exhibit B at page 203 to which reference has been made shows that the Rangaroon Tea Estate was purchased at the price of Rs. 1,50,000. The conveyance was in respect of land and immovable property. It should be stated here that out of the sum of Rs. 1,50,000, Rupees 20,001 was received as earnest money which was paid in the month of February 1944. Exhibit D at page 228 is the receipt dated 30th August 1944 for the sum of Rs. 2,50,000 representing the price of machinery, furniture, live & dead stock and other movable assets of the Rangaroon Tea Estate. The other receipt also marked as exhibit D dated 30th August 1944 at page 227 for the sum of Rs. 32,282-2as-6p. represents the price of all stocks of tea and stores at the estate. The natural question which arises is that if the bank had advanced Rupees

2,75,000 where did the balance come from? This was put to Nirmal Kumar Pal in questions 53 to 56 and some of the questions were of the court. The witness stated that the total amount that was received from the persons who purchased the shares was about Rs. 2,00,000 and the deficit amount was taken from the bank- In other words, the total price paid for the purchase of Rangaroon Tea Estate was met by the advance of Rs. 2,75,000 from the bank and the other sums of moneys raised by issue of shares or representing share capital. This indicates that the portion of the purchase price was admittedly paid by the tea company out of its share capital and the balance came from the advances from the appellat bank.

9. At this stage reference may be made to exhibit 15B which contains entries in the cash book of Rangaroon Tea Company Ltd, These entries are under the date 28/30th August 1944. A sum of Rs. 1,45,191-10 as-6p appears to be paid to M/s. Dutta & Sen on account of consideration money for Rangaroon Tea Estate. The other entry headed "mortgage account" indicates that a sum of Rs. 2,75,000 was received from the Calcutta National Bank against the mortgage of Rangaroon Tea Estate. The third entry for the sum of Rs. 3,89,999-3as-6p, represents the amount paid through M/s. Dutt and Sen, Solicitors to R. S. S. Treanor in payment of the balance price of Rangaroon Tea Estate including interest of Rs. 10,000. The other entries are amounts paid to M/s. Dutt and Sen representing their costs and charges in connection with the conveyance and stamp for the deed of conveyance. These entries indicate that the Rangaroon Tea Company Ltd. paid moneys representing consideration money for the purchase of Rangaroon Tea Estate. These entries further indicate that Rangaroon Tea Company Ltd, paid to M/s. Dutt and Sen costs and charges for conveyance and stamps for the conveyance. These entries also indicate that the amounts mentioned in the entries were paid through M/s. Dutt and Sen to Treanor in payment of the balance price of Rangaroon Tea Estate. It is the oral evidence of Kanak Nath Bhattacharjee that M/s. Dutt and Sen acted as solicitors for the bank. These entries are also in the handwriting of Ranjit Bose.

10. The next document which merits consideration is exhibit 14 being the voucher dated 9th October 1944. This document is also in the handwriting of Ranjit Bose. This voucher represents payment of Rs. 239-11-6 to Ranjit Bose for expenses incurred for visiting the garden on 31st August 1944 with M/s. M. Biswas and N. Bose for taking formal delivery of possession of the properties. Exhibit 15 (a) which is an entry in the cash book of Rangaroon Tea Company Ltd. and bears date 9th Oct. 1944 shows payment of Rs. 239-11 as-6p, to Ranjit Bose for travelling expenses for visiting garden as per voucher. These exhibits numbered 14, 15 (a) and 15(b) which are all in Ranjit Bose's handwriting are documents of great importance to show the real character of the transaction.

11. To my mind it appears that these aforementioned documents completely repel the case that the purchase of the Rangaroon Tea Estate was made by Ranjit Bose. These documents have unmistakable and unimpeachable evidence that the

purchase of Rangaroon Tea Estate was made by Rangaroon Tea Company Ltd.

12. Payment of Rs. 20,000 as earnest money which was made by Ranjit Bose as mentioned in exhibit B was refunded to Hindustan Planters of which Ranjit Bose was the managing partner. Exhibit 4(b) which is an entry under the date 20th June 1944 shows allotment of shares to Hindustan planters for the sum of Rs. 20,000. Nirmal Kumar Pal in his oral evidence (qq. 11. 148 and 152) said that the sum of Rs. 20,000 which was advanced to Treanor before the formation of the company was returned to Hindustan Planters by allotment of shares. This evidence again indicates that the consideration money was paid by Rangaroon Tea Company Ltd.

13. An important document is exhibit 3 being the letter dated 3rd August 1944 written by M/s. Dutt and Sen who acted as solicitors for the appellant bank and also as solicitors for Rangaroon Tea Company Limited. It may be stated here that this letter was brought in aid by both parties in support of their rival contentions. The contention on behalf of the appellant was that the letter would indicate that the transaction was really of Ranjit Bose. The contention on behalf of the respondent on the other hand was that the letter revealed the real nature of the transaction that it was the mortgage of Rangaroon Tea Estate by Rangaroon Tea Company Limited. The solicitors stated that the mortgage to be effected by the company would require the previous sanction of the examiner of capital issues, and the solicitors understood that the Rangaroon Tea Company Ltd. did not want to spend. Therefore, M/s. Dutt and Sen as solicitors for both the appellant bank and Rangaroon Tea Company Ltd. advised that the conveyance might be taken in the name of Ranjit Bose and that the latter should execute a mortgage in favour of the bank and thereafter the estate would be transferred by Ranjit Bose as the trustee of the company. This letter, in my opinion, shows that the real transaction was that Rangaroon Tea Company Ltd. was the purchaser and the mortgagor.

14. Counsel for the appellant placed emphasis on the document dated 30th December 1944 being exhibit E. The contentions on behalf of the appellant were that exhibit E would indicate that the transaction was of Ranjit Bose's because the property had been purchased by Ranjit Bose. There are some recitals in exhibit E. which was made between Ranjit Bose of the first part. Rangaroon Tea Company Ltd. of the second part and Calcutta National Bank Ltd. of the third part. Calcutta National Bank Ltd. the appellant did not sign exhibit E. It was signed by Ranjit Bose and Rangaroon Tea Company Ltd. It was also registered in book No. 1. In exhibit E Ranjit Bose is described as transferor and Rangaroon Tea Company Ltd. is described as transferee. One of the recitals is that the transferee company being short of funds negotiated with Calcutta National Bank Ltd. for advance of Rs. 2,75,000. The second recital is that by a resolution dated 3rd August 1944 the transferor was authorized to act as trustee of the transferee in the matter of purchase. It was contended on behalf of the appellant that since the appellant bank was not a party to the deed the appellant was not bound by it. Reliance was placed on Norton on Deeds, second edition at pages 213 and 214

and the decision in *Doe v. Shelton* reported in (1835) 111 ER 413 and the observations at page 420 of the report in support of the contention that the recital would be binding if it was a statement of party to the deed. In *Norton on Deeds* it is said that it is a question of the construction of the whole deed, whether any of the recitals is to be taken as that of all parties or of some or one of them only, and the estoppel limited accordingly. In other words, when a recital is intended to be the statement of one party only the estoppel is confined to that party and the intention is to be gathered from the instrument. In (1835) 111 ER 413 there is an observation that the deed in that case which recited the bankruptcy was not executed by the defendant and there was consequently no direct estoppel. In (1835) 111 ER 413 the question for consideration was whether the statement in a former deed would bind a party recognizing and adopting the former deed by executing the second deed.

15. There are some significant features in exhibit E dated 30th December 1944. In the first place this is described as a deed of relinquishment and not of transfer. This feature of relinquishment is consistent with the entries in the books of account and also other features attending the transaction of purchase- Secondly, the recital that Ranjit Bose was to act as trustee in the matter of the purchase for and on behalf of the company and to acquire the same for and on behalf of the company and also for the mortgage will show that the transaction was of Rangaroon Tea Company Ltd. Thirdly, the deed states that the transferee company called upon the transferor to transfer the Rangaroon Tea Estates including all movable and immovable estates subject to the mortgage and there is another recital that in the transaction of the mortgage the transferor acted for the company. This document, exhibit E is in my opinion binding on the appellant bank for these reasons, First, this deed is accepted by the plaintiff and the object with which it was tendered as an exhibit was for imposing liability on Rangaroon Tea Company Limited. Secondly, Ranjit Bose is described in the cause title of the plaint as a trustee under the deed dated 30th December 1944. Particularly in paragraph 6 of the plaint there is reference to this deed and the appellant bank the plaintiff in this suit is described as a party to the deed. It should be slated here that counsel appearing for the appellant submitted that it was a mistake and is should be read that the plaintiff was not a party to the deed. The plaint was not amended. The learned Judge at the lime of hearing of the suit called upon the parties to explain this feature of the case. The learned Judge in his judgment rightly came to the conclusion that paragraph 6 as it stood indicated be-yond any measure of double that the appellant was bound by the deed. Fourthly, the appellant acted upon exhibit A and transferred the loan account. Knnak Nath Bhattacharjee, a witness on behalf of the appellant, stated in Clause 81 that when Ranjit Base made a transfer deed in the name of Rangaroon Tea Company Limited and the deed was sent to the appellant, the name of Ranjit Bose was struck off and the name of Rangaroon Tea Company Limited was substituted. Again, in questions 161 to 165 and 267 to 276 the same witness stated that the document dated 30th December 1944 was sent to the appellant

bank and when it was put to the witness that the bank acted on the basis of the document the witness answered that there was nothing in writing to show that But the evidence establishes the fact that the appellant bank acted upon the deed exhibit E. Finally, the witness stated that the name of Rangaroon Tea Company Limited was substituted. Counsel for the respondent rightly contended that if the appellant bank had any grievance regarding the recitals the bank should have sued for setting aside the deed. On the contrary, the appellant bank relied on the deed.

16. The most important documents are exhibits F/I, G/I and H/I. Exhibit F/I is the loan register. Exhibit G/I is the loan ledger and exhibit H/I is also the loan ledger subsequent to exhibit G/I. While discussing exhibit F/I, reference may also be made to exhibit 2/b which was tendered by the respondent. Exhibit "2/b is at page 12(5 of the loan register and exhibit F/I is at page 127 of the same book. Exhibit F/I shows the account in the name of Ranjit Bose. The particulars there are loans against mortgage Rangaroon Tea Estate and hypothecation of all movables and the loan is described as loan No. 1519- (t should he stated that in the particulars at page 127. Exhibit F/I the writing as it stood was loan against mortgage Rangaroon Tea Company Ltd. The words "company limited" were struck out and the word "estate" was written thereafter. The date "30th August" appears to be re-written. The importance of exhibit 2/b at page 126 is based on the suggestion which was made that the entry at page 126 was in the name of Rangaroon Tea Company Ltd. in respect of the same loan No. 1519. To the naked eyes loan No. 1519 is apparent in exhibit 2/b. Loan No. 1519 is also stated in exhibit F/I. It was rightly contended by counsel for the respondent that exhibit F/I was brought into existence to make out the case that the transaction was of Ranjit Bose and not of Rangaroon Tea Company Limited. The learned Judge referred to the exhibits aforementioned and rightly came to the conclusion that the documents prior to 30th August 1944 were in the name of the company and at the earliest possible opportunity on 30th December 1944 when exhibit E was received the entries were made in the name of Ranjit Bose and described it as an example of how a transaction was entered into before a company was floated. This feature of the case again indicates that the transaction was really of Rangaroon Tea Company Limited and Ranjit Bose acted in the matter of arrangement of the advance and other allied work. Exhibit G/I which is the loan ledger was in the name of Rangaroon Tea Company Ltd. and the address was Block E. 3 Clive Buildings. 8 Clive Street, Calcutta, the loan was described as loan No 1519. On top of Rangaroon Tea Company Ltd.. which is in symmetry with the print ed word "account" appears in writing the words "Mr. Ranjit Bose" and then that name is struck out and there is a signature made by the witness Kanak Nath Bhatlacharjee. The words "C. O." appears to be written as a prefix to Rangaroon Tea Company Ltd and again the words "C. O. are struck out. Exhibit H/I which is the loan ledger shows the account in the name of Rangaroon Tea Company Ltd. These documents when studied at close quarters will indicate that the learned Judge came to the correct conclusion that the account was in the

name of Rangaroon Tea Company Ltd- There appears the strongest evidence of mutilation in exhibit 2/b at page 126 of the loan register and the creation of exhibit F/I. If Ranjit Bose was the party then one would expect the address of Ranjit Bose to be entered in the account. The significant absence of the address, counsel for the respondent rightly contended, leads to the inescapable conclusion that the insertion of the entry of the name of Ranjit Bose was for the purpose of giving semblance to the case of the appellant bank.

17. Annexure "D* to the plaint which was also tendered and marked as exhibit 16 in my opinion completely nullifies the case of the appellant bank. Annexure D as it stood prior to amendment showed the name of Rangaroon Tea Company Ltd. and the address 2S5/F Bowbazar Street. By amendment the words "A/c Mr. Ranjit Bose" and "Particular loan against mortgage Rangaroon Tea Estate and hypothecation of all movables" and the address Block E, 3 Clive Buildings. 8 Clive Street, Calcutta were introduced but the most important feature of exhibit 16 is that the certificate given by the Manager of the appellant bank is that the entries are true copy of the entries made in the loan account of Rangaroon Tea Company Ltd of 285/F Bowbazar Street. Calcutta, with Calcutta National Bank Ltd. kept in the usual and ordinary course of business and that the ledger is in the custody of the bank. After such a certificate there cannot be any vestige of truth in the alleged version of the appellant bank. The learned Judge referred to exhibit 16 and rightly expressed the opinion that it was necessary for the court to know from which of the books of the bank the statement was copied and that the book was not shown to the learned Judge. Any bank worth its name when certifying any account to be the true copy of the entries made in the account must disclose the original when there is controversy and dispute about the account and establish the ease. The non-production of such an account in the original leads to the irresistible conclusion that exhibit 16 is unworthy of credence and should be rejected as baseless." The learned Judge rightly commented on this feature of the case and I have no doubt in my mind that the absence of any explanation as to how and from which book exhibit 16 came to be copied and the fact that exhibit 16 does not tally with exhibit F/I leave no doubt in my mind that the account described as in the name of Ranjit Bose is utterly unbelievable.

18. Exhibit 16 was the subject of cross-examination of Kanak Nath Bhattacharjee and in questions 170 to 185 the witness was asked to find out the book of which exhibit 16 was a copy and the witness said that exhibit 16 was a copy of exhibit F/I. It has only to be stated to be rejected- The witness was asked by the court to find out the heading of Rangaroon Tea Company Ltd. in any of the books. But the witness referred to exhibit H/I. The witness was asked as to why it was written "loan against mortgage Rangaroon Tea Company Limited" and the witness said that it was written by mistake and a limited company could not be kept by way of security and therefore the security was Tea Estate- In question 212 it was suggested to Kanak Nath Bhattacharjee that the heading had been deliberately tampered subsequently to make it appear that the account was of Ranjit Bose. The witness denied the suggestion but I have no hesitation in

accepting the suggestion to be proved beyond any measure of doubt by intrinsic evidence contained in exhibits F/I and 2/b and the other documents to which I have made reference.

19. There are two letters at pages 277 and 291 of the paper book marked exhibits 5 and 11 respectively which will throw light on this question. Exhibit 5 is dated 13 January 1948 and is addressed by the appellant bank to Rangaroon Tea Company Limited informing the "interest due on your loan account dated 30-8-44 for Rs. 2,75,000/-" Exhibit 11 at page 291 is dated 18 November 1948 and is written by the appellant Calcutta National Bank Ltd. to Rangaroon Tea Company Ltd. and headed "loan against deposit of title deeds of Rangaroon Tea Estate and Hypothecation deed of movable assets of the Company." In exhibit 11 the appellant bank wrote to Rangaroon Tea Company Ltd. "We are sorry to point out that you have not arranged to liquidate your loan taken from us on 30th August 1944." These letters as also exhibit 6 dated 30th March 1949 written by Calcutta National Bank Ltd. to Rangaroon Tea Company Ltd whereby the appellant bank called upon Rangaroon Tea Company Ltd. to repay "your liabilities to the Bank" leave no doubt whatever that the transaction of loan was between the appellant bank on the one hand and the respondent Rangaroon Tea Company Ltd. on the other. I am therefore of opinion that the learned judge for the reasons given in the judgment came to the correct conclusion that the company purchased the Tea Estate and that the loan was taken by Rangaroon Tea Company Ltd. and the mortgage was also made by Rangaroon Tea Company Ltd.

20. A short question which arose was as to the date of possession. It was contended on behalf of the appellant that Ranjit Bose took possession on 1st February 1944. The oral evidence of Nirmal Kumar Pal was that Ranjit Bose had been going to Darjeeling from time to time before 30th August 1944. When the attention of Nirmal Kumar Pal was drawn to exhibit 14 which is the voucher dated 9th October 1944 Nirmal Kumar Pal said that Ranjit Bose went to the gardens after the Incorporation and the expenses were paid by the tea company. Exhibit 3 which is dated 3rd August 1944 being a letter of M/s. Dutt and Sen indicates that there was great urgency in regard to the transaction. It is true that Kanak Nath Bhattacharjee in his oral evidence said that Ranjit Bose came to the appellant bank in the months of March and April 1944 and that evidence was adduced for the purpose of introducing possession. In my opinion counsel for the respondent rightly contended that it was unbelievable that Treanor would part with possession in the month of February 1944 before he was paid the purchase price. The document, namely, exhibit B dated 30th August 1944 being the conveyance indicates by intrinsic evidence that the vendor Treanor was seised and possessed of the Tea Estate. The consideration was for the purchase of land and movables. I am unable to accept the contention that Ranjit Bose was put in possession in the month of February 1944.

21. Counsel on behalf of the appellant contended that if the transaction was not of Ranjit Bose's but of Rangaroon Tea Company Ltd. the transaction would not

be within the mischief of Rule 94-A of the Defence of India Act for two broad reasons. First that mortgage would not be within the mischief of Rule 94-A and secondly, there was no instrument creating charge within the meaning of Rule 94-A. The relevant provisions of Rule 94-A for appreciating the rival contentions in the present appeal are as follows:

(1) 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, viz. (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) 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;

(ii) make in British India any public offer of securities for sale;

(iii) renew or postpone the date of maturity or repayment of any security maturing for payment in British India.

(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."

22. It was first contended that the provisions contained in Rule 94-A were not mandatory and the arguments which were made in the trial court were again advanced. The learned judge, in my opinion, correctly came to the conclusion that the provisions contained in Rule 94-A were mandatory. The most important question is whether there is an instrument creating a charge in the present case. The contention on behalf of the appellant was that there was an equitable mortgage for deposit of title deeds and the instruments which came into existence were subsequent to the creation of equitable mortgage and therefore were not instruments creating a charge. The decision in *Kedarnath Dutt v Shamlali Khettry*, reported in (1873) 11 Beng LR 405 deals with the question as to the creation of equitable mortgage by an instrument. In that decision the test with regard to writings was laid down as follows: "If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created." In *Kedarnath Dutt's* case (1873) 11 Beng LR 405 the instrument was as follows: "For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit to the plaintiff as a collateral

security by way of equitable mortgage, title-deeds of my property," It was held that the mortgage was complete without the memorandum and the memorandum was not in writing which the parties had made as the evidence of their contract but only a writing which was evidence to the fact from which the contract was to be inferred.

23. This question again came up for decision before the Judicial Committee on three occasions. These are the decisions in *Subramonian v. Lutchman*, reported in 50 Ind App 77 : (AIR 1923 PC 60), AIR 1931 36 (Privy Council) and the case of AIR 1939 167 (Privy Council) . The test laid down in (1873) 11 Beng LR 405 was referred to in those cases. Lord Carson in 50 Ind App 77 : (AIR 1923 PC 50) said that "if the memorandum in question was a bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, it would require registration." Lord Tomlin in AIR 1931 36 (Privy Council) also referred to the same test as to whether the memorandum embodied all the particulars of transaction of which the deposit formed part. In GG Ind App 184 : (AIR 1939 PC 167) the document along with the title deeds was delivered at a later date and yet it was held to be registrable, the entire law is now summed up in the Supreme Court decision in *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, . The Supreme Court said that the question as to whether the deposit of title deeds is made by a memorandum as an instrument creating an interest in Immovable property would depend on the fact as to whether the parties intended to reduce their bargain regarding the deposit in the form of a document. The Supreme Court said that the time factor would not be decisive and the document might be handed over to the creditor along with the title deeds" and yet might not be registrable or it might be delivered at a later date and nevertheless be registrable. The Supreme Court said "the crucial question is: did the parties intend to reduce their bargain regarding the deposit of title deeds to the form of a document. If so, the document requires registration." In other words, if the deposit of title deeds and the documents form integral parts of the transaction the instrument then would be creating charge and it would require registration.

24. In the present appeal there is no aspect of registration under the Indian Registration Act. But these decisions are of importance to show as to whether charge was created by any instrument in the present case or not. In the case before the Supreme Court. *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, the memorandum was as follows: "We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7 Sambhu Mallick Lane relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions" The Supreme Court referred to the decision in AIR 1939 167 (Privy Council) where the essential terms of the transaction stated as

"hereby agreed" and reference to the moneys as "hereby secured" were held by Lord Macmillan to amount to the parties professing to create a mortgage by deposit of title deeds contemporaneously entering into a contractual agreement in writing making the same an integral part of the transaction and itself an operative instrument and not merely evidential.

25. In the present case exhibit A dated 30th August 1944 would show in the recitals that the mortgagor has deposited with the mortgagee the title deeds and thereafter these words occur "now it is hereby agreed and declared by and between the mortgagor and the mortgagee." There are three important clauses. The first clause relates to the amount and obligation to repay with interest and the dates of repayment. The second clause states that set long as the principal sum remains due and outstanding the mortgagor shall pay to the mortgagee interest at the rate of 6 per cent, per annum on the 15th day of each month. The third clause is that the mortgagor has already deposited with the mortgagee the title deeds relating to the land, garden and premises known as Rangaroon Tea Estate with intent to create a security thereon by way of mortgage by deposit of title deeds for the due repayment of the principal sum and all interests and all costs of realization. In the same memorandum it is thereafter stated as follows: "the mortgagor doth hereby covenant with the mortgagee." Five covenants are thereafter set out. In those covenants it is stated that the mortgagor shall during the subsistence of this security duly pay all government revenue, accesses, taxes, rates. It is further stated that if the mortgagor fails to carry out covenants or if it appears to the mortgagee that the value of the security created as aforesaid has depreciated the entire amount then shall at once become due and payable. It is also stated that for the realisation of its dues the mortgagee will be entitled to appoint a nominee to be receiver. These features in the light of the observations of the various decision indicate that the parties in the present case entered into the transaction of mortgage by the instrument in writing which created the mortgage and that the written instrument was an integral part of the transaction and was itself the repository of the agreement and an operative instrument of the bargain regarding the deposit.

26. Reference may be made to exhibit B which is the deed of hypothecation. That is the hypothecation of movables dated 30th August 1944. This deed is necessary to be considered in relation to another contention that if the mortgage is unenforceable by reason of non-compliance with the provisions contained in Rule 94-A whether the appellant plaintiff can realise the sums claimed in the plaint. I shall deal with that question later on.

27. The next question is that if there is an instrument of mortgage whether a mortgage would be an instrument creating a charge. Counsel on behalf of the appellant contended that there was a distinction between mortgage and charge and relied on the decision in K.J. Nathan Vs. S.V. Maruty Reddy and Others, and in Shiva Prasad Singh v. Beni Madhab, reported in AIR 1922 Pat 529 In the Patna case it was said that a charge only gave right to payment out of a particular fund

or property without transferring that fund or properly and a mortgage was in essence a transfer of an interest in specific immovable property. Relying on that definition counsel for the appellant contended that since the Defence of India Act referred to charge a mortgage would not be within the mischief of the provisions. Reliance was placed on Craies on Statutes 6th edition at pages 168 to 174 in support of the proposition that ordinary meaning should be given to the word "mortgage.- It was also said that the legislature should be presumed to know of the distinction between "mortgage" and "charge" and therefore since the word used was "charge" mortgage should not fall within the scope and intent of Rule 94-A. In support of that contention reference was made to certain other provisions of Defence of India Rules namely Rules 90 and 94 in support of two propositions that Rule 94 spoke of mortgages and Rule 90 referred to several expressions and those expressions were said to mean matters stated in those rules. It was therefore contended that when Rule 94-A said that securities should mean the instruments mentioned there the meaning was exhaustive and no higher content should be given to the word "charge". Reliance was placed on the decision in *Ittiavira Thomas v. Joseph Tile Works Ltd.*, reported in AIR 1957 Trav-Co 6 for two reasons first that the words "instruments creating charge" were to be used *ejusdem generis* and secondly that the securities in order to come within the mischief of Rule 94-A would have to be issued and not executed. In the Travancore Cochin case it was said that since shares, stocks, bonds and debentures under the Companies Act were issued and the word "issue" was used in relation to shares in various sections and in S. 109 of the Companies Act the word used was "created" and not the word "issued", "instruments executing or creating charge" in the Defence of India Rules would not be within the meaning of securities issued by or for the benefit of the company. The other finding in the Travancore Cochin case is that the rule of interpretation is that the general word which follows particular and specific words of the same nature takes its meaning from that and is presumed to be restricted to the genus in those words.

28. In the case of *Anderson v. Anderson*, reported in 1895 1 Q B 749 a voluntary settlement came up for consideration as to whether the deed of settlement would include the horses, carriages, harness and stable furniture which were in the stable in the coach house at the time of the settlor's death. By a settlement made by a husband upon the wife a leasehold messuage described in schedule was assigned to the trustees in these words "all the house-hold furniture, plate, linen, glass and tenant's fixtures, wines, china spirits and other consumable stores and other goods, chattels and effects in or upon or belonging to" the leasehold messuage. In the Schedule the leasehold premises were described as a piece of ground "with the messuage tenement or dwelling house, back buildings, coach-houses, stable buildings and all other erections thereupon." The question was whether the general words "other goods, chattels and effects" there would pass to the trustees carriages, horses, harness and stable furniture in or upon the coach house and stable building. The question was answered in the affirmative. Lord Esher M. R. said "Nothing can well be plainer

than that to shew that prima facie general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before." Rigby L. J. said: "The main principle upon which you must proceed is, to give to all the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning and the mere fact that general words follow specific words is certainly not enough." In *S.S. Magnhild v. McIntyre Brothers and Co.*, reported in 1920 3 KB 321 the question for consideration was the meaning of the words "or other accident". McCardie J. said relying on the observation of Vaughan Williams L. J. in *Tillmanns v. S.S. Knutsford*. 1908 2 KB 385. that if a common genus was not to be found the necessary consequence would be that the words "or any other cause" could not be limited by the doctrine of ejusdem generis. In *Tillmanns*" case. 1908 2 KB 385, Farwell L. J. said that "unless you can find a category there is no room for the application of the ejusdem generis." Kennedy L. J said in *Tillmanns*"s case 1908 2 KB 385 that "the genus must first be found, and then you must find whether the words that follow are applicable to the species enumerated belonging to the one genus."

29. In the present case, the words in Rule 94-A are to be found in Sub-rule (1) in four separately numbered categories: shares, stocks, bonds in the first category, debentures in the second category, instruments creating charge or lien on the assets of the company in the third category and instrument acknowledging loan or indebtedness of the company and guaranteed by a third party or entered into jointly with the third party in the fourth category. Counsel for the respondent, in my view, rightly contended that there was no occasion for application of the doctrine of ejusdem generis. First, there is no genus and there is no category-The words "shares, stocks, bonds, debentures, instruments creating a charge and instruments acknowledging loan to or indebtedness of the company do not form a genus. Secondly, shares, stocks and bonds do not create a charge. Thirdly, debentures may not create a charge there could be secured and unsecured debentures Fourthly, Rule 94-A was introduced in 1948. Categories 3 and 4 in Rule 94-A (1) were introduced in the month of June 1944. Counsel for the respondent, in my view, rightly contended that when all the four categories were not enumerated at the inception the intention was to introduce something new. Finally, the fourth category namely instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party entered into jointly with a third party shows that the third category representing instruments creating charge or lien on the assets of the company should not and could not be read ejusdem generis.

30. Reliance was placed by counsel for the respondent on the *Bolton Insurance* case, reported in 1943 AC 166 where Lord Wright said that the ejusdem generis rule is merely a rule of construction not a rule of law and it presupposes a genus.

The word workman was there defined in the statute to mean "any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing" etcher. Lord Wright further said that in that case the only genus was a contract with an employer and the contract would constitute the person a workman male or female. Clerical work was added later. Therefore, the words "or otherwise" were held by Lord Wright to be intended to embrace the entire range of wage earning or salaried employment.

31. In the present case counsel for the respondent, in my view, rightly contended that there was no common feature in the four categories enumerated in Sub-rule I of Rule 94-A. Counsel for the respondent rightly submitted that ordinary meaning should be given to the words "instruments creating charge and hypothecation or mortgage instruments creating charge or lien on the assets of the company would be within the scope of Rule 94-A (1). For these reasons I am unable to accept the contention of counsel for the appellant that the words "instruments creating charge" would not embrace hypothecation or mortgage instruments. With respect, I am unable to agree with the view expressed in the Travancore Cochin decision-

32. The contention on behalf of the appellant that mortgage was something different to charge and since the word used in Rule 94-A (I) was only charge, the mortgage would be exempted from the operation of the rule is also, in my view, unacceptable. The word "charge" here is used in the generic sense of incumbrance. Counsel for the respondent referred to the meaning of charge in the Shorter Oxford Dictionary, Wharton's Legal Lexicon, Osborn's Legal Dictionary and Jewel's Legal Dictionary to show that the primary meaning would be a liability to pay money laid upon any estate or upon an obligation imposed upon property or when applied to property it would be security for payment of debt or performance of an obligation. In other words, it would be a formal security for payment of debt or performance of obligation and payment would be out of the specific funds or out of realisation of proceeds of property. Counsel for the respondent contended that in a charge the right to sell the property was contractual and could be defeated by 3 bona fide purchaser for value without notice. Whereas, in the case of a mortgage the right to sell would consist of interest in the property being transferred to mortgagee and as such it was a right in rem and for properties valued at Rs. 100/-or more there was no distinction because of compulsory registration. In my opinion, this distinction correctly sums up the legal position. In the case of a charge as well as in the case of a mortgage two elements are common. First, that there is a loan and secondly that there is a security for the repayment of the loan. The only difference between a charge and mortgage is that in the case of mortgage there is transfer of interest but in the case of a charge there is no transfer of interest That is how in the Patna decision reported in AIR 1922 Pat 529 a mortgage was described as a jus in rem and the charge was described as a jus ad rem. Counsel for the respondent relied on the decisions in Srinivasa Raghava Iyenger v. K.R. Renganatha Iyengar, reported in

AIR 1919 Mad 528 and in *Chhaganlal Sakham Vs. Chunilal Jagmal*, . In the Madras case there was a promissory note and thereafter a security bond was given on the same day. The security bond amounted to a charge on immovable property according to one party and it amounted to a mortgage according to another party. The distinction between a mortgage and a charge was referred to. At page 530 of the report Sadnsiva Aiyar J. said that every mortgage document created also a charge but conversely a charge might not amount to a mortgage in all cases. Where the charge is created over specific immovable property though it might not be a simple mortgage it was held to be a mortgage though of an anomalous kind mentioned in Section 98 of the 1882 Act. In the Madras case reference was made to the Bench decision of this Court in *Royzuddin Sheik v. Kali Nath Mookerjee* reported in ILR (1906) Cal 985 and it was said that the Calcutta view of the effect of the document creating a charge on specific immovable property was too narrow and even where there was no covenant to pay the document creating such a charge was a mortgage and not a mere charge liable to be defeated by a subsequent mortgage deed or sale deed.

33- The decision in AIR 1934 Bom 189 was also relied on by counsel for the respondent on the observation appearing at 190 of the report that every mortgage includes a charge and it would be a difficult question to find out if a charge amounted to a mortgage. No court will favour an endeavor to give to an identical transaction another name with the object of bringing about the particular legal results in question without observing the formalities specified by the law. If the transaction was exactly of the nature contemplated by law which the law described or otherwise referred to as mortgage if, it has the same incidents, so that it cannot be distinguished from a mortgage, then the transaction cannot be treated as otherwise than a mortgage merely by calling it a charge.

34. In the light of these decisions it will appear that the meanings ascribed to mortgage and charge under Sections 58 and 100 of the Transfer of Property Act indicate that an instrument creating a mortgage upon assets of the company is an instrument falling within the mischief of Rule 94-A (1) of the Defence of India Rules. It cannot, in my opinion, be said that a mortgage which has all the attributes of a charge and has in addition the character of transfer of interest in land is outside the purview of Rule 94-A (1) Counsel for the respondent rightly contended that the attribute of the element of security gave the real clue to the meaning of the charge. The word "charge" here is used in the generic sense and it embraces mortgages within the meaning of the words "instruments creating a charge on the assets of Company."

35. Counsel for the appellant contended that if the transaction fell within the mischief of Rule 94-A as an illegal transaction the plaintiff appellant would not be entitled to recovery of money. In aid of that argument it was also contended that at the trial an amendment was asked for the recovery of Rs. 1,75,000/- and that amendment should have been allowed. The learned judge came to the conclusion

that as no suit could be brought to enforce any illegal contract the courts would not recognise any action founded upon it. Reliance was placed upon Anson on Principles of the English Law of Contract 21st Edition at page 313 and the decision in *Holman v. Johnson* (1775) 1 Cowp 341. In my opinion the learned judge came to the correct conclusion. In the present case there is an additional feature which is to be found in Sub-rule (7) in R. 94-A of the Defence of India Rules; namely, "No person shall accept or give any consideration for any securities 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." The result is that both the acceptance and the giving of consideration for any of the securities mentioned in Rule 94-A is prohibited by the Statute. It should be stated here that the *Travancore Cochin* case, AIR 1957 Trav. Co 6 does not refer to Sub-rule 7). It may be that the particular sub-rule was not placed for consideration in that case or it may be that it was not necessary to go into the question by reason of the conclusion that the hypothecation in that case was not within the mischief of Rule 94-A. Cheshire in the Law of Contracts, 6th edition (page 312) states that the effect of the two maxims *Ex turpi causa non oritur action* and *in pari delicto potior est conditio defendantis* is that neither can maintain an action against the other if he requires any aid from the illegal transaction to establish his case. See 1915 AC 100. If a plaintiff cannot maintain his cause of action without showing as part of such cause of action that he has been guilty of illegality then the courts will not assist him in his cause of action. This was the opinion of A.L. Smith L. J. in *Scott v. Brown Doering McNah and Co.* (1892) 2 QB 724. Counsel on behalf of Ranjit Bose's heirs contended that the plaintiff appellant asked for preliminary mortgage decree and Ranjit Bose was sued as a trustee and also for self. In view of my conclusion that the mortgage transaction is of the company there is no liability of the heirs of Ranjit Bose. In my view the illegality inherent in the transaction prevents the plaintiff appellant from relying on it either for the enforcement of rights under the instrument or for the recovery of the consideration money for the transaction.

36. Counsel for the respondent Tea Company, in my view, rightly contended that the consideration of Rs. 2,75,000/- in the present case was the entire consideration for the mortgage by deposit of title deeds. Apart from the mortgage there was exhibit C which created a charge on movables. The consideration was the same for both the deeds. It was one entire integral consideration. The result is that the illegality of the transaction prevents the plaintiff appellant from relying upon the same consideration for recovery of the same.

37. A contention was advanced by counsel for the appellant that the appellant bank was entitled to exemption. The exemption was based on the notification No. D- 4114-E. C.I./44 in exercise of the power conferred by Sub-rule 9) of R. 99-A of the Defence of India Rules. The exemption in short is that "the Central Government is pleased to exempt 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 advance made or to be made or over-draft granted or to be granted by that person from time to time". The learned judge rightly came to the conclusion that there was no pleading to that effect and that no issue was raised. The learned Judge came to the conclusion that the plaintiff-appellant was not entitled to exemption for three broad reasons, First, there was no pleading. Secondly, there was no issue- Thirdly, there was no evidence. Counsel for the appellant relied on oral evidence of Nirmal Kumar Pal in questions 5, 6 and 7 where the deponent said that Rangaroon Tea Company Ltd. was incorporated for doing tea business and the tea business was done by purchasing a tea estate. In my opinion, this evidence is utterly useless in aid of the appellant's contentions. In order to succeed on exemption there is to be specific pleading and there is to be evidence that the exemption is available by reason of the transaction having been entered into in the ordinary course of normal business and secondly that it is strictly and solely for the purpose of that business. There is no evidence to establish such a case of exemption.

38. The last question was whether the transaction of mortgage satisfied the requirements of registration u/s 109 of the Companies Act. If the transaction was of the company and if there was no registration u/s 109 the result would be that any person who fails to register it would rank as unsecured creditor. This would be so in case of valid transactions. In the present case irrespective of the illegality under Rule 94-A of the Defence of India Rules the plaintiff appellant did not have the mortgage registered in accordance with Section 109 of the Indian Companies Act.

- 39. For these reasons, I am of opinion, that the contentions advanced on behalf of the appellant fail. The judgment is affirmed. The appeal is dismissed. The order as to costs made by the learned judge in the trial court is set aside. This being a transaction which is illegal neither party should, in my opinion, be entitled to costs against the other and each party should pay and bear its own costs of this appeal and of the trial Court. The liquidator will retain his costs as between attorney and client, certificate for two counsel, out of the assets including the assets lying with the official receiver in the case of Rangaroon Tea Company Ltd. and including the assets lying with the court liquidator in the case of Calcutta National Bank Ltd.

S.K. Mukherjea, J

40. The main question which has to be decided in this appeal is whether having regard to the provisions of Rule 94-A of the Defence of India Rules a company could create a valid mortgage by an instrument for its own benefit except with the consent of the Central Government.

41. The relevant portions of the Rule provide:

94-A. Control of Capital issues -- (1) 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, viz., (i) shares, stocks and bonds, (ii) debentures, (in) 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) 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;

(ii) make in British India any public offer of securities for sale;

(iii) renew or postpone the date of maturity or repayment of any security maturing for payment in British India. X X X X

(7) No person shall accept or give any consideration for any securities 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.

X X X X

(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.

42. The Rule expired over two decades ago but it has lost none of its importance as it still rules from its grave through the Capital Issues (Control) Act 1947. by which its material provisions have been re-enacted with slight modifications.

43. The learned trial judge has found, and so have we that on or about August 30, 1944, the respondent company by its trustee or benamdar one Ranjit Bose, deposited title deeds of Rangaroon Tea Estate with the appellant bank with intent to create a security on the said estate. It transpires that Ranjit Bose, the trustee or benamdar was the ostensible owner and the respondent company, the real owner of the property.

44. On August 30, 1944 an agreement was entered into between the appellant bank and Ranjit Bose which was recorded in a Memorandum of Agreement subsequently registered with the Registrar of Assurances. It is recited in the Memorandum that the mortgagor has already deposited with the appellant bank title deeds of properties which are free from encumbrances, with intent to create a security on the same, by way of mortgage by deposit of title deeds in favour of the appellant bank for due repayment of the sum of Rs. 2,75,000/- which the mortgagee has lent and advanced to the mortgagor. The terms and conditions on which the loan has been advanced and on the basis of which the mortgage has

been created are set out in the memorandum in great detail. No instrument avowedly creating a mortgage could have been more elaborate and complete. Even the right of the mortgagee to appoint a receiver in the event of the mortgagee instituting a suit against the mortgagor has been reserved. There is no question that the parties themselves, in the language of Sir Richard Couch, C. J., considered and made the Memorandum in writing the only repository and the appropriate evidence of their agreement. The intention of the parties is amply borne out not only by the nature of the document and the terms of the agreement but also by the fact that the parties themselves, assisted by their Solicitors, thought it necessary to register the agreement. In these circumstances, it must be held that the mortgage was created not merely by deposit of title deeds but also by the instrument described as Memorandum of Agreement in the light of pronouncements made in a series of decisions from *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, .

45. The question then arises whether the mortgage created by the Memorandum of Agreement is a charge created by an instrument within the meaning of Rule 94-A. It is said that a "charge" as defined in Section 100 of the Transfer of Property Act, is not a mortgage. In fact, the section provides that where an Immovable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Relying on the Section, Mr. Das contended that the same meaning is to be given to the expression "charge" in Rule 94-A as in Section 100 of the Transfer of Property Act. He also drew our attention to the use of the word "mortgage" in Rule 94 (4) of the Defence of India Rules. If the framers of the Rules intended to extend the operation of Rule 94-A to mortgages, the Rule, he argued, should have clearly said so. He also referred to the definition of "Security" in Rule 92-A where mortgage is not spoken of at all. He submitted that as the definition of "Security" in Rule 94-A is exhaustive, in the absence of any reference to mortgage, mortgages are outside the scope of the Rule.

46. The definition of "Security" in Rule 92-A is in my opinion, not relevant because "Security" is defined again in Rule 94-A specifically for the purpose of that Rule. It is true that the Rule does not speak of mortgage, but only of charge- It cannot be disputed that every mortgage creates a charge and in its generic sense, is mortgage must, and does, include a charge. A statute must be given the meaning that its language permits so as to carry out and not to defeat its object. The object of the Rule, as is provided by Section 2 (xxii) of the Defence of India Act, 1939, is to control the possession, use OP disposal of, or dealing in Securities. It will be unreasonable to construe the expression "charge" in a restricted sense, as, confined to a transaction not amounting to mortgage as contemplated u/s 100 of the Transfer of Property Act and not in its wider and generic sense. To do so will be to hold that under Rule 94-A although a company cannot lawfully create a charge by an instrument on its assets except with the consent of the Central Government it can create a mortgage by an instrument in

the absence of such consent. In my opinion, such a construction is not tenable. Having regard to the object of the Rule and the principle that every mortgage necessarily creates a charge, it must be held that the expression "charge" in R. 94-A includes a mortgage. It is more than likely that R. 94-A made no mention of mortgage because the framers of the Rule thought that as a mortgage necessarily creates a charge, it is not necessary to make specific reference to "mortgage" in the definition,

47. In these circumstances, I am of opinion that a mortgage is within the ambit of Rule 94-A (1) and (2) of the Defence of India Rules.

48. In construing Indian Statutes of the British period, it is often useful to refer to corresponding English Statutes by which they were directly inspired. Rule 94-A was inspired by Clause 6 of the Defence (Finance) Regulations, 1939, the relevant provisions of which are as follows:--

(6) Control of capital issues. -- (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury, to make an issue of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom-

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who --

(a) issues any securities (whether for cash or otherwise), or

(b) receives any money on loan on the terms express or implied that the loan will or may be discharged or secured wholly or partly by the issue of any securities or by the transfer of any securities issued after the making of the loan, or will or may be repaid wholly or partly out of the proceeds of any securities issued after the making of the loan.

(4) A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions.

(5) In this Regulation, references to securities and to the issue of securities respectively include, references to any mortgage or charge, whether legal or

equitable, and to the creation of, or the increasing of the amount secured by, any such mortgage or charge; and the expression "security" includes shares, stocks, bonds, notes, debentures, debenture stock, Treasury bills, a bill of exchange other than a bill payable on demand or at a fixed period not exceeding six months after date or after sight, a promissory note of a local authority, a promissory note payable more than six months after date, a deposit receipt for money lent, issued, by a local authority or by any person carrying on a business other than the business of banking, and a unit or sub-unit of a unit trust, but does not include any other security -- Butterworth's Emergency Legislation-- The Defence (Finance) Regulations 1939.

49. In the Defence Regulations, mortgages created by instruments are specifically included in the definition of securities. In this connection, it may be pointed out that the legal position in India has been made clear by the Capital Issues (Control) Act 1947 as amended by an Act of 1957, which re-enacted the provisions of Rule 94-A. In the Act of 1947, the expression "securities" has been defined so as to include "mortgage deeds" "instruments of pawn," "pledge" or "hypothecation"- The argument that Rule 94 A does not contemplate mortgage because there is no express mention of mortgage in the definition of securities is," in my opinion, not tenable.

50. It seems to me that the Defence (Finance) Regulations 1939 and the Capital Issues (Control) Act 1947 specifically speak of mortgages *ex abundanti cautela* and even apart from any reference to mortgage in the definition of "securities", mortgage is included in the expression "charge" in those statutes. Many instances are found of provisions put into Statutes merely by way of precaution -- Craies on Statute Law. 6th Edition, p. 98.

51. It was contended on the basis of the decision in AIR 1957 Trav-Co 6. that "instruments creating a charge on the assets of the Company" should be read *reused generis* with shares, stocks, bonds and debentures. To dispose of this argument it is only necessary to point out that on a fair reading of the sub-rule which includes within its ambit tailings so diverse as shares, bonds, debentures, instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party and instruments creating a charge or lien on the assets of the company, no genus is discernible. Most of the instruments contemplated under Sub-rule (1) (a) of Rule 94A do not and some may not create a charge. In certain events, share capital may have to be restored to the share-holders out of the assets of a company but It cannot be said that a shareholder has a charge on the assets. A debenture, again, may be an unsecured debenture. Some of the instruments referred to in the sub-rule do not even create a liability or a debt, e.g the category of instruments contemplated in paragraph (iv) of Sub-rule (I)(a), that is to say instruments acknowledging loan to or indebtedness of the company entered into jointly with a third party. They do not create any liability but are only evidence of liability. I am unable to hold that the *ejusdem generis* principle has any application in construing Rule 94A(I)

(a) of the Defence of India Rules.

52. It was also submitted on the basis of the Travancore-Cochin case that the expression "issue" is singularly inapt in relation to mortgage. A mortgage is created or executed, not issued. A company issues shares or debentures. The term "issue" is a mercantile term and has a specific meaning in trade and commerce which it has acquired by long usage. One does not speak of issuing mortgage. Therefore, it is contended, mortgages are not contemplated under Rule 94A which relates to control of capital issues. It is true that in popular parlance or in commercial language one does not speak of issuing a mortgage; but then, one does not speak of issuing a charge either; and volatile Rule contemplates issue of instruments creating a charge or lien. After all the Defence of India Rules cannot be described as a piece of commercial legislation although commerce and trade come within its scope. The expression "issue" has a special meaning given to it by the character and scope of the Rules themselves. That the term is not used in a popular or mercantile sense is clear from the fact that the Rule provides that a person shall be deemed to make an issue of capital who issues any securities for cash or otherwise. When a company borrows money on a deed of hypothecation or any other instrument creating a charge on its assets, it does not issue capital; in fact typical balance-sheets will make it clear that although monies raised on debentures are sometimes characterised as capital loan, loans taken by a company on hypo the action of its stock-in-trade or other assets are never treated or specified as capital; and yet the Rule provides that a person shall be deemed to make an issue of capital who issues any security whether for cash or otherwise.

53. It is clear that in Rule 94A the expression "issue" has been given an extended and wider signification. The Rule in my judgment, contemplates issue of mortgages. To set all reasonable doubts at rest that in the context of legislative enactments or statutory orders, it is permissible to speak of issue of mortgages, reference may be made to an order of the British Treasury dated June 1, 1943 made under The Defence (Finance) Regulations 1939 by which it was directed that "no mortgage shall be issued or renewed on terms providing for repayment before a date seven years after the date of issue or renewal". (Bullock's Emergency Legislation, Defence (Finance) Regulations, 1939).

54. In the view I have taken I am unable to agree with the learned judges who decided the Travancore-Cochin case. AIR 1957 Trav-Co 6 that the word "issue" is not used in the sense of "executed" or "created" in relation to mortgages or hypothecations and that mortgages and hypothecations are not hit by the Rule.

55. The mortgage created by the respondent company has in my opinion been created in contravention of Sub-rule (2) of Rule 94-A. By the combined operation of Sub-rules (7) and (10) the mortgagor and the mortgagee in such cases are liable to penalty. The transactions, namely, creation of the security and the giving and taking of consideration for the security are prohibited by Rule 94-A. Not only must the transaction be held illegal but the consideration given by the appellant

bank must also be held to be an illegal consideration having regard to Sub-rule (7). In this connection reference may again be made to The Defence (Finance) Regulations, 1939, Clause (6) paragraph 4 of which provides: "A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions." No similar provision is to be found in Rule 94-A. In the context of the Statute it must be held that not only the mortgage is invalid but the consideration given for the mortgage is also irrecoverable because the entire transaction is tainted with illegality.

56. Having regard to the finding that the mortgage is invalid and that the consideration given for the mortgage is not recoverable in law, it is not necessary to go into other questions. However as an issue was raised before the learned trial judge with regard to the effect of non-registration of the mortgage u/s 109 of the Companies Act, I propose to deal very briefly with that aspect of the matter. As the mortgage was created by the company in respect of its properties, the mortgage is registrable u/s 109 of the Companies Act. It appears that the mortgage has been registered u/s 109-A within the time extended by an order of S.B. Sinha J.: That order was presumably made on the basis that it was a case of registration of charge on properties acquired subject to charge as contemplated u/s 109-A of The Indian Companies Act of 1913. It is the case of the respondent company that the mortgage is a benami transaction. It is not in dispute that the name of the company nowhere appears on the mortgage instrument. According to the tenor of the instrument, the company is neither the mortgagor nor the mortgagee. In fact the name of the company appears nowhere in the instrument itself. Be that as it may, if the mortgage has been created by the company as is the case here, and the property on which the mortgage is created is the property of the company, the mortgage, if it has not been registered u/s 109 is void against the liquidator and the creditors of the company. In the result the mortgage must be held to be void against the liquidator and the creditors of the company for non-registration u/s 109 even if it be held that the mortgage is a valid mortgage. In saying so, I do not intend to mean that I have decided that a benami mortgage created by a company by an instrument through a benamidar or a trustee is contemplated u/s 109 of the Indian Companies Act 1913. If the declarations made in the prescribed form are at complete variance with and are not related to the tenor of the instrument and if the Registrar of Companies cannot receive any notice of trust u/s 33 of the Indian Companies Act, it is more than doubtful whether he is competent to register the charge u/s 109. However, as it is not necessary to decide that question for the purpose of this appeal, I do not propose to decide it but I consider it only proper to express the gravest doubt which I entertain on the subject. It may not be out of place to mention that the learned trial Judge has also expressed the same doubt in his judgment

where he says, "t 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"

57. On the question whether the appellants are entitled to the benefit of the relevant exemption order. I agree that there is total lack of evidence on this question. It is not, therefore, possible for the Court to hold that the appellant company is entitled to exemption-

58. In the view I have taken, I agree that the appeal should be dismissed and I concur in the order my Lord has made