

Privy Council Appeal No. 133 of 1928.

Allahabad Appeal No. 39 of 1927.

Messrs. Kamlapat-Moti Lal - - - - - *Appellants*

v.

The Union Indian Sugar Mills Company, Limited (in liquidation) - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1929.

Present at the Hearing :

VISCOUNT SUMNER.

LORD WARRINGTON OF CLYFFE.

LORD ATKIN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court of Judicature at Allahabad in a proceeding in the course of the winding up by the Court of the Union Indian Sugar Mills Company. On the 28th May, 1926, the winding-up order was made on a creditor's petition. The company carried on an extensive business and strenuous efforts were made by the shareholders to save the concern. Eventually alternative proposals were made by various financial houses either to buy the undertaking out and out : or to advance on mortgage defined sums on the terms that the mortgagees managed the business for a term of years and recouped themselves out of the profits. In due course these proposals were laid before the Court by the liquidators for direction. The Court directed a meeting of shareholders to be held to decide whether they would accept the offers of Lala Har Kishin Lal or of Lala Kamlapat the appellants. Both parties had put forward a scheme to advance substantial sums on mortgage ; and both had alternatively offered to purchase at a named sum. It is clear that all parties concerned and the Court considered that they were acting under the provisions of Section 153 of the Indian

Companies Act, 1913, which provides that where an arrangement is proposed between the company and its members or any of them, the Court may order a meeting of the members of the Company; and if a majority of three-fourths in value present in person or in proxy at the meeting agree to any arrangement, the arrangement if sanctioned by the Court shall be binding on the members and the Company. The question was raised by Counsel for the liquidators whether in fact the proposals did amount to an arrangement between the Company and its members; but for reasons to be given later this appears to their Lordships in the circumstances of this case immaterial. The proposal of the appellants Kamlapat as laid before this meeting was as follows :—

That the applicant is willing to advance a sum of Rs. ten lacs to the above Company in liquidation on the terms annexed herewith and is also prepared to purchase it for rupees eleven lacs fifty thousand on the conditions mentioned therein.

1. Deposit of Rs. 1,50,000 to-day and Rs. 8,50,000 within a month of this date, which should be paid to creditors as early as possible, the balance, if any, after paying the legal debts, to be returned to us.

2. The Company to be mortgaged to us at 8 per cent. compound interest with six monthly rests.

3. We to be the managing agents for ten years even if mortgage paid off earlier, and to get all the advantages which the present managing director enjoy and to get 5 per cent. commission on net profits only.

4. The mortgage with interest to be paid off first and then the shareholders to get the profit.

5. We to provide entire working capital against the goods of the Company at 8 per cent. per annum.

6. The Company to be handed over to us as soon as we deposit the entire money.

7. The consent of the share-holders to be obtained to the above scheme.

8. In case the share-holders do not accept the scheme, we are willing to purchase the company at Rs. 11,50,000.

(Signed) KAMLAPAT.

(Signed) RAMAKANT MALAVIYA, vakil for
L. Kamlapat.

22nd November, 1926.

The meeting of shareholders was duly held on the 16th December, 1926, and Kamlapat's scheme was accepted by a large majority. On the 21st December the liquidators reported that they had received claims from creditors amounting to Rs. 10,61,168. On the same day the Court sat to consider the approval of Kamlapat's scheme. They found, however, as they state in their judgment, that a new situation had been created by the liquidators' report, inasmuch as the previous proceedings had taken place under the impression of the Court as well as the previous persons interested, that the sum of Rs. 10,00,000 would fully satisfy all the creditors. Hopes were, however, held out that Kamlapat might increase their offer to advance 10,00,000 to 12,00,000. Rather than decide to reject the scheme or accept an offer for an out-and-out sale, the Court decided to adjourn the matter to enable

Kamlapat to increase their offer ; and consented that Kamlapat should be given immediate possession on the understanding that the out-and-out sale or the mortgage should be effected in his favour in the near future. On the same day Kamlapat completed the payment of Rs. 10,00,000 to the liquidators. On the 24th December they were given possession of the properties by the liquidators. On the 7th January Kamlapat stated that they were willing to advance a further sum of Rs. 37,000 which, with the 10,00,000, they believed would be sufficient to discharge all the liabilities and to advance a further sum of 25,000 to cover the liquidators' charges " on the terms proposed for 10 lacs." On this footing the scheme went forward. On the 25th February the Court appear to have approved the scheme in principle. They directed that a mortgage deed be executed for Rs. 10,62,000. The terms were to be submitted to the Government conveyancer. After the terms had been settled by the parties and examined by Mr. Weir they were to be submitted to the Court for their consideration and sanction.

Disputes, however, arose between Kamlapat and the liquidators as to the terms of the mortgage deed. Eventually, by order dated the 20th June, 1926, the Court approved the deed as settled by Government conveyancer and directed the liquidators to take steps for getting it executed. Unfortunately, it seems to have escaped the notice of the Court that the scheme approved by them and purporting to be recorded in the draft deed was not the scheme accepted by the meeting of shareholders. The accepted scheme provided for an advance only of 10 lacs ; the new scheme evolved by the new situation provided for a further advance of Rs. 62,000. It is possible that the shareholders would have gladly accepted the further advance ; it is, however, possible that they might consider the extra burden turned the scale ; and indeed a warning note had been sounded by three shareholders, who by a petition of the 28th March pointed out that the shareholders had accepted an advance of 10 lacs only ; that it was uncertain whether even Rs. 62,000 more would meet the further liabilities ; that prices were going down and they petitioned for an out-and-out sale. The scheme had been put before the meeting in written form submitted to the Court by Kamlapat ; the approval of the meeting was not taken as is usual in carefully drawn schemes subject to modifications to be approved by the Court. Their Lordships find it impossible to hold that the amended scheme had been approved by the shareholders at the meeting on the 16th December or that the shareholders impliedly assented to an increased advance of Rs. 62,000.

Faced with this difficulty Counsel for the liquidators argued before the Board that the scheme was not within Section 153 at all ; and that it was a mere scheme for financing the company's affairs which the Court could in the liquidation approve without

the necessity of having it approved by the shareholders. Their Lordships find it unnecessary to determine whether this was a scheme under Section 153. It is plain that the Court thought that it was ; and as it appears in any case that the action of the Court has throughout been taken on the basis that the particular scheme they were approving had in fact been accepted by the shareholders' meeting the case must be dealt with on that footing. The result is that as the shareholders have not assented to the scheme as approved the orders of the Court dated the 25th February, 28th March, 7th April, 9th April, 20th April, 29th April, 4th May, 23rd May, 25th May, and 20th June, 1927, must be set aside. A meeting of shareholders should be summoned to consider the amended scheme ; and it seems advisable that the scheme as laid before the shareholders should be more detailed than before ; and should reserve the power to the Court to approve modifications. Meanwhile proceedings in the liquidation should be confined to the steps necessary for laying the scheme before the meeting and reporting thereon to the Court.

As the terms of the draft deed are in the circumstances reopened, it seems unnecessary for the Board to settle its terms where these have been in dispute. But as the matters have been argued before them their Lordships think it right to intimate that they have no doubt that the proposed mortgage is an usufructuary mortgage ; and that no further duty of care can be imposed upon the mortgagees than arises out of the statutory duties imposed upon mortgagees in possession under Section 76 of the Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other. They cannot see that any advantage is gained by seeking expressly to define these. On the question of net profits they express no opinion as the parties seem to have been agreed as to how these should be calculated.

Their Lordships consider that the abortive result of the proceedings in the High Court is due in part measure to the failure of the appellants to take the objection on which they have succeeded. It was suggested at one time tentatively and not pressed. In the circumstances they come to the conclusion that there should be no costs of the appeal. The appeal should be allowed and the orders already mentioned should be set aside. Their Lordships will humbly advise His Majesty accordingly.

THE GREAT SIBIRIAN PORTALS

In the Privy Council.

MESSRS. KAMLAPAT-MOTI LAL

vs.

THE UNION INDIAN SUGAR MILLS COMPANY,
LIMITED (IN LIQUIDATION)

DELIVERED BY LORD ATKIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1929.