Privy Council Appeal No. 95 of 1928.

The Ripon Press and Sugar Mill Company, Limited, Bellary - - *Appellants*

v.

V. Gopal Chetti and others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1931.

Present at the Hearing:
LORD BLANESBURGH.
LORD ATKIN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 13th November, 1924, reversing a judgment and order dated the 3rd November, 1922, of a single Judge of the same High Court in its ordinary original civil jurisdiction. These orders were made in the matter of a petition presented to the Court on the 1st May, 1922, for the compulsory winding-up of the appellant company. By the order of the 3rd November, 1922, Mr. Justice Kumarswami Sastri dismissed the petition with costs. On appeal his order was discharged by that of the 13th November, 1924, and the compulsory winding-up of the company was thereby decreed. This appeal from that order reached the Board for hearing more than six years after it had been made. Its discharge accordingly involved the supersession of all proceedings in a liquidation which as a result of it had then been in operation for more than eight years. To this fact are attributable the grave difficulties which have confronted the Board in disposing of the appeal.

The company was constituted in 1882 for the purpose (1) of erecting a cotton-pressing factory at Raichur in Hyderabad and

(2) of erecting a sugar factory at Hospet in the Madras Presidency of British India. It was registered in Madras solely because part of its business was to be carried on in British India. But for the Hospet project it would have been registered in the Nizam's Dominions. And the Hospet factory did not materialise. It was definitely abandoned as a project in 1909. The company has never done any business in British India. Its sole activities have been centred at Raichur in connection with the factory which in due course was erected there. The fact that the fixed property of the company and its business have thus been in one jurisdiction and its place of incorporation and statutory obligations in another has always been a source of difficulty. It hampered the company in its competition with local rivals: it exposed it to the risk of double taxation: its accounts were necessarily kept at Raichur in the local vernacular, and the compilation of the annual statements at Bellary from these materials in a form to meet the requirements of the statute law of British India must always have been difficult and never quite satisfactory. It is unfortunate that in the liquidation no allowance appears so far to have been made for, or consideration given to, these difficulties inherent in the situation.

The company was not a private company, but its shareholders were never numerous. Its articles of association were those of Table A of the Act of 1882, with modifications introduced which did not affect its status as a public company. It had a nominal capital of Rs. 1,25,000, divided into 250 shares of Rs. 500 each. Of these, 200 shares were issued at the time of its formation, Rs. 250 being then called up on every share. This paid-up capital sufficed for the establishment of the Raichur factory. The 200 shares with Rs. 250 paid up were in May, 1922, in the hands of 24 holders or sets of holders.

The original articles of the company, Clauses 7 and 8, provided for the appointment of named persons, as secretaries and treasurers at an allowance of 5 per cent. on nett profits, and as agents in charge of the factories at a like allowance. Between 1905 and 1909 K. Venkata Rao, of whom much will be heard in the sequel—it is around him that the whole controversy has raged—had become one of the two agents.

In 1909 and 1910 the original offices of secretary and treasurer and agent were abolished, and by special resolutions of the company, passed and confirmed unanimously on the 7th and 28th of May, 1910, Clauses 7 and 8 of the company's articles of association were cancelled, and it was resolved that, in lieu thereof, the firm of K. U. S. Ramachander & Co. should be appointed treasurers of the company on condition of their retaining the company's moneys without interest, and lending moneys to the company without interest whenever required.

In view of the allegations of the petition with reference to this arrangement—operative, as it was, for so many years—it is convenient to note, in passing, the deliberation with which it was

made—the special resolution of May superseding with a technical amendment an earlier special resolution adopted with similar unanimity in April, 1910. It is material also to note that under the arrangement the firm was called upon to discharge the duties which had theretofore devolved upon the secretary, treasurer and agent combined, and that in any advantage that might accrue to it from the fact that, like a banker, it was not required to pay interest on the company's balances, was to be found the only counterpart for the 10 per cent. on profits which, under the superseded arrangement, had to be found by the company.

The firm K. U. S. Ramachander & Co. was the family firm of Venkata Rao. From 1910 and earlier he had been at its head. In 1922 he was 73 years of age. It is impossible to read the record without seeing that, even at a later date, he remained a man of outstanding ability and strong personality. From 1910 his was undoubtedly the predominant influence in the firm, although he was only one of nine members, as also in the directorate of the company, although the evidence is clear to show that no duly qualified shareholder who desired a seat on the Board was ever excluded therefrom. His influence, real, and, for anything that appears, thoroughly well deserved, was not, at all events, unwelcome. Everything points to the conclusion that the shareholders, for benefits resulting to them therefrom, were well content to leave the management of the company's affairs in Venkata Rao's hands.

At all relevant times a large number of shares in the company stood registered in his own name, and in the names of his firm and of different individual members of his family, some of them members of the firm. But the number which at any time he really controlled is left in complete uncertainty. His own personal holding was never large. He complains in his evidence that members of his family had become, prior to the date of the petition, at variance with him. The petitioners have put in the minutes of a meeting of the 23rd June, 1917 (Record Part II, p. 7), at which K. Ramachander, his eldest son, is found voting against him in favour of a larger dividend. Indeed, their Lordships can find nothing in the record to show that if at any time any disagreement with Venkata Rao's action or policy had existed amongst the shareholders, it would not have found effective expression as, for the moment at all events, it did, at the meeting of the 21st August, 1921, to which reference will presently be made. The proceedings of the shareholders up to that date do not indicate that as the petition suggests they were there merely to register Venkata Rao's decrees. They do show that up to 1921 there was never any serious disagreement amongst them.

The first trace of conflict originates with a resolution proposed by Venkata Rao as an extraordinary resolution at a general meeting of the company held on the 6th August of that year. The resolution, in effect, was that in view of the complete

abandonment of the Hospet venture and of difficulties resulting from its British Indian incorporation, the registration of the company should be transferred to Hyderabad. The proposal, as might, perhaps, have been expected from what has been already said, was accepted unanimously at that meeting. But Subhapati Rao, a shareholder, a vakil of 30 years of age, who now becomes as prominent in the drama as Venkata Rao himself, although the holder of a single share only, and with, therefore, it might perhaps have been supposed, no very extensive interest in dividends, detected in the resolution or thought or said that he detected a subtle device on the part of Venkata Rao to make the recovery of dividends more difficult. Accordingly, at the meeting held on the 27th August, 1921, to confirm the resolution, he proposed an amendment to the effect that the company should be wound up voluntarily. And his amendment was carried by a bare majority of the members present, and Venkata Rao's original resolution was therefore lost, although the amendment was not, of course, affirmatively effective.

From this incident must be dated the movement, such as it was, headed by Subhapati Rao, culminating in the petition and ultimately in the winding-up order which is now under review.

The petition, as has been said, was presented on the 1st May, 1922. There were six petitioners. Subhapati Rao is one; his brother, Lakshmikanta Rao, holding two shares, is another; a third has since died; and a fourth, Sidabasappa, sold his 21 shares in the company on the 2nd November, 1924, before the winding-up order was made. The whole six petitioners between them held no more than 32 shares out of the total of 200. Only one other shareholder, the respondent, Madam Venkayya, supported them. The company, in its opposition to the petition, represented the views of a preponderant majority. It was amply solvent. Creditors were in no way interested, if they existed at all.

The petition is an attack upon Venkata Rao from every angle. That that attack was inspired throughout by Subhapati Rao has never been questioned, while Venkata Rao has reiterated in evidence that it is from some unexplained enmity to himself on the part of Subhapati Rao and from that alone that everything has resulted—the winding-up petition, the appeal from the order dismissing it, and the whole course of the supervening liquidation so marked in its hostility to himself. Their Lordships are not prepared to treat these assertions lightly. They have never been contradicted by Subhapati Rao, although he has given evidence on two occasions and has made many affidavits in the course of the liquidation. No petitioner, except himself, has ever taken any part in the proceedings. The petition, for the terms of which Subhapati Rao is clearly, primarily, and not improbably exclusively responsible, is inexcusable in the recklessness and misleading character of its most serious allegations, and their Lordships have been compelled to note that throughout the

recorded proceedings in the subsequent liquidation the activities of Subhapati Rao have been exclusive, constant, persistent, and officious, not to be explained by his insignificant material interest in the liquidation or its results. It is necessary to approach the consideration of the case with these most disturbing facts in mind. The learned Trial Judge was able to dismiss the petition on what may be called its own demerits. Their Lordships will anticipate so far as to say that it is almost inconceivable that the High Court could have wound up the Company as and when it did or have justified its order by the reasons assigned had these matters been even remotely present to the minds of the learned Judges there.

Being in effect an undiscriminating attack upon Venkata Rao the petition is, characteristically, the victim of undesigned inconsistencies. In one paragraph, for example (paragraph 5), it contains an allegation that with the exception of the petitioners and their outside supporter, "the shareholders are thwarted by the fear of the influence and capacity of Venkata Rao for doing them harm"; alongside of which is to be found the account, twice given or referred to (paragraphs 8 and 12), of the manner in which Venkata Rao's proposal that the Company should become a Hyderabad Company was, at the very latest meeting of the Company, defeated by a majority vote in favour of voluntary liquidation. Again, in contrast with a charge in paragraph 10 that the treasurer firm improperly retains the Company's balances for its own advantage—the main burden of the petition—the complaint of paragraph 11, inconsistently enough, is that Venkata Rao is proposing to invest Rs. 30,000 of presumably these very balances in the purchase of machinery for the Raichur mill —a purchase from which it is not suggested that, except as shareholders, any advantage could accrue either to himself or his firm.

These contradictions are important in a petition whose remaining charges, when supported by any evidence at all, and when not based upon facts distorted in statement beyond recognition, are either vague or out of date. But as there is one charge—trivial enough, for service on such a petition, but upon the supposed proof of which the learned Judges of the High Court appear mainly to have proceeded in making the winding-up order—it will be convenient to deal with it in detail now. It is typical also of other charges.

It is alleged in paragraph 8 that six years before, *i.e.*, in 1916, Venkata Rao threatened to call up the unpaid amount of Rs. 250 a share therewith to start the sugar mill at Hospet, which it was known must then be a failure: that the intended and resulting effect was to bring down the market value of the shares: that then he bought up about 60 shares from Chavani Pakirappa and others, and soon after he dropped the subject, as his object had thus been secured. Later in the paragraph it is alleged that at the meeting of the 27th August, 1921—this presumably is the

meeting referred to, although with characteristic inaccuracy the date is given as the 12th September, 1921—Venkata Rao again threatened the shareholders in open meeting, "that he would harass them by calling up the unpaid share capital. The shareholders are daily expecting the threat to be put into force."

Now, as to the first of these allegations, the only occasion on which the threat could have been made was not, as alleged, six years, but 14 years before, viz., in 1908, when the firm had not even become treasurers, and at a time when Venkata Rao's position was that of joint agent of the company, with the same Pakirappa, who is named. At that time, as a reference to the minutes shows, the proposal to proceed with the Hospet project and call up capital for the purpose was not that of Venkata Rao at all, but was put forward by, amongst others, S. Gavappa, the father of the sixth petitioner; and as a result of further meetings of the Board, the project was, in April 1909, finally abandoned, and with it any proposal or necessity to make a call. The shares of Pakirappa were purchased by Venkata Rao's firm for Rs. 28,000, but not until January, 1910, and in no connection whatever with the starting of the sugar mill. Venkata Rao gave this circumstantial denial to this charge which, significantly unfounded in point of date, depends only on the evidence of Subhapati Rao, who was not himself, in 1908, even a member of the company, being a mere boy of 16.

As to the second occasion, Venkata Rao, in his evidence, characterises the charge (Record, p. 28) as a downright lie, and it is certainly not obvious why, when no attempt to put the threat in force had for nine months been made, the shareholders should still be daily expecting its fulfilment. It seems unlikely, too, that Venkata Rao should have chosen the same threat on both occasions, although its effect upon the Stock Exchange value of the shares does not enter into the later threat at all. But that this second threat was ever made again depends on the statement of Subhapati Rao alone—a witness, Audimulam Pillai, evidently called to corroborate his story failing to do so (Appendix, Part I, p. 43).

The learned Judge found that none of the charges against Venkata Rao had been established. So far as these, in particular, were concerned, there was surely no room at all for any other conclusion. Upon the evidence, this is one of the reckless unsubstantiated allegations by which the petition is discredited. It is unfortunate, indeed, that the winding-up order should to any extent have been rested on the assumption that it had been proved.

It would be tedious further to detail the charges in the petition, the alleged delay in payment of dividends and the like. It will suffice to take these from the learned Trial Judge's judgment. But there are two matters further affecting the good faith of the petition as a whole which cannot properly be passed over in silence. The first of these are the words in paragraph 10,

in which the position of the firm as treasurers under the special resolution of 1910 is attacked:

> "Under the pretext," says paragraph 10, "that this firm would lend large amounts free of interest to the treasurers for its needs, Mr. Venkata Rao succeeded in getting a resolution passed that the funds of the company shall be entrusted to the treasurers free of interest, and that the treasurers should similarly lend an amount to the company if required."

Such is the petitioners' paraphrase in 1922 of the two sets of special resolutions unanimously adopted in 1910, and acted upon without protest or objection ever since.

The allegation goes on:

> "Sums above Rs. 20,000 have been lying with the treasurers for several years for their sole benefit and advantage. . . . The whole thing was a ruse to give the use and the control of the company's funds to Mr. Venkata Rao's family."

It casts in their Lordships' minds the gravest doubt upon the *bona fides* of the petition that the true facts in relation to this matter already set forth should there be so distorted in statement as to be quite unrecognisable.

The other matter, more important still in this connection, relates to the gravest charge of all made by the petition against Venkata Rao, and, in conjunction with him, the company's auditor. In paragraph 13 the following allegations appear:—

> "The petitioners are credibly informed, and believe the same to be true, that all articles supplied to the factory were by Mr. Venkata Rao or his relatives or dependants, and vouchers for higher values were got up in the names of third parties who are either his friends, clients, or dependants over whom he wields an enormous influence."

To this may be added the further allegation from paragraph 11:

> "The petitioners believe that the funds of this company have been utilised for the [said] private concerns of Mr. Venkata Rao's family."

Then, as to the auditor, after a statement that it is upon him that the shareholders had alone to depend for the accuracy of the accounts to which they were not allowed access, the same paragraph 13 proceeds:

> "The auditor is a partisan of Mr. Venkata Rao, and is afraid of losing his auditorship and remuneration if he did not comply with the wishes of Mr. Venkata Rao in granting his certificate blindly. . . . If an independent audit be made, the petitioners believe that several grave and serious irregularities will come to light."

It is a serious thing that no evidence has at any time been adduced in support of these grave allegations, or any of them. With regard to the charge against Venkata Rao, Subhapati Rao sought in evidence to justify its insertion in the petition on the ground that it was based upon information given to him by an unnamed ex-official of the company, who was not, however, going to be called as a witness. And not even by a question put to Venkata Rao, in the course of his prolonged cross-examinations, both on the petition and in the course of the liquidation, has this

accusation of fraud against him ever been again referred to or revived. So far as the auditor is concerned, the charge, without the slightest evidence to support it, is even more culpable. Its recklessness may be judged by the fact that not only were the audited accounts invariably accepted in each year with unanimity by the shareholders at meetings, several of them attended by Subhapati Rao and other petitioners, but the audited accounts after eight years still remain undisturbed. And the auditor is now dead.

These grave allegations of personal dishonesty with no available evidence to support them make it incumbent upon every court to approach the other allegations of the petition with the greatest reserve.

These were all examined by the learned Judge in the course of an elaborate inquiry. He tried out the case to the end. In a cross-petition the allegations against himself and his firm were denied in detail by Venkata Rao. The petitioners had complained that the company's accounts were not open to the shareholders. To meet this complaint, the books and accounts of the company up to 1922 were produced for the inspection of the petitioners, and were inspected by Subhapati Rao on different days in August, 1922. Subhapati Rao, in support of the petition, gave evidence; Venkata Rao was cross-examined at great length.

In the result the learned Judge, as has been already noted, found that the charges made by the petition had not been proved in any particular. It had been conceded, he said, that unless the case could be brought within clause 6 of Section 162 of the Indian Companies Act no order could be made: no misconduct had been proved against Venkata Rao or the other directors. The fact that Venkata Rao had a preponderating voice in the company by reason of his owning or controlling a large number of shares was of itself no reason for winding-up the company; the allegation that dividends had not been paid regularly was no ground for winding-up, but the trouble had only arisen in transmission cases. The petitioners had had inspection of all the accounts, and in no instance had these been shown to be wrong. As regarded the sum proposed to be spent on machinery, it was hardly likely that Venkata Rao, with his preponderating interest, would ruin the company for the pleasure of annoying the other shareholders.

Their Lordships subscribe to that judgment. The order dismissing the petition with costs was in their judgment, on the evidence before the Court, the only possible order. They think it both fair and right to add that on a careful consideration of all the evidence they can find no justification worthy of the name for the suggestion that during Venkata Rao's long tenure of office his management of the company's affairs had in view any other object than the welfare of the company in which as a shareholder he was, directly and indirectly, so

largely interested. Nor have they in the evidence found any proof that moneys retained by the firm were normally in excess of reasonably possible prospective needs or that there was any impropriety on the part of the treasurers in retaining the moneys they did retain or on the part of the directors in recommending their retention. The balances were, in fact, the working capital of the company, even although some portion of them might without illegality or even inconvenience have been distributed as dividend had the shareholders so insisted.

The petitioners appealed to the High Court by notice dated the 17th November, 1922. For some unexplained reason the appeal was not disposed of until the 13th November, 1924—nearly two years later. There were no new materials placed before the appellate Court to account for this loss of time, which would not have been possible in England, where winding-up appeals are placed in an interlocutory list in order to be beyond any such risk. Their Lordships hope that this case is, in this, as in so many other respects, exceptional. But this delay ought to have weighed with the learned Judges in reaching a decision. The difficulties created by a winding-up order in November, 1924, with effect from the 22nd May, 1922, which so soon became manifest in the liquidation, might have given them pause. It does not appear that these difficulties were even present to their minds.

Nor is it easy either to discover or to state the actual reasons of the Appellate Judges for making a winding-up order when they did or at all. They were apparently led to do so partly by the case of *Loch* v. *John Blackwood* [1924], A.C. 783, which, as they noted, had not been available for the trial Judge's consideration, but which, so far as their Lordships can see, bears no resemblance either in principle or detail to the facts as proved in this case. For the rest, while the learned Judges do not in terms reject the Trial Judge's findings of fact, they ignore them altogether. They seem to treat allegations in the petition as true merely because they are placed there. They find neither in its contradictions nor in its charges any room even for criticism. This omission in relation to the alleged threats by Venkata Rao to call up the unpaid share capital of the company is particularly unfortunate. The learned Judges appear, without examination, to accept these charges as proved, while from their statement of the first of them, it is apparent that the nature of the charge made was quite misunderstood. Perhaps their conclusions on the whole matter may, however, best be taken from their own closing words :—

> "It is evident that the affairs of this company are carried on in such a way that the members of one family are able to exercise a predominating influence over the management of the company and to secure certain benefits for themselves. The minority are unable to protest effectively against the actions of the directors because the majority of shares are in the hands of one family and the directors themselves are able to hold over

the shareholders the fear of having to pay up the unpaid portion of their shares. This causes a lack of confidence in the management of the directors which there is no hope of improving so long as the present directorate continues and the funds are in the hands of the present treasurers. Under these circumstances, we think the only course we can take to secure the just rights of the shareholders is to direct the winding-up of the company."

Venkata Rao has sworn, and it has not been denied, that before the appeal was heard, two of the petitioners had notified to him their actual, although apparently not their formal, withdrawal from the proceedings. One had died; a fourth, Sidabasappa, as has been stated, had, before this judgment of the High Court, sold his shares. In active support of the petition, therefore, if Venkata Rao has sworn truly, there remained, at the date of the winding-up order, only Subhapati Rao and his brother, holding three shares between them, and Madam Venkayya, who had never even verified its allegations. A striking comment on the observations of the High Court when read in the light of the history already set forth.

But, presumably, these petitioning casualties were not—at least, all of them—known to the learned Judges, and Venkata's statement of them may have been exaggerated. Even so, the conclusions of the Appellate Court cannot, in their Lordships' judgment be supported. Their own examination of the petition leads them, on the evidence, to the inevitable conclusion that its allegations, so far as these were offensive, were entirely unproved. Its proper fate was the dismissal which it met with at the hand of the Trial Judge. The winding-up order on the materials before the High Court ought not to have been made. So far the present appeal is entirely justified.

But many further considerations emerging in subsequent events have to be weighed before it can be properly disposed of. To the statement and consideration of these, their Lordships now proceed,

At the instance of the directors, immediate steps were taken to have the order set aside. An application for leave to use the company's name as appellant was first made. This was strenuously opposed by Subhapati Rao, who, in an affidavit, challenged Venkata Rao to ascertain the contributories' views on the subject. At a meeting, in answer, held on the 2nd April, 1925, 16 contributories holding 168 shares out of 200 declared themselves for an appeal in the company's name or, if that were not possible, for one in their own. Notwithstanding this declaration of their wishes (see Section 174 of the Act), the learned Judge in charge of the liquidation on the 19th November, 1925, refused the leave asked for, on the ground that Venkata Rao was then in default under an order made against him in the liquidation, and, on appeal to the Court, this refusal was, on the 18th December, 1925, upheld, on the expressed ground, the basis of which their Lordships are quite unable even to conjecture, that there was no reason to suppose that those who purported to be the company in the application "represented the wishes of the majority of the

shareholders." This new misunderstanding of the position at another critical moment in the history is responsible for the further misfortune that an appeal against a winding-up order, so unusual in its occasion and circumstances, only became possible through the special leave granted by His Majesty on the recommendation of this Board two years later, on the 2nd December, 1926. Four further years elapsed before the appeal was brought to a hearing—the greater part of that long interval having been apparently consumed in the preparation and printing of the supplemental appendices included in the record at the instance of the official liquidator.

The appeal, quite rightly, is in the company's name. The objection taken to its competence long persisted in was quite unfounded. In that respect it is in accord with a well-established practice, devised to meet the necessities of just such a situation as here arose.

But this is all mere form or style. The appeal is really that of the contributories who are behind it. They may be truly regarded as the appellants. (See *In re Diamond Fuel Company*, 13 Ch.D., 400, 405.) Of the respondents, the official liquidator alone has appeared to oppose. He has taken it upon himself to contest the appellants' case *ab initio*—the remaining respondents, with Madam Venkayya, their unpledged supporter, being all who remain of the original petitioners. They have kept themselves in the background throughout, doubtless by arrangement. The official liquidator in his printed case and at the Bar has said for them all that they could have said for themselves. Moreover, he has had printed and included in the record 364 pages of the proceedings in the winding-up, including a verbatim transcript of the depositions that have been taken in the course of it. What has really been attempted by this procedure is that the opposition to the appeal—the petitioners' business—shall be conducted even if it fails at the charge of the assets of the Company.

Such unusual partisan activity on the part of an official liquidator in relation to such an appeal clearly called for some justification, and this was sought to be supplied by referring to an order of the 14th November, 1928, by the Judge in winding-up, which directed the liquidator to oppose the appeal and do all the above things. Their Lordships have noted that the order referred to is really an affirmative answer by the learned Judge to questions asked by the liquidator on an *ex parte* summons, while the order made has been so liberally interpreted by the liquidator that in the second appendix he has had printed 124 pages of depositions, all taken after the date of the order and, save for a few lines here and there, entirely irrelevant, as their Lordships think, to any issue arising on the appeal.

Their Lordships are gravely concerned that such an order should ever have been asked for. They are even more concerned that it should have been acted upon with so little discrimination.

The order, in principle, was sought to be justified by the representation doubtless made by the official liquidator to the learned Judge, and as a contention maintained before the Board, that in these appendices facts are disclosed which had they been known to the Court when the petition came before it would have made a winding-up order inevitable. It is merely an aggravation of the position that, in their Lordships' judgment, as will appear presently, no such facts are there disclosed. For, even if they had been, these were facts to be brought forward, if so advised, by the petitioner respondents at their own risk, and not by the liquidator at the charge of the assets. Their existence would have been no justification for his becoming partisan in a dispute between two sets of contributories concerning the propriety of an order from which his authority alone proceeded. His only duty on an appeal against such an order was from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the Board of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Board ought to know.

In the present case the liquidator's attitude is peculiarly invidious. It appears from the depositions that he was put forward by the petitioners for his office on the resignation of the official first appointed, and that his appointment was opposed by the Venkata Rao party for that very reason. He, too, was an "enemy." From him, therefore, on appointment, an attitude of unqualified detachment was specially to be desiderated. His conception of detachment in relation to this appeal has been to ask for and to obtain *ex parte* and to interpret with an excess of liberality an order which has enabled him free of expense to the petitioners, in relief of their responsibilities, and already at a cost far in excess of any possible interest of theirs in assets, to fight their battle, with, as will be seen, no success and at what, except as to a trifling amount, must be the inordinate expense of their opponents. It is to be hoped that orders like that of the 14th November, 1928, will not in future be lightly made in the course of an Indian winding-up. The only results of the order in the present instance have been excessive delay and utterly useless expenditure, both of which will, like the delay already referred to, be found to have been operative to the prejudice of the appellants, in absence of whom the order was made.

It was upon these appendices and their contents that the real opposition to the appeal was based by the official liquidator. When examined, they strike their Lordships as being for the most part quite irrelevant to the conclusion which he asked the Board to draw from their perusal. It is quite true that there are found in them instances of grave disobedience by Venkata Rao to orders for payment into court or to the official liquidator of moneys shown by their accounts to be in the hands of the

treasurers. The record, however, does not establish, as has been contended, either disobedience to orders to hand over the company's remaining books and documents or even reluctance to produce them. Carelessness in relation to their custody or preservation there may have been, but the difficulties with regard to these books seem to the Board to have been largely due to the fact that the mill at Raichur, with, as it would seem, all documents there, had been in the hands since the 1st January, 1924, of the lessee under a transaction later to be referred to. But the orders upon Venkata Rao for payment of money, whether regular or not, ought to have been obeyed; and he must not complain that his disobedience was made, once, the occasion of an order for his committal at the instance of the official liquidator. If the pendency of an appeal to this Board was his excuse for disobedience, it was no excuse. Venkata Rao must remain justly responsible and accountable for his recalcitrancy. Their Lordships, however, do not find in what has emerged since the winding-up order anything going to show that before it was made Venkata Rao had been guilty of wrongful acts unknown to the Court and sufficient to justify a winding-up order had they been alleged in the petition. By these supplemental appendices they are not even led to conclude that had the winding-up order not been made Venkata Rao would have been guilty of any disobedience to any order of court. He nowhere appears to be congenitally recalcitrant. It was his resentment at the existence of a winding-up order in any shape which betrayed him to disobedience, although their Lordships hasten to add that such resentment, however well authenticated, being manifested while the order stood, can never be judicially excused.

But the official liquidator points to one other transaction disclosed as justifying his contention under this head. He says that a certain purchase by the directors of gins in March, 1924, after the dismissal of the petition, together with the lease of these gins to the lessee of the mill, was *ultra vires* the company and a fraud upon it. Venkata Rao's answer on the question of *ultra vires* is that the transaction was conducive to the attainment of the company's purposes, an object probably implied in the memorandum of association of every trading company, and very easily implied in the skeleton form in use and adopted for this company in 1882. His answer as to the lease of the gins was that it amounted to the completion of the lease of the mill at Raichur which had been made with the shareholders' assent as from the previous January. It is unnecessary for their Lordships at this stage to go into further detail. The acts were long after the petition and it is, moreover, well settled that an *ultra vires* transaction on the part of directors, if this was one, is of itself no ground for a winding-up order. A shareholder has his complete remedy in other directions.

Accordingly, their Lordships have reached the conclusion that the proceedings in the liquidation, the details of which —at such great expense—the official liquidator has introduced into the appeal, do not, in any way, help the case he has sought to make. On the contrary, they operate further to imperil it. For what, in their Lordships' judgment, these proceedings do show is that, owing to the mistaken principles upon which the liquidation has been conducted, doubtful orders have been made in the past and that, unless the methods hitherto adopted are for the future discarded, nothing can result from the further progress of the liquidation but the dissipation of the company's entire assets in expenses. In other words, the liquidator's appendices, properly appreciated, point to the discharge of the winding-up order being called for rather than to the continuance of the liquidation being beneficial. And the proper choice between these two alternatives becomes thus ever more difficult.

This statement requires some expansion.

The outstanding fact in relation to this winding-up which seems to far to have been entirely missed is that the contributories are alone interested in its results. The company had no creditors. From this it followed that the liquidation was peculiarly one in which the Court, as to all matters affecting the contributories as a class, would have regard to their wishes as proved by any sufficient evidence (Act of 1913, Section 174) and one, also, in which the official liquidator (Section 183 (2)), would lose no opportunity of summoning meetings of contributories for the purpose of ascertaining their wishes in respect of similar matters. Now, it is hardly too much to say that with consequences—serious in many other respects than excessive cost—these vital considerations have been consistently forgotten or ignored throughout the liquidation.

Two typical examples may be given. The first relates to the lease of the Raichur factory, granted pursuant to a resolution of the company in general meeting on the 8th November, 1923, for a term of 10 years from the 1st January, 1924, to Ramashanda, the son of Venkata. Ramashanda's offer was the highest of three then received: the policy of leasing the factory was approved by all: and with regard to the choice of the tenant even Sabhapati Rao, who was present at the meeting, made no protest. Ramashanda had been in possession since the 1st January, 1924, duly paying the rent reserved, when on application by the then official liquidator, the Judge, on the 20th August, 1925, declared the lease void under Section 227 (2) of the Act, as being a disposition of the company's property subsequent to the commencement of the winding up.

Their Lordships do not go into other matters in relation to this order, approved as it was on appeal—into the fact that the value of the lease to the company was not questioned and that, in making the order, no regard was had to the law of the Nizam's Dominions, where the validity or otherwise of

the lease would have been determined without any reference whatever to Section 227 (2). They say nothing of all that followed therefrom. They are concerned now only to point out that the later disasters flowed from the initial failure of those responsible to appreciate that no one had been or remained interested in the factory except the shareholders, who had by an unopposed resolution approved the lease, and that so far from declaring it void under the section, it was a transaction to be confirmed almost as a matter of course.

The second typical example of failure in the same respect is disclosed in the proceedings with reference to a dividend of Rs. 40 per share in respect of the profits of the company for the years 1922 and 1923, declared unanimously at a meeting of shareholders, or more accurately of contributories, held on the 27th December, 1924, as one to be paid on the terms that it would be repaid if called for. At that date the winding-up order had been made, but no liquidator had so far been appointed. In point of law, under Section 178 (2) of the Act the company's assets were then constructively in the custody of the Court, and it is quite clear that no disposition of them by the contributories could be regular. But, on the other hand, except these contributories, no one at the date of the resolution had any interest whatever in the moneys to be distributed, while it is not surprising, as one of the Judges remarks, that the contributories were entirely unanimous in declaring the dividend. Now in the treasurer's accounts for the year 1924, there is a disbursement claimed of Rs. 10,665 in respect of a partial distribution of this dividend, and this disbursement has been attacked by the official liquidator from every angle, but always on the basis that any payment whatever of dividend after the winding-up order, albeit in substance no more than a payment on account of the ultimate interest of each contributory in the surplus assets of the company, was as blameworthy as if, in the liquidation of an insolvent company, it had represented a distribution of creditors' funds amongst contributories.

It was of course the immediate duty of the official liquidator in going through the accounts to satisfy himself that the payments set up had in fact been made, and that the money had been received in circumstances which, as between the company and the registered holder of the shares in respect of which it was paid, was a complete discharge to the company. But the official liquidator did not think fit to stop there. He obtained orders from the Court directing the repayment of the dividends paid, and orders against the directors personally for any dividends not so repaid by their recipients, and in other cases—in one particularly, where the registered shareholder himself makes no claim to the dividend (see supplemental appendix, p. 124), and where the dividend has admittedly been paid to and received by one who claims that in equity he was so entitled to receive it—the liquidator has embarked upon an inquiry in the interest of another

claimant in equity to the same dividend, in the course of which he took—and these are now included in the appendices—over 200 pages of depositions, and in connection with which he obtained an order for a commission to Nasik to take evidence, all on a subject and in support of a claim with which the company in liquidation has as such no concern whatever. It is a disturbing circumstance that the claimant for whom all this was done was the original petitioner, Siddabasappa, then not even a contributory, acting through Sabhapati Rao (see second appendix, page 119), while the claimant against whom the irrelevant campaign was waged was I. Narayana Reddi, one of the directors.

But there are other orders made in the liquidation, the terms of which are set forth in the official liquidator's appendices, and, on the face of them, at all events, so remarkable that it would not be very disconcerting to note their disappearance with the winding-up order, on which they depend. There are also cases where, on the startling opinion judicially expressed in the order of the 4th March, 1925, "that in effect the treasurers are not very different from the directors," orders have apparently without discrimination been made against "the directors" or "the treasurers," without anything whatever to indicate who are the persons so described. Their Lordships have been specially struck by the three orders following:

(*a*) An order of the 19th April, 1928, whereby five named directors are apparently as for a misfeasance, and on a summons in chambers ordered to pay Rs. 7761.13.9—a sum which a debtor to the company had made default in paying, no consideration having apparently been given to the contention that the debt had become statute barred by the neglect of the official liquidator, to say nothing of its having been guaranteed by Ramachander, one of the directors named.

(*b*) An order *in chambers* of the 26th April, 1928, (*a*) for repayment of the dividends distributed under the resoluton of the 22nd December, 1924; (*b*) for payment by Ramachander as guarantor of the Rs. 7761.13.9 he had already as director been ordered to pay by the order of the 19th April, 1928.

(*c*) An order of the 15th October, 1929, whereby, *inter alia* (*a*) all items of disbursement shown on treasurers' accounts of 1924 were ordered to be refunded by Venkata Rao and the company's treasurers, with apparently no credit given for any benefit derived by the company from the expenditure; (*b*) repayment was to be made by the directors of the sum paid to the sellers for the gins already referred to, presumably as for a misfeasance, or in respect of an alleged *ultra vires* transaction, without reference to the fact that the gins in question had been delivered to and remained in the hands of the official liquidator under a previous order; (*c*) payment by directors and treasurers was directed of dividends distributed under resolution of the 22nd December, 1924, and not repaid by the recipient, and other smaller payments were ordered without any consideration being given, so far as appears

in the records, to the answers made; (*d*) the lease of the gins to Ramachander was set aside.

None of the orders above referred to are under appeal. They have doubtless long since become final in the sense in which administrative orders ever are final. It may be that in working them out defects, apparent on the face of them, ceased to be serious. But their Lordships cannot refrain from expressing the hope that in liquidation proceedings in India matters of such importance will not normally be so summarily disposed of.

Their Lordships have now detailed with much particularity the salient incidents in this long history. They have done so, laboriously they fear, but not finding it possible otherwise to make clear within the confines of a self-sufficient judgment the difficulty of the problem disclosed. What they find themselves faced with at the end of the day is a winding-up order, made two years after its presentation upon a petition which ought never to have been presented, for, even if not merely vindictive and malicious, the petition was entirely without proved merits. They find also that the winding-up order has in the liquidation been succeeded by a series of orders off-hand in form and on the face of them, at all events, made without full consideration of all relevant circumstances. Lastly, their Lordships find a liquidation in being which, if carried on as it has been begun, can, as they forecast it, end in nothing for the contributories but a call of all the unpaid capital to provide for payment of the costs and expenses. And for these disasters, one and all—with the exception only of the expense and trouble due to the recalcitrancy of Venkata Rao, the costs of which have already and rightly fallen upon him—the petitioners are mainly, if not indeed entirely, responsible. There is, therefore, so far, and even at this distance of time, everything to be said for the discharge of the winding-up order appealed against.

But what would now be the consequences of discharging that order? The business of the company has ceased for years: its undertaking has been broken up: its reconstitution except under new auspices is now probably quite impracticable: and the task of adjusting liability for the mischief which has resulted from the liquidation presents a prospect of far-reaching and ruinous litigation. Nor could these consequences be mitigated, nor could any bounds be set by their Lordships to the range and extent of future trouble if the winding-up order were now to be set aside. A direction to that effect would, their Lordships cannot doubt, be a calamity to all concerned. They cannot give it.

On the other hand, it seems to the Board by no means hopeless that if the liquidation be left operative, it may by a change of method be possible to avoid at least total disaster.

Their Lordships are, of course, well aware that it is not for them to dictate the future course of the liquidation. That is a matter for the learned Judge in winding-up. The judicial

discretion in such matters is, at all events in the first instance, with him alone, and he may not divest himself or be divested of full responsibility for its exercise. The observations accordingly which immediately follow are made merely for his assistance. They are in no way directory. It is enough that they will have his attentive consideration. In their Lordship's view, then, it is essential, if complete disaster is to be avoided, that for the future this liquidation shall be conducted in a spirit of complete impartiality, as between different sets of contributories, and with due regard to the wishes of the contributories (Section 174). It will be for the learned Judge to consider whether this end can be attained under the present liquidator, who has identified himself so completely and, so far, so unfortunately, with the petitioners in their unworthy conflict with the main body of contributories, or whether it will not be necessary to place in the position of liquidator a man of no less high standing than the present official liquidator, but who has not hitherto been associated professionally or otherwise with either set of contributories, and who would be advised by a vakil, equally dissociated from either side, whose appointment would be authorised under Section 181 of the Act. It will further deserve most careful consideration at the hand of the learned Judge, whether in the future course of the liquidation, by whomsoever it is conducted, the audited accounts up to 1923 should not remain undisturbed for reasons similar to those which have led their Lordships to leave the winding-up order in being, and whether the accounts of the company for 1924 should not be taken on the best available materials and audited in order that on these accounts, as so taken, the actual amounts with which the treasurers are to be charged may appear as accurately as is now possible. Particularly, however, will it be for the learned Judge to determine if the liquidator should not be directed to consider, as a protection from all further litigation, whether the liquidation cannot be brought to an end by some scheme under which the whole remaining assets of the company would be taken over by the majority contributories on the terms of their providing for the authorised costs and expenses of the liquidation and a sum equivalent to the then existing value of the shares in the company of the remaining contributories; and whether, failing that, the liquidator should not be directed in relation to the dividend declared on the 22nd December, 1924, and notwithstanding the orders on that subject previously made, either to complete its distribution out of the assets in his hands or enforce repayment from each recipient of the dividend paid to him. In their Lordships' judgment, the preferable course, if funds permit, is, with the sanction of the Court, to complete the distribution. All these observations, however, as their Lordships have explained, express their own views only. They form no part of the order following.

The actual order now to be made should, their Lordships think, be as follows: That the winding-up order of the 13th

November, 1924, although not justified when made, be, by reason of the lapse of time and intervening events, maintained except as to costs. As to these, the order will be discharged.

And their Lordships will humbly advise His Majesty accordingly.

As to costs, as the winding-up is allowed to continue, the petitioners cannot be ordered to pay the company's costs either of the petition or of the appeal to the High Court, proper though such an order would be. But they must not have costs in either Court, and if these costs have been paid by the official liquidator they must be repaid. The official liquidator must pay out of the assets the costs of the company—that is, the majority contributories—of the petition, of the appeal to the High Court and of this appeal. There will be no costs of this appeal to the petitioner respondents or Madam Venkayya. The Registrar will tax the costs of this appeal of the official liquidator, who will have liberty to apply in the liquidation for payment out of the assets of these costs or of such part of them as the Judge, in winding-up, may, in view of this judgment, allow, the official liquidator having further liberty reserved to apply to the learned Judge for payment otherwise than by the majority contributories of such of his taxed costs as may be disallowed out of assets.

It will be the duty of the official liquidator when applying for his costs to bring this judgment of their Lordships to the notice of the learned Judge.

In the Privy Council.

THE RIPON PRESS AND SUGAR MILL COMPANY, LIMITED, BELLARY

v.

V. GOPAL CHETTI AND OTHERS.

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