

The Official Liquidator of M. E. Moolla Sons, Limited - - *Appellants*

v.

Mrs. Perrin R. Burjorjee - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1932.

Present at the Hearing :

LORD BLANESBURGH.

LORD TOMLIN.

SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.

On the 23rd December, 1929, the trial judge on the original side of the High Court of Judicature at Rangoon held that the proof was rightly rejected. On the 4th August, 1930, this decision was reversed on appeal to the appellate side of the Court.

The proof in question was for Rs. 63,219.15.0, damages alleged to have been incurred by the respondent by reason of the failure of the Company to complete the purchase of property agreed to be sold by the respondent by an agreement dated the 27th July, 1921.

The only question in issue or debated at the hearing before the trial judge, or on the appeal, was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the Company was the undisclosed principal of Moolla in respect of such agreement.

The trial judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefit of it to the Company and that therefore the Company was under no liability to the respondent.

The appellate Court held that the Company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected.

Against this decision the liquidator appealed to His Majesty in Council and before their Lordships' Board raised the contention that the agreement of the 27th July, 1921, required registration under the Indian Registration Act, that it had not been registered and that as it had not been registered it could not be used for any purpose whatever and ought to be ignored by the Court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail.

The questions therefore which arise for their Lordships' consideration are :—

- (1) Ought the appellant to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement ?
- (2) If the question as to registration can now properly be raised (*a*) did the agreement, which admittedly was not registered, require registration, and (*b*) if it did require registration, what is the effect of non-registration in regard to the respondent's right to claim damages under the agreement ?
- (3) If the question as to registration cannot now be properly raised, or if it can be properly raised but upon consideration of the merits of the question, it is held that the non-registration of the agreement does not preclude the respondent from putting forward a claim for damages under the agreement, whether the Company was or was not the undisclosed principal of M. E. Moolla in regard to the agreement ?

To enable these questions to be considered, it will be convenient to state the facts so far as they are proved or admitted.

The Company was formed under the Indian Companies Act, 1913, on the 21st January, 1921, as a private company.

Clause III (6) of the Memorandum of Association enabled the Company to acquire by purchase, lease, exchange or otherwise land, buildings, and hereditaments of any tenure or description in Burma.

By Articles of Association 115 and 116 (2) the directors had power to purchase for the Company any property which the Company was authorised to acquire.

At a meeting of the Board of Directors held on the 1st February, 1921, Moolla was appointed Managing Director, with power to manage the business of the Company as he thought fit.

He was further authorised to purchase and sell any property (moveable or immoveable) as he thought best in the interest of the Company.

The issued share capital of the Company stood as to about 90 per cent. thereof in the name of Moolla, and as to the remainder in the name of his mother Mariam Bee Bee. The trial judge said "the Company was essentially a one man Company, being for all practical purposes Moolla incorporate."

The Company's office was also Moolla's office.

The agreement of the 27th July, 1921, was made between the respondent (described as the vendor) and Moolla (described as the purchaser) and contained no reference to the Company. Omitting formal parts, the agreement was as follows :—

" 1. The vendor agrees to sell to the purchaser and the purchaser shall purchase from the vendor the properties described in the schedule herein-under written measuring 12·54 more or less at or for the price of Rs. (Twelve thousand five hundred) per acre.

" 2. That the purchaser had paid to the vendor Rs. (10,000) Ten thousand as earnest money, the receipt of which the vendor doth hereby acknowledge.

" 3. That the purchaser agrees to complete the conveyance within three months from the 12th July, 1921, by paying the balance of the purchase money calculated at the rate aforesaid save and except a sum of Rs. (1,00,000) One hundred thousand which sum is to remain outstanding as in the clause next provided.

" 4. The vendor agrees to keep the said balance of unpaid purchase money, namely, Rs. (1,00,000) One hundred thousand invested with the purchaser for a period not exceeding three to five years as the purchaser may wish on the purchaser paying interest thereon at the rate of eight per annum payable monthly and the same secured by the equitable mortgage of the premises hereby agreed to be sold, that is, by the purchaser depositing the title deeds of the said premises including the conveyance in his favour with the vendor.

" 5. That the vendor shall make out a good and clean title to the said premises and produce for inspection the title deeds as soon as required by the purchaser."

The schedule contained a description of certain immoveable property in Burma belonging to the respondent. The acreage is given as 12·54 acres and on this basis, the total purchase price under the agreement would be Rs. 1,57,375. Upon the execution of the agreement Rs. 10,000 was paid to the respondent as earnest money.

The respondent had no personal contact with Moolla in connection with the negotiation for or the execution of the agreement. She acted by brokers throughout.

On the 31st December, 1921, the Board of Directors held a meeting, the Minutes of which state that "the following properties were purchased by the managing director during the course of the year on behalf of the Company." A list of twenty-eight properties follows. The second on the list under date, 13th July, 1921, is the property, the subject of the agreement of the 27th July, 1921.

Of the twenty-eight properties in the list, twenty-five had been bought in the name of the Company, three properties (including the respondent's property) had been purchased in Moolla's name and admittedly the two properties other than the respondent's property had been purchased on the Company's behalf.

On the 30th March, 1923, the purchase being uncompleted, the respondent's brother-in-law wrote to Moolla, asking for the balance of the purchase-price, or at least Rs. 15,000.

Moolla replied by executing four promissory notes in the respondent's favour, for a total of Rs. 40,000.

On the 20th November, 1923, the respondent gave to Moolla a receipt for Rs. 1,000 in respect of interest.

Further payments of interest were made up to February, 1927, but the purchase was never completed.

Moolla at the trial admitted that Rs. 15,000 in respect of the promissory notes and all interest was paid out of the Company's funds. He alleged that the earnest money was paid by himself but refunded to him by the Company. He stated that all the Company's books prior to 1924 were destroyed under his instructions, and that he had no books to show that the earnest money came originally out of his own moneys. He alleged that he had purchased the property on his own account and had subsequently transferred the benefit of the agreement to the Company. He produced no document to evidence the alleged transfer.

On the 6th April, 1927, a creditors' petition was presented to wind up the Company, and an order for winding up was made on the 21st June, 1927, and one Hormasji was appointed liquidator.

Between the presentation of the petition and the making of the order, viz., on the 18th June, 1927, the respondent, at the instance of Moolla, filed in opposition to the petition, an affidavit prepared by Moolla's clerk. In this affidavit she stated that she was a secured creditor of the Company for Rs. 1,31,137.8.0. This was the sum then calculated to be owing under the agreement of the 27th July, 1921.

Moolla himself was declared insolvent on some date between April and June, 1927. His assets were practically nil. He did not enter the name of the respondent as a creditor in the schedule relating to his own affairs which it was his duty to file in the insolvency proceedings.

What subsequently followed is not clear.

The record before their Lordships' Board contains an affidavit sworn by the liquidator on the 17th February, 1928, on an application which he made to the Court for directions. This affidavit was treated as his evidence at the trial and at the trial no oral evidence was given by him.

The affidavit, omitting formal parts, is in the following terms :—

"1. On 27th July, 1921, Mr. M. E. Moolla in his own name entered into an agreement with Mrs. P. R. Burjorjee for the purchase of 12.54 acres

of garden land near the Victoria Lake on the terms contained in the deed of agreement, a copy of which is herewith attached and marked "A."

"The balance of the purchase price save Rs. 1,00,000 which was to lie invested with the purchaser was never paid and default was made in the payment of interest as stipulated in the agreement and consequently no conveyance was executed by the vendor.

"2. When the vendor applied persistent pressure and threatened to specifically enforce the agreement, Mr. Moolla in his own name on 1st April, 1923, executed four pro-notes for Rs. 15,000, Rs. 10,000, Rs. 10,000 and Rs. 5,000, towards the purchase price, out of which the first one for Rs. 15,000 was subsequently paid up in full.

"3. The payment of Rs. 10,000 on account of earnest money, of Rs. 15,000 in discharge of the pro-note for Rs. 15,000, dated 1st April, 1923, and of Rs. 41,409.12.0 on account of interest on the balance of purchase-price amounting in all to Rs. 66,409.12.0 was made from the funds of M. E. Moolla Sons, Limited, on different dates as detailed in the list annexed and marked "B." The payments have been debited in the Company's books on the respective dates thereof.

"4. Throughout the correspondence, nothing is mentioned to show that Mr. Moolla was acting as the agent of the Company, except for some stray references in Mr. N. N. Burjorjee's letters and in the minutes of a meeting of the Directors held on 31st December, 1921, copies of which are herewith annexed and marked "C" and "D" respectively.

"5. According to Article 111 of the Company's Articles of Association, read with Minutes of Proceedings of meeting of Directors, dated 1st February, 1921 (of which copies are annexed marked "E" and "E1") the Managing Director of the Company had power to purchase properties for and on behalf of the Company.

"The vendor has put in her proof of claim (copy annexed and marked "F") in which she offers to take over the property at Rs. 4,500 per acre. She has subsequently put in a valuation certificate by Mr. Joakim, Managing Director of Balthazar & Son, Limited (copy annexed marked "G"), stating that the present market value of the land is about Rs. 56,000. I have (without advertising) endeavoured unsuccessfully to obtain a better offer than that made by the vendor and from inquiries made and judging by a recent sale by auction of similar land in the neighbourhood, I have come to the conclusion that Rs. 56,000 is about as high a price as could possibly be realised for the land at the present time."

Of the exhibits referred to in the affidavit, Exhibit "A" was a copy of the agreement of the 27th July, 1921. Exhibit "B" was a statement printed in the record before their Lordships described as "Statement of payments made from the funds of M. E. Moolla Sons Limited."

This statement purports to show payments made by the Company in respect of the agreement of the 27th July, 1921, to a total amount of Rs. 66,409.12.0 including Rs. 10,000 for earnest money paid by the Company on the 27th July, 1921 and Rs. 15,000 to satisfy one of the promissory notes given by Moolla, paid by the Company on the 7th July, 1923. The balance of the Rs. 66,409.12.0 was made up of interest payments in respect of the period between the 1st April, 1923 and February, 1927.

With regard to the Exhibits "C" and "D," reference has already been made to the material minutes of the directors' meeting. The only letter of the respondent's brother-in-law,

N. N. Burjorjee, printed in the record, is one asking for payment of the Rs. 15,000 and carries matters no further.

Exhibits "E" and "E 1" dealt with the powers of the managing director to purchase immoveables, which have never been in dispute.

Exhibit "F" is not printed in the record, and the form of the respondent's proof is therefore not before their Lordships.

It is, however, reasonably clear from the affidavit (1) that the respondent had put in a proof of claim presumably on the same lines as that contained in her affidavit of the 18th June, 1927; (2) that for the purpose of minimising her claim to damages she had offered to take over the property at Rs. 4,500 per acre; (3) that the liquidator had neither admitted nor rejected her claim, but had applied to the Court for directions, putting in the agreement and pointing out that there was a question whether Moolla was principal or agent.

The printed extracts from the official diary of the proceedings in the winding up contains the following passage:—

" 28th February, 1928.—Doctor for Mrs. Burjorjee, Munshi for Company. Clark for Chartered Bank. Official Liquidator in person.

" Let the property mentioned in the application of the official liquidator be sold by public auction after due advertisement, with a reserve price of Rs. 56,000. No orders will be passed on the present application of the official liquidator till after the sale, and his proposal will be sanctioned thereafter if Mrs. Burjorjee is still willing to abide by the terms of the arrangement.

" As regards Mrs. Burjorjee's claim against the Company, it will be enquired into by me on 12th March, 1928, unless before that date the official liquidator and Mr. Clark for the Company admit the claim. The sale may be held after the enquiry, and, if at the enquiry, I uphold Mrs. Burjorjee's claim, she will be given leave to bid at the auction and set off the purchase price against her claim *pro tanto*.

Their Lordships are informed and both parties are agreed that the property was in fact sold and the proceeds paid to the respondent.

Presumably it was sold under the order referred to in the extract from the diary. It is, however, obvious that no title could have been made without the concurrence of the respondent. An agreement of some kind between the official liquidator and the respondent in relation to the matter seems therefore to have been essential, though the appellant does not admit that there was any such agreement.

Having regard to the material before their Lordships' Board there may well have been such an agreement upon the lines that, the existence of an agreement for purchase at Rs. 1,57,375 and non-performance of that agreement by the purchaser being admitted, the parties arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent, the question whether the Company was the principal in respect of the agreement of sale being the only question left open for the decision of this Court.

However this may be, the respondent subsequently amended her proof by giving credit for the purchase money, her claim being thus reduced to Rs. 63,219.150.

On the 16th July, 1929, the official liquidator rejected the claim, giving the following reason :—

“ I am not satisfied that the Company was the real contracting party. The contract is, therefore, not binding on and enforceable against the Company.”

On the 29th July, 1929, the respondent petitioned to have the decision of the official liquidator reversed.

At the hearing of the petition the respondent gave oral evidence. Neither the official liquidator nor Moolla gave oral evidence. The affidavit of the official liquidator already referred to was treated as his evidence, and a deposition of Moolla made apparently at some earlier stage in the winding-up proceedings, was treated as his evidence.

In his evidence in chief, Moolla stated as follows :—

“ I entered into the transaction with Mrs. P. R. Burjorjee as evidenced by the agreement of 27th July, 1921. When I agreed to buy this land, I was buying it at first for myself. I myself was the buyer. I signed the pro-notes which were given as part consideration of the purchase-price. The pro-notes were given in my own name and I paid Rs. 10,000 as earnest money and that was my own money. (Minutes of M. E. Moolla & Sons, Limited, dated the 31st December, 1921, explained to the witness.) I purchased that property and put it in the assets of the Company. From 31st December, 1921, it was considered as the property of the Company. The Directors of the Company agreed and as I did not want to sell the property I put it into the Company. The Company agreed to take it over in December, 1921. I presided at that meeting. Mariam Bee Bee is my mother. Hashim Eusoof Moolla is my brother's son (nephew). I held shares worth 1 crore and 53 lakhs and 50 thousand. The capital of the Company was 1 crore and 65 lakhs. My mother held shares worth Rs. 11,50,000. The minute was recorded at my suggestion. It was at my suggestion that the Company took over this deal. Apart from this minute there is no written document showing that this deal was taken over by the Company. The receipts made out by Mrs. Burjorjee were made out in my name.

In cross-examination, Moolla said :—

“ I still say [*sic*] that the purchases by me of Mrs. Burjorjee's, Emin's and Bymeah's properties were for the Company. I don't remember whether I stated to Mr. Hormasji that the purchases made in my own name of Mrs. Burjorjee's, Emin's and Bymeah's lands were made for the Company.

* * * * *

“ When the official assignee examined me I made the following statements :— ‘ As for properties purchased by me in my own name after the promotion of the Company, they were treated as the Company's properties because the purchase-money or part purchase-money was paid from the Company and debited in the Company's accounts and they were bought for the Company. There are only two such properties, viz., Mrs. R. N. Burjorjee's land and the house in Park Road mortgaged to Emin. The Tiger Alley property, which has been sold, was another such transaction. I shall furnish lists in a day or two of all properties held for the Company though they are not in the Company's name.’ ”

In reply to the Court, Moolla subsequently added "as regards Mrs. Burjorjee's land it was in my own name and this was because Mrs. Burjorjee refused to negotiate with the Company."

Mrs. Burjorjee denied that she had refused to negotiate with the Company and said in effect that she only knew of the Company in the matter some time after the agreement.

The only matter debated before the judge who tried the petition was the question of fact whether the Company was in connection with the purchase the undisclosed principal of Moolla. The learned judge held that Moolla purchased on his own account.

The respondent appealed. The question, and the only question, debated before the appellate side was that which had been debated below.

The appellate side reversed the trial judge and held that the Company was the principal in the matter.

Subsequently the appellant applied for a review of the judgment on the ground that Exhibit "B" to his affidavit had been erroneous in so far as it showed the earnest money to have been paid out of the Company's funds on the 27th July, 1921, the books of the Company for 1921 having been destroyed and there being, therefore, no evidence of such payment.

The application for a review of judgment was rejected.

On the 7th January, 1931, leave to appeal to His Majesty in Council was granted to the appellant. In his application for such leave, the appellant for the first time raised the question of the non-registration of the agreement in these terms: "This Honourable Court has omitted to take note of the fact that the agreement of sale of 27th July, 1921, had not been registered and was thereby invalid and inoperative." The same point was raised in his case before their Lordships' Board.

The first question for consideration, therefore, is ought the applicant to be allowed at this stage to raise for the first time the point of non-registration?

In *Connecticut Fire Insurance Company v. Kavanagh*, 1892, A.C. 473 at p. 480, Lord Watson, in delivering the judgment of their Lordships' Board, said as follows:—

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. ~~But their Lordships have no hesitation in holding that~~ the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea."

Section 49 of the Registration Act, which states the results of non-registration is, so far as material, as follows :—

“ 49. No document required by Section 17 to be registered shall—

“(a) affect any immoveable property comprised therein.

* * * * *

or

(c) be received as evidence of any transaction affecting such property, unless it has been registered.

Their Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non-registration.

They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the Company and Moolla in regard to the agreement of the 27th July, 1921.

In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non-registration of the document.

It becomes therefore unnecessary to consider the second question as to the necessity for registration.

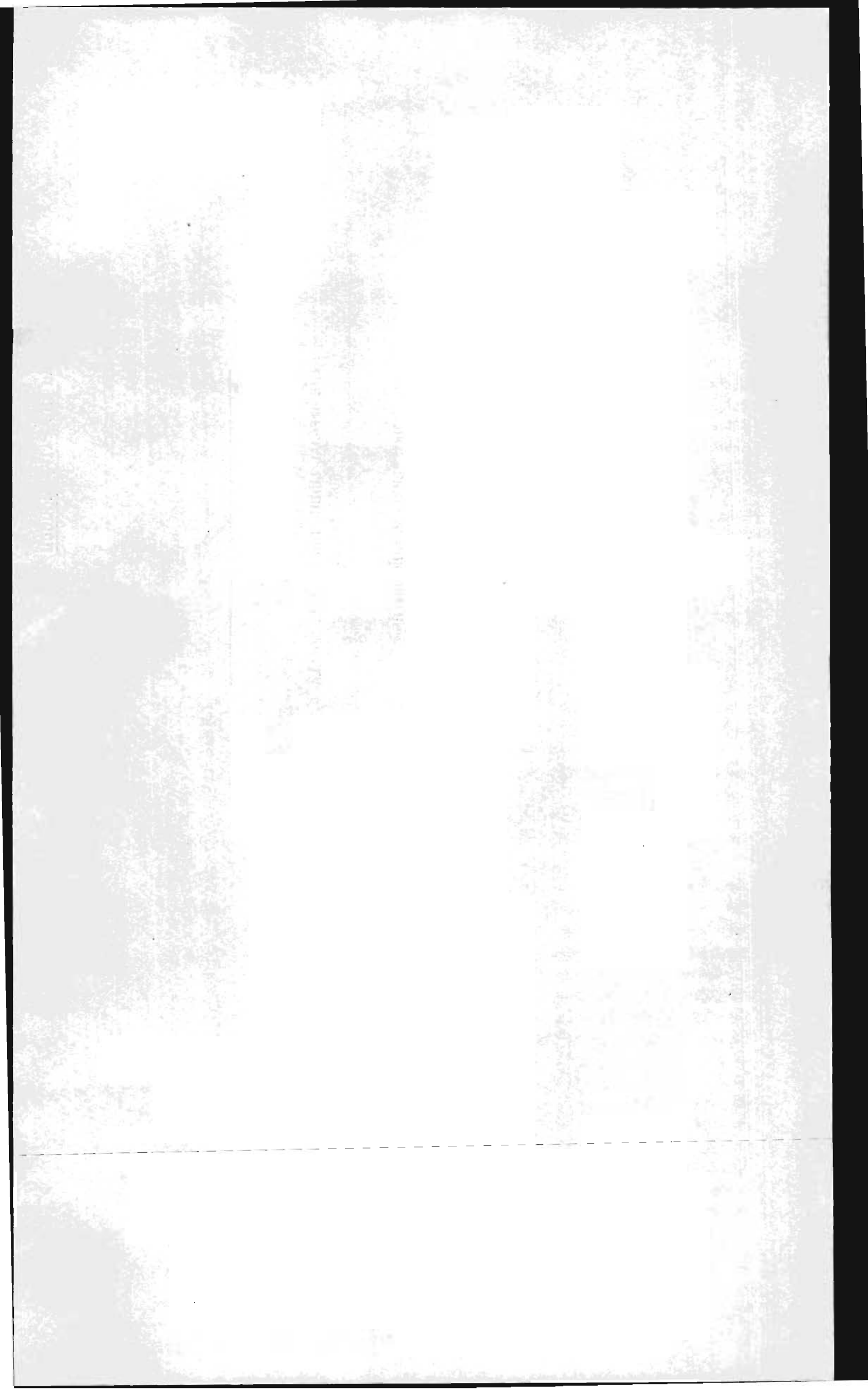
There remains the third and last question, one of fact upon which the Courts below have differed, viz., was the Company the undisclosed principal of Moolla in relation to the agreement of the 27th July, 1921.

Their Lordships are satisfied that the Company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points strongly in

the direction of his having acted as the Company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the trial judge. In their Lordships' opinion the learned judges of the appellate side reached a correct conclusion upon the issue of fact.

In the result, therefore, the appeal fails and must be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE OFFICIAL LIQUIDATOR OF M. E. MOOLLA
SONS, LIMITED

v.

MRS. PERRIN R. BURJORJEE.

DELIVERED BY LORD TOMLIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1932.