

Privy Council Appeal No. 26 of 1937

T. R. Pratt (Bombay) Limited (in liquidation) - - *Appellant*

v.

M. T. Limited (in voluntary liquidation) - - - *Respondent*

E. D. Sassoon & Co. Limited - - - *Appellant*

v.

T. R. Pratt (Bombay) Limited (in liquidation) - - *Respondent*

(Consolidated Appeals)

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 11TH MARCH, 1938.

Present at the Hearing :

LORD WRIGHT.

LORD ROMER.

SIR LANCELOT SANDERSON.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[Delivered by SIR GEORGE RANKIN.]

In this case two appeals have been consolidated. They arise out of proceedings taken in the winding-up of a company called T. R. Pratt (Bombay), Limited (herein called "Pratts") which was registered in 1919 under the Indian Companies Act, 1913. On 22nd June, 1932, it was ordered by the High Court of Bombay to be wound up. The order appealed from is dated 18th September, 1935, and was made by a Division Bench on appeal from Kania J. It dealt with two separate but inter-related claims against Pratts—one preferred by E. D. Sassoon & Company, Limited, and the other by M.T. Limited (in voluntary liquidation). The claim of the former (herein called "the Sassoon company") was to be a secured creditor of Pratts for Rs.4,91,284 by virtue of an equitable mortgage evidenced by an indenture dated 28th February, 1928, and confirmed by another indenture dated 11th August, 1931. The claim of M.T. Limited was intended as an alternative to the claim of the Sassoon company: it was that if the latter failed to establish its claim, M.T. Limited should be admitted to rank as unsecured creditors in respect of the said sum of Rs.4,91,284. Kania J. by order dated 11th July, 1934, allowed the claim of the Sassoon company and held that the claim of M.T. Limited

was valid in the alternative. The Division Bench [Beaumont C.J. and Wadia J.] disallowed the claim of the Sassoon company and accepted the claim of M.T. Limited. The appellants before the Board are the Sassoon company which appeals from the rejection of its claim and the Official Liquidator of Pratts, who disputes both claims.

From 1920 until the liquidation in 1932, Pratts was financed by loans from M.T. Limited who in turn were financed by loans from the Sassoon company. The course of dealing between M.T. Limited and Pratts, as disclosed by their books, was for interest to be charged at 6 per cent. per annum on the half-yearly balances: on that basis the amount for which M.T. Limited claim to prove is correctly calculated. The Official Liquidator resists the claim of M.T. Limited on the ground that from 1920 to 1928 the sums advanced were in excess of the borrowing powers of the directors of Pratts under article 73 of table A being more than the amount of Pratts' issued share capital which was five lacs of rupees. The consequences of this breach of article 73 need not, however, be considered until the claim of the Sassoon company has first been examined.

There is no dispute as to the execution of the indentures of 1928 and 1931 to both of which all three companies—Pratts, M.T. Limited, and the Sassoon company—were parties. The main though not the sole objection taken to the Sassoon company's claim under these instruments is that the directors of Pratts were disqualified under section 91B of the Indian Companies Act from entering into them on behalf of Pratts since they were all directors and shareholders of M.T. Limited. On this question it is important to enquire whether the Sassoon company is shown by the evidence to have had notice both in 1928 and in 1931 of the fact that all the directors of Pratts were interested in M.T. Limited. If not, it will be necessary to construe the indenture of 28th February, 1928, to determine whether it was *intra vires* of Pratts and to ascertain the amount due thereunder in the events which have since happened. If, however, notice must be imputed to the Sassoon company of the fact that in 1928 and 1931 Pratts' directors were shareholders and directors of M.T. Limited, then the claim of the Sassoon company fails, and the claim of M.T. Limited must be examined.

Pratts was incorporated in 1919, and by clause 6 of its memorandum a firm called H. M. Mehta & Co. were appointed its managing agents for 30 years in consideration of their services as promoters. A written agreement dated 5th July, 1924, shows the partners of the firm to be H. M. Mehta, Mani H. M. Mehta and F. H. Mehta. Though it was intended to adopt certain draft articles of association, no articles of association were adopted or filed and table A accordingly applied. The authorised capital consisted of 2,000 preference and 3,000 ordinary shares of Rs.100 each, making 5 lacs in all. The 2,000 preference shares were held by nominees of H.H. the Maharaja of Gwalior. By

1921, 2,990 ordinary shares came to be held by M.T. Limited, and 10 by directors of Pratts, who from 1924 onwards also held some 400 shares as nominees of M.T. Limited. The objects of the company were to deal in motor cars and other vehicles and appliances used therewith but power was taken to hold immovable property to erect buildings and to borrow money.

M.T. Limited was registered in 1920. Among the original subscribers to the memorandum appear the names of H. M. Mehta, F. H. Mehta, M. G. Parekh, C. G. Parekh, Sir Victor Sassoon and A. J. Raymond. The promoters were F. H. Mehta and Company, Limited, in which all these gentlemen were shareholders. F. H. Mehta and Co., Ltd., were by the memorandum of M.T. Limited, made their permanent managing agents. By clause 3 D of the memorandum one of the objects of M.T. Limited, was to purchase the ordinary shares of Pratts. The authorised capital was twenty lacs of rupees divided into 15,000 ordinary and 5,000 preference shares of Rs. 100 each.

The Sassoon company is a private company limited by shares. The evidence of its head accountant is that the firm of E. D. Sassoon and Co., became a limited company in 1921. Its first directors were Sir Victor Sassoon, R. E. Sassoon, Albert Raymond and another gentleman of the name of Sassoon. In 1921 Mr. A. J. Raymond was added to the board. From 1924-28 the board consisted of Sir Victor Sassoon, Mr. R. E. Sassoon, Mr. A. J. Raymond and Mr. Albert Raymond. In 1928 Captain Derek Fitzgerald was added. According to a return dated 13th November, 1931, Sir Victor Sassoon had ceased to be a director and a Mr. Fred Stones had joined the board. At the end of 1920 the Sassoon company was debited in the ledger of M.T. Limited, with the cost of 5,000 shares in the latter company. On 3rd November, 1921, the board of the Sassoon company resolved that Mr. A. J. Raymond as managing director be authorised to exercise all the powers that the directors themselves are empowered to exercise as a board. On the 24th April, 1924, Mr. A. J. Raymond joined the board of Pratts. On 3rd April, 1928, the minute book of the Sassoon company records that Mr. A. J. Raymond resigned the office of managing director and also that Mr. Albert Raymond was appointed a managing director and invested with all powers that the directors were empowered to exercise as a board. On 26th September, 1928, the minute book of Pratts records that Mr. A. J. Raymond was given leave of absence for six months and that Mr. Albert Raymond joined the board of Pratts.

From 1921 onwards M.T. Limited held the whole of the ordinary shares (save ten) of Pratts and every director of Pratts was a shareholder in M.T. Limited. That the management and control of Pratts was in the hands of M.T. Limited is not in doubt as it was clearly the intention with which M.T. Limited was incorporated. According to

the annual balance sheets of M.T. Limited the transactions between the three companies can be tabulated as shown hereunder. The Sassoon company was not treated as a creditor of Pratts but of M.T. Limited and the finance obtained by Pratts was treated as obtained from M.T. Limited:—

	<i>Due by Pratts to M.T. Rs.</i>	<i>Due by M.T. to Sassoons. Rs.</i>
1921	12,17,069	6,84,791
1922	13,04,758	7,99,978
1923	12,28,514	8,24,330
1924	10,33,665	8,00,010
1925	7,95,727	9,30,010
1926	7,16,200	8,96,796
1927	6,16,211	8,81,973
1928	5,48,179	7,17,214
1929	4,98,719	6,85,745
1930	4,94,199	6,93,140
22nd June, 1932 ...	4,91,284*	

* Inclusive of interest up to the end of 1931.

In 1926 the Sassoon company was minded to obtain security from M.T. Limited which owed money to the Calcutta and Rangoon "branches" as well as to the Bombay house—the total being over 13 lacs of rupees. Mr. Albert Raymond and Sir Victor Sassoon having given "very careful consideration" to the points raised by M. T. Limited, the Sassoon company wrote to M.T. Limited insisting upon obtaining an equitable mortgage of "your Bombay properties" (8th March, 1926), a phrase which by 15th April of that year is found to include a property belonging to Pratts. On the 28th April the directors of M.T. Limited not only resolved to grant a mortgage over a property known as Collings Building which belonged to M.T. Limited but passed a resolution that by way of security for the nine lacs borrowed from the Sassoon company and advanced to Pratts an equitable mortgage be created in favour of the Sassoon Company of the property known as 100B, Hughes Road ("Pratts Building") the property of Pratts. In the end, by way of a fair division between the two properties of the total amount of M.T. Limited's indebtedness to the Sassoon company, each building was charged for half, viz., $4\frac{1}{2}$ lacs of rupees. On 14th October, 1926, the mortgage of Collings Building was completed. As the leasehold title of Pratts to Pratts Building had to be perfected the deeds were not deposited with the Sassoon company until November, 1927. After much correspondence between the Sassoon company and M.T. Limited and their agents, F. H. Mehta & Co., Ltd., the form of the agreement was settled, and on the 23rd February, 1928, two board meetings were held, one at 5 p.m., and the other at 5.15 p.m. At the first the board of Pratts resolved upon the execution of the deed and authorised two of its members to affix the seal of the company. Five members were present, H. M. Mehta, A. J. Raymond, C. G. Parekh, Mani H. M. Mehta and F. H. Mehta. At the second the same persons as the

board of M.T. Limited did the same on behalf of M.T. Limited. On the 28th February the indenture was executed: the seal of each company being affixed by the same two directors C. G. Parekh and F. H. Mehta "pursuant to the resolution of the board of directors." In the case of M.T. Limited their secretary, Mr. S. M. Chothia, "counter-signed" as part of the execution of the instrument: in the case of Pratts the signature of the two directors was witnessed by two persons, Mr. Satgar and Mr. Krishna Rao.

In 1931 it was noticed that the articles of association which had been intended for Pratts had neither been adopted nor filed, so that table A applied to the company. As the secretary of Pratts had not signed the indenture of 28th February, 1928, it was doubted whether the execution was a sufficient compliance with article 76 of table A. The Sassoon company called for a deed of confirmation. Accordingly H. M. Mehta, M. H. Mehta and F. H. Mehta, on the 4th August, 1931, as the board of Pratts, and on 11th August, 1931, as the board of M.T. Limited, passed the resolutions necessary in that behalf and both seals were duly affixed by M. H. Mehta and F. H. Mehta "pursuant to the resolution of the board of directors" in each case. Apart from the three gentlemen of the name of Mehta the board of Pratts in 1931 included Mr. Albert Raymond who was a member of the board of M.T. Limited as well as of the Sassoon company. Mr. M. G. Parekh had died on 6th December, 1930. Mr. C. G. Parekh had been on the board of Pratts and of M.T. Limited since 1921: he was a shareholder in M.T. Limited and of F. H. Mehta & Co., Ltd. He does not appear to have been a member of either board (Pratts or M.T. Limited) in August, 1931, though he was a member of both in the previous year and again in the following year.

It may tend to clearness if the particulars as to the directorates of the three companies concerned are stated in tabular form: the figures of shares held are as at the time of the winding-up of Pratts in 1932. Since 1924 the boards of Pratts and of M.T. Limited had been constituted of the same persons as in February, 1928:—

PRATTS		M. T. LTD.		SASSOONS
DIRECTORS	SHARES HELD	DIRECTORS	SHARES HELD	DIRECTORS
<i>Feb. 1928</i>	<i>1932</i>	<i>Feb. 1928</i>	<i>1932</i>	<i>Feb. 1928</i>
Mehta, H. M.	52	Mehta, H. M.	897	Sassoon, Sir V.
Mani, H. M.	52	Mani, H. M.	335*	R. E.
F. H.	52	F. H.	334*	Raymond, A. J.
Parekh, M. G.	51	Parekh, M. G.	524	Albert
C. G.	51	C. G.	524	
Sassoon, Sir V.	50	Sassoon, Sir V.	100	
Raymond, A. J.	50	Raymond, A. J.	200	
<i>August 1931</i>	<i>1932</i>	<i>August 1931</i>	<i>1932</i>	<i>August 1931</i>
Mehta, H. M.	52	Mehta, H. M.	897	Sassoon, Sir V.
Mani, H. M.	52	Mani, H. M.	335*	R. E.
F. H.	52	F. H.	334*	Raymond, A. J.
Raymond, Albert	50	Raymond, Albert	100	Albert
				Fitzgerald, D.

* Jointly with H. M. Mehta.

Section 91B was inserted into the Indian Companies Act (VII of 1913) by Act XI of 1914 and at the time of the transactions now in question it read as follows:—

“ 91B.—(1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted:

“ Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

“ (2) Every director who contravenes the provisions of subsection (1) shall be liable to a fine not exceeding one thousand rupees.

“ (3) This section shall not apply to a private company.

Their Lordships are of opinion that the indentures of 28th February, 1928, and 11th August, 1931, embody a contract or arrangement in which each director of Pratts was concerned or interested within the meaning of the section by reason of his being a director and shareholder in M.T. Limited. The section is a concise statement of the general rule of equity which was fully considered and explained by the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady L.J., and Pickford L.J.) in *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company* L.R. [1914] 2 Ch. 488, 503:

“ Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others. He is bound to do as well for his *cestuis que* trust as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the *cestui que* trust, upon which subject no enquiry is permitted.”

Subject to the question whether the Sassoon company had notice of the facts as to the interest of the directors of Pratts, their Lordships think, therefore, that the indentures of 28th February, 1928, and 11th August, 1931, are voidable by the Official Liquidator. They are not of opinion that section 91B would operate to deprive of the benefit of his contract with the company a third party who had no notice of the defect in the directors' authority. This would be contrary to principle: such a person would be entitled to assume that the internal management of the company had been properly conducted. [*Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327.] But on the facts of the present case their Lordships think it impossible to regard the Sassoon company as ignorant that in any question between Pratts and M.T. Limited the former had no independent board and indeed no single

director who was not interested on behalf of M.T. Limited. The fact that one of the directors taking part in the resolution of 23rd February, 1928, was their own managing director clothed with all the powers of their own board, is both a striking and important fact but it is not by itself the determining feature of the case. At the meeting of 4th August, 1931, no director of the Sassoon company was present. A careful and able argument was addressed to their Lordships by Mr. Romer and Mr. Russell based upon *In re Hampshire Land Company* L.R. [1896] 2 Ch. 743. *In re Fenwick Stobart and Co., Ltd.*, L.R. [1902] 1 Ch. 507. *In re David Payne and Co.*, L.R. [1904] 2 Ch. 608. But the facts which affect the validity of the mortgage here in question cannot be regarded as mere items of information which had been acquired by an individual director privately or in his capacity as director of Pratts and which he might or might not be expected to share with his co-directors on the board of the Sassoon company.

The Sassoon company had for seven years been financing Pratts through M.T. Limited, and though the latter was their debtor had determined in 1926 to obtain property of Pratts as security for their debt. Control of Pratts by M.T. Limited had been the basis of their dealings. They were interested as financiers both in the extent and in the method of this control and there had been ample time and opportunity to acquire familiarity with these matters in detail.

To what extent Mr. R. E. Sassoon was active as a director is left in doubt upon the evidence but the case of the Sassoon company would not be improved by assuming that he left the direction of the company's affairs to his co-directors. Up to 1928 Mr. A. J. Raymond and thereafter Mr. Albert Raymond was in primary charge as managing director with full powers. Sir Victor Sassoon may have exercised a less detailed supervision but was certainly an active director. He and Mr. A. J. Raymond were both original subscribers to the memorandum of M.T. Limited and to that of F. H. Mehta & Co., Ltd., the managing agents. Sir Victor himself was one of the first directors of the latter. He had been on the board of Pratts since 1922 and Mr. A. J. Raymond since 1924. He had been on the board of M.T. Limited since 1920 and Mr. A. J. Raymond since 1921. He went carefully into the question of security in 1926. It may safely be taken therefore that the Mehtas and the Parekhs and the interests they represented were as well known to the Sassoon directors as the Raymonds and Sassoons were to them. That M.T. Limited, which was putting forward Pratts' property as security, held all save ten of the ordinary shares in Pratts and that the directors of Pratts had for years been directors of M.T. Limited—these are facts which it was the business of the Sassoon company as financiers to know, and which as their Lordships think the directors came to know in the course of their business. There is no reason to suppose that Sir Victor Sassoon, Mr. Albert Raymond, Mr. A. J. Raymond

or Mr. R. E. Sassoon (the directors of the Sassoon company in 1928) would have any difficulty in appreciating them; or would fail to grasp the obvious facts that the directors of Pratts had no real interest in Pratts save through their interest in M.T. Limited, and that the Gwalior nominees were leaving the control of Pratts to M.T. Limited, the holder of the ordinary share capital. These facts cannot be regarded as extraneous information beyond the cognizance of the Sassoon company; they are facts which had a direct and important bearing on its dealings throughout. All the information which is material was really public property ascertainable without difficulty by anyone under section 87 of the Act. In their Lordship's opinion the Sassoon company cannot on the facts disclaim knowledge of the interest of the directors of Pratts in 1928 or 1931 and were not entitled to assume on either occasion that the provisions of section 91 (b) had been complied with. No case of ratification by the preference shareholders of Pratts can be made out, and the result is that the Official Liquidator is entitled to avoid the equitable mortgage which is the Sassoon company's sole ground of claim in the winding-up of Pratts.

The right of M.T. Limited to prove as unsecured creditors for the balance outstanding at the date of the winding-up order was affirmed by both Courts in India. On the ground that from 1921 to 1928 their advances exceeded the limit imposed (by article 73 of table A) upon the powers of the directors of Pratts the Official Liquidator resists the proof, notwithstanding that at the time of the liquidation (and indeed for three years before) the balance due was within the limit. Their Lordships construe article 73 as limiting the directors' authority to borrow. The requirement of the article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. Assuming, however, that the directors from 1921 to 1928 exceeded their authority in so far as the advances obtained from M.T. Limited exceeded five lacs of rupees, the loans were not *ultra vires* of the company, and there are concurrent findings of the Indian Courts that the money was received by the company and applied for its purposes. In these circumstances it is plain that the Official Liquidator cannot reduce the balance outstanding at the date of liquidation by disputing the liability of Pratts to repay the whole sums advanced. The question of interest on the sums borrowed in excess of the limit of five lacs is, however, another matter. Before their Lordships, as before the Division Bench of the High Court, it was contended for the Official Liquidator that the whole account since 1920 should be revised and reconstructed so as to eliminate all charges for interest upon advances in excess of five lacs. In the High Court Beaumont C.J. and Wadia J. refused to entertain

this argument which had not been urged before Kania J. and was not mentioned in the memorandum of appeal to the Division Bench. They considered that the Official Liquidator was in great difficulty upon this point by reason that his counsel at the trial had stated that he did not dispute the correctness of Pratts' account in the ledgers of M.T. Limited and had consented to this being marked as an exhibit without any proof. In their discretion they refused to entertain the Liquidator's claim—then for the first time put forward—to have an account directed upon principles which would eliminate a portion of the interest which has been charged from 1921 onwards. Their Lordships desire to take every care that an admission should not be strained. Mr. Lionel Cohen's argument upon this point merited and has received particular attention. But their Lordships do not find that the High Court has erred in this respect, and see no reason for interfering with the discretion which they have exercised. The appeal of the Official Liquidator must accordingly fail and it becomes unnecessary that their Lordships should discuss the arguments forcefully advanced by Mr. Buckley on behalf of M.T. Limited in defence of their right to interest.

Their Lordships will humbly advise His Majesty that both appeals should be dismissed. The Sassoon company will pay half of the costs of Pratts in this consolidated appeal and Pratts will pay the costs of M.T. Limited.

In the Privy Council

T. R. PRATT (BOMBAY) LIMITED
(in liquidation)

vs.

M. T. LIMITED
(in voluntary liquidation)

E. D. SASSOON & CO. LIMITED

vs.

T. R. PRATT (BOMBAY) LIMITED
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(Consolidated Appeals)

DELIVERED BY SIR GEORGE RANKIN.

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