Privy Council Appeal No. 118 *of* 1927.

Bai Mangu and others - - - - - - - - *Appellants*

v.

The Bharatkhand Cotton Mills Company, Limited - - - *Respondents*

Bhai Dhiraj and others - - - - - - - *Appellants*

v.

Same - - - - - - - - - - *Respondents*

Sheth Kevaldas Tribhovandas and others - - - - *Appellants*

v.

Same - - - - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY, 1930.

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from a decree of the High Court of Judicature at Bombay reversing a decree of the Subordinate Judge of Ahmedabad and dismissing with costs a suit brought by the appellants against the respondent Company. There has been much litigation between the parties and others which is relevant to the issues that arise in these suits. The course of the litigation has been carefully and adequately set forth in the judgment appealed from of the present Chief Justice of Bombay, who has appended to his judgment a valuable table of the relevant dates

and decrees. The facts have also been fully set out in the judgments below. In the view taken by their Lordships it becomes unnecessary to discuss many of the matters that were in contest in the Courts below and before the Board, and their Lordships will proceed to state only so much of the facts as is essential to explain the reason for their decision. The respondent Company, the Bharatkhand Cotton Mills Company, Limited, was formed in 1896. The appellant Kevaldas had from the beginning a substantial interest in it. He was chairman and manager, and his firm, who for this purpose may be treated as synonymous with himself, was at all material times until the end of 1911 secretary, treasurer and agent of the Company. In that capacity a running account existed between Kevaldas and the Company, running into large figures, in which Kevaldas appears at some times debtor, at others creditor of the Company. In the year 1905 Kevaldas started on his own behalf a weaving factory on land which he took on lease. The weaving factory was run in close co-operation with the spinning mills, which were the business of the Company, and no doubt might legitimately serve the Company's interests. In January, 1909, however, one of the shareholders, suing for himself and the other shareholders, commenced a suit against Kevaldas for a declaration that the weaving factory was built out of the Company's money and was the property of the Company, and for an account of the profits made by Kevaldas out of the Company's money used by him. The claim to the factory was not persisted in, but on January 26th, 1910, a preliminary decree was made declaring that Kevaldas was liable for profits made by the use of the Company's money and directing the necessary accounts and inquiries. In April, 1914, the Subordinate Judge, on consideration of the report of the Commissioner who took the account, dismissed the suit, but in August, 1916, the Company's appeal was allowed by the High Court, and a decree made in favour of the Company for Rs. 1,46,453, with interest at 9 per cent. as from May 15th, 1910. This money decree was executed against Kevaldas's property between 1916 and 1920, and a sum of Rs. 47,677 was realised. In June, 1923, this Board dismissed an appeal by Kevaldas against the decree.

Meantime the circumstances had arisen out of which the present claim by Kevaldas arises. In May, 1910, the Company confirmed a special resolution for the purchase of the weaving factory from Kevaldas for a net sum of Rs. 3,51,000, "to be brought to account in his name," and took over the factory as from May 15th, 1910. The validity of this sale was challenged in subsequent litigation between Kevaldas and the Company, but without success, and the debt so created for the purchase price must be taken to be established. The result of bringing it into account with Kevaldas, together with a further sum of Rs. 87,975, which was credited as the price of stores, etc., taken over, was to convert a debit of nearly a lac and a-half into a

credit to Kevaldas of nearly 3 lacs. This sum was reduced by drawings until in September, 1911, it stood at something over a lac. On September 1st Kevaldas issued a deposit receipt in the name of the Company to himself, which later he endorsed to his wife, and for which a few days later he substituted a deposit receipt in the name of his wife. The account, however, was still running, and on October 31st, 1911, he cancelled the existing deposit receipt and issued three deposit receipts in varying amounts to his wife and his daughter-in-law and himself amounting in all to Rs. 137,417, which was the balance then standing to his credit. It is not disputed that the wife and daughter-in-law were nominees for Kevaldas, and that the rights of the parties must be determined as though Kevaldas alone had held the receipts. In August, 1911, the Mills had been destroyed by fire, and later in the year Kevaldas decided to retire from the position of secretary and agent, a position which he ceased to hold on December 31st, 1911.

The point of time is now reached at which the alleged cause of action in this suit arose. The Company, being in some financial difficulty, determined to reduce its capital and to make an issue of preference shares. Of the preference shares some were to be allotted to creditors in satisfaction of their debts; the balance was to be available for the purpose of raising further working capital. Kevaldas alleged that he agreed with the Company to have preference shares allotted to him to the nominal value of the debt owing by the Company to him and his nominees, represented by the amount of the deposit receipts, with accrued interest and some addition to the current account, which was incurred between October 31st, 1911, and the actual date of his resignation. In the present suit he claims specific performance of the agreement or, alternatively, damages for non-delivery. As the company attained considerable prosperity during the war years and after, the preference shares, with arrears of dividend, represent a value much greater than the original debt. The Company deny that there ever was a concluded agreement to allot shares to Kevaldas; but if there were, they say that the result of the shareholders' action brought in 1909 was to show that there never was in fact any balance due in 1911, and therefore the deposit receipts must be taken to be given without consideration; or, in the alternative, they say that the shares were only to be given for the ultimate nett indebtedness of the Company on all accounts; and as against the debt due on the deposit receipts there must be set off the balance of the amount of Rs. 146,453.0.2 and interest due on the decree of August, 1916. The Subordinate Judge found in favour of Kevaldas that there was a binding agreement to allot preference shares in satisfaction of the debt substantially represented by the deposit receipts, and decreed specific performance accordingly.

The learned Judges of the High Court found that the result of the decision of the High Court in the shareholders' action was

to negative the existence of any debt which could support the deposit receipts; for the amounts found due to the Company should have been credited in the current account, and would have resulted in a debit balance to Kevaldas instead of a credit. This view disposed of the action, but they proceeded to express their opinion that there was no concluded contract. The opinion of the Chief Justice was that there was no consideration for it; a view which does not dispose of an alleged contract to allot shares for such an amount as should be found to be due in the future. Mr. Justice Fawcett held that there could be no concluded contract until after allotment in fact and communication of the allotment to the proposed shareholder. Their Lordships cannot uphold this view of the law. There may be a valid executory contract for the allotment of shares constituted by offer and communicated acceptance before allotment is made. If, however, the only facts are that there is application for shares to a company, and nothing further is done by the company but allotment, there is no concluded contract until the allotment is communicated to the applicant. These are the facts in *Gunn's* case, L.R. 3, Ch. 40 (1867), relied on by the learned Judge; but they are not the facts alleged in this case.

There is no very clear evidence of the contract. It consists of the minutes of meetings of the shareholders of the Company and of the subsequent conduct of the parties. The material meeting is of April 20th, 1912. A resolution was proposed that: "The secretaries, treasurers and agents are hereby authorised to allot at the par value of the shares to Kevaldas and to other creditors of this Company for their claims so many of the preference shares as would be sufficient to satisfy their claims." After certain amendments were moved, the minute records: "Mr. Kevaldas Tribhovandas, on being asked, said that he agrees to take preference shares in respect of moneys which may be found due on making account of the moneys which may be claimable in his own name, in the name of his wife, and in the name of his son, making up the amount by calculating interest at 6 per cent." Later, on a submission of May 11th, 1912, Kevaldas went to arbitration with Mulchand, his then successor in the office of secretary and agent, as to the right to have preference shares, and an award was made that Kevaldas, his wife and daughter-in-law were bound to take preference shares "for the amount which may be due to them by the Company." There may be some doubt whether this award, to which the Company were not in terms a party, was in itself evidence on the issue; but Kevaldas subsequently applied to the Court to have the award filed in Court, and thereby clearly made it evidence against him. As far as the Company was concerned, they retained preference shares to meet any possible claim by Kevaldas, and kept dividends in reserve accordingly. The directors' report for the year ending December 31st, 1919, shows a sum of Rs. 9,000 "to be kept credited for payment of dividend and shares, which would on a

rough estimate come to this amount, till the disposal of that suit; that is pending against the family of Kevaldas and others in the event of its being held that shares should be given to them." In the present suit the Company, pleading before the decree of August 22nd, 1916, had been given in their favour, alleged in para. 30 of their written statement that though nothing was due to the plaintiff, "yet if on accounts being taken (if any amount be found due to him) we were and are always prepared to give him preference shares for the amounts which may justly be found due to him, and to accept such preference shares he has given his consent." It appears to their Lordships, on consideration of the whole of the minutes, correspondence and other fact, including those above referred to, that there was a concluded contract between Kevaldas and the Company to take preference shares for the amount which he should be entitled to claim.

But in ascertaining what that amount is their Lordships have no doubt that the balance of the sum due on the decree must be taken into calculation. The offer of the Company to allot preference shares to creditors for their claims can only mean for their just claims, not for what they may put forward as their claims. It appears to their Lordships to have been accepted in this sense by Kevaldas. There was at the time of the offer the suit pending by the shareholder, which claimed that Kevaldas was indebted to the Company, and though at the time a majority of the shareholders were hostile to the suit proceeding, they were powerless to stop it, and, in fact, it continued. The present suit was brought in 1914, and it appears to their Lordships that the defendants were clearly entitled to raise the question what the true amount of the claim was, and though when they pleaded originally the shareholders' suit had been dismissed, yet after the appeal was allowed in 1916 and a decree for Rs. 1,46,453 given, they were entitled by amendment to bring that sum into the account, and their Lordships entirely approve of the decision of the High Court to admit the amendment. In this view of the case it is immaterial to decide whether there have been in existence two debts, one due by Kevaldas to the Company, and another due by the Company to Kevaldas, or only one, the balance of a current account in which the items relied on appear on either side. The substance of the matter is that the Company only agreed to satisfy the creditors' just claim: such a claim as he might have proved in a liquidation, and that in the present case Kevaldas's claim can only be ascertained by deducting from the amount owed to him by the Company the amount he owes the Company. Inasmuch as the balance is in favour of the Company the suit fails.

Their Lordships ascertained from Counsel for the Company that they were prepared to accept this view of the case, which their Lordships had formed on the conclusion of the appellants' arguments. It became unnecessary, therefore, for their Lordships to form a final opinion upon the view expressed by the learned

Judges of the High Court that the Company were entitled to treat the items making up the amount for which the decree was obtained as items which should have been included in the current account between Kevaldas and the Company, so that the credit balance for which the deposit receipts were given disappeared, and Counsel of the Company were not asked to support this finding. Their Lordships content themselves with saying that, as at present advised, they find it difficult to see how the Company can consistently use the items to destroy contra credits, and at the same time obtain a money decree for the full amount of the items and procced to execute it accordingly. If the case had turned on this they would have required further argument.

A further complication arose in the suit, which might well have disposed of the plaintiffs' claim at an early stage. It appears that, on April 12th, 1912, Kevaldas mortgaged by assignment the three deposit receipts in question to one Tulsidas to secure a pre-existing debt, and notice of the assignment was duly given to the Company. Tulsidas was a party to the present suit and obtained from the Subordinate Judge a decree for the full cash amount due on the receipts. On appeal the High Court intimated that Tulsidas took subject to equities, and thereupon by consent of all parties a consent decree was made which, as amended on March 2nd, 1922, provided that the Company paid Tulsidas the balance due to him, Rs. 86,444, with interest at 7 per cent. from October 31st, 1920. This payment was subject to the right of the Company to be credited with the amount against any sum that should be found to be due to Kevaldas on the deposit receipts, and was to be without prejudice to all other contentions which might be raised by the parties. The assignment to Tulsidas would appear to preclude any right of Kevaldas to put the deposit receipts in suit in 1914, and if the payment by the Company to Tulsidas was on the footing of an assignment by Tulsidas of his rights on the deposit receipts, Kevaldas would be in difficulty in asserting any claim. The compromise is inartificially stated; but it appears to their Lordships that the true view is that, as far as the rights of the parties in this suit are concerned, Tulsidas disappears as though there never had been an assignment to or by him, and that Kevaldas acknowledges that the Company are entitled to recover from him by deduction from the deposit receipts if possible, if not, by any other way the amount which they paid to Tulsidas under the compromise. In the view taken by their Lordships this sum falls to be deducted in the first instance from the sum due to the deposit receipts.

On the conclusion of the arguments for the appellants their Lordships gave the parties an opportunity of agreeing the figures if possible on the footing of the view of the case expressed above. Unfortunately, agreement as to the exact amount could not be reached on the information available in England. All parties, however, have assented to the convenient procedure adopted by the Court of Appeal of expressing, in

one decree the financial result of the relations between the parties including decrees now standing against either party. Their Lordships are unable to ascertain the precise figures, a task which will devolve upon the Courts in India. The decree of the High Court requires to be varied, but the appellant substantially fails, and must pay the costs of the appeal. An account must be taken to ascertain how much should be credited to Kevaldas in respect of the amount of the deposit receipts with interest and in respect of the dividends claimed to be deducted by the respondents in the execution schedule, the dividends to be credited as they fall due with interest, if any interest is payable under the articles. On the other hand the Company are entitled to be credited with the payment to Tulsidas with interest in accordance with the consent decree of March 2nd, 1922. They are also entitled to their decree dated August 22nd, 1916, for Rs. 146,453, with interest from May 15th, 1910, less the sums realized on execution which must be ascertained and capital sums and interest adjusted accordingly. It is desirable that the balance so ascertained should be the only sum for which execution should be permitted under the decree of August 22nd, 1916: and the Court will determine the form of decree by entering up satisfaction or otherwise which will best achieve this result. There should be a stay of execution of the decree of August 22nd, 1916, until any further order which the Court in its discretion may make. In the result the decree of October 8th, 1924, is varied by the omission of paragraphs 2 and 5 otherwise it will stand. The case is remitted to the High Court to be dealt with in accordance with their Lordships' judgment. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY LORD ATKIN.

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