Privy Council Appeal No. 21 *of* 1922.

Seth Kevaldas Tribhovandas - - - - - *Appellant*

v.

Sakerlal Bulakhidas and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1923.

Present at the Hearing :

LORD SUMNER.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* MR. AMEER ALI.]

The plaintiff (respondent) is a shareholder in the Bharatkhand Cotton Mills Company, Limited, carrying on business in the City of Ahmedabad, Bombay Presidency. He brought this suit, the nature of which will be explained presently, so long ago as the 5th January, 1909. The first five defendants are managing agents and directors of the Company; the sixth is a retired director; the seventh defendant is the Company itself, having been added as a party to the suit later in the course of the proceedings. The first defendant (the present appellant before the Board), Kevaldas Tribhovandas acted as Chairman of the Board of directors and is the manager of the Company. The plaintiff seeks in the suit an account of the funds belonging to the Company used by the appellant for his own purposes, and for a declaration that a weaving factory erected and worked by him is the property of the Company. The Company appears to

have been established sometime in the year 1896. The evidence shows that in 1905 the defendant Kevaldas Tribhovandas started the weaving factory which he claimed as his own property. The plaintiff charges that that factory was built and erected by the defendant with money belonging to the Company, and that he has worked the same for his own benefit. He seeks an account of the profits made by the defendant therefrom and a declaration that such profits also belong to the Company.

The date for filing the defence was originally the 12th February 1909, but the appellant applied for time which was extended to the 14th April, 1909, when the written statement was filed. It is unnecessary to refer in detail to the contentions raised by him against the plaintiff's claim. It is enough to say that on the 23rd December of the same year the Subordinate Judge delivered a judgment in which he overruled the defendant's technical objections to the suit; and that on the 26th January, 1910, he made a preliminary decree directing accounts against the defendant and appointing a Commissioner to take the same. The defendant preferred an appeal from this preliminary judgment to the District Judge. Whilst this appeal was pending he convened a meeting of the shareholders which was held on the 29th April, 1910. At this meeting a resolution was adopted which the plaintiff charges was at the instance of the defendant. This resolution was subsequently on the 15th May affirmed, it is charged, under similar circumstances. It runs as follows :—

> " On reading the application received from some shareholders and the " scheme " which has been submitted thereupon by Pari. Kevaldas Tribhowandas (it appears that) Pari. Kevaldas Tribhowandas has asked for Rs. 4,00,000, in words four lacs as the price of the weaving factory erected by himself (*sic*). But on a consideration of the said (matter, it appears that) as he has worked the same up to this day depreciation had been caused and profit had been made (or) loss had been sustained. After deducting a lump sum of Rs. 49,000, in words forty-nine thousand for both the items Rs. 3,51,000, in words three lacs and fifty-one thousand in the lump be brought to account with reference to him and possession of the said weaving-factory be taken by us and as owing to this the work of " Vahiwat " (management) (to be done) by Pari. Kevaldas Tribhowandas would increase Rs. 8,000, in words eight thousand be continued to be paid every year to him and his heirs and representatives for his trouble after debiting the same to the account of expenses."

It is necessary to mention here that on the 4th November, 1900, at a meeting of the shareholders a resolution had been adopted, which is extremely material in the consideration of this case. It is as follows :—

> " The moneys of the Company shall not be lent to any one on personal security. And the Vahivatdar (the Manager) shall not keep the account of the Company in his own shop; so also the Vahivatdar shall not withdraw by debiting in his own name, any amount whatever, except his own dues."

After the institution of the present suit, several meetings were held on the defendant's motion or at his instance, for the

purpose of rescinding the resolution of the 4th November, 1900, which certainly clogged his free handling of the Company's funds. There is an allusion to this alleged rescission in the resolution affirmed on the 15th May, 1910, in these terms :—

> " As to the special resolution which we passed on the 4th November, 1900, clause 6 thereof was cancelled on the 10th April, 1909, and the whole of the special resolution besides that be cancelled. Moreover, we do not consider the suit which has been filed by Sakarlal Bulakhidas in the Court of the First Class Subordinate Judge (at) Ahmedabad as a *bonâ fide* one and that on account of the said suit having been filed the company's credit has suffered to a very great extent. This meeting is therefore of opinion that the Agents should seek remedy by taking proper steps for the said loss of credit to the company. This meeting therefore resolves that if the Agents think proper, proper steps be taken against Sakarlal Bulakhidas accordingly. Shah Nagindas Girdhardas seconded the said (proposal)."

Although the resolution, which the defendant now contends was an adjustment between the Company and himself, was affirmed on the 15th May, 1910, no reference to it was made in the appeal to the District Judge, which was dismissed on the 8th February, 1911. The defendant appealed from the decree of the District Judge to the High Court, which appeal was dismissed on the 18th September, 1912. No reference was made to this so-called adjustment in the appeal to the High Court. No appeal was preferred from the dismissal by the High Court of the appeal from the preliminary decree of the Subordinate Judge holding him accountable for his dealings with the Company's funds and directing accounts. It is suggested before this Board by counsel for the defendant that on the appeal from the final decree by the High Court, he is entitled at this stage to question the preliminary decree. The certificate granted by the High Court to enable the defendant to come to His Majesty in Council does not cover any appeal from the preliminary decree. But even if it was open to the defendant to question in the present appeal the findings arrived at by the three Courts in India on the accountability of the defendant relative to his dealings with the Company's funds, their Lordships do not find any material on which his contention may be said to be legitimately based.

To proceed with the history of the case, on the dismissal of the appeal by the High Court on the 18th September, 1912, the Commissioner proceeded with the taking of the accounts. It was only on the 21st October, 1912, after the dismissal of his appeal, from the preliminary decree, by the High Court, that the defendant first applied to the Subordinate Judge stating that :—

> " during the pendency of our appeals, the Company settled this suit with us, and the Company has taken from us the possession of the weaving shed, which we had built with our own money, agreeing to pay us Rs. 3,51,000 as price of the said weaving shed, after taking into consideration the wear and tear (*i.e.*, depreciation) on account of the conducting of the work of the said weaving shed till this day and the profit and loss which had occurred ; and a registered sale-deed has also been taken from us in the matter."

and he then proceeded to urge :—

> " The Company having agreed with us—the defendant—in this way, with regard to this suit, this suit cannot now proceed further. Therefore a note should be taken of this settlement, and after holding that this suit has been settled, this suit should be dismissed."

On the 1st November, 1912, the plaintiff filed an affidavit in contradiction of the defendant's statement as set forth in his petition of the 21st October, 1912, charging the defendant with having manipulated the shareholders' meetings ever since he was called upon to answer the charges made in the suit. He also alleged that the meetings of the 29th April, 1910, or the 15th May, 1910, were equally worked by Kevaldas for the purpose of getting the resolution affirmed. The plaintiff further stated in his affidavit that on the 23rd December, 1911, whilst the appeal from the preliminary decree was still pending in the High Court certain arbitrators had been appointed with the object of settling the matter in dispute after examining the Company's account books and the defendant's private books of account, but the defendant having failed to produce the necessary books, the reference to arbitration proved ineffectual and the arbitration failed. There appears to have been no mention in the application to refer the matter in dispute to arbitrators of the alleged settlement arrived at on the 15th May, 1910. The Company were added as defendants, apparently soon after the settlement of the issues, and new agents had been appointed for carrying on the work of the Company. These agents, on the 21st November, 1912, filed an affidavit in answer to the defendant's allegations, in which they stated as follows :—

> " Defendant Kevaldas' allegation in his application that the (defendant) Company had effected settlement with him in connection with the suit is entirely untrue. It appears from the records of the Company that no settlement has at all been effected in connection with the present suit. Subsequent to a " preliminary decree " for taking accounts being passed by the Court of first instance in this suit the defendant Kevaldas filed an appeal, being Appeal No. 85 of 1910 in the District Court. It appears that prior to the hearing of the appeal Mr. Kevaldas, as Chairman of the Board of Directors, called an extraordinary meeting of the Company on an application of some shareholders and got some resolutions passed improperly at the said meeting. One of the resolutions got passed is to the effect that the weaving shed Karkhana (factory) should be purchased from from Mr. Kevaldas for Rs. 3,51,000, in words three lacs and fifty-one thousand, and that as he would be required to take more trouble for its Vahivat (management) he should be paid every year Rs. 8,000, in words, eight thousand, for that trouble. Before this resolution was got passed valuation of the machinery and premises of the weaving shed was not got made by any experienced man. . . . . As a resolution to the above effect has been got passed simply on the strength of Mr. Kevaldas holding a large number of shares, a great fraud has been committed on the defendant Company, and the Company has thereby sustained a very great loss."

It is clear that after this affidavit, which challenged the validity and *bonâ fides* of the resolutions adopted after the

institution of the suit, the defendant abandoned, so far as the records show, proceeding with his contention that there had been a settlement on the 15th May, 1910.

No order, however, appears to have been recorded in the order-sheet in respect of the defendant's petition of the 21st October, 1912. The Commissioner submitted his report on the 11th July, 1913, and on the 24th April, 1914, the Subordinate Judge made his final decree in which he held that the Company was not entitled to recover anything from the defendant. The judgment also contains no reference to the question of settlement. The final order of the Subordinate Judge is in these terms :—

> " Defendant 1 is thus entitled to Rs. 1,08,703-10-8. At this rate plaintiff or the Company is entitled to recover nothing as profit. The plaintiff has brought suit No. 408 of 1910 against the defendant and the Company for getting the resolution under which the Company agreed to purchase the factory from plaintiff set aside on the ground that the said resolution is illegally passed. That suit has been all along kept with this suit after settling issues. Under the resolution the sale has taken place and the defendant Company is actually in possession and enjoyment of the factory since May, 1910. The profit and loss of the sale transaction has been considered in this suit as shown above. So practically speaking that suit has been disposed of by itself.
>
> " For the above reasons, I dismiss this suit. Plaintiff has succeeded in the preliminary decree but the final result is in defendant's favour. Under these circumstances, I order that each party should bear his or their own costs of this suit."

The plaintiff and the Company appealed from this decree of the Subordinate Judge to the High Court of Bombay, and the learned Judges disposed of the appeal on the 22nd August, 1916. They criticised, not without reason, the view of the Subordinate Judge absolving the defendant from all liability in connection with his dealings with the Company's funds and with the profits made by him from the weaving factory with the funds of the Company. They held, in fact, that the defendant Kevaldas Tribhovandas had misappropriated the money of the appellant Company to his own use and then, being called upon to account and restore what he had appropriated, claimed a very large salary for " the time and skill " he had spent on the employment of that money ; and they justly ridiculed the idea of the Subordinate Judge giving him remuneration for his work. In the result they made a decree against the defendant for a considerable sum of money. There was an application for review of judgment on the question of the alleged settlement of the 15th May, 1910, which was rejected. The present appeal to His Majesty in Council is from this decree of the High Court and the order on review.

The main contention on which the appeal is based relates to the orders of the High Court with regard to the alleged adjustment. In their main judgment the learned Judges had said as follows :—

> " When the dispute arose, negotiations appear to have been entered into, and on the 29th of April, 1910, upon a representation by the defendant

that he had spent some three *lacs* and 66 thousand rupees upon building and stocking the factory, the appellant-company agreed by a majority resolution, which was confirmed on the 15th of May, to take over this factory at a price of Rs. 3,51,000 in part payment of the defendant's total indebtedness to them."

After stating that :—

"There was a clear misrepresentation by one who was under a very special obligation to make full and true disclosure, and that being so, it follows without the need of pursuing the argument through the somewhat nice and difficult case law of England that the appellant-company was entitled to a refund of so much of this money as has been overpaid."

and dealing with the specific plea of adjustment, they state their views in the following terms :—

"On the 29th of April, 1910, after the preliminary decree had been passed, a resolution was passed, which was confirmed on the 15th of May at a General Extraordinary Meeting, and it was contended on behalf of the respondent that that was a lawful adjustment of the suit which put an end to all further proceeding. This matter appears to have been brought before the Lower Court and issues were raised upon it on the 21st November, 1912, but the respondent or whoever was taking sides with him at the time pressed the matter no further. We cannot discover that any evidence whatever was offered to the Court in substantiation of this contention. The onus clearly lay upon the defendant-respondent and inasmuch as he failed to discharge it or even to attempt to discharge it, we are not now in a position to express any opinion upon this last contention and to afford relief on that ground."

On the review application they deal with the contention more fully.

Their Lordships entirely concur with the views of the High Court on this point. They consider in the first place that there is absolutely no reality in the plea of adjustment; that it was not a real adjustment after an examination of the accounts or ascertainment of the facts; that it was never brought to the notice of the District Judge or of the High Court when the preliminary decree was under appeal; that it was never mentioned before the arbitrators and that soon after the defendant Company filed its affidavit the allegation was dropped. Besides, on a reference to Rule 3 of Order 23 of the Civil Procedure Code, it is abundantly clear that whatever might have taken place at the shareholders' meeting it was not an adjustment within the provisions of the Code. Rule 3 provides as follows :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

In this case there is not the smallest proof of a *bonâ fide* adjustment, nor did the defendant ever ask the Court to record

satisfaction and pass a decree made in accordance with the alleged adjustment.

On the whole their Lordships are of opinion that the judgment of the High Court is correct and that this appeal should be dismissed with costs. They will, therefore, humbly advise His Majesty accordingly.

In the Privy Council.

SETH KEVALDAS TRIBHOVANDAS

v.

SAKERLAL BULAKHIDAS AND ANOTHER.

DELIVERED BY MR. AMEER ALI.

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