Privy Council Appeal No. 94 *of* 1926.

Parashuram Detaram Shamdasani and another - - - *Appellants*

v.

The Tata Industrial Bank, Limited, and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1928.

Present at the Hearing:
LORD SHAW.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD BLANESBURGH.]

The Tata Industrial Bank, Limited, was in the year 1917 incorporated under the Indian Companies Act, 1913, for the purpose of carrying on the business of banking in all its branches. It had a nominal capital of 12 crores of rupees, divided into 1,600,000 shares of 75 rupees each. In July, 1923, 1,000,893 of its shares were in issue, and on each of them the sum of Rs. 22.8 had been paid up. There was therefore an uncalled liability of Rs. 52.8 on every issued share. In July, 1923, the first appellant was the holder of 100 of these 1,000,893 shares, and the second appellant was the holder of 5. The relatively trifling amount of these holdings constitutes a circumstance of relevance at many stages of this case.

It seems to be accepted on all hands that for some years prior to July, 1923, the Tata Bank had been losing ground. It is in evidence that its deposits had in 2½ years sunk from 12 crores to 3½ crores. Its industrial banking business had been so unprofitable that about a year before it had been given up, leaving the Bank in possession of a considerable block of industrial securities largely depreciated and difficult to realise. There had been an agitation against the Bank—partly patriotic—a Bank built up with Indian

money should be run by Indians—partly carried on by persons who had grievances, real or supposed, against the Board. Amongst the disaffected was the first appellant, who, having been in the service of the Bank, had had his employment terminated by the general manager without due cause, as he alleged. In consequence, so it was rightly or wrongly suggested, he adopted an attitude of hostility to the Board. He had appeared at the general meeting of the shareholders on the 1st of May, 1923, and having as he complained been then denied a hearing, he instituted, with his brother, the second appellant, a suit against the Bank for redress on that score—a suit which had been dismissed by Pratt, J., in June (see 47 Bomb. 915), in a judgment which gravely questioned the *bona fides* of the appellants in bringing it. It was stated in evidence that in July the Bank was moribund : that it would have had to close in a few months if something drastic had not been done to save the situation. This may be, probably was, an exaggeration. But public confidence in the Bank had been, it would seem, weakened, if not destroyed. Some form of reorganisation was necessary. So much seems to be conceded on all hands. The choice lay between liquidation, reconstruction and amalgamation. Here there was a difference of opinion. The first appellant in a long open letter to the shareholders, on the 14th July, 1923—a letter to which reference must again be made in another connection—advocated reconstruction, with liquidation as a second alternative. The views of the Directors were not at first at one. But, after withdrawal from the Board of two of them—embarrassed it would seem by divided interests—the remaining Directors unanimously resolved that amalgamation with the Central Bank of India, Limited, upon terms which the Directors of that Bank had previously either proposed or provisionally agreed to, was the solution of the troubles of the Tata Bank most to be favoured. Accordingly, having caused to be entered into a conditional agreement for amalgamation with the Central Bank, the Directors of the Tata Bank decided to submit it for the approval of their shareholders as a scheme of amalgamation under Section 193 of the Indian Companies Act.

The Central Bank had been incorporated in 1911 under the Act of 1882. It had been established with a Head Office at Bombay for the purpose of carrying on the business of banking in all its branches. Its capital was much less than that of the Tata Bank, consisting of 3 crores only, divided into 600,000 shares of Rs. 50 each. Of these shares, in July, 1923, 200,000 had been issued and each was paid up to the extent of Rs. 25. The Central Bank was vigorous, and its business was profitable. In July, 1923, it had a reserve of 30 lakhs of rupees—a circumstance the significance of which, as it seemed to their Lordships, was somewhat missed by the appellant in his argument before the Board. In the Central Bank the first appellant was the holder of five shares. There were many persons, apparently, who like him had shares in both Banks.

The conditional agreement for amalgamation was dated the 5th July, 1923. It provided for the Tata Bank going into voluntary liquidation with a direction to its liquidators to adopt the agreement and carry it into effect. It envisaged the increase of the nominal capital of the Central Bank to 3½ crores, so as to bring into existence shares of that Bank sufficient in number for the service of the agreement. It provided for the transfer to the Central Bank of the entire undertaking of the Tata Bank, exclusive only of its uncalled capital, and here it may be observed in passing, that the assets to be transferred are expressed with a generality sufficient to include any misfeasance claims against the Directors or officers of the Tata Bank, if any such there were.

Part of the consideration for the transfer was to be the discharge by the Central Bank of all the debts, liabilities and engagements of the Tata Bank. Here again, it may be observed that while these liabilities were by a separate clause to include all claims against the Tata Bank for compensation in respect of loss of office or employment, the Directors of the Tata Bank were expressly excepted from the operation of this provision. A further part of the consideration was to be the payment of the costs and expenses incidental to the winding-up of the Tata Bank and the carrying of the transfer into effect. As the residue of the consideration the Central Bank, in respect of every two shares held in the Tata Bank, was to allot to the nominee or nominees of every member of the Tata Bank who should require the Central Bank so to do, one share of that Bank of Rs. 50 with the sum of Rs. 25 credited as paid thereon, and ranking for dividend as from the 1st of July, 1923.

The supplemental provisions of the agreement were such as in these cases under the corresponding section of the Imperial Statute have been sanctioned by long usage and judicial approval. They were in every respect conceived in the interests of the Tata shareholders, whether accepting the scheme or dissenting from it, or neither accepting nor dissenting. As to dissentients there was a special provision that the Central Bank would, without suit, pay each of them Rs. 15 for every share held by him in the Tata Bank, or, if such a sum were not acceptable, such a sum as by arbitration should be determined to be the proper price for his interest.

On the 5th July, 1923, notice convening an extraordinary general meeting of the Tata Bank shareholders for the 19th of July was, in due form, given. The meeting was to consider as an extraordinary resolution the winding up of the Bank with a view to the adoption by the liquidators pursuant to Section 213 of the Indian Companies Act, 1913, of the conditional agreement for amalgamation just stated. In the notice a further intimation was given of a second extraordinary meeting to be held on the 6th of August for the purpose of confirming the extraordinary resolution as a special resolution and appointing liquidators. The notice was accompanied by a Directors' circular of even date. Of

this circular much was made in the argument before the Board and special attention to its terms is desirable.

The circular set forth the terms of the offer from the Central Bank so far as the issue of shares was concerned. It stated that the General Managers of the two banks, with the assistance of Messrs. A. F. Ferguson & Co., Chartered Accountants of both banks, and Messrs. S. B. Billimoria & Co., auditors of the Tata Bank, had examined the financial position of each bank and that they were satisfied that the offer made by the Central Bank was fair and that the value offered in exchange for the shares in the Tata Bank was just and equitable. The circular then set forth the joint certificate of Messrs. Ferguson and Messrs. Billimoria as follows :—

> "We have examined the accounts of the Central Bank of India Ltd. and of the Tata Industrial Bank Ltd. as at 30th June, 1923, with a view to ascertaining their respective financial positions for the purpose of amalgamation. We are of opinion that a fair and equitable basis of amalgamation judged from our examination and in the light of the information and explanation we have received is that two shares of the Tata Industrial Bank are worth one share of the Central Bank."

The result of the amalgamation, it was then pointed out, would be that the uncalled liability of Rs. 105, which existed on two shares in the Tata Bank, would be exchanged for an uncalled or contingent liability of Rs. 25 in the Central Bank. The circular next referred to the conditional agreement of the 5th of July, 1923, and offered it for inspection at the bank's registered office ; and it announced that if the proposed amalgamation were sanctioned it would be necessary for the Tata Bank to go into liquidation and for the liquidators to be authorised to adopt the agreement. The circular closed with a full reference to the rights of dissentients under section 213 of the Indian Companies Act, and called attention to the special provision with regard to these shareholders made by the conditional agreement.

It is in their Lordships' view impossible to read this circular without seeing that its purpose was to make the certificate of the two firms of accountants the pivot on which the wisdom of accepting the scheme was made to rest. And it is a most striking circumstance —the full implications of which seemed to be lost upon the first appellant—that, while for one reason or another he sought before their Lordships to impeach the scheme, he made no criticism upon the accountants or their competence, and disclaimed any aspersion upon their complete *bona fides* in giving their certificate. Nor has he offered any evidence or made any suggestions, on which judicial reliance can be placed, which in any way tend to discount its propriety or wisdom. Their Lordships can have no doubt that that which commanded the overwhelming assent of the Tata Bank's shareholders was this unchallenged certificate : fortified it may be by a statement of the Managing Governors of the Imperial Bank of India, read by the chairman at the meeting of the 19th July, 1923, as follows :—

"The Managing Governors of the Imperial Bank of India are of the opinion that the amalgamation is a good solution of the situation, and is also in the financial interest of the country."

At this meeting after a speech by the chairman, which has been criticised by the Trial Judge with quite unmerited severity, and after other incidents to which their Lordships must at a later stage return, the extraordinary resolution was carried with only three shareholders voting against it—two of these being the appellants. On a poll it was carried by 525,249 votes to 369.

The confirmatory meeting was duly held on the 6th August, 1923. At that meeting the extraordinary resolution was confirmed as a special resolution, only three shareholders again voting against it, and after some incidents to which their Lordships must also return at a later stage, the following resolution for the appointment of liquidators was declared to be duly passed with two dissentients.

> "That Angus Gilchrist of Messrs. A. F. Ferguson & Co., Chartered Accountants, Shapurji Bomanji Billimoria of Messrs. S. B. Billimoria & Co., Public Accountants, Kaikhusru Nusserwanji Chandabhoy of Messrs. Chandabhoy & Jassabhoy, Associated Accountants, and Shapurji Nowroji Guzdar be appointed liquidators in the winding up for the purpose of adopting the agreement of the 5th July, 1923, and carrying the same into effect, with such, if any, modifications as the Liquidators may think expedient, under the supervision of the Directors of the Central Bank of India Limited, and the Tata Industrial Bank Limited, the powers of the last mentioned of whom shall continue for the purpose of carrying the said agreement into effect and that the remuneration of the liquidators for their services be the sum of rupees five thousand."

Their Lordships have set forth now this resolution at length. Upon its terms they will have some comment to make hereafter.

On the 7th August, 1923, the conditional agreement of the 5th July, 1923, was by a supplemental agreement duly confirmed and made binding on both Banks and the amalgamation so resolved upon has in fact been completely carried out and the Central Bank has been possessed of and has been carrying on the combined businesses as from the 1st July, 1923.

Such being its history in broad outline, their Lordships have been anxious to ascertain, if there were objections of substance to the amalgamation so resolved upon. They have not been able to discover any. It was recommended by competent experts with exceptional means of knowledge whose impartiality has not been impugned. It accorded with the current quotations of the shares of both banks. By its provision for dissentients it gave to each shareholder in the Tata Bank who did not desire to join the new combine a value in cash for his interest which would not have been exceeded in amount after a long winding up had that been the alternative procedure resolved upon. It offered to the shareholders who were willing to come in the prospect, which has not been disappointed, of an immediate resumption of dividends. More perhaps than all it relieved the shareholders from the burden of any immediate call—a necessary incident

probably, of any effective reconstruction scheme and a not unlikely incident if experience counts for anything of an ordinary liquidation.

But the scheme was not agreeable to the appellants and the present suit was instituted by them in the High Court of Judicature at Bombay on the 29th August, 1923.

In the first instance the suit was representative, the two appellants as plaintiffs purporting to sue on behalf of themselves and other shareholders of the Tata Bank. On application made to the Court, however, under Order 8, Rule 1 of the Code, permission so to sue was refused and the suit proceeded as one personal to the plaintiffs alone, a circumstance not to be lost sight of. The defendants were the Tata Bank, its " ostensible liquidators," and the Central Bank. By the plaint the appellants on the grounds there stated asked, as effective relief, for declarations that the resolutions just set forth were invalid and inoperative ; that the appointment of the " ostensible liquidators " was invalid, and that the amalgamation agreement was not binding on the members of the Tata Bank or on the plaintiffs. They asked that the agreement should be ordered to be delivered by the Central Bank to them for cancellation and for other consequential relief. The plaintiffs, as will be gathered from what has already been stated, had many difficulties to overcome before so drastic an order could in the circumstances be made at their bidding. It is perhaps therefore not surprising that on the 14th December, 1923, the suit was dismissed by the learned Trial Judge, Pratt, J. That dismissal was, on appeal, confirmed by order of the Appellate Court on the 22nd July, 1924. It is from that order that the present appeal is brought.

The second appellant did not appear before the Board. The appeal was argued in great detail by the first appellant in person alone, and it is his case only which now calls for consideration.

It is the desire of their Lordships to deal, *seriatim*, with such of the many points raised by that appellant as survive for discussion. It is convenient, however, at once to advert to the extremely special character of the suit. In it the individual rights of the plaintiffs as shareholders in the Tata Bank are alone being asserted. It may, indeed, be doubted whether there are any other members of that Bank who are not now bound by the scheme either by acceptance or by dissent. Certain it is, that of the two shareholders called as witnesses by the plaintiffs one of them had accepted the scheme and the other had duly dissented therefrom. The plaintiffs' competent claims were therefore narrowly circumscribed. They had, to be valid, to be in respect of some right personal to themselves as shareholders in the Tata Bank ; they must not be in respect of any matter which was within the cognisance of a majority of the shareholders, unless in acting in the manner complained of such majority had acted either fraudulently, tyrannically or arbitrarily. As against the Central Bank, the purchasing company, the actionable claims of the plaintiffs were even further circumscribed. These could not extend beyond claims which would be

competent to the Tata Bank itself if that Bank were plaintiff and were putting them forward. Now these difficulties in the first appellant's way are in the present case on the facts already stated well nigh overwhelming, and while their Lordships will examine the contentions put forward by him without further reference to them it must not be supposed that their Lordships consider them to have been overcome. They are merely, for convenience, held in reserve.

The first contention of the appellant was that the scheme of amalgamation was *ultra vires* of the Tata Bank altogether. For that purpose the memorandum and articles of association of the Bank were submitted by him to a rigid scrutiny with a view to show that such a scheme as that here resolved upon was not thereby authorised. With reference to this part of the appellant's argument it is enough to say that the scheme does not depend for its validity upon the constitution of the Tata Bank; it rests solely upon statute. The only question on this issue, so far as the Tata Bank is concerned, is whether the scheme is one authorised by section 213 of the Indian Companies Act and upon that question there can in their Lordships' view be no doubt that it was.

Inasmuch, however, as the Central Bank as purchasers were not proceeding under section 213, the issue whether the amalgamation is binding upon them depends not upon the section but upon the question whether that Bank is by its constitution empowered to effect such an acquisition as under the agreement of the 7th August, 1923, it proposed to effect. On this question, although the point was raised by the appellant, there is also no room for doubt. Their Lordships are in agreement with both Courts in India that the transaction was, so far as it affected the Central Bank completely within its powers.

The next objection to the validity of the scheme was that sufficient information as to its real effect was not given to the shareholders by the Directors' circular and notice of the 5th July, 1923. Here the fact that the action is personal to the appellant is unfortunate for him. He at least knew before the first meeting everything about the scheme that was to be known. Indeed, on the 14th July, 1923, he addressed to the shareholders of the Tata Bank the open letter already referred to occupying ten pages of the Appendix and discussing the whole scheme with a particularity of detail which has hardly since been amplified. No possible complaint of the notice or circular on the ground of insufficiency is therefore open to him. But their Lordships do not desire it to be supposed that in their judgment either the notice or the circular of the 5th July was in any way questionable. Elaborate detail in such a public circular, while it would not be informing to the Tata Bank shareholders, might well be detrimental to the interests of their undertaking, which was still to continue. Doubtless it was for this reason, possibly it may be at the instance of the Directors of the Central Bank, that the circular was focussed upon the accountants' certificate, while offering to the shareholders inspection of the amalgamation

agreement—an agreement entirely usual in its terms—and their Lordships are not surprised that, except from the appellant who was himself cognisant of every detail in connection with the scheme, no complaint of the sufficiency of the notice by any person or from any quarter has been brought to their attention.

But the substantial gravamen of the appellant's case was that the scheme was invalid in that it involved as he said the issue at a premium to the Tata shareholders of Central Bank shares, a phrase by which he described the fact that the net value of the assets transferred to the Central Bank exceeded the amount credited as paid up on the shares issued by way of consideration to the Tata Bank shareholders. But it was the whole basis of the scheme that this should be the result. Necessarily so, if the amalgamation were to be in any way fair to the shareholders of the Central Bank. As has been shown, that Bank possessed a reserve fund of 30 lakhs. If their Lordships may, without prejudice, adopt the same phraseology, its issued shares stood in its accounts at a premium represented by that amount. If that premium was not to be swamped by the claims against it, of the Tata Bank shareholders in respect of the Central Bank shares to be issued to them, it was essential that the Tata Bank assets brought in should represent a corresponding excess over the paid-up capital of the Central Bank given in exchange. And it was upon this principle that the amalgamation was based, and it was because it was so based that the auditors in good faith, as is admitted, were able to give the certificate they did. The whole argument of the appellant at this stage—and it was his one contention that had any substance—was really misplaced. He seemed to suppose that the transaction from the point of view of the Tata Bank shareholders was to be regarded as if it were one in which the consideration was either cash or was taken in shares of some company other than the Central Bank. This of course was not so. As a result of the amalgamation the bulk of the Central Bank's shares were to be held by the Tata Bank shareholders, who accordingly would not only retain in their proper proportion as against the Central Bank's original shareholders their interest in the Tata Bank assets they brought in, but would acquire in the like proportion an interest in the original assets of the Central Bank. In their Lordships' judgment the amalgamation on the basis on which it was rested could not, with justice, have taken any other form than in this respect it did take. The provision, on the accepted figures, was eminently fair, and it was open to no technical objection.

The next points taken by the appellant related to the proceedings at the meeting of the 19th July, 1923. In the Courts in India he had objected that two amendments then moved by him had been ruled out of order by the Chairman as incompetent. This point he did not raise before the Board, and the incident is only now relevant by reason of the fact that the appellant's first amendment was a reasoned statement against the proposed

amalgamation and was in fact read *in extenso* to the meeting. This fact is of importance with reference to the appellant's remaining complaint that the shareholders present refused to hear him when he sought to address them and set forth his reasons for opposition to the resolution for amalgamation.

The situation at this stage cannot, their Lordships think, be judged accurately unless the circumstances of the moment are recalled. The appellant's attitude towards the Tata Bank, aggravated by his unsuccessful litigation just concluded, was well known to the shareholders present. His views on the whole subject had not only been expressed in the reasoned amendment just read out to the meeting, but had been set forth at length in the open letter to the shareholders published by him some days earlier. On the evidence it appears to their Lordships that there was no organised opposition ; there was a very clearly expressed indication by the shareholders that they did not desire further to hear the appellant, and what really happened was that the appellant desisted from any further effort to make himself heard because even he realised that no further speech from him would be of any avail. In their Lordships' judgment nothing in the circumstances of the present case can be made of this point. The objection taken by the appellant to every vote tendered on the poll in favour of the resolution without further specification of reasons was, their Lordships think, unworthy of consideration. It was rightly ignored by the Chairman.

With reference to the proceedings at the second meeting, the criticism made by the appellant before the Board was that the election of liquidators should have been made to depend on the result of a poll taken but not announced, and should not have been made as the effect of a compromise agreed to by all the shareholders present other than the appellants. There might have been more substance in this objection if it did not appear from the minutes of the meeting that the appellant himself opposed the resolution on which the poll was taken. Having himself opposed it, he has no individual cause of complaint that the resolution was not in the event accepted.

There is, however, an objection to the appointment of the liquidators more serious than that taken by the appellant. The resolution appointing them has already been set forth and it is, as will be seen, a resolution under which in terms they become merely ministerial officers required to have regard to the supervision of the Directors of the two companies in discharging their duties. And in the present case two of the liquidators so appointed were removed from office by the Court (48 Bomb. 485) for the reason that against the will of their co-liquidators and the directors they desired to inspect the books and inquire into the transactions of the Bank. Their Lordships think it right to say that a form of appointment which was relied upon even as partly instructing such a result is much to be deprecated. They hope that it has not been generally followed in India ; and they think that the form should never again be used.

So great was the importance at one time attached in England to the consideration that arrangements of a Company's affairs should not when made effective preclude all proper inquiry into the, past that the Court, in cases where its sanction to the arrangement was necessary used to insist, as a condition of its sanction, on the insertion in the scheme of provisions for meeting the expense of any such inquiry. That practice no longer obtains and where, as in a scheme like the present, the amalgamation becomes effective without judicial sanction, no opportunity of imposing any such condition is given to the Court. But the counterpart of that old practice, as applied to amalgamations like this is, that the Court, when, as in this case, it has the opportunity of doing so, will always cause it to be clearly understood that a liquidator in a voluntary liquidation, which is an essential condition of such an amalgamation, must not by the resolution appointing him be restricted in the exercise of his statutory duties. The resolution of appointment in the present case was highly objectionable.

The appellant was very insistent that this objection taken to the liquidator's appointment, although not previously raised, should now be made open to him by amendment. Their Lordships do not agree. It would, they think, be disastrous in this case if such an objection taken, nearly five years after the event, should now be entertained. The provisions of the appointment which are objectionable could at once have been corrected if attention had been timeously drawn to them, and notwithstanding some of the observations of Macleod, C.J., in 48 Bomb. 485, with which their Lordships are not in agreement, it is not unlikely that the order then made by him was fully justified on other grounds, and, even if that be not so, it has not been shown that in the present case the irregularity has produced any injustice whatever.

It only remains to consider the question whether the appellant should have been permitted by the Trial Judge to introduce by amendment into his pleadings a direct allegation of gross fraud against the Directors of the Tata Bank. That amendment in their Lordships' judgment was rightly refused. They are on this point in entire agreement with both Courts in India, and they do not consider it necessary further to elaborate their reasons for that agreement.

The appeal, in their judgment, fails.

The appellant was very insistent that even if his appeal were not acceptable some special indulgence should be extended to him in the matter of costs, specially having regard to the form of the resolution appointing the liquidators to which attention has just been called. The appellant, however, gave no indication of any readiness on his part to discontinue this extensive litigation in which he has for so long been engaged. In these circumstances it would be unfair to the respondents that the appellant's failure on this most unnecessary appeal should not carry with it the usual consequences in the matter of costs.

Their Lordships, however, while disclaiming all sympathy with the appellant's attitude in this matter, desire to recognise the ability, courtesy, and excellent temper with which he argued his case before the Board. The whole subject of the appeal was highly technical, the appellant's knowledge of the law applicable was extensive if not always well directed, and his statement of his position in a language not his own was remarkably clear, Their Lordships cannot but regret that so much industry had not been reserved for a less barren controversy. On the whole case their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

PARASHURAM DETARAM SHAMDASANI AND ANOTHER

v.

THE TATA INDUSTRIAL BANK, LIMITED, AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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