

(1925) 04 CAL CK 0043
In the Calcutta High Court

In Re: A.E. Alexander and Co. Ltd. in Liquidation

Date of Decision : 28-04-1925

Acts Referred:

Companies Act, 1956 — Section 235

Citation : 88 Ind. Cas. 672

Hon'ble Judges : C.C. Ghose, J

Bench : Single Bench

Judgement

C.C. Ghose, J.—In this matter the applicants, who are the Liquidators of the above Company, apply for an order that the persons named in the prayer of the petition may be ordered to attend before this Court and be examined under the provisions of the Indian Companies Act as to certain charges made against them in the petition and be ordered to pay forthwith to the applicants as Liquidators the sums mentioned against their names, with such interest thereon as may be allowed.

2. As regards one of the said persons, namely, Mr...the matter was gone into at some length before me on the 25th March 1925. On the next day, i.e., the 26th March 1925, I was informed by Mr. Avetoon, Counsel for the applicants, that his clients had arranged with Mr....certain terms of settlement and that they desired that the application as against Mr...should stand over till the 30th June 1925. One of the Liquidators, Mr. Law made an affidavit to the effect that he had considered the terms of settlement between the Liquidator's and Mr....and was of opinion that they were in the best interests of the Company and thereupon the application, so far as Mr....is concerned, was allowed to stand over.

3. The application so far as the other respondent, W.R. Alexander, is concerned has been pressed before me and I have heard at considerable length learned Counsel on behalf of the Liquidators and on behalf of W.R. Alexander.

4. The facts are as follows: The above mentioned Company Messrs. A.E. Alexander & Co., Ltd., was incorporated on the 2nd December 1919 under the provisions of the Indian Companies Act and its objects, inter alia, were to purchase, acquire and take over as a going concern the good will and the

business carried on by A.E. Alexander & Co. at No. 2, Middle Road, Entally, in Calcutta, as manufacturers of leather goods and to carry on business as tanners and manufacturers of leather goods. Among other objects of the Company were the following (See Clause 23 and 24 of the objects in the Memorandum of Association):

(23) To invest moneys of the Company not immediately required upon such securities as may from time to time be determined.

(24) To lend moneys to such persons and on such terms as may seem expedient; and in particular to customers of, and other persons having dealings with the Company and to guarantee the performance of contracts by members of or persons having dealings with the Company.

5. The capital of the Company was Rs. 15,00,000 divided into 1,50,000 shares of Rs. 10 each. It is stated that the Company went into voluntary liquidation in May, 1924, and that the applicants were appointed Liquidators, of the Company. Subsequently an order was made on the 15th July 1924 by which it was directed that the Company should be wound up under the supervision of this Court, the applicants continuing to be Liquidators in such winding up. The applicants state that after they were appointed Liquidators, they have had an opportunity of inspecting the books and papers of the Company and from an examination of the books and papers of the Company they have discovered the following facts regarding the dealings of the respondent W.E. Alexander Math the funds belonging to the Company. The applicants have produced before me the minute books of the share-holders and of the Directors and my attention was drawn to the matters stated below.

6. The Company as stated above was incorporated on the 2nd December, 1919, and the first meeting of the Directors was held on the 31st January, 1920, when the following resolution was passed by the Directors: "That the powers conferred by Article 108 of the Articles of Association on the Managing Director under Clauses (a), (e), (f), (g), (j), (k) and (l) be and the same are hereby unconditionally delegated to him, The powers conferred under Clauses (b), (c), (d), (h), (i), (m), (n), (o) and (p) should not be exercised by the Managing Director without the previous sanction of the Directors. In the case of (o), contracts in and for the ordinary course of business of the Company will be carried out by the Managing Director."

7. Of the various sub-clauses of Article 108 mentioned above dealing with the powers of the Directors of the Company, the only clause material for the purposes of this application is Clause (n), which runs as follows: "To invest and deal with any of the moneys for the Company not immediately required for the purposes thereof upon such securities or investments and in such manner as they may think fit and from time to time to vary or realize such securities and investments."

8. At the second meeting of the Directors held on the 1st March, 1920, it

appears, however, that the following resolution was passed by the Directors: "That the sums of money not immediately required by the Company may be invested by the Managing Director to enable him to declare a dividend, the Company's Solicitor being responsible for the investment." It may be stated here that the Company's Solicitor was Mr. N.C. Bose of whose firm Mr....was and is a member and to whom reference has already been made. It appears now from the books of the Company that a sum of Rs 23,000 was withdrawn from the till of the Company in July 1920 by the respondent W.E. Alexander, who was the Managing Director of the Company from its commencement until the date when the Company went into liquidation. Mr. Alexander's version is that in the month of July 1920 one Mr. Kerr, who was the proprietor of the Monteviot Estate in Kurseong, approached him and his wife for a loan on the second mortgage of the said estate. At that time he and his wife had not the full amount required by Mr. Kerr and it is alleged by Mr. Alexander that with the knowledge and approbation of the Directors of the Company he withdrew a sum of Rs. 23,000 from the till of the Company to enable him to make up the whole amount required by Mr. Kerr and that the said sum was advanced to Mr. Kerr along with other moneys on a second mortgage of the said Monteviot Estate in Kurseong. The mortgage by Mr. Kerr bears date the 8th July 1920, and a certified copy thereof has been produced before me and it purports therefrom to be a mortgage between Mr. G.W.L. Kerr of the one part and Mrs. Alexander and Mr. W.E. Alexander of the other part. It appears that a first mortgage was executed on the 8th July 1920, by the mortgagor in favour of the Alliance Bank of Simla, Ltd., for a sum of Rs. 2,00,000 lent and advanced by the said Bank, re-payable with interest thereon at the rate of 8 per cent, per annum with half-yearly rests, the security being the said Monteviot Estate in Kurseong, and that on the same date a second mortgage of the said estate was executed in favour of Mr. and Mrs. Alexander to secure a further sum of Rs. 85,000, re-payable with interest thereon at 12 per cent. per annum with quarterly rests. It appears further that the mortgagees represented, to the mortgagor that the said sum of Rs. 55,000 was paid to the mortgagor by the mortgagees, Mr. and Mrs. Alexander, out of moneys alleged to belong to them on a joint account.

9. Mr. Alexander states in his affidavit that the Auditors were apprized of the fact that a sum of Rs. 23,000 belonging to the Company had been advanced on the security of the Monteviot Estate and that reference was made thereto in the balance sheet of Messrs. A.E. Alexander & Co., Ltd., dated the 31st December 1922. The reference to the balance sheet is as follows:

Investment: Rs. a. p. With Mr.-----, Company's Solicitor, per Directors' resolution dated 1st March, 1920, (In-secure) 1,30,597 6 0

Caldwell & Co., Sonada (Secure) 44,500 0 0

Monteviot Estate, Kurseong, (Jointly secure) 23,000 0 0

A. G. Manual (Insecure) 2,400 0 0 ----- 2,00,497 6 0 10. Mr.

Alexander's point is that the facts relating to the withdrawal of the said sum of Rs. 23,000 were fully disclosed and that the Directors knew of the facts which were referred to in the Auditor's report and that the said report was passed by the share-holders of the Company at a meeting held on the 31st October 1923. Mr. Alexander annexes to his affidavit a copy of the report of the Auditors, which contains among other things, the following: "Monteviot Estate. The mortgage-deed in support of the above is in the name of Mr. and Mrs. Alexander. The Company advanced Rs. 23,000 through Mr. Alexander and Mrs. Alexander the latter advanced Rs. 62,000. No deed has, however, been seen between Mr. Alexander (Managing Director) and the Company, which, in our opinion, should be done in consultation with the lawyers." Suspense. The main item under this head is for interest due but not realized on investment-account amounting to Rs. 28,605-23.

11. The above sum is made up as follows:

"Name of party.	Due for 1921.	1922.	Total.	"-----,Esq.	..	-----
13,329-1-0	13,329-1-0	Caldwell & Co.	..	3,881-14-0	5,259-1-0	9,140-15-0
"Monteviot Estate	..	2,833-1-0	3,242-3-0	6,075-7-0	"A. G. Manual, Esq.	..
-----	53-4-3	53-4-3	"Interest on G. P. Note.	..	-----	6-7-0 6-7-0
-----	-----	-----	..	Rs. 6,715-2-0	21,890-0-3	28,605-2-3

From the above it is seen that the interests from Caldwell & Co., and Monteviot Estate are not being realized regularly and they are in arrears. We would request you, therefore, to scrutinize the investment affairs with the help of your lawyers to ascertain whether they are in order and whether the amounts due from Caldwell & Co., and Monteviot Estate are realizable soon.

12. Alexander's point before me is that there was nothing wrong in what he did that no case has been made out for the order sought to be obtained by the Liquidators. The Liquidators state that on the 5th August, 1924, they wrote to Mr. Alexander making enquiries about the said sum of Rs. 23,000 which had been withdrawn from the till of the Company by Mr. Alexander. Mr. Alexander, replied on the 19th August, 1924, (The letter is set out in para. 16 of the petition of the Liquidators) and he said, among other things, as follows: "There is no separate receipt of Mr. Linberry Kerr for Rs. 23,000. You are already aware that there is one mortgage-deed executed by Mr. Linberry Kerr for advances made by Mrs. Alexander and by the Company in my name. The advance made by the Company amounts to Rs. 23,000, which I shall claim in liquidation of moneys due to me by the Company." In passing I may state here that on the papers before me there is nothing to indicate that the said advance was made by the Company in Mr. Alexander's name as is suggested in the letter. On receipt of this letter the Liquidators addressed a letter to Mr. Linberry Kerr on the 15th August, 1924, in respect of the said sum of Rs. 23,000, in reply to which Mr. Kerr wrote to the Liquidators as follows. "With reference to your letter of the 15th instant, I beg to inform you that, as far as I am aware, no moneys were advanced to me by Messrs. Alexander & Co., Ltd, The advances were made in the name of A.E.

Alexander and his wife and I, therefore, cannot understand your writing to me on the subject. May I suggest your obtaining a copy of the mortgage bond in question?"

13. These are all the facts relating to this transaction and J. might mention in this connection that on the papers before me I can find no trace of Mr. Alexander having exerted himself to re-pay to the Company the moneys withdrawn by him as aforesaid.

14. Sir Binode Mitter on behalf of Mr. Alexander contended that, having regard to the facts set out in Mr. Alexander's affidavit, there has been no breach of trust on his part and that assuming that the Court takes an unfavourable view of Mr. Alexander's conduct, the utmost that can be said against him is that he has been guilty of an error of judgment and that, if that is so, he is not liable because of the provisions of Art 135 of the Articles of Association of the Company. In my view, Mr. Alexander, as Managing Director, occupied the position of a trustee for the Company and that he was bound to exercise his powers for the benefit of the Company and for that alone. He could not in law withdraw from the till of the Company the said sum of Rs. 23,000 and mix the same with moneys belonging to him and his wife and represent to the mortgagor, Mr. Kerr, that the entirety of the moneys advanced on the mortgage were moneys belonging to Mr. and Mrs. Alexander on a joint account. I am further of opinion that nothing in the Memorandum and Articles of Association of the Company and in the said two resolutions passed by the Directors authorized the withdrawal of the said sum of Rs. 23,000 from the till of the Company and the utilization of the same in manner indicated above, and that Mr. Alexander's conduct was something more than a mere error of judgment. The touchstone by which such cases are to be tried is whether the trustee has been guilty of a breach of trust or not. If he has been guilty of gross negligence it is as bad in its consequences as fraud and is a breach of trust. Can it be denied on the facts set out above that Mr. Alexander, to put it as mildly as possible, has been guilty of gross negligence. It is all very well for Mr. Alexander to say that he has credited the Company with a certain amount of interest, (see, however, the Auditor's report) but I ask, is there any security for this sum of Rs. 23,000 upon which the Company can fall back? There is none because there was no investment on behalf of the Company and, in my opinion, it is idle to suggest that under the Memorandum and the Articles of Association the Directors had the power of ratifying what Mr. Alexander has done. The Directors could not ratify, however, much you may stretch the words of the Memorandum and the Articles of Association, a transaction of this nature on the part of the Managing Director and, in my opinion, the ratification, if there has been any is of no avail, the transaction being wholly ultra vires. At all times I am sensible of the fact that an order u/s 235 of the Indian Companies Act should only be made on a clear case being made out: See *In re Property Insurance Co.* (1914) 1 Ch. 775 at p. 780 : 83 L.J. Ch. 525 : 110 L.T. 973 : 58 S.J. 472 but if this is not a clear case of breach of trust and misfeasance I have yet to know what would amount to a clear case. In my opinion, therefore, there are

substantial grounds in support of the application which the Liquidators have made and that the rules of justice, equity and good conscience plainly require that I should make an order directing Mr. Alexander to attend before me to be examined as prayed for on Friday the 8th May 1925 at 11 A.M. under the provisions of Section 235 of the Indian Companies Act and I accordingly make an order in that behalf.