

(1971) 04 MP CK 0040
In the Madhya Pradesh High Court
Case No : F.A. No. 39 of 1963

Prakashchandra

APPELLANT

Vs

Swarupchand Hukumchand and Co. and Others

RESPONDENT

Date of Decision : 14-04-1971

Acts Referred:

Limitation Act, 1963 — Section 10
Trusts Act, 1882 — Section 88

Citation : (1975) JLJ 264

Hon'ble Judges : Shiv Dayal Shrivastava, J; S.R. Vyas, J

Bench : Division Bench

Advocate : A.S. Bobde and R.G. Waghmare, for the Appellant; R.K. Vijayawargiya for respondents Nos. 1, 2, 3, 7 to 11, K.A. Chitale for respondent No. 3 and K.B. Joshi Advocate guardian for minors respondents No. 12 and 13, for the Respondent

Final Decision : Dismissed

Judgement

Shivdayal, J.—This appeal is from the dismissal of the appellant's suit for (1) a declaration that the resolution passed on November, 14, 1949, in a special general meeting of the Hukumchand Mills Ltd (defendant No 7 or respondent No. 14) hereafter called the company; was ultra vires the company, was fraudulent and collusive to the detriment of the pecuniary interest of the minority shareholders and was aimed at illegally appropriating the profits of the company into the pocket of the Managing Agent, was oppressive to the minority and was against natural justice; (2) a declaration that the company was not competent to give retrospective effect to the said resolution dated-November 14, 1949; and (3) a decree for rendition of accounts from the Managing Agent, firm Swaroopchand Hukumchand and Co. (defendant No.1) or (respondent No.1, hereinafter called the firm) for the period from May 18, 1915, to November 18, 1945

2. On September 16, 1954, Prakashchandra, the appellant purchased a share of

Rs 100/- and became a share holder of the company. On November 21, 1955, he instituted the suit in the following capacities; (i) individual; (ii) representative; and (iii) derivative. Sir Seth Hukumchand was defendant No. 2, He died during the pendency of the suit. His legal representatives were brought on record. Defendants 3 to 6 were the other members of the said joint Hindu Family firm during the relevant period.

3. The Company (Hukumchand Mills Ltd) is a company incorporated under the Indore Companies Act, 1914, (No. 6 of 1914) (hereinafter called the Act). That Act bodily incorporated the Indian Companies Act 1913, subject to certain modifications which were contained in a schedule. It was published in the Holkar State Gazette dated September 28, 1914. On May 18, 1915 the Company appointed the firm (Firm Swarupchand Hukumchand and Co) as their Managing agents, secretaries and treasurers under the Act. Clause 3 of the managing agency agreement entitled the firm to receive from the company a commission of 14 percent on the net profits of the company, which may remain after deducting the actual expenses only and without making any deduction on account of depreciation or otherwise. A fixed sum of Rs. 1,000/-per month was the minimum remuneration guaranteed (Ex. P.1).

4. By a resolution dated May 24, 1922, clause 3 was amended so as to raise the percentage of commission from 14 percent to 16 percent with effect from July 1, 1922 (Ex.P.2).

5. On May 1, 1926, the Indore Industrial Tax Rules, imposing an Industrial tax, which admittedly was in the nature of income tax, came into force.

6. On September 17, 1944, came into force the Indore Excess Profit Duty Order. That Order was, however, repealed in 1946.

7. On November 1, 1948, the firm tendered their resignation (Ex.P.9) with effect from January 1, 1948, stating that they were desirous of resigning their offices as Secretaries, Treasurers and Agents for various reasons under the stress of real difficulties and with a view to the smooth and proper working of the Company and in the larger interest of the Company and its share holders. This resignation was accepted on November, 14, 1949, with retrospective effect from January 1, 1948.

8. During the entire period of their managing agency, the firm drew their commission on the basis of the annual profits which were always calculated and arrived at after deducting the actual expenses incurred but without making any deductions for any taxes (e.g. for Industrial Tax and the Excess Profit Duty). On November 14, 1949, before passing its resolution accepting the Managing Agents' resignation, the company resolved as follows:-

That in the clause 3 of the Agreement dated the 18th day of May 1915 made between the company and the Secretaries. Treasurers and Agents Messrs Swarupchand Hukamchand and Company, the following words be added after the

word "depreciation":-

Industrial Tax. Excess Profits Duty, Income Tax or Super Tax, Corporation or Excess Profits Tax, or any other Tax or Duty on income or revenue or for expenditure by way of interest on Debentures or otherwise on Capital Account or on account of any sum which may be set aside in each year out of the profits, for reserve or any other special fund.

That such variation shall be deemed to have been made as from the date of their appointment as such Secretaries, Treasurers and Agents, and that such variation shall take effect on the passing of this resolution whether the same be embodied in a supplementary agreement or not The Directors are authorised to execute a supplementary Agreement embodying the above variation whenever required by the said Messrs. Swarupchand Hukumchand & Co., or their assignees.(Ex P. 4 B).

9. This resolution was passed at 3 P. M. Half an hour later at 3-30 P. M. the resignation was accepted and on the same day, Sir Hukumchand and Mannalal Co. were appointed as the new Managing Agents with retrospective effect from January 1, 1948, for a period of 20 years on the terms contained in the agreement (Ex. P. 10-A.), clause 2 (b) of which defines the expression "net profits" as meaning the profits of the company calculated after allowing for all the usual working charges, interest on loans etc., but without any deduction in respect of depreciation, income tax or Super-Tax, Corporation or Excess Profits Tax, or any other tax, or duty or income or revenue.

10. The appellant in the present suit challenged the validity of the resolution dated November 21, 1955, only in so far as it "varied" clause 3 of the managing agency agreement dated May 18, 1915, between the company and the firms. The plaintiff's contention was, and is, that the firm (defendant No. 1) was entitled to draw their Managing Agency commission on the actual profits of the company which had to be calculated after deduction of all taxes and dues, like Excess Profit Duty, Industrial Tax, Income Tax, etc. from the said profits and that the resolution ratifying the past wrongful acts of the company and also of the find with respect to the managing agents' commission already paid to the said firm was invalid and illegal being ultra vires the Company, or, at any rate, being fraudulent and oppressive to the minority and also void being without consideration. It was also contended that the resolution was collusive. The suit was valued at Rs. 10,500.

11. The suit was resisted by all the defendants except the Company against which the suit proceeded ex-parte. The defence was that the impugned resolution was duly and validly passed in a special general meeting. It merely incorporated clause 3 of the original agreement dated May 18, 1915. The only purpose of the resolution was to meet certain technical remarks of the Company's auditors and for the removal of doubts and possible misgivings. Regarding the interpretation of the said clause 3, it was contended that the impugned resolution of November 14, 1949, was in consonance with the original

terms of the agreement dated May 18, 1915, inasmuch as in the original agreement also it was not intended that the Industrial Tax, Excess Profits Duty, income tax etc. were to be deducted from the annual profits for the purpose of calculating the managing agency commission. Alternatively, it was contended that the Company had the power to vary the terms of the original agreement. Allegations of ultra vires, fraud and collusion were all denied. The plaintiff's right to sue was challenged. Bar of limitation was also pleaded.

12. The learned trial Judge held that the plaintiff had the right to sue on behalf of the minority share holders and also on behalf of the company but not in his individual capacity, as he became a share-holder of the Company in 1954 much after the impugned resolution (dated November 14, 1949) was passed. He further held that the resolution dated November 14, 1949 was intra vires the Company, that there was no collusion, conspiracy undue influence or mala fides on the part of the majority share holders; nor was the minority defrauded or deprived of any legitimate dues nor were they oppressed. The special resolution was in accordance with law and perfectly consistent with the Articles of the Association of the Company and the terms of the agreement of managing agency. No question of want of consideration arose. He further held that the suit was barred so far as the relief of accounts was concerned.

13. Shri Bobde, learned counsel for the appellant contended that the trial Court erred in holding that the impugned resolution dated November 21, 1955, was in consonance with the terms of the agreement of managing agency of 1915. Relying on their Lordships decision in *I. T. Commissioner v. Delhi Flour Mills Co. Ltd* [1] it was urged that for the purpose of managing agency commission, the annual net profits had to be arrived at after deducting all taxes and it was immaterial that in 1915 or 1922, the Industrial Tax and the Excess Profits Tax were not in contemplation of the parties. In this context, learned counsel referred to the balance sheets from the year 1941 to 1948 in which the amount of managing agents' commission was shown as "subject to adjustment for taxation" or "subject to deductions for taxation." It was contended that by the impugned resolution the company made a gift of huge amounts which had been overdrawn by the Managing Agents from 1915 to 1948 and it was illegal and ultra vires the Company inasmuch as there was no quid pro-quo. Learned counsel, however, conceded that the Company had the power to vary the percentage of the managing agents' commission or to alter the terms of the managing agency commission, but not without consideration. It was vehemently argued that the impugned resolution made gratuitous grants to the firm without any consideration whatever and to the detriment of the interest of the minority share holders.

14. Before we separately consider the two limbs of the appellant's contention, let it be stated that Shri Chitale, learned counsel for respondent No. 3 not only supported the judgment of the trial Court when it held that the impugned resolution of 1949 was intra vires the Company but also contended that the

managing agents" firm was wholly within its rights under the very terms of the agreement of 1915 to draw their managing agency commission on the profits of the company calculated without deduction of taxes. Learned counsel also took us through the circumstances as they developed in which the resolution was moved for the removal of doubts and the clarifications of a nebulous situation. We shall deal with this point first.

15. Clause 3 of the agreement of 1915, whereby the firm was appointed managing agents, reads thus:

The said firm shall receive from the said company a commission of fourteen per cent on the annual profits of the company (which may remain after deducting all actual working expenses only and without making any deduction on account of the depreciation or otherwise) with a guaranteed minimum of Rupees one thousand per month such remuneration to commence from the day of the date on which the foundation of the company's first building shall have commenced.

Under this clause, the managing agents were entitled to a commission of 14 per cent on the annual profits of the Company. Actual expenses only were to be deducted from the earnings of the Company and the balance would be "annual profits" for the purposes of that clause. The manner in which the profits of the Company had to be arrived at was also expressly stated in the clause. No deduction was to be made on account of depreciation or otherwise. We find that the language is emphatic enough to make it abundantly clear what was to be excluded. The wording denoting exclusion and the language denoting non-exclusion were both made exhaustive by employing the word "only" in the former and the words "or otherwise" in the latter. To put it differently, all that could be deducted for calculating the annual profits was "all actual working expenses only." The word "only" emphasised that nothing else could be deducted. This was further fortified by saying what was not to be deducted and that was expressed again by employing an exhaustive expression. Depreciation was not to be deducted, but that was merely illustrative. The words "or otherwise" was clearly deposited the intention of the parties that nothing else was to be deducted.

16. Shri Bobbe argued that in 1922, when the clause was amended, the expression "net profits" was employed and that expression must be read as interpreted by their Lordships in *I.T. Commissioner v. Delhi Flour Mills Co. Ltd.* (supra). It is true that in that case it was held that Excess Profit Duty had to be deducted for calculating the amount of net profits. A distinction was also pointed out between excess profit tax and income tax. Their Lordships referred to in *Re- G. B. Oblivant & Co. Ltd. Agreement (1942)* 2 All ER 528 and observed :-

Like the earlier cases, 1942-2-All E. R. 528 also turned on the language of the agreement involved in it and is not therefore of any great assistance.

17. In *Ashton Gas Co. v. Attorney General* 1906 AC 10 (12) it was held.-

Income Tax is a charge upon the profits; the thing which is taxed is the profit

that is made, and you must ascertain what is the profit that is made before you deduct the tax. You have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure.

18. In Delhi Flour Mills Case (supra) their Lordships have instructively remarked thus:-

Each agreement has to be construed according to the words contained in it and the circumstances in which it was made;

19. In the present case, the word "only" in the exclusion clause and the words "or otherwise" in the non exclusion clause are significant. Neither of these exhaustive expressions was used in the agreement which was before their Lordships for consideration.

20. The only thing which the resolution of 1922 did was to raise the percentage of managing agents' commission from 14 to 16. There is nothing in the language of the resolution to show that any other alteration or variation was made in the agreement of 1915. It must be said that the expression "net profits" was loosely used in the resolution of 1922 (Ex.P.2) as is patent enough from its very language. It says that in place of 14 percent which is paid as commission on the net profits 15 percent be paid (SALANA JO NET PROFIT PAR UNKO RUPAYE 14 PRATISHAT COMMISSION DIYA JATA HAI USKI JAGAH AB UNKO RUPAYE 16 PERCENT DIYA JAY). Clearly enough, the resolution did not substitute the words "net profits" for "annual profits", but merely used the former expression for the latter. That aside, the real crux of the matter is the intention of the parties to be gathered from Clause 3.

21. Adverting now to the balance sheets containing expressions of reservation and the auditors' remarks in their reports, some more facts have to be stated. It appears that as a matter of law but not as a matter of the terms of the agreement, a question arises whether a payment by a trader computed in relation to profits, represents a mere division of profits with another party, or is an item of expenditure the amount of which is ascertained by reference to profits. The importance of this question lies in its legal consequence in as much as that payment would be allowable in the second case but not in the first.

22. In AIR 1931 165 (Privy Council) a railway company in consideration of a ninety nine years concession from the French Colonial Government agreed to make over to the Colonial Government during the whole duration of the concession one half of the company's net profits to be ascertained in a prescribed manner. It was held by the Privy council that the Company was not entitled to any deduction in respect of the half share of its profits made over to the Colonial Government. Lord Macmillan said :-

A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that

profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits.

In *Union Cold Storage Co. Ltd. v. Adamson* 16 TC 293 Lord Macmillan himself observed that the first sentence in the above quoted passage must be read with reference to the facts of the Pondicherry case where the obligation was, first of all, to ascertain the profits in the prescribed manner, after providing for all outlays incurred in earning them and then to divide them. In the Pondicherry Railway case (*supra*) their Lordships approved of the following dictum of *Grasham Life Assurance Society v. Styles*. 1892 AC 309-

The thing to be taxed is the amount profits or gains. The word "profits" is to be understood in its natural and proper sense, in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits or the charge which has been made on those profits by previous agreement or otherwise is perfectly immaterial. The tax is payable upon the profits realised.

In *Indian Radio and Cable Communications Co. Ltd. v. C. I. T.* 1973 ITR 270 Lord Maugham laid down thus :-

It is not universally true to say that a payment the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company.....

If a company having made an apparent net profit of ₹ 10,000 has then to pay ₹ 100 to directors or managers as the contractual recompense for their service during the year, it is plain that the real net profit is only ₹ 9000

As observed by the Supreme Court in *The Nandlal Bhandari Mills Ltd., Indore Vs. The State of Madhya Bharat*,

These two sets of cases proceed upon different principles. If the agreement is to share the profits the expenditure cannot properly be treated as one incurred solely for the purpose of earning such profits; but if a slice of the profits is to be paid to persons as remuneration to help in the earning of the profits, the deduction can be claimed.

23. However, it appears that in 1931, the question was considered by the Government of His Highness the Maharaja of Indore, which is recapitulated in the Notification No. 13, dated July 14, 1933. A Full Bench of the High Court of Indore, to which the matter was referred was of the opinion that the managing agents' commission on profits was not an item of expenditure incurred solely for the purpose of earning the said profits within the meaning of Rule 3 (2) (IX) of the Indore Industrial Tax Rules Thereupon, the Rulers of Indore, vide *Shri*

Shankar Order No 173, dated June 29, 1933, ordered that the cabinet resolution No. 1072 dated August, 29, 1931, which also had expressed the view which was taken by the Full Bench of the High Court, be given effect to and the Industrial Tax due on the amount of managing agency commission on profits be recovered with effect from the date of the said cabinet resolution. This matter was later on considered in *Rajkumar Mills Ltd. v. Madhya Bharat State* AIR 1953 MB 135 In that case, the company had agreed to pay 16 percent on the net profits of the company to the Managing Agents. The amount of the commission was not to be less than Rs. 25,000 in each year. In the return for 1939, Rs. 27,537 was shown as paid for commission. The Special Tax Commissioner did not allow Rs. 27,537 on the ground that the commission on profits was not an item of expenditure incurred solely for earning the assessable profits within Rule 3 (2) (IX) and there was Huzur Shree Shankar Order No. 173 of 19-6-1933 communicated by a Notification No. 13 of 14-7-1933. On appeal against the order of the Special Tax Commissioner, it was held that Huzur Shri Shankar Order No. 173 of June 29, 1933 was conclusive and hence the company was not entitled to deduct the sum of Rs. 27,537 from taxable profits.

24. In *Nandlal Bhanderi Mills v. State of M.B. (supra)*; their Lordships approved the view taken in the said *Madhya Bharat* decision and held that the notification of 1933 and the earlier notification of 1932 referred to therein must be interpreted as legislative exposition of Rule 3 (2) (IX) and in the nature of an explanation because when to the order of the Ruler the usual mode of making and promulgating rules had been added, the position which emerged was unassailable. In that case, their Lordships clearly observed that as the notification which had the force of law had laid down that industrial tax due on the amount of the managing agent's commission be recovered, there was no room for judicial interpretation of the rule and it would not be pertinent in deciding the matter to consider the principles laid down by cases decided in the absence of legislative enactment on the subject. It is thus quite clear that it was because of Huzur Shri Shankar Order that the matter did not remain open for judicial interpretation.

25. Shri Chitale argued that when Huzur Shri Shankar Order came in 1933, the position became nebulous as was, evidently, reflected in the notes appended to the balance sheets and the remarks of the Directors and also in the reports of the Company's auditors. In the balance sheet (Ex P. 7-B) of 1941, below the entry of managing agents' commission, the words are "subject to some adjustment to be made later on " On what account adjustment had to be made was not clear. In 1942 again, the words "possible adjustment" were used. In 1943, the note was "subject to possible adjustment in respect of tax which has not been deducted." In Ex. P. 7-E for the year 1944, the reservation is "subject to adjustment for taxation." The Directors also made a mention of this in their reports.

26. Shri Chitale's contention was that in the above background it was only

natural for the managing agents, who had tendered their resignation, that they desired the position to be made clear once for all. They were naturally keen for the company to consider the matter and give their final decision. The Company then passed the impugned resolution.

27. This brings us to the main issue whether the resolution of 1949 is vitiated as ultra vires, fraudulent or oppressive against the minority share holders. Before we deal with this question, it is necessary to consider the defendant's contention that the plaintiff had no right to sue.

28. It is true that the plaintiff became a share-holder of the company only on September 16, 1954, when he purchased one share of Rs. 100. He was not a share-holder when the impugned resolution dated November 14, 1949, was passed. Therefore, he had no right to sue in his personal capacity either for the declarations he has sought, or for rendition of accounts for the period prior to his becoming a member. In our opinion, it is undoubted position of the law that a share-holder cannot bring a personal action to enforce a right which did not accrue to him by reason of the fact that he was not a share-holder when that right could have accrued to him. Shri Chitale, contended that the present suit was malofide as the plaintiff became a share-holder of the company simply to indulge in this litigation as an instrument for some one else. It is not necessary to probe into that point

29. It is a fundamental rule of Company Law that the Court will not interfere with the internal management of a company acting within its powers. It can even be said that the Court has no jurisdiction to do so. The second rule is that to redress a wrong done to the company, the action must be brought by the company itself and even where a minority of shareholders is alleged to have been overborne by the vote of the majority, the plaintiff cannot complain of acts which are valid, if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. It is not sufficient that there was a mere irregularity or informality such as could be remedied by the majority. These rules have long been established. The rule of the Supremacy of the majority is usually referred to as the rule in *Fooz v. Harbottle* (1843) 2 Hare 46. See also *Mozley v. Alston* (1847) 1 Ph. 790, *Burland v. Earle* 1903 AC 83 (93) and 6 HS 418 P. 810, The exceptions to these rules are also well settled and it would be pedantry to go through the line of decisions by which they have been established.

30. A share holder is entitled to institute a suit in the representative capacity on behalf of the minority share-holders, when the minority are overborne by the vote of the majority, and one of three things is established. (1) where the act complained of is ultra vires the company, (2) where the act complained of is a fraud on the minority; or (3) when there is an absolute necessity to waive the rule in order that there may not be a denial of justice. See *Burland v. Earle* (1902) AC 83 6 Halsbury (Siamonds) 419 Pr. 811 and *Vadilal Raghavji Vs. Maneklal Mansukhbhai*, where it was observed as follows:

I may, however, observe that in a case like this where fraud is alleged and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in *Foos v. Harbottle* (supra), it will I think, in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact bind the minority. This is because until the facts are ascertained at the expense of the company.

In *Dominion Cotton Mills Co. Ltd v. George E. Amyot* 1912 AC 546 (551), Lord Macgathen succinctly stated the rule thus :

The principle applicable to cases where a dissentient minority of share holders in a company seek redress against the action of the majority of their association, are well settled.....In order to succeed, it is incumbent on the minority either to show that the action of the majority is ultra vires or to prove that the majority have abused their powers and are depriving the minority of their rights.

31. The plaintiff being a share-holder of the Company was, therefore, entitled to sue in the representative capacity on behalf of the other share holders as his allegations against the majority and against the Company, on which the suit was based, are within the exceptions stated above.

32. Further more, it is now well recognised that where a Company is entitled to bring an action to redress a wrong done to the Company but does not do so, a share-holder of the recalcitrant company can bring a representative action on behalf of the Company. Such an action has come to be known as "derivative action". In such derivative action, the individual share holder who brings a suit for and on behalf of the Company, is merely a nominal plaintiff, while the real plaintiff is the Company itself although the company is necessarily made defendant in the action. In the United States the term "derivative action" is very much in vogue by its distinctive name. English Courts have also recognised that a derivative action may sometime be brought by an individual member where it is impracticable for the Company to do so. See *East Pant Dun Lead Mining Co v. Merry Weather* (1864) 2 H & M 254 and *Pavlides v. Jenson* (1956) Ch. 565, the benefit of judgment in such an action goes to the company and not in favour of the nominal plaintiff. In a derivative action, a share holder really sues not on behalf of the minority of share holders but on behalf of the Company itself. This feature distinguishes a derivative action from a representative action; the latter being an action for and on behalf of the other share holders of the Company; against the company or against a third party. See Gower's *Principles of Modern Company Law* (2nd Edition) page 531 to 5-8.

33. It must, therefore, be held that the appellant had the right to sue in a representative capacity and was also entitled to bring a derivative action.

34. We shall now turn to the appellant's contention that the resolution of 1949 was ultra vires. It was conceded by the learned counsel for the appellant that the Company had undoubted power to enter into an agreement with the contesting

defendants (managing agents) to pay remuneration at the agreed rate on profits to be calculated before deduction of taxes. What was contended before us was that this could not be done as there was no quid pro quo.

35. The term *ultra vires*, in the case of a company is used in two senses and there is a marked distinction between their effect. In its true sense, the term *ultra vires* denotes some act or transaction on the part of a company, which is beyond its legitimate powers and as defined by the statute under which it is incorporated, or the laws which are applicable to it, or by its memorandum of association or charter. Such an act will be *ultra vires* the company, though it may not be unlawful or contrary to public policy as when done by an individual. This is because the incorporation of a company is under a statutory authority. It cannot, therefore, do anything which is beyond the powers expressly or by necessary implication conferred upon it by the statute or the memorandum of association. Therefore, any purported activity in excess of its powers is void and it is of no consequence that it was agreed to by all the members. This affords protection to investors so that they know the objects in which their money would be employed. This further protects the creditors so that they are ensured that the company's funds will not be dissipated on unauthorised activities.

36. The term *ultra vires* is also applied to an act or transaction which is beyond the lawful powers of any person, for instance, the Directors; but in such a case, the expression "*ultra vires* the Directors" must necessarily be used to describe the situation when the Directors of the Company have exceeded the powers delegated to them.

37. There can be no confusion between the two entirely distinct legal principles stated above. When an act or transaction is *ultra vires* the company, the company is not bound by such act or transaction. The reason is that it lacks legal capacity to incur responsibility for it. Such an act cannot be validated by assent of a general meeting of the members, nor by a consent judgment against the company nor even by estoppel. On the other hand, in the case of an act or transaction *ultra vires* the Directors, the Company is not bound because its agents have exceeded their authority. However, in the latter case, if the company's own powers are not exceeded, there is no question of want of capacity and the company may ratify such act or transaction. The distinction is clear. While a company cannot ratify or confirm an act which is *ultra vires* the company, the company can ratify an act done or a transaction entered into by the Directors, which is beyond their own powers but which is within the powers of the Company [See 6 Halsbury (Simmonds) Paragraph 802, 803, and 823; and Gower's Modern Company Law 2nd edition 78].

38. That being the law, the appellant's contention cannot be accepted. As soon as the power of the company to grant remuneration to its managing agents on profits to be calculated without deduction of taxes is conceded, all that is to be seen is whether the company eventually ratified the act of the managing agents of drawing their remuneration on profits without deduction of taxes. For the

purposes of this point it may be assumed that they could not do so, while actually they did so. The company's resolution of 1949 tantamounts to such ratification.

39. The appellant's next contention was that the resolution of 1949 was an act of fraud and oppressive against the minority share holders. The settled rule is that any person bound in a fiduciary character to protect the interests of another person, must not put himself in a position where his interest and duty conflict. It is a corollary of this rule that if a person bound in a fiduciary character by availing himself of such character or by entering into any dealings under the circumstances in which his interests are or may be adverse to those of such other person, gains for himself a pecuniary advantage, he must hold such advantage for the benefit of such other person (See Section 88 of the Trusts Act). Lord Eldon, in *Coles v. Trecothick* 32 ER 592 (557) said:-

A trustee may buy from the cestuique trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the cestuique trust intended, the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. I admit, it is a difficult case to make out, whenever it is contended that the exception prevails.

It is stated in *Kerr on Fraud and Mistake*, 6th Edition, page 192:-

Thus, a trustee for sale may purchase the trust estate, if the cestuique trust fully and clearly understands with whom he is dealing and makes no objection to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property and give a just and fair price, and does not seek to secure surreptitiously any advantage for himself. The onus however rests upon the trustee, and he is bound to produce clear affirmative proof that the parties were at arm's length, that the cestuique trust had the fullest information upon all material facts, and that having this information he agreed to and adopted what was done.

Their Lordships approved of these principles in *Peirce Leslie and Co. Ltd. Vs. Miss Violet Ouchterlony Wapshare and Others*,

40. The following circumstances, in which the resolution of 1949 was passed, leave no manner of doubt that there was no element of fraud : (1) In the Balance sheets and the profit and loss accounts of the previous year, it was clearly stated that the managing agents' commission had been arrived at on the basis of the profits which had been calculated without deduction of taxes. The Directors had also made this abundantly clear in their reports before the accounts were passed. Suffice to quote, for instance the Directors's report of 1946 (Ex. P. 7-G) :-

Your Directors have pleasure in submitting their 32nd Annual Report together with the audited Balance Sheet and Profit and Loss Account for the year ending

31 December 1946 showing a profit of Rs. 13, 43, 494 00 including Rs. 1.14.421 15-9 brought forward from the last year's account but without deducting Agents remuneration on profits and sales amounting to Rs 3,24, 941-50 and without providing for Industrial Tax and Excess Profits Duty in Holkar State from 1st January 1946 to 31st March 1945 and Income Tax, Super Tax and Excess Profit Tax if any on profits earned in British India.

(2) Every year the company had been adopting the balance sheets and profit and loss accounts, with open eyes. There was no element of fraud or concealment or suppression of material facts, (3, The agreement of 1915 could reasonably be interpreted as to allow the managing agents' commission on profits before payment of taxes. This aspect of the case we have already discussed. (4) It was the notification of 1933 issued by the Holkar State Government which made the position nebulous. The Managing agents were naturally and legitimately anxious that the position be clarified, particularly when they tendered their resignation.

41. Clauses 106 and 134 (3 of the Articles of Association of the company (Ex. P. 11) clearly permitted the terms of the original agreement to be modified and altered in a suitable manner by mutual agreement between the company and the firm during the subsistence of the agreement.

42. The appellant's contention that the resolution of 1949 was bad inasmuch as it was without consideration has no substance. Where an agents' remuneration is fixed by agreement, the principal can subsequently enhance the remuneration even with retrospective effect from the date of the original agreement. This power is not disputed. Therefore, the consideration in such a case will be the services rendered by the agents both for the remunerations originally fixed and also for the enhanced remuneration. There is no question of any ex-gratia payment in such a case. That case will be quite different where the company makes a payment as managing agency commission to a person or firm which has not actually worked as the managing agent. In the latter case it can be said that the payment is gratuitous. But where a managing agent had worked as such enhancement of his remuneration cannot be said to be ex-gratia, and no question of fresh consideration arises. It cannot, therefore, be said that the company, by its resolution of 1949, ratified the managing agents act of drawing their commission on profits before deduction of taxes, without quid-pro quo.

43. On the above discussion we have reached the following conclusions t-

(1) It is incontestable that an agreement to pay remuneration to the managing agents on the profits calculated without deducting taxes would be valid, and could not be said to be ultra vires the company or otherwise unlawful or invalid.

(2) Such a covenant is clearly deducible from the language of the 1915 agreement.

(3) A doubt, however, arose when Huzur Shri Shankar Order of 1933 was made by the Ruler of the erstwhile Holkar State, whether the agreement would prevail

or the Ruler's order would override it (In fact eventually in Nandlal Bhandari Mills case (supra) their Lordships held that, the ruler being sovereign his order was conclusive and binding, and that an argument to the contrary was not open)

(4) The nebulous position naturally created an anxiety of which the managing agents desired to be relieved before their resignation was accepted and they relinquished their office in November 1949.

(5) The company could, by a resolution just clarify the position by declaring the correct interpretation of the agreement of 1915. But instead they decided to ratify that act of the managing agent with the background of the correct interpretation, so that there would not remain any possibility of doubt being raised in future.

(6) The impugned resolution of November 14, 1949 was intra vires the company. There was no fraud nor oppression against the minority.

(7) The service rendered by the managing agents were themselves the consideration for the managing agents' commission as determined in the agreement of 1915 and as modified (or clarified) by the company by the impugned resolution of November 14, 1949. No fresh consideration was necessary for the impugned resolution. There was no ex gratia payment There was no question of want of quid pro quo.

44. Therefore, we hold that there was no invalidity or legal infirmity in the resolution of 1949.

45. The question of limitation remains. The suit is for declaration that the resolution of 1949 is ultra vires, void and ineffective, and also for accounts, It was contended for the appellant that the position of the defendants is that of a trustee and there being no specific Article in the Limitation Act, the residuary article 120 of the Limitation Act of 1908, which was then in force applies. Learned counsel conceded that section 10 of the Limitation Act was out of the question. Shri Chitale contended that Article 89 applies. This article does not appear to have been taken into consideration by the learned trial Judge. It reads thus-

By a principal against his agent for moveable property received by the latter and not accounted for three years. When the account is during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.

In our opinion, so far as the suit for accounts is concerned, this Article clearly applies. The defendants being the managing agents, secretaries and treasurers of the company, received moneys out of which they drew their managing agency commission. The suit could, therefore, be brought within three years of the termination of the managing agency. The managing agency terminated in 1949, but the suit was brought in 1955. It was therefore, barred by time so far as the suit for accounts was concerned.

46. Even if article 120 applied, since a suit for accounts for every year had to be instituted within six years of that year because the cause of action for account of every particular year accrued at the end of that year and since the suit was instituted in 1955, it would have been within limitation for the year 1948-49 only provided the plaintiff succeeded in the declaration sought.

47. No doubt the suit was within time so far as the relief of declaration is concerned because it was instituted within six years, when the court re-opened after Diwali holiday.

48. In the result, the appeal is dismissed. Appellant shall pay costs to all respondents except the company. One set of costs.