
(1972) 09 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous First Appeal No. 32 of 1963

The Central Provinces Syndicate Pvt. Ltd.

APPELLANT

Vs

Smt. Sita Devi and Others

RESPONDENT

Date of Decision : 05-09-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Companies Act, 1913 — Section 202

Citation : AIR 1973 MP 134 : (1974) 44 CompCas 46 : (1973) JLJ 364 : (1973) 18 MPLJ 300

Hon'ble Judges : Bishambhar Dayal, C.J; S.M.N. Raina, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari and P.R. Padhye, for the Appellant; N.S. Kale, (for Nos. 1 to 4), J.S. Shrivastava, (for No. 3) and R.S. Dabir, (for No. 4), for the Respondent

Final Decision : Partly Allowed

Judgement

Raina, J.

This is an appeal u/s 202 of the Companies Act, 1913.

The facts which give rise to this appeal, briefly stated are as follows:--

In Civil Suit No. 14 of 1927 in the Court of Sub-Judge, First Class, Chhindwara, Amalgamated Coal-fields Company obtained a decree against M/s. Raisaheb Hiralal Verma and Munshi Kanhaiya Lal Ltd. During proceedings in execution of the decree, the decree-holder applied for appointment of a receiver in respect of Junnardev Colliery No. 2 which belonged to the judgment-debtor. This application was opposed by Hasanali-Abdul Ali, creditor of the judgment-debtor company on the ground that there was an existing arrangement between him and the judgment-debtor company which would be adversely affected. Ultimately with the consent of Hasanali, one Abdul Kadar was appointed. He was removed in the year 1929 and in his place one J. D. Flynn was appointed as receiver.

Subsequently in an appeal preferred by Hasanali before the Court of Judicial Commissioner against an order in the execution case, Hasanali was placed in possession of Junnardev Colliery No. 2 on 2-1-1932. He engaged the C. P. Contracting and Mining Syndicate (hereinafter referred to as "the Syndicate" as raising contractor for the colliery,

Although subsequently Hasanali was removed from the possession of the colliery under orders of the Court, the Syndicate continued as raising contractor on behalf of the Court on certain terms. On 9-1-1933 the Syndicate filed an application for being appointed as receiver. By an order dated 23-1--1933 the Syndicate was appointed receiver on the condition that the receiver would not incur capital expenditure exceeding Rs. 20/- without the permission of the Court, Under the terms of appointment the Syndicate was to get Rs. 1/13/- per ton as cost of raising coal, Annas 0-8-0 per ton as transportation charges and annas 0-2-0 per ton as their commission for general management. (Vide order dated 23-1-1933 - Page 237 of the Paper Book, Part I).

On 28-3-1933, the Syndicate filed an application proposing the scheme known as guaranteed profit scheme (Page 297 of the Paper Book, Part I). They offered to carry on the work of the colliery entirely at their expenses and deposit in Court from month to month guaranteed profits at the rate specified in the schedule attached to the application and prayed that the entire working of the colliery be made over to them so that they may be able to effect all the improvements" that they desire to develop the colliery. According to this scheme certain amounts were to be paid to the decree-holders out of the guaranteed profits and 25 per cent of the balance of the remaining profits was to be appropriated by the Syndicate in part payment of the capital sum invested to develop the colliery. All the decree-holders except Hasanali Abdulali agreed that the scheme prepared by the Syndicate for payment of their debts may be accepted. This scheme was sanctioned by the Court on 4-5-1933. It would appear from the said order that Hasanali and Abdul Ali objected to the scheme to safeguard their interest as creditor of the judgment-debtor company. They had filed a suit against the company and, therefore, it was provided that in case Hasanali succeeded in the Civil Suit and did not accept the guaranteed profits scheme, the Syndicate will continue as receiver on old terms.

The Syndicate continued as receiver upto 7-1-1941 and worked in accordance with the guaranteed profit scheme. On 7-1-1941 the District Judge, Chhindwara in pursuance of the order of winding up of judgment-debtor company appointed Shri Ghiara and Shri Manjrekar as official liquidators: vide order dated 7-1-1941 fat paces 870 to 876 of Paper Book, Part TTT). Shri Ghiara's appointment was objected to on the ground that he was the managing director of the Syndicate. But the Court considered his appointment necessary to safeguard the interest of the Syndicate which had invested large sums of money in the colliery and was thus one of the biggest creditors. In order to avoid any partiality to the Syndicate the Court directed that the Syndicate's claim for money shall be dealt

with by Manjrekar alone and not by Ghiara who will be in-charge of the colliery. Shri Manjrekar died on 2-3-1942 and on his death Shri Lokras was appointed official receiver in his place vide order dated 25-4-1942 (Page 995, Paper Book, Part III). The Syndicate, however, continued to work in the colliery until it was sold in 1945 and the possession was delivered to the purchaser Dalmia and Co., in February, 1945. (Vide order sheet dated 2-2-1945 at page 787 of the Paper Book Part III).

The Syndicate had submitted a claim of Rs. 1,58,341-0-1 by affidavit dated 27-5-1942 and report of official Liquidator dated 2-7-1942 (Pages 1057-1073 of the Paper Book Part III) but this claim was not considered by Shri Lokras Official Liquidator as an objection was raised that he had appeared in some cases as counsel of the Syndicate. He was also precluded from considering the claim of the Syndicate by order of the High Court dated 29-9-1942. Ultimately the claim of the Syndicate was ascertained by Shri Mankeshwar, Chartered Accountant who was appointed by the Court, to enquire into the claim of the Syndicate and to submit his report vide order of the District Judge dated 10-1-1955 (At Page 803 of the Paper Book Part III). Shri Mankeshwar submitted his report dated 20-10-1955 whereby he held the Syndicate entitled to a sum of Rs. 1,98,472-15-10 out of the total sum of Rs. 2,01,684-9-4 claimed by the Syndicate, upto February, 1945 various creditors submitted their objections to this report (1235 to 1240 of Paper Book Part III). The Syndicate submitted its reply to the objections (vide pages 1241 to 1250 of the Paper Book Part III). The said objections have been duly considered by the lower Court. The Court found that the Syndicate was entitled to recover only Rs. 98,970-2-10. As the Syndicate had withdrawn a sum of Rupees 2,00,000-0-0 (Two Lacs) from the Court towards its claim on 21-2-1945, the Court held that it was bound to return a sum of Rupees 97,818-19 with interest amounting to Rupees 52,585.35 np. at 3% per annum for the period from 21-2-1945 to 22-1-1963 (that is the date of the order). The Court further directed that the principal sum shall carry interest at 5% per annum from the date of the order till recovery. Being aggrieved thereby, the Syndicate has preferred this appeal. The respondents 2 and 3 namely Shri J. Saran and Shobaram Singh have preferred the cross-objection, that the Syndicate should be held liable for a larger sum as stated therein.

Before proceeding to deal with the appeal on merits we propose to consider a preliminary objection raised by the learned counsel for the appellant regarding the cross-objection filed by the respondents. It has been urged that the only course open to the respondents to have the decree of the trial Court varied in their favour was to file an appeal u/s 202 of the Companies Act, 1913 (hereinafter referred to as "the Act"). It is not disputed that this case is governed by this Act. In the Act there is no provision corresponding to Order 41, Rule 22 of the CPC and it is urged that in the absence of such a provision cross-objection is not maintainable. Shri Kale, learned counsel for the respondents on the other hand urged that cross-objection is maintainable as the appeals u/s 202 of the Act are governed by the same procedure as is applicable to appeals, under

the Code of Civil Procedure. It is, therefore, necessary to refer to Section 202 of the Act, which reads thus:

"Re-hearing of and appeals from, any order or decision made or given in the matter of winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction."

From the aforesaid section it is clear that an appeal from an order or decision of the Court in the matter of winding up of a company is to be had in the same manner and subject to the same conditions in and "subject to which appeals may be had from the orders or decisions of the Court in cases within its ordinary jurisdiction. There can be no doubt that the appeals arising out of the orders or decisions of the Courts in cases within its ordinary jurisdiction are governed by the Code of Civil Procedure. It, therefore, follows that the same procedure shall be applicable to appeals u/s 202 of the Act.

In *Kishan Chander Vs. State of Madhya Pradesh*, , their Lordships held that the second part of Section 202 which refers to "the manner" and "the conditions subject to which the appeals may be had" must be construed as merely regulating the procedure to be followed in the presentation of the appeals and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would be, and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section. (Vide paragraph 18). The question, therefore, is whether the right to file cross-objection is procedural right or substantive right equivalent to that of appeal. It is almost settled that the right of appeal is not a mere matter of procedure and cannot be exercised unless such right is expressly conferred by statute.

In *Bokaro and Ramgur Ltd. and Others Vs. Kathara Coal Co. Ltd. and Others*, while dealing with a case under Coal Bearing Areas (Acquisition and Development) Act, 1957. It was observed in paragraph 12 that the right of cross-objection, like a right of appeal is a creature of statute and in the absence of any express provision corresponding to Order 41, Rule 22 of the Code of Civil Procedure, the cross-objection was held to be not maintainable. The decision rested mainly on the construction of the various provisions of the said Act but we must observe with great respect that in our view it would not be correct to equate a right of appeal with the right to file a cross-objection.

The right to file a cross-objection is a procedural right which enables a party to exercise his right of appeal where an appeal is preferred by other party attacking the decree in favour of the person entitled to file the cross-objection. Normally a right of appeal must be exercised within the stipulated period but as a matter of procedure the limitation for exercising this right is extended where the other party appeals against a decree of the Court below.

It would be here pertinent to mention that under the English Law a cross-objection is in the nature of a cross-appeal and it entitles the respondent to give notice of motion by way of cross-appeal, if he intends on the hearing of the appeal to contend that the decision of the Court below should be varied in his favour. (Paragraph 789 at page 327 -- Halsbury's Laws of England Third Edition, Vol. 9). Thus it would appear that where a party has a right of appeal but has not chosen to exercise it for one reason or the other he may exercise it by preferring a cross-appeal where an appeal is preferred by other party. This right to file a cross-appeal or a cross-objection is thus a matter of procedure by which the right of appeal may be exercised and since the procedure applicable to regular appeals under the CPC is applicable to the appeals u/s 202 of the Act, it follows that Order 41, Rule 22 of the CPC would be applicable to the appeals under the Act. We, therefore, hold that the cross-objection is maintainable.

The learned counsel for the respondents referred to the decision of the Nag-pur High Court in AIR 1940 292 (Nagpur) in which it was held that the procedure in Order 41, Rule 22 of the CPC relating to cross-objections applies to insolvency proceedings, and the respondent in an appeal u/s 75 of the Provincial Insolvency Act is entitled to file a cross-objection. The decision in that case was based mainly on the construction of Section 75 of the Provincial Insolvency Act which provides that in regard to proceedings under the Act, the Courts shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits. This decision is not directly in point but it indicates that where there is a right of appeal to one of the ordinary Courts the procedure will be governed by the ordinary rules of the CPC and right of cross-objection would be available.

In *Smt. Manjula Devi Bhuta v. Smt. Manjusri Raha* 1967 MPLI 972 while entertaining a cross-objection in an appeal from the award by the Claims Tribunal, this Court made the following observations:--

"We are of the opinion that as soon as this Court becomes seized of an appeal, even where an appellate jurisdiction is conferred under a special statute, the rules of practice and procedure of this Court applicable to a Civil Appeal will, in the absence of any specific rule to the contrary, govern such appeal."

Similarly in *Collector, Jabalpur v. Babulal Motilal Mishra* 1961 MPLJ 1219, it was held by this Court that where an appeal is filed against an award given by the Civil Court on a reference by the Land Acquisition Officer, the respondent is entitled to file a cross-objection. In paragraph 14 of the Judgment in the said case the following decision of the Madras High Court in *Alagappa Chettiar v. Chockalingam Chettiar* ILR 41 Mad 904 : AIR 1919 Mad 784 the following observations were made:

"If a substantial right of appeal is given somewhere in the Act, then Rule 22 of Order XLI of the CPC merely allows the respondent to avail himself of an additional rule of procedure by a memorandum of cross-objections as provided in

Rule 22 of Order XLI to exercise his right of appeal."

The aforesaid decisions fully support the conclusion that in an appeal u/s 202 of the Act the respondents are entitled to file a cross-objection under Order XLI, Rule 22 of the Code of Civil Procedure.

Although we propose to deal with the points raised in the appeal first, before proceeding to consider the cross-objection, it would be convenient to deal with the appeal as well as the cross-objection together where they relate to the same item. We may mention here that we experienced a good deal of inconvenience in dealing with this case because the learned trial Judge has referred to various pages of a paper book prepared in another appeal arising out of this case. The said paper book is not before us. Since it is not possible to refer to the original record it being too bulky, we propose to refer to the various pages in the paper book prepared in this case which is in six parts.

One of the principal items in dispute is the one relating to capital expenditure incurred by the Syndicate during the period they worked the Colliery. It seems that in the lower Court it was urged by the objectors that during the period the guaranteed profit scheme was in force the Syndicate was not entitled to any amount spent by it towards any expenditure incurred by it as capital expenditure. This contention was rejected by the trial Court for the reasons given vide paragraph 32 of the Order. The reasons given by the trial Court are convincing and it is also obvious from the very fact that under the scheme 25 per cent of the profits were to be appropriated towards the cost of capital investment. It is not necessary to deal with this point any further because this point was not also pressed by the objectors at the hearing. The main points that were urged in connection with the capital expenditure were that certain items should not have been allowed by the trial Court. On the other hand on behalf of the Syndicate it has been urged that the syndicate is entitled to certain items which have been disallowed by the trial Court.

We shall now first deal with the appeal of the Syndicate as regards certain items which have been disallowed by the trial Court.

The total capital expenditure Rs. 8274/9/6 for the year 1938-39 was claimed by the Syndicate as per details given below:

Office staff quarters

500/-

Underground water dam

1457/8/-

Nala diversion

980/3/9

Underground stopping

521/6/9

Boring and Prospecting

841/1/9

New Incline No. 4

3488/12/9

(incomplete)

8274/9/6

(Vide statement of the Syndicate at page 1185 of the Paper Book Part III).

Out of the aforesaid amount the objectors accepted the expenditure of Rs. 500/- on office and staff quarters and a sum of Rupees 385/- on account of land compensation out of Rs. 980/- spent on nala diversion and urged that the rest of the items should not be accepted as capital expenditure. According to them, other items must be treated as revenue expenditure and, therefore, the Syndicate should not be held entitled thereto. The expression "capital expenditure" was not defined in precise terms when guaranteed profit scheme was introduced nor did the Court clearly lay down while introducing the scheme as to what would be treated as capital expenditure and revenue expenditure respectively. But since the Syndicate is an established business concern, it is expected that these expressions were used in the same sense in which they have been used in the Income Tax Act.

In *The Jagat Bus Service Vs. Commissioner of Income Tax*, referred to by the lower Court, the following observations in paragraph 18 regarding the distinction between capital and revenue expenditure are pertinent:

"To my mind, "capital" means an asset which has an element of permanency about it and which is capable of being a source of income and "capital expenditure" must, therefore, generally mean an acquisition of an asset and the asset must be intended to be of lasting value. While income or revenue expenses are generally running expenses incurred in earning profit or expenses incurred with the primary object of an immediate return or acquisition of assets which are not of lasting value and are likely to get exhausted or consumed in the process of the return or a very limited number of returns."

The lower Court also referred to the decision of the Supreme Court in *Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal*, in which the difference between the capital expenditure and revenue expenditure was considered and explained. Their Lordships quoted with approval the following observations of Maha-jan, J., (as he then was) in the Full Bench decision of Lahore High Court in *Banarsidas Jagannath v. Commissioner of Income Tax*, AIR 1947 Lah 162 . "It is not easy to define the term "capital expenditure" in the abstract or lay down any general and satisfactory test to

discriminate between a capital and a revenue expenditure". Their Lordships after considering the various tests laid down in the Full Bench case for determining whether a particular item of expenditure is capital expenditure or revenue expenditure observed as follows in paragraph 24:

"In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure."

..... "If the expenditure is made for acquiring or bringing" into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure."

Though it is difficult to give a precise definition of the expression "capital expenditure" and "revenue expenditure", the two can be easily distinguished by applying the tests laid down by their Lordships.

The trial Court was of the view that in accordance with the aforesaid tests the expenditure incurred on underground water dam nala diversion, underground stoppings and underground stowing were not expenditure of capital nature. We are inclined to agree with him because all these items of expenditure were essential and incidental to normal mining operations. It has not been suggested that mining operations could properly be carried out without carrying out these works which were essential and, therefore, the expenditure on their account must be treated as revenue expenditure and not capital expenditure.

As regards the expenditure on New Incline No. 4, we will deal with it separately.

The trial Court disallowed the Syndicate's claim to capital expenditure on underground stoppings and nala diversion during the year 1939-40 and we are inclined to agree with him for the reasons given above. It no doubt appears that J. Saran, one of the objectors had in a letter dated 8-3-1940 sent on behalf of the company stated that the judgment-debtor company had no objection to the diversion of the nala by the receiver. It has been urged on behalf of the appellant that this item of expenditure should have been allowed in view of the fact that the judgment-debtor had agreed to the diversion. The mere fact that the judgment-debtor had agreed to the expenditure, would not make any difference to the nature of the expenditure itself. Since it appears that it was in the nature of revenue expenditure it cannot be allowed as an item of capital expenditure.

We shall now deal with the expenditure on Incline No. 4 and Pit. As it is clear from Schedule "A" attached to the judgment of the trial Court, the Syndicate claimed a total sum of Rs. 59,247/14/3. Out of this amount, the auditors allowed a sum of Rs. 58,621/4/3 while the Court allowed Rs. 52,521/5/6. On behalf of the objectors it has been urged that the Syndicate is not entitled to any amount

on this count. On 6-10-1938 the Syndicate had filed an application that it was necessary to take in hand the construction of a pair of inclines because the old inclines of the colliery were practically exhausted (Vide Page 694 of Part IT of the Paper Book). The estimated cost of the incline as given in the application is Rs. 12,100/-. The Syndicate (Receiver) subsequently submitted another application dated 21-10-1939 in which it was stated that it would cost about Rs. 30,000/- to complete this incline and Rs. 10,000/- to complete the pit (Vide Page 743 of the Paper Book Part II). In this application the Syndicate prayed that the completion of the new incline within a few months was of utmost importance and prayed for the direction of the Court for completion of the work at an early date. It seems that no orders were passed but the work continued with the implied consent of the Court as well as the parties concerned because everyone was to be benefited thereby. The fact that the construction of the Incline was absolutely essential is borne out by the report of Shri B. M. Baechi, Mining Engineer dated 15-10-1939 (at Page 746 of the Paper Book, Part II). According to Shri Bagchi it would be most unwise to give up the incline. The fact that the construction of the incline was in the interest of all and was extremely essential is also borne out by the joint application by the decree-holder, judgment-debtor and the receiver dated 31-10-1939 (at page 759 of the Paper Book Part II). The relevant part of the application is as follows:

"The receiver may also be permitted to proceed with the construction of the new incline and pit, and the receiver agrees to recover the cost of constructing this Incline and pit by adjusting depreciation in the same manner as he is recovering the cost of all capital expenditure incurred by him upto 31st March, 1938."

This application not only goes to show that the construction of the Incline was agreed to by all concerned but that it was treated as part of the capital expenditure. It would appear from the application of the Syndicate dated 21-10-1939 (at page 743 of the Paper Book Part II) that if the Incline had not been constructed, the mine would have been virtually exhausted and the extraction of coal would have practically ceased. It is, therefore, obvious that construction of this Incline was necessary for securing good return from the mine for a long period and as such It was an item of capital expenditure.

It has been urged on behalf of the objectors that even if it is treated as an item of capital expenditure the Syndicate should not be allowed to claim this expenditure unless it is able to show that it had obtained prior sanction of the Court for the same. In this connection reference was made to the order of the Court dated 23-1-1933 (Page 237 of the Paper Book Part I) in which it was directed that the Syndicate should not incur capital expenditure exceeding Rs. 20/- without previous permission of the Court in writing. In the first place this order must be deemed to have been subsequently modified by the guaranteed profit scheme under which Syndicate was entitled to adjust 25% of the profit towards capital expenditure. Apart from this we find that the Syndicate was from time to time soliciting orders of the Court by various applications indicating the

estimated expenditure which was necessary for keeping the mine alive. Although the Court did not pass any orders expressly granting permission for incurring expenditure over the Incline, no orders directing the Syndicate not to incur any such expenditure were brought to our notice. Thus even if there was any irregularity inasmuch as the previous sanction of the Court was not obtained, the Court could accord its sanction subsequently after hearing both the sides and this is what the trial Court has already done. Moreover it is clear from the application of Shri Saran, the main objector in this case that he was willing to have a sum of Rupees 40,000/- sanctioned for the incline. (Vide page 283 Paper Book Part V).

It has not been disputed before us that the total amount of expenditure on the Incline is supported by the entries in the account-books of the Syndicate and in the absence of the evidence to the contrary we must treat it as sufficient evidence of the fact that a total amount of Rs. 59,257-14-3 was incurred over the construction of the Incline. It is also obvious that the construction of the Incline was absolutely essential for keeping the coal mine fully alive and productive. In these circumstances it would be proper to allow the expenditure incurred by the Syndicate towards the Incline unless there are any special reasons for not doing so. The dispute in this connection is mainly regarding the expenditure incurred, over the construction of the Incline in the year 1941-42. The Syndicate has claimed a sum of Rupees 14099-14-8 while the Court had expressly sanctioned a sum of Rs. 3000/- to be spent over it vide order of the Court dated 5-4- 1941 (At page 768 of Paper Book Part HI). The Court observed as under:--

"The driving Incline will continue and be completed at a cost not to exceed Rupees 3000/- this being the Court average between the estimates of the creditors on the one hand and the Syndicate on the other."

No amount in excess of the amount sanctioned by the Court could, therefore, be allowed unless good reasons are shown therefor. It would be significant to mention in this case that Syndicate had originally estimated the entire expenditure to be about Rs. 12,000/- and that total expenditure exceeded this limit. According to the report of Mr. Young, a First Class Mining Engineer of South Panara Colliery, who was conversant with the working of the collieries, an expenditure of Rs. 2000/- was necessary (Paragraph 82 of the Judgment of the Lower Court at page 1423, Paper Book Part III). The trial Court seems to have allowed an expenditure of Rs. 8000/- mainly on the ground that in their estimate dated 5-4-1941 the Syndicate had indicated that the expenditure may be between 7000/-to 8000/-. It is difficult to say on what basis this estimate was made and taking into account all the facts and circumstances of the case it seems that it would not be proper to allow a sum of Rs. 8000/- merely on the basis of the estimate of the Syndicate particularly in view of the express order of the Court that the expenditure should not exceed Rs. 3000/- which was made after considering all the material facts. We, therefore, hold that the Syndicate is entitled only to an expenditure of Rs. 3000/- over the Incline after 5-4-1941.

Thus the total amount to which the Syndicate is entitled in respect of the Incline and the pit is Rupees 47,521-5-6.

We shall now deal with the item of Rs. 15,527-6-5 which was disallowed by the trial Court on the ground that this amount had already been adjusted by the Syndicate towards capital expenditure out of guaranteed profits. From the schedule showing guaranteed profits and disbursement from 16-12-1932 to 31-3-1939 filed by the Syndicate it would appear that in 1938-39 there was capital expenditure of Rupees 8,274-9-6 on the Incline and that this amount was appropriated out of the guaranteed profits earned by the judgment-debtor company (Vide Pages 723-733 of Paper Book Part II). Having already recouped this amount out of the guaranteed profits it was not open to the Syndicate to claim this amount as an item of capital expenditure. Similarly the Syndicate appropriated Rs. 7252-12-11 out of the balance of the guaranteed profits towards the capital expenditure (Vide Page 906 of Paper Book, Part III) while in their final claim on 7-4-1948 they included capital expenditure of Rs. 1900/7/- incurred in 1939-40 and capital expenditure on Incline No. 4 Rs. 16,917/3/-. Thus they claimed the entire capital expenditure of Rs. 18,817-10-0 and not the balance. The trial Court, therefore, rightly held in paragraph 63 of the Judgment that as the Syndicate had recovered Rs. 8274-9-6 and Rs. 7252-12-11 from out of the guaranteed profits, the capital expenditure as claimed by them in their final account (Vide Page 712 of Paper Book Part II) must be reduced by these two sums, the total of which is Rs. 15,527-6-5. We may here mention that Shri Dharmadhikari, learned counsel for the appellant was unable to urge anything substantial to impeach the finding of the trial Court on this point and it seems that Shri Padhye learned counsel for the Syndicate was also unable to put forth any plausible arguments in favour of the Syndicate in the trial Court as observed by the trial Court in paragraph 62 of the Judgment.

The next item relates to the price of 5320 tons of coal which has been dealt with by the trial Court in paragraphs 67 to 69 of the Judgment. It is not disputed that there was a stock of 5500 tons of coal on 9-1-33 on the pits mouth and it was there when the Syndicate took over the mine as receiver. (Vide application of the Syndicate dated 9-1-33 at pages 195 to 198 of Paper Book Part I). The question, therefore, is whether the price of this coal has been credited to the judgment-debtor company. It is no doubt true that this coal was raised by the Syndicate as a raising contractor and, therefore, they could claim their raising charges in respect thereof. But they were bound to account for the price of the coal to the judgment-debtor company. The learned trial Judge found that although this coal was sold by the Syndicate its price was not accounted for. We are inclined to agree with this finding looking to the evidence on record. Objector's witness No. 8 Chimanlal who was an Accountant of the Syndicate and was summoned with the Account Books admitted that there was no entry relating to the sale of this coal. We have been referred to the accounts furnished by Shamsher Bahadur Receiver for the period 1-1-1933 to 16-1-1933 vide pages 158 to 169 of Paper Book Part I but it seems it relates to the coal actually raised during this period.

Id the application dated 9-1-33 (Vide pages 197-199 of Paper Book Part I) the Syndicate claimed lien over it for its raising costs and had, therefore, prayed that the possession of the same be not given to the Receiver. In the order dated 23-1-1933 appointing the Syndicate as receiver their lien on stocks of coal at the colliery was recognized (vide page 238 of Paper Book Part I) and Shamsheer Bahadur was merely to continue as Supervisor in his capacity as one of the Directors of judgment-debtor company. From the statement dated 9-1-33 furnished by the Syndicate at page 204 of the Paper Book Part I, it appears that the Syndicate claimed 5320 tons of coal as its own and, therefore, did not account for its price. The Syndicate may have a lien over it for its raising charges but It could not appropriate the entire price of the coal. In the absence of any material to show that the price of this coal was credited to the company the proper course would be to hold the Syndicate liable for the price thereof, less raising charges. The trial Court has calculated the price at Rs. 2/12 per ton for the reasons given by him and this appears to be fair. But he has not adjusted the raising charges to which the Syndicate was entitled as raising contractor. By allowing the raising charges at the rate of Rs. 1/13 per ton as per order dated 23-1-33 at p. 238 of the Paper Book Part I, the balance to which the judgment-debtor company would be entitled comes to Rs. 4987-8-0 instead of Rs. 14,630/- as worked out by the trial Court.

The next item relates to guaranteed profits on 7714 tons of coal in stock on 7-1-1941, as admitted by the Syndicate in their application dated 3-5-1941 (Pages 907 to 910 Paper Book Part 111), the date on Which the possession of the colliery was handed over to the Liquidators. The fact that this much quantity of coal was in stock on the relevant date is not disputed. The question of crediting profits on this amount of coal to the judgment-debtor company would not have arisen if the coal had been handed over to the Liquidator intact and the Syndicate had nothing to do thereafter with it. But it appears that the Syndicate continued to sell the coal even thereafter and appropriated the price thereof. This is borne out by the statement (at pages 164 to 175 of the Paper Book Part V) which shows that the price of the coal sold from old stock as on 31-12-1940 was appropriated by the Syndicate. Since the price was appropriated by the Syndicate, the Syndicate was bound to pay guaranteed profits in respect thereof to the judgment-debtor company. Objecting creditor's witness No. 6 Gandhi, agent of the Syndicate could not say if the guaranteed profits in respect of this coal were credited in the account book (vide paragraph 24 of his deposition). Similarly objecting creditor's witness No. 8 Ishwarial, Accountant of the Syndicate admitted that there was no credit entry relating to guaranteed profits in respect of this coal. The trial Court, therefore, rightly allowed a sum of Rs. 1205-5-0 on account of guaranteed profits in respect of this coal (vide paragraph 98 of the judgment).

Another item is that of Rupees 26,903/- which the trial Court has held that the Syndicate wrongly charged the Company for it in respect of price of coal which was consumed in the Boilers. Shri Gandhi (Manek Shah Gandhi) Objecting

Creditor's witness No. 6 who was an employee of the Syndicate from 1920 and had the general power of attorney from 1942 and was posted to the colliery from 1938 to 1940 had worked up to 1945 when the colliery was sold. He admitted that though the Syndicate has charged for the coal consumed in the boiler, there was nothing to show on what basis the price of the coal consumed was debited to the company. He, however, admitted that the coal belonged to the judgment-debtor company as it was raised from the mine and was not purchased from outside. It is obvious that this coal belonged to the judgment-debtor company and mere-fore, the Syndicate was not entitled to charge its price. The learned Judge of the trial Court observed in paragraph 85 of the judgment that Shri Padhye, learned counsel for, the Syndicate was unable to justify the price of the coal being charged and we must say that the learned counsel for the appellant had also no effective explanation there-for. Thus this item was rightly disallowed by the lower Court.

Now we come to the item of Rs. 6,791/- on account of the price of the shale. Objecting Creditor's witness No. 8 Chimanlal, Accountant of the Syndicate admitted in paragraph 2 that coal-shale, which is bad quality of coal worth Rs. 6791/- was sold from the year 1941-1945. Gandhi Objecting Creditor's witness No. 6, who was also an employee of the Syndicate and had worked in various capacities admitted in paragraph 24 of his deposition that shale used to be sold from time to time but the sale proceeds thereof were not credited in the account books, according to the instructions from the Head Office. The trial Court dealt with this item in paragraph 87 of the judgment. We agree with him that the shale sold during 1941 to 1945 was not of old stock when guaranteed profit scheme was in force and, therefore, its price should have been credited. The trial Court came to a finding that the price of shale has not been credited to the judgment-debtor company and accordingly held that the Syndicate was liable for Rs. 6791/- sum on account of the price of shale. The finding of the lower Court seems reasonable and we find no reason to disturb this finding.

The next item is a sum of Rupees 5062-8-0 which is said to have been paid by the Syndicate to one Shukla who was working as the clerk of the Syndicate at the head office at Nagpur for the period 1-1-1941 to 22-2-1945. From the accounts of the Syndicate it would appear that this amount was not claimed by the Syndicate as an item of expenditure from month to month, It was claimed in a lump sum on 28-1-1945 (vide copy of cash-book of the Syndicate of that date at page 1493 of the Paper Book Part IV) after the sale of the colliery. The trial Court while dealing with this item in paragraph 90 observed that there was no satisfactory evidence that this expenditure was incurred. At least there is nothing to show that this expenditure was actually incurred and was necessary in connection with the affairs of the judgment-debtor company. Shri Shukla was already working at the Head Office at Nagpur and since the Syndicate was carrying on other business at its Head Office at Nagpur, it follows that he must have been paid his salary on a monthly basis in connection with the said business. We agree with the learned District Judge that this appears to be a

disingenuous method adopted by the Syndicate of claiming this amount from the judgment-debtor company as an afterthought after the colliery was sold because from 1941 the official liquidator was in-charge of the affairs the judgment-debtor company. This amount was, therefore, rightly disallowed by the trial Court.

An item of Rs. 6737-0-9 has been claimed by the Syndicate as extra payment for transportation charges. This item has been considered by the trial Court in paragraphs 91 to 93 of the judgment and we generally agree with the view taken by the trial Court. It appears that Sardar Naurangsingh carried on transport work for the Syndicate. His bills were paid off and at the end of the bills there was a foot-note that no other demand remained. Thus the entire amount of the bills was paid by the Syndicate and nothing remained in arrears. In spite of this Naurangsingh submitted additional bills claiming additional rate for transportation work on account of increase in price of material due to war: vide supplementary bill dated 23-3-1943 (Paper Book Part IV pages 1470 and 1471). It is obvious that as the bills had been already paid off earlier there could be no question of allowing extra remuneration for the work covered by the previous bills. The learned trial Judge rightly observed that the Syndicate had no business to be over-generous at the cost of the judgment-debtor company. This amount was, therefore, rightly disallowed by the trial Court.

Another item is of Rs. 6087-8-9 on account of rebate and commission which has been disallowed by the trial Court. The fact that the commission was actually paid to Madholal is borne out by the accounts furnished by the Syndicate and must be accepted in the absence of any evidence to the contrary. The only point for consideration is whether the Syndicate is entitled to claim this amount. This amount relates to the period 1941-42 and 1942-43 when the guaranteed profits scheme was not in force. It is clear from the record and it was also not disputed that the Syndicate was competent to sell and had actually sold coal from the colliery in question. It is, therefore, proper that all incidental expenditure including the commission at usual rate which may have been actually paid must be allowed to the Syndicate. The learned counsel for the Objectors strongly relied on the order of the trial Court dated 3-11-1941 (at page 773 of the Paper Book Part III). The Court observed in concluding paragraph as under:

"The Liquidator says that a tender without the payment of a commission of not more than -/4/- per ton is likely to make the tender useless. I disallow any commission whatever."

It appears that the commission referred to in this order relates to the commission for securing acceptance of the tender. The Court rightly observed that it was not proper to pay any illegal gratification to any one for securing acceptance of the tender. The order cannot be construed as disallowing commission payable in the usual course of business while effecting sales through commission agent. The statement at page 164 of the Paper Book Part V and at pages 168, 175, 178, 181, 185, 188 and 192 of the Paper Book Part V go to show that the commission was paid to Madholal in connection with the sales and

not for securing acceptance of tender. It is significant that this commission was paid from January to April, 1941 when the Liquidator was responsible for the sales and this was apparently with the concurrence of the Liquidator. Thus in the absence of any material on record to show that this commission was paid for securing acceptance of tender, we see no good reason to disallow this item. The same remark apply to rebate paid to Nat-warlal (vide statement at page 224 of the Paper Book Part V). We, therefore, do not agree with the finding of the learned trial Judge in paragraph 103 of the judgment.

Another item is of Rs. 1256-5-6 as expenses charged during the period from 1-1-1941 to 6-1-1941 when the guaranteed profit scheme was in force and the Syndicate was not entitled to the actual expenditure incurred in raising coal. The quantity of coal raised during this period, as rightly observed by the trial Court in paragraph 95 was obviously included in the balance of coal on 7-1-1941. The Syndicate was liable to pay guaranteed profits in respect of this quantity. It is, therefore, obvious that the Syndicate was not entitled to charge the expenditure incurred prior to 7-1-1941. The trial Court, therefore, rightly held that the Syndicate was act entitled to charge this amount

Another item Is of Rs. 660/-This item relates to the pay at the rate of Rs. 220/- per month of Gandhi an employee of the Syndicate for the period from April to June. 1945 This amount was disallowed By the trial Court for the reasons given in paragraph 108 of the Judgment Since the possession of the colliery was delivered to the auction-purchasers on 22-2-1945, there could be apparently no justification for retaining Gandhi in connection with the work of the colliery thereafter. This amount was, therefore, rightly disallowed by the trial Court. Another item of expenditure which was Incurred in March, 1945 was rightly allowed by the trial Court on the ground that it was in respect of the liabilities incurred by the Syndicate prior to 22-2-1945 in connection with the colliery. We, therefore, uphold the decision of the trial Court on this point

Another item is of Rs. 4196-6-6 which relates to the contention of the objectors that this amount was received by the Syndicate from the auction-purchasers in respect of certain articles belonging to the judgment-debtor company which were sold to the auction-purchaser along with the colliery. The trial Court held that it was established that the goods worth Rs. 4196/6/6 were sold to the auction-purchasers including the grain but the point is whether this amount was actually received by the Syndicate. In this connection our attention was invited to certain bills at pages 1499, 1503, 1504 etc. of Part IV of the Paper Book. These bills purport to have been addressed to M/s. C. P. Syndicate by M/s. Dalmia Jain and Co. the auction-purchaser of the colliery. In the absence of any other satisfactory evidence on the point we are unable to conclude therefrom that the Syndicate realised the price of these articles belonging to the judgment-debtor company from Dalmia Jain and Company. We, therefore, hold that this amount was wrongly debited to the Syndicate by the trial Court.

The trial Court allowed interest at 3% on the amount found due from the

Syndicate upto the date of the order as this rate was fixed by the Court vide order dated 8-2-1945 (Page 787 Paper Book Part III). The Court further allowed future interest at the rate of 5% till payment. The learned counsel for the appellant urged that future interest should not have been more than 3% in the circumstances of the case. The Objectors on the other hand contended that future interest should have been at a higher rate. Future interest is within the discretion of the Court. Taking into account the facts and circumstances of the case rate of interest allowed by the trial Court seems reasonable and we see no good reason to interfere with it,

We shall now deal with the cross-objections. Some of the cross-objections which relate to items in respect of which appeal has been preferred have already been considered above. The others Items are considered below.

The question of capital expenditure incurred by the Syndicate falls in two parts, one prior to the coming into force of the guaranteed profits scheme and the other after the scheme came into force. We have already discussed above that the Syndicate was entitled to claim reimbursement of capital expenditure during the guaranteed profit scheme and have also considered the various disputed items. As regards capital expenditure before the scheme came into force, the question was taken up by the executing Court on 20-8-1938 (Vide Page 393 of the Paper Book Part II) and oral statements of Shri H. L. Verma for the judgment-debtor company and Shri Ghiara for the Receiver were recorded. Shri H. L. Verma in his deposition accepted the figure of Rs. 1,11,002 (One Lac, Eleven Thousand and two) given by the Receiver as capital expenditure upto 31-3-38 and the depreciation on the aforesaid amount upto that date as Rs. 20,000/- (Vide Page 685 of the Paper Book Part II). Thus the judgment-debtor accepted the amount of Rs. 90,102/- as due to the receiver on that date on account of capital expenditure incurred by the Receiver Syndicate over the development of the mine. Shri Ghiara adopted the above statement and the executing Court recommended the aforesaid figures for acceptance by the District Judge, Company Judge dealing with winding up proceedings. (Vide Order sheet dated 20-8-1938).

On 19-9-1938 the District Judge accepted the figure of capital expenditure as well as the rate of depreciation as recommended by the executing Court subject to objection by the Creditors not represented in execution proceedings (Vide Page 394 of the Paper Book Part II). In view of this order it is certainly open to the Objectors to challenge the figures as well as the rate of depreciation allowed by the Court but we find no merit in the objections. So far as proof of the expenditure is concerned it has already been examined by a qualified auditor, Shri Mankeshwar who was appointed for the purpose. After such a long lapse of time the Syndicate cannot be expected to prove each and every item of expenditure before the Court in the usual manner. So the auditor's report must be accented on this point. It is no doubt true that Objectors were not represented before the auditors and so had no opportunity to say whether the

Syndicate was entitled to claim expenditure on any particular item. We have, therefore, considered various items in dispute in this connection.

One of the objections is that the Court should not have allowed depreciation at flat rate of 5% when the Syndicate itself in its application dated 18-6-1938 (Vide Page 652 of Paper Book Part II) had offered a rate varying from 5% to 10%. The learned counsel for the appellant pointed out that a flat rate of 5% was accepted by the Court as the Syndicate gave us its claim to interest at 9% on capital investment. (Vide statement of Shri Ghiara dated 20-8-1938 Page 686 of the Paper Book. Part II). Since the Syndicate gave up its claim to interest, a flat rate of 5% appears reasonable.

Another objection is that the payment of any amount to Shri H. L. Verma was not justified as his debts were not duly proved. The account of judgment-debtor company is given at page 1006 of Part III of the Paper Book. It shows that a total amount of Rs. 17230 was paid. From the report of Shri Mankeshwar dated 20-10-1955 at page 1222 of Paper Book Part II, it is clear that he had scrutinized the account of Messrs. Hiralal and Munsii Kanhaiyalal in the book of the Syndicate.

It has been urged that very few vouchers of Rs. 1200/- only are on the record and in the absence of rest of the vouchers the payment is not duly proved. The auditor having duly audited the account and accepted the payment it must be held to be duly proved particularly in view of the fact that the payments were never challenged by Shri Vcrma himself as pointed out by the trial Court in paragraph 72 of the judgment.

As regards the justification for these payments, the matter was fully considered by the trial Court in paragraphs 73 to 75 of the judgment and a sum of Rupees 16,975/- was held to be admissible for the reasons given therein. We generally agree with the lower Court in this point and nothing has been brought to our notice which may impel us to take a contrary view. Shri Saran, one of the Objectors who personally argued the case questioned almost every item in general terms. We have already considered all such objections which need consideration. Other must be rejected without any specific reference,

Thus the appeal and the cross-objection are partly allowed to the extent indicated above. The total amount due from the Syndicate on 21-2-1945 works out at Rs. 82,891-74 Paisa instead of Rs. 97,818.19 as determined by the trial Court. The Syndicate is directed to return the said amount with interest at 3% from 21-2-1945 to 22-1-1963 and at 5%A thereafter till realisation as directed by the trial Court. The appellant shall bear his own costs of this appeal and that of the respondents. As regards the cross-objection, the parties shall bear their own costs. Counsel's fee Rs. 500/- if certified.