APPEAL FROM ORIGINAL CIVIL.

Before Costello and Lort-Williams JJ.

MIHIRENDRAKISHORE DATTA

v.

BRAHMANBARIA LOAN COMPANY, LTD.*

1934

May 1.

Company—Scheme of arrangement with creditors—Modifications, if court may impose—Indian Companies Act (VII of 1913), s. 153.

In the absence of any provision empowering the company or some person or persons to assent to any modifications or conditions approved or imposed by the court, and certainly in the absence of any consent on the part of persons who have entered into a scheme of arrangement with the company, it is not open to the court to impose conditions or modifications of its own, to such scheme.

Dawson v. *Hormasji* (1) and In re *Canning Jarrah Timber Company (Western Australia), Limited* (2) considered and explained.

APPEAL by creditors.

The relevant facts of the case and the arguments of counsel appear fully from the judgment.

Page for the appellants.

S. N. Banerjee, N. C. Chatterjee and *S. K. Dutt* for the respondent company.

S. B. Dutt for the respondent, Comilla Union Bank.

COSTELLO J. This is an appeal from an order made by Mr. Justice Ameer Ali on the 22nd August, 1933. By that order, he gave sanction to a scheme of arrangement, put forward by the Brahmanbaria Loan Co., Ltd., which scheme of arrangement had been arrived at between the company and a body of creditors of that company, at a meeting held on the 25th June, 1933, which had been convened under an order of this Court, made on the 9th May, 1933, under

*Appeal from Original Order, No. 110 of 1933.

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the provisions of sub-section (*1*) of section 153 of the Indian Companies Act. That sub-section provides :—

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the court directs.

The section then proceeds to say in sub-section (*2*) that :—

> If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

In the present instance the company with which we are concerned, are not in the course of being wound up and consequently there is no liquidator.

It appears from the petition upon which the present proceedings were founded, that the company became very much involved financially and it was obviously desirable that some arrangement should be arrived at between the company and a very considerable number of its creditors. The petition is dated the 5th July, 1933, and it sets out, in effect, the history of the company and certain of its operations, and indicates how it came about that there was necessity for an arrangement between the company and its creditors. The scheme as passed in the meeting of the 25th June, 1933, was not exactly the scheme which had originally been proposed. Certain alterations were made and it was the scheme as ultimately settled, which came before the court for sanction. The scheme was opposed by certain creditors including the present appellant Mihirendrakishore Datta and some of his relatives.

The matter came before Mr. Justice Ameer Ali on the 14th August, 1933, and on that occasion the

company was represented by counsel, and the opposing creditors were represented and there was also represented a secured creditor, the Comilla Union Bank. It appears that the matter was fully discussed before the learned Judge, and in the result he thought fit to refuse the application for the sanction of the scheme. The order made was in these terms :— "Application refused. Mr. Sen's client will add costs to claim". That is to say, the opposing creditors were to be allowed to add their costs to the claim which they already had against the company. It appears that the learned Judge must have been in some doubt, to say the least of it, as to the propriety of the order which he made on the 14th August, because four days later he gave a direction that the matter was to appear in his list "next Tuesday", that is to say, on the 22nd August. On that day, the learned Judge made the order which is now complained of. That order is in these terms :—

> Scheme sanctioned, subject to a time limit of twelve years and intended to operate *vis-a-vis* the class of creditors as the depositors, which is to include any persons who filed suits on their deposits, provided there is no security and execution not having been completed by sale. Mr. Sen's clients' costs of the application to be added to his claim. Mr. Dutt's client will get his costs of this application.

Mr. Dutt's client was a secured creditor, the Comilla Union Bank. It is to be seen, therefore, that the learned Judge not only changed his mind with regard to the question whether the scheme should be sanctioned in any circumstances whatever; but gave sanction with the addition of a condition and a modification, which is entirely outside the arrangement, arrived at between the company and its creditors, at the meeting of the 25th June.

This appeal has been brought on the basis that it was not competent for the learned Judge, of his own motion, to impose any condition of the kind, and that indeed it was not competent for him to impose any sort of modification at all.

Mr. Page started his argument by quoting a passage from Palmer's Company Precedents,

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Fourteenth edition, Part I, which appears at page 1236. That passage is in these words :—

> The scheme of arrangement usually contains a clause empowering the company or its liquidator to assent to any modifications or conditions approved or imposed by the court, and the clause is sometimes qualified, *e.g.*, by adding the words " and by the trustees for the debenture holders ".

The paragraph then continues thus :—

> In the absence of any such clause, it is more than doubtful whether the court can sanction a modified scheme or impose conditions which must operate by way of modification.

Mr. Page has pointed out to us that it is usual for the scheme to contain a provision empowering some one, be it the liquidator or some officer of the company, to assent to any such modification as the court may think fit to impose. Mr. Page has argued, and we think rightly, that in the absence of any such person, it is not open to the court *suo motu* to impose on the applicant any condition which will operate by way of modification of the scheme.

Mr. Banerjee sought to rely upon a decision of the Rangoon High Court in *Dawson* v. *Hormasji* (1). Mr. Banerjee was disposed to argue that that case is an authority for saying that the court, when asked to sanction a scheme under section 153, has power to impose, at any rate, some minor modifications, or some comparatively unimportant term, as a condition for the grant of sanction. We find, however, at page 449 of the report, that the Chief Justice of Burma says, with regard to the duty of the court, when asked to grant sanction under section 153 :—

> It is certainly not the function of the court to substitute its own scheme for the scheme presented to it for sanction, and if the court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally altered, it ought not to be sanctioned, it is the duty of the court to reject the same.

In this particular instance, the Court thought fit to suggest some alteration with regard to the interest which has to be paid, and so made that alteration to the conditions in the scheme which was before the court. But we find in the preceding paragraph that the liquidator of the company with whom the matter

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was concerned, petitioned the court to sanction the scheme "with such modifications, if any, which the "court might think right to impose". That fact provides the key, if I may so call it, to the answer to the contention put forward by Mr. Banerjee, because I find that the form which is usual in cases of this kind, is to be found at page 1251 of Palmer's Company Precedents, in the volume to which I have already referred. It contains a clause in these terms:

> The directors may give effect to any modification of the scheme which the court may approve or impose as a condition of giving its sanction to this scheme.

In the present instance, there was, before the Court, no one who was empowered to assent to a modification of the scheme, either on behalf of the company or on behalf of the creditors, and it had apparently never been within the contemplation of any of the parties to the arrangement, that a question might arise as to the court thinking it desirable that there should be some conditions attached to the granting of the sanction or some modification of the scheme. Those who were responsible for putting forward the petition to the court, did not include in it any such provision as that to which I have just referred as being, generally speaking, a part of the common form which is used in cases of this kind. I have no doubt that the law is that in the absence of any such provision and certainly in the absence of any consent on the part of the persons who have entered into the arrangement it is not open to the court to impose conditions or modifications of its own. That view of the matter seems to be supported by the case *In re Canning Jarrah Timber Company (Western Australia), Limited* (1). In that case there was a petition for the sanction of the Court, to a scheme of arrangement for reconstructing the company. The scheme provided for the formation of a new company and the substitution for the existing debenture liability of a different debenture liability of the new company. When the matter came before the Court in

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the first instance, Mr. Justice Cozens-Hardy refused to sanction the arrangement and in so doing he said with regard to a part of the scheme :—

> That is an arrangement which, as at present advised, I think illegal and improper on the part of the liquidator, and I certainly cannot sanction it.

The matter went to the court of appeal and in the course of the argument there, the Master of the Rolls said this :—

> If the liquidator is willing to undertake to pay the unsecured creditors in full and not to act upon the underwriting agreements, we will hear the respondents.

Thereupon, the liquidator indicated that he was ready to assent to what was asked of him. In giving judgment of the Court, the Master of the Rolls said :

> With the modifications which have been discussed and *which are now assented to by the liquidator*, I think we may sanction the proposed scheme.

In my opinion, it is clear from that case that the Court was only in a position to sanction the scheme with the modification, because there was some one present in Court, who was empowered to assent to the alteration which the Court thought it desirable should be made.

I am of opinion that in the present instance, in the absence of assent of any of the parties, especially on the part of the creditors who were unrepresented in court, the learned Judge was wrong in giving sanction to the modification shown in the order made on the 22nd August, 1933.

This appeal is, therefore, allowed and the order of the 22nd August, 1933 is set aside.

The appellants will get costs against the Brahmanbaria Loan, Co., Ltd. The costs of the Comilla Union Bank will be added to their claim.

LORT-WILLIAMS J. I agree.

Appeal allowed.

Attorneys for appellants : *Dutt & Sen.*

Attorney for respondents : *J. K. Dutt.*

S. M.