APPELLATE CIVIL.

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May, 18.

Before Mr. Justice Banerji and Mr. Justice King.

DEHRA DUN-MUSSOORIE ELECTRICT TRAMWAY CO. (DEFENDANTS) v. JAGMANDAR DAS AND OTHERS (PLAINTIFFS).*

Company—Power to borrow—Managing agent can borrow in an emergency—Ratification in Directors' reports—Power to mortgage—Deed under seal not necessary—Mortgage ultra vires *the managing agent owing to irregularity in authorisation—Creditor unaffected by irregularity—"Previous" sanction by Government to transfer—Mortgage void for want of sanction—Dehra Dun-Mussoorie Tramway Order*, 1921, *clause* 37—*Contract Act* (IX *of* 1872), *sections* 188 *and* 189.

Article 104 of the Articles of Association of a company provided that the Board of Directors might delegate any of their powers, other than powers to borrow and to make calls. Article 120 gave the managing agent very extensive powers to conduct and manage the business and affairs of the company, including power "to enter into all contracts and to do all other things usual, necessary or desirable in the management of the affairs of the company". *Held* that under the articles the managing agent had no general power to borrow money on behalf of the company, but that nevertheless, in accordance with sections 188 and 189 of the Contract Act, he was authorised to incur a temporary loan in an emergency, for protecting the interests of the company. Moreover, his action being ratified by the Board of Directors, who showed the loan as being due by the company in their reports to shareholders, the loan was binding on the company.

A mortgage deed, hypothecating certain land of the company, was executed later by the managing agent as security for the loan. The deed bore the common seal of the company, but it was not signed and countersigned in the manner prescribed by one of the Articles for documents to which the common seal of the company was affixed. None

*First Appeal No. 80 of 1929, from a decree of M. A. Ansari, Subordinate Judge of Dehra Dun, dated the 27th of October, 1928.

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of the Articles provided that a mortgage deed was to bear the common seal. *Held* that there was no rule of law applicable to companies in general, or to this company in particular, which required a deed of mortgage to be executed by affixation of the common seal; and as a document under seal was not necessary, the formalities about signature and countersignature were also not necessary and a mere defect in the manner of affixing the seal would not render the document invalid.

The managing agent was authorised to execute the mortgage by a resolution purporting to have been passed by the Board of Directors at a certain meeting which, however, was not a properly convened meeting. The creditor was not aware of the fact that the resolution was not passed by a properly convened meeting; on this point he was deceived by the managing agent. *Held* that the creditor was protected in spite of the defect in passing the resolution and the company was bound by the mortgage, so far as company law was concerned.

Under clause 37 of the Dehra Dun Mussoorie Tramway Order, 1921, made under section 6(3) of the Indian Tramways Act, 1886, the "promoter" was given power to transfer the undertaking with the assent of Government previously obtained, but not otherwise, to any person or to a company. No sanction was obtained by the company for the mortgage in question. The original "promoter" transferred the undertaking to the defendant company by an agreement dated 22nd December, 1921, and formal sanction for the transfer was accorded by Government on 22nd February, 1922. But there was a letter dated 9th July, 1921, by a Secretary to Government in the Public Works Department intimating that Government would have no objection to the transfer. *Held* that the letter of 9th July, 1921, was sufficient to convey the previous assent of Government, and therefore the defendant company became a "promoter" in place of the original promoter and therefore subject to the conditions laid down in clause 37 of the Tramway Order, 1921; that as the land mortgaged belonged to the company and was suitable for and used by the company for the purposes of the Tramway, it was part of the "undertaking" as defined in the Tramways Act; and the mortgage made by the company in contravention of clause 37 of the Tramway Order without the previous assent of Government was

absolutely void and not merely voidable at the option of Government, and the creditor was in the position of an unsecured creditor.

Dr. *K. N. Katju* and Mr. *K. Verma*, for the appellant.

Messrs. *Iqbal Ahmad* and *Mansur Alam*, for the respondents.

BANERJI and KING, JJ. :—This is a defendant's appeal arising out of a suit for sale upon the basis of a mortgage. The defendant is the Dehra Dun Mussoorie Electric Tramway Company, Limited (in liquidation). This company was incorporated about the end of August, 1921, having a registered office at Dehra Dun. The plaintiffs are the proprietors of a Bank at Dehra Dun and the company had an account with that Bank. On the 19th of January, 1923, the plaintiffs allowed the company, at the request of their managing agent Mr. Beltie Shah Gilani, an overdraft of Rs. 25,000. The mortgage deed in suit was executed on the 19th of June, 1923, by Mr. Beltie Shah on behalf of the company in favour of the plaintiffs to secure the overdraft. The defendants admit receipt of the consideration by the company. The overdraft of Rs. 25,000 was undoubtedly utilised for the necessary purposes of the company. The defendants have no objection to treating the plaintiffs as unsecured creditors, but plead that the company is not bound by the mortgage deed for various reasons which we shall have to consider in detail. The trial court held that the mortgage was valid and binding upon the company and decreed the plaintiffs' suit. The defendants in appeal have pressed the same points that were taken in the court below in support of their contention that the mortgage deed is not valid and binding upon the company.

The first question is whether Mr. Beltie Shah had authority to borrow Rs. 25,000 from the plaintiffs on

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behalf of the company. This question formed the subject of the first issue in the trial court.

The Board of Directors undoubtedly had power under the Articles of Association to borrow money for the purposes of the company and to secure the loan by a mortgage. The appellants rely upon article 104 of the Articles of Association which lays down that "The Board may delegate any of their powers, *other than powers to borrow* and make calls, to Committees consisting of such member or members of their body as they think fit." Under this article the Board are expressly prohibited from delegating their power to borrow money. Under article 120 the managing agent was given very extensive powers to conduct and manage the business and affairs of the company and he was given power "to enter into all contracts and do all other things usual, necessary or desirable in the management of the affairs of the company". The respondents contend that the power of entering into contracts would include the power of contracting loans. In our opinion, however, this contention cannot be accepted. The articles must be read as a whole and as article 104 restricts the Board from delegating its powers of borrowing, we think that article 120 could not be interpreted so as to give the managing agent unrestricted powers of borrowing money on behalf of the company. It is open to question, however, whether under the ordinary rules of law relating to agency the managing agent should not be held to have been authorised to obtain the overdraft in the circumstances of this case. The loan was urgently required for the purposes of the company. Machinery and stores had been ordered and had arrived from England and had to be paid for without delay. Under sections 188 and 189 of the Indian Contract Act an agent has very extensive powers in an emergency to do such acts as are necessary for the purpose of protecting his principal from loss and for

carrying on the business. Under article 120 of the Articles of Association also the managing agent was given extensive powers to do anything necessary in the management of the affairs of the company. In the circumstances of this case the managing agent might well be regarded as being faced with an emergency and thus authorised under the ordinary rules of agency to obtain temporary accommodation from the bank for the purpose of protecting the interests of the company. It is not denied that the loan was necessary and that the money was at once utilised for the purposes of the company. We think that although the managing agent had no general power to borrow money on behalf of the company he was nevertheless authorised to incur a temporary loan in the interests of the company in an emergency such as arose in the present case. Article 104 prohibits the delegation of a general power of borrowing but we think it does not prohibit the managing agent from incurring a temporary loan in an emergency, for protecting the interests of the company.

Even if Mr. Beltie Shah acted *ultra vires* in obtaining this loan, it appears that his action was clearly ratified by the Board of Directors. We cannot lay stress upon the resolution which purports to have been passed at a meeting of the Board on the 2nd of June, 1923, as it appears to us (for reasons which we shall presently give) that this resolution was not passed by a properly convened meeting of the Board. The Directors' reports to the shareholders for the period ending the 31st of March, 1923, submitting the audited accounts for that period, shows the item of Rs. 24,454-3-8 as due to Bhagwan Das and Company (the plaintiffs) as an unsecured loan. This report purports to be signed by four of the Directors of the company at a meeting dated the 17th of September, 1923, and it has not been argued

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that this meeting was not properly convened. We take it, therefore, that the Board of Directors clearly ratified the loan to the plaintiffs in their report dated the 17th of September, 1923.

Similarly the Directors' report for the period ending the 31st of March, 1924, was signed by the Directors on the 7th of January, 1925. This report submitted the audited accounts of the company and the accounts clearly show a sum of Rs. 26,802-7-3 as due to Bhagwan Das and Company secured by charge over the company's lands. Even if Mr. Beltie Shah exceeded his powers in obtaining the loan to meet an emergency his action was never repudiated, but on the contrary was clearly ratified by the Board of Directors; so we hold that the company cannot escape liability on the ground that their managing agent had no authority to raise the loan.

The second question is whether the mortgage deed was executed in such a manner as to bind the company under the provisions of Company law.

The mortgage deed was signed by Mr. Beltie Shah in his capacity as managing agent of the company and it bears the common seal of the company. The appellants refer to article 98 (*t*) of the Articles of Association and argue that the execution of the mortgage deed is invalid because under article 98 (*t*) a document to which the common seal is affixed must also be signed by at least one Director and countersigned by the agent or other officer appointed by the Board for that purpose. Mr. Beltie Shah is an ex-officio Director as well as managing agent, but it is clear that, even if he be considered to have signed the document in his capacity as Director, article 98 (*t*) requires countersignature by the agent or some other officer duly appointed and the document in question bears no countersignature.

The respondent contends that there was no necessity for affixing the common seal to the mortgage deed and the presence of the seal may be ignored. In our opinion the affixation of the seal was not required by Company law. Under section 88 of the Companies Act the mortgage could be validly executed by any person acting under the authority of the company. No rule of law applicable to companies in general, or to this company in particular, has been shown to us requiring a deed of mortgage to be executed on behalf of a company by affixation of the common seal. If a document under seal is not necessary, then a mere defect in the manner of affixing the seal will not render the document invalid. This was the view taken by the Calcutta High Court in *Prabodhchandra Mitra* v. *Road Oils (India) Ltd.* (1). Their Lordships held that a mere defect in respect of the seal does not make the document for all purposes bad, even if it was intended to be under seal.

The next question is whether Mr. Beltie Shah was authorised to execute the mortgage on behalf of the company. The minute book of the company (page 121 of the printed record) sets forth a resolution which purports to have been passed by the Directors of the company at a meeting held on the 2nd of June, 1923, in these terms: "Resolved that the Board of Directors of the Dehra Dun Mussoorie Electric Tramway Company, Limited, approve of the proposal of the managing agents to the effect that in order to secure the overdraft of Rs. 25,000 obtained by the company from Messrs. Bhagwan Das and Company, Bankers at Dehra Dun, the company's land known as the Khazanchi Bagh near the Dehra Dun railway station be legally assigned to the said Messrs. Bhagwan Das and Company on such terms and conditions as may be settled between the managing agents and Messrs. Bhagwan Das and Company.

(1) (1929) I. L. R., 57 Cal., 1101.

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The Board of Directors authorise Mr. Beltie Shah to enter into the agreement and give the necessary deed to Messrs. Bhagwan Das and Company, and to sign and seal and deliver the deed on behalf of the Board." [Certain evidence was then referred to.] We think it is clear that there could not have been a properly convened meeting of Directors on the 2nd of June, 1923, which passed the resolution set forth above.

The next question is whether the plaintiff knew that there could have been no properly convened meeting of Directors on the 2nd of June, which passed the resolution mentioned. The appellant contends that the plaintiff Jagmandar Das knew perfectly well that no meeting had been held on the 2nd of June, and that the resolution was a mere bogus resolution. . . . For the respondent it is contended that although no resolution may have been passed at a properly convened meeting of Directors on the 2nd of June, the plaintiff was not aware of that fact. . . . In all the circumstances of this case we think it was very possible that Buggan Lal and the plaintiff were deceived by Mr. Beltie Shah. One must remember that in June, 1923, there was no suspicion that the company would go into liquidation and the plaintiff had no reason to suspect Mr. Beltie Shah of being a tricky and unreliable man. Subsequent events have no doubt cast a lurid light upon his character and methods and in the light of such subsequent events it may be argued that the plaintiff and Buggan Lal ought not to have put so much trust in Mr. Beltie Shah. It is easy to be wise after the event, but in the circumstances we think that Mr. Beltie Shah who appears to have been a very capable and plausible man persuaded the plaintiff that the execution of the mortgage had really been sanctioned by a properly convened meeting of the Directors. Buggan Lal and the plaintiff may have thought it

strange that Mr. Beltie Shah did not refer to the resolution in his letter of the 12th of June, but he seems to have explained to them that he was in daily expectation of receiving large sums of money from Nabha out of which he could repay the overdraft, thus rendering the execution of a mortgage deed unnecessary, and therefore he made no previous mention of the resolution sanctioning the mortgage. However this may be, when Mr. Beltie Shah showed Buggan Lal the minute book of the company containing the resolution signed by three of the Directors, as we believe he did, we think it would have been difficult for Buggan Lal to disbelieve the representation that the resolution had been duly passed. Moreover, the conduct of the plaintiff in accepting the mortgage supports the view that he believed that the execution of the mortgage had been sanctioned by the Board of Directors. The plaintiff would not have been likely to accept a mortgage which to his knowledge had not been sanctioned by the Directors and was not binding upon the company. If the plaintiff had known or even strongly suspected that the mortgage had not been sanctioned he would not have accepted it but would have sued the company for recovery of the loan.

It has further been argued for the appellant that the Directors were not authorised under the Articles of Association to empower Mr. Beltie Shah to execute the mortgage. The argument is that as the Directors cannot delegate their power to borrow they could not leave the details of the mortgage transaction to be settled by the managing agent. The reply to this is that the loan had already been incurred and there was no question of delegating the power of borrowing any further sums. The only question for the Directors was whether they should give the plaintiff a security for the loan which he had already advanced. Under article 104 we think the Board could legally empower one of the Directors to execute the mortgage deed on

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their behalf and to settle the details of the mortgage transaction.

The result is that in our opinion the Board of Directors could legally authorise Mr. Beltie Shah to execute the mortgage on behalf of the company by a resolution passed at a properly convened meeting. As a matter of fact, we hold that there was no properly convened meeting which passed the resolution dated the 2nd of June, but the plaintiff had no reason to suppose that the resolution had not been properly passed and was not binding upon the company. On these facts we consider that the plaintiff is protected in spite of the defect in passing the resolution, and the company is bound by the mortgage so far as Company law is concerned. The law on this point is laid down in Halsbury's "Laws of England", volume 5, page 302, as follows: "The persons contracting with a company and dealing in good faith may assume that acts within the power of the company have been properly and duly performed and are not bound to enquire whether acts of internal management have been regular." The case of the *Royal British Bank* v. *Turquand* (1) is one of the most important cases on this point. In that case the Directors of the company were authorised in certain circumstances to give bonds, but the company sought to escape liability on the ground that there had been no resolution authorising the making of the bond in suit. It was held that the plaintiff was entitled to judgment, having a right to presume that there had been a resolution at a general meeting authorising the borrowing of the money on the bond. For an Indian decision on this point we may refer to the case of *Ram Baran Singh* v. *Mufassil Bank Limited* (2) in which it was held that a company is liable for all acts done by its Directors, even though unauthorised by it, provided such acts are within the apparent authority of the Directors and

(1) (1856) 6 Ellis and Blackburn's Reports, 327.

(2) (1924) 83 Indian Cases, 142.

not *ultra vires* the company. Persons dealing *bona fide* with a Managing Director are entitled to assume that he has all such powers as he purports to exercise if they are powers which according to the constitution of the company a Managing Director can have.

We agree with the court below, therefore, in finding that the company is bound by the mortgage so far as Company law is concerned.

The next question is whether the mortgage is void for want of previous sanction by the Local Government. Under clause 37 of the Dehra Dun Mussoorie Tramway Order, 1921, it is laid down that "the promoter shall have power to transfer the undertaking with the assent of Government previously obtained, but not otherwise, to any person or persons or to a company." It is argued that as the Local Government did not give their previous assent to the mortgage it is void. [After referring to certain facts the judgment continued.] We consider that it must be held that the mortgage was executed without previous sanction by the Local Government. The question, however, remains whether the mortgage is void on that account and this raises several points for determination. The first question is whether the company was a "promoter" within the meaning of the Indian Tramways Act, 1886, and the Tramway Order of 1921, made under sub-section (3) of section 6 of that Act by the Local Government. "Promoter" is defined in the Act as meaning a local authority or person in whose favour an order has been made and includes a local authority or person on whom the rights and liabilities conferred and imposed on the promoter by this Act and by the Order and any rules made under this Act as to the construction, maintenance and use of the Tramway have devolved. Beltie Shah was undoubtedly a "promoter" and is expressly referred to as the promoter in the Tramway Order. The question is whether the rights and liabilities conferred and imposed upon him have legally devolved upon the company.

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It is argued for the respondent that they have not legally devolved upon the company because the Local Government did not give their previous consent to the transfer of the undertaking by Beltie Shah to the company. On the 22nd of December, 1921, an agreement was entered into between Beltie Shah and the company whereby the company agreed to take over the benefit and liability of Beltie Shah under the Tramway Order. It was argued that there was no proof of any previous sanction of this transfer and therefore it was void and the company never became a "promoter" and was not subject to the conditions laid down in the Tramway Order. By consent of parties we allowed the appellant to file further evidence on the question of the Local Government's sanction of the transfer of the undertaking by Beltie Shah to the company. [After referring to the evidence the judgment continued.] For the respondent it is argued that as formal sanction for the transfer was only accorded on the 22nd of February, 1922, the transfer effected by the agreement of the 22nd of December, 1921, was void since there was no *previous* sanction. The appellant maintains that the letter of the 9th July, 1921, intimating that Government will have no objection to the transfer is sufficient authority for the transfer. In our opinion the appellant's contention is correct. The Tramway Order merely lays down in clause 37 that the undertaking can only be transferred with the assent of Government previously obtained, but does not specify any form in which such assent should be expressed. In our opinion a demi-official letter such as that of the 9th of July, 1921, by a Secretary to Government in the Public Works Department, intimating that Government will have no objection to the transfer is sufficient to convey the previous assent of Government. We take it therefore that the company did become a "promoter" in place of Beltie Shah.

The next question is whether the land mortgaged formed part of the "undertaking". The land was bought by the company on the 15th of May, 1922, for the purpose of a tramway dépôt, that is, for administrative offices and a car shed. "Undertaking" is defined as including all movable and immovable property of the promoter suitable to and used by him for the purposes of the tramway. The fact that the land near the railway station was "suitable" for the purposes of the tramway can hardly be disputed. It was obviously necessary that the Tramway Company should have some administrative offices and a car shed, and a site near the railway station was obviously suitable. It is argued, however, that at the time of the mortgage the property was not *used* by the company for the purposes of the tramway. The evidence shows that at that time some sleepers, intended for the construction of the tramway, were stacked upon the land. In our opinion this indicates use of the land for the purposes of the tramway sufficient to bring it within the definition of "undertaking". The mere fact that the land was not acquired under the Land Acquisition Act or with the concurrence of the Superintendent of the Doon, as laid down in clause 13 of the Tramway Order, will not take the land out of the category of "undertaking". Undoubtedly the land was acquired for the purpose of the tramway and the method of its acquisition is immaterial for the purpose of deciding whether it is part of the company's undertaking. We find that it is part of the "undertaking" because it belonged to the company and was suitable for and used by the company for the purposes of the tramway.

The mortgage, then, was made in contravention of clause 37 of the Tramway Orders as having been made without the previous assent of Government. On these facts the respondent argues that the transfer would only be voidable at the option of the Local Government and not absolutely void. The appellant maintains that the mortgage is absolutely void and in our opinion his contention is well founded. The rules laid down

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in the Tramway Order have the force of law and in our opinion the transfer of part of the undertaking without the previous sanction of Government must be held to be absolutely void. In the case of *Gaurishankar Balmukund* v. *Chinnumiya* (1) it was held by their Lordships of the Privy Council that a mortgage by a judgment-debtor in contravention of paragraph 11 of the third schedule of the Code of Civil Procedure is void and not merely voidable. We may also refer to the rulings in *Dipan Rai* v. *Ram Khelawan* (2), and *Har Prasad Tiwari* v. *Sheo Gobind Tiwari* (3), in which the mortgage of an occupancy holding in contravention of the Agra Tenancy Act was held to be void. In our opinion the same principles would apply to a mortgage in contravention of a clause of the Tramway Order. If the mortgage is void it cannot be ratified nor can it be pleaded that the defendant is estopped from denying his competence to create the mortgage. We hold, therefore, that the mortgage is void.

The appellants being the Liquidators of the Dehra Dun Mussoorie Electric Tramway Company and all the evidence having been taken in this case, we think that instead of the plaintiffs proving their claim in the course of the liquidation proceedings they should be given a decree for money as against the Liquidators. They will thus rank as unsecured creditors and will get their money in due course of liquidation.

We allow the appeal and vary the decree of the trial court by granting to the plaintiffs a simple money decree for Rs. 29,773-4-3 to be realised by them in due course of liquidation. Interest at the contractual rate will cease as from the 29th of January, 1926. If there are any surplus assets interest at 6 per cent. per annum will be payable out of the surplus up to the date of repayment. The appellants will get half the costs of this appeal and those in the court below from the respondents. The respondents will bear their own costs.

(1) (1918) I. L. R., 46 Cal., 183. (2) (1910) I. L. R., 32 All., 383.
(3) (1922) I. L. R., 44 All., 486.