1968 *Present :* **H. N. G. Fernando, C.J. and Sirimane, J.**

H. C. HENRY SOYSA and others, Appellants, *and* THE JUPITER CIGARETTE AND TOBACCO CO. LTD., Respondent

S. C. 156/66—D. C. Colombo, 9039/MB.

Company law—Debt incurred by irregularly appointed Directors—Ratification of it by the Company—Effect.

Mortgage—Concurrent mortgagees—Right to sue mortgagor in one action—Joinder of parties and causes of action—Mortgage Act (Cap. 89), s. 65 (1) (a).

Where an *intra vires* debt transaction on behalf of a Company is entered into by its Directors concerning whose appointment as Directors there is some irregularity, the transaction may be ratified by the Company.

Where a single property is hypothecated in a single mortgage bond, two or more lenders who have provided, in different proportions, the money borrowed by the mortgagor are permitted by section 65 (1) (*a*) of the Mortgage Act to sue on the bond in one action. In such a case, it cannot be contended that there is a misjoinder of parties and causes of action.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *Ben Eliyatamby*, for the plaintiffs-appellants.

C. Ranganathan, Q.C., with *B. J. Fernando*, for the defendant-respondent.

Cur. adv. vult.

December 20, 1968. SIRIMANE, J.—

This was a hypothecary action filed by the three plaintiffs against the defendant-Company claiming a sum of Rs. 125,000 on mortgage bond No. 432 of 13th August 1960 (P1).

The defendant-Company filed answer pleading, *inter alia*, that the borrowing was not for the purposes of the Company, that there was no resolution or decision in terms of the Articles of the Company to borrow, that the borrowing was *ultra vires*, and that the bond was, therefore, not binding on the Company.

According to the recitals in the bond P1, a meeting of members had been held on 12th August 1960 and a resolution passed authorising the borrowing.

The learned District Judge dismissed the action on the ground that there was no meeting held on that day at which such a resolution was passed.

The bond bears the seal of the Company, and has been signed by two persons : E. A. P. Edirisinghe, and E. A. S. Appuhamy (by his thumb impression) as Directors of the Company.

The evidence shows that at some time before 16th August 1960, E. A. P. Edirisinghe was in reality the Company itself. He owned 3239 shares out of 3241. His father, E. A. S. Appuhamy, and his mother owned one share each.

The money was lent to the defendant-Company by the plaintiffs on three cheques, in all of which the defendant-Company is the payee. At the time of the borrowing, the Company was in debt to the extent of about Rs. 122,000 according to D1, which is a statement of affairs of the Company as at 31st May 1960. This sum includes loans advanced to the Company by Directors among whom were the three plaintiffs and E. A. P. Edirisinghe.

P9 shows that this bond had been sent to the Registrar of Companies for registration as an instrument creating a charge over the Company's property, as required by Section 78 of the Companies Ordinance, Chapter 145. The annual returns of the Company for the years 1961, 1962 and 1963 sent to the Registrar of Companies (P7, P6 and P8) show this sum of Rs. 125,000 borrowed on this bond as a debt due *from the Company*.

At the time the bond was signed, E. A. P. Edirisinghe was admittedly a Director of the Company and his father E. A. S. Appuhamy, before he signed as a Director, had, according to the evidence, the terms of the bond explained to him by his own lawyer.

E. A. P. Edirisinghe giving evidence on behalf of the defendant-Company stated that his father was a Director on 13th August 1960, i.e., the day on which the bond was signed. This fact was never in dispute. So that on the face of the bond and the defendant's own evidence relating to its execution, P1 was a perfectly valid bond and would be binding on the Company.

Was the borrowing *ultra vires ?*

In the Articles of Association of the Company, under the heading " Powers and duties of Directors ", Regulation 69 reads as follows :—

" The Directors may from time to time at their discretion raise or borrow any sum or sums of money for the purposes of the Company in such manner and upon such terms and conditions in all respects as they think fit. Provided that the Directors shall not, without the

sanction of a General Meeting of the Company, so borrow any sum of money which will make the amount borrowed by the Company and then outstanding exceed the amount of the subscribed capital for the time being of the Company. Nevertheless no lender or other person dealing with the Company shall be concerned to see whether this limit is observed."

The sum borrowed is admittedly much less than the subscribed capital of the Company at that time. So that there was no necessity for a meeting or a resolution authorising the borrowing as long as it was done by two Directors for the purposes of the Company. In these circumstances, I do not think that it was necessary to decide whether, in fact, a meeting had been held to authorise the loan and the exact time and place of the meeting. It could not be seriously contended that the money borrowed was not utilized for the purposes of the Company. On the contrary, D1, P6, P7 and P8, referred to earlier, indicate that it was so used.

The three plaintiffs had themselves been Directors of this Company, and sold their shares to Edirisinghe. It was submitted that the money borrowed on the bond was for the purpose of purchasing these shares. The evidence, however, shows that Edirisinghe had plenty of money of his own to buy these shares for himself, and the cheques D9 and D10, D62 to D64, D71 and D72 put this matter beyond doubt. These were Edirisinghe's personal cheques on which he purchased the shares.

According to the copies of the minutes P5, P10 and P11, signed by all the Directors including Edirisinghe, three meetings had been held on 12th August 1960, and according to P5, a resolution was passed authorising this loan. The learned District Judge, on the evidence of Proctor Abeywardene (who was alleged to have been present at that meeting, but who denied that fact), held that there was no meeting at which the loan was authorized, and that the defendant was, therefore, not liable. He said in his judgment,

" On a consideration of the circumstances which I referred to, I hold that no meeting of shareholders was held on 12.8.60 at which a resolution is said to have been passed with regard to the alleged loan P1. I hold that the evidence, real as well as circumstantial, is sufficient to contradict the recital in P1 although it is a notarial document and also the minutes P5. *In view of this the defendant-Company had no power to borrow.*"

As pointed out earlier, under Regulation 69, no resolution was necessary to empower the Directors to raise the loan, and once it was admitted that two persons, who were, in fact, Directors of the Company at the time of its execution, signed this bond, I think that the Company cannot avoid liability to repay the loan.

It is not suggested that this was anything but an honest and bona fide transaction. No shareholders were in any way prejudiced and all persons concerned were aware of, and consented to, the transaction.

In these circumstances, I think that the learned District Judge attached too much importance to the exact date of the meeting at which Directors were appointed.

Even assuming that there had been some irregularity in the appointment, the evidence (for example, P9, P6, P7 and P8) clearly shows that the Company ratified the borrowing of the loan on P1.

In *Parker and Coper Limited v. Reading and James* [1] it was held that if all the individual corroborators, in fact, assent to a transaction which is *intra vires* the Company, although *ultra vires* the Directors, it is valid although they had not met together in one room or place, but all of them discussed and agreed to do one with another separately. In the course of his judgment, Astbury, J. said, "If Company Law enables the entirety of the corroborators to ratify an irregular *intra vires* transaction, why should this not protect an honest bona fide *intra vires* transaction entered into for the benefit of the Company ?".

An issue as to whether there was a misjoinder of parties and causes of action had been left unanswered by the learned District Judge and some argument was addressed to us on this point. There is a single bond on which a single property is hypothecated. The fact that there were three lenders who provided the money borrowed in different propertions, does not, in my view, preclude all three of them suing on the bond in one action. I think section 65 (1) (*a*) of the Mortgage Act, Chapter 89, contemplates an action of this kind. That section reads as follows :—

> " 65 (1). Where a mortgage bond is executed in favour of two or more persons (each of whom is hereinafter referred to as a " mortgagee ") in consideration of sums due or to be due to each of such persons by the mortgagor,
>
> (*a*) any such mortgagee to whom any monies secured by the mortgage are due and payable, may institute a hypothecary action for the enforcement of the mortgage, and in such action join as a defendant, every such mortgagee, who is not a plaintiff in the action."

The judgment of the learned District Judge is set aside and judgment entered for the plaintiff as prayed for in the plaint. The plaintiffs are entitled to costs of this appeal.

H. N. G. FERNANDO, C.J.—I agree.

Appeal allowed.

[1] *136 Law Times 170.*