

Emperor Vs. Laxman Bharmaji

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Court : Mumbai

Decided On : Nov-23-1944

Reported in : (1945)47BOMLR660

Judge : Lokur and ;Weston, JJ.

Appeal No. : Criminal Application for Revision No. 384 of 1944

Appellant : Emperor

Respondent : Laxman Bharmaji

Disposition : Appeal dismissed

Judgement :

Lokur, J.

1. This is an application in revision against the petitioner's conviction under Section 134 of the Indian Companies Act, 1913, and the sentence of a fine of Rs. 100 by the Chief Presidency Magistrate, Bombay. The petitioner is one of the directors of the India Patron Bank, Ltd., which is a private limited company incorporated under the Indian Companies Act, its main business being to sell what are called 'Patron Bonds', to invest moneys realised by the sale of those bonds and to take steps to carry out the terms of the scheme of those bonds. Being a private limited company, it cannot issue an invitation to the public to subscribe for

any shares or debentures, and according to Section 2(1), Clause (13)(c), of the Indian Companies Act, if it issues such invitation to the public, it ceases to be a private company and becomes a public company liable to fulfil the obligations imposed upon a public company by the Act and the rules. One of such obligations, from which a private limited company is exempt, is to file three copies of the annual balance-sheet and profit and loss account with the Registrar of Companies after they have been laid before the company at the general meeting, and any default in complying with this requirement is made punishable under Section 134(4) of the Act. Section 134(3) provides that where a private company has included all the necessary provisions in its articles of association, but is not complying with those or any of those provisions, it shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions of the Act, and shall be treated as if it were not a private company.

2. Being of opinion that the so-called Patron Bonds issued by the company to the public are in fact debentures and finding that the company had not filed with him three copies of its balance-sheet and profit and loss account for the year ending March 31, 1939, the Registrar of Companies filed a complaint against the company and its three directors in the Court of the Chief Presidency Magistrate, Bombay. One of the directors died thereafter, and the learned Magistrate, agreeing with the view of the Registrar of Companies, convicted the remaining accused under Section 134(4) of the Indian Companies Act and sentenced each of them to a fine of Rs. 100. One of the directors thus convicted, who was accused No. 2, has now presented this application for revision.

3. It is admitted that the company has not filed with the Registrar of Companies its balance-sheet and profit and loss account for the year ending March 31, 1939, and, therefore, the only point in dispute is whether the Patron Bonds issued by it are debentures such as are prohibited from being offered to the public by a private limited company. A form of the Patron Bond is produced at Ex. A. It bears a serial number and its title at the top is 'The India Patron Bank Limited' and below it 'Patron Bond, Rupees Ten only'. It then goes on to say:

In consideration of Mr. (name of the holder) having paid Rs. 10 as the purchase price of Patron Bond in the India Patron Bank Limited, Sholapur, it is hereby agreed and declared by the said Bank, that the said Bank will pay all money to Mr. (holder) that may hereafter become due in respect of this Bond, on terms and conditions and rules and regulations printed on the reverse. In witness whereof the common seal of the Bank has been affixed and the Manager of the Bank has hereunto set his hand this day etc.

4. The bond purports to be signed by the manager of the company and sealed with the company's seal. On the reverse of the bond are set out the rules and privileges. According to those rules, every purchaser is to pay 8 annas as admission fee in addition to Rs. 10. Then, after deducting Re. 1-8-0 for initial expenses and reserving 8 annas for the reserve fund, the balance is to be invested and the interest earned is distributed among the bond-holders according to the scheme set out in Clause (2) of the rules. If any of the bond-holders gets any of those prizes, his bond is cancelled, and if the bond-holder is not lucky enough to secure a prize in the distribution for twenty years, the original price of the bond, viz. Rs. 10, would be returned to him without deduction at the end of twenty distributions. In exceptional cases, if the amount is required earlier, then only Rs. 8 are repaid, if the directors are satisfied that the holder cannot do without the amount. Clause (7) provides that the reserve fund would be utilised for payment of the amounts of the bonds. Then there are other conditions which are not material for our purpose.

5. On a consideration of the nature and conditions of these Patron Bonds we are clearly of opinion that they are really debentures within the meaning of Section 2(1), Clause 13(c), of the Indian Companies Act. In Section 2(1), Clause (4), of the Act, a debenture is said to include debenture stock, but nowhere is to be found a legal definition of the word 'debenture.' In *Levy v. Abercorris Slate and Slab Co.* (1837) 37 Ch. D. 260 Chitty J. defined a debenture as 'any document which either creates a debt or acknowledges it', and he says that any document which fulfils either of those conditions is a debenture. In *British India Steam Navigation Co. v. Commissioners of Inland Revenue* (1881) 7 Q.B.D. 165 Lindley J. held that a document which on the face of it was called a debenture and recorded

indebtedness and was one of a series was to be dealt with as a debenture under the Stamp Act. He observed (p. 172):

Now, what the correct meaning of 'debentures' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds, and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness.

6. It is true that the bonds issued by the accused are not styled 'debentures'. But as pointed out by Chitty J. in *Edmonds v. Blaina Furnaces Co. : Beesley v. Blaina Furnaces Co.* (1887) 36 Ch.. 215 in determining what is or is not a debenture within the section we are not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. We must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion we can whether the instrument is or is not a debenture. The main features which in our opinion tend conclusively to show that these Patron Bonds are debentures are the acknowledgment of debt, the promise to return it, the fact that they form a series bearing consecutive numbers and the fact that all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest realised by the company.

7. Mr. Kavalekar has advanced various reasons on behalf of the petitioner why they are not to be regarded as debentures. The first is that the company does not issue them as debentures but sells them for a price. It is wholly immaterial what the company calls them and the name given to them by the company does not prevent them from being debentures if in fact they are debentures. The next argument advanced is that they do not purport to be a charge on the company's assets. We find that in Clause (7) of the rules and privileges it is provided that the reserve fund is to be utilised for payment of guaranteed amounts payable to the holders Under Clauses (5) and (6). Thus the reserve fund being ear-marked and

set apart for the repayment of the amount of the bonds to the bond-holders, a charge is tacitly created on that reserve fund. There is no doubt that if the company has other assets, it may pay the bondholders their debts out of them. But in addition to this, the reserve fund is specially set apart for that purpose, and thus it may be said that the rules of the company do provide for a charge on at least a part of its assets. Moreover a charge, though usual, is not an essential requisite of a debenture. As already pointed out, there may be a mortgage debenture or a simple debenture which does not create any charge on any of the assets of the company. It is next contended that the bonds do not contain in terms an acknowledgment of a debt simpliciter, but it is accompanied by various conditions and the debt is in fact never wholly repaid. Thus although every purchaser has to pay Rs. 10-8-0, if he is not lucky enough to draw a prize within twenty years, he may get back only Rs. 8 if the directors choose to return the amount to him within the period of 20 years or to Rs. 10 at the end of twenty years. This only means that the company undertakes the liability of repaying only Rs. 10 at the end of twenty years. This is none the less an acknowledgment of indebtedness and the holder has a right to recover the amount from the company at the end of the stipulated period.

8. The various more common or salient characteristics of a debenture are enumerated in Palmer's Company Precedents (14th edition), Part III, p. 3. But as pointed out by Pollock M. R. in *Lemon v Austin Friars Investment Trust* [1926] 1 Ch. 12 it is not essential that all those characteristics should be present and some of them are almost the antithesis the one of the other. After considering these characteristics and in holding certain income stock certificates to be debentures, he observed (p. 15):

Now, Sir Francis Palmer in his catalogue of the characteristics of a debenture says: 'A debenture is, as a general rule, one of a series.' This document is certainly one of a series. The term 'debenture' is applied, as a general rule, to instruments issued by a company. This instrument is issued by a company. It is not issued, it is true, under seal. A debenture usually provides for the payment of a specific principal sum at a specific date, but that, as he points out in the paragraph, is not essential, for there are millions of debentures which have not an actual provision

for repayment because they are perpetual or permanent debentures. A debenture usually provides for payment of interest. This document does not; and a debenture generally contains a charge on the undertaking of the company; but from the cases that are referred to it is quite plain that there are a number of debentures in which there is no such charge ; and indeed one must be careful not to confuse a debenture with a mortgage debenture.

9. This reasoning applies all the more strongly to the prize bonds of the accused. Many of the characteristics which did not appear in the income stock certificates, which were held by Pollock M.R. to be debentures, do appear in these prize bonds. The bond acknowledges a debt ; it is one of a series ; it is issued by a company; it bears the company's seal, it provides for the payment of interest by determining the lucky numbers and it indirectly creates a charge of the amount repayable on the reserve fund of the company. It is true that, as pointed out by Mr. Kavalekar, some other indicia usually found in ordinary debentures are absent in these bonds. But it is not necessary that every one of them must be present in every kind of debentures. The presence of the features referred to above far outweigh the absence of other indicia, and we are clearly of opinion that these prize bonds are debentures, and by issuing them to the public the company has ceased to be a private company and was bound to file its balance-sheet and the profit and loss account with the Registrar of Companies after they were laid before the company at the general meeting of the company. The admitted default of the company in complying with that requirement renders the company and its directors liable to the penalty under Section 134(4) of the Indian Companies Act. The petitioner's conviction must, therefore, be upheld.

10. The rule is discharged.