

SUPREME COURT OF INDIA

Chunilal Khushaldas Patel

Vs.

H. K. Adhyaru

C.A.No.2 and 3 of 1956

(S. R. Das, C.J.I., N. H. Bhagwati and T. L. Venkatarama Ayyar, JJ.)

14.02.1956

JUDGEMENT

BHAGWATI J. –

1. These are two appeals filed with certificates under Art. 133 (1) of the Constitution against the Judgement and Order of the High Court of Judicature at Bombay setting aside the order passed by the District Judge, Ahmedabad.

2. The National Mills Company Limited, Ahmedabad, hereinafter referred to as the National Mills, was ordered to be compulsorily wound up by an order of the Joint Judge, Ahmedabad, dated 14-3-1950 and Trikamlal J., Patel, Manvantray T. Mehta (since deceased) and Krishnalal B. Dave were appointed liquidators of the National Mills. The liquidators invited sealed tenders for the purchase of the mills land, bungalow, warehouses, etc., and the Himabhail Manufacturing Company, Limited Ahmedabaad, hereinafter referred to as the Himabhai Company, submitted their tender on 15-9-1953 offering to purchase the same.

The said offer was sanctioned by the Court on 22-9-1953 and an agreement was entered into between the liquidators and the Himabhai Company for the sale of the properties therein Mentioned for a consideration of Rs 12,68,000. Rs. 3,00,000 were to be paid in cash and the balance in 1936 shares of the Himabhai Company which were taken to be of the value of Rs.500 per share. There were 484 shares of the National Mills held by 232 shareholders.

It was then contemplated that,. After the payment of all debts by the liquidators, these 1936 shares would be distributed amongst the contributories, in the proportion of 4 shares of the Himabhai Company to 1 share of the National Mills. Clauses 5 and 6 of the agreement, however, provided :--

"Clause (5). That the Managing agents of the Second Party Sheth Chunilal Khushaldas by way of and in consideration of this agreement, agrees to purchase the shares to be issued by the Second Party from the contributories of the First Party as agreed at Rs. 500. This amount of Rs. 500 per each share of the Second party shall be payable by the Said Sheth Chunilal Khushaldas within five months from the date of the execution of the Sale Deed to such contributories who intend to case the said shares of the Second Party and who shall notify his intention and deliver his share certificates with transfer forms duly signed and executed by him, Sheth Chunilal Khushaldaas to cash the said share within the period aforesaid.

"Clause (6). That over and above Rs. Three Lacs to be paid in cash as and by way of consideration by the Second Party, if the Official Liquidators require further funds for payments to the creditors, the Official Liquidators may at any time submit up to Seven Hundred shares allotted to the First Party's name by Second Party to Sheth Chunilal Khushaldas and Sheth Chunilal Khushaldas hereby agrees and undertakes to pay to the extent of Rs. three and half lacs on such submission of shares with transfer from A duly executed at the rate of Rs. 500 (rupees five hundred) per each such share in addition to expenses of such transfer of shares pertaining to those shares only."

3. On 3-11-1953, another agreement was entered into between the Liquidators and Chunilal Khushaldas Patel, hereinafter referred to as Chunilal, incorporating therein the terms of Cls. (5) and (6) set out above and Chunilal agreed to abide by the Same. The sale deed was actually executed on 18-4-1954, and the five months period provided in Cl.(5) expired on 18-9-1954.

4. Even though the Liquidators had anticipated that the work of liquation would be over within the said period of five months and the 1936 shares of the Himabhai Company distributed amongst the contributories, the Liquidators found that the Income-tax Authorities assessed the National Mills heavily beyond their expectations and the creditors also could not be paid more than As. 8 in a Rupee. It was, therefore, not possible to distribute the shares to the contributories.

The market price of the shares of the Himabhai Company, which was Rs. 435 in September 1953 was about Rs. 450 in Septemebr 1954 and neither the Liquidators nor the contributories were in a position to realise anything beyond this sum by sale of the shares in open market. Therefore, with the object of cashing the shares at Rs. 500 as provided in the agreement, the Liquidators secured letters of authority from contributories holding 227 shares in the National Mills representing 908 shares of the Himabhai Company, and armed with these letters of authority, approached Chunilal at 7-30 P. M. on 17-9-1954 asking him to take delivery of the 1936 shares which had been allotted to them along with blank transfer forms duly signed by them. They purported to tender these shares under Cl. (5) of the agreement dated 28-9-1953 and called upon Chunilal to fulfil his obligation under the agreement dated 3-11-1953. Chunilal however, contended that the tender was not valid and he was not bound to accept the same.

A letter and a telegram dated 17-9-1954 were addressed by the Liquidators to Chunilal and he replied the same day denying that he had ever refused to accpet delivery of whatever the Liquidators wanted to deliver to him. He further called upon the Liquidators to deliver to him that very way whatever they wanted to deliver. The Liquidators replied on 18-9-1954 reiterating the position which they had taken up and insisted upon Chunilal fulfilling his obligation. They wound up by saying that the question of their delivering whatever they wanted to deliver did not arise unless Chunilal made payment by cash or by cheque of Rs. 9,68,000 against delivery.

Chunilal rejoined by his letter dated 19-9-1954 setting out the correct facts according to him and pointed out that the tender was invalid and inoperative and that he had not refused the same.

5. The Liquidator sent no reply to this letter but it appears that they approached Chunilal and his legal advisers with a view to bring about a settlement of the dispute. These attempts failed and the Liquidators had, therefore, to approach some other party. They tried to induce Harshadkumar K. Adhyaru, hereinafter referred to as Adhyaru, to purchase these 1936 shares.

Adhyaru was at first unwilling to do so. He had, in March 1955 purchased five shares of the Himabhai Company in the open market and had submitted them to the Himabhai Company for

registration in his name. Chunilal, who was the senior partner in the Managing Agents firm of the Himabhai Company, is alleged not to have sanctioned the transfer and Adhyaru took umbrage at it and resolved to buy up the whole lot of 1936 shares of the Himabhai Company which were offered to him by the Liquidators at the price of Rs. 500 per share which Chunilal had agreed to pay for the same in certain events contemplated in the agreement of 3-11-1953.

Between 19-7-1955 and 29-7-1955, 11 letters were addressed by 57 contributories of the National Mills holding 108 shares to the Liquidators authorising them to dispose of the said 1936 shares to anyone in open market inasmuch as, according to their information, Chunilal had failed to make payment for those shares and to recover the loss, if any, incurred thereby from Chunilal, if need be, by taking necessary legal steps against him.

6. On 27-7-1955, Adhyaru addressed a letter to the Liquidators offering to purchase the said 1936 shares at Rs. 500 per share and enclosed a cheque for Rs. 1,00,000 as and by way of earnest money promising to pay the balance forthwith on the approval and sanction by the District Judge of his said offer. It appears that Chunilal also about the same time thought of waiving the objections which he had raised to the purported tender by the Liquidators on 17-9-1954 and approached Trikamlal J. Patel, one of the two surviving Liquidators, hereinafter referred to as Trikamlal, offering to take the said 1936 shares.

On the morning of 29-7-1955, there was an interview between one Ratilal Nathalal, a co-director of the Himabhai Company on the one hand and Trikamlal on the other in the office of Vasavda, a labour leader in Ahmedabad, in the Premises of the Majoor Mahajan. Trikamlal, at that interview, drafted a letter which he handed over to Ratilal Nathalal with instructions that, if a letter in those terms was addressed by Chunilal to the Liquidators accompanied by a cheque for the full amount of Rs. 9,68,000, the said 1936 shares would be delivered to him,

Chunilal accordingly addressed to the Liquidators a letter on the same date in accordance with the said draft waiving all the objections to the tender made on 17-9-1954 and offering to take delivery of the said 1936 shares at the said rate in pursuance of the agreement dated 3-11-1953. He sent a cheque for Rs. 9,68,000 along with the said letter and requested the Liquidators to deliver the said 1936 shares to him with transfer forms duly signed by them.

7. Matubhai, Son of Chunilal, went along with the said letter and the cheque to Trikamlal at his office in the Court premises at 2 P. M. Trikamlal, however, told him that Chunilal should address another letter to the Liquidators promising to pay the dividend which would be sanctioned at the Annual General Meeting of the Himabhai Company for the year 1954 and he, Matubhai, should bring such a letter to him in the Court premises at about 4 P. M.

Chunilal accordingly addressed another letter to the Liquidators promising to pay the dividend which would be sanctioned at the Annual-General Meeting of the Himabhai Company for the year 1954. When, however, Matubhai went with both the letters and the cheque to Trikamlal in the Court premises, he was not found there as evidently he had taken ill and gone home. Matubhai and Ratilal Nathalal, therefore, went to Trikamlal's place of residence at 7-30 P. M. the same evening and handed over the two letters and the cheque to Trikamlal.

Trikamlal accepted these documents but said that the share certificates were with his co-liquidator Krishnalal B. Dave, hereinafter referred to as Dave, and stated that he would hand them over on Tuesday the 2nd August 1955 after Dave had returned from Bombay where he had gone that

evening, and after the relative transfer forms had been duly signed by both the Liquidators.

Trikamlal, however, handed over to Matubhai at that very time proxies for the said 1936 shares for Annual General Meeting of the Himbhai Company which was to be held on 6-8-1955. On 30-7-1955, Chunilal addressed a letter to Trikamal thanking him for giving him the proxies for the said 1936 shares. He put on record that Trikamal had already received the cheque for Rs. 9, 68,000 and promised to deliver the share certificates of the said 1936 shares together with the transfer forms duly signed by both the Liquidators on Tuesday the 2nd August 1955 on Dave returning from Bombay. He stated that he would be sending his man, Shri Thakersey N. Shah, to Trikamal's chambers at the Court premises at 11-30 A. M. that day and requested that Trikamal should deliver the said share certificates and the transfer forms duly signed by both the Liquidators to him.

On the same date, Trikamal also addressed a letter to Chunilal acknowledging the receipt of the cheque for Rs. 9,68,000 and the said letter. He stated that his co-liquidator Dave had gone outside, i.e. to Bombay and intimated that the Liquidators would properly deal with the subject after Dave had been acquainted with matter. Chunilal sent Thakersely N. Shah to Trikamal on 2-8-1955 along with his letter of the same date asking Trikamal to deliver the said 1936 shares to him and also 20 transfer forms duly signed by the liquidators. He also asked for the stamped receipt for the amount paid by him in full settlement of the amount of the said shares.

Trikamal replied the same day stating that Dave had not returned from Bombay and, therefore, nothing could be done till he returned . He stated further that on the return of Dave, he, Trikamal, would submit the correspondence between Chunilal and himself of Dave for further action. He, however , stated that, without prejudice to the rights of the Liquidators and subject too the approval by Dave and subject to the sanction of the District Judge, he was sending the cheque for Rs. 9,68,000 drawn by Chunilal in favour of the Liquidators to the Bank for acceptance. This cheque was cashed by the Bank and the amount was credited to the account of the Liquidators.

8. After Dave returned from Bombay and the Liquidators had consultations amongst themselves, they made a reeport on 3-8-1955 submitting both the offers of Chunilal and Adhyaru for sanction by the Court.

9. In the report which they submitted to the District Judge, the Liquidators set out the facts in regard to the alleged breach of the agreement of 3-11-1953 by Chunilal and the letters which had been addressed by the contributories to them between the 19th July and the 29th July 1955 and what had transpired between Chunilal and Trikamal on and after 29-7-1955. They also set out the offer which was made by Adhyaru and stated that the offer of Adhyaru was prior and made on 27-7-1955, that Chunilal had committed a breach of the agreement dated 3-11-1953 by refusing to encash the said 1936 shares, that by the said breach of the agreement the Liquidators were put to great trouble and could not pay the remaining annas 8 to the Creditors and that Adhyaru also was a mill owner and a substantial party. The Liquidators submitted both the offers to the Court for its consideration and sanction.

10. As the Annual General Meeting of the Himabhai Company was to be held on 6-8-1955 the Liquidators made an application to the District Judge on the evening of 3-8-1955 and the District Judge fixed the hearing for the next day, 4-8-1955. He ordered that notice of the application should be given to Chunilal and Adhyaru and they should file their statements and appear at the hearing before him. Chunilal and Adhyaru accordingly filed their statements.

Chunilal denied that he had committed a breach of the agreement dated 3-11-1953, reiterated that he was always ready and willing to purchase the said 1936 shares as per the agreement and pointed out that he had even when showed his readiness and willingness to purchase the said shares and had already given the two letters as also the cheque for Rs. 9,68,000 to the Liquidators and that the matter of sale was thus really completed and concluded between him and the Liquidators and submitted that in these circumstances the Liquidators had no right to sell the said shares to anybody else except himself and were bound to transfer the said shares to him.

As regards Adhyaru's offer, he stated that the same did not appear to be genuine and should not be accepted. Adhyaru, in his statement, pointed out the circumstances under which he came to make his said offer and submitted that this offer being prior in time should be accepted in preference to the offer of Chunilal.

11. The District Judge, after hearing the arguments advanced before him by the Liquidators as well as Chunilal and Adhyaru, sanctioned the offer of Chunilal. He negatived the contention that Chunilal had committed a breach of the agreement dated 3-11-1953 observing that the tender purporting to have been made by the Liquidators on 17-9-1954 was not a valid tender. He took into consideration the circumstances under which Chunilal had come to write the letter dated 29-7-1955 and the events that had since happened in regard to Chunilal's offer to purchase these shares and observed that even if Adhyaru may be inconvenienced by reason of Chunilal's offer it would be unfair to penalise Chunilal and deprive him of the right to which he was entitled under the agreement. He, therefore, ordered that the offer of Chunilal be accepted by the Liquidators and also the full price had already been paid by him. The 1936 shares be delivered to him or his duly authorised agent together with the necessary transfer forms duly signed. The cheque given by Adhyaru was ordered to be returned and the parties were ordered to bear their own costs.

12. It may be observed that Madhubhai, one of the signatories to the letter dated 19-7-1955 had not appeared before the District Judge. When the offer of Adhyaru was not accepted by the District Judge, both Adhyaru and Madhubhai joined in taking an appeal to the High Court on 6-8-1955. filed a common memo of appeal and applied for interim relief before Bavdekar J., which was, however, refused, Chunilal undertaking through his advocate to hand back the shares to the Liquidators on Monday 8-8-1955 if they were handed over to him that day.

13. The appeal came for admission before Bavdekar J. on 18-8-1955 and at that time Bavdekar J., enquired of Madhubhai who had joined in the appeal what grievance had had to make against the order in appeal and the advocate for Madhubhai told Bavdekar J. that this grievance was substantial inasmuch as the contributories felt that the shares in question might fetch a much higher value than Rs. 500 per share.

Bavdekar J. called upon the contributories to show the bonafides of this contention by requesting Adhyaru to raise his offer to Rs. 550 per share and deposit the required additional amount in Court. The said additional amount was accordingly deposited in Court.

14. The appeal was heard before a Bench of the Bombay High Court constituted by Gajendragadkar and Gokhale JJ. on the 24th and 25th August 1955. Adhyaru and Madhubhai appeared by separate counsel and Madhubhai, in the first instance, supported Adhyaru. At the end of the second day; herein, however, his advocate was instructed to tell the Court that the contributories had withdrawn from the Liquidators the authority to sell the shares by private negotiations but had asked them instead to sell the shares in the open market so that the shares might fetch a much higher value in

the open market at Ahmedabad.

The hearing of the appeal was then adjourned. The appeal came for further hearing before the same Bench of 6-9-1955. Further affidavits were filed by Madhubhai and by Matubai the Son of Chunilal pointing out the state of the market in regard to these shares. At the further hearing, the advocate for Madhubhai produced before the Court a receipt passed by the Liquidators showing that one Pasavala had deposited with them an amount of Rs. 11,61,600 at the rate of Rs. 600 per share.

Counsel appeared also on behalf of the one Gangaprasad Puria offering to purchase the said 1936 shares en bloc at the rate of Rs. 625 per share. The High Court set aside the order of the District Judge and ordered that the said shares should be sold in the open market and that the offer made by Pasavala should be taken as the minimum offer made for the purchase of the shares in question.

The amount of Rs. 11,61,600 deposited by Pasavala in support of the offer was ordered to continue in deposit with the Liquidators until the public auction was held and the bid made at the public auction was sanctioned by the District Judge. Chunilal and Adhyaru were declared entitled to bid at the auction if they so desired. Adhyaru was declared to be at liberty to withdraw the additional amount deposited by him with the Liquidators. Each party was ordered to bear and pay his own costs.

15. In the judgment which it delivered, the High Court laid great stress upon the observation of the District Judge that Chunilal was entitled to a right under the agreement. This position was severely attacked before the High Court and the High Court came to the conclusion that Chunilal had no right under the agreement dated 3-11-1953, that neither on the 17th nor on the 18th September 1954 Chunilal was willing to abide by his undertaking and that he had committed a breach of the agreement, that Chunilal made his offer on 29-7-1955 after coming to know that Adhyaru had made his offer on the 27th July, that, if the matters had stood there Adhyaru's offer should have been accepted but, having regard to the conduct of the Liquidators, Adhyaru's offer also could not be accepted, that the interests of the contributories were primarily to be considered by the Court and there being higher offers for the purchase of these shares as evidenced by the offer of Pasavala the proper course was to sanction a sale by public auction of these shares so as to fetch the highest price available in the open market for the benefit of the contributories.

The High Court accepted the position that normally the discretion exercised by the District Judge should not be interfered with but came to the conclusion that the exercise of the discretion here by the District Judge was erroneous inasmuch as the District Judge was influenced by two considerations, viz., (1) that Chunilal had a right under an agreement dated 3-11-1953, and (2) that Chunilal had not committed a breach of the said agreement, both of which considerations were in law. The High Court, therefore, felt justified in setting aside the order of the District Judge in favour of Chunilal and ordering the sale by public auction of these shares.

16. Chunilal and Adhyaru both applied for certificates for leave to appeal to this Court and the High Court granted the requisite certificates. The appeal filed by Chunilal before this Court is Civil Appeal No.2 of 1956 and the appeal filed by Adhyaru is Civil Appeal No. 3 of 1956. Both these appeals have come for hearing and final disposal before us.

17. The learned Attorney-General appearing for Chunilal before us contended that even though on a construction of the terms of the agreement dated 3-11-1953 he had no right to the purchase of these 1936 shares, he had acquired a right to his offer being accepted in the events that had happened

and the District Judge was not wrong when he stated that he had thus acquired a right under the agreement. He further contended that the offer made by Chunilal was really for Rs. 520 per share he having agreed to give to the Liquidators the dividend sanctioned in the Annual General Meeting of the Himabhai Company for the year 1954 and was, therefore, higher than the offer of Adhyaru by Rs. 20 per share. He also contended that the District Judge was right in holding that he had not committed a breach of the agreement and had exercised his discretion properly in his favour. He, therefore, contended that the discretion exercised by the District Judge not being in any manner whatever erroneous, should not have been interfered with by the High Court and the order made by the District Judge should have been confirmed.

In regard to the order of the High Court directing a sale by public auction of these shares, he contended that throughout up to 4-8-1955 the market price for these shares had never gone beyond Rs. 427-8-0 or at the highest Rs. 450 per share, that the contributories had accepted the same position not only in their letters addressed to the Liquidators between the 19th July and the 29th July 1955 but also in the grounds of appeal which had been filed by Madhubai along with Adhyaru and right up to the end of the second day of hearing before the High Court on 25-8-1955 and that the High Court was not justified in taking into consideration the situation which subsequently developed as the result of the keen competition between Adhyaru and Chunilal. On Adhyaru's offer not having been accepted by the District Judge and of Madhubai having brought in a number of speculators to bid for the en bloc purchase of the 1936 shares with a view to acquire the managing agency of the Himabhai Company. He., therefore, submitted that the order of the High Court should be set aside and the order of the District Judge restored.

18. Counsel for Adhyaru contended that there was nothing in the conduct of the Liquidators which would justify either the District Judge or the High Court in refusing to accept his offer which was prior in point of time to that of Chunilal. He supported the conclusion reached by the High Court that the agreement dated 3-11-1953 conferred no right on Chunilal and contended that his offer should have been accepted by both the courts below. He contended in the alternative that the order which was made by the High Court directing a sale by public auction of these shares was, under the circumstances, quite correct.

19. Counsel for Madhubhai contended that the order made by the High Court directing a sale of these shares by public auction in the open market was conducive to the benefit of the contributories, that the contributories had in fact countermanded the authority given by them to the Liquidators by their subsequent, letters addressed to them between 19th July 27th July 1955 and that the judgment of the High Court should be sustained.

20. The Liquidators had come in for considerable criticism at the hands of all the parties. Chunilal had charged them with having sided with Adhyaru when he made the report to the court on 3-8-1955.

Adhyaru had charged them and in particular Trikamlal with having obtained the offer of Chunilal, and Madhubhai had charged them with not having prominently brought to the notice of the District Judge the fact that the contributories had countermanded their authority as above and also the fact that the said 1936 shares if sold en bloc would fetch a much higher price than was offered either by Chunilal or by Adhyaru. Their conduct met with disapproval at the hands of the High Court and it was by reason of what the High Court thought of their attitude that even though the High Court refused to accept Chunilal's offer it also refused to accept Adhyaru's offer and directed that a sale by public auction of these shares should be held by the District Court as above stated.

Counsel for the Liquidators urged before us that they were no doubt guilty of any indiscretion in so far as they did not prominently bring to the notice of the District Judge the fact of the countermanding of their authority by the contributories and the further fact that if the said shares were sold en bloc in open market they might have fetched much more than Rs. 500 per share which had been offered by Chunilal and Adhyaru. He, however, endeavoured to justify the conduct of the Liquidators in all other respects and urged that it was in the interest of the contributories that the order made by the High Court should be sustained.

21. It is necessary to clear the ground by considering the two points which particularly weighed with the High Court, viz., (1) that Chunilal had committed a breach of the agreement dated 3-11-1953 and (2) that he was not entitled to any right under the agreement. Clauses (5) and (6) of the agreement dated 28-9-1953 which were in terms incorporated in the agreement entered into between the Liquidators and Chunilal provided that Chunilal would purchase the shares issued by the Himabhai Company at the rate of Rs.500 per share within five months from the date of the execution of the Sale Deed from such contributories as intended to cash the said shares and notify their intention and deliver the share certificates with transfer forms duly signed and executed by them to Chunilal and pay the said amount of Rs. 500 per share to such contributories.

A sum of rupees three lacs was paid in cash by the Himabhai Company to the Liquidators but if the Liquidators required further funds for payment to the creditors the Liquidators were entitled under cl.(6) at any time to submit up to 700 shares allotted to them by the Himabhai Company to Chunilal and Chunilal agreed and undertook to pay to the extent of Rs. 3 1/2 lacs on such shares on transfer forms duly executed at the rate of Rs. 500 per each such share in addition to expenses of such transfer of shares pertaining to those shares only. No period was specified within which the Liquidators were entitled to submit these 700 shares to Chunilal.

It appears that the Liquidators expected to wind up the affairs of the Company within a period of five months from the execution of the Sale Deed and to distribute the 1936 shares or such part thereof as remained with them after they had exercised their right under cl.(6) to the contributories and it was after such distribution that the contributories were entitled to exercise their right under cl. (5) to cash the said shares with Chunilal at the rate of Rs. 500 per share on their complying with the formalities therein contained. That expectation of the Liquidators was not realised. The liability of the National Mills for payment of income-tax was assessed at a very high figure which was beyond their expectation and it was, therefore, not found possible by the Liquidators to pay off the debts due to the creditors and to distribute the shares to the contributories.

It appears that they were not able to proceed with the work of winding up even by the exercise of their right under cl(6) and did not think it feasible for them to get Rs. 3,50,000 from Chunilal by offering 700 out of these 1936 Shares which were allotted by the Himabhai Company in their names. They, therefore, set about obtaining letters of authority from the contributories and by 17-9-1954 succeeded in obtaining such letters of authority from contributories to the extent of 908 out of these 1936 shares according to the version of Chunilal and 1236 out of these 1936 shares according to their own version. They appear to have considered that with the letters of authority in respect of the 1236 shares they would be entitled to tender the whole lot of 1936 shares to Chunilal and call upon him to pay the sum of Rs. 9,68,000 computed at the rate of Rs. 500 per share by the combined operation of cls. (5) and (6), they being entitled in their own right to submit 700 shares to Chunilal cl. (6) and they having letters of authority from the contributories to the extent of the balance of 1236 shares. These were the documents which they purported to tender to Chunilal on

the evening of 17-9-1954.

The whole tender was as composite tender and Chunilal was not satisfied that it was a valid tender of these 1936 shares by the Liquidators to him. The correspondence which took place between the Liquidators and Chunilal between 17-9-1954 and 19-9-1954 makes it abundantly clear that at that stage the Liquidators had not got with them the requisite letters of authority from the contributories so as to enable them to tender even the 1236 shares to Chunilal nor did they at that time make it clear to Chunilal that they were tendering the balance of 700 shares to Chunilal in exercise of their right under cl.(6).

It may be that Chunilal expected that he would ultimately be able to acquire these shares from the individual contributories beyond the said period of five months at the then market rate which according to the then expectation could never be more than Rs. 450 per share, which was much less than Rs. 500 per share which he had agreed to pay under the terms of his agreement. Whatever may have been at the back of his mind, the fact remains that the Liquidators, on the evening of the 17-9-1954, did not make a valid tender of these 1936 shares to Chunilal and Chunilal was well within his rights in refusing to accept the same. He made his position clear in his letter dated 19-9-1954 which he addressed to the Liquidators and it is futile to urge that the attitude which he took up on 19-9-1954 was a pure after-thought.

We are of the opinion that the District Judge was right in his appreciation of the situation as it obtained on 17-9-1954 and the High Court's conclusion that Chunilal committed a breach of the agreement was clearly erroneous.

22. It is no doubt true that on a true construction of cls. (5) and (6) of the agreement dated 3-11-1953 Chunilal had no right to acquire these shares from the contributories or the Liquidators. The contributories and the Liquidators were not bound to offer any portion of these shares to him and if they wanted to sell these shares to other parties they would have been entitled to do so.

Clauses (5) and (6) of the agreement, however, were beneficial to the contributories and the Liquidators and the Liquidators had obtained from Chunilal an undertaking that, if the contributories offered their shares to Chunilal within five months of the execution of the Sale Deed and likewise they also submitted to him 700 out of these 1936 shares at any time thereafter. Chunilal would pay to them the price of these shares at the rate of Rs. 500 per share which price was certainly far higher than the price of the shares which obtained in the market at or about the times when the agreements were entered into between the parties.

It was a distinct advantage which was stipulated for the benefit of the contributories and the Liquidators and it was with a view to secure that advantage to themselves that the Liquidators armed themselves with the letters of authority from the contributories such as were available to them and purported to make the tender of all the 1936 shares to Chunilal on the evening of 17-9-1954. The price of these shares quoted in the market was no more than Rs. 427-8-0 per share and in purporting to make this tender the Liquidators wanted to secure a definite advantage to themselves and the contributories by trying to hold Chunilal to his obligation to pay Rs. 500 per share.

It was contended that Chunilal committed a breach of the agreement and the agreement, therefore, came to an end. There was nothing, however, to prevent the Liquidators from submitting to Chunilal 700 shares in exercise of Their right under cl. (6) at any time and there was also nothing to prevent Chunilal, if any such offer had been made in the further , from waiving his right to have the shares

offered by the contributories to him in terms of cl (5) within a period of five months from the dated of the execution of the Sale Deed.

As a matter of fact, the alleged breach by Chunilal of the agreement was not accepted as such by the Liquidators and they, in fact, carried on negotiations with him after 19-9-1954 to induce him to fulfil his obligation thereunder. Chunilal, however, would not yield and the Liquidators, therefore, gave the contributories to understand that Chunilal had committed a breach of the agreement. The Liquidators also approached Adhyaru who was unwilling in the first instance to go in for the purchase of these shares.

It was only when Adhyaru found himself frustrated in his attempt to get the five shares of the Himabhai Company which he had purchased in the open market transferred to his name proper was wounded and he decided to go in for the purchase of this whole lot of 1936 shares obviously with a view to make a bid for the managing agency of the Himabhai company after acquiring these shares.

Madhubhai and the other contributories in the share of the 57 shareholder of 108 shares of the National Mills wrote the 11 letters between the dates 19th July and the 29th July 1955 whereby they called upon the Liquidators to sell the said shares in the open market and to recover the loss, if any, from Chunilal by taking the necessary legal proceedings. These letters were intended to secure for the contributories the sum of Rs. 500 per share which had been agreed to be paid by Chunilal in terms of clause (5) of the agreement and the directions which were given by these contributories to the Liquidators under those letters could not have been given if Adhyaru's offer of purchase of these 1936 shares at the rate of Rs. 500 per share had already been obtained by the Liquidators before those letters were addressed to them by the contributories.

The whole idea at that time was to sell these shares in the open market at the risk and cost of Chunilal and to sue him in the court of law, if necessary for recovering the loss, if any. The contributories also by these letters asked the Liquidators to support Madhubhai and others in the resolution which they were going to move at the Annual General Meeting of the Himabhai Company which was to be held on 6-8-1955 with a view to safeguard the interest of the contributories but these directions also were not calculated to do anything further than try to punish Chunilal for his alleged breach of the agreement.

Adhyaru made up his mind finally on 27-7-1955 and he wrote a letter to the Liquidators offering to purchase these 1936 shares at the rate of Rs. 500 per share subject to the sanction of the District Court. He gave a cheque of Rs. 1,00,000 as and by way of earnest which cheque the Liquidators kept with themselves pending the sanction of the District Court. It was not cashed by them at any time.

In the meanwhile, Chunilal, through his co-director Ratilal Nathalal, had an interview with Trikamlal in the office of Vasavda and Trikamlal gave to Ratilal Nathalal a draft of the letter to be addressed by Chunilal to the Liquidators waiving his objections to the tender which purported to have been made by the Liquidators to him on the evening of 17-9-1954 and offering to take delivery of the said 1936 shares for fully consideration of Rs. 9,68,000.

Trikamlal had no express authority from his co-Liquidator Dave in the matter of these negotiations but Trikamlal appears to have thought that he would be able to persuade Dave and complete the transaction. He not only procured from Chunilal on 29-7-1955 a letter withdrawing his contentions about the contract to purchase the shares at the value of Rs. 500 per share but also procured from

him on the same day another letter agreeing to give the Liquidators the dividend sanctioned at the Annual General Meeting of the Himabhai Company for the year 1954 in respect of these 1936 shares. These two letters along with the cheque for Rs. 9,68,000 were handed over to Trikamlal on the evening of the same day at his place of residence and Trikamlal gave to Matubhai, the son of Chunilal, at that time the proxies in respect of there 1936 shares to enable Chunilal to vote at the Annual General Meeting of the Himabhai Company which was to be held on 6-8-1955 in any manner he desired so that Chunilal would be able to thwart the move which was contemplated by Madhubhai and other share holders of the Company.

Trikamlal also, on 2-8-1955, cashed the cheque of Rs. 9,68,000 though in the receipt which he gave to Chunilal he stated that the same was subject to approval by his co-Liquidator Dave and subject to the sanction of the District Court. These were the Circumstances attendant upon the offer Chunilal to purchase these 1936 shares which was placed by the Liquidators before the court on 3-8-1955. Even though Chunilal had initially no right to have these 1936 shares offered to him by the contributories and the Liquidators under cls. (5) and (6) of the agreement, the events that happened in July 1955 culminating in his addressing those two letters of 29-7-1955 to the Liquidators, his giving the cheque of Rs. 9,68,000 drawn by him in favour of the Liquidators to Trikamlal, the giving of the proxies by Trikamlal to him and the encasement of the cheque though it was hemmed in with a condition that the acceptance was subject to the sanction of the District Court, really created in Chunilal an expectation amounting to an inchoate right depending on the fulfilment of the conditions or at least a preferential claim to have these 1936 shares delivered to him together with the relevant transfer forms duly signed by the Liquidators. This was what may well have been referred to by the District Judge in his judgment delivered on 4-8-1955 as a right.

Even though both the offers of Chunilal and Adhyaru were placed before the court each offering no more than Rs. 500 per share for the purchase of the whole lot of 1936 shares, the District Judge was perfectly right in the exercise of his discretion in sanctioning the offer of Chunilal who was fulfilling his obligation under the agreement and was certainly entitled to better consideration at the hands of the court than Adhyaru. The fact that Adhyaru's offer was dated 27-7-1955 and Chunilal's offer was dated 29-7-1955 was neither here nor there.

Both were in effect simultaneous offers for the purchase of this block of 1936 shares at the price of Rs. 500 per share as it appears to have been understood and if that was the position there were in the events that happened perfect justification for the District Judge exercising his discretion in favour of Chunilal in spite of the recommendation which had been made by the Liquidators in their report in favour of Adhyaru. These was no erroneous exercise of discretion by the District Judge in favour of Chunilal as held by the High Court.

23. It was strenuously urged both before the High Court and before us by counsel for Madhubhai and the Liquidators that no notice was given to the contributories of the application made by the Liquidators before the District Judge and the interests of the contributories were not properly safeguarded.

The Liquidators, it was contended, should have brought specifically to the notice of the District Judge the desire of the contributories to have the said shares sold in the open market and ought to have pointed out that a sale by public auction of these shares at that stage was likely to fetch more than Rs. 500 per share. The discretion exercised by the District Judge therefore in favour of Chunilal was, it was submitted, erroneous and was rightly interfered with by the High Court.

24. This argument, however, ignores the true position that at no material time prior to 4-8-1955 the market price of the shares of the Himabhai Company was anywhere beyond Rs. 427-8-0 or at the highest Rs. 450 per share. This position was well-known to the Liquidators as well as to the contributories and it was a realisation of this position that actuated the Liquidators in obtaining the letters of authority from such of the contributories as they could before 17-9-1954 and purporting to tender the whole lot of 1936 shares to Chunilal so as to hold him to his obligation to pay the sum of Rs. 500 per share.

The market never improved up to 4-08-1955 and it was after considerable effort that the offer of Adhyaru for the purchase of these 1936 shares was obtained by the Liquidators on 27-7-1955. The anxiety of the Liquidators all along was to obtain the sum of Rs. 500 for each share and that was also the anxiety of the contributories in the letters which were addressed by them to the Liquidators between the 19th July and 29th July 1955.

The contributories on the Liquidators in fact wanted to hold Chunilal to his obligation and to all intents and purposes would not have taken any further proceedings against Chunilal if in fact he had fulfilled his obligation and paid to the Liquidators the full amount of Rs. 9,68,000 in exchange for the share certificates for 1936 shares which had been allotted by the Himabhai Company in their names together with blank transfer forms duly signed by both the Liquidators. There was thus no prospect at all on 3-8-1955 when the application was made by the Liquidators to the District Judge of obtaining anything beyond the said sum of Rs. 500 per share and there was also no question of giving any notice to the contributories in the matter of the said application.

No contributory would have cared as the matters then stood to appear before the District Judge and we fail to understand what contention the contributories would have urged before the District Judge apart from that which was already urged by the Liquidators in their report. There was no question also at the time of any competition between Chunilal on the one hand and Adhyaru on the other, much less between either or both of them and outside parties. Nobody at that time thought that the shares were capable of realising more than Rs. 500 per share which Chunilal or Adhyaru were willing to offer.

As a matter of fact, Madhaubhai, who was one of the biggest contributories of the National Mills, joined Adhyaru in the appeal which he took to the High Court against the judgement and order of the District Judge dated 4-8-1955 and made common cause with him.

The grounds of appeal which were urged recognised this very position that nothing more than Rs. 500 were ever possible to be realised by a sale of these shares in open market and the answer which was made by the counsel for Madhubai to Bavdekar J., on 16-8-1955 that these shares would probably fetch a higher price in the open market was merely the result of concerted action on the part of Madhubai and Adhyaru to clinch the bargain in favour of Adhyaru by making him offer Rs. 50 more per share than what Chunilal had offered in his turn.

Even at that time there was no question of any higher price being obtained by public auction of this block of 1936 shares in the open market. The hearing before the High Court also proceeded on this basis and in the early stages of the hearing of the appeal before the High Court on 24-8-1955 and 25-8-1955 Madhubai actually supported Adhyaru. It was only on the evening of the second day of the hearing viz., 25-8-1955 that counsel was instructed by Madhubai to convey to the Court that

these shares might fetch a much higher value in the open market at Ahmedabad.

The High Court then called upon him to prove the bona fides and the genuinences of his complaint by producing before it an offer at the higher rate and the further hearing of the appeal was adjourned. It was only when the hearing was resumed on 6-9-1955 that counsel for Madhubhai produced before the High Court a receipt passed by the Liquidators that Pasavala had deposited with the Liquidators a sum of Rs. 11,61,600 at the rate of Rs. 600 per share.

It must be noted that right up to the evening of 25-8-1955 there was nothing before the Court to show that beyond the trumped up offer of Adhyaru there was any possibility of securing anything beyond Rs. 500 per share even by a sale in the open market. It was after the adjournment of the hearing of the appeal on 25-8-1955 that Madhubhai appears to have approached other parties and procured Pasavala to offer Rs. 600 per share and deposit the total price of 1936 shares at that rate with the Liquidators.

It was then that Adhyaru and Madhubhai parted company and it was on 6-9-1955 that this offer of Pasavala was brought to the notice of the High Court in effect submitting to the court that Adhyaru's offer also should not be accepted. Counsel for one Gangaprasad Puria also offered to purchase en bloc the 1936 shares at the rate of Rs. 625 per share. The High Court, under the circumstances, though that in the interest of the contributories a sale by public auction of these 1936 shares en bloc should be held by the District Court with Rs. 600 per share as the minimum offer for the purchase of the shares in question.

25. It is clear from the above that there could be no question of the District Court giving any notice to the contributories and the District Judge was right in the circumstances of the case in considering the only two offers which were submitted before him and exercising his discretion and giving the sanction in favour of Chunilal as he did.

If even the contributories who interests were primarily to be safeguarded had not the slightest notion that anything more than Rs. 500 per share could be obtained by a sale of the shares in open market as is evident from the attitude of Madhubhai right up to 25-8-1955, much less could the Liquidators or the District Judge himself have thought of having these shares sold in the open market. If that step had been then taken the result would have been disastrous and not even Rs. 427-8-0 per share would have been obtained at such auction sale.

The contributories would certainly have suffered and even the offers made by Chunilal and Adhyaru would then have been of no avail. The adventitious circumstance of third parties coming into the field after 25-8-1955 could not have been foreseen by any of the parties concerned and it would be certainly unfair to Chunilal and to Adhyaru to refuse to accept their offers merely on the ground that a sale by public auction was directed by the contributories and might have fetched a higher price than that of Rs. 500 per share actually offered by Chunilal or Adhyaru.

26. It was urged that the appeal was by way of re-hearing of the original application and it was open to the High Court to take into consideration the further facts and events in arriving at its conclusion as it did. We are not impressed with that argument.

Even though an appeal is in the nature of a re-hearing and the courts in this country can take into account the facts and events which have come into existence after the decree appealed against, it could be only for moulding the relief to be granted in the appeal : Vide observations of

Varadachariar, J., in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*, 1940 FCR 84 at p. 103 : (AIR 1941 FC 5 at p. 13) (A). In the events that had happened as narrated above, there was no justification, therefore, for the High Court taken into consideration the higher offers which were brought into existence by Madhubhai after 25-8-1955 based on a bid for the managing agency of the Himabhai Company on the strength of the acquisition of the voting rights in respect of the whole block of 1936 shares.

The position as it stood on 4-8-1955 was to be considered and it was on an appreciation of the position as it then stood that the District Judge had to and did consider whether the offer of Chunilal or that of Adhyaru should be sanctioned.

27. If, therefore the discretion of the District Judge was not, on the facts and circumstances as they then stood, erroneously exercised as stated before and there was also no prejudice to the interests of the contributories, the High Court was not justified in interfering with the discretion exercised by the District Judge and setting aside the order of the District Judge and directing a sale of these 1936 shares by public auction as it did.

28. There is also a further consideration why the offer of Chunilal should have been accepted in preference to that of Adhyaru. By his letter dated 29-7-1955 addressed to the Liquidators, Chunilal had offered to give to the Liquidators the dividend sanctioned at the Annual General Meeting of the Himabhai Company for the year 1954.

The directors of the Company had recommended Rs. 20 per share as and by way of dividend and that dividend was to be declared at the Annual General Meeting which was to be held on 6-8-1955. The shares stood in the name of the Liquidators in the register of shareholders of the Himabhai Company and, so far as the Company was concerned, that dividend would be payable to the Liquidators in whose names the shares stood, unless by the time that the dividend came to be declared the shares were transferred in the register of shareholders to the name of Chunilal.

The books of the Company were to be closed from 30-7-1955 and unless the transaction had been completed and the shares transferred in the register of shareholders of the Company to the name of Chunilal he would not have been entitled to receive the dividend which would be sanctioned at the

Annual General Meeting of the Company on 6-8-1955. This circumstances was considered enough by the High Court to enable it to hold that the offer of Chunilal to the Liquidators to give them the dividend was illusory.

It is no doubt true that unless and until the shares were transferred in the name of Chunilal in the register of shareholders of the Company before the date of the Annual General Meeting Chunilal would not have been entitled to the dividends on these 1936 shares. The Company would not recognize anybody except the person whose name was shown as the shareholder in the register of shareholders of the Company and would certainly not be bound to pay the dividends to Chunilal even though the transaction between the Liquidators and Chunilal had been completed. The position, however, between the Liquidators and Chunilal was quite different.

Even though Chunilal could not under these circumstances claim the dividend from the Company, as between the Liquidators and Chunilal, Chunilal would be entitled to the dividend and the Liquidators, even though they received the dividend from the Company by virtue of their having been shown as shareholders in the register of shareholders of the Company, would be bound, once

the contract of sale had been entered into between them and Chunilal, to hand over the said dividend to Chunilal. The position in law is thus enunciated in Palmer's Company Law, 19th edn., page 205 :

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"Declared but unpaid dividend passing on transfer.

A transfer of shares, after dividend declared, does not, as against the Company, carry the dividend, even where the transferee has expressly bought cum div., but, as between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged."

There is nothing in the record of the case to show that there was any other arrangement in this behalf and the normal position was that, after the contract for sale was entered into between the Liquidators and Chunilal, Chunilal would become entitled to the dividend on these 1936 shares. Even if the date of the sanction by the District Court, viz., 4-8-1955 be considered as the material date for this purpose, the position would have been no different because both the offers of Chunilal and Adhyaru were before the District Court and the moment the Court sanctioned either of the two offers, the contract of sale would become complete.

If the contract of sale thus became complete on 4-8-1955 before the declaration of the dividend at the Annual General Meeting of the Himabhai Company on 6-8-1955, as between the Liquidators and the purchaser the Liquidators would be entitled to recover the dividends from the Company but would be bound to hand over the same to the purchaser.

If Adhyaru's offer had been sanctioned Adhyaru would have got these dividends from the Liquidators and the Liquidators would not have been entitled to retain the same there being nothing to that effect in the terms of the offer given by Adhyaru to the Liquidators on 27-7-1955. On the other hand, the Liquidators would have been entitled to retain the dividends as against Chunilal because, by his letter dated 29-7-1955 he had agreed to give the dividends the Liquidators.

In either view of the situation, the Liquidators stood to gain Rs. 20 more per share if Chunilal's offer was sanctioned. They were thus in a position to realise Rs. 520 per share as against Rs. 500 per share offered by Adhyaru. If this circumstance was taken into account there is no doubt that the offer of Chunilal was higher than that of Adhyaru and deserved to be sanctioned by the District Court.

29. Having regard, therefore, to all the circumstances of the case, we are of the opinion that the order made by the District Judge was right and the High Court was in error when it set it aside and directed that he said 1936 shares should be sold by public auction.

30. Civil Appeal No. 2 of 1956 will, therefore, be allowed, Civil Appeal No. 3 of 1956 will be dismissed, the order made by the High Court will be set aside and the order made by the District Judge restored. Under the peculiar circumstances of this case, we feel that the proper order for costs should be that each party appearing before us should bear and pay his own costs throughout.

31. Chunilal will be at liberty to withdraw the sum of Rs. two lacs deposited by him as and by way of security in the Court of the District Judge at Ahmedabad pursuant to the order of this Court, dated 7-10-1955. The Liquidators will hand over to Chunilal 1936 shares of the Himabhai Company standing in their name in the register of shareholders of the Himabhai Company together with such number of transfer forms duly signed by them as Chunilal requires within a fortnight of the certified

copy of this decree being served upon them.

Order accordingly.

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