

(1952) 09 BOM CK 0006
In the Bombay High Court
Case No : O.C.J.I.C. No. 36 of 1948

Blanche Fonseca	Vs	APPELLANT
Jupiter Airways Ltd.		RESPONDENT

Date of Decision : 25-09-1952

Acts Referred:

Companies Act, 1913 — Section 101, 101(7), 102, 102(1), 136
Contract Act, 1872 — Section 19
English Companies Act — Section 49
English Companies Act, 1900 — Section 4, 5

Citation : AIR 1953 Bom 417 : (1953) 55 BOMLR 473 : (1954) ILR (Bom) 1

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Advocate : S.A. Desai and B.K. Amin, for the Appellant; S.V. Gupte, for the Respondent

Judgement

1. This is a chamber summons for rectification of the register of shareholders of the respondent company by excluding therefrom the name of the applicant in respect of 100 ordinary shares of the said company and also for rectification of the list of contributories by omitting the name of the applicant therefrom.

2. It appears that the applicant on 15-7-1946, made an application for 100 shares of the company and paid a sum of Rs. 250 which was payable with the application. On 3-9-1946, these shares were allotted to her by a resolution of the directors of the company and a notice of allotment was given to her by a letter dated 10-9-1946. Thereafter by a letter of 13-9-1946, the applicant repudiated the contract for taking up the shares. This letter has not been produced before me, but it was obviously a letter in which no ground had been given for repudiating the contract for taking up the shares. The company accordingly by its letter of 4-10-1946, asked for the ground on which the allotment was challenged by the applicant. Such ground was supplied by the applicant by her letter dated 3-1-1947, in these terms :

"From an inspection taken by me in the office of the Registrar of Companies, I find that in the statement in lieu of Prospectus filed by you on 3-9-1946 upon which the allotment made to me on the same date is based, there is no mention made of the minimum subscription upon which the Directors will proceed to allotment. This is at illegality and I therefore repudiate the allotment,"

The statutory meeting of the company was held on 12-3-1947. No proceedings were taken by the applicant for having her name removed from the register of shareholders until the present chamber summons.

3. Section 102(1), Companies Act, "inter alia" provides as follows:

"An allotment made by a company to an applicant in contravention of the provisions of Section 98 or Section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting or the company and not later ... and shall be so voidable notwithstanding that the company is in course of being wound up."

Now, in the present case what is alleged is that the allotment was in contravention of the provisions of Section 101(7). It is not disputed that the allotment is in contravention of that sub-section, and I need not, therefore, reproduce that Sub-section. The only question that has been raised and argued is whether there has been a sufficient repudiation by the applicant of the allotment of shares made to her.

4. Now, in the first instance it is contended that the notice of repudiation which was given on 13-9-1946, was ineffective and invalid because it did not set out the ground on which the repudiation was made. In my opinion there is no substance in this contention. A party entitled to avoid a contract is not bound to give any reasons for doing so, and even if he did, he may in subsequent proceedings support the repudiation on any other ground. In a case reported in -- "National Motor Mail-Cuach Co. Ltd. In re", (1908) 2 Ch 228 (A) the notice of repudiation which was given u/s 5, English Companies Act, 1900, which corresponded to Section 102, Indian Companies Act, is set out at p. 229, and it is in these terms :

"I beg to inform you that I hereby avoid the allotment of 250 shares in the above company made to me in June last."

No ground whatever was assigned in the notice. Swinfen Eady J. in his judgment set out the notice and it was not even suggested that the notice was bad. But assuming that it were necessary to set out the ground of repudiation in the notice itself, that ground was set out in the letter of the applicant dated 3-1-1947. u/s 102, Sub-section (1), the repudiation has to be within one month after the holding of the statutory meeting of the company and not later. Actually in this case the statutory meeting was held on 12-3-1947, only and therefore the repudiation even if one holds that the repudiation was by the letter of 3-1-1947, and not by the letter of 13-9-1946, was well within time.

5. It is next urged that in order that an allotment should be effectively avoided u/s 102, Sub-section (1), it is not sufficient to give a notice of repudiation but such notice must be followed up by appropriate legal proceedings to have the register of shareholders rectified. Against this contention, it is pointed out on behalf of the applicant that the section does not contain any such requirement; and that is perfectly true. But this section in the Indian Companies Act is an exact reproduction of Section 5, English Companies Act, 1900, which is now Section 49, English Companies Act, 1943, and in cases decided in England it has been laid down that it is not sufficient for an allottee merely to give notice of avoidance of the allotment but he must take legal proceedings promptly. The earliest of such decisions is to be found in -- "Taite's Case", (1867) 3 Eq 705 (B). In that case a shareholder gave notice to the company on 2-7-1866, that, unless within three days steps were taken to remove his name from the register of shareholders, he would apply to the Court. The directors by their apply of July 3 intimated that they would oppose his application. The shareholder left town and upon his return about the end of August, finding that his name was still on the register of shareholders, he stated that he would apply to the Court as soon as the Long Vacation was over. It was held that the delay between July 3 and the beginning of the long Vacation was fatal to the shareholder's application.

Sir William Page-Wood V. C. in a short judgment simply stated (p. 793) :

"After this delay I must refuse his application ..."

This principle laid down by the English Courts has been followed in many subsequent decisions. To refer only to a few of the important ones, in (1908) 2 Ch 228 (A), it was held u/s 5, English Companies Act, 1900, that it was not necessary that actual legal proceedings should be taken within the month allowed by Section 5 as a condition of avoidance. Notice of avoidance within the month followed by prompt legal proceedings after the month was sufficient.

Swinfen Eady J. in his judgment observed (p. 234) :

"...Under the old law it was generally necessary to commence proceedings before the commencement of the winding-up. But Section 5 expressly says that an allotment in contravention of Section 4 "shall be avoidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up." The winding up, therefore, does not preclude the avoidance of the allotment. The applicants were not bound to institute legal proceedings immediately or within the month. They were entitled to wait a reasonable time for the decision of the board before taking proceedings. After the winding-up they followed up their notices by taking proceedings with reasonable promptitude. They are entitled to the removal of their names from the register and to the return of the money they have paid..."

The learned Judge assumes in this judgment what was the well recognised principle in English Courts that it is not sufficient for avoidance of a contract to

take shares merely to repudiate it by giving a notice but such repudiation must be followed up by the institution of legal proceedings.

6. We next have another decision of the King's Bench Division in -- "First National Reinsurance Co. v. Greenfield", (1921) 2 KB 260 (C). This was an action by a company for calls on shares, and the defendant's answer was that he had repudiated the contract because of mis-representation in the prospectus. It was held that it was not sufficient for the defendant to have repudiated the contract, but after discovering the misrepresentation he should have taken prompt steps to have his name removed from the register of the company.

7. These cases lay down that an allotment is effectively avoided not merely by giving a notice of repudiation or avoidance but by following it up with legal proceedings taken promptly. So far as the time during which the legal proceedings should be taken is concerned, the Calcutta High Court has taken a view somewhat different from the view adopted by the English decisions; and in -- "Calcutta Celluloid Works Ltd. v. Labanya Muhan", 47 CWN 421 (D) in a suit for rescission of a contract to take shares on grounds of fraud and misrepresentation, Gentle J. held that delay in taking proceedings promptly by the shareholder, provided steps are taken within the statutory period, will not disentitle him to relief, so long as the company is a going concern. It is unnecessary for me to determine whether this view of the law ought to be preferred to the view uniformly adopted in England, because I am not dealing on this chamber summons with the rectification of the register of a company in existence. The company now is in liquidation and different principles have been held to apply in any event to an application by a shareholder to avoid an allotment of shares after the company goes into liquidation.

Gentle J himself in his judgment points out (p. 431) :

"...In (1921) 2 KB 260 (C) it was emphasised that even in the absence of liquidation the fact of a shareholder, although being entitled to rescind his contract with a Company, delaying doing so might affect creditors who could inspect the register. The creditors' rights, however, save as against the Company itself do not arise until winding up commences. Until that event occurs the contract between the shareholder and the Company is one between the parties to it and the shareholder's liability arises under the contract and not from any statutory provision, the liability u/s 156 only commences upon winding up. If the Company goes into liquidation after proceedings for rescission have been taken but before they are terminated, the rights of the creditors having then intervened, the question of the delay by the shareholder arises, as by that time the creditors are directly concerned and their personal rights may be affected."

The learned Judge only held that so long as the company is a going concern the shareholder may come to Court for avoiding a contract to take shares not necessarily promptly so long as he comes within the statutory period of limitation.

8. This position was also pointed out by Lush J. in his judgment in (1921) 2 KB

260 (C) where the learned Judge points out that there are three classes of cases in which the question of repudiation of contracts arises. The first two are executory contracts and executed contracts. In the first, all that a party has to do is to say that he has given notice of repudiation. In the second the party entitled to repudiate the contract must do more than merely prove that he is entitled to repudiation. There must be a restitution "in inte-grum" as far as possible. Then the learned Judge proceeds to observe (p. 267) :

"...At first sight it might appear that that includes a case like the present where there was a contract to take shares and the shares have been duly allotted. Shares stand, in my opinion, upon an entirely different footing; they represent what I may call a third class of cases. If a person agrees to accept shares, and shares have been allotted to him, and his name is on the register, he is liable by statute to pay the calls...

What is a proper defence to an action for calls brought against a shareholder? The member being liable "qua" shareholder to pay the calls, the only plea one would have thought that could be effective would be a plea that he is not a shareholder. The plaintiff alleges that the defendant has a certain status, that of shareholder. The statute says a shareholder must pay the calls. One would expect the plea would be: "I am not a shareholder." In substance that is the proper plea. I do not mean that a person must plead and prove that his name has actually been taken off the register, but he must plead that, so far as he is concerned, he has taken steps, and taken them within a reasonable time after discovery of the fraud, to have his name removed from the register. That is all he can do. He cannot take his own name off the register and thereby cease to be a shareholder. He can only invoke the jurisdiction of the Court and ask it to do so. If he has done that, and if it turns out ultimately that his name will be removed from the register, the judgment of course dates back to his application, and it will in substance turn out to be true that he has ceased to be a shareholder and therefore not liable to pay calls. That, in my view, is the position in law of a defendant in an action of this kind; it is not enough merely to treat the claim as if it were a claim on a contract and say: "I have been deceived, and I have repudiated my contract"-"

Incidentally these observations of the learned Judge lend some support to the suggestion that the words "voidable at the instance of the applicant" used in Section 102 mean that the applicant has to invoke the jurisdiction of the Court and ask to avoid the contract. The words "voidable at the instance of the applicant" may in this connection be contrasted with the language of Section 19, Contract Act, which makes contracts "caused by coercion, fraud or misrepresentation" voidable at the option of the party, and it supports the contention that in addition to giving a notice of avoidance, the allottee must approach the Court to have his name removed from the register in order that the allotment should be successfully avoided. Therefore, in this case after the company has gone into liquidation and the rights of third parties as against the

shareholders have come into existence, it is not open to the applicant to come to Court to have the register of shareholders rectified.

9. The same conclusion is also reached by a somewhat different process of reasoning. u/s 156 in the event of the company being wound up, every present and past member is liable to contribute to the assets of the company, and it has been held by their Lordships of the Privy Council that this liability is "ex lege", and even if the contract for taking up shares was void, a shareholder could not escape this liability. In -- AIR 1932 240 (Privy Council) their Lordships of the Privy Council were dealing with the case of a shareholder who at the commencement of the winding up had been for a long time entered on the register of shareholders. It appears that under a contract between the company and the shareholder the shareholder had agreed to take up certain shares in consideration of the company giving him certain contracts. This agreement between the company and the shareholder was challenged in a Court of law by the shareholder and was held to be illegal and void. The shareholder in winding up proceedings applied that his name should be removed from the list of contributories. This application was rejected by the Allahabad High Court and it is against this rejection, that the appeal was taken to their Lordships of the Privy Council.

In the judgment of their Lordships of the Privy Council delivered by Lord Russell of Killowen it was assumed that the decision that the agreement between the shareholder and the company included an agreement to take up the shares was illegal and void; and on this basis the judgment proceeds to say (p. 243) :

"... But even with this assumption made in their favour, the Appellants cannot, in their Lordships' view, succeed. Whatever may have been the rights and liabilities of the testator before the winding up intervened, the position was altered by the happening of that event. At the commencement of the winding up he was and had for over three years been entered on the register of shareholders as the holder of the shares now in question, with his full knowledge and assent. On the winding up, Section 136, Indian Companies Act, came into play. His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of those shares, but after the winding up his liability in respect of the shares arose "ex lege" and not "ex contractu."

Their Lordships accordingly advised His Majesty that the appeal should be dismissed.

10. Mr. B. K. Amin for the applicant has drawn my attention to the provisions of Section 38, Companies Act, which confer on the Court discretion to rectify the register even after winding up commences. There is no doubt that in a proper case the Court may order rectification of the register after the commencement of the winding up proceedings, but it appears to me that where a shareholder seeks

to avoid a contract for taking shares after the winding up, the Court will not exercise its discretion in his favour unless the contract was "ab initio" void. u/s 102, Companies Act, the contract is not "ab initio" void. It is only voidable at the instance of the allottee. If he wishes to avoid, he must take legal steps to have it avoided, and if he adopts those steps within a month from the date of the statutory meeting, a winding up order made during that period will not affect his rights. But if he does not take any steps within that period, then a winding up order will debar him from coming to Court for rectification of the register, because by that time the rights of third parties have come into existence and they cannot be defeated at the instance of a shareholder to whom it was open to come to Court with promptitude, and who did not choose to do so.

The principle that when winding up commences it is too late for a shareholder to avoid a contract for taking up shares was established in England in the case of -- "Oakes v. Turquand and Harding", (1897) 2 LR 325 (F). This principle was reaffirmed by the House of Lords in -- "Tennent v City of Glasgow Bank", (1879) 4 AC 615 (G), where Earl Cairns L C. observed (p. 621) :

"The case of -- "Oakes v. Turquand (F)", in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the rescission."

Where the rescission is sought on a ground other than fraud, viz., on the ground of a disregard of any statutory requirement, the case does not in my opinion, stand on any different footing.

McCardie J in his judgment in -- "First National Reinsurance Co. v. Greenfield (C)" referred to the case of -- "Oakes v. Turquand (F)", in the following passage:

"There is one further marked feature of this body of company decisions, and that is the effect of a winding-up order. It is impossible to understand many of these decisions, unless it is remembered that a winding-up order since the Act of 1862 bears a special significance and produces specific results upon contracts which have been made for the taking of shares, because since -- "Oakes v. Turquand (F)", the effect of which is very far reaching, decided the vital principle that when winding up has commenced there is no right to avoid a contract to take shares. The avoidance is not possible, unless there has been either proceedings instituted before the commencement of the winding up, or an agreement that the shareholders shall be bound by the result of other proceedings which have been taken for the avoidance of a contract to take shares."

11. In my opinion, therefore, the applicant having come to Court for an avoidance of the contract u/s 102 after the liquidation of the company and almost six years after the notice of repudiation given by her, she is not entitled to have the register rectified and her name deleted from the list of contributories.

12. The summons will, therefore, be dismissed with costs. Costs to be taxed.
Counsel certified.

13. Summons dismissed.