

(1965) 05 GAU CK 0006
In the Gauhati High Court
Case No : First Appeal No. 32 of 1960

Chiranjilal Jasrasaria and Another

APPELLANT

Vs

Mahabir Dhelia and Others

RESPONDENT

Date of Decision : 08-05-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Companies Act, 1913 — Section 38
Companies Act, 1956 — Section 155, 82, 9

Citation : (1965) 05 GAU CK 0006

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : S.K. Ghose, N.M. Lahiria and J.P. Bhattacharjee, for the Appellant;
S.M. Lahiri and S.R. Khound, for the Respondent

Final Decision : Allowed

Judgement

G. Mehrotra, C.J.—This is Defendants appeal. In the year 1951 Defendant No. 3, Dhelia Brothers Private Ltd. was incorporated as a private limited company under the Indian Companies Act 1913 and having its registered office at Ouphalia Tea Estate, Moran district Lakhimpur. The authorised capital of the company is Rs. 1,00,000 divided into 10,000 ordinary shares of Rs. 10 each and subscribed and fully paid up capital is Rs. 48,000. There were four shareholders of this company. Keshoredeo Dhelia Defendant No. 4 owned 4,200 shares, Sheokishon Dhelia Plaintiff No. 3 owned 200 shares, Mohahir Dhelia Plaintiff No. 1 owned 200 shares and Mrs. Nanki Dhelia Plaintiff No. 2 owned 200 shares. Thus the Plaintiff-Respondents owned 600 shares. Defendant No. 4 was originally appointed as the Managing Director of the Company. The Plaintiffs came to know that the Defendant No. 4 out of his 1200 shares transferred 1300 shares in favour of Defendant No. 1 Sri Chiranjilal Jasrasaria and 1200 shares in favour of Defendant No. 2 Srimati Bhawani Debi Jasrasaria. The Plaintiffs further came to know that Defendant No. 1 had been declaring himself to be duly elected managing director of the company. The Plaintiffs brought the suit on these facts

for a declaration that the transfer of 2500 shares of the Defendant No 3 by Defendant No. 4 in favour of Defendants Nos. 1 and 2 was illegal and without jurisdiction and thus the Defendants 1 and 2 have not been shareholders of the company A permanent injunction was prayed for against Defendants 1 and 2 restraining them from interfering with the affairs and management of Defendant No. 3 Company. There was also a prayer for mandatory injunction against the Defendant No. 1 calling upon him to return the books of the company to the Plaintiffs.

2. The trial court, however, has decreed the suit for a declaration that the transfer of the shares by Defendant No. 4 in favour of Defendants Nos. 1 and 2 was void and it has further issued a permanent injunction against the Defendants Nos. 1 and 2 restraining them from interfering with the affairs and management of the company. The Defendants have filed the present appeal against the aforesaid decision of the trial court.

3. The first point urged by the Appellant is that the suit was not maintainable. His contention is that the suit in effect amounts to the rectification of the company's register and such a relief can only be granted by the High Court in its company jurisdiction. It is not disputed that u/s 38 of the Indian Companies Act, 1913, the rectification of the company's register can be done by the High Court as the High Court is the court as defined under the Companies Act. But there is no bar to a civil suit for a declaration that the transfer is invalid in law. In fact the proper forum for the decision of the complicated questions of title is a civil court and such matters cannot be decided in a summary proceeding under the section. In the case of *Mahadeo Lal v. New Darjeeting Union Tea Co. Ltd.* AIR 1052 Cal 58 it was held by a Division Bench of the Calcutta High Court that the remedy of the transferee of a share is not limited to an application u/s 38, but he has the right to bring a suit to get his name registered and where the case is a complicated one an action should be brought To the same effect are the cases of *Devakumar Mishra Vs. Rupak Ltd., Bank of Hindustan Ltd. v. Kowtha Suryanarayana Rao (S)* AIR 1957 Mad 702 and *Ramesh Chandra Mitter v. logini Mohan Chatterji* ILR Cal 901 : AIR 1920 Cal 789, u/s 9, CPC a suit for a declaration that the transfer is invalid is maintainable before the civil court as it is a suit of civil nature unless there is any bar under the Companies Act. We do not find anything in the Companies Act which expressly or impliedly bars such a suit. Section 155 of the Companies Act, 1956 corresponds to Section 38 of the Indian Companies Act, 1913. We are in complete agreement with the views expressed in the cases referred to above wherein the question of the interpretation of Section 38 of the Act of 1913 was involved. There is thus no substance in the contention of the Appellants that the suit was not maintainable.

4. Regarding the merits of the case Mr. Ghose's contention is that the court below was not right in holding that there was an absolute bar to the transfer of the shares by a member to a non-member. The case of the Plaintiffs-Respondents is based entirely on the ground that the transfer by Defendant No.

4 in favour of Defendants Nos. 1 and 2 was in contravention of clause 9 of the Articles of Association of the company which creates an absolute bar to the transfer of the shares to a non-member of the company Mr. Ghose contends that legally there can be no absolute bar to the transfer of the shares and further that on the proper construction of the provisions of the Articles of Association there was no absolute bar to the transfer of the shares to a non-member A right of pre-emption has been given to the members and under the terms of the Articles of Association they have a preferential right to purchase the shares But as the transfer by Defendant No. 4 was approved in the meeting of the Board of Directors in which the Plaintiffs were also present, it must be held that the Plaintiffs refused to exercise their option of purchase of shares. Section 9 of the Act of 1956 provides that save as otherwise expressly provided in the Act, the provisions of the Act shall have effect notwithstanding anything to the contrary contained in the memorandum or Articles of a company. The Articles of the company are in the nature of the contract between the various members of the company and the provisions of the Act must prevail over the provisions of the articles. Section 82 of the Act of 1956 provides that the shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the Articles of the company. This section lays down that the shares are in the nature of movable property and are transferable. The Articles of association can lay down the manner of such transfers. Section 82 thus in effect permits the transfer of the shares and there can be no absolute bar to the transfer of the shares. The manner of the transfer may be regulated by the Articles of the company and restrictions may be placed on the transfer. But there can be no absolute bar to the transfer of the shares.

5. Mr. Lahiri for the Respondents relies upon section; 3(1)(iii) of the Act of 1956 which defines a private company as follows:

"private company" means a company which, by its articles,

- (a) restricts the right to transfer its shares, if any;
- (b) limits the number of its members to fifty not including-
 - (i) persons who are in the employment of the company, and
 - (ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and
- (c) prohibits any invitation to the public (sic) subscribe for any shares in, or debentures of, the company:

Provided that where two or more persons (sic) one or more shares in a company jointly, they shall, for the purposes of this definition, be treated as a single member;

This section only defines a private company and one of the ingredients of the

definition is that the company by its Articles restricts the right to transfer its shares. But the article cannot completely prohibit the transfer of the shares. In the case of *Ontario Jockey Club (sic) v. Samuel McBride* AIR 1928 PC 291 the following observation at p. 293 of the report states the law on the point as follows:

That restrictions may be placed upon a shareholder's right of transfer of his shares cannot be questioned. The cases are numerous in which such restrictions have been upheld, shares are prima facie transferable. But there is law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall (sic) be transferred to rivals in the company's aid. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of preemption is valid.

(sic) that case on the interpretation of the agreement it was held no doubt that the restriction was only giving a right of pre-emption. The court below thus is not right in holding that there was a complete bar to the transfer of the shares to an outsider.

6. Mr. Lahiri's contention is that clause 9 of the Articles of Association does not absolutely prohibit the transfer. It only restricts inasmuch as it provides for transfer to the members only and unless it is proved that the members refused to purchase the shares or that notice was given to the other members of the intention to sell, the transfer cannot be upheld.

7. The relevant clauses of the Articles of Association are Clauses 6, 7 and 9. Clause 6 reads as follows:

6. No transfer of any share shall be made or registered without the previous sanction of the Directors who may without assigning any reason decline to give any such sanction and shall so decline in the case of any transfer the registration of, which will involve a contravention of clause 2 of these articles.

Clause 7 reads as follows:

7. Subject to the registration of these Articles the shares shall be transferable but every transfer must be in writing in the usual common form or in such other form as the Directors shall from time to time approve and must be left at the office accompanied by the certificate of the share to be transferred and such other evidence (if any) as the - Directors may require to prove the title of the intending transfer.

Clause 9 reads as follows:

9. No transfer of share shall be made to any non-member. Every member who intends to, transfer his share shall notify his intention to do so to the Board of Directors and the Board shall sell those shares as his agents to any member at a price to be agreed upon between the vendor and the intending purchaser and in

default of agreement at a value to be fixed by the Board of Directors. Reading these clauses it is clear that, there is no absolute bar to the transfer of the shares. The opening sentence of clause 9 that no transfer of share shall be made to any non-member also is no absolute bar to the transfer of the share to a non member. What clause 9 lays down is that the member intending to transfer his share has to notify his intention to do so to the Board of Directors, and thereafter the Board of Directors have got a right to sell as the agents of, the member" to any other member at a price to be agreed upon between the vendor and the intending purchaser, or, in the absence of any such agreement, on the value to be fixed by the Board of Directors.

8. Sheekishan Dhelia, witness No. 1 for the Plaintiffs has himself stated that Defendant No. 4 expressed his mind in a meeting of the Board of Director that he wanted to sell some of his shares but at that time he did not say to whom those shares were going to be sold. In cross-examination he stated that in 1956 or 1955 the Defendant No. 4 stated that he would sell some of his shares.

This statement of the Plaintiff clearly shows that there was compliance with clause 9 of the Articles of association which enjoins upon a member who intends to transfer his shares, to notify his Intention to do so to the Board of Directors. The case of the Defendants is that the intention was notified and in the meeting of the Board of Directors the transfer was approved in the presence of the Plaintiffs. This fact has no doubt been denied, it cannot, therefore, be said that there was any noncompliance with clause. 9, unless it is found as a fact that the contention of the Defendants that in the Board of Directors the transfer was approved in the presence of the Plaintiffs is false.

9. Mr. Ghose's next contention is that the finding of the lower court that the Defendants failed to establish that the transfer was made in the meeting of the Board on 22nd February 1956 in which at least these 3 Plaintiffs were present and gave their consent to such a transfer in favour of Defendants Nos. 1 and 2 is not based on any evidence. The Defendants had filed a copy of the proceedings of the meeting of the Board and had applied for the summoning of the original to prove the genuineness of the copy from the High Court, wherein the record was in connection with a winding up application. From order sheet dated 21st January 1959 it will appear that the Defendants filed some copies of the documents of which the original was in the High Court and prayed for acceptance of the same and that the court accepted those documents. In these circumstances the court below was not right in finding that the Defendants have failed to prove that in the meeting of the Board of Directors in the presence of the 3 Plaintiffs the sale of the shares by Defendant No. 4 was approved. The Court below should have, if it had any doubt, summoned the originals from the High Court record. On the 3rd February 1960 the Defendants also made an application praying that the original documents that were filed by Defendant No. 1. should be summoned from the High Court. The court passed the following order on that application."

Defendants No. 1 and 2 who filed hajira showing presence of Defendant No. 1 and another witness today, suddenly came up with a petition after the Plaintiff's side closed, praying for adjournment and to call for certain records at this stage from the Hon'ble High Court. It is not the stage to call for record. Prayer is registered. Defendants Nos. 1 and 2 declined to adduce evidence. Case closed.

As I have already pointed out, the copies of the resolution were filed by the Defendants. They were admitted and from time to time effort was made by the Defendants to get a copy from the High Court and to file it. The prayer of the Defendants to summon the original from the High Court cannot be said to be unreasonable and should have been allowed by the court below. The transfer not being void on the face of it, the Defendants should have been given an opportunity in the circumstances of the case to prove that in the meeting of the 22nd February, 1956 the transfer was approved by the Board of Directors in the presence of the 3 Plaintiffs. This opportunity was denied to the Defendants.

10. In the result, therefore, we allow this appeal, set aside the judgment of the court below and send back the case to the Subordinate Judge with the direction that the original of the proceeding book and the other necessary documents filed by the Defendant No. 1 or by the office assistant of the Registrar of Companies in the Original Case No. 2 of 1958 may be called for and the Defendants be given an opportunity to prove that the transfer of the shares was approved by the Board of Directors in the presence of the 3 Plaintiffs. The Plaintiffs will also have an opportunity to adduce fresh evidence if they so desire. The parties will bear their own costs of this appeal. The costs of the court below will abide the result of the suit. As this case is an old one, the lower court will see that the case is disposed of at an early date.