
(1932) 09 BOM CK 0022

In the Bombay High Court

Case No : O.C.J. Appeal No. 6 of 1932 and I.C. No. 14 of 1926

Dhanraj Keshrimal Jhalani

APPELLANT

Vs

H.H. Wadia

RESPONDENT

Date of Decision : 28-09-1932

Acts Referred:

Companies Clauses Consolidation Act, 1845 — Section 22

Citation : AIR 1933 Bom 80 : (1933) 35 BOMLR 26 : (1933) ILR (Bom) 413

Hon'ble Judges : John Beaumont, J;Blackwell, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, C.J.—This is an appeal from a decision of Mr. Justice Kania. The official liquidator of the Rutlam Bombay United Spinning and Weaving Co. Ltd. (in liquidation) applied to the Judge in winding-up to settle the list of contributories of the company and to include therein the name of the present appellant as the holder of 450 shares. The learned Judge made the order asked for, and from that order this appeal is brought.

2. [His Lordship Bet out the facts of the case, and then proceeded.] The claim of the company is a startling one. In the most formal manner the company purported to forfeit the appellant's shares, and thereby to terminate the contractual relations between the company and the appellant, and for some two years they acted upon the view that the forfeiture was valid. They now seek to set aside the forfeiture, and to restore the contractual relations between the company and the appellant, on the basis of their own, default in carrying out the forfeiture. It is clear that if the forfeiture took effect, the company cannot reinstate the appellant as a shareholder without his consent, see Larkworthy's Case [1903] 1 Ch. 711; but the ground on which the company put their case, and the only ground on which, in my opinion, it can be put, is this : A forfeiture of shares, which involves reduction of the company's capital, can only be carried out under the articles of association of the company where a call has been validly

made, and that call has not been paid; in the present case no call was validly made; the forfeiture was, therefore, outside the powers of the company and invalid, and the appellant has in fact never ceased to be a shareholder of the company.

3. The first and principal question which we have to determine on this appeal is whether the second and third calls were validly made, and for that purpose it is necessary to look at the articles of association. The material articles, which appear to be founded on Palmer's Company Precedents, are Articles 18, 19, 20 and 24, which are in the following terms :-

18. The Directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof made payable at fixed times and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the Directors. A call may be made payable by instalments.

19. A call shall be deemed to have been made at the time when the resolution of the Directors authorising such call was passed.

20. Seven days' notice of any call shall be given specifying the time and place of payment, and to whom such call shall be paid.

24. If any member fails to pay any call or instalment on or before the day appointed for the payment of the same, the Directors may at any time thereafter, during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such non-payment.

4. Dealing with these articles in the first instance, apart from authority, it appears to me that Article 18 deals with two distinct matters; the first part authorises the directors to make calls, and the second part provides what the liability of the member is to be in respect of the calls so made and stipulates that he is to pay the amount of the call made on him to the persons and at the times and places appointed by the directors. As matter of construction I can see no justification for reading the conditions necessary to impose liability to pay upon the member into the first part of the article authorising the directors to make a call. It seems to me that the directors may (as they did in this case) pass a resolution, making a call of a particular amount payable at a particular time, and that that resolution constitutes a valid call and fixes the date of the call, although before the payment of the call can be enforced the directors must appoint the persons to whom and the place where the call is to be made. That seems to me the natural meaning of the language of Article 18, but the contention of the company is that Article 18 read as a whole requires that any resolution for a call must state not only the amount of the call and the time at which it was payable, but the person to whom and the place where it is to be paid. We have been

referred to many authorities of which the following seem to me to be in point.

5. In *The Newry and Enniskillen Railway Company v. Edmunds* (1848) 2 Exch. 118 before Pollock C.B., Parke B., and Platt B., the company was governed by the Company's Clauses Consolidation Act (8 & 9 Vic. c. 16), and it appears to me that the 22nd section of that Act is substantially in the same terms as Article 18 in the present case. In that case the directors had made a call, but the resolution contained no time or place for payment. The Court held that the call was validly made. Parke B., who gave the leading judgment, expressly states that the resolution to make a call need not specify either the time or place for payment, but the directors must appoint a time and place which must be notified to the shareholder by a notice allowing him twenty-one days for the purpose of payment. There are two cases, *The Great North of England Railway Company v. Biddulph* (1840) 7 M. & W. 245 and the other *The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock* (1841) 7 M. & W. 574 in both of which the judgment was given by Parke B. and which support to some extent the conclusion reached in the case of *The Newry and Enniskillen Railway Company v. Edmunds*, but those cases are not, I think, direct authorities on the point at issue.

6. The next case is *Johnson v. Lyttle's Iran Agency* (1877) 5 Ch. D. 687. In that case the company was governed by table A of the Companies Act, 1862, and it appears to me that Article 4 is substantially in the same terms as Article 18 in the present case. In that case the directors resolved that a call be made of ? 2 per share, and that the shareholders be requested to pay the same as soon as possible. The secretary in an affidavit stated that the time of payment of the call was discussed by the directors, and that he received verbal instructions from them to send out the necessary notices informing the shareholders that the call should be payable on or before December 16, 1876. The plaintiff did not pay the call, and he was subsequently served with a notice that unless the call together with interest at the rate of live per cent, per annum from the date of the call was paid by a specified date his shares would be forfeited. In the action the plaintiff moved for an injunction to restrain the company from proceeding with the forfeiture. Sir George Jessel M.R. refused the motion holding that the call had been validly made. In dealing with the construction of table A, the Master of the Rolls says (p. 690):-

Now, it is quite clear that the Act of Parliament does not require the day for the call to be named in the same resolution as the one by which the call, is made. You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it.

The matter then went to the Court of Appeal who allowed the appeal on the ground that the notice for final payment was inaccurate inasmuch as it claimed

payment of interest from the date of the call, and they held that the forfeiture founded on the notice was bad, None of the Judges in the, Court of Appeal expressed any dissent from the views of the Master of the Rolls as to the construction of table A, except that James L.J. expressed the tentative view that the time for the payment of the call could not properly be fixed by a mere verbal, direction to the secretary, and that it ought to be fixed by a formal, resolution of the directors. It appears to me that that case is a direct authority for the proposition that under such articles as we have in this case it is not necessary for the resolution making the call to specify the time for payment, a fortiori it would seem to follow a fortiori that it is not necessary to specify the person to whom or the place where the call is to be made. I need hardly say that the opinion of Sir George Jessel as to the construction of articles of association is entitled to very great weight.

7. The next case to which I wish to refer is *In re Cawley & Co.* (1880) 42 Ch. D. 209 and it was on that case that the learned Judge in this case based his decision. In that case there had been a resolution of the directors making a call which left the date on which it was to be paid in blank. It was held by the Court of Appeal that in fact the shareholder concerned had transferred his shares before the call was made, and it was not therefore necessary to consider whether the call was valid or not. But in the Court of Appeal the learned Judges did express opinions as to the validity of the call, although they recognised that it was not necessary to do so. The material Article in that case was Article 38 which was in these terms :-

The amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the board.

It is to be observed that it is in quite a different form from Article 18 in the present case. There is no express power to the directors to make a call; the article only deals with how the call, is to be paid. On the construction of that article the Court of Appeal expressed the view that the resolution making a call must state the time at which it was to be paid; in effect they held that all the conditions specified in Article 38 and necessary to make a call enforceable must be specified in the resolution making the call. The previous cases to which I have referred were not cited in the Court of Appeal, no doubt, on the ground that the articles in those cases were worded quite differently from Article 38 in that case, and the case seems to me to be at the most an authority on the construction of the particular article in that case. It is true that at the conclusion of the judgments Lord Esher M.R. said this (p. 236) :-

I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of the call that the time and place for payment should be determined.

If the learned Master of the Rolls intended to say that whatever the articles might provide no resolution for a call could be valid which did not specify the time and place of payment, his opinion seems to me to be directly at variance with the previous decisions quoted, and I respectfully dissent from it.

8. With regard to the two cases in this Court which the learned Judge discusses in his judgment, the case of *The Pioneer Alkali Works Limited Vs. Amiruddin Shalebhoy Tyebji*, is distinguishable because the amount of the call was not specified in the resolution, and it may well be that a call cannot be validly made unless the amount is specified. I am not, however, prepared to agree with all the views expressed by the learned Judge in that case. The judgment seems to me open to the same criticism as the judgment under appeal, namely, that it attaches to the articles falling for construction a meaning other than they naturally bear in deference to a decision upon articles differently worded. The case of *Bhagirath Spinning & Weaving Co. v. Balaji* (1929) 32 Bom. L.R. 87 was also a case in which the amount of the call was not specified and the case does not really assist us, because the report does not show what were the articles of association which governed the company and neither of the learned Judges who decided the case mention the terms of the articles which the Court had to construe. It appears to me that the weight of authority is clearly in favour of the construction which I should myself put upon the articles in this case, and that we should hold that the second and third calls were validly made by the resolutions of December 16, 1921, and November 7, 1922.

9. But then Mr. Setalvad for the company says that that does not dispose of the matter. He says that the shareholder was not liable to pay a call until the person to whom and the place where it was payable were appointed by the directors ; and that no doubt is so. He says that these matters never were appointed by the directors, that there was, therefore, no enforceable call, and that the forfeiture was invalid. The persona to whom, and the place where, the call was to be made were specified in the notices of calls given to the appellant, and those notices were signed by the agents "by the order of the board", The learned Advocate General for the appellant contends that we must presume that a proper resolution was passed dealing with these matters, and he relies on several cases, particularly *Knights' Case* (1867) L.R. 2 Ch. 321. I am disposed to agree with the view of the learned Judge that as we have the minute book of the company in evidence, we cannot presume that there was any formal resolution of the directors going beyond the resolutions entered in the minute book. Nor do I think that the resolution of September 7, 1925, (Ex. J), can be treated as part of the resolution of the directors appointing the persons to whom and the place where the original calls were to be made (as argued by the Advocate General)-that resolution having been passed under Article 24, and being based on the view that a call had been validly made. But speaking for myself, I do not think that it is necessary to have a formal resolution of the directors specifying the person to whom, and the place where, a call is to be made. These are minor matters of much less consequence to a shareholder than the fixing of the time for payment,

and, as I have pointed out, Sir George Jessel M.R. in *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687 held that even the fixing of time need not be the subject of a formal resolution, though James L.J. differed from this view. It is true that these matters must be fixed by the board because the articles so provide, but I think we must presume that the agents did their duty and took instructions from the board; otherwise they would not have been justified in signing "By order of the Board". It is plain from the resolution (Ex. J.) that the directors knew to whom and where the calls were to be paid. I am of opinion that we must presume that these matters were the subject of directions given by the board, though there may have been no formal resolution; and if that is so, there was no irregularity. Stress was laid on the fact that the appellant was himself a director at the time and has not given evidence of any directions given by the directors to the agents. But in my view the burden is upon the company to displace the presumption that the agents acted properly. In any event the absence of evidence can hardly be matter of comment in view of the time which has elapsed since the resolutions in question. Directors or agents cannot be expected to remember exactly what happened eight or nine years ago. I would, however, hold further that even if it were necessary to have a formal resolution of the board stating the names of the person to whom, and the place where, the call should be paid, that is a matter which it would be open to the parties to waive (see *Ex parte Wollaston* (1859) 28 L.J. Ch. 721. It is, in my opinion, clear that the appellant has waived any right he might have had to object to his liability for the calls and to challenge the forfeiture, and the company having enforced the forfeiture for two years have waived any irregularity which it is within their power to waive. In my opinion to hold that a forfeiture solemnly resolved upon and enforced for two years without objection from the shareholder should be set aside as ultra vires the company on the ground that there had been no formal resolution of the directors directing that the calls be paid to the agents at the registered office of the company (which would be the natural method of payment) would be to take much too narrow a view.

10. For the above reasons I am of opinion that the shares of the appellant were validly forfeited and that his name ought not to be entered on the register of shareholders, and that the appeal must be allowed with costs, against the company. Two counsel allowed.

Blackwell, J.

11. I am of the same opinion. Mr. Setalvad's contention that the call was bad because the persons to whom and the place at which it was to be paid were not mentioned in the resolution was mainly based upon the observations of the learned Judges of the Court of Appeal in *In re Cawley & Co.* (1889) 42 Ch. D. 209. But in that case the article with which they were dealing was in an entirely different form from Article 18 in the present case, and the opinions of the learned Judges were obiter. In *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687 in construing Clause 4 of table A, which was very similar to the article which

we are called upon to interpret, Jessel M.R. said (p. 690) :-

You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter.

In coming to this conclusion he relied upon the authority of *The Newry and Enniskillen Railway Company v. Edmunds* (1848) 2 Exch. 118 where Parke B., giving the judgment of the full Court of Exchequer, said (p. 122):-

It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment. The case of *The Great North of England Railway Company v. Biddulph* (1840) 7 M. & W. 243 proves, that the resolution need not contain the place of payment; and I think that by implication it also proves, that it need not contain the time of payment.

The judgment of Jessel M.R. was reversed in the Court of Appeal, but on another point; and although James L.J. said that as at present advised he thought that the time for payment of the call could not properly be fixed by a mere verbal direction to the secretary, and that it ought to be fixed by a formal resolution of the directors, Mellish L.J. and Baggallay J.A. did not express any dissent from the opinion of Jessel M.R. on this point.

12. Mr. Setalvad also relied upon two decisions of this High Court, namely, *The Pioneer Alkali Works Limited Vs. Amiruddin Shalebhoy Tyebji*, and *Bhagirath Spining & Weaving Co. v. Balaji* (1929) 32 Bom. L.R. 87. In the first case the facts were in some respects different from those in the present case, but inasmuch as the learned Judge appears to have regarded the opinion of Jessel M.R. in *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687 as having been overruled by the Court of Appeal, although his judgment was in fact reversed upon another point, and also based certain of his observations upon the obiter dicta of Esher M.R. in *In re Cawley & Co.* (1889) 42 Ch. D. 209 I am, with respect, not able to agree with those observations. In the second case the relevant articles are not set out; that case, therefore, appears to me to be of no assistance in the present case.

13. Construing Article 18 in the light of the opinion of Jessel M.R. in *Johnson v. Lyttle's Iron Agency*, I am of opinion that it is not necessary that the persons to whom, and the place at which, the call is to be paid, should be mentioned in the resolution making the call, and that the article is complied with if the directors appoint the persons and the place, even though, informally, before the notice of the call is sent out.

14. Mr. Setalvad has, however, contended that even if this be the true construction of Article 18, there is no evidence that the directors did in fact appoint the persons and the place. So far as positive evidence is concerned, this is no doubt true. But the question then arises as to whether in the absence of evidence the Court ought not to presume that the directors appointed the persons and the place before the notice of the call was sent to the appellant. In *Johnson v. Lyttle's Iron Agency* Jessel M.R. summarised the opinion of Parke B. in the *Great North of England Railway Company v. Biddulph* case on the question whether it was necessary that the place should be specified in the resolution for the call as follows (p. 691) :-

He comes to the conclusion that it is not necessary that it should be named at the time of making the call, and therefore he says, where you have no proof at all, that is, where there is an absence of proof but you find an act done which ought to be done by the authority of the directors, you must assume it to have been done by their authority :...

Then dealing with the facts of the case before him, Jessel M.R. went on to say (p. 691) :-

I take it as a general principle, when we find, for instance, the secretary writing letters on behalf of the company, we assume in the absence of evidence that he is authorised by the company to write them. Therefore, if there had been no evidence at all either way in this case I should be bound to assume, both on principle and authority, that this letter was written with the sanction of the directors.

Now in the present case the notices of the second and third calls, Exts. E and J., which specify the persons to whom, and the place at which, they were to be paid, and which were sent to the appellant, were signed by the agents of the company, and each of them bears upon the face of it the words "by the order of the board ", and I think that in the absence of any evidence upon the point the Court is entitled to assume that those notices were sent out by the agents of the company with the sanction of the directors, and that the directors had in fact appointed the persons and the place, and that is the assumption which I make.

15. In my opinion, therefore, the requirements of the articles in this case had been complied with and the appellant's shares were duly forfeited. It follows that the company were not entitled to rescind the forfeiture without the consent of the appellant (see *Larkworthy's Case* [1903] 1 Ch. 711) and his name ought not to have been placed upon the list of Contributories Accordingly I agree that this appeal should be allowed with costs.