

(1926) 06 CAL CK 0009
In the Calcutta High Court

Dulichand Samsukh

APPELLANT

Vs

Dunbar Mills. Co. and Another

RESPONDENT

Date of Decision : 29-06-1926

Acts Referred:

Citation : AIR 1927 Cal 947

Hon'ble Judges : Buckland, J

Bench : Division Bench

Judgement

Buckland, J.—This suit has arisen out of the alleged loss of 25 shares in the Dunbar Mills, Ltd. The reliefs prayed for cannot be comprehensively stated, and I will proceed to narrate the facts.

2. The registered holder of the shares in question which were Nos. 2025 to 2049 inclusive, was the defendant Durga Prosad Singhania, whose name still stands on the books of the company as the registered holder to this day. In the month of February 1920, they were sold by him to Messrs. Tezpal Makunlal. This transfer has not been proved with the exactitude with which the later transfers have been proved, but in the circumstances I do not think there can be any doubt that these shares were among those sold at or about that time by Singhania to Tezpal Makunlal according to the evidence of the witness Tezpal Jhoon Jhoonwalla.

3. Evidence has been called tracing the subsequent dealings in these shares. Tezpal Makunlal sold them to Jwalaprosad Shroff who in his turn sold them to Magniram Bungar. On the 28th May 1920, the same shares came back into the hands of Jwalaprosad Shroff from Narain-das Khendenwalla, and on the same day Jwalaprosad Shroff sold them to Nemai Chand Boral. The witnesses Khasinath Chobey and Jabbermull have traced the subsequent dealings with the particular shares, and eventually on or about the 28th May 1920, they came into the hands of the plaintiff.

4. This evidence which has hardly been subjected to cross-examination, in my opinion, clearly establishes that the plaintiff bought the shares in question as

alleged in the first paragraph of the plaint; and the question need not, therefore, be further considered, and that disposes of the first issue submitted on "behalf of the defendant. Nor has it been challenged that the certificates were accompanied by a duly executed transfer deed, and, in my opinion, that also was the case and I hold accordingly.

5. The shares having come into the hands of the plaintiff according to his evidence he found that the scrip was slightly damaged, and he gave orders to his man, Hetram, to take them to the sellers to have them changed for other certificates. Hetram proceeded on his way with the scrip, and since then according to the plaintiff, nothing more has been heard or seen of it. Hetram made a report to him but the report which he received from Hetram has not been admitted in evidence because Hetram is in his native village, and has not been called as a witness.

6. The plaintiff also says that he gave instructions for advertisements to issue as to the loss alleged, but as to this again no evidence of the advertisements has been adduced. I am at a loss to understand why no attempt has been made to produce the evidence of Hetram or the advertisements, but nevertheless such is the case.

7. The plaintiff thereupon approached Messrs. Kettlewell Bullen & Co., the Mangging Agents of the defendant company, and what he desired and still desires according to the plaint, is to have new certificates issued to him. A long story is stated in the plaint as to how the Managing Agents refused to issue to him new certificates, but this has not been proved.

8. The position taken up by the company, however, is that they would be prepared to issue new certificates to the registered share-holder in accordance with Article 16 of the Articles of Association. That could not be to the plaintiff because he is not the registered holder but it may be that the plaintiff would be entitled to have his name placed upon the register, in which case it would be for him to satisfy the defendant company as regards the indemnity required for the purpose of obtaining new certificates.

9. No evidence of any facts has been given beyond the point where the shares are said to have been lost, but I am prepared to hold, on the evidence adduced, that the shares having been handed to a man in the employment of the plaintiff, and he having gone away with the shares, and the shares never having since been seen or heard of by the plaintiff, as regards the plaintiff the certificates have been lost.

10. This disposes of the third issue submitted on behalf of the defendant company, in the terms in which it is stated though having regard to the terms of Article 16 to which I shall further refer I am not sure that it arises.

11. But in so holding I must not be taken to imply that the shares are irretrievably lost so that in ail human probability there is no possibility whatever

of any person coming forward with them and making a claim against the company. It is necessary that I should say this as it might be contended upon Article 16 of the company's Articles of Association that my finding debarred the directors from requiring the indemnity which that Article entitles them to demand in default of proof of loss to their satisfaction, and that by virtue of this judgment the plaintiff, once his name is registered, is entitled to new certificates without giving an indemnity. That would not be fair to the company and my finding is not intended to go to that length.

12. It is not disputed on behalf of the company that the plaintiff would be entitled to have his name placed upon the register once he has proved his title, and this brings me to the stage when the real matters in controversy, which have given rise to all the trouble, arise. They are embodied in the following issues submitted on behalf of the defendant company:

1. Was the defendant company entitled to require from the registered holder the indemnity required in para. 8 of the written statement?

2. Is the plaintiff, upon adducing proof of loss entitled to the issue to him of a duplicate certificate?

14. The last issue submitted is the usual one as to the relief to which the plaintiff is entitled.

15. So far as the plaintiff claims, to have new certificates issued to him, he clearly, in my opinion, has no locus standi until he has had his name registered as the holder and, however much he might satisfy the company as to the loss the answer to the second of the above issues must be in the negative.

16. The question really is as to the right of the registered holder, be it the plaintiff or be it Singhania, for the trouble has arisen as to the indemnity. What the requirements were and what the plaintiff was prepared to do has not been proved but I have been informed that the defendant company required, among other guarantors, a European Bank, which the plaintiff could not or did not offer to furnish. Be that as it may, there is no need to discuss what actually was required for the whole question turns upon the point whether the Court will interfere with the discretion allowed to the directors by Article 16. This Article is as follows:

16. If any certificate be worn out or defaced then, upon production thereof to the directors they may order the same to be cancelled and may issue a new certificate in lieu thereof, and if any certificate be lost or destroyed, then upon proof to the satisfaction of the directors; or in default of proof on such indemnity as the directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate.

17. The clause, in my opinion, gives an absolute discretion to the directors as to the indemnity to be furnished with which the Court will not interfere, there being, as here, no question of mala fides. Various observations have been made to me

as to the risk which the company would incur on the one hand, and as to the need for a substantial guarantee on the other hand. In the view which I take I have nothing to do with such considerations. It is entirely a matter for the directors who are given a discretion and may exact such indemnity as they deem adequate.

18. In this view there is no need to consider the ground upon which the various attempts to claim new certificates fell through, and indeed evidence of that would not have been relevant. In my judgment the defendant company is entitled to require from the registered holder such indemnity as the directors may deem adequate.

19. In these circumstances it only remains to consider to what relief the plaintiff is entitled. I have already expressed my opinion on the questions of fact, and I declare that the plaintiff is the owner of ordinary shares Nos. 2025-2049 in the Dunbar Mills, Ltd., and solely and beneficially entitled thereto and to all the advantages and benefits thereof, and all dividends, privileges, bonuses, etc., declared since the day of purchase.

20. As regards dividends it appears that dividends which have accrued amount to Rs. 6,800 but by some arrangement or other which is not disputed this money was paid to Durga Prosad Singhania. The plaintiff by his counsel does not ask for any order against the company as regards the sum already paid to Singhania. I also hold that the plaintiff is entitled to have his name registered in the books of the company as the holder of the said, ordinary shares, and I direct rectification of the register of the company accordingly.

21. The plaintiff is not entitled to an order that certificates be issued to him. Once his name has been placed on the register it will be for him to apply to the company for new certificates which I have no doubt will be supplied if he furnishes an indemnity which the directors deem adequate.

22. The question of costs required a certain amount of consideration for it would appear as though the plaintiff had obtained some measure of success in these proceedings, but I think upon analysis it is clear that he has entirely failed in regard to his real object in bringing the suit. If one takes the first three issues as to purchase of the shares, delivery of the certificates with the deed of transfer and the loss, they are merely preliminary to the next point which is the rectification of the register.

23. The need for that has, as far as I am aware, been entirely ignored by the plaintiff throughout. His one object has been to get the new certificates. Assuming, however, that he was the proper person to apply for the new certificates, he has not, according to the evidence, and there is nothing to show that he has, made any effort to prove to the directors the loss of the shares and to satisfy them. It may be that even so, had a sufficiently substantial indemnity been forthcoming the directors would not have been too stringent in this respect. The new certificates and the indemnity, undoubtedly, have been the real question

at issue through out. As to that the plaintiff has entire failed in this suit.

24. The questions of fact to which I have referred and the rectification of the register have been put in issue as the company could hardly have been expected to admit them but as the same time it cannot be said that they have strenuously contested It was, however, necessary for the plaintiff to establish his case in regard to these matters before the question of the indemnity and the new certificates could be reached.

25. In the circumstances, though he may, as I said just now, appear to have obtained some measure of success in these proceedings, nevertheless as to the real objects for which the suit was brought, he has entirely failed. In my judgment he should pay the costs of the defendant company.

26. Before I conclude I wish to refer to the brief of correspondence. A brief of correspondence, was tendered in evidence, filed and marked. No letters have been referred to by either side. Learned Counsel for the defendant company was willing that the brief of correspondence should be returned. Learned Counsel for the plaintiff was anxious that it should remain on the record. To this course no objection was taken on behalf of the defendant.

27. As I have directed the plaintiff to pay the costs of the defendant, there is no need to give any special directions as to this brief of correspondence, but had I ordered otherwise I should have directed that the costs of the brief of correspondence be borne by the plaintiff in any event.