

(1941) 07 CAL CK 0017
In the Calcutta High Court

In Re: Bengal Electric Lamp Works Ltd.

Date of Decision : 18-07-1941

Acts Referred:

Citation : AIR 1942 Cal 516

Hon'ble Judges : Williams, J

Bench : Division Bench

Judgement

Williams, J.—This is the petition of Prafulla Kumar Basu, who asks for an order for rectification of the register of members of the respondent company by restoring the petitioner's name as the holder of 1500 ordinary shares. He states that he was the registered holder of 1500 ordinary shares in the capital of the company, having applied for allotment on or about 6th January 1940 and having paid Rs. 1500 to the company along with his application for and on behalf of one Kamta Prosad Bhargava. The company decided to treat the petitioner as the absolute owner of the shares and declined to recognise Bhargava as having any right in the said shares or to register the transfer of the shares to him. On 2nd February 1941 the petitioner received a letter from the company informing him that the sum of Rs. 13,500 due for calls on his shares was long overdue, "as per details given below," namely:

Allotment money 3000 due date 10-2-40. 1st call money 3000 due date 31-5-40. 2nd call money 3000 due date 13-8-40. 3rd call money 3000 due date 30-9-40. 4th call money 1500 due date 18-12-40.
Making a total of Rs. 13,500.

2. Further, the petitioner was informed that the Directors required him on or before 28th February 1941 to pay the sum of Rs. 13,500 at the registered office of the company at 14 Clive Street, Calcutta, and that in the event of non-payment the shares would be liable to be forfeited. The petitioner admits that he received the notice of allotment and also notice of the purported fourth call dated 18th November 1940, but no notice of the purported first, second and third calls was ever given to him. In reply to the letter of 18th November giving notice of the fourth call, the petitioner wrote putting on record that he had not received

any other notice of call. Subsequently, one Gopee Ballav Sen wanted to take a transfer of his shares from the petitioner and was willing to pay the balance of the face value of the shares in full. Accordingly on 28th February 1941 the petitioner and Gopee Ballav Sen executed a deed of transfer and the petitioner wrote a letter addressed to the company saying that he had transferred the shares to Mr. Sen and that the latter would pay Rs. 13,500 to the company. On the same date Mr. Sen forwarded to the company the transfer deed and the letter from the petitioner, accompanied by a cheque for Rs. 13,512-4-0 being the balance of the face value of the shares, together with a sum of Rs. 11-40 for stamps for the transfer and Re. 1 for transfer fee. The company refused to register the transfer. On 14th April 1941 the petitioner received a letter from the company dated 2nd April 1941 intimating that by a resolution of the board of directors passed on 31st March 1941 the shares standing in the name of the petitioner had been forfeited.

3. In the affidavit in opposition made by the managing director of the company dated 12th May 1941 it is contended that notice of every call was sent to the petitioner and with regard to the first call the respondents produced a peon book signed by Mr. B.K. Mittra who, they alleged, was an assistant of Messrs. Indian Loan & Trading Co., Ltd., of which the petitioner is a director. The registered office of that company is situated at No. 102H, Russa Road which is the residential address of the petitioner. The notice of the second call was sent by post and is evidenced by the despatch book of the company. The notice of the third call was sent by peon book signed by the petitioner himself. I am satisfied that the notices of all these calls reached the petitioner. The relevant Articles of Association of the company are as follows:

7. If, by the condition of allotment of any shares the whole or part of the amount or issue price thereof shall be payable by instalments, every such instalment shall, when due, be paid to the company by the person who for the time being shall be the registered holder of the share or his legal representative.

15. 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.

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

23. 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.

24. The notice shall name a day and a place or places on and at which such call or instalment and such interest and expenses as aforesaid are to be paid. The notice shall also state that in the event of non-payment at or before the time and at the place appointed, the shares in respect of which the call was made or instalment is payable will be liable to be forfeited.

25. If the requisitions of any such notice as aforesaid are not complied with any shares in respect of which such notice has been given, may, at any time thereafter before payment of calls or instalments, interest and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited shares, and not actually paid before the forfeiture.

33. The provisions of these articles as to forfeiture shall apply in the case of non-payment of any sum which by the terms of the issue of a share becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

36. The directors may at any time in their absolute and uncontrolled discretion and without assigning any reason decline to register any proposed transfer of shares. This clause shall also apply to a case where the proposed transferee is already a member.

99. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined three directors shall be a quorum. A director interested is to be counted in a quorum notwithstanding his interest.

100. A director may at any time convene a meeting of the directors. It shall not be necessary to give notice of a meeting of the directors to a director who is not in Calcutta. Questions arising at any meeting shall be decided by a majority of votes, and in case of any equality of votes, the chairman shall have a second or casting vote.

106. A resolution in writing signed by all the directors present in Calcutta shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted.

108. The directors shall cause minutes to be duly entered in books provided for the purpose: (a) Of the names of the directors present at each meeting of the directors and of any committee of directors. (b) Of all orders made by the directors and committees of directors, (c) Of all resolutions and proceedings of general meetings and of meetings of the directors and committees.

And any such minutes of any meeting of the directors or of any committee or of

the company, if purporting to be signed by the chairman of such meeting or by the chairman of the next succeeding meeting, shall be receivable as prima facie evidence of the matters stated in such minutes.

145. Any notice sent by post shall be deemed to have been served on the second day following that on which the envelope or wrapper containing the same is posted and in proving such service it shall be sufficient to prove that the envelope or wrapper containing the notice was properly addressed and put into the post office. And a certificate in writing signed by the manager, secretary or other officer of the company that the envelope or wrapper containing the notice was so addressed and posted shall be conclusive evidence thereof. Any notice which may be given by advertisement shall be deemed to have been served when the newspaper containing the notice is published.

4. Notice of allotment was given on 6th January 1940 with regard to 1100 ordinary shares and the petitioner was asked to pay the sum of Rs. 2200, being Rs. 2 per share, on or before 10th February 1940 to the company's head office. This letter was signed by the managing director. There was a similar notice with regard to the balance of 400 ordinary shares. With regard to the first call made on 27th April 1940, a resolution was passed by the board of directors in the following form: "Resolved that the first call of Rs. 2 per ordinary share be and is made on the 17,954 ordinary shares as per list submitted to this meeting. This call be and is made payable on or before 31st May 1940," and the notice to the petitioner was sent on 2nd May requesting him to remit Rs. 3000 in respect of this call, on or before 31st May 1940 to the "Company's Head Office" and is signed "By order of the Board, P.C. Datta, Secretary." The letter is headed "14 Clive Street," but there is nothing to show whether the company's head office is at Clive Street or at any other address. All the calls were in a similar form, and it is to be noted that nothing is said in the resolution about the persons and places to be appointed by the directors in accordance with the provisions of Article 15, and though the notice states that the amount due under the call is to be paid at the head office of the company, it gives no address of such office nor is there any mention of the person to whom the money is to be paid, as provided by the Articles or by Article 17.

5. It is, therefore, contended on behalf of the petitioner that the calls were invalid because they were not correct in form as provided by the Articles and that the notices given in respect of those calls were bad and ultra vires for similar reasons. Though Article 106 provides that "a resolution in writing signed by all the directors present in Calcutta shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted," there is no evidence of any such resolution having been signed nor is there any evidence to show that after the resolutions making the calls, there were any subsequent resolutions appointing the persons and places to whom and at which the call money was to be paid, nor is there any evidence of any resolution either made at a meeting of directors or signed by them which would justify the statement "by

order of the board" made in the notices given by the secretary with regard to any of the calls. Article 108 provides that the directors shall cause minutes to be entered in the books of all orders made by the directors and committees of directors and of all resolutions passed at meetings of directors or committees or a general meeting. The minutes have been produced and no such resolutions as are required by the Articles are to be found in the minutes. In *re Hay Craft Gold Reduction and Mining Co.* (1900) 2 Ch. D. 230 it was held that a resolution of the company was ineffectual because the notices summoning the meeting had been issued by the secretary without the authority of a resolution of the directors duly assembled at a board. Cozens-Hardy J. as he then was, said at p. 235 that:

It was laid down by the Court of Exchequer in *D'Arcy v. Tammar, Kill Hill and Callington Ry. Co.* (1867) 2 Ex. 158, that directors must act together as a board, and that it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum.

6. It is true that in the present case Article 110(4) enables the directors to appoint officers and determine their powers and duties and that Article III provides that the directors may delegate certain powers and that by resolution the directors empowered the secretary to call meetings of the directors, never the less, it is clear that resolutions to appoint or fix the persons times and places respecting calls must be made with the authority of a resolution of the directors duly assembled at a board, or in any case by a resolution in writing signed by all the directors present in Calcutta, and there is no evidence of any such resolution having been passed. As was stated by Lord Romer in AIR 1938 284 (Privy Council) :

This may seem to be somewhat technical ; but in the matter of the forfeiture of shares technicalities must be strictly observed. And it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of the company.

7. But on the specific question as to whether it is necessary for the directors to name the persons, times and places in the resolution making a call or whether these persons, times and places may be appointed by a subsequent resolution, or whether they may be published to the share-holders by means merely of a direction of the directors or even by publication in the press, it is curious that there are no recent English decisions. The case in *Newry and Enniskillen Railway Co. v. Edmunds* (1848) 2 Ex. 118 was tried in 1848. In that case Baron Parke said at p. 122:

It is clear that the word "call" is used in the Act in two different senses. In one part it means, the applications to the share-holders to pay and in another, the amount to be paid. I am therefore of opinion, that it is not a condition precedent that each party should have notice to pay the amount of his call at the same

time and place. 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 share holder by a notice, allowing him twenty-one days for the purpose of payment. The case in *Great North of England Railway 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 resolution is nothing more than a determination that thereafter "a call" shall be made, that is that an application shall be made to each share holder for a proportion of his share ; and it is enough if the directors appoint a time or place, either by public advertisement, (where such a mode is allowed by the private act) as in the case referred to, or under the general act by an individual notice to each share-holder.

8. Even in this case the learned Baron uses the word "appoint." That is to say, it is necessary for the directors to appoint a time or place either by public advertisement if allowed by the Act or the articles, or by a notice to each share-holder and such appointment in the present case, can be made only by a resolution passed at a meeting of the Board of Directors or by one signed in accordance with the provisions of Article 106. In *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687, the company was governed by the regulations of Table A in the Companies Act, 1862, the directors made a call and gave verbal instructions to the secretary to make it payable on 16th December and the secretary sent a circular notice to the shareholders accordingly. One of the shareholders did not pay and on 21st December the secretary wrote to him, telling him that if he did not pay the amount of the call together with interest at 5 per cent. from the date of the call, on or before 31st December his shares would be liable to forfeiture. He did not pay, and on 4th January the directors passed a resolution forfeiting his shares. It was held, that as the notice of 21st December claimed interest from the date of the call instead of from the date fixed J for its payment, as provided by Clause 6 of Table A, it was a bad notice and the forfeiture was invalid, and an injunction was granted restraining the company from proceeding further under the resolution of forfeiture. Semble that the time for payment of the call could not properly be fixed by a mere verbal direction to the Secretary, and the decision of Jessel M.R. was reversed. Jessel M.R. at p. 690 had said as follows:

The objection is that there is no formal resolution entered in the book of the directors appointing a day for the call. Now, all that Table A says is, if any member fails to pay any call on the day appointed for payment thereof the directors may at any time thereafter forthwith serve a notice which they have done, to state whether a day has been appointed for the payment of the call. 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. What shall be sufficient evidence of direction is another matter.

9. He then referred to the cases which I have mentioned and the judgment of Baron Parke and came to the conclusion that all that was required was that the directors should "authorise the secretary, the proper officer, to write the proper letter. He says he does it by authority of the directors; that is all that is wanted. No formal resolution is required and he positively states that which the Court would presume without evidence, that it was written by the authority of the directors." In reversing this decision, James L.J. at p. 693 said:

I am of opinion that the notice of 21st December did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations of Table A. It was the established rule of the Court of Chancery and of the Courts of Common law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid. I may add that, as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary, it ought to be fixed by a formal resolution of the directors.

10. Mellish L.J. said as follows:

I am of the same opinion. I think it is clear that a forfeiture of shares is to all intents and purposes the same thing as any other forfeiture which deprives a man of his property. The rule at common law was that before any forfeiture could take place, all the conditions precedent must have been strictly complied with. Clause 17 of table A says, that if the call is not paid on the appointed day, the directors may serve a notice on the shareholder requiring him to pay it together with interest and any expenses which may have accrued; and by Clause 119, if the requisitions of the notice are not complied with, the directors may forfeit the shares. And Clause 6 provides that interest is to be payable from the day appointed for payment of the call to the time of actual payment. If no notice under Clause 17 had been served, it is clear that the forfeiture would be altogether bad. In this case the notice of 21st December was inaccurate in demanding the payment of interest from the date of the call. Was that a good notice? I think that if the notice departs in any respect from the statutory form it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it is invalid.

11. Baggallay J. A. at p. 694 said:

I am of the same opinion. The Legislature has thought fit to impose very heavy penalties for the non-payment of calls upon shares. Not only are the shares liable to forfeiture but the shareholder can also be sued for the unpaid calls. The Legislature has pointed out the steps which are to be taken previously to the

forfeiture, and it is essential that all those steps should be strictly followed. In the present case one of those steps has not been properly taken, and the forfeiture is therefore invalid.

12. And as I have already pointed out it was held in *In re Hay Craft Gold Reduction and Mining Co.* (1900) 2 Ch. D. 230 that such directions must be given under the authority of a resolution of the directors to be assembled at a board. In *In re Cowley & Co.* (1889) 42 Ch.D. 209 it was held that a resolution for a call to be valid must state not only the amount of the call, but also the time at which it is to be paid. Thus, where the directors of a company passed a resolution for a call and the resolution fixed the sum per share to be called up, but left the date at which it was to be paid in blank, and some time afterwards a resolution was passed fixing the date for payment, and notices of the call were sent to the shareholders, there was no proper call made until the second resolution fixing the date of payment, and that the second resolution did not in point of date relate back to the first. In that case Article 38 of the company provided that "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."

13. Lord Esher M.R. at p. 228 said as follows:

But it has been strenuously argued that there was a good call on 18th December and as the question has been argued, I do not hesitate to express my opinion upon it. My opinion is, that there was no call whatever made on 18th December. In order to make a call within the articles of association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Article 38 says the time and place for payment must be stated. Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. The article says "as shall be appointed from time to time" I take those words to mean this: that the directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up. After making a call, as for instance, 55 per share, if a particular number of shareholders do not pay on the day appointed, the directors may, under Article 44, appoint another day, but only after they have made a valid appointment of a certain day in the first instance; and then owing to circumstances that have arisen since, they may appoint a further day on which those who have been called on to pay on the first day, and have not paid, are to pay the call; and then under Arts. 46 and 51, if they do not pay on that further

day, the remedy of the directors is either by action or forfeiture. These provisions make the case stronger against the company, because they show that there was no valid call made on 18th December, and that no time or place of payment was appointed until 17th January following.

But then it is said that the resolution of 17th January reverts back to 18th December; but, if there is a resolution passed that a call shall be made and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but that there is no call until the latter day, that is to say, the first resolution must be carried down to the second. Therefore, if there was a valid call on 17th January, there was no valid call until 17th January.

14. Later, Lord Esher said at 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 a call that the time and place for payment should be determined.

15. These are the whole of the English cases which can be discovered on this point. There are three cases in the Bombay High Court the first being Pioneer Alkali Works, Limited Vs. Amiruddin Shalebhoy Tyebji, and the second being Bhagirathi Spinning, Weaving and Manufacturing Co. Ltd. v. Balaji Bhowani Powar AIR 1930 17 Bom. 267, in both of which cases the learned Judges followed the decision in *In re Cowley & Co.* (1889) 42 Ch.D. 209, the third is *Dhanraj Keshrimal v. H.H. Wadia* AIR 1933 20 Bom. 80. In that Case No. 18 of the articles of association was the same as Article 15 in the present case. The case was tried by Beaumont C.J. and Blaokwell J. The learned Chief Justice followed the earlier decisions, especially the judgment of Baron Parke to which I have referred, and distinguished the decision of Lord Esher M.R. in *In re Cowley & Co.* (1889) 42 Ch.D. 209 it was held that under the article it was not necessary for the resolution making the calls to specify the persons to whom and the place where the call were to be paid. That it was not necessary to have a formal resolution of the Board of Directors specifying the person to whom and the place where a call was to be made, since the form of the notice showed that it was "by order of the board" which raised a presumption that the matter was the subject of directions even in the absence of a formal resolution. That even if it were necessary to have a formal resolution of the board stating the names of the persons to whom and the place where, the call should be paid, it was a matter which it would be open to the parties to waive; and that the applicant had waived any such right. With regard to the decision of Sir George Jessel M.R. in *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687 the learned Chief Justice seemed to think that his judgment was reversed by the Court of appeal only upon the ground that the notice for final payment was inaccurate and therefore the forfeiture founded on the notice was bad. Further he observed, that none of the Judges in the Court of appeal expressed dissent from the views of the Master of the Bolls 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, and the learned Chief Justice thought that the case was a direct authority for the proposition that under such articles it is not necessary for the resolution making the call to specify the time for payment, and a fortiori it was not necessary to specify the person to whom or the place where the call was to be made.

16. It seems to me, with respect that the learned Chief Justice did not give sufficient weight to the observations of the Lords Justices about the necessity for strict adherence to the provisions of the contract between the company and the shareholders and that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with a very little inaccuracy being as fatal as the greatest. He distinguished *In re Cowley & Co.* (1889) 42 Ch.D. 209 on the ground that the material article was in different terms. It is true that the wording of the article was somewhat different from the article in the case with which he was dealing and the article in the present case. But in my opinion, the effect of the article is substantially the same in all three cases. In *In re Cowley & Co.* (1889) 42 Ch.D. 209 Article 38 provided that the amount payable on the shares should be payable at the bankers of the company or that the board should appoint a place at which the amount should be paid in such instalments and manner and at such time as the board should appoint. I do not think it is possible to distinguish the present case from *In re Cowley & Co.* (1889) 42 Ch.D. 209 and for the reasons given, I prefer the latter decision to the previous decisions to which I have referred. The respondents in the present case contend, further, that the petitioner has waived any right to object to the resolutions or the notices because of his letter dated 28th February 1941. In my opinion, his letter cannot be taken to be a waiver of his right to object to the forfeiture of his shares. What he asked the company to do was to allow the shares to be transferred to Mr. Gopee Ballav Sen, who was willing to pay the whole of the sum outstanding upon the shares, namely, Rs. 13,500. Further, he could not waive his rights. I have already referred to Lord Romer's judgment in AIR 1938 284 (Privy Council) where he states that others than the share-holders are interested in a forfeiture of shares, e.g., the creditors. He goes on to say as follows:

The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the share-holder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual share-holder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due.

17. The last point raised on behalf of the respondent company was that the petitioner had admittedly applied for allotment of shares and allotment had been made, and on 6th January 1940, he was asked to pay the allotment money. The answer to this contention is that Article 23 requires that if a member has failed to pay a call or any instalment, which undoubtedly would include the allotment money, the directors must serve a notice requiring him to pay, together with any interest which may have accrued and all expenses that may have been incurred by the company by reason of such non-payment. Such notice must be strictly accurate, as other notices to which I have already referred. The notice in the present case was dated 31st January 1941, and required him to pay a sum of Rs. 13,500 at the registered office of the company, 14 Clive Street, Calcutta. This notice was faulty not only because it failed to mention the person to whom the payment was to be made, but in addition it asked for payment with respect not only to the allotment money, but to the four calls amounting to Rs. 10,500. As I have already stated, these were not valid calls owing to defects in the resolutions passed and notices given on behalf of the company and this notice was defective in a way similar to the notice referred to in *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch. D. 687, namely it required payment of too large a sum and of sums which were not due and was a bad notice. Therefore, forfeiture based upon failure to pay the allotment money, is a bad forfeiture invalid and ultra vires. For these reasons the petitioner is entitled to have the register rectified by restoring his name as the holder of 1500 ordinary shares in the company. The petition is, therefore, allowed with costs; certified for counsel. The costs will be as of one day's hearing.