

(1939) 07 CAL CK 0012
In the Calcutta High Court

In Re: Happy India Insurance Co. Ltd.

Date of Decision : 11-07-1939

Acts Referred:

Companies Act, 1956 — Section 103, 38

Citation : AIR 1940 Cal 164

Hon'ble Judges : Panckridge, J

Bench : Division Bench

Judgement

Panckridge, J.—Sushil Krishna Pal, the applicant in this case, seeks to avoid an allotment of 100 ordinary shares in the company, notice of which was given him by letter dated 6th May 1939. The authorized share capital of the company is Rs. 10,00,000 divided into 10,000 shares of Rs. 100 each, out of which Rs. 25 is payable on application and Rs. 25 on allotment. The company was incorporated in 1936. The prospectus states that the minimum subscription upon which the Directors may proceed to allotment is Rs. 25,000 and that applications already received by the company for shares far exceed that amount. The preliminary expenses are estimated not to exceed Rs. 5000 (exclusive of commission on the sale of shares), which will be borne by the company. The first meeting of the Board of Directors was held on 13th January 1937, and at it 688 shares were allotted to various applicants. The Registrar's certificate entitling the company to commence u/s 103 of the Act, was obtained on 14th January 1937. On 9th March 1939, the applicant signed an application form for 100 shares in the company. The form states that the applicant authorizes the Directors to place his name upon the register of members in respect of the shares so allotted, and that he agrees to accept such shares or any smaller number the Directors may allot to him, subject to the provisions of the Memorandum and Articles of Association. The form further states that the applicant has paid the sum of Rs. 2500 being the deposit of Rs. 25 per share payable on application. In fact nothing was ever paid to the company by the applicant on account of application money. On 6th May 1939 the applicant received a letter from the company informing him that 100 shares had been allotted to him, and calling on him to pay Rs. 5000 as application and allotment money in respect thereof. On 5th June 1939, he made

this application to the Court. The applicant's petition does not allege fraud, nor does the application purport to be made u/s 38, Companies Act.

2. Moreover, although the petition vaguely suggests that the application form was intended to be a provisional offer, this is nowhere specifically stated, and is at variance with the facts. The petitioner himself states that Mr. M.K. Govila, the General Manager of the company, urged him to sign the application form on 9th March, as the Directors were to hold a meeting that day or the next. It is clear from this that the petitioner desired that the Board should consider his offer with the least possible delay. Apparently the application for shares was in some way connected with the desire of the petitioner at that time to be appointed Secretary of the company. This fact however is irrelevant, and the sole question is whether the allotment is in contravention of the provisions of Section 101, Companies Act, within the meaning of Section 102 of that Act and therefore voidable at the instance of the applicant under the latter Section. u/s 101 (1) as it stood before 1st January 1937, no allotment can be made of any share capital offered to the public for subscription unless (a) the amount (if any) fixed by the Memorandum and Articles and named in the prospectus as the minimum subscription on which the directors may proceed to allotment; or (b) if no amount is so fixed and named, then the whole amount offered for subscription, has been subscribed, and the sum payable on application for the amount so fixed and named or for the whole amount offered for subscription has been paid to and received in cash by the company. Under Sub-section (3) the amount payable on application shall not be less than five per cent of the nominal amount of the share. Sub-section (5) provides that any condition requiring or binding any applicant for shares to waive compliance with any requirement of the Section shall be void. Sub-section (6) provides that the Section except sub-section (3) thereof shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription. Text-book writers in the past have pointed out from time to time that the provisions of this Section and of the corresponding Sections of the English Acts do not in fact prevent companies from proceeding to allotment and commencing business with totally inadequate resources. This is because the provisions are technically complied with, if a company fixes as its minimum subscription a merely nominal number of shares, say seven, and indeed until the Acts were amended this device was frequently adopted.

3. In England however since 1929, Section 39(1) of 19 and 20 Geo. VI. Ch. 23 forbids allotment unless the amount stated in the prospectus as the minimum amount, which in the opinion of the directors must be raised by the issue of share capital in order to provide for certain matters has been subscribed, and the sum payable on application for the, amount so stated has been paid to and received by the company. The provisions of Sub-section (3), (5) and (6) are retained in the Section. In 1936 Section 101(1), Companies Act 1913 was amended, and it materially differs from Section 39(1) of the English Act. It lays down that no allotment shall be made unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be

raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in Sub-section (2) has been subscribed, and the sum of at least five per cent thereof has been paid to and received in cash by the company. Sub-section (2) sets out the matters for which provision must be made. As in the English Act Sub-section (3), (5) and (6) are retained. As Sub-section (1) of the amended Section specifically requires at least five per cent, of the minimum subscription to be paid to the company before the first allotment of shares I am doubtful if any useful purpose is served by the retention of Sub-section (3).

4. It would also appear that, provided five per cent, of the minimum subscription has been received in cash, allotment can now be made although the prospectus requires a larger percentage of the paid up value of each share to be paid on application. Be that as it may, both under the old and the new Sections the only statutory restriction on allotment is that imposed by Sub-section (1). I find nothing in the Section which forbids the directors to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this would be an infringement of the Act. This is a somewhat unsatisfactory conclusion, and I regret that there is no relevant authority in any of the authorised reports. My attention has been drawn to a decision of the Lahore High Court appearing in an unauthorized series of reports which is certainly opposed to the view I have taken *Mutual Bank of India Ltd. v. Sohan Singh* 258 AIR (1936) Lah. 790. There the respondents had instituted a suit to have it declared that they were not share-holders in the appellant company. The trial Court made the declaration asked for, on the ground that the respondents' offer to take shares was conditional, and that the necessary conditions had not been fulfilled. It appears that no application money had been paid by the respondents, and that the trial Court indicated that this of itself would not have affected the validity of the allotment. The High Court dismissed the company's appeal and upheld the decision of the trial Judge on the main question. However they added that the allotment was also invalid because it was made "without payment of at least five per cent, of the nominal value of the shares." These observations are obiter dicta, and I am unable to agree with them. In my opinion the allotment of the shares to the petitioner in this case cannot be properly described as being in contravention of Section 101 and accordingly it is not voidable at the instance of the applicant u/s 102. The application is dismissed with costs. Certified for counsel.