

(1958) 01 GAU CK 0011

In the Gauhati High Court

Case No : Misc. Appeal (First) No's. 24 of 1954 and 5 of 1956

K.L. Goenka and Another

APPELLANT

Vs

S.R. Majumdar

RESPONDENT

Date of Decision : 09-01-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Companies Act, 1956 — Section 102, 104, 105, 105A, 156
Defence of India Rules, 1962 — Rule 94A, 94A(2), 94A(4), 94A(5)

Citation : (1958) 01 GAU CK 0011

Hon'ble Judges : Sarjoo Prosad, C.J;H. Deka, J

Bench : Division Bench

Advocate : P.K. Lahiri, for the Appellant; N.M. Dam, for the Respondent

Judgement

Sarjoo Prosad, C.J.—These two appeals have been preferred by different Appellants u/s 202 of the Indian Companies Act (hereinafter called the Act) and are directed against a judgment and order dated 28th July, 1954 passed by Ram Labhaya, J., settling the list of contributories in a proceeding for winding up the Assam Corporated Bank Ltd. The Appellant Kamakhyalal Goenka in Misc. Appeal No. 24/54 was the Chairman of the Bank in liquidation until May, 1946; whereas Mr. Thomas, the Appellant in Miscellaneous Appeal No. 5/56 was the Director-in-charge of Law and Organization of the said Bank.

2. The Official Liquidator filed a list of contributories under Rule 143 of the Calcutta High Court Rules Original Side as adapted, stating that the contributories shown in the list were so in their own rights as shown from the books and papers of the Company and he prayed that they should be made liable to contribute to the amount of call money due from them.

So far as the Appellants in Miscellaneous Appeal No. 24 are concerned they took the plea that the call money due had been already paid and that there was nothing due from them in respect of those shares. It was also urged that there was no valid allotment of the alleged discount shares to the Appellant

Kamakhyalal and that neither in fact nor in law he was liable for the payment of any contribution in respect of them. Therefore the questions arising for consideration in this appeal may be formulated under the following heads:

1. Whether there was no valid or any allotment of 2905 discount shares to the Appellant Kamakhyalal Goenka; and
2. Whether there was actually any payment made by the Appellants in respect of the shares standing in their respective names as alleged by them.

It may be stated at the outset that the rejoinder to the application of the Official Liquidator was filed by Kamakhyalal Goenka alone, the other Appellants being the members of his family. I will first take up the question of the liability in regard to the 2905 discount shares.

3. The argument on this point is twofold. It is contended firstly by the learned Advocate General who appears on behalf of the Appellants that in fact there was no allotment of these shares at all to Kamakhyalal. It is next submitted by him that the allotment if any, was altogether void and therefore no liability in respect of these shares could be enforced by way of contribution from this Appellant.

As the relevant evidence bearing on the factum of allotment has been fairly and elaborately reproduced in the judgment under appeal, the learned Counsel has not considered it necessary to take us to the evidence itself but has been content to draw our attention to the relevant passages in the judgment of the learned Judge. In the list of statement sent to the Registrar of Joint Stock Companies Kamakhyalal Goenka is shown as owner of 2905 shares against item No. 114 and the amount due on account of calls of arrears is shown as Rs. 14,525/-.

Sailesh Chandra Aditya, an employee of the Mahalaxmi Bank, who is employed by the Official Liquidator to assist him in the work of liquidation has deposed in the case. He produced the cash book of the Bank which shows that Appellant Kamakhyalal Goenka held 2905 shares in his own name and that the amount due in respect of these shares had not been paid. On 15th December, 1945 there is an entry in the cash book showing that Kamakhyalal had borrowed a sum of Rs. 14,526/- and this amount was shown as deposited against his share money in the bank the same day, though the money which he had to deposit as cash money on that date came to Rs. 29,050/-.

It is quite clear from the cash book that no cash deposit was actually made by the Appellant and his liability at any rate as to the payment of the balance of Rs. 14,526/- continued. An entry dated 3rd August 1945 shows that Kamakhyalal, who was a permanent Chairman of the Bank, had borrowed a sum of Rs. 726/- shown in the suspense account which was credited towards the share account of Om Prakash Goenka.

Again on 30th July, 1945 he is shown to have borrowed Rs. 10,350/- which is also shown as deposited in the share account of the seven members of his family who are also the Appellants here, namely Santi Goenka, Debi Prosad Goenka,

Kamakhyalal Goenka, Anandi Goenka, Brijbala Goenka, Balchand K. Lall and Om Prakash Goenka. The cash book entries therefore reveal that even in respect of the purchase of the shares standing in the names of the other Appellants, the Appellant Kamakhyalal Goenka himself borrowed money from the accounts of the Bank which were later deposited in the share accounts of the other members of his family.

On 9th November, 1944 he is shown to have borrowed Rs. 7,700/- in advance account which were also shown as deposited in the share account of the seven persons named above. The learned Judge was therefore right in concluding on the basis of these entries that it was a regular practice of the Appellant Kamakhyalal Goenka to make payments in respect of his share account and also in respect of the account of the members of his family by borrowings from the Bank, without making any actual payment.

The cash book entry therefore supports the claim of the Official Liquidator that a sum of Rs. 14,526/- is due from the Appellant Kamakhyalal on account of the allotment of 2905 discount shares. These shares are said to have been allotted to Kamakhyalal at a meeting of the Board of Directors held on the 19th March 1946. It is true that the proceeding book has not been produced in the case and Mr. Lahiri has naturally commented upon the absence of this book, but there is plenty of other materials on record which would go to show that in fact this allotment had been made.

The notice for the meeting which also embodied the agenda for the allotment of shares, bears the initials of Kamakhyalal Goenka and the attendance register also, for that day, bears his signature. There is also the further fact of the entry of payment of Rs. 14,526/- in the cash book, by mere transfer entries, representing deposit of half the application money due on these shares from the Appellant. The share register of the bank has also been produced in evidence. It appears to be incomplete and after serial 104 the entries present an unfortunate state of affairs.

The entries thereafter have not been made in ink as they should have been: rather the entries are in pencil. Nevertheless it is not the case of any party that these entries are interpolations. The Official Liquidator with a view to ascertain the actual petition, obtained a list of shares allotted from the Registrar of Joint Stock Companies. In the register of shares it appears that entry No. 107 which is in pencil, relates to this allotment of 2905 shares in favour of the Appellant Kamakhyalal Coenka, though in the statement obtained from the Registrar of Joint Stock Companies the item is shown in serial No. 114.

The above entry in the register which is also confirmed by the statement produced from the Registrar of Joint Stock Companies, clearly proves the allotment of these shares to the Appellant. Of course the relevant application for allotment of these shares is not produced as appears to be also the case in respect of certain other shares, about the allotment whereof there is no dispute.

Up to 5th April the cash book purports to have been signed by the Secretary and the Accountant every day, though the signatures of the General Manager and the Cashier are not there.

From 6th April 1945 to 5th June 1945, the book was signed only by the accountant. Even the Secretary did not sign. After 6th June it does not bear the signature of any one. The indication is as the learned Judge has observed, that the affairs of the bank were speedily deteriorating and officers of the Bank were avoiding personal responsibility. However in the circumstantial background, there is little doubt about the genuineness of the entries which may be safely taken to represent the state of affairs as they actually existed.

The notice issued in respect of the meeting of the Board of Directors on 19th March 1946, on which date these allotments were made, has been proved by Thomas himself. He also proves the fact that the receipt of the notice had been signed by the Appellant Kamakhyalal Goenka and that he was present at the meeting when these shares were allotted as shown in the statement of shares issued in the account, vide Ext. L (9).

Thomas was the man, who as the Director-in-charge, used to submit statements to the Registrar of Joint Stock Companies and carry on correspondence with him; and as Director in-charge he had sent the return of allotments dated 2nd April 1946 of which Ext. L(8) was a certified copy. The statement shows the number of shares issued at discount on 19th March, 1946 in the name of the Appellant. The case of the Appellant that he never applied for the shares in question or that he made no payments for the same or that he had no knowledge of these allotments is impossible to accept on the state of the evidence which is before us.

It is not only that he was present at the meeting as the Chairman of the Board and had signed the notice and the attendance register and had put his name about the allotment of these shares, but also that he signed the vouchers Ext. L(1) and L(2) showing transfer entries in respect of Rs. 14,526/- in connection with these block shares. It is therefore futile on the part of the Appellant to seek to wriggle out of the situation by stating that he had no knowledge of this allotment until November 1951.

The members of the Board used to take decisions in his presence, he being the Chairman and although the proceedings may have been recorded in English his explanation that he did not understand what transpired at the meetings is without substance inasmuch as the evidence shows that the discussions took place also in Bengali, Assamese and Hindi. On the evidence as it is, there can be no other conclusion except this that the allotments of these shares had been made to the Appellant Kamakhyalal Goenka with his knowledge and consent and that in due course a statement thereof had been sent by the Director-in-charge, Sri Thomas to the Registrar of Joint Stock Companies as required by law u/s 104 of the Indian Companies Act.

4. The next question is whether this allotment was a valid allotment or at any

rate whether the liability for contribution in respect of these discount shares could be enforced against the Appellant Kamakhyalal. A question was raised before the learned Judge that the allotment of these shares was in contravention of the orders of the Examiner of Capital Issues and as such it was illegal. Our attention has been drawn to Rule 94-A of the Defence of India Rules which deals with control of capital issues. The rule requires that

no company, whether incorporated in British India or not, shall except with the consent of the Central Government make an issue of capital in British India, or make in British India any public offer of securities for sale.

Now so far as this prohibition under the law is concerned, it appears that the defect was cured. A representation was made on behalf of the Bank for condonation of the illegality and it was condoned as per Ext. L(13), dated 8th October 1946, which is another factor which goes to prove that these shares had in fact been issued in the name of the Appellant. Clause 6 of the Rule in question provides that the Central Government may by order condone a contravention of Sub-rule (2), Sub-rule (4) or Sub-rule (5) and on the making of such order, the provisions of the rule shall have effect as if an exemption had been granted thereunder from the operation of the rule.

There can be no question now that the illegality if any for non-compliance with Rule 94-A in making the allotment has been sufficiently cured or condoned under the law. Therefore the allotment will have effect as if an exemption had been granted by the Central Government. The learned Advocate General has raised another very important question, assailing the validity of these allotments which was not raised before the learned Judge.

He contends that the allotment of these discount shares is void and inoperative u/s 105-A of the Indian Companies Act and therefore the Official Liquidator has no right to levy any contribution on the basis of such an allotment which the law did not recognise at all. According to the learned Counsel, no, rights or liabilities flowed from such a void allotment. Under the relevant provisions of the above section, it is lawful for a company to issue at a discount shares in the company, of a class already issued, provided that the issues of the shares at a discount was authorised by a resolution passed in a General Meeting of the Company and sanctioned by the Court.

The two requirements of this provision therefore evidently are: (1) that the issue of the share in discount should be authorised by a resolution passed in the General Meeting and (2) that it must be also sanctioned by the Court; in the absence whereof the allotments will not be valid. It is pointed out that none of these requirements of the law have been fulfilled in the present instance and therefore the Court) should not take any notice of the allotment for purposes of enforcing contribution against the Appellant.

The learned Counsel further refers by way of analogy to Section 102 of the Act which also lays down certain prohibitions against the allotment of the shares; but

those prohibitions do not make the allotment altogether void but only voidable at the instance of the applicant, provided the latter applies to do so within the relevant period mentioned in the section. This the applicant can do notwithstanding that the company is in course of being wound up.

The learned Counsel therefore contends that if the intention of the law was to make the allotments in the other case also voidable for non-compliance with the requirements of Section 105-A, it would have definitely said so, as it did in the provisions contained u/s 102 of the Act. These arguments have no doubt a good deal of force in them but they fail to take due notice of the liability for contribution against a member of the Company founded on Section 156 of the Act. The section says that in the event a company be wound up, every present and past member shall, subject to the provisions of the section, be liable to contribute to the assets of the company an amount sufficient for payment of its debts and liabilities.

It has been repeatedly pointed out in a large number of cases that when a company is in the process of being wound up, the liability of the members is ex lege and not ex contractu; in other words whatever liability there was under any contract, whether void or voidable, terminates, and the liability thereafter when the process of winding up starts, becomes a statutory liability as enjoined by Section 156 of the Act. This statutory liability attaches by reason of the fact that the person is a member of the company.

That he is a member of the company has to be proved like any other question of fact. A "member" has been defined in Section 30 of the Act, under which the subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members; and every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall also be a member of the company.

Under Section 31 of the Act every company is in duty bound to maintain in one or more books a register of its members, and enter therein the particulars in regard to their names and addresses, their occupation if any, along with a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member; the date at which each person was entered in the register as a member; and the date at which any person ceased to be a member. The failure to maintain a register as required by Section 31 of the Act may entail penal consequences.

Mr. Lahiri has therefore laid great stress upon the point that in order to be a member it is necessary that the name of the person should be borne on the register of members maintained by the Company which should also show the particulars contemplated by Section 31 of the Act; and he contends that in the present case in the register itself there is nothing to indicate that in serial No.

114 the Appellant has been mentioned as a member of the company in respect of these 2905 shares.

There is no doubt that there is some discrepancy about the serial number as mentioned in the register and the serial number as mentioned in the statement submitted to the Registrar of Joint Stock Companies as required by Section 104 of the Act. In serial No. 114 of the register which is in pencil, the name of one Mr. Joshi appears; but the fact remains that serial No. 107 shows the name of the Appellant as holder of these 2905 shares. Therefore on the register also his name appears as a member.

Mr. Lahiri says that these are pencil entries and it cannot be therefore assumed that there is any entry showing his name as a member on the register. It is nobody's case that there was any interpolation in the register made by any person. On the contrary the fact that a contemporaneous statement was sent to the Registrar of Joint Stock Companies as required by Law goes to confirm the correctness of the entry that the Appellant was a member as such. The position then is that the Appellant is shown as a member of the company and therefore u/s 156 of the Act his statutory liability to contribute arises.

It is to be remembered that these entries in the register and the corresponding statement appear to have been made as early as in March and April 1945. It has been also shown that the allotments of the shares in question were made to the knowledge of the Appellant. He being the Chairman of the Company during the relevant period, he must have been aware of the records in question recording him as a member of the company, yet no effort was made by the Appellant to get his name removed from the register. That being so, there is no reason why on the terms of Section 156 of the Act the liability to contribute should not be enforced against him.

5. That point though not specifically considered by the learned Judge, has been considered by him incidentally. He observes that when the winding up commenced, none of the Appellants (in fact Kamakhyalal is the sole actor on the scene) ever applied for getting his name struck off from the register. That being so, they were not entitled to raise any objection about the invalidity of the allotment, because the irregularities in the process of allotment if any, are no answer to the liability which commences after the winding up and which is an *ex lege* obligation.

There is of course no decision directly on the point which has dealt with the effect of non-compliance with Section 105-A of the Act, yet it is useful to refer to a decision of the Privy Council in AIR 1932 240 (Privy Council) In that case a point was taken that it had been already decided between the parties in some previous litigation that the arrangements between them constituted One indivisible contract which was illegal and void, that the matter had thus become *res judicata* and that since the contract to take shares was void, the executors were under no liability in respect of the shares, but were entitled to have their

names removed from the list of contributories and to have the application and allotment monies repaid.

The argument challenging the allotments of shares as in pursuance of a void contract was not entertained by their Lordships, who held that even if they assumed in favour of the Appellants that the contract contravened the provision of Section 105 of the Companies Act, the matter could be disposed of on a short but sufficient ground. They observed as follows:

Whatever may have been the right and liabilities of the testator before the winding up intervened, the position was altered by the happening of that event. At the commencement of the winding up he was and had for over three years been entered on the register of shareholders as the holder of the shares now in question, with his full knowledge and assent. On the winding up, Section 156, Companies Act, came into play.

His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been pleaded on the register in respect of the shares, but after the winding up his liability in respect of the shares arose *ex lege* and not *ex contractu*.

The principle underlying this decision completely covers the case before us. Section 105 which was canvassed before their Lordships also lays down certain inhibitions against issue of shares by a Company; and in the section itself as in Section 105-A there is nothing to show that an allotment of shares notwithstanding the inhibitions is merely voidable. Indeed their Lordships proceeded to decide the matter on the assumption of the allotment being void and yet they held that the liability arising u/s 156 was entirely an independent liability which did not depend upon the contract of the parties.

The liability arises by virtue of the fact that the name of the person appeal's on the register of the Company. The above decision has been followed in various other decisions including the decision in *Mahomed Akbar Abdulla Fazalbhoys Vs. The Official Liquidator*, and *R. Lakshmi Narasa Reddi v. Official Receiver Sree Films* AIR 1951 Mad 890 (C). It is unnecessary to discuss these cases though perhaps a reference to the Bombay decision may be useful later. We are therefore unable to entertain the contention of the learned Advocate General that the liability in respect of these shares could not be enforced in view of the bar of Section 105-A of the Companies Act.

6. We are also satisfied that this is not a case where the Appellant Kamakhyalal could claim any correction of the register u/s 38 of the Act even if such a correction can be made in the course of the winding up proceedings. There is of course no such prayer made to us either.

The winding up order was made in 1948 and he having knowingly continued to allow his name to stand on the register, having taken no action to have it

removed during all this period, cannot now be allowed to plead for the exclusion of his name from the list of contributories, even on the assumption that the allotment of shares was void. Such plea has to be overruled on the doctrine of holding out. The above decision in Pattipati Ramalingaiah and Another Vs. Nagulagunta Subbarami Reddi, (ibid), with which we entirely agree is a case in point.

7. I shall therefore now turn to deal with the question of the plea of payment. This refers to 417 ordinary shares issued in the name of the Appellant Kamakhyalal Goenka and the members of his family. In support of this plea of payment two receipts were produced by the Appellant Kamakhyalal Goenka. One is dated 2nd December 1946 which purports to be a receipt for Rs. 20,800/- (Ext. G (1)). The other is a receipt dated 18th June 1945 which is for a sum of Rs. 100/- only (Ext. G (2)).

The first one purports to bear the signature of the Secretary of the Bank and the other the signature of the Promoter-Director. The latter receipt is for value received for one fully paid-up share transferred, as the receipt shows, to Master Deviprasad Goenka, a minor son of Kamakhyalal Goenka. Only one witness was examined to prove the receipts. He is Prabhat Ranjan Dhar, a shop-keeper of Gauhati. At a later stage Kamakhyalal himself sought leave to prove these receipts which the learned Judge permitted.

He further produced a day-book to show payment of the sum of Rs. 20,800/-, which according to the Appellants was in full satisfaction of the dues in respect of 416 shares which had been allotted to them. There is no other evidence in support of the payments. The entries in the Rokar book have been rightly discarded by the learned Judge as being of no consequence, because the book did not bear the initial of the Income Tax Officer and did not appear to be a genuine day-book.

There are also other important reasons for not relying on these receipts. Appellant Kamakhyalal Goenka retired in May 1946 from the Chairmanship of the bank, yet it is difficult to believe that without any pressing call he would pay this big sum of Rs. 20,800/- in December 1946, when earlier he had been borrowing from the bank accounts even to make small payments for the various shares. Then again there is no entry of these payments in the Bank accounts at all.

It is impossible to believe that if these payments had been actually made, there would be no entry in the Bank accounts. The other significant fact is that the persons who are said to have granted the receipts have not been examined. It has been proved that the alleged executants of the receipts are not only alive but they are in Shillong and yet no attempt was made by the Appellant to examine them to prove their genuineness. Lastly the day-book entry has been already held to be fictitious. It is therefore difficult to put any reliance on the above evidence in proof of payment.

8. In this context there is a further contention raised before us by the learned

Advocate General which was not raised at an earlier stage. The contention is that some of the contributories belonging to the Appellant's family in whose names the shares have been purchased, were minors, some of them being minors even now. Therefore the contract so far as these minors go is void. It is pointed out that the petition filed by the Official Liquidator asserts that all the persons included in the list of contributories were liable in their own right as such.

Therefore no contribution could be levied against the minors, they having no capacity to enter into the contract at all. Reliance has been also placed upon the recital in the cause title to the rejoinder petition filed by the Appellant Kamakhyalal Goenka, wherein some of the Appellants have been described as minors. It should be observed at the outset that in this petition Kamakhyalal Goenka merely took the plea that the shares of the above-named contributories had been fully paid up and that they had "absolutely no liability to the Bank for its affairs in holding the above shares, except participating in its assets.

The claim was put forward by Kamakhyalal Goenka on behalf of all. There is no plea raised therein on the ground of illegality of contract in favour of minors and as such the contract being unenforceable against the other contributories. Even in the grounds of appeal the Appellants did not raise any such objection; but the learned Counsel appearing for them has now tried to reinforce his position by filing a counter-affidavit before us asserting that some of the Appellants are and were minors.

The learned Advocate General has therefore vehemently pressed before us his contention on this ground. It is to be remembered that in this case there is nothing to show that the company was at any stage apprised of the fact that the other members of the family of Kamakhyalal Goenka in whose name the shares were being purchased, were minors at the time of those purchases. In fact Appellant Kamakhyalal Goenka was himself the Chairman and he was the person who was buying up these shares in the names of different members of his family.

The evidence further shows that he had been borrowing from the accounts of the Bank for himself in order to make payments of these shares as already indicated earlier. That being so, it cannot be held that the allotment of the shares in the names of these persons who were all members of Kamakhyalal's family, even assuming that they were minors, was void and as such the liability arising for contribution in respect of those shares could not be enforced at all.

Indeed even if it is eventually found about which we are not at present satisfied, that the persons in whose names some of these shares stood, were minors, the Appellant Kamakhyalal Goenka who appears to have purchased these shares in those names could still be substituted under the law as a contributory in respect of those shares. Anandi Goenka and Santi Goenka are the daughters of Kamakhyalal Goenka and Debi Prasad Goenka and Om Prakash are his sons. It is nobody's case that they paid the consideration amount for the purchase of the shares in their names or that the consideration was paid out of their money.

The point of their minority was never canvassed at any earlier stage and throughout Kamakhyalal Goenka appears to have been resisting time claim for contribution as if he was the person acting on the scene and responsible for the contributions, if at all. Mr. Lahiri has relied upon a decision in *Dalmia Jain Airways Ltd. Vs. Miss Saroj Rani and Another*, in support of his contention that the contribution for these shares could not be enforced against minors. That case is clearly distinguishable.

There an application was made u/s 38 of the Companies Act for rectification of the register and substitution of the name of the father in place of his two minor daughters in whose names the shares had been purchased. The evidence showed that the money was paid by the father from out of the monies which belonged to the grand-mother of the minor children and which has been inherited by the minors. That) being so, it is obvious that the father was not himself making the purchases in that case in the alias name of the daughters, but he was making purchases for the daughters in their own rights and out of their money.

The facts show that the money in that case was paid on behalf of the minor daughters by the father, who was practically an agent for them and the applications which were made by the father indicated clearly that the persons to whom the shares were being allotted were minors. In these circumstances it was held that where an application is made by the father as guardian of his minor daughter for shares and the company issues shares to and registers shares in the name of the minor describing her as a minor, the transaction is void on the face of it and the father of the minor who signed the application could not be deemed to have contracted for the shares and could not be placed on the list of contributories.

This case therefore does not assist the contention of the learned Counsel. The decision of the Madras High Court in *M.S. Paluniappa Mudaliar v. Official Liquidator, Pasupathi Bank Ltd., Coimbatore* AIR 1942 Mad 470 (E), in effect supports the proposition that where in fact the company is not aware of the persons to whom the shares are issued as being minors, and a person buys certificates in their names using their names merely as a benamidar or as aliases for himself, the person could be made responsible as a contributory.

In that case also the application was by a guardian of his minor daughter for shares and the company issued shares in the name of the minor. It was held that the transaction was void on the face of it. An attempt was made by the Liquidator to have the father guardian substituted as a contributory but this attempt did not succeed and their Lordships distinguished the decision in. In the matter of *Muslim Bank of India Ltd. in liquidation* ILR (1939) Lah 299 : AIR 1939 Lah 515 (F), and the other English cases on the ground that in those cases the person on the register was merely an alias of or a name-lender for the person whom it was sought to put on the register in his place.

In those English cases it was held that where the fact of minority is not revealed

and a person contracts in the name of another not being a legal entity, the former must be deemed to have contracted personally, because in effect such a person merely utilises the names of others as his own, aliases. We therefore hold that even if the contention is accepted that some of the members of the family of Appellant Kamakhyalal Goenka who are said to be contributories are minors, the Appellant Kamakhyalal Goenka himself should be substituted as a contributory in respect of those shares.

This order we would be justified in making even within the purview of Order 41, Rule 33 of the Code of Civil Procedure. The position then is that we modify the decree to the effect that the liability for contribution of Kamakhyalal Goenka will be joint and several in respect of all the 417, shares standing in his name and the names of the different members of his family as mentioned in his own rejoinder petition. The above appeal is therefore without any merit and must be dismissed with costs: hearing fee Rs. 200/-.

9. The point in the other appeal of Charles Thomas is very simple. There is no difficulty in his case because he admitted the allotment of 2000 discount shares which was made to him on 19th March 1946 as having been made in his presence. It was he who sent the statement to the Registrar of Joint Stock Companies showing this allotment also. He also admitted by reference to Ext. L (13) that the irregularity in the allotment of shares on 19th March 1946 was condoned by the Government of India.

But his only plea was that these shares were transferred by him to one J.M. Roy Choudhury, the Managing Director of the Bank. There is no instrument of transfer in this case. Apparently he being the Director-in-Charge of Law and Organization, must have been aware of what Section 34 of the Act requires. Section 34 says *inter alia* that an application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee but it shall not be lawful for the company to register a transfer of shares unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the script.

An exception is of course provided, where the instrument is lost and the loss has been proved to the satisfaction of the directors, in which case the company may if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may require. The provisions of Section 34 therefore had to be strictly followed before any transfer could be recorded and recognised by the company and before the company could be bound by the transfer.

Regulation 18 of the First Schedule to the Act says that the instrument of transfer of any share shall be executed both by the transferor and the transferee and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of the members in respect

thereof. It is quite clear therefore that until the name of the transferee is entered in the register of membership,, the transferor shall be deemed to be the holder of the shares and as such liable as a member.

There is no instrument in this case and no attempt was ever made to have the transfer registered. In Mahomed Akbar Abdulla Fazalbhoj Vs. The Official Liquidator, Chagla C.J. held that it is no answer for the contributory against the claim of the company to say that although his name appears on the register, he is not liable because he has sold his shares to a purchaser who has not got his name registered in the register.

In the absence of rectification of the register u/s 38, his liability is absolute u/s 156. In this case on facts also it appears that the plea of transfer was entirely a frivolous plea and no man in any responsible position should have ventured to set up a plea of this nature in a Court of law. The Appellant's own evidence on the point is so vague that it has been rightly commented upon by the learned Judge. He admitted that he did not pay anything to the Bank for the allotment of these shares. He is not even definite as to when this transfer was made.

He at first stated that as far as he remembered a deed of transfer was effected by him in favour of the transferee but no such deed was ever produced. He also does not remember what the total consideration payable to him by the transferee was. He stated that the transferee did give him a note in writing promising him to pay rupees one thousand each month after the first payment of rupees ten thousand, but even that is misplaced. All this evidence is wholly untrustworthy.

He also does not remember whether upto the date of his deposition any money had been paid to him by J.M. Roy Choudhury. So far as the rectification of the register u/s 38 is concerned, we have already discussed these aspects of the matter. These Appellants cannot claim any rectification u/s 38 of the Act because there is no question of any misrepresentation or mistake in their case.

The other point about any illegality on account of non-compliance with Section 105-A of the Act has been already sufficiently answered. We have held that it does not affect the liability of the Appellant as a member. The appeal therefore is without any substance on merits and in that view of the matter it is not necessary to deal with the question of limitation raised in this case. This appeal is also accordingly dismissed with costs: hearing fee Rs. 100/-.

H. Deka, J.

10. I agree.