

(1972) 05 DEL CK 0029

In the Delhi High Court

Case No : Company Appeal No. 3 of 1968

K.P. Shankara, O.L.

APPELLANT

Vs

Hardhan Singh

RESPONDENT

Date of Decision : 11-05-1972

Acts Referred:

Citation : (1973) RLR 324

Hon'ble Judges : Prakash Narain, J; Narain Andley, J

Bench : Division Bench

Advocate : K.K. Raizada, Satish Chander, Ved Vyas, B.N. Kripal and D.D. Sharma, for the Appellant;

Judgement

Prakash Narain

(1) This appeal is directed against the order of a learned Single Judge of this Court passed in C.O. No. 49 of 1958 while exercising jurisdiction as Company Judge.

(2) The People's Insurance Company Limited was a public limited liability company which was promoted by various persons, one of the chief promoters being one Sardul Singh Caveeshar. This company went into voluntary liquidation but later on was ordered to be compulsorily wound up by an order of the District Judge, Delhi, passed in 1955 at the instance of the Controller of Insurance, Government of India. Shri K.P. Shankara was appointed the Official Liquidator. These orders were passed under the Indian Companies Act, 1913.

(3) After the enforcement of the Companies Act, 1956 the liquidation proceedings of the company were transferred to the Punjab High Court which at that time exercised jurisdiction over litigation in the Union Territory of Delhi. The Official Liquidator applied to the High Court for settlement of the list of contributories u/s 184 of the Indian Companies Act, 1913. The said application was registered as C.O. No. 7 of 1957. In respect of 3045 shares respondents 2 to 9 in CO. No, 49 of 1958 were settled as contributories of the company by an

order passed in 1962. In the mean time on April, 30, 1958 the Official Liquidator moved C.O. 49 of 1958 u/s 184 read with Section 38 of the Indian Companies Act, 1913 for rectification of the register of members in respect of the said 3045 shares of the company registered in the name of Handhan

(4) In C.O. 49 of 1958 the contention of the Official Liquidator is that a block of 3405 shares was held by Sardul Singh Caveeshar, As on September 30, 1940 those shares were paid up to the extent of 10 per cent of their value and on that date were transferred to the name of Handhan Singh, Respondent No. 1. Haridhan Singh was the Managing Director of the company from 1941 till March. 1946 and earlier from September 30, 1940 was also Chairman of the Company. On August 10, 1944 and November 10, 1944 two calls each of Rs. 10 per share were made on the shareholders. The call in respect of 3045 shares held by Haridhan Singh were not enforced. After Haridhan Singh ceased to be a Director of the company in March, 1946, the company by a resolution date July 23. 1946 forfeited these 3045 shares and related the same to some of the present respondents including the Manphool Singh, who in their turn further transferred them, to remaining respondents with the result that at the time of the settlement of the list of contributories respondents 2 to 9 were shown as members holding this block of shares and so, were included in the list of contributories. According to the Official Liquidator, Haridhan Singh instead of paying the two calls made on the shares held by him colluded with Sardul Singh Caveeshar and his friends to have the shares forfeited although Haridhan Singh was in a position to pay up the call moneys. Later on these shares were shown as having been allotted to other persons including one Manphool Singh who was allegedly an active accomplice and true lieutenant of Sardul Singh Caveeshar but a man of straw. It is alleged that in this way the company was defrauded of the money due to it and Haridhan Singh was relieved of his liability to pay the call moneys. In these circumstances it was prayed that the court should rectify the members' register under the provisions of Section 38 of the Indian Companies Act, 1913 and in consequence also rectify the list of contributories.

(5) The application was contested by Haridhan Singh and others. As ready noticed earlier, on remand Harbans Singh, J. settled the following issues :-

"1. Whether shares were held by respondent No. 1 benami for S. Sardul Singh Caveeshar? If so, is he not liable for calls made during the period when he was a registered holder of the shares ? 2. Whether the surrender of shares by respondent No. 1 to S. Sardul Singh Caveeshar and the subsequent forfeiture and reallocation thereof was made collusively and fraudulently as alleged and if so, to what effect. 3. Whether the payments of subsequent call as shown in the books of the company were invalid, fraudulent and ultra vires, and if so, to what effect ? 4. Are there good grounds for rectification of the register by bringing the name of respondent No. 1 in respect of the shares, which were held by him and subsequently forfeited ? 5. What is the effect of judgments in C.O. 7 of 1957 and L.P.As. 14,122 and 123 of 1962 on this petition ? 6. Whether the petition is

within time ? 7. Whether respondent no. 9 is a bona-fide transferee ?

(6) S. K. Kapur, J. decided the second issue against the Official Liquidator and the first issue against Haridhan Singh. It was conceded by the counsel that issue No. 3 need not be decided in this petition. The learned Judge in view of his findings on Issues 1 and 2 did not consider it necessary to decide any other issue and dismissed the application. Aggrieved by that decision the Official Liquidator has preferred this appeal.

(7) When the appeal was called up for hearing Mr. Ved Vyasa, the learned counsel for Haridhan Singh. Respondent No. 1, raised three preliminary objections to the maintainability of the appeal. These were (i) In as much as the list of contributories has been settled in 1962 and no appeal against that order settling the list has been preferred by any body, it is binding on all and the Official Liquidator cannot have the list changed by adding names thereto or deleting any names from the list which must be the result if the present application of the Official Liquidator was to be allowed. Indeed there is no prayer in the application to rectify the list of contributories; (ii) After the settlement of the list of contributories the official Liquidator steps to make further calls on Respondents Nos. 2 to 9. The Official Liquidator is, Therefore, debarred from getting the name of Haridhan Singh placed in the list of contributories and Realizing from him moneys under the two calls made in August and November, 1944 ; (iii) All the holders of the 3045 shares are not before the court and in as much as inclusion of the name of Haridhan Singh in the register of member would necessarily mean deletion of the name of some persons from the list of members, those persons who will be affected should be before the court and no decision can be made behind their back. In other words, those persons are necessary parties and in their absence the petition must fail.

(8) It may be mentioned that these objections were not raised before S.K. Kapur, J and although considerable argument was advanced on these objections, we are of the opinion that it is unnecessary to dilate upon them in the view that we are going to take in the matter. (After reproducing Section 38 of the Indian Companies Act, 1913 judgment proceeds).

(9) As a reading of the section would show in order to attract its provisions, it has to be established that there was some act or omission on the part of the company. It is not sufficient, however, merely to contend or prove that there was omission in the name of any person being entered in or omitted from the register of members. The name should have been included in the register of members or omitted there from fraudulently or without sufficient cause. Therefore, what has to be seen is whether there is any element of fraud in the name of Haridhan Singh being excluded from the register of members. The subsequent in elusion of the names of respondents 2 to 9 or others in respect of these 3045 shares would be immaterial as, admittedly, at that time Haridhan Singh was neither the Chairman, nor the Managing Director, nor even a Director of the company. It has also to be seen whether if there was no fraud there was sufficient cause for

forfeiture of the shares held by Haridhan Singh.

(10) Mr. K. K. Raizada, the learned counsel for the official Liquidator, has urged that it stood established that Sardul Singh Caveeshar was the principal promoter of the company and Haridhan Singh was a very close associate of his as well as a friend. Haridhan Singh in his written statement to C. O. No. 49 of 1958 stated that the calls on these 3045 shares were not enforced against him as everybody knew that he held the shares benami for Sardul Singh Caveeshar who was the real owner of the shares. This contention of Haridhan Singh was overruled by the learned Single Judge. In other words it was held that Haridhan Singh was the real and beneficial owner of these shares. If that be correct then the fraud, if any, would be in not enforcing calls on the shares held by Haridhan Singh either because he was the Managing Director of the company or because the Directors were prevailed upon not to enforce that liability against Haridhan Singh. What actually transpired in the meeting of Board of Directors is not known for as observed by the learned Single Judge the minute book of the Board of Directors' meetings has not been made available. The fraud alleged is with regard to the forfeiture of the shares held by Haridhan Singh instead of enforcing the calls on the shares in his name. We shall presently deal with the question as to what is to be done if a member does not pay up the call money. It is first requisite, however, to understand what is meant by fraud. According to the Oxford English Dictionary fraud means criminal deception, the using of also representations to obtain an unjust advantage or to injure the rights or interests of another, the quality or disposition of being deceitful; faithlessness, insincerity. According to Section 25 of the Indian Penal Code a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. When a person is said to have done a thing fraudulently it means that there must be deception, actual or intended, an injury or risks of injury resulting in some advantage to the doer or disadvantage to some other person. A fraudulent act has to be distinguished from a dishonest act. A fraudulent act has an element of deceit which is not to be found in a dishonest act. There is a close affinity between the two and yet there is a distinction. In the present case there is no doubt that the forfeiture of the shares did to a certain extent confer pecuniary advantage on Haridhan Singh inasmuch as it absolved him of his liability to pay the moneys due under the two calls made in August and November, 1944 but at the same time it cannot be disputed that inasmuch as the company allotted these shares to other persons later on, there was no pecuniary loss as such to the company, at that stage at least. This act of forfeiture was on July 23, 1946 when Haridhan Singh was not a Director of the company and so unless there is cogent evidence to show that he prevailed upon the Directors to effect forfeiture to avoid liability of the calls, he cannot be connected with the act which is said to be the fraudulent act resulting in the name of Haridhan Singh being omitted from the register of members. This act of the then Directors may not be one for which the then Directors are responsible but Haridhan Singh is not proved to be connected with the act of forfeiture.

(11) We now come to the question as to whether there was sufficient cause for forfeiting the shares. The Articles of Association of the company have not been shown to us but it was stated that the same are more or less in conformity with the regulations as given in Table "A" of the First Schedule to the Indian Companies Act, 1913. According to Regulation 12, the Directors of a company may from time to time make calls upon the members in respect of any moneys unpaid on their shares. Under Regulation 14 if a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent per annum from the day appointed for the payment thereof to the time of the actual payment but the directors shall be at liberty to waive payment of that interest wholly or in part. Thus, when calls are made on shares the company has a right not only to recover the money called in but also to claim interest thereon. Regulation 24 gives the power to forfeit shares if a member fails to pay any call or installment of a call on the day appointed for the payment thereof. This shows that the company apart from the right to recover the money of the calls made may impose the penalty of forfeiture on the defaulting shareholders. Admittedly, Haridhan Singh had not paid in the moneys called in August and November, 1944. The company could claim that amount from Haridhan Singh as well as interest thereon but apart from this could also exercise the right to forfeit the shares. This is exactly what was done and we fail to appreciate how the exercise of this right can be termed as an exercise of right without sufficient cause. Haridhan Singh may or may not be a person of means but the forfeiture as such cannot be regarded as without sufficient cause. Whether the then Directors are or are not responsible for the loss occasioned to the company in not realizing the moneys due on the calls and the interest thereon is a matter which has to be dealt with in any misfeasance proceedings that may be taken up but have nothing to do with the rectification of register of members u/s 38, which is the scope of the present application.

(12) Mr. Raizada urged that the relationship of Haridhan Singh with Sardul Singh Caveeshar resulted in all this alleged fraud being perpetrated to benefit Haridhan Singh to the detriment of the company. If Haridhan Singh was the real owner of these shares and the calls were not enforced against him by the Board of Directors or even by himself when he was Managing Director it may be a case of misfeasance or malfeasance but certainly not a case which attracts the provisions of Section 38 of the Act.