
(1949) 03 MAD CK 0009
In the Madras High Court
Case No : Appeal No. 505 of 1945

Mahalakshmi Textile Mills Ltd.

APPELLANT

Vs

A.K. RM. M.K. Meyyappa Chettiar and Others

RESPONDENT

Date of Decision : 04-03-1949

Acts Referred:

Citation : AIR 1950 Mad 202 : (1950) ILR (Mad) 369 : (1949) 62 LW 479

Hon'ble Judges : P.V. Rajamannar, C.J;Raghava Rao, J

Bench : Division Bench

Advocate : A. Krishnaswami Iyer, K. Subramaniam and Alladi Kuppuswami, for the Appellant; S. Venkatesa Iyengar, for the Respondent

Final Decision : Allowed

Judgement

Raghava Rao, J.—An interesting question of company law is raised for determination by this appeal. The material facts which are more or less beyond the pale of controversy -- may be briefly stated.

2. The plaintiff, a shareholder of the defendant, which is a limited company, fell into arrears in respect of the third and fourth instalments of Rs.

1250 each of the total share amount of Rs. 5000 payable by him on his 50 shares of the face value of Rs. 100 each, having duly paid the amounts

of the first and second instalments of Rs. 1250 each, payable along with the application for shares and at the time of the allotment thereof

respectively. There was a meeting of the Directors of the company held on 31st October 1928 as shown by the entries, Exs. D-4 and D 6, in the

minutes book at which, firstly, it was resolved that the first call (i. e., the call in respect of the third instalment) made as proposed in the circular

letters, Ex. D-2 series, should be confirmed and, secondly, the Managing

Directors were authorised to make the second call (i. e., the call in respect of the fourth instalment) before 5th December 1928, requiring the amount of that call to be paid by 25th December 1928. It is the case of the defendant company that thereafter, as shown by Exs. D-3 and D-3 (a), the blank printed form of the call notice maintained by it and the counterfoil of the notice actually issued, notice was duly sent to the plaintiff in respect of the first call on 30th March 1928 and that, similarly, as shown by Exs. D-6 and D-6 (a), a similar printed form of the call notice and a similar counterfoil respectively, notice was duly sent to the plaintiff in respect of the second call on 4th December 1928. The plaintiff did not comply with the notices and make the payments. There were further notices, Ex. D-8 series, which also proved fruitless, The company thereupon resolved by Ex. D-9 on 2nd December 1938 to issue further notices to defaulting shareholders intimating to them its intention to forfeit their shares on default of payment within the further time to be given. Accordingly on 30th July 1940, notice (Ex. D-10) was issued by the company to the plaintiff, demanding the payment of Rs. 2500 for the first and second calls with interest at nine per cent. per annum on 31st August 1940 and intimating forfeiture on default. Although the plaintiff received this notice, he did not respond. On 18th January 1941 the Directors resolved, as shown by Ex. D-11 (a) the entry in the minutes book, that final notice should be given to the defaulters that payment should be made by 30th April 1941, or, else that the shares would stand forfeited. Exhibit D-12 is the notice issued to the plaintiff, giving him intimation of the resolution and demanding payment. In response to this notice, the plaintiff sent to the managing agents of the company a hundi, EX. D-14, on 23rd April 1941 for Rs. 2500, and along with the hundi also paid a sum of Rs. 500, leaving a balance of Rs. 2000 still to be paid. The balance not having been paid till 11th May 1943, there was a resolution of forfeiture passed by the company on that date (EX. D-17). Intimation of the forfeiture was given to the plaintiff by letter dated 22nd May 1943 (Ex. D-18). The hundi, Ex. D-14, and Rs. 500 were also returned to the plaintiff along with a covering letter, Ex. D-19. Thereupon, notices passed between the parties, Exs. D-20 and D-20 (a) and Exs. D-21 and D-21 (a), the plaintiff challenging and the company maintaining the validity of the forfeiture. The suit out of

which this appeal arises is the sequel to these notices. The plaintiff craves in his plaint a declaration of the invalidity of the forfeiture and an

injunction in restraint of a sale or re-allotment of the shares or any other dealing with them by the company.

3. The Court below found (1) that Ex. D-2 series, the circular letters and the resolution at the meeting, Ex. D-4, in respect of the first call, were

defective, in that they did not fix the amount of the call or specify the person to whom or the place at which it was to be paid, as required by

Article 40, Articles of Association ; (2) that the resolution EX. D-5 in respect of the second call, did not, while fixing the time for payment, specify

the amount to be paid and the person to whom or the place at which it was to be paid, and was therefore defective for want of conformity to the

same article; (3) that the notices said to have been issued by the company to the plaintiff in respect of the two calls on 30th March 1928 and 4th

December 1928 were not proved to have been served on the plaintiff or even posted, and that there was no proof, in fact, of how the notices were

sent to the plaintiff; (4) that the further notices, Ex. D-8 series, of 1931 and 1932 were defective, in that, while mentioning the total amount as

being Rs. 2500 they did not, as required by Art. 42 of the Articles of Association, contain particulars concerning the place at which or the person

to whom the amount was to be paid; (5) that the resolutions Exs. D-9 and D-11 (a) could not be regarded as resolutions for calls under Article 40;

and (6) that the notices, Exs. D-10 and D-12 were defective in the particulars required to be mentioned by Article 42 in notices for call amounts.

On these findings the Court below held the forfeiture of shares made by the defendant by Ex. D-17 to be illegal and invalid. It also held that there

was no waiver on the part of the plaintiff of his right to complain of the irregularity of proceedings on the part of the defendant. The parties were at

issue in the Court below also on one subsidiary matter which we may dismiss from consideration after just adverting to it, viz., whether the hundi,

EX. D 14 and the Rs. 500 were accepted by the defendant as an unconditional payment as contended by the plaintiff or only as a conditional

payment as contended by the defendant. The Court below upheld the defendant's case in this regard and found that it was open to the defendant

to treat the plaintiff as a defaulter, even though the defendant did not send the hundi to the plaintiff's agent at Rangoon for encashment. On this last

mentioned subsidiary matter, no question arises on this appeal, as the respondent has accepted the finding recorded by the Court below.

4. The questions arising on the arguments advanced before us in the appeal are, (1) whether the forfeiture of the plaintiff's shares by the defendant

company is illegal and invalid; and (2) whether there has been on the part of the plaintiff any waiver of the illegality and the invalidity by reason of

his conduct. We do not feel called upon to say anything on the latter question; for, assuming that there was no waiver, the appellant is, in our

opinion, entitled to succeed on the ground that there was sufficient warrant for its forfeiture of the plaintiff's shares. In connection with the former

question, we may observe in limine that we fully realise that a forfeiture ought not to be lightly favoured and that a party thereby aggrieved is

entitled to rely on any technicality of rule or regulation to invalidate it. The first submission of Mr. Venkatesa Aiyangar, the learned advocate for the

respondent, in connection with this question, is that the notices for call amounts said to have been issued by the defendant to the plaintiff are not

proved by the evidence on record, and that for want of notices duly conforming to the requirements of Article 42 of the Articles of Association the

forfeiture made by the company must be regarded as illegal and invalid. This is a contention which the learned Subordinate Judge in the Court

below has accepted. We consider that, in so accepting, he was unreasonable to a degree which we are constrained to discountenance in no

mistakable terms in his appreciation of the evidence on record. The learned Subordinate Judge makes the criticism, which we cannot accept, that

there is no knowing whether the blank spaces of the printed notice forms were filled up and notices were duly posted. He makes the point which,

in our opinion, is not of much substance, that the clerk who is said to have informed D. W. 1 of the despatch of notices has not been examined.

Notwithstanding the abstention of the clerk from the witness box, commonsense warrants the presumption, which we are prepared to raise, that

the notices were duly posted in the ordinary course of business. Notwithstanding again, the interested and of-course uncorroborated denial by the

plaintiff of his receipt of the notices, the common course of human affairs warrants the further presumption, which we are prepared to raise, that the

notices were duly received by the plaintiff. His conduct in keeping quiet after his admitted receipt of Ex. D-8 series and Ex. D-10 which he has

produced into Court, quite apart from his conduct in sending in response to Ex. D-12, the hundi, Ex. D-14, and the sum of Rs. 500 fortifies us in

our conclusion that he must have received the prior notices suggested by Exs. D-3 and D-3 (a) in regard to the first call and by Exs. D-6 and D-6

(a) in regard to the second, which he is apparently suppressing, as, if produced, they will be found to contain all the particulars required by Article

42 of the Articles of Association of the company. Asked in cross examination why he did not pay the calls as demanded in Ex. D-8 series, P. W. 1

states in reply that he did not, thinking that he might pay if D. W. 1 went to him and personally asked him to pay. The conduct of the plaintiff has

been such that we have no hesitation in the circumstances in accepting and acting upon the evidence of D. W. 1 and holding that there is no

substance in the respondent's complaint that notices of the kind required were not duly despatched to him or served on him. We accordingly

overrule the first submission of Mr. Venkatesa Aiyangar.

5. Mr. Venkatesa Aiyangar has next contended that the resolutions passed by the directors at their meeting of 31st October 1928 one confirming

EX. D-2 series in relation to the first call and the other authorising the Managing Directors to make the second call, are invalid as not fulfilling the

requirements of Article 40 of the Articles of Association. He complains that there is no proof that the particulars required by Articles 40 and 42

were fixed by the Directors themselves, whether in connection with Ex. D-2 series, confirmed though they may have been by Ex. D-4 or in

connection with Ex. D-5 authorising the Managing Directors to make the second call. Says the learned advocate, Exs. D. 4 and D-5 do-not at all

refer to such particulars and therefore negative any fixation of the particulars by the directors themselves and not by the managing agents. In

support of his submission, the learned advocate placed strong reliance on a decision of the High Court of Bengal reported in In Re: Bengal Electric

Lamp Works Ltd., and attacked a decision of the High Court of Bombay to the contrary reported in Dhanraj Keshrimal Jhalani Vs. H.H. Wadia, .

In a conflict between the two decisions, counsel urged that the former has to be preferred, founded as it is on a decision of the Judicial Committee

reported in AIR 1938 284 (Privy Council) which is subsequent in date to the Bombay decision and prior to the Calcutta decision. That there is a

conflict between the decisions of the two High Courts is undeniable; but we cannot, after the most anxious and careful consideration that we have

bestowed on the matter, agree that the Privy Council decision in AIR 1938 284 (Privy Council) invalidates the decision of the Divisional Bench of

the Bombay High Court rendered by Beaumont C. J. and Blackwell J. or contains anything to support the criticism made of it by Lord Williams J.

in the Calcutta case.

6. In the Bombay case Beaumont C. J. observes at p. 425 of the report:

It is true that these matters must be fixed by the Board, because the articles so provide, but I think we must presume that the agents did their duty

and took instructions from the Board; otherwise they would not have been justified in signing "by order of the Board." At p. 428 of the report,

Blackwell J. observes :

I am of the opinion that it is not necessary that the persons to whom, and the place at which, the call is to be paid, should be mentioned in the

resolution making the call.....

and at page 429, the learned Judge further observes :

....in the absence of any evidence upon the point the Court is entitled to assume that these notices were sent out by the agents of the company

with the sanction of the directors, and that the directors had in fact appointed the persons and the place, and that is the assumption which I make,

With these observations we respectfully agree. The learned Judges deal exhaustively with the English case law on the point and rely in particular

on the judgment of Jessel M. R. in *Johnson v. Lyttle's Iron Agency*, (1877) 5 Ch. D. 687 : (1877) 46 L. J. Ch. 786. They point out that the article

of the company which they had to deal with was similar to the one which Jessel M. R. in the English case had to deal with. We may observe that in

the present case also, as in the Bombay case and in the English case before Jessel M. R., Article 40 does not prescribe that by means of a formal

resolution to be passed by the directors the particulars should be fixed or appointed. We hold, like the Bombay Judges, that before the prescribed

notice is issued to the shareholder in default it will do if the particulars are, however, informally fixed by the directors and the notices issued with

particulars so fixed with the sanction of the directors. The Court below has attempted to distinguish the Bombay case from the present by

observing that, there, the words ""By order of the Board"" were to be found in the signature part of the notice. We are inclined to think that this distinction attempted by the learned Subordinate Judge is rather unsubstantial. Evidence of the appointment of the particulars by order of the Board could always be adduced, even though there should be no such words in the signature part of the notice issued by the managing agents. Likewise, even where such words occurred, it would be open to the party impeaching the validity of the notice to show that there was, in fact and in truth, no appointment of the particulars by the Board. The matter is one of evidence, and the presumption is in favour of such appointment in the absence of evidence one way or the other. More-over, if the existence of the words ""By order of the Board"" in the Bombay case is not merely an accident of fact but an element which enters into the essence of the reasoning -- which we think it is not -- there is no reason why we may not presume in the present case that such words would be found in the notices, if produced. A presumption of that kind is not in our opinion, ill-drawn against the party suppressing the notices. But it is not necessary for us to go so far, as on broad principle, we consider the Bombay decision sufficiently in point.

7. Turning next to the Calcutta case, we find that what happened there was that Lort-Williams J. held on the facts that the Directors had failed to appoint the place at which and person to whom the call was payable, that therefore the resolutions and notices of calls were invalid and that there could be no forfeiture of the shares for non-payment of such calls. The learned Judge sets forth the substance of the decision of the Chief Justice of the Bombay High Court at page 145 in the following words:

With regard to the decision of Sir George Jessel M. R. in the case of 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 Rolls 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.

Then the learned Judge proceeds to criticise the view of the learned Chief Justice on the ground that his Lordship did not give sufficient weight to the observations of the Lords Justices in *Johnson v. Lyttle's Iron Agency*, (1877) 5 Ch. d. 687: 46 L. J. Ch. 786, about the necessity for strict adherence to the provisions of the contract between the company and the shareholders. Lord-Williams J. then proceeds to observe that no forfeiture of property could be made, unless every condition precedent had been strictly and literally complied with. To this last observation of the learned Judge we have no exception to take, but the question still remains whether his criticism of the view of the Chief Justice of Bombay is correct. We think not. His criticism is only in general terms and does not attempt to show specifically how or where exactly the Chief Justice's view of Jessel M. R.'s judgment or James L. J.'s judgment in *Johnson v. Lyttle's Iron Agency*, (1877) 6 Ch. d. 687: (1877) 46 L. J. Ch. 786 goes wrong.

8. We have finally to ascertain what precisely the Privy Council ruling in AIR 1938 284 (Privy Council) decides and to consider how far it supports *In Re: Bengal Electric Lamp Works Ltd.*, and invalidates *Dhanraj Keshrimal Jhalani Vs. H.H. Wadia*, . The substance of the decision is set forth accurately in the headnote which, so far as relevant to the consideration of the point under discussion, may be reproduced as follows:

A scheme of arrangement, sanctioned by the Court u/s 153, Indian Companies Act is binding upon the creditors, shareholders and the company alike. Its terms can thereafter only be varied by order of the Court after the variation has been approved at meetings of the creditors and shareholders.

It is not, therefore possible for the company, its directors or shareholders whether by resolution or ratification or otherwise to alter dates fixed by a sanctioned scheme for calls on unpaid capital.

A resolution of directors requiring payment of calls on dates at variance with a sanctioned scheme is an attempt to do something ultra vires of the company.

A purported forfeiture of shares for non-payment of calls in accordance with such a resolution is inoperative and void and the creditors, in a winding up, are entitled to have the names of shareholders which have been removed from the register of members by reason of an invalid forfeiture restored.

It will be seen from this that there is nothing decided by this case which can be held to conflict with *Dhanraj Keshrimal Jhalani Vs. H.H. Wadia*, ;

but Mr. Venkatesa Aiyangar has contended that there is the following passage of two paragraphs in the judgment of the Privy Council beginning at page 18 and running into page 19 which assists his contention:

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 a company. It will suffice to take the

present case as an example. If the forfeiture are upheld, the appellants remain liable, no doubt, for the whole 25 per cent, called up in March 1932,

and in January 1933. But they will escape liability altogether in respect of the uncalled 25 per cent, and this is a matter that vitally affects the

creditors. These creditors cannot be deprived of their right to have this 25 per cent. made available for payment of their debts without due cause.

The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit the

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 shareholder affected. Such provisions may properly be regarded as being directory only and capable of

being waived by the individual shareholder. 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.

It seems to us that this passage has no relevancy to the point under discussion. We are not satisfied on a consideration of Articles 40 and 42 and of the evidence on record in the present case that there was any irregularity, much less illegality, committed by the company in declaring the forfeiture of the plaintiff's shares; nor does the question of waiver fall to be considered in this view of the matter. The facts of the case before the Privy Council in AIR 1938 284 (Privy Council) are altogether different from those of the present case, and there is no principle of law exigible from that decision which affects the conclusions which we have reached on the evidence.

9. The appeal is accordingly accepted, and the suit dismissed with costs of the appellant here and in the Court below.