
(1935) 11 CAL CK 0003
In the Calcutta High Court

Marwari Stores, Ltd.

APPELLANT

Vs

Gouri Shanker Goenka

RESPONDENT

Date of Decision : 13-11-1935

Acts Referred:

Companies Act, 1956 — Section 38, 40, 50

Citation : AIR 1936 Cal 327 : 165 Ind. Cas. 408

Hon'ble Judges : Panckridge, J;Costello, J

Bench : Full Bench

Judgement

Costello, J.—This matter comes before us by way of appeal from an order made by Cunliffe, J., on 18th March 1935, whereby he refused with costs an application made on behalf of the Marwari Stores Ltd. for permission to reduce the share capital of that company. The application was opposed by Gouri Shanker Goenka who is a shareholder of that company and the respondent in the present appeal. The Marwari Stores Ltd., was originally incorporated as a private company on 15th March 1919, having a nominal capital of Rupees two lacs divided into fifty shares of Rs. 4,000 each. On 22nd March 1921, by an extraordinary resolution, the capital of the company was increased by Rs. 3 lacs making a total capital of Rs. 5 lacs represented by 5,000 shares of Rs. 100 each. Shares of the value of rupees two lacs were applied for and issued and a sum of Rs. 1,92,000 was paid up. Shares out of the balance to the extent of Rs. 8,000 were forfeited. The present position, therefore, is this: that the paid up capital of the company is Rs. 1,92,000. A sum of Rs. 4,000 which had been paid in respect of forfeited shares was transferred to the profit and loss account. The Articles of Association of the company contained the usual kind of provision entitling the company to reduce its capital. The relevant article is No. 43. It appears from the petition and from an affidavit of Motilal Lath, who is described as a Managing Director of the company, that up to 31st March 1920 the company made a profit of Rs. 10,026 odd, and up to 31st March 1921 the profit was Rs. 10,105 and some odd annas.

2. The present respondent became connected with the company on 6th April

1921. It appears that he was taken into the service of the company on or about that time. Towards the end of the year 1921, that is to say on the 30th November of that year, the company was converted into a public company and in the following year the present respondent Gouri Shanker Goenka became a shareholder in the company to the extent of 80 shares. It appears from the years 1922 to 1924 the company sustained a loss amounting to the sum of Rs. 1,10,000 and that is shown in the balance sheets for the years 1922, 1923 and 1924. That fact is stated in para. 8 of the petition on which the present proceedings were founded. It is also set out in that paragraph that the loss has ever since been carried forward. It is further stated that the company was not able to make any profit during the years 1923 and 1924, but since 1925 the company has been making a profit. The amount of the loss has now been reduced to Rs. 96,000. The said sum of Rs. 96,000 was stated to be a loss and not to be represented by any available assets. In the year 1932 the respondent Gouri Shanker Goenka became a director of the company. It appears that in 1933 he was party to the passing of the draft balance sheet which was submitted at the directors' meeting. Actually from 6th April 1921, the date on which the respondent joined the company down to 4th August 1934 he was functioning as the Assistant Manager and, as such, he assisted in the preparation of each one of the accounts and must be taken to have known the contents of those accounts. On 4th October 1934 Gouri Shanker ceased to be a director of the company. At the end of October 1934 there was a transfer of certain shares which had been held by the Managing Director, Motilal Lath, to some of his relations and in December of that year, Mr. P.D. Himatsingka and Mr. Baijnath Prasad Deora resigned from the Board of the company and in their places, about a month later, two of Motilal Lath's nominees, if they can properly be called his nominees, namely Mr. Bholaram Tibrewalla and Mr. Luxminarain Lath were appointed directors of the company. On 20th January 1935 an ordinary general meeting of the company was held, accounts were passed, and at that meeting the present respondent was in attendance in his capacity as a shareholder of the company. On the same day, namely on 20th January 1935, there was an extraordinary general meeting at which a resolution was passed for the reduction of the capital of the company. That appears from para. 9 of the petition set out at p. 3 of the paper book. That paragraph reads as follows:

Under the provisions of Section 50, Companies Act, and in pursuance of the power contained in that behalf in the Articles of Association the company by special resolution of its shareholders duly passed and confirmed at extraordinary general meetings duly convened and held on 20th January 1935 and 4th February 1935 respectively resolved: that the paid up capital of the Marwari Stores Limited be reduced from Rs. 1,92,000 divided into 1920 Ordinary Shares of Rs. 100 each to Rs. 96,000 divided into 1920 Ordinary Shares of Rs. 50 each and that such reduction be effected by cancelling; the paid up capital to the extent of Rs. 96,000 which had been lost and is not represented by available assets and by reducing this nominal, amount of all the shares in the company's

paid up capital from Rs. 100 to Rs. 50 per share.

3. It appears therefore that the resolution which was passed at the meeting on 20th January 1935 was duly confirmed at the subsequent extraordinary general meeting held on 4th February 1935. A week later, namely on 11th February 1935 a petitions for reduction of capital was admitted by Cunliffe, J. The petition had been verified on 7th February 1935. The 11th March 1935 was fixed as the date for hearing of the petition and directions were duly given for necessary advertisements. Those advertisements appeared in certain papers on 20th February 1935 as directed by the Court. On 6th March 1935 Gouri Shanker affirmed an affidavit in opposition to the company's petition and on 12th March he put in a supplementary affidavit in opposition. On 18th March there was an affidavit in reply by Motilal Lath on behalf of the company. Then finally, as I said at the outset, the matter came before the Court on 18th March 1935 when the application which the company was making was refused by Cunliffe, J. The company now comes before this Court asking that the order made by Cunliffe, J., be set aside and the company be authorised to reduce their capital in the manner asked for in their petition.

4. The application of the company is opposed by Gouri Shanker Goenka on two grounds, and Mr. Chowdbury on behalf of the respondent says: (1) there was no evidence before the Court that there had been in fact any loss of capital as averred by the company, and (2) the resolution which purported to have been passed on 20th January 1935 and confirmed on 4th February 1935 was not valid in law by reason of the fact that certain persons who voted for the resolution were not duly qualified as share-holders so to vote or to vote at all. The respondent Goenka, so far as the second point is concerned, challenged the validity of the transfer of certain shares made by Motilal Lath during the month of October as I have already stated. The allegation made on behalf of Goenka was to the effect that although the names of these transferees appear in the register of share-holders of the company, the entry in that register is not a proper or a genuine entry and the transfers could not have taken place at the time when they are alleged to take place, by reason of the fact that Motilal was not in Calcutta on the dates which appears on the transfers or on 30th October, the date on which the entries were made by Motilal in the register of share-holders of the company.

5. With regard to the first mentioned point, it is not at all certain that it is always essential or necessary for the Court to satisfy itself in proceedings of this kind, that there has been a reduction of capital. The principles on which a Court ought to act in a matter of this description, were laid down by Lord Macnaghten in *Poole v. National Bank of China Ltd.* (1907) A C 229 at pages 238-239. The relevant passage in the judgment of his Lordship is this:

Such being the views expressed in this House without any dissent or qualification, I was surprised to hear it argued by the learned Counsel for the appellants that the Court has no jurisdiction to entertain a petition for the

reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found even in cases which have occurred since the decision of this House in *British and American Trustees and Finance Corporation v. Couper* (1894) A C 399. In *Re: Barrow Hamatite" Steel Co.* (1900) 2 Ch 846, where the scheme proposed was obviously unfair to the preference shareholders and the petition was very properly dismissed, there are some expressions in the judgment of the learned Judge who decided the case which, taken apart from the context, may appear to support that contention. The decision of Buckley, J., in *Re: Anglo-French Exploration Co.* (1902) 2 Ch 845 goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specified certain cases and declared that the power conferred by the Act of 1867 includes" those specified it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned Judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect.

6. Then his Lordships stated this:

In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any share holder of any paid-up capital. The only questions, therefore, to be considered are these: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and 2. Is the reduction fair and equitable as between the different classes of shareholders?.

7. It would appear from that passage in the judgment of Lord Macnaughten that the only serious question with which I the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital should be reduced.

8. Since the decision in that case, however, there have been a number of other cases and upon one of them Mr. Chowdhury laid considerable stress as indicating that the Court ought to require proof that there has been in fact a loss of capital. The case to which I refer is the case of *Caldwell v. Caldwell & Co. Paper Makers Ltd.* (1916) S C (H L) 120 a resume of which appears in 1916 W N 70. The account of the case in the Weekly Notes is as follows:

Lord Parker of Waddington, after stating that the law in respect of reduction of capital, as stated in *Poole v. National Bank of China Ltd.* (1907) A C 229, had not been altered by the Companies (Consolidation) Act, 1908, said that where the resolution was expressed to be founded upon loss of capital he understood that since the decision of the House of Lords the practice of the Courts in Scotland

had been to dispense with proof of the facts referred to in the resolution, at any rate where there was no reason to suspect the bona fides of the parties. The practice of the High Court of Justice in England had not been uniform. His own practice had been to insist on prima facie evidence of the existence of the state of facts referred to in the resolution. If no such prima facie evidence were forthcoming it might well be that the special resolution had been passed under the influence of some mistake or misrepresentation as to the true facts, and it would be unfair to the minority, if not also to the majority of the shareholders, to confirm a reduction voted under such circumstances. Further inability to produce some such evidence might well suggest want of bona fides in the matter. If capital not really lost or unrepresented by available assets were cancelled, it might be possible thereafter, by some adjustment of the figures in the company's balance sheet, to carry the amount so cancelled to profit and loss account, and so indirectly return paid-up capital to share-holders, thus affecting the rights of erectors. He still thought there fore, that where the reduction of capital was based on the ground that capital had been lost or was unrepresented by available assets, it was, though not necessary, at any rate wise and prudent to insist on some evidence of the fact.

9. I have no doubt that the proposition that where a reduction of capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. In the present instance we are not, however, called on to lay down any general principle with regard to that particular point, because there is clear evidence that in the case of Marwari Stores Ltd., there had in fact been a loss of capital. I have already mentioned the nature of that loss. The evidence with regard to it is the definite statement in para. 8 of the company's petition dated 7th February 1935 as verified by the solemn affirmation of Motilal. The averments contained in that paragraph are not disputed by Goenka. On the contrary in para. 3 of his own affidavit, dated 6th March 1935, he says:

With reference to para. 8 of the said petition I state that the amount of loss mentioned in the said paragraph would have been very considerably reduced had the Managing Director conducted the business of the company in a proper workmanlike manner.

10. It is clear, therefore, that Goenka was accepting the statements that there had been a loss as stated by the Managing Director, though he was saying that the loss was due to something done or something not done by the Managing Director Motilal. We are of opinion, therefore, that the learned Judge in the Court below ought to have acted upon the assumption that there was evidence of loss of capital. With regard to the other point, on which the objector sought to rely, viz. that the resolution was not properly passed, his complaint is set out in para. 6 of the affidavit at p. 13 of the paper book, where he says:

The following are the transfers alleged to have been made by the said Motilal

Lath to the persons hereinafter named who are his relatives as is mentioned: (1) Bholaram Tibrewala, father-in-law of Motilal Lath; (2) Luxminarain Lath, cousin of Motilal Lath; (3) Nurmala Lath and (4) Hanumanbux Lath, nephews of Motilal Lath, employees of the company; (5) Hariram Khaitan, and (6) Jugalkishore Khaitan, cousins in law of Motilal Lath, and employees of the company.

That I state that on the respective dates the said Motilal Lath is alleged to have transferred the said shares, namely 25th and 27th October 1934, and on the date when he is alleged to have registered the said alleged transfers, namely 30th October 1934, the said Motilal Lath was not in Calcutta at all and could not have transferred the said shares in the manner alleged, nor could he have registered the said transfer in the books of the company on that date. The alleged deeds of transfer purporting to have been executed on 25th and 27th October 1934, by the said Motilal Lath and by the respective transferees at Calcutta are all false and fictitious and are in fraud of the company and its shareholders.

11. No answer to that paragraph, which of course contains a very serious allegation against Motilal, is given. The latter in his affidavit in reply dated 18th March 1935 para. 2 (d) says this:

With regard to para. 4 of the said first affidavit I state that the extraordinary general meetings were properly convened, constituted and held. All the persons present as shareholders were in fact share-holders of the company and registered as such by the company. The person who acted as the Chairman was a shareholder duly and properly elected as Chairman and the mover of the resolution was also a shareholder entitled to move the resolution which he did.

12. and then in sub-para. (e) at p. 27 of the paper book he adds this:

The six persons named in para. 6 of the first affidavit duly became transferees of the shares which have been registered in their names after they were duly approved and they became members of the company, and their names were duly placed on the register of the company. Gourishanker Goenka inspected the register of members several times in December 1934 and early in January 1935 and he saw the said names on the register of the company and he did not then take any objection thereto. No application has yet been made for the removal of the names of the said persons or rectification of the said register of members either by Gourishanker Goenka or anybody else except that Gourishanker is not attacking the said transfers by criminal proceedings and not by appropriate civil proceedings and by way of side-issue in this application nobody else has raised any objection regarding their becoming members.

13. Now it is obvious that the allegations that these six persons whose names appear in the register of shareholders were not shareholders, came entirely from Goenka. If he was to be successful in opposing the application which the company was making he was bound to show that the names of these persons were not properly entered in the register or that their names were not on the

register for length of time sufficient to entitle them to vote at the meetings which were held on 20th January 1935 and 4th February 1935. In my opinion he has entirely failed to do so. We have examined the register for ourselves and as far as one can see on the face of it, it is perfectly regular and in order. It was open to Goenka to have taken appropriate proceedings u/s 38, Companies Act, to have had the Register corrected had he been so minded. That section is in the same terms as the corresponding section in English Act of 1929, viz. Section 100 and runs thus:

If (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

14. Section 40, Companies Act, provides that the register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. I think that we ought to take it, in the present instance, that as no steps were taken to have this register altered or rectified and the persons whose names appear therein were qualified shareholders and therefore entitled to take part in the meetings of 20th January and 4th February 1935. In that view of the case Goenka has wholly failed to show any cause whatsoever why the application put forward by the company for the reduction of capital should not be granted by the Court. The result is that this appeal is allowed, the order made by Cunliffe, J., is set aside and the prayers Nos. 1 and 2 and the first part of prayer No. 3 contained in the petition of the company and affirmed by Motilal Lath on 7th February 1935 are granted. As regards costs of these proceedings, we are of opinion that as, in any event, it was necessary for the company to obtain the sanction of the Court for the reduction of the capital, the company should pay their own costs in the Court below. But we direct that the respondent must pay the costs of the appeal to the appellant company.

Panckridge, J.

15. I agree.