

(1940) 11 MAD CK 0032
In the Madras High Court

M.F.R. D'Cruz

APPELLANT

Vs

K.N. Viswanathan (the Official Liquidator)

RESPONDENT

Date of Decision : 15-11-1940

Acts Referred:

Companies Act, 1956 — Section 156

Citation : (1941) 54 LW 745 : (1941) 2 MLJ 94

Hon'ble Judges : Gentle, J

Bench : Division Bench

Judgement

Gentle, J.—The capital of the company was Rs. 50,00,000 divided into 1,50,000 7 1/2 per cent. preference shares of Rs. 10 each and 3,50,000 ordinary shares of Rs. 10 each. Of these, 702 preference shares were issued and held by 46 persons representing in the aggregate issued capital of Rs. 7,020 and 13,245 ordinary shares were issued and held by 105 persons representing issued ordinary share capital of Rs. 1,32,450. 68 of the ordinary shares have been fully paid and the remainder are partly paid. The matters which now require decision are as follows:

1. Whether the holders of the preference shares are entitled to be repaid the amount of their capital out of the calls made upon the ordinary shareholders in respect of the unpaid portion of their share money, and
2. Whether, in addition, the preference shareholders are entitled to a cumulative dividend at 7 1/2 per cent. upon each preference share.
2. Clause 5 of the Memorandum of Association, which deals with capital, is as follows:

The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7 1/2 per cent. per annum on the capital for the time being paid up therein respectively and shall have priority as to such dividend and also as to return of capital in the winding up over all other shares in the capital for the time being of the company, but shall not carry any further

right to participate in profits or assets. The rights hereby attached to the said preference shares may be modified in accordance with the Company's Articles of Association.

3. This clause gives to the preference shareholders a priority over the ordinary shareholders to participate in the company's assets and to return of capital, in the case of winding up, over the other shares in the capital of the company. Article 9 is the only article which has any relevance to the matter now before me, the material portion of which is as follows:

The Cumulative Preference Shares carry a fixed cumulative dividend at the rate of 7 1/2 per cent. per annum on the capital for the time being paid thereon and shall both as regards dividend and capital rank in priority to the Ordinary Shares but without any further right to participate in the profits or assets.

4. I do not find any appreciable modification or alteration in the extent of the provisions of Clause 5 of the Memorandum of Association in Article 9. It is quite clear that, whatever profits the company might have made, the preference shareholders would be entitled only to 7 1/2 per cent. dividend upon the amount of their subscribed capital, and before winding up, the annual dividend of 7 1/2 per cent. being cumulative, it would follow that, a preference shareholder would be entitled to look to the company for payment of dividend in respect of any year in which it was not paid, out of any future earnings, the dividend must be paid upon preference shares before the ordinary shares are entitled to receive any benefit. Another matter which is beyond doubt is that if in a liquidation the assets exceed the liabilities and after payment of all the debts and after return of capital invested by the preference shareholders and by the ordinary shareholders a surplus remains, then that surplus will be divisible amongst ordinary shareholders and the preference shareholders will be entitled to no more than the amount of their subscribed capital.

5. The matter which now requires decision is whether the unpaid portion of the shares held by the ordinary shareholders can be called up to repay to the preference shareholders the amount of their capital. This involves consideration of the question whether the unpaid or uncalled capital upon issued shares forms part of the capital or assets or both of the company. If unpaid share money does form part of the capital and assets, then since under Clause 5 and Article 9 preference shareholders are entitled to return of capital in a winding up in priority to all other shareholders, it must follow that, after payment of all the debts, the preference shareholders are entitled to be repaid the amount of their investment out of calls made upon the ordinary shareholders. Counsel on behalf of some ordinary shareholders have informed me that they are unable to find any authority which has decided that unpaid or uncalled share money does not form part of the assets or capital of the company. In my view it does. Supposing a call had been made by the company which was due and paid on the day before the company went into liquidation, that money would form part of the assets of the company. The fact that it has not been called up before the winding up but

remains unpaid until the liquidator has exercised his powers u/s 156 of the Companies Act, does not make the unpaid share capital excluded from the assets or capital of the company. In *re Sheppard's Corn Malting Company : Ex parte Lowenfield* 70 L.T. 3, observations are made by learned Lords Justices which are relevant to the matter now to be considered. Lindley, L.J., at p. 5 in the course of his judgment, said:

I do not think it is possible to read, in this contingency, "surplus assets" in such a sense as to exclude a call whether or not it is wanted at all.

6. Davey, L.J., referring to the judgment in the Court below at p. 6, said:

I understand the substance of it, but I do not quite understand the form--that the surplus assets do not include uncalled capital. I suppose he means by that, and from his judgment, to say, that surplus assets do not include capital which has been called up, or may be called up, for the purpose of adjusting the rights of the contributories, *inter se*, because undoubtedly the surplus assets conceivably consist wholly of capital which was uncalled at the commencement of the winding up, and had been called during the winding up.

7. The above observations of the learned Lords Justices express the view that uncalled capital at the date of the winding up does form part of the assets of the company. In *Wakefield Rolling Stock Co., In re* (1892) 3 Ch. D. 165, Vaughan Williams, J., at p. 172 said:

It must be remembered that in a winding-up the property of the company includes the uncalled capital, and that the rights arising from unequal contributions on shares of equal amounts must be adjusted out of the property, including uncalled capital, not required to satisfy prior claims.

8. The preference shareholders being entitled in winding up to return of capital in priority to other shares, in my view it means that unpaid ordinary share capital can be called up to meet the amount required to repay the preference share capital. In Clause 5 it is provided that, except the priority specified, preference shares shall not carry any further right to participate in profits or assets. This makes it clear that in regard to the right specified the preference shares are to participate in the profits and assets of the company. In Article 9 the words "shall both as regards dividend and capital rank in priority to the ordinary shares but without any further right to participate in the profits or assets" also clearly indicate that to the extent specified preference shares are entitled to priority in the profits and assets. I hold therefore that the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares.

9. A further matter is whether these preference shareholders are entitled to payment of a sum equivalent to 7 1/2 per cent. upon the capital of each share

from the date of the issue of the preference share. Clause 5 of the Memorandum provides that preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7 1/2 per cent. per annum on the capital for the time being paid up and Article 9 provides to the same effect. Article 155 is as follows:

No dividend shall be payable except out of the net profits arising from the business of the company.

10. No dividend can be paid unless the company makes profits. This company never made any profits, but always incurred losses. No dividend can therefore be paid. The priority of the preference shares for payment of 7 1/2 per cent. is in regard to dividend. As there were no profits which could justify a dividend, there can be no dividend payable to the preference shareholders. The contention put forward on behalf of the preference shareholders is that each share is entitled to a sum equivalent to 7 1/2 per cent. from the amount of the capital. That would amount to interest being payable each year. Neither the Memorandum nor the Articles provide for any interest. In my view, as there were no profits no dividends could be declared and were not declared; nothing is payable to the preference shareholders in respect of dividend or interest and they are entitled only to repayment of the actual share capital. There will be an order accordingly.

11. In this application the Official Liquidator seeks authority to draw cheques in favour of the holders of 68 ordinary fully paid shares to make payments to them. In my view, this application is premature. I make no order in regard to that at present.

12. As regards costs, for counsel for preference shareholder No. 121 I allow a sum of Rs. 50. For the two learned Counsel who appeared on behalf of two other preference shareholders they have merely adopted the argument of Mr. Lobo, and I allow Rs. 17-8-0 each. For the two learned Counsel for ordinary shareholders I allow Rs. 35 each. This will be payable by the Official Liquidator out of the assets. The Official Liquidator will have Rs. 5 (stamp).