

(1976) 05 DEL CK 0004

In the Delhi High Court

Case No : Company Petition No. 44 of 1975

Mrs. Promila Bansal

APPELLANT

Vs

Wearwell Cycle Co. (India) Ltd.

RESPONDENT

Date of Decision : 28-05-1976

Acts Referred:

Citation : (1978) 48 CompCas 202

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : K.L. Budhiraja, for the Appellant; D.D. Sharma, for the Respondent

Judgement

D.K. Kapur, J.—This petition u/s 155 of the Companies Act, 1956, prays for rectification of the register of members of the respondent-company on the ground that the petitioner is a holder of 1,738 cumulative 10% preference shares having the face value of Rs. 100 each in the respondent-company, the distinct numbers of which are 15722 to 17509. It is claimed that the petitioner left the country in 1966 to live with her husband in the United States of America and, except for a few occasional visits to India, she has been living there ever since. In paragraphs 7, 8 and 9 of the petition, it is claimed that the shares of the petitioner have been forfeited illegally and got transferred fraudulently by the directors to themselves or their nominees or friends. It is claimed in paragraph No. 8 of the petition specifically that the forfeiture is void as being in violation of Article 42 of the articles of association of the company. In paragraph No. 9, it is claimed that no notice in compliance with Article 43 of the articles was given. In paragraph No. 10, it is claimed that the notice required by Article 45 concerning the factum of forfeiture was also not given.

2. In reply, the company filed a detailed affidavit taking several preliminary objections and also claiming on the merits that the petitioner knew about the forfeiture at least in January, 1966, and the sale of the forfeited shares was advertised in Hindustan Times on 20th May, 1968. In answer to paragraph No. 8, it was stated that the petitioner had misrepresented about there being no calls

due and in fact she was liable for filing a false affidavit and for perjury. It was further stated that a notice of forfeiture was issued to the petitioner and has been got exhibited in Suit No. 234/67, which is pending before a subordinate judge. As regards the notices of calls, forfeiture, etc., it was claimed that the same were issued when the petitioner's father was the managing director and the mother was also a director of the respondent-company. In reply to paragraph No. 9, it is claimed that a proper notice was issued according to the articles to the petitioner. I found that from the affidavit filed in reply, it was not possible to determine whether the notices given to the petitioner were in accordance with the articles Nos. 42, 43 and 44 of the articles of association and, hence, I gave the company further time to file an affidavit which has been filed on 27th May, 1976. The arguments were treated as part-heard. I have also been given a copy of the memorandum and articles of association of the company.

3. The main question for consideration in this case is whether the forfeiture of the shares of the petitioner is valid and it has then to be seen as to how this matter is to be decided on this petition. It is to be noted that the petition has been moved in April, 1975, although the forfeiture took place about ten years earlier. There is also evidence to show that the factum of forfeiture was known to the petitioner at a much earlier date. Therefore, the preliminary objection that the petition is very much belated has to be very carefully considered on account of the considerable delay which has taken place in moving the petition.

4. It is also one of the preliminary objections that the father of the petitioner, Shri K.C. Aggarwal, has filed a suit before a subordinate judge concerning these very shares in which he has challenged the forfeiture and also claimed that he was a benami owner of these shares. It is further claimed that the petition was not maintainable because the petition had not been instituted by the petitioner herself, but by someone else who forged her signatures. Further, it is claimed that the petition had been instituted at the instance of the said Shri K.C. Aggarwal, and the petitioner knew about the forfeiture and the calls through her parents, who were managing director and director of the company.

5. I think the preliminary objections can be dealt with later and it is first necessary to ascertain whether there is any substance in the claim that the shares were wrongfully forfeited. The procedure u/s 155 of the Companies Act, 1956, is a summary procedure and, Therefore, it is necessary to analyze the pleadings and affidavits filed before the court on the merits of the claim that the forfeiture is bad. As far as the petitioner's case is concerned, she has made an allegation that the forfeiture is bad.

6. The learned counsel for the respondent-company urges that this does not discharge the onus of proof and does not show that the forfeiture is bad. On the other hand, the method by which the forfeiture has been brought about is known only to the company as the notices have to be issued by the company and other formalities have also to be fulfilled by the company. A shareholder necessarily has to make an allegation and all the facts are in the knowledge of the company,

who has to show what was the procedure that was followed in bringing about the forfeiture of the shares in question. It is also to be noticed that the shares had a face value of Rs. 1,73,800, being 1,738 preference shares of Rs. 100 each. The calls up to the time of forfeiture were about 7 1/2 per cent. according to the account filed by the company ; the calls were in arrears to the extent of Rs. 12,000. Thus, at least, Rs. 1,00,000 had been paid up on these shares and it follows that the forfeiture would result in the loss of Rs. 1,00,000 to the petitioner without any compensation.

7. The question of forfeiture and lien on shares has been dealt with in Articles 42 to 56 of the articles of association of the respondent-company. In Article 42, it is stated that if a member fails to pay calls or Installments within the time allowed or within the extended time, the directors may serve a notice on the member requiring him to pay this sum together with interest and expenses that may have been incurred by the company by reason of non-payment. Hence, the first step the company has to take is to serve a notice on the shareholder calling upon him to pay the unpaid calls. Article 43 requires that such notice shall specify another date which shall be at least 14 days after the date of the notice where the money is to be paid. The notice is also required to state that in case there is non-payment, the shares will be liable to be forfeited. Thus, Articles 42 and 43 have to be read together. Article 44 states that if such notice is not complied with, any shares which are the subject-matter of the notice, may be forfeited by a resolution of the directors. The forfeiture will include all dividends and bonuses declared in respect of the shares but not actually paid and will include also other rights to incidentals. Article 45 requires that when the shares have been forfeited, notice of the resolution has to be given to the member and an entry has to be made in the register of members concerning the forfeiture. Article 46 shows that the forfeiture shall be deemed to be the property of the company and may thereafter sell, re-allot, etc., either to the original holder or to any other person by public auction upon such terms and in such manner as the directors may think fit. Article 47 shows that, on forfeiture, the member concerned will cease to be a member of the company who shall notwithstanding the forfeiture be liable to pay all calls, interest owed in respect of the shares, together with interest thereon at 7%, and the directors may enforce the payment if they think fit. Article 49 shows that upon a duly verified declaration in writing, every other person to whom the shares are sold, will get a good title and his title to such shares shall not be affected by any irregularity or invalidity in the proceedings to such forfeiture. Article 50 says that any forfeiture may until the shares are sold or re-allotted in the discretion of the directors be remitted as a matter of grace and not as a matter of right on payment to the company of the money which was owed to the company. Out of the remaining articles, only Article 56 is important because it states that, upon any sale after forfeiture, etc., the directors may cause the purchaser's name to be entered in the register and the purchaser will not be bound to see to the regularity of the proceedings or the application of the purchase money. After his name has been entered on the register, the validity of

the sale shall not be impeached by any person and the remedy by any person aggrieved by the sale shall be in damages only and against the company exclusively.

8. These articles have been referred by me for the purpose of analysing the facts of the present case, which I will now deal with. In the original reply to the petition and the affidavit filed therewith, there was not any reference to the forfeiture notices and other notices required to be given by the articles to the petitioner. However, it was claimed that all the notices had been filed in Suit No. 234/67, which was pending in the court of the Commercial Subordinate Judge, Delhi. I had given time for filing a further affidavit which is before me. The new affidavit is by Shri H.L. Seth, one of the directors of the company. He states that he is the managing director of the company and claimed that the shares were forfeited on 30th April, 1965, in a board meeting of the company. It was stated in the resolution that the calls had not been paid since 1961. The name of the petitioner is given as Miss Promila Aggarwal, Regent House, Simla. It was further claimed that the forfeited shares were auctioned by advertisement in Hindustan Times issued on 20th May, 1968, and then were re-allotted to various persons, whose names are set out in the affidavit. It is claimed that these persons have to be joined as parties because their shares are being taken away. Article 56 of the articles, referred to earlier, states that the petitioner cannot impeach the validity of the re-allotment and the only remedy is by way of damages and the rectification petition is not maintainable. It is claimed that Shri K.C. Aggarwal has claimed that he is the real owner of these shares in Suit No. 234/67, and said there that Miss Promila Aggarwal was only his benami or nominee. It was claimed that the petition was being proceeded with by Shri K.C. Aggarwal himself who was also present in court on 15th May, 1975, as recorded in the order of the court on that date. An affidavit of Shri K.C. Aggarwal was also filed in these very proceedings. It was claimed that Shri K.C. Aggarwal had taken away the minutes book of the company from 1951 till December, 1963, which contained the resolution regarding the calls. It was further claimed that the shares were allotted to Miss Promila Aggarwal in May, 1958, when she was a minor. Thus, the registration of the shares was bad ab initio and she could not become a shareholder in the eye of law. It was further stated that there was a board meeting of the company on 21st December, 1963, in which it had been decided to call upon the shareholders to make payment of the arrears in calls. The requisite notices were R-1 and R-2. Those notices are in the form of notices sent to the shareholders asking them to make calls and the notices stating that the shares had been forfeited, respectively. Lastly, it was stated that a registered A.D. letter was sent to Miss Promila Aggarwal on 14th January, 1964, from the Eastern Court Post Office, New Delhi, but the letter had come back un-served with the remarks that she was not traceable at the address. This closed envelope was claimed to be exhibited in the court of Shri S.M. Aggarwal, Commercial Subordinate Judge, in the aforementioned suit.

9. Thus, the case of the respondent-company is that the notice required by

Article 42 was sent to the petitioner but came back unserved. The question for consideration is whether a notice which has come back unserved can be deemed to be a service of a notice, as required by Article 42. Further, if it is to be held that this is no service at all, it has to be ascertained whether the forfeiture is to be held to be bad and further whether the subsequent re-allocation of the shares to someone else defeats the claim. The first question for decision is whether the service is good when the notices have been returned unserved. It is provided in the articles that a notice is deemed to be served if sent by registered post acknowledgement due at the registered address of the shareholder. I do not think that the deeming provision has any application if the notice comes back unserved. I think the company is bound to enquire, especially in the case of a shareholder whose shares are to be forfeited as to whether the shareholder's address has not changed. When the shareholder happens to be the daughter of the managing director, and that is the case of the respondent-company, I fail to understand why the company could not ascertain the correct address from Shri K.C. Aggarwal. I think that, in the circumstances, there is little doubt that the company was only too anxious to somehow forfeit the shares and thus appropriate a sum of Rs. 1,00,000. In my view, at least, on the facts of this case, there is no doubt that the company did not make any enquiry as to the proper address of the petitioner and it chose to forfeit the shares by passing the resolution. It is well established that the power to forfeit is one which is to be very strictly scanned by the court, as observed in *Public Passenger Service Ltd. Vs. M.A. Khader and Another*, :

" Where a power of forfeiture exists, it is to be treated as strict is *Simi Jurisdiction*, A very little inaccuracy in complying with the conditions precedent to a forfeiture is as against the company as fatal as the greatest. " The court also referred to the judgment of the Court of Appeal in *Johnson v. Lytle's Iron Agency* [1877] 5 Ch D 687 (CA) and quoted from the judgment therein. I repeat only one of those quotations of Lord Mellish L.J., when he stated :

" I think it is clear that a forfeiture of shares is, to all intents and purposes, the same thing as any other forfeiture which deprives a man of his property. The rule at common law was, that before any forfeiture can take place, all the conditions precedent must have been strictly complied with. "

10. It was held by the Privy Council in *Promila Devi v. Peoples Bank* [1939] 9 Comp Cas 1, by the judgment of Romer L.J.:

"This may seem to be somewhat technical, but, in the matter of 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 fulfillment of the conditions prescribed for forfeiture. "

11. The judgment of the Madras High Court also refers to the statement of law in *Halsbury's Laws of England*, Simonds edition, volume 6, page 266, para. 552,

that in the matter of forfeiture of shares, technicalities must be strictly observed. Thus, I have no doubt that the service on the petitioner was a most essential pre-requisite for effecting the forfeiture. The forfeiture is, Therefore, clearly void.

12. Now, the main difficulty which arises at this stage is, what is the result of the further sale of these shares to someone else. It has been stated in Article 56 "that the validity of the sale shall not be impeached by any person and the remedy of any person aggrieved by the sale shall be in damages only and against the company exclusively ". I think the meaning of this is that the sale of the shares cannot be impeached as far as the third parties are concerned but, nevertheless, if the forfeiture is bad, the petitioner has to be made a shareholder of the company to the extent of the forfeited shares. If the shares were never forfeited, they could not also be transferred. In my view, this article merely bars the impeaching of the sale of the shares. It does not bar the impeaching of the forfeiture. If the forfeiture was bad it would mean that the petitioner's name could not be struck off the register. If the petitioner's name could not be struck off the register she must be shown on the register to the extent of 1,738 shares. It is still open to the company to make calls in respect of those shares. If the company has sold some shares to a third person or others, the company must give those persons other shares because the consequential loss is due to the fault of the company itself. Thus, there is no difficulty in allowing the petition u/s 155 of the Companies Act, 1956, on the ground that the petitioner's name has been wrongly excluded without sufficient cause from the register of members. The company must, Therefore, take necessary steps to enter the petitioner's name in the register of members concerning the shares in question and as far as the purchasers of the shares are concerned, they can be allotted the shares with other numbers. Alternatively, I see no difficulty in the petitioner being allotted 1,738 shares bearing different numbers from the shares which she formerly had. There is no magic in the numbering of shares because every individual share is of the same type. The shares will be paid up to the extent they were paid up at the time of the forfeiture. As indicated, the company can still call upon the petitioner to make the necessary payments on failure of which the shares will be forfeited.

13. I have not dealt with the preliminary objections earlier, but I do so now. As far as the delay in bringing the petition is concerned, it was held in the aforementioned judgment. *Public Passenger Service Ltd. Vs. M.A. Khader and Another*, , by the Madras High Court that mere laches or delay will not disentitle the shareholder to an equitable relief. This view has also been expressed by the Privy Council in *Garden Gully United Quartz Mining Co. v. Hugh McLister* [1875] 1 AC 39. The Supreme Court has expressed a similar view in *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd.* [1953] 23 Comp Cas 1, and held there that mere acquiescence, waiver or laches does not defeat the grant of an equitable relief. As regards the respondent's claim that Shri K.C. Aggarwal has claimed these shares as benami and filed a suit thereof, I do not think that that makes any difference to the rights of the petitioner. The company can either claim that these

shares belong to Shri K.C. Aggarwal or to the petitioner. But it cannot claim that they belong to neither. If the shares belong to Shri K.C. Aggarwal, then the forfeiture is bad. In any case, notices were not sent to him. Hence, the forfeiture would be bad whether the shares belong to Shri K.C. Aggarwal or to the petitioner. It is not the case of the respondent-company that the shares belong to Shri K.C. Aggarwal, and hence the contention of Shri K.C. Aggarwal on this question seems to be quite irrelevant. There is a claim that the petition has not been signed by the petitioner but as her affidavit accompanies the petition and she resides in America, I must accept the fact that the petitioner has filed the petition. A point was raised that the petitioner's name is Miss Promila Aggarwal in the books of the company and she has filed the petition under her married name, Mrs. Promila Bansal. In order to avoid any controversy, the company may enter the petitioner's name under her original name of Miss Promila Aggarwal. As regards the contention that the petition is mala fide, I do not see why the petition can be considered to be mala fide only because Shri K.C. Aggarwal appeared once in this court during these proceedings. The petition has to be judged on its own merits and the question of mala fides does not enter into the controversy and clearly the petitioner has been deprived of an investment of Rs. 1,00,000.

14. I accordingly reject all the preliminary objections and allow the petition. I have already mentioned that the result will be that the petitioner's name, i.e., Miss Promila Aggarwal, will be restored to the register of members in respect of 1,738 preference shares of the face value of Rs. 100 each. The company will be free to enforce any calls that remain to be paid on those shares. On account of delay, I disallow the petitioner any costs.