
(1943) 04 CAL CK 0001
In the Calcutta High Court
Case No : Suit No. 268 of 1939

Naresh Chandra Sanyal

APPELLANT

Vs

Ramani Kanto Roy

RESPONDENT

Date of Decision : 21-04-1943

Acts Referred:

Citation : (1943) 04 CAL CK 0001

Judgement

S.R. Das, J.—In this application, the Calcutta Stock Exchange Association Limited (which I shall hereinafter call the Association) prays that the injunction granted by this Court on 29th August 1940 prohibiting and restraining the Association until further order of this Court from making payment of the sale proceeds of share No. 163 or any part thereof to any person whomsoever be dissolved.

2. The facts leading up to the present application are not in dispute and are as follows: On 20th December 1939 a consent decree was passed in this suit. By the terms of settlement embodied in this decree, the plaintiff undertook to pay to the defendant Rs. 4000 by certain instalments. The plaintiff also undertook not to transfer share No. 163 of the Association standing in his name until payment of Rs. 4000 in full. The share was also charged with the repayment of the amount. A copy of the terms of settlement was on 8th January 1940 sent by the defendant's solicitor to the Association.

2a. On 29th August 1940 in execution of this decree the defendant obtained a prohibitory order a copy of which is annexure "B" to the present petition. This order was served on the Association on 10th September 1940. It is this order which the Association is complaining against in the present application.

3. In answer to the defendant's solicitor's enquiry as to how much was due to the plain tiff for dividend on the above share the Association on 6th February 1941 replied stating that a sum of Rs. 1000 was payable as bonus declared for the year ending September 1940 and that there was no other attachment on the share On 24th March 1941 the Association sent a cheque for Rs. 1000 to the Sheriff and informed the defendant's solicitor about such payment.

4. It appears that about this time the plaintiff was unable to fulfil his engagements with other members of the Association. Eventually on 19th February 1942, he was declared a defaulter by the Committee of the Association under Bye-law 13 of the Association and was also suspended from membership of the Association under cl. 21(6) of its Articles of Association with effect from that date.

5. In April and May 1942, there was some further correspondence between the defendant's solicitor and the Association and its solicitors in course of which the Association informed the former that the plaintiff had been suspended by the Committee and that the Association had under cl. 31 of its Articles of Association, the first and paramount lien on the amount of the bonus on account of arrears of subscription and that after deducting its dues it was prepared to pay the balance into Court on a payment order being obtained by the defendant from the Court. The Association also mentioned that the attachment was subject to the Association's right against the share by virtue of its Articles of Association and that if the plaintiff did not satisfy the claims of the members in due time the share would be forfeited and that the plaintiff would cease to hold any right or interest in the share and the defendant's right as attaching creditor would ipso facto come to an end. The defendant's solicitor contended that the Association could only realise the dues from the sale proceeds and the residue would remain subject to the attachment of the defendant. The Association reiterated its contention that upon forfeiture the share would become the property of the Association.

6. The plaintiff having failed and neglected to fulfil any of the engagements within six months from the date upon which he had been declared a defaulter the share No. 163 was, by a resolution passed by the Committee of the Association on 1st September 1942, forfeited to the Association and he was also expelled from the Association on and from that date. A declaration of forfeiture was made by one Biswambhar Nath Chaturvedi a member of the Committee of the Association under cl. 30 of its Articles of Association.

7. The defendant having come to know that due to default the share of the Association standing in the name of the plaintiff would be sold by the Association the defendant's solicitor on 20th September 1942 wrote to the Association reminding it that the interest of the plaintiff in the share had been attached and requesting the Association not to pay any money to the plaintiff out of the sale proceeds as the same would stand attached. The Association through its solicitors gave notice to the defendant's solicitors that the share having been forfeited it had become the property of the Association and called upon the defendant to withdraw the attachment.

8. On 10th December 1942 the share was sold by the Association at and for Rs. 32,000. Exhibit "D" to the petition shows that the sum of about Rs. 11,358-9-0 is due by the plaintiff to the other members of the Association. It is also stated that Rs. 141-6-0 is due by the plaintiff to the Association.

9. The defendant not having taken any steps to remove the attachment the Association has made the present application for getting the injunction dissolved. The plaintiff has not appeared to oppose this application. This application is opposed by the defendant.

10. The argument before me has proceeded on broad general principles as to the validity or otherwise of the power of forfeiture taken by the Association in its Articles of Association and as to whether, in the circumstances of this case, the power could be exercised so as to nullify or prejudice the rights which the defendant had acquired by virtue of the charge created by the decree in his favour. No point has been raised before me that, even if the power of forfeiture was valid and could be exercised in the circumstances of this case, there has been any irregularity or illegality in the mode of exercise of this power so as to vitiate the resulting forfeiture.

11. The several questions, which have been argued by Learned Counsel on both sides with admirable clarity and indeed with great ability and thoroughness, are as follows:

(a) Does the Indian Companies Act sanction forfeiture in general or does it sanction forfeiture for nonpayment of calls only?

(b) If the Act does not affirmatively and in so many words sanction forfeiture otherwise than for non-payment of calls, is the power of forfeiture contained in the Articles of Association of this Association and exercise of such power of forfeiture in the circumstances of this case illegal and ultra vires the Association by reason of its being or involving:

(i) an illegal reduction of capital, or

(ii) a purchase of its own share?

(c) Assuming the power of forfeiture to be valid, can the Association, in the circumstances of this case, exercise this power of forfeiture for its own benefit and to the prejudice of the rights which the defendant had, prior to the exercise of this power, acquired by virtue of the charge created by the decree?

12. Mr. Khaitan who appears for the Association contends that under S. 21, Companies Act, 1913, the Memorandum and Articles bind the Association and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member to observe all the provisions of the Memorandum and of the Articles subject to the provisions of the Act. Then he refers me to S. 32(2)(g) and S. 151 of the Act and Form E of Sch. III to the Act. The reference to part II in Form E appears to be a mistake for Part III. Perhaps it is due to the fact that Out Form E was copied from Form E of the English Act of 1908 where Part II is mentioned. In Sarkar & Sen's edition of the Act I find that Part III is mentioned in Form E. Section 32 which is mentioned in Form E is in Part III of the Act. Be that as it may, the contention of Mr. Khaitan is that the above sections and the form clearly

recognise forfeiture in general and that there is no reason whatever to limit forfeiture to nonpayment of calls only. Regulations in Table "A" in Sch. I to the Act and in particular Regulations 24 to 34 are, says Mr. Khaitan, model Regulations which may or not be adopted by a Company at its option and therefore they cannot be regarded as in any way cutting down or limiting the provisions of S. 32(2)(g) and Form E where forfeiture is referred to generally and with out any qualification or limit.

13. Mr. A.C. Mitra appearing for the defendant on the other hand refers me to Ss. 2(1), 17 and 18 of the Act and contends that the Regulations in Table "A" are parts of the Act and explains what the legislature meant by the use of the term "forfeiture" in S. 32(2)(g) and in Form E in sch. III to the Act. According to Mr. Mitra, the Regulations in Table "A" should be read along with the provisions of the Act and so read, they clearly establish that the Act sanctions only forfeiture for non-payment of calls.

14. It is common knowledge that the Company legislation in India has been based on English Statutes. It is, therefore, necessary to take note of the English law and Statutes on the subject. In England from very early times Companies used to be incorporated by Royal Charter or by Special Acts of Parliament. The habit of forming Joint Stock Companies grew among trading people and they used to execute deeds of settlement governing their mutual relations. These deeds of settlement, as will be seen from the cases cited hereafter, frequently contained clauses providing for forfeiture of the interest of its member not only when he failed to bring into common stock what he had undertaken to do, but also if and when a member or a person who had acquired the interest of any member failed to execute the deed of settlement.

15. In 1844, Parliament passed an Act for the registration, incorporation and regulations of Joint Stock Companies (7 and 8 Vic. C. 110). This Act did not limit the liability of the members but expressly preserved it by Ss. 25 and 66. Section 7 of this Act provided that no Joint Stock Company should be entitled to receive a certificate of complete registration unless it be formed by some deed or writing under the bands and seals of the share-holders therein. The section required that the deed should appoint not less than three Directors and one or more auditors and should also set forth in a schedule thereto certain particulars, e.g., name of the company, the business and purpose of the company, the amount of capital and so on. Then the section provided that such deed must contain a covenant on the part of every share-holder, with a trustee on the part of the company, to pay up the amount of the instalments on the shares taken by such share holder, and to perform the several engagements in the deed contained on the part of the share-holders, and that such deed must also make provision for such of the purposes set forth in Sch. (A) to this Act as the nature and business of the company might require, and either with or without provision for such other purposes (not inconsistent with law) as the parties to such deed should think proper. Then followed provisions as to mode of execution and filing of the deed

with the Registrar of Joint Stock Companies. Schedule "A" to the Act set out a list of purposes for which provision was required to be made by the deed of settlement of the company. There were 38 items. Item 32 was as follows:

32. For determining whether on failure to pay any instalment or calls, the share shall or shall not be forfeited and if forfeited, whether and on what conditions the property in such share may be recovered by the share-holder.

Although Sch. "A" to the Act referred to forfeiture for non-payment of call or instalment it cannot be seriously contended that they limited forfeiture only to non-payment of call or instalment, for, S. 7 authorised the company to include in its deed of settlement "provisions for such other purposes (not inconsistent with law) as the parties to such deed should think proper," The scheme of this Act was to leave it open to the parties to include in the deed of settlement any provision not inconsistent with law.

16. The Joint Stock Companies Act (19 & 20 Vic., c. 47) was passed in 1856. This Act introduced the principle of limited liability of the members. Section 3 permitted 7 or more persons by subscribing their names to a memorandum of association to form themselves into an incorporated company with or without liability. Sections 5 and 7 dealt with the contents and form of the memorandum. Section 9 provided that the memorandum might be accompanied by articles of association prescribing the regulations of the company; but if no such regulations were prescribed or so far as the same did not extend to modify the regulations contained in the table marked "B" in the schedule to that Act, such last-mentioned regulations should, so far as the same were applicable, to be deemed to be the regulations of the company. Table "B" was headed "Regulations for management of the company." Clauses 15 to 19 of this Table B dealt with forfeiture of shares for non-payment of call. There was form of a balance-sheet at the end of Table "B." According to this balance-sheet against capital were to be shewn certain particulars including particulars of any forfeited shares. Section 17 required the making and filing of an annual list of share-holders with certain particulars. One of these particulars was "(6). The total number of shares forfeited." Form E in the schedule also required that the total number of shares forfeited should be stated. Thus we find that in this Act of 1856 was introduced for the first time the scheme of referring to forfeiture without any qualification in the body of the Act and in Form E, and of referring to forfeiture for non-payment of calls only in the table set forth in the schedule.

17. This scheme has been maintained ever since in all subsequent statutes, namely, the Companies Act, 1862 (25 & 26 Vic. c. 89), the Companies (Consolidation) Act, 1908 (8 Edw. VII c. 69), and the Companies Act, 1929 (19 & 20 Geo. V, c. 23). The provisions with regard to forfeiture thus remained practically the same. Section 26(g) of the Act of 1908 and S. 108(3)(i) of the Act of 1929 referred to the total number of shares forfeited. Form E of 1908 and the form in Sch. 6 to the Act of 1929 remained the same as Form E in the Acts of 1856 and 1862 except that certain foot-notes were added in 1908 and are

continued in 1929. Foot-note (3) requires that in the total amount of calls received should include what had been received on forfeited shares and foot-note (4) requires that the aggregate number of shares forfeited should be inserted in the item dealing with total amount paid on forfeited shares. Table "A" continued to deal with forfeiture of shares for non-payment of calls only. There is no longer any balance-sheet at the end of Table "A."

18. The legislation in India relating to companies has followed the lines of legislation in England. Thus the Indian Joint Stock Companies Act, 1850 (Act 43 of 1850) was based on Statute 7 and 8 Vic. c. 110. Then we had successive enactments following further changes of law in England. Finally the Indian Companies Act of 1913 was based on the English Act of 1908. Recent amendments of our Act of 1913 have brought it up to date on the lines of the English Act of 1929 with certain modifications. For our present purpose, S. 32(2) (g) of our Act corresponds with S. 26(g) and S. 108(3)(i) of the English Acts of 1908 and 1929 respectively. Our Form E corresponds to the Form E of the English Act of 1908 and the form in Sch 6 to the English Act of 1929. Clauses 24 to 30 of our Table "A" deal with forfeiture for non-payment of calls as to the corresponding clauses of Table "A" of the English Acts.

18a. The above analysis of the earlier Acts shows that the scheme of referring to forfeiture without any qualification or limitation in the body of the Act and in the form and of referring to forfeiture for non payment of call in the table set out in the schedule to the Act dates back to 1856, if not to 1844. Having ascertained this scheme, it becomes necessary to enquire how the Courts in England have interpreted the scheme for I apprehend that I am bound to follow the principles the English Courts have laid down with regard to this matter in different cases. I, therefore, proceed to deal with some of these cases.

19. The case of *In re Kollman's Railway Locomotive and Carriage Improvement Co.; Beresford's case* 3 De. G. & Sm. 175 : (19 L.J. Ch. 332), was decided in 1850. The deed of settlement of the company contained a clause authorising the directors to declare forfeited the shares of any party to the deed who did not execute it and another clause directing that, on a transfer the transferee should take to himself the antecedent liability of the transferor. The respondent, Beresford, to whom 5 shares had been allotted paid his deposit and some calls but he did not execute the deed of settlement. Thereupon in August 1845 the directors declared his shares forfeited and carried them to the company's share account and Beresford submitted to it. Several years later on, the company came to be wound up under the Joint stock companies winding up Acts and it was sought to include the name of Beresford in the list of contributories. Beresford objected to this. After hearing the question discussed, the Master held that Beresford should not be included in the list of contributories as he was virtually a party to the deed so as to enable the directors to forfeit his shares under its provisions and that such forfeiture relieved him from responsibility in respect of losses accruing before it was declared. The official manager as he was then called

appealed and Knight Bruce V.C. upheld the decision of the Master. There was a further unsuccessful appeal which is reported in *Ex parte Beresford*, (1850) 2 Mac. & G. 197 : (42 E.R. 76). The company in this case does not, however, appear to have been registered under the Act of 1844.

20. In *re Cobre Copper Mining Co.*; *Kelke's case*, (1869) 9 Eq. 107 : (39 L.J. Ch. 231), is another instance where a forfeiture otherwise than for non-payment of calls was upheld. In this case the company was formed in 1885 under a deed of settlement. The original deed of settlement contained a provision for forfeiture for nonpayment of instalment. In 1866 at a general meeting held under the provisions of the deed of settlement certain resolutions were passed by the requisite majority altering some of the original clauses. One of the resolutions was that the capital be increased from ₹40 to ₹50 per share and that upon non-payment of the additional amount that share be forfeited. Another resolution adopted a new clause that within a certain period the share-holders were to bring in their certificates with the name, residence and description of the holders to be registered and that in default the shares should be forfeited for the benefit of the company. Copies of the resolutions were sent to all share holders. Holders of 2405 shares did not send in their certificates and their shares were forfeited on 6th December 1866. The company was registered on 13th December 1866 under the Act of 1862 and the names of 9595 share-holders who had sent in their certificates were filed with the Registrar as share holders. In 1868 the company went into voluntary liquidation. The liquidators gave notice to Kelke and Count Pahlen whose shares had been forfeited that they intended to put their names on the list of contributories. Kelke and Count Pahlen thereupon took out summons praying that their names might be struck off the list of contributories of the company. James V.C held that the shares of the members who did not send in their certificates had been effectually forfeited and that they were not liable to be placed on the list of contributories of the company. Eminent counsel appeared in the case but no point was taken that the Act of 1862 did not sanction forfeiture otherwise than for non-payment of calls. It is true that the forfeiture took place on 6th December 1866 and the company was registered on 13th December 1866 as a company with limited liability but it was treated as the continuation of the same company with the same constitution.

21. The next case I should refer to is that of *Hope v. International Financial Society*, (1876) 4 Ch. D 327 : (46 L.J. Ch. 200). The Company in this case was registered in May 1863. Clause 107 of its Articles of Association authorised the forfeiture of the shares of any share-holder who directly or indirectly carried on, commenced, supported or threatened any action, suit or other proceeding at law or in equity against the company on payment to him of the full market value of the share. On 12th August 1876, the directors recommended that the shares of those share-holders who wished to retire be purchased and that on surrender the price be paid in cash. The plaintiff who was in the minority and was opposed to this scheme, filed this action to prevent its adoption and applied for injunction. No order was made on the application on the undertaking of the company not to

give effect to the resolutions if passed, until the disposal of this suit. Pending the suit the company passed the special resolution and the confirmatory resolution according to the recommendations of the directors in August and September 1876. At a subsequent meeting of the shareholders, the shares of the plaintiff were forfeited in accordance with Art. 107 to which I have referred because the plaintiff had brought this action and marked value was offered to him but he did not accept it. Bacon V.C. held that the scheme was ultra vires as it amounted to buying of own shares and an illegal reduction of capital. As to the forfeiture of the plaintiff's share Bacon V.C. at p. 332 did not say that such power of forfeiture was had because the Act only sanctioned power of forfeiture for non-payment of call but rather put it on the ground of public policy. There was an appeal from this decision. It was held by the Court of Appeal (James, Baggaley and Brett L. JJ.) affirming Bacon V.C. that the scheme of buying up the shares of those share-holders who desired to retire was ultra vires and invalid being either an attempt to reduce the capital without complying with the provisions of the Companies Act or else a trafficking in its own shares which was not authorised by the memorandum. I shall have to deal with this part of this case more in detail hereafter when I deal with the second point in the present case. For our present purposes, I need only point out that eminent counsel, namely, Cotton Q.C., Davey Q.C. and Macnaghten appearing for the appellant did contend before the Court of Appeal that the plaintiff had no locus standi to continue the action as his shares had been forfeited under Art. 107. James L.J. at page 334 during argument observed as follows:

We cannot listen to that argument. Any stipulation that a shareholder shall not appeal to a Court of Justice must be bad.

If forfeiture otherwise than for non-payment of call was illegal, it is difficult to understand how such eminent counsel relied on this clause to found their aforesaid argument and why this article was not held by Bacon V.C. or the Lord Justices to be bad because no such forfeiture was sanctioned by the Companies Act but was held had on the ground of its being opposed to public policy being in restraint of legal proceedings.

22. I now pass on to more recent decisions to see how the Courts have understood and interpreted the Act, the Form E and the Table "A". Of course the point now before me was not in issue in those cases.

23. In the case of *In re Dronfield Silkstone Coal Co.*, (1881) 17 Ch. D. 76 : (50 L.J. Ch. 387), Jeseel M.R. observed at page 84:

As to forfeiture not only are there regulations given in the articles in Table A but it is expressly referred to in the Act.

24. In *Trever v. Whitworth*, (1887) 12 A.C. 409 : (57 L.J. Ch. 28), Lord Herschell at page 417 said:

The forfeiture of share is distinctly recognised by the Companies Act and by the

articles contained in the Schedule which in the absence of other provisions regulate the management of a limited liability company.

Lord Watson said at page 429:

Section 26 of the Act of 1862 and the regulations of Table "A" (17 to 22) show plainly that the legislature intended companies to have the power of forfeiting shares.

Lord Macnaghten at page 438 said:

Forfeiture is contemplated by the Act of 1862; it is mentioned in S 26; every company is to return to the Registrar of Joint Stock Companies once a year "the total amount of shares forfeited." There can be no question as to the power of a Company in a proper case to forfeit shares.

25. In *Bellerby v. Rowland and Marwood Steamship Co.*, (1902) 2 Ch. 14 at page 26 : (71 L.J. Ch. 541), Collins M.R. said that:

The justification of forfeiture rests upon the statute itself.

At page 31 Cozens Hardy L.J. said:

Two propositions may be asserted without doubt. Firstly a company may forfeit shares. This is recognised by S. 26, Companies Act 1862, as well as by Table A.

26. I am referring to these passages to show that the learned Judges held that both the Act and the Table "A" recognised forfeiture. Indeed Lord Macnaghten does not even refer to Table "A" in the passage I have quoted. He refers to S. 26 and Form E and states that forfeiture is contemplated by the Act. If S. 26 and Form E without the aid of Table "A" recognises forfeiture, then what is the forfeiture contemplated by the Act, apart from Table "A"? It is not forfeiture for any particular reason but forfeiture in general.

27. *Phillips v. Manufacturers Securities Ltd.*, (1917) 116 L.T. 290 : (86 L.J. Ch. 305) and *Side Bottom v. Kershaw, Lease and Co Ltd.* (1920) 1 Ch. 154 : (89 L.J. Ch. 113) are instances of cases where articles authorising the directors to require any shareholder who competed with the company's business to transfer his shares, at their full value to the nominees of the directors were upheld although there is no such provision in the Act or in Table A.

28. The subject of forfeiture is dealt with in *Lindley on Law of Companies*, 6th Edition, 1902 in Bk. III, Ch. 6, pages 722 to 730. There I find no statement that the Act contemplates forfeiture for non-payment of calls only and no other forfeiture. Nor do I gather anything to that effect from *Buckley's Companies Act*, 10th Edn., page 597 et seq. In *Stiebeis, Company Law*, Edn. 3, page 206 in *Halsbury's Laws of England* (Hailsham Edition), Vol. V, Arts. 492, 493 and in *Gore Brown's Joint Stock Companies*, Edn. 34, p. 408 and in the student's edition of *Topham's Principles of Company Law* to which I have been referred by Mr. Mitra, there are passages suggesting that forfeiture otherwise than for non-

payment of calls is invalid. But those learned authors do not lay down this proposition on a construction of the Act and Table "A" but base themselves on the decision in *Hopkinson v. Mortimer, Harley and Co.*, (1917) 1 Ch. 646 : (86 L.J. Ch. 467). With great respect to the learned authors, I am bound to say that this decision ought not to be so widely interpreted but should be limited to the facts of that case. I shall deal with that case in greater detail when I deal with the second point argued before me.

29. On the first point, then, my view is that the Indian Companies Act, S. 32(2) (g) and Form E recognise forfeiture generally. In my judgment, neither precedent nor principle compels me to hold that the Act sanctions forfeiture for non-payment of calls only. I regard the clauses in Table "A" as model regulations which may be usefully inserted in the Articles of Association of trading companies if they so choose. For the ordinary purposes of an ordinary trading company, those regulations are generally found to be satisfactory and sufficient, but the companies are left free to provide their own rules including rules relating to forfeiture, having regard to the nature and scope of their business, except that some of the clauses of Table "A" which do not include the forfeiture clauses have recently been made compulsory by our Act. I find no good reason to hold that the forfeiture recognised in the body of the Act and in Form E is limited to forfeiture for non-payment of calls. Forfeitures otherwise than for non-payment of calls were frequently in use, as the old cases, to which I have referred, show and if the legislature intended to do away with that it would have expressly said so. In other words, I am not of opinion that Table "A" controls the section or the form. My answer to the first question, therefore, is that the Act sanctions forfeiture generally, that is to say, forfeiture as a means to get rid of a member who is in default either in payment of calls or in observing or performing other rules and regulations of the Company. In this view of the matter question (b) will not arise.

30. If I am wrong in this view then the second question arises and I pass on to discuss that question. Re (b): The Association was incorporated in 1923 under the Indian Companies Act (Act VIII [8] of 1913) as a company limited by shares. The objects of the Association are inter alia:

(a) To acquire and take over all or any of the assets and liabilities of the present unincorporated Association known as "the Calcutta Stock Exchange Association" and to conduct the affairs of the Stock Exchange founded by that Association and generally to support and protect the character, status and interest of brokers and dealers in stocks and shares on the Stock Exchange at Calcutta and elsewhere.

(b) To facilitate the transaction of business on the Stock Exchange and to make rules and bye-laws regulating the mode and conditions in and subject to which the business on the Stock Exchange shall be transacted and the conduct of the persons transacting the same and generally for the good order and government of Members of the Association.

(c) To establish just and equitable principles, to settle points of practice and to decide upon any questions of business usage or courtesy between or among members of the Association.

* * * * *

(d) To do all such other things as may be conducive to or incidental to the attainment of the above objects or any of them.

and the other objects set forth in its Memorandum of Association. The capital of the Association is Rs. 3,00,000 divided into 300 shares of Rs. 1000 each with power to increase or reduce the capital of the Association for the time being.

31. Clause 2 of the Articles of Association excludes the regulations contained in Table A. Clause 4 forbids the employment of the funds of the Association in the purchase of the shares of the Association. Clauses 5 and 6 deal with the qualification and conditions of membership. Clause 19 provides that no share shall be allotted otherwise than upon the condition that the full amount payable thereon shall be paid or credited as fully paid up on allotment. Clauses 21 to 30 deal with suspension, expulsion and forfeiture, and how the forfeited share is to be dealt with. Clause 31 gives the Association a first and paramount lien on the shares and the sale proceeds thereof for the debts, and liabilities of the member, such lien extending to all payments out of profits declared in respect of such share. Clause 32 confers on the Association power to sell the shares in enforcement of its lien subject to certain conditions.

32. Clause 33 provides how the proceeds of sale in enforcement of lien are to be applied, namely:

33. The nett proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities, or engagements, and the residue (if any) paid to such member, his executors, administrators, committee, curator or other representatives.

33. As I have said, cls. 21 to 30 deal with the expulsion, suspension and forfeiture of shares. These articles afford means to the Association to get rid of a defaulting member. The shares being fully paid up under cl. 19, there was no necessity in this Association to provide for forfeiture for non-payment of calls in respect of the shares. Therefore, the defaults leading to suspension, expulsion and forfeiture contemplated by these clauses cover a variety of misconduct which renders the member guilty of such misconduct an undesirable member. The main and primary purpose of these clauses is to get rid of such a member. The other provisions in these clauses, namely, what will happen to the share so forfeited, the power of sale or re-allotment of the forfeited share and the appropriation of the proceeds of sale after forfeiture are ancillary or incidental to the primary object and regulate the procedure that has to be followed upon the expulsion and forfeiture. In spite of the forfeiture, the member whose share has been forfeited continues to be liable for his dues without any deduction for the value of the

share at the date of the forfeiture.

34. Articles 31 to 33, however, give the Association the first and paramount lien upon the shares and proceeds of sale thereof for all debts, liabilities and engagements of the member to or with the Association and the means of enforcing such lien by sale. The power of sale given by these articles is primarily to enable the Association to realise its dues. This distinction between sales under the two sets of articles, viz., 21 to 30 and 31 to 33 is important and should be borne in mind.

35. Power of forfeiture otherwise than for non-payment of calls and power of compulsory expropriation of members by purchasing their shares were well known in England and was usually taken by Joint Stock Companies in their deeds of settlement as will appear from the cases I have already referred to. That similar clauses may be lawfully adopted by a similar but un-incorporated Association governed by a deed of trust is shown by the case of *Official Assignee, Bombay v. K.R.P. Shroff & Ors.*, 59 I.A. 318 : (A.I.R. (19) 1932 P.C. 186). That such power of expulsion or forfeiture is permissible in the case of companies limited by guarantee and not having a share capital cannot be doubted. Form No. 253 at page 753, Form No. 253(a) at p. 757 and Form No. 254 at p. 762 of Part I of *Palmer's Company Precedents*, 15th Edn., are instances of such power of expulsion or forfeiture. It is clear, therefore, that there is no inherent vice or objection to these clauses regarded as terms of an agreement. They are not opposed to public policy. The question, therefore, is whether a company limited by shares is precluded from adopting such clauses by any provision in the Companies Act. In other words, is the abandonment of these clauses, which are necessary and usual in the case of similar associations in the nature of members club, the price the Association has to pay for the privilege of having the liability of its members limited by shares?

36. Mr. Mitra contends that these clauses giving a power of forfeiture otherwise than for non-payment of calls and the appropriation of the sale proceeds in liquidation of its dues are prohibited by the Companies Act. Mr. Mitra seeks to place the Association on the horns of a dilemma, namely, either such power is an illegal reduction of capital or such appropriation of sale proceeds is a trafficking in its own shares. The two lines of argument are as follows:

37. (a) Under S. 6 of the Act, the memorandum has to state certain things. Those are the conditions of the memorandum. One of these conditions is the amount of the share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount. Section 10 of the Act prevents a company from altering the conditions contained in its memorandum except in the case and in the mode and to extent for which express provision is made in the Act. The next step in the argument is that S. 55 of the Act permits reduction of share capital under certain conditions only. Any reduction of capital otherwise than in accordance with the mode prescribed by that section is illegal. Forfeiture extinguishes the share which is forfeited. So forfeiture is reduction of

capital at all times and as it is done without the sanction of the Court it is not within S. 55 and therefore illegal. But there is an exception in the case of forfeiture for non payment of call only, because there is express provision in the Act for such forfeiture. Therefore, forfeiture otherwise than for non-payment of call is an unauthorised and illegal reduction of capital. Therefore the articles giving such power of forfeiture otherwise than for non-payment of calls are illegal and ultra vires the company.

38. It will be noticed that the whole of this line of argument is based on the assumption that a forfeiture of shares at all times operates as a reduction of capital, which in its turn, is based on the further assumption that the share is extinguished on forfeiture. We have to see whether these assumptions are well founded.

39. (b) The appropriation of sale proceeds of a forfeited share towards its dues amounts to buying the share for the dues. The dues are the price indirectly of this buying and this is had under S. 64-A, Companies Act.

40. In support of the first line of argument Mr. Mitra has referred me to Arthur Field-house's treatise on Book keeping at p 398 et seq and has argued that in the case of shares forfeited the practice of book-keeping is to deduct the amount of the forfeited shares from the amount of the subscribed and paid up capital and to show it under a separate head as forfeited shares account. After the shares are re-issued, the forfeited share account may be either credited to a reserve fund or utilised towards the liquidation of an unrealisable asset such as preliminary expenses or good-will. This system of bookkeeping, he says, clearly shows that, upon forfeiture, the share is extinguished, for, there cannot be a share without a shareholder and consequently the capital account is automatically reduced and the danger is that the amount paid up on the forfeited shares being thus taken out of the category of capital may be utilised by the company or its directors in paying dividends or in any other unauthorised manner so as to prejudice and injure the interests of the creditors of the company. I do not accept that this practice of book-keeping can affect the question I have to decide, namely, whether in fact or in law there is a reduction of share capital on a forfeitures A glance at the balance-sheet that was attached to table, "A" of the English Acts of 1850 and 1862 will clearly show that against capital were to be shown the following particulars, namely, (1) number of shares, (2) the amount paid per share, (3) if there be any arrears of calls, the nature of the arrears and the names of the defaulters, and (4) the number of forfeited shares. The sum total of all these four items constituted the capital. Form E, to which I have referred, requires that the nominal share capital, the total number of shares taken up, the number of shares issued and the consideration therefor, the amounts called up on each share, total amount of calls received including payment on application and allotment and certain other particulars are to be shown in the annual return to be filed under the Act. In the last mentioned item is to be included whatever has been received on forfeited as well as existing

shares. Further down there is another item requiring disclosure of the total amount, if any, paid on shares forfeited stating the aggregate number of shares forfeited. Thus the total amount of nominal capital, issued capital and the amount of calls received including payments on application or allotment in respect of forfeited as well as existing shares are fixed and earmarked as capital and there can be no room for any mis-application of this capital either by the company or the directors and any misapplication will constitute misfeasance on the part of the directors so as to render them liable under S. 235 of the Act. Farther, if on a forfeiture the share is extinguished altogether then it becomes difficult to understand how or why table "A" provides for the sale of such non-existent share. The Articles of Association of this Association make the member whose share is forfeited to continue to be liable. The shares are and under cl. 19 of the Articles have to be fully paid up. If surrender of fully paid up shares, according to Lindley L.J. in *In re Denver Hotel Co.*, (1893) 1 Ch. 495 at p. 505 : (62 L.J. Ch. 450), does not involve any release by the company of any of its rights, I do not see how a forfeiture of a fully paid up share can operate as a reduction of capital, nominal or issued, where sale or re-allotment of the forfeited share is authorised by the articles. The true position seems to me to be that the right of a particular shareholder is gone but the share considered as an unit, exists and is kept in suspense until another holder is found for it by sale or re-allotment. It is earmarked as a species of capital, namely forfeited share.

41. I now proceed to deal with the cases cited before me to see whether they support Mr. Mitra's contentions. It should be borne in mind that none of them except one was a case of forfeiture and the point now before me was not before the Court. So the observations in those cases should not be unduly stressed.

42. The first case is the case of *Hope v. International Financial Society*, (1876) 4 Ch. D. 327 : (46 L.J. Ch. 200), to which I have already referred. This was a case where the company proposed to purchase the share of those shareholders who wished to retire by paying the purchase price in cash. Bacon V.C. held that this was nothing but a diminution of the capital which it was not competent to the company to do. James L.J. held that the company was on the horns of a dilemma. Either it was purchase of shares in the sense of trafficking in its own shares not authorised by the memorandum or it is an extinguishment of the shares and therefore a reduction of the capital of the company. It was a scheme to divide the assets between the share-holders, a device, in fact to evade the provisions of the law regulating the reduction of capital. All the Lord Justices held that it was a reduction of capital. I do not think that this case helps Mr. Mitra. Here there was actual payment made out of the capital and therefore an actual diminution of the capital and not a mere notional reduction brought about by any system of book-keeping. Brett L.J. observed at p. 340:

But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished, It is true to say that the mere power to accept a surrender or a mere power of

forfeiture does not alter the memorandum of association, because it is only accepting a surrender from one share-holder for the purpose of obtaining another share-holder; the amount of capital issuable, or which the company has power to issue, is not modified at all.

This passage appears to me to be against the contention of Mr. Mitra. It indicates that if shares are re-issued or intended to be re-issued then there is no extinguishment of any part of the capital, nominal or actual. Forfeiture and surrender equivalent to forfeiture is obtaining of one member for another member.

43. In *re Drongfield Silkstone Coal Co.*, (1881) 17 Ch. D. 76 : (50 L.J. Ch. 387), has been discussed before me. In this case, there was no provision in the memorandum enabling the company to purchase its own shares. Article 10, however, authorised the directors to purchase the company's shares. There were disputes between the directors namely. Ward on one side and Addy & Batt on the other. Eventually, it was agreed that the company would purchase Ward's shares and necessary documents were executed in 1872 and Ward went out of the company. His shares were registered in the name of the company itself. The affairs of the company flourished for several years thereafter but ultimately in 1879 the company went into liquidation. The liquidators included Ward in the list of contributories. Ward applied to have his name removed from the list. The matter was heard by Jessel M.R. The learned Master of the Rolls referred to Art. 10 and pointed out that the article was as general as possible and contemplated dealing with the shares for profit. He held that the transaction was invalid for the following reasons: (i) that the transaction was a trafficking in its own shares and the article which authorised it went beyond the memorandum; (ii) that the company could not be a member of itself; (iii) that the transaction was a reduction of capital without the sanction of the Court. Accordingly he held that Ward's name should be in the list of contributories. Ward appealed and the Court of Appeal reversed the decision of Jessel M.R. I do not propose to deal with the reasonings of the Lord Justices because in a subsequent case to which I shall presently refer the House of Lords disapproved of those reasons although they supported the actual decision on the facts and particularly having regard to the conduct of the parties and the lapse of time. In that case the House of Lords approved of the reasoning of the Master of the Rolls. I therefore take this opportunity to quote only two passages from the judgment of Jessel M.R. which, I think, show the nature and effect of forfeiture. At page 84 the learned Master of the Rolls observed as follows:

As to forfeiture, not only are there regulations given in the articles in Table A, but it is expressly referred to in the Act. It is plain that forfeiture is not treated as a diminution of capital. The company does not pay anything on a forfeiture of shares; it simply takes them away from a share-holder who cannot pay his calls. The power of forfeiture is the means of enforcing payment if possible. As long as the shares are worth anything the holder does not let them be forfeited, and

pays; it is only when they are worth nothing, and he cannot pay, that he allows them to be forfeited.

Then after quoting a passage from the judgment of James L.J. in *Hope v. International Financial Society*, (1876) 4 Ch. D. 327 at p. 336 : (46 L.J. Ch. 200), the Master of the Rolls said at p. 85:

Now that applies to forfeiture with very great force. It is quite plain that it is not the meaning of the Act that the power of forfeiture should be interfered with, nor can forfeiture be treated as a diminution of capital.

In this case there was actual payment by the directors. This was not a case of forfeiture, The Master of the Rolls makes it clear that forfeiture does not involve any payment and cannot be treated as diminution of capital.

44. Mr. Mitra has strongly relied on the case of *Trevor v. Withworth*, (1887) 12 A.C. 409 : (57 L.J. Ch. 28). This was also a case of purchase by the company of its own shares. It was not a case of forfeiture. In this case it was found as a fact that capital had been used in purchasing these shares. See per Lord Herschell at p. 416, per Lord Watson at p. 430 and per Lord Macnaghten at p. 434. This being the position the transaction amounted both to an unauthorised reduction of capital and to illegal trafficking in shares and could not be supported at all. There are, however, certain observations as to the effect of forfeiture which are useful and instructive. Said Lord Herschell at pp. 417-8 as follows:

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule which, in the absence of other provisions, regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield Silkstone Coal Co.*, (1881) 17 Ch. D. 76 : (50 L.J. Ch. 387). It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits.

Lord Watson observed at p. 424 as follows:

When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company the shareholder being relieved of liability for future

calls, whilst the share itself reverts to the company, bears no dividend, and may be re-issued. When shares are purchased at par, and transferred to the company, the result is very different. The amount paid up on the shares is returned to the shareholder; and in the event of the company continuing to hold the shares (as in the present case) is permanently withdrawn from its trading capital.

His Lordship at pp. 428-9 made the following observations:

When a company, in order to get rid of a troublesome shareholder buys his shares and continues to hold them as in *In re Dronfield Silkstone Coal Company* : (1881-17 Ch. D. 76 : 50 L.J. Ch. 387) the object may be different, but the result so far as regards the capital of the company, is precisely the same as if it had purchased the shares as an investment. If the shares are purchased with the view of being re-sold, that is simply a speculation with the funds of the company. If they are purchased with the view of their being retained by the company, that is a permanent withdrawal of the money invested in them from the trading capital of the company. I do not agree with Cotton L.J. in thinking that if such a transaction is invalid no forfeiture or surrender could be supported, When shares are forfeited or surrendered and not re-issued, that affects only the nominal amount of the shares so far as unpaid; when they are bought and not re-issued that diminishes the paid up as well as the nominal capital.

This passage was relied on by Mr. Mitra but I don't think it helps him in view of the fact that under Art. 19 of the applicant association all its shares are fully paid up. On the other hand, this passage clearly indicates that in the case of forfeiture of fully paid up shares not even the nominal capital is affected. There is no question of the paid up capital being diminished. I have endeavoured to show by reference to Form E that on a forfeiture of shares, whether fully paid up or partly paid up, there is not even a nominal diminution of capital. In the annual return the nominal capital and the paid up capital in respect of all shares, existing or forfeited, are ear-marked and kept in tact. The following observations of Lord Macnaghten at p. 438 clearly establish this:

One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862: it is mentioned in S. 26; every company is to return to the registrar of joint-stock companies once a year the total amount of shares forfeited. There can be no question as to the power of a company in a proper case to forfeit shares.

The passages I have quoted above clearly indicate that forfeiture does not involve any payment; the paid up capital remains with the company; if forfeited share is re-issued there is no withdrawal of any capital even if the share was partly paid up. I do not think that this case is any authority for the proposition that a forfeiture of share operates automatically as a reduction of capital.

45. The next case to be considered is that of *Bellerby v. Rowland & Marwood Steamship Co. Ltd.*, (1902) 2 Ch. 14 : (71 L.J. Ch. 541). This case was concerned

with the validity or otherwise of a surrender of partly paid up shares. The surrendered shares were not issued. Kekewich J. held that the surrender was illegal and null and void but he dismissed the action on the ground of delay. The plaintiffs appealed. Collins M.R. held (p. 22) that it was not a case of gratuitous surrender because it involved the release by the company to the surrenderors of the right to call up the unpaid balance of ₹1 on each share and there being thus an exchange of consideration the transaction was a sale and purchase rather than a surrender and since *Trevor v. Whitworth*, (1887-2 A.C. 409 : 57 L.J. Ch. 28), this is not permissible. At p. 25 the learned Master of the Rolls observed as follows:

I can see no distinction in principle between returning to a shareholder a part of the paid up capital in exchange for his shares and wiping out his liability for the uncalled up sum payable thereon. Both methods involve a reduction of the capital which, as Lord Watson pointed out in *Trevor v. Whitworth*, (1887-2 A.C. 409 : 57 L.J. Ch. 28), persons dealing with the company are entitled to rely upon as existing either as paid up or as still to be called up, and such a reduction, therefore, can only hold good if sanctioned under the conditions prescribed.

His Lordship at p. 26 referred to the observations of Lindley L.J. in *In re Denvor Hotel Co.*, (1893) 1 Ch. 495 at p. 505 : (62 L.J. Ch. 450), but did not think it necessary to consider whether surrender of fully paid up shares could be supported. Cozens Hardy L.J. held that the company parted with ₹415, a portion of its assets, in consideration of the acquisition of the shares and this was a purchase of the shares and is directly within the authority of *Trevor v. Whitworth*, (1887 2 A.C. 409 : 57 L.J. Ch. 28). At p. 32 Cozens Hardy L.J. made the following observations which were relied on by Mr. Mitra:

It is not necessary, in my view, for the purpose of the present case to go beyond this. But a careful consideration of the speeches of Lord Macnaghten and Lord Watson in *Trevor v. Whitworth*, (1887-2 A.C. 409 : 57 L.J. Ch. 28) and *British and Amercian Trustee and Finance Corporation v. Couper*, (1894 A.C. 399 : 63 L.J. Ch. 425) has satisfied me that the real objection to a surrender of shares does not lie in the fact that money has been paid by the company to acquire the shares. The objection is founded on a larger proposition. A company cannot be a shareholder in itself. Every surrender of shares, whether fully paid up or not, involves a reduction of capital which is unlawful except when sanctioned by the Court under the Companies Acts of 1867 and 1877. Forfeiture is a statutory exception and is the only exception. For I regard a surrender, under circumstances which would justify a forfeiture, as merely equivalent to a forfeiture.

I find it difficult to follow how a surrender of fully paid up share involves a reduction of capital unless it be for the reason that in the annual return in Form E there is no provision for showing the amount of surrendered shares and therefore the directors may in the return deduct the same out of the issued capital and thereby reduce the issued capital and enable them to deal with the

amount in any manner they please to the prejudice of the creditors. Further, the statement that every surrender involves a reduction of capital is opposed to the view of Lindley L.J. to which I have referred. Provision for forfeiture with a mandatory provision for sale or re-allotment of the forfeited share appears to me to prevent any reduction. The case is still more apparent when the share is fully paid. The passages I have quoted from *Trevor v. Whitworth*, (1887-2 A.C. 409 : 57 L.J. Ch. 28) and the judgments of the learned Lords generally in that case do not appear to me to support the observations of Cozens Hardy L.J. in *Bellerby v. Rowland and Marwood Steamship Co. Ltd.*, (1902) 2 Ch. 14 at p. 32 : (71 L.J. Ch. 541). With great respect to the learned Lord Justice, I cannot rely on this obiter dictum as establishing the proposition that a forfeiture of shares whether fully paid up or partly paid up must of necessity amount to a reduction of capital. I do not think this broad proposition can be deduced from *Trevor v. Whitworth*, (1887 2 A.C. 409 : 57 L.J. Ch. 28) to which I have already referred.

46. The case of *Hopkison v. Mortiner, Harley and Co. Ltd.*, (1917) 1 Ch. 646 : (86 L.J. Ch. 467), requires careful consideration for Mr. Mitra's argument is principally based on this case. The company in this case was incorporated in 1912 with a capital of 100,000 divided into 9900 preferred shares of ₹10 each and 1000 deferred shares of ₹1 each. All deferred shares and 8445 preferred shares were issued. All these issued shares (except 7 preferred shares) had been fully paid up. Article 22 gave the company a first and paramount lien on all shares other than fully paid up shares for all debts due by the member to the company. Article 23 gave a power of sale for enforcing this lien and also gave & power to the board to forfeit the shares subject to such lien. Article 24 provided in the case of sale, for application of the sale proceeds towards satisfaction of the debts of the member. Article 25 provided, in the case of forfeiture, that the forfeiture should include all dividends. Article 99 declared that all forfeited shares should be deemed to be the property of the company and the Board might sell, re-allot, re-issue or otherwise dispose of the same. There were other articles expressly providing in the usual manner for forfeiture for non-payment of any call or instalment but no question arose in this case as to that power of forfeiture: see p. 651. Thus, it is clear that there were two sets of clauses, one set related to forfeiture pure and simple which was not considered in this case, the other set related to lien and power of forfeiture was attached to it as a means of enforcing this lien. The plaintiff was a former manager of the company and held 100 fully paid up shares. The company had claims against the plaintiff. In these circumstances of 6th June 1916, the directors issued a notice of meeting for 17th June 1916, for passing a resolution (inter alia) altering Art. 22, by deleting the words "other than fully paid up." The effect of this alteration would give the company a lien on all fully paid up shares and dividends thereon for the liabilities of the members and render the shares and dividends liable to forfeiture in enforcement of the lien. The plaintiff after writing a letter to the directors to abandon this part of the resolution filed this suit on 16th June 1916, for a declaration that the resolution was ultra vires. The resolution, however, was

passed and duly confirmed. After referring to the group of articles relating to lien and stating that the other group of articles relating to forfeiture were not relevant, Eve J. summarises the rival contentions at pages 651 and 652. After dealing with the preliminary question as to whether the action was premature or not, with which we are not concerned, his Lordship at page 653 passes on to the question whether the forfeiture under this power would or would not result in an illegal reduction of capital. I again emphasise that his Lordship was here dealing with power of forfeiture attached to lien and not with the other power of forfeiture. Therefore all the observations made by his Lordship as to power of forfeiture must be read as referring to this special kind of power of forfeiture for enforcing the lien.

47. After referring to S. 26 of the Act of 1862 and Arts, 17 to 22 of the Table "A," his Lordship at page 653 proceeded as follows:

But I do not think it follows from anything to be found in the Act or in any reported case that reduction of capital brought about by means of a forfeiture for non-payment of debts due from a member generally as distinct from debts due from him as a contributory, is legalized without being sanctioned by the Court.

Even if the forfeiture is made without any part of the value of the shares being set off against the debt, the capital is reduced by the amount paid up on the forfeited shares and if on the other hand the debt is partially or wholly satisfied the transaction involves not only the game reduction but what is equivalent to an actual payment by the company and how can this operation be said to be anything but a purchase by the company of its own shares?

At page 654 his Lordship makes the following observations:

But, as the article stands, I am of opinion it is invalid in this respect, and that the board cannot forfeit shares for non-payment of the debts and liabilities therein referred to without bringing about an illegal reduction of the company's capital in any event and a purchase by the company of its own shares in some events, It may be that a reduction in capital brought about by the forfeiture of fully paid shares inflicts no injury on the creditors or con tributaries but this consideration cannot legalize a procedure which for other reasons is illegal and it does not exist if in fact the value of the shares which may be greatly in excess of the amount paid up on them-has to be brought into account with the defaulting member.

His Lordship proceeds on the assumption that forfeiture always involves reduction of capital but gives no reasons for this assumption. He does not consider or even refer to Form E.

48. Then Eve J. goes on to discuss the third point, namely, whether such a power attached to lien constitutes a clog on the equity, After referring to certain authorities his Lordship states his conclusion at page 655 in the following terms:

Such being the state of the law, I think this power to forfeit the plaintiff's shares on his failure to redeem on a seven days' notice is a clog on the equity and as

such invalid and ultra vires.

Bearing in mind that by the words "this power to forfeit" his Lordship was referring to the particular power of forfeiture attached to lien, I respectfully agree with the conclusions arrived at by the learned Judge on this point of clog on equity. But with utmost respect to the learned Judge I cannot subscribe to the broad general proposition that forfeiture for debts, as distinct from calls, amounts to an illegal reduction of capital. The proposition, in my humble opinion, should be qualified so as to say that a forfeiture in enforcement of a lien on shares for debts, as distinct from calls, due by a member to the company under a special article attaching the right of forfeiture to lien amounts to a reduction of capital. This is what I think the learned Judge meant to lay down for I find that at page 655, after referring to *In re Dunlop*, (1883-21 Ch. D. 583 : 31 W.R. 211), his Lordship made the following observations:

I am not saying that a power to forfeit a contributory's shares for non-payment of debts generally is an invalid power to be inserted in the articles of a company registered under the Companies Acts, but *In re Dunlop*, (1883) 21 Ch. D. 583 : (31 W.R. 211), is no authority for saying it is a valid one.

I think his Lordship was here referring to the ordinary clauses relating to forfeiture. It is to be noted that in the head-note to this case the reporter after referring to Arts. 22 and 23, was careful to insert the words "under this power" in item (2) of the summary of the decision, obviously referring to the power of forfeiture given by those articles relating to lien. In my opinion, therefore, the observations of Eve J. should be taken as referring to that power of forfeiture alone.

49. That there is a distinction between forfeiture pure and simple and a forfeiture in enforcement of a lien which I have endeavoured to explain also appears from the judgment of Luxmore J., in *In re Bolton; Ex parte North British Artificial Silk Ltd.*, (1930) 2 Ch. 48 : (99 L.J. Ch. 209). In that case Art. 29 dealt with lien and included a power of forfeiture in enforcement of lien and there was another group of Arts. 30 to 35, which dealt with forfeiture for non-payment of call. Luxmore J. after referring to Art. 29, under the heading "lien" which was similar to the article in the case of *Hopkinson v. Mortimer, Harley and Co. Ltd.*, (1917) 1 Ch. 646 : (86 L.J. Ch. 467), and Arts. 30 to 35, under the heading "Forfeiture of shares" observed as follows at page 58:

This group of articles is in the usual and well known form. The company has purported to act under the powers in this particular group and not under Art. 29..... The power in Arts. 33 to 35 is obviously a separate and distinct power from that in Art. 29, and to my mind it would be contrary to all the rules of construction to read a proviso on a distinct power conferred for a distinct purpose by one article as applicable to an equally distinct power conferred for an equally distinct purpose by another group of articles in the same articles of association. I am satisfied that the forfeiture of the 8200 shares by the resolution of 11th

October 1928, was a valid and effective forfeiture and I so hold.

The case of *Hopkinson v. Mortimer, Harley and Co. Ltd.*, (1917) 1 Ch. 646 : (86 L.J. Ch. 467), was cited before Panckridge J. in the case of *Surajmull Mohta v. Ballavdas Mohta*, 63 Cal. 531. In that case it was not argued by Mr. S.N. Banerjee that the articles of this very association were ultra vires, although he relied on the Judgment of Eve J. At page 533 Panckridge J, observed as follows:

He relies on the judgment of Eve J. in *Hopkinson v. Mortimer, Harley and Co. Ltd.*, (1917) 1 Ch. 646 : (86 L.J. Ch. 467). There it was held that alien held by the company on the shares of a member being an equitable charge in the nature of a mortgage the power to forfeit the members' shares on his failure to redeem on a seven day's notice was a clog on the equity of redemption and as such invalid and ultra vires.

In my opinion in this case these considerations do not arise, because the association did not attempt to enforce their lien by sale, but purported to act under quite different powers which came into operation on certain events happening which had nothing to do with the registered share held by the shareholder. If the association had been purporting to exercise the lien given them under Art. 31, then the legality and extent of Art. 33, would become matters for consideration. But as things stand, in my opinion the question does not arise. The distinction between articles authorising forfeiture and articles providing for a lien is recognised in *In re Bolto; Ex parte North British Artificial Silk, Ltd.*, (1930) 2 Ch. 48 : (99 L.J. Ch. 209), Mr. Banerjee maintains that that case, properly applied, is of assistance to him, because it. was there held that in the circumstances the company could claim no more than the difference between the amount received on the re-allotment of the forfeited shares and the amount due at the date of forfeiture. The answer, I think, to this is that the language of the articles in that case was quite different from the language which is before me, and there was nothing so drastic in those articles as provision for the extinction of all interest incidental to the shares.

50. On a consideration of the provisions of the Act, and the different decisions to which I have been referred, I have arrived at the conclusion that the Articles of this Association relating to forfeiture are not, having regard to the nature and scope of its objects, ultra vires the Association or repugnant to any provision of the Act. Exercise of such power of forfeiture, specially in view of the fact that under Art. 19, all the shares of the Association are fully paid up at the time of allotment, does not bring about any illegal reduction of capital in contravention of S. 55 of the Act. Nor do I think the exercise of this power of forfeiture in the circumstances of this case amount to a buying of its own share so as to offend against S. 54A of the Act. Buying of shares imports an agreement between the buyer and the seller. Forfeiture is wholly inconsistent with any idea of agreement. Further, as I have tried to explain, there is a difference between sale after forfeiture and a sale in enforcement of a lien. In the latter case, the primary object of the sale is the realisation of the dues. In the former case the sale is

incidental to the forfeiture, which has preceded and is the mode of disposing of the share which has come into the hands of the Association as a result of forfeiture. It is true in both cases of sale the sale proceeds are appropriated towards the dues of the Association and other members but the primary object of sale after forfeiture is not to realise the dues or to release the debt but to dispose of the forfeited share so as to find one shareholder for another. The liability of the member whose share has been forfeited continues. The trafficking in shares prohibited by S. 54A, imports the idea of some actual payment directly or indirectly in the initial acquisition of the share. In all the cases cited there was an actual payment in cash or actual release of a debt by arrangement between the company and the member.

51. Re: (c) - The last point argued by Mr. Mitra is that assuming the power of forfeiture is valid the Association cannot exercise it for its own benefit so as to prejudice the defendant's right under the charge created by the decree in his favour. His argument is as follows: The decree created a charge in his clients favour as far back as 20th December 1939. The Association was notified about the charge. There was an actual attachment by means of the prohibitory order dated 29th August 1940. The Association acted upon the decree and the order and actually paid Rs. 1000. Now the Association cannot turn round and capriciously exercise the power of forfeiture so as to nullify the right of the defendant. This argument overlooks the nature of the share. The share was subject to the articles and all the incidents thereof. The liability to forfeiture is, as it were, an inherent vice or defect to which the right of the member is subject. Creditors of the member can have no higher right. The decree and the attachment affected the right, title and interest of the member, which was subject to this liability to forfeiture all the time. The right of the Association was dormant when it made the payment. The inchoate right has since ripened into full right. I do not see that there is any question of estoppel here.

52. Mr. Mitra has referred me to the case of Bradford Banking Co. Ltd. v. Henry Briggs, Son and Co., Ltd., (1886) 12 A.C. 29 : (56 L.J. Ch. 364). That case appears to me to be clearly distinguishable and not applicable to the facts of the case now before me, for, here, the Association is not claiming any right on the lien clauses but is insisting on its rights under the forfeiture clauses and the incidents thereof. The share on which the defendant is claiming rights as a charge-holder and attaching creditor was always subject to the infirmities imposed thereon by the forfeiture clauses. The question of priority cannot therefore arise. The cases of Rainford v. James Keith and Blackman Co. Ltd., (1905) 2 Ch. 147 : (74 L.J. Ch. 531) and Imperial Bank of India v. U Rai Thu and Co. Ltd., 50 I.A. 283 : (A.I.R. (10) 1923 P.C. 211), were also not cases of forfeiture. The question in those cases were about priority between persons claiming charge. In the case before me, the real point is not of priority at all. In my judgment the question I am considering must be answered in the affirmative.

53. The result is that in my opinion this application should be allowed with costs

as of a motion. As between the Association and its Solicitors, I certify for 3 days hearing and for two counsel.