
(1954) 09 MP CK 0003

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 7 of 1949

Official Liquidator

APPELLANT

Vs

Suleman Bhai Kachhi

RESPONDENT

Date of Decision : 22-09-1954

Acts Referred:

Companies Act, 1956 — Section 24

Citation : AIR 1955 MP 166

Hon'ble Judges : Nevaskar, J;A.H. Khan, J

Bench : Division Bench

Advocate : Chaphekar, for the Appellant; Chitaley, for the Respondent

Final Decision : Allowed

Judgement

Nevaskar, J.—The present appeal arises out of proceedings of winding up started as a result of a petition filed by some of the share-holders M/s Sardar Murar Rao Jadhava and others on 19-5-1947 in the High Court of Dewas (Junior) State. This State has now merged in the State of Madhya Bharat. During the course of these proceedings Mr. A. S. Patwardhan was appointed an Official Liquidator. On 8-12-1947 the Official Liquidator caused to be published in the Dewas "Gazette" a notice addressed to the contributories of the Company calling upon them to show cause why they should not be taken to have purchased the shares mentioned against their names. Respondent Suleman Kachhi was mentioned as one of such persons with 200 shares shown against his name as having been subscribed by him.

2. The proceedings were transferred for the purpose of expedition in the District Court and here the said Haji Suleman Kachhi submitted a reply contending that he was a contributory in respect of only 21 shares and not 200 shares as mentioned in the "Gazette" notice aforesaid. The District Judge, Dewas, who heard the matter accepted the contention and held that although the respondent Haji Suleman was a subscriber to the memorandum of the Company yet he had surrendered his 200 shares by his letter Ex. P/2 dated 14-10-1943 and this was

accepted by the directors in their meeting dated 24-11-1953 Ex. P/3-B and a fresh allotment of only 21 shares was made and on that basis further steps had been taken.

3. Against this decision the Official Liquidator has filed the present appeal.

4. In order to appreciate the actual point of controversy involved in this appeal it will be useful to refer to the circumstances leading to the incorporation of the company and steps taken by the directors of the Company consequent on such incorporation.

5. On 20-9-1943 subscribers to the Memorandum of the Company which included the present respondent Haji Suleman Kachhi with 200 shares mentioned against his name, applied to the Registrar Joint Stock Companies, Dewas State, for registration of the Company under Indian Companies Act, 1913. This Act was adopted by Dewas State as being applicable within its territories. The Company was thus registered after the incorporation of the Company, its Managing Director Mr. K. G. Choudhary issued notice to respondent Haji Suleman Kachhi calling upon him to pay Rs. 600 as the amount due in respect of his 200 ordinary shares which he had agreed to purchase under an advance promise as a subscriber to the Memorandum of the Company Ex. P/1.

In this notice it was also stated that unless the aforesaid amount is paid the management would not be in a position to place the matter before the Board for allotment of the shares. This was followed by a letter dated 2-10-1943 Ex. P/1-A again issued by the Managing Director to the respondent. In this letter the Managing Director ex-pressed regret for the misunderstanding which might have been caused to the respondent by reason of the aforesaid notice. He told him by this letter that the earlier notice was not intended to insult him but was merely a sort of an intimation that he, as a promoting director of the Company, had agreed to subscribe for 200 shares and that for this reason he was required to pay Rs. 600 as the deposit amount in respect of the aforesaid 200 shares.

In this letter, it appears, a further suggestion was made that he should express his wish in the matter early.

6. On 14-10-1943 the respondent, Haji Suleman applied for cancellation of his previous application (meaning probably his previous agreement as indicated in the copy of the Memorandum submitted to the Registrar) for 200 shares and acceptance of his new application for 21 shares and agreed to pay Rs. 63 in respect of the same (Ex. P/2). On 14-11-1943 the matter was submitted for consideration of the Board of Directors in their meeting. They resolved that since the respondent has refused to subscribe for 200 shares he is not entitled to be a director and his name therefore should be removed from the list of directors.

It was also resolved that Seth Ramanand of Indore had purchased 200 shares and his name therefore be included amongst the directors (Ex. P/B). It was further resolved to sanction the applications which were received and which

would be received for the purchase of shares and made allotment of shares in accordance with such applications.

7. On 10-1-1944 the Managing Director issued a letter of request addressed to the defaulting shareholders to pay the amount due from them and along with this a list of defaulting share-holders together with the amount due from each was appended. In this list as against the respondent only Rs. 126 were mentioned as the dues in respect of share-calls of Rs. 6 each thus indicating that he is taken to have been liable in respect of 21 shares only Ex. P/4-A.

8. On these facts question arose for consideration before the lower Court whether Haji Suleman Kachhi of Dewas should be treated as a contributory in respect of 200 ordinary shares or only 21 shares.

9. Learned District Judge who heard the matter decided in favour of the respondent holding him to be a share-holder in respect of 21 shares only instead of 200 shares as was contended by the Official Liquidator.

10. Mr. Chaphekar, who appeared for the appellant in this appeal preferred by the Official Liquidator, contended that in order to arrive at a correct conclusion in this matter in controversy the fact that the respondent ceased to be a director of the Company by reason of a resolution of the Board should be kept severely apart from the consideration as to his liability in respect of 200 shares. He further contended that any question regarding surrender of shares by the respondent cannot arise under the circumstances of the present case because, according to him, it is only, after the shares are actually allotted that a question of surrender arises.

On the same ground, he said, no question of forfeiture as contemplated under S. 24, Companies Act would arise. Where there is no allotment there would be no forfeiture of shares. What, in fact, is material to consider in this respect, according to the learned counsel, is the provision contained in S. 30(1), Companies Act which provides that subscribers of the memorandum of a Company should be deemed to have agreed to become members of the Company and on its registration should be entered as members in its register of members.

Thus, by the very conduct in subscribing to the memorandum, a subscriber becomes a share-holder in respect of the shares entered against his name in the memorandum. He irrevocably agrees to take from the company the number of shares placed opposite his signature and he becomes a member *IPSO FACTO* whether his name is entered on the register or not. It is only, when all the shares of the Company have been duly allotted to others that he can be relieved of the liability thus created.

A subscriber remains a member, he contended, until such time as either he validly surrenders the shares or pays for them and validly transfers them to somebody else. He relied in this connection upon the decisions reported in -- "In

re Machine Exchange Co. Ltd." 12 Bom 311 (A) and -- Gur Prasad Kapoor and Others Vs. L. Rameshwar Prasad and Others .

11. As regards surrender he further contended in the alternative that every surrender or forfeiture of shares involves reduction of capital of the Company. Forfeiture of shares in accordance with the procedure prescribed under the Act is specifically sanctioned by the Act. Any other reduction of capital cannot stand unless sanctioned by the Court.

Therefore where there is surrender unless it were shown that this was resorted to by the Directors as a short cut to forfeiture the same cannot be valid. No surrender is permissible, urged the learned counsel, to enable a subscriber to escape from his liability. That would be contrary to the very purpose of the Act and would involve a fraud upon the members of the public who are called upon to subscribe for the shares of the Company.

Reliance in this connection was placed upon the cases reported in -- "Bellerby v. Rowland and Marwood's Steamship Co. Ltd.", 1902-2 Ch 14 (C) and -- AIR 1948 197 (Oudh) . On the question regarding the circumstances under which forfeiture is valid he relied upon the cases reported in -- AIR 1938 284 (Privy Council) , -- "Gokal Chand v. Lahore Bank Ltd.", AIR 1915 Lah 358 (F) and -- "Lala Kanshi Ram v. Kishore Chand", AIR 1915 Lah 109 (1) (G).

12. Thus, according to him, in the absence of application for the actual allotment of shares followed by issue of share scripts there could be no forfeiture or surrender and even on assumption that no allotment and issue of share scripts be necessary in the absence of circumstances justifying the exercise of powers of forfeiture no surrender can be, valid. No such circumstances exist in this case according to him. He therefore submitted that the decision of the Court below accepting the surrender of 200 shares by the respondent as valid is erroneous and ought to be set aside.

13. On the other hand Mr. Chitale, who appeared for the respondent, contended that the real questions which fall to be determined in this appeal are--

Firstly--Whether the respondent had in fact surrendered his 200 shares, and

Secondly--Whether this was accepted by the Directors under circumstances justifying the exercise of power of forfeiture by them and only as a short cut to forfeiture.

If both these things are held to be proved then the surrender would be valid and the decision of the lower Court ought to stand.

14. He criticised the contention raised on behalf of the appellant that there ought to be actual application for and allotment of shares followed by the issue of the share scripts in order to enable a member of the Company to surrender his shares. This is, according to him, contrary to the very terms of S. 30(1), Companies Act. Whatever may be the position of the subscriber to the

memorandum prior to the registration of the Company, he urged, the moment the company is registered he at Once becomes a member and is deemed to hold shares which he had agreed to subscribe for at the time the memorandum was signed by him.

The formality of an application and allotment is unnecessary and is dispensed with by law. Nor is the entry of his name in the register of members essential. The act of entering his name on the register of members is ministerial and any failure or error in this respect cannot deprive him of his status.

15. The learned counsel then drew our attention to the respondent's application Ex. P/2 dated 14-10-1943 for the cancellation of 200 shares and for allotting to him 21 shares. This he had made after the issue of notice Ex. P/1 dated 21-9-1943 demanding the payment of Rs. 600 as the amount then payable in respect of those 200 share. He further pointed out the subsequent conduct of the Managing Director of the Company and that of the Board of Directors that the respondent was treated as a share-holder for 21 shares only and calls were made by the Company on that footing.

16. From these facts he submitted that the directors had accepted the surrender of his 200 shares and had allotted to him 21 shares instead. Circumstances were, according to him, clearly present for the forfeiture of his shares because a debt] was then due in respect of the call money and at demand had been made on 21-9-1943 to pay the same. Surrender thus made and accepted relieved the respondent from all the future obligation with respect to these 200 shares.

The case reported in -- "Vishwanath Prasad v. Holyland Cinetone Ltd., Benaras, AIR 1939 Ail 739 (H) was cited in this connection. He further urged that once conditions are shown to exist a valid surrender there can be no challenge as to the propriety of the discretion used by Directors. Reference in this connection is made to the case of -- "Trevor v. Whitworth", (1887) 12 AC 409 (I) decided by the House of Lords in England.

The learned counsel read copiously from the speeches of the noble Lords in that case in support of the proposition that if a surrender is accepted by the Directors under a power conferred upon them by the Articles of Association in a case where the Company was in a position to forfeit the shares the transaction would be perfectly valid. Counsel further referred to the case reported in (1902) 2 Ch 14 (C) and submitted that the statement of Collins J. in that case that surrender in so far as it affects future calls amounts to a purchase by the Company of its own shares is too wide and may lead to an inference that there cannot be a valid surrender where the shares are not fully paid.

Our attention was drawn in this connection to Art. 47 of the Articles of Association of this Company. He further took up the position that after accepting the surrender the Directors proceeded to reallocate these shares in exercise of their power under Art. 39 of the Articles of Association of the Company to Ramanand Pannalal of Indore who stepped into the shoes of the respondent.

17. Summarising this submission the counsel urged that all that need be seen in this case is whether the debt was due to the Company from the respondent for the shares taken by him and whether the circumstances had existed then which would have justified forfeiture. If both these things are proved to co-exist then the action of the Directors in permitting the respondent to take 21 shares instead of 200 shares may well be taken to be surrender permissible in law and the decision of the lower Court therefore is correct.

18. As regards the contention of Mr. Chaphekar that there could be no surrender or forfeiture until the shares are actually allotted to the subscribers of the memorandum and until his name is actually put in the register of members, there is no doubt that it cannot stand.

19. Section 30, Companies Act lays down:

(1) The subscribers of the memorandum of a Company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

The phrase "deemed to have agreed to become members of the Company" has been interpreted to mean that the subscriber of the memorandum is to be treated as having become member by the very fact of subscription: vide--- U.P. Oil Mills Vs. Jamna Prasad and Others .

20. The first directors are bound to see that the allotment is made in their name and they cannot avoid their liability to pay for the shares by pleading their own default or negligence in not making the allotment to themselves. In Palmer's Company Precedents at p. 336 it is stated:

The subscriber of the memorandum agrees to take the shares set opposite to his name from the company, and to pay for them. The fact that no shares have ever in fact been allotted to him (unless all the shares have been allotted to other persons), or that his name has never been put on the register, will not relieve him, for he has by subscribing, notwithstanding he is not entered on the register acquired the full status of membership.

Further below on the same page (336) it is stated:

where a person subscribes the memorandum for shares, no allotment being required to render him liable, he should not sign any further application for such shares though if he does sign such application, merely intending to apply for the shares he has already subscribed for, he will not incur any further liability.

By virtue of the subscription he is entitled to the shares, but he takes them upon the ordinary conditions, and one is that he is not bound to pay up the amount of the shares except in answer to calls duly made upon him in accordance with the

articles before the company is wound up, or in a winding up.

21. From the foregoing observations and the provisions of S. 30, Companies Act as interpreted it is clear that neither application for nor allotment of shares is necessary in the case of a subscriber to the memorandum and he acquires the full status of a member with all the rights and liabilities by the very fact of subscription and subsequent registration of the company. Even an absence of entry in the registration of members cannot deprive him of this status.

22. Mr. Chaphekar's contention that S. 30 has the effect of rendering him liable but cannot clothe him with rights in respect of the shares until the same are actually allotted and put on the register is therefore not supportable on principle. His further contention therefore in this regard that where there is neither allotment nor entry in the register of shares there could be no forfeiture or surrender is also untenable.

Snell's case which to a certain extent supports the first part of Mr. Chaphekar's contention is no longer regarded as good law after the decision of the Court of Appeal in England in the case of (1902) 2 Ch 14 (C). The principle of this latter case is followed in several Indian decisions notably in -- AIR 1928 240 (Lahore) ; -- In Re: Mirza Ahamad Namazi, and AIR 1948 197 (Oudh) , which regarded the grounds of decision in Snell's case as not laying down correct law.

23. The only questions then which we are called upon to consider are firstly whether there is in fact surrender of shares by the respondent and secondly whether such a surrender is valid in law.

24. Articles of Association of the Company contained in its Art. 47 power permitting Directors of the company to accept surrender of shares on such terms as they think fit where such a surrender! does not amount to purchase by the Company of its own shares. This is in line with the general principle as laid down in Trevor's case (I).

25. It is not disputed that the respondent was a subscriber to the memorandum and had agreed to purchase 200 shares of the company. He was actually present in the meeting of the promoters of the Company held on 20-8-1943 and took part in it, (Ex. X/4). The respondent was also a signatory to the application for registration presented on 20-9-1943 to the Registrar of the Joint Stock Company.

26. On 21-9-1943 the Managing Agent of the Company wrote a letter (Ex, P/1) to the respondent reminding him of his having agreed to purchase 200 shares and requesting him to make the requisite payment and further bringing to his notice the fact that unless such a payment were made allotment would not be possible. Respondent's reaction to this letter is indicated by the subsequent letter of the Managing Agent dated 2-10-1943 (Ex. P/1-A). It appears that he was displeased with that letter of 21-9-1943. The Managing Agent thereupon on his own initiative suggested to him whether he wanted a change in the number of shares which he had initially agreed to purchase.

27. The letter of the Managing Agent seems to indicate his ignorance of the legal position. He seemed to think that it only affected This privilege of becoming a director and that if he did not want to become one he could take lesser number of shares. Upon receipt of this letter from the Managing Agent the respondent sent a letter dated 14-10-1943, admitting therein that he had initially agreed under his signature to purchase 200 shares but that he wanted to purchase 21 shares only instead of 200 shares. He further wanted to have his earlier application for 200 shares cancelled and promised to pay Rs. 63 in respect of only 21 shares.

28. By reference to proceedings of 14-11-1943 of the Board of Directors it appears that on respondent's refusal to pay for 200 shares his name was removed from the Board of Directors and instead of him one Ramanand Pannalal who had purchased shares was made the Director. Applications, pending and future, for shares were authorised to be allowed in that meeting.

29. There is no specific resolution of the Board of Directors referring to and indicating acceptance of surrender but from the fact that thereafter he was treated as a share-holder in respect of 21 shares instead of 200 shares it is sought to contend that there was surrender and the same was accepted by the Board of Directors. Reliance in misconnection is placed upon the document Ex. P/4-A dated 10-1-1944 which was a sort of a public request to the defaulters to pay and reminding them that in case such a payment were not made they would be disappointed owing to overwhelming demand for shares.

This purported to be signed by the Managing Agent Mr. Choudhary and as against the name of the respondent Rs. 126 were mentioned as due indicating that he was treated as share-holder for 21 shares only. A letter intimating allotment of 21 shares to the respondent was also relied upon.

30. It is difficult to hold on these materials that there was in fact surrender of 200 or 179 shares and that the same was accepted by the Company. In his statement before the Court the respondent stated that he was induced to subscribe for 200 shares on account of a representation made by Mr. Deshpande, Accountant General of Dewas, that he would receive Rs. 75 as monthly remuneration for his being a Director and that when he was later told that he would not receive the same he refused to purchase 200 shares as initially agreed. He further stated that by his application dated 14-10-1943 he requested for cancellation of 200 shares and made a proposal for purchase of 21 shares.

No fresh application for these 21 shares was however, made and as the business of the Company stopped no payment even in respect of these 21 shares was made. It was also averred that allotment of 21 shares was made to him by the company though he paid nothing towards the same.

31. It is clear from this statement that the respondent wanted to rely upon the case of misrepresentation by one of the Directors Mr. Deshpande for being relieved of the liability in respect of 200 shares which he subscribed for. But it is

well settled that a subscriber cannot escape his liability to pay for the shares which he subscribed for in the memorandum even on the ground of misrepresentation by the Company or any of its Directors.

Therefore even if the case of misrepresentation, though not specifically pleaded, be true that cannot help the respondent or have the effect of making his demand for cancellation of 200 shares effective.

32. Letter Ex. P/1 dated 21-9-1943 sent by the Managing Agent reminding the respondent that he is the subscriber for 200 shares and had become liable to pay before allotment could be made and subsequent demand for cancellation of his 200 shares by letter dated 14-10-1943 with an offer to purchase 21 shares cannot be read as creating circumstances under which forfeiture would be valid.

33. Nor was this followed by a resolution of the Board accepting the surrender. As I shall presently discuss surrender of this nature has no other effect but to reduce the capital of the company by permitting cancellation of shares particularly as it had not been established that all the shares of the company had been subscribed for.

34. It had further the effect of acquisition by the Company of its own shares in consideration of the promise to the respondent to relieve him from all future liability in respect of those shares. Both these things are not permissible in law except under certain conditions which do not exist in this case.

35. Assuming however that the letter of the respondent of 14-10-1943 demanding cancellation of his 200 shares and subsequent act of the Managing Agent or the Director in sanctioning his application for 21 shares amounted to surrender of 179 shares by him and acceptance of such a surrender by the Company, the next question is does such a surrender amount to a surrender valid in law.

36. Leading English cases bearing on this point are (1875) 12 AS 409 (1) & (1902) 2 Ch 14 (C).

37. In the former case the facts were that a limited company was incorporated under the Joint Stock Companies Act, with the objects of acquiring and carrying on flannel manufacturing business and any other incidental or auxiliary business. The articles authorised the Company to purchase its own shares. After this Company had gone into liquidation a former share-holder made a claim against the Company for the balance of price of his shares sold by him to the Company before liquidation and not wholly paid for. On these facts question arose whether the company could purchase its own shares under the provisions of the Companies Act.

38. It was held by the House of Lords that such a company had no such power under the Act.

39. In this case Lord Herschell dealing with the question of this sale remarked at

p. 416 as follows:

Let me now invite your attention to the facts of the present case. The Company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid up capital of the company had been either paid, or contracted to be paid, to share-holders, in consideration only of their ceasing to be so.

I am quite unable to see how this expenditure was incurred in respect or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the share-holders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the Company's liabilities to them were to be met.

And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares whole sale, and so effect the desired result.

Dealing with the subject of forfeiture and surrender the same learned Judge said at p. 417:

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 shown 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 shares were allotted the transaction would seem to me perfectly valid.

He further held--

But however that may be, when the company deals with an individual share-holder, and does not appear to be right under the circumstances, viz., to accept the surrender from the share-holder who cannot pay, and to release him from further liability, that might be good although incidentally and to a small extent it may be said to diminish the capital.

Lord Watson another Judge said at p. 429:

There is no reference in the Acts to surrender of shares; but these have been admitted by the Courts upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is

a proceeding "in invitum" and the other a proceeding taken with the assent of the share-holder, who is unable to retain and pay future calls on his shares.

Whatever may be the case in regard to surrender, I do not think the purchase of its own shares by a company bears any analogy to forfeiture.

Lord Macnaghten also stated at p. 438:

Surrender of shares stands on a different footing. It is not mentioned in the Companies Act, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

40. The grounds of decision in Trevor's case (1) and the principles which it affirmed are ably summarised by Buckley in his famous work on the Companies Act, Edn. 12, at p. 135 thus:

(1) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognizes it; the company parts with no money, but resumes dominion of a share upon which something, has been paid, and this because a further payment cannot be obtained.

Surrender may be valid, e.g., where the company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender.

(2) The company cannot be member of itself.

(3) The purchase of its own shares is a reduction of its own capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed.

(4) The Act impliedly prohibits the return of capital to members. The payment of capital to one share-holder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders ratably

(5) The transaction cannot be justified as "incidental" to the Company's objects, e.g., in a private Company where it is desired to keep the shares in the hands of a few. To the creditors whose interests the Act intends to protect it makes no difference what object of the purchase is.

41. In (1902) 2 Ch 14 (C) the facts were as follows:

42. In 1893 the plaintiffs, Moss and Marwood were with William Wright and John Rowland (both since deceased) the Directors of a Company. The former three were still the Directors on the date of the action. In 1893 a shop called Golden Cross belonging to the Company was, owing to depressed condition of shipping

trade, sold for 4000 ₹. The Directors agreed to bear the loss among them with the object of relieving the company from the loss, it was arranged that each of the Directors should surrender to the Company 83 of his shares in the Company.

At this time 10 ₹ per share had been paid and 1 ₹ per share remaining uncalled. This transaction was confirmed by a resolution of the Board of Directors. While thus making the surrender it was declared that they would in no way be further liable to the extent of uncalled capital of these shares. Company later prospered and it was then resolved that the condition of the Company justified restoration of shares previously surrendered.

Thereupon the three Directors and the executors of the two who had died brought the action for declaration that the surrender of 1893 was invalid and for rectification of the rights of shares.

43. The Court of appeal in its decision accepted this position and held that the surrender was invalid in law.

Collins M. R. at p. 25 of the report said:

I can see no distinction in principle between returning to a share-holder 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* (1)", 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.

If it be objected that the shares may, in the language of Lord Watson, be "reissued", and that though the liability of the surrenderor to pay the amount still uncalled is extinguished, the liability will remain good against any one to whom the company disposes of the share, the answer in this case is the same as that suggested by Lord Watson in the case where the money paid up on the share is returned to the share-holder.

He said in the event of the company continuing to hold the shares (as in the present case) the amount paid up is permanently withdrawn from its trading capital.

In the next paragraph he said--

But further and apart from the question of sale or trafficking in a company's own shares, I think the reasoning in -- "*Ooregum Gold Mining Company of India v. Roper*", 1892 AC 125 (M) establishes that to release a share-holder from any part of his obligation to pay the uncalled up balance on his shares is an "ultra vires" act on the part of the company. "It seems to me" said Lord Halsbury L. C. that the system thus created, by which the share-holder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with

their share-holders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money.

It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security"; and the opinions of the learned Lords are to the same effect.

The justification of forfeitures rests upon the statute itself, and I think that since "Trevor v. Whitworth (I)" no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture.

44. Cozens Hardy L. J. at p. 31 held as follows:

Two propositions may be asserted without doubt. First, a company may forfeit shares. This is recognised by S. 26, Companies Act, 1862, as well as by Table A. Secondly, it is not competent to a company to purchase its own shares, and any such transaction is "ultra vires". I think "Trevor v. Whitworth (I)" also decides that under circumstances which would entitle a company to forfeit shares for non-payment of calls, the same result may be attained by means of a voluntary surrender.

In the case of forfeiture the statute treats the forfeited shares as being the property of the company, and it may well be that the acquisition of this property by the company is equally lawful, whether it is acquired by hostile proceedings in the nature of forfeiture or by a voluntary transaction producing the same result. There is no infringement of the statutory provisions in either case.

There is merely an important difference in form. When, however, the transaction involves, as in the present case, the release by the Company to the share-holders of uncalled capital on their shares, it seems to me that it is, within "Trevor v. Whitworth (I)", a reduction of capital not sanctioned by law.

"The decision of the House of Lords in the Ooregum case (M) that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot by any device relieve a share-holder from the liability to pay the full amount due on his shares. This would be the result, if the shares had been retained by the plaintiffs, instead of being surrendered to the company. But the fact that in consideration of the release the shares were surrendered seems to me to render the transaction no better. Uncalled capital is part of the assets of the company.

45. The learned Judge further stated regarding transaction involving reduction of capital:

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.

46. From these observations of the learned Judges it is clear that a transaction which results in reduction of share capital whether called for or otherwise is invalid where there is no sanction of the Court for the purpose. The only statutory exception is forfeiture under conditions laid down by law. Surrender, where authorised by the Articles of the Company, is only permissible where it is equivalent to forfeiture or is made and accepted merely as a short cut to forfeiture i.e., where the conditions for valid forfeiture exist and surrender is resorted to where the share-holder is unable to retain and pay for the future calls on the shares.

It is never intended to permit a share-holder and particularly a subscriber of the memorandum to escape from his liability. The necessary mental approach needed both in the case of the company or its directors and the defaulting share-holder or the subscriber is that the latter was unable to hold the shares and pay for them and the former intended to forfeit the shares and took steps for the purpose but before forfeiture is actually brought about its effect is hastened by the mental assent of both.

47. In Palmer's Company Precedents at p. 495 it is stated about forfeiture as follows:

The power creates a trust to be exercised for the benefit of the Company, and, if it is used for the purpose of enabling members to escape from their liabilities it is invalid.

Further at p. 617 it is stated with regard to shares upon which there is a liability as follows:

It may be that where a Company is in a position to forfeit such shares, a bona fide arrangement for a surrender as a short cut to the same end, and without payment or consideration is valid but it is rarely expedient to accept such a surrender. It is far better to proceed to forfeit the shares in due course, and thus avoid any question as to whether there has been an "ultra vires" reduction of the capital; for in accepting a surrender the directors incur a special risk.

In the case of forfeiture the calls in arrear remain a recoverable debt, whereas in the case of surrender this is "prima facie" not the case. And, as a consequence such a surrender of shares, partly paid, in consideration of a release from further liability is equivalent to a purchase by the Company of its own snares, and is ultra vires and void.

In 12 Bom 311 (A), claims were brought by the Liquidator of Machine Exchange Company to place Shapurji Katruck and Rustamji Wadia on the list of contributories on the ground that they were the subscribers of the Memorandum of Association of the Company. Both set up a defence that they had notified their

withdrawal from part of the shares which they had subscribed for before its registration to the Agent Mr. Drewett.

On facts it was found that they did not. It was held that Shapurji and Wadia were subscribers for the full number of shares as claimed by the Liquidator and had not notified their partial withdrawal but that even if they did notify to Mr. Drewett it was to an Agent having no authority to cancel the subscription and at any rate the act bound them fully from the moment of subscription.

48. This case suggests that even if there is an attempt at withdrawal by a subscriber before registration but it is not actually brought about and the names appear on the Memorandum of Association as subscriber he is liable.

49. In -- In Re: J.H. Chandler and Co. Ltd. , the circumstances were somewhat similar as in the present case. One Mr. Phillips was a subscriber of J. H. Chandler and Co. for 100 shares. After the Company was registered Mr. (sic) who was instrumental in floating the Company and was its Director enquired of Mr. Phillips if he was going to take the number of shares he had subscribed for. Mr. Phillips replied that he was no longer in a position to subscribe for the shares and asked Mr. Chandler to cancel his requirements.

This query was made by Mr. Chandler because then the shares were being allotted. Afterward the name of Mr. Phillips was not entered on the register of shares. When the Company went into liquidation the Liquidator wanted to put the name of Phillips as a contributory for 100 shares. This was opposed by Mr. Phillips. Mukerji J. who delivered the judgment held that Phillips was liable as claimed by the Liquidator. It is significant that circumstances were not held to be sufficient to hold that there was valid surrender of shares. The point was not even pressed.

50. In AIR 1948 197 (Oudh) , one Raja Jagat Kumar was a promotor and a subscriber of a certain number of shares of Equity Insurance Company, Lucknow. No money was paid for the shares subscribed for by the Raja till his death which occurred on 8-3-1934, nor did it appear that any shares were formally allotted to him.

Just after his death Court of Wards assumed superintendence of his estate in April 1934. On 23-4-1934 Secretary of the Company wrote a letter to the Collector as the Officer in charge of Court of Wards making a claim against the estate in respect of the shares subscribed by the Raja. This was in reply to a notice published in the Gazette calling upon the creditors of the Raja under S. 17, Court of Wards Act to submit their claims.

Collector wrote a letter to the Secretary intimating to him that he wanted to withdraw from the position as he no longer wanted to incur further expenditure of that kind. On this the Managing Agent of the Company replied to the Collector agreeing to forego the claim of the Company against the Raja or his estate.

51. On the basis of these facts it was urged that this amounted to surrender of

shares by the Collector and acceptance of the same by the Company through its Managing Agent.

52. Kaul and Misra JJ. who delivered the judgment refused to accept the transaction as amounting to surrender of shares and held that the Raja was liable for the full number of shares he has subscribed for.

53. These cases fully support the appellant.

54. In the present case it cannot be said that the respondent was unable to hold 200 shares and pay for them. Nor does it appear that the remaining directors feeling that way wanted to forfeit his shares and that they notified their intention to that effect. Further it cannot be said that there was surrender or cancellation of shares by the Directors in fair discharge of a trust exercised by them for the benefit of the Company. In fact on the facts as revealed in this case the question of relieving the respondent from all future liabilities in respect of 200 shares did not come up for consideration before the Board.

The only question considered was who should be the Director if the respondent refuses to pay for the shares initially agreed to be purchased by him and this was solved by them. The solution thus effected cannot be read to mean that they wanted to forfeit his 200 shares and legally notified their intention to do so but that this was hastened by surrender. There does not appear to be full realization of the fact, on the part of the Managing Agent Mr. Choudhary or the Directors that the law bound the respondent to his representation in the Memorandum and he could not be relieved.

It is therefore clear to me that there was whether in fact nor in law any surrender of shares as contended for on behalf of the respondent. The respondent therefore ought to be treated as a contributory in respect of 200 shares instead of 21 shares as held by the lower Court.

55. I am not persuaded to accept Mr. Chitale's contention that there is over-statement on the part of Collins J. in the case of -- "Bellerby v. Rowland and Marwood's Steamship Co. Ltd. (C), when he held that surrender in so far as it affects future calls amount to a purchase by the Company of its own shares. The learned Judge clearly stated that "there can be no objection to surrender of shares which are liable to forfeiture". This should completely answer Mr. Chitale's objection to that statement.

56. The result is that the appeal is allowed, the decision of the lower Court is set aside and it is held that the respondent should be treated as a contributory in respect of 200 shares instead of 21 shares.

57. The appellant will have his costs of all the Courts from the respondent who shall bear his own costs.

A.H. Khan J.:

58. I agree.