

(1925) 11 BOM CK 0046
In the Bombay High Court

Pioneer Alkali Works, Limited

APPELLANT

Vs

Amiruddin Shalebhoy Tyebji

RESPONDENT

Date of Decision : 24-11-1925

Acts Referred:

Citation : AIR 1926 Bom 341

Hon'ble Judges : Taraporewala, J

Bench : Division Bench

Judgement

Taraporewala, J.—In the first suit the plaintiff company claim to recover from the defendant a sum of Rs. 3,058-7-7 with interest thereon alleging that the said amount is due by the defendant as the shareholder in the plaintiff company in respect of the third call alleged to have been made by the plaintiff company. The only issue in the suit is whether the call was legally made and is binding on the defendant under the Articles of Association of the company.

2. There was one resolution passed by the directors making the second and the third calls. That resolution is as follows:

Resolved that the second (or the first as the case may be) call be made on June 30, 1922, and the third (or the second as the case may be) call be also made payable two months after the date.

3. Article 38 of the Articles of Association provides for the making of calls in the following terms:

The Board may, from time to time, make such calls upon the shareholders in respect of all moneys for the time being unpaid on their shares as the Board think fit, and every shareholder shall be liable to pay the amount of every call to the persons, and at the time and place appointed by the board; provided that no amount shall be called up in respect of any share to an extent in excess of the amount called up in respect of the rest of the issued or allotted shares for the time being.

4. Then Article 40 provides for the notice of the call being given, and Article 41 provides that a call shall be deemed to have been made at the time when the resolution of the board authorizing the call was passed. The plaintiffs originally claimed interest on the amount of the calls, but they have abandoned that claim.

5. Now Article 38 is in the same terms as the usual article which now appears in the Articles of Association of Companies, The question as to what is a proper resolution for making a call under an article framed as here, is considered in *In re Cawley & Co.* [1889] 42 Ch. 638. In that case no time or place of payment was appointed in the original resolution of December 18. The time and place of payment were appointed by a resolution of January 17 following. It was held by the appeal Court that there was no proper call made until the second resolution fixing the time and place for payment. The head-note at pp. 209 and 210 is not accurate as will appear from the following observations of Lord Esher, M.R., at p. 228, in which the other two Lords of Appeal concurred:

In order to make a call within the Articles of Association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Article 38 says the time and place for payment must be stated.... Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. The article says : "as shall be appointed from time to time". I take these words to mean this : that the directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up...but, if there is a resolution passed that a call shall be made, and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but there is no call until the latter day.

6. The question was also discussed in *Johnson v. Lyttle's Iron Agency* [1877] 5 Ch.D. 687 There in the judgment of the first Court, Jessel, M.R., held that there was no objection to the call which could be sustained on the ground which was taken, viz., that the time for payment was not mentioned in the original resolution and the same was inserted therein afterwards by the secretary. It was assumed by Jessel, M.R., that that must have been done with the authority of the directors. The appeal Court came to the contrary conclusion. Lord Justice James observes at page 694 as follows:

It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is

as fatal as the greatest. Here the notice is inaccurate. It is, therefore, bad, and the forfeiture invalid. I may add that, as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary; it ought to be fixed by a formal resolution of the directors.

7. Mr. Munshi for the plaintiffs relied on the judgment in *Sheffield and Manchester Railway Co. v. Woodcock* [1841] 7 M. & W. 574. In that case none of the resolutions making the calls specified the place where or the person to whom payment was to be made; But shortly after the passing of each of the resolutions, notices were inserted in the local newspapers pursuant, to the directions of the Act of Parliament, signed "by order of the directors" by the clerk and secretary, stating that "the directors having resolved to make a call" for an instalment of...per share, the proprietors were required to pay the said call on or before etc., to some one of the undermentioned bankers. It was contended that the time and place of payment of the calls ought to have been specified in the resolutions in order to entitle the company to recover them. Parke, B., in delivering the judgment of Court, observes as follows (p. 687):

There appears to us to be nothing in the one hundred and fifteenth section, nor in any other part of the Act, which requires the directors to fix the person to whom and the place where the payment is to be made, at the same time that they resolve that a call shall be made and as part of the same resolution. It seems to us to be open to them to fix such person, as well as the time and place of payment, at a different period, and by a, distinct act. A question indeed may arise in some cases, where there has been a change of proprietorship by transfer, what is the time of making a call, which fixes the liability of the then proprietor of a share under the 118th section, and which prevents the free transfer of a share under the 127th section; whether it is to date from the original resolution, from the time of fixing the mode of payment, of giving notice in the news papers, or even from the period when the calls become due.... All that we have to determine now is, that the directors may fix the time, place, and manner of payment, after the original resolution has been made, and by a distinct act.

8. The judgment proceeds entirely upon the construction of the section of the Act in that case, and on the proved fact that the directors had, subsequent to the passing of the resolution, appointed the place where and the person to whom the payment was to be made.

9. The time of payment is mentioned in the resolution before me, but the defect which the defendant points out is in respect of the amount, the place of payment, and the person to whom the same was to be paid, which are not mentioned in the resolution. Mr. Munshi has argued that the amount of the calls was fixed when the new issue of capital, to which the defendant subscribed, was resolved upon by the company. The company then gave authority to the directors to fix the manner in which the new capital should be paid by the subscribers. The directors accordingly resolved that the new capital should be paid by calls of Rs. 5 which were not to be made before a certain interval had elapsed. Mr. Munshi

says that that resolution ought to be read with the resolution in making the second and third calls; that the amount of the call having been fixed in the first, resolution, it cannot be said that the amount was not fixed by a resolution of the directors, and that taking the two resolutions together, there was a valid and binding call made on the subscribers so far as the amount of the call was concerned.

10. Now, there is no doubt that the shareholders are bound by the Articles of Association, and the Memorandum of Association and nothing else in the absence of any special agreement. Even if in the prospectus the amount of the calls was stated to be fixed at a certain figure, the same would not create a liability in the nature of a call. Palmer in his *Company Precedents*, 12th Edn., Part I, at page 628, says as follows:

In the absence of a special provision in the memorandum or articles, or any special agreement as to payment, a subscriber to the Memorandum of Association, like an ordinary share holder, is not liable to pay anything in respect of the shares subscribed for by him until calls are duly made on him.

11. Then, in the form of the articles given by Palmer, he specifically provides for a case like the present in Article 21(a) at page 630 in the following terms:

If by the terms of issue of any share or otherwise any amount is made payable at any fixed time, or by instalments at fixed times whether on account of the amount of the share or by way of premium, every such amount or instalment shall be payable as if it were a call duly made by the directors and of which due notice had been given, and all the provisions herein contained in respect of calls shall relate to such amount or instalment accordingly.

12. In the absence of any such provision in the Articles of Association, the fact that the amount, of a call is fixed by the terms of the issue of the shares, cannot be treated as creating an obligation on the shareholder to pay such amount as and by way of a call. It is something quite distinct; from the process of making a call whereby alone the liability to pay the amount is created. Under Article 38, the directors must, when they make a call, fix and appoint by resolution the amount to be paid, the time and place of payment and the person to whom the same should be paid. The fact that in this case there is a resolution of the directors fixing the amount of the calls, when they fixed the (manner in which the capital of the new issue should be paid, does not differentiate this case from a case where the amount of the calls is fixed by the prospectus. It has been held that, notwithstanding any such provision, a company can make even a call in excess of the amount so fixed at the time of the issue, and certainly can make a call for a lesser amount. The shareholder, therefore, on whom the call is made is entitled to know from the resolution making the call, the amount which the directors have resolved to ask for in respect of that particular call. It is to be noted that in the resolution for the first call passed by the directors in respect of the new issue, the amount of the call viz., Rs. 5, is mentioned.

13. In my opinion, there cannot be any distinction between the other requirements of the article regarding the call. I do not see on what principle it can be argued that although the place is not mentioned in the resolution, it is sufficient if it is subsequently mentioned in the notice, but that if the time is mentioned in the resolution, it would invalidate the call. As observed by Lord Justice James; in *Johnson v. Lyttle's Iron Agency* [1877] 5 Ch. D. 687 every requirement is of the same importance whether it is a small or a big one, and, therefore, if the place is not mentioned in the resolution it cannot be contended that because it is mentioned in the notice it is sufficient. There is no evidence before me to show that, so far as the second and third calls are concerned, the directors ever resolved that the amount of the calls should be Rs. 5 each or that they should be paid at a particular place or to a particular person, Even if Mr. Munshi's argument as to the amount of the call having been fixed by the resolution at the time of issue of new capital be correct, neither the place of payment nor the person to whom the payment was to be made was appointed by a resolution of the directors. Mr. Potdar, who gave evidence on behalf of the plaintiffs, did not make any allegation to that effect.

14. Under these circumstances, I must hold that the second and third calls were not validly made, and the plaintiffs' suit must be dismissed with costs.