

(1920) 03 CAL CK 0019
In the Calcutta High Court

Ramesh Chandra Mitter

APPELLANT

Vs

Jogini Mohan Chatterji

RESPONDENT

Date of Decision : 17-03-1920

Acts Referred:

Companies Act, 1956 — Section 38

Citation : 60 Ind. Cas. 946

Hon'ble Judges : Ernest Fletcher, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, J.—This is an appeal from an order made by Mr. Justice Chaudhuri on an application u/s 38 of the Indian Companies Act for the removal of the name of the respondent from the Register of Members of a Company known as the Bengal C., Ltd.

2. On the 19th June 1915 the respondent agreed to purchase six ordinary shares of the Company on the understanding, that he would be elected as one of its Special Directors. On the same date he paid Rs. 1,000 for the six shares, which were issued to him two days later. On the 27th June 1915 the appellant entered into an agreement with the Company for a first charge, to the extent of Rs. 10,000, on all uncalled share capital; he advanced Rs. 5,000, on the same day and the balance was paid on the 11th January, 1916. The mortgage instrument, which was executed by the Company in favour of the appellant on the 21st March 1916, referred specifically to thirty ordinary shares of Rs. 1,000 each, six ordinary shares, class "A", of Rs. 500 each, and twenty-seven preference shares of Rs. 100. It is not disputed that the six ordinary shares specified in the schedule to the document are those that belonged to the respondent; consequently, there can be no doubt that the appellant had a specific charge on the six shares in question.

3. It appears that the respondent was not elected as a Special Director. He thereupon instituted a suit in the Court of Small Causes, on the 7th May 1918, for damages for breach of agreement and obtained a decree against the Company

on the 7th August 1918. On the 20th December 1918 the respondent made an application u/s 38 of the Indian Companies Act, with a view to have his name removed from the Register of Members of the Company. The Company did not oppose the application, which was, however, contested by the present appellant. Mr. Justice Chaudhuri expressed a doubt, whether the appellant, a mortgages of the Company, had locus standi in these proceedings, but held that, even if he was allowed to intervene, it would be inexpedient to decide summarily the objection raised by him. In this view, Mr. Justice Chaudhuri, on the 4th March 1919, made an order in favour of the respondent, without opportunity afforded to the appellant to place his objections before the Court for adjudication. The mortgagee accordingly lodged this appeal on the 11th April 1919. Thereafter, on the 16th June 1919, the respondent made an application for liquidation of the Company and three days later obtained an order in that behalf. The appellant he now argued, first, that Section 38 is comprehensive enough to entitle a person in his position to oppose the application of the respondent for removal of his name from the Register of Members of the Company; and, secondly, that on the indisputable facts of the case, the application should have been refused on the merits. In our opinion, these contentions are well founded.

4. It is now well settled that, although persons are not entitled to an order *ex debito justitiae*, the jurisdiction u/s 38 is unlimited, with a discretion in the Court in the circumstances of each case. In support of this proposition, reference may be made to the decisions in *Kimberley North Block Diamond Co. In re*, *Wernher, Ex parte* (1839) 59 L.T. 579 *Ruby Consolidated Mining Co. In re*, *Askew's case* (1874) 18 L.J. Ch. 633 : 9 Ch. 631 : 31 L.T. 55 : 21 W.R. 883, *Sussex Brick Co. Ltd.*, *In re* (1904) 1 Ch. 598 : 73 L.J. Ch. 303 : 90 L.T. 426 : 52 W.R. 371 : 11 *Manson* 63 and *Gresham Life Assurance Society, In re*, *Penney, Ex parte* (1873) 42 L.J. Ch. 186 : 8 Ch. 416 : 23 L.T. 150 : 21 W.R. 186. In a simple case where an immediate rectification is essential, it may be desirable to apply under the section; but if the case is at all complicated, an action should be brought. The respondent has, however, argued that Section 38 does not authorise the Court to consider a dispute between a member and a stranger. In support of this proposition, reliance has been placed upon the language of Sub-section (3) of Section 38, which is in these terms: "On any application under this section, the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the Register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the Company on the other hand: and, generally, may decide any question necessary or expedient to be decided for rectification of the register." Mr. Ghose has contended that the generality of the concluding words of the sub section is materially restricted by what precedes, and that, notwithstanding their comprehensive phraseology, we are bound to hold that "a question necessary or expedient to be decided for rectification of the Register" must be a question between members or alleged members, or between members on the one hand and the Company on the other

band. We are of opinion that we should not adopt this narrow interpretation of the section. The Legislature obviously intended that the Court should have the widest possible power to determine, in its discretion, questions which may appear to it to be necessary or expedient for decision before an order for rectification is made or refused. In the case before us, the appellant was manifestly entitled to intervene to oppose the application made by the respondent. He is vitally interested in these proceedings and his position might be seriously prejudiced by an order for rectification made behind his back. There is no conceivable reason why the respondent should be allowed to obtain an ex parte order, and the appellant should be driven to fight him in a suit brought for the purpose.

5. We may point out that the respondent has hitherto proceeded on the assumption that there was a valid contract between him and the Company. There was admittedly an agreement between him and the Company for the transfer of six shares. He obtained the shares, and, on the basis of his position as a shareholder, got his name entered in the Register of the Company. Subsequently, he sued the Company successfully in the Court of Small Causes for damages for breach of contract. That suit could be maintained only on the assumption that there was a valid contract between him and the Company, which had been unlawfully broken by them. In these circumstances, there can be no room for controversy that he was a shareholder and that the appellant had a valid charge on the uncalled capital covered by those shares. The appellant must consequently be heard, on the elementary principle that no man should be prejudiced unheard. The view we take follows as a corollary from the principle that the Register of Members is the creditors' guarantee, showing them to whom and to what they have to trust, and must consequently be properly kept, so that the names appearing therein are all the names and nothing but the names of the persons really for the time being liable to the creditors.

6. The result is, that this appeal is allowed and the application made by the respondent dismissed with costs in both Courts.

Ernest Fletcher, J.

7. I agree.